



University of Hawaii at Manoa

Environmental Center
Crawford 317 • 2550 Campus Road
Honolulu, Hawaii 96822
Telephone (808) 948-7361

RL:0771A

SB 3182, SD 2
RELATING TO THE DEVELOPMENT AND USE OF GEOTHERMAL ENERGY

Statement for
Senate Committee on
Agriculture, Energy and Ocean Resources
Informational Briefing - April 6, 1988

By
Jacquelin Miller, Environmental Center
John Harrison, Environmental Center
Doak Cox, Professor Emeritus of Geology
Peter Rappa, Sea Grant
Casey Jarman, Law School

The amended version, SD 2, of SB 3182, would established a comprehensive permit system for geothermal and cable system development in the state of Hawaii. Because this version of SB 3182 would have such sweeping effects on the land use permitting and planning decisions in the state of Hawaii with regard to Geothermal Development and the bill was so widely supported by the Department of Business and Economic Development and others associated with Geothermal Development, we took special care to solicit input from several members of the University community including specialists in law, planning, geochemistry, resource management, and the environment. We must report that we have received very different and conflicting responses to our requests for comments on this bill. On the one hand some of our reviewers have expressed deep concern at the magnitude and extent of the provisions of this bill and at the potential implications for management of natural resources, reduction or elimination of county jurisdictions, and land use in the State of Hawaii. We have other reviewers who perceive that the statewide needs for energy must take precedence over individual county rule and therefore some form of legislative or regulatory action is needed to assure that the statewide needs, and presumably majority opinions, are not permanently thwarted by a minority. In response to the notice of an informational briefing on SB 3182 SD 2 we would like to provide the following concerns, questions, and suggestions for your consideration. Our comments do not represent an institutional position of the University of Hawaii.

County Responsibilities

SB 3182 SD 2 provides that all county responsibility for land use management related to geothermal development or electrical transmission of the power produced would be transferred to the Department of Land and Natural Resources and thus the State would preempt existing county authority with regard to zoning and shoreline setback permits.

A persuasive argument can be made that because the development of geothermal energy and its attendant cabling system transcends county jurisdictions, it is more appropriate for the state to assume the statutory responsibility for permitting, regulation, management, and enforcement. However, it is unclear how or if the local community of individual islands (counties) would be fairly served by having DLNR control the economic structure of the county through control of zoning. What ancillary effects would such control have on county government prerogatives outside of the geothermal areas? What zoning changes, for example, will be forced on the counties to meet needs occasioned by zoning changes independently permitted by DLNR? The proposed legislation would establish a procedure of preferential treatment for a specific type of action and in so doing may set a precedent for special regulatory management of other large, special interest, projects such as agricultural parks, highways, or resort developments.

Regulatory Responsibility: DLNR, DOH, DOT, Counties

As drafted, SB 2182, SD 2 gives the department (DLNR) sole authority over all permits, exploration, monitoring, enforcement, and future reconstructions with regard to geothermal energy development and transmission.

The language of the bill does not reflect the basis for assuming that DLNR has the expertise and personnel to carry out permitting responsibilities that under all other circumstances are handled by departments, agencies, and counties specifically staffed by professionals specializing in these types of resource management operations. For example, it is our understanding that air and water quality permits are under the jurisdiction of DOH by Federal authority. Yet DLNR, according to this bill, will be solely responsible for issuance of any permits that will directly (or indirectly) affect both air and water quality. Who will be responsible for enforcement of air and water quality standards including any discharge permits, DLNR or DOH? Is it reasonable to expect one agency (DLNR) to issue construction or other permits pertinent to air and water and expect another agency (DOH) to have responsibility for enforcement of pollution discharges for which they have only ministerial in contrast to discretionary control?

Rebuttable Presumptions

The bill cites (page 18, (6) that where possible, "rebuttable presumptions" are to be incorporated into the comprehensive permit process.

What are the "rebuttable presumptions" and how will they be incorporated? No definition or limitation is offered for the "rebuttable presumptions". The effect of this statute is to shift the burden of proof, in the case of judicial appeal, from the applicant to the public.

Agency Regulatory Responsibility

The bill specifically directs the department to assist the applicant, as appropriate, in its project (page 15, lines 19-20).

The directed assistance appears to engender an inherent conflict of interest with the agency's regulatory mandate. If the agency is assisting (representing) the applicant, who is assisting (representing) the public in the development of geothermal energy?

In our previous testimony on this bill we pointed out that most, if not all, of the desired "coordination of permits" could be accomplished by agency and county rule-making under existing statutes. As was pointed out in the Informational Briefing held by the House, Committee on Planning, Energy, and Environmental Protection, the purpose of this bill is not permit simplification per se, but to reduce or eliminate delays in permit processing by restricting or eliminating the opportunity for public challenge of each of multiple permits through contested case hearings. We recognize the economic exigencies of the development of geothermal power and the importance of timely decisions with regard to statewide energy planning needs but we are concerned that as presently structured, SB 3182 SD 2 will create a "super permitting" system with in adequate provision for informed agency, county and public contributions and may result in even greater efforts toward judicial appeal in retaliation. We urge that the approach of House Draft 1 be considered.