This is the third in a series of blog posts on reforming the California Environmental Quality Act (CEQA). The first post, discussing different paradigms for CEQA, is here. The second post, discussing the conceptual framework for reform, is here. In this post, I will discuss two ways to reform CEQA: designating a state agency to set binding, clear standards for CEQA implementation; and setting stricter limits on alternatives analysis.

Create binding, clear standards, with the possibility for updating:

The state would set many more binding, clear standards for implementation of CEQA than is currently the case. While the state Resources Agency does have a large body of regulations (the CEQA Guidelines) that do bind agencies, as their name indicates those Guidelines in general provide guidance, rather than clear rules, as to many important issues, such as what is a significant impact or the setting of thresholds of significance.

A designated state agency (which might be the Resources Agency, or some other body) would be tasked and empowered to develop and update regulations that provide greater clarity on the topics below, including the list of environmental resources to consider and thresholds of significance, at least where the legislature does not do so directly in any reform legislation. Initially, the designated agency would be required by the legislature to enact a first set of regulations that provide greater clarity on important issues (such as thresholds of significance), perhaps with a backstop set by the legislature if the agency fails to act. At least the initial set of agency regulations should be exempted from the California Administrative Procedure Act, to facilitate quickly standing up the new system – and it is possible that future revisions should be exempt as well (or at least subject to a streamlined approach). In addition, regulations issued by the designated agency would be exempt from CEQA review. The legislature might want to provide that for some types of regulations, the designated agency could not "backslide" and weaken standards. Finally, courts would be instructed to deferentially review the designated agency's regulations implementing CEQA.

Alternatives analysis

The current standard under the CEQA Guidelines as to the number of alternatives that are to be assessed for an EIR is fairly general: "An EIR shall describe a range of reasonable alternatives to the project, or to the location of the project, which would feasibly attain most of the basic objectives of the project but would avoid or

substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives. . . . There is no ironclad rule governing the nature or scope of the alternatives to be discussed other than the rule of reason." 14 Cal. Code Reg. § 15126.6. Again, that uncertainty can be leveraged in disputes, and eventual litigation, over the scope of environmental review.

Pre-specifying the range of alternatives that are reasonable is a difficult task, given the wide range of possible projects and their impacts. However, there are two steps that reform could take to reduce uncertainty here. First, for private land-use development projects, the legislature could specify that alternatives analysis can take as given plan-level identification of the suitability of areas for particular types of projects, and not require alternative site analysis for those projects (as proposed here, drawing on caselaw).

Second, if the goal of environmental review is no longer to identify an "optimum" project through a technocratic process, then alternatives analysis is really most meaningful as the basis for a finding by an agency that there is no feasible way to mitigate the significant environmental impacts of a project. That conclusion necessarily requires an alternatives analysis – this project, with these impacts, is the only feasible way to accomplish these goals. Reciprocally, that means that alternatives analysis should only be pursued to the extent it informs that decision. If an agency will avoid significant impacts through mitigation, alternatives analysis should not be required. And the range of reasonable alternatives should be informed by the significant impacts that will not be mitigated (or may not be mitigated) – a reasonable range of alternatives is only defined by what alternatives should reasonably be considered to reduce that unmitigated significant impact. For instance, if the only unmitigated significant impact of a project is habitat impacts, then variation in site location to reduce those impacts are the only kinds of alternatives that should be considered, not variations that would reduce air quality or traffic impacts. This would result in a narrower range of alternatives to be considered than under current CEQA practice (which requires alternatives analysis for all significant environmental impacts even if they will be mitigated).