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## Fish and Game Commission



*Celebrating 150 Years of  
Wildlife Heritage and Conservation!*

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October 9, 2020

### **NOTICE OF PROPOSED EMERGENCY ACTION**

Emergency Action to Add Section 749.10, Title 14, California Code of Regulations  
Re: Take of Western Joshua Tree

Pursuant to the requirements of Government Code Section 11346.1(a)(1), the Fish and Game Commission (Commission) is providing notice of proposed emergency action with regard to the above-entitled emergency regulation.

#### **SUBMITTING COMMENTS**

Government Code Section 11346.1(a)(2) requires that, at least five working days prior to submitting the proposed emergency action to the Office of Administrative Law (OAL), the adopting agency provide a notice of the proposed emergency action to every person who has filed a request for notice of regulatory action with the agency. After submitting the proposed emergency to OAL, OAL shall allow interested persons five calendar days to submit comments on the proposed emergency regulations as set forth in Government Code Section 11349.6.

Any interested person may present statements, arguments or contentions, in writing, submitted via U.S. mail, fax or e-mail, relevant to the proposed emergency regulatory action. Written comments submitted via U.S. mail, fax or e-mail must be received at OAL within five days after the Commission submits the emergency regulations to OAL for review.

Any person who submits comments concerning emergency regulations to OAL must simultaneously transmit a complete copy of the comments to the Commission's contact person noted below. Written comments may be submitted to the Commission via U.S. mail or email.

Please reference submitted comments as regarding "Emergency Regulations: Take of Western Joshua Tree" addressed to:

Agency:	Reference Attorney Office of Administrative Law	California Fish and Game Commission Attn: David Thesell
Mailing Address:	300 Capitol Mall, Suite 1250 Sacramento, CA 95814	P.O. Box 944209 Sacramento, CA 94244-2090
E-mail Address:	<a href="mailto:staff@oal.ca.gov">staff@oal.ca.gov</a>	<a href="mailto:fgc@fgc.ca.gov">fgc@fgc.ca.gov</a>
Fax No.:	916-323-6826	n/a

For the status of the Commission's submittal to OAL for review, and the end of the five-day written submittal period, please consult OAL's website at <http://www.oal.ca.gov> under the heading "Emergency Regulations."

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COMMISSION SERVICES  
BOARD OF SUPERVISORS  
SUTTER COUNTY

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

Emergency Action to  
Add Section 749.10,  
Title 14, California Code of Regulations  
Re: Take of Western Joshua Tree

Date of Emergency Statement: October 9, 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 (F&G 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. 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 (the "may be warranted" vote) pursuant to F&G Code 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 F&G Code 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. Candidate species are protected under CESA pursuant to F&G Code Section 2085 during the remainder of the CESA listing.

CESA also provides that the Commission may adopt regulations to authorize take of candidate species under F&G Code Section 2084 (Section 2084). At its August 19, 2020 meeting, the Commission heard testimony from several stakeholders expressing concern about the inability to proceed with projects related to critical infrastructure and renewable energy during the candidacy period, however, the Commission was not provided specifics about those projects and so did not have enough information to determine whether action under Section 2084 might be appropriate. Department staff indicated that there was the possibility to provide an exemption for certain projects under Section 2084, and that the option could be explored in this case. The Commission requested that either the industry directly or through the Department provide

more specifics about the prospective impacts and a proposed regulation addressing those impacts.

Following the August 2020 meeting, several renewable energy project proponents contacted the Department to express concern about projects that had already completed environmental permitting and review and were projected to initiate and complete construction activities during the western Joshua tree candidacy period. The proponents asserted that proceeding as quickly as possible with their projects is imperative as those projects will provide renewable energy sources needed to meet California's goals in reducing fossil fuel use and their contribution to climate change impacts. Because climate change is the principal threat to western Joshua tree identified in the listing petition, the projects will also contribute to the species recovery in the long-term.

The Department subsequently requested that stakeholders interested in the 2084 incidental take option submit their projects for consideration. The Department met with stakeholders representing 24 renewable energy projects in Kern and San Bernardino counties to determine whether each of the projects met the criteria of having completed or nearly completed permitting processes and anticipated near-term ground-breaking activities.

After consultation with renewable energy developers and local governments, the Department and stakeholders agreed on a list of 16 renewable energy projects to include in this proposed Section 2084 regulation. Throughout this process, the Department also consulted the Center for Biological Diversity, which filed the listing petition for western Joshua tree.

Climate change impacts in California will include more frequent and intense droughts and flood events; increasing extreme heat days; increased wildfire intensity, extent and frequency; worsening air quality; and higher electricity demand resulting from these impacts (Pierce et al. 2018). The impacts are a clear threat to public health in California. The Department therefore agrees that the 15 projects included in the 2084 regulation should move forward to stay on track to meet climate change goals during the western Joshua tree candidacy period, if mitigation occurs for any unavoidable impacts.

The Commission received a proposed draft regulation from the Department on September 18, 2020, which identified 16 large-scale renewable energy projects and a process for identifying impacts to western Joshua trees on the site of each of the projects and allowing take with mitigation.

The Commission received oral testimony at its September 22, 2020 meeting explaining that 15 of the 16 large-scale renewable energy projects identified in the Department's draft regulation will add approximately 20,000 megawatts of renewable energy to California's power grid when they are completed. Even minimal delays in these projects would jeopardize the ability to meet California's greenhouse gas reduction goals and result in additional shortfalls in the energy grid. Further the effort to address the greenhouse gas reduction goals is in part an effort to mitigate climate change, which is the primary threat to the western Joshua tree and other species.

In particular, the viability of nine of the large-scale renewable energy projects comprising more than 3,000 megawatts of renewable energy will be put at grave risk if incidental take authorization for western Joshua tree is not provided by an emergency regulation within the next several weeks. This risk is based on not just when construction needs to commence in order to meet deadlines to deliver electricity under power purchase agreements (contracts to generate and purchase electricity), but also the need to obtain financing to construct projects in an already-difficult economic environment. Tax equity and other financing and investment are extremely difficult and prohibitively expensive to secure absent the regulatory certainty that emergency regulation would provide. For nearly 1/3 of the 3000 megawatts, a tax equity letter of intent must be obtained within the next 30 days to facilitate project financing. Without such financing, which must be secured months prior to construction, projects cannot go forward. This would result in a cascade of injuries to workers, contractors, counties, developers, investors, and California's climate and renewable energy mandates.

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 identified large-scale renewable energy projects coupled with the needed specificity on how to address the regulation not being known by the Commission until September 18, 2020.

The proposed addition of Section 749.10, Title 14, California Code of Regulations (CCR) creates a special order allowing incidental take of western Joshua tree during CESA candidacy for identified renewable energy projects that have met the above qualifications and continuation with planned development activities as well as take for research and monitoring.

The Commission considered the following factors in determining whether an emergency exists: the magnitude of potential harm; the existence of a crisis situation; 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 F&G Code Section 2084 is needed.

## **II. Proposed Emergency Regulations**

### ***Incidental take of western Joshua tree during the candidacy period that may result from activities related to authorized renewable energy projects***

The Commission will authorize the incidental take of western Joshua tree during the candidacy period that may result from activities related to authorized renewable energy projects. This authorization will only apply to the projects listed in the regulation.

#### *Tree Census Report*

Understanding the number of trees and the age classes of trees removed during grading and project implementation provides the basis for comparing and contrasting the functional qualities of project areas to support, sustain, and

enhance western Joshua tree with the amount and functional quality of compensatory habitat needed to ensure the take of individual western Joshua tree is minimized and mitigated.

Even small western Joshua trees are relatively easy to inventory (although some may be obscured by nurse plants). There is some evidence that plants that have grown to be at least one meter in height have a much greater likelihood of survival (and therefore, eventually reproduction) than plants that are less than this height (DeFalco et al. 2010, p. 246; Esque et al. 2015, p. 89). Western Joshua trees that are over one meter in height therefore represent a reasonable approximation of the future population, even if they may take several more years or decades to reproduce.

Western Joshua trees are capable of clonal growth, which can lead to clumps of genetically identical plants, growing together very closely. This could confound counting efforts, but because these plants are capable of surviving and reproducing independently, plants that appear to be separate should be considered as separate western Joshua tree plants for the purposes of the census. Western Joshua trees that have one or more secondary axes (branches) are generally considered to be reproductive adult plants, because branching usually occurs after flowering. Flowering has been observed in plants as short as one meter, but adult plants are typically taller, often greater than five meters in height.

Implementation of project activities may result in the incidental take of individuals in the form of mortality ("kill") as a result of tree removal, habitat loss, and modification; trampling by construction workers or earthmoving equipment; removal of soil that renders living seeds in the soil inviable or causes them to be killed; erosion of substrates supporting individuals which could cause uprooting, washing away, and burying of individuals and/or could make substrates unstable for growth; death of living seeds due to mold, disease, or other reasons that cause inviability; and pesticide application.

Potential indirect and long-term indirect impacts to western Joshua tree and its habitat include introduction or spread of invasive species; altering or eliminating seed dispersal mechanisms; changes in drainage patterns that favor different vegetative growth; construction related fugitive dust that can coat individuals and reduce photosynthesis and evapotranspiration efficiency; pesticide application; increased edge effects; altered drainage patterns, and reduced input of water necessary to create and maintain appropriate soil moisture, vegetation cover, and humidity requirements that make western Joshua tree more vulnerable to competition, disease, or reduced fecundity. Individuals displaced due to habitat loss and degradation may be unable to survive in adjacent areas if these areas are already at carrying capacity or are unsuitable for dispersal.

A complete census of the western Joshua trees present within an impact area is the most straightforward and efficient methodology to obtain robust data to directly quantify take of western Joshua tree within a project area. As part of approval for incidental take under this 2084 emergency regulation, project proponents must prepare a tree census report and submit it to the Department

for review and approval prior to removing any western Joshua tree or engaging in ground-breaking activities within the project site. The tree census report must be conducted by one or more qualified biologists and by walking transect surveys to ensure a complete and accurate report is achieved. In the context of the specific projects listed in this regulation, the project proponents understand how the fact-specific determination will be made regarding what constitutes a qualified biologist and what that phrase means. To ensure that the project can start during the western Joshua tree candidacy period, the tree census report must be submitted to the Department within six months of the effective date of the regulation. Within 15 days of receipt, the Department shall either approve the tree census report or inform the project proponent in writing of any additional information required for its approval.

### *Project Impact Area*

Three size classes of western Joshua trees are identified in the proposed regulation; trees less than one meter in height; trees one meter or greater but less than five meters in height; and trees five meters or greater in height. Of these three size classes, take of trees that are five meters or greater in height represents the greatest impact to western Joshua tree populations. Trees of this height are typically considered to be adults with multiple branches. Not only does it take many decades for western Joshua trees to reach this size and become reproductive, but when flowering does occur, trees with multiple branches produce significantly more flower clusters and therefore produce significantly more seeds than the trees in the other size classes. These larger trees can be over 100 years old and are critically important for the persistence of the population.

Western Joshua trees that are one meter or greater in height but less than five meters in height are also very important to conserve, because they represent the trees that have already become established, and that are already reproductive, or are likely to survive to become reproductive adults in the future. These trees represent the future of the population, but do not yet produce as significant of a contribution to the reproductive output of the population as the trees that are already five meters or greater in height.

Western Joshua trees that are less than one meter in height are less likely to survive (and therefore, eventually reproduce) than plants that have exceeded this height.

For this regulation, project impact area means all areas in which there will be permanent or temporary impacts to an individual live western Joshua tree and the area around each live western Joshua tree, defined by a radius, as measured from a single point at its trunk, of:

- 40 feet for western Joshua trees five meters or greater in height.
- 12 feet for western Joshua trees one meter or greater but less than five meters in height.
- 6 feet for western Joshua trees less than one meter in height.

### *Herbicide Use*

The proposed regulation states that the project proponent shall limit herbicide use for invasive plant species and shall use herbicides only after it has documented that hand or mechanical efforts are infeasible and submitted that documentation to the Department. Limiting herbicide use will help to protect the other native plants and wildlife in the project area and directly adjacent to the project area.

### *As-built Development Plans*

To ensure the Department is aware of the final outcomes of a project, and can confirm that the project contains only the approved elements and that the elements are sited in the locations where the Department was informed they would go, each project proponent shall submit as-built development plans in portable document format (PDF) to the Department within 90 days of completing all construction and ground-disturbing activities.

### *Mitigation*

The compensatory mitigation ratio for impacts to western Joshua tree shall be determined by the functional quality of the habitat based on the size and reproductive class of trees within the project impact area as confirmed in the Department-approved tree census report. The compensatory mitigation ratio for impacts to western Joshua tree shall be at 1.5:1 of the project impact area.

To satisfy the compensatory mitigation requirement, prior to commencing any project activities in areas that may contain western Joshua trees, the project proponent shall pay a mitigation fee of \$10,521.95 per acre to be deposited into the Western Joshua Tree Mitigation Fund (to be established by the Department). The fee accounts for biological monitoring, infrastructure, short- and long-term habitat maintenance, and reporting activities (as shown in Table 1. Western Joshua Tree Management Fee Estimate.)

The fee estimate is a per acre mitigation cost for the purpose of calculating the individual project mitigation fee. The fee estimate was derived by the average number of acres and cost per acre of recent sales (previous six months) of lands that contained western Joshua trees in the Mojave desert; the prevailing wage rates for qualified biologists and land managers to conduct biological monitoring and other land management activities such as trash clean-up and removal; the cost (in 2020 dollars) of fencing materials, signage, and prevailing wage rates for fencing installation and repair, and equipment and materials for invasive species control; and the cost based on prevailing wage rates for data management and to produce an annual land management report. The cost per acre-fee is to be multiplied by the number of acres required as mitigation to offset the impacts of the individual project and will yield the total fee to be deposited into the Western Joshua Tree Mitigation Fund. For example, if the project is required to provide 15 acres of compensatory mitigation (based on 10 acres of project impact area at a mitigation ratio of 1.5:1) the project proponent will pay \$157,829.25 into the Western Joshua Tree Mitigation Fund.



Additionally, prior to removing any western Joshua tree or engaging in ground-breaking activities within project impact areas, each participating project must contribute \$10,000 to cover the cost of account fees and retaining a land acquisition specialist to assist the Department in locating, acquiring, and conserving the mitigation lands.

#### *Credit for Existing Mitigation*

Some projects included in this proposed regulation are already obligated by other permits issued by the Department or other federal, state, or local agencies to complete mitigation for take of western Joshua tree. In consideration of projects that have already completed or are legally obligated to complete compensatory mitigation for take of or impacts to western Joshua tree woodlands, or take of or impacts to a species other than western Joshua tree where the mitigation for that species will also benefit western Joshua tree, the project proponent may elect to provide the Department with information about the project impacts, the mitigation obligation, and all compensatory mitigation land acquired and conserved. If, after assessment of the information, the Department determines that the mitigation land has comparable western Joshua tree density as the density in the project or is reasonably comparable in western Joshua tree habitat quality to the project impact area, and is subject to a conservation easement or reasonably comparable instrument with adequate management funding, the Department shall credit the project at a 1:1 ratio for all such mitigation lands acquired by the project proponent.

#### *Limitations*

To ensure clarity and transparency, it is imperative that nothing in Section 749.10 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.

#### ***Research and Monitoring***

Continued research of the western Joshua tree is important for monitoring the impact of projects on the tree and its habitat as well as the effectiveness of restoration programs. Take of western Joshua tree in the course of ongoing research and monitoring by public agencies other than the Department and by private parties is authorized provided that a written, detailed project progress report describing objectives, methods (gear, sampling schedules and locations), efforts to minimize adverse effects to the species, and estimated level of take of the species shall be provided to the Department's Habitat Conservation Planning Branch chief. All take in the course of research and monitoring by public agencies other than the Department and by private parties is authorized subject to the same restrictions applicable to ongoing research and monitoring. Pursuant

to F&G Code Section 2081, the Department may also authorize take of western Joshua tree for research and monitoring activities not addressed above.

**Table 1. Western Joshua Tree Management Fee Estimate (2020\$)**

<b>Biological Monitoring</b>	<b>\$ 237,885.43</b>
Transects (100% coverage, 4 people, 16 hours each, plus travel)	
Vegetation Baseline (100% coverage - # trees, map invasives)	
Travel = (1 hour each way* each person, 45 miles)*2/per day	
<b>Habitat Feature Maintenance</b>	<b>\$ 151,795.74</b>
Invasive Species Control (2 people, 1 day, plus travel)	
Follow-up Surveys (2 people, 1 day, plus travel)	
Invasive Species Removal (2 people, 2 days, plus travel)	
Equipment - Start-up (Backpack Sprayers, herbicide, hand tools)	
Equipment - Long-term (Backpack Sprayers, herbicide, tools)	
<b>Infrastructure</b>	<b>\$ 229,569.80</b>
Establish Fence (Contract)	
Fence Maintenance (2 people, 4 days, plus travel)	
Fence Replacement (Contract)	
Trash Clean-up (2 people, 1 day, plus travel)	
Materials for Fence Replacement - Interim	
Materials for Fence Replacement - Long-term	
Signage	
Signage - Maintenance	
Powder River Gate	
<b>Reporting</b>	<b>\$ 191,954.29</b>
Annual Report	
Data Management	
<b>Stewardship Subtotal</b>	<b>\$ 811,205.26</b>
Contingency	\$ 81,120.53
Administrative Cost	\$ 276,620.99
<b>Grand Total</b>	<b>\$ 1,168,946.78</b>
Cost/Acre	\$ 5,844.73
<b>Total Endowment with Land</b>	<b>\$ 2,104,390.78</b>
Mean Cost/Acre	\$ 4,677.22
<b>Mitigation Cost/Acre</b>	<b>\$ 10,521.95</b>

Source: Department Habitat Conservation and Planning Branch

### 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>. Specific sources cited above are listed below:

DeFalco, L.A., T.C. Esque, S.J. Scoles-Sciulla, and J. Rodgers. 2010. Desert wildfire and severe drought diminish survivorship of the long-lived Joshua tree (*Yucca brevifolia*; Agavaceae). *American Journal of Botany* 97:243–250.

Esque, T.C., P.A. Medica, D.F. Shrylock, L.A. DeFalco, R.H. Webb, and R.B. Hunter. 2015. Direct and indirect effects of environmental variability on growth and survivorship of prereproductive Joshua trees, *Yucca brevifolia* Engelm. (Agavaceae). *American Journal of Botany*. 102:85–91.

Pierce, D.W., J.F. Kalansky, and D. R. Cayan. 2018. Climate, drought, and sea level rise scenarios for California’s fourth climate change assessment. Available online at [https://www.energy.ca.gov/sites/default/files/2019-11/Projections\\_CCCA4-CEC-2018-006\\_ADA.pdf](https://www.energy.ca.gov/sites/default/files/2019-11/Projections_CCCA4-CEC-2018-006_ADA.pdf)

### 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 for program startup and implementation as shown in Table 2. Startup costs are estimated to be \$4,227.23 and the implementation costs per project are estimated to be \$11,467.72. The Department anticipates approximately 15 separate projects, resulting in total program costs of \$176,243.09 over the 180 days of the proposed action. The identified program costs are within existing budgets.

**Table 2.** Estimated Department Startup and Implementation Costs per Project for Western Joshua Tree (WJT) Take During Candidacy (2020\$)

#### STARTUP

Department Classification	Activity/Task	Hourly Rate <sup>1</sup>	Hours per Task	Projected Cost
Associate Budget Analyst	Setup WJT Mitigation Fund	\$55.42	4	\$221.68
Attorney IV	Setup WJT Mitigation Fund	\$110.72	20	\$2,214.40

Department Classification	Activity/Task	Hourly Rate <sup>1</sup>	Hours per Task	Projected Cost
Senior Environmental Scientist (Supervisory)	Setup WJT Mitigation Fund	\$96.42	10	\$964.20
	<b>Subtotal</b>			\$3,400.28
	Overhead <sup>2</sup>	24.32%		\$826.95
	<b>Total Startup</b>			<b>\$4,227.23</b>

**ONGOING IMPLEMENTATION (per Project)**

Department Classification	Activity/Task	Hourly Rate <sup>1</sup>	Hours per Task	Projected Cost
Senior Environmental Scientist	Approve qualified biologist in writing; work with Project Proponent	\$70.93	2	\$141.86
Senior Environmental Scientist	Review and approve tree census report; work with Project Proponent	\$70.93	8	\$567.44
Senior Environmental Scientist	Review as-built plans 45 d. of completing ground-disturbing activities	\$70.93	2	\$141.86
Senior Environmental Scientist	Work on compensatory mitigation, work with mitigation banks; ensure payments are made; approve compensatory mitigation lands	\$70.93	40	\$2,837.20
Attorney IV	Ensure all requirements met	\$110.72	50	\$5,536.00
	<b>Subtotal</b>	<b>Per project</b>		\$9,224.36
	Overhead <sup>2</sup>	24.32%		\$2,243.36
	<b>Total per Project Costs</b>			<b>\$11,467.72</b>
	<b>Total for 15 Projects</b>			<b>\$172,015.80</b>
	<b>Grand Total Costs</b>			<b>\$176,243.03</b>

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

<sup>2</sup> Non-Federal Project Overhead rate for FY 2020-2021 is 24.32% per Department Budget Branch.

(b) Nondiscretionary Costs/Savings to Local Agencies:

This emergency regulation is not anticipated to impact costs or savings to local agencies because this action would not prevent the continuation of current activities.

(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 F&G Code and to implement, interpret, or make specific sections 399 and 2084 of F&G Code.

## **VI. Section 399 Finding**

Climate change impacts in California pose a clear threat to public health and are identified in the petition as a primary threat to the western Joshua tree. The proposed emergency regulation is necessary to allow renewable energy projects that have completed or nearly completed the permitting and review process to proceed with groundbreaking activities during western Joshua tree candidacy under CESA. The projects are integral components in California's strategy to achieve greenhouse gas reduction goals and the State's contribution to global climate change. The allowance of incidental take of western Joshua tree specific to the included renewable energy projects will contribute to the species' recovery in the long-term.

Pursuant to Section 399, subdivision (b), of F&G 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.

## **VII. Compliance with Govt Code 11346.1**

Government Code section 11346.1(a)(2) requires that, at least five working days prior to submission of the proposed emergency action to the Office of Administrative Law, the adopting agency provide a notice of the proposed emergency action to every person who has filed a request for notice of regulatory action with the agency. After submission of the proposed emergency to the Office of Administrative Law, the Office of Administrative Law shall allow interested persons five calendar days to submit comments on the proposed emergency regulations as set forth in Government Code section 11349.6.

## 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 (F&G 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 F&G Code Section 2074.2, and therefore western Joshua tree will become a candidate species and the Department will undertake a one-year status review. After it receives the Department's status review, the Commission will make a final decision on listing. Candidate species are protected under CESA pursuant to F&G Code Section 2085 during the remainder of the CESA listing.

CESA also provides that the Commission may adopt regulations to authorize take of certain threatened or endangered species and candidate species under F&G Code Section 2084. At its August 19, 2020 meeting, the Commission heard testimony from several stakeholders expressing concern about the inability to proceed with projects related to protecting public health during the candidacy period. The proposed addition of subsection 749.10(a), Title 14, California Code of Regulations creates a special order allowing incidental take of western Joshua tree during CESA candidacy for certain renewable energy projects that will provide renewable energy sources needed to meet California's goals in reducing fossil fuels use and their contribution to climate change impacts. Because climate change is the principal threat to western Joshua tree identified in the listing petition, these projects will also contribute to the species' recovery in the long-term. However, mitigation must occur for any unavoidable impacts.

Project proponents will be required to comply with the terms and conditions specified in the regulation:

- A tree census report must be conducted by a qualified biologist who is approved in advance by the Department.
- Restrictions on herbicide use.
- As-built development plans must be submitted to the Department within 90 days of completion of all construction and ground-disturbing activities.
- Payment of a mitigation fee based on the number of acres to be mitigated.

Each project proponent will also be required to contribute \$10,000 to cover account fees and the cost of retaining a land acquisition specialist. Credit for existing mitigation may be provided.

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 proposed addition of subsection 749.10(b) provides for take of western Joshua tree in the course of ongoing research and monitoring by public agencies other than the Department and by private parties provided that a written, detailed project progress report is provided to the Department's Habitat Conservation Planning Branch chief. All incidental take in the course of research and monitoring by public agencies other than the Department and by private parties is authorized subject to the same restrictions applicable to ongoing research and monitoring.

Commission staff has searched the California Code of Regulations and has found no other state regulation relating to the take of western Joshua tree during its candidacy under CESA, and therefore concludes that the proposed regulations are neither inconsistent nor incompatible with existing state regulations.

## Emergency Regulatory Language

Section 749.10 Title 14, CCR, is added to read:

### 749.10 Special Order Relating to Take of Western Joshua Tree (*Yucca brevifolia*) During Candidacy Period.

The commission authorizes the take of western Joshua tree during the candidacy period for each of the activities described in this section, subject to the terms and conditions specified for each activity.

(a) Incidental take associated with development of solar energy projects in Kern and San Bernardino counties.

(1) Project list.

(A) Aratina Solar Farm, 8minute Solar Energy/64NB 8ME LLC, Kern County.

(B) Bellefield Solar Farm, 8minute Solar Energy/50LW 8ME LLC, Kern County.

(C) Big Beau Solar, EDF Renewables, Inc./Big Beau Solar, LLC, Kern County.

(D) Camino Solar, Avangrid Renewables, LLC/Aurora Solar, LLC, Kern County.

(E) Chaparral Solar, First Solar, Inc./Chaparral Solar, LLC/Chaparral Springs, LLC, Kern County.

(F) Edwards AFB Solar, Terra-Gen Power Holdings II, LLC/Edwards Solar, LLC, Kern County.

(G) Kudu Solar Farm, 8minute Solar Energy/69SV 8ME LLC, Kern County.

(H) Rabbitbrush Solar, First Solar, Inc./Rabbitbrush Solar, LLC, Kern County.

(I) RE Gaskell West 2, Recurrent Energy, LLC/ RE Gaskell West 2 LLC, Kern County.

(J) RE Gaskell West 3, Recurrent Energy, LLC/ RE Gaskell West 3 LLC, Kern County.

(K) RE Gaskell West 4, Recurrent Energy, LLC/ RE Gaskell West 4 LLC, Kern County.

(L) RE Gaskell West 5, Recurrent Energy, LLC/ RE Gaskell West 5 LLC, Kern County.

(M) Rubita Solar, SF Rubita, LLC, San Bernardino County.

(N) Willow Springs Solar 3, First Solar, Inc./Willow Springs Solar 3, LLC/Chaparral Springs, LLC, Kern County.

(O) Windhub Solar B, First Solar, Inc./Windhub Solar B, LLC, Kern County.

(2) Definitions.



(A) Project impact area means all areas in which there will be permanent or temporary impacts to an individual western Joshua tree and the area around each western Joshua tree, defined by a radius, as measured from a single point at its trunk, of:

1. 40 feet for western Joshua trees five meters or greater in height.
2. 12 feet for western Joshua trees one meter or greater but less than five meters in height.
3. 6 feet for western Joshua trees less than one meter in height.

If the areas around individual western Joshua trees overlap, the area of overlap shall be counted only once to avoid over-counting in assessing the project impact area.

(3) Take authorization.

The commission authorizes each solar project listed in subsection (a)(1) to take western Joshua tree on the project site, in accordance with the project specifications provided to the department pursuant to this section and subject to the terms and conditions set forth in subsection (a)(4).

(4) Take of western Joshua tree.

(A) Prior to removing any western Joshua tree or engaging in ground-breaking activities within a project site, each project proponent shall conduct a complete census (count) of all western Joshua trees within the project site.

1. The census shall be conducted by one or more qualified biologist(s), approved in advance in writing by the department, which approval shall not be unreasonably withheld or delayed.

2. The census shall be conducted by walking transect surveys so that 100 percent visual coverage of the project impact areas is achieved.

3. For purposes of calculating the number of acres to be mitigated and for purposes of providing information for the department's status review of western Joshua tree to be prepared pursuant to Fish and Game Code Section 2074.6, the census shall count and classify western Joshua trees by height into the following three categories: trees less than one meter in height, trees one meter or greater but less than five meters in height, and trees five meters or greater in height.

(B) Within six months of the effective date of this section and prior to removing any western Joshua tree or engaging in ground-breaking activities within project impact areas, the qualified biologist shall prepare, and the project proponent shall submit to the department, a Tree Census Report for department review and approval. Within 15 days of receipt, the department shall either approve the Tree Census Report or inform the project proponent in writing of any additional information required for its approval. The Tree Census Report shall contain, at a minimum, the following:

1. The name(s) and affiliation of the qualified biologist(s) who conducted the census.
2. The date(s) of the census.

3. A map of the project site, indicating the total project footprint and all project impact areas.
4. The number of acres in the census area.
5. The distance between transects.
6. A map of the census area that depicts the number and location of western Joshua trees visually identified.
7. Photographs of the project impact area, including at a minimum two photographs per acre depicting different aspects, such as east and south orientation, and a visual representation of the scale of the height of the trees in the photographs.
8. The number of western Joshua trees in each of the three height categories defined in subsection (a)(4)(A)3.
9. The total number of acres to be mitigated, as calculated pursuant to subsection (a)(4)(F).

(C) The project proponent shall limit herbicide use for invasive plant species and shall use herbicides only after it has documented that hand or mechanical efforts are infeasible and submitted that documentation to the department. To prevent drift, the project proponent shall apply herbicides only when wind speeds are less than seven miles per hour. All herbicide application shall be done by a licensed applicator in accordance with this subsection and all applicable federal, state, and local laws and regulations.

(D) The project proponent shall submit as-built development plans in portable document format (PDF) to the department at [CESA@wildlife.ca.gov](mailto:CESA@wildlife.ca.gov) within 90 days of completing all construction and ground-disturbing activities. The as-built plans shall:

1. Delineate and quantify the extent of permanent project features, including roads, utilities, and all other facilities associated with the project.
2. Include an estimate of the permanent disturbance area.
3. Be at a scale of 1":250' (one inch to 250 feet) or smaller.
4. Be derived from survey data acquired after project construction has been completed and shall be verified by the project proponent and the qualified biologist(s).

(E) Compensatory mitigation ratios for impacts to western Joshua tree shall be determined by the functional quality of the habitat based on the size and reproductive class of trees within the project impact area as confirmed in the department-approved census. The compensatory mitigation ratio for impacts to western Joshua tree shall be at 1.5:1 of the project impact area as confirmed in the department-approved census.

(F) The number of acres to be mitigated shall be calculated by multiplying the total number of acres of the project impact area by the applicable mitigation ratio set forth in subsection (a)(4)(E).

(G) To satisfy the compensatory mitigation requirement, prior to commencing any project activities in areas that may contain western Joshua trees, the project proponent shall pay a mitigation fee to be deposited into the Western Joshua Tree Mitigation Fund established pursuant to subsection (a)(5). The fee for each project shall be \$10,521.95 per acre to be mitigated, as calculated pursuant to subsection (a)(4)(F).

(5) The department shall establish a Western Joshua Tree Mitigation Fund to receive project fees required by subsection (a)(4)(G). The department shall ensure the fund is expended for the purpose of addressing threats to western Joshua tree, including but not limited to, acquiring and conserving western Joshua tree mitigation lands to offset impacts of the projects listed in subsection (a)(1). Prior to removing any western Joshua tree or engaging in ground-breaking activities within project impact areas, each participating project listed in subsection (a)(1) shall contribute the sum of \$10,000 to cover the account fees and the cost of retaining a land acquisition specialist to assist the department in locating, acquiring, and conserving the mitigation lands.

(6) Credit for existing mitigation.

(A) If a project listed in subsection (a)(1) has already completed or is legally obligated to complete compensatory mitigation for take of or impacts to western Joshua tree woodlands, the project proponent may elect to provide the department with information about the project impacts, the mitigation obligation, and all compensatory mitigation land acquired and conserved. The department shall assess this information and, if it determines in its reasonable discretion that the mitigation land has comparable western Joshua tree density as the density in the project impact area or is otherwise reasonably comparable in western Joshua tree habitat quality to the project impact area and is subject to a conservation easement or reasonably comparable instrument with adequate management funding, the department shall credit the project at a 1:1 ratio for all such mitigation lands acquired by the project proponent.

(B) If a project listed in subsection (a)(1) has already completed or is legally obligated to complete compensatory mitigation for take of or impacts to a species other than western Joshua tree, the project proponent may elect to provide the department with information about the project impacts, the mitigation obligation, all compensatory mitigation acquired and conserved, and the existence of suitable habitat for and individual western Joshua trees on the mitigation land. The department shall assess this information and, if it determines in its reasonable discretion that the mitigation land has comparable western Joshua tree density as the density in the project impact area or is otherwise reasonably comparable in western Joshua tree habitat quality to the project impact area and is subject to a conservation easement or reasonably comparable instrument with adequate management funding, the department shall credit the project at a 1:1 ratio for all such mitigation lands acquired by the project proponent.

(7) Limitations.

(A) Nothing in this section is intended to be or shall be construed to be a general project approval. It shall be the responsibility of each project proponent receiving take authorization for a project listed in subsection (a)(1) to obtain all necessary permits and approvals and to comply with all applicable federal, state, and local laws.

(B) Nothing in this section is intended to be or shall be construed to prohibit any of the projects listed in subsection (a)(1) from electing to obtain incidental take coverage through Fish and Game Code Section 2081, subdivision (b).

(C) Nothing in this section is intended to or shall be construed to limit the terms and conditions, including those relating to mitigation ratios and compensatory mitigation, the department includes in incidental take permits for western Joshua tree.

(b) Ongoing research and monitoring.

(1) Public agencies and private parties.

(A) Take of western Joshua tree in the course of ongoing research and monitoring for this species by public agencies other than the department and by private parties is authorized provided that a written, detailed project progress report describing objectives, methods (gear, sampling schedules and locations), efforts to minimize adverse effects to the species, and estimated level of take of the species shall be provided to the department's Habitat Conservation Planning Branch chief.

(B) Take of western Joshua tree incidental to the course of research and monitoring by public agencies other than the department and by private parties is authorized subject to the restrictions in subsection (b)(1)(A).

(C) Research and monitoring activities not addressed by the procedures in subsections (b)(1)(A) and (B) may receive separate authorization for take of western Joshua tree pursuant to Fish and Game Code Section 2081.

Note: Authority cited: Sections 399 and 2084, Fish and Game Code. Reference: Sections 399 and 2084, Fish and Game Code.