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## Enacting SEQRA: The Legislative Debates and a 25-Year Look Back

by Matthew A. Sokol

*Editor's Note: This article has two segments: a legislative history of New York's State Environmental Quality Review Act of 1975 (SEQRA) by Matthew A. Sokol, and a brief retrospective on how the predictions in the legislative debates of 25 years ago have actually turned out, by Michael B. Gerrard.*

### I. INTRODUCTION

Environmental Quality Review in this country has progressed from a vague, misunderstood concept to an integral part of our legislative regime. Generally, the term "environmental quality review" involves evaluating and weighing social and economic factors of proposed activities against the impact of those activities on the environment.<sup>1</sup> Former Governor Hugh Carey defined environmental quality review as the process by which "state and local officials . . . intelligently assess and weigh environmental factors, along with social, economic and other relevant considerations in determining whether or not a project or activity should be approved or undertaken."<sup>2</sup>

Like most other states, New York felt the same environmental pressures that impelled Congress to enact the National Environmental Policy Act of 1969. Like its federal counterpart, the New York state legislature was ready to act. Between 1970 and 1975, New York enacted over a dozen new environmental laws, including the codification of the Environmental Conservation Law, the adoption of the Tidal Wetlands Act,<sup>3</sup> and the creation of the Adirondack Park Agency.<sup>4</sup> As commentators observed, this environmental legal structure developed "despite the depressed economic conditions . . . and the common 'wisdom'

that environmental protection and economic prosperity are antithetical."<sup>5</sup> During the early and mid-1970s, "the case had been made that public health, welfare and enlightened self-economic interest required . . . the same sort of environmental laws as had been enacted in most sister states and by the Federal government."<sup>6</sup>

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Stephen L. Kass and Jean M. McCarroll, "NAFTA's CEC: First Lessons for the Americas," [NAFTA's Commission on Environmental Cooperation] *New York Law Journal*, Oct. 22, 1999, at 3:1.

Richard G. Leland and Karen Leo, "Parent Company Liability After 'Bestfoods': Court Focuses on Relationship to Facility That Released Hazardous Substances," *New York Law Journal*, Oct. 25, 1999, at S3:1.

Christopher W. Mahoney and John H. Kazanjian, "Water Contamination Suits Likely to Hit N.Y.: Vexing Issues Seen Arising in Claims Over MTBE," *New York Law Journal*, Oct. 25, 1999, at S2:1.

Sergio A. Sanudo-Wilhelmy and Gary A. Gill, "Impact of the Clean Water Act on the Levels of Toxic Metals in Urban Estuaries: The Hudson River Estuary Revisited," 33 *Environmental Science & Technology* 3477 (1999).

J.L. Stoddard et al., "Regional trends in aquatic recovery from acidification in North American and Europe," *Nature*, Oct. 7, 1999, at 575.

Philip Weinberg, "Environmental Law" [annual survey], 49 *Syracuse Law Review* 453 (1999).

Adam L. Wekstein, John S. Marwell, and Stuart R. Shamberg, "Evolution Rather Than Revolution: New York's Court of Appeals Reaffirms the Commercial Utility Test of Navigability While Modernizing the Proof Requirements to Encompass Evidence of Recreational Use," *The New York Environmental Lawyer* (New York State Bar Association), Summer 1999, at 11.

## Enacting SEQRA: The Legislative Debates and a 25-Year Look Back

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Although the early 1970s brought many new environmental laws, "New York [still] lagged behind in establishing an across-the-board procedure which would resolve . . . two missing elements in New York's environmental regulatory scheme: a generally applicable environmental evaluation procedure and a general standard for decision-making which would balance environmental concerns against social and economic concerns."<sup>7</sup> The legislature attempted to fill these gaps with SEQRA.

Although many significant pieces of legislation came from the "extraordinary 1975 environmental session" of the state legislature,<sup>8</sup> SEQRA was perhaps the most momentous. It marked New York's coming of age in the field of environmental review legislation. It also provided a comprehensive framework for environmental protection, with broadly stated goals, implications on the state and local level, and provisions for public and private actions.

### II. THE LEGISLATIVE DEBATE

SEQRA met very different receptions in the two houses of the state legislature. There was very little debate in the Assembly

on the SEQRA Bill.<sup>9</sup> A brief argument was made by Assemblyman Lane regarding the burden on local municipalities in developing an Environmental Impact Statement (EIS).<sup>10</sup> He argued that if New York were to pass a citizens suit bill (which was being considered during the same time), any person could bring suit to force a local municipality to provide an impact statement, even when an EIS was not needed.<sup>11</sup> Also, Assemblyman Henderson made an argument that a possible fee requirement for the EIS process "could be very prohibitive as far as going ahead with any project."<sup>12</sup> These were the only two Assembly comments on SEQRA, and they went without response. The bill passed 105 to 43 on June 2, 1975. The Assembly declared that day "Environment Day."<sup>13</sup>

SEQRA's experience in the Senate was very different. There, 117 pages of debate were logged. Senator Bernard C. Smith, chair of the Senate Environmental Committee and the man responsible for writing much of the bill, handled most of the questions and criticisms. Senator Smith began the debate by describing the environmental impact statement and its components.<sup>14</sup> He also touched on a number of issues involved in SEQRA, including the balance between environmental considerations and social and economic factors, DEC's role in the EIS process, the importance of involving local governments in the environmental review process, and the elimination of duplicative state-federal review.<sup>15</sup>

A common confusion surfaced regarding the definition of words like "project" and "action," and the possible far-reaching effects that such words would have.<sup>16</sup> Some feared that SEQRA would apply to the building of every home and "hot dog stand" in the State. But Senator Smith continually referred his colleagues to the language of the bill and the exceptions that would preclude review of such small-scale projects.

Another concern was that SEQRA would add another layer of bureaucracy and that the DEC would wield a veto power over all local and state actions. To this, Senator Smith answered unequivocally that DEC did not have any review or veto power, and that DEC's rulemaking power was very restrictive.<sup>17</sup> However, at least one opposing senator, Senator Caemmerer, felt that "despite . . . best efforts to circumscribe the powers of the [DEC] Commissioner, they're so broad as to give him a strangle hold on local government."<sup>18</sup> He continued, "I think you've given an appointed official in this state almost a total control over every locally elected official in [N.Y.] and I fear that [the EIS process] will be abused by perhaps people with good intentions but abused to the point of where it could strangle the economy . . . and stop almost every major building project in the State . . ."<sup>19</sup> Senator Caemmerer went on to discuss what he believed to be other shortcomings in SEQRA, including the need to change existing state and local laws to comply with SEQRA,<sup>20</sup> and his fear that every permit (even a common building permit) will require an EIS, placing a tremendous burden on developers and local governments.<sup>21</sup>

Hearing these criticisms, Senator Smith delivered one of his more emotional recitations in support of SEQRA. Answering Senator Caemmerer, he stated:

[Y]ou have fallen into the same trap that so many of our building organizations and others who have been affected by the economic recession in making an analysis of this and other environmental legislation . . . Senator, I say to you and I say to every member of this House and I stake my own personal reputation on it, that [unlimited] power is not in the Commissioner. You're not surrendering any home rule powers. As a matter of fact, there are times . . . when I become a little upset when people hide behind this surrendering of home rule power because what [was done] here . . . very carefully was to make certain that the local people were involved . . . Senator, that's the basic thrust of this bill to get every municipality, every section of government in this state cognizant of the fact that whenever they go into a development or an action of any kind . . . that they have a responsibility to the people to make certain that they are not doing something that's going to adversely affect not only the lives of those that are there at this time, but the lives in the future.<sup>22</sup>

But Senator Caemmerer was persistent in his plea that the Commissioner of DEC held too much power under SEQRA. He retorted:

Ladies and gentlemen, . . . we're going to rue the day that we didn't tie the Commissioner down more specifically than we do in this bill.<sup>23</sup>

Senator Smith replied:

I just can't believe that you would continue to say . . . that the Commissioner can close down a project. Now you know doggone well that's not in the bill and that the responsibility [to review a project] is in the agency.<sup>24</sup>

Senator Ohrenstein added to Senator Smith's comments by saying:

The environmentalists of this state are not very happy with this bill . . . because it was their thought that unless there was enforcement power, the bill would not be workable. But this bill has no power to stop any project and, consequently, all of the fears that were expressed on this floor that . . . construction costs are going to go sky high are simply unfounded.<sup>25</sup>

A number of senators expressed their concern that, with the passage of SEQRA, the state will become bogged down with the same types of costs and delays that NEPA had caused regarding federal projects. For instance, Senator Schermerhorn listed a number of federally-funded state projects that had engendered considerable delay because of what he called "lousy impact studies."<sup>26</sup> He criticized the proposed bill as "nothing more than an obstruction to progress."<sup>27</sup>

Senator Halperin responded to Senator Schermerhorn's comments, referring to his tales of delay and cost increases as "horror stories."<sup>28</sup> Senator Halperin stated:

I think an even greater horror story is the horror story that we see as to what is happening to our environment, the way that we are destroying it, the irreversible damage that we're

doing to ourselves. We heard the cost of this legislation. What's the cost of the waste we are creating? The cost of the pollution to the rivers, the cost . . . [of] destroying our farmlands . . . I think that that cost is great when I have a young child . . . having to go out and find employment and also at the same time trying to breathe and eat and drink clean water and live in an environment that's decent, and to me the decision is clear . . . the environment must be saved and must be protected.

A number of other Senators added to this praise of SEQRA. Senator Ohrenstein added:

What does this bill do? The bill requires that before projects are going to be built, there be spread on the public record an analysis of any impact . . . on the environment, whether it be air or water or the community environment . . . Now, I don't know how anybody can quarrel with that.

We are living at a time when the environment, whether it's in the cities or the suburbs, is being crowded and impacted every day and changed every day and in many instances that is necessary because if we're going to house our people, if we're going to provide transportation for our people, if we're going to provide public works projects for our people . . . , then they have to be built and nobody is going to be able to . . . stand in the way. But if they're going to be built, they have to be built intelligently. We can't go on building without considering at least the way in which the total environment in which our communities live is going to be affected and that's all this bill does . . . Let the public know what the consequences are. Let them be able to consider fully the options, the alternatives, and if, on balancing all of the objections and those factors which are mitigating in favor of the project, the public desires to go ahead, its going to go ahead, and if the public opposes it, it ought to have a right to say so.<sup>29</sup>

Senator Bellamy added, "we are about to adopt landmark legislation . . . and I think that when we look back on this legislative year there will be few pieces of legislation that we can point to more proudly than this bill which is before us now."<sup>30</sup>

SEQRA passed the Senate June 24, 1975 with 35 votes in favor and 23 votes opposed.<sup>31</sup>

### III. PUBLIC REACTION TO THE SEQRA BILL

After SEQRA passed the legislature and before it was signed by the governor, members of state agencies, organizations, and the general public were given an opportunity to comment on the bill. The following list gives examples of the types of organizations that commented on SEQRA, and their respective positions.

#### APPROVED

State Education Department

State Department of Law

Environmental Planning Lobby

Department of Environmental Conservation

NO RECOMMENDATION

State Department of Transportation

Division of Housing and Community Renewal

DISAPPROVED

New York Power Authority

City of Albany

City of New York

General Contractors Association of New York

New York Conference of Mayors

New York City Bar Association

New York Chamber of Commerce and Industry

Home Builders Association of Central New York

New York State Electric and Gas

New York State Builder's Association

Nassau County Village Officials Association

New York State Budget Office

NYS Executive Department

Office of General Services.

Although some comments regarding SEQRA were positive,<sup>32</sup> critical comments were legion. Negative comments generally fell into one of the following four categories:

- SEQRA is too ambiguous;
- SEQRA will lead to the deprivation of home rule authority;
- SEQRA will cause undue delay and expense; and
- SEQRA will be used by private groups to prevent or delay projects.

Each of these criticisms will now be discussed.

### A. SEQRA Is Too Ambiguous

Many expressed the view that words like "action" and "significant" were too loosely defined for the Act to be effectively implemented.<sup>33</sup> For example, the Association of the Bar of the City of New York noted that "[t]he number of 'actions' which could require impact statements under [SEQRA] could easily be many thousands each year."<sup>34</sup> The City Bar went on to say that at the very minimum, the actions covered should be limited to "major actions" as defined in other statutes (e.g. NEPA), so that judicial interpretations from other courts could be used.<sup>35</sup>

The New York State Power Authority ("Power Authority") stated that SEQRA's "potential for . . . misconstruction [is] so great that the bill should not be approved."<sup>36</sup> The New York Chamber of Commerce believed that SEQRA was "defective in failing to provide statutory criteria including, for example, what constitutes a 'significant effect on the environment.'"<sup>37</sup>

Still others believed that SEQRA ignored many aspects of environmental planning. The New York Conference of Mayors believed that SEQRA's "single-minded enthusiasm for the environment, neglect[ed] to address the essential question of growth, i.e., policies to guide economic development, population control, housing distribution, use of natural resources, protection of the environment, farming, transportation, and utilities, and energy policies."<sup>38</sup>

### B. SEQRA Will Lead to the Deprivation of Home Rule Authority

Traditionally, municipalities in New York have been fiercely protective of their ability to govern at the local level, what is known as "home rule authority." Many cities, towns, and villages feared SEQRA would undercut their ability to control development in their own communities. A common perception was that DEC would remove a municipality's ability to advance its own environmental objectives. For example, New York City felt that SEQRA would act "in derogation of valued home rule prerogatives."<sup>39</sup> The City also felt that SEQRA, and more specifically its corresponding regulations, would give DEC "a blank check" with which it could control the City's future.<sup>40</sup>

The New York Conference of Mayors felt that SEQRA "accord[ed] the Environmental Conservation Commissioner with greater direct control over individual lives than that exercised by any level of government."<sup>41</sup> The Conference continued, "[t]he bill seeks to preempt local land use planning and management . . . by awarding that function to [the DEC]. Home rule, and the heart of its responsibilities, are effectively removed from local governments."<sup>42</sup>

The Nassau County Village Officials Association wrote that although it supported environmental legislation, it believed that cities, towns, and villages were well equipped to handle such regulation on the local level.<sup>43</sup> The group opposed SEQRA because "it create[d] new layers of government agencies, with powers of regulation, where the existing local governments can fully perform the required acts." Further, they believed that SEQRA was "a most serious repudiation of the long established principle in New York State of local home rule powers of local governments."<sup>44</sup>

### C. SEQRA Will Cause Undue Delay and Expense

Many critics felt that SEQRA would add a level of bureaucracy, which would lead to procedural delay in approvals or budgeting, and would add the increased expense of environmental review onto building projects. Further, critics argued, these increased building costs would be inevitably passed onto consumers, driving up the cost of housing in an already-depressed housing market.

The "undue delay and expense" call was spearheaded by the building industry, which remained steadfastly opposed to SEQRA. One industry group wrote:

This legislation will wreak immeasurable damage to the

Industry, which already has been placed into a very precarious state. It will delay construction of virtually any type for many months, while environmental impact statements are created, revised, reviewed, amended by the public, subjected to public hearing and appeals. Construction, which is at an all time low, will be further stymied with concomitant loss of thousands of jobs to construction trades, which are presently experiencing unemployment levels in excess of 50%.<sup>45</sup>

Another industry group argued:

The increased costs and time delays certain to be experienced in residential construction projects should [SEQRA] be approved will result in even greater inflation in the housing industry. The needs of citizens to be protected by government are being far overshadowed by the ability of the citizen to pay for that protection. Not only will homebuyers be forced to pay for the additional costs incurred through [complying with] this legislation, they will be forced to pay (through their tax dollars) for the administration of [the law].<sup>46</sup>

Quoting former Governor Rockefeller's rejection of an earlier attempt at environmental review legislation, the New York State Builders Association characterized SEQRA as "wastefully duplicative, administratively uncertain and costly."<sup>47</sup>

The construction industry beseeched the governor not to sign the bill, stressing that existing laws could be used to force environmental compliance, and arguing that government officials were "becoming more and more responsive to the views of the people in [environmental] matters."<sup>48</sup>

Public agencies shared the building industry's concern. The Power Authority commented that "[e]xperience with [NEPA] shows that the requirement of an environmental impact statement inevitably causes serious delay and enormous expense."<sup>49</sup> It went on to say that "[s]uch burdens should be imposed, if ever, only with respect to major actions."<sup>50</sup> The mayor of the City of Albany echoed these concerns, stating that "the implications of [SEQRA] are such that it creates a legal nightmare and will be both tremendously costly and intolerably time-consuming to comply with its provisions."<sup>51</sup>

Some believed that some of the delay potentially caused by SEQRA could be prevented by using existing laws to accomplish environmental review. For instance, New York City, one of the most ardent critics of SEQRA, stated that while it believed that the concept of environmental review was important, "[the] process should be dovetailed with existing procedures and should not bring the wheels of government to a virtual halt with added delays and costs."<sup>52</sup> The City, taking a cue from its Planning Commission, went on to note that "[w]hile the bill purports to set outside limits on the environmental review process, it must be realistically noted that in many cases a legally adequate EIS could not be produced within 45 days from the end of required hearings."<sup>53</sup> The City was likely referring to the statutory time, under 1975 law, within which a city agency must act on a development application after a public hearing.

The increased burden on private citizens was not the only concern. New York City voiced its concern that where a lack

of private applicants existed, "the city would have to bear the costs directly."<sup>54</sup> The City noted that many of its actions covered by SEQRA would not have private applicants, and that the fiscal burden in complying with the law would be enormous.<sup>55</sup> The City also feared that it would have to add major new staffing resources to deal specifically with complying with SEQRA.<sup>56</sup>

#### D. SEQRA Will Be Used by Private Groups to Prevent or Delay Projects

This argument, which was also made by critics of NEPA, originates in the belief that private groups, who disfavor an action, would use the SEQRA's substantial environmental review procedure to challenge agency decisions regarding that action. So the argument goes, environmental and citizen groups and other opponents can use the law to challenge an agency determination made pursuant to SEQRA to tie up a proposed project for months, even years.

For instance, the Power Authority wrote, "[t]he power to approve the sufficiency of an environmental report on a proposed action is in practical effect the power to block that action indefinitely. Experience with Federal law shows that such power is often exercised not only by government officials but by private pressure groups acting through the Courts."<sup>57</sup>

The building industry also felt that SEQRA would become a vehicle for abuse. The General Contractors Association wrote, "[a] fanatical fringe that is outraged by anything and compelled to protest in loud voices at the drop of a picket sign, will have a field day" with SEQRA.<sup>58</sup>

### IV. THE GOVERNOR'S SIGNING OF SEQRA

After gaining the approval of the legislature, the SEQRA Bill was in front of Governor Carey for signing. After playing a key role in getting it passed through both the Senate and Assembly, Governor Carey enthusiastically signed the Bill. In the comments accompanying his signature, Governor Carey wrote the following:

In recent years it has become abundantly clear that state and local agencies have not given sufficient consideration to environmental factors when undertaking or approving various projects or activities. Th[is] bill, which is modeled after [NEPA], requires the preparation of an impact statement which must consider in detail the environmental implications of any proposed project or activity. The information provided by the impact statement will allow state and local officials to intelligently assess and weigh environmental factors, along with social, economic and other relevant considerations in determining whether or not a project or activity should be approved or undertaken. With the information which will be provided by these impact statements, state and local officials will be in a better position to make decisions which are in the best overall interest of the People of the State.<sup>59</sup>

The governor assured all state agencies and representatives of local government that they would have a chance to provide input in the development of the regulations that would implement the new Act.<sup>60</sup> He also noted that "[t]he Commissioner



[of Environmental Protection] has assured me that he will give the most careful consideration to the views of agencies and representatives of local government and interested citizens in formulating [the] regulations so that the act can be implemented without imposing unnecessary burdens on local governments and those involved in the construction industry, which is of such vital importance to our State."<sup>61</sup>

Lastly, the governor mentioned that the Act would not become effective until June 1, 1976 (almost one year after his signing), and that he would be responsive to any favorable amendments that may arise until that time.<sup>62</sup>

## V. PHASED IMPLEMENTATION

Governor Carey's assurances did not pacify the law's critics. The 1976 legislative session brought a host of proposed legislation designed to amend or repeal SEQRA, precipitated by the complaints set forth above.<sup>63</sup> Governor Carey was sensitive to

these complaints. He realized that industry and the economy were in a fragile state, and did not wish to see legislation add further strain. However, the governor's support of SEQRA was unyielding.

As a compromise, Governor Carey introduced a bill that allowed SEQRA to be established in stages. This "staged" or "phased" implementation would delay SEQRA's effective date until September 1, 1976, and would then only affect actions directly undertaken by the state.<sup>64</sup> Actions directly undertaken by local agencies or action wholly or partially funded by the state would not be subject to SEQRA until June 1, 1977.<sup>65</sup> Finally, private actions needing state or local funding, licenses, approval, or permits would not be covered until September 1, 1977.<sup>66</sup>

The governor's bill met with approval and was adopted in the early days of the 1976 legislative session.<sup>67</sup>

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<sup>1</sup> See N.Y. Jur.2d *Environmental Rights and Remedies* (1998).

<sup>2</sup> 1975 N.Y. Legis. Ann. 438.

<sup>3</sup> See 1973 N.Y. Laws 790.

<sup>4</sup> See Rosemary Nichols & Nicholas A. Robinson, *A Primer on New York's Revolutionized Environmental Laws: Part I*, 49 N.Y. St. B. J. 41, 41 (Jan. 1977).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 41-42.

<sup>7</sup> Ross Sandler, *State Environmental Quality Review Act*, N.Y. St. B. J. 110 (Feb. 1977).

<sup>8</sup> Nichols & Robinson, *supra* note 4, at 42.

<sup>9</sup> See 1975 N.Y. Laws 612, 5866-69 (Assembly debate transcripts).

<sup>10</sup> See *id.* at 5867 (statement of Assemblyman Lane).

<sup>11</sup> See *id.*

<sup>12</sup> *Id.* at 5869 (statement of Assemblyman Henderson).

<sup>13</sup> See Sandra M. Stevenson, *Early Legislative Attempts at Requiring Environmental Assessment and SEQRA's Legislative History*, 46 Alb. L. Rev. 1114, 1119 (1982).

<sup>14</sup> See 1975 N.Y. Laws 612, 8694-97 (Senate debate transcripts) (statement of Senator Smith).

<sup>15</sup> *Id.* at 8697-99.

<sup>16</sup> See *id.* at 8712, 8749, 8766.

<sup>17</sup> See *id.* at 8703-05. Senator Smith alluded to a number of memos that had been circulating from the Building Trades Association, the Association of

Towns and others, which alluded to extensive DEC rulemaking power and overview authority. Mr. Smith called these memos "absolutely inaccurate."

Speaking on the issue of controlling DEC's rulemaking ability, Senator Smith stated that "we did something that is very rarely done in state government. We proscribed, we set up parameters within which [the commissioner] can draw the rules and regulations and we're rather proud of that." *Id.* at 8721.

<sup>18</sup> *Id.* at 8727. Senator Caemmerer's concerns stemmed in part from the fact that DEC would be the agency drafting the regulations to be promulgated pursuant to SEQRA.

<sup>19</sup> *Id.* at 8729.

<sup>20</sup> See *id.* at 8711.

<sup>21</sup> See *id.* at 8714-19.

<sup>22</sup> *Id.* at 8730-31.

<sup>23</sup> *Id.* at 8784 (statement of Senator Caemmerer).

<sup>24</sup> *Id.* at 8785 (statement of Senator Smith).

<sup>25</sup> *Id.* at 8796 (statement of Senator Ohrenstein).

<sup>26</sup> *Id.* at 8774 (statement of Senator Schermerhorn). Senator Schermerhorn gave five examples of delay and price increase caused by federal EIS compliance: (1) a power plant that was overdue and over budget by \$446 million; (2) bridge improvements to the Newburg-Beacon bridge (prompting the Senator to state "you'd think we had never built a bridge before"); (3) the extension of an airport runway; (4) a paper plant in Ulster County; and (5) the repaving of state route 9W. See *id.* at 8774-76.

<sup>27</sup> *Id.* at 8777.

<sup>28</sup> See *id.* at 8780 (statement of Senator Halperin).

- <sup>29</sup> *Id.* at 8796-98 (statement of Senator Ohrenstein).
- <sup>30</sup> *Id.* at 8778.
- <sup>31</sup> *See id.* at 8801-8809.
- <sup>32</sup> *See, e.g.*, Memorandum from Robert D. Stone, State Education Department, to Judah Gribetz, Counsel to the Governor (hereinafter "Judah Gribetz") (July 11, 1975) (in approving the bill, the Education Department encouraged DEC to use the resources of the State Science Service of the Education Department in developing regulations); Memorandum from Louis J. Lefkowitz, Department of Law, to Judah Gribetz (July 7, 1975) (noting "no legal objection").
- <sup>33</sup> *See, e.g.*, Letter from the City of New York to the Honorable Hugh L. Carey 2 (June 27, 1975).
- <sup>34</sup> Letter from Herbert H. Smith, Executive Director of the New York City Bar Association, to Judah Gribetz (July 7, 1975).
- <sup>35</sup> *See id.*
- <sup>36</sup> Memorandum from Scott B. Lilly, New York State Power Authority, to Judah Gribetz, Counsel to the Governor (July 1, 1975).
- <sup>37</sup> Letter from Arnold Witte, Executive Vice President, New York Chamber of Commerce, to Judah Gribetz (June 27, 1975).
- <sup>38</sup> Memorandum from Sandra Stanley, Research Assistant, New York Conference of Mayors, to Senator B.C. Smith (June 9, 1975).
- <sup>39</sup> Letter from the City of New York to the Honorable Hugh L. Carey 2 (June 27, 1975).
- <sup>40</sup> Letter from the City of New York to the Honorable Hugh L. Carey 2 (June 27, 1975).
- <sup>41</sup> Memorandum from Sandra Stanley, Research Assistant, New York Conference of Mayors, to Senator B.C. Smith (June 9, 1975).
- <sup>42</sup> *Id.*
- <sup>43</sup> *See* Letter from George Pidot, Nassau County Village Officials Association, to Judah Gribetz (July 30, 1975).
- <sup>44</sup> *Id.*
- <sup>45</sup> Letter from William C. Finneran, Jr., General Manager and Director of Labor Relations of the General Contractors Association of New York, Inc., to Governor Hugh Carey (June 26, 1975); *see also* Letter from Arnold Witte, Executive Vice President, New York Chamber of Commerce, to Judah Gribetz (June 27, 1975) (stating that SEQRA "would have a severe dampening effect on the construction of public works and private projects, including sorely needed housing"); Letter from Charles F. Kennedy, Executive Vice President, New York State Gas and Electric, to Governor Hugh Carey (July 9, 1975) (calling SEQRA "hastily contrived environmental regulation" that will cripple necessary growth and development).
- <sup>46</sup> Letter from Lawrence M. Cummings, Executive Director, Home Builders Association of Central New York, Inc., to Judah Gribetz (June 30, 1975).
- <sup>47</sup> Memorandum from Robert A. Wieboldt, Executive Vice President, New York State Builders Association, to Governor Hugh Carey (undated).
- <sup>48</sup> *Id.*
- <sup>49</sup> Memorandum from Scott B. Lilly, New York State Power Authority, to Judah Gribetz, Counsel to the Governor (July 1, 1975).
- <sup>50</sup> *Id.*
- <sup>51</sup> Memorandum from Erastus Corning, Mayor, City of Albany, to Judah Gribetz (July 11, 1975). Mr. Corning went also said that SEQRA would "cause such a strong reaction that . . . it will do irreparable damage to the environmental movement." *Id.*; *see also* Memorandum from Sandra Stanley, Research Assistant, New York Conference of Mayors, to Senator B.C. Smith (June 9, 1975).
- <sup>52</sup> Letter from the City of New York to the Honorable Hugh L. Carey 1 (June 27, 1975).
- <sup>53</sup> *Id.*
- <sup>54</sup> Letter from the City of New York to the Honorable Hugh L. Carey 2 (June 27, 1975).
- <sup>55</sup> *See id.*
- <sup>56</sup> *See id.* at 3.
- <sup>57</sup> Memorandum from Scott B. Lilly, New York State Power Authority, to Judah Gribetz (July 1, 1975).
- <sup>58</sup> Letter from William C. Finneran, Jr., General Manager and Director of Labor Relation of the General Contractors Association of New York, Inc., to Governor Hugh Carey 3 (June 26, 1975).
- <sup>59</sup> 1975 N.Y. Laws § 612, 1761 (Governor's Memoranda).
- <sup>60</sup> *See id.*
- <sup>61</sup> *Id.* at 1761-62.
- <sup>62</sup> *See id.*
- <sup>63</sup> *See* Sandler, *supra* note 7, at 112.
- <sup>64</sup> *See* 1976 N.Y. Laws 228.
- <sup>65</sup> *See id.*
- <sup>66</sup> *See id.*
- <sup>67</sup> *See id.*

# A SEQRA Retrospective: Whose Predictions Were Correct?

by Michael B. Gerrard

## I. INTRODUCTION

Amazingly, a full quarter-century has now passed since the enactment of SEQRA. Some of the protagonists have died; others are still alive but have left the political stage; and a few are still active.

The legislative debates, as summarized by Matthew Sokol, were dominated by predictions of what would happen if SEQRA was enacted. There has now been ample time to see who was right and who was wrong. Here is my own personal tally.

## II. DEC'S ROLE

A dominant complaint by SEQRA's opponents was that SEQRA would give enormous power to the DEC Commissioner and would erode the home rule powers of local governments. This has clearly not happened. Some state environmental laws give considerable power to DEC—the tidal and freshwater wetlands laws, the solid and hazardous waste laws, for example—but SEQRA is not one of them. DEC's main roles under SEQRA are to promulgate the regulations, to decide conflicts over lead agency designation, and to serve as lead agency itself in a small percentage of the projects in which it is involved. As Senator Smith rightly said, SEQRA gives no veto powers to DEC over projects.

The statute, and DEC's own regulations under the statute, give the great bulk of SEQRA's powers to municipalities—the entities that decide the fate of most of the projects that are subject to SEQRA. SEQRA has become a reflection of each locality's development philosophy. If one were looking for quantitative indicators of whether a municipality wanted to encourage or discourage development within its borders, it would be hard to find better surrogates than the percentage of like projects requiring EISs, the length of those EISs, and (perhaps most importantly) the time lapse between initial application and final project decision. This is home rule in its purest form.

## III. APPLICABILITY

Here, too, SEQRA's opponents were off base. The prediction of thousands of EISs a year turned out to be too high by an order of magnitude; in most years the number ranges between 100 and 200. Building permits are exempt, and "hot dog stands"—shorthand, I presume, for extremely small commercial

projects—are likely to be categorized as Type II projects, and therefore outside of SEQRA's ambit.

On the other hand, SEQRA has been held applicable to many kinds of projects that were certainly not anticipated by SEQRA's sponsors—the selection of procedures for removal of lead paint from bridges,<sup>1</sup> the sale of the New York City water system,<sup>2</sup> and the removal of fire alarm boxes,<sup>3</sup> for example.

## IV. DELAY AND EXPENSE

Here SEQRA's opponents were correct. The fear that compliance with SEQRA would be expensive and time-consuming proved accurate. The preparation of an EIS for a large project can easily cost several hundred thousand dollars, and sometimes more than \$1 million, and the process (including drafts, hearings, and so forth) can go on for two or more years. The costs are mostly borne by private applicants rather than municipalities (except for EISs concerning municipal projects), but they are no less real.

Some of the commenters on SEQRA feared that a citizen suit bill would allow widespread litigation under SEQRA. As it turned out, a citizen suit bill has not been enacted in New York—it is the only major piece of legislation on the environmentalists' wish list of the early 1970s left undone—but Article 78 has provided plenty of procedural opportunity to sue under SEQRA. On the other hand, recent restrictions on citizen standing may make the absence of a citizen suit law more important.

## V. UNDERLYING OBJECTIVES

The underlying purpose of SEQRA was to infuse environmental considerations into governmental decision-making. Here, SEQRA must be judged a success. The preparation of SEQRA documentation has now become an integral part of project planning, and in the course of this preparation, applicants and regulators are constantly informed about (or reminded of) the potential environmental impacts of their actions. Projects are frequently—indeed, constantly—altered as a result. Applicants may still propose, and regulators may still approve, projects with negative environmental impacts, but at least now they are far more likely to do this with open eyes than before SEQRA was enacted in those ancient days before 1975.



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<sup>1</sup> See Williamsburg Around the Bridge Block Ass'n v. Giuliani, 223 A.D.2d 64, 644 N.Y.S.2d 252 (1st Dept. 1996).

<sup>2</sup> See Giuliani v. Hevesi, 90 N.Y.2d 27, 659 N.Y.S.2d 159 (1997).

<sup>3</sup> See Powis v. Giuliani, 216 A.D.2d 107, 628 N.Y.S.2d 634 (1st Dept. 1995).

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