THE ENVIRONMENTAL LITIGATION BOND: AN ILLEGAL AND SHORTSIGHTED LIMITATION ON ENVIRONMENTAL LITIGATION IN UTAH

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I. INTRODUCTION

Utah Governor Gary R. Herbert signed House Bill 399, the Environmental Litigation Bond, into law on March 21, 2011.[1] The Environmental Litigation Bond requires parties seeking a preliminary injunction or administrative stay related to state environmental permitting decisions to post a bond covering the costs that are likely to be incurred by the defendant due to project delays resulting from litigation.[2]

Part II of this Note begins with a description of the political environment in which H.R. 399 was drafted and signed into law. Part III analyzes the ways in which the Environmental Litigation Bond fails to achieve its purported goals in two respects: First, although it was passed in direct response to project delays associated with litigation surrounding the Legacy Parkway project, the Environmental Litigation Bond, if applied retroactively, would not have applied to the Legacy Parkway litigation, and could not have provided a remedy. Second, the Environmental Litigation Bond has collateral, distorting, and potentially negative consequences for both citizens and environmental agencies in the state. Finally, Part III of this Note concludes with a hypothetical permitting scenario involving a pending coal mine expansion on federal land in Alton, Utah, to illustrate the negative consequences the Environmental Litigation Bond could impose on citizens and environmental groups challenging environmental permits in the state.

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[1] *Governor Herbert Signs Additional Legislation*, UTAH.GOV (Mar. 21, 2012), http://www.utah.gov/governor/news_media/article.html?article=4487.

[2] UTAH CODE ANN. § 78B-5-828(3) (West Supp. 2012).

II. THE DECADE LONG DEVELOPMENT OF THE ENVIRONMENTAL LITIGATION BOND IN THE UTAH LEGISLATURE, FROM LEGACY PARKWAY TO GOVERNOR HERBERT

H.R. 399 was sponsored by Michael E. Noel, a Republican representing District 73 in the State of Utah House of Representatives.[3] The political motivation to pass the bill can be traced to 2002,[4] when a similar bill, Senate Bill 183, was proposed in direct response to environmental litigation surrounding the controversial Legacy Parkway project.[5]

A. The Odyssey of Legacy Parkway: Catalyst of the Environmental Litigation Bond

On July 17, 1996, Utah Governor Michael O. Leavitt announced the Legacy Parkway project.[6] According to Governor Leavitt's press release for the project, the Legacy Parkway was proposed to extend from Ogden to Nephi, west of the Wasatch Front.[7] The Governor's press release identified a desire to work together with a coalition of concerned stakeholders to assuage environmental concerns associated with the project.[8] Despite this commitment, the press release also indicated a desire to "expedite an environmental study" on the segment of the project that was planned to cut through wetlands vital to migratory shorebird populations of the Great Salt Lake.[9]

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[3] H.R. 399, 59th Leg., Gen. Sess. (Utah 2011).

[4] Audio recording: Floor Debate, 59th Leg., Gen. Sess. (Utah Feb. 24, 2011) (House recording day 31, part 3, at 45:30–46:27) (statement of Rep. Michael E. Noel), *available at* http://le.utah.gov/asp/audio/index.asp?Sess=2011GS&Day=31&House=H [hereinafter Audio recording: Floor Debate] (citing delays associated with Legacy Parkway project as example of why it is necessary to "level the playing field" through H.R. 399) (select "Day 31 (2/24/11)" from the dropdown menu; then follow "MP3 format" hyperlink next to "Part 3" to download); *see also* S. 183, 54th Leg., Gen. Sess. (Utah 2002).

[5] *See*; Ember Herrick & Victoria Langdorf, *Passage of Bill Brings Legal Woes to Legacy Highway Opponents*, UNIVERSE (Mar. 7, 2002), *available at* http://universe.byu.edu/beta/2002/03/07/passage-of-bill-brings-legal-woes-to-legacy-highway-opponents/; Charles F. Trentelman, *Note to Legislature: First Amendment Covers Tree Huggers Too*, STANDARD-EXAMINER (Feb. 28, 2011), http://www.standard.net/topics/utah-legislature/2011/02/28/note-legislature-first-amendment-covers-tree-huggers-too. Senate Bill 183 was eventually passed by the Utah legislature, only to be vetoed by Governor Michael O. Leavitt on March 26, 2002. *See* S. 183 Substitute 54th Leg., Gen. Sess. (Utah 2002); *see also* discussion *infra* Part II.B.

[6] News Release, Office of the Governor (July 17, 1996) (on file with author).

[7] *See id.*

[8] *Id.*

[9] *See id.* at 2.

Almost presciently, the Governor's initial press release framed the issue that would ultimately result in multiple costly delays for the Legacy Parkway project. Indeed, the press release identified the competing interests of state officials to rush the project and those of citizens and local environmental groups concerned with the multifarious environmental consequences of highway construction, including impacts to critical wetland habitat near the Great Salt Lake and the transportation policy of the region. It is no surprise the tension created by the competing interests of these groups ultimately led to litigation that would delay the Legacy Parkway project.[10]

The delays associated with the Legacy Parkway project stemmed from deficiencies in the Environmental Impact Statement (EIS) prepared by the Utah Department of Transportation (UDOT) as required by the National Environmental Policy Act (NEPA), as well as the analysis of project alternatives under § 404 of the Clean Water Act (CWA).[11] Despite the idealistic and largely unenforceable language of NEPA's § 101,[12] the Supreme Court of the United States has interpreted § 102(2)(C) to require federal agencies to submit environmental impact statements for major federal actions that affect the environment.[13]

The requirements established by § 102(2)(C) are largely procedural in nature.[14] Accordingly, the Court has specified the standard of review for an EIS under NEPA is "to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary and capricious."[15]

The Legacy Parkway project fell under the scope of NEPA because it constituted a major federal action.[16] Much of its funding and permit approval was dependent on two federal agencies: the Federal Highway Administration (FHWA)

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[10] For a more thorough discussion of the delays associated with environmental concerns surrounding the Legacy Parkway project, see Robert W. Adler, *In Defense of NEPA: The Case of the Legacy Parkway*, 26 J. LAND RESOURCES & ENVTL. L. 297, 302–10 (2006).

[11] Utahns for Better Transp. v. U.S. Dep't of Transp., 305 F.3d 1152, 1192 (10th Cir. 2002) (vacating and remanding Legacy Parkway project permits due to violations under the CWA as well as several inadequacies identified in the EIS for the project).

[12] *See* 42 U.S.C. § 4331 (2006).

[13] *See* Aberdeen & Rockfish R.R. Co. v. Students Challenging Regulatory Agency Procedures (SCRAP), 409 U.S. 1207, 1210 (1972) ("Section 102(2)(C) . . . requires an impact statement 'in every recommendation or report on proposals for . . . major Federal actions significantly affecting the quality of the human environment . . . .'" (quoting 42 U.S.C. § 4332(2)(C) (internal quotation mark omitted))).

[14] Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 756 (2004) ("NEPA imposes only procedural requirements on federal agencies . . . .").

[15] Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc., 462 U.S. 87, 97–98 (1983).

[16] *See* 42 U.S.C. § 4332(C).

and the Army Corps of Engineers (CoE).[17] Accordingly, FHWA and CoE were designated as the NEPA "lead agencies" for the Legacy Parkway project.[18] As required by NEPA, an independent third party consultant chosen by the lead agencies from a list suggested by the project proponent prepared the EIS for the project.[19] The Draft EIS (DEIS) was issued in September of 1998, approximately two years after the Legacy Parkway project was announced by Governor Leavitt.[20] The Final EIS (FEIS) was subsequently issued nearly two years later, in June of 2000.[21] The delay between the issuance of the DEIS and the FEIS was largely due to deficiencies identified in public comments by concerned citizens, environmentalists, and state and federal agencies, including the Environmental Protection Agency (EPA), and the U.S. Fish and Wildlife Service.[22] In spite of these critical comments, FHWA issued a Record of Decision on October 31, 2000 permitting the preferred project alternative identified in the FEIS for the Legacy Parkway.[23]

On January 9, 2001, CoE issued a Record of Decision that included a CWA § 404 permit specifying the allowed wetlands impacts and mitigation requirements for the Legacy Parkway project.[24] Together, the permits issued by FHWA and CoE would have allowed the project to commence. However, these final agency actions also allowed a coalition of concerned citizens and environmentalists to appeal the decisions under § 704 of the Administrative Procedure Act.[25] These appeals ultimately culminated in a decision by the Tenth Circuit which vacated and remanded the permits because of CWA and NEPA violations.[26]

Some critics, including Utah Senators Orrin G. Hatch and Robert F. Bennett, blamed the Legacy Parkway project delays on the coalition of environmentalists and concerned citizens, claiming they were looking for avenues to block the project entirely.[27] In fact, Senator Hatch tried to push a rider through a federal

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[17] *See* Utahns for Better Transp. v. U.S. Dep't of Transp., 305 F.3d 1152, 1161 (10th Cir. 2002).

[18] *See id.*; 40 C.F.R. § 1508.16 (2012) (defining "lead agency").

[19] *See* Adler, *supra* note 10, at 303 n.26.

[20] FED. HIGHWAY ADMIN. ET AL., LEGACY PARKWAY DRAFT ENVIRONMENTAL IMPACT STATEMENT AND SECTION 4(F), 6(F) EVALUATION, tit. p. (1998).

[21] FED. HIGHWAY ADMIN. ET AL., LEGACY PARKWAY FINAL ENVIRONMENTAL IMPACT STATEMENT AND SECTION 4(F), 6(F) EVALUATION, tit. p. (2000).

[22] *See* Adler, *supra* note 10, at 302 n.22, 303.

[23] FED. HIGHWAY ADMIN., LEGACY PARKWAY SALT LAKE AND DAVIS COUNTIES, UTAH: RECORD OF DECISION 1, 36–37 (2000).

[24] U.S. Dep't of the Army, Permit No. 199650197, 1–5 (2001) (on file with the author).

[25] *See* 5 U.S.C. § 704 (2006).

[26] Utahns for Better Transp. v. U.S. Dep't of Transp., 305 F.3d 1152, 1192 (10th Cir. 2002).

[27] *See* Thomas Burr, *Hatch Moves to End Legacy Fight*, SALT LAKE TRIB., July 28, 2005, at B1.

transportation bill that would have foreclosed any court challenge of the Legacy Parkway project under NEPA.[28] Others blamed the project delays on the state and NEPA lead agencies for rushing through the EIS process too quickly in an effort to "expedite" the project.[29]

On September 21, 2005, after years of delay and court challenges, a settlement was finally reached between UDOT, FHWA, CoE, and the coalition of environmentalists and concerned citizens that allowed for the eventual construction of the Legacy Parkway.[30] The settlement prevented further litigation associated with the project and was approved by the Utah Legislature in a special legislative session on November 9, 2005.[31] The compromise incorporated several project alternatives sought by environmentalists, including limiting the speed limit on the parkway to fifty-five miles per hour, prohibitions against truck traffic and billboards, setting aside additional land for the Legacy Nature Preserve, and $2.5 million for an environmental study of light rail and bus transit in south Davis County.[32]

The project was completed on September 13, 2008.[33] It is estimated the delays associated with NEPA and CWA litigation resulted in costs to taxpayers of $100,000 per day,[34] adding approximately $234 million to the total cost of the Legacy Parkway.[35]

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[28] *Id.*

[29] *See* Adler, *supra* note 10, at 302–03; News Release, *supra* note 6.

[30] *Details of the Legacy Parkway Settlement Agreement*, DESERET NEWS, Oct. 29, 2005, at B07 [hereinafter *Legacy Parkway Agreement*].

[31] H.R. Con. Res. 201, 56th Leg., 2d Spec. Sess. (Utah 2005), *available at* http://le.utah.gov/~2005S2/htmdoc/hbillhtm/HCR201.htm.

[32] *See Legacy Parkway Agreement*, *supra* note 30; Jerry Spangler, *Legacy Deal Backed*, DESERET NEWS, Nov. 13, 2005, at A01.

[33] Joseph M. Dougherty, *"The Legacy Parkway is Done"—and it's Open to the Commuters*, DESERET NEWS, Sept. 14, 2008, at A1.

[34] Letter from Michael O. Leavitt, Governor, State of Utah, to L. Alma Mansell, President, Utah State Senate & Martin R. Stephens, Speaker, Utah House of Representatives (Mar. 26, 2002) [hereinafter Letter from Utah Governor], *available at* http://archive.li.suu.edu/docs/ms122/LG/ms122LG20020326.pdf (specifying that costs associated with the Legacy Parkway delays were "in excess of $100,000 a day").

[35] *See* Dougherty, *supra* note 33 (indicating that the original budget of the Legacy Parkway in 2001 was $451 million and was subsequently increased to $685 million after the settlement in 2006).

B. The Political Response to Legacy Parkway: Early Incarnations of the Environmental Litigation Bond

In response to the delays associated with the Legacy Parkway litigation, the Utah Legislature passed Senate Bill 183 on March 6, 2002.[36] Senate Bill 183 sought to hold litigants liable for costs associated with delaying state approved projects.[37] Governor Leavitt vetoed the bill on March 26, 2002, citing concerns in his veto letter that such a broad statute could restrain the average citizen's access to the courts.[38] Governor Leavitt concluded his veto letter with a strong rebuke of Senate Bill 183, stating, "It is fundamental to our democracy that citizens be able to take complaints to court. Government is not always right."[39]

In 2006, the Utah State Legislature passed House Bill 100, another attempt at creating the Environmental Litigation Bond.[40] In response, then-EPA Regional Administrator Robert Roberts wrote a letter to then-Governor Jon Huntsman identifying concerns associated with the implications of the bill on federally delegated environmental regulatory programs in Utah.[41] In his letter, Roberts cautioned, "[F]or a state to assume responsibility for federal environmental programs, the state must provide the same opportunity for judicial review as would be available under the federal program."[42] Governor Huntsman ultimately vetoed House Bill 100 on March 21, 2006.[43] Governor Huntsman's primary concern was that the bill was preempted by federal law and was, therefore, unconstitutional.[44]

In 2009, Representative Noel sponsored House Bill 379, which, like House Bill 100 before it, carried the title "Environmental Litigation Bond."[45] House Bill 379 ultimately failed in the Senate after being approved by the House.[46]

Undeterred, Representative Noel introduced House Bill 399, which was virtually identical to House Bill 379, during the 2011 general session.[47] The EPA,

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[36] S. 183, 54th Leg., Gen. Sess. (Utah 2002); *2002 General Session Bills Passed as of 1/23/2013 6:07:01 PM*, UTAH ST. LEGISLATURE, http://le.utah.gov/asp/passedbills/passedbills.asp?session=2002GS (last visited Jan. 23, 2013).

[37] Utah S. 183.

[38] Letter from Utah Governor, *supra* note 34.

[39] *Id.*

[40] H.R. 100, 56th Leg., Gen. Sess. (Utah 2006).

[41] Letter from Robert E. Roberts, Reg'l Adm'r, U.S. Envtl. Prot. Agency, Region 8, to Jon Huntsman, Governor, State of Utah (Mar. 2, 2006) (on file with author).

[42] *Id.*

[43] Letter from Jon Huntsman, Governor, State of Utah, to Greg J. Curtis, Speaker, Utah House of Representatives & John L. Valentine, President, Utah State Senate (Mar. 21, 2006), *available at* http://www.acluutah.org/hb100veto.pdf.

[44] *Id*.

[45] H.R. 379, 58th Leg., Gen. Sess. (Utah 2009).

[46] *See H.B. 379 Environmental Litigation Bond (Noel, M.)*, UTAH ST. LEGISLATURE, http://le.utah.gov/~2009/status/hbillsta/hb0379.htm (last visited Jan. 28, 2013).

once again, responded to the proposed legislation with a letter to the Governor.[48] In the letter, EPA Regional Administrator, James B. Martin, warned Governor Gary R. Herbert that "compromising citizens' access to the courts could bring into question the EPA's authorization for Utah's [delegated] environmental programs."[49]

In response to the letter from the EPA Regional Administrator, the House amended House Bill 399, removing environmental permitting decisions by the Utah Department of Environmental Quality (DEQ) from the list of environmental actions subject to bonding requirements under the bill.[50] This was done to assuage the concerns identified in the EPA Regional Administrator's letter, because the DEQ is the state agency delegated to execute EPA regulations in Utah.[51] Following this amendment, the scope of the Environmental Litigation Bond still included environmental permit decisions by three state agencies: the Utah Department of Natural Resources (DNR), UDOT, and the School State Institutional and Trust Lands Administration (SITLA).[52] The small but significant changes to the legislation—eliminating references to DEQ permits—define the final version of the bill that was passed by the Utah Legislature, signed by the Governor, and codified as statute.

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[47] *Compare* H.R. 379, 58th Leg., Gen. Sess. (Utah 2009), *with* H.R. 399, 59th Leg., Gen. Sess. (Utah 2011), *available at* http://le.utah.gov/~2011/bills/hbillint/hb0399.htm.

[48] Letter from James B. Martin, Reg'l Adm'r, U.S. Envtl. Prot. Agency, Region 8, to Gary R. Herbert, Governor, State of Utah (Feb. 24, 2011) [hereinafter Letter from James B. Martin] (on file with author).

[49] *Id.* The federal government can withdraw federally delegated environmental programs if states do not comply with environmental regulations. *See, e.g.*, 40 C.F.R. § 123.1 (2009) (specifying procedures the EPA will follow in withdrawing state programs and the requirements that state programs must meet under the CWA). For example, there is a specific regulatory provision under the state program requirements of the CWA specifying that delegated programs can be withdrawn if states do not provide an opportunity for judicial review of final state permits delegated under the program in state courts. 40 C.F.R. § 123.30. More specifically, the regulation stipulates that "[a] State will not meet this standard if it narrowly restricts the class of persons who may challenge the approval or denial of permits . . . ." *Id.* Such language clearly precludes limitations on judicial review with respect to delegated permitting programs under the CWA, providing the EPA authority to withdraw delegation of the program if necessary

[50] *See* H.R. 399, 59th Leg., Gen. Sess. (Utah 2011), *available at* http://le.utah.gov/ ~2011/ bills/hbillamd/hb0399.htm.

[51] *See* Letter from James B. Martin, *supra* note 48.

[52] *See* H.R. 399, 59th Leg., Gen. Sess. (Utah 2011), *available at* http://le.utah.gov/ ~2011/ bills/hbillamd/hb0399.htm.

III. ANALYSIS OF THE PRACTICAL, CONSTITUTIONAL, ADMINISTRATIVE, AND THEORETICAL SHORTCOMINGS OF THE ENVIRONMENTAL LITIGATION BOND

The Environmental Litigation Bond legislation fails to achieve its purported legislative goals in two primary respects. First, despite being passed in response to the Legacy Parkway, as a practical matter, the Environmental Litigation Bond would not have provided a remedy to address the lengthy delays associated with the project. Second, the Environmental Litigation Bond creates collateral, constitutional, administrative, and theoretical issues which could have distorting, and potentially negative consequences, both for citizens and for environmental agencies in the state.

A. The Environmental Litigation Bond Would Not Have Applied to the Legacy Parkway Litigation, and Instead Represents a Solution to a Nonexistent Problem

The common thread linking all of the previous incarnations of the Environmental Litigation Bond, from Senate Bill 183 in 2002 to House Bill 399 in 2011, is the delayed Legacy Parkway project. In fact, during the floor debate for House Bill 399, Representative Noel referred to the Legacy Parkway project as a prime example of the costly delay that can be incurred because of preliminary injunctions associated with environmental litigation.[53] In addition, Representative Noel reportedly referred to House Bill 399 as "the Legacy Highway bill," linking the legislative intent of the bill with the prevention of the costly delays that befell the Legacy Parkway project.[54]

Despite the fact that the Legacy Parkway delays ultimately precipitated the Environmental Litigation Bond, the Environmental Litigation Bond would not have prevented the delays of the Legacy Parkway project for three primary reasons: (1) The Legacy Parkway litigation challenged federal, not state, permits; (2) the Tenth Circuit in *Utahns for Better Transportation v. U.S. Department of Transportation*[55] set a bonding requirement of $50,000 on the plaintiffs as a condition of the preliminary injunction issued in the case; and (3) issuance of preliminary injunctions associated with projects requiring environmental permits from state agencies covered by the Environmental Litigation Bond are extremely rare in Utah.

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[53] Audio recording: Floor Debate, *supra* note 4 (statement of Rep. Noel).

[54] Editorial, *The Right to Object: Herbert Should Veto HB399*, SALT LAKE TRIB. (Mar. 18, 2011, 12:25 AM), http://www.sltrib.com/sltrib/opinion/51446030-82/state-bill-federal-citizens.html.csp.

[55] 305 F.3d 1152, 1162 (10th Cir. 2002).

1. The Legacy Parkway Litigation Involved Federal, Not State, Permits

The Legacy Parkway project required an EIS under NEPA due to federal funding and permitting requirements associated with the project.[56] Purported deficiencies associated with the EIS and permits issued by CoE and FHWA were the subject of the Legacy Parkway litigation.[57] These facts immediately put the issues involved in the Legacy Parkway litigation out of the scope of the Environmental Litigation Bond because the Environmental Litigation Bond applies only to plaintiffs seeking a temporary injunction challenging state environmental permits issued by DNR, UDOT, or SITLA.[58] Because petitioners in the Legacy Parkway litigation were seeking a preliminary injunction associated with appeal of federal permits,[59] their challenge falls beyond the reach of the Environmental Litigation Bond. Had it been in force at the time of the Legacy Parkway litigation, the Environmental Litigation Bond would not have remedied any delays associated with petitioners' appeal of federal agency permits, and would not have reduced or mitigated the delays associated with the project or the costs incurred therein.

2. A Bond Was Set by the Tenth Circuit in the Legacy Parkway Litigation Before the Preliminary Injunction Was Granted

As identified in *Utahns for Better Transportation*, the Tenth Circuit actually granted the defendant's motion requiring plaintiffs to post a $50,000 bond when proceeding with their emergency motion for an injunction pending appeal.[60] There is nothing in the record to suggest the plaintiffs failed to comply with the bond requirement. Furthermore, there is no indication the requirement materially hindered their lawsuit.[61] It is likely that the primary reason the bond requirement by the Tenth Circuit did not materially affect subsequent action by the plaintiffs was because the bond was set at $50,000, and was not an exorbitant amount tied to costs associated with project delays or some other metric for assessing damages.

Although the Legacy Parkway litigation would have been outside the scope of the Environmental Litigation Bond, it illustrates a simple but important point about

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[56] *See* discussion *supra* Part II.A.

[57] *Utahns for Better Transp.*, 305 F.3d at 1161.

[58] UTAH CODE ANN. § 78B-5-828(1)(b)(ii)(A)–(C) (West 2011).

[59] *Utahns for Better Transp.*, 305 F.3d at 1161.

[60] *Id.* at 1162.

[61] *See id.* (indicating that plaintiffs' request for an emergency motion for injunction pending appeal was granted along with defendants' motion requiring a $50,000 bond); *see also* Reply Memorandum in Support of Motion for Injunction Pending Appeal at 21–22, *Utahns for Better Transp.*, 305 F.3d 1152 (No. 1:01CV0007J; No. 1:01CV0014J) (arguing against a substantial bond requirement, but not indicating that it would materially limit plaintiffs' ability to continue litigation).

the futility of the statute. Judges are authorized to require plaintiffs to post bonds before issuing a preliminary injunction under Rule 65A(c) of the Utah Rules of Civil Procedure, without the Environmental Litigation Bond statute. [62] Furthermore, it is rare that a court would actually have to execute the plaintiff's bond, because one of the central elements plaintiffs must meet in order to obtain a preliminary injunction is a high likelihood of success on the merits.[63] This also rebuts the claim that the Environmental Litigation Bond prevents delays caused by "frivolous" challenges. Under Rule 65A(c), a frivolous challenge would never result in an injunction, and would likely be dismissed outright. Therefore, had the Environmental Litigation Bond actually been applicable to the Legacy Parkway litigation, the bond requirement set out under the statute would have already been met, rendering this aspect of the statute moot.[64]

In addition, the Environmental Litigation Bond fails because not only does it simply duplicate the requirements of the existing rule for preliminary injunctions under Rule 65A(c), it purports to apply to administrative appeals, which fall outside the scope of Rule 65A(c).[65] Rule 65A(c) imparts built-in flexibility that allows judges to administer bond requirements flexibly, under equitable principles that allow them to take into account all the circumstances of the case. [66] Conversely, the Environmental Litigation Bond requires judges to mechanically

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[62] UTAH R. CIV. P. 65A(c).

[63] The elements that a plaintiff must demonstrate in order to obtain a preliminary injunction in Utah are: (1) the plaintiff will suffer irreparable injury unless the injunction is issued; (2) the threatened injury outweighs whatever damage the proposed injunction may cause to the opposing party; (3) the injunction, if issued, would not be adverse to the public interest; and (4) there is a substantial likelihood the plaintiff will prevail on the merits of the underlying claim. *Id.* at 65A(e).

[64] As specified in the statute, the bond posted must be "in an amount the court . . . considers sufficient to compensate each defendant opposing the preliminary injunction . . . for damages that each defendant may sustain as a result of the preliminary injunction . . . ." The statute also indicates that "a court's . . . refusal to require the posting of a surety bond . . . as required by this section is subject to immediate appeal." UTAH CODE ANN. §§ 78B-5-828(3)(a), (6) (West 2011). Although the Tenth Circuit set a $50,000 bond, had the litigation been subject to the statute, it is possible defendants would have immediately appealed the $50,000 bond, seeking a higher bond amount.

[65] *See Utah Amendment Submission*, REGULATIONS.GOV, http://www.regulations.gov/#!documentDetail;D=OSM-2012-0011-0003 (locate Docket No. ID OSM-2012-0011-0003 then follow "View Document" hyperlink to download report) (last visited Mar. 11, 2013) [hereinafter *Utah Amendment Submission*]; *see also* discussion *infra* Part III.B.2.b.ii (discussing possible ambiguity of H.B. 399's applicability to the administrative review process).

[66] *See* UTAH R. CIV. P. 65A(c)(1) (allowing a judge to tailor a "giving of a security . . . in such sum and form as the court deems proper").

apply bond requirements based on damages the defendant might incur due to project delays caused by litigation.[67]

3. Preliminary Injunctions Associated with State Environmental Permits are Rarely Issued

The Environmental Litigation Bond is a solution for a problem that does not exist. One could argue that the Environmental Litigation Bond addresses the problem of project delays caused by allegedly frivolous preliminary injunctions issued in response to state environmental permits. However, this assumption is inaccurate. The administrative agencies issuing environmental permits that fall within the scope of the Environmental Litigation Bond rarely, if ever, face plaintiffs that seek, much less receive, a preliminary injunction or administrative stay.

In response to a Government Records Access and Management Act request by HEAL Utah, a local environmental non-profit organization, the Utah DNR Division of Oil, Gas, and Mining (DOGM) stated that during a five-year period ending on March 1, 2011, none of the plaintiffs challenging a final permit issued by the agency had successfully received an administrative stay or preliminary injunction.[68] This evidence suggests that preliminary injunctions in response to state environmental permits are rarely sought and rarely issued. These facts, combined with the determination that the Environmental Litigation Bond would not have applied to the facts of the Legacy Parkway litigation, make it unclear what statutory goals the Utah Legislature was trying to meet when it passed the Environmental Litigation Bond.

Although it took nine years, the passage of the Environmental Litigation Bond might still be perceived as a knee-jerk reaction to the delays associated with the Legacy Parkway litigation. Despite its connection to the Legacy Parkway, had the statute been in force at the time of the Legacy Parkway litigation, it would not have affected the outcome of the case. Further, contrary to the statements of the representatives who passed H.R. 399, the Environmental Litigation Bond is not designed to correct a phenomenon currently causing a drag on the judicial system, resulting in high costs to local businesses.[69] Instead, the Environmental Litigation Bond is more accurately characterized as unnecessary legislation that provides a solution to a problem that does not exist. It can therefore be considered, as some

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[67] *See* UTAH CODE ANN. § 78B-5-828(3)(a).

[68] Letter from Steven L. Schneider, Admin. Serv. & Policy Coordinator, Utah Dep't of Natural Res., Div. of Oil, Gas, and Mining, to Matt Pacenza, Policy Dir., HEAL Utah (Mar. 1, 2011) (on file with author).

[69] Audio recording: Floor Debate, *supra* note 4 (statement of Rep. Noel) (suggesting that stays are a common remedy in environmental litigation in the state, and that passage of House Bill 399 would "level the playing field," forcing environmental groups to "pick and choose" which projects to challenge within the state).

have suggested, an unprovoked attack on the local environmental community,[70] essentially serving as a warning shot across the bow of environmental groups in Utah as part of a broader effort to discourage environmental litigation in the state.

B. The Environmental Litigation Bond Has Collateral, Unintended, and Potentially Negative Consequences for Citizens and Administrative Agencies in Utah

In addition to its lack of application to the types of events that gave rise to its passage, the Environmental Litigation Bond also has serious negative collateral consequences for citizens and administrative agencies in Utah. These negative collateral consequences include multiple violations of both the United States and Utah Constitutions, distorting impacts on federally delegated environmental regulations under the Surface Mining Control and Reclamation Act of 1977 (SMCRA), and a chilling effect on environmental litigation.

1. The Environmental Litigation Bond Violates the U.S. and Utah Constitutions

Through the passage of the Environmental Litigation Bond, the Utah Legislature crafted unconstitutional legislation that should be challenged in court and invalidated. The Environmental Litigation Bond is unconstitutional for three reasons: (1) it prevents litigants from having their grievances heard in court, (2) it violates equal protection, and (3) it violates a separation of powers requirement in the Utah Constitution because it is a procedural measure that was not passed by a two-thirds vote of the legislature.

(a) The Environmental Litigation Bond Blocks Access to Courts

The Environmental Litigation Bond is unconstitutional under both the U.S. and Utah Constitutions because it blocks access to the courts, thereby violating the Petition Clause of the First Amendment and the Open Courts provision of the Utah Constitution.

(i) The Petition Clause

As written in the First Amendment of the U.S. Constitution, "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the

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[70] *See* Editorial, *The Right to Object*, SALT LAKE TRIB. (Mar. 18, 2011), http://www.sltrib.com/sltrib/opinion/51446030-82/state-bill-federal-citizens.html.csp; Editorial, *Misdirected Lob*, SALT LAKE TRIB. (Mar. 6, 2011), http://www.sltrib.com/sltrib/opinion/51331116-82/state-environmental-bill-noel.html.csp.

government for a redress of grievances."[71] Chief Justice Marshall first articulated the right to petition in *Marbury v. Madison*,[72] stating, "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."[73] For approximately two hundred years after Marshall's famous decision in *Marbury*, the Supreme Court did not recognize the Petition Clause as a fundamental right to access the American judicial system.[74] More recently, however, the right to petition has been recognized more broadly as applying to all civil causes of action,[75] and the Supreme Court has applied a strict scrutiny standard of review to government regulation of First Amendment rights, including the right to petition.[76] Under this standard, a law is invalid unless it serves a compelling state interest and is narrowly tailored to serve that interest.[77] In order to pass strict scrutiny, the state must identify an "'actual problem'" to be solved, and the subsequent denial of a First Amendment right must be "actually necessary to [achieve] the solution."[78]

By automatically limiting access to the court system to only those litigants with the means necessary to post a bond, the Environmental Litigation Bond abrogates the First Amendment right to petition. Assuming that prospective litigants have standing to sue, they have a right to access the courts under the Petition Clause. Therefore, the strict scrutiny test must be applied to determine whether the Environmental Litigation Bond is a permissible limitation of First Amendment rights. Even if it is assumed that project delays resulting from challenges to environmental permitting decisions are an actual problem, the

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[71] U.S. CONST. amend. I. *See generally* Fiske v. Kansas, 274 U.S. 380 (1927) (incorporating the First Amendment into the due process clause of the Fourteenth Amendment, and applying it to the states); Gitlow v. New York, 268 U.S. 652 (1925); Twining v. New Jersey, 211 U.S. 78 (1908).

[72] 5 U.S. 137 (1803).

[73] *Id.* at 163.

[74] Carol Rice Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 OHIO ST. L.J. 557, 562 (1999).

[75] Bill Johnson's Restaurants, Inc. v. N.L.R.B., 461 U.S. 731, 741 (1983) (applying the right to petition to a private suit by a single plaintiff outside of the antitrust context); California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972) ("The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms." (quoting E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 138 (1961) (internal quotation marks omitted))).

[76] *See* Williams v. Rhodes, 393 U.S. 23, 31 (1968) (specifying that the Supreme Court has consistently held that the strict scrutiny standard is applied to a state's ability to regulate First Amendment freedoms); *see also* NAACP v. Button, 371 U.S. 415, 438 (1963) ("[O]nly a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms.").

[77] Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2738 (2011).

[78] *Id.*

Environmental Litigation Bond does not pass muster under the strict scrutiny standard because it is not a necessary means to achieve the end targeted by the Utah legislature.

The presence of existing procedural tools available to the courts in the state illustrates that the Environmental Litigation Bond is not the *only* means available to achieve the end sought by the legislature. Under Rule 65A(c) of the Utah Rules of Civil Procedure, a judge has the power to require, as a condition of the issuance of an injunction, that the plaintiff be required to post a bond "as the court deems proper, unless it appears that none of the parties will incur or suffer costs . . . as a result of any wrongful order or injunction . . . ."[79] Because courts already have the power to require bonding before a preliminary injunction is issued, it is readily apparent that the Environmental Litigation Bond is duplicative of powers already possessed by the judiciary in Utah, and is therefore not the *only* necessary means to achieve the end targeted by the legislature.

The automatic nature of the Environmental Litigation Bond's requirements makes the legislation unconstitutional under the First Amendment. Conversely, non-mandatory bond requirements set by judges under Rule 65A(c) of the Utah Rules of Civil Procedure are constitutional because judges are allowed to weigh equitable considerations, such as the plaintiff's ability to pay.[80] Thus, the inflexibility of the Environmental Litigation Bond and its failure to allow judges to take factors such as the plaintiff's ability to pay, or the nature of the harm alleged into account places it in violation of the Petition Clause.

(ii) Open Courts

The Utah Constitution specifies that "[a]ll courts shall be open, and every person, for any injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay . . . ."[81] The Utah Supreme Court has read the Open Courts provision to mean "that an individual [cannot] be arbitrarily deprived of effective remedies designed to protect basic individual rights."[82] Accordingly, the court has developed a two-part test to determine when the Open Courts provision can be abrogated by legislation.[83] First, the Open Courts provision is satisfied if the legislation "provides an injured person an effective and reasonable alternative remedy" which gives "essentially comparable substantive protection."[84] Second, if no alternate remedy is provided, the legislation may be justified "only if there is a clear social or economic evil to be eliminated and the elimination of an

[79] UTAH R. CIV. P. 65A(c)(1).
[80] *Id.*
[81] UTAH CONST. art. I, § 11.
[82] Berry *ex rel.* Berry v. Beech Aircraft Corp., 717 P.2d 670, 675 (Utah 1985).
[83] *Id.* at 680.
[84] *Id.*

existing legal remedy is not an arbitrary or unreasonable means for achieving the objective."[85]

Because the Environmental Litigation Bond does not provide an alternate remedy to plaintiffs seeking a preliminary injunction who do not have sufficient financial resources to post a bond covering project delay costs, only the second part of the court's analytical framework applies. Therefore, it must be determined whether the Environmental Litigation Bond is justified by its elimination of an economic evil and that the removal of the plaintiff's ability to sue for a preliminary injunction is not an arbitrary means for achieving the objective. It could be argued that lawsuits seeking preliminary injunctions associated with environmental permitting decisions constitute a clear economic evil because they delay projects, causing economic loss to the defendant. However, most litigation involves great expense and the mere assertion of a legal right by an injured plaintiff surely cannot be considered a clear economic evil. Additionally, one could argue that a bond requirement, as mandated by the Environmental Litigation Bond, is unreasonable because judges already possess discretionary authority to require bonds on a case-by-case basis[86] and forcing judges to require bonds via statute is unreasonable.

(b) The Environmental Litigation Bond Violates the Equal Protection Doctrine

The Environmental Litigation Bond is unconstitutional because it violates the Equal Protection Clause. The Fourteenth Amendment states, "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."[87] The U.S. Supreme Court and the Utah Supreme Court have interpreted this to mean "all persons similarly situated should be treated alike."[88]

The Environmental Litigation Bond presents an equal protection problem under the Utah Constitution because it does not treat all similarly situated parties alike. For example, if an applicant for an environmental permit covered by the Environmental Litigation Bond challenged a permit condition applied by a state environmental agency as too stringent and sought a stay, none of the bonding requirements imposed by the statute would apply to the permittee. Conversely, if an environmental group challenged the same permit as being too lenient, it would be subject to the requirements of the statute. As the preceding example illustrates, the Environmental Litigation Bond creates an imbalanced system that favors

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[85] *Id.*

[86] UTAH R. CIV. P. 65A.

[87] U.S. CONST. amend. XIV, § 1; *see also* UTAH CONST. art. I, § 24 ("All laws of general nature shall have uniform operation.").

[88] City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985); *see also* ABCO Enters. v. Utah State Tax Comm'n, 211 P.3d 382, 387 (Utah 2009) (indicating that both the uniform operation of laws provision in the Utah Constitution and the Equal Protection Clause of the U.S. Constitution "embody the same general principle").

challenges by one side over the other. Supporters of the statute might contend that challenges by a permittee on their own permit cause no harm, while challenges by outside groups on an environmental permit have the potential to cause economic harm. However, this is a narrow and one-sided analysis. Indeed, a permit that is too lenient can cause significant harm to human health and the surrounding environment. In such a situation, the permittee is not required by the Environmental Litigation Bond to post a bond to redress any ensuing harm to human health or the environment, presenting a clear equal protection problem.

The Utah Supreme Court applies two different levels of scrutiny in equal protection cases.[89] In cases involving rights protected by the Open Courts provision of the Utah Constitution, the Utah Supreme Court applies a higher standard of review.[90] Because the Environmental Litigation Bond involves a right protected by the Open Courts provision, it must be analyzed under the following framework to determine if it: "(1) is reasonable, (2) has more than a speculative tendency to further the legislative objective and, in fact, actually and substantially furthers a valid legislative purpose, and (3) is reasonably necessary to further a legitimate legislative goal."[91]

To survive equal protection review under Utah's high scrutiny standard, statues must survive a three-pronged test, the Environmental Litigation Bond fails at least one of three prongs. First, it must be determined if the classification is reasonable. As specified by the Utah Supreme Court, "Broad deference is given to the legislature when assessing 'the reasonableness of its classifications and their relationship to legitimate legislative purposes."[92] Although broad deference is given to the legislature, one could convince the court that it was unreasonable for the legislature to treat concerned citizens or environmental groups differently from similarly situated permittees when challenging environmental permits issued by state agencies. Because the legislature is afforded broad deference at this step, however, it is likely that a court would determine that the Environmental Litigation Bond survives the first prong of the equal protection analytic applied by the Utah Supreme Court.

Next, it must be determined if the legislation has more than a speculative tendency to further the legislative objective and, in fact, actually and substantially furthers a valid legislative purpose. The Utah Supreme Court analyzes this prong

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[89] Tindley v. Salt Lake City Sch. Dist., 116 P.3d 295, 302 (Utah 2005) ("[W]e review statutory classifications . . . protected by the open courts clause under 'heightened scrutiny.' . . . However, when a statute does not create a suspect classification and implicates neither a fundamental right nor a right protected by the open courts clause, we will subject that statute to a lower level of scrutiny." (quoting Judy v. Drezga, 103 P.3d 135, 141 (Utah 2004) (internal quotation mark omitted))).

[90] *Id.*

[91] Lee v. Gaufin, 867 P.2d 572, 583 (Utah 1993).

[92] *ABCO Enters.*, 211 P.3d at 382 (quoting Blue Cross & Blue Shield of Utah v. State, 779 P.2d 634, 637 (Utah 1989)) (internal quotation marks omitted).

of the equal protection test to "determine whether the legislative objectives are legitimate."[93] More specifically, the court has indicated that it will "sustain a [legislative] classification if [it] can reasonably conceive of facts which would justify the distinctions."[94] Like the standard for the first prong, this affords the court significant latitude to give the legislature's decision deference. Accordingly, it is possible the court would find the difference in classification between a concerned citizen or environmental group challenging a permit and a permittee or permit applicant challenging a permit as legitimate, given the findings of the legislature.

Despite the possibility that the court might find that the Environmental Litigation Bond satisfies the first two prongs of the Utah Equal Protection standard, one could argue that it fails the third element. To meet the third element, the Environmental Litigation Bond must be reasonably necessary to further a legitimate legislative goal. Even if it is determined that the Environmental Litigation Bond furthers a legitimate legislative goal of reducing costs associated with project delays resulting from environmental litigation, it is not reasonably necessary to further such a goal because a judge in an environmental lawsuit can already require the plaintiffs in a lawsuit for a preliminary injunction to post a bond to mitigate costs incurred by the defendant resulting from a wrongful injunction.[95]

Therefore, the Environmental Litigation Bond violates the Equal Protection Clause under the Utah Constitution because it does not treat all persons similarly situated alike and is not reasonably necessary to further a legitimate legislative goal.

(c) The Environmental Litigation Bond Violates the Separation of Powers Provisions of the Utah Constitution

The Utah Constitution specifies that "[t]he legislature may amend the Rules of Procedure and Evidence adopted by the Supreme Court upon a vote of two-thirds of all members of both houses of the Legislature."[96] The Utah Supreme Court has explained that the separation of powers argument under this section turns on whether the legislation is determined to be substantive or procedural.[97] The Utah Supreme Court has specified that substantive law "creates, defines and regulates the rights and duties of the parties . . . which may give rise to a cause for action."[98] Conversely, procedural law "prescribes the practice and procedure of the legal

[93] State v. Robinson, 254 P.3d 183, 189 (Utah 2011).
[94] *Id.* (quoting *Blue Cross & Blue Shield of Utah*, 779 P.2d at 641).
[95] UTAH R. CIV. P. 65A.
[96] UTAH CONST. art. VIII, § 4.
[97] State v. Drej, 233 P.3d 476, 484 (Utah 2010).
[98] *Id.* (quoting Petty v. Clark, 192 P.2d 589, 593 (Utah 1948)) (alteration in original).

machinery by which the substantive law is determined or made effective."[99] The court classifies purely procedural statutes as those providing a "different mode or form of procedure for enforcing substantive rights."[100]

The Environmental Litigation Bond should be classified as procedural because it prescribes the specific procedures for plaintiffs pursuing preliminary injunctions in environmental lawsuits by requiring them to post a bond before proceeding. Accordingly, it provides a different mode of procedure for enforcing a substantive right—the right to obtain a preliminary injunction to sustain the status quo until the case has been decided. In addition, the procedural nature of the Environmental Litigation Bond is also apparent based on its location within the Utah Code in the Procedure and Evidence Chapter of the Judicial Code.[101] Therefore, the Environmental Litigation Bond is squarely in the procedural realm and is subject to the provision of the Utah Constitution mandating that rules of procedure must be passed by a two-thirds vote of both houses of the legislature.[102]

According to legislative voting records, the Environmental Litigation Bond did not pass by a two-thirds majority in both houses. The bill passed the House with a vote of sixty-two yeas and thirteen nays, satisfying the two-thirds requirement.[103] However, the bill passed the Senate with a vote of eighteen yeas, six nays, and five absent.[104] Therefore, out of the twenty-nine possible votes in the senate, the bill received only eighteen yeas, or just over 62% of the senate vote, falling short of the 66% required for a constitutional two-thirds majority. Thus, the Environmental Litigation Bond does not meet the requirements of the Utah Constitution.

A pair of recent cases decided at the trial level in the Third and Fourth Judicial Districts of Utah found legislation affecting procedural and evidentiary rules in direct violation of the separation of powers provision of the Utah Constitution.[105] Both cases addressed legislation preventing discovery of medical records under the "care review privilege."[106] This privilege was established by the Utah Legislature in 1994 in response to a decision by the Utah Supreme Court in 1993 that held that

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[99] *Id.* (quoting *Petty*, 192 P.2d at 593–94).

[100] *Id.* (quoting Brown & Root Indus. Serv. v. Indus. Comm'n, 947 P.2d 671, 675 (Utah 1997).

[101] UTAH CODE ANN. § 78B-5-828 (West Supp. 2012).

[102] UTAH CONST. art. VIII, § 4.

[103] H.R. 399, 59th Leg., Gen. Sess. (Utah 2011), *available at* http://le.utah.gov/~2011/status/hbillsta/hb0399.htm (last visited Mar. 08, 2013).

[104] *Id.*; *Compare* Utah Senate Rule 4-7-102(b) (2012) ("[A]mendments to the Utah Constitution, amendments to court rules, and certain motions specified in these rules require a constitutional two-thirds vote—20 votes—to pass . . . ."), *with* Utah Senate Rule 4-7-102(d) (2012) ("[C]ertain motions require a two-thirds vote—two-thirds of those present—to pass . . . .").

[105] Allred v. Saunders, No. 100103761, slip op. (4th Dist. Utah Mar. 19, 2012); Jones v. Univ. of Utah Health Sci. Ctr., No. 100419242, slip op. (3d Dist. Utah Jan. 13, 2012).

[106] *Allred*, No. 100103761, at *2–3; *Jones* No. 100419242, at *2–3.

care review materials were discoverable, but were not admissible in court.[107] Both cases addressed the constitutionality of the care review privilege created by the Utah Legislature, finding it to be unconstitutional under the separation of powers provision of the Utah Constitution.[108] As specified by Judge Andrew H. Stone in the Third Judicial District Court, "the primary constitutional power to adopt 'rules of procedure and evidence' rests with the Supreme Court."[109] Further, "when the Legislature desires to override the Supreme Court and create or expand a rule of evidence [or procedure] it must do so by amending the Utah Rules of Evidence [or Procedure]."[110] Like the recent care review privilege cases, the Environmental Litigation Bond must also be found unconstitutional in direct violation of the plain language of Article VIII, Section 4 of the Utah Constitution because it was not passed by the requisite two-thirds vote of both houses.

The Environmental Litigation Bond does not pass constitutional muster under either the U.S. Constitution or the Utah Constitution for three reasons: First, the Environmental Litigation Bond blocks access to the courts, violating the Petition Clause of the First Amendment and the Open Courts provision of the Utah Constitution. Second, the Environmental Litigation Bond violates equal protection because it is not reasonably necessary to further a legitimate legislative goal. Finally, the Environmental Litigation Bond violates separation of powers under the Utah Constitution because it is a procedural statute that did not receive at least a two-thirds majority in both houses of the legislature. Therefore, should the Environmental Litigation Bond be challenged in court, there is a high likelihood the individual(s) challenging the legislation would succeed on the merits.

2. The Environmental Litigation Bond Has Distorting Impacts on Federal Environmental Laws Delegated to the State of Utah Under SMCRA

The Environmental Litigation Bond elicits several distorting impacts on federal administrative regulations delegated to the State of Utah DNR under SMCRA, including: (1) violation of DOGM's delegated authority to enforce SMCRA; (2) violation of the citizen suit provisions identified under SMCRA; and (3) confusion associated with the scope of H.B. 399's applicability to the administrative review process of final agency decisions.

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[107] *Jones*, No. 100419242, at *3.
[108] *Allred*, No. 100103761, at *11–12; *Jones*, No. 100419242, at *8.
[109] *Jones*, No. 100419242, at *5.
[110] *Id.* at *6.

(a) A Brief History of SMCRA and the Federally Delegated Coal Program in Utah

SMCRA was passed by the United States Congress in 1977 to establish a uniform national policy regulating present, future, and abandoned surface coal mining operations.[111] The passage of SMCRA resulted in the establishment of the Office of Surface Mining (OSM) as an executive agency within the Department of the Interior.[112] Similar to other environmental and natural resource statutes passed by Congress in the 1970s, SMCRA incorporated a framework encouraging concurrent regulation. Under this framework, individual states could obtain the responsibility to permit and enforce regulatory requirements under SMCRA, provided they followed specific guidelines set out under the statute.[113]

As specified in the statute, if a state with delegated authority enacts statutes or regulations of coal surface mining that are inconsistent with SMCRA, the inconsistent statutes or regulations will be preempted and superseded by the federal program.[114] In addition, SMCRA indicates that, in the event that a state has a delegated program for surface coal mining and fails to enforce any part of its program, the Secretary of the Department of the Interior can implement federal enforcement of SMCRA.[115] SMCRA also specifically prohibits state laws or regulations from superseding any section of the federal statute, and requires OSM to identify inconsistencies with the federal statute.[116]

The State of Utah has delegated authority under SMCRA to permit and enforce regulations for surface coal mining operations and reclamation activities in the state (Utah Coal Program). DOGM, a division within the Utah DNR is assigned to enforce SMCRA in Utah.[117] DOGM received delegation for the Utah Coal Program under SMCRA in 1981 and in 1987 it entered into a cooperative agreement for permitting, inspection, and enforcement of SMCRA on federal lands in the state.[118] Utah's coal mining statute, the Utah Coal Mining and Reclamation Act (Utah Coal Act), is codified at Utah Code Title 40, Chapter 10;[119] the rules governing coal mine permitting and enforcement under SMCRA are specified in rule R645 of the Utah Administrative Code.[120] Together, these statutory provisions

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[111] 30 U.S.C. § 1201 (2006).

[112] *Id.* § 1211.

[113] *Id.* § 1253 (outlining seven criteria that must be met for an individual state to receive program delegation under SMCRA).

[114] *Id.* § 1254(g).

[115] *Id.* § 1254(b).

[116] *Id.* § 1255.

[117] *About Us*, UTAH DEP'T OF NATURAL RES., DIV. OF OIL, GAS AND MINING, http://linux1.ogm.utah.gov/WebStuff/wwwroot/aboutus.html (last visited Mar. 8, 2013).

[118] *Id.*

[119] UTAH CODE ANN. § 40-10-1 (West 2012).

[120] UTAH ADMIN. CODE r. 645-100-403 (2012).

dictate the regulatory requirements for proposed, existing, and abandoned coal mines in Utah.

(b) Identification of the Distorting Outcomes Under SMCRA Caused by the Environmental Litigation Bond

Passage of the Environmental Litigation Bond has impacted administrative regulation of surface coal mining operations in Utah by DOGM in three primary respects. First, the Environmental Litigation Bond violates DOGM's delegated authority to enforce SMCRA in Utah. Second, it violates the citizen suit provisions within SMCRA. Finally, the Environmental Litigation Bond creates confusion regarding the scope of its applicability in the administrative review process for plaintiffs seeking preliminary injunctions against projects permitted by DOGM under its delegated SMCRA authority.

(i) The Environmental Litigation Bond Violates DOGM's Delegated Authority to Enforce SMCRA

The Environmental Litigation Bond violates the Utah Coal Program delegation under SMCRA overseen by OSM. As previously indicated,[121] SMCRA § 504(g) specifies that state laws interfering with the purposes and requirements of SMCRA shall be preempted and suspended by OSM.[122] Section 520 outlines the citizen suit provisions required under SMCRA, which default to the Federal Rules of Civil Procedure with respect to issuance of temporary restraining orders or preliminary injunctions.[123] In addition, SMCRA regulations identify "changes in State law and regulations different from those contained in the approved State program" as program amendments.[124]

Utah's Coal Program agreement with OSM specifies that program amendments must be promulgated according to the procedures identified in 30 C.F.R. section 732.[125] By requiring, instead of merely permitting, the issuance of a bond when a temporary injunction is sought in response to a permit issued under SMCRA, the Environmental Litigation Bond alters the procedural requirements identified in § 520 of SMCRA.[126] Therefore, it reflects a change in a state law that affects the implementation, administration, or enforcement of the previously approved Utah State Coal Program under SMCRA.[127] Accordingly, the state is

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[121] *See supra* text accompanying notes 114–16.

[122] 30 U.S.C. § 1254(g) (2006).

[123] *Id.* § 1270(d) (stating that the court *may* require a bond when temporary restraining orders or preliminary injunctions are sought).

[124] 30 C.F.R. § 732.17(b)(3) (2012).

[125] *Id.* § 944.30, art. XIV (2012).

[126] 30 U.S.C. § 1270(d).

[127] 30 C.F.R. § 732.17(e)(2).

required to obtain an amendment for its Coal Program from OSM before it can legally enforce the provisions of the Environmental Litigation Bond.

Concurrent with the passage of the Environmental Litigation Bond, DOGM did not seek an amendment to the Utah Coal Program, putting its SMCRA delegation in jeopardy.[128] Upon discovery of the existence of the Environmental Litigation Bond, and its potential impact on judicial review of permits issued by the state under SMCRA, OSM requested a written amendment of the state's SMCRA program from DOGM.[129] In addition, OSM instructed DOGM not to enforce the Environmental Litigation Bond as it applied to the Utah Coal Program until the coal program was successfully amended.[130] In response to OSM's request, DOGM submitted a description of amendments to its Coal Program.[131] This triggered an OSM review of the proposed amendment under 30 C.F.R. section 732.17(h), and led to a notice of proposed rulemaking published by OSM in the Federal Register.[132] The comment period for the notice of proposed rulemaking for Utah's proposed amendments to its Coal Program concluded on July 12, 2012, and resulted in two comments, which were filed in the administrative docket for the

[128] Stephen Bloch, an attorney for the Southern Utah Wilderness Alliance, initially identified the SMCRA conflict precipitated by House Bill 399, and sent a letter explaining his position to OSM. In correspondence that followed between OSM and DOGM, OSM determined that the Environmental Litigation Bond reflected a change in state law that created a new procedural requirement pursuant to judicial review under SMCRA § 520. Letter from Stephen Bloch, Attorney, S. Utah Wilderness Alliance, to Al Klein, Chief, W. Region, Office of Surface Mining (May 16, 2011) (on file with author); Letter from Kenneth Walker, Chief, Denver Field Div., Office of Surface Mining, to Stephen Bloch, Attorney, S. Utah Wilderness Alliance, cc John Baza, Dir., Utah Div. of Oil Gas & Mining (Aug. 8, 2011) (on file with author); Letter from John Baza, Dir., Utah Div. of Oil Gas & Mining, to Kenneth Walker, Chief, Denver Field Div., Office of Surface Mining (Oct. 31, 2011) (on file with author); Letter from Kenneth Walker, Chief, Denver Field Div., Office of Surface Mining, to John Baza, Dir., Utah Div. of Oil Gas & Mining (Feb. 24, 2012) (on file with author); Letter from John Baza, Dir., Utah Div. of Oil Gas & Mining, to Kenneth Walker, Chief, Denver Field Div., Office of Surface Mining (Apr. 18, 2012) (on file with author).

[129] *See* Letter from Kenneth Walker, Chief, Denver Field Div., Office of Surface Mining, to John Baza, Dir., Utah Div. of Oil Gas & Mining, *supra* note 128 (requesting that within 60 days DOGM submit an amendment or a description of amendments proposed by DOGM in addition to a timetable for enactment).

[130] *Id.*

[131] *See* Letter from John Baza, Dir., Utah Div. of Oil Gas & Mining, to Kenneth Walker, Chief, Denver Field Div., Office of Surface Mining, *supra* note 128.

[132] Utah Regulatory Program, 77 Fed. Reg. 34,892 (proposed June 12, 2012) (to be codified at 30 C.F.R. pt. 944).

proposed rulemaking.[133] OSM is currently reviewing the comments and a final ruling on Utah's proposed amendments to its coal program is pending.

If OSM accepts the state's proposed amendments to the Utah Coal Program, the Environmental Litigation Bond will apply to the issuance of preliminary injunctions in environmental litigation involving SMCRA permits issued by DOGM within the state.[134] However, if OSM rejects the state's proposed amendments to the Utah Coal Program, the statute will not apply to preliminary injunctions sought in cases litigating DOGM permits under SMCRA. Should this occur, it is likely the Utah Legislature would have to amend the Environmental Litigation Bond to specifically exclude DOGM from the statute.[135]

DOGM's failure to recognize the impacts the Environmental Litigation Bond would have on its delegated authority to enforce SMCRA in the state and its failure to amend the Utah Coal Program when the legislation was initially passed has distorted the applicability of the Environmental Litigation Bond with respect to potential challenges of DOGM permits issued under SMCRA in Utah. Although the distorting impacts will be resolved when OSM reaches a final ruling on OSM's proposed amendments to the Utah Coal Program, DOGM's failure to amend its program concurrently with the passage of the Environmental Litigation Bond creates uncertainty in the near term for groups seeking preliminary injunctions through administrative or judicial review of DOGM permits issued under SMCRA in Utah.

(ii) The Environmental Litigation Bond Violates Citizen Suit Provisions Under SMCRA

Citizen suit provisions are outlined under SMCRA § 520.[136] Citizen suit provisions are quite common in environmental statutes, and became a key

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[133] *Utah State Regulatory Program*, REGULATION.GOV, http://www.regulations.gov/#!docketBrowser;dct=PS;rpp=25;po=0;D=OSM-2012-0011 (locate "Comment on FR Doc # 2012-14312" (Doc. No. OSM-2012-0011) then follow hyperlink to download report) (last visited Mar. 11, 2013) [hereinafter *Utah State Regulatory Program*].

[134] Utah Regulatory Program, 77 Fed. Reg. at 34,893.

[135] Although different from a procedural standpoint, an amendment to the Environmental Litigation Bond following OSM rejection of the state's proposed amendments to the Coal Program would be substantively similar to earlier amendments to HR 399 before it was passed. As previously discussed, after receiving a letter from EPA Regional Administrator James B. Martin identifying inconsistencies with federal law and programs delegated to Utah by the EPA, HR 399 was amended to remove references to environmental permitting decisions by the DEQ from the bill. *See supra* text accompanying note 48–52.

[136] 30 U.S.C. § 1270 (2006).

component in many environmental laws passed after 1970.[137] Citizen suit provisions serve two primary purposes within environmental statutes. First, they serve as an effective auxiliary enforcement mechanism, allowing concerned citizens redress for environmental harms.[138] This is an important function, because limited government resources minimize the amount of enforcement activities that an agency can sustain. Second, citizen suit provisions also address the concern that government agencies tasked with implementation and enforcement of environmental statutes may fail to perform the nondiscretionary duties assigned to them by law.[139] Thus, citizen suit provisions can act as a check on government agencies, ensuring they perform their statutory duties.

The legislative history of SMCRA indicates that Congress intended to encourage public participation throughout the permitting and enforcement process.[140] Furthermore, the legislative history of the statute also suggests that Congress intended the SMCRA citizen suit provisions serve both as an auxiliary enforcement function as well as a means to ensure that federal and state agencies carried out their nondiscretionary duties under the statute.[141] Congress specifically identified the importance of citizen participation to aid enforcement of SMCRA, stating, "The State or Department of Interior can employ only so many inspectors."[142] Congress also stated that citizen participation under the statute "will help insure that the decisions and actions of the regulatory authority are grounded upon complete and full information."[143] Furthermore, Congress recognized the importance of citizen checks on regulatory and permitting decisions by the federal and state agencies responsible for implementing SMCRA, stating that "providing citizens access to administrative appellate procedures and the courts is a practical and legitimate method of assuring the regulatory authority's compliance with the requirements of the act."[144]

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[137] *See*, *e.g.*, Toxic Substances Control Act § 18, 15 U.S.C. § 2619; Endangered Species Act § 11(g), 16 U.S.C. § 1540; Resource Conservation and Recovery Act § 7002, 42 U.S.C. § 6972; Clean Air Act § 304, 42 U.S.C. § 7604; Comprehensive Environmental Response, Compensation, and Liability Act § 310, 42 U.S.C. § 9659.

[138] ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 1028 (3d ed. 2004).

[139] *Id.*

[140] H.R. REP. NO. 95-108, at 88–90 (1977) ("The success or failure of a national coal surface mining regulation program will depend, to a significant extent, on the role played by citizens in the regulatory process.").

[141] *Id.* at 89–90 (identifying citizen participation provisions within SMCRA, including regulatory programs, the permit process, enforcement, and citizen suits against regulatory authorities who fail to perform nondiscretionary acts under the statute).

[142] *Id.* at 88.

[143] *Id.* at 89.

[144] *Id.*

Finally, the legislative history of SMCRA also indicates that Congress was aware of the risk that citizen suit provisions might encourage frivolous lawsuits under the statute.[145] However, Congress tempered these risks by stating that "judges are quite capable of dismissing frivolous suits early in the proceedings and further protection is available as the judge may require the filing of a bond or equivalent security of a temporary restraining order or preliminary injunction is granted."[146] The fact that Congress identified bonding as a potential remedy to frivolous lawsuits but refused to require it plainly illustrates Congress' trust in the American judicial system as well as the importance of the citizen suit provisions under SMCRA.

Both the legislative history of SMCRA, as well as the plain language of the statute, make it clear that the citizen suit oversight and suit provisions were designed and implemented to aid enforcement and to ensure that regulatory authorities performed the nondiscretionary functions required by the statute. Thus, the statutory text containing the SMCRA citizen suit provisions and the legislative history supporting them are in direct contravention to the provisions of the Environmental Litigation Bond.

(iii) The Scope of the Environmental Litigation Bond's Applicability to the Administrative Review Procedures Associated with Permits Issued by DOGM Under SMCRA Is Unclear

Appeals of permit applications and final permitting decisions issued by regulatory authorities are governed by SMCRA § 513 and § 514, respectively.[147] Specifically, SMCRA § 513(b) specifies that any person who has an interest that is, or may be, adversely affected by a proposed project under the statute may file written objections to an initial or revised permit application within thirty days of the permit's publication.[148] SMCRA § 513(b) also indicates that written objections be transmitted to the applicant and made available to the public.[149] Finally, § 513(b) has provisions for an informal conference, held in the area of the proposed mining operation, as long as a request is made within a reasonable time of the objections to the permit application.[150]

Similarly, under § 514, final agency decisions can be appealed within thirty days after the applicant is notified of the agency's final decision.[151] If a final decision is properly appealed, the statute requires the regulatory authority to hold a

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[145] *Id.* at 91.
[146] *Id.*
[147] 30 U.S.C. §§ 1263–64 (2006).
[148] *Id.* § 1263(b).
[149] *Id.*
[150] *Id.*
[151] *Id.* § 1264(c).

hearing within thirty days of the request and notify all interested parties.[152] The statute also stipulates that if the regulatory authority is the state (not the federal government), the hearing shall be "of record," "adjudicatory in nature," and cannot involve the regulatory authorities who initially granted the permit that is subject to appeal.[153]

The Utah Coal Act, which governs issuance and appeal of SMCRA permits in Utah, contains similar provisions allowing administrative appeal of permit applications and final permits issued by DOGM.[154] Section 40-10-13(2)(a) of the Utah Coal Act includes provisions for challenging permit applications.[155] Under this section, any person with an interest that is, or may be, affected has the right to file written objections to the initial permit application for surface coal mining operations within thirty days of the publication of notice by the agency.[156] These objections are then immediately sent to DOGM as well as the applicant and are made public.[157] In addition, interested parties can request an informal conference regarding the permit application.[158] If a conference is requested, it must be held in the locality of the proposed coal mining operation and be advertised by DOGM in a local newspaper of general circulation at least two weeks prior to the date of the conference.[159] In addition, the statute requires that an electronic or stenographic record of the conference proceeding shall be made unless waived by all parties.[160]

Section 40-10-14(3) of the Utah Coal Act governs the administrative procedures associated with permit applications that have achieved final approval by DOGM.[161] Similar to the provisions of section 40-10-13(2)(a), upon final approval of a permit application, anyone who has an interest that may be adversely affected by the decision can request a hearing regarding the reasons for DOGM's final determination.[162] Upon request for a hearing, the Board of Oil, Gas, and Mining has the authority to grant temporary relief if three elements are met: (1) all parties have been notified and have had the opportunity to be heard on a request

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[152] *Id.*

[153] *Id.*

[154] In 2012, the Utah legislature passed S. 11, which provided new administrative procedures for DEQ to apply when issuing or denying environmental permits. *See* UTAH CODE ANN. § 19-1-301 (West 2012). However, these new administrative procedures only apply to DEQ, and therefore, do not reach permits issued by DOGM, which are still governed by the Utah Administrative Procedures Act. *See id.* §§ 40-10-30(1), -6.7 (West 2011).

[155] UTAH CODE ANN. § 40-10-13(2)(a) (West 2011).

[156] *Id.*

[157] *Id.*

[158] *Id.* § 40-10-13(2)(b).

[159] *Id.*

[160] *Id.*

[161] *See id.* § 40-10-14(3).

[162] *Id.*

for temporary relief, (2) the party requesting relief shows there is a substantial likelihood they will prevail on the merits in a final determination of the proceedings, and (3) the relief granted will not adversely impact public health or safety or cause environmental harm.[163]

The temporary relief standard contained within the Utah Coal Act is substantively identical to the preliminary injunction standard applied by the judiciary in Utah under Rule 65A of the Utah Rules of Civil Procedure, as well as the standard articulated under the Utah Administrative Procedures Act.[164] Section 40-10-14(5) of the Utah Coal Act enumerates the powers possessed by the Board of Oil, Gas, and Mining during hearings, which include: administering oaths, subpoenaing witnesses or written materials, compelling attendance of witnesses or production of materials, and the ability to take evidence.[165]

Finally, the Utah Coal Act also includes provisions for appeal of board decisions, specifying that they shall go directly to the Utah Supreme Court, and are governed by the Utah Administrative Procedures Act.[166] The Utah Coal Act specifies the Utah Supreme Court shall not apply de novo review to board decisions.[167]

The scope of the Environmental Litigation Bond's applicability to administrative appeals of DOGM permitting decisions under SMCRA is not entirely clear. This is because the plain language of the Environmental Litigation Bond indicates that it is applicable to "environmental actions" which are defined as "a cause of action that: . . . seeks *judicial* review of a final agency action to issue a permit."[168] A literal interpretation of this statutory definition leads one to conclude the bonding requirements of Environmental Litigation Bond apply only to judicial review of DOGM permit decisions under SMCRA, and do not apply to administrative review of DOGM permits by the Board of Oil, Gas, and Mining.[169]

In spite of the plain language of the statute, DOGM has interpreted the Environmental Litigation Bond to apply to temporary relief granted during administrative review of permits issued under SMCRA in addition to judicial review.[170] Specifically, in their proposed amendments to the Utah Coal Program, DOGM stated:

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[163] *Id.* § 40-10-14(4).

[164] *Compare id.*, *with* UTAH R. CIV. P. 65A(c), *and* UTAH CODE ANN. § 63G-4-404 (West 2011).

[165] UTAH CODE ANN. § 40-10-14(5).

[166] *Id.* §§ 40-10-14(6)(a), -30.

[167] *Id.* § 40-10-30(3).

[168] *Id.* § 78B-5-828(1)(b) (emphasis added).

[169] This is the position argued by SUWA and the Sierra Club in their comment to the proposed OSM rulemaking action that would amend the Utah Coal Program, allowing for the implementation of H.B. 399. *See Utah State Regulatory Program*, *supra* note 133.

[170] *See Utah Amendment Submission*, *supra* note 65.

> Although appeals of the Board's administrative adjudications of coal mining permit decisions are taken directly to the Utah Supreme Court, the issuance of a stay must first be considered by the administrative agency. Accordingly any stay sought for a judicial appeal of a permit decision under the Utah Coal Act is subject to the H.B. 399 changes.[171]

In its analysis, DOGM essentially imputes the bonding requirements of the Environmental Litigation Bond to the administrative review procedures of the Board of Oil, Gas, and Mining. This is an important distinction because it compels the board to require bonds when plaintiffs request temporary relief in causes of action involving permits issued under SMCRA.

Thus, the broad language of the Environmental Litigation Bond adds an additional layer of uncertainty regarding the scope of the statute's applicability during the administrative review process. This uncertainty has distorting effects on the traditional procedure of administrative review of DOGM permits issued under SMCRA, which have historically been governed by the Utah Administrative Procedures Act and the Utah Coal Act. Even if OSM accepts DOGM's amendments to the Utah Coal Program, there remains a possibility that plaintiffs forced to issue a bond in order to obtain a preliminary injunction during administrative review proceedings by the Board of Oil, Gas, and Mining could challenge the Board's requirement based on the plain language of the statute, which seems to confine the applicability of the Environmental Litigation Bond solely to instances of judicial review.

(c) Investigation of the Distorting Outcomes Under SMCRA Caused by the Environmental Litigation Bond: A Hypothetical Example

The Coal Hollow Mine provides an ideal hypothetical case study involving a highly controversial project requiring a permit issued by DOGM under its delegated SMCRA authority. This case study offers a glimpse into how the Environmental Litigation Bond could potentially impact the administrative process associated with the appeal of a permit issued by DOGM under its SMCRA authority. Following a challenged DOGM permit for coal operations on federal land through the administrative appeal process illuminates the distorting effects the Environmental Litigation Bond might inflict on citizens and environmental groups (collectively, "concerned citizens").

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[171] *Id.* (citation omitted).

(i) The Coal Hollow Mine: Background and Hypothetical Facts

The Coal Hollow Mine is located in Alton, Utah, near Bryce Canyon National Park, and is located entirely on private property.[172] The mine is currently seeking to expand its strip mining operations onto adjacent federal land, and is in the early stages of seeking a federal lease to permit additional coal development. The expansion proposal is currently in the initial stages of permitting, and coal leases on federal land within the targeted expansion area have not yet been granted by the Bureau of Land Management.[173]

For the purposes of the discussion that follows, it will be assumed that the coal leases adjacent to the mine have been granted by the Bureau of Land Management and purchased by the Coal Hollow Mine. It will also be assumed that the mine has also received the necessary state permits from DOGM under SMCRA to expand their existing mine on to the adjacent federal land permitted for coal development. Finally, it will be assumed that OSM has issued a final rulemaking accepting DOGM's proposed amendments to the Utah Coal Program, incorporating the requirements of the Environmental Litigation Bond. [174] Accordingly, the sole focus of this discussion is the final permit for surface coal mining operations issued by DOGM under its delegated SMCRA authority, and subsequent appeal of the permit by a coalition of concerned citizens.

(ii) Challenging the Application of the Environmental Litigation Bond at the Administrative Review Stage

The first opportunity to challenge the Coal Hollow Mine expansion project would be at the permit application stage.[175] It is highly likely that environmental groups or citizens claiming actual or potential injuries associated with the project would object to the permit application and would request an informal conference with the agency, as allowed under the Utah Coal Act.[176] However, at this stage of the process, there has not yet been a final decision rendered by the agency. Thus, a preliminary injunction is not yet available as a possible remedy for the environmental groups and citizens objecting to the mine expansion, and the

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[172] Brandon Loomis, *Feds Plan to Expand Strip Coal Mine near Bryce Canyon*, SALT LAKE TRIB. (Nov. 5, 2011), http://www.sltrib.com/sltrib/politics/52849564-90/mine-coal-blm-bryce.html.csp.

[173] *Id.* (stating that BLM has not yet made a final decision to lease coal on federal land adjacent to the Coal Hollow mine).

[174] *See Utah Amendment Submission*, *supra* note 65 (identifying DOGM's proposed amendments to the Utah Coal Program incorporating the provisions of H.R. 399).

[175] UTAH CODE ANN. § 40-10-13(2)(a) (West 2011) (identifying opportunity to comment on the proposed application for coal mining operations and request an informal conference with the agency).

[176] *Id.*

provisions of the Environmental Litigation Bond do not apply because the concerned citizens do not yet have the opportunity to appeal.[177]

Assuming DOGM approves the application for coal mining operations on the federal lands adjacent to Coal Hollow's existing operations, the concerned citizens are able to challenge the permit under section 40-10-14 of the Utah Coal Act.[178] As previously specified,[179] the initial stage of permit appeals under the Utah Coal Act takes place in a hearing before the Board of Oil, Gas, and Mining.[180] The board has authority under the statute to grant temporary relief, as long as three elements are satisfied: (1) all parties have been notified and have had the opportunity to be heard on a request for temporary relief, (2) the party requesting relief shows there is a substantial likelihood they will prevail on the merits in a final determination of the proceedings, and (3) the relief granted will not adversely impact public health or safety or cause environmental harm.[181]

Based on the irreversible harm that surface coal mining can exact on natural landscapes, it is conceivable that environmental groups and concerned citizens might seek temporary relief, enjoining mining operations until their concerns have been fully litigated through the administrative appeal process identified in the Utah Coal Act. Although it is not part of the standard for obtaining temporary relief identified in section 40-10-14(4) of the Act, DOGM has indicated that the provisions of the Environmental Litigation Bond apply to the board's decision to grant temporary relief under the statute.[182]

As previously stated, it is an open question whether or not DOGM's interpretation that the Environmental Litigation Bond applies to administrative review of DOGM permits by the Board of Oil, Gas, and Mining is correct, or if the plain language of the statute dictates that it only applies to judicial review of environmental actions.[183]

According to DOGM's stated position, if the concerned citizens sought temporary relief under section 40-10-14(4) of the Utah Coal Act, the Board of Oil, Gas, and Mining would require that a bond be posted as specified by the Environmental Litigation Bond before granting temporary relief under the statute. Because of the magnitude of a project like the Coal Hollow Mine, and the capital investments associated with the mine's expansion efforts, it is conceivable that costs associated with the bond requirement required by the board could be quite high. This could potentially foreclose the citizens' opportunity to obtain temporary

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[177] *See* 5 U.S.C. § 704 (2006).

[178] UTAH CODE ANN. § 40-10-14.

[179] *See supra* text accompanying notes 161–65.

[180] UTAH CODE ANN. § 40-10-14(3).

[181] *Id.* § 40-10-14(4).

[182] *Utah Amendment Submission*, *supra* note 65 (specifying that H.B. 399 applies to temporary relief granted by the board, however, this position has not yet been finalized and is pending a final rulemaking decision by OSM).

[183] *See supra* text accompanying notes 169–70.

relief due to the prohibitive costs of posting a bond to cover the expenses of possible project delays caused by the injunction.

Due to the fact that it is an open question whether or not the plain language of the statute applies to decisions regarding temporary relief made by the board,[184] it is possible that the concerned citizens seeking temporary relief might appeal the board's bond requirement under the Environmental Litigation Bond to the Utah Supreme Court.[185] In the event of an appeal of the board's bonding requirement, it is unclear whether the Coal Hollow expansion would be allowed to continue in the intervening period before the Supreme Court's ruling on the bonding question brought by the concerned citizens. Accordingly, this result is an example of the potential distorting effects that application of the Environmental Litigation Bond might have on permitting decisions made by DOGM under SMCRA.

Altering the hypothetical reveals additional potentially distorting impacts the Environmental Litigation Bond might inflict on permitting decisions made by DOGM under SMCRA. For example, assume instead that DOGM issued a surface mining permit for the Coal Hollow Mine expansion but subsequently revoked it after finding the mine might contaminate local water supplies. In this instance, it is possible the permittee could obtain a stay of the permit revocation under section 40-10-14(3) of the Utah Coal Act before the Board of Oil, Gas, and Mining. As previously specified, the scope of the Environmental Litigation Bond's applicability to administrative appeals of DOGM permitting decisions under SMCRA is not entirely clear.[186] However, assuming that, as suggested by DOGM, the statute does apply to administrative appeals, it should not apply in this instance because the text of the statute specifies that it applies only to "judicial review of a final agency action to *issue* a permit . . . ."[187] Thus, the plain language of the statute makes it clear that it does not apply in instances where a permittee might seek an administrative stay of a permit that has been revoked by a state environmental agency. Even if the Environmental Litigation Bond was found to apply in such a situation, there are no mechanisms for setting a bond to pay for environmental damage to local water supplies, and it is unclear who the permittee would pay in the event that the stay was overturned.[188]

These examples illustrate the distorting impacts the Environmental Litigation Bond can have within the administrative context, which would likely lead to unpredictable results necessitating additional litigation.[189] Altering the facts of the hypothetical to place the permittee in the position of plaintiff illuminates the one-sided nature of the Environmental Litigation Bond, corroborating claims that it was

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[184] *Id.*

[185] UTAH CODE ANN. § 40-10-14(6)(a).

[186] *See supra* text accompanying notes 169–70.

[187] *See* UTAH CODE ANN. § 78B-5-828(1)(b)(ii) (emphasis added).

[188] *See id.* § 78B-5-828(3) to (4).

[189] In fact, the Environmental Litigation Bond has mechanisms in place that encourage additional litigation. *See* UTAH CODE ANN. § 78B-5-828(6).

enacted as a conscious effort by the Utah legislature to tip the scales in favor of permittees at the expense of concerned citizens and environmental groups seeking preliminary injunctions associated with environmental permits issued by the state.

(iii) Challenging OSM's Interpretation of SMCRA Under *Chevron*

In addition to challenging the application of the Environmental Litigation Bond to a request for temporary relief before the Board of Oil, Gas, and Mining, the coalition of concerned citizens could also challenge OSM's interpretation of SMCRA, allowing DOGM to incorporate the provisions of the Environmental Litigation Bond into the Utah Coal Program through rulemaking.[190] The concerned citizens would likely base their challenge on the administrative law doctrine of *Chevron* deference.[191] The concerned citizens' challenge of OSM's final rulemaking decision allowing DOGM to amend the Utah Coal Program to achieve consistency with the requirements of the Environmental Litigation Bond would fall under step one of the *Chevron* analytical framework. This is because the plain language of SMCRA's citizen suit provisions does not allow for mandatory imposition of a bond when a preliminary injunction is sought by plaintiffs challenging a permit issued under the statute.[192]

Chevron applies to the issue presented by the concerned citizens because OSM's decision to accept DOGM's amendment to the Utah Coal Program to achieve consistency with the provisions of the Environmental Litigation Bond inherently involves agency interpretation of SMCRA—OSM's organic act. Accordingly, the issue of statutory interpretation presented by petitioners passes *Chevron* step zero analysis, because through its rulemaking decision, OSM has interpreted SMCRA, which is a statute that the agency has been tasked with implementing by Congress.[193] Because the issue survives *Chevron* step zero analysis, it is necessary to analyze the concerned citizens' contention that OSM's rulemaking decision fails at step one of the *Chevron* analytical framework.

As articulated by the Supreme Court in *Chevron*, step one analysis identifies "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[194] In addition, the Court specified that "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are

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[190] *See Utah Amendment Submission*, *supra* note 65.

[191] The principle of *Chevron* deference was established by the Supreme Court in the seminal administrative law case, *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

[192] *See* discussion *supra* Part III.B.2.ii.

[193] Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 191–92 (2006).

[194] *Chevron*, 467 U.S. at 842–43.

contrary to clear congressional intent."[195] To determine congressional intent and whether or not the statute has directly and unambiguously spoken to the question at issue, the Supreme Court stated that "traditional tools of statutory construction" should be applied.[196] The traditional tools of statutory construction used to analyze the plain intent of a particular statute include analysis of the statutory text[197] as well as the legislative intent behind the statute.[198]

The concerned citizens have strong arguments that OSM incorrectly applied the statutory requirements under SMCRA when it accepted DOGM's proposed amendments to the Utah Coal program through final rulemaking. First, the plain language of SMCRA § 520 indicates that Congress intended the citizen suit provisions of SMCRA to open the courthouse doors broadly to perspective litigants with causes of action under the statute.[199] The text of SMCRA § 520 indicates that "any person" with an interest that is or may be adversely affected can bring a civil action against the government or the state regulatory authority to compel compliance.[200] The statutory text of § 520 also clearly states that "[t]he court may, if a temporary restraining order or preliminary injunction is sought require filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure."[201] This provision of SMCRA is a clear indication that Congress did not intend to constrain the ability of citizens to bring suits to enforce the statute by requiring that a bond be set whenever a preliminary injunction was granted by the court. Instead, Congress specifically left it to the judiciary to determine when a bond should be required. Therefore, the plain language of SMCRA § 520 supports the concerned citizens' contention that OSM's final rulemaking decision allowing DOGM to amend the Utah Coal Act in accordance with the requirements of the Environmental Litigation Bond is incompatible with the citizen suit provisions of SMCRA, and should not be enforced.

In addition to the plain language of the statute, the legislative history associated with the passage of SMCRA in 1977 also works against OSM's final rulemaking decision. The legislative history of SMCRA provides a clear indication that Congress sought to encourage citizen involvement in the enforcement and oversight of the statute.[202] In addition, the legislative history of the statute directly addresses the section of the citizen suit provision that affords courts discretion to

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[195] *Id.* at 843 n.9.

[196] *Id.*

[197] Timex V.I., Inc. v. United States, 157 F.3d 879, 882 (Fed. Cir. 1998) (stating that under *Chevron* step one analysis, "[t]he first and foremost 'tool' to be used is the statute's text, giving it its plain meaning").

[198] *Id.* (stating that if the statute's text does not address the precise question at issue, the court must look to the legislative history to determine Congress' intent).

[199] 30 U.S.C. § 1270(a) (2006).

[200] *Id.*

[201] *Id.* § 1270(d).

[202] *See* discussion *supra* Part III.B.2.ii.

set a bond when granting temporary relief. In a Senate report regarding SMCRA, the committee stated, "It is the Committee's intent that the courts will *carefully* consider the circumstances and probable outcome of the litigation in deciding whether to require a bond."[203] This statement is an explicit indication that Congress intended the determination of the bonding requirement to be a careful consideration of the judge.

This is in direct opposition to the provisions of the Environmental Litigation Bond, which automatically *require* plaintiffs to post a bond before a preliminary injunction can be granted. Thus, the intent of SMCRA § 520 cannot be reconciled with the automatic bonding requirements of the Environmental Litigation Bond. Accordingly, plaintiffs' contention that OSM's interpretation of the statute was inconsistent with the legislative intent of SMCRA set out in the citizen suit provisions of the statute is supported by the statements of Congress during the legislative processes preceding the passage of SMCRA into law.

In sum, both the plain language and the legislative intent of SMCRA § 520 cut against OSM's final rulemaking decision to incorporate DOGM's amendments to the Utah Coal Program to accord with the requirements of the Environmental Litigation Bond. Therefore, it is likely that the concerned citizens' challenge of OSM's interpretation of SMCRA under *Chevron* would be successful, and OSM's final rulemaking incorporating the Environmental Litigation Bond into the Utah Coal Program would fail step one of the court's *Chevron* analysis.

3. The Environmental Litigation Bond Has a Chilling Effect on Environmental Litigation in Utah

In addition to its distorting impacts on administrative review of DOGM permitting decisions under SMCRA, the Environmental Litigation Bond has a broader effect of chilling environmental litigation in Utah. It can be argued that the Environmental Litigation Bond represents the legislative analog of a Strategic Lawsuit Against Public Participation (SLAPP suit),[204] and should, therefore, be repealed for public policy reasons.

SLAPP suits can occur in a variety of different contexts; however, they can be broadly described as "civil lawsuits . . . aimed at preventing citizens from exercising their political rights or punishing those who have done so."[205] The most common type of SLAPP suit occurs when an environmental group (SLAPP-defendant) petitions the government (or permitting authority) to enjoin a project, and is subsequently sued by the developer (permittee or SLAPP-plaintiff).[206] The

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[203] S. REP. NO. 95-108, at 88 (1977) (emphasis added).

[204] Penelope Canan & George W. Pring, *Strategic Lawsuits Against Public Policy Participation*, 35 SOC. PROBS. 506, 506 (1988).

[205] *Id.*

[206] Thomas A. Waldman, *SLAPP Suits: Weaknesses in First Amendment Law and in the Courts' Responses to Frivolous Litigation*, 39 UCLA L. REV. 979, 984 (1992).

most common causes of action under which SLAPP suits are filed include defamation, interference with business advantage, and nuisance.[207] SLAPP suits are characterized by complaints seeking damage awards that are large in magnitude, especially when compared to the resources of the SLAPP-defendant.[208]

The underlying goal of a SLAPP suit is to cause the SLAPP-defendant, against whom the SLAPP suit is leveled, to incur significant legal costs, ultimately draining their resources and jeopardizing the underlying lawsuit against the SLAPP-plaintiff.[209] Quantitative analyses of SLAPP suits have found that the vast majority of them are frivolous, with one study determining that 83% of SLAPP-defendants obtain favorable verdicts.[210] Despite their low success rate, the overarching goal of a SLAPP suit is not to prevail on the merits. Rather, SLAPP-plaintiffs seek to dissuade SLAPP-defendants from pursuing their underlying legal claims, effectively chilling their ability to continue to litigate.[211] In response to the negative impacts caused by SLAPP suits, multiple states have enacted legislation discouraging this frivolous and harmful practice.[212] Similarly, some courts have instituted public interest modifications to bonding requirements.[213]

The Environmental Litigation Bond shares many common features with SLAPP suits, and leads to a similar end result—effectively chilling environmental litigation in Utah. Like the plaintiff in a SLAPP suit, the Utah legislature targeted a specific group of individuals, seeking to limit or preclude their efforts to challenge certain projects.[214] The floor debates involving H.R. 399 substantiate this contention. For example, the bill's sponsor, Representative Noel, stated H.R. 399 would force those seeking a preliminary injunction for an environmental project in Utah to "have a skin in the game," suggesting the financial impositions of such a bond would dissuade plaintiffs from seeking temporary relief, forcing them to "pick and choose which fights they want to engage in, and which stays they want to go for."[215] Representative Noel also stated that passage of the Environmental

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[207] Canan & Pring, *supra* note 204, at 508.

[208] Waldman, *supra* note 206, at 984.

[209] *Id.*

[210] Canan & Pring, *supra* note 204, at 514.

[211] Waldman, *supra* note 206, at 989–90.

[212] Approximately 28 states, including Utah, have enacted some form of anti-SLAPP legislation. *State Anti-SLAPP Laws*, PUB. PARTICIPATION PROJECT, http://www.anti-slapp.org/your-states-free-speech-protection/ (last visited Jan. 27, 2013).

[213] *See* Reina Calderon, *Bond Requirements Under Federal Rule of Civil Procedure 65(c): An Emerging Equitable Exemption for Public Interest Litigants*, 13 B.C. ENVTL. AFF. L. REV. 125, 146–60 (1986) (identifying instances when mandatory bond requirements have not been followed or have been nominalized for public interest plaintiffs in state and federal courts).

[214] *See* discussion *supra* Part III.B.1.b.

[215] Audio recording: Floor Debate, *supra* note 4 (beginning at 23:30).

Litigation Bond represented "an opportunity to push back . . . and try to level the playing field" against environmentalists.[216]

The statements made by Representative Noel parallel the fundamental goals of SLAPP suits, which seek to impose additional costs on SLAPP-defendants in an effort to persuade them to drop their underlying claims against SLAPP-plaintiffs. Arguing against the bill, Representative King stated that H.R. 399 unnecessarily and unfairly "discourage[s] . . . environmental litigation."[217] Similarly, in their proposed amendments to the Utah Coal Program, drafted in response to the Environmental Litigation Bond, DOGM aptly stated the ultimate effect of the statute "may be to discourage citizens from seeking stays pending review and may therefore discourage appeals."[218] Taken together, these inferences show the substantive effects of the Environmental Litigation Bond in Utah are analogous to a broadly applied SLAPP suit—or perhaps more appropriately identified as "SLAPP legislation"—resulting in a concerted effort to chill litigation involving environmental permits in the state.

Like a SLAPP suit, the Environmental Litigation Bond also has the potential to result in waste of judicial resources. This is apparent from the plain language of the statute, which specifies that bond amounts set by the court for environmental actions are immediately appealable to the Utah Supreme Court.[219] Thus, it is plausible that, in accordance with the statute, a judge ruling on a preliminary injunction might set the bond at a level the defendant believes is not high enough, and, therefore, is inconsistent with the provisions of the statute. In this situation, the Environmental Litigation Bond allows the defendant to immediately appeal the bond amount, causing a strain on judicial economy in the state.[220] In fact, during floor debates on H.R. 399, Representative King, speaking against the bill, identified the inefficiencies associated with this provision of the Environmental Litigation Bond, stating that the provision is "inefficient, wasteful, . . . and generally frowned on and discouraged" under the law.[221] This provision of the statute is also incongruent with the recent amendments to the Utah Rules of Civil Procedure, which were updated to increase the efficiency of the state's legal system.[222]

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[216] *Id.*

[217] *Id.* (statement of Rep. King).

[218] *See Utah Amendment Submission*, *supra* note 65.

[219] UTAH CODE ANN. § 78B-5-828(6) (West 2011).

[220] *Id.*

[221] Audio recording: Floor Debate, *supra* note 4 (statement of Rep. King).

[222] PROPOSED RULES GOVERNING CIVIL DISCOVERY, THE UTAH SUPREME COURT ADVISORY COMM. ON THE RULES OF CIVIL PROCEDURE (2010), *available at* http://www.utcourts.gov/committees/civproc/Proposed_Rules_Governing_Discovery_Clean.pdf (stating that the goal of the amendments to the Utah Rules of Civil Procedure were to move quickly and efficiently to the merits of the case).

In sum, the Environmental Litigation Bond reflects a legislative analog of a SLAPP suit. This "SLAPP legislation" has the broad effect of chilling specific types of environmental litigation in Utah, and preys on the asymmetric financial resources of plaintiffs compared to defendants in most environmental litigation. In the same way that SLAPP suits have been vilified as frivolous and have resulted in legislation preventing them for public policy purposes, the Environmental Litigation Bond should be viewed in a similar light and invalidated.

IV. CONCLUSION

In conclusion, the Environmental Litigation Bond, passed by the Utah legislature in the 2011 general session, fails in two primary respects.

First, although the statute was passed in direct response to project delays associated with litigation surrounding the Legacy Parkway project, because the Legacy Parkway litigation involved federal, not state permits, the Legacy Parkway litigation fell entirely outside the scope of the Environmental Litigation Bond and therefore would not have applied to the facts of the Legacy Parkway litigation, and could not have provided a remedy. Further, the Environmental Litigation Bond represents a solution to a problem that does not exist because the type of litigation it seeks to restrict is extremely rare in Utah.

Second, the Environmental Litigation Bond has collateral, distorting, and potentially negative collateral consequences, both for citizens and for environmental agencies in the state. Its negative collateral consequences include multiple violations of both the U.S. and Utah Constitutions including: access to courts, equal protection, and separation of powers concerns. The Environmental Litigation Bond also has distorting impacts on federally delegated environmental regulations under the SMCRA in the state, violating DOGM's federal delegation to enforce SMCRA in Utah, in addition to violating the citizen suit provisions identified in SMCRA § 520.

As identified by the hypothetical Coal Hollow Mine permit appeal example, the Environmental Litigation Bond also results in potentially distorting outcomes during the administrative review of permits for surface coal mining operations in Utah. Finally, the Environmental Litigation Bond has a broad chilling effect on environmental litigation in Utah, and can be classified as SLAPP-legislation, since it essentially disincentivizes concerned citizens from seeking preliminary injunctions against projects requiring state environmental permits.

For these reasons, the Environmental Litigation Bond should be challenged and invalidated in court. This would restore civility, order, and predictability to causes of action seeking temporary relief against projects requiring state environmental permits in Utah.