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**SENATE COMMITTEE ON ENVIRONMENTAL QUALITY**

**Senator Allen, Chair**

**2021 - 2022 Regular**

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**Bill No:** AB 1260

**Author:** Chen

**Version:** 2/19/2021

**Hearing Date:** 6/28/2021

**Urgency:** No

**Fiscal:** Yes

**Consultant:** Genevieve M. Wong

**SUBJECT:** California Environmental Quality Act: exemptions: transportation-related projects

**DIGEST:** Exempts from the California Environmental Quality Act, until 2023, projects to construct or maintain infrastructure to charge or refuel zero-emission trains if certain conditions are met.

**ANALYSIS:**

Existing law, under the California Environmental Quality Act (CEQA):

- 1) Requires lead agencies with the principal responsibility for carrying out or approving a proposed discretionary project to prepare a negative declaration, mitigated declaration, or environmental impact report (EIR) for this action, unless the project is exempt from CEQA (CEQA includes various statutory exemptions, as well as categorical exemptions in the CEQA Guidelines) (Public Resources Code (PRC) §21000 et seq.).
- 2) Exempts from CEQA the following transportation project types:
  - a) Bicycle transportation plans for an urbanized area for restriping of streets and highways, bicycle parking and storage, signal timing, and related signage until January 1, 2030. (PRC §21080.20)
  - b) Projects for the institution or increase of passenger or commuter services on rail or highway rights-of-way already in use, including modernization of existing stations and parking facilities. (PRC §21080(b)(10))
  - c) Projects for the institution or increase of passenger or commuter service on high-occupancy vehicle lanes already in use, including the modernization of existing stations and parking facilities. (PRC §21080(b)(11))
  - d) Facility extensions not to exceed four miles in length which are required for the transfer of passengers from or to exclusive mass transit guideway or busway public transit services. (PRC §21080(b)(12))
  - e) Projects for the development of a regional transportation improvement program, the state transportation improvement program, or a congestion

management program (PRC §21080(b)(13)); however construction projects implementing these programs are subject to CEQA.

- f) Restriping of streets or highways to relieve traffic congestion. (PRC §21080.19)
- 3) Also exempts from CEQA, until January 1, 2023, the following “SB 288 transportation” projects types:
    - a) Pedestrian and bicycle facilities.
    - b) Projects that improve customer information and wayfinding for transit riders, bicyclists, or pedestrians.
    - c) Transit prioritization projects.
    - d) On highways with existing public transit service or that will be implementing public transit service within six months of the conversion, a project for the designation and conversion of general purpose lanes or highway shoulders to bus-only lanes, for use either during peak congestion hours or all day.
    - e) A project for the institution or increase of new bus rapid transit, bus, or light rail service, including the construction of stations, on existing public rights-of-way or existing highway rights-of-way, whether or not the right-of-way is in use for public mass transit.
    - f) The maintenance, repair, relocation, replacement, or removal of any utility infrastructure associated with a project listed above.
    - g) A project to construct or maintain infrastructure to charge or refuel zero-emission transit buses, provided the project meets certain conditions.
    - h) A project carried out by a city or county to reduce minimum parking requirements.
  - 4) Requires SB 288 transportation projects that exceed \$100,000,000 to also meet the following:
    - a) Must be incorporated in a regional transportation plan, sustainable communities strategy, general plan, or other plan that has undergone a programmatic-level environmental review within 10 years of the project.
    - b) Construction impacts are fully mitigated consistent with applicable law.
    - c) The lead agency completes and considers results of a project business case and a racial equity analysis, as specified.
    - d) The lead agency holds noticed public hearings, as prescribed by the bill.
  - 5) Requires the lead agency to file a notice of exemption with the Office of Planning and Research and the county clerk of the county in which the project is located if the lead agency determines the project is not subject to CEQA pursuant to an SB 288 exemption.

This bill exempts, until 2023, a project to construct or maintain infrastructure to charge or refuel zero-emission trains if:

- 1) The project is carried out by a public transit agency;
- 2) The project is located on property owned by a transit agency or within an existing public right-of-way; and
- 3) The project meets the requirements of the SB 288 projects.

## Background

- 1) *Overview of CEQA Process.* CEQA provides a process for evaluating the environmental effects of a project, and includes statutory exemptions, as well as categorical exemptions in the CEQA guidelines. If a project is not exempt from CEQA, an initial study is prepared to determine whether a project may have a significant effect on the environment. If the initial study shows that there would not be a significant effect on the environment, the lead agency must prepare a negative declaration (ND). If the initial study shows that the project may have a significant effect on the environment, the lead agency must prepare an environmental impact report (EIR).

Generally, an EIR must accurately describe the proposed project, identify and analyze each significant environmental impact expected to result from the proposed project, identify mitigation measures to reduce those impacts to the extent feasible, and evaluate a range of reasonable alternatives to the proposed project. Prior to approving any project that has received environmental review, an agency must make certain findings. If mitigation measures are required or incorporated into a project, the agency must adopt a reporting or monitoring program to ensure compliance with those measures.

- 2) *CEQA litigation.* The only tool for enforcing CEQA is civil litigation. Eliminating the possibility of litigation means taking away the ability for anyone to enforce the law.

Some cite CEQA litigation as a problem but do not indicate the result of that litigation. For example, were significant impacts that were not evaluated in the initial document ultimately addressed? What would have been the result if those impacts had not been mitigated (e.g. exposure of people to hazards, congestion, or inadequate public services)?

The volume of CEQA litigation is low considering the thousands of projects subject to CEQA each year as well as the volume of civil litigation in general statewide. In its report, *CEQA in the 21<sup>st</sup> Century*, BAE Urban Economics found that less than 1% of projects reviewed under CEQA were subject to litigation. And if a project is the subject of litigation, perhaps the cause of action has merit and CEQA ensures compliance with the law.

## Comments

- 1) *Purpose of Bill.* According to the author, “San Bernardino County Transportation Authority has been leading the charge for a greener passenger rail future by piloting self-powered zero-emission rail technology for their new service between San Bernardino and Redlands. They will be the first to operate the Zero-Emission Multiple Unit (ZEMU) in North America and will use a hybrid of hydrogen fuel cell and battery technology. This will provide a cleaner transportation option for my district and the state of California. AB 1260 will help deliver the most environmentally friendly rail vehicle in the United States. This bill is consistent with previous efforts to jumpstart sustainable transportation projects.”
- 2) *What do we lose when we remove the environment review of CEQA?* Often groups will seek a CEQA exemption to expedite construction of a particular type of project and reduce costs. Providing an exemption, however, can overlook the benefits of environmental review: to inform decisionmakers and the public about project impacts and identify ways to avoid or significantly reduce environmental damage. Environmental review includes more than just looking at the impact a project may have on a wetland or a threatened species; it looks at things such as air quality, impacts to neighboring facilities such as hospitals and schools, pressure on underlying infrastructure, and so much more, and analyzes those impacts in the context of one another.

CEQA provides for streamlined processes for preparing EIRs and other CEQA documents that enable public agencies to use various special types of EIR’s to simplify preparation and avoid duplication. These various documents include “program” EIRs for a series of related actions that can be collectively characterized as a single project, “staged” EIRs for sequential projects, and “master” EIRs for community-level projects. CEQA also provides for “tiering”—the process of analyzing general projects in a broad EIR, followed by focused review of subsequent environmental projects that are narrower in scope, thereby allowing an agency to defer analysis of certain details of later phases of long-term linked or complex projects until those phases are up for approval.

Even projects that are considered environmentally beneficial may, nonetheless, have significant impacts on the environment. Without CEQA, potentially significant impacts will be unknown, unanalyzed, and unmitigated.

“CEQA operates, not by dictating pro-environmental outcomes, but rather by mandating that ‘decision makers and the public’ study the likely environmental effects of contemplated government actions and thus make fully informed decisions regarding those actions. ... In other words, CEQA does not care what decision is made as long as it is an informed one.” (Citizens Coalition Los Angeles v. City of Los Angeles (2018) 26 Cal. App. 5th 561, 577.)

- 3) *Adding to SB 288 exemptions.* Last year, SB 288 was enacted as a measure to expedite investment in “shovel-ready” clean transportation projects to boost COVID-19 economic recovery by temporarily exempting those projects from CEQA. Included in those exemptions were projects to construct or maintain infrastructure to charge or refuel zero-emission transit buses. This bill adds to the “SB 288 list” and exempts similar projects for zero-emission trains. Both electric trains and hydrogen fuel cell trains are zero-emission trains.
- 4) *Projects that could be eligible.* With a sunset of January 1, 2023, a limited number of projects could qualify for this exemption. There are two known projects that could qualify for this exemption: (1) San Bernardino County Transportation Authority’s (SBCTA) Arrow Maintenance Facility (AMF) Hydrogen Fuel Upgrade Project and (2) Metrolink’s Antelope Valley Line Capital and Service Improvements Project. According to SBCTA, who are the sponsors of the bill, SBCTA will not be applying this exemption to the AMF Hydrogen Fuel Upgrade Project. That project would be subject to a full EIR process and an exemption is sought so other agencies can utilize it. The sponsors provided information on the AMF Hydrogen Fuel Upgrade Project as an example of a project that *could* be eligible for an AB 1260 exemption.

AMF Hydrogen Fuel Upgrade Project includes purchasing a zero or low emission vehicle, converting a diesel multiple unit (DMU) to a ZEMU vehicle, constructing infrastructure to support the alternative propulsion technology, and testing the vehicle on the Arrow service corridor. According to information provided by the sponsor, this will be the first hydrogen fuel cell-powered train in the United States, operating on a nine-mile extension of the San Bernardino Line. According to its initial study, the project would include improvements to the AMF maintenance building including ventilation and air conditioning; spark proofing on electrical wiring; battery charging outside of the maintenance building; installation of a hydrogen detection system; and a

hydrogen refueling pad. The hydrogen refueling pad would consist of a storage tank, paved pad, and conversion container.

Antelope Valley Line Zero Emission Pilot includes the conversion from rail multiple unit to ZEMU on Metrolink's Antelope Valley Line, located between Lancaster and Los Angeles. The specifics of this project are unknown and it is unclear if the ZEMUs will be hydrogen fuel or electric. Any infrastructure to refuel or recharge the ZEMUs could be exempt from CEQA under this bill.

- 5) *Could a CEQA exemption already apply?* CEQA Guidelines (Guidelines) provide three categorical exemptions that could apply to an AB 1260 project: (1) replacement or reconstruction of existing structures or facilities on the same site and with substantially the same purpose and capacity (Guidelines §15302); (2) construction of new small structures or facilities, installation of small new equipment and facilities in structures, and conversion of existing small structures from one use to another with only minor modifications (Guidelines §15303); and (3) construction or placement of minor structures accessory to existing commercial, industrial, or institutional facilities (Guidelines §15311). According to notices of exemptions filed on OPR's CEQAnet, many hydrogen refueling stations for passenger cars have been eligible for one of these exemptions. It is unclear if a recharging or refueling station for zero-emission buses have applied a categorical exemption; but, effective this year and until 2023, recharging and refueling stations for zero emission buses are statutorily exempt from CEQA under SB 288.

However, a categorical exemption is not absolute and can be subject to CEQA if it falls within "an exception to the exemption." Exceptions to the exemptions include considerations of location, cumulative impact, or significant effect of the project. Additionally, categorical exemptions cannot be used on projects that may result in damage to scenic resources, projects that are located on certain hazardous waste sites, and projects that may cause a substantial adverse change to the significance of a historical resource.

It is unknown if refueling or recharging stations for zero emission (electric or hydrogen fuel) trains would be ineligible for a categorical exemption due to one of these considerations. However, making these projects statutorily exempt means that the "exception to the exemption" circumstances do not apply and factors, such as a project's unique circumstances or the potential to cause adverse change to a historical resource, will no longer be considered. *With a statutory exemption, a project could still be exempt from CEQA despite its, sometimes significant, environmental impacts.*

- 6) *The AMF Project.* According to the sponsor, the AMF project is ineligible for a categorical exemption because the existing facility did not store hydrogen onsite. According to the project's initial study, "H2 used in fuel is a colorless, odorless, and tasteless flammable gas that can cause fires and explosions. Due to its nature, detecting leaks is difficult and can collect in a semi-dense cloud, that, when exposed to an ignition source, can result in a flame front traveling at supersonic speeds. Storage of liquid H2 can also result in the explosion of the container under superheated conditions. The industrial and mixed-use buildings surrounding the Project area would be affected by both instances, that could result in serious injury. Therefore, a potentially significant impact is anticipated for this resource area and would require further analysis in the EIR."

This bill would exempt from CEQA a project such as the AMF maintenance building project, including the placement of the hydrogen storage tank in an area that, according to its initial study, is near a "residential suburban" area. While the project would be required to follow and implement safety processes that are required independent of CEQA, such a project would not be subject to the analysis and mitigation measures that CEQA requires.

- 7) *The removal of public participation.* CEQA guarantees the public the ability to participate in the local approval process. Absent CEQA, local processes for public participation can vary jurisdiction to jurisdiction. A CEQA exemption removes that guarantee.

Safety concerns are often linked to hydrogen. Supporters of the bill argue that this type of infrastructure is not "new," because hydrogen fuel stations for zero emission buses and passenger cars are located throughout the state. Robust safety measures are taken when installing hydrogen fueling stations for passenger cars and buses, and it is certain that safety measures will also be implemented when it comes to the construction of these fueling stations for zero-emission trains.

However, it also could be argued that although not "new" in the context of buses and passenger cars, it is new when it comes to trains. Trains are much larger than buses and require a lot more power (in the case of the AMF project – hydrogen) to move. For a hydrogen fuel station, this need for increased power could also mean an increased amount of hydrogen stored onsite. Using the AMF project as an example, and according to its initial study, the hydrogen storage tank would measure approximately 40 feet by 15 feet. It is unclear what the storage capacity could be for a storage tank of this size. General internet research has indicated that capacity could range from about 58,000 to

220,000 gallons. On the other hand, sponsors assert that the storage tank is similar to the one used by the Orange County Transportation Authority (OCTA) refueling station for zero emission buses, which has a hydrogen storage tank with a capacity of 18,000 gallons. Does the increased amount of stored hydrogen impact the amount of risk to the surrounding areas? (Note, under AB 1260, there are no size restrictions on a hydrogen storage tank for these zero emission train refueling stations and such tank could potentially be any size. SB 288 also did not contain hydrogen storage tank size restrictions for zero emission bus refueling stations.).

If exempt from CEQA, a fueling station could be allowed in a sensitive area without public input. Using the AMF project as an example, the opportunity of nearby residents and business owners to engage in the placement of a potentially large hydrogen storage tank will be taken away.

Sponsors of the bill assert that because the project would be required to file a notice of exemption with CEQAnet and the county clerk's office, per SB 288 requirements, the public is given notice of the project. However, this is not the same as actual public noticing. The average person likely does not know about CEQAnet nor will check the county clerk's office. The only way area residents and businesses will know about this type of project is if they are provided direct notice, typically by mail. (For projects that are over \$100 million, SB 288 does require additional specific noticed public meetings for public comment; it is unlikely that an AB 1260 project would meet that threshold).

- 8) *Unknown territory.* While the deployment of ZEMUs is appealing from an emissions perspective, the associated environmental impacts of its supporting infrastructure may be significant. The AMF Hydrogen Fuel Upgrade Project and the Antelope Valley Line Zero Emission Pilot are both pilot projects - test runs to see if the technology will be feasible and useful throughout the state.

Some would argue that because there is an exemption for refueling and recharging infrastructure for zero emission buses, a similar exemption should be made for zero emission trains. Could there be unique environmental impacts that are associated with the infrastructure needed to refuel or recharge these trains? Could converting existing infrastructure to support the new electric or hydrogen fuel train result in environmental impacts that could have been avoided if a CEQA analysis was done? The AMF Hydrogen Fuel Upgrade Project will be the first in the United States. Would it be prudent to exempt from environmental review associated infrastructure projects that involve the use of an energy source known to be flammable or explosive? As this emerging technology in the context of trains, shouldn't all aspects of the



project be explored and fully vetted? Does a CEQA exemption allow local officials to be willfully unaware of potential consequences of their decision? While hydrogen is an efficient source of energy that plays a role in meeting our climate goals, it is still a volatile source and has the potential for significant risk of damage to surrounding communities.

The desire to expedite the utilization of zero emission trains for purposes of reducing greenhouse gas emissions and combating climate change should be balanced against the need for informed decision making and public participation when it comes to emerging technology.

*If the committee decides that expediting the construction of these types of projects outweighs the need for better-informed decision-making and the public's ability to enforce CEQA, the committee may wish to amend the bill to require an AB 1260 project do the following:*

- *Provide notice of the project through all of the following:*
  - *Publication in a newspaper of general circulation in the area affected by the project;*
  - *Posting notice on and offsite in the area where the project will be located;*
  - *Direct mailing or door hangers to owners and occupants of contiguous property; and*
  - *Direct mailing or door hangers to the owners and occupants of property within ¼ mile of any parcel on which the project is located.*
- *Provide the above described notice at least 45 days before the public transit agency takes action, either discretionary or nondiscretionary, on the project; and*
- *At least 30 days before the public transit agency takes action, either discretionary or nondiscretionary, on the project, provide for a noticed public meeting on the project and takes into account any concerns discussed at the meeting, if any.*

### **Related/Prior Legislation**

SB 288 (Wiener, Chapter 200, Statutes of 2020) exempt from CEQA, until 2023, various transit-related projects such as pedestrian and bicycle facilities projects, transit prioritization projects, and projects for the institution or increase of new bus rapid transit, bus, or light rail service on existing public rights-of-way or existing highway rights-of-way.

**SOURCE:** San Bernardino County Transportation Authority

**SUPPORT:**

Southern California Regional Rail Authority (METROLINK)

**OPPOSITION:**

350 Silicon Valley

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