Study R-100 January 13, 2023

# First Supplement to Memorandum 2023-6

## Fish and Game Law: Draft Recommendation

At its November 2022 meeting, the Commission[1] considered Memorandum 2022-54, which presented a staff draft of a final recommendation, proposing numerous technical improvements to the Fish and Game Code.

The draft included a section entitled "A Note on the Definition of 'Fish.'" A part of that discussion was presented in brackets, to signal that it was provisional. The Commission did not approve the bracketed language for inclusion in the recommendation.

With the bracketed language omitted, the remainder of the discussion is on pages 3 and 4 of the draft recommendation that is attached to Memorandum 2023-6.

After the November meeting, the staff received informal comment about the discussion. The person who made the comment preferred not to speak publicly and so asked that their comment be communicated without attribution. The staff agreed.

The commenter made two main points:

(1) *Related case should be noted.* The commenter believes that the discussion is incomplete because it does not mention an earlier appellate decision in which the court held that the code-wide definition of "fish" in Fish and Game Code Section 45 applies to the California Endangered Species Act. **The staff agrees that it would be helpful to include the suggested reference.**

(2) *The reference to the Chief Justice's statement should be omitted.* The discussion includes the following: "the Chief Justice suggested that it might be appropriate for the Legislature to examine the issue." The commenter believes that statement to be problematic, because the Chief Justice's remarks were susceptible to more than one interpretation. It was suggested that the Commission should not try

1. Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

to characterize the Chief Justice's statement. This point is discussed further below.

The Chief Justice's statement, in which Justices Groban and Corrigan concurred, is reproduced *in toto* below, with emphasis added:

> Our denial of a petition for review does not communicate any particular view regarding the merits of the issues presented in the petition. Thus, all should understand that our decision to deny review in this case is not an endorsement (nor is it a rejection) of the statutory analysis undertaken by the Court of Appeal, which determined that bumble bees, a nonaquatic invertebrate, are susceptible to being listed as endangered under the California Endangered Species Act (Fish & G. Code, § 2050 et seq.; CESA) because that statute applies to fish (Fish & G. Code, §§ 2062, 2067 & 2068), and "invertebrates" are included within what the Court of Appeal deemed to be the applicable definition of "fish" (*id.*, § 45). (*Almond Alliance of California v. Fish & Game Com.* (2022) 79 Cal.App.5th 337, 341, 294 Cal.Rptr.3d 603.)
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> Yet if experience is any guide, our decision not to order review will be misconstrued by some as an affirmative determination by this court that under the law, bumble bees are fish. A better-informed observer might ask: How can the court pass up this opportunity to review the Court of Appeal's interpretation of the Fish and Game Code, which seems so contrary to common knowledge that bumble bees are not a type of fish? Doesn't this clear disconnect necessarily amount to "an important question of law" (Cal. Rules of Court, rule 8.500(b)(1)) warranting this court's intervention, because the Legislature could not possibly have intended such a result?
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> Were things always that simple. Careful analysis of a statute to divine legislative intent can sometimes yield results that might seem surprising at first blush. Courts engaged in this task have interpreted "less" as "more" (Amalgamated Trans. Loc. 1309 v. Laidlaw Tran. Ser. (9th Cir. 2006) 435 F.3d 1140, 1146) and "unlawful" as "lawful" (Scurto v. LeBlanc (1938) 191 La. 136, 184 So. 567, 574). Long ago, the United States Supreme Court concluded that the "seas" referenced in one statute required no water at all (Murray's Lessee v. Baker (1818) 16 U.S. 541, 545, 3 Wheat. 541, 4 L.Ed. 454); quite recently, it determined that a fish is not a "tangible object" (United States v. Yates (2015) 574 U.S. 528, 536, 135 S.Ct. 1074, 191 L.Ed.2d 64).
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> These kinds of seemingly illogical outcomes can in fact best capture the enacting legislature's intent in a variety of circumstances. A statute may be construed in a manner that goes beyond the literal meaning of its text to avoid an absurd result the legislature could not possibly have contemplated. Sometimes courts perceive a scrivener's error or typo that must be corrected to vindicate the intent behind a measure. Or the context surrounding the use of a word or phrase within a statute can convey that it carries an unusual meaning, peculiar to that law. The Court of Appeal below concluded that the

> interpretive question before it fell into the last of these categories, with the consequence that bumble bees should indeed be regarded as "fish" under the CESA.
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> Even if the Court of Appeal arrived at what might superficially seem like a counterintuitive result, that alone does not establish that it erred. Moreover, our decision not to order review here does not prevent us from considering the CESA's reach in some future case, at which time we may agree or disagree with the Court of Appeal's analysis. *In the interim, the Legislature is in a position to make whatever statutory amendments it may regard as necessary or useful. For although it may not be exceptional for a court to determine that a particular word or phrase within a statute carries a meaning that deviates from common parlance or understanding, such decisions also can provide notice to legislators that some clarification may be in order.*[2]

The commenter asserts that the italicized language could mean either of two things:

(1) The Legislature should consider whether a clarifying amendment should be made.

(2) If the Legislature did not intend for Section 45 to apply to CESA, the Legislature is free to amend the law to reflect their intention.

The first meaning is more active, suggesting that the Legislature might want to make a determination whether the law should be amended. The latter is more passive, suggesting only that the Legislature has the power to act if it is does not agree with the holding in the case.

Because the commenter sees the Chief Justice's statement to be ambiguous on that point, they believe that the Commission should refrain from impliedly endorsing one of the two possible interpretations.

If the Commission wishes to make the changes suggested by the Commenter, it could be done by revising the language in the draft recommendation as follows:

> The question about whether to apply the statutory definition of "fish" recently resurfaced in *Almond Alliance of California v. California Fish and Game Commission*.[3] In that case, the Almond Alliance of California challenged a decision of the Fish and Game Commission to apply the California Endangered Species Act ("CESA") to bees (because CESA expressly applies to "fish" and the general statutory definition of "fish" expressly includes invertebrates). The Court of Appeal ~~held~~ reaffirmed the 2007 *California Forestry Association v.*

2. *Almond All. of California v. Fish & Game Comm'n*, No. S275412, 2022 WL 4374847, at *18 (Cal. Ct. App. May 31, 2022), *review denied* (Sept. 21, 2022) (*emphasis added*).

3. *Almond All. of California v. Fish & Game Comm'n (2022)*, 79 Cal.App.5th 337, 294 Cal.Rptr.3d 603, *review denied* (Sept. 21, 2022), *republished with additional material at* 79 Cal.App.5th 337, 299 Cal.Rptr.3d 9, *review denied* (Sept. 21, 2022).

*California Fish and Game Commission* decision,[4] holding that the definition of "fish" in Section 45 governs CESA. Consequently, CESA applies to invertebrates (including terrestrial invertebrates like bees). ~~The California Supreme Court did not grant review. However, the Chief Justice suggested that it might be appropriate for the Legislature to examine the issue.~~

**The Commission should decide whether to make one or both of those changes.**

Respectfully submitted,

Brian Hebert
Executive Director

4. *California Forestry Assn. v. California Fish & Game Commission* (2007) 156 Cal.App.4th 1535, 68 Cal.Rptr.3d 391.