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SUPPLEMENTAL FINAL STATEMENT OF REASONS
California Code of Regulations, title 20, Appendix B
OAL Z# 2022-0630-01

**INCORPORATION OF ORIGINAL FINAL STATEMENT OF REASONS AND
RULEMAKING RECORD**

This Supplemental Final Statement of Reasons (SFSOR) incorporates by reference the original Final Statement of Reasons (TN 248284) which can be found in Docket 21-OIR-04 at

<https://efiling.energy.ca.gov/Lists/DocketLog.aspx?docketnumber=21-OIR-04> and rulemaking record filed with the Office of Administrative Law, Regulatory Action Number 2022-1028-05.

UPDATES TO THE INITIAL STATEMENT OF REASONS

Between April 26, 2023, and May 11, 2023, the California Energy Commission held a public comment period on a supplemental Initial Statement of Reasons for purposes of updating the necessity sections of the document.

SUMMARY OF RESPONSES TO PUBLIC COMMENTS RECEIVED

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 SFSOR." In this response, each specific comment is addressed with the comment excerpted followed by a response. Comments that are similar are aggregated into a single response.

Introduction

Government Code section 11346.9(a)(3) governs the process for an agency to respond to each objection or recommendation, commonly referred to as "comments," made regarding the proposed adoption, amendment, or repeal. The operative language in the Government Code concerning comments is that an agency may aggregate and summarize irrelevant comments or summarily dismiss irrelevant comments as a group.

Government Code section 11346.9(a)(3) states, "For the purposes of this paragraph, a comment is "irrelevant" if it is not specifically directed at the agency's proposed action or to the procedures followed by the agency in proposing or adopting the action." In this

case, the document subject to the 15-day public comment period was the SISOR, not the regulatory language.

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), 2) acted in contravention of statements made by unidentified individuals from the California Department of Fish and Wildlife's (CDFW), 3) makes "virtually impossible" the public's ability to evaluate potential project impacts, and 4) disempowers individuals who cannot afford to pay for a CNDDDB subscription.

As detailed below, these assertions are inaccurate, ambiguous, and rely on vague statements attributed to unknown individuals from CDFW. The assertions also imply maps submitted under confidential cover are 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.

Responses to Specific Comments

- 1) COMMENT: *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.*

RESPONSE: There is no erroneous interpretation. 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. 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." (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>.)

The coalition did not identify which or how many decisions, comments, and projects it reviewed to form the basis for their assertion. The CEC cannot speculate on this argument as it lacks specificity and would call for speculation. It would be impossible to assess the relevancy of the comment to the adopted regulatory text. The determination of whether a map should be confidential requires a map-by-map assessment to identify potential impacts to sensitive biological resources.

- 2) COMMENT: *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.*

RESPONSE: See response to Comment #1. If a high-resolution map is already public, then, by definition, it will not be confidential. Whether a map is public or needs to be confidential to protect a rare species is a matter outside the scope of this adopted rulemaking. If the coalition is aware of any maps that the CEC has previously designated as confidential, which are in the public domain, they should notify the CEC so that the relevant project manager can address the issue.

- 3) COMMENT: *The CEC's proposed regulation and its justification within the SISO 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.*

RESPONSE: The proposed regulation and justification within the SISO do not constitute a misinterpretation of the CNDDDB guidelines. The focus of the proposed regulation is not where the information is submitted - to the CEC as part of the project application or directly to CNDDDB. The objective of having high resolution maps at 1:6000 submitted under confidential cover is to provide an opportunity for the second step, consideration by CEC in consultation with CDFW, as to whether a particular map should be confidential to protect sensitive biological resources. Most biological maps submitted to the CEC come from the CNDDDB but even those generated by the applicant's biologist and later submitted to the CNDDDB, need to follow the same process. As articulated in both the ISOR and SISO, the adopted regulatory language will ensure that applicants do not file into the CEC's public docket, maps of a scale that would allow someone to locate sensitive biological resources.

- 4) COMMENT: *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.*

RESPONSE: There is no statement in Appendix B or the SISO that data generated by developers, or the public automatically becomes confidential. The term “proprietary” is also not used. There is no prohibition in Appendix B, regarding the ability of the data owner to share maps. The process and basis for withholding any specific map from public disclosure is outside the scope of this adopted rulemaking.

- 5) COMMENT: *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.*

RESPONSE: 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 also does not specify what “propose change” in the regulation, if any, the “CDFW does not support.” CEC Staff have had numerous discussions with key CDFW staff including the Assistant Chief Counsel, senior attorneys, biologists, as well as CDFW staff within the Biogeographic Data Branch supporting the CNDDDB system, on the issue of maps, confidentiality, and resource protection. It is noted that CDFW personnel had an opportunity to comment during the original 45-day comment period on the amended language and submitted no comments on the Appendix B language. CEC Staff and CDFW legal staff agree that many maps submitted will be public. But 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.

- 6) COMMENT: *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.*

RESPONSE: See response to Comment #5. This comment is based on nonspecific knowledge of “conversations between agencies” and then makes a conclusory assertion unsupported by any record. CEC staff agrees that 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 SISO is demonstrably true and supports the adopted regulatory language requiring high-resolution maps 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 SISO 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 SISO 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.” (Appendix B, § (g)(13)(A))

The language clearly identifies protecting biological resources as the paramount basis for screening the maps, which is consistent with CDFW guidelines. The allegation, based on claimed statements of one or more unidentified CDFW personnel, regarding their position on how maps are submitted to the CEC, does not invalidate the rationale or necessity supporting the adopted language or make the decision to adopt the language arbitrary and capricious.

- 7) COMMENT: *Furthermore, not only is the CEC’s reasoning flawed within the SISOR, 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.*

RESPONSE: See response to Comment #6. Maps are only one component of the publicly available biological resources information filed into the proceeding. It is not necessary for the public to have access to granular scale maps to be able to meaningfully evaluate a project’s impacts. Extensive written analysis, tables of species, survey results are all part of the public record allowing for robust public review. (See Appendix B section (13) Biological Resources for all the data categories required in the application.)

The issue is the appropriateness of requiring high-resolution maps to be submitted under “confidential cover.” As noted, staff anticipates many maps and text describing biological resource analysis will be publicly available. Even if a specific map is designated as confidential and not publicly available, extensive biological information in the form of maps, narrative, tables, charts, and oral testimony are public. This allows for public engagement and detailed project evaluation.

- 8) COMMENT: *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.

RESPONSE: There is no language in Appendix B or any of the CEC's regulations set forth in title 20 that requires an annual CNDDDB subscription before accessing documents submitted to the CEC. Even if a specific map is designated as confidential and not publicly available, extensive biological information in the form of maps, narrative, tables, charts, and oral testimony are public. This allows robust public engagement and detailed project evaluation.

- 9) COMMENT: *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.*

RESPONSE: See response to comment #5. As described in the notice of the 15-day comment period, the regulatory language was already adopted and was not the subject of the 15-day comment period on the SISO. The operative language in Appendix B section (g)(13)(A) is: "include a map at a scale of 1:6000 under confidential cover" which the coalition equates to an automatic confidential designation that prohibits public release. The purpose of Appendix B is the informational requirements for an application. The process for determining whether a record is public or not, is set forth in the California Code of Regulations, title 20, sections 2505-2508, not Appendix B.

As stated by the CDFW in its CNDDDB guidelines, "at any scale larger... 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." The SISO and SISO use this guidance from CDFW along with the general acknowledgement that detailed maps may put species at risk. This is the basis for the adopted regulatory language.

Confidential submission is a screening step to ensure sensitive biological resources are not put at risk by public release of high-resolution maps. Having high-resolution maps filed under confidential cover is more protective of the environment than having such maps filed directly into the public docket.

Response to Comments Made at the June 16, 2023, CEC Business Meeting

A representative from the coalition appeared at the June 16, 2023, business meeting reiterating the comments made in the letter. The CEC incorporates the responses provided orally at the business meeting during the discussion of agenda item 8, as well as the above responses to the written comment letter.