



# South Coast Air Quality Management District

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April 15, 2022

The Honorable Michael S. Regan, Administrator  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W. (Mail Code 1101A)  
Washington, D.C. 20460

*Sent via certified mail, return receipt requested*

**RE: Notice of Intent to Sue Pursuant to Section 304(b)(2) of the Clean Air Act; State Implementation Plan Submissions from California; South Coast Air Quality Management District**

Dear Administrator Regan:

I am writing on behalf of South Coast Air Quality Management District (South Coast AQMD) to notify you of ongoing violations of the federal Clean Air Act by the U.S. Environmental Protection Agency (EPA) for failing to timely act on a State Implementation Plan (SIP) submittal on contingency measures submitted by the South Coast AQMD on December 31, 2019. EPA action on this SIP submittal is due according to the mandatory deadlines assigned by Section 110(k)(2) of the Clean Air Act (CAA), 42 U.S.C. § 7410(k)(2). More specifically, EPA has failed to timely act on a contingency measures plan adopted December 6, 2019 that was submitted through the California Air Resources Board (CARB) on December 31, 2019 for EPA approval in addressing the provisions of CAA Section 182(e)(5). EPA was required to act on the plan by June 30, 2021. Section 110(k)(2) directs action in accordance with Section 110(k)(3) on “Full and partial approval and disapproval,” but in this case, EPA must under Section 110(k)(3) only approve, and not disapprove, this SIP submittal. Congress intended for EPA to regulate federal sources<sup>1</sup> as necessary to allow all areas, and in particular the South Coast Air Basin, to attain the air quality standards. Any action to disapprove the SIP on the basis that it relies on the federal government to take actions would be subject to challenge because the South Coast region simply cannot attain without massive reductions from federal sources. Accordingly, we submit

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<sup>1</sup> Federal sources, as used in this notice, refers to federally regulated sources for which neither South Coast AQMD nor the State (i.e., CARB) can set emission standards. EPA has previously employed this terminology, for example, in recognizing EPA’s need to deliver “fair share reductions of federal sources” to South Coast. *See, e.g.*, 64 Fed. Reg. 39923, 39924 (July 23, 1999).

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that the SIP must be approved, and EPA must develop a regulatory strategy and find sufficient funding to reduce federal emissions to meet the health-based National Ambient Air Quality Standards.

The South Coast AQMD intends to file a lawsuit seeking to address EPA's failure to timely act as required by 42 U.S.C. § 7410(k)(2) and (3), 60 days from the date of this letter under CAA Section 304, 42 U.S.C. § 7604. This notice is submitted in accordance with 40 C.F.R Section 54.3. The following case information supports our position.

**I. The South Coast Air Basin Cannot Attain the 1997 Eight-Hour Ozone Standard Without Massive Emission Reductions From Federally Regulated Sources**

The South Coast Air Basin cannot attain the 1997 8-hour ozone standard without massive emission reductions from federal sources. Even considering only emissions from ships, locomotives, and aircraft, the region needs an additional 46 tons per day (tpd) of NO<sub>x</sub> reductions by 2023 to attain the standard in a timely manner.<sup>2</sup> When also considering the emissions from on-road heavy-duty trucks that are subject to federal authority, the region needs a total of 67-69 tpd of NO<sub>x</sub> reductions from federal sources.<sup>3</sup>

Unfortunately, the federal government does not currently have plans to secure these reductions as specific commitments and a regulatory agenda were noticeably absent in the Fiscal Year 2022-2026 EPA Strategic Plan released on March 28, 2022. While total NO<sub>x</sub> emissions in the South Coast Air Basin will have been reduced by almost 50% between 2012 and 2023, almost all these reductions will come from sources under CARB or South Coast AQMD authority. For example, over this time, NO<sub>x</sub> emissions from light duty vehicles will have been reduced by over 70%. CARB and the South Coast AQMD are doing our part. In contrast, NO<sub>x</sub> emissions from aircraft, locomotives, and ocean-going vessels will *increase* by almost 10% over the same period.<sup>4</sup>

It would be impossible to attain the standard without the required reductions from these federal sources. Reaching attainment solely with emission reductions from South Coast AQMD and CARB regulated sources would require eliminating all emissions from *virtually all* such sources. According to the CARB 2018 updates to the California SIP, baseline emissions of NO<sub>x</sub> in 2023 in the South Coast Air Basin will total 269 tpd. *See* Summary Table for 2023 NO<sub>x</sub> Emissions, appended to this letter. To attain the 1997 ozone standard, these emissions must be reduced to a

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<sup>2</sup> Revised Proposed 2016 State Strategy for the State Implementation Plan (March 7, 2017), p.32. *available at* <https://ww3.arb.ca.gov/planning/sip/2016sip/rev2016statesip.pdf>.

<sup>3</sup> Final Contingency Measure Plan, December 2019, Table 2-1, p. 39, *available at* <https://www.aqmd.gov/docs/default-source/clean-air-plans/air-quality-management-plans/2016-air-quality-management-plan/1997-ozone-contingency-measure-plan/1997-8-hour-ozone-draft-contingency-measure-plan---120619.pdf?sfvrsn=10>.

<sup>4</sup> Final Contingency Measure Plan, December 2019, p. 58.

carrying capacity of 141 tons per day by 2023.<sup>5</sup> Thus, the region must reduce expected 2023 emissions by 128 tpd (the difference between the baseline of 269 tpd and the carrying capacity of 141 tpd). If no further reductions come from federal sources, all 128 tons of reductions would need to come from state and locally regulated sources. This would mean, for example, completely eliminating all emissions from stationary and area sources (49 tpd), all emissions from California-regulated on-road vehicles (69 tpd), and 10 tpd of California-regulated off-road sources such as larger farm and construction equipment (about 20% of the total of off road sources).

It is not yet possible to completely eliminate all emissions from on-road, stationary, and area sources of NO<sub>x</sub> in the South Coast Air Basin. Nor is it realistic to expect that all such sources would be entirely zero-emissions in the near future. Therefore, it is imperative that significant emission reductions come from federal sources. And it would be manifestly unfair to penalize the South Coast AQMD and the State by disapproving the Contingency Measure Plan and triggering sanctions based on emissions under federal control.

## **II. The Legislative History Demonstrates that Congress Intended EPA to Regulate Federal Sources as Needed to Enable All Areas of the Nation to Attain the National Ambient Air Quality Standards**

In the 1990 Amendments to the CAA, Congress preempted the states from establishing emission standards for locomotives, farm and construction equipment, and other nonroad engines, which includes marine vessels. CAA Section 209(e).<sup>6</sup> And for decades, states have been preempted from regulating new motor vehicles, with California allowed to adopt its own standards with a waiver from EPA. CAA Section 209(a) and (b); 42 U.S.C. §§ 7543(a), (b).

As Congress debated the 1990 Amendments, Members of Congress from California stated that unless EPA regulates these sources, the South Coast region would be prevented from attaining the ozone standards. Representative Carlos Moorhead (R-CA) stated that it will be impossible for Los Angeles to attain the NAAQS if EPA fails to regulate federal sources.<sup>7</sup> Senator Pete Wilson (R-CA) also explained that if federal sources are not controlled, California will not be able to comply.<sup>8</sup> In response to these concerns, Senator John Chafee (R-RI), the lead co-sponsor of the Senate Bill, assured the California delegation that Congress intended that EPA would regulate federal sources as necessary so that all areas could attain the standards. In response to a question from Senator Wilson regarding the Amendments, Senator Chafee explained that “EPA has the obligation...to adopt control measure[s] for sources which it exclusively controls when these

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<sup>5</sup> Final Contingency Measure Plan, December 2019, p. 2.

<sup>6</sup> 42 U.S.C. § 7543(e). The CAA also preempts state and local governments from setting emission standards for aircraft. CAA Section 233; 42 U.S.C. § 7573.

<sup>7</sup> Congressional Research Service, A Legislative History of the Clean Air Act Amendments of 1990, (Leg. History), p. 2613.

<sup>8</sup> Leg. History, p. 1125-26.

controls are necessary to attain national [ambient air quality] standards.”<sup>9</sup> Finally, when Congress enacted section 213 of the CAA, 42 U.S.C. § 7547, which obligated EPA to regulate nonroad sources, it stated in the Conference Report: “We expect EPA to carry out this mandate in a fashion which assures that states which are preempted will not suffer any additional [e]missions beyond what they themselves would have allowed.”<sup>10</sup> This Conference Report reflects the views of the Members from both the House and Senate. Thus, Congress intended for EPA to regulate federal sources as necessary to allow all areas to attain the standards.

### **III. EPA Has Previously Recognized the Need for Significant Reductions From Federal Sources and Approved the 1994 South Coast Ozone SIP Which Relied on Such Reductions and EPA Must Do So Again**

As demonstrated above, under the CAA, EPA has the responsibility to regulate federal sources where necessary to allow all areas to attain the standards. EPA itself has recognized that responsibility in the past. In approving the 1994 1-hour ozone SIP for the South Coast Air Basin, EPA recognized that “massive further reductions are needed for attainment in the South Coast and that attainment may be either very costly and disruptive or impossible if further reductions are not achieved from national or international sources.”<sup>11</sup> While EPA noted it did not think states have authority to assign responsibilities to the Federal Government under the Clean Air Act, it also said it believed EPA should help speed cleaning the air in California and nationally.<sup>12</sup> Accordingly, EPA made an “enforceable commitment” to adopt federal measures that it determined were EPA’s responsibility.<sup>13</sup> On this basis, EPA was able to approve a SIP submittal that relied on federal measures. Therefore, EPA has established precedent of doing the right thing and approving a plan that relies on federal measures, recognizing the federal responsibility to regulate where necessary to allow the region to attain the standard.<sup>14</sup> EPA must take a similar approach to acting on the 2019 Contingency Measure Plan, since as discussed below, a disapproval, which inevitably triggers sanctions, would be unlawful.

### **IV. Disapproval of the Contingency Measure Plan Would Lead to Sanctions that Congress Did Not Intend**

If EPA were to disapprove the contingency measure plan on the basis that it relies on federal measures, such disapproval would trigger sanctions. The sanctions include greatly increasing the cost and difficulty of issuing permits as well as cutting off federal highway funds. CAA Section 179; 42 U.S.C. Section 7509. Sanctions can be avoided if the basis for the disapproval is corrected. *Id.* However, in this case it is not possible to eliminate the plan’s reliance on federal

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<sup>9</sup> Leg. History, p. 1127.

<sup>10</sup> Leg. History, p. 1021

<sup>11</sup> Approval and Promulgation of Implementation Plans; California—Ozone, 62 Fed. Reg. 1150, 1152 col.3---1153 col. 1 (Jan. 8, 1997).

<sup>12</sup> 62 Fed. Reg. 1150, 1151 col. 2.

<sup>13</sup> 62 Fed. Reg. 1150, 1154 col. 1.

<sup>14</sup> See 40 CFR § 52.238 (“Commitment to undertake rulemaking”).

measures, because CARB and South Coast AQMD lack adequate authority to obtain necessary emission reductions from federal sources. Therefore, the region has no ability to avoid sanctions. But Congress did not intend sanctions to be imposed where the area being sanctioned does not have adequate authority to correct the alleged deficiency.

The legislative history of the 1990 Amendments to the Clean Air Act shows that Congress did not intend sanctions to be imposed where the state and local governments lack sufficient authority to remedy the deficiency, which in this case is because the CAA preempts state and local governments from setting emission standards for federal sources. On May 23, 1990, during the House debate on the CAA, Representative Norm Mineta (D-CA) stated that “Under the sanctions provisions, the EPA Administrator is required to establish criteria for exercising his or her authority to impose sanctions on political subdivisions that have adequate authority to correct an air quality deficiency.”<sup>15</sup> In this case, the South Coast AQMD does not have adequate authority to correct the supposed deficiency, since it is impossible to devise a plan that does not rely on emission reductions from federal sources for which EPA has the authority to set emission standards. This principle was repeated during the House debate on the Conference Report on October 26, 1990. Representative Glenn Anderson (D-CA) stated: “This provision will ensure that available sanctions are applied to the geographical areas under the control of the government agency principally responsible for failure to comply with the Clean Air Act and with the authority to remedy the deficiency.”<sup>16</sup> While this discussion pertains directly to CAA Section 110(m), which prohibits statewide sanctions for 24 months if the failure is primarily due to a political subdivision, it clearly shows that Congress did not intend for sanctions to be imposed on an area that may be unable to correct the deficiency.

Moreover, Congress did not intend for a state to be penalized where an inability to demonstrate attainment is due to emissions from federal sources. The Clean Air Act recognizes that such a result would be highly unfair. Section 179B of the CAA [42 U.S.C. § 7509a] requires EPA to approve an attainment demonstration where the state shows it would attain the standard “but for emissions emanating from outside of the United States.” The legislative history of this section makes it clear that it was adopted precisely because it would be unfair to hold a state responsible for emissions over which it has no control. The amendment was sponsored by Senator Phil Gramm (R-TX), who explained: “it is unfair to hold El Paso accountable for pollution that is generated in a foreign country that they have no control over.”<sup>17</sup> Senator Max Baucus (D-MT), the sponsor of the Senate bill, spoke in support of the provision, noting that border areas “do not have control of their own destiny themselves.”<sup>18</sup> Thus, Congress did not intend to penalize areas that have no control over the sources causing nonattainment. By the same token, Congress would not have intended to penalize areas where nonattainment is due to federal sources. Congress did not see a need to specifically discuss this possibility because it had already made it clear that

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<sup>15</sup> Congressional Research Service, *A Legislative History of the Clean Air Act Amendments of 1990*, (Leg. History) Committee Print, p. 2658

<sup>16</sup> Leg. History, p. 1200.

<sup>17</sup> Leg. History, p. 5741.

<sup>18</sup> Leg. History, p. 5742.

EPA was expected to regulate federal sources as needed to allow all areas, and specifically the South Coast Air Basin, to attain the standards, as discussed in Part III above. Therefore, Congress did not anticipate that areas would fail to attain due to emissions from federal sources.

**V. EPA Action to Disapprove the South Coast 2019 Contingency Measure Plan Would Violate the Doctrines of Impossibility and Absurd Results**

As discussed in Part I above, it is impossible for the South Coast Air Basin to attain the 1997 8-hour ozone standard without massive further emissions reductions from federal sources. Therefore, if EPA were to disapprove the 2019 Contingency Measure plan because it relies on federal action, it would be impossible for the South Coast AQMD to submit a plan that eliminated that reliance. Thus, the South Coast AQMD would never be able to correct the alleged deficiency in the plan and would be subject to sanctions which it has no ability to avoid. These sanctions would likely lead to the South Coast AQMD being unable to issue permits for new or modified major stationary sources, because the 2-to-1 offset ratio would require offsets that simply are not available in the region. Moreover, the sanction of withholding highway transportation funds would likely affect billions of dollars in economic activity as infrastructure projects are waylaid creating ramifications for the largest container Ports complex in the nation with no way to ever correct the deficiency and have the transportation sanctions lifted. Since disapproval of the 2019 Contingency Measure Plan would lead to a requirement that the South Coast AQMD do the impossible, it would be unlawful. “The law does not require impossibilities of any person, natural or artificial...” *Dist. of Columbia v. Woodbury*, 136 U.S. 450, 464 (1890). And as stated in California Civil Code Section 3531, “[t]he law never requires impossibilities.” So EPA cannot by a disapproval require the South Coast and California to do the impossible.

In addition, the doctrine of “absurd results” prevents EPA from disapproving the Plan. Any action which would impose sanctions on a region for a failure caused by sources over which it has no control would create absurd results. The Supreme Court has long held that when the literal language of a statute “has led to absurd or futile results...this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one plainly at variance with the policy of the legislation as a whole this Court has followed that purpose rather than the literal words.” *U.S. v. American Trucking Ass’ns.*, 310 U.S. 534, 543 (1940) (cleaned up). The Supreme Court reiterated this language in *Perry v. Commerce Loan Co.*, 383 U.S. 392, 400 (1966). Penalizing the South Coast with an action that causes sanctions because of emissions over which the state and local agencies lack the ability to set emission standards creates absurd results and is plainly at variance with the purpose of the statute as a whole, which is not to penalize states for sources outside their control.

**VI. Imposing Sanctions on An Area that Cannot Attain the Standard Because of Emissions from Federal Sources Would Violate the 10<sup>th</sup> Amendment and Principles of the Spending Clause**

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In 2012, the U.S. Supreme Court struck down provisions of the Affordable Care Act on the ground that the conditions placed on the receipt of federal funds were so coercive as to violate the limits of the Spending Power. *Nat'l Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012). Since the 1990 Amendments, certain states have challenged the CAA as violating the 10<sup>th</sup> Amendment and the Spending Clause of the U.S. Constitution. These cases have been unsuccessful, based on the conclusion that the CAA sanctions were not so coercive that the state had no choice but to comply with the Act's demands. *Mississippi Commission on Environmental Quality v. EPA*, 790 F. 3d. 138 (D.C. Cir. 2015); *Com. of Virginia v. Browner*, 80 F. 3d 869 (4<sup>th</sup> Cir. 1996). However, in the present case, an action that results in sanctions would violate the 10<sup>th</sup> Amendment and the Spending Clause, because the state and local government have no choice, and no ability, to avoid sanctions.

The principles under which the Supreme Court has upheld exercises of the Spending Power depends on the element of choice. Congress may "offer States the choice of regulating the activity according to federal standards or having state law preempted by federal regulation." *New York v. U.S.*, 505 U.S. 144 167 (1992). Moreover, a valid exercise of the Spending Power requires that the state have a choice whether to regulate as the federal law directs or to lose federal funding. *See New York*, 505 U.S. at 173. Here, the state and South Coast AQMD have no choice whether to lose federal funding or suffer other sanctions because they lack the ability to set emission standards for federal sources, and thus no ability to comply with what would be required if EPA disapproves the Plan. Thus, an action to disapprove the Plan, which triggers sanctions the region has no ability to avoid, would violate the 10<sup>th</sup> Amendment and the Spending Clause.

## **VII. Notice of Intent to Sue**

### **A. Failure to Perform Nondiscretionary Duties**

The contingency measure plan submitted to meet CAA Section 182(e)(5) is subject to the SIP processing requirements of CAA Section 110. *See* 42 U.S.C. §§ 7410, 7511a(e)(5). The Clean Air Act further requires the Administrator to fully or partially approve or disapprove a plan submission within twelve (12) months after such submission has been deemed complete, either by the Administrator or as a matter of law. *See* 42 U.S.C. Section 7410(k)(2). If the EPA does not make a completeness finding, plan submissions are deemed complete by operation of law six (6) months after submission. *See* 42 U.S.C. Section 7410(k)(1)(B). Therefore, at most, EPA had eighteen (18) months within which to take final action to approve, disapprove, or partially approve the plan submission. As of the date of this letter, EPA has failed to fully or partially approve or disapprove the SIP submittal. As explained, in this case, the only lawful exercise of the Administrator's duties would be to approve the SIP submittal in acting under 42 U.S.C. § 7410(k)(3). Because EPA has failed to take required action by the statutory deadline, EPA is now in violation of CAA Section 110(k)(2) and (3); 42 U.S.C. § 7410(k)(2) and (3). After the expiration of sixty (60) days from the date of this notice of intent to sue, South Coast AQMD intends to file suit against EPA in federal court for the failure to act in accordance with, or fulfill, the duties described in this letter.

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United States Environmental Protection Agency  
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**B. Identity of Persons Giving Notice and Their Counsel**

As required by 40 C.F.R Section 54.3, the name and address of South Coast AQMD, the noticing party, is as follows:

South Coast Air Quality Management District  
21865 Copley Drive  
Diamond Bar, CA 91765  
Tel: 909-396-3535

Legal contacts and counsel representing South Coast AQMD on this matter will include the following:

Bayron T. Gilchrist, General Counsel  
Barbara Baird, Chief Deputy Counsel  
Brian Tomasovic, Principal Deputy District Counsel  
Tel: 909.396.3400  
Fax: 909.396.2961  
Email: bgilchrist@aqmd.gov; bbaird@aqmd.gov; btomasovic@aqmd.gov

**C. Offer to Negotiate**

During the sixty (60) day notice period, South Coast AQMD is willing to discuss effective measures to correct EPA's failure to comply with nondiscretionary duties and to discuss any information bearing upon this notice. We sincerely hope that we can engage in productive and meaningful discussions with EPA that results in a regulatory strategy and finds sufficient funding to reduce federal emissions to meet the health-based National Ambient Air Quality Standards. We do not, however, intend to delay the filing of a complaint in federal court if the discussions fail to resolve these matters within the sixty (60) day notice period, and intend to seek all appropriate relief, including injunctive relief and all costs of litigation, including, but not limited to, attorneys fees, expert witness fees, and other costs. We believe this notice provides information sufficient for EPA to determine the mandatory duty we allege it has failed to perform. If, however, there are any questions, please feel free to contact us for clarification.

We look forward to working with you on this important issue.

Sincerely,



Bayron T. Gilchrist  
General Counsel

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Appendix.  
 Summary Table for 2023 NO<sub>x</sub> Emissions.

<b>Source Category</b>	<b>2023 NO<sub>x</sub> Emissions</b>	<b>References</b>
Stationary and Area Sources	49 tpd	2018 SIP Update <a href="https://ww3.arb.ca.gov/planning/sip/2018sipupdate/2018update.pdf?_ga=2.203433616.1202062696.1609860434-773042855.1578434161">https://ww3.arb.ca.gov/planning/sip/2018sipupdate/2018update.pdf?_ga=2.203433616.1202062696.1609860434-773042855.1578434161</a>
CA Vehicles (on-road)	68.5 tpd	2018 SIP Update <a href="https://ww3.arb.ca.gov/planning/sip/2018sipupdate/2018update.pdf?_ga=2.203433616.1202062696.1609860434-773042855.1578434161">https://ww3.arb.ca.gov/planning/sip/2018sipupdate/2018update.pdf?_ga=2.203433616.1202062696.1609860434-773042855.1578434161</a> EMFAC 2014 <a href="https://arb.ca.gov/emfac/2014/">https://arb.ca.gov/emfac/2014/</a>
CA off-road mobile	54.2 tpd	2018 SIP Update <a href="https://ww3.arb.ca.gov/planning/sip/2018sipupdate/2018update.pdf?_ga=2.203433616.1202062696.1609860434-773042855.1578434161">https://ww3.arb.ca.gov/planning/sip/2018sipupdate/2018update.pdf?_ga=2.203433616.1202062696.1609860434-773042855.1578434161</a> California Emission Projection Analysis Model (CEPAM) Version 1.05 <a href="https://www.arb.ca.gov/app/emsinv/fcemssumcat/fcemssumcat2016.php">https://www.arb.ca.gov/app/emsinv/fcemssumcat/fcemssumcat2016.php</a>
Federal Vehicles (on-road)	20.3 tpd	2018 SIP Update <a href="https://ww3.arb.ca.gov/planning/sip/2018sipupdate/2018update.pdf?_ga=2.203433616.1202062696.1609860434-773042855.1578434161">https://ww3.arb.ca.gov/planning/sip/2018sipupdate/2018update.pdf?_ga=2.203433616.1202062696.1609860434-773042855.1578434161</a> EMFAC 2014 <a href="https://arb.ca.gov/emfac/2014/">https://arb.ca.gov/emfac/2014/</a>
Federal off-road	7.2 tpd	2018 SIP Update <a href="https://ww3.arb.ca.gov/planning/sip/2018sipupdate/2018update.pdf?_ga=2.203433616.1202062696.1609860434-773042855.1578434161">https://ww3.arb.ca.gov/planning/sip/2018sipupdate/2018update.pdf?_ga=2.203433616.1202062696.1609860434-773042855.1578434161</a> California Emission Projection Analysis Model (CEPAM) Version 1.05 <a href="https://www.arb.ca.gov/app/emsinv/fcemssumcat/fcemssumcat2016.php">https://www.arb.ca.gov/app/emsinv/fcemssumcat/fcemssumcat2016.php</a>
Federal planes trains and ships	69.7 tpd	2018 SIP Update <a href="https://ww3.arb.ca.gov/planning/sip/2018sipupdate/2018update.pdf?_ga=2.203433616.1202062696.1609860434-773042855.1578434161">https://ww3.arb.ca.gov/planning/sip/2018sipupdate/2018update.pdf?_ga=2.203433616.1202062696.1609860434-773042855.1578434161</a>
<b>TOTAL</b>	<b>269 tpd</b>	