

This is the third in a series of blog posts [on the California Chamber of Commerce's proposed ballot initiative](#) amending the California Environmental Quality Act (CEQA). The first blog post is [here](#). The second blog post is [here](#).

The most sweeping change in the initiative is buried in the lead-in to an innocuously titled section, proposed new Section 21023 "Other Public Agency Actions for Essential Projects."

Here is the key text, in the beginning of 21023(a)

"If an essential project requires any other public agency action that is not expressly addressed by other provisions of this chapter, the public agency shall make a final written decision thereon based on compliance with existing laws."

What this means is that any approval – *even if it has nothing to do with CEQA* – must be made pursuant to "compliance with existing laws." What does "existing laws" mean? That term is defined in proposed new Section 21028(r)(1):

"Formally adopted legal requirements contained in statutes, regulations, rules, standards, or ordinances that existed and were in effect on the date an application for an essential project was submitted to a public agency."

Thus, only the law in place at the time an application is submitted to an agency can be applied to review of a project. This is what lawyers call "vested rights" – a constraint on the ability of the government to change the rules for a project after a certain point in time. California recognizes vested rights, but in general the trigger for vested rights in California is substantially later in time than the submission of an application. And for good reason.

Early vested rights provide certainty and predictability for project proponents. Those are good things. But they come with costs.

First, it prevents the government from responding to changed circumstances. For instance, if the environmental review of a project identifies a new harm not currently covered in existing written standards, there is nothing the government

can do to prevent that harm. This may be particularly an issue when a proponent proposes a dramatically new type of project, or is proposing a project in a location without preexisting environmental data.

The initiative does provide a very limited exception to address this issue, but only “to mitigate or avoid a specific, adverse life-safety impact, meaning a significant, quantifiable, direct, and unavoidable life-safety impact, including life-safety impacts associated with new or emerging technologies, materials, or grid-integration systems, and that is based on objective, identified and written public safety standards, policies, or conditions.” (Proposed new Section 21028(r)(2)). If you’re a newly discovered endangered species population, for instance, you may well be out of luck. Or if there is uncertainty about the potential impacts, perhaps because there is not clear information about the risks of the new technology involved, the government may well be unable to act as well.

Second, it may facilitate strategic behavior by project proponents. 21028(r)(1) does not define “submitted” – but it seems to mean when an applicant has submitted an application, any kind of application, to the public agency. (Such a broad interpretation would, of course, be based on Section 21029, which calls for the initiative to be broadly interpreted to allow for approval of covered projects.) So what is to stop an applicant from submitting a proposal with minimal information to a public agency to freeze the relevant law? Sure, the public agency can say the application is incomplete – the initiative has a limited timeframe for the agency to provide such a response, where CEQA is involved – but there is nothing to stop the applicant from dawdling in their response, or providing only a partial response (requiring another reply by the agency), and so freezing the relevant law for an extended period of time. We might even see properties with submitted applications get increased value because of their vested rights.

The vested rights here do not appear to depend on whether CEQA applies to a project. And indeed the scope section for the proposed initiative, proposed new Section 21013, says it applies to all “essential” projects, period, not just to the “essential” projects going through a CEQA process. Thus, these are vested rights for *all state and local approval of all covered projects in the state*. That breadth belies the claims of the initiative text that it does not “diminish the authority of any public agency to approve or disapprove an essential project.” (Section 21014(a)).

And note that because the initiative states that it overrides any conflicting law, it necessarily overrides any contrary vested rights doctrine in state law for any other

statute.

Finally, it is possible the vested rights in the initiative extend beyond the initial approval of the project, and prohibit increasing regulatory standards for any covered project after it is constructed, during its operation. The vested rights provision in 21023(a) covers “any other public agency action that is not expressly addressed by other provisions of this chapter.” Action is not defined in the initiative. But it might include any public agency action that applies at any time to the essential project – proposed new Section 21023(a) on its own terms provides no time limit to its coverage. If that is the case (and again, remember we are to broadly apply the initiative under Section 21029(a) “to afford the fullest possible weight to the interest of . . . essential projects”), then any subsequent regulatory decision for a covered project is bound by vested rights. In other words, the agency and state legislature could never update or make more stringent the regulatory standards that apply to a covered project, in perpetuity. It is a permanent lock-in of all regulatory standards. That would be a drastic – and probably untenable – change in law. Cutting against this interpretation is that overall Section 21023 sets decision timeframes for the “other public agency action” based on the timeframe for the original decision about CEQA applicability or review for the project. Section 21023(a)(1). However, one could also read this provision as implicitly prohibiting any adverse subsequent public agency action with respect to the project, if that action would occur after the deadlines set in Section 21023(a)(1). That would mean that public agencies could not (except at the request of the applicant) make additional regulatory decisions with respect to a covered project after its initial approval – basically achieving the same result of freezing in relevant law.

Of course, this broad vested rights provision is not flagged at all in the preamble to the initiative (which asserts it does not affect existing state environmental laws).