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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

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,

v.

CALIFORNIA FISH AND GAME COMMISSION, a California Public Agency; CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE, a California Public Agency,

Respondents,

and

Case No. 34-2019-80003216-CU-WM-GDS

Assigned to:
Hon. James P. Arguelles, Dept. 17

INTERVENORS' OPPOSITION BRIEF

Hearing Date:	November 13, 2020
Time:	10:00 a.m.
Department:	17
Action Filed:	September 9, 2019

XERCES SOCIETY FOR INVERTEBRATE CONSERVATION; DEFENDERS OF WILDLIFE; and CENTER FOR FOOD SAFETY,

Intervenors.

INTRODUCTION

In 1970, the Legislature passed the California Endangered Species Act ("CESA"), a landmark law that protects imperiled species by regulating activities that contribute to extinction. Over the last fifty years, Californians have used CESA to protect nearly ninety species of mammals, birds, fish, crustaceans, mollusks, amphibians, and reptiles. In October of 2018, three groups—the Intervenors in this case—petitioned the California Fish and Game Commission to protect four native bumble bee species (the "California Bumble Bees") under CESA. The California Bumble Bees pollinate many of California's wild and cultivated plants, but they have precipitously declined in the last two decades. In fact, the world's foremost network of conservation biologists says these species are now vulnerable to extinction, and two are critically endangered. Recognizing this crisis, the Commission made the California Bumble Bees candidates for "endangered" status under CESA and began investigating whether to formally list the Bees as endangered.

Petitioners, a group of agricultural interests led by the Almond Alliance, argue that CESA cannot protect the Bees, or, in fact, *any* insects. They are incorrect. CESA is part of and subject to the California Fish and Game Code, and the Code's express legislative definitions place "invertebrates," including insects, within CESA's scope. The Code also explicitly refers to "insects" listed under CESA, making it clear that CESA covers insects. In addition, CESA's legislative history demonstrates that the Legislature intended to protect insects: The same Legislature that penned CESA added the unqualified word "invertebrates" to the definition of "fish," thus placing invertebrates (and insects) within CESA's scope. Moreover, the Legislature had actual knowledge that CESA's wording applied to insects when it repassed CESA in 1984. And even if CESA's plain language or history were ambiguous, case law demands that any ambiguities in it be resolved in favor of heightened conservation. Finally, protecting endangered insects is good public policy, because

insects are necessary to sustain California's wild and cultivated ecosystems, which will help ensure the continued viability of agriculture in California.

Petitioners would constrict CESA's reach and prohibit the Commission from protecting the California Bumble Bees, and indeed any imperiled insects, based on thin authority. They rely primarily on a poorly reasoned Attorney General Opinion, an unproffered Office of Administrative Law letter, a single sentence of judicial dicta, an unsigned and undated webpage, and a repeated implication that the Legislature cannot define its own terms. These authorities provide scant or no analysis, do not obey the rules of statutory interpretation, and do not deserve any deference. Petitioners fall back on apocalyptic predictions about the future of agriculture were the Bees to be listed. But those predictions will not come to pass; the Legislature already addressed such concerns by exempting routine agricultural activities from CESA's take prohibition, an exemption Petitioners conveniently fail to mention. Constricting CESA as Petitioners urge would rewrite the law and ignore the Legislature's intent. The Commission's decision to designate the California Bumble Bees as candidate species under CESA is lawful and must be upheld.

BACKGROUND

I. Legal background

A. CESA's legislative history and the listing process

CESA is the keystone of California's strategy for preserving the State's most vulnerable wildlife. The Legislature first added CESA to the Fish and Game Code in 1970.[1] To carry out the Code's purpose of protecting California's exceptional wildlife and ecosystems, the Code grants the Fish and Game Commission ("Commission") the power to regulate the "take"[2] of California wildlife, § 200, and grants the Department of Fish and Wildlife ("Department") the power to "manage California's diverse fish, wildlife, and plant resources, and the habitats upon which they depend, for their ecological values and for their use and enjoyment of the public," § 712.1(a)(1).

When passing CESA, the Legislature declared its intent to protect "rare" and "endangered animals" from the dangers of "loss of habitat, change in habitat, overexploitation, predation,

[1] Unless otherwise specified, section references and "the Code" refer to the Fish and Game Code.
[2] To "take" means to "hunt, pursue, catch, capture, or kill," or to attempt any of those acts. § 86.

competition, or disease." 1970 Cal. Stat., c. 1510, § 3. In the 1970 version, as in the current version, CESA prohibited the import, sale, possession, and take of listed species. *Id.*; §§ 2080, 2582.

The 1970 version of CESA defined "endangered" and "rare animals" to include any "birds, mammals, fish, amphibia, or reptiles" that were close to extinction. 1970 Cal. Stat., c. 1510, § 3. The Code's definitions in sections 1 through 89.5 "govern the construction of this code and all regulations adopted under this code," and therefore apply to CESA. § 2. Important here, in 1969 the Legislature added "mollusks, crustaceans, [and] *invertebrates*" to the definition of "fish." 1969 Cal. Stats. c. 689 (S.B. 858), § 1 (HeinOnline) (emphasis added). This definition of "fish" survives today. § 45.

In 1984, the Legislature passed two bills that overhauled CESA and created the legal scheme that remains in effect today. *See* 1984 Cal. Stat., cc. 1162, 1240 (A.B. 3309, 3270) (West). While considering the bills, the Legislature sought and twice received the Department's expertise on CESA. *See* Request for Judicial Notice (hereinafter "RFJN"), Exh. A at 1 [Cal. Dep't of Fish and Wildlife, Bill Summary of AB 3309 of 1984 (June 26, 1984)]; Exh. B at 1 [Cal. Dep't of Fish and Wildlife, Bill Summary of AB 3309 of 1984 (Sept. 11, 1984)].[3] The 1984 overhaul clarified that CESA seeks to preserve species because they have "ecological, educational, historical, recreational, esthetic, economic, and scientific value to the people of this state." § 2051(c).

Among other things, the overhaul re-designated all "rare" and "endangered" animals as "threatened" and "endangered species" and added a definition for those species that the Commission is considering for protection, "candidate species." §§ 2062, 2067–2068. Critically, these definitions still include any "bird, mammal, fish, amphibian, [or] reptile" in serious danger of extinction, *id.*, and "fish" still includes "mollusks, crustaceans, [and] invertebrates," § 45. The heart of CESA—its prohibition on take—also remains in force, and now extends to candidate species like the California Bumble Bees. §§ 2068, 2080, 2085. Later enactments have built on the core of CESA's framework for protecting vulnerable wildlife, such as in 1988 when the Legislature established civil liability for the "[u]nlawful[] . . . transporting, sale, possession, receiving, acquisition, or purchasing of any

[3] Exhibit 1 contains the Department's summaries of AB 3309 of 1984, submitted to the Legislature in June and September of that year. Legislative history may be judicially noticed. *People v. Connor*, 115 Cal. App. 4th 669, 681 n.3 (2004) (citing Evid. Code § 452(c)).

plants, *insects*, or other species listed pursuant to the California Endangered Species Act." § 2582(a)(2) (emphasis added). When different sections of the code "relat[e] to the same subject matter" as other provisions, those provisions "shall be construed as restatements and continuations thereof, and not as new enactments." § 3. Section 2582 is therefore properly a "continuation of" CESA, rather than a separate law.

Finally, CESA's 1984 overhaul established the modern, two-phase process for listing species. §§ 2071–2075.5. That process allows any interested person to petition the Commission to list one or more species as endangered or threatened. *Id.* In the first phase, the Commission, in consultation with the Department, considers information that the third party and other interested members of the public provide and decide whether listing the species "may be warranted." §§ 2071–2073.5; *see also* 14 C.C.R. § 670.1(d) (listing the requirements of listing petitions). If the Commission accepts the petition after a public hearing at this step, then the petition moves to the second phase and the species at issue become "candidate species," gaining protection from take for the remainder of the process. §§ 2074–2074.5, 2080, 2085. In the second phase, the Department and Commission review all the information received and seek additional scientific information before the Commission holds a second public hearing and decides either to reject the listing or to list the species as threatened or endangered. §§ 2074.6–2074.8, 2080.

B. CESA's agricultural exemption

There is a single, major exemption from CESA's prohibition on take. In 1997, the Legislature balanced its goals of species conservation and promoting agriculture by creating a two-part exemption for agricultural activities. 1997 Cal. Stat. c. 528 (S.B. 231) (West).[4] The first part allows "farmers, ranchers, or other agricultural experts," to design local, voluntary programs for conserving protected species on agricultural land. § 2086. If approved by the Department and followed by a farm, these programs authorize any take, even foreseeable take, of protected species that is incidental to routine agricultural activity. § 2086(c). The second part of the exemption prevents liability for all

[4] This agricultural exemption is in addition to other exemptions from the take prohibition such as the granting of take permits under section 2081 and take exemptions under section 2084(a)(1).

accidental take that is incidental to routine agricultural activities, even absent any approved voluntary program. § 2087 (a); *see* § 2089; 14 C.C.R. § 786.1 (b) (defining routine agricultural activity). This "accidental take" exemption was set to expire in 2002, but the Legislature has consistently extended it, most recently until 2024. *See* West's Ann. Cal. Fish & G. Code § 2087 (noting five amendments since 2002 in the credits section). The voluntary program component has no sunset. § 2086.

II. Factual background

A. The decline of the California Bumble Bees

Insects like the California Bumble Bees form the bedrock of California's ecosystems. Insects perform the majority of all pollination and provide other critical ecosystem services that are necessary for the perpetuation of human and animal life.[5] AR 6, 286–90. Fully 80% of terrestrial plants and 35% of global food production relies on insect pollinators, primarily bees. AR 6, 264. Pollinating insects and pollinating bees are therefore key to the survival of the overwhelming majority of wild and cultivated plants. *Id.*; AR 264. And because many vital nutrients are found almost exclusively in insect-pollinated plants, human health is inextricably linked to insects. *Id.* Through pollination alone, wild insects annually contribute over $9 billion to the national economy. AR 254; AR 287; AR 860; Mot. to Intervene, Decl. of Sarina Jepsen ¶ 15 (Dec. 10, 2019). (hereinafter "Jepsen Decl.") Wild, native insects like the California Bumble bees also create immense value through scientific and recreational opportunities, and through their role as the exclusive pollinators for many of the state's smaller farmers and gardeners. Jepsen Decl. ¶¶ 7, 10–11; Mot. to Intervene, Decl. of Kimberly Delfino ¶¶ 15–16 (Dec. 6, 2019) (hereinafter "Delfino Decl."); Decl. of Rebecca Spector ¶¶ 19–21 (Dec. 4, 2019) (hereinafter "Spector Decl.")

Bumble bees in particular perform many specialized and unique functions. For example, bumble bees "buzz pollinate," a kind of pollination required for plants like blueberries, and peppers to produce at full potential. AR 23. Buzz pollination allows bumble bees to pollinate some food

[5] The U.S. Environmental Protection Agency defines "ecosystem services" as "the many life-sustaining benefits we receive from nature—clean air and water, fertile soil for crop production, pollination, and flood control." U.S. EPA, *Ecosystem Services*, https://www.epa.gov/eco-research/ecosystem-services (last visited September 23, 2020).

crops like tomatoes and eggplants that honey bees cannot. AR 981. And because of their acute vision and relative hardiness, bumble bees can pollinate for more of the day, in cooler temperatures, and in more inclement weather than other bees, sustaining crops when they would otherwise suffer. *Id.* Wild bumble bees like the California Bumble Bees are therefore essential to the production of many of California's crops, including tomatoes, peppers, melons, and squash. AR 23–24. Bumble bees are also key to many of California's wild ecosystems, from the flowers of the Carrizo Plain to the meadows of the Sierra Nevada Mountains. AR 254, AR 917. And finally, many people seek out bumble bees like the California Bumble Bees for recreation and education. Delfino Decl. ¶¶ 15–16; Jepsen Decl. ¶¶ 7, 10–11; Spector Decl. ¶¶ 19–21.

Despite all we know about their immense contributions to human and ecological health, wild insects have faced a precipitous decline at our own hands. Habitat loss, increased pesticide use, and disease spread by commercial bees have crippled insect abundance and diversity, leading some scientists to warn of an ongoing "pollinator apocalypse." AR 264. As insects decline, the vital services they provide also decline, destabilizing ecosystems. This chain reaction is predicted to cause global challenges, including food shortages, if not halted. *See id.*; AR 286–90; AR 847; Delfino Decl. ¶¶ 20–21.

The California Bumble Bees are facing an especially steep decline. Experts indicate that the Bees' relative abundance has declined between 84% and 98%. AR 8. The decline has been so great that small farmers and gardeners now rarely see once plentiful wild bees. Spector Decl. ¶¶ 19–21. Survey missions to find the Franklin's bumble bee have not been able to locate even a single specimen for over a decade. AR 14. The International Union for the Conservation of Nature, an international network of conservation biologists, has listed each of the California Bumble Bees on its "Redlist" of species vulnerable to extinction, and has designated the Franklin's and Suckley cuckoo bumble bees as critically endangered. AR 63–64. Experts have linked the Bees' decline to problems like under-regulated pesticide use, land use change, and diseases spread by commercial bee production. AR 37; AR 878. These experts warn that "[c]urrent regulations and regulatory mechanisms are inadequate to protect these species of bumble bees against the threats they face within California," and that "[w]ithout protective measures, [the California Bumble Bees] are likely

to go extinct in California." AR 63; *see* AR 847; AR 918; AR 924; AR 928; *see also* Table 1.

Species	Historic Distribution	Range Decline: Extent of Occurrence	Range Decline: Persistence	Relative Abundance Decline	Average Decline	Reference
Crotch bumble bee (*Bombus crotchii*)	**United States** (CA) **Mexico** (B.C.)	25%	79%	98%	67%	Hatfield et al. 2015a
Franklin's bumble bee (*Bombus franklini*)	**United States** (CA, OR)	44%	67%	85%	65%	Hatfield 2018b, unpublished data
Western bumble bee, southern subspecies (*Bombus occidentalis occidentalis*)	**United States** (AZ, CA, CO, ID, MT, NE, NV, NM, OR, SD, UT, WA, WY) **Canada** (AB, BC, SK)	53%	33%	84%	57%	Hatfield 2018a, unpublished data
Suckley cuckoo bumble bee (*Bombus suckleyi*)	**United States** (AK, CA, CO, ID, MT, NY, ND, OR, SD, UT, WA, WY) **Canada** (AB, BC, MB, NL, NT, NS, ON, QC, SK, YT)	57%	84%	90%	77%	Hatfield et al. 2015c

Table 1: Summary of changes in range and relative abundance of the California Bumble Bees. AR 8. A species' extent of occurrence is the total area where it is found. Persistence is the proportion of its historically occupied range that remains occupied in recent studies. A species' relative abundance is the abundance of one species compared to the abundance of all other species within a dataset.

B. The petition to list the California Bumble Bees

Fearing the California Bumble Bees' impending extinction, three organizations of experts—the Xerces Society for Invertebrate Conservation, Defenders of Wildlife, and Center for Food Safety ("Wildlife Coalition")—formed a coalition to petition the Commission to list the California Bumble Bees as endangered under CESA. AR 1–6. The Wildlife Coalition compiled decades of research and nearly two centuries of historical data to produce the 119-page listing petition, which they provided to the Commission in October of 2018. AR 1–119.

The Commission and Department spent the next six months evaluating the petition and accepting public comments, then held a hearing about whether to accept the listing petition. AR 1019. Drawing on its long-held understanding that insects may be listed under CESA, the Commission accepted the listing petition for further consideration in June of 2019. *Id.* On September 9, 2019, Petitioners filed their petition for writ of mandate to challenge the Commission's acceptance of the petition, claiming that insects cannot be listed under CESA. Writ Pet. ¶¶ 37–46, (September 9, 2019). On October 4, 2019, Petitioners filed an amended petition that was identical

except for the removal of one Petitioner, The Wonderful Company, LLC. First Amended Writ Pet.

LEGAL STANDARD

Petitioners seek a writ of mandate, which requires that they prove that the Commission abused its discretion by "not proceed[ing] in the manner required by law." Code Civ. Proc. § 1094.5 subd. (b). Courts exercise independent judgement on questions of statutory interpretation, including whether CESA extends to insects such as the California Bumble Bees. *Cleveland Nat'l Forest Found. v. Cty. of San Diego*, 37 Cal. App. 5th 1021, 1041 (2019). Expert agencies, like the Commission and the Department, are afforded deference in construing laws that the Legislature has tasked them with enforcing. *See Yamaha Corp. of Am. v. State Bd. of Equalization*, 19 Cal. 4th 1, 13–16 (1998).

ARGUMENT

The purpose of statutory interpretation is to determine and effectuate the Legislature's intent. *Watershed Enforcers v. Dep't of Water Res.*, 185 Cal. App. 4th 969, 978 (2010). Statutory interpretation can take up to three steps. First, the primary indicator of legislative intent is a statute's plain language, construed "in the context of the statutory framework as a whole . . . keeping in mind the statute['s] nature and obvious purposes." *Id.* at 978–79 (quoting *People v. Cole*, 38 Cal. 4th 964, 975 (2006)); *see also Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal. 4th 1094, 1103 (2007) ("[W]e must look first to the words of the statute, 'because they generally provide the most reliable indicator of legislative intent.'") (quoting *Hsu v. Abbara*, 9 Cal. 4th 863, 874 (1995)). If the Legislature's intent is clear from the plain language, the inquiry ends there. *Even Zohar Constr. & Remodeling, Inc. v. Bellaire Townhouses, LLC*, 61 Cal. 4th 830, 838 (2015).

Where statutory language proves ambiguous, the second step is to look to external indicators such as legislative history and the canons of statutory construction to determine legislative intent. *Watershed Enforcers*, 185 Cal. App. 4th at 978. The third step, considering an interpretation's impact on public policy, takes place when a statute's meaning remains uncertain after the first two steps. *Id.* Throughout all steps of statutory interpretation, statutes must be construed "to comport with apparent legislative intent" and to "further[], not defeat[], the general statutory purpose." *Id.* Finally, statutes that provide for the conservation of natural resources, including CESA, "'are of great

remedial and public importance and thus should be construed liberally.'" *Id.* at 979 (quoting *California Forestry Assn. v. California Fish & Game Comm'n*, 156 Cal. App. 4th 1535, 1545 (2007)).

Applying these principles in this case, Petitioners' challenge fails. Petitioners can succeed only if they demonstrate that the plain language unambiguously excludes insects, because case law demands that any ambiguity in CESA be construed in favor of heightened protection. Unfortunately for Petitioners, the plain language of the Code includes insects in CESA's scope: Insects fall within CESA's definition of possible "endangered species" and the Code explicitly speaks of "insects . . . listed pursuant to the California Endangered Species Act." §§ 2050, 2062, 2582. Even if these sections were ambiguous (they are not), Petitioners arguments would still fail—because CESA must be construed broadly; because CESA's legislative history shows that the Legislature intended CESA to cover insects; and because the canons of statutory interpretation favor an inclusive reading of CESA. To argue otherwise, Petitioners rely on a cursory Attorney General Opinion, a passing reference to an apparently unavailable letter from the Office of Administrative Law, irrelevant federal agency documents, an unsigned webpage, and dicta to suggest that insects cannot be listed. None of this authority can overcome CESA's plain language and the robust evidence showing the Legislature's intent to protect insects. Finally, protecting endangered and threatened insects through CESA will not only comport with the law, it will also further the Legislature's stated goal of conserving species without unreasonably burdening agriculture.

I. The plain language of the Fish and Game Code covers invertebrates, including insects such as the California Bumble Bees.

A. CESA's definitions for "endangered," "threatened," and "candidate species" include insects.

CESA's definitions of "endangered," "threatened" and "candidate species" include any "bird, mammal, fish, amphibian, [or] reptile," §§ 2062, 2067–2068, and the Fish and Game Code's binding definition of "fish" includes any "invertebrate," § 45, which in turn includes insects, *see invertebrate*, Webster's Third New International Dictionary (1966) [hereinafter Webster's Third]. Where "the words themselves are not ambiguous, we presume the Legislature meant what it said." *Even*

Zohar Constr., 61 Cal. 4th at 838. Thus, while it may sound counterintuitive, here there is no ambiguity: Invertebrates, such as insects, are "fish" under the Fish and Game Code, including under CESA's "endangered species" definition. §§ 45, 2062.

1. CESA's definition of "endangered species" includes "invertebrates."

Where "the Legislature has provided an express definition of a term, that definition is ordinarily binding on the courts." *Curle v. Superior Court*, 24 Cal. 4th 1057, 1063 (2001). The exception is where the Legislature uses a general residual clause such as "any activity similar to those listed" at the end of a list. *People v. Canty*, 32 Cal. 4th 1266, 1276 (2004). Where there is no such general language, the definition is binding. *People v. Foreman*, 126 Cal. App. 4th 338, 343 (2005) ("It was the Legislature's inclusion of the additional generalized language that made judicial explication [in *Canty*] necessary.") (citing *Canty*, 32 Cal. 4th at 1276–77).

CESA defines "endangered species" as any "native species or subspecies of bird, mammal, fish, amphibian, reptile, or plant" in serious danger of extinction. § 2062; *see* §§ 2067–2068 (defining threatened and candidate species with identical lists). The Code defines "fish" to mean "a wild fish, mollusk, crustacean, *invertebrate*, [or] amphibian. § 45 (emphasis added). Neither definition includes a residual clause or any general language, making them binding. *Curle*, 24 Cal. 4th at 1063; *Foreman*, 126 Cal. App. 4th at 343. Applying section 45's definition to section 2062 means that an endangered species under CESA can be any native species of bird, mammal, fish, mollusk, crustacean, invertebrate, amphibian, reptile, or plant. Again, this list is definite and therefore binding. This list reflects how the term "fish" is used throughout CESA and the rest of the Code (as discussed below), and how the Commission and the Department have already administered CESA to list, among other things, three invertebrates (two crustaceans and a terrestrial mollusk).

Petitioners claim that applying the Legislature's own definitions to CESA is somehow "sophistry." Petitioners Opening Brief at 18–19 (hereinafter "Pet. Br."). As support for this claim, Petitioners argue that the mention of "mollusks, crustaceans, [and] amphibia" in section 1583 of the Code would be redundant if section 45's definition of "fish" were inserted. *Id.* But Petitioners fail to mention that section 1583 was last revised in 1968, *before section 45 was updated to include the supposedly redundant terms.* 1968 Cal. Stat., c. 1257 (West). Petitioners then list a number of other,

supposedly redundant sections of the Code outside of CESA. Pet. Br. at 19. But all these sections demonstrate is that the Legislature is at times repetitive, in order to ensure that a law achieves the desired outcome.

Examining CESA itself reveals that the Legislature is careful when it means to avoid incorporating the Code's general definitions, specifically with the term "fish."[6] For example, a section of CESA's agricultural exemption refers not to "fish" but to "fish species," which is defined for the purpose of the exemption as "a member of the class Osteichthyes." § 2088. Osteichthyes are a class of fish characterized by a bony skeleton and jaws, "including the majority of modern [fish] species." *Osteichthyes,* Oxford English Dictionary (3d ed., 2019) [hereinafter OED]. This use of "fish species" instead of "fish" *within* CESA demonstrates that the Legislature means to use its general definition of "fish" elsewhere in the statute, including in the definitions of endangered and threatened species.

Petitioners alternatively argue that we must ignore section 45 because a single word—"amphibians"—is listed in both section 2062 and section 45. Pet. Br. at 20. This argument fails because section 45 has already been applied to section 2062's use of fish. The Shasta Crayfish, the California freshwater shrimp (two crustaceans), and the Trinity bristle snail (a mollusk) were all uncontroversially listed under CESA in 1980, and all three of these species fit into section 2062 only through section 45's definition of "fish." 14 C.C.R. § 670.5; RFJN, Exh. C at 1–2 [Cal. Dep't of Fish and Wildlife, *State and Federally Listed Endangered and Threatened Animals of California*, 1 (July 17, 2020)]. These listings, not challenged when made and unchallenged for the forty years since, show that section 45's definition of "fish" has been part of CESA since before the 1984 overhaul. If the Legislature had intended section 45 not to apply to CESA—i.e., if the Commission in 1980 had listed species the Legislature did not intend CESA to cover—it would have so specified in 1984. Additionally, Petitioners circularly argue that the Court must ignore the Legislature's definition of

[6] The Legislature's occasional repetition when being broad, compared to its clarity when being narrow, in CESA mirrors the judicial "duty to construe [sections of CESA] to effect the Legislature's intent and to promote the resource-conservation purposes and policies of the CESA statutory scheme." *Watershed Enforcers*, 185 Cal. App. 4th at 983.

"fish" because the other terms in section 2062 do not themselves include invertebrates. Pet. Br. at 21. This argument fails for the same reason as the last: Section 45 already applies to CESA's definitions, and the two crustaceans and the mollusk listed under CESA are each themselves invertebrates. RFJN, Exh. D at 2–6 [Cal. Dep't of Fish and Wildlife, *Species Accounts—Invertebrates and Crustaceans* (2005) available at https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=84011].

Petitioners' arguments fail for another reason. The traditional canons of statutory interpretation that Petitioners employ are applicable only in cases where statutory language is actually ambiguous. *Watershed Enforcers*, 185 Cal. App. 4th at 978. But there is nothing ambiguous about the Legislature's definition of "fish" including "invertebrates"—the definition may be unexpected or inconvenient to Petitioners, but it is not ambiguous. It is within the Legislature's purview to define words in ways that expand upon past understandings, and those definitions must be honored. *Foreman*, 126 Cal. App. 4th at 343; *Curly*, 24 Cal. 4th at 1063; *cf.* Cal. Health & Safety Code § 231 (defining "bicycle" to include devices with only one or more than two wheels).

2. "Invertebrates" include insects.

Except for "amphibian," the Code does not define the terms, like "invertebrate," that are included in the definition of "fish." When terms are not defined by the Legislature, it is appropriate to look to dictionaries to elucidate their meaning. *Gutierrez v. Carmax Auto Superstores California*, 19 Cal. App. 5th 1234, 1249 (2018). "Invertebrate" is defined variously as "an animal having no backbone or internal skeleton" (*invertebrate*, Webster's Third), or "[a]n animal without a backbone; any animal not belonging to the chordate subphylum Vertebrata" (*invertebrate*, OED). Insects, including the California Bumble Bees, fit either definition, as animals without any internal skeleton that are outside of the Vertebrata chordate. *Insect*, Webster's Third ("any of numerous small invertebrate animals . . . ."); *Insect*, OED ("a small invertebrate animal . . . ."). Thus, under the ordinary usage of the words in the Fish and Game Code, insects are "invertebrates" and therefore may be listed under CESA. *See* §§ 45, 2062, 2067–2068.

Petitioners assert that section 45 is limited to aquatic or marine invertebrates because part of the Legislature's intent in updating that section was to protect aquatic life. Pet. Br. at 19–20. But such an interpretation conflicts with section 45's plain meaning. Section 45 includes "invertebrates,"

without qualification. Of the animals listed in section 45, only fish themselves are exclusively aquatic. Mollusks, crustaceans, and invertebrates can all be terrestrial. In fact, the Trinity Bristle Snail, the invertebrate mollusk currently protected under CESA, is terrestrial, living its entire life on land. *See* RFJN, Exh. D at 2–3. If the Legislature believed this listing, made in 1980, was incorrect—if it wanted to limit section 45 to aquatic or marine life—it could have done so as recently as 2015, when it last revised the section. 2015 Cal. Stat., c. 154 (AB 1527), § 5 (West). But it did not; instead the Legislature has retained "invertebrates" and "mollusks" in the definition for fifty years without any qualification, and for at least forty years section 45 has applied to a terrestrial animal. This unambiguous, unqualified use of "invertebrates" can only be viewed as including *all* invertebrates under CESA, including insects.

B. CESA's general provisions and the liability provision for unpermitted take further demonstrate that CESA protects insects.

The interpretation of any statutory provision must harmonize the provision with the "statutory purpose, and statutes or statutory sections relating to the same subject." *People v. Valencia*, 3 Cal. 5th 347, 356–57 (2017) (*quoting Dyna-Med, Inc. v. Fair Emp. & Housing Comm'n.*, 43 Cal. 3d 1379, 1387 (1987)). CESA must protect insects, or it would conflict with other provisions of the Fish and Game Code and with its own purpose. First, CESA seeks "to conserve, protect, restore, and enhance *any* endangered species or *any* threatened species and its habitat," because such species "are of ecological, educational, historical, recreational, esthetic, economic, and scientific value to the people of this state." §§ 2051–2052 (emphasis added). Second, the Code establishes civil liability for any person who profits from exploiting "any plants, *insects*, or other species listed pursuant to the California Endangered Species Act." § 2582(a)(2) (emphasis added).

Petitioners argue that the phrase "listed pursuant to [CESA]" in section 2582(a)(2) applies only to "other species," not to plants or insects, because CESA does not apply to insects.[7] Pet. Br.

[7] Petitioners also point out that section 2582 is in a different chapter of the Code from CESA. But all "provisions of [the Fish and Game C]ode, insofar as they are substantially the same as existing statutory provisions relating to the same subject matter, shall be construed as restatements and continuations thereof, and not as new enactments." § 3. Given the identical subject matter and the

at 22. This tautology contradicts section 2582's plain meaning, and it would render the words "plants" and "insects" and "other," and therefore section 2582 itself, meaningless. As Petitioners elsewhere acknowledge, the "rules of statutory construction direct us to avoid, if possible, interpretations that render a part of a statute surplusage." *People v. Cole*, 38 Cal. 4th 964, 980–81 (2006). Thus, the sole proper reading of section 2582 is that the modifier "other" in front of "species" clarifies that "plants" and "insects" are two kinds of "species listed pursuant to [CESA]." *Other*, Webster's Third, (an adjective modifying a noun "being the one (as of two or more) left: not being the one (as of two or more) first mentioned or of primary concern."). If the Legislature had meant "plants" and "insects" to remain separate from "other species listed," as Petitioners argue, then the subdivision would refer to "any plants or insects, or species listed . . ." or "any plants, insects, or species listed pursuant to [CESA]." But, contrarily, section 2582(a)(2) refers to "plants, insects, or other species listed pursuant to [CESA]," reinforcing the fact that insects can be listed under CESA by their specific mention.

Sections 2051 through 2052 and section 2582 make the purpose of CESA clear: To protect all species—animals, plants, *and* insects—because their preservation is of value to the people of California. CESA protects insects precisely because that is the only way for the statute to be consistent with the legislative scheme establishing liability for the exploitation of "any plants, insects, or other species listed pursuant to the California Endangered Species Act," § 2582, and with the purpose of protecting *all* endangered species and their values to Californians, §§ 2051–2052.

C. Even If CESA's definitions could be read not to include insects, then section 2582, a more recent amendment, controls.

Even if Petitioners were correct that CESA's provisions do not protect insects, section 2582, a more recent enactment, amends those provisions to do just that. Where laws directly conflict, more recent law controls by impliedly amending the prior law. *Peatros v. Bank of Am. NT & SA*, 22 Cal.

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fact that section 2582 refers to CESA by name, section 2582 is therefore a restatement or continuation of CESA, not a new law. Moreover, because courts must harmonize provisions with "statutes or statutory sections relating to the same subject," section 2582 is relevant in either case. *Valencia*, 3 Cal. 5th at 356–57 (2017).

4th 147, 167–68; *see also People v. Acosta*, 29 Cal. 4th 105, 140 (2002), *as modified* (Sept. 11, 2002) (Kennard, J., concurring).

CESA's current definitions of "endangered," "threatened," and "candidate species" were enacted in 1984. §§ 2062, 2067–2068. The Legislature added section 2582 to the Code in 1988. 1988 Cal. Stat., c. 1059 (AB 512) § 4 (West). Section 2582(a)(2) imposes civil liability on parties who "[u]nlawfully export, import, transport . . . any plants, insects, or other species listed pursuant to the California Endangered Species Act." As detailed in the last section, the plain reading of this subdivision—and the only reading that gives each word meaning—requires giving meaning to the phrase, "insects . . . listed pursuant to CESA." Thus, if sections 2062–2068 were read to exclude insects, then they would conflict with section 2582, and because section 2582 was added to the Code after CESA, its language impliedly amends CESA to include insects. *Peatros*, 22 Cal. 4th at 167–69.

The California Supreme Court's decision in *Peatros* illustrates such an implied amendment. There, the Court needed to reconcile the National Bank Act, which "grants a national bank the unlimited power to dismiss any of its officers at pleasure by its board of directors," with laws that confer employees "a right against dismissal on the ground of race, color, religion, sex, national origin, or age." *Id.* at 167. Because the Court was "[u]nable to harmonize" these laws, it held that the recent laws had impliedly amended the National Bank Act, such that directors have "a *limited* power to dismiss any of its officers at pleasure by its board of directors, not extending to dismissal on the grounds of race, color, religion, sex, national origin, or age." *Id.* at 168–69. Similarly, here, if CESA were read to exclude insects, it could not be harmonized with section 2582, which explicitly includes insects as eligible for CESA's protection. Because of its recency, section 2582 would therefore have amended CESA, extending its protections to insects. *Id.*

II. The legislative history and canons of statutory construction further demonstrate the Legislature's intent to protect insects under CESA.

Where, as here, the plain language of a statute is unambiguous, the remaining steps of statutory interpretation are unnecessary. *San Bernardino Valley Audubon Society v. City of Moreno Valley*, 44 Cal. App. 4th 593, 601 (1996). But even if CESA's language were ambiguous, it would

still cover insects. CESA's legislative history and the canons of statutory construction demonstrate the Legislature's intent for CESA to cover insects.

A. CESA's legislative history shows that the Legislature intended CESA to apply to insects.

Legislative history aids finding "the interpretation that best effectuates the legislative intent or purpose," where a statute's plain language is ambiguous. *Gutierrez*, 19 Cal. App. 5th at 1250.

Bill summaries that the Department provided to the Legislature demonstrate that the Legislature knew CESA would protect insects when it repassed the law in 1984. *See*, RFJN, Exhs. A–B. Bill summaries are helpful interpretative aids. *Mt. Hawley Ins. v. Lopez*, 215 Cal. App. 4th 1385, 1396 (2013).[8] And bill summaries provided by implementing agencies, like the Department, are especially helpful because they inform the Legislature how that agency will implement the law if passed, giving the Legislature a clear chance to amend the law if necessary. *See Cleveland Nat'l Forest*, 37 Cal. App. 5th at 1047–48, 1060 (examining summaries by the Department of Conservation to illuminate the purpose of Williamson Act amendments and ultimately holding that the agency's interpretation was correct).[9]

In the June Bill Summary of AB 3309, the primary bill that overhauled CESA in 1984, the Department informed the Legislature that CESA already covered invertebrates. In this summary, the Department explained that it understood the 1970 Act "to extend to invertebrates," and that "[i]t was not believed necessary to include the term invertebrate in the original legislation because 'fish' is defined in the Fish and Game Code to include 'invertebrates.'" RFJN, Exh. A at 4. The Department

[8] To clarify, bill summaries *of the statute being interpreted* are useful in cases of ambiguity. Despite Petitioners' insistence, the legislative history of an unpassed bill from 2017 cannot help us discern what the 1984 or 1970 Legislature intended when passing CESA. *See* Pet. Br. at 18.

[9] In addition to elucidating legislative intent, such agency bill summaries give an authoritative look at the relevant agency's contemporary understanding of the law. *See Yamaha*, 19 Cal. 4th at 12–13. The same cannot be said for the unsigned, undated document from the Department's website that Petitioners cite. Pet. Br. at 16. Asserting that this document states the official position of the Department is disingenuous given that it lacks any marker of reliability. *Yamaha*, 19 Cal. 4th at 12–13. The document bears no proof of careful consideration by senior administrators, of being a longstanding position, or of being contemporaneous with the Legislature's enactment; it is not even part of an official administrative action. Moreover, it contradicts the position that the Department made clear in the more reliable, contemporaneous bill summaries.

stated that "three species of invertebrates are currently designated as endangered or rare." *Id.* The Department further noted the confusion created by a 1980 Office of Administrative Law letter disapproving of the protection of four butterfly species.[10] *Id.* By mentioning the Commission's 1980 attempt to list butterflies, the Department informed the Legislature that "invertebrates" included terrestrial insects like butterflies and bumble bees. *Id.*

Once informed by this summary that the Department read AB 3309's language to include insects, the Legislature did not amend that language to explicitly exclude invertebrates or insects, nor did it amend the definition of "fish" to exclude insects. On the contrary, when told by the Department that AB 3309 protected insects, the Legislature then passed AB 3309. The Department's second summary even explains why the Legislature did not add the word "invertebrates" to the definitions of threatened and endangered species after it considered doing so in 1984. RFJN, Exh. B at 3–4. The Department concluded that "sufficient authority currently exists" to conclude that invertebrates are covered, and "that adding the term invertebrates in the legislation would only serve to confuse the matter" because it "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." *Id.* Not adding the term was therefore a way for the Legislature to confirm that, unless otherwise specified, it uses "fish" to include "invertebrates" in CESA and throughout the Code. *Id.*

B. The relevant canons of statutory interpretation require reading CESA to protect insects.

As with legislative history, the canons of statutory construction help reveal legislative intent in the event that a law's language is ambiguous. *See Gutierrez*, 19 Cal. App. 5th at 1250. One important canon states that the Legislature is presumed "aware of all existing statutes," including statutory definitions. *Gutierrez*, 19 Cal. App. 5th at 1253 (citing *People v. Harrison*, 48 Cal. 3d 321, 329 (1989)). The Legislature added the term "invertebrates" to the definition of "fish" in 1969. 1969 Cal. Stats., c. 689 (S.B. 858) (HeinOnline); § 45. Thus, under *Gutierrez*, the Legislatures of 1970 and

[10] Petitioners rely heavily on this letter, which they have not produced. We discuss it further below.

1984 must be presumed aware of the 1969 enactment adding "invertebrates" to the meaning of "fish."

This case is like, and in fact stronger than, *Gutierrez*. There, the Court of Appeal relied on legislative definitions of "fraud" and "deceit" passed in 1872 to interpret the undefined term "deceptive acts" in the Consumer Legal Remedies Act, passed much later, in 1970. In this case, only one year elapsed between the addition of "invertebrates" to section 45 and CESA's original passage. Indeed, because no election passed between 1969 and 1970, the very same legislators who added "invertebrates" to the definition of "fish" in 1969 then included "fish" within CESA's scope in 1970. Both they and the Legislature of 1984, which enacted today's CESA, presumptively knew that section 45's definition of fish included invertebrates, which in turn includes insects, when they included "fish" in CESA's definitions. *See Gutierrez*, 19 Cal. App. 5th at 1253.[11]

III. Petitioners' contrary authorities are not persuasive.

A. The Office of Administrative Law's missing 1980 disapproval is not persuasive.

Petitioners rely on a 1980 Office of Administrative Law ("OAL") disapproval letter. The disapproval, which is not in the administrative record and which Petitioners have not brought before this Court, appears to have prevented the Commission from listing certain butterfly species as endangered and to have suggested that insects cannot be protected under CESA. AR 575. This missing disapproval letter does not hold any weight.

The OAL exists to ensure that California agencies are clear in their regulations, follow proper procedure, and comport with the California Constitution, but the OAL does not have substantive expertise in any particular area. Thus, while its opinions on administrative procedure may be entitled to some deference, the OAL has little to say on substantive issues like whether CESA protects insects. *Compare Leighton v. Old Heidelberg, Ltd.*, 219 Cal. App. 3d 1062, 1071–72 (refusing to afford the OAL's reasoning any weight when it concerned an interpretation of the Labor Code) *with Central Coast Forest Ass'n v. Fish & Game Comm'n*, 18 Cal. App. 5th 1191, 1207 (2018) (giving the

[11] Petitioners attempt to extend the presumption of legislative awareness of existing laws and statutes to administrative decisions, specifically the 1980 Office of Administrative Law disapproval discussed in the next section. Pet. Br. at 17. But Office of Administrative Law disapprovals do not carry the weight of law, and no authority exists for expecting such omniscience of the Legislature.

Commission deference in interpreting CESA due to its technical expertise). Indeed, courts have explained that the OAL's judgement does not substitute for the judgement of an expert agency, here the Commission and the Department. *Trancas Prop. Owners Ass'n v. City of Malibu*, 61 Cal. App. 4th 1058, 1062 (1998).

Further considerations undermine the OAL's 1980 disapproval. There is only one contemporary reference to the disapproval in the record: the report of a law professor about the OAL submitted to the Administrative Conference of the United States ("Report"). The Report itself casts doubt on the OAL's position in three ways. *See* AR 575. First, the Report opines that the OAL was acting to protect "[r]eal estate development interests" that had "fought the inclusion of the butterflies on the endangered species list in the first instance." AR 575. Second, the Report indicates that the "OAL perceives itself as coming into the world to reduce regulation" (the OAL was less than a month old at the time), and that "[t]he standards for review used by OAL, particularly in application, seem markedly different from those used by a court," resulting in a situation where "regulations unlikely to be enjoined—indeed unlikely to be brought to court—are sometimes returned [i.e., disapproved] by OAL." AR 576. Third, the Report mentions how the OAL's position contradicted the opinion of the then-Attorney General, who, the Report states, concluded that insects could be listed under CESA; finally mentioning how the OAL's "determination of authority was not, however, so gracefully and thoroughly explored as it was by the Attorney General or would be by a court." AR 575–77.

Finally, the OAL itself has cast doubt on its 1980 disapproval. Less than three months after issuing that disapproval, the OAL approved the CESA listing of two crustaceans and one mollusk, showing that the OAL itself recognized that CESA applies to animals listed in section 45 through the use of "fish" in sections 2062 and 2067. RFJN, Exh. C at 1–2. Such a quick about-face, on top of the many reasons to doubt the depth of OAL's analysis in an apparently unascertainable document from its first month of existence, renders the 1980 disapproval unpersuasive.

B. The Attorney General's 1998 Opinion is weak and breaks with CESA precedent.

Petitioners next try to use a 1998 opinion by the Attorney General to refute the Legislature's clear intent to cover insects under CESA. Pet. Br. at 15–16; AR 470. Although Attorney General opinions are sometimes entitled to weight, they are not binding. *E.g.*, *Watershed Enforcers*, 185 Cal.

App. 4th at 984 n.11; *Dep't of Alc. Bev. Control v. Alc. Bev. Control Appeals Bd.*, 100 Cal. App. 4th 1066, 1075 (2002); *Mallet v. Superior Court*, 6 Cal. App. 4th 1853, 1869 (1992) ("We are not bound by opinions of the attorney general. Such opinions are advisory only and do not carry the weight of law.") The 1998 Opinion is unpersuasive and contradicts other, more persuasive authorities.

The 1998 Opinion's analysis is split into a background section followed by discussions of four separate legal questions. AR 468–74. The relevant section of the Opinion is less than one page long. AR 470. Most of that space is filled with the unabridged definitions of "endangered," "threatened," and "candidate species." *Id.*; *see* §§ 2062, 2067–2068. The Opinion's sole paragraph of analysis (of whether CESA covers insects) states that the "definitions limit the application of CESA to birds, mammals, fish, amphibians, reptiles, and plants," noting that the dictionary definition of "insects" is not included in any of these categories. AR 470.

This cursory Opinion is unconvincing. First, despite claiming that it means to "'ascertain the intent of the Legislature so as to effectuate the purpose of the law,'" AR 469, the Opinion never mentions CESA's stated purpose of slowing extinction and protecting the value of the State's wildlife, §§ 2051–2052. Second, despite in its background recognizing that "'statutory sections relating to the same subject must be harmonized,'" *id.*, the Opinion does not discuss any provision of the Code outside of sections 2062, 2067, and 2068 (such as section 45's definition of "fish" or section 2582's coverage of "insects listed . . . pursuant to [CESA]."). Third, the Opinion does not review CESA's legislative history, stating only that CESA "has a legislative history dating back to 1970" and noting that the 1970 version did not cover plants. AR 469. Indeed, the Opinion's cursory analysis ignores (and, if correct, would exclude) the three invertebrates already protected by CESA at the time the Opinion was issued.

Finally, the 1998 Opinion does not deserve the weight sometimes accorded to Attorney General opinions. Courts give such opinions less weight when there is case law interpreting the statute at issue, even if not the specific provision. *Dep't of Alc.*, 100 Cal. App. 4th at 1075 & n.2. Here, the 1998 Opinion conflicts with the many cases that mandate a broad interpretation of CESA. *E.g.*, *California Forestry Ass'n*, 156 Cal. App. 4th at 1545; *Watershed Enforcers*, 185 Cal. App. 4th at 983; *San Bernardino Valley*, 44 Cal. App. 4th at 601.

C. California courts have not addressed whether CESA protects insects, and Petitioners' reliance on contrary dicta does not show otherwise.

Petitioners claim that the Court of Appeals opined on the question before this Court in *W. W. Dean & Associates v. City of San Francisco*, a case about the federal Endangered Species Act that mentions CESA a single time. 190 Cal. App. 3d 1368, 1377 (1987). Petitioners are incorrect.

The question in *W. W. Dean & Associates* was whether an amendment to a City's development plan, issued under the federal Endangered Species Act, was subject to referendum. 190 Cal. App. 3d at 1368. The answer to this question turned on which section of the *federal* Endangered Species Act (16 U.S.C. 1535 or 1539) the relevant habitat conservation plan was created under.[12] The court's sole mention of CESA is the sentence Petitioners quote: "Moreover, as appellant itself points out, California's Endangered Species Act (Fish & G. Code, § 2050 et seq.) does not even protect insect species such as the endangered butterflies on San Bruno Mountain." 190 Cal. App. 3d at 1377. This statement was not relevant to the court's interpretation of the federal Endangered Species Act, and is therefore dicta. Unsurprisingly, the court did not apply the rules of statutory interpretation to CESA, did not explore relevant provisions of the Fish and Game Code, and did not even state a reason why CESA did not protect insects.

IV. Case law mandates that CESA be construed broadly in favor of conservation.

The Code may diverge from its general definitions only if "the provisions or context [so] requires." § 2. No provision constricts the reading of sections 2062, 2067, or 2068, and courts have recognized that when construing CESA, the relevant "context" is the conservation of species. *Watershed Enforcers*, 185 Cal. App. 4th at 983. If CESA's definitions are ambiguous, CESA must be construed to cover insects, because CESA is a conservation law "of great remedial and public importance and thus should be construed liberally." *California Forestry Ass'n*, 156 Cal. App. 4th at 1545. This conclusion is plain from comparing this case to two others: *California Forestry*, *id.*, and *Watershed Enforcers*, 185 Cal. App. 4th at 983.

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[12] The court did not, as Petitioners claim, state that "CESA did not authorize incidental take permits"—which CESA already did, 1984 Cal. Stat., c. 1240, § 2. Rather, the court stated that section 1535(c) of the *federal* Endangered Species Act did not authorize incidental take permits. *Id.*

The plaintiffs in *California Forestry* claimed that CESA's use of the terms "species or subspecies" foreclosed the Department's listing of individual "evolutionarily significant units" of salmon. 156 Cal. App. 4th at 1545. In rejecting this argument, the Court of Appeal first noted that "subspecies" could be read either as including or excluding "evolutionarily significant units." *Id.* at 1545–48. The court then credited the Legislature's stated intent to fight species extinction, and held that the inclusion of "evolutionarily significant units" within the definition of "subspecies" was "consistent with the liberal construction we accord 'laws providing for the conservation of natural resources.'" *Id.* (*quoting San Bernardino Valley*, 44 Cal. App. 4th at 601).

Here, Petitioners argue that CESA's use of the terms "bird, mammal, fish, amphibian or plant" forecloses the listing of insects. *See* §§ 2062, 2067–2068. However, under *California Forestry*, even if CESA is ambiguous as to whether it protects insects, reading it to do so is most consistent with a "liberal construction" that effectuates the legislative intent of conserving species. This reasoning is in fact stronger than in *California Forestry*, because any definition of "invertebrate" includes insects, while "subspecies" does not necessarily include "evolutionarily significant units." *Id.* at 1545.

Watershed Enforcers is even more compelling. That case concerned whether section 2080's prohibition against any "person" taking protected species without a permit applied to state agencies. 185 Cal. App. 4th at 975. The general definition of "person" in effect at the time did not expressly include "state agencies," but other sections of CESA applied explicitly to agencies. *Id.* Most importantly, section 2081 enabled the Department to grant permits to "public agencies" to take protected species, implying that such agencies could not take without a permit. *Id.* Faced with these provisions, the court noted its "duty to construe section 2080 to effect the Legislature's intent and to promote the resource-conservation purposes and policies of the CESA statutory scheme," and applied section 2080 to state agencies. *Id.* at 983.

This case is even easier than *Watershed Enforcers*. First, there, section 2081 implied only that state agencies could not take species without a permit; here, section 2582 explicitly applies to "insects . . . listed pursuant to [CESA]." *See* 185 Cal. App. 4th at 980. Second, although section 2080 had no support on its face for including "state agencies," here, recognizing the Legislature's own definitions is all that is required to see that invertebrates are within CESA's scope. §§ 45, 2062,

2067–2068. In *Watershed Enforcers*, the mandate to broadly construe CESA required the court to read "state agencies" into a definition that had no support on its face for doing so. 185 Cal. App. 4th at 980. *A fortiori*, CESA must include insects given that the plain language of an applicable definition includes insects, § 45, and given that another section of the Code describes "insects . . . listed pursuant to [CESA]," § 2582.

V. Interpreting CESA to protect insects will not unreasonably burden the Petitioners or the agricultural industry and serves important public policy goals.

A. Protecting insects under CESA furthers CESA's core policy goals.

If the legislative intent of a statutory provision remains ambiguous after examining both the relevant text and the external indicators of intent, then courts take the third step of interpretation. The third step requires considering "'the consequences that will flow'" from an interpretation, as well as other matters including "'the object in view, the evils to be remedied, the history of the times and of legislation upon the same subject, [and] public policy,'" all with an eye "'to *effectuate the purpose* of the law.'" *Mt. Hawley Ins.*, 215 Cal. App. 4th at 1397 (*quoting Alejo v. Torlakson*, 212 Cal. App. 4th 768, 788 (2013)). If the court determines that it must reach this step to decide this case, these aspects only emphasize that CESA protects insects.

There is no shortage of case law enunciating CESA's public policy goals, its "object," and the "evils" it seeks to remedy. CESA's core purpose is to conserve natural resources, specifically species. *Watershed Enforcers*, at 979; *California Forestry Ass'n*, at 1545; *San Bernardino Valley*, at 601–02 (noting that "the Legislature expressed the objects to be achieved and the evils to be remedied in enacting CESA," and citing sections 2051 and 2052's extirpation of human-caused extinction); *Dep't of Fish & Game v. Anderson-Cottonwood Irr. Dist.*, 8 Cal. App. 4th 1554, 1563–64 (1992); *see* § 2051 ("Certain species . . . have been rendered extinct as a consequence of man's activities, untempered by adequate concern and conservation."); § 2052 ("[I]t is the policy of the state to conserve, protect, restore, and enhance any endangered species.").

Excluding insects from CESA works directly against these clear policy goals. Insects form the bedrock of most California ecosystems and provide many services and values to Californians. AR 6, AR 23–24, AR 254, AR 936–37. Protecting pollinators will make it easier to preserve other

species. Contrarily, if insect abundance and diversity continues to decline, more and more ecosystems will become unstable or collapse, harming the ecosystem services that we all rely on and increasing the likelihood that other non-insect species that rely on these ecosystems will go extinct. AR 290, AR 936–37. The California Bumble Bees are themselves especially effective agricultural pollinators, and their continued decline would likely harm both wild and cultivated plants in the long-term. *See id.*; AR 23–24.

Given that CESA protects the "ecological, educational, historical, recreational, esthetic, economic, and scientific value" of "fish, wildlife, and plants," it would be absurd to read CESA as being unable to protect imperiled insects and to prevent the probable chain reaction of extinctions that would result from further insect decline. For nearly thirty years, California courts have deemed similar interpretations of CESA—ones that would restrict its applicability on pedantic lines—to be untenable. *See Anderson-Cottonwood Irr. Dist.*, 8 Cal. App. 4th at 1563–64 (holding that "the purpose of [CESA] is to protect natural resources," and that "[i]t is inconceivable that [the] statutory scheme [of CESA] . . . should be construed to allow the wholesale killing of endangered species simply because the mode of death does not involve hunting or fishing").

B. Protecting the California Bumble Bees will not unreasonably burden agriculture.

Petitioners claim that protecting insects like the California Bumble Bees through CESA will bring agriculture to a grinding halt, with grazing restricted, pesticides unapplied, and farmland untilled. Pet. Br. at 10. We can expect this parade of horribles, we are told, because Petitioners' members own land in the "vicinity of" the historical range of *one* the California Bumble Bees. Pet. Br., Decl. of Jim Houston ¶ 6 (hereinafter "Houston Decl."); Pet. Br., Decl. of Elaine Trevino ¶ 7 (hereinafter "Trevino Decl."). According to Petitioners, "farming activities where the Bumble Bees are present must be avoided" if the California Bumble Bees are protected. Houston Decl. ¶ 9. These flimsy allegations do not withstand scrutiny because agricultural operations already enjoy significant exemptions under CESA.

The Legislature has already decided how to balance the public policy goals of promoting agriculture and conserving species through a two-part agricultural exemption to CESA's take prohibition, which Petitioners fail to mention in their opening brief. §§ 2086–2089. Under CESA,

agricultural operations are not punished for accidental takes resulting from routine activities. § 2087. This exemption does not apply to new land conversions, *id.*, or to take of "fish species," § 2088. "Fish species" does not mean "fish," however (see above), so the agricultural exemption applies to insects. *Id.* The agricultural exemption will therefore protect Petitioners' members from liability for accidental takes during their routine operations. And if Petitioners' members are still worried about liability, the exemption's second part provides yet more protection: Farmers can enter a voluntary program under section 2086 that protects them from liability for even knowing take that is incidental to their operations. § 2086(a)–(c).

The balance that the Legislature has struck through CESA's agricultural exemption makes sense given the importance of wild pollinators, which are mostly insects, to the continued health of California's ecosystems, and its agriculture. AR 5–6; AR 23–24; AR 254; Delfino Decl. ¶¶ 8–10, 22–23; Jepsen Decl. ¶¶ 14–15. This balance allows agriculture to continue under much lighter regulation than other industries, but still encourages innovation in agricultural techniques to prevent the destruction of endangered species. As a result, the incentives to generate short-term agricultural profits will not undermine the long-term viability of agriculture in California, which depends on healthy ecosystems and wild pollinators.

Petitioners care a great deal about the annual importation of domesticated honey bees, ignoring that they pollinate fewer plants than native bumble bees and threaten both native pollinators and "the plants that need pollination." AR 936, AR 981. Many farmers and other California residents rely solely on native, wild pollinators like the California Bumble Bees to pollinate their crops free of charge. *See* Spector Decl. ¶ 20–21. Farmers are increasingly recognizing the importance of native pollinators by dedicating their land to restoring these insects' habitats. AR 285; Jepsen Decl. ¶ 13. All farmers, Petitioners' members included, need CESA to work as intended—to protect the native species of California, the values these species present, and, ultimately, their livelihoods.

CONCLUSION

Bees are insects, and insects are invertebrates. The Legislature has decided that the word "fish," as used in CESA, includes "invertebrates." Therefore, CESA applies to invertebrates, and

therefore to the California Bumble Bees. This reading is commanded by the plain language of all applicable sections of CESA and the Fish and Game Code, is consistent with CESA's legislative history, and brings effect to the Legislature's intent (and the courts' mandate) that CESA be construed broadly to protect all vulnerable wildlife in California. The Fish and Game Commission's decision to designate the California Bumble Bees as candidate species under CESA is lawful and must be upheld.

DATED: September 24, 2020

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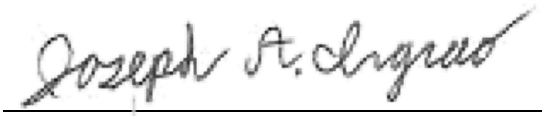
By: 

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