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SEVEN WAYS TO BULLETPROOF THE TRANSPORTATION CONFORMITY PROCESS

"Monkeywrench" Lawsuits Attack Transportation Planning

In metropolitan areas all over the country, environmental and NIMBY groups are bringing strategic lawsuits to stop road building projects using the "conformity requirement" of the federal Clean Air Act. Section 176 of the Act requires air emissions generated by transportation projects to match (or "conform" to) emissions budgets in state air quality plans. In Clean Air Act jargon, emissions from metropolitan transportation plans and transportation improvement programs ("TIPs") developed by metropolitan planning organizations ("MPOs") must conform to motor vehicle emissions budgets ("MVEBs") in state implementation plans for air quality ("SIPs"). In simpler terms, *the TIP must fit the SIP*. Under the Clean Air Act and Federal-Aid Highway Act, the MPO and the U.S. Department of Transportation must both make a "conformity determination" before transportation projects can move forward.

The conformity process has become a favorite target of environmental groups. The complicated nuances of the conformity rules offer a number of "chokepoints" that plaintiff groups can exploit to monkeywrench a region's planning process. These conformity suits are being filed in alarming numbers.

Widespread Problem

Lawsuits have hit many of the nation's urban areas. For example, in Sacramento, Sierra Club and two local citizen groups opposed highway expansion and bridge widening projects as part of a "transit-first" campaign. These groups filed a conformity suit alleging that Sacramento took too much credit for Smog Check (California's vehicle inspection and maintenance program). But instead of asking the court to fix the Smog Check program, they asked the court to kill the bridge and other infrastructure projects.

In Atlanta, Sierra Club sued four times in three years. Most recently, they challenged EPA's approval of the Atlanta MVEB. A second suit attacked 135 road projects. Two other suits opposed the air quality plan for the Atlanta region. These suits are particularly disruptive to the Atlanta region, which had been in conformity "lapse" and was eager to stop the consequent loss of millions of dollars in federal highway funds. The MVEB and SIP are essential building blocks in the conformity process because the MVEB is the yardstick in the SIP that the TIP must match. These lawsuits threatened to throw Atlanta back into lapse.

In Salt Lake City, environmental groups challenged the TIP and its package of transportation improvements in order to stop one particular project known as the Legacy Highway.

In Houston, Texas, these powerful special interests were able to use the threat of a lawsuit to delay many projects already programmed in the TIP.

Other lawsuits have plagued the Bay Area in San Francisco and Washington, D.C. In Baltimore, an "anti-sprawl" group challenged the motor vehicles budget in an effort to stop transportation projects for the Baltimore region.

Currently, environmental groups are using mass transit funding shortfalls to argue that all

transportation projects should stop - including subways - in an effort to gain political leverage. Are these lawsuits legal? It's questionable. But are they effective? You bet. So what can MPOs and the transportation community do to help transportation planning proceed smoothly? Citizens groups have a right to fire off lawsuits, but their ammunition can be defused. Here are a few ideas to bulletproof the conformity process – lessons learned from involvement in many of these conformity cases.

Seven Ways to Bulletproof
<u>the Conformity Process</u>

1. *Document Everything*

The elements of transportation planning (e.g., the conformity determination, regional analysis, and federal approval) will be closely scrutinized by the court if a lawsuit is filed. As a legal matter, the court should defer to the planning bodies if their actions were reasonable, but the court needs a written record to base its decision on. Make sure the record is solid and in writing. For example, in one of our cases, a weak link was a telephone conversation between the MPO and the state air agency that had resolved some outstanding issues. But the call was not memorialized in writing and the solution to the problem never made it into the conformity package sent to USDOT. When a lawsuit was later filed, the court had nothing to look at.

Ensure that telephone conversations and conference discussions on important issues are translated into the written conformity record. MPOs should ask their legal counsel to review the record and monitor the planning process with an eye toward creating a solid, written rationale for all decisions. Similarly, responses to public comment should fully explain the decisions on all issues.

1. *Document Everything*

2. *Be Generous With Notice and Comment*

3. *Ally With Business*

4. *Oppose Retroactivity*

5. *Oppose Citizen Suits*

6. *Build-In TCMs and Safety Margins*

7. *Protect the Building Blocks*

2. *Be Generous With Notice and Comment*

Public participation procedures are an easy target for citizen group lawsuits. Most MPOs follow procedures rigorously in terms of sending out notices and holding stakeholder meetings. But problems can crop up when a last-minute change to the plan, TIP or budget is proposed, or when the conformity analysis is revised in response to a comment received during the initial public participation process. Being responsive to public comments is exactly what the rules are designed to encourage – but keep in mind that, if a change is made, parties that are not involved in the resolution of a problem may be upset, especially if the change was unanticipated.

Consider re-noticing and taking comment on the change, if only for a week or two. Bulletproofing the process in this way and avoiding a lawsuit is well worth the short delay. Although, in some cases, this kind of procedure is already required by federal planning regulations, MPOs should consider writing this type of re-notice procedure into their local procedural rules.

3. *Business and MPOs Should be Allies*

Business groups can be useful partners in defending conformity decisions or emissions budgets. If a conformity suit is filed, consider supporting (or even seeking out) intervention by industry stakeholders. Business can often make arguments or suggest legal theories to the court that an MPO or other government agencies are constrained from raising, either because of political considerations or circumstances of the case.

This type of partnership has worked successfully for our clients in several agency action challenges. Ask industry to file affidavits detailing how these citizen suits disrupt their businesses, transportation needs, and the

planning process. Keep in mind that industry may be entitled to challenge any settlement struck with environmental groups, so it usually will be more efficient in the long run to include stakeholders from all sides in order to resolve the lawsuit once and for all.

4. *Oppose Retroactivity*

Transportation planning is supposed to be a forward-looking and self-correcting process. Citizen groups typically use flaws in the conformity process (whether real or perceived) to shut down transportation building. Environmental lawsuits turn the planning process on its head. They argue that if the planning process is not perfect, or if conformity cannot be shown, the planning process must start over. This is a dangerous argument that would paralyze planning.

In practice, plans and TIPs are revised frequently and conformity is reevaluated often. If new data shows that an estimate was incorrect, or that a pollution reduction program has a shortfall, the proper remedy is to incorporate that new knowledge in the next planning cycle. The courts must be taught that retroactivity can wreak havoc on the planning process and will disrupt contracts and expectations linked to projects in the pipeline. Make sure you and your lawyers support this "forward looking" principle.

5. *Oppose Citizen Suits*

Citizens groups love to use "citizen suit" provisions in environmental statutes because they can potentially recover attorney fees and impose $25,000 per day penalties if they win. This allows them to fund new lawsuits and creates potent leverage over government agencies that can't risk paying these awesome sums. The Clean Air Act includes a generous citizen suit provision. But conformity challenges should be heard under federal or state administrative laws – not under the Clean Air Act citizen suit provision, which is limited to certain types of enforcement suits such as violations of smokestack permit limits. MPOs should always oppose Clean Air Act citizen suit jurisdiction. Court decisions in Sacramento, New Hampshire, and Washington state have thrown out citizen suit claims, but plaintiff groups will keep trying.

6. *Build-in Projects and Safety Margins*

Conformity lapses can stop or delay all highway and transit projects, even projects that have the potential to reduce air pollution like HOV lanes, congestion relief and rail expansion. Only certain projects can proceed during a lapse (even these will be delayed 6-12 months) including those that are "built into" the State Implementation Plan as Transportation Control Measures ("TCMs"). Consider qualifying projects as TCMs to insulate them to some extent from conformity suits. It may be worth the extra effort. Also, consider building in a safety margin to provide extra emissions reductions if flaws or shortfalls are discovered. In many cases, conformity lawsuits attack a small element of the conformity process. Because many MPOs design their transportation plans to just meet their budgets, a dispute over a small number of tons of emissions can put a region over budget and cause a lapse.

7. *Don't Forget the Building Blocks*

Bulletproofing the conformity process through these and other steps is essential to protecting transportation planning. But also be sure to protect the "building blocks" of transportation conformity. Opponents of transportation projects are as likely to challenge the building blocks (the MVEB, SIP measures, models, data, etc.) that go into the ultimate conformity decision as they are to challenge the conformity decision itself.

Conformity decisions reflect a complicated blend of actions by state air quality agencies, EPA, state transportation agencies, MPOs, and USDOT. Challenges can target the decisions of each of these bodies, and lawsuits can turn routine building blocks into troublesome chokepoints. For example, we have seen a number of lawsuits challenging EPA's approval of the MVEB as "adequate" for conformity purposes. Other lawsuits have challenged EPA's decision not to "bump up" a nonattainment area to a more stringent

classification. Others questioned the EPA or state-approved models or data used to generate estimates used in the conformity process.

MPOs should be aware of all of these potential "chokepoints" and "building blocks" and should work with fellow regulators to ensure that all decisions necessary for the final conformity determination are as bulletproof as possible. ■

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