

DOCKETED

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**Joint Conservation Organizations Comments on Small Power Plant
Exemptions SISR**

Additional submitted attachment is included below.



May 11, 2023

Jared Babula, Senior Attorney
California Energy Commission
715 P Street, MS-4
Sacramento, CA 95814

RE: Rulemaking to Amend Regulations for Small Power Plant Exemptions –
CEC Docket No. 21-OIR-04

Dear Mr. Babula,

Thank you for the opportunity to provide comments in response to the Supplemental Initial Statement of Reasons (SISOR) for the Rulemaking to Amend Regulations for Small Power Plant Exemptions. These comments are submitted on behalf of California Native Plant Society, Center for Biological Diversity, Defenders of Wildlife, Natural Resources Defense Council and Sierra Club California. Our organizations are dedicated to protecting and conserving wild animals, plants and habitats throughout California.

As we transition toward a clean energy future, it is imperative that we consider the near-term impact of energy development on our biodiversity, fish and wildlife habitat, and natural landscapes while addressing the long-term impacts of climate change. Energy projects must be planned, sited, developed and operated to avoid, minimize and mitigate adverse impacts on biodiversity and land with known high-resource value. Providing meaningful review and comments on a project's potential impacts on natural resources relies on understanding the location of specific species occurrences on project sites and in relation to project infrastructure.

The SISOR provides detailed explanations for the proposed changes to regulatory language for the California Code of Regulations, Title 20, Appendix B. This includes an explanation to address the changes to Appendix B(g)(13)(A), which dictates the requirements of scale for public maps that contain information on biological resources. The proposed change would require restricted public release of maps that contain biological resources at a scale greater than 1:350,000. The SISOR claims that requiring confidential submission of maps at a smaller scale is necessary to ensure maps are not made public that would allow a member of the public to know the location of sensitive biological resources such as endangered plants, animals, or nests.

The CEC staff justifies the decision to restrict the public from accessing species occurrences at a finer scale than 1:350,000 for purposes of providing public review and comment during project siting proceedings by citing to the language from the CNDDDB licensing contract. However, the CEC's justification and proposed regulatory change is based on an erroneous interpretation of the CNDDDB licensing contract. A review of California Department of Fish and Wildlife's (CDFW) endangered species permit decisions and comments for numerous projects during a California Environmental Quality Act review has revealed no comments or requirements by CDFW that this kind of data for special-status species is confidential. Nor is there evidence that CDFW typically requests, as part of the administrative records of projects, that maps of species locations be held at a scale of 1:350,000 in accordance with the guidelines. There is no demonstrated precedence that CDFW interprets the guidelines to mean all public maps with CNDDDB data must be at a 1:350,000 scale.

The CEC's proposed regulation and its justification within the SISOR is also a misinterpretation of the guidelines regarding biological data submitted to CNDDDB. This proposed change within the rulemaking applies not only to biological data obtained and originating from CNDDDB but also data generated by a project applicant as part of the CEC's project application process, which is then subsequently submitted to CNDDDB by the project applicant. It is an unreasonable interpretation that data generated by developers or the public must automatically become confidential because it is also submitted to CNDDDB. Submitting data to CNDDDB does not render that data confidential and proprietary information, which cannot be shared elsewhere by the owner of the data. CNDDDB does not have that level of proprietary authority, and the guidelines cannot be interpreted as a reason to withhold biological data from the public in a public proceeding.

Furthermore, the SISOR states that the CEC's proposed change reflects CDFW's stated position to CEC biological resources staff. However, based on recent discussions with CDFW and Defenders' staff and consultants, CDFW has stated that it does not support this proposed change in the regulation. Withholding more granular biological resources data from a public siting proceeding is not supported by CDFW and does not accurately reflect conversations between the

agencies. In fact, according to discussions between Defenders and CDFW, no one from CDFW has advised CEC Staff that data being generated by an applicant cannot be publicly disclosed. Therefore, the purpose and necessity stated within the SISO is patently untrue and therefore the decision to change the regulation is arbitrary and capricious.

Furthermore, not only is the CEC's reasoning flawed within the SISO, but if the CEC's proposed change to the regulation were to be finalized as currently written, it would have unintended consequences well beyond the intent and scope of the guidelines. A scale of 1:350,000 merely shows if a species is present at a gross scale, but where that presence is relative to the various part of a Project is a mystery. Withholding locational information makes it virtually impossible for the public to evaluate potential project impacts and provide informed analysis of appropriate measures to avoid, minimize, and potentially mitigate project impacts thus gravely hindering the ability for a robust and meaningful public review and commenting process for projects. Moreover, withholding this information and telling the public that they need to secure a CNDDDB subscription to be able to provide meaningful comments renders the CEC's proceedings a type of "pay to play" process that excludes those in the public who cannot afford to pay hundreds of dollars to secure an annual CNDDDB subscription. This creates a class of "haves" and "have nots" in what is supposed to be an equitable, open and public siting process at the CEC. Essentially, the CEC is creating an inequitable process that would NOT be inclusive of disadvantaged communities.

Due to the flawed, arbitrary and capricious reasoning listed within the SISO, we request the Office of Administrative Law reject the reason provided for the change to Appendix B(g)(13)(A) and delete the portion of the rulemaking pertaining to the scale of public maps that include biological resources.

Thank you once again for the opportunity to provide comments on the rulemaking and for considering our comments. If you have any questions, please contact us via the contact information below.

Respectfully submitted,



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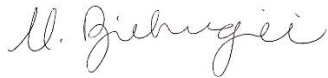
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