This is the sixth 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 third blog post is here. The fourth blog post is here. The fifth blog post is here.

In any environmental review process, key issues are the scope of the project that you are analyzing, and the alternatives you are assessing in your analysis. The scope of the project – what the project entails in terms of physical activity, and what its direct and indirect impacts might be – will necessarily determine what possible effects it will have, and thus whether those effects might be significant. And alternatives analysis helps the public (and the agency) understand the context of the effects analysis for the original project – alternatives analysis, done well, can allow for assessment of whether the effects of the original proposal are necessary to accomplish the goals of that proposal, and the benefits and costs of the original proposal versus other plausible options. In many ways, defining the scope of the project, and its alternatives, can drive outcomes in terms of whether an analysis finds significant effects and whether they can be mitigated. Finally, under CEQA feasible alternatives must be adopted.

The initiative would allow project proponents to define the scope of their project, including its "principal components and fundamental purposes," what kind of project it is, what resources it might impact, and any "anticipated permits or approvals required." Proposed new Section 21024. The applicant then can identify a single alternative that is "compatible with the project's fundamental purpose" Proposed new Section 21025(a)(1). Any CEQA review then only considers the applicant's proposed scope of project, the applicant's alternative, and a no-project alternative. Proposed new Section 21025(b).

The initiative would substantially change the standards for identifying alternatives. While the current CEQA Guidelines require alternatives to "feasibly attain most of the basic objectives of the project," the initiative would require the alternative to be "compatible with the proposed essential project's fundamental purpose." Proposed new Section 21025(a)(1). That change would likely make it easier for project proponents to narrow the range of alternatives that might be considered to those that are very similar to the proposal. That in turn makes alternatives easier and also makes it harder to show that the alternatives would provide meaningful differences in terms of environmental impacts.

The initiative also creates a deferential presumption that the identified alternative

would eliminate significant environmental impacts so long as that conclusion is supported by "substantial evidence." Proposed new Section 21025(b)(2)(C). The initiative is silent as to whether additional requirements under the current CEQA Guidelines for alternatives would still apply to the proposed alternative under the initiative. Again, a broad interpretation of the initiative under Section 21029 to facilitate project approval would mean that any additional requirements for alternatives that might increase the analytic burdens on the project proponent would be overridden.

The public agency in charge of review (the "lead agency" in CEQA-speak) then has to certify "whether the applicant has met the requirements" of this alternative scoping process. It's not entirely clear what "met the requirements" means – does it just mean that the applicant submitted a document with the various elements describing the project and a single alternative, even if they have no bearing with reality? That's not clear – and again, the initiative calls for interpreting its provisions in favor of approving projects!

Even if the public agency has the ability to reject the scoping prepared by the applicant (and interestingly, there is no discussion in the initiative about what process is followed if that occurs – a problematic omission in the drafting), giving the applicant the power to determine the scope of the project in this way allows applicants to selectively exclude resources that might be impacted (perhaps because analysis might find significant impacts). It allows applicants to "segment" review such that it is divided up to avoid finding significant impacts – for instance, a road project of 50 miles might be divided into 5 miles segments, or a housing project of 1000 units might be divided into 10 100 unit segments, with each segment having impacts below the significance threshold. It allows applicants to exclude "indirect" effects – for instance, construction of a highway might facilitate development on sensitive lands. The alternative provision allows an applicant to introduce a trivial variation between the proposal and the alternative (perhaps make one of the housing units a 2 bedroom instead of 2 bedroom?), making alternatives analysis useless paperwork. (Indeed, proposed new Section 21025(b)(2)(B) allows an alternative to simply "include an alternative or additional component of the proposed essential project.") While agencies might be able to reject scoping documents for failure to consider these kinds of factors, it is unclear if they would do so.

And of course, remember the restrictions on judicial review in proposed new Sections 21026 and 21027. Claims for CEQA violations require a demonstration of a

violation of “objective existing laws” – do the requirements for properly scoping and considering alternatives fall within that concept? Again, the initiative is to be interpreted in favor of approving projects! Section 21029(a).

There is potentially even more leeway for proponents to manipulate this new process. Even if courts find a violation of CEQA, the new judicial review provisions only allow courts to issue an order prohibiting commencement of the part of the overall project that is resulted in the violation – the rest of the project can proceed. Proposed new Section 21027(c). An injunction against an entire project that is under construction can only be issued if there is “a showing by clear and convincing evidence that an essential project would have a specific, adverse impact upon public safety, and there is no feasible method to satisfactorily mitigate or avoid the specific, adverse impact upon public safety.” Proposed new Section 21027(e)(1).

These limitations on relief could mean that, even where there is a flaw in the CEQA review process for an essential part of the project as a whole, the result of the project can proceed. That of course will create a real pressure for ultimate approval of the essential part, even though it is supposedly still subject to judicial review (and the ability of the public agency to reject the project), short-circuiting the CEQA review process. Proponents could do sloppy scoping and alternatives development, and/or agencies could do sloppy analyses, knowing that even if a court finds a problem, the project as a whole will start, and no court is going to want to stop an in progress project by not granting eventual approval for the flawed part of the analysis.

But project proponents can be even more aggressive with this new process. A proponent – with the support of the relevant agency – could develop a scope that does not adequately reflect the project as ultimately envisioned. The initially scoped project goes through CEQA review, and survives judicial review. The proponent could then, with the agency, revise the project in fundamental ways, including a much larger scope – for instance, convert a five-story project to a ten-story project. A court would be unable to step in, at least based on CEQA, because proposed new Section 21027(e)(1) prohibits injunctions for ongoing projects, unless there is a “specific, adverse impact upon public safety” without any feasible mitigation. In other words, the proponent and a sympathetic agency can use the interaction of the self-definition process plus the lack of judicial remedies to basically bypass CEQA entirely for large parts of covered projects. (It is true that proposed Section 21027(d)(2) provides that “[m]inor modifications . . . which do not result in any new significant impacts, or which do not substantially worsen any

previously identified significant impacts, of the initially approved essential project, may not be challenged in an action or proceeding under this division." Perhaps that provision forecloses that gambit I envision here, by impliedly stating that major modifications can be the basis for lawsuits. But the injunctive limits still remain. And remember, the initiative is to be interpreted in favor of the "realization of" essential projects, proposed new Section 21029(a)), which means we are probably not reading such an implicit limitation into the initiative.