

CALIFORNIA FISH AND GAME COMMISSION
FINDING OF EMERGENCY AND
STATEMENT OF PROPOSED EMERGENCY REGULATORY ACTION

Emergency Action to
Add Section 749.11
Title 14, California Code of Regulations
Re: Incidental Take of Western Joshua Tree

Date of Emergency Statement: December 2, 2020

I. Statement of Facts Constituting the Need for Emergency Regulatory Action

On October 21, 2019, the Fish and Game Commission (Commission) received a petition from the Center for Biological Diversity to list the western Joshua tree (*Yucca brevifolia*, WJT) as threatened under the California Endangered Species Act (CESA). California Fish and Game Code (FGC) Section 2073.5 requires that the California Department of Fish and Wildlife (Department) evaluate the petition and submit a written evaluation with a recommendation to the Commission, which was received at the Commission's April 2020 meeting. CESA, and case law interpreting it, make clear that the Commission must accept a petition when the petition contains sufficient information to lead a reasonable person to conclude that there is a substantial possibility the requested listing could occur. Based upon the information contained in the petition and other relevant information, the Department determined in its 90-day evaluation that there is sufficient scientific information available to indicate that the petitioned action may be warranted.

On September 22, 2020, the Commission determined that listing may be warranted pursuant to FGC Section 2074.2. Western Joshua tree became a candidate species under CESA, effective upon publication of the notice of findings on October 9, 2020 (Office of Administrative Law notice number Z2020-0924-01). Pursuant to FGC Section 2074.6, the Department will undertake a one-year status review. After the Commission receives the Department's status review, the Commission will make a final decision on listing.

Statutory Authority

Candidate species are protected from take under CESA pursuant to FGC Section 2085 during the remainder of the CESA listing. Under FGC Section 2084, CESA provides that the Commission may adopt regulations to authorize take of candidate species, based on the best available scientific information, when the take is otherwise consistent with CESA. As with all regulations, the Commission may adopt a regulation under Section 2084 on an emergency basis when it determines that a situation exists which threatens public health and safety or general welfare.

Another means to allow take of CESA candidate species is by Incidental Take Permit (ITP) pursuant to FGC Section 2081, subdivision (b), from the

Department. An ITP allows a permittee to take CESA listed or candidate species if such taking is incidental to, and for the purpose of, carrying out an otherwise lawful activity, including for research or monitoring activities of such activity. However, issuance of ITPs falls under Department authority and involves a more lengthy and costly permit approval process which is not feasible for the tree trimming and dead tree removal projects covered by this proposed emergency regulation.

Winter weather conditions in the high desert, including high winds and snow, can result in fallen trees in public rights-of-way and weakened tree limbs, which can create a public health and safety hazard. Dead trees and branches also pose a fire risk. These situations are particularly dangerous when dead or damaged trees are in close proximity to homes or other structures. California Department of Forestry and Fire Protection (CalFire) advises property owners regarding the need to maintain a multiple zone defensible space for fire management, which includes removing any dead trees from a zone that extends a minimum of 30 feet from buildings, structures, decks, etc. and trimming tree branches based on proximity to structures or proximity to other trees. The CalFire advice is outlined on the CalFire website here: <https://www.readyforwildfire.org/prepare-for-wildfire/get-ready/defensible-space/>

On December 3, 2020, the Department provided the Commission with a proposed regulation to address potential human safety issues related to western Joshua trees, the winter weather that much of the state was beginning to experience, and the constraints imposed by the western Joshua tree candidacy protections. At the

At a December 9-10, 2020 meeting, the Commission considered whether to take action to address the potential human safety issues related to western Joshua trees identified in the Department's cover memo for the proposed emergency regulation. At the meeting, the Department explained the nature of the emergency on the record and the inadequacy of regulatory mechanisms available to the Department during candidacy period as those mechanisms can only be applied to listed species.

In sum, an emergency exists as a consequence of the application of candidacy protections on western Joshua tree (protections which were not certain until the Commission's "may be warranted" vote on September 22, 2020) and the impact of those protections on the ability to mitigate threats to human safety and property resulting from particular western Joshua trees that create a hazard.

The proposed addition of Section 749.11, Title 14, California Code of Regulations (CCR) creates a special order allowing incidental take of western Joshua tree during CESA candidacy necessary to address this emergency.

Finding of Emergency

The Commission considered the following factors in determining whether an emergency exists: public health, safety and general welfare, as well as the magnitude of potential harm; the immediacy of the need; and whether the anticipation of harm has a basis firmer than simple speculation, and has determined that an emergency regulation authorized under FGC Section 2084 is needed. In this case, an emergency exists because of the public health and safety hazard presented by dead or weakened WJT in public rights-of-way or near structures. The proposed addition of Section 749.11, Title 14, California Code of Regulations (CCR) creates a special order allowing incidental take of WJT during CESA candidacy for activities that have met the qualifications described below.

II. Proposed Emergency Regulations

Overview

The Commission will authorize the incidental take of western Joshua tree during the candidacy period that may result from activities related to the removal of a dead western Joshua tree or trimming of a western Joshua tree under certain conditions described below.

Proposed Provisions

DEFINITIONS

The following definitions are provided under subsection 749.11(a):

(a)(1) – Desert native plant specialist – Minimum requirements for a desert native plant specialist are necessary to help ensure that activities required under the regulation are more likely to be conducted by experienced, ethical professionals and are therefore more likely to be implemented successfully.

(a)(2) – Western Joshua Tree definition - WJT is defined as all stems that have emerged from the ground within a one-meter radius measured from a single point at the base of the largest stem. This definition is necessary because WJTs are capable of asexual clonal growth via rhizomes that emerge from the ground surface somewhat close to the main stem of a western Joshua tree plant. The presence of this clonal growth can confound efforts to count the number of western Joshua trees present on a project site because one plant may have multiple stems emerging from the ground. The distance of one meter from the largest stem was selected to include stems of a plant that are reasonably likely to be connected to the main plant via underground rhizomes, but that could be less likely to survive and reproduce independently from the largest stem of the main plant. Stems outside of this one-meter radius would then be considered separate plants because they could be genetically different plants that grew from seed, or they could be plants that were generated by clonal growth from the main plant, but that are reasonably likely to be capable of independent survival and

reproduction, even if they are no longer connected to the main stem. The distance of one meter was selected because it is a biologically reasonable distance, can be measured easily and accurately, and is simple to understand.

PERMIT ISSUANCE

Subsection 749.11(b) describes the conditions under which the Department may issue a permit to authorize either the removal of a dead WJT or the trimming of a WJT, without payment of mitigation or other fees or mitigation. A permit may be issued provided that the dead tree or any limb to be removed:

- Has fallen over;
- Is leaning against an existing structure; or
- Creates an imminent threat to public health or safety.

These criteria are necessary to ensure that removal or trimming of a WJT only occurs when the tree creates a hazard to the public or structures, and not for other reasons such as convenience.

PERMIT PROCESS

Subsection 749.11(c) lists the information that must be submitted by property owners who are seeking a permit to trim or remove a WJT.

(c)(1) Permit request must be emailed to the Department at WJT@wildlife.ca.gov or mailed to the Department at California Department of Fish and Wildlife, Habitat Conservation Planning Branch, Attention: Western Joshua Tree Permitting, P.O. Box 944209, Sacramento, CA 94244-2090, and must include the street address of the property on which the WJT to be trimmed or removed is located. The request must also include photographs that demonstrate that the dead tree or limb(s) to be trimmed meets at least one of the requirements in subsection (b). This information is necessary to document the location and condition of trees for which the permit is requested.

(c)(2) The Department shall either issue a permit allowing for the removal or trimming of a WJT, or will deny the request if it doesn't include the information required in (c)(1), within 30 days of receipt of the request. Upon Department notification of permit approval, the property owner will have 60 days to ensure that the permitted removal or trimming of WJT is completed by a desert native plant specialist. If the permit request is denied, property owners may resubmit permit requests with additional information. This provision is necessary to ensure timely issuance of permits for valid requests by the Department, and completion of permitted removal or trimming by the project proponents.

(c)(3) Demonstration of compliance - within 30 days of completion of the removal or trimming of WJT in accordance with a permit issued under (c)(2), photographs of the site at which WJT removal or trimming occurred must be sent to WJT@wildlife.ca.gov.

LIMITATIONS

749.11(d) Limitations - To ensure clarity and transparency, it is imperative that nothing in Section 749.11 be construed as a general project approval. Each project proponent receiving take authorization is responsible for obtaining all necessary permits and approvals and must comply with all applicable federal, state, and local laws. The project proponents may also elect to obtain incidental take coverage through F&G Code Section 2081, subdivision(b). Nothing in Section 749.10 is intended to limit the terms and conditions that the Department includes in incidental take permits for western Joshua tree under Section 2081.

III. Identification of Reports or Documents Supporting Regulation Change

A summary of general scientific information on the life history of western Joshua tree is presented in the United States Fish and Wildlife Service Joshua Tree Species Status Assessment, dated October 23, 2018, and available online at: <https://ecos.fws.gov/ServCat/DownloadFile/169734>.

IV. Impact of Regulatory Action

The potential for significant statewide adverse economic impacts that might result from the proposed regulatory action has been assessed, and the following determinations relative to the required statutory categories have been made:

- (a) Costs or Savings to State Agencies or Costs/Savings in Federal Funding to the State:

The Commission anticipates that there will be costs to the State, specifically the California Department of Fish and Wildlife (Department). Estimated program costs of \$129,974.70 over the proposed emergency regulation period of 180 days will be absorbed within existing budgets.

Table 1. Estimated Department Implementation Costs for Take of Western Joshua Tree

| Classification | Activity/Task | # Permit Requests | Hours per Task | Hourly Rate ¹ | Projected Cost (2020\$) |
|---|---|-----------------------|----------------|--------------------------|-------------------------|
| Senior Environmental Scientist (Specialist) | Review permit requests and correspondence with applicant about request, permit tracking | 250 | 3 | \$70.93 | \$53,197.50 |
| Environmental Program Manager I (Supervisory) | Approve permit request and CEQA compliance | 200 | 1 | \$111.49 | \$22,298.00 |
| Senior Environmental Scientist (Specialist) | Deny permit request and correspondence with applicant | 50 | 3 | \$70.93 | \$10,639.50 |
| Senior Environmental Scientist (Specialist) | Review final report photographs | 200 | 1 | \$70.93 | \$14,186.00 |
| Office Technician (Typing) | Administrative Support | 250 | 0.5 | \$33.82 | \$4,227.50 |
| Subtotal | | | | | \$104,548.50 |
| | | Overhead ² | 24.32% | | \$25,426.20 |
| Total Costs | | | | | \$129,974.70 |

¹ Hourly Rate includes wages per CalHR payscale 2020-21 and Department benefit rates.

² Non-Federal Project Overhead rate for FY 2020-2021 is 24.32% per Department Budget Branch. Note: Minor discrepancies (less than \$1.00) may be apparent in total costs due to rounding error.

(b) Nondiscretionary Costs/Savings to Local Agencies:

This emergency regulation will not introduce nondiscretionary costs or savings to local agencies. Should an agency choose to consider the review and issuance of a permit, the process would likely entail the review of project plans, census information, and relocation plans.

(c) Programs Mandated on Local Agencies or School Districts:

None.

(d) Costs Imposed on Any Local Agency or School District that is Required to be Reimbursed Under Part 7 (commencing with Section 17500) of Division 4, Government Code:

None.

V. Authority and Reference

The Commission adopts this emergency action pursuant to the authority vested by sections 399 and 2084 of the Fish and Game Code and to implement, interpret, or make specific sections 399 and 2084 of the Fish and Game Code.

VI. Section 399 Finding

Fallen WJT in public rights-of-way and weakened tree limbs from winter conditions can create a public health and safety hazard. Dead trees and branches also pose a fire risk during fire-prone conditions. These situations are particularly dangerous when dead or damaged trees have fallen over, are leaning against an existing structure, or are otherwise creating an imminent threat to public health or safety.

Pursuant to Section 399, subdivision (b), of the Fish and Game Code, the Commission finds, based on the information above, that adopting this regulation is necessary for the immediate preservation of the public peace, health and safety, and general welfare.

Informative Digest (Plain English Overview)

On October 21, 2019, the California Fish and Game Commission (Commission) received a petition from the Center for Biological Diversity to list the western Joshua tree (*Yucca brevifolia*, WJT) as threatened under the California Endangered Species Act (CESA). California Fish and Game Code Section 2073.5 requires that the California Department of Fish and Wildlife (Department) evaluate the petition and submit a written evaluation with a recommendation to the Commission, which was received at the Commission's April 2020 meeting. Based upon the information contained in the petition and other relevant information, the Department determined and informed the Commission that there is sufficient scientific information available to indicate that the petitioned action may be warranted.

On September 22, 2020, the Commission determined that listing may be warranted pursuant to Fish and Game Code (FGC) Section 2074.2 of the, and therefore western Joshua tree will become a candidate species and the Department will undertake a one-year status review. At that time, the Commission will make a final decision on listing. Candidate species are protected under CESA pursuant to FGC Section 2085 during the remainder of the CESA listing.

Candidate species are protected from take under CESA pursuant to FGC Section 2085 during the remainder of the CESA listing. Under FGC Section 2084, CESA provides that the Commission may adopt regulations to authorize take of candidate species, based on the best available scientific information, when the take is otherwise consistent with CESA. As with all regulations, the Commission may adopt a regulation under Section 2084 on an emergency basis when it determines that a situation exists which threatens public health and safety or general welfare

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Commission staff has searched the California Code of Regulations and has found no other state regulation relating to the Commission's ability to allow for incidental take of a candidate species under CESA, and therefore concludes that the proposed regulations are neither inconsistent nor incompatible with existing state regulation.