The Texas Commission on Environmental Quality (TCEQ or commission) adopts amendments to §§114.6, 114.312, 114.314 - 114.316, 114.318, and 114.319. Sections 114.6, 114.312, 114.314 - 114.316, and 114.319 are adopted *with changes* to the proposed text as published in the December 31, 2004, issue of the *Texas Register* (29 TexReg 12098). Section 114.318 is adopted *without change* to the proposed text and will not be republished.

The amended sections will 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 ADOPTED RULES

In April 2000, the commission adopted rules establishing requirements for low emission diesel (LED), and requiring that only LED be sold for on-road and off-road use in the Dallas/Fort Worth (DFW) nonattainment counties as part of that area's ozone attainment demonstration SIP. These new diesel fuel standards were to go into effect May 1, 2002. In December 2000, the commission adopted amendments to the LED rules expanding their coverage to the entire state and made the diesel fuel content limits for sulfur more stringent than federal diesel fuel regulations for on-road vehicles. The commission submitted, as part of that SIP revision, a waiver in accordance with 42 United States Code (USC), §7545(C)(4)(c) for the on-road portion of the rules. The EPA granted the waiver on November 14, 2001 (66 FR 57197), as part of EPA's approval of the SIP revision. Subsequent to this adoption, the 77th Legislature, 2001, passed House Bill (HB) 2912, Article 15, which amended the Texas Clean Air Act (TCAA), §382.039(g) - (i) to restrict the commission from requiring distribution of LED as described in the revised SIP prior to January 1, 2005, and to allow the commission to consider, as an

alternative method of compliance with LED standards, fuels to achieve equivalent emission reductions. The commission, in September 2001, adopted amendments to the LED rules implementing the changes required by HB 2912, Article 15. At the direction of the EPA and in order to reduce nitrogen oxide (NO_x) emissions necessary for the Houston/Galveston/Brazoria (HGB) area to demonstrate attainment with the ozone national ambient air quality standards (NAAQS), these amendments also limited the coverage area of the LED rules from statewide to those counties previously included in the regional air pollution control strategy for the HGB nonattainment area. Under the current rules, on and after April 1, 2005, a person who sells, offers for sale, supplies, offers for supply, dispenses, transfers, allows the transfer, places, stores, or holds any diesel fuel in a stationary tank, reservoir, or other container will be allowed to sell only LED or an approved alternative in the affected areas of the state. These rules apply to the HGB, DFW, and Beaumont/Port Arthur (BPA) nonattainment areas, as well as all counties along Interstates 35 and 37 and to the north and east of those highways.

The current rules allow the use of alternative diesel formulations that have been shown to provide equivalent emission reductions, and specify the tests that can be used to demonstrate equivalence. The current rules also permit an entity regulated by the rule to use other diesel formulations if the entity submits a plan detailing how the entity will obtain equivalent reductions using a fuel strategy. The current rules also require producers of LED or alternative formulations of LED to register with the commission by December 1, 2004, or 30 days prior to beginning production.

On August 4, 2004, the commission received a petition for rulemaking by the Texas Petroleum Marketers and Convenience Store Association (TPCA). The petitioner requested that the commission

extend the compliance date for LED to October 1, 2006, and to June 1, 2007, for the ultra low sulfur requirement. The commission responded by directing staff to initiate rulemaking to extend the compliance date for LED to October 1, 2005, and to strengthen registration requirements and improve the rules' enforceability. The commission also directed staff to include updates and corrections to references included in the rules.

This rule adoption implements the commission's direction in response to the petition for rulemaking. The commission adopts amendments to these rules to postpone the compliance date to October 1, 2005.

The commission also adopts amendments to add flexibility to the requirements for demonstrating that an alternative formulation is equivalent to LED, and to restructure the registration requirement to provide the commission with better and more timely information regarding the planned production of LED. The commission adopts amendments to establish a compliance date phase-in schedule, to remove the sulfur content requirements, to revise the monitoring and testing requirements to improve rule enforceability, and to reflect new compliance methods such as additive-based strategies. Also, revisions are adopted to require all producers and importers of diesel fuel to register with the commission by May 1, 2005, as to their plans to produce LED. Finally, the commission adopts amendments to update several references included in the rules and to delete specific references to test methods in order to be consistent with EPA test methods.

By providing additional methods of compliance and a short postponement of the compliance date, these changes lower the cost of compliance with the rules, while providing the commission with more

assurance that diesel supplies will be adequate, and that the commission will have the information and authority necessary for equitable and effective enforcement of the rules.

SECTION BY SECTION DISCUSSION

The commission adopts administrative changes throughout these sections to be consistent with Texas Register requirements and other agency rules.

Subchapter A: Definitions

The adopted amendment to §114.6, Low Emission Fuel Definitions, contains revisions to the definition of diesel fuel. The adopted amendment to the definition of diesel fuel replaces "Number" with "Grade No." for better consistency with common or commercial terms and replaces the language referencing American Society for Testing and Materials (ASTM) Test Method D975-98b with "the active version of ASTM D975 (Standard Specification for Diesel Fuel Oils)." This adopted revision is necessary to promote consistency with widely recognized national standards. ASTM International is a voluntary standards development organization made up of over 30,000 members representing producers, users, consumers, government, and academia. ASTM members set consensus standards for their respective industries. Finally, the adopted definition of diesel fuel exempts the lubricity testing requirements listed in ASTM D975, since the LED rules do not regulate lubricity. The definition of further process was amended, at adoption, to include the phrase “or addition of an approved additive.” While it was the commission’s intent that the term “blending” include the addition of additives, the added phrase provides additional clarity to the definition.

Subchapter H: Low Emission Fuels

Division 2: Low Emission Diesel

The adopted amendment to §114.312, Low Emission Diesel Standards, removes the sulfur content requirements in subsection (b). These requirements are no longer needed in the state LED rules, since the federal sulfur regulations have now been promulgated to reduce sulfur in diesel fuel used in on-highway motor vehicles beginning in June 2006 and in non-road equipment, locomotives, and marine engines beginning in June 2007. The remaining subsections in §114.312 have been relettered accordingly. The adopted revisions to relettered subsection (e), concerning the automatic acceptance of diesel fuel approved by the California Air Resources Board (CARB), clarify that, to satisfy the requirements of subsection (a), a formulation must either have been approved by an executive order of the CARB on or before January 18, 2005, for compliance with California diesel fuel regulations that were in effect as of October 1, 1993, or be compliant with adopted CARB regulations that were in effect as of January 18, 2005. Diesel fuel produced under any of the CARB small refinery compliance measures will not be accepted as LED. Formulations approved by the CARB after January 18, 2005, may be approved under revised and relettered subsection (f). Adopted revisions to subsection (f) will provide the executive director additional discretion when evaluating and accepting diesel fuel formulations approved by the CARB. The discretion provided to the executive director for approval of alternative diesel fuel formulations is also clarified by deleting the reference to also require approval from the EPA. Under these adopted revisions, any producer of an alternative diesel fuel formulation having a post-January 2005 approved CARB executive order for a Certified Diesel Fuel Formulation or a fuel compliant with adopted CARB regulations that where adopted after January 18, 2005, could provide the executive order or fuel content of the components of the compliant fuel to the executive

director for consideration in satisfying the emission and performance testing requirements in §114.315(c) and (d) as required by subsection (f). The amendment also removes redundant and unnecessary language regarding proprietary and/or confidential information submitted by the producer of an alternative diesel fuel formulation.

The adopted amendment to §114.314, Registration of Diesel Producers and Importers, contains revisions requiring all producers and importers that now provide diesel fuel for ultimate use in the affected 110 counties, as of April 1, 2005, to register with the executive director no later than May 1, 2005. The language previously in §114.314 only required those producing and importing LED to register. This adopted revision is necessary to provide more comprehensive data on the future quantities of both LED and non-LED fuel being supplied into the affected area. The additional data will allow the commission to develop more effective enforcement strategies for the rule, if necessary. This data can also be used for analysis of any possible withdrawal of producers or importers from the diesel fuel market within the affected counties and subsequent supply shortages that could occur. This section is restructured into subsections and paragraphs. Adopted new subsection (b) requires producers and importers that are new to the market in the listed counties, after April 1, 2005, to register at least 30 days prior to the first date of providing diesel fuel for use in the listed counties. As with all commission rules, failure to comply with a notification requirement could lead to an enforcement action against the noncompliant company. Adopted new subsection (c) moves language regarding the prescribed forms for registration to its own subsection. This adopted subsection also includes added language specifying what information the producer or importer must provide in the registration. This information includes: a statement signed by the producer or importer indicating whether the producer

or importer does or does not intend to produce or import LED compliant diesel on or after October 1, 2005; a statement of the 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; a statement of the estimated total number of barrels of LED diesel that the producer or importer is planning to produce or import in the 12 months following the compliance date that the producer or importer intends to sell, offer for sale, supply, or offer to supply from its production facility or import facility for affected counties; 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 in the 12 months following the compliance date 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 affected counties; any other information determined by the commission to be necessary to determine the adequacy of diesel supply in the affected counties; and finally, a statement of consent signed by the registrant that the executive director is permitted to collect samples and access documentation and records. Section 114.314(d) was amended by replacing the term "suppliers" with the more appropriate phrase "producers and importers."

The adopted amendment to §114.315, Approved Test Methods, revises subsection (a), at adoption, to specify that compliance with the diesel fuel content requirements of this division must be determined by applying the appropriate test methods and procedures specified in the most current version of ASTM D975 (Standard Specification for Diesel Fuel Oils) and the other listed supplementary methods, which are the aromatic and polycyclic hydrocarbon content determined by the active version of ASTM Test Method D5186; the nitrogen content determined by the active version of ASTM Test Method D4629;

the American Petroleum Institute (API) gravity index determined by the active version of ASTM Test Method D287; the viscosity determined by the active version of ASTM Test Method D445; the flashpoint determined by the active version of ASTM Test Method D93; and the distillation temperatures determined by the active version of ASTM Test Method D86. This adopted revision is necessary to ensure the use of the most accurate testing methods and to promote consistency with widely recognized national standards.

The adopted amendment to §114.315(b) allows modifications to the test methods specified in this section if approved by the executive director. This adopted revision allows the executive director greater flexibility in approving modified or alternative test methods.

The adopted amendment to §114.315(c) clarifies and updates existing references and provides additional flexibility in the testing of alternative formulations. The adopted revision to §114.315(c)(1)(C) clarifies the diesel grades and sulfur content of the reference fuel for the testing of alternative formulations. Adopted revisions to §114.315(c)(1)(C) and also to §114.315(c)(4) replace or add language to reference the active version of the appropriate test methods or procedures rather than the date-specific versions. These revisions will ensure the use of the most accurate and up-to-date testing methods or procedures by ASTM or EPA. There is not a standard for lubricity in the LED rules, therefore, testing for lubricity is not required. Since the sulfur requirements have been removed from §114.312, revisions to §114.315(c)(3)(A) set the sulfur limit of the reference fuel at a maximum value of 15 parts per million (ppm). This limit matches the federal on-highway sulfur requirement. At adoption, the revision to §114.315(c)(4)(C) provides additional flexibility in the testing of new diesel formulations under

§114.312(f) by amending the test sequences to now include sequences for when testing with cold and hot start exhaust emission testing cycles and sequences for when only testing with hot start exhaust emission test cycles, which include a new sequence for testing formulations that require an extended duration conditioning cycle, and allowing other test sequences to be approved at the discretion of the executive director. The adopted revision to §114.315(c)(4)(D) eliminates the need for parties conducting the testing of alternative diesel fuel formulations to contact the executive director by telephone and in writing when any unscheduled interruptions or delays occur during testing. At adoption, §114.315(c)(4)(E) and (5)(A) and (d) was amended by replacing the phrase "volatile organic compounds (VOC)" with the phrase "total hydrocarbons (THC), non-methane hydrocarbons (NMHC)." The measurement of THC and NMHC is typically conducted in exhaust emissions testing as a means to determine overall VOC emissions. At adoption, the revisions to §114.315(c)(5) also include a new formula that specifies the measurement tolerances per pollutant type that will be acceptable when calculating the determination of whether the emissions generated by a candidate fuel are comparable to the emissions generated by the reference fuel. The revision to §114.315(c)(6) adds a consultation with the EPA into the process to approve an alternative fuel formulation.

The adopted amendment to §114.315(d) eliminates the language "the formulations are intended only for use in non-road equipment and, through emissions and performance testing with supporting data," which will allow alternative diesel fuel formulations to be approved, as specified in this subsection, for all compression-ignition engines. The revision adopted in §114.315(d) adds requirements for what must be included in the application for approval of alternative diesel fuel formulations using additives. Adopted new paragraph (1) outlines that the application provided to the executive director must include

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. Adopted new paragraph (2) outlines what will be included in the executive director's approval notification of an alternative diesel fuel formulation. The adopted paragraph requires an approval notification to identify the total aromatic hydrocarbon content, cetane number, and other parameters as appropriate and as determined in accordance with the test methods identified in §114.315(a). For alternative diesel fuel formulations using additives, the adopted paragraph requires the approval notice to specify, at a minimum, the identity, the minimum concentration, and the treatment rate of the additives used, along with the minimum specifications for the base fuel to be used in the approved formulation as determined by the test method identified in §114.315(d)(1). Adopted new §114.315(d)(2)(B) adds language stating that the executive director will assign an identification number to the approved alternative diesel fuel formulation for better tracking purposes.

The adopted amendment to §114.316, Monitoring, Recordkeeping, and Reporting Requirements, reformats this section at adoption. Relettered subsections (c), (d), (e), and (h) remove the requirement to sample for sulfur content. Relettered subsection (d) was further amended to clarify the sampling and testing intervals for the producer or importer of LED by retaining the term "each final blend." The adopted revisions to relettered subsections (d) and (e) also alter the frequency and compounds required to be analyzed to ensure appropriate sampling for additive-based alternative formulations. For producers and importers that blend 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 must be sampled and tested at a rate of one sample and test per 250,000

gallons of LED produced. Records must be maintained for two years from the date of sampling, including, but not limited to: sample date, identity of blend sampled, container or other vessel sampled, final blend volume, and the content of the appropriate fuel components. At adoption, relettered subsections (d) and (e) were revised to be consistent with relettered subsection (c), in that all diesel fuel produced and not tested as LED by the producer or imported as required by the requirements of this division, will be deemed to exceed the standards specified in this division, unless the producer or importer demonstrates that the diesel fuel meets those standards and limits. At adoption, relettered subsection (e), concerning approved blended fuels that contain an additive system was amended to require that 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. Specifically, the producers or importers records must be such that it is shown that sufficient additive was added to maintain the appropriate additive concentration. However, if the additive is approved by the commission for use with diesel fuel produced to comply with the fuel content standards of 40 Code of Federal Regulations (CFR) §80.510, the testing for the content of the fuel components of the base fuel is not required.

The adopted amendment to relettered §114.316(f) revises the number of days required to submit requested information from five days to 15 days.

The adopted revision to relettered §114.316(g) provides alternative certification statements depending on the type of fuel produced or supplied. The certification statements required in subsection (g) were simplified, requiring statements of either: 1) “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"; 2) "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 3) "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." At adoption, the sulfur content recordkeeping requirement was removed from relettered §114.316(h)(2). The adopted amendments to relettered §114.316(i) and (k) replace the requirement to submit quarterly reports "no later than the 15th day of the month following the end of the calendar quarter" to "no later than the 45th day following the end of the calendar quarter."

The adopted relettered §114.316(j) now requires producers or importers that are supplying compliant fuels under either an executive order issued by CARB or by complying with adopted CARB regulations, to supply a copy of the executive order or documentation demonstrating that the fuel meets all of the CARB regulations.

The adopted relettered §114.316(k) now requires those producers with an approved alternative emission reduction plan to submit quarterly reports to the commission no later than the 45th day following the end of the quarterly report, including diesel fuel and additive volumes. At adoption, amendments to subsection (k) also require producers with an approved alternative emission reduction plan to sample and test for the appropriate fuel components of the diesel upon which their projected emission reductions were based. Sampling and testing for particular components which are not part of the alternative emission reduction plan are not required. These quarterly reports will provide needed

enforcement requirements that were previously not detailed in §114.318 but simply included as the language "contain adequate enforcement provisions," which is now deleted. The quarterly reports must provide, at a minimum: the volume of diesel fuel produced that is subject to the provisions of the alternative emission reduction plan; the volume of diesel fuel that was not produced by the producer but was sold or supplied by the producer in the affected counties and is subject to the provisions of the alternative emission reduction plan as approved by the executive director; the identity of the persons(s) from whom such diesel fuel was acquired; the date(s) that it was acquired; the volume of additive (if any) utilized by the producer to produce diesel fuel that is subject to the provisions of the alternative emission reduction plan as approved by the executive director; and the identity of the additive and additive manufacturer.

The adopted amendment to §114.318, Alternative Emission Reduction Plan, restructures the section into four subsections for added clarity and revises language. Adopted subsection (a) states that an approved alternative emission reduction plan will only satisfy the requirements of §114.312(a) and not the entire division. Adopted subsection (b) states what must be demonstrated in the alternative emission reduction plan in order to be approved by the executive director. Due to the adopted revisions in §114.316, which added needed enforcement requirements that were previously not detailed in §114.318, the language "contain adequate enforcement provisions," has been deleted. Adopted subsection (c) contains the current language on applicant's use of early reductions. Finally, adopted subsection (d) adds to the current language that the executive director approval of an alternative emission reduction plan must occur prior to the use of that plan for compliance with the requirements of this section.

The adopted amendment to §114.319, Affected Counties and Compliance Dates, extends the initial compliance date of April 1, 2005, to October 1, 2005. This revision allows the commission to more accurately determine the supply of LED into the affected counties once implemented and to identify appropriate investigation and enforcement strategies. This six-month extension to the compliance date, combined with the revisions to §§114.314, 114.315, 114.316, and 114.318, should enable the commission to more accurately analyze the supply of diesel fuel to the affected counties. Furthermore, at adoption, §114.319 was revised to establish a phase-in schedule for the implementation of the LED rules. Producers and importers must be in compliance with the LED rules, beginning on October 1, 2005. Bulk plant distribution facilities must be in compliance with the LED rules by November 15, 2005. Retail fuel dispensing outlets, wholesale bulk purchaser/consumer facilities, and all other affected persons must be in compliance with the LED rules by January 1, 2006. This new schedule is congruent with compliance schedules established for federal diesel fuel rules and will allow the distribution system to better adjust to the LED requirements.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the adopted 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 adopted amendments to §§114.6, 114.312, 114.314 - 114.316, 114.318, and 114.319 extend the

initial compliance date for the LED standards by six months. In addition, the rulemaking enhances enforcement of, and provides needed flexibility in, the LED air pollution control program as part of the strategy to reduce emissions of NO_x necessary for the counties in the HGB, BPA, and DFW nonattainment areas to be able to demonstrate attainment with the ozone NAAQS. While this strategy is intended to protect the environment by reducing NO_x emissions that help form ozone, the commission does not find that the additional diesel fuel producers and importers covered by this rulemaking comprise a sector of the economy, or that the revisions will adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety in the DFW, HGB, and BPA nonattainment areas.

The adopted amendments to Chapter 114 are not subject to the regulatory analysis provisions of §2001.0225(b), because the adopted rules do 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, the LED fuel requirements in Chapter 114 were initially developed as part of the control strategy to meet the one-hour ozone NAAQS set by the EPA under the Federal Clean Air Act (FCAA), 42 USC, §7409, and therefore meet a federal requirement. The LED rules are also part of the state's

strategy to meet the eight-hour ozone NAAQS. The amendments to this chapter were developed in order to strengthen and provide flexibility in meeting the LED requirements, and were also developed as a result of a petition for rulemaking by the TPCA to extend the compliance date of the LED standards. The FCAA, 42 USC, §7410, requires states to adopt and submit a SIP that provides for "implementation, maintenance, and enforcement" of the primary NAAQS in each air quality control region of the state. While 42 USC, §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). While 42 USC, §§7401 *et seq*. does require some specific measures for SIP purposes, like the inspection and maintenance program, the statute also provides flexibility for states to select other necessary or appropriate measures. The federal government, in implementing 42 USC, §§7401 *et seq*., recognized that the states are in the best position to determine what programs and controls are necessary or appropriate to meet the NAAQS, and provided for the ability of states and the public to collaborate on the best methods for attaining the NAAQS within a particular state. However, this flexibility does not relieve a state from developing and submitting a SIP 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 will be brought into attainment on schedule.

As discussed earlier in this preamble, this rulemaking action implements requirements of 42 USC, §§7401 *et seq*. There is no contract or delegation agreement that covers the topic that is the subject of this action. Therefore, the adopted 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 TCAA), and the Texas Water Code, which are cited in the STATUTORY AUTHORITY section of this preamble, including Texas Health and Safety Code, §§382.012, 382.019, 382.202, and 382.208. Therefore, this rulemaking action is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b), because the adopted rulemaking does not meet any of the four applicability requirements.

TAKINGS IMPACT ASSESSMENT

The commission completed a takings impact analysis for the adopted rulemaking action under Texas Government Code, §2007.043. The specific purposes of this strategy are to achieve reductions of NO_x emissions to reduce ozone formation in the HGB, BPA, and DFW nonattainment areas and help bring these areas into compliance with the air quality standards established under federal law as NAAQS for ozone. The adopted amendments extend the initial compliance date for the LED standards by six months. In addition, the rulemaking enhances enforcement of, and provides needed flexibility in, the LED air pollution control program by adding enforcement provisions to the alternative emission reduction plan requirements, allowing new NO_x calculation models developed by EPA to be used to determine equivalency of alternative diesel fuel formulations to LED standards, and strengthening

registration requirements in order to collect more comprehensive data on diesel supply in Texas. These amendments 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.

Texas Government Code, §2007.003(b)(4), provides that Chapter 2007 does not apply to this adopted rulemaking action, because it is reasonably taken to fulfill an obligation mandated by federal law. The emission limitations and control requirements within this rulemaking action as part of the LED air pollution control program were developed in order to meet the one-hour ozone and eight-hour NAAQS 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. Under 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 meet the air quality standards established under federal law as NAAQS. Attainment of the one-hour and eight-hour ozone standards will eventually require reductions in NO_x emissions as well as VOC emissions. This rulemaking is only one step among many necessary for attaining the ozone standards.

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 the HGB, BPA, and DFW areas exceeding the federal one-hour and eight-hour ozone NAAQS, that adversely affects public health, primarily through irritation of the lungs. The action significantly advances the health and safety purpose by reducing ozone levels in these nonattainment areas and 95 central and eastern Texas counties. Consequently, these adopted rules meet the exemption in §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 adopted rules do not constitute a takings under Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined the adopted 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 adopted 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 adopted rulemaking and SIP revision will ensure that the amendments comply with 40 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).

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

Chapter 114 is an applicable requirement under 30 TAC Chapter 122, Federal Operating Permits Program; therefore, owners or operators subject to the federal operating permit program must, consistent with the revision process in Chapter 122, revise their operating permit to include the revised Chapter 114 requirements at their sites affected by the revisions to Chapter 114.

PUBLIC COMMENT

The public hearing for this rulemaking was held on January 18, 2005 in Austin. The following persons submitted written or oral comment: Capital Area Council of Governments (CAPCO); CITGO Petroleum Corporation (CITGO); Bullard Environmental Coating, Inc. on behalf of Direct Fuels, Inc. (Direct Fuels); Flint Hills Resources, LP (FHR); Good Company Associates (Good Company); Magellan Midstream Partners (Magellan); ORYXE Energy International, Inc. (ORYXE); Sierra Club, Houston Regional Group (Sierra); Lloyd Gosselink on behalf of Texas Mining and Reclamation Association and SouthWestern Brick Institute (TMRA/SWBI); Texas Oil and Gas Association (TxOGA); Texas Petroleum Marketers and Convenience Store Association (TPCA); Representative Vicki Truitt, District 98 (Representative Truitt); EPA; and Valero Energy Corporation (Valero).

RESPONSE TO COMMENTS

TPCA generally supported the direction of the proposal. CAPCO and Sierra generally opposed the proposal. Direct Fuels, CITGO, FHR, Good Company, ORYXE, Sierra, TMRA/SWBI, TxOGA, TPCA, Representative Truitt, EPA, and Valero expressed concerns and/or suggested changes to the proposal.

Repeal Rule

CITGO and TxOGA expressed their opposition to the LED rules requiring a unique "boutique" set of fuel specifications for diesel fuel in East Texas because these fuels invariably lead to price spikes and supply disruptions and are a very cost-ineffective way to reduce NO_x and potentially ozone in the HGB and DFW nonattainment areas. TxOGA recommended the repeal of this rulemaking along with action to make those regulated parties that took action to make cleaner diesel fuel in Texas whole. Magellan commented that the additional tankage needed for its infrastructure to handle an additional diesel fuel such as LED is estimated to cost approximately $10 million. CITGO encouraged the state to accept a federal fuel and seek the required NO_x reductions in other areas.

The concerns raised by these commenters were addressed in previous rulemakings for the LED rules adopted by the commission on December 6, 2000, and September 26, 2001. These comments 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.

FHR commented that the commission should repeal the sulfur requirements in §114.312(b) and §114.319(c), thereby leaving sulfur regulated by federal rules, since the EPA has finalized both on-road and non-road sulfur requirements.

The commission agrees that the suggested change is appropriate and changed the rule accordingly. The EPA promulgated federal rules regulating a reduction in sulfur content for diesel fuel used in on-highway motor vehicles in the January 18, 2001, issue of the *Federal Register* (66 FR 5002) and then additionally in the June 29, 2004, issue for diesel fuel used in non-road equipment, locomotives, and marine engines (69 FR 38958). Since earlier reductions of the sulfur content in diesel fuel have no impact on NO_x emissions from diesel engines that are not equipped with emission control devices that can be damaged by sulfur contamination, the commission has elected to amend the rules to allow producers and importers to conform with federal requirements and compliance dates.

Implementation Delay

CAPCO and Sierra were opposed to the delay of the LED implementation date due to the attainment needs of the early action compact (EAC) areas and the HGB ozone nonattainment area. CAPCO further commented that if the compliance date is delayed, it should not be delayed past August 2005.

The commission believes that the extension of the compliance dates for LED will not impact attainment demonstrations for the HGB area for the one-hour ozone NAAQS or attainment of the eight-hour NAAQS for the EAC and HGB areas. The commission notes that the delay in

compliance dates is adopted in order to avoid a lack of LED supply and to allow time for additives and alternative formulations to be introduced into the market. This short time delay should promote the introduction of LED and LED compliant fuels into the Texas market and produce the NO_x emission reductions necessary for these areas to attain the NAAQS on schedule. Additionally, the commission expects that some reductions will occur despite the delay due to alternative reduction plans and other commitments, which are already in place. The commission made no change to the rules in response to these comments.

TPCA supported the proposed delay in implementation date but expressed concern that given the ambiguity of several of the proposed rule components, the October 1, 2005, deadline may still not provide sufficient time for the production and distribution of commercially reasonable supplies of LED.

The commission appreciates the support. The commission is confident that the adopted changes made to the rules will allow adequate supplies of LED compliant fuel to be produced and distributed into the Texas market.

CITGO, FHR, TPCA, TxOGA, and Valero suggested that the implementation schedule in §114.319 be revised to incorporate a phased-in implementation schedule similar to EPA's diesel fuel rules for both the initial implementation date of the rule and the subsequent 15 ppm sulfur phase-down requirement, resulting in a 45-day transition period between distribution levels at each of these program milestones, with the compliance deadline at the retail outlets and wholesale purchaser-consumers facilities occurring 90 days after the refinery implementation date.

The commission agrees and made changes to the rule in response to these comments. The implementation schedule was revised to incorporate a phased-in implementation schedule that requires producers and importers to comply with the rule beginning on October 1, 2005, bulk plant distributions facilities beginning November 15, 2005, and retail fuel dispensing outlets, wholesale bulk purchaser/consumer facilities, and all other affected persons in the affected counties beginning January 1, 2006.

EPA requested that the commission explain, in the final adoption package, how changing the implementation date to October 1, 2005, is still expeditious as practicable for implementation.

As stated in the proposal published in the *Texas Register* on December 31, 2004, the commission believes that postponing the compliance date of the LED requirements by six months will provide more assurance that diesel supplies to East Texas will be adequate. The commission heard testimony from the petitioner that their fuel suppliers warned of a potential shortage of diesel fuel in the East Texas market. In addition, the commission believes that the extension will allow the entry of newly developed additives and alternative diesel formulations into production, thereby adding more assurance that end-users in Texas will have access to LED compliant fuel. At the commission's October 13, 2004, public meeting, representatives of the additive fuel industry provided information indicating progress was being made in getting their product to market. Based on this testimony, the commission is confident that an additional few months will allow adequate LED compliant diesel fuel to be produced and supplied into the Texas market. The commission made no change to the rules in response to these comments.

TMRA/SWBI and TPCA commented that §114.319 should contain a provision allowing the commission to delay or suspend enforcement of the rules if it is determined that a potential imbalance of supply and demand of LED is shown. TMRA/SWBI further suggested that the provision should automatically extend the implementation date of the LED rule to April 1, 2006, if the commission determines that the registrations received by May 1, 2005, indicate that an adequate supply of LED compliance diesel fuel is not available for use in the affected counties from October 1, 2005, to September 30, 2006.

The commission declines to make the suggested change. The commission is confident that the adopted changes made to the rule will allow adequate supplies of LED compliant diesel fuel to be produced for and distributed into the Texas market beginning on October 1, 2005. In addition, the adopted changes to the registration requirements of the rule will provide the commission with sufficient information to determine whether an adequate supply of LED compliant fuel is expected to be available for use in the affected counties well before the start of the new compliance date phase-in schedule that begins on October 1, 2005.

Definitions

CITGO, FHR, and TxOGA supported the revised reference for the most current version of ASTM D975 in both the definition of diesel fuel in §114.6 and in §114.315(c)(1)(C). However, CITGO and TxOGA strongly recommended that the commission exclude the new lubricity standard included in ASTM D975 from these rules until the 15 ppm sulfur requirements go into effect in June 2006.

The commission appreciates the support and made changes to both the §114.6 definition and §114.315(c)(1)(C) to exclude the specification for lubricity, since the commission has not established a specific limit for lubricity in diesel fuel.

FHR supported the reference to current ASTM test methods and specification naming conventions in the definition of "Diesel fuel" in §114.6 since the change in definition does not imply that diesel fuel supplied in the State of Texas is required to meet the specifications of the current version of ASTM D975, but is merely for the purpose of specifying what is meant when the rules refer to "Diesel Fuel."

The commission appreciates the support.

Valero commented that the definition of "Further process" in §114.6(9) should be expanded to clarify that the addition of an approved additive (CARB or TCEQ) at the truck rack is included in the definition of further processing. Valero suggested that the following phase be added to this subsection: ". . . or addition of an approved additive under section 114.312 (f) or (g), ..."

The commission agrees and made changes to the rule in response to these comments. The phrase "or addition of an approved additive," was added to the definition of "Further process" in §114.6.

ORYXE commented that §114.6 should be revised to include a definition for "Additive Manufacturer" that would incorporate the parent company, agents, and contractors responsible for the delivery and

maintenance of any additive system and suggested the following language: "Additive Manufacturer - The company that is primarily responsible for the creation of the formulae for the additive and is responsible for its manufacture." TMRA/SWBI commented that §114.6 should be revised to include definitions for "additive vendor" and "low emission diesel additive," and suggested the following language: "Additive vendor - Any person who markets, provides, or sell an additive that the executive director has approved for use in complying with the standards specified in §114.312 of this title (relating to Low Emission Diesel Standards)."; and "Low emission diesel additive - an additive that the executive director has approved for use in complying with the standards specified in §114.312 of this title (relating to Low Emission Diesel Standards)."

The commission does not agree that the terms specified in these comments need to be defined in the rule. This rule is directed toward diesel fuel producers and importers, not additive manufacturers and vendors. The commission made no changes to the rule in response to these comments.

ORYXE further commented that the words ", other than one composed solely of carbon and/or hydrogen," should be deleted from the definition of additive in §114.6(1).

The commission made no change to the rule in response to these comments. The wording for this definition was derived from the federal definition of additive in 40 CFR §79.2(e).

Additive controls

CITGO and ORYXE commented that §114.312(g) should be modified such as to create new subsections (g) and (h) so that alternative formulations that use new diesel formulations are treated separately from alternative formulations that utilize additives. ORYXE further commented that the revised §114.312(g) and (h) should include the words "additive manufacturer" in the sentences relating to proprietary or confidential information. CITGO commented that this revision would require a change to cite the new subsection (h) in the first sentence of §114.315(d): ". . . may approve alternative diesel fuel formulations as prescribed under §114.312(g) and (h) of this title . . .."

The commission made no change to the rule in response to these comments, because the rule is presently inclusive of the request and no additional rulemaking is needed.

Good Company commented that when the commission accepts a CARB equivalent or approved low emissions fuel for sale in Texas to the meet the LED requirements that the CARB certification of that fuel should be current and should not be a "small refinery certification."

The commission agrees that the suggested change more clearly states the intent of the rule and changed the provision in §114.312(f) accordingly.

Registration

Sierra supported the May 1, 2005, registration date found in §114.314(a).

The commission appreciates the support.

TPCA commented that §114.314 should be revised to require producers and importers of LED to provide information regarding the total volume of LED that they will have available for use in each affected county as of October 1, 2005, and the percentage of that total volume that will be produced using an additive. TMRA/SWBI commented that the registration requirements should require producers and importers report the total volume of LED that they will have available for use in each affected county for each calendar month from October 1, 2005, through September 30, 2006, and for each calendar quarter from October 1, 2006, through September 30, 2007, and the percentage of total volume that will be produced using an LED additive. TMRA/SWBI commented that the commission should require producers and importers to specify their LED production method (e.g., whether they used an additive or alternative formulation), report how much diesel they supplied to the affected counties in 2003 and 2004, and report how much of the total volume of diesel they supply to the affected counties produced outside of Texas (to avoid double counting of diesel or LED produced outside of Texas, and reported by the producer and importer of that same fuel).

The commission made changes to the rule in response to these comments. The registration requirements in §114.314 were amended to require producers and importers to submit information on the total barrels of diesel fuel they produced or imported annually for use in the affected counties, the projected amount of LED compliant fuel they are planning to produce or import for use in these areas on or after the implementation date, and any other information requested by the commission to determine whether an adequate supply of LED compliant fuel is expected to be available for use in the affected counties beginning on October 1, 2005.

ORYXE commented that §114.314(b) should be revised to increase the lead time required for a producer to register with the executive director their intent to make LED available for sale to at least 90 days.

The commission made no change to the rule in response to this comment. This provision only applies to producers or importers that have not provided diesel fuel to the affected counties in the past and requires these entities to give advance notice of their intention to supply diesel fuel into the affected areas by registering with the commission a minimum of 30 days in advance. They have the option to register well in advance of the 30-day minimum, if they so choose.

TMRA/SWBI commented that the commission should project the demand for diesel fuel in the affected counties beginning on October 1, 2005.

The commission made no change to the rules in response to this comment. The commission has adopted changes to the registration requirements that should provide sufficient information based on the current amount of diesel fuel being supplied to the affected counties and projected LED production to determine whether an adequate supply of LED compliant fuel is expected to be available for use in the affected counties beginning on October 1, 2005. The commission believes that the diesel fuel industry is better equipped to project demand for its product. Partly for this reason, the commission solicited comments at proposal on how to better project supply and demand. The commission did not receive suggestions for how to project demand.

TMRA/SWBI commented that the heading for §114.314 should be revised to include "Additive Vendors," and provided suggested language to amend this section to address their comments regarding registration requirements.

The commission made no change to the rule in response to this comment. Only producers and importers of diesel fuel are required to register.

TMRA/SWBI commented that the commission should require the submittal of documentation that substantiates all representations made in a LED registration to verify/ensure the accuracy of representations made by producers, importers, and additive vendors. In addition, each registration should also be required to be certified and governed by the certification requirements of Texas Water Code, Chapter 7.

The commission made no change to the rules in response to this comment. Requiring supporting documentation as part of the registration is unduly burdensome. If the commission believes supporting documentation is needed to verify the accuracy of a registration, it has the authority to request such information. The registration form being developed by the commission will include a certification statement on the accuracy of the information being submitted.

TMRA/SWBI commented that the commission should provide, in the preamble, as much information as is currently available regarding the adequacy of the existing distribution system to reasonably conclude that all of the affected counties will have an adequate supply of LED compliant fuel.

The commission is confident that the adopted changes to the registration requirements of the rules will provide the commission with sufficient information to reasonably determine whether an adequate supply of LED compliant diesel fuel will be available for use in the affected counties. However, since this is information that producers and importers must submit to the commission by the new registration deadline of May 1, 2005, it is not available at this time. The commission made no change to the rules in response to these comments.

TMRA/SWBI commented that the registration requirements should require all registrants to explain, in detail, the manner in which their product will be made available for distribution in each affected county, in what time interval, and in what quantity. This should include requirements for additive vendors to demonstrate that existing fuel rack terminals can be used to integrate additives without physical changes to those terminals, and if changes are required, the specific cost and time line estimates should be provided.

The commission declines to make the suggested change. The recommended change would add significantly to the cost of the registration requirement, and would produce information that is of limited value. The commission has no basis to require such an action since the method of the distribution of LED compliant diesel fuel is not regulated by these rules.

TxOGA suggested that the commission delete §114.314(a), since the December 1, 2004, date has already passed.

The commission made changes to the rule in response to this comment. Producers and importers that have marketed diesel fuel in the affected counties as of April 1, 2005, will be required to register with the commission by May 1, 2005.

TxOGA suggested that the commission revise §114.314(b) to replace the term "diesel fuel" with the phrase "Low Emission Diesel Fuel"; otherwise, those producers who are selling EPA grade diesel today, but have not yet registered to sell LED in the future, could be interpreted to be out of compliance.

The commission made no change to the rule in response to these comments. The registration requirements in §114.314(a) and (b) were intentionally written to apply to all producers and importers of diesel fuel that supply diesel fuel to the affected counties, not just those that will be producing or importing LED compliant diesel fuel.

TxOGA suggested that §114.314(c)(1) be revised to read "whether the producer or importer does or does not plan to produce or import . . .." The change is needed since producers cannot provide guarantees of future performance, but should be comfortable with sharing plans. FHR commented that the wording in §114.314(c)(1) should be changed from "will or will not" to "intends to," since as currently proposed, a company would be at risk of its registration being deemed false if unexpected events or changing market conditions cause the company to alter its plans as stated in the registration.

The commission agrees that the suggested changes more clearly state the intent of the provision and changed this provision accordingly to request whether the producer or importer does or does not intend to produce or import LED.

FHR commented that the current registration form on the TCEQ Web site will need to be changed well in advance of the first registration deadline specified in the proposed amended rules, since several items on the form are not applicable to non-LED producers and the form should be modified such that producers indicate if they have an approved alternative plan.

The commission appreciates the comment and will ensure that a revised registration form is available well in advance of the registration deadline.

FHR commented that companies that are proceeding under an approved alternative plan are not required to be in compliance with §114.314(c)(2) since they must instead comply with the standards in their individual alternative plan and that the commission must amend this subsection by either: 1) clarifying that it only applies to producers of LED; 2) adding the word "applicable" before "standards"; or 3) deleting it entirely. FHR further commented that this subsection is an unnecessary provision since whether or not a company makes a statement accepting these standards is irrelevant to whether or not a company is legally subject to them.

The commission agrees that this provision is not needed since acceptance of these rules is irrelevant to whether or not a company is legally subject to them. The commission made changes to the rule in response to this comment.

TMRA/SWBI commented that all registrants should be required to submit, under confidentiality terms, if necessary, the cost associated with producing their fuel/additive and a range of expected pricing of their fuel/additive. TMRA/SWBI further commented that the commission should solicit comments about the expected price of LED fuel/additives, both through *Texas Register* notice and independently from market experts.

The commission does not see the need to request this type of information, as future fuel prices are driven more by volume demand and market competition than by production costs. The commission made no change to the rules in response to these comments.

TMRA/SWBI commented that all registrants should be required to provide test results that demonstrate the compatibility and performance of their fuel/additive with a wide variety of diesel equipment in use throughout the affected counties, i.e., such as "do no harm" tests that demonstrate the long-term compatibility of fuels/additives with diesel engine components and dynamometer tests that demonstrate the impact of the fuel/additive on engine horsepower in various operational scenarios.

The commission does not believe the type of testing requested by these commenters is a necessity for these rules. All fuels and fuel additives that are intended for use in on-road motor vehicles are

required by federal regulation to be registered with EPA. Each manufacturer or importer of gasoline, diesel fuel, or a fuel additive is required to have its product registered by EPA prior to its introduction into commerce. Registration involves providing a chemical description of the product and certain technical, marketing, and health-effects information. This allows EPA to identify the likely combustion and evaporative emissions. In certain cases, health-effects testing is required for a product to maintain its registration or before a new product can be registered. EPA uses this information to identify products whose emissions may pose an unreasonable risk to public health, warranting further investigation and/or regulation. The definition of additive in §114.6(1) requires additives to be approved and registered with EPA. The commission made no change to the rules in response to these comments.

Alternative Formulations

TPCA commented that §114.315 should be revised to require producers of LED, as well as producers of additives, to submit a certificate or other documentation that their blend of LED or additive will not damage diesel-powered engines or compromise their performance. This documentation will allow diesel fuel suppliers in the affected counties to allay their customer's concerns regarding the use of LED or additized diesel fuels.

The commission disagrees with this comment. As stated previously, fuel producers bear the responsibility for ensuring customer satisfaction with their products. The commission made no change to the rule in response to these comments.

Valero commented that the original wording used for the test methods in §114.315(a)(1) - (9) should be retained, except that the year designation for the ASTM test method should be eliminated and the "active" version specified. FHR and TxOGA commented that §114.315(a) should be revised to include test methods for polycyclic aromatics and nitrogen since test methods for these properties are not specified in ASTM D975 and suggested that the current version of ASTM D4629 for nitrogen and the current version of ASTM D5188 for polycyclic aromatics should be specified. FHR also requested that the most current version of ASTM D5186 be allowed for determination of total aromatics using the CARB correlation for conversion of weight percent to volume percent. ORYXE commented that additional language should be added to §114.315(a) to clarify that the ASTM test methods and procedures to be used are the most current version adopted and in use by ASTM. EPA commented that the commission should harmonize the sulfur testing methods in §114.315(a) with the EPA's non-road rule (Control of Emissions of Air Pollution from Nonroad Diesel Engines and Fuel, June 29, 2004, 69 FR 38957). TxOGA supported reliance on test methods prescribed by ASTM.

The commission agrees with these comments in that portions of the original rule should be retained as supplementary methods to the appropriate methods specified in ASTM D975 for testing the fuel content requirements of this rule and made changes accordingly.

Sierra commented that the term "comparable" found in §114.315(c)(5)(A) should be replaced with the phase "equal to but not greater than." ORYXE commented that the term "comparable" in §114.315(c)(5)(A) should be replaced with the industry standard term of "equivalent" and a reference to standard laboratory guidelines and measurements for particular emission constituents. FHR commented

that §114.315(c)(6)(A)(i) should be revised to read as follows: ". . . and nitrogen content not appreciably exceeding that of the candidate fuel . . .."

The commission made changes in §114.315(c) to include a new formula that specifies the measurement tolerances per pollutant type that will be acceptable when calculating the determination of whether the emissions generated by a candidate fuel are comparable to the emissions generated by the reference fuel.

ORYXE commented that "additive manufacturer" should be added to §114.315(c) to allow additive manufacturers to apply for the approval of an alternative diesel fuel formulation.

The commission agrees that persons other than producers and importers should be allowed to apply for approval of an alternative diesel fuel formulation under the provisions adopted in §114.315 and made changes accordingly.

TxOGA supported the revision the commission made to §114.315(d). ORYXE commented that §114.315(d) should include a statement that would allow previously approved technologies to be grandfathered under these provisions. ORYXE further commented that §114.315(d)(1) should be revised to include protections for the confidentiality of business information and additive formulations. EPA commented that rule language in §114.315(c) and (d) should be clarified so that any producer of an alternative fuel formulation having a post-January 2001 approved CARB executive order for a

Certified Diesel Fuel Formulation could provide the executive order to the executive director as an acceptable approach to meeting the requirement in §114.312(g).

The commission appreciates the support and has made no changes to the rule in response to these comments. The commission does not believe it is appropriate to include requirements relating to the handling of confidential information in the rule since the Texas Public Information Act exceptions for trade secrets and business confidential information apply across the agency. As is the case for all such information, registrants, submitters of alternative emission reduction plans, and applicants for approvals of alternative formulas and additives should clearly mark confidential information as such when submitting documents to TCEQ. The commission believes that adopted changes to §114.312(e) provide a clear understanding that formulations that were approved by CARB up to January 18, 2005, are not required to be approved under §114.315. In addition, the adopted changes in §114.315 provide the executive director with authority to approve formulations based upon satisfaction that comparable emission reductions will occur, which is likely if the formulation is already approved by CARB.

EPA commented that the rules for the approval of alternative diesel formulations in §114.315 should include a process for EPA involvement in the approval process such as allowing for EPA comment and concurrence and/or separate EPA approval.

The commission agrees with this comment and made changes accordingly to provide the executive director the ability to accept fuel additives that have been approved by EPA through its Environmental Technology Verification (ETV) process.

EPA commented §114.315(c)(4)(D) should be modified to follow the EPA's ETV program testing protocol for fuel additives, which requires that method of testing be performed on seven different engines in order to establish an emission reduction of that additive.

The commission declines to make the suggested changes. The commission adopted changes to §114.315(d) that would allow the executive director to approve formulations that have been approved by EPA through its ETV program.

Sampling Rate

Sierra supported the revisions to §114.316 relating to the rate of sampling for LED fuels.

The commission appreciates the support. However, some additional revisions to the sampling frequency have been made since proposal.

CITGO, FHR, TPCA, TxOGA, and Valero commented that the proposed sampling rate in §114.316(b) and (c) is excessive. TxOGA further commented that the sampling frequency should be designed to match final blending methodology. FHR, TxOGA, and Valero commented that the original rule language denoting "each final blend" was appropriate for blending into bulk fuel tanks, which are

mixed in large batches of approximately 10,000 to 50,000 barrels at a time. TxOGA and Valero commented that where blending occurs as product is being directly transferred into pipelines, barges, railroad cars, and trucks, the sampling frequency should be more frequently. TxOGA suggested sampling once every 250,000 gallons and Valero suggested once every 25,000 barrels.

The commission agrees that the sampling rate frequency should be consistent with the way fuels are blended and made changes to the rule in response to these comments. As noted in the preamble, §114.316(b) and (c) have been relettered to (c) and (d) respectively. The proposed sampling rate of once per 100,000 gallons in new §114.316(c) has been removed and the original language was retained for sampling of a final blend. Given the large batch size, the commission believes that this rate is an appropriate frequency for sampling and testing. Under new subsection (d), if the approved final blend, including blends that contain an additive system, is blended as the product is being transferred to pipelines, barges, etc., then the sampling frequency was changed from once every 50,000 gallons to once every 250,000 gallons.

CITGO commented that the commission should consider breaking apart §114.316(c) into two parts, modifying subsection (c) and making a new subsection (d), to follow through with its previously suggested changes to §114.312 for separate language for alternative plans with different diesel fuel formulations versus alternative plans that utilize additives.

The commission adopted amendments to §114.316 to address separate reporting requirements for fuels using additives for compliance with the LED requirements.

Valero commented that the commission should limit testing for "other appropriate components" in §114.316 to those fuel parameters with specified limits in a CARB executive order or TCEQ approval.

The commission agrees with this comment and made changes to the rule accordingly.

FHR commented that if additives are used to meet alternate formulations requirements, the commission should rely on volumetric additive reconciliation (VAR) accounting as is done in the federal gasoline detergent program, specified in 40 CFR Part 80, Subpart G - Detergent Gasoline, for sampling requirements, since fuel producers and distributors are well experienced in conducting such programs and have the necessary mechanisms and processes in place. In addition, Valero commented that the commission should not require testing for the additive as this analysis is not always possible, but should use the terminal's additive addition documentation to verify compliance with the proper additization rate.

The commission declines to make changes to the rules in response to these comments. The commission is confident that the adopted changes to §114.316 provide adequate provisions to ensure reasonable compliance.

CITGO commented that a new §114.316(d) should be written to read as follows: "If the approved blend contains an additive system, 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. The producer or importer shall maintain, for two years from the

date of distribution, records showing the volume of additive used with the corresponding volume of diesel distributed. Any producer or importer of LED whose alternative plan utilizes an additive program who does not maintain these records and make them available for inspection by the TCEQ shall be deemed to exceed the standards specified in §114.312 of this title."

The commission declines to make changes to the rule in response to this comment. However, the commission has revised the requirements for approved blends containing an additive system, in that 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). 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. However, 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 CFR §80.510, the testing for the content of the fuel components of the base fuel is not required.

CITGO commented that there is no value added if the state requires testing of the base diesel parameters in a program where an additive is used with standard EPA diesel to make LED. CITGO further commented that an extensive sampling and testing program for LED that is made through the use of additives does not add value and should not be included in the final rule.

The commission agrees that testing of the base fuel is not warranted if the additive is approved for use with standard EPA diesel and made changes to the rules accordingly. The commission made no other changes to the rules in response to these comments.

ORYXE commented that §114.316 should be revised to include a new subsection devoted entirely to recordkeeping requirements for fuel producers utilizing an additive system and suggested the following language: "If the approved blend contains an additive system that conforms with §114.312(h), 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. The producer or importer shall maintain for two years from the date of distribution, records showing the volume of low emission diesel distributed and the corresponding additive contained in that volume."

The commission agrees that recordkeeping requirements for fuel producers using additive systems should be addressed in a separate subsection and made changes to the rule accordingly.

Reporting

CITGO, FHR, ORYXE, and TxOGA commented that the five-day response time in §114.316(d) for written data requests is too short of a deadline. CITGO, ORYXE, and TxOGA suggested that the response time be extended to 15 days. FHR suggested that the provision be revised to allow the response time to be set by the commission on a case-by-case basis.

The commission agrees and made changes to the rule in response to these comments to extend the response time in these provisions to 15 days.

FHR further commented that §114.316(d) should be modified to include language that would clarify that the "presumption" of noncompliance referenced in this subsection is refutable by the refiner through the presentation of any credible evidence.

The commission declines to make the suggested changes. The commission made changes to §114.316 to be very specific that if sampling and testing is not performed as required, the fuel is considered noncompliant unless the producer or importer demonstrates that the fuel meets the required standards and limits.

CITGO, FHR, ORYXE, and TxOGA commented that the 15-day response time in §114.316(g) for quarterly reports is too short of a deadline and does not provide ample time to put together the information requested by the commission. CITGO, ORYXE, and TxOGA suggested that the response time should be extended to 45 days from the close of the previous calendar quarter. FHR suggested that it should be revised to "no later than the last day of the second month following the end of the calendar quarter."

The commission agrees with the comment concerning the time needed to gather the required information. Therefore, the commission has revised the response time from 15 days to 45 days following the end of the calendar quarter.

FHR commented that §114.316(f) should be revised to provide an exception for producers (such as FHR) and importers that utilize any form of averaging that includes all diesel batches produced for the LED areas so that only the total volume of the previously certified diesel used and its properties would need to be reported.

The commission declines to make the suggested changes. The commission is confident that the adopted changes to §114.316 provide adequate provisions to ensure reasonable compliance.

Direct Fuels commented that transmix operators should not be considered subject to the monitoring, recordkeeping, and reporting requirements of §114.316.

The commission disagrees and made no changes to the rule in response to this comment. Transmix operations are considered to be producers and like all producers are subject to the requirements of these rules. The commission believes that transmix operators are capable of complying with all of the requirements of this rule, especially since adopted changes to §114.312 removed the sulfur content requirements and transmix operations can apply for an alternative emissions reduction plan under §114.318.

Product Transfer Documents (PTD)

FHR, TxOGA, TPCA, and Valero commented that the required statements for product transfer documents in §114.316(e)(7)(A), (B), and (C) are too long and should be amended to shorten, abbreviate, or eliminate the statements entirely. Valero suggested that the provision be amended to

achieve a workable and enforceable PTD designation scheme that minimizes the number of grades to only three main grades: Texas LED, alternative emission reduction plan diesel, and non-Texas LED. Valero further commented that the proposed PTD language is too technical and complex and should be simplified into short plain English phases, such as "Texas Low Emission Diesel. This fuel may be used in diesel engines in East Texas."

The commission agrees that the product transfer documents statement should be simplified and made changes to the rule accordingly. However, the language in the product transfer documents is an important tool for determining compliance with the LED requirements and the commission declines to eliminate this requirement entirely. The certification statements required in subsection (e) were simplified, generally requiring either: 1) the product is LED; 2) the product cannot be used as LED fuel without further processing; or 3) the product has been produced under a commission approved alternative emission reduction plan.

FHR commented that §114.316(e) should be modified to include language that clarifies that this subsection applies only to diesel fuel intended for the counties specified in §114.319.

The commission has not made any changes due to these comments. It is the commission's intent that the requirements in §114.316(e) (now subsection (g)) apply to "All parties in the distribution chain (producer, importer, terminals, pipelines, truckers, rail carriers, and retail fuel dispensing outlets) subject to the provisions of §114.312 of this title . . .." Since §114.312 applies to all diesel

fuel intended for the counties specified in §114.319, including diesel fuel sold under an alternative plan, no change is needed to §114.316(e).

Alternative plans

CAPCO commented that the commission should reconsider any alternative method of compliance impacting EAC areas to ensure LED availability in EAC areas during the critical 2005 - 2007 period.

The commission made no change to the rules in response to this comment. The commission believes that the adopted changes (a short postponement of the compliance date), will allow adequate supplies of LED compliant diesel to be produced and distributed into the Texas market.

TxOGA commented that in §114.318, the commission should develop or allow compliance via more simple arithmetic algorithms or put models out on a Web site where companies can make runs as necessary to plan future compliance. In addition, the commission should revise its policy judgements now being used that disallow time period or geographic balancing and carryover. This change would be consistent with the transport concepts EPA and the commission recognize.

The commission made no change to the rule in response to these comments. The commission has posted on its Web site models that calculate emissions performance based on fuel property changes to assist regulated entities with compliance planning. The commission has allowed regulated entities to use these models to support their alternative emission reduction plans as allowed under §114.318.

FHR commented that §114.318(a) should be amended to read as follows, ". . . will be considered in compliance with the requirements of this division, except that the producer must also comply with Section 114.314 (Registration) and Section 114.316 (Monitoring, Record keeping and Reporting) subsections (d), (e)(1) - (7), (f) and (I)."

The commission believes that the language in proposed new §114.318(a) is clear and does not need to be changed as suggested by the commenter. A producer with an approved alternative emission reduction plan under §114.318 is considered to be in compliance with the LED standards set forth in §114.312(a). Under the adopted changes to the LED rules, holders of approved alternative emission reduction plans must comply with provisions of the LED rules, such as the registration requirements of §114.314 and the monitoring recordkeeping and reporting requirements of §114.316 as applicable. Because these producers are committing to an alternative fuel strategy to achieve the NO_x reductions expected from LED, the requirements of other provisions of the LED rules, such as §114.312(f) regarding alternative diesel fuel specifications and §114.317 regarding exemptions to LED requirements do not apply. The commission made no changes to the rule in response to these comments.

EPA commented that the commission should work with the EPA on a process for coordination of alternative emission reduction plans to help ensure acceptance by EPA as required in §114.318(a).

The commission anticipates working with EPA to successfully coordinate the acceptance of alternative compliance plans. The commission made no additional changes to the rule in response to these comments.

Transmix

Representative Truitt commented that transmix processing operations should be exempted from the sulfur, aromatic, and cetane limits in the LED rules and should be allowed to follow the implementation time lines of the federal EPA on-road and non-road diesel regulations instead. Direct Fuels commented that the commission should amend the LED rules to exempt transmix processors from the LED 15 ppm sulfur standard that is to take effect April 1, 2005, in the 110-county area that includes the diesel market of Direct Fuels.

The commission made changes to the rules to remove the sulfur requirements in §114.312 and therefore no action is needed to address these comments in regards to sulfur. The commission made no changes to the rules in response to the comments relating to controls on aromatics and cetane since it is the understanding of the commission that transmix operators can meet these requirements through the alternative methods of compliance allowed in the rule.

Direct Fuels commented that the commission should revise §114.317 to include a new subsection (e) exempting transmix processing operations from the LED rules and suggested the following language: "(e) The owner or operator of a transmix processing facility that separates transmix or other off-specification fuel is exempt from the provisions of this division (relating to Low Emission Diesel)."

The commenter requests an action that is beyond the scope of this rulemaking, as §114.317 was not amended in the proposed rulemaking that was published in the December 31, 2004, issue of the *Texas Register* (29 TexReg 12098). Furthermore, the commission believes that transmix operators can meet the LED requirements through the alternative methods of compliance allowed in the rule.

General Comments

TxOGA commented that it agreed that the flexibility offered in compliance through the various alternative compliance methods will help bring forward additional supply alternatives. TxOGA expressed concern with field level compliance. TxOGA expressed the belief that compliance with the rules is fully based on self-reporting, with no field level resources being committed to this area. TXOGA commented that the enforcement methodology applied to this rule seems to invite import or production of fuel that does not meet the standards but can easily hidden in a fungible system, and sees this as a major flaw in the rules.

The commission believes that the enforcement of these rules will be no different than any of the other fuel related rules that are currently being monitored and enforced by the commission. The commission made no changes to the rules in response to these comments.

FHR commented that the words, "that may ultimately" in §§114.6(14)(A), 114.312(a), and 114.319(a), (b), and (c), should be replaced with "that is intended to," since it is impossible for a wholesale fuel

supplier to know if the fuel's end use will be in a diesel compression-ignition engine or whether it will be used in a county that is subject to the LED rule.

The commission disagrees with this suggested change as it will make the rules extremely difficult to enforce. The language proposed in these comments would place the burden on the commission or EPA to prove intent in an enforcement action in order to show a violation. As the commission explained in response to a similar comment to the adoption of the LED rule on December 6, 2000, the rules are directed at producers and importers, and while they may not have control over the handling or use of the fuel once it leaves their possession, they generally know the area in which it is to be used, and how it will be used. This language puts the burden on a producer, importer, or supplier who is sending diesel fuel into areas in or near the covered counties to either ensure that noncompliant fuel is not meant for distribution in the covered area or ensure that the fuel complies with these rules. The commission made no change to the rule language in response to this comment.

TMRA/SWBI commented that the commission should give priority to the award of Texas Emissions Reduction Plan grant funds for a refueling infrastructure project regarding the use of the LED Program-approved Oryxe additive, given that it would provide important information for the commission as well as diesel consumers in the affected counties.

The commenter requests an action that is beyond the scope of this rulemaking, as Subchapter K (Mobile Source Incentive Programs) was not amended in the proposed rules that were published

in the December 31, 2004, issue of the *Texas Register* (29 TexReg 12098). The commission made no changes to the rules in response to this comment.

TMRA/SWBI commented that the commission has either not addressed or fully satisfied applicable statutory fiscal analysis requirements, including the Cost/Benefit Note requirement of Texas Government Code, §2001.024(a)(5) that requires costs and benefits to be estimated for each year of the first five years that the rules will be in effect.

The commission disagrees with this comment. This proposed rulemaking did not change the requirements to produce low emission diesel, which was established in an earlier rulemaking. The intent of the proposed rules was to extend the compliance deadline to October 1, 2005, and establish firm deadlines for producers to notify the commission whether or not they would produce low emission diesel. Production costs to meet LED standards of $.04 to $.08 per gallon were determined by staff to be valid cost estimates for the first five years the proposed rules will be in effect. Since a number of strategies can be employed by producers to meet LED standards, more precise estimates of production costs are not available. Alternative diesel fuel formulations may appear on the market and be approved by the executive director during the proposed deadline extension, which may give producers more flexibility in terms of production methods and costs.

Valero commented that the proposed §114.312(f)(1) allows alternative CARB certifications but does not automatically allow CARB diesel, i.e., diesel that meets 10 volume percent aromatics or alternative

certification of up to 21 volume percent aromatics if equivalent limits for other fuel parameters such as poly aromatic hydrocarbons, API gravity, cetane number, and nitrogen content are met. Valero further commented that to increase the potential supply of Texas LED, the commission should revise the proposed rules so that all CARB approved certified diesel fuel formulations as of January 18, 2005, will be considered to meet the requirements of Texas LED.

The commission made changes to the rule in response to these comments to amend §114.312(e) to allow diesel fuel that 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, to be considered in compliance with the requirements of §114.312(a).

SUBCHAPTER A: DEFINITIONS

§114.6

STATUTORY AUTHORITY

The amendment is adopted under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, that authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code. The amendment is also adopted 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 TCAA; §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; §382.202, 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 Texas LED as described in the SIP is not required prior to February 1, 2005, and authorizes the commission to consider alternative emission reduction plans to comply with Texas LED requirements; and §382.208, 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 adopted amendment implements Texas Water Code, §5.103 and §5.105, and Texas Health and Safety Code, §§382.002, 382.011, 382.012, 382.017, 382.019, 382.202, and 382.208.

§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 the TCAA, §3.2 and §101.1 of this title (relating to Definitions), the following words and terms, when used in Subchapter H of this chapter (relating to Low Emission Fuels), have the following meanings, unless the context clearly indicates otherwise.

(1) **Additive** - Any substance, other than one composed solely of carbon and/or hydrogen, 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 approved by and registered with the United States Environmental Protection Agency in accordance with 40 Code of Federal Regulations Part 79.

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

(3) **Bulk plant** - An intermediate motor vehicle fuel distribution facility where delivery of motor vehicle fuel to and from the facility is solely by truck or pipeline.

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

(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).

(7) **Diesel fuel** - Any fuel that is commonly or commercially known, sold, or represented as 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.

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

(9) **Further process** - To perform any activity on motor vehicle fuel, including distillation, treating with hydrogen, blending, or addition of an approved additive, for the purpose of bringing the motor vehicle fuel into compliance with the requirements of Subchapter H of this chapter.

(10) **Gasoline** - Any fuel that is commonly or commercially known, sold, or represented as gasoline, in accordance with ASTM Test Method D4814-99 (Standard Specification for Automotive Spark-Ignition Engine Fuel), dated 1999.

(11) **Import** - The process by which 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.

(12) **Import facility** - The stationary motor vehicle fuel transfer point wherein the importer takes delivery of imported motor vehicle fuel and from which imported 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 or retail fuel dispensing facility.

(13) **Importer** - Any person, except a person acting as a common carrier, who imports motor vehicle fuel.

(14) **Low emission diesel (LED)** - Any diesel fuel:

(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).

(15) **Motor vehicle** - Any self-propelled device powered by a gasoline fueled spark-ignition engine or a diesel fueled compression-ignition 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 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 engine or a diesel fueled compression-ignition 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 motor vehicle 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 and/or produces motor vehicle fuel.

(20) **Production facility** - A facility at which motor vehicle fuel is produced or that manufactures liquid fuels by distilling petroleum.

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

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

SUBCHAPTER H: LOW EMISSION FUELS

DIVISION 2: LOW EMISSION DIESEL

§§114.312, 114.314 - 114.316, 114.318, 114.319

STATUTORY AUTHORITY

The amendments are adopted 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 amendments are also adopted 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 TCAA; §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; §382.202, 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 Texas LED as described in the SIP is not required prior to February 1, 2005, and authorizes the commission to consider alternative emission reduction plans to comply with Texas LED requirements; and §382.208, 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 adopted amendments implement Texas Water Code, §5.103 and §5.105, and Texas Health and Safety Code, §§382.002, 382.011, 382.012, 382.017, 382.019, 382.202, and 382.208.

§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 engine in the affected counties, that does not meet either the low emission diesel (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 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, may be used to satisfy the requirements of subsection (a) of this section.

(f) Alternative diesel fuel formulations that the producer has demonstrated to the satisfaction of the executive director, through emissions and performance testing methods 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, volatile organic compounds, and particulate matter may be used to satisfy the requirements of subsections (b) and (c) of this section. 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.

§114.314. Registration of Diesel Producers and Importers.

(a) Each producer and importer that 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.

(c) Registration must be submitted on forms prescribed by the executive director and must include, at a minimum:

(1) 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 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) 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;

(5) any other information determined by the executive director to be necessary to determine the adequacy of diesel supply in the affected counties; and

(6) a signed statement of consent by the registrant that the executive director is permitted to collect samples and access documentation and records.

(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 the following supplementary methods, 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).

(2) The polycyclic 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).

(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).

(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.

(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) in accordance with the following procedures.

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

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

(B) test procedures consistent with the requirements of paragraphs (2) and (4) of this subsection;

(C) test data showing that the candidate fuel meets the specifications for the appropriate Grade No. 1-D S15 or S500, or Grade No. 2-D S15 or S500 diesel fuel as specified in the active version of ASTM D975 (Standard Specification for Diesel Fuel Oils), except for lubricity, and identifying the characteristics of the candidate fuel identified in paragraph (2) of this subsection;

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

(E) reasonable quality assurance and quality control procedures; 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. The tests must not be conducted until the protocol is approved by the executive director. Upon completion of the tests, the applicant may submit an application for certification to the executive director. The application must include the approved test protocol, all of the test data, a copy of the complete test log prepared in accordance with paragraph (4)(D) of this subsection, 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.

(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, and cetane number 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) The identity and concentration of each additive in the candidate fuel must be determined by a test method specified by the applicant and approved by the executive director to adequately determine the presence and concentration of the additive.

(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 CFR 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.

(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 the reference fuel and "C" is 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 the reference fuel and "C" is the candidate fuel:

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

(IV) Alternative 4: RR CCC RR (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); or

(V) Alternative 5: a sequence determined to provide equivalent results and approved by the executive director.

(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.

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

(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.

Figure: 30 TAC §114.315(c)(5)(C)

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

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 percent of $\bar{X}_R$ NO_x, and 2% of $\bar{X}_R$ for total hydrocarbons (THC), non-methane hydrocarbons (NMHC), and 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.

(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 United States Environmental Protection Agency (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 characteristics of the candidate fuel determined in accordance with paragraph (2) of this subsection.

(A) The approval notification must provide that the approved alternative diesel fuel formulation has the following specifications:

(i) a sulfur content, total aromatic hydrocarbon content, polycyclic aromatic hydrocarbon content, and nitrogen content not exceeding that of the candidate fuel;

(ii) a cetane number not less than that of the candidate fuel; and

(iii) presence of all additives that were contained in the candidate fuel, in a concentration not less than in the candidate fuel.

(B) All such characteristics must be determined in accordance with the test methods identified in subsection (a) of this section. 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, THC, NMHC, 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 to achieve comparable or better reductions in emissions of NO_x, THC, NMHC, 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, and 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, minimum concentration and 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 (relating to Monitoring, Recordkeeping, and Reporting Requirements).

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

§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 diesel fuel 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 low emission diesel (LED) must contain a statement declaring whether the aromatic hydrocarbon content of the sample conforms to the basic standard, to a designated alternative 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 (relating to Low Emission Diesel Standards), or whether the diesel fuel conforms to an alternative diesel fuel formulation approved under §114.312(f) of this title.

(c) Each producer or importer of a diesel fuel that conforms to §114.312(a) - (e) of this title 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). The producer or importer shall maintain, for two years from the date of each sampling, records showing the sample date, identity of blend sampled, container or other vessel sampled, final blend volume, and the aromatic hydrocarbon content and minimum cetane number. 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.

(d) Each producer or importer of a 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 §80.510, 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.

(g) All parties in the distribution chain (producer, importer, terminals, pipelines, truckers, rail carriers, and retail fuel dispensing outlets) subject to the provisions of §114.312 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:

(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, 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.

(i) Each producer or importer 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 the calendar quarter. The quarterly report must provide, at a minimum, 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.

(j) Each producer or importer electing to sell, offer for sale, supply, or offer to supply LED under §114.312(e) of this title shall provide to the executive director, as applicable, a copy of the executive order issued by the 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 volume of additive (if any) utilized by the producer to produce diesel fuel that is subject to the provisions of the alternative emission reduction plan as approved by the executive director and the identity of the additive and additive manufacturer.

§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, that contains a substitute fuel strategy and that is approved by the executive director and the United States Environmental Protection Agency (EPA) will

be considered in compliance with the requirements of §114.312(a) of this title (relating to Low Emission Diesel Standards).

(b) 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, and specify a substitute fuel strategy that will achieve equivalent reductions.

(c) Early reductions may be deemed to be equivalent by the executive director and the EPA.

(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.

§114.319. Affected Counties and Compliance Dates.

(a) Affected persons in the counties listed in subsection (b) of this section shall 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 applicable, for diesel fuel that may ultimately be used to power a diesel-fueled compression-ignition engine in a motor vehicle or in non-road equipment.

(b) The following counties 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) Affected persons 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.