



Air Transport Association

December 1, 2006

BY ELECTRONIC MAIL AND FACSIMILE

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RE: Draft 2007 Air Quality Management Plan

Dear Mr. Cassmassi:

I write on behalf of the Air Transport Association of America, Inc. (ATA)¹ 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).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 Draft Plan, and comments to the California Air Resources Board (ARB)³ and the U.S. Environmental Protection Agency (EPA) concerning any proposed State Implementation Plan (SIP) provisions.⁴

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

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: Aeromexico, Air Canada, Air Jamaica, and Mexicana de Aviación.

² Available at <http://www.aqmd.gov/aqmp/07aqmp/draft/07aqmp.pdf>.

³ 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.

⁴ 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.⁵ 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.”⁶

With respect to aircraft, at least, this is incorrect. Neither SCAQMD nor EPA⁷ has authority to adopt regulations relating to the movement or operation of aircraft, including taxiing

⁵ Draft Plan App. IV-B, p. 91.

⁶ Draft Plan App. IV-A, p. 111.

⁷ 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.⁸ 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.⁹

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).

⁸ *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.”)).

⁹ *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.¹⁰ Indeed, EPA has rejected SIP measures because states and localities have “no authority to control airline operations.”¹¹ 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 NO_x, and consider adopting related requirements such as emissions surcharge fees, and changes to jet fuel formulations.¹² 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).”¹³ The Draft Plan asserts that “CARB has the authority to regulate emissions from [these] sources.”¹⁴

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

¹⁰ *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”).

¹¹ *See* 66 Fed. Reg. 57160, 57189 (Nov. 14, 2001).

¹² Draft Plan App. IV-B, pp. 90-92.

¹³ Draft Plan, pp. 4-52, 4-53.

¹⁴ 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 (NO_x), 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 NO_x standard effective as a matter of international law as of January 1, 2004, that reduced allowable NO_x 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 NO_x standard by an additional 12 percent, and this new standard will be effective as a matter of international law in 2008.¹⁵

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

¹⁵ 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 NO_x 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.¹⁶ 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.¹⁷ 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.¹⁸ 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.”¹⁹ 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).²⁰ 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.”²¹ However, the authority of states and localities to impose limited “in-use”

¹⁶ 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.

¹⁷ Draft Plan, pp. 4-22 to 4-23; Draft Plan App. IV-A, pp. 111-114.

¹⁸ Draft Plan, App. IV-A, pp. 106-108.

¹⁹ Draft Plan, p. 4-22.

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

²¹ 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,²² 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).²³

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,²⁴ 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.

²² *See, e.g.*, 42 U.S.C. § 7543(d).

²³ 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.

²⁴ 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 NO_x emissions to 1.0 g/bhp-hr.²⁵ 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 NO_x and PM emissions from GSE: the PE ATCM;²⁶ LSI Rule;²⁷ and Off-Road Diesel ATCM.²⁸ These rules address both spark-ignition and diesel GSE, and are designed by ARB to achieve all feasible emission reductions from GSE statewide.²⁹ 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.³⁰ 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*

²⁵ Draft Plan at 4-46, App. IV-B, pp. 95-96.

²⁶ Portable Engine Airborne Toxic Control Measure (adopted Mar. 11, 2005). *See* www.arb.ca.gov/regact/porteng/porteng.htm.

²⁷ “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.

²⁸ Off-Road Equipment (In-Use) Control Measure (pending). *See* www.arb.ca.gov/msprog/ordiesel/ordiesel.htm.

²⁹ 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.

³⁰ 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.”³¹ SCAQMD has recognized this also, noting in the Draft Plan that “GSE is critical to the efficient functioning of airports.”³² GSE perform a variety of critical airport functions, including starting aircraft, moving aircraft to and from gates and maintenance facilities, and transporting fuel and cargo³³ -- 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,³⁴ and explained how the rule “would impinge on aircraft operations in violation of the Federal Aviation Act.”³⁵ 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.

³¹ 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.”)

³² Draft Plan, App. IV-B-96.

³³ *See id.*

³⁴ Letter from P. Dykeman, FAA, to D. Zinger, EPA (Aug. 24, 2000) (Exhibit B hereto).

³⁵ Letter from C. Bursleson, FAA, to G. Fontenot, EPA, Region VI (Apr. 24, 2001) (included as an attachment to Exhibit A hereto).

Mr. Joseph Cassmassi
December 1, 2006
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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,

A handwritten signature in black ink, appearing to read "Tim", with a large, stylized initial "T" and "P" that loops together.

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

EXHIBIT A



AIR TRANSPORT ASSOCIATION

March 26, 2003

Via Facsimile & Electronic Mail

Zorik Pirveysian
Planning and Rules Manager
South Coast Air Quality Management District
21865 E. Copley Drive
Diamond Bar, CA 91765

Dear Mr. Pirveysian:

Enclosed please find the comments of the Air Transport Association of America, Inc. ("ATA") on the South Coast Air Quality Management District's ("District's") 2003 Draft Air Quality Management Plan. Please call me if you have any questions, or if the District would like to discuss ATA's comments further. My phone number is (202) 626-4155.

Sincerely,

Scott F. Belcher
Managing Director of Environmental
Affairs and Assistant General Counsel

Enclosure

**Comments on the
South Coast Air Quality Management District's
Draft 2003 Air Quality Management Plan**

**Submitted by
The Air Transport Association of America, Inc.**

March 28, 2003

**Comments Prepared by the
Air Transport Association of America, Inc.
on the
South Coast Air Quality Management District's
Draft 2003 Air Quality Management Plan**

INTRODUCTION

The Air Transport Association of America, Inc. ("ATA") submits the following comments on the South Coast Air Quality Management District's ("SCAQMD's" or "District's") Draft 2003 Air Quality Management Plan ("Draft AQMP") for the South Coast Air Basin ("Basin").¹

The ATA member carriers play a vital role in the Basin's economy, providing convenient, affordable domestic and international airline passenger and cargo transport, medical and emergency services, "just-in-time" inventory capability, mail and perishable goods shipment, and similar services. Additionally, Southern California travel, tourism, and service industries – such as travel agents, rental car agencies, hotel and restaurant workers, resort and convention services, and entertainment providers – owe their livelihoods and economic welfare to a vibrant and efficient air transportation system. The general public as well – families, individuals, and private groups – have come to expect safe, reliable, and affordable commercial air transportation as an integral part of their daily lives.

Because of the importance of the services that air carriers provide, ATA, among other functions, monitors federal and state regulatory and legislative proposals to provide formal comment and advice on the effects of such proposals on commercial air service in the United States. In that capacity, it submits these comments on the Draft AQMP.

SUMMARY OF COMMENTS

As explained in detail below, the "Mitigation Fee Program for Federal Sources" ("Fee Measure") proposed in the Draft AQMP is unlawful and unwarranted. That measure would impose fees on federal sources, such as aircraft and ground service equipment ("GSE"), to fund emission reduction programs in the Basin. While the District admits in the Draft AQMP that the Clean Air Act ("CAA") preempts direct local regulation of "federal sources," such as aircraft and GSE, the District is openly

¹ ATA serves as the principal trade and service organization of the major scheduled air carriers in the United States, including those who service the five major commercial airports in the Basin. ATA members include Airborne Express, Alaska Airlines, Aloha Airlines, America West Airlines, American Airlines, ATA Airlines, Atlas Air, Continental Airlines, Delta Air Lines, DHL Airways, Emory Wordline Airlines, Evergreen International Airlines, FedEx Corporation, Hawaiian Airlines, JetBlue Airways, Midwest Airlines, Northwest Airlines, Polar Air Cargo, Southwest Airlines, United Airlines, UPS Airlines, and US Airways. Aeromexico, Air Canada, Air Jamaica, KLM Royal Dutch Airlines, and Mexicana are associate members.

attempting to circumvent that preemption by imposing fees on federal sources because of their emissions.

Sections 233 and 209(e) of the CAA prohibit SCAQMD's end-run around preemption. These sections respectively preempt regulation of aircraft and GSE emissions, regardless of whether it is cast in the form of a traditional regulation, or as a compulsory financial payment. Any other construction of the CAA would nullify Congress' judgment that certain federal sources, such as aircraft, should be immune from local regulation.

Moreover, the Fee Measure ignores altogether the preemptive effect of federal aviation law. The Federal Aviation Administration ("FAA") and the U.S. Environmental Protection Agency ("EPA") agree that aviation law may independently preempt emission measures relating to commercial aviation. The Fee Measure contravenes the uniform and exclusive scheme of federal regulation of commercial aviation, as expressed in several federal statutes, including the Federal Aviation Act and the Airline Deregulation Act.

In light of these considerations, ATA requests that the District amend the draft Fee Measure to exclude aircraft and GSE.² Instead of a fee measure, ATA supports the position of the California Air Resources Board ("ARB") and EPA that the carriers will provide substantial emission reductions toward the Basin's attainment in the "South Coast Ground Service Equipment Memorandum of Understanding" ("GSE MOU" or "MOU").³

SUMMARY OF THE DRAFT FEE MEASURE

The Fee Measure would apply only to certain "federal sources," including aircraft and "*preempted* nonroad equipment," such as GSE.⁴ The District has repeatedly admitted that these sources are "subject to *exclusive* federal regulations."⁵ Notwithstanding this admission, the Fee Measure would effectively require these sources to pay "mitigation"

² ATA also views as legally problematic "FSS-06 – Further Emission Reductions from In-Use Off-Road Equipment and Vehicles" ("FSS-006"). *See* Draft AQMP, at 4-18. That control measure consists of the District's threat to develop future regulations such as retrofits for off-road sources if the District views ARB's and EPA's regulations as not sufficiently "aggressive." *Id.* To the extent that FSS-06 would apply to GSE, then that control measure would be preempted by the CAA and federal aviation law for the same reasons that the Fee Measure is preempted.

³ ATA intends to file separate comments with ARB in support of the GSE MOU because the MOU is included in ARB's portion of the SIP. *See* ARB, "Draft State and Federal Element of South Coast State Implementation Plan," Section III (Jan. 2003).

⁴ Draft SIP, at 4-17 (emphasis added).

⁵ *E.g., id.; see also id.* at 4-2, 4-36.

fees to the District.⁶ In turn, the District would use the money to fund “equivalent” emission reduction measures in the Basin.⁷

DISCUSSION

I. The Clean Air Act Preempts the Fee Measure.

A. CAA Sections 233 and 209(e) Preempt Regulation of Aircraft and GSE Emissions.

Section 233 of the CAA provides that, “[n]o State or political subdivision thereof may adopt or attempt to enforce any standard respecting emissions of any air pollution from any aircraft or engine thereof unless such standard is identical to a standard” established by EPA.⁸ Instead, that regulatory power is vested exclusively in the federal government under Sections 231-234 of the CAA.⁹ State and local authorities are thus effectively preempted from taking any “independent action” with respect to aircraft engine emissions or operations related thereto.¹⁰ Consistent with this, the U.S. Supreme Court has declared unequivocally that the CAA “pre-empted the field so far as emissions from airplanes are concerned.”¹¹

Similarly, CAA Section 209(e) preempts states from establishing or enforcing “any standard or other requirement relating to” nonroad engines and vehicles, which

⁶ While SCAQMD asserts that EPA could pay the fees in lieu of the federal sources, that position is not credible for a variety of legal and practical reasons. EPA, for example, has consistently taken the position that it cannot be assigned responsibility for SIP measures. *E.g.*, 62 Fed. Reg. 1,150, 1,152 (1997).

⁷ Draft AQMP, at 4-17-4-18. The Draft AQMP does not provide key details regarding the draft Fee Measure (*e.g.*, amount of fees, estimated emission reductions, *etc.*). *See id.* at 4-7, 4-17-4-18. Once those details are provided, ATA reserves the right to provide further comments demonstrating the illegality of the Fee Measure.

⁸ 42 U.S.C. § 7573 (*emphasis added*).

⁹ *See, e.g.*, 42 U.S.C. §§ 7571-7574.

¹⁰ “Control of Air Pollution from Aircraft and Aircraft Engines; Emissions Standards and Test Procedures,” 62 Fed. Reg. 25,356, 25,359 (1997).

¹¹ *Washington v. General Motors Corp.*, 406 U.S. 109, 114-15 (1972). The legislative history of the CAA also makes clear that Congress intended to preempt the field of regulatory authority over aircraft emissions. *See, e.g.*, House Consideration of the Report of the Conference Committee, December 18, 1970 (“With regard to aircraft the Federal Government would preempt the field . . .”) (Statement of Rep. Staggers), *reprinted in* CAA Legislative History, at 113.

includes aircraft GSE.¹² In this regard, Section 209(e) extends to emissions standards or other requirements relating to both new and *existing* nonroad engines and vehicles.¹³

B. The Preemption Language in CAA Sections 209(e) and 233 is to be Read Broadly, Consistent with Well-Settled Principles of Statutory Construction and the Purposes of the CAA.

Where Congress preempts state laws “relating to” a particular subject area, the Supreme Court has held that the scope of preemption must be construed broadly.¹⁴ Such a construction of CAA preemption is entirely consistent with the legislative history of the CAA, which reveals that Congress chose to broadly preempt state regulation of mobile sources to avoid “an anarchic patchwork” of federal and state regulations.¹⁵

Indeed, Congress expressly sought to avoid the “difficulty of subjecting” mobile sources “to control by individual states,”¹⁶ recognizing that allowing “each state to go its own way . . . ‘could result in chaos insofar as manufacturers, dealers, and *users* are concerned.’”¹⁷ Consistent with this, it is undisputed that “*the cornerstone of Title II is Congress’ continued express preemption of state regulation*” of mobile sources such as aircraft and GSE.¹⁸

C. Sections 233 and 209(e) Preempt the Fee Measure.

Consistent with the broad reading given to Sections 233 and 209(e), courts have concluded that a common sense interpretation of “standards or other requirements” preempted by these sections encompasses any “regulatory measures intended to lower the level of . . . emissions”¹⁹

¹² 42 U.S.C. § 7543(e).

¹³ See *Engine Mfrs. Ass’n v. United States Env’tl. Protection Agency*, 88 F.3d 1075, 1087-93 (D.C. Cir. 1996).

¹⁴ See *Barnett Bank v. Nelson*, 517 U.S. 25, 38 (1996).

¹⁵ *Engine Mfrs. Ass’n*, 88 F.3d at 1082 (quoting *Motor & Equip. Mfrs. Ass’n, Inc. v. United States Env’tl. Protection Agency*, 627 F.2d 1095, 1109 (D.C. Cir. 1979)).

¹⁶ *Id.*

¹⁷ *Motor Vehicle Mfrs. Ass’n v. New York Dep’t of Env’tl. Conservation*, 17 F.3d 521, 524 (2d Cir. 1994) (“*MVMA I*”) (quoting S. Rep. No. 192, 89th Cong., 1st Sess. 5-6 (1965)) (emphasis added).

¹⁸ *Id.* at 526 (emphasis added).

¹⁹ *Motor Vehicle Mfrs. Ass’n v. New York Dep’t of Env’tl. Conservation*, 152 F.3d 196, 200 (2d Cir. 1998) (“*MVMA II*”).

Here, the Fee Measure is a regulatory measure intended to lower emissions and therefore preempted. On its face, the measure would require fees to fund emission reductions. Moreover, the District has made clear that it expects the Fee Measure to coerce preempted federal sources to reduce emissions, notwithstanding that the District indisputably lacks the authority to do so. For example, the District's Executive Director has publicly stated that the "bottom line" of the Fee Measure is to secure "emission reductions from federal sources."²⁰

Moreover, states and localities cannot evade federal preemption by attempting to regulate indirectly what they are prohibited from regulating directly.²¹ Consistent with this, it is well settled that compulsory financial payments are a form of regulation and cannot be used to circumvent preemption.²² The U.S. Supreme Court has recognized the coercive regulatory effect of monetary payments, holding that the "obligation to pay compensation can be, indeed, is designed to be, a potent method of governing conduct and controlling policy."²³

II. The Fee Measure Violates Federal Aviation Law.

Congress has long recognized the need for a safe, efficient, and reliable national aviation system, consistent with legally binding international standards. It has also understood that, in order to function efficiently and reliably, the system must apply a consistent set of regulatory requirements throughout the country and that the successful integration of each airport into the system implicates not only aircraft operations, but also infrastructure, facilities, and operations that support aircraft. As a consequence, federal aviation law, including the federal statutes discussed further below, carefully prescribe the scope of permissible regulation of aircraft-related operations.

A. The Draft AQMP Ignores that Federal Aviation Law Independently Preempts State and Local Measures.

FAA and EPA agree that such federal aviation law may independently preempt emissions regulation of commercial aviation. FAA has explained that "[t]he Federal regulatory regime for aviation is grounded in a number of statutory and regulatory provisions that generally preempt states from regulating the area of commercial

²⁰ Inside Cal/EPA, "South Coast Pushes EPA to Back Mitigation Fee on Federal Sources," at 1 (Feb. 28, 2003) (Attachment A hereto).

²¹ See, e.g., *International Paper Co. v. Ouellette*, 479 U.S. 481, 495 (1987); *San Diego Unified Port District v. Gianturco*, 651 F.2d 1306, 1313-14 (9th Cir. 1981).

²² E.g., *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521 (1992).

²³ *Cipollone*, 505 U.S. at 521 (quoting *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959)); see also *Philadelphia & Southern Mail S.S. Co. v. Commonwealth of Pennsylvania*, 122 U.S. 326, 336 (1887) ("[T]axing is one of the forms of regulation."); *Air Transport Ass'n of America v. City of Los Angeles*, 844 F. Supp. 550, 553 (C.D. Cal. 1994) (airport fees are a "type of regulation.").

aviation.”²⁴ Thus, FAA has concluded that a state or local measure may be preempted under federal aviation law, regardless of whether it is permissible under the CAA.²⁵

EPA concurs in FAA’s determination that federal aviation law poses an independent barrier to state and local emission measures. EPA has rejected commercial aviation-related measures for inclusion in State Implementation Plans (“SIPs”) based solely on preemption under federal aviation laws.²⁶ For example, EPA has found that states have “no authority to control airline operations” because of the Federal Aviation Act, and has rejected SIP measures based on the Airline Deregulation Act.²⁷ In accordance with its prior actions on SIPs, EPA stated in the 2002 nonroad rulemaking that local regulation of commercial aviation “may be subject to other federal restrictions” besides the CAA, including federal aviation law.²⁸ EPA therefore put states and localities on notice that they “should keep the arguments of ATA in mind if they attempt” to enact commercial aviation measures.²⁹

The District ignored this warning. As discussed below, the Fee Measure violates the express prohibitions, aims, and objectives of federal aviation law, including the Federal Aviation Act and the Airline Deregulation Act. As such, the Fee Measure is unlawful and preempted.

B. The Federal Aviation Act Preempts the Fee Measure.

The Federal Aviation Act of 1958 (“Aviation Act”) establishes “a *uniform and exclusive* system of federal regulation” of aircraft operations that preempts state and local regulation.³⁰ Aviation regulation is an area where “[f]ederal control is intensive and

²⁴ Letter from Carl Bureson, FAA to Gerald Fontenot, EPA, Region IV, at 2 (Apr. 24, 2001) (Attachment B hereto).

²⁵ *Id.*

²⁶ *See* 66 Fed. Reg. 57,160, 57,189 (2001).

²⁷ *Id.*

²⁸ *See* EPA, “Summary and Analysis of Comments: Control of Emissions from Unregulated Nonroad Engines, at III-60 through III-62 (Sept. 2002) (Attachment C hereto).

²⁹ *See id.* at 62.

³⁰ *Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 639 (1973) (emphasis added); *see, also e.g.*, 49 U.S.C. §§ 40101, 40103, 44701.

exclusive.”³¹ This pervasive federal regulatory scheme extends not only to aircraft flight, but to aircraft-related operations on the ground.³²

The Fee Measure violates the Aviation Act. The measure grants the District the authority to impose fees upon carriers who are simply exercising their right to operate in the National Airspace System, consistent with federal and international aviation standards. It is well settled that the Aviation Act preempts such local pre-conditions on the right to operate aircraft and related ground operations.³³ Indeed, the EPA has previously rejected SIP measures for precisely that reason.³⁴

C. The Airline Deregulation Act Prohibits the Fee Measure.

The Airline Deregulation Act (“ADA”) provides that a state “may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier”³⁵ Where a state law expressly regulates a “price, route or service,” that law is clearly preempted.³⁶ As the Supreme Court has held, the ADA’s language “express[es] a broad preemptive purpose,” and even indirect regulation of airlines by generally applicable state laws is preempted if those laws have “a significant effect” on rates, routes, or services.³⁷

³¹ *American Airlines v. Department of Transp.*, 202 F.3d 788, 801 (5th Cir. 2000) (quoting *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 303 (1944)).

³² *See, e.g.*, 49 U.S.C. § 40103(b)(2)(B)-(C) (granting Federal Aviation Administration regulatory authority to protect “individuals and property on the ground” at airports); *City of Houston v. FAA*, 679 F.2d 1184, 1195 (5th Cir. 1982).

³³ *See, e.g., Burbank-Glendale-Pasadena Airport Authority v. City of Los Angeles*, 979 F.2d 1338, 1341 (9th Cir. 1992) (zoning ordinance that required consideration of environmental impacts before runway construction amounted to an “interference with the movements and operations of aircraft” preempted by the Federal Aviation Act).

³⁴ *See, e.g.*, 66 Fed. Reg. at 57,189 (rejecting suggested SIP measure because states and localities have “no authority to control airline operations”). Binding treaty requirements that have the force of law would also be violated by the Fee Measure. *See, e.g.*, Article 15 of the Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180; ICAO Doc. 7300/6 (1980) (“[n]o fees, dues or other charges shall be imposed by any contracting State in respect solely of the right of . . . entry into or exit from its territory of any aircraft of a contracting State.”).

³⁵ 49 U.S.C. § 41713(b)(1). This statutory provision was previously codified at 49 U.S.C. § 1305(a)(1). *See* 49 U.S.C. App. § 1305(a)(1). In 1994, Congress reenacted this provision at 49 U.S.C. § 41713(b)(1) as part of its reenactment of Title 49, and changed the operative language from “rates, routes or services” to “price, route, or service.” “Congress intended the revision to make no substantive change.” *American Airlines v. Wolens*, 513 U.S. 219, 223 n.1 (1995).

³⁶ *See, e.g., Morales v. Transworld Airlines*, 504 U.S. 374 (1992) (holding that ADA preempted state law requirements that expressly referred to airlines and established “binding requirements” upon them).

³⁷ *Id.*

The ADA prohibits the Fee Measure. On its face, the measure would impermissibly regulate the core services of carriers – the operation of aircraft and related ground operations.³⁸ The Fee Measure, moreover, could significantly affect the prices and routes of carriers in the Basin. Pursuant to federal law, carriers already pay steep fees and charges for airport operations and projects.³⁹ These existing fees and charges, combined with other factors, force carriers to operate on thin to nonexistent profit margins. Piling on additional local fees would likely force airlines to raise prices, or even reduce or drop altogether certain routes in the Basin. This seems particularly likely in light of the District’s goal of exacting fees large enough to fund emission programs throughout the Basin over several years.⁴⁰

CONCLUSION

The Fee Measure cannot meet its stated objective of helping the Basin reach attainment, as it conflicts and interferes with the express prohibitions and purposes of the CAA and federal aviation law. ATA therefore urges the District to exempt aircraft and GSE from the Fee Measure. In lieu of the Fee Measure, ATA supports ARB’s and EPA’s position that the carriers will provide significant emission reductions toward attainment in the GSE MOU.

³⁸ See, e.g., *Federal Express Corp. v. California Pub. Util. Comm’n*, 936 F.2d 1075, 1078 (9th Cir. 1991) (holding that state’s generally applicable trucking regulation of air carrier’s trucking operations was preempted because such trucking operations “are integral to . . . operations as an air carrier”).

³⁹ See, e.g., 49 U.S.C. § 40117 (allowing carriers to be assessed passenger facility fees to fund certain airport projects). States and localities are prohibited from “tax[ing], regulat[ing], prohibit[ing] or otherwise attempting to control in any manner” the imposition, collection, or use of passenger facility fees. *Id.* § 40117(j).

⁴⁰ See, e.g., Draft AQMP, at 4-17 – 4-18, 7-7.

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Attainment at stake

SOUTH COAST PUSHES EPA TO BACK MITIGATION FEE ON FEDERAL SOURCES

Date: February 28, 2003 -

South Coast air district officials are attempting to persuade U.S. EPA to back a new fee on federal sources of pollution to help pay for emission reductions in the Los Angeles area. The district argues that EPA's failure to reduce pollution from federally regulated ships, planes, trains and other sources makes it extremely difficult for the region to meet impending and longer-range air quality attainment standards.

An EPA Region IX official responded this week that the agency is seriously considering the fee proposal. "We haven't rejected it and we think that the idea has some merit," said the source. "We just want to explore further how it would work legally, and really just to look at all the issues that that type of proposal raises." The proposal raises a "whole series of questions on authority and logistically how you would work [it], so it will take a little bit of time to work though the proposal internally at EPA." One idea that has been discussed is that the district and EPA would "partner to create a fund to offset emissions -- similar to the [Air Resources Board's] Carl Moyer Memorial diesel-reduction program -- and through agreements or other enforceable mechanisms have sources reduce emissions by tapping into the fund to pay for the reductions," the source added.

South Coast officials raised the fee proposal during a Feb. 27 press conference to unveil their 2003 Air Quality Management Plan (AQMP), which is the regulatory blueprint for achieving federal air quality standards for ozone and particulate matter (PM) over roughly the next decade. The AQMP must be approved by the ARB as part of its state implementation plan (SIP). SIPs must be approved by EPA as showing adequate short-, mid- and long-term measures to meet federal air standards. *A copy of the AQMP is available at InsideEPA.com.*

While South Coast leaders say the proposed AQMP can achieve the federal one-hour ozone standard by a 2010 deadline, they believe that it will be difficult to meet future eight-hour ozone standards, as well as PM 10 and PM 2.5 standards, without additional help from EPA to crack down on federally regulated sources of pollution. The focus on federal sources has intensified since EPA officials recently told South Coast staff that they will not grant any pollution-reduction credit to the district for any measure relying on federal-source pollution reduction. EPA believes that if it allows California to assume the federal agency will act to reduce pollution from federal sources, every other nonattainment area in the country will do the same, with the result being a collection of clean air plans based on false assumptions.

As a result, South Coast officials are asking federal sources to pay fees that will go toward programs to reduce pollution in the region. "While we may not get [EPA] to move in a regulatory manner, maybe we have a chance in these difficult budget times at the federal level to have them help us through alternative means," said Barry Wallerstein, executive director of the South Coast air district, at the press conference. "The bottom line is we need emission reductions from federal sources."

The "mitigation fee component is to ask federal sources to pay into a fund and to use the money to reduce emissions from either federal or other sources" in the Los Angeles area, said South Coast staffer Elaine Chang.

Chang said that Region IX officials have been "more responsive" to the proposal than to adopting new

national regulations. And Wallerstein said that district officials have been “engaged in preliminary discussions with regional staff, and we’re hoping in the next few weeks to initiate discussion with staff in Washington D.C.”

If EPA does not adopt any new national regulations or allow the federal source mitigation fee, “that will not be acceptable,” Wallerstein said. Allowing federal sources to go “uncontrolled puts that emission reduction burden on local agencies and on ARB -- it’s just an unacceptable position.”

The Region IX official said that the agency is limited in its ability to adopt and enforce a slew of new regulations on federal sources. “We think it makes sense to approach controlling sources through other methods, such as the [South Coast fee] proposal or through agreements with sources themselves. There are a whole host of tools we want to examine on how to achieve further reductions from these sources. . . . If these sources were amenable to new regulations we would have adopted them by now.”

Approval by EPA of a new mitigation fee on federal sources may be a tough sell, sources said, especially since most observers view the Bush Administration as dead against more financial burdens on industries. They point to EPA’s recent relaxation of new source review requirements on stationary sources as an indication of the administration’s position. Wallerstein said district officials are concerned about some of the recent federal policy changes, but added that during the Clinton Administration EPA also rejected South Coast and ARB calls for new and tougher federal regulations. “We’re back at the door once again and we’ve knocked politely in the past, and this time we’re knocking louder,” he said.

Federal pollution sources that demand the most immediate regulatory action are ships and locomotive engines, Wallerstein said, adding that a new mitigation fee on ships calling in Los Angeles-area ports is crucial.

In addition to urging EPA to help reduce pollution in the region, district officials plan to seek new legal authority to crack down on mobile sources and consumer products, and also want to adopt a new fee on ports (*see separate story, p16*).

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U.S. Department
of Transportation
**Federal Aviation
Administration**

800 Independence Ave., S.W.
Washington, D.C. 20591

April 24, 2001

Mr. Gerald Fontenot
Acting Administrator
United States Environmental Protection
Agency, Region VI
Dallas, TX 75202-2733

Dear Mr. Fontenot:

This letter is intended to convey the concerns of the Federal Aviation Administration (FAA) regarding the Environmental Protection Agency's (EPA) March 26, 2001, notice of its proposed State Implementation Plan (SIP) approval of the Texas Natural Resource Conservation Commission's (TNRCC) Dallas-Fort Worth Ground Support Equipment Rule (the GSE Rule).¹ 66 Fed. Reg. 16432 (2001). As explained more fully below, FAA believes that EPA's proposed approval: (1) is inconsistent with previous notices regarding the GSE Rule, (2) may potentially damage cooperative efforts undertaken by TNRCC and the regulated community to reduce GSE emissions and achieve attainment, (3) is unnecessary in light of recent litigation developments related to the GSE Rule, and (4) fails to address the issues that were addressed in an FAA letter transmitted last year to EPA headquarters and Region VI, which provided a detailed analysis of the GSE Rule and how it would impinge on aircraft operations in violation of the Federal Aviation Act.

With respect to the approval itself, EPA's March 26 notice appears to be a departure from the views it expressed in its January 18, 2001 proposed approval for the Dallas/Fort Worth Ozone Nonattainment State Implementation Plan. See Approval and Promulgation of Implementation Plans; Texas; the Dallas/Fort Worth Nonattainment Area; Ozone; Proposed Rule, 66 Fed. Reg. 4756 (2001). As EPA indicated in that notice, the legality of the GSE Rule has been challenged in both Federal and state court and the litigation will determine whether EPA can approve the GSE Rule. Accordingly, the January 18 Proposed Approval stated that EPA intended to take no action with respect to the GSE Rule. See 66 Fed. Reg. at 4756-57, 4760.

Additionally, the substance of the March 26 notice appears to be at odds with the comments that EPA provided to TNRCC on an identical GSE measure that had been proposed for the Houston Galveston Nonattainment Area. In those comments, EPA stated that it was not aware of any

¹ "Airport Ground Support Equipment," 30 TAC §§114.400, 114.402, 114.406, 114.409.

California requirement for NOx reduction systems similar to that proposed by TNRCC and, therefore, the rule was preempted by Section 209(e) of the Clean Air Act.²

The March 26 Proposed Approval also raises serious concerns with respect to its impact on cooperative efforts between EPA, state environmental officials, the FAA, airport officials, and the aviation industry to address emissions concerns relating to GSE. In this instance, TNRCC, the airlines, and the affected airports have been able to reach agreement on measures to address emissions inventories relating to GSE that will achieve the emissions reductions necessary to demonstrate attainment. These agreements were reached in the context of a settlement of the above-referenced legal challenge to the GSE Rule brought by the Air Transport Association of America, Inc. (ATA), on behalf of its member carriers. As a result of the agreements, equivalent emission reductions have been found, TNRCC has proposed repealing the GSE Rule, and the airlines have agreed to stay and ultimately dismiss their legal challenge in conjunction with TNRCC's action.

In light of these cooperative efforts, EPA's March 26 proposed approval of the DFW GSE Rule now appears unnecessary and potentially counter-productive. Certainly, there appears to be no reason why EPA should seek to SIP-approve a rule that TNRCC is in the process of withdrawing. Indeed, EPA's proposed action risks undermining the settlement reached between TNRCC and the stakeholders and resurrecting the litigation, notwithstanding the fact that it has been resolved by the parties in a matter wholly consistent with both the public interest in emissions reductions and the preservation of the National Aviation System.

FAA is similarly concerned that the proposed action sends a negative message to the broader group of stakeholders who are engaged in a national effort to achieve negotiated GSE emissions reductions in the ongoing initiative that is being pursued under the joint auspices of the FAA and EPA. The ability to conclude a voluntary agreement on GSE emission reductions as part of that process may be jeopardized if the parties believe their willingness to reach constructive compromise may be subsequently disregarded and perhaps even used against them by regulators.

Finally, FAA also has concerns regarding the potential impact of the views that EPA expressed in the proposed approval regarding the GSE Rule. The Federal regulatory regime for aviation is grounded in a number of statutory and regulatory provisions that generally preempt states from regulating the area of commercial aviation. Such statutes include the Federal Aviation Act, the Airline Deregulation Act, the Airport Noise and Capacity Act, and Sections 209(e) and 233 of the Clean Air Act.

² See Letter from Carl E. Edlund, EPA Region VI, to Jeffrey M. Saitas, TNRCC, at 26 (Sept. 25, 2000) ("*Engine Manufacturers Association of America v. EPA*, 88 F.3d 1075 (D.C. Cir. 1996) held that State regulation of non-road engines is preempted by the CAA unless it is a use restriction. Requirements to install NOx reduction systems do not qualify as use restrictions, therefore, this rule is preempted for non-road engines, unless it is identical to a California rule as provided in Section 209(e)(2) of the Clean Air Act. We are not aware of any California requirement for NOx reduction systems similar to that proposed by Texas, so we believe this rule is preempted for controls on non-road engines.").

In a letter transmitted last year to EPA's headquarters and Region VI, FAA provided a detailed analysis of the GSE Rule and how it would impinge on aircraft operations in violation of the Federal Aviation Act. That letter also expressed the view that the GSE Rule potentially violated other aspects of Federal aviation law. See Letter from Paul Dykeman, Deputy Director, FAA's Office of Environment and Energy, to Donald Zinger, Assistant Director for Transportation and Air Quality, U.S. EPA, and Ben Harrison, Region VI Office of Regional Counsel (August 24, 2000) (FAA Letter). EPA's March 26 Proposed Approval of the GSE Rule does not, however, address any of the issues raised in the FAA Letter. Nor was FAA's input sought before the publication of the proposed approval in the Federal Register.

Although this apparent oversight may have a diminished impact because of the GSE Rule's pending withdrawal, the proposed approval's approach to GSE preemption issues suggests a potentially problematic precedent for future actions by EPA with respect to state efforts to regulate emissions from aviation sources. In the proposed approval, EPA appears to take the position that a unilaterally imposed state-GSE rule need only avoid the preemption provision set forth in Section 209(e) of the Clean Air Act. Without expressing any opinion on the validity of state GSE rules under Section 209(e), FAA strongly believes that potential preemption under Federal aviation law must be considered as well when evaluating the legality of state environmental rules relating to commercial aviation.

In conclusion, FAA has serious concerns regarding both the necessity of the March 26 Proposed Approval of the GSE Rule and EPA's views regarding the role of states in regulating the area of commercial aviation. Accordingly, we recommend that the notice be withdrawn or amended.

I or members of my staff are most willing to meet with you to discuss this issue, if you so desire.

Sincerely,


for Carl E. Burleson
Director of Environment and Energy

cc: Mr. Jeffrey M. Saitas, TNRCC
Mr. Donald Zinger, USEPA



Summary and Analysis of Comments: Control of Emissions from Unregulated Nonroad Engines

NPGA opposed increased use of electric forklifts for many reasons:

- increased electricity consumption.
- electricity production also involves emissions.
- there are substantial inefficiencies in converting energy for electricity into power for forklifts; 27 percent of the fuel energy is available to the end user.
- battery disposal is a significant environmental issue.
- this would be in conflict with the energy-conservation goals of the National Energy Policy Act.
- battery-powered forklifts do not match the performance of engine-powered models. (NPGA 6)

The market has clear reasons to choose either battery- or engine-powered forklifts (cost, battery issues, performance characteristics, maintenance). Banning engine-powered forklifts would cause significant market dislocation. EPA has the authority to regulate engines, not to ban them. (see ITA 27-28)

Our Response:

We do not believe it is necessary or appropriate to require the use of electric forklifts at this time. Applying emission-control technology to internal-combustion engines, as contemplated in this rulemaking, removes most of the air-quality advantage of operating battery-powered forklifts. As other commenters note, there are significant energy, performance, and other issues implicated by such a mandate. Before we would contemplate any electric forklift requirement, we would need to undertake a rigorous analysis of full life-cycle environmental and economic impacts of the two alternative power sources, considering the source of electricity generation for charging batteries and problems associated with battery disposal. In addition, as Clean Air Act section 213 refers to regulation of nonroad engines, which are defined as internal-combustion engines, we would have to review our authority for regulating based on "propulsion systems" before any such regulation could be contemplated.

5. Federal Preemption

What We Proposed:

Although some aircraft utilize engines similar to those described in this proposal, we did not propose emission standards for aircraft or aircraft engines—aircraft are covered under a separate part of the Clean Air Act (sections 231, 232, and 233). Aircraft ground support equipment (GSE), which are classified as nonroad vehicles, are also covered by section 209(e) of the Clean Air Act which prohibits states and political subdivisions from enforcing standards relating to the control of emissions from nonroad engines and nonroad vehicles, though California may receive a waiver of federal preemption for most types of nonroad engines and other states may adopt California standards.

Current EPA regulations define aircraft as needing airworthiness certification from the Federal Aviation Administration (FAA). Our proposed definition of aircraft in these regulations would exclude all aircraft from emission standards, including those aircraft that do not receive an airworthiness certificate from FAA.

What Commenters Said:

The Air Transport Association (ATA) has concerns with statements in the proposed rule regarding the authority of states with respect to aircraft ground support equipment (GSE). ATA believes that these statements appear inconsistent with the Federal Aviation Law's control of aviation and with section 209 of the Clean Air Act which preempts states from regulating emissions from these vehicles.

ATA requests that the final rule acknowledge that section 209(e) of the Act preempts state regulation of existing nonroad vehicle emissions; further, they request that EPA revisit the preamble language in the final rule to ensure that it is consistent with Federal Aviation Law and section 209. The proposed rule states that section 209 preempts states “from setting emission standards for *new* engines or vehicles”; ATA believes that this is potentially misleading with respect to GSE due to the fact that this preemption is for *new and existing* nonroad vehicles. ATA also requests that the final rule describe and clarify the California “opt-in” process for standards. They believe the discussion of the California “opt-in” process is misleading in the proposal and provide clarification that California may regulate emissions only after applying for a waiver of federal preemption from EPA. ATA states that, for section 209, nonroad sources may be regulated as either a “federal” nonroad vehicle subject to federal standards, or a “California” vehicle for which a preemption waiver has been granted and statutory lead-time provisions have been met.

ATA requests that EPA clarify and explain the limited nature of use restrictions under the Act in the final rule. They have concerns with the statement in the proposal that “there is generally no federal preemption of state initiatives related to the way individuals use individual engines or vehicles.” They state that this is inaccurate and incomplete in that section 209(e) was specifically revised to preempt State and local retrofit requirements imposed on vehicle “owners or operators regardless of the impact on engine manufacturers.” Further, they state that the Act allows states to impose certain traditional restrictions on how a vehicle is used such as transportation control measures. These controls may reduce emissions, but do not generally impinge upon the standard setting authority for mobile source emissions exclusively given to the federal government and California. States are given the authority to regulate stationary sources, or anything that is “local in nature.”

Lastly, ATA requests that the final rule acknowledge the limitation on state regulation of GSE under the Federal Aviation Law. ATA also believes that the aforementioned statement in the proposal ignores the preemptive effect of the Federal Aviation Law on potential state and local efforts relating to GSE. Attachment A, a letter from FAA to EPA, states that for aviation there are a “number of statutory and regulatory provisions that generally preempt states from regulating the area of commercial aviation.” Further, the Federal Aviation Act’s system extends to aircraft-related ground operations and the Airline Deregulation Act provides that a state “may not enact or enforce a law related to...service of an air carrier...”, both of which preempt states from regulating GSE.

Our Response:

While we do not believe our discussion of federal preemption in the preamble to the proposed rule was inaccurate, we agree in general with the ATA’s comments. States are initially preempted under section 209(e) from promulgating emission standards for new and existing nonroad engines. However, California may under section 209(e)(2) request authorization to promulgate emission standards for any type of nonroad engine, excluding new locomotive engines and engines in new farm or construction equipment which are smaller than 175 horsepower. California may not enforce such regulations until it has received authorization from EPA. As the commenter notes, EPA must make certain particularized determinations regarding a request from California before granting such authorization. Other states may enact emission standards identical to California’s and may enforce these standards after California has received its authorization, as long as two years of lead time has been provided.

Regarding use restrictions, EPA agrees that certain regulations of vehicles in use, for example retrofit requirements, would generally be considered emission standards, rather than use restrictions and thus covered by the preemption of section 209(e). However, EPA also notes, and the commenter

acknowledges, that many types of restrictions (idling restrictions, for example) can validly be called use restrictions. As the commenter notes, Congress and the courts have held that such restrictions were inherently local in nature. EPA's regulations contain further discussion on this point. See 40 CFR part 89, Subpart A, Appendix A.

EPA's statement in the proposal that there was no federal preemption of state initiatives regarding the use of nonroad engines was only intended to apply to federal preemption under the Clean Air Act. State regulation of specific types of nonroad engines may be subject to other federal restrictions besides those under section 209 of the Clean Air Act. EPA does not need to make any determinations in this rulemaking regarding whether federal aviation law restricts the ability of states to regulate airport ground service equipment. States and localities should keep the arguments of ATA in mind if they attempt to regulate airport ground service equipment in the future.

EXHIBIT B



U.S. Department
of Transportation
Federal Aviation
Administration

800 Independence Ave., S.W.
Washington, D.C. 20591

Donald Zinger
Assistant Director for
Transportation and Air Quality
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

AUG 24 2000

Dear Mr. Zinger:

This letter clarifies the Federal Aviation Administration's (FAA) views concerning the rule adopted by the Texas Natural Resources Conservation Commission (TNRCC) on April 19, 2000, on emissions from airport ground service equipment. Enclosed please find an analysis of preemption issues related to that rule. The analysis concludes that any authority the State of Texas has to regulate airport ground service equipment is exceeded when that authority is exercised in a manner that would necessarily regulate aircraft operations. The Clean Air Act and Federal Aviation Act preempt state regulations that impinge upon aircraft operations and management of the navigable airspace. Based upon the data available, the FAA is unable to conclude that the regulation has left fleet operators a choice between suggested, reasonably available alternative means to comply with the TNRCC regulation and the freedom to select measures that do not restrict aircraft operations in the future.

The FAA has confidence that the ongoing discussions with the U.S. EPA with stakeholder groups to develop voluntary measures to reduce emissions from the aviation sector will be successful in providing reductions at airports throughout the country. In the meantime, FAA encourages U.S. EPA and TNRCC to continue to work cooperatively with appropriate airport officials and other affected parties to explore ways to reduce oxides of nitrogen and

other pollutants at airports that do not impinge upon aircraft operations. If you would like to discuss this matter further, please feel free to contact me at (202) 267-3577 or Daphne A. Fuller in the FAA Office of the Chief Counsel at (202) 267-3199.

Sincerely yours,



Paul Dykeman
Deputy Director
Office of Environment and Energy

Enclosure

cc: Ben Harrison, Office of U.S. EPA Regional Counsel

I. Factual Background

The TNRCC has adopted a rule that would require persons who own or operate ground service equipment (GSE) in the Dallas Ft. Worth (D/FW) ozone nonattainment area at airports having 100 or more air carrier operations per year, averaged over a three year period to "demonstrate a reduction of oxides of nitrogen (Nox) emissions" equal to or greater than the amount specified in the regulation. This includes the four largest commercial airports in the D/FW ozone nonattainment area, Dallas Ft. Worth, Meachem, Alliance, and Love Field airports. GSE is defined to include equipment that is used to service aircraft during passenger and/or cargo loading and unloading, maintenance, and other ground-based operations (excluding equipment used to service general aviation aircraft and military aircraft and equipment that is used during freezing weather such as ground heaters and deicing vehicles). Owners and operators of ground service equipment are required to:

- (1) have a 100% electrified fleet by May 1, 2005 or three years after the airport becomes subject to the rule, whichever is later. If a GSE unit is not available for purchase or conversion to electric power then the lowest emitting equipment available may be used instead, subject to the approval of the executive director of TNRCC and U.S. EPA; or
- (2) have a plan that provides for emission reduction measures to achieve the phased compliance required by (a), (b), or (d) (generally 20% by 2003, 50% by 2004, and 90% by 2005). The plan may include measures, which are applied to the GSE fleet itself, and measures which have been achieved elsewhere within the nonattainment area as long as those measures would be creditable in accordance with the Commission's emission banking program.

By letter dated June 23, 2000, to the Chairman of the Texas Natural Resource Commission, the U.S. EPA Regional Administrator for Region 6 clarified earlier U.S. EPA comments concerning the proposed rule. The letter stated that, based upon U.S. EPA's analysis "the Texas regulation is not preempted by the Clean Air Act."

II. Discussion

A. Federal Preemption

Article VI of the United States Constitution provides that the laws of the United States “shall be the supreme law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.” Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992), quoting Art. VI, cl. 2. Since M’Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 427 (1819), it has been settled that state law that conflicts with Federal law is “without effect.” Maryland v. Louisiana, 451 U.S. 725, 746 (1981). Consideration of issues arising under the Supremacy Clause start with the assumption that the historic police powers of the States are not to be superceded by Federal law unless that is the “clear and manifest purpose of Congress.” Cipollone, 505 U.S. at 516, quoting Rice v. Santa Fe Elevator Corporation, 331 U.S. 218, 230, (1947). Accordingly, the purpose of Congress is the ultimate touchstone of preemption analysis. Cipollone, 505 U.S. at 516. Preemption is predicated on Congressional intent.

Federal law may supercede state law in several different ways. California Federal Saving and Loan Association v. Guerra, 479 U.S. 272, 280-281 (1987). First, when acting within constitutional limits, Congress is empowered to preempt state law by so stating in express terms. Jones v. Rath Packing Company, 430 U.S. 519, 525 (1977). Second, Congressional intent to preempt state law in a particular area may be inferred from a “ ‘scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,’ because the ‘Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject,’ or because ‘the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose.’ ” Pacific Gas and Electric v. State Energy Resources Conservation & Development Commission, 461 U.S. 190, 203-204 (1983), quoting Fidelity Federal Savings & Loan Association v. De la Cuesta, 458 U.S. 141, 153 (1982), Rice v. Santa Fe Elevator Corporation, 331 U.S. 218, 230 (1947). Third, in those areas where Congress has not completely displaced state regulation, Federal law may nonetheless preempt state law to the extent that it actually conflicts with Federal law. Such conflict occurs either because “compliance with both

federal law and state regulations is a physical impossibility," Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143 (1963), or because the state law stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

B. State Regulation Of Aircraft Operations and Use of the Navigable Airspace Is Preempted Under the Clean Air Act, the Federal Aviation Act and Airport Noise and Capacity Act

The authority of the State to regulate aircraft to reduce air pollution is sharply circumscribed under the Clean Air Act, as amended, 42 U.S.C. § 7401, et seq. Section 233 of the Clean Air Act expressly preempts state regulation of aircraft engine emissions. Section 233 provides that "no state or political subdivision thereof may adopt or attempt to enforce any standard respecting emission of any air pollution from any aircraft or engine thereof unless such standard is identical to a standard applicable to such aircraft under this part." 42 U.S.C. § 7573.¹

Section 233 preempts any action by the State to enforce any standard for aircraft emissions unless the standard is identical to a standard applicable under the Clean Air Act. In other words, the State may only adopt a regulation addressing a particular aircraft emission if it is identical to a Federal standard. If there is no Federal standard, then State action is preempted and the State has no authority to apply a standard. In addition to the explicit prohibition under Section 233, the comprehensive scheme established by Sections 231 and 232 of the Clean Air Act for regulation of aircraft engine emissions by the U.S. Environmental Protection Agency ("EPA") and the U.S. Department of Transportation ("DOT") demonstrates Federal preemption of the field.² Under Section 231, the EPA, in consultation with the Secretary of Transportation (to assure safety), establishes national standards for aircraft engine pollutants. EPA must consult with DOT to assure that the standard takes effect after time allowing for the development and application of requisite technology. If DOT finds

¹ This section has been interpreted in California v. Dept of the Navy, 624 F. 2d 885 (9th Cir. 1980). In that case, the court ruled that the State could regulate U.S. Navy jet engine test cells. These test cells were not considered to fall within the preemption of Section 233 because the test cells were separate and apart from the aircraft engines themselves and could be regulated without necessarily affecting the operation of the aircraft.

² See, Washington v. General Motors Corp., 406 U.S. 109, 114 (1972) (Congress has "preempted the field so far as emissions from airplanes are concerned.")

that a proposed standard would create a hazard to aircraft safety, then the DOT may request review by the President who determines whether to disapprove the standard. The EPA has established standards for fuel venting and exhaust emissions for in-use gas turbine airplane engines manufactured after 1984. See 40 CFR Part 87. Under Section 232, the FAA is then responsible for enforcing those standards through the certification process. See 14 CFR Part 34. Based upon this comprehensive scheme there is clearly no room for States to establish or impose any aircraft emission standard not identical to those established by the EPA. When the scheme of regulation of aircraft engine emissions under the Clean Air Act is read together and harmonized with the other aviation statutes discussed below, it is clear that standards under Section 233 refer broadly not just to quantitative emission levels, but to emission reduction targets that necessarily have the direct or indirect effect of restricting aircraft operations.

The Federal Aviation Act, as recodified at 49 U.S.C. § 40103, the regulations implementing it in 14 C.F.R., the Airport Noise and Capacity Act (ANCA), as recodified at 49 U.S.C. § 47521, and the regulations implementing it in 14 C.F.R., preempt the States from regulating in the area of aircraft operations and airspace management. In a long series of cases,³ the courts have ruled that neither the States nor their political subdivisions can regulate the manner in which aircraft are operated or the airspace in which the aircraft are operated. This Federal scheme of regulation is deemed to be pervasive, intensive, and exclusive and is vested solely in the FAA. The court in City of Burbank v. Lockheed Air Terminal⁴, expressed concern about the need for uniformity of safe, efficient use of the navigable airspace. It reasoned that to permit curfews and other local regulation of flight operations would increase difficulties of scheduling flights to avoid congestion and concomitant decrease in safety would be compounded.

Congress recently reiterated in ANCA the federal policy against “uncoordinated and inconsistent restrictions on aviation that could impede the national air transportation system.” 49 USC 47521(2). Where, as here,

³ Allegheny Airlines v. Village of Cedarhurst, 238 F.2d 812 (2d Cir. 1956); American Airlines, Inc. v. Town of Hempstead, 398 F.2d 369 (2d Cir. 1968), cert. denied, 393 U.S. 1017, 21 L.Ed.2d 561, 89 S.Ct. 620 (1969); American Airlines v. City of Audubon Park, 297 F.Supp. 207, aff'd, 407 F.2d 1306 (6th Cir. 1969), cert. denied, 396 U.S. 845, 24 L.Ed.2d 95, 90 S.Ct. 78 (1969); City of Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973).

⁴ 411 U.S. 624 (1973).

Congress has articulated a policy, the most relevant preemption standard appears to be that stated in Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 236 (1947): “The test [of applicability of state laws] is whether the matter on which the State asserts the right to act is in any way regulated by the Federal Act. If it is, the federal scheme prevails though it is a more modest, less pervasive regulatory plan than that of the State.” See also, American Airlines v. Hempstead, 272 F. Supp 226, 230, aff’d, 398 F.2d 368, cited in City of Burbank v. Lockheed Air Terminal, 411 U.S. at 628 (“The aircraft and its noise are indivisible; the noise of the aircraft extends outward with the same inseparability as its wings and tail assembly; to exclude the aircraft noise from the Town is to exclude the aircraft...”)

Finally, the Airline Deregulation Act of 1978 (ADA), 49 U.S.C. § 41713, prohibits state regulation of aircraft operations. Congress enacted the ADA to “... ensure that the States would not undo federal deregulation with regulation of their own.” Morales v. Trans World Airlines, Inc., 504 U.S. 374, 378 (1992). (States’ enforcement of attorney general guidelines on air travel industry advertising and marketing practices held to be preempted for having a connection with or reference to airline rates, routes, or services). Section 105 prohibits any State or political subdivision from enacting or enforcing “... any law, rule, regulation, standard, or other provision having the force and effect of law relating to price, routes, or services of any air carrier” 49 U.S.C. § 41713(b)(1). The Supreme Court has defined the “relating to” language broadly to mean “having a connection with or reference to airline rates, routes, or services.” American Airlines v. Wolens, 513 U.S. 219, 223 (1995), citing Morales, 504 U.S. 374.

D. The TNRCC Regulation

Using its delegated authority under the Clean Air Act and its residual authority, the State of Texas may regulate sources of air pollution to achieve and maintain state and national air pollution standards. We do not here reach the issue of whether the Texas regulation is preempted under Section 209 of the Clean Air Act. We assume here, *arguendo*, without conceding, that the State of Texas may regulate airport ground service equipment in some manner. However, as discussed above, the State may not impose measures that necessarily regulate aircraft or aircraft operations and interfere with safety and efficiency in management of the navigable airspace. The central issue here is whether the TNRCC regulation has left owners and operators of GSE equipment the discretion to choose among suggested

procedures and the freedom to choose measures that do not necessarily regulate aircraft operations. See, Air Transport Association v. Crotti, 389 F. Supp. 58 (ND Cal. 1975)(Court upheld state airport noise statute that imposed noise abatement duties on airport proprietors where airport proprietors were left to choose among suggested procedures and were free to choose noise control measures that did not directly regulate aircraft operations). See also, California v. Navy, 431 F. Supp at 1286.

Based upon review of the preamble to the Texas regulations, FAA lacks sufficient data to make an informed judgment that compliance with the Texas regulation is possible without affecting growth in aircraft operations. 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. The availability of reliable GSE equipment is accordingly essential to safe and efficient use of the navigable airspace.

There is no clear evidence that the emission reduction requirements can be met without reducing total GSE equipment and, in turn, aircraft flights. Electrification will be difficult to implement without affecting operations given the recharging time, battery life, and the need for space for recharging equipment at the airport. Both the phased-in percentage emission reduction alternative and the electrification alternative potentially reduce the availability of GSE during peak periods of airport operation. Limitations on total numbers of GSE available at any given time would create difficulties in scheduling flights and increase congestion and delays.

It is equally unresolved whether the requirement for 100% electrification is feasible given the cost and availability of such equipment or reasonably attainable within the next five years given the infrastructure and electric grid requirements considering cost. TNRCC does not appear to have considered whether "opportunity charging" is practicable. There is little or no evidence that a reliable source of power exists that is adequate to provide power for all-necessary GSE equipment and sufficient back-up systems in the event of power outages or disruptions. Although the regulation provides for substitution, the regulation does not articulate the standards that TNRCC and U.S. EPA will use to determine when electric GSE is not available such that the lowest emitting available technology may be substituted.

Based upon information available to date, the emission trading program does not obviate any necessity for fleet operators to limit growth to achieve compliance in the future. There has been no analysis to demonstrate that credits are reasonably expected to be available elsewhere in the nonattainment area. Nor is it clear that the Commission trading program leaves GSE owners and operators the freedom to purchase credits from other nonattainment areas in Texas, such as the Houston area, which has more emissions available for credit. Although we agree with the U.S. EPA letter that the TNRCC regulations may allow owners and operators of GSE to include measures in their plans besides the two enumerated, there is no analysis showing that other viable measures are available to fleet operators.

A case that involves similar facts is San Diego Unified Port District v. Gianturco.⁵ In Gianturco, the State sought to require the Port District, as owner of Lindbergh Field, to extend the hours of an existing curfew. The State made extension of the curfew a condition of the variance needed for the permit to continue to operate the airport, which was not in compliance with California noise standards. The Ninth Circuit Court of Appeals held that the State's curfew was federally-preempted because it impinged on airspace management by directing when planes may fly in the San Diego area. The court explained that "Local governments may adopt local noise abatement plans that do not impinge upon aircraft operations." 651 F.2d at 1314. The court reasoned that the State could not use variances, licenses and permits to achieve indirectly what the Supreme Court had precluded in Burbank. Similarly, assuming arguendo that the State of Texas may adopt plans to regulate ground service equipment, such plans may not indirectly impinge upon aircraft operations. The State of Texas may not accomplish indirectly that which it is precluded from imposing directly.

The TNRCC regulations may also be determined to be preempted under § 105 of the Airline Deregulation Act of 1978 (ADA), 49 U.S.C. § 41713. To the extent that the TNRCC regulation would effectively require fleet operators to limit operations at airports in Texas, the TNRCC regulations very likely "relate" to air carrier routes in violation of § 41713(b)(1). Whether a fleet operator may take advantage of the flexibility inherent in the Federal deregulatory environment and increase service would appear to depend upon whether the TNRCC regulation indirectly restricts future growth in flights. The statute's proprietary exception, 49 U.S.C. §

⁵ 457 F. Supp. 283 (SD Cal. 1978), aff'd, 651 F. 2d 1306, 1313-14 (9th Cir. 1981), cert. den. 455 US 1000 (1982).

41713(b)(3), does not apply here since the State of Texas is not an airport proprietor.

In support of the conclusion that state regulation of GSE equipment is not federally preempted, in its letter dated June 23, 2000, U.S. EPA posits that the prohibition on state emissions standards under section 233 has been interpreted similarly to the prohibition in section 209. As authority for this proposition, EPA cites State of California v. Navy, supra. However, that case is factually distinguishable. It involved state authority to regulate aircraft engine test cells. The court in that case concluded that state regulation of aircraft engine test cells was not preempted, but did not otherwise define the scope of state authority to regulate aircraft operations. Nor did the court uphold state authority to indirectly regulate aircraft operations through operational restrictions on ground service equipment. Indeed, the reasoning in the case, particularly the opinion of the U.S. District Court, which was cited favorably by the Ninth Circuit Court of Appeals, strongly supports the conclusion that state regulations are federally-preempted to the extent that they necessarily impinge upon aircraft operations. A broad reading of state authority to regulate aircraft operations directly, or indirectly through ground service equipment limitations, would be inconsistent with federal preemption of airspace management and aircraft operations. Compare, Motor Equipment Manufacturers Association v. EPA, 627 F.2d 1095 (DC Cir. 1979), cert. den., 446 U.S. 952 (1980); Engine Manufacturers Association v. US EPA, 88 F.3d 1075, 1094 (DC Cir. 1996)(Section 209 of the Clean Air Act only preempts state regulation to establish quantitative limits on emissions. States have authority to impose restrictions on use of motor vehicles and non-road engines and vehicles, such as limitations on downtown usage).

To interpret the term standards in Section 233 of the Clean Air Act so narrowly as to authorize states to regulate aircraft operations would set a precedent that could lead to a proliferation of restrictions at other airports to control local air pollution. Such a result would be contrary to the concepts of Federal preemption and the comprehensive and pervasive scheme of Federal oversight of the nation's air transportation system enacted by Congress.

This analysis is limited to clarifying the scope of state authority based upon Section 233 of the Clean Air Act, when read together with federal aviation laws. FAA otherwise expresses no opinion concerning the remainder of the

analysis in the U.S EPA letter dated June 23, 2000. The FAA reserves the right to revise this analysis should the FAA receive additional, relevant information not heretofore available regarding the TNRCC regulation and alternatives for compliance available under that regulation.