

**FILED/ENDORSED**

**SEP 9 2019**

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Deputy Clerk

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13 Almond Alliance of California; California Association of Pest  
14 Control Advisers; California Citrus Mutual; California Cotton  
15 Ginners and Growers Association; California Farm Bureau  
16 Federation; Western Agricultural Processors Association; Western  
17 Growers Association; and The Wonderful Company LLC

12 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
13 FOR THE COUNTY OF SACRAMENTO

14 ALMOND ALLIANCE OF CALIFORNIA;  
15 CALIFORNIA ASSOCIATION OF PEST  
16 CONTROL ADVISERS;  
17 CALIFORNIA CITRUS MUTUAL;  
18 CALIFORNIA COTTON GINNERS AND  
19 GROWERS ASSOCIATION;  
20 CALIFORNIA FARM BUREAU  
21 FEDERATION;  
22 WESTERN AGRICULTURAL PROCESSORS  
23 ASSOCIATION;  
24 WESTERN GROWERS ASSOCIATION; and  
25 THE WONDERFUL COMPANY LLC,

26 Petitioners/Plaintiffs,

27 vs.

28 CALIFORNIA FISH AND GAME  
COMMISSION, a California Public Agency;  
CALIFORNIA DEPARTMENT OF FISH AND  
WILDLIFE, a California Public Agency,

Respondents/Defendants.

Case No. **24 = 2019 - 80003216**

**VERIFIED PETITION FOR WRIT OF  
MANDATE**

**BY FAX**

1 Petitioners and Plaintiffs, Almond Alliance of California, California Association of Pest  
2 Control Advisers, California Citrus Mutual, California Cotton Ginners and Growers Association,  
3 California Farm Bureau Federation, Western Agricultural Processors Association, Western  
4 Growers Association, and The Wonderful Company LLC, as individuals and as Co-Trustees  
5 (collectively, "Petitioners"), seek the issuance of a writ of mandate in this action, which  
6 challenges the unlawful actions of the California Fish and Game Commission (the  
7 "Commission") and the California Department of Fish and Wildlife (the "Department") in (i)  
8 making a finding that the Crotch bumble bee (*Bombus crotchii*), Franklin's bumble bee (*Bombus*  
9 *franklini*), Suckley cuckoo bumble bee (*Bombus suckleyi*), and Western bumble bee (*Bombus*  
10 *occidentalis*) (collectively, "Bumble Bees") are candidates for listing as an endangered or  
11 threatened species under the California Endangered Species Act (CESA) and (ii) recommending  
12 that the Bumble Bees should be made candidates for listing as an endangered or threatened  
13 species under CESA.

14 CESA defines candidate species as "a native species or subspecies of a bird, mammal,  
15 fish, amphibian, reptile, or plant that the commission has formally noticed as being under review  
16 by the department for addition to either the list of endangered species or the list of threatened  
17 species, or a species for which the commission has published a notice of proposed regulation to  
18 add the species to either list." The Bumble Bees do not fall into any of the classifications of a  
19 candidate species under CESA, that is, they are not birds, mammals, fishes, amphibians, reptiles,  
20 or plants. Therefore, as a matter of law, the Commission cannot make them candidate species  
21 and exceeded its statutory authority when it did so. By acting in excess of its statutory authority,  
22 the Commission has violated its public duty and wasted government resources. By this verified  
23 petition ("Petition"), Petitioners further allege as follows:

#### 24 PARTIES AND STANDING

25 1. Petitioners are a broad coalition of companies and industry associations that  
26 collectively represent the farming community in California, and many individuals and businesses  
27 that support the farming community.

28

1           2.   Petitioner Almond Alliance of California (Almond Alliance) is a non-profit trade  
2 association dedicated to advocating on behalf of the California almond industry by educating  
3 state and federal elected officials, policy makers and regulators about the California almond  
4 community. As a membership-based organization, our members include almond processors,  
5 hullers/shellers, growers and allied businesses. Almonds are one of California's top three valued  
6 commodities, with a farmgate value of \$5.6 billion and the state's leading agriculture export.  
7 Seventy percent of growers of almonds are farming 100 acres or less and are primarily family  
8 owned and operated. California produces 82% of the global supply of almonds. California  
9 almonds generate more than \$21 billion in economic revenue and directly contribute more than  
10 \$11 billion to the state's total economy. Almonds create approximately 104,000 jobs statewide,  
11 over 97,000 in the Central Valley.

12           3.   Petitioner California Association of Pest Control Advisers California Association of  
13 Pest Control Advisers (CAPCA) represents more than 75% of the nearly 4,000 California EPA  
14 licensed pest control advisers (PCAs) that provide pest management consultation for the  
15 production of food, fiber and ornamental industries of this state. CAPCA is dedicated to the  
16 professional development and enhancement of our member's education and stewardship, which  
17 includes legislative, regulatory, continuing education and public outreach activities.

18           4.   Petitioner California Citrus Mutual is a California non-profit corporation that  
19 advocates for citrus growers on the economic, regulatory, and political issues that impact the  
20 industry. California Citrus Mutual is authorized by law to commence and maintain this action on  
21 behalf of itself and its members. California Citrus Mutual represents more than 1,400 citrus  
22 growers throughout California.

23           5.   Petitioner California Cotton Ginners and Growers Association (CCGGA) is a  
24 voluntary dues trade association representing cotton gins and cotton growers throughout the state  
25 of California on regulatory and legislative issues. While membership is voluntary, CCGGA  
26 currently represents 100% of the cotton gins and cotton growers in the state of which there are 24  
27 operating cotton gins and approximately 600 cotton growers throughout the state.

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1           6. Petitioner California Farm Bureau Federation (Farm Bureau) is a non-governmental,  
2 non-profit, voluntary membership California corporation whose purpose is to protect and  
3 promote agricultural interests throughout the state of California and to find solutions to the  
4 problems of the farm, the farm home and the rural community. Farm Bureau is California's  
5 largest farm organization, comprised of 53 county Farm Bureaus currently representing more  
6 than 35,000 agricultural, associate and collegiate members in 56 counties. Farm Bureau strives to  
7 protect and improve the ability of farmers and ranchers engaged in production agriculture to  
8 provide a reliable supply of food and fiber through responsible stewardship of California's  
9 resources.

10           7. Petitioner Western Agricultural Processors Association (WAPA) is a voluntary dues  
11 trade association representing hullers and processors of almonds, pecans, pistachios and walnuts  
12 on regulatory and legislative issues. WAPA currently represents more than 160 tree nut hullers  
13 and processors throughout California.

14           8. Petitioner Western Growers Association (Western Growers) is a trade association  
15 that represents local and regional family farmers growing fresh produce in Arizona, California,  
16 Colorado, and New Mexico. Western Growers' members and their workers provide over half the  
17 nation's fresh fruits, vegetables, and tree nuts, including nearly half of America's fresh organic  
18 produce. Western Growers advocates for its members in legislative, regulatory, and judicial  
19 forums to ensure that environmental policy is based on sound science and proven data.

20           9. Petitioner The Wonderful Company LLC (Wonderful) is a privately-held Delaware  
21 limited liability company with its principal place of business in Los Angeles County. Wonderful  
22 and its affiliates are engaged in the business of growing, harvesting, packaging, and marketing a  
23 diverse range of products, including fruits, nuts, flowers, water, wines, and juices.

24           10. Petitioners have a beneficial interest in the issuance of the requested writ (Code Civ.  
25 Proc., § 1086) that is over and above the interest held by the public at large for the following  
26 reasons:  
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- a. The administrative process has imposed and will continue to impose burdens on Petitioners and their members to oppose listing of species that cannot be listed as a matter of law.
- b. The Commission’s decision to make the Bumble Bees candidates for listing is harming and will harm the farming community, including Petitioners and their members. The Listing Petition alleges that practices of the agricultural community pose a substantial threat to the survival and reproduction of the Bumble Bees including (1) conversion of habitat to agricultural use, (2) impacts to habitat from grazing methods, (3) reduction of floral resources attributable to the use of herbicides and pesticides, and (4) impacts caused by managed honey bees. The Listing Petition recommends actions that would injure Petitioners and their members, including permanently leaving farmland untilled, restricting grazing, restricting herbicide and pesticide application that is otherwise lawful, and prohibiting the use of commercial honey bees to pollinate crops such as blueberries, cherries, and almonds. Such actions will directly affect the farming community, including Petitioners and their members.
- c. The Listing Petition includes maps purporting to identify prior known locations of the bees and the extent of occurrence (or range) of the bees. These maps identify areas on and adjacent to lands farmed by Petitioners or their members. More specifically, members of both Almond Alliance and Farm Bureau own land in the immediate vicinity of the records of at least one the bees included in the Listing Petition and within the area described as the extent of occurrence of at least one of the bees included in the Listing Petition. As a result, Petitioners or their members have a real interest in the legality of the Commission’s finding that the bees are candidates for listing. In other words, Petitioners have a beneficial interest in the outcome of this Action.
- d. The action of the Commission requires Petitioners and their members to expend resources to survey for the Bumble Bees in the vicinity of activity undertaken on

1 land in the State owned by Petitioner's members, and to avoid engaging in activity  
2 where the Bumble Bees are present or face the prospect of enforcement of the take  
3 prohibition in CESA by law enforcement. This harm to Petitioners and their  
4 members is real and is compounded by the inability of even trained biologists to  
5 distinguish the Bumble Bees that are candidates for listing from myriad other  
6 species of bumble bees that are similar in appearance and occur across California.

7 11. Petitioners also have public interest standing to bring this Action because the proper  
8 application of CESA to the Commission's species listing determinations is a matter of public  
9 right, with implications for future petitions to list insects and other terrestrial invertebrates, and  
10 Petitioners are seeking to procure the enforcement the Commission's duty to comply with CESA.

11 12. Petitioners Almond Alliance, CAPCA, California Citrus Mutual, CCGGA, Farm  
12 Bureau, WAPA, and Western Growers have standing to bring this Petition on behalf of their  
13 members because their members would otherwise have standing to sue in their own right, the  
14 interests it seeks to protect are germane to their purposes, and neither the claim asserted nor the  
15 relief requested requires the participation of individual members in the lawsuit.

16 13. Petitioners exhausted administrative remedies by participating in the administrative  
17 process leading to the actions taken by the Department and the Commission with respect to the  
18 Bumble Bees, as alleged in paragraphs 31, 33, 36 and 37, below.

19 14. Respondent California Fish and Game Commission is an agency of the State of  
20 California. Respondent Commission is in charge of authorizing, adopting, and promulgating  
21 regulations under CESA. Further, Respondent Commission is authorized under CESA to  
22 determine – consistent with CESA and on the basis of a petition to list a species as threatened or  
23 endangered along with other information in the administrative record – whether a species should  
24 be a candidate for listing.

25 15. Respondent California Department of Fish and Wildlife is an agency of the State of  
26 California, authorized under CESA to issue a written evaluation, including a recommendation to  
27 the Commission, with respect to a petition to list a species as threatened or endangered whether  
28 the petitioned action may be warranted under CESA. Respondent California Department of Fish

1 and Wildlife is also responsible for enforcement of CESA, including the prohibitions that extend  
2 to candidate species.

### 3 **JURISDICTION AND VENUE**

4 16. As a court of general jurisdiction, this Court has jurisdiction to issue the requested  
5 writ and all other requested relief under Code of Civil Procedure sections 525, 526, 1060, 1085,  
6 1094.5, Government Code 11350(a), and Fish and Game Code section 2076.

7 17. Venue is proper in this Court under Code of Civil Procedure 393.

### 8 **FACTUAL BACKGROUND**

#### 9 **The California Endangered Species Act**

10 18. The California State Legislature enacted CESA “to conserve, protect, restore, and  
11 enhance any endangered species or any threatened species and its habitat.” (Fish & G. Code,  
12 § 2052.)

13 19. Section 2070 of the Fish and Game Code provides that “[t]he commission shall  
14 establish a list of endangered species and a list of threatened species.”

15 20. CESA defines an endangered species as “a native species or subspecies of a bird,  
16 mammal, fish, amphibian, reptile, or plant which is in serious danger of becoming extinct  
17 throughout all, or a significant portion, or its range due to one or more causes, including loss of  
18 habitat, change in habitat, overexploitation, predation, competition, or disease.” (Fish & G. Code,  
19 § 2062.)

20 21. CESA defines a threatened species as “a native species or subspecies of a bird,  
21 mammal, fish, amphibian, reptile, or plant that, although not presently threatened with extinction,  
22 is likely to become an endangered species in the foreseeable future in the absence of the special  
23 protection and management efforts required by this chapter.” (Fish & G Code, § 2067.)

24 22. CESA defines a candidate species as “a native species or subspecies of a bird,  
25 mammal, fish, amphibian, reptile, or plant that the commission has formally noticed as being  
26 under review by the department for addition to either the list of endangered species or the list of  
27 threatened species, or a species for which the commission has published a notice of proposed  
28 regulation to add the species to either list.” (Fish & G. Code, § 2068.)

1           23. Any person can submit a petition to list a species that is eligible for listing under  
2 CESA. To be accepted, a petition must include sufficient scientific information that the  
3 petitioned action may be warranted. (Fish & G. Code, § 2072.3.)

4           24. Within 10 days of the receipt of a petition to list a species, the Commission must  
5 refer the petition to the Department. (Fish & G. Code, § 2073.)

6           25. Within 90 days of receipt of the petition, the Department must submit to the  
7 Commission a written evaluation report with a recommendation to the Commission either that  
8 the petitioned action is not warranted and the petition should be rejected or that the petitioned  
9 action may be warranted and the petition should be accepted. (Fish & G. Code, § 2073.5.)

10           26. After receiving the Department’s recommendation, the Commission must either  
11 reject the petition or accept it and publish notice that the species is a candidate for listing. (Fish &  
12 G. Code, § 2074.2.)

13           27. The same protections afforded to listed species under CESA apply to candidate  
14 species. (Fish & G. Code, § 2085.)

15           28. A species does not qualify for candidate status if there is not sufficient information  
16 that would lead a reasonable person to conclude that the petitioned action may be warranted.  
17 (*Natural Resources Defense Council v. Fish & Game Com.* (1994) 28 Cal.App.4th 1104, 1119.)  
18 The Department of Fish and Game and the Commission have the legal obligation to evaluate the  
19 information in a petition and other available information and determine whether the petition’s  
20 claims are accurate and credible. (*Id.* at pp. 1119, 1125.)

### 21   **The Listing Petition**

22           29. On October 16, 2018, Respondent received the Listing Petition from the Xerces  
23 Society, Defenders of Wildlife, and Center for Food Safety.

24           30. On October 25, 2018, Petitioners sent the Commission a letter requesting that the  
25 Listing Petition be rejected because it was deficient on its face.

26           31. Respondent referred the Listing Petition to the Department for its review and  
27 recommendation.

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1           40. The Office of Administrative Law has ruled that the Commission does not have the  
2 authority to list insects as candidate, threatened or endangered species under CESA. In 1980,  
3 the Office of Administrative Law determined that the Commission acted outside of its authority  
4 in listing two butterflies, the Smith's blue butterfly (*Euphilotes enoptes smithi*) and Lange's  
5 metalmark butterfly (*Apodemia mormo langei*). The Commission had approved the listing of  
6 the butterflies under CESA. The Commission argued that (1) the definitions of endangered and  
7 threatened species expressly include fish, (2) section 45 of the Fish and Game Code expressly  
8 defines fish to include invertebrates, (3) insects are invertebrates, (4) insects are therefore fish,  
9 and (5) insects can be listed. The Office of Administrative Law rejected this argument and  
10 determined that insects are not fish. (M.E. Price, California Office of Administrative Law (1981)  
11 Report to the Administrative Conference of the United States, Washington, D.C.) Thereafter,  
12 the Commission rescinded its action to list the butterflies.

13           41. In 1998, Assembly member Keith Olberg requested an opinion of the Attorney  
14 General regarding the eligibility of insects for listing under CESA. (81 Ops.Cal.Atty.Gen. 222.)

15           42. The Attorney General opined that "insects are ineligible for listing as a threatened or  
16 endangered species under the California Endangered Species Act." (*Id.*)

17           43. The Attorney General further explained, "These definitions limit the application of  
18 CESA to birds, mammals, fish, amphibians, reptiles, and plants. Insects do not fall within any of  
19 these categories." (*Id.*)

20           44. The California Department of Fish and Wildlife website includes a publication on  
21 the history of CESA wherein the Department takes the clear and unequivocal position that  
22 insects and plants could not be listed under the Act as enacted in 1970. It states: "Recognized  
23 birds, mammals, fish, amphibian, and reptiles as species that may be endangered. Did not  
24 include insects or plants." The publication goes on to explain that in 1984 CESA was amended  
25 to add plants to the categories of wildlife that could be listed. (See Cal. Dept. Fish & Wildlife,  
26 History of California's Legislative and Regulatory Actions to Protect Wildlife  
27 <<https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=90061&inline=1>> (as of September 5,  
28 2019) (attached as Exhibit 1).

1 45. The decisions of the California Office of Administrative Law, the California  
2 Attorney General, and the California Department of Fish and Wildlife affirm the plain language  
3 of CESA that insects are not eligible for listing.

4 46. The Commission violated its legal duty to reject the Listing Petition because CESA  
5 does not authorize the listing of the Bumble Bees as candidate species.

6 **FIRST CAUSE OF ACTION**

7 **(Writ of Mandate Under Code of Civil Procedure § 1094.5, Against All Respondents,**  
8 **Including Does)**

9 47. Petitioners incorporate by this reference, as though fully set forth, each and every  
10 allegation contained in paragraphs 1-49, inclusive.

11 48. By engaging in the above actions, the Commission violated its legal duty, acted  
12 without or in excess of its jurisdiction or abused its discretion, and/or failed to proceed in a  
13 manner required by law. The Commission's determination of the Bumble Bees as candidate  
14 species for listing under CESA violated the Commission's legal duty, was a clear legal error,  
15 and was an abuse of discretion.

16 49. Petitioners have performed any and all conditions and prerequisites to the filing of  
17 this action. Petitioners have exhausted any and all administrative remedies by commenting at  
18 every major stage of the listing process and objecting to the Commission's actions that are  
19 challenged herein. The Commission's decision is subject to judicial review. (Fish & G. Code,  
20 § 2076.)

21 50. Petitioners have no plain, speedy or adequate remedy in the ordinary course of law,  
22 other than the relief sought in this Petition. Petitioners hold a beneficial interest in the issuance  
23 of a writ of mandate, and the awarding of other relief, as the Court deems just and proper. (Code  
24 Civ. Proc., § 1086.)

25 51. Petitioners are entitled to recover attorneys' fees as provided in Code of Civil  
26 Procedure section 1021.5, because this lawsuit will result in the enforcement of an important  
27 right affecting the public interest, in that: (a) a significant benefit will be conferred on the  
28 general public or a large class of persons, (b) the necessity and financial burden of private

1 enforcement are such as to make the award appropriate, and (c) such fees should not in the  
2 interest of justice be paid out of the recovery, if any.

3 **PRAYER FOR RELIEF**

4 WHEREFORE, Petitioners pray for relief as follows:

- 5 1. An Alternative Writ of Mandate commanding the Commission to show cause why  
6 the Court should not issue a Peremptory Writ of Mandate commanding the  
7 Commission to vacate its designation of the Bumble Bees as candidate species.  
8 2. Following the hearing on the Alternative Writ of Mandate, a Peremptory Writ of  
9 Mandate commanding the Commission to rescind its determination that the listing  
10 of the Bumble Bees is warranted, and vacating the designation of the Bumble  
11 Bees as candidate species.  
12 3. An award of reasonable attorneys' fees under Code of Civil Procedure section  
13 1021.5 and/or Government code section 800.  
14 4. Any other relief deemed appropriate by the Court.

15 Dated: September 9, 2019

NOSSAMAN LLP  
PAUL S. WEILAND  
ROBERT D. THORNTON  
CRESCENT CHENG

16  
17  
18 By: 

19 Paul S. Weiland

20 Attorneys for Plaintiffs/Petitioners  
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24 Growers Association; California Farm Bureau  
25 Federation; Western Agricultural Processors  
26 Association; Western Growers Association; and  
27 The Wonderful Company LLC  
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**VERIFICATION**


I, Paul S. Weiland, declare as follows:

I have read the foregoing Verified Petition for Writ of Mandate.

I am one of the attorneys for the Plaintiffs/Petitioners in this action (collectively, "Petitioners"). Petitioners are absent from the county in which my firm's Irvine office is located, and is otherwise unavailable, and I make this verification for and on behalf of Petitioners for that reason. I am informed and believe and on that ground allege that the matters stated with respect to Verified Petition for Writ of Mandate are true.

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

Executed on this 9th day of September 2019, at Irvine, California.



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Paul S. Weiland

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**INDEX OF EXHIBITS**

<u>Description</u>	<u>Tab No.</u>
Cal. Dept. Fish & Wildlife, History of California's Legislative and Regulatory Actions to Protect Wildlife < <a href="https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=90061&amp;inline=1">https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=90061&amp;inline=1</a> > (as of September 5, 2019)	1