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

Amended §114.6 is adopted *with change* to the proposed text as published in the March 23, 2012, issue of the *Texas Register* (37 TexReg 2012). Sections 114.312, and 114.314 - 114.319; the repeal of §114.313; and new §114.313 are adopted *without changes* to the proposed text and will not be republished.

The adopted revisions will be submitted to the United States Environmental Protection Agency (EPA) as a revision to the state implementation plan (SIP).

Background and Summary of the Factual Basis for the Adopted Rules

The current state regulations for Texas low emission diesel (TxLED) under Chapter 114 require that all diesel as defined under §114.6 that is sold or supplied for use in a compression-ignition engine operating in any of the 110 central and eastern Texas counties listed in §114.319 must comply with the specifications for aromatic hydrocarbons and cetane number as listed in §114.312 or one of the other compliance options listed under this section. This regulation includes all diesel used as fuel for on-road motor vehicles and non-road equipment. The TxLED regulations also apply to marine distillate fuels, i.e., Marine Distillate fuel X (DMX), Marine Distillate fuel A

(DMA), and Marine Gas Oil (MGO), when these marine distillate fuels are used in the 1997 Houston-Galveston-Brazoria (HGB) ozone nonattainment area counties of Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller. Diesel producers are also allowed to produce TxLED in accordance with an alternative emission reduction plan (AERP) as specified under §114.318. TxLED producers and importers are required to register with the TCEQ as specified under §114.314 and to submit quarterly reports to the TCEQ as specified under §114.316. There are 112 producers and importers currently registered under the TxLED program. The total nitrogen oxides (NO_X) emission reduction benefit from TxLED in 2018 from all 110 counties currently regulated is estimated to be approximately 5.62 tons per day (tpd) from on-road vehicle use and 7.54 tpd from non-road equipment use. The estimated NO_X emission reduction benefit in 2018 from TxLED marine diesel in the 1997 eight-county HGB ozone nonattainment area is approximately 0.89 tpd.

The adopted rulemaking will address the following issues.

Alternative Diesel Formulations

The TCEQ has currently approved 20 alternative diesel formulations in accordance with the testing requirements specified under §114.315 that producers and importers may use to produce TxLED, with 18 of these formulations requiring the use of a diesel additive. All but one of the additive-based alternative diesel formulations for TxLED were

approved under the testing procedures specified under §114.315(c). In 2011, approximately 52% of all TxLED was reported to have been produced using the additive-based alternative diesel formulations approved by the TCEQ. Approximately 30% of all TxLED in 2011 was reported to have been produced using an additive-based alternative diesel formulation for California diesel approved by the California Air Resources Board (CARB) that producers are allowed to use under §114.312(e) to produce TxLED.

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

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

The adopted rulemaking will remove the alternative diesel fuel formulation test procedures in §114.315(c) and the option under §114.315(d) for allowing the testing of these formulations through the EPA's Environmental Technology Verification (ETV) Program, which the EPA has discontinued. The other approval option currently specified under §114.315(d), which specifies criteria for using the Unified Model that was developed by the EPA specifically for the TxLED program, will remain as the only TCEQ method for approving alternative diesel formulations. Acceptance of alternative diesel formulations approved by CARB as allowed under §114.312(e) will also continue. The adopted rulemaking will greatly lessen the TCEQ's fiscal and staff resource needs in the physical testing aspects of the alternative diesel formulation approval process without significantly limiting TxLED compliance options.

Designated Alternative Limits

The current TxLED regulations specified in §114.312(e) allow diesel fuel produced to comply with specific California regulations for diesel fuel to be used for compliance with the TxLED requirements including diesel fuel produced under the designated equivalent limits specified under Title 13 California Code of Regulations (13 CCR) §2282(h)(1). Although this subsection was adopted in March 2005, it does not appear that many producers in Texas are taking advantage of the flexibility provided by these parameters. The adopted rulemaking will repeal the current rules in §114.313 and simultaneously adopt a new §114.313 that will establish new designated alternative limits with the same

fuel property limits specified in 13 CCR §2282(h)(1) that producers may use to produce TxLED. This adopted action will provide further clarification of an underutilized flexibility in the TxLED program while ensuring equivalent emission reductions.

Alternative Emission Reduction Plans

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

Administrative

The current TxLED regulations contain several administrative compliance deadlines that have expired and other administrative requirements relating to registration and reporting that are outdated or need further clarification. The adopted rulemaking will revise definitions in §114.6 to clarify that only the person or company that owns or operates the production facility that is producing the final blend of diesel fuel is considered a producer and is therefore required to register and comply with the other

TxLED requirements. In addition, the adopted rulemaking will revise the registration requirements in §114.314 to remove expired provisions and to add new requirements for the registration of production and import facilities. The adopted rulemaking will also make other clarifying changes to the administrative provisions of the rules as needed for accuracy and consistency.

Section by Section Discussion

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

§114.6, Low Emission Fuel Definitions

The adoption will amend §114.6 to remove the definition of designated alternative limit as needed for consistency with adopted new §114.313; remove the definition of motor vehicle fuel; renumber and revise the definitions of bulk plant, bulk purchaser/consumer, further process, import, import facility, importer, produce, producer, and production facility to replace the term, "motor vehicle fuel," with the terms, "gasoline" or "diesel fuel," as needed for consistency and to make other changes to these terms as needed to clarify that only the person or company that owns or operates the production facility that is producing the final blend of diesel fuel is considered a producer and is therefore required to register and comply with all TxLED

requirements. The adoption will also make changes to clarify the definitions of additive, diesel fuel, final blend, gasoline, low emission diesel, motor vehicle, non-road equipment, and retail dispensing outlet.

In response to public comment, the adoption will make additional changes to the definition of additive in §114.6(1)(B) to further clarify that only those substances that have been added to diesel fuel for the purpose of producing TxLED would be considered additives under the TxLED program. Also in response to public comment, the adoption will further amend the definitions of motor vehicle in §114.6(14) and non-road equipment in §114.6(15) to revise the relevant Texas Transportation Code (TTC) citations from TTC, §502.002 to TTC, §502.040 and from TTC, §502.006 to TTC, §502.140. These citation changes are needed in order to reflect the renumbering of the statute as directed by House Bill 2357, 82nd Texas Legislature, 2011.

§114.312, Low Emission Diesel Standards

The adoption will amend §114.312 to make changes needed for accuracy and consistency with the adopted new §114.313 and the adopted revisions to §114.315. The adoption will amend §114.312 to remove language limiting the acceptance of CARB-approved alternative diesel fuel formulations to only those approved on or before January 18, 2005, to allow the use of new alternative diesel fuel formulations approved by CARB in the future. The adoption will also amend §114.312 to cite the current effective date of the

California diesel regulations relevant to this section.

§114.313, Designated Alternative Limits

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

§114.314, Registration of Diesel Producers and Importers

The adoption will amend §114.314 to remove expired registration requirements and to require all new producers and importers to register by no later than 45 days after the first date that they begin to provide TxLED to the affected counties listed in §114.319. In addition, the adoption will amend §114.314 to require producers and importers to provide information on each production facility and import facility from which TxLED is produced or imported. The adopted registration requirements will provide further clarification that only owners and operators of production facilities are considered producers subject to the TxLED regulations. The adoption will make other clarifying changes to §114.314 as needed to enhance and simplify the registration process.

§114.315, Approved Test Methods

The adoption will amend §114.315 to remove the alternative diesel formulation test procedures in subsection (c) to clarify that alternative diesel fuel formulations will only be approved through the provisions currently specified under subsection (d). The adoption will also amend §114.315 to remove the option for allowing testing of an alternative diesel fuel formulation through the EPA's ETV Program, which the EPA has discontinued. The adoption will also amend §114.315 to remove the supplementary test methods for viscosity and flash point in subsection (a) for consistency with the changes to subsection (c).

The adoption will also amend §114.315 to specify that the approvals of all additive-based alternative diesel fuel formulations approved prior to April 1, 2012, and thereafter will be subject to revocation if the composition of the additive is found to be altered. Producers using an additive-based alternative diesel formulation will be required to discontinue use of the formulation within 45 days of the date of revocation. In addition, the adoption will amend §114.315 to add a new subsection (e) to specify that all alternative diesel fuel formulations approved by the executive director prior to April 1, 2012, may continue to be used for compliance.

§114.316, Monitoring, Recordkeeping, and Reporting Requirements

The adoption will amend §114.316 to make clarifying changes to the reporting requirements as needed for accuracy and consistency with the adopted changes to

§§114.313 - 114.315, and 114.318. The adoption will also amend §114.316 to specify the sampling and analysis requirements for the specific fuel properties for TxLED produced under §§114.312, 114.313, and 114.318.

§114.317, Exemptions to Low Emission Diesel Requirements

The adoption will amend §114.317 to make clarifying changes as needed for accuracy and consistency with the adopted changes to §114.316 and §114.319.

§114.318, Alternative Emission Reduction Plan

The adoption will amend §114.318 to remove the provisions pertaining to the calculation and use of early gasoline sulfur reduction credits as a methodology option for AERP compliance. In addition, the adoption will amend §114.318(b) to require AERPs that use the Unified Model to calculate compliance based on the average fuel properties determined each calendar quarter, instead of yearly as currently required. The adoption will also amend §114.318(b) to allow producers to calculate the average fuel properties used in the Unified Model based on the fuel properties of diesel sold or supplied for use in all affected counties, instead of specific groups of counties as currently required.

§114.319, Affected Counties and Compliance Dates

The adoption will amend §114.319 to remove expired compliance schedules in subsection (c) and to modify subsection (d) to clarify that if the final compliance date of

any provision in the section is before the adoption of the current revision to the section and the compliance dates are not specified in the current revision, then the compliance date is past and all affected persons must be and remain in compliance with the provision as of the original compliance date. The adoption will also amend §114.319 to make other clarifying changes as needed for accuracy and consistency within the section.

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 revisions to Chapter 114, Subchapter H, will remove the alternative diesel fuel formulation test procedures in §114.315(c) and the option for testing for approval through the EPA's ETV program, which the EPA has discontinued, thereby only allowing approval of alternative diesel formulations through the other two approval options currently allowed that either specify criteria for using the Unified Model that was

developed by the EPA specifically for the TxLED program or accept alternative diesel formulations approved by CARB. The adoption will lessen the TCEQ's fiscal and staff resource needs in the physical testing aspects of the alternative diesel formulation approval process.

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

Finally, the current TxLED regulations contain several administrative compliance deadlines that have expired and other administrative requirements relating to registration and reporting that are outdated or need further clarification. The adopted rulemaking will clarify the administrative provisions of the rules necessary for accuracy and consistency.

Due to the limited nature and scope of these amendments, this action will not adversely affect, in a material way, the economy or a sector of the economy, productivity,

competition, or jobs. The adopted rule changes continue to provide alternatives and flexibility to producers of TxLED and additives in order to meet the fuel requirements. The amendments to the rule do not affect the NO_X reductions expected from the sale and use of TxLED in Texas. Therefore, adverse impacts to the environment or public health and safety in the state will not occur.

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

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

Specifically, this rulemaking action will make improvements to the alternative formulation and additive approval process. The TxLED program was developed as part of the control strategy to meet the NAAQS for ozone set by the EPA under Federal Clean Air Act (FCAA), 42 United States Code (USC), §7409, and therefore meet a federal requirement. The adopted rulemaking implements requirements of 42 USC, §7410, which requires states to adopt a SIP that provides for "implementation, maintenance, and enforcement" of the NAAQS in each air quality control region of the state. While 42 USC, §7410 does not require specific programs, methods, or reductions to meet and maintain the standard, SIPs must include "enforceable emission limitations and other control measures, means or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this chapter," (meaning 42 USC, Chapter 85, Air Pollution Prevention and Control). It is true that the FCAA does require some specific measures for SIP purposes, such as the inspection and maintenance program, but those programs are the exception, not the rule, in the SIP structure of 42 USC, §7410. The provisions of the FCAA recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet and maintain the NAAQS. This flexibility allows states, affected industry, and the public to collaborate on the best methods to attain the NAAQS for the specific regions in the state. Even though the FCAA

allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of 42 USC, §7410. Thus, while specific measures are not generally required, the emission reductions are required. States are not free to ignore the requirements of 42 USC, §7410, and must develop programs to assure that the nonattainment areas of the state would be brought into attainment on schedule and to maintain the NAAQS after redesignation. The adopted revisions will help areas in the state attain and maintain the 1997 eight-hour ozone NAAQS as expeditiously as practicable.

The requirement to provide a fiscal analysis of proposed regulations in the Texas Government Code was amended by Senate Bill (SB) 633 during the 75th Legislature, 1997. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis of extraordinary rules. These rules are identified in the statutory language as major environmental rules that would have a material adverse impact and would exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill would have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion

was based, in part, on the criteria set forth in the bill that exempted proposed rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law. As discussed previously in this preamble, 42 USC, §7410 does not require specific programs, methods, or reductions in order to meet and maintain the NAAQS; thus, states must develop programs for each nonattainment area to ensure that area would meet the attainment deadlines. Because of the ongoing need to address nonattainment issues, the commission routinely proposes and adopts SIP rules. The legislature is presumed to understand this federal scheme. If each rule proposed for inclusion in the SIP was considered to be a major environmental rule that exceeds federal law, then every SIP rule would require the full regulatory impact analysis contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board in its fiscal notes. Because the legislature is presumed to understand the fiscal impacts of the bills it passes, and that presumption is based on information provided by state agencies and the Legislative Budget Board, the commission contends that the intent of SB 633 was only to require the full regulatory impact analysis for rules that are extraordinary in nature. While the SIP rules would have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of 42 USC, §7410. For these reasons, rules adopted for inclusion in the SIP fall under the exception in Texas Government Code, §2001.0225(a), because they are specifically required by federal law.

In addition, 42 USC, §7502(a)(2) requires attainment as expeditiously as practicable, and 42 USC, §7511(a) requires states to submit ozone attainment demonstration SIPs for ozone nonattainment areas, such as the HGB and the Dallas-Fort Worth 1997 eight-hour ozone nonattainment areas. The commission has consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature has revised the Texas Government Code but left this provision substantially un-amended. The commission presumes that "when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation." *Central Power & Light Co. v. Sharp*, 919 S.W.2d 485, 489 (Tex. App. Austin 1995), writ denied with per curiam opinion respecting another issue, 960 S.W.2d 617 (Tex. 1997); *Bullock v. Marathon Oil Co.*, 798 S.W.2d 353, 357 (Tex. App. Austin 1990), no writ; Cf. *Humble Oil & Refining Co. v. Calvert*, 414 S.W.2d 172 (Tex. 1967); *Sharp v. House of Lloyd, Inc.*, 815 S.W.2d 245 (Tex. 1991); *Southwestern Life Ins. Co. v. Montemayor*, 24 S.W.3d 581 (Tex. App. Austin 2000), pet. denied; and *Coastal Indust. Water Auth. v. Trinity Portland Cement Div.*, 563 S.W.2d 916 (Tex. 1978).

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

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

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period, but received no comments relating to this subject.

Takings Impact Assessment

The commission evaluated this adopted rulemaking and performed an analysis of

whether these adopted revisions to rules constitute a taking under Texas Government Code, Chapter 2007. The specific purpose of these adopted rules is to achieve reductions in NO_X emissions to reduce ozone formation in order to help bring nonattainment areas in the state into attainment with the federal NAAQS for ozone and to maintain it. The adopted rules will advance this stated purpose by clarifying and simplifying testing procedures for additives and alternative fuel formulation approvals, clarifying designated alternative limits for TxLED, and updating and adding definitions. Promulgation and enforcement of these adopted rules will be neither a statutory nor a constitutional taking of private real property. Specifically, the subject rulemaking does not affect a landowner's rights in private real property, because this rulemaking does not burden (constitutionally); nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which will otherwise exist in the absence of the regulations. These revisions will not place a burden on private real property, because this action does not require an investment in the permanent installation of new refinery processing equipment. Additive-based alternative fuel formulations can be developed to meet TxLED that do not require changes to refinery processes. Additionally, the alternative formulation approvals made by the executive director are not property rights, and the adopted changes to the rules do not foreclose other approval options to meet TxLED for these alternative formulations. Alternative formulations were initially developed as a way to provide flexibility for diesel producers and suppliers to meet TxLED requirements.

Furthermore, the commission's analysis indicates that Texas Government Code, Chapter 2007 does not apply to these adopted rules, because this is an action that is reasonably taken to fulfill an obligation mandated by federal law, which is exempt under Texas Government Code, §2007.003(b)(4). Specifically, the TxLED requirements were developed in order to meet the NAAQS for ozone set by the EPA under 42 USC, §7409. States are primarily responsible for ensuring attainment and maintenance of NAAQS once the EPA has established them. Pursuant to 42 USC, §7410, and related provisions, states must submit, for approval by the EPA, SIPs that provide for the attainment and maintenance of NAAQS through control programs directed to sources of the pollutants involved. Therefore, one purpose of this rulemaking action is to provide additional clarification and flexibility in implementing the TxLED program necessary for the state's nonattainment areas to meet the air quality standards established under federal law as NAAQS. Attainment and maintenance of the 1997 ozone standard required substantial reductions in NO_X emissions as well as volatile organic compounds emissions. This rulemaking is only one step among many necessary for attaining and maintaining the 1997 ozone standard.

In addition, Texas Government Code, §2007.003(b)(13), states that Chapter 2007 does not apply to an action that: 1) is taken in response to a real and substantial threat to public health and safety; 2) is designed to significantly advance the health and safety

purpose; and 3) does not impose a greater burden than is necessary to achieve the health and safety purpose. Although the rules do not directly prevent a nuisance or prevent an immediate threat to life or property, they do prevent a real and substantial threat to public health and safety and significantly advance the health and safety purpose. This action is taken in response to areas of the state exceeding the federal NAAQS for ozone, which adversely affects public health, primarily through irritation of the lungs. The action significantly advances the health and safety purpose by improving the TxLED program that reduces ozone levels in the nonattainment areas and other areas of the state that contribute to high ozone levels in these areas. Consequently, these adopted rules meet the exemption in Texas Government Code, §2007.003(b)(13). This rulemaking action therefore meets the requirements of Texas Government Code, §2007.003(b)(4) and (13). For these reasons, the adopted rulemaking does not constitute a taking under Texas Government Code, 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 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 invited public comment regarding the consistency with the CMP during the public comment period, but received no comments relating to this subject.

Public Comment

The commission scheduled a public hearing for April 26, 2012, in Austin. However, since no one registered to provide comments, the public hearing was not formally opened. The public comment period closed on April 27, 2012.

The commission received written comments from the Biodiesel Coalition of Texas (BCOT), Good Company Associates, Love's Travel Stops and Country Stores, Inc. and the Musket Corporation (Love's/Musket), the National Biodiesel Board (NBB), and the EPA. All five commenters were in support of the rule changes and four of the commenters suggested minor non-substantive changes and/or requested additional clarification on the rule changes.

Response to Comments

Good Company Associates commented that the references to the TTC, §502.002 and §502.006 as cited in §114.6 appeared to be incorrect.

The commission agrees and made changes to the definitions of motor vehicle in §114.6(14) and non-road equipment in §114.6(15) to revise the relevant TTC citations from TTC, §502.002 to TTC, §502.040 and from TTC, §502.006 to TTC, §502.140. These citation changes were needed in order to reflect the renumbering of the statute as directed by House Bill 2357, 82nd Texas Legislature, 2011.

The EPA commented that the only provision to remove an additive from the approved list of alternative diesel fuel formulations is if the manufacturer changes the formulation and requested an explanation on how the TCEQ would determine that the composition

of the additive has been changed.

The TCEQ can periodically request the EPA provide copies of the most current EPA fuel additive registration letters for all of the additives used in the TCEQ-approved alternative diesel formations to determine if any changes have been made to their additive compositions. The approval notifications of all TCEQ-approved alternative diesel fuel formulations specify the EPA fuel additive registration number and additive name as registered with the EPA in accordance with 40 CFR Part 79 for the additive used in the emissions testing of the approved formulation. Any change to the chemical composition of a registered fuel additive requires the additive manufacturer to notify the EPA with the changes. If the EPA determines the changes are significant, the altered fuel additive will be required to have a new registration with the EPA, which will result in a new registration number being issued for the altered additive. Consequently, since the original additive specification in the TCEQ-issued approval notification would no longer be valid, the TCEQ would then have justification to revoke the approval of the alternative diesel fuel formulation. The commission made no changes to the rules in response to this comment.

Good Company Associates commented that §114.318(b) seems to imply that the Unified

Model applies to "average fuel properties of all on-road diesel fuel" but later requires achieved savings of NO_X for both on and off-road fuels.

The AERP demonstration requirements specified in §114.318(b) apply to both the average fuel properties of on-road diesel fuel and the average fuel properties of non-road diesel fuel. The commission made no changes to the rules in response to this comment.

BCOT, Love's/Musket, and NBB commented that they support the changes to the definition of additive in §114.6(1), which they understand will result in the TCEQ no longer regulating biodiesel as an additive subject to the requirements of the TxLED program.

The commission appreciates the support and has made additional changes to the definition of additive in §114.6(1)(B) to further clarify that only those substances that have been added to diesel fuel for the purpose of producing TxLED would be considered additives under the TxLED program. Biodiesel would not be considered an additive under the revised definition since biodiesel is generally only added to diesel fuel by diesel fuel producers to comply with requirements of the federal renewable fuels standards specified in 40 CFR Part 80, Subpart M.

BCOT and Love's/Musket requested that the TCEQ update the regulatory guidance document for the TxLED program as soon as possible to accurately reflect the TCEQ's position that biodiesel will no longer be regulated as an additive under the TxLED rules.

Changes to regulatory guidance documents are beyond the scope of this rulemaking. However, the TCEQ does intend to revise its regulatory guidance document for the TxLED program in a timely manner to reflect all of the rule changes including the changes relating to alternative diesel fuel formulations, AERPs, and that biodiesel is no longer considered an additive under the TxLED program. The commission made no changes to the rules in response to these comments.

SUBCHAPTER A: DEFINITIONS
§114.6

Statutory Authority

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

The adopted amendment implements THSC, §§382.002, 382.011, 382.012, 382.017, and

382.202.

§114.6. Low Emission Fuel Definitions.

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

(1) Additive--Any substance that is intentionally added to gasoline or diesel fuel for the purpose of producing a gasoline or diesel fuel in compliance with the requirements of Subchapter H of this chapter that is:

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

(B) exempted from the EPA registration requirements in accordance with 40 CFR Part 79.

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

(3) Bulk plant--An intermediate gasoline or diesel fuel distribution facility where gasoline or diesel fuel is stored and then transported for delivery to a bulk purchaser/consumer or retail fuel dispensing facility.

(4) Bulk purchaser/consumer--A person who purchases or otherwise obtains gasoline or diesel 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) Diesel fuel--Any middle distillate fuel used in compression-ignition internal combustion engines that is commonly or commercially known, sold, or represented as:

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

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

(7) Final blend--A distinct quantity of diesel fuel that is introduced into commerce as low emission diesel fuel (LED), without further process.

(8) Further process--To perform any alteration to diesel fuel, including distillation, treating with hydrogen, blending, or addition of an additive, for the purpose of producing a diesel fuel in compliance with the requirements of Subchapter H, Division 2 of this chapter prior to the diesel fuel being introduced into commerce as LED.

(9) Gasoline--Any fuel that is commonly or commercially known, sold, or represented as gasoline, in accordance with the active version of American Society for

Testing and Materials (ASTM) D4814 (Standard Specification for Automotive Spark-Ignition Engine Fuel).

(10) Import--The process by which gasoline or diesel 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.

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

(12) Importer--Any person, except a person acting as a common carrier, who imports gasoline or diesel fuel.

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

(14) Motor vehicle--Any self-propelled device powered by a gasoline fueled spark-ignition internal combustion engine or a diesel fueled compression-ignition internal combustion engine in or by which a person or property is or may be transported, and is required to be registered under Texas Transportation Code, §502.040 , excluding vehicles registered under Texas Transportation Code, §502.140 .

(15) Non-road equipment--Any device powered by a gasoline fueled spark-ignition internal combustion engine or a diesel fueled compression-ignition internal combustion engine that is not required to be registered under Texas Transportation Code, §502.040 .

(16) Produce--Perform the process to convert liquid compounds into gasoline or diesel fuel or to further process diesel fuel to create a final blend of LED.

(17) Producer--Any person who owns, leases, operates, controls, or supervises a production facility that produces gasoline or diesel fuel.

(18) Production facility--Any facility where gasoline or diesel fuel is produced or that manufactures liquid fuels by distilling petroleum.

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

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

SUBCHAPTER H: LOW EMISSION FUELS
DIVISION 2: LOW EMISSION DIESEL
[§114.313]

Statutory Authority

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

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

§114.313. Designated Alternative Limits.

SUBCHAPTER H: LOW EMISSION FUELS
DIVISION 2: LOW EMISSION DIESEL
§§114.312, 114.313, 114.314 - 114.319

Statutory Authority

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

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

§114.312. Low Emission Diesel Standards.

(a) No person shall sell, offer for sale, supply, or offer for supply, dispense, transfer, allow the transfer, place, store, or hold any diesel fuel in any stationary tank, reservoir, or other container in the counties listed in §114.319 of this title (relating to Affected Counties and Compliance Dates) that may ultimately be used to power a diesel fueled compression-ignition internal combustion engine in the affected counties that does not meet the low emission diesel fuel (LED) standards specified in paragraphs (1) and (2) of this subsection.

(1) The maximum aromatic hydrocarbon content of LED is 10% by volume per gallon.

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

(b) Subsection (a) of this section does not apply to a sale, offer for sale, or supply of diesel fuel to a producer where the producer further processes the diesel fuel at the

producer's production facility prior to any subsequent sale, offer for sale, or supply of the final blend of LED.

(c) 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 for compliance with California diesel fuel regulations that were in effect as of August 4, 2005, 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 that were in effect as of August 4, 2005, except for those approved for small refinery compliance, may be used to satisfy the requirements of subsection (a) of this section.

(d) Alternative diesel fuel formulations that have been approved by the executive director as prescribed in §114.315(c) of this title (relating to Approved Test Methods) may be used to satisfy the requirements of subsection (a) of this section.

§114.313. Designated Alternative Limits.

(a) Diesel fuel that has been produced to meet all of the designated alternative limits specified in subsection (b) of this section may be used to satisfy the low emission

diesel fuel (LED) requirements specified in §114.312(a) of this title (relating to Low Emission Diesel Standards).

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

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

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

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

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

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

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

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

§114.314. Registration of Diesel Producers and Importers.

(a) Each producer and importer that sells, offers for sale, supplies, offers to supply, dispenses, transfers, allows the transfer, places, stores, or holds any diesel fuel in any stationary tank, reservoir, or other container in the affected counties listed in §114.319 of this title (relating to Affected Counties and Compliance Dates) that may ultimately be used to power a diesel fueled compression-ignition internal combustion engine in the affected counties listed in §114.319 of this title shall register with the executive director by no later than 45 days after the first date the diesel fuel from its production facility or import facility is made available for use in the affected counties listed in §114.319 of this title.

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

(1) the legal business name of the producer or importer, mailing address, agency assigned customer reference number, and contact information for the producer or importer, or their authorized representative;

(2) a statement of the estimated total number of barrels of low emission diesel fuel that the producer or importer is planning to produce or import in the 12 months following the date of registration that the producer or importer intends to sell, offer for sale, supply, or offer to supply from its production facility or import facility for use in the counties listed in §114.319 of this title;

(3) the physical address, agency assigned regulated entity reference number, and contact information for each production facility or import facility that is used to produce or import diesel fuel that may be sold, offered for sale, supplied, or offered for supply for use in the affected counties listed in §114.319 of this title;

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

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

production facility or import facility used to produce or import diesel fuel that may ultimately be used to power a diesel fueled compression-ignition internal combustion engine in the counties listed in §114.319 of this title.

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

§114.315. Approved Test Methods.

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

(1) The aromatic hydrocarbon content may be determined by the active version of ASTM Test Method D5186 (Standard Test Method for Determination of Aromatic Content and Polynuclear Aromatic Content of Diesel Fuels and Aviation Turbine Fuels by Supercritical Fluid Chromatography). The following correlation equation must be used to convert the supercritical fluid chromatography (SFC) results

in mass percent to volume percent: aromatic hydrocarbons expressed in percent by volume = 0.916 x (aromatic hydrocarbons expressed in percent by weight) + 1.33.

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

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

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

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

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

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

(1) The applicant shall submit documentation demonstrating that the applicable fuel properties of the alternative diesel fuel formulation demonstrate at least a 5.5% reduction in NO_X emissions from on-road diesel fuel for the year 2007, and at least a 6.2% reduction in NO_X emissions from non-road diesel fuel, using the Unified Model as described in the EPA staff discussion document, *Strategies and Issues in*

Correlating Diesel Fuel Properties with Emissions, Publication Number EPA420-P-01-001, published July 2001.

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

(3) If the alternative diesel fuel formulation has been demonstrated to the satisfaction of the executive director and the EPA to achieve comparable or better reductions in emissions of NO_X in accordance with paragraph (1) of this subsection, then the executive director may issue a notice of approval indicating that the alternative diesel fuel formulation may be used to satisfy the LED requirements of §114.312(a) of this title.

(A) The approval notification must identify the specifications of the alternative diesel fuel formulation as approved under this subsection by listing the

cetane number, aromatic hydrocarbon content, specific gravity, and the temperature corresponding to the 50% point on the distillation curve in degrees Fahrenheit (T50) of the alternative diesel fuel formulation as documented in paragraph (2) of this subsection.

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

(d) Approval of any additive-based alternative diesel fuel formulation as prescribed under this section prior to April 1, 2012, and thereafter, is subject to revocation if the executive director determines that the composition of the additive component of the approved alternative diesel fuel formulation has been altered so that it no longer matches the composition of the additive as originally approved. If the executive director revokes the approval of an additive-based alternative diesel formulation, producers using the alternative diesel formulation to satisfy the LED requirements of §114.312(a) of this title must discontinue all use of the alternative diesel formulation within 45 days of the date of revocation.

(e) All alternative diesel fuel formulations approved by the executive director as prescribed under this section prior to April 1, 2012, may continue to be used to comply with the provisions specified in this division.

§114.316. Monitoring, Recordkeeping, and Reporting Requirements.

(a) Every producer or importer that has elected to sell, offer for sale, supply, or offer for supply low emission diesel fuel (LED) produced at its production facility or imported from its import facility in compliance with the requirements specified in §§114.312, 114.313, or 114,318 of this title (relating to Low Emission Diesel Standards; Designated Alternative Limits; Alternative Emission Reduction Plan, respectively) that may ultimately be used in counties listed in §114.319 of this title (relating to Affected Counties and Compliance Dates) is subject to the applicable requirements of this section.

(b) Each producer or importer of LED must keep records that declare or demonstrate that each final blend of LED conforms to the basic LED standards as specified in §114.312(a) of this title, to the designated alternative limits as specified in §114.313 of this title, to the specifications of a Certified Diesel Fuel Formulation or a diesel fuel as accepted under §114.312(c) of this title, to an alternative diesel fuel formulation as approved under §114.312(d) of this title, or to an alternative emission reduction plan as approved under §114.318 of this title.

(c) Each producer or importer of LED shall collect and analyze a representative sample of each final blend of LED produced at its production facility or imported from

its import facility for the fuel properties specified in paragraphs (1) - (5) of this subsection.

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

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

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

(4) The aromatic hydrocarbon content, polycyclic aromatic hydrocarbon content, American Petroleum Institute (API) gravity index, cetane number, nitrogen content, and sulfur content must be analyzed for LED produced or imported in accordance with §114.313 of this title using the test methods specified in §114.315(a) of this title.

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

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

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

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

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

or importer in violation of the standards specified in §114.312 of this title, to which the producer or importer has elected to be subject.

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

(1) the date of transfer;

(2) the name and address of the transferor;

(3) the name and address of the transferee;

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

(5) the volume of diesel fuel being transferred;

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

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

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

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

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

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

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

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

(3) any other information determined by the executive director to be necessary to demonstrate that the producer or importer has produced or imported LED that has satisfied the requirements specified in §§114.312, 114.313, or 114.318 of this title.

(g) Each producer or importer electing to sell, offer for sale, supply, or offer to supply LED in accordance with §114.312(c) of this title shall provide to the executive director, as applicable, a copy of the executive order issued by the 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 August 4, 2005.

§114.317. Exemptions to Low Emission Diesel Requirements.

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

exempted from the provisions of this division (relating to Low Emission Diesel), provided that:

(1) the diesel fuel is kept segregated from non-exempt product, and the person possessing the product maintains documentation identifying the product as research, development, or testing fuel, as applicable, and stating that it is to be used only for research, development, or testing purposes; and

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

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

(1) the fuel is kept segregated from non-exempt fuel, and the party possessing the fuel for the purposes of refining, selling, dispensing, transferring, or

offering for sale, dispensing, or transfer as competition racing fuel maintains documentation identifying the product as racing fuel, restricted for non-highway use in competition racing motor vehicles or engines;

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

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

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

(d) Diesel fuel that does not meet the LED requirements of §114.312 of this title is not prohibited from being transferred, placed, stored, and/or held within the affected counties so long as it is not ultimately used to power a diesel fueled compression-ignition internal combustion engine operating in a motor vehicle or in non-road equipment in the counties listed in §114.319 of this title (relating to Affected Counties

and Compliance Dates), except for that used in conjunction with purposes stated in subsections (a) and (b) of this section.

§114.318. Alternative Emission Reduction Plan.

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

(b) The alternative emission reduction plan must demonstrate, using the Unified Model as described in the United States Environmental Protection Agency (EPA) staff discussion document, *Strategies and Issues in Correlating Diesel Fuel Properties with Emissions, Publication Number EPA420-P-01-001*, published July 2001, that the average fuel properties of all on-road diesel fuel produced in any given calendar quarter that is sold, offered for sale, supplied, or offered for supply by the producer for use in the affected counties listed in §114.319 of this title (relating to Affected Counties and Compliance Dates) achieve at least a 5.5% reduction in nitrogen oxides (NO_X) emissions for the year 2007; and the average fuel properties of all non-road diesel produced in any given calendar quarter that is sold, offered for sale, supplied, or offered for supply by the

producer for use in the affected counties listed in §114.319 of this title achieve at least a 6.2% reduction in NO_X emissions.

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

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

(e) Alternative emission reduction plans submitted to the executive director in accordance with subsection (b) of this section must contain sufficient documentation to validate the average diesel fuel properties used to satisfy the requirements specified in subsection (b) of this section.

§114.319. Affected Counties and Compliance Dates.

(a) All affected persons in the counties listed in subsection (b) of this section shall continue to comply with §§114.312 - 114.317 of this title (relating to Low Emission Diesel Standards; Designated Alternate Limits; Registration of Diesel Producers and Importers; Approved Test Methods; Monitoring, Recordkeeping, and Reporting

Requirements; and Exemptions to Low Emission Diesel Requirements) as required by subsection (d) of this section, as applicable, for any diesel fuel as defined in §114.6(6)(A) of this title (relating to Low Emission Fuel Definitions) that may ultimately be used to power a diesel-fueled compression-ignition internal combustion engine in a motor vehicle or in non-road equipment in any of the counties listed in subsection (b) of this section.

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

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

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

(3) Hardin, Jefferson, and Orange; and

(4) Anderson, Angelina, Aransas, Atascosa, Austin, Bastrop, Bee, Bell, Bexar, Bosque, Bowie, Brazos, Burleson, Caldwell, Calhoun, Camp, Cass, Cherokee, Colorado, Comal, Cooke, Coryell, De Witt, Delta, Falls, Fannin, Fayette, Franklin,

Freestone, Goliad, Gonzales, Grayson, Gregg, Grimes, Guadalupe, Harrison, Hays, Henderson, Hill, Hood, Hopkins, Houston, Hunt, Jackson, Jasper, Karnes, Lamar, Lavaca, Lee, Leon, Limestone, Live Oak, Madison, Marion, Matagorda, McLennan, Milam, Morris, Nacogdoches, Navarro, Newton, Nueces, Panola, Polk, Rains, Red River, Refugio, Robertson, Rusk, Sabine, San Jacinto, San Patricio, San Augustine, Shelby, Smith, Somervell, Titus, Travis, Trinity, Tyler, Upshur, Van Zandt, Victoria, Walker, Washington, Wharton, Williamson, Wilson, Wise, and Wood.

(c) All affected persons in the counties listed in subsection (b) of this section shall continue to comply with §§114.312 - 114.317 of this title as required by subsection (d) of this section, as applicable, for any diesel fuel as defined in §114.6(6)(B) of this title that may ultimately be used to power a diesel-fueled compression-ignition internal combustion engine located on a marine vessel in any of the counties listed in subsection (b)(2) of this section.

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

affected persons must be and remain in compliance with the provision as of the original compliance date.