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

Readoption of Section 749.12
Title 14, California Code of Regulations (CCR)
Re: Incidental Take of Western Joshua Tree

Date of Statement: September 24, 2021

I. Emergency Regulation in Effect to Date

The California Game Commission (Commission) approved an emergency rulemaking to add Section 749.12, Title 14, CCR that became effective on January 7, 2021. The emergency regulation permits the City of Palmdale, County of San Bernardino and the Town of Yucca Valley (participating agencies) to continue work on certain projects scheduled within their jurisdictions that are addressing health and safety concerns that may cause take of western Joshua trees (*Yucca brevifolia*, WJT).

Section 749.12 grants participating agencies the authority to authorize the incidental take of a limited number of WJTs during the candidacy period that may result from activities related to approvals or permits issued by the participating agencies for construction of single-family residences and accessory structures, public works projects, or the trimming or removal of damaged or dead trees. These activities will take place within the jurisdictions of the participating agencies, in habitats that are currently supporting the presence of WJT.

II. Request for Approval of Readoption of Emergency Regulations

The current emergency rule, Section 749.12, will expire on November 9, 2021, unless it is readopted for an additional 90 days.

Post adoption of the emergency rule, the Town of Yucca Valley and the City of Palmdale adopted the required ordinances to implement Section 749.12 and provided their initial $10,000 deposits to the Western Joshua Tree Mitigation Fund (mitigation fund). The County of San Bernardino opted to not participate in the implementation of Section 749.12, therefore, references to the applicability to and participation of the County of San Bernardino are deleted from the regulation text.

Since the adoption of the ordinances, the City of Palmdale has reported zero (0) take of WJT, and therefore has not paid any additional funds to the mitigation fund. In the same time frame, the Town of Yucca Valley has reported 64 total WJT take applications, where 36 permits were issued in support of connecting homes to the High Desert Water District (HDWD) wastewater treatment system and has paid an additional $80,000 to the mitigation fund. The Department anticipates reviewing the bi-monthly reports from two entities, for a total of four more reports, during the next 90-day re-adoption period.

III. Statement of Facts Constituting the Need for Readoption of the Emergency Regulatory Action

On October 21, 2019, the Commission received a petition from the Center for Biological Diversity to list WJT as threatened under the California Endangered Species Act (CESA). On September 22, 2020, the Commission determined that listing may be warranted pursuant to California Fish and Game Code (FGC) Section 2074.2. On October 9, 2020, WJT became a candidate species under CESA, effective upon publication of the notice of findings (Office of Administrative Law notice number Z2020- 0924-01). Pursuant to FGC Section 2074.6, the California Department of Wildlife (Department) has undertaken a one-year status review. During the status review process, candidate species are protected from take under CESA pursuant to FGC Section 2085.

The Commission adopted a regulation under Section 2084 on an emergency basis because it determined that a situation exists which threatens public health and safety or general welfare.

Scheduled projects within the jurisdictions of the City of Palmdale and the Town of Yucca Valley continue to move forward and require the removal, relocation and/or trimming of WJT to address the associated health and safety concerns. These were:

- Groundwater protection: Expediency is still needed for HDWD and the Town of Yucca Valley to be able to complete connection phases between the new water treatment and reclamation plant and residences already underway, in order to replace reliance on leaking septic systems and protect groundwater. Thirty-six permits have been issued thus far during the candidacy period in support of connecting homes to the new plant.
- Residences and accessory structures: Work associated with modifications to single-family residences and accessory structures within the candidacy period continues for the City of Palmdale and Town of Yucca Valley.
- Public works projects: Various public works and other projects are ongoing for the Town of Yucca Valley and the City of Palmdale during the candidacy period, including road improvements or road structures and new single family residences.
- Trimming or removing dead or damaged trees or limbs: 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 conditions remain a concern for public safety coming into winter months.

The emergency continues to exist as a consequence of the application of candidacy protections on WJT and the impact of those protections on the ability to address the associated health and safety concerns, or threats to property.

Another means to allow take of CESA candidate species is by Incidental Take

Permit (ITP) issued by the Department pursuant to FGC Section 2081, subdivision (b). 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. However, issuance of ITPs involve a more lengthy and costly permit approval process which is infeasible for the projects covered by the emergency regulation.

Prior Commission Actions

On September 22, 2020, the Commission determined that listing WJT under the California Endangered Species Act (CESA) may be warranted pursuant to FGC Section 2074.2. A species is a “candidate” until the Commission decides whether listing the species as threatened or endangered "is warranted" or "is not warranted" (FGC Section 2075.5). The emergency regulation adopted by the Commission under FGC Section 2084 authorizes incidental take of WJT during candidacy, subject to certain terms and conditions prescribed by the Commission (i.e., a “Section 2084” regulation). On December 10, 2020, the Commission found that the adoption of the Section 749.12 emergency regulation pursuant to FGC Section 2084 was necessary for the immediate preservation of the public peace, health and safety or general welfare. On June 16, 2021, the Commission approved the Department’s request for a 6-month extension to deliver the one-year status review.

Existence of an Emergency and Need for Immediate Action

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.

Proposed Action by the Commission

The Commission proposes the readoption of Section 749.12 that is the same as previously adopted, with the following exceptions:

Subsection 749.12(a) and (f)(2):

- The County of San Bernardino opted to not participate in the implementation of Section 749.12, therefore, references to the applicability to and participation of the County of San Bernardino are deleted from the regulation text.

Subsection 749.12(b)(2)(B):

- Clarifying language for the meaning of an “accredited college” has been added to make explicit the general term for recognition by the U.S. Department of Education for a college or university. This necessary change makes it clear that a desert plant specialist must hold a degree from such an institution.
- Additional language for the meaning of “professional experience” has been added to clarify that the desert plant specialist refers to a person who has been formally employed to conduct relocation or restoration of WJT.

Subsection 749.12(b)(4):

- Removal of the word “counties” since County of San Bernardino opted not to participate in implementation of Section 749.12, leaving “cities and towns.”

Subsection 749.12(b)(12):

- Correcting reference to 749.10(a)(5) from “Section” to “subsection,” and adding in the word “former” before 749.10(a)(5). This change is necessary because although Section 749.10 is repealed from Title 14, the WJT Mitigation Fund continues to exist, and maintaining the reference clarifies this specific mitigation fund for WJT.

Subsection 749.12(c):

- Changing the language, “within sixty days of the effective date of this section” to “No later than March 8, 2021” is necessary to prevent confusion with 60 days of the effective date of the re-adoption, when the 60 days was intended for the original enactment of the emergency. The March date ensures that affected individuals are clear on the (now past) due date for deposition of money in the Mitigation Fund.

Subsection 749.12(c)(5)(B):

- Remove the words “property owner may include” from before the words “the assessor’s parcel number” and add the words “may be included” since either the property owner or a participating agency could reasonably include the parcel number with the report on survival rates, if there is no street address.

Subsection 749.12(d)(4)(C)2.:

- Remove a hyphen between the words “foundations structures; striking out the words before and after it since a reader can’t see the hyphen when it is struck out.

Subsection 749.12(d)(7):

- Adds a subsection that clarifies that no refunds will be provided from the Western Joshua Tree Mitigation Fund. Additional changes are included to clarify the regulation. This added subsection is necessary to clarify that in the event that a city or town did not end up removing the tree, that the fees paid into the fund are non-refundable. The rationale for this is that the fees are calculated for mitigation for impacts, but even if a participating agency didn’t participate in take of WJT, the administrative aspect of reviewing and issuing the permit would still occur, and thus no refund is allowable.

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 Department. Estimated program costs of $32,373.82 over the proposed

emergency regulation period of 90 days will be absorbed within existing budgets.

(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. Readoption Criteria

1) Same as or Substantially Equivalent

Pursuant to Government Code Section 11346.1(h), the text of a readopted "same or substantially equivalent" to the text of the original emergency regulation that must be the "same as or substantially equivalent" to the text of an emergency regulation previously adopted by that agency." The language proposed for this rulemaking is substantially equivalent to the emergency regulation previously adopted by the Commission, with the exceptions noted above in Section III.

2) Substantial Progress

Government Code subdivision 11346.1(h) specifies "readoption shall be permitted only if the agency has made substantial progress and proceeded with diligence to comply with subdivision (e)" [Sections 11346.2 through 11347.3, inclusive].

Pursuant to FGC sections 2080 and 2085, take of a candidate species is prohibited, unless: (1) the take is authorized in a regulation adopted by the Commission pursuant to FGC Section 2084 or (2) the Department authorizes the take through Incidental Take Permits (ITP) issued on a project-by-project basis pursuant to FGC section 2081. A 12-month review of the species' status by the Department will be presented to the Commission in April 2022 for a final decision on listing status as threatened or endangered. A certificate of compliance (permanent) rulemaking is not being sought in this particular circumstance, because after the Commission makes the determination that listing the species is or is not warranted, a 2084 regulation would no longer be appropriate because the species is no longer a candidate for listing. At that point, the species is either protected under CESA as a listed species, or is no longer protected under CESA because it is not listed and is no longer a candidate for listing.

If the Commission determines that listing the WJT "is warranted," the former candidate species will become a listed species and the persons conducting activities currently covered by the 2084 regulation that take WJT will be required to obtain an ITP pursuant to FGC section 2081(b) with tailored measures to mitigate the impacts of the take.

If the Commission decides that listing the WJT “is not warranted,” take of the former candidate species will no longer be prohibited under CESA. Absent protected status, no mechanism would be needed to authorize take of WJT. In that circumstance, permanent adoption of this 2084 regulation as permanent is unnecessary.

VI. 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.

VII. Section 399 Finding

Delay in the ability for residences in the Town of Yucca Valley to connect to the new sewer and water treatment system for groundwater recharge as a result of western Joshua tree take protections will risk CRWQCB noncompliance and may mean those connections aren’t realized and that septic waste would continue to leach to the groundwater basin. The necessary sewer connections are critical to implementing the transition away from septic and the reduction of nitrate concentrations in the groundwater basin, which is a clear public safety and public health concern.

Work associated with modifications to single-family residences and accessory structures will provide critical cash-flow to small businesses and local permitting agencies in economically hard-hit areas, benefiting the general welfare of the residents of those communities.

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 health and safety, and general welfare.

Proposed Regulatory Action

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 (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. Based upon the information contained in the petition and other relevant information, the Department recommended that the Commission determine the petition has sufficient scientific information available to indicate that the petitioned action may be warranted, and informed the Commission of that recommendation.

On September 22, 2020, the Commission determined that listing may be warranted pursuant to FGC Section 2074.2, and therefore WJT became a candidate species. The Department is in the process of conducting a one-year status review and will provide it to the Commission along with a listing recommendation. Due to the large geographic range of the species and the depth of scientific information available, the Department requested and received a 6-month extension to deliver the one-year status review. As such, the Department is on track to deliver the one-year status review to the Commission in accordance with that extension by April 2022. At that time, the Commission will make a final decision on 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.

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 determined that an emergency regulation authorized under FGC Section 2084 is needed.

The readoption of the emergency action of Section 749.12 to Title 14, California Code of Regulations would allow the Commission to grant the City of Palmdale and Town of Yucca Valley (participating agencies) the authority to authorize the incidental take of a limited number of WJTs during the candidacy period that may result from activities related to approvals or permits issued by the participating agencies for construction of single-family residences and accessory structures, public works projects, or the trimming or removal of damaged or dead trees. These activities will take place within the jurisdictions of the participating agencies, in habitats that are currently supporting the presence of WJT, ranging from poor to higher quality habitat. Lands on which project activities are expected to take place are expected to be pre-subdivided parcels of one to five acres in size. Parcels that have not been developed or disturbed are more likely to provide high quality WJT habitat, and parcels that have already been

developed or disturbed are likely to provide of lower quality WJT habitat.

Mitigation fees will be collected for authorized take of WJTs by the participating agencies. Project activities that result in take of WJT in habitats that are expected to provide lower quality habitat for WJT (developed parcels) are subject to lower mitigation fees than project activities that result in take of WJT in habitats that are expected to provide higher quality habitat (undeveloped parcels). Furthermore, removal and relocation of WJT from project activities will be subject to lower mitigation fees than removal of WJT without relocation, because relocated WJT may survive, and provide benefits. These fees will be deposited into a WJT Mitigation Fund and may be expended for the purpose of addressing threats to WJT, which may include but are not limited to acquiring and conserving WJT mitigation lands.

The participating agencies may authorize take of WJT associated with developing single-family residences, accessory structures, and public works projects concurrent with approval of the project, subject to the following terms and conditions:

- Adoption of a required WJT ordinance by each participating agency;
- Deposit of required moneys to the WJT Mitigation Fund no later than March 8, 2021, and bi-monthly thereafter;
- Submittal of bi-monthly reports and an annual report by each participating agency;
- No more than ten WJTs may be removed per project site;
- Completion of a required WJT census for each project by the project proponent, and submittal of a corresponding report to the participating agency;
- Avoidance of take to the maximum extent practicable;
- Minimization of take via limits on ground disturbance and a requirement to relocate WJTs to the maximum extent feasible;
- Meeting circumstances warranting relocation of individual WTJ, and subsequent measures to be taken for relocation efforts;
- The option of removal of individual WJT where relocation of such individuals is not feasible;
- Payment of required mitigation fees defined by size class, take action (relocation vs. removal), and land status (undeveloped or developed) to the participating agencies by the project proponents; and
- The option of issuing permits for removing detached WJT or tree limbs when posing a threat to structures or public health or safety.
- Cumulative limits on the amount of WJT take for single family residences, accessory structures, and public works projects that may be permitted by the participating agencies.

The current emergency rule, Section 749.12, will expire on November 9, 2021, unless it is readopted for an additional 90 days. The Commission proposes the readoption of Section 749.12 that is the same as previously adopted, with the following exceptions considered substantially equivalent:

Subsection 749.12(a) and (f)(2):

- The County of San Bernardino opted to not participate in the implementation of Section 749.12, therefore, references to the applicability to and participation of the County of San Bernardino are deleted from the regulation text.

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clarify the regulation. This added subsection is necessary to clarify that in the event that a city or town did not end up removing the tree, that the fees paid into the fund are non-refundable. The rationale for this is that the fees are calculated for mitigation for impacts, but even if a participating agency didn't participate in take of WJT, the administrative aspect of reviewing and issuing the permit would still occur, and thus no refund is allowable.

Benefits

The benefits of readopting the emergency regulation include fulfilling the transition away from septic tank storage for the Town of Yucca Valley and reducing nitrate leaching into the groundwater basin and ensuring timely connection to the new sewer and water treatment system, protecting the groundwater basin water quality (drinking water supply) and public health. Take authorization to participating agencies of WJT would augment the general welfare of city and county residents by allowing residential improvements by local contractors, and may provide critical cash-flow to small businesses and local permitting agencies in economically hard-hit areas. Allowing the removal of weakened WJT with broken or downed limbs would reduce threats to public safety and structures during the WJT candidacy period.

Consistency and Compatibility with Existing State Regulations

Commission staff has searched the CCR and has found no other state regulation relating to the incidental take by the specific projects identified under this regulation of WJT during its candidacy under CESA, and therefore concludes that the proposed regulations are neither inconsistent nor incompatible with existing state regulation.