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Sacramento Superior Court Rules That Insects Are Not Eligible for Listing Under the California Endangered Species Act



listing under
[fish and](#)

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." Fish & Game Code § 2062. In October 2018, a group of non-profit organizations petitioned the California Fish & Game Commission to list four species of bumble bees as endangered under the CESA. In June 2019, the Commission accepted the petition and the bumble bees accordingly became "candidate" species pending the Commission's decision on whether to formally list them as endangered. A coalition of farming groups sued, claiming that insects are not covered by the CESA definition of a "species" and that the bumble bees were therefore ineligible for listing. The superior court agreed with the farming groups based on straightforward principles of statutory interpretation. The Commission argued that insects are covered by CESA, on the grounds that the Fish & Game Code defines "fish" to include "invertebrates" and that bumble bees and other insects are "invertebrates." The court 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 also pointed to a statement in the CESA legislative history indicating that—unlike the federal Endangered Species Act, which explicitly covers terrestrial invertebrates—the California statute was drafted to exclude such invertebrates from eligibility. The court further cited a 1998 California Attorney General opinion concluding that CESA did not apply to insects. While Attorney General opinions are not binding, they are entitled to "great weight," especially in the absence of clear case law authority. The court concluded: "Combined with CESA's legislative history, the Attorney General's opinion makes a very strong case that the Commission was not authorized to list bumble bees." In addition, the court declined to defer to the Commission's scientific expertise and its longstanding position that it has the authority to list insects under CESA. The court noted that the Commission only attempted once before to list an insect species, under CESA's predecessor statute, and that the

Office of Administrative Law rejected the listing as unauthorized. More broadly, the court observed: "Because the Commission's opinion of its authority under CESA is at odds with the Legislature's, the Commission's expertise does not command the deference sought." The court also addressed a 1988 statutory amendment subsequent to CESA's enactment that provides for civil liability for unlawful actions related to "any plants, insects or species listed" under CESA. Fish & Game Code § 2582(a)(2). The court reasoned that this amendment did not purport to confer authority to list any particular species under CESA; that, at most, the reference to insects in the amendment merely reflected the Legislature's view at the time of the extent of CESA's coverage; and that this later view of CESA's meaning was not the "proper construction" given the clear statutory text and the contemporaneous legislative intent behind CESA's initial enactment. The court explained: "Put another way, to the extent the Legislature that enacted Section 2582 was interpreting CESA, which is far from clear, because that interpretation was incorrect, the court does not adopt it." Lastly, the court rejected the Commission's claim that CESA should be interpreted broadly to effectuate CESA's purposes. The court concluded that "the absence of authority to list insects under CESA, either as fish or otherwise, is clear. As a result, CESA's purposes do not confer authority that the Legislature withheld." The superior court's ruling will likely not be the final word in the matter. An appeal is expected, and it also possible that the Legislature will revisit the statutory text to change CESA's definition of "species" eligible for listing.

Authors

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