

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

**SUNFLOWER ELECTRIC POWER)
CORPORATION,)
)
Plaintiff,)
)
v.)
)
KATHLEEN SEBELIUS, et al.,)
)
Defendants.)**

Case No. 08-CV-2575-EFM-DWB

**DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR
MOTION TO DISMISS**

COME NOW, Governor Kathleen Sebelius ("Governor"), Lieutenant Governor Mark Parkinson ("Lt. Governor") and Kansas Department of Health and Environment Secretary Roderick Bremby ("Secretary") and, for their Memorandum in Support of Defendants' Motion to Dismiss, state as follows:

SUMMARY OF ARGUMENT

Defendants' Motion to Dismiss should be granted because: (1) pursuant to the *Younger* and *Burford* abstention doctrines and the doctrine of primary jurisdiction, this Court either lacks subject matter jurisdiction or should not exercise its jurisdiction over Plaintiff's claims; (2) Plaintiff's claims are not ripe because the Secretary has not yet issued a "final order" with respect to Plaintiff's Application; and (3) Plaintiff has failed to state a claim against Defendants Governor and Lt. Governor because, as a matter of law, neither defendant has the authority to grant or deny Plaintiff's Application.

OVERVIEW

In February 2006, Plaintiff Sunflower Electric Power Corporation submitted an application ("Application") to the Kansas Department of Health and Environment

("KDHE") for a permit under the Kansas Air Quality Act, K.S.A. 65-3001 *et seq.*, which would grant Plaintiff the authority to expand its coal-fired power plant in Holcomb, Kansas. (Complaint, ¶ 14.) After extensive analysis by KDHE staff and a lengthy public comment period, the Secretary issued an initial denial of Plaintiff's Application, which was communicated to Plaintiff via a letter dated October 18, 2007 ("Denial Order"). (Complaint, ¶ 39; Ex. A.) In an effort to reverse the Secretary's Denial Order, Plaintiff initiated multiple administrative appeals and civil suits. Plaintiff's administrative appeals and one of its civil suits are ongoing.

In this case, Plaintiff seeks to circumvent the ongoing proceedings (which Plaintiff initiated) by asking this Court to determine what factors Defendants¹ may consider when deciding whether to grant Plaintiff's Application. Specifically, Plaintiff requests the following relief: (1) a declaration that Defendants' consideration of Plaintiff's power plant's carbon dioxide ("CO₂") emissions violates Plaintiff's right to equal protection; (2) a declaration that Defendants have violated Plaintiff's right to conduct interstate commerce; (3) an order vacating the Denial Order; (4) the issuance of an injunction enjoining Defendants from considering CO₂ emissions in connection with any future proceedings on Plaintiff's Application; and (5) the issuance of an injunction enjoining Defendants from considering the final destination of any electricity generated by Plaintiff's proposed power plant expansion. (Complaint, pp. 23-24.) Plaintiff also requests that this Court retain "jurisdiction over the matters that are the subject of this action through all further proceedings relating to [Plaintiff's] Application." (Complaint, p. 24.)

¹ Defendants dispute that each of the named defendants exercises decision making power with respect to Plaintiff's Application. As explained in Section V of this motion, the Secretary is the sole decision maker.

FACTUAL BACKGROUND

Plaintiff submitted its application in February 2006. (Complaint, ¶ 14.) On September 6, 2007, the Secretary requested a formal opinion from the Kansas Attorney General regarding "whether K.S.A. 65-3012² authorizes the secretary of health and environment, in absence of national or state regulations setting limitations for a pollutant to: (1) deny an air quality permit application on the basis of contribution of future emissions of that pollutant to the quality of the air, (2) modify a proposed permit to address that pollutant, and or, (3) place a stay on permit issuance until state regulations are enacted addressing the pollutant." (Ex. B.)

On September 24, 2007, and in response to the Secretary's request, the Attorney General issued Attorney General Opinion No. 2007-31, which stated that:

if the secretary makes a factual determination that a particular emission constitutes air pollution and that such emission presents a substantial endangerment to the health of persons or to the environment, *then* even in the absence of federal or state regulations setting limitations for a particular pollutant, K.S.A. 65-3012(a)(1) authorizes the secretary to take actions as necessary to protect the health of persons or the environment. Such actions may include denying an air quality permit application on the basis of anticipated emissions of a particular pollutant or modifying a proposed permit to address such pollutant.

(Ex. C, pp. 3-4.)

² Kansas Statute 65-3012 reads, in part, as follows: "Action to protect health or environment. (a) Notwithstanding any other provision of this act, the secretary may take such action as may be necessary to protect the health of persons or the environment: (1) Upon receipt of information that the emission of air pollution presents a substantial endangerment to the health of persons or to the environment; or (2) for an imminent or actual violation of this act, any rules and regulations adopted under this act, any orders issued under this act or any permit conditions required by this act."

In his October 18, 2007 Denial Order, the Secretary indicated that his decision to deny Plaintiff's Application was based on "the scientific and technical information related to carbon dioxide including but not limited to many oral and written comments submitted in the public hearing and comment period[,]" which "provides support for the position that emission of air pollution from the proposed coal fired plant, specifically carbon dioxide emissions, presents a substantial endangerment to the health of persons or to the environment." (Ex. A, pp. 1-2; Complaint, ¶ 41.) The Secretary cited *Massachusetts v. E.P.A.*, 549 U.S. 497 (2007), for the proposition that carbon dioxide meets the broad definition of an air pollutant under the Federal Clean Air Act. (Ex. A, p. 1.) The Secretary also explicitly informed Plaintiff that "[p]ursuant to K.S.A. 65-3008b(e), [Plaintiff] has the right to appeal this decision within fifteen (15) days and request an administrative hearing under the Kansas administrative procedures act set forth at K.S.A. 77-501 *et seq.*" (Ex. A, p. 2.)

In an effort to overturn the Secretary's Denial Order, Plaintiff initiated multiple administrative actions and civil suits. On November 1, 2007, Plaintiff timely appealed the Secretary's Denial Order by filing two requests for hearings – one pursuant to K.S.A. 65-3012(b)(1) and another pursuant to K.S.A. 65-3008a(b).³ (Ex. D; Ex. E.) These requests were forwarded to the Office of Administrative Hearings ("OAH") for consolidated administrative adjudicative hearing proceedings pursuant to the Kansas Administrative Procedure Act ("KAPA"). (Ex. F.) Plaintiff's appeal before the OAH is ongoing. Once the OAH proceeding is complete, the Secretary will issue a "final order,"

³ Also on November 1, 2007, Plaintiff filed two petitions for reconsideration pursuant to K.S.A. 65-3012(b)(1) and K.S.A. 65-3008a(b). (Ex. G; Ex. H.) The Secretary determined that Plaintiff's petitions were "premature under KAPA and must await the completion of the administrative adjudicative proceedings and issuance of the initial order of the hearing officer." (Ex. F.)

which Plaintiff may then elect to appeal to the Kansas Court of Appeals pursuant to K.S.A. 65-3008a(b).

Though Plaintiff had already properly instigated a hearing on the Secretary's Denial Order before the OAH, Plaintiff filed a petition in the Finney County district court ("Finney County Case") on November 16, 2007, in which it sought judicial review of the Secretary's Denial Order. (Ex. I.) On July 22, 2008, the Finney County district court held that it did not have subject matter jurisdiction over Plaintiff's claims and dismissed the Finney County Case. (Ex. J.)

On the same day that it filed the Finney County Case, Plaintiff filed a largely identical petition with the Kansas Court of Appeals (Case No. 07-99567) in which it, again, sought judicial review of the Secretary's Denial Order. (Ex. K.) Upon the court's motion, the case was transferred to the Kansas Supreme Court ("Kansas Supreme Court Case"). (Ex. L, p. 3.) In the Kansas Supreme Court Case, Plaintiff characterized the Secretary's Denial Order as a "final agency action." (Ex. M, p. 2.) The court disagreed with Plaintiff's characterization and, on April 24, 2008, stayed the case "(1) pending the completion of all matters related to these cases that are pending before the Kansas Department of Health and Environment and the Office of Administrative Hearings, and before the District Court of Finney County, Kansas, or (2) until this Court may otherwise later order." (Ex. N, p. 1.) The Kansas Supreme Court case remains stayed, though Plaintiff's motion to lift the stay is fully briefed and awaits the court's ruling. (Ex. L, pp. 1-2.)

Plaintiff has artfully framed this case as one in which Plaintiff seeks relief from Defendants' alleged violations of Plaintiff's constitutional rights. In reality, even a

cursory analysis of Plaintiff's requested relief indicates that this case constitutes nothing more than Plaintiff's most recent attempt to achieve judicial review of the Secretary's Denial Order prior to the OAH and the Kansas Supreme Court completing their ongoing proceedings and the Secretary issuing a final order.

DISCUSSION

Defendants' Motion to Dismiss should be granted because: (1) pursuant to the *Younger* and *Burford* abstention doctrines and the doctrine of primary jurisdiction, this Court either lacks subject matter jurisdiction or should not exercise its jurisdiction over Plaintiff's claims; (2) Plaintiff's claims are not ripe because the Secretary has not yet issued a "final order" with respect to Plaintiff's Application; and (3) Plaintiff has failed to state a claim against Defendants Governor and Lt. Governor because, as a matter of law, neither defendant has the authority to grant or deny Plaintiff's Application.

For all arguments related to subject matter jurisdiction, Defendants' Motion to Dismiss is brought pursuant to Fed. R. Civ. P. 12(b)(1). *Paper, Allied-Industrial, Chemical and Energy Workers Intern. Union v. Continental Carbon*, 428 F.3d 1285, 1292 (10th Cir. 2005) (holding that, in deciding a Rule 12(b)(1) motion, the court may consider evidence outside the pleadings without converting the proceeding to one for summary judgment). For all other arguments, Defendants' Motion to Dismiss is brought pursuant to Fed. R. Civ. P. 12(b)(6).

I. THIS COURT LACKS SUBJECT MATTER JURISDICTION PURSUANT TO THE YOUNGER ABSTENTION DOCTRINE.

Pursuant to the *Younger* abstention doctrine, this Court lacks subject matter jurisdiction over Plaintiff's claims because any judgment rendered by this Court would

interfere with an ongoing state proceeding, which implicates important state interests and in which Plaintiff could litigate its constitutional claims.

The *Younger* doctrine requires a federal court to abstain from hearing a case if (1) state judicial proceedings are ongoing; (2) state proceedings implicate an important state interest; and (3) the state proceedings offer an adequate opportunity to litigate federal constitutional issues. *Winnebago Tribe of Nebraska v. Stovall*, 341 F.3d 1202, 1204 (10th Cir. 2003); *see also D.L. v. Unified School District No. 497*, 392 F.3d 1223, 1227-28 (10th Cir. 2004) ("Even when a federal court would otherwise have jurisdiction to hear a claim, the court may be obliged to abstain when a federal-court judgment on the claim would interfere with an ongoing state proceeding implicating important state interests."). "Once these three conditions are met, *Younger* abstention is non-discretionary and, absent extraordinary circumstances, a district court is required to abstain." *Crown Point I, LLC v. Intermountain Rural Elec. Ass'n*, 319 F.3d 1211, 1215 (10th Cir. 2003).

A. State judicial proceedings are ongoing at both the OAH and the Kansas Supreme Court.

Defendants satisfy the first *Younger* consideration because, as explained in this motion's overview and factual background sections, two state judicial proceedings are ongoing: (1) Plaintiff's appeal before the OAH, in which Plaintiff seeks a hearing as to whether the Secretary's Denial Order was proper; and (2) Plaintiff's case in the Kansas Supreme Court, in which Plaintiff seeks an order vacating the Denial Order and instructing the Secretary to issue a final permit.

In the instant case, Plaintiff seeks an order from this Court vacating the Denial Order along with other relief that, if granted, would render Plaintiff's state court

proceedings superfluous. (Complaint, pp. 23-24.) Specifically, Plaintiff seeks an injunction preventing the Secretary from "taking into account the potential CO₂ emissions from Sunflower's proposed new Power Plants in connection with any future proceedings relating to Sunflower's Application." (Complaint, pp. 23-24.) Given that the Secretary's Denial Order was premised entirely on the "substantial endangerment to the health of persons or to the environment" posed by CO₂ emissions, if this Court grants Plaintiff the relief it requests, then the ongoing OAH and Kansas Supreme Court proceedings would be rendered moot. (Ex. A, pp. 1-2.)

Because two state judicial proceedings are ongoing, Defendants have satisfied the first *Younger* consideration.

B. The ongoing state proceedings involve the important state interests of protecting the health of the State's residents and environment, issuing its pollution permits and interpreting state statutes.

The second *Younger* consideration requires that "the state proceedings involve important state interests, matters which traditionally look to state law for their resolution or implicate separately articulated state policies." *Crown Point*, 319 F.3d at 1215 (quoting *Amanatullah v. Colorado Bd. of Med. Exam'rs*, 187 F.3d 1160, 1163 (10th Cir. 1999)). Defendants satisfy the second *Younger* consideration because the ongoing state proceedings involve the important state interests of protecting the health of the State's residents and environment, issuing state permits and interpreting state statutes.

Both of the ongoing state proceedings concern Kansas' environment and its pollution permitting process, which are important state interests that, as a matter of law, are exclusively assigned to the KDHE. *See* K.S.A. 65-3003 ("The responsibility for air quality conservation and control of air pollution is hereby placed with the secretary of

health and environment."); K.S.A. 65-3008(a) (requiring all polluters to obtain pollution permits from the secretary of health and environment); *Trans Shuttle, Inc. v. Public Utilities Commission*, 2001 WL 1355987, *5 (10th Cir. 2001) (unpublished) (holding that *Younger's* important state interest consideration is satisfied where state commission charged with protecting citizens' health and safety via motor carrier regulation assessed penalties against motor carrier operators who held federal permits for interstate transport but did not hold state permits for intrastate transport).

Furthermore, central to the ongoing state proceedings is the interpretation of K.S.A. 65-3012, which provides, in relevant part, that the Secretary "may take such action as may be necessary to protect the health of persons or the environment . . . [u]pon receipt of information that the emission of air pollution presents a substantial endangerment to the health of persons or to the environment." K.S.A. 65-3012. Based, in part, on Kansas Attorney General Opinion No. 2007-31, which interpreted K.S.A. 65-3012, the Secretary concluded that, pursuant to his power under that state statute, he could deny Plaintiff's Application because Plaintiff's proposed coal plant would emit a level of air pollution that substantially endangered Kansans. In the instant case, Plaintiff asks the Court to effectively preempt the ongoing state proceedings by rendering its own interpretation of K.S.A. 65-3012. *See Tast v. Dean*, 2006 WL 1484915, *2 (10th Cir. 2006) (unpublished) (holding that *Younger's* important state interest consideration is satisfied where litigant's claims require interpreting the state constitution and state statutes).

Because the ongoing state proceedings involve the important state interests of protecting the health of the State's residents and environment, issuing its pollution

permits and interpreting state statutes, Defendants have satisfied the second *Younger* consideration.

C. The state proceedings offer an adequate opportunity to litigate the federal constitutional issues.

The third *Younger* consideration is satisfied if a plaintiff "has an opportunity to raise and have timely decided by a competent state tribunal the constitutional claims which he asserts in the federal action." *Phillips v. Martin*, 535 F. Supp. 2d 1210, 1215 (D. Kan. 2008) (quotation omitted). "Typically, a plaintiff has an adequate opportunity to raise federal claims in state court 'unless state law clearly bars the interposition of the [federal statutory] and constitutional claims.'" *Id.* (quoting *J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280, 1292 (10th Cir. 1999)).

For reasons known only to it, Plaintiff has not vigorously litigated its constitutional claims in either state proceeding, neither of which precludes the constitutional claims. *See Phillips*, 535 F. Supp. 2d at 1215 ("The Supreme Court has reaffirmed the constitutional obligation of state courts to uphold federal law, and its expression of confidence in their ability to do so." (citation omitted)). Because the state proceedings offer an adequate opportunity for Plaintiff to litigate its constitutional claims, Defendants have satisfied the third *Younger* consideration.

In sum, Defendants have satisfied *Younger's* three considerations: (1) state judicial proceedings are ongoing at both the OAH and the Kansas Supreme Court; (2) these proceedings implicate important state interests with respect to the health of the State's residents and environment, its pollution permitting process and the interpretation of state statutes; and (3) though it has not exercised it, Plaintiff has the opportunity to raise its federal constitutional claims in the ongoing state judicial proceedings. Because

Defendants have satisfied all three *Younger* considerations, Defendants' Motion to Dismiss must be granted.

II. THIS COURT LACKS SUBJECT MATTER JURISDICTION PURSUANT TO THE *BURFORD* ABSTENTION DOCTRINE.

Pursuant to the *Burford* abstention doctrine, this Court lacks subject matter jurisdiction over Plaintiff's claims because state law provides Plaintiff adequate administrative and state court review of the Secretary's Denial Order and either (1) the issue of what the Secretary may consider when deciding whether to grant a polluter's permit application involves questions of state law bearing on policy problems of substantial public importance far greater than the singular issue of Plaintiff's Application; or (2) the exercise of federal review of the permitting process would lead to conflicting rulings that would disrupt the Secretary's comprehensive policy governing the review of pollution permit applications.

The *Burford* abstention doctrine "is concerned with protecting complex state administrative processes from undue federal influence." *Logsdon v. AT&T Communications of the Southwest, Inc.*, 2002 WL 31941059, *3 (D. Kan. 2002); *Walker Operating Corp. v. F.E.R.C.*, 874 F.2d 1320, 1330 (10th Cir. 1989) ("*Burford*-type abstention is deference by a federal court in order to avoid needlessly interfering in state activities.").

In *Burford*, the Supreme Court held that a federal district court correctly abstained from deciding a suit by an oil company challenging the validity of a Texas Railroad Commission order that granted an individual permission to drill oil wells on a specific piece of land. *Burford v. Sun Oil Co.*, 319 U.S. 315, 334 (1943). The court held that "questions of regulation of the [oil] industry by the State administrative agency . . . so

clearly involve[] basic problems of Texas policy that equitable discretion should be exercised to give the Texas courts the first opportunity to consider them." *Id.* at 332. As support for its holding, the *Burford* court specifically found that (1) the state provided "a unified method for the formation of policy and determination of cases by the Commission and by the state courts;" (2) "judicial review of the Commission's decisions in the state courts is expeditious and adequate;" and (3) "[c]onflicts in the interpretation of state law, dangerous to the success of state policies, are almost certain to result from the intervention of the lower federal courts." *Id.* at 333-34.

In *New Orleans Public Service, Inc. v. Council of the City of New Orleans*, 491 U.S. 350 (1989) ("*NOPS*"), the Supreme Court analyzed *Burford* and its progeny. The *NOPS* court concluded that *Burford* abstention is appropriate in two instances:

Where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar"; or (2) where the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."

Id. at 361 (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976)).

A. Kansas law provides an adequate forum for judicial review.

It is beyond doubt that state law provides entities, such as Plaintiff, an adequate and expeditious forum for judicial review. If an applicant is displeased by the Secretary's initial disposition of its application, pursuant to K.S.A. 65-3008b(e), it may appeal the Secretary's determination by filing a request for hearing before the KDHE and then

participating in the hearing process in accordance with the Kansas Administrative Procedure Act, K.S.A. 77-501 *et seq.* Once the hearing concludes and the Secretary issues a final order, then an applicant has the right to seek review of the Secretary's final order in the Kansas Court of Appeals, which by state law has original jurisdiction to review final agency action. K.S.A. 65-3008a(b).

In this case, Plaintiff has taken full advantage of its right to appeal the Secretary's initial determination. On November 1, 2007, Plaintiff filed two requests for hearing before the KDHE plus two petitions for reconsideration before the Secretary. As explained earlier in this memorandum, Plaintiff's requests for hearing are ongoing in the OAH; and Plaintiff's petitions for reconsideration were denied because they were premature. Once the OAH proceeding concludes and the Secretary issues a final order as to Plaintiff's Application, Plaintiff will have the right to appeal the Secretary's final order directly to the Kansas Court of Appeals.

B. This case involves questions of state law bearing on policy problems of substantial public importance.

This case involves the important state interests of how Kansas state statutes, specifically K.S.A. 65-3012, should be interpreted and what factors the Secretary may consider when deciding whether to grant a polluter's permit application. *See Tast*, 2006 WL 1484915, *2 (unpublished) (holding that interpreting the state constitution and state statutes constitute important state interests). Kansans' interests in the interpretation of their state's laws, the administration of an intricate pollution permitting process, and the quality of their air are far more important than the singular issue of whether the Secretary should have granted Plaintiff's Application. *See Browning-Ferris, Inc. v. Baltimore County, Md.*, 595 F. Supp. 851, 853 (D. Md. 1984) (*Burford* abstention ordered in case

involving the denial of permits to operate a sanitary landfill because the "case involve[d] both a complex regulatory scheme and predominantly local factors."); *see also Onondaga Landfill Systems, Inc. v. Williams*, 624 F. Supp. 25, 30 (N.D.N.Y. 1985) (holding that *Burford* abstention was appropriate in a suit challenging the constitutionality of a state environmental statute that was part of a state regulatory system involving an area of important state concern, namely the operation of the state's landfills).

C. The exercise of federal review in this case would disrupt the Secretary's comprehensive policy governing the review of pollution permit applications.

Prompted by Plaintiff's Application and subsequent appeal, Kansas is currently working through the OAH and the Kansas Supreme Court Case to establish the validity of the Secretary's comprehensive policy governing the review of pollution permit applications. At this point, federal review of the Secretary's decision making process would disrupt this ongoing effort. *See Bath Memorial Hosp. v. Maine Health Care Finance Comm'n*, 853 F.2d 1007, 1012 (1st Cir. 1988) ("A federal court, by abstaining, may avoid the awkward circumstance of turning the federal court into a forum that will effectively decide a host of detailed state regulatory matters, to the point where the presence of the federal court, as a regulatory decision-making center, makes it significantly more difficult for the state to operate its regulatory system.").

In sum, this Court lacks subject matter jurisdiction over Plaintiff's claims because state law provides Plaintiff adequate administrative and state court review of the Secretary's Denial Order and either (1) the issue of what the Secretary may consider when deciding whether to grant a polluter's permit application involves questions of state law bearing on policy problems of substantial public importance far greater than the singular

issue of Plaintiff's Application; or (2) the exercise of federal review would lead to conflicting rulings that would disrupt the State's efforts to establish the validity of the Secretary's comprehensive policy governing the review of pollution permit applications. Therefore, Defendants' Motion to Dismiss must be granted.

III. THIS COURT SHOULD DISMISS PLAINTIFF'S CLAIMS PURSUANT TO THE DOCTRINE OF PRIMARY JURISDICTION.

Pursuant to the doctrine of primary jurisdiction, this Court should dismiss Plaintiff's claims because: (1) this Court is being asked to decide factual issues not within the expertise of judges; (2) conflicting orders could arise out of this proceeding and the OAH proceeding; (3) a relevant agency proceeding was initiated by Plaintiff and is ongoing; (4) the KDHE has diligently worked to evaluate and decide Plaintiff's Application; and (5) the doctrine of primary jurisdiction is readily applied to claims for injunctive relief requiring scientific expertise.

"The doctrine of primary jurisdiction is concerned with promoting proper relationships between the courts and administrative agencies charged with particular duties." *Davies v. National Coop. Refinery Ass'n*, 963 F. Supp. 990, 997 (D. Kan. 1997) (citing *United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 63 (1956)). The doctrine "allows a federal court to refer a matter extending beyond the 'conventional experiences of judges' or 'falling within the realm of administrative discretion' to an administrative agency with more specialized experience, expertise, and insight." *Id.* (quoting *Williams Pipe Line Co. v. Empire Gas Corp.*, 76 F.3d 1491, 1496 (10th Cir. 1996)); see *Marshall v. El Paso Natural Gas Co.*, 874 F.2d 1373, 1376 (10th Cir. 1989) ("Primary jurisdiction is invoked in situations where the courts have jurisdiction over the claim . . . but it is

likely that the case will require resolution of issues which, under a regulatory scheme, have been placed in the hands of an administrative body.").

Courts are guided by five factors when deciding whether the doctrine of primary jurisdiction applies to a given case. *Friends of Santa Fe County v. LAC Minerals, Inc.*, 892 F. Supp. 1333, 1349 (D.N.M. 1995) ("No fixed formula constrains the Court's exercise of its discretion to invoke the doctrine.").

The first factor this Court should consider is "whether it is being called upon to decide factual issues not within the conventional experience of judges or whether the issues are of the sort that a court routinely considers." *Davies*, 963 F. Supp. at 997; *Friends of Santa Fe County*, 892 F. Supp. at 1349. In order to grant Plaintiff the relief it seeks, this Court must make the scientific determination that the Secretary's actions under K.S.A. 65-3012 were unwarranted because CO₂ emissions do not pose a risk to the health of persons or the environment. This scientific determination, however, is a factual issue that should be decided by the experts at the KDHE and the Secretary, who is charged by state law with "[t]he responsibility for air quality conservation and control of air pollution." K.S.A. 65-3003; *see Davies*, 963 F. Supp. at 997 (holding that the doctrine's first factor was satisfied where claim concerned the threat posed by hazardous waste and KDHE was "charged by state law with responsibility for investigating hazardous waste problems in Kansas and for protecting human health and the environment"). Therefore, the first factor weighs in favor of primary jurisdiction.

The second factor this Court should consider is whether conflicting orders could arise out of the Court's proceeding and the ongoing OAH proceeding. *Davies*, 963 F. Supp. at 998 ("The court should also consider whether the defendants could be subjected

to conflicting orders of both the court and the administrative agency."). Conflicting orders could easily result in this case if this Court independently determines that CO₂ emissions should not be considered by the Secretary, and the OAH concludes that the Secretary's Denial Order should be upheld. Therefore, the second factor weighs in favor of primary jurisdiction.

The third factor this Court should consider is "whether relevant agency proceedings have actually been initiated." *Id.* at 998; *Friends of Santa Fe County*, 892 F. Supp. at 1350 ("It is axiomatic that the advisability of invoking primary jurisdiction is greatest where the issue is already before the agency."). In the instant case, it is beyond doubt that a relevant agency proceeding was initiated by Plaintiff and is ongoing. Therefore, the third factor weighs in favor of primary jurisdiction.

The fourth factor this Court should consider is "whether the agency has demonstrated diligence in resolving the issue or has instead allowed the issue to languish." *Davies*, 963 F. Supp. at 998. In the instant case, the KDHE has diligently worked to evaluate and decide Plaintiff's Application in a timely manner. Plaintiff submitted its Application in February 2006. After analysis by the KDHE staff and a public comment period, the Secretary issued his Denial Order on October 18, 2007. Less than 15 days later, Plaintiff appealed the Secretary's Denial Order. That appeal is now being actively litigated at the OAH. Because Plaintiff's Application has not languished at the KDHE, the fourth factor weighs in favor of primary jurisdiction.

Finally, the fifth factor this Court should consider is the type of relief Plaintiff requests. "The courts routinely evaluate claims for damages, but the doctrine of primary jurisdiction is more readily applied to claims for injunctive relief requiring scientific or

technical expertise." *Id.* at 998. This factor weighs in favor of primary jurisdiction because, as explained in Defendants' discussion of the first factor, the injunctive relief Plaintiff seeks requires evaluation of scientific matters that are within the specific expertise of the KDHE.

Because the balance of the doctrine's five factors weighs heavily in favor of primary jurisdiction, this Court should not exercise its jurisdiction over Plaintiff's claims. Therefore, Defendants' Motion to Dismiss should be granted.

IV. PLAINTIFF'S CLAIMS ARE NOT RIPE FOR ADJUDICATION BECAUSE THE SECRETARY HAS NOT YET ISSUED A FINAL ORDER WITH RESPECT TO PLAINTIFF'S APPLICATION.

Even if the Court finds that it has subject matter jurisdiction over this case and should exercise its jurisdiction, Plaintiff's claims should be dismissed because the Secretary has not yet issued a final order with respect to Plaintiff's Application.

"Ripeness is a justiciability doctrine designed to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Nat'l Park Hospitality Ass'n v. Dept. of Interior*, 538 U.S. 803, 807 (2003) (internal quotation omitted). "[T]he ripeness inquiry asks whether the challenged harm has been sufficiently realized at the time of trial. The ripeness issue . . . focuses not on whether the plaintiff was in fact harmed, but rather whether the harm asserted has matured sufficiently to warrant judicial intervention." *Morgan v. McCotter*, 365 F.3d 882, 890 (10th Cir. 2004) (quotation omitted).

In the instant case, Plaintiff's claims are not ripe because the Secretary has not issued a final order granting or denying Plaintiff's Application. The Secretary's initial October 18, 2007 Denial Order did not constitute a final order because the Denial Order

did not conclude KDHE's decisionmaking process. *See Public Service Company of Colorado v. United States Environmental Protection Agency*, 225 F.3d 1144, 1147 (10th Cir. 2000) ("In resolving whether a particular agency action is final . . . we look to whether the action's impact is direct and immediate, whether the action marks the consummation of the agency's decisionmaking process, and whether the action is one by which rights or obligations have been determined, or from which legal consequences will flow." (citation and alteration omitted.)).

The Secretary issued his Denial Order on October 18, 2007. Pursuant to K.S.A. 65-3008b(e), Plaintiff then had 15 days to appeal the Secretary's initial order, which Plaintiff accomplished by filing its Request For Hearing On Denial of Permit Application Pursuant to K.S.A. § 65-3008a(b) and its Request for Hearing on Denial of Permit Application Pursuant to K.S.A. § 65-3012(b)(1). Plaintiff's appeal is now pending at the OAH. Once the OAH proceeding is completed, the Secretary will issue a "final order," which, pursuant to K.S.A. 65-3008a(b), Plaintiff may then appeal to the Kansas Court of Appeals. After the Secretary issues a final order and only if that final order denies Plaintiff's Application, Plaintiff may bring its constitutional claims. Before then, Plaintiff's claims are, at best, anticipatory.

Because Plaintiff's constitutional claims are not yet ripe for adjudication, Defendants' Motion to Dismiss must be granted.

V. PLAINTIFF'S CLAIMS AGAINST DEFENDANTS GOVERNOR AND LT. GOVERNOR MUST BE DISMISSED BECAUSE NEITHER DEFENDANT HAS AUTHORITY TO GRANT OR DENY PLAINTIFF'S APPLICATION.

Even if the Court finds that it has subject matter jurisdiction over this case and should exercise its jurisdiction, Plaintiff's claims against Defendants Governor and Lt.

Governor must be dismissed because neither defendant has authority to grant or deny Plaintiff's Application.

Under Kansas law, the secretary of the KDHE has the exclusive authority to grant or deny Plaintiff's Application. Kansas Statute 65-3008 reads as follows:

65-3008. Approvals and permits for emission stationary sources.

(a) No person shall construct, own, operate, install, alter or use any air contaminant emission stationary source which, in accordance with rules and regulations, the secretary finds may cause or contribute to air pollution, unless an appropriate approval or permit has been issued for the source by the secretary under this act.

K.S.A. 65-3008 (emphasis added).

Kansas Statute 65-3003 makes clear that the "secretary" referred to in K.S.A. 65-3008 is the secretary of the KDHE. The statute reads as follows:

65-3003. Responsibility of secretary; administration.

The responsibility for air quality conservation and control of air pollution is hereby placed with the secretary of health and environment. The secretary shall administer this act through the division of environment.

K.S.A. 65-3003.

Plaintiff concedes that the Secretary has sole authority to grant or deny Plaintiff's Application: "The process for permitting new sources of regulated air pollutants located in Kansas is established and governed by K.S.A. §§ 65-3008, 65-3008a, 65-3008b and the regulations promulgated thereunder." (Complaint, ¶ 18.) None of these statutes or regulations gives the Governor or Lt. Governor any authority to grant or deny Plaintiff's Application.

As a matter of law, the Court cannot grant the relief Plaintiff seeks from the Governor and Lt. Governor. Therefore, even if the Court finds that it has subject matter jurisdiction over this case, because neither the Governor nor the Lt. Governor has the authority to grant or deny Plaintiff's Application, Defendants' Motion to Dismiss must be granted as to Defendants Governor and Lt. Governor.

CONCLUSION

For the reasons stated herein, Defendants respectfully request that the Court grant their Motion to Dismiss.

Respectfully Submitted,

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By:

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of December, 2008, I electronically filed the foregoing with the clerk of the court using the CM/ECF system, which sent notification of such filing to the following:

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