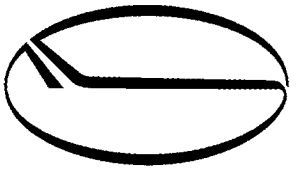


Air Transport Association

June 20, 2007

BY ELECTRONIC SUBMITTAL

Clerk of the Board
California Air Resources Board
1001 I. Street
Sacramento, California 95814
http://www.arb.ca.gov/lispub/comm/bclist.php

RE: Draft California State Implementation Plan

Dear California Air Resources Board:

I write on behalf of the Air Transport Association of America, Inc. (ATA)[1] to comment on the Proposed State Strategy for California's State Implementation Plan (Proposed SIP) for the Federal 8-hour Ozone and PM2.5 Standards.[2] ATA is the principal trade and service organization of the U.S. scheduled airline industry, and regularly comments on regulatory developments that may affect its member airlines. ATA appreciates this opportunity to present its views, and reserves the right to raise different or additional issues at a later time, including in response to any proposed regulations implementing the SIP, comments to ARB upon consideration of local air district SIP strategies, and comments to the U.S. Environmental Protection Agency (EPA) concerning its review of these or other proposed California SIP provisions.[3]

---

[1] The members of the Association are: ABX Air, Alaska Airlines, Aloha Airlines, American Airlines, ASTAR Air Cargo, Atlas Air, Continental Airlines, Delta Air Lines, Evergreen International Airlines, FedEx Corporation, Hawaiian Airlines, JetBlue Airways, Midwest Airlines, Northwest Airlines, Southwest Airlines, United Airlines, UPS Airlines, and US Airways; associate members are: Air Canada, Air Jamaica, and Mexicana de Aviación.

[2] *Available at* http://www.arb.ca.gov/planning/sip/2007sip/2007sip.htm.

[3] *See, e.g., Ober v. United States EPA*, 84 F.3d 304, 312 (9th Cir. 1996) (noting public comment requirements of the SIP approval process).

Air Transport Association of America, Inc.
1301 Pennsylvania Ave., NW – Suite 1100 Washington, DC 20004-1707
(202) 626-4000

DISCUSSION

I. NO ADDITIONAL MEASURES RELATING TO AIRPORT GROUND SUPPORT EQUIPMENT ARE WARRANTED FOR INCLUSION IN THE SIP

A. The Large Off-Road Equipment Measure, as Currently Proposed, is Problematic

The proposed SIP includes a "Large Off-Road Equipment Measure" that will require off-road diesel fleet owners to meet increasingly stringent PM and NOx emission standards.[4] As indicated in the proposed SIP, an ARB rulemaking to adopt such a measure is already underway.[5] The Board is currently scheduled to consider a revised proposed Off-Road Diesel (ORD) rule at its regular hearing on July 26, 2007. As reflected in initial written comments and testimony provided by ATA, as currently proposed the ORD Rule is problematic in a number of respects -- including its inordinate complexity and failure to provide reasonable certainty regarding its requirements -- and is also preempted by federal law (particularly as applied to GSE).[6] In addition, due to the unpredictability of the proposed requirements, the resulting emission reductions would likely not be sufficiently quantifiable to obtain full SIP credit. ATA looks forward to continuing to work with ARB staff to address ATA's serious concerns with the proposal, and expects to provide detailed written comments in advance of the Board's final consideration.[7]

B. An Additional "Push for Increased Electrification of GSE," on Top of ARB's Existing Regulatory Effort, is Not Needed And Would be Counter-Productive

The proposed SIP suggests a "push for increased electrification" of GSE as a "potential long-term concept" to be considered for inclusion in a future SIP modification.[8] ATA and its

---

[4] Proposed SIP at 51-52, 117-18.

[5] *Id.* at 98; Proposed Regulation for In-Use Off-Road Diesel Vehicles, rulemaking materials available at: http://www.arb.ca.gov/msprog/ordiesel/ordiesel.htm.

[6] *See* Letter from T. Pohle (ATA) to Clerk, Air Resources Board (May 23, 2007), available at: www.arb.ca.gov/lists/ordiesl07/868-2007-05-23_ata_initial_comments_on_proposed_ord_rule.pdf (incorporated herein by reference).

[7] ATA expects to raise numerous factual and legal issues in its final written comments on the proposed regulation, and expressly reserves the right to raise additional or different issues in those comments and any subsequent judicial challenge.

[8] *Id.* at 56.

members have been and continue to be strong proponents of new technologies, including electric GSE. We are committed to deploying electric for those GSE applications where electrification is feasible, and we are working with airports to do so. In California, and particularly in the South Coast, ATA members have made substantial voluntary investments in implementing electrification, and in exploring and attempting to expand the types of GSE applications that can be effectively electrified.

While ATA supports electrification, we oppose electrification mandates.[9] Such mandates limit flexibility, and are inconsistent with the varied and highly-specialized nature of GSE. With current technology, not all GSE applications can be electrified, and the ability of a given airline to implement electrification depends a great deal on the nature of the airline's operations, as well as the availability of necessary infrastructure at each airport. An electrification mandate is also incompatible with the fleet-average emissions model ARB has adopted in its recent regulations for large spark-ignition (LSI) GSE[10] and portable engines,[11] and in its proposed ORD Rule (which ARB has recognized is already intended to impose the greatest emission reductions that industry can bear economically). Moreover, as cleaner new engines become available the improvement in PM2.5 and NOx emissions from electric will be marginal. It would make little sense to require GSE operators to spend potentially hundreds of millions of dollars to replace existing equipment with cleaner new combustion engines to achieve the state's emission reduction goals, only to then require that those engines be discarded to meet an arbitrary electrification mandate.

In addition, a GSE electrification mandate would also likely be preempted by federal law, including the Federal Aviation Act and Airline Deregulation Act, particularly if imposed as an overlay to ARB's comprehensive fleet average emissions regulations (which are themselves legally problematic as ATA has noted in previous comments). GSE perform a variety of critical functions, not all of which are amenable to electrification. As discussed in greater detail in ATA's comments on the Draft 2007 Air Quality Management Plan (Draft Plan) issued by the South Coast Air Quality Management District (SCAQMD), reliable and fully-functional GSE is

---

[9] ATA reserves the right to review and comment on the terms of any specific measure ARB may propose in the future.

[10] 13 C.C.R. Sections 2430-38 (approved by the Office of Administrative Law on April 12, 2007).

[11] 17 C.C.R. Sections 93116-93116.5.

[13] *See* Letter from T. Pohle (ATA) to J. Casmassi (SCAQMD) at 2-6, 8-9 (December 1, 2006) (available at www.aqmd.gov/aqmp/07aqmp/draft/Comment_Ltrs/Dec06/AirTransportAssociation.pdf with attachments, incorporated herein in its entirety; for ease of reference a copy of the letter without attachments is also attached hereto as Exhibit A).

critical to the safe and efficient operation of the National Airspace System.[13] Under these circumstances, federal preemption would likely preclude any future electrification mandate.[14]

C. The Proposed SIP Correctly Rejects the Additional Mobile Source Measures Suggested by SCAQMD

In the proposed SIP, ARB correctly concludes that a number of mobile source measures suggested by SCAQMD in its Draft Plan are not feasible and "cannot be included as approvable measures in the SIP," including a measure that would seek to impose further Emission Reductions from Airport Ground Support Equipment (SCOFFRD-04).[15] As noted by ARB, the measures relate to sources already identified for "aggressive new controls" in the state plan[16] (including the ORD Rule for GSE). ATA concurs with ARB's assessment that the measures suggested by SCAQMD would require billions of dollars of public subsidies, and that the equipment turnover necessary to obtain the additional reductions within the timeframe suggested by SCAQMD would not be possible.[17] Indeed, ARB concluded that, even if subsidized, no more than 50% of the suggested mobile source reductions (at most) would be technically feasible.[18] These considerations are particularly apt with respect to the suggested measure for GSE (SCOFFRD-04), in light of ARB's existing effort to aggressively regulate that equipment at the state level, the unique and highly specialized nature of GSE, and the critical necessity for a stable and reliable GSE fleet to ensure the safe and efficient operation of the National Airspace System.

II. ARB'S STATEMENTS CONCERNING FEDERAL AIRCRAFT EMISSION STANDARDS ARE INACCURATE AND UNNECESSARY AND SHOULD BE WITHDRAWN

The Proposed SIP includes blanket language suggesting that EPA "should move as fast as possible" to "[a]dopt more stringent standards for sources under federal control," including ships, locomotives, harbor craft, and aircraft.[19] The SIP suggests that aircraft emissions have been left "unaddressed" due to an asserted "lack of effective international standards."[20]

---

[14] *Id.*

[15] Proposed SIP at 82.

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] Proposed SIP at 68.

[20] *Id.*

Such statements are manifestly inaccurate and are not appropriate for inclusion in the proposed SIP. As explained in detail in ATA's attached comments on the SCAQMD's Draft Plan, EPA is vested with exclusive authority to establish uniform aircraft emission standards that ensure passenger safety.[21] In recent years, EPA has repeatedly exercised this authority to promulgate increasingly stringent aircraft engine emission standards that are consistent with international standards.[22] For example, the United Nations International Civil Aviation Organization (ICAO) established a standard, effective under international law as of January 2004, that reduced allowable NOx emissions for new aircraft engines by 16%, and EPA incorporated that standard into U.S. law effective December 2005.[23] ICAO already has acted to further reduce the NOx emission standard by an additional 12%, effective under international law in 2008.

Moreover, airlines have achieved dramatic reductions in air emissions over the past 30 years through continual improvements in fuel efficiency, and airlines have enormous economic incentives to continue such improvements to the maximum extent possible.[24] Indeed, since 1976 passenger carriers have made a 146 percent improvement in fuel efficiency. These achievements have been realized despite extremely challenging technical hurdles and in conjunction with dramatic reductions in noise. ARB's conclusory and unsupported statements concerning the need for, or feasibility of, more stringent federal aircraft emission standards are wholly unwarranted, and should be removed from the proposed SIP.

---

[21] Exhibit A at 4-6. *See also Nat'l Ass'n of Clean Air Agencies v. Envtl. Prot. Agency*, No. 06-1023, slip op. at 3-5, 13, 16 (D.C. Cir. June 1, 2007) (upholding current EPA aircraft emission standards, and rejecting argument by the National Association of Clean Air Agencies that safety concerns should be given no more than "subsidiary" consideration in setting aircraft standards, explaining, among other things, that EPA is vested with exclusive authority to regulate aircraft emissions in a way that does not significantly affect safety or increase noise)

[22] Exhibit A at 5; *Nat'l Ass'n of Clean Air Agencies*, at 5.

[23] *See* 70 Fed. Reg. 69664 (Nov. 17, 2005); *Nat'l Ass'n of Clean Air Agencies*, at 5, 14 (noting that EPA "does not regulate on a blank slate" but in concert with ICAO); Exh. A at 5.

[24] *Id.* at 5-6.

CONCLUSION

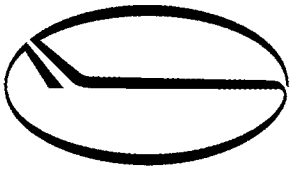
ATA appreciates this opportunity to comment on ARB's proposed SIP. Please contact me at 202-626-4216 if you have any questions or would like additional information in connection with any of the points raised in these comments.

Sincerely,

Timothy Pohle
Assistant General Counsel – Environmental Affairs
Air Transport Association of America, Inc.

EXHIBIT A

Air Transport Association of America, Inc.
1301 Pennsylvania Ave., NW – Suite 1100 Washington, DC 20004-1707
(202) 626-4000



Air Transport Association

December 1, 2006

BY ELECTRONIC MAIL AND FACSIMILE

Mr. Joseph Cassmassi
Planning and Rules Manager
Planning, Rule Development and Area Sources
South Coast Air Quality Management District (SCAQMD)
21865 Copley Drive
Diamond Bar, CA 91765
E-mail: jcassmassi@aqmd.gov
Facsimile: 909-396-3324

RE: Draft 2007 Air Quality Management Plan

Dear Mr. Cassmassi:

I write on behalf of the Air Transport Association of America, Inc. (ATA)[25] to provide comments on the Draft 2007 Air Quality Management Plan (2007 Draft AQMP or Draft Plan) issued by the South Coast Air Quality Management District (SCAQMD or District).[26] ATA is the principal trade and service organization of the U.S. scheduled airline industry, and regularly comments on regulatory developments that may affect its member airlines. ATA appreciates this opportunity to present its views, and reserves the right to raise different or additional issues at a later time, including in response to any proposed regulations implementing the Draft Plan, and comments to the California Air Resources Board (ARB)[27] and the U.S. Environmental Protection Agency (EPA) concerning any proposed State Implementation Plan (SIP) provisions.[28]

The 2007 Draft AQMP identifies a number of measures relating to NOx and PM 2.5 emissions from aircraft and airport ground support equipment (GSE), with some designated as

---

[25] The members of the Association are: ABX Air, Alaska Airlines, Aloha Airlines, American Airlines, ASTAR Air Cargo, Atlas Air, Continental Airlines, Delta Air Lines, Evergreen International Airlines, FedEx Corporation, Hawaiian Airlines, JetBlue Airways, Midwest Airlines, Northwest Airlines, Southwest Airlines, United Airlines, UPS Airlines, and US Airways; associate members are: Aeromexico, Air Canada, Air Jamaica, and Mexicana de Aviación.

[26] *Available at* http://www.aqmd.gov/aqmp/07aqmp/draft/07aqmp.pdf.

[27] CARB is vested with the sole authority to adopt and submit the state's proposed SIP to EPA, and may accept or reject some or all of the South Coast's final plan. *See* Cal. Health & Safety Code § 39602.

[28] *See, e.g., Ober v. United States EPA*, 84 F.3d 304, 312 (9th Cir. 1996) (noting the public comment requirements of the SIP approval process).

proposed District measures and others as "recommended" state or federal measures. As discussed below, the District lacks the authority to regulate these mobile sources or to require that ARB or EPA seek to do so. Moreover, the measures proposed or "recommended" by the District are unnecessary and inappropriate, given the stringent state and federal regulatory efforts currently focused on these sources and the substantial emissions reductions already achieved through industry-led efforts. For these reasons, measures relating to aircraft or GSE should be removed from the Draft Plan.

DISCUSSION

I. The Proposed Measures Relating to Aircraft Should be Withdrawn Because They Are Inconsistent with Federal Law and Unwarranted

The 2007 Draft AQMP proposes or recommends a number of measures relating to aircraft. At least two contemplate direct regulation of aircraft emissions and aircraft operations: OFFRD-11 (Emission Reductions from Aircraft); and LTM-05 (Further VOC Reductions from Mobile Sources). Two others would impose a "fee" based on aircraft emissions: MOB-01 (Mitigation Fee Program for Federal Sources); and EGM-02 (Emission Budget and Mitigation for General Conformity Projects). As discussed below, such proposed measures purporting to regulate aircraft are preempted by the federal Clean Air Act, Federal Aviation Act, and Airline Deregulation Act. In addition, such measures are unwarranted given existing emission standards, EPA's commitment to adopt more stringent standards in the near future, and the track record of continuing improvements in aircraft emissions.

A. Measures Relating to Aircraft Operations Are Preempted by Federal Aviation Laws

Measure OFFRD-11 of the Draft Plan recommends that EPA adopt regulations mandating changes in aircraft operations, such as requiring single or "reduced" engine taxiing, derating takeoff power, and reducing the use of reverse thrust.[29] In another portion of the Draft Plan, while recognizing federal jurisdiction to establish emission standards for "federal" sources such as aircraft, ships, and trains, SCAQMD asserts that it may nonetheless adopt local "use or operational limitations for such sources."[30]

With respect to aircraft, at least, this is incorrect. Neither SCAQMD nor EPA[31] has authority to adopt regulations relating to the movement or operation of aircraft, including taxiing

---

[29] Draft Plan App. IV-B, p. 91.

[30] Draft Plan App. IV-A, p. 111.

[31] As discussed in Part I.A.2. of these comments, the federal Clean Air Act provides EPA with exclusive but carefully circumscribed authority to establish aircraft emission standards, after consultation with FAA, and consistent with passenger safety.

and take-off procedures. The Federal Aviation Act of 1958 (Aviation Act) establishes "a uniform and exclusive system of federal regulation" of aircraft operations, administered by the Federal Aviation Administration (FAA), which preempts state and local regulation of aircraft operations.[32] The principal objectives of the Aviation Act are to promote safety, efficiency, and the development of air commerce. *See* 49 U.S.C. §§ 40101, *et seq.* To achieve these statutory purposes, Congress vested plenary authority in the FAA -- not the EPA -- concerning the use and management of the navigable airspace, the protection of individuals and property on the ground, air traffic control, and air navigation facilities. *See, e.g.,* 49 U.S.C. §§ 40103 and 44502. This pervasive federal regulatory scheme extends not only to aircraft in flight, but also to aircraft-related operations on the ground.[33]

In addition, the federal Airline Deregulation Act separately preempts state and local regulations "related to the price, route, or service of an air carrier." 49 U.S.C. § 41713. The words "related to" in the ADA "express a broad pre-emptive purpose." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992). ADA preemption is not limited to direct regulation of services, but also reaches regulations connected with or referencing airline services, as well as regulations not designed to affect airlines that have only an indirect effect. *E.g., id.* at 384-386; *Federal Express Corp. v. California Pub. Utils. Comm'n*, 936 F.2d 1075 (9th Cir. 1991) (ADA preempts state attempt to regulate air carrier trucking operations, even though trucks often operated hundreds of miles away from the airport).

---

[32] *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 639 (1973). According to the *Burbank* Court:

> Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls.

City of Burbank, 411 U.S. at 633-34 (quoting *Northwest Airlines, Inc. v. Minnesota,* 322 U.S. 292, 303 (1944) (Jackson, J., concurring); *see also* 49 U.S.C. § 40103(a) ("[t]he United States Government has exclusive sovereignty of airspace of the United States.").

[33] *See, e.g.*, 49 U.S.C. § 40103(b)(2)(B)-(C); *City of Houston v. FAA*, 679 F.2d 1184, 1195 (5th Cir. 1982). The FAA has exercised this authority by promulgating extensive federal regulations governing the use of navigable airspace and air traffic control. *See* 14 C.F.R. Parts 21-49 (certification of aircraft and aircraft maintenance), 61-67 (certification of aircraft crew members and related personnel), 71 (designation of airspace areas; air traffic service; routes), 73 (special use airspace), 91-105 (general operating and flight procedures), 119-39 (certification of operations), 150-69 (airport noise compatibility planning, federal aid, and land acquisition and alteration for airports).

In sum, neither SCAQMD nor EPA has authority to regulate the operation of aircraft, whether in flight or on runways.[34] Indeed, EPA has rejected SIP measures because states and localities have "no authority to control airline operations."[35] Moreover, as EPA has confirmed, SCAQMD cannot "assign" EPA responsibility for SIP measures. *See*, *e.g.*, 62 Fed. Reg. 1150, 1152 (Jan. 8, 1997).

In any event, Congress appropriately vested the FAA -- as the federal agency with the necessary expertise regarding aircraft flight and safety requirements -- with exclusive and uniform jurisdiction over aircraft operations consistent with the Federal Aviation Act. Thus, the Draft Plan SIP measures recommending regulations relating to aircraft are inconsistent with federal law, and should be removed from the Draft Plan.

B. EPA has Exclusive Jurisdiction to Adopt Aircraft Emission Standards Consistent with Passenger Safety, and EPA Has Adopted and Continues to Adopt Increasingly More Stringent Standards

Measure OFFRD-11 of the Draft Plan also recommends that EPA develop and adopt "more stringent" aircraft emission standards for NOx, and consider adopting related requirements such as emissions surcharge fees, and changes to jet fuel formulations.[36] By contrast, measure LTM-05 recommends that *ARB* investigate and achieve long-term VOC emission reductions from various mobile sources, including aircraft, and adopt "[m]ore stringent emission standards for jet aircraft (engine standards, clean fuels, retrofit controls)."[37] The Draft Plan asserts that "CARB has the authority to regulate emissions from [these] sources."[38]

As a threshold matter, contrary to the suggestion in measure LTM-05, ARB lacks authority to adopt regulations relating to aircraft emissions. Sections 231 and 233 of the federal Clean Air Act (CAA) vest EPA with exclusive authority to establish aircraft emission standards, and state and local agencies such as ARB and SCAQMD are expressly preempted from adopting any such measures. 42 U.S.C. § 7573 ("No State or political subdivision thereof may adopt or

---

[34] *See e.g., Burbank-Glendale-Pasadena Airport Auth. v. City of Los Angeles*, 979 F.2d 1338, 1341 (9th Cir. 1992) ("The regulation of runways and taxiways is thus a direct interference with the movements and operations of aircraft, and is therefore preempted by federal law."). Taxiing and operational restrictions would also be inconsistent with FAA safety regulations that vest ultimate legal authority for aircraft operation with the pilot in command of the aircraft. *See*, *e.g.*, 14 C.F.R. § 91.3(a) ("The pilot in command of an aircraft is directly responsible for, and is the final authority as to, the operation of that aircraft").

[35] *See* 66 Fed. Reg. 57160, 57189 (Nov. 14, 2001).

[36] Draft Plan App. IV-B, pp. 90-92.

[37] Draft Plan, pp. 4-52, 4-53.

[38] Draft Plan, App. IV-A, p. 148.

attempt to enforce any standard respecting emissions of any air pollutant from any aircraft or engine thereof . . ."). Of course, uniform aircraft standards are necessary to allow for the safe and efficient operation of the National Airspace System. *Cf. City of Burbank*, 411 U.S. at 639 (state and local regulation of aircraft would result in "fractionalized control" inconsistent with FAA flexibility to control air traffic flow, and compounding the difficulties of scheduling flights to avoid congestion and ensure safety).

Moreover, the suggestion in measure OFFRD-11 that EPA should develop "more stringent" aircraft emission standards is inconsistent with federal law and inappropriate for inclusion in the South Coast's proposed SIP. EPA is vested with exclusive jurisdiction to determine appropriate aircraft emission standards, after consulting with the FAA, and may impose such standards only to the extent they do not adversely affect safety or significantly increase noise. 42 U.S.C. § 7571(a). In addition, in recognition of the fact that international aviation would be virtually impossible if each country adopted its own aircraft engine standards, by treaty the United States has agreed to seek conformity to the extent practicable with the international aircraft emission standards established by the United Nations International Civil Aviation Organization (ICAO).

Over the years, ICAO has established increasingly stringent aircraft certification standards for oxides of nitrogen (NOx), carbon monoxide (CO), hydrocarbons (HC), and smoke, which EPA has adopted under CAA Section 231 and incorporated into U.S. law. *See* 40 C.F.R. Part 87. These standards are constantly under review and are revised as technology and safety allow. For example, ICAO adopted a new NOx standard effective as a matter of international law as of January 1, 2004, that reduced allowable NOx emissions for new aircraft engines by 16% below the previous standard. EPA incorporated that standard into U.S. law effective December 2005. *See* Control of Air Pollution From Aircraft and Aircraft Engines; Emission Standards and Test Procedures, 70 Fed. Reg. 69664 (Nov. 17, 2005). ICAO already has approved a proposal to further tighten the international NOx standard by an additional 12 percent, and this new standard will be effective as a matter of international law in 2008.[39]

In addition to improvements in aircraft emissions due to regulatory certification standards, airlines have enormous economic incentives to reduce fuel consumption. Indeed, since 1975 the manufacturers and the airlines have made a 125 percent gain in fuel efficiency, as

---

[39] While the Draft Plan references the ICAO process, it is unclear to what extent the anticipated emission reductions from approved ICAO standards are included in the Draft Plan's emissions inventory for SIP purposes. Indeed, one portion of the Draft Plan appears to propose that EPA adopt the January 1, 2004, ICAO NOx standard -- which, as noted above, EPA already adopted effective December 2005. *See* Draft Plan, App. IV-B-91. Notably, at the public workshop on November 14, 2006, Zorik Pirveysian of SCAQMD recognized that EPA is vested with exclusive jurisdiction to determine appropriate aircraft emission standards. SCAQMD also appeared to recognize that there are no feasible "retrofit" options for aircraft, given that the utmost concern for aircraft is safety, as well as the need for EPA aircraft standards that are consistent with international standards.

confirmed by FAA statistics, with consequent improvements in aircraft emissions.[40] Thus, existing regulations and voluntary industry efforts have resulted, and will continue to result, in substantial emission reductions from aircraft.

For these reasons, measures OFFRD-11 and LTM-05 (as it relates to aircraft) are inconsistent with federal law and unwarranted, and should be removed from the Draft Plan.

C. SCAQMD Lacks Authority to Regulate Aircraft Emissions Through Fees

Under MOB-01 (Mitigation Fee Program for Federal Sources), the District "proposes to implement" a mitigation fee on emissions from federal sources, including aircraft.[41] Similarly, under EGM-02, the Draft Plan proposes a fee be imposed on federal source emissions for major projects that exceed those allocated in the District's SIP for general conformity purposes.[42] In the Draft Plan summary of the measure, the District appears to recognize that it lacks the authority to impose such fees at the local level, stating that the MOB-01 fee program "is to be adopted by U.S. EPA."[43] However, the measure is included among the District measures, rather than the recommended state or federal measures, and in Appendix IV-A the District suggests merely that it "may" lack authority to implement this control measure absent EPA regulation.

SCAQMD proposed a measure virtually identical to MOB-01 in its 2003 Plan, and, as discussed in ATA's March 2003 comments on that Plan, such a fee program for federal sources is inconsistent with federal law and is unwarranted. *See* Letter from S. Belcher (ATA) to Z. Pirveysian (SCAQMD) (Mar. 26, 2003) (Attached hereto as Exhibit A).[44] MOB-01 and EGM-02 are preempted by federal law for the same reasons discussed in ATA's March 2003 comments, which are incorporated herein by reference.

In its June 2003 response to ATA's March 2003 comments, SCAQMD asserted that it has the authority to establish "in-use" restrictions on federal sources such as "fleet rules" affecting the sources, "indirect source regulations and fees," or regulations "capping emissions."[45] However, the authority of states and localities to impose limited "in-use"

---

[40] At the same time, the airlines have reduced the population exposed to significant levels of aircraft noise (the "65 DNL" standard) in the United States from over 7,000,000 million in 1975 to fewer than 500,000 today, while tripling enplanements.

[41] Draft Plan, pp. 4-22 to 4-23; Draft Plan App. IV-A, pp. 111-114.

[42] Draft Plan, App. IV-A, pp. 106-108.

[43] Draft Plan, p. 4-22.

[44] Available at www.aqmd.gov/aqmp/docs/comments/Air%20Transport%20Association.pdf.

[45] Response to Comments on the Draft 2003 Air Quality Management Plan at 3-1 (June 2003 response), www.aqmd.gov/aqmp/docs/comments/Response%20to%20Comments%20Document.pdf.

requirements on certain mobile sources stems from specific statutory provisions applicable only to motor vehicles regulated under Part A of the Clean Air Act subchapter that addresses mobile sources,[46] and not aircraft which are addressed separately under Part B. *See* 42 U.S.C. §§ 7571-7574.

In any event, after the District's June 2003 response, the Supreme Court rejected the District's narrow view of Clean Air Act preemption. *See Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252-256 (2004) (holding that "fleet rules" constituted preempted "emission standards" under Clean Air Act 209(a) and that any numerical emission limit is an "emission standard" even where enforced indirectly). After *EMA*, it is even more clear that a regulation that adopts a numerical emissions limit constitutes an "emission standard," regardless of whether the enforcement mechanism is characterized as a "fee" or a civil penalty. *See id.*, 541 U.S. at 255 ("A command, accompanied by sanctions, that certain purchasers may buy only vehicles with particular emission characteristics is as much an 'attempt to enforce' a 'standard' as a command, accompanied by sanctions, that a certain percentage of a manufacturer's sales volume must consist of such vehicles."); *see also*, *e.g.*, *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521 (1992) ("'The obligation to pay compensation can be, indeed, is designed to be, a potent method of governing conduct and controlling policy'") (citation omitted).[47]

Accordingly, as discussed in detail in ATA's March 2003 comments, and as the District initially appears to recognize in the body of the current Draft Plan,[48] measures MOB-01 and EGM-02 are preempted by federal law as they relate to aircraft, and those measures should be removed from the District's Draft Plan.

---

[46] *See*, *e.g.*, 42 U.S.C. § 7543(d).

[47] Moreover, contrary to the District's June 2003 response, preemption under the Aviation Act is not limited to "measures that regulate the flight of aircraft." *See* June 2003 response at p. 3-1. As discussed above, the Aviation Act independently preempts regulations that affect the operation of aircraft, including related ground operations and taxiways. *See*, *e.g.*, *Burbank-Glendale-Pasadena Airport Authority v. City of Los Angeles*, 979 F.2d 1338, 1341 (9th Cir. 1992); *San Diego Unified Port Dist. v. Gianturco*, 651 F.2d 1306, 1314 (9th Cir. 1981). As discussed in ATA's March 2003 comments, it is well established that the Aviation Act preempts fees or other local preconditions to the operation of aircraft consistent with federal and international standards. With respect to Airline Deregulation Act preemption, the District's June 2003 response conceded that "the regulation of emissions may have an indirect effect on the prices that carriers charge" but asserted that the effect on prices would be "too tenuous" to be preempted and that the fee program would not affect routes or services. To the contrary, particularly given that the District has not proposed the amount, a local fee may readily impact prices as well as the routes and transportation services airlines can economically offer in that locality.

[48] Draft Plan, p. 4-22.

II. Measures Relating to GSE Should be Withdrawn Because the District Lacks Authority to Regulate GSE, ARB is Already Imposing Stringent New GSE Emission Limits, and the GSE Measure Proposed in the Draft Plan is Inconsistent With Federal Law

Proposed measure OFFRD-13 recommends that ARB implement regulations requiring 40% of GSE to be electrified and the remaining 60% of GSE to reduce VOC and NOx emissions to 1.0 g/bhp-hr.[49] Under California law, the District lacks jurisdiction over vehicular sources. *See* Cal. Health & Safety Code § 39002.

This proposed measure ignores the three pending and final ARB regulations that would impose stringent, state-wide limits on NOx and PM emissions from GSE: the PE ATCM;[50] LSI Rule;[51] and Off-Road Diesel ATCM.[52] These rules address both spark-ignition and diesel GSE, and are designed by ARB to achieve all feasible emission reductions from GSE statewide.[53] It is unclear whether the Draft Plan even seeks to account for the emission reductions already anticipated from these regulations.

Moreover, proposed measure OFFRD-13 would be preempted by federal aviation laws.[54] As discussed above, the Federal Aviation Act occupies the field of aviation, preempting state and local regulation. This federal preemption extends to GSE. According to the FAA, "state authority to regulate aircraft operations directly, *or indirectly through ground service equipment*

---

[49] Draft Plan at 4-46, App. IV-B, pp. 95-96.

[50] Portable Engine Airborne Toxic Control Measure (adopted Mar. 11, 2005). *See* www.arb.ca.gov/regact/porteng/porteng.htm.

[51] "Emission Standards, Fleet Requirements, and Test Procedures For Forklifts and Other Industrial Equipment," previously the Large Spark Ignition ("LSI") Rule (approved by ARB on May 25, 2006, awaiting finalization). *See* www.arb.ca.gov/regact/lore2006/lore2006.htm.

[52] Off-Road Equipment (In-Use) Control Measure (pending). *See* www.arb.ca.gov/msprog/ordiesel/ordiesel.htm.

[53] ATA reserves the right to challenge any state or local regulation that purports to regulate GSE as preempted under the Federal Aviation Act, Airline Deregulation Act, and the Clean Air Act, or on any other ground -- including the PE ATCM, and the pending LSI Rule and ORD ATCM -- particularly if in its final form such state or local regulation of GSE affects the movement or operation of aircraft or airline prices, routes, or services.

[54] In addition, OFFRD-13 would be preempted by the federal Clean Air Act, unless and until California requests and EPA grants authorization under Section 209. Under the statute, EPA authorization would not be available, because OFFRD-13 would be inconsistent with the lead time and stability requirements of Section 202(a), given the short or nonexistent lead times between the requirements of the three current and pending ARB regulations and the additional requirements of OFFRD-13. *See, e.g.*, 68 Fed. Reg. 65702, 65703 (Nov. 21, 2003) (to obtain EPA authorization under Section 209(e), a nonroad emission standard must be consistent with Section 202(a)).

limitations, would be inconsistent with federal preemption." Letter from P. Dykeman, FAA, to Donald Zinger, EPA, at page 8 (Aug. 24, 2000) (emphasis added); *see also Burbank-Glendale-Pasadena Airport Auth. v. City of Los Angeles*, 979 F.2d 1338, 1340-41 (9th Cir. 1992). Similarly, the Airline Deregulation Act preempts state or local regulations "related to a price, route, or service of an air carrier." 49 U.S.C. § 41713(b)(1); *see, e.g.*, *Federal Express Corp.*, 936 F.2d at 1078 (state cannot impose economic regulations on trucking operations of an air cargo carrier which were "part and parcel of the air delivery system.").

As the FAA has recognized, "[t]he availability of reliable GSE equipment is . . . essential to safe and efficient use of navigable airspace."[55] SCAQMD has recognized this also, noting in the Draft Plan that "GSE is critical to the efficient functioning of airports."[56] GSE perform a variety of critical airport functions, including starting aircraft, moving aircraft to and from gates and maintenance facilities, and transporting fuel and cargo[57] -- not all of which are amenable to electrification. Each piece of GSE is a necessary component of an overall operational strategy for efficiently supporting aircraft moving through the National Airspace System.

Although the Draft Plan does not provide detail, proposed measure OFFRD-13 is particularly problematic for at least two reasons. First, it relies on an arbitrary and inflexible percentage electrification mandate. In August 2000, the FAA issued a detailed analysis of a Texas GSE electrification mandate,[58] and explained how the rule "would impinge on aircraft operations in violation of the Federal Aviation Act."[59] Second, to the extent that any state regulation of GSE is permissible under federal law, ARB's existing and pending regulations are designed to achieve all available emission reductions from GSE. A measure that mandates technically infeasible or unachievable emission reductions from GSE is particularly likely to result in unreliable GSE or other disruptions to GSE operations, and thus be preempted as impinging on the operation of aircraft or affecting airline prices, routes, or services.

---

[55] Letter from P. Dykeman, FAA, to D. Zinger, EPA, Attachment at 6 (Aug. 24, 2000) (Exhibit B hereto); *see also id.* ("GSE equipment is necessary to landings and takeoff of aircraft. Aircraft are dependent upon GSE for maintenance, fueling, housing, and in some cases, for movement on the ground as well as a myriad of other activities that are critical to the safety of aircraft and flight preparation.")

[56] Draft Plan, App. IV-B-96.

[57] *See id.*.

[58] Letter from P. Dykeman, FAA, to D. Zinger, EPA (Aug. 24, 2000) (Exhibit B hereto).

[59] Letter from C. Burleson, FAA, to G. Fontenot, EPA, Region VI (Apr. 24, 2001) (included as an attachment to Exhibit A hereto).

CONCLUSION

For the foregoing reasons, measures relating to aircraft and GSE should be removed from the District's Draft 2007 AQMP. ATA appreciates this opportunity for public input. Please contact me at 202-626-4216 if you have any questions or would like additional information in connection with any of the points raised in these comments.

Sincerely,

Timothy Pohle
Assistant General Counsel – Environmental Affairs
Air Transport Association of America, Inc.