SB-145 Environmental mitigation: Department of Transportation. (2023-2024)

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Senate Bill No. 145

CHAPTER 57

An act to amend Section 2081 of the Fish and Game Code, and to amend Section 104 of, to add Section 143.2 to, and to add and repeal Sections 104.1, 126, 126.1, 126.2, and 126.3 of, the Streets and Highways Code, relating to transportation, and declaring the urgency thereof, to take effect immediately.

[Approved by Governor July 10, 2023. Filed with Secretary of State July 10, 2023.]

LEGISLATIVE COUNSEL'S DIGEST

SB 145, Newman. Environmental mitigation: Department of Transportation.

(1) The California Endangered Species Act (CESA) requires the Fish and Game Commission to establish a list of endangered species and a list of threatened species and to add or remove species from either list if it finds, upon the receipt of sufficient scientific information, as specified, that the action is warranted. CESA prohibits the taking of an endangered, threatened, or candidate species, except as specified. Under the act, the Department of Fish and Wildlife may authorize the take of listed species if the take is incidental to an otherwise lawful activity, the impacts are minimized and fully mitigated, and the applicant ensures adequate funding for implementing the mitigation measures and for monitoring compliance with, and the effectiveness of, those measures.

This bill would specify that any transportation funding identified in the State Highway System Management Plan for purposes of these provisions is presumed to provide adequate funding for the long-term maintenance of a habitat connectivity or wildlife corridor structure on the state highway system, but not for the habitat on or around the structure, and would require an applicant to provide an endowment.

(2) Existing law vests the Department of Transportation with full possession and control of the state highways and associated properties. Existing law authorizes the department to acquire any real property that it considers necessary for state highway purposes.

This bill would authorize the department to purchase property for specified environmental mitigation purposes, to be called environmental mitigation property, and to transfer that property to specified governmental and nongovernmental entities, or to purchase the property in the name of those entities.

This bill would authorize the department to create an endowment or enter into an agreement with the transferee of an environmental mitigation property or another party to provide funding for the establishment, preservation, restoration, and maintenance of the property consistent with certain permit conditions or mitigation requirements. The bill would authorize the department to enter into a cooperative agreement with certain other parties to hold, manage, and invest an endowment for an environmental mitigation property and disburse payments from the endowment to the holder of the property consistent with the fund agreement. The bill would repeal these provisions on December 31, 2033.

This bill would also authorize the department to purchase, exempt from specified advertising or bidding requirements, environmental mitigation credits in a mitigation credit agreement or from a mitigation bank, conservation bank, in-lieu fee program, or from another mitigation credit provider in certain circumstances. The bill would authorize the department to purchase, exempt from those same advertising or bidding requirements, environmental mitigation credits from a mitigation bank, conservation bank, in-lieu fee program, mitigation credit agreement, or from another mitigation credit provider for the purpose of fulfilling mitigation responsibilities for natural resources or for advance mitigation purposes, using an alternative solicitation method, as specified. The bill would authorize the department to enter into agreements with governmental, nonprofit, and for-profit entities for the purpose of mitigating environmental impacts caused by transportation projects or for advance mitigation purposes. The bill would repeal these provisions on December 31, 2033.

This bill would require, by July 1, 2025, and annually thereafter until July 1, 2033, the department to provide a written report to the relevant legislative policy and budget committees that includes specified information related to its environmental mitigation program.

(3) Existing law authorizes the Department of Transportation to make and enter into any contracts in the manner provided by law that are required for the performance of its duties. Existing law, the State Contract Act, governs the bidding and award of public works contracts by specific state departments, including the Department of Transportation.

This bill would, if an intercity passenger rail project is constructed within the Interstate 15 right-of-way, require the department to ensure the construction of 3 wildlife crossings and appurtenances at 3 priority locations, as provided. The bill would authorize the department to solicit proposals for, accept unsolicited proposals for, negotiate, or enter into an agreement with a rail entity, as defined, to develop and construct the wildlife crossings and appurtenances, as specified. The bill would establish parameters for this authorization.

(4) This bill would declare that it is to take effect immediately as an urgency statute.
Vote: 2/3   Appropriation: no   Fiscal Committee: yes   Local Program: no

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THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 2081 of the Fish and Game Code is amended to read:

2081. The department may authorize acts that are otherwise prohibited pursuant to Section 2080, as follows:

(a) Through permits or memorandums of understanding, the department may authorize individuals, public agencies, universities, zoological gardens, and scientific or educational institutions, to import, export, take, or possess any endangered species, threatened species, or candidate species for scientific, educational, or management purposes.

(b) The department may authorize, by permit, the take of endangered species, threatened species, and candidate species if all of the following conditions are met:

(1) The take is incidental to an otherwise lawful activity.

(2) The impacts of the authorized take shall be minimized and fully mitigated. The measures required to meet this obligation shall be roughly proportional in extent to the impact of the authorized taking on the species. Where various measures are available to meet this obligation, the measures required shall maintain the applicant’s objectives to the greatest extent possible. All required measures shall be capable of successful implementation. For purposes of this section only, impacts of taking include all impacts on the species that result from any act that would cause the proposed taking.

(3) (A) The applicant shall ensure adequate funding to implement the measures required by paragraph (2), and for monitoring compliance with, and effectiveness of, those measures.

(B) For purposes of this section, transportation funding identified in the State Highway System Management Plan shall be presumed to ensure adequate funding for the long-term maintenance of a habitat connectivity or wildlife corridor structure on the state highway system, but not for the habitat on or around the structure. To ensure adequate funding to maintain the habitat on or around the structure, the applicant shall provide an endowment.

(c) No permit may be issued pursuant to subdivision (b) if issuance of the permit would jeopardize the continued existence of the species. The department shall make this determination based on the best scientific and other information that is reasonably available, and shall include consideration of the species’ capability to survive and reproduce, and any adverse impacts of the taking on those abilities in light of (1) known population trends; (2) known threats to the species; and (3) reasonably foreseeable impacts on the species from other related projects and activities.

(d) The department shall adopt regulations to aid in the implementation of subdivision (b) and the requirements of Division 13 (commencing with Section 21000) of the Public Resources Code, with respect to authorization of take. The department may seek certification pursuant to Section 21080.5 of the Public Resources Code to implement subdivision (b).

(e) Commencing January 1, 2019, the department shall post each new permit issued pursuant to subdivision (b) on its internet website within 15 days of the effective date of the permit.

SEC. 2. Section 104 of the Streets and Highways Code is amended to read:

104. The department may acquire, either in fee or in any lesser estate or interest, any real property that it considers necessary for state highway purposes. Real property for these purposes includes, but is not limited to, real property considered necessary for any of the following purposes:

(a) For rights-of-way, including those necessary for state highways within cities.

(b) For purposes of exchanging the same for other real property to be used for rights-of-way.

(c) For rock quarries, gravel pits, or sand or earth borrow pits.

(d) For offices, shops, or storage yards.

(e) For parks adjoining or near a state highway.

(f) For the culture and support of trees that benefit a state highway by aiding in the maintenance and preservation of the roadbed, or that aid in the maintenance of the attractiveness of the scenic beauties of a state highway.

(g) For drainage in connection with a state highway.

(h) For the maintenance of an unobstructed view of any portion of a state highway so as to promote the safety of the traveling public.

(i) For the construction and maintenance of stock trails.

(j) For the construction and maintenance of nonmotorized transportation facilities, as defined in Section 887.

(k) (1) (A) For environmental mitigation property, which the department may transfer to, purchase for transfer to, or purchase in the name of a, governmental entity, special district, nonprofit organization, for-profit entity, person, or other entity in accordance with Chapter 4.6 (commencing with Section 65965) of Division 1 of Title 7 of the Government Code, as applicable.

(B) Where feasible, a governmental entity holding property pursuant to subparagraph (A) shall have the principal responsibility for natural resource protection or conservation. A governmental entity holding property pursuant to this section shall be approved through the due diligence process set forth in Section 65967 of the Government Code.

(2) For purposes of this section, “environmental mitigation property” means property that is required by state or federal law, or by permit conditions imposed by a state or federal agency, to be preserved or restored and maintained as natural habitat to offset the environmental impacts caused by the construction and operation of a state highway improvement project or for advance mitigation purposes as provided in Section 800.6.

SEC. 3. Section 104.1 is added to the Streets and Highways Code, to read:

104.1. (a) (1) For purposes of environmental mitigation pursuant to subdivision (k) of Section 104, the department may create an endowment or enter one or more agreements with the transferee of an environmental mitigation property or another party or parties to provide funding for the establishment, preservation, restoration, and maintenance of the property consistent with any permit conditions, mitigation requirements imposed by state or federal law, conditions imposed by a state or federal agency, or advance mitigation requirements. This authority includes, but is not limited to, the requirements of Chapter 4.6 (commencing with Section 65965) of Division 1 of Title 7 of the Government Code, as applicable.

(2) Where feasible, a governmental entity holding property pursuant to paragraph (1) shall have the principal responsibility for natural resource protection or conservation. A governmental entity holding property pursuant to this section shall be approved through the due diligence process set forth in Section 65967 of the Government Code. For federally imposed mitigation requirements, the department is subject to Chapter 4.6 (commencing with Section 65965) of Division 1 of Title 7 of the Government Code, as applicable, to the extent not in conflict with federal law or regulation.

(b) (1) This section shall remain in effect only until December 31, 2033, and as of that date is repealed.

(2) Endowments or agreements entered into pursuant to this section before December 31, 2033, shall remain in effect beyond that date.

SEC. 4. Section 126 is added to the Streets and Highways Code, to read:

126. (a) Notwithstanding the advertising and bidding provisions of Part 2 (commencing with Section 10100) of Division 2 of the Public Contract Code or Article 6 (commencing with Section 999) of Chapter 6 of Division 4 of the Military and Veterans Code, the department may enter into an agreement for the purchase of environmental mitigation credits in a mitigation credit agreement, or from a mitigation bank, conservation bank, or an in-lieu fee program, or other mitigation credit provider, if a state or federal regulatory agency requires the department to purchase credits from a particular mitigation credit provider.

(b) Notwithstanding the advertising and bidding provisions of Part 2 (commencing with Section 10100) of Division 2 of the Public Contract Code or Article 6 (commencing with Section 999) of Chapter 6 of Division 4 of the Military and Veterans Code, the department may use an alternative method to purchase environmental mitigation credits from a mitigation bank, conservation bank, or in-lieu fee program, mitigation credit agreement, or other mitigation credit provider for the purpose of fulfilling mitigation responsibilities for natural resources or for advance mitigation purposes, as specified in Section 800.6, if the environmental mitigation credits are solicited through a process, as determined by the department in cooperation with the Department of General Services, that includes a solicitation or evaluation of cost and the availability of environmental mitigation credits.

(c) The department and a governmental entity, a special district, a nonprofit organization, a community foundation, or a congressionally chartered foundation may enter into a cooperative agreement at any time to hold, manage, and invest an endowment for an environmental mitigation property, as defined in subdivision (k) of Section 104, and disburse payments from the endowment to the holder of the property consistent with the fund agreement.

(d) For purposes of this section, the following definitions apply:

(1) “Community foundation” has the same meaning as defined in Section 65965 of the Government Code.

(2) “Congressionally chartered foundation” has the same meaning as defined in Section 65965 of the Government Code.

(3) “Environmental mitigation credit” means a unit of mitigation as determined in a mitigation or conservation bank enabling instrument, as defined in Section 1797.5 of the Fish and Game Code, in-lieu fee program instrument, mitigation credit agreement, or other agreement approved by a state or federal regulatory agency.

(4) “In-lieu fee program” has the same meaning as provided in Section 332.2 of Title 33 of the Code of Federal Regulations or Section 230.92 of Title 40 of the Code of Federal Regulations.

(5) “Mitigation bank” or “conservation bank” means an entity as defined in subdivision (d) or (f) of Section 1797.5 of the Fish and Game Code or as defined as a “mitigation bank” in Section 332.2 of Title 33 to the Code of Federal Regulations or Section 230.92 of Title 40 of the Code of Federal Regulations.

(6) “Mitigation credit agreement” means a mitigation credit agreement approved by the Department of Fish and Wildlife pursuant to Chapter 9 (commencing with Section 1850) of Division 2 of the Fish and Game Code.

(7) “Nonprofit organization” has the same meaning as defined in Section 65965 of the Government Code.

(e) (1) This section shall remain in effect only until December 31, 2033, and as of that date is repealed.

(2) Endowments or other agreements entered into pursuant to this section before December 31, 2033, shall remain in effect beyond that date.

SEC. 5. Section 126.1 is added to the Streets and Highways Code, to read:

126.1. (a) The department may enter into agreements, which shall provide funding as necessary, with governmental, nonprofit, and for-profit entities for the purpose of mitigating environmental impacts caused by transportation projects, for maintaining environmental mitigation property, as defined in Section 104, or for advance mitigation purposes, as provided in Section 800.6. These agreements may provide for the advancement of funds as necessary.

(b) (1) This section shall remain in effect only until December 31, 2033, and as of that date is repealed.

(2) Agreements entered into pursuant to this section before December 31, 2033, shall remain in effect beyond that date.

SEC. 6. Section 126.2 is added to the Streets and Highways Code, to read:

126.2. (a) (1) Agreements between the department and governmental, nonprofit, and for-profit entities pursuant to subdivision (c) of Section 126 and Section 126.1 shall be in accordance, as applicable, with the requirements of Chapter 4.6 (commencing with Section 65965) of Division 1 of Title 7 of the Government Code. For federally imposed requirements, the department is subject to Chapter 4.6 (commencing with Section 65965) of Division 1 of Title 7 of the Government Code, as applicable, to the extent not in conflict with federal law or regulation.

(2) Where feasible, a governmental entity holding property pursuant to paragraph (1) shall have the principal responsibility for natural resource protection or conservation. A governmental entity holding property pursuant to this section shall be approved through the due diligence process set forth in Section 65967 of the Government Code.

(b) (1) This section shall remain in effect only until December 31, 2033, and as of that date is repealed.

(2) Agreements entered into pursuant to this section before December 31, 2033, shall remain in effect beyond that date.

SEC. 7. Section 126.3 is added to the Streets and Highways Code, to read:

126.3. (a) By July 1, 2025, and annually thereafter until July 1, 2033, the department shall provide a written report to the relevant legislative policy and budget committees that includes at least the following information about its environmental mitigation program:

(1) The total number of endowments and new endowments, the amount of funds held in endowments and new endowments, the holder of each endowment, and the moneys disbursed for each endowment, in the preceding calendar year.

(2) The environmental mitigation properties purchased or transferred, and the status of each environmental mitigation property, in the preceding calendar year.

(3) A summary of each of the mitigation and advanced mitigation agreements entered into by the department in the preceding calendar year.

(4) Recommendations to address any identified barriers to implementation of the environmental mitigation program.

(b) If any information required to be reported in subdivision (a) is also provided in the report required by subdivision (f) of Section 800.6, reference to the latter is sufficient to comply with the reporting requirements of this section.

(c) This section shall remain in effect only until December 31, 2033, and as of that date is repealed.

SEC. 8. Section 143.2 is added to the Streets and Highways Code, to read:

143.2. (a) For the purposes of this section, the following definitions apply:

(1) “Authorized agreement” means either of the following types of agreements:

(A) An agreement whereby the rail entity assists the department in defining a feasible project and negotiates fair and reasonable terms for implementing the project.

(B) An agreement whereby the rail entity assumes responsibility for designing, procuring, delivering, improving, or constructing an eligible facility in accordance with established specifications and payment terms.

(2) “Eligible facility” means any wildlife crossing and appurtenance thereto developed, operated, or held in accordance with this section, and includes the wildlife crossings and appurtenances described in paragraph (1) of subdivision (b).

(3) “Quantifiable environmental benefits” means documented, ongoing, positive, and quantifiable benefits to the environment and environmental quality, including to wildlife.

(4) “Rail entity” means a person, entity, or organization that is not the federal government or any other public agency and that is undertaking an intercity passenger rail construction project within the Interstate 15 right-of-way.

(5) “State-Rail agreement” means the “Agreement to Implement Wildlife Overcrossings Over Interstate 15” executed on January 11, 2023, by and among DesertXpress Enterprises, LLC, the department, and the Department of Fish and Wildlife.

(b) (1) If an intercity passenger rail project is constructed within the segment of the Interstate 15 right-of-way at the segment described in Recital B of the State-Rail agreement, the department shall ensure the construction of three wildlife crossings and appurtenances at three priority locations.

(2) The department may use an authorized agreement to comply with paragraph (1).

(3) The department shall consult with the Department of Fish and Wildlife and with entities with expertise in the development, design, and construction of wildlife crossing structures as part of the development, design, and construction of the three wildlife crossing structures described in paragraph (1).

(4) After construction, the department shall own the wildlife overcrossings, and the department, in consultation with, and the support of, the Department of Fish and Wildlife, shall maintain and operate the wildlife overcrossings, including the maintenance of habitat, consistent with Section 2.2.6 and 2.3.6 of the State-Rail agreement.

(5) The department may enter into an agreement, which shall provide permanent funding as necessary, for the purpose of maintaining habitat on an eligible facility.

(c) Notwithstanding any other law, but subject to this section, the department may solicit proposals for, accept unsolicited proposals for, negotiate, or enter into, an authorized agreement with a rail entity to develop and construct concurrently with the rail entity's project an eligible facility that is described in paragraph (1) of subdivision (b).

(d) The department may enter into an authorized agreement for purposes of paragraph (2) of subdivision (b) if the authorized agreement will provide quantifiable environmental benefits for the region and for wildlife and if the department deems the authorized agreement to be in the best interest of the state.

(e) (1) The department may include in an authorized agreement to develop, design, and construct an eligible facility for purposes of paragraph (2) of subdivision (b), any provision the department determines necessary or appropriate, including, but not limited to, the following:

(A) Provisions addressing how the department and rail entity will share development costs and allocate and manage project risks.

(B) Provisions allowing the department to grant or otherwise disburse state or federal funds to the rail entity for the costs to develop and construct an eligible facility, excluding any costs associated with the design of an eligible facility.

(C) Provisions addressing the acquisition of rights-of-way and other property interests that may be required, including for the granting of necessary easements and for the issuance of permits or other authorizations.

(D) Provisions identifying any technical specifications concerning the eligible facility that must be satisfied by the rail entity.

(E) Provisions specifying events of default, remedies available to the rail entity and department, and dispute resolution procedures, including arbitration and other alternative dispute resolution procedures.

(F) Provisions regarding the maintenance and auditing of the rail entity's books and records.

(G) Provisions specifying that the rail entity will comply with all applicable legal requirements related to the use of state or federal funds.

(H) Provisions specifying that the rail entity will obtain errors and omissions insurance coverage for the design elements of the project.

(I) Provisions specifying that the rail entity will require payment and performance bonding, liability insurance, and errors and omissions insurance of its contractors and consultants.

(2) An authorized agreement shall include indemnity, defense, and hold harmless provisions agreed to by the department and the rail entity, including provisions for indemnifying the State of California from any claims or losses resulting or accruing from the performance of the rail entity.

(f) (1) The department may use any lawful source of funding or financing, either previously appropriated or upon appropriation, for the development or construction of an eligible facility under this section, including funding described in paragraph (2).

(2) The department may accept from the United States or any of its agencies any funds or credit assistance as are available to it for carrying out the purposes of this section, whether the funds are made available by grant, loan, or other financing arrangement.

(g) The department shall apply for a competitive grant from federal grant programs to fund activities associated with construction of the wildlife crossing structures described in paragraph (1) of subdivision (b).

(h) (1) Before executing an authorized agreement pursuant to this section, the department shall submit a draft of the agreement to the Department of Finance for review.

(2) An authorized agreement may only be executed under this section before January 1, 2025.

(3) If the department has not executed an authorized agreement pursuant to this section on or before July 1, 2024, the department shall notify the Joint Legislative Budget Committee and submit a progress report on entering into an authorized agreement to the budget committees of the Legislature.

(i) The department shall exercise the authority under this section in consultation with the Department of Fish and Wildlife.

(j) Nothing in this section affects, expands, alters, or limits any other rights or remedies otherwise available at law.

(k) On or before January 1, 2024, and at least annually thereafter, the department shall submit a written status report to the relevant policy committee and budget committee of the Legislature on the implementation of this section.

SEC. 9. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the California Constitution and shall go into immediate effect. The facts constituting the necessity are:

To promote environmental protection and safeguard economic development of California's diverse public resources and people, and enhance the state's ability to maximize federal funding to support those efforts, it is necessary for this act to take effect immediately.