# TCEQ LogoNational Comments

# Executive Review Summary

# ****TCEQ Proposed Comments On:****

Withdrawal of Finding of Substantial Inadequacy of Implementation Plan and of Call for Texas State Implementation Plan Revision—Affirmative Defense Provisions; EPA Docket ID No. EPA-R06-OAR-2018-0770.

# ****Overview of Proposal:****

# On April 29, 2019, the United States Environmental Protection Agency (EPA) Region 6 published in the *Federal Register* a proposed rulemaking to adopt an alternative interpretation regarding affirmative defense provisions in State Implementation Plans (SIPs) in Region 6 that departs from the EPA’s June 12, 2015 policy on this subject in the Startup, Shutdown and Malfunction (SSM) SIP Call. Specifically, EPA proposes to find that TCEQ’s affirmative defense provisions, applicable to the types of excess emissions covered by 30 Texas Administrative Code (TAC) § 101.222(b) – (e), do not make the Texas SIP substantially inadequate under the Federal Clean Air Act (FCAA). EPA also proposes to withdraw the SIP Call for Texas issued in the SSM SIP Call. The proposal is in response to a Petition for Reconsideration (PFR) filed by TCEQ on March 15, 2017 requesting EPA to reconsider its basis for its policy change with regard to affirmative defense and the SIP Call for Texas.

# ****Summary of Comments:****

* TCEQ agrees with and supports EPA’s policy position that affirmative defense SIP provisions for malfunctions are allowed and that it is not appropriate to extend the D. C. Circuit’s reasoning in *NRDC v. EPA* to the affirmative defense provisions in the Texas SIP.
* TCEQ agrees with Region 6 that the *Luminant* decision upheld EPA’s authority to interpret the FCAA to allow affirmative defense provisions in the Texas SIP.
* TCEQ agrees with Region 6 that withdrawal of the finding of inadequacy and the corresponding SIP Call will leave in place the EPA’s 2010 approval of the TCEQ’s affirmative defense as part of the Texas SIP.
* The proposal is consistent with EPA’s Regional Consistency Rules, which allows Region 6 to adopt a policy that varies from national policy.

**Lead Office: Office of Compliance and Enforcement**

**Internal Coordination: Janis Hudson / Office of Legal Services / Environmental Law Division**

**Office of Legal Services: Janis Hudson / OLS / ELD**

**Deputy Director Approval: Ramiro Garcia / OCE**

**EPA Deadline:** June 28, 2019