

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

ALMOND ALLIANCE OF CALIFORNIA et al.,

Plaintiffs and Respondents,

v.

FISH AND GAME COMMISSION et al.,

Defendants and Appellants;

XERCES SOCIETY FOR INVERTEBRATE
CONSERVATION et al.,

Intervenors and Appellants.

C093542

(Super. Ct. No.
34201980003216CUWMGDS)

APPEAL from a judgment of the Superior Court of Sacramento County, James P. Arguelles, Judge. Reversed.

Rob Bonta, Attorney General, Robert W. Byrne, Senior Assistant Attorney General, Eric M. Katz, Supervising Deputy Attorney General, Jeffrey P. Reusch and Adam L. Levitan, Deputy Attorneys General, for Defendants and Appellants California Fish and Game Commission and California Department of Fish and Wildlife.

Environmental Law Clinic, Mills Legal Clinic at Stanford Law School, Deborah A. Sivas, Matthew J. Sanders, and Stephanie L. Safdi, for Intervenors and Appellants Xerces Society for Invertebrate Conservation, Defenders of Wildlife, and Center for Food Safety.

Nossaman, Paul S. Weiland, Robert D. Thornton, Benjamin Z. Rubin, and Samantha Savoni, for Plaintiffs and Respondents Almond Alliance of California et al.

The California Endangered Species Act (Act) (Fish & G. Code,¹ § 2050 et seq.) directs the Fish and Game Commission (Commission) to “establish a list of endangered species and a list of threatened species.” (§ 2070.) The issue presented here is whether the bumble bee, a terrestrial invertebrate, falls within the definition of fish, as that term is used in the definitions of endangered species in section 2062, threatened species in section 2067, and candidate species (i.e., species being considered for listing as endangered or threatened species) in section 2068 of the Act. More specifically, we must determine whether the Commission exceeded its statutorily delegated authority when it designated four bumble bee species as candidate species under consideration for listing as endangered species.

We first reaffirm and expand upon our conclusion in *California Forestry Association* that section 45 defines fish as the term is used in sections 2062, 2067, and 2068 of the Act, by application of section 2. (*California Forestry Assn. v. California Fish & Game Commission* (2007) 156 Cal.App.4th 1535, 1552 (*California Forestry Assn.*)). That means the Commission has the authority to list an invertebrate as an endangered or threatened species. We next consider whether the Commission’s authority is limited to listing only aquatic invertebrates. We conclude the answer is, “no.” Although the term fish is colloquially and commonly understood to refer to aquatic species, the *term of art* employed by the Legislature in the definition of fish in section 45 is *not* so limited.

We acknowledge the scope of the definition is ambiguous but also recognize we are not interpreting the definition on a blank slate. The legislative history supports the liberal interpretation of the Act (the lens through which we are required to construe the Act) that the Commission may list *any invertebrate* as an endangered or threatened

¹ Undesignated section references are to the Fish and Game Code. References to the code are to the Fish and Game Code.

species. We thus agree with the Commission, the California Department of Fish and Wildlife (Department), and intervenors Xerces Society for Invertebrate Conservation, Defenders of Wildlife, and Center for Food Safety (collectively public interest groups) that the trial court erred when it reached a contrary conclusion.² We accordingly reverse the judgment.

FACTUAL AND PROCEDURAL BACKGROUND³

I

The Definition Of Fish In Section 45

Section 45 is located in chapter 1, “general definitions” (bolding and capitalization omitted), of division 0.5, “general provisions and definitions” (bolding and capitalization

² Petitioners 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, Western Growers Association, and The Wonderful Company LLC (collectively petitioners) named both the Commission and the Department as respondents in their writ petition. Petitioners, however, sought relief against only the Commission and later stipulated the Department be designated a real party in interest.

³ The parties filed several requests for judicial notice. We granted one such request, filed by the public interest groups, in an October 2021 order. We deferred ruling on three additional requests, filed by petitioners, the public interest groups, and the Commission and Department, respectively. We now grant those requests because they contain relevant statutory law (Evid. Code, § 451, subd. (a)), regulations or legislative enactments (*id.*, § 452, subd. (b)), official acts of legislative and executive departments, including administrative agencies, of the United States and California (*id.*, § 452, subd. (c); *Post v. Prati* (1979) 90 Cal.App.3d 626, 634 [legislative history falls within § 452, subd. (c)]), and documents not reasonably subject to dispute and capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy (Evid. Code, § 452, subd. (h)). On the eve of oral argument, petitioners further requested we take judicial notice of Assembly Bill No. 559 (2015-2016 Reg. Sess.) (Assembly Bill 559) and various legislative history documents analyzing the bill. We granted the request but admonish petitioners’ counsel for not presenting the documents to the trial court in the first instance and waiting until the eve of oral argument to present the documents to this

omitted) of the code. Prior to 1969, section 45 defined fish as “wild fish, mollusks, or crustaceans, including any part, spawn or ova thereof.” In 1969, the Legislature amended section 45 via Senate Bill No. 858 (1969 Reg. Sess.) (Senate Bill 858) to add invertebrates and amphibia to the definition of fish. (Stats. 1969, ch. 689, § 1.) Section 45 has been amended only once since 1969 -- in 2015 (effective January 1, 2016), when the Legislature made nonsubstantive stylistic changes, modifying the definition to read “ ‘[f]ish’ means a wild fish, mollusk, crustacean, invertebrate, amphibian, or part, spawn, or ovum of any of those animals.” (Stats. 2015, ch. 154, § 5.)

When Senate Bill 858 was moving through the Legislature, the Department and Natural Resources Agency submitted an enrolled bill report in support of the bill, stating “[t]he expanded definition of fish will permit closer control and monitoring of the harvest of species such as starfish, sea urchins, sponges and worms, and the . . . Commission will be authorized to make regulations deemed necessary for proper protection and management of these species.” (Dept. Fish & Game and Natural Resources Agency, Enrolled Bill Rep. on Senate Bill 858, July 24, 1969.) The Department of Finance also submitted an enrolled bill report regarding Senate Bill 858. The Department of Finance therein stated: “By expanding the definition of fish as proposed in this bill, it will be possible for the . . . Commission to regulate the taking of amphibians (frogs) and invertebrates, such as starfish, sea urchins, anemones, jellyfish and sponges.” (Dept. Finance, Enrolled Bill Rep. on Senate Bill 858, Aug. 1, 1969.)

court and thereby eliminating any opportunity for the other parties to provide a written analysis regarding the documents’ applicability to the issue presented.

Section 2 in the same chapter as section 45 provides the definition of fish governs the code and regulations adopted under the code, “[u]nless the provisions or the context otherwise requires.”⁴

II

The 1970 Endangered And Rare Animals Legislation

“California has been at the forefront of enacting legislation to protect endangered and rare animals -- first doing so in 1970.” (*California Forestry Assn., supra*, 156 Cal.App.4th at p. 1540.) The 1970 endangered and rare animals legislation (1970 Legislation) provided “[n]o person shall import into this state, or take, possess, or sell within this state, any bird, mammal, fish, amphibia or reptile, or any part or product thereof, that the commission determines to be an endangered animal or rare animal, except as otherwise provided in this chapter.” (Former § 2052; see Stats. 1970, ch. 1510, § 3.) Former section 2051 defined “[e]ndangered animal” as “an animal of a species or subspecies of birds, mammals, fish, amphibia, or reptiles, the prospects of survival and reproduction of which are in immediate jeopardy from one or more causes, including loss of habitat, change in habitat, overexploitation, predation, competition, or disease”; and “[r]are animal” as “an animal of a species or subspecies of birds, mammals, fish, amphibia or reptiles that, although not presently threatened with extinction, is in such

⁴ When the Act was enacted in 1984, former section 2 provided: “Unless the provisions or the context otherwise requires, these definitions, rules of construction, and general provisions shall govern the construction of this code and all regulations made or adopted under this code.” (Stats. 1959, ch. 994, § 1.) Section 2 was amended in 1998 and now provides: “Unless the provisions or the context otherwise requires, the definitions in this chapter govern the construction of this code and all regulations adopted under this code.” (Stats. 1998, ch. 1052, § 3.) The statute thus has not materially changed for purposes of determining whether section 45 applies to define fish, as the term is used in sections 2062, 2067, and 2068 of the Act.

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