

A Guide to Advocacy in Transportation Projects

Two Case Studies

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ABSTRACT

This paper serves as a guide to citizens who want to get involved in transportation funding decisions in California and Oregon. First, the transportation funding process is described. Second, public participation is explored as a concept and spectrum of practice. This paper reviews the federal requirements of states and metropolitan planning organizations. Then it discusses laws, such as the National Environmental Policy Act, that can be used to challenge federal funding decisions. Next, a case study for Oregon and California is performed to describe their unique funding strategies and public participation opportunities. The case studies cover the strongest state laws advocates can use for certain causes. For example, Oregon's land use laws and California's greenhouse gas emissions reductions laws shape many transportation decisions. Finally, the paper reviews a court case in each state where land use law (Oregon) or GHG emission reduction targets (California) were successfully used to change the outcome of transportation decisions.

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Introduction

The focus of this paper is on public participation in surface transportation funding in Oregon and California. Each state spends billions of dollars on transportation projects annually. Transportation investment affects fundamental aspects of our daily lives: our economy, our environment, our health and the amount and quality of time we spend with our families and friends. Average citizens, environmental advocates, business and trade associations, and people who use mobility devices are all stakeholders in the transportation system. Advocates from these groups want to protect their neighborhoods, mitigate climate change, live independently, strengthen their region's economy or ensure on time delivery of goods and services. The intended audience of these case studies is advocates who wish to get involved in transportation decision-making in Oregon or California.

Public Involvement here is defined broadly and will include opportunities that agencies offer the public to engage in the planning and programming process, as well as where in the process there are opportunities to challenge agency decisions in project development and rulemaking. For the purposes of this paper, "transportation" refers to surface transportation that people use in their day-to-day lives. This includes roadways (city streets and highways) as well as public transportation (transit operators and paratransit providers).

In each state, I will provide an overview of their transportation planning and funding processes. First, I will describe the actors that play a role in each state's funding process. Then, I will highlight opportunities that agencies make available to the public to participate in the planning and funding process. Next, this paper

reviews each state's administrative procedures act to identify opportunities to challenge or delay rulemaking. These case studies conclude with a section on using litigation in event that an advocate is unable to accomplish their goals through public participation.

Transportation Funding Process

Broadly, transportation funding can be characterized by three phases: planning, programming, and project development. Planning is the process through which needs and goals are identified, solutions and funding sources are proposed, evaluated, and compared and then preferred alternatives are selected.¹ Programming refers to the solicitation, selection, prioritization, and scheduling of transportation projects that are ultimately approved for funding. Programming of federal funds is limited to selecting only projects that are identified in plans required under 23 CFR 450.322.² Project development is preformed when a project has been approved for funding and specific elements of a project are determined including engineering, right of way, and construction.

This section first reviews the actors involved in the development of transportation plans and programs and then describes the planning and programming processes. Figure 1 represents an overview of the process of developing and implementing a transportation project as well as opportunities for advocates to engage at each stage of the process. This overview will be addressed again at the synthesis section of this paper.

Projects progress along this timeline with increasing levels of detail and stricter requirements from state and federal policy. During the planning stage, high level needs of a community are assessed through projections of growth over long

¹ 23 CFR 450.150 & FHWA, Model Long Range Transportation Plans. 2014. Pg. 8. http://www.fhwa.dot.gov/planning/performance_based_planning/mlrtp_guidebook/fhwahep14046.pdf (Accessed on May 14, 2016)

² 23 CFR 450.216(k)

time horizons (typically about 20 years). Projects are proposed in this stage at the local level, but rarely include design details or specific project impacts. For instance, a business owner will probably not be altered that their property will be subject to eminent domain if a light-rail line is proposed along a corridor adjacent to their property. During programming more specific details of a project are publicized, such as expected daily use of a facility or the alignment on the exact streets it will occupy or expand. Finally, once a project has been programmed for funding, the exact details of a project emerge as it is submitted for final approval to funding agencies and subjected to environmental review. During this stage, advocates can expect to learn the details about the precise location and impacts of a project. The stage of a projects development will affect the way that an advocate needs to approach their participation.

Generic Timeline of Project Development

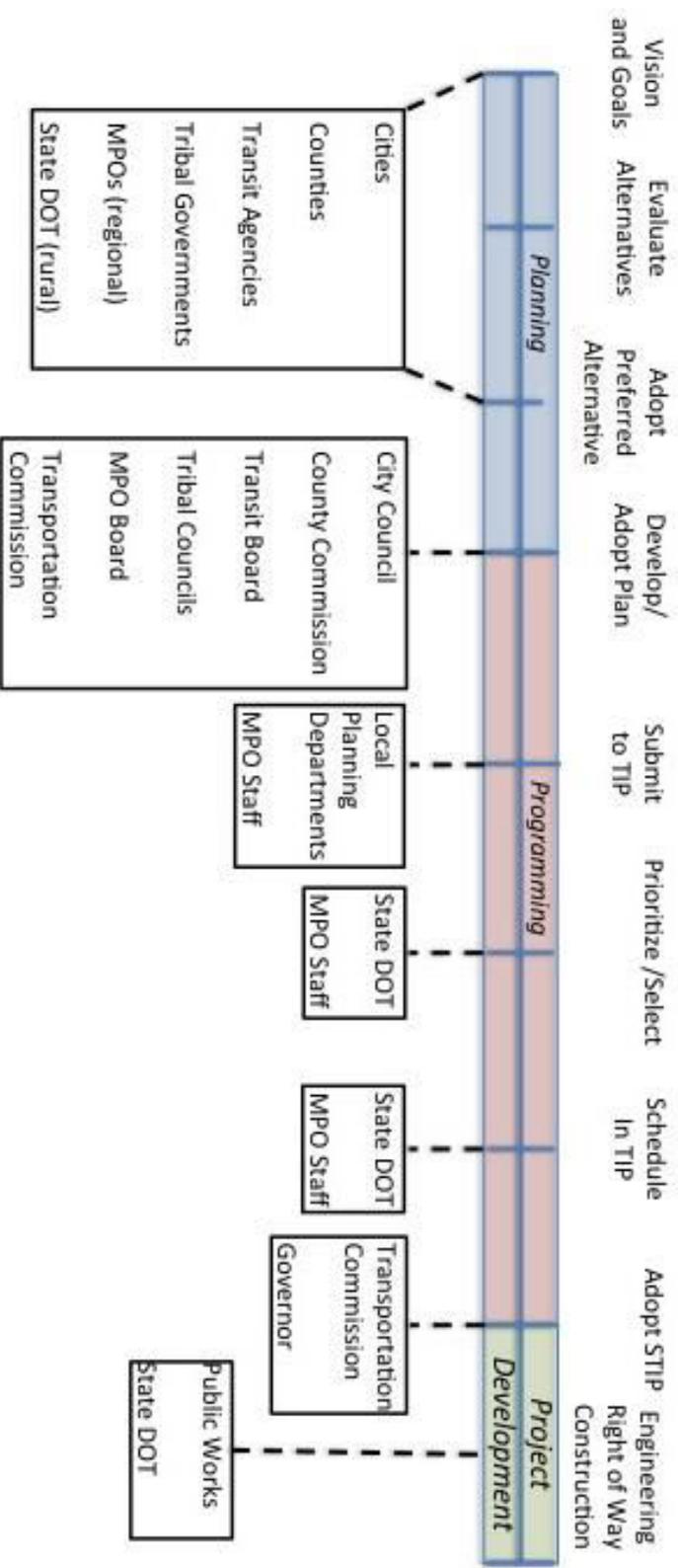


Figure 1. Timeline of Project Development

Public Participation

Before discussing the federal requirements of public participation, it is important to understand the benefits and types of public participation. This context will provide a backdrop to compare the description of each state's public participation process. First, public participation can have many benefits including: empowering the public, improving relations between the government and the public, breaking political gridlock and moving a policy discussion forward, and avoiding litigation costs.³

Public participation, done correctly, can be empowering by providing the public a role in the decisions that affect their lives. Alternatively, public participation can be a tool that government uses to assuage public resistance to a controversial decision.⁴ In other words, public participation is used to legitimize controversial decisions. Another benefit of public participation is that it can be used to decide on controversial political issues and break gridlock among decision makers. Lastly, public participation can avoid future litigation by raising and addressing issues in the planning process so that projects don't need to be challenged later to meet stakeholder's interests. The end of this paper addresses cases where stakeholders resorted to litigation after a failure in the planning process.

³ Renee A. Irvin and John Stansbury, *Citizen Participation in Decision Making: Is It Worth The Effort?*, pg. 3, http://c.ymcdn.com/sites/www.iap2.org/resource/resmgr/imported/Journal_Issue1_Irving.pdf (Accessed May 14, 2016)

⁴ Id. at page 4.

It is important to point out that public participation is not a discrete and well-defined process. Figure 2 depicts a spectrum of opportunities to incorporate public opinion into the policy making process.^{5, 6}

⁵ International Association for Public Participation, The IAP2 Public Participation Spectrum, <https://www.iap2.org.au/resources/public-participation-spectrum> (Accessed on May 14, 2016)

⁶ The rest of this section is based on the spectrum described in Footnote 5.

Public Participation in Practice



Inform	Consult	Involve	Collaborate	Empower
What does the government do?				
Government provides only information but no opportunity to influence process.	Government listens to needs and concerns of public but does not ensure influence	Government works with public in the development of alternatives	Government allows public to develop alternatives and methods for selecting preferred alternative	Government places final decision making authority in the hands of the public
Tools for public participation				
<ul style="list-style-type: none"> Informational materials Information sharing meetings 	<ul style="list-style-type: none"> Public comment Hearings Surveys Focus Groups 	<ul style="list-style-type: none"> Workshops or to develop alternatives Deliberative polling 	<ul style="list-style-type: none"> Participatory decision making Consensus building 	<ul style="list-style-type: none"> Citizen Juries Ballots Delegated decision making

Figure 2. Public Participation Spectrum⁷

⁷ International Association for Public Participation, The IAP2 Public Participation Spectrum, <https://www.iap2.org.au/resources/public-participation-spectrum> (Accessed on May 14, 2016)

The minimal level of participation can be defined as merely informing the public of problem that is being addressed. This includes providing complete and objective information about a decision making process, but does not ask the public for feedback or any role in the decision making process. In practice, informing the public can be done through websites, open houses, and fact sheets.

The opposite end of the spectrum of public involvement could be described as empowerment. This places the final decision making authority into the hands of a public body such as a neighborhood council, or a vote by the public at large. Citizen juries, ballots, and delegated decisions are all examples of empowering the public in the decision making process.

There are a number of degrees between these two ends of the public involvement spectrum including: consulting, involving, and collaborating. Starting with consulting, agencies and planning departments can ask for public feedback, alternative solutions, and recommendations for preferred solutions. This approach focuses both on informing the public and listening to the public while letting them know whether and how their input influenced the decision making process. Examples of consulting the public include public comment, surveys, focus groups, and public meetings.

A more elaborate degree of public participation is involvement. Involvement is more of a continuous and frequent interaction between decision-making bodies and the public. Rather than just asking for recommendations on key or final decision points, like which of the alternatives is preferred, involvement asks the public what their aspirations are throughout the development of alternatives. Deliberative

polling and workshops are tools that policy makers can employ to involve the public in decisions.

Finally, public participation through collaborative planning entails a much more robust engagement with the public in defining the alternatives and the methodology employed in selecting them. In collaborative public decision-making, the public is a partner in the process and has real influence over the decisions that ultimately lead to project planning and development. Collaboration is accomplished through participatory decision-making, consensus building, and citizen advisory committee.

There are trade-offs to each of these levels of public participation and this paper is not designed with the intent to prescribe any one approach towards public participation as the silver bullet to finding needs and solutions within our transportation system. Rather, this spectrum is offered as a context to reflect upon when thinking about what level of engagement is being used in a given planning or programming process as well as offering alternatives to the process offered. Though most public participation processes lean towards the *inform and consult* approach, readers will find more collaborative levels of participation in elements of the following case studies.

Federal Requirements for Public Participation

Title 23

Title 23 of the United States Code specifies the federal requirements of state's and metropolitan planning organizations in their planning and programming processes Transportation planning and funding, and public participation therein, are shaped by federal transportation packages (most recently: MAP-21 and the FAST Act) as well as federal regulations of the Federal Highway Administration (FHWA) and the Federal Transit Administration (FTA). Both nationwide policy and funding for transportation planning and programming start and end with Congress, the FHWA, and the FTA. First, under Title 23, the scope of transportation planning and programming is defined. At the highest level, states are required to develop statewide plans and programs that support: economic vitality, safety, security, accessibility and mobility, the environment, connectivity, efficiency, and preservation of the existing transportation system.⁸ Unfortunately for citizen plaintiffs, these goals are not reviewable in a court and are therefore strictly aspirational rather than enforceable by citizen suit.⁹

Federal law requires that interested parties are provided *reasonable opportunities to comment* on statewide and metropolitan transportation plans and programing.¹⁰ This means that when states, cities, counties or transit agencies are

⁸ 23 CFR 206(a)

⁹ 23 CFR 206(c)

¹⁰ 23 CFR 450.210(a)(1) and 23 CFR 450.316 (a)(1)

spending federal transportation dollars, they must publish plans before they are adopted and take written comments or hold a hearing. This standard is silent as to the level of influence that public comments carry and the mere acceptance of comments is sufficient to satisfy the requirements of public involvement under Title 23. However, federal regulations require states and MPOs to develop and use public involvement plans that incorporate the processes in Table 1.

Table 1. Public Participation Requirements in Transportation Planning.¹¹

Public Participation Requirements in Transportation Planning	
State	MPO
(i) Establish early and continuous public involvement opportunities that provide timely information about transportation issues and decision making processes	(i) Provide adequate public notice of public participation activities and time for public review and comment at key decision points,
(ii) Provide reasonable public access to technical and policy information	(ii) Provide timely notice and reasonable access to information about transportation issues and processes;
(iii) Provide adequate public notice of public involvement activities and time for public review and comment at key decision points	(iii) Employ visualization techniques to describe metropolitan transportation plans and TIPs;
(iv) To the maximum extent practicable, ensure that public meetings are held at convenient and accessible locations and times;	(iv) Make public information (technical information and meeting notices) available in electronically accessible formats
(v) To the maximum extent practicable, use visualization techniques	(v) Hold any public meetings at convenient and accessible locations and times;
(vi) To the maximum extent practicable, make public information available in electronically accessible format and means	(vi) Demonstrate explicit consideration and response to public input received
(vii) Demonstrate explicit consideration and response to public input	(vii) Seek out and consider the needs of those traditionally underserved by existing transportation systems, such as low-income and minority households,
(viii) Include a process for seeking out and considering the needs of those traditionally underserved by existing transportation systems, such as low-income and minority households	(viii) Provide an additional opportunity for public comment, if the final metropolitan transportation plan or TIP differs significantly from the version that was made available for public comment by the MPO and raises new material issues which interested parties could not reasonably have foreseen
(ix) Provide for the periodic review of the effectiveness of the public involvement process to ensure that the process provides full and open access to all interested parties	(ix) Coordinate with the statewide transportation planning public involvement process
	(x) Periodically review the effectiveness of the procedures and strategies contained in the participation plan to ensure a full and open participation process

¹¹ 23 CFR 450.210(a)(1) and 23 CFR 450.316 (a)(1)

If a state or MPO does not describe or use these processes, an interested party or transportation advocacy group may have standing in federal court to challenge the process. Challenging a plan or process could lead an agency to reconsider public input into a plan and at a minimum delay its final adoption. However, no cases alleging failure to meet statewide or metropolitan public involvement requirements have been brought since the adoption of these requirements in 2007.

Additional Federal laws

In addition to the requirements of Title 23 statutes and regulations, several other federal laws apply to the transportation-funding context and can be useful hooks for legal arguments challenging transportation decisions. First, the Administrative Procedures Act (APA) binds federal agencies to follow certain methods before taking final actions. Borne out of concerns for due process, the APA requires that agencies allow for adequate notice, timeliness, and standards of review for agency rulemaking and orders. Agencies have been allotted wide discretion in their interpretation of statutes they are responsible for implementing. Agency decisions are given deference by courts unless it is shown that their actions were “arbitrary and capricious” or “not in accordance with law.”¹² This means that challenges under the APA must be for flagrant violations of clear statutes (such as not following one of the public participation requirements in Table 1) or unreasonable interpretations of vague statutes.

¹² Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

Another important federal law for transportation planning and programming, the National Environmental Policy Act (NEPA) requires that federal agencies consider the impacts and alternatives of their actions on the environment.¹³ NEPA, like the APA, is also strictly procedural in that it does not demand certain protections of the environment, but rather that agencies adequately consider the environmental impacts of an action and a reasonable range of alternatives. The “environment” under NEPA is broader than the natural environment and also includes the human and built environment for purposes of NEPA. Planning and programming activities are not reviewable government actions under NEPA, but NEPA is important for the actual funding of projects after planning and programming has been completed.¹⁴

Federal Laws in a State Context

In the federal system, Congress and the FHWA and FTA allow states great flexibility in both how they plan and program and how they provide public participation activities. Some states prioritize central control by a statewide transportation commission while others leave more authority over project development to MPOs. Even within MPOs, some make decisions for the region while others allocate resources to local governments to develop and prioritize projects. State’s also differ significantly in the ways that they allow the public to use and challenge administrative processes to advance rules or policies under state

¹³ The Sierra Club has a great resource on NEPA and public involvement. Sierra Club, The Road to Better Transportation Projects: Public Involvement and the NEPA Process, http://vault.sierraclub.org/sprawl/nepa/sprawl_report.pdf (Accessed June 4, 2016)

¹⁴ 23 CFR 450.222

administrative procedures acts. Finally, states also have their own statutory law that can be the source of greatest empowerment to advocates in proposing or challenging transportation projects. All of these factors relevant to transportation advocacy are unique to each state. The following case studies for Oregon and California provide examples of states that differ in their governance structure and the substantive state law under which citizens can influence transportation decisions.

Oregon

The following sections describe the actors involved in Oregon's transportation funding process. It is ordered according to the agencies geographic and governmental priority - state, regional, local. Local agencies are described in more detail because they are responsible for some of the most important tasks in the project selection process.

Actors in Oregon's Planning and Programming Process

Oregon's transportation funding process is controlled by the following entities:

- Oregon Transportation Commission
- Oregon Department of Transportation
- Department of Land Conservation and Development
- Land Use Board of Appeals
- Area Commissions on Transportation
- Metropolitan Planning Organizations
- County Governments
- City Governments
- Public Transportation Agencies

The following subsections describe the role of each of these actors. For the purposes of this paper, discussion of public involvement with the legislature and governor is omitted because it is political in nature and not subject to legal standards. Keep in mind that significant opportunities exist to influence transportation policy at the political level, even though they are not addressed in this paper.

Oregon Transportation Commission

The Oregon Transportation Commission (OTC) is a five-member board appointed by the governor to establish transportation policy in Oregon. The OTC approves statewide and modal plans as well as State Transportation Improvement Programs (STIPs) described below. Therefore, the OTC is responsible for setting the highest level policy in the state as well as the final approval of transportation projects that include federal dollars. The Oregon Department of Transportation is the agency responsible for carrying out the policy of the OTC.¹⁵

Oregon Department of Transportation

The Oregon Department of Transportation (ODOT) implements transportation policy established by the OTC. Additionally, ODOT maintains and manages highways, roads, bridges, railways, public transportation, safety programs driver and vehicle licensing, and motor carrier regulation.¹⁶

Most importantly for this paper, ODOT develops the statewide and modal plans and Statewide Transportation Improvement Program (described below) that bring projects from idea to reality.¹⁷ While ODOT does not have final approval on plans or programs, it has the greatest influence on the development of statewide plans and programs. ODOT has regions that are responsible for project selection and

¹⁵ Oregon Department of Transportation, Oregon Transportation Commission Page, https://www.oregon.gov/ODOT/COMM/Pages/otc_main.aspx (last visit May 14, 2016)

¹⁶ Oregon Department of Transportation, About Us page, http://www.oregon.gov/ODOT/Pages/about_us.aspx (last visit May 14, 2016).

¹⁷ Oregon Department of Transportation, Transportation Development -Planning page, <http://www.oregon.gov/ODOT/TD/TP/Pages/index.aspx> (last visit May 14, 2016).

the public involvement processes.¹⁸ If an advocate wants to shape high-level statewide policy, it is critical to engage with ODOT's planning and programming processes described below in order to shape OTC's ultimate choices.

Department of Land Conservation and Development / Land Conservation and Development Commission

The Department of Land Conservation and Development (DLCD) is responsible for overseeing local planning process and ensuring that local plans meet the requirements of Oregon's land use system established by the Land Conservation and Development Commission (LCDC).¹⁹ Even though transportation plans are not traditional "land use" plans, DLCD and LCDC have authority over transportation plans that have a "substantial impact" on land use.²⁰ Goals in Oregon's land use system are binding and enforceable administrative rules that determine how cities and counties are allowed to plan and grow. Goal 12 of Oregon's land use system is to create a safe, convenient, and economic transportation system.²¹ Plans are "acknowledged" through a formal process by Land Conservation and Development Commission and bind localities to follow their comprehensive plan.²² The Transportation Planning Rule and its impact on local planning is discussed in greater detail below.

¹⁸ Oregon Department of Transportation, STIP page, <http://www.oregon.gov/ODOT/TD/STIP/Pages/about.aspx> (last visit May 14, 2016)

¹⁹ Department of Land Conservation and Development, Goals page, <https://www.oregon.gov/LCD/Pages/goals.aspx> (last visit May 14, 2016)

²⁰ *Citizens for Better Transit vs. Metropolitan Service District*, 15 Or LUBA 623, at 2, (1987).

²¹ OAR 660-015-0000(12)

²² OAR 600-003-0005

Land Use Board of Appeals

The Land Use Board of Appeals (LUBA) was created in 1979 largely because Oregon's land use law was technical and hard for circuit courts to interpret. Inconsistent decisions across the state led the Legislature to create LUBA. LUBA has exclusive jurisdiction over all government land use decisions, both legislative (like a zoning change) and quasi-judicial (like a denial of a variance permit).²³ Once a locality has made its final decision regarding a land use issue, advocates can challenge that decision by appealing it to LUBA.

Metropolitan Planning Organizations

Metropolitan Planning Organizations (MPOs), such as Lane Council of Governments, are established under federal law for urban areas with a population greater than 50,000. There are eight MPOs in Oregon:

- Albany
- Bend Area
- Corvallis Area
- Eugene-Springfield
- Middle Rogue
- Portland
- Rogue Valley
- Salem-Keizer

MPOs are responsible for Regional Transportation Plans (RTPs) and coordinating the funding in Metropolitan Transportation Improvement Programs (MTIPs).²⁴ MTIPs include projects that are derived from Capital Improvement

²³ Land Use Board of Appeals website, <http://www.oregon.gov/luba/Pages/index.aspx> (accessed on May 14, 2016)

²⁴ Lane Council of Governments, Transportation Planning page, <http://www.lcog.org/564/Regional-Transportation-Planning> (accessed on May 14, 2016)

Programs (CIPs) of local jurisdictions as well as projects in the RTP.²⁵ These projects are local (within the boundaries of only one city or county) or are regional (connecting more than one locality), but not of statewide significance. MTIPs are assembled by each MPO in the state and then ultimately added to the STIP and approved by the OTC.

Area Commissions on Transportation

Area Commissions on Transportation (ACTs) are chartered by the OTC and advise the OTC on regional transportation issues with a focus on issues that have a statewide impact.²⁶ It's easy to confuse an ACT with an MPO since they are both regional. The main difference is that ACTs recommend funding decisions for funds that ODOT and the OTC directly control and have statewide importance while MPOs select projects that are more urban and local in nature. ACTs are composed of local elected officials and stakeholders and issue recommendations but not final decisions.²⁷ The ACTs are regional and cover all of Oregon. Figure 3 is a map that identifies the boundaries of Oregon's ACTs:

²⁵ Lane Council of Governments, Metropolitan Transportation Improvement Program page, <http://www.lcog.org/371/Metropolitan-Transportation-Improvement-> (accessed on May 14, 2016).

²⁶ Oregon Department of Transportation, Area Commissions on Transportation, https://www.oregon.gov/ODOT/COMM/Pages/act_main.aspx (accessed May 15, 2016).

²⁷ Oregon Transportation Commission, Policy on Formation and Operation of Area Commissions on Transportation, pages 3 & 4 <http://www.oregon.gov/ODOT/COMM/docs/acts/ACTPolicy0603.pdf> (Accessed May 14th, 2016)

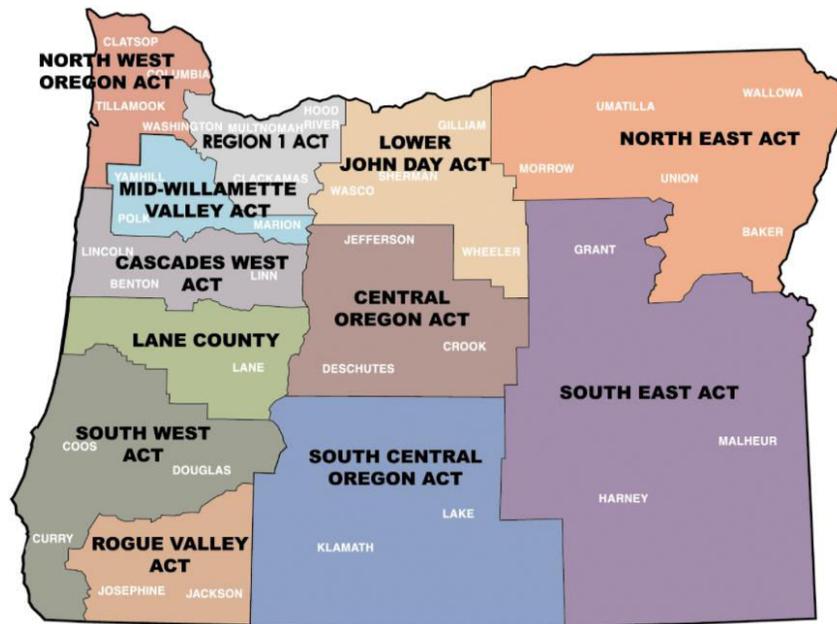


Figure 3. Map of ACTs in Oregon

ACTs are responsible for scheduling funded transportation projects through a selection and prioritization process described below. The OTC determines funding levels for each ACT and then the ACTs recommend a list of projects that have statewide significance.²⁸

Counties, Cities, and Public Transportation Agencies

Finally, local governments play one of the most important roles in transportation decision-making. Local governments take citizen input and technical assessments to develop Transportation System Plans (TSP) as part of their long range planning process required by Oregon land use law.²⁹ TSPs are incorporated into comprehensive plans and are ultimately approved under Goal 12 of Oregon’s land use system. Finally, on the funding side of project development, localities create

²⁸ Lane Council of Governments, Lane Area Commission on Transportation page, <http://www.lcog.org/551/Lane-Area-Commission-on-Transportation-A> (Accessed May 14, 2016).

²⁹ City of Eugene, Transportation System Plan, <http://www.centallanertsp.org/EugeneTSP> (Accessed on May 14, 2016).

Capital Improvement Programs (CIPs) that include the list of projects that are eligible for local, state, or federal funding.

Oregon's Planning Process

Statewide Long Range Plan

Oregon's statewide transportation plan is called the Oregon Transportation Plan (OTP). It is intended to provide a broad vision for the future of Oregon's transportation system. The OTP offers high-level goals, challenges, opportunities, strategies, and outcomes that should guide transportation operators in Oregon. Project applications from local governments use language established in this plan to justify the need for their project. In addition, the goals of the OTP can be used to support arguments if advocates are arguing for project selection criteria of MPOs and ACTs.

Regional and local plans are required comply with the TPR (described below) and be consistent with the goals and strategies of the OTP.³⁰ LCDC (and LUBA) determines if a transportation plan complies with the TPR but there is no formal process to determine if a plan is consistent with the OTP.

Getting Involved in the Oregon Transportation Plan

Policy 7.3 of the OTP is Public Involvement and Consultation. The policy indicates ODOT's intent to involve "Oregonians to the fullest practical extent in

³⁰ 23 CFR 450.208 & OAR 660-012-0016. See also, Oregon Department of Transportation, Transportation System Planning Guidelines 2008, page 16, <http://www.oregon.gov/ODOT/TD/TP/Plans/Guidelines.pdf> (Accessed May 14, 2016)

transportation planning and implementation.”³¹ The strategies to implement this policy place ODOT in a facilitator role in engaging with the public, underserved communities, ACTs, MPOs, city and county governments in the planning and programming process.

During updates to the OTP, ODOT will hold public meetings where citizen input can be heard. Additionally, the OTC must adopt the plan before it is implemented or before federal funds can be received. OTC meetings allow for public comment at their meetings. There are no requirements that force ODOT or the OTC to incorporate public input into final plans, and there is no cause of action for disagreeing with the final OTP. Plans are not rules or cases under Oregon administrative law, but they do serve as broad policy statements that set the priorities for planning at the local level.

Benefits from engaging in planning at the state level

- Influence high level strategies and framing of language used to justify transportation projects
- Create flexibility for differences between urban and rural areas
- May not change individual projects, but has potential to influence investment strategies

Local and Regional Long Range Plans

Each MPO is required to develop a 20-year Long Range Transportation Plan under federal law.³² Oregon land use law also requires transportation to be a component of locality’s comprehensive plan.³³ Oregon law allows for the

³¹ Oregon Department of Transportation, Oregon Transportation Plan, <https://www.oregon.gov/ODOT/TD/TP/docs/otp/otpv01.pdf> (Accessed on May 14, 2016).

³² 23 CFR 450.322

³³ OAR 660-012-0015(2 & 3)

coordination of comprehensive planning among MPOs and cities and counties to avoid redundancy.³⁴ Under federal regulation,³⁵ the plan is required to include:

- Projected demand for transportation (defined in OAR 660-012-0030)
- Existing and proposed facilities
- Strategies to improve performance of existing facilities
- Assessment of capital investment strategies to preserve the transportation system
- Design concept and scope sufficient to develop cost estimates
- Environmental mitigation strategies for impacts from the plan
- Pedestrian, walkway and bicycle activities
- Transit enhancements
- A financial plan that demonstrates how the plan can be implemented

These plans are a critically important for a project to transition from an idea to a reality. For a project to get funded through the programming process described below, it must be in a local long-range plan.

The next section begins a discussion of the importance of land use law for transportation advocates in Oregon. Oregon has one of the most restrictive land use laws in the country and it can be used to guide development as well as the design and location of infrastructure. The land use system requires that local governments must plan for a 20-year supply of land and ensure that their infrastructure is adequate to support that growth. As mentioned above, local governments land use decisions are overseen first by the DLCD and LCDC. Advocates can challenge these decisions at LUBA. Below, this paper reviews the one of the most important parts of Oregon land use law to challenge transportation decisions.

³⁴ OAR 660-012-0016

³⁵ 23 CFR 450.322(f)(1-10)

State Law Governing Local and Regional Planning

Senate Bill 100 established Oregon’s land use system in 1973 and required each city and county to adopt comprehensive land use plans. The bill also established DLCD and LCDC (described above). LCDC’s first task was to create a set of statewide goals that should guide each locality’s comprehensive planning process. The first of these goals is citizen involvement.³⁶ That means that each locality is required to provide some sort of public involvement in its land use process.

Goal 12 of Oregon’s land use system requires a transportation element in all comprehensive plans. The goal is designed to ensure that all plans provide for the development of a safe, convenient, and economic transportation system. Through rulemaking, the LCDC has adopted and amended a Transportation Planning Rule (TPR) that describes the requirements of Goal 12 in Comprehensive Plans.³⁷

The TPR creates a framework for cities and counties to consider plans in transportation and land use contemporaneously.³⁸ Under this framework, the TPR recognizes the differences between rural and urban communities and generally requires more detail and transportation options from more urbanized areas.³⁹

The rule has many components that are worth reviewing when looking at a locality’s transportation system plan, but a comprehensive review of this rule is outside the scope of this paper. However, two interesting hooks that may be relevant in challenges to transportation plans arise under OAR 660-012-0035. That rule reads in part: “The transportation system shall minimize adverse economic,

³⁶ OAR 660-015-0000(1)

³⁷ OAR 660-012-0000

³⁸ OAR 660-012-0000(1)

³⁹ OAR 660-012-0000(3)

social, environmental and energy consequences.”⁴⁰ The use of “shall minimize” is compelling language that a court will take seriously. Another instance of strong language in Goal 12 is “The transportation system shall avoid principal reliance on any one mode of transportation by increasing transportation choices to reduce principal reliance on the automobile.”⁴¹ For advocates who are seeking to increase transportation options, one could hardly hope for a clearer directive. In practice however, these rules exist in a context of limited resources and competing interests. The TPR is perhaps most effective not at initiating new multi-modal projects, but in preventing projects contrary to Oregon’s land use principles. The last section of this paper discusses one such case.

Getting involved in local and regional planning

Each locality has its own decision public involvement process. Advocates will want to check their city’s website or contact the local planning office to determine when plans are available, public hearings are held, and how to submit comments. Be aware that in urban areas with populations above 50,000 there are both city and MPO plans to become familiar with. In addition to commenting on plans, many cities have transportation (often called “Bicycle and Pedestrian”) advisory committees made up of volunteer citizens. These groups are directly responsible for making recommendations to city councils or transportation planning departments.

Benefits from engaging in planning at the local level

- Influence projects in your neighborhood

⁴⁰ OAR 660-012-0035(3)(c)

⁴¹ OAR 660-012-0035(3)(e)

- Shape development of your city
- Create a record of decision that will strengthen case on appeal at LUBA

Oregon's Programming Process

Once a project has been planned and adopted in a transportation plan, programming is needed to fund it. In contrast to the planning process that starts from national goals, programming happens in a process that is more bottom up. Generally, local elected officials and planners work to prioritize projects that most efficiently meet the needs of a community. The state works more as an intermediary in this process and functions and coordinates funding regionally. The following two sections describe the statewide and metropolitan programming aspects of transportation projects.

Statewide Transportation Improvement Program

Federal law requires that state submit Statewide Transportation Improvement Programs (STIP) that list the projects that are funded by federal dollars. CFR 450.000. Each project must be consistent state long-range transportation plans as well as local comprehensive plan.⁴² Therefore, each project must be first adopted as part of a long-range transportation plan before it can be eligible for federal funds. The STIP is composed of all projects listed in each metropolitan transportation improvement program (described below) as well as all non-metropolitan (rural) projects that rely on federal funding. Each year, the OTC decides what level of funding each ODOT region receives for each program (e.g. the

⁴² 23 CFR 450.216(k)

Preservation program).⁴³ ACTs and MPOs then take their allocation of funds and create a list of recommended projects to submit to the OTC. The OTC is not required to follow the recommendations of ACTs but, in practice, they almost always do. Once ODOT has assembled the final list of projects from all of the MPOs and the projects of rural areas, a STIP is published in draft form before final adoption for a 45-day period of public review.⁴⁴ Finally, after ODOT considers comments from public review, the OTC adopts the final STIP and submits it the FHWA and the FTA for final approval.

Metropolitan Transportation Improvement Program

Federal law also requires that MPOs complete an agreed to list of transportation projects eligible for federal funding.⁴⁵ The MTIP is composed of project drawn from local long range plans and capital improvement programs. Each MPO has different processes for selecting projects. As an example, the Lane Council of Governments selects projects that are in the capital improvement programs of each of the cities within the MPO. These projects meet needs identified in the regional transportation plan.

Getting involved in programming

Programming is the step of a projects development that moves it from idea to reality. Because programming is only possible once a project is in a plan and a capital improvement program, keep in mind those preliminary steps before

⁴³ Oregon Department of Transportation, STIP User Guide, page 7, <http://www.oregon.gov/ODOT/TD/STIP/documents/stipusers.pdf> (Accessed on May 14, 2016).

⁴⁴ Lane Council of Governments, How a project gets in the STIP, <http://www.lcog.org/documentcenter/view/848> (Accessed on May 14, 2016)

⁴⁵ 23 CFR 450.324.

advocating for a project that hasn't become ripe for programming. Those preliminary steps do not guarantee that a project will get programmed and funded, but they are critical.

Benefits from engaging in programming

- Ensure that your city follows through on its plans
- Select the projects that are most cost effective
- Find political support from coalitions that support the same projects

Opportunities to impact future rules under the Oregon APA

Rules issued by regulatory agencies have an enormous influence on the way that transportation planning is done. If advocates are arguing for transportation solutions that appear to violate administrative rules, it might be in their best interest to look at what administrative rules need changed to accommodate your objective. Additionally, an advocate may see a proposed rule and think that it will make transportation projects they support more challenging to implement. This section of the paper discusses the ways in which advocates can initiate rulemaking, inform rulemaking, or delay or defeat a rule.

The Oregon Administrative Procedures Act (APA) controls the administrative rulemaking process. Provisions of the APA control where and when the public can influence changes in administrative rules of ODOT and DLCD described above that have an impact on transportation planning and programming. The APA states "it is the policy of this state that whenever possible the public be involved in the development of public policy by agencies and in the drafting of rules." ORS

183.333(1). The following analysis describes points in the rulemaking process that could initiate rulemaking or delay the effective date of a rule.

Petition for Rulemaking

Interested persons are permitted to petition an agency to adopt, amend, or repeal any rule.⁴⁶ An advocate may be interested in petitioning for a change in an agency's rules if they have identified a barrier in existing rules or a opportunity to achieve their goals in the adoption or amendment of a new rule. Petitioners submit the language they want to see in the new rule and describe its effect generally rather than just the effect it has on the petitioner as an individual.⁴⁷ Agencies are required to either deny the petition or begin rulemaking within 90 days of the petition.⁴⁸

Notice

ORS 183.333(1) states that the Legislature "encourages agencies to seek public input to the maximum extent possible before giving notice of intent to adopt a rule." ODOT and DLCDC must provide separate notices to the Legislative Assembly, people on the ODOT or DLCDC's mailing list, and the Secretary of State's Bulletin, and anyone else who requires notice under ODOT's own rules.⁴⁹ Rules cannot take effect before a specified time for each notice.⁵⁰ A notice must be sent to members of the legislature [defined in ORS 183.355(15)] 49 days before the effective date of any

⁴⁶ ORS 183.390

⁴⁷ Ellen Rosenblum, Oregon's Attorney General's Administrative Law Manual, pages 52-53, 2014.

⁴⁸ ORS 183.390(1)

⁴⁹ ORS 183.355(1)

⁵⁰ Id.

rule.⁵¹ Notice must be sent to persons on the ODOT or DLCD mailing lists [mailing list procedure is established in ORS 183.335(8)] at least 28 days before the effective date of the rule.⁵² Finally, notice must be published in the Secretary of State's Bulletin (specified in ORS 183.360) at least 21 days before the effective date.⁵³ Each notice will start a time frame within which ODOT cannot make a rule effective. Failure to provide any of these three notices can be used to delay the effective date until all notice periods have expired.

Hearing

ODOT is required to provide a reasonable opportunity for public comment.⁵⁴ Upon request, ODOT or DLCD must hold oral hearings to allow for submissions of comments and data.⁵⁵ The notice period is the typical amount of time that an agency takes to hold a hearing and review public comment. However, in particularly complicated rulemaking, a *reasonable* amount of time must be taken for the ODOT or DLCD to review public comment. Advocates could argue to ODOT or DLCD that a rule they oppose is sufficiently complicated to warrant an extended review of public comment. In doing so, it would be beneficial to bring as detailed of an analysis as possible to enter into the Record. Additionally, it would support an advocate's case to have as many interested persons as possible to comment or attend the public hearing.

⁵¹ ORS 183.355(1)(d)

⁵² ORS 183.355(1)(c)

⁵³ ORS 183.355(b)

⁵⁴ ORS 183.335(3)(a)

⁵⁵ Id.

A hearing can be requested at least 10 persons affected by the rule, or associations with at least 10 members who will likely be affected by the rule. The hearing must have its own notice separate from the notice for rulemaking 21 days before the hearing.⁵⁶ A request based on ORS 183.335(3)(a) can delay the effective date at least 21 days and up to 90 days. ORS 183.355(4)

Fiscal impact

If an agency does not establish an advisory committee, 10 or more persons (or an organization representing 10 members likely to be affected by the rule) can object to ODOT or DLCD's statement of fiscal impact.⁵⁷ This objection must be made within 14 days of any of the rulemaking notices. If ODOT or DLCD determines that they need to consider fiscal impact, they are required to extend the period of for public submission of data by at least 20 days. Assuming advocates waited until the last day (the 14th day after the last notice to the Secretary of State) to file this objection, the effective date could be delayed by at least 13 days (20 days less the 7 days left in the notice period).⁵⁸

Post-effective date

In some instances (e.g. before any new plans have been created under an adopted rule), advocates can still have time to challenge the rule after its effective date, but before it has any real impact. To do this, a person affected by the rule can petition Legislative Counsel to review that rule to ensure that it falls within the

⁵⁶ ORS 183.355(3)(a)

⁵⁷ ORS 183.333(5)

⁵⁸ Id.

scope of the rule's enabling legislation and is otherwise constitutional. ORS 183.720(2). If Legislative Counsel determines that the rule is not within the scope of enabling legislation or is unconstitutional, ODOT or DLCDC will have 30 days to respond while stating whether it intends to amend, repeal, or take other action with the rule and attempt to resolve the issue.⁵⁹ If the issue cannot be resolved between ODOT or DLCDC and Legislative Counsel, it will be sent to an interim committee of the Legislative Assembly to be resolved. There are a variety of variables here that affect how long advocates could delay the implementation of the rule. If Legislative Counsel reviews the rule with a negative determination and ODOT or DLCDC decides to suspend implementation, advocates may be able to delay the implementation until the next legislative session, where advocates can lobby for statutes that resolve the conflict in a way that satisfies an advocate's objective.

Discussion

As a general rule, it is better to get involved in the transportation planning process as early as possible if an advocate wishes to have the most influence. Once projects are in local TSPs, they are eligible for funding and compete only against other projects in the TSP for funding. Projects that are not proposed and adopted in the planning process will not be funded in the programming process. Therefore, it is critically important to participate in the public meetings and comment periods in the development of local transportation plans if advocates are concerned (either for or against) about a project's eligibility for funding. To do this, look at the websites of

⁵⁹ ORS 183.772

the jurisdictions advocates are interested in and get in touch with local planners in public works and planning departments to identify opportunities for public involvement.

There are several local bodies, in addition to planning and public works departments that offer a forum of input into local transportation plans. These include planning commissions, bicycle and pedestrian advisory councils, city and county budget committees, and technical working groups. All of these groups are important to engage with at the earliest stages. Planning Commissions and advisory councils usually serve in an advisory capacity to city councils, and county or state commissions. City councils, and county and state commissions serve as the body that adopts plans and have final authority over their contents.

Do not overlook budget committees, planning commissions, and city councils. These entities are the gateways through which transportation projects are added to capital improvement programs and are the earliest and most influential decision makers in determining which projects are funded and which gather dust on a shelf.

Once projects have made their way through the most local of planning and programming processes (i.e. once they are in adopted plans and recommended to the state for funding) many are referred to the MPOs and ACTs to compete against other planned projects in a region. Other projects compete at the state level (such as through the Enhance program of ODOT) and are selected by OTC. It is at these ACT, MPO, and OTC meetings where advocates can lobby decisions makers to support or oppose a project. Keep in mind that projects that have made it to this point already reflect the thinking of local government assessments about the community's values

and needs. Therefore, if advocates oppose a project that is at this stage, it might be a stronger strategy to argue that there are other more pressing priorities. As always, broad coalitions and many voices make the case for a project more compelling.

Using Litigation When Public Participation Fails

Sometimes, no amount of participation will get an advocate the outcome they desire. There is a sense in which challenging planning decisions in court provide advocates an “empowering” or at least “collaborative” approach to public participation described above. Even though the planning agencies themselves are failing to meet a portion of the public’s interests in cases that are challenged, the government as a whole is doing more than mere informing or consulting when the law allows advocates to challenge decisions in court. Here, the court is a part of the public participation process for advocates who have standing to challenge decisions.

Fortunately for people Oregon, the land use system provides strong hooks that can convince courts to compel cities and counties to take the actions that an advocate may want. This happened, for example, in *1000 Friends of Oregon v. Washington County*⁶⁰ when Metro, the regional government of Portland, proposed a “Western Bypass” freeway. This freeway would have cut northwest from I-5 near Tualatin through farmland and suburbs to Hillsboro. Metro adopted the “Southwest Corridor Study” that included the recommendation for building Western Bypass in the regional transportation plan.⁶¹ Metro entered into an agreement with

⁶⁰ *1000 Friends of Oregon v. Washington County and Metropolitan Service District*, 17 Or LUBA 671, (1989).

⁶¹ *Id.* at 673.

Washington County permitting Washington County to assume responsibility for the land use process and find consistency with the statewide planning goals.⁶² Then Washington County adopted two ordinances that amended the County's comprehensive plan, rural and natural resources plan, and transportation plan.⁶³

1000 Friends of Oregon (1000 Friends) challenged those amendments because Washington County had failed to find consistency with the statewide land use goals.⁶⁴ The county argued that the amendments to their transportation plan were not a final land use decision and did not have any legal effect. Therefore, the County argued, the amendments were not subject to review under the statewide planning goals.⁶⁵ The court agreed with 1000 Friends, however, and decided that findings for goal compliance are necessary before the adoption of plan amendments.⁶⁶ This judgment was based on the language in the plan amendments that could be read to mean that the Western Bypass was the preferred (and selected) solution to Washington County's needs.⁶⁷

A lesson can be taken from this case: LUBA and the goals of Oregon's land use system have real teeth. This project was ultimately shelved (it's still alive in some sense) because the county would have a difficult time finding that this proposed freeway would fall under any exceptions that would allow it to be built through rural land. In other words the advocates at 1000 Friends found an inconsistency

⁶² Id. at 676

⁶³ Id. at 677

⁶⁴ Under *Ludwich v. Yamhill county*, 72 Or App 224, 230-231, (1985), comprehensive plans amendments must comply with statewide goals.

⁶⁵ Id at 683-684.

⁶⁶ Id at 690

⁶⁷ Id. at 687

between a proposed project and the land use goals of Oregon to stop (or at least delay) a freeway from being built.

Summary of Oregon

The following bullets highlight the most important findings from this discussion of advocacy in Oregon transportation planning:

- Oregon's OTC relies on recommendations from ACTs and MPOs, but retains the centralized decision making authority to override local and regional processes.
- In practice, the OTC usually follows the recommendation of ACTs and MPOs, so getting involved early when transportation needs and projects are identified at the local and regional levels.
- The goals and rules that implement Oregon's land use laws are the strongest hooks of state law that can be used to challenge transportation decisions.
- Oregon's Land use laws allow for challenging decisions that are inconsistent with the purpose of preserving farm and forest land.
- The TPR promotes the implementation of a multimodal (not car dependent) transportation system to the maximum extent practicable.
- The laws and goals of the land use system are enforceable in court.
- City councils or county commissions, the Land Use Board of Appeals and the Land Conservation and Development Commission are the most important organizations to appeal to if the issue an advocate is challenging is related to land use.

California

The following sections describe the actors involved in California's transportation funding process. It is ordered according to the agencies geographic and governmental priority - state, regional, local. Local agencies are responsible for some of the most important tasks in the project selection process. California is a vast and complex state and some of these jurisdictions overlap and some do not. For example, some MPOs are also RTPAs (more on these organizations below) and in other cases county governments are RTPAs. One would have to consult with their local governments to determine what actors are involved in a given context.

Note that the California State Transportation Agency (CalSTA) is not addressed in this overview. That is because CalSTA is a new agency (created in 2013) created within the governor's office to manage statewide transportation policy to group together all state level transportation agencies under one larger agency. Caltrans is now an agency within CalSTA and is the only statewide level agency that deals with transportation planning and programming.

Actors in California's Planning and Programming Process

California's transportation funding process is controlled by the following entities:

- California Transportation Commission
- California Department of Transportation (Caltrans)
- Metropolitan Planning Organizations
- Regional Transportation Planning Organizations
- County Governments
- City Governments

- Public Transportation Agencies

For the purposes of this paper, discussion of public involvement with the legislature and governor is kept to a minimum. Keep in mind that significant opportunities exist to influence transportation policy that each level.

California Transportation Commission

The California Transportation Commission (CTC) is composed of 11 members. Nine of those members are appointed by the governor, one by the Senate Rules Committee, and one by the Speaker of the Assembly. The CTC allocated funds for highway, passenger rail, and transit throughout California. It does this through approving statewide plans developed by Caltrans (described below) as well as approving Regional Transportation Improvement Programs, an Inter-regional Transportation Improvement Program and a STIP. It also is responsible for establishing policy direction on transportation in California as well as informing the legislative process related to transportation bills.⁶⁸

California Department of Transportation

The California Department of Transportation (Caltrans) owns and operates the California transportation system. Caltrans is responsible for planning and designing, projects that are recommended to the CTC for approval and funding.⁶⁹ The California Transportation Plan is developed by Caltrans and establishes goals for the statewide system and influences the development of regional and local plans.

⁶⁸ California Transportation Commission, Home page, <http://www.catc.ca.gov> (Accessed on May 14, 2016)

⁶⁹ Caltrans, 2015 California STIP, pg 4, http://www.dot.ca.gov/hq/transprog/federal/fedfiles/2015_finalfstip/3-2015-fstip_sec1_intro_rev.pdf (Accessed on May 14, 2016)

MPOs receive guidance from Caltrans (approved by CTC) in the development of their Regional Transportation Plans.⁷⁰ The Interregional Transportation Strategic Plans (ITSP) is developed by Caltrans for non-metropolitan areas to recommend projects and programs to the CTC. The ITSP accounts for 25% of California's STIP funding (mandated by SB 45) while the remaining 75% is planned by MPOs and RTPAs.

Metropolitan Planning Organizations

Metropolitan Planning Organizations (MPOs), such as the Metropolitan Transportation Commission of the Bay Area, are established under federal law for urban areas with a population greater than 50,000. MPOs are responsible for Regional Transportation Plans (RTPs) and coordinating the funding in Regional Transportation Improvement Programs (RTIPs). RTIPs include projects that are derived from Capital Improvement Programs (CIPs) of local jurisdictions as well as projects in the RTP. A map of all 18 California MPOs in Figure 4 below.

Regional Transportation Planning Associations

Regional Transportation Planning Associations are created under state law to develop regional transportation plans and transportation improvement programs.⁷¹ Their responsibilities overlap significantly with MPOs in areas where both are present. In areas where they do overlap, some RTPAs/MPOs are the same entity. For example, Metropolitan Transportation Commission is both the MPO and

⁷⁰ California Transportation Commission, 2010 Regional Transportation Plan Guidelines, http://www.dot.ca.gov/hq/tpp/offices/orip/rtp/index_files/2010%20RTPGuidelines_Jan2011_Technical_Change.pdf (Accessed on May 14, 2016)

⁷¹ California Government Code § 29532

the RTPA for the Bay Area. The difference is that RTPAs carry out state policy, while MPOs handle federal policy at the regional level. Another difference is that MPOs only occur in urban areas (with a population of over 50,000) whereas RTPAs exist in rural areas and urban areas.⁷² The location of the project or plan in question will determine which MPO and/or RTPA has authority.

⁷² Caltrans, RTP Evaluation Report Version 2.1, http://www.dot.ca.gov/hq/tpp/publications_files/Chapters_1_3.pdf (Accessed on May 14, 2016)

CALIFORNIA
Metropolitan Planning Organizations (MPOs)
and
Regional Transportation Planning Agencies (RTPAs)

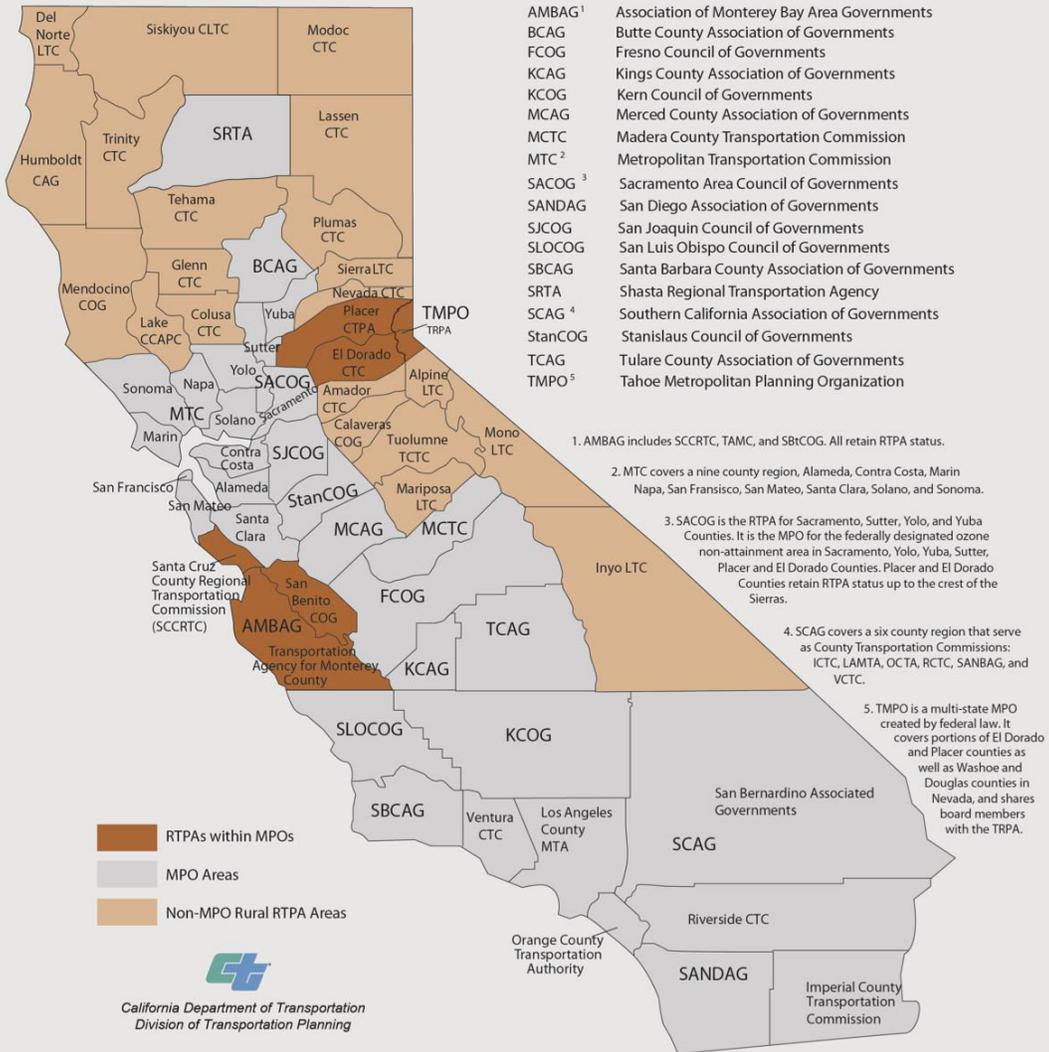


Figure 4. Map of California's MPOs and RTPAs

Congestion Management Agencies

California's proposition 111 in 1990 created Congestion Management Agencies (CMAs) to administer funds raised from the proposition and Congestion Management Programs required under 23 CFR 450.320. Broadly, the agencies recommend projects that reduce congestion.⁷³ Counties have the option to fill the role of CMAs on their own and program their areas transportation projects, or to create a CMA as a separate entity whose sole responsibility is to meet the requirements of Congestion Management. CMAs (or counties in areas that choose not to use a CMA) submits projects to RTPAs or MPOs for RTIP funding.⁷⁴

Counties, Cities, and Public Transportation Agencies

Finally, local governments play one of the most important roles in transportation decision-making. Localities create Capital Improvement Programs (CIPs) that include the list of projects that are eligible for state or federal funding. The projects that are listed in CIPs must first be in a regional long-range plan for federal funding eligibility.⁷⁵ CMAs use the CIPS of cities and transit districts within their county to select projects for the region's Transportation improvement Program described below.

⁷³ Bar Rail Alliance, What is a CMA?, http://www.bayrailalliance.org/question/what_cma_congestion_management_agency (Accessed on May 14, 2016)

⁷⁴ Metropolitan Transportation Commission, 2016 RTIP, page 6, http://mtc.ca.gov/sites/default/files/!00_2016%20RTIP%20Final_NoMapPPR.pdf (Accessed May 14, 2016)

⁷⁵ San Francisco County Transportation Authority, Congestion Management Program, page 7, http://www.sfcta.org/sites/default/files/content/Planning/CongestionManagementPlan/2015/CM_P_2015_FINAL.pdf (Accessed May 14th, 2016)

California's Planning Process

Statewide Long Range Plan

California's statewide transportation plan is called the California Transportation Plan (CTP). At least every four years, Caltrans updates the CTP to establish statewide transportation policy. The plan uses goals and performance measures to direct the Caltrans' approach to interregional planning and MPOs' RTPs. The most recent CTP adopted the following goals:

- Improve Multimodal Mobility and Accessibility for All People
- Preserve the Multimodal Transportation System
- Support a Vibrant Economy
- Improve Public Safety and Security
- Foster Livable and Healthy Communities and Promote Social Equity
- Practice Environmental Stewardship

These goals are not binding, but they do shape the way that plans at the regional and local levels are framed. Each goal is connected with a policy that is aimed at implementing the goal.⁷⁶ For example, the goal of "Improving Multimodal Mobility and Accessibility for All People" is accompanied by the policy of "invest strategically to optimize system performance."⁷⁷ Commenting on plans at this stage in the project development process may yield some high level policy direction, but the CTP is not project specific, so it will require more than setting goals to have influence over individual projects.

⁷⁶ Caltrans, California Transportation Plan, Page 18, <http://www.dot.ca.gov/hq/tpp/californiatransportationplan2040/final-draft-ctp2040/docs/ctp2040-final-draft.pdf> (Accessed on May 14, 2016)

⁷⁷ Id.

Getting involved in the California Transportation Planning Process

The CTP does not have a public participation policy within it to guide public involvement. Instead, Caltrans references their Public Participation Plan (PPP) that applies to the CTP and the STIP.⁷⁸ The PPP offers a variety of tools and lists the plans that are available to people interested in participated in California's planning and programming process:

- Dynamic website
- Email Blasts
- Focus Groups
- Regional Workshops
- Stakeholder and community group presentations
- Connecting with trusted community leaders
- Mainstream and ethnic media outreach
- Newsletters
- Surveys

Benefits from engaging in planning at the state level

- Influence high level strategies and framing of language used to justify transportation projects
- Create flexibility for differences between urban and rural areas
- May not change individual projects, but has potential to influence investment strategies

Local and Regional Long Range Plans

Each MPO is required to develop a Long Range Transportation Plan under federal law.⁷⁹ Under federal regulation,⁸⁰ plans are required to include:

- Projected demand for transportation
- Existing and proposed facilities
- Strategies to improve performance of existing facilities
- Assessment of capital investment strategies to preserve the transportation system
- Design concept and scope sufficient to develop cost estimates

⁷⁸ California Department of Transportation, California Transportation Plan, Page 8, <http://www.dot.ca.gov/hq/tpp/californiatransportationplan2040/final-draft-ctp2040/docs/ctp2040-final-draft.pdf> (Accessed June 4, 2016)

⁷⁹ 23 CFR 450.322

⁸⁰ 23 CFR 450.322(f)(1-10)

- Environmental mitigation strategies for impacts from the plan
- Pedestrian, walkway and bicycle activities
- Transit enhancements
- A financial plan that demonstrates how the plan can be implemented

These plans are a critically important for a project to transition from an idea to a reality. For a project to get funded through the programming process described below, it must be in a local long-range plan.

State Law Governing Local and Regional Planning

In California, there are additional requirements imposed by Senate Bill 375 that require regional Sustainable Community Strategies. These strategies must include goals and measures that reduce greenhouse gas emissions (GHG) and house new residents without expanding the regions urban footprint. As an example of SB 375 in action, the next paragraph describes Plan Bay Area – the RTP of the nine counties that surround the San Francisco Bay.

Plan Bay Area meets not only federal requirements for transportation planning and programming, but also the requirements of state law. California’s SB 375 requires that each MPO develop a Sustainable Communities Strategy (SCS) to create an integrated housing and transportation investment strategy. The SCS must also include performance measures for climate protection and affordable housing. MTC adopted an additional set of seven goals and ten performance measures. These are described in Table 2.

Table 2. Metropolitan Transportation Commission Goals and Performance Measures

Goal/Outcome		Performance Target
Required		
Climate Protection	1	Reduce per-capita CO ₂ emissions from cars and light-duty trucks by 15 percent (Statutory requirement is for year 2035, per SB 375)
Adequate Housing	2	House 100 percent of the region’s projected growth (from a 2010 baseline year) by income level (very-low, low, moderate, above-moderate) without displacing current low-income residents (Statutory requirement, per SB 375)
Voluntary		
Healthy and Safe Communities	3	Reduce premature deaths from exposure to particulate emissions: <ul style="list-style-type: none"> • Reduce premature deaths from exposure to ne particulates (PM_{2.5}) by 10 percent • Reduce coarse particulate emissions (PM₁₀) by 30 percent • Achieve greater reductions in highly impacted areas
	4	Reduce by 50 percent the number of injuries and fatalities from all collisions (including bike and pedestrian)
	5	Increase the average daily time walking or biking per person for transportation by 70 percent (for an average of 15 minutes per person per day)
Open Space and Agricultural Preservation	6	Direct all non-agricultural development within the urban footprint (existing urban development and urban growth boundaries) (Note: Baseline year is 2010.)
Equitable Access	7	Decrease by 10 percentage points (to 56 percent, from 66 percent) the share of low-income and lower-middle income residents’ household income consumed by transportation and housing
Economic Vitality	8	Increase gross regional product (GRP) by 110 percent — an average annual growth rate of approximately 2 percent (in current dollars)
Transportation System Effectiveness	9	<ul style="list-style-type: none"> • Increase non-auto mode share by 10 percentage points (to 26 percent of trips) • Decrease automobile vehicle miles traveled per capita by 10 percent
	10	Maintain the transportation system in a state of good repair: Increase local road pavement condition index (PCI) to 75 or better <ul style="list-style-type: none"> • Decrease distressed lane-miles of state highways to less than 10 percent of total lane-miles • Reduce share of transit assets past their useful life to 0 percent (Note: Baseline year is 2012.)

Planners at MTC used these goals and performance targets to quantitatively evaluate and compare over 900 potential projects for Plan Bay Area.⁸¹ MTC then took these performance measures and applied them to growth scenarios envisioned by current regional plans.⁸² They looked at each scenario based on a transportation investment strategy that focused on maintenance and limited expansion of roads or transit and another that made significant increases in transit expansion.⁸³ This process was highly technical and involved little in the way of public influence over project evaluation. On the IAP2 public participation spectrum, this process fell most closely within the informational category. However, the process is an outcome of Plan Bay Area in which MTC consulted and involved advocates and citizens.

Getting involved in local and region planning

Each locality has its own public involvement process. Advocates will want to check their city's and MPO's website or contact the local planning office to determine when plans are available, public hearings are held, and how to submit comments.

However, to continue with the concrete example of MTC above, the Bay Area uses a very decentralized approach to project selection. MTC establishes goals and local jurisdictions select the projects to meet those goals. Conformity with the goals is maintained by MTC through a review for consistency between the RTP and the

⁸¹ Metropolitan Transportation Commission, Measuring Up: More Bang for the Buck in Transportation Project Selection. http://mtc.ca.gov/sites/default/files/More_Bang_for_the_Buck_in_Transportation_Project_Selection_Heminger_Boston_7-14_0.pdf (Accessed on May 14, 2016)

⁸² Metropolitan Transportation Commission, Plan Bay Area, Page 22-25, http://files.mtc.ca.gov/pdf/Plan_Bay_Area_FINAL/1-Setting_Our_Sights.pdf (Accessed on May 14, 2016)

⁸³ Id.

RTIP (described below). This places greater importance on local agency decisions and makes it more important to participate at the city and county level than in regions that rely on centralized decision-making processes. In contrast, many other regions across the country select projects for locals and in other places state departments of transportation even select projects for MPOs and locals.

Benefits from engaging in planning at the local and regional level

- Influence projects in your neighborhood
- Shape development of your city
- Create a record of decision that will strengthen case on appeal at LUBA

California's Programming Process

Once a project has been planned and adopted in a transportation plan, programming is needed to fund it. In contrast to the planning process that starts from national goals, programming happens in a process that is more bottom up. Generally, local elected officials and planners work to prioritize projects that most efficiently meet the needs of a community. The state works more as an intermediary in this process and functions and coordinates funding regionally. The following two sections describe the statewide and metropolitan programming aspects of transportation projects.

Statewide Transportation Improvement Program

Federal law requires that state submit Statewide Transportation Improvement Programs (STIP) that list the projects that are funded by federal dollars.⁸⁴ Each project must be consistent state long-range transportation plans as

⁸⁴ 23 CFR 450.000.

well as local comprehensive plan. Therefore, each project must be first adopted as part of a long-range transportation plan before it can be eligible for federal funds. The STIP is composed of all projects listed in each metropolitan transportation improvement program (described below) as well as all non-metropolitan (rural) projects that rely on federal funding. California law splits funds to have 75 percent go to MPO area and 25 percent go to rural areas as administered by Caltrans.⁸⁵ MPOs then take their allocation of funds and create a list of recommended projects to submit to the CTC. The CTC is not required to follow the recommendations of MPOs but, in practice, they almost always do. Once Caltrans has assembled the final list of projects from all of the MPOs and the projects of rural areas, a STIP is published in draft form before final adoption for a 45-day period of public review.⁸⁶ Finally, after Caltrans considers comments from public review OTC adopts the final STIP and submits it the Federal Highway Administration and the Federal Transit Administration for final approval.

The CTC is only authorized to accept or reject the entire STIP and cannot pick projects to add or remove on an individual basis.⁸⁷ The CTC can reject the entire STIP if:

1. It is inconsistent with the STIP guidelines
2. There are insufficient funds to implement the RTIP
3. There are conflicts between RTIPs or the ITIP
4. A project is not in an approved list of a county or CMA

⁸⁵ California Transportation Commission, Federal Transportation Improvement Program, Page 15, http://mtc.ca.gov/sites/default/files/2014_RTIP.pdf (Accessed May 14, 2016).

⁸⁶ California Transportation Commission, 2014 STIP Guidelines, Page 38, http://www.catc.ca.gov/programs/STIP/2014_STIP/2014_STIP_Guidelines_adopted_0813.pdf (accessed on May 14, 2016)

⁸⁷ California Transportation Commission, 2016 STIP Guidelines, page 31, http://www.catc.ca.gov/programs/STIP/2016_STIP/Proposed_2016_STIP_Guidelines_Aug_2015.pdf (Accessed June 4, 2016).

5. The RTIP is not a cost effective expenditure of state funds

Because the CTC is only able to adopt or reject the entire STIP, there is a strong incentive to accept the RTIPs and final STIP without a clear violation of the requirements described in the guidelines.

Regional Transportation Improvement Program

Federal law also requires that MPOs complete an agreed to list of transportation projects eligible for federal funding.⁸⁸ The RTIP is composed of project drawn from local long range plans and capital improvement programs. Each MPO has different processes for selecting projects. For example, the Metropolitan Transportation Commission allows CMAs or counties to select projects for the RTIP.⁸⁹ As long as the selected projects are consistent with the RTP, they are sent to the CTC for final approval.

Getting involved in programming

Programming is the step of a projects development that moves it from idea to reality. Because programming is only possible once a project is in a plan and a capital improvement program, keep in mind those preliminary steps before advocating for a project that hasn't become ripe for programming. Those preliminary steps do not guarantee that a project will get programmed and funded, but they are critical.

Benefits from engaging in programming

- Ensure that your city follows through on its plans
- Select the projects that are most cost effective

⁸⁸ 23 CFR 450.324.

⁸⁹ Metropolitan Transportation Commission, Regional Transportation Improvement Program, Page 6, http://mtc.ca.gov/sites/default/files/2014_RTIP.pdf (Accessed May 14, 2016)

- Find political support from coalitions that support the same projects

Opportunities to impact future rules under the California APA

Rules issued by regulatory agencies have an enormous influence on the way that transportation planning is done. If advocates are advocating for transportation solutions that appear to violate administrative rules, it might be in their best interest to look at what administrative rules need changed to accommodate their objective. Additionally, advocates may see a proposed rule and think that it will make transportation projects they support, more challenging to implement. This section of the paper discusses the ways in which advocates can inform rulemaking or delay or defeat a rule.

The California Administrative Procedures Act (CAPA) controls the administrative rulemaking process. Provisions of the CAPA control where and when the public can influence changes in administrative rules of the CTC and Caltrans described above that have an impact on transportation planning and programming. The following analysis describes points in the rulemaking process that could delay the effective date of a rule.

Petition for rulemaking

If advocates want an agency to take an action that they believe they have the authority to do, petitioning for rulemaking can be a powerful tool. CAPA allows for “any interested person” to petition for the adoption, amendment, or repeal of a

rule.⁹⁰ The language “any interested person” is notably broad in that it includes even non-Californian citizens and perhaps even people from anywhere in the world.

When citizens submit a petition for rulemaking, they must include the substance or nature of the regulation, the reason for the request, and the authority under which the agency can take the proposed action.⁹¹ The agency is required to notify the petitioner of the receipt of the petition and either deny or initiate the rulemaking according to the notice requirements described below within 30 days.⁹²

Notice

When an agency initiates rulemaking, it must follow proper notice requirements of the CAPA. The agency must issue a notice 45 days prior to a hearing and the end of the public comment period. That means that an agency cannot provide notice less than 45 days before either any hearing it holds on the rulemaking or the close of the public comment period. The agency must mail notice of the rule containing the time, place and nature of any hearing about the rule (hearing includes written comment); reference to the authority it is issued under; a summary of the laws related to the proposed action, and a summary in plain English of the objectives and anticipated benefits; and finally the costs to the state government and any economic impact of the regulation.⁹³

An important caveat to this is that the CAPA has two clauses that will uphold a rule even if these processes are not followed. First, on the timing of a hearing or

⁹⁰ California Government Code 11340.6

⁹¹ Id.

⁹² California Government Code 11340.7

⁹³ California Government Code 11346.5

comment period, a rule will not be invalidated if proper timing is not observed.⁹⁴ Second, even if there the content of the notice is adequate, a judge will not overturn a rule.⁹⁵ These notice and comment provisions are in place because of concerns about 5th and 14th amendment due process. Therefore, an agency has strong reasons to follow these notice requirements, but these exceptions provide a judge the flexibility to uphold rules that do not comport with the CAPA but fall within her judgment of appropriate due process.

Hearing

Public hearings are not required under CAPA. However, statutes outside of the CAPA may provide for oral hearings in some contexts. When a public hearing is held, agencies must allow for oral and written comments as well as arguments and contentions.⁹⁶ If the notice does not provide for a public hearing, then any interested person can request a hearing 15 days before the close of the comment period. That means that if advocates do not want a regulation or want to delay it, they can do so by waiting till 15 days before the notice of the action and submit a request for a hearing. This will add up to 30 days to the minimum of 45 days before a rule can be adopted, amended, or repealed.

Discussion

As a general rule, it is better to get involved in the transportation planning process as early as possible if advocates wish to have the most influence. Once

⁹⁴ California Government Code 11346.4(f)

⁹⁵ California Government Code 11340.85(d)

⁹⁶ California Government Code 11346.8(a)

projects are in local plans, they are eligible for funding and compete only against other projects in county's or CMA's CIPs for funding. Projects that are not proposed and adopted in the planning process will not be funded in the programming process. Therefore, it is critically important to participate in the public meetings and comment periods in the development of local transportation plans if advocates are concerned (either for or against) about a project's eligibility for funding. To do this, look at the websites of the CMAs or counties advocates are interested in and get in touch with local planners in public works and planning departments to identify opportunities for public involvement.

There are several local bodies, in addition to planning and public works departments that offer a forum of input into local transportation plans. These include planning commissions, bicycle and pedestrian advisory councils, city and county budget committees, and technical working groups. All of these groups are important to engage with at the earliest stages. Planning Commissions and advisory councils usually serve in an advisory capacity to city councils, and county or state commissions. City councils, and county and state commissions serve as the body that adopts plans and have final authority over their contents.

Do not overlook budget committees, planning commissions, and city councils. These entities are the gateways through which transportation projects are added to capital improvement programs and are the earliest and most influential decision makers in determining which projects are funded and which gather dust on a shelf.

Keep in mind that projects that have made it to the point of being submitted to the RTIP already reflect the thinking of local government assessments about the

community's values and needs. Therefore, if advocates oppose a project that is at this stage, it might be a stronger strategy to argue that there are other more pressing priorities than the one they oppose. As always, broad coalitions and many voices make the case for a project more compelling.

Using Litigation When Public Participation Fails

Sometimes, no amount of participation will get an advocate the outcome they desire. There is a sense in which challenging planning decisions in court provide advocates an “empowering” or at least “collaborative” approach to public participation described above. Even though the planning agencies themselves are failing to meet a portion of the public's interests in cases that are challenged, the government as a whole is doing more than mere informing or consulting when the law allows advocates to challenge decisions in court. Here, the court is a part of the public participation process for advocates who have standing to challenge decisions.

Fortunately for advocates California, the state legislature adopted laws that compel transportation agencies to meet greenhouse gas emission reduction goals. This happened, for example, in *Sierra Club v. San Diego Area Governments (SANDAG)* when advocates claimed that SANDAG's RTP failed to address the state's climate polices.⁹⁷ Sierra Club alleged that SANDAG failed to create a climate action plan in accordance with an executive order⁹⁸ and state laws⁹⁹ that compel

⁹⁷Sierra Club v. County of San Diego. 231 Cal.App.4th 1152. (2014).

⁹⁸ Executive Order No. S-3-05.

⁹⁹ AB 32 and SB 375.

reductions in greenhouse gas emissions from the transportation sector.¹⁰⁰ In fact, SANDAG’s plan expressly stated that it “does not ensure reductions.”¹⁰¹ Even though the Sierra Club presented feasible alternative mitigation measures that would have complied with GHG reduction mandates, the County rejected them without substantial evidence.¹⁰² The court held that the county’s climate action plan’s transportation strategies failed to comply with GHG reduction targets.

A lesson for advocates can be taken from this case: California’s greenhouse gas emission reduction polices have real teeth. If advocates believe that a MPO or local government’s transportation plan is not on track to meet GHG reduction targets, they may have the law on their side.

Summary of California

The following bullets highlight the most important findings from this discussion of advocacy in California transportation planning:

- California’s state government provides wide discretion to regional governments to direct transportation investments as long as they are consistent with regional transportation plans, sustainable communities strategies, and the California Transportation Plan.
- Local governments are the most critical level in the project selection process because after a project has been programmed by a local government, it is unlikely to be overturned by the MPO or CTC.
- The CAPA has weak enforcement provisions and courts are not required to overturn agency decisions that do not comply with the procedural aspects of the CAPA.
- Advocates concerned about climate impacts should always check to make sure that local and regional transportation plans comply with GHG reduction targets established under AB 32 and SB 375 by CARB.

¹⁰⁰ 231 Cal.App.4th 1152, at 1156.

¹⁰¹ Id. at 1161.

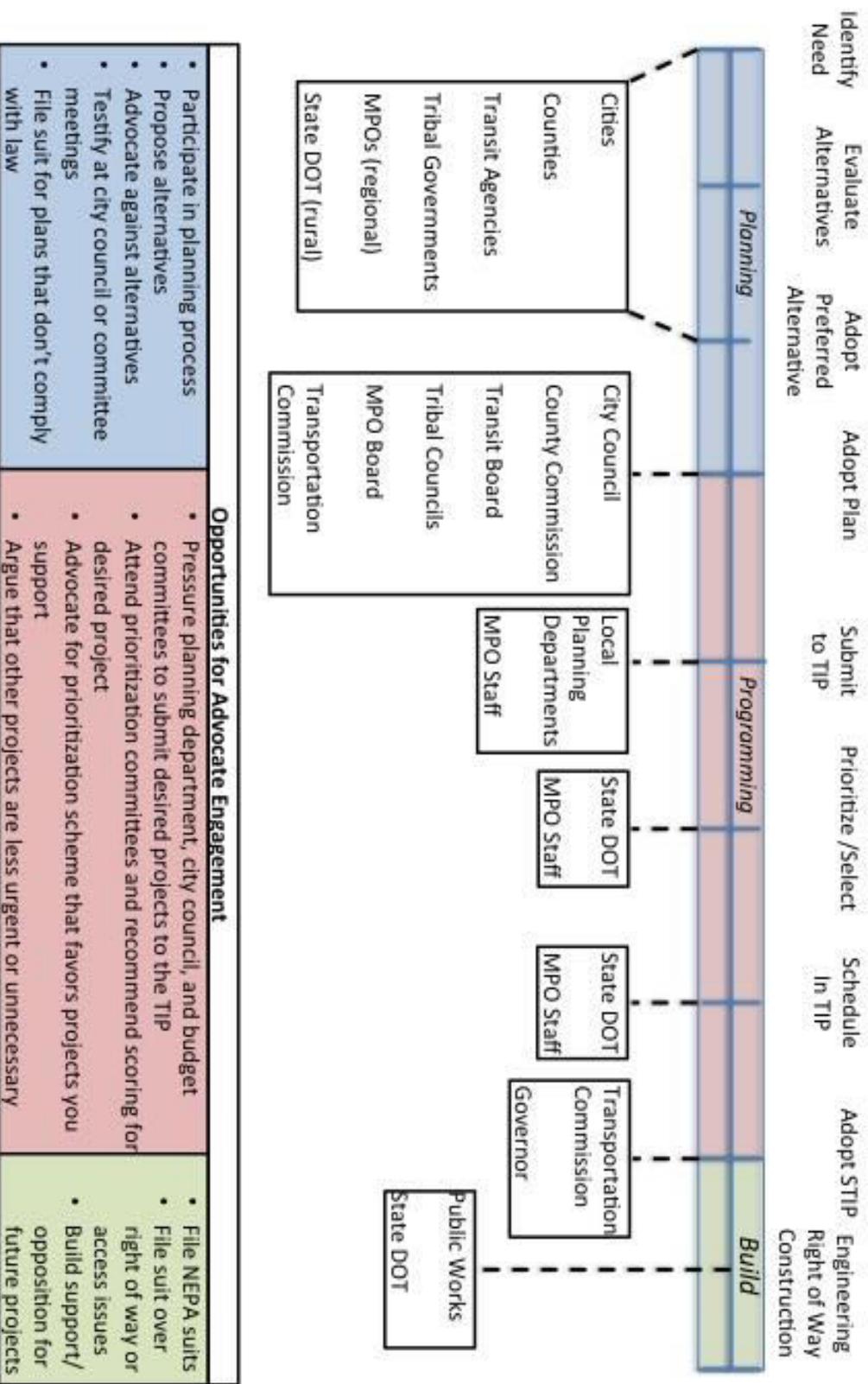
¹⁰² Id. at 1175.

Conclusions

This section will bring together the conclusions of California's and Oregon's transportation planning prompt a discussion of best practices for advocates in the two states. First, the section will review practices that apply to both states. Then it will conclude with recommendations that each state could adopt to improve opportunities for the public to have a more empowered role in transportation decision making.

Recall Figure 1 from the beginning of this paper. Figure 5 adds opportunities for advocates to engage in the process of project development.

Generic Timeline of Project Development



Phase	Opportunities for Advocate Engagement
Planning	<ul style="list-style-type: none"> Participate in planning process Propose alternatives Advocate against alternatives Testify at city council or committee meetings File suit for plans that don't comply with law
Programming	<ul style="list-style-type: none"> Pressure planning department, city council, and budget committees to submit desired projects to the TIP Attend prioritization committees and recommend scoring for desired project Advocate for prioritization scheme that favors projects you support Argue that other projects are less urgent or unnecessary
Build	<ul style="list-style-type: none"> File NEPA suits File suit over right of way or access issues Build support/opposition for future projects

Figure 5. Timeline of Project Development and Opportunities for Advocate Engagement.

As mentioned earlier, timing is critical in influencing transportation projects. It is important to know which stage a project is presently in, to know whom your appeal should be addressed. At the highest policy level it is difficult to influence the outcome of individual project decisions. For instance, asking your state to prioritize bicycle infrastructure spending at the statewide plan stage, won't ensure that an individual project an advocate supports will get funded. Conversely, at the local planning level, it's unlikely a project will get included in a plan if the state hasn't prioritized spending on that type of project at the statewide level. Advocates must be present and aware at each level in order to secure their highest level of effectiveness. Advocates must also stay up to date on the status of any project they are interested in because missing a step can undermine future advocacy efforts.

During the planning process advocates should spend time thinking about the needs a project is addressing. An advocate should ask herself what the needs of an area are and what alternative solutions would meet those needs as well as her interests. Framing a project in terms of the goals of a transportation plan will contextualize the project in language that appeals to decision makers.

Advocacy in the planning stage of project development may include arguing for a project or against a project. Once a list of potential alternatives has been compiled, an advocate should testify at meetings of the planning commission and city council meetings. Arguments for or against a project should be based on as many interests as possible and reflect the diversity of the community for which the project is proposed. Advocating with a broader coalition from as many backgrounds as possible will put more pressure on decision makers to take the recommended

course of action. An advocate should consider how their course of action could be supported by members of the business community, labor unions, underserved populations and people from a variety of ages (especially older people who vote more). Finally, if the project that is ultimately selected does not support that advocates goals, they should consider speaking with a lawyer to understand if the selected project may be against.

In Oregon, the planning process presents the best opportunity for advocates to use state law to empower their role in influencing decision-making. The TPR as well as the goals 3 and 4 to protect agricultural and forest land have been used to augment the traditional public participation approach. Advocates working towards a more climate friendly or equitable transportation system in California are empowered through Sustainable Communities Strategies. Strategies can be recommended by advocates to spur cities, counties, and MPOs to work towards emissions targets.

Advocating within the programming process is more constrained than the planning process. Here it is critical to understand the governance structures that shape how planned projects are selected for funding. Advocates can use the programming process to achieve their goals by showing support for the ranking and evaluation of particular projects under the selection criteria.

In California, MTC uses a heavily decentralized approach so advocates need to work at the local level in order to influence funding recommendations. Once a project has advanced beyond the local selection process, advocates will need to

argue that the project they want to defeat is inconsistent with the regional transportation plan.

Oregon's planning process is more regional through its reliance on ACTs and MPOs to select projects. Local governments are still important in that they submit projects for consideration by the ACT or MPO, it is at the regional level that projects are compared to other projects eligible for funding. Oregon also retains a stronger role in final approval by the OTC because the recommendations for can be ignored on a project-by-project basis rather than the rejecting the whole STIP like California. Therefore, a last effort to stop or include a project at the state level is possible.

California and Oregon are both leaders in state land use and sustainability laws that also promote the empowerment of the public to influence transportation decision-making. Public involvement can help transportation agencies develop and select projects that are more equitable, sustainable, economically productive and fiscally sound. It is also the only method we have that can shape our transportation system in a way that reflects the values of our communities. Planners cannot act in a vacuum, but rather depend on the public and advocates to balance the interests of everyone and find solutions that serve the best use of public resources.

This guide has covered much of the context of transportation planning and policy advocacy. However, much more can be said for each aspect of transportation advocacy. The preceding sections should provide readers with a high level sense of the transportation funding process. In addition, readers should have a more nuanced perspective on the spectrum of public participation activities. This guide provides overviews of key agencies, laws, and processes for advocates in Oregon

and California and recommends policy changes for improved public participation in each state. Advocates can use this guide to familiarize themselves with transportation project development and educate others. Advocacy is essential in improving our transportation system and it cannot be done alone.

Recommendations

Based on the findings above from each state, this paper considers options that lawmakers and agencies in California and Oregon can use to create a more inclusive and empowering transportation decision-making process.

Leadership

With limited resources and diminishing revenue for transportation funds, policymakers at the state, regional, and local levels need to lead the conversation on public participation. Quite often, transportation funding is politicized and reduced to a process of using transportation projects as bargaining chips for political purposes. At the state level, lawmakers need to consider the funding levels for transportation and the restrictions on those funds. If there are not enough funds to meet local needs, advocates need to pressure lawmakers to secure adequate funding. Likewise, if state regulation hinders the use of funds in ways that constrain communities from achieving their goals, advocates need to pressure agencies and the legislature to modify rules or statutes to fit the needs of their constituents. At the local level, decision makers are often deciding the fate of individual projects. Leaders at the local level must evaluate the work of planning staff and listen to the voices of the community and determine the merit of each project. Sometimes there will be vocal opposition and to projects and leaders must listen to those voices while considering the voices that aren't being heard. The framework for leadership at the local level rests on understanding the needs of a community broadly and forming credible coalitions of support for the decisions that are made.

California

- Make the CAPA procedural requirements more enforceable on state agencies.
- Clarify how regional governments serve as a check on local governments in determining consistency of project programming with regional transportation plans.
- Publish a findings document that describes how each county's list of programmed projects is consistent with the RTP.

Oregon

- At least for planning purposes, extend the APA to local governments with regard to the notice and comment requirements of rulemaking.
- Publish a document that describes how projects are split between MPOs and ACTs so that advocates know where to argue for their recommendations
- Like California, restrict the OTC from rejecting projects on a case-by-case basis and only allow for the wholesale approval of TIPs. This will allow local decision makers who know their community and are able to face local political consequences to be more responsible for their decisions.