

June 17, 2024

California Department of Fish & Wildlife  
Submitted electronically: [WJT@wildlife.ca.gov](mailto:WJT@wildlife.ca.gov)



**RE: Western Joshua Tree Conservation Act – Comments following Second Stakeholder Meeting**

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 previous stakeholder sessions 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—if given the right policy incentives—is prepared to invest in and 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 on 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 to ensure our on-the-ground knowledge informs the Plan 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 here.

CalERBA's main observation on the Plan's newly proposed land management actions is that bank credits already reflect all three actions and considerations – banks identify and protect priority conservation lands, banks restore and steward conservation lands, and bank sponsors consider the management unit criteria when siting and designing banks for WJT. This fact supports our continued recommendation that the Plan should rely on acquisition of bank credits as a preferred implementation mechanism.

Our other comments are organized around the following more detailed recommendations: i) integration of conservation banks and PRM as strategies for achievement of the Plan's objectives; ii) stringent and equivalent land protection and management standards; iii) clarification of the WJTCP's proposed land management criteria; and iv) additional observations and outstanding questions.

Again, we appreciate CDFW's efforts to date to engage the public and our community of experienced mitigation sponsors on the WJTCA. We look forward to CDFW's publication of the draft WJTCP for more substantive information to analyze and comment on. Please do not hesitate to reach out to our

Executive Director Sara Johnson at [sjohnson@ecologicalrestoration.org](mailto: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 identify and protect priority conservation lands for WJT as a part of their early diligence, design, and approval process. Conservation lands within a conservation bank are then protected, restored, and actively managed to achieve ecological performance milestones defined as a part of rigorous agency review in entitling the conservation bank. And lastly, conservation bank development incorporates the four proposed land management unit criteria throughout the bank siting, design, and performance stages. Because conservation banks already implement the three land management actions proposed by CDFW for the Plan, bank credit acquisition should be included as an implementation option under the description for each management action.

As CalERBA stated in our April 1<sup>st</sup> comment letter to CDFW, conservation banks currently preserve substantial acreage within WJT ecosystems and provide measurable benefits to WJT in advance of takings. CalERBA reiterates here our recommendation for CDFW to leverage full authority under the WJTCA to utilize existing and future conservation bank credits to fulfill the Act’s mandate to prevent extinction, preserve functioning ecosystems, and maintain sustainable populations of WJT. The Plan will fail to achieve the defined goals if it does not acknowledge and prioritize collected fees towards advance mitigation solutions that eliminate temporal loss and provide offsets at scale – direct outcomes of conservation banks.

In our April 1<sup>st</sup> comment letter, CalERBA described two pathways for CDFW to pursue conservation bank credit acquisitions under the Plan: first, through the non-exhaustive conservation language in Sections 1927.5(a) and 1927.6(c) of the Act, under which CDFW can direct moneys towards the acquisition of existing and future conservation bank credits; and second, through the Act’s contemplation of mitigation measures other than payment of fees in Section 1927.3(a)(3), which allows CDFW to direct permittees to a mix of conservation bank credits plus fees to achieve mitigation compliance under the Act.

Additionally, CalERBA encourages CDFW to direct permittees and moneys collected under the WJT Conservation Fund (Fund) towards PRM or “turnkey” conservation project mitigation solutions designed and implemented by experienced practitioners. In exchange for receiving legal authorization for WJT take, permittees could comply with mitigation requirements via payment of fees, purchase of bank credits, or through development of PRM.

**II. Land protection and management standards should be both stringent and equivalent.**

CalERBA advocates for high standards for all ecological projects, both restoration and conservation, to ensure durability, science-based design and performance criteria, and risk-reduction mechanisms.<sup>1</sup> We also advocate for equivalency in standards for ecological projects, especially when multiple forms of projects may qualify as an offset for a permit action. In this vein, CalERBA recommends that CDFW establish standards for WJT land conservation that are equivalent to the conservation banking program standards. Specifically, CalERBA recommends the following standards and requirements, which should

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<sup>1</sup> CalERBA, *Principles for Nature-Based Solutions*, March 2022, at <https://caecologicalrestoration.org/calerba-principles>.

be incorporated into the Plan's proposed land management action to "Identify and Protect Priority Conservation Lands:"

- Durable restrictions on land use and long-term site maintenance. To achieve this, CalERBA recommends that CDFW require i) a permanent conservation easement as the primary preferred instrument for site protection and ii) a long-term stewardship endowment with interest sufficient to support perpetual management for each newly conserved property.
- Equivalent restrictions on land use across federal, state, and private lands, including the same requirements/assessments on habitat quality, additionality, durability, and lands package reviews and surveys.
- Full cost accounting on the acquisition, adaptive management, and long-term monitoring and maintenance costs for protected priority conservation lands. CalERBA recommends that CDFW partner with the banking industry, and/or knowledgeable consultants with banking experience, to accurately assess and value the in-lieu fee (ILF) fee schedule so that the WJTCA goals are adequately funded. As CalERBA explained in our April 1<sup>st</sup> letter to CDFW, ILF programs often do not establish fees that accurately reflect the cost of implementing and managing mitigation, and, as a result, the resource suffers, even potentially declines, and the program becomes a financial and regulatory risk for the program administrator.<sup>2</sup> Low fees ultimately undermine the conservation intent of the Act, and may increase CDFW's vulnerability to time intensive lawsuits by watchdog entities.
  - To avoid the performance failures that often result from insufficient ILF fees, CalERBA recommends that CDFW establish a cap on the scale of impact liabilities the ILF program can assume from one project. Under this approach, CDFW would direct permittees 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 its implementation measures are finalized, and the program's fees are increased to reflect the actual cost of WJT conservation efforts.

### **III. CDFW should further clarify the WJTCP's proposed land management criteria.**

CalERBA appreciates CDFW's efforts to establish land management actions and criteria for the Plan under a tight timeline. However, we were hoping to have the opportunity to review and comment on expanded in-depth Plan details during the last stakeholder session ahead of this comment period. We look forward to future opportunities to review and comment on a fulsome set of defined criteria and ideally a map of identified WJT priority areas. For now, CalERBA has several preliminary recommendations to clarify CDFW's strategies and utilize WJTCP funds in an effective manner.

First, CalERBA notes that conservation bank sponsors are already implementing the strategies listed under the proposed actions such as degraded land remediation, invasive species control, seed banking,

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<sup>2</sup> See 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](https://nicholasinstitute.duke.edu/sites/default/files/publications/nicholas-institute-report_doyle_in-lieu-fee_web.pdf).

and wildlife management. Again, the conservation banks sponsored by CalERBA members currently integrate these same strategies, which reinforces CalERBA's recommendation made in Section I that CDFW should integrate conservation banks and PRM within the Plan.

Based on CalERBA's experience, we believe that some of the strategies proposed as land and management actions are unrealistic considering the fee schedule outlined in the WJTCA. For example, degraded land remediation involves significant costs and restoration/management complexities, which is why we have even seen agencies resist remediation when proposed in a banking context. CDFW should only propose activities that are realistic within the current fee schedule set under the WJTCA. Activities that cannot be adequately carried out should be tabled until adequate fees can be established and collected, which supports our prior recommendation of capping ILF Program liabilities in the short term.

CalERBA also recommends greater details and transparency in the Plan disclosing how CDFW plans to measure criteria to assess the effectiveness of the Plan. Essentially, how will CDFW assess progress towards WJT recovery. Section 1927.6(a) of the Act requires CDFW to incorporate "objective, measurable criteria" to assess the effectiveness of its conservation actions. Accordingly, measurable metrics and standards applicable to WJT functions and services should be established in the Plan to ensure a clear nexus between the impact of a WJT take and the conservation actions proposed by CDFW. Minimum thresholds for recovery should be implemented based on current habitat and refugia habitat. For example, if an applicant's activities result in take of a certain number of WJT individuals, the fees collected should guarantee conservation of that same certain number of WJT. Without such defined goals, the proposed land and management actions are unmoored from conservation outcomes, and the effectiveness of the WJTCP will not be measurable.

While CalERBA supports consideration of WJT predicted climate refugia regions, we caution that an emphasis on actions in refugia regions – which do not contain actual WJT – should not supersede conservation of actual habitat currently supporting WJT individuals. An overemphasis on refugia could lead to a number of takes that are not adequately offset with actions that guarantee WJT protection elsewhere. We recommend investments in climate refugia regions as secondary to protection of known currently occupied WJT habitat.

#### **IV. Additional Observations and Outstanding Questions.**

*Land Management process.* As explained above, we recommend CDFW establish objective, measurable criteria for land management. CalERBA members have the following outstanding questions regarding specific land management actions.

- i. *Further clarity on climate refugia.* What climate models will be consistently referenced to make refugia determinations? What defined standards will be used to ensure the refugia and other lands identified for conservation are adequate to support WJT populations? How will WJTs be transported to refugia?
- ii. *Genetic information criteria.* At the second WJTCP stakeholder meeting, details regarding genetic information as management unit criteria were not fully developed. CDFW should share information with stakeholders on how genetic information will factor into the Plan. What are the standards for delineating management units based on genetic information? How will these standards inform decision making?

*Relocation Guidelines and Protocols.* The relocation program is insufficiently described in the WJTCA, and materials provided thus far. CalERBA members have the following recommendations and questions on relocation:

- i. *Equivalency in relocation for minimization and mitigation purposes.* The Act states that relocation can also be required in addition to fees, indicating that relocation could act as both a minimization and mitigation measure. The guidelines and standards for relocation of trees and the relocated trees' receiver sites should be equivalent whether for minimization or mitigation.
- ii. *Extent of relocation and receiver site requirements.* Section 1927.3(a)(4) states that CDFW "may" include as permit conditions the requirement that the permittees relocate WJT. To achieve the goals of the Act, CalERBA recommends that the Plan require the maximum amount of WJT relocation as necessary for minimization of take impacts. Importantly, for the relocation to be successful, CDFW should establish standards for the receiver sites including (i) suitable and adequate funds for integrated maintenance, monitoring and adaptive management, (ii) instruments that are durable and designed to protect sites, and (iii) site standards to ensure long-term success of relocated WJT. The Plan should recognize the opportunity for partnerships with the conservation banking industry on identification and management of the receiver sites to ensure performance and outcomes similar to banks.
- iii. *Integration with the banking program.* CalERBA members have a proven track record of success with relocated WJTs. To the maximum extent possible the Plan should acknowledge the banking industry as a conservation ally to assist in planning for and developing receiver sites for relocated WJT. Again, we note that based on CalERBA member's experience in the industry, the fee schedule under the Act is insufficient for many of the proposed land management criteria activities, including creating and maintain receiver sites. Integrating with private industry would alleviate some of the pressures, including vulnerability to increased litigation risk, CDFW would face due to a limited amount of available funds.
- iii. *Removal of trees.* Section 1927.3(a)(4)(C) requires CDFW to employ the "best available science" when adopting relocation guidelines. CalERBA recommends that the final relocation guidelines provide criteria to inform a range of acceptable approaches for removal of WJTs to retain flexibility for site and individual specific considerations.
- iv. *Clones.* CDFW should take the opportunity to better understand and define WJT vegetative reproduction ("clones"), how to distinguish clones from seedlings, and how clones will be assessed in the population and factor into the genetic information management unit criteria.