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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

CENTRAL COAST FOREST ASSOCIATION et al., Plaintiffs and Respondents, v. CALIFORNIA FISH AND GAME COMMISSION, Defendant and Appellant.	C060569 (Super. Ct. No. 07CS00851)

APPEAL from a judgment of the Superior Court of Sacramento County, Gail D. Ohanesian, Judge. (Retired Judge of the Sacramento Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Reversed.

Edmund G. Brown, Jr., and Kamala D. Harris, Attorneys General, Mary E. Hackenbracht and Kathleen A. Kenealy, Senior Assistant Attorneys General, Sara J. Russell, Supervising Deputy Attorney General, Tara L. Mueller and Cecilia Dennis, Deputy Attorneys General for Defendant and Appellant.

Deborah A. Sivas and Robb W. Kapla for Environmental Law Clinic, as Amicus Curiae on behalf of Defendant and Appellant.

Murphy & Buchal and James L. Buchal for Plaintiff and Respondent.

The California Endangered Species Act (Fish and G. Code, § 2050 et seq.; hereafter CESA)[1] provides that a wild, native, species may be added to or removed from the regulation listing endangered species by a finding of the Fish and Game Commission (Commission) based on scientific information from the Department of Fish and Game (department)[2]. (§§ 2074.6, 2075.5.) The finding constitutes a final, quasi-legislative, determination to enact a regulation listing or delisting a species as endangered.[3] (§ 2070.) The standard for adding a species is that it is in serious danger of extinction. (§ 2062.) The standard for removing (delisting) a species is that its "*continued* existence is no longer threatened [with extinction] . . . ." (Cal. Code Regs., tit. 14, § 670.1, subd. (i)(1)(B), italics added.)

The procedure for adding or removing a species from the list of endangered species has two stages. It is initiated by a petition from an interested person or a recommendation from the department. (§§ 2071, 2072.7.) The petition or recommendation must contain scientific information relating to the present ability of the species to survive and reproduce. (§ 2072.3.) The petition is in effect an application for consideration of a proposal to adopt or amend a rule. In the first or preliminary stage the petition and the department's evaluation of it are submitted to the Commission for it to decide whether to accept the petition for consideration. (§§ 2073.5, 2074.2.) If accepted, the department submits a recommendation and written report to the Commission "based upon the best scientific information available . . . ." (§ 2074.6.) In the final stage, the

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[1] Undesignated statutory references are to the Fish and Game Code.

[2] Effective January 1, 2013, the department will be renamed the Department of Fish and Wildlife. (Stats. 2012, ch. 559, § 5.)

[3] The CESA provides for two lists, a list of endangered species and a list of threatened species. (§§ 2062, 2067, 2070.) Since the procedure is the same for both lists and this case concerns only endangered species we refer to that list in the opinion.

Commission determines, based on the department's scientific report, whether the petitioned action is warranted. (§§ 2075, 2075.5.)[4] A final determination is judicially reviewable pursuant to Code of Civil Procedure section 1094.5. (§ 2076.)

The Commission added coho salmon in streams south of San Francisco (Santa Cruz County) to the list of endangered species in 1995 pursuant to a petition from the Santa Cruz County Fish and Game Advisory Commission. The Commission joined them with coho salmon north of San Francisco (to Punta Gorda) in 2004 as members of the Central California Coast (CCC) evolutionary significant unit (ESU)[5] pursuant to a petition from the Salmon and Steelhead Recovery Coalition.

The respondents Central Coast Forest Association and Big Creek Lumber Company own and harvest timber from lands in the area of the coho salmon spawning streams in the Santa Cruz Mountains. The respondent Big Creek Lumber Company received notice of the 1995 proceeding and participated in the 2004 proceeding but did not seek review of the final decision in either case. However, just before the 2004 decision became final, the respondents filed a petition seeking to redefine the southern boundary of the CCC ESU to remove (delist) coho salmon in coastal streams south of San Francisco from the register of endangered species.[6] The respondents sought review in the superior court, which ruled that the petition should be accepted for consideration.

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[4] The CESA also provides for the adoption of emergency regulations. (§ 2076.5.)

[5] An ESU is a population of organisms that is considered distinct for purposes of conservation. The determination whether the coho salmon constitute an ESU is a matter of judgment and expertise. An ESU is included within the term "species or subspecies" in sections 2062 and 2067. (*California Forestry Assn. v. California Fish & Game Commission* (2007) 156 Cal.App.4th 1535, 1548-1549.)

[6] The 2004 decision was the subject of review by this court, which affirmed the decision of the Commission. (*California Forestry Assn. v. California Fish & Game Commission, supra*, 156 Cal.App.4th 1535.)

The court directed the Commission to reexamine the petition. The Commission did so and rejected the petition a second time. The trial court again ruled for the respondents and the Commission appeals from that decision.

The respondents do not claim that the coho salmon became extinct after the 1995 decision of the Commission, the regulatory standard for delisting. Rather, their delisting petition seeks to show that there was no basis for the Commission's 1995 finding that coho salmon is an endangered species. The respondents assert that there never were wild, native, coho salmon south of San Francisco and that the 1995 decision was "undertaken without benefit of the information in the 2004 Petition [and] proceeded on the false premise that the native range of coho salmon extended below San Francisco." They argue that "[t]he Petition may be understood . . . as demonstrating that the presumption [that wild, native, coho existed] which backed up the 1995 listing was simply wrong." (Italics omitted.)

The petition fails at the outset because a petition to delist a species may not be employed to challenge a final determination of the Commission. The delisting procedure is not a means by which new information may be submitted on the merits of a final determination. The exclusive means of judicial review of the merits is by administrative mandamus. (§ 2076.) Any other conclusion would undermine the finality of the administrative decision and bypass the standard by which a delisting decision is to be judged. Since a delisting petition may not be employed at all to challenge a final decision of the Commission it need not be reviewed at the preliminary stage.

We shall reverse the judgment of the superior court.[7]

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[7] We have no occasion to determine the applicable period of limitations for review of a final determination of the Commission.

Facts

A. The 1995 Commission Decision

In 1993 the Santa Cruz County Fish and Game Advisory Commission filed a petition requesting the listing of coho salmon in Scott and Waddell creeks in Santa Cruz County south of San Francisco as endangered. In 1994 the Commission designated the coho salmon as a candidate species. (§ 2068.) It provided notice thereof to respondent Big Creek Lumber Company. The department conducted a status review and prepared a rulemaking file for the Commission setting forth scientific information showing that the coho salmon was an endangered species and recommending that it be listed as endangered.

The Commission accepted the recommendation and enacted a rule listing the coho salmon as endangered, effective December 31, 1995. (Cal. Code Regs., tit. 14, § 670.5, subd. (a)(2)(N), Register 95, No. 48 (December 31, 1995).) The Commission's determination states it was "based on the best available scientific information regarding the distribution, abundance, biology and nature of threats to coho salmon south of San Francisco Bay . . . ." The Commission found that "[c]oho salmon numbers south of San Francisco Bay have declined over 98 percent since the early 1960's and currently are restricted to one remnant population in Waddell Creek, one small naturalized (hatchery-influenced) population in Scott Creek, and a small hatchery-maintained, non-native run in the San Lorenzo River, Santa Cruz County. There is minimal possibility of successful natural expansion of the remnant Waddell and Scott Creek populations to neighboring drainages due to the functional extinction of two of the three brood year lineages, inadequate numbers of adult coho to naturally produce the necessary founder populations for successful recolonization of streams, loss of genetic and population viability, and general lack of secure adjacent suitable habitat."

The department recommended recovery measures. "The first priority should be to set minimum flows necessary to sustain the coho salmon on Scott and Waddell Creeks.

. . . [¶] Following the establishment and maintenance of minimum flows, restoration of coho salmon habitat should be initiated to produce enough habitat to allow for more juvenile coho to be reared in Scott and Waddell Creeks. Instream habitat restoration in Scott and Waddell Creeks is a viable option [because] County and State regulations, land ownership patterns, and improvement in present land use practices can bring about better control of accelerated erosion in the watershed."

The Commission published a notice of its determination and distributed it to a list of interested persons including respondent Big Creek Lumber Company.

B. The 2004 Commission Decision

Five years later, in July 2000, the Commission received a petition from the Salmon and Steelhead Recovery Coalition to add coho salmon from the area north of San Francisco Bay to the Oregon border to the list of endangered species. In November of 2000, the department recommended to the Commission that it accept the petition for consideration. In April of 2001 the Commission held a hearing and took testimony from numerous persons including a representative of respondent Big Creek Lumber Company. In April of 2002 the department submitted a status report identifying two groups of coho salmon, one from Punta Gorda to the Oregon border, referred to as the Southern Oregon/Northern California Coasts ESU (SONCC ESU) and the other from south of Punta Gorda to the San Lorenzo River in Santa Cruz County, referred to as the CCC ESU.

The department based its determination on the scientific analysis of the reproductive isolation and genetic differences between the two groups. In April of 2002 the department submitted a written report on the status of the species to the Commission as required by section 2074.6. On May 28, 2002, the department recommended to the Commission that it "list coho salmon north of Punta Gorda (Humboldt Co.) as a threatened species and coho salmon south of Punta Gorda (Humboldt Co.) . . . as an endangered species . . . ." Coho salmon south of Punta Gorda were joined in the report

with coho salmon south of San Francisco as the CCC ESU. On August 30, 2002, the Commission found "that coho salmon north of Punta Gorda and coho salmon south of Punta Gorda warrant listing as [respectively] threatened and . . . endangered," but delayed rulemaking for one year while the department prepared a recovery plan. On February 11, 2004, the Commission proposed a rule to "add the populations of coho salmon between San Francisco Bay and Punta Gorda, California, to the [California Code of Regulations, title 14,] Section 670.5 list as an endangered species . . . ." On February 25, 2004, the Commission staff issued a notice of intent to begin the "rulemaking process to add coho salmon north of Punta Gorda and coho salmon south of Punta Gorda to the list [respectively] of threatened and endangered species."

On August 5, 2004, the Commission amended the 1995 regulation that listed coho salmon south of San Francisco as endangered by joining them with coho salmon north of San Francisco. The rule, to be found at California Code of Regulations, title 14, section 670.5, subdivision (a)(2)(N), declares that the following species are endangered: "Coho salmon . . . south of Punta Gorda (Humboldt County), California." The context of the regulation makes clear that south of Punta Gorda included the streams south of San Francisco, the subject of the 1995 final determination of the Commission.

As noted, this court upheld the 2004 listing in *California Forestry Assn. v. California Fish & Game Commission, supra*, 156 Cal.App.4th 1535.

C. The Delisting Petition

Although the respondent Big Creek Lumber Company was given notice of the 1995 proceeding and participated in the 2004 proceeding it did not seek review of the Commission's findings in either matter pursuant to Code of Civil Procedure section 1094.5. Rather, the respondents initiated a separate, delisting proceeding asking that the Commission redefine the southern boundary of the CCC ESU to remove coho salmon in streams south of San Francisco from the rule listing endangered species.

The respondents' delisting petition was filed on June 17, 2004, two months before the Commission's final action in the 2004 proceeding. It states that "the petitioners hereby request that the California Fish and Game Commission redefine the southern boundary of the Central California Coast coho salmon evolutionary significant unit [ESU] to exclude coastal waterways south of San Francisco, thereby delisting coho salmon south of San Francisco from the list of endangered or the list of threatened species." The petition makes clear that it was challenging the facts underlying the 1995 decision placing the coho salmon on the list of endangered species. It stated: "[T]he status review prepared by the California Department of Fish and Game indicating whether the petitioned action is warranted must be based on the best scientific information available.[8] The preponderance of previously unconsidered scientific and historical evidence presented herein clearly shows that the legal standard for listing under the California Endangered Species Act has not been met. [¶] Archeological evidence strongly supports the concept that coho salmon populations were not present prehistorically in coastal streams south of San Francisco. . . . [H]arsh environmental conditions for coho survival beyond the fringe of their range (south of San Francisco) prevented the establishment of permanent populations in this area. The scientific and historical record since the arrival of Europeans substantiates the absence of coho populations. In particular, professional ichthyologic surveys in the latter part of the 1800s report the absence of coho south of San Francisco." Further, "[a]lthough no single scientific disciplinary source may be sufficient to conclude unequivocally that coho are or are not native south of San Francisco, the mutually consistent patterns disclosed

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8 The reference to "status review" is to the written report of the department upon which a final determination by the Commission is based. (§§ 2074.6, 2075) In this case it refers to the rulemaking files underlying the 1995 and 2004 final determinations by the Commission.

independently by multiple scientific disciplines and historical records provide a preponderance of evidence. This same evidence also indicates that populations of coho salmon south of San Francisco are not an important component in the evolutionary legacy of the species. Most importantly, no petition or [department] status review presents any legitimate or compelling evidence to the contrary. Therefore, coho salmon populations south of San Francisco do not constitute nor are part of any evolutionary significant unit."

The respondents further assert that the department's "status reviews of coho salmon in 1995 and 2002 . . . were undertaken without benefit of the information in [their] 2004 Petition." The 2004 petition explains that "[i]n order to qualify for listing under the [CESA], a species or subspecies must be native and represent an important component in the evolutionary legacy of the species. Additionally, the status review prepared by the [department] indicating whether the petitioned action is warranted must be based on the best scientific information available. The preponderance of previously unconsidered scientific and historical evidence presented herein clearly shows that the legal standard for listing under the [CESA] has not been met." The respondents assert that "[s]cientific and historic research unequivocally establishes that there have never been permanent colonies of native coho in these streams. The artificially introduced and hatchery maintained coho populations south of San Francisco are not native, carry no important genetic heritage and do not qualify for listing as an ESU or part of an ESU under the CESA."

In February of 2005 the Commission considered the delisting petition and denied it consideration on the ground that it did not contain sufficient scientific information that delisting may be warranted. It ratified the denial in March of 2005 and published a notice of its findings. The petitioners challenged the rejection of the petition in the superior court which remanded the matter to the Commission in November 2006. The Commission again denied the petition in March of 2007 and filed a notice of its findings and statement of reasons in April of 2007. The Commission joined issue with the

respondents in considering the petition pursuant to the threshold test of section 2072.3, whether the petition contained sufficient information to indicate that the petitioned action may be warranted. The Commission said: "One of the most obvious omissions in the petition is a failure to include specific information that the species in question is 'no longer threatened by any one or any combination of the . . . factors' " set forth in California Code of Regulations, title 14, section 670.1, subdivision (i)(1)(A). As noted this is the standard for judging the substantive merits of a petition to delist a species.

The superior court again overturned the Commission's decision and the Commission's appeal is taken from the resulting judgment.

DISCUSSION

I

The Administrative Procedure for Review of a Petition to Add or Remove a Species from the List of Endangered Species

The dispositive issue in this case is the statutory means for judicial review of the Commission's final decision to list a species as endangered. We begin with an overview of the CESA procedure.

The procedure for the listing or delisting of a species as endangered is a rulemaking procedure and must comply with the rulemaking procedures of the Administrative Procedure Act (Gov. Code, § 11340 et seq.). (§ 2075.5, finding (2).) The CESA sets forth the procedure by which the facts may be determined whether a native (§ 2062), wild (§ 45) species is threatened with extinction. The procedure is initiated by a petition from an interested person. (§ 2071.) It also may be initiated by the department, either by a direct recommendation to the Commission (§ 2072.7) or by a recommendation occasioned by the department's periodic review "to determine if the conditions that led to the original listing are *still present*." (§ 2077, subd. (a), italics added.) A petition or recommendation initiating an action must set forth "scientific information [on] the population trend, range, distribution, abundance, and life history of [the] species."

(§ 2072.3.) A recommendation from the department initiating a proceeding is treated as a petition and must include the information in section 2072.3. (§§ 2072.7, 2077.) A petition is in the nature of an application to the Commission to consider a proposal to adopt or amend a rule. (See *American Board of Cosmetic Surgery v. Medical Board of California* (2008) 162 Cal.App.4th 534.) The Commission shall publish notice in the California Regulatory Notice Register of the receipt of the petition. (§ 2073.3.)

The procedure has two stages. At the first or preliminary stage the department is directed to evaluate a petition "*on its face* . . . in relation to other relevant information the department possesses or receives . . . ." (§ 2073.5, subd. (a), italics added.) Any "person may submit information to the department relating to the petitioned species during the [department's] evaluation of the petition . . . ." (§ 2073.4.) The department then shall recommend to the Commission in a written report whether the "information contained *in the petition* . . . is sufficient . . . to indicate that the petitioned action may be warranted . . . ." (§ 2073.5, subd. (a)(2).) The Commission must decide whether to accept the petition for consideration. (§ 2074.2, subd. (a)(2).)

If accepted for consideration by the Commission, a second or final stage requires that the Commission decide whether to grant the petition (§ 2075.5) based upon a written report by the department containing "the best scientific information available to the department" (§ 2074.6). Although "affected [or] interested parties" are entitled to notice of the proceeding and may submit "data and comments" to the department for inclusion in the department's report, in making a final determination the Commission considers only the department's recommendation and scientific data in the report. (§§ 2074.4, 2074.6, 2075; Cal. Code Regs., tit. 14, § 670.1, subd. (h).) It is clear from these procedures that the Commission must depend upon the department's expertise in making a decision. If the petition is granted, the Commission is directed to publish a notice of proposed rulemaking and comply with the rulemaking provisions of the Government Code. (§ 2075.5, finding (2).)

II
The Exclusive Means of Review of a Final Commission Decision Is by Administrative Mandamus

Section 2075.5 provides for a final decision of the Commission whether a species is endangered. The next section provides that "[a]ny finding pursuant to *this section* is subject to judicial review under Section 1094.5 of the Code of Civil Procedure." (§ 2076, italics added.) The use of the singular "this section" logically refers to the immediately preceding section 2075.5. The statutory term which encompasses more than one section is "article" and the CESA is organized on that principle. Hence, the exclusive means of review of the merits of a final decision of the Commission is by administrative mandamus as provided in section 1094.5 of the Code of Civil Procedure.[9] "[I]t follows that [the agency decision] can be vacated only in the manner and upon the grounds that would justify the vacation of a judgment rendered by a court of record, and a mere error in the adjudication of a question of fact, not procured by fraud extrinsic or collateral to such question, is not a ground upon which it may be vacated, since, if it were, no adjudication of a question of fact would ever become final, so long as new evidence could be had . . . ." (*People v. Los Angeles* (1901) 133 Cal. 338, 342-343.)

The action under review is the quasi-legislative action of the Commission. The Commission is granted the authority to "establish [by rule] a list of endangered species

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[9] Code of Civil Procedure section 1094.5 provides, in relevant part: "(b) The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of, jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence. [¶] (c) Where it is claimed that the findings are not supported by the evidence [in the absence of a vested right] abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record."

and a list of threatened species." (§ 2070.) A final decision to list a species gives rise to "a notice of proposed rulemaking pursuant to Section 11346.4 of the Government Code." (§ 2075.5, finding (2).) And the list of endangered species is embodied in a regulation. (Cal. Code Regs., tit. 14, § 670.5.)

The review of an ordinary case of rulemaking is by ordinary mandamus. (Code Civ. Proc., § 1085.) "As to the quasi-legislative acts of administrative agencies, 'judicial review is limited to an examination of the proceedings before the [agency] to determine whether [the] action has been arbitrary, capricious, or entirely lacking in evidentiary support, or . . . failed to follow the procedure and give the notices required by law." (*Pitts v. Perluss* (1962) 58 Cal.2d 824, 833.) The CESA substitutes review by Code of Civil Procedure section 1094.5 for review whether the Commission's action is arbitrary and capricious. Nonetheless, it is a review of quasi-legislative action, and is limited to the question whether substantial evidence supports the exercise of quasi-legislative authority. (§ 2076; Code Civ. Proc., § 1094.5, subd. (c).) A substantial evidence review preserves the facts as determined by the agency and leaves for the court the question whether the law is consistent with the facts.

The respondents have failed to utilize this procedure for review of the final 1995 and 2004 decisions of the Commission and therefore are barred by section 2076 from using a delisting procedure to challenge the facts underlying those decisions. When a statute specifies a procedure for review of a decision that is the procedure that must be used.

The respondents argue that if a petition to delist a species is the only means by which an interested person may contradict the facts underlying a final determination of the Commission, there is no check on a wrongful decision. The respondents misunderstand the administrative procedure. An interested person has ample opportunity to tender scientific information to the department for consideration by the department and

the Commission during the administrative process leading to a final decision.[10] What an interested person may not do is tender new information in a later proceeding that challenges the grounds upon which the final decision has been rendered.

The respondents refer to section 2077, that provides periodic review of the status of an endangered or threatened species by the department, and imply that that it empowers the department to determine whether a prior decision of the Commission was in error. From that premise they reason that a regulation based on incorrect information is in violation of the CESA statutes and may be corrected by a delisting petition. The respondents misread section 2077. It does provide for periodic review whether a species is endangered, but the review is limited to the present condition of the species, whether "the conditions that led to the original listing are *still present*." (§ 2077, subd. (a), italics added.)[11]

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[10] As noted the respondent Big Creek Lumber Company received notice of the 1995 proceeding and participated in the 2004 proceeding but did not seek review of the final decision in either proceeding.

[11] The respondents ask us to take a procedural detour regarding the standard of judicial review of a Commission decision denying consideration of a petition at the preliminary stage. Although not relevant to this case, we address the issue to clear up a confusion occasioned by an earlier decision of this court and to address the nature of a CESA proceeding.

The confusion stems from our decision in N*atural Resources Defense Council v. Fish & Game Com.* (1994) 28 Cal.App.4th 1104 (*Natural Resources Defense Council*). It concerned the standard of review of a preliminary determination by the Commission whether to consider a petition to list or delist a species pursuant to section 2074.2. The standard for consideration is whether "the petition provides sufficient information to indicate that the petitioned action may be warranted." (§ 2074.2, subd. (a)(2).) We said that "the section 2074.2 [preliminary] determination is a quasi-adjudicatory one that contemplates the Commission weighing the evidence for and against [accepting the petition for review] and deciding essentially a question of fact in the process." (*Natural Resources Defense Council,* at pp. 1116; see also p. 1117, fn. 10.) We further said that judicial review of the decision at the preliminary stage is subject to Code of Civil Procedure section 1094.5. (*Natural Resources Defense Council,* at pp. 1114-1115.) The opinion is incorrect on both points.

Whether the conditions are "still present" is of course directed to the present conditions of the species and does not relate to the conditions upon which a prior decision of the Commission was based. This is consistent with the regulatory grounds of delisting, as we next show.

III

The CESA Authorizes the Delisting of a Species Only Where the Species Is No Longer Endangered

The Commission is empowered to adopted guidelines "by which an interested person may petition the Commission to add a species to, or remove a species from either the list of endangered or the list of threatened species." (§ 2071.) The Commission has done so. (Cal. Code Regs., tit. 14, § 670.1.) Among the regulations the Commission has enacted is the substantive standard by which a petition to delist a species is to be judged.

A petition to delist a species pursuant to the CESA is directed to events that occur after the listing of the species. The requirement is embodied in California Code of Regulations, title 14, section 670.1, which implements the CESA by regulation. It

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Code of Civil Procedure section 1094.5 does not apply to a preliminary determination whether to consider a petition because it does not result in a final decision, as required by subdivision (a). As we said in a subsequent decision: "The Commission is not free to choose between conflicting inferences on subordinate issues and thereafter rely upon those choices in assessing how a reasonable person would view the [delisting] decision." (*Center for Biological Diversity v. Fish & Game Com.* (2008) 166 Cal.App.4th 597, 611.) This bars review by Code of Civil Procedure section 1094.5, which provides for the judicial resolution of conflicting inferences. (Code of Civ. Proc. § 1094.5, subd. (a).)

Notwithstanding, the respondents argue that the legislative history of the CESA shows that section 2076 was intended to encompass not only the final determination of section 2075.5 but also the preliminary determination of section 2074.2. We disagree. It is true that in an early version of the CESA the provisions of present sections 2075.5 and 2074.2 were subsections of the provision now contained in section 2076. In that syntactic configuration the singular reference to "this section" encompassed both subsections. However, the early version was superseded by the present provision, in which the Legislature made separate sections out of the subsections (see now §§ 2074.2, 2075.5) yet retained the singular reference "this section" in section 2076. That rules out the inclusion of more than one section and points to the immediately preceding section 2075.5.

provides: "Delisting. A species may be delisted as endangered or threatened, as defined in sections 2062 and 2067 . . . if the Commission determines that its *continued existence is no longer threatened*," as measured by factors specified in subdivision (i)(1)(A). (Cal. Code Regs., tit. 14, § 670.1, subd. (i)(1)(B), italics added.) The factors, all of which relate to the present condition of the species, are: "1. Present or threatened modification or destruction of its habitat; [¶] 2. Overexploitation; [¶] 3. Predation; [¶] 4. Competition; [¶] 5. Disease; or [¶] 6. Other natural occurrences or human-related activities."[12] (Cal. Code Regs., tit. 14, § 670.1, subd. (i)(1)(A).) The CESA also contains a provision for the periodic review of the status of a species by the department. (§ 2077.) But, as noted, it also is limited to the "present" condition of the species, whether "*the conditions that led to the original listing are still present*."[13] (§ 2077, subd. (a).)

The dissent complains that our opinion would preclude the use of new evidence to show that the original listing was in error. That is correct. It would not, however, preclude any "person [from] submit[ing] information to the department relating to the petitioned species during the [department's] evaluation of the petition pursuant to Section 2073.5." (§ 2073.4, subd. (a).) At least one of the respondents, Big Creek Lumber Company, had the opportunity to do so. As noted, Big Creek Lumber Company

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[12] The CESA contains a single requirement for a "petition [to] the commission to add a species to, or to remove a species from ... the list of endangered . . . species." (§ 2071.) The criteria for addition or removal are the same. (§ 2072.3.) Since a petition to add a species "in serious danger of becoming extinct" is addressed to the present condition of the species so must a petition to remove a species. (§ 2062.)

[13] Section 2077, subdivision (a), in relevant part provides: "The department shall review species listed as an endangered species . . . every five years to determine if *the conditions that led to the original listing are still present*." (Italics added.) It also provides that the review shall be based on the information required for adding or deleting a species and that the department shall identify the "habitat that may be essential to the *continued existence* of the species . . . ." (Italics added.)

presented testimony at a hearing reviewing the 2000 petition. Moreover, Big Creek Lumber Company received notice of the 1995 proceeding and could have tendered a Code of Civil Procedure section 1094.5 petition in review of the decision. Nor would the regulation bar a delisting petition from showing that the coho salmon are *presently* extinct. (Cal. Code Regs., tit. 14, § 670.1, subd. (i)(1)(B).)[14] That would, of course, require the presentation of scientific evidence meeting the requirements of section 2072.3.

IV

The Species Challenge

The respondents also challenge the 2004 determination. They claim, based on evidence produced by the parties in the delisting proceeding, that the coho salmon south of San Francisco may be genetically distinct from the coho salmon north of San Francisco and are not part of the same ESU. However, the respondents did not seek review of the 2004 determination by administrative mandamus, the species issue arises in the context of the 1995 and 2004 decisions of the Commission and is subject to the broad authority of the Commission to define an ESU.

Whether wild, native, coho salmon ever existed and were historically native to the area south of San Francisco is, of course, a matter of fact and expert judgment, the evidence for which was before the Commission in the administrative rulemaking file supporting the 1995 listing. The rulemaking file contains the written report of the department "based upon the best scientific information available to the department." (§ 2074.6.) The respondents do not examine that data, and their reply brief contains not a single reference to it. Rather, they rely on information tendered pursuant to their 2004

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[14] The language of the regulation can be read to include the extinction of the species in the period following the listing of the species as endangered. That is the position of the Commission. It states: "Species may also be delisted if they are found extinct, but that is not the case here."

delisting petition to demonstrate that the information originally relied upon by the Commission is in error.

In *California Forestry Assn. v. California Fish & Game Commission, supra,* 156 Cal.App.4th 1535, an appeal from the final 2004 determination of the Commission to group coho salmon both south and north of San Francisco as a single ESU, we said that "there are two areas of 'genetic discontinuity/transition' for coho salmon. These areas occur from Punta Gorda south to the San Lorenzo River [Santa Cruz County] - the Central California Coast coho evolutionary significant unit . . . and from Punta Gorda north across the state border to Cape Blanco, Oregon - the Southern Oregon/Northern California Coast evolutionary significant unit . . ." (*Id.* at p. 1542.) " '[T]hese discontinuities represent areas of restrictive gene flow that likely results in some level of reproductive isolation.' " (*Ibid.*) These concern the range of an ESU, about which the "Commission and the Department have a wide degree of discretion in defini[tion] . . . ." (*Id.* at p. 1551.)

The decision is binding on the respondents.

DISPOSITION

The judgment is reversed. The parties shall bear their own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(5).)

BLEASE, Acting P. J.

I concur:

ROBIE, J.

Nicholson, J., Dissenting

This case has been going on for over seven years. Twice a judge ordered the Fish and Game Commission (hereafter Commission) to reconsider its refusal to accept plaintiffs' petition to delist a species. Twice the Commission stubbornly refused. Failing twice to persuade the trial judge it is correct, the Commission is now here. With the filing of their majority opinion, my colleagues compound error by the Commission with error of their own.

The majority opinion mistakenly treats this case as one of judicial review of a final administrative decision. It is not. No complaint or petition was filed in a court challenging the Commission's 1995 and 2004 listing decisions. Rather, this case concerns an attempt to obtain a repeal of a quasi-legislative decision by the means provided by the California Endangered Species Act (CESA) to do so: a petition to the Commission to delist.[1]

The majority opinion explains at length how the listing decision is a quasi-legislative decision, but then it concludes a person cannot ask the administrative agency that enacted the legislative rule to reconsider its decision because the original listing decision is final and immune to judicial review. This mixes apples with oranges, wrongly treating a legislative determination as adjudication. Even though plaintiffs' petition challenges the continued validity of the original listing decision, it does so by legislative process, not judicial action. Nothing in CESA says the Commission cannot reconsider its own legislative decision because the decision is final for purposes of judicial attack.

In fact, CESA says the opposite. It expressly authorizes the Commission to reconsider its prior listing decisions even though they may be final for purposes of

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[1] CESA is codified in the Fish and Game Code section 2050 et seq. Undesignated references to sections are to the Fish and Game Code.

judicial review. Specifically, the statute vests the Commission with authority to delist a species when it finds upon the receipt of sufficient scientific information that the "action is warranted." (§ 2070.)

Indeed, the statute provides three avenues by which the Commission may receive the scientific information and reconsider its prior listing decision. First, an interested person may petition the Commission to delist a species at any time. (§ 2071.) Second, the Department of Fish and Game, in the absence of a petition from an interested person, may recommend to the Commission that it delist a species at any time. (§ 2072.7.) Third, the Department is required to review listed species every five years, and it may as part of that review recommend that the Commission delist a species where the condition that led to the original listing is no longer present. (§ 2077.)

The majority opinion is simply wrong in holding judicial finality bars legislative reconsideration. As can be seen, the statute clearly provides for reconsideration of prior listing decisions even when the listing decision is final for purposes of judicial review. The Commission's prior decisions are not irrelevant to a later reconsideration, but neither are they res judicata; otherwise they would undermine the statutory structure and policy allowing for revising legislative listing decisions based on new or previously undiscovered scientific knowledge.

Thus, the dispositive issue is not whether the 1995 and 2004 listing decisions are final and section 2076 bars further judicial review. That statute does not apply here. Contrary to the holding of the majority opinion, the dispositive issue is whether plaintiffs' petition to the Commission includes sufficient scientific information that the delisting "may be warranted," regardless of when the listing decision was made. (§§ 2072.3, 2074.2, subd. (a).) This was the standard which the trial court on two occasions ordered the Commission to apply and also correctly determined the Commission had failed to apply. I turn now to that standard.

By regulation, the Commission has stated delisting a species is "warranted" only when the species' continued existence is no longer threatened. (Cal. Code Regs., tit. 14, § 670.1, subd. (i)(1)(B).) Both the majority opinion and the Commission rely upon this regulation as conclusive authority that prevents the Commission from delisting a species based on new scientific information that demonstrates the species is not truly an endangered species as CESA defines one. The regulation, however, is not the last word.

Assuming for purposes of argument that the regulation is a quasi-legislative regulation promulgated pursuant to a delegation of lawmaking power, a court nonetheless does not defer to it blindly. "[E]ven quasi-legislative rules are reviewed independently for consistency with controlling law. A court does not, in other words, defer to an agency's view when deciding whether a regulation lies within the scope of the authority delegated by the Legislature. The court, not the agency, has 'final responsibility for the interpretation of the law' under which the regulation was issued. [Citations.]" (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 11, fn. 4.) " ' "Whatever the force of administrative construction . . . *final responsibility for the interpretation of the law rests with the courts*." [Citation.] Administrative regulations that alter or amend the statute or enlarge or impair its scope are void and courts not only may, but it is their obligation to strike down such regulations. [Citations.]' " (*Id*. at p. 16 (conc. opn. of Mosk, J., original italics, quoting *Morris v. Williams* (1967) 67 Cal.2d 733, 748.)

The Commission's regulation limiting delisting to when a species is no longer threatened arbitrarily limits the Commission's statutory authorization to delist whenever it is warranted. It is ultimately the court's duty to determine the meaning of the "as warranted" standard, and the Commission's regulation arbitrarily restricts the full scope of the statutory phrase. Delisting may be warranted on additional grounds. Authority under the federal Endangered Species Act (FESA) makes this clear, and California courts may rely on federal authority to help interpret similar provisions of CESA. (*Natural*

Resources Defense Council v. Fish and Game Com. (1994) 28 Cal.App.4th 1104, 1117-1118.)

Under regulations implementing the FESA, delisting is warranted when the species (1) has become extinct; (2) the species has recovered, or (3) of relevance here, when the species "is neither endangered nor threatened" because "[o]riginal data for classification [was] in error. Subsequent investigations may show that the best scientific or commercial data available when the species was listed, or the interpretation of such data, were in error." (50 C.F.R. § 424.11, subd. (d)(3).)

The federal interpretation of the "as warranted" standard as including delisting on account of prior erroneous data exposes the arbitrary nature of the Commission's regulation. The regulation impairs the Commission's statutory authority under CESA to delist. If the data supporting a listing is later found to be erroneous and the species truly does not qualify as an endangered species, the Commission is not authorized, or warranted, to continue regulating the listed species and its habitat. Otherwise, in the worst case scenario, the Commission would continue to impose restrictions on otherwise lawful activities and land uses when the species does not in fact justify or require them. The regulation's exclusion of this ground for delisting, in light of its potential consequence of unwarranted regulation of lawful activities, is arbitrary indeed. Consideration of delisting by the Commission under CESA is "warranted" on this basis.

Plaintiffs' arguments and evidence in support of their petition fall into this category. The petition provides evidence indicating delisting may be warranted because new scientific information demonstrates the original listing may be in error. The issue before us, then, is whether the Commission abused its discretion in rejecting the petition by determining the petition did not demonstrate delisting may be "warranted," giving that statutory term its full meaning. (§ 2074.2, subd. (a)(1).)

We review the Commission's decision under a substantial evidence test. Specifically, we are to determine whether the evidence in the record, including the

Commission's evidence, clearly would lead a reasonable person to conclude there is a substantial possibility delisting could occur. If we conclude it does, then the Commission abused its discretion in rejecting the petition. (*Center for Biological Diversity v. Fish and Game Com.* (2008) 166 Cal.App.4th 597, 610-612.) I conclude the evidence in the record meets this standard, and the Commission erred.

The Legislature defined an endangered species of fish as a species or subspecies of wild fish native to California which is in danger of becoming extinct throughout all or a significant portion of its range. (§§ 45, 2062.) Based upon the evidence in the record derived from investigations conducted after the Commission listed coho salmon as endangered in 1995, a reasonable person clearly could conclude a substantial possibility of delisting exists in this instance because coho salmon south of San Francisco may not qualify as endangered under CESA's definition. Contrary to what was believed at the time of listing, substantial evidence now indicates these coho salmon may constitute a separate species or subspecies of fish that may not be wild or native to California. If that is so, delisting would be warranted.

The majority opinion highlights the importance of the judgment and expertise of the Commission and its staff. Yet, the opinion forecloses the public from receiving the benefit of that judgment and expertise by means of a technicality, and a faulty technicality at that. Res judicata does not bar new legislative action. Plaintiffs seek nothing more from the Commission than a full and fair consideration of the new scientific evidence they presented in their petition and whether the legislative listing no longer satisfies its statutory prerequisites. CESA is written to allow that consideration to take place at any time. The trial court twice ordered it to take place. I conclude the trial court was correct, and I would affirm its judgment and order the Commission finally to accept plaintiffs' petition for full consideration. (§ 2074.2, subd. (a)(2).)

NICHOLSON, J.