

DOCKETED

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CEC-057 (Revised 1/21)



Preliminary Response to Comment Letter
California Code of Regulations, title 20, Appendix B
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Introduction

During the 15-day public comment period on the supplemental initial statement of reasons (SISOR) one comment letter was received on May 11, 2023, from a coalition of environmental groups entitled "Joint Conservation Organizations Comments on Small Power Plant Exemptions SISR." Consistent with Government Code section 11346.9(a), after readoption of the Appendix B amendments, CEC Staff will be preparing and filing a supplemental final statement of reasons (SFSOR) which includes detailed responses to the multiple comments contained in the letter. Staff offers this preliminary response to comments in advance of filing the SFSOR.

The Joint Conservation Organizations' (coalition) comment letter objects to two specific provisions of Appendix B, that would require high-resolution biological resources maps at a scale of 1:6000 to be submitted to the California Energy Commission (CEC) under confidential cover. (Appendix B, §§ (b)(13)(A) & (b)(13)(B)(i).) In its comments the coalition requests that the maps be made fully public and questions the CEC's basis for any confidentiality. The coalition asserts that CEC lacks justification for the amendment in that it has: 1) misinterpreted language from the California Natural Diversity Database (CNDDDB), and 2) acted in contravention of statements made by unidentified individuals from the California Department of Fish and Wildlife (CDFW).

Staff Response and Discussion

The assertions are unsupported and vague and rely on statements attributed to unknown individuals from CDFW. The assertions also imply maps submitted under confidential cover are automatically excluded from public release. However, documents (including maps) submitted as confidential are reviewed according to a process governed by California Code of Regulations, title 20, sections 2505-2508. It is through this process that a determination of confidentiality is made. The adopted regulatory language of Appendix B only covers the process for submitting high resolution maps to the CEC, not the process for designating a map as confidential.

CDFW's guidelines on the use of its CNDDDB maps are posted on its website, are clear and unambiguous, and specifically state:

“For maps at a scale larger than 1:350,000: At any scale larger (more zoomed in) than 1:350,000 the polygon layer should not be shown on a public map. **This is because at scales larger than 1:350,000, there is enough detail for a user to fairly easily determine exactly where a species is located and that is what we are trying to prevent.** [Bold added] The map below is at a scale of 1:100,000. Section lines are visible and it would be easy to find these locations. Therefore, this is too detailed for use as a publicly displayed map.” (Italics added, CNDDDB Data Use Guidelines Vol. 4.2, 2011, p.9 <https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=27285&inline>.)

Similar language is found in CDFW’s Licensing Agreement for the CNDDDB dated June 2018. (See <https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=75516&inline>.)

Based on this clear guidance to ensure the protection of sensitive biological resources, the adopted regulatory language requiring high resolution biological resource maps be submitted under confidential cover was developed and adopted by the CEC on October 12, 2022.

The coalition in its comment letter on the SISO states that “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.”

This comment, based on statements attributed to unknown CDFW staff regarding unknown lines of discussion, is vague and lacks sufficient specificity for a direct response. The comment does not specify who was spoken to and what “propose change” in the regulation, if any, the “CDFW does not support.” CEC Staff has had numerous discussions with key CDFW staff including the Assistant Chief Counsel, senior attorneys, and various biologists, as well as CDFW’s Biogeographic Data Branch Information Services Coordinator, on the issue of maps, confidentiality, and resource protection. It is noted that agency staff and the public had an opportunity to comment on the amended Appendix B language during the original 45-day comment period and no comments were received regarding submission of high-resolution maps under confidential cover.

CEC Staff has learned that despite the unambiguous CNDDDB Guidelines that restrict the public release of maps at resolution greater than 1:350,000, CDFW has been allowing for the release of high-resolution maps as part of different public agency proceedings. Based on this information, CEC Staff and CDFW legal and biological staff have discussed the potential for releasing biological resource maps that have previously been designated as confidential by the CEC or are pending confidential review under California Code of Regulations, title 20, section 2505.

CEC Staff and CDFW legal staff agree that most maps submitted in pending CEC proceedings will be public and CEC Staff, in consultation with CDFW, is in the process of publicly releasing the high-resolution maps filed in pending CEC proceedings. On May 19, 2023, CEC Staff met with coalition members to discuss the maps and efforts to efficiently screen maps for public release.

Because maps at 1:6000 are of such high-resolution, consistent with the CNDDDB guidelines, it is appropriate that those maps be submitted under confidential cover to allow for an initial review to ensure protection of sensitive biological resources. Maps that present no issues can then be filed into the public docket.

In its letter, the coalition stated that “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 SISOR is patently untrue and therefore the decision to change the regulation is arbitrary and capricious.”

Like the prior comment this comment is based on nonspecific knowledge of “conversations between agencies” and then makes a conclusory assertion unsupported by any record. Most data submitted by an applicant in a CEC proceeding is public and that is why there are often thousands of pages of documents publicly available in the proceeding’s docket. (See for example Docket 20-SPPE-02 that contains over 120 publicly available documents.) The purpose and necessity set forth in the ISOR and repeated in the SISOR are demonstrably true and support the adopted regulatory language requiring high-resolution maps to be submitted under confidential cover. (CNDDDB Data Use Guidelines Vol 4.2, 2011 p.9 <https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=27285&inline>.)

The SISOR does not rely on just CDFW guidelines to support the filing of 1:6000 maps under confidential cover, but also the fundamental objective of protecting sensitive biological resources. The salient language from the SISOR states:

“Additionally, language requiring that maps of a certain scale be submitted to the CEC as confidential is necessary to ensure maps are not made public that would allow one to locate sensitive biological resources such as endangered plants, animals, or nests. Ensuring confidentiality of these maps for resource protection is also consistent with CDFW’s CNDDDB licensing contract and stated position to CEC biological resources staff.” (SISOR, Appendix B, § (g)(13)(A))

The language clearly identifies protecting biological resources as the paramount basis for screening all high-resolution maps, which is consistent with CDFW guidelines. The rationale and necessity supporting the adopted language is sound, is based on published CDFW guidelines and is not arbitrary and capricious. The process for determining if a map should be designated as confidential is set forth in California Code of Regulations, title 20, section 2505.

A more detailed response to comments will be included in the fourth coming SFSOR.