THE DISTINCT POPULATION SEGMENT PROVISION OF THE ENDANGERED SPECIES ACT AND THE LACK THEREOF IN THE CALIFORNIA ENDANGERED SPECIES ACT

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INTRODUCTION

In 1972, President Richard Nixon delivered a speech to the 93rd Congress in which he outlined a new and comprehensive environmental agenda. In his speech, the President called on Congress to adopt legislation that would provide the necessary management tools for the federal government to identify and protect endangered species. A year later Congress passed the federal Endangered Species Act of 1973 (FESA). FESA has specific provisions designed to foster smaller state-based endangered species acts; and in 1984, California adopted its version, the California Endangered Species Act (CESA). FESA differs from its California counterpart in a variety of ways. This Article highlights one of those differences—the authority to list and protect “distinct population segments” of species.

The definition and application of the “distinct population segment” (DPS) power under FESA has been highly contentious. Recent court cases address issues such as the meaning of the DPS policy issued jointly by the United States Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (collectively the Services); whether the DPS policy is entitled to deference; and the application of the DPS concept to salmon populations (which

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2 Id.

3 The adjective “federal” is used to distinguish and make comparisons to the California Endangered Species Act.


6 See CAL. FISH & GAME CODE §§ 2050-98 (West 2009).

7 Ariz. Cattle Growers’ Ass’n v. U.S. Fish & Wildlife Serv., 273 F.3d 1229 (9th Cir. 2001).

8 Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984). Under the Chevron doctrine, when an agency is charged with administering a statute, that agency’s interpretation of the statute is entitled to judicial deference if the statutory text is ambiguous and the agency’s interpretation is reasonable. Id. at 842-45.

9 Nw. Ecosystem Alliance v. U.S. Fish & Wildlife Serv., 475 F.3d. 1136 (9th Cir. 2007).
are termed evolutionarily significant units (ESUs)). These decisions focus on the meaning of FESA’s DPS terminology, added to FESA in 1978.

These debates have been absent under CESA for two related reasons. First, few populations smaller than an entire species or subspecies have been listed under CESA. Second, CESA expressly provides for “species or subspecies” listing but makes no reference to any smaller population. This Article analyzes whether CESA authorizes the listing of DPSs or ESUs. As a case-in-point, the Article uses the California Court of Appeal’s recent decision in California Forestry Association v. Fish & Game Commission, which concerned a challenge to the California Fish and Game Commission’s listing of two Coho salmon ESUs. The Article concludes that neither the text of CESA, nor the Act’s legislative history, supports a DPS-ESU-listing power. The Article also offers some predictions as to the likely implications of the Court of Appeal’s decision in California Forestry Association to uphold the Commission’s DPS-listing power under CESA.

I. UNDERSTANDING THE FEDERAL ENDANGERED SPECIES ACT AND ITS APPLICATION TO DISTINCT POPULATION SEGMENTS

To judge best whether and how CESA authorizes the listing of DPSs and ESUs requires a general knowledge of FESA, as well the specific statutory history pertaining to the DPS power under FESA.

A. From Listing to Consultation—The Federal Endangered Species Act

1. Listing a Species

FESA’s administration is entrusted to the Secretaries of the Interior and Commerce, who have delegated their authority to FWS and NMFS, respectively. To be protected under FESA, a species must be designated as either “threatened” or “endangered.” An endangered species is “any species which is in

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10 Trout Unlimited v. Lohn, 559 F.3d 946 (9th Cir. 2009).
12 CAL. FISH & GAME CODE §§ 2050-98 (West 2009).
13 In addition to the Coho ESUs, the Commission has listed six plant populations and three salmon populations. See Brief of Respondent at 18, California Forestry Association v. California Fish & Game Commission, No. 05CS00948 (Sacramento Sup. Ct. Feb. 21, 2006). At present, over a hundred species and subspecies of plants and wildlife are listed. See CAL. CODE REGS. tit. 14, §§ 670.2, 670.5 (2010).
14 68 Cal. Rptr. 3d 391 (Cal. Ct. App. 2007).
16 The former official name for the National Oceanic and Atmospheric Administration, Fisheries.
17 Throughout this Article, “Service” is used for convenience, although the assertions apply equally to both Services when describing the agencies’ legal authorities.
danger of extinction throughout all or a significant portion of its range.”¹⁸ A threatened species is “any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.”¹⁹ Listing determinations are made according to five factors:

(A) [T]he present or threatened destruction, modification, or curtailment of its habitat or range;
(B) overutilization for commercial, recreational, scientific, or educational purposes;
(C) disease or predation;
(D) the inadequacy of existing regulatory mechanisms; or
(E) other natural or manmade factors affecting its continued existence.²⁰

The listing determination must be made “solely on the basis of the best scientific and commercial data available.”²¹

Section 9 of FESA forbids the taking of a listed species.²² Although Section 9 applies only to endangered species, the Services have adopted a rule, pursuant to this authority under Section 4 of the Act,²³ that makes the take of a threatened species illegal.²⁴ To “take” means to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”²⁵ The Services have defined “harm” to mean:

an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.²⁶

A “take” by habitat modification, however, requires more than a mere degradation; such a take is established by proof that the habitat modification actually prevents or retards the species’ recovery.²⁷

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¹⁹ Id. § 1532(20).
²⁰ Id. § 1533(a)(1).
²¹ Id. § 1533(b)(1)(A).
²² Id. § 1538(a)(1)(B).
²³ Id. § 1533(c).
²⁴ 50 C.F.R. § 17.3 (2008).
²⁷ See Ariz. Cattle Growers’ Ass’n v. U.S. Fish & Wildlife Serv., 273 F.3d 1229, 1238 (9th Cir. 2001).
2. **Finding a Home—The Designation of “Critical Habitat”**

Under Section 4 of FESA, the Service (whether FWS or NMFS) must, concurrent with listing, designate a species’ critical habitat “to the maximum extent prudent and determinable.” Critical habitat is defined as:

(i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features

(I) essential to the conservation of the species and
(II) which may require special management considerations or protection; and

(ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

Critical habitat designations and amendments thereto must be based on the best available scientific data and be made only “after taking into consideration the economic impact . . . and any other relevant impact, of specifying any particular area as critical habitat.” The Services may exclude any area from critical habitat if the benefits of exclusion outweigh the benefits of inclusion, provided the exclusion would not result in the extinction of the species.

3. **What Species Listing and Designation of Critical Habitat Means for Other Federal Agencies—Consultation under the Federal Endangered Species Act**

Federal agencies are obligated to ensure that the actions they authorize, fund, or carry out are “not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species.” A federal agency must consult with the appropriate Service if a permit applicant “has reason to believe that an endangered species or a threatened species may be present in the area affected by his project and that implementation of such action will likely affect such species.”

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29 Id. § 1532(5)(A)(i)-(ii).
30 Id. § 1533(b)(2).
31 Id.
32 Id. § 1536(a)(2). A similar obligation was found within CESA, but its consultation provisions have been repealed. See 1993 Cal. Stat. 2107.
At the conclusion of consultation, the Service provides the federal agency with a “biological opinion” which explains how the anticipated federal action will affect the listed species or its critical habitat. If the Service determines that jeopardy to the species or adverse modification of its critical habitat will likely result from the contemplated action, then the Service may suggest “reasonable and prudent alternatives” to the proposed action that would avoid jeopardy or adverse modification.

If the Service determines that the proposed federal action will not jeopardize the species’ existence or adversely modify its critical habitat (either as proposed or by following suggested reasonable and prudent alternatives), the Service may issue an incidental take statement which authorizes what might otherwise violate Section 9 of the Act. The incidental take statement, however, must specify: (1) the impact on the species of the incidental take; (2) the reasonable and prudent measures to minimize the impact; and (3) the terms and conditions with which the agency or applicant must comply.


1. From National Environmental Policy Act to Federal Endangered Species Act—Increasing the Federal Government’s Authority over Endangered Species

The present-day FESA was enacted in 1973 for the purpose of “provid[ing] a means whereby the ecosystems upon which endangered species . . . depend may be conserved, [and] to provide a program for the conservation of such endangered and threatened species . . . .” The origins of Section 7 of the Act can be traced to the National Environmental Policy Act of 1969 (NEPA). FESA represented a significant increase of federal authority over nationwide environmental policy. As originally enacted in 1973, FESA defined a species as...
including “any subspecies of fish or wildlife or plants and any other group of fish or wildlife of the same species or smaller taxa in common spatial arrangement that interbreed when mature.”42 This definition did not allow for the listing of distinct population segments, although it provided for the listing of defined “groups” of wildlife smaller than subspecies.43

2. Congress’ Controversial Decision to Add the “Distinct Population Segment” Language to the Federal Endangered Species Act

In 1978, Congress modified the 1973 definition of species to include DPSs.44 Specifically, Congress defined “species” to “include[,] any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.”45 The lack of legislative history, however, clouds Congress’ motivation behind this change in the definition of species.46

Importantly, the new language did not contain any reference to “taxa in common spatial arrangement.”47 The new definition was “not restricted to species as recognized in formal taxonomic terms.”48 Yet this policy choice—favoring greater agency flexibility for listing species—came under fire the following year when the General Accounting Office (GAO) objected to the Services’ increased authority under FESA.

“[T]he GAO recommended that Congress eliminate the Services’ ability to list populations of species, fearing that such listings would ‘increase the number of potential conflicts between endangered and threatened species and Federal, State, which placed a more flexible duty upon federal agencies only “where practicable.” 16 U.S.C. § 668bb(d) (1970) (repealed 1973).
43 Kalyani Robbins, Missing the Link: The Importance of Keeping Ecosystems Intact and What the Endangered Species Act Suggests We Do About It, 37 ENVTL. L. 573, 576 (2007).
45 Id. (emphasis added).
46 Holly Doremus, Listing Decisions Under the Endangered Species Act: Why Better Science Isn’t Always Better Policy, 75 WASH. U. L.Q. 1029, 1094 n.349 (1997) (quoting H.R. CONF. REP. NO. 95-1804, at 3-4 (“The existing definition of ‘species’ in the act includes subspecies of animals and plants, taxonomic categories below subspecies in the case of animals, as well as distinct populations of vertebrate ‘species.’ The definition included within the conference report would exclude taxonomic categories below subspecies from the definition as well as distinct populations of invertebrates.”)).
and private projects and programs.”

The GAO objected that the Service “had interpreted the term ‘species’ to include any population of the animal, regardless of its size, location or total numbers.” As an example of the potential for abuse, the GAO argued that “this could result in the listing of squirrels in a specific city park, even though there is an abundance of squirrels in other parks in the same city, or elsewhere in the country.” Congress, however, was not persuaded by the GAO’s arguments. Thus, the 1979 Endangered Species Act amendments did not include any changes to the 1978 definition of species.

The 1978 FESA amendments did not define DPS. “While scientists had studied and used subspecies definitions, they had never, in the scientific literature, employed the term DPS.” The lack of an accepted definition for a DPS became apparent less than fifteen years later when NMFS adopted its ESU policy in response to numerous petitions to list anadromous fish populations under FESA.


As noted above, Congress has delegated the authority to administer FESA to the Secretaries of the Interior and Commerce. Those Secretaries in turn have

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52 S. REP. NO. 96-151 (1979), reprinted in LEGISLATIVE HISTORY OF THE ENDANGERED SPECIES ACT at 1397 (1982). (“The committee agrees [with the FWS] that there may be instances in which FWS should provide for different levels of protection for populations of the same species. Nonetheless, the committee is aware of the great potential for abuse of this authority and expects the FWS to use the ability to list populations sparingly and only when the biological evidence is warranted.”); see also Teaney, supra note 49, at 654.


56 See generally Gulessarian, supra note 54, at 607-610.

delegated their authority to list species to FWS and NMFS, respectively.\textsuperscript{58} In 1990, NMFS received petitions to list five stocks of Pacific salmon under FESA.\textsuperscript{59} NMFS recognized that when evaluating these petitions, it would, for the first time, need to establish a usable definition of DPS.\textsuperscript{60} In response, NMFS adopted an interim policy that allowed for the listing of a species that “represent[ed] an evolutionarily significant unit of the biological species.”\textsuperscript{61} NMFS derived this authority from its interpretation of the DPS language.\textsuperscript{62} NMFS received twenty-one comments on the interim rule.\textsuperscript{63} Later that year, NMFS adopted a final policy that would allow for the listing of certain salmon stocks under FESA if they could be identified as “evolutionarily significant units.”\textsuperscript{64} NMFS paid particular heed to the 1979 concerns raised by the GAO.\textsuperscript{65}

For a specific salmon stock to fall under NMFS’ ESU umbrella, it must satisfy two criteria:

1. It must be substantially reproductively isolated from other nonspecific population units;
2. It must represent an important component in the evolutionary legacy of the species.\textsuperscript{66}

Yet NMFS’ ESU policy “applie[d] only to species of salmonids native to the Pacific.”\textsuperscript{67} While NMFS had provided a workable definition of DPS applicable to certain species under FESA, the agency provided no broader definition applicable to species generally.

4. The Path Towards Creating a Joint Distinct Population Segment Policy

NMFS’ ESU policy was applicable only to Pacific salmon.\textsuperscript{68} Perhaps recognizing the need for consistency, FWS joined with NMFS in 1996 to produce a joint “Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act, 61 Fed. Reg. 58,612, 58,612 (Nov. 20, 1991).

\textsuperscript{58} Species are listed by NMFS and FWS pursuant to Section 4 of the Act, 16 U.S.C.A. § 1533. See also Roderick E. Walston, Judicial Deference to Agency Interpretations: The Ups and Downs of the Chevron Doctrine, 15 SOUTHEASTERN ENVTL. L.J. 405, 414-15 (2007); Steven Ferrey, ESA and Bird Protection, in L. OF INDEP. POWER § 6:105 (West 2008).


\textsuperscript{60} Petition to List Sockeye Salmon in the Snake River, ID, 55 Fed. Reg. 22,942, 22,943 (June 5, 1990).


\textsuperscript{62} Id.


\textsuperscript{64} Id.

\textsuperscript{65} See id.

\textsuperscript{66} Id. at 58,612.


Segments under the Endangered Species Act. In developing their joint policy, the agencies noted that Congress had instructed the Secretaries to exercise their authority with regard to DPSs “sparingly and only when the biological evidence indicates that such action is warranted.” The Joint DPS Policy also considered NMFS’ work in developing its ESU policy, observing, “[t]he Services believe that the NMFS policy . . . on Pacific salmon is consistent with the policy outlined in this notice.”

Before publishing their final Joint DPS Policy, NMFS and FWS “received 31 letters from individuals and organizations commenting on the draft policy.” The Services addressed many of the concerns detailed by the letters when they published their joint policy. The final policy requires consideration of three factors when determining whether a potential DPS should be listed as endangered or threatened under the Act:

1. Discreteness of the population segment in relation to the remainder of the species to which it belongs;
2. The significance of the population segment to the species to which it belongs; and
3. The population segment’s conservation status in relation to the Act’s standards for listing.

These are summarized by the Services as (1) Discreteness, (2) Significance, and (3) Status. The Services’ Joint DPS Policy provides guidelines for interpreting each factor. The factors are “sequential,” i.e., the agency will only evaluate “significance” after “discreteness” is satisfied, and it will only evaluate “status” if both “discreteness” and “significance” are satisfied.

II. IMPLEMENTING DISTINCT POPULATION SEGMENT POLICY THROUGH A WEST COAST FISH

A. The Federal Listing History of Two Evolutionarily Significant Units of Coho Salmon

On July 21, 1993, NMFS received a petition to list multiple populations of Coho salmon as ESUs and to designate critical habitat under FESA. Shortly

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70 Id. (citing S. Rpt. No. 96-151 (1979)).
72 Id.
73 Id. at 4,722-24.
75 Id.
thereafter, NMFS determined that the “petition present[ed] substantial scientific information indicating that [listing] may be warranted,” and began a comprehensive status review on Coho salmon stocks in Washington, Oregon, and California.77 NMFS next published a notice of finding that a non-emergency listing may be warranted for salmon ESUs coastwide.78 The notice of finding reiterated that the petitioned species were capable of being listed as “species” by virtue of FESA’s DPS clause.79

The first Coho salmon stock to be listed as a threatened species under the FESA was the Central California Coast ESU, on October 31, 1996.80 In the final rule listing the Central California Coast ESU, NMFS spent considerable time explaining how the listing of the ESU qualified as a “species” under FESA.81 In citing both NMFS’s 1991 ESU policy as well as the Joint DPS Policy published by NMFS and FWS, NMFS underscored that its ability to list ESUs under FESA derives from its interpretation of the DPS clause.82

At the same time that NMFS issued its final rule listing the Central California Coast ESU, the agency also issued a notice of extension regarding the final determination of both the Oregon Coast and Southern Oregon-Northern California Coast ESUs.83 The delay in listing resulted from “substantial disagreement regarding the sufficiency and accuracy of the available data relevant to the listing determination.”84 Six months later, NMFS issued a final rule listing, as threatened only, the Southern Oregon-Northern California Coast ESU, while at the same time noting that the Oregon Coast ESU did not warrant listing.85 Once again, NMFS explained that its authority for listing ESUs under FESA stemmed from “the definition of ‘distinct population segments.’”86 Neither the 1997 listing of the ESUs, nor the 1996 listing of the Central California Coast ESU, was accompanied

79 Id. (“[T]he petition presents substantial scientific information that a non-emergency listing may be warranted . . . based on evidence presented in the petition that the petitioned populations may qualify as ‘species’ under the ESA, in accordance with NMFS’ ‘Policy on Applying the Definition of Species under the Endangered Species Act to Pacific Salmon.’” (citing 56 Fed. Reg. 58,612 (Nov. 20, 1991))).
81 Id.
82 Id. (“This policy indicates that one or more naturally reproducing salmonid populations will be considered distinct, and hence species under the ESA, if they represent an ESU of the biological species.”).
83 Notice of Six-Month Extension on the Final Determination on Whether to List the Oregon Coast and Southern Oregon/Northern California Coast Evolutionarily Significant Units (ESUs) of Coho Salmon, 61 Fed. Reg. 56,211 (Oct. 31, 1996).
85 Id.
86 Id. at 24,590.
by a designation of critical habitat for the salmonid populations. In 1999, NMFS designated critical habitat for all three ESUs.

NMFS’ original determination not to list the Oregon Coast ESU was successfully challenged in court; the agency, after a court-ordered remand, formally listed the ESU on August 10, 1998. Soon thereafter, a separate federal lawsuit was brought in the District of Oregon, challenging the listing as arbitrary and capricious under the federal Administrative Procedure Act, on the grounds that the agency had improperly excluded hatchery-raised salmon from its listing determination. In ruling for the plaintiffs, the court reasoned that the authority to list ESUs stems from NMFS’ lawful interpretation of the DPS language of FESA. Nevertheless, the court overturned the listing, agreeing with the plaintiffs that, once included within an ESU, hatchery-raised individuals cannot be entirely ignored or discounted in the listing analysis.

B. The California State Listing History of Two Coho Evolutionarily Significant Units

1. What the California Endangered Species Act Allows

The California Fish and Game Commission is vested with the authority under CESA to establish and maintain a list of “endangered” and “threatened” species. The Act defines an “endangered species” as any:

native species or subspecies of a bird, mammal, fish, amphibian, reptile, or plant which is in serious danger of becoming extinct throughout all, or a significant portion, of its range due to one or more causes, including loss of habitat, change in habitat, overexploitation, predation, competition, or disease.
A "threatened species" is defined in similar fashion, except that "although not presently threatened with extinction, [it] is likely to become an endangered species in the foreseeable future in the absence of the special protection and management efforts required by this chapter." 95 CESA prohibits the "take" of any endangered or threatened species,96 with "take" defined as to "hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture, or kill."97

Any interested person may petition to list or delist any species.98 Within 90 days of receipt of a petition, the California Fish and Game Department must recommend to the Commission whether the petition contains sufficient information to indicate that the petitioned action may be warranted.99 If the Commission determines that the petition provides sufficient information, the matter is referred back to the Department, which must then recommend, within twelve months, whether the petitioned action, in light of the best available scientific information, is warranted.100 Upon receipt of the Department’s recommendation, the Commission must then make the final determination whether to proceed with the petitioned action.101 If the Commission determines that the listing is warranted, it must issue a notice of proposed rulemaking in anticipation of the adoption of a regulation listing the species.

2. The Actions of the California Agencies

On July 19, 2000, the Salmon and Steelhead Recovery Coalition (Recovery Coalition) formally submitted to the Commission a petition to list the Coho salmon in California as an endangered species under CESA.102 From the outset, the Recovery Coalition recognized that the Coho salmon at issue should be properly classified as an ESU.103

Pursuant to CESA,104 the Commission referred the petition to the Department for its initial review. During the review period, numerous interested entities and individuals submitted materials demonstrating that the petition to list the Coho salmon was insufficient and could not support a finding that the listing “may be warranted.”105 Opponents to the petition noted, among other things, that the “scientific evidence” presented in the Recovery Coalition’s petition failed to address a number of required “candidacy factors,”106 including the habitat

95 Id. § 2067.
96 Id. § 2080.
97 Id. § 86.
98 See id. § 2071.
99 Id. § 2073.5.
100 See id. § 2074.6.
101 Id. § 2075.5.
102 Admin. Record, Cal. Forestry Ass’n v. Cal. Fish & Game Comm’n, No. 05CS00948 (Sacramento Superior Court 2005) (on file with authors and with the Journal) [hereinafter Record].
103 Id. at 000029.
104 CAL. CODE REGS. tit. 14, § 670.1(c) (2010).
105 See, e.g., Record, supra note 102, at 004861-004872.
necessary for the survival\textsuperscript{107} of the Coho salmon and the impact of existing management efforts\textsuperscript{108} on the continued survival of the Coho salmon.\textsuperscript{109} Furthermore, the petition’s opponents noted that the petition failed to consider all available scientific data, and did not undertake a quantitative comparison of the current and historic abundance of Coho salmon.\textsuperscript{110} Nevertheless, the Department recommended that the Commission make a finding that the listing of the Coho salmon “may be warranted.”\textsuperscript{111} In April 2001, based upon the Department’s preliminary 90-day review and recommendation, the Commission voted unanimously that the listing of the Coho salmon “may be warranted,” accepted the petition, and designated the Coho salmon as a candidate species under CESA.\textsuperscript{112}

Once a species is designated as a “candidate” for listing as “threatened” or “endangered,” the Department is then required promptly to commence a more exhaustive review of the status of the species at issue.\textsuperscript{113} Within twelve months of the time the species becomes an official “candidate,” the Department must provide a written report to the Commission, “based upon the best scientific information available to the department,” which indicates whether the petitioned action is warranted.\textsuperscript{114} Once the Commission receives a copy of the Department’s report, it is required to make a finding either that (a) the petitioned action is not warranted, or (b) the petitioned action is warranted.\textsuperscript{115} If the Commission finds that the proposed action is warranted, it must publish a formal notice of that finding and a “notice of proposed rulemaking,” pursuant to California Government Code section 11346.4 (part of the state’s Administrative Procedure Act [California APA]).\textsuperscript{116}

After the Commission voted that the Coho listing “may be warranted,” the Department began its year-long review of the Recovery Coalition’s petition to list the Coho salmon. Between April and August 2002, numerous interested individuals and entities again submitted materials to the Commission demonstrating that the Department’s report was inadequate in several respects and, therefore, that the listing of the Coho salmon was not warranted under CESA.\textsuperscript{117} A few of these objections deserve closer inspection: (1) the Status Report failed to include required information; (2) the Status Report did not consider hatchery salmon; and (3) the absence of authority to list ESUs under CESA.

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{107}]CAL. CODE REGS. tit. 14, §§ 670.1(d)(1)(D) (2010).
\item[\textsuperscript{108}]Id. §§ 670.1(d)(1)(I).
\item[\textsuperscript{109}]See Record, supra note 102, at 004448-004460.
\item[\textsuperscript{110}]Id.
\item[\textsuperscript{111}]Id. at 000070.
\item[\textsuperscript{112}]Id. at 000259.
\item[\textsuperscript{113}]CAL. FISH & GAME CODE § 2074.6 (West 2009).
\item[\textsuperscript{114}]Id. § 2074.6.
\item[\textsuperscript{115}]Id. § 2075.5.
\item[\textsuperscript{116}]Id. § 2075.5(2).
\item[\textsuperscript{117}]See generally Record, supra note 102, at 004281-007330.
\end{itemize}
\end{footnotesize}
(a) The Coho Salmon Population

Before the Commission can list a species under CESA, it needs sufficient scientific information that the species is “threatened” or “endangered.” Opponents to the Coho listing pointed out that the Status Review conceded that “the Department does not know how many coho there are today, nor how many there need to be to ensure its survival over the long term (100 years), or even the short term (10 years).” Indeed, the Status Review noted:

The number of individuals that would ensure population viability to a negligible probability of extinction over 100 years is difficult to calculate. Evaluation of viability is based on assessments of abundance, population growth rate, population structure and diversity. Reliable estimates of these parameters are not available for California coho salmon.

(b) Why Were Hatchery Salmon Ignored?

Opponents of the listing also argued that the listing was improper because the Department failed to consider the availability and presence of hatchery salmon when determining the population of California Coho salmon. Under CESA, the Commission is authorized to list “species” or “subspecies.” Because hatchery salmon and naturally spawning salmon are genetically indistinguishable, listing opponents argued that the entirety of the species or subspecies must be counted when determining whether to list. Recognizing the importance of hatchery salmon to the recovery of the naturally spawning populations, the Department conceded, “[h]atchery- and natural-origin coho salmon are of the same species” and “often indistinguishable genetically.”

The Department countered that California state policy sought to encourage production of naturally-spawning salmon stocks. Indeed, the legislative findings of the Salmon, Steelhead Trout, and Anadromous Fisheries Program Act note that “[h]atchery production may be an appropriate means of protecting and increasing salmon and steelhead in specific situations; however, when both are feasible alternatives, preference shall be given to natural production.” This argument, however, misses the point. When determining whether a species is endangered or threatened, the Department must count all of the “genetically indistinguishable”

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118 CAL. FISH & GAME CODE § 2070 (West 2009).
119 Record, supra note 102, at 006841.
120 Id. (citing Status Review, at 37 (citation omitted)).
121 Record, supra note 102, at 006859-006860.
122 See CAL. FISH & GAME CODE § 2062 (West 2009).
123 Record, supra note 102, at 006859-006860.
124 Id. at 006859 (citing Status Review, at 88).
125 Id. at 006860.
126 CAL. FISH & GAME CODE § 6901 (West 2009).
species. Thus, “[f]or CESA purposes, a hatchery coho is no different from a
naturally spawned coho—they are the same species.” 127

(c) The Authority of the California Agencies

As will be more fully explored infra, opponents of the Coho listing objected
that no authority exists to list ESUs under CESA. Unlike its federal counterpart,
which authorizes the listing of “distinct population segments”128 of species, CESA
only allows for the listing of “species or subspecies.”129 Nevertheless, the
Department evaluated the status of the Coho salmon as two separate populations:
the Central California Coast Coho ESU and the Southern Oregon-Northern
California Coast Coho ESU.130

The Department’s Coho Salmon Status Report itself acknowledges that there
is no biological basis to conclude that the two Coho salmon ESUs are, in fact,
distinct “subspecies.” 131 Furthermore, the Department conceded that “[n]o recent
comprehensive study of Coho salmon population genetics covering the range of
Coho salmon in California is available.”132 Because CESA’s language did not
authorize the listing of distinct population segments, opponents of Coho listing
argued that “[i]f the Commission adopts the recommendations made by the
Department and lists the coho based on the ESU approach, the listing would be an
abuse of discretion and be subject to judicial review and reversal.”133

Despite the formal protests, the Commission voted in favor of a finding that
the listing “is warranted,” and directed the Department to prepare a recovery
strategy, but approved the delay of the rulemaking process during the formulation
of the recovery plan.134 After the delay, on August 5, 2004, the Commission
formally adopted a new regulation listing the Coho salmon as “endangered”
between San Francisco and Punta Gorda, and as “threatened” between Punta Gorda
and the California-Oregon border.135

III. LITIGATING THE DECISION TO LIST THE COHO UNDER THE CALIFORNIA
ENDANGERED SPECIES ACT

In June, 2005, following the Commission’s decision to list the two Coho
ESUs, a coalition of organizations representing a large segment of the regulated
public—including the timber, grazing, agriculture, and business communities—
filed suit in California Superior Court against the Commission and the

127 Record, supra note 102, at 006860.
128 See 16 U.S.C. § 1532(16). As noted previously, NMFS has interpreted the “distinct
population segment” to allow for the listing of ESUs. See discussion infra Part I.B.3.
129 CAL. FISH & GAME CODE § 2062 (West 2009).
130 Record, supra note 102, at 006856.
131 Id. at 006856-006858.
132 Id.
133 Id.
134 Record, supra note 102, at 001453.
Department, contending that those agencies’ actions had violated CESA as well as the California APA. The lower court and Court of Appeal’s decisions are described below.

A. Stage One: In Superior Court

The plaintiffs contended that the ESU listings were invalid under CESA. In particular, they argued that CESA does not authorize the listing of DPSs or ESUs. They also contended that CESA requires the endangered/threatened analysis to be made with respect to a species’ full natural range, and not just the species’ range within California. Further, the plaintiffs argued that CESA does not allow the Commission and the Department to favor the naturally spawning component of a given ESU over that ESU’s hatchery raised component. In other words, the plaintiffs contended that the endangered or threatened species analysis must turn on the ESU’s viability as a whole, and not just the viability of one part. The plaintiffs also raised a number of challenges to the ESU listings under the California APA, among them that the listings violated the California APA’s necessity and non-duplication requirements.

The superior court ruled for the Commission and Department on all grounds. With respect to the DPS issue, the focus of this Article, the court began its analysis by noting that, strictly speaking, CESA does not define “species” as such. Rather, CESA’s operative terms are “endangered species” and “threatened species,” in contrast to the FESA, which defines “endangered,” “threatened,” and “species” separately. The court concluded that the term “species” “is a scientific one, not a matter of common understanding among those not trained in biological science,” and thus a term whose interpretation by the agency should merit judicial deference. The court quoted approvingly the Department’s record statement that the ESU concept is consistent with “the generally accepted biological criterion that a species is ‘a group of interbreeding organisms that is reproductively isolated from other such groups.’” Finally, the court noted the state policy of protecting endangered and threatened species, as well as the interpretive canons that agency expert determinations are entitled to deference and that laws providing for the

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136 Cal. Forestry Ass’n v. Cal. Fish & Game Comm’n, No. 05CS00948 (Sacramento Superior Court 2005). California Trout, Inc., Pacific Coast Federation of Fishermen’s Associations, and the Northcoast Environmental Center subsequently intervened as Defendants.
139 Id. at 10.
140 Id. at 10-17. For the California state agency regulation to become effective, the regulation must be shown to be (1) a necessity, and (2) non-duplicative of other state or federal statutes and regulations. CAL. GOV’T CODE §§ 11349(a), 11349.1(a), 11349(f).
142 Cal. Forestry Ass’n, Statement of Decision, at 5.
143 Id. at 6 (quoting Record, supra note 102, at 000356).
conservation of natural resources are to be construed “liberally.” The court therefore upheld the two listings.

B. Stage Two: In the Court of Appeal

On appeal to the Third District, the California Forestry Association plaintiffs-appellants renewed their argument that CESA does not authorize the listing of DPSs or ESUs, as well as their other CESA-and California APA-based contentions. The Court of Appeal unanimously rejected each of the appellants’ arguments and upheld the ESU listings.

With respect to the DPS issue, the Court of Appeal concluded that the meaning of CESA’s “species or subspecies” phrase is ambiguous. The court cited to a dictionary definition of “subspecies” defining the term to mean “subgroup,” and reasoned that, “[i]n nonscientific terms, therefore, it can be said that an evolutionarily significant unit of coho salmon is a subgroup of coho salmon.” The appellate court then reiterated the lower court’s observation that remedial and conservation statutes are to be construed liberally, and, in the case of CESA, with an eye toward preserving fish, wildlife, and plants. The court then analyzed the salient aspects of ESU conservation for the preservation of salmon species and biodiversity.

The court rejected the appellants’ reliance on San Bernardino Valley Audubon Society v. City of Moreno Valley, a Fourth District Court of Appeal decision concerning the Department’s authority to issue incidental take permits under CESA. The San Bernardino Valley plaintiffs had contested the incidental take permit on the grounds that CESA contains no authority for the incidental take permit. Whereas FESA contains express authorization for such permits, the San Bernardino Valley plaintiffs noted that CESA contains no such authorization. Given that CESA was passed after FESA was amended to allow

\[144\] Cal. Forestry Ass’n, Statement of Decision, at 6-7.

\[145\] The court also held that (1) the Commission properly limited its listing analysis to the California segment of the Coho’s pan-Pacific range, (2) the Commission properly deemphasized the hatchery raised component of the two ESUs in its listing analysis, and (3) the listings comported with the California APA, including its necessity and non-duplication requirements.

\[146\] Cal. Forestry Ass’n v. Cal. Fish & Game Comm’n, 68 Cal. Rptr. 3d 391 (Ct. App. 2007).

\[147\] Id.

\[148\] Id.

\[149\] Id. at 397.

\[150\] Id.

\[151\] Id. at 397-98.

\[152\] 51 Cal. Rptr. 2d 897 (Ct. App. 1996).

\[153\] Cal. Forestry Ass’n, 68 Cal. Rptr. at 399.


\[156\] Cal. Forestry Ass’n, 68 Cal. Rptr. 3d at 399-400.
for incidental take permits.\footnote{\textsuperscript{157}} The San Bernardino Valley plaintiffs argued that the court should not read such authority into CESA. The Fourth District agreed, concluding that the California Legislature had been aware of the federal permit provisions, and the absence of any parallel provision in CESA is proof that the “Legislature deliberately chose not to adopt that provision into the state statute.”\footnote{\textsuperscript{158}}

The California Forestry Association appellants argued that San Bernardino Valley supported their contention: CESA was passed several years after FESA was amended to allow for DPS listings; given that CESA contains no express power to list DPSs, the court should not read such a power into CESA.\footnote{\textsuperscript{159}} The Third District, however, found San Bernardino Valley to be inapposite, reasoning that the Fourth District’s approach makes sense because it is consonant with a purpose of protecting natural resources, but that such reasoning in the DPS/ESU context would undercut CESA’s purpose.

\textit{Given the Legislature’s policy in enacting the CESA, it is reasonable to conclude that the Legislature did not want to limit the term “species or subspecies” to the federal definition. Instead, it may have wanted to leave the interpretation of that term to the Department which is responsible for providing the ‘best scientific information,’ and to the Commission, which is responsible for making the listing decisions.}\footnote{\textsuperscript{160}}

The court concluded its analysis by again noting that its deference to the Commission and the Department on the interpretation of “species or subspecies” furthers the policy undergirding the CESA and similar conservation statutes.\footnote{\textsuperscript{161}}

On other issues the Third District held that the Commission and the Department properly limited their listing analysis to the California segment of the coho’s pan-Pacific range,\footnote{\textsuperscript{162}} that the listing preference for naturally raised salmon is proper,\footnote{\textsuperscript{163}} and that the listings comport with the California APA’s “necessity” and “nonduplication” requirements.\footnote{\textsuperscript{164}}

\footnote{\textsuperscript{158}} \textit{Cal. Forestry Ass’n}, 68 Cal. Rptr. 3d at 399 (citing San Bernardino Valley, 51 Cal. Rptr. 2d at 604).
\footnote{\textsuperscript{159}} \textit{Id.}
\footnote{\textsuperscript{160}} \textit{Id.} (citations omitted).
\footnote{\textsuperscript{161}} \textit{Id.}
\footnote{\textsuperscript{162}} \textit{Id.} at 401-02.
\footnote{\textsuperscript{163}} \textit{Id.} at 402.
\footnote{\textsuperscript{164}} \textit{Id.} at 403.
\footnote{\textsuperscript{165}} \textit{Id.} at 404-05.
IV. California Forestry Association Erred Because the California Endangered Species Act Contains No Power to List Evolutionarily Significant Units

Having reviewed FESA and CESA, as well as the administrative and procedural background to the California Forestry Association decision, this Article now turns to CESA’s statutory analysis and demonstrates how CESA cannot credibly be read to authorize the listing of DPSs or ESUs.

A. Consistent with Common Canons of Statutory Interpretation, the California Endangered Species Act’s Plain Meaning Permits Only the Listing of Species and Subspecies

As noted above, both the superior and appellate courts in California Forestry Association relied in their statutory analysis on two interpretive canons, namely, that agencies are entitled to deference in the interpretation of statutes they are charged with administering, and that remedial, and especially conservation, statutes should be construed liberally. Regardless of the state’s policy toward endangered wildlife, or the deference owed to agencies in the execution of their statutory duties, it is cardinal that the plain meaning of the Act controls. The court’s two methodologies put the cart before the horse because the central argument for CESA not allowing DPS and ESU listings is that the statute’s plain language does not support it. Deference to the Commission and the Department cannot trump the law in the name of species preservation.

Although there is no CESA definition of “species”—an observation that the trial court found relevant—the point does not amount to much, for the Commission is not empowered to list “species”; rather, its duty is to maintain a list of endangered and threatened species. Further, CESA’s “take” prohibition is

166 See supra Part II.A-B.
167 Yamaha Corp. of America v. State Bd. of Equalization, 960 P.2d 1031, 1033-34 (Cal. 1998). The California Supreme Court’s administrative deference jurisprudence places considerable weight on the distinction between quasi-legislative and interpretive regulations, see id. at 1033, giving substantially less deference to the latter than to the former, see id. at 1034. In contrast, the degree to which a federal court will defer to an agency interpretation of law depends not so much on the nature of the interpretation (that is, whether it is quasi-legislative or interpretive) but rather whether and to what extent the interpretation carries “the force of law.” See United States v. Mead Corp., 533 U.S. 218, 226-27 (2001). Nevertheless, the characterization of an agency regulation as “interpretative” rather than substantive has effects even at the federal level, although bearing more on reviewability than deference. See Syncor Int’l Corp. v. Shalala, 127 F.3d 90, 94 (D.C. Cir. 1997).
168 E.g., San Bernardino Valley, 51 Cal. Rptr. 2d at 902 (citing Blumenfeld v. San Francisco Bay Conservation, 117 Cal. Rptr. 327, 330 (Ct. App. 1974)).
169 See Kerr’s Catering Serv. v. Dep’t of Indus. Relations, 369 P.2d 20, 26 (Cal. 1962) (“[I]t is fundamental in our law that an administrative agency may not, under the guise of its rule-making power, abridge or enlarge its authority or act beyond the powers given to it by the statute which is the source of its power . . . .”).
170 See Cal. Fish & Game Code § 2070 (West 2009).
expressed in terms of *endangered* and *threatened* species. Instead of defining “species,” the Legislature defined the phrases “endangered species” and “threatened species,” because those are the terms of art used in the statute.

CESA defines endangered and threatened species as “native species or subspecies.” A court’s starting point for statutory construction is a provision’s plain meaning. A court may depart from the plain meaning rule in order to harmonize its interpretation with the statute’s purported purpose only if the results of a plain meaning analysis are inconsistent with the statute’s general purpose or would produce absurd results. An administrative agency’s interpretation of a statute it is charged with administering is not entitled to deference if inconsistent with, among other things, the statute’s plain meaning.

It is difficult to harmonize these principles with the Third District’s statutory analysis. CESA defines endangered and threatened species to mean “native species or subspecies.” That definition necessarily excludes ESUs. Had the Legislature intended to include other taxonomic categories under the species heading, it could have done so. In fact, the Legislature did so act when it chose to include “subspecies” as one type of smaller taxonomic group included within “species.” In these circumstances, where the Legislature has expressly included one member of a group and no other, the Legislature may be presumed to have intended to exclude all other potential members of that group. This is in accordance with the canon that the expression of certain things in a statute necessarily involves the exclusion of things not expressed. As noted, ESUs are, in the Department’s estimation, “justifiable constructs” to segment any given population of a species from another population of the same species. By the same token, subspecies are justifiable constructs within a species. CESA expressly includes the one subset—subspecies—within the definitions of endangered and threatened species. The unavoidable conclusion is that all other population segments below the level of species, including ESUs, have been excluded from CESA’s definitions of endangered and threatened species.

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171 See id. § 2080.
172 Cal. Teachers Ass’n v. Governing Bd. of Rialto Unified Sch. Dist., 927 P.2d 1175, 1177 (Cal. 1997) (citations omitted) (“In interpreting statutes, we follow the Legislature’s intent, as exhibited by the plain meaning of the actual words of the law, whatever may be thought of the wisdom, expediency, or policy of the act.”). See also Stephens v. County of Tulare, 134 P.3d 288, 308 (Cal. 2006); Fitch v. Select Prods. Co., 115 P.3d 1233, 1236 (Cal. 2005).
175 Referred to often in Latin as *inclusio unius est exclusio alterius*. See, e.g., Dyna- Med, Inc. v. Fair Employment & Housing Comm’n, 743 P.2d 1323,1330 n.13 (Cal. 1987); Lantzy v. Centex Homes, 73 P.3d 517, 525 (Cal. 2003).
176 See supra Part I.C.2.
177 See Record, supra note 102, at 000356.
B. The Listing of Evolutionarily Significant Units under the California Endangered Species Act Is Unsupportable in Light of the Parallel Experience under the Federal Endangered Species Act

The Third District rejected the contention that a comparison to FESA demonstrates that CESA does not authorize the listing of DPSs or ESUs, notwithstanding accepted principles of statutory interpretation and common-sense ways of deciphering legislative intent. The appellate court would presumably agree that it is appropriate to look to FESA to interpret CESA, a proposition already established in the case law.

FESA was amended in 1978, in part to allow for the listing of populations within a particular species that do not meet taxonomic requirements for separate status. FESA now defines species as including any “subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.” The term “distinct population segment” “is not commonly used in scientific discourse.” To assist in the application of that phrase, NMFS produced its ESU policy in 1990. In contrast, CESA contains no language parallel to FESA’s DPS provision. It is only natural, then, to be reluctant to read such language into CESA.

The Court of Appeal used this reasoning in San Bernardino Valley to conclude that the then-current version of CESA did not authorize the Department to issue incidental take permits. Recall that in San Bernardino Valley, an environmental group challenged an incidental take permit for the San Bernardino Kangaroo Rat, contending that CESA, unlike FESA, contained no language authorizing such permits. The Department argued that Fish and Game Code Section 2081(a)’s authorization of “take” for management purposes was sufficient authority for incidental take permits. The Court of Appeal rejected the

184 San Bernardino Valley Audubon Society v. City of Moreno Valley, 51 Cal. Rptr. 2d 897, 904-05 (Ct. App. 1996). See Anthony v. Superior Court, 167 Cal. Rptr. 246, 251 (Ct. App. 1980) (quoting People v. Drake, 566 P.2d 622, 624 (Cal. 1977) (“Where a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject . . . is significant to show that a different intention existed.”)).
185 Id. at 902.
186 Id. at 903-04.
Department’s contention with reasoning that is directly applicable to the DPS/ESU question:

As noted above, the Legislature followed FESA in many respects when it enacted CESA. In particular, the stated policies underlying the two statutes are virtually identical. Yet, the California Legislature did not incorporate into CESA the preexisting federal permit process allowing take incidental to development and other lawful activities. The omission of a provision contained in a foreign statute providing the model for action by the Legislature is a strong indication that the Legislature did not intend to import such provision into state statute. Here, the fact that the federal incidental taking permit process existed before the drafting and passage of CESA convinces us that the Legislature deliberately chose not to adopt that provision into the state statute. Courts may not rewrite statutes to make express an intention not expressed in the statute itself.188

By parity of reasoning, the Legislature’s decision to limit the populations eligible for listing to “species or subspecies,” in light of FESA’s parallel inclusion of “distinct population segments,” indicates that “the Legislature deliberately chose not to adopt that provision into the state statute.”189 Thus, the Commission and the Department are without authority to list populations that do not themselves qualify as species or subspecies.

This conclusion is strengthened by CESA’s statutory history. The current provisions190 of the Fish and Game Code were enacted in 1984, six years after the “distinct population segment” language was added to FESA. The Legislature is presumed to know of parallel statutes when enacting laws.191 Thus, the Legislature was aware that FESA allows for the listing of species, subspecies, and distinct population segments; yet it authorized only the listing of “species and subspecies.” The Legislature did not intend to permit the Commission to list populations below that of subspecies.

Pertinent legislative history also confirms that conclusion, including the Report from the California Senate Committee on Natural Resources and Wildlife accompanying A.B. 3270—one of the bills that would become CESA.192 The

188 Id. at 904-05 (citations and quotation marks omitted).
189 Id. at 904.
190 California’s first Endangered Species Act, passed in 1970, afforded protection to “endangered animals,” which were defined as animals “of a species or subspecies of birds, mammals, fish, amphibia, or reptiles . . . .” 1970 Cal. Stat. 1510.
191 People v. Harrison, 768 P.2d 1078, 1081-82 (Cal. 1989) (“[T]he Legislature . . . is deemed to be aware of statutes and judicial decisions already in existence, and to have enacted or amended a statute in light thereof.”); Singh v. Superior Court, 44 Cal. Rptr. 3d 348, 358 (Ct. App. 2006).
192 See 1984 Cal. Stat. ch. 1162. The Legislature also passed, and the Governor signed, A.B. 3309, proposed by Assemblyman Costa. That bill contained definitions of “endangered” and “threatened” species identical to A.B. 3270, but was chaptered after A.B. 3270. See 1984 Cal. Stat.
Report emphasizes that the bill would substitute “threatened species” for the 1970 Act’s “rare animal,” “on the pattern of the federal Endangered Species Act of 1973.” The Report also notes that the bill’s expansion of the Commission’s authority to list plants and to require the Department to conduct five-year status reviews was consistent with federal law. The legislative history accompanying A.B. 3309, which would also become CESA, offers similar inferences. In a letter to the Governor accompanying the enrolled bill, Assemblyman Jim Costa stated that his bill, which provided protections to “species or subspecies,” was “[p]atterned largely after the federal Endangered Species Act.” Thus, the fact that the Costa bill’s protections did not track FESA provides additional support for the proposition that the Legislature did not intend to allow the listing of ESUs.

The Legislature’s decision not to incorporate FESA’s “distinct population segment” language into CESA’s definitions of endangered and threatened species, is thus strong evidence that CESA does not authorize the listing of DPSs or ESUs.

C. The Evolutionarily Significant Unit Is Not the Functional Equivalent of a Species or Subspecies

The Third District, in justifying its statutory analysis, relied substantially on the Department’s assertions that protecting species and subspecies according to

ch. 1240, § 2. Both bills contained provisions providing that neither, if passed, would prevail over the other. Compare 1984 Cal. Stat. ch. 1162, § 7, with id. ch. 1241 § 5.


194 Id.


196 There are few remaining references to the 1984 Act’s endangered and threatened species definitions in the available legislative history. One is found in an enrolled bill report from the Department of Finance, which simply makes the point that the new definitions differ from the old definitions by allowing the Commission to list plants. See A.B. 3270, 1984 Leg., 20th Sess. (Cal. 1984). Another is in the Report from the Senate Committee on Natural Resources and Wildlife, which also emphasizes that the 1984 Act would allow for the listing of plant as well as animal species. See Report from the Senate Committee on Natural Resources and Wildlife for A.B. 3270, as amended June 25, 1984.

197 Assem. Daily Journal 6825, 6825-30 (May 23, 1994). This is the reasoning used by the California Legislative Counsel in an opinion dated May 19, 1994, printed in the Assembly Daily Journal for the 1993-1994 Regular Session, in response to an inquiry from Assemblyman Pringle as to whether CESA’s “take” prohibition includes habitat modification. Id. Under FESA, a take may occur through habitat modification, because the Secretary of the Interior has interpreted the word “harm,” which is used in FESA’s take definition, see 16 U.S.C. § 1532(19) (2006), as encompassing habitat modification. See Babbitt v. Sweet Home Chapter of Communities for a Great Or., 515 U.S. 687, 708 (1995). In contrast, “take” as used in CESA does not contain the word “harm.” See CAL. FISH & GAME CODE § 86 (West 2009). Consequently, the Legislative Counsel concluded that because the Legislature chose not to include “harm” in its “take” definition, it intended to exclude habitat modification from that definition. Assem. Daily Journal 6825, 6825-30. In the same manner, the Legislature chose not to include the phrase “distinct population segment” in its definitions of endangered and threatened species, and thus declined to give the Commission authority to list ESUs. Id.
DPSs and ESUs is an essential tool in modern conservation science, thus treating ESUs as the functional equivalent of species and subspecies. In a similar manner, relying upon the Department’s statement that ESUs represent a “generally accepted biological criterion” of what constitutes a species, the trial court determined that CESA permits the listing of ESUs. The ESU concept cannot, however, be equated with a species or subspecies classification. The science upon which the Commission and the Department relied does not support that conclusion; and the Department’s own record explanations are inconsistent with the proposition that an ESU is the functional equivalent of a species.

The Department adopted the ESU concept from NMFS, which expressly developed its policy to improve consistency in the listing of distinct population segments, not species or subspecies, under FESA. Both NMFS and FWS concede that “[a]vailable scientific information provides little specific enlightenment in interpreting [distinct population segments],” in part because the term “is not commonly used in scientific discourse,” in contrast with species and subspecies classifications. NMFS’ ESU policy requires that any given salmonid population be substantially reproductively isolated and must represent an important component “in the evolutionary legacy of the species.” As the italicized language indicates, NMFS’ policy would be nonsensical if it were interpreted as meaning that ESUs themselves qualify as stand-alone species. The ESU concept only makes sense when dealing with several populations of the same species. Not surprisingly, NMFS justified its ESU criteria on the basis that certain populations within a species can “contribute[] substantially to the ecological/genetic diversity of the species as a whole.”

The Department’s Coho status report comes to the same conclusion that Coho are but one of five species within the *Oncorhynchus* genus. The report also notes that ESU delineations represent important information regarding relationships among and reproductive isolation of Coho populations, i.e., infra-species

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198 Cal. Forestry Ass’n v. Cal. Fish & Game Comm’n, 68 Cal. Rptr. 3d 391, 399 (Ct. App. 2007).
199 See Record, supra note 102, at 000356.
200 Statement of Decision, at 6-7, Cal. Forestry Ass’n v. Cal. Fish & Game Comm’n, No. 05CS00948 (Sacramento Superior Court 2005).
201 See, e.g., LAWRENCE R. LIEBESMAN & RAFE PETERSEN, ENDANGERED SPECIES DESKBOOK 13 (2003) (noting that the term “species” “has a generally understood biological significance” and the term “subspecies” “is common in biological literature,” whereas the term “distinct population segment” may have “little objective significance” given that “it is not used within biological literature at all”).
202 See Record, supra note 102, at 000355.
205 Id.
206 See Record, supra note 102, at 000350-000351.
taxonomic categories. The report concludes that ESUs “represent distinct population segments of [C]oho salmon.”

In upholding the ESU listings, the trial court relied heavily upon the Department’s statement that ESUs are consistent with “the generally accepted biological criterion that a species is ‘a group of interbreeding organisms that is reproductively isolated from other such groups.’” But reproductive isolation alone does not support an ESU listing power, otherwise geographic reproductive isolation would be both a necessary and sufficient condition to species status. That cannot be the case. If it were, then neither NMFS, nor the Commission, nor the Department would have any need to develop the ESU concept. Isolated populations, according to the trial court’s estimation, would themselves qualify as species. Yet the Commission’s and the Department’s actions concerning the Coho belie that interpretation.

The agencies’ error is largely due to the false equivalence drawn between geographic and reproductive isolation. The salient criterion for species status, according to the Commission and the Department, is “sympatric coexistence without interbreeding,” i.e., population overlapping without interbreeding. But ESUs coexist and interbreed.

Further, common understanding of the term teaches that geographic reproductive isolation is not sufficient to define a species. If that were so, then Nicaraguans would constitute a different species of *Homo sapiens* from Nepalese. The Third District’s deference to the Commission and the Department’s expert scientific determination was misplaced, because their expertise was directed at defining ESU status (which CESA does not recognize) instead of species status (which CESA requires).

**D. California Forestry Association Got It Wrong**

The previous sections have set forth the basic reasons supporting the position that CESA does not authorize the listing of DPSs and ESUs. CESA’s plain meaning, buttressed by interpretive canons, as well as the parallel experience under FESA, confirm this conclusion. Further, ESUs cannot reasonably be taken as functional substitutes of species or subspecies. This section notes several additional points as to why the Third District’s conclusion that CESA authorizes the listing of DPSs or ESUs is untenable.

The central ground upon which the Third District based its statutory analysis of “species or subspecies” was its conclusion that “subspecies” means, in nonscientific terms, “subgroup.” Therefore, the court reasoned, it is *prima facie*
reasonable to allow the listing of ESUs, given that ESUs are “subgroups” of their larger species or subspecies. And because the term “subspecies” is susceptible to both a scientific and nonscientific understandings, the court could properly defer to the Commission’s and the Department’s selection of one of those equally reasonable interpretations.  

There are a number of problems with this analysis. 

First. The trial court and the appellate court both based their statutory analyses on the supposed ambiguity of the phrase “species or subspecies,” yet for reasons nearly opposite. The trial court deferred to the Commission and the Department on the grounds that the term “species” “is a scientific one, not a matter of common understanding among those not trained in biological science.” Yet the Court of Appeal concluded that the term was ambiguous because “subspecies” is purportedly susceptible to both a scientific and a nonscientific definition, and that the Legislature could plausibly have intended the latter. Both rationales cannot be maintained. 

Second. The Court of Appeal failed to recognize that its nontaxonomic interpretation of the phrase “species or subspecies” is itself unreasonable. The Court of Appeal gave no consideration to the issue of statutory context, i.e., whether it is reasonable to expect the Legislature, when passing comprehensive species protection legislation, to use the phrase “native species or subspecies” not in its normal (taxonomic) sense when applied to flora and fauna, but rather in an obscure sense. It would be rare indeed for a member of the scientific community to use, in reference to flora and fauna, the terms “species” and “subspecies” in a nontaxonomic sense. It is no surprise that FESA’s use of “species” and

212 Cal. Forestry Ass’n v. Cal. Fish & Game Comm’n, 68 Cal. Rptr. 3d 391, 399-400 (Ct. App. 2007).

213 Cal. Forestry Ass’n, Statement of Decision, at 5.

214 Cal. Forestry Ass’n, 68 Cal. Rptr. 3d at 396. This fundamental difference in rationale makes the Court of Appeal’s compliment to the Superior Court for a “well-reasoned” opinion a little bizarre.

215 See LIEBESMAN & PETERSEN, supra note 201, at 13 (noting that the term “species” “has a generally understood biological significance” the term “subspecies” “is common in biological literature”).

216 Cf. Prof’l Eng’rs in Cal. Gov’t v. Wilson, 72 Cal. Rptr. 2d 111, 115 (Ct. App. 1998) (“When we interpret a statute, we attempt to determine legislative intent so as to effectuate the purpose of the law. The first thing we do is read the statute, and do so in an ordinary way unless special definitions are provided.”) (emphasis added; citation omitted); Rapanos v. United States, 547 U.S. 715, 733 n.4 (2006) (plurality opinion) (“It seems to us wholly unreasonable to interpret the statute as regulating only ‘floods’ and ‘inundations’ rather than traditional waterways—and strange to suppose that Congress had waxed Shakespearean in the definition section of an otherwise prosaic, indeed downright tedious, statute. The duller and more commonplace meaning is obviously intended.”); 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 47:29 (6th ed. 2000) (“[T]echnical terms or terms of art used in a statute are presumed to have their technical meanings.”).

“subspecies” has been interpreted taxonomically. The Third District justified its nonscientific interpretation of the phrase “native species or subspecies” because it would further CESA’s conservation goals. Yet this line of argument again puts the cart before the horse: recourse to purpose and supposed legislative intent is, as the Court of Appeal recognized, proper if the statutory language is ambiguous, but legislative purpose may not be used to create the ambiguity.

Third. In addition to producing an analysis wholly at odds with canons of statutory interpretation, California Forestry Association affords the Commission an essentially unlimited power to list any group of flora and fauna, no matter how small. With the Court of Appeal’s holding on “native species or subspecies,” the Commission may potentially list any “subgroup” of any group of individuals bearing common characteristics. Thus, the Commission may list the “Sacramento Capitol Park” sparrow population, or the “Union Square” mouse population.

Ironically, the fear of the proliferation of such mini-listings led Congress in 1978 to amend FESA to limit the listing of subgroups to “distinct population segment[s].” The 1973 FESA authorized the listing of “any other group of fish or wildlife of the same species or smaller taxa in common spatial arrangement that interbreed when mature.” The 1978 FESA amendments were passed six years prior to CESA’s enactment. Thus, FESA contained an express provision authorizing the listing of nontaxonomic subgroups in one form or another for more than ten years prior to the passage of CESA in 1984. A legislature is presumed to know of parallel laws. The California Legislature’s decision not to include an express provision authorizing the protection of nontaxonomic subgroups of flora and fauna is strong evidence of the Legislature’s intent. Yet the Court of Appeal concluded that the Legislature did not wish to preclude the Commission from listing nontaxonomic subgroups.

The Court of Appeal gave no consideration to the likely possibility that the Legislature purposely declined to afford the Commission the power to list “distinct population segments” (and ESUs) precisely because of the federal experience and the controversy over whether and how nontaxonomic subgroups of flora and fauna should be protected. The Court of Appeal also failed to recognize that its

218 See 50 C.F.R. § 424.11(a) (2010) ("In determining whether a particular taxon or population is a species for the purposes of the Act, the Secretary shall rely on standard taxonomic distinctions and the biological expertise of the Department and the scientific community concerning the relevant taxonomic group.").
222 See Cal. Forestry Ass’n, 68 Cal. Rptr. 3d at 399-400.
interpretation of “native species or subspecies” allows for much more than the listing of ESUs; it authorizes multiple mini-listings. The Commission now has free rein to list any “subgroup” of any recognized species, regardless of how insignificant that population is to the species as a whole.

Further, with the ability potentially to list any subgroup, the Commission can “cherry pick” populations for listing. For example, a native species may be doing quite well overall, but it may be close to disappearing from a particular city block. Under *California Forestry Association* that city block’s species population may be listed, even though no risk of extinction is posed to the species overall and even though that population is of no significance to the species. Such an action would disrupt the Legislature’s goal of protecting species by bringing CESA into the public’s disrepute through such manufactured listings. That is a result the Legislature rejected in 1984 by limiting CESA listings to species and subspecies.

V. CONCLUSION

*California Forestry Association*’s court’s interpretation of CESA is its rejects a plain meaning analysis and canons of interpretation. It uses instead a brand of purposivism that allows the Commission and the Department to interpret CESA in a free-form manner, so long as the proffered rationale is dressed in scientific terms and the end result is environmentally friendly. This methodology is not judicial interpretation but judicial abdication.

*California Forestry Association*’s analysis grants the Commission power to list any population of animals, plants, or fish, no matter how small or no matter how insignificant to the population’s larger taxon. This is not merely a new power of the Commission; it is also an obligation: CESA allows for any interested person to petition the Commission to list a species or subspecies, and now, per *California Forestry Association*, a DPS or ESU.

Although the California Supreme Court denied review of the *California Forestry Association* decision, the issue will likely be presented again. The *California Forestry Association* decision binds all superior courts in the state, but not sister courts of appeal; thus, it is quite possible, and perhaps probable, that a new case challenging the Commission’s DPS listing power will arise in the future.

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223 Justice Baxter was of the opinion that the petition for review should have been granted. See Cal. Forestry Ass’n v. Cal. Fish & Game Comm’n, 68 Cal. Rptr. 3d 391 (Ct. App. 2007), review denied by Cal. Forestry Ass’n v. Cal. Fish & Game Comm’n, 2008 Cal. LEXIS 1674 (Cal. Feb. 13, 2008).