U.S. Department of Transportation
Federal Transit Administration
Federal Highway Administration

Headquarters

1200 New Jersey Avenue, SE
Washington, DC 20590

FEB 0 1 2016

Ms. Ann R. Goering
Ratwik, Roszak & Maloney, P.A.
730 Second Avenue South, Suite 300
Minneapolis, MN 55402

Re: **Metropolitan Council Certification Review**

Dear Ms. Goering:

On behalf of Secretary Foxx, this letter responds to your correspondence dated October 1, 2015, on behalf of a coalition of suburban counties of the Twin Cities metropolitan area ("Suburban Counties"), as well as your January 11, 2016, letter inquiring as to the status of our response. In your October 1 letter, you requested that the Federal Highway Administration ("FHWA") and Federal Transit Administration ("FTA") review an earlier determination, reached jointly by the FHWA Minnesota Division office and FTA Region V, that the Minnesota Metropolitan Council ("Metropolitan Council") complies with the structure requirements of 23 U.S.C. § 134(d)(2)[1] in its role as a metropolitan planning organization ("MPO"). For the reasons set forth below, FHWA and FTA confirm their earlier determination.

I. Background

A. Federal Requirements

Since the 1991 passage of the Intermodal Surface Transportation Efficiency Act ("ISTEA"), Pub. L. 102-240, Federal law has required MPOs serving transportation management areas (TMAs) to include certain structuring of their boards. The current version of the law requires:

> Not later than 2 years after the date of enactment of [the Moving Ahead for Progress in the 21st Century Act, Pub. L. 112-141, ("MAP-21")], each metropolitan planning organization that serves an area designated as a transportation management area shall consist of—

[1] Substantively similar provisions are codified in 23 U.S.C. § 134 and in 49 U.S.C. § 5303. For clarity, this letter refers only to Title 23.

> (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.

23 U.S.C. § 134(d)(2). The law also includes a "grandfathering" provision, which excludes planning entities established prior to ISTEA from the structuring requirements:

> Nothing in this subsection shall be construed to interfere with the authority, under any State law in effect on December 18, 1991, of a public agency with multimodal transportation responsibilities-
>
> (A) to develop the plans and TIPs for adoption by a metropolitan planning organization; and
>
> (B) to develop long-range capital plans, coordinate transit services and projects, and carry out other activities pursuant to State law.

23 U.S.C. § 134(d)(4).[2] This grandfathering clause applies to an MPO when: (1) the MPO operates pursuant to a State law that was in effect on or before December 18, 1991; (2) such State law has not been amended after December 18, 1991, with regard to the structure or organization of the MPO; and (3) the MPO has not been designated or redesignated after December 18, 1991. Policy Guidance on Metropolitan Planning Organization (MPO) Representation, 79 Fed. Reg. 31,214, 31,216 (June 2, 2014).

B. The Suburban Counties' May 8, 2015, letter to FHWA and FTA

The Metropolitan Council is the designated MPO for the Twin Cities metropolitan area, which is a transportation management area. Minn. Stat. § 473.146, subd. 4(a). It is composed of 17 members, all of whom are appointed by the Governor. *Id.* § 473.123, subds. 3 and 4. For purposes of transportation planning, the Metropolitan Council includes a transportation advisory board ("TAB") of, *inter alia*, local elected officials, representatives of State agencies, and representatives of public transit, freight transportation, non-motorized transportation, and the Metropolitan Airports Commission. *Id.* § 473.146, subd. 4(b).

Between June 25 and 28, 2012, FHWA and FTA conducted a review of the Metropolitan Council's compliance with the planning requirements of 23 C.F.R. Part 450. Transporta-

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[2] In previous correspondence on this matter, this section was designated as 23 U.S.C. § 134(d)(3). With the enactment of the Fixing America's Surface Transportation Act ("FAST Act"), Pub. L. 114-94, § 1201(3), on December 4, 2015, this section became 23 U.S.C. § 134(d)(4).

tion Planning Certification Review Report for the Minneapolis-St. Paul Metropolitan Area ("2012 Report"). The 2012 Report concluded that the Metropolitan Council was the properly constituted MPO for the region and made no recommendations for corrective actions. *Id.* at 9, 10. In reaching this conclusion, the 2012 Report emphasized the role of the TAB in the Metropolitan Council's planning process. For example, the 2012 Report stated that the "Metropolitan Council in conjunction with the [TAB] is the designated MPO" and that "[t]ogether, the Council and the TAB are responsible for the governance and transportation policy making for the Twin Cities region." *Id.*

In a May 8, 2015, letter addressed to FHWA's and FTA's regional offices, the Suburban Counties asked FHWA and FTA to partially reject the 2012 Report's findings and hold that the Metropolitan Council does not comply with the membership requirements for MPOs serving TMAs. The Suburban Counties argued that, because Federal law defines an MPO as "the policy board of an organization", 23 U.S.C. § 134(b)(2), the TAB, which by Minnesota law is merely advisory, should not be considered part of the MPO, and therefore the Metropolitan Council does not have the membership required by 23 U.S.C. § 134(d)(2). The Suburban Counties further argued that the Metropolitan Council is not grandfathered because post-ISTEA amendments to Minnesota law, adopted in 1994, have affected the structure or organization of the Metropolitan Council.

FHWA's Division and FTA's Regional office replied on August 3, 2015. The regional offices agreed with the Suburban Counties that the TAB is not part of the MPO, and therefore the Metropolitan Council's membership does not comply with 23 U.S.C. § 134(d)(2). However, the regional offices disagreed with respect to the application of the grandfathering clause. Considering the changes in Minnesota law identified by the Suburban Counties, the regional offices concluded that "the changes were not 'substantial' so as to require a redesignation" under 23 C.F.R. § 450.310(k). The regional offices' reply went on to discuss situations when an MPO would or would not be required to redesignate.

II. The Suburban Counties' October 1, 2015, letter to FHWA and FTA

The Suburban Counties sent another letter on October 1, 2015, this time addressed to Secretary Foxx and the Administrators of FHWA and FTA, requesting reconsideration of the conclusions set forth in the August 3, 2015, response. The Suburban Counties urged that we "find the Metropolitan Council is not a properly constituted MPO, and take all other necessary actions consistent with that finding." This October letter reiterated many of the same arguments put before FHWA and FTA previously, including the suggestion that the grandfathering clause of 23 U.S.C. § 134(d)(4) does not apply to MPOs generally, does not apply to the Metropolitan Council specifically, and does not apply to the membership requirements imposed on MPOs by the same subsection.

With respect to the first argument, as explained in our joint policy guidance, FHWA and FTA have determined that the grandfathering provision does still apply to any MPO that (1) operates pursuant to a State law that was in effect on or before December 18, 1991; (2) such State law has not been amended after December 18, 1991, with regard to the structure or organization of the MPO; and (3) the MPO has not been designated or re-designated after December 18, 1991. 79 Fed. Reg. 31,216. The agencies reiterated that interpretation in a joint Notice of Proposed Rulemaking to implement MAP-21 revisions to Federal metropolitan transportation planning requirements. 79 Fed. Reg. 31,784 (June 2, 2014). Subsequently, Congress enacted the FAST Act, P.L. 114-94, which included amendments to 23 U.S.C. § 134 (FAST Act § 1201) and 49 U.S.C. § 5303 (FAST Act § 3003). The FAST Act clarified requirements relating to an MPO's designation or selection of officials or representatives to an MPO in light of the FHWA/FTA Policy Guidance and NPRM and public comments that the agencies received on these two documents, but *did not* amend the grandfathering provision. Congress' enactment of these statutory changes while leaving the grandfathering provision intact is a strong indication that Congress concurs with the agencies' interpretation of that provision. *See, e.g., Davis v. United States*, 495 U.S. 472, 482 (1990) ("Congress' reenactment of [a statute], using the same language, indicates its apparent satisfaction with the prevailing interpretation of the statute."); *Pierce v. Underwood*, 487 U.S. 552, 566-68 (1988).

Second, the Suburban Counties disagreed with the FHWA and FTA regional offices' conclusion that the State law changes were not substantial enough to "require a redesignation" and so did not require the Metropolitan Council to come into compliance with 23 U.S.C. § 134(d)(2). As addressed in the FHWA/FTA Policy Guidance, an MPO is no longer grandfathered from current Federal board structuring requirements if *either* the MPO redesignates *or* changes in State law affect the structure or organization of the MPO. Bearing in mind this distinction between the standards for the grandfathering provision and redesignation, we conclude that neither of these standards is implicated here.

We reviewed the amendments to the laws governing the Metropolitan Council cited in your October 1, 2015, letter. In summary, the amendments: (1) changed the MPO from a State administrative agency to a public corporation and political subdivision of the State[3]; (2) changed the term length of MPO members[4]; (3) allowed the Metropolitan Council to "hold, use, and dispose of" grant funds without depositing the money into the State Treasury[5]; and (4) changed provisions regarding the Metropolitan Council districts which have changed to represent the population changes from the Federal decennial census, although the number of districts remains the same.[6]

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[3] Minn. Stat. §473.123, subd . 1 (1994); Minn. Laws 1994 c. 628-S.F. No. 2015, Sec. 4.
[4] Minn. Stat. § 473.123, subd. 2a. (1994).
[5] Minn. Stat. § 473.129, subd. 4 (1994); Minn. Laws 1994 c. 628-S.F. No. 2015, Sec. 39.
[6] Minn. Stat. § 473.129, subd. 3 (1994).

In our opinion, these amendments would not require the Metropolitan Council to redesignate. Our regulations require redesignation of an MPO whenever the existing MPO proposes to make (1) a substantial change in the representative proportion of voting members, or (2) a substantial change in the decisionmaking authority or responsibility of the MPO, or in decisionmaking procedures established under MPO by-laws. 23 C.F.R. 450.310(k). FHWA and FTA's regulations also identify the changes to an MPO that do not require a redesignation as long as they do not trigger a substantial change as described in 450.310(k). 23 C.F.R. 450.310(l). We find that the regional offices correctly analyzed the amendments under these regulations in determining that the amendments do not substantially change the Metropolitan Council's representation proportions or decisionmaking procedures such that redesignation is necessary.

Even if a change in State law would not require redesignation, the MPO no longer would be grandfathered if that change affected the structure or organization of the MPO. We conclude that none of the amendments you cite affect the structure or organization of the Metropolitan Council such that it would no longer be grandfathered from the structure requirements of 23 U.S.C. 134(d)(2). None of these changes, including, (1) changing the terms of the Council's members, (2) characterizing the Council as a public corporation instead of an administrative agency, (3) allowing the Council to "hold, use, and dispose of" grant funds without depositing the money into the State Treasury, and (4) other miscellaneous and minor statutory changes, directly affect in any material way the structure or organization of the Council itself, and they clearly cannot be deemed substantial changes. The core of the Metropolitan Council's structure and organization remains the same as it was in 1991, notwithstanding these minor legislative amendments.

In sum, we concur with the findings in the August 3, 2015, regional offices' response and decline to reverse their decision. If you have further questions, please do not hesitate to contact us.

Sincerely,

Gregory G. Nadeau, Administrator
Federal Highway Administration

Therese McMillan, Acting Administrator
Federal Transit Administration