SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

DATE / TIME **JUDGE**	**November 13, 2020 / 10:00 a.m.** **James P. Arguelles**	**DEPT. NO.** **CLERK**	**17** **Slort**
ALMOND ALLIANCE OF CALIFORNIA: CALIFORNIA ASSOCIATION OF PEST CONTROL ADVISERS; CALIFORNIA CITRUS MUTUAL; CALIFORNIA COTTON GINNERS AND GROWERS ASSOCIATION; CALIFORNIA FARM BUREAU FEDERATION; WESTERN AGRICULTURAL PROCESSORS ASSOCIATION; and WESTERN GROWERS ASSOCIATION, **Petitioners/Plaintiffs,** **v.** **CALIFORNIA FISH AND GAME COMMISSION, a California Public Agency; CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE, a California Public Agency,** **Respondents/Defendants,** **XERCES SOCIETY FOR INVERTEBRATE CONSERVATION; DEFENDERS OF WILDLIFE; and CENTER FOR FOOD SAFETY,** **Intervenors.**		**Cases No.: 34-2019-80003216**	
Nature of Proceedings:	**Petition for Writ of Mandate – Final Ruling**		

The petition for writ of mandate is GRANTED.

The parties' requests for judicial notice are GRANTED.

Background

The California Endangered Species Act (CESA) is codified in Division 3, Chapter 1.5 of the Fish and Game Code, Section 2050 *et seq.*[1] CESA protects native species designated "endangered" or "threatened." An "endangered species" is a "native species or subspecies of a bird, mammal,

[1] Undesignated statutory references shall be to the Fish and Game Code.

fish, amphibian, reptile, or plant which is in serious danger of becoming extinct[.]" (§ 2062.) A "threatened species" is 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" absent protection. (See § 2067.)

Any interested person may petition Respondent California Fish and Game Commission (Commission) to add a species to one of these lists. (See § 2070 *et seq.*) Co-Respondent California Department of Fish and Wildlife (Department) evaluates the petition and recommends action that the Commission should take. (§§ 2071.5, 2073.5.) The Commission considers the Department's recommendation and, after holding a public hearing, decides whether to accept or reject the petition. (§ 2074.2.) If the petition is accepted, then the species under consideration becomes a "candidate species," i.e., "a native species or subspecies of a bird, mammal, fish, amphibian, reptile or plant that the Commission has formally noticed as being under review[.]" (§ 2068.) Additional procedures dictate whether the candidate species is listed as endangered or threatened. (See *California Forestry Assn. v. California Fish & Game Commission* [*California Forestry*] (2007) 156 Cal.App.4th 1535, 1542.) Subject to exceptions, persons may not import, export, take, possess, purchase or sell within the state endangered or threatened species. (See § 2080 *et seq.*)

In October 2018, Intervenors herein petitioned the Commission to add four species of bumble bees to its list of endangered species. In June 2019, the Commission accepted the listing petition and elevated the bumble bees to candidate-species status.

Petitioners now seek an administrative writ of mandate that sets aside the June 2019 listing decision. (See § 2076 [authorizing judicial review under Code of Civil Procedure Section 1094.5].) Petitioners argue that CESA does not authorize the Commission to designate insects such as bumble bees as endangered, threatened or candidate species.

The Commission and the Department (collectively "Respondents") oppose. They argue that listing authority extends to insects and other invertebrates under the definition of "fish" at the beginning of the Fish and Game Code. Intervenors join in this argument and raise other arguments as well.

For reasons discussed below, the court agrees with Petitioners and grants the writ.

Standard of Review

Under Code of Civil Procedure Section 1094.5(b), the court inquires whether the agency proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was prejudicial abuse of discretion. Abuse of discretion is established if the agency has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence. (Civ. Proc. Code § 1094.5(b).) The court independently reviews pure questions of law. (See *Schafer v. City of Los Angeles* (2015) 237 Cal.App.4th 1250, 1261.)

Discussion

The Commission's authority under CESA to list insects *vel non* presents a question of statutory interpretation.

> "The rules governing statutory construction are well settled. [Courts] begin with the fundamental premise that the objective of statutory interpretation is to ascertain and effectuate legislative intent. [Citations.] To determine legislative intent, [courts] turn first to the words of the statute, giving them their usual and ordinary meaning. [Citations.] When the language of a statute is clear, [courts] need go no further. However, when the language is susceptible of more than one reasonable interpretation, [courts] look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part. [Citations.]" In addition, "every statute should be construed with reference to the whole system of law of which it is a part, so that all may be harmonized and have effect. [Citation.] Legislative intent will be determined so far as possible from the language of the statutes, read as a whole." [Citation.]

(*Doe v. Albany Unified School Dist.* (2010) 190 Cal.App.4th 668, 675-676.)

Petitioners argue that CESA is unambiguous in that it enumerates categories of wildlife that may be listed but does not include insects. (See *Haniff v. Superior Court* (2017) 9 Cal.App.5th 191, 201 ["'[W]here a statute enumerates things upon which it is to operate it is to be construed as excluding from its effect all those not expressly mentioned'"].) Petitioners thus caution the court not to read into CESA a term that the Legislature intended to exclude. (See *Security Pacific Nat'l Bank v. Wozab* (1990) 51 Cal.3d 991, 998 [noting "the cardinal rule of statutory construction that courts must not add provisions to statutes"].)

Respondents and Intervenors counter that CESA's definitions for endangered, threatened and candidate species must be harmonized with other definitions in the Fish and Game Code. In particular, they point out that Section 45 defines "fish" to include "invertebrates."[2] Section 2 further provides that "[u]nless the provisions or the context otherwise requires, the definitions in this chapter govern the construction of this code and all regulations adopted under this code." Because bumble bees and other insects are invertebrates, Respondents and Intervenors argue that the Commission was entitled to list the bumble bees in question as fish.

To support their argument, Respondents and Intervenors cite *California Forestry*, *supra*. That case involved a successful petition to list two evolutionarily distinct units of coho salmon. The Commission listed one unit as endangered and another as threatened. The Court of Appeal held that the phrase "species or subspecies" as it appears in CESA's definitions of "endangered

[2] Section 45 reads, "'Fish' means wild fish, mollusks, crustaceans, invertebrates, or amphibians, including any part, spawn, or ova thereof."

species" and "threatened species" encompassed evolutionarily distinct units. Because the phrase "species or subspecies" was ambiguous, a liberal construction supporting CESA's remedial purposes was warranted. The Commission's scientific expertise and longstanding policy also supported the construction.

In reaching its conclusion, the *California Forestry* court rejected an argument that, in making its listing decision, the Commission should not have considered the effect of hatchery salmon on wild salmon:

> [T]he Legislature intended that "wild fish," as opposed to hatchery fish, be protected under the CESA. **While the definition of threatened species and endangered species in the CESA includes "native species or subspecies of a bird, mammal, fish, amphibian, reptile, or plant" (§§ 2062, 2067), the Legislature has narrowed the definition of "fish" to mean "wild fish" (§ 45).** We therefore find inapposite plaintiffs' reliance on federal case law interpreting the F[ederal Endangered Species Act] and deeming the Secretary of Commerce's decision to list only "naturally spawned" coho salmon (as opposed to "hatchery spawned" coho salmon) "arbitrary and capricious." [Citation.] Leaving aside whether that case was correctly decided [citation], "fish" in the FESA is not defined with reference to "wild fish" [citation]. Therefore, the Commission and the Department did not err in analyzing both wild coho salmon and hatchery coho salmon when determining whether the two coho units were entitled to protection under the CESA.

(*California Forestry*, p. 1552, boldface added, underlining omitted.) In Respondents' and Intervenors' view, the same reasoning requires this court to uphold the Commission's listing of bumble bees: because the definition of "fish" in Section 45 includes invertebrates, and because bumble bees are invertebrates, bumble bees may be listed under CESA as fish. As Intervenors recognize, though, a counterintuitive mental leap is required to conclude that bumble bees may be protected as fish. Harmonizing the term "fish" as it is used in CESA with the term "wild fish" as used in Section 45 does not require the same exertion.

In context, the word "invertebrates" as it appears in Section 45's definition of "fish" clearly denotes invertebrates connected to a marine habitat, not insects such as bumble bees. (See *Doe*, *supra*, p. 676 [where the statutory language is clear, the court goes no further].)[3] For that reason, the Commission exceeded its authority when it designated the bumble bees in question as candidate species.

But even if the term "invertebrates" as it appears in Section 45 created an ambiguity about CESA's application to insects such as bumble bees, extrinsic interpretive aids would still entitle

[3] At oral argument, counsel for Respondents asserted that 90 percent of all animal species are invertebrates. Yet, "invertebrates" is just one term in a series that define "fish." It is unlikely that the Legislature meant for a single word in a series defining the term "fish" to capture such an extraordinarily broad group of animal life.

Petitioners to writ relief. First, the parties dispute the import of CESA's legislative history. While CESA was under consideration as Assembly Bill 3309 (1984),[4] the Department provided the Legislature with a bill summary and analysis indicating that CESA's predecessor protected invertebrates. The Department asked the Legislature to include invertebrates within CESA's definitions of endangered and threatened species "to remove any doubts as to the Commission's authority to designate insects as endangered or threatened[.]" (See Intervenors' RJN, Exh. A, p. 4; see *id.*, Exh. A, p. 5 ["Including the term invertebrates in the definitions of endangered and threatened species would help eliminate confusion on the part of the O[ffice of Administrative Law] over the Commission's authority under the Act, but does not add any new authority to that which the A. G. indicates already exists"].)[5]

The final version of AB 3309 deleted the term "invertebrates" from definitions of endangered and threatened species appearing in earlier drafts. In its enrolled bill report to the Governor, the Department changed course and characterized the deletion as the removal of an unnecessary change that would have sewn confusion. (See *id.*, Exh. B, p. 4 ["For example, to have included the term would have required that, for consistency, all other references in the Fish and Game Code to the various groups of animals be amended to add the term invertebrates, as necessary"].) Intervenors ask the court to defer to this characterization and the Department's other statements to the Legislature while AB 3309 was under consideration. But a Senate Committee analyzing the penultimate version of the bill, in which the term "invertebrates" was deleted, wrote that "[u]nlike federal law, the bill would exclude all invertebrates from eligibility for listing as threatened or endangered species." (Reply RJN, Exh. 2, p. ARC-23b.)[6] Although a court construing a statute may consider an executive agency's enrolled bill report, it properly defers to the enacting Legislature's own statements of its intent. (See *Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1218, fn. 3 ["Although these reports certainly do not take precedence over more direct windows into legislative intent such as committee analyses, and cannot be used to alter the substance of legislation, they may be as here 'instructive' in filling out the picture of the Legislature's purpose"]; *Kaufman & Broad Communities, Inc. v. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 41.) Consequently, the court does not defer to the Department's statements in the enrolled bill report in the face of other, clear evidence that the Legislature did not intend for CESA to protect invertebrates categorically.

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[4] CESA was drawn from two bills, AB 3309 and AB 3270. (See Section 2050 (West 2013), Historical and Statutory Notes.)

[5] The "doubts" and "confusion" apparently stem from the OAL's determination in 1980 that the Commission lacked authority under then-existing legislation to list two species of butterflies as "fish" under Section 45. (See Opening Brf. at 14.) Petitioners cite this determination as further evidence that the "fish" described in Section 45 do not include insects such as butterflies.

[6] The penultimate version of AB 3309 would have required the Department to study the necessity and feasibility of including invertebrates in CESA in the future, but that provision was also excised from the final version. (Compare Reply RJN, Exh. 2 with Exh. 6.)

In 1998, the Attorney General was asked for a formal opinion about CESA's application to insects. The Attorney General opined that the answer was "no." (See 81 Ops.Atty.Gen. 222; 1998 Cal. AG LEXIS 111.)[7] Presumed to be aware of the Attorney General's opinion, the Legislature did not subsequently amend CESA's definitions of threatened or endangered species. Although not binding, the Attorney General's opinion that CESA does not cover insects is entitled to "great weight," especially in the absence of clear case authority. (See *Sonoma County Employees' Retirement Assn. v. Superior Court* (2011) 198 Cal.App.4th 986, 996.) 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 as it did.

The Commission argues that its longstanding interpretation of CESA permits the listing of insects as fish under Section 45. Under *Yamaha Corp. of Am. v. State Bd. of Equalization* (1999) 73 Cal.App.4th 338, 350-351, two of several factors supporting an agency's interpretation of a statute are the interpretation's consistency and duration. Citing its listings of freshwater shrimp, the Shasta crayfish and the Trinity bristle snail, the Commission argues that, although these species are not commonly considered "fish," they were listed because they are crustaceans, mollusks and/or invertebrates within the definition of "fish" in Section 45. The Commission further notes that the Trinity bristle snail, which was listed in 1980 pursuant to predecessor legislation, is a terrestrial species. Hence, the Commission argues that it has consistently interpreted Section 45 to inform listings under CESA, and that its interpretation extends CESA to invertebrates or other "fish" that do not inhabit a marine environment.

The Commission acknowledges, however, that the only time it attempted to list insects was under the same predecessor statute, and the attempt was unsuccessful. Notwithstanding that the OAL rejected the listing as unauthorized, the Commission argues that it never "acquiesced" to the OAL's view and has consistently construed its authority as extending to terrestrial invertebrates. But given that the Commission's interpretation did not prevail under the predecessor legislation, and given that the Legislature subsequently considered but rejected extending CESA to invertebrates, it is difficult to see how the Commission's view, even if consistent and longstanding, is probably the correct one.

The Commission also requests judicial deference to its scientific expertise. An agency's expertise is an important factor when considering the agency's construction of a statute it enforces. (See *Yamaha*, p. 353.) Given the "taxanomic complexity" that CESA and Section 45

[7] The Attorney General wrote: "These definitions [of endangered, threatened and candidate species] limit the application of CESA to birds, mammals, fish, amphibians, reptiles, and plants. Insects do not fall within any of these categories. In zoological terms, insects comprise the Insecta class of the phylum Arthropoda. (Webster's Third New Internat. Dict. (1971) p. 1168.) Since they are not within the governing definitions contained in CESA, insects are not eligible for listing as threatened or endangered species thereunder. While the last sentence of section 2062 and of section 2067 'grandfather' certain designations made prior to 1985, no insects were so designated. Therefore, we need not inquire whether insects were eligible for listing prior to 1985." (1998 Cal. AG LEXIS 111, *6-7, footnote omitted.)

present, (see Respondents' Opp., Part III-B), the Commission argues that such deference is warranted in the current action.

The court does not dispute that applying CESA and other provisions in the Fish and Game Code requires expertise that the Commission possesses and which the court lacks. And if the Legislature had not made clear in the ways described above that CESA does not protect insects in particular, or invertebrates as a distinct group, the Commission's expertise might hold more sway. In the end, however, the court must render an interpretation that gives effect to the Legislature's intent, not a learned agency's opinion. 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.

Furthermore, the Commission is not the only agency with experts administering CESA. The Department is charged with making listing recommendations to the Commission and enforcing prohibitions that protect listed species. (See § 2080, 2081(d).) Pursuant to its enforcement obligations, the Department in 1998 promulgated a regulation governing the "take" of wildlife protected by CESA and other legislation. Subject to exceptions, Title 14, Section 783.1(a) of the California Code of Regulations prohibits the "import into this State, export out of this State or take, possess, purchase, or [sale] within this State, [of] any endangered species, threatened species ... ." Notably, subdivision (d) of the same section provides: "The take of insects and other invertebrates that are not fish as defined in the Fish and Game Code is not prohibited." However one reads it, this language is not consistent with the construction that Respondents and Intervenors now tender, namely that the term "fish" as defined in the Fish and Game Code encompasses all invertebrates, including insects.

A better argument, although one that court ultimately rejects as well, is that the Legislature itself has interpreted CESA to reach insects. Enacted in 1988, provisions codified in Section 2582 impose civil liability "upon any person pursuant to this chapter for ... [enumerated] acts done for profit or personal gain." The cited "chapter" is 6.5, which is entitled "Control of Illegally Taken Fish and Wildlife." Section 2582 refers to endangered and threatened species under CESA, as well as other wildlife, and in subdivision (a)(2) creates civil liability against those who:

> Unlawfully export, import, transport, sell, possess, receive, acquire, or purchase, or unlawfully assist, conspire, or aid in the importing, exporting, transporting sale, possession, receiving, acquisition, or purchasing of **any plants, insects, or other species listed pursuant to the California Endangered Species Act** ... which are taken or possessed in violation of this code or the regulations adopted pursuant to this code. (Emphasis added.)

Neither Respondents nor Intervenors argue that these provisions expressly amended CESA. Nor does the court construe them as an express grant of authority to list species under CESA. Rather, Respondents argue that Section 2582 constitutes the Legislature's view of CESA's meaning, and in particular CESA's scope vis-à-vis insects.

> While "the interpretation of a statute is an exercise of the judicial power the Constitution assigns to the courts" [citation], "if the courts have not yet finally and conclusively interpreted a statute and are in the process of doing so, a declaration of a later Legislature as to what an earlier Legislature intended is entitled to consideration. [Citation.] But even then, 'a legislative declaration of an existing statute's meaning' is but a factor for a court to consider and 'is neither binding nor conclusive in construing the statute.' [Citations.] This is because the 'Legislature has no authority to interpret a statute. That is a judicial task. The Legislature may define the meaning of statutory language by a present legislative enactment which, subject to constitutional restraints, it may deem retroactive. But it has no legislative authority simply to say what it *did* mean.' [Citation.]" [Citations.]

(*National Asian American Coalition v. Newsom* (2019) 33 Cal.App.5th 993, 1011-1012, italics in original.) The Legislature that enacted CESA expressed its intent not to protect invertebrates categorically. Furthermore, insects do not fall within any of the categories of wildlife that CESA was intended to protect. Consequently, to the extent Section 2582(a)(2) is a subsequent Legislature's view of CESA's application to insects, the court does not adopt that view as the proper construction.

Intervenors argue that Section 2582 constitutes an implied amendment of CESA's definitions of endangered and threatened species. Typically, though, a later-enacted statute impliedly amends existing legislation where the two enactments contain substantively irreconcilable provisions. (See *Peatros v. Bank of America* (2000) 22 Cal.4th 147, 167-169 [where National Bank Act of 1864 immunized from liability banks dismissing their officers, but later enacted Civil Rights Act of 1964 and Age Discrimination and Employment Act of 1967 created liability for certain dismissals, the latter impliedly amended the former by limiting immunity]; *Turner v. Association of American Medical Colleges* (2011) 193 Cal.App.4th 1047, 1053-1054 [later-enacted attorney fee-shifting provisions in Civil Code Section 52 and 54.3 created an implied exception to the fee-shifting provisions in Civil Code Section 55].)

When it enacted Section 2582, the Legislature did not purport to grant authority under CESA. Instead, it at most potentially declared insects to be among the animal life subject to CESA's protections. 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. (See *City of Emeryville v. Cohen* (2015) 233 Cal.App.4th 293, 309 [Legislature's incorrect description of an enactment as a declaration of existing law was not entitled to deference]; *Peralta Community College Dist. v. Fair Employment & Housing Com.* (1990) 52 Cal.3d 40 ["The declaration of a later Legislature is of little weight in determining the relevant intent of the Legislature that enacted the law.[.. citations] ... especially ... when, as here, such declared intent is without objective support in either the language or history of the legislation"].)

At the hearing, counsel for Intervenors argued that, even if Section 2582(a)(2) constitutes the Legislature's incorrect interpretation of CESA as it existed in 1988, the consequence is merely

that Section 2582(a)(2) may not be given retroactive effect. According to Intervenors, the reference to insects in Section 2582(a)(2) still constitutes an implied amendment that has operated prospectively since its passage in 1988. Section 2582, however, only creates civil liability for violations of other legal rules. Neither Respondents nor Intervenors cite anything in the legislative history suggesting that Section 2582 was intended to broaden CESA's reach, and the court does not discern such an intent from Section 2582(a)(2) itself. Furthermore, and as noted above, both the Attorney General and the Department construed CESA in 1998 to exclude insects.

Finally, Respondents and Intervenors argue that CESA's remedial purposes compel a broad interpretation of the Commission's listing authority. The court readily agrees that CESA is construed broadly to achieve its purposes. (See *Department of Fish & Game v. Anderson-Cottonwood Irrigation Dist.* (1992) 8 Cal.App.4th 1554, 1563.) Here, however, 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.

Disposition

The petition is granted.

Pursuant to Rule of Court 3.1312, counsel for Petitioners shall lodge for the court's signature a judgment to which this ruling is attached as an exhibit.

Unless otherwise ordered, any administrative record, exhibit, deposition, or other original document offered in evidence or otherwise presented at trial, will be returned at the conclusion of the matter to the custody of the offering party. The custodial party must maintain the administrative record and all exhibits and other materials in the same condition as received from the clerk until 60 days after a final judgment or dismissal of the entire case is entered.

SO ORDERED.

Dated: November 17, 2020

Hon. James P. Arguelles
California Superior Court Judge,
County of Sacramento

CERTIFICATE OF SERVICE BY MAILING
(C.C.P. Sec. 1013a(4))

I, the undersigned deputy clerk of the Superior Court of California, County of Sacramento, do declare under penalty of perjury that I did this date place a copy of the above entitled **Motion to Intervene – Final Ruling** in envelopes addressed to each of the parties, or their counsel of record as stated below, with sufficient postage affixed thereto and deposited the same in the United States Post Office at Sacramento, California.

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Dated: November 16, 2020

Superior Court of California,
County of Sacramento

By: S. Slort,
Deputy Clerk