

# S.5394 (Parker) / A.2261 (Simon)

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<b>BILL</b> S.5394 (Parker) / A.2261 (Simon)
<b>SUBJECT</b> Citizen Suits
<b>DATE</b> March 16, 2021
<b>OPPOSE</b>

The Business Council opposes S.5394 (Parker) / A.2261 (Simon), which would allow private "citizen suits" to be brought in response to alleged violations of the Environmental Conservation Law, and to enforce administrative or judicial orders under the state's inactive hazardous waste site remedial program.

While we have many concerns regarding this proposal, our main point of opposition is that this bill will not significantly enhance environmental protection in New York.

Looking at recent experience in New York, citizen suit filings are mostly influenced by easily accessible data, or the ability to recover legal costs, rather than the significance of possible environmental violations, or the lack of effective state enforcement. Few cases are brought to address environmental issues that are not already being addressed, or that have already been addressed, through actions by the Department of Environmental Conservation

Specifically, the majority of federal citizen suit notices filed in New York in recent years have been brought under the Clean Water Act and the Resource Conservation and Recovery Act (or RCRA, the federal waste management statute).

The CWA has been the most common basis for citizen suits over the years, simply because of the public accessibility of discharge monitoring reports filed by SPDES permit holders, rather than the lack of compliance oversight or effective enforcement within the state's wastewater permitting program. Most of these CWA suits address discharge issues that have been, or are currently being, addressed by the DEC.

Over the past several years, the citizen suit provisions of RCRA have increasingly been used to facilitate the recovery of attorney's fees in site cleanup actions, in large part due to court-imposed restrictions on such cost recoveries under the CERCLA – the federal "superfund" law.

The bottom line is that these actions brought under federal citizen suit provisions have done little if anything to enhance environmental protection in New York State. Therefore, it is unclear why the state would pass legislation making it even easier to bring such cases. And there is little doubt that this is the intent of S.5013 (Parker) / A.1424 (Simon) – compared with federal citizen suit statutes, this bill eliminates significant safeguards against unwarranted suits, and makes it easier for a plaintiff to recover costs even if they do not win in court. As a result of these provisions, The Business Council believes that this bill would result in more meritless suits, and more suits regarding insignificant violations, but no real improvements in environmental quality.

Our specific concerns regarding S.5394 (Parker) / A.2261 (Simon) include the following:

- This legislation would allow state courts, rather than the Department of Environmental Conservation, to make decisions on compliance and remedial requirements. Since this legislation fails to give the courts substantive guidance on these requirements, this legislation could result in judicial orders that are inconsistent with, or that go beyond, requirements of the state's environmental statutes and policies.
- The bill would allow for citizen lawsuits even in instances where the DEC and/or the Attorney General's office have decided that an alleged violation of the ECL does not warrant enforcement. For example, a number of water discharge standards are set at or even below current reliable detection limits, and emission data showing "violations" of such standards may be the result of statistical variability in testing methodologies. Under this bill, however, these cases could be subject to citizen enforcement action.
- The bill allows plaintiffs to be awarded costs, including attorneys' fees, if a facility enters into a consent order with the DEC subsequent to the filing of a citizen suit action. To be eligible, a plaintiff simply has to file court papers. Under this bill, the plaintiff can be awarded costs under this provision *even if there is no formal finding of violations in the consent order.*
- On the other hand, this bill would limit the award of court costs to defendants only in instances where the defendant can demonstrate the suit was brought on frivolous grounds, and would limit such awards to \$10,000. In contrast, Federal citizen suit provisions allow courts the discretion to award court costs to any prevailing or substantially prevailing party. This selective use of Federal standards, and the double standard established for plaintiffs and defendants, illustrates a clear bias against potential defendants under this legislation.
- Under this proposal, the mere act of submitting a notice that a citizen suit may be filed gives the "potential plaintiff" automatic intervenor status in any

subsequent administrative or judicial enforcement action. This is contrary to the notion that citizen suits are intended to compliment, rather than duplicate, state enforcement efforts.

In addition to these concerns, it is important to consider the availability of relief under Federal citizen suit provisions, as well as the nature of citizen suit laws in other states, in assessing the appropriateness of S.5394 (Parker) / A.2261 (Simon).

Citizen suits can presently be brought in the absence of additional New York State legislation in many situations. A private party is able to employ existing Federal citizen suit provisions against alleged violations of Federal law, and in many cases can use Federal citizen suit provisions against alleged violations of New York State permits and regulations which are developed pursuant to Federal statutes and/or related to Federal programs that have been delegated to the state.

We would also like to address the argument that suggests that New York State environmental program is somehow substandard, "since more than thirty states have enacted citizen suit legislation." Actually, New York State already has a citizen suit law. It applies to violations of mining and mined-land reclamation laws. In fact, this sole program is affected in at least eleven of the thirty-one states which now have citizen suit laws. Another eleven states allow citizen suits for violations of another stand-alone environmental program such as hazardous or solid waste management, low-level radioactive wastes, or coastal resource management.

On the other hand, only eight states have broad-based citizen suit measures as proposed in this bill, and none of these state programs have been enacted since 1983. These factors illustrate that, with the development of state-level enforcement programs over the past two decades, the original justifications for broad citizen suit provisions have become far less persuasive.

For the reasons discussed above, The Business Council strongly recommends against approval of S.5394 (Parker) / A.2261 (Simon).