

Date of Hearing: April 23, 2024

ASSEMBLY COMMITTEE ON WATER, PARKS, AND WILDLIFE

Diane Papan, Chair

AB 2443 (Juan Carrillo) – As Introduced February 13, 2024

SUBJECT: Western Joshua Tree Conservation Act: agreements with counties or cities: industrial and commercial projects

SUMMARY: Authorizes the Department of Fish and Wildlife (DFW) to enter into an agreement with any county or city to delegate to the county or city the taking of a western Joshua tree associated with commercial and industrial projects.

EXISTING LAW:

- 1) Specifies that DFW has jurisdiction over the conservation, protection, and management of fish, wildlife, native plants, and habitat necessary for biologically sustainable populations of those species [Fish and Game Code (FGC) § 1802].
- 2) Defines “take” as hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture, or kill (FGC § 86).
- 3) Prohibits the taking of an endangered or threatened species, except in certain situations (FGC § 2080 *et seq.*).
- 4) Allows DFW to authorize the taking of listed species pursuant to an incidental take permit if the taking is incidental to an otherwise lawful activity, the impacts are minimized and fully mitigated, and the issuance of the permit would not jeopardize the continued existence of the species (FGC §§ 2081; 2084).
- 5) Establishes the Western Joshua Tree Conservation Act (WJTCA) that enacts the following (FGC § 1927 *et seq.*):
 - a) Prohibits any person or public agency from importing into the state, exporting out of the state, or taking, possessing, purchasing, or selling within the state, a western Joshua tree or any part or product of the tree, except as provided pursuant to existing law or by paying a specified fee;
 - b) Specifies that certain take authorizations apply during any period in which the western Joshua tree has been designated by the Fish and Game Commission (Commission) as a candidate for listing under the California Endangered Species Act (CESA), if the Commission lists the western Joshua tree as endangered or threatened pursuant to the CESA, and upon the approval of a natural community conservation plan in which the western Joshua tree is a covered species;
 - c) Authorizes DFW to issue a permit for the taking of a western Joshua tree if specified conditions are met, including, that the permittee mitigates all impacts to, and taking of, the western Joshua tree;
 - d) Authorizes a permittee, in lieu of completing the mitigation measures on its own, to elect to satisfy the mitigation obligation by paying a fee pursuant to a specified fee schedule;

- e) Requires DFW to annually adjust the fees for inflation, and to review the fees by December 31, 2026, and every four years thereafter, to ensure the conservation of western Joshua tree;
- f) Requires all fees remitted to DFW to be deposited into the Western Joshua Tree Conservation Fund (Conservation Fund), as provided, and requires the moneys in the Conservation Fund, upon appropriation by the Legislature, to be used solely for the purposes of acquiring, conserving, and managing western Joshua tree conservation lands and completing other activities to conserve the western Joshua tree.
- g) Exempts DFW from the State Contract Act; requirements related to state acquisition of goods and services; requirements related to contracts with private architects, engineering, land surveying, and construction project management firms; and the California Environmental Quality Act (CEQA) for the expenditure of moneys in the Conservation Fund;
- h) Authorizes DFW to enter into an agreement with any county or city to delegate to the county or city the ability to authorize the taking of a western Joshua tree associated with developing single-family residences, accessory structures, and public works projects, as defined, concurrent with the city's or county's approval of the project;
- i) Authorizes DFW or its designee to issue a permit to authorize the removal or trimming of a dead western Joshua tree or the trimming of a live western Joshua tree, as provided;
- j) Requires DFW to develop and implement a western Joshua tree conservation plan in collaboration with governmental agencies, California Native American tribes, and the public. Specifies that DFW shall present the final conservation plan at a public meeting of the Commission, for its review and approval, by December 31, 2024, and requires the Commission to take final action on the plan by June 30, 2025;
- k) Requires DFW to submit an annual report to the Commission and the Legislature addressing the conservation status of the western Joshua tree, as provided; and
- l) Requires the Commission, beginning in 2026, and at least every four years thereafter, to, at a public meeting, review the status of the western Joshua tree and the effectiveness of the conservation plan, as specified.

FISCAL EFFECT: Unknown. This bill is keyed fiscal.

COMMENTS:

- 1) **Purpose of this bill.** This bill authorizes DFW enter into an agreement with any county or city to delegate to the county or city the taking of a western Joshua tree associated with commercial and industrial projects. According to the author, "The Western Joshua Tree is an iconic symbol of the High Desert region and I support the preservation of this species. Although the state has been moving in the right direction to protect this iconic species while meeting our state's goals, we must address the need to streamline permitting for projects that are vital economic developments for local governments in the growing region. With the increased cost of living and lack of space in the metropolitan areas of Los Angeles, more people are continuing to move into the High Desert region. Therefore, I believe there is an

opportunity to strike a balance between conservation and economic development that is needed to address the increases in population. This bill will create a pathway for local governments to issue permits on specified commercial and industrial projects, just like they do for housing and public works projects within their jurisdictions. This will take pressure off of CDFW's permitting program and allow local jurisdictions to complete the project at the local level."

- 2) **Background.** The western Joshua tree, *Yucca brevifolia*, is a member of the Agave family. The Joshua tree is a monocot in the subgroup of flowering plants that also includes grasses and orchids. Many birds, mammals, reptiles, and insects depend on the Joshua tree for food and shelter.

The tree's life cycle begins with the rare germination of a seed—its survival dependent upon well-timed rains. Young sprouts may grow quickly in the first five years, then slow down considerably thereafter. The tallest Joshua trees can be more than forty feet (12.2 meters) high. Determining the age of a Joshua tree is difficult, and rough estimates are often based on height—Joshua trees grow at rates of one-half inch to three inches per year. Some researchers think an average lifespan for a Joshua tree is about 150 years, but some of the largest trees may be older than that.

Western Joshua trees are widely distributed in the Mojave Desert region of California. According to DFW's Status Review of the species, estimates indicate that the abundance of the western Joshua tree is currently relatively high, but there is high uncertainty in estimates of population size due to both the uncertainty of density estimates, and uncertainty regarding how much area is occupied by the species. The eastern Joshua tree is also present in California, but is not considered in this bill or this analysis.

Threats to western Joshua trees. Populations of western Joshua trees within California have declined following European settlement of the Mojave Desert region, primarily due to habitat loss and degradation related to agricultural conversion and development. DFW estimates that approximately 30% of the habitat occupied by western Joshua tree in California may have been modified between European settlement and the present. Habitat loss, wildfires, aridification, and other climate change effects are major threats to the western Joshua tree. For example, in 2020, the Dome Fire incinerated 1.3 million Joshua trees in a part of the Mojave National Preserve called the Cima Dome. While potentially less immediate than other threats, climate change could represent an existential threat to the western Joshua tree. DFW expects that some of the effects of climate change (e.g., increased temperatures and decreased total water availability locally) will likely contribute to a decline in populations of western Joshua trees within California through the end of the 21st century

Proposed CESA listing. In response to this threat, the western Joshua tree was proposed for listing as threatened under CESA at the Commission in late 2019. The Commission accepted the western Joshua tree as a candidate species in 2020 and has not made a final decision on the listing yet. While a candidate for listing, the western Joshua tree has similar protections to those of a listed species. This includes take prohibitions and take authorization through permits obtained from DFW. Since becoming a candidate, take permits were issued under FGC §§ 2081 and 2084.

The Western Joshua Tree Conservation Act. To provide protections to western Joshua trees and hopefully prevent an official listing while enabling development, WJTCA was enacted

last year (see Related Legislation and Existing Law). The WJTCA prohibits the importation, export, take, possession, purchase, or sale of any western Joshua tree in California unless authorized by DFW. WJTCA authorizes DFW to issue permits for the incidental take of one or more western Joshua trees if the permittee meets certain conditions. Permittees may pay specified fees in lieu of conducting mitigation activities. WJTCA also authorizes DFW to issue permits for the removal of dead western Joshua trees and the trimming of live western Joshua trees under certain circumstances.

Pursuant to the WJTCA, DFW may enter into an agreement with any county or city to delegate limited authority to permit the take of a western Joshua tree associated with developing single-family residences, multifamily residences, accessory structures, and public works projects (Delegation Agreements). Delegation Agreements for this purpose limit the number of trees that may be take depending on the type of project. DFW may similarly enter into Delegation Agreements with any county or city to permit the removal of dead western Joshua trees and the trimming of live western Joshua trees. Delegation Agreements just became available as of February 28, 2024 and DFW has already begun negotiating agreements with several local agencies.

Under WJTCA, all in-lieu fees collected will be deposited into the Conservation Fund for appropriation to DFW solely for the purposes of acquiring, conserving, and managing western Joshua tree conservation lands and completing other activities to conserve the western Joshua tree. Additionally, WJTCA requires DFW to develop and implement a western Joshua tree conservation plan in collaboration with governmental agencies, California Native American Tribes, and the public. The complete draft conservation plan must be presented no later than December 31, 2024 at a public meeting of the Commission for its review and approval. DFW must also develop annual reports assessing the conservation status of the western Joshua tree and submit them to the Commission and the State Legislature no later than January 1 of each year, starting in 2025. The Commission is expected to postpone final consideration of the petition to list western Joshua tree until DFW submits an updated status review to the Commission by no later than January 1, 2033.

- 3) **Policy considerations.** WJTCA, which this bill is amending, represents a highly negotiated balance between mitigation, in lieu fees, impacted area, allowed activities, and even the definition of an “individual tree.” Modifying WJTCA at this time will likely interrupt current implementation and unsettle the balance struck in the WJTCA. Specifically, this bill enables the take of an unspecified number of western Joshua trees for commercial and industrial projects, which have an unknown and potentially very large footprints, via Delegation Agreement. This extremely broad authority could lead to untold impacts to western Joshua trees. Further, commercial and industrial projects would be allowed to access the lower fee structures put in place by WJTCA for an unspecified amount of trees, greatly destabilizing the amount of in lieu fees that would have been placed in the Conservation Fund to protect the trees.
- 4) **Proposed committee amendments.** Commercial and industrial projects within the boundaries specified by the WJTCA were able to access the reduced fees before this bill; however, to preserved the fee structure, commercial and industrial projects that are outside of the boundary, but permitted by a Delegation Agreement, should continue to use the higher fee structure. To clarify the allowed take of western Joshua trees in the Delegation

Agreements and ensure the structure by which the fees were negotiated remains intact, the Committee may wish to ask the author to accept the following amendments:

Amendment 1 – subdivision (c) is amended to read:

(c) The department may enter into an agreement with any county or city to delegate to the county or city the ability to authorize the taking of a western Joshua tree associated with developing single-family residences, multifamily residences, accessory structures, **and** public works projects, ~~commercial projects, and industrial projects~~, concurrent with its approval of the project, **and the department may enter into an agreement with any city to delegate to the city the ability to authorize the taking of western Joshua tree associated with commercial and industrial projects, concurrent with the approval of the project, residence, or structure, if all of the following conditions are met:**

(1) The county or city adopts an ordinance that requires as a condition of any approval or permit issued under the authority of an agreement entered into pursuant to this subdivision satisfaction of the requirements of this chapter.

(2) Except as provided otherwise in this subdivision, the county or city ensures that the permittee satisfies all of the requirements of subdivision (a) of this section.

(3) The project will take no more than 10 individual western Joshua trees on the project site where the project proponent proposes to construct a single-family residence, multifamily residence, ~~or~~ accessory structure, **commercial project, or industrial project**, or no more than 40 individual western Joshua trees on the project site on which a public agency proposes to undertake a public works project. Before authorizing the take of more than 20, but no more than 40, individual western Joshua trees for a public works project, the county or city shall obtain the department's written concurrence that the project has avoided and minimized the take of western Joshua trees to the maximum extent practicable.

Amendment 2 – subdivision (d)(1)(B) is amended to read:

(d) Any person or public agency receiving a take authorization pursuant to this chapter for a project that meets the criteria set forth in paragraph (1) may elect, in lieu of satisfying the mitigation obligation provided for in paragraph (3) of subdivision (a), to pay fees in the amounts provided in paragraph (2) for deposit into the fund.

(1) (A) Any project in the area bounded by the intersection of Highway 99 and Highway 58, then east along Highway 58 to the intersection of Interstate 15, then north along Interstate 15 to the intersection of Highway 247, then south along Highway 247 to the intersection of Highway 18, then west along Highway 18 to the intersection of Highway 138, then west and north along Highway 138 to the intersection of Interstate 5, then north along Interstate 5 to the intersection of Highway 99, then north along Highway 99 to Highway 58.

(B) Any project, **except commercial and industrial projects**, receiving a permit issued by a county or city pursuant to an agreement with the department pursuant to subdivision (c), regardless of location

(2) (A) One thousand dollars (\$1,000) for each western Joshua tree five meters or greater in height.

(B) Two hundred dollars (\$200) for each western Joshua tree one meter or greater but less than five meters in height.

(C) One hundred fifty dollars (\$150) for each western Joshua tree less than one meter in height.

- 5) **Arguments in support.** Several industry organizations and San Bernardino County write in support of this bill. They indicate that this bill will “streamline projects that are vital economic developments for local governments.” California Building Industry Association writes, “One of the goals for enabling cities and counties to authorize take in these limited circumstances was to alleviate the anticipated increase in permitting actions soon to be facing [DFW... so] the addition of commercial and industrial projects to the list of projects that could be permitted by local governments pursuant to the requirements in [WJTCA] helps accomplish this goal.” The San Bernardino County concurs that “local agencies can review permits more expeditiously than Sacramento.”
- 6) **Arguments in opposition.** Numerous environmental organizations write in opposition to this bill with three primary concerns. First, these groups argue that the lack of minimum thresholds for the allowed take of western Joshua trees by these projects is not in line with the strict numerical limits placed on other projects and would therefore enable projects that could destroy hundreds of trees. Second, they claim this bill will threaten the fiscal stability of the WJTCA by enabling these large projects to access the lower in lieu fees thereby reducing available mitigation fees. The Center for Biological Diversity writes, “The WJTCA contains a narrow exception to the fee structure to incentivize local jurisdictions to seek permitting authority [... with] the expectation is that such limited delegation would not greatly reduce the overall fee amounts collected and applied to Joshua tree conservation. [...] [This bill] would make these large projects eligible for the fee discount, potentially reducing overall conservation funds by 50% or more, ensuring that any DFW, [Commission] or future Legislative review of the adequacy of the mitigation fund would necessarily find mitigation fees to be inadequate.” Finally, opposition notes that any change to the WJTCA is premature as the Delegation Agreements have just taken form and it unclear how the WJTCA was functioning before the amendments in this bill. The organizations believe the current WJTCA may not provide enough protection as it is and note that they have been patiently waiting to renegotiate the fees per the timeline designated in the WJTCA. They write, “CDFW has only purchased 200 acres of ‘mitigation lands’ while approving thousands of acres of removal of western Joshua tree” and that changing WJTCA at this juncture would further threaten the tree.
- 7) **Related legislation.** AB 1008 (Bauer-Kahan) of 2023 was the policy bill that established the WJTCA and enabled negotiation. The WJTCA was included in budget bill SB 122, Chapter 51, Statutes of 2023.

AB 1183 (Ramos), Chapter 380, Statutes of 2021, establishes the California Desert Conservation Program at the Wildlife Conservation Board to acquire, preserve, restore, and enhance desert habitat within the California deserts region.

SR 116 (Allen, Hertzberg, Hill, Leyva, and Stern) of 2018 declares the California Desert an ecological treasure, and proclaims we should secure for the American people of this and

future generations an enduring heritage of biodiversity, wilderness, national parks, and public land values in the California Desert.

REGISTERED SUPPORT / OPPOSITION:

Support

California Building Industry Association
California Cement Manufacturers Environmental Coalition
California Construction & Industrial Materials Association
San Bernardino County

Opposition

California Native Plant Society
Center for Biological Diversity
Defenders of Wildlife
Mojave Desert Land Trust
National Audubon Society
Planning and Conservation League
Sierra Club California

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