Fish and Game Commission Violated Law by Seeking to Protect Bees Under CESA

11.20.2020 | By Paul S. Weiland, Robert D. Thornton, Benjamin Z. Rubin, Samantha Savoni

The Sacramento Superior Court upheld a challenge to a decision by the California Fish and Game Commission to designate four subspecies of bumble bees as candidates for protection under the California Endangered Species Act (CESA). The decision in *Almond Alliance et al. v. California Fish and Game Commission* reinforces a long line of authority dating back several decades suggesting that insects are not subject to protection under CESA. It also reflects respect for the role of the coordinate branches of government in formulating, executing and interpreting the laws that the Commission has disregarded in recent decisions.

CESA defines candidate, threatened and endangered species to include "a native species or subspecies of a bird, mammal, fish, amphibian, reptile or plant." Based on the plain language of the statute, it does not extend to insects. Nonetheless, in June 2019, the Commission responded to a petition to list four subspecies of bumble bees by designating them candidates for listing under CESA. The Commission reasoned that (1) the definition of "fish" included in the Fish and Game Code extends to invertebrates and (2) bees are invertebrates; therefore, (3) under California law "bees" are "fish" and subject to protection. Based on the definition of fish and its legislative history, the Superior Court rejected the Commission's reasoning, holding "[i]n 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."

The Commission relied on this unsuccessful argument once before to justify its decision to seek to protect two species of butterfly under CESA in 1980. At the time, the Office of Administrative Law (OAL) rejected this reasoning and forced the Commission to withdraw its decision. In the intervening 40 years, the Commission has not sought to list an insect species.

In 1984, the California State Legislature overhauled CESA. Among other things, the Legislature added plants to the categories of species that could be protected. The draft bill that led to the amendments initially added

“invertebrates” to the categories of species that could be protected. But that language was removed before it was passed and signed by the Governor. While the Commission sought to minimize the implications of this legislative history, the Superior Court held it was “clear evidence that the Legislature did not intend for CESA to protect invertebrates categorically.”

In 1998, the Attorney General issued a formal opinion on whether insects could be protected under CESA. As the Superior Court noted, the answer was “no.” The Superior Court acknowledged existing precedent that such formal opinions from the Attorney General are entitled to great weight. The Court also noted precedent presuming that the legislature is aware of such formal opinions and can amend the law in response.

Other authorities that the Superior Court did not expressly rely upon in this most recent case reinforce its position, including the California Department of Fish and Wildlife, whose website states that the Legislature did not include insects among the categories of species that can be listed. Further, in numerous Federal Register notices, the U.S. Fish and Wildlife Service justified federal protections for insects endemic to California because those species cannot be listed under CESA.

Nossaman represents the petitioners in *Almond Alliance et al. v. California Fish and Game Commission.*