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BUMBLEBEES ARE “FISH,” CALIFORNIA COURT RULES. NEXT, PIGS FLY?

by David Ivester

More than a few eyebrows raised upon hearing that, according to a California Court of Appeal, bumblebees are “fish” within the meaning of the California Endangered Species Act (CESA) and may be listed as endangered and thereby protected from taking (killing, capturing, hunting, etc.) by anyone. By its ruling, the Court squeezed bees—indeed, invertebrates of all sorts—within the purview of CESA, which speaks of birds, mammals, fishes, amphibians, reptiles, and plants but says nothing about insects. In doing so, the Court disagreed with contrary decisions by the trial court, the Office of Administrative Law in a 1980 determination, and the California Attorney General in a 1998 Formal Opinion. As multitudes of insects and other invertebrates populate nearly every nook and cranny of California’s landscape, dry and wet, natural and built, the Court’s expansion of CESA’s scope promises eventually, as more and more “fish” are listed as threatened or endangered, to reach many new places, activities, and people—farmers, ranchers, builders, businesses, and folks living in their homes.

Background

CESA generally prohibits any person from taking “any bird, mammal, fish, amphibia or reptile” that the California Fish and Game Commission has listed as “endangered” or “threatened.” The Act authorizes the California Department of Fish and Wildlife or any interested persons to petition the Commission to list a species. The Commission must consider a petition, together with the Department’s evaluation of it, and decide whether it contains “sufficient scientific information that [the listing] may be warranted” and thus “accept” it for further consideration. If the Commission accepts a petition, the species is dubbed a “candidate” for listing, and the Department must within 12 months (or an extended period) prepare a peer-reviewed report based on the best scientific information available to it indicating whether listing the species actually is warranted. The Commission must then consider that report, hold a public hearing, and determine whether to list the species.

CESA prohibits anyone from “taking” listed species without authorization and, unlike the federal Endangered Species Act, also prohibits the take of “candidates” for listing as if they are already listed.

Bumblebee Decision

In 2019, the Commission accepted a petition to list four species of bumblebees as endangered. Agricultural organizations sued to overturn that decision, arguing that CESA does not cover insects. The trial court agreed, and held that CESA does not authorize the Commission to list insects.

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The Court of Appeal reversed that decision on May 31, 2022, in *Almond Alliance of California v. Fish and Game Commission*. The Court observed that CESA defines “candidate species,” in pertinent part, as native species of “a bird, mammal, fish, amphibian, reptile, or plant.” In seeking to ascertain the intent of the Legislature in order to effectuate the purpose of a statute, the Court explained, “[w]e generally give words their usual and ordinary meaning,” but “[w]here . . . the Legislature has provided a technical definition of a word, we construe the term of art in accordance with its technical meaning.” Acknowledging that the Legislature did not define “fish” in CESA, the Court drew on a definition the Legislature had previously included in other general provisions of the Fish and Game Code, which states that “fish” means “a wild fish, mollusk, crustacean, invertebrate, amphibian, or part, spawn, or ovum of any of those animals.” While it took a little doing to smooth over some redundancy and incongruity that insertion of that preexisting definition into CESA produced, the Court decided it best reflected the Legislature’s intent when enacting CESA. Since that technical definition treats “invertebrates” as fish and bumblebees indeed lack backbones, bumblebees logically fall within the purview of CESA.

Not so fast, argued the agricultural organizations. The term “invertebrates” as used in the technical definition of “fish,” inherently aquatic species, should be understood at least in that context to refer only to aquatic invertebrates. The Court rejected that limitation. Noting that the term “invertebrates,” read literally and liberally, is susceptible of encompassing both aquatic and terrestrial species, the Court decided that the broadest reading would best effectuate CESA’s overall remedial purpose.

Accordingly, the Court held that by its reading of the term “fish,” the “Commission may list any invertebrate as an endangered or threatened species,” if of course it qualifies.

What’s Next?

The agricultural groups could, of course, petition the California Supreme Court for review. As the case presents a purely legal issue, the Supreme Court would not review the Court of Appeal’s opinion for error, but rather would itself interpret CESA *de novo*.

If the Court of Appeal decision remains intact, what effects might the regulated community expect? For one, the decision obviously resolves long simmering uncertainty about CESA’s coverage of invertebrates and thus clarifies the law in that respect.

The decision should as well promptly reestablish that the four bumblebee species at issue in the case are candidates for listing and thus take of those species is prohibited. Whether the Commission ultimately decides to list any or all of them remains to be seen.

The nature and magnitude of long-term effects of expanding CESA to cover invertebrates will depend largely on how many and which species of invertebrates are proposed for listing. Currently 25 insects and 11 other invertebrates in California are listed under the federal Endangered Species Act. To the extent that future listings under the state act overlap those, the additional effects of state listing will be slight; authorization of any take of the species would require two rather than one permit, both federal and state approval. To the extent, though, that the Department or interested persons petition to list other species, the burden on the regulated community will grow. Some projects and activities may be prohibited or curtailed, and permits for incidental take of new invertebrate species will add time and expense to efforts to remain in compliance with the law.

CESA’s unique “hair trigger, heavy hammer” feature may exacerbate regulatory burdens. Unlike the federal act, CESA prohibits the taking of candidates as soon as the Commission accepts a petition for further review. Jumping the gun to so stringently regulate an unlisted species in this

fashion might seem difficult to justify in any event, and all the more so if the evidence underpinning the Commission's acceptance of a petition falls far short of a showing that actually warrants listing the species. Further review, after all, may well indicate there was no real justification for prohibiting take of the candidate species—with all the disruption of otherwise lawful activities that caused.

Illustrative of this quandary is the Commission's experience with the Western Joshua tree (WJT). In 2020, the Commission accepted a petition to list the species even though the petition offered little about the species' abundance and population trend, the two main factors in assessing a species' status. The "bar is very low," one Commissioner explained, adding that the Commission could reject the petition only if it believed there is "no substantial possibility [the WJT] could be listed upon review by the Department" over the course of a year. Such a weak standard, which effectively relieves petitioners of the burden of proof and flips it on everyone else to show a negative, naturally leaves wide open the prospect that closer review will reveal that listing the species is not warranted. And that is exactly what has happened in the case of the WJT. The Department has found after its year-long peer reviewed analysis that the WJT does not qualify as threatened. The Commission will consider the Department's findings in the coming months.

A proliferation of "candidates" under this lax process may well disrupt and burden lawful activities for what later turns out to be no good reason.