

SUMMARY:

S1730-B SCHNEIDERMAN No Same as
SCHNEIDERMAN, DUANE, THOMPSON

Add Art 71 Title 45 SS71-4501 - 71-4513, amd S71-1311, En Con L

Relates to enforcement actions for violations of the environmental conservation law.

SPONSORS MEMO:

**NEW YORK STATE SENATE
INTRODUCER'S MEMORANDUM IN SUPPORT
submitted in accordance with Senate Rule VI. Sec 1**

BILL NUMBER: S1730B

SPONSOR: SCHNEIDERMAN

TITLE OF BILL:

An act to amend the environmental conservation law, in relation to enforcement actions for violations of such law

PURPOSE OR GENERAL IDEA:

To enable injured parties, who demonstrate standing, the ability to seek abatement of ongoing violations of certain titles of the Environmental conservation Law (ECL).

SUMMARY OF SPECIFIC PROVISIONS:

The bill adds a new Title 45 to Article 71 of the ECL.

The bill authorizes an injured party with requisite standing to commence a civil judicial action to abate violations of existing law under specific circumstances. Such party may, under these circumstances, commence a civil action in a court of competent jurisdiction solely for injunctive relief against any person who is alleged to be in violation of any rule, regulation, permit, certificate or order promulgated or issued pursuant to: sections 150501, 15-0503 or 15-0505 of Title 5 and Title 27 of Article 15 (Protection of Waters and Water Supply), Titles 5, 7, 8, 10 or 17 of Article 17, Articles 23, 24, 25 or 40 (Water pollution Control, Mineral Resources, Freshwater Wetlands, Tidal Wetlands, and Hazardous Substances Bulk storage), or Title 3, 7, 9 or 13 of Article 27

(Solid, Infectious and Hazardous Waste) of the ECL. A civil action may also be commenced to enforce a violation of an administrative or court order compelling remediation of an inactive hazardous waste disposal site. The State, and political subdivisions of the State, may only be sued pursuant to this bill in its capacity as the owner or operator of a pollution source in violation of any statutory or regulatory requirements, or as a person responsible for an inactive hazardous waste disposal site pursuant to ECL Article 27, Title 13.

The bill contains the standing requirements developed under federal decisional law, and as recently adopted by the Court of Appeals in *Save the Pine Bush, Inc., v. Common Council of the City of Albany*, 13 N.Y.S. 3d 297 (2009), to ensure that only truly injured parties may bring an action under this title.

The requirement that a defendant be "in violation" of an applicable provision of the ECL is consistent with the limited equitable relief available to a plaintiff. This language is consistent with federal decisional provisions and there is an established body of law interpreting the phrase "in violation." No action may be commenced against a party for past violations and no damages or penalties are available under this title.

The bill requires prior notice to the alleged violator, the Commissioner of Environmental Conservation and the Attorney General as a condition precedent to commencement of an enforcement action. Such notice must be served at least 60 days prior to the commencement of an action. This notice requirement may be waived if a substantial and imminent hazard to the environment can be shown. The plaintiff must follow procedures as may be promulgated by the Commissioner in providing the required notice. The bill also prohibits an enforcement action if the Commissioner or the Attorney General has commenced and is diligently prosecuting an administrative or civil action relative to the alleged violation; or has obtained a settlement or disposition of such an action; or is seeking remediation of the inactive hazardous waste disposal site. In addition, no action may be commenced if the alleged violation is the subject of a consent order, a Court order or any other order setting forth a compliance schedule for the elimination of the violation, provided the alleged violator is in compliance with the schedule.

The Attorney General is given the right to intervene in any enforcement action commenced under this bill. An injured party who has given notice of intent to commence an action under this bill may intervene upon timely motion as a matter of right in any civil action or administrative enforcement proceeding subsequently commenced by the Attorney General or the Department of Environmental Conservation relating to the violation alleged in the notice of intent.

No enforcement action may be settled except upon an affirmative order of the court upon notice to all parties, the Commissioner of Environmental Conservation and the Attorney General. The court will not approve a settlement if the court determines that a monetary settlement in excess of total costs has been offered or paid by a defendant in exchange for settlement. Awards of the costs of litigation and reasonable attorney and expert witness fees may be made by the court to a plaintiff in any action brought under this bill, where the court determines such awards to be appropriate. In addition, a prevailing defendant may make a motion to recover costs, however, he or she must show that the action or claim brought by the plaintiff was frivolous. No such awards for costs or fees may be made against the State or any of its political subdivisions.

The standing requirement, the availability of only injunctive relief, the notice provision, the supervision of settlements, and the unlimited award of costs and fees to a defendant contesting a frivolous suit, collectively insure that only meritorious actions will be prosecuted.

The bill contains a "savings" clause to ensure that rights existing under statutory or common law to seek enforcement of any statute, rule, regulation, permit or order, or to obtain any available relief, are not diminished.

JUSTIFICATION:

The large number of violations of environmental laws, rules, regulations, permits, certificates and orders makes it impossible for the State to pursue timely enforcement actions in every instance where such actions may be necessary or appropriate. This bill provides injured parties with the right to seek enforcement through the courts in instances involving violations of those provisions of the ECL relating to protection of waters, water supply, water power, drainage, solid and hazardous waste, freshwater and tidal wetlands, pesticides and hazardous substances bulk storage. To avoid duplication of effort, the bill prohibits initiation of an enforcement action when a particular activity or condition constitutes a violation of the ECL if the Commissioner or the Attorney General is diligently prosecuting an administrative or judicial proceeding.

With limited enforcement resources, the State simply cannot bring an enforcement action for every violation of the ECL or the rules, regulations, permits, certificates or orders issued thereunder. As a result, a member of the regulated community may reason that if compliance with legal requirements, which may be costly, is postponed, it may be worth running the risk that an enforcement action will be commenced.

Enforcement actions would allow the State to marshal the pool of resources and assistance that could be provided by injured parties. Allowing injured parties to seek judicial enforcement of certain ECL violations would increase the likelihood that such violations would be prosecuted. This increased enforcement effort would have a significant deterrent effect on the regulated community.

By requiring notice to the Department and the Attorney General of the intent to institute an action, allowing the state to intervene in such suits and requiring notice to the Department and the Attorney General prior to settlement of such suits, this proposal assures that the state can oversee and provide input into the conduct and settlement of such action. The State's role as guardian of the environment and enforcer of the State's environmental laws is thereby preserved. Injured party provisions are contained in numerous federal environmental statutes, including the Clean Air Act, the Clean Water Act, the Resource Conservation and Recovery Act, the Toxic Substances Control Act, the Safe Drinking Water Act, the Noise Control Act and the CERCLA reauthorization bill.

A pooling of all available resources will assist both public and private sectors in achieving their common goal of increased compliance with the environmental laws of New York State. It will enable government to allocate scarce enforcement resources more efficiently by allowing it to concentrate on the most significant violations with the assurance that lower priority violations will not be overlooked.

LEGISLATIVE HISTORY:

A.4788 (1993-94)
A.191-B (1995-96)
A.1620-A (1997-98)
A.956-A (1999-2000)
A.455 (2001-02)
A.5936 (2003-04 Passed Assembly)
A.1885 (2005-06 Passed Assembly)
A.1100 (2007-2008)
A.4272 (3/1/10 Passed Assembly)

FISCAL IMPLICATION FOR STATE AND LOCAL GOVERNMENTS:

None.

EFFECTIVE DATE:

This act shall take effect immediately; provided, however, that no action authorized by section 71-4501 of the environmental conservation law, as added by section one of this act, may be commenced against any city, village, town or county prior to September 1, 2012, and nothing in this act shall affect any action commenced pursuant to section 71-1311 of the environmental conservation law prior to such effective date.
