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Nationwide Overview of Transportation Conformity Lawsuits

Lawsuits challenging urban air quality and transportation plans have been filed by environmental groups in various metropolitan areas throughout the United States. This article outlines these cases and the legal principles at issue.[1]

I. General Background

The "conformity" process links air quality planning and transportation planning.[2] On the air quality side, the federal Clean Air Act requires the U.S. Environmental Protection Agency ("EPA") to establish National Ambient Air Quality Standards ("NAAQS") for certain pollutants, including ozone and particulate matter.[3] States must submit State Implementation Plans ("SIPs") for areas that do not meet the NAAQS ("nonattainment areas") in order to bring the area into "attainment."[4] A SIP contains restrictions on emissions from stationary sources (e.g., factories) and mobile sources (e.g., cars, trucks and highways). The SIP typically includes a specific motor vehicle emissions budget ("MVEB") capping emissions from transportation sources.

On the transportation planning side, metropolitan planning organizations ("MPOs") for each urban region develop a long-term regional transportation plan and a short-term Transportation Improvement Program ("TIP") under the Federal-Aid Highway Act (as amended by ISTEA and TEA-21). The U.S. Department of Transportation ("USDOT") - through the Federal Highway Administration ("FHWA") and Federal Transit Administration ("FTA") - must certify the planning process and approve individual projects if federally funded or permitted.

Section 176 of the Clean Air Act integrates air quality planning with transportation planning by requiring the TIP to match, or "conform," to the MVEB in the SIP. Conformity of the TIP to the SIP is determined by comparing emissions predicted to budgeted emissions in the MVEB. In a phrase, "*the TIP must fit the SIP.*" Individual projects cannot receive federal approval or funding unless they "come from" a conforming TIP. No projects can be approved or advanced during a "conformity lapse."

The SIP, MVEB, TIP and conformity analysis are essential "building blocks" in the planning process. Citizen groups have begun to target these building blocks through "monkeywrench" lawsuits designed to disrupt the planning process and stop project construction. These suits are typically brought under the "citizen suit" provision of the Clean Air Act (which potentially allows recovery of attorneys fees and civil penalties) or under the federal Administrative Procedure Act ("APA").

These lawsuits fall into two general categories: (1) suits against EPA challenging the MVEB or elements of state air quality plans ("SIP challenges") or (2) suits against MPOs, state DOTs, and/or USDOT challenging the transportation plan, TIP, or individual project approvals ("TIP challenges").

II. Summary of Lawsuits

A. Atlanta

1999 TIP Suit – Georgians for Transportation Alternatives v. Shackelford, No. 99-0160 (N.D. Ga., filed Jan. 20, 1999). Sierra Club and local Atlanta citizen groups sued to stop 81 projects that were approved shortly before Atlanta fell out of conformity ("lapsed"). The projects were grandfathered under EPA regulations that were subsequently overturned. The case settled out of court with major

concessions from the government. At issue was the ability of citizen groups to disrupt transportation projects and the application of EPA's grandfathering policy.

MVEB SIP Suit – Georgians for Transportation Alternatives v. EPA, No. 00-12187 (11th Cir., filed Apr. 28, 2000). Sierra Club and local groups challenged EPA's determination that the Atlanta-area MVEB was adequate for transportation planning purposes. The court initially stayed the MVEB. However, the MPO and USDOT approved the TIP based on a prior MVEB, which as a practical matter mooted the challenge. EPA subsequently settled the suit by withdrawing the challenged budget. At issue was whether EPA's approval of a submitted MVEB can be reviewed before the entire SIP is approved or disapproved.

Bump-Up SIP Suit – Sierra Club v. Browner, No. 01-0127 (N.D. Ga., filed Jan. 17, 2001). Sierra Club, Environmental Defense, and local groups sued to force EPA to "bump-up" the Atlanta area from a "serious" to "severe" classification because Atlanta failed to attain ozone standards by the 1999 statutory deadline. The suit became moot when EPA extended the 1999 deadline on account of pollution from upwind sources.

2002 TIP Suit – Sierra Club v. Atlanta Regional Commission, No. 01-428 (N.D. Ga., filed Feb. 13, 2001). Sierra Club and other groups sued the MPO, state DOT, and USDOT alleging that the Atlanta-area TIP failed to match the MVEB and was based on faulty data (e.g., incorrect vehicle speed estimates and outdated fleet profiles) and did not contain enough mass transit and demand management measures. At issue was the interpretation of EPA's conformity regulations, the use of estimates and data in conformity analyses, and the ability of citizen groups to stop capacity-expanding highway projects through court injunctions. The district court ruled in favor of the government defendants and the Eleventh Circuit affirmed that decision.

2002 MVEB and SIP Suits – Sierra Club v. EPA, No. 02-11188 (11th Cir.). Sierra Club has filed two subsequent suits challenging EPA's approval of the MVEB and SIP for Atlanta. At issue is EPA's extension of the Atlanta attainment deadline to 2004, based on its downwind pollution policy.

B. San Francisco

Failure-to-Attain SIP Suit – Bayview Hunters Point Community Advocates v. Browner, No. 01-502 (N.D. Cal., filed Jan. 8, 2001). A coalition led by Sierra Club accused EPA of failing to disapprove an attainment SIP for the San Francisco area that was submitted in 1999 but never acted on by EPA. EPA ultimately disapproved the SIP and the area briefly fell into a conformity lapse. A subsequent SIP suit was dismissed on standing grounds.

TCM TIP Suit – Bayview Hunters Point Community Advocates v. Metropolitan Transportation Comm'n, No. 01-750 (N.D. Cal., filed Feb. 21, 2001). The same groups sued the San Francisco MPO alleging that the Bay Area failed to implement transportation control measures ("TCMs") in the SIP designed to increase mass transit ridership (programs such as free bus-subway transfers or reduced off-peak fares). At issue was an MPO's duty to implement TCMs that are no longer needed for SIP or conformity purposes. The federal district court held that the MPO violated the SIP by not achieving a 15% ridership increase goal.

C. Sacramento

I/M TIP Suit – Environmental Council of Sacramento v. Slater, No. 00-409 (E.D. Cal., filed Jan. 10, 2000). Sierra Club and local groups sued to stop 57 highway projects, claiming that the MPO took too much credit for California's Smog Check inspection and maintenance ("I/M") program, which was not achieving expected emissions reductions. At issue was Clean Air Act citizen suit jurisdiction and use by transportation

planning agencies of estimates and data developed by air quality agencies. A federal district court dismissed the citizen suit claim. No projects were affected but public participation procedures were enhanced as part of a settlement of the remaining APA claims.

D. Baltimore

MVEB SIP Suit – 1000 Friends of Maryland v. Whitman, No. 00-1489 (4th Cir., filed Apr. 24, 2000). An anti-sprawl group challenged EPA's approval of the MVEB for the Baltimore area. At issue was the modeling procedures used to approve MVEBs and whether MVEB approval requires rulemaking notice and comment. The circuit court ruled that modeling submitted with a prior MVEB had been sufficient.

E. Salt Lake City

TIP Suit – Utahns for Better Transportation v. USDOT, No. 01-07 (D. Utah, filed Jan. 17, 2001) and Sierra Club v. USDOT, No. 01-0014 (D. Utah, filed Jan. 31, 2001). The Sierra Club and local groups sued to invalidate the Salt Lake City-Ogden TIP and halt the controversial Legacy Highway project. Issues included data used in the conformity determination, the ability of citizen groups to stop individual projects, and the level of notice and comment required in the conformity process. The Clean Air Act portion of the case settled after government planners agreed to adjust their models in future conformity analyses. On appeal, the Legacy project was stopped on wetlands grounds. The Tenth Circuit also ruled that an industry coalition was entitled to intervene in the case.

F. Houston/Galveston

MVEB SIP Suit – Environmental Defense v. EPA, No. 00-60570 (5th Cir., filed Aug. 14, 2000). Environmental groups challenged EPA's approval of the Houston MVEB. The suit was settled and a new SIP and budget were proposed. A second lawsuit has been filed and is pending before the Fifth Circuit as BCCA Appeal Group v. EPA, No. 02-60017.

TIP Suit – Sierra Club and Environmental Defense filed a notice of intent to sue on June 29, 2000 claiming that the Houston-Galveston TIP did not conform to a yet-to-be-submitted SIP. A temporary compromise was brokered not to advance projects outside the first year of the TIP. At issue is citizen groups' ability to influence transportation planning through lawsuits. A lawsuit remains likely.

TCM SIP Suit – On the heels of the San Francisco Bayview Hunters case, a Houston bicycle coalition filed a notice of intent to sue on November 29, 2001, claiming that Houston-Galveston violated a SIP requirement to build 260 miles of bike paths.

G. Washington, D.C.

SIP Suit – Sierra Club v. EPA, No. 01-1070 (D.C. Cir., filed Feb. 14, 2001). Sierra Club challenged EPA's approval of the Metropolitan Washington attainment SIP based on its extension of the ozone attainment date under its downwind extension policy. At issue was EPA's extension policy, SIP requirements after the attainment date has passed, and whether attacks on the SIP will interfere with transportation planning. The D.C. Circuit ruled that EPA's downwind extension policy was invalid. A second suit seeks to force EPA to "bump up" the D.C. area from serious to severe nonattainment status.

Project TIP Suit – City of Alexandria v. Slater, No. 98-0251 (D.D.C., filed Jan. 30, 1998). City and community groups sued to stop a controversial bridge project based on modeling discrepancies. The court ruled that the conformity analysis had been faulty.

H. St. Louis

Bump-Up SIP Suit – Sierra Club v. Browner, No. 98-2733 (D.D.C., filed Nov. 9, 1998); Sierra Club v. EPA, No. 01-2844 (7th Cir., Nov. 25, 2002). Sierra Club sued EPA to reclassify the St. Louis area from moderate to serious nonattainment status and find that St. Louis had failed to submit a SIP. Sierra Club argued that reclassification should be retroactive and trigger highway sanctions (and a conformity lapse). The district court ordered EPA to determine whether St. Louis had failed to meet deadlines, but declined to make the ruling retroactive. The D.C. Circuit affirmed. At issue was the effect of missed deadlines and the consequence of SIP failures on transportation planning. The Seventh Circuit recently rejected EPA's subsequent attempt to extend the St. Louis attainment deadline under its ozone transport policy.

I. New York City, Philadelphia, Washington, Baltimore, Houston-Galveston, Chicago, Milwaukee, Connecticut

Consent Decree SIP Suit – Natural Resources Defense Council v. Browner, No. 99-2976 (D.D.C., filed Nov. 8, 1999). On November 11, 2001, NRDC filed a motion in federal court to force EPA to promulgate a Federal Implementation Plan ("FIP") for Houston. A June 2000 consent decree between NRDC and EPA set deadlines for a number of urban areas to receive SIP approval or cede control of air quality planning to federal authority. Although the current motion applies only to Houston, this could have consequences for many of the Nation's largest urban areas, including transportation sanctions.

III. Impact on Transportation Planning

Both SIP challenges and TIP challenges have important consequences for transportation planning, which are discussed below.

A. Consequences of TIP Challenges

TIP challenges pose the most direct and immediate threat to transportation planning. If the TIP is invalidated or the area thrown into conformity "lapse," no individual projects can be bid, awarded, or approved until conformity is re-established. Exempt projects and transportation control measures "built into" the SIP can proceed only if the MPO prepares an interim TIP (which takes upwards of 6 months).

In addition, past federal approvals for individual projects based on the TIP could be invalidated and projects enjoined. Stopping approved projects would interfere with planning, contracts and construction schedules and would precipitate disputes between contractors and project sponsors. Environmental groups use the threat of injunctions, loss of federal funding, and other consequences, coupled with the specter of daily civil penalties and attorney fees, to leverage lopsided settlements with government agencies.

B. Consequences of SIP Challenges

Three different SIP actions can have transportation planning consequences: (1) EPA's disapproval of a SIP submitted by a State; (2) EPA's finding that a State failed to attain air quality standards by the required deadline; and (3) EPA's finding that the MVEB in a submitted, but not yet approved, SIP is not "adequate" for transportation planning purposes.

An EPA disapproval of a submitted SIP has immediate transportation consequences. First, the area falls into a "semi-freeze" during which only projects in the first three years of the current TIP may advance. Second, an 18-month "sanctions clock" begins to run, at the end of which EPA can cut off all federal transportation funding (so that even projects in the first three years of the TIP cannot be funded) and the conformity status of the TIP will lapse (which means that no individual project approvals can

be made, even if funding is not an issue).

The transportation consequences of failing to attain Clean Air Act goals by the required deadline are less obvious, but important. If EPA finds that an area failed to attain ozone standards, the State must submit a new SIP for the region within one year and the area is "bumped up" to a downgraded nonattainment status. Although there are no immediate transportation consequences of this action, the State would have to submit a new SIP before it was next needed for conformity purposes. The State would also impose new pollution-reduction measures, including offsetting any growth in vehicle miles and setting a smaller MVEB, which could limit highway and housing/commercial development (but could also spur more mass transit and/or HOV lane construction).

Because conformity must be periodically re-established, EPA's approval of the MVEB is also critical to avoiding conformity lapses EPA's disapproval or invalidation of the MVEB in a lawsuit makes the conformity showing harder by reverting to an older budget or triggering the more stringent build/no-build conformity test.

IV. Looking Ahead

Conformity lawsuits are of critical concern to the 147 counties nationwide that are currently in nonattainment for smog-related ozone and many others grappling with particulate or carbon monoxide pollution. An additional 187 counties will soon face conformity challenges as EPA's new ozone and particulate standards are implemented. States and MPOs are well advised to "bulletproof" their transportation and air quality planning process through advance planning and understanding the pitfalls that can expose the planning process to litigation.[5] ■

Endnotes

[1] Beveridge & Diamond, P.C. has advised the transportation industry, MPOs and state governments in a full range of transportation issues, including many of the matters surveyed here.

[2] See Clean Air Act §176, 42 U.S.C. § 7506; Federal-Aid Highway Act, 23 U.S.C. § 109(j).

[3] These are the most problematic pollutants in the transportation arena. Ozone is regulated through its chemical precursors, nitrogen oxides ("NO_x") and volatile organic compounds ("VOCs"), which combine in sunlight to form ozone.

[4] Nonattainment areas are classified according to the degree of their air quality problem and assigned deadlines (attainment dates) according to their classification. For example, Marginal ozone nonattainment areas had to comply with the NAAQS in 1993, Moderate areas in 1996, Serious areas in 1999, Severe areas in 2005-2007, and Extreme areas in 2010.

[5] For more information on protecting transportation planning from litigation threats, see "Six Ways to Bulletproof the Conformity Process Under the Clean Air Act," by Beveridge & Diamond, P.C.

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