

DOCKETED

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Via Email

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**Application for Confidential Designation:
AFC Data Adequacy Supplement No. 1, Attachments DA5.2-1 and DA5.2-3,
Biological Resources Figures
Gem Energy Storage Center, Docket No. 21-AFC-02**

Dear Samantha Neumyer:

The California Energy Commission (CEC) has received the GEM A-CAES, LLC's (GEM) application for confidential designation, dated April 25, 2022, for biological resources figures and information contained in the Data Adequacy Supplement No. 1 for the Application for Certification of the Gem Energy Storage Center. Confidential designation is sought for the following documents (Biological Figures):

1. AFC Data Adequacy Supplement No. 1, Attachment DA5.2-1, Biological Technical Report:
 - PDF, p. 88, Figure 7, CNDDDB Species
 - PDF, p. 89, Figure 8, Special-status Plant Species
 - PDF, p. 90, Figure 9, Special-status Wildlife
 - PDF, p. 118, Figure 2, Suitable Swainson's Hawk Nesting Substrate
 - PDF, p. 119, Figure 3, Swainson's Hawk Observations within the Survey Area
 - PDF, p. 154, Figure 2, Vegetation and Burrowing Owl Burrow Map
 - PDF, p. 155, Figure 2, Vegetation and Burrowing Owl Burrow Map
 - PDF, p. 156, Figure 2, Vegetation and Burrowing Owl Burrow Map
 - PDF, p. 157, Figure 2, Vegetation and Burrowing Owl Burrow Map
 - PDF, p. 158, Figure 2, Vegetation and Burrowing Owl Burrow Map
 - PDF, p. 159, Figure 2, Vegetation and Burrowing Owl Burrow Map
 - PDF, p. 160, Figure 2, Vegetation and Burrowing Owl Burrow Map
2. AFC Data Adequacy Supplement No. 1, Attachment DA5.2-3, Burrows:
 - Figure 9, Special-status Wildlife

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 [California] Public Records Act or other provision of the law authorizes the [CEC] to keep the record confidential.” The executive director’s 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 application states that the Biological Figures should be kept confidential in their entirety indefinitely. The application identifies one basis for confidentiality: Government Code section 6255(a), commonly referred to as “the balancing test.”

Public Interest in Disclosure/Balancing Test

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 balancing test can be used to support the nondisclosure of information. However, mere claims of potential mischief are insufficient and facts demonstrating that specific harm is likely to result to the public or specific individuals are 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.)

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.)

The application asserts that the public interest served by not disclosing the Biological Figures clearly outweighs the public interest served by the disclosure of this information. The applicant states that not disclosing the Biological Figures protects sensitive information regarding biological resources because the Biological Figures include details about special status occurrences and locations in the areas surveyed on behalf of Gem Energy Storage Center obtained from

the California Natural Diversity Database, in addition to information obtained from surveys conducted on behalf of GEM. The application further notes that the public disclosure of the Biological Figures may enable entities to conduct an unauthorized collection or disturbance of sensitive biological resource sites.

Conclusion

Based on the applicant's claim and a review of the Biological Figures, the applicant has made a reasonable claim under the law that authorizes the granting of confidentiality status. In order for CEC staff to adequately review the Biological Figures, the information cannot be submitted in a sufficiently anonymized manner. Thus, the CEC will keep confidential the Biological Figures indefinitely.

Be advised that under the 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 records is issued by the CEC's chief counsel. Under the California Code of Regulations, title 20, section 2507, the executive director may disclose, 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 in the California Code of Regulations, title 20, sections 2506 to 2507.

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 procedural questions regarding this application for confidential designation, please contact Jennifer Baldwin, senior attorney, at jennifer.baldwin@energy.ca.gov.

Sincerely,



Drew Bohan
Executive Director