FOR INTRA-COMPANY USES

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DIVISION OR DEPARTMENT LAW
FILE NO.
RE LETTER OF
SUBJECT Comments: ERCDC Draft Staff Report - Geothermal

February 7, 1978

MS. TINA BERGQUIST:

My major impression of the Staff Draft "Geothermal Policy Option Paper . . ." is that notwithstanding repeated statements that geothermal development is to be encouraged by streamlining the regulatory siting process, the ERCDC is trying to confer on itself jurisdiction over the exploratory development of the resource; thus, expanding regulatory involvement. The Staff is proposing alternative methods of asserting control over the county's conditional use - EIR process.

The Warren-Alquist Act simply does not grant siting jurisdiction to the Energy Commission for exploratory steam well drilling. See, letter to Mr. Robert B. Keeler, Deputy Attorney General, from Dan Lubbock, re: Jurisdiction of the ERCDC, November 8, 1977. For the Staff to say that the Commission simply chooses not to take jurisdiction is to ignore the statutory scheme regulating geothermal development and serves to reinforce a posture justifying extensive control over the county's land use prerogative.

The Staff clearly states that the Commission does not want to be left out of the steam exploratory stage even if they have no direct jurisdiction. Two evils are seen to demand such participation: (1) that the Commission would be powerless to advance a desired project if it was rejected by the county or regional authorities; and, more importantly, (2) that the Commission does not want to be a pro former rubberstamp of prior county action or to incur the rath of county, developer, and utility by rejecting a county approved project.

The Draft Report expands Commission jurisdiction from "facilities" [an electric transmission line or thermal power plant regulated according to the Warren-Alquist Act - P.R.C. § 25110] to "project" [as "total well and power plant development" - Draft, p. 15]. To achieve this step it becomes necessary to manipulate the local EIR process [Draft, p. 18]. Several means of such action are suggested.

DISCLAIMER

I. Interagency Agreements

The Commission has broad powers to arrange, by contract or agreement, generic research and development related to, inter alia, sources of energy, siting, energy supply, public safety, ecology, and conservation [P.R.C. § 25216(c)].

The Commission may also "participate, as a party, to the extent it shall determine, in any proceeding before any . . . state agency having authority whatsoever to approve or disapprove any aspect of a proposed facility . . ." [P.R.C. § 25220]. P.R.C. §§ 25224 (Exchange of information with state agencies); 25309(g) (Biennial Report Energy Assessment); 25400 (ongoing assessment of opportunities and constraints presented by all forms of energy); and 25401 (conductive research on the nature, extent, and distribution of energy resources) give the Commission a wide latitude for involvement in any governmental agency proceeding in which it wishes to participate.

II. Flexible NOI

This format would involve the ERCDC at the earliest possible stages by requiring Commission concurrence in a categorized specific site tracking plan. Since such activities would appear to be far afield from the realm of generic studies, the Staff has proposed that the steam developer would initiate the NOI process. Thus, the NOI proceedings could run simultaneous to the county's EIR.

Such a proposal is not within the statute. Steam prospective and production is not an activity over which the Commission has NOI jurisdiction. Such jurisdiction extends only to "facilities," i.e., thermal power plants and certain electric transmission lines. P.R.C. § 25517 speaks of ERCDC jurisdiction over a "electric utility." That term is defined in P.R.C. § 25108 to mean any person "authorized to engage in generating, transmitting, or distributing electric power . . ." Should the Commission wish to stretch its definition of thermal power plant to include thermal wells which might eventually supply a geothermal power plant, the action - without the real electric utility - would foreclose any AFC by anyone but the steam supplier.

You, of course, realize that to run the EIR with the NOI ignores the established sequence of field exploration before power plant commitment. The Staff's suggested answer to this problem is for the Commission to start processing an NOI without

one being filed. That is, the Commission, under its generic study power - P.R.C. § 25309(e) - would "make its NOI or equivalent decision at the same time the county makes its decision on the exploratory permits." [Draft, p. 23.] The role of the utility is undefined. Would we be intervenors to a hearing process controlled by the Commission or the steam suppliers? Equally important would be the question of whether PGandE could even assume that it was to be the utility that would eventually build and operate the sited power plant. The choice becomes one of either commitment before any steam is found (and being drawn into the supplier's EIR process) or waiting untill the field is proven and, perhaps, bidding against others - NCPA, DWP, etc., - for the steam and approved site.

There is nothing in the statute which authorized the imposition of the flexible NOI or the "case" categorization. While I won't dwell on the possibilities of disputes between the Commission and the steam supplier over the initial categorization, you should be aware that any announced shortening of the review process may give cause to those who oppose the project altogether to litigate a favorable site determination. This problem also exists under the fixed NOI: "[T]he Commission should make adjustments in the vigor of the NOI analyses rather than its substantive requirements." [Draft, p. 26.]

III. Fixed NOI

There seem to be less problems with the fixed NOI: a process which resembles current practice with the CPUC. The conditions listed on page 27 appear acceptable and within the Commission's statutory authority.

The Staff is still suggesting ways of broadening Commission jurisdiction. There is, again, an attempt to make the steam supplier an NOI applicant - at least along with the utility (see, Chart, p. 31). If the supplier was brought in as co-applicant at the time the utility was ready to file, the effect would be to draw the production well operation under the Commission's jurisdiction. As already discussed, the Commission does not have jurisdiction over the steam wells. This is a back door attempt to gain something which it cannot directly achieve and follows what predictably will be an attempt by the ERCDC to run the county's EIR show through its intervenor-party status and generic review material. [See, NOI definition, p. 51.]

The use of generic information as a basis for NOI findings may be acceptable if the subject is without actual controversy. Perhaps safety and reliability of a standarized

power plant design would be permissible subjects, though we must urge that any such process is more fully and adequately defined. Again, watch for expanding jurisdictional claims.

IV. Final Point

One final point. The Staff states that it is looking into the possibilities of asserting CEQA/EIR jurisdiction where it is not a permitting agency. This is a dangerous precedent and is not supported by either CEQA or the Warren-Alquist Act. An EIR is required on "any project they (all state agencies, boards, and commissions) propose to carry out or approve which may have a significant effect on the environment." [P.R.C. § 21100.] (Emphasis added.) "Project" is defined in P.R.C. § 21065 in part as:

> "Activities involving the issuance to a person of a lease, permit, license, . . . for use by one or more public agencies."

The fact that the Commission is interested in the siting of steam wells does not grant them CEQA jurisdiction. Nor, absent statutory basis, can they grant themselves a new role and use it to bootstrap CEQA involvement. The county, through its active land use permitting authority, is the "lead agency" for CEQA and has the responsibility to prepare the EIR.

Richard Moss

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from DGLubbock 11-14-77

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November 8, 1977

Mr. Robert B. Keeler
Deputy Attorney General
Office of the Attorney General
3580 Wilshire Boulevard
Los Angeles, California 90010

Dear Mr. Keeler:

Re: Jurisdiction of the Energy Resources Conservation and Development Commission

You have requested the opinion of our office regarding the extent of jurisdiction of the Energy Resources Conservation and Development Commission (ERCDC) over geothermal wells which are drilled prior to the time a utility proposes to construct a geothermal power plant. We have reviewed the Energy Act along with separate provisions of the Public Resources Code dealing specifically with geothermal resources and have determined that the Legislature did not intend to and did not vest jurisdiction over the development and operation of geothermal wells in the ERCDC.

Of paramount importance is the fact that the Legislature as early as 1965 established an elaborate scheme for the development and production of geothermal resources throughout the state. Pubic Resources Code Section 3700 et seq., Stats 1965 ch 1483. In such enactment, authority is given initially to the State Oil and Gas Supervisor and ultimately to the Geothermal Resources Board 1/ to:

1/ The Supervisor is empowered to issue written directives, "concerning the drilling, testing or other operations in any well drilled or in the process of drilling, or being abandoned." PRC § 3734. Such order is appealable to the Geothermal Resources Board. PRC § 3762.

". . . supervise the drilling, operation, maintenance and abandonment of geothermal resources wells as to encourage the greatest ultimate economic recovery of geothermal resources, to prevent damage to life, health, property, and natural resources . . . ."2/ (PRC § 3712, emphasis added.)

Within the provisions of such enactment, before any well may be drilled or redrilled, an owner or operator must file a notice of intention to commence drilling, which contains, inter alia, location of the proposed well. PRC § 3724. Operators are required to file indemnity bonds or other guarantees of their compliance with orders of the Supervisor. PRC §§ 3725, 3728.5. Owners are required to keep and file a log, core record and history of the drilling of each well (PRC §§ 3737, 3742.1) and failure to comply with the provisions of the act may impose criminal liability. PRC § 3754.

All in all, the Legislature has established a specific agency and detailed procedure, including an appellate process,3/ for the control of the development of geothermal resources in the state.

In contrast to such specific legislation, in the Energy Act (PRC § 25000, et seq.) the Legislature was silent about specifically including the control of geothermal well development and production within the jurisdiction of the ERCDC. The inquiry has been raised, however, whether or not a geothermal well is an appurtenant facility to a geothermal power plant and thus within ERCDC jurisdiction.

It is established law that in order for a general statute to control and take precedence over a special one, there must be a clear indication by the Legislature of such intent. Warne v. Harkness (1963) 60 Cal 2d. 579, 588; In re Williamson (1954) 43 Cal 2d. 651, 654. Candlestick Properties, Inc., v. San Francisco Bay Conservation and Development Commission (1970) 11 Cal App 3d. 557, 565-566.

2/ The 1965 enactment did not contain the phrase, "to prevent damage to life, health, property and natural resources." Such was added in 1970. Stats. 1970 ch 117.

3/ Section 3762 of the Public Resources Code authorizes appeal from written orders of the Supervisor to the Geothermal Resources Board. Specific procedures and the extent of judicial review are set forth in Section 3763 through 3771.

The special statute will take precedence even if the general statute was enacted later unless the two are irreconcilably inconsistent. People v. Pacific Imp. Co. (1900) 130 Cal 442, 466. Ryder v. Los Altos (1954) 125 Cal App 2d. 209, 210-211.

Coupled with the requirement that statutes on the same subject matter must be construed together and harmonized if possible (Placer County v. Aetna Casualty & Surety Co. (1958) 50 Cal 2d. 182, 188-189) is a rule of construction that unless the language of a statute permits no alternative, a construction leading to absurd consequences will not be adopted. Clements v. Bechtel (TR) Co. (1954) 43 Cal 2d. 227, 233; Department of Motor Vehicles v. Industrial Acc. Comm. (1939) 14 Cal 2d. 189, 195; Jersey Maid Milk Products Co. v. Brock (1939) 13 Cal 2d. 620, 648.

Applying these rules, it is evident that the Legislature did not intend that the ERCDC exercise jurisdiction over the development and operation of geothermal wells.

The 1965 enactment is a special statute directed solely towards the development and operation of geothermal wells within the state. In contrast, the Energy Act is directed toward the siting of thermal generation facilities, which may be fueled with a variety of energy sources, not just geothermal energy. The relation of the ERCDC to geothermal wells is only incidental.

As mentioned above, the Energy Act is devoid of any clear indication that the Legislature intended the ERCDC to have jurisdiction over geothermal wells, and on examination of the two acts, it can be seen that they are not irreconcilably inconsistent. In the Energy Act, the Legislature chose to give the ERCDC the authority only to make "recommendations for state policy and actions for the development of all potential sources of energy . . . including . . . geothermal energy resources." PRC § 25401, emphasis added. The ERCDC also is only given authority to establish research and development programs into expansion and acceleration of development of alternate energy sources, including geothermal resources. PRC § 25600(c). The authority to conduct research programs and to make recommendations to other state entities is totally consistent with the exercise of jurisdiction to control by another state agency. Consequently, the 1965 enactment, as special legislation, controls.

A further indication that the Legislature intended geothermal development and operation to remain within the jurisdiction of the State Oil and Gas Supervisor and the Geothermal Resources Board is provided by subsequent legislative history to the Energy Act. In 1975, after the effective date of the Energy Act, the Legislature amended the composition of the Geothermal Resources Board to include an additional member (PRC § 3742), but it did not include any representative of the ERCDC. PRC § 3742 Stats 1975 ch 773. From this, it is apparent that the Legislature intended that the 1965 enactment control, and that the ERCDC was not meant even to participate in the direct development and control of geothermal resources.

Only if one strains the definition of a thermal power plant in Section 25108 to mean that a geothermal well is an appurtenant facility can the two acts be found to be inconsistent. If such construction were accepted, an absurdity is created and the entire siting process breaks down. If a well is an appurtenant facility to a power plant, over which the ERCDC has jurisdiction, then that well may not be drilled, or "constructed" in the technical sense, 4/ without a certification from the ERCDC. PRC § 25517. In order to obtain a certificate authorizing construction of a power plant, to which the well is appurtenant, the plant must have a site, the location of which must have been approved by the Commission, PRC §§ 25504, 25516 and 25519. Yet the site, practically, cannot be located until sufficient steam is discovered by drilling more than one well at several dispersed locations in one general area. Consequently, because you can't drill a well until you have the final certificate for the plant, and because you can't locate the site for the plant until you have the necessary wells, you can't site a geothermal plant at all. 5/ This is clearly contrary to the intent of the Legislature which provided for expedited and preferential treatment for the siting of geothermal power plants in Section 25540. Admitting that the ERCDC could seek to establish a separate procedure to regulate the drilling of geothermal development, such procedure would directly conflict with the abbreviated process established especiallly for geothermal power plants in Section 25540.

4/ PRC § 25105 defines construction to include the installation of "permanent equipment for any facility." The necessary installation of casing as the well is drilled and required safety devices can be considered as the installation of permanent equipment for a facility, under the offered jurisdictional construction of Section 25108.

5/ For those few wells which may have been drilled prior to the effective date of the Energy Act, it nevertheless is quite clear that control over operation and maintenance is specifically vested in the State Oil and Gas Supervisor. PRC §§ 3714, 3715. Extensive regulations have been promulgated under the authority of the 1965 act. (Title 14 Calif. Admin. Code § 1931.5, 1950 et seq.)

Since the argument claiming ERCDC jurisdiction turns on construction of Section 25108, the concept of an appurtenant facility also can be examined. What is "appurtenant" is usually viewed in the context of real property transactions. The key in the cases analyzing such term is the concept that whatever is appurtenant passes on transfer of the principal thing or item transferred. Sparks v. Hess (1860) 15 Cal 186, 196; Schumann v. Reichel, C. R. Engineering Co. (1961) 187 Cal App 2d. 309, 319; Van Rohr v. Neely (1946) 76 Cal App 2d. 713, 715. The ability to transfer necessarily contemplates ownership. It is fundamental that one can't transfer ownership to something that he doesn't own. In the case of geothermal wells, such wells are not owned by the utility proposing the power plant. This division of ownership is acknowleged by the Legislature in the Energy Act where it treats utilities as different persons than "fuel producers." PRC § 25216. 6/

In light of the foregoing, we feel that it is clear that the ERCDC is not vested with jurisdiction over geothermal wells. 7/

Thank you for providing us with an opportunity to present our analysis of this matter.

Very truly yours,

Dan G. Lubbock

DAN G. LUBBOCK

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6/ Section 25121 defines "fuel" to include "any other substance used primarily for its energy content." which would include geothermal energy.

7/ Geothermal wells can be used for purposes other than generating electricity, which is acknowledged in the 1955 enactment. Public Resources Code Section 3757.2 governs "low-temperature geothermal wells" which currently cannot be used for generation of electricity.