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## SEQRA's Silver Anniversary: Reviewing the Past, Considering the Present, and Charting the Future

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## AFTERWORD

### SEQRA'S SILVER ANNIVERSARY: REVIEWING THE PAST, CONSIDERING THE PRESENT, AND CHARTING THE FUTURE

*Patricia E. Salkin\**

The collaborative effort of many entities at Albany Law School was responsible for the ultimate success of the first symposium, and one of only two symposia state-wide, to comprehensively address State Environmental Quality Review Act (SEQRA) issues—from the development of first legislative drafts of SEQRA<sup>1</sup> to predictions on future developments in the legal and regulatory applications of environmental review under this law—as part of the Act's twenty-fifth anniversary. The Government Law Center's primary goal in assembling the outstanding cadre of panelists—representing academia, public service at all levels of government, the private sector, and the non-profit sector—was to bring together a diverse number of the best stakeholder representatives who were knowledgeable in the intricacies and nuances of environmental review in New York and who could collectively develop a reform agenda to ensure the continued viability of New York State's environmental review program. All of this and more occurred at the two-day program that attracted over 250 participants and attendees—including attorneys, planners, policymakers, public officials, and citizen advocates. The purpose of this contribution to the *Albany Law Review* is to focus on the recommendations for reform that were highlighted during the program, particularly at the end of the last day through a facilitated panel discussion entitled *The Great Debate*. By recording the options for reform that were discussed, this article creates a lasting memorial of the many

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<sup>1</sup> See *The Historical Development of SEQRA*, 65 ALB. L. REV. 323, 325-34 (2001) (comments of Paul Bray, Esq.).

excellent ideas that were offered and will hopefully serve to aid lawmakers and policymakers desirous of meaningful reform.

### BACKGROUND

Twenty-five years ago advocates for and against the adoption of the SEQRA, New York's "little NEPA" (National Environmental Policy Act), flooded the Governor's office with letters and calls regarding the status of the legislation.<sup>2</sup> The interest, debate, and heated passion of the SEQRA stakeholders remains strong after a quarter of a century. Although it is an acronym, SEQRA has become a well-known word in the land use and environmental fields.

There is at least one commercial treatise dedicated exclusively to discussing and reporting on every SEQRA case, regulation, change, and proposed change.<sup>3</sup> In addition, the *SEQRA Cookbook* and a handbook are distributed by the New York State Department of Environmental Conservation (DEC).<sup>4</sup> There are numerous authors and scholars who regularly publish articles in law reviews, provide regular columns in the New York Law Journal, and dedicate a significant number of pages in environmental newsletters about this famous five-letter word.<sup>5</sup> One court commentator reports annually

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<sup>2</sup> See generally Sandra M. Stevenson, *Early Legislative Attempts at Requiring Environmental Assessment and SEQRA's Legislative History*, 46 ALB. L. REV. 1114 (1982). Professor Stevenson provides a detailed account of the legislative evolution of SEQRA—the State Environmental Quality Review Act; see N.Y. ENVTL. CONSERV. L. §§ 8-0101 to 8-0117 (McKinney 1997).

<sup>3</sup> MICHAEL B. GERRARD, DANIEL A. RUZOW & PHILIP WEINBERG, *ENVIRONMENTAL IMPACT REVIEW IN NEW YORK* (2001).

<sup>4</sup> See N.Y. Dep't of Envtl. Conserv., *Environmental Impact Assessment in New York State*, at <http://www.dec.state.ny.us/website/dcs/seqr/index.html> (last modified June 13, 2001) (providing downloadable copies of the SEQRA Cookbook, the revised draft SERQA Handbook, and others).

<sup>5</sup> The following is a select listing of articles that focus on SEQRA: Philip Weinberg, *Are Standing Requirements Becoming a Great Barrier Reef Against Environmental Actions?*, 7 N.Y.U. ENVTL. L.J. 1 (1999); Philip Weinberg, *SEQRA's Too Valuable to Trash: A Reply to Stewart Sterk*, 14 CARDOZO L. REV. 1959 (1993); Nicholas A. Robinson, *SEQRA's Siblings: Precedents from Little NEPAs in the Sister States*, 46 ALB. L. REV. 1155 (1982); Sandra M. Stevenson, *Early Legislative Attempts at Requiring Environmental Assessment and SEQRA's Legislative History*, 46 ALB. L. REV. 1114 (1982); Kelly L. Munkwitz, Note, *Does the SEQRA Authorize Mitigation Fees?*, 61 ALB. L. REV. 595 (1997); Michael Carr, Comment, *The Aftermath of Long Island Pine Barrens Society v. Planning Board of Brookhaven: The Need for Amending SEQRA*, 9 ST. JOHN'S J. LEGAL COMMENT. 857 (1994); Robert Crespi, Comment, *Land Use Law in New York State: Playing "Hide & SEQRA" with the Elusive Comprehensive Plan*, 11 PACE ENVTL. L. REV. 835 (1994); Howard Geneslaw, Note, *Coordinating Subdivision Review with New York's State Environmental Quality Review Act (SEQRA)*, 19 COLUM. J. ENVTL. L. 445 (1994); Paul M. Bray, *Twenty-Fifth Anniversary of SEQRA*, EMPIRE ST. REP., May 2000, at 38; Phil Larocque & Bruce Boncke, *SEQRA's 25th Anniversary: A Building*

in the New York Law Journal on every SEQRA case decided that year, and, according to these articles, the courts hand down between sixty and seventy such decisions each year, and since 1975 there have been 2000 judicial opinions issued discussing SEQRA.<sup>6</sup>

A boutique practice, or professional niche, has evolved to deal with the requirements of the Act and, more importantly, its implementing regulations. Many law firms hire attorneys who focus all or most of their time on matters involving SEQRA, and planning and consulting firms similarly hire staff members who do little more than continually prepare environmental reviews. Perhaps this may have been the intended result: more people paying more attention to environmental considerations with respect to proposed actions. But are people actually getting what they are paying for? Have the intended and/or unintended costs associated with environmental reviews and resulting actions and inactions produced communities that are more livable, more "green," and that offer a better quality of life? Critics maintain that higher project costs resulting from SEQRA-related delays have been a constant in the land use permitting process. While academics and public sector proponents of the implementing regulations argue that state-

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*Industry Perspective*, EMPIRE ST. REP., Aug. 2000, at 27; Steven Russo, *The Local Land Use Process and SEQRA*, N.Y. ZONING L. & PRAC. REP., September/October 2000, at 1; Patricia E. Salkin, *SEQRA's Silver Anniversary: An Opportunity to Review the Past, Consider the Present, and Chart the Future*, EMPIRE ST. REP., Aug. 2000, at 25; Matthew A. Sokol, *Enacting SEQRA: The Legislative Debates and a 25-Year Look Back*, ENVTL. L. IN N.Y., January 2000, at 1; Val Washington, *SEQRA: "Big Bad & Little Bad"*, EMPIRE ST. REP., Aug. 2000, at 28; Philip Weinberg, *SEQRA: Effective Weapon—If Used as Directed*, EMPIRE ST. REP., Oct. 2000, at 38; John Armentano, *SEQRA Settlements: Courts are Becoming Vigilant "Guardians of the Environment"*, N.Y. L.J., Sept. 23, 1998, at 5; Michael B. Gerrard, *A Review of 1997 SEQRA Cases*, N.Y. L.J., May 22, 1998, at 3; Michael B. Gerrard & Monica Jahan Bose, *Possible Ways to 'Reform' SEQRA*, N.Y. L.J., Jan. 23, 1998, at 3; Stephen L. Kass & Jean M. McCarroll, *Reforming SEQRA—A Counter Proposal*, N.Y. L.J., Mar. 31, 1998, at 3; John R. Nolon, *Impact Statements: Regulations Leave Room for Delays in SEQRA Proceedings*, N.Y. L.J., Dec. 16, 1998, at 5; John Armentano, *The Anatomy of SEQRA: Every 'Action' Must be Analyzed for Environmental Impact*, N.Y. L.J., July 2, 1997, at 5; Michael B. Gerrard & Deborah Goldberg, *Update on SEQRA Lawsuits for 1996*, N.Y. L.J., Mar. 28, 1997, at 3; Stephen L. Kass & Jean M. McCarroll, *Landmarking and SEQRA*, N.Y. L.J., Apr. 25, 1997, at 3; John M. Armentano, *A 'Hard Look' and SEQRA: Courts Require Reasoned Review of Environmental Issues*, N.Y. L.J., Jan. 5, 1994, at 5; John Armentano, *New SEQRA Rules Proposed: Amendments Should Streamline the Development Process*, N.Y. L.J., Mar. 2, 1994, at 5; Stephen L. Kass & Michael B. Gerrard, *DEC's Proposed New SEQRA Regulations*, N.Y. L.J., Mar. 25, 1994, at 3; Stephen L. Kass & Michael B. Gerrard, *Update on SEQRA Lawsuits for 1993*, N.Y. L.J., Apr. 22, 1994, at 3; Robert B. Koegel, *Streamlining SEQRA Compliance*, N.Y. L.J., Nov. 20, 1997, at 1; Terry Rice, *Statutes for Subdivisions: Enabling Statutes for Subdivisions; SEQRA: Review Process*, N.Y. L.J., Aug. 31, 1994, at 5; and Robert B. Koegel, *Vesting Property Rights Under SEQRA*, N.Y. L.J., June 24, 1991, at 1.

<sup>6</sup> See Michael B. Gerrard, *Judicial Review Under SEQRA: A Statistical Study*, 65 ALB. L. REV. 365, 365 (2001).

imposed time frames are reasonable, the practical reality is that these time frames are rarely adhered to; and delays abound while governments await modifications to proposals, additional requested information, and myriad details that cause a glitch in what, on paper, often seems quite reasonable.

Debates continue as to whether SEQRA is more aptly used as a sword or a shield. The truth is that it can be, has been, and in all likelihood will continue to be used as both. SEQRA and its attendant process can be intimidating to applicants and to the volunteers who sit as members on local planning and zoning boards.<sup>7</sup> With its rich litigious history, twenty-five years has proven that more training and education is needed, as well as continuing dialogue among the stakeholder interests. Technology offers opportunities for this. Technology also offers the ability to add, among other things, a visual dimension to the SEQRA review process.

#### CALLS FOR REFORM OF THE SEQRA LAW AND PROCESS

During the last decade, there have been many calls for SEQRA reform. Some of the ideas others have articulated include the creation of a statewide environmental review board; a re-examination of the judicially-created limitations on standing; an adjusting of the SEQRA fee structure to encourage, not discourage, prompt reviews; the use of generic environmental impact statements; the use of technology (specifically the Internet) to maintain a searchable public database of Environmental Impact Statements (EISs); the development of a model that can result in a more predictable environmental review process; a better integration of SEQRA into the local land use decision making process, or, alternatively, the exemption of local zoning from the SEQRA process; a narrowing of the scope or definition of "environment" under SEQRA regulations; the authorization of impact fees in lieu of impact statements; and an effort to reach true consensus on the issue of cumulative impacts.<sup>8</sup>

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<sup>7</sup> See Russo, *supra* note 5 (providing a good overview of the issues confronted by planning and zoning boards in integrating SEQRA into the local land use decision-making process).

<sup>8</sup> Symposium participant Professor Philip Weinberg stated that, while in his view the New York State Department of Environmental Conservation (DEC) has done a commendable job in looking at cumulative impacts, there is more that can be done. See Philip Weinberg, Remarks at the SEQRA 25th Anniversary Conference ("The Great Debate"), (Mar. 16, 2001) (transcript available from the Albany Law School Government Law Center (GLC)) [hereinafter Great Debate Transcript]. Paul Bray, Esq., has noted that although statutory language coupled with the common law provides a strong affirmation for consideration of cumulative impacts, DEC has ignored this; and the environmental community and the environmental bar, in turn,



The number of reform proposals should not, however, signal that the process is not working. In fact, a number of environmental issues confronting communities today were not even on the radar screen when SEQRA was enacted.<sup>9</sup> Proponents certainly can point to dozens, if not hundreds, of significant examples of how SEQRA undoubtedly has resulted in a substantial and positive benefit to the environment.

The *Albany Law School SEQRA Symposium* concluded with a panel entitled "The Great Debate" that focused on the future of SEQRA. Participants offered a wide range of opinions as to the utility of SEQRA in the next twenty-five years. What follows is a summary of this historic discussion.

### EDUCATION

Dan Ruzow, Esq., who started off the program speaking on the historical development panel,<sup>10</sup> observed that one way of making SEQRA more useful and less frustrating is for government to do a better job of educating people about SEQRA.<sup>11</sup> To accomplish this, Ruzow proposed that government entities involved with SEQRA must do a better job of sharing information with other levels of government.<sup>12</sup> He further asserted that the commitment to education is critical given the fact that across the state a third of the people who administer the process at the local government level change each year, leaving newly elected and appointed officials with a major learning curve in this area.<sup>13</sup> Currently, both the New York State Department of State and the DEC offer no-cost SEQRA training programs for municipal officials; and typically one or more courses on SEQRA are offered during the annual training sessions sponsored by the statewide municipal associations. The fact remains, however, that with approximately 1600 units of local government in the state, with an estimated turn-over of one-third of

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have ignored the DEC's posture. See *The Historical Development of SEQRA*, 65 ALB. L. REV. at 333 (comments of Paul Bray, Esq.).

<sup>9</sup> Val Washington, Esq., noted during the Symposium that many of the environmental issues that are considered most vital today were not of great concern in 1975. SEQRA does not adequately address, for example, either sprawl or environmental justice. See Val Washington, *Great Debate Transcript*, *supra* note 8, at 10-11. Ms. Washington is the Executive Director of Environmental Advocates of New York; see <http://www.eany.org/>.

<sup>10</sup> See *The Historical Development of SEQRA*, 65 ALB. L. REV. 325, 347-56 (2001) (comments of Dan Ruzow, Esq.). Dan Ruzow is a partner with the law firm Whiteman, Osterman & Hanna, in Albany, New York.

<sup>11</sup> *Great Debate Transcript*, *supra* note 8, at 3.

<sup>12</sup> *Id.*

<sup>13</sup> See *id.*

all officials every year, there is simply not enough geographically diverse training offered at convenient times for the approximately 30,000 municipal officials and volunteers who must work with this law.<sup>14</sup> In addition, efforts need to be focused on SEQRA training for regional planning organizations and for state agencies whose actions may be subject to environmental review.

Debra Allee<sup>15</sup> concurred with the need for training and education but pointed out that there is a lack of consistency in how municipalities deal with the environmental review process.<sup>16</sup> She noted the excellent predictability of the process in New York City, compared to the uncertainties in the review process as administered by the various other municipalities across the state, all with different protocols and ways of doing business.<sup>17</sup> Several other participants observed that the *SEQRA Handbook*, published by the DEC, is sorely out-of-date and in need of a revision.<sup>18</sup>

On behalf of the New York State Builders' Association, Bruce Boncke<sup>19</sup> described his organization's struggle to keep decision-makers abreast of the SEQRA process.<sup>20</sup> He commented that compared to the education on SEQRA that lawyers, judges, and other officials get, the actual decision-makers in the communities of New York State are woefully under-educated on this subject.<sup>21</sup> Mr. Boncke concluded that without a significant amount of time, resources, and money being dedicated to the training of community decision makers, SEQRA will continue to lead to burdensome litigation without necessarily leading to a greater overall environmental benefit.<sup>22</sup> The Builders' Association's position is that

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<sup>14</sup> During the comment period at the end of the Symposium, one unidentified audience participant, a former local government attorney, said that he supported the shift of training resources to the local government level. He stated that he had represented a village, the commercial center of a rural county, where the mayor earned \$6000 per year. The audience member reported that, as the village attorney, he had routinely handled "billion-dollar projects" with no staff to speak of. He said that it had always baffled him that so much time is spent at the New York State Capital talking about SEQRA, but that there is so little help available at the local government level as to what is actually required by the SEQRA law and regulations. See *Great Debate Transcript*, *supra* note 8, at 13-14.

<sup>15</sup> Deborah Allee is President of Allee King Rosen & Fleming, a planning and consulting firm based in New York City.

<sup>16</sup> See *Great Debate Transcript*, *supra* note 8, at 7.

<sup>17</sup> See *id.*

<sup>18</sup> See *id.* at 17.

<sup>19</sup> Bruce Boncke is President of the New York State Builders Association and Vice President of the New York Planning Federation.

<sup>20</sup> See *Great Debate Transcript*, *supra* note 8, at 8.

<sup>21</sup> *Id.* at 8-9.

<sup>22</sup> See *id.* at 9. A member of the audience suggested creating a state fund, similar perhaps to the Environmental Protection Fund, that would deal with both land use planning and SEQRA and would provide money to local governments for SEQRA compliance, land use

where local officials are untrained in SEQRA and/or unable to make decisions under SEQRA in accordance with the time frames set forth in the regulations, then consequences against these communities should be placed in the law.<sup>23</sup>

Professor William Ginsburg challenged participants to consider whether units of local government below a particular size will ever have the capacity to handle SEQRA in its present form and whether SEQRA ought to be removed in some cases to the next "higher" unit of government—perhaps to the county level.<sup>24</sup> While it was noted that due to the current posture of state-local relations, removal "upstairs" is unlikely to occur, one participant commented that perhaps municipalities could be given the *option* of referring the responsibility for SEQRA to the county or to some other level of government on a case-by-case basis.<sup>25</sup>

#### INFORMATION SHARING

Pointing out the need to present clear information on the most critical environmental impacts to be considered, Mr. Ruzow suggested that municipalities and applicants need to place greater emphasis on analyzing the issues and less on inefficient positioning strategies, i.e., the "battle of the consultants"; and that one way to foster this shift would be to make current examples, technologies, and methodologies more available to participants in the SEQRA process.<sup>26</sup> Michael Gerrard, Esq., noted that although the DEC is supposed to retain EISs, a large number of EISs were lost in a flood at the State Library and several hundred were discarded when the DEC moved its headquarters.<sup>27</sup> The benefits of keeping the EISs are many; they represent an enormous body of data—compiled at considerable public expense—about natural history, land use, and technology, among other things. As Mr. Gerrard stated, if EISs are lost or discarded, the information they contain may be "lost to the ages."<sup>28</sup> Mr. Gerrard suggested that a library or university step forward and start collecting EISs before more of them are irretrievably lost.

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planning, and "green planning." *See id.* at 18.

<sup>23</sup> *See id.* at 9-10.

<sup>24</sup> *See id.* at 15-16.

<sup>25</sup> *See id.* at 17.

<sup>26</sup> *See id.* at 3.

<sup>27</sup> *See id.* at 12.

<sup>28</sup> *Id.*



In addition, Mr. Gerrard argued persuasively that the DEC should amend the SEQRA regulations to require that all EISs, including technical appendices, be submitted electronically as well as in "hard copy" document form, so that EISs may easily be accessed via the Internet.<sup>29</sup> Taking this one step further, perhaps a cooperative effort between the DEC and the New York State Office for Technology (OFT) could yield on-line SEQRA resources including an indexed repository of all EISs filed.<sup>30</sup> Then, using available technology, the State could offer an electronic notification system to interested parties seeking to track certain applications.<sup>31</sup> To further enhance public participation in SEQRA review, the State could offer the option of electronic submission of comments, which could then be posted on a designated website for the review and comments of other interested parties.<sup>32</sup>

The data presently available on the OFT's Geographic Information System (GIS)<sup>33</sup> is a useful starting point for consultants and municipal planners, and the State GIS Clearinghouse<sup>34</sup> holds significant promise for the future. For example, the State's GIS website could be enhanced to provide a fully searchable database of all of the non-copyrighted technical data that are prepared at great expense and submitted in EISs.<sup>35</sup>

#### ROLE OF THE JUDICIARY, STANDING TO LITIGATE, CITIZEN PARTICIPATION, AND PUBLIC ADVOCACY

Professor Philip Weinberg observed that the courts have tended to focus too much on procedural compliance with SEQRA and too little on substantive environmental review, often in effect "rubber-stamping" agency determinations which were accompanied by an

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<sup>29</sup> *Id.* Gerrard suggested that electronic filing also could be required for environmental assessment forms and as well as for other SEQRA documents.

<sup>30</sup> In fact, Mr. Gerrard made the point that when it comes to the circulation of Environmental Impact Statements (EISs), New York may as well still be back in 1975. He noted that while the world has since gone "on-line," EISs are still manually photocopied, usually in very limited numbers. He further lamented the fact that EISs are neither indexed nor easily searchable. Mr. Gerrard commended the work of the New York State Department of Public Service in making all of the Public Service Law Article X applications and related information available to the public on the Internet, and noted that this is a good example of what can be done with present technology. *See id.* at 12.

<sup>31</sup> *See id.* at 12.

<sup>32</sup> *See id.*

<sup>33</sup> *See* James G. Natoli, *Geographic Information Systems: The Wave of the Future for Information Analysis*, N.Y. STATE BAR ASS'N GOV'T L. & POL.'Y J., Spring 2000, at 42.

<sup>34</sup> *See* <http://www.nysgis.state.ny.us/index.html> (last updated Jan. 3, 2002).

<sup>35</sup> *See Great Debate Transcript, supra* note 8, at 12-13.

EIS regardless of the actual environmental consequences of the project.<sup>36</sup> Professor Weinberg opined, however, that the courts may well be on the verge of a shift away from this tendency.

Professor Weinberg also predicted that the courts will begin to relax the current requirements for standing to litigate SEQRA cases.<sup>37</sup> This is consistent with the view of Professor Joan Leary Matthews, who argues that the Court's interpretation of standing in the *Society of Plastics*<sup>38</sup> decision was too narrow.<sup>39</sup>

Professor Weinberg urged both citizens and advocacy groups to take advantage of the "golden opportunity" to participate in the SEQRA process and see to it that the science, the economics, and the law are all in order before a project moves forward.<sup>40</sup> Professor Weinberg asserted that it is the responsibility of all stakeholders to ensure that the SEQRA process is not a "two-handed card game between the local government and the sponsor of the project."<sup>41</sup> Deborah Allee concurred, noting that public *review*, which merely mandates times for the public to be permitted to speak, is not the same as public *participation*.<sup>42</sup>

Pointing out that over the years the office of the Attorney General of the State of New York has intervened in situations where it thought that a local government was not following the dictates of SEQRA, Professor Weinberg stated that the "public advocate" role of the Attorney General is important in lending aid to public interests, and sometimes even representing them in court when no citizen group has the resources to litigate.<sup>43</sup>

## CONCLUSION

With the many different suggestions offered to fix the problems associated with SEQRA, some common themes were echoed. Environmental review is here to stay. The SEQRA law and regulations need to remain flexible to allow for consideration of environmental issues that were not contemplated when the law was initially enacted twenty-five years ago, including the issues of tomorrow that we cannot even begin to fathom today.

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<sup>36</sup> See *id.* at 4.

<sup>37</sup> See *id.*

<sup>38</sup> *The Soc'y of the Plastics Indus., Inc. v. County of Suffolk*, 573 N.E.2d 1034 (N.Y. 1991).

<sup>39</sup> See generally Joan Leary Matthews, *Unlocking the Courthouse Doors: Removal of the "Special Harm" Standing Requirement Under SEQRA*, 65 ALB. L. REV. 421 (2001).

<sup>40</sup> *Great Debate Transcript*, *supra* note 8, at 4-5.

<sup>41</sup> *Id.* at 4.

<sup>42</sup> See *id.* at 7.

<sup>43</sup> *Id.* at 5.

The two ideas that garnered the most support and on which there was the greatest consensus were: (1) investing in the education and training of municipal SEQRA participants, and (2) using technology to aid in all facets of the SEQRA process.

Ironically, for modest investments these two items would reap significant rewards for the citizens of the State. In this reporter's opinion reflecting on the healthy symposium dialogue, SEQRA is alive and well, but perhaps in need of some minor tune-ups to meet the challenges ahead. Happy Birthday SEQRA: a quarter-of-a-century young and still going strong.