

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

Second Re-adoption of Section 749.11
Title 14, California Code of Regulations
Re: Incidental Take of Western Joshua Tree

Date of Statement: November 10, 2021

I. Emergency Regulation in Effect to Date

The California Game Commission (Commission) granted WJT endangered status protection under the California Endangered Species Act (CESA) on September 22, 2020, by determining that WJT is a candidate species (see Section III below for more information). The Commission approved an emergency rulemaking to add Section 749.11, Title 14, California Code of Regulations (CCR) that became effective on January 7, 2021, and a first re-adoption was approved by the Office of Administrative Law (OAL) on November 8, 2021. The emergency addressed potential human safety issues related to western Joshua trees (*Yucca brevifolia*, WJT), the winter weather that much of the state was beginning to experience, and the constraints imposed by the WJT candidacy protections. The rule allows for incidental take of WJT tree during the candidacy period that may result from activities related to the removal of a dead WJT or trimming of a WJT under certain conditions.

Subsection 749.11(b) describes the conditions under which the California Department of Fish and Wildlife (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 and is within 30 feet of a structure; or
- 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.

II. Request for Approval of Second Re-adoption of Emergency Regulations

The current emergency rule, Section 749.11 was extended for the first of two 90-day periods November 8, 2021 (OAL file No. 2021-1027-02EE) and will expire on February 8, 2022 unless it is re-adopted for the second 90 day-period.

As of September 7, 2021, and since its adoption in January, Department staff has issued 66 permits under Section 749.11. The most common requests are for trimming limbs or removing fallen trees that threaten public safety/homes and the removal of

detached limbs and trees within 30 feet of a structure. The Department anticipates issuing several dozen more permits with the re-adoption of this emergency regulation.

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

Prior Commission Actions

On October 21, 2019, the Commission received a petition from the Center for Biological Diversity to list WJT as threatened under CESA. On September 22, 2020, the Commission determined that listing WJT may be warranted pursuant to Fish and Game Code (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). On October 9, 2020, WJT became a candidate species under CESA, effective upon publication of the notice of findings (OAL No. Z2020- 0924-01). Pursuant to FGC Section 2074.6, the 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.

On December 10, 2020, the Commission adopted Section 749.11 emergency regulation to protect public health pursuant to FGC Section 2084 (OAL No. 2020-1228-02E). 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 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

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. The 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/>.

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 mitigate threats to human safety and property resulting from particular WJTs that create a hazard.

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.

Proposed Action by the Commission

The Commission proposes the second re-adoption of Section 749.11 that is the same as previously re-adopted.

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 \$64,987.35 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 subdivision 11346.1(h), the text of a readopted “same or substantially equivalent” to the text of the original emergency regulation 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 the same as the language of the re-adopted emergency regulation.

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

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)

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 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 FGC Section 2074.2, and therefore WJT became a candidate species. The Department is in the process of concluding 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. 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 second readoption of Section 749.11, Title 14, California Code of Regulations allows the continued incidental take of WJT during CESA candidacy for tree and limb removal actions. 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 mitigate threats to human safety and property resulting from particular WJTs that create a hazard.

The current emergency rule, Section 749.11 was extended for the first of two 90-day periods November 8, 2021 (OAL file No. 2021-1027-02EE) and will expire on February

8, 2022 unless it is readopted for an additional 90 days.

The Commission proposes the second re-adoption of Section 749.11 that is the same as previously re-adopted.

Benefits

The primary benefit of the proposed emergency action is removal of hazardous western Joshua trees for public safety. 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. The 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/>

Consistency and Compatibility with Existing State Regulations

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.