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December 8, 2008

By Electronic Submission and
U.S. First Class Mail

California Air Resources Board
Attn: Clerk of the Board
1001 I Street
Sacramento, California 95814

Re: *Climate Change Proposed Scoping Plan,*
A Framework for Change

Dear California Air Resources Board and Board Staff:

This comment letter is submitted by the County of Orange ("County"), in its capacity as the owner and operator of John Wayne Airport ("JWA" or "Airport"). The Airport is located in Santa Ana, California, and is the only commercial service airport in the County and one of only two airports in the County that accommodate general aviation.

This letter contains the County's written comments on the California Air Resources Board's ("CARB") recently issued *Climate Change Proposed Scoping Plan, A Framework for Change* ("Proposed Scoping Plan") (October 2008). As with our prior comment letter on the Draft Scoping Plan, dated July 31, 2008, the comments expressed herein focus exclusively on the potential impacts of the Proposed Scoping Plan on the Airport, and do not address more general impacts to or comments of the County.

Before addressing more specific comments on the Proposed Scoping Plan, the County would like to take this opportunity to congratulate CARB Staff on completion of the Proposed Scoping Plan, which truly is a comprehensive framework designed to facilitate carbon management and is notably more detailed than the Draft Scoping Plan. We look forward to working with Staff during the formal rulemaking processes required to implement the greenhouse gas ("GHG") emission reduction strategies in order to ensure that CARB and interested stakeholders reach understanding on the best manner in which to secure effective, cost efficient GHG reductions.

In order to avoid redundancy, please note that all of the concerns raised in our prior July 31, 2008 comment letter remain (attached). For example, the continuing evolution of the international and federal regulatory frameworks governing aircraft emissions are of significant note, and the incorporation of aviation-related fuels in a cap-and-trade program may run afoul of federal preemption principles. In addition to the primary concerns articulated in our prior letter, we also have provided specific comments on the Proposed Scoping Plan below.

A. INCORPORATION OF A RECOMMENDED REDUCTION TARGET FOR LOCAL GOVERNMENT

When reviewing the revisions to the Draft Scoping Plan, the County noted the addition of CARB's recommendation that local governments "adopt a reduction goal for municipal operations emissions and move toward establishing similar goals for community emissions that parallel the State commitment to reduce greenhouse gas emissions by approximately 15 percent from current levels by 2020." (Proposed Scoping Plan, p. 27.) In order to assist local governments in this endeavor, the Proposed Scoping Plan observes that CARB is developing various tools and guidance specifically catered to the local government sector. (*Ibid.*)

Based on our reading, the Proposed Scoping Plan does not clearly indicate whether this reduction target recommendation is intended to apply on a cumulative countywide basis, or to individual county operations. To the extent CARB intends the latter, such that CARB recommends the Airport reduce its emissions by approximately 15 percent, it is important to note that the Airport is subject to international and federal legal obligations that regulate a significant amount of activity at the Airport, and particularly the emissions from the largest carbon dioxide emitters at the Airport – the aircraft themselves. The County, therefore, has limited authority to control emissions from these sources and is only able to regulate emissions from County owned and operated sources to the extent feasible and authorized by law. Therefore, placing a 15 percent reduction target on Airport emissions, to be achieved solely on the authority of the County as the airport proprietor, is not feasible.

B. ENCOURAGED PROLIFERATION OF COGENERATION

When reviewing the reduction strategy designed to maximize energy efficiency through the increased stringency of building and appliance standards and new technologies and policy mechanisms, the County noted the inclusion of a measure setting "a target of an additional 4,000 MW of installed CHP capacity by 2020, [which would be] enough to displace approximately 30,000 GWh of demand from other power generation sources." (Proposed Scoping Plan, p. 43.) The County supports this reduction strategy as it encourages energy efficiency and minimizes distribution infrastructure. In fact, in connection with previously approved infrastructure projects for the Airport, the County is contemplating construction of a combined heat and power (*i.e.*, cogeneration) plant to assist the Airport in establishing a reliable and environmentally responsible energy source within the Airport's geographic boundary.

C. CAP-AND-TRADE PROGRAM

With regard to California's proposed linkage with the Western Climate Initiative's ("WCI") cap-and-trade program, which is anticipated to achieve "a hard and declining cap [that] will cover 85 percent of California's greenhouse gas emissions" by 2020, we continue to have reservations regarding the phase-in of certain liquid transportation fuels in 2015 due to federal preemption. (Proposed Scoping Plan, p. ES-7; see also *id.* at p. 31.) In addition, to the extent the program may be lawfully applied to aviation-related fuels, and to the extent the program increases costs for the commercial airlines and other general aviation users, airports throughout the State, including JWA, may suffer negative economic ramifications and even capacity loss. Given the current economic hurdles facing the aviation community, it is paramount that all reduction strategies be economically viable. Clearly, what directly impacts one component of the aviation community (*e.g.*, airlines purchasing the fuel) may indirectly impact another component of the aviation community (*e.g.*, airports who experience capacity withdrawal as airlines redirect business to regions without the costs associated with the cap-and-trade program).

We look forward to continuing to work with CARB during the formal rulemaking proceedings for the greenhouse gas reduction strategies identified in the Proposed Scoping Plan, particularly to ensure that aviation-related interests are adequately represented and accounted for as the State of California tackles the issue of global climate change. In the interim, the County looks forward to continuing to implement energy efficient and green building practices at JWA, and managing airport operations to minimize environmental impacts to the extent feasible and authorized by law.

Please do not hesitate to contact me if you have any questions or concerns regarding the comments expressed in this letter.

Very truly yours,

T. Moore for

Lori D. Ballance
of
Gatzke Dillon & Ballance LLP

Enclosure

LDB/rlf

cc: Alan Murphy, Airport Director, John Wayne Airport

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July 31, 2008

By Electronic Submission and
U.S. First Class Mail

California Air Resources Board
1001 "I" Street
P.O. Box 2815
Sacramento, California 95812

Re: *Comments on the Draft Scoping Plan (June 2008 Discussion Draft)*

Dear Staff of the California Air Resources Board:

This letter is submitted on behalf of the County of Orange ("County"), acting in its capacity as the owner and operator of John Wayne Airport ("JWA" or "Airport"). The Airport is located in Santa Ana, California, and is the only commercial service airport in the County and one of only two airports in the County that accommodate general aviation. Accordingly, the Airport serves as an important regional transportation hub for County residents.

This letter contains the County's written comments on the *Climate Change Draft Scoping Plan: A Framework for Change* (June 2008 Discussion Draft) ("Draft Scoping Plan" or "Plan"), which was issued by the California Air Resources Board ("CARB") on June 26, 2008. In accordance with the Global Warming Solutions Act of 2006, the Draft Scoping Plan proposes a comprehensive framework of action designed to reduce California's carbon footprint and corresponding impact on global climate change. According to the Draft Scoping Plan, specific measures recommended in the Plan will be subject to the formal rulemaking process following CARB's approval of the Plan, and implemented by 2012. Importantly, the scope of this letter only encompasses the County's comments on the Plan's potential impact on the operation and development of the Airport, and does not address other components of the Plan that may impact County operations, generally (e.g., local government actions; regional targets).

The County appreciates the opportunity to submit these comments on the Draft Scoping Plan and looks forward to working constructively and cooperatively with CARB and Staff in the future to help ensure that practical, feasible, and real solutions to global climate change are developed, and that such solutions are consistent with the existing and developing international, federal and other state and local parameters, discussed below, regulating airports and aircraft.

Our comments on the Draft Scoping Plan are premised upon the following primary concepts, concerns and objectives:

1. There is a complex web of international and federal laws and regulations pertaining to the operation of airports and aircraft that limits the ability of CARB, the County, or any other regional entity to unilaterally secure greenhouse gas emission reductions from aircraft that operate at the Airport; and

2. In that regard, the Draft Scoping Plan needs to be revised to more explicitly identify CARB's intended impacts to airports and aircraft, so as to ensure that all preemption concerns are addressed and CARB acts within the parameters of its jurisdictional authority.

3. The County is concerned that comments on the Draft Scoping Plan have been requested prior to providing the County with an opportunity to review the economic modeling for the Draft Scoping Plan. In light of the economic turbulence presently impacting the nation, generally, and the commercial aviation industry, specifically, the County is particularly interested in Staff's assessment of potential costs associated with implementation of the measures recommended in the Draft Scoping Plan. The County recommends that the economic modeling, to the extent possible, assess impacts on a sector-by-sector basis in order to provide various sectors with sufficient notice of the costs associated with the measures recommended in the Plan. Without careful attention to these issues, it will be impossible to structure appropriate and effective solutions to global climate change.

I. AN EVOLVING REGULATORY FRAMEWORK: INTERNATIONAL AND FEDERAL EFFORTS TO REDUCE GREENHOUSE GAS EMISSIONS FROM THE AVIATION SECTOR

Air quality standards for aircraft are established via a complex web of international and federal collaboration, in accordance with the 1944 Convention on International Civil Aviation, also known as the Chicago Convention. More specifically, the International Civil Aviation Organization ("ICAO"),[1] United States Environmental Protection Agency ("USEPA"), and Federal Aviation Administration ("FAA") historically have worked together as the primary agencies responsible for developing aircraft emission standards for aircraft. The aircraft emission standards, practically speaking, significantly affect not only aircraft but the day-to-day operation of airports.

In September 2007, the ICAO established the Group on International Aviation and Climate Change ("GIACC"). (See http://www.icao.int/icao/en/env/Meetings/Giacc.html.) The GIACC's primary goal is to determine how best to secure greenhouse gas emission reductions from aircraft. Accordingly, the GIACC is evaluating, among other issues, aircraft and ground support equipment technology improvements and the energy efficiency of operational measures.

1 The ICAO is a specialized agency of the United Nations, and was created pursuant to the Chicago Convention.

The GIACC also is evaluating various policy mechanisms to secure the desired reductions; mechanisms presently under consideration include a global cap-and-trade program for aviation and/or a set of performance-based measures to mitigate impacts. Due to the extensive coordination between the ICAO, USEPA and FAA with respect to setting air quality standards for aircraft, it is likely that the ICAO will play an important role in regulating greenhouse gas emissions from aircraft engines.

In addition to the United States' international treaty obligations under the Chicago Convention, as noted by Staff during the July 8, 2008, Draft Scoping Plan workshop in Diamond Bar, California, the FAA is authorized with the preemptive right to manage airspace within the United States. (See 49 U.S.C. §40103.) The federal government's preemptive right over airspace also is memorialized in the Airline Deregulation Act, which prohibits states and their political subdivisions from enacting or enforcing a law or regulation that has the "force and effect of law related to a price, route, or service of an air carrier that may provide air transportation." (49 U.S.C. §41713(b)(1).) Moreover, the federal Clean Air Act explicitly preempts states and their political subdivisions from "adopt[ing] or attempt[ing] to enforce any standard respecting emissions of any air pollution from any aircraft or engine," unless that standard is identical to one adopted by the USEPA. (42 U.S.C. §7573.)

Accordingly, states, either individually or collaboratively, are federally preempted from taking direct regulatory action affecting aircraft in flight. (See, e.g., *City of Burbank v. Lockheed Air Terminal, Inc.* (1973) 411 U.S. 624; *San Diego Unified Port District v. Gianturco* (1981) 651 F.2d 1306.) Local airport regulation also must be non-discriminatory and not unduly burden interstate commerce.

On July 11, 2008, the USEPA issued an Advanced Notice of Proposed Rulemaking ("ANPRM") with respect to the regulation of greenhouse gas emissions under the federal Clean Air Act. The ANPRM expressly contemplates the regulation of aircraft engine emissions, and acknowledges the USEPA's receipt, in December 2007, of two petitions to reduce such emissions. (ANPRM, pp. 314-318.) Noting the complex regulatory framework with respect to aircraft, particularly due to the involvement of the ICAO, the USEPA currently is seeking comment on the regulation of aircraft emissions under the Clean Air Act. (See also *id.* at pp. 352-371.) Accordingly, there is evidence that the USEPA is contemplating the adoption of emissions standards for aircraft pursuant to the Clean Air Act; and, as highlighted above, any standards implemented at any other level will need to be *identical* to the standards adopted by the USEPA.

As evidenced by the discussion above, aircraft emission standards are not the subject of local regulation, but subject to a highly complex web of international and federal rulemaking. The regulation of such emissions by the ICAO, USEPA and FAA effectively preempts CARB from independently regulating aircraft emissions, and certain components of airport operations. Accordingly, the greenhouse gas reduction measures in the Draft Scoping Plan, as they apply to airports and aircraft, need to be carefully evaluated under this existing regulatory framework.

II. THE DRAFT SCOPING PLAN: UNCOVERING THE INTENDED IMPACT ON AIRPORTS

The Draft Scoping Plan does not specifically discuss airports or aircraft. While the omission is consistent with the preemption concerns in this field of regulation discussed above, the omission also creates some ambiguity and uncertainty regarding the Draft Scoping Plan's intended impact on airports, generally, which have been a continuous target for controversial, and often preempted, air quality regulations at both a state and local level. The comments below provide a brief discussion of the County's interpretation of the Draft Scoping Plan by identifying recommended measures that are potentially applicable to the Airport, and flagging recommended measures that potentially would be subject to preemption, to the extent the measure(s) interferes with either the federal government's right to manage airspace or interstate commerce.

A. Direct Regulatory Efforts

Based on the County's evaluation of the Draft Scoping Plan, various recommended regulatory measures may directly impact operations at the Airport in order to reduce California's carbon footprint. For example, buildings at the Airport (e.g., terminals; administrative offices) may be subject to improved energy efficiency and building standards. In addition, the low carbon fuel standard ("LCFS"), which is designed to secure a reduction of at least ten percent (10%) in the carbon intensity of California's transportation fuels by 2020, likely would impact ground support equipment.[2] Other measures may indirectly impact the Airport. For example, the light-duty vehicle standards may impact passengers traveling to and from the Airport, and the heavy/medium-duty vehicle standards may impact shuttles operating at the Airport. These measures do not raise preemption concerns in light of their non-interference with aircraft in flight and interstate commerce. However, the County is interested in whether there are other regulatory measures that may directly (or indirectly) impact operations at the Airport.

B. Cap-And-Trade Program

As addressed in the Draft Scoping Plan, one policy mechanism Staff is considering implementing to secure greenhouse gas emission reductions is a "broad-based" cap-and-trade program that links with the Western Climate Initiative ("WCI") in order to establish a regional market system. (Draft Scoping Plan, pp. 15-20.) While the County appreciates that the cap-and-trade program is not yet fully designed, and that substantial technical work and consensus building lies ahead, the County has some preliminary concerns with the cap-and-trade program currently envisioned by the WCI that it would like to highlight at this time.

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2 Notably, jet fuel and aviation gas are *excluded* from the LCFS due to preemption issues. (See *Proposed Concept Outline for the California Low Carbon Fuel Standard Regulation*, California Air Resources Board (March 2008), p. 1; see also *A Low-Carbon Fuel Standard for California, Part 1: Technical Analysis*, U.C. Berkeley and U.C. Davis (May 29, 2007), p. 30 ["[I]t may not be practical for CARB to regulate every fuel type, or CARB may not have the statutory authority to do so. For instance, aircraft emissions are controlled by international agreements, not state regulation."]; *A Low-Carbon Fuel Standard for California, Part 2: Policy Analysis*, U.C. Berkeley and U.C. Davis (August 1, 2007), pp. 28-29.)

As noted in various documents issued for public review by the WCI, the scope of the cap-and-trade program will likely extend to liquid transportation fuels. (See, e.g., Western Climate Initiative Scope Subcommittee, *Scope Draft Design Recommendations*, Appendix C, p. 7.) These fuels would include, but are not limited to, jet fuel and aviation gas. (*Ibid.*) The point of regulation being examined by the WCI is the point at which the fuels enter into commerce within individual states and provinces, and the emission sources targeted would include aircraft. (*Ibid.*)

The County believes that the inclusion of jet fuel and aviation gas in the cap-and-trade program is an impermissible and unconstitutional intrusion into an area which is pervasively and exclusively controlled by federal law and federal authority.[3] By placing a cap on liquid transportation fuels relating to aviation, the WCI's program would interfere with interstate commerce by "encouraging" airlines to frequent other airports (i.e., airports in non-WCI states), and interfere with the FAA's regulation of airspace by limiting accessibility to aviation-related fuels necessary for flight. Also, to the extent that airports are determined to be the "point of regulation," due to a finding by the WCI and/or Staff that fuels "enter into commerce" at the fuel farms located on airport property that service aircraft, the County has serious doubt as to whether airport proprietors generally have sufficient regulatory authority to implement and enforce any cap on transportation fuels.

Setting aside the preemption issue, there are numerous policy reasons supporting a determination that the aviation sector does not need a "price signal" to stimulate emission reductions. First, the industry has every incentive, particularly in light of the cost of oil, to improve engine efficiency, which necessarily results in a co-benefit of fewer greenhouse gas emissions. Second, the aviation sector will not benefit from additional costs, imposed via a cap-and-trade program, when future efficiency improvements necessarily depend upon the availability of funds to invest in new equipment and technology. The aviation sector should be allowed to funnel the necessary capital towards new technology, rather than divert it towards trying to establish compliance under a cap-and-trade program with old aircraft technology. Finally, the aviation sector is a very greenhouse gas emissions efficient economic engine. For example, at the international level, commercial aviation accounts for approximately three (3) percent of greenhouse gas emissions and drives approximately eight (8) percent of the world's gross domestic product. Imposing the burden associated with the WCI's program would result in very little overall benefit in terms of emission reductions.

In sum, to the extent that California links up with the WCI, the cap-and-trade program implemented in California should not apply to liquid transportation fuels used by aircraft, as such regulation is federally preempted and is not based on sound policy.

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3 This preemption issue has been brought to the WCI's attention on at least two previous occasions. Specifically, the Air Transport Association ("ATA"), which is the principal trade and service organization of the U.S. airline industry, has submitted two comments letters on the WCI's program design that extensively discuss preemption. The ATA's comments were submitted following their review of the March 2008 draft program scope recommendations and May 2008 draft program design recommendations. (See ATA comment letters, dated March 17, 2008 and June 6, 2008, available on the WCI's website at http://www.westernclimateinitiative.org/Draft_Proposals_Comments.cfm.)

III. CONCLUSION

In closing, we thank you again for the opportunity to submit comments on CARB's Draft Scoping Plan, and also reserve the opportunity to submit further comments once all components of the Plan are issued for public review. In that regard, the County looks forward to reviewing the Proposed Scoping Plan, which, as indicated in the Draft Scoping Plan, "will be made sharper and given more detailed analysis." (Draft Scoping Plan, p. 76.) The County hopes that the Proposed Scoping Plan will facilitate the efforts of individual sectors, and in particular, airports, to understand the specific, potential ramifications of the recommended measures on their day-to-day operations.

Please do not hesitate to contact us at your convenience with any questions or concerns that arise during your review of this letter.

Very truly yours,

for LDB

Lori D. Ballance
of
Gatzke Dillon & Ballance LLP

LDB/rlf

cc: Alan Murphy, Airport Director, John Wayne Airport