

**VOLUME II, SECTION III.**  
**FEDERAL LEGISLATION AND TRANSPORTATION PLANNING: A**  
**CHRONOLOGICAL REVIEW**

The spatial pattern of growth in cities is inextricably intertwined with the development of transportation facilities over time. Each transportation improvement, from electric streetcars to automobiles, has contributed to urban decentralization and the increasingly metropolitan character of cities.

The automobile emerged as a new mode of transportation in 1904. Few technological developments have had as profound an impact on social and economic development as the car. The need for a continuous system of highways was recognized by Congress in the *Federal-Aid Highway Acts of 1916 and 1921*, which established the Bureau of Public Roads [BPR] (now the U.S. Federal Highway Administration) to administer a program of federal matching grants for intercity roads and highways.<sup>1</sup> By the 1930s, the major cities of the United States were linked together by a network of two-lane smooth, all-weather roads.<sup>2</sup> The combination of hard-surface roads, the internal combustion engine, the pneumatic tire, and assembly-line production brought sensational growth to the automobile industry.<sup>3</sup>

By World War I, electric railways dominated urban transportation with 1,000 streetcars carrying 1.1 billion passengers in 1917. But by 1923, urban rail ridership began to decline, as buses, with their lower capital costs and greater route flexibility, began to supplant rail as the primary means of urban transit.<sup>4</sup> Hastened by the growing popularity of the automobile, public mass transit began a slow but steady corresponding decline beginning in the mid-1930s (except during World War II).<sup>5</sup> Three-fifths of all housing built in the 1940s was built in the suburbs. This pattern of dispersed population created a high level of dependence on the automobile and a need for a network of roads and highways to support it, while reducing the population densities necessary to support transit.<sup>6</sup> This suburbanization of America and decline of urban transit in the early post war era was accelerated by a host of factors, including several major federal policies:

1. Federal money was available for construction of highways; none was available for transit;

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<sup>1</sup> See Joseph Thompson, ISETEA Reauthorization and the National Transportation Policy, 25 *Transp. L.J.* 87, 93 (1997).

<sup>2</sup> U.S. Dep't of Transportation, *Urban Transportation Planning in the United States: An Historical Overview* 2, 8 (3<sup>rd</sup> ed. 1988); Edward Weiner, *Urban Transportation Planning in the United States* 7-8 (Praeger, 2d ed. 1999).

<sup>3</sup> Paul Dempsey, *The Social & Economic Consequences of Deregulation* 15 (1989).

<sup>4</sup> Edward Weiner, *Urban Transportation Planning in the United States* 10 (Praeger, 2d ed. 1999).

<sup>5</sup> Paul Dempsey & William Thoms, *Law & Economic Regulation in Transportation* 311 (1986).

<sup>6</sup> Jayne Daly, *Transportation and Clean Air: Making the Land Use Connection*, 1995 *Pace L. Rev.* 141 (1995).

2. Low-interest FHA and VA home mortgages stimulated low-density suburban growth;<sup>7</sup>
3. Federal policies in favor of inexpensive fuel kept taxes on gasoline relatively low compared with taxes imposed by other industrialized countries;<sup>8</sup> and
4. Beginning in the 1960s, federal courts began ordering forced school busing as a means of achieving school desegregation.<sup>9</sup>

In the *Transportation Act of 1940*, Congress set forth a statement of national transportation policy, which included an obligation that the Interstate Commerce Commission [ICC] (which regulated the surface modes of transportation) shall “provide for a fair and impartial regulation of all modes of transportation . . . all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States . . . .”<sup>10</sup> Nonetheless, though Congress would embrace intermodal facilitation as an important policy goal in several subsequent legislative acts, several decades would pass before intermodalism would take center stage in national policy.<sup>11</sup>

During World War II, regular highway programs were curtailed, automobile production halted, and gasoline and tires rationed. As a consequence, transit ridership grew by 65% to an all-time high of 23.4 billion trips annually between 1941 and 1946.<sup>12</sup> With the end of the war, pent-up demand for cars and homes led to soaring automobile production and a massive building boom in suburban homes. Transit use declined by about the same rate it had grown during the war; by 1953, there were fewer than 14 billion trips annually. Higher wages for transit employees caused a nearly 50% increase in transit fares by 1950, which further eroded transit demand.<sup>13</sup>

In the *Federal-Aid Highway Act of 1944*, Congress initially authorized construction of a national highway system, and significantly increased funding for highway projects.<sup>14</sup>

Between 1950 and 1955, 98% of U.S. population growth occurred in metropolitan suburbs. Suburban growth was without the density required for efficient transit service.

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<sup>7</sup> Jayne Daly, *Transportation and Clean Air: Making the Land Use Connection*, 1995 *Pace L. Rev.* 141 (1995); Mark Solof, *History of Metropolitan Planning Organizations – Part II* 3 (1998).

<sup>8</sup> See Matthew Ward, Kenneth Brown & David Lieb, *National Incentives for Smart Growth Communities*, 13 *Natural Resources and Environment* 325 (1998).

<sup>9</sup> Robert Hardaway, *America Goes To School* 115-30 (1995).

<sup>10</sup> 49 U.S.C. § 13101(a)(2). See Paul Dempsey, *Foreign Commerce Regulation Under the Interstate Commerce Act: An Analysis of Intermodal Coordination of International Transportation in the United States*, 5 *Syracuse J. Int'l L. & Com.* 53, 57-59 (1977).

<sup>11</sup> An Interagency Committee on Intermodal Cargo was created in 1973 to coordinate the activities of the DOT, ICC, CAB, and FMC on intermodal issues. See Paul Dempsey, *The Contemporary Evolution of Intermodal and International Transport Regulation Under the Interstate Commerce Act*, 10 *Vanderbilt J. Transnat'l L.* 505, 555 (1977).

<sup>12</sup> Edward Weiner, *Urban Transportation Planning in the United States* 15 (Praeger, 2d ed. 1999).

<sup>13</sup> U.S. Dep't of Transportation, *Urban Transportation Planning in the United States: An Historical Overview* 17-19 (3<sup>rd</sup> ed. 1988).

<sup>14</sup> Mark Solof, *History of Metropolitan Planning Organizations – Part I* 12 (1998).

Additionally, General Motors, Firestone, Standard Oil and Mack Trucks conspired to buy out rail transit companies and dismantle them, creating bus companies to take their place.<sup>15</sup>

As a consequence, the public turned from a fixed-route mass transit system, to a means of moving which was increasingly reliant on a more diffused pattern of routes between distant home, work and shopping destinations. America's metropolitan areas were increasingly faced with suburban sprawl, road congestion, and noise and air pollution. All the while, private transit companies suffered declining ridership and poorer profits, which led to service deterioration and higher fares, which in a circular fashion, contributed to further declines in ridership.<sup>16</sup>

Limited by the geographic circumscription of their boundaries, and fragmented jurisdiction, existing governments were constrained in their ability to deal with problems of increasing highway congestion, pollution, disappearing open spaces and inadequate water and sewer systems -- problems which recognized no political boundaries.<sup>17</sup> The regional nature of these problems made the case for new governmental institutions and decision-making mechanisms to address them.<sup>18</sup>

Section 701 of the *Housing Act of 1954*, for the first time, gave federal grants to councils of government and other metropolitan planning agencies to encourage cooperation in analyzing and addressing regional problems.<sup>19</sup> The purpose of the legislation was to encourage an orderly process of urban planning on a regional basis within the framework of comprehensive planning.<sup>20</sup> Also in 1954, Congress created the Committee on Urban Transportation "to help cities do a better job of transportation planning through systematic collection of basic facts . . . to afford the public the best possible transportation at the least possible cost and aid in accomplishing desirable goals of urban renewal and sound urban growth."<sup>21</sup>

In the first of what would become an ever-widening legislative base in its attempt to arrest environmental pollution, Congress passed the *Air Quality Control Act of 1955*. The Act directed the Surgeon General to conduct research to aid in the abatement of air pollution.<sup>22</sup>

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<sup>15</sup> Penny Mintz, Transportation Alternatives Within the Clean Air Act: A History of Congressional Failure to Effectuate and Recommendations for the Future, 3 N.Y.U. Envtl. L.J. 156 (1994).

<sup>16</sup> Paul Dempsey & William Thoms, Law & Economic Regulation in Transportation 311-12 (1986).

<sup>17</sup> Mark Solof, History of Metropolitan Planning Organizations – Part I 5 (1998).

<sup>18</sup> Mark Solof, History of Metropolitan Planning Organizations – Part I 8 (1998).

<sup>19</sup> Mark Solof, History of Metropolitan Planning Organizations – Part II 5 (1998).

<sup>20</sup> U.S. Dep't of Transportation, Urban Transportation Planning in the United States: An Historical Overview 27 (3<sup>rd</sup> ed. 1988).

<sup>21</sup> U.S. Dep't of Transportation, Urban Transportation Planning in the United States: An Historical Overview 25 (3<sup>rd</sup> ed. 1988).

<sup>22</sup> U.S. Dep't of Transportation, Urban Transportation Planning in the United States: An Historical Overview 72 (3<sup>rd</sup> ed. 1988).

The *Federal Highway Act of 1956* authorized the largest public works project ever undertaken – the construction of the 41,000 mile National System of Interstate and Defense Highways [the interstate highway system]. The Act also provided for federal aid for primary, secondary and lesser roads.<sup>23</sup> The 50% federal matching share was increased to 90%. The companion *Highway Revenue Act of 1956* created the Highway Trust Fund, comprised of revenue derived from user charges -- the sales of gasoline and other fuels, tires, and a weight tax for heavy trucks and buses. This legislation broke with long-standing Congressional precedent not to earmark taxes for specific purposes.<sup>24</sup> These acts assured federal funding for highways through user charges at a time when no federal financial support was available for mass transit.<sup>25</sup>

Throughout the 1960s, the focus of transportation planning was on long-term time and broad geographic horizons. This was largely a result of the legislation creating the National System of Interstate and Defense Highways, which required major highways be designed for traffic projected 20 years into the future.<sup>26</sup>

Many cities became increasingly concerned about the financial difficulties faced by commuter rail and transit services. But it was not until 1961 that Congress approved a program of urban mass transit assistance to state and local governments. The *Housing Act of 1961* inaugurated a small, low-interest loan program for acquisitions and capital improvements for mass transit systems. The legislation also provided federal planning assistance for “preparation of comprehensive urban transportation surveys, studies, and plans to aid in solving problems of traffic congestion, facilitating the circulation of people and goods in metropolitan and other urban areas and reducing transportation needs.” In amending the planning program of Section 701 of the Housing Act of 1954, the 1961 Housing Act broadened the use of this federal aid to “facilitate comprehensive planning for urban development, including coordinated transportation systems, on a continuing basis.”<sup>27</sup>

President Kennedy delivered his first message to Congress on the subject of transportation in April of 1962. It drew heavily from a joint report by the commerce and housing agencies which recommended that “aid for urban transportation should be made available only when urban communities have prepared or are actively preparing up-to-date general plans for the entire urban area which relate transportation plans to land-use and development plans.” Kennedy also emphasized the need to balance the use of private automobiles and urban transportation to shape and serve urban areas.<sup>28</sup> President

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<sup>23</sup> Mark Solof, *History of Metropolitan Planning Organizations – Part II* 6 (1998).

<sup>24</sup> U.S. Dep’t of Transportation, *Urban Transportation Planning in the United States: An Historical Overview* 31 (3<sup>rd</sup> ed. 1988).

<sup>25</sup> Edward Weiner, *Urban Transportation Planning in the United States* 29 (Praeger, 2d ed. 1999).

<sup>26</sup> U.S. Dep’t of Transportation, *Urban Transportation Planning in the United States: An Historical Overview* 183 (3<sup>rd</sup> ed. 1988).

<sup>27</sup> U.S. Dep’t of Transportation, *Urban Transportation Planning in the United States: An Historical Overview* 33 (3<sup>rd</sup> ed. 1988).

<sup>28</sup> Edward Weiner, *Urban Transportation Planning in the United States* 32 (Praeger, 2d ed. 1999).

Kennedy initiated several important legislative initiatives on the issue of transportation planning and transit.

Urban transportation planning came of age with promulgation of the *Federal-Aid Highway Act of 1962*, which created a federal mandate for transportation planning in the United States.<sup>29</sup> It was the first legislation in which Congress made receipt of federal funds contingent on planning, in addition to promoting “the development of transportation systems embracing various modes of transport.” The 1962 Act made federal aid to urban areas (defined as areas with populations in excess of 50,000) contingent on the “establishment of a continuing and comprehensive transportation planning process carried out cooperatively by state and local communities.”<sup>30</sup> This became known as 3-C (continuing, cooperative and comprehensive) planning, which remains an essential feature of metropolitan transportation planning today.<sup>31</sup> This emphasis on urban areas was a significant one, for it set the scale at the metropolitan or regional level rather than at the city or county level. It also called for planning to be carried out cooperatively by the states and local communities.<sup>32</sup>

The federal Bureau of Public Roads required the creation of planning organizations capable of carrying out the legislative mandate.<sup>33</sup> In interpreting the 3-C process, the BPR defined “cooperative” to include not only cooperation between various federal, state and local governmental institutions, but also between various agencies within each level of government. “Continuing” was deemed to require periodic reevaluation and updating of the transportation plan. “Comprehensive” was defined to include a requirement that the following ten factors be inventoried and analyzed:

1. Economic factors affecting development
2. Population
3. Land use
4. Transportation facilities including those for mass transportation
5. Travel patterns
6. Terminal and transfer facilities
7. Traffic control features
8. Zoning ordinances, subdivision regulations, building codes, etc.
9. Financial resources
10. Social and community-value factors, such as preservation of open space, parks and recreational facilities; preservation of historical sites and buildings; environmental amenities; and aesthetics.<sup>34</sup>

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<sup>29</sup> Edward Weiner, *Urban Transportation Planning in the United States* 1, 31 (Praeger, 2d ed. 1999).

<sup>30</sup> 23 U.S.C. § 134(a).

<sup>31</sup> Mark Solof, *History of Metropolitan Planning Organizations – Part II* 8 (1998).

<sup>32</sup> Edward Weiner, *Urban Transportation Planning in the United States* 33 (Praeger, 2d ed. 1999).

<sup>33</sup> U.S. Dep’t of Transportation, *Urban Transportation Planning in the United States: An Historical Overview* 38-39 (3<sup>rd</sup> ed. 1988).

<sup>34</sup> U.S. Dep’t of Transportation, *Urban Transportation Planning in the United States: An Historical Overview* 40-41 (3<sup>rd</sup> ed. 1988).

The 3-C process included four technical phases: (1) collection of data; (2) analysis of data; (3) forecasts of activity and travel; and (4) evaluation of alternatives. By the legislative deadline of July 1, 1965, all 224 then-existing urbanized areas that fell under the 1962 Act had an urban transportation planning process underway.<sup>35</sup> Combined with the incentive of 90% federal funding for interstate highway projects, the Act was a major catalyst for urban planning throughout the United States, and had a significant impact on urban transportation throughout the world.<sup>36</sup>

The *Clean Air Act of 1963* authorized the Secretary of the U.S. Department of Health, Education and Welfare [HEW] to call a conference of appropriate state agencies and polluters to determine the cause of pollution and create an abatement program once he determined that the pollution in one state endangered the health and welfare of the people in another.<sup>37</sup>

In the decade prior to enactment of the *Urban Mass Transportation Act of 1964* [now known as the Federal Transit Act] 243 transit companies were sold and another 194 were abandoned. Transit employment had fallen from 242,000 employees in 1945, to 156,000 in 1960.<sup>38</sup> Faced with the collapse of privately owned bus, transit and rail commuter systems across the country, Congress established the first comprehensive program of federal assistance for transit.<sup>39</sup> It included a program of matching grants based on a 2/3 federal and 1/3 local share for the preservation, improvement and expansion of urban mass transportation systems.<sup>40</sup> The purpose of the legislation was “to encourage the planning and establishment of area-wide mass transportation systems needed for economical and desirable urban development.”<sup>41</sup> In furtherance of this purpose, it established a program of research, development and demonstration projects.<sup>42</sup> Over the years, Congress also imposed several unfunded mandates for transit operators, including labor protective provisions, federally mandated labor rates (under the Davis-Bacon Act), limitations on foreign content in transit vehicles, restrictions against charter and school bus service in competition with the private sector, and with the more recent promulgation of the Americans With Disabilities Act, access by disabled patrons.<sup>43</sup>

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<sup>35</sup> U.S. Dep’t of Transportation, *Urban Transportation Planning in the United States: An Historical Overview* 35 (3<sup>rd</sup> ed. 1988); Edward Weiner, *Urban Transportation Planning in the United States* 31 (Praeger, 2d ed. 1999).

<sup>36</sup> Edward Weiner, *Urban Transportation Planning in the United States* 1 (Praeger, 2d ed. 1999).

<sup>37</sup> Penny Mintz, *Transportation Alternatives Within the Clean Air Act: A History of Congressional Failure to Effectuate and Recommendations for the Future*, 3 N.Y.U. Envtl. L.J. 156,160 (1994).

<sup>38</sup> H.R. Rep. No. 204, 88<sup>th</sup> Cong., 1<sup>st</sup> Sess. (1963), at 2571.

<sup>39</sup> William Mahoney, *The Interstate Commerce Commission/Surface Transportation Board as Regulator of Labor’s Rights and Deregulator of Railroads’ Obligations*, 24 Transp. L.J. 241, 254-55 (1997).

<sup>40</sup> Paul Dempsey & William Thoms, *Law & Economic Regulation in Transportation* 312 (1986).

<sup>41</sup> U.S. Dep’t of Transportation, *Urban Transportation Planning in the United States: An Historical Overview* 46 (3<sup>rd</sup> ed. 1988).

<sup>42</sup> Edward Weiner, *Urban Transportation Planning in the United States* 42 (Praeger, 2d ed. 1999).

<sup>43</sup> David Gardner, *Federal Assistance for Local Public Transit*, 27 Urb. Law. 1015 (1995); Paul Dempsey, *The Civil Rights of the Handicapped In Transportation: The Americans With Disabilities Act and Related Legislation*, 19 Transp. L.J. 309 (1991).

The *Housing and Urban Development Act of 1965* created the Department of Housing and Urban Development [HUD] to coordinate urban planning at the federal level. It also extended and expanded the Section 701 grants created in the 1950s so as to support mass transit planning by regional planning organizations, helping to coordinate highway and transit systems.<sup>44</sup> The 1965 Act provided that public assistance programs established under the Housing Act of 1954 shall be made to planning “organizations composed of public officials whom he [the Secretary of HUD] finds to be representative of the political jurisdictions within a metropolitan area or urban region . . . .” This encouraged the creation of regional planning organizations controlled by elected rather than appointed officials, giving impetus to the formation of such organizations as councils of government [COGs]. It also encouraged the governments to cooperate in addressing their problems in a regional context.<sup>45</sup>

The *Motor Vehicle Air Pollution Control Act of 1965* required the Secretary of the Department of Health, Education and Welfare to promulgate automotive emission standards.<sup>46</sup>

In 1966, Congress amended the Urban Mass Transportation Act of 1964 to create a technical studies program, providing up to a two-thirds federal matching share for planning, engineering and designing of urban mass transportation projects.<sup>47</sup>

The U.S. Department of Transportation [DOT] was created pursuant to the *Department of Transportation Act of 1966* to coordinate national transportation programs and to facilitate safe, expeditious, efficient, economical and convenient transportation. DOT was designated to provide leadership in the identification of transportation problems and solutions, stimulate new technology, encourage cooperation, and recommend national policies and programs to accomplish these goals.<sup>48</sup> In 1968, the Urban Mass Transportation Administration (now the Federal Transit Administration) was created within DOT.

The *Demonstration Cities and Metropolitan Development Act of 1966* required the Secretary of Transportation to establish a comprehensive research program to enhance the convenience, speed, safety and cleanliness of urban transit. Section 204 thereof required that all applications for planning and constructing public facility projects be submitted to an area wide planning agency for review and comment. The purpose was to encourage agencies with narrow functional responsibility to coordinate their projects consistent with area wide plans for urban growth. In response, many urban areas created new planning

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<sup>44</sup> Mark Solof, *History of Metropolitan Planning Organizations – Part II 4* (1998).

<sup>45</sup> U.S. Dep’t of Transportation, *Urban Transportation Planning in the United States: An Historical Overview* 50 (3<sup>rd</sup> ed. 1988).

<sup>46</sup> Penny Mintz, *Transportation Alternatives Within the Clean Air Act: A History of Congressional Failure to Effectuate and Recommendations for the Future*, 3 N.Y.U. *Envtl. L.J.* 156, 160 (1994).

<sup>47</sup> U.S. Dep’t of Transportation, *Urban Transportation Planning in the United States: An Historical Overview* 50 (3<sup>rd</sup> ed. 1988).

<sup>48</sup> U.S. Dep’t of Transportation, *Urban Transportation Planning in the United States: An Historical Overview* 55 (3<sup>rd</sup> ed. 1988).

agencies or reorganized existing ones to include elected officials in their policy boards.<sup>49</sup> Follow-up legislation in 1968 required applications for federal planning for the construction of housing, roads and other facilities to be submitted to a regional planning organization for review and comment.<sup>50</sup>

While the *Air Quality Act of 1967* required HEW to list air pollutants and publish air quality criteria for various regions, it left to individual states the establishment of specific emission goals by designating ambient air quality standards [AAQS] and plans for implementing, maintaining and enforcing them.<sup>51</sup>

The *Intergovernmental Cooperation Act of 1968* required federal agencies to notify the governors or legislatures of the purpose and amount of any grants-in-aid to their states. The Act required that area wide planning agencies be established pursuant to state legislation.<sup>52</sup>

The *Federal-Aid Highway Act of 1968* established the Traffic Operation Program to Improve Capacity and Safety [TOPICS] in an effort to increase the acceptance of traffic engineering techniques designed to reduce traffic congestion and improve traffic flow in urban areas. The Act also required public hearings on the economic, social and environmental effects of highway projects and their compatibility with local urban objectives.<sup>53</sup>

The *National Environmental Policy Act of 1969* [NEPA]<sup>54</sup> (signed into law on January 1, 1970) established a broad national policy to prevent or eliminate environmental harm. It also added an environmental dimension to transportation planning by requiring federal agencies, like DOT, to “use all practicable means” to “assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings” and “attain the widest range of beneficial uses of the environment without degradation.” With its companion bill, the *Environmental Quality Improvement Act of 1970*, NEPA gave the federal government final say in the trade off between infrastructure construction and environmental quality. These bills created a new environmental planning process in parallel with the existing urban transportation planning processes.<sup>55</sup> They required that an environmental assessment [EA], and an environmental impact statement [EIS] be prepared, the latter for any “major federal action significantly

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<sup>49</sup> U.S. Dep’t of Transportation, *Urban Transportation Planning in the United States: An Historical Overview* 55-6 (3<sup>rd</sup> ed. 1988).

<sup>50</sup> Mark Solof, *History of Metropolitan Planning Organizations – Part II* 4 (1998).

<sup>51</sup> Penny Mintz, *Transportation Alternatives Within the Clean Air Act: A History of Congressional Failure to Effectuate and Recommendations for the Future*, 3 N.Y.U. *Envtl. L.J.* 156, 163 (1994).

<sup>52</sup> U.S. Dep’t of Transportation, *Urban Transportation Planning in the United States: An Historical Overview* 67 (3<sup>rd</sup> ed. 1988).

<sup>53</sup> U.S. Dep’t of Transportation, *Urban Transportation Planning in the United States: An Historical Overview* 63-64 (3<sup>rd</sup> ed. 1988).

<sup>54</sup> 49 U.S.C. § 4321.

<sup>55</sup> U.S. Dep’t of Transportation, *Urban Transportation Planning in the United States: An Historical Overview* 73 (3<sup>rd</sup> ed. 1988).

affecting the quality of the human environment.” The EA determines whether potential impacts are significant, explores alternatives and mitigation measures, and provides essential information as to whether an EIS must be prepared. The EA focuses attention on potential mitigation measures during the planning process, at a time when they can be incorporated without significant disruption.<sup>56</sup> If the relevant federal agency concludes that there are no significant adverse environmental impacts, or that with appropriate prevention or mitigation efforts they will be minimized, it issues a “finding of no significant impact” [FONSI]. If however, the agency concludes the impacts are significant, it must prepare an EIS.<sup>57</sup> The EIS must include an assessment of the environmental impacts, evaluate reasonable alternatives, and suggest appropriate mitigation measures.<sup>58</sup> Included in the EIS must be a review of such issues as the impact of the project on noise, air quality, water quality, endangered species, wetlands and flood plains. However, the thrust of NEPA was a process; there being no mandatory obligation to implement mitigation measures, even if feasible.<sup>59</sup>

Under *Reorganization Plan No. 3 of 1970*,<sup>60</sup> President Nixon created the Environmental Protection Agency [EPA], sweeping scattered jurisdictional authorizations from several federal agencies into one consolidated agency.

The *Clean Air Act Amendments of 1970* gave the EPA power to establish NAAQS (standards for acceptable levels of pollutants) and a method for their attainment.<sup>61</sup> It set emission standards for new automobiles and banned lead in gasoline. On the local level, the Clean Air Act required that state and local planning conform to air quality standards.<sup>62</sup> It also required that, if it is necessary to achieve NAAQS, non-attainment states must include in their State Implementation Plans [SIPs] “such other measures as may be necessary to insure attainment and maintenance [of the NAAQS] . . . including, but not limited to, land-use and transportation controls.”<sup>63</sup> This marked the first federal step in the move away from private automobiles as the foundation of our transportation system, in order to improve air quality.<sup>64</sup> The preparation, submission and review of SIPs was conducted outside the traditional urban transportation planning process and often did not involve the transportation planning agencies. It took several years before environmental

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<sup>56</sup> Federal Aviation Administration, *Airport Master Plans 49-50* (1985).

<sup>57</sup> James Spensley, *Airport Planning*, in *Airport Regulation, Law & Public Policy* 76 (R. Hardaway ed. 1991).

<sup>58</sup> 49 U.S.C. § 4332(c).

<sup>59</sup> See *Stryckers Bay Neighborhood Council v. Karlen*, 444 U.S. 223 (1980).

<sup>60</sup> 5 U.S.C. § 901.

<sup>61</sup> U.S. Federal Highway Administration: *Air Quality Programs and Provisions of the Intermodal Surface Transportation Efficiency Act of 1991* 17 (1992).

<sup>62</sup> Kaid Benfield, *Running On Empty: The Case for Sustainable National Transportation System*, 25 *Envtl. L.* 651, 662 (1995).

<sup>63</sup> *Clean Air Act Amendments of 1970*.

<sup>64</sup> Penny Mintz, *Transportation Alternatives Within the Clean Air Act: A History of Congressional Failure to Effectuate and Recommendations for the Future*, 3 *N.Y.U. Env'tl. L.J.* 156, 165 (1994).

and transportation planning agencies began to mediate joint plans and policies for urban transportation and air quality.<sup>65</sup>

The *Urban Mass Transportation Assistance Act of 1970* provided the first long-term commitment of federal funds to transit. The legislation supported advance acquisition of rights of way and an enhanced role for state governments, and required public hearings to assure public input to and acceptability of the programs under consideration.<sup>66</sup> It also provided for public hearings on the economic, social and environmental aspects of a proposed project, as well as its consistency with the comprehensive plan for the area, and for an analysis of the environmental impact of the project.<sup>67</sup>

The *Federal-Aid Highway Act of 1970* increased the influence of local jurisdictions in making urban highway decisions.<sup>68</sup> Section 134 thereof provided, “No highway project may be constructed in any urban area of 50,000 population or more unless the responsible local officials of such urban area . . . have been consulted and their views considered with respect to the corridor, the location and the design of the project.” The Act also authorized the expenditure of highway funds on exclusive or preferential bus lanes if they reduced the need for additional highway construction or if no other highway project could provide the person-carrying capacity of the bus project. It also called for the promulgation of guidelines for assuring that highway projects were consistent with the SIPs created under the Clean Air Act. Henceforth, urban highway plans and SIPs would have to be consistent.<sup>69</sup> As a consequence of the 1970 transit and highway acts, projects for both modes were subjected to similar criteria in areas of impact assessment and public hearings.<sup>70</sup>

The 1970s marked a departure from the traditional long-term/broad geographic scope of transportation planning, toward a focus on shorter-term time horizons and corridor-level scale. This transformation came about as a result of the realization that long-range planning tended to focus on major regional highway and transit projects with only minor attention paid to smaller facilities having the potential of increasing the efficiency of the system. This shift was reinforced by the greater difficulties and cost encountered in constructing new facilities, enhanced environmental concerns, and the Arab oil embargo of 1973.<sup>71</sup>

The *1972 Water Pollution Control Act Amendments* and subsequent amendments, as well as policies of the EPA, require area wide planning.

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<sup>65</sup> U.S. Dep’t of Transportation, *Urban Transportation Planning in the United States: An Historical Overview* 74 (3<sup>rd</sup> ed. 1988).

<sup>66</sup> Paul Dempsey & William Thoms, *Law & Economic Regulation in Transportation* 313 (1986).

<sup>67</sup> U.S. Dep’t of Transportation, *Urban Transportation Planning in the United States: An Historical Overview* 85-6 (3<sup>rd</sup> ed. 1988).

<sup>68</sup> Edward Weiner, *Urban Transportation Planning in the United States* 74 (Praeger, 2d ed. 1999).

<sup>69</sup> U.S. Dep’t of Transportation, *Urban Transportation Planning in the United States: An Historical Overview* 87 (3<sup>rd</sup> ed. 1988).

<sup>70</sup> Edward Weiner, *Urban Transportation Planning in the United States* 75 (Praeger, 2d ed. 1999).

<sup>71</sup> U.S. Dep’t of Transportation, *Urban Transportation Planning in the United States: An Historical Overview* 183 (3<sup>rd</sup> ed. 1988).

The *Federal Highway Act of 1973* opened up the Highway Trust Fund for urban mass transportation projects for the first time. The federal share was increased from 2/3 to 80% of the net project cost. This enabled federal highway funds to be used for such purposes as exclusive high-occupancy-vehicle [HOV] lanes, bus shelters, and parking facilities.<sup>72</sup> The legislation also created incentives for the preparation of metropolitan transportation plans.<sup>73</sup> The 1973 Act dedicated a small portion of each state's funding (one half of one percent) from the Highway Trust Fund for the creation of Metropolitan Planning Organizations [MPOs] in metropolitan areas with more than 50,000 inhabitants.<sup>74</sup> The Act also increased the role of local officials in selecting urban highway projects, allowing the local officials to choose routes with the concurrence of state highway departments.<sup>75</sup> DOT could not approve the projects unless it concluded that they were based on the 3-C planning process engaged in cooperatively by the states and local communities.<sup>76</sup>

The *National Mass Transportation Assistance Act of 1974* made federal money available for transit operating expenses for the first time. \$11.8 billion was made available for 1975-1980, with \$7.3 billion available for urban mass transportation, and \$500 million available for planning, demonstration projects and capital projects in non-urban areas.<sup>77</sup> Capital expenditures for transit enjoyed an 80% federal matching share, while operating expenses were eligible for a 50% federal matching share. Highway and transit projects were subjected to the same long-range planning process, thereby formalizing the requirement for multimodal transportation planning.<sup>78</sup>

In 1975, UMTA and FHWA promulgated joint regulations governing urban transportation planning. They required joint designation and annual certification of state designated MPOs, and production of a long-range transportation plan to be reviewed annually, as well as a multi-year Transportation Improvement Program to include all highway and transit projects to be implemented within the forthcoming five years.<sup>79</sup> The Transportation Improvement Program regulations designated MPOs as the focus of the 3-C planning process for each urban area, to develop the multi-year TIP as well as annual transportation projects for each fiscal year.<sup>80</sup> These transportation plans and project priorities were to be forwarded to the state for its approval, then by the state to the DOT.<sup>81</sup>

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<sup>72</sup> Paul Dempsey & William Thoms, *Law & Economic Regulation in Transportation* 313 (1986).

<sup>73</sup> Mark Solof, *History of Metropolitan Planning Organizations – Part II* 4 (1998).

<sup>74</sup> Mark Solof, *History of Metropolitan Planning Organizations – Part III* 7 (1998).

<sup>75</sup> U.S. Dep't of Transportation, *Urban Transportation Planning in the United States: An Historical Overview* 97-98 (3<sup>rd</sup> ed. 1988).

<sup>76</sup> *County of Los Angeles v. Adams*, 574 F.2d 607 (1978).

<sup>77</sup> Paul Dempsey & William Thoms, *Law & Economic Regulation in Transportation* 313 (1986).

<sup>78</sup> U.S. Dep't of Transportation, *Urban Transportation Planning in the United States: An Historical Overview* 100 (3<sup>rd</sup> ed. 1988).

<sup>79</sup> U.S. Dep't of Transportation, *Urban Transportation Planning in the United States: An Historical Overview* 107 (3<sup>rd</sup> ed. 1988).

<sup>80</sup> 23 CFR Part 450.

<sup>81</sup> *County of Los Angeles v. Coleman*, 423 F. Supp. 496 (D.D.C. 1976).

The *Clean Air Act Amendments of 1977* fortified the automobile emission strategies and required regional planning. It was also the first statute explicitly to mandate solving air problems through the provision of transit. The Act prohibited MPOs and the federal government from approving projects not in conformity with a state's implementation plan for achieving or maintaining federal air quality standards.<sup>82</sup> Where national ambient air quality standards had not yet been attained, the legislation required state and local governments to revise their state implementation plans to provide for attainment by 1982, or in areas with severe photochemical oxidant or carbon monoxide problems, no later than 1987. MPOs were expected to develop transportation control measures [TCMs] within the SIPs, and funding priority was given to such TCMs.<sup>83</sup> The Amendments required the DOT to withhold highway funding if the EPA informed it that a state had failed to implement SIP-required transportation controls.<sup>84</sup>

The *Federal Public Transportation Act of 1978* established a \$16.4 billion grant and loan program for public capital and operating assistance for transit.<sup>85</sup>

The *Surface Transportation Assistance Act of 1978* was the first federal Act to combine highway, public transportation, and safety authorizations in a single piece of legislation.<sup>86</sup> Energy conservation was included as a new goal in the planning process, while alternative transportation system management strategies were also required to be considered. Under the Act, MPOs were to be designated by agreement among the general-purpose units of local governments in cooperation with the state Governor.<sup>87</sup>

The 1980s were marked by decentralization of authority and responsibility, reduced federal involvement, and increased flexibility for state and local governments.<sup>88</sup>

The *Federal-Aid Highway Act of 1981* declared the expeditious completion of the Interstate Highway system as a priority of the highest importance. It expanded the 3R program of resurfacing, restoration, and rehabilitation of highways by adding "reconstruction" as an eligible category, in what became a "4R" program.<sup>89</sup>

The *Surface Transportation Assistance Act of 1982* raised user charges to accelerate completion of the Interstate Highway system (by 1991), to support an enhanced 4R program and expanded bridge replacement and rehabilitation program, and to provide

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<sup>82</sup> Environmental Defense Fund v. Browner, 1995 WL 91324 (N.D. Calif. 1995).

<sup>83</sup> U.S. Dep't of Transportation, *Urban Transportation Planning in the United States: An Historical Overview* 119-21 (3<sup>rd</sup> ed. 1988).

<sup>84</sup> Penny Mintz, *Transportation Alternatives Within the Clean Air Act: A History of Congressional Failure to Effectuate and Recommendations for the Future*, 3 N.Y.U. *Envtl. L.J.* 156, 174 (1994).

<sup>85</sup> Paul Dempsey & William Thoms, *Law & Economic Regulation in Transportation* 313 (1986).

<sup>86</sup> Edward Weiner, *Urban Transportation Planning in the United States* 109 (Praeger, 2d ed. 1999).

<sup>87</sup> U.S. Dep't of Transportation, *Urban Transportation Planning in the United States: An Historical Overview* 128 (3<sup>rd</sup> ed. 1988).

<sup>88</sup> U.S. Dep't of Transportation, *Urban Transportation Planning in the United States: An Historical Overview* 185-86 (3<sup>rd</sup> ed. 1988).

<sup>89</sup> U.S. Dep't of Transportation, *Urban Transportation Planning in the United States: An Historical Overview* 145-46 (3<sup>rd</sup> ed. 1988).

greater funding for primary, secondary and interstate projects. It also authorized the administration of highway planning and research [HP&R] funds as a single fund eligible for a federal match of 85%. The Act also restructured federal transit programs by creating a new formula grant program allowing expenditures on planning, capital and operating costs, and giving state and local governments substantial discretion in selecting projects for funding with minimal federal interference.<sup>90</sup>

In 1983, the FHWA and UMTA issued new joint urban transportation planning regulations. The regulations retained the requirements for a transportation plan, a TIP, and a unified planning work program (for areas of 200,000 or more in population). The process was to be self-certified by the states and MPOs as meeting its requirements. The federal government would no longer specify the elements of the process or the factors to be considered in conducting it; those would be left to the MPOs, the local governments, and the state Governors. The federal government remained committed to urban planning by its requirement that projects continue to be based on a 3-C planning process and by providing funding for planning, but it would no longer specify how the process would be performed.<sup>91</sup>

The *Surface Transportation and Uniform Relocation Assistance Act of 1987* included major funding for highways and transit. It also required development of long-term financial plans for regional urban mass transit improvements.<sup>92</sup>

By the 1990s, there was growing consensus that the traditional methods of attempting to arrest traffic congestion through building new highways and expanding existing ones was providing only temporary relief. Increased capacity seemed to attract more traffic, creating a need to further expand the road and highway system.<sup>93</sup> As the 43,000-mile Interstate Highway system neared completion (final funding in this program was distributed in fiscal year 1995), the focus in transportation priorities shifted away from new highway construction toward improving the efficiency of the existing system and alternative modes of transport. Traffic congestion and road and bridge deterioration also were identified as key priorities.<sup>94</sup> Though representing only 1% of all roads in the United States, the Interstate Highways carried 21% of the nation's vehicular traffic; 40% of all Interstate pavement was rated in fair or poor condition.<sup>95</sup> Additionally, it became increasingly apparent that issues such as water and air quality, species protection, housing

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<sup>90</sup> U.S. Dep't of Transportation, *Urban Transportation Planning in the United States: An Historical Overview* 151-54 (3<sup>rd</sup> ed. 1988).

<sup>91</sup> U.S. Dep't of Transportation, *Urban Transportation Planning in the United States: An Historical Overview* 156-57 (3<sup>rd</sup> ed. 1988).

<sup>92</sup> U.S. Dep't of Transportation, *Urban Transportation Planning in the United States: An Historical Overview* 171-76 (3<sup>rd</sup> ed. 1988).

<sup>93</sup> Jayne Daly, *Transportation and Clean Air: Making the Land Use Connection*, 1995 *Pace L. Rev.* 141 (1995).

<sup>94</sup> U.S. General Accounting Office, *Transportation Infrastructure: Reshaping the Federal Role Poses Significant Challenges for Policy Makers* (Dec. 1989).

<sup>95</sup> U.S. General Accounting Office, *Transportation Infrastructure: Preserving the Nation's Investment in the Interstate Highway System* (Aug. 1991).

and transportation defied jurisdictional boundaries, and could be dealt with effectively only on a regional basis.<sup>96</sup>

Suburbanization was criticized by some as having created sprawl, which in turn caused “traffic congestion; commuting journeys that ‘steal time from work’; air and water pollution; lost farmland and recreational space; increased flooding; and more taxes to pay for suburban infrastructure. Moreover, as the suburbs expanded, so the inner city’s tax base shrank, setting off a vicious cycle of higher taxes, lower corporate profits, higher joblessness and lower property values.”<sup>97</sup>

Recognizing that transportation consumed 63% of oil resources (two-thirds by automobiles), and in light of the experience of Operation Desert Shield/Storm in the Persian Gulf in 1990 and 1991, Congress determined that “the nation can no longer afford to rely on volatile and insecure nations for our oil supply.”<sup>98</sup> Thus, energy policy would continue to influence transportation policy, as it had since the 1970s.

The *Clean Air Act Amendments of 1990* made air pollution policy an overriding factor in transportation policy.<sup>99</sup> It imposed stricter automobile emission standards, and required that transportation plans be designed to achieve clean air goals. If a region was not in compliance, it was to be designated a “nonattainment area”, and the state was required to adopt measures to bring it into compliance. The amendments encouraged federal investment in alternatives to reduce automobile use, and mandate employer-based transportation programs in nonattainment areas to reduce commuting.<sup>100</sup> The Act required each state to submit a State Implementation Plan (SIP) to the EPA setting forth its program to achieve or maintain national air quality standards. A state failing to meet such goals would risk losing billions of dollars in federal funding. Section 176 of the Act provided that no federal financial assistance of any kind may be provided if a transportation program fails to achieve conformity with the state’s plan to achieve federal air quality standards. “Conformity” means that a plan or project advances a SIP’s purpose of expeditiously eliminating or reducing violations of National Ambient Air Quality Standards.<sup>101</sup> A “conforming project” must not cause or contribute to any new violation, increase the frequency or severity of any violation, or delay attainment.<sup>102</sup> Moreover, by virtue of the Amendments, federal highway funds for any project can be withheld if the EPA deems it appropriate and reasonable.<sup>103</sup>

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<sup>96</sup> Earl Blumenauer, *The View From Capitol Hill*, 4 *Brookings Rev.* 16 (1998).

<sup>97</sup> *Urban Sprawl: No End In Sight*, *The Economist* (Sept. 12, 1998), at 29.

<sup>98</sup> *Intermodal Surface Transportation Efficiency Act of 1991*, Conference Report, 102nd Cong., House Rep. No. 102-404 (Nov. 27, 1991).

<sup>99</sup> *Intermodal Surface Transportation Efficiency Act of 1991*, Conference Report, 102nd Cong., House Rep. No. 102-404 (Nov. 27, 1991).

<sup>100</sup> Robert Yuhnke, *The Amendments To Reform Transportation Planning in the Clean Air Act Amendments of 1990*, *Tul. Env’tl. L.J.* 239 (1991).

<sup>101</sup> *Citizens for a Better Environment v. Deukmejian*, 1991 WL 424981 (N.D. Calif. 1991).

<sup>102</sup> *Environmental Defense Fund v. Browner*, 1995 WL 91324 (N.D. Calif. 1995).

<sup>103</sup> Jayne Daly, *Transportation and Clean Air: Making the Land Use Connection*, 1995 *Pace L. Rev.* 141, 142 (1995).

The *Intermodal Surface Transportation Efficiency Act of 1991* [ISTEA] established new national priorities in areas of economic progress, cleaner air, energy conservation, and social equity, requiring that the intermodal transportation system be “economically efficient and environmentally sound . . .” as well as “energy efficient . . . .”<sup>104</sup> In the legislation, Congress declared it to be in the “national interest to encourage and promote the development of transportation systems embracing various modes of transportation in a manner which will efficiently maximize mobility of people and goods within and through urbanized areas and minimize transportation-related fuel consumption and air pollution.”<sup>105</sup> In ISTEA’s legislative history, Congress concluded:

An intermodal transportation system . . . to enhance efficiency will be the key to meeting the economic, energy and environmental challenges of the coming decades. The nation will not be able to meet all of those demands through continued reliance on separate, isolated modes of transportation.

Development of an intermodal transportation system will result in increased productivity growth the nation needs to compete in the global economy of the 21st Century. We can no longer rely on a transportation system designed for the 1950s to provide the support for American industry to compete in the international marketplace.<sup>106</sup>

By placing the word “intermodal” (as opposed to the historical “highway” term) in the title of the bill, Congress sought “to bring the need for intermodalism to the forefront of the nation’s transportation and economic debate.”<sup>107</sup> ISTEA authorized \$156 billion for fiscal years 1992-1997, but not just for highways. It shifted federal transportation policy from traditional highway funding for automobiles to an approach that integrates highways, rail and mass transit in a comprehensive system, with seamless connectivity between modes.<sup>108</sup> ISTEA enhances state and local governmental flexibility in redirecting highway funds to accommodate other modes and pay for transit and carpool projects, as well as bicycle and pedestrian facilities, research and development, and wetland loss mitigation.<sup>109</sup> It created flexible guidelines that cut across traditional boundaries in allowing expenditures on highways, transit and non-traditional areas (e.g.,

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<sup>104</sup> 49 U.S.C § 101. See Joseph Thompson, *ISTEA Reauthorization and the National Transportation Policy*, 25 *Transp. L.J.* 87, 99 (1997).

<sup>105</sup> 23 U.S.C. § 134(a).

<sup>106</sup> *Intermodal Surface Transportation Efficiency Act of 1991, Conference Report, H.R. No. 102-404, 102nd Cong., (Nov. 27, 1991).*

<sup>107</sup> *Intermodal Surface Transportation Efficiency Act of 1991, Conference Report, H.R. No. 102-404, 102nd Cong., (Nov. 27, 1991).*

<sup>108</sup> Jayne Daly, *Transportation and Clean Air: Making the Land Use Connection*, 1995 *Pace L. Rev.* 141, 148 (1995).

<sup>109</sup> Penny Mintz, *Transportation Alternatives Within the Clean Air Act: A History of Congressional Failure to Effectuate and Recommendations for the Future*, 3 *N.Y.U. Envtl. L.J.* 156, 180 (1994).

vehicle emission inspection and maintenance).<sup>110</sup> According to DOT, “This flexibility will help State and local officials to choose the best mix of projects to address air quality without being influenced by rigid Federal funding categories or different matching ratios that favor one mode over the other.”<sup>111</sup>

ISTEA discouraged continued reliance on the automobile and expanded highways while encouraging the seamless movement of people and goods between modes of transportation.<sup>112</sup> The transit match was increased to 80% to achieve parity in matching ratios between the modes.<sup>113</sup> ISTEA also gave the states greater authority by exempting a large number of projects from “full” FHWA oversight.<sup>114</sup>

The process for designation or redesignation of MPOs in each urbanized area of more than 50,000 in population required agreement of officials representing at least 75% of the affected population as well as the central city or cities, and the Governor. Metropolitan area boundaries must at minimum encompass the existing urbanized area and the area expected to be urbanized within the forecast period. For areas designated as non-attainment for carbon monoxide or ozone, the boundaries were required to be coterminous with the non-attainment area.<sup>115</sup>

ISTEA also gave MPOs expanded funding for planning purposes and authority to select projects for funding, thereby significantly expanding their jurisdictions by authorizing MPOs to designate projects eligible to receive federal highway funds. Under ISTEA, the MPO, in *consultation* with the state, selects all federal highway, transit and alternative transportation projects to be implemented within its boundaries, except for projects undertaken on the National Highway System and pursuant to the Bridge and Interstate Maintenance programs. Projects on the National Highway System and pursuant to the Bridge and Interstate Maintenance Program are selected by the State in *cooperation* with the MPO. ISTEA also required MPOs to “begin serious, formal transportation planning”, and to “fiscally constrain” their long-range plans and short-term Transportation Improvement Programs [TIPs], requiring MPOs to create realistic, multi-year agendas for projects which could be completed with available funds.<sup>116</sup> An opportunity for public comment must be provided in preparation of both the long-range

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<sup>110</sup> U.S. Federal Highway Administration, A Guide to the Congestion Mitigation and Air Quality Improvement Program 1 (1994).

<sup>111</sup> U.S. Federal Highway Administration: Air Quality Programs and Provisions of the Intermodal Surface Transportation Efficiency Act of 1991 6 (1992).

<sup>112</sup> Theodore Taub & Katherine Castor, ISTEA—Too Soon To Evaluate Its Impact, ALI-ABA Land Use Institute (Aug. 16, 1995).

<sup>113</sup> U.S. Federal Highway Administration: Air Quality Programs and Provisions of the Intermodal Surface Transportation Efficiency Act of 1991 9-10 (1992).

<sup>114</sup> U.S. General Accounting Office, Transportation Infrastructure: Managing the Costs of Large-Dollar Highway Projects (Feb. 1997).

<sup>115</sup> Intermodal Surface Transportation Efficiency Act of 1991, Conference Report, H.R. No. 102-404, 102nd Cong., (Nov. 27, 1991); U.S. Federal Highway Administration: Air Quality Programs and Provisions of the Intermodal Surface Transportation Efficiency Act of 1991 12 (1992).

<sup>116</sup> Mark Solof, History of Metropolitan Planning Organizations – Part IV 5 (1998).

plan and the TIP.<sup>117</sup> Prepared in cooperation with the state and the local transit operator, and updated every two years, TIPs must include all projects in the metro area to be funded under Title 23<sup>118</sup> and the Federal Transit Act, and be consistent with the long-range plan and the Statewide Transportation Improvement Program [STIP]. The STIP usually covers a time frame of about three years and describes specific projects or project segments, as well as their scope and estimated cost. States must also prepare a long-range transportation plan which identifies the state's transportation needs and proposed projects over a period of 20 years.<sup>119</sup> Under ISTEA, the MPO's planning process, at minimum, had to consider the following factors:

- efficient use of existing transportation facilities
- energy conservation goals;
- methods to reduce and prevent traffic congestion;
- effect on land use and land development;
- programming of expenditures for transportation enhancement activities;
- effects of all transportation projects regardless of sources of funds;
- international border crossings and access to major traffic generators such as ports, airports, intermodal transportation facilities, and major freight distribution routes;
- connectivity of roads within the metropolitan area with roads outside the metropolitan area;
- transportation needs identified by management systems;
- preservation of transportation corridors;
- methods to enhance efficient movement of commercial vehicles;
- life cycle costs in design and engineering of bridges, tunnels, and pavement;
- social, economic and environmental effects.<sup>120</sup>

With respect to the latter criterion, ISTEA also established a Congestion Mitigation and Air Quality Improvement [CMAQ] Program which allocates funds to states to use for transportation control measures [TCMs] in helping them implement their transportation/air quality plans and attain national standards for carbon monoxide, ozone, and small particulate matter. Both the MPO long-range plan and the TIP must conform to the state's plan to achieve conformity with air quality standards. Conformity requires that no program may be included in the state or MPO transportation program if it causes new violations of the air quality standards, exacerbates existing violations, or delays attainment of air quality standards.<sup>121</sup> In urbanized areas with more than 200,000 in population (known as transportation management areas, or TMAs), MPOs develop TIPs

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<sup>117</sup> U.S. Federal Highway Administration: Air Quality Programs and Provisions of the Intermodal Surface Transportation Efficiency Act of 1991 14 (1992).

<sup>118</sup> 23 U.S.C. § 134.

<sup>119</sup> U.S. General Accounting Office, Transportation Infrastructure: Managing the Costs of Large-Dollar Highway Projects 14-15 (Feb. 1997).

<sup>120</sup> Intermodal Surface Transportation Efficiency Act of 1991, Conference Report, H.R. No. 102-404, 102nd Cong., (Nov. 27, 1991).

<sup>121</sup> Jayne Daly, Transportation and Clean Air: Making the Land Use Connection, 1995 Pace L. Rev. 141,148 (1995).

in cooperation with state governments.<sup>122</sup> For federally funded transportation projects, MPOs within TMAs must develop a congestion management system [CMS] which requires consideration of “travel demand reduction and operational management strategies.”<sup>123</sup> For TMAs classified as nonattainment areas for ozone or carbon monoxide pursuant to the Clean Air Act, federal funds may not be allocated to any transit or highway project that will result in a significant increase in carrying capacity for single occupancy vehicles unless the project is part of an approved CMS.<sup>124</sup> In nonattainment areas for transportation-related pollutants, the MPO must coordinate the development of its long-range transportation plan with the process for development of transportation measures in the SIP required by the Clean Air Act.<sup>125</sup> The DOT may approve a proposal for abbreviated requirements for development of transportation plans and programs for urbanized areas not designated as TMAs, unless they are designated as nonattainment for ozone or carbon monoxide under the Clean Air Act. The DOT must certify the process in each TMA at least every three years.<sup>126</sup>

The *Transportation Equity Act for the 21<sup>st</sup> Century of 1998* [TEA-21]<sup>127</sup> reaffirms and retains the planning provisions and MPO structure of ISTEA, with its emphasis on federal-state-local cooperation and public participation, though significant changes were made in funding levels.<sup>128</sup> For example, under the \$217 billion authorization bill (the largest infrastructure bill in U.S. history), funding was significantly increased for the Congestion Mitigation and Air Quality Program (by 35%) as well as for transit (by 50%).<sup>129</sup> TEA-21 replaced ISTEA’s fifteen factors to be considered in TIP preparation with seven:

1. Support the economic vitality of the metropolitan area, particularly by enhancing global competitiveness, productivity, and efficiency;
2. Increase the safety and security of the transportation system for motorized and nonmotorized users;
3. Increase the accessibility and mobility options available to people and freight;
4. Protect and enhance the environment, promote energy conservation, and improve the quality of life;
5. Enhance the integration and connectivity of the transportation system, across and between modes, for people and freight;

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<sup>122</sup> Theodore Taub & Katherine Castor, *ISTEA—Too Soon To Evaluate Its Impact*, ALI-ABA Land Use Institute (Aug. 16, 1995).

<sup>123</sup> 23 U.S.C. § 134(i)(1).

<sup>124</sup> *Clairton Sportsman’s Club v. Pennsylvania Turnpike Commission*, 882 F. Supp. 455, 478 (W.D. Pa. 1995); U.S. Federal Highway Administration: *Air Quality Programs and Provisions of the Intermodal Surface Transportation Efficiency Act of 1991* 13 (1992).

<sup>125</sup> *Intermodal Surface Transportation Efficiency Act of 1991*, Conference Report, H.R. No. 102-404, 102nd Cong., (Nov. 27, 1991).

<sup>126</sup> *Intermodal Surface Transportation Efficiency Act of 1991*, Conference Report, H.R. No. 102-404, 102nd Cong., (Nov. 27, 1991).

<sup>127</sup> Pub. L. No. 105-178.

<sup>128</sup> William Vantuono, *TEA 21: Uncomplicated Answers for Complicated Questions*, *Railway Age* (Sept. 1, 1998), at 16; American Public Transit Ass’n, *TEA 21: A Summary of Transit Related Provisions* 6 (1998).

<sup>129</sup> Bud Shuster, *Shuster Applauds Gore’s “Better America Bonds”*, Press Release (Jan. 11, 1999).

6. Promote efficient system management and operation; and
7. Emphasize the preservation of the existing system.

As was the case with ISTEA, TEA-21 requires MPOs to develop TIPs which include all federally funded highway, transit, alternative mode and management projects, in consultation with the State and transit agencies. State transportation agencies have primary responsibility for projects undertaken with National Highway System, Bridge and Interstate Maintenance funds (in cooperation with the MPO), and for areas outside the TMAs. The TIP must contain a priority list of proposed federally supported projects and strategies to be carried out within each three-year period. TEA-21 also requires that TIPs be fiscally constrained to funds expected to be reasonably available. Once a TIP is prepared and approved by an MPO, it must be approved by the state governor and incorporated into the State Transportation Improvement Program.

The Act also continues ISTEA's policy of permitting the shifting of highway funds to other uses aimed at alleviating congestion.<sup>130</sup> Though it gives States and MPOs greater flexibility to select transportation projects that best address their needs, TEA-21 provides that MPOs should emphasize alternatives to additional highway capacity in areas that have not achieved air quality attainment goals. "Preventive maintenance" was also added by TEA-21 to the list of capital expenditures permissible under the formula program.<sup>131</sup> TEA-21 requires that MPOs, state and transit agencies cooperate in the development of financial estimates that support the plan and TIP development. It also modifies the procedures for designating multiple MPOs in urbanized areas, adding a requirement for concurrence by the MPO and the governor.<sup>132</sup>

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<sup>130</sup> See Matthew Ward, Kenneth Brown & David Lieb, National Incentives for Smart Growth Communities, 13 *Natural Resources and Environment* 325, 328 (1998).

<sup>131</sup> William Vantuono, TEA 21: Uncomplicated Answers for Complicated Questions, *Railway Age* (Sept. 1, 1998), at 16.

<sup>132</sup> Federal Highway Administration, TEA-21 - Transportation Equity Act for the 21st Century (1998).