SECTION 2

TRANSPORTATION PLANNING

A. METROPOLITAN TRANSPORTATION PLANNING: AN OVERVIEW

Transportation planning in metropolitan areas cannot be done by the local transit provider in isolation. Instead, federal law requires that all transportation planning must be done comprehensively, in coordination and cooperation with other governmental institutions, and the public, on a regional basis.[1] These requirements have become far more meaningful since federal legislation passed in 1991, as Congress recognized that transportation, congestion, land use, and environmental pollution are issues that transcend municipal boundaries and therefore have to be addressed on a regional scale. Transit agencies are a participant in that larger comprehensive planning process, along with other state and local governmental institutions.

The process of coordinating transportation planning with other governmental institutions, as required by federal law, is the subject of this Section. Transportation planning in the environmental context is described in Section 3—Environmental Law. Transportation planning for "new starts" is also discussed in Section 4—Transportation Funding and Finance;[2] further, certain planning considerations are woven into Section 5—Procurement, as they are integral to issues surrounding the acquisition and disbursement of federal funds. The focus here is on the *legal* requirements. The practical dimensions of planning are described in other federal documents, many of which may be accessed from the DOT, FTA, and FHWA Web sites.[3]

1. Metropolitan Planning Organizations

In communities with a population of 50,000 or more, the forum for planning is the MPO.[4] The Clean Air Act inaugurated a process whereby Congress vested MPOs with primary responsibility for planning transportation projects and designating eligibility for certain transportation dollars within their regions. MPOs do not actually design, build, or operate transportation projects; they merely designate those eligible for federal assistance.

Federally-funded transportation projects within a metropolitan planning boundary must be included on a long-range transportation plan (LRP) and TIP developed and approved by the MPO.[5] The LRP and TIP must be fiscally constrained, subject to a locally adopted public involvement procedure, and in nonattainment areas, must conform with the state Air Quality Implementation Plan. The TIP must also be approved by the Governor, at which time it becomes part of the STIP.[6]

2. ISTEA

As the 43,000-mile Interstate Highway System neared completion, congressional attention turned to alternatives other than the single-occupancy vehicle (SOV) to satiate the public's desire for mobility. Concerns over congestion, sprawl, and pollution, all of which defied political jurisdictional boundaries, emerged as political issues. Congress also recognized that the separate and isolated modal networks were not linked together well. Seamless connectivity between modes might well allow Americans to enjoy the inherent advantages of all modes. With a conclusion that the Interstate Highway System would not be further expanded, transportation development would transition to a more regional or local focus. Devolution of power, from the federal government to the states, the regions, and the local jurisdictions, would empower institutions closer to the people.

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[1] Robert Jay Dilger, *ISTEA*: *A New Direction for Transportation Policy,* PUBLIUS: THE J. FEDERALISM, Summer 1992, at 67–78; Robert W. Gage & Bruce D. McDowell*, ISTEA and the Role of MPO's in the New Transportation Environment: A Midterm Assessment,* PUBLIUS: THE J. FEDERALISM, Summer 1995, at 133–54; John Prendergast, *MPO's Become VIP's,* CIV. ENGINEERING, April 1, 1994, at 40, 40–44; PAUL G. LEWIS & MARY SPRAGUE, PUBLIC POLICY INSTITUTE OF CALIFORNIA, FEDERAL TRANSPORTATION POLICY AND THE ROLE OF THE METROPOLITAN PLANNING ORGANIZATIONS IN CALIFORNIA (1997); TED D. ZOLLER & JEFFREY A. CAPIZZANO, EVOLUTION AND DEVOLUTION: A NATIONAL PERSPECTIVE ON THE CHANGING ROLE OF METROPOLITAN PLANNING ORGANIZATIONS IN AREA-WIDE INTERMODAL PLANNING (Virginia Transportation Research Council Report No. VTRC 97-R19, 1997); TRANSP. RESEARCH BD., TRANSP. RES. REC. No. 1617, Land Use and Transportation Planning and Programming Applications 118–29 (1998); James H. Andrews, *Metro Power,* PLAN., June 1996, at 8–12; JACK D. HELTON, INTERMODAL PARTNERSHIPS UNDER ISTEA 138-148 (Transp. Research Bd. Special Report No. 240, 1992); Robert W. Gage, *Sector Alignments of Regional Councils: Implications for Intergovernmental Relations of the 1990's*, 22 AM. REV. PUB. ADMIN., 207–26 (1992); TRANSP. RESEARCH BD., TRANSP. RES. REC. No. 1552, Transportation Planning and Land Use at State, Regional, and Local Levels, 71–78, 171–76 (1996); Hank Dittmar, *A Broader Context for Transportation Planning—Not Just an End in Itself*, 61 J. AM. PLAN. ASS'N, 7–13 (1995); TRANSP. RESEARCH BD., Transportation Research Circular No. 450, INSTITUTIONAL ASPECTS OF METROPOLITAN TRANSPORTATION PLANNING 37–38, 40–44 (1995); Paul G. Lewis, *Regionalism and Representation: Measuring and Assessing Representation in Metropolitan Planning Organizations*, 33 URB. AFF. REV. 839–53 (1998); Seth B. Benjamin et al*., MPOs and Weighted Voting*, 20 INT'L PERSP. 31–35 (1994); ANTHONY DOWNS, THE DEVOLUTION REVOLUTION: WHY CONGRESS IS SHIFTING A LOT OF POWER TO THE WRONG LEVELS (1996); Mark Baldassare, *Regional Variations in Support for Regional Governance*, 30 URB. AFF. Q. 275–84 (1994).

[2] *New Starts, Planning, Development, and Funding for New Starts Projects* (visited July 8, 2003), http://www.fta.dot.gov/library/policy/ns/ns.htm.

[3] *See, e.g.*, http://www.dot.gov/; http://www.fhwa.dot.gov/; http://www.fta.dot.gov/.

[4] 23 C.F.R. pt. 450; 49 C.F.R. pt. 613, 58 Fed. Reg. 58040 (Oct. 28, 1993). The MPO is a forum for transportation planning in which the state, local cities and counties, the local transit provider, and the public participate.

[5] Projects that are wholly locally funded need not be included in the TIP or LRP.

[6] 23 U.S.C. §§ 134, 135 (2003).

Enactment of the ISTEA reflected these concerns. Significantly, it was one of the few highway bills in the nation's history to have expunged the word "highway" or "roads" from its title. This legislation provided enhanced flexibility for state and local governments to redirect highway funds to accommodate nonhighway modes and modal connections. Most importantly, for present purposes, ISTEA significantly enhanced the role of MPOs in transportation planning. Larger MPOs[7] were given principal authority, in consultation with the state, to select projects as eligible for certain "pots" of federal money, while requiring the state to cooperate with the MPO on allocating federal money in those "pots" over which the state had primary jurisdiction. The MPO has responsibility for allocating STP-regional, and in some states, Congestion Mitigation and Air Quality (CMAQ)[8] and enhancement (e.g., bicycle, pedestrian) funds in "consultation" with the state DOT. These are the so-called "flex" funds, which allow highway dollars to "flex" to transit projects in a particular region with agreement by the interested parties. CMAQ funds projects that promote transit ridership, clean-fuel development, and emissions maintenance and inspection programs.[9] It has been used to fund such projects as alternative fuels, transit, traffic flow improvements, auto emissions inspections, ridesharing, and bicycle and pedestrian projects.

The state has jurisdiction over the National Highway System, Bridge, and Interstate Maintenance funds, which it selects in "cooperation" with the MPO. The MPO was required to engage in formalized planning of two types—a 20-year long-range plan, and a short-term TIP, covering transportation projects to be implemented over at least a 3-year period. The TIP must be updated at least every 2 years.

ISTEA made two important structural changes in the planning process. First, it required MPOs to include several new types of stakeholders (including transportation providers and the public) in the planning process. Second, it required an expansion of the boundaries of the planning area to include space for the next 20 years of expected urban growth, and to encompass the area in the air quality region (if the region experiences air quality problems). ISTEA also established new national priorities in areas of economic progress, cleaner air, energy conservation, and social equity,[10] requiring that the intermodal transportation system be "economically efficient and environmentally sound…," as well as "energy efficient…."[11] In the legislation, Congress declared that it is in the "national interest to encourage and promote the development of transportation systems embracing various modes of transportation in a manner which will efficiently maximize mobility of people and goods within and through urbanized areas and minimize transportation-related fuel consumption and air pollution."[12]

3. TEA-21

TEA-21[13] (at this writing, the most recent of the 6-year transportation authorization bills) further enhanced the importance of the MPOs by increasing the amount of federal money over which they have primary responsibility. TEA-21 also gives states and local governmental institutions significant flexibility for projects on any federal-aid highway, bridge projects on any public road, transit capital projects, and public bus terminals and facilities. The Act also expands and clarifies that STP funds may be devoted to environmental programs, modifications to sidewalks to meet the requirements of the Americans with Disabilities Act, and intercity bus terminals and facilities.[14]

TEA-21 replaced ISTEA's numerous factors to be considered in TIP preparation with seven:

1. Support the economic vitality of the metropolitan area, particularly by enhancing global competitiveness, productivity, and efficiency;

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[7] Those classified as Transportation Management Areas, or generally, those with a population of 200,000 or more.

[8] CMAQ = Congestion Mitigation and Air Quality Improvement. CMAQ fund allocation is the responsibility of the state DOT. Project selection should occur cooperatively between the MPO and the state DOT.

[9] There are no regulations in effect for implementing CMAQ. The program's requirements are those expressed in the statute.

[10] Under ISTEA, the MPO's planning process, at minimum, had to consider the following factors:

- efficient use of existing transportation facilities;
- energy conservation goals;
- methods to reduce and prevent traffic congestion;
- effect on land use and land development;
- programming of expenditures for transportation enhancement activities;
- effects of all transportation projects regardless of sources of funds;
- international border crossings and access to major traffic generators such as ports, airports, intermodal transportation facilities, and major freight distribution routes;
- connectivity of roads within the metropolitan area with roads outside the metropolitan area;
- transportation needs identified by management systems;
- preservation of transportation corridors;
- methods to enhance efficient movement of commercial vehicles;
- life-cycle costs in design and engineering of bridges, tunnels, and pavement; and
- social, economic, and environmental effects.

Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, H.R. 2950, 102d Cong. (1991). As explained below, these were replaced with seven factors in TEA-21.

[11] 49 U.S.C. § 101 (2003). *See* Joseph R. Thompson, *ISTEA Reauthorization and the National Transportation Policy,* 25 Transp. L.J. 87, 99 (1997).

[12] 23 U.S.C. § 134(a)(i) (2003).

[13] Pub. L. 105-178, 112 Stat. 107 (June 9, 1998).

[14] Christina Nystrom, *TEA Time for the Nation's Roads,* AM. CITY & COUNTY, Sept. 1999, at 58, 72.

2. Increase the safety and security of the transportation system for motorized and nonmotorized users;

3. Increase the accessibility and mobility options available to people and freight;

4. Protect and enhance the environment, promote energy conservation, and improve the quality of life;

5. Enhance the integration and connectivity of the transportation system, across and between modes, for people and freight;

6. Promote efficient system management and operation; and

7. Emphasize the preservation of the existing system.[15]

In this Section, we review both the statutory planning requirements promulgated by Congress and the resultant regulatory requirements issued by the relevant administrative agencies. At this writing, the relevant regulations were those promulgated pursuant to ISTEA; FHWA and FTA have not yet updated those regulations to address TEA-21.[16] Nonetheless, FTA field offices have been instructed to work with MPOs, state DOTs, and local transit operators to ensure compliance with TEA-21's requirements.[17]

B. MPO BOUNDARIES, STRUCTURE, AND DESIGNATION

1. Federal Requirements

In 1968, Congress required that regional planning agencies be established under state law. An MPO is designated for each urbanized area with a population of more than 50,000 people, by agreement between the Governor of the state and the local government officials that together represent at least 75 percent of the affected population (including the central city).[18] Such agreement must be in accordance with procedures established by applicable state or local law.[19] The MPO's policy board must consist of local elected officials,[20] officials of public transportation agencies, and appropriate state officials.[21] A designation of an MPO will remain in effect until it is redesignated.[22]

An MPO may be redesignated by agreement between the Governor and units of local government that represent at least 75 percent of the affected population (including the central city).[23] MPOs may also be redesignated when requested by a unit(s) of local government representing at least 25 percent of the affected population in any urban area (1) whose population is more than 5,000,000 but less than 10,000,000, or (2) which is an extreme nonattainment area for ozone or carbon monoxide as defined under the Clean Air Act, provided there is agreement between the Governor and local government representing at least 75 percent of the affected population.[24] More than one MPO may be designated within a metropolitan planning area when the Governor and the existing MPO determine that the size and complexity of the existing area make a single MPO inappropriate.[25]

Where a public agency with multimodal transportation responsibilities was operating under state law at the time 23 U.S.C. § 134 was enacted, such agency may continue its statutory duties.[26] These duties may include developing plans and programs, developing long-range capital plans, coordinating transit services and

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[15] TEA-21 also strengthened the linkage between land use and transportation planning.

[16] As explained below, the FHWA and FTA regularly engage in a joint certification review of the transportation planning process of MPOs.

[17] Proposed regulations were published at 65 Fed. Reg. 33922 (May 25, 2000). A version of the final rules was sent to the Office of Management and Budget during the closing days of the Clinton Administration. But they were caught in the web of pending regulations by the George W. Bush administration for review. Daily Report for Executives (Feb. 15, 2001).

[18] 23 U.S.C. § 134(b)(1) (2003); 49 U.S.C. § 5303(c)(1) (2003).

[19] To the extent possible, only one MPO should be designated for each UZA [census-defined urbanized area] or group of contiguous UZAs. More than one MPO can be established only if the Governor(s) conclude that the size and complexity of the UZA makes designation of more than one appropriate. 23 C.F.R. § 450.306(a) (2003). However, TEA-21 changed the statutory basis of this provision, adding the existing MPO to this determination. To the extent possible, the MPO should be designated under state legislation or interstate compact, and be authorized to carry out metropolitan planning.

[20] Federal regulations require that the MPO policy body must include within its voting members local elected officials; officials of agencies that administer or operate major modes of transport (e.g., transit operators, airports, rail operators); and state officials. 23 C.F.R. § 450.306(i) (2003). Where a city council member has been appointed to an MPO board, that council member may be removed from the board upon refusal to vote in accordance with the council's wishes. This removal does not violate a First Amendment freedom of expression because the council member was appointed to represent the council. Capacity as an elected official is not compromised by removal from the MPO board. Rash-Aldrich v. Ramirez, 96 F.3d 117 (5th Cir. 1996).

[21] 23 U.S.C. § 134(b)(2)(c) (2003); 49 U.S.C. § 5303(c)(2) (2003).

[22] 23 U.S.C. § 134(b)(4) (2003); 49 U.S.C. § 5303(c)(4), (c)(5)(D) (2003).

[23] 23 U.S.C. § 134(b)(5)(A) (2003); 49 U.S.C. § 5303(c)(5)(A) (2003). Stated differently, a new MPO may be designated to replace an existing MPO only upon agreement by the Governor and affected local governments representing 75 percent of the metropolitan population, including the local government representing the central city. 23 C.F.R. § 450.306(d) (2003).

[24] 23 U.S.C. § 134(b)(5)(B) (2003); 49 U.S.C. § 5303(5)(B) (2003).

[25] 23 U.S.C. § 134(b)(6) (2003); 49 U.S.C. § 5303(c)(3) (2003).

[26] This section was enacted in 1962, though it has been amended on numerous occasions since then. Pub. L. No. 87-866, § 9(a), 76 Stat. 1148 (Oct. 23, 1962). An MPO may not impose legal requirements on any transportation facility, provider, or projects not eligible under Title 23 or chapter 53 of Title 49 of the U.S. Code. 23 U.S.C. § 134(m) (2003).

projects, and other activities to which it has been charged.[27]

Boundaries of an MPO are determined by agreement between the MPO and the Governor, but must encompass at least the existing urbanized area and the contiguous area expected to become urbanized within a 20-year forecast period.[28] The area may encompass the entire, or consolidated, metropolitan statistical areas as defined by the Census Bureau. When an urbanized area is in nonattainment for ozone or carbon monoxide, as defined by the Clean Air Act, the boundaries of the MPO in existence as of the date of the enactment of 23 U.S.C. § 134 are ordinarily retained.[29] The area may, however, be adjusted by agreement of the Governor and the affected MPO in the method described above.[30] If an urbanized area is designated as a nonattainment area for ozone or carbon monoxide after the enactment of 23 U.S.C. § 134, the boundaries will be established as they would under a new MPO designation.[31]

If more than one MPO has authority within a metropolitan area or an area that is designated as a nonattainment area for ozone or carbon monoxide under the Clean Air Act, each MPO must consult with the other MPO and the state when coordinating plans and programs.[32] If a specific project is located within the boundaries of more than one MPO, again, all involved MPOs must consult one another and must coordinate plans regarding the project.[33]

The scope of planning by an MPO may extend beyond its own boundaries. The Governor and the MPOs are encouraged to coordinate planning within the entire metropolitan area and the state.[34] Congress authorizes cooperation between any number of states to enter into agreements or compacts and to establish agencies in the advancement of mutual support and assistance in carrying out transportation plans.[35]

Federal regulations provide that MPO boundaries shall, at a minimum, include the UZA(s) and contiguous geographic area(s) likely to become urbanized within the 20-year forecast period covered by the transportation plan. Before determining the MPO's boundaries, the planning areas in use for all transport modes must be reviewed, and adjustments made to foster an effective planning process that assures intermodal connectivity, reduces modal disadvantages, and promotes efficient transportation investment strategies.[36] The boundaries selected need not be approved by the FHWA or FTA.

For geographic areas designated as nonattainment or maintenance areas under the Clean Air Act Amendments of 1990, the MPO boundaries must include at least the boundaries of the nonattainment or maintenance areas, unless a contrary agreement has been reached between the MPO and the Governor.[37] Where the MPO boundaries do not include the entire nonattainment or maintenance areas, there should be an agreement between the MPO and the state DOT, the state air quality agency, and affected local agencies describing the process for cooperative planning and analysis of projects outside the metropolitan planning area, but within the nonattainment or maintenance area; the agreement should indicate how the total transportation-related emissions will be treated for purposes of determining conformity with EPA regulations.[38] Proposals to exclude a portion of the nonattainment or maintenance area from the planning area boundary must be coordinated with the FHWA, FTA, EPA, and state air quality agency before a final decision is made.[39]

2. State Requirements

The foregoing summarizes the *federal* statutory and regulatory requirements for MPO formation. State legislation also impacts the formation, structure, and responsibilities of MPOs. There is enormous diversity between states in the way MPOs are formed, and the responsibilities they hold. In many jurisdictions, the composition of the MPO and who represents local jurisdictions on the Board and important committees can be highly politicized. In others, rural and suburban districts have greater representation than the central core city, which may have the largest share of vehicle miles traveled (VMTs) and tax contribution. This can be particularly troublesome where suburban sprawl is a divisive issue, or where providing infrastructure to fast growing regions is a controversial topic. Here, we review four states as examples of state requirements—Arizona, Colorado, Texas, and Washington.

Arizona law provides for the creation of tax-levying regional public improvement districts—a regional public transportation authority (RPTA) in areas of a population of 1.2 million or more,[40] and the creation of a regional transportation authority (RTA) in a county of between 400,000 and 1.2 million.[41] The RTA board must develop a regional public transportation system plan that defines public transportation goals for each corri-

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[27] 23 U.S.C. § 134(b)(3)(B) (2003); 49 U.S.C. § 5303(c)(6) (2003).

[28] 23 U.S.C. § 134(c)(1)(2) (2003); 49 U.S.C. § 5303(d)(2) (2003).

[29] 23 U.S.C. § 134(c)(3) (2003); 49 U.S.C. § 5303(d)(3) (2003).

[30] 23 U.S.C. § 134(b)(5), (c)(3) (2003); 49 U.S.C. § 5303(c)(5), (d)(3) (2003).

[31] 23 U.S.C. § 134(b)(1), (c)(2), (c)(4) (2003); 49 U.S.C. § 5303(d)(4) (2003).

[32] 23 U.S.C. § 134(e)(1) (2003); 49 U.S.C. § 5303(e)(3) (2003).

[33] 23 U.S.C. § 134(e)(2) (2003); 49 U.S.C. § 5303(e)(5) (2003).

[34] 23 U.S.C. § 134(d)(1) (2003); 49 U.S.C. § 5303(e)(1) (2003).

[35] 23 U.S.C. § 134(d)(2) (2003); 49 U.S.C. § 5303(e)(2) (2003). One example of such interstate planning is the *Tahoe Regional Planning Compact.*

[36] 23 C.F.R. § 450.308(c) (2003).

[37] 23 C.F.R. § 450.308(a) (2003).

[38] 40 C.F.R. pt. 51 (2003).

[39] 23 C.F.R. § 450.310(f) (2003).

[40] A.R.C. § 48-5102 (2003).

[41] A.R.C. §§ 48-5301, 48-5302 (2003).

dor, prioritizes corridors for development, selects appropriate public transportation technology, and determines operating performance criteria and costs for public transportation systems.[42] The RTA board, comprised of representatives of member jurisdictions of the regional council of governments, develops and submits proposals for a 10-year transportation plan to the electorate for approval.[43]

In Colorado, state law imposes specific requirements for transportation planning by MPOs. The MPO must cooperate with the state and other governmental agencies in carrying out 3-C transportation planning.[44] (As explained below, federal law requires that transportation planning be cooperative, comprehensive, and continuing—hence the term "3-C Planning"). Colorado MPOs must prepare 20-year regional transportation plans that include the following:

- New and expanded transportation facilities and services required to meet the estimated demand for transportation in the region over the 20-year period;
- Time schedules for completion of the projects included in the transportation plan;
- Funding needs and sources;
- Expected environmental, social, and economic impacts of the recommendations in the plan, including an evaluation of "the full range of reasonable transportation alternatives," including traffic system and travel demand management strategies and other modes of transport "in order to provide for the transportation and environmental needs of the area in a safe and efficient manner";
- Assistance to other agencies in developing transportation control measures to satisfy federal requirements and comport with the state implementation plan, and achieve clean air objectives; and
- Fiscal needs and constraints assessment to identify mobility measures that can reasonably be implemented when anticipated.[45]

The plan may also prioritize transportation improvements. The Colorado Department of Transportation (CDOT) must integrate the regional transportation plan into its comprehensive statewide transportation plan, which must include the following:

- An emphasis on multi-modal transportation, with connectivity between modes;
- Coordination with county and municipal land use planning, with an examination of the impact of land use decisions on transportation needs, and the preservation of transportation corridors; and
- Development of areawide multi-modal management plans.[46]

The first state requirements for transportation planning in Colorado were enacted in 1991.[47] Among other things, the legislation established Transportation Planning Regions (TPRs), specifying that the state's MPOs constitute five of the 15 TPRs allowed by law, apparently grandfathering them in as they existed in 1991.

Under Colorado law, the metropolitan Denver transit authority, RTD [the "Regional Transportation District"], may take no action relating to the construction of a fixed guideway mass transit system until that system has been approved by the designated MPO (the Denver Regional Council of Governments (DRCOG)), which must approve each component part or corridor of the system, as well as its financing and technology.[48] CDOT is required to cooperate with the MPO to develop a procedure for the fair and equitable distribution of funds distributed under the Urban Mass Transportation Act of 1964[49] and progeny.[50]

Pursuant to federal regulations that required such an agreement, in 1977, DRCOG, RTD, and the state of Colorado entered into a Memorandum of Agreement Regarding the Urban Transportation Planning Process [1977 MOA].[51] More than 2 decades later, this Agreement still governed the 3-C transportation and comprehensive land use planning process for the Denver-Boulder Standard Metropolitan Area.[52] The 1977 MOA designated DRCOG as the MPO and charged it with ensuring cooperative planning among the staffs of

[42] A.R.C. § 48-5121B (2003).

[43] A.R.C. § 48-5304, 48-5309 (2003).

[44] COLO. REV. STAT. § 43-1-1103(3)(a) (2002).

[45] COLO. REV. STAT. § 43-1-1103(1)(2) (2002).

[46] COLO. REV. STAT. § 43-1-1103(4)(5) (2002).

[47] COLO. REV. STAT. § 43-1-1102(7) (2002).

[48] COLO. REV. STAT. § 32-9-107.7 (2002).

[49] Pub. L. No. 880365; 49 U.S.C. § 1601 *et seq*.

[50] COLO. REV. STAT. § 43-1-901 (2002).

[51] *Memorandum of Agreement Between the Denver Regional Council of Governments and the State Department of Highways and the Regional Transportation District Regarding the Urban Transportation Planning Process of January 28, 1977* [hereinafter 1977 MOA]. The purposes of the 1977 MOA are:

- To satisfy the transportation planning requirements established by federal law so as to qualify for federal capital and operating assistance;
- To integrate transportation planning with other elements of comprehensive areawide planning;
- To develop, update, and adopt transport plans to reflect changing needs; and
- To translate these plans into action items with priority recommendations for transportation system improvement.

1977 MOA, at 5–6.

[52] At this writing, the 1977 MOA is being revised and updated. The MOA requires that the planning process must be consistent with the state of Colorado's *Action Plan*, approved March 22, 1974, as amended. 1977 MOA, at 5–6. The *Action Plan* established a process for transportation planning with a philosophy of planning from the local level upward through the structures of government. 1977 MOA, at 2–3. The federal requirement for an "Action Plan" has lapsed, however, and no state "Action Plan" currently exists. There are several other anachronisms in the MOA reflecting the fact that it has not been updated since originally drafted in 1977, despite the promulgation of major federal legislation in the field. For example, FTA is referred to as FHWA. Federal public involvement requirements have changed considerably since 1977. Freight planning is now recognized as a priority, and is nowhere discussed in the 1977 MOA.

DRCOG, the CDOT, and the RTD through the Transportation Committee (TC).[53] To facilitate and coordinate comprehensive planning and land use, the 1977 MOA outlined a 19-step process.[54]

In Texas, local governments can form Regional Planning Commissions (RPC).[55] The participating governmental units may determine the number and qualifications of the governing body, though at least two-thirds of the members must be elected officials of the participating governmental institutions.[56] The RPC must maintain a comprehensive development planning process to assess the needs and resources of the region and formulate goals, objectives, policies, and standards to

[53] 1977 MOA at 6–7. The TC must consist of the following voting members:

- DRCOG
  - Council Chairman
  - Chairman of the Program Committee
  - Executive Director
  - Council's Designee
- State of Colorado
  - Chairman of the Highway Commission
  - Member of the Highway Commission designated by the Governor
  - Executive Director CDH
- RTD (Regional Transportation District)
  - Chairman of the Board
  - Executive Director
  - Board's Designee

[54] 1. *Planning Meeting.* First, the MPO staff calls a planning meeting of the Regional Review Team and all other agencies or organizations expected to participate in preparation or review of the reports being prepared.

2. *Schedule and Responsibility.* At the planning meeting, the MPO staff proposes a timetable and responsibilities for preparation of the document.

3. *Agreement on Approach*. If at the Planning Meeting the agencies involved are unable to agree on a proposed schedule and responsibilities, the disputed issues are presented to the TC, which resolves them.

4. *Resolve Schedule/Responsibility Differences*. Where such an agreement cannot be reached, the MPO staff must generate a report outlining the grievances, and at least one representative from each aggrieved agency shall be present at the subsequent TC meeting. The TC then makes a final resolution and distributes a ruling to all parties for implementation.

5. *Minor Revisions.* Whether there are or are not disputed issues to be resolved, the TC determines whether suggested changes or modifications to any document are "major" or "minor." If major revisions are contemplated, the full comprehensive planning process proceeds. If minor revisions are involved, the MPO staff prepares appropriate material for TC review and approval.

6. *Staff Input.* Based on the schedule and responsibilities determined above, the staff of each participating agency carries out the necessary planning studies and submits the results to the MPO staff.

7. *First Draft.* The MPO assembles the information provided by the agencies and prepares a first draft of the report. The MPO staff submits the draft to each participating agency for their staffs' review and comment.

8. *Staff Review.* The MPO staff compiles and summarizes the written comments and proposes revisions to the second draft.

9. *Second Draft.* Based on the comments received, the MPO staff revises the first draft and prepares a second.

10. *Agency Review.* The MPO staff then distributes the second draft to each participating agency for a second round of review and comment. Comments must be submitted to the MPO in writing.

11. *Summarize Comments and Propose Resolutions of Differences.* All submitted comments are summarized by MPO staff, and proposed revisions to the second draft, in response to those comments, are developed.

12. *TC Review and Resolution.* The TC must review agency comments and the proposed resolution of differences that were summarized by MPO staff. The TC directs the staff in its revisions of the second draft until a final draft is approved by the TC. Where seven members do not vote affirmatively for a document after 90 days, that draft receiving the highest number of votes will be approved and submitted to the MPO.

13. *MPO Staff Assemble Final Draft*. The MPO staff assembles the final draft. Upon its receipt and review by the MPO policy body, that Body may approve it or direct its revision.

14. *MPO Policy Board Approval/Endorsement*. The MPO policy body reviews the final draft during regularly scheduled monthly meetings until final approval is achieved.

15. *Review of Policy Board Revisions.* If the document is approved without revision, it is submitted to the appropriate state and federal agencies for their review or action. If revisions are made, copies are sent to all participating agencies for their review.

16. *Participating Agency Concurrence*. The agencies shall forward their concurrence or nonconcurrence in writing to the MPO for its review.

17. *Final MPO Review*. The MPO reviews written comments filed by the participating agencies. Where an agency formally objects to an item in the Final Document, that document shall not be submitted for state or federal review until the item is removed or issue resolved between the MPO Policy Body and the dissenting agency.

18. *Submit Documents*. The MPO staff submits the approved/endorsed document to appropriate state or federal agencies for review and action. All planning documents submitted to the FHWA must be routed through CDH.

19. *Federal Review/Action*. After receipt of the Final Document from the MPO, the relevant federal agency will review it and take appropriate federal action consistent with its regulations.

In addition to the requirements outlined in the 19-step planning process, the MOA requires citizen involvement at all levels of planning. This includes appropriate provisions for citizen advisory committees, presentations, and public hearings that must be incorporated into the Prospectus and Unified Work Program.

[55] TEX. LOCAL GOV'T CODE ch. 391 (2002). These are sometimes known as Councils of Government.

[56] TEX. LOCAL GOV'T CODE § 391.006 (2002).

guide the long-range physical, economic, and human resource development of a region.[57]

In the state of Washington, local governments within a county or within geographically contiguous counties may join together as a regional transportation planning organization (RTPO).[58] A RTPO must prepare and update a regional transportation strategy and a regional transportation plan.[59] It must review the plan biennially and forward it to the state department of transportation which, in cooperation with the RTPO, must establish minimum standards for development of the plan and facilitate cooperation among RTPOs.[60]

Space does not permit an examination of each state's legislative gloss on MPO formulation, organization, and powers, but this succinct review provides a few representative examples of the ways in which state law establishes the metes and bounds of MPO operation. Many appear to track the federal requirements, though some with greater fidelity to those federal requirements than others.[61] The reader is encouraged to peruse the relevant state statutes to see precisely how these issues are handled locally.[62]

C. TRANSPORTATION MANAGEMENT AREAS (TMAS)

Transportation Management Areas (TMAs) are designated by the Secretary of Transportation for each urbanized area with a population of over 200,000 people.[63] The Secretary must designate any additional TMAs on the request of the Governor and the MPO designated for the area.[64]

In the event that a metropolitan area is not designated as a TMA, the Secretary may provide for the development of an abbreviated LRP and TIP (unless the area is in nonattainment for ozone or carbon monoxide under the Clean Air Act), taking into account the complexity of transportation problems in the area.[65]

For TMAs, or areas within an MPO classified as nonattainment areas for ozone or carbon monoxide pursuant to the Clean Air Act,[66] federal funds may not be given for any highway project that will result in a significant increase in carrying capacity for single-occupant vehicles unless the project is part of an approved congestion management system.[67] Individual projects included in the plans and programs within the TMA are reviewable under the National Environmental Policy Act of 1969. Under that Act, however, any decision by the Secretary of Transportation concerning a plan or program is not considered to be a federal action subject to review.[68]

Transportation plans and programs in a TMA must be based on a continuing and comprehensive planning process that the MPO carries on in cooperation with both the state and the local transit operators.[69] That planning process for a TMA must include a congestion management system that provides for effective management (through travel demand reduction and operational management strategies) of federally-funded transportation facilities under Chapter 53 of Title 49, U.S.C. (transit), and Title 23, U.S.C. (highways).[70]

D. PLANNING: GENERAL CONSIDERATIONS

1. Public Input and Acceptance

In most communities, transit planning transcends technical engineering and design issues. It is a complex and politically sensitive public process. Many different users and diverse interests must be accommodated. Consensus building collaboration of affected interests is required on a regional basis.[71] As discussed below and in Section 3, legal (including environmental) restrictions influence decisionmaking. Political considerations must be understood. The business community and the press can also be highly influential in molding governmental and public opinion. Several constituencies must be involved early and throughout—the politicians; the various governmental agencies (federal, state and local); the tenants; the nearby residents; the business community; and the general public.[72] Their involvement avoids unnecessary surprises and helps build consensus. Therefore, the transit planning process should be characterized by consultation and cooperation among various constituencies. The planning organization must seek the advice and input of interest groups and interested citizens prior to and during the preparation of the short- and long-term plans. The process should be undertaken in a way that ensures that the plan thereby produced will receive acceptance by the appropriate governmental officials and the general public.[73]

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[57] TEX. LOCAL GOV'T CODE § 391.012(b) (2002).

[58] WASH. REV. CODE ch. 47.80.011 (2003).

[59] WASH. REV. CODE ch. 47.80.023 (2003).

[60] WASH. REV. CODE ch. 47.80.030 (2003).

[61] *See, e.g.,* FLA. STAT. § 339.175 (2003), which appears to follow the federal requirements with greater fidelity than some.

[62] *See, e.g.,* HAW. REV. STAT. § 279E-2 (2003), ME. REV. 23 STAT. § 3502 (repealed 1975).

[63] The Secretary of Transportation must designate as transportation management areas (TMA) all UZAs with populations greater than 200,000. The TMA designation applies to the entire metropolitan area boundary. 23 C.F.R. § 450.312(f) (2003).

[64] 23 U.S.C. § 134(i)(1) (2003); 49 U.S.C. § 5305(a) (2003).

[65] 23 U.S.C. § 134(j) (2003); 49 U.S.C. § 5305(g) (2003).

[66] 42 U.S.C. § 7401 *et seq*. (2003).

[67] 23 U.S.C. § 134(l) (2003); 49 U.S.C. § 5305(f) (2003).

[68] 49 U.S.C. § 5305(h) (2003).

[69] 49 U.S.C. § 5305(b) (2003).

[70] 49 U.S.C. § 5305(c) (2003).

[71] *See generally* NATIONAL ASSOCIATION OF REGIONAL COUNCILS, WORKING TOGETHER ON TRANSPORTATION PLANNING: AN APPROACH TO COLLABORATIVE DECISIONMAKING (1995).

[72] *Id*.

[73] *Id*.

The requirement is a meaningful public participation process—a meaningful opportunity to comment, but without the Administrative Procedure Act requirement to "accommodate or explain" all comments received during the public participation process. Moreover, a planning process without meaningful public participation will not withstand legal challenge. At the outset of the planning process, transit planners must (1) develop a public participation process that identifies (2) the phases and/or stages at which public participation is either legally required or solicited for political reasons to engender public support, (3) the constituencies that will be solicited, and (4) the outreach methods necessary to ensure meaningful participation.[74] The transit planner must address each of these issues, and how to overcome or work through them.

2. The Planning Organization

In the preplanning stage, the transit organization ordinarily undertakes the study, develops a work program, and provides a means for financing the work.[75] The organization should establish policy that is acceptable to the community; bring together for advisory and coordinating purposes the relevant interests (particularly the MPO, the state DOT, the FTA, and, depending on the project, the FHWA); and provide a process that is both technically sound and responsive to transportation policy and the coordination of the various constituencies. Thus, in pursuing large projects (particularly those requiring environmental review) the planning organization should perform several functions including policy formulation, advice and coordination, and technical planning (and for air quality conformity, modeling). Failure to do this properly may result in fragmented public support for the transit plan's recommendations, unrealistic recommendations unacceptable to the community, and a completed study with little utility that is difficult to implement. For complex projects, formal policy, technical, and review committees meet regularly. They must decide whether to open their meetings to the public. Initially, they must determine whether they are legally required to conduct the meeting in public. If not so required, a policy decision must be made whether to open the meeting to the public. As a practical matter, some meetings are better and more efficiently handled if not open to the public. Frequently, once the project has been properly scoped, consultants are hired to provide data, plan development, assess alternatives, and the like.[76]

Once a systems plan is developed and the community planning process is begun, specific proposals for new projects are considered under what is termed "project planning" or "master plan development." For large projects, several basic phases can be involved, including purpose and needs assessment, facilities assessment, facilities design, environmental assessment, and financial planning.[77] Each should be done on a short-term, intermediate term, and long-term planning horizon. Of course, smaller projects do not go through such a complicated planning process. Some projects, such as simple fleet procurements, are categorically exempt from the rigorous planning process.[78]

3. Needs Assessment and Demand Forecasting

Needs assessment usually requires forecasting of anticipated passenger movements. Forecasting requires an expert judgment, or estimate, of future traffic and demand. Such forecasts are based on the assumption that assessment of historical data and trends (e.g., vehicle movements) may have a predictive relationship vis-à-vis events in the future. An array of transportation, socioeconomic, and demographic information will form the basis of the forecast. Forecasters must analyze such information as historical trends in highway and transit movements and volume, population, employment, economic growth characteristics of the region, trends in traffic, congestion, geographic factors, technology dynamics, government regulation, and travel patterns (typically including vehicle miles traveled between residential and employment centers).[79] Also examined are demand/delay relationships and the capability of existing roads and transit lines to satiate present and projected future demand with existing capacity.[80] Since promulgation of the Clean Air Act Amendments in 1990, pollution modeling has also been an integral part of the transportation planning process.[81]

The purpose of forecasting is not to predict the future with precision, but to provide data that can be useful in reducing uncertainty. If overly optimistic forecasts prompt investments in infrastructure too early, then premature capital costs and unnecessary operating expenses can be incurred. On the other hand, if overly pessimistic forecasts dissuade infrastructure expansion, efficiency costs can be high. Thus, the purpose of forecasting is to provide a framework for gauging the timing of investments in a way that minimizes forecasting error costs in either the excessively optimistic or pessimistic direction.

Though historical annual and seasonal data are useful, peak demand defines capacity needs.[82] Thus, the

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[74] *See* 49 C.F.R. pt. 450 (2003).

[75] As we shall see below, federal requirements insist that the plan be financially constrained by available economic resources.

[76] 42 U.S.C. §§ 4321–4370d (2002).

[77] James Spensley, *Airport Planning, in* AIRPORT REGULATION, LAW & PUBLIC POLICY 69-71 (Robert M. Hardaway, ed., 1991).

[78] *See* Section 5—Procurement, below.

[79] ROBERT HORONJEFF & FRANCIS MCKELVEY, PLANNING AND DESIGN OF AIRPORTS (McGraw Hill, 4th ed. 1994). PAUL S. DEMPSEY ET AL., DENVER INTERNATIONAL AIRPORT: LESSONS LEARNED 34 (McGraw Hill 1997).

[80] Spensley, *supra* note 78 at 63, 69.

[81] *Supra* note 72.

[82] INTERNATIONAL CIVIL AVIATION ORGANIZATION, AIRPORT PLANNING MANUAL 1-17 (2d ed. 1987).

annual capacity capability of transportation networks measured in passengers or volumes of freight is a relatively less helpful number than the system capacity on a peak day at a peak hour. By and large, transit systems tend to have greater ridership in congested corridors. Therefore, forecasts are most useful when converted into peak period data for passenger movements—typically the commuting "rush hour."

Numerous forecasting techniques have emerged, including forecasting by judgment; trend extrapolation; market share models; econometric models such as multiple regression or logit models[83] for trip generation; trip distribution and modal choice analysis; trend projection; and linear, exponential, and logistic curve extrapolation.[84] Nonetheless, forecasting remains an extremely subjective process that can result in widely differing predictions depending on the assumptions made and techniques used.[85]

4. Alternatives Analysis, Engineering, and Design

Once the baseline data have been analyzed and growth projected, a Major Investment Study is ordinarily undertaken for major projects.[86] This will assess all the transportation alternatives: (1) doing nothing; (2) highway expansion; (3) bus routes; (4) light rail; (5) commuter rail; (6) bicycle; or (7) pedestrian. With respect to each, cost, community preferences, congestion and delay, technology, alignment (corridors), life style, land use, development, environmental pollution, and environmental justice will be considered.

Once this is completed, the alternative(s) will be selected that satisfies this cost/benefit analysis. Preliminary engineering and design will be performed, and environmental study undertaken, followed by funding and contracting for the project.

It should be emphasized that the foregoing describes the planning process for major projects. The level of planning can vary greatly, and often becomes much more complex if there are negative environmental impacts. Or it can be less complex. For example, fleet procurements are subject to a categorical exclusion, and may forego the elaborate process described above.

5. New Starts Planning and Project Development Process

The FTA's "new starts" program supports locally planned, implemented, and operated transit "guideway" capital projects.[87] FTA has developed a New Starts Planning and Project Development Process that requires local agencies to engage in:

- *Alternatives Analysis*—evaluate several modal and alignment options for addressing mobility needs, and select a locally-preferred alternative to implement;
- *Preliminary Engineering*—refine project costs, benefits, and impacts; complete federal environmental studies; and secure local funding commitments; and
- *Final Design*—secure commitment of nonfederal funding; identify rights-of-way to be acquired and utility relocation needed, and develop final construction plans.

FTA must evaluate and approve each step in the process. Once final design has been completed, FTA may enter into a full funding grant agreement [FFGA] with the local agencies, and construction then may begin.[88] "New starts" procedures are discussed in greater detail in Section 4—Transportation Funding and Finance.

6. Zoning and Land Use Issues

In an attempt to assure appropriate population density to support transit, and in order to arrest suburban sprawl, which places enormous demands upon transportation resources, many jurisdictions are beginning to address the relationship between transportation planning and land use. Since promulgation of ISTEA, MPOs have begun to focus more strongly on land use and growth boundary issues. Many local governments have adopted zoning ordinances that facilitate development densities to support transit. Some states have passed Growth Management Acts.[89] Zoning is discussed in greater detail in Section 5—Procurement. Some have also effectively used transit oriented development or joint public/private development.[90] In fact, private enterprise participation is encouraged "to the maximum extent feasible" by law.[91]

E. COOPERATIVE, COMPREHENSIVE, AND CONTINUOUS (3-C) PLANNING

Congress initially mandated that transportation planning be a condition of receiving federal funds in 1962. At that time, Congress also insisted the planning process be continuing, comprehensive, and cooperative (since known as "3-C Planning"). Federal regulations defined "continuing" as requiring periodic reevaluation and updating of the plan. "Comprehensive" planning requires consideration of a variety of factors, including economics; population; land use; transit; travel patterns; terminal and transfer facilities; traffic control;

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[83] Logit models are logistic models used in statistical analysis.

[84] HORONJEFF & MCKELVEY, *supra* note 80.

[85] PAUL S. DEMPSEY ET AL., *supra* note 80, at 35.

[86] *See* 23 U.S.C. § 134 (2003).

[87] 49 U.S.C. § 5309 (2003). TEA-21 authorized $8.44 billion in New Starts funding through 2003.

[88] FTA, THIS IS THE FEDERAL TRANSIT ADMINISTRATION 7-8 (2000).

[89] See D. Brennan Keene, *Transportation Conformity and Land-Use Planning: Understanding the Inconsistencies,* 30 U. RICH. L. REV. 1135 (1996). S. MARK WHITE, THE ZONING AND REAL ESTATE IMPLICATIONS OF TRANSIT-ORIENTED DEVELOPMENT (Transit Coop. Research Program Legal Research Digest No. 12, 1999).

[90] *See, e.g.*, San Diego Metro. Dev. Bd. v. Handlery Hotel, 73 Cal. App. 4th 517 (1999).

[91] 49 U.S.C. § 5306(a) (2003).

zoning; financial resources; and social, environmental and aesthetic issues. The "cooperative" requirement of the 3-C Planning process mandates cooperation between federal, state, and local governmental agencies, as well as between agencies at each level of government. Moreover, empirical research has shown that transportation coordination can result in significant cost reductions per passenger and vehicle hour.[92] So there are practical reasons to faithfully implement the statutory requirements.

Federal law requires that development of plans and programs is to occur on a continuing, cooperative, and comprehensive basis, to a degree dependent upon the complexity of the transportation problems to be addressed.[93] The 3-C process includes four technical phases: (1) collection of data; (2) analysis of data; (3) forecasts of activity and travel; and (4) evaluation of alternatives. ISTEA added intermodalism to the comprehensive dimension of the planning process.

1. Cooperative Planning

Even after Congress mandated cooperative transportation planning in 1962, many state highway departments resisted cooperation with local governmental agencies and planning organizations. So in 1970, in order to reaffirm the requirement of "cooperative" transportation planning, Congress required that no transportation project could be constructed unless local officials had been consulted.[94]

The Secretary of Transportation is charged with encouraging MPOs to coordinate the design and delivery of transportation services with all recipients of funding under Title 49 of the U.S. Code (including transit providers), governmental agencies, and nonprofit organizations (and their representatives) that receive governmental assistance from sources other than the DOT to provide nonemergency transportation services for the MPO's metropolitan area.[95]

Federal regulations provide that the responsibilities for cooperatively carrying out transportation planning should be clearly identified in a memorandum of understanding between the MPO and the state and public transit operators.[96] In nonattainment or maintenance areas, where the MPO is not designated as the air quality planning agency under the Clean Air Act,[97] the MPO should have an agreement with the designated air quality agency describing their respective roles in areas of air quality related transportation planning.[98] Ideally, there should be one cooperative agreement containing these understandings between the MPO and state, local transit, and air quality agencies.[99]

Federal regulations provide that the metropolitan transportation planning shall be carried out by the MPO in cooperation with the state and the local transit operator, who shall cooperatively determine their responsibilities in the planning process, the Unified Planning Work Program (UPWP),[100] the transportation plan, and the TIP. The development of the plan and the TIP must also be coordinated with other providers of transportation (e.g., airports and rail freight operators).[101] There must be a proactive public involvement process.[102] The MPO must also involve traffic, ridesharing, parking, transportation safety, and enforcement agencies, commuter rail operators, toll authorities, and where appropriate, private transportation providers, city officials, and environmental resource and permit agencies.[103] The state must cooperatively participate in development of the metropolitan transportation plan.[104] The MPO must approve the metropolitan transportation plan and its periodic updates. The MPO and the Governor must approve the TIP and amendments thereto.[105]

Within the TMA, plans and programs must be based on a continuing and comprehensive transportation planning process carried out by the MPO in cooperation with the state and transit operators.[106] The planning process must include a congestion management system that provides for effective management of new and existing transportation facilities eligible for funding under Titles 23 and 49 of the U.S. Code, through the use of travel demand reduction and operational management strategies.[107]

In general, projects within the TMA are selected from the approved TIP by the MPO designated for the area, in *consultation* with the state and any affected public

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[92] U.S. GAO, TRANSPORTATION COORDINATION: BENEFITS AND BARRIERS EXIST, AND PLANNING EFFORTS PROGRESS SLOWLY (1999).

[93] 23 U.S.C. § 134(a)(4) (2003); 42 U.S.C. § 7504 (2003); 49 U.S.C. § 5303(a)(3) (2003).

[94] Coordination of planning a corridor project must be carried out by the states and MPOs along the corridor and, to the extent appropriate, with transportation planning being carried out by federal land management agencies, by tribal governments, or by government agencies in Mexico or Canada. *National Corridor Planning and Development Program,* Pub. L. No. 105-178, tit. I, Subtit. A, § 1118(f), 112 Stat. 161 (1998).

[95] 49 U.S.C. § 5303(e)(4) (2003).

[96] 23 C.F.R. § 450.310(a)(b) (2003).

[97] 42 U.S.C. § 7504 (2003).

[98] 23 C.F.R. § 450.310(c) (2003).

[99] 23 C.F.R. § 450.310(d) (2003).

[100] UPWPs discuss the planning priorities facing the metropolitan planning area, transportation related air quality planning activities anticipated within the next 1- or 2-year period, and activities to be performed with federal funds. 23 C.F.R. § 450.314(a) (2003). *See* Southwest Williamson Community Ass'n v. Slater, 243 F.3d 270 (6th Cir. 2001).

[101] 23 C.F.R. § 450.312(a) (2003).

[102] 23 C.F.R. § 450.316(b) (2003).

[103] 23 C.F.R. § 450.316(b)(4)(5) (2003).

[104] 23 C.F.R. § 450.312(h) (2003).

[105] 23 C.F.R. § 450.312(b) (2003).

[106] 23 U.S.C. § 134(i)(2) (2003); 49 U.S.C. § 5305(b) (2003).

[107] 23 U.S.C. § 134(i)(3) (2003); 49 U.S.C. § 5305(c) (2003).

transit operator.[108] The exception to this rule is that National Highway System projects and bridge program projects within the TMA are selected by the state in *cooperation* with the MPO.[109] The term "consultation" suggests sharing information, while "cooperation" suggests achieving consensus. All selected projects must comply with the established priorities of the TIP for the area.[110] These requirements help ameliorate the problem that emerged in many regions where priorities developed based on established planning criteria in a detailed planning process could be disregarded by politicians participating in the MPO process on the basis of political considerations or expediency. These newer requirements better ensure that projects are developed in accordance with proven planning criteria, and ranked based on established criteria.

In nonattainment or maintenance areas, the MPO must coordinate development of the transportation plan with the State Implementation Plan (SIP)[111] development process, and develop transportation control measures.[112] The MPO may not approve a transportation plan or program that does not conform with the SIP.[113]

2. Comprehensive Planning

Federal funds must only be used to support balanced and comprehensive transportation planning that considers the relationships among land use and all transportation modes.[114] The content of the plans and programs for each metropolitan area must provide for the development, integration, and management of all forms of transportation, allowing the metropolitan transportation system to function as an integral part of an intermodal transportation system serving the metropolitan area, the state, and the United States.[115]

During the planning process, an MPO must consider projects and strategies that serve the following objectives:

- Support the economic vitality of the metropolitan area, especially by enabling global competitiveness, productivity, and efficiency;
- Increase the safety and security of the transportation system for motorized and nonmotorized users;
- Increase the accessibility and mobility options available to people and for freight;
- Protect and enhance the environment, promote energy conservation, and improve quality of life;
- Enhance the integration and connectivity of the transportation system, and across and between modes, for people and freight;
- Promote efficient system management and operation; and
- Emphasize the preservation of the existing transportation system.

Failure to consider these factors, however, is not reviewable by any court in any matter affecting a transportation plan, a TIP, a project strategy, or the certification of the planning process.[116]

Both pedestrian and bicycle transportation are emphasized as alternatives to transportation by automobile. MPOs must give due consideration to these alternate forms in creating comprehensive transportation plans. Where appropriate, such plans and projects must include safety measures, such as contiguous routes for bicyclists and pedestrians and audible traffic signs and signals at street crossings.[117]

The following factors must be explicitly considered in all planning process products:

1. Preservation of existing transportation facilities and use of existing facilities more efficiently;
2. Energy conservation;
3. The need to relieve congestion and prevent congestion from occurring;[118]
4. The effect of transportation policy decisions on land use and development;
5. Transportation enhancement activities;[119]
6. The effects of all transportation projects to be undertaken within the metropolitan planning area;
7. International border crossings and access to ports, airports, intermodal transport facilities, freight distribution routes, national parks, recreational areas, monuments, historical sites, and military installations;
8. Connectivity of roads within the metropolitan planning area with those outside it;
9. Transportation needs identified through the use of management systems;[120]
10. Preservation of rights-of-way to meet future transportation needs;
11. Efficient movement of freight;
12. The use of life-cycle costs in the design and engineering of bridges, tunnels, and pavement;
13. The overall social, economic, energy, and environmental effects of transportation decisions;[121]
14. Expansion, enhancement, and increased use of transit services;
15. Security in transit systems; and

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[108] 23 U.S.C. § 134(i)(4)(A) (2003); 49 U.S.C. § 5305(d)(1)(A) (2003).

[109] 23 U.S.C. § 134(i)(4)(B) (2003); 49 U.S.C. § 5305(d)(1)(B) (2003).

[110] 49 U.S.C. § 5305(d)(2) (2003).

[111] *See, e.g.,* Council of Commuter Organizations v. Thomas, 799 F.2d 879 (2d Cir. 1986); Action for Rational Transit v. West Side Highway Project*,* 699 F.2d 614 (2d Cir. 1983).

[112] 23 C.F.R. § 450.312(c) (2003).

[113] 23 C.F.R. § 450.312(d) (2003); 40 C.F.R. pt. 51 (2003).

[114] 49 U.S.C. § 5303(h) (2003).

[115] 23 U.S.C. §§ 134(a)(3), 217(g)(1) (2003); 49 U.S.C. § 5303(a)(2) (2003).

[116] 23 U.S.C. § 134(f) (2003); 49 U.S.C. § 5303(b) (2003); TEA-21, Pub. L. No. 105-178 (1998).

[117] 23 U.S.C. § 217(g)(1)(2) (2003).

[118] To be considered are congestion management strategies that improve the mobility of people, and in TMAs, a congestion management system that reduces travel demand.

[119] *See* 23 U.S.C. § 133 (2003).

[120] *See* 23 U.S.C. § 303 (2003).

[121] *See* 23 U.S.C. § 109(h) (2003); 49 U.S.C. § 1610 (2003); 49 U.S.C. § 303 (2003); 42 U.S.C. § 7504(b) (2003).

16. Recreational travel and tourism.[122]

3. Intermodal Transportation Planning

Early federal funding of transit was largely an effort to prop up and revive failing transit systems, whose fare box revenues and ridership levels were insufficient to cover fully allocated costs. With ISTEA, "comprehensive planning" now includes a requirement that fostering all transport modes and intermodal connectivity must be an integral part of the transportation planning process.

In the Transportation Act of 1940, Congress set forth a Statement of National Transportation Policy, which included an obligation that the ICC (which then regulated the surface modes of transportation) shall "provide for a fair and impartial regulation of all modes of transportation…all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States…."[123] Though Congress would embrace intermodal facilitation as an important policy goal in several subsequent legislative acts, and consolidate all the modes into a single Department of Transportation in 1967, several decades would pass before intermodalism would take center stage in national policy.[124]

ISTEA provided enhanced flexibility for state and local governments to redirect highway funds to accommodate other modes and modal connections.[125] In ISTEA's legislative history, Congress concluded:

> An intermodal transportation system…to enhance efficiency will be the key to meeting the economic, energy and environmental challenges of the coming decades. The nation will not be able to meet all of those demands through continued reliance on separate, isolated modes of transportation.
>
> Development of an intermodal transportation system will result in increased productivity growth the nation needs to compete in the global economy of the 21st Century. We can no longer rely on a transportation system designed for the 1950s to provide the support for American industry to compete in the international marketplace.126

By placing the word "intermodal" (as opposed to the historical "highway" term) in the title of the bill, Congress sought "to bring the need for intermodalism to the forefront of the nation's transportation and economic debate."[127] TEA-21[128] reaffirms and retains the intermodal emphasis of ISTEA, with a requirement that transportation planning, *inter alia,* "Enhance the integration and connectivity of the transportation system, across and between modes, for people and freight."

Congress has declared that among the transportation policies of the United States is "to encourage and promote development of a national intermodal transportation system…to move people and goods in an energy-efficient manner, provide the foundation for improved productivity growth, strengthen the Nation's ability to compete in the global economy, and obtain the optimum yield from the Nation's transportation resources." [129] Congress created the U.S. Department of Transportation to "make easier the development and improvement of coordinated transportation service…."[130] The Secretary of Transportation is required to coordinate federal policy on intermodal transportation, and promote creation and maintenance of an efficient U.S. intermodal transportation system.[131] He is also obliged to consult with the heads of other federal agencies to establish policies "consistent with maintaining a coordinated transportation system…."[132]

Among the aviation statutes is a recognition that it is the policy of the United States "to develop a national intermodal transportation system that transports passengers and property in an efficient manner."[133] Congress has declared that,

> A national intermodal transportation system is a coordinated, flexible network of diverse but complimentary forms of transportation that transports passengers and property in the most efficient manner. By reducing transportation costs, these intermodal systems will enhance the ability of the industry of the United States to compete in the global marketplace.134

Further, Congress has recognized that,

> An intermodal transportation system consists of transportation hubs that connect different forms of appropriate transportation and provides users with the most efficient means of transportation and with access to commercial centers, business locations, population centers, and the vast rural areas of the United States, as well as providing links to other forms of transportation and intercity connections.135

The Wendell H. Ford Aviation Investment and Reform Act for the 21st Century amended this provision to provide for the encouragement and development "of intermodal connections on airport property between aeronautical and other transportation modes to serve air transportation passengers and cargo efficiently and

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[122] 23 C.F.R. § 450.316(a)(16) (2003).

[123] 49 U.S.C. § 13101(a)(2) (2003).

[124] An Interagency Committee on Intermodal Cargo was created in 1973 to coordinate the activities of the DOT, ICC, CAB, and FMC on intermodal issues.

[125] Though ISTEA emphasized a national policy of promoting a seamless system of intermodal transportation, facilitation of intermodalism may be proceeding sluggishly in certain regions.

[126] Intermodal Surface Transportation Efficiency Act of 1991, Conference Report, H.R. 2950 No. 404, 102d Cong. (Nov. 27, 1991).

[127] *Id*.

[128] Pub. L. No. 105-178.

[129] 49 U.S.C. § 302(e) (2003).

[130] 49 U.S.C. § 101(b)(2) (2003).

[131] 49 U.S.C. § 301(3) (2003).

[132] 49 U.S.C. § 301(7) (2003).

[133] 49 U.S.C. § 47101(b)(1) (2003).

[134] 49 U.S.C. § 47101(b)(3) (2003).

[135] 49 U.S.C. § 47101(b)(5) (2003).

effectively and promote economic development."[136] Congress also has decided that the United States "must make a national commitment to rebuild its infrastructure through development of a national intermodal transportation system."[137]

In ISTEA, Congress set forth a detailed national policy to establish a National Intermodal Transportation System "that is economically efficient and environmentally sound, provides the foundation for the United States to compete in the global economy, and will move individuals and property in an energy efficient way."[138] The National Intermodal Transportation System shall:

- "consist of all forms of transportation in a unified, interconnected manner…to reduce energy consumption and air pollution while promoting economic development and supporting the United States' preeminent position in international commerce";[139]
- include the Interstate highway system and the principal arterial roads;[140]
- include public transportation;[141]
- provide improved access to seaports and airports;[142]
- give special emphasis to the role of transportation in increasing productivity growth;[143]
- give "increased attention to the concepts of innovation, competition, energy efficiency, productivity, growth and accountability";[144]
- be adapted to new technologies wherever feasible and economical, giving special emphasis to safety considerations;[145] and
- be the centerpiece of a national investment commitment to create new national wealth.[146]

All DOT employees are required to be given a copy of the National Intermodal Transportation System Policy, and it is required to be posted prominently in all offices of the Department.[147]

In the Amtrak Reform and Accountability Act of 1997, Congress declared that, "intercity rail passenger service is an essential component of a national intermodal passenger transportation system," and that Amtrak and intercity bus providers should work together to "develop coordinated intermodal relationships promoting seamless transportation services which enhance travel options and increase operating efficiencies."[148] Amtrak provides commuter rail service on behalf of several states.

The states' long-range 20-year transportation plan must provide for the development and implementation of the intermodal transportation system of the state.[149] The Secretary of Transportation shall make grants to the states to develop model state intermodal transportation plans, which shall include systems for collecting data related to intermodal transportation.[150] States are required to allocate up to 2 percent of federal highway appropriations to planning and research of, *inter alia*, "highway, public transportation, and intermodal transportation systems."[151] Emphasizing the importance of highway, public transport, and intermodal systems, Congress mandated that not less than 25 percent of such funds expended by the state shall be devoted to research and development of these systems.[152] In ISTEA, Congress also required DOT to promulgate regulations for state development, establishment, and implementation of a system for managing its intermodal transportation facilities and systems.[153] A state's intermodal management system "shall provide for improvement and integration of all of a state's transportation systems and shall include methods of achieving the optimum yield from such systems, methods for increasing productivity in the state, methods for increasing use of advanced technologies, and methods to encourage the use of innovative marketing techniques, such as just-in-time deliveries.[154]

4. Continuous Planning

As is explained in the next section, federal law requires that MPOs, in cooperation with the states, transit operators, and the public, prepare and update their TIP at least every 2 years, as well as their 20-year long-range plan. The states are required to prepare plans and programs along the same time horizons, and to update them periodically.

F. TYPES OF PLANS

MPOs are charged with developing, or assisting in the development of, a number of different transportation plans. These include the long-range plan, the TIP, the SIP, plans for a TMA, transportation control measures (TCMs), national corridor project plans, and other project plans. The state must also produce a statewide transportation plan, and a STIP, into which the TIP must be incorporated. Before approving these plans, citizens, affected public agencies, transit unions, freight shippers and carriers, private transportation providers,

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[136] 106 Pub. L. 106-181; 114 Stat. 61 (137)(a)(5) (Apr. 5, 2000).

[137] 49 U.S.C. § 47171(b)(8).

[138] 49 U.S.C. § 5501(a) (2003).

[139] 49 U.S.C. § 5501(b)(1) (2003).

[140] 49 U.S.C. § 5501(b)(2) (2003).

[141] 49 U.S.C. § 5501(b)(3) (2003).

[142] 49 U.S.C. § 5501(b)(4) (2003).

[143] 49 U.S.C. § 5501(b)(5) (2003).

[144] 49 U.S.C. § 5501(b)(6) (2003).

[145] 49 U.S.C. § 5501(b)(7) (2003).

[146] 49 U.S.C. § 5501(b)(9) (2003).

[147] 49 U.S.C. § 5501(c) (2003).

[148] Pub. L. 105-134 (Dec. 2, 1997), 111 Stat. 2570.

[149] 23 U.S.C. § 135(e)(1) (2003).

[150] 49 U.S.C. § 5504(a) (2003).

[151] 23 U.S.C. § 505(a)(5) (2003).

[152] 23 U.S.C. § 505(b)(1) (2003).

[153] 23 U.S.C. § 303(a) (2003).

[154] 23 U.S.C. § 303(e) (2003). Paul S. Dempsey, *The Law of Intermodal Transportation: What it Was, What it Is, What it Should Be,* 27 TRANSP. L.J. 367 (2000).

and other interested parties must be given a reasonable opportunity to comment.[155] The plans and programs must also be developed in cooperation with the state, the MPO, and the local transit provider.[156] The local transit provider must engage in project selection in cooperation with the MPO.[157]

It may be useful to think of it as a three-step process: (1) the preparation (by the state and the MPO) of a long-term 20-year Plan; (2) the preparation of a short-term Program; and (3) the implementation of the foregoing through implementation of a Project.[158] Planning does not stop with the completion of a Plan or a Program; periodic assessment and updating are required.

1. Long-Range (20-Year) Transportation Plans

Each MPO must prepare, and update periodically as determined by the Secretary of Transportation, a long-range plan for its metropolitan area, with a minimum 20-year forecast period.[159] Federal regulations require that the metropolitan transportation planning process include a long-term transportation plan addressing at least a 20-year planning horizon, including both short- and long-range strategies leading to the development of an integrated intermodal system that facilitates the efficient movement of goods and people. The MPO must consider the seven general planning objectives described above.[160] Taking these factors into account, the long-term plan must, at a minimum, contain the following:[161]

- Identification of transportation facilities that function as an integrated metropolitan transportation system, emphasizing those facilities that serve important national and regional transportation functions. In formulating this plan, the objectives listed in the following section must be observed as they relate to a 20-year forecast period.
- A financial plan that shows how the long-range plan can be implemented, indicates resources from public and private sources that are reasonably expected to be made available to carry out the plan, and recommends additional financing strategies for needed projects and programs. The financial plan may include, for illustrative purposes, additional projects that would be included in the adopted long-range plan if reasonable additional resources beyond those identified were available.[162] The MPO and the state must cooperatively develop the estimated funds available to support the plan.[163]
- Assess capital investment and other measures necessary to (1) ensure the preservation of the existing metropolitan transportation system, including requirements for operational improvements, resurfacing, restoration, and rehabilitation of existing and future major roadways, and (2) ensure the operation, maintenance, modernization, and rehabilitation of existing and future transit facilities.
- Indicate as appropriate proposed transportation enhancement activities.
- Identify transportation strategies necessary (1) to ensure preservation, including requirements for management, operation, modernization, and rehabilitation, of the existing and future transportation system; and (2) to use existing transportation facilities most efficiently to relieve congestion, to efficiently serve the mobility needs of people and freight, and to enhance access within the metropolitan planning area.[164]

The regulations require that the long-term plan must:

1. Identify projected demand;
2. Identify adopted congestion management strategies;
3. Identify pedestrian walkway and bicycle transportation facilities;[165]
4. Identify SOV projects that result from a congestion management system;[166]
5. Assess capital investment and other measures necessary to preserve the existing transportation system and make the most efficient use of existing transportation facilities to relieve vehicular congestion and enhance the mobility of people and goods;
6. Identify proposed improvements in sufficient detail to develop cost estimates;[167]
7. Reflect a multimodal evaluation of the transportation, socioeconomic, and financial impact of the overall plan;
8. Identify the major transportation investments for which analyses are not yet complete;
9. Reflect the area's comprehensive long-range land use plan;
10. Indicate proposed transportation enhancement activities;[168] and
11. Include a financial plan that demonstrates consistency of the transportation plan with available and projected sources of revenue.[169]

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[155] 49 U.S.C. §§ 5303(f)(4), 5304(d) (2003).

[156] 49 U.S.C. § 5305(b) (2003).

[157] 49 U.S.C. § 5304(c)(1)(B) (2003).

[158] SARAH J. SIWEK ET AL., STATEWIDE TRANSPORTATION PLANNING UNDER ISTEA: A NEW FRAMEWORK FOR DECISIONMAKING (1996).

[159] 23 U.S.C. §§ 134(f), 135(e); 49 U.S.C. § 5303(b), (f)(2); TEA-21, Pub. L. No. 105-178 (1998).

[160] 49 U.S.C. § 5303(f)(2) (2003).

[161] 23 U.S.C. § 134(g)(2) (2003); 49 U.S.C. § 5303(f)(1) (2003).

[162] A state or MPO will not be required to select any project from the illustrative list of projects should additional resources become available. 23 U.S.C. § 134(g)(6) (2003); 49 U.S.C. § 5303(f)(6) (2003).

[163] 49 U.S.C. § 5303(f)(2) (2003).

[164] 23 U.S.C. § 134(g)(2)(C) (2003); 49 U.S.C. § 5303(f)(1)(C) (2003).

[165] *See* 23 U.S.C. § 217(g) (2003).

[166] *See* 23 C.F.R. 500.109 (2003).

[167] In nonattainment and maintenance areas, additional requirements are imposed to assure conformity with 40 C.F.R. pt. 51 (2003).

[168] *See* 23 U.S.C. § 101(a)(3)(H)(35) (2003).

[169] 23 C.F.R. § 450.322(b)(ii) (2003).

In metropolitan areas that are in nonattainment for ozone or carbon monoxide under the Clean Air Act, the MPO must coordinate the development of the long-range transportation plan with the process for development of the TCMs of the SIP (a requirement of the Clean Air Act).[170] In nonattainment and maintenance areas for transportation related pollutants, the MPO, FHWA, and FTA must make a Clean Air Act conformity determination of any new or revised plan.[171]

During both the process of formulation and prior to approval of the long-range plan, each MPO must provide all interested parties and citizens with a reasonable opportunity to comment on the plan.[172] Each plan prepared by an MPO must be published or otherwise made available for public review and must be submitted to the Governor.[173]

The plan should be reviewed and updated at least triennially in nonattainment areas and every 5 years in attainment areas to confirm its validity and its consistency with current and projected transportation and land use conditions and trends during the forecast period. After an adequate opportunity for public official and citizen involvement in the development of the plan,[174] it must be approved by the MPO.[175]

2. Transportation Improvement Program

In cooperation with the state and any affected public transportation operator, MPOs must develop a TIP for their designated metropolitan area.[176] The plan must be consistent with the long-range transportation plan[177] and include funding estimates reasonably expected to be available to support TIP implementation.[178] The TIP must be updated at least once every 2 years, and be approved by both the MPO and the Governor.[179] As with the long-term transportation plan, citizens and all interested parties must be afforded the reasonable opportunity to comment on the proposed TIP.[180]

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[170] 23 U.S.C. § 134(g)(3) (2003); 49 U.S.C. § 5303(f)(3) (2003).

[171] 23 C.F.R. § 450.322(d) (2003); *see* 40 C.F.R. pt. 51.

[172] 23 U.S.C. § 134(g)(4) (2003); 49 U.S.C. § 5303(f)(4) (2003).

[173] 23 U.S.C. § 134(g)(5)(ii) (2003); 49 U.S.C. § 5303(f)(5) (2003).

[174] 23 C.F.R. § 450.322(c) (2003).

[175] 23 C.F.R. § 450.322(a) (2003).

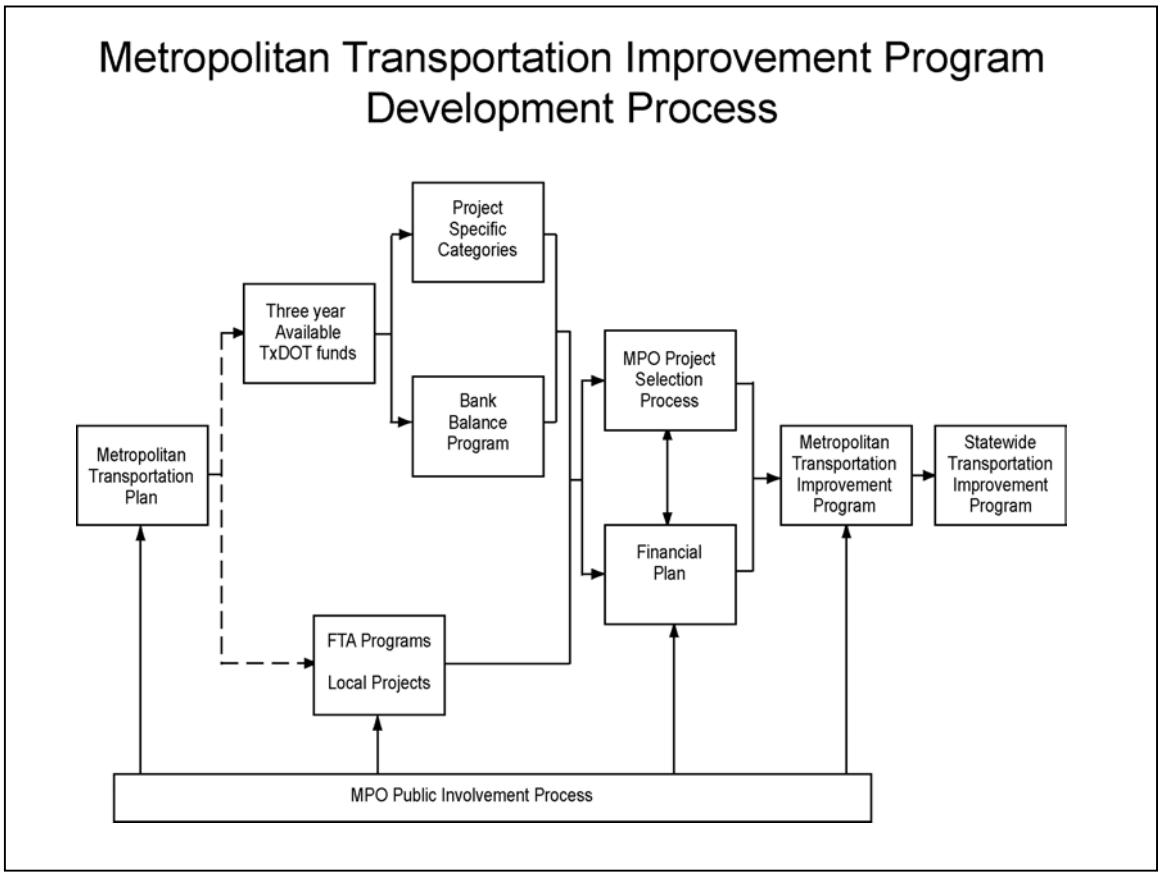
[176] 23 U.S.C. §§ 134(h)(1)(A), 135(f)(1)(B) (2003); 49 U.S.C. § 5304(a)(1) (2003).

[177] 23 U.S.C. § 134(h)(3)(C) (2003); 49 U.S.C. § 5304(c)(2)(A) (2003).

[178] 23 U.S.C. § 134(h)(1)(C) (2003); 49 U.S.C. § 5304(a)(2), (c)(2)(B) (2003).

[179] 23 U.S.C. § 134(h)(1)(D) (2003); 49 U.S.C. § 5304(a)(1) (2003). In cooperation with the state and local transit provider, the MPO must prepare a transportation improvement plan (TIP) for the metropolitan planning area. 23 C.F.R. § 450.324(a) (2003). The TIP shall cover a period of at least 3 years. 23 C.F.R. § 450.324(d) (2003). It must be updated at least every 2 years, and be approved by the MPO and the Governor.

[180] 23 U.S.C. § 134(h)(1)(B), (h)(4) (2003); 49 U.S.C. § 5304(a)(1), (d) (2003). "Interested parties" include the following: citizens, affected public agencies, representatives of transportation agency employees, private providers of transportation, and other interested parties.



The TIP must include the following:

- A priority list of proposed federally supported projects, parts of projects, and strategies to be carried out within each 3-year period after the initial adoption of the TIP; and
- A financial plan that (1) demonstrates how the TIP can be implemented; (2) indicates resources from public and private sources that are reasonably expected to be available to carry out the program; (3) identifies innovative financing techniques to finance projects, programs, and strategies; and (4) may include, for illustrative purposes, additional projects that would be included in the approved TIP if reasonable additional resources beyond those identified in the financial plan were available.[181]

[181] 23 U.S.C. § 134(h)(2); 49 U.S.C. § 5304(b) (2003). The applicable regulations require that the TIP include the following:

1. All transportation projects or phases thereof within the metropolitan area proposed for federal highway or transit funding;

2. Only projects that are consistent with the long-term transportation plan;

3. All regionally significant transportation projects for which FHWA or FTA approval is required, whether or not federally funded;

4. In nonattainment and maintenance areas, all regionally significant transportation projects not covered above; and

5. For each project above, sufficient descriptive material to identify the project or phase; the estimated total cost; the amount of federal funds proposed to be obligated in each year; the agency or agencies to be responsible for carrying it out; the projects that are identified as TCMs in nonattainment or maintenance areas; also in nonattainment or maintenance areas, project description in sufficient detail to permit EPA air quality analysis; and projects that will implement Americans with Disabilities Act-required paratransit and key station plans.

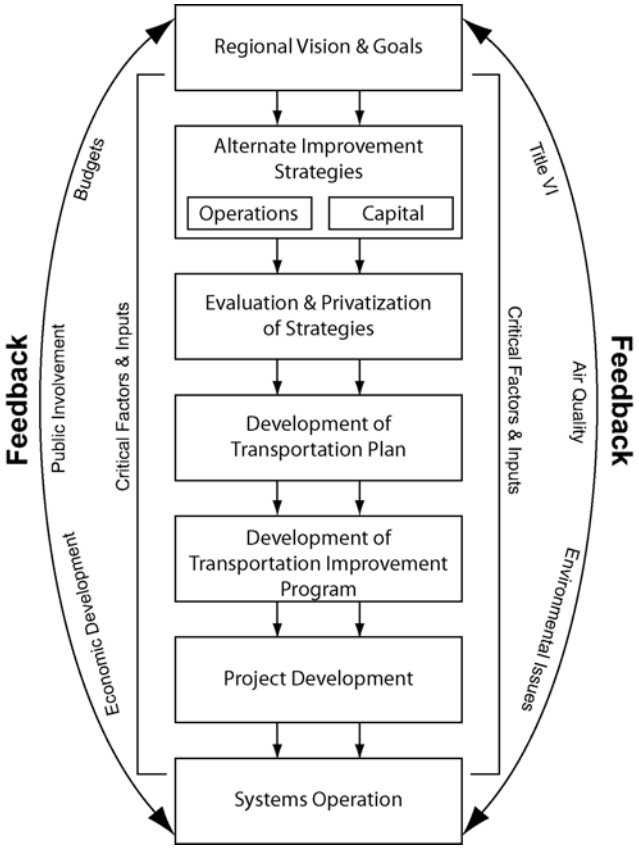
23 C.F.R. § 450.324(f)-(h) (2003). TIPs must also:

1. Identify the criteria and process for prioritizing implementation of the elements of the transportation plan for inclusion in the TIP and any changes in priorities from prior TIPs and reasons therefor;

2. List major projects included in the previous TIP that were implemented as well as any significant delays in their implementation; and

3. In nonattainment and maintenance areas, list the progress in implementing required TCMs, including reasons for significant delays and strategies for ensuring their completion as soon as possible, as well as a list of all projects found to conform in previous TIPs and that are a part of the base case for air quality conformity analysis.

23 U.S.C. § 134(h)(3)(A) (2003). The rules differ from the statute for, at the time this research was done, the rules were left over from the days of ISTEA, and new TEA-21 regulations had not been promulgated.



Projects designated in the TIP include all projects and strategies within the area proposed for funding under chapter 1 of Title 23 and chapter 53 of Title 49 of the U.S. Code. Individual projects may be funded under chapter 2 of Title 23, however, if they are determined to be regionally significant or if identified in the TIP.[182] Only those projects for which full funding can reasonably be expected shall be listed in the TIP.[183]

The TIP must be financially constrained by year, and include a financial plan that specifies which projects can be implemented using available revenue, and which are to be implemented using projected revenue sources. The state and local transit provider shall cooperate with the MPO in developing the financial plan, and provide the MPO with estimates of available state and federal funds. Only those projects for which construction and operating fund availability can reasonably be anticipated may be included in the TIP. For transit systems without a dedicated funding source, this requirement raises difficult issues of how to prove sufficient operating funds for a large or long-term capital project. For transit funding, the federal share may not exceed levels of funding committed to the area in the first year of the TIP, and in subsequent years, may not exceed funds committed or reasonably expected to be available to the area.[184] In nonattainment and maintenance areas, projects included in the first 2 years of the TIP must have funds available or committed.[185]

Selection of federally-funded projects in metropolitan areas listed in the TIP shall be carried out in cooperation with the MPO by the state, if funded under Title 23, or by the designated transit funding recipients, if funded under Title 49 of the U.S. Code.[186] Modification of the priority list may be made at any time.[187] A state or an MPO will not be required to choose a project from the illustrative list should additional funds become available, but if the state or MPO does wish to add a project from that list, approval must be obtained from the Secretary of Transportation.[188] The DOT Secretary is not obligated to approve a project added by the state or the MPO.

The MPO must publish, or make otherwise publicly available, the TIP. Additionally, the MPO must publish an annual listing of projects for which federal funds have been obligated in the preceding year. That list must be consistent with the categories identified in the TIP.[189]

Section 176(c) of the Clean Air Act places additional statutory requirements regarding air quality conformity

[182] 23 U.S.C. § 134(h)(3)(B) (2003); 49 U.S.C. § 5304(c)(6) (2003).

[183] 23 U.S.C. § 134(h)(3)(D) (2003).

[184] 23 C.F.R. § 450.324(m) (2003).

[185] 23 C.F.R. § 450.324(e) (2003).

[186] 23 U.S.C. § 134(h)(5)(A) (2003); 49 U.S.C. § 5304(c)(1) (2003).

[187] 23 U.S.C. § 134(h)(5)(B) (2003); 49 U.S.C. § 5304(c)(3) (2003).

[188] 23 U.S.C. § 134(h)(6) (2003); 49 U.S.C. § 5304(c)(4) (2003).

[189] 23 U.S.C. § 134(h)(7) (2003); 49 U.S.C. § 5304(c)(5) (2003).

on both the long-range plan and the TIP.[190] Once approved by the MPO and the Governor, the TIP is included in the STIP without modification, unless the TIP covers a nonattainment or maintenance area. The MPO cannot adopt the TIP unless it makes a conformity designation.[191] The TIP becomes part of the STIP only after a conformity finding by the FHWA and FTA.[192] The frequency and cycle of the TIP process must be compatible with the STIP development and approval process. A copy of the TIP must be submitted to the FHWA and FTA, though neither federal agency need approve the TIP.[193] However, the FHWA and FTA must jointly find that the TIP is based on a continuing, comprehensive transportation process carried out cooperatively by the MPO, the state, and the local transit operator.[194] In nonattainment or maintenance areas, the FHWA and FTA, as well as the MPO, must also jointly conclude that the TIP conforms with the adopted SIP and that priority has been given to the timely implementation of TCMs contained in the SIP.[195] The process for TIP preparation must provide a reasonable opportunity for public comment, and in nonattainment TMAs, an opportunity for at least one formal public hearing. Both the proposed and final TIP must be published or otherwise made readily available to the public.[196]

3. Unified Planning Work Programs

In TMAs, the MPO, in cooperation with the state and local transit operator, must develop UPWPs that discuss the planning priorities facing the metropolitan planning area, transportation related air quality planning activities anticipated within the next 1- or 2-year period, and activities to be performed with federal funds.[197] In areas not designated as TMAs, the MPO, in cooperation with the state and the local transit provider, and with the approval of the FHWA and FTA, may prepare a simplified statement of work submitted as part of the statewide planning work program, in lieu of a UPWP.[198]

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[190] *See, e.g.,* EDF v. EPA, 82 F.3d 541 (D.C. Cir. 1996), and Atlanta Coalition on Transp. Crisis v. Atlanta Regional Comm'n, 599 F.2d 1333 (5th Cir. 1979).

[191] Conformity requires that no program may be included in the state or MPO transportation program if it causes new violations of the air quality standards, exacerbates existing violations, or delays attainment of air quality standards.

[192] 23 C.F.R. § 450.328(a) (2003).

[193] 23 C.F.R. § 450.324(b) (2003).

[194] 23 C.F.R. § 450.330(a) (2003).

[195] 23 C.F.R. § 450.330(b) (2003); *see* 40 C.F.R. pt. 51 (2003).

[196] 23 C.F.R. § 450.324(c) (2003).

[197] 23 C.F.R. § 450.314(a) (2003).

[198] 23 C.F.R. §§ 450.314(d), 450.316(c) (2003).

4. Statewide Transportation Plan

Each state must carry out an intermodal statewide transportation planning process, including the development of a STIP and TIP that facilitate the efficient, economic movement of people and goods in all areas of the state.[199] The STIP should provide a long-term (at least 20-year) vision of the state's transportation system.[200] It should be linked to the economic goals and environmental objectives of the state. It should be coordinated with all modes and transportation providers, identify the existing and desired linkages between modes, and address existing gaps in connections.[201] It should emphasize managing existing assets.[202] Its preparation should include public input. It should be realistic and financially sound.[203] In *Environmental Defense Fund v. Environmental Protection Agency,* the D.C. Circuit provided a succinct summary of these requirements:

> Under 23 U.S.C. § 135 (1994), states must prepare statewide transportation plans and improvement programs similar to those required of metropolitan planning organizations. The [DOT] transportation regulations require that metropolitan planning organization's transportation plans and programs conform to the relevant SIP, but do not require conformity determinations for state transportation plans or programs…. Petitioners challenge the exclusion of state transportation planning from the Clean Air Act's conformity requirements, arguing that the Agency has improperly circumscribed a broad statutory provision. Section 176(c)(2), after all, requires conformity determinations to be made for "any transportation plan or program."
>
> We agree with the Agency that it reasonably defined "transportation plan or program" to be only those plans or programs adopted by metropolitan planning organizations and that not requiring state plans or programs to conform in no way works to reduce the protections afforded air quality under the statute. A state transportation plan or program must include the plans or improvement programs adopted by metropolitan planning organizations within that state. Before any plan or improvement program can be included in the state's plan or program, it must be found by the relevant metropolitan planning organization to conform to the SIP. A state may well include both areas that have and areas that have not attained the national ambient air quality standards. The conformity requirements, however, apply only to nonattainment areas. The Agency concluded, therefore, that little was to be gained by requiring state plans and programs to conform. An area inside a state that was covered by the conformity rules—a nonattainment area—and contained a metropolitan planning organization would necessarily already have a conforming plan or improvement program…. We further agree with the Agency that the information yielded by conformity determinations at the state level is of minimal additional value—we are told, and petitioners do not dispute, that analyses for purposes

[199] 23 U.S.C. § 135 (2003), and Sections 3, 5, 8, 9, and 26 of the Federal Transit Act, 49 U.S.C. §§ 1602, 1604, 1607, 1607a, and 1622 (2003), since recodified under Chapter 53 of Title 49, U.S.C., 23 C.F.R. pt. 450, subpt. B (1999); 49 C.F.R. § 613.200 (2003); 58 Fed Reg. 58079 (Oct. 28, 1993).

[200] 49 U.S.C. §§ 5303, 5304, 5305, and 5323(1) (2003).

[201] States are encouraged to develop model intermodal transportation plans. 49 U.S.C. § 5504 (2003).

[202] Management and monitoring systems are set forth in Joint FHWA/FTA Regulations, 23 C.F.R. pt. 500 (2003), and 49 C.F.R. pt. 614 (2003).

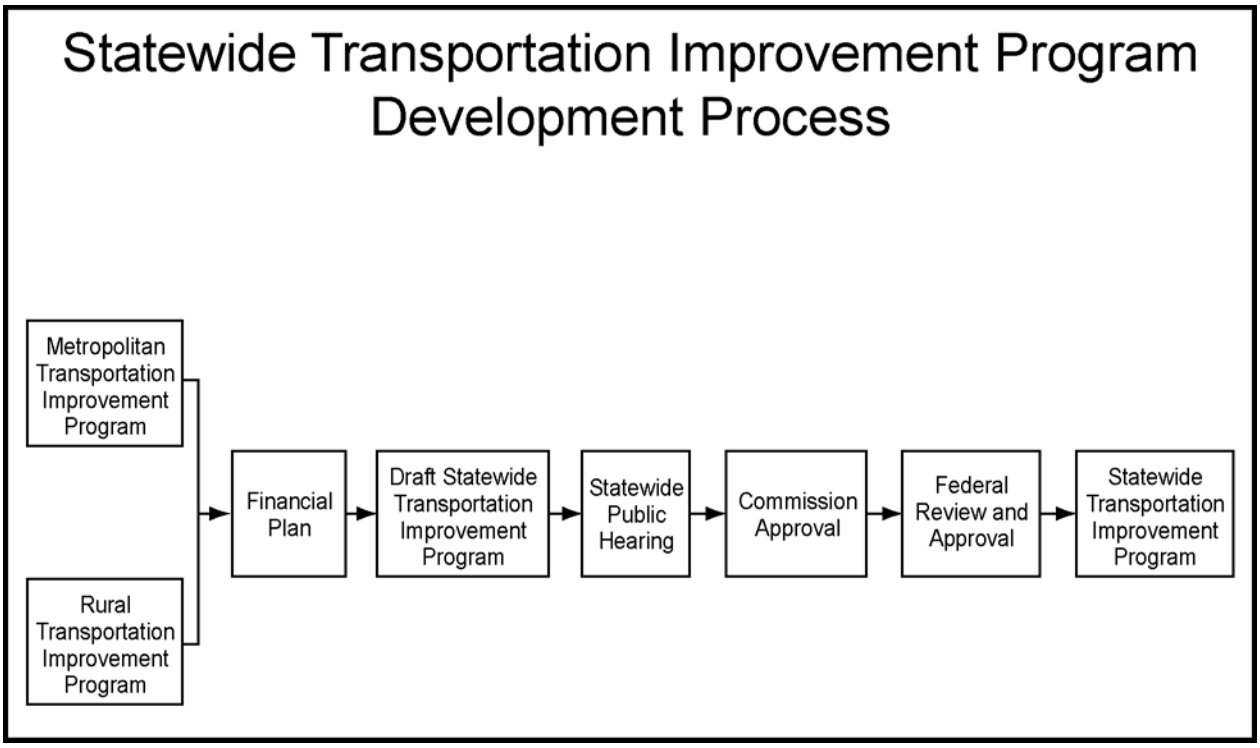
[203] Planning assistance and standards are identified in Joint FHWA/FTA Regulations, 23 C.F.R. pt. 450 (2003), and 49 C.F.R. pt. 613 (2003).

of determining conformity are performed by region, not by state.[204]

5. Statewide Transportation Improvement Program

The STIP is a complete list and description of all FTA/FHWA-funded projects for the forthcoming 3-year period (projects beyond 3 years may be included for informational purposes only). STIP projects must be consistent with the statewide plan. Each state must submit its STIP to the FTA and FHWA for joint approval at least every 2 years, though amendments may be submitted at any time.

[204] EDF v. EPA, 82 F.3d 451, 460–61 (D.C. Cir. 1996) [citations omitted].



The STIP should include all capital and non-capital (such as transit operations) projects, or phases of projects, designated to use FTA or FHWA funding. It must also include all regionally significant transportation projects[205] requiring federal approval or permits that do not involve federal funding. The public must have an opportunity to participate in STIP development. The STIP must be financially constrained by year — it must identify the source of funding for new projects while ensuring the continued operation and maintenance of the existing transportation system.[206]

G. AIR QUALITY CONFORMITY REQUIREMENTS

Air quality conformity is an important part of the planning process, for designation as "nonattainment" results in a more complex set of statutory and regulatory requirements for a region, and may result in a loss of federal funds. Moreover, once a plan or program commits to build or expand the transit system in order to meet air quality attainment requirements, these commitments may be judicially enforceable.[207] The relevant environmental issues such as these are sufficiently complex that they are discussed in their own Section, Section 3—"Environmental Law." The reader is advised to view Sections 2 and 3 as companions in identifying the full panoply of planning requirements.

H. NATIONAL AND INTERNATIONAL PLANNING

An MPO will be involved with national planning to the extent that it is involved with the maintenance and improvement of the Interstate Highway System and in planning corridors to promote economic growth and interregional trade. On an international level, those

[205] A regionally significant project is defined as a project on a facility that serves regional transportation needs.

[206] *Supra* note 159.

[207] *See* McCarthy v. City of Tucson, 27 F.3d 1363 (9th Cir. 1994).

MPOs lying on the border areas with Canada or Mexico are charged with developing plans to facilitate international trade and border operations.

Allocations to states and MPOs may only be used in a border region for the following types of projects:

- Improvements to existing transportation and supporting infrastructure that facilitate cross-border vehicle and cargo movements;
- Construction of highways and related safety and safety enforcement facilities that will facilitate vehicle and cargo movements related to international trade;
- Operational improvements, including improvements relating to electronic data interchange and use of telecommunications, to expedite cross border vehicle and cargo movement;
- Modifications to regulatory procedures to expedite cross border vehicle and cargo movements;
- International coordination of planning, programming, and border operation with Canada and Mexico relating to expediting cross border vehicle and cargo movements; and
- Activities of federal inspection agencies.[208]

I. FEDERAL REVIEW AND CERTIFICATION OF MPOS

FHWA and FTA jointly perform periodic certification reviews of the MPO transportation planning process.[209] Not less than every 3 years, the Secretary of Transportation must certify that the metropolitan planning process in each TMA is being carried out in accordance with applicable federal law.[210] In addition, certification requires that there is a TIP for the area that has been prepared in accordance with statutory requirements,[211] and that it has been approved by both the MPO and the Governor.[212]

Certification reviews consist of a desk audit by FHWA/FTA field staff of documentation pertaining to the planning process, a site visit, a public meeting, and preparation of a report on the certification review. The U.S. General Accounting Office (GAO) has described the certification reviews as "by far the most in-depth assessments of the MPOs' performance in transportation planning."[213] However, not until 1998 did the FHWA and FTA develop a standard format for assessing or reporting MPO compliance with its statutory and regulatory obligations, and neither agency collects such certification documents in a single location for purposes of analyzing compliance. The form of certification reviews of MPOs was left largely to the discretion of the local federal review team, to tailor the certification review to the particular characteristics of the MPO.

If a metropolitan planning process is not certified, the Secretary of Transportation may withhold up to 20 percent of the apportioned funds attributable to the TMA.[214] Withheld funds, however, shall be restored upon certification.[215] The Secretary may not withhold certification based on the policies and criteria established by an MPO or transit grant recipient,[216] and shall provide for public involvement appropriate to the metropolitan area under review in making a certification determination.[217]

In addition to the FHWA/FTA joint certification documents, on occasion, the U.S. DOT's John A. Volpe National Transportation Systems Center [Volpe Center] has prepared formal, comprehensive "enhanced planning reviews" of selected MPOs. These are designed to be less judgmental and regulatory focused than certification reviews, but nonetheless provide a more comprehensive and thorough analysis of MPO performance.

Several other reviews of the urban transportation planning process exist. Since 1983, urban transportation planning regulations have required that the state and MPO "self-certify" that they are in compliance with the 3-C (continuing, cooperative, and comprehensive) process mandated by statute and regulation. Moreover, the DOT reviews and approves planning work programs for all metropolitan areas, assesses the TIP and TIP amendments for conformity with the state's air quality plan in meeting federal air quality requirements, and reviews and approves state TIPs.[218]

J. THE ROLE OF MPOS IN TRANSPORTATION PLANNING

With the promulgation of ISTEA in 1991, MPOs were transformed from advisory institutions into institutions

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[208] *Coordinated Border Infrastructure Program.* Pub. L. No. 105-178, tit. I, subtit. A, § 1119, 112 Stat. 163 (1998).

[209] These reviews have been described by the U.S. General Accounting Office as "by far the most in-depth assessments of the MPOs' performance in transportation planning." Though these certification reviews contain useful information about how well MPOs are performing their enhanced mission, they are nowhere centrally collected and analyzed. Since 1998, such reviews have performed under a standard format developed by FHWA and FTA.

[210] 23 U.S.C. § 134(i)(5)(A)(i) (2003); 49 U.S.C. § 5305(e)(1) (2003).

[211] 23 U.S.C. § 134 (2003).

[212] 23 U.S.C. § 134(i)(5)(B)(ii) (2003); 49 U.S.C. § 5305(e)(l) (2003).

[213] U.S. GENERAL ACCOUNTING OFFICE, URBAN TRANSPORTATION: METROPOLITAN PLANNING ORGANIZATIONS' EFFORTS TO MEET FEDERAL PLANNING REQUIREMENTS 30 (1996).

[214] Should an MPO fail to be certified, the Federal Highway Administration (FHWA) and Federal Transit Administration (FTA) may withhold all or a part of its federal highway and transit funds, or withhold approval for certain projects.

[215] 23 U.S.C. § 134(i)(5)(C) (2003); 49 U.S.C. § 5305(e)(2) (2003).

[216] 23 U.S.C. § 134(i)(5)(C)(iii) (2003); 49 U.S.C. § 5305(e)(3) (2003).

[217] 23 U.S.C. § 134(i)(5)(D) (2003); 49 U.S.C. § 5305(e)(4) (2003).

[218] U.S. GENERAL ACCOUNTING OFFICE, *supra* note 214, at 30–31.

that actually have direct influence over the distribution of money—from voluntary planning organization to organizations that have their fingers on some of the purse strings. In ISTEA, and expanded in TEA-21, MPOs were empowered with the ability to directly authorize projects eligible for the federal dollars under their primary jurisdiction. Though the "pots" of federal money over which the MPOs exercise jurisdiction are small relative to those controlled by the state, it is clear that such empowerment over money caused many local jurisdictions to take the MPO process and their participation in that process far more seriously than they had prior to the passage of ISTEA and TEA-21. Many began to send more senior politicians and staff to participate in MPO committees, for example.

All this gave transportation planning a new perspective. The interstate and inter-regional "top-down" highway planning process of the federal and state governments, respectively, and the localized "bottom-up" street and road planning process of the cities and counties would now be coupled with a third regional process that was a bit of both, expanded beyond highways, streets, and roads into a comprehensive transportation planning process that took into account all modes, as well as a number of related social, economic, and environmental issues.

It is important to note what federal legislation has done and what it has not. Clearly, it has formalized the regional transportation planning process, involving all stakeholders, including the local cities and counties, the state DOT, the local transit provider, and the public. These procedures are even more stringent and formalized in regions that have air quality attainment problems. Congress recognized that transportation and environmental issues cross jurisdictional lines, and therefore need a regional approach to resolving problems of mobility, congestion, air pollution, and sprawl. MPOs might be described as small group democracy engaged in a process that attempts to build consensus between and among various constituencies. In fact, an MPO is essentially a coalition of local governments, the state DOT, and the local transit provider, ideally working together to solve regional transportation needs.

Beyond the short-term fiscal resource allocation of TIP development, participation in the MPO planning processes may yield other significant benefits. These include access to longer-term policy development and consensus building, sharing of information resources, technical assistance from the MPO staff in corridor or subarea studies, and structured access to a forum of elected peers for coordination and exchange of ideas and political goals. Such collaboration may also move the region to coalesce on issues such as land use planning (which are inextricably intertwined with issues of transportation adequacy), equity issues surrounding the state's allocations of transportation fiscal resources, or even common social and economic issues unrelated to transportation. The ability of the MPO to facilitate such regional planning depends in large part on the technical competence of its staff, the ability of its leadership to build consensus among diverse participants, and the leadership of local officials and the business community. An important role for MPOs is to build "partnerships" of jurisdictions and constituencies for moving forward on solving regional problems. If done well, the regional planning framework provided by MPOs can provide the technical studies and consensus-building processes among local officials, enabling support for using state and federal funds from a variety of programs, along with local funds, to achieve broader community goals. If done poorly, the regional planning framework can devolve into turf wars pitting suburban areas against one another in contests for needed infrastructure improvements, or suburban growth areas against the core city that provides the lion's share of the tax base.

Consensus-building between large and small, central and suburban, counties and cities can consume considerable time and energy. State and local coordination and cooperation on transit vis-à-vis highway allocations can also be challenging. Consensus-building can be a particularly acute problem for fast-growing regions, where transportation needs can outpace existing infrastructure and available funding. MPOs typically have no power to regulate growth. Fast-paced housing and commercial development can overwhelm available infrastructure. The formal procedural structure of LRP and TIP development, exacerbated by a need to achieve consensus among diverse participants, necessarily can slow the ability of the MPO to respond quickly to rapidly changing transportation needs. The TIP cycle is formalized on a 2- to 3-year planning horizon, though it can be amended midstream. The 20-year long range plan is manifestly at odds with a local zoning process that may consume only a few months. The planning horizon for shopping centers and housing developments is significantly shorter than the planning horizon for new transportation corridors, or even major expansion of existing corridors, once such corridors have been designated and funded. Thus, there is a disjunction between the metropolitan transportation planning process and land development.[219]

MPOs do not create resources; they allocate resources. It is for the federal, state, and local governments to create the necessary tax resources to meet transportation needs (though the MPO could attempt to influence resource creation). In many (perhaps most) jurisdictions, needs outpace resources. MPOs also do not design and build transportation projects, pour asphalt, or purchase transportation infrastructure or rolling stock. MPOs (in a collaborative process driven by their member jurisdictions, the state, the transit provider, and the public) designate which projects shall be

[219] For purposes of better coordination between transportation and land use, it is useful to consider the experience of rapidly-growing metropolitan areas and states. For example, the state of Washington enacted a Growth Management Act in the early 1990s that has served as a framework within which transportation decisions are made.

built with the economic resources within their jurisdictional ambit.

The empowerment of MPOs sought to be achieved by Congress also included a requirement that the state engage in "cooperative" transportation planning with the local jurisdictions. ISTEA took this long-standing requirement a step further by requiring that the state DOT submit its projects for approval in the TIP. Theoretically, a state that refused to engage in cooperative planning, or pursued priorities significantly different from those of the MPO, could have its projects vetoed by the MPO, for unless they were included in the TIP, they could not be federally funded. But then, the Governor has an equally potent veto over the TIP, for he or she must sign off on the TIP, and it must be included in the STIP, or the MPO's projects will not be federally funded. The state could also retaliate by devoting its resources to projects outside any metropolitan area whose MPO or its members challenged the state's priorities. Because either side could "checkmate" the other, it has been rare that either side has exercised its veto over the other's projects, no matter how they may disagree with the other's priorities. In this sense, there is a balkanized disconnect between one set of projects (the larger set) that do not have to satisfy the criteria that have been developed by the collective will of the jurisdictions in whose areas the infrastructure will be built. The formalized federal requirement of putting the state's projects in the TIP is meaningless if the state may ignore the objective criteria of project prioritization developed in the TIP.

Because the state controls most of the transportation dollars spent in a metropolitan area (in many areas, the state controls two-thirds or more of the regional transportation dollars; the regional transit provider also controls a sizable amount), it is difficult to assess the success or failure of MPOs in transportation planning. In fact, metropolitan transportation planning is a complex process in which the MPO process is only a component part, for the state DOT, the counties, and cities each play a primary role with respect to those projects within their fiscal and jurisdictional realm.

Moreover, relative to needs, in most regions financial resources are chronically inadequate. Thus, the competition for scarce resources may be viewed as a "zero sum game," in which some jurisdictions are perceived "winners" at the expense of others, perceived as "losers." The MPO may be blamed for an inadequate transportation infrastructure, whose inadequacy may be a product of circumstances beyond its control, including the inadequacy of economic resources to keep pace with needs for infrastructure maintenance or expansion.

Any particular participant may blame the MPO for not funding projects it has prioritized as essential for its jurisdiction. But some players are better at game-playing than others, no matter what the rules of the game. All else being equal, better game-players will do better in a competition for limited dollars. A participant who wants projects in his or her jurisdiction funded will need to see that those projects are included on the long-range plan. She or he will have to participate in development of the TIP criteria and submit projects for funding fashioned in a way to score higher on the TIP criteria adopted. Perhaps only the larger jurisdictions can devote the full-time staff to ensuring their project proposals are well crafted. Others may be better at the state's more political process of project prioritization, and prefer that to the more formalized, less (but not entirely non-) politicized MPO process.

Participation in the MPO process consumes considerable time. Typically, the individuals who participate on the key committees of the MPO wear two hats — they may be a Mayor, city council member, city planner, or county commissioner in the jurisdiction they represent, and a board or committee member at the MPO. Because the process and substance of TIP criteria development are complex, these representatives may have to rely on the MPO staff to guide them through. The staff in all large and complex organizations tends to have considerable influence on the development of the organization's work. But the point here is that effective participation by a jurisdictional representative in the MPO's work will enhance its jurisdiction's ability to get a larger piece of the pie. Those who fail to bring home a larger slice may be replaced by the jurisdiction, which may send one who is more capable of representing its interests to serve on the MPO board or committee.

That, of course, begs the question of whether "getting a larger piece of the pie" is what MPO participation should be about. Shouldn't the primary focus of the MPO, and its participants, be about meeting regional transportation needs? Aren't all jurisdictions "winners" when regional transportation needs are met? That may mean prioritizing projects in a way that puts the region's most pressing transportation needs at the top of the list, even when such prioritization may not satiate a particular jurisdiction's parochial needs.[220]

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[220] *See generally* Andrew Goetz et al., *Metropolitan Planning Organizations: Findings and Recommendations for Improving Transportation Planning,* PUBLIUS: THE J. FEDERALISM, Winter 2002, at 87.