



COMMERCIAL REAL ESTATE  
DEVELOPMENT ASSOCIATION



Fresh produce from our families to yours



August 5, 2020

Mr. Eric Sklar  
President  
California Fish and Game Commission  
1416 9<sup>th</sup> Street, Suite 1320  
Sacramento, CA 95814

Re: California Fish and Game Commission Meeting - August 19-20, 2020  
Agenda Item 25: Petition to list the Western Joshua Tree as Threatened pursuant to the  
California Endangered Species Act

Dear President Sklar:

Our organizations endorse the attached comments from Briscoe, Ivester & Bazel on behalf of the California Building Industry Association, California Alliance for Jobs, California Business Properties Association, California Farm Bureau Federation, California Construction and Industrial Materials Association, California Manufacturers and Technology Association, California Cattlemen's Association, Joshua Tree Gateway Association of Realtors, and Southwest Riverside County Association of Realtors regarding Item #25 on the August 19-20, 2020, California Fish and Game Commission meeting agenda – Western Joshua Tree. As noticed on the Commission's August 19-20, 2020 agenda, the Commission will consider and potentially act on the Petition to determine whether the petitioned action may be warranted.

As discussed in the attached document, our organizations are concerned by the clear absence of “sufficient information” in the Petition, as prescribed in Fish and Game Code section 2072.3, regarding the “abundance” and “population trend” of the western Joshua tree to indicate that listing the species may be warranted. For example, the Petition fails to offer any estimate of the abundance of the western Joshua tree, so there is no showing for the Department or Commission to even evaluate with respect to this statutorily required factor.

We are concerned that should the Commission determine that the petitioned action may be warranted – even in light of the fact that there is zero information in the petition regarding “abundance” and “population trend” – that it will provide a justification for future petitioners to

Petition to list the Western Joshua Tree

August 5, 2020

Page 2

dispense with any pretense of addressing the abundance and population trend of a species (or, indeed, any other statutorily required factor impacting species survival). This is not a question regarding whether the petitioned action may be warranted, but rather whether there is sufficient information regarding each of the statutorily required categories upon which the Commission can base its findings.

Based on the issues raised in the attached document as well as other concerns raised by other commenters objecting to the Petition, we urge the Commission to find that the Petition does not contain sufficient information regarding abundance and population trend to indicate that listing the western Joshua tree may be warranted, and reject the Petition.

Sincerely,

Tyler Munzing  
American Council of Engineering  
Companies, California

Peter Tateishi  
Associated General Contractors of  
California

Michael Quigley  
California Alliance for Jobs

Michael Miiller  
California Association of Winegrape  
Growers

Nick Cammarota  
California Building Industry Association

Rex S. Hime  
California Business Properties Association

Kirk Wilbur  
California Cattlemen's Association

Frank T. Sheets, III  
California Cement Manufacturers  
Environmental Coalition

Valerie Nera  
California Chamber of Commerce

Sunshine Saldivar  
California Farm Bureau Federation

Rich Gordon  
California Forestry Association

Lance Hastings  
California Manufacturers and Technology  
Association

Adam Harper  
California Construction and Industrial  
Materials Association

Dan Macon  
California Wool Growers Association

Jody Rich-Ramirez  
Joshua Tree Gateway Association of  
REALTORS®

James Camp  
National Association of Industrial and  
Office Properties – California Chapters

Gene Wunderlich  
Southwest Riverside County Association of  
Realtors®

Gail Delihant  
Western Growers Association

Petition to list the Western Joshua Tree

August 5, 2020

Page 3

cc: Commission Vice President Samantha Murray  
Commissioner Jacque Hostler-Carmesin  
Commissioner Russell Burns  
Commissioner Peter S. Silva  
Executive Director Melissa Miller-Henson, California Fish and Game Commission  
Director Charlton Bonham, California Department of Fish and Wildlife

**BRISCOE IVESTER & BAZEL LLP**  
235 MONTGOMERY STREET  
SUITE 935  
SAN FRANCISCO, CALIFORNIA 94104  
(415) 402-2700  
FAX (415) 398-5630

*David M. Ivester*  
(415) 402-2702  
[divester@briscoelaw.net](mailto:divester@briscoelaw.net)

August 5, 2020

***By Email***

California Fish and Game Commission  
1416 Ninth Street, Suite 1320  
Sacramento, CA 95814

**Re: Petition to List Western Joshua Tree**

Dear Members of the Commission:

**Introduction**

I write on behalf of the California Building Industry Association, California Alliance for Jobs, California Business Properties Association, California Farm Bureau Federation, California Construction and Industrial Materials Association, California Manufacturers and Technology Association, California Cattlemen's Association, Joshua Tree Gateway Association of Realtors, and Southwest Riverside County Association of Realtors to call to the Commission's attention deficiencies in the Petition, dated October 15, 2019, by the Center for Biological Diversity (CBD) to list the western Joshua tree as threatened under the California Endangered Species Act (CESA). The Petition plainly fails to provide "sufficient information," as prescribed in Fish and Game Code section 2072.3, regarding the "abundance" and "population trend" of the western Joshua tree to indicate that listing the species may be warranted. Abundance and population trend, naturally, are two of the most obvious and important factors in determining whether a species warrants listing, yet CBD acknowledges that its Petition does not provide either an estimate of western Joshua tree abundance or evidence of a rangewide population trend. Nor does CBD explain why it failed to obtain or provide any such information. If a petition as deficient as this one is deemed acceptable, one is hard put to imagine why the Legislature bothered to require petitions to include such information or direct the Commission to assess the "abundance" and "population trend" of a species when deciding whether to accept a petition for further consideration. (Fish & Game Code §§ 2072.3, 2074.2.) The Commission should reject the Petition in keeping with section 2074.2.

**Legal Background**

The Commission is authorized to list certain species as threatened or endangered under CESA. The Act allows an interested person to petition the Commission to list a species (Fish & Game Code § 2071) and establishes a process for the Commission's consideration of such a petition. After referring a petition to the Department of Fish and Wildlife to evaluate whether the petition

contains sufficient information to indicate that the petitioned action may be warranted and receiving the Department's evaluation report and recommendations, the Commission must hold a public hearing and then determine whether the petition contains "sufficient information" to indicate that the petitioned action "may be warranted." (Fish & Game Code §§ 2073, 2073.5, 2074.2.) If the Commission determines that the petition does not provide sufficient information, it must reject the petition (*Id.* § 2074.2(e)(1)), and that ends the process. If the Commission determines that the petition does provide sufficient information, it must accept it for consideration. (*Id.* § 2074.2(e)(2).) If the petition is accepted, the species becomes a "candidate" for listing (*id.*) and is treated under CESA much the same as a listed species (*id.* § 2085). The Department must then review the status of the species and, within 12 months, submit to the Commission a report indicating whether the listing is warranted. (*Id.* § 2074.6.) After receiving the Department's report, the Commission must hold a public hearing and then determine whether the petitioned action "is warranted." (*Id.* § 2075.)

The Legislature prescribed the necessary contents of a petition:

To be accepted, a petition shall, at a minimum, include sufficient scientific information that a petitioned action may be warranted. Petitions shall include information regarding the population trend, range, distribution, abundance, and life history of a species, the factors affecting the ability of the population to survive and reproduce, the degree and immediacy of the threat, the impact of existing management efforts, suggestions for future management, and the availability and sources of information. The petition shall also include information regarding the kind of habitat necessary for species survival, a detailed distribution map, and any other factors that the petitioner deems relevant.

(*Id.* § 2072.3.)

The California Court of Appeal has elaborated on the standard to be applied by the Commission in finding facts and exercising its discretion regarding accepting or rejecting a petition:

"[T]he term 'sufficient information' in section 2074.2 means that amount of information, when considered with the Department's written report and the comments received, that would lead a reasonable person to conclude the petitioned action may be warranted." The phrase "may be warranted" "is appropriately characterized as a 'substantial possibility that listing could occur.'" (*Natural Resources Defense Council, supra*, at p. 1125.) "Substantial possibility," in turn, means something more than the one-sided "reasonable possibility" test for an environmental impact report [under the California Environmental Quality Act] but does not require that listing be more likely than not [akin to the "reasonably probable" standard required for preliminary injunctions].

(*Center for Biological Diversity v. Fish & Game Com.* (2008) 166 Cal.App.4th 597, 609-610.)

### Petition

As noted above, section 2072.3 provides that to be accepted, a petition to list a species must, at a minimum, include sufficient scientific information that the listing may be warranted and must include information regarding, among other things, the “population trend” and “abundance” of the species.

CBD’s discussion of both population trend and abundance, comprising but one page of its petition, may readily be summarized. CBD first admits:

Due to the species’ patchy distribution within its range, highly variable population density (4 to 840 trees per acre) and lack of range-wide population surveys, a reliable estimate of Joshua tree population size is not available (USFWS 2018). Similarly, no range-wide population trends have been documented.

(Petition, p. 19.) It then points to some recent studies and speculates about population decline:

However, recent studies carried out in portions of the species’ range indicate that density is negatively correlated with increasing temperature, the species range is contracting at lower elevations, recruitment is limited, and mortality is increasing, all of which would likely reflect a population already starting to decline.

(*Id.*) After briefly describing four studies, none of which speak of the rangewide abundance or population trend of the western Joshua tree, CBD concludes:

Regardless of whether Joshua tree abundance is already declining, it is virtually certain that abundance will decline in the foreseeable future. The impacts of climate change, fire, habitat loss and other sources of mortality are discussed further [elsewhere in the Petition].

(*Id.*, p. 20.)

### Department’s Evaluation Report

The Department’s discussion of both population trend and abundance in its Evaluation Report, dated February 2020, is similarly brief.

With respect to population trend, the Department observes:

The Petition acknowledges that a reliable estimate of western Joshua tree population size is not available and that no range-wide population trends have been documented. The Petition therefore relies on studies indicating that western Joshua tree density is negatively correlated with increasing temperature, the species range is contracting at lower elevations, recruitment is limited, and plant mortality is increasing.

(Evaluation Report, p. 8.) It then summarizes the four studies in a brief paragraph devoted to each. The Department also states that it received two other reports on western Joshua tree populations at Edwards Air Force Base:

One of these reports describes a geographic information system (GIS) based analysis that was conducted to determine population trends for western Joshua tree at Edwards Air Force Base between 1992 and 2015 (USAF 2017a). The report suggests that western Joshua tree populations on the base were stable to increasing; however, the report describes several issues that increase the uncertainty of the results. The second report describes a GIS analysis, literature review, and field survey conducted of a 1999 fire area on Edwards Air Force Base to evaluate western Joshua tree survivorship and/or regeneration (USAF 2017a). The report used aerial photography taken in 1992 to count all identifiable western Joshua trees present in two areas prior to the 1999 fire and compared this information with the results of a 2017 field survey that identified all western Joshua trees in these same two areas. This report concludes that Joshua tree populations were stable in the sampled areas of the fire area from 1992 to 2017.

(*Id.*, p. 9.)

The Department concludes:

The Petition does not present an estimate of western Joshua tree population size, nor does it provide evidence of a range-wide population trend; nevertheless, the Petition does provide information showing that some populations of western Joshua tree are declining, particularly within Joshua Tree National Park. The Petition provides sufficient information on the population trend of western Joshua tree for the Department to make the recommendation [that the Commission accept the Petition for further consideration].

(*Id.*)

With respect to abundance, the Department observes that “[t]he Petition acknowledges that a reliable estimate of western Joshua tree population size is not available.” (*Id.*, p. 13.) The Department notes that the Petition states that “the western Joshua tree has a patchy distribution and a variable population density of 4 to 840 trees per acre” and “includes information demonstrating that western Joshua tree currently has a relatively widespread distribution in southern California.” (*Id.*)

The Department describes, apart from the Petition, other relevant scientific information that it has indicating the relatively high abundance of western Joshua trees:

[T]he Department possesses vegetation maps that cover a large portion of the California deserts where western Joshua tree occurs. It may be possible to use cover estimates from these maps as a rough proxy for western Joshua tree abundance;

however, the Department does not possess this information for the entire western Joshua tree distribution in California. The range, distribution, and density information available to the Department indicates that the abundance of western Joshua tree is currently relatively high.

(*Id.*)

The Department concludes:

The Petition acknowledges that a reliable estimate of western Joshua tree population size is not available; however, information available to the Department indicates that the abundance of western Joshua tree is currently relatively high. The Petition provides sufficient information on the abundance of western Joshua tree for the Department to make the recommendation [that the Commission accept the Petition for further consideration].

(*Id.*, pp. 13-14.)

### **Discussion**

#### **The Petition Does Not Contain Sufficient Information Regarding The Abundance Of Western Joshua Tree To Indicate That Its Listing May Be Warranted**

For many reasons, the Petition falls far short of providing sufficient information regarding the abundance of the western Joshua tree to indicate that listing of the species may be warranted.

First and most obvious, the Petition does not provide an estimate of the abundance of the western Joshua tree. Indeed, CBD acknowledges as much. (Petition, p. 19.)

Second, while the Petition points to four studies of certain characteristics of the western Joshua tree, it does not even venture to assert what, if anything, these studies may reveal about the abundance of the western Joshua tree. Put bluntly, the Petition says nothing to indicate the current abundance of the western Joshua tree.

Third, the Department in any event observes that available evidence belies any implicit suggestion that the abundance of the western Joshua tree is anything but robust. Noting that it “possesses vegetation maps that cover a large portion of the California deserts where western Joshua tree occurs,” the Department confirms that “[t]he range, distribution, and density information available to the Department indicates that the abundance of western Joshua tree is currently relatively high.” (Evaluation Report, p. 13.)<sup>1</sup>

---

<sup>1</sup> After acknowledging that the Petition does not estimate western Joshua tree abundance and offering its own assessment that its abundance is “relatively high,” the Department nonetheless concludes that “[t]he Petition provides sufficient information on the abundance of western Joshua tree” for the Department to recommend accepting it. (Evaluation Report, pp. 13-14.) One might be forgiven for wondering how the Department could reach such a conclusion, since it appears contrary to the cited facts and the Department offers no explanation of how or

Fourth, while the Commission and the Court of Appeal have, *in appropriate circumstances*, allowed petitioners to get by without providing reliable information about a species' abundance and instead resort to reasonable inferences about abundance drawn from incomplete evidence, no such alternative approach is warranted here, nor is any such inference justified by the information in the petition. In *Center for Biological Diversity v. Fish & Game Com.* (2008) 166 Cal.App.4th 597, the court considered whether a petition to list the California tiger salamander (CTS) contained sufficient information to indicate its listing may be warranted. As the court observed, CTS spend most of their adult lives out of sight in underground burrows, and individual CTS emerge only infrequently, sporadically, and briefly to breed. (*Id.*, pp. 601-603.) In that case too limited scientific data was available on the abundance of the species, and there was no comprehensive, rangewide population estimate. (*Id.*, p. 602.) Owing to the difficulty of estimating total population size, the Department concluded that "absent long-term monitoring data produced by a scientifically designed study, attempting to estimate the total population size rangewide is not appropriate." (*Id.*, pp. 602-603.) CBD offered instead an estimate of the number of breeding females, 4,479, derived from statistical analysis (comprised largely of assumptions) regarding known breeding ponds. (*Id.*, p. 603.) Noting again the characteristics of CTS complicating estimating abundance, the court found CBD's estimate of breeding female salamanders plausible and found that it supported a *prima facie* showing that CTS may be threatened or endangered. (*Id.*, p. 611.)

Here, circumstances are anything but appropriate to accept the paltry information in the Petition. As noted above, CBD fails to offer *any* estimate of the abundance of the western Joshua tree, so there is no showing even to evaluate with respect to this statutorily required factor.

Even if CBD had ventured an estimate of abundance, there is no reason for it to suggest it could do so by resorting to some less reliable, indirect approach. Unlike the CTS, the western Joshua tree does not move and does not hide. Rather, it stands still and stands out prominently on the desert landscape, 24/7/365—just waiting to be observed and counted. CBD offers no excuse for its failure simply to look and count. Given the relative ease with which a reliable estimate of western Joshua tree abundance may be obtained, this is not an appropriate circumstance for a petition to fail to provide such an estimate.

Similarly, even if CBD had asserted that inferences might be drawn from the studies it cited to derive an estimate of western Joshua tree abundance, no such inference is appropriate here. As the court explained in *Center for Biological Diversity v. Fish & Game Com.* (2008) 166 Cal.App.4th 597, when presented with information supporting a *prima facie* showing, a reasonable person would conclude there is a substantial possibility that listing could occur, "unless the countervailing information and logic, persuasively, wholly undercut some important component of that *prima facie* showing." (*Id.*, p. 612.) The court then considered the absence of an estimate of CTS abundance

---

why it concluded otherwise. California courts have long called on agencies to "set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order." (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515.) The Department has failed to do so here. With apologies to Ricky Ricardo, "Lucy, you got some 'splainin' to do."

and concluded “[t]he absence of historic population counts of the species, *given its reclusive characteristics*, does not greatly diminish the strength of the inferences of threat or endangerment that arise from the showing of habitat loss.” (*Id.*, emphasis added.) Noting that the strength of inferences from circumstantial evidence varies, the court added:

Pointing to an absence of evidence that could provide a stronger inference of population decline, alone, does nothing to diminish the evidence that was provided. That would only undermine the existing showing if the absent evidence was available but was suppressed because it was unfavorable.

(*Id.*, fn. 15.)

Here, unlike the CTS, the western Joshua tree is not reclusive nor hard to find; one need only look and count. CBD though averted its eyes from such evidence, failed to provide it to the Commission, and failed to provide any estimate of western Joshua tree abundance. Moreover, the Department independently concluded from information apart from the Petition that western Joshua tree abundance is “relatively high”—not a finding that, in and of itself, would suggest the species is threatened or endangered. Under these circumstances, any contrary inference CBD may wish to draw from its cited studies is wholly undercut.

#### **The Petition Does Not Contain Sufficient Information Regarding The Population Trend Of Western Joshua Tree To Indicate That Its Listing May Be Warranted**

CBD does not offer a separate discussion of population trend, and instead collapses its discussion of both abundance and population trend into a single page in the Petition. Glossing over these fundamental factors suggests that information regarding them would not advance a finding that listing the western Joshua tree may be warranted. Because CBD treated abundance and population trend together in its Petition, the reasons the Petition is deficient with respect to population trend track in many respects those discussed above with respect to abundance.

First, the Petition does not provide information of a rangewide population trend of the western Joshua tree. CBD acknowledges as much. (Petition, p. 19.)

Second, rather than attempt to demonstrate what, if anything, the four studies it cites may reveal about a rangewide population trend of the western Joshua tree, CBD punts. It instead asserts that “[r]egardless of whether Joshua tree abundance is already declining,” it will decline in the future and impacts of climate change, fire, and habitat loss are discussed elsewhere in the Petition. (Petition, p. 20.)

Third, much as explained above with respect to abundance, while the Commission and the Court of Appeal have, in appropriate circumstances, allowed petitioners to get by without providing reliable information about a species’ population trend and instead resort to reasonable inferences drawn from incomplete evidence, this is not such a circumstance. Even if CBD had ventured to assert a rangewide population trend, there is no reason for it to suggest it could do so by resorting to some less reliable, indirect approach like resorting to studies, such as it cites, regarding other aspects

of the species.<sup>2</sup> The western Joshua tree does not move and does not hide. Moreover, it stands prominently on the desert landscape. One need only look to observe them on the landscape or on current and historical aerial photographs. CBD offers no excuse for its failure simply to look and count to ascertain a population trend. Given the relative ease with which a reliable population trend of the western Joshua tree could be derived, this is not an appropriate circumstance for a petition to fail to provide such fundamental, important information.

Moreover, even if one deemed resort to some alternative approach otherwise reasonable, no inference about population trend that might conceivably be drawn from the studies CBD cited is appropriate here, since CBD failed even to try to obtain the most obvious, definitive, and readily available evidence simply by looking and counting. Blinding itself to such evidence does not lend credence to whatever inference CBD might posit from the paltry information it offered.

Indeed, the U.S. Air Force provided two reports on western Joshua tree populations at Edwards Air Force Base to the Department that showed how such a direct assessment of population trend can and should be done. As described by the Department, two geographic information system (GIS) based analyses were conducted, drawing on aerial photography, literature review, and field surveys, to determine population trends, one from 1992 to 2015 and the other from 1992 to 2017. One concluded that the western Joshua tree population on the Base was “stable to increasing,” and the other that the population in the study area of an earlier fire was “stable.” (Evaluation Report, p. 7.)

Any inference about population trend that might be drawn from CBD’s cited studies would be wholly undercut by CBD’s failure to seek and obtain the best evidence readily available to it and by the forthright observe-and-count studies that show populations in sampled areas to be stable and even increasing.

### Conclusion

CBD’s Petition fails to provide even the most basic information about two critical factors in determining whether a species’ listing may be warranted: information about its “abundance” and “population trend.” CBD indeed seems to dismiss these statutory requirements of a petition as all but unnecessary. It describes a few studies of various aspects of the western Joshua tree apparently as eyewash, but fails even to assert, much less explain, what, if anything, these studies might show about the species’ rangewide abundance or population trend. Rather, CBD summarily dispenses with these statutory requirements by turning instead to argue only that “[r]egardless of whether Joshua tree abundance is already declining,” it will decline in the future. (Petition, p. 20.)

The Legislature though presumably included “abundance” and “population trend” among the factors that must be addressed in petitions for good reason. It presumably had good reason as

---

<sup>2</sup> The Department inexplicably seems to give more credence to the studies CBD cites than CBD even asserts, and concludes that the Petition provides sufficient information on population trend for it to recommend acceptance of the Petition. (Evaluation Report, p. 9.)

BRISCOE IVESTER & BAZEL LLP  
California Building Industry Association  
August 5, 2020  
Page 9

well to call on the Commission to consider these two factors in deciding whether a petition provides sufficient information to indicate a species' listing may be warranted.

Were CBD's Petition to be deemed adequate, and accepted for further consideration, the Legislature's requirements would be rendered a dead letter. Future petitioners may well dispense with any pretense of addressing the abundance and population trend of a species (and, indeed, perhaps other factors prescribed in section 2072.3), and instead hire experts simply to opine what the future may bring with climate change, fires, and all.

The Commission should adhere to the Legislature's requirements, find that the Petition does not contain sufficient information regarding abundance and population trend to indicate that listing the western Joshua tree may be warranted, and reject the Petition.

Very truly yours,

BRISCOE IVESTER & BAZEL LLP



David Ivestor

DMI/mh