

DOCKETED	
Docket Number:	82-AFC-01C
Project Title:	Compliance - Application for Certification for PG&E Geysers Unit 20
TN #:	241377
Document Title:	CEC Response Letter Geysers #3 Confidential Application May 25, 2018, Nov 19 and Dec 10, 2021, and Jan 10 and 27, 2022
Description:	N/A
Filer:	Pam Fredieu
Organization:	California Energy Commission
Submitter Role:	Commission Staff
Submission Date:	2/2/2022 12:37:50 PM
Docketed Date:	2/2/2022



February 2, 2022

Via Email

Jeff Harris
Ellison Schneider Harris & Donlan LLP
2600 Capitol Avenue, Suite 400
Sacramento, California 95816
jdj@eslawfirm.com

Applications for Confidential Designation
Geysers Unit 3, Sonoma (80-AFC-1C)
Geysers Unit 16, Quicksilver (79-AFC-5C)
Geysers Unit 17, Lakeview (79-AFC-1C)
Geysers Unit 18, Socrates (79-AFC-3C)
Geysers Unit 19, Calistoga (81-AFC-1C)
Geysers Unit 20, Grant (82-AFC-1C)

Dear Jeff Harris:

The California Energy Commission (CEC) received an application for confidential designation submitted on behalf of the listed CEC-certified projects, Geysers Units 3, 16, 17, 18, 19, and 20 (Geysers facilities), dated May 25, 2018. This application was followed by repeated applications for document submissions covering substantially similar information submitted in response to CEC staff's investigation of the Geysers facilities and the recommissioning process that continues. CEC received applications for confidential designation dated November 19, 2021, December 10, 2021, January 10, 2022, and January 27, 2022, in conjunction with the submission of monthly documents related to the recommissioning and inspection, testing, and maintenance activities at the six Geysers units. These applications were submitted on behalf of Geysers Power Company, LLC, (GPC or applicant), the project owner of the Geysers facilities.

The referenced applications contained similar bases for confidential designation. This letter addresses all applications submitted to date. Collectively, the applications request confidential designation for information related to the testing, maintenance and recommissioning of the fire protection and wet-down systems of the Geysers facilities. Specifically, the applications seek confidential designation for:

1. Fire Protection System Inspection, Testing and Maintenance (ITM) Reports, which include fire alarm and life safety inspection certificates, deluge sprinkler systems and water spray reports, dry-pipe fire sprinkler system reports, pre-action fire sprinkler system reports, fire alarm inspection reports, fire pump inspection reports, wet pipe fire sprinkler system reports, and summary corrective action tables.
2. Site specific fire protection drawings.
3. Plant manuals sections 4, 8, and 9: fire protection system and equipment descriptions.
4. Fire system alarm design description and narrative.
5. Fire protection plans.
6. 49 Hazardous materials business plans overlay drawings.
7. Draft and final basis of design narratives and recommissioning plan drafts that contain detailed information regarding facility fire protection and wet-down systems.
8. Multiple monthly recommissioning reports with a confidential Appendix A that details ongoing construction activities and Appendix B that details the schedule of activities during recommissioning.

In discussing this matter with CEC staff, I understand that the documents in the CEC's possession subject to the applications can be divided into three broad categories: (1) documents that reflect the Geysers facilities' fire protection systems as they existed before the recommissioning efforts, generally documents dated between 2013 and 2018 (historic records), (2) the basis of design (BOD) narrative recommissioning plans (BOD records) and monthly recommissioning reports (MR reports) generally dated from 2019 to the present, and (3) fire protection and deluge systems inspection, testing, and maintenance reports (ITM) with corrective action tables generated 2019 and later (ITM records).

The historic records are composed of the fire system ITM reports and fire and deluge system technical information in existence prior to 2019. The historic records describe the condition of the fire protection systems at the Geysers facilities and reflect inspections between 2013 and 2018. These documents were provided at the request of CEC staff in 2018 and are included in categories 1-6 above.

The BOD records and MR reports comprise the plans on how the existing fire protection and deluge systems are being replaced, modified, or removed at the Geysers facilities through a recommissioning process and includes design information on the new systems. The BOD records were generated after the

historic records. The MR reports were first provided to staff starting in April 2020 and reflect the progress made in installing the new systems. The relevant portions of the MR reports subject to the repeated applications for confidential designation are appendices A and B reflecting details of ongoing construction work as well as a schedule of future work on the various fire systems. Categories 7 and 8, noted above, reflect the BOD records and MR reports, respectively.

The post 2018 ITM records contained in category 1 cover inspection, testing, and maintenance reports, the related fire alarm and life safety system inspection certificates, and the corrective action table summarizing the findings in the ITM records.

An application for confidential designation shall be granted under the California Code of Regulations, title 20, section 2505(a)(3)(A), “. . . if the applicant makes a reasonable claim that the Public Records Act or other provision of law authorizes the Commission to keep the record confidential.” The executive director determination made in response to an application for confidential designation is subject to a reasonableness standard. It is the applicant’s burden to make a reasonable claim for confidentiality based on the California Public Records Act and other applicable laws.

The May 25, 2018, application (and repeated applications) identifies four bases for confidential designation: (1) trade secrets/proprietary information based on Government Code sections 6254.7(d) and 6254.15, (2) Government Code section 6255(a), commonly referred to as the balancing test, (3) critical infrastructure information (CII) or critical energy infrastructure information (CEII) under state and federal laws, and (4) personnel, medical or similar files under Government Code section 6254(c). The term of the confidential designation requested is for the life of each facility. The November 19, 2021, applications and successive applications identify the first three bases but do not include #4 and the requested term of confidential designation is also for the life of each facility.

Confidentiality Claims

Trade Secrets/Proprietary Information

The California Public Records Act allows for the non-disclosure of trade secrets including, among others, those records exempt from disclosure under the Uniform Trade Secrets Act. (Gov. Code sections 6254(k), 6276, 6276.44; Evid. Code section 1061(a); Civ. Code section 3426.1(d).) California Code of Regulations, title 20, section 2505(a)(1)(D), states that if an applicant for

confidential designation believes that the record should not be disclosed because it contains trade secrets, the application shall state: (1) the specific nature of the advantage, (2) how the advantage would be lost, (3) the value of the information to the applicant, and (4) the ease or difficulty with which the information could be legitimately acquired or duplicated by others. In this case, the applications do not specify how these four elements are met.

The May 25, 2018, application and repeated applications claim that the site-specific drawings, reports, and system descriptions related to the fire protection and suppression systems covering both the historic records and BOD records represent specific compilations of information related to the specific technologies employed at the six facilities, including the design and location of certain fire protection systems, drawings, photographs, and other commercially valuable information related to the facility's operations and schematics. The applications also note that such information is used for asset protection purposes and that the detailed information has independent economic value from not being known to the public or competitors. Finally, the applications state the relevant fire protection systems are located on non-public, secure facilities.

The November 19, 2021, applications, and successive applications state that the applicant purchases equipment for the fire protection systems and retains the services of consultants and contractors to conduct work associated with the recommissioning, to inspect the fire protection systems, and to carry out any ITM corrective actions. The applications claim that public disclosure of this information could place the applicant at a pricing disadvantage if the totality of the basis of designs, recommission plans, the schedule of the fire protection system recommissioning efforts, or other confidential fire protection system information identified in categories 1, 7, and 8 above is made public and available to potential vendors of equipment and providers of fire protection system services. The applications also state that the confidential information has independent economic value from not being generally known to the public, including GPC's competitors and vendors who could obtain economic value from the disclosure or use of the confidential information.

Civil Code section 3426.1(d) defines "trade secret" as:

"[I]nformation, including a formula, pattern, compilation, program, device, method, technique, or process, that:

- (1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and

(2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.”

(Civ. Code section 3426.1(d); *See also* Gov. Code sections 6254(k), 6276, 6276.44; Evid. Code section 1061(a); *Uribe v. Howie* (1971) 19 Cal. App. 3d 194, 207.)

The applicant requests confidentiality under Government Code sections 6254.7(d), 6254.15, and 6254(k). The first two sections do not apply to the records submitted with the application as they do not contain emissions data, do not contain building code violation information, and do not relate to retaining, locating, or expanding a facility in California. We consider broadly whether the applicant has made a claim under Government Code section 6254(k), which exempts from disclosure those records that are exempted or prohibited from being disclosed pursuant to other laws, including federal or state law governing trade secrets.

The applications for confidential designation cover historic records, BOM records, MR reports, and ITM reports.

Historic Records of Systems Replaced or Removed

The historic records do not identify specific technologies currently or proposed to be employed at the sites. Given the recommissioning and redesigning of the fire protection systems and the removal and modification of obsolete systems, the rationale in the applications regarding trade secrets and proprietary information is no longer valid for those historic records. These records do not indicate how the applicant is currently operating or will operate in the future, or otherwise indicate what independent economic value is derived from their secrecy. Therefore, these records are not trade secrets exempt from disclosure under the California Public Records Act.

BOD Records of Existing and New Systems, MR Report, and ITM Records

With respect to the remaining records, the claim of trade secrets could be supported for some records but not others. Specifically, the applicant has failed to explain how “independent economic value” is derived from keeping information about the fire protection system from being made public. However, the CEC recognizes that release of some of these records could create safety and security concerns. These concerns are addressed under a different exception to

the California Public Records Act disclosure requirements, discussed below.

As noted, the November 19, 2021, applications and successive applications also claims that the public disclosure of the confidential information could place the applicant at a pricing disadvantage if the totality of the basis of designs, recommission plans, the schedule of the fire protection system recommissioning efforts, or other confidential fire protection system information is made public and available to potential vendors of equipment and providers of fire protection system services. However, the application does not specifically identify which fire protection equipment the applicant is purchasing. Confidentiality would be appropriate for those records that, if released, could affect ongoing procurement negotiations, but the application does not support the applicant's trade secret claim. If the applicant can demonstrate such a claim, the confidentiality likely overlaps with the confidentiality protection granted in the public interest in disclosure section of this letter and expires after the procurement is complete.

Public Interest in Disclosure section 6255(a)

Government Code section 6255(a) allows an agency to withhold records from public disclosure where on the facts of the case the public interest served by not disclosing the record "clearly outweighs the public interest served by disclosure of the record." This is referred to as the balancing test.

The referenced applications assert that the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record because there is a public interest in preventing possible vandalism, tampering, and other third-party imposed damages. Finally, the applications note that the facilities are not accessible so there is no public interest in disclosing site-specific information.

The balancing test can be used to support the non-disclosure of information related to public safety. However, mere claims of potential mischief are insufficient and facts demonstrating that specific harm is likely to result to the public or specific individuals is required to justify withholding information. "The critical point is that a court applying section 6255(a) cannot allow '[v]ague safety concerns' to foreclose the public's right of access. (citations omitted)" (*American Civil Liberties Union Foundation v. Superior Court* (2017) 3 Cal.5th 1032, 1046 [221 Cal.Rptr.3d 832, 843, 400 P.3d 432, 441].)

For example, the Court of Appeal rejected a claim by the County of Santa Clara that GIS information showing the location of easements for Hetch Hetchy water

pipelines should be withheld, despite the County's claim that doing so was necessary to minimize the threat of terrorist attack. The court noted that the claim was overbroad and additionally undermined by the fact that the County had released the information, albeit under a nondisclosure agreement. "While we are sensitive to the County's security concerns, we agree with the trial court that the County failed to support nondisclosure on this ground." (*County of Santa Clara v. Superior Court* (2009) 170 Cal.App.4th 1301, 1329 [89 Cal.Rptr.3d 374, 395], as modified (Feb. 27, 2009).)

Historic Records of Systems Replaced or Removed

The applicant has not made a reasonable claim that the public interest served by not disclosing the historic records clearly outweighs the public interest served by disclosure. The historic records generally include documents dated between 2013 and 2018 that reflect facility fire protection systems before the recommissioning efforts. The consequences in the applications regarding vandalism, tampering, or third-party imposed damages are no longer valid for historic records related to the fire protection and related systems that have been replaced or removed.

BOD Records of Existing and New Systems

The public has an interest in knowing what corrective actions the applicant is implementing and how it is managing its fire protection systems as a result of the CEC's investigation of the Geysers facilities. This interest may be outweighed by other considerations, such as the threat and danger to the facility and safety from disclosing the exact configuration of fire protection systems that, if tampered with or vandalized, could provoke a fire onsite and offsite the facilities. Here, the applicant is concerned about site safety and security relevant to the new fire protection systems and fire protection systems or related systems still in operation and not recommissioned. Specifically, the applicant argues that the public interest in protecting the fire protection systems for the Geysers facilities arises from preventing possible vandalism, tampering, or other third-party imposed damages and noted recent trespassing incidents at substations and other energy facilities.

The Geysers facilities are in remote areas prone to wildfire. It is reasonable to conclude that knowledge of either the status of a system or how a system can be shut down could risk fire moving off site. Furthermore, details concerning the specific design and operation of the fire protection and wet-down system contained in the BOD records could provide sufficient information for someone to interfere with its proper functioning. Here, there are sufficient facts

demonstrating that specific and serious harm could result to the public. As such, the applicant has made a reasonable claim that the public interest in ensuring that details regarding fire protection systems and related systems at the Geysers facilities do not fall into the wrong hands outweighs the public interest in understanding the exact configuration of these systems.

MR Reports and ITM Records

The applicant's concerns regarding site safety and security are also relevant to the MR reports' appendices A and B, which include details of ongoing construction work and schedule of future work on the various fire systems and the ITM records. The records contain information regarding which fire protection systems are offline, being installed, or otherwise impaired. Knowledge of the system status and schedule would enhance one's ability to strategically damage the facility by targeting specific areas based on fire system status. Here, there are sufficient facts demonstrating that specific harm is likely to result to the public. As such, the public interest in ensuring that details regarding the status of fire protection systems and schedule for repairs and installation of systems at the Geysers facilities do not fall into the wrong hands outweighs the public interest in immediately knowing the system status or schedule for system repairs or installation.

Critical Energy Infrastructure Information

The referenced applications identify Government Code section 6254(ab) and its protection against the release of critical infrastructure information (CII), the Department of Homeland Security (DHS) protection of CII, and Federal Energy Regulatory Commission's (FERC) protection of Critical Energy Infrastructure Information (CEII) in support of the requested confidential designation. But the language in the application confirms that none of these exemptions apply.

At the state level, Government Code section 6254(ab) sets forth protection from public disclosure of certain infrastructure information provided the following is met: (1) the information is CII, as defined in United States Code, title 6, section 131(3), and (2) the information is voluntarily submitted to the Office of Emergency Services (OES) for use by that office. Importantly, Government Code section 6254(ab) expressly states that, this subdivision shall not affect the status of information in the possession of any other state or local governmental agency.

Similar to Government Code section 6254(ab), DHS and FERC have processes in place to designate information as protected CII or CEII, but the same limitations found in Government Code section 6254(ab) apply: The information must be voluntarily submitted to the federal agency for designation and the designation does not cover data independently obtained by a state agency. The salient provision of federal law states in part, "nothing in this section shall be construed to limit or otherwise affect the ability of a State...agency...to obtain critical infrastructure information in a manner not covered by subsection (a), including any information lawfully and properly disclosed generally or broadly to the public and to use such information in any manner permitted by law." (See 6 U.S.C. section 673 and 18 CFR section 388.113.)

The applications state there has been no occasion to date to seek CII or CEII designation for the facility fire protection information. Thus, there has been no opportunity for the DHS or FERC to consider whether fire protection information warrants a designation of CII or CEII.

The applicant has not made a reasonable claim that the records can be withheld under CII or CEII as the applications state the records at issue have not been provided to the relevant federal or state agencies for designation and the records in the possession of the CEC were not obtained from DHS, FERC, or OES. In addition, it is unlikely the historic records of obsolete fire systems would show vulnerabilities in critical systems and be deemed to meet the definition of CEII set forth in 18 CFR section 388.113(c)(2).

Personnel, medical, or similar files under Government Code section 6254(c)

Government Code section 6254(c) protects from disclosure personal information such as that found in personnel or medical files. The May 25, 2018, application and repeated applications state the records may contain plant personnel and contractor personnel information and job performance. Staff has informed me that they are unaware of any such information in the submitted records beyond the names from the signatures of those performing inspections and plan review. Thus, this basis is irrelevant to the documents provided.

Executive Director's Determination

Historic Records of Systems Replaced or Removed

The historic documents that include information regarding fire protection and related systems that were removed or replaced are not granted confidential designation. The applications have not presented a rationale as to why records of removed systems retain proprietary value or why the public interest served by not disclosing these historic records clearly outweighs the public interest served by disclosure of these records.

BOD Records of Existing and New Systems

For the reasons above, the BOD records, which include detailed information about the design and operation of the fire protection and related systems now installed or being installed at Geysers Units 3, 16, 17, 18, 19, and 20 are granted confidential designation for the life of the Geysers or until such time as they may be publicly released.

MR Reports

The confidential appendices A and B to the MR reports that include details of ongoing construction work and the schedule of work at each site will be confidential for two years from the report date. The applications do not provide a rationale as to why a completed repair or recommissioning schedule evidencing a functioning fire protective system presents risks to the public if disclosed or why the public interest in knowing corrective action was completed is clearly outweighed by maintaining the confidentiality of a work schedule far into the future. The two-year time period ensures that identified repair and recommissioning work can be completed, removing the risk of somebody taking advantage of an offline system. The public version of the MR reports must be filed in the CEC docket.

ITM Records

Similar to the MR reports appendices, the ITM records and summary of corrective actions setting forth the system status and schedule for system work will be subject to the same two-year confidentiality period from the date of the report. The applications do not provide a rationale as to why it is in the public interest to maintain confidentiality far into the future for ITM reports and corrective action summaries and schedules or why the public interest in knowing

the results of the ITM and corrective action status is clearly outweighed by maintaining confidentiality for the life of the facility. The two-year time period ensures that any failed inspection can be corrected, removing the risk of somebody taking advantage of an offline system.

You may request that the CEC determine the confidentiality of records that the executive director denied confidential designation. You have 14 days to request that the CEC determine the confidentiality of the record. If you make such a request, the CEC will conduct a proceeding pursuant to the provisions in California Code of Regulations, title 20, section 2508.

Be advised that under California Code of Regulations, title 20, section 2506, one may petition to inspect or copy records that the CEC has designated as confidential. A decision on a petition to inspect or copy confidential records is issued by the CEC's chief counsel. Under California Code of Regulations, title 20, section 2507, the executive director may disclose records, or release records previously designated as confidential, in certain circumstances. The procedures for acting on a petition and criteria for disclosing or releasing records previously designated as confidential are set forth in the California Code of Regulations, title 20, sections 2506-2508.

You may seek a confidential designation for information that is substantially similar to information for which an application for confidential designation was granted by the executive director by following the procedures set forth in California Code of Regulations, title 20, section 2505(a)(4).

If you have any questions concerning this matter, please email Chief Counsel Linda Barrera at linda.barrera@energy.ca.gov.



Sincerely,
Drew Bohan
Executive Director