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# Assembly California Legislature

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## **ASSEMBLY TRANSPORTATION COMMITTEE INFORMATIONAL HEARING SUBJECT: Administration's Policy Package on Transportation Infrastructure**

### **BACKGROUND**

#### **Introduction**

Governor Newsom unveiled a broad set of policy proposals on May 19, 2023 to streamline clean energy, water, and transportation infrastructure projects. This "infrastructure package" includes the following 10 policy proposals:

- Administrative Records Review (Language) (updated: 05/19/2023)
- CEQA Judicial Streamlining (Language) (updated: 05/19/2023)
- Green Financing Programs for Federal IRA Funding (Language) (updated: 05/19/2023)
- Accelerating Environmental Mitigation (Language) (updated: 05/19/2023)
- National Environmental Policy Act (NEPA) Delegation Authority (Language) (updated: 05/19/2023)
- Direct Contracting (Public-Private Partnership Authority 1-15 Wildlife Crossings) (Language) (updated: 05/19/2023)
- Job Order Contracting (Language) (updated: 05/19/2023)
- Progressive Design Build Authority for Caltrans and DWR (Language) (updated: 05/19/2023)
- Fully Protected Species Reclassification (Language) (updated: 05/19/2023)
- Delta Reform Act Streamlining (Language) (updated: 05/19/2023)

This package was made public along with the issuance of Executive Order N-8-23, which calls for the convening of an Infrastructure Strike Team to identify streamlining opportunities. Governor Newsom intends to "facilitate and streamline project approval and completion to maximize California's share of federal infrastructure dollars and expedite the implementation of projects that meet the state's ambitious economic, climate, and social goals."

*Appropriate process for significant policy changes?* The Governor has expressed a desire that the Legislature include these streamlining proposals – released after the May Revision – as "trailer bills" in the 2023-24 State Budget. As a whole, this package of bills represents significant policy changes in various areas, including transportation, wildlife, water, and natural

resource laws. Considering these proposals late in the Budget process, especially after sub-committees have concluded their work, significantly limits transparency and public input. Hastily considering these proposals increases the potential for creating unintended consequences while limiting the Legislature's ability to evaluate whether the proposals will actually lead to the positive impacts envisioned by this administration.

Transportation Committee, Water, Parks, and Wildlife Committee, Natural Resources Committee, and Judiciary Committee will be holding informational hearings to gather information and hear initial stakeholder input on these infrastructure proposals on June 5th, 6th and 7th. While these informational hearings are important first conversations, a more thorough policy process is likely needed, especially for the more expansive proposals.

*Urgency?* While accelerating the development and construction of critical infrastructure is a laudable and shared goal, each of these proposals should be evaluated for whether it is necessary to take legislative action in June as part of the Budget or if it is even necessary to undertake a truncated legislative process to consider these proposals through the remainder of this legislative year. These proposals relate to streamlining environmental review for certain projects, expediting public contracting processes, and changing quorum rules for one state agency. Should aspects of these proposals be found to have merit and be passed by the Legislature, there will likely be minimal impact on project implementation timelines, whether these measures are passed in June or August, or even January of next year.

The Legislature may wish to evaluate each of these proposals to understand whether there are sufficient benefits for evaluating these policies during a very truncated timeline, given the potential for unintended consequences.

The five transportation-related proposals are as follows and each will be discussed in more detail below in addition to raising questions for legislative consideration for each of the proposals.

- Accelerating Environmental Mitigation
- National Environmental Policy Act (NEPA) Delegation Authority
- Direct Contracting (Public-Private Partnership Authority I-15 Wildlife Crossings)
- Job Order Contracting
- Progressive Design-Build Authority for Caltrans and Department of Water Resources (DWR)

## **Accelerating Environmental Mitigation**

### ***Background***

Environmental mitigation is the process by which project proponents apply measures to avoid, minimize, or compensate for the adverse effects and environmental impacts resulting from their projects. The CEQA guidelines consider mitigation as any of the following:

- Avoiding an impact altogether by not taking a certain action or parts of an action.

- Minimizing impacts by limiting the degree or magnitude of the action and its implementation.
- Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.
- Reducing the impact over time by preservation and maintenance operations during the life of the action.
- Compensating for the impact by replacing or providing substitute resources or environments.

Mitigation is mandated under CEQA whenever a project may result in a significant impact to the environment. Existing law requires lead agencies to consider feasible mitigation measures to avoid or substantially reduce a project’s significant environmental impacts.

The California Department of Fish and Wildlife (CDFW) and the Department of Transportation (Caltrans) currently employ a mitigation bank strategy for certain projects, whereby, for wildlife habitat damaged by the transportation system, Caltrans can pay an in-lieu fee, or purchase habitat for conservation, as environmental mitigation.

Caltrans Advance Mitigation Program (Program) was established by the Road Repair and Accountability Act of 2017 (SB 1), authorizing Caltrans to plan and implement advance mitigation solutions for its future transportation projects. This business practice allows Caltrans to reduce delays by proactively obtaining environmental mitigation in advance for transportation projects. The stated goal of the program is to address longer-term future environmental mitigation needs resulting in improved environmental, economic and project delivery outcomes. Ultimately, the program aims to help Caltrans meet conservation goals in addition to regulatory requirements. Planning and implementation of the program is a collaborative process primarily between Caltrans and its twelve districts, as well as CDFW.

Mitigation banking can be private or public. Examples of private banking include economic incentives to protect natural resources, consolidating sites into large contiguous wildlife sites, and providing long-term protection and management of habitat. Examples of public banking include the public agency sponsoring advance mitigation for large projects for multiple years of operation and maintenance.

Land is frequently protected to provide “mitigation” to offset the adverse impacts of development. For example, the effects of constructing a new highway that would destroy wetlands could be mitigated by acquiring and protecting other wetlands. Similarly, a housing development that would pave over farmland would mitigate that impact by acquiring and protecting other farmland. Mitigation banks are simply formed through the acquisition and protection of land by purchasing land or a conservation easement in excess of what is currently required by any specific development project. The excess land or conservation easement that is available for use to mitigate for other projects is the “mitigation bank.”

***Proposal***

The proposed language seeks to expand Caltrans’ current use of mitigation banking primarily by allowing Caltrans to acquire mitigation property directly, and by allowing Caltrans to use other

strategies for mitigation including using mitigation credit, or other methods as appropriate, in consultation with the Department of General Services. Specifically, the proposed language:

- 1) Clarifies that funding identified in the State Highway System Management Plan (SHSMP) shall have funding maintained, not including the habitat on the structure;
- 2) Adds environmental mitigation property to what Caltrans may purchase or transfer;
- 3) Defines environmental mitigation property as property required to be preserved or restored per state/federal law or permit, as natural habitat to offset “environmental impacts” caused by construction and operation of state highway improvement;
- 4) Allows Caltrans to create an endowment or enter into an agreement for establishment, preservation, restoration, and maintenance;
- 5) Allows Caltrans to enter into a mitigation credit (bank, in lieu fee, credit provider);
- 6) Allows Caltrans to use other methods for environmental mitigation credits (in consultation with the Department of General Services).

### ***Comments***

The success of Caltrans’ current mitigation banking, in lieu fees, and the Advance Mitigation Program is unclear. The fact sheet provided by the Administration for this proposal cites that it implements “several recommendations of the AB 1282 Transportation Permitting Task Force Report (Report).” It is unclear what recommendations this proposal implements beyond the mitigation strategies Caltrans is currently authorized to utilize. Examples of current mitigation strategies included in the report are: purchasing mitigation credits, establishing a fund or mitigation bank, and paying for mitigation fees associated with transportation projects under a conservation plan. It is unclear how this proposal implements policy recommendations included in the AB 1282 Task Force.

The proposal specifically comments that projects within the SHSMP shall have funding maintained, not including the habitat on the structure. It is unclear how this will strengthen the proposed purpose of the proposal, to ensure habitat is maintained. This proposal makes clear that funding for projects in the SHSMP, likely for maintenance and safety, is prioritized over funding for habitat. The proposal includes, “transportation funding identified in the SHSMP for habitat connectivity and wildlife maintenance corridors shall be presumed to ensure adequate funding for the long-term maintenance of a structure on the state highway system, but not for the habitat of the structure.” This would suggest that funding for wildlife habitat related to a project within the SHSMP is not guaranteed.

### ***Questions for Legislative Consideration***

- 1) How will this proposal impact current Caltrans’ mitigation projects and funding in the Advance Mitigation Program and what does it do to ensure that there is sufficient funding for mitigation?
- 2) How is “environmental impact” defined that would warrant mitigation under this proposal?
- 3) What types of local projects could this mitigation include?
- 4) What is missing in Caltrans’ current authority that warrants this proposal?

- 5) What is the purpose in ensuring wildlife habitat projects are not included in funded projects in the SHSMP?
- 6) Does the proposal prioritize the maintenance of infrastructure over habitat maintenance?
- 7) Would the proposal allow Caltrans to expand its use of advance mitigation, such as by developing mitigation credit agreements or other programmatic approaches to advance mitigation? If so, how?
- 8) Would the proposal only accelerate the conservation of natural resources for mitigation purposes, or would it also accelerate the construction of wildlife crossings, the management and restoration of natural resources, or other more active mitigation actions?
- 9) Could the proposal also include language accelerating environmental permitting for the construction of wildlife crossings, habitat protection, management and restoration associated with wildlife crossings, and other important and challenging mitigation actions?
- 10) Is there a reason why Mitigation Credit Agreements were not included in the second provision (b) as well under SEC 4 – 126?

## **National Environmental Policy Act Delegation Authority**

### ***Background***

The National Environmental Policy Act of 1969 (NEPA) is a United States environmental law that promotes the enhancement of the environment. NEPA is applied to any major project, whether on a federal, state, or local level, that involves federal funding, work performed by the federal government, or permits issued by a federal agency.

The federal government allows for the assignment of U.S. Department of Transportation environmental responsibilities under NEPA to states for highway projects, and more recently for railroad, public transportation, and/or multimodal projects. California via Caltrans has exercised this option for highway projects (since 2007) and more recently delegated this authority to the Secretary of the California State Transportation Agency (CalSTA) for rail, public transportation, and multimodal projects undertaken by state agencies. According to Caltrans, “NEPA Assignment has resulted in documents being approved in less time; improved the efficiency in which Caltrans prepares, reviews, and approves environmental documents; improved the quality of documents; and provides for greater accountability through monitoring.” The recent statutory authority to CalSTA for NEPA delegation for rail, public transportation, and multimodal projects sunsets January 1, 2025.

Currently six other states have a NEPA delegation and a seventh state is in progress. Most of the delegations are for highway projects only and one state includes railroads, public transit and multimodal projects. It does not appear that any other state has a delegation for locally led projects.

### ***Proposal***

The proposed language would delete the sunset of January 1, 2025 for the Secretary of CalSTA to assume NEPA responsibilities for railroad, public transportation, and multiprojects.

The proposal also would extend the NEPA delegation to **local** railroad, public transportation, and multimodal projects, upon request of a local or regional agency. A local or regional agency may include but is not limited to cities, counties, cities and counties, special districts and joint power authorities.

### *Comments*

The extension of the sunset does not need to occur now since it does not expire until 2025 and can therefore be considered as a policy bill introduced at the beginning of 2024.

It is unclear why the state's NEPA delegation should be extended to local railroad, public transportation, and multimodal projects. The impacts of this change on project delivery are unknown, but may result in a need for additional staff at CalSTA.

### *Questions for Legislative Consideration*

- 1) Why is this language necessary now?
- 2) What specifically allows Caltrans' existing NEPA delegation to result in the environmental documents being approved in less time?
- 3) Is the Administration currently working on a MOU with the Federal Highway Administration to extend NEPA delegation to CalSTA for projects undertaken by local agencies?
- 4) What are the potential impacts of extending the state's NEPA delegation to local projects?
- 5) How would this proposal expedite federal environmental review of local projects?
- 6) What criteria would CalSTA use in determining whether or not to accept NEPA delegation for a local project if requested?
- 7) What can the Administration not do now because they do not have this authority?
- 8) Would there be increased costs to CalSTA from this proposal and if so how much?
- 9) Assuming NEPA delegation requires California to assume sole responsibility and liability for its NEPA actions and decisions, what is the Administration's assessment of the potential liability costs for assuming NEPA responsibilities on behalf of the federal government?

## **Direct Contracting (Public-Private Partnership Authority I-15 Wildlife Crossings)**

### *Background*

The Brightline West (BLW) project is being constructed by a private company and will provide electrified, passenger high-speed rail service along Interstate 15 (I-15) from Rancho Cucamonga to Las Vegas, Nevada on a fully grade-separated line. The project has been in the planning and design phase for the last decade and it is estimated that it will break ground for construction by the end of 2023. Caltrans, CDFW, and BLW staff have been working on a way to mitigate the project's impacts to wildlife connectivity, and for animals currently crossing the highway. In particular these animals include Desert bighorn sheep which are designated as a Fully Projected Mammal under state law and mountain lions which are a candidate for listing as threatened under the California Endangered Species Act. In addition, the desert tortoise was listed as threatened in California and in October 2020 was upgraded to endangered status. There are numerous culverts and undercrossings now that can be used by smaller sensitive species including the desert

tortoise, but CDFW is concerned that as the infrastructure is built it may render some or all of them nonfunctional.

Caltrans, CDFW, and BLW entered into an agreement on January 11, 2023 to build three dedicated wildlife overcrossings. These would provide a sustainable and safe path for wildlife connectivity over the existing northbound and southbound highway lanes and the future high-speed rail corridor to be built in the median. The determination was made that efficiencies are available that will improve the feasibility of constructing the Wildlife Overcrossings if they are constructed concurrently with the current construction implementation schedule of the BLW System. At this time the cost of the project is unknown, but early estimates are \$125 million for the capital cost of construction. These costs, in addition to design and maintenance of the Wildlife Overcrossings, will be funded from a combination of cooperative contributions from BLW, Caltrans, CDFW, and the federal government.

The agreement stipulates that BLW will provide to the maximum extent possible design services for a design package (for either a design-bid-build or design-build delivery method) for the Wildlife Overcrossings at no cost to Caltrans or CDFW. The Wildlife Overcrossings will be designed to accommodate the BLW System, and BLW will not be required to modify the design of the BLW System for the Wildlife Overcrossings. Any design services will include preparation of a preliminary estimate of cost of construction under construction conditions anticipated to involve federal or state funding requirements.

### ***Proposal***

The proposed language would allow Caltrans to directly contract with BLW to develop, design, and construct three wildlife crossings across the highway.

### ***Comments***

The three wildlife crossings proposed for construction as part of the BLW project are critical to help minimize existing impacts and the impact of the project to threatened wildlife in the area. Constructing the crossings as part of the project, rather than afterwards, may reduce conflicts between the two projects and may also create efficiencies.

It is unclear if prevailing wage or other labor requirements that would have applied to the wildlife crossings if they remain public projects, would apply under this arrangement.

It is unclear from the language if construction of the crossings involves BLW assisting Caltrans in its construction of the crossings or if Caltrans will turn everything over to BLW. These are two very different things and could either mean that Caltrans builds the crossings at their own schedule or it allows BLW to have more control over dictating the schedule.

There has been no role for the Legislature to weigh in on decisions, especially about providing state funding for wildlife crossings for this project. The proposed legislation does not provide such an opportunity.

Wildlife advocacy groups have raised concerns that even with this language there is nothing to ensure the crossings will be built because the need for the crossings has not been established as NEPA mitigations. The agreement between Caltrans, CDFW, and BLW to build the crossings is voluntary and nonbinding, according to the advocates.

### ***Questions for Legislative Consideration:***

- 1) Is there anything in this language or the agreements previously entered into with Caltrans, CDFW, and BLW that makes construction of the three wildlife crossings legally binding?
- 2) Who will be designing and constructing the wildlife crossings and what role will Caltrans and CDFW play in the process?
- 3) Which entities (Caltrans, CDFW, and BLW) will be funding which aspects of the wildlife crossings (development, design, and construction)? How much is each entity anticipated to contribute and what are the sources of these funds?
- 4) The January 2023 Agreement mentions that the parties strive to start construction of the crossings by Oct 2023 (end of Q3), but the proposal allows for an agreement regarding design and construction of the crossings to be executed as far out as January 2025, suggesting that construction may not occur until 2025. Meanwhile, the Brightline project has requested \$3.75 billion in federal grants, none of which would finance the crossings, and the company intends to begin rail construction as soon as possible, with or without the crossings. There is a potential that the wildlife crossings could get left behind. Is the Administration open to adding language that would provide a guarantee the crossings are constructed prior to or alongside the construction of the rail project?
- 5) Would prevailing wage and other standard state labor requirements apply to the construction of the wildlife crossings?

### **Job Order Contracting**

#### ***Background***

Job Order Contracting (JOC) is a competitively bid, fixed price, indefinite-quantity contract for the performance of minor construction, renovation, and maintenance. JOC is typically used for well-defined, recurring, or repetitive work where quick execution is essential, not for single larger projects. These contracts can run for one or more years, and contracts can be renewed a limited number of times.

A JOC is a fixed price agreement based upon specified charges contained in a Unit Price Book (UPB), which is prepared by the public agency or by independent commercial sources. The UPB sets forth detailed repair and construction tasks, including task descriptions, specifications, units of measurement, and unit prices for each task (“Unit Price” means the amount paid for a single unit of an item of work). A contractor’s bid is expressed in terms of a percentage of the specified UPB charges.

California counties have had the authority to use JOC since 1983. Furthermore, The Legislature has authorized multiple agencies to use JOC, some state and some local, including counties, school districts, community college districts, and the California State University system. Finally, the Department of Transportation (Caltrans) is granted limited authority to use JOCs for building the critical statewide Broadband “Middle-Mile” Network (BMMN) and the Clean California Program.



JOC was developed to simplify federal procurement for smaller contracts where bidding requirements were viewed as burdensome and expensive. The award of annual contracts on a unit price basis enables what would otherwise be multiple separately-bid projects to be combined into one bid. It is **not** generally viewed as an appropriate method of contracting for large, complex construction projects that require extensive or innovative design or are likely to encounter changes and revisions during Construction. However, SB 156 of 2021 authorized the office of the Office of Broadband and Digital Literacy and, any department they assign (which includes Caltrans), to build a portion of the Statewide open-access middle-mile broadband network.

### ***Proposal***

Authorizes Caltrans to use JOC for a broad range of projects of unspecified cost. Establishes a process for soliciting and reviewing JOC bids. Caps the length of these contracts at 12 months with the option to renew the JOC for two additional 12-month terms. Requires the department to publish a report detailing the projects completed using JOC, cost, and other metrics on the department website by July 1st of every year until 2027.

### ***Comments***

There are some discrepancies between the proposed JOC legislation JOC legislation the Legislature has previously passed. Previous legislation like AB 2763 (Kalra of 2022) included a \$5 million cap on individual contract costs and a sunset provision to provide an automatic mechanism for the Legislature to review the use of JOC and its effectiveness. In its current form, the Governor's trailer bill language does not include a cap on cost or a sunset provision.

The Legislature may wish to consider amendments to narrow the scope of this proposal and add a sunset if this proposal is to move forward.

### ***Questions for Legislative Consideration***

- 1) What is the urgency for this proposal especially given that it was proposed last year as a budget trailer bill and the Legislature directed the Administration to pursue the proposal as a policy bill at that time?
- 2) What has been the Administration's experience with the state's use of JOC for the statewide open-access middle-mile broadband network program? Is it resulting in faster delivery of the project? Have there been any lawsuits, need for change orders, or other issues?
- 3) What types of projects does Caltrans envision using this authority for?
- 4) The language does not include a maximum cost for projects that could use JOC. What would be a reasonable maximum cost?

## **Progressive Design Build Authority for Caltrans and DWR**

### ***Background***

State and Local agencies typically use the traditional design-bid-build method for constructing public works. This approach splits construction projects into two distinct phases: design and construction. During the design phase, the agency prepares detailed project plans and specifications using its own employees or by hiring outside architects and engineers. Once project designs are complete, agencies invite bids from the construction community and award the contract to the lowest responsible bidder. The design-bid-build process was developed to secure a fair and reasonable price for public works construction through competition between bidding contractors.

In 1990s, public works agencies began experimenting with alternative project delivery methods, namely to design-build. Design-build is an alternate method for procuring design and construction services for the delivery of public works projects from a single entity. Under the design-build method, a single contract covers the design and construction of a project with a single company or consortium that acts as both the project designer and builder. The design-build entity arranges all architectural, engineering, and construction services. The design-build entity is responsible for delivering the project at a guaranteed price and schedule based upon performance criteria set by the public agency.

Progressive design-build is a variant of traditional design-build contracting. While there is some variation, the progressive design-build model generally includes two phases. In the first phase, the awarding authority uses a best-value process to select a design-build entity that completes preliminary plans and preconstruction services necessary to provide a cost estimate and final design proposal. The project then “progresses” to the second phase, where the awarding authority and the design-build entity agree to a final design, project cost (“guaranteed max price”), and schedule. If they cannot agree, there is an “off-ramp” between the two phases where the awarding authority can pursue other options, but still benefit from having the first phase work complete. This is different from traditional design-build, where the awarding entity contracts with a single entity to design and construct a project at a set price before design work begins, and without a similar off-ramp.

The Legislature enacted SB 785 (Wolk), Chapter 931, Statutes of 2014 to outline a standardized design-build procurement process. Legislation has been enacted in recent years to allow local agencies to use design build for specific projects such as AB 36 (Gallagher), Chapter 689, Statutes of 2021 to allow the Town of Paradise and the Paradise Irrigation District to use of design-build contracting for sewer and water conveyance projects. and AB 2932 (O’Donnell), Chapter 54, Statutes of 2020 to allow the City of Long Beach to use design-build for curb ramps to comply with ADA requirements. Most recently, the Legislature enacted SB 991 (Newman), Chapter 243, Statutes of 2022 authorizes local agencies, that provide for the production, storage, supply, treatment, or distribution of any water from any source, to use the progressive design-build process for up to 15 public works projects in excess of \$5 million for each project, similar to the progressive design-build process authorized for use by the Director of General Services.

All procurement methods contain some element of risk. Using the lowest bidder for highly complicated projects can sometimes lead local agencies to sacrifices in quality or significant change orders. Also, when methods require a different firm for design and construction, there can be inconsistencies between the two firms, leading to additional costs and delays. Design-build contractors are typically selected using qualifications-based selection criteria or best-value analysis. These approaches are more subjective than a low-bid approach, potentially subjecting the public works owner to greater contract challenges and higher costs. Therefore giving State agencies the flexibility to choose the best procurement methods can have some benefits.

### ***Proposal***

This proposal authorizes both DWR and Caltrans to procure progressive design-build contracts for up to eight public works projects with an estimated cost of \$25 million or more. It maintains Caltrans' responsibility for inspecting construction projects on or interfaced with the state highway system. The proposal clarifies the definition of progressive design-build and establishes a procurement process for progressive design-build projects. The proposal requires the departments to submit a report to the Legislature on January 1, 2030, detailing project cost, project completion status, and other metrics for projects that have begun construction by January 1, 2029. The pilot program would sunset January 1, 2031.

### ***Comments***

The Administration's trailer bill language clarifies the definition of progressive design-build and explicitly states the departments' authority to solicit a new round of bids if the initial contractor and the department are unable to reach an agreement on a maximum guaranteed price. The proposal lacks language seen in previously enacted legislation related to design-build and progressive design-build, specifically language pertaining to prevailing wages and skilled labor.

### ***Questions for Legislative Consideration***

- 1) Are there already eight projects that Caltrans has in mind for the use of progressive design-build?
- 2) Why does this proposal need to be adopted now?