RESPONSE TO COMMENTS RECEIVED FOR
ARKANSAS'S PROPOSED STATE IMPLEMENTAION PLAN REVISION:
REMOVAL OF RULE 19.602

(Prepared September 2022)

On May 22, 2022, the Arkansas Department of Energy and Environment's Division of Environmental Quality (DEQ) proposed a revision to the Arkansas State Implementation Plan (SIP) to address EPA's 2015 Startup, Shutdown, Malfunction (SSM) SIP call as it pertains to the provision at Rule 19.602. DEQ proposed to remove the provision from the SIP, while retaining it in Rule 19 as a matter of state law. DEQ published notice of the proposed SIP revision on May 22, 2022, and hosted a public hearing on the matter on June 22, 2022. The public comment period was extended per requests from the public and ended on July 5, 2022. DEQ received the following comments on the proposed removal of Rule 19.602 from the Arkansas SIP:

Comment 1: One commenter supported the State's efforts in the development and submittal of a SIP revision to address the 2015 SSM SIP Call, as it applies to Rule 19.602. The commenter requested that DEQ clearly state that this particular revision is being submitted in response to the national 2015 SSM SIP Call in the submittal letter.

DEQ Response 1: DEQ will include the requested plan-identifying statement in the official SIP proposal submission letter to EPA.

Comment 2: One commenter stated that the submittal will need to include a Clean Air Act (CAA) section 110(l) analysis to show that the SIP revision will not interfere with any applicable requirement concerning attainment or any other applicable requirement of the CAA.

DEQ Response 2: Due to the limited scope of the "SIP Call" and this subsequent SIP revision, DEQ finds that the requirements of 40 CFR, Appendix V to Part 51 – *Criteria for Determining the Completeness of Plan Submissions, 2.2 Technical Support*, may be satisfied without the formal, detailed analysis that customarily supports a request for plan revision. This approach is consistent with EPA's determination as detailed in Example 1 of Section X. Implementation Aspects of EPA's SSM SIP Policy, B. Recommendations for Compliance with Section 110(l), and Section 193 for SIP Revisions of the Federal Register:

> "Example 1: A state elects to revise an existing SIP provision by removing an existing automatic exemption provision, director's discretion provision, enforcement discretion provision or affirmative defense provision, without altering any other aspects of the SIP provision at issue (e.g., elects to retain the emission limitation for the source category but eliminate the exemption for emissions during SSM events). Although the EPA must review each SIP submission for compliance with section 110(l) and section 193 on the facts and

> circumstances of the revision, the Agency believes in general that this type of SIP revision should not entail a complicated analysis to meet these statutory requirements. **Presumably, removal of the impermissible components of preexisting SIP provisions would not constitute backsliding, but would in fact strengthen the SIP and would be consistent with the overarching requirement that the SIP revision be consistent with the requirements of the CAA.** Accordingly, the EPA believes that this type of SIP revision should not entail a complicated analysis for purposes of section 110(l). If the SIP revision is also governed by section 193, then elimination of the deficiency will likewise presumably result in equal or greater emission reductions and thus comply with section 193 without the need for a more complicated analysis. The EPA has recently evaluated a SIP revision to remove specific SSM deficiencies in this manner."[1] [emphasis added]

Due to the limited scope of the proposed "SIP Call" and this subsequent SIP revision, the requested changes to the Arkansas SIP to address EPA's updated policy related to SSM does not result in any increase in plan allowable emissions from affected sources.

DEQ will revise the draft SIP proposal to include the preceding discussion to address the analysis required under CAA section 110(l).

Comment 3: One commenter asked DEQ to elaborate and clarify whether it is the State's position that the phrase "complete affirmative defense" at Rule 19.602(A) means that injunctive relief would not be available as a remedy for noncompliance with an emission limitation, provided the requirements set forth in Rule 19.602 were met.

DEQ Response 3: The phrase "complete affirmative defense" in Rule 19.602 does not preclude any party from injunctive relief to which the party might be entitled under federal or state law that results from noncompliance with an emission limitation. The flexibility that remains in Rule 19.602 (but will be removed from the SIP) does not affect federal authority or any party's right to petition for injunctive relief for exceedances of emission limitations.

No change to the proposed SIP is necessary due to this comment.

Comment 4: One commenter asked DEQ to explain and elaborate on Arkansas' authority under State law to carry out the federally-approved Arkansas SIP, including a program for the enforcement of emission limitations and control measures to assure that national ambient air quality standards are achieved/maintained and that the requirements in Part C and Part D of title I of the federal CAA are met, as Rule 19.602 is not being repealed as a matter of State law.

DEQ Response 4: State law grants legal authority to DEQ for implementation of the federally-

[1] 80 FR 33840, as published June 12, 2015, at 33957.

approved SIP. The State's legal authority to adopt and implement state plans can be found in Ark. Code Ann. § 8-1-203(b)(1), § 8-4-311(a), and § 8-4-317. Copies of these provisions are provided as part of the supporting documentation for the SIP proposal.

Further, the Arkansas SIP contains approved infrastructure elements for all national ambient air quality standards (NAAQS), with the exception of DEQ's SIP submittals for interstate transport for the 2015 ozone NAAQS and visibility transport for the 2018 – 2028 planning period under the Regional Haze Program. The discretion afforded under Rule 19.602 to the DEQ Director is restricted to technology-based emission limits in emergency circumstances. Other provisions of the SIP, including 19.303, require regulated sources to cease operation in the event that a malfunction would result in a NAAQS violation. See https://www.ecfr.gov/current/title-40/chapter-I/subchapter-C/part-52/subpart-E for currently approved Arkansas SIP provisions related to the NAAQS and Arkansas's PSD program, including emission limitations and control measures to protect air quality in federal class I and class II areas.

Part D of title I of the federal CAA pertains to nonattainment plans; Arkansas has no areas designated as nonattainment. If an area of Arkansas were designated as nonattainment, the discretion afforded under Rule 19.602 to the DEQ Director is restricted to technology-based emission limits in emergency circumstances. Other provisions of the SIP, including 19.303, require regulated sources to cease operation in the event that a malfunction would result in a NAAQS violation.

No change to the proposed SIP is necessary due to this comment.

Comment 5: One commenter requested that DEQ pause final action on submitting this Arkansas SIP revision until related matters currently before the United States Court of Appeals for the D.C. Circuit are finalized.

The question of whether EPA has the authority to approve such a provision in a state implementation plan or to issue a SIP Call to remove a previously approved provision from an EPA-approved SIP is currently pending before the Court in the case of Environmental Committee of the Florida Electric Power Coordinating Group, Inc. v. EPA, Docket No. 15-1239 (D.C. Cir.). The State of Arkansas is party to that case along with fifteen other States requesting that the EPA's 2015 SSM SIP Call be withdrawn on the basis of the structure of cooperative federalism in the Clean Air Act, among other things. Oral argument in the case was heard on March 25, 2022 and presumably a decision will be forthcoming shortly.

The commenter believes that it would be premature for DEQ to submit its proposed SIP revision to EPA before a decision has been released by the D. C. Circuit in the Environmental Committee of the Florida Electric Power Coordinating Group case and respectfully requested that DEQ not do so at this time. Furthermore, it is unknown what effect such a request might have on the State's litigation position in this case or other cases involving the issue of cooperative federalism.

DEQ Response 5: DEQ is aware of and following developments in the aforementioned case, and appreciates the commenter's concerns.

No change to the proposed SIP is necessary due to this comment.