The Texas Natural Resource Conservation Commission (commission) adopts amendments to §114.314, Registration of Diesel Producers and Importers and §114.319, Affected Counties and Compliance Dates; and new §114.318, Alternative Emission Reduction Plan. The commission adopts the amendments and new section to Chapter 114 and corresponding revisions to the state implementation plan (SIP) in order to control ground-level ozone in the Houston/Galveston (HGA) ozone nonattainment area as well as the other affected areas in the state and implement House Bill (HB) 2912, Article 15, of the 77th Legislature, 2001. Sections 114.314, 114.318, and 114.319 are adopted *with changes* to the proposed text as published in the June 15, 2001 issue of the *Texas Register* (26 TexReg 4388).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The HGA ozone nonattainment area is classified as Severe-17 under the 1990 Amendments to the Federal Clean Air Act (FCAA) as codified in 42 United States Code (USC), §§7401 et seq., and therefore is required to attain the one-hour ozone standard of 0.12 parts per million (ppm) by November 15, 2007. In addition, 42 USC, §7502(a)(2), requires attainment as expeditiously as practicable, and §7511a(d), requires states to submit ozone attainment demonstration SIPs for severe ozone nonattainment areas, such as HGA. The HGA area, defined as Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties, has been working to develop a demonstration of attainment in accordance with 42 USC, §7410. On January 4, 1995, the state submitted the first of several Post-1996 SIP revisions for HGA.

The January 1995 SIP consisted of urban airshed model (UAM) modeling for 1988 and 1990 base case episodes, adopted rules to achieve a 9% rate-of-progress (ROP) reduction in volatile organic

compounds (VOC), and a commitment schedule for the remaining ROP and attainment demonstration elements. At the same time, but in a separate action, the State of Texas filed for the temporary nitrogen oxide (NO_x) waiver allowed by 42 USC, §7511a(f). The January 1995 SIP and the NO_x waiver were based on early base case episodes which marginally exhibited model performance in accordance with the United States Environmental Protection Agency (EPA) modeling performance standards, but which had a limited data set as inputs to the model. In 1993 and 1994, the commission was engaged in an intensive data-gathering exercise known as the Coastal Oxidant Assessment for Southeast Texas (COAST) study. The commission believed that the enhanced emissions inventory, expanded ambient air quality and meteorological monitoring, and other elements would provide a more robust data set for modeling and other analysis, which would lead to modeling results that the commission could use to better understand the nature of the ozone air quality problem in the HGA area.

Around the same time as the 1995 submittal, the EPA policy regarding SIP elements and timelines went through changes. Two national initiatives in particular resulted in changing deadlines and requirements. The first of these initiatives was a program conducted by the Ozone Transport Assessment Group (OTAG). This group grew out of a March 2, 1995 memo from Mary Nichols, former EPA Assistant Administrator for Air and Radiation, that allowed states to postpone completion of their attainment demonstrations until an assessment of the role of transported ozone and precursors had been completed for the eastern half of the nation, including the eastern portion of Texas. Texas participated in the OTAG program, and OTAG concluded that Texas does not significantly contribute to ozone exceedances in the Northeastern United States. The other major national initiative that impacted the SIP planning process was the revision to the national ambient air quality standard (NAAQS) for ozone.

The EPA promulgated a final rule on July 18, 1997 changing the ozone standard to an eight-hour standard of 0.08 ppm. In November 1996, concurrent with the proposal of the standards, the EPA proposed an interim implementation plan (IIP) that it believed would help areas like HGA transition from the old to the new standard. In an attempt to avoid a significant delay in planning activities, Texas began to follow this guidance, and readjusted its modeling and SIP development timelines accordingly. When the new standard was published, the EPA decided not to publish the IIP, and instead stated that, for areas currently exceeding the one-hour ozone standard, the one-hour standard would continue to apply until it is attained. The FCAA requires that HGA attain the standard by November 15, 2007.

The EPA issued revised draft guidance for areas such as HGA that do not attain the one-hour ozone standard. The commission adopted on May 6, 1998 and submitted to the EPA on May 19, 1998 a revision to the HGA SIP which contained the following elements in response to EPA's guidance: UAM modeling based on emissions projected from a 1993 baseline out to the 2007 attainment date; an estimate of the level of VOC and NO_x reductions necessary to achieve the one-hour ozone standard by 2007; a list of control strategies that the state could implement to attain the one-hour ozone standard; a schedule for completing the other required elements of the attainment demonstration; a revision to the Post-1996 9% ROP SIP that remedied a deficiency that the EPA believed made the previous version of that SIP unapprovable; and evidence that all measures and regulations required by Subpart 2 of Title I of the FCAA to control ozone and its precursors have been adopted and implemented, or are on an expeditious schedule to be adopted and implemented.

In November 1998, the SIP revision submitted to the EPA in May 1998 became complete by operation of law. However, the EPA stated that it could not approve the SIP until specific control strategies were modeled in the attainment demonstration. The EPA specified a submittal date of November 15, 1999 for this modeling. In a letter to the EPA dated January 5, 1999, the state committed to model two strategies showing attainment.

As the HGA modeling protocol evolved, the state eventually selected and modeled seven basic modeling scenarios. As part of this process, a group of HGA stakeholders worked closely with commission staff to identify local control strategies for the modeling. Some of the scenarios for which the stakeholders requested evaluation included options such as California-type fuel and vehicle programs as well as an acceleration simulation mode equivalent motor vehicle inspection and maintenance program. Other scenarios incorporated the estimated reductions in emissions that were expected to be achieved throughout the modeling domain as a result of the implementation of several voluntary and mandatory statewide programs adopted or planned independently of the SIP. It should be made clear that the commission did not propose that any of these strategies be included in the ultimate control strategy submitted to the EPA in 2000. The need for and effectiveness of any controls which may be implemented outside the HGA eight-county area will be evaluated on a county-by-county basis.

The SIP revision was adopted by the commission on October 27, 1999, submitted to the EPA by November 15, 1999, and contained the following elements: photochemical modeling of potential specific control strategies for attainment of the one-hour ozone standard in the HGA area by the attainment date of November 15, 2007; an analysis of seven specific modeling scenarios reflecting

various combinations of federal, state, and local controls in HGA (additional scenarios H1 and H2 build upon Scenario VIf); identification of the level of reductions of VOC and NO_x necessary to attain the one-hour ozone standard by 2007; a 2007 mobile source budget for transportation conformity; identification of specific source categories which, if controlled, could result in sufficient VOC and/or NO_x reductions to attain the standard; a schedule committing to submit by April 2000 an enforceable commitment to conduct a mid-course review; and a schedule committing to submit modeling and adopted rules in support of the attainment demonstration by December 2000.

The April 19, 2000 SIP revision for HGA contained the following enforceable commitments by the state: to quantify the shortfall of NO_x reductions needed for attainment; to list and quantify potential control measures to meet the shortfall of NO_x reductions needed for attainment; to adopt the majority of the necessary rules for the HGA attainment demonstration by December 31, 2000, and to adopt the rest of the shortfall rules as expeditiously as practical, but no later than July 31, 2001; to submit a Post-1999 ROP plan by December 31, 2000; and to perform a mid-course review by May 1, 2004.

The emission reduction requirements included as part of the December 2000 SIP revision represented substantial, intensive efforts on the part of stakeholder coalitions in the HGA area. These coalitions, involving local governmental entities, elected officials, environmental groups, industry, consultants, and the public, as well as the commission and the EPA, worked diligently to identify and quantify potential control strategy measures for the HGA attainment demonstration. Local officials from the HGA area formally submitted a resolution to the commission, requesting the inclusion of many specific emission reduction strategies.

A SIP revision for HGA was adopted by the commission on December 6, 2000 and was submitted to the EPA by December 31, 2000. The December 2000 SIP revision contained rules, enforceable commitments, and photochemical modeling analyses in support of the HGA ozone attainment demonstration. In addition, this SIP contained Post-1999 ROP plans for the milestone years 2002 and 2005, and for the attainment year 2007. The SIP also contained enforceable commitments to implement further measures, if needed, in support of the HGA attainment demonstration, as well as a commitment to perform and submit a mid-course review.

In order for the HGA area to have an approvable attainment demonstration, the EPA indicated that the state must adopt those strategies modeled in the November 15, 1999 submittal and then adopt sufficient controls to close the remaining gap in NO_x emissions. The predicted emission reductions from these rules are necessary to successfully demonstrate attainment.

The HGA ozone nonattainment area will need to ultimately reduce NO_x more than 750 tons per day (tpd) to reach attainment of the one-hour standard. In addition, a VOC reduction of about 25% will have to be achieved. Adoption of the low emission diesel fuel (LED) program amendments will contribute to attainment and maintenance of the one-hour ozone standard in the HGA area.

The 77th Legislature, 2001, passed HB 2912, Article 15, which amended Texas Clean Air Act (TCAA), §382.039(g) - (i). Subsection (g) was amended to restrict the commission's authority, before January 1, 2004, to regulate the fuel content for clean motor vehicle fuel for any area of the state that is more stringent or restrictive than the EPA standard for that area, except as provided in subsection (h),

unless the fuel is specifically authorized by the legislature. New subsection (h) restricts the commission from requiring the distribution of Texas LED as described in revisions to the SIP for control of ozone air pollution prior to February 1, 2005. Subsection (i) allows the commission to consider, as an alternative method of compliance with subsection (h), fuels to achieve equivalent emissions reductions. This rulemaking action implements the changes required by HB 2912, Article 15.

These rules are one element of the control strategy for the HGA Attainment Demonstration SIP that reduce NO_x emissions necessary for the HGA nonattainment area to be able to demonstrate attainment with the ozone NAAQS. Additional benefits will be achieved in the Beaumont/Port Arthur (BPA) and Dallas/Fort Worth (DFW) ozone nonattainment areas, and the 95-county central and eastern Texas region. The purpose of these amendments is to modify the LED air pollution control strategy to provide additional flexibility in the rules to allow for alternative emission reduction plans; to delay the implementation date from May 1, 2002 to April 1, 2005 to allow producers sufficient time to complete refinery modifications to comply with the LED requirements; and to reduce the coverage area of the rules from statewide to those counties that have previously been included in the regional air pollution control strategy for the HGA nonattainment area.

These amendments to the LED rules would no longer require LED for on-road use statewide, but would continue to require LED fuel for both on-road and non-road use in the eight-county HGA ozone nonattainment area; the four-county DFW ozone nonattainment area, which includes Collin, Dallas, Denton, and Tarrant Counties; the three-county BPA ozone nonattainment area, which includes Hardin, Jefferson, and Orange Counties; and 95 additional central and eastern Texas counties, which include

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, Ellis, Falls, Fannin, Fayette, Franklin, Freestone, Goliad, Gonzales, Grayson, Gregg, Grimes, Guadalupe, Harrison, Hays, Henderson, Hill, Hood, Hopkins, Houston, Hunt, Jackson, Jasper, Johnson, Karnes, Kaufman, Lamar, Lavaca, Lee, Leon, Limestone, Live Oak, Madison, Marion, Matagorda, McLennan, Milam, Morris, Nacogdoches, Navarro, Newton, Nueces, Panola, Parker, Polk, Rains, Red River, Refugio, Robertson, Rockwall, 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 Counties.

The LED fuel will lower the emissions of NO_x and other pollutants from fuel combustion. Because NO_x is a precursor to ground-level ozone formation, reduced emissions of NO_x will result in ground-level ozone reductions. To comply with the state LED regulations, diesel fuel producers and importers must ensure that diesel fuel distributed to the affected areas meets the specifications stated in these rules. The amendments and new section delay the LED requirements from May 1, 2002 until April 1, 2005. The requirements specify that diesel fuel produced for delivery and ultimate sale to the consumer (which may ultimately be used to power a diesel fueled compression-ignition engine in a motor vehicle or in non-road equipment in the affected counties) does not exceed 500 ppm sulfur, must contain less than 10% by volume of aromatic hydrocarbons, and must have a cetane number of 48 or greater.

The LED fuel ozone control strategy requires diesel fuel content limits more restrictive than federal diesel fuel regulations. The current federal regulations governing diesel fuel quality are found in Title

40 Code of Federal Regulations (40 CFR) Part 80, Regulation of Fuels and Fuel Additives, §80.29 (Controls and Prohibitions on Diesel Fuel Quality). Section 80.29 establishes limits for fuel content for diesel fuel used in on-road motor vehicle applications. These federal regulations limit sulfur in on-road diesel fuel to 500 ppm and allow the producer to choose between meeting a minimum cetane number of 40 or a maximum aromatic hydrocarbon content of 35% by volume. The recently adopted federal regulations governing diesel fuel quality in 40 CFR §80.520 (What are the standards and dye requirements for motor vehicle diesel fuel?) will limit on-road diesel sulfur to 15 ppm beginning June 1, 2006. The state's adopted LED regulations limit both on-road and non-road diesel to 500 ppm sulfur, 10% aromatic hydrocarbons, and a 48 cetane minimum in the HGA, DFW, BPA ozone nonattainment areas and 95 central and eastern Texas counties in 2005 and further limits on-road and non-road diesel sulfur to 15 ppm in the coverage area in 2006. However, although the EPA regulates diesel fuel content for on-road use, it does not regulate the fuel content for non-road diesel fuel. Therefore, because there is currently no federal limit on the content of non-road diesel, the state has the authority to place controls on the fuel content of non-road diesel fuel. As such, the commission is submitting, as part of the SIP, concurrent with this rulemaking, a request for a waiver in accordance with the 42 USC, §7545(C)(4)(c), for the on-road portion of these rules. The commission does not believe that a waiver is needed for the non-road portion of these rules.

Modeling performed for the commission assessing the benefits of this NO_x emission reduction strategy demonstrated that significant emission reductions could be achieved from using a low aromatic hydrocarbon/high cetane diesel fuel as specified by the commission's LED fuel requirements. By the year 2007, the LED fuel program will reduce NO_x emissions from on-road vehicles and non-road

equipment in the regional coverage area by 16.32 tpd, of which 6.67 tpd of reductions will be achieved in the HGA ozone nonattainment area. The commission anticipates production cost will increase from $.04 to $.08 per gallon of diesel fuel to comply with rules.

The commission developed this NO_x emission control strategy to cover the eight counties contained in the HGA ozone nonattainment area. The coverage area also includes the four DFW ozone nonattainment counties, the three BPA ozone nonattainment counties, as well as 95 central and eastern Texas counties for both on-road and non-road diesel fuel use. The involvement of the regional area counties as part of the NO_x emission control strategy is necessary for the HGA and DFW areas to demonstrate attainment of the ozone NAAQS. The amendments and new section are intended to help bring the ozone nonattainment areas into compliance and to help keep attainment and near nonattainment areas from going into nonattainment by ensuring the ability of the fuel industry to comply with the LED program.

SECTION BY SECTION DISCUSSION

The amendments to §114.314 revise the dates by which producers and importers are required to register from December 1, 2001, or after May 31, 2002 for those entities that begin to produce or import LED after that date, to December 1, 2004 and April 30, 2005 respectively, in order to reflect the changes to the implementation dates in §114.319. Language has been revised to clarify that the April 30, 2005 date is intended to discourage entities from attempting to register after the December 1, 2004 deadline by not allowing entities to produce or import LED in the first 30 days starting April 1, 2005.

The new §114.318 establishes an alternative method of compliance with the requirements of Chapter 114, Division 2, for producers that submit an alternative emission reduction plan by January 2003 which is approved by the executive director and the EPA no later that May 2003. The emission reduction plan must demonstrate the market share the producer supplies, demonstrate the reductions associated with compliance with this division attributable to the market share, specify a substitute fuel strategy that will achieve equivalent reductions, and contain adequate enforcement provisions. This section will allow equivalent emission reductions to be achieved while providing additional flexibility to producers and importers. The section also clarifies that the executive director may consider early reductions in the determination of equivalency. Additionally, the section provides the executive director with some discretion to accept late plans in order to allow, for example, for new producers which come into the market after the deadline. In addition, the compliance dates in the proposed §114.318 were amended at adoption from January 2003 to January 31, 2003; May 2003 to May 31, 2003; and January 2003 to January 31, 2003; respectively, to provide clarification.

The amendments to §114.319 will revise subsection (a) to delay the implementation date from May 1, 2002 to April 1, 2005, and to limit the coverage area to those counties listed in subsection (b). These amendments will allow producers and importers additional time to complete refinery modifications to comply with the LED requirements, but will also implement the LED requirement in sufficient time to achieve the emission reductions needed to demonstrate attainment. The reduction in coverage area will reduce the cost burden upon areas of the state that would not benefit as much from the use of LED as those counties that have previously been included in regional air pollution control strategies for the HGA nonattainment area. Additionally, limiting LED to the central and eastern region of Texas, rather

than requiring on-road LED for the whole state, ensures that there will be sufficient clean diesel for areas of the state where it is most needed. The commission has received information from diesel fuel refiners and suppliers in Texas that a state-wide requirement would exceed the capacity of refiners to provide the clean fuel when it is required, creating the possibility that adequate LED would not be available to achieve the anticipated emission reductions. In addition, §114.319 was amended at adoption to make minor editorial changes.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking action is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. A "major environmental rule" is 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 amendments to Chapter 114 are intended to protect the environment or reduce risks to human health from environmental exposure to ozone but will not affect in a material way, a sector of the economy, competition, and the environment due to its impact on the fuel manufacturing and distribution network of the state. The amendments are intended to provide flexibility in the LED air pollution control program as part of the strategy to reduce emissions of NO_x necessary for the counties included in the HGA ozone nonattainment area to be able to demonstrate attainment with the ozone NAAQS. Additionally, §2001.0225 only applies to a major environmental rule, the result of which is to: 1)

exceed a standard set by federal law, unless the rule is specifically required by state 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.

This rulemaking action does not meet any of these four applicability requirements. Specifically, the LED fuel requirements including these rules were developed in order to meet the ozone NAAQS set by the EPA under 42 USC, §7409, and therefore meet a federal requirement. Provisions of 42 USC, §7410, require states to adopt a SIP which provides for "implementation, maintenance, and enforcement" of the primary NAAQS in each air quality control region of the state. While §7410 does not require specific programs, methods, or reductions in order to meet 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 42 USC does require some specific measures for SIP purposes, like the inspection and maintenance program, but those programs are the exception, not the rule, in the SIP structure of 42 USC. The provisions of 42 USC recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public, to collaborate on the best methods for attaining the NAAQS for the specific regions in the state. Even though 42 USC allows states to develop their own programs, this

flexibility does not relieve a state from developing a program that meets the requirements of §7410. Thus, while specific measures are not generally required, the emission reductions are required. States are not free to ignore the requirements of §7410 and must develop programs to assure that the nonattainment areas of the state will be brought into attainment on schedule.

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 Legislative Session, 1997. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis (RIA) of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will 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 will 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 previously discussed, 42 USC does not require specific programs, methods, or reductions in order to meet the NAAQS; thus, states must develop programs for each nonattainment area to ensure that area will 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 RIA 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 (LBB) 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 LBB, the commission believes that the intent of SB 633 was only to require the full RIA for rules that are extraordinary in nature. While the SIP rules will have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of 42 USC. For these reasons, rules proposed for inclusion in the SIP fall under the exception in Texas Government Code, §2001.0225(a), because they are required by federal law. The commission performed photochemical grid modeling which predicts that NO_x emission reductions, such as those required by these rules, will result in reductions in ozone formation in the HGA ozone nonattainment area. This rulemaking does not exceed an express requirement of state law. This rulemaking is intended to obtain NO_x emission reductions which will result in reductions in ozone formation in the HGA ozone nonattainment area and help bring HGA into compliance with the air quality standards established under federal law as NAAQS for ozone. The rulemaking does not exceed a standard set by federal law, exceed an express requirement of state law (unless specifically required by federal law), or exceed a requirement of a delegation agreement. The rulemaking was not developed solely under the general powers of the agency, but was specifically developed to meet the NAAQS established under federal law and authorized under TCAA, §§382.011, 382.012, 382.017, 382.019, 382.037(g) - (i), and 382.039.

The commission invited public comment on the draft RIA determination, and received comments which are addressed in the RESPONSE TO COMMENTS section of this preamble.

TAKINGS IMPACT ASSESSMENT

The commission prepared a takings impact assessment for these rules in accordance with Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of the rulemaking action is to provide flexibility in the LED fuel program which will act as an air pollution control strategy to reduce NO_x emissions necessary for the eight counties included in the HGA ozone nonattainment area to be able to demonstrate attainment with the ozone NAAQS. Promulgation and enforcement of these amended and new rules will not burden private, real property because this rulemaking action does not require an investment in the permanent installation of new refinery processing equipment. Although the amended and new rules do not directly prevent a nuisance or prevent an immediate threat to life or property, the LED program does prevent a real and substantial threat to public health and safety, and partially fulfill a federal mandate under 42 USC, §7410. Specifically, the emission limitations and control requirements within the LED program have been developed in order to meet the ozone NAAQS set by the EPA under 42 USC, §7409. States are primarily responsible for ensuring attainment and maintenance of the NAAQS once the EPA has established them. Under §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, the purpose of these rules is to provide flexibility in implementing cleaner-burning diesel fuel which is necessary for the HGA ozone nonattainment area to meet the air quality standards established under federal law as NAAQS. Consequently, the exemption

which applies to these rules is that of an action reasonably taken to fulfill an obligation mandated by federal law; therefore, this rulemaking action does not constitute a takings under the Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that the rulemaking action 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 rules of the Coastal Coordination Council, and determined that the action is consistent with the applicable CMP goals and policies. The CMP goal applicable to this rulemaking action is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(1)). No new sources of air contaminants will be authorized and NO_x air emissions will be reduced as a result of these rules. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with regulations in 40 CFR, to protect and enhance air quality in the coastal area (31 TAC §501.14(q)). This rulemaking action complies with 40 CFR Part 51 (Requirements for Preparation, Adoption, and Submittal of Implementation Plans). Therefore, in compliance with 31 TAC §505.22(e), the commission affirms that this rulemaking action is consistent with CMP goals and policies. The

commission solicited comment on the consistency of the proposed rules with the CMP during the public comment period, but received no comment.

HEARINGS AND COMMENTERS

The commission held public hearings on this proposal at the following dates and locations: June 13, 2001, Galveston; June 14, 2001, Rosenberg and Houston; June 15, 2001, Austin; and July 2, 2001, Houston. The public comment period closed on July 2, 2001.

The following commenters provided oral testimony and/or submitted written testimony: American Trucking Associations (ATA), Business Coalition for Clean Air (BCCA), Environmental Defense (ED), EPA, Galveston-Houston Association for Smog Prevention (GHASP), Houston Metropolitan Transit Authority (Metro), National Petrochemical and Refiners Association (NPRA), Sierra Club Houston Regional Group (Sierra-Houston), Texas Association of Businesses and Chambers of Commerce (TABCC), Texas Motor Transportation Association (TMTA), Texas Oil and Gas Association (TxOGA), and Texas Petroleum Marketers and Convenience Store Association (TPCA). EPA, Metro, NPRA, and TABCC generally supported the proposal, while ATA, BCCA, ED, GHASP, Sierra-Houston, TMTA, TxOGA, and TPCA generally opposed the proposal. EPA, Sierra-Houston, TMTA, and TxOGA suggested changes to the rule language.

RESPONSE TO COMMENTS

ATA, NPRA, TABCC, TMTA, and TxOGA expressed opposition to all region-specific, patchwork, or boutique fuel control strategy methods and requested that the commission refrain from implementing the

proposed rules. TxOGA strongly urged the commission to refrain from adopting the proposed LED requirements and to align the commissions's SIP planning with the federal diesel program. ATA and TMTA expressed strong opposition to the LED rules and supported a single uniform national diesel fuel standard and the use of incentive-based programs to reduce NO_x emission in the HGA area. TxOGA strongly recommended that the commission repeal all portions of these rules, including the rules regarding aromatics and cetane, and refrain from seeking a waiver to regulate diesel in Texas. TPCA opposed the commission's adoption of LED rules. BCCA supported the new national fuel standards as the best way to ensure cleaner-burning fuels at a reasonable costs to consumers and recommended that the regional diesel fuel requirement be removed from the SIP in favor of the national fuel.

The concerns raised by these comments were addressed in the previous rulemaking for the LED rules adopted by the commission on December 6, 2000 and published in the January 12, 2001 issue of the *Texas Register* (26 TexReg 328), and do not specifically address changes to the rules associated with this rulemaking. Therefore, the commission made no changes in the rule language in response to these comments.

ED commented that delaying LED implementation until 2005 is backsliding from the December 2000 SIP. GHASP commented that the implementation delay from May 1, 2002 until April 1, 2005 is unnecessary and will result in less widespread use of catalytic devices to control emissions by 2007, resulting in fewer than 5.7 tpd in NO_x reduction. Sierra-Houston commented that the proposal to delay the diesel fuel regulation from 2002 to 2005 is a mistake. Sierra-Houston opposed the diesel fuel specifications that allow 500 ppm sulfur in diesel fuel from May 1, 2002 to April 1, 2005 because 500

ppm of sulfur will poison, inactivate, and degrade catalysts. Sierra-Houston questioned why is the commission delaying LED fuel until 2005 instead of requiring it by 2002 because the commission admitted in the proposed SIP revision that diesel fuel sulfur level could have a significant impact on aftermarket NO_x reduction systems which are often fouled by exposure to higher sulfur level.

The commission is prohibited from implementing the LED fuel standards until after February 2005 as a result of HB 2912, Article 15, 77th Legislature, 2001. In addition, EPA has expressed an opinion that the 2004 heavy-duty engine emission standards can be met without recourse to NO_x after-treatment devices, therefore, sulfur reductions are not expected to generate further NO_x reductions beyond the engine standards themselves. For these reasons, further sulfur controls to enable the use of catalytic converters are unnecessary until the implementation of the 2007 heavy-duty engine emission standards. The commission made no changes in the rule language in response to these comments.

NPRA and TxOGA commented that the proposed LED rules will have a negative impact on supplies of on-road and non-road diesel fuel for Texas. TABCC commented that the rules would put supply at risk for diesel fuel users by forcing state-specific requirements on the existing Texas diesel manufacturing and distribution system which is currently committed to producing federal diesel fuel. TxOGA commented that a study conducted by the National Petroleum Council, *U.S. Petroleum Refining: Assuring the Adequacy and Affordability of Cleaner Fuels*, June 2000, concluded that there was doubt as to whether the distribution system can handle ultra-low sulfur product and maintain the integrity of the sulfur level if higher sulfur products are being shipped in the same system.

The concerns raised by these comments were addressed in the previous rulemaking for the LED rule adopted by the commission on December 6, 2000, and do not specifically address changes to the rules associated with this rulemaking. The commission made no changes in the rule language in response to these comments.

TPCA commented that many of their members would be at risk of losing their business if the commission adopts these changes to Chapter 114, because many of the over-the-road truckers would refuel outside the affected counties. TPCA further commented that every one of the truck stops in the affected counties would be put on an uneven playing field competing with truck stops outside the affected counties that will be purchasing non-LED fuel at $.15 to $.20 per gallon cheaper.

The commission acknowledges that over-the-road trucks have the fuel carrying capacity to travel hundreds of miles between refueling stops and that the price of fuel could play a large part in determining refueling location. Therefore, the possibility of increased out-of-area refueling by diesel truck traffic does exist and has been considered by the commission. The issue would exist whether the program was implemented statewide or in the smaller region as adopted in these amendments. However, as noted in the preamble, the reduction in coverage area will reduce the cost burden upon areas of the state that would not benefit as much from the use of LED as those counties that have previously been included in regional air pollution control strategies for the HGA nonattainment area. The commission has previously received information from diesel fuel refiners and suppliers in Texas that a state-wide requirement would exceed the capacity of refiners to provide the clean fuel when it is required, creating the possibility that adequate LED would not

be available to achieve the anticipated emission reductions. Limiting LED to the central and eastern region of Texas, rather than requiring on-road LED for the whole state, ensures that there will be sufficient clean diesel for areas of the state where it is most needed. The commission made no change to the rule language in response to these comments.

ATA and TMTA commented that the proposed rules overstate the environmental benefits derived from the use of LED because they fail to account for economic incentive to purchase noncompliant fuel. ATA and TMTA further commented that the use of federal fuel has not been accounted for because the majority of diesel fueled vehicles are involved in "pass through" activities and would have an economic incentive to refuel outside the control area. This would be especially true when non-LED fuel will be available within a very short distance, i.e., the Texas-Louisiana border is only about 50 miles from the HGA area. Additionally, ATA and TMTA commented that the commission has not considered the cost of purchasing LED because the commission has failed to take into account the fact that some Texas refineries will choose not to produce LED fuel, resulting in tighter supplies and higher prices. ATA and TMTA further commented that trucking companies located inside the affected areas would be at a considerable competitive disadvantage because the higher fuel costs associated with LED could not be passed on to customers due to competition from trucking firms located outside the affected areas.

The concerns raised by these comments were addressed in the previous rulemaking for the LED rules adopted by the commission on December 6, 2000, and do not specifically address changes to the rules associated with this rulemaking. The commission believes that the amendments will

ensure participation of more refineries, thus mitigating the problems raised by the commenters. The commission made no changes in the rule language in response to these comments.

TABCC and TxOGA commented that the environmental benefits of the LED are overstated, because the commission's analysis is based on outdated data and ignored more recent data. TxOGA stated that they have serious doubts that these rules will provide the desired benefits in terms of NO_x emission reductions and ambient air quality in the three nonattainment areas. TxOGA stated that the Eastern Research Group analysis is based on a very narrow data set that fails to model the real world. TxOGA quoted EPA's estimates on diesel parameters and commented that if they were assumed correct, the proposed Texas LED will fail to achieve the desired NO_x reductions in the HGA area. TxOGA pointed out that the EPA is studying this very issue.

The concerns raised by these comments were addressed in the previous rulemaking for the LED rules adopted by the commission on December 6, 2000, and do not specifically address changes to the rules associated with this rulemaking. The commission made no changes in the rule language in response to these comments.

ATA, TxOGA, TMTA, and TPCA commented that the investment costs are under estimated.

The concerns raised by these comments were addressed in the previous rulemaking for the LED rules adopted by the commission on December 6, 2000, and do not specifically address changes to the rules associated with this rulemaking. In fact, the amendments adopted in this rulemaking

should help to address the concerns expressed by the commenters. The commission made no changes in the rule language in response to these comments.

BCCA commented that they applaud the commission's decision to remove the regional gasoline from the proposed SIP before it was adopted in December 2000. However, they stated a continuing concern about the regional diesel that was adopted at that time, and referred to a detailed discussion of their concerns in their Appendix A (September 2000) comments document.

The concerns raised by these comments were addressed in the previous rulemaking for the LED rules adopted by the commission on December 6, 2000, and do not specifically address changes to the rules associated with this rulemaking. The commission made no changes in the rule language in response to these comments.

NPRA commented that they have serious concerns about the commission's sulfur standards and that a recent report prepared by the Department of Energy, Energy Information Administration, *The Transition to Ultra-Low-Sulfur Diesel Fuel: Effects on Prices and Supply*, May 2001, concluded that potential diesel fuel supply issues could occur as a result of ultra-low-sulfur diesel fuel requirements as those in the current LED rules. NPRA further commented that the commission should repeal the LED program's ultra-low sulfur standards for highway and non-road diesel fuel because they threaten the commission's need for assurance that there will be sufficient and affordable clean diesel in 2006.

The concerns raised by these comments were addressed in the previous rulemaking for the LED rules adopted by the commission on December 6, 2000, and do not specifically address changes to the rules associated with this rulemaking. In fact, the amendments adopted in this rulemaking should help to address the concerns expressed by the commenter. The commission made no changes in the rule language in response to these comments.

TxOGA commented that the implementation schedule is not practical, and that it is not realistic for Texas to require major fuel property changes in 2005, and then expect the industry to further respond to federal changes in 2006. TABCC commented that the production schedule is impractical given the commitment of Texas refiners to produce federal diesel in 2006.

The commission acknowledges that the implementation schedule may be difficult for some producers to comply with if major refinery modifications are required. However, the 2005 implementation date does not require any further reductions in sulfur than required by current federal regulations and the amended rules allow the producer to use an approved alternative diesel fuel formulation or alternative emission plan if it is equivalent in emission reduction benefits to diesel fuel meeting the rules' aromatic and cetane standards. Additionally these amendments have reduced the area of coverage for this fuel which should decrease the amount of changes that must occur prior to the federal deadline. The commission believes that the industry is already planning refinery changes to meet both the EPA Tier II low sulfur gasoline and the 2006 federal ultra-low sulfur diesel standards and should be able to complete these projects within the framework of the rules' implementation schedule.

Metro-Houston supported the later implementation date and the additional flexibility allowed in the rules, however, they expressed a concern about the potential price fluctuations and the impact the fluctuations would have on their operating budgets. NPRA and TABCC supported the delay the implementation date by three years (from May 1, 2002 to April 1, 2005), the reduction in the coverage area from statewide to 110 central and eastern Texas counties, and the allowing of compliance flexibility for alternative emission reduction plans for individual companies.

The commission appreciates the support for this rulemaking. The commission acknowledges that there could be an estimated $.08 per gallon increase in fuel production costs as a result of these rules and that the actual retail price could be more expensive than just the difference in production costs. However, the commission is not aware of any firm method of determining what the actual retail price of LED fuel will be in April 2005 or in June 2006 and what factors will be affecting the price difference to that of conventional diesel fuel. In addition, the commission believes that new refining technologies for reducing sulfur, such as the recently introduced Phillips 66 "S Zorb" technology and British Petroleum OATS process, could significantly reduce production costs and could help alleviate concerns about cost and supply availability.

TxOGA commented that federal low-sulfur diesel rules should supercede these rules because the emission benefits are nearly equivalent and the cost to the consumer clearly favors the federal rules.

The concerns raised by these comments were addressed in the previous rulemaking for the LED rules adopted by the commission on December 6, 2000, and do not specifically address changes to

the rules associated with this rulemaking. The commission made no changes in the rule language in response to these comments.

TxOGA commented that the application of fuels control measures in attainment areas is not supported for reasons ranging from outright lack of air quality need to a host of legal issues including federal preemption, waiver requirements, and state-level prohibitions. TxOGA further commented that these rules do not need not be statewide.

As noted in the rule preamble, the geographical coverage area of these rules in regard to the on-road use of LED has been reduced from statewide coverage to 110 central and eastern Texas counties. The concerns raised by the comments regarding lack of air quality need and legal issues such as federal preemption, waiver requirements and state-level prohibitions were addressed in the previous rulemaking for the LED rules adopted by the commission on December 6, 2000, and do not specifically address changes to the rules associated with this rulemaking. However, the involvement of regional attainment counties as part of the NO_x emission control strategy is necessary for the HGA area to demonstrate attainment of the ozone NAAQS. This regional coverage will also provide a greater market for diesel fuel producers and importers to provide the fuel required by these regulations and should help alleviate concerns regarding out-of-area refueling practices. The commission made no changes in the rule language in response to these comments.

TxOGA commented that they do not believe that this proposal is legally defensible, and stated concerns which included federal preemption on sulphur controls for diesel fuel, lack of federal authority to require controls in attainment areas, and the availability of alternate (and much less costly) alternatives.

The concerns raised by these comments were addressed in the previous rulemaking for the LED rules adopted by the commission on December 6, 2000, and do not specifically address changes to the rules associated with this rulemaking. As shown in the modeling for the SIP that is associated with this control strategy, the state is requiring no more emission reductions than absolutely required to meet the standard. The SIP submittal included a waiver request which demonstrates that no other alternative strategies are practicable. This waiver has been proposed for approval by the EPA (*Federal Register*, Volume 66, Number 134, Pages 36542 - 36547, July 12, 2001). The commission made no changes in the rule language in response to these comments.

ATA submitted, as part of their comments to these rules, a copy of a letter to EPA requesting the EPA to withdraw its proposed approval of the LED fuel waiver for the DFW SIP.

The commission acknowledges the receipt of this letter to EPA as part of the public record, but does not believe it is appropriate to respond in this rulemaking to comments addressed specifically to EPA regarding an EPA rulemaking.

ATA and TMTA commented that the commission will not be able to obtain a fuel waiver from the EPA because it has failed to demonstrate the need for LED under the FCAA. They also commented that the

environmental benefits are overstated because LED is not necessary for attainment. Finally, they stated that the commission failed to explain why more cost-effective measures are unreasonable or impracticable, and failed to consider existing programs implemented in other areas with demonstrated emission reductions, such as California's Carl Moyer Memorial Air Quality Standards Attainment Program.

The commission disagrees with these comments. The commission believes that it has submitted to the EPA sufficient data to substantiate the need for a fuel waiver from the EPA. In addition, the commission has adopted rules to implement the Texas Emission Reduction Plan (TERP) as established by SB 5, 77th Legislature, which provides incentive funding very similar to California's Carl Moyer program. However, as required by SB 5, the emission reductions associated with the TERP will be used to replace the emission reductions attributed to the construction shift and accelerated Tier 2 - Tier 3 engine purchase rules previously adopted by the commission as part of the DWF and HGA control strategies. SB 5 requires the commission to repeal the construction shift and accelerated Tier 2 - Tier 3 engine purchase rules. As shown in the modeling for the SIP that is associated with this control strategy, the state is requiring no more emission reductions than absolutely required to meet the standard. The SIP submittal included a waiver request which demonstrates that no other alternative strategies are practicable. This waiver has been proposed for approval by the EPA (*Federal Register*, Volume 66, Number 134, Pages 36542 - 36547, July 12, 2001). The commission made no changes in the rule language in response to these comments.

ATA, TMTA, and TxOGA commented that the commission's assertion that this rulemaking does not meet the statutory criteria mandating that an RIA be performed is erroneous because the LED rules clearly exceed federal fuel standards.

The LED rules were originally adopted on April 19, 2000, and at that time the commission received comments regarding the requirement to perform an RIA. As stated at that time, the commission held the position that the rules do not exceed a standard set by federal or state law. The federal standard used for comparison is the ozone NAAQS which is a more stringent standard in this case than the federal diesel program. The state is required to demonstrate compliance with this standard under federal law, 42 USC, §7410, and under state law, TCAA, §382.012 and §382.039. As shown in the modeling for the SIP that is associated with this control strategy, the state is requiring no more emission reductions than absolutely required to meet the standard. The SIP submittal included a waiver request which demonstrates that no other alternative strategies are practicable. This waiver has been proposed for approval by EPA (*Federal Register*, Volume 66, Number 134, Pages 36542-36547, July 12, 2001). Therefore, the commission was not required to perform an RIA for these rules when they were originally adopted.

The requirement to perform an RIA on subsequent revisions to the rules would be judged solely on the revisions, not the underlying rules. In this case, the revisions actually add flexibility for the regulated fuel providers by allowing for alternative emission reduction plans; delaying the implementation date from May 1, 2002 to April 1, 2005 to allow producers sufficient time to complete refinery modifications to comply with the LED requirements; and reducing the coverage

area of the rules from statewide to those counties that have previously been included in the regional air pollution control strategy for the HGA nonattainment area. Because these revisions provide flexibility instead of promulgating new requirements, it is the commission's position that the revisions are not "major environmental rules" because they do not negatively impact a sector of the economy.

EPA commented that it fully supported the proposed changes to §114.314 and §114.319.

The commission appreciates the support for this rulemaking.

EPA requested that the commission clarify how the proposed §114.318 differs from §114.312(g), which allows for alternative diesel fuel formulations that achieve equivalent or better emissions reductions as that achieved by compliance with LED standards.

Under §114.318, the commission will allow the diesel fuel distributed by a producer who has had a substitute fuel emission reduction plan approved by the executive director to be considered as being in compliance with the requirements of LED program, regardless of the sulfur, aromatic, and cetane properties of the diesel fuel being distributed. This alternative emission reduction plan may involve reductions from an entirely different fuel strategy such as low emission gasoline. The alternative diesel fuel formulation requirements under §114.312(g) require producers to demonstrate that their alternative *diesel fuel* formulations are equivalent to LED in reducing emissions. The difference between the two sections is that §114.318 allows the use of an approved

plan **for an alternative method of reducing emissions from fuels other than diesel in lieu of complying with the LED fuel specification requirements; while §114.312(g) requires the use of a *diesel fuel* with alternative component properties. The commission made no changes in the rule language in response to this comment.**

Sierra-Houston opposed the open-ended use of the phase in §114.318 of "deemed to be equivalent" as it allows too much discretion for the commission and could provide industry an incentive to pressure the commission to allow a substitute fuel that is not really equivalent. Sierra-Houston further commented that the commission must define "equivalent."

The commission disagrees that it is necessary to define "equivalent." This term has a commonly understood meaning. The commission will make every effort to ensure emissions equivalency for alternative plans, if approved.

EPA expressed concern about the implementation of provisions in these rules that require that a producer must demonstrate equivalent emission reductions attributable to a producer's "market share" and questioned what would happen if the market share changes significantly after the determination of equivalency is made. EPA requested that the commission clarify what is intended by this "market share" approach, in terms of both the time period during which the market share is estimated and the type of fuel to which it applies. EPA commented that its approval is needed for these alternative compliance plans and that one factor EPA will consider before approval is what safeguards have been included in the enforceable alternative plan to address the issue of market share.

The commission will require producers to submit documentation verifying their market share and to provide the commission with contingency plans to ensure emission reduction equivalency in case of reductions in market share. The commission's approval of an alternative emission reduction plan will be based on whether the plan demonstrates, to executive director satisfaction, that the alternative emission reduction strategy will reduce NO_x emissions equivalent to what would have been reduced through the use of LED during the same time period. The rules do not limit alternative emission reduction plans to only diesel fuel control strategies, but could also include control strategies for other fuels, such as gasoline, aviation fuel, or jet fuel.

EPA requested that the commission clarify the date of compliance for alternative emission reduction plans because substitute fuel strategies must be submitted by January 2003 and approved by May 2003. EPA further requested that the commission clarify for the public its authority to expect early reductions given the statutory prohibition on requiring LED prior to 2005.

The date of compliance for alternative emission reduction plans would be no later than the compliance date for the LED rules, April 1, 2005, however, the compliance date may be earlier if elected by the producer. The commission's authority to expect early reductions from fuel strategies under an alternative emission reduction plan is based in the voluntary nature of this plan. A producer may opt to participate in this plan by providing clean fuel at a date earlier than required by state or federal law. Once the producer chooses this option, the requirement becomes mandatory.

Sierra-Houston commented that records must be kept for five years, like the recordkeeping requirements for upset and maintenance records, and not two years as the current rule requires.

Action regarding recordkeeping is beyond the scope of this rulemaking. The commission made no changes in the rule language in response to this comment.

STATUTORY AUTHORITY

The amendments and new section are adopted under Texas Water Code (TWC), §5.103, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; and under the Texas Health and Safety Code, TCAA, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA. The amendments are also adopted under TCAA, §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; §382.019, concerning Methods Used to Control and Reduce Emissions from Land Vehicles, which authorizes the commission to adopt rules to control and reduce emissions from engines used to propel land vehicles; §382.037(g), concerning Vehicle Emissions Inspection and Maintenance Program, which authorizes the commission to regulate fuel content if it is demonstrated to be necessary for attainment of the NAAQS; and §382.039, concerning Attainment Program, which authorizes the commission to develop and implement transportation programs and other measures necessary to demonstrate attainment and protect the public from exposure to hazardous air contaminants from motor vehicles. The amendments and new section are also adopted under TCAA, §382.039(g) - (i), as

amended by HB 2912, Article 15, which states that the commission may not establish before January 1, 2004, vehicle fuel standards which specify fuel content for any area of the state that are more stringent than EPA standards, unless specifically authorized by the legislature; the commission may not require the distribution of Texas LED as described in the SIP prior to February 1, 2005; and the commission may consider, as an alternative method of compliance, fuels to achieve equivalent emissions.

SUBCHAPTER H: LOW EMISSION FUELS

DIVISION 2: LOW EMISSION DIESEL

§§114.314, 114.318, 114.319

§114.314. Registration of Diesel Producers and Importers.

Each producer and importer that sells, offers for sale, supplies, or offers for supply from its production facility or import facility low emission diesel fuel (LED) which may ultimately be used in counties listed in §114.319 of this title (relating to Affected Counties and Compliance Dates) shall register with the executive director by December 1, 2004 to begin production or importation of LED April 1, 2005. Those producers or importers not registered by December 1, 2004, may not begin production or importation of LED until after April 30, 2005, and registration must occur within 30 days after the first date that such person will produce or import LED. Registration shall be on forms prescribed by the executive director and shall include a statement of acceptance of the standards and enforcement provisions of this division; and shall include a statement of consent by the registrant that the executive director shall be permitted to collect samples and access documentation and records. The executive director shall maintain a listing of all registered suppliers.

§114.318. Alternative Emission Reduction Plan.

Diesel fuel which is sold, offered for sale, supplied, or offered for supply by a producer who submits by January 31, 2003 an alternative emission reduction plan, which contains a substitute fuel

strategy and which is approved by the executive director and the EPA no later that May 31, 2003, will be considered in compliance with the requirements of this division. In order to be approved, the plan must demonstrate the market share the producer supplies, demonstrate the reductions associated with compliance with this division attributable to the market share, specify a substitute fuel strategy that will achieve equivalent reductions, and contain adequate enforcement provisions. Early reductions may be deemed to be equivalent by the executive director and the EPA. The executive director may allow plans to be submitted after January 31, 2003; however any plan must be approved prior to the use of that plan for compliance with the requirements of this division.

§114.319. Affected Counties and Compliance Dates.

(a) Beginning April 1, 2005, affected persons in the counties listed in subsection (b) of this section shall be in compliance, as applicable, 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) for that diesel fuel which may ultimately be used to power a diesel-fueled compression-ignition engine in a motor vehicle.

(b) Beginning April 1, 2005, affected persons in the following counties shall be in compliance with §§114.312 - 114.317 of this title for that diesel fuel which may ultimately be used to power a diesel-fueled compression-ignition engine in a motor vehicle or in non-road equipment:

(1) Collin, Dallas, Denton, 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, Ellis, Falls, Fannin, Fayette, Franklin, Freestone, Goliad, Gonzales, Grayson, Gregg, Grimes, Guadalupe, Harrison, Hays, Henderson, Hill, Hood, Hopkins, Houston, Hunt, Jackson, Jasper, Johnson, Karnes, Kaufman, Lamar, Lavaca, Lee, Leon, Limestone, Live Oak, Madison, Marion, Matagorda, McLennan, Milam, Morris, Nacogdoches, Navarro, Newton, Nueces, Panola, Parker, Polk, Rains, Red River, Refugio, Robertson, Rockwall, 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) Beginning June 1, 2006, affected persons in the counties listed in subsection (b) of this section shall be in compliance with §114.312(b)(2) of this title for that diesel fuel which may ultimately be used to power a diesel-fueled compression-ignition engine in a motor vehicle or in non-road equipment.