

STATE OF NEW MEXICO
COUNTY OF LEA
FIFTH JUDICIAL DISTRICT COURT

SENATOR CARROLL H. LEAVELL,
SENATOR GAY G. KERNAN
REPRESENTATIVE DONALD E. BRATTON,
REPRESENTATIVE WILLIAM H. GRAY,
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,
NEW MEXICO PETROLEUM MARKETERS ASSOCIATION, and
SOUTHWESTERN PUBLIC SERVICE COMPANY,
Plaintiffs,

vs.

No. CV2010-50

NEW MEXICO ENVIRONMENTAL IMPROVEMENT BOARD,
Defendant,

NEW ENERGY ECONOMY, INC.,
Defendant-in-Intervention.

**DECISION MEMO DENYING MOTIONS TO DISMISS
AND GRANTING PRELIMINARY INJUNCTION**

I. Defendant's Motion to Dismiss

This case arises from a Petition filed by New Energy Economy (hereinafter NEE) before the Environmental Improvement Board (hereinafter EIB) to promulgate a statewide cap on greenhouse gas emissions. The proposed new regulation would require the EIB to determine what the statewide greenhouse gas emission level was in 1990 and thereafter limit greenhouse gas emission by twenty-

five percent (25%) below 1990 emission levels, to be achieved by 2020.¹ Plaintiffs are state legislators, individuals or entities represented by Plaintiffs that include major oil and gas producers, pipeline companies, well servicing and field servicing companies, refineries, processing plants, an electric power generation, transmission and distribution company, an electric power supply cooperative, a voluntary non-profit organization of farmers, ranchers and people interested in agriculture and a public utility company. NEE was allowed to intervene in this lawsuit and is the Petitioner requesting the EIB to adopt the proposed regulation. The EIB is an agency of the state which has authority to adopt standards for various environmental programs including air quality.

Defendant EIB and Intervenor NEE Motions to Dismiss

Intervenor NEE and Defendant EIB moved to dismiss the amended complaint based upon the following arguments:

1. Failure to Exhaust Administrative Remedies.

The Court finds that the question as to whether the EIB lacks statutory authority to consider the regulations proposed by NEE without first adopting an air quality standard is a purely legal issue. No additional fact-finding is necessary in order to determine the scope of EIB's authority to pass the proposed regulation, no special agency findings or expertise are necessary - only legal conclusions are necessary. The Court can interpret the proposed regulation based upon existing state statutes without fact finding by the EIB. A declaratory judgment action may be used to raise a purely legal challenge to EIB's statutory authority. State ex rel Hanosh vs. NM Environmental Improvement Board, 2009-NMSC-047, 147 N.M. 87, 217 P.3d 100, Smith vs. City of Santa Fe, 2007-NMSC-055,

¹The Petition filed by NEE may have been amended but the amended petition was not before the Court. The Court was advised that on March 2, 2010, NEE attempted to modify its proposal requiring 3% reductions of greenhouse gas emissions each year beginning 2012 without adoption of an ambient air quality standard. The legal analysis is unchanged.

142 N.M. 786, 171 P.3d 300. This case is unlike State vs. Zinn, 72 N.M. 29, 380 P. 2d 179 (1963) in that in Zinn the State Corporation Commission was proceeding under its statutory authority while the allegation herein is that the EIB is acting ultra vires and in excess of its statutory authority in considering the proposed new regulation. If Plaintiffs had to wait for the passing of the regulation, they could not stop an allegedly ultra vires hearing by the EIB. Because no additional fact-finding is necessary in order to determine the scope of EIB's authority to adopt the proposed regulation, the Plaintiffs may file for declaratory relief independent of the administrative appeal process. Plaintiffs are therefore not required to exhaust administrative remedies concerning this purely legal issue.

2. Actual Controversy and Ripeness.

In order for the Court to assume jurisdiction under the Declaratory Judgment Act (DJA), NMSA 1978, §44-6-2, the case must involve an actual controversy. An actual controversy under the DJA exists if the question is "real, and not theoretical, the person raising it must have a real interest, and there must be someone having a real interest in the question who may oppose the declaration sought." Taos County Board of Education v. Sedillo, 44 N.M. 300, 306, 101 P. 2d 1027, 1033 (1940). The question presented to the Court involves statutory authority for the EIB to approve a petition limiting greenhouse gas emissions without first adopting an air quality standard. The question is real and not theoretical and the parties are on opposite sides of the controversy. Plaintiff's complaint presents an actual controversy.

Ripeness is applicable to a declaratory judgment action, and the issue before the Court must involve an actual, present controversy. Whether the EIB has authority to adopt the proposed regulation does not require further administrative action by the EIB. The proposed regulation is the subject of a good deal of controversy as the EIB has taken a definitive position on the purely legal issue that it may proceed to adopt the proposed regulation without first adopting an air quality

standard. (See ¶43 of the Amended Complaint). “Our case law makes it clear that the terms ‘finality’ is to be given a practical, rather than a technical, construction.” Kelly Inn No. 102 Inc. vs. Kapnison, 113 N.M. 231, 236, 824 P.2d 1033, 1038 (1992). As to the purely legal issue before the Court and in a truly practical sense, it is ripe for review in a declaratory judgment action.

3. Standing.

Defendant and Intervenor argue that Plaintiffs lack standing under traditional requirements. Traditional standing requirements require Plaintiffs to show (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 v. City of Albuquerque, 2008 NMSC 45, 144 N.M. 471 (2008). The extent of the injury can be slight and “the litigant need only show that he is ‘imminently’ threatened with injury.” DeVargas Savings and Loan Assoc. v. Campbell, 87 N.M. 469, 535 P. 2d 1320 (1975).

The Court finds that there is a real risk of future injury if the proposed regulations are adopted. (See ¶ 48 of the Amended Complaint.) The Amended Complaint alleges that “Plaintiffs will be required to implement significant changes to their facilities at significant cost, or will be adversely affected by the increased costs if the Rulemaking Petition is adopted.” Some of the Plaintiffs are participating in the EIB hearings at significant cost, other Plaintiffs are not participating in the EIB hearings. The participating Plaintiffs did not initiate the proceeding but are attempting to defeat the proposal which they contend is ultra vires; as contrary to powers expressly granted by statute. Generally, the cost of participating in an administrative proceeding does not constitute irreparable harm. Zinn, supra, 72 N.M. 38. However, the Amended Complaint alleges 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. Plaintiffs

are imminently threatened with injury now and in the future.

Plaintiffs also argue that they have standing under the Declaratory Judgment Act because the statute creates a cause of action and designates who may sue, “the issue of standing becomes interwoven with that of subject matter jurisdiction.” They argue that DJA jurisdiction is predicated on “cases of actual controversy.” An actual controversy was found by this Court and the Court further finds that jurisdiction exists pursuant to the DJA, NMSA 1978 §44-6-2. There is an actual controversy, the question posed is real and not theoretical, and each side has a real interest in the declaration.

4. Failure to State a Claim.

Defendant EIB also moves to dismiss for failure to state a claim under Rule 1-012 (b)(6). EIB argues that the Plaintiffs’ Amended Complaint asking for a legal determination that it can not act on the proposed regulation without first establishing an ambient air quality standard for greenhouse emissions does not challenge the Board’s authority to act. To state a claim for declaratory judgment, Plaintiffs must only allege facts that involve legal principles that entitle them to relief. A motion to dismiss should only be granted if it appears beyond doubt that the Plaintiffs can prove no set of facts in support of their claim entitling them to relief and all well pleaded facts are accepted as true. Gomez vs. Board of Educ., 85 N.M. 708, 516 P.2d 679 (1973). Plaintiffs have raised a pure question of law which challenges EIB’s jurisdiction to act on the petition. Plaintiffs have stated a claim for declaratory relief.

The motions to dismiss are denied.

II. Plaintiff’s Motion for Preliminary Injunction

There is presently pending before the EIB the petition filed by NEE on December 19, 2008, seeking to establish a statewide cap on greenhouse gas emissions requiring regulated entities to

reduce such emissions to 25% below 1990 levels by the year 2020. Hearings are scheduled to begin on June 21, 2010. 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. Plaintiffs alleged before the EIB, as they do here, that the EIB may not limit greenhouse emissions without first establishing a standard for such emissions that bears some relationship to levels of such emissions upon the ambient air in New Mexico that may cause adverse effects upon human health or the environment. The EIB verbally denied the Motion to Dismiss on April 6, 2009, and Plaintiffs thereafter initiated this action seeking preliminary injunctive relief.

The purpose of a preliminary injunction pursuant to Rule 1-066 NMRA is to preserve the status quo pending a final determination of the rights of the parties. Insure New Mexico, LLC vs. McGonigle, 2000-NMCA-018, 128 N.M. 611, 995 P. 2d, 1053. To grant a preliminary injunction, the Court must find:

1. the Plaintiff 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
4. there is a substantial likelihood Plaintiff will prevail on the merits.

A. Irreparable Harm

As discussed above, Plaintiffs need only show that they face a real risk of future injury or that they are "imminently threatened with injury." DeVargas, supra, 87 N.M. at 473. The Court finds 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. A preliminary injunction will preserve the status quo while the court decides whether the EIB has statutory authority to promulgate the proposed regulation.

B. Threatened Injury Outweighs Any Damage the Injunction Might Cause Defendant

The status quo does not harm the EIB. In fact the EIB has an interest in ensuring that its actions are legal as permitted by state law. A preliminary injunction will allow the Court to rule on the merits of Plaintiffs' claim before any further action is taken. If the Court finds that the petition and proposed regulation are within the EIB's authority, the EIB can proceed and be in no worse position than it is in today.

C. Issuance of a Preliminary Injunction Will Not Be Adverse to the Public's Interest

Defendant and Intervenor admit that the proposed regulation will not by itself avoid catastrophic climate change. New Mexico's greenhouse emissions are admittedly a small percentage of total United States emissions and an even smaller percent of world emissions. The proposed regulation will likely cause a significant burden on the regulated community, some of which will likely be passed on to the public at large. The economic competitiveness of the state may well be negatively impacted by the proposed regulation setting emission restrictions in this state without regard to any national or any other established standard.

The Court finds that the issuance of a preliminary injunction will not be adverse to the public's interest.

D. There is a Substantial Likelihood That Plaintiffs Will Prevail on the Merits

The New Mexico Clean Air Act requires the EIB to adopt require regulations 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... NMSA 1978 §74-2-5(B)(1). The act authorizes the EIB to adopt regulations that are no more stringent than federal standards of performance adopted by the Environmental Protection Agency. NMSA 1978 §74-2-5(C)(2). The EIB's authority is "limited to the power and

authority that is expressly granted and necessarily implied by statute.” In re Application of PNM Electric Services, 1998-NMSC-017, ¶10, 125 N.M. 302, 961 P.2d 147. Statutes must be interpreted to give effect to the legislative intent. When a statute is clear and unambiguous, it should be interpreted as written. The EIB’s authority is limited by the New Mexico Air Act and the parties agree that there no national air quality standard exists for greenhouse emissions. The EIB’s authority to adopt the proposed greenhouse gas regulation must derive from its authority “to prevent or abate air pollution.” NMSA §74-2-5(B). Air pollution is defined as “the emission ... 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 §74-2-2(B). Construing the plain meaning of the statutes, the EIB’s authority to prevent or abate air pollution must be premised on a previously established standard. Since there are no presently existing standards for greenhouse emissions in New Mexico, the EIB lacks statutory authority to adopt the proposed regulation. Greenhouse gas emissions can not be considered air pollution until such time as the EIB adopts a standard that establishes the “quantities and ... 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 §74-2-2(B). The proposed regulation does not seek or give notice of the intention to adopt a standard for greenhouse emissions. Regulations which are not necessary to implement a standard to prevent or abate air pollution are outside the statutory authority given to the EIB. The EIB “may not set a new standard or adopt regulations ... for any reason other than to prevent or abate air pollution.” Public Service Co. of New Mexico vs. New Mexico Environmental Improvement Board, 89 N.M. 223, 230, 549 P.2d at 645. Simply stated, air pollution regulations must be based upon ambient air quality standards.

Inteviewer NEE argues that the EIB has authority to adopt the proposed regulation under its authority to abate nuisance. NMSA §74-1-8(A)(7). However, EIB's authority to manage air quality is limited to the specific language of the New Mexico Air Quality Control Act. The Air Quality Control Act requires a standard that defines quantities and duration of emissions that constitute air pollution. The Air Quality Control Act limits the EIB's authority to manage air quality to preventing air pollution as defined by an established standard. The EIB cannot adopt regulations that manage air quality pursuant to its authority to regulate abatement of the nuisance.

Plaintiffs Motion for a Preliminary Injunction is granted enjoining the EIB from conducting further proceedings on the Rulemaking Petition. Mr. Rose is directed to prepare and Order consistent with this decision Memo.

WILLIAM G. W. SHOBRIDGE
DISTRICT JUDGE