



April 1, 2024

California Department of Fish & Wildlife
Submitted electronically: WJT@wildlife.ca.gov

RE: Western Joshua Tree Conservation Act

Dear California Department of Fish & Wildlife staff:

The California Ecological Restoration Business Association (CalERBA) appreciates the opportunity to provide comments to the California Department of Fish & Wildlife (CDFW) on the Western Joshua Tree Conservation Act (WJTCA/Act) Conservation Plan (the Plan). We thank CDFW for the time and effort spent engaging with CalERBA during the February 22nd stakeholder session on the forthcoming Plan and considerations for the overall implementation success of the WJTCA Program.

CalERBA represents California's growing industry of businesses and jobs that specialize in full delivery of wetland, stream, water quality, habitat restoration, and other ecological restoration projects in collaboration with conservationists, NGOs, landowners, and regulators. Collectively, the membership represents decades of experience in successful ecological restoration projects, thousands of conserved acres, and substantial private capital that is—if given the right policy incentives—prepared to invest in advance ecological outcomes. Investments by the ecological restoration industry accelerate conservation and fill in gaps where public funding and public lands alone are not enough.

Specific to the Western Joshua Tree (WJT), CalERBA members have experience both as sponsors of conservation banks and turn-key/permittee responsible mitigation (PRM) projects for the WJT as well as consultants advising sponsors on such bank projects or advising permittees on incidental take permits for WJT. Our members understand first-hand the costs and advanced planning necessary for successful conservation at scale of the WJT. We urge CDFW to continue consulting with CalERBA members through Request for Qualification processes and direct stakeholder outreach with CalERBA to ensure our on-the-ground knowledge informs the Plan and Program implementation. Besides this WJT specific experience, we also have experience both in California and nationally with in-lieu fee program pitfalls and best practices, which inform our comments on full cost accounting and scale of impact liabilities.

Our feedback is organized around the following recommendations and comments: i) integrate acquisition of conservation bank credits or allowing for permittee responsible mitigation as a strategy under the Plan, ii) establish a cap on the scale of impact liabilities that the WJT Conservation Fund (the Fund) may accept, iii) establish restrictive covenants and long-term management standards equivalent to those already required of WJT mitigation projects, and iv) various observations and outstanding questions.

Again, we appreciate CDFW's effort to date to engage the public and our community of experienced mitigation sponsors on the WJTCA. We welcome opportunities for continued dialogue on the Plan and collaboration directly with CalERBA members to implement the Plan's conservation objectives. Please

do not hesitate to reach out to our Executive Director Sara Johnson at sjohnson@ecologicalrestoration.org with any questions or requests for further information.

I. Integrate Conservation Banks and PRM as a strategy for achievement of the Plan’s objectives.

Conservation banks are already preserving large swaths of WJT ecosystems and providing measurable benefits for this unique resource in advance of takings. As a readily available form of conservation with performance standards and assurances already in place, we urge CDFW to leverage their full authority under the WJTCA to utilize existing and future conservation bank credits to fulfill the Act’s vision to prevent extinction, preserve functioning ecosystems, and maintain sustainable populations of WJT over the long term. The Plan will fail to achieve these goals if it does not direct moneys and permittees towards advance mitigation solutions that eliminate temporal loss and provide offsets at scale, i.e. conservation banks.

The WJTCA allows for CDFW to pursue conservation bank credit acquisitions under the Program in at least two ways. First, Section 1927.5(a) states that any moneys in the Fund are appropriated for the purposes of acquiring WJT lands “and completing other activities to conserve” the WJT. Conservation banks for WJT are, by definition, lands dedicated solely to the conservation and management of WJT. The legislature also purposefully gave CDFW flexibility in how Fund moneys are spent by granting authority for “other activities to conserve.” The Act goes on in 1927.6(c) to enumerate specific purposes and acceptable expenditures for the program, and while acquisition of bank credits is not explicitly included, in both instances the list is qualified as not exhaustive (“include, but not limited to”). CalERBA recommends that CDFW use all these sources of authority to direct moneys towards the acquisition of existing and future conservation bank credits. Utilizing bank credits is particularly strategic as a priority activity for the first few years of the Program while CDFW goes through the long process of identifying, acquiring, and establishing the legal, financial, and management components for their own performing WJT conservation sites.

Second, the Act contemplates that payment of fees alone may not be the only mitigation measure required of permittees, recognizing that there are “various measures” and “other mitigation” besides fees. CalERBA recommends that CDFW direct permittees towards a mix of conservation bank credits plus fees and PRM as all different options to achieve their mitigation compliance under the WJTCA. A combination of credits in addition to fee payment is particularly appropriate for impacts of a certain scale and, again, especially in the early years of Program implementation when it is still unclear how fees will be collected and timely applied towards on the ground conservation. Permittees could also be directed to bank credits as an action when relocation under the Program is not possible.

In addition to the acquisition of bank credits, we encourage CDFW to use their full authority under the Act to also direct permittees and Fund moneys towards PRM or “turnkey” solutions. Under this approach, the WJTCA Program would provide permittees with legal authorization for their WJT take and permittees could then comply with corresponding mitigation requirements via payment of fees, purchase of banks credits, or performing PRM. To still achieve the benefits of aggregated fund resources towards conservation of an impactful scale, there could be a required minimum size of restoration for PRM to be available as an option. Just as has proven successful in other mitigation contexts, PRM projects could be implemented by the permittee so long as the permittee’s mitigation plan meets all requirements or, preferably, could be delivered by a qualified third-party provider on behalf of the permittee.

II. Cap the scale of impact liabilities the Fund can accept.

When in-lieu fee (ILF) programs struggle to establish fees that accurately reflect the costs of implementing mitigation, the resource suffers and the program becomes a financial and regulatory risk for the administrator. The tendency of new ILFs to set their fees too low and associated repercussions are well documented in a 2019 Duke University study.¹ As mentioned in the study, this situation is particularly likely when fees are codified under a process subject to political pressures and not based on a detailed analysis of the full costs of providing mitigation.

The fees established in the WJTCA are lower than the fees outlined in existing incidental take permits for WJT. Based on our practitioner experience, the current fees will not provide adequate funding for CDFW to implement conservation land acquisitions and measures that meet the fully mitigated standard. We recognize that CDFW is not legislatively authorized to adjust the fees in response to this concern until 2026, at which time we recommend CDFW closely consult with our experienced practitioners on cost realities. In the interim, we recommend that CDFW limit the size of project impacts they accept fees for under the program and direct large-scale impacts to the traditional route of mitigation options including conservation banks and PRM.

Capping the scale of permissible impacts, at least initially until the Plan is fully developed and fees are adjusted, will be critical to the program actually preventing extinction of the WJT and avoiding a common ILF pitfall. If the program takes on large-scale impacts at the current fee rates, then permitted impacts to WJT will quickly outpace the Fund's ability to replace the resource. Put simply, the larger the impact, the larger risk of failure for the program. Taking on large scale impacts at the current fee rates will result in decades loss of WJT, which loss may not be possible to recover from because of the long time it would take the resource to return to its pre-impact baseline. Such a resource loss also exposes the program and CDFW as Administrator to time intensive lawsuits by watchdog organizations.

To acknowledge the limitations of the current fee schedule and operate in a risk adverse manner for the benefit of the resource, we strongly recommend that CDFW establish a cap on the scale of impact liabilities the program can assume from one project. Under this approach, CDFW would direct permittees for projects with impacts estimated to exceed the cap to existing conservation bank credits and other mitigation options if bank credits are not available. CDFW could then revisit this cap once the Plan and related infrastructure for implementation are in place, plus the fees are adjusted higher to reflect the actual cost of WJT conservation efforts. CalERBA recommends that CDFW establish the cap at the scientifically accepted minimum for a sustainable patch of trees. CDFW could look to the limits established in the WJTCA for cities and counties (e.g. 10 trees for residential impacts, 40 trees for public works impacts) as an informative metric.

¹ Doyle, Martin. 2019. The Financial and Environmental Risks of In Lieu Fee Programs for Compensatory Mitigation. NI Report 19-01. Durham, NC: Duke University, https://nicholasinstitute.duke.edu/sites/default/files/publications/nicholas-institute-report_doyle_in-lieu-fee_web.pdf. We also encourage CDFW to reflect on lessons learned from SB 34 Advance Mitigation Land Acquisitions Grants Program to identify pitfalls to avoid under the WJTCA.

III. Establish land protection and management standards equivalent to existing mitigation.

CalERBA's policy positions are informed by our *Principles for Nature-Based Solutions*.² For all ecological restoration projects, including WJT conservation, we advocate for high standards to ensure: i) durability (*i.e.*, perpetual land protection and stewardship of the resource), ii) science-based design and performance criteria, and iii) risk reduction mechanisms (such as financial assurances and adaptive management tools). To incentivize investment in restoration and conservation, we advocate for equivalency in standards for restoration projects, especially when multiple forms of restoration may qualify as an offset for a permit action.

Generally, the standards and requirements of conservation banks are the "gold standard" for fulfilling the durability and risk reduction principles. Accordingly, we recommend that CDFW look to their existing compensatory mitigation program's standards to inform requirements for long-term site protection and management. A permanent conservation easement should be used as the primary preferred instrument for site protection, along with a long-term stewardship endowment with interest sufficient to generate perpetual management for each of the newly conserved properties. CDFW has identified preservation of WJT habitat on public lands as a potential strategy. Public lands also lack the same durability tools, *e.g.* conservation easement, which are available on private lands. CalERBA also cautions that an overreliance on public land conservation/restoration efforts may fail to meet the additionality principle, *i.e.* may not provide the impacted resource a conservation benefit that would not already be available on public lands. We recommend that CDFW establish standards for land conservation that are equivalent to the compensatory mitigation program standards to address these issues.

IV. Additional Observations and Outstanding Questions.

- i. *Land Acquisition process.* We recommend CDFW establish a specific set of publicly available criteria that can be consistently applied statewide to assess different WJT acquisition opportunities. Clear, consistent criteria to inform the decision-making process on acquisitions will help CDFW's partners in WJT conservation identify the best sites possible for fulfillment of the Plan.
 - a. *Support for Siting in WJT Climate Refugia.* Relatedly, CalERBA supports CDFW's consideration of climate refugia sites for WJT and incorporating climate refugia considerations into the land acquisition site selection criteria. This approach will provide more flexibility on available sites for WJT and appropriately plan for climate impacts. However, research alone should not be accepted as mitigation for a taking of a WJT. Research on WJT climate refugia sites should only supplement and not supplant land-based conservation efforts.
 - b. *Habitat Quality Considerations.* As a part of the site selection criteria, CDFW should address how they will balance different factors to assess the overall quality of a property for WJT conservation (*e.g.* density of trees, carrying capacity of a property, support for genetic diversity, climate change risks). We recommend the criteria appropriately incentivize collaboration with qualified third-party providers, like CalERBA members, to generate ecological uplift for the WJT at degraded or burn forest sites in need of rehabilitation.

² CalERBA, *Principles for Nature-Based Solutions*, March 2022, at <https://caecologicalrestoration.org/calerba-principles>.

- ii. *RFPs to engage industry.* CalERBA recommends that the WJT ILF Program follow the North Carolina Department of Mitigation Services model for an example of a successful ILF that timely implements funds towards offset implementation and leverages partnerships with third-party mitigation providers through a competitive RFP process.³ Their approach maximizes efficiencies in the use of collected funds towards conservation via a mix of available bank credits plus turn-key PRM solutions. Timely issuing RFPs also quickly moves accumulated funds from several smaller impacts towards meaningful strategic conservation investments on a landscape scale.
- iii. *Consistency with existing locality WJT requirements.* Some cities/localities already have requirements on how WJTs may be relocated or handled. To avoid conflicting requirement provisions, we recommend that CDFW review existing requirements for consistency and outline a process to avoid conflicts.
- iv. *Outstanding Questions on Translocation.* The transplant program is insufficiently described in the WJTCA. We recommend addressing the outline of questions below in step down guidance:
 - a. What financial assurances, site protection, monitoring, and long-term management requirements will apply to sites where trees are transplanted? CalERBA recommends applying equivalent standards to WJT conservation banks for WJT conservation sites under the Plan.
 - b. How will CDFW judge how many trees each project will need to transplant to “minimize” the impact?
 - c. How does CDFW plan on guaranteeing 80% survival rate of transplanted trees?
 - d. How does CDFW anticipate performing remedial actions if 80% survival is not achieved? There aren’t “new” Joshua trees to be planted if target survival rates aren’t achieved.
 - e. Will CDFW collect financial securities from participating project proponents to ensure 80% survival? If so, how will those securities be calculated? What are the thresholds to draw on those securities?
 - f. How will CDFW select and review transplant receiver sites?
 - g. How will CDFW guarantee sufficient water and water rights for receiver sites?

³ See <https://www.deq.nc.gov/about/divisions/mitigation-services/dms-vendors/processes-and-awards>.