In Defense of NEPA:
The Case of the Legacy Parkway

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I. INTRODUCTION

On November 14, 2005, Utah Governor Jon Huntsman, Jr. signed legislation approving a landmark settlement to the longstanding controversy over the Legacy Parkway. The Legacy Parkway is the first, fourteen-mile segment of a much longer proposed road extending along Utah's Wasatch Front from Brigham City (north of Salt Lake City) to Lehi (south of Provo).¹ The U.S. Court of Appeals for the Tenth Circuit had vacated and remanded permits issued for the project by the Federal Highway Administration (FHWA) and the U.S. Army Corps of Engineers (ACE) in 2002,² based on deficiencies in the Environmental Impact Statement (EIS) prepared under the National Environmental Policy Act of 1969 (NEPA),³ and failure to fully comply with section 404 of the Clean Water Act.⁴

The Utah Department of Transportation (UDOT) and residents of Davis County, Utah have argued in favor the proposed road to help reduce existing and projected traffic congestion in the narrow corridor that separates the Wasatch Mountains from Great Salt Lake in southern Davis County and northern Salt Lake

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¹ Plans for some roadway to the west of Interstate 15 have been on the books for many years. See Wasatch Front Regional Council, Western Transportation Corridor (WTC) Major Investment Study (MIS) (Jan. 1998) (detailing history of road planning in the corridor). However, Governor Michael O. Leavitt formally announced plans for the Legacy Parkway segment of this road at a press conference on July 17, 1996. Utah Governor's Office, News Release, Governor announces Legacy Project (July 17, 1996), available at https://www.utah.gov/governorwalker/newsre1s1996.html.

² Utahns for Better Transp. v. U.S. Dep’t of Transp., 305 F.3d 1152 (10th Cir. 2002), modified in part on rehearing, 319 F.3d 1207 (10th Cir. 2003).

³ 42 U.S.C. §§ 4321–4347. NEPA mandates an environmental impact statement (EIS) for any major federal action with a significant impact on the human environment. Id. § 4332(2)(C).

⁴ 33 U.S.C. § 1344. This provision, together with section 301(a) of the Clean Water Act, id. § 1311(a), prohibit discharges of dredged or fill material—or the filling in of wetlands—without a permit from the ACE or a state with delegated authority to issue section 404 permits.
Because the road would affect important wetlands and wildlife habitat, and because of the region’s almost exclusive reliance on automobiles and roads to address transportation needs, a coalition of environmental and transportation organizations urged that the Legacy proposal be canceled or deferred in favor of a broader range of sequenced transit, land use, and other strategies to reduce congestion. The settlement allowed a less environmentally-damaging version of the road to be built, with more mitigation property in the associated Legacy Nature Preserve, and funding for a pivotal light rail study in the region.

Approximately one month after approval of the Legacy settlement, a taskforce comprising members of the U.S. House Committee on Resources, released a long-awaited draft report. The report was highly critical of the thirty-six-year-old NEPA. This report is just the latest in a series of attacks on the effectiveness and alleged unintended negative consequences of NEPA, and likely will prompt proposals for legislative changes to the statute. NEPA also has many defenders.

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9 See Rick Krause, Time For A New Look At NEPA, ENVTL. F., May/June 2005, at 38 (expressing the view of the American Farm Bureau Federation that NEPA has resulted in “a jumble of red tape, exhaustive analysis and overlapping bureaucracy” and should be reformed); Bradley C. Karkkainen, Whither NEPA?, 12 N.Y.U. ENVTL. L. J. 333 (2004) (asserting that NEPA has substantial shortcomings that have not been adequately addressed by proposed government reforms) and Toward a Smarter NEPA: Monitoring and Managing Government’s Environmental Performance, 102 COLUM. L. REV. 903 (2002) (making the case for a procedural overhaul of NEPA).

10 The draft House report recommends thirteen specific amendments to NEPA. Initial Findings and Draft Recommendations, supra note 8, at 25–29; see also Robert G. Dreher, NEPA Under Siege: The Political Assault on the National Environmental Policy Act, 2005 GEO. ENVTL. L. & POL’Y INST., at 7–11 (reviewing the recent “range of proposals [that] have been advanced to weaken the NEPA process”).
as well as some who believe that the statute should be strengthened and expanded rather than simply maintained.\textsuperscript{12}

NEPA can be defended on many levels, all of which have been explored at length elsewhere. It seems like plain, old-fashioned common sense that we should "look before we leap," that is, at least take careful stock of the environmental impacts of major federal actions, and of feasible alternatives to meeting the same underlying goals, before the bulldozers (or whatever) begin to roll.\textsuperscript{13} It is true, that such process sometimes delays projects, and that project proponents would prefer to move ahead more quickly. Detractors also claim that NEPA serves as nothing more than an unfair tactic used by project opponents as an institutionalized, legal version of Edward Abbey's monkey wrench approach to stopping projects through delay.\textsuperscript{14}

Some argue environmental harm is the inevitable result of legitimate economic development, or the "price of progress." Likewise, some delay is the inevitable result of legitimate efforts to minimize and to mitigate such harm, and to explore alternatives that achieve the same economic or social goals with a lower environmental cost, the "price of good decisions." NEPA also serves very important and effective transparency and public accountability goals, by ensuring that environmental and other impacts, and core value judgments implicit in federal

\begin{itemize}
  \item \textsuperscript{11} See Tom Udall, \textit{What Doesn't Need Fixing In NEPA}, ENVTL. F., May/June 2005, at 40 (asserting that from his vantage point as Ranking Minority Member of the Task Force on Improving the National Environmental Policy Act and "[g]iven the importance of this statute . . . those who seek to amend NEPA face a heavy burden of proof to demonstrate that such changes are necessary and in the public interest"); Dreher, \textit{supra} note 10 (rebuilt common criticisms of NEPA and concluding that inadequate agency implementation and lack of resources are the true impediments to effective NEPA process).

  \item \textsuperscript{12} See, \textit{e.g.}, Lyonton Caldwell, The National Environmental Policy Act: An Agenda for the Future (1998) (arguing the Supreme Court has interpreted NEPA too narrowly, thus eliminating its intended substantive effect). Professor Caldwell was a consultant to Senator Henry Jackson, who is widely viewed as the "parent" of NEPA while the legislation was being developed. \textit{See id.} at xx. \textit{See also} Matthew J. Lindstrom, Procedures Without Purpose: The Withering Away of the National Environmental Policy Act's Substantive Law, 20 J. LAND RES. & ENVTL. L. 245, 260 (2000) (lamenting that recent Supreme Court interpretation of NEPA has "effectively squashed any possibility of judicial enforcement of NEPA's substantive goals"); Nicholas C. Yost, NEPA’s Promise—Partially Fulfilled, 20 ENVTL. L. 533, 548–49 (1990) (advocating greater enforcement of the substantive aspects of NEPA).

  \item \textsuperscript{13} See Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989) ("Simply by focusing the agency's attention on the environmental consequences of a proposed project, NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast. Moreover, the strong precatory language of . . . the Act and the requirement that agencies prepare detailed impact statements inevitably bring pressure to bear on agencies 'to respond to the needs of environmental quality.'") (citation omitted)).

  \item \textsuperscript{14} See Edward Abbey, The Monkey Wrench Gang (1975).\end{itemize}
agency decisions, are fully disclosed and vetted publicly during the agency decision process.

My goals here, however, are much more modest than to engage in the full debate over the pros and cons of NEPA and its implementation. First, I will suggest that the result if not the process in the Legacy Parkway saga provide a good example of how NEPA ultimately can “work”, that is, to facilitate better environmental decisions that promote a broader set of interests on behalf of a wider public. While the process may have been somewhat painful along the way, the result was a better project because it will serve its intended needs with fewer environmental impacts, and with a broader range of transportation options for the region. The public ended up getting more, not less, from the process.

Second, the Legacy result highlights the fallacy of debating NEPA’s merits at the extremes. The NEPA debate is often waged on an inappropriately win-lose, pass-fail basis. Because the Supreme Court has ruled so clearly that NEPA imposes purely procedural requirements, agencies are held to no firm, enforceable substantive requirements. Because it is an information-based approach to environmental protection, in which decision makers (here, the federal government) are forced simply to consider the effects of their actions fully and openly, it works or does not work depending on the integrity of the process itself. That integrity can be abused by either side in the yes-no, “build it or stop it” spectrum. Detractors argue that irresponsible plaintiffs can abuse NEPA simply to delay a project long enough that it falls of its own weight, either financially or politically. On the other side, NEPA cynics claim that agencies have learned to game the NEPA process so that results are typically decided at the outset, and simply ratified by a well-oiled EIS factory in which the right issues are addressed, and the right words are magically invoked to survive any judicial review. Having practiced and taught NEPA law for many years, I have no doubt that there is some truth to both claims.

In the middle, however, are a large number of projects, perhaps the vast majority, which have been made more environmentally sound by routine NEPA

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15 Methow Valley Citizens Council, 490 U.S. at 350 (“Although [NEPA] procedures are almost certain to affect the agency’s substantive decision, it is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process”); Strycker’s Bay Neighborhood Council v. Karlen, 444 U.S. 223, 228 (1980) (sustaining an agency decision against a NEPA challenge on the grounds that the agency “considered the environmental consequences of its decision . . . NEPA requires no more”); Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 558 (1978) (“NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural”).

16 See DAVID M. DRIESEN AND ROBERT W. ADLER, ENVIRONMENTAL LAW: A CONCEPTUAL AND PRAGMATIC APPROACH, ch. 10 (forthcoming from Aspen Publishers) (identifying NEPA as a prime example of an information-based approach to environmental protection).
compliance. Moreover, where citizens seek judicial redress to bad NEPA processes, judicial review can stimulate an improved process, and an improved result. The point I want to make most urgently, then, is that Legacy highlights the perils of debating the merits of information-based approaches to environmental matters based solely on extreme cases, in which projects either are stopped altogether due to litigation delay, or in which a shallow impact statements result in rubber stamp ratification of projects without legitimate attention to environmental matters. The Legacy saga shows NEPA can work, because it ultimately brought the parties together to forge a project combining the best aspects of the state’s original proposal with the best ideas from members of the affected public.18

I will begin by presenting a brief history of the Legacy NEPA process. This history will show that despite the resulting project delay, NEPA analysis produced a project that will better serve its intended purpose with less environmental impact, and that involved a broader public in the planning process. I will then evaluate the

17 See Council on Envtl. Quality, Exec. Office of the President, The National Environmental Policy Act, A Study of its Effectiveness After Twenty-five Years (Jan. 1997) [hereinafter 25-Year Study], available at http://ceq.eh.doc.gov/nepa/nepa25fn.pdf. The fundamental conclusion of the 1997 CEQ Study was that NEPA was a progressive and successful legislative effort that could work more effectively with better and earlier agency implementation of the NEPA process: “participants [in the Study] felt that NEPA’s most enduring legacy is as a framework for collaboration between federal agencies and those who will bear the environmental, social, and economic impacts of [agency] decisions. However, Study participants also stated that frequently NEPA takes too long and costs too much, agencies make decisions before hearing from the public, documents are too long and technical for many people to use, and training for agency officials at times is inadequate . . . Study participants found that the “NEPA process” is often triggered too late to be fully effective. At the same time, agency managers who have learned to use NEPA have discovered it helps them do their jobs. NEPA’s requirements to consider alternatives and involve the public and other agencies with expertise can make it easier to discourage poor proposals, reduce the amount of documentation down the road, and support innovation. NEPA helps managers make better decisions, produce better results, and build trust in surrounding communities. Fortunately, many agencies are making progress by taking a more comprehensive and strategic approach to decision-making.” Id. at xx. The Study sought to identify means of improving five critical components of the NEPA process: strategic planning; public information and input; interagency coordination; an interdisciplinary place-based approach to decision-making that focuses the knowledge and values from a variety of sources on a specific place; and science-based and flexible management approaches once projects are approved. See id. at 11–34 and 19–20 (finding increases in project mitigation as a result of routine Environmental Assessment and “Finding of No Significant Impact” (FONSI) processes). But see Methow Valley Citizens Council, 490 U.S. at 350 (holding that NEPA requires agencies to consider but not necessarily to implement mitigation measures).

18 I make no claim that the Legacy process and project represents a perfect “prototype” against which NEPA’s strengths and weaknesses are measured in any scientific sense, and obviously a more rigorous analysis would use a series of carefully chosen projects for this purpose. However, I do believe that Legacy represents a rather “typical” example of a contested NEPA process.
NEPA Task Force recommendations in light of the Legacy NEPA experience. Using the NEPA Task Force Report as a vehicle for this analysis will serve two complementary purposes. To the extent that the Task Force identified some of the key complaints raised about the NEPA process, I will use the Legacy history and result as a case study to test those assertions. Likewise, the Task Force issues present a useful set of issues against which to evaluate how well NEPA served its purposes during the Legacy decision process.

II. A BRIEF HISTORY AND ANALYSIS OF THE LEGACY PARKWAY NEPA PROCESS

A. The Legacy NEPA Odyssey

On July 17, 1996, Utah Governor Michael O. Leavitt\(^\text{19}\) announced plans for the Utah Department of Transportation (UDOT) to build a 130-mile highway from Brigham City to Nephi, Utah, along a north-south corridor traversing the west side of Utah’s Wasatch Front.\(^\text{20}\) The press release indicated that Governor Leavitt had directed UDOT to “expedite environmental study” on the first, fourteen mile segment of the project through Davis County, and that they planned to cooperate with public and private agencies in an effort to resolve environmental concerns about the project.\(^\text{21}\) A coalition of environmental and transportation advocacy groups expressed concern that the proposed highway would have unacceptable adverse impacts to internationally-significant wetlands habitats adjacent to Great Salt Lake and the wildlife it supports,\(^\text{22}\) and that the state was ignoring other transportation alternatives, including mass transit, changes in land use patterns and other options to reduce travel demand in the region.\(^\text{23}\) The groups were concerned about increased reliance on roads to meet the region’s transportation needs based

\(^{19}\) Mr. Leavitt later would become Administrator of the U.S. Environmental Protection Agency (USEPA), and then Secretary of Health and Human Services, under President George W. Bush.

\(^{20}\) Utah Governor’s Office, supra note 1.

\(^{21}\) Id.

\(^{22}\) The mosaic of wetlands and upland habitats along the eastern shore of Great Salt Lake forms one of the most important wetland ecosystems and wildlife habitats in North America. See Legacy FEIS, supra note 5, at 3-1-3-2; Letter from Reed Harris, Utah Field Supervisor, U.S. Fish & Wildlife Serv. to Colonel Michael J. Walsh, District Eng’r, U.S. Army Corps of Eng’rs (Sept. 13, 2000) (commenting on Legacy Parkway permit application and DEIS) [hereinafter FWS DEIS Comments]. As a result, those areas have been designated as a Hemispheric Reserve in the Western Hemisphere Shorebird Reserve Network, a distinction afforded to only five areas within the contiguous United States. See Letter from Steven J. Wendt, Chair, Western Hemisphere Shorebird Reserve Network to Utah Governor Mike Leavitt (Oct. 8, 1998) (copy on file with author); Letter from Natalie Gochnour, State Planning Coordinator, Governor’s Office of Planning and Budget, to Byron Parker, Project Director, Legacy/I-15 North, Utah Dep’t of Transp. (Oct. 24, 2000) (copy on file with author).

\(^{23}\) See DEIS Comments, supra note 6.
on both air quality\textsuperscript{24} and transportation equity\textsuperscript{25} concerns. Those groups urged UDOT and the two major permitting agencies, which were designated as the "lead agencies" for NEPA purposes,\textsuperscript{26} to consider alternatives to the proposed highway.

The state's effort to expedite the NEPA process for such a large, complicated and controversial process, however, delayed the project more than if they had taken a more careful and deliberate approach from the start. For example, early in the EIS development process EPA expressed concern to UDOT about the "expedited pace at which the DEIS is being finalized," and EPA anticipated that "considerable improvements will be necessary prior to the issuance of the draft EIS."\textsuperscript{27} Nevertheless, despite significant controversy over how close to the lake the road would be built, and hence the amount and quality of wetlands that would be affected, UDOT announced just two months later, and nine full months before the draft EIS was even released, that it was already preparing to purchase rights of way for the road,\textsuperscript{28} assuming that not just the project but UDOT's preferred route would be approved.

The two federal agencies principally responsible for approving the project, the Federal Highway Administration (FHWA) and the ACE, issued the Draft EIS on September 4, 1998. This was slightly more than two years after Governor Leavitt announced the proposed project.\textsuperscript{29} The DEIS eliminated from further consideration, proposed road alignments,\textsuperscript{30} which would have had considerably higher wetland impacts than the Great Salt Lake alignment within which the agencies focused their analysis.\textsuperscript{31} Within the Great Salt Lake regional alignment, the DEIS also compared impacts to wetlands and other resources of a series of

\textsuperscript{24} The Wasatch Front region has a history of non-attainment with applicable ambient air quality standards for carbon monoxide, ozone, and particulate matter, in part due to automotive pollution. See Legacy FEIS at 3-42–3-45.

\textsuperscript{25} Virtually exclusive reliance on roads impairs mobility for those who are too young, too old, too poor, or too physically impaired to drive automobiles.

\textsuperscript{26} See 40 C.F.R. § 1508.16 (2005). The EIS was actually prepared, however, by a third party consulting firm, with a long list of involved consultants and agency officials. See Legacy Parkway Draft Environmental Impact Statement and Section 4(f), 6(f) Evaluation (Sept. 1998) [hereinafter Legacy DEIS]; Legacy FEIS [list of preparers].

\textsuperscript{27} Letter from U.S. EPA Region VIII to Byron Parker, EIS Project Manager, Utah Dep't of Transp. (Nov. 17, 1997) (copy on file with author).


\textsuperscript{29} See Legacy DEIS [list of preparers].

\textsuperscript{30} Referring to the Antelope Island, Trans-Bay and Farmington regional roadway alignments.

\textsuperscript{31} See id. at 2–3. The Legacy DEIS however, also rejected alignments within existing railroad corridors which would have had even smaller wetland impacts, id., but with higher estimated construction costs, a judgment which the Tenth Circuit later criticized and which formed one of the grounds for remanding the project. Utahns for Better Transp. v. U.S. Dep’t of Transp., 305 F.3d 1152, 1186–87 (10th Cir. 2002).
alternative routes, with increasingly significant wetland impacts for the westernmost alignments.\(^{32}\) Most significantly, the DEIS chose as the preferred alternative an alignment (Alignment A) which would require about 111 acres of wetlands to be filled rather than 156 acres under a "locally-preferred" alignment,\(^ {33}\) which local communities preferred largely because it would have allowed more developable land in the region.\(^ {34}\) Under the preferred alternative, 570 acres of wetlands would be protected as mitigation for wetland losses, within a total Legacy Nature preserve of approximately 1,089 acres.\(^ {35}\)

In addition to the citizen groups, a number of federal and state resource agencies submitted highly critical comments on the adequacy of the DEIS. EPA rated the DEIS "environmentally unsatisfactory," and "inadequate" due to failure to properly assess impacts to wetlands, wildlife, and existing land uses; failure to select the least damaging feasible alternative as required by the CWA; and failure to properly and fairly evaluate other alternatives, including other highway alignments, mass transit, and land use planning.\(^ {36}\) Similarly negative comments were submitted by the U.S. Fish and Wildlife Service,\(^ {37}\) the Utah Division of Wildlife Resources,\(^ {38}\) and the Utah Division of Air Quality.\(^ {39}\)

The FHWA and ACE issued the final EIS (FEIS) for the project on June 26, 2000, nearly two years after issuance of the DEIS. The FEIS rejected transit-based and other alternatives to the proposed road.\(^ {40}\) It recommended as the preferred alternative a combination alignment that would require filling of approximately 114 acres of wetlands, compared to as many as 188 acres under the most damaging proposed route, but still more than under the least damaging alternative identified in the EIS.\(^ {41}\)

The long time needed to proceed from draft to final EIS resulted in part from the number and degree of deficiencies in the DEIS and its underlying analysis, as suggested in the comment letters submitted both by project opponents and by the various federal and state agencies. As just one telling example, outside experts

\(^ {32}\) See Legacy DEIS, at 2-24–2-26 and Figures 2-3 and 2-5.

\(^ {33}\) Id. at 2-25. The DEIS table identified wetland fills in hectares. The above figures are based on the conversion factor of one hectare = 2.47 acres.

\(^ {34}\) See id. at 2-27.

\(^ {35}\) Id. at 2-25 (again converting from hectares).

\(^ {36}\) Letter from William P. Yellowtail, Reg’l Administrator, USEPA Region VIII, to Michel G. Ritchie, Div. Administrator, FHWA Utah Div. and Byron Parker, Project Director, UDOT (and attachments thereto) (Jan. 6, 1999) (copy on file with author).

\(^ {37}\) FWS DEIS Comments, supra note 6.

\(^ {38}\) Letter from John Kimball, Dir., Utah Div. of Wildlife Resources to Kathleen Clarke, Exec. Dir., Utah Dep’t of Natural Resources (and attachment thereto) (submitting DWR review of Legacy DEIS) (Nov. 16, 1998) (copy on file with author).

\(^ {39}\) Memorandum from Rachael Parkhurst-Miller, P.E., to Ursula Trueman, Director, Utah Div. of Air Quality (Jan. 7, 1999) (copy on file with author) (regarding DEQ review of Legacy DEIS).

\(^ {40}\) Legacy FEIS at 2-1-2-22.

\(^ {41}\) Id. at 2–53.
identified serious deficiencies in the travel demand models used to justify the
project purpose and need, and to compare alternative means of meeting regional
travel demand, which resulted in significant changes in the model during the
NEPA process.\textsuperscript{42} While the result ultimately was a more recent and sophisticated
travel model for the region, significant delay in the Legacy NEPA process ensued.

Once again, both project opponents and various resource agencies expressed
serious concerns about the adequacy of the NEPA and CWA analysis for the
project, and EPA actually recommended that the project approvals be denied.\textsuperscript{43}
Notwithstanding these comments, UDOT awarded a construction contract for
Legacy on December 22, 2000, before project permits were even issued.\textsuperscript{44} EPA
again urged the federal permitting agencies to correct deficiencies in the project
before proceeding.\textsuperscript{45} Nevertheless, the ACE issued its permit on January 9, 2001
which, along with an earlier approval by FHWA, allowed the project to proceed.\textsuperscript{46}
The permit allowed the filling of 114 acres of wetlands to construct the road along
the preferred alignment, but mitigation had now increased to 776 acres of wetlands
to be preserved, restored, or enhanced, within a Legacy Nature Preserve now
approximately 2,100 acres in size (about twice the size of the original proposed
project mitigation).\textsuperscript{47}

These project approvals led to the litigation that culminated in the Tenth
Circuit's September, 2002 decision vacating the permits and remanding the project
for further analysis. The Court remanded the project on four main grounds, based
on a combination of NEPA and CWA violations. These were: (1) failure to
consider a narrower right-of-way for the proposed road, which would have reduced
wetland impacts; (2) failure to consider the proposed railroad right-of-way as a less
damaging practicable alternative; (3) failure to evaluate wildlife impacts properly;
and (4) failure to consider whether a different sequencing and integration of transit,
roads, and other transportation options might better serve the transportation needs
of the region. The defendants prevailed on other challenges to the proposed

\begin{itemize}
\item \textsuperscript{42} See, e.g., Caroline J. Rodier and Robert A. Johnston, Dep't of Envtl. Science and
Policy, Univ. of Calif., Davis, \textit{Review of the Purpose and Need, Alternatives, and
Environmental Justice Evaluation in the Legacy Parkway Final Environmental Impact
\item \textsuperscript{43} See Letter from Rebecca W. Hamner, Acting Reg'l Administrator, EPA Region
VIII to David C. Gibbs, Div. Administrator, Fed. Highway Admin., Utah Div. and Byron
Parker, Project Dir., Utah Dep't of Transp. (Sept. 1, 2000); and Letter from Rebecca W.
Hamner, Acting Reg'l Administrator, USEPA Region VIII to Colonel Michael J. Walsh,
Dist. Eng'r, Sacramento Div'n, U.S. Army Corps of Eng'rs (Sept. 1, 2000) (copies on file
with author).
\item \textsuperscript{44} Utahns for Better Transp. v. U.S. Dept. of Transp., Nos. 01-4216, 01-4217, 01-
4220, at 9 (10th Cir. Nov. 16, 2001) [hereinafter 10th Circuit Injunction Order].
\item \textsuperscript{45} Letter from William P. Yellowtail, Reg'l Administrator, USEPA Region VIII, to
Colonel Michael J. Walsh, Dist. Eng'r, Sacramento Dist., U.S Army Corps of Eng'rs (and
attachment thereto) (Jan. 4, 2001) (copy on file with author).
\item \textsuperscript{46} See Information for the COE Record of Decision, Permit Application Number
\item \textsuperscript{47} See id. at 3.
\end{itemize}
project, including the geographic scope of the impacts analysis, adequacy of the travel demand models and other tools used to evaluate the project, the growth-inducing impacts of the proposed road, and failure to consider land uses changes as an alternative to new highway construction.

The Legacy remand took another three years, during which time the agencies prepared a draft and then a final Supplemental EIS for the project, the citizens groups developed a Citizens Smart Growth Alternative to the agency proposal, and the parties negotiated a settlement consisting of a mixture of concepts in the agency and citizens’ proposals. Following a new NEPA scoping process, which included another significant round of meetings, comments, and analysis the agencies issued the Draft SEIS in December 2004 (more than two years after the 10th Circuit remand). While the DSEIS ratified the original project in most respects, the modified project did include a narrower right-of-way to reduce impacts to wetlands and other habitat, additional features to integrate roads and transit, and more additions to mitigation acreage in the Legacy Nature Preserve.

In responding to the DSEIS, the coalition of environmental and transportation groups by now realized that their efforts to convince the agencies to study a broader range of feasible alternatives to road locations, designs, and the role of transit were not likely to be heeded. Instead, they worked with consultants to develop what they called the Citizens’ Smart Growth Alternative (CSGA) to the Legacy Parkway. The groups conceded that some additional road capacity was necessary, in combination with transit and other new transportation strategies, to meet regional transportation needs. They proposed, however, that the road be relocated significantly farther east, with far fewer impacts to Great Salt Lake wetlands (as an extension of the existing Redwood Road). The road also would be designed as a boulevard or parkway rather than a freeway, and would be better integrated into the rest of the regional road and transit network. The proposal would include some variation of either light rail or bus rapid transit in the region, along with a new regional bikeway along the Legacy right-of-way.

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49 Fed. Highway Admin., U.S. Dep’t of Transp. and U.S. Army Corps of Eng’rs, Legacy Parkway, Draft Supplemental Environmental Impact Statement/Reevaluation and Draft Section 4(f), 6(f) Evaluation (Dec. 2004) [hereinafter Legacy DSEIS]. Pursuant to applicable regulations requiring a full project re-evaluation if a project is not built soon enough after issuance of an FEIS, see 23 C.F.R. § 771.129, the DSEIS went beyond the specific issues remanded by the 10th Circuit, to determine whether any changes since issuance of the FEIS might affect the project analysis or decision. See Legacy DSEIS at Intro-1.

50 Based on additional consultations with USEPA and FWS, the preserve now included almost 2,100 acres on the west side of the road.

51 See Comments of Utahns for Better Transportation, Future Moves Coalition, Friends of Great Salt Lake, Great Salt ILke Audubon, and League of Women Voters of Salt
Realizing that a second round of litigation was risky and expensive for both sides, and would further delay the development of transportation solutions for the region, representatives of the environmental coalition and UDOT engaged in a long series of negotiations to develop a consensus alternative to the proposed project. In the final settlement, the parties agreed to a parkway rather than highway design, but along the state’s preferred right-of-way. The road will be designed to meander around wetlands and other sensitive areas, and will prohibit most trucks and have a speed limit of fifty-five miles per hour. Slower speeds and the absence of trucks will reduce highway noise dramatically, thus significantly reducing disturbance to birds and other species in the adjacent Legacy Nature Preserve and other Great Salt Lake habitats. The settlement also provides for another addition to the Legacy Nature Preserve, and funding to initiate the light rail EIS for the corridor. On February 14, 2006, at the joint request of the parties, the Tenth Circuit issued an order dissolving the Legacy injunction in light of the settlement of the case. Construction began on March 2, 2006.

B. The Impacts of NEPA on the Legacy Project

There is no doubt the NEPA process delayed construction of the Legacy Parkway by several years. Some delay was caused by administrative comments by various interested state and federal resource agencies, which severely criticized drafts of the EIS at various phases of the process. This forced UDOT, the federal lead agencies, and the consultants who prepared the EIS to go back to the drawing boards several times in an ultimately unsuccessful effort to produce a more legally defensible project. Additional delay resulted from the Tenth Circuit remand and the ensuing SEIS process.

One first must ask, however, whether the real source of delay was NEPA itself, or the manner in which the agencies and their consultants approached the NEPA process. From the outset, Governor Leavitt urged that the Legacy planning and permitting process be expedited, and the agencies responded accordingly. Various other agencies specifically warned that this effort to hasten the product (and the result) would risk legal deficiencies in the final EIS, and they turned out to be correct. Had the agencies and others who oversaw or prepared the NEPA documents taken the necessary additional time at the front end of the process, far less delay would have occurred in the long run.

52 Because the state had not only purchased but begun to grade this route when the project was first approved, retaining the original right-of-way was preferred by the state.
The delay caused by the NEPA and CWA litigation also cost the state a significant amount of money, for which some blame the plaintiffs. As the Tenth Circuit noted when it issued the injunction, however, most of the blame for those costs lies with the state itself, which incurred financial obligations on the assumption that the project would be approved and would sustain legal review, which turned out to be a monumental losing gamble with taxpayer funds:

Although [the state] intervenors have presented substantial evidence that they will incur a financial loss if the injunction is granted, it appears that much of this harm is self-inflicted. The Utah Department of Transportation awarded the highway contract to Fluor Ames Kraemer in December 2000 (before the Army Corps of Engineers approved the project), thereby entering into contractual obligations that anticipated a pro forma result. Further, the state agency was aware that there were several court cases challenging the approval of the Legacy Parkway, but chose to proceed nevertheless. This cuts against their claim of harm outweighing environmental concerns. Moreover, as the Legacy Parkway is intended to alleviate traffic congestion in the year 2020, the public's inability to use the highway more than fifteen years earlier does not appear to be substantial harm.

Second, and more important for purposes of this analysis, we should ask whether this delay was worthwhile. If the only goal was to push through the highway project as quickly as possible according to the original plan, or something close to it, obviously not. If one believes that the only acceptable result was no road whatsoever, the delay was simply a waste of time, and the citizens groups should have pushed forward with a second round of litigation, and perhaps more. Viewed from the middle ground, the answer is quite different. In light of one key intended goal of NEPA (to evaluate alternative ways to meet the basic project purpose with the least possible environmental impact), even the extensive delay the Legacy Parkway project experienced was justified.

The acreage of wetlands that will be filled or otherwise disturbed by the road dropped several times through the NEPA process, and additional savings may result from the final parkway design, which is currently being developed. The amount of mitigation for the project, meanwhile, steadily increased through virtually every phase of the analysis, including the final project settlement. The resulting Legacy Nature Preserve now is large enough and contiguous enough to serve as a barrier to development between the new road and the sensitive and important wetlands to the west. By re-designing the road as a lower-speed, largely

\[55\] See Mark Eddington and Greg Burton, Senate Raises Stakes in Legacy, SALT LAKE TRIB. Mar. 5, 2002 at A1 ("Since the Utah Department of Transportation’s contract with Legacy builder Fluor Ames Kraemer does not indemnify the state for court ordered work stoppages, taxpayers are spending about $100,000 per day on the stalled project.").

\[56\] 10th Circuit Injunction Order, supra note 44, at 9–10 (citation omitted).
truck-free parkway, wildlife impacts will be reduced further, and the mitigation afforded by the Nature Preserve will be more meaningful and much better protected. The road and adjacent recreational trail will be better integrated into other components of the regional transportation network, thus better enhancing mobility for more people. And because the state agreed to move forward with the critical first step study of a light rail or bus rapid transit system for the corridor, mobility is likely to be enhanced for even more segments of the population.

Last, but certainly not least, the Legacy saga proved an important although painful lesson about the role of transparency and open public participation in decisions with significant impacts on environmental quality and quality of life. When the threat of a second round of litigation—and the inherent litigation risks faced by both sides—finally brought the parties together to discuss their shared goals and values, a win-win solution became possible. Further, the very fact that the final settlement embraced ideas developed in the Citizens Smart Growth Alternative proved that open public participation can contribute to better public outcomes. Had a more cooperative approach been adopted from the outset, perhaps a similar result would have been possible without the accompanying delay. That is the painful part of the lesson. The important message is, that including more interested citizens and considering a broader range of ideas and values, the very thing NEPA is designed to do, can work as Congress intended.

III. LEGACY AND THE HOUSE NEPA TASK FORCE REPORT

On December 21, 2005, the Task Force on Improving the National Environmental Policy Act and Task Force on Updating the National Environmental Policy Act issued its Initial Findings and Draft Recommendations (the Task Force Report). Congressman Richard Pombo (R-California), the chairman and ranking member of the House Committee on Resources, initiated the Task Force for the stated purpose of studying how NEPA might be improved, and based its conclusions on seven “field hearings” held across the country and the contents of over 3,000 written comments.\(^5\)

The Task Force Report begins by stating that “[f]rom the outset of this investigation, it was clear that the original policy goals of NEPA remain valid today,”\(^5\) noting that “[t]here was little debate over NEPA’s importance or that [sic] its positive results.”\(^5\) Nonetheless, the overall tenor of the Task Force Report is that NEPA is not as necessary to today’s governmental decision making as it was when it was first passed in 1969.\(^6\) Pointing to the issues of uncertainty in the

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57 Initial Findings and Draft Recommendations, supra note 8, at 5.
58 Id. at 8.
59 Id.
60 The Task Force Report observes, “In addition, the state of affairs that existed when NEPA was debated and signed into law is not the same one that exists today. In response to a question from the Task Force, one witness acknowledged the times had definitely changed since NEPA’s deliberation and enactment. Indeed, the arguably ‘myopic, dishonest and dumb government’ making decisions in the mid to late 1960s has become
NEPA process, the absence of effective participatory roles for state, local and tribal parties, NEPA compliance costs, and cancellation of projects due to NEPA delays, the Report asserts that NEPA reform is warranted and that critical evaluation of NEPA's evolution is overdue.\(^6\)

In the end, the Task Force makes 22 specific recommendations to address perceived NEPA deficiencies, grouped under nine more general headings.\(^6\) The general issues most relevant to the Legacy Parkway case study are among the most significant in the report: addressing NEPA delays, enhancing public participation, addressing litigation issues, and clarifying alternatives analysis.

### A. Addressing Delays in the NEPA Process

The first issue addressed by the Task Force Report is delay.\(^6\) The Report notes that "delay has become synonymous with the NEPA process," which the Task Force attributes primarily to the length and complexity of NEPA documents and the breadth of alternatives analysis currently required by NEPA.\(^6\) The Report proposes a four-pronged approach to ameliorate the problem of delay in the NEPA process by restricting the fundamental scope of NEPA applicability, enlarging the appropriate role of "categorical exclusion" in agency decision-making, imposing mandatory timelines on NEPA analysis, and limiting supplemental NEPA process.\(^6\) The Legacy Parkway case study is relevant to only the third these proposals, as the other three would not have affected or applied to Legacy.\(^6\)

...
One of the most significant Task Force proposals is to limit the timeframe for NEPA analysis to nine months for an Environmental Assessment (EA) and eighteen months for an Environmental Impact Statement (EIS); “[a]nalyses not completed by these timeframes will be considered completed.” The Task Force Report does not propose to impose any penalty or consequence on an agency that, for whatever reason, fails to timely complete its environmental analysis, thereby leading some environmentalists to charge that the recommendations would render NEPA voluntary.

It is not clear, however, how the proposed new timelines would affect judicial review of an EIS. If the automatic statutory declaration of “completion” means “adequate and lawful completion,” any EIS process that surpassed the new deadline would become insulated from substantive judicial review. That is surely an absurd result that would give agencies a perverse incentive to miss the deadline. If this is what the Task Force intends, it should abandon any pretense that it simply seeks a more efficient, rather than an essentially gutted, NEPA process.

If existing standards for judicial review remain, the proposed deadlines will force agencies to rush a NEPA processes to completion. That will increase the time, resources, and expenditures. Additionally the Report proposes amending NEPA to “state that temporary activities or other activities where the environmental impacts are clearly minimal are to be evaluated under a [Categorical Exclusion (CE)] unless the agency has compelling evidence to utilize another process.” The Legacy Parkway is a permanent facility with significant environmental impacts. Finally, the Legacy SEIS was prepared because of judicial remand, not due to the regulatory standard for significant new information.

The Report does contemplate that, if absolutely necessary, the Council on Environmental Quality (CEQ) can extend the timeframe for EA and EIS analysis on a case-by-case basis. The maximum extensions allowed under the Report are three additional months for an EA and six additional months for an EIS. The Task Force Report would partially codify existing CEQ regulations applicable to supplemental NEPA analysis, incorporating only the language that supplementary NEPA process is appropriate where there have been “substantial changes in the proposed actions that are relevant to environmental concerns” and there are “significant new circumstances or information” relevant to the environmental impact of the proposed action. See also 40 C.F.R. § 1502.9(c) (1) (i)–(ii).

See, e.g., The Wilderness Society, News Release: Proposed Pombo Changes to National Environmental Policy Act Receive Close Scrutiny (Jan. 19, 2006) [hereinafter The Wilderness Society 1/19/06 News Release], available at http://www.wilderness.org/NewsRoom/Release/20060119.cfm (“Proposal 1.2 creates mandatory timelines for the completion of NEPA documents. If analysis is not complete at the end of this timeline and no extension has been granted, the NEPA analysis will be considered complete even if no public documents have been released or public comments made. This will allow agencies to delay the NEPA process until the deadline and then declare their analysis concluded.”).

As a purely practical matter, it is also not clear what it is the court would “review,” if a not-yet-complete process were declared “complete” before a final document was prepared.
probability that a court will find an EIS legally deficient, and remand it for additional analysis, causing more rather than less delay. This is exactly what happened in the Legacy NEPA process. Agency officials felt political pressure to rush the EIS to completion, leading to a legally deficient document. The Legacy EIS ultimately did not survive judicial review, even though it took far longer to prepare than the 18 months proposed by the Task Force Report.\footnote{The Legacy FEIS was issued in June 2000, nearly four years after Governor Leavitt announced the project in July of 1996, about three times longer than would be allowed under the Task Force proposal.} So if the substantive standards for judicial review of an EIS remain, declaring EIS “completion” before the necessary research and analysis is complete would only make EISs more vulnerable to legal challenge, and hence more delay in the long run due to judicial remands. This is precisely why the CEQ specifically declined, in its NEPA implementing regulations, to establish rigid time limits for NEPA reviews similar to those now proposed by the Task Force.\footnote{40 C.F.R. § 1501.8 (2005).} At the same time, however, agencies are already under an affirmative but more appropriately flexible obligation to reduce delay in the NEPA process.\footnote{See id. § 1500.5.}

A more likely middle ground result is that reviewing judges will expect less proficient impact statements in deference to the limited amount of time allowed to complete the analysis. Again, in the guise of expediting the process, the Task Force would weaken the requirements for the analysis itself. Had the Legacy EIS been issued in 18 months, it would have suffered from even more significant flaws than the EIS ultimately rejected by the Court of Appeals. But if the standards for NEPA analysis were lowered to reflect the 18-month deadline, a similarly defective EIS might survive legal challenge despite those flaws.\footnote{In the case of Legacy, this does not necessarily mean that the project itself would have survived judicial review, because the 10th Circuit panel rejected the analysis on both NEPA and CWA grounds.}

\textit{B. Enhancing Public Participation}

To improve public participation in the NEPA process, the Task Force Report suggests requiring that environmental impact analyses under NEPA give greater weight to the issues and concerns presented by local interests than by outside parties who will not be “directly affected” by the proposed action.\footnote{See Initial Findings and Draft Recommendations, \textit{supra} note 8 at 26.} Although the Report notes that public participation is crucial to NEPA’s success and in fact maximizes the opportunity for resolving conflicts during the NEPA process,\footnote{Id. at 22.} it makes no further suggestions for broadening public participation or collaborative problem solving during the NEPA process beyond imposing EIS page limits.\footnote{Id. at 26. The Report proposes to codify within NEPA the EIS page limits already set forth in 40 C.F.R. § 1502.7 of fewer than 150 pages for a garden variety EIS and a
Report does, however, seek to maximize avenues for state, local and tribal participation in the NEPA process. The Report would amend NEPA to require that "cooperating agency status" be routinely granted to any tribal, state, local or other political subdivision that requests such status. Additionally, the Report would direct CEQ to promulgate regulations that permit state environmental review procedures to satisfy NEPA requirements where the state process is "functionally equivalent" to the NEPA process.

The NEPA regulations already provide for extensive attention to local interests in actions involving "effects primarily of local concern." Accordingly, the Legacy EIS reflects tremendous attention to local communities and interests. The FEIS, for example, discusses eight separate regional planning studies, three corridor-planning studies, and fourteen local planning studies and general plans. The project itself, of course, reflected local pressure for additional road capacity through the corridor. Moreover, as discussed above, local governments preferred a road alignment that would have destroyed more wetlands than the alignment ultimately approved by the agencies, in order to leave more developable land.

Ultimately, the Legacy issue reflected a fundamental conflict among values in the corridor. Some preferred rapid road expansion and developable land. Others valued a broader range of transportation choices for area residents and preservation of wetlands, air quality, and other critical resources. NEPA is designed to facilitate a full airing of those competing values in a fair, open public process. Providing superior access and conferring added weight to some interests over others would subvert that most democratic goal of the statute. Moreover, one of the basic reasons to consider a broader range of resources and values in the NEPA process is that they are not always fully represented by state and local governments, which are elected to reflect more parochial needs and interests, sometimes at the expense of national or international values such as the migratory bird resources that rely so heavily on Great Salt lake wetlands. Declaring representatives of those broader values less important because they are not "directly affected" by the proposed maximum of 300 pages for a complex EIS. By comparison, just the main text of the Final EIS for the Legacy Parkway (Volume I) was over 400 pages long, not including the many appendices in Volumes II–IV.

Cooperating agency status requests are to be denied only where there is "clear and convincing evidence that the request should be denied." The Report's inclusion of political subdivisions is intended "to capture the large number of political subdivisions that provide vital services to the public but are generally ignored in the planning for NEPA." Id. (articulating NEPA's commitment to "prevent or eliminate damage to the environment and biosphere by focusing government and public attention on the environmental effects of the proposed agency action").
action minimizes some of the most important values NEPA was enacted to protect.  

Thus, in the name of enhancing public participation, the Task force Report actually proposes to weaken the public participation goals of the law by exalting some values and interests over others.

C. Addressing Litigation Issues

The Task Force Report notes that the issue of litigation arose in every field hearing and in numerous written comments, concluding that “[t]he Task Force heard that litigation has shaped the meaning and applicability of NEPA.”

Although the Report concedes that NEPA litigation is not actually on the rise and that only 0.2 percent of the 50,000 EISs filed annually result in litigation, the Report suggests that “the number of suits has little meaning when examined against the actual impact of these suits.”

In order to curb what it views as undue agency caution and economic losses resulting from the mere potential for NEPA litigation, the Task Force Report proposes amending NEPA to create a citizen suit provision, which would limit NEPA claims relative to the existing claims available under the Administrative Procedure Act. The citizen suit provision would set a time limit on NEPA challenges of 180 days from a final decision on a federal action, and would create “guidelines” for who has standing to bring a challenge under NEPA based on the relationship between the plaintiff and the action at issue, the direct impact of the proposed action on the plaintiff, and whether the plaintiff has been involved in the entirety of the NEPA process. To mount a NEPA challenge, a plaintiff with proper standing would be required to “demonstrate that the evaluation was not conducted using the best available information and science.” A party would not be allowed to appeal a NEPA ruling unless she had been involved in the entirety of

83 See 42 U.S.C. §§ 4331 (establishing national policy to recognize the impact of human activities on “all components of the natural environment”), 4332(2) (F) (recognizing the “world-wide and long-range character of environmental problems”).

84 See Initial Findings and Draft Recommendations, supra note 8 at 11.

85 Id. Additional statistics provided to the Task Force by the CEQ indicate that injunctive relief is granted in only a small percentage of NEPA cases filed. Of 156 NEPA actions filed in 2004, courts issued injunctions in only 11 cases. Those statistics were 6 injunctions out of 128 NEPA cases filed in 2003; and 27 injunctions in the 150 cases filed in 2002. Id.

86 Id. at 26–27. In order to reduce the threat of potential NEPA litigation the Report also proposes requiring agencies to “pre-clear” their projects with the CEQ. Id. The “pre-clearing” requirement proposed by the Pombo Report would task CEQ with serving as a “clearinghouse” for procedural NEPA requirements imposed by either judicial decisions or agency administrative proceedings and advising agencies accordingly on their proposed actions. Id. at 27.

87 Id. at 27.

88 Id. at 26–27.

89 Id. at 26.
Finally, the citizen suit provision would prohibit agencies from entering into settlements that severely limit the activities of businesses that were not involved in the initial lawsuit, and would require that any settlement discussions between a NEPA plaintiff and the relevant agency include businesses and individuals affected by the potential settlement.

Some of the changes proposed in the NEPA Task Force Report probably would not have affected the Legacy plaintiffs. Those groups were involved in the NEPA process from the outset. It is not clear from the Task Force Report, however, whether other NEPA plaintiffs would be barred from litigation if they did not participate in the very earliest phase of the NEPA process, project scoping,

when many involved citizens might not even be aware of the proposal. Agencies should not be insulated from judicial review merely because interested citizens did not learn of a proposal early on. Expecting the public to be constantly aware of the massive amount of federal agency actions that might affect them is an unreasonable burden, and one that thwarts rather than promotes NEPA’s goals. Nor is it clear what the Task Force hopes to accomplish with this proposed new requirement. A fundamental tenet of U.S. administrative law generally prohibits parties from litigating issues that they did not raise in the administrative comments, which suffices to protect agencies or project proponents from unfair surprise, and allows the NEPA agencies to address issues during the NEPA process. Thus, it is only when agencies fail to meet their obligations to respond fairly to comments that an EIS is likely to be challenged successfully in court.

The Legacy plaintiffs also filed their case well within 180 days of the decisions. The FHWA approval, however, was in October, almost ninety days before the 404 permit. This difference in timing raises an interesting problem with the Task Force proposal, which might generate more, rather than less, NEPA litigation. If the ACE permit came more than 180 days after the FHWA approval, and if the Task Force recommendation were in place, plaintiffs would have been forced to file a potentially unnecessary lawsuit challenging the FHWA approval to avoid missing the new statute of limitations. Many projects require multiple permits and approvals. Unnecessary NEPA cases can be avoided with the existing six-year statute of limitations that applies to NEPA and other claims against the federal government, where other approvals ultimately are not issued, or where the project fails to proceed for other reasons. The proposed 180-day rule would force plaintiffs to rush to the courthouse to avoid missing the deadline. Conversely, parties failing to challenge a project that is moving forward quickly are not likely to obtain injunctive relief, especially absent good cause for their delay.

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90 Id.
91 Id. at 26–27.
92 See 40 C.F.R. § 1501.7 (2005).
93 See 40 C.F.R. § 1503.
94 The Complaint was filed on Jan. 17, 2001, just eight days after the final federal construction permit (the section 404 permit) was issued.
The proposed new guidelines for NEPA standing could pose a particularly dangerous barrier to citizen access to the courts, depending on the manner in which the new guidelines defined the requisite relationship between the plaintiff and the action at issue, and the direct impact of the proposed action on the plaintiff. The Legacy plaintiffs included local groups and residents whose interests would have been affected very seriously by the proposed action. The choices at stake in the Legacy matter affect the range of transportation options open to the plaintiffs and other residents, the quality of air they breathe, their access to open space and wildlife habitats, indeed, the very character of the region in which they and their children will live. Will those impacts be sufficiently "direct" under the proposed guidelines, or must plaintiffs actually live in the path of a proposed highway or other project?

The standing proposal, of course, underscores the fundamental difference in perspective between the House Task Force Report and plaintiffs who seek access to the courts to vindicate potential NEPA violations. The Task Force views litigation as an ill to avoid, as it has the potential to delay or even stop projects altogether. When citizens seek judicial review of governmental actions, however, it is because they believe that the agencies have violated a law Congress passed to ensure that environmental values are properly considered in federal agency decisions. When government itself breaks the law, citizens such as the Legacy plaintiffs remain the only guardians to protect those values. Nearly a century ago, the Supreme Court wrote that "the right to sue and to defend in courts ... is one of the highest and most essential privileges of citizenship." The Task Force proposals to limit citizen standing in NEPA cases would violate that principle.

The proposed new "best available science" threshold for citizen standing is another dangerous approach to the litigation issue, in that it narrows significantly the grounds on which plaintiffs can challenge an EIS. The NEPA regulations already require agencies to "insure the professional integrity, including scientific integrity of the discussions and analyses in environmental impact statements." Those are not, however, by any means the only grounds for affected parties to challenge NEPA compliance. For example, the Legacy plaintiffs successfully challenged the Legacy EIS for failure to evaluate all feasible alternatives to the proposed project, and for failure to evaluate some environmental impacts fully. Those issues are independent of the quality of science used to prepare and EIS. The Task Force proposal apparently would insulate agencies from challenges based on those and other kinds of NEPA violations.

Finally, the proposed restrictions on the government's authority to settle NEPA cases that severely limit the activities of businesses that were not involved

96 40 C.F.R. § 1502.24.
97 See Utahns for Better Transp. v. U.S. Dep't of Transp., 305 F.3d 1152, 1192 (10th Cir. 2002) (invalidating Legacy EIS for failure to consider alternative road alignments and configurations, failure to consider alternative sequencing and integration of road and transit projects, and failure to consider wildlife impacts properly).
in the initial lawsuit, and that would require that any such settlement discussions include businesses and individuals affected by the potential settlement, could do more to increase or prolong than to limit NEPA litigation. The Legacy Settlement Agreement successfully avoided a second round of potentially lengthy and expensive NEPA litigation. Yet the settlement admittedly affected many businesses in various ways, as any matter of this complexity is likely to do. For example, under the settlement most trucks will be prohibited on the new parkway, a component of the deal that was rigorously opposed by the trucking industry. The settlement also requires a posted speed limit of 55 MPH on the parkway, and the use of noise reducing pavement, in order to reduce noise impacts to wildlife. That will certainly “affect” every individual who will travel the new road (in both positive and negative ways, depending on one’s perspective), and suppliers of concrete and other, noisier pavement materials. If all of those interests had to be involved in the Legacy settlement negotiations, I am confident settlement would have been impossible and the matter would be back in court; achieving exactly the opposite of what the Task Force Report purports.

D. Clarifying Alternatives Analysis

The Task Force Report proposes to limit NEPA analysis of “reasonable alternatives” to those alternatives “which are economically and technically feasible.” Thus, an agency would only be required to consider those alternatives that were supported by feasibility and engineering studies and that realistically could be implemented “after taking into account: a) cost, b) existing technologies, and c) socioeconomic consequences (e.g. loss of jobs and overall impact on a community.)” Some groups note that this NEPA revision would unduly favor corporate participants over citizen groups or public interest organizations.

99 Of course, if any of those interests were sufficiently aggrieved and believed that the revised project was unlawful, they would have the right to file their own legal challenge. To date, no such case has been brought in the wake of the Legacy settlement.
100 See Task Force Report, supra note 8 at 27.
101 Id.
102 The Wilderness Society 1/19/06 News Release, supra note 69 (“Proposal 5.1 would amend NEPA to require that “reasonable alternatives” analyzed in NEPA documents be limited to those which are supported by feasibility and engineering studies. Hardly any ordinary citizen and few organizations have the technical or financial resources to prepare such studies. Industry, on the other hand, has ample resources to do so. This change is not needed. Existing guidance already supports a common sense approach of what is practical and feasible from a technical and economic standpoint.”).
The NEPA regulations provide that a full consideration of alternatives is the "heart of the environmental impact statement." Thus, the ability of parties to identify feasible alternatives to the agency proposal is a particularly critical aspect of the NEPA process, as shown by the Legacy history. The Tenth Circuit remanded the matter for failure to evaluate alternatives that might better meet the project purpose and need, with less environmental damage. It was the combination of alternatives proposed by the citizens and the agency, which achieved that result in the Legacy settlement. In responding to the DSEIS, the Legacy plaintiffs worked with transportation consultants—at considerable expense—to develop the Citizens Smart Growth Alternative at a level of detail sufficient to inform the agencies adequately about the merits of the proposals. Even absent the Task Force changes, it is already true that an alternative is "reasonable" and must be considered by an agency if it is "practical or feasible from the technical and economic standpoint." Requiring citizens who comment in a NEPA process to prove such feasibility, however, would impose a threshold burden far beyond what is required in any other similar administrative process. Such a burden would have been prohibitive financially and otherwise for the citizens in the Legacy process.

IV. CONCLUSION

The Legacy Parkway NEPA process is notable more for its flaws than for its strengths. It took far longer than intended, was fraught with divisive controversy, and ultimately the FEIS was rejected by the U.S. Court of Appeals for the Tenth Circuit. Despite all of those problems, however, in the end the NEPA process (and the accompanying Clean Water Act analysis) served its intended purposes. It facilitated a broader public discussion of the values at stake in the controversy, and a wider consideration of alternatives. Litigation is never the preferred way to resolve disputes, and can be expensive, time-consuming, and even painful. The end result, however, was a project that will better serve the transportation needs of the corridor, but with less impact to the internationally significant wetlands and wildlife resources in the Great Salt Lake ecosystem. Examples such as Legacy should prompt the House NEPA Task Force to reconsider its recommendations, many of which would thwart rather than foster the most fundamental goals of NEPA.

103 40 C.F.R. § 1502.14 (2005). See also Resources Limited v. Robertson, 35 F.3d 1300, 1307 (9th Cir. 1993) ("The existence of a viable but unexamined alternative renders an environmental impact statement inadequate") (internal quotations and citation omitted).

104 See Utahns for Better Transp. v. U.S. Dep’t of Transp., 305 F.3d 1152 (10th Cir. 2002).

105 Smart Mobility, Inc. and Robert Cervero, Ph.D., Report on the Citizens’ Smart Growth Alternative to the Proposed Legacy Parkway (Mar. 2005) (attached to DSEIS Comments, supra note 6).