

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
AGENDA ITEM REQUEST
for Proposed Rulemaking

AGENDA REQUESTED: August 3, 2011

DATE OF REQUEST: July 15, 2011

INDIVIDUAL TO CONTACT REGARDING CHANGES TO THIS REQUEST, IF NEEDED: Charlotte Horn, 239-0779

CAPTION: Docket No. 2009-2039-RUL. Consideration for publication of, and hearing on, amended Sections 114.6, 114.312, and 114.314 - 114.319, repealed Section 114.313, and new Section 114.313 of 30 Texas Administrative Code, Chapter 114, Control of Air Pollution from Motor Vehicles, and corresponding revisions to the state implementation plan.

The proposed rulemaking would define *biodiesel* and *biodiesel blends*; require currently approved and new alternative diesel fuel formulations for biodiesel blends of up to 20% biodiesel by volume to comply with the active version of the American Society for Testing and Materials (ASTM) D7467 (Standard Specification for Diesel Fuel Oil, Biodiesel Blend (B6 to B20)); establish new designated alternative limits for Texas low emission diesel fuel properties; remove expired registration requirements and establish new registration requirements for identifying production and import facilities; revise approval procedures for alternative diesel fuel formulations; specify that all approved alternative diesel formulations are subject to revocation if emissions performance is not maintained; allow all alternative diesel formulations approved by the Texas Commission on Environmental Quality prior to September 1, 2011, to remain in effect; revise reporting requirements to include production and import facility data; require alternative emission reduction plans using the Unified Model to determine compliance each calendar quarter; remove expired early gasoline sulfur reduction credits provisions; and make other clarifying changes as needed for accuracy and consistency. (Morris Brown, John Minter) (Rule Project No. 2009-001-114-EN)

Susanna Hildebrand
Chief Engineer

Kim Herndon for David Brymer
Division Director

Charlotte Horn
Agenda Coordinator

Copy to CCC Secretary? NO __ YES X

Texas Commission on Environmental Quality

Interoffice Memorandum

To: Commissioners **Date:** July 15, 2011

Thru: Melissa Chao, Acting Chief Clerk
Mark R. Vickery, P.G., Executive Director

From: Susana M. Hildebrand, P.E., Chief Engineer

Docket No.: 2009-2039-RUL

Subject: Commission Approval for Proposed Rulemaking
Chapter 114, Control of Air Pollution from Motor Vehicles
Revision of TxLED Rules
Rule Project No. 2009-001-114-EN

Background and reason(s) for the rulemaking:

The current state regulations for Texas low emission diesel (TxLED) under Title 30 Texas Administrative Code (30 TAC) Chapter 114 require that all diesel as defined under §114.6 (concerning Low Emission Fuel Definitions) that is sold or supplied for use in a compression-ignition engine operating in any of the 110 central and eastern Texas counties listed in §114.319 (concerning Affected Counties and Compliance Dates) must comply with the specifications for aromatic hydrocarbons and cetane number as listed in §114.312 (concerning Low Emission Diesel Standards) or one of the other compliance options listed under this section. This regulation includes all diesel used as fuel for on-road motor vehicles and non-road equipment. The TxLED regulations also apply to marine distillate fuels when these marine distillate fuels are sold or supplied for use in the 1997 Houston-Galveston-Brazoria (HGB) ozone nonattainment area counties of Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller. Diesel producers are also allowed to produce TxLED in accordance with an alternative emission reduction plan as specified under §114.318 (concerning Alternative Emission Reduction Plan). TxLED producers and importers are required to register with the Texas Commission on Environmental Quality (TCEQ) as specified under §114.314 (concerning Registration of Diesel Producers and Importers) and to submit quarterly reports to the TCEQ as specified under §114.316 (concerning Monitoring, Recordkeeping, and Reporting Requirements). There are 114 producers and importers currently registered under the TxLED program.

The total projected nitrogen oxides (NO_x) emission reduction benefit from TxLED in 2018 from all 110 counties currently regulated is estimated to be approximately 5.62 tons per day (tpd) from on-road vehicle use and 7.54 tpd from non-road equipment use. The estimated NO_x emission reduction benefit in 2018 from TxLED marine diesel use in the eight-county HGB ozone nonattainment area is approximately 0.89 tpd.

The purpose for the proposed rulemaking is to address the following five issues:

1. Alternative Diesel Formulation Approval Process

The TCEQ has currently approved 19 alternative diesel formulations in accordance with the testing requirements specified under §114.315 (relating to Approved Test Methods) that

Re: Docket No. 2009-2039-RUL

producers and importers may use to produce TxLED, with 17 of these formulations requiring the use of a diesel additive. All but one of the additive-based alternative diesel formulations for TxLED were approved under the testing procedures specified under §114.315(c). In 2010, approximately 34% of all TxLED was reported to have been produced using the additive-based alternative diesel formulations approved by the TCEQ. Approximately 25% of all TxLED in 2010 was reported to have been produced using an additive-based alternative diesel formulation for California diesel approved by the California Air Resources Board (CARB) that producers are allowed to use under §114.312(e) to produce TxLED.

The current TCEQ process to evaluate an alternative diesel formulation for TxLED under §114.315(c) includes review and approval of test protocols prior to emissions testing, observation of the emissions testing at the testing facilities, review of the final test reports from the testing facilities describing the results of the emissions testing, and determining whether the emissions test results satisfy the criteria specified in §114.315(c) that allows the TCEQ to approve the formulation. The TCEQ is also required to request the United States Environmental Protection Agency's (EPA) consultation when proposing to approve an alternative diesel formulation for TxLED.

The TCEQ approval process specified in §114.315(c) has resulted in fiscal and staff resource challenges for the agency. The professional services needed to validate the emissions testing data and to physically observe the emissions testing being performed for approval purposes is costing the TCEQ approximately \$20,000 per application. This rule change would revise the rules to remove the test procedures in §114.315(c) and to only allow approval under the provisions currently specified in §114.315(d) in order to more efficiently utilize agency resources associated with the review, physical testing, and approval process. The TCEQ approval options currently specified under §114.315(d) either require EPA's testing of the formulation through its Environmental Technology Verification (ETV) Program or specify criteria for using the Unified Model that was developed by the EPA specifically for the TxLED program. Companies also have the option of seeking CARB approval. In addition, revising the rules to grandfather all alternative diesel formulations approved prior to September 1, 2011, would maintain market stability and address concerns from vendors with previously approved products.

2. Designated Alternative Limits

Section 114.312(e) allows diesel fuel produced to comply with specific California regulations for diesel fuel to be used for compliance with the TxLED requirements, including diesel fuel produced under the designated equivalent limits specified under Title 13 California Code of Regulations (13 CCR) §2282(h)(1). Although this subsection was adopted in March 2005, it does not appear that many producers in Texas are taking advantage of the flexibility provided by these parameters. Revising the current rules to amend §114.313 (relating to Designated Alternative Limits) to include the same fuel property limits specified in 13 CCR §2282(h)(1) as designated alternative limits that producers may use to produce TxLED would provide further clarification of an

Re: Docket No. 2009-2039-RUL

underutilized flexibility in the TxLED program while ensuring equivalent emission reductions.

3. Biodiesel and Biodiesel Blend Definitions

Changes to the American Society for Testing and Materials (ASTM) D975 standards for diesel fuel allow biodiesel blends of up to 5% biodiesel by volume to be considered diesel fuel. Revising the current rules in §114.6 to amend the definitions that are applicable to the TxLED regulations by adding new definitions for biodiesel and biodiesel blends would clarify that biodiesel would only be considered an additive when blended with diesel fuel at greater than 5.5% biodiesel by volume and that the resulting biodiesel blend is considered an alternative diesel formulation under the TxLED regulations and must be approved in accordance with §114.315. Biodiesel blends of 99% biodiesel by volume or greater used only as a blend stock for producing lesser volume biodiesel blends subject to the TxLED regulations will continue to be considered the same as 100% biodiesel, which is not subject to the TxLED regulations. Currently, six alternative diesel formulations for biodiesel blends containing 20% or less biodiesel by volume have been approved by the TCEQ for use as TxLED.

4. Alternative Emission Reduction Plans

The TxLED regulations allow producers to use diesel offset credits from early gasoline sulfur reductions as a compliance option under the alternative emission reduction plan (AERP) provisions specified under §114.318. However, the ability to use diesel offset credits in the ozone nonattainment counties specified under §114.319(b)(1) - (3) expired December 31, 2008, and expired in the other 90 TxLED counties on December 31, 2010. Revising the current rules in §114.318 to remove the expired provisions pertaining to the use of early gasoline sulfur reduction credits as a methodology option for AERP compliance would simplify this section of the rules.

5. Administrative

The TxLED regulations contain several administrative compliance deadlines that have expired and other administrative requirements relating to registration and reporting that are outdated or need further clarification. Revising the current rules in §114.6 to amend the definitions of final blend, further process, produce, producer, and production facility would clarify that only the person or company that owns or operates the production facility producing the final blend of diesel fuel is considered a producer and is therefore required to register and comply with the other TxLED requirements. Revising the current rules in §114.314 and §114.316 to include registration and quarterly reporting requirements for production facilities would enhance TCEQ's compliance monitoring abilities and would provide further clarification that only the owners and operators of production facilities are considered producers under the TxLED program.

Scope of the rulemaking:

The proposed rule revision would amend Chapter 114 as follows:

- amend §114.6 to add new definitions for *biodiesel* and *biodiesel blends*; repeal the definition of *designated alternative limit* as needed for consistency with proposed new §114.313; remove the definition of *motor vehicle fuel*; renumber and revise the

Re: Docket No. 2009-2039-RUL

definitions of *bulk plant*, *further process*, *import*, *import facility*, *importer*, *produce*, *producer*, and *production facility* to replace the term "motor vehicle fuel" with the terms "gasoline" or "diesel fuel" as needed for consistency and clarity; and make other clarifying changes to the definitions of *additive*, *diesel fuel*, *final blend*, *further process*, *gasoline*, *low emission diesel*, *motor vehicle*, *non-road equipment*, *produce*, *producer*, *production facility*, and *retail dispensing outlet* as needed for consistency with other changes to this subchapter;

- amend §114.312 to make changes needed for accuracy and consistency with the proposal to §114.313 and §114.315 and to require approved alternative diesel fuel formulations that are comprised of biodiesel blends of up to 20% biodiesel by volume to comply with the active version of ASTM D7467 (Standard Specification for Diesel Fuel Oil, Biodiesel Blend (B6 to B20));
- repeal the existing §114.313 and propose a new §114.313 that would establish new designated alternative limits that have the same fuel property limits as currently specified in 13 CCR §2282(h)(1) to provide additional flexibility to the TxLED program while ensuring equivalent emission reductions;
- amend §114.314 to remove expired registration requirements; require all new producers and importers to register within 30 days of the date that they begin to provide TxLED to the affected counties; require producers and importers to provide information on each production facility and import facility from which TxLED is produced or imported; and make other clarifying changes as needed to enhance and simplify the registration process;
- amend §114.315 to remove the supplementary test methods for viscosity and flash point in subsection (a) and the alternative diesel formulation test procedures in subsection (c) to clarify that alternative diesel fuel formulations would only be approved through the provisions currently specified under subsection (d); require all new alternative diesel fuel formulations that are comprised of biodiesel blends of up to 20% biodiesel by volume to demonstrate compliance with the active version of ASTM D7467 (Standard Specification for Diesel Fuel Oil, Biodiesel Blend (B6 to B20)); specify that all approved alternative diesel formulations are subject to revocation if emissions performance is not maintained; and add a subsection (e) to allow all alternative diesel formulations approved by the TCEQ prior to September 1, 2011, to remain in effect;
- amend §114.316 to make clarifying changes to the reporting requirements as needed for accuracy and consistency with the proposed changes to §§114.313 - 114.315, and 114.318;
- amend §114.317 to make clarifying changes as needed for accuracy and consistency with the proposed changes to §114.316 and §114.319;
- amend §114.318 to remove the provisions pertaining to the calculation and use of early gasoline sulfur reduction credits as a methodology option for AERP compliance; require AERPs that use the Unified Model to calculate compliance based on the average fuel properties determined each calendar quarter, instead of yearly as currently required; and allow producers to calculate the average fuel properties used in the

Re: Docket No. 2009-2039-RUL

Unified Model based on the fuel properties of diesel sold or supplied for use in all affected counties, instead of specific groups of counties as currently required; and

- amend §114.319 to remove expired compliance schedules in subsection (c) and to add a subsection (d) to clarify that if the final compliance date of any provision in the section is before the adoption of the current revision to the section and the compliance dates are not specified in the current revision, then the compliance date is past and all affected persons must be and remain in compliance with the provision as of the original compliance date; and make other clarifying changes as needed for accuracy and consistency within the section.

A.) Summary of what the rulemaking will do:

The proposed rulemaking would define *biodiesel* and *biodiesel blends*; require currently approved and new alternative diesel fuel formulations for biodiesel blends of up to 20% biodiesel by volume to comply with the active version of ASTM D7467 (Standard Specification for Diesel Fuel Oil, Biodiesel Blend (B6 to B20)); establish new designated alternative limits for TxLED fuel properties; remove expired registration requirements and establish new registration requirements for identifying production and import facilities; revise approval procedures for alternative diesel fuel formulations; specify that all approved alternative diesel formulations are subject to revocation if emissions performance is not maintained; allow all alternative diesel formulations approved by the TCEQ prior to September 1, 2011, to remain in effect; revise reporting requirements to include production and import facility data; require alternative emission reduction plans using the Unified Model to determine compliance each calendar quarter; remove expired early gasoline sulfur reduction credits provisions; and make other clarifying changes as needed for accuracy and consistency.

B.) Scope required by federal regulations or state statutes:

None.

C.) Additional staff recommendations that are not required by federal rule or state statute:

Not applicable.

Statutory authority:

The revisions are proposed under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code. The revisions are also proposed under Texas Health and Safety Code, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; and §382.202, concerning Vehicle Emissions Inspection and Maintenance Program, which

Re: Docket No. 2009-2039-RUL

authorizes the commission to establish vehicle fuel content standards after January 1, 2004, as long as distribution of TxLED as described in the state implementation plan (SIP) is not required prior to February 1, 2005, and authorizes the commission to consider alternative emission reduction plans to comply with TxLED requirements.

Effect on the:

A.) Regulated community:

The proposed rulemaking would require biodiesel blend producers to continue to use TCEQ-approved alternative diesel formulations when producing B6 to B99 biodiesel blends for sale or supply as a fuel for diesel engines in the state and would require these producers to ensure that the biodiesel blends comprised of 20% biodiesel or less produced for compliance with the TxLED requirements also complies with the active version of ASTM D7467 (Standard Specification for Diesel Fuel Oil, Biodiesel Blend (B6 to B20)). The proposed rulemaking would also require additive manufacturers seeking TCEQ approval for an alternative diesel formulation for TxLED to obtain a verification of emission reduction under the EPA's ETV program. The estimated cost for additive manufacturers to complete EPA's ETV testing could range from \$20,000 to \$250,000 per verification.

B.) Public:

The public would benefit from improved air quality; however, the proposed regulation has the potential for the cost impact on the regulated community to be passed on to consumers.

C.) Agency programs:

Minimal impact is anticipated on agency resources since compliance is monitored through reporting and record reviews. Any cost savings associated with revisions to the alternative diesel formulation approval procedures will be reallocated to other air compliance activities.

Stakeholder meetings:

No stakeholder involvement beyond the required public review and comment period is planned.

Potential controversial concerns and legislative interest:

Biodiesel blend producers may oppose the proposed changes to the definitions of additive and diesel fuel and the proposed new definition of biodiesel blend since the TxLED rules would continue to require that biodiesel blends of greater than 5.5% biodiesel by volume must be approved by the TCEQ as alternative diesel formulations before use in the 110 affected Texas counties.

Diesel additive companies may oppose the proposed changes to the approval procedures for alternative diesel fuel formulations that would require all new alternative diesel formulations for TxLED to be approved under the proposed new procedures that will require additive-based formulations to be verified through the EPA's ETV program, which can typically take six to nine months to complete per verification. The ETV program costs for each verification, which include a non-refundable application fee of \$2,000, test plan

Re: Docket No. 2009-2039-RUL

preparation costs, and verification testing costs, range from \$20,000 to \$250,000 depending on complexity of the technology being tested.

Will this rulemaking affect any current policies or require development of new policies?

The proposed rulemaking will affect one current TCEQ policy, i.e., requiring TCEQ observers to be present during the emissions testing being performed for the approval of an alternative diesel fuel formulation for TxLED. This policy will no longer be required under the proposed rulemaking.

What are the consequences if this rulemaking does not go forward? Are there alternatives to rulemaking?

The consequence of not proceeding with the proposed rulemaking would be that TCEQ would continue to implement the current TxLED regulations that will require a continued cost of approximately \$20,000 per TxLED alternative diesel formulation approval application for the professional services needed to validate the emissions testing data and to physically observe the emissions testing being performed for approval purposes.

The alternatives to proceeding with the proposed rulemaking would be:

- Repeal the TxLED rules entirely and rely on federal diesel regulations to achieve emission reductions. However, as the federal rule focuses on sulfur limits and particulate emissions, the TCEQ would need to address potential Federal Clean Air Act backsliding provisions (Section 110(l) demonstration) for the NO_x emission reductions currently modeled in the SIP for the TxLED rules.
- Maintain the status quo and continue to implement the current TxLED rules.

Key points in the proposal rulemaking schedule:

Anticipated proposal date: August 3, 2011.

Anticipated *Texas Register* publication date: August 19, 2011.

Public hearing date (if any): September 15, 2011.

Public comment period: August 19, 2011 - September 19, 2011.

Anticipated adoption date: January 25, 2012.

Agency contacts:

Morris Brown, Rule Project Manager, 239-1438, Air Quality Division

John Minter, Staff Attorney, 239-0663

Charlotte Horn, Texas Register Coordinator, 239-0779

Attachments

Commissioners

Page 8

July 15, 2011

Re: Docket No. 2009-2039-RUL

cc: Chief Clerk, 2 copies
Executive Director's Office
Susana M. Hildebrand, P.E.
Anne Idsal
Curtis Seaton
Ashley Morgan
Office of General Counsel
Morris Brown
Charlotte Horn

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes amendments to §§114.6, 114.312, and 114.314 - 114.319; repeal of §114.313; and new §114.313.

If adopted, the revisions would be submitted to the United States Environmental Protection Agency (EPA) as revisions to the state implementation plan (SIP).

Background and Summary of the Factual Basis for the Proposed Rules

The current state regulations for Texas low emission diesel (TxLED) under Chapter 114 require that all diesel as defined under §114.6 that is sold or supplied for use in a compression-ignition engine operating in any of the 110 central and eastern Texas counties listed in §114.319 must comply with the specifications for aromatic hydrocarbons and cetane number as listed in §114.312 or one of the other compliance options listed under this section. This regulation includes all diesel used as fuel for on-road motor vehicles and non-road equipment. The TxLED regulations also apply to marine distillate fuels, i.e., Marine Distillate fuel X (DMX), Marine Distillate fuel A (DMA), and Marine Gas Oil (MGO), when these marine distillate fuels are used in the 1997 Houston-Galveston-Brazoria (HGB) ozone nonattainment area counties of Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller. Diesel producers are also allowed to produce TxLED in accordance with an alternative emission reduction plan (AERP) as specified under §114.318. TxLED producers and

importers are required to register with the TCEQ as specified under §114.314 and to submit quarterly reports to the TCEQ as specified under §114.316. There are 114 producers and importers currently registered under the TxLED program. The total nitrogen oxides (NO_x) emission reduction benefit from TxLED in 2018 from all 110 counties currently regulated is estimated to be approximately 5.62 tons per day (tpd) from on-road vehicle use and 7.54 tpd from non-road equipment use. The estimated NO_x emission reduction benefit in 2018 from TxLED marine diesel in the 1997 eight-county HGB ozone nonattainment area is approximately 0.89 tpd.

The purpose for the proposed rulemaking is to address the following issues.

Alternative Diesel Formulations

The TCEQ has currently approved 19 alternative diesel formulations in accordance with the testing requirements specified under §114.315 that producers and importers may use to produce TxLED, with 17 of these formulations requiring the use of a diesel additive. All but one of the additive-based alternative diesel formulations for TxLED were approved under the testing procedures specified under §114.315(c). In 2010, approximately 34% of all TxLED was reported to have been produced using the additive-based alternative diesel formulations approved by the TCEQ. Approximately 25% of all TxLED in 2010 was reported to have been produced using an additive-based alternative diesel formulation for California diesel approved by the California Air Resources Board

(CARB) that producers are allowed to use under §114.312(e) to produce TxLED.

The TCEQ process to approve an alternative diesel formulation for TxLED under §114.315(c) includes review and approval of test protocols prior to emissions testing, observation of the emissions testing at the testing facilities, review of the final test reports from the testing facilities describing the results of the emissions testing, and determining whether the emissions test results satisfy the criteria specified in §114.315(c) that allows the TCEQ to approve the formulation. The TCEQ is also required to request the EPA's consultation when proposing to approve an alternative diesel formulation for TxLED.

The TCEQ approval and review process specified in §114.315(c) has resulted in fiscal and staff resource challenges for the agency. The professional services needed to validate the emissions testing data and to physically observe the emissions testing being performed for approval purposes is costing the TCEQ approximately \$20,000 per application.

The proposed rulemaking would remove the test procedures in §114.315(c), thereby only allowing approval of alternative diesel formulations through the other two approval options currently specified under §114.315(d) that either require testing of the formulation through the EPA's Environmental Technology Verification (ETV) Program or specify criteria for using the Unified Model that was developed by the EPA specifically

for the TxLED program. The proposed rulemaking would greatly lessen the TCEQ's fiscal and staff resource needs in the physical testing aspects of the alternative diesel formulation approval process. The estimated cost for additive manufacturers to complete EPA's ETV testing could be as much as \$100,000 per verification.

Biodiesel

The recent changes to the American Society for Testing and Materials (ASTM) D975 standards for diesel fuel allows biodiesel blends of up to 5% (or 5.5% based on normal rounding convention) biodiesel by volume to be considered diesel fuel. The proposed rulemaking would add definitions for biodiesel and biodiesel blends to §114.6 to clarify that biodiesel is considered an additive when blended with diesel fuel at greater than 5.5% biodiesel by volume and the resulting biodiesel blend is considered an alternative diesel formulation under the TxLED regulations and must be approved by the TCEQ in accordance with §114.315. Biodiesel blends of 99% biodiesel by volume or greater will be considered the same as 100% biodiesel if used only as a blend stock for producing lesser volume biodiesel blends subject to the TxLED regulations. Currently, several alternative diesel formulations for biodiesel blends containing 20% or less biodiesel by volume have been approved by the TCEQ for use as an additive-based alternative diesel formulation.

Designated Alternative Limits

The current TxLED regulations specified in §114.312(e) allow diesel fuel produced to

comply with specific California regulations for diesel fuel to be used for compliance with the TxLED requirements, including diesel fuel produced under the designated equivalent limits specified under Title 13 California Code of Regulations (13 CCR) §2282(h)(1). Although this subsection was adopted in March 2005, it does not appear that many producers in Texas are taking advantage of the flexibility provided by these parameters. The proposed rulemaking would repeal the current rules in §114.313 and simultaneously propose a new §114.313 that would establish new designated alternative limits with the same fuel property limits specified in 13 CCR §2282(h)(1) that producers may use to produce TxLED. This proposed action would provide further clarification of an underutilized flexibility in the TxLED program while ensuring equivalent emission reductions.

Alternative Emission Reduction Plans

The current TxLED regulations allow producers to use diesel offset credits from early gasoline sulfur reductions as a compliance option under the AERP provisions specified under §114.318. However, the ability to use diesel offset credits in the ozone nonattainment counties specified under §114.319(b)(1) - (3) expired December 31, 2008, and expired in the other 90 TxLED counties on December 31, 2010. The proposed rulemaking would remove the expired provisions specified under §114.318 pertaining to the use of early gasoline sulfur reduction credits as a methodology option for AERP compliance.

Administrative

The current TxLED regulations contain several administrative compliance deadlines that have expired and other administrative requirements relating to registration and reporting that are outdated or need further clarification. The proposed rulemaking would revise definitions in §114.6 to clarify that only the person or company that owns or operates the production facility that is producing the final blend of diesel fuel is considered a producer and is therefore required to register and comply with the other TxLED requirements. In addition, the proposed rulemaking would revise the registration requirements in §114.314 to remove expired provisions and to add new requirements for the registration of production and import facilities. The proposed rulemaking would also make other clarifying changes to the administrative provisions of the rules as needed for accuracy and consistency.

Section by Section Discussion

To conform to TCEQ and Texas Register formatting requirements, non-substantive revisions would be made throughout the proposed amendments to correct citations, acronym usage, and other minor issues.

§114.6, Low Emission Fuel Definitions

The proposal would amend §114.6 to add new definitions for biodiesel and biodiesel

blends to clarify that biodiesel is considered an additive when blended with diesel fuel at greater than 5.5% biodiesel by volume and the resulting biodiesel blend is considered an alternative diesel formulation under the TxLED regulations and must be approved by the TCEQ in accordance with §114.315. Biodiesel blends of 99% biodiesel by volume or greater will be considered the same as 100% biodiesel if used only as a blend stock for producing lesser volume biodiesel blends subject to the TxLED regulations. The proposal would also repeal the definition of designated alternative limit as needed for consistency with the proposed new §114.313; repeal the definition of motor vehicle fuel; renumber and revise the definitions of bulk plant, bulk purchaser/consumer, further process, import, import facility, importer, produce, producer, and production facility to replace the term, "motor vehicle fuel," with the terms, "gasoline" or "diesel fuel," as needed for consistency and to make other changes to these terms as needed to clarify that only the person or company that owns or operates the production facility that is producing the final blend of diesel fuel is considered a producer and is therefore required to register and comply with all TxLED requirements. The proposal would also make changes to clarify the definitions of additive, diesel fuel, final blend, gasoline, low emission diesel, motor vehicle, non-road equipment, and retail dispensing outlet.

§114.312, Low Emission Diesel Standards

The proposal would amend §114.312 to make changes needed for accuracy and consistency with the proposed new §114.313 and the proposed revisions to §114.315. In

addition, the proposal would amend §114.312 to require approved alternative diesel fuel formulations that are comprised of biodiesel blends of up to 20% biodiesel by volume to comply with the active version of ASTM D7467 (Standard Specification for Diesel Fuel Oil, Biodiesel Blend (B6 to B20)).

§114.313, Designated Alternative Limits

The proposal would repeal existing §114.313 and propose a new §114.313 that would establish new designated alternative limits that have the same fuel property limits as currently specified in California regulations (13 CCR §2282(h)(1)) to provide further clarification of an underutilized flexibility in the TxLED program while ensuring equivalent emission reductions.

§114.314, Registration of Diesel Producers and Importers

The proposal would amend §114.314 to remove expired registration requirements and to require all new producers and importers to register within 30 days of the date that they begin to provide TxLED to the affected counties listed in §114.319. In addition, the proposal would amend §114.314 to require producers and importers to provide information on each production facility and import facility from which TxLED is produced or imported. The proposed registration requirements would provide further clarification that only owners and operators of production facilities are considered producers subject to the TxLED regulations. The proposal would make other clarifying

changes to §114.314 as needed to enhance and simplify the registration process.

§114.315, Approved Test Methods

The proposal would amend §114.315 to remove the alternative diesel formulation test procedures in subsection (c) to clarify that alternative diesel fuel formulations would only be approved through the provisions currently specified under subsection (d). The proposal would also amend §114.315 to remove the supplementary test methods for viscosity and flash point in subsection (a) for consistency with the changes to subsection (c). In addition, the proposal would amend §114.315 to require new alternative diesel fuel formulations that are comprised of biodiesel blends of up to 20% biodiesel by volume to demonstrate compliance with the active version of ASTM D7467 (Standard Specification for Diesel Fuel Oil, Biodiesel Blend (B6 to B20)).

The proposal would also amend §114.315 to specify that the approvals of all alternative diesel fuel formulations approved prior to September 1, 2011, and thereafter, would be subject to the actual emissions performance of the approved alternative diesel fuel formulation and evidence that the use of an approved alternative diesel fuel formulation does not result in emissions that are equivalent to or better than the emissions from the use of diesel fuel satisfying the aromatic hydrocarbon and cetane number requirements of §114.312(b) and (c), respectively, may result in the revocation of the approval or other appropriate enforcement action. In addition, the proposal would amend §114.315 to add

subsection (e) to specify that all alternative diesel fuel formulations approved by the executive director prior to September 1, 2011, may continue to be used for compliance after the adoption date of this proposed revision to this division.

§114.316, Monitoring, Recordkeeping, and Reporting Requirements

The proposal would amend §114.316 to make clarifying changes to the reporting requirements as needed for accuracy and consistency with the proposed changes to §§114.313 - 114.315, and 114.318. The proposal would also amend §114.316(c) to specify the sampling and analysis requirements for specific fuel properties for TxLED produced under §114.312(b) and (c), §114.312(e), §114.312(f), §114.313, and §114.318.

§114.317, Exemptions to Low Emission Diesel Requirements

The proposal would amend §114.317 to make clarifying changes as needed for accuracy and consistency with the proposed changes to §114.316 and §114.319.

§114.318, Alternative Emission Reduction Plan

The proposal would amend §114.318 to remove the provisions pertaining to the calculation and use of early gasoline sulfur reduction credits as a methodology option for AERP compliance. In addition, the proposal would amend §114.318(b) to require AERPs that use the Unified Model to calculate compliance based on the average fuel properties determined each calendar quarter, instead of yearly as currently required. The proposal

would also amend §114.318(b) to allow producers to calculate the average fuel properties used in the Unified Model based on the fuel properties of diesel sold or supplied for use in all affected counties, instead of specific groups of counties as currently required.

§114.319, Affected Counties and Compliance Dates

The proposal would amend §114.319 to remove expired compliance schedules in subsection (c) and add subsection (d) to clarify that if the final compliance date of any provision in the section is before the adoption of the current revision to the section and the compliance dates are not specified in the current revision, then the compliance date is past and all affected persons must be and remain in compliance with the provision as of the original compliance date. The proposal would also amend §114.319 to make other clarifying changes as needed for accuracy and consistency within the section.

Fiscal Note: Costs to State and Local Government

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency as a result of administration or enforcement of the proposed rules. The proposed rules are expected to result in some cost savings for the agency for activities associated with the emissions testing and approval of alternative diesel formulations. However, any cost savings associated with this task will be reallocated to other air compliance activities and are not expected to be significant.

Other state agencies and local governments are not expected to be affected by the proposed rules.

The proposed rules amend sections of Chapter 114 that concern Low Emission Diesel.

The proposed rulemaking would make several changes including the following: define biodiesel and biodiesel blends; require currently approved and new alternative diesel fuel formulations for biodiesel blends of up to 20% biodiesel by volume to comply with the active version of ASTM D7467 (Standard Specification for Diesel Fuel Oil, Biodiesel Blend (B6 to B20)); establish new designated alternative limits for TxLED fuel properties; remove expired registration requirements and establish new registration requirements for identifying production and import facilities; revise approval procedures for alternative diesel fuel formulations; specify that all approved alternative diesel formulations are subject to revocation if emissions performance is not maintained; allow all alternative diesel formulations approved by the TCEQ prior to September 1, 2011, to remain in effect; revise reporting requirements to include production and import facility data; require alternative emission reduction plans using the EPA's Unified Model to determine compliance each calendar quarter; remove expired early gasoline sulfur reduction credits provisions; and make other clarifying changes as needed for accuracy and consistency.

Impacts to the Agency – Alternative Diesel Formulations

The proposed rules will revise approval procedures for alternative diesel fuel formulations by removing agency test and certification procedures and limiting approval of those formulations to the other three certification options currently available in the rules. The other three certification options specify criteria for approval through the EPA's ETV program, the use of EPA's Unified Model, or diesel formulations approved by the CARB. Because the agency will no longer validate emissions testing data, the proposed rules could save the agency as much as \$20,000 per application in professional services costs. However, the exact amount of savings is difficult to quantify, because of the variance in the number of applications the agency has received. Applications have ranged from a low of two in Fiscal Year 2009 to a high of eight in Fiscal Year 2008 (\$40,000 to \$160,000). Any costs savings experienced by the agency will be reallocated to other air compliance activities.

Impact to Other State Agencies and Local Government

The proposed rules will not have fiscal impacts for other state agencies or local governments since these governmental entities do not typically produce low emission diesel fuels.

Public Benefits and Costs

Nina Chamness also determined that for each year of the first five years the proposed new rules are in effect, the public benefit anticipated from the changes seen in the

proposed rules will be a statewide improvement in air quality.

The proposed rules are not expected to have a significant fiscal impact on individuals in the 110 central and eastern Texas counties in which TxLED is required to be used.

The proposed rules are not expected to have a significant fiscal impact on large businesses. All alternative diesel formulations approved prior to September 1, 2011, will remain in effect under the proposed rules. The proposed rules do remove one certification option available under current rules, but three other existing options for certification will still be available, and there will be no change in certification costs under the proposed rules.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules. All alternative diesel formulations approved prior to September 1, 2011, will remain in effect under the proposed rules. The proposed rules do remove one certification option available under current rules, but three other existing options for certification will still be available, and there will be no change in certification costs under the proposed rules.

Small Business Regulatory Flexibility Analysis

The agency has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required, because the proposed rules are necessary to protect human health and the environment and the proposed rules are not expected to adversely impact small businesses.

Local Employment Impact Statement

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required, because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

Draft Regulatory Impact Analysis Determination

The commission reviewed the proposed rulemaking considering the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking does not meet the definition of a "major environmental rule." A major environmental rule means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

The proposed revisions to Chapter 114, Subchapter H, would remove the test procedures in §114.315(c), thereby only allowing approval of alternative diesel formulations through the other two approval options currently specified under §114.315(d) that either require testing of the formulation through the EPA's ETV Program or specify criteria for using the Unified Model that was developed by the EPA specifically for the TxLED program. The proposal would lessen the TCEQ's fiscal and staff resource needs in the physical testing aspects of the alternative diesel formulation approval process.

The proposed rulemaking would also add new definitions for biodiesel and biodiesel blends to §114.6 to clarify that biodiesel blended with diesel fuel at greater than 5.5% biodiesel by volume is considered an additive under the TxLED regulations.

This rulemaking action would repeal existing §114.313 and propose a new §114.313 that would establish new designated alternative limits with the same fuel property limits specified in California regulations (13 CCR §2282(h)(1)) that producers may use to produce TxLED. This proposed action would provide added flexibility to the TxLED program while ensuring equivalent emission reductions. The proposed rulemaking would remove the expired provisions specified under §114.318 pertaining to the use of early gasoline sulfur reduction credits as a methodology option for AERP compliance.

Finally, the current TxLED regulations contain several administrative compliance deadlines that have expired and other administrative requirements relating to registration and reporting that are outdated or need further clarification. The proposed rulemaking would make clarifying changes to the administrative provisions of the rules as needed for accuracy and consistency.

Due to the limited nature and scope of these amendments, this action would not adversely affect, in a material way, the economy or a sector of the economy, productivity, competition, or jobs. The proposed rule changes continue to provide alternatives and flexibility to producers of TxLED and additives in order to meet the fuel requirements. The amendments to the rule do not affect the NO_x reductions expected from the sale and use of TxLED in Texas. Therefore, adverse impacts to the environment or public health and safety in the state will not occur.

The TxLED rules are part of the strategy to reduce NO_x emissions necessary for designated areas in the state to be able to demonstrate attainment and maintenance of the National Ambient Air Quality Standards (NAAQS) for ozone. This strategy is intended to protect the environment or reduce risks to human health from environmental exposure to ozone by reducing NO_x emissions that help form ozone.

Assuming the proposed revisions constituted a major environmental rule, the action is

not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b), because the proposed rulemaking does not meet any of the four applicability requirements. Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

Specifically, this rulemaking action will make improvements to the alternative formulation and additive approval process. The TxLED program was developed as part of the control strategy to meet the NAAQS for ozone set by the EPA under Federal Clean Air Act (FCAA), 42 United States Code (USC), §7409, and therefore meet a federal requirement.

The proposed rulemaking implements requirements of 42 USC, §7410, which requires states to adopt a SIP that provides for "implementation, maintenance, and enforcement" of the NAAQS in each air quality control region of the state. While 42 USC, §7410 does not require specific programs, methods, or reductions to meet and maintain the standard, SIPs must include "enforceable emission limitations and other control

measures, means or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this chapter," (meaning 42 USC, Chapter 85, Air Pollution Prevention and Control). It is true that the FCAA does require some specific measures for SIP purposes, such as the inspection and maintenance program, but those programs are the exception, not the rule, in the SIP structure of 42 USC, §7410. The provisions of the FCAA recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet and maintain the NAAQS. This flexibility allows states, affected industry, and the public to collaborate on the best methods to attain the NAAQS for the specific regions in the state. Even though the FCAA allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of 42 USC, §7410. Thus, while specific measures are not generally required, the emission reductions are required. States are not free to ignore the requirements of 42 USC, §7410, and must develop programs to assure that the nonattainment areas of the state would be brought into attainment on schedule and to maintain the NAAQS after redesignation. The proposed revisions will help areas in the state attain and maintain the 1997 eight-hour ozone NAAQS as expeditiously as practicable.

The requirement to provide a fiscal analysis of proposed regulations in the Texas

Government Code was amended by Senate Bill (SB) 633 during the 75th Legislature, 1997. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis of extraordinary rules. These rules are identified in the statutory language as major environmental rules that would have a material adverse impact and would exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill would have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted proposed rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law. As discussed previously in this preamble, 42 USC, §7410 does not require specific programs, methods, or reductions in order to meet and maintain the NAAQS; thus, states must develop programs for each nonattainment area to ensure that area would meet the attainment deadlines. Because of the ongoing need to address nonattainment issues, the commission routinely proposes and adopts SIP rules. The legislature is presumed to understand this federal scheme. If each rule proposed for inclusion in the SIP was considered to be a major environmental rule that exceeds federal law, then every SIP rule would require the full regulatory impact analysis contemplated by SB 633.

This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board in its fiscal notes. Because the legislature is presumed to understand the fiscal impacts of the bills it passes, and that presumption is based on information provided by state agencies and the Legislative Budget Board, the commission contends that the intent of SB 633 was only to require the full regulatory impact analysis for rules that are extraordinary in nature. While the SIP rules would have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of 42 USC, §7410. For these reasons, rules adopted for inclusion in the SIP fall under the exception in Texas Government Code, §2001.0225(a), because they are specifically required by federal law.

In addition, 42 USC, §7502(a)(2) requires attainment as expeditiously as practicable, and 42 USC, §7511(a) requires states to submit ozone attainment demonstration SIPs for ozone nonattainment areas, such as the HGB and the Dallas-Fort Worth eight-hour ozone nonattainment areas. The commission has consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature has revised the Texas Government Code but left this provision substantially un-amended. The commission presumes that "when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation." *Central Power & Light Co. v. Sharp*, 919 S.W.2d 485, 489 (Tex. App. Austin 1995), writ denied with per

curiam opinion respecting another issue, 960 S.W.2d 617 (Tex. 1997); *Bullock v. Marathon Oil Co.*, 798 S.W.2d 353, 357 (Tex. App. Austin 1990), no writ; Cf. *Humble Oil & Refining Co. v. Calvert*, 414 S.W.2d 172 (Tex. 1967); *Sharp v. House of Lloyd, Inc.*, 815 S.W.2d 245 (Tex. 1991); *Southwestern Life Ins. Co. v. Montemayor*, 24 S.W.3d 581 (Tex. App. Austin 2000), pet. denied; and *Coastal Indust. Water Auth. v. Trinity Portland Cement Div.*, 563 S.W.2d 916 (Tex. 1978).

As discussed previously in this preamble, this rulemaking action implements requirements of 42 USC, §§7410. Furthermore, there is no contract or delegation agreement that covers the topic that is the subject of this action. Therefore, the proposed rulemaking does not exceed a standard set by federal law, exceed an express requirement of state law, or exceed a requirement of a delegation agreement. Finally, this rulemaking action was not developed solely under the general powers of the agency, but is authorized by specific sections of Texas Health and Safety Code, Chapter 382 (also known as the Texas Clean Air Act), and the Texas Water Code, which are cited in the Statutory Authority section of this preamble, including Texas Health and Safety Code, §§382.012, 382.017, 382.019, and 382.202. Therefore, the proposed rulemaking does not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, nor is adopted solely under the general powers of the agency.

Based on the foregoing, if this rulemaking action is assumed to be a major environmental rule, it is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b), because the proposed rulemaking does not meet any of the four applicability requirements. The commission invites public comment on the draft regulatory impact analysis determination.

Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Takings Impact Assessment

The commission evaluated this proposed rulemaking and performed an analysis of whether these proposed revisions to rules constitute a taking under Texas Government Code, Chapter 2007. The specific purpose of these proposed rules is to achieve reductions in NO_x emissions to reduce ozone formation in order to help bring nonattainment areas in the state into attainment with the federal NAAQS for ozone and to maintain it. The proposed rules would substantially advance this stated purpose by clarifying and simplifying testing procedures for additives and alternative fuel formulation approvals, clarifying designated alternative limits for TxLED, and updating and adding definitions. Promulgation and enforcement of these proposed rules would be neither a statutory nor a constitutional taking of private real property. Specifically, the

subject rulemaking does not affect a landowner's rights in private real property, because this rulemaking does not burden (constitutionally); nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. These revisions will not place a burden on private real property, because this action does not require an investment in the permanent installation of new refinery processing equipment. Additive based alternative fuel formulations can be developed to meet TxLED that do not require changes to refinery processes. Additionally, the alternative formulation approvals made by the executive director are not property rights, and the proposed changes to the rules do not foreclose other approval options to meet TxLED for these alternative formulations. Alternative formulations were initially developed as a way to provide flexibility for diesel producers and suppliers to meet TxLED requirements.

Furthermore, the commission's analysis indicates that Texas Government Code, Chapter 2007 does not apply to these proposed rules, because this is an action that is reasonably taken to fulfill an obligation mandated by federal law, which is exempt under Texas Government Code, §2007.003(b)(4). Specifically, the TxLED requirements were developed in order to meet the NAAQS for ozone set by the EPA under 42 USC, §7409. States are primarily responsible for ensuring attainment and maintenance of NAAQS once the EPA has established them. Pursuant to 42 USC, §7410, and related provisions, states must submit, for approval by the EPA, SIPs that provide for the attainment and

maintenance of NAAQS through control programs directed to sources of the pollutants involved. Therefore, one purpose of this rulemaking action is to provide additional clarification and flexibility in implementing the TxLED program necessary for the state's nonattainment areas to meet the air quality standards established under federal law as NAAQS. Attainment and maintenance of the new ozone standard require substantial reductions in NO_x emissions as well as volatile organic compounds emissions. This rulemaking is only one step among many necessary for attaining and maintaining the new ozone standard.

In addition, Texas Government Code, §2007.003(b)(13), states that Chapter 2007 does not apply to an action that: 1) is taken in response to a real and substantial threat to public health and safety; 2) is designed to significantly advance the health and safety purpose; and 3) does not impose a greater burden than is necessary to achieve the health and safety purpose. Although the rules do not directly prevent a nuisance or prevent an immediate threat to life or property, they do prevent a real and substantial threat to public health and safety and significantly advance the health and safety purpose. This action is taken in response to areas of the state exceeding the federal NAAQS for ozone, which adversely affects public health, primarily through irritation of the lungs. The action significantly advances the health and safety purpose by improving the TxLED program that reduces ozone levels in the nonattainment areas and other areas of the state that contribute to high ozone levels in these areas. Consequently, these proposed

rules meet the exemption in Texas Government Code, §2007.003(b)(13). This rulemaking action therefore meets the requirements of Texas Government Code, §2007.003(b)(4) and (13). For these reasons, the proposed rulemaking does not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission determined the proposed rulemaking relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 *et seq.*), and the commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the Texas Coastal Management Program. As required by 30 TAC §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to actions and rules subject to the CMP, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this action for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council and determined that the proposed amendments are consistent with the applicable CMP goal expressed in 31 TAC §501.12(1) of protecting and preserving the quality and values of coastal natural resource areas, and the policy in 31 TAC §501.14(q), which requires that the commission protect air quality in coastal areas. The proposed rulemaking will ensure that the amendments comply with 40 Code of Federal Regulations (CFR) Part 50, National Primary and Secondary Air Quality

Standards, and 40 CFR Part 51, Requirements for Preparation, Adoption, and Submittal of Implementation Plans. This rulemaking action is consistent with CMP goals and policies, in compliance with 31 TAC §505.22(e).

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on September 15, 2011, at 2:00 p.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services at (512) 239-1802. Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Charlotte Horn, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: <http://www5.tceq.texas.gov/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2009-001-114-EN. The comment period closes September 19, 2011. Copies of the proposed rulemaking can be obtained from the commission's Web site at http://www.tceq.texas.gov/nav/rules/propose_adopt.html. For further information, please contact Morris Brown, Air Quality Division, at (512) 239-1438.

SUBCHAPTER A: DEFINITIONS

§114.6

Statutory Authority

The amendment is proposed under Texas Water Code (TWC), §5.103, concerning Rules, and TWC, §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC. The amendment is also proposed under Texas Health and Safety Code (THSC), §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; THSC, §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; THSC, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; and THSC, §382.202, concerning Vehicle Emissions Inspection and Maintenance Program, which authorizes the commission to establish vehicle fuel content standards after January 1, 2004, as long as distribution of low emission diesel (LED) as described in the state implementation plan is not required prior to February 1, 2005, and authorizes the commission to consider alternative emission reduction plans to comply with LED requirements.

The proposed amendment implements THSC, §§382.002, 382.011, 382.012, 382.017, and 382.202.

§114.6. Low Emission Fuel Definitions.

Unless specifically defined in Texas Health and Safety Code, Chapter 382, also known as the Texas Clean Air Act (TCAA), or in the rules of the commission, the terms used in this subchapter have the meanings commonly ascribed to them in the field of air pollution control. In addition to the terms that are defined by TCAA, §3.2, and §101.1 of this title (relating to Definitions), the [following] words and terms specified in this section, when used in Subchapter H of this chapter (relating to Low Emission Fuels), have the [following] meanings as defined in this section, unless the context clearly indicates otherwise.

(1) Additive--Any substance that is intentionally added to gasoline or diesel fuel [, including any added to a motor vehicle fuel system, and that is not intentionally removed prior to sale or use and] that is:

(A) registered as a fuel or fuel additive with the United States Environmental Protection Agency (EPA) in accordance with 40 Code of Federal Regulations (CFR) Part 79 (relating to Registration of Fuels and Fuel Additives); or

(B) added to gasoline or diesel for the purpose of reducing exhaust emissions from motor vehicles or non-road equipment and is exempted from the EPA registration requirements in accordance with 40 CFR [Code of Federal Regulations] Part 79.

(2) Barrel--A unit of measure equal to 42 United States gallons.

(3) Biodiesel--A fuel comprised of mono-alkyl esters of long chain fatty acids derived from vegetable oils or animal fats, designated B100, in accordance with the active version of American Society for Testing and Materials (ASTM) D6751 (Standard Specification for Biodiesel Blend Stock (B100) for Middle Distillate Fuels).

(4) Biodiesel blend--A blend of biodiesel and diesel fuel that is comprised of more than 5.5% biodiesel by volume.

(5) [(3)] Bulk plant--An intermediate gasoline or diesel [motor vehicle] fuel distribution facility where gasoline or diesel fuel is stored and then transported for delivery to a bulk purchaser/consumer or retail fuel dispensing facility [delivery of motor vehicle fuel to and from the facility is solely by truck or pipeline].

(6) [(4)] Bulk purchaser/consumer--A person who purchases or otherwise obtains gasoline or diesel [motor vehicle] fuel in bulk and then dispenses it into the fuel tanks of motor vehicles owned or operated by the person.

(7) [(5)] Common carrier--A person engaged in the transportation of goods or products of another person for compensation and is available to the public for hire.

[(6)] Designated alternative limit (DAL)--An alternative specification limit for a specific fuel standard, which is assigned by a producer or importer to a final blend of low emission diesel fuel (LED) in accordance with §114.313 of this title (relating to Designated Alternative Limits).]

(8) [(7)] Diesel fuel--Any middle distillate fuel used in compression-ignition internal combustion engines that is commonly or commercially known, sold, or represented as:

(A) Grade No. 1-D or Grade No. 2-D diesel fuel, in accordance with the active version of American Society for Testing and Materials (ASTM) D975 (Standard Specification for Diesel Fuel Oils)[, except for lubricity]; or [and]

(B) Marine Distillate fuel X (DMX), Marine Distillate fuel A (DMA), or Marine Gas Oil (MGO) diesel fuel in accordance with the active version of the International Organization for Standardization (ISO) 8217 Specifications of Marine Fuels.

(9) [(8)] Final blend--A distinct quantity of [low emission] diesel fuel [(LED)] that is introduced into commerce without further process [alteration, which would tend to affect a regulated specification of LED].

(10) [(9)] Further process--To perform any [activity on] alteration to diesel [motor vehicle] fuel, including distillation, treating with hydrogen, blending, or addition of an [approved] additive, prior to the diesel fuel being introduced into commerce [for the purpose of bringing the motor vehicle fuel into compliance with the requirements of Subchapter H of this chapter].

(11) [(10)] Gasoline--Any fuel that is commonly or commercially known, sold, or represented as gasoline, in accordance with the active version of American Society for Testing and Materials (ASTM) D4814 [D4814-99] (Standard Specification for Automotive Spark-Ignition Engine Fuel)[, dated 1999].

(12) [(11)] Import--The process by which gasoline or diesel [motor vehicle] fuel is transported into the State of Texas by any means or method whatsoever, including transport via pipeline, railway, truck, motor vehicle, barge, boat, or railway tank car.

(13) [(12)] Import facility--The stationary gasoline or diesel [motor vehicle] fuel transfer point wherein the importer takes delivery of imported gasoline or diesel [motor vehicle] fuel and from which imported gasoline or diesel [motor vehicle] fuel is transferred into the cargo tank truck, pipeline, or other delivery vessel from which the fuel will be delivered to a bulk plant, bulk purchaser/consumer, or retail fuel dispensing facility.

(14) [(13)] Importer--Any person, except a person acting as a common carrier, who imports gasoline or diesel [motor vehicle] fuel.

(15) [(14)] Low emission diesel fuel (LED)--Any diesel fuel that conforms to the requirements specified in §§114.312, 114.313, or 114.318 of this title (relating to Low Emission Diesel Standards; Designated Alternative Limits; or Alternative Emission Reduction Plan, respectively). [:]

[(A) sold, intended for sale, or made available for sale that may ultimately be used to power a diesel fueled compression-ignition engine in the counties listed in §114.319 of this title (relating to Affected Counties and Compliance Dates);]

[(B) that the producer knows, or reasonably should know, may ultimately be used to power a diesel fueled compression-ignition engine in counties listed in §114.319 of this title; and]

[(C) complies with the standards] specified in §114.312 of this title (relating to Low Emission Diesel Standards).]

(16) [(15)] Motor vehicle--Any self-propelled device powered by a gasoline fueled spark-ignition internal combustion engine or a diesel fueled compression-ignition internal combustion engine in or by which a person or property is or may be transported, and is required to be registered under Texas Transportation Code [(TTC)], §502.002, excluding vehicles registered under Texas Transportation Code, §502.006 [TTC, §502.006(c)].

[(16) Motor vehicle fuel--Any gasoline or diesel fuel used to power gasoline fueled spark-ignition or diesel fueled compression-ignition engines.]

(17) Non-road equipment--Any device powered by a gasoline fueled spark-ignition internal combustion engine or a diesel fueled compression-ignition internal combustion engine that is not required to be registered under Texas Transportation Code, §502.002.

(18) Produce--Perform the process to convert liquid compounds [that are not motor vehicle fuel] into gasoline or diesel [motor vehicle] fuel or to further process diesel fuel to create a final blend of diesel fuel [, except where a person supplies motor vehicle fuel to a producer who agrees in writing to further process the motor vehicle fuel at the production facility and to be treated as a producer of the motor vehicle fuel, only the final producer shall be deemed for all purposes under Subchapter H of this chapter to be the producer of the motor vehicle fuel].

(19) Producer--Any person who owns, leases, operates, controls, or supervises a production facility that [and/or] produces gasoline or diesel [motor vehicle] fuel.

(20) Production facility--Any [A] facility where gasoline or diesel [at which motor vehicle] fuel is produced or that manufactures liquid fuels by distilling petroleum.

(21) Retail fuel dispensing outlet--Any establishment where [at which] gasoline and/or diesel fuel is sold or offered for sale for use in motor vehicles and/or non-road equipment, and the fuel is directly dispensed into the fuel tanks of the motor vehicles and/or non-road equipment using the fuel.

(22) Supply--To provide or transfer gasoline or diesel fuel to a physically separate facility, vehicle, or transportation system.

SUBCHAPTER H: LOW EMISSION FUELS

DIVISION 2: LOW EMISSION DIESEL

[\$114.313]

STATUTORY AUTHORITY

The repeal is proposed under Texas Water Code (TWC), §5.103, concerning Rules, and TWC, §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC. The repeal is also proposed under Texas Health and Safety Code (THSC), §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; THSC, §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; THSC, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; and THSC, §382.202, concerning Vehicle Emissions Inspection and Maintenance Program, which authorizes the commission to establish vehicle fuel content standards after January 1, 2004, as long as distribution of low emission diesel (LED) as described in the state implementation plan is not required prior to February 1, 2005, and authorizes the commission to consider alternative

emission reduction plans to comply with LED requirements.

The proposed repeal implements THSC, §§382.002, 382.011, 382.012, 382.017, and 382.202.

[§114.313. Designated Alternative Limits.]

[(a) A producer or importer may assign a designated alternative limit (DAL) for aromatic hydrocarbon content to a final blend of low emission diesel fuel (LED) produced or imported by the producer or importer, except for that LED produced in accordance with §114.312(f) of this title (relating to Low Emission Diesel Standards), if the following conditions are met.]

[(1) In no case may the aromatic hydrocarbon content of the final blend shown by the sample and test conducted in accordance with §114.315 of this title (relating to Approved Test Methods) exceed the assigned DAL.]

[(2) The producer or importer shall notify the executive director of the volume (in barrels) and the DAL of the final blend. This notification must be received by the executive director before the start of physical transfer of the LED from the production or import facility, and in no case less than 12 hours before the producer completes physical transfer of the final blend.]

[(3) Within 90 days before or after the start of physical transfer of any final blend of LED to which a producer or importer has assigned a DAL exceeding the limit for aromatic hydrocarbon content specified in §114.312(b) of this title, the producer or importer shall complete physical transfer from the production or import facility of LED in sufficient quantity and with a DAL sufficiently below the standard specified in §114.312(b) of this title to offset the volume of aromatic hydrocarbons in the LED reported in excess of the standard.]

[(b) No person shall sell, offer for sale, or supply LED, in a final blend to which a producer or importer has assigned a DAL:]

[(1) exceeding the standard specified in §114.312(b) of this title for aromatic hydrocarbon content, where the total volume of the final blend sold, offered for sale, or supplied exceeds the volume reported to the executive director in accordance with subsection (a)(2) of this section; nor,]

[(2) less than the standard specified in §114.312(b) of this title for aromatic hydrocarbon content, where the total volume of the final blend sold, offered for sale, or supplied is less than the volume reported to the executive director in accordance with subsection (a)(2) of this section.]

[(c) Whenever the final blend of a producer or importer includes volumes of diesel fuel the producer or importer has produced or imported, and volumes it has not produced or imported, the producer's or importer's DAL shall apply only to the volume of diesel fuel the producer or importer has produced or imported. In such a case, the producer or importer shall report to the executive director in accordance with subsection (a)(2) of this section, both the volume of diesel fuel produced or imported and the total volume of the final blend.]

SUBCHAPTER H: LOW EMISSION FUELS

DIVISION 2: LOW EMISSION DIESEL

§§114.312, 114.313, 114.314 - 114.319

STATUTORY AUTHORITY

The amendments and new section are proposed under Texas Water Code (TWC), §5.103, concerning Rules, and TWC, §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC.

The amendments and new section are also proposed under Texas Health and Safety Code (THSC), §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; THSC, §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; THSC, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; and THSC, §382.202, concerning Vehicle Emissions Inspection and Maintenance Program, which authorizes the commission to establish vehicle fuel content standards after January 1, 2004, as long as distribution of low emission diesel (LED) as described in the state implementation plan is not required prior to February 1,

2005, and authorizes the commission to consider alternative emission reduction plans to comply with LED requirements.

The amendments and new section implement THSC, §§382.002, 382.011, 382.012, 382.017, and 382.202.

§114.312. Low Emission Diesel Standards.

(a) No person shall sell, offer for sale, supply, or offer for supply, dispense, transfer, allow the transfer, place, store, or hold any diesel fuel in any stationary tank, reservoir, or other container in the counties listed in §114.319 of this title (relating to Affected Counties and Compliance Dates)[,] that may ultimately be used to power a diesel fueled compression-ignition internal combustion engine in the affected counties[,], that does not meet either the low emission diesel fuel (LED) standards of subsections (b) and (c) of this section, or the requirements of subsection (f) of this section.

(b) The maximum aromatic hydrocarbon content of LED is 10% by volume per gallon. [; or the LED has been reported in accordance with all of the requirements of §114.313 of this title (relating to Designated Alternative Limits), where:]

[(1) the aromatic hydrocarbon content does not exceed the designated alternative limit (DAL); and]

[(2) the DAL exceeds 10% by volume, the excess aromatic hydrocarbon content is fully offset in accordance with §114.313 of this title.]

(c) The minimum cetane number for LED is 48.

(d) Subsection (a) of this section does not apply to a sale, offer for sale, or supply of diesel fuel to a producer where the producer further processes the diesel fuel at the producer's production facility prior to any subsequent sale, offer for sale, or supply of the final blend of diesel fuel.

(e) Diesel fuel that has been produced to comply with all specifications for a Certified Diesel Fuel Formulation as approved by an executive order by the California Air Resources Board on or before January 18, 2005, for compliance with California diesel fuel regulations that were in effect as of October 1, 1993, except for those approved for small refinery compliance, or diesel fuel that has been produced to meet all specifications for diesel fuel under regulations adopted by the California Air Resources Board[, except for those approved for small refinery compliance,] that were in effect as

of January 18, 2005, except for those approved for small refinery compliance, may be used to satisfy the requirements of subsection (a) of this section.

(f) Alternative diesel fuel formulations that have been approved by [the producer has demonstrated to the satisfaction of] the executive director [, through the emissions and performance testing methods] as prescribed in §114.315(c) [and (d)] of this title (relating to Approved Test Methods)[, as achieving comparable or better reductions in emissions of oxides of nitrogen and particulate matter] may be used to satisfy the requirements of subsections (b) and (c) of this section. Approved alternative diesel fuel formulations comprised of a biodiesel blend of up to 20% biodiesel by volume must comply with the active version of American Society for Testing and Materials D7467 (Standard Specification for Diesel Fuel Oil, Biodiesel Blend (B6 to B20)). [For alternative diesel fuel formulations that incorporate additive systems, the estimated emissions benefits of the alternative diesel fuel formulation may be determined by comparing the emissions and performance characteristics of the alternative diesel fuel with the additive system versus the emissions and performance characteristics of a diesel fuel without the additive system, as determined by the testing methods prescribed in §114.315(c) and (d) of this title.]

§114.313. Designated Alternative Limits.

(a) Diesel fuel that has been produced to meet all of the designated alternative limits specified in subsection (b) of this section may be used to satisfy the low emission diesel fuel (LED) requirements specified in §114.312(a) of this title (relating to Low Emission Diesel Standards).

(b) The designated alternative limits per gallon of LED are set forth in paragraphs (1) - (6) of this subsection.

(1) An aromatic hydrocarbon content of no greater than 21.0% by weight;

(2) A polycyclic aromatic hydrocarbon content of no greater than 3.5% by weight;

(3) An American Petroleum Institute gravity index of no less than 36.9;

(4) A cetane number of no less than 53;

(5) A nitrogen content of no greater than 500 parts per million by weight (ppmw); and

(6) A sulfur content of no greater than 15 ppmw.

(c) Compliance with the designated alternative limits specified in subsection (b) of this section must be determined by the test methods specified in §114.315(a) of this title (relating to Approved Test Methods).

§114.314. Registration of Diesel Producers and Importers.

(a) Each producer and importer that sells, offers for sale, supplies, offers to supply, dispenses, transfers, allows the transfer, places, stores, or holds any diesel fuel in any stationary tank, reservoir, or other container in the counties listed in §114.319 of this title (relating to Affected Counties and Compliance Dates) that may ultimately be used to power a diesel fueled compression-ignition internal combustion engine in the counties listed in §114.319 of this title shall register with the executive director at least 30 days prior to the first date the diesel fuel from its production facility or import facility is to be made available for use in the listed counties [sold, offered for sale, supplied, or offered for supply diesel fuel from its production facility or import facility that may have been used in counties listed in §114.319 of this title (relating to Affected Counties and Compliance Dates) on or before April 1, 2005, shall register with the executive director by May 1, 2005].

[(b) Each producer or importer that did not begin to sell, offer for sale, supply, or offer to supply diesel fuel from its production facility or import facility that may ultimately be used in counties listed in §114.319 of this title until after April 1, 2005, shall register with the executive director at least 30 days prior to the first date the diesel fuel is to be made available for use in the listed counties.]

(b) [(c)] Registration must be submitted on forms prescribed by the executive director and must include, at a minimum, the information specified in paragraphs (1) - (5) of this subsection:

(1) the legal business name of the producer or importer, mailing address, assigned customer reference number, and contact information for the producer or importer, or their authorized representative [a signed statement indicating whether the producer or importer does or does not intend to produce or import low emission diesel for use in the counties listed in §114.319 of this title on or after October 1, 2005];

(2) a statement of the estimated total number of barrels of low emission diesel fuel that the producer or importer is planning to produce or import in the 12 months following the date of registration that the producer or importer intends to sell, offer for sale, supply, or offer to supply from its production facility or import facility [total number of barrels of diesel fuel produced or imported in the 12 months prior to

the date of registration that the producer or importer sold, offered for sale, supplied, or offered for supply from its production facility or import facility that was intended] for use in the counties listed in §114.319 of this title;

(3) the physical address, assigned regulated entity reference number, and contact information for each production facility or import facility that is used to produce or import diesel fuel that may be sold, offered for sale, supplied, or offered for supply [if appropriate, a statement of the estimated total number of barrels of low emission diesel that the producer or importer is planning to produce or import in the 12 months following the compliance date listed in §114.319(c)(1) of this title that the producer or importer intends to sell, offer for sale, supply, or offer to supply from its production facility or import facility] for use in the counties listed in §114.319 of this title;

[(4) if appropriate, a statement of the estimated total number of barrels of diesel fuel that the producer or importer is planning to produce or import under an alternative emission reduction plan under §114.318 of this title (relating to Alternative Emission Reduction Plan) in the 12 months following the compliance date listed in §114.319(c)(1) of this title that the producer or importer intends to sell, offer for sale, supply, or offer to supply from its production facility or import facility for use in the counties listed in §114.319 of this title;]

(4) [(5)] any other information determined by the executive director to be necessary to identify the persons responsible for [determine] the adequacy of diesel supply in the affected counties; and

(5) [(6)] a signed statement of consent by the registrant that the executive director is permitted to collect samples and access documentation and records at any production facility or import facility used to produce or import diesel fuel that may ultimately be used to power a diesel fueled compression-ignition internal combustion engine in the counties listed in §114.319 of this title.

(c) [(d)] The executive director shall maintain a listing of all registered producers and importers.

§114.315. Approved Test Methods.

(a) Compliance with the diesel fuel content requirements of this division must be determined by applying the appropriate test methods and procedures specified in the active version of American Society for Testing and Materials (ASTM) D975 (Standard Specification for Diesel Fuel Oils), or by applying the [the following] supplementary test methods and procedures specified in paragraphs (1) - (5) of this subsection, as appropriate.

(1) The aromatic hydrocarbon content may be determined by the active version of ASTM Test Method D5186 (Standard Test Method for Determination of Aromatic Content and Polynuclear Aromatic Content of Diesel Fuels and Aviation Turbine Fuels by Supercritical Fluid Chromatography). The following correlation equation must be used to convert the supercritical fluid chromatography (SFC) results in mass percent to volume percent: aromatic hydrocarbons expressed in percent by volume = $0.916 \times (\text{aromatic hydrocarbons expressed in percent by weight}) + 1.33$.

(2) The polycyclic aromatic hydrocarbon (also referred to as polynuclear aromatic hydrocarbons or PAH) content may be determined by the active version of ASTM Test Method D5186 (Standard Test Method for Determination of Aromatic Content and Polynuclear Aromatic Content of Diesel Fuels and Aviation Turbine Fuels by Supercritical Fluid Chromatography). The correlation equation specified in paragraph (1) of this subsection must be used to convert the SFC results in mass percent to volume percent.

(3) The nitrogen content may be determined by the active version of ASTM Test Method D4629 (Standard Test Method for Trace Nitrogen in Liquid Petroleum Hydrocarbons by Syringe/Inlet Oxidative Combustion and Chemiluminescence Detection).

(4) The American Petroleum Institute (API) gravity index may be determined by the active version of ASTM Test Method D287 (Standard Test Method for API Gravity of Crude Petroleum and Petroleum Products (Hydrometer Method)).

[(5) The viscosity may be determined by the active version of ASTM Test Method D445 (Standard Test Method for Kinematic Viscosity of Transparent and Opaque Liquids (the Calculation of Dynamic Viscosity)).]

[(6) The flashpoint may be determined by the active version of ASTM Test Method D93 (Standard Test Methods for Flash-Point by Pesky-Martens Closed Cup Tester).]

(5) [(7)] The distillation temperatures may be determined by the active version of ASTM Test Method D86 (Standard Test Method for Distillation of Petroleum Products at Atmospheric Pressure).

(b) Modifications to the testing methods and procedures in this section may be approved by the executive director after consultation with and agreement by the United States Environmental Protection Agency (EPA).

(c) The executive director, upon application, may approve alternative diesel fuel formulations as prescribed under §114.312(f) of this title (relating to Low Emission Diesel Standards) that may be used to satisfy the requirements of §114.312(b) and (c) of this title if the applicant has demonstrated to the satisfaction of the executive director and the EPA in accordance with the procedures specified in paragraph (1) of this subsection that the alternative diesel fuel formulation will achieve equivalent or better reductions in emissions of nitrogen oxides (NO_x) and particulate matter (PM) [in accordance with the following procedures].

(1) The applicant shall submit documentation demonstrating that the alternative diesel formulation has met at least one of the criteria specified in subparagraphs (A) or (B) of this paragraph.

(A) The alternative diesel fuel formulation has been verified by the Air Pollution Control Technologies Center, a center under the EPA's Environmental Technology Verification Program, and the EPA's Office of Transportation and Air Quality's Diesel Retrofit Technology Verification Program, to achieve at least a 5.78% reduction in NO_x emissions when tested in a heavy-duty highway use diesel engine and compared against a base diesel fuel with fuel properties within the ranges as described for nationwide average fuel in EPA's *Verification Protocol for Determination of Emissions Reductions Obtained by Use of Alternative or Reformulated Liquid Fuels*.

Fuel Additives, Fuel Emulsions, and Lubricants for Highway and Nonroad Use Diesel Engines and Light Duty Gasoline Engines and Vehicles (Revision Number 03, September 2003).

(B) Using the Unified Model as described in the EPA staff discussion document, *Strategies and Issues in Correlating Diesel Fuel Properties with Emissions*, Publication Number EPA420-P-01-001, published July 2001, the applicable fuel properties of the alternative diesel fuel formulation demonstrate at least a 5.5% reduction in NO_x emissions from on-road diesel fuel for the year 2007, and at least a 6.2% reduction in NO_x emissions from non-road diesel.

(2) For alternative diesel fuel formulations that use an additive to achieve reductions as verified in accordance with the criteria specified in paragraph (1)(A) of this subsection, the applicant shall provide to the executive director upon application, the identity, chemical composition, and concentration of each additive used in the formulation, the test method by which the presence and concentration of the additive may be determined, documentation indicating the additive has complied with fuel additive registration requirements in accordance with 40 Code of Federal Regulations (CFR) Part 79 (relating to Registration of Fuels and Fuel Additives), and if the alternative diesel fuel formulation is comprised of a biodiesel blend of up to 20% biodiesel by volume, documentation indicating the biodiesel blend complies with the

active version of ASTM D7467 (Standard Specification for Diesel Fuel Oil, Biodiesel Blend (B6 to B20)).

(3) For alternative diesel fuel formulations that achieve emission reductions as demonstrated in accordance with the criteria specified in paragraph (1)(B) of this subsection, the applicant shall provide documentation to the executive director upon application that includes the cetane number, aromatic hydrocarbon content, specific gravity, and the temperature corresponding to the 50% point on the distillation curve in degrees Fahrenheit (T50) of the alternative diesel fuel formulation for which the applicant is requesting approval.

(4) If the alternative diesel fuel formulation has been demonstrated to the satisfaction of the executive director and the EPA to achieve comparable or better reductions in emissions of NO_x and PM in accordance with paragraph (1) of this subsection, then the executive director may, after consultation with the EPA, issue an approval notification certifying that the alternative diesel fuel formulation may be used to satisfy the requirements of §114.312(a) of this title.

(A) The approval notification must identify the specifications of the alternative diesel fuel formulation as approved under this subsection by listing the information as specified in clauses (i) and (ii) of this subparagraph, as appropriate:

(i) the total aromatic hydrocarbon content, cetane number, or other parameters as appropriate and as determined in accordance with the test methods identified in subsection (a) of this section; or

(ii) for an alternative diesel fuel formulation using an additive to achieve reductions, the identity and minimum concentration or treatment rate of the additive, the test method or methods by which the presence and concentration of the additive may be determined, and any other parameters as appropriate that must be used to satisfy the monitoring requirements of §114.316 of this title (relating to Monitoring, Recordkeeping, and Reporting Requirements).

(B) The approval notification must assign an identification number to the specific approved alternative diesel fuel formulation.

(d) All alternative diesel fuel formulations approved by the executive director as prescribed under this section prior to September 1, 2011, and thereafter, are subject to the actual emissions performance of the approved alternative diesel fuel formulation and evidence that the use of an approved alternative diesel fuel formulation does not result in emissions that are equivalent to or are less than the emissions from the use of diesel fuel satisfying the requirements of §114.312(b) and (c) of this title may result in

the revocation of this approval or other appropriate enforcement action.

(e) All alternative diesel fuel formulations approved by the executive director as prescribed under this section prior to September 1, 2011, may continue to be used for compliance with the provisions specified in this division after the date of adoption of the current revision to this division.

[(1) The applicant shall initially submit a proposed test protocol to the executive director for approval, that must include:]

[(A) the identity of the entity that will conduct the tests described in paragraph (4) of this subsection;]

[(B) a testing plan with test procedures that are consistent with the requirements of paragraphs (2) and (4) of this subsection;]

[(C) fuel analysis test data showing that the candidate fuel meets the specifications for the appropriate Grade No. 1-D S15 or Grade No. 2-D S15 diesel fuel as specified in the active version of ASTM D975, except for lubricity, and identifying the characteristics of the candidate fuel identified in paragraph (2) of this subsection;]

[(D) fuel analysis test data showing that the fuel to be used as the reference fuel satisfies the characteristics identified in paragraph (3) of this subsection;]

[(E) a detailed description of the reasonable quality assurance and quality control procedures that will be implemented by the entity identified in subparagraph (A) of this paragraph to ensure the validity of the testing being performed; and]

[(F) notification of any outlier identification and exclusion procedure that will be used, and a demonstration that any such procedure meets generally accepted statistical principles.]

[(2) The applicant shall supply the candidate fuel to be used in the comparative testing in accordance with paragraph (4) of this subsection.]

[(A) The sulfur content, total aromatic hydrocarbon content, polycyclic aromatic hydrocarbon, nitrogen content, cetane number, API gravity index, viscosity at 40 degrees Celsius, flash point, and distillation (in degrees Fahrenheit) of the candidate fuel must be determined as the average of three tests conducted in accordance with the referenced test method specified in subsection (a) of this section.]

[(B) For alternative diesel fuel formulations that use an additive in the candidate fuel to achieve reductions, the applicant shall provide to the executive director upon application, the identity, chemical composition, and concentration of each additive used in the formulation and the test method by which the presence and concentration of the additive may be determined.]

[(C) The applicant may also specify any other parameters for the candidate fuel, along with the test method for determining the parameters. The applicant shall provide the chemical composition of each additive in the candidate fuel, except when the chemical composition of an additive is not known to either the applicant or to the manufacturer of the additive (if other), the applicant may provide a full disclosure of the chemical process of manufacture of the additive in lieu of its chemical composition.]

[(3) The reference fuel used in the comparative testing described in paragraph (4) of this subsection must be produced from straight-run diesel fuel by a hydrodearomatization process and must have the following characteristics determined in accordance with the referenced test method specified in subsection (a) of this section:]

[(A) sulfur content - 15 parts per million maximum;]

[(B) total aromatic hydrocarbon content - 10% maximum, volume percent;]

[(C) polycyclic aromatic hydrocarbon content - 1.4%, maximum weight percent;]

[(D) nitrogen content - ten parts per million, maximum;]

[(E) cetane number - 48, minimum;]

[(F) API gravity index - 33 to 39 degrees;]

[(G) viscosity at 40 degrees Celsius - 2.0 to 4.1 centistokes;]

[(H) flash point - 130 degrees Fahrenheit, minimum; and]

[(I) distillation:]

[(i) initial boiling point - 340 to 420 degrees Fahrenheit;]

[(ii) 10% point - 400 to 490 degrees Fahrenheit;]

[(iii) 50% point - 470 to 560 degrees Fahrenheit;]

[(iv) 90% point - 550 to 610 degrees Fahrenheit; and]

[(v) end point - 580 to 660 degrees Fahrenheit.]

[(4) Exhaust emission tests using the candidate fuel and the reference fuel specified in paragraph (3) of this subsection must be conducted in accordance with the federal test procedures as specified in 40 Code of Federal Regulations Part 86 (Control of Emissions from New and In-Use Highway Vehicles and Engines), Subpart N (Emission Regulations for New Otto-Cycle and Diesel Heavy-Duty Engines - Gaseous and Particulate Exhaust Test Procedures), as amended.]

[(A) The tests must be performed using a Detroit Diesel Corporation Series-60 engine or an engine specified by the applicant and approved by the executive director to be equally representative of the post-1990 model year heavy-duty diesel engine fleet. The test engine must have a minimum of 125 hours of use and exhibit stable operation before beginning the testing specified in this paragraph and

must not exceed 110% of its applicable exhaust emission standards when using the reference fuel specified in paragraph (3) of this subsection.]

[(B) The comparative testing must be conducted by a third party that is mutually agreed upon by the executive director and the applicant. The applicant shall be responsible for all costs of the comparative testing.]

[(C) The applicant shall ensure that one of the test sequences in clause (i) or (ii) of this subparagraph is used to conduct the exhaust emissions tests.]

[(i) If both cold start and hot start exhaust emission tests are conducted, a minimum of five exhaust emission tests, each test consisting of at least one cold start and two hot start cycles, must be performed on the engine with each fuel, using either of the following sequences, where "R" is a test on the reference fuel and "C" is a test on the candidate fuel: RC RC RC (and continuing in the same order) or RC CR RC CR RC (and continuing in the same order). The engine mapping procedures and a conditioning transient cycle must be conducted with the reference fuel before each cold start procedure using the reference fuel. The reference cycle used for the candidate fuel must be the same cycle as that used for the fuel preceding it.]

[(ii) If only hot start exhaust emission tests are conducted, one of the following test sequences must be used throughout the testing, where "R" is a test on the reference fuel and "C" is a test on the candidate fuel, each test consisting of at least three hot start cycles:]

[(I) Alternative 1: RC CR RC CR (continuing in the same order for a given calendar day; a minimum of 20 individual hot start cycles must be completed with each fuel);]

[(II) Alternative 2: RR CC RR CC (continuing in the same order for a given calendar day; a minimum of 20 individual hot start cycles must be completed with each fuel);]

[(III) Alternative 3: RRR CCC RRR CCC (continuing in the same order for a given calendar day; a minimum of 21 individual hot start cycles must be completed with each fuel); or]

[(IV) Alternative 4: RR CCC RR (a minimum of six hot start cycles must be performed on the reference fuel followed with a conditioning period not to exceed 72 hours of engine operation on the candidate fuel before the first individual hot start emission test on the candidate fuel is performed; the conditioning

cycle must represent normal engine operation; a minimum of nine hot start cycles must be performed on the candidate fuel after the conditioning period; only the emissions from the tests on the reference fuel conducted before the candidate fuel tests must be used in the calculations conducted in accordance with paragraph (5) of this subsection; a minimum of six hot start cycles must be performed on the reference fuel after the candidate fuel tests to determine any carry-over effect that may occur from the use of the candidate fuel).]

[(iii) For alternatives 1, 2, and 3, an equal number of tests must be conducted using the reference fuel and the candidate fuel on any given calendar day. At the beginning of each calendar day, the sequence of testing must begin with the fuel that was tested at the end of the preceding day.]

[(iv) For all alternatives, the engine mapping procedures and a conditioning transient cycle must be conducted after every fuel change and/or at the beginning of each day. The reference cycle generated from the reference fuel for the first test must be used for all subsequent tests.]

[(v) Each paired or triplicate series of individual tests must be averaged to obtain a single value that would be used in the calculations conducted in accordance with paragraph (5) of this subsection.]

[(D) The applicant shall submit a test schedule to the executive director at least one week prior to commencement of the tests. The test schedule must identify the days that the tests will be conducted, and must provide for conducting the test consecutively without substantial interruptions other than those resulting from the normal hours of operations at the test facility. The executive director or his designee shall be permitted to observe any tests. The party conducting the testing shall maintain a test log that identifies all tests conducted, all engine mapping procedures, all physical modifications to or operational tests of the engine, all re-calibrations or other changes to the test instruments, and all interruptions between tests and the reason for each such interruption. All tests conducted in accordance with the test schedule, other than any tests rejected in accordance with an outlier identification and exclusion procedure included in the approved test protocol, must be included in the comparison of emissions in accordance with paragraph (5) of this subsection.]

[(E) In each test of a fuel, exhaust emissions of oxides of nitrogen (NO_x), total hydrocarbons (THC), non-methane hydrocarbons (NMHC), and particulate matter (PM) must be measured.]

[(F) The exhaust emissions tests described in this paragraph must not be conducted until the test protocol as described in paragraph (1) of this subsection is approved by the executive director.]

[(G) Upon completion of the tests described in this paragraph, the applicant may submit an application for certification to the executive director. The application must include the approved test protocol, all of the fuel analysis and emissions test data, a copy of the complete test log prepared in accordance with subparagraph (D) of this paragraph, a demonstration that the candidate fuel meets the requirements for certification specified in this subsection, and other information as the executive director may reasonably require. Upon review of the certification application, the executive director shall grant or deny the application. Any denial must be accompanied by a written statement of the reasons for denial.]

[(5) The average emissions during testing with the candidate fuel must be compared to the average emissions during testing with the reference fuel specified in paragraph (3) of this subsection, applying one-sided Student's t statistics as set forth in Snedecar and Cochran, *Statistical Methods* (7th edition), page 91, Iowa State University Press, 1980. The executive director may issue a certification in accordance with this paragraph only if the executive director makes all of the following determinations:]

[(A) the average individual emissions of NO_x and PM, respectively, recorded during testing with the candidate fuel are comparable or better than the average individual emissions of NO_x and PM, respectively, recorded during testing with the reference fuel;]

[(B) use of any additive identified in accordance with paragraph (2)(B) of this subsection in diesel powered engines will not increase emissions of noxious or toxic substances that would not be emitted by such engines operating without the additive;]

[(C) in order for the determinations in subparagraph (A) of this paragraph to be made, for each referenced pollutant the candidate fuel must satisfy the following relationship; and]

[Figure: 30 TAC §114.315(c)(5)(C)]

$$\bar{X}_C < \bar{X}_R + \delta - S_P \cdot \sqrt{\frac{2}{n}} \cdot t(a, 2n - 2)$$

Where:

- \bar{X}_C = Average emissions during testing with the candidate fuel.
- \bar{X}_R = Average emissions during testing with the reference fuel.
- δ = Tolerance level equal to 1% of \bar{X}_R for oxides of nitrogen (NO_x) and 2% of \bar{X}_R for particulate matter (PM).
- S_P = Pooled standard deviation.
- $t(a, 2n-2)$ = The one-sided upper percentage point of t distribution with $a=0.15$ and $2n-2$ degrees of freedom.
- n = Number of tests of candidate and reference fuel.

[(D) the average individual emissions of THC and NMHC, respectively, recorded during testing with the candidate fuel do not exceed the test engine's applicable exhaust emission standards.]

[(6) If the executive director finds that a candidate fuel has been properly tested in accordance with this subsection, and makes the determinations specified in paragraph (5) of this subsection, then the executive director may, after consultation with the EPA, issue an approval notification certifying that the alternative diesel fuel formulation represented by the candidate fuel may be used to satisfy the requirements of §114.312(a) of this title. The approval notification must identify all of the relevant characteristics of the candidate fuel determined in accordance with paragraph (2) of this subsection.]

[(A) The approval notification must identify the following specifications of the alternative diesel fuel formulation as approved under this subsection:]

[(i) the total aromatic hydrocarbon content, cetane number, or other characteristics as appropriate and as determined in accordance with the test methods identified in subsection (a) of this section; or]

[(ii) for an alternative diesel fuel formulation using an additive to achieve reductions, the identity and minimum concentration or treatment rate of the additive, the minimum specifications of the base diesel fuel used in the approved formulation, and the test method or methods that must be used to satisfy the monitoring requirements of §114.316 of this title (relating to Monitoring, Recordkeeping, and Reporting Requirements).]

[(B) The approval notification must assign an identification number to the specific approved alternative diesel fuel formulation.]

[(d) Notwithstanding subsection (c) of this section, the executive director, upon application, may approve alternative diesel fuel formulations as prescribed under

§114.312(f) of this title that may be used to satisfy the requirements of §114.312(b) and (c) of this title if the applicant has demonstrated to the satisfaction of the executive director and the EPA that the formulation will achieve comparable or better reductions in emissions of NO_x and PM.]

[(1) For alternative diesel fuel formulations that use an additive to achieve reductions, the applicant shall provide to the executive director upon application, the identity, chemical composition, and concentration of each additive used in the formulation, and the test method by which the presence and concentration of the additive may be determined.]

[(2) If the alternative diesel fuel formulation has been demonstrated to the satisfaction of the executive director and the EPA to achieve comparable or better reductions in emissions of NO_x and PM under this subsection, then the executive director may issue an approval notification certifying that the alternative diesel fuel formulation may be used to satisfy the requirements of §114.312(a) of this title.]

[(A) The approval notification must identify the following specifications of the alternative diesel fuel formulation as approved under this subsection:]

[(i) the total aromatic hydrocarbon content, cetane number, or other parameters as appropriate and as determined in accordance with the test methods identified in subsection (a) of this section; or]

[(ii) for an alternative diesel fuel using an additive to achieve reductions, the identity and minimum concentration or treatment rate of the additive, the minimum specifications of the base fuel used in the approved formulation, and the test method or methods that must be used to satisfy the monitoring requirements of §114.316 of this title.]

[(B) The approval notification must assign an identification number to the specific approved alternative diesel fuel formulation.]

[(3) The demonstration required under this subsection may be satisfied using the Unified Model as described in the EPA staff discussion document, *Strategies and Issues in Correlating Diesel Fuel Properties with Emissions*, Publication Number EPA420-P-01-001, published July 2001, to demonstrate that the applicable fuel properties of the alternative diesel fuel formulation will achieve at least a 5.5% reduction in NO_x emissions from on-road diesel fuel for the year 2007, and at least a 6.2% reduction in NO_x emissions from non-road diesel.]

[(4) The demonstration required under this subsection may be satisfied by the verification of an alternative diesel fuel formulation by the Air Pollution Control Technologies Center, a center under the EPA's Environmental Technology Verification Program, and the EPA's Office of Transportation and Air Quality's Voluntary Diesel Retrofit Program, demonstrating at least a 5.78% reduction in NO_x emissions when compared against a base diesel fuel with fuel properties within the ranges as described for nationwide average fuel in EPA's *Verification Protocol for Determination of Emissions Reductions Obtained by Use of Alternative or Reformulated Liquid Fuels, Fuel Additives, Fuel Emulsions, and Lubricants for Highway and Nonroad Use Diesel Engines and Light Duty Gasoline Engines and Vehicles* (Revision No. 03, September 2003).]

§114.316. Monitoring, Recordkeeping, and Reporting Requirements.

(a) Every producer or importer that has elected to sell, offer for sale, supply, or offer for supply low emission diesel fuel (LED) produced at its production facility or imported from its import facility that conforms to the requirements specified in §§114.312, 114.313, or 114.318 of this title (relating to Low Emission Diesel Standards; Designated Alternative Limits; Alternative Emission Reduction Plan, respectively) that may ultimately be used in counties listed in §114.319 of this title (relating to Affected Counties and Compliance Dates) is subject to the applicable requirements of this section.

(b) All records relating to LED [low emission diesel (LED)] sampling must contain a statement declaring whether [the aromatic hydrocarbon content of] the sample conforms to the basic standards [standard] as specified in §114.312(b) and (c) of this title [(relating to Low Emission Diesel Standards)], to [a] the designated alternative limits [limit (DAL)] in accordance with §114.313 of this title [(relating to Designated Alternative Limits)], to a limit as accepted under §114.312(e) of this title, [or whether the diesel fuel conforms] to an alternative diesel fuel formulation approved under §114.312(f) of this title, or to an alternative emission reduction plan approved under §114.318 of this title.

(c) Each producer or importer of LED [a diesel fuel] that conforms to §§114.312, 114.313, or 114.318 [§114.312(a) - (e)] of this title that is subject to the requirements of this section shall collect and analyze a representative sample of each final blend of LED produced at its production facility or imported from its import facility for the fuel properties specified in paragraphs (1) - (5) of this subsection [shall sample and test for the aromatic hydrocarbon content and minimum cetane number in each final blend of LED that the producer or importer has produced or imported, by collecting and analyzing a representative sample of diesel fuel taken using the methodologies specified in §114.315 of this title (relating to Approved Test Methods)].

(1) The aromatic hydrocarbon content and cetane number must be analyzed for LED produced or imported in accordance with §114.312(b) - (c) of this title using the test methods specified in §114.315(a) of this title (relating to Approved Test Methods).

(2) The aromatic hydrocarbon content, cetane number, and/or any other appropriate components listed in the California regulations or the executive order issued by the California Air Resources Board (CARB) for producing or importing LED in accordance with §114.312(e) of this title must be analyzed using the test methods specified in §114.315(a) of this title and if appropriate, the test methods as listed in the executive order issued by CARB.

(3) The appropriate components of the alternative diesel fuel formulation as listed in the approval notification issued by the executive director under §114.315(c)(1)(A) of this title must be analyzed for LED produced or imported in accordance with §114.312(f) of this title using the methodologies specified in §114.315(a) of this title and if appropriate, the test methods as listed in the approval notification.

(4) The aromatic hydrocarbon content, polycyclic aromatic hydrocarbon content, American Petroleum Institute (API) gravity index, cetane number, nitrogen content, and sulfur content must be analyzed for LED produced or imported in

accordance with §114.313 of this title using the test methods specified in §114.315(a) of this title.

(5) The aromatic hydrocarbon content, cetane number, specific gravity, and the temperature corresponding to the 50% point on the distillation curve in degrees Fahrenheit (T50) must be analyzed for LED produced in accordance with §114.315(c)(1)(B) of this title or §114.318(b)(1) of this title using the test methods specified in §114.315(a) of this title.

(6) If the final blend of LED required to be analyzed in paragraphs (2) and (3) of this subsection is produced at a production facility with the use of an additive as it is being loaded directly to pipelines, tank ships, railway tank cars, tank trailers, or fuel delivery trucks, the producer or importer may satisfy the sampling requirements of this subsection by recording the volume of additive and the volume of diesel additized in each final blend of LED as it is produced at the production facility. The analysis of the volumetric record must demonstrate that sufficient additive was added to the final blend of LED to maintain the appropriate additive concentration per gallon as listed in the approval notification issued by the executive director or in the executive order issued by the CARB.

(7) The producer or importer shall maintain [, for two years from the date of each sampling,] records showing the sample date, identity of the final blend sampled, identity of the container or other vessel sampled, volume of the final blend sampled [volume], and the fuel properties of each sample as analyzed in accordance with paragraphs (1) - (6) of this subsection as appropriate, for two years from the date each sample was collected [aromatic hydrocarbon content and minimum cetane number].

(8) All LED [diesel fuel] produced by the producer at its production facilities or imported by the importer from its import facilities and not tested [as LED] by the producer or importer as required by this subsection [section] will be deemed to exceed the standards specified in §114.312 of this title, unless the producer or importer demonstrates that the LED [diesel fuel] meets those standards and limits.

(d) A producer or importer subject to the requirements of this division shall provide to the executive director any records required to be maintained by the producer or importer in accordance with this section within 15 days of a written request from the executive director, if the request is received before expiration of the period during which the records are required to be maintained. Whenever a producer or importer fails to provide records regarding a final blend of LED in accordance with the requirements of this section, the final blend of LED will be presumed to have been sold by the producer or importer in violation of the standards specified in §114.312 of this title, to which the

producer or importer has elected to be subject. [Each producer or importer of diesel fuel that conforms to §114.312(f) of this title shall sample and test for the appropriate components of the alternative diesel fuel formulation as listed in the approval notification issued by the executive director under §114.315(c) or (d) of this title in each final blend of LED that the producer or importer has produced or imported, by collecting and analyzing a representative sample of diesel fuel taken from the final blend, using the methodologies specified in §114.315 of this title. If a producer or importer blends the diesel fuel components of the approved alternative diesel fuel formulation to produce a final blend of LED directly to pipelines, tank ships, railway tank cars, or trucks and trailers, the loading(s) must be sampled and tested for the appropriate components of the alternative diesel fuel formulation as approved by the executive director by the producer or importer or authorized contractor at a rate of one sample and test per 250,000 gallons of LED produced. The producer or importer shall maintain records showing the sample date, identity of blend sampled, container or other vessel sampled, final blend volume] and the content of the appropriate fuel components for two years from the date of each sampling. All diesel fuel produced by the producer or imported by the importer and not tested as LED by the producer or importer as required by this section will be deemed to exceed the standards specified in §114.312 of this title, unless the producer or importer demonstrates that the diesel fuel meets those standards and limits.]

[(e) If the alternative diesel fuel formulation being sampled and tested under subsection (d) of this section contains an additive system, the final blend must be sampled and tested for the content of the appropriate fuel components of the base fuel and additive as listed in the approval notification issued by the executive director under §114.315(c) or (d) of this title, and the producer or importer or authorized contractor shall maintain records showing that sufficient additive was added to maintain the appropriate additive concentration as approved by the executive director. If the additive is approved by the executive director for use with diesel fuel produced to comply with the fuel content standards specified in 40 Code of Federal Regulations §80.520, the testing for the content of the fuel components of the base fuel is not required.]

[(f) A producer or importer subject to the requirements of this division shall provide to the executive director any records required to be maintained by the producer or importer in accordance with this section within 15 days of a written request from the executive director, if the request is received before expiration of the period during which the records are required to be maintained. Whenever a producer or importer fails to provide records regarding a final blend of LED in accordance with the requirements of this section, the final blend of diesel fuel will be presumed to have been sold by the producer or importer in violation of the standards specified in §114.312 of this title, to which the producer or importer has elected to be subject.]

(e) [(g)] All parties in the distribution chain (i.e., producers, importers, bulk plants, common carriers, [producer, importer, terminals, pipelines, truckers, rail carriers,] and retail fuel dispensing outlets) that supply diesel fuel subject to the requirements specified in [provisions of] §114.312 of this title that may ultimately be used in counties listed in §114.319 of this title shall maintain copies or records of product transfer documents for a minimum of two years and shall upon request, make such copies or records available to representatives of the commission, United States Environmental Protection Agency, or local air pollution agency having jurisdiction in the area. The product transfer documents must contain, at a minimum, the [following] information specified in paragraphs (1) - (7) of this subsection:

(1) the date of transfer;

(2) the name and address of the transferor;

(3) the name and address of the transferee;

(4) in the case of transferors or transferees who are producers or importers, the registration number of those persons as assigned by the commission under §114.314 of this title (relating to Registration of Diesel Producers and Importers);

(5) the volume of diesel fuel being transferred;

(6) the location of the diesel fuel at the time of transfer; and

(7) one of the [following] certification statements specified in subparagraphs (A), (B), or (C) of this paragraph, as appropriate:

(A) "This product is Texas low emission diesel and may be used as fuel for diesel engines in any Texas county requiring the use of low emission diesel fuel."; or

(B) "This product may not be used as fuel for diesel engines in any Texas county requiring the use of low emission diesel fuel without further processing."; or

(C) "This product has been produced under a TCEQ approved alternative emission reduction plan and may be used as fuel for diesel engines in any Texas county requiring the use of low emission diesel fuel."

[(h) For each final blend that is sold or supplied by a producer or importer from the party's production facility or import facility, and that contains volumes of diesel fuel

that the party has produced and imported and volumes that the party neither produced nor imported, the producer or importer shall establish, maintain, and retain adequately organized records containing the following information.]

[(1) The volume of diesel fuel in the final blend that was not produced or imported by the producer or importer, the identity of the person(s) from whom such diesel fuel was acquired, the date(s) that it was acquired, and the invoice(s) representing the acquisition(s).]

[(2) The aromatic hydrocarbon content and the cetane number of the volume of diesel in the final blend that was not produced or imported by the producer or importer, determined either by:]

[(A) sampling and testing by the producer or importer of the acquired diesel fuel represented in the final blend; or]

[(B) written results of sampling and test of the diesel fuel supplied by the person(s) from whom the diesel fuel was acquired.]

[(3) A producer or importer subject to this subsection shall establish such records by the time the final blend triggering the requirements is sold or supplied from

the production or import facility, and shall retain such records for two years from such date. During the period of required retention, the producer or importer shall make any of the records available to the executive director upon request.]

(f) [(i)] Each producer or importer subject to subsection (a) of this section [electing to sell, offer for sale, supply, or offer to supply LED in accordance with §114.312 of this title] shall provide a quarterly summation report to the executive director no later than the 45th day following the end of each [the] calendar quarter and must maintain a record of the information submitted in the quarterly report for two years from the date of each report. The quarterly report must be submitted on forms prescribed by the executive director and must include [provide], at a minimum, the information specified in paragraphs (1) - (3) of this subsection for each of the producer's production facilities or for each of the importer's import facilities:

(1) the total volume of LED produced or imported during the calendar quarter that is subject to the requirements of this section, and if the volume of LED required to be reported in this paragraph was produced with the use of an additive, the total volume of additive used to produce the LED must also be included in the quarterly report;

(2) a reconciliation of the records required in subsection (c)(7) of this section for each sample collected and analyzed during the calendar quarter; and

(3) any other information determined by the executive director to be necessary to demonstrate that the producer or importer has produced or imported LED that has satisfied the requirements specified in §114.312, §114.313, or §114.318 of this title. [the information required to be collected by subsections (c) - (e), and (h) of this section and a reconciliation of the quarter's transactions relative to the requirements of subsections (c) - (e), and (h) of this section. Updates or revisions to estimated transaction volumes required by subsections (c) - (e) of this section must be included in this report.]

(g) [(j)] Each producer or importer electing to sell, offer for sale, supply, or offer to supply LED in accordance with [under] §114.312(e) of this title shall provide to the executive director, as applicable, a copy of the executive order issued by the CARB [California Air Resources Board (CARB)] for the Certified Diesel Fuel Formulation used to produce the LED or documentation demonstrating that the LED has been produced to meet all specifications for diesel fuel under regulations adopted by the CARB, except for those approved for small refinery compliance, that were in effect as of January 18, 2005 [, and shall comply with the requirements of subsections (c) and (h) of this section

using the fuel specifications for aromatic hydrocarbon and cetane set by this executive order or regulations].

[(k) Each producer electing to sell, offer for sale, supply, or offer to supply diesel fuel in accordance with §114.318 of this title (relating to Alternative Emission Reduction Plan) shall comply with the sampling and testing requirements of subsections (d) and (e) of this section for the appropriate fuel components of the diesel upon which the projected emission reductions were based. Each producer shall provide a quarterly report to the executive director no later than the 45th day following the end of the calendar quarter. The quarterly report must provide, at a minimum, the following information:]

[(1) the volume of diesel fuel produced by the producer that is subject to the provisions of the alternative emission reduction plan as approved by the executive director;]

[(2) the volume of diesel fuel that was not produced by the producer but was sold or supplied by the producer in the counties listed in §114.319 of this title and is subject to the provisions of the alternative emission reduction plan as approved by the executive director and the identity of the persons(s) from whom such diesel fuel was

acquired and the date(s) that it was acquired. The producer shall retain records of the invoice(s) representing the acquisition(s) for two years from such date; and]

[(3) the information required to be collected in accordance with the sampling and testing requirements of this subsection and a reconciliation of the quarter's transactions relative to the requirements of this subsection for the appropriate fuel components of the diesel fuel that the projected emission reductions demonstrated in the producer's alternative emission reduction plan were based upon.]

§114.317. Exemptions to Low Emission Diesel Requirements.

(a) Any diesel fuel subject to the requirements specified in §114.312 of this title (relating to Low Emission Diesel Standards) that is either in a research, development, or test status; or is sold to petroleum, automobile, engine, or component manufacturers for research, development, or test purposes; or any diesel fuel to be used by, or under the control of, petroleum, additive, automobile, engine, or component manufacturers for research, development, or test purposes, is exempted from the provisions of this division (relating to Low Emission Diesel), provided that:

(1) the diesel fuel is kept segregated from non-exempt product, and the person possessing the product maintains documentation identifying the product as

research, development, or testing fuel, as applicable, and stating that it is to be used only for research, development, or testing purposes; and

(2) the diesel fuel is not sold, dispensed, or transferred, or offered for sale, dispensing, or transfer from a retail fuel dispensing facility. It shall also not be sold, dispensed, or transferred, or offered for sale, dispensing, or transfer from a wholesale purchaser-consumer facility, unless such facility is associated with fuel, automotive, or engine research, development, or testing.

(b) Any diesel fuel subject to the requirements specified in §114.312 of this title that is refined, sold, dispensed, transferred, or offered for sale, dispensing, or transfer as competition racing fuel is exempted from the provisions of this division, provided that:

(1) the fuel is kept segregated from non-exempt fuel, and the party possessing the fuel for the purposes of refining, selling, dispensing, transferring, or offering for sale, dispensing, or transfer as competition racing fuel maintains documentation identifying the product as racing fuel, restricted for non-highway use in competition racing motor vehicles or engines;

(2) each pump stand at a regulated facility, from which the fuel is dispensed, is labeled with the applicable fuel identification and use restrictions described in paragraph (1) of this subsection; and

(3) the fuel is not sold, dispensed, transferred, or offered for sale, dispensing, or transfer for highway use in a motor vehicle.

(c) The owner or operator of a retail fuel dispensing outlet is exempt from all requirements of §114.316 of this title (relating to Monitoring, Recordkeeping, and Reporting Requirements) except §114.316(e) [§114.316(g)] of this title.

(d) Diesel fuel that does not meet the requirements of §114.312 of this title [(relating to Low Emission Diesel Standards)] is not prohibited from being transferred, placed, stored, and/or held within the affected counties so long as it is not ultimately used [:]

[(1)] to power a diesel fueled compression-ignition internal combustion engine operating in a motor vehicle or in non-road equipment in the counties listed in §114.319 of this title (relating to Affected Counties and Compliance Dates), except for that used in conjunction with purposes stated in subsections (a) and (b) of this section, [; or]

[(2) to power a diesel fueled compression-ignition engine in non-road equipment in the counties listed in §114.319(b) of this title, except for that used in conjunction with purposes stated in subsections (a) and (b) of this section.]

§114.318. Alternative Emission Reduction Plan.

(a) Diesel fuel that is sold, offered for sale, supplied, or offered for supply by a producer who submits an alternative emission reduction plan in accordance with subsection (b) of this section that is approved by the executive director will be considered in compliance with the requirements of §114.312(a) of this title (relating to Low Emission Diesel Standards).

(b) An alternative emission reduction plan must demonstrate that the emission reductions associated with compliance with the requirements of this division (relating to Low Emission Diesel) that are attributable to the volume of diesel fuel that is sold, offered for sale, supplied, or offered for supply by the producer to the affected counties listed in §114.319 [under §114.319(b)] of this title (relating to Affected Counties and Compliance Dates) each year will be achieved by the producer through an equivalent substitute fuel strategy for the affected counties listed in §114.319 of this title, using the Unified Model as described in the United States Environmental Protection Agency (EPA) staff discussion document, *Strategies and Issues in Correlating Diesel Fuel*

Properties with Emissions, Publication Number EPA420-P-01-001, published July 2001, and using only the diesel fuel that is sold, offered for sale, supplied, or offered for supply by the producer in the specific counties listed in §114.319 of this title, to demonstrate that the average fuel properties of all on-road diesel fuel produced in any given calendar quarter that is sold, offered for sale, supplied, or offered for supply by the producer in the affected counties achieve at least a 5.5% reduction in nitrogen oxides (NO_x) emissions for the year 2007; and the average fuel properties of all non-road diesel produced in any given calendar quarter that is sold, offered for sale, supplied, or offered for supply by the producer in the affected counties achieve at least a 6.2% reduction in NO_x emissions. [in accordance with either one or a combination of the following procedures.]

[(1) A producer shall demonstrate for each specific group of affected counties listed in under each paragraph of §114.319(b) of this title, using the Unified Model as described in the United States Environmental Protection Agency (EPA) staff discussion document, *Strategies and Issues in Correlating Diesel Fuel Properties with Emissions, Publication Number EPA420-P-01-001*, published July 2001, and using only the diesel fuel that is sold, offered for sale, supplied, or offered for supply by the producer in the specific counties listed in each group to determine the average fuel properties to be used for the demonstration applicable to each group of affected counties, the following:]

[(A) the average fuel properties of all on-road diesel fuel produced in any given calendar year that is sold, offered for sale, supplied, or offered for supply by the producer in the applicable group of affected counties achieve at least a 5.5% reduction in oxides of nitrogen (NO_x) emissions for the year 2007; and]

[(B) the average fuel properties of all non-road diesel produced in any given calendar year that is sold, offered for sale, supplied, or offered for supply by the producer in the applicable group of affected counties achieve at least a 6.2% reduction in NO_x emissions.]

[(2) A producer shall demonstrate for the counties listed in §114.319(b)(4) of this title, the total number of barrels of noncompliant diesel fuel that may be offset by credits from early gasoline sulfur reduction using the following methodology or the methodology specified in paragraph (3) of this subsection.]

[(A) The credits from early gasoline sulfur reduction as determined in subparagraph (C) of this paragraph and paragraph (3)(A) of this subsection will be based on the actual level of sulfur in a producer's gasoline that was below the sulfur levels identified in the EPA's MOBILE6 model as the default refinery average and cap for conventional gasoline in each applicable year and as reported by the producer to EPA in

accordance with 40 Code of Federal Regulations (CFR) §80.105 for 2003, and 40 CFR §80.370 for 2004 and 2005.]

[(B) The credits from early gasoline sulfur reduction can only be generated from the gasoline supplied by the producer in calendar years 2003, 2004, and 2005, to the counties listed in §114.319(b)(4) of this title and these credits, as determined in accordance with the applicable gasoline-to-diesel offset ratios calculated under subparagraph (D) of this paragraph, can only be used in the counties listed in §114.319(b)(4) of this title to demonstrate compliance through December 31, 2010.]

[(C) The credits from early gasoline sulfur reduction will be determined based on the level of sulfur reduction in each year using the following methodologies and subject to the applicable gasoline-to-diesel offset ratios determined using the methodology specified under subparagraph (D) of this paragraph.]

[(i) Methodology 1 - valid only for 2003 gasoline sulfur values between 259 parts per million (ppm) and 30 ppm.]

[Figure: 30 TAC §114.318(b)(2)(C)(i)]

$$M6 = (0.0000007 \cdot X^2) - (0.0007 \cdot X) + (0.137)$$

- Where:
- M6 = The percent reduction in oxides of nitrogen (NOx) emission reductions as determined using factors calculated by MOBILE6.2.
- X = The gasoline sulfur level in 2003 in ppm.

[(ii) Methodology 2 - valid only for 2004 gasoline sulfur values between 121 ppm and 30 ppm.]

[Figure: 30 TAC §114.318(b)(2)(C)(ii)]

$$M6 = (0.000003 \cdot X^2) - (0.0012 \cdot X) + (0.1046)$$

- Where:
- M6 = The percent reduction in oxides of nitrogen (NOx) emission reductions as determined using factors calculated by MOBILE6.2.
- X = The gasoline sulfur level in 2004 in parts per million (ppm).

[(iii) Methodology 3 - valid only for 2005 gasoline sulfur values between 92 ppm and 30 ppm.]

[Figure: 30 TAC §114.318(b)(2)(C)(iii)]

$$M6 = (0.000005 \cdot X^2) - (0.0016 \cdot X) + (0.1046)$$

- Where:
- M6 = The percent reduction in oxides of nitrogen (NOx) emission reductions as determined using factors calculated by MOBILE6.2.
- X = The gasoline sulfur level in 2005 in parts per million (ppm).

[(D) To determine the number of barrels of noncompliant diesel fuel that may be offset by credits from early gasoline sulfur reduction, the actual number of barrels of lower sulfur gasoline supplied by the producer to the counties listed in §114.319(b)(4) of this title annually in 2003, 2004, and 2005, must be divided by the gasoline-to-diesel offset ratio determined in accordance with the following methodology.]

[(i) Methodology 1 - calculation to determine gasoline-to-diesel offset ratio.]

[Figure: 30 TAC §114.318(b)(2)(D)]

$$(450.6 \cdot 5.78\%) / (GNEI \cdot M6) = \textit{Gasoline - to - DieselOffsetRatio}$$

- Where:
- GNEI = Total NOx emissions inventory in tons per day attributed to gasoline engines for the counties listed in §114.319(b)(4) of this title as follows: 229.51 tons per day for 2003, 215.37 tons per day for 2004, and 201.24 tons per day for 2005.
- M6 = The appropriate percent reduction as determined using the applicable methodology specified under subparagraph (C) of this paragraph.

[(3) A producer shall demonstrate for the counties listed in §114.319(b)(4) of this title the total number of barrels of noncompliant diesel fuel that may be offset by credits from early gasoline sulfur reduction using the percentage of NO_x emission reductions attributed to on-road diesel for 2007 calculated with the Unified Model as described in paragraph (1) of this subsection, and the average fuel properties of the diesel fuel that is sold, offered for sale, supplied, or offered for supply by the producer in these specific counties, to determine the applicable offset ratio to be applied to the actual number of barrels of lower sulfur gasoline supplied by the producer to the counties listed in §114.319(b)(4) of this title annually in 2003, 2004, and 2005.]

[(A) To determine the number of barrels of noncompliant diesel fuel that may be offset by credits from early gasoline sulfur reduction, the actual number of barrels of lower sulfur gasoline supplied by the producer to the counties listed in §114.319(b)(4) of this title annually in 2003, 2004, and 2005, must be divided by the gasoline-to-diesel offset ratio determined in accordance with the following methodology.]

[(i) Methodology 1 - calculation to determine gasoline-to-diesel offset ratio.]

[Figure: 30 TAC §114.318(b)(2)(D)]

$$(450.6 \bullet 5.78\%) / (GNEI \bullet M6) = \textit{Gasoline - to - Diesel Offset Ratio}$$

- Where:
- UM = Percentage of oxides of nitrogen (NO_x) emission reductions attributed to on-road diesel for 2007 as calculated with the Unified Model.
 - GNEI = Total NO_x emissions inventory in tons per day attributed to gasoline engines for the counties listed in §114.319(b)(4) of this title as follows: 229.51 tons per day for 2003, 215.37 tons per day for 2004, and 201.24 tons per day for 2005.
 - M6 = The appropriate percent reduction as determined using the applicable methodology specified under subparagraph (C) of this paragraph.

[(B) The credits from early gasoline sulfur reduction can only be generated from the gasoline supplied by the producer in calendar years 2003, 2004, and 2005, to the counties listed in §114.319(b)(4) of this title and these credits, as determined in accordance with the applicable gasoline-to-diesel offset ratios as calculated in accordance with subparagraph (A) of this paragraph, can only be used in the counties listed in §114.319(b)(4) of this title for compliance through December 31, 2010.]

[(4) A producer shall demonstrate for the counties listed in §114.319(b)(1) or (2) of this title, respectively, the total number of barrels of noncompliant diesel fuel that may be offset by credits from the residual effects of early gasoline sulfur reduction on the NO_x emission reduction efficiencies of catalytic converters installed in gasoline-powered motor vehicles by using the following methodology.]

[(A) The credits from the residual effect of early gasoline sulfur reduction may only be generated by the volume of reformulated gasoline supplied by the producer in 2004 and 2005 to the counties listed in §114.319(b)(1) or (2) of this title, that had an average sulfur level reported by the producer to EPA in accordance with 40 CFR §80.370 that was below the sulfur level of 92 ppm in 2004, and 77 ppm in 2005.]

[(B) The number of barrels of noncompliant diesel fuel that may be offset by credits from the residual effects of early gasoline sulfur reduction will be determined by dividing the actual number of barrels of lower sulfur gasoline determined to be eligible to generate credit in accordance with subparagraph (A) of this paragraph by the following gasoline-to-diesel offset ratio as applicable.]

[(i) The gasoline-to-diesel offset ratio for eligible lower sulfur gasoline supplied to the counties listed in §114.319(b)(1) of this title will be 32.0 for calendar years 2006 through 2008.]

[(ii) The gasoline-to-diesel offset ratio for eligible lower sulfur gasoline supplied to the counties listed in §114.319(b)(2) of this title will be 66.0 for calendar years 2006 through 2008.]

[(C) The credits from the residual effects of early gasoline sulfur reduction as determined in accordance with subparagraph (B)(i) or (ii) of this paragraph can only be used in the counties listed in §114.319(b)(1) or (2) of this title, respectively, for compliance through December 31, 2008.]

[(c) All alternative emission reduction plans] approved by the executive director prior to May 17, 2006, will expire on December 31, 2007.]

(c) [(d)] An alternative emission reduction plan must be approved by the executive director prior to the use of that plan for compliance with the requirements of this section.

(d) [(e)] The executive director shall approve or disapprove alternative emission reduction plans that have been submitted by producers in accordance with subsection (b) of this section within 45 days of submittal.

(e) [(f)] Alternative emission reduction plans submitted to the executive director in accordance with subsection (b) of this section must contain sufficient documentation to validate the average diesel fuel properties used to satisfy the requirements specified in [accordance with] subsection (b) of this section [(1) or (2) of this section and, as

appropriate, the sulfur properties and volumes of the gasoline that is being used to generate credit in accordance with subsection (b)(3) or (4) of this section].

§114.319. Affected Counties and Compliance Dates.

(a) All affected [Affected] persons in the counties listed in subsection (b) of this section shall continue to comply with [be in compliance in accordance with the schedule listed in subsection (c) of this section with] §§114.312 - 114.317 of this title (relating to Low Emission Diesel Standards; Designated Alternate Limits; Registration of Diesel Producers and Importers; Approved Test Methods; Monitoring, Recordkeeping, and Reporting Requirements; and Exemptions to Low Emission Diesel Requirements) as required by subsection (d) of this section, as applicable, for any diesel fuel as defined in §114.6(8)(A) [under §114.6(7)(A)] of this title (relating to Low Emission Fuel Definitions) that may ultimately be used to power a diesel-fueled compression-ignition internal combustion engine in a motor vehicle or in non-road equipment in any of the counties listed in subsection (b) of this section.

(b) The [following] counties specified in paragraphs (1) - (4) of this subsection are subject to subsection (a) of this section:

(1) Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, and Tarrant;

(2) Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller;

(3) Hardin, Jefferson, and Orange; and

(4) Anderson, Angelina, Aransas, Atascosa, Austin, Bastrop, Bee, Bell, Bexar, Bosque, Bowie, Brazos, Burleson, Caldwell, Calhoun, Camp, Cass, Cherokee, Colorado, Comal, Cooke, Coryell, De Witt, Delta, Falls, Fannin, Fayette, Franklin, Freestone, Goliad, Gonzales, Grayson, Gregg, Grimes, Guadalupe, Harrison, Hays, Henderson, Hill, Hood, Hopkins, Houston, Hunt, Jackson, Jasper, Karnes, Lamar, Lavaca, Lee, Leon, Limestone, Live Oak, Madison, Marion, Matagorda, McLennan, Milam, Morris, Nacogdoches, Navarro, Newton, Nueces, Panola, Polk, Rains, Red River, Refugio, Robertson, Rusk, Sabine, San Jacinto, San Patricio, San Augustine, Shelby, Smith, Somervell, Titus, Travis, Trinity, Tyler, Upshur, Van Zandt, Victoria, Walker, Washington, Wharton, Williamson, Wilson, Wise, and Wood.

(c) All affected [Affected] persons in the counties listed in subsection (b) of this section shall continue to comply with §§114.312 - 114.317 of this title as required by subsection (d) of this section, as applicable, for any diesel fuel as defined in §114.6(8)(B) of this title that may ultimately be used to power a diesel-fueled compression-ignition

internal combustion engine located on a marine vessel in any of the counties listed in subsection (b)(2) of this section. [subject to subsection (a) of this section shall be in compliance with this division according to the following schedule:]

[(1) beginning October 1, 2005, for producers and importers;]

[(2) beginning November 15, 2005, for bulk plant distribution facilities;

and]

[(3) beginning January 1, 2006, for retail fuel dispensing outlets, wholesale bulk purchaser/consumer facilities, and all other affected persons.]

(d) For all counties affected by this section, the final compliance dates for control requirements are given within the subsections relating to counties and compliance schedules for provisions specified in this division if the final compliance date of any provision is after the date of adoption of the current revision to this division. If the compliance dates are not specified for any provision, the compliance date is past and all affected persons must be and remain in compliance with the provision as of the original compliance date.

[(d) Affected persons in the counties listed in subsection (b) of this section shall be in compliance in accordance with the schedule listed in paragraph (1), (2), or (3) of this subsection with §§114.312 - 114.317 of this title, as applicable, for any diesel as defined under §114.6(7)(B) of this title, that may ultimately be used to power a diesel-fueled compression-ignition engine located on a marine vessel in any of the counties listed in subsection (b)(2) of this section:]

[(1) beginning October 1, 2007, for producers and importers;]

[(2) beginning November 15, 2007, for bulk plant distribution facilities;
and]

[(3) beginning January 1, 2008, for retail fuel dispensing outlets,
wholesale bulk purchaser/consumer facilities, and all other affected persons.]