

Evolution of Metropolitan Planning Organizations (MPOs) into Multi-Functional Regional Roles

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ABSTRACT: In the United States, all three levels of government, federal, state, and local, are engaged in coordinating the movement of goods and people. Recognizing the importance of an inter-connected transportation system, Congress enacted legislation in the mid-twentieth century that conditioned federal transportation funding upon continuing, comprehensive, and coordinated (“3-C”) transportation planning linking cities and suburbs. Thereafter, Congress mandated that the states create Metropolitan Planning Organizations (“MPOs”) to undertake 3-C planning on a metropolitan scale. Congress has now expanded the scope of transportation planning criteria to include environmental protections, energy conservation, local planned growth, economic development patterns, mitigation of storm water impacts, and resiliency and reliability improvements. The states also undertake regional multi-functional, integrated planning that includes both economic development and environmental factors. This Essay argues that MPOs should be engaged in the planning of other metropolitan functions as well as 3-C transportation planning.

Because multi-functional criteria guide MPOs’ planning, MPO roles have evolved beyond transportation planning. Further, Congress in 2012 required MPOs to develop their plans through a performance-driven, outcome-based approach, making MPOs accountable for the achievement of specific performance thresholds. The Essay argues that this expansion in MPOs’ roles requires an examination of whether MPOs’ institutional structures facilitate the performance of these enlarged functions. Because Congress has granted the states flexibility with respect to MPO formation and organization, MPOs

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vary greatly in their planning capabilities. Yet, federal legislation treats all MPOs the same. The Essay analyzes the structural impediments to MPOs' performance of assigned functions and offers suggestions as to how MPOs might be restructured for more equitable and efficient results. The Essay argues that representation on MPO boards should include representatives from the metropolitan geographic area as well as local and state officials. It argues that proportional representation should be instituted for MPO boards. Further, MPO performance would be enhanced by granting them the power to implement their plans, an independent funding source, and some land use powers.

The Essay concludes that Congress should recognize MPOs' valuable experience in coordinating planning among different levels of government. MPOs, as federally mandated bodies acting in the states on a metropolitan-wide scale, possess expertise in securing partnerships that will be vital to success in infrastructure and climate change implementation. MPOs' future roles may very well include regional, multi-purpose planning. MPOs may also evolve into metropolitan service providers for a range of public functions with the power to implement their plans.

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I. INTRODUCTION

Transportation infrastructure in the United States falls under the public domain to facilitate the moving of goods and people across state and local boundaries. In the mid-twentieth century, Congress conditioned federal funding of transportation projects upon the states’ creation of Metropolitan Planning Organizations (“MPOs”) to undertake “continuing, comprehensive, and coordinated” (“3-C”) transportation planning for metropolitan regions. Congress foresaw the necessity to improve mobility through well-designed transportation routes and modes in central cities and their suburban environs. This Essay argues that the 3-C transportation planning should now be integrated with the planning of other metropolitan functions, which include economic development, environmental protection, and infrastructure that supports social cohesion.

Part II of the Essay traces the historical development of public bodies to undertake the construction and maintenance of public infrastructure on a regional or metropolitan scale. This Part explores the reasons why Congress conditioned the receipt of federal transportation funding upon the creation of MPOs and the guidance Congress provided with respect to their institutional design. Part III then discusses the evolution of MPOs’ transportation planning through subsequent federal legislation. Part IV then sets out the functions Congress expects MPOs to perform. In 2012, Congress required MPOs to set transportation performance standards, giving them a stronger role in the transportation planning process. This Part discusses the reasons for this change.

The next two Parts, V and VI, discuss the structural composition of MPOs and the structural impediments to their performance of assigned responsibilities. Part VII argues that MPOs need to have an independent source of revenue to be effective in fulfilling their mandated functions; at present MPOs rely heavily upon funds provided by the federal Highway Trust Fund. Because Congress has broadened the planning factors MPOs must consider to include protection of the environment, energy conservation, economic development, transportation resiliency, and storm water impacts caused by surface transportation, Part VIII analyzes whether the MPOs’ roles has evolved beyond transportation planning due to this expanded criteria. This Part discusses the future role that MPOs should play in a regional approach to infrastructure design and implementation that emphasizes the

integration of transportation with other metropolitan functions, including metropolitan resiliency to climate change and extreme weather events. The Essay sets forth different stages of development into which MPOs may emerge and argues that megaregional planning should be instituted.

II. METROPOLITAN PLANNING ORGANIZATION BACKGROUND

A. EVOLUTION OF SINGLE-FUNCTION METROPOLITAN PUBLIC BODIES AND REGIONAL PLANNING AGENCIES

1. Creation of Single-Function Metropolitan Public Bodies

Long before the creation of MPOs, metropolitan areas needed to coordinate the construction of certain types of public works, in addition to transportation facilities, on a metropolitan scale. States authorized regional agencies to build this infrastructure and provide attendant services, including water supply; sewage and solid waste disposal; management of storm water drainage; street lighting; parks and recreation; and wharves.¹ Expanding commerce and economic development, as well as the necessity to protect the public health—strong nineteenth-century forces—resulted in infrastructure construction to provide streets, sewers, and water.² In growing urban areas, reliance upon local and private resources proved inadequate to supply the capital-intensive infrastructure needed to service the public, leading municipalities to resort to municipal bond financing when the levy of assessments and real property taxes proved insufficient to cover capital costs.³

In urban regions comprised of a number of small-sized cities that could adversely affect each other with the flow of sewerage or flood waters, a more acute need existed for metropolitan-wide public authorities to construct and manage public infrastructure. A public health crisis, for example, created by municipal discharge of sewerage into public waters in the Boston urban area, prompted the state legislature in 1889 to create the Metropolitan Sewerage Board, the nation's first state-established regional agency, to construct and maintain a metropolitan-wide sewer system.⁴ Independent agencies created for metropolitan parks and waterworks were later combined with the Metropolitan Sewerage Board in 1919 to create a single, multi-function regional agency, the Metropolitan District Commission, which soon engaged

1. See KATHRYN A. FOSTER, *THE POLITICAL ECONOMY OF SPECIAL-PURPOSE GOVERNMENT* 15–20 (1997).

2. See Joel A. Tarr, *The Evolution of the Urban Infrastructure in the Nineteenth and Twentieth Centuries*, in *PERSPECTIVES ON URBAN INFRASTRUCTURE* 4, 10–11 (Royce Hanson ed., 1984).

3. See *id.* at 17–18.

4. See ENV'T DEP'T, BOS. LANDMARKS COMM'N, *THE METROPOLITAN DISTRICT COMMISSION (MDC) HEADQUARTERS BUILDING* 13–14 (2006), [https://www.cityofboston.gov/images_documents/Metropolitan%20District%20Commission%20\(MDC\)%20Building%20Study%20Report_tcm3-17378.pdf](https://www.cityofboston.gov/images_documents/Metropolitan%20District%20Commission%20(MDC)%20Building%20Study%20Report_tcm3-17378.pdf) [<https://perma.cc/N7RB-WR7F>].

in regional planning that “included designs for transportation routes, bridges, and other connectors that facilitated travel throughout the district.”⁵

2. Creation of Regional Planning Agencies

Voluntary regional planning agencies began to emerge in the early part of the twentieth century. The 1909 Burnham Plan for the City of Chicago inspired the completion in 1929 of a landmark regional plan for the New York, New Jersey, and Connecticut metropolitan area, which resulted in the incorporation of the Regional Plan Association.⁶ Other state public authorities, such as the Port Authority of New York and New Jersey, which received congressional approval in 1921, engaged in infrastructure planning for airports, port facilities, rail lines, bridges, and tunnels.⁷ Councils of government and other state-authorized regional planning agencies also preceded the enactment of federal transportation legislation in the 1960s.⁸ The Metropolitan Planning Commission, created in 1947 and predecessor to the Atlanta Regional Commission, claims to be the first multi-county planning agency in the United States that was publicly supported.⁹

B. FEDERAL LEGISLATION RECOGNIZES TRANSPORTATION AS A REGIONAL ISSUE THAT REQUIRES PLANNING AND MANDATES THE CREATION OF MPOS

1. Metropolitan-wide Planning Needed to Effectuate Inter-connected Transportation Systems

Following World War II, as suburban areas mushroomed and the production of automobiles greatly increased, Congress recognized that tackling urban issues required systematic planning. In enacting Section 701

5. *Id.* at 16.

6. See THOMAS ADAMS ET AL., REG’L PLAN ASS’N, REGIONAL PLAN OF NEW YORK AND ITS ENVIRONS, <https://rpa.org/work/reports/regional-plan-of-new-york-and-its-environs#overview> [<https://perma.cc/FU4D-GPL5>].

7. *History of the Port Authority*, PORT AUTH. N.Y. & N.J., <https://www.panynj.gov/port-authority/en/about/History.html> [<https://perma.cc/Z3X4-6PNU>].

8. Councils of government are associations, formed by elected local governmental officials, to offer planning and technical advice to their member local governments on regional issues that transcend municipal borders. The Metropolitan Washington Council of Governments, for example, was created in 1957. See *About Us: History & Regional Awards*, METRO. WASH. COUNCIL OF GOV’TS, <https://www.mwcog.org/about-us/cog-and-our-region/history-and-regional-awards> [<https://perma.cc/AE4J-K9U6>]. The Denver Regional Council of Governments was formed in 1955. See *About DRCOG*, DENVER REG’L COUNCIL OF GOV’TS, <https://drcog.org/about-drcog/about-drcog> [<https://perma.cc/34PE-H35H>].

9. See *ARC Planning Archives: 70 Years of Regional Planning*, ATLANTA REG’L COMM’N, <https://atlantaregional.org/about-arc/guidelines-compliance/arc-planning-archives/#:~:text=In%201947%2C%20the%20Metropolitan%20Planning,agency%20in%20the%20United%20S%20tates.&text=MPC%20was%20the%20predecessor%20to,and%20the%20City%20of%20Atlanta> [<https://perma.cc/4QD3-FC7S>].

of the Housing Act of 1954, Congress laid an important cornerstone to urban planning by authorizing the provision of federal planning grants to states and their political subdivisions. Congress hoped that Section 701 monies would “encourage an orderly process of urban planning to address the problems associated with urban growth and the formulation of local plans and policies.”¹⁰

Because vehicles cross local, metropolitan, and state jurisdictional boundaries, an interstate highway system must be designed for interconnectivity. To help assure such interconnectedness, most needed in urban routes, Congress enacted legislation in 1962 that conditioned federal transportation financial assistance upon urban transportation planning in urban areas of more than 50,000 population.¹¹ The legislation mandated the 3-C planning processes, which required transportation planning to be continuing, comprehensive, and carried out cooperatively by local and state governmental agencies.¹²

Although strong support for 3-C planning was expressed in congressional hearings prior to the enactment of the 1962 transportation legislation,¹³ some opposition to mandatory comprehensive planning existed. The American Road Builders’ Association preferred voluntary cooperation in transportation planning to “a rigid mandate imposed by legislation.”¹⁴ Robert Moses, Chairman of the Triborough Bridge and Tunnel Authority, stated that conditioning approval of highway projects on conformity to a comprehensive balanced transportation plan would “bring the Federal highway program in New York City to a complete standstill.”¹⁵ He believed that it would take more than a decade to complete such comprehensive plans.¹⁶

10. EDWARD WEINER, OFF. OF THE SEC’Y OF TRANSP., URBAN TRANSPORTATION PLANNING IN THE UNITED STATES: AN HISTORICAL OVERVIEW 18 (5th ed. 1997).

11. See *About MPOs: A Brief History*, ASS’N METRO. PLAN. ORGS., <https://ampo.org/about-us/about-mpos> [<https://perma.cc/J78P-BUGK>]. The “Act combined with the incentive of 90 percent federal funding for Interstate highway projects caused urban transportation planning to spread quickly throughout the United States. It also had a significant influence on urban transportation planning in other parts of the world.” WEINER, *supra* note 10, at 1.

12. See MARK SOLOF, N. J. TRANSP. PLAN. AUTH., INC., HISTORY OF METROPOLITAN PLANNING ORGANIZATIONS 15 (1998), [https://www.njtpa.org/NJTPA/media/Documents/Newsroom/Publications-Reports/Publications-Brochures/MPOhistory1998_rev1\(4\).pdf](https://www.njtpa.org/NJTPA/media/Documents/Newsroom/Publications-Reports/Publications-Brochures/MPOhistory1998_rev1(4).pdf) [<https://perma.cc/T98H-XRS2>].

13. The Federal-Aid Highway Act of 1962 § 7(a) called for the 3 Cs. See *Federal Highway Act of 1962: Hearing on H.R. 9725, 9848 and 11199 Before the Subcomm. on Roads of the H. Comm. on Pub. Works*, 87th Cong. 9 (1962) (statement of Rex M. Whitton, Federal Highway Administrator, Bureau of Public Roads, Department of Commerce) [hereinafter *Federal Highway Act of 1962 Hearing on H.R. 9725*].

14. *Id.* at 112 (statement of Major Gen. Louis W. Prentiss, U.S. Army (retired), Executive Vice President, American Road Builders’ Association).

15. *Id.* at 48 (statement of Robert Moses, Chairman, Triborough Bridge & Tunnel Authority).

16. See *id.*

2. Necessity of Metropolitan-wide Organizations to Undertake Transportation Planning

Because many metropolitan areas in the 1960s lacked qualified planning agencies, Congress saw fit in the Housing and Urban Development Act of 1965 to amend the Section 701 urban planning assistance program by authorizing comprehensive planning grants to organizations found “representative of the political jurisdictions within a metropolitan [area].”¹⁷ Thus, Congress decided to condition future highway grants to states upon their creation of a metropolitan-wide transportation planning system to ameliorate the deficiency of metropolitan-wide institutions to undertake integrated planning that would lay the foundation for urban connectedness.¹⁸ This enactment gave rise to the formation of regional planning organizations controlled by elected officials, such as councils of government, and encouraged greater cooperation on the part of local governments to address regional issues.¹⁹

In hearings before Congress prior to the 1965 Section 701 expansion, Clarence D. Martin, Jr., Under Secretary for Transportation, stated that the national transportation system was burdened with problems due to “the patchwork way all levels of government have administered, promoted, and regulated the various modes and facilities over a long period of years.”²⁰ Rapid suburban expansion following World War II necessitated improvement and greater investment in secondary roads to connect the suburbs to central cities and to each other.²¹ As in its enactment of Section 701 of the Housing Act, Congress indicated that planning should occur on a metropolitan-wide basis within a comprehensive planning framework.²²

Highway building in the 1950s and 1960s on a grand scale commanded wide public support, but by the 1970s urban coalitions formed to block highway construction that split neighborhoods apart and brought environmental degradation into plain view, including increased air and noise

17. See ASS'N METRO. PLAN. ORGS., *supra* note 11.

18. The states had placed governance functions in general-purpose local bodies, many with a limited geographic scope not covering an entire metropolitan area, so-called fragmented local governance, thereby impeding planning on a metropolitan basis.

19. See ASS'N METRO. PLAN. ORGS., *supra* note 11.

20. *Federal Highway Act of 1962 Hearing on H.R. 9725, supra* note 13, at 144 (statement of Clarence D. Martin, Jr., Under Secretary for Transportation).

21. See *id.* at 8 (statement of Rex M. Whitton, Federal Highway Administrator, Bureau of Public Roads, Department of Commerce). Primary system road extensions in urban areas received higher priority than secondary roads; President John F. Kennedy requested that Congress amend the Federal-Aid Highway law to provide greater flexibility for funding secondary urban road systems. See *id.* This flexibility was needed for: (1) suburban areas due to the higher priority granted for funding highway primary systems; and (2) smaller cities in which extensions of secondary routes did not carry a sufficient traffic volume to merit higher priority treatment. See *id.*

22. See *id.*; WEINER, *supra* note 10, at 33.

pollution.²³ As a result of the highway battles, which also included clashes between the highway building industry and mass transit funding advocates, Congress sought to balance these interests and address economic, environmental, and neighborhood concerns generated by highway traffic.²⁴ Federal officials urged strengthened regional planning as a solution, and Congress, in drafting the 1973 Highway Act, included provisions that called for the dedication of a portion of each state's funding, albeit small, for the creation of metropolitan planning organizations to be created or designated in urbanized areas with a population greater than 50,000.²⁵

The Federal-Aid Highway Act of 1973 is credited for conditioning the receipt of federal highway funding upon "the designation of MPOs in urban areas with populations of more than 50,000 people to carry out a continuing, cooperative, and comprehensive ("3-C") planning process."²⁶ Congress funded urban transportation planning for the first time as a separate item: "1/2 of 1 percent of all federal-aid funds were [to be earmarked] for this purpose."²⁷ Apportioned "on the basis of urbanized area population," these funds were required to be distributed to the metropolitan planning organizations that states designated as "responsible for comprehensive transportation planning."²⁸

In its 1973 transportation legislation, Congress sought to invigorate 3-C planning through the transformation of the nation's hodgepodge of regional planning bodies into effective, multimodal planning agencies.²⁹ Congress wanted states and localities to view the planning work of regional planning agencies as more than an exercise to meet federal requirements; instead, it envisioned regional planning as the means to solve urban problems.³⁰ Some also viewed the new MPOs as a means to keep in check domineering state highway departments focused on pushing highway projects.³¹

3. Necessity of a Balanced Transportation System Incorporating Different Modes of Transportation

In addition to the necessity of well-planned, inter-connected transportation systems throughout the United State, other policy considerations motivated Congress to incentivize long-range, comprehensive

23. See SOLOF, *supra* note 12, at 18.

24. See *id.* at 21.

25. See *id.*

26. GAO, METROPOLITAN PLANNING ORGANIZATIONS: OPTIONS EXIST TO ENHANCE TRANSPORTATION PLANNING CAPACITY AND FEDERAL OVERSIGHT 1 (2009), <https://www.gao.gov/assets/300/294812.pdf> [<https://perma.cc/DJ2U-ALXX>].

27. WEINER, *supra* note 10, at 62.

28. *Id.*

29. See SOLOF, *supra* note 12, at 21.

30. See *id.*

31. See *id.*

metropolitan-wide planning. Congress aspired to lay the groundwork for a more balanced transportation system that focused on mass transit, water transport, and other transportation modes in addition to highways.³² Senator Clifford P. Case argued that mass transit projects would not be effective unless their planning was coordinated with highway development in urban areas.³³ Rex M. Whitton, the Federal Highway Administrator, believed that balanced transportation planning would both improve the quality of general metropolitan planning and cause metropolitan areas to become integral parts of a national transportation system.³⁴ Such long-range planning had already proved feasible when undertaken by the Federal Bureau of Roads and state highway commissions.³⁵ Congress clearly expressed this intent for broader transportation modes in section 9(a) of the Federal-Aid Highway Act of 1962 as follows:

It is declared to be in the national interest to encourage and promote the development of [balanced] transportation systems, embracing [all appropriate] modes of transport To accomplish this objective the Secretary shall cooperate with the States . . . in the development of long-range highway plans and programs . . . properly coordinated with plans for improvements in other . . . forms of transportation and . . . formulated with due consideration to their probable effect on the future development of [metropolitan] areas³⁶

4. The Importance of Planning on a Metropolitan Scale to Improve Economic Productivity

As the role metropolitan areas play in the nation's economic productivity has expanded, the necessity for transportation planning and regional planning

32. See *Federal-Aid Highway Act of 1962: Hearings on S. 3136 & H.R. 12135 Before a Subcomm. of the Comm. on Pub. Works*, 87th Cong. 33 (1962) (statement of Rex M. Whitton, Federal Highway Administrator, Bureau of Public Roads, Department of Commerce) [hereinafter *Federal-Aid Highway Act of 1962 on S. 3136*]. At the time, states focused primarily upon highways as a single mode of transportation. See U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELS., TOWARD MORE BALANCED TRANSPORTATION: NEW INTERGOVERNMENTAL PROPOSALS 1 (1974).

33. See *Federal-Aid Highway Act of 1962 on S. 3136, supra* note 32, at 117-18 (statement of Sen. Clifford P. Case).

34. See *id.* at 56 (statement of Rex M. Whitton, Federal Highway Administrator, Bureau of Public Roads, Department of Commerce).

35. See *Federal Highway Act of 1962 Hearing on H.R. 9725, supra* note 13, at 9 (statement of Rex M. Whitton, Federal Highway Administrator, Bureau of Public Roads, Department of Commerce). The Housing and Home Finance Agency had also spearheaded coordinated comparable planning in its urban transportation program. See *id.* While transportation planning had been instituted in most large urban areas, many medium-sized and smaller cities did not undertake it. See *id.* at 146 (statement of Clarence D. Martin, Jr., Under Secretary of Transportation, Bureau of Public Roads, Department of Commerce).

36. Federal-Aid Highway Act of 1962, Pub. L. 87-866, § 9(a), 76 Stat. 1145, 1148 (codified at 23 U.S.C. § 134 (2018)).

bodies has become more pronounced. A key Congressional service report states as follows:

The foremost rationale for MPOs and metropolitan transportation planning is that the metropolitan scale is the level at which most economic activities, including commuting and, therefore, local highway and transit systems, are organized. These “metropolitan economies” transcend local government and sometimes state boundaries, and, as some observers have argued, are often too far removed from state capitals for state governments to successfully oversee them. This is particularly an issue in places where a metropolitan area is spread over more than one state.³⁷

C. FEDERAL STATUTORY DEFINITION OF MPOS

Federal legislation has left the creation of MPOs in state hands. The states authorize their creation as well as the establishment of other regional planning agencies. A MPO becomes designated upon an “agreement [reached] between the [state’s] Governor and units of general purpose local government.”³⁸ Congress has defined a MPO as “the policy board of an organization established as a result of the designation process under subsection (d).”³⁹ The subsection (d) designation process provides that MPOs shall be designated for areas with a population in excess of 50,000 “by agreement between the Governor and units of general purpose local governments that together represent at least 75 percent of the affected population . . . ; or . . . in accordance with procedures established by applicable State or local law.”⁴⁰

Congress has provided guidance with respect to the composition of MPO policy boards. In general, a MPO policy board selects its officials or representatives in accordance with its bylaws or state enabling statute.⁴¹ Federal legislation dictates, however, that MPOs serving a transportation management area, an urbanized area with a population of at least 200,000, must be structured to include: (1) “local elected officials;” (2) public agency officials that “operate major modes of transportation in the metropolitan area;” and (3) “appropriate state officials.”⁴² Thus, MPO policy boards generally include both state and local elected and appointed officials as well as persons with professional skills. MPOs’ primary responsibility rests in the

37. WILLIAM J. MALLETT, CONG. RSCH. SERV., METROPOLITAN TRANSPORTATION PLANNING 1 (2010), <https://fas.org/sgp/crs/misc/R41068.pdf> [<https://perma.cc/66X2-XNFX>] (footnote omitted).

38. 23 U.S.C. § 134(d)(1)(A)(2018).

39. *Id.* § 134(b)(2).

40. *Id.* § 134(d)(1).

41. *Id.* § 134(d)(3)(A).

42. *Id.* § 134(d)(2).

development of “long-range transportation plans and transportation improvement programs through a performance-driven, outcome-based approach to planning for metropolitan areas of the State.”⁴³

III. EVOLUTION OF MPOs AS REGIONAL TRANSPORTATION PLANNING AGENCIES THROUGH FEDERAL TRANSPORTATION LEGISLATION

The 1980s Reagan era resulted in the decline of federal oversight of state regional planning, leaving it up to the states to define MPO roles, but MPO responsibilities to plan and approve transportation projects were left untouched.⁴⁴ Nonetheless, many MPOs just compiled transportation wish lists while the officials of states and local governments decided which projects advanced.⁴⁵ The transition from the Reagan to the Bush Administration ushered in a commitment to a more active federal role in national transportation policy.⁴⁶ The public demanded that attention be paid to more complex patterns of traffic congestion resulting from the suburban development boom and expanding roadway use as women began working outside the home.⁴⁷

In 1991, Congress responded to vexing transportation problems by enacting the Intermodal Surface Transportation Efficiency Act (“ISTEA”), which enhanced MPOs’ stature and left behind the decade or more in which MPOs had been consigned to a minimal transportation planning role.⁴⁸ ISTEA bolstered MPO project selection authority by expanding the criteria for the scope of the planning process to include economic, environmental, and social equity goals.⁴⁹ The metropolitan planning process conducted by MPOs must now consider projects and strategies that will “protect and enhance the environment, promote energy conservation, improve the quality of life, and promote consistency between transportation improvements and State and local planned growth and economic development patterns.”⁵⁰ This 1991 law “also required 3C planning to conform with federal air quality standards,” which meant that “region[al] planning . . . projects that . . . worsen[ed] [air] pollution would lose federal fund[ing].”⁵¹

43. *Id.* § 134 (c)(1).

44. *See* SOLOF, *supra* note 12, at 26.

45. *See* Gian-Claudia Sciarra, *Metropolitan Transportation Planning: Lessons from the Past, Institutions for the Future*, 83 J. AM. PLAN. ASS’N 262, 270 (2017).

46. *See* SOLOF, *supra* note 12, at 29.

47. *See id.* “Overall, between 1983 and 1990, the annual miles of vehicle travel grew 30 percent, a rate faster than population growth.” *Id.*

48. *See* Sciarra, *supra* note 45, at 270.

49. *See* SOLOF, *supra* note 12, at 31.

50. 23 U.S.C. § 134(h)(1)(E) (2018).

51. Sciarra, *supra* note 45, at 270; *see also* Brian W. Ohm, *Is There a Law of Regional Planning*, 4 BELMONT L. REV. 35, 53–56 (2017) (describing federal legislation calling for the integration of air quality standards in MPOs’ transportation plans).

ISTEA broke new ground by turning federal transportation policy away from a single focus on road building and transportation efficiency to “a transportation system in which all modes and facilities were integrated to allow a ‘seamless’ movement of both goods and people.”⁵² Transit, bicycle, pedestrian, and other transportation modes were now within the reach of metropolitan planning. ISTEA provided metropolitan regions with greater flexibility in the allocation of funds, supported improved “intermodal” connections, and favored improvements to existing transportation infrastructure over building new capacity.⁵³

ISTEA further changed MPOs’ roles by doubling funding for MPO operations and giving them greater leverage in their dealings with state and local officials.⁵⁴ Large MPOs were empowered “to allocate federal funds for the first time with metro-focused Surface Transportation Program and Congestion Mitigation Air Quality funds.”⁵⁵ The new law further restrained the use of transportation project wish lists; instead MPO long-range plans and short-range transportation improvement plans had to contain realistic, multiyear project designations matched with available funds.⁵⁶ ISTEA further formalized participation processes to ensure that a broader and more diverse base of stakeholders engaged in 3-C planning.⁵⁷

ISTEA provided the impetus for “something of a renaissance for MPOs” following a decade or more in which they had been consigned to a minimal transportation planning role.⁵⁸ “[N]ew political alignments and the need to address” complicated traffic patterns emerging from suburban growth caused Congress to make a stronger commitment to regional planning.⁵⁹ The focus could no longer be on just automotive travel—MPOs’ new agenda included planning for alternative modes of transportation and an assessment of the environmental and social impacts caused by transportation funding decisions, including air quality.⁶⁰ In short, ISTEA gave MPOs increased funding and expanded their authority to select projects funded with certain categories of federal funds.⁶¹ “State transportation officials, for the first time, were required to seriously consult with” MPOs on project selection.⁶² “Subsequent surface transportation reauthorization legislation, the Transportation Equity Act for

52. SOLOF, *supra* note 12, at 30; *see also* Sciara, *supra* note 45, at 271 (describing the ISTEA’s efforts for a balanced transportation system).

53. SOLOF, *supra* note 12, at 30.

54. *See id.* at 30–31.

55. Sciara, *supra* note 45, at 271.

56. *See* SOLOF, *supra* note 12, at 31.

57. *See* Sciara, *supra* note 45, at 271.

58. *See* SOLOF, *supra* note 12, at 28.

59. *Id.*

60. *See id.* at 31.

61. *See* Sciara, *supra* note 45, at 270–71.

62. *See* SOLOF, *supra* note 12, at 28.

the 21st Century, . . . enacted in 1998 (TEA-21; P.L. 105-178; P.L. 105-206) and [the Safe, Accountable, Flexible, Efficient Transportation Equity Act] (SAFETEA), enacted in 2005, reaffirmed” the changes made by ISTEA.⁶³

With the 2009 expiration of SAFETEA looming, Congress asked the U.S. Government Accountability Office (“GAO”) to assess “the effectiveness of MPOs’ transportation planning activities”⁶⁴ The GAO noted that existing federal legislation did not include any “requirements [for MPOs] to attain explicit performance thresholds.”⁶⁵ Of the view that transportation investment decision-making could be improved by focusing on outcomes, the GAO recommended that federal oversight of MPOs’ planning processes should become more performance based.⁶⁶ The GAO concluded that MPOs’ planning efforts could be assessed better by a focus on the “achiev[ement of] specific results, rather than” a review of MPOs’ “compliance with existing statutes and rules.”⁶⁷ Congress agreed with the GAO’s assessment, and in its next transportation enactment in 2012, the Moving Ahead for Progress in the 21st Century Act (“MAP-21”), it mandated that MPOs establish performance targets to track progress in the attainment of critical regional outcomes, covering both surface transportation and public transportation targets.⁶⁸

On December 4, 2015, President Obama signed into law the Fixing America’s Surface Transportation (“FAST”) Act, successor legislation to SAFETEA and MAP-21.⁶⁹ The FAST Act provided long-term funding certainty, enabling states and local governments to pursue capital projects with the knowledge that funding would be available to finance them even if their development and completion took a number of years.⁷⁰ It also increased funding for bicycling and walking as modes of transportation.⁷¹ Building on the success of these transportation funding measures, new legislation is now pending in Congress. Senate Bill No. 2302 introduces America’s Transportation Infrastructure Act (“ATIA”), which would provide an increased funding level

63. See MALLETT, *supra* note 37, at 5.

64. See GAO, *supra* note 26, at 2.

65. See *id.* at 28.

66. See *id.* at 28, 30–31.

67. *Id.* at 29.

68. See 23 U.S.C. § 134(h)(2) (2018); DANIEL R. MANDELKER, JUDITH WELCH WEGNER, JANICE C. GRIFFITH, KENNETH BOND & CHRISTOPHER J. TYSON, STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM 164–65 (8th ed. 2014); MARIA ZIMMERMAN, TRANSP. FOR AM., THE INNOVATIVE MPO: SMART PLANNING, STRONG COMMUNITIES: A GUIDEBOOK FOR METROPOLITAN TRANSPORTATION PLANNING 139 (David Goldberg ed., 2014), <https://t4america.org/maps-tools/the-innovative-mpo> [<https://perma.cc/S3K8-G6VJ>].

69. See *Background on the Fixing America’s Surface Transportation (FAST) Act*, LEAGUE OF AM. BICYCLISTS, <https://www.bikeleague.org/content/what-know-about-fast-act-o> [<https://perma.cc/CY3B-AYG4>] [hereinafter *Fixing America’s FAST Act*].

70. See *The Fixing America’s Surface Transportation Act or “FAST Act”*, U.S. DEP’T OF TRANSP., <https://www.transportation.gov/fastact> [<https://perma.cc/F7FR-KBU6>].

71. See *Fixing America’s FAST Act*, *supra* note 69.

for five years of program authorization and authorize over six billion dollars during this period for a bridge investment program to address bridges in need of repair or replacement.⁷² ATIA calls for a new title to treat climate change with proposed resiliency program investments that include natural disaster protections for roads and bridges, and it supports new funding to reduce traffic congestion in large urbanized areas.⁷³ The proposed law would also institute simplified federal-state stewardship agreements and decreased state and local paperwork burdens associated with transportation project planning.⁷⁴

IV. MPO FUNCTIONS

A. PLANNING FUNCTIONS

The federally mandated transportation planning process requires all MPOs “to produce the following: long-range (20-year) transportation plans; short-range (4-year) Transportation Improvement Programs [TIP]; annual statements of planning priorities and activities (generally called a Unified Planning Work Program or UPWP); and public participation plans.”⁷⁵ The long-range Metropolitan Transportation Plan (“MTP”) is required to include a projection of transportation supply and demand as well as congestion management strategies in the metropolitan area.⁷⁶ Further, the MTP must assess capital investments, including operational and infrastructure investment strategies expected to improve the transportation systems’ condition and performance.⁷⁷ An assessment is also mandated of transportation’s effect upon the environment, energy conservation, local planned growth, economic development, quality of life, and storm water runoffs.⁷⁸ The MTP must also include a financial plan that shows the source of revenues to implement it.⁷⁹ The development of the MTP includes two important components: travel demand forecasts and estimates of such inputs and outputs as pollution emissions and land use patterns expected over the life of the plan.⁸⁰

The TIP has been called the most important undertaking of an MPO because it establishes budgetary or investment priorities through its “priority list of proposed federally supported highway and transit projects.”⁸¹ This

72. See S. REP. NO. 116-200, at 4 (2020).

73. See *id.* at 6.

74. See *id.* at 5.

75. See GAO, *supra* note 26, at 5.

76. See *id.* at 7; MALLETT, *supra* note 37, at 2–3.

77. See GAO, *supra* note 26, at 7; MALLETT, *supra* note 37, at 2–3.

78. See 23 U.S.C. § 134(h)(1)(E), (I) (2018).

79. See GAO, *supra* note 26, at 7; MALLETT, *supra* note 37, at 2–3.

80. See MALLETT, *supra* note 37, at 3.

81. *Id.*

priority selection, however, is “fiscally constrained”—the targeted projects “must be supported by . . . available funding.”⁸² Covering a period of at least four years, the TIP includes project data on the following: (1) a description of the type of work to be undertaken so as to identify the project; (2) total estimated project cost, which may be projected beyond the four-year period; (3) identification of the federal funds and non-federal funds expected to be available to fund the project during each of the four program years; (4) identification of the public bodies implementing the project; (5) conformance with the applicable state implementation plan to bring air quality nonattainment and maintenance areas into compliance with air pollution standards; and (6) identification of projects in areas that will implement American with Disabilities Act requirements for “paratransit and key station[s].”⁸³ Each TIP project must “be consistent with the approved [MTP].”⁸⁴

MPOs also are required to develop “a unified planning work program (UPWP)” for the expenditure of Federal Highway Administration and Federal Transit Administration funds.⁸⁵ The Federal Transit Administration describes the UPWP as a “statement of work,” produced on an annual or biennial basis, which identifies the metropolitan area’s planning priorities and activities.⁸⁶ A UPWP, at a minimum, should describe the planning work and resulting products, identify the persons or parties who will perform the work, set time frameworks for completion of the work, specify the cost of the work, and establish the funding sources to complete the work.⁸⁷ The MTP creates the framework for the UPWP, which is also integrated with the TIP and performance planning targets.⁸⁸ The UPWP may cover studies to effectuate transportation goals, projected transportation initiatives, activities to address the management of existing transportation systems, transit-related projects, technical support assistance, public participation and outreach efforts, and data development and support activities on a regional scale.⁸⁹

82. *See id.*

83. *See* 23 C.F.R. § 450.326(g) (2020).

84. *See id.* § 450.326(i).

85. *See id.* § 450.308(b).

86. *Unified Planning Work Program (UPWP)*, FED. TRANSIT ADMIN. (Mar. 11, 2019), <https://www.transit.dot.gov/regulations-and-guidance/transportation-planning/unified-planning-work-program-upwp> [<https://perma.cc/4KZA-L9BP>].

87. *See id.*

88. *See* BOS. REGION METRO. PLAN. ORG., UNIFIED PLANNING WORK PROGRAM FFY 2020, at ES-7 (2019), <https://www.ctps.org/data/pdf/plans/UPWP/FFY-2020-UPWP-20190827.pdf> [<https://perma.cc/LS9E-UGAJ>] (including a diagram of MTP, UPWP, and TIP relationships).

89. *See* GENESEE TRANSP. COUNCIL, UNIFIED PLANNING WORK PROGRAM 2020-2021, at 13-14 (2020), https://www.gtcmpo.org/sites/default/files/pdf/2020/final_upwp_2021_board_approved_02272020.pdf [<https://perma.cc/PP4V-VRCU>].

Federal legislation requires MPOs to seek input from the public in the development of both the long-term and short-term planning documents.⁹⁰ MPOs also release draft UPWP documents for public review and invite comments on them. As the end of every UPWP development process approaches, the Boston Region Metropolitan Planning Organization releases a draft document that describes its ongoing projects, work, studies, and financial information; it then seeks comments from the public on this draft UPWP, which are compiled and reviewed.⁹¹ To obtain ongoing feedback, Boston's MPO uses the following communication channels: websites; Twitter accounts; a blog; targeted external outreach to specific advocacy and community groups; public events; and open-house events.⁹²

After the enactment of MAP-21 in 2012, the regional transportation planning process was strengthened by the requirement that MTPs and TIPs be developed "through a performance-driven, outcome-based approach to planning for metropolitan areas."⁹³ During the transportation planning process, MPOs in coordination with their states are required to establish performance targets that provide measures to achieve performance in such areas as highway management, including the condition of bridges and pavement on the interstate highway system; highway safety; congestion mitigation; on-road mobile source emissions; and national freight movement.⁹⁴ MPOs' selection of performance targets must also be coordinated with public transportation providers to realize consistency with the targets such public transportation providers are required to establish.⁹⁵

Now that Congress mandates a performance-based approach to transportation planning and decision-making, MPOs are also preparing transportation system performance reports on the extent to which performance targets have been met. Lincoln, Nebraska's MPO, for example, prepared an annual transportation system performance report in which it outlined the extent to which the performance goals set forth in its long-range transportation plan had been realized.⁹⁶ The report analyzed performance data relating to the plan's seven goals, namely how well the transportation system: (1) is maintained; (2) moves people and freight efficiently and reliably; (3) supports livability and travel choice goals through a more compact urban environment and multimodal transportation options; (4) realizes safety

90. See 23 U.S.C. § 134(i)(6)(A), (j)(B) (2018).

91. See BOS. REGION METRO. PLAN. ORG., *supra* note 88, at ES-14.

92. See *id.*

93. 23 U.S.C. §134(c)(1).

94. See *id.* §§ 134(h)(2), 150(c).

95. See 23 C.F.R. § 450.306(d)(2)(iii) (2020).

96. See LINCOLN METRO. PLAN. ORG., ANNUAL TRANSPORTATION SYSTEM PERFORMANCE REPORT 1-2 (2020), https://www.lincoln.ne.gov/files/sharedassets/public/planning/mpo/projects-amp-reports/2020-performance-tracking-report_final_122120.pdf [<https://perma.cc/F92Y-9CP9>].

and security goals; (5) supports economic vitality; (6) enhances the natural, cultural, and built environment; and (7) meets its funding and cost effectiveness measures through collaboration.⁹⁷

Many MPOs perform planning functions in areas not strictly transportation related.⁹⁸ Some states and other public entities in recent years have moved away from silo thinking in which a particular public service functions by itself without coordination or integrated planning with other public functions.⁹⁹ While the states and local governments continue to rely upon single-function districts at the local and regional level to oversee public infrastructure related to one function such as transit, airports, sewerage disposal, storm water drainage, water supply, and parks, a trend has been growing to coordinate and integrate these essential but diverse public functions.¹⁰⁰ MPOs, which historically by necessity have coordinated transportation planning among local, regional, state, federal, and private stakeholders, find themselves in the unique position of spearheading such integration and collaboration.

*B. MPOs' COMPREHENSIVE PLANNING CRITERIA EXTENDS BEYOND PURELY
TRANSPORTATION FUNCTIONS*

Over the years, Congress has expanded the criteria that a MPO must consider in prioritizing and planning transportation infrastructure. Projects and strategies under consideration must consider ten factors.¹⁰¹ Of the ten factors, five include the following broad categories that expand the scope of transportation planning:

1. “[S]ecurity of the transportation system for motorized and non-motorized users;”
2. “[E]conomic vitality of the metropolitan area, especially . . . global competitiveness, productivity, and efficiency;”
3. “[P]rotect[ion] and enhance[ment of] the environment, . . . energy conservation, . . . quality of life, and . . . consistency between transportation improvements and [s]tate and local planned growth and economic development patterns;”

97. See *id.*

98. See Adjo Amekudzi & Michael D. Meyer, *Considering the Environment in Transportation Planning: Review of Emerging Paradigms and Practice in the United States*, 132 J. URB. PLAN. & DEV. 42, 42–45 (2006); Elisa Sirkka Barbour, *Regional Sustainability Planning by Metropolitan Planning Organizations* 38–42 (2016) (Ph.D. dissertation, University of California, Berkeley), <https://escholarship.org/uc/item/2fm3o0so> [<https://perma.cc/B8XV-QAPL>]; Sciarra, *supra* note 45, at 270–71; ZIMMERMAN, *supra* note 68, at 11–16.

99. See ROSABETH MOSS KANTER, *MOVE: PUTTING AMERICA'S INFRASTRUCTURE BACK IN THE LEAD* 19 (2015) (describing the problems of transportation as stemming from “silos within the government and . . . across industries”).

100. See FOSTER, *supra* note 1, at 31–33 (discussing the functional fragmentation created by reliance upon special districts).

101. See 23 U.S.C. § 134(h)(1) (2018).

4. “[R]esiliency and reliability of the transportation system and reduc[tion] or mitigat[ion] [of] stormwater impacts [upon] surface transportation; and”
5. “[E]nhance[d] travel and tourism.”¹⁰²

Not only has the wide-ranging criteria guiding transportation planning been broadened, but MPOs are now required to integrate this wide scope of planning criteria into their transportation planning. In fact, a handbook for innovative MPO practices exhorts MPOs to be engaged in these emerging areas of regional importance, calling for MPO leadership “in disaster planning, storm water management, climate change and workforce development.”¹⁰³

MPOs must now plan for a number of functional areas that may be under the jurisdiction of different state and local departments and agencies. An Illinois statute directs Chicago’s MPO, the Chicago Metropolitan Agency for Planning (“CMAP”), for example, to develop a regional plan that guides the metropolitan region’s physical development, including both “public and private investments in housing, economic development, preservation of natural resources, transportation, water supply, flood control, sewers, and other physical infrastructure.”¹⁰⁴ The New Orleans Regional Planning Commission, the MPO for the New Orleans metropolitan area, lists its focus areas as the environment, transportation, and economic development, implying that the “environment” and “economic development” are equally as important as “transportation.”¹⁰⁵ It is quite clear that in the nation’s large metropolitan areas, MPOs are engaged quite comprehensively in physical infrastructure planning for the metropolitan area under their jurisdiction.

Because some of the criteria driving MPO planning efforts potentially conflict with each other, MPOs now face the challenge of making decisions as to the importance of each criterion and which criteria should win out when incompatibilities arise among them. The economic viability of a metropolitan area can sometimes be at odds with mitigating storm water impacts, improving air quality, or protecting the region’s water supply.¹⁰⁶ In some metropolitan areas MPOs undertake growth management planning, thereby expressing the

102. *Id.* §§ 134(h)(1)(A), (C), (E), (I), (J). The more closely related transportation-based criteria cover the following areas: (1) transportation safety; (2) “accessibility and mobility of people and . . . freight;” (3) “integration and connectivity of the transportation system, across and between modes, for people and freight;” (4) “efficient system management and operation;” and (5) “preservation of the existing transportation system[.]” *Id.* §§ 134(h)(1)(B), (D), (F), (G), (H).

103. ZIMMERMAN, *supra* note 68, at 118.

104. 70 ILL. COMP. STAT. ANN. 1707/45(a) (West 2018).

105. *Planning Our Region’s Future*, NEW ORLEANS REG’L PLAN. COMM’N, <https://www.norpc.org> [<https://perma.cc/EH3Z-ZMGH>].

106. Continued consumption of the world’s resources through a policy of continued economic growth has been viewed as incompatible with ecosystem preservation. *See* Diana Mitlin, *Sustainable Development: A Guide to the Literature*, 4 ENV’T & URBANIZATION 111, 118–19 (1992).

region's aspiration to achieve sustainable environments while fostering a strong economy, a goal not easily realized.¹⁰⁷

In 2005, Hurricane Katrina demonstrated vulnerabilities in emergency preparedness for disasters relating to transportation systems. Many people could not heed advice to evacuate because no transportation modes existed for them to leave the area about to be devastated by this gargantuan storm.¹⁰⁸ Many of those affected did not own cars and public transit was either nonexistent or insufficient.¹⁰⁹ Post-Katrina disaster planning pinpointed the important role transportation plays in disaster preparedness and response—it must provide a clear path for evacuation, as well as enable the populace to reach a safe place for shelter.¹¹⁰ Federal law now clearly mandates that MPOs in drafting their plans must include strategies that will both increase the safety and security “of [the] transportation system[s] for motorized and non-motorized users[.]”¹¹¹

V. STRUCTURAL COMPOSITION OF MPOS

In the United States, local governments are classified as general-purpose governments because they undertake a comprehensive set of functions in a defined area for a specific population.¹¹² Due to the necessity for the performance of a particular function on a regional scale that crosses municipal boundaries, special districts have been formed.¹¹³ Most special districts perform only one function.¹¹⁴ A MPO does not fit into these neat categories. Historically, a MPO could be viewed as comparable to a single-function district focused solely on transportation planning. But given the broad, multi-purpose criteria it must now consider, it can be considered more of a hybrid form of government at the regional level.¹¹⁵ Its role as an agent of

107. See, e.g., *About the Atlanta Regional Commission*, ATLANTA REG'L COMM'N, <https://atlanta-regional.org/about-arc> [<https://perma.cc/MCM2-VL8R>] (discussing Atlanta's plan to create a strong economy and healthy community); *Metro Vision*, DENVER REG'L COUNCIL OF GOV'TS, <https://metrovision.drcog.org> [<https://perma.cc/X38Q-RB75>] (discussing the organization's vision of creating a better environment and economy); *Our Work: Vision 2050*, PUGET SOUND REG'L COUNCIL, <https://www.psrc.org/vision> [<https://perma.cc/2TEF-8J6V>] (envisioning a community with a strong economy and healthy environment in 2050).

108. See U.S. EXEC. OFF. OF THE PRESIDENT, THE FEDERAL RESPONSE TO HURRICANE KATRINA: LESSONS LEARNED 26 (2006), https://tools.niehs.nih.gov/wetp/public/hasl_get_blob.cfm?ID=4628 [<https://perma.cc/3FK2-AA34>].

109. See *id.*

110. See *id.* at 40 (highlighting the need for federal agencies to be prepared for mass evacuations during disasters).

111. 23 U.S.C. § 134(h)(1)(B)–(C) (2018).

112. See MANDELKER ET AL., *supra* note 68, at 33.

113. See FOSTER, *supra* note 1, at 12–13.

114. See *id.* at 12.

115. Because urban boundary lines are redrawn after every decennial census, MPOs, which are organized for areas on a population basis, may be subject to boundary changes. See U.S. DEP'T

the federal government while created pursuant to state law highlights its uniqueness.¹¹⁶ MPOs exemplify “marble cake” federalism in which all levels of governance share authority for planning and implementation.¹¹⁷ A MPO’s primary role thrusts it into a tangle of intra- and inter-governmental relations—its success, in large part, depends on how well it can achieve cooperation and coordination among a diverse set of both private and public stakeholders.

States have been granted great flexibility in structuring MPOs. Congress mandates only that a MPO, which serves a designated transportation management area, be comprised of: (1) “local elected officials”; (2) “officials of public agencies that . . . operate major modes of transportation in the metropolitan area”; and (3) “appropriate state officials.”¹¹⁸ Because only the local officials are required to be elected, this prescribed structure seems to suggest that MPOs obtain their legitimacy in our republican form of government from local governments. The criteria of public transportation providers, ushered in by MAP-21, and appropriate state officials appears to indicate that professional planners and other officials who bring expertise to their MPO responsibilities should also play an integral role on the policy boards of MPOs, although a representative of a public transportation provider “may also serve as a representative of a local municipality.”¹¹⁹ State officials, of course, could also include elected state representatives, as well as the state’s governor. MPOs thus are comprised of elected local officials and persons with professional expertise in the areas in which MPOs plan and operate.

This combination of elected and non-elected experts working together on MPO boards does not upset existing state and local governmental regimes that depend upon appointed executives and staff members to carry out numerous public functions. With elected local officials serving on their boards, MPOs may be said to be more representative of the public than many single-function districts and agencies that operate under the guidance of state or local appointed officials. Nonetheless, MPOs’ structures indicate that they do not operate in a purely democratic manner—states can structure them to tip the balance to state officials or unelected experts.

In preparation for a 2017 report to the U.S. Department of Transportation, 279 out of a total of 396 eligible MPOs were surveyed regarding their organizational structure.¹²⁰ MPOs were initially divided into

OF TRANSP., MPO STAFFING AND ORGANIZATIONAL STRUCTURES 3–25 (2017), https://www.planning.dot.gov/documents/MPOStaffing_and_Org_Structures.pdf [<https://perma.cc/5QUL-AKBg>] (describing the process of drawing MPO boundaries).

116. See *Openlands v. Dep’t of Transp.*, 127 N.E.3d 40, 51 (Ill. App. Ct. 2018) (referring to MPOs as “creatures of the federal government” while “created pursuant to state or local law”).

117. Barbour, *supra* note 98, at 12.

118. 23 U.S.C. § 134(d)(2) (2018). See *supra* text accompanying notes 41–42.

119. See *id.* § 134(d)(3)(B).

120. See U.S. DEP’T OF TRANSP., *supra* note 115, at 1-3, 1-1.

two broad categories: hosted or independent.¹²¹ Hosted MPOs are those that are part of another institution, often controlled by it as to staffing and fiscal matters, whereas independent MPOs act independently of another institution and manage their own affairs.¹²² Organizations that host MPOs include: city, county, or state governments; councils of governments; state regional planning agencies; and joint powers authorities created by a number of local governmental members to perform functions on their behalf.¹²³ Hosted MPOs, which comprised 68.8 percent of the surveyed MPOs, have been further described as running on a continuum with the All-in-One Agency not differentiating between MPO and non-MPO transportation functions; the Dual Purpose MPO, in which staff shift between host agency tasks and agency and MPO transportation planning functions; and the Component MPO, which separates MPO functions from host functions and employs a MPO director who reports to a host manager for administrative functions, but supervises staff engaged only in MPO duties.¹²⁴

Independent MPOs, which comprised 31.2 percent of the MPOs surveyed, fell into two groups: Leaning Independent and Freestanding Independent, with the latter category consisting of MPOs that manage their own finances and independently administer their functions through their own staff.¹²⁵ Leaning Independent MPOs oversee their own finances, and their boards supervise their directors and staff, but these MPOs lean upon another agency for some type of support, usually services under a severable contract for employee benefits or procurement.¹²⁶

MPO policy boards set policy for the transportation planning process in each metropolitan region.¹²⁷ The MPO survey showed that among eligible board members, local elected officials have the greatest representation on MPO boards. In 93.1 percent of the MPOs surveyed, municipal elected officials served on MPO boards holding nearly nine membership positions on average across all MPOs.¹²⁸ The next most common board member category was “appropriate state officials,” typically state department of transportation

121. See *id.* at 3-1.

122. See *id.*

123. See GAO, *supra* note 26, at 11; see, e.g., *Transportation Planning Board*, METRO. WASH. COUNCIL OF GOV'TS, <https://www.mwcog.org/tpb> [<https://perma.cc/PBU9-76KF>] (showing that Council of Governments hosts the MPO Board); *Transportation Policy Board*, PUGET SOUND REG'L COUNCIL, <https://www.psrc.org/board/transportation-policy-board> [<https://perma.cc/J2PF-T6P4>] (showing that the Council, comprised of elected local officials, hosts the MPO Board); *About Us*, SCAG, <https://www.scag.ca.gov/about/Pages/Home.aspx> [<https://perma.cc/48S3-5NP7>] (stating that the Southern California Association of Governments, a Joint Powers Authority acting under California law, is the region's designated MPO).

124. See U.S. DEP'T OF TRANSP., *supra* note 115, at 3-1, 3-3-3-4.

125. See *id.* at 3-1, 3-4 to 3-5.

126. See *id.* at 3-4.

127. See *id.* at 2-1.

128. See *id.* at 2-2.

officials, which were represented on 76.4 percent of all MPO boards.¹²⁹ County officials and county elected officials, defined as persons holding executive positions, constituted respectively 75.7 percent and 30.4 percent of MPO board seats.¹³⁰ Among modal transportation providers, another required category for board representation, public transit agencies dominated with representation on 50.4 percent of MPO boards.¹³¹ A small number of MPO board members served as representatives from such diverse constituencies as aviation authorities, the private sector, toll authorities, a MPO Advisory Committee, school boards, colleges or universities, the state governor, tribal governments, and military installations.¹³² Further, municipal elected officials filled 42.2 percent of total MPO board seats, followed by: county commissioners (15.4 percent); municipal elected executive officials (8.7 percent); state department of transportation representatives (6.4 percent); countywide elected executive officials (6.1 percent); public transit authorities' representatives (3.6 percent); MPO advisory committee representatives (2.0 percent); private sector representatives (1.6 percent); and regional councils/councils of government (1.0 percent).¹³³

On average, the survey data show that municipal officials clearly dominate MPO board membership with trailing county officials also playing a strong hand. It cannot be forgotten, however, that many MPOs complain of state department of transportation domination over transportation planning.¹³⁴ Because state transportation departments implement transportation plans and possess financial resources not available to MPOs, their heavy influence continues despite Congress's attempt to achieve greater equilibrium through the addition of public transit agencies to MPO board membership and expanded planning criteria.

The MPO organizational survey revealed other important facts. As the population of a MPO planning area increased, so did its membership board size: MPOs with over a million people in their planning areas averaged 28.8 board members while smaller MPOs with populations less than 100,000 averaged 9.3 board members.¹³⁵ This correlation between population in a MPO's area and MPO board size could be attributable to the desire to provide representation to an increasing number of local officials as the metropolitan area expands. Finding it impossible to have an elected official from every municipality within a MPO planning area, some MPOs rotate seats among municipalities while other MPOs exclude municipality board representation,

129. See *id.* at 2-3.

130. See *id.*

131. See *id.* at 2-3 to 2-4.

132. See *id.*

133. See *id.* at 2-4 fig.2-2.

134. See MALLETT, *supra* note 37, at 6-9; GAO, *supra* note 26, at 19.

135. U.S. DEP'T OF TRANSP., *supra* note 115, at 2-2 fig.2-1. "Governatorial appointees to MPO boards are relatively rare." *Id.* at 2-3.

choosing to meet the local official criterion by including only county officials on their boards. The Boston metropolitan area MPO board, for example, designates the City of Boston as a permanent member with two votes while making provision for representation on its board from 12 other municipal members.¹³⁶ In contrast, the nine-member New York City Metropolitan Transportation Council, the New York City metropolitan area MPO, excludes local elected officials in preference for five elected county executives and a representative from each of New York City's Departments of City Planning and Transportation, the State Department of Transportation, and the Metropolitan Transportation Authority.¹³⁷

The voting rights of board members also play a significant role in MPO decision-making. Federal statutes do not require voting rights among MPO members on the basis of population. Weighted voting within different population classes is relatively uncommon among MPOs—reported to be in effect in only 36 out of the 276 MPOs surveyed, thus constituting “only 13.0 percent of MPOs.”¹³⁸ More populated MPOs have instituted weighted voting in greater numbers than MPOs with planning areas of less than a 200,000 population.¹³⁹ MPOs, with planning areas populated from 200,000 to over 1,000,000, reported the use of weighted voting in ranges from 17 percent to 26 percent.¹⁴⁰

Many MPOs include non-voting members on their boards to inject additional perspectives into the MPO decision-making process.¹⁴¹ Fifty-three percent of the survey's respondents reported the presence of non-voting members on their boards with four being the mean number of such non-voting members.¹⁴² The major types of non-voting members reported in the survey were as follows: state departments of transportation (44 percent); regional councils (17 percent); public transit authorities (15 percent); municipal elected officials (14 percent); aviation authorities (12 percent); military installations (10 percent); colleges and universities (7 percent); county commissioners (6 percent); and toll or expressway authorities (6 percent).¹⁴³ Federal officials of the Federal Highway Administration

136. See BOS. REGION METRO. PLAN. ORG., MEMORANDUM OF UNDERSTANDING RELATING TO THE COMPREHENSIVE, CONTINUING AND COOPERATIVE TRANSPORTATION PLANNING PROCESS IN THE BOSTON METROPOLITAN AREA 6–7 (2011), https://www.ctps.org/data/pdf/about/mpo/Boston_Region_MPO_MOU_2011.pdf [<https://perma.cc/3FEB-AZK2>].

137. See *Council Members*, N.Y. METRO. TRANSP. COUNCIL, <https://www.nymtc.org/ABOUT-US/who-we-are/council-members> [<https://perma.cc/6XLG-DMGG>].

138. U.S. DEP'T OF TRANSP., *supra* note 115, at 2-6.

139. See *id.*

140. See *id.* at 2-6 tbl.2-4.

141. See *id.* at 2-7.

142. See *id.*

143. See *id.* at 2-7–2-8.

(“FHWA”) and the Federal Transit Administration (“FTA”), who are barred from serving on board voting seats, frequently serve in an advisory capacity.¹⁴⁴

Federal law does not require MPO advisory committees, but many MPOs draw valuable advice and planning assistance from advisory committee members.¹⁴⁵ Although most advisory committee members do not participate directly in MPO board meetings, they often forward their recommendations, reached by votes at their own meetings, to MPO governing boards.¹⁴⁶ Nearly all (92 percent) of the respondents to the survey reported assistance from a technical advisory committee (“TAC”), which typically educates MPO board members on complex engineering and planning concepts.¹⁴⁷ In addition to providing insight, TACs have proven useful in transmitting information back and forth between MPO staff members and local constituencies.¹⁴⁸ Citizen advisory committees, populated by representatives of the local citizenry, provide feedback to the MPO process from citizens’ perspectives.¹⁴⁹

In addition to the more common technical and citizen advisory committees, some MPOs have instituted committees dedicated to a specific transportation mode, such as a bicycle and pedestrian advisory committee, the members of which would guide the elements of this transportation mode in MPO documents and convene local stakeholders to help resolve issues relating to bicycles and pedestrians.¹⁵⁰ Specific issue committees were less common among the MPOs surveyed, but such committees can generate ideas for resolving specific issues, many of which need MPO attention due to their local and regional significance.¹⁵¹ The MPOs surveyed have created advisory committees to cover an array of issues: freight and goods movement; congestion management; air quality; land use; corridor management; emergency management/homeland security; water; regional growth; livability; and the environment.¹⁵²

VI. STRUCTURAL IMPEDIMENTS TO MPOS’ PERFORMANCE OF ASSIGNED FUNCTIONS

MPOs face a number of challenges due to their organizational structure. This Part of the Essay explores these challenges.

144. *See id.* at 2-7.

145. *See id.* at 2-8.

146. *See id.*

147. *See id.* at 2-9.

148. *See id.* at 2-9.

149. *See id.*

150. *See id.* at 2-9 to 2-10.

151. *See id.* at 2-10.

152. *See id.* at 2-9 tbl.2-9, 2-10.

A. *MULTI-FUNCTIONAL PLANNING HAS REPLACED SILO
TRANSPORTATION PLANNING*

Although the criteria that MPOs consider in transportation planning have evolved to include homeland security, economic development, the environment, and other non-transportation factors, MPOs' primary function is transportation planning. The states generally have abandoned single-function planning in favor of the creation of regional planning entities that undertake planning for a number of interrelated functions. Viable transportation planning must be coordinated with planning in other areas of public concern such as land use, environmental protection, emergency management, open space preservation, energy conservation, watershed protection, and disposal of sewerage and solid waste.

Most MPOs are now hosted by a regional council or planning agency, thereby facilitating planning coordination under one umbrella organization across a number of functions. While MPOs could attempt to coordinate transportation planning with each separate functional planning organization by reaching out to them, this type of process has become increasingly inefficient. Even Congress's proposed grant program to improve the resiliency of transportation infrastructure recognizes that its success would rest upon consultation by the U.S. Department of Transportation with the following federal agencies: Army for Civil Works; Environmental Protection Agency; Department of Interior; Department of Commerce; and the Federal Emergency Management Agency.¹⁵³ The days of transportation planning in a vacuum without examining its effects upon other public infrastructure or priorities have largely ended.¹⁵⁴

B. *MPOs LACK INSTITUTIONAL IDENTITY AS THE MAJORITY OF MPOs ARE HOSTED
BY A REGIONAL PLANNING AGENCY OR A LOCAL PUBLIC BODY*

Because many MPOs are hosted by another agency, they lack the type of identity that can garner support for their mission. Instead, the hosting regional entity is credited with the performance of transportation planning. Many MPOs do not even have the "metropolitan planning organization" identifier attached to their organization's name. The Puget Sound Regional Council, for example, refers to its "Transportation Policy Board" as providing advice "on key transportation issues."¹⁵⁵ Few people understand what a MPO is or the functions it performs, making it difficult to generate public

153. See S. REP. NO. 116-200, at 30 (2020).

154. "The old way was for transit officials to stay within boundaries and be purely operational. The new way is to think more expansively and connect the pieces." KANTER, *supra* note 99, at 190.

155. See *About: Boards*, PUGET SOUND REG'L COUNCIL, <https://www.psrc.org/boards> [<https://perma.cc/FV55-V8UD>].

participation in the MPO planning process or public support for its regional transportation planning work.¹⁵⁶

*C. MPO DECISION-MAKING RESTS WITH LOCALLY ELECTED OFFICIALS,
NOT REGIONAL OFFICIALS*

As previously discussed, Congress has granted the states flexibility in designing their MPOs' structure, and local elected officials possess the largest representation on MPO boards.¹⁵⁷ Congress should re-evaluate whether its lofty goals for metropolitan planning can best be effectuated through the institutional structures it has let the states design. No federal requirements have been fashioned for representation by individuals who would serve as representatives of the metropolitan area as a whole, perhaps due to the nation's lack of institutions designed for regional governance.

Although many regional councils of government, comprised of local elected officials, have realized success in certain areas of metropolitan planning, one cannot expect such officials to make decisions based solely from a regional perspective. Assuming that elected officials desire to perform their responsibilities in a manner that will earn them reelection, they most likely will be beholden primarily to the people who elect them.¹⁵⁸ Because the vast majority of seats on MPO boards are held by local officials, their views will dominate MPO decision-making.¹⁵⁹

The MPO planning process, which requires compromises and negotiation among the local elected officials representing different municipalities and counties, may result in setting priorities beneficial to the region, but such an outcome cannot be assured. Most likely, MPOs will need to rely heavily upon their staffs of professional experts to present data showing how metropolitan-wide priorities will benefit local jurisdictions. In situations where one locality must forego or postpone its transportation priority for the good of a project in another area of the region, misunderstandings and ill will may arise. MPOs, by the nature of their constituencies, must be constantly involved in coordination and leadership that brings the diverse local elected officials together to set metropolitan-wide priorities.

156. See GAO, *supra* note 26, at 18.

157. See *supra* text accompanying notes 38–43, 118, 128.

158. See Elisabeth R. Gerber & Clark C. Gibson, *Balancing Regionalism and Localism: How Institutions and Incentives Shape American Transportation Policy*, 53 AM. J. POL. SCI. 633, 635, 647 (2009). “When regional decision making empowers actors who are aligned with local interests, we expect to see the balance of policy outcomes shifting in the direction of those local interests.” *Id.* at 635.

159. See U.S. DEP'T OF TRANSP., *supra* note 115, at 2-4 fig.2-2.

D. *LACK OF PROPORTIONAL REPRESENTATION UNDERMINES INFLUENCE OF MORE DENSELY POPULATED AREAS COVERED BY A MPO*

Seats on MPO policy boards are usually based on constituencies rather than a percentage of the population comprising the metropolitan area.¹⁶⁰ Prevalent seat types include: municipal elected officials/executive officials; state department of transportation; county commissioners; public transit agency; and county-wide elected officials.¹⁶¹ Thus, jurisdictional boundaries play an important role in determining the MPO's policy makers because, generally, local elected officials and county commissioners possess the most seats on MPO boards.¹⁶² If densely populated municipalities are not given additional seats to reflect their population, they will be underrepresented on MPO boards given the nation's fragmented local governmental structures in which a large number of municipalities comprise a metropolitan area.

The required placement of local elected officials on MPO boards, at least in a designated transportation management area, necessitates that MPOs focus on a large number of constituencies and gain their favor in order for MPOs to carry out their responsibilities. An argument can be made that weighting MPO board composition toward local officials irrespective of their locality's percentage of metropolitan population ensures their representation in transportation planning, which will affect each of the local jurisdictions within a metropolitan area. The choice, however, to forego proportional representation will most likely result in domination by suburban localities on MPO boards given their outsized numbers in a metropolitan area. Should suburban predominance be desired, then the lack of proportional representation would not be viewed as an impediment to MPO transportation planning. Nonetheless, the GAO has stated that "[a] core function of MPOs is to establish and manage a fair and impartial setting for effective transportation decision-making in an urbanized area."¹⁶³

E. *MPOS LACK POWER TO IMPLEMENT THEIR PLANS*

The 2009 GAO's survey of MPOs found that "[a]bout 80 percent of all MPOs . . . indicated that the lack of authority to implement the plans they develop is a challenge."¹⁶⁴ Further, some MPOs lack authority to select the projects that receive the most immediate time frame for implementation.¹⁶⁵ One would think that parties vested with the responsibility to implement their plans would be more engaged in the planning process—it could be

160. Weighted voting structures among MPO board members are relatively uncommon. *See* U.S. DEP'T OF TRANSP., *supra* note 115, at 2-6.

161. *See id.* at 2-3.

162. *See id.* at 2-2 to 2-4.

163. GAO, *supra* note 26, at 4.

164. *See id.* at 18.

165. *See id.* at 14.

disheartening for planners to see their established planning priorities rejected or eviscerated during the implementation stage. Many organizations separate planning and operational functions, but because both groups bear responsibility for the success of the organization, coordination and consultation is incentivized. MPOs, however, must “rely [up]on . . . cities, counties, . . . state [transportation] departments . . . [and other agents] to carry out the[] plans” they have developed.¹⁶⁶ The absence of a regional voting constituency means that “federal, state, [and] local political leaders [have little or no incentive] to involve themselves in regional governance issues”¹⁶⁷

While the transportation improvement program, developed by “MPOs help determine [the eligibility of] projects . . . for funding and . . . [establishes their] priority[,] . . . [other] federal, state, and local policymakers” determine which “project[s] will be funded and the amount of fund[ing]” they will receive.¹⁶⁸ Thus, MPOs are “relegat[ed] . . . largely [to an] advisory capacity.”¹⁶⁹ “[A]ccording to [the MPOs surveyed in the GAO study], the availability of funding and public support are more important drivers of transportation investment decisions than the analysis conducted by MPOs.”¹⁷⁰ Thus, funding availability and public support trump the economic analyses and other studies MPOs provide to guide the transportation planning process.

*F. STATE DEPARTMENT OF TRANSPORTATION DOMINATION
IN THE PLANNING PROCESS*

ISTEA and TEA-21 required MPOs to “consider alternative modes of transportation as well as the impact of” transportation decision-making upon the environment and social cohesion.¹⁷¹ Congress hoped that the enactment of these statutes would reform federal transportation policy by shifting it away from the road building favored by state departments of transportation (“DOTs”).¹⁷² It has been argued that these reforms were insufficient because they failed to grant MPOs sufficient independence from state governments, furnish strong planning requirements, or ensure adequate “federal oversight, which could have counteracted the dependence of MPOs on state governments.”¹⁷³

166. *Id.* at 19.

167. David K. Hamilton, *Developing Regional Regimes: A Comparison of Two Metropolitan Areas*, 26 J. URB. AFFS. 455, 456 (2004).

168. GAO, *supra* note 26, at 19.

169. Benjamin K. Olson, *The Transportation Equity Act for the 21st Century: The Failure of Metropolitan Planning Organizations to Reform Federal Transportation Policy in Metropolitan Areas*, 28 TRANSP. L.J. 147, 174 (2000).

170. GAO, *supra* note 26, at 19.

171. Olson, *supra* note 169, at 147.

172. *See id.*

173. *Id.*

State officials' responsibilities for transportation operations, maintenance, and development throughout a state will undoubtedly continue to play an important role in the development of long-range and short-range transportation plans.¹⁷⁴ The state department of transportation enjoys a higher hierarchical position than the metropolitan-based MPO, giving it standing to direct transportation decision-making. The addition of transit agencies on MPO boards and a performance-based approach to transportation planning have added more balance to transportation governance, but state DOTs will continue to exercise great weight in transportation decision-making processes.¹⁷⁵

G. NO FEDERAL RECOGNITION THAT TRANSPORTATION PLANNING IN LARGE METROPOLITAN AREAS DIFFERS FROM PLANNING IN LESS POPULATED AREAS

Basic federal transportation planning requirements, which call for long-term and short-term plans, a Unified Planning Work Program, and public participation plans, apply to all MPOs.¹⁷⁶ Because MPOs vary considerably as to the number of people residing in their planning area and the extent of their staff resources, one-size-fits-all does not always work well for smaller MPOs that may face staffing constraints.¹⁷⁷ Some MPOs may be assisted by two staff members or less whereas the few largest populated MPOs may employ 100 full or part-time workers.¹⁷⁸ Smaller MPOs may not be able to retain staff with expertise in such areas as travel forecasting.¹⁷⁹

H. VESTING OF LAND USE POWER IN LOCAL GOVERNMENTS WEAKENS MULTI-FUNCTIONAL AND TRANSPORTATION PLANNING

Because states have largely delegated land-use decision-making powers to their local governments, agencies created to perform functions on a regional scale of operation face challenges in forecasting regional growth patterns or integrating decisions relating to land use into their plans.¹⁸⁰ Despite continuing criticism of local governmental practices that exclude undesirable land uses within their jurisdictions, known as not in my backyard ("NIMBY"), states appear to have little appetite to address locally controlled land uses that threaten the well-being of a region or metropolitan area. For this reason, MPOs will most likely continue to experience difficulty in corralling local

174. See BRUCE D. MCDOWELL, U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELS., MPO CAPACITY: IMPROVING THE CAPACITY OF METROPOLITAN PLANNING ORGANIZATIONS TO HELP IMPLEMENT NATIONAL TRANSPORTATION POLICIES 2 (1995), <https://library.unt.edu/gpo/acir/Reports/policy/a-130.pdf> [<https://perma.cc/L7HH-KGX2>].

175. See MALLETT, *supra* note 37, at 6-7.

176. See GAO, *supra* note 26, at 5.

177. See *id.* at 11, 17-18.

178. See *id.* at 11.

179. See *id.* at 18.

180. See *id.* at 19.

jurisdictions to make land-use decisions that benefit a metropolitan area as a whole, rather than their individual communities.¹⁸¹

VII. FINANCIAL LIMITATIONS TO PERFORMANCE OF MPO FUNCTIONS

Because financing of public transportation is closely related to governance, they should be addressed together.¹⁸²

A. MPO PUBLIC FUNDING SOURCES

Metropolitan Planning Funds (“PL Funds”) and Federal Transit Administration Section 5303 funds generally constitute a large portion of a MPO’s budget.¹⁸³ States and localities are required to make a 20 percent match of these federal funds.¹⁸⁴ Congress does not appropriate PL Funds—rather, they are paid under contract authority from the Federal Highway Trust Fund (“HTF”), the funding of which comes from such sources as excise taxes on motor fuels and weight-based heavy-vehicle use taxes.¹⁸⁵ HTF funds are set aside and apportioned for “five . . . [highway] programs plus the Metropolitan Planning Program.”¹⁸⁶ “PL funds are distributed to States . . . [on the basis of a formula that uses the] ratio of . . . [the state’s] urbanized-area population . . . to the total national urbanized-area population.”¹⁸⁷ The HTF funds go directly to state departments of transportation who distribute them to MPOs “based on a formula” developed by the state in consultation with the MPOs and subject to approval by the Federal Highway Division Office.¹⁸⁸ Federal regulations mandate consideration of the following factors in the development of the MPO distribution formula: “population, status of planning, attainment of air quality standards, metropolitan area transportation needs, and other factors necessary to provide for an appropriate distribution of funds to carry out the requirements of . . . Federal

181. *See id.*

182. *See* YONEL GRANT, CYNDY POLLAN & TAGAN BLAKE, AM. PUB. TRANSP. ASS’N, REGIONAL ORGANIZATIONAL MODELS FOR PUBLIC TRANSPORTATION 17 (2011), <http://onlinepub.trb.org/onlinepubs/tcrp/docs/TCRPJ-11Task10-FR.pdf> [<https://perma.cc/A7L7-BRL6>].

183. GAO, *supra* note 26, at 12. *See* U.S. DEP’T OF TRANSP. & THE JOHN A. VOLPE NAT’L TRANSP. SYS. CTR., REVIEW OF STATE DOT APPROACHES TO DISTRIBUTE FEDERAL METROPOLITAN PLANNING (PL) FUNDS TO MPOS 1 (2015), <https://rosap.ntl.bts.gov/view/dot/12218> [<https://perma.cc/KY2K-CDGQ>].

184. *See* GAO, *supra* note 26, at 12.

185. *See* U.S. DEP’T OF TRANSP. & THE JOHN A. VOLPE NAT’L TRANSP. SYS. CTR., *supra* note 183, at 1–2. “Contract authority is a type of budget authority that is available for obligation even without an appropriation (although appropriators must eventually provide liquidating authority to pay the obligations).” CONG. RSCH. SERV., FEDERAL-AID HIGHWAY PROGRAM (FAHP): IN BRIEF 2 (2021) (emphasis omitted), <https://crsreports.congress.gov/product/pdf/R/R44332> [<https://perma.cc/U8Z6-HUAW>].

186. *See* CONG. RSCH. SERV., *supra* note 185, at 6.

187. U.S. DEP’T OF TRANSP. & THE JOHN A. VOLPE NAT’L TRANSP. SYS. CTR., *supra* note 183, at 2.

188. *See id.*; 23 C.F.R. § 420.109 (2020).

law.¹⁸⁹ States have developed different distribution formulas, but many states use population as the primary factor.¹⁹⁰

B. INDEPENDENT FUNDING SOURCES REQUIRED FOR MPOS

Eighty-five percent of the respondents to the GAO survey cited the lack of transportation planning funds as a challenge.¹⁹¹ MPOs favored the greater flexibility accorded by the FTA in the expenditure of funds in comparison to the more prescriptive approach taken by the Federal Highway Administration.¹⁹² MPOs expressed concern that the required state and local matching funds could not always be secured, causing some MPOs to be staffed insufficiently.¹⁹³ Another difficulty stemmed from the federal fiscal constraint requirement barring planning for projects not backed by reliable revenue sources. Here, MPOs complained that proposed projects had to be abandoned in the absence of reliable revenue projections, and difficulties in obtaining more reliable revenue projections from their state departments of transportation hindered their planning processes.¹⁹⁴ The lack of overall funding for transportation projects also affected MPO planning efforts because projects for which MPOs had drawn up plans could not be implemented.¹⁹⁵ Finally, approximately 50 percent of MPOs surveyed reported insufficient funding to employ the trained staff necessary to conduct transportation planning in accordance with federal requirements, which have expanded to require technical expertise in such areas as motor vehicle emissions and changing land-use patterns.¹⁹⁶

Various solutions have been proposed to provide MPOs with additional funding. One recommendation calls for granting MPOs a larger portion of PL Funds by raising the 1.25 percent deduction for MPOs from PL Funds to 1.50 percent.¹⁹⁷ Given projected shortfalls in the Highway Trust Fund, this

189. 23 C.F.R. § 420.109(b).

190. See U.S. DEP'T OF TRANSP. & THE JOHN A. VOLPE NAT'L TRANSP. SYS. CTR., *supra* note 183, at 2.

191. GAO, *supra* note 26, at 16.

192. See *id.*

193. See *id.* at 17.

194. See *id.*

195. See *id.* Public spending for transportation and water infrastructure has declined since around 2002, except for a bump between 2009 and 2010 in response to the Great Recession. See Debra Knopman, Martin Wachs, Benjamin Miller, Scott Davis & Katherine Pfrommer, *Renewing America's Infrastructure: An Agenda for Federal Transportation and Water Policy*, 23 PUB. WORKS MGMT. & POL'Y 310, 312 (2018).

196. See GAO, *supra* note 26, at 17–18, 20.

197. MALLETT, *supra* note 37, at 12; see *Legislative Affairs and Policy Communications*, U.S. DEP'T OF TRANSP.: FED. HIGHWAY ADMIN., <https://www.fhwa.dot.gov/policy/olsp/financingfederalaid/procs.cfm> [https://perma.cc/Y4LZ-HYQY].

suggestion does not appear realistic.¹⁹⁸ Should MPOs evolve into more robust roles, potentially responsible for the implementation as well as the planning of transportation projects, an independent source of revenue will be required. Dedicated taxes, such as percentage of sales or property taxes, provide possible funding sources, as well as a portion of transit fare box revenues.¹⁹⁹ Taxpayers are more apt to approve a levy of taxes when they know the purpose for which the tax revenue will be used.²⁰⁰

VIII. HOW MPOS MIGHT EVOLVE IN THE FUTURE

A. PLAYERS IN PUBLIC INFRASTRUCTURE REBUILDING AND CLIMATE CHANGE

The nation now faces two very critical problems: public infrastructure deficiencies and the impact of climate change. Both issues are transportation related. First, the country has allowed its existing public infrastructure to deteriorate, and it has failed to focus on innovative solutions to improve and rebuild it. A large portion of this infrastructure deficiency relates to infrastructure that facilitates mobility: interstate highways; local and state roads; transit systems; bridges; sidewalks; and airports. MPOs are well positioned as metropolitan-scale organizations to provide the coordination and expertise needed to rebuild transportation infrastructure. Further, they have the advantage of years of experience in juggling transportation priorities between federal and state governments. Although they are state-created institutions, they are also designated as an agent of the federal government to ensure the integration of transportation systems throughout a metropolitan area.

Second, MPOs are well suited to assist in measures that address climate change and the increasing prevalence of extreme weather disturbances, should the federal government desire a more active role in these endeavors. The federally mandated scope of MPO planning is already broad enough to cover the elements of climate change. MPOs must take into consideration projects and strategies that will accomplish the following: increase transportation systems' security, protect the environment, "improve the resiliency and reliability of the transportation system[,] and reduce or mitigate storm water impacts"²⁰¹ Most importantly, climate change solutions, while requiring local cooperation and input, must be scaled to an ecosystem basis that most likely will cover a territorial area larger than a municipality. Accordingly, MPOs, which usually encompass a region comprised of a number of municipalities, are better placed territorially than

198. See *The Tax Policy Center Briefing Book: Key Elements of the U.S. Tax System*, TAX POL'Y CTR., <https://www.taxpolicycenter.org/briefing-book/what-highway-trust-fund-and-how-it-financed> [<https://perma.cc/Q4LB-7AgE>].

199. See GAO, *supra* note 26, at 12.

200. See GRANT ET AL., *supra* note 182, at 23.

201. 23 U.S.C. §§ 134(h)(1)(C), (E), (I) (2018).

localities to integrate and coordinate measures across local jurisdictional boundary lines to combat climate change.

Because sustainability measures require a regional scale of implementation, many MPOs “have become active sustainability planners.”²⁰² Given the constraints under which MPOs operate, including their often voluntary governance structures as associations of local governments, one may ask why MPOs have developed ambitious sustainable growth goals.²⁰³ One answer may lie in the 3-C planning process causing MPOs to be proactive in addressing new issues reflective of changing times; another answer may be found in the new mandates relating to air quality and an expanding list of planning criteria that cover the environment, equity, and economic goals.²⁰⁴ As planning for sustainability has become normative, MPOs have refocused their transportation expertise to explore closer coordination between transportation objectives and land use policy.²⁰⁵ Although local control over land-use planning inhibits the complete integration of mobility and land uses, MPOs have been creative in finding ways to incentivize local governments to adopt more “regional good” perspectives.²⁰⁶ The San Francisco Bay Area’s MPO, for example, has targeted funding for some local projects contingent upon the adoption of smart growth policies.²⁰⁷

B. EVOLUTION TOWARD MULTI-PURPOSE PLANNING RATHER THAN SINGLE-FUNCTION TRANSPORTATION PLANNING

Governance in the United States encompasses general-purpose governments, such as the states, counties, cities, and towns, and task-specific jurisdictions, which fulfill a distinct function and operate at different territorial levels.²⁰⁸ Quite common at the local level, task-specific governance leads to the supply of different public services by a number of independent service providers, often called districts, authorities, or agencies.²⁰⁹ MPOs fall into the latter category of task-specific jurisdictions because they focus on one distinct function: transportation.

MPOs, especially those nested in regional planning agencies and councils of government, have broadened their planning scope to include factors

202. See Barbour, *supra* note 98, at 1. “MPOs, more than any other institutions in the current landscape of American federalism, provide an opening for creative dialogue, bargaining, political mobilization, and institutional experimentation to articulate and advance the collective ‘regional good’ in regard to development policy.” *Id.*

203. See *id.*

204. See *id.* at 2.

205. See *id.* at 1–2, 154.

206. See *id.* at 1–2.

207. See *id.* at 2.

208. See Liesbet Hooghe & Gary Marks, *Unraveling the Central State, but How? Types of Multi-level Governance*, 97 AM. POL. SCI. REV. 233, 236–37 (2003).

209. See *id.* at 237.

impacted by transportation systems, as well as the single function, mobility. The more multi-function planning criteria that MPOs now consider causes greater engagement in multi-purpose planning. In addition, many regional planning agencies and councils of government, performing a number of different metropolitan functions, now integrate planning across a number of different fields. Increasingly, MPOs integrate the planning of transportation projects in collaboration with other functional planning, such as watershed protection or wastewater treatment.

C. *MULTI-PURPOSE SERVICE PROVIDER WITH POWER TO IMPLEMENT PLANS*

MPOs presently perform some multi-functional planning on a metropolitan scale. The next stage in MPOs' evolution would be state authorization granting these entities the power to implement their plans. Because metropolitan planning has become multi-functional, MPOs would become service providers, as well as a planners, of those functions best and most efficiently performed on a metropolitan level of governance.

The state of Washington has enacted legislation that provides an excellent example of how to structure multi-function service providers on a metropolitan scale of operation. The statute authorizes the creation of metropolitan municipal corporations ("MMCs") empowered to perform the following functions: (1) water pollution abatement; (2) water supply; (3) public transportation; (4) garbage disposal; (5) parks and parkways; and (6) comprehensive planning.²¹⁰ Thus, the metropolitan municipal corporations engage both in planning and the provision of six different functions. Voters can authorize a MMC to perform additional functions by vote.²¹¹ Another procedure that can authorize additional MMC functions involves the approval of component city and county legislative bodies.²¹² Local governments continue to perform functions not delegated to MMCs.²¹³

The statute vests the powers and functions of a MMC in a metropolitan council, a legislative body, unless otherwise vested in specific officers, boards, or commissions.²¹⁴ A MMC is granted the power to establish offices, departments, boards, or commissions found necessary for it to fulfill the purposes of a MMC, and it is authorized to employ specialized personnel as needed.²¹⁵ More broadly, the statute grants MMCs "all powers which are necessary to carry out the purposes of the [MMC] and to perform authorized metropolitan functions."²¹⁶ The composition of a MMC follows the model established for MPOs: elected officials of component counties and cities, and

210. WASH. REV. CODE ANN. § 35.58.050 (West 2016).

211. *Id.* § 35.58.100.

212. *Id.* § 35.58.110.

213. *Id.* § 35.58.060.

214. *Id.* §§ 35.58.130, 35.58.350.

215. *Id.* § 35.58.350.

216. *Id.* § 35.58.180.

“other persons, as determined by agreement of each of the component counties and the component cities equal in number to at least twenty-five percent of the total number of component cities that have at least seventy-five percent of the combined component city populations.”²¹⁷

The process to create a MMC starts with either the filing of a petition by qualified voters or a resolution adopted by the city council of a central city, the city councils of two or more component cities other than a central city, and a county board of commissioners.²¹⁸ This bottom-up approach next calls for a vote of qualified electors residing in the metropolitan area.²¹⁹ In voting for the formation of a MMC, voters also approve authorization for the MMC to levy a general tax of 25 cents per thousand dollars of assessed value, which is not subject to constitutional or statutory limitations.²²⁰

The Washington state approach does not create a general-purpose government at the metropolitan governance level. Rather, the MMCs perform a number of discrete functions, previously performed by counties or municipalities, throughout the metropolitan area, because the performance of these functions improves and causes fewer externalities when undertaken on an integrated metropolitan basis. The MMCs’ ability to perform their roles will be dependent upon coordination with localities, since MMCs perform services previously performed by incorporated municipalities or counties, which most likely will exert political pressure to ensure the fulfillment of local resident needs.

The statute empowers MMCs to undertake comprehensive planning, but their role with respect to land use planning remains advisory.²²¹ The statute, however, grants MMCs an additional land use power not commonly granted to MPOs: it authorizes MMCs “[t]o review proposed zoning ordinances . . . or comprehensive plans of component cities and counties and make recommendations thereon.”²²² After review, the ordinance and plans are returned to the component entities with findings and recommendations made by MMC planning staff members.²²³

D. STATE-CREATED METROPOLITAN GOVERNANCE

Two states, Oregon and Minnesota, have created metropolitan-sized governments with comprehensive land-use planning powers—the Portland Metropolitan Services District (“Metro”) and the Twin Cities Metropolitan Council (“Met Council”). The governor appoints the members of Met

217. *Id.* § 35.58.120.

218. *Id.* § 35.58.070.

219. *Id.*

220. *Id.* § 35.58.090.

221. An MMC possesses the power only “[t]o prepare a recommended comprehensive land use and capital facilities plan for the metropolitan area.” *Id.* § 35.58.310(1).

222. *Id.* § 35.58.310(2).

223. *Id.*

Council, while Metro consists of six councilors who are elected by district in non-partisan races, and a president elected at large.²²⁴ Other states have not followed these models, which have developed over 50 years, but the possibility exists that current MPOs could evolve into comparable public bodies. The Puget Sound Regional Council, for example, replaced the Puget Sound Council of Governments when state legislation established a statewide growth management framework in 1991.²²⁵

Metro and Met Council both serve as the MPO for their metropolitan area, and they prepare their region's long-range comprehensive plans.²²⁶ They have set goals comparable to the mission of existing MPOs. Met Council lists its priorities as the creation of a sustainable transportation system, the promotion of housing opportunities, and investment in infrastructure that underpins economic development.²²⁷ It describes itself as "the regional policy-making body, planning agency, and provider of essential services for the Twin Cities metropolitan region."²²⁸ Metro makes growth management its primary focus, and it oversees compliance with Oregon's land use programs, which require the establishment of urban growth boundaries.²²⁹

Metro and Met Council provide the type of services that can be integrated and coordinated best at a metropolitan or regional level of governance. Unlike other states in which a plethora of special districts and public authorities provide a single function over an area encompassing a number of general-purpose governments, Metro and Met Council manage a number of these functions under one metropolitan-wide umbrella. As service providers, they bear responsibility for such functions as: solid waste disposal; wastewater treatment; water supply; transportation planning; parks and trails; open space preservation; natural disaster planning; and regional air and water quality.²³⁰ Metro also operates the Oregon Zoo, the Oregon Convention Center, the Portland Expo Center, and a Center for the Arts.²³¹

224. See MANDELKER ET AL., *supra* note 68, at 158–60.

225. See AM. PLAN. ASS'N, LOCAL AND REGIONAL PERSPECTIVES ON THE MEGAREGIONAL CONCEPT IN LONG-RANGE PLANNING 4 (2016), <https://planning-org-uploaded-media.s3.amazonaws.com/document/Megaregions-Case-Studies.pdf> [<https://perma.cc/RCY8-3R3L>].

226. See *Transportation Planning Process*, METRO. COUNCIL, <https://metro council.org/Transportation/Planning-2/Transportation-Planning-Process.aspx> [<https://perma.cc/NZ7B-LH5Z>]; *What is Metro?*, METRO, <https://www.oregonmetro.gov/regional-leadership/what-metro> [<https://perma.cc/SL5E-FUJU>].

227. See *Who We Are*, METRO. COUNCIL, <https://metro council.org/About-Us/Who-We-Are.aspx> [<https://perma.cc/287Y-EEGQ>].

228. *Id.*

229. See MANDELKER ET AL., *supra* note 68, at 158–59.

230. See *id.* at 158–60.

231. See METRO, *supra* note 226.

E. MEGAREGION PLANNING

Currently, MPOs concentrate on planning within their metropolitan areas, but the nation's economic competitiveness depends upon addressing the needs of megaregions, which are "large networks of metropolitan centers and surrounding areas connected through cultural, environmental, and economic characteristics as well as major infrastructure."²³² Megaregion links and perspectives will become increasingly valuable as global economic interconnections expand and growth in trade and population occurs.²³³ Although transportation planning typically involves geographic and political designations, MPOs and state departments of transportation are well positioned to engage in multi-jurisdictional planning, should Congress provide funding to support it.²³⁴

Transportation planners now treat megaregions as prime infrastructure investment priorities because they: (1) influence "national and regional economic competitiveness in an increasingly globalized economy; and [(2)] . . . address energy and environmental concerns at a scale commensurate with the challenge."²³⁵ "[A]s metropolitan areas merge into one another," the "physical connectivity between regions" has become more important, giving MPOs a significant role to play in the development of mobility links as their megaregion expands.²³⁶ At a time in which Congress contemplates the expenditure of billions of dollars for infrastructure improvements and measures to rejuvenate environmental resources, it should not ignore the fact that the nation's future rests with the health of megaregions, "extend[ing] beyond the local . . . [and] [s]tate boundaries within which transportation planning traditionally occurs."²³⁷ Congress needs to induce new governance structures that will link metropolitan areas and megaregions in an integrated transportation network that supports mobility and accessibility.²³⁸

232. Haley Peckett & William M. Lyons, *Evolving Role of Metropolitan Planning Organizations in Transportation Planning for Megaregions*, 2307 J. TRANSP. RSCH. BD. 43, 43 (2012).

233. See Catherine L. Ross, Peter J. Hylton & David Jung-Hwi Lee, *Megaregion Planning: State of Practice in Metropolitan Planning Organizations and State Departments of Transportation*, 2453 J. TRANSP. RSCH. BD. 171, 171 (2014).

234. See *id.* at 171, 175.

235. U.S. DEP'T OF TRANSP. & THE JOHN A. VOLPE NAT'L TRANSP. SYS. CTR., METROPOLITAN PLANNING ORGANIZATIONS AND TRANSPORTATION PLANNING FOR MEGAREGIONS 6 (2014), https://www.fhwa.dot.gov/planning/megaregions/reports/mpo_and_transportation_planning/fhwaep15010.pdf [<https://perma.cc/76DP-ZNQU>].

236. *Id.*

237. *Id.* at 1.

238. Congress has instructed the Secretary of Transportation to "encourage each Governor with responsibility for a portion of a multistate metropolitan area and the appropriate [MPOs] to provide coordinated transportation planning for the entire metropolitan area." 23 U.S.C. § 134(f)(1) (2018). The states, however, are left to establish agencies to "mak[e] . . . agreements and compacts effective." *Id.* § 134(f)(2)(B).

In the absence of formal funding or institutional structures to connect megaregions with each other and their constituent parts, some MPOs are pursuing megaregion planning to expand their technical capacity through partnerships in such areas as regional freight plans, data access, environmental mitigation strategies, and economic development.²³⁹ Megagroups often convene to pursue a common project “such as a communications system to coordinate traffic management or a high-speed rail corridor.”²⁴⁰ They engage in both action-oriented programs to address a transportation problem, and in discussion-oriented forums to deliberate megaregion issues, including their shared visions and goals.²⁴¹ Key megaregion transportation issues involve “freight networks that allow . . . seamless connections between metropolitan areas,” intelligent transportation systems that provide real-time data for managing congestion, and MPO planning criteria calling for environmental stewardship and economic development.²⁴²

IX. CONCLUSION

In the 1960s Congress showed great foresight in calling for the creation of MPOs to coordinate transportation planning on a metropolitan basis across local boundary lines. It granted states and municipalities flexibility in the creation of these new regional entities. Nearly 60 years later, however, Congress has failed to address the issue of whether the varied MPO institutional structures force stakeholders to envision their interests through a regional lens.²⁴³ Comprised largely of local elected officials, MPO policy boards may experience difficulties in forging a shared metropolitan-wide vision. Megaregions, together with their component metropolitan areas, now drive the country’s economic competitiveness, creating greater urgency for Congress to evaluate whether the MPO-established structures facilitate sound transportation and other infrastructure investments.

This Essay argues that single-purpose transportation planning falls short in fulfilling the transportation planning criteria that Congress has established. More importantly, such planning overlooks the immense benefits that can be obtained by integrating transportation planning with planning for the other functions that metropolitan-wide organizations perform. Transportation

239. See Peckett & Lyons, *supra* note 232, at 49.

240. *Id.*

241. See *id.* at 49 fig.2.

242. *Id.* at 50.

243. See generally Jen Nelles, *Toothless Tigers in a Metropolitan Revolution: Are Metropolitan Planning Organizations Equally Ineffective?* (Aug. 21, 2014) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2453250 [https://perma.cc/59NG-JDYF] (being prepared for the Annual Meeting of the American Political Science Association held on August 28–31, 2014) (arguing that MPOs, with governing boards dominated by local officials, are designed to strengthen planning through intergovernmental coordination, but lack independent authority to handle pressing metropolitan issues such as land uses).

planning should take cognizance of other metropolitan-scale planning activities in the areas of resource protection, water supply, sewerage and solid waste disposal, wastewater treatment, housing opportunities, open space preservation, and parks and recreational spaces. It is unlikely that political coalitions will uphold the complete integration of land uses and transportation planning, but states should be called upon to grant MPOs the power to review local land-use ordinances and comprehensive plans for compliance with regional goals.

The United States faces two immense challenges: inadequate public infrastructure and unsustainable growth. MPOs can play an important role in the development of plans that will address these issues. Among all the intra-state institutions, they have the most experience in bringing diverse stakeholders together to engage in collaborative efforts. Further, as agents of the federal government, they have expertise in fulfilling federal mandates and undertaking joint partnerships among federal, state, metropolitan, and local constituencies.

Should Congress decide to enhance MPOs' roles, the Essay sets forth different institutional structures that would accomplish this purpose. The most advanced metropolitan organizations, Portland, Oregon's Metro and the Twin Cities' Met Council, can serve as a model even though other states have not empowered their MPOs or their other regional planning bodies to perform local land-use oversight. Many MPOs, which are nested in host agencies, however, are already engaged in multi-purpose planning, and many MPOs view their missions as including economic development or environmental protection.

MPOs must now do more than plan—with the new performance-based mandates imposed upon them—they now are bound impliedly, if not clearly, to put transportation goals into effect. At issue is whether MPOs have been given the tools to attain the critical regional outcomes Congress hopes to realize through the establishment of performance targets in metropolitan transportation plans and processes. The Essay points out structural impediments to a performance-based approach to transportation decision-making on a metropolitan scale in the United States. Because performance-based systems impliedly cover both decision-making and implementation, it is argued that Congress's new performance criteria will cause a further evolution in the roles of MPOs.