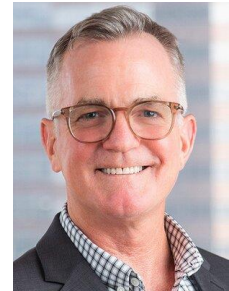


How A Bumblebee Got Under Calif. Wildlife Regulator's Bonnet

By **David Smith** (June 14, 2024)

What's the deal with the Crotch's bumblebee? In almost 30 years of legal practice with a heavy bent on imperiled species and habitat conservation compliance, I have never heard the same plea of desperation erupt from so many disparate sectors in such a short period.

What started as a "Daily Show" parody mocking California's designation of an insect as an endangered fish is becoming a potentially paralyzing quagmire for regulators and permittees alike.



David Smith

From San Diego to San Francisco Bay, developers, utilities and even renewable energy project proponents are now finding that their otherwise standard operations are triggering survey requirements for which protocols have yet to be defined by the California Department of Fish and Wildlife.

Further, given the nearly statewide range of the Crotch's bumblebee, landowners throughout the state are being advised to apply for "take" coverage under the California Endangered Species Act — even though, again, neither the CDFW nor biologists are entirely sure what the species needs for conservation.

To this author's knowledge, only one permit has been issued allowing take, or killing, of the Crotch's bumblebee, and its provisions are ambiguous and without predictable compliance timelines. Uncertainty and extended project delays have both the CDFW and the regulated community scrambling for direction.

Survey Requirements, Incidental Take and Regulatory Paralysis

Requirements that landowners and project proponents survey for the Crotch's bumblebee began popping up in relatively common permits issued by the CDFW.

Lake and streambed alteration agreements, or LSAs, under California Fish and Game Code Section 1600 are required where a project will alter a lakebed or stream course. They may include requirements relative to the aquatic resource, potentially affected species and related habitats.

LSAs regularly include a litany of survey requirements for any number of species and related consequences should the survey come back positive. A common term of LSAs is the regular presence of a designated biologist to observe on-site activities for the presence of a protected species.

For some permittees, project biologists began reporting the presence of the Crotch's bumblebee when the permittee was not even aware it had been added to the LSA. While the CDFW has not yet formally listed the Crotch's bumblebee, it is a candidate for listing, entitling it to full protection under the California Endangered Species Act.

An LSA cannot grant an authorization to take any species protected under the California Endangered Species Act. Take can only be granted by an incidental take permit, also issued by the CDFW.

The problem is that very little is known about the Crotch's bumblebee, including what measures are most effective to conserve it and help it recover from its listed status. While its historic range blankets the vast majority of California, the petition for listing claims the species is largely extirpated from the entire Central Valley.

The CDFW is under an obligation to protect the Crotch's bumblebee, mandates for surveys now routinely land in standard permits, and the agency has little idea or understanding of conditions and mitigations appropriate for allowing take — stranding landowner and project-proponent permittees in a state of regulatory paralysis.

Crotch's Bumblebee

Bumblebee species generally, according to the listing petition being considered by the CDFW, live in colonies composed of a queen, workers, and new queens and males born to the colony. Each member of the community has a designated purpose.

Queens initiate colonies and lay eggs; workers gather food, defend the colony and feed youngsters; and males exist solely for mating with queens. New queens produced by the colony mate at the end of the colony cycle, and then enter a type of underground hibernation known as overwintering.

The petition characterizes bumblebees as generalists, meaning that they utilize a wide variety of flowering plants for foraging and sustenance. This less-than-discriminating palate is one of the reasons it has proven so difficult to rule in or out areas or habitats where the Crotch's bumblebee can be expected or excluded for regulatory purposes.

Early LSAA survey obligations provided that the confirmed presence of a Crotch's bumblebee required full cessation of vegetation-removing or ground-disturbing activities for the duration of the species' flight season — March 1 to Sept. 1.

With the remainder of the year being subject to rain and related land disturbance prohibitions, confirmed presence of the Crotch's bumblebee could readily result in full shutdown of a project site. Thus, permittees found themselves desperate for take authorization allowing the permitted activities to proceed.

As noted, however, very little is known of measures necessary to protect and facilitate recovery of the species. Some early incidental take permits actually shift the burden of proposing a survey methodology and potential mitigation regime back onto the permittee.

So, while the permittee may obtain an incidental take permit, rather than documenting predictable and definite terms and requirements of authorized take of the Crotch's bumblebee, it initiates an uncertain and indefinite process with an undefined cost and conclusion.

Of particular concern is the noted overwintering hibernation period. The CDFW evaluation report of the petition as to overwintering cryptically notes: "Little is known about the hibernacula, or overwintering sites, of the Crotch bumble bee, but if the behavior of queens of most other bumble bee species is indicative, it likely overwinters in soft soil ... or under leaf litter or other debris."

In other words, they could be underground almost anywhere throughout the winter.

The Bee-Fish

Species listings in California are far from new. So, how, many ask, did the CDFW and the regulated community get so blindsided by the Crotch's bumblebee candidacy?

The California Endangered Species Act makes express provision for the listing of mammals, reptiles, fish and birds. But it makes no provision for listing insects. Accordingly, it was broadly accepted that insects were not subject to listing under the state act, unlike the federal Endangered Species Act.

Nonetheless, petitioners mounted an aggressive effort to list the Crotch's bumblebee and three other species of bumblebee. The dispute over listing resulted in litigation and, ultimately, the California Supreme Court let stand a determination to list the Crotch's bumblebee based upon a reference to invertebrates in the statutory allowance for listing fish.

The regulated community was not the only body aghast at this judicial contortion of statutory language. In October of last year, Comedy Central's "Daily Show" devoted over six minutes to a parody lambasting the legal determination. Yes, that can of Bumble Bee tuna from your childhood was quite prescient for California.

Only the Beginning

No one has any delusion that the candidacy of the Crotch's bumblebee is an isolated circumstance. Now that the barrier to listing insects under the California Endangered Species Act has been eliminated, both the regulated community and the CDFW expect a tsunami of forthcoming listing petitions.

Practitioners in the field are concerned because, among other things, the structure of California Endangered Species Act and related take provisions anticipate a corpse for demonstration of compliance and violation of the act.

With species whose members are tiny and potentially blanket a given landscape, many of the predicable and proven strategies for implementing the California Endangered Species Act may be inapplicable — further exacerbating the problematic state of regulatory paralysis beyond just the Crotch's bumblebee.

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Disclosure: The author is a member of the California Building Industry Association, which advocates for pro-housing public policy on behalf of its membership. He chairs a CBIA member task force considering the potential impact of proposed new and forthcoming species listings under the California Endangered Species Act, including that of the Crotch's bumblebee.

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