Endangered Species

Balanced Reforms Need to Consider Science, Economic Stability

Endangered species protection continues to confront and confound business activities in California. Housing, transportation, agriculture and basic infrastructure needs—including water, gas, electricity and alternative energy sources like wind and solar—are complicated by encroaching environmental laws like the federal and state endangered species acts. It becomes a balancing act to provide basic human needs and species protections while trying to invigorate business productivity that adds to a stable economy.

BACKGROUND

The federal Endangered Species Act (ESA) of 1973 protects a wide variety of wildlife species that are threatened with extinction. Since the beginning of the Trump administration, the President has stated repeatedly that the ESA is ineffective and that new regulations would be introduced to roll back the Obama-era regulations. California legislators proactively responded with legislation in 2018—SB 49 (de León; D-Los Angeles)—that among other topics required immediate protection for any federally listed species under California's Endangered Species Act (CESA) should a federal rollback occur.

SB 49 failed in the Assembly, but was reintroduced in 2019 as SB 1 (Atkins; D-San Diego). SB 1 was very controversial, pitting the environmental community against the business and agricultural communities. Negotiations were heated, lasting through the last week of session. Governor Gavin Newsom vetoed the bill, saying he disagreed about the efficacy and necessity of SB 1 but wrote in his veto message: "I look forward to working with the Legislature in our shared fight against the weakening of California's environmental and worker protections." (*See Business Issues* article on "Voluntary Water Agreements" for discussion of a related concern.)

CURRENT LAW

California is one of a handful of states that is subject to regulation by three endangered species laws—the federal ESA, the California Endangered Species Act, and the California Fully Protected Species Act. Endangered species laws require that no activity be allowed which threatens the well-being of the listed species unless permission to "take" the species is granted. "Take" is defined in Section 86 of the state Fish and Game Code as "hunt, pursue, catch, capture, or kill, or attempts to hunt, pursue, catch, capture, or kill." Unlike federal law, California does not list insects.

In California, the Department of Fish and Wildlife may authorize individuals to take an endangered species for scientific, educational, or management purposes and may require mitigation measures. Fully protected species may not be taken or possessed at any time, and no licenses or permits may be issued for the take, except for collecting these species for necessary scientific research and relocation of bird species to protect livestock.

The federal ESA has similar provisions for take. In addition, federal law requires critical habitat designations within one year of a species being listed as threatened or endangered. Critical habitat is a "specific geographic area(s) that contains features essential for the conservation of a threatened or endangered species and that may require special management and protection. Critical habitat may include an area that is not currently occupied by the species, but that will be needed for its recovery."

The process for listing a species as endangered or threatened generally begins with the species being placed on the candidate list while undergoing consideration. Once information has been collected, a decision is made to either start the process to list the species as endangered/threatened or leave the species on the candidate list because not enough information is available to list it, or the species is found not be endangered/threatened and should be removed from the candidate list.

FEDERAL ACTIVITY

In August 2019 the U.S. Fish and Wildlife Service (USFWS), the National Oceanic and Atmospheric Administration (NOAA) and the National Marine Fisheries Service (NMFS) announced

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that they were pushing through changes to the ESA. These changes do not change the letter of the ESA, but they do change how the federal government will enforce it. New language deals with adding species to or removing species from ESA protections and designating critical habitat; revises some definitions to provide more clarity and consistency; rescinds a blanket rule that automatically gives threatened species the same protections as endangered species in most cases but allows discretion and allows use of economic impacts information though not in the determination to list a species. The new rules do not apply to species already listed, only to prospective listings.

Numerous environmental groups and state attorneys general stated that they will sue the federal administration over the changes, alleging they are illegal because they're not grounded in scientific evidence. California Attorney General Xavier Becerra said, "We don't look to pick a fight every time this administration decides to take an action. But we challenge these actions by this administration because it is necessary."

Industry groups ranging from gas companies to utilities to ranchers praise the new rules, saying they lead to "the reduction of duplicative and unnecessary regulations that ultimately bog down conservation efforts."

CALIFORNIA ACTIVITY: THE ISSUE—ARE BEES FISH?

California law defines candidate species as "a native species or subspecies of a bird, mammal, fish, amphibian, reptile or plant that the Fish and Game Commission has formally noticed as being under review by the Department of Fish and Wildlife for addition to either the list of endangered species or the list of threatened species, or a species for which the commission has published a notice or proposed regulation to add the species to either list."

In June 2019, environmental groups petitioned the Fish and Game Commission to list the Crotch bumblebee, Franklin's bumblebee, Suckley cuckoo bumblebee, and the Western bumblebee as endangered under the California Endangered Species Act for protection, claiming that increased agricultural activity has resulted in increased use of crop-protection materials and competition with managed honeybees. The petition included a list of proposed remedies, such as permanently leaving farmland untilled (fallowed), restricting grazing, and restricting herbicide and pesticide usage—all of which are measures that jeopardize the viability of agricultural operations. By June 2020 the Department of Fish and Wildlife must submit a written report indicating whether the action is warranted. Several agricultural organizations have already sued, claiming the commission lacks the authority to list the bees on the precedent set in 1980 regarding butterflies, as discussed below. The lawsuit hinges on whether bumblebees are fish.

In 1980, the Fish and Game Commission tried to list two butterfly species as endangered using the following reasoning:

- The definitions of endangered and threatened species expressly include fish.
- Section 45 of the Fish and Game Code expressly defines "fish" to include invertebrates.
- Insects are invertebrates.
- Insects are therefore fish.
- Insects may be listed.

The Office of Administrative Law rejected the reasoning that insects are fish and the Fish and Game Commission did not pursue the listing. Agricultural groups are pursing the same argument: bees aren't fish.

ANTICIPATED ACTIVITIES IN 2020

The Fish and Game Commission and the Department of Fish and Wildlife continue to accept petitions to list various plants and animals as endangered. Six more species were listed as endangered or threatened and five species were listed as candidates in 2019. The department will be gathering information on the candidate species to form its report.

Every effort should be made to provide economic impact information of proposed listings to the department as early as possible. Attendance and participation at Fish and Game Commission hearings is crucial to provide testimony and information about the real effects of regulations.

CALCHAMBER POSITION

The California Chamber of Commerce supports reforms to state and federal laws that achieve a balanced approach between environmental protection and social economic progress. Environmental regulations should be based on sound science, subject to peer review. Economic impacts should be evaluated to ensure that the benefits outweigh the social costs of imposing mitigation measures.

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