

11. DRAFT BYLAWS REVISION DISCUSSION

BACKGROUND

At the February 2024 Transportation Policy Council meeting, the TPC reviewed and discussed potential Bylaws revisions under consideration from the TPC’s Select Committee work. The TPC confirmed the following major revisions:

- Establishing two new membership categories for new areas added to the Metropolitan Planning Area (MPO Boundary). First is a “Growth Area” membership, where the new area shares one TPC vote with other growth area members and all MPO planning and programming activities are eligible within the area. Second is an “Associate” membership, where the new area does not seek to join the MPO, but the MPO is required to add the geographical area to comply with its federal regulations.
- Adding The Woodlands as a local government member of the TPC.
- Adding an additional At-Large TPC member representing cities smaller than 50,000 residents and makes both positions at-large for the entire region (e.g., both represent small cities in the entire MPO area). Both members may not be from the same county.
- Adding a process for the TPC to follow for conducting the MPO’s portion of expanding the Metropolitan Planning Area (MPO boundary).

Additionally, staff presented numerous revisions intended to update the Bylaws to address current regulations pertaining to Metropolitan Planning Organizations.

CURRENT SITUATION

At its April 2024 meeting, the Transportation Policy Council reviewed the attached draft Bylaws revisions. Following this review, the Policy Council took action to amend the Bylaws by adding The Woodlands Township as a TPC member, but took no further action pending review of the draft Bylaws by external counsel. That legal review has been completed and is attached for discussion.

Attachment 1: Legal Review of Proposed Amendments to Transportation Policy Council Bylaws

No action is recommended.

ACTION REQUESTED

For Discussion Only

Norton Rose Fulbright US LLP
1301 McKinney, Suite 5100
Houston, Texas 77010-3095
United States

Tel +1 713 651 5151
Fax +1 713 651 5246
nortonrosefulbright.com

Memorandum

To	Chuck Wemple, Executive Director Houston-Galveston Area Council		
From	Kathleen R. Ellison Arthur Kimball-Stanley	Date	May 10, 2024
Direct line	+1 713 651 3612 +1 512 536 3069		
Email	kathleen.ellison@nortonrosefulbright.com arthur.kimball-stanley@nortonrosefulbright.com		
Re	Proposed Amendments to Transportation Policy Council Bylaws		

The purpose of this memorandum is to summarize our review of the provisions regarding voting board membership in the current Bylaws and Operating Procedures (the “**Current Bylaws**”) of the Transportation Policy Council (“**TPC**”), as set forth in Exhibit A attached hereto, and the draft amendments to the Current Bylaws in the form attached hereto as Exhibit B (the “**Proposed Amendments**”), and to respond to the following specific questions raised by you and your staff:

1. Do the Current Bylaws generally conform to the federal law requirements applicable to Metropolitan Planning Organizations (“**MPO(s)**”)?
2. Are there any forthcoming changes in federal law that would require any amendments to the Current Bylaws?
3. Do the Proposed Amendments generally conform to the federal law requirements applicable to MPOs?
4. Does Section 2 of the Proposed Amendments conform to the requirements of 23 USC 134(d)(2) and the related federal regulatory guidance?
5. Are the provisions in the Proposed Amendments regarding representation by a non-elected alternate on behalf of elected officials consistent with federal law requirements regarding MPO governance?
6. Are the proxy voting procedures set forth in Section 3 of the Proposed Amendments consistent with federal law requirements regarding MPO governance?

As discussed in more detail below, we think both the provisions in the Current Bylaws and the Proposed Amendments regarding voting board membership generally conform to the requirements of federal law governing MPOs. Specifically, we think that the procedures set forth in both the Current Bylaws and the Proposed Amendments fall within the scope of discretion allowed under the federal law governing MPO governance. However, with respect to the

Proposed Amendments we would recommend that any provision regarding expansion of the MPO boundaries that would add new voting members to the MPO include a provision that prevents such new members from participating as voting members of the MPO until the related boundary adjustments are approved by the Governor.

A. 23 USC 134 and MPO Board Governance.

The federal statutory requirements for MPO board composition and governance are set forth primarily in 23 USC 134(d)(1)-(3). Subsection 23 USC 134(d)(1) provides in relevant part that MPOs are to be designated “by agreement between the Governor and units of general purpose local government that together represent at least 75 percent of the affected population (including the largest incorporated city (based on population) as determined by the Bureau of Census); or (B) in accordance with procedures established by applicable State or local law.”

Subsection 23 USC 134(d)(2) provides that “each metropolitan planning organization that serves an area designated as a transportation management area shall consist of (A) local elected officials; (B) officials of public agencies that administer or operate major modes of transportation in the metropolitan area, including representation by providers of public transportation and (c) appropriate state officials.”

Subsection 23 USC 134(d)(3) states as follows:

(A) Designation or selection of officials or representatives under paragraph (2) shall be determined by the metropolitan planning organization according to the bylaws or enabling statute of the organization.

(B) Subject to the bylaws or enabling statute of the metropolitan planning organization, a representative of a provider of public transportation may also serve as a representative of a local municipality.

(C) An official described in paragraph (2)(B) shall have responsibilities, actions, duties, voting rights, and any other authority commensurate with other officials described in paragraph (2).

(D) In designating officials or representatives under paragraph (2) for the first time, subject to the bylaws or enabling statute of the metropolitan planning organization, the metropolitan planning organization shall consider the equitable and proportional representation of the population of the metropolitan planning area.

The regulatory guidance published with respect to the requirements of 23 USC 134(d) emphasizes deference to state and local government decisions with respect to MPO board membership.¹ For example, with respect to the determination of what major modes of transportation require representation on an MPO board, federal regulators have stated that MPOs “are in the best position to define what constitutes a major mode of transportation in their respective [metropolitan planning area.]”² The one exception to this general emphasis on deference to regional decision making is the requirement that MPO board membership include at least one representative of providers of public transportation. With respect to public transportation,

¹ See 81 FR 34050-91; CFR 450 310(d).

² See 81 FR 34050-91.

federal regulators require that “every MPO that serves an area designated as a TMA must include an official (or officials) who is formally designed to represent the collective interests of the operations of public transportation in the [metropolitan planning area] and will have equal decision making rights and authorities as other officials on its policy board.”³ The term “public transportation” is defined to mean “(A) regular, continuing shared-ride surface transportation services that are open to the general public or open to a segment of the general public defined by age, disability, or low income; and (B) does not include— (i) intercity passenger rail transportation provided by the entity described in chapter 243 (or a successor to such entity); (ii) intercity bus service; (iii) charter bus service; (iv) school bus service; (v) sightseeing service; (vi) courtesy shuttle service for patrons of one or more specific establishments; or (vii) intra-terminal or intra-facility shuttle services.”⁴

Subsection 23 USC 134(d)(5) provides that “a designation of a metropolitan planning organization under this subsection or any other provision of law shall remain in effect until the metropolitan planning organization is redesignated under paragraph (6). Subsection 23 USC 134(d)(6) provides that “a metropolitan planning organization may be redesignated by agreement between the Governor and units of general purpose local government that together represent at least 75 percent of the existing planning area population (including the largest incorporated city (based on population) as determined by the Bureau of the Census) as appropriate to carry out this section.” Subsection 23 USC 134(d)(6) goes on to state that a metropolitan planning organization may be restructured to meet the requirements of paragraph (2) without undertaking a redesignation. Federal regulation interpreting these provisions state that “redesignation of an MPO [...] is required whenever the existing MPO proposes to make: (1) A substantial change in the proportion of voting members on the existing MPO representing the largest incorporated city, other units of general purpose local government served by the MPO, and the State(s); or (2) A substantial change in the decision making authority or responsibility of the MPO, or in decision making procedures established under MPO by-laws.”⁵ The regulations go on to state that “[r]edesignation of an MPO serving a multistate metropolitan planning area requires agreement between the Governors of each State served by the existing MPO and units of general purpose local government that together represent at least 75 percent of the existing metropolitan planning area population (including the largest incorporated city, based on population, as named by the Bureau of the Census).”

The regulations also state that the following changes in the bylaws do not require redesignation: “(1) The identification of a new urbanized area (as determined by the Bureau of the Census) within an existing metropolitan planning area; (2) Adding members to the MPO that represent new units of general purpose local government resulting from expansion of the metropolitan planning area; (3) Adding members to satisfy the specific membership requirements described in paragraph (d) of this section for an MPO that serves a TMA; or (4) Periodic rotation of members representing units of general-purpose local government, as established under MPO by-laws.”⁶

³ Id.

⁴ 49 U.S.C. § 5302(15).

⁵ 23 CFR 450.310(j)-(k).

⁶ 23 CFR 450.310(l).

B. Summary of Provisions in Current Bylaws Regarding Voting Membership.

The Current Bylaws were adopted in 2013 and consist of twelve sections. Section (B) provides that the TPC shall consist of twenty-eight members and that all members of the TPC shall be local elected officials, officials of public agencies that administer or operate major modes of transportation in the Houston-Galveston Transportation Management Area, or appropriate officials of the Texas Department of Transportation. Section (B) states that cities and counties with one member are required to be represented by the chief elected official, the chief administrative officer or another designated official. Section (B) of the Current Bylaws also states that any entity with more than one member shall name an elected official to at least one of the positions. Voting members are appointed by the cities, counties or transportation related organization authorized to appoint members, as set forth in Section (B). Members serve a term of one calendar year and are chosen by the chief elected official or head and/or board of the entity which they represent. Section (B) specifically provides that the Metropolitan Transit Authority shall be represented by one voting member and that the Texas Department of Transportation shall be represented by two voting members. Section (B) also provides one voting board membership to an appointee made by each of the following entities: (i) Houston-Galveston Area Council (“HGAC”), (ii) an “at-large” appointee selected by HGAC to represent Harris County or a designated city, (iii) an appointee by TPC to represent “other transportation interests.” Section (B) states that cities not otherwise having designated voting membership but having a population of 50,000 according to the official decennial census shall have voting membership on the TPC effective after the decennial census has been published.⁷

Section (C) of the Current Bylaws provides that each voting member of the TPC may have a designated alternate member who may serve at any TPC meeting in the voting member’s absence. The Current Bylaws state that such alternate members must be appointed in the same manner as the voting members and must qualify as local elected officials, officials of public agencies that administer or operate major modes of transportation in the Houston-Galveston Transportation Management Area, appropriate officials of the Texas Department of Transportation or another designated official. Section (C) states that an appointed alternate member will have the rights and privileges of a voting member when serving in the absence of such member.

Section (E) provides that in the event a voting member becomes ineligible or unable to serve, a new member named by the chief elected official or the head and/or board of the appropriate governmental unit shall be allowed to assume the position of the ineligible member on the council. Changes of voting members can be made by a chief elected official or the head and/or board of the appropriate government unit at any time.

C. Summary of Proposed Amendments.

If adopted, the Proposed Amendments would make several changes to the TPCs Bylaws. These include:

- Establishing two new membership categories for new areas added to the TPC’s metropolitan planning area. The first is a “Growth Area” membership, where the

⁷ We note that the provision regarding cities with a population over 50,000 does not specifically state that it applies only to cities located in the Houston-Galveston Transportation Management Area. However, we think that such limitation is logical when read in the context of Section (B) as a whole.

new area shares one vote with other growth area members. Counties that are expected to contain part of an urbanized area as identified in the TPC's 20 year growth forecast may appoint a Growth Area member. The second is an "Associate" membership, where the new member is given a non-voting position on the board. These new board positions are designed to attempt to incorporate areas along the boundary of the TPC metropolitan planning area that the TPC projects that it will be required to include in the future as the TPC's metropolitan planning area expands. Associate Members cannot be included in the group of municipalities that choose the Growth Area member.

- Adding The Woodlands as a local government member of the TPC.
- Adding an additional "at-large" TPC board member for the purpose of representing small municipalities in the TPC's metropolitan planning area.
- Adding an "Agency Member" to represent major modes of transportation, including public transportation.
- Adding a set of procedures for the TPC to follow for the purpose of expanding the TPC's metropolitan planning area to adhere to requirements under federal regulations for boundary expansion. The procedures recognize that formal expansion of the TPC's boundaries requires the agreement of the Governor of the State of Texas in accordance with the redesignation procedures set forth in 23 USC 134. The Proposed Amendments state that no federal funds may be expended or programmed in the newly included area until the redesignation process is completed. However, the Proposed Amendments allows new voting members of the TPC board to be appointed and participate on TPC matters prior to such redesignation being approved.
- Prohibiting non-elected persons that are serving as alternates to elected officials appointed to the TPC from voting on behalf of such elected officials.

D. Responses to Questions and Analysis.

1. Do the Current Bylaws general conform to the federal law requirements applicable to MPOs?

We think the Current Bylaws generally conform to the requirements of federal law because the Current Bylaws adhere to 23 USC 134(d) in that they require all members of the TPC to be local elected officials, official of public agencies that administer or operate major modes of transportation in the Houston Galveston Transportation Management Area, or appropriate officials of the Texas Department of Transportation. While there are certain questionable provisions in the Current Bylaws, as discussed further below, we think these can be interpreted as conforming to the requirements of federal law given the extent to which federal regulators have provided guidance stating that interpretation of the federal law is deferential to local policy choices. With respect to representation of public transit providers, the one area of MPO board membership for which federal regulators have provided clear guidance that is not deferential to local and/or regional policy choices, the TPC clearly meets the federal requirement that its board include representation of public transit providers because Section (B) of the Current Bylaws requires that the Metropolitan Transit Authority be provided a voting seat on the TPC board. We think it may be helpful, if only to provide clarity in the Current Bylaws, if a sentence were added to the Current Bylaws stating that the representative of the Metropolitan Transit Authority shall be deemed to represent public transportation providers.

We note that Section (B) of the Current Bylaws provides that cities and counties with one member shall be required to appoint, as the voting representative of such municipality, either the chief elected official, the chief administrative officer or another designated official of such municipality. This language raises the possibility that the representative of a municipality might be a non-elected official, which, in order to comply with 23 USC 134(d), would require that such non-elected official be an official of a public agency that administers or operates a major mode of transportation. The guidance provided by federal regulators with respect to the interpretation of 23 USC 134(d) has declined to define “major modes of transportation” and has stated it is appropriate to defer to local policy makers with respect to how such provision should be interpreted. Given the position of federal regulators on this point, we think the concept of “major modes of transportation” can be interpreted broadly so as to allow a variety of non-elected officials that work on transportation related matters to serve as a member of the TPC. However, we would recommend that the TPC attempt to ensure that any voting member that represents a municipality without being an elected official serve such municipality in a capacity that is clearly related to transportation. Accordingly, if the provisions of the Current Bylaws are to be interpreted as being compliant with federal law it is important that the TPC when accepting the appointment of any nonelected “chief administrative officer” or “another designated official of such municipality” establish a record (e.g., in the instrument that appoints such person to the TPC to represent the municipality) that demonstrates or recites how such unelected appointee’s current public duties include matters that are clearly related to a major mode of public transportation. A chief administrative officer of a municipality that manages departments responsible for a portfolio of roads or a bus transit system would likely constitute sufficient evidence that such person is serving in a capacity that constitutes administering or operating a major mode of transportation.

Another provision in the Current Bylaws that may raise scrutiny regarding compliance with federal law is Section (C). This section potentially allows each of the entities entitled to appoint voting members to the TPC board to structure the board so that it consists entirely of alternate members that fall into the category of “another designated official” and not any of the following (i) elected officials, (ii) officials of public agencies that operate or administer major modes of transportation, or (iii) appropriate state officials. Based on our review of the actual make-up of the TPC’s voting membership, which list the primary and alternate member, it seems that in practice the Current Bylaws are being interpreted by the TPC so that all members fall within one of the categories required under 23 USC 134(d). While Section (C) as drafted does create the possibility that the TPC’s board could be comprised of voting members that don’t meet the requirements of 23 USC 134(d), we think that as long as the provisions of the Current Bylaws that govern the appointment of alternate voting members are implemented with the applicable federal law in mind, these provisions can be interpreted to comply with federal law.

For example, TPC members representing HGAC may be considered officials of a public agency that administers or operates major modes of transportation given that (i) HGAC administers the TPC, (ii) HGAC is the fiscal agent of the TPC, and (iii) the TPC plays a pivotal role in administering capital planning for all major modes of transportation in the TPC’s metropolitan planning area. We think the position that HGAC’s membership on the TPC board complies with federal law is supported by the fact that HGAC has been a member of the TPC for over a decade and, to our knowledge, no federal or state regulator has sought (by formal or informal action) to have HGAC removed as a TPC member because it is not eligible for membership.

We also note that in considering the questions we were asked to address in this memorandum we reviewed the bylaws (or similar governing document) of several MPOs for major metropolitan areas in other parts of Texas as well as other parts of the country. While not a comprehensive or systematic review of all MPOs currently operating in the United States under the existing federal legal framework, our modest comparative study indicated that TPC is not alone in allowing unelected officials to represent municipalities on an MPO board. The Lubbock Metropolitan Planning Organization's Bylaws provides that the City Manager of the City of Lubbock, an unelected administrative official appointed by the Lubbock City Council, shall be a voting member of the Transportation Policy Committee, the committee that perform for the Lubbock Metropolitan Planning Area the equivalent duties of the TPC. Similarly, the Transportation Policy Board for the El Paso Metropolitan Planning Area, allows three of the six board members that can be appointed by the City of El Paso to be appointees that are not elected officials. The Memorandum of Understanding that governs the Boston Region Metropolitan Planning Organization allows the chief executive officer of member municipalities in the metropolitan planning area for Boston, Massachusetts to make appointments of voting members of the MPO board to represent such municipalities and there is no requirement that such appointee be an elected official. In addition, the Boston Region Metropolitan Planning Organization, an economic development planning organization for the region that plays a similar role to the Houston Galveston Area Council, is given a voting seat on the MPO board. In contrast, the Capital Area Metropolitan Planning Organization Joint Powers Agreement that governs the MPO for the Austin Metropolitan Planning Area, requires that all voting members of such MPO to be elected officials or representatives of the Capital Metropolitan Transportation Authority or the Texas Department of Transportation, Austin District.⁸ These contrasting approaches to MPO governance further demonstrate the federal deference to local entities in determining the composition of their MPO boards to achieve the overall federal policy goal of transportation policy planning coordinated through regional collaboration.

2. Are there any forthcoming changes in federal law that would require any amendments to the Current Bylaws?

We are not aware of any forthcoming changes in federal law or regulation that would require amendments to the Current Bylaws. We note that over the last several decades any major change in federal policy regarding MPO board governance has been implemented with long lead times designed to facilitate the implementation of such changes at the MPO level in a collaborative way.

3. Do the Proposed Amendments generally conform to the federal law requirements applicable to MPO?

As a general matter, we think that each of the Proposed Amendments conforms to the requirements set forth under federal law regarding MPO board governance. Moreover, we think that the Proposed Amendments may be implemented without seeking redesignation of the MPO because the Proposed Amendments make a non-substantial change in the proportion of voting members representing the largest incorporated city, other units of general purpose local government served by the MPO, and the State, or are designed to either identify new urbanized areas (as determined by the Bureau of the Census) within an existing metropolitan planning area or to add members to the MPO that represent new units of general purpose local government

⁸ We have enclosed copies of these MPO governing documents in Exhibit C of this Memorandum.

resulting from expansion of the metropolitan planning area. As discussed above, federal law regarding MPO board membership is deferential to the policy choices of state and local policy makers. As a result, given the purposes described in the Proposed Amendments and the permissive approach to MPO management taken by federal regulators, we think the changes set forth in the Proposed Amendments would be viewed as meeting the requirements of federal law.

We note, however, there are provisions in the Proposed Amendments that seem to allow new members in areas that are outside the TPC's existing boundaries to participate as voting members prior to the expansion of those existing TPC boundaries being approved by the Governor of Texas. We note that Texas law requires the Governor (or the Texas Transportation Commission as a representative of the Governor) to approve any MPO boundary adjustment.⁹ The federal law also states that an MPO's boundaries shall be determined based on an agreement between the Governor and local representatives from the area comprising the MPO.¹⁰ Accordingly, in order to avoid a challenge to the results of a TPC vote that included participation by members from areas outside the boundaries of the TPC approved by the Governor of Texas, we would recommend that the TPC prohibit voting by new members representing areas outside the existing boundaries of the TPC until the Governor has approved the expanded boundaries of the TPC so as to encompass the areas represented by such new members.

We also note that the Proposed Amendments do not specifically identify which members of the TPC are meant to represent the interests of providers of public transportation in the TPC's metropolitan planning areas. While we presume these interests are represented by the board member from METRO, we think it would be helpful for compliance purposes to specifically identify such member of the board as being appointed to adhere to the requirements of 23 USC 134(d)(2) with respect to the inclusion of a public transportation representative.

4. Does Section 2 of the Proposed Amendments conform to the requirements of 23 USC 134(d)(2) and the related federal regulatory guidance?

Section 2 of the Proposed Amendments allows two kinds of voting TPC board member: (i) local elected officials servicing as local government members or growth area members; and (ii) agency members consisting of officials of public agencies that administer or operate major modes of transportation or appropriate state officials. These provisions of the Proposed Amendments conform to the requirements of federal law because they require that a board member that is not a state official be an elected official or an official of a public agency that administers or operates a major mode of transportation. The language of the Proposed Amendments would adhere to a more stringent interpretation of 23 USC 134(d) than the Current Bylaws and may help to remove any ambiguity in the Current Bylaws regarding who may be a voting member of the TPC.

⁹ Texas Administrative Code 43 § 16.51 requires an MPO in Texas to work with Texas agencies representing the Governor with respect to potential MPA boundary adjustments to approve any such adjustment. The applicable provision states: "The governor or the commission, if the approval authority has been delegated to the commission, must approve the boundaries of a designated metropolitan planning area and any revision of those boundaries. Approval of the boundaries of a designated metropolitan planning area by the Federal Highway Administration (FHWA) or the Federal Transit Administration (FTA) is not required. The MPO must provide the governor and the department [of transportation] with appropriate documentation and the rationale supporting any recommended boundary change. The MPO must provide its approved metropolitan planning area boundary maps to the department for submission to the FHWA, FTA, and other applicable federal agencies."

¹⁰ 23 USC § 134(d)(1).

5. Are the provisions in the Proposed Amendments regarding representation by a non-elected alternate on behalf of elected officials consistent with federal law requirements regarding MPO governance?

Section 2.3 of the Proposed Amendments allows an elected primary member of the TPC to select an alternate to serve on the TPC in the voting member's absence. The alternate must be appointed in the same manner as a voting member and must be a local elected official, official of a public agency that administers or operates a major mode of transportation in the Houston-Galveston Transportation Management Area, or an appropriate official of the Texas Department of Transportation. An elected primary member may select an alternate who is a non-elected official from the same jurisdiction; however such alternate may not cast votes on behalf of the primary member. The federal regulations allow for MPO bylaws to be crafted to meet the local and regional requirements specific to a given MPO. The provisions of Section 2.3 of the Proposed Amendments would seem to fall within the scope of rulemaking authority that federal regulators leave to the discretion of an individual MPO. Accordingly, we think these provisions would not be prohibited by any federal regulatory requirements regarding MPOs.

6. Are the proxy voting procedures set forth in Section 3 of the Proposed Amendments consistent with federal law requirements regarding MPO governance?

Section 3.1 provides that TPC members may designate in writing the appointment of "proxy voters" that are entitled to vote on their behalf on TPC board matters. The "proxy voter" rules state that "if a primary member designating a proxy is an elected official, then the proxy voter must also be an elected member or alternate." The rules go on to state that if "the primary member designating the proxy voter is a non-elected official, then the proxy voter can be either a non-elected or an elected member or alternate." As stated above, the federal regulations allow for MPO bylaws to be crafted to meet the local and regional requirements specific to a given MPO. The provisions of Section 3.1 of the Proposed Amendments would seem to fall within the scope of rulemaking authority that federal regulators leave to the discretion of an individual MPO. Accordingly, we think these provisions would not be prohibited by any federal regulatory requirements regarding MPOs.

E. Qualifications.

All of the foregoing analysis and its conclusions are premised upon, and limited to, the law of the United States of America (and with respect to MPO boundary expansions, the State of Texas) in effect as of the date of this memorandum. The views and observations expressed herein are as of the date hereof and we make no undertaking to amend or supplement such views and observations as facts and circumstances subsequent to the date hereof come to our attention or changes in the law occur which could affect such views. The views expressed in this memorandum are based on, and rely upon, the facts described in this memorandum. In the event that any of the facts described in this memorandum should change, the views described herein may change. If you believe that any of the facts described in this memorandum are inaccurate, please let us know. This memorandum is furnished by us to you, solely for your benefit, and solely in connection with TPC's evaluation of the Proposed Amendments. We hope the discussion and analysis set forth in this memorandum is helpful. Please feel free to call us if you have any questions or would like to discuss any of these points further.