

STATE OF NEW MEXICO
COUNTY OF LEA
FIFTH JUDICIAL DISTRICT

SENATOR CARROLL H. LEAVELL,
SENATOR GAY G. KERNAN,
REPRESENTATIVE DONALD E. BRATTON,
NEW MEXICO OIL AND GAS ASSOCIATION,
DAIRY PRODUCERS OF NEW MEXICO,
NEW MEXICO RURAL ELECTRIC COOPERATIVE
ASSOCIATION, EL PASO ELECTRIC COMPANY,
PUBLIC SERVICE COMPANY OF NEW MEXICO
TRI-STATE GENERATION AND TRANSMISSION
ASSOCIATION, INC., NEW MEXICO FARM &
LIVESTOCK BUREAU, and NEW MEXICO
PETROLEUM MARKETERS ASSOCIATION

Plaintiffs,

v.

No. D-0506-CV-2010-00050

NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD

Defendant,

v.

NEW ENERGY ECONOMY, INC.

Defendant-in-Intervention.

MOTION TO DISMISS

COMES NOW New Energy Economy (“NEE”), by and through its attorneys,
New Mexico Environmental Law Center, and requests the Court to dismiss the Plaintiffs’
Amended Complaint for Declaratory Judgment and Injunctive Relief (“Complaint”).

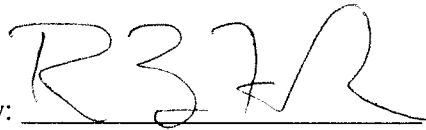
As set forth in NEE’s Brief in Support of this Motion, the administrative
proceeding that Plaintiffs seek to enjoin is a rulemaking that the Environmental
Improvement Board (“Board”) is conducting in accordance with the Board’s express
statutory authority under the New Mexico Air Quality Control Act (“AQCA”) and

Environmental Improvement Act (“EIA”). Most of the Plaintiffs have entered their appearance before the Board and are participating in the rulemaking as parties. The Board has made no final decision, however, and it is unknown at this time when the Board will make a final decision or what that final decision will be.

WHEREFORE, NEE requests the Court to dismiss the Plaintiffs’ Complaint (1) because Plaintiffs have failed to exhaust their administrative remedies, (2) because there is no actual controversy before the Court that is ripe for judicial review, and (3) because Plaintiffs have no standing.

Respectfully submitted:

NEW MEXICO ENVIRONMENTAL LAW
CENTER

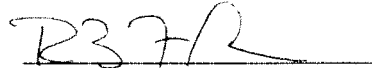
By: 

Bruce Frederick
Douglas Meiklejohn
Jon Block
Eric Jantz
1405 Luisa Street, Ste. 5
Santa Fe, NM 87505
(505) 989-9022
bfrederick@nmelc.org

Attorneys for New Energy Economy, Inc.

CERTIFICATE OF SERVICE

I certify that I caused a copy of the foregoing paper to be mailed, first class, to the following persons pursuant to NMRA 1-005 on the 5th day of February, 2010:


R. Bruce Frederick

Louis W. Rose
Montgomery & Andrews, P.A.
Post Office Box 2307
Santa Fe, New Mexico 87504-2307
(505) 982-3873

Richard L. Alvidrez
Miller Stratvert PA
P.O. Box 25687
Albuquerque, NM 87125-0687
(505) 842-4737

*Attorneys for Plaintiffs Senator Carroll H. Leavell,
Senator Gay G. Kernan, Representative Donald E.
Bratton, New Mexico Oil and Gas Association,
Dairy Producers of New Mexico, New Mexico Rural
Electric Cooperative Association, Tri-State
Generation and Transmission Association, Inc.,
New Mexico Farm & Livestock Bureau, and New
Mexico Petroleum Marketers Association.*

*Attorneys for Public Service Company of New
Mexico and Southwestern Public Service Company*

Eric Groten
Vinson & Elkins LLP
2801 Via Fortuna, Suite 100
Austin, TX 78746
(512) 542-8709

Stephen A. Vigil
Office of the Attorney General
P.O. Box 1508
Santa Fe, NM 87504-1508

Attorneys for EL Paso Electric

STATE OF NEW MEXICO
COUNTY OF LEA
FIFTH JUDICIAL DISTRICT

SENATOR CARROLL H. LEAVELL,
SENATOR GAY G. KERNAN,
REPRESENTATIVE DONALD E. BRATTON,
NEW MEXICO OIL AND GAS ASSOCIATION,
DAIRY PRODUCERS OF NEW MEXICO,
NEW MEXICO RURAL ELECTRIC COOPERATIVE
ASSOCIATION, EL PASO ELECTRIC COMPANY,
PUBLIC SERVICE COMPANY OF NEW MEXICO
TRI-STATE GENERATION AND TRANSMISSION
ASSOCIATION, INC., NEW MEXICO FARM &
LIVESTOCK BUREAU, and NEW MEXICO
PETROLEUM MARKETERS ASSOCIATION

Plaintiffs,

v.

No. D-0506-CV-2010-00050

NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD

Defendant,

v.

NEW ENERGY ECONOMY, INC.

Defendant-in-Intervention.

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

COMES NOW New Energy Economy, Inc. (“NEE”), by and through its attorneys, New Mexico Environmental Law Center, and submits this Memorandum in Support of its Motion to Dismiss Plaintiffs’ Amended Complaint for Declaratory Judgment and Injunctive Relief (“Complaint”). Plaintiffs’ premature Complaint should be dismissed on several grounds.

Plaintiffs ask this Court to disrupt and stop an ongoing rulemaking being conducted by an administrative agency, the New Mexico Environmental Improvement Board (“Board”),

pursuant to the agency's express statutory authority under the New Mexico Environmental Improvement Act ("EIA") and Air Quality Control Act ("AQCA"). Plaintiffs' sole reason for asking the Court to take the extraordinary step of stopping the Board's rulemaking is Plaintiffs' fear that the Board might disagree with their strained interpretation of the AQCA on a minor point of law.

However, the merit (or lack thereof) of Plaintiffs' legal argument is irrelevant at this time: No court has jurisdiction to review the Board's decision on the fine legal point raised by Plaintiffs unless and until the prescribed statutory process runs its course and the Board actually makes a final decision. This conclusion is compelled by the related doctrines of "exhaustion of administrative remedies," "ripeness" and "standing," which all postpone the courts' jurisdiction over administrative actions until the agency makes a final decision. Therefore, because the Board has made no final decision, NEE requests the Court to dismiss the Plaintiffs' Complaint.

BACKGROUND

The material facts are not in dispute. Pursuant to the New Mexico Air Quality Control Act ("AQCA"), the Environmental Improvement Board ("Board") has exclusive authority to "adopt, promulgate, publish, amend and repeal regulations consistent with the [AQCA] to attain and maintain national ambient air quality standards and prevent or abate air pollution, including regulations prescribing air standards" NMSA 1978, § 74-2-5(B)(1) (2007). Similarly, pursuant to the New Mexico Environmental Improvement Act ("EIA"), the Board has a duty to "promulgate rules and standards in the [area of] ... (7) nuisance abatement." NMSA 1978, § 74-1-8(A)(2000).

In accordance with Section 74-2-6(A)(1992) of the AQCA and Section 74-1-9(A) (1985) of the EIA, which both provide that any “person may ... propose regulations to the environmental improvement board ... for adoption,” NEE filed a petition with the Board proposing that it adopt regulations to control the emission of greenhouse gases (“GHGs”). Complaint, Exhibit A. NEE contends that GHGs qualify as an “air contaminant” under the AQCA, and that GHG emissions contribute to a dangerous public nuisance under the EIA.

In accordance with NMSA Sections 74-1-9 and 74-2-6, the Board scheduled a public hearing to consider NEE’s Petition. Complaint, ¶ 44. The hearing is scheduled to occur over several days, with hearing on the merits to begin on June 21, 2010. *Id.* The Board cannot adopt any regulation until after a noticed public hearing at which all persons are provided opportunity to present evidence, etc. NMSA 1978, §§ 74-1-9, 74-2-6. In determining whether to adopt regulations under the AQCA and the EIA, the Board must consider many factors, including (1) the “character and degree of injury” to public health and welfare, (2) “public interest,” and (3) “technical practicability.” NMSA 1978, §§ 74-1-9(B), 74-2-5(E).

At this time, it is unknown and unknowable whether the Board will adopt any regulations. If the Board decides to adopt regulations, its regulations may vary substantially from those proposed in by NEE, depending on the evidence presented at hearing. Wylie Bros. Contracting Co. et al. v. Albuquerque-Bernalillo County Air Quality Control Bd., 80 N.M. 633, 642, 459 P.2d 159, 168 (Ct. App. 1969). Indeed, under the Board’s procedural rules, any party to the rulemaking may recommend modifications to NEE’s proposal. NMAC § 2.1.1.302(A)(5); *cf.* NMSA 1978, § 74-1-9(E).

STANDARD

“A motion to dismiss tests the legal sufficiency of the complaint” and the Court must accept as “true all well-pleaded facts.” New Mexico Life Ins. Guar. Ass'n v. Quinn & Co., 111 N.M. 750, 753, 809 P.2d 1278, 1281 (1991).

ARGUMENT

I. **Plaintiffs failed to exhaust their administrative remedies.**

In State ex rel. State Corporation Commission et al. v. Zinn, District Judge, 72 N.M. 29, 380 P.2d 182 (1963), our Supreme Court issued a writ of prohibition against Judge Zinn to prevent him from interfering with an administrative proceeding pending before the State Corporation Commission (“SCC”). The SCC had commenced the proceeding to determine whether the McWood Corporation was “engaging in the transportation of property over the public highways of New Mexico for compensation as a common contract carrier by motor vehicle.” Id. at 34, 380 P.2d at 185. In the midst of the proceeding, the McWood Corporation filed a separate declaratory judgment action in the Eleventh Judicial District that ended up before Judge Zinn, demanding like Plaintiffs in the instant case that the Court enjoin the pending administrative proceeding. Id. at 31, 35 & 37, 380 P.2d at 181, 185 & 187.

Just like Plaintiffs’ argument in the instant case, statutory interpretation was at the heart of the McWood Corporation’s case. The corporation claimed that it was not a “common carrier” within the meaning of the applicable statute and that, therefore, the Corporation Commission lacked power to conduct the hearing and should be enjoined. Id. at 32 & 37, 380 P.2d at 184 & 187. In order to protect the integrity of its own proceedings, the Corporation Commission was forced to apply to the Supreme Court for a writ of prohibition against Judge Zinn, arguing that the Judge lacked jurisdiction to entertain the McWood Corporation’s complaint. Id. at 30-31, 380 P.2d at 182-183.

In defending against the writ, Judge Zinn argued to the Supreme Court that the determination of whether the McWood Corporation was a “common carrier” was a “judicial question” and that, therefore, he had jurisdiction to decide the issue and to enjoin the administrative proceeding then pending before the SCC. Id. at 37, 380 P.2d at 187. The Supreme Court unanimously disagreed, holding that it was Judge Zinn who lacked jurisdiction, not the SCC, because the statutory proceeding before the agency was still pending and the McWood Corporation had not yet exhausted its administrative remedies. Zinn at 36-38, 380 P.2d at 186-188.

In making the writ of prohibition against Judge Zinn “absolute,” our Supreme Court found that Judge Zinn’s argument was “identical with the one of the claims made in” Myers v. Bethlehem Shipbuilding Corporation, 303 U.S. 41 (1938). Zinn at 35-36, 380 P.2d at 186. In that New Deal era case, the corporation also sought heavy-handed declaratory and injunctive relief as a way of stopping an administrative proceeding then pending before the National Labor Relations Board. Myers at 46. As in the instant case and in Zinn, the corporation’s complaint in Myers was based entirely on a legal argument that, if correct, would have deprived the agency of power to conduct the hearing. Id. at 48 (corporation claimed that it was not involved in interstate or foreign commerce and that, therefore, the National Labor Relations Act did not apply to it.) The United States Supreme Court held, essentially, that the corporation’s argument was irrelevant, because the “District Court was without power to enjoin the Board from holding hearings.” Id. at 47. As in Zinn, the basis of the Court’s decision was that the proceeding before the agency was ongoing and that the corporation had not yet exhausted its administrative remedies. Id. at 50 – 52.

Myers and Zinn show clearly that Plaintiffs have no right to declaratory or injunctive relief as against the Board's ongoing statutory proceedings. As in those cases, the Board is proceeding in accordance with express statutory power to conduct public hearings for the purpose of considering proposed regulations in the areas of nuisance abatement and air quality management—areas over which it has express statutory authority. NMSA 1978, §§ 74-1-8(A), 74-1-9, 74-2-5, and 74-2-9. Moreover, as explained by the U.S. Supreme Court in Myers, Plaintiffs' argument that they will suffer "irreparable damage" if forced to endure the Board's statutorily prescribed rulemaking procedure:

... is at war with the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.

Myers at 50-51. The "rule of exhaustion" applies even where, as in the instant case, "the contention is made that the administrative body lacked power over the subject matter." Id. at 51. Furthermore:

Obviously, the rule requiring exhaustion of the administrative remedy cannot be circumvented by asserting that the charge on which the complaint rests is groundless and that the mere holding of the prescribed administrative hearing would result in irreparable damage. Lawsuits also often prove to have been groundless; but no way has been discovered of relieving a defendant from the necessity of a trial to establish the fact.

Id.; Zinn at 38, 380 P.2d at 187 (quoting this holding on "irreparable damage" from Myers).

Thus, as a matter of law, Plaintiffs have suffered no "irreparable damage."¹

The Supreme Court further explained in Zinn that the "exhaustion doctrine" does not result in an "ouster of jurisdiction of the courts, but a postponement until" the agency "has passed upon" the matter at hand. Zinn at 36, 380 P.2d at 186. "Applying this pronouncement," the Court held:

¹ This is especially true where, as in the instant case, Plaintiffs have no obligation to participate in the Board's rulemaking.

[The] conclusion is inescapable that so long as [the Corporation Commission] was proceeding under its statutory authority and administrative remedies had not been exhausted, the district court was without jurisdiction to entertain the proceedings, and accordingly, was subject to prohibition by this court.

Zinn at 36, 380 P.2d at 186-187. Similarly, in the instant case, so long as the Board is proceeding “under its statutory authority and administrative remedies [have] not been exhausted, the district court [is] without jurisdiction to entertain” Plaintiffs’ complaint for declaratory and injunctive relief. Id. The Plaintiffs’ Complaint should be dismissed.

Plaintiffs, moreover, do not complain about any final decision of the Board but instead take issue, prematurely, with the Board’s preliminary decision that it “has authority to address [NEE’s] Rulemaking Petition.” Complaint ¶¶ 40-41. A primary purpose of the doctrine” of exhaustion of administrative remedies “is the avoidance of premature interruption of the administrative process.” Jarvis v. Kansas Commission on Civil Rights et al., 528 P.2d 1232, 1234 (Kan. S.Ct 1974). In Jarvis, Kansas’ Supreme Court relied on Myers and other similar precedents of the United States Supreme Court to hold:

Since agency decisions are frequently of a discretionary nature, or frequently require expertise, the agency should be given the first chance to exercise that discretion or to apply that expertise. It is more efficient for the administrative process to go forward without interruption than it is to permit the parties to seek aid from the courts at various intermediate stages. The very same reasons lie behind judicial rules sharply limiting interlocutory appeals. Frequent and deliberate flouting of administrative processes could weaken the effectiveness of an agency by encouraging people to ignore its procedures. (McKart v. United States, 395 U.S. 185, 23 L. Ed. 2d 194, 89 S. Ct. 1657; Fed. Power Comm’n v. Edison Co., 304 U.S. 375, 82 L. Ed. 1408, 58 S. Ct. 963.)

Id. The respondent in Jarvis had, like the Plaintiffs in the instant case, “attempted to employ the provisions of the declaratory judgment statute” to disrupt an ongoing administrative proceeding. Id. at 1235. In reversing the district court’s decision to preliminarily enjoin the agency’s proceedings, the Court held:

Even if an actual controversy existed between the parties, we cannot permit the use of a declaratory judgment in this situation. The courts should not interfere with administrative proceedings and assume jurisdiction of declaratory judgment proceedings until administrative remedies have been exhausted.

Id.; see also Sanchez v. Bradbury & Stamm Construction et al., 109 N.M. 47, 49, 781 P.2d 319, 321 (Ct. App.), *cert. denied*, 109 N.M. 54, 781 P.2d 782 (1989) (“The general rule in administrative law is that, absent express statutory authorization, ‘no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted’”) (*quoting Coca-Cola Co. v. F.T.C.*, 475 F.2d 299, 302 (5th Cir.), *cert. denied*, 414 U.S. 877 (1973)).

Plaintiffs invite this Court to grant the same premature relief that was sought and denied to the losing parties in Myers, Zinn, Sanchez, Coca-Cola and Jarvis. Although Plaintiffs are no doubt politically and financially powerful, they are not above the law. The Court should, therefore, uphold the Separation of Powers Doctrine that forms the foundation of our form of government and dismiss the Plaintiffs’ Complaint in accordance with established law. Id.; see also Muhammad v. Carlson, 739 F.2d 122, 124 (3d Cir. 1984) (“For courts to act prematurely, prior to the final decision of the appropriate administrative agency, would raise a serious question implicating the doctrine of separation of powers.”).

Plaintiffs no doubt hope to exploit the recent cases of Smith et al. v. City of Santa Fe, 2007 NMSC 55, 142 N.M. 786 (2007) and State ex rel. Hanosh et al. v. N.M. Env'tl. Improvement Bd., 145 N.M. 269 (Ct. App. 2008), *aff'd and remanded*, 2009 NMSC 47, 217 P.3d 100, but these cases did not change the law and are easily distinguishable. Plaintiffs in Hanosh did not participate in the Board’s administrative rulemaking and never challenged the Board’s authority to conduct the rulemaking; and, moreover, they waited until the day the Board actually adopted a regulation to file their declaratory judgment action. Hanosh ¶ 1, 145

N.M. at 270. Thus, the plaintiffs in Hanosh waited until the rulemaking was complete and never asked the district court to disrupt and stop an ongoing administrative proceeding; and neither the Court of Appeals nor the Supreme Court ever condoned such heavy-handed interference by the judiciary.

The Supreme Court compared and contrasted the circumstances of two plaintiffs in Smith, the Stillmans and the Smiths, with diametrically opposed legal consequences. The Stillmans and the Smiths had both obtained permits to drill domestic wells from the State Engineer, but both would have been denied permits by the City pursuant to a City ordinance. Smith ¶¶ 2-4, 142 N.M. at 788. The “Stillmans did not apply for a city permit” and never asked the district court to interfere with or cut short any ongoing proceeding before the City of Santa Fe. Smith ¶ 4, 142 N.M. at 788. The Stillmans instead asked the district court to declare that the City’s existing ordinance (requiring a permit) was preempted by state law. Smith ¶¶ 5-6, 142 N.M. at 788-789. Therefore, “because the Stillmans’ challenge to the City’s authority present[ed] a pure question of law that would have been futile to pursue through the City’s administrative appeals process, exhaustion [of administrative remedies] was not required.” Smith ¶ 27, 142 N.M. at 794. Accordingly, the district courts had jurisdiction over the declaratory judgment actions brought by plaintiffs in Hanosh and the Stillmans in Smith.

However, the Supreme Court held that the district court lacked jurisdiction to hear the Smiths’ request for declaratory judgment (Smith ¶ 7, 142 N.M. at 789) because, unlike the Stillmans, “the Smiths *did* apply for permits from the City.” Id. ¶ 4, 142 N.M. at 788 (emphasis added). The Court distinguished the Smiths’ situation from the Stillmans’ based on this admonition:

[We] must remain mindful of some important limitations on the use of declaratory judgment actions to review the propriety of administrative actions.

In particular, and as we discuss more fully below, within the context of this case, we caution against using a declaratory judgment action to challenge or review administrative actions if such an approach would foreclose any necessary fact-finding by the administrative entity, discourage reliance on any special expertise that may exist at the administrative level, disregard an exclusive statutory scheme for the review of administrative decisions, *or circumvent procedural or substantive limitations that would otherwise limit review through means other than a declaratory judgment action.*

Id. ¶ 15, 142 N.M. at 791 (emphasis added). Accordingly, because the Smiths applied for a permit from the City and thus invoked its administrative process, they could not circumvent the process but “were obligated to either pursue a timely appeal under Rule 1-075 or, at a minimum, initiate a declaratory judgment action within the same time frame.” Id. ¶ 24, 142 N.M. at 793. “Having failed to do so,” the Court concluded “that the district court lacked jurisdiction to rule on the Smiths' claim for declaratory relief.” Id.

This Court should reach the same conclusion in the instant case. First, most of the Plaintiffs have entered their appearance in the administrative proceeding currently pending before the Board. Having voluntarily chosen to participate as parties in the Board's rulemaking, like the Smiths in Smith, Plaintiffs cannot circumvent the process established for judicial review. NMSA 1978, § 74-1-9 (providing for direct appeal of the Board's decisions to the Court of Appeals); NMSA 1978, § 74-2-9 (same). Second, Plaintiffs should also not be allowed to “circumvent procedural or substantive limitations that would otherwise limit review through means other than a declaratory judgment action.” Id. ¶ 15, 142 N.M. at 791. In this case, Plaintiffs are clearly hoping to disrupt an ongoing administrative proceeding, prevent the Board from ever making a final decision, and circumvent the doctrines of “exhaustion of administrative remedies,” “ripeness” and “standing” that would otherwise apply. In Smith the Supreme Court expressly cautioned against such tactics, and accordingly, the Court should dismiss the Plaintiffs' Complaint. And third, Plaintiffs are not seeking a

declaration of their “rights, status and other legal relations” under any existing law, as the Stillmans did with respect to the ordinance at issue in Smith, but are instead merely seeking to impose their peculiar legal interpretation upon the Board. In any event, there is really nothing for this Court to declare, because Plaintiffs’ complaint identifies no existing “laws of the state of New Mexico” under which Plaintiffs’ “rights, status and other legal relations” have been called into question. NMSA 1978, § 44-6-13 (1975).

II. There is no controversy before the Court that is ripe for review.

Under the Declaratory Judgment Act, this Court clearly has the “power to declare rights, status and other legal relations,” but only in “cases of actual controversy.” NMSA 1978, § 44-6-2(1969); State ex rel. Overton v. New Mexico State Tax Comm’n, 81 N.M. 28, 31, 462 P.2d 613, 616 (N.M. 1969) (“There must be an ‘actual controversy’ before jurisdiction” vests under the Declaratory Judgment Act). One of the “prerequisites of ‘actual controversy’ warranting consideration in a declaratory judgment action [is] ... the issue involved must be ripe for judicial determination.” Sanchez v. Santa Fe, 82 N.M. 322, 324, 481 P.2d 401, 403 (1971).

As applied in the context of an administrative proceeding, the doctrine of ripeness serves “to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.” Abbott Laboratories v. Gardner, 387 U.S. 136, 148-149, 18 L. Ed. 2d 681, 87 S. Ct. 1507 (1967), *abrogated on other grounds by* Califano v. Sanders, 430 U.S. 99, 105, 51 L. Ed. 2d 192, 97 S. Ct. 980 (1977).

U.S. West Communications, Inc. v. New Mexico State Corp. Comm’n, 1998 NMSC 32, ¶ 8, 125 N.M. 798, 801 (1998); *cf.* Harris v. Revenue Div. of Taxation & Revenue Dep’t, 105 N.M. 721, 722, 737 P.2d 80, 81 (Ct. App. 1987) (“In general, an appellate court will not

review the proceedings of an administrative agency until the agency has taken final action.”). The requirement of ripeness allows the courts “to conserve judicial machinery for problems which are real and present or imminent, not to squander it on abstract or hypothetical or remote problems.” In re ALTERNATIVES TO THE INVENTORYING RATEMAKING METHODOLOGY, 111 N.M. 622, 630, 808 P.2d 592, 600 (1991).

It is plain on the face of Plaintiffs’ Complaint that there is no “actual controversy” that is ripe for judicial determination. Plaintiffs admit that no regulation has been adopted by the Board; indeed, hearing on the merits is not even scheduled to begin until June 21, 2010. Complaint ¶ 44. At the conclusion of the hearing (which will likely take several months), the Board may or may not adopt any regulations. Furthermore, if the Board chooses to adopt regulations, the final version of the regulations will not necessarily be those proposed by NEE. Under the Board’s procedural rules, any party (including NEE) may “recommend[] modifications to the proposed regulatory change” (NMAC § 20.1.1.302(A)(5)), and thus the final regulations (if any) may vary substantially from those initially proposed by NEE. See also Wylie Bros. Contracting Co. v. Albuquerque-Bernalillo County Air Quality Control Bd., 80 N.M. 633, 642, 459 P.2d 159, 168 (Ct. App. 1969) (“The provisions of the [Air Quality Control] Act in regard to a public hearing do not contemplate that every change in proposed regulations, whether such change be inconsequential or substantial, requires another public hearing thereon.”).

Thus, Plaintiffs’ legal argument that the Board must adopt “an ambient air quality standard” in order to limit the emission of greenhouse gases (Complaint ¶ 52), even if it were

correct, does not create any “actual controversy” that is ripe for review.² The Board has made no final decision and Plaintiffs are free to argue their position to the Board. If the Board were to accept Plaintiffs’ legal argument, nothing prevents it from adopting an ambient air quality standard (if evidence supported such a decision) or from simply deciding not to adopt any regulations at all.³ Id. In any event, the Board has made no final decision, and the statutorily prescribed administrative process by which the Board makes decisions has barely begun. The process will require months to complete and the outcome is far from certain. Accordingly, Plaintiffs’ Complaint should be dismissed, because there is no “actual controversy” before the Court that is ripe for judicial review. Wyatt v. Gov’t of the V.I., 385 F.3d 801, 806 (3d Cir. 2004) (“A dispute is not ripe for judicial determination if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all”)(internal quoted omitted).

III. Plaintiffs have no standing.

To establish standing, Plaintiffs must demonstrate that: “(1) they are directly injured as a result of the action they seek to challenge; (2) there is a causal relationship between the injury and the challenged conduct; and (3) the injury is likely to be redressed by a favorable decision.” ACLU of N.M. v. City of Albuquerque, 2008 NMSC 45, ¶1 144 N.M. 471, 473 (2008). Plaintiffs have no standing, because they have suffered no “injury in fact.” Although slight injury can be sufficient to confer standing, the plaintiff must nonetheless suffer or be “imminently threatened” with some concrete “direct injury.” Id. ¶ 11, 144 N.M. at 476.

² There is an obvious “slippery slope” problem with Plaintiffs’ approach. Under Plaintiffs’ approach, any lawyer (or law student) could create jurisdiction in the district courts under the Declaratory Judgment Act, prior to a final agency decision, merely by “spotting” potential legal issues.

³ NEE, however, would argue that the Board is not required to adopt any ambient air quality standard before regulating the emission of greenhouse gases. Indeed, the Environmental Protection Agency has decided to begin regulating the emission of greenhouse gases under the Clean Air Act without setting any ambient air quality standard. *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, 74 FR 66496 (December 15, 2009).

While it does not matter how many persons have been injured by the challenged action, the party bringing suit must show that the action injures him in a concrete and personal way. This requirement is not just an empty formality. It preserves the vitality of the adversarial process by assuring both that the parties before the court have an actual, as opposed to a professed, stake in the outcome, and that the legal questions presented . . . will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.

Id. ¶ 19, 144 N.M. at 478 (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 581 (1992)).


Where the actions of the executive department are challenged, as in the instant case, the “injury in fact” requirement serves to establish the “proper relationships between the judiciary and other branches of the . . . government.” Id. Plaintiffs have suffered no injury in fact, because the Board has made no final decision and there is no way of knowing at this time what its final decision will be. Having suffered no injury or imminent threat of injury, Plaintiffs cannot use this Court to control the Board through injunction. Asplund v. Hannett, 31 N.M. 641, 656, 249 P. 1074, 1079 (1926) (“Injunction is not a remedy which may be invoked by the citizen for the purpose of controlling public officers or tribunals in the exercise of their functions.”) Plaintiffs’ complaints are based on pure conjecture; they have no standing and their Complaint should be dismissed.

Conclusion

Based on all the foregoing reasons, NEE respectfully requests the Court to dismiss the Plaintiffs’ Complaint.

Respectfully submitted:

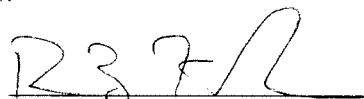
NEW MEXICO ENVIRONMENTAL LAW
CENTER

By: 
Bruce Frederick
Douglas Meiklejohn
1405 Luisa Street, Ste. 5
Santa Fe, NM 87505
(505) 989-9022
bfrederick@nmeic.org

Attorneys for New Energy Economy, Inc.

CERTIFICATE OF SERVICE

I certify that I caused a copy of the foregoing paper to be mailed, first class, to the following persons pursuant to NMRA 1-005 on the 5th day of February, 2010:


R. Bruce Frederick

Louis W. Rose
Montgomery & Andrews, P.A.
Post Office Box 2307
Santa Fe, New Mexico 87504-2307
(505) 982-3873

Richard L. Alvidrez
Miller Stratvert PA
P.O. Box 25687
Albuquerque, NM 87125-0687
(505) 842-4737

*Attorneys for Plaintiffs Senator Carroll H. Leavell,
Senator Gay G. Kernan, Representative Donald E.
Bratton, New Mexico Oil and Gas Association,
Dairy Producers of New Mexico, New Mexico Rural
Electric Cooperative Association, Tri-State
Generation and Transmission Association, Inc.,
New Mexico Farm & Livestock Bureau, and New
Mexico Petroleum Marketers Association.*

*Attorneys for Public Service Company of New
Mexico and Southwestern Public Service Company*

Eric Groten
Vinson & Elkins LLP
2801 Via Fortuna, Suite 100
Austin, TX 78746
(512) 542-8709

Stephen A. Vigil
Office of the Attorney General
P.O. Box 1508
Santa Fe, NM 87504-1508

Attorneys for EL Paso Electric

Attorney for the Environmental Improvement Board

STATE OF NEW MEXICO
COUNTY OF LEA
FIFTH JUDICIAL DISTRICT

SENATOR CARROLL H. LEAVELL,
SENATOR GAY G. KERNAN,
REPRESENTATIVE DONALD E. BRATTON,
NEW MEXICO OIL AND GAS ASSOCIATION,
DAIRY PRODUCERS OF NEW MEXICO,
NEW MEXICO RURAL ELECTRIC COOPERATIVE
ASSOCIATION, EL PASO ELECTRIC COMPANY,
PUBLIC SERVICE COMPANY OF NEW MEXICO
TRI-STATE GENERATION AND TRANSMISSION
ASSOCIATION, INC., NEW MEXICO FARM &
LIVESTOCK BUREAU, and NEW MEXICO
PETROLEUM MARKETERS ASSOCIATION

Plaintiffs,

v.

No. D-0506-CV-2010-00050

NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD

Defendant,

v.

NEW ENERGY ECONOMY, Inc.

Defendant-in-Intervention.

REQUEST FOR HEARING

1. Type of case: Jury: Non-Jury: xxx
2. Assigned Judge: Honorable William Shoobridge
3. Hearings presently set: None
4. Specific matters to be heard: Motion to Dismiss
5. Estimated total time required for this hearing: 1 hour
6. Request submitted by: New Energy Economy, Inc.
7. Other attorneys and pro se parties of record entitled to notice:

Louis W. Rose
Montgomery & Andrews, P.A.
Post Office Box 2307
Santa Fe, New Mexico 87504-2307
(505) 982-3873

*Attorneys for Plaintiffs Senator Carroll H. Leavell,
Senator Gay G. Kernan, Representative Donald E.
Bratton, New Mexico Oil and Gas Association,
Dairy Producers of New Mexico, New Mexico Rural
Electric Cooperative Association, Tri-State
Generation and Transmission Association, Inc.,
New Mexico Farm & Livestock Bureau, and New
Mexico Petroleum Marketers Association.*

Eric Groten
Vinson & Elkins LLP
2801 Via Fortuna, Suite 100
Austin, TX 78746
(512) 542-8709

Attorneys for EL Paso Electric

Richard L. Alvidrez
Miller Stratvert PA
P.O. Box 25687
Albuquerque, NM 87125-0687
(505) 842-4737

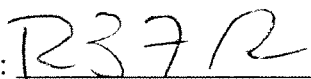
*Attorneys for Public Service Company of New
Mexico and Southwestern Public Service Company*

Stephen A. Vigil
Office of the Attorney General
P.O. Box 1508
Santa Fe, NM 87504-1508

8. I have emailed opposing counsel to inquire as to available dates and have had no response. I am available on the following dates: **March 22-26, March 31, April 19-23, April 26-30.**

Respectfully submitted:


NEW MEXICO ENVIRONMENTAL LAW
CENTER

By: 
Bruce Frederick
Douglas Meiklejohn
Eric Jantz
1405 Luisa Street, Ste. 5
Santa Fe, NM 87505
(505) 989-9022 (tel.)
(505) 989-3769 (fax)
bfrederick@nmelc.org

Attorneys for New Energy Economy, Inc.

CERTIFICATE OF SERVICE

I certify that I caused a copy of the foregoing paper to be mailed, first class, to the following persons pursuant to NMRA 1-005 on the 5th day of Feb, 2010:


R. Bruce Frederick

Louis W. Rose
Montgomery & Andrews, P.A.
Post Office Box 2307
Santa Fe, New Mexico 87504-2307
(505) 982-3873

Richard L. Alvidrez
Miller Stratvert PA
P.O. Box 25687
Albuquerque, NM 87125-0687
(505) 842-4737

*Attorneys for Plaintiffs Senator Carroll H. Leavell,
Senator Gay G. Kernan, Representative Donald E.
Bratton, New Mexico Oil and Gas Association,
Dairy Producers of New Mexico, New Mexico Rural
Electric Cooperative Association, Tri-State
Generation and Transmission Association, Inc.,
New Mexico Farm & Livestock Bureau, and New
Mexico Petroleum Marketers Association.*

*Attorneys for Public Service Company of New
Mexico and Southwestern Public Service Company*

Eric Groten
Vinson & Elkins LLP
2801 Via Fortuna, Suite 100
Austin, TX 78746
(512) 542-8709

Stephen A. Vigil
Office of the Attorney General
P.O. Box 1508
Santa Fe, NM 87504-1508

Attorneys for EL Paso Electric

STATE OF NEW MEXICO
COUNTY OF LEA
FIFTH JUDICIAL DISTRICT

SENATOR CARROLL H. LEAVELL,
SENATOR GAY G. KERNAN,
REPRESENTATIVE DONALD E. BRATTON,
NEW MEXICO OIL AND GAS ASSOCIATION,
DAIRY PRODUCERS OF NEW MEXICO,
NEW MEXICO RURAL ELECTRIC COOPERATIVE
ASSOCIATION, EL PASO ELECTRIC COMPANY,
PUBLIC SERVICE COMPANY OF NEW MEXICO
TRI-STATE GENERATION AND TRANSMISSION
ASSOCIATION, INC., NEW MEXICO FARM &
LIVESTOCK BUREAU, and NEW MEXICO
PETROLEUM MARKETERS ASSOCIATION

Plaintiffs,

v.

No. D-0506-CV-2010-00050

NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD

Defendant,

v.

NEW ENERGY ECONOMY, INC.

Defendant-in-Intervention.

NOTICE OF HEARING

The above matter (regarding New Energy Economy, Inc.'s Motion to Dismiss) will be heard before the Honorable William Shoobridge, at the Lea County Courthouse, at _____.M., on the _____ day of _____, 2010, with _____ allocated for hearing.

Trial court administrative assistant

Notice of hearing mailed to: R. Bruce Frederick
1405 Luisa, Suite 5
Santa Fe, New Mexico 87505
(505) 989-9022

Attorney for New Energy Economy, Inc.

on the _____ day of _____, 2010, by:

PLEASE ACKNOWLEDGE RECEIPT IN WRITING WITHIN THREE (3) DAYS.

RECEIPT ACKNOWLEDGED: _____,

BY _____.