

The Texas Commission on Environmental Quality (TCEQ or commission) proposes amendments to §§114.6, 114.312, 114.314 - 114.316, 114.318, and 114.319.

The amended sections are proposed to be submitted to the United States Environmental Protection Agency (EPA) as revisions to the state implementation plan (SIP).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

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 proposal implements the commission's direction in response to the petition for rulemaking.

The commission proposes to amend these rules to postpone the compliance date to October 1, 2005.

The commission also proposes 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 proposes 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 proposed 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 proposes to update several references included in the rules and to delete several 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 are intended to 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.

The commission is also seeking comment on how it can better estimate the projected supply and demand for compliant diesel in the affected areas. To estimate demand, staff have relied on information supplied by the Energy Information Administration and the Office of the Comptroller on diesel sales statewide in Texas. These figures have been multiplied by the proportion of population in the affected counties to the entire state populations to determine the size of the diesel market in the HGB, DFW, and regional areas. To evaluate the likely supply, staff have relied upon the market share data and estimated production submitted under alternative emission reduction plans. Staff have also received data from registered producers and importers on TxLED and TxLED-equivalent formulations. The commission is soliciting comment on how these methods of projecting supply and demand can be improved, and on how and where better information may be obtained on supply and demand.

SECTION BY SECTION DISCUSSION

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

The proposed amendment to §114.6, Low Emission Fuel Definitions, contains revisions to the definition of diesel fuel. The proposed 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 proposed 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.

The proposed amendment to §114.312, Low Emission Diesel Standards, amends subsection (f), concerning the automatic acceptance of diesel fuel approved by the California Air Resources Board (CARB), to clarify that, to satisfy the requirements of subsection (a), a formulation must have been approved by an executive order of the CARB as of the effective date of the rule's revision in January 2001, rather than at the time the fuel is produced. Formulations approved after the effective date of the January 2001 revision could be approved under revised subsection (g). Proposed revisions to subsection (g) would provide the executive director additional discretion when evaluating and accepting diesel fuel formulations approved by the CARB. Under these proposed revisions, a producer of an alternative diesel fuel formulation would now be subject to subsection (g). The sole 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 proposed revisions, any producer of an alternative diesel 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 for consideration in satisfying the emission and performance testing requirements in §114.315(c) and (d) as required by subsection (g). 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 proposed 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 to register with the executive director no later than May 1, 2005. The language now in §114.314 only requires those producing and importing LED to register. This proposed 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 proposed to be restructured into subsections and paragraphs. Proposed new subsection (b) is added to require producers and importers that are new to the market in the listed counties, after December 1, 2004, to register at least 30 days prior to the first date of providing diesel fuel for use in the listed counties. Proposed new subsection (c) moves current language regarding the prescribed forms for registration to its own subsection. This proposed subsection also includes added language specifying what information the producer or importer must provide in the registration.

The proposed amendment to §114.315, Approved Test Methods, revises subsection (a) to delete paragraphs (1) through (9) relating to the test method requirements for sulfur content, aromatic hydrocarbon content, cetane number, polycyclic aromatic hydrocarbon content, nitrogen content, gravity index, viscosity, flashpoint, and distillation temperatures and to substitute a reference to the procedures and methods in ASTM D975, which is the standard specification for diesel fuel oils. This

proposed revision is necessary to ensure the use of the most accurate testing methods and to promote consistency with widely recognized national standards.

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

The proposed amendment to §114.315(c) clarifies and updates existing references and provides additional flexibility in the testing of alternative formulations. The proposed revision to §114.315(c)(1)(C) would clarify the diesel grades and sulfur content of the reference fuel for the testing of alternative formulations. Proposed 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 are intended to ensure the use of the most accurate and up-to-date testing methods or procedures by ASTM or EPA. The proposed revision to §114.315(c)(4)(C) provides additional flexibility in the testing of new diesel formulations under §114.312(g) by adding a new test sequence in proposed clause (iii) and allowing other test sequences to be approved at the discretion of the executive director in proposed clause (iv). The proposed 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.

The proposed amendment to §114.315(d) eliminates a reference to EPA and also 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 most extensive revision proposed in §114.315(d) is the added requirements for what must be included in the application for approval of alternative diesel fuel formulations using additives. Proposed 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. Proposed new paragraph (2) outlines what will be included in the executive director's approval notification of an alternative diesel fuel formulation. The proposed paragraph would require an approval notification to identify the total aromatic hydrocarbon content, cetane number, and other parameters, as appropriate, and in accordance with the test methods identified in §114.315(a). For alternative diesel fuel formulations using additives, the proposed paragraph would require 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). Proposed 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 proposed amendment to §114.316, Monitoring, Recordkeeping, and Reporting Requirements, revises subsection (b) to clarify the sampling and testing intervals for the producer or importer of LED

by deleting the term "each final blend" and replacing it with "at the rate of one sample and test per 100,000 gallons of LED produced." The proposed revision to subsection (c) would also alter the frequency and compounds required to be analyzed to ensure appropriate sampling for additive-based alternative formulations. The proposed revision to subsection (e) provides alternative certification statements depending on the type of fuel produced or supplied. The proposed new subsection (i) will now require those producers with an approved alternative emission reduction plan to submit quarterly reports, including diesel fuel and additive volumes. These quarterly reports will provide needed enforcement requirements that were previously not detailed in §114.318 but simply included as language "contain adequate enforcement provisions," which will now be deleted.

The proposed amendment to §114.318, Alternative Emission Reduction Plan, restructures the section into four subsections for added clarity and revises language. Proposed subsection (a) states that an approved alternative emission reduction plan will only satisfy the requirements of §114.312(a) and not the entire division. Proposed 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 proposed revisions in §114.316(i), which added needed enforcement requirements that were previously not detailed in §114.318, the language "contain adequate enforcement provisions," will now be deleted. Proposed subsection (c) contains the current language on applicant's use of early reductions. Finally, proposed 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 proposed amendment to §114.319, Affected Counties and Compliance Dates, extends the compliance date of April 1, 2005, to October 1, 2005. This revision is intended to allow 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, and 114.318, should enable the commission to more accurately analyze the supply of diesel fuel to the affected counties.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Grants Management Section, has determined that for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency or other units of state or local governments as a result of administration or enforcement of the proposed rules. However, state agencies or local governments that purchase diesel fuel in the HGB, DFW, and BPA nonattainment areas, as well as the other 95 counties affected by the proposed rulemaking, would experience a delay in any cost increases for the purchase of diesel by six months, which could result in a more positive cash flow and possible budget flexibility.

Under the current rules, suppliers of diesel to the affected area must comply with LED fuel standards starting April 1, 2005. The proposed rules would extend this deadline to October 1, 2005. Under the proposed rules, suppliers, producers, and importers of LED would have until October 1, 2005, to produce or import diesel fuel complying with LED standards for the HGB, DFW, and BPA nonattainment areas, as well as 95 counties bordering Interstates 35 and 37 and to the north and east of

those highways. The proposed rules would also establish May 1, 2005, as a firm, mandatory deadline for producers to notify the commission whether or not they will be producing LED fuel. The proposed rulemaking specifies the tests that demonstrate compliance with LED standards and procedures to be used if alternative diesel fuel formulations are to be approved by the executive director.

The costs projected for implementing the current rules were an increase in production costs of \$.04 to \$.08 per gallon for LED. This proposed rulemaking allows flexibility in meeting the LED fuel standards and could possibly result in lower production and retail costs depending on the options chosen for rule compliance.

PUBLIC BENEFITS AND COSTS

Ms. Chamness also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed deadline extension will be the possible development or approval of alternative diesel fuel formulations or additives that may be less costly to produce and to purchase. The public will experience the loss of the LED strategy during the 2005 ozone season. However, the proposed rules will not affect the attainment date of 2007.

Under the current rules, production costs of meeting LED standards were projected at \$.04 to \$.08 per gallon. Entities that could decide to produce fuels meeting the LED standards, could see this cost decrease depending on whether they choose to employ the commission approved alternate formulations of LED or other commission approved fuel strategies. The buying public may not experience higher

fuel costs as soon as projected under the current rules. Under the proposed rules, cost increases for LED may not be as severe as those originally projected.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications from this proposed rulemaking are anticipated for small or micro-businesses. Currently, there are no diesel fuel producers or importers that would be considered small or micro-businesses. If production costs decrease because of added flexibility in producing fuel complying with the LED standards, retailers may see a decrease in their costs to purchase the fuels for resale. If the deadline for complying with LED standards is extended, retailers may find that their costs to purchase diesel fuel may not rise as quickly or as much as anticipated. The strategies employed by producers and importers of diesel fuel to produce and price a fuel complying with the LED standards will determine the cost that retailers pay for the fuel they sell.

LOCAL EMPLOYMENT IMPACT STATEMENT

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

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking considering the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking does not meet the definition of a “major environmental rule.” A major environmental rule means a rule, the specific intent of which

is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The proposed amendments to §§114.6, 114.312, 114.314 - 114.316, 114.318, and 114.319 would extend the compliance date for the LED standards by six months. In addition, the rulemaking could enhance enforcement of and provide 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 proposed amendments to Chapter 114 are not subject to the regulatory analysis provisions of §2001.0225(b), because the proposed 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 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 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 proposed rulemaking does not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, nor is it adopted solely under the general powers of the agency. 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 proposed rulemaking does not meet any of the four applicability requirements. The commission invites public comment on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission completed a takings impact analysis for the proposed 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. If adopted, the amendments would extend the compliance date for the LED standards by six

months. In addition, the rulemaking would enhance enforcement of and provide 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 proposed 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 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 ozone standard will eventually require substantial reductions in NO_x emissions as well as volatile organic compound emissions. This rulemaking is only one step among many necessary for attaining the one-hour ozone standard.

In addition, Texas Government Code, §2007.003(b)(13), states that Chapter 2007 does not apply to an action that: 1) is taken in response to a real and substantial threat to public health and safety; 2) is designed to significantly advance the health and safety purpose; and 3) does not impose a greater burden than is necessary to achieve the health and safety purpose. Although the rules do not directly prevent a nuisance or prevent an immediate threat to life or property, they do prevent a real and substantial threat to public health and safety and significantly advance the health and safety purpose. This action is taken in response to the HGB, BPA, and DFW areas exceeding the federal one-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 proposed 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 proposed rules do not constitute a takings under Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined the proposed rulemaking relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 *et seq.*), and the commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the Texas Coastal Management Program. As required by 30 TAC §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to actions and rules subject to the CMP, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this action for consistency with the CMP

goals and policies in accordance with the regulations of the Coastal Coordination Council and determined that the proposed amendments are consistent with the applicable CMP goal expressed in 31 TAC §501.12(1) of protecting and preserving the quality and values of coastal natural resource areas, and the policy in 31 TAC §501.14(q), which requires that the commission protect air quality in coastal areas. The proposed rulemaking and SIP revision will ensure that the amendments comply with 40 Code of Federal Regulations (CFR) Part 50, National Primary and Secondary Air Quality Standards, and 40 CFR Part 51, Requirements for Preparation, Adoption, and Submittal of Implementation Plans. This rulemaking action is consistent with CMP goals and policies, in compliance with 31 TAC §505.22(e).

The commission solicits comments on the consistency of the proposed amendments with the CMP during the public comment period.

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.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on January 18, 2005, at 2:00 p.m. in Building F, Room 2210, at the commission's central office located at 12100 Park 35 Circle. The

hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. A time limit may be established at the hearing to assure that enough time is allowed for every interested person to speak. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes before the hearing and will answer questions before and after the hearing.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the hearing should contact the Office of Environmental Policy, Analysis, and Assessment at (512) 239-4900. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Comments may be submitted to Lola Brown, Office of Environmental Policy, Analysis, and Assessment, Texas Commission on Environmental Quality, MC 205, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. All comments should reference Rule Project Number 2005-008-114-AI. Comments must be received by 5:00 p.m., January 18, 2005. Copies of the proposed rules can be obtained from the commission's website at <http://www.tnrcc.state.tx.us/oprd/rules/propadop.html>. For further information, please contact Clifton Wise, Policy and Regulations Division, at (512) 239-2263 or Scott Carpenter, Technical Analysis Division, at (512) 239-1757.

SUBCHAPTER A: DEFINITIONS

§114.6

STATUTORY AUTHORITY

The amendment is proposed 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 proposed under Texas Health and Safety Code, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the 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 proposed 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) [the 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 [which] are defined by the TCAA, §3.2 [of this title (relating to Definitions)], 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), [shall] 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 [EPA] in accordance with 40 Code of Federal Regulations Part 79.

(2) - (6) (No change.)

(7) **Diesel fuel** - Any fuel that is commonly or commercially known, sold, or represented as Grade No. [diesel fuel Number] 1-D or Grade No. [Number] 2-D diesel fuel, in accordance with the active version of [the] American Society for Testing and Materials (ASTM) D975 [Test Method D975-98b] (Standard Specification for Diesel Fuel Oils)[, dated 1998].

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

(9) - (13) (No change.)

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

(A) sold, intended for sale, or made available for sale that [which] 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) - (C) (No change.)

(15) - (16) (No change.)

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

(18) **Produce** - Perform the process to convert liquid compounds that [which] 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) - (22) (No change.)

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 proposed under Texas Water Code, §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code. The amendments are also proposed under Texas Health and Safety Code, §382.002, concerning Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the 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 proposed 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 [which] 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) - (d) of this section, or the requirements of subsection (f) [or (g)] of this section.

(b) Sulfur content.

(1) The maximum sulfur content of LED must [shall] not exceed 500 parts per million (ppm) by weight per gallon in the counties specified in §114.319 [§114.319(a) and (b)] of this title.

(2) The maximum sulfur content of LED must [shall] not exceed 15 ppm by weight per gallon in accordance with the counties and compliance date specified in §114.319(c) of this title.

(c) 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) (No change.)

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

(d) (No change.)

(e) Subsection (a) of this section does [shall] 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.

(f) Diesel fuel that [which] 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 that was in effect as of January 18, 2001, may be used to satisfy the requirements of subsection (a) of this section.

(g) Alternative diesel fuel formulations that [which] the producer has demonstrated to the satisfaction of the executive director [and the EPA], 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 (c) and (d) 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. [The commission recognizes that fuel content specifications, additive formulation, and testing technology often include factors that can reasonably be considered proprietary or confidential. Therefore, proprietary] Proprietary or confidential information supplied by the producer for evaluation of an alternative diesel fuel formulation must be identified as such when submitted. Decisions regarding confidentiality will be made subject to the Texas Public Information Act, Texas Government Code, Chapter 552.

§114.314. Registration of Diesel Producers and Importers.

(a) Each producer and importer that sells, offers for sale, supplies, or offers for supply from its production facility or import facility [low emission] diesel fuel that [(LED) which] may ultimately be used in counties listed in §114.319 of this title (relating to Affected Counties and Compliance Dates) on or before December 1, 2004, shall register with the executive director by May 1, 2005 [December 1, 2004 to begin production or importation of LED April 1, 2005. Those producers or importers not registered by December 1, 2004, may not begin production or importation of LED until after April 30,

2005, and registration must occur within 30 days after the first date that such person will produce or import LED].

(b) Each producer or importer that did not begin to sell, offer for sale, supply, or offer to supply from its production facility or import facility diesel fuel that may ultimately be used in counties listed in §114.319 of this title until after December 1, 2004, 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 [shall] be on forms prescribed by the executive director and must [shall] include:

(1) a statement indicating whether the producer or importer will or will not be producing or importing 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 acceptance of the standards and enforcement provisions of this division; and

(3) [shall include] a statement of consent by the registrant that the executive director is [shall be] permitted to collect samples and access documentation and records.

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

§114.315. Approved Test Methods.

(a) Compliance with the low emission diesel (LED) fuel content requirements of §114.312 of this title (relating to Low Emission Diesel Standards) must [shall] be determined by applying the [following] test methods and procedures specified in the active version of American Society for Testing and Materials (ASTM) D975 (Standard Specification for Diesel Fuel Oils), as appropriate.

[(1) The sulfur content of low emission diesel (LED) shall be determined by the American Society for Testing and Materials (ASTM) Test Method D2622-98 (Standard Test Method for Sulfur in Petroleum Products by Wavelength Dispersive X-ray Fluorescence Spectrometry), dated 1998.]

[(2) The aromatic hydrocarbon content of LED shall be determined by ASTM Test Method D5186-99 (Standard Test Method for Determination of Aromatic Content and Polynuclear Aromatic Content of Diesel Fuels and Aviation Turbine Fuels by Supercritical Fluid Chromatography), dated 1999.]

[(3) The cetane number of LED shall be determined by ASTM Test Method D613-95 (Standard Test Method for Cetane Number of Diesel Fuel Oil), dated 1995.]

[(4) The polycyclic aromatic hydrocarbon content of LED shall be determined by ASTM Test Method D2425-99 (Standard Test Method for Hydrocarbon Types in Middle Distillates by Mass Spectrometry), dated 1999.]

[(5) The nitrogen content of LED shall be determined by ASTM Test Method D4629-96 (Standard Test Method for Trace Nitrogen in Liquid Petroleum Hydrocarbons by Syringe/Inlet Oxidative Combustion and Chemiluminescence Detection), dated 1996.]

[(6) The American Petroleum Institute (API) gravity index of LED shall be determined by ASTM Test Method D287-92 (Standard Test Method for API Gravity of Crude Petroleum and Petroleum Products (Hydrometer Method)), dated 1995.]

[(7) The viscosity of LED shall be determined by ASTM Test Method D445-97 (Standard Test Method for Kinematic Viscosity of Transparent and Opaque Liquids (the Calculation of Dynamic Viscosity)), dated 1997.]

[(8) The flashpoint of LED shall be determined by ASTM Test Method D93-99c (Standard Test Methods for Flash-Point by Pensky-Martens Closed Cup Tester), dated 1999.]

[(9) The distillation temperatures of LED shall be determined by ASTM Test Method D86-00 (Standard Test Method for Distillation of Petroleum Products at Atmospheric Pressure), dated 2000.]

(b) Modifications to the testing methods and procedures in this section may be approved by the executive director. [Alternatives to the test methods prescribed in subsection (a) of this section may be used if validated by [Title 40 Code of Federal Regulations (CFR), Part 63, Appendix A (related to Test Methods), Method 301 (related to Field Validation of Pollutant Measurement Methods from Various Waste Media), dated December 29, 1992. For the purposes of this subsection, substitute "executive director" in each location that Test Method 301 references "administrator."]

(c) The executive director, upon application of any producer or importer, may approve alternative diesel fuel formulations as prescribed under §114.312(g) of this title in accordance with the following procedures.

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

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

(B) (No change.)

(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 [Number 1-D or 2-D] diesel fuel as specified in [ASTM D975-98b (Standard Specification for Diesel Fuel Oils), dated 1998,] the

active version of ASTM D975 (Standard Specification for Diesel Fuel Oils), 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 [specifications] identified in paragraph (3) of this subsection;

(E) (No change.)

(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 [shall] 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 [shall] 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 [shall] 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 [shall] 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 [shall] 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 [that if] 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 [shall] be produced from straight-run diesel fuel by a hydrodearomatization process and must [shall] have the following characteristics determined in accordance with the referenced test method specified in subsection (a) of this section:

(A) - (I) (No change.)

(4) Exhaust emission tests using the candidate fuel and the reference fuel specified in paragraph (3) of this subsection must [shall] be conducted in accordance with the federal test procedures as specified in [Title] 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 [dated 1998].

(A) The tests must [shall] 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 [shall] be conducted by a third party [third-party or third-parties] that is [are] 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 [conduct] a minimum of five exhaust emission tests are conducted on the engine with each fuel, using either of the following sequences, where "R" is the reference fuel and "C" is the candidate fuel:

(i) RC, RC, RC, RC, RC (and continuing in the same order); [or]

(ii) RC, CR, RC, CR, RC (and continuing in the same order);

(iii) RRRRR, CCCCC (and continuing in the same order); or

(iv) a sequence determined to be equivalent and approved by the executive director.

(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 [shall] identify the days that [on which] the tests will be conducted, and must [shall] 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 [which] 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. [The party conducting the tests or the applicant shall notify the executive director by telephone and in writing of any unscheduled interruption resulting in a test delay of 48 hours or more, and of the reason for such delay. Prior to restarting the test, the applicant or person conducting the tests shall provide the executive director with a revised schedule for the remaining tests.] 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 [shall] 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), volatile organic compounds (VOC), and particulate matter (PM) must [shall] be measured.

(5) The average emissions during testing with the candidate fuel must [shall] 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 [shall] issue a certification in accordance with this paragraph only if the executive director [he or she] makes all of the following determinations:

(A) the average individual emissions of NO_x, VOC, and PM, respectively, recorded during testing with the candidate fuel are comparable or better than [do not exceed] the average individual emissions of NO_x, VOC, 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 [which] would not be emitted by such engines operating without the additive.

(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 [shall] 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 [shall] identify all of the characteristics of the candidate fuel determined in accordance with paragraph (2) of this subsection.

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

(i) - (iii) (No change.)

(B) All such characteristics must [shall] be determined in accordance with the test methods identified in subsection (a) of this section. The approval notification must [shall] assign an identification number to the specific approved alternative diesel fuel formulation.

(d) Notwithstanding subsection (c) of this section, the executive director, upon application of any producer or importer, may approve alternative diesel fuel formulations as prescribed under §114.312(g) of this title that [which] may be used to satisfy the requirements of §114.312(c) and (d) of this title if [the formulations are intended only for use in non-road equipment and, through emissions and performance testing with supporting data,] the producer or importer has demonstrated to the satisfaction of the executive director that the formulation will achieve [and the EPA as achieving] comparable or better reductions in emissions of NO_x, VOC, 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, VOC, 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, and the minimum specifications of the base fuel used in the approved formulation and as determined by the test method identified in paragraph (1) of this subsection.

(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 low emission diesel fuel (LED) in counties listed in §114.319 of this title (relating to Affected Counties and Compliance Dates) is subject to the requirements of this section. Under these requirements LED that [which] has been produced or imported must conform with the standards for sulfur content, aromatic hydrocarbon content, and minimum cetane number as specified in §114.312 of this title (relating to Low Emission Diesel Standards) or other standards, including the type and concentration of additive as specified in accordance with §114.312(g) of this title. All records relating to 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 specified in a Certified Diesel Fuel Formulation as approved by an executive order issued by the California Air Resources Board (CARB) as accepted under §114.312(f) of this title, or whether the diesel fuel conforms to an alternative diesel fuel formulation approved under §114.312(g) of this title.

(b) Each producer or importer of a diesel fuel that conforms to §114.312(a) - (f) of this title shall sample and test for the sulfur content, aromatic hydrocarbon content, and minimum cetane number in the [each final blend of] LED that [which] the producer or importer has produced or imported, by

collecting and analyzing a representative sample of diesel fuel taken [from the final blend,] at a rate of one sample and test per 100,000 gallons of LED produced using the methodologies specified in §114.315 of this title (relating to Approved Test Methods). [If a producer or importer blends diesel fuel components directly to pipelines, tank ships, railway tank cars, or trucks and trailers, the loading(s) shall be sampled and tested for the sulfur content, aromatic hydrocarbon content, and minimum cetane number by the producer or importer or authorized contractor.] 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 sulfur content, 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 [shall] 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.

(c) Each producer or importer of a diesel fuel that conforms to §114.312(g) of this title shall sample and test for the sulfur content and other appropriate components of the alternative diesel fuel formulation as approved by the executive director in the [each final blend of] LED that [which] the producer or importer has produced or imported, by collecting and analyzing a representative sample of diesel fuel taken at a rate of one sample and test per 100,000 gallons of LED produced [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 [shall] be sampled and tested for the sulfur content and other 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 50,000 gallons of LED produced. 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 each sampling, records showing the sample date, identity of blend sampled, container or other vessel sampled, final blend volume, and the sulfur content and other appropriate fuel components. 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 [shall] 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) 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 five 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 [shall] be presumed to have been sold by the producer or importer in violation of the standards specified in §114.312 of this title, to which the producer or importer has elected to be subject.

(e) 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 [must] 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 [EPA], or local air pollution agency having jurisdiction in the area. The product transfer documents must contain, at a minimum, the following information:

(1) - (6) (No change.)

(7) one of the following certification statements, as appropriate [statement]:

(A) “This product complies with the requirements for low emission diesel fuel specified in Title 30 Texas Administrative Code, §114.312 and may be used in any Texas county requiring the use of low emission diesel fuel in compression-ignition engines.”; or

(B) “This product may only be used for the purpose of producing low emission diesel fuel specified in Title 30 Texas Administrative Code §114.312 and may not be used in any Texas county requiring the use of low emission diesel fuel in compression-ignition engines without a further process that may be required to comply with the requirements of Title 30 Texas Administrative Code, §114.312.”; or

(C) “This product has been produced in compliance with a TCEQ approved alternative emission reduction plan as allowed under Title 30 Texas Administrative Code, §114.318 and may be used in any Texas county requiring the use of low emission diesel fuel in compression-ignition engines.”; and

(8) (No change.)

(f) For each final blend that [which] is sold or supplied by a producer or importer from the party's production facility or import facility, and that [which] 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) [persons(s)] from whom such diesel fuel was acquired, the date(s) that [on which] it was acquired, and the invoice(s) representing the acquisition(s).

(2) (No change.)

(3) A producer or importer subject to this subsection [(f) of this section] 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.

(g) 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 [report on each final blend and a] quarterly summation report to the executive director no later than the 15th day [fifteenth] of the month following the end of the calendar quarter. The quarterly report must [on each final blend shall] provide, at a minimum, the information required to be collected by subsections (b), (c), and (f) of this section and a [. The quarterly report shall provide, at a minimum,] reconciliation of the quarter's transactions relative to the requirements of subsections (b), (c), and (f) of this section. Updates or revisions to estimated transaction volumes required by subsections (b) and (c) of this section must [shall] be included in this report.

(h) (No change.)

(i) 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 provide a quarterly report to the executive director no later than the 15th day of the month 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.

[(i) Each producer or importer electing to sell, offer for sale, supply, or offer to supply LED under §114.312(f) of this title shall sample and test for the polycyclic aromatic hydrocarbon content and nitrogen content in each final blend of LED which the producer or importer has produced or imported using the fuel specifications for polycyclic aromatic hydrocarbons and nitrogen set by the executive order issued by the CARB for the Certified Diesel Fuel Formulation used to produce the LED, 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 and shall include a record of these tests in the report required by subsection (g) of this section.]

§114.318. Alternative Emission Reduction Plan.

(a) Diesel fuel that [which] is sold, offered for sale, supplied, or offered for supply by a producer who submits [by January 31, 2003] an alternative emission reduction plan, that [which] contains a substitute fuel strategy and that [which] is approved by the executive director and the United States Environmental Protection Agency (EPA) [EPA no later than May 31, 2003,] will be considered in compliance with the requirements of §114.312(a) of this title (relating to Low Emission Diesel Standards) [this division].

(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[, and contain adequate enforcement provisions].

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

(d) An alternative emission reduction [The executive director may allow plans to be submitted after January 31, 2003; however any] plan must be approved by the executive director prior to the use of that plan for compliance with the requirements of this section [division].

§114.319. Affected Counties and Compliance Dates.

(a) Beginning October [April] 1, 2005, affected persons in the counties listed in subsection (b) of this section shall be in compliance, as applicable, with §§114.312 - 114.317 of this title (relating to Low Emission Diesel Standards; Designated Alternate Limits; Registration of Diesel Producers and Importers; Approved Test Methods; Monitoring, Recordkeeping, and Reporting Requirements; and Exemptions to Low Emission Diesel Requirements) for [that] diesel fuel that [which] may ultimately be used to power a diesel-fueled compression-ignition engine in a motor vehicle.

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

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

(2) - (3) (No change.)

(4) Anderson, Angelina, Aransas, Atascosa, Austin, Bastrop, Bee, Bell, Bexar, Bosque, Bowie, Brazos, Burleson, Caldwell, Calhoun, Camp, Cass, Cherokee, Colorado, Comal, Cooke, Coryell, De Witt, Delta, [Ellis,] Falls, Fannin, Fayette, Franklin, Freestone, Goliad, Gonzales, Grayson, Gregg, Grimes, Guadalupe, Harrison, Hays, Henderson, Hill, Hood, Hopkins, Houston, Hunt, Jackson, Jasper, [Johnson,] Karnes, [Kaufman,] Lamar, Lavaca, Lee, Leon, Limestone, Live

Oak, Madison, Marion, Matagorda, McLennan, Milam, Morris, Nacogdoches, Navarro, Newton, Nueces, Panola, [Parker,] Polk, Rains, Red River, Refugio, Robertson, [Rockwall,] Rusk, Sabine, San Jacinto, San Patricio, San Augustine, Shelby, Smith, Somervell, Titus, Travis, Trinity, Tyler, Upshur, Van Zandt, Victoria, Walker, Washington, Wharton, Williamson, Wilson, Wise, and Wood.

(c) Beginning June 1, 2006, affected persons in the counties listed in subsection (b) of this section shall be in compliance with §114.312(b)(2) of this title for [that] diesel fuel that [which] may ultimately be used to power a diesel-fueled compression-ignition engine in a motor vehicle or in non-road equipment.