

6/14/2023

Re: SEIU-USWW Public Comments on May 31 & June 1, 2023 LCFS Community Meetings

Our Union & Member Communities

SEIU United Service Workers West (USWW) represents nearly 45,000 janitors, security officers, entertainment & stadium workers across California, including thousands of workers at LAX, SFO and other airports throughout the state. Our membership primarily consists of workers within low-wage industries, including aviation. Many of our members reside in communities near major airports and within their flight paths. For decades, these communities - largely Black and Brown - have endured exposure from an array of toxic pollutants produced by airport operations, adding on to the decades of environmental racism these cities and neighborhoods have faced from other sources.

SEIU USWW recognizes the detrimental health impacts on our membership and communities produced by commercial aviation's dependency on fossil fuel consumption. For years, we've fought to raise industry standards at the bargaining table, but more recently have been expanding our commitment to confronting the environmental racism and inequity that our members and their communities face as a result of this industry's continued and ever-expanding operations.

California's LCFS & Commercial Aviation's Immense Privilege

It is for these reasons that we are excited to see CARB taking steps to decarbonize the industry by finally ending the industry exemption and incorporating conventional jet fuel (CJF) into the Low Carbon Fuel Standard. This is long overdue: Sustainable Aviation Fuel (SAF)¹ has been a credit-generating fuel under the LCFS for years, but it's difficult to imagine airlines prioritizing a meaningful transition to more sustainable fuels while their older, polluting fuels continue to draw hundreds of millions of dollars worth of subsidies and savings from the state.

The carveout for CJF saves the airlines an estimated \$110 to \$360 million each year on the cost of that fuel.² The state exemption from sales & use taxes for fuel used in international flights totaled nearly \$300 million in 2021-2022³, and the jet fuel exemption from excise taxes saves airlines about \$23 million a year.⁴

This heavily subsidized, minimally regulated dynamic for aviation will have to be changed in order to transition to a sustainable industry and meet California's ambitious climate goals. It's simply a matter of when and how.

¹ Called "Alternative Jet Fuel" under the program

² State fuel use estimated using DoT T-100 data on available seat miles originating in state & DoT data on national airline fuel consumption for 2019

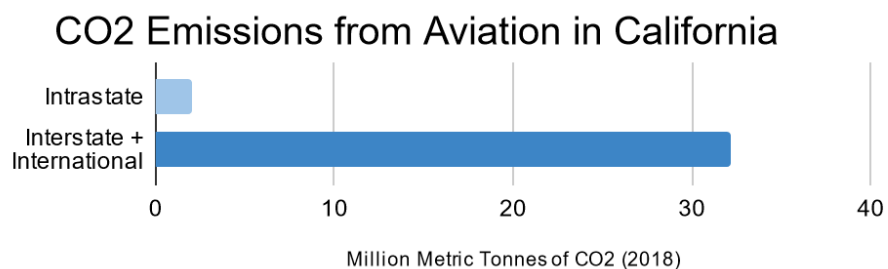
³ CA Dept. of Tax and Fee Administration, Aircraft Jet Fuel - Frequently Asked Questions

⁴ CA Dept. of Finance, Tax Expenditure Reports, 2021-22

Intrastate Jet Fuel in the LCFS - A Great First Step

SEIU USWW is very encouraged to see CARB continuing to seriously explore the idea of subjecting conventional jet fuel to LCFS standards - a concept that our union has been on the record in support of since last year⁵, and one we know the agency has been entertaining since at least 2021.⁶ The time has come for this idea to move toward implementation. This is a great first step, but we do want to emphasize why it can't be the last one. Intrastate flights represent an extremely small portion of overall emissions from aviation activity: just 3% of emissions nationally, and less than 6% in California.

- **California's aviation sector accounted for approximately 34 million metric tonnes of CO₂ emissions in 2018, and only about 2 million were the result of intrastate flights.⁷** This is represented in the chart below.



- **Intrastate flights make up only about 3% of aviation's CO₂ emissions in the United States.⁸** While nearly two-thirds of aviation CO₂ emissions in this country come from domestic flights - 112 million metric tonnes in 2019 - just 6 million tonnes comes from intrastate flights alone. Within just domestic flights in the United States, intrastate flights account for about 5% of CO₂ emissions.

To be clear, we view any progress toward reckoning with aviation's actual climate impact on California residents and communities as both welcome and overdue. But it should be the start of a much more comprehensive effort that California is uniquely positioned to lead on. Given the relatively limited portion of emissions that come from intrastate air travel in California, program amendments that end at intrastate jet fuel emissions only run the risk of greenwashing aviation's outsized climate impact by focusing the state's policy solutions on a source of emissions that amounts to a drop in the bucket for the industry.

The incremental approach of bringing intrastate jet fuels into the LCFS must include concrete efforts to explore - and report to the public - the full scope of emissions commercial aviation accounts for. This would include emissions from interstate and international flights beginning, ending or passing through our state. We feel that the fossil jet fuels behind these flights and emissions could and should also be incorporated into the LCFS as soon as possible.

⁵ SEIU USWW, "Re: CARB Draft 2022 Climate Change Scoping Plan Update," 6/23/2022

⁶ CARB, Public Workshop: Potential Future Changes to the LCFS Program, 12/7/2021

⁷ Zheng & Rutherford, ICCT, "Reducing aircraft CO₂ emissions: The role of U.S. federal, state, and local policies," February 2021

⁸ Zheng & Rutherford, ICCT, "Reducing aircraft CO₂ emissions: The role of U.S. federal, state, and local policies," February 2021

The Prospects of Overcoming Aviation's Inevitable Legal Challenges to Any LCFS Policy on Jet Fuel Are Promising

For decades now, commercial airlines have enjoyed significant protection from state and local oversight following the industry's deregulation in the late 1970s. The industry is quick to cite federal preemption in response to policies it may not support even if those policies are legally viable, and has several times in recent years sued *and lost* to overturn such policies. This happened in 2017 at LAX in a decision affirmed by the Ninth Circuit Court of Appeals that the US Supreme Court declined to review in 2019⁹, and again in 2022 when a federal court found that a San Francisco ordinance was not preempted as the airlines argued.¹⁰

At least three times now, the trade group for the major domestic airlines, Airlines for America, has argued that CARB's potential changes to the LCFS with respect to jet fuel would be federally preempted: in January 2022, June 2022, and March 2023¹¹. While we don't doubt that the industry would challenge LCFS amendments related to conventional jet fuel in court, the case law related to the Airline Deregulation Act (ADA) and Federal Aviation Act (FAA) preemption challenges - by far the most frequent grounds for such arguments - has us optimistic about the legal viability of such policy changes.

The Supreme Court has acknowledged in *Morales v. Trans World Airlines* that state regulations can be found "too tenuous, remote or peripheral" to trigger ADA preemption.¹² So, whether CARB's proposed changes to the LCFS would be preempted under the ADA depends on the directness or remoteness of any connection between the costs that such a policy would create for producers and consumers of jet fuel, and the prices and services offered by the airlines buying the fuel. A regulation that features several layers of abstraction outside the point of decision-making about prices, routes and services is less likely to implicate ADA preemption.

Fortunately, the LCFS' conventional jet fuel regulations would operate several steps removed from air carriers' points of decision-making on prices, routes and service. Should the exemption for jet fuel be removed, the regulatory burden of the LCFS would apply to *suppliers* of conventional jet fuel, not the consumer airlines. Moreover, the provisions of the program target the composition of carbon-based fuels produced by any kind of entity in the state, not producers or importers of conventional jet fuel specifically.

In recent years, the Ninth Circuit Court of Appeals has applied its own line-drawing as permitted under *Morales* and upheld state regulations against preemption challenges under the ADA (and the closely-related Federal Aviation Authorization Act.)¹³ For example, in *Bernstein v. Virgin America*¹⁴ (9th Cir. 2021) the Ninth Circuit upheld several California labor requirements as applied to flight attendants, ruling that they were *not* preempted by the ADA because "background regulations that are several steps removed from prices, route, or services...are not preempted, even if employers must factor those provisions into their decisions about the prices that they set, the routes that they use, or the services

⁹ *JD Supra*, "US Supreme court Declines to Review Two Airline Industry Cases," 06/28/2019

¹⁰ *Bloomberg Law*, "San Francisco Defeats Airline's Suit Over Health Benefits Law," 04/06/2022

¹¹ Airlines for America, "Input on the December 7, 2021, LCFS Public Workshop," 01/07/2022; Airlines for America, "Comments on the Draft 2022 Scoping Plan Update," 06/24/2022; Airlines for America, "Input on the February 22, 2023, Public Workshop to Discuss Potential Changes to the Low Carbon Fuel Standard," 05/25/2023

¹² *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992)

¹³ The Ninth Circuit construes these statutes' preemption provisions coextensively due to their virtually identical language, and considers the reasoning of cases construing one statute's preemption principles to apply with equal force to cases construing the other's. See, e.g., *Bernstein v. Virgin America* (9th Cir. 2021). ("The language of the ADA's preemption clause is virtually identical to the language of the FAA's. The reasoning [of recent FAA case] applies with equal force here").

¹⁴ *Bernstein v. Virgin America, Inc.*, No. 19-15382 (9th Cir. 2021)

that they provide.”¹⁵ Note that the Ninth Circuit upheld these regulations as applied directly to an air carrier. In contrast, the LCFS regulations in question apply to commercial suppliers of conventional jet fuel.

It bears emphasizing that the industry has raised the specter of a preemption challenge even in response to LCFS reform limited to intrastate flights only. This threat will have to be overcome eventually, as the industry will fight to preserve the status quo no matter how measured the regulations are, and California is going to be hard-pressed to meet its decarbonization benchmarks without addressing a sector that represented the second largest emissions subcategory in the entire state in 2019, behind only the combined emissions from all on-road transportation.¹⁶

Legally the structure of the LCFS works in our favor and there is a viable path for the proposed LCFS action that is well-supported by recent case law. We view recent Ninth Circuit decisions applying ADA preemption as promising with respect to the industry’s signaled legal challenges.

Moving Forward

At SEIU USWW we strongly support efforts to incorporate intrastate conventional jet fuel into the LCFS program and will continue to advocate for this kind of policy - though we believe that CARB can and should still include the fuels used in interstate and international flights in current proposals. We believe that meeting California’s ambitious climate goals will require a sober-minded view of the sources of carbon emissions, and that decarbonizing aviation is a necessary challenge that our state must overcome. We are encouraged by this policy as a first step and optimistic about the legal viability of this direction. We look forward to continued and increased collaboration with CARB in the years to come as we work to bring true accountability to an industry with so many stakeholders in our workplaces and communities.

Sincerely,

A handwritten signature in black ink, appearing to read 'David Huerta', with a stylized flourish at the end.

David Huerta

President - SEIU United Service Workers West & SEIU California

¹⁵ *Bernstein v. Virgin America, Inc.*, at 1141 quoting *Dilts v. Penske Logistics LLC* 769 F.3d 637, 646 (9th Cir. 2014)

¹⁶ CARB, CA GHG Inventory for 2000-2020 - by Sector and Activity, 10/26/22