

California Court Rules Bees Can Be Listed Under the California Endangered Species Act

In a notable decision interpreting the California Endangered Species Act (CESA), a California court of appeal ruled that insects are eligible for listing as threatened, endangered, or candidate species under the act. See *Almond Alliance of California v. California Department of Fish and Wildlife*, No. C093542 (3rd Dist. May 31, 2022). The court reasoned that the CESA definition of "species" includes "fish," and the definition of "fish" includes "invertebrates." The court of appeal overturned the Sacramento County Superior Court, which had ruled that the definition of "fish" encompasses only aquatic invertebrates, and not terrestrial invertebrates such as insects.

CESA defines "endangered species" as "a native species or subspecies of a bird, mammal, fish, amphibian, reptile, or plant which is in serious danger of becoming extinct." CESA similarly defines "threatened species" as "a native species or subspecies of a bird, mammal, fish, amphibian, reptile, or plant that, although not presently threatened with extinction, is likely to become an endangered species in the foreseeable future," and it defines "candidate species" as "a native species or subspecies of a bird, mammal, fish, amphibian, reptile, or plant" that the California Fish and Game Commission (Commission) or California Department of Fish and Wildlife has formally proposed to add the list of threatened or endangered species. Fish and Game Code §§ 2062, 2067, 2068. CESA further defines "fish" as "a wild fish, mollusk, crustacean, invertebrate, amphibian, or part, spawn, or ovum of any of those animals."

In October 2018, a group of nonprofit organizations petitioned the Commission to list four species of bumblebees as endangered under CESA. The Commission accepted the petition in June 2019, and the bumblebees accordingly became "candidate" species pending the Commission's decision on whether to list them under the act.

A coalition of farming groups sued, claiming that insects are not covered by the CESA definition of a "species" and that the bumblebees were therefore ineligible for listing. In November 2020, the superior court agreed with the farming groups. The court, relying in part on a 1998 California Attorney General opinion, reasoned that while the definition of "fish" included "invertebrates connected to a marine environment" (such as shellfish and crustaceans), it did not encompass "insects such as bumble bees." The court rejected the "counterintuitive mental leap" that would be "required to conclude that bumble bees may be protected as fish."

The court of appeal reversed. Like the superior court, the court of appeal relied on principals of statutory interpretation and legislative history, but the court of appeal ended up reaching the opposite conclusion.

First, the court concluded that the statutory definition of "fish" in section 45 of the Fish and Game Code includes all invertebrates, including insects, and not just aquatic invertebrates. The court then concluded that this definition applied to the term "fish" as that term is used in the definitions of "endangered," "threatened," and "candidate" species in sections 2062, 2067, and 2068 of CESA.

The court dismissed the superior court's interpretation of CESA's legislative history and found that this history supported including invertebrates. The court reasoned that the legislature had acknowledged that section 45 of the Fish and Game Code included the term "invertebrates" and had the opportunity to remove or alter the text of this section but did not do so. The court also dismissed the 1998 California Attorney General opinion stating that

CESA does not apply to insects. The court held that the opinion had "no persuasive value under the circumstances presented" since it did not address the definition of "fish" in section 45.

Next, the court evaluated the language and legislative history of the CESA to determine whether the legislature intended to include terrestrial invertebrates in addition to aquatic invertebrates. The court held that the definition of "fish" should be interpreted liberally and that this interpretation is supported by the legislative history. The language in section 2067, which defines "threatened species," designates all animals determined by the commission as "rare" prior to 1985 as a "threatened species." The court reasoned that this constitutes express language allowing for the designation of terrestrial invertebrates, since a terrestrial mollusk was designated as "rare" prior to 1985.

The then court struck down the remaining arguments presented for excluding insects from CESA's coverage.

- The court found unpersuasive the Office of Administrative Law's 1980 determination that butterflies could not be listed under the 1970 CESA legislation, on the ground that this determination lacked sufficient reasoning why terrestrial invertebrates could not be listed.
- The court similarly found unpersuasive the arguments for excluding insects based on Fish and Game Code section 1021, which provides for ways to mitigate impacts on the monarch butterfly. The court concluded that the enactment of this section did not modify or amend any provision of CESA, and it dismissed as "fleeting" statements in the legislative history for this provision that the butterflies were not protected under CESA. The court concluded that this statutory provision had no bearing on the issues presented in this case.
- The court dismissed the statement that CESA does not include insects that was contained in a senate report for a bill that was never enacted, finding that the legislative history for an unenacted bill cannot refute the legislative intent for a statute it did enact.
- The court dismissed a 1987 court of appeal opinion that stated that CESA does not protect butterflies, on the ground that the court in that case did not explain its reasoning or address section 45.
- Lastly, the court dismissed arguments based on canons of statutory interpretation that would favor excluding insects, on the ground that use of these cannons would be "directly at odds" with the legislature's implicit approval of the Commission's prior listing of a terrestrial invertebrate and with the court's "duty to liberally construe" CESA's protective provisions.

Based on all of these grounds, the court concluded: "Although the term fish is colloquially and commonly understood to refer to aquatic species, the *term of art* employed by the Legislature in the definition of fish in section 45 is *not* so limited." (Court's original emphasis.)

Starting from when the decision becomes final on June 30, 2022, the take of the four candidate bee species will be prohibited without an incidental take permit from the California Department of Fish and Wildlife. It is anticipated that a petition for review will be filed with the California Supreme Court; if so, the court likely will decide by early October whether to hear the case.

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