This is the ninth 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. The sixth blog post is here. The seventh blog post is here. The eighth blog post is here.

CEQA has over time become a key component of a range of environmental protections in California. As I've discussed before, that means that if you significantly trim back on CEQA, the result may be a range of (unintended?) consequences in terms of reducing environmental legal protections under other laws, because those laws were drafted based on a reliance that CEQA review provided both procedural and substantive protections for important environmental resources. Thus, eliminating CEQA might result in substantial gaps in our current environmental protection structure in California.

The problem is that it's not entirely clear what those gaps might be, at least not without a thorough review of the existing structure of current California environmental law. As an example, I'll use the California Endangered Species Act (CESA), which I know fairly well, and thus have some (but not complete!) confidence to assess what the consequences of CEQA repeal might be.

CESA protects a range of endangered and threatened species in California. Some (but not all!) of those species are also protected against the federal Endangered Species Act (ESA). And many of those species are threatened by habitat destruction. One would think then, that CESA would provide clear protection for those species from habitat destruction. That would not necessarily be a correct conclusion though.

As it turns out (see this blog post), whether CESA prevents the destruction of habitat for a CESA-listed species is not clear. State agencies have been acting as if that is the case – but that is in part because, regardless of what CESA says, CEQA does protect the habitat of CESA-listed species. Under the current CEQA guidelines, a project that would "substantially reduce the number or restrict the range of an endangered, rare or threatened species" necessarily has a significant effect on the environment, such that full CEQA review would be required. That in turn triggers the mitigation requirements under CEQA. Those requirements are not absolute – they apply to the extent "feasible" as determined by the agency. But they are a substantial protection. So the lack of explicit coverage of habitat destruction under CESA has not been an issue.

That would change if this initiative is enacted. As I discussed earlier, it is plausible that the mandatory findings of significance under the CEQA Guidelines would not count for determining significance for projects covered by the initiative. That in turn means that there probably is not "existing law" (defined in the initiative under Section 21028(r)(1) as "[f[ormally adopted legal requirements") that protects CESA-listed species habitat, and that in turn means that impacts on that habitat would not be significant under the initiative, and so would not trigger mitigation requirements. In other words, the CEQA protections for endangered species habitat would be gone. Of course, perhaps CESA still provides protections here – either by interpreting the existing CESA language to cover habitat modification, or alternatively by amending CESA. But that's a gamble I personally would not want to take.

And note that even if the mandatory findings of significance do count as existing law, they may well not satisfy the objective standard in the initiative that is necessary for judicial review of agency compliance with the revised CEQA procedures – in other words, an agency could still eliminate endangered species habitat without any possibility of litigation under CEQA.

(By the way, you may wonder if CESA-listed species that are also protected under the federal ESA would still have their habitat protected under the ESA. Not if the Trump Admnistration has its way and repeals the relevant provision of the ESA regulations!)

This is but one example. My guess is that there are many more in state environmental law where the loss of CEQA will destabilize the protections provided to a range of important resources: clean water, clean air, wetlands, endangered species, and more. For instance, it is possible that without CEQA, there might be substantial additional conversion of agricultural lands to other uses. As another example, air quality districts often use thresholds of significance for determining whether cumulative air quality impacts from projects are substantial. But, as noted above, it is not clear that those thresholds of significance will actually be relevant going forward for projects covered by this initiative. And since CEQA is generally the primary tool to address cumulative environmental impacts under California environmental law, that might mean that cumulative air quality impacts will no longer be regulated under state environmental law. That could be a huge issue for communities near major industrial sources, freeways, and ports, often with high proportions of Latino and African-American residents and low incomes, communities that face significantly worse air quality than most communities in the state.

And the potential gaps in underlying protection are important because, if CEQA review is going to be much lighter (if it exists at all) for a whole lot of projects, then those other protections will matter a whole more. Understanding the on-the-ground impact of this initiative requires understanding how state environmental law will operate with much less CEQA review, and that is very unclear.

What about the possibility that local land-use regulations might restrict the scope of what development is enabled by the initiative? Even if CEQA review is sped up (or essentially eliminated) by the initiative, wouldn't local land-use regulations provide a check on what might occur?

The answer is . . . maybe. But probably less than one might expect. That is first because local governments vary greatly in their attitude towards individual projects, and their underlying zoning will vary a lot as well. So making generalizations here is hard. In major urban and suburban areas, there is a lot of single-family only zoning that will constrain development – but there are also areas without that zoning. In addition, as I noted earlier, the initiative appears to apply to rezoning decisions by local governments that apply to covered projects. Thus, while the local government may still have to do a rezone (or other zoning decision) to allow a project to proceed, the traditional CEQA review process would not apply to that rezoning decision – the new one would. And as noted throughout these blog posts, that might have sweeping implications.

Overall, the problem is really the uncertainty. But given the lock-in provision of the initiative, which prohibits the legislature from making amendments without a 2/3 majority, the legislature will be hamstrung in its ability to respond to any unintended consequences of this initiative.