A California appeals court ruled last week that bumblebees are fish and are therefore protected by the California Endangered Species Act (CESA). That may sound ridiculous, but there's actually a convoluted legal argument to support the court. That argument does justify giving the CESA some extra coverage beyond what we would ordinarily classify as fish. Making the statute stretch far enough to cover bumblebees, however, is a bit too much.

The CESA explicitly covers birds, reptiles, amphibians, and plants, with no mention of invertebrates. The root of the problem is the way different parts of California law fit together. The CESA is part of the Fish and Game Code. There's a definition of fish elsewhere in that law that sweeps pretty broadly. That provision, section 45, says that "'[f]ish' means a wild fish, mollusk, crustacean, invertebrate, amphibian, or part, spawn, or ovum of any of those animals." Bumblebees aren't actually fish, but neither are mollusks, crustaceans, or amphibians. The court's argument is that bumblebees are invertebrates (true), that invertebrates are classified as fish by section 45, and that the reference to fish in the CESA thus includes invertebrates and therefore bumblebees. Got that?

Bumblebees *are* invertebrates. The question is whether the "fish" definition in section 45 includes *all* invertebrates or only those that spend some or all of their lives in the water. If only invertebrates connected with water are covered, dragonflies would be "fish" because their larvae live in the water, just as tadpoles do. But even under that definition, bumblebees would not be legally classified as fish.

I think the argument goes wrong at the second stage, where the court assumes that section 45 covers all invertebrates rather than just some. It seems unreasonable to interpret section 45 to cover invertebrates even if they have no connection to water bodies. I would guess that if we look at the Fish & Game Code as a whole, we would find that most of the references to fish refer to plainly aquatic settings. For instance, catching butterflies with a net presumably doesn't require a fishing license. So reading section 45 as a definition applying to the whole Fish & Game Code, it doesn't make sense to apply it to invertebrates that aren't at least partially aquatic.

There's a complicated history of disputes about whether invertebrates are protected by California law. In 1980, the Fish and Game Commission classified some types of butterflies and a snail as endangered. The state office of administrative law, however, disapproved this interpretation of the law. That dispute was never fully resolved within the executive branch. In 1984, the precursor of the CESA was repealed and replaced with the current law. There's good evidence that at that time, the legislature was aware of the Fish and Game Commission's view that the CESA covers invertebrates.

The court of appeals relied partly on section 45's definition of fish and partly on the 1984 reuse of the definitional language of the 1970 precursor law. It viewed the reuse of that language as approving the Commission's interpretation. The 1984 law also explicitly covered any species that had already been listed under the precursor law, which included one species of terrestrial snail. Finally, the court relied on what it considered the legislature's purpose and construed the law in favor of expanded coverage.

The legislature's use of the same language in the CESA as in its predecessor does carry some weight, given the Commission's broad interpretation of the earlier law. Still, it's always a bit tricky to figure out how much a legislature really understood about existing legal interpretations and how much it was ratifying them in new legislation. What really drives the court's opinion, however, seems to be the desire to resolve doubts in favor of the CESA's purpose of protecting endangered species.

The court's interpretation of the CESA isn't untenable, but it's undercut by three important facts:

1. ***The word "fish" isn't a technical term.*** It's not always used the way a biologist would, but it has *extremely* strong associations with water in both common and scientific usage. It's less likely that the legislature would redefine such a common word to have a meaning that's unrelated to its normal understanding than that it would redefine a more technical term or one whose connotations were less powerful.
2. ***Section 45 isn't part of the CESA.*** It applies to the whole Fish & Game Code, where the broad reading to include all invertebrates generally makes no sense. If section 45 were part of the CESA and tied to the purpose of protecting endangered species, the court's argument would be stronger.
3. ***The pre-1984 interpretation of the CESA to include all invertebrates wasn't clearly established.*** The 1984 legislature wasn't given clear and consistent information about how the CESA had been interpreted before its reenactment. Nor were the relevant executive branch actors themselves in agreement prior to 1984. And no court had ever ruled on the issue.

Taken together, these considerations counsel against the court's legal interpretation. As an environmentalist, I couldn't agree more with the decision to protect bumblebees. But as a lawyer, I think the best interpretation of section 45 is that it covers only aquatic or partly aquatic animals, and that the same definition applies to the CESA. That would leave some insects like dragonflies covered by the CESA, but only those with an aquatic connection. That wouldn't include bees.

Fortunately, bumblebees are clearly covered by the federal ESA, so the result wouldn't be to leave them without legal protection. Nevertheless, the California legislature really should eliminate any doubt and expand the CESA to include insects, or at the very least, plant pollinators like bees, butterflies, and moths.