



***Via TrueFiling***

August 3, 2022

The Honorable Tani G. Cantil-Sakauye, Chief Justice  
Supreme Court of California  
350 McAllister Street  
San Francisco, CA 94102

Re: *Almond Alliance of California, et al. v. Fish and Game Commission, et al.*  
California Supreme Court, Case No. S275412  
Third Appellate District, Case No. C093542  
Sacramento County Superior Court, Case No. 34-2019-80003216-CU-WM-GDS  
Association of California Water Agencies Amicus Curiae Letter in Support of  
Petitioner Almond Alliance et al.'s Petition for Review

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Pursuant to Rule 8.500(g) of the California Rules of Court, Amicus Curiae Association of California Water Agencies ("ACWA") respectfully submits this letter in support of Petitioner Almond Alliance et al.'s Petition for Review of the Third District Court of Appeal's opinion in *Almond Alliance of California, et al. v. Fish & Game Commission, et al.* (2022) 79 Cal.App.5th 337 ("the Opinion"). This case raises an important question of statewide interest as to the California Endangered Species Act ("CESA"), more specifically whether the term "fish," as used in CESA, authorizes the California Fish & Game Commission ("Commission") to list terrestrial invertebrates, such as the bumble bees at issue in this case, as "candidate," "threatened," or "endangered" species under CESA.

## **I. Interest of Amicus Curiae**

ACWA, with over 460 members, is the largest statewide coalition of public water agencies in the country. Its members are a diverse group of water associations and public water agencies engaged in municipal, agricultural, and wildlife refuge water supply service. Collectively, ACWA's members are responsible for more than 90% of the water delivered to cities, farms, and businesses in California.

ACWA's member agencies as well its members' water users are regularly engaged in an array of infrastructure, agricultural, and conservation activities throughout the state. They depend upon the reasonable and consistent application of federal and state environmental regulatory requirements, including those prescribed by CESA. As explained in Almond Alliance et al.'s Petition for Review, the Opinion upends the wide-held understanding that CESA does not apply to terrestrial

invertebrates. (Petition for Review at pp. 19-22, 24.) The Opinion, if left intact, could dramatically increase the number of projects and activities subject to CESA’s regulatory requirements and, thus, increase the regulatory burden and expense of CESA compliance for ACWA’s member agencies and their water users.

## **II. Review is Necessary to Settle an Important Question of Law**

Rule 8.500(b)(1) of the California Rules of Court provides that the Supreme Court may order review of a Court of Appeal decision “[w]hen necessary to secure uniformity of decision or to settle an important question of law.” This case raises an important question of statewide interest as to CESA. The question of whether the term “fish,” as used in CESA, authorizes the Commission to list terrestrial invertebrates, including insects, as candidate, threatened, or endangered species is important because it has broad implications.

### **A. General Implications**

CESA prohibits the “take” of any species listed as a candidate, threatened, or endangered species under CESA without prior authorization. (Fish & G. Code, § 2080; Cal. Code Regs., tit. 14, § 783.1.) One form of prior authorization that allows for take of a listed species is an incidental take permit issued by the California Department of Fish & Wildlife (“Department”). (Fish & G. Code, § 2081(b).) A permittee must implement the species-specific minimization and avoidance measures specified in their incidental take permit and, in turn, may take a listed species within the parameters of the permit.

The process for obtaining an incidental take permit and implementing the permit’s measures can be lengthy and costly. It can take months or years to obtain a permit, depending on the scope of the permitted activity and availability of Department technical and regulatory staff. The Fish & Game Code specifies permit fees; for example: “For a project where the estimated project cost is less than one hundred thousand dollars (\$100,000), the department shall assess either of the following amounts: (A) Seven thousand five hundred dollars (\$7,500) [or] (B) Six thousand dollars (\$6,000), if the project uses a department-approved conservation or mitigation bank ....” (Fish & G. Code, § 2081.2.) In addition, if the Department determines that the permit application fee paid is insufficient to complete permitting work, it “shall collect an additional fee of up to ten thousand dollars (\$10,000) from the permittee to pay for its estimated costs.” (*Ibid.*) These fees, already substantial for some permittees, only represent a portion of the compliance cost borne by permittees. Mitigation in the form of habitat restoration and conservation can run into millions of dollars to acquire and restore land and to fund a non-wasting endowment for monitoring and enforcement in perpetuity. In addition, such planning requires substantial work from technical consultants and attorneys.

Last, a violation of the take prohibition, i.e., take without prior authorization such as a permit, can result in civil and criminal prosecution, including penalties of between \$25,000 and \$50,000 for each violation, and imprisonment of up to one year. (Fish & G. Code, § 12008.1(a).)

The Opinion greatly expands the number of species that may be listed under CESA. As the Department or interested persons petition to list other terrestrial invertebrates, the burden on the regulated community will grow. Permits for incidental take of listed invertebrate species will add time and expense to efforts to remain in compliance with the law, and the likelihood of projects and activities being prohibited or curtailed altogether will increase.

### **B. Implications Specific to Listing the Bumble Bee Species at Issue in This Case**

The Opinion, if left intact, has immediate implications. Under CESA, the take prohibition applies as soon as a species is determined to be a “candidate” for listing. (Fish & G. Code, §§ 2080, 2085.) That is, even if the Commission ultimately decides that listing the species as threatened or endangered is not warranted, the candidate species will be afforded the same protection as threatened and endangered species during its candidacy. As long as the Opinion remains intact, there are immediate implications for the regulated community because the four bumble bee species at issue in this case will remain candidates for listing and, thus, will be subject to the same regulatory requirements as those that apply to threatened and endangered species.

The bumble bees at issue are widely distributed. Maps in the petition to list the four bumble bee species filed by The Xerces Society et al. in October 2018 (“Petition to List”) show the wide distribution of the bumble bees in California, especially the Western bumble bee and the Crotch bumble bee. (Petition to List at pp. 114 (Crotch), 115 (Franklin’s), 116 (Western), and 118 (Suckley Cuckoo).) The Western bumble bee has been documented in 38 counties in California and the Crotch bumble bee has been documented throughout much of the southern two-thirds of California. (*Id.* at pp. 9, 16; Department Eval. of Petition (Apr. 2019) at pp. 15-16.)

Listing the bumble bees could have weighty implications for public water agencies. According to the Petition to List, bumble bee nests can be underground or on the surface of the ground. (Petition to List at p. 30.) Thus, allegedly, “any near-surface or subsurface disturbance of the ground can be disastrous for bumble bee colonies or overwintering queens. This includes mowing, fire, tilling, grazing, and planting. Having large areas of land free from such practices is essential for sustaining bumble bee populations.” (*Id.* at p. 31.) This means that basic maintenance and repair practices that disturb soil, including excavation of soil to reach pipelines and other water/wastewater infrastructure, clearing land for fuel management to protect critical infrastructure from wildfire, application of federally approved pesticides, and potentially limitless other activities throughout California, could inadvertently result in take of the candidate bumble bees. Extensive preconstruction surveys and incidental take permits are now required prior to such activities, and public agencies are now exposed to potential civil and criminal liability, for conduct that is part and parcel of providing essential utility services throughout California. Lastly, listing the bumble bees would set a precedent for listing other terrestrial invertebrates, including other pollinators found throughout California such as honey bees, butterflies, beetles, ants, moths, wasps etc. As the Department or interested persons petition to list other terrestrial invertebrates, the burden on the regulated community—indeed all Californians who tend gardens or apply pesticides—will grow—in a manner that the Legislature does not appear to have contemplated.

**C. The Opinion Is Contrary to the Plain Meaning of CESA, the Commission and Departments' Practices Under CESA, and the Legislative History of CESA**

Almond Alliance et al.'s Petition for Review provides a thorough analysis and discussion of the plain meaning of CESA, the Commission and Department's practices under CESA, and the legislative history of CESA. ACWA will not repeat that analysis here but emphasizes that the question for review in this case is important because the Opinion is contrary to the plain meaning of CESA, the Commission and Departments' practices under CESA, and the legislative history of CESA. The Opinion upends the wide-held, decades-old understanding that CESA does not apply to terrestrial invertebrates, including insects. For example, in 1998, the California Attorney General issued a formal opinion reaffirming that insects cannot be listed under CESA, and that same year, the Department promulgated a regulation—a regulation that is still in effect today—that states, "Take of insects. The take of insects and other invertebrates that are not fish as defined in the Fish and Game Code is not prohibited." (Cal. Code Regs., tit. 14, § 783.1.) Because the Opinion departs from the previous, widely-held understanding of the law and that departure has weighty implications for the regulated community, Supreme Court review is merited. The question whether CESA should be extended to terrestrial invertebrates is one the Legislature has answered in the negative; it is in that policy arena that the issues involved must be addressed.

**III. Conclusion**

The Opinion has significant implications for ACWA's member agencies and the municipal, agricultural, and wildlife refuge water supply purposes they serve. Increasing the number of projects and activities subject to CESA's regulatory requirements will increase the regulatory burden and expense of CESA compliance for ACWA's member agencies and their water users. The question in this case is important, in part, because of these implications and merits Supreme Court review.

Respectfully Submitted,



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Dave Eggerton, Executive Director  
Association for California Water Agencies

**PROOF OF SERVICE**

***Almond Alliance of California v. Fish and Game Commission, et al.***  
**California Supreme Court Case No. S275412**  
**Court of Appeal, Third Appellate District Case No. C093542**  
**Sacramento County Superior Court Case No. 34-2019-80003216-CU-WM-**  
**GDS**

**STATE OF CALIFORNIA, COUNTY OF SACRAMENTO**

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 Sacramento, State of California. My business address is 1331 Garden Hwy, 2nd Floor, Sacramento, CA 95833.

On August 3, 2022, I served true copies of the following document(s) described as **ASSOCIATION OF CALIFORNIA WATER AGENCIES AMICUS CURIAE LETTER IN SUPPORT OF PETITIONER ALMOND ALLIANCE ET AL.'S PETITION FOR REVIEW** on the interested parties in this action as follows:

**SEE ATTACHED LIST FOR METHOD OF SERVICE**

**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 Kronick, Moskovitz, Tiedemann & Girard 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 Sacramento, California

**BY EMAIL OR ELECTRONIC FILING:** Based on a court order or an agreement of the parties to accept service by email or electronic transmission, by causing the documents to be sent to the persons at the e-mail addresses listed on the service list on August 3, 2022, from the court authorized e-filing service at TrueFiling.com. No electronic message or other indication that the transmission was unsuccessful was received within a reasonable time after the transmission.

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

Executed on August 3, 2022, at Sacramento, California.



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Terri Whitman

**SERVICE LIST**

***Almond Alliance of California v. Fish and Game Commission, et al.***  
**California Supreme Court Case No. S275412**  
**Court of Appeal, Third Appellate District Case No. C093542**  
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**GDS**

*Via Email Through TrueFiling.com*

Paul S. Weiland  
Robert D. Thornton  
Benjamin Z. Rubin  
Samantha Savoni  
Nossaman LLP  
18101 Von Karman Avenue, Suite 1800  
Irvine, CA 92612  
Telephone: (949) 833-7800  
Email: pweiland@nossaman.com  
Email: rthornton@nossaman.com  
Email: brubin@nossaman.com  
Email: ssavoni@nossaman.com

*Attorneys for Petitioners and  
Appellees Almond Alliance of  
California, et al.*

*Via Email Through TrueFiling.com*

Adam Levitan  
Deputy Attorney General  
Jeffrey P. Reusch  
Deputy Attorney General  
California Department of Justice  
Office of the Attorney General  
1300 I Street  
P.O. Box 944255  
Sacramento, CA 94244-2550  
Telephone: (916) 210-7787  
Email: adam.levitan@doj.ca.gov  
Email: jeffrey.reusch@doj.ca.gov

*Attorneys for  
Respondents/Defendants/Appellants  
California Fish and Game  
Commission and California  
Department of Fish and Wildlife*

*Via Email Through TrueFiling.com*

Deborah A. Sivas  
Alicia E. Thesing  
Matthew J. Sanders  
Mills Legal Clinic at Stanford Law School  
Crown Quadrangle  
559 Nathan Abbott Way  
Stanford, CA 94305  
Telephone: (650) 725-8571  
Email: dsivas@stanford.edu  
Email: athesing@stanford.edu  
Email: matthewjsanders@stanford.edu

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

*Via TrueFiling*

California Court of Appeal  
Third Appellate District

*Via U.S. Mail*

Clerk of the Court  
Sacramento County Superior Court  
720 Ninth Street  
Sacramento, CA 95814