

Hostile Environment
The SEQRA Debate at 30

HVBiz.biz
Vol. 3, No. 7
February 16, 2009

By: Jim Gordon

After more than three decades of effort, can New York improve SEQRA? The question is more than a legal matter, because resolving the question will impact not just the environment but the economy and even how New Yorkers get their electricity.

SEQRA is the State Environmental Quality Review Act, which has been in place for about three decades. It is often criticized by business as a cause of delay and expense that discourages investment in development projects and also often praised by environmentalists as a far-sighted bid to ensure economic development now does not harm the environment later. There are no plans to reduce the scope of the statute, but some legislation is being offered to expand who can use it in court challenges.

Orange County attorney Larry Wolinsky has practiced environmental law for 30 years in New York. He said SEQRA hurts the state economy. “The application of SEQRA is inefficient and has too frequently been used as a means to oppose and delay projects,” said Wolinsky. He said the law “is frequently applied in ways that “certainly made economic development in New York more challenging.”

Thus, he said, SEQRA “has hurt New York State’s ability to compete effectively with other states for good economic development projects.”

Wolinsky believes it is for the SEQRA laws to be set aside because they are redundant to laws adopted after SEQRA was adopted some 30 years ago. He said laws regulating, for example, wetlands, storm water, sewage and hazardous waste now serve SEQRA’s function of protecting the environment, without forcing developers through a complex and expensive process to receive necessary approvals.

But that view misses the true value of SEQRA, said state Assemblyman Kevin Cahill, Democrat of Ulster County. He says the comprehensive nature of the environmental laws compiles and presents “societal values” in a single statute. Cahill said SEQRA sets out a framework for regulating the rights of property owners and developers with the rights of citizens to have a say in how their communities grow. “It’s a balancing act,” said Cahill. “I think SEQRA has been a success in that regard.”

Cahill, chairman of the Assembly’s energy committee, would change state environmental law in one important regard: He supports creating a separate environmental review process to expedite construction of power plants in New York by placing them outside the SEQRA process.

Support for an even stronger SEQRA law comes from state Assemblyman Adam Bradley, Democrat of Westchester County. He favors expanding the scope of SEQRA to return it to what he says is its original intent, offering broader opportunity for citizens to go to court to intervene for environmental reasons in development issues.

Bradley is sponsor of the Environmental Right to Justice Act. It would stipulate citizens have legal standing to challenge SEQRA decisions if they can show they may suffer injury from the impact of a project. That threshold is different from the current standard, which requires would-be interveners to show that any injury they may suffer is different from what would be suffered by the public at large.

Bradley said that is a muddled standard that derives from a controversial 1991 case on Long Island that divided the state Court of Appeals. Its upshot, he said, produces an absurd outcome. “The problem with the current standard is very few environmental cases involve sludge hitting you right in the face,” said Bradley. “Environmental effects are widespread, if the water supply is harmed that hurts everyone. And currently, people who clearly have legitimate interest have no entry into the court process.”

He said he “fully expects” that with the new Democratic majority in both houses of the state Legislature the changes he seeks will pass in the current legislative session.

Wolinsky believes the current standard should be maintained and he would further restrict the statute’s effects. He said officials should deny legal standing in SEQRA matters to potential parties “merely on ground of proximity to the proposed project.” He said standing should be based on a finding of potential harm based on the current standard of injury different from injury that could be suffered by the public at large.

NEPA, the federal National Environmental Policy Act signed into law by Richard Nixon in 1969, is a set of complex regulations and procedures for debating and mitigating the environmental effects of development projects.

SEQRA is the New York State version of NEPA. It took effect in September 1976 and was phased in over several years. The laws regulate how government conducts environmental reviews and allows local officials to oversee projects in their locale, if they are “lead agency.”

Thus, the lead agency overseeing and “action” under SEQRA can be a planning board, a town board, or in the case of major projects that may affect state interest, the state Department of Environmental Conservation.

SEQRA goes further than NEPA in empowering local jurisdictions and mandating that a broad range of environmental effect be considered, including traffic, effect on wildlife and vegetation, the effect on local housing stock and educational resources and hard-to-define considerations about “community character.” the Law allows for situations where, if perceived impacts can’t be mitigated, the right to do an action may be denied.

Even skeptics of the SEQRA law conceded it’s not going to be repealed any time soon. So, Wolinsky said improvements should focus on fixing the process.

“In too many instances there is poor coordination and a duplication of effort between local and state agencies,” said Wolinsky. He said that frequently after developers complete SEQRA reviews at the local level, additional permit review occurs at the state level, often looking at the same issues. There is usually no clear time frame for this additional review, adding more uncertainty to an already complex and lengthy process.

Wolinsky also said the state simply does not devote enough attention to the problem. “Due to limited state resources, there is really no effective coordination between the state and local municipality during the SEQRA review,” said Wolinsky.

The lack of resources is likely to worsen in the current budget crisis.

To improve the process Wolinsky said the state must raise the bar on what concerns are ruled as relevant enough to require they be studied by developers. Such studies are extremely expensive to perform, but all too easy to request. To improve matters, Wolinsky said public officials or private citizens who want issues to be investigated, “must provide some actual evidence of the existence of the potential area of concern. Just saying, ‘I heard this was an Indian burial ground,’ or ‘traffic at this intersection is unsafe,’ is not enough.”

And the state must abide by the rule laid out in SEQRA regarding the time frames for making decisions. An improved SEQRA law, “should specifically provide that the lead agency should not accept and is not required to consider additional comments beyond the specifically prescribed time-frame,” said Wolinsky.

Bradley and Wolinsky do agree on one potential change. Both the assemblyman and the attorney say there ought to be sanctions for frivolous SEQRA actions.