TRANSPORTATION ISSUES WITH EPA ACTIONS ON AIR PERMITTING STATE IMPLEMENTATION PLANS

DESCRIPTION:

The purpose of this presentation is to brief the Commission on issues related to pending EPA decisions on Air Permit State Implementation Plans (Permit SIPs) that might affect transportation. A lawsuit settlement requires the EPA to take final action on 30 outstanding Permit SIPs by December 2013. So far, EPA has approved one revised SIP and disapproved nine that were not subject to sanctions and has proposed one disapproval that could levy sanctions.

ISSUES:

- EPA SIP Disapprovals
- Conformity Freeze and Highway Sanctions for SIP Disapprovals
- SIP Decision Process
- Future Scenarios

EPA SIP Disapprovals

- EPA may issue sanctions for SIP disapprovals under either the Clean Air Act (CAA):
  - Section 110(m) - discretionary sanctions that may be levied statewide for failure of a state agency or entity including "lack of good faith" at any time after appropriate public notice.
  - FHWA-Headquarters conformity specialists are not aware of transportation sanctions being levied statewide anywhere in the U.S. under 110(m) sanctions; or
  - Section 179(b) - automatic sanctions for nonattainment areas; highway sanctions would apply 24 months after SIP disapproval if issues not addressed.
- A "protective finding" may be issued by EPA for a SIP disapproval subject to CAA Section 179(b) sanctions that prevents imposition of a transportation conformity freeze. According to EPA Notices dated 2008, only three 179(b) sanctions nationwide were issued without a protective finding.
- For control strategy SIPs, the SIP disapproval effective date starts a conformity freeze if no protective finding is issued and highway sanctions would begin 18 to 24 months later, if SIP issues aren't resolved. A conformity freeze does not apply to non-control strategy SIPs.

Conformity Freeze and Highway Sanctions for SIP Disapprovals:

- A conformity freeze means that only projects in the first four years of the transportation plan and TIP can proceed. During a freeze, no new plans, TIPs or plan/TIP amendments can be found to conform until SIP issues are resolved.
- A highway sanction means only "exempt" projects may advance. Exempt projects are generally maintenance and safety projects. For example, public and privately funded projects that are regionally significant that add capacity to the roadway network cannot advance.

SIP Decision Process:

- EPA issues notice of proposed decision (approval/disapproval)
- Public comment period
- EPA notifies Federal Highway Administration/Federal Transit Administration (FHWA/FTA) six months prior to pending sanctions/conformity freeze[1]
- FHWA/FTA notifies State Governor[2]
- EPA issues notice of final decision (approval/disapproval and notice if sanctions clock is tripped and or if a protective finding is issued)

[1] National Memorandum of Understanding between USDOT and US EPA, April 19, 2000.

[2] FHWA/FTA Revised Guidance for Implementing the March 1999 Circuit Court Decision Affecting Transportation Conformity, January 2, 2002.

Future Scenarios and Basis:

The notice of November 26, 2008 that proposed disapproval for the Texas' public participation Permitting SIP mentioned the possibility of sanctions, and EPA correspondence to Senator Watson indicated that sanctions were a possibility. EPA has scheduled their final decision for October 29, 2010. To address EPA's concerns, the TCEQ adopted new public participation rules, effective July, 2010 and forwarded these to EPA for approval. With this new rulemaking, TCEQ withdrew from EPA's consideration the rules that were the subject of the proposed disapproval and highway sanctions. Because of the lawsuit, EPA still has an October 29, 2010 deadline. Therefore, according to TCEQ, EPA may either publish a notice stating that the issue is moot, or that they cannot take final action, because the rules are no longer before their consideration.

Best Case Scenario:

- EPA approves TCEQ revisions, no disapproval, no sanctions and no freeze.

Good Case Scenarios:

- EPA conditionally approves TCEQ revisions and does not start the sanctions clock and allows TCEQ to resolve remaining minor issues specified by EPA; or.
- EPA proposes and finalizes a disapproval and concurs with TCEQ that this is not a control strategy SIP; therefore no freeze is imposed. Sanctions would be imposed in 18 to 24 months if SIP issues are not resolved; however; SIP issues are resolved before sanctions are imposed.

Worst Case Scenario:

A worst case scenario would be a new proposed disapproval and final disapproval that would levy statewide sanctions under CAA Section 110(m). It is believed a worst case scenario is not likely because there are no known cases of these sanctions being issued anywhere statewide throughout the U.S. and TCEQ believes EPA's concerns have been addressed with the new public participation rules. In addition, according to FHWA, EPA had not notified FHWA/FTA of a potential highway sanction or conformity freeze for the now defunct proposed disapproval. The impacts of such a scenario would be developed if needed, should a new proposed disapproval be published.

DESIRED RESULTS:

The desired effect of this presentation is to inform the Commission about current newsworthy issues and to receive Commission support for maintaining an open dialogue between TxDOT, TCEQ and FHWA at management policy levels.

FURTHER ACTIONS:

If highway sanctions or a transportation conformity freeze appear imminent, then a course of action would be recommended to redirect federal highway funds to projects exempt from transportation conformity, along with other necessary measures to address possible sanctions or freeze.

REFERENCES: Office of the Governor – Texas Environmental Success Record: http://www2.governor.state.tx.us/highlight/epa_texas

- EPA website regarding issues lawsuit and EPA actions: http://www.epa.gov/earth1r6/index.htm
- Federal Clean Air Act, Sections 110 and 179: http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=browse_usc&docid=Cite:+42USC7410, http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=browse_usc&docid=Cite:+42USC7509
- TCEQ website on Permitting SIP Issues: http://www.tceq.state.tx.us/nav/permits/air_permits.html
- SIP Disapprovals: 40 CFR Part 52 (including Sections 52.30 and 52.31)
- 11/26/2008 Federal Register Proposed Disapproval – cites 179(b) and 40 CFR 52.31 – both refer to sanctions under 179(b), and not 110(m); however the SIP is a SIP that is under 110 (emission limitations), and not 179 (nonattainment areas). The following is subject to legal interpretation; however, it would appear that EPA would have to re-notice in the Federal Register to reference CAA Section 110(m) sanctions and 40 CFR 52.30 prior to imposition of 110(m) sanctions under the worst case scenario.
- FHWA References: http://www.fhwa.dot.gov/environment/conformity/ref_guid/chap4.htm#freeze or http://www.fhwa.dot.gov/environment/sanction.htm#exempt.
- 40 CFR Part 52.31 has provisions for sanctions under CAA Section 179(b) and specifies SIPs for nonattainment areas, but does not specify control strategy SIP.
- 40 CFR Part 93.120 has provisions for sanctions under CAA Section 179(b) associated with "control strategy SIPs" that implement a federal requirement and has provisions for protective findings.
- EPA has deferred the decision on whether any of the Permitting SIPs meet the definition of "control strategy SIP" until and unless EPA issues a final case-by-case SIP disapproval.

EPA Actions on State Implementation Plans That May Affect Transportation

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Purpose of Presentation

- Inform you about issues related to EPA action on TCEQ Air Permitting Rules State Implementation Plans (SIPs) between now and December 2013, that might affect transportation.

SIP

- A SIP is a plan developed by a state to demonstrates how it will attain and maintain compliance with the National Ambient Air Quality Standards (NAAQS).
- In Texas, TCEQ develops the SIP
- EPA approves the SIP

Potential Consequences of EPA SIP Disapprovals -- Sanctions

- EPA may impose sanctions either statewide or only within nonattainment areas
- Disapproval of a SIP starts an 18-24 month sanctions clock
- If the SIP is intended to control emissions, the EPA must decide whether or not to issue a protective find
- If the EPA does not issue a protective finding, only projects in the existing 4 year STIP may proceed
- If the TCEQ fails to address the EPA's issues within the 18-24 month sanctions period, only exempt projects may advance thereafter

EPA SIP Lawsuit

- **2008 BCCA v. EPA** – industry group sued EPA to force a decision on 30 pending Texas SIPs that had not been acted upon by the EPA
- **Result** – settlement establishing a timeline for the EPA to take action on these SIPs
- **Progress** – EPA has proposed and or finalized decisions on ten SIPs
- **Impacts on Transportation** – SIPs acted on to date did not impact transportation. The one currently being considered does.

Dispute Concerning TCEQ's Public Participation Rules

- The current SIP being consider by the EPA involves the proposed public participation rules previously submitted by the TCEQ
- The EPA had proposed a limited disapproval for TCEQ's public participation rules with the possibility of including highway sanctions
- TCEQ withdrew these proposed rules and submitted new proposed rules to the EPA on July 2, 2010
- **Therefore**, EPA must start over on their consideration, and cannot make a decision on the public participation rules that were withdrawn and cannot impose sanctions at this time

Future Scenarios and Basis

- TCEQ will have the opportunity to address any concerns EPA raises as part of its review of the new public participation rules
- New rules have a new deadline for EPA action – 18 months from the date rules were submitted (July 2, 2010) to EPA
- Future EPA actions on other SIPs

Desired Results and Further Action

- Maintain the open dialogue between TxDOT, TCEQ and FHWA.
- If highway sanctions eventually appear imminent, then a course of action would be recommended to address possible sanctions.