IN THE NEW MEXICO SUPREME COURT

NEW ENERGY ECONOMY, INC.

Petitioner,

vs. No.: ____________________

THE HONORABLE WILLIAM W. SHOOBRIDGE, Judge for New Mexico's Fifth Judicial District,

Respondent.

SUPREME COURT OF NEW MEXICO
FILED
MAY 14 2010

VERIFIED EMERGENCY PETITION FOR WRIT OF SUPERINTENDING CONTROL, INCLUDING A WRIT OF PROHIBITION, OR OTHER APPROPRIATE WRIT AND REQUEST FOR STAY

I. INTRODUCTION

Petitioner, New Energy Economy, Inc. files this Verified Emergency Petition and respectfully requests this Court to exercise its power of superintending control over Respondent. Respondent, the Honorable William G. W. Shoobridge, is a District Judge for the Fifth Judicial District. Although he has *no* jurisdiction, Respondent is presiding over and has refused to dismiss the civil case styled Senator Leavell et al. v. New Mexico Environmental Improvement Board, Fifth Judicial District Court, Cause No. 0506-CV-2010-00050 ("Leavell et al.").[1] On May 4, 2010, Respondent issued a preliminary injunction in Leavell et al. against

[1] Exhibit A is a copy of the Amended Complaint for Declaratory Judgment and Injunctive Relief ("Complaint") filed by the Leavell et al. Plaintiffs ("Plaintiffs").

the New Mexico Environmental Improvement Board ("Board"), without legal justification, thereby abruptly halting an administrative rulemaking ("Rulemaking") that has been pending before the Board for more than a year. The enjoined Rulemaking is styled In the Matter of the Petition to Adopt New Regulations Within 20.2 NMAC, Statewide Air Quality Regulations, to Require Greenhouse Gas Emissions Reductions, New Mexico Environmental Improvement Board, No. EIB 08-19(R).[2]

Petitioner is uniquely affected by Respondent's improper actions in Leavell et al. Petitioner initiated the Rulemaking before the Board and duly invoked the Board's exclusive regulatory jurisdiction on December 19, 2009, by submitting a regulatory proposal to the Board pursuant to the New Mexico Environmental Improvement Act ("EIA"), the New Mexico Air Quality Control Act ("AQCA" or "Air Act") and the Board's regulations. NMSA 1978, § 74-1-9(A)(1985); NMSA 1978, § 74-2-6(A)(1992); 2.1.1.300 NMAC. The regulatory proposal requests the Board to prevent and abate air pollution (pursuant to the AQCA) and to abate a public nuisance (pursuant to the EIA) caused by greenhouse gas ("GHG") emissions from stationary sources. NMSA 1978, § 74-1-8(A)(2000) (requiring the Board under the EIA to adopt regulations in several areas, including "nuisance

[2] Respondent's *Decision Memo Denying Motions to Dismiss and Granting Motion for Preliminary Injunction* ("Decision Memo") is attached as Exhibit E.

abatement"); NMSA 1978, § 74-2-5(A)(2007) (requiring the Board under the AQCA to "prevent or abate air pollution").

Petitioner's position that Respondent lacks jurisdiction over Leavell et al. and that he had no justification to issue a preliminary injunction against the Board is based on the following points of law, which Petitioner explains in detail below:

A. Point One: Respondent has no appellate jurisdiction to entertain Plaintiffs' Complaint. **Page 18**

B. Point Two: Respondent has no original jurisdiction to entertain Plaintiffs' Complaint. **Page 21**

B.1 Plaintiffs' declaratory judgment action was untimely. **Page 24**

B.2 Plaintiffs' declaratory judgment action was filed in the wrong venue. **Page 24**

B.3 The Board's decision was not final and Plaintiffs have no statutory right to appeal the Board's interlocutory decisions. **Page 26**

B.4 There is no controversy that is ripe for Respondent or any court to review. **Page 31**

B.5 Plaintiffs have no standing. **Page 37**

B.6 There are no circumstances justifying an exception to the normal exhaustion, finality, and ripeness rules applicable to pending administrative proceedings. **Page 39**

C. Point Three: Respondent should not have issued a preliminary injunction. **Page 43**

C.1 Plaintiffs failed to show irreparable harm. **Page 43**

C.2 Plaintiffs cannot succeed on the merits. **Page 47**

i. Respondent's interpretation of the AQCA conflicts with the text of that Act. **Page 48**

ii. The Board has authority under the EIA to address global warming as a public nuisance. **Page 52**

iii. Respondent should have allowed the Board to interpret the statutes at issue in the "first instance." **Page 55**

In addition to the forgoing points of law, Petitioner submits that this case involves matters of great public interest. The Plaintiffs in Leavell et al. include four New Mexico state legislators, major New Mexico industries and trade groups who all wish preempt the Board's discretion. This Petition thus presents the Court with an opportunity to specify exactly what circumstances, *if any*, justify a district court's extraordinary action of halting an executive agency's administrative proceeding *while it is still pending*. If Respondent can enjoin the Board's pending Rulemaking in its tracks, then anyone potentially can stop a controversial administrative proceeding simply by filing an action for declaratory and injunctive relief in their hometown forum. Indeed, multiple plaintiffs could file different actions in different forums, each seeking declaratory judgment on a "pure question of law" and each seeking to enjoin the same administrative proceeding.[3]

Respondent's interference with the Board's pending administrative rulemaking raises issues concerning Separation of Powers, subject matter jurisdiction, venue, "forum shopping," multiplicity of suits, and the proper relationship between the judiciary and executive agencies. Also at issue is whether

[3] For example, there is a controversial administrative proceeding currently pending before the State Engineer involving nearly a thousand parties.

this Court intended in Smith vs. City of Santa Fe, 2007-NMSC-055, 142 N.M. 786, 171 P.3d 300 to authorize judicial interference with *pending* administrative proceedings. Respondent relied on Smith to enjoin the Board's pending rulemaking. However, on its facts Smith merely permits persons aggrieved by *final* agency action to, under certain limited circumstances, seek judicial review by filing an original declaratory judgment action in lieu of the available statutory or other right of appellate review. Petitioner contends that Respondent extended Smith too far and that neither Smith nor any other case justifies Respondent's interference with a pending administrative proceeding.

Accordingly, Petitioner requests this Court to grant the following relief on an emergency basis:

A. Prohibit Respondent from further exercising jurisdiction Leavell et al."

B. Order Respondent to immediately stay his proceedings during the pendency of this proceeding.

C. Order Respondent to immediately dissolve the preliminary injunction that he issued against the Board. Exhibit B (preliminary injunction). And,

D. Order Respondent to dismiss the Complaint in Leavell et al. for lack of jurisdiction.

Finally, Petitioner files this Emergency Verified Petition pursuant to Article VI, Section 3 of the New Mexico Constitution and NMRA 12-504 and submits that it has no other remedy at law. Petitioner requests relief on an emergency basis to preserve the Board's Rulemaking schedule (which required nearly a year to develop and obtain). The hearing before the Board will involve multiple parties, numerous experts and the public and will likely require at least two to three weeks to complete. The public hearing is presently scheduled and noticed to begin on June 21, 2010, and Petitioner has already pre-filed substantial expert testimony in support of its regulatory proposal pursuant to the scheduling order entered in the matter. Preserving the Board's schedule will thus prevent irreparable harm to Petitioner, Petitioner's expert witnesses (two of whom are out-of-state), the Board, the other parties to the Rulemaking and the public.

II. PARTIES AND PROCEEDINGS

A. Leavell et al. (in Respondent's court)

1. Leavell et al. began on or around January 13, 2010, when Plaintiffs filed their Complaint. Exhibit A. The Purpose of Plaintiffs' Complaint was to stop the Board's pending Rulemaking and to prevent the Board from considering the merits of Petitioner's regulatory proposal at a public hearing, which is scheduled to begin in June 2010.

2. There are thirteen (13) Plaintiffs in Leavell et al. They are: New Mexico State Senator Carroll H. Leavell, New Mexico Senator Gay G. Kernan, New Mexico State Representative Donald E. Bratton, New Mexico State Representative William J. Gray, New Mexico Oil and Gas Association ("NMOGA"), Dairy Producers of New Mexico ("DPNM"), New Mexico Rural Electric Cooperative Association, El Paso Electric ("El Paso"), Public Service Company of New Mexico ("PNM"), Tri-State Generation and Transmission Association, Inc. ("Tri-State"), New Mexico Farm and Livestock Bureau ("NMFLB"), New Mexico Petroleum Marketers Association, and Southwestern Public Service Company of New Mexico ("Southwestern").

3. The Board is a Defendant and Petitioner is an Intervenor-Defendant in Leavell et al.

4. Plaintiffs' Complaint Leavell et al. is based entirely on two legal arguments: (1) that the Board has no statutory authority to consider Petitioner's

regulatory proposal under the AQCA, because the proposal did not include a proposed "ambient air quality standard" for GHGs; and (2) that the Board has no authority under the EIA to consider Petitioner's regulatory proposal, because "air quality" can only be managed under the AQCA. Neither argument has merit.

5. Petitioner and the Attorney General (on behalf of the Board) argued in Leavell et al. that the Board did not have to adopt an ambient air quality standard before regulating an air contaminant such as GHGs under the AQCA. Petitioner further argued that if, at the end of the hearing, the Board determined that an ambient air quality standard for GHGs should or must be adopted, it could do so. Petitioner also argued that the Board could regulate GHGs under the EIA, if it were shown at the public hearing that GHG emissions in New Mexico contribute to global warming and that global warming is a public nuisance under New Mexico law.

6. Respondent adopted all of Plaintiffs' arguments in Leavell et al. and stopped the Board from proceeding with the Rulemaking on May 4, 2010, by issuing a preliminary injunction against the Board. Exhibits B & E.

B. Administrative Rulemaking before the Board

7. There are so far approximately seventy (70) parties to the Board's Rulemaking, including Petitioner and Plaintiffs PNM, NMOGA, DPNM, El Paso, Tri-State, NMFLB and Southwestern. The New Mexico Environment Department ("NMED") is also a party to the Rulemaking.

8. No one is compelled to participate in the Board's Rulemaking.

9. The Board has not adopted any regulation and has not indicated whether it will adopt any regulation in response to Petitioner's regulatory proposal. The Board may or may not adopt a regulation. If the Board does adopt a regulation, that regulation may vary in form and substance from the original proposal.

II. DETAILED PROCEDURAL BACKGROUND

Petitioner incorporates by reference the preceding paragraphs.

A. Administrative Rulemaking before the Board

10. On December 19, 2009 and February 2, 2009, respectively, Petitioner filed an original and a corrected regulatory proposal to the Board.[4] Exhibit A ¶¶ 34 & 35. On March 2, 2010, pursuant to 20.1.1.302 NMAC and the hearing officer's scheduling order (Exhibit R), Petitioner submitted recommended changes to its regulatory proposal as part of its pre-filed technical testimony. This later filing

[4] The corrected and original proposals are identical except that the latter corrects typographical errors in the original and provided a redline/strike-out version of the proposed regulations.

constitutes Petitioner's entire regulatory proposal to the Board and is attached hereto as Exhibit C.

11. On January 5, 2009, pursuant to Section 74-1-9(A) of the EIA and Section 74-2-6(A) of the AQCA, the Board held a public meeting to "determine whether or not to hold a hearing" on the Petitioner's "proposed regulation." Exhibit D at 2, line 84, to 4, line 182.

12. In attendance at the January 5th meeting were Plaintiffs PNM, NMOGA, DPNM, and the NMFLB. Exhibit D at 3, lines 120-126. Plaintiffs urged the Board to "deny the Petition for Hearing," because (according to Plaintiffs) the Board lacked authority to consider Petitioner's regulatory proposal. Exhibit D at 3 (lines 128-131); Exhibit E at 5 (Respondent's *Decision Memo Denying Motions to Dismiss and Granting Preliminary Injunction*) ("Some of the Plaintiffs participating in the EIB proceeding sought to have the petition dismissed based upon the claim that the proceeding is *ultra vires*, in excess of EIB's statutory authority.")

13. In response to Plaintiffs' arguments, the Board instructed the parties to brief the issue of the Board's jurisdiction and authority, appointed a hearing officer, and informed the parties that it would take up the matter again at its April 6, 2009, public meeting after the issue had been fully briefed. Exhibit D.

14. On January 20, 2009, the hearing officer entered an Order for Pre-hearing Briefing Schedule. Exhibit F. This Order provided:

> Interested parties may file briefs related to the Board's statutory or regulatory authority to conduct a hearing on the matters addressed in the [regulatory proposal]. Any party may file a brief-in-chief, response brief ..., or a reply brief [.]

Exhibit F at 1 ¶ 1. The Order also established a briefing schedule and allowed for oral argument on April 6, 2009.

15. The issue of the Board's jurisdiction and authority to consider Petitioner's regulatory proposal was extensively briefed by several parties. PNM filed a brief and a group of Plaintiffs consisting of NMOGA, NMDP, NMFLB and Tri-State ("*NMOGA et al.*") filed a separate brief. *See, e.g.*, Exhibit G (PNM brief-in-chief); Exhibit H (NMOGA *et al.* brief-in-chief).

16. Both PNM and NMOGA *et al.* argued in their respective briefs that the Board had no authority to regulate any air contaminant under the AQCA, including GHGs, unless it first established an ambient air quality standard. Exhibit G at 8; Exhibit H at 7. Both PNM and NMOGA *et al.* requested the Board to deny Petitioner's request for hearing on its regulatory proposal, because the Request did not ask the Board to adopt an ambient air quality standard. *Id.*

17. In its brief-in-chief, Petitioner argued:

> EIB has express statutory authority under the [AQCA] and the [EIA] to prevent and abate air pollution and nuisances, and the Petitioner contends that the unregulated emission of greenhouse gases in New Mexico causes both air pollution and a public nuisance. These factual allegations cannot be prejudged or decided outside the context of an evidentiary hearing.

Exhibit I at 1. Citing NMAC 20.1.1.302 (A) and Wylie Bros. Contracting Co. v. Albuquerque-Bernalillo County Air Quality Control Bd., 80 N.M. 633, 642, 459 P.2d 159, 169 (Ct. App. 1969), Petitioner stressed that "the final regulation adopted by [the Board] may vary from that proposed in the original petition, depending on the evidence presented at hearing and [the Board's] resolution of the various issues." Exhibit I at 5. Petitioner also argued in subsequent briefs that the adoption of an ambient air quality standard is not an essential prerequisite to regulating GHG emissions, but that the Board could adopt such a standard in the Rulemaking.[5]

18. NMED "urge[d] the Board to affirm [the Board's] jurisdiction to hear the [Petitioner's regulatory proposal], as well as potential amendments for a trade program."[6] Exhibit J at 13.

19. On April 6, 2009, after hearing extensive public comment and oral arguments on the issue of its jurisdiction and authority to consider Petitioner's regulatory proposal, the Board decided that it "had the authority to hear this case" and scheduled a hearing. Exhibit K at 7. Respondent characterized the Board's decision as "verbally [denying Plaintiffs'] the Motion to Dismiss ...." Exhibit E at

[5] In order not to clutter the record, Petitioner is providing as exhibits only pertinent excerpts of the voluminous briefing of the parties in the Rulemaking. Petitioner will make available to the Court complete copies upon request.

[6] "Trade" refers to a "cap and trade" program, which is the type of program adopted by the "Western Climate Initiative" advocated by New Mexico Governor Bill Richardson.

6. However, the Board never decided the specific legal issues that Plaintiffs raised in Leavell et al.

20. At the Board's hearing on April 6, 2009, both NMED and Petitioner stressed that there could be amendments to the regulatory proposal. Exhibit K at 5 & 6.

21. On July 13, 2009, the hearing officer scheduled a pre-hearing conference for August 3, 2009, to discuss several issues. Exhibit L.

22. On or around July 21, 2009, Plaintiffs PNM, NMOGA, NMDP, Tri-State, as well as *Grupo Cementos de Chihuahua S.A. De. C.V.* ("Grupo"), filed a Motion for Temporary Stay of Proceedings, asking the Board to indefinitely stay its proceedings until NMED or Congress addressed the issue of global warming. Exhibit M. On or around July 30, 2009, Plaintiff El Paso filed essentially the same motion. Exhibit N.

23. On October 14, 2009, the hearing officer denied the Motions for Temporary Stay of Proceedings and entered her First Order for Hearing Procedures. Exhibit O at 4 ¶ 13. The initial schedule established by this First Order was revised, in part, by subsequent orders.

24. On or around October 26, 2009, PNM filed several objections to the First Order for Hearing Procedures. Exhibit P.

25. On December 31, 2009, public notice was published on the Petitioner's regulatory proposal. Among other things, notice was provided that:

a) The Board would "hold a public hearing beginning at 10:00 a.m. on March 1, 2010 to take public comment and May 3, 2010 to accept technical testimony, continuing thereafter as necessary to consider the adoption of proposed" regulation. Exhibit Q.

b) The Petitioner's regulatory proposal "seeks to regulate greenhouse gas emissions statewide as an air pollutant and public nuisance through the imposition of an emissions cap." Exhibit Q.

c) The "Board may make ... changes [to the regulatory proposal] as necessary to accomplish the purpose of providing public health and safety in response to public comments and evidence presented at the hearing." Exhibit Q.

d) "All interested persons will be given reasonable opportunity at the hearing to submit relevant evidence, data, views, or arguments, orally or in writing, to introduce exhibits and to examine witnesses." Exhibit Q.

26. On January 14, 2010, the hearing officer entered her Second Order for Hearing Procedures. Exhibit R. This Second Order provided the following schedule:

a) On March 1, 2010, the hearing officer would take public comment on Petitioner's regulatory proposal (although public comment could also be provided at any other time during the pendency of the proceeding). Exhibit R at 1 ¶ 2.

b) On March 2, 2010, Petitioner would pre-file all of its technical testimony in support of its regulatory proposal pursuant to 20.1.1.302 NMAC. Exhibit R at 2 ¶ 6.

c) On May 3, 2010, all parties other than Petitioner would pre-file their technical testimony, either in support of or in opposition to the regulatory proposal pursuant to 20.1.1.302 NMAC. Exhibit R at 3 ¶ 7.

d) On June 4, 2010, any party could pre-file written rebuttal testimony. Exhibit R at 3 ¶ 8.

e) On June 21 and 22, 2010, the hearing "for presentations on the merits of" the regulatory proposal would begin. Exhibit R at 2 ¶ 3.

27. On March 1, 2010, the Board appointed a new hearing officer to the case and heard public comment on the regulatory proposal, as scheduled. Exhibit S.

28. On March 2, 2010, the Petitioner submitted its *Notice of Intent to Present Technical Testimony* ("NOI"), which included pre-filed technical testimony and recommended changes to its regulatory proposal pursuant to 20.1.1.302 NMAC, as scheduled. Exhibit T (NOI); Exhibit C (recommended changes).

29. On March 12, 2010, Plaintiffs PNM, NMOGA, NMDP, NMFLB, Grupo, El Paso and Southwestern Public Service Company ("Southwestern") filed a Motion to Strike Petitioner's Technical Testimony. Exhibit U.

30. On April 1, 2010, the hearing officer entered an order that, among other things, denied the Motion to Strike, changed the caption of the case, and ordered that additional notice on Petitioner's recommended changes be published. Exhibit U.

31. On April 15, 2010, the additional notice ordered by the hearing officer was published. Exhibit V.

32. On May 4, 2010, in compliance with a preliminary injunction issued by Respondent, the hearing officer stayed the Rulemaking. Exhibit W.

B. Proceedings before Respondent (Leavell et al.)

33. On or around January 13, 2010, Plaintiffs filed a Complaint for Declaratory Judgment and Injunctive Relief ("Complaint") against the Board. On or around February 1, 2010, Plaintiffs filed an Amended Complaint. Exhibit A. The case was assigned to Respondent. Petitioner successfully intervened in the case, Exhibit E, and its Answer in Leavell et al. is attached hereto as Exhibit X.

34. Plaintiffs describe the nature and basis of their complaint as follows:

> This is a civil action in which Plaintiffs seek a declaratory judgment establishing that the [Board] lacks statutory authority to consider or adopt the rulemaking petition filed by [Petitioner] on December 19, 2008, as amended on February 2, 2009 … seeking promulgation of a statewide cap on greenhouse gas ("GHG") emissions …. EIB is prohibited from considering or adopting the [Petitioner's proposed regulations] because [the Board] lacks authority under either the Environmental Improvement Act ("EIA"), NMSA 1978, §§ 74-1-1 to 16 (1971, as amended through 2009) or the New Mexico Air Quality Control Act ("AQCA"), NMSA 1978, §§ 74-2-1 to -17 (1967, as amended through 2009), to adopt regulations limiting emissions of

GHG without first establishing an ambient air quality standard for GHG.

Exhibit A ¶ 1.

35. Plaintiffs describe the relief they seek as follows:

Plaintiffs also seek to enjoin [the Board] from conducting further administrative proceedings on the [Petitioner's proposed regulations], or other appropriate equitable relief.

Exhibit A ¶ 2.

36. Plaintiffs allege in their Complaint that at "the conclusion of the hearing [on April 6, 2009], EIB made an oral ruling that it has authority to address" Petitioner's regulatory proposal. EIB did not issue a written order or findings on this matter. Exhibit A ¶ 43.

37. On or around February 8, 2010, Petitioner filed a Motion to Intervene and attached a *Motion to Dismiss* based on Plaintiffs' failure to exhaust administrative remedies, the absence of any controversy that was ripe for judicial review, and Plaintiffs' lack of standing. Exhibit E.

38. On or around February 16, 2010, Plaintiffs filed a Motion for Preliminary Injunction, asking the Court to enjoin the Board from further considering Petitioner's regulatory proposal. Exhibit E.

39. On or around February 18, 2010, the Attorney General filed a Motion to Dismiss on behalf of the Board. Exhibit E. The Attorney General raised the

same defenses as Petitioner and further asserted that Plaintiffs' Complaint failed to state a claim upon which relief could be granted. Exhibit E.

40. On or around April 13, 2010, after hearing oral argument on April 1, 2010, Respondent issued a Decision Memo that: (a) granted Petitioner's Motion to Intervene; (b) denied the Motions to Dismiss; and (c) granted Plaintiffs' Motion for Preliminary Injunction. Exhibit E. Respondent entered final orders in accordance with his Decision Memo on April 29, 2010. Exhibits B (preliminary injunction); Exhibit Y (order denying motions to dismiss).

III. ARGUMENT

A. Point One: Respondent has no appellate jurisdiction to entertain Plaintiffs' Complaint.

41. Assuming *arguendo* that a New Mexico district court could have jurisdiction to review the Board's interlocutory decision that "it has the authority to address" Petitioner's regulatory proposal, Petitioner respectfully submits that it is not Respondent's court. The New Mexico Constitution provides, in pertinent part:

> The district court shall have original jurisdiction in all matters and causes not excepted in this constitution, and such jurisdiction of special cases and proceedings as may be conferred by law, and *appellate jurisdiction of all cases originating in inferior courts and tribunals in their respective districts*, and supervisory control over the same. The district courts, or any judge thereof, shall have power to issue writs of habeas corpus, mandamus, injunction, quo warranto, certiorari, prohibition and all other writs, remedial or otherwise in the exercise of their jurisdiction; provided, that no such writs shall issue directed to judges or courts of equal or superior jurisdiction.

N.M. Const. Art. VI, § 13 (emphasis added). This Court recently confirmed that Article VI, Section 13 "restricts the district courts' appellate jurisdiction to 'cases originating in inferior courts and tribunals *in their respective districts*.'" State ex rel. Regents of E. N.M. Univ. v. Baca, 2008 NMSC 47, ¶ 9, 144 N.M. 530, 533, 189 P.3d 663 (emphasis added). The Court further confirmed that administrative agencies may be considered "inferior tribunals" within the meaning of the New Mexico Constitution when they are acting in a quasi-judicial capacity. Id. ¶¶ 11, 12, 144 N.M. at 534, 189 P.2d at 667.

42. Plaintiffs' Complaint constitutes an appeal of the Board's interlocutory decision that the Board has authority under the AQCA to hold a public hearing on Petitioner's regulatory proposal. Exhibit A ¶ 43; Exhibit E at 6; Exhibit K at 7. In deciding this issue, the Board was acting "as an inferior court or tribunal ... in its quasi-judicial capacity." See Rainaldi v. Public Employees Retirement Bd., 115 N.M. 650, 653, 857 P.2d *761*, 764 (1993); see also, State ex rel. Board of Comm'rs v. Kiker, 33 N.M. 6, 8, 261 P. 816, 817 (1927). Plaintiffs raised the issue of the Board's authority on January 5, 2009, less than a month after Petitioner submitted its regulatory proposal, and urged the Board to deny Petitioner's regulatory proposal for lack of statutory authority. In response, the Board appointed a hearing officer who established a briefing schedule. After the matter had been noticed, fully briefed and argued by counsel, in a public meeting

held on April 6, 2009, in Santa Fe, New Mexico, the Board deliberated and then decided simply that it "had the authority to hear this case." Exhibit K at 7.

43. The administrative proceeding described above, by which the Board decided the issue of its authority, was analogous to a motion to dismiss in district under the Rules of Civil Procedure. The Board was thus acting in a quasi-judicial capacity as an "inferior tribunal" within the meaning of our State Constitution. Accordingly, the *only* district court (if any) that had jurisdiction to entertain an appeal from the Board's interlocutory decision, which was made in Santa Fe, was the first judicial district court. N.M. Const. Art. VI, § 13; see Baca ¶ 13 (holding that the administrative "proceeding" at issue in the case "complied with [the statutory hearing] process and constituted an administrative tribunal, making the jurisdictional limits in Article VI, Section 13 applicable to this case."). Therefore, as a fifth judicial district judge, Respondent had no appellate jurisdiction to review the Board's decision.

B. Point Two: Respondent has no original jurisdiction to entertain Plaintiffs' Complaint.

44. Respondent also lacks original jurisdiction to entertain Plaintiffs' Complaint. Before asking Respondent to decide the issue of the Board's authority, Plaintiffs requested the Board to decide the issue, which the Board did on April 6, 2009. Exhibit E at 6; Exhibit K at 7. Assuming *arguendo* that this decision constituted "administrative action" within the meaning of Section 74-2-9(A), and leaving aside multiple other issues discussed below, Plaintiffs had an immediate right to appeal the Board's decision to the Court of Appeals:

> Any person adversely affected by an administrative action taken by the environmental improvement board … may appeal to the court of appeals. All appeals shall be upon the record made at the hearing and shall be taken to the court of appeals within thirty days following the date of the action.

NMSA 1978, § 74-2-9(A). Plaintiffs elected not to pursue this statutory remedy, but instead chose to file a declaratory judgment action in Lovington, New Mexico.

45. "Smith authorizes declaratory judgment actions as an alternative means for plaintiffs to challenge the rule-making authority of administrative agencies in certain circumstances …." State ex rel. Hanosh v. N.M. Envtl. Improvement Bd., 2008 NMCA 156, ¶ 13, 145 N.M. 269, 273, 196 P.3d 970, 974, aff'd, 2009 NMSC 47; see also Baca ¶ 1. However, this Court indicated in Smith that it understood the potential for abuse by "caution[ing] against using a declaratory judgment action to … circumvent procedural or substantive limitations

that would otherwise limit review through means other than a declaratory judgment action." Smith ¶ 15, 142 N.M. at 791. In practice, this means that where the plaintiff asks for and receives an agency decision, he may seek judicial review of the legal validity of that decision by filing an *original* declaratory judgment action in district court. Smith ¶ 23, 142 N.M. at 794. However, in order for the district court to have jurisdiction, Smith requires the plaintiff to file his complaint within the limitations imposed on seeking *appellate* review. Id.

46. The Court explained:

> Given that the Smiths chose to initiate the administrative appeals process as their method for securing a permit to drill their wells, we believe that sound judicial policy and the limitations inherent in all declaratory judgment actions required that the Smiths seek judicial review of the City's administrative decision within the 30-day time frame imposed by Rule 1-075(D). As discussed above, the Smiths' declaratory judgment action could have been a reasonable procedural choice for seeking judicial review of the City's authority to act. However, having first chosen to pursue administrative relief, we hold that the Smiths were then required to comply with the applicable time frames that would otherwise govern judicial review of the administrative decision that the Smiths themselves requested. *To hold otherwise would invite chaos and preclude certainty in the finality of administrative decisions that might otherwise be subject to multiple avenues of judicial review at unpredictable times.*

Smith ¶ 23 (emphasis added). Thus, the Court applied the 30-day "procedural limitation" on invoking a district court's *appellate* jurisdiction under Rule 75 of the Rules of Civil Procedure to limit the district court's *original* jurisdiction to entertain a declaratory judgment action. Similarly, in Baca, the Court applied both the time *and* venue limitations on a district court's appellate jurisdiction under

NMSA 1978, § 39-3-1.1 (1999) to oust the second judicial district court of original jurisdiction to entertain a declaratory judgment action. Baca ¶¶ 22 & 23.

47. In Leavell et al., there are at least five "procedural or substantive limitations" on appellate review that deprive Respondent of original jurisdiction over Plaintiffs' Complaint—the first is timing, the second is venue, the third is exhaustion of administrative remedies, the fourth is ripeness, and the fifth is standing. Although courts recognize exceptions to these requirements in rare cases when presented with extraordinary circumstances, as discussed below, such circumstances are manifestly not present in Leavell et al. Therefore, to allow Plaintiffs to circumvent the normal limitations on judicial review of agency decisions "would invite chaos and preclude certainty in the finality of administrative decisions that might otherwise be subject to multiple avenues of judicial review at unpredictable times." Smith ¶ 23; *cf.* Anaconda Co. v. Ruckelshaus, 482 F.2d 1301, 1304 (10th Cir. Colo. 1973) ("the only effect of this action [for declaratory and injunctive relief] is to frustrate the [pending] administrative proceedings"); Nader v. Volpe, 466 F.2d 261, 267 (D.C. Cir. 1972) ("departures from statutory modes of judicial review may well . . . result in unnecessary duplication and conflicting litigation") (internal quotes omitted).

B.1 Plaintiffs' declaratory judgment action was untimely.

48. Section 74-2-9(A) requires appeals from an "administrative action" of the Board to be filed, if at all, "within thirty days following the date of the" action. NMSA 1978, ¶ 74-2-9(A). Plaintiffs' Complaint seeks judicial review of the Board's decision that it "has the authority to hear this case," which the Board made on April 6, 2009. Exhibit A ¶ 43; Exhibit K at 7; Exhibit E at 6. Therefore, assuming that the Board's decision was appealable at all, Smith required Plaintiffs to file their Complaint on or before May 6, 2009. See NMSA 1978, § 74-2-9(A). Because Plaintiffs did not file until January 13, 2010, more than *nine* (9) months after the Board made its decision, the Complaint was untimely and Respondent had no jurisdiction to entertain it. Smith ¶ 23.

B.2 Plaintiffs' declaratory judgment action was filed in the wrong venue.

49. The venue limitations applicable to appellate review also apply under Smith to limit the forum in which a plaintiff may file an original declaratory judgment action. In Baca, *supra*, the plaintiff "initiated the administrative review process" but then filed an original declaratory judgment action in the Second Judicial District. Baca ¶ 22. However, the plaintiffs in Baca would have been required to file a "statutory" appeal of the agency's decision in the Ninth Judicial District. Id. The Court held:

> [Plaintiff] could not circumvent the established procedures for judicial review and was thus obligated either to pursue its

> [statutory] right to judicial review or to file its declaratory judgment action in compliance with the procedures for administrative appeal set out in Section 39-3-1.1, *which included filing in the Ninth Judicial District Court, not in the Second Judicial District Court.*

Baca ¶ 22 (emphasis added). This Court thus attempted to make clear that Smith prohibited "forum shopping."

50. In refusing to allow plaintiffs to disregard even non-exclusive statutory remedies, federal courts similarly prohibit forum shopping:

> To allow review [of agency action] by way of injunction in the case at bar could only serve to cause delay and to take the case up in a district court removed from the scene is not appropriate either, for it could conceivably encourage forum shopping and the thwarting of procedures which Congress has carefully adopted. It follows then that where, as here, Congress has specifically designated a forum for judicial review of administrative action and does so in unmistakable terms except under extraordinary conditions, that forum is exclusive.

Anaconda at 1304-1305; Nader at 268 (holding that where Congress "has enacted a specific statutory scheme for obtaining review the doctrine of exhaustion of administrative remedies comes into play and requires that the statutory mode of review be adhered to notwithstanding the absence of an express statutory command of exclusiveness")(internal citation omitted).

51. Similar to the plaintiff in Baca, Plaintiffs in Leavell et al. "initiated" the Board's "review process" by voluntarily participating in the Board's administrative proceeding, raising the issue of the Board's authority, and eliciting the Board's decision on the issue. Exhibit A ¶ 43; Exhibit D at 3; Exhibit E at 6 ;

Exhibit K at 7. Assuming *arguendo* that the Board's decision constituted "administrative action," Plaintiffs thereafter had a "statutory right to judicial review" by the Court of Appeals in Santa Fe. NMSA 1978, § 74-2-9(A). Therefore, even if Plaintiffs had the right to file an original declaratory judgment action in lieu of a statutory appeal, the principles set down in Smith and Baca prohibited the Plaintiffs from circumventing the venue limitation that would otherwise apply to a statutory appeal. The importance of imposing this limitation is highlighted here by Plaintiffs' choice of venue in Lovington, New Mexico, which is *over three hundred miles* from the location of the hearing, the Board and Petitioner.[7] Accordingly, Plaintiffs should have filed their declaratory judgment action, if at all, in the first judicial district court in Santa Fe. Cf. N.M. Const. VI, § 13; Baca ¶¶ 22, 23.

B.3 The Board's decision was not final and Plaintiffs have no statutory right to appeal the Board's interlocutory decisions.

52. "Appellate courts may not review the actions of an administrative agency until those actions are final." Mills v. New Mexico State Bd. of Psychologist Exam'rs, 1997 NMSC 28, ¶ 11, 123 N.M. 421, 425, 941 P.2d 502, 506; but see In re Application of Angel Fire Corp., 96 N.M. 651, 652, 634 P.2d 202, 203 (1981) (holding that where a statute allows appeal from *any* "decision, act

[7] Plaintiffs' reason for picking this forum is clear enough: The oil and gas industry is a major emitter of GHGs and Lovington is in the middle of "oil and gas country."

or refusal to act of the state engineer ... there is no requirement of finality.").

Moreover,

> The general rule in New Mexico for determining the finality of a judgment is that "an order or judgment is not considered final unless all issues of law and fact have been determined and the case disposed of by the trial court to the fullest extent possible." Kelly Inn No. 102, Inc. v. Kapnison, 113 N.M. 231, 236, 824 P.2d 1033, 1038 (1992) (quoting B.L. Goldberg & Assocs. v. Uptown, Inc., 103 N.M. 277, 278, 705 P.2d 683, 684 (1985)).

Paule v. Santa Fe County Bd. of County Comm'rs, 2005 NMSC 21, ¶ 9, 138 N.M. 82, 86 , 117 P.3d 240, 244. In an administrative context, a "final decision" means "an agency ruling that as a practical matter resolves all issues arising from a dispute within the jurisdiction of the agency, once all administrative remedies available within the agency have been exhausted."). *Id.* (quoting NMSA 1978, Section 39-3-1.1(H)(2)). In this matter, the Board has not made any "final decision" in the Rulemaking.

53. The Board's decision that it "had authority to address" Petitioner's regulatory proposal (Exhibit A ¶ 43) was a non-final *interlocutory* decision, made during the course of an ongoing administrative proceeding. The Board's administrative process is not complete. The Board has not decided whether it should or must adopt an ambient air quality standard for GHGs under the AQCA, much less decided whether it should adopt any regulations at all.

54. In denying an attempted appeal from an interlocutory agency decision, our Court of Appeals held:

> 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." *Coca-Cola Co. v. F.T.C.*, 475 F.2d 299, 302 (5th Cir.), *cert. denied*, 414 U.S. 877, 94 S.Ct. 121, 38 L.Ed.2d 122 (1973) (quoting *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51, 58 S.Ct. 459, 463-464, 82 L.Ed. 638 (1938); *see also Angel Fire Corp. v. C. S. Cattle Co.*, 96 N.M. 651, 634 P.2d 202 (1981).

Sanchez v. Bradbury & Stamm Constr., 109 N.M. 47, 49, 781 P.2d 319, 321 (Ct. App. 1989). Given the absence of any statutory authorization, the Court of Appeals denied the "appellant's application for interlocutory appeal." Id. at 50. Similarly, there is no statutory right to appeal the Board's interlocutory decisions; and therefore, appeals can only be taken from the Board's final decisions. Id. Plaintiffs cannot circumvent this limitation by filing a declaratory judgment action in the midst of the Board's pending administrative proceeding. *Id.;* Smith, *supra*; Baca; *supra*.

55. This limitation is well-illustrated by the case of State ex rel. State Corporation Commission et al. v. Zinn, District Judge, 72 N.M. 29, 380 P.2d 182 (1963), which is directly on point. In Zinn, this Court issued a writ of prohibition against Judge Zinn to prevent him from interfering with an administrative proceeding then 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 that the district court enjoin the pending administrative proceeding. Id at 31, 35 & 37, 380 P.2d at 181, 185 & 187.

56. Just like Plaintiffs' argument to Respondent, statutory interpretation was at the heart of the McWood Corporation's case. Like the Plaintiffs in Leavell et al. the corporation in Zinn claimed that the agency lacked authority to conduct an administrative hearing and that it should be enjoined from doing so.[8] 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.

57. In defending against the writ, Judge Zinn argued that the determination of whether the McWood Corporation was a "common carrier" was a legal question that he had jurisdiction to decide. Id. at 37, 380 P.2d at 187. The Supreme Court unanimously disagreed, holding that Judge Zinn lacked jurisdiction, because the statutory proceeding before the agency was still pending

[8] Respondent attempts to distinguish Zinn by arguing that the agency there was "proceeding under its statutory authority." Exhibit E at 3. But it was the agency's statutory authority that the corporation attacked in Zinn, just as Plaintiffs do in Leavell et al.

and the McWood Corporation had not yet exhausted its administrative remedies. Zinn at 36-38, 380 P.2d at 186-188; see also State Racing Comm'n v. McManus, 82 N.M. 108, 113, 476 P.2d 767, 772 (1970) ("In the original proceeding here, using our power of supervisory control, we determine that respondent district judge had no jurisdiction in the matter because of the failure of the jockey, Ellis, to first exhaust his administrative remedies.").

58. Judge Zinn's argument was "identical with one of the claims made in Myers v. Bethlehem Shipbuilding Corporation, 303 U.S. 41, 58 S.Ct. 459, 82 L.Ed [1938]." Zinn at 35-36, 380 P.2d at 186. In that case, the corporation also sought 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 Leavell et al. 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 authority to conduct the hearing. Id. at 48. 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.

59. In Leavell et al., as in Zinn and Myers, "exhaustion of administrative remedies" means allowing the agency to make a final decision after the conclusion

of the statutorily-prescribed administrative process. Only in this way can the Board fully consider Petitioner's regulatory proposal, *including any recommended modifications or alternatives to it*, and thus fulfill its statutory mission of protecting public health and welfare and the environment. Ultimately, the Board may or may not adopt any regulations, but Plaintiffs cannot circumvent the required administrative process by filing a premature declaratory judgment action in the middle of it; and therefore, Respondent has no jurisdiction under the circumstances to entertain Plaintiffs' Complaint. Smith, *supra*; Baca, *supra.*

B.4 There is no controversy that is ripe for Respondent or any court to review.

60. Under the Declaratory Judgment Act, Respondent 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). In the context of administrative proceedings, this Court has adopted the U.S. Supreme Court's view of ripeness:

> 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); see also In re Alternatives to the Inventory Ratemaking Methodology, 111 N.M. 622, 626, 808 P.2d 592, 596 (1991) ("Ratemaking Case") (applying ripeness test set out in Abbott).

61. In Toilet Goods Ass'n v. Gardner, 387 U.S. 158 (1967), which has been cited with approval by this Court, the U.S. Supreme Court applied "the standards set forth in Abbott Laboratories v. Gardner. Id. at 159; Ratemaking Case at 632, 808 P.2d at 602 (citing Toilet Goods). Toilet Goods presented the Court with a pre-enforcement challenge to the Commissioner of Food and Drugs' authority to adopt existing regulations. Id. at 159. The Court explained the test for ripeness under Abbott:

> In determining whether a challenge to an administrative regulation is ripe for review a twofold inquiry must be made: *first* to determine whether the issues tendered are appropriate for judicial resolution, and *second* to assess the hardship to the parties if judicial relief is denied at that stage.

Toilet Goods at 162 (emphasis added). In analyzing the case, the Court conceded that "there can be no question that this regulation -- promulgated in a formal manner after notice and evaluation of submitted comments -- is a "final agency action" under § 10 of the Administrative Procedure Act." *Id.* The Court further conceded that the question presented was "a purely legal question: whether the regulation is totally beyond the agency's power under the statute." *Id.* at 163.

62. Nevertheless, the Court held that the purely legal issue of whether the agency had statutory authority to adopt the regulation was not ripe for review in a pre-enforcement declaratory judgment action.

> The regulation serves notice only that the Commissioner *may* under certain circumstances order inspection of certain facilities and data, and that further certification of additives *may* be refused to those who decline to permit a duly authorized inspection until they have complied in that regard. At this juncture we have no idea whether or when such an inspection will be ordered and what reasons the Commissioner will give to justify his order.

Id. (emphasis added). In other words, the Court had no way of knowing what actual effect the regulation would have on plaintiffs. Moreover,

> [The] test of ripeness, as we have noted, depends not only on how adequately a court can deal with the legal issue presented, but also on the degree and nature of the regulation's present effect on those seeking relief.

Id. at 164. The regulation at issue had *no* effect on the plaintiffs whatsoever and "no irremediable adverse consequences [would] flow from requiring a later

challenge to [the] regulation" in the context of an enforcement action. Id. at 164-165. The Court so held even though plaintiffs would be forced to first endure an administrative proceeding in which the "factual basis" for the agency's allegedly *ultra vires* enforcement action would be determined. Id. at 166-165. The Court held that this "adverse consequence" was "only minimal" and that it was "wiser"

> to require [plaintiffs] to exhaust this administrative process through which the factual basis of the [enforcement action] will certainly be aired and where more light may be thrown on the Commissioner's statutory and practical justifications for the regulation.

Id. at 166.

63. The reasoning of the U.S. Supreme Court in Toilet Goods, where the legality of an *existing* regulation was not ripe for review, applies with even more force in the context of a *proposed* regulation.

> The [agency] has merely proposed a rule, which may never be adopted or enforced. Even after a rule has been promulgated, the ripeness doctrine may in some circumstances bar judicial review prior to actual enforcement. The rulemaking authority of an agency cannot usually be fairly tested in the absence of a specific legal and factual setting.

Bristol-Myers Co. v. Federal Trade Com., 424 F.2d 935, 940 (D.C. Cir. 1970); see also Anaconda Co. v. Ruckelshaus, 482 F.2d 1301, (10th Cir. Colo. 1973) (issue of whether agency had authority to adopt proposed regulation not ripe for review); Nader v. Volpe, 466 F.2d 261, 263 (D.C. Cir. 1972) (issue of whether agency had authority to adopt proposed standard not ripe for review); Lever Bros. Co. v. FTC,

325 F. Supp. 371, 372 (D. Me. 1971) (issue of whether agency had authority to adopt proposed regulation not ripe for review).

64. In Lever Bros., the Federal Trade Commission ("FTC") provided notice on January 25, 1971, that it had "undertaken a trade regulation rule proceeding to consider whether it should promulgate a rule ...." Id. at 372. The notice provided "that interested persons may participate in the proceeding by submitting written comments on the proposed rule by April 19, 1971 and by presenting oral statements ... at hearings to be held on April 26 and 27, 1971. Id. However, on March 31, 1971, plaintiffs in the case preemptively sued the FTC in the district court "seeking declaratory and injunctive relief enjoining the [FTC] from conducting further proceedings with respect to the proposed trade regulation rule." Id. Like Plaintiffs in Leavell et al., the plaintiffs in Lever Bros. argued that the agency had "no statutory authority to promulgate the proposed rule ...." Id. at 373. Also like Leavell et al., the district court was called upon to decide defendants' motion to dismiss and the plaintiffs' motion for temporary injunction. Id. However, based largely on ripeness grounds, the district court's decision in Lever Bros. was the opposite of Respondent's.

65. The court's application of the ripeness doctrine in Lever Bros. was logical, straightforward and should be adopted by this Court in the context of a regulatory proposal:

> We do not know today what type of rule, if any, will eventually be promulgated by the [agency]. Nor can we ascertain at this stage the procedures which the [agency] may follow before finally adopting any such rule. Here, as in Bristol-Myers, the proper time to challenge the [agency's] rule-making power or procedures will be when, and if, a rule is adopted.

Id. In response to the plaintiffs' argument that the issues presented were purely legal and thus ripe for review, the court held:

> It may be conceded, *arguendo*, that the issues tendered in instant case present purely legal questions. But it can hardly be contended that the pending rule-making proceeding constitutes "final agency action" within the meaning of the Administrative Procedure Act. The rule-making process is far from complete. The [agency] has served notice only that it may promulgate a rule of the type proposed. Certainly, it has as yet made no "considered and formalized determination." Toilet Goods Assn. v. Gardner, *supra* at 162. At this juncture, there is no assurance as to whether or when a rule will be adopted, the form it will take, or the basis the [agency] will give therefor. In this respect, the present case follows *a fortiori* from Toilet Goods Assn. v. Gardner, *supra*, where the Court denied pre-enforcement judicial review of a regulation which, although already in effect, served notice only that the agency might impose sanctions upon those failing to comply. Id. at 163.

Id. at 374. As to the second Abbott factor, which requires courts to evaluate the "present effect of the challenged administrative action," the court held:

> The [agency's] pending rule-making proceeding requires no "immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance." As in Toilet Goods Assn. v. Gardner, *supra*, where the Court denied pre-enforcement judicial review of a regulation which was not "self-executing," this is not a situation "where the impact of the administrative action could be said to be felt immediately by those subject to it in conducting their day-to-day affairs." Id. at 164. And as in that case, "no irremediable adverse consequences flow from requiring a later challenge" to whatever the [agency's] final action may

> be. Id. If and when a rule is adopted, the rule can be challenged and a judicial determination of its validity obtained, either immediately ... or at such time as the [agency] takes steps to enforce the rule as against a plaintiff. ... At this juncture, such a challenge is premature.

Id. The court ultimately granted defendants' motions to dismiss and denied the plaintiffs' motion for preliminary injunction. Id. at 375.

66. Lever Bros. and the other federal cases cited above, which all applied *this* Court's test for whether a controversy is ripe for judicial review, present the basic rationale as to why a regulatory *proposal* is virtually never ripe for judicial review. Most obviously, a mere proposal may never be adopted and, if ultimately the agency does adopt a regulation, it may vary substantially in form and substance from the original proposal. Those who oppose the proposed regulation may get everything they want at the conclusion of the administrative proceeding, thus obviating the need for judicial review. Therefore, whatever Respondent's justification for asserting jurisdiction may have been, the case before him does not present any actual controversy that is ripe for review, nor does it serve to protect Plaintiffs from any existing or imminent injury. It merely serves to "frustrate" the Board's pending "administrative proceedings," Anaconda at 1304, which may serve Plaintiffs' purposes but fails to conserve judicial resources or promote justice.

B.5 Plaintiffs have no standing.

67. To establish standing, Plaintiffs had to 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). Respondent held that Plaintiffs met this standard, because "there is a real risk of future injury *if* the proposed regulations are adopted." Exhibit E at 4 (emphasis added). Although Respondent conceded that "the cost of participating in an administrative proceeding does not constitute irreparable harm," he found "a causal relationship between the proposed regulation and the likelihood of significant costs in the future which would be redressed if the proposed allegedly *ultra vires* regulation is not adopted." Id. He therefore concluded that "Plaintiffs are imminently threatened with injury now and in the future." Id.

68. 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.

> 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)). The "injury in fact" requirement serves to establish the "proper relationships between the judiciary and other branches of the . . . government," especially where the actions of the executive department are challenged. Id. Here, the 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 Respondent 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.") The injuries alleged in Plaintiffs' Complaint are based on pure conjecture, and therefore, Respondent should have dismissed the Complaint.

B.6 There are no circumstances justifying an exception to the normal exhaustion, finality, and ripeness rules applicable to pending administrative proceedings.

69. Courts almost never interfere with an agency's pending administrative proceedings or review an agency's interlocutory decisions absent some express

statutory authorization. However, on rare occasions, courts have undertaken such "interlocutory review ... where the agency proceedings suffer from a *fundamental infirmity* requiring a court to act immediately to protect [petitioner's] rights to a fair proceeding." Gulf Oil Corp. v. Dept. of Energy, 214 U.S. App. D.C. 119, 663 F.2d 296, 312 (D.C. Cir. 1981) (emphasis added). Gulf Oil involved an adjudication (as opposed to a rulemaking) in which clear evidence of the following extraordinary circumstances justified the district court's measured interference with an ongoing agency proceeding:

> [A] combination of (1) serious allegations originating in the agency itself of document destruction and prohibited *ex parte* communications between adjudicator and enforcement counsel, (2) backed by admissions of agency personnel that some such actions had already taken place, (3) along with a history of extremely restrictive discovery permitted to the parties to explore the extent of alleged document destruction or their cover-up and (4) the unavailability for an estimated five years under the agency's procedures of any judicial review of proceedings of massive scope and complexity.

Id. at 313. Given the "totality of these circumstance ... the district court [was permitted] to make an exception to the normal exhaustion, finality, and ripeness rules and [was] justified [in issuing] its limited order requiring that an agency-appointed [administrative law judge] conduct discovery into the allegations and report back to the court." Id.

70. In contrast, Plaintiffs in Leavell et al. do not allege any "fundamental infirmity" in the Board's process or any violation of their due process or substantive rights that might justify Respondent's "extraordinary action" of

interfering with a pending agency proceeding. Id. at 314 (Judge Ginsburg, concurring). Indeed, in an administrative rulemaking there is generally no constitutional right of due process, and therefore, the only issue is whether the Board's process substantially complies with the applicable statutory requirements. Cf. Livingston v. Ewing, 98 N.M. 685, 688, 652 P.2d 235, 238 (1982) ("There is no fundamental right to notice and hearing before the adoption of a rule; such a right is statutory") (*citing* Bi-Metallic Co. v. Colorado, 239 U.S. 441 (1915)). Plaintiffs have not alleged or shown any failure by the Board to substantially comply with the applicable statutes governing the conduct of Rulemaking or the public hearing.

71. Another rare circumstance that justifies immediate judicial review is where the agency is proceeding in "a plain contravention of a statutory mandate." Coca-Cola Co. v. F.T.C., 475 F.2d 299, 303 (5th Cir.), *cited with approval*, Sanchez at 50, 781 P.2d at 322; but see Zinn, supra (allegation that agency proceeding in excess of authority held not sufficient to justify district court's disruption of pending administrative proceeding). Here, in the Board's Rulemaking, the Board is not violating any "statutory mandate" but is instead proceeding in accordance with its express mandate under two statutes—the EIA and the AQCA.

72. The EIA and AQCA require the Board, respectively, to adopt regulations in the areas of "nuisance abatement" and the "prevention or abatement

of air pollution." NMSA 1978, § 74-1-8(A)(7) (EIA); NMSA 1978, § 74-2-5 (AQCA). Both Acts expressly authorize the Board to conduct a public hearing on the regulatory proposals submitted by "any person," and that is all the Board has done so far in the Rulemaking. NMSA 1978, § 74-1-9(A) (EIA); NMSA 1978, § 74-2-6 (AQCA). Nothing in the applicable statutes or the Board's rules compels the Board to adopt a regulatory proposal *as submitted*. An administrative rulemaking is a fluid process in which an agency weighs the competing proposals, ideas and viewpoints submitted by the parties and the public. See, e.g., NMSA 1978, 74-1-9 (E)(requiring the Board to conduct a public hearing and to give "all interested persons reasonable opportunity to submit data, proposed changes to the proposed regulation, views or arguments orally or in writing and to examine witnesses testifying at the hearing"); NMSA 1978, 74-2-6 (D)(same). Thus, if a proposal raises legal or other substantive issues, such issues can and should be dealt with in the course of the agency's administrative process; alternatively, the agency can simply refuse to adopt any regulation.

73. Plaintiffs argue that the Board cannot regulate GHG emissions until it adopts an ambient air quality standard and, therefore, the Board cannot even *consider* a regulatory proposal that fails to propose an ambient air quality standard.[9] First, nothing in the AQCA or the EIA indicates that a regulatory proposal must be flawless or immediately capable of adoption by the Board.

[9] However, this legal argument lacks merit, as explained in ¶¶ 78-83 below.

Second, the Board has not decided the specific legal issue raised by Plaintiffs and its position cannot be known until it duly adopts a regulation. The issue might never even arise—either because the Board adopts a regulation that includes an ambient air quality standard or because it refuses to adopt any regulation at all. In any event, Plaintiffs will suffer no prejudice whatsoever if their legal theory is not tested unless and until the Board adopts a final regulation that conflicts with Plaintiffs' legal position. Cf. Anaconda, 482 F.2d at 1304 ("The presence of a statutory review remedy [after agency's final decision] will ordinarily render the injunctive interruption of the administrative process improper.").

C. Point Three: Respondent should not have issued a preliminary injunction against the Board.

74. In order to be entitled to a preliminary injunction, Plaintiffs must "show that (1) [they] will suffer irreparable injury unless the injunction is granted; (2) the threatened injury outweighs any damage the injunction might cause the defendant; (3) issuance of the injunction will not be adverse to the public's interest; and [that] (4) there is a substantial likelihood plaintiff will prevail on the merits." LaBalbo v. Hymes, 115 N.M. 314, 318, 850 P.2d 1017, 1021 (Ct. App. 1993). Without conceding the other elements, Petitioner focuses here on Plaintiffs' failure as a matter of law to show "irreparable harm" and "likelihood of prevailing on the merits." Plaintiffs' failure on these elements precluded Respondent from issuing a preliminary injunction against the Board.

C.1 Plaintiffs failed to show irreparable harm.

75. Plaintiffs must prove irreparable injury or "serious threat" of such injury to be entitled to preliminary injunction.

> [An] 'irreparable injury' is an injury which cannot be compensated or for which compensation cannot be measured by any certain pecuniary standard." ... The injury must be actual and substantial, or an affirmative prospect thereof, and not a mere possibility of harm. ... It is not enough that the party seeking injunctive relief merely claim irreparable harm; he must come forth with evidence of the irreparability of his harm or inadequacy of any remedy.

State v. City of Sunland Park, 2000 NMCA 44, ¶ 19, 129 N.M. 151, 157 (Ct. App. 2000) (internal citations and quotes omitted); Winrock Enters. v. House of Fabrics, 91 N.M. 661, 664, 579 P.2d 787, 790 (1978). Speculative fears or the mere possibility of harm also does not constitute "irreparable harm" and cannot otherwise justify the drastic remedy of preliminary injunction. Phillips v. Allingham, 38 N.M. 361, 366, 33 P.2d 910, 913 (1934), *overruled on other grds.*, Sundance Mechanical & Util. Corp. v. Atlas, 109 N.M. 683, 690, 109 N.M. 683, 690 (1990) ("If the injury be doubtful, eventual, or contingent, equity will not grant relief"); State v. City of Sunland Park, 2000 NMCA 44, 19, 129 N.M. 151, 157 (Ct. App. 2000) "mere possibility of harm" not sufficient); City of Albuquerque v. State, 111 N.M. 608, 615, 808 P.2d 58, 65 (Ct. App. 1991) (same); Padilla v. Lawrence, 101 N.M. 556, 562, 685 P.2d 964, 970 (Ct. App. 1984) ("Injunctions are harsh and drastic remedies which should issue only in extreme

cases of pressing necessity ..."); see also Tenneco Oil Co. v. New Mexico Water Quality Control Comm'n, 105 N.M. 708,709, 736 P.2d 986, 988 (Ct. App. 1986), *cert. denied*, 106 N.M. 714, 749 P.2d 99 (1988) ("The mere fact that an administrative regulation ... may cause injury or inconvenience ... is insufficient to warrant suspension of an agency regulation by the granting of a stay"); Dominion Video Satellite, Inc. v. Echostar Satellite Corp., 356 F.3d 1256, 1260 (10th Cir. 2004) (injury "must be both certain and great"); Rothberg v. LSAC, 102 Fed. Appx. 122, 125 (10 Cir. 2004) ("The mere unavailability of compensatory damages" is not synonymous with irreparable injury where "the harm alleged ... is speculative.").

76. Respondent found "that the risk of future injury to Plaintiffs is real if they are required to defend themselves in a purely *ultra vires* proceeding which seeks far reaching and significant changes to their facilities at significant cost." Exhibit E at 6-7. Thus, Plaintiffs' alleged future injury depends on at least three contingencies: (1) the Board must adopt an invalid regulation; (2) the regulation is either upheld despite its invalidity or goes unchallenged; and (3) the regulation forces Plaintiffs to make "significant changes to their facilities."[10] However, the Board has not adopted any regulations and may never do so, and the content of any regulation that the Board might adopt in the future is unknown. Although

[10] Petitioner only asks the Board to regulate the oil and gas sector and electricity generation sectors. Accordingly, Respondent's finding obviously cannot apply to the Plaintiffs who are outside these sectors or to the State Legislators.

Plaintiffs clearly fear that the Board *might* adopt a regulation that *might* harm or inconvenience them in some way, such fears cannot constitute "irreparable injury;" indeed, fears based on speculation do not even satisfy the minimal injury necessary to confer standing. Cf. ACLU of N.M. v. City of Albuquerque, 2008 NMSC 45, ¶ 23, 144 N.M. 471, 479 (2008) (holding that speculative fear of possible unjustified arrest for DWI was not sufficient injury to confer standing). Accordingly, Plaintiffs were not entitled to preliminary injunction.

77. Respondent's finding that Plaintiffs will suffer "irreparable damage" if forced to endure the Board's statutorily prescribed rulemaking and exhaust their administrative remedies

> ... 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 v. Bethlehem Shipbuilding Corporation, 303 U.S. 41, 50-51 (1938). The "rule of exhaustion" applies even where, as here, "the contention is made that the administrative body lack[s] 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.; State ex rel. State Corporation Commission *et al.* v. Zinn, District Judge, 72 N.M. 29, 38, 380 P.2d 182, 187 (1963) (quoting this holding from Myers). Based on Myers, courts have repeatedly and consistently held that litigation expenses do not qualify as "irreparable injury."[11] Id.; Renegotiation Bd. v. Bannercraft Clothing Co., 415 U.S. 1, 24 (1974) ("Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury"); Randolph-Sheppard Vendors of America v. Weinberger, 795 F.2d 90, 108 (D.C. Cir. 1986) ("The usual time and effort required to pursue an administrative remedy does not constitute irreparable injury"); Rosenthal & Co. v. Commodity Futures Trading Com., 614 F.2d 1121, 1127-1128 (7th Cir. 1980) ("It is clear, however, that litigation expense and attendant inconvenience do not constitute irreparable injury sufficient to justify judicial intervention into pending agency proceedings"); Niagara Mohawk Power Corp. v. Federal Power Com., 538 F.2d 966, 970 (2d Cir. 1976) ("The mere expense and inconvenience of a prospective administrative hearing do not, without more, constitute irreparable injury."). Thus, Plaintiffs have suffered no irreparable injury.

C.2 Plaintiffs cannot succeed on the merits.

78. Respondent adopted Plaintiffs' argument that the Board cannot under any circumstances regulate the emissions of a particular contaminant under the

[11] This is certainly true where, as here, Plaintiffs have no obligation to participate in the Board's rulemaking.

AQCA unless and until it sets "an ambient air quality standard" for that contaminant. Exhibit E at 8-9. Respondent also adopted Plaintiffs' conclusion that the Board lacks authority under the EIA to help abate global warming caused by greenhouse gas ("GHG") emissions. Exhibit E at 9. Respondent's conclusions are contrary to law.

i. Respondent's interpretation of the AQCA conflicts with the text of that Act.

79. Respondent bases his holding—that the Board must adopt an "ambient air quality standard" for a contaminant before it can regulate the emissions of that contaminant—is based on the definition of "air pollution" in the AQCA and Section 74-2-5 of the Act. As to the definition:

> "air pollution" means the *emission*, except emission that occurs in nature, into the outdoor atmosphere of one or more air contaminants *in quantities and of a duration* that may with reasonable probability injure human health or animal or plant life or as may unreasonably interfere with the public welfare, visibility or the reasonable use of property[.]

NMSA 1978, § 74-2-2(B)(2001) (emphasis added). Section 74-2-5, the heart of the AQCA, provides in pertinent part:

> A. The environmental improvement board … shall prevent or abate air pollution.
>
> B. The environmental improvement board … shall:
>
> (1) adopt, promulgate, publish, amend and repeal regulations consistent with the Air Quality Control Act to attain and maintain national ambient air quality standards and prevent or abate air

> pollution, *including regulations prescribing air standards*, within the geographic area of the environmental improvement board's jurisdiction … [.]

(Emphasis added). In quoting the definition, Respondent places particular emphasis on the language "in quantities and of a duration," but he ignores the fact that the AQCA defines "air pollution" as an "emission." Exhibit E at 8-9.

80. Petitioner's regulatory proposal precisely meets the AQCA's definition of "air pollution." Petitioner asks the Board to "abate or prevent air pollution" caused by the "emission" of an "air contaminant" (i.e., *GHGs*) at or above a specified "quantity" (i.e., 25,000 *tons*) over a specified "duration" (i.e., one *year*). Exhibit C. Thus, Petitioner has proposed that the Board adopt an "air standard" for GHGs within the meaning of Section 74-2-5(B). This standard would define "air pollution" within the meaning of Section 74-2-2(B) as the emission of 25,000 or more tons per year. This is all the AQCA requires.

81. Section 74-2-5(B) authorizes the Board generally to establish "air standards," which Respondent and Plaintiffs interpret to mean "ambient air quality standards" and nothing else. But an ambient air quality standard is just one possible example of an "air standard." Petitioner's proposal to define "air pollution" as the emission of an air contaminant at above a threshold rate, i.e., 25,000 tons per year, is another example.

82. Moreover, an "ambient air quality standard" does not come within the AQCA's literal definition of "air pollution," because it refers to the *concentration*

of contaminants in the air and <u>not</u> to the "emission" of contaminants from a source.[12] Therefore, the Board's power to "prevent or abate air pollution" (i.e., *emissions*) does not necessarily depend upon the existence of an "ambient air quality standard." The Legislature gave the Board express power to adopt regulations to "abate or prevent air pollution" *and* to "attain and maintain national ambient air quality standards" *and* to prescribe state-based "air standards." <u>Id.</u>

83. In practice, the Board has adopted only a few ambient air quality standards, NMAC Part 20.2.3, but the vast majority of the Board's air regulations are aimed at limiting the emission of air contaminants *for which there are no ambient air quality standards*. <u>See, e.g.</u>, NMAC § 20.2.43.112 (limiting emission of hydrogen cyanide); NMAC § 20.2.43.113 (hydrogen chloride); NMAC § 20.2.43.115 (ammonia); NMAC § 20.2.61 (smoke and visible emissions); NMAC § 20.2.63.202 (PCDD/PCDF and metals); NMAC §§ 20.2.78 (hazardous air pollutants); NMAC §§ 20.2.72.400 - 502 (toxic air pollutants). Accordingly, Respondent's holding that the Board cannot abate "air pollution" unless it first adopts an air quality standard conflicts with the text of the AQCA and the Board's longstanding practice. Furthermore, nothing prevents the Board from adopting an ambient air standard in response to Petitioner's regulatory proposal.

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[12] For example, the national ambient air quality standard for "oxides of nitrogen is 53 parts per billion (ppb, which is 1 part in 1,000,000,000) ... measured in the ambient air as nitrogen dioxide." 40 CFR § 50.11(a).

84. Respondent's reliance on the case of PNM et al. v. EIB, 89 N.M. 223, 549 P.2d 638 (Ct. App. 1976) is misplaced. Exhibit E at 8-9. At issue in PNM was whether the Board had authority to limit sulfur dioxide emissions for the purpose of making "more room" to allow further "industrial development of the area." PNM at 227, 549 P.2d at 642. Because this purpose was "unrelated to [the Board's] statutory mission" of abating or preventing air pollution, the Court struck down the Board's emission limits. PNM at 228-229, 549 P.2d at 643-644. In *dicta*, the Court also stated:

> The Board having set the standard[13] is bound by it, the same as anyone else.

Public Service Company at 229, 549 P.2d at 644. However, the Court never stated, in *dicta* or otherwise, that the Board must in all cases adopt an ambient air quality standard before it limits emissions. That issue simply was not present in PNM. Accordingly, PNM does not establish a precedent that the Board must adopt an ambient air quality standard for an air contaminant before it regulates emissions of that contaminant. State v. Cortez, 2007 NMCA 54, 16, 141 N.M. 623, 628 (Ct. App. 2007) ("Cases are not precedent for issues not raised and decided.").

[13] National and state ambient air quality standards have been established for sulfur dioxide. PNM at 227 and 231 (Lopez, J., dissenting).

ii. The Board has authority under the EIA to address global warming as a public nuisance.

85. The Environmental Protection Agency ("EPA") described the unique issues associated with regulating GHG emissions in its recent "Endangerment Finding":

> The specific issue here is whether an effect on human health that results from a change in climate should be considered when EPA determines whether the air pollution of well-mixed greenhouse gases is reasonably anticipated to endanger public health. In this case, the air pollution has an effect on climate. For example the air pollution raises surface, air, and water temperatures. *Among the many effects that flow from this is the expectation that there will be an increase in the risk of mortality and morbidity associated with increased intensity of heat waves. In addition, there is an expectation that there will be an increase in levels of ambient ozone, leading to increased risk of morbidity and mortality from exposure to ozone. All of these are effects on human health, and all of them are associated with the effect on climate from elevated atmospheric concentrations of greenhouse gases. None of these human health effects are associated with direct exposure to greenhouse gases.*

Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 FR 66496, 66527 (December 15, 2009) (emphasis added). Thus, unlike other air contaminants, the effect of GHG emissions on air quality causes no direct and immediate harm. Instead, GHG emissions lead to global warming and global warming harms public health and welfare by causing more sickness and death, among other adverse effects. Therefore, it may make more sense for the Board to define global warming as a

public nuisance and to regulate GHG emissions under the EIA. NMSA 1978, § 74-1-8(A)(7); Gonzalez v. Whitaker, 97 N.M. 710, 713, 643 P.2d 274, 277 (Ct. App. 1982) (holding that EIA requires the Board to "promulgate regulations and standards to prevent the creation or to abate the existence of nuisances").

86. A "public nuisance" is one that "adversely affects [the] public health, welfare, or safety … [of] a considerable number of people," Padilla v. Lawrence, 101 N.M. 556, 562, 685 P.2d 964, 970 (Ct. App. 1984) (citations omitted), through an "unreasonable interference with a right common to the general public." State ex rel. Village of Los Ranchos de Albuquerque v. City of Albuquerque, 119 N.M. 150, 163, 889 P.2d 185, 198 (1994) (citations omitted); Restatement (Second) of Torts, § 821B(1) (1979) (defining public nuisance as "an unreasonable interference with a right common to the general public"). The tort of public nuisance is commonly used to abate dispersed threats to public health or welfare from multiple sources. For example, the New Mexico Supreme Court held that "the cumulative effects of pollution [from multiple landfills], exacerbated by the incidences of poverty, may rise to the level of a public nuisance." Colonias Development Council v. Rhino Environmental Services, 2005 NMSC 24, ¶ 32, 138 N.M. 133, 141-142 (2005). More to the point, the Second Circuit recently held that a complaint based on the defendants' contribution to global warming, i.e., GHG emissions, stated a valid public nuisance claim. State of Connecticut *et al.* v. American Electric Power Company *et al.*, 582 F.3d 309 (2nd Cir. 2009); cf.

Espinosa v. Roswell Tower, Inc., 121 N.M. 306, 310, 910 P.2d 940, 944 (Ct. App. 1995) (holding that asbestos emissions in violation of emission standard "created a public nuisance *per se*"). Both the Second Circuit and New Mexico have adopted the Restatement's definition of a public nuisance. Los Ranchos, at 163, 889 P.2d at 198; American Electric at 351 ("The Restatement principles have served as the backbone of state nuisance law").

87. Respondent's conclusion that the Board lacks authority to abate nuisances related to "air quality" (Exhibit E at 9) is not supported by either the EIA or the AQCA. The manifest purpose of both laws is to protect public health and welfare, not to create legalistic categories and technicalities. NMSA 1978, § 74-2-2(B), NMSA 1978, § 74-1-2. Thus, depending on the situation, the Board may use either or both of these laws to accomplish their overlapping remedial purposes. In fact, the Board has long cited both the AQCA *and* its nuisance authority under the EIA as authority to regulate air contaminant emissions. See, e.g., NMAC §§ 20.2.31.3 (regulating emissions and citing 74-1-8(A)(7) (nuisance abatement) and AQCA as authority); NMAC §§ 20.2.32.3 (same); NMAC §§ 20.2.33.3 (same); NMAC §§ 20.2.34.3 (same); NMAC §§ 20.2.37.3 (same); NMAC §§ 20.2.43.3 (same); NMAC §§ 20.2.70.3 (regulating emissions from stationary sources and citing 74-1-8(A)(7) (nuisance abatement) and AQCA as statutory authority). This is because "air pollution is ... one of the most notorious types of public nuisance in modern experience." Washington v. Gen. Motors Corp., 406 U.S. 109, 114

(1972); see also Roswell Tower, *supra* (emission of asbestos is public nuisance). Thus, the Board has authority under the EIA to abate any nuisance, including those that may touch on issues of air quality.

iii. Respondent should have allowed the Board to interpret the statutes at issue in the "first instance."

88. Respondent's interpretations of the AQCA and the EIA conflict with the text and purpose of both laws. However, to the extent these statutes are "ambiguous, it is within the authority of the agency charged with effecting [these] statute[s] to interpret [them]." Rex, Inc. v. Manufactured Hous. Comm., Manufactured Hous. Div., 119 N.M. 500, 512, 892 P.2d 947, 959 (1995). "In resolving ambiguities in the statute ... which an agency is charged with administering, the Court generally will defer to the agency's interpretation if it implicates agency expertise." Atlixco Coalition v. Maggiore, 1998 NMCA 134, 30,125 N.M. 786, 795 (Ct. App. 1998). In the instant case, Plaintiffs' Complaint raises the following issues of statutory interpretation: (1) must the Board adopt an ambient air quality standard before it regulates emissions; (2) can or should the Board adopt an ambient air quality standard in response to Petitioner's regulatory proposal; and (3) can the Board abate nuisances relating to air quality? Even if Respondent had jurisdiction in this case, which he does not, he should afford the Board an opportunity to decide these issues of statutory interpretation in the "first instance." See id.; cf. Negusie v. Holder, 129 S. Ct. 1159, 1167, 173 L. Ed. 2d 20,

30 (2009)("Whether the statute permits such an interpretation based on a different course of reasoning must be determined in the first instance by the agency"); Puerto Rico Higher Educ. Assistance Corp. v. Riley, 10 F.3d 847, 854 (D.C. Cir. 1993) ("Where a statute that the agency has been entrusted to administer is ambiguous, it is the obligation and the province of the agency to interpret it in the first instance").

WHEREFORE, Petitioner New Energy Economy, Inc., respectfully requests this Court to issue an appropriate Writ of Superintending Control, including such alternative writs as the Court deems necessary, to:

(1) Immediately prohibit Respondent from further exercising jurisdiction in the case styled *Senator Leavell et al. v. New Mexico Environmental Improvement Board*, Fifth Judicial District Court, Cause No. 0506-CV-2010-00050.

(2) Order Respondent immediately to stay his proceedings.

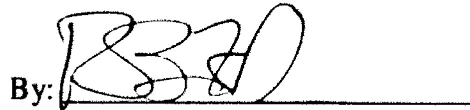
(3) Order Respondent immediately to dissolve the preliminary injunction that he issued against the Environmental Improvement Board.

(3) Order Respondent immediately to dismiss the Complaint in Leavell et al. for lack of jurisdiction. And,

(4) Grant such other relief as this Court deems appropriate.

Respectfully submitted:

NEW MEXICO ENVIRONMENTAL LAW
CENTER



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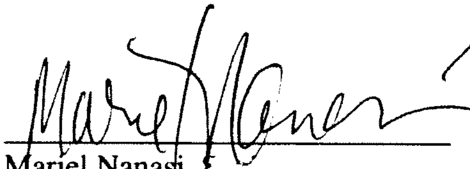
Attorneys for Petitioner New Energy Economy, Inc.

VERIFICATION BY PETITIONER

I, Mariel Nanasi, director of New Energy Economy, Inc., have read the forgoing Petition and state, under oath, that the statements contained in the Petition are true and correct to the best of my knowledge, information and belief.



Mariel Nanasi,
Senior Policy Advisor, New Energy Economy, Inc.

CERTIFICATE OF SERVICE

I certify that I caused a copy of the foregoing paper to by mailed, first class, to the following persons pursuant to NMRA 12-307 on the 14th day of May, 2010:

R. Bruce Frederick

Honorable William G. W. Shoobridge District Judge, Fifth Judicial District Lea County Court House 100 North Main Box 6-C Lovington, NM 88260 *Respondent*	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*
Eric Groten Vinson & Elkins LLP 2801 Via Fortuna, Suite 100 Austin, TX 78746 (512) 542-8709 *Attorneys for El Paso Electric*	Stephen A. Vigil Office of the Attorney General P.O. Box 1508 Santa Fe, NM 87504-1508 *Attorney for the Environmental Improvement Board*
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.*	