

HB 399 – The Environmental Litigation Bond Bill

AN UNNECESSARY, UNCONSTITUTIONAL AND POTENTIALLY DISASTROUS BILL FOR UTAH

What is it?

HB 399 is a bid to discourage Utah citizens and organizations from challenging state permitting decisions in environmental actions in court. It requires plaintiffs to post a bond before requesting an administrative stay or an injunction while challenging a permit issued by the Utah Department of Transportation, Department of Natural Resources and the School or Institutional Trust Lands Administration.

Here's how it works:

- Any plaintiff who requests an injunction or administrative stay in an environmental action must post a bond with the court or agency "in an amount the court or agency considers sufficient to compensate each defendant... for damages that each defendant may sustain as a result of the preliminary injunction or administrative stay." These losses could easily add up to millions of dollars.
- If the plaintiff wins the stay – but then ultimately loses their challenge to the permitting decision on the merits – it would then forfeit the bond.

Is it easy now for a citizen or group to stop a project via a stay or injunction?

No. It's very difficult. Under current state law, here is what a plaintiff has to prove to get a judge or administrative board to stay a permitting decision:

- That the plaintiff will be irreparably harmed without the stay/injunction
- That the harm suffered outweighs the harm to the other party
- That the plaintiff's position is not adverse to the public interest
- That the plaintiff is likely to prevail in the case on the merit of their arguments

Those are strict criteria, designed precisely to keep out frivolous legal challenges.

Are Utah groups and citizens regularly winning stays and injunctions to block state permitting decisions, clogging the courts and harming local businesses?

No. Our research suggests this rarely happens. Many high-profile cases that the proponents of this bill refer to have been waged in federal courts, not state courts, and so this bill wouldn't apply. Others don't involve seeking a stay or injunctions. The environmental groups we've surveyed say they almost never use this remedy – and even more rarely have been successful doing so. We have had conversations with attorneys who represent the state agencies named in the bill – the DNR, UDOT and SITLA – and they have also indicated this rarely happens.

If you rarely seek such stays or injunctions, why are you fighting so hard against this bill?

Because it's important that citizens retain the right to go to court or appear before an agency board and stay a project that could harm Utah's public health and the environment – even if we rarely do so. It's a remedy that could become critical down the road if we believe the state had erred in granting a company a permit to expand a nuclear waste dump, or open up a new coal mine or construct a private fishing lodge along a popular stretch of river, for example. Businesses, municipalities, unions, homeowner associations and environmental organizations have the right to challenge decisions by state agencies to approve new permits when those decisions threaten their diverse interests – regardless of how rich they are.

If the bill is passed, could it have serious unintended consequences?

Yes. It creates conflicts with several federal laws. For example, the bill is inconsistent with provisions of the Surface Mining Control Reclamation Act, and thus these changes would jeopardize the state's coal program. Industry will face tremendous uncertainty about whose rules will govern. The last thing that state wants in these troubled economic times is to drive industry to other states which don't have uncertainty about whether state or federal authorities are in charge.

In addition, the term "environmental action" is sweepingly broad and may effectively rope in any and all challenges by private companies, individuals, special service districts, etc. to permitting decisions by the DNR, DOT and SITLA.

Is the bill unconstitutional?

Yes. In 2009, the Office of Legislative Research and General Counsel studied this bill. They issued a detailed memo examining its constitutionality and concluded that constitutional conflicts would likely arise if the legislature and Governor approve this measure. Those include:

- Violations of the Fourteenth Amendment's equal protection clause and similar Utah constitutional clauses which require that all citizens be treated similarly by laws. The OLRGC suggested that because this bill would discourage environmental actions, it would treat citizens and groups looking to bring those actions differently than a citizen or group bringing a different legal claim, thereby violating both federal and state equal protection statutes.
- Violations of the "open courts" provisions, again in both federal and state law. The First Amendment, of course, prohibits laws that abridge the rights of citizens to "petition the government for a redress of grievances." Even more explicitly, the Utah constitution says "All courts should be open...and every person shall have remedy by due course of law, which shall be administered without denial or unnecessary delay." This law, which could absolutely prevent a plaintiff from filing an action if they couldn't afford a bond, may very well violate these clauses, according to the memo.