

Endangered Species

Rules Should Balance Human Needs, Economic Impacts, Species Protection

The federal Endangered Species Act (ESA) of 1973 protects a wide variety of wildlife species that are threatened with extinction. Since the beginning of his administration, President Donald J. Trump repeatedly stated that the ESA was ineffective and that new regulations would be introduced to roll back to the pre-Obama-era regulations. California legislators twice proactively responded with legislation that required immediate protection for any federally listed species under the California Endangered Species Act (CESA) should a federal rollback occur, but neither bill was successful. The state Attorney General sued the federal administration. The change in administration at the federal level could reduce activity on endangered species issues in California.

BACKGROUND

California is one of a handful of states that is subject to regulation by three endangered species laws—the federal Endangered Species Act, 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.”

In California, the Department of Fish and Wildlife (Department) 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 for the protection of livestock.

Federal endangered species law has similar provisions for take and in addition, federal law requires critical habitat designations within one year of listing. 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.” California, unlike federal law, does not list insects.

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 currently available to list it, or the species is found not be endangered/threatened and should be removed from the candidate list.

FEDERAL ACTIVITY

The U.S. Fish and Wildlife Service (USFW), the National Oceanic and Atmospheric Administration (NOAA) and the National Marine Fisheries Service (NMFS) pushed through many changes to ESA during the Trump administration. These changes did not alter the letter of ESA, but they did change how the federal government enforced the regulations. The new language dealt with adding species to or removing species from ESA protections and designating critical habitat; revised some definitions to provide more clarity and consistency; rescinded a blanket rule that automatically gives threatened species the same protections as endangered species in most cases but allows use of economic impacts information, though not in the determination to list a species. These rules do not apply to species already listed, only to prospective listings.

Numerous environmental groups and state attorneys general proceeded to sue the federal administration over the changes,

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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 praised the new rules, saying they lead to "the reduction of duplicative and unnecessary regulations that ultimately bog down conservation efforts."

CALIFORNIA ACTIVITY

The California Fish and Game Commission (Commission) placed 11 species on the candidate list in 2019–2020. Noteworthy are the listings for four bees and the western Joshua tree.

THE ISSUE: ARE BEES FISH? NO, COURT OPINES

The Sacramento Superior Court upheld a challenge to a Commission decision to list bees as candidates for protection under CESA in *Almond Alliance et al. v. California Fish and Game Commission*. The decision reinforces a long line of authority dating back several decades that insects are not subject to protection under CESA. The Commission has 180 days from the date of the decision to appeal.

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 bumble bee, Franklin's bumble bee, Suckley cuckoo bumble bee, and the Western bumble bee as endangered under the CESA 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, which are all measures that jeopardize the viability of agricultural operations. The Commission declared the bees to be candidate species in June 2020. The Department was scheduled to deliver a status review report in December 2020. 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 suit hinges on whether bumble bees 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 pursued the same argument in their lawsuit: bees aren't fish.

THE ISSUE: IS CLIMATE CHANGE THE REASON FOR THE DECLINE IN WESTERN JOSHUA TREES?

A month after the Commission voted to make the western Joshua tree a candidate for listing as a threatened species, several trade groups and a high desert town sued to block the protections granted to the desert tree. It was the first time climate change was used in a petition to list a species under CESA. According to government scientists, the last five years have been the five hottest in recorded human history, and further, local researchers predict that rising temperatures could wipe out Joshua trees from wide swathes of Southern California by the end of the century. Allowing climate change as a reason to list a species as endangered expands the criteria for which a species can be listed.

The lawsuit is not challenging the merits of whether Joshua trees should be protected. Rather, it argues that the original petition to protect the species did not meet minimum requirements outlined under the law. Opponents of the petition for listing questioned two critical factors in determining whether a species' listing may be warranted: information about its "abundance" and "population trend." The U.S. Air Force provided studies based on aerial photography, literature review, and field surveys, to determine population trends on the Air Force base, one from 1992 to 2015 and the other from 1992 to 2017. The Commission found neither study to be compelling evidence. One study clearly showed the tree population was "stable to increasing" while the other in an earlier fire area found the tree population was "stable."

The Commission carved out 15 shovel-ready solar projects in Kern and San Bernardino counties that could move forward regardless of the plant's new status. No such consideration was given development projects or city plans for infrastructure expansion.

The western Joshua tree status at the federal level also will be decided in the courts, as the environmental advocacy group WildEarth Guardians is fighting the USFW's refusal to list the species as threatened.

ANTICIPATED ACTIVITIES IN 2021

The Fish and Game Commission and the Department of Fish and Wildlife continue to accept petitions to list various plants and animals as threatened or endangered. The Department will continue to gather information on the candidate species to form its reports.

Every effort should be made to provide economic impact information about 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 on the real effects of regulations.

There is a possibility that legislation will be introduced expanding CESA to include insects as a category.

CALCHAMBER POLICY

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 such as 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.

The CalChamber 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.



Staff Contact
Valerie Nera
 Policy Advocate

valerie.nera@calchamber.com

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