

Case No. C093542

**IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT**

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,

Plaintiffs and Respondents,

v.

California Fish and Game Commission and California Department of Fish and Wildlife,

Defendants and Appellants,

Xerces Society for Invertebrate Conservation, Defenders of Wildlife, and Center for Food Safety,

Intervenors and Appellants.

Intervenor-Appellants' Reply Brief

On Appeal from the Superior Court for the State of California,
County of Sacramento, Case No. 34-2019-80003216
Hon. James Arguelles

ENVIRONMENTAL LAW CLINIC
Mills Legal Clinic at Stanford Law School
Deborah A. Sivas (CA Bar No. 135446)
*Matthew J. Sanders (CA Bar No. 222757)
Stephanie L. Safdi (CA Bar No. 310517)
Samuel B. Joyce (CA Bar Student Cert. No. 716985)
Caroline T. Zhang (CA Bar Student Cert. No. 716941)
matthewjsanders@stanford.edu
559 Nathan Abbott Way
Stanford, California 94305-8610
Telephone: (650) 725.8371
Facsimile: (650) 723.4426

TABLE OF CONTENTS

INTRODUCTION9

ARGUMENT 12

I. By its plain text, CESA protects insects..... 12

 A. The Legislature created an unambiguous statutory definition that protects invertebrates, including the California bumble bees, under CESA. 12

 B. The Almond Alliance’s contrary statutory construction arguments lack merit..... 16

 1. The canon against surplusage cannot defeat the Code’s words. 17

 2. If the Court were to adopt a strict reading of the canon against surplusage, then Section 2582 of the Code indicates that CESA protects insects..... 20

 3. The Almond Alliance misapplies the canon of *noscitur a sociis*. 23

 4. The Almond Alliance’s “absurd results” argument presents a false target. 25

 5. The Almond Alliance recites inapplicable legislative history to interpret Section 45. 27

II. The Legislature intended CESA to protect invertebrates. 28

 A. Legislative history confirms that the 1984 CESA amendments continued to protect invertebrates. 29

 B. Later ambiguous statements by legislators and an agency official are not probative of the Legislature’s intent in 1984. 37

C.	The Almond Alliance relies on documents with no bearing on legislative intent to argue that CESA covers only “aquatic” invertebrates.	42
III.	The Almond Alliance’s remaining authorities are not persuasive.	45
A.	The missing 1980 OAL decision and the 1998 Attorney General’s opinion cannot bear the weight the Almond Alliance places on them.	45
B.	The Department’s regulation allowing the take of insects is not relevant to whether CESA protects insects.	52
C.	Dicta in a Court of Appeals opinion and interpretations of state law by federal agencies are not relevant in interpreting CESA.	54
IV.	CESA’s general statutory purpose requires interpreting CESA to protect insects.	56
	CONCLUSION.....	60
	CERTIFICATE OF WORD COUNT.....	62
	PROOF OF SERVICE	63

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Ali v. Fed. Bureau of Prisons</i> , 552 U.S. 214 (2008).....	19
<i>Am. Fed'n of Gov't Emps. v. Fed. Lab. Rels. Auth.</i> , 204 F.3d 1272 (9th Cir. 2000).....	55-56
<i>Cal. Chamber of Com. v. State Air Res. Bd.</i> , 10 Cal. App. 5th 604 (3d Dist. 2017)	35 n.6
<i>Cal. Forestry Ass'n v. Cal. Fish & Game Comm'n</i> , 156 Cal. App. 4th 1535 (3d Dist. 2017).....	10, 25-26, 56, 58
<i>Cal. Sch. Bds. Ass'n v. State Bd. of Educ.</i> , 186 Cal. App. 4th 1298 (2010), <i>as modified on</i> <i>denial of reh'g</i> (Aug. 24, 2010).....	47
<i>Carter v. Cal. Dep't of Veterans Affs.</i> , 38 Cal. 4th 914 (2006)	35
<i>Cent. Coast Forest Ass'n v. Fish & Game Comm'n</i> , 18 Cal. App. 5th 1191 (2018)	44
<i>Day v. City of Fontana</i> , 25 Cal. 4th 268 (2001).....	12
<i>Delta Stewardship Council Cases</i> , 48 Cal. App. 5th 1014 (3d Dist. 2020)	12
<i>Doe v. Albany Unified School Dist.</i> , 190 Cal. App. 4th 668 (3d Dist. 2010).....	12, 13, 28
<i>Gerawan Farming, Inc. v. Agric. Lab. Rels. Bd.</i> , 3 Cal. 5th 1118 (2017).....	34
<i>Grier v. Kizer</i> , 219 Cal. App. 3d 422 (1990)	46, 49

<i>Joyce v. Ford Motor Co.</i> , 198 Cal. App. 4th 1478 (3d Dist. 2011).....	41
<i>Kaufman & Broad Cmtys., Inc. v. Performance Plastering, Inc.</i> , 133 Cal. App. 4th 26 (3d Dist. 2005).....	38, 43, 45
<i>Kim v. Reins Int’l Cal., Inc.</i> , 9 Cal. 5th 73 (2020).....	15
<i>Martin v. Szeto</i> , 32 Cal. 4th 445 (2004).....	39
<i>McLean v. State</i> , 1 Cal. 5th 615 (2016).....	19
<i>Peatros v. Bank of Am.</i> , 22 Cal. 4th 147 (2000).....	22
<i>People v. Colbert</i> , 6 Cal. 5th 596 (2019).....	11, 15
<i>People v. Cole</i> , 38 Cal. 4th 964 (2006).....	12, 13, 20
<i>People v. Cruz</i> , 13 Cal. 4th 764 (1996)	19
<i>People v. Gonzales</i> , 2 Cal. 5th 858 (2017).....	15
<i>People v. Statum</i> , 28 Cal. 4th 682 (2002).....	16
<i>People v. Superior Ct.</i> , 3 Cal. 5th 230 (2017).....	36
<i>People v. Valencia</i> , 3 Cal. 5th 347 (2017).....	19, 21
<i>Ruiz v. Podolsky</i> , 50 Cal. 4th 838 (2010).....	15

<i>Samantha C. v. State Dep’t of Developmental Servs.,</i> 185 Cal. App. 4th 1462 (2010).....	35 n.6
<i>Sanchez v. Unemployment Ins. Appeals Bd.,</i> 20 Cal. 3d 55 (1977)	49-50
<i>Siskiyou Cnty. Farm Bureau v. Dep’t of Fish & Wildlife,</i> 237 Cal. App. 4th 411 (3d Dist. 2015).....	27-28
<i>Skidgel v. Cal. Unemployment Ins. Appeals Bd.,</i> 12 Cal. 5th 1 (2021).....	18-19
<i>State Bldg. & Constr. Trades Council of Cal. v. Duncan,</i> 162 Cal. App. 4th 289 (2008), <i>as modified on denial of reh’g</i> (May 16, 2008).....	53
<i>Tidewater Marine W., Inc. v. Bradshaw,</i> 14 Cal. 4th 557 (1996).....	46
<i>United States v. Phelps Dodge Corp.,</i> 391 F. Supp. 1181 (D. Ariz. 1975)	9-10
<i>W. Landscape Constr. v. Bank of Am.,</i> 58 Cal. App. 4th 57 (1997).....	54-55
<i>W. W. Dean & Associates v. City of South San Francisco,</i> 190 Cal. App. 3d 1368 (1987)	54
<i>Watershed Enforcers v. Dep’t of Water Res.,</i> 185 Cal. App. 4th 969 (2010).....	10, 56, 58
<i>Wilson v. Handley,</i> 97 Cal. App. 4th 1301 (3d Dist. 2002).....	13
<i>Yamaha Corp. of Am. v. State Bd. of Equalization,</i> 19 Cal. 4th 1 (1998).....	44

Statutes

42 U.S.C. § 6903(27)9

Cal. Fish & Game Code:

 § 2 13-14, 26

 § 3 22

 § 22 13

 § 45 13, 15-16, 24-25, 31

 § 519

 § 54 13

 § 700 27 n.2

 § 1583 18

 § 2052 56, 57, 59

 § 2062 14

 § 2067 14

 § 2068 14

 § 2070 52

 § 2582 20

 § 8034..... 26-27

 § 8598.2..... 26

Cal. Harbors & Navigation Code § 229

Cal. Insurance Code § 103.....9

Other Authorities

14 Cal. Code Regs. § 783.1 (1998) 52

1969 Cal. Stat., c. 689, § 1 31, 42

1970 Cal. Stat., c. 1510, § 3 31

1984 Cal. Stat. c. 1162 33

 § 6 29

Invertebrate, Oxford English Dictionary (3d ed. 2010) 43

INTRODUCTION

Legislatures, including the California Legislature, often define terms in ways that deviate—occasionally radically—from colloquial usage. For example:

- “*Marine* insurance includes insurance against any and all kinds of loss of or damage . . . in connection with any and all risks or perils of navigation, transit, or transportation . . . *on land or in the air.*” Cal. Ins. Code § 103.
- “‘Kelp’ means kelp or *other marine aquatic plants* and the seeds thereof.” Cal. Fish & Game Code § 51.
- “‘Steam vessel’ means *any vessel which is propelled by machinery.*” Cal. Harb. & Nav. Code § 22.
- “The term ‘*solid waste*’ means any garbage, refuse . . . and other discarded material, *including solid, liquid, semisolid, or contained gaseous material.*” 42 U.S.C. § 6903(27).

(Emphasis added.)

Furthermore, when confronted with expansive statutory definitions, courts apply definitions as necessary to fulfill the purpose of the statute. *See, e.g., United States v. Phelps Dodge Corp.*, 391 F. Supp. 1181, 1187 (D. Ariz. 1975) (defining

“navigable waters” to include “normally dry arroyos” under the Clean Water Act). The California Endangered Species Act (“CESA”), Cal. Fish & Game Code § 2050 *et seq.*, is no exception: This Court has defined the term “subspecies” in CESA to include different populations of the same subspecies, while another California appellate court has defined “person” in CESA to include public agencies. *Cal. Forestry Ass’n v. Cal. Fish & Game Comm’n*, 156 Cal. App. 4th 1535, 1547 (3d Dist. 2017); *Watershed Enforcers v. Dep’t of Water Res.*, 185 Cal. App. 4th 969, 983 (2010).

In their opposition brief, Respondents Almond Alliance of California, et al. (“Almond Alliance”) characterize as “bizarre” the argument advanced by Appellants California Fish and Game Commission (“the Commission”), California Department of Fish and Wildlife (“the Department”), and Intervenor-Appellants Xerces Society for Invertebrate Conservation, et al. (“the Coalition”). Combined Respondents’ Brief in Response to Appellants’ and Intervenor-Appellants’ Opening Briefs (“Opp. Brief”) at 12. While it may be “bizarre” to say that dry arroyos are “navigable waters” or to declare a liquid “solid waste,” these are the statutory definitions. When the Legislature creates a

definition, “it is the statutory definition, not the colloquial understanding, that must control.” *People v. Colbert*, 6 Cal. 5th 596, 604 (2019).

At its core, this case presents a question of statutory interpretation. Section 45 of the Fish and Game Code defines “fish” to include “invertebrates.” The Code states that its definitions govern the entire Code. Three sections of the Code define the protections of CESA to extend to “fish.” Because CESA protects “fish,” CESA protects invertebrates, including the Crotch’s, Franklin’s, Suckley cuckoo, and western bumble bees (the “California bumble bees”).

None of the arguments the Almond Alliance musters calls into question this unambiguous reading of the statutory text. The Almond Alliance resorts to an incomplete and misleading portrayal of the legislative history, ignoring key documents showing the Legislature intended CESA to protect invertebrates. The Alliance further relies on a handful of cursory or irrelevant sources to justify its interpretation of CESA, none of which is entitled to substantial weight in this Court. Neither of these arguments can overcome CESA’s plain language, particularly

when the Almond Alliance’s interpretation would impermissibly serve to undermine CESA’s core purpose.

Accordingly, this Court should reverse the trial court and affirm the California Fish and Game Commission’s legal authority to list the California bumble bees under CESA.

ARGUMENT

I. By its plain text, CESA protects invertebrates.

A. The Legislature created an unambiguous statutory definition that protects invertebrates, including the California bumble bees, under CESA.

“A fundamental rule of statutory construction is that a court should ascertain the intent of the Legislature so as to effectuate the purpose of the law.” *Delta Stewardship Council Cases*, 48 Cal. App. 5th 1014, 1065 (3d Dist. 2020) (citations omitted). Ascertaining the Legislature’s intent must always begin with “the words of the statute,” *Doe v. Albany Unified School Dist.*, 190 Cal. App. 4th 668, 675 (3d Dist. 2010), considered “in the context of the statutory framework as a whole,” *People v. Cole*, 38 Cal. 4th 964, 975 (2006). “If there is no ambiguity, then we presume the lawmakers meant what they said.” *Day v. City of Fontana*, 25 Cal. 4th 268, 272 (2001).

The Almond Alliance opens its argument with a wide-ranging but intentionally selective discussion of various documents, including everything from a decision of the Office of Administrative Law issued in 1980 to a Senate bill proffered as recently as 2017. In doing so, the Almond Alliance ignores the well-established process of statutory interpretation. Courts may “resort to extrinsic sources,” such as legislative history, only if “the statutory terms are ambiguous.” *Wilson v. Handley*, 97 Cal. App. 4th 1301, 1306 (3d Dist. 2002). The court must begin with the text, “look[ing] to the entire substance of the statutes in order to determine their scope and purposes.” *Cole*, 38 Cal. 4th at 975. If the text is unambiguous, the court “need go no further.” *Doe*, 190 Cal. App. 4th at 676.

The statute in this case is unambiguous. The Fish and Game Code begins with a series of definitions, including “bird,” “fish,” and “mammal.” §§ 22, 45, 54.¹ These definitions, “[u]nless the provisions or the context otherwise requires, . . . govern the construction of this code and all regulations adopted under this

¹ All section citations are to the California Fish and Game Code (“the Code”) unless otherwise specified.

code.” § 2. Sections 2062, 2067, and 2068 of the Code, parts of CESA, protect “native species or subspecies of a bird, mammal, fish, amphibian, reptile, or plant.” §§ 2062, 2067-2068. CESA does not define these terms, and nothing about CESA’s context requires a different definition . Instead, CESA relies on the Code’s definitions.

Section 45 defines “fish” to mean “wild fish, mollusk, crustacean, invertebrate, amphibian, or part, spawn, or ovum of any of those animals.” § 45. Section 45 does not include the word “marine,” “aquatic,” or any other qualifier. The California bumble bees, like all insects, are invertebrates. As a result, the California bumble bees fall within Section 45’s definition of “fish.” CESA protects “fish” and thus protects invertebrates, including the California bumble bees.

The Almond Alliance is plainly uncomfortable with this result, calling it “fallacious” and “bizarre.” Opp. Brief at 11-12. Again, it is unusual to think about defining bees as “fish.” But, as the California Supreme Court has repeatedly emphasized, statutory definitions cannot be ignored merely because they deviate from colloquial use.

In fact, the Supreme Court has established two guiding principles for interpreting and applying statutory definitions. The first is that, when the Legislature provides a definition that “clearly deviates in certain respects from the colloquial understanding of the term . . . it is the statutory definition, not the colloquial understanding, that must control.” *Colbert*, 6 Cal. 5th at 604; *see also Kim v. Reins Int’l Cal., Inc.*, 9 Cal. 5th 73, 84 (2020) (“When a statute prescribes the meaning to be given to particular terms used by it, that meaning is generally binding on the courts.”). The second principle is that, “when the Legislature uses a term of art, a court construing that use must assume that the Legislature was aware of the ramifications of its choice of language.” *Ruiz v. Podolsky*, 50 Cal. 4th 838, 850 n.3 (2010).

Here, the Legislature created a statutory definition of the term “fish.” § 45. “In doing so, [the statute] creates a term of art, which must be understood as it is defined, not in its colloquial sense.” *People v. Gonzales*, 2 Cal. 5th 858, 871 (2017). The Legislature’s definition deviates from the colloquial understanding of fish, including mollusks, crustaceans, invertebrates, and amphibians, while excluding farm-raised fish. § 45. Under the Supreme Court’s controlling precedent, it is the

Legislature’s definition that must govern this Court’s understanding of the term. And the Legislature must be assumed to have been aware of the consequences when it used this term elsewhere in the Code. The language of the statutory definition is unambiguous, and applying this definition to CESA produces an unambiguous conclusion: The California bumble bees, as invertebrates, are eligible for protection under CESA.

B. The Almond Alliance’s contrary statutory construction arguments lack merit.

Only the Code’s unambiguous statutory language is required to resolve this case. “When the statutory language is clear and unambiguous, there is no need for construction and courts should not indulge in it.” *People v. Statum*, 28 Cal. 4th 682, 689-90 (2002).

Nevertheless, the Almond Alliance makes five scattershot attempts to undermine the straightforward reading of the statute. First, it argues that the canon against surplusage “compels” this Court to hold that CESA does not protect invertebrates. Second, the Almond Alliance then backpedals and attempts to explain how this canon applies to CESA, but does *not* apply to Section 2582 of the Code, which confirms that CESA

protects insects. Third, the Almond Alliance invokes the canon of *noscitur a sociis* (“it is known from its associates”), but in one instance ignores an associated term and, in another, invents a category of “traditionally aquatic” organisms. Fourth, the Almond Alliance catalogues unrelated provisions of the Code where applying the Section 45 definition of “fish” would be inappropriate. Finally, the Almond Alliance includes yet another argument about legislative history in its discussion of statutory interpretation. All five arguments fail.

1. The canon against surplusage cannot defeat the Code’s words.

The first of the Almond Alliance’s five arguments misrepresents the Commission’s and the Coalition’s arguments, claiming we argue that Section 45’s definition of “fish” must be applied “whenever the word ‘fish’ is used in a section of the Fish and Game Code.” Opp. Brief at 27. The Almond Alliance then observes that applying the definition everywhere would create surplusage in a handful of random sections of the Code. Opp. Brief at 27-28. But the Almond Alliance fails to—and cannot—cite to any point in any briefing to support this characterization. The Coalition does not argue that Section 45’s definition of “fish”

must be applied to *every* instance of the term “fish” throughout the Code; indeed, the Coalition explicitly notes that Section 2 allows for flexibility when context requires. Intervenor-Appellants’ Opening Brief (“Coalition Opening Brief”) at 42. The sole question in this case is whether Section 45’s definition of “fish” applies in three specific sections of the Code: 2062, 2067, and 2068. Whether applying the definition to, say, Section 1583 (concerning unlawful entry into ecological reserves) would create surplusage is irrelevant.

The Almond Alliance next employs the canon to point out that “amphibians” are listed separately from “fish” in Sections 2062, 2067, and 2068. Opp. Brief 28-29. If the Section 45 definition of fish applied, the Alliance argues, it would render the separate listing of “amphibian” superfluous.

The Almond Alliance fails to correctly apply recent guidance from the California Supreme Court on the canon’s function. The Almond Alliance claims that “[t]he rules of statutory construction compel” this Court to adopt its interpretation of CESA. Opp. Brief at 29. But the canon of surplusage cannot *compel* outcomes—it, like all interpretive canons, “is [merely] a guide to statutory interpretation and is not

invariably controlling.” *Skidgel v. Cal. Unemp. Ins. Appeals Bd.*, 12 Cal. 5th 1, 21 (2021) (alteration in original) (quoting *People v. Valencia*, 3 Cal. 5th 347, 381 (2017) (Krueger, J., concurring)). The canon cannot be wielded “to defeat legislative intent’ as gleaned from available sources, including the rest of the words in the statute, related statutes, the legislative history and the wider historical circumstances of the enactment.” *Id.* (quoting *People v. Cruz*, 13 Cal. 4th 764, 782, 783 (1996)).

In Sections 2062, 2067 and 2068, the Legislature “may simply have intended to remove any doubt” that amphibians are covered by CESA. *McLean v. State*, 1 Cal. 5th 615, 624 (2016) (declining to apply the canon against surplusage). Legislative drafters may include “technically unnecessary examples . . . out of an abundance of caution.” *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 226 (2008). For example, Section 45 itself contains surplusage: It lists mollusks, crustaceans, and invertebrates, even though mollusks (like snails) and crustaceans (like pill bugs) are invertebrates. The canon against surplusage cannot be wielded to defeat the plain meaning of a statute, and it does not “compel” this Court to adopt a contrived reading solely to avoid

surplusage, particularly when Section 2 of the Code exists to avoid unintended results.

2. If the Court were to adopt a strict reading of the canon against surplusage, then Section 2582 of the Code indicates that CESA protects insects.

Besides the unambiguous text of CESA itself, Section 2582 confirms that CESA protects insects. In 1988, the Legislature created civil liability for the export, sale, etc. of “any plants, insects, or other species listed pursuant to [CESA].” § 2582(a)(2). This language explicitly confirms that insects may be protected under CESA: The modifier “other” clarifies that “plants” and “insects” are two classes of wildlife that may be “listed pursuant to [CESA].” Put another way, the statute explicitly protects “plants . . . listed pursuant to [CESA],” “insects . . . listed pursuant to [CESA],” and “other species listed pursuant to [CESA].” § 2582(a)(2).

As the Almond Alliance itself emphasizes, “[t]he rules of statutory construction direct us to avoid, if possible, interpretations that render a part of a statute surplusage.” Opp. Brief at 28 (quoting *People v. Cole*, 38 Cal. 4th 964, 980-81 (2006)). If insects cannot be “species listed pursuant to [CESA],”

then “other” serves no grammatical function in Section 2582; as a result, the only interpretation that complies with the canon against surplusage is that insects may be listed under CESA. Although the canon against surplusage (discussed in Part I.B.1 above) is “not invariably controlling,” if the Court were to apply it in this case, it bolsters the plain reading of the statute by further confirming that the Legislature intended to protect insects under CESA. *Valencia*, 3 Cal. 5th at 381.

The Almond Alliance suggests that Section 2582’s language may refer to other provisions of the Code, Opp. Brief at 40, but the section does not refer to “other species protected under the Fish & Game Code.” Instead, it refers specifically to “other species listed pursuant to [CESA].” This language can refer only to wildlife that may be protected under CESA, not under Section 1002 or some other provision of the Code.

The Almond Alliance also argues that Section 2582 is irrelevant because Section 2582 and Sections 2062, 2067 and 2068 are “each a part of two distinct statutes codified in different divisions of the Fish and Game Code.” Opp. Brief at 38. The Almond Alliance is incorrect. Sections 2582, 2062, 2067 and 2068 are all codified in Division 3 of the Code. Further, the Code

instructs that provisions like Section 2582 are “construed as restatements and continuations” of CESA, not as new enactments, because they “relat[e] to the same subject matter” in the Code. § 3.

The Almond Alliance also fails to address Section 2582’s function as an implied amendment. When two laws directly conflict and cannot be harmonized, courts consider the later statute to have amended the earlier one. *Peatros v. Bank of Am.*, 22 Cal. 4th 147, 167-68 (2000). If this Court concludes that CESA’s listing provisions exclude insects, then there is a direct conflict with Section 2582. As Section 2582 was passed four years after CESA, it must, in that case, be considered to have amended CESA.

The Almond Alliance claims we argue that Section 2582 *expressly* amended CESA. Opp. Brief at 42. The Coalition has made no such claim and argues only that Section 2582 is an “implied amendment of CESA.” Coalition Opening Brief at 50. The Almond Alliance further asserts that Section 2582 and CESA cannot directly conflict because protections for insects exist elsewhere in the Code. Opp. Brief at 42. But Section 2582 does not refer generally to all species protected under the Code; as

discussed above, Section 2582 refers only to “species listed pursuant to [CESA].”

3. The Almond Alliance misapplies the canon of *noscitur a sociis*.

For its third argument, the Almond Alliance twice invokes the canon of *noscitur a sociis* (“it is known from its associates”), first arguing that applying Section 45’s definition of “fish” to CESA would render “fish” “markedly dissimilar” from the other types of listed wildlife. Opp. Brief at 29. If one ignores the inclusion of plants on the list, they say, the other listed categories are all vertebrates, and invertebrates are not vertebrates. Opp. Brief at 29-30.

The Almond Alliance cannot—and does not attempt to—argue that invertebrates are “markedly dissimilar” from a list that includes both plants and wildlife. Recognizing this flaw, the Almond Alliance chooses not to address the inclusion of plants at all, proclaiming that “the only animals that may be listed under CESA are birds, mammals, fish, amphibians, and reptiles.” Opp. Brief at 29. But the Almond Alliance cannot freely re-write the statutory list because some items might complicate its argument. The Legislature broadly applied CESA’s protections to everything

from complex mammals to simple plants; there is no reason to think that these categories exist to exclude invertebrates.

Moreover, the Almond Alliance's contention that only vertebrates may be listed under CESA contradicts even the trial court's decision. The trial court did not question the Commission's authority to list "invertebrates connected to a marine habitat," acknowledging that at least some invertebrates are included within the term "fish." Appendix of Intervenor-Appellants Xerces Society for Invertebrate Conservation, et al. ("App."), at 483. When convenient, the Almond Alliance likewise limits its arguments to "terrestrial invertebrates" or "terrestrial insects" throughout its own brief, implicitly acknowledging that aquatic invertebrates may be listed as "fish" under CESA. *See, e.g.*, Opp. Brief at 9, 37, 43. There can be no question that the term "fish" includes *some* invertebrates, and, for the reasons we proffer, all invertebrates.

Separately, the Almond Alliance argues that Section 45 excludes terrestrial invertebrates because the statute lists only "traditional aquatic organisms." Opp. Brief at 34. But again, the Almond Alliance cannot rewrite the statute. Section 45 lists "wild fish, mollusks, crustaceans, invertebrates, and

amphibians.” § 45. Wild fish are the only “traditionally aquatic” group of animals listed; *Mollusca*, *Crustacea*, and *Amphibia* each contain hundreds of species that live in terrestrial environments. The Trinity bristle snail (a CESA-listed threatened species), the common pill bug, and the desert slender salamander (a CESA-listed endangered species) are all terrestrial species that fall into these categories, respectively. See Appellants’ Opening Brief at 23-24. Both the Almond Alliance and the trial court ignore the diversity of organisms in these groups when they invoke the artificial categories of “traditional aquatic organisms” or species “connected to a marine habitat.” Opp. Brief at 34; App. 483.

4. The Almond Alliance’s “absurd results” argument presents a false target.

The Almond Alliance devotes four pages to exploring every possible absurdity that would result from reading “fish” to include invertebrates in obscure provisions of the Fish and Game Code. This argument masks the central question in this case: whether Section 45’s definition of “fish” applies to Sections 2062, 2067, and 2068.

This Court has already answered that question in the affirmative. In *California Forestry*, this Court concluded that

Section 45's definition of "fish" applied to CESA and covered "wild fish," not hatchery fish. *Cal. Forestry*, 156 Cal. App. 4th at 1552. In so doing, the Court accepted that the definitions in the Code do not apply if "the provisions or context otherwise requires." § 2. Nothing about the context of CESA "requires" that an alternative definition of "fish" apply with respect to endangered species, and no absurd results flow from applying the Section 45 definition to *CESA*.

The Almond Alliance cannot defeat what is a contextually appropriate application of "fish" by pointing to a handful of random and unrelated applications that are not. Section 2 of the Code establishes a general rule: The Section 45 definition applies to all instances of the word "fish," save certain sections that may require applying another definition. The "plainly absurd" results that the Almond Alliance has identified plainly fall within that exception. Opp. Brief at 35. Fortunately, Section 2 explicitly affords agencies and courts the flexibility to avoid these absurd results if the context "otherwise require[s]." § 2. Should this Court ever be tasked with determining the proper definition of "fish" in the context of Section 8598.2 (prohibited methods of taking organisms for the marine aquaria industry), Section

8034(a) (commercial fish processor licensing), or any of the other sections that the Almond Alliance has dredged up, it may consider alternative definitions. But those sections are not at issue in this case; only sections 2062, 2067, and 2068 are.

5. The Almond Alliance recites inapplicable legislative history to interpret Section 45.

Finally, after its brief detour into the statutory text, the Almond Alliance concludes its discussion of “The Rules of Statutory Interpretation” not with the words of the statute, but with further discussion of legislative history. Pointing to enrolled bill reports from the Departments of Fish and Wildlife² and Finance, as well as a letter from a legislator to Governor Reagan, the Almond Alliance argues that the Legislature did not intend for the word “invertebrates” in Section 45 to include terrestrial invertebrates. Opp. Brief 30-31. As this Court recently emphasized, however, “statutory language is *the* measure of its meaning, and not some progenitor, be it the author of a precursor bill, or detritus from the legislative process.” *Siskiyou Cnty.*

² The Legislature renamed the Department of Fish and Game as the Department of Fish and Wildlife in 2013. § 700. Older documents refer to the Department as the Department of Fish and Game, but for the sake of consistency, in this brief we refer to it as the Department of Fish and Wildlife.

Farm Bureau v. Dep't of Fish & Wildlife, 237 Cal. App. 4th 411, 432 (3d Dist. 2015). The Almond Alliance cannot rely on this “detritus” to ignore the clear language of the statute itself and read in a word that does not exist. As the Almond Alliance’s argument is focused *entirely* on legislative history and not the statutory language, it is accordingly dealt with in Part II.C *infra*.

The plain text of the Code is clear: CESA protects “invertebrates,” including the California bumble bees.

II. The Legislature intended CESA to protect invertebrates.

Because CESA’s language is clear, the Court need not consult the legislative history and other extrinsic sources upon which the Almond Alliance stakes its case. *Doe*, 190 Cal. App. 4th at 675-76. But even if these sources are relevant, they confirm that the Legislature intended CESA to protect invertebrates.

As we discuss below, although there may have been occasional ambiguity about CESA’s scope over the course of the statute’s 50-year history, the legislative and executive branches have generally understood that CESA protects invertebrates and has always done so. The Almond Alliance pastes together a

handful of cherry-picked statements to construct an alternative, slipshod version of CESA’s legislative history.

A. Legislative history confirms that the 1984 CESA amendments continued to protect invertebrates.

In 1984, the Legislature enacted Assembly Bill (“AB”) 3309, amending CESA to increase protections for native wildlife. App. 431-32. In the course of making these amendments, the Legislature revised the bill several times. Although earlier versions explicitly added “invertebrates” to CESA’s definitions of endangered and threatened species, later versions deleted that word and directed the Department to report on the feasibility of including invertebrates. *Compare* App. 388 *with* App. 425 *and* App. 429. The final version of the 1984 amendments deleted any explicit mention of invertebrates, including the reporting provision that suggested they were excluded from CESA. 1984 Cal. Stat., c. 1162, § 6. The Legislature’s decision to maintain the status quo with respect to invertebrates reflected its ultimate understanding that the 1970 version of CESA already protected invertebrates.

At most, the Almond Alliance’s alternative version of the legislative history shows only that the Legislature may have, at

one point, believed that CESA did not cover invertebrates, but that it ultimately changed its mind. The Almond Alliance argues that the Legislature’s deletion of invertebrates from the final bill that was enacted into law means that CESA excludes invertebrates. Opp. Brief at 21. The Alliance relies primarily on a sentence in a Senate Natural Resources Committee report that the Alliance argues is “dispositive” of the Legislature’s intent to exclude invertebrates. Opp. Brief at 19. Specifically, the Senate Committee report analyzed the June 25, 1984,³ version of AB 3309, and noted that, “[u]nlike federal law, the bill would exclude all invertebrates from eligibility for listing.” App. 396.

The Almond Alliance’s argument is attractive because it is simple, but it is wrong. The Alliance ignores most of the legislative history surrounding the 1984 amendments of CESA, focusing on a draft of AB 3309 that differed significantly from the version the Legislature actually enacted into law. The full legislative history, chronicled below, shows that the Legislature learned during the drafting process that CESA already protected

³ In an apparent typo, the report stated that it analyzed AB 3309 as amended in the Senate on June 26. App. 396. The Senate amended AB 3309 on June 25. App. 425.

invertebrates, and adopted a final version predicated on that understanding.

- **1970:** The Legislature enacted CESA. The 1970 version defined “endangered species” as “species or subspecies of birds, mammals, fish, amphibia, or reptiles.” 1970 Cal. Stat., c. 1510, § 3. The California Fish and Game Code had already defined “fish” to include invertebrates. 1969 Cal. Stat., c. 689, § 1 (codified at § 45).
- **October 1980:** The Commission interpreted the 1970 version of CESA to protect all invertebrates. It relied on Section 45’s definition of “fish” to list three invertebrate species under CESA: the Trinity bristle snail (a terrestrial invertebrate), the Shasta crayfish, and the California freshwater shrimp. App. 229-30.
- **February 16, 1984:** Assembly member Costa introduced the first version of AB 3309, which proposed to revise CESA’s definitions of endangered and threatened species to explicitly include “invertebrates.” App. 386-88.
- **April 13 – June 11, 1984:** The Legislature reviewed additional versions of AB 3309, which continued to include

“invertebrates” in the definitions of endangered and threatened species. App. 402-13, 416-23.

- **June 25, 1984:** The Legislature revised AB 3309 and removed invertebrates from the definition of endangered species. App. 427. It also directed the Department of Fish and Wildlife to report to the Legislature on the “necessity and feasibility of including invertebrates.” App. 429. The Senate Committee on Natural Resources published the report upon which the Almond Alliance relies, analyzing the June 25 version of the bill.⁴ The report stated that, “[u]nlike federal law, the bill would exclude all invertebrates from eligibility for listing.” App. 396-97.
- **June 26, 1984:** The Department provided a bill analysis of the June 11 version of the bill, informing the Legislature that CESA already protected invertebrates. App. 211, 214 (“[I]t was the Department’s understanding of legislative intent that the Act was to extend to invertebrates as well.”). The analysis also informed the Legislature that the Commission had already listed three invertebrates under

⁴ The report is dated June 24, 1984; this is likely a typo.

CESA in 1980, and that the Department had a long history of managing invertebrates. App. 214.

- **August 22, 1984:** The Legislature revised AB 3309 again. It removed the provision directing the Department to report on the feasibility of including invertebrates and did not reintroduce “invertebrates” to the definitions of endangered and threatened species. App. 431, 433, 436.
- **September 11, 1984:** The Department provided an enrolled bill report noting that the Legislature made the “minor change[]” of deleting the explicit mention of invertebrates, and stating that the Commission already had authority under CESA to list invertebrates. App. 218, 220-21.
- **September 14, 1984:** The governor signed the final version of AB 3309 into law. 1984 Cal. Stat., c. 1162.

This full history of AB 3309 establishes that the Legislature’s understanding of CESA’s scope evolved as it received contemporaneous analysis. During the drafting process, the Department informed the Legislature that the Commission, Department, and Attorney General had all consistently

interpreted CESA to already protect invertebrates.⁵ App. 214.

The Department was not engaged in a “self-serving” analysis, as the Almond Alliance claims, but instead was communicating longstanding agency interpretations. Opp. Brief at 19.

The Legislature’s August, 1984, revisions show that it acted on the Department’s analysis. The Legislature is “presumed to be aware of a long-standing administrative practice.” *Gerawan Farming, Inc. v. Agric. Lab. Rels. Bd.*, 3 Cal. 5th 1118, 1156 (2017) (citations omitted). The Legislature’s drafting changes in August indicate that it was, in fact, aware of the Commission’s, Department’s, and Attorney General’s interpretation of CESA’s scope. The Legislature deleted the provision directing the Department to report on the “necessity and feasibility of including invertebrates,” the *only* part of the bill that suggested that invertebrates were excluded from CESA’s protections. App.

⁵ The Attorney General had supported the interpretation that the 1970 version of CESA already protected insects. The Department informed the Legislature of this fact in its June 26, 1984, bill analysis, noting that the Attorney General had confirmed that the Commission had the legal authority to list insects. App. 214. The Attorney General had affirmed the Commission’s interpretation of CESA in 1981 when the Office of Administrative Law challenged the Commission’s decision to list several butterfly species. *Id.*; see also AR 574-75 (discussing prior Attorney General’s communications).

436. The Legislature went from believing that CESA did not protect invertebrates to understanding that it did, and as a result did not include any language in the final bill that would have changed that status quo.

Thus, the June, 1984, Senate Committee report that forms the backbone of the Almond Alliance’s arguments was published in the middle of the drafting process, when the Legislature’s understanding of CESA was still changing. At most, then, the report revealed that the bill *as written on June 25, 1984*, would have excluded invertebrates, but it reveals much less of the legislative intent behind *the final version of the bill that became law*. Two months after the Committee published the June, 1984, report, the Legislature removed the only provision that implied that CESA excluded invertebrates. The report therefore sheds little light on the Legislature’s intent behind the enacted bill. *See Carter v. Cal. Dep’t of Veterans Affs.*, 38 Cal. 4th 914, 927 (2006) (“[A]s we have often explained, ‘Unpassed bills, as evidences of legislative intent, have little value.’”) (citation omitted).⁶ What

⁶ *See also Cal. Chamber of Com. v. State Air Res. Bd.*, 10 Cal. App. 5th 604, 630 (3d Dist. 2017) (“The light shed by such unadopted proposals is too dim to pierce statutory obscurities.”); *Samantha C. v. State Dep’t of Developmental Servs.*, 185 Cal.

light it does shed actually underscores that the Legislature ultimately recognized that CESA protected invertebrates and chose not to change that protection.

Trying a similar tack, the Almond Alliance argues that the fact the Legislature considered and rejected explicitly adding “invertebrates” to the definition of endangered species under CESA in 1984 shows that CESA was not intended to include invertebrates. Opp. Brief at 21. However, the California Supreme Court has explicitly cautioned against placing weight on the Legislature’s failure to include proposed language in a statute. *People v. Superior Ct.*, 3 Cal. 5th 230, 233, 242-43 (2017) (rejecting the argument that the Legislature’s consideration of a failed bill to amend the Government Code to explicitly include independent contractors indicated that the definition of “employee” did not include “private contractors”).

The Almond Alliance also urges the Court to disregard the Commission’s decisions to list three invertebrates in 1980 because they were illegal when they were made and they were

App. 4th 1462, 1489 (2010) (“A former version of a bill which differs significantly from the version which is enacted is of little value on the issue of legislative intent.”).

grandfathered in when the Legislature amended CESA in 1984. Opp. Brief at 36-37. However, the 1980 listing decisions show that the Commission and Department had a long-standing practice of interpreting CESA to protect all invertebrates, a fact that the Legislature learned during the 1984 amendment process. Moreover, the Commission's subsequent action with respect to one of these listings shows that the Commission interpreted the 1984 amendments to continue to protect invertebrates. In 1988, the Commission changed the designation of the Shasta crayfish, one of the three invertebrates it had listed in 1980, from threatened to endangered without any apparent controversy. App. 229. Far from being a "violation" of the law, Opp. Brief at 36, the pre-1984 listings (and 1988 upgrade) reveal that everyone understood CESA to protect invertebrates.

B. Later ambiguous statements by legislators and an agency official are not probative of the Legislature's intent in 1984.

Unable to show that the Legislature intended to exclude invertebrates from CESA's protections in 1984, the Almond Alliance next attempts to introduce two post-hoc statements that are not cognizable as legislative history: (1) a Senate Committee report from 2017 concerning a failed bill to amend CESA, and (2)

a 1990 letter from Pete Bontadelli, the then-director of the Department of Fish and Wildlife. Neither document constitutes legislative history of the 1984 CESA amendments. *See Kaufman & Broad Cmtys., Inc. v. Performance Plastering, Inc.*, 133 Cal. App. 4th 26, 39 (3d Dist. 2005) (post-enrollment documents regarding a bill are not legislative history).

In 2017, the Legislature considered Senate Bill (“SB”) 49, which proposed to amend CESA to protect federally listed species if the federal government reduced protections under the federal Endangered Species Act. App. 130-32. The report said the bill would protect federally listed insects that experienced rollbacks in federal protections, and would not add “insects” as a new category of species under CESA. App. 133. According to the report, “Section 2062 of the Fish and Game Code includes birds, mammals, fish, amphibians, reptiles, or plants that may be listed as threatened or endangered species. It does not include insects.” *Id.*

The Almond Alliance relies on the 2017 Senate Committee report to argue that the Legislature “expressly rejected” the interpretation that CESA protected invertebrates and “reaffirmed” its prior intent to exclude invertebrates. Opp. Brief

at 26-27, 45. But what a Senate Committee says in 2017 is irrelevant to discerning what the Legislature intended when it amended CESA in 1984. A failed attempt to amend a statute offers “only limited guidance, if any” on the Legislature’s original intent. *Martin v. Szeto*, 32 Cal. 4th 445, 451 (2004) (explaining that courts “attach little value to the Legislature’s subsequent failure to pass a bill”).

Even assuming the 2017 report could shed light on the Legislature’s intent thirty-three years earlier, the Almond Alliance’s claim is still mistaken. The Legislature has more recently said that CESA *does* protect invertebrates. After SB 49 failed to pass in 2017, the Legislature introduced a very similar version of the bill in 2019, SB 1. Intervenor-Appellants’ Request for Judicial Notice in Support of Reply Brief, Exh. A at 8 (Committee on Natural Resources report on SB 1). The Assembly Committee on Natural Resources report on that bill stated: “*The CESA states that all native species of fishes, amphibians, reptiles, birds, mammals, invertebrates, and plants, and their habitats, threatened with extinction . . . will be protected or preserved.*” *Id.* at 6 (emphasis added). Accordingly, the 2017 report hardly shows that the Legislature rejected the view that

CESA protects invertebrates when the Legislature expressed the opposite conclusion just two years later. *See* Opp. Brief at 26-27.

The Almond Alliance’s second source—a 1990 letter from Pete Bontadelli, then head of the Department of Fish and Wildlife—is equally irrelevant to the Legislature’s intent in 1984. In 1990, Mr. Bontadelli wrote a letter to the author of AB 3309, Jim Costa, seeking clarification on the final, enacted version of the bill. Respondents’ Motion for Judicial Notice on Appeal and Declaration of Paul S. Weiland in Support Thereof (“Opp. Brief RFJN”), Exh. 1. Mr. Bontadelli stated that “[m]y understanding resulting from these discussions is that insects were not intended to be covered by CESA.” *Id.* at 19. The Almond Alliance argues that this letter stated “in no uncertain terms” that the Department believed the 1984 amendments did not protect insects, and claims the letter demonstrates that “the Legislature and the Department rejected” the interpretation that CESA protected invertebrates. Opp. Brief at 20-21.

In fact, the letter has little bearing on the Department’s position on CESA’s scope, and even less bearing on the Legislature’s intent in amending CESA in 1984. First, Mr. Bontadelli’s personal understanding of CESA’s scope was at odds

with the agency's clear position: The letter states that the Department had recently been prepared to recommend that a petition to list an insect under CESA be accepted. Opp. Brief RFJN at 19.

Second, contrary to the Almond Alliance's portrayal, the letter does not offer a conclusive interpretation of CESA. It actually expresses confusion about CESA's scope and requests clarification from AB 3309's author. *Id.* ("Unfortunately, the remaining legislative history and available records are replete with ambiguity . . .").

Third, Mr. Bontadelli's interpretation of what the Legislature intended is unsound. That interpretation, like the Almond Alliance's, relies heavily on the June, 1984, Senate Committee report, which, as discussed above, is not relevant to the final enacted bill. It is also contradicted by the Department's official analysis—which named Mr. Bontadelli as the point of contact—at the time that the Legislature was actually considering the amendments. App. 211. A document from a lone agency official written six years after a final bill becomes law is not probative of the Legislature's intent. *Cf. Joyce v. Ford Motor Co.*, 198 Cal. App. 4th 1478, 1493 (3d Dist. 2011) (an agency's bill

report prepared after the Legislature had already passed the bill inherently cannot reflect the Legislature's intent).

C. The Almond Alliance relies on documents with no bearing on legislative intent to argue that CESA covers only “aquatic” invertebrates.

The Almond Alliance cannot show that Section 45's definition of “fish” does not apply to CESA, so it tries another angle: It urges the Court to deviate from the plain meaning of “invertebrates” based on three sentences of cursory analysis in Section 45's legislative history, as well as a document that is not even cognizable as legislative history.

In 1969, the Legislature amended Section 45 to expand the definition of “fish” to include “invertebrates.” 1969 Cal. Stat., c. 689, § 1. After the Legislature had voted to enact the amendment, the Departments of Finance and Fish and Wildlife provided enrolled bill reports discussing the implications of the expanded definition. The Departments opined that adding “invertebrates” to the definition of “fish” would improve management of tidal invertebrates such as starfish and sponges. App. 137-38. Additionally, Senator Alquist, the author of the bill amending Section 45, wrote to the governor that the expanded

definition of fish would allow the Commission to issue rules for taking species in tidepools. App. 139.

The Almond Alliance relies on these documents to argue that Section 45 includes only “traditionally aquatic species” of invertebrates. Opp. Brief at 31. That is, the Legislature did not intend the plain meaning of “invertebrates” (any “animal without a backbone”) to apply to Section 45. *Invertebrate, Oxford English Dictionary* (3d ed. 2010); Opp. Brief at 31.

In fact, none of these statements sheds much light on the Legislature’s intent behind adding “invertebrates” to the definition of “fish” in Section 45. First, enrolled bill reports have little to no bearing on legislative intent behind a statute. While courts do take judicial notice of enrolled bill reports as legislative history, “enrolled bill reports cannot reflect the intent of the Legislature because they are prepared by the executive branch, and then not until after the bill has passed the Legislature and has become ‘enrolled.’” *Kaufman & Broad Cmty.*, 133 Cal. App. 4th at 42. Just as the Department’s September 11, 1984, enrolled bill report is not probative of the Legislature’s intent (in contrast to its June 26, 1984, analysis submitted during the legislative process), the Departments of Finance and Fish and Wildlife’s

1969 enrolled bill reports on Section 45 are not indicative of whether the Legislature intended “invertebrates” to cover only aquatic invertebrates.

Second, the Department of Finance does not manage the state’s wildlife and does not have any expertise in interpreting the Fish and Game Code. Therefore, the Court should not give any weight to its interpretation of Section 45. *See Cent. Coast Forest Ass’n v. Fish & Game Comm’n*, 18 Cal. App. 5th 1191, 1207 (2018) (“Judicial deference is more likely where ‘the agency has expertise and technical knowledge’”) (quoting *Yamaha Corp. of Am. v. State Bd. of Equalization*, 19 Cal. 4th 1, 12 (1998)).

As for the Department of Fish and Wildlife’s enrolled bill report, even if it sheds light on the Legislature’s intent, the Department’s statement in its 1984 bill analysis was explicit—“it was the Department’s understanding of legislative intent that the Act was to extend to invertebrates as well”—in a way that merely referencing species such as starfish and sponges is not. App. 214; App. 137. The Department’s single sentence analyzing Section 45’s expanded definition of fish does not go to whether “invertebrates” in Section 45 covers terrestrial invertebrates.

Finally, the letter from Senator Alquist is even less relevant to Section 45's meaning. This Court has established comprehensive standards for what is—and is not—considered valid legislative history. A letter from an individual legislator urging the Governor to sign a bill “do[es] *not* constitute cognizable legislative history in this court.” *Kaufman & Broad Cmty.*, 133 Cal. App. 4th at 31. Senator Alquist's letter sheds no light on the Legislature's intent in 1969.

III. The Almond Alliance's remaining authorities are not persuasive.

The Almond Alliance next proffers a series of miscellaneous documents as authority for the interpretation that CESA does not protect invertebrates. These documents lack authority, lack proper analysis, and do not actually speak to CESA's scope.

A. The missing 1980 OAL decision and the 1998 Attorney General's opinion cannot bear the weight the Almond Alliance places on them.

An Office of Administrative Law (“OAL”) decision from 1980 that rejects the Commission's decision to list two insect species and that is nowhere to be found has no bearing on whether CESA protects invertebrates.

In 1980, the Commission decided to list two butterfly species under CESA. The OAL reportedly rejected that decision, reasoning that the Commission lacked authority to list the species because CESA did not protect insects. Certified Administrative Record (“AR”) 574-75. The OAL’s decision itself is missing, and the only source in the record describing it is a 1981 report submitted to the Administrative Conference of the United States. AR 564.

The Almond Alliance claims that the OAL decision, based on its characterization in a later report, should be afforded deference because the OAL reviews regulations for “consistency” and “authority under the law.” Opp. Brief at 22 (internal quotations omitted). It cites a 1990 Court of Appeal opinion for the proposition that the OAL deserves deference for determining whether the Commission exceeded its authority under CESA when it tried to list insects. Opp. Brief at 22 (citing *Grier v. Kizer*, 219 Cal. App. 3d 422, 435 (1990), *modified* (May 2, 1990), *and disapproved of on other grounds by Tidewater Marine W., Inc. v. Bradshaw*, 14 Cal. 4th 557 (1996)).

However, the OAL's decision is due no weight, as even the trial court recognized.⁷ First, the OAL has been inconsistent regarding whether CESA protects invertebrates. The OAL rejected the Commission's listing of the two butterfly species in July of 1980, but the Commission listed three other invertebrates without any apparent opposition from the OAL less than three months later: the Trinity bristle snail, Shasta crayfish, and California freshwater shrimp. AR 575; App. 229-30. The deference due an agency's interpretation depends in part on "its consistency with earlier and later pronouncements." *Cal. Sch. Bds. Assn. v. State Bd. of Educ.*, 186 Cal. App. 4th 1298, 1314 (2010), *as modified on denial of reh'g* (Aug. 24, 2010). Because

⁷ The trial court cited the OAL opinion merely to point out that the Commission was previously unsuccessful in listing insects. App. 488.

The Almond Alliance erroneously claims that the Coalition did not object to the trial court's consideration of the OAL's decision and therefore cannot object to this Court's consideration of it. *See* Opp. Brief at 22; App. 188 (Coalition's trial brief challenging consideration of the decision because the Almond Alliance could not produce a copy of it); Coalition Opening Brief at 64 (same).

The Almond Alliance also urges the Court to defer to a decision of which, because it is missing, the Almond Alliance cannot establish the basic facts. *Compare* App. 214 (OAL rejected the Commission's listing decision for four butterfly species in 1981) *with* AR 574-75 (OAL rejected the Commission's listing decision for two butterfly species in 1980).

the OAL apparently changed its position less than three months after it decided the Commission did not have the authority to list invertebrates, the Court should give its (missing) 1980 decision no weight.

Second, the OAL's authority and role in reviewing agency actions was uncertain at the time it issued the 1980 decision. According to the later report to the Administrative Conference, the OAL was a brand-new agency at the time it reviewed the Commission's listing decision, and it was not clear if OAL even had the duty or the authority to substantively review regulations before agencies adopted them.⁸ AR 566.

⁸ According to the report to the Administrative Conference:

It is not clear what, if any, role OAL has when proposed regulations are filed with it prior to adoption by the agency. No formal duty is given OAL to engage in a preadoption review or to advise the agency of the substantiation it will ultimately require or of any doubts that the proposed regulation will meet the statutory standard. At present, most formal and informal contacts between OAL and agency take place after the proposed regulations are adopted by the agency and then formally presented to OAL under the statute.

The OAL has, however, determined that it should return regulations when the agency has not adequately followed preadoption requirements. . . .

AR 566.

Finally, contrary to the Almond Alliance’s opinion, the OAL is due deference only when it is assessing an agency’s compliance with *procedural* mandates. Opp. Brief at 22 (citing *Grier*, 219 Cal. App. 3d at 435). *Grier* gave “due consideration” to OAL’s determination that a Department of Health Services’ auditing method was an underground regulation, not to any determination of whether the Department’s method was consistent with its substantive legal authority. *Grier*, 219 Cal. App. 3d at 434-35.

The Almond Alliance next relies on a 1998 opinion from the Attorney General on the scope of CESA’s protections. In response to a request from a California Assembly member, the Attorney General published an opinion in 1998 examining, among other things, whether insects were eligible for listing under CESA. AR 468. The Attorney General concluded that CESA did not cover insects, but instead was limited to “birds, mammals, fish, amphibians, reptiles, and plants.” AR 470. The Almond Alliance argues that the Attorney General’s 1998 opinion is due persuasive authority. Opp. Brief at 23-25.

The California Supreme Court’s precedent shows otherwise. See *Sanchez v. Unemployment Ins. Appeals Bd.*, 20 Cal. 3d 55, 66 (1977). In *Sanchez*, the Court held that two

Attorney General’s opinions interpreting a term in the California Unemployment Insurance Code to mean “availability for suitable employment” were unpersuasive because the Attorney General did not consider the many factors that were relevant to determining “suitability” or an additional criterion for “availability” set forth in the case law. *Id.* at 66.

Just like the Attorney General’s opinions in *Sanchez*, the 1998 Attorney General opinion omits key considerations in assessing whether CESA covers invertebrates. To begin with, the opinion does not address the fact that the Legislature provided, in Section 45, a definition for “fish” that applies to CESA. The Almond Alliance counters that, because the opinion cites other definitions from the Code, the Attorney General “was clearly aware of the definitions in Chapter 1” and therefore “did consider th[ose] definitions.” Opp. Brief at 24. But the Attorney General’s first step should have been to consider the obviously applicable definition of “fish” in Section 45. Nothing in the Attorney General’s opinion itself indicates that it ever considered whether Section’s 45 definition of “fish” applied to CESA. If the Attorney General *had* considered this argument, even if only to reject it, it

would have done so explicitly. The Almond Alliance presents no more than a wishful inference that it did.

The opinion also fails to address the Commission's interpretation that the 1970 version of CESA already protected invertebrates. It does not consider the fact that the Commission listed three invertebrates under CESA as early as 1980, casually and circularly stating that it "need not inquire whether insects were eligible for listing prior to 1985" simply because no insects were listed prior to 1985. AR 470.

The 1998 opinion is also due little weight because the Attorney General has been inconsistent in interpreting whether CESA protects invertebrates. When the Commission acted in 1980 to list two butterfly species under CESA, it did so in part because it had earlier sought and received two Attorney General communications concluding that insects could be listed as "endangered species" under CESA. AR 574-75. Corroborating this fact, the Department also informed the Legislature during the 1984 CESA amendments that the Attorney General had previously confirmed that CESA protected invertebrates. App. 214.

B. The Department’s regulation allowing the take of insects is not relevant to whether CESA protects insects.

In 1998, the Department promulgated a regulation establishing procedures for permitting the take of listed species. The regulation states: “The take of insects and other invertebrates that are not fish as defined in the Fish and Game Code is not prohibited.” 14 Cal. Code Regs. (“C.C.R.”) § 783.1(d) (1998). According to the Almond Alliance, this regulation shows that the Department interpreted CESA to exclude insects, and that the Department’s and the Commission’s current interpretation of CESA is inconsistent with Section 783.1. Opp. Brief at 35-36.

However, Section 783.1 merely regulates takes and does not define, or seek to define, which species are eligible for listing under CESA. The Commission—not the Department—is the agency with the authority to list species under CESA, § 2070, and the Department’s regulation does not concern listing eligibility. Its sole purpose is to “establish procedures for the orderly application and review of incidental take permits.” Intervenor-Appellants’ Request for Judicial Notice Exh. B.

Even if Section 783.1 could be said to accurately reflect the Department's interpretation of CESA in 1998, the regulation is still irrelevant in construing CESA in 1970, 1984, or now. At each of those points—when CESA's scope has been at issue—the Department has interpreted CESA to protect invertebrates; a single line in an unrelated regulation does not outweigh that longstanding interpretation. Of course, “ultimate responsibility for statutory interpretation rests with the courts.” *State Bldg. & Constr. Trades Council of Cal. v. Duncan*, 162 Cal. App. 4th 289, 304 (2008), *as modified on denial of reh'g* (May 16, 2008); *see also id.* at 303, 304, 311 (giving no deference to the Department of Industrial Relations' interpretation of the Labor Code, in part because the Department had been inconsistent, but ultimately holding that the Department's litigating position was the correct one).

Thus, even if the Department had on one occasion been inconsistent in its interpretation of CESA's scope, its interpretation in this case is the correct one. Today, both the Commission and the Department interpret CESA to protect invertebrates, as indicated most clearly by their litigating positions in this case.

C. Dicta in a Court of Appeals opinion and interpretations of state law by federal agencies are not relevant in interpreting CESA.

The Almond Alliance relies on *W. W. Dean & Associates v. City of South San Francisco*, 190 Cal. App. 3d 1368 (1987) to argue that the First District Court of Appeals has already “directly addressed” the question of whether CESA covers insects. Opp. Brief at 44. The Almond Alliance is mistaken.

W. W. Dean concerned whether a city’s amendment to a habitat conservation plan created pursuant to the federal Endangered Species Act was subject to a referendum. 190 Cal. App. 3d at 1371, 1373. In a single sentence buried at the end of the Court’s background discussion of governing legal authorities, the Court said: “Moreover, as appellant itself points out, California's Endangered Species Act does not even protect insect species” *Id.* at 1377 (internal citations omitted).

The court’s single mention of CESA was a mere dictum. *W. W. Dean* dealt solely with the federal Endangered Species Act and did not discuss CESA beyond that single sentence, and there is no indication that the issue of CESA’s scope was briefed. A court’s restatement of one party’s concession does not a precedential holding make. *W. Landscape Constr. v. Bank of*

Am., 58 Cal. App. 4th 57, 61 (1997) (“Only statements necessary to the decision are binding precedents.”).

The Almond Alliance presents even less persuasive authority in the form of the U.S. Fish and Wildlife Service’s listing decisions under the federal Endangered Species Act. The Service sometimes mentions CESA in its listing decisions because it considers state protections as part of the federal listing process. App. 145, 152, 158, 164. In its listing decisions for a few insect species, the U.S. Fish and Wildlife Service opined that “insect species . . . are not afforded protection under CESA.” App. 152; *see also* App. 164 (“[T]he California Endangered Species Act does not allow for the listing of insect species.”). The Almond Alliance argues that the Commission’s interpretation that CESA protects insects is due no deference because it conflicts with the U.S. Fish and Wildlife Service’s contrary interpretation, which is based on a “high-level understanding of CESA.” Opp. Brief at 46.

However, the Fish and Wildlife Service’s interpretation is due no weight because the Service does not administer CESA (and therefore does not have a “high-level understanding” of the statute). *See Am. Fed’n of Gov’t Emps. v. Fed. Lab. Rels. Auth.*, 204 F.3d 1272, 1275 (9th Cir. 2000) (“When an agency interprets

a statute outside its administration, however, we review that interpretation de novo.”). The Service’s opinion on CESA’s scope is irrelevant to this Court’s decision, particularly given the consistent interpretation by the Commission—the expert agency charged with administering CESA’s listing provision—that CESA protects invertebrates, including the California bumble bees.

IV. CESA’s general statutory purpose requires interpreting CESA to protect insects.

CESA’s purpose is to “conserve, protect, restore, and enhance any endangered species or any threatened species and its habitat.” § 2052. To fulfill this purpose, California courts have recognized that CESA “should be construed liberally.” *Cal. Forestry Ass’n v. Cal. Fish & Game Comm’n*, 156 Cal. App. 4th 1535, 1545 (3d Dist. 2017); *see also Watershed Enforcers v. Dep’t of Water Res.*, 185 Cal. App. 4th 969, 979 (2010) (“We must construe [CESA] . . . with a view to furthering, not defeating, the general statutory purpose.”).

As a result, where CESA is susceptible of more than one plausible interpretation, courts must choose the one that furthers its conservation purpose. The Coalition’s reading of CESA would best effectuate CESA’s purpose by protecting the invertebrate

species that lie at the foundation of every ecosystem in California. The Almond Alliance’s reading, by contrast, would yield a statute that seeks to “protect . . . *any* endangered species or *any* threatened species” except insects and other invertebrates. § 2052 (emphasis added). The Almond Alliance’s reading actively hinders CESA’s conservation purpose by denying CESA’s protections to keystone species like the California bumble bees, thereby undermining the conservation of listed insect-pollinated plants and the vertebrate animals that depend on them.

The Almond Alliance does not dispute that the Coalition’s reading of Section 45 is more consistent with CESA’s purpose than its own interpretation. Instead, it attempts to distinguish *California Forestry and Watershed Enforcers* on their facts, arguing that the liberal construction of CESA applied in both cases is a “far cry” from the Coalition’s interpretation. Opp. Brief at 44. In its telling, reading “species or subspecies” to include different populations of the same subspecies, or reading “person” to include “public agencies,” are both reasonable constructions consistent with CESA’s purpose. Applying Section 45’s definition of “fish” to provisions of the Fish and Game Code aimed at

protecting species, however, is “creat[ing] a purpose out of thin air.” Opp. Brief at 44.

This distinction does not hold water. In *California Forestry*, the term “subspecies” was “left undefined,” which meant the court had to define the term based on dictionary definitions and analogous statutes. 156 Cal. App. 4th at 1540, 1545, 1548. *Watershed Enforcers*, meanwhile, involved the term “person,” defined by statute to include only natural persons and certain types of business organizations. 185 Cal. App. 4th at 980. The court concluded that, “given the context and policies of CESA,” a liberal construction of “person” was necessary to effectuate CESA’s statutory purpose. *Id.* at 983.

Here, by contrast, the Coalition is not asking this Court to determine the meaning of an undefined term by reference solely to dictionary definitions or analogous statutes, or to adopt a definition that goes beyond the “literal textual meaning” of the statute. *Id.* at 980. Instead, the Coalition asks this Court to apply an existing statutory definition to a specific section of the Code where applying that definition best furthers that section’s purpose, as the case law requires.

CESA’s purpose—to “conserve, protect, restore, and enhance any endangered species or any threatened species and its habitat”—is at stake in this case. § 2052. Failing to recognize that CESA’s statutory protections apply to invertebrates will accelerate the decline and extinction of many endangered and threatened species, starting with the four California bumble bees at issue in this case.

Bumble bees are “keystone species,” playing an essential function in virtually every ecosystem where they occur. AR 286. More than 85 percent of flowering plants are pollinated by insects, primarily bees. AR 6. These plants, as well as the fruits and seeds they produce, are essential to the diets of many of California’s birds and mammals (including humans). AR 290. California’s ecosystems, from the dramatic wildflower fields of the Carrizo Plain to the resplendent meadows of the Sierra Nevada, would not exist without the pollination services provided by insects, including native bees. AR 254.

Existing conservation measures have proven woefully inadequate to protect the California bumble bees. AR 928. All four species are in steep decline and now exist in only a few scattered patches of their historical range. *See* AR 8-23.

Entomologists, ecologists, and other scientists have concluded that “formal protection, such as that provided by CESA, is necessary to protect these species and preserve the pollination services they provide.” AR 844. Without these protections, these species are “likely to go extinct in California.” AR 63. The loss of these bumble bees may have “far ranging ecological impacts due to their role as pollinators,” affecting the plants that rely on these species for pollination, as well as the birds and mammals whose diets depend on healthy plant populations. AR 31. Holding that CESA does not protect invertebrates will also make it much more difficult to save many other imperiled native insects, such as the western monarch butterfly, which is currently on the precipice of extinction. *Cf.* AR 928. The loss of the California bumble bees, as well as countless other invertebrate species that may otherwise be eligible for protection under CESA, will directly undermine CESA’s goal of protecting all endangered and threatened species in California.

CONCLUSION

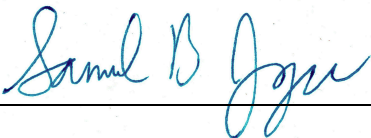
The Fish and Game Code defines “fish” to include “invertebrates.” CESA, which protects “fish,” is part of the Code and subject to its definitions. None of the Almond Alliance’s

contrived arguments based on cherry-picked evidence overcomes the plain text of the statute, by which CESA protects invertebrates like the California bumble bees. This result is also consistent with controlling case law that requires interpreting CESA liberally to advance its conservation purpose. Ruling otherwise will undermine that purpose by directly jeopardizing the continued survival of the California bumble bees. We lose the California bumble bees, and California's other vanishing invertebrates, at our peril.

Dated:
Dec. 10, 2021

Respectfully submitted,

ENVIRONMENTAL LAW CLINIC
Mills Legal Clinic at Stanford Law School

By:  _____

DEBORAH A. SIVAS
MATTHEW J. SANDERS
STEPHANIE L. SAFDI
SAMUEL B. JOYCE, Certified Law Student
CAROLINE T. ZHANG, Certified Law Student

*Attorneys for Intervenors and Appellants Xerces
Society for Invertebrate Conservation, Defenders
of Wildlife, and Center for Food Safety*

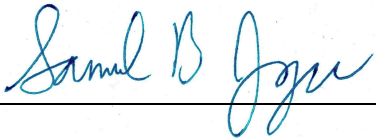
CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.204(c) of the California Rules of Court, I certify that the text of this brief consists of 10,068 words, not including tables, signature blocks, and required certificates, as counted by Microsoft Word, the computer word processing program used to generate the brief.

Dated:
Dec. 10, 2021

Respectfully submitted,

ENVIRONMENTAL LAW CLINIC
Mills Legal Clinic at Stanford Law School

By:  _____

DEBORAH A. SIVAS
MATTHEW J. SANDERS
STEPHANIE L. SAFDI
SAMUEL B. JOYCE, Certified Law Student
CAROLINE T. ZHANG, Certified Law Student

*Attorneys for Intervenors and Appellants Xerces
Society for Invertebrate Conservation,
Defenders of Wildlife, and Center for Food
Safety*

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SANTA CLARA

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Santa Clara, State of California. My business address is Crown Quadrangle, 559 Nathan Abbott Way, Stanford, CA 94305-8610.

On December 10, 2021, I served true copies of the following document(s) described as **INTERVENOR-APPELLANTS' REPLY BRIEF** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the practice of Mills Legal Clinic at Stanford Law School for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid. I am a resident or employed in the county where the mailing occurred. The envelope was placed in the mail at Stanford, California.

BY ELECTRONIC SERVICE: I served the document(s) on the person listed in the Service List by submitting an electronic version of the document(s) to TrueFiling 3.0, through the user interface at <https://tf3.truefiling.com/>.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on December 10, 2021, at Stanford, California.



Ana Villanueva

SERVICE LIST

Clerk of the Court
Sacramento Superior Court
720 9th Street
Sacramento, CA 95814

via USPS First Class mail

*Adam Leonard Levitan
Jeffrey P. Reusch
Office of the State Attorney
General
1300 I Street
P.O. Box 944255
Sacramento, CA 94244*

*via the Court's electronic
filing system, TrueFiling
portal*

*Paul S. Weiland
Robert D. Thornton
Benjamin Zachary Rubin
Samantha Savoni
Nossaman LLP
18101 Von Karman Avenue,
Suite 1800
Irvine, CA 92715*

*via the Court's electronic
filing system, TrueFiling
portal*