

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY  
**AGENDA ITEM REQUEST**  
for Rulemaking Adoption

**AGENDA REQUESTED:** June 27, 2018

**DATE OF REQUEST:** June 22, 2018

**INDIVIDUAL TO CONTACT REGARDING CHANGES TO THIS REQUEST, IF NEEDED:** Paige Bond, Rule/Agenda Coordinator, (512) 239-2678

**CAPTION:** **Docket No. 2018-0216-RUL.** Consideration for the adoption of amended Section 106.494 of 30 TAC Chapter 106, Permits by Rule.

The adopted rule revises definitions and makes corresponding revisions to the permit by rule concerning non-commercial incinerators and crematories. The proposed rule was published in the May 11, 2018, issue of the *Texas Register* (43 TexReg 2943). (Kati Wooten, Booker Harrison) (Rule Project No. 2018-019-106-AI)

Steve Hagle, P.E.  
\_\_\_\_\_  
**Deputy Director**

Mike Wilson, P.E.  
\_\_\_\_\_  
**Division Director**

Paige Bond  
\_\_\_\_\_  
**Agenda Coordinator**

**Copy to CCC Secretary?** NO ☒ YES

# Texas Commission on Environmental Quality

## Interoffice Memorandum

**To:** Commissioners **Date:** June 22, 2018

**Thru:** Bridget C. Bohac, Chief Clerk  
Stephanie Bergeron Perdue, Interim Executive Director

**From:** Steve Hagle, P.E., Deputy Director  
Office of Air

**Docket No.:** 2018-0216-RUL

**Subject:** Commission Approval for Rulemaking Adoption  
Chapter 106, Permits by Rule  
SB 8: Revisions to Permits by Rule  
Rule Project No. 2018-019-106-AI

**Background and reason(s) for the rulemaking:**

Senate Bill (SB) 8, 85th Texas Legislature, 2017, amended Texas Health and Safety Code (THSC) by adding THSC, Chapter 697, relating to the disposition of embryonic and fetal tissue remains. Under SB 8, THSC, §697.002 defined the term "Embryonic and fetal tissue remains"; THSC, §697.003, stated that embryonic and fetal tissue remains are not considered pathological waste under state law; and THSC, §697.003 stated that unless otherwise provided by this chapter, THSC, Chapter 711 (General Provisions Relating to Cemeteries) and Chapter 716 (Crematories) do not apply to the disposition of embryonic and fetal tissue remains. SB 8 became effective on September 1, 2017; however, THSC, Chapter 697 applies only to the disposition of embryonic and fetal tissue remains that occurs on or after February 1, 2018. The legislation requires the executive commissioner of the Texas Human and Health Services Commission (HHSC) to adopt any rules necessary to implement THSC, Chapter 697 no later than December 1, 2017. At the time of this rulemaking, HHSC has adopted new 25 TAC Chapter 138, Disposition of Embryonic and Fetal Tissue Remains (*See* January 26, 2018, issue of the *Texas Register* (43 TexReg 465)), and the Texas Department of State Health Services (DSHS) has adopted amendments to 25 TAC Chapter 1, Miscellaneous Provisions, to implement SB 8 (*See* May 18, 2018, issue of the *Texas Register* (43 TexReg 3242)).

While the legislation does not require TCEQ to adopt any rules to implement SB 8, revisions to Chapter 106 are necessary to align TCEQ definitions with those in SB 8 and other references to 25 TAC Chapter 1, Miscellaneous Provisions, which are under the jurisdiction of DSHS and HHSC.

Under previous §106.494 (Pathological Waste Incinerators), crematories and non-commercial incinerators which meet the conditions of this section and which are used to dispose of pathological waste, human remains, and carcasses are permitted by rule. Under previous §106.494, certain defined terms in the section referred to the terms as defined in THSC, §711.001 and 25 TAC §1.132 (Definitions). In their previous form, the terms as defined in THSC, §711.001 and 25 TAC §1.132 were not consistent with the new THSC, Chapter 697. The commission adopts the amended title of §106.494, from "Pathological Waste Incinerators" to "Non-commercial Incinerators and Crematories."

In order to adhere to the directives of the legislature and maintain consistency with the regulations of DSHS and HHSC, TCEQ adopted this rulemaking to revise §106.494.

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**Scope of the rulemaking:**

**A.) Summary of what the rulemaking will do:**

For consistency with the provisions of SB 8, the adopted amendment would revise the definition of "Pathological waste." Specifically, the commission adopts the deletion all of the materials that are considered to be pathological waste under §106.494(a)(1)(A) - (D) and adopted a minor rephrasing of §106.494(a)(1) to clarify that the term "Pathological waste" will have the meaning as it is defined in 25 TAC §1.132. The amendment to §106.494(a)(1) aligns with the changes to 25 TAC §1.132 adopted by the executive commissioner of HHSC. As such, the term still captures all other materials listed under the definition and continues to align the commission's definition of "Pathological waste" with any subsequent changes to the definition made under 25 TAC §1.132.

In addition, the adopted amendment defines the term "Embryonic and fetal tissue remains" to reflect the term as it is defined in THSC, §697.002, as enacted by SB 8. The rulemaking revises the definition of "Crematory" and "Non-commercial incinerator" to clarify those devices may cremate materials meeting the definition of "Embryonic and fetal tissue remains."

The rulemaking also includes adopted revisions throughout §106.494 to bring clarity to the types of materials authorized to be disposed of by incinerators and crematories installed and operated under this section. The adopted rulemaking also includes additional language in §106.494(a)(3) and (b)(2)(G) regarding the disposition of embryonic and fetal tissue remains.

The commission adopted rule language that will be consistent with SB 8 regarding the cremation of embryonic and fetal tissue remains and the clarification that such remains are not considered pathological waste. No technical requirements, design requirements, or operational conditions under §106.494 are affected as part of this rulemaking. The rulemaking is not expected to result in any change to current authorizations under §106.494.

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

To be consistent with SB 8 and the corresponding addition of THSC, Chapter 697, the rulemaking amended §106.494 to align TCEQ definitions with those in SB 8 and other references to 25 TAC, which are under the jurisdiction of DSHS and HHSC.

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

The rulemaking amended the title of §106.494 to clarify that the types of facilities authorized under this permit by rule are non-commercial incinerators and crematories.

**Statutory authority:**

- Texas Water Code (TWC), §5.013, General Jurisdiction of Commission;
- TWC, §5.102, General Powers;
- TWC, §5.103, Rules;

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- TWC, §5.105, General Policy;
- THSC, Texas Clean Air Act, §382.002, Policy and Purpose;
- THSC, §382.011, General Powers and Duties;
- THSC, §382.012, State Air Control Plan;
- THSC, §382.051, Permitting Authority of Commission; Rules; and
- THSC, §382.05196, Permits by Rule.

**Effect on the:**

**A.) Regulated community:**

The rulemaking is not expected to result in any change to current authorizations under §106.494, unless existing sources authorized under §106.494 are modified and require new authorization or need to re-register their authorization. This rulemaking does not change any technical requirements, design requirements, or operational conditions under §106.494, or change the character of the authorized emissions. For these reasons, the commission has determined that a facility operating under an existing §106.494 registration would not need to re-register before it could begin accepting embryonic and fetal tissue remains. The adopted changes do not create additional fees and no fiscal impact is anticipated. Therefore, the regulated community is not anticipated to be significantly affected.

**B.) Public:**

The public will not be significantly affected by the adopted amendment. However, the public may benefit from greater clarity and specificity of regulatory requirements as a result of the adopted rulemaking.

**C.) Agency programs:**

The commission is not expected to be impacted by the adopted rulemaking. The adopted rulemaking would not directly affect existing authorized sources. No additional workload is anticipated as a result of this rule change, so no increase in staffing is required.

**Stakeholder meetings:**

The commission did not hold any stakeholder meetings related to this rulemaking; however, the adopted rulemaking did undergo the required 30-day public comment period and a public hearing was offered in Austin.

**Public comment:**

The public comment period closed on June 12, 2018. A comment was submitted by Texas Values and stated that the proposed preamble implies that a crematory operating under an existing §106.494 registration would need to re-register before it could start accepting embryonic and fetal tissue remains. Texas Values commented that this statement was inconsistent with other statements in the proposed preamble that assert that this rulemaking would not directly affect existing authorized sources and requested the preamble include discussion that clarifies a crematory operating under an existing §106.494 registration would not need to re-register before it could begin accepting embryonic and fetal tissue remains.

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**Significant changes from proposal:**

Since proposal, the adopted rulemaking also includes additional language in §106.494(a)(3) and (b)(2)(G) regarding the disposition of embryonic and fetal tissue remains.

**Potential controversial concerns and legislative interest:**

It is anticipated that the adopted rulemaking may generate interest from other state agencies, legislative bodies, the public, and other interested parties. The legislation requires the executive commissioner of HHSC to adopt any rules necessary to implement THSC, Chapter 697, no later than December 1, 2017. At the time of this rulemaking adoption, HHSC has adopted new 25 TAC Chapter 138 and DSHS has adopted amendments to 25 TAC Chapter 1 to implement SB 8. The potential for controversy or legislative interest is anticipated because some of the statutory provisions of SB 8 are currently the subject of litigation in federal court.

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

No current policies are expected to be affected, and no new policies are expected to be necessary.

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

If the rulemaking does not go forward, commission rules will not be consistent with the statutory changes enacted by SB 8 in regard to the definition of pathological waste under state law. Additionally, commission rules may not be consistent with the regulations of DSHS and HHSC.

**Key points in the adoption rulemaking schedule:**

*Texas Register* proposal publication date: May 11, 2018

Anticipated *Texas Register* adoption publication date: July 13, 2018

Anticipated effective date: July 19, 2018

Six-month *Texas Register* filing deadline: November 12, 2018

**Agency contacts:**

Kati Wooten, Rule Project Manager, Air Permits Division, (512) 239-0837

Booker Harrison, Senior Attorney, (512) 239-4113

Paige Bond, Texas Register Rule/Agenda Coordinator, (512) 239-2678

**Attachments:**

Senate Bill 8

cc: Chief Clerk, 2 copies  
Executive Director's Office  
Grace Barr  
Jim Rizk  
Office of General Counsel  
Kati Wooten

Commissioners

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Paige Bond

AN ACT

relating to certain prohibited abortions and the treatment and disposition of a human fetus, human fetal tissue, and embryonic and fetal tissue remains; creating a civil cause of action; imposing a civil penalty; creating criminal offenses.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Section 33.001(1), Family Code, is amended to read as follows:

(1) "Abortion" has the meaning assigned by Section 245.002, Health and Safety Code ~~[means the use of any means to terminate the pregnancy of a female known by the attending physician to be pregnant, with the intention that the termination of the pregnancy by those means will with reasonable likelihood cause the death of the fetus]~~. This definition, as applied in this chapter, ~~[applies only to an unemancipated minor known by the attending physician to be pregnant and]~~ may not be construed to limit a minor's access to contraceptives.

SECTION 2. Section 161.006(b), Family Code, is amended to read as follows:

(b) In this code, "abortion" has the meaning assigned by Section 245.002, Health and Safety Code ~~[means an intentional expulsion of a human fetus from the body of a woman induced by any means for the purpose of causing the death of the fetus]~~.

SECTION 3. Section 170.001(1), Health and Safety Code, is

amended to read as follows:

(1) "Abortion" has the meaning assigned by Section 245.002 ~~[means an act involving the use of an instrument, medicine, drug, or other substance or device developed to terminate the pregnancy of a woman if the act is done with an intention other than to~~

~~[(A) increase the probability of a live birth of the unborn child of the woman,~~

~~[(B) preserve the life or health of the child; or~~

~~[(C) remove a dead fetus].~~

SECTION 4. Section 171.002(1), Health and Safety Code, is amended to read as follows:

(1) "Abortion" has the meaning assigned by Section 245.002 ~~[means the use of any means to terminate the pregnancy of a female known by the attending physician to be pregnant with the intention that the termination of the pregnancy by those means will, with reasonable likelihood, cause the death of the fetus].~~

SECTION 5. Section 171.061(1), Health and Safety Code, is amended to read as follows:

(1) "Abortion" has the meaning assigned by Section 245.002. This definition, as applied in this subchapter, may not be construed to apply to an act done with the intent to ~~[means the act of using, administering, prescribing, or otherwise providing an instrument, a drug, a medicine, or any other substance, device, or means with the intent to terminate a clinically diagnosable pregnancy of a woman and with knowledge that the termination by those means will, with reasonable likelihood, cause the death of~~

~~the woman's unborn child. An act is not an abortion if the act is done with the intent to:~~

~~[(A) save the life or preserve the health of an unborn child,~~

~~[(B) remove a dead, unborn child whose death was caused by spontaneous abortion,~~

~~[(C) remove an ectopic pregnancy; or~~

~~[(D)]~~ treat a maternal disease or illness for which a prescribed drug, medicine, or other substance is indicated.

SECTION 6. Chapter 171, Health and Safety Code, is amended by adding Subchapters F and G to read as follows:

SUBCHAPTER F. PARTIAL-BIRTH ABORTIONS

Sec. 171.101. DEFINITIONS. In this subchapter:

(1) "Partial-birth abortion" means an abortion in which the person performing the abortion:

(A) for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus, deliberately and intentionally vaginally delivers a living fetus until:

(i) for a head-first presentation, the entire fetal head is outside the body of the mother; or

(ii) for a breech presentation, any part of the fetal trunk past the navel is outside the body of the mother; and

(B) performs the overt act described in Paragraph (A), other than completion of delivery, that kills the partially delivered living fetus.

1           (2) "Physician" means an individual who is licensed to  
2 practice medicine in this state, including a medical doctor and a  
3 doctor of osteopathic medicine.

4           Sec. 171.102. PARTIAL-BIRTH ABORTIONS PROHIBITED. (a) A  
5 physician or other person may not knowingly perform a partial-birth  
6 abortion.

7           (b) Subsection (a) does not apply to a physician who  
8 performs a partial-birth abortion that is necessary to save the  
9 life of a mother whose life is endangered by a physical disorder,  
10 physical illness, or physical injury, including a life-endangering  
11 physical condition caused by or arising from the pregnancy.

12           Sec. 171.103. CRIMINAL PENALTY. A person who violates  
13 Section 171.102 commits an offense. An offense under this section  
14 is a state jail felony.

15           Sec. 171.104. CIVIL LIABILITY. (a) Except as provided by  
16 Subsection (b), the father of the fetus or a parent of the mother of  
17 the fetus, if the mother is younger than 18 years of age at the time  
18 of the partial-birth abortion, may bring a civil action to obtain  
19 appropriate relief, including:

20                   (1) money damages for physical injury, mental anguish,  
21 and emotional distress; and

22                   (2) exemplary damages equal to three times the cost of  
23 the partial-birth abortion.

24           (b) A person may not bring or maintain an action under this  
25 section if:

26                   (1) the person consented to the partial-birth  
27 abortion; or

1           (2) the person's criminally injurious conduct resulted  
2 in the pregnancy.

3           Sec. 171.105. HEARING. (a) A physician who is the subject  
4 of a criminal or civil action for a violation of Section 171.102 may  
5 request a hearing before the Texas Medical Board on whether the  
6 physician's conduct was necessary to save the life of a mother whose  
7 life was endangered by a physical disorder, physical illness, or  
8 physical injury, including a life-endangering physical condition  
9 caused by or arising from the pregnancy.

10           (b) The board's findings under Subsection (a) are  
11 admissible in any court proceeding against the physician arising  
12 from that conduct. On the physician's motion, the court shall delay  
13 the beginning of a criminal or civil trial for not more than 60 days  
14 for the hearing to be held under Subsection (a).

15           Sec. 171.106. APPLICABILITY. A woman on whom a  
16 partial-birth abortion is performed or attempted in violation of  
17 this subchapter may not be prosecuted under this subchapter or for  
18 conspiracy to commit a violation of this subchapter.

19                   SUBCHAPTER G. DISMEMBERMENT ABORTIONS

20           Sec. 171.151. DEFINITION. In this subchapter,  
21 "dismemberment abortion" means an abortion in which a person, with  
22 the purpose of causing the death of an unborn child, dismembers the  
23 living unborn child and extracts the unborn child one piece at a  
24 time from the uterus through the use of clamps, grasping forceps,  
25 tongs, scissors, or a similar instrument that, through the  
26 convergence of two rigid levers, slices, crushes, or grasps, or  
27 performs any combination of those actions on, a piece of the unborn

child's body to cut or rip the piece from the body. The term does not include an abortion that uses suction to dismember the body of an unborn child by sucking pieces of the unborn child into a collection container. The term includes a dismemberment abortion that is used to cause the death of an unborn child and in which suction is subsequently used to extract pieces of the unborn child after the unborn child's death.

Sec. 171.152. DISMEMBERMENT ABORTIONS PROHIBITED. (a) A person may not intentionally perform a dismemberment abortion unless the dismemberment abortion is necessary in a medical emergency.

(b) A woman on whom a dismemberment abortion is performed, an employee or agent acting under the direction of a physician who performs a dismemberment abortion, or a person who fills a prescription or provides equipment used in a dismemberment abortion does not violate Subsection (a).

Sec. 171.153. CRIMINAL PENALTY. (a) A person who violates Section 171.152 commits an offense.

(b) An offense under this section is a state jail felony.

Sec. 171.154. CONSTRUCTION OF SUBCHAPTER. (a) This subchapter shall be construed, as a matter of state law, to be enforceable to the maximum possible extent consistent with but not further than federal constitutional requirements, even if that construction is not readily apparent, as such constructions are authorized only to the extent necessary to save the subchapter from judicial invalidation. Judicial reformation of statutory language is explicitly authorized only to the extent necessary to save the

statutory provision from invalidity.

(b) If any court determines that a provision of this subchapter is unconstitutionally vague, the court shall interpret the provision, as a matter of state law, to avoid the vagueness problem and shall enforce the provision to the maximum possible extent. If a federal court finds any provision of this subchapter or its application to any person, group of persons, or circumstances to be unconstitutionally vague and declines to impose the saving construction described by this subsection, the Supreme Court of Texas shall provide an authoritative construction of the objectionable statutory provisions that avoids the constitutional problems while enforcing the statute's restrictions to the maximum possible extent and shall agree to answer any question certified from a federal appellate court regarding the statute.

(c) A state executive or administrative official may not decline to enforce this subchapter, or adopt a construction of this subchapter in a way that narrows its applicability, based on the official's own beliefs concerning the requirements of the state or federal constitution, unless the official is enjoined by a state or federal court from enforcing this subchapter.

(d) This subchapter may not be construed to:

(1) authorize the prosecution of or a cause of action to be brought against a woman on whom an abortion is performed or induced in violation of this subchapter; or

(2) create or recognize a right to abortion or a right to a particular method of abortion.

SECTION 7. Subtitle H, Title 2, Health and Safety Code, is

amended by adding Chapter 173 to read as follows:

CHAPTER 173. DONATION OF HUMAN FETAL TISSUE

Sec. 173.001. DEFINITIONS. In this chapter:

(1) "Authorized facility" means:

(A) a hospital licensed under Chapter 241;

(B) a hospital maintained or operated by this state or an agency of this state;

(C) an ambulatory surgical center licensed under Chapter 243; or

(D) a birthing center licensed under Chapter 244.

(2) "Human fetal tissue" means any gestational human organ, cell, or tissue from an unborn child. The term does not include:

(A) supporting cells or tissue derived from a pregnancy or associated maternal tissue that is not part of the unborn child; or

(B) the umbilical cord or placenta, provided that the umbilical cord or placenta is not derived from an elective abortion.

Sec. 173.002. APPLICABILITY. This chapter does not apply to:

(1) human fetal tissue obtained for diagnostic or pathological testing;

(2) human fetal tissue obtained for a criminal investigation;

(3) human fetal tissue or human tissue obtained during pregnancy or at delivery of a child, provided the tissue is obtained

1 by an accredited public or private institution of higher education  
2 for use in research approved by an institutional review board or  
3 another appropriate board, committee, or body charged with  
4 oversight applicable to the research; or

5 (4) cell lines derived from human fetal tissue or  
6 human tissue existing on September 1, 2017, that are used by an  
7 accredited public or private institution of higher education in  
8 research approved by an institutional review board or another  
9 appropriate board, committee, or body charged with oversight  
10 applicable to the research.

11 Sec. 173.003. ENFORCEMENT. (a) The department shall  
12 enforce this chapter.

13 (b) The attorney general, on request of the department or a  
14 local law enforcement agency, may assist in the investigation of a  
15 violation of this chapter.

16 Sec. 173.004. PROHIBITED DONATION. A person may not donate  
17 human fetal tissue except as authorized by this chapter.

18 Sec. 173.005. DONATION BY AUTHORIZED FACILITY. (a) Only  
19 an authorized facility may donate human fetal tissue. An  
20 authorized facility may donate human fetal tissue only to an  
21 accredited public or private institution of higher education for  
22 use in research approved by an institutional review board or  
23 another appropriate board, committee, or body charged with  
24 oversight applicable to the research.

25 (b) An authorized facility may not donate human fetal tissue  
26 obtained from an elective abortion.

27 Sec. 173.006. INFORMED CONSENT REQUIRED. An authorized

facility may not donate human fetal tissue under this chapter unless the facility has obtained the written, voluntary, and informed consent of the woman from whose pregnancy the fetal tissue is obtained. The consent must be provided on a standard form prescribed by the department.

Sec. 173.007. CRIMINAL PENALTY. (a) A person commits an offense if the person:

(1) offers a woman monetary or other consideration to:

(A) have an abortion for the purpose of donating human fetal tissue; or

(B) consent to the donation of human fetal tissue; or

(2) knowingly or intentionally solicits or accepts tissue from a fetus gestated solely for research purposes.

(b) An offense under this section is a Class A misdemeanor punishable by a fine of not more than \$10,000.

(c) With the consent of the appropriate local county or district attorney, the attorney general has concurrent jurisdiction with that consenting local prosecutor to prosecute an offense under this section.

Sec. 173.008. RECORD RETENTION. Unless another law requires a longer period of record retention, an authorized facility may not dispose of any medical record relating to a woman who consents to the donation of human fetal tissue before:

(1) the seventh anniversary of the date consent was obtained under Section 173.006; or

(2) if the woman was younger than 18 years of age on

1 the date consent was obtained under Section 173.006, the later of:

2 (A) the woman's 23rd birthday; or

3 (B) the seventh anniversary of the date consent  
4 was obtained.

5 Sec. 173.009. ANNUAL REPORT. An authorized facility that  
6 donates human fetal tissue under this chapter shall submit an  
7 annual report to the department that includes for each donation:

8 (1) the specific type of fetal tissue donated; and

9 (2) the accredited public or private institution of  
10 higher education that received the donation.

11 SECTION 8. Section 245.002, Health and Safety Code, is  
12 amended by amending Subdivisions (1) and (4-a) and adding  
13 Subdivision (4-b) to read as follows:

14 (1) "Abortion" means the act of using or prescribing  
15 an instrument, a drug, a medicine, or any other substance, device,  
16 or means with the intent to cause the death of an unborn child of a  
17 woman known to be pregnant ~~[an act or procedure performed after~~  
18 ~~pregnancy has been medically verified and with the intent to cause~~  
19 ~~the termination of a pregnancy other than for the purpose of either~~  
20 ~~the birth of a live fetus or removing a dead fetus]~~. The term does  
21 not include birth control devices or oral contraceptives. An act is  
22 not an abortion if the act is done with the intent to:

23 (A) save the life or preserve the health of an  
24 unborn child;

25 (B) remove a dead, unborn child whose death was  
26 caused by spontaneous abortion; or

27 (C) remove an ectopic pregnancy.

1           (4-a) "Ectopic pregnancy" means the implantation of a  
2 fertilized egg or embryo outside of the uterus.

3           (4-b) "Executive commissioner" means the executive  
4 commissioner of the Health and Human Services Commission.

5           SECTION 9. Section 245.005(e), Health and Safety Code, is  
6 amended to read as follows:

7           (e) As a condition for renewal of a license, the licensee  
8 must submit to the department the annual license renewal fee and an  
9 annual report~~[, including the report required under Section~~  
10 ~~245.011]~~.

11          SECTION 10. The heading to Section 245.011, Health and  
12 Safety Code, is amended to read as follows:

13          Sec. 245.011. PHYSICIAN REPORTING REQUIREMENTS; CRIMINAL  
14 PENALTY.

15          SECTION 11. Section 245.011, Health and Safety Code, is  
16 amended by amending Subsections (a), (b), (d), and (e) and adding  
17 Subsections (f) and (g) to read as follows:

18          (a) A physician who performs an abortion at an ~~[Each]~~  
19 ~~abortion facility must~~ complete and submit a monthly ~~[an annual]~~  
20 ~~report to the department on each abortion~~ [that is] performed by the  
21 physician at the abortion facility. The report must be submitted on  
22 a form provided by the department.

23          (b) The report may not identify by any means ~~[the physician~~  
24 ~~performing the abortion or]~~ the patient.

25          (d) Except as provided by Section 245.023, all information  
26 and records held by the department under this chapter are  
27 confidential and are not open records for the purposes of Chapter

1 552, Government Code. That information may not be released or made  
2 public on subpoena or otherwise, except that release may be made:

3 (1) for statistical purposes, but only if a person,  
4 patient, physician performing an abortion, or abortion facility is  
5 not identified;

6 (2) with the consent of each person, patient,  
7 physician, and abortion facility identified in the information  
8 released;

9 (3) to medical personnel, appropriate state agencies,  
10 or county and district courts to enforce this chapter; or

11 (4) to appropriate state licensing boards to enforce  
12 state licensing laws.

13 (e) A person commits an offense if the person violates  
14 Subsection (b), (c), or (d) ~~[this section]~~. An offense under this  
15 subsection is a Class A misdemeanor.

16 (f) Not later than the 15th day of each month, a physician  
17 shall submit to the department the report required by this section  
18 for each abortion performed by the physician at an abortion  
19 facility in the preceding calendar month.

20 (g) The department shall establish and maintain a secure  
21 electronic reporting system for the submission of the reports  
22 required by this section. The department shall adopt procedures to  
23 enforce this section and to ensure that only physicians who perform  
24 one or more abortions during the preceding calendar month are  
25 required to file the reports under this section for that month.

26 SECTION 12. Chapter 245, Health and Safety Code, is amended  
27 by adding Sections 245.0115 and 245.0116 to read as follows:

1       Sec. 245.0115. NOTIFICATION. Not later than the seventh  
2 day after the date the report required by Section 245.011 is due,  
3 the commissioner of state health services shall notify the Texas  
4 Medical Board of a violation of that section.

5       Sec. 245.0116. DEPARTMENT REPORT. (a) The department  
6 shall publish on its Internet website a monthly report containing  
7 aggregate data of the information in the reports submitted under  
8 Section 245.011.

9       (b) The department's monthly report may not identify by any  
10 means an abortion facility, a physician performing the abortion, or  
11 a patient.

12       SECTION 13. Subtitle B, Title 8, Health and Safety Code, is  
13 amended by adding Chapter 697 to read as follows:

14       CHAPTER 697. DISPOSITION OF EMBRYONIC AND FETAL TISSUE REMAINS

15       Sec. 697.001. PURPOSE. The purpose of this chapter is to  
16 express the state's profound respect for the life of the unborn by  
17 providing for a dignified disposition of embryonic and fetal tissue  
18 remains.

19       Sec. 697.002. DEFINITIONS. In this chapter:

20               (1) "Cremation" means the irreversible process of  
21 reducing remains to bone fragments through direct flame, extreme  
22 heat, and evaporation.

23               (2) "Department" means the Department of State Health  
24 Services.

25               (3) "Embryonic and fetal tissue remains" means an  
26 embryo, a fetus, body parts, or organs from a pregnancy that  
27 terminates in the death of the embryo or fetus and for which the

issuance of a fetal death certificate is not required by state law.  
The term does not include the umbilical cord, placenta, gestational  
sac, blood, or body fluids.

(4) "Executive commissioner" means the executive  
commissioner of the Health and Human Services Commission.

(5) "Incineration" means the process of burning  
remains in an incinerator.

(6) "Interment" means the disposition of remains by  
entombment, burial, or placement in a niche.

(7) "Steam disinfection" means the act of subjecting  
remains to steam under pressure to disinfect the remains.

Sec. 697.003. APPLICABILITY OF OTHER LAW. Embryonic and  
fetal tissue remains are not pathological waste under state law.  
Unless otherwise provided by this chapter, Chapters 711 and 716 of  
this code and Chapter 651, Occupations Code, do not apply to the  
disposition of embryonic and fetal tissue remains.

Sec. 697.004. DISPOSITION OF EMBRYONIC AND FETAL TISSUE  
REMAINS. (a) Subject to Section 241.010, a health care facility  
in this state that provides health or medical care to a pregnant  
woman shall dispose of embryonic and fetal tissue remains that are  
passed or delivered at the facility by:

(1) interment;

(2) cremation;

(3) incineration followed by interment; or

(4) steam disinfection followed by interment.

(b) The ashes resulting from the cremation or incineration  
of embryonic and fetal tissue remains:

1           (1) may be interred or scattered in any manner as  
2 authorized by law for human remains; and

3           (2) may not be placed in a landfill.

4           (c) A health care facility responsible for disposing of  
5 embryonic and fetal tissue remains may coordinate with an entity in  
6 the registry established under Section 697.005 in an effort to  
7 offset the cost associated with burial or cremation of the  
8 embryonic and fetal tissue remains of an unborn child.

9           (d) Notwithstanding any other law, the umbilical cord,  
10 placenta, gestational sac, blood, or body fluids from a pregnancy  
11 terminating in the death of the embryo or fetus for which the  
12 issuance of a fetal death certificate is not required by state law  
13 may be disposed of in the same manner as and with the embryonic and  
14 fetal tissue remains from that same pregnancy as authorized by this  
15 chapter.

16           Sec. 697.005. BURIAL OR CREMATION ASSISTANCE REGISTRY. The  
17 department shall:

18           (1) establish and maintain a registry of:

19                   (A) participating funeral homes and cemeteries  
20 willing to provide free common burial or low-cost private burial;  
21 and

22                   (B) private nonprofit organizations that  
23 register with the department to provide financial assistance for  
24 the costs associated with burial or cremation of the embryonic and  
25 fetal tissue remains of an unborn child; and

26           (2) make the registry information available on request  
27 to a physician, health care facility, or agent of a physician or

1 health care facility.

2 Sec. 697.006. ETHICAL FETAL REMAINS GRANT PROGRAM. The  
3 department shall develop a grant program that uses private  
4 donations to provide financial assistance for the costs associated  
5 with disposing of embryonic and fetal tissue remains.

6 Sec. 697.007. SUSPENSION OR REVOCATION OF LICENSE. The  
7 department may suspend or revoke the license of a health care  
8 facility that violates this chapter or a rule adopted under this  
9 chapter.

10 Sec. 697.008. CIVIL PENALTY. (a) A person that violates  
11 this chapter or a rule adopted under this chapter is liable for a  
12 civil penalty in an amount of \$1,000 for each violation.

13 (b) The attorney general, at the request of the department,  
14 may sue to collect the civil penalty. The attorney general may  
15 recover reasonable expenses incurred in collecting the civil  
16 penalty, including court costs, reasonable attorney's fees,  
17 investigation costs, witness fees, and disposition expenses.

18 Sec. 697.009. RULES. The executive commissioner shall  
19 adopt rules to implement this chapter.

20 SECTION 14. Section [164.052](#)(a), Occupations Code, is  
21 amended to read as follows:

22 (a) A physician or an applicant for a license to practice  
23 medicine commits a prohibited practice if that person:

24 (1) submits to the board a false or misleading  
25 statement, document, or certificate in an application for a  
26 license;

27 (2) presents to the board a license, certificate, or

1 diploma that was illegally or fraudulently obtained;

2 (3) commits fraud or deception in taking or passing an  
3 examination;

4 (4) uses alcohol or drugs in an intemperate manner  
5 that, in the board's opinion, could endanger a patient's life;

6 (5) commits unprofessional or dishonorable conduct  
7 that is likely to deceive or defraud the public, as provided by  
8 Section 164.053, or injure the public;

9 (6) uses an advertising statement that is false,  
10 misleading, or deceptive;

11 (7) advertises professional superiority or the  
12 performance of professional service in a superior manner if that  
13 advertising is not readily subject to verification;

14 (8) purchases, sells, barters, or uses, or offers to  
15 purchase, sell, barter, or use, a medical degree, license,  
16 certificate, or diploma, or a transcript of a license, certificate,  
17 or diploma in or incident to an application to the board for a  
18 license to practice medicine;

19 (9) alters, with fraudulent intent, a medical license,  
20 certificate, or diploma, or a transcript of a medical license,  
21 certificate, or diploma;

22 (10) uses a medical license, certificate, or diploma,  
23 or a transcript of a medical license, certificate, or diploma that  
24 has been:

25 (A) fraudulently purchased or issued;

26 (B) counterfeited; or

27 (C) materially altered;

1           (11) impersonates or acts as proxy for another person  
2 in an examination required by this subtitle for a medical license;

3           (12) engages in conduct that subverts or attempts to  
4 subvert an examination process required by this subtitle for a  
5 medical license;

6           (13) impersonates a physician or permits another to  
7 use the person's license or certificate to practice medicine in  
8 this state;

9           (14) directly or indirectly employs a person whose  
10 license to practice medicine has been suspended, canceled, or  
11 revoked;

12           (15) associates in the practice of medicine with a  
13 person:

14               (A) whose license to practice medicine has been  
15 suspended, canceled, or revoked; or

16               (B) who has been convicted of the unlawful  
17 practice of medicine in this state or elsewhere;

18           (16) performs or procures a criminal abortion, aids or  
19 abets in the procuring of a criminal abortion, attempts to perform  
20 or procure a criminal abortion, or attempts to aid or abet the  
21 performance or procurement of a criminal abortion;

22           (17) directly or indirectly aids or abets the practice  
23 of medicine by a person, partnership, association, or corporation  
24 that is not licensed to practice medicine by the board;

25           (18) performs an abortion on a woman who is pregnant  
26 with a viable unborn child during the third trimester of the  
27 pregnancy unless:

1 (A) the abortion is necessary to prevent the  
2 death of the woman;

3 (B) the viable unborn child has a severe,  
4 irreversible brain impairment; or

5 (C) the woman is diagnosed with a significant  
6 likelihood of suffering imminent severe, irreversible brain damage  
7 or imminent severe, irreversible paralysis;

8 (19) performs an abortion on an unemancipated minor  
9 without the written consent of the child's parent, managing  
10 conservator, or legal guardian or without a court order, as  
11 provided by Section 33.003 or 33.004, Family Code, unless the  
12 abortion is necessary due to a medical emergency, as defined by  
13 Section 171.002, Health and Safety Code;

14 (20) otherwise performs an abortion on an  
15 unemancipated minor in violation of Chapter 33, Family Code; or

16 (21) performs or induces or attempts to perform or  
17 induce an abortion in violation of Subchapter C, F, or G, Chapter  
18 171, Health and Safety Code.

19 SECTION 15. Section 164.055(b), Occupations Code, is  
20 amended to read as follows:

21 (b) The sanctions provided by Subsection (a) are in addition  
22 to any other grounds for refusal to admit persons to examination  
23 under this subtitle or to issue a license or renew a license to  
24 practice medicine under this subtitle. The criminal penalties  
25 provided by Section 165.152 do not apply to a violation of Section  
26 170.002, Health and Safety Code, or Subchapter C, F, or G, Chapter  
27 171, Health and Safety Code.

SECTION 16. Section 48.02(a), Penal Code, is amended to read as follows:

(a) In this section, "human [~~"Human~~] organ" means the human kidney, liver, heart, lung, pancreas, eye, bone, skin, [~~fetal tissue~~], or any other human organ or tissue, but does not include hair or blood, blood components (including plasma), blood derivatives, or blood reagents. The term does not include human fetal tissue as defined by Section 48.03.

SECTION 17. Chapter 48, Penal Code, is amended by adding Section 48.03 to read as follows:

Sec. 48.03. PROHIBITION ON PURCHASE AND SALE OF HUMAN FETAL TISSUE. (a) In this section, "human fetal tissue" has the meaning assigned by Section 173.001, Health and Safety Code.

(b) A person commits an offense if the person knowingly offers to buy, offers to sell, acquires, receives, sells, or otherwise transfers any human fetal tissue for economic benefit.

(c) An offense under this section is a state jail felony.

(d) It is a defense to prosecution under this section that the actor:

(1) is an employee of or under contract with an accredited public or private institution of higher education; and

(2) acquires, receives, or transfers human fetal tissue solely for the purpose of fulfilling a donation authorized by Section 173.005, Health and Safety Code.

(e) This section does not apply to:

(1) human fetal tissue acquired, received, or transferred solely for diagnostic or pathological testing;

1           (2) human fetal tissue acquired, received, or  
2 transferred solely for the purposes of a criminal investigation;

3           (3) human fetal tissue acquired, received, or  
4 transferred solely for the purpose of disposing of the tissue in  
5 accordance with state law or rules applicable to the disposition of  
6 human fetal tissue remains;

7           (4) human fetal tissue or human tissue acquired during  
8 pregnancy or at delivery of a child, provided the tissue is acquired  
9 by an accredited public or private institution of higher education  
10 for use in research approved by an institutional review board or  
11 another appropriate board, committee, or body charged with  
12 oversight applicable to the research; or

13           (5) cell lines derived from human fetal tissue or  
14 human tissue existing on September 1, 2017, that are used by an  
15 accredited public or private institution of higher education in  
16 research approved by an institutional review board or another  
17 appropriate board, committee, or body charged with oversight  
18 applicable to the research.

19           (f) With the consent of the appropriate local county or  
20 district attorney, the attorney general has concurrent  
21 jurisdiction with that consenting local prosecutor to prosecute an  
22 offense under this section.

23           SECTION 18. (a) Not later than December 1, 2017, the  
24 executive commissioner of the Health and Human Services Commission  
25 shall adopt any rules necessary to implement Section [245.011](#),  
26 Health and Safety Code, as amended by this Act, and Chapters 173 and  
27 697, Health and Safety Code, as added by this Act.

1 (b) The Department of State Health Services shall:

2 (1) as soon as practicable after the effective date of  
3 this Act, develop the electronic reporting system required by  
4 Section 245.011, Health and Safety Code, as amended by this Act;

5 (2) not later than October 1, 2017, establish the  
6 grant program required by Section 697.006, Health and Safety Code,  
7 as added by this Act;

8 (3) not later than December 1, 2017, prescribe the  
9 standard consent form required by Section 173.006, Health and  
10 Safety Code, as added by this Act; and

11 (4) not later than February 1, 2018, begin to award  
12 grants under the grant program described by Subdivision (2) of this  
13 subsection.

14 SECTION 19. (a) Subchapters F and G, Chapter 171, Health  
15 and Safety Code, as added by this Act, apply only to an abortion  
16 performed on or after the effective date of this Act. An abortion  
17 performed before the effective date of this Act is governed by the  
18 law in effect immediately before the effective date of this Act, and  
19 that law is continued in effect for that purpose.

20 (b) Sections 173.003, 173.004, 173.005, and 173.006, Health  
21 and Safety Code, as added by this Act, apply to a donation of human  
22 fetal tissue that occurs on or after the effective date of this Act,  
23 regardless of whether the human fetal tissue was acquired before,  
24 on, or after that date.

25 (c) An authorized facility is not required to make an  
26 initial annual report under Section 173.009, Health and Safety  
27 Code, as added by this Act, before January 1, 2019.

1           (d) Chapter 697, Health and Safety Code, as added by this  
2 Act, applies only to the disposition of embryonic and fetal tissue  
3 remains that occurs on or after February 1, 2018. The disposition  
4 of embryonic and fetal tissue remains that occurs before February  
5 1, 2018, is governed by the law in effect immediately before the  
6 effective date of this Act, and the former law is continued in  
7 effect for that purpose.

8           (e) Chapter 48, Penal Code, as amended by this Act, applies  
9 only to an offense committed on or after the effective date of this  
10 Act. An offense committed before the effective date of this Act is  
11 governed by the law in effect on the date the offense was committed,  
12 and the former law is continued in effect for that purpose. For  
13 purposes of this subsection, an offense was committed before the  
14 effective date of this Act if any element of the offense occurred  
15 before that date.

16           SECTION 20. It is the intent of the legislature that every  
17 provision, section, subsection, sentence, clause, phrase, or word  
18 in this Act, and every application of the provisions in this Act to  
19 each person or entity, are severable from each other. If any  
20 application of any provision in this Act to any person, group of  
21 persons, or circumstances is found by a court to be invalid for any  
22 reason, the remaining applications of that provision to all other  
23 persons and circumstances shall be severed and may not be affected.

24           SECTION 21. (a) If some or all of the provisions of this  
25 Act are ever temporarily or permanently restrained or enjoined by  
26 judicial order, all other provisions of Texas law regulating or  
27 restricting abortion shall be enforced as though the restrained or

1 enjoined provisions had not been adopted; provided, however, that  
2 whenever the temporary or permanent restraining order or injunction  
3 is stayed or dissolved, or otherwise ceases to have effect, the  
4 provisions shall have full force and effect.

5 (b) Mindful of Leavitt v. Jane L., 518 U.S. 137 (1996), in  
6 which in the context of determining the severability of a state  
7 statute regulating abortion the United States Supreme Court held  
8 that an explicit statement of legislative intent is controlling, it  
9 is the intent of the legislature that every provision, section,  
10 subsection, sentence, clause, phrase, or word in this Act, and  
11 every application of the provisions in this Act, are severable from  
12 each other. If any application of any provision in this Act to any  
13 person, group of persons, or circumstances is found by a court to be  
14 invalid, the remaining applications of that provision to all other  
15 persons and circumstances shall be severed and may not be affected.  
16 All constitutionally valid applications of this Act shall be  
17 severed from any applications that a court finds to be invalid,  
18 leaving the valid applications in force, because it is the  
19 legislature's intent and priority that the valid applications be  
20 allowed to stand alone. Even if a reviewing court finds a provision  
21 of this Act to impose an undue burden in a large or substantial  
22 fraction of relevant cases, the applications that do not present an  
23 undue burden shall be severed from the remaining provisions and  
24 shall remain in force, and shall be treated as if the legislature  
25 had enacted a statute limited to the persons, group of persons, or  
26 circumstances for which the statute's application does not present  
27 an undue burden. The legislature further declares that it would

1 have passed this Act, and each provision, section, subsection,  
2 sentence, clause, phrase, or word, and all constitutional  
3 applications of this Act, irrespective of the fact that any  
4 provision, section, subsection, sentence, clause, phrase, or word,  
5 or applications of this Act, were to be declared unconstitutional  
6 or to represent an undue burden.

7 (c) If any provision of this Act is found by any court to be  
8 unconstitutionally vague, then the applications of that provision  
9 that do not present constitutional vagueness problems shall be  
10 severed and remain in force.

11 SECTION 22. This Act takes effect September 1, 2017.

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President of the Senate

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Speaker of the House

I hereby certify that S.B. No. 8 passed the Senate on March 15, 2017, by the following vote: Yeas 24, Nays 6; and that the Senate concurred in House amendments on May 26, 2017, by the following vote: Yeas 22, Nays 9.

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Secretary of the Senate

I hereby certify that S.B. No. 8 passed the House, with amendments, on May 20, 2017, by the following vote: Yeas 93, Nays 45, one present not voting.

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Chief Clerk of the House

Approved:

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Date

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Governor

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts amended §106.494 *with change* to the proposed text as published in the May 11, 2018, issue of the *Texas Register* (43 TexReg 2943) and, therefore, will be republished.

### **Background and Summary of the Factual Basis for the Adopted Rule**

Senate Bill (SB) 8, 85th Texas Legislature, 2017, amended Texas Health and Safety Code (THSC) by adding THSC, Chapter 697, relating to the disposition of embryonic and fetal tissue remains. Under SB 8: THSC, §697.002 (Definitions), defined the term "Embryonic and fetal tissue remains"; THSC, §697.003 (Applicability of Other Law), stated that embryonic and fetal tissue remains are not considered pathological waste under state law; and THSC, §697.003, stated that unless otherwise provided by this chapter, THSC, Chapter 711 (General Provisions Relating to Cemeteries), Chapter 716 (Crematories), and Texas Occupations Code, Chapter 651 (Cemetery and Crematory Services, Funeral Directing, and Embalming), do not apply to the disposition of embryonic and fetal tissue remains. Additionally, SB 8 requires health care facilities to ensure that embryonic and fetal tissue remains that are passed or delivered at the facility are disposed by interment, cremation, incineration followed by interment, or steam disinfection followed by interment. SB 8 became effective on September 1, 2017; however, THSC, Chapter 697, as added by SB 8 applies only to the disposition of embryonic and fetal tissue remains that occurs on or after February 1, 2018. The disposition of embryonic and fetal tissue remains that occurs before February 1, 2018,

is governed by the law in effect immediately before the effective date of SB 8.

While the legislation does not require TCEQ to adopt any rules to implement SB 8, revisions to Chapter 106 are necessary to align TCEQ definitions with those in SB 8 and other references to 25 TAC Chapter 1, Miscellaneous Provisions, which are under the jurisdiction of the Texas Department of State Health Services (DSHS) and the Texas Health and Human Services Commission (HHSC).

The legislation requires the executive commissioner of HHSC to adopt any rules necessary to implement THSC, Chapter 697 no later than December 1, 2017. At the time of this rulemaking, HHSC has adopted new 25 TAC Chapter 138, Disposition of Embryonic and Fetal Tissue Remains (*See* January 26, 2018, issue of the *Texas Register* (43 TexReg 465)) and DSHS has adopted amendments to 25 TAC Chapter 1 to implement SB 8 which were effective on May 24, 2018 (*See* May 18, 2018, issue of the *Texas Register* (43 TexReg 3242)).

In order to adhere to the directives of the legislature and maintain consistency with the regulations of DSHS and HHSC, TCEQ initiates this rulemaking adoption to revise §106.494.

Under §106.494, crematories and non-commercial incinerators which meet the conditions of this section and which are used to dispose of pathological waste, human

remains, and carcasses are permitted by rule. Under existing §106.494, certain defined terms in the section refer to the terms as defined in THSC, §711.001, and 25 TAC §1.132, Definitions. At the time this rulemaking was proposed, the terms as defined in THSC, §711.001, and 25 TAC §1.132 were not consistent with new THSC, §697.003 and §697.004.

Specifically, §106.494 defined "Pathological waste" by referencing 25 TAC §1.132 and restating the definitional language, in slightly different form, found in 25 TAC §1.132; 25 TAC §1.132 and §106.494 stated this term includes products of spontaneous or induced human abortions, including tissues and fetuses. The definition "Crematory" under §106.494 referred to the definition in THSC, §711.001, which specified the use of the crematory furnace is for the cremation of human remains. The definition "Human remains" is also defined under §106.494 and refers to the definition in THSC, §711.001. Under SB 8, and as specified by newly added THSC, §697.002 and §697.003, "Embryonic and fetal tissue remains" are specifically not pathological waste and THSC, Chapters 711 and 716 are not applicable to the disposition of embryonic and fetal tissue remains. Current state law, as enacted by SB 8, provides for cremation of embryonic and fetal tissue remains as a form of disposition of those remains. The commission is adopting this rulemaking to conform its rule to SB 8 and remove all references that would define embryonic and fetal tissue remains as pathological waste. The amendment to §106.494 clarifies that a facility operating under §106.494 is authorized to burn any materials meeting the definition of "Embryonic and fetal tissue

remains," whether done by a non-commercial incinerator, or by a crematory used for the cremation of human remains.

No technical requirements, design requirements, or operational conditions under §106.494 are affected as part of this rulemaking. The rulemaking is not expected to result in any change to current authorizations under §106.494, and therefore, the commission is not requiring any facility currently authorized by this permit by rule to re-register the facility.

### **Section by Section Discussion**

#### *§106.494, Non-commercial Incinerators and Crematories*

The commission adopts the amended title of §106.494, from "Pathological Waste Incinerators" to "Non-commercial Incinerators and Crematories" to clarify the types of facilities authorized under this permit by rule.

The commission adopts amended §106.494(a)(1), which defined "Pathological waste" by specifying the term is as defined in 25 TAC §1.132 and also listed materials that are included in that definition under §106.494(a)(1)(A) - (D). As mentioned earlier in the Background and Summary of the Factual Basis for the Adopted Rule section of this preamble, DSHS adopted amendments to 25 TAC §1.132 to conform to SB 8.

"Pathological waste," as it was previously defined in §106.494(a)(1)(A) - (D), closely mirrored the definition and materials listed under the previous 25 TAC §1.132(42)(A) -

(D). Previously under §106.494(a)(1)(B), and corresponding 25 TAC §1.132(42)(B), "Pathological waste" was defined as including products of spontaneous or induced human abortions including body parts, tissues, fetuses, organs, and bulk blood and body fluids.

In accordance with SB 8 and THSC, §697.003, embryonic and fetal tissue remains are not pathological waste under state law. Therefore, the commission adopts the deletion of all the materials that are considered to be pathological waste under §106.494(a)(1)(A) - (D), and adopts a minor rephrasing of §106.494(a)(1) to clarify that the definition of "Pathological waste" will have the meaning as it is defined in 25 TAC §1.132, which has been amended to comply with SB 8. The amendment to §106.494(a)(1) aligns with the changes to 25 TAC §1.132 adopted by the executive commissioner of HHSC. Both amendments are being made in concurrent, but separate, rulemakings to comply with state law. As such, the term will still capture all other materials listed under the definition and continue to align the commission's definition of "Pathological waste" with any subsequent changes to the definition made under 25 TAC §1.132.

The commission adopts §106.494(a)(3) to add the definition of "Embryonic and fetal tissue remains" and to specify that the term is prescribed the meaning given in THSC, §697.002. The commission also adopts additional language to clarify, consistent with THSC, § 697.004, the umbilical cord, placenta, gestational sac, blood, or body fluids

from the same pregnancy may be disposed of in the same manner as embryonic and fetal tissue remains. The adoption of amended §106.494(a)(3) is necessary to reflect the addition of THSC, §697.002 and §697.004, as enacted by SB 8, and the adopted changes in §106.494(a)(5) and (7), and (b), (b)(2)(E), and (G). The commission also adopted renumbered §106.494(a)(3) as §106.494(a)(4) and renumbered subsequent existing §106.494(a)(4) - (7) as §106.494(a)(5) - (8) to accommodate the adopted changes to §106.494(a)(3).

The commission adopts renumbered §106.494(a)(5). Under the previous §106.494(a)(4), "Crematory" is defined under THSC, §711.001 as a structure containing a furnace used or intended to be used for the cremation of human remains. The term "Human remains" within this definition restricts a crematory from cremating "Embryonic and fetal tissue remains" since both terms are assigned their own individual definitions and do not overlap. "Crematory" is defined in 25 TAC §1.132 as being used for the reduction (by burning) of pathological waste. "Crematory" is defined in 25 TAC §138.2 as being used for the reduction (by burning) of human remains or embryonic and fetal tissue remains.

The adopted amendment removes the existing reference to THSC, §711.001, from the definition of "Crematory" and clarifies the definition to be consistent with the definition under the DSHS and HHSC rules. It clarifies that crematory furnace(s) are used for the reduction (by burning) of human remains, and/or embryonic and fetal

tissue remains.

The commission adopts renumbered §106.494(a)(7) to clarify that a non-commercial incinerator includes an incinerator which does not accept for monetary compensation embryonic and fetal tissue remains generated off-site.

The commission adopts amended §106.494(b) to specify that crematories and non-commercial incinerators which are used to cremate embryonic and fetal tissue remains are required to meet the conditions of this section to be permitted by rule. This change is necessary to maintain consistency with the addition of THSC, §697.002 - §697.004, enacted by SB 8, and with adopted changes to §106.494(a)(5) and §106.494(b)(2)(G).

The commission adopts amended §106.494(b)(2)(E) to add language to clarify the types of materials which are authorized to be cremated by incinerators installed and operated under this section.

The commission adopts amended §106.494(b)(2)(G) to add language to clarify that embryonic and fetal tissue remains are authorized to be cremated using a crematory. The commission also adopts additional language regarding the disposition of embryonic and fetal tissue remains. The adopted change is necessary to be consistent with THSC, Chapter 697, enacted by SB 8, and with the adopted changes to §106.494(a)(5).

### **Final Regulatory Impact Determination**

The commission reviewed the adopted rulemaking in light of the Draft Regulatory Impact Analysis requirements of Texas Government Code, §2001.0225, and determined that the adopted rulemaking is not subject to Texas Government Code, §2001.0225, because it does not meet the definition of a "Major environmental rule" as defined in that statute, and in addition, if it did meet the definition, would not be subject to the requirements to prepare a Regulatory Impact Analysis (RIA).

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.

Therefore, the adopted amendment will not 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.

In addition, a RIA is not required because the rule does not meet any of the four applicability criteria for requiring a regulatory analysis of a "Major environmental rule" as defined in the Texas Government Code. Texas Government Code, §2001.0225,

applies only to a major environmental rule the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not exceed a standard set by federal law. In addition, this rulemaking does not exceed an express requirement of state law and does not exceed a requirement of a delegation agreement or contract to implement a state or federal program. Finally, this rulemaking is not adopted solely under the general powers of the agency but is specifically authorized by the provisions cited in the Statutory Authority section of this preamble.

The requirement to provide a fiscal analysis of regulations in the Texas Government Code was amended by SB 633 during the 75th Texas Legislature, 1997. The intent of SB 633 was to require agencies to conduct a RIA of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded, "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill

will have significant fiscal implications for the agency due to its limited application."

The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted rules from the full RIA unless the rule was a major environmental rule that exceeds a federal law. Because of the ongoing need to meet federal requirements, the commission routinely proposes and adopts rules incorporating or designed to satisfy specific federal requirements. The legislature is presumed to understand this federal scheme. If each rule adopted by the commission to meet a federal requirement was considered to be a major environmental rule that exceeds federal law, then each of those rules would require the RIA contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board in its fiscal notes. The commission contends that the intent of SB 633 was only to require the full RIA for rules that are extraordinary in nature. Any impact the adopted rule may have is no greater than is necessary or appropriate to meet the requirements of the Federal Clean Air Act and, in fact, creates no additional impacts since the adopted rule does not exceed the requirement to attain and maintain the National Air Ambient Quality Standards. For these reasons, the adopted rule falls under the exception in Texas Government Code, §2001.0225(a), because it is required by, and does not exceed, federal law.

The commission consistently applied this construction to its rules since this statute

was enacted in 1997. Since that time, the legislature revised the Texas Government Code, but left this provision substantially unamended. It is presumed 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); *Berry v. State Farm Mut. Auto Ins. Co.*, 9 S.W.3d 884, 893 (Tex. App. Austin 2000, no writ); *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)).

The commission's interpretation of the RIA requirements is also supported by a change made to the Texas Administrative Procedure Act (APA) by the legislature in 1999. In an attempt to limit the number of rule challenges based upon APA requirements, the legislature clarified that state agencies are required to meet these sections of the APA against the standard of "substantial compliance" (Texas Government Code, §2001.035). The legislature specifically identified Texas Government Code, §2001.0225, as falling under this standard. As discussed in this analysis and elsewhere in this preamble, the commission substantially complied with the requirements of Texas Government Code, §2001.0225.

The purpose of the adopted amendment to the permit by rule is to align definitions in the permit by rule with the statutory changes required by SB 8. The adopted amendment was not developed solely under the general powers of the agency, but is authorized by specific sections of the THSC, Chapter 382, and the Texas Water Code, which are cited in the Statutory Authority sections of this preamble. Therefore, this adopted rulemaking action is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b).

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. No comments were received regarding the draft regulatory impact analysis.

### **Takings Impact Assessment**

Under Texas Government Code, §2007.002(5), taking means a governmental action that affects private real property, in whole or in part, or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or the Texas Constitution, §17 or §19, Article I, or restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action, and is the producing cause of a reduction of at least 25% in the market value of the affected private real property, determined by comparing the

market value of the property as if the governmental action is not in effect with the market value of the property as if the governmental action is in effect.

The commission completed a takings impact analysis for the adopted rulemaking action under Texas Government Code, §2007.043. The primary purpose of this adopted rulemaking action, as discussed elsewhere in this preamble, is to adhere to the directives of the legislature, and maintain consistency with the regulations of the DSHS and HHSC. The adopted rulemaking action will not create any additional burden on private real property. The adopted rulemaking action will not affect private real property in a manner that would require compensation to private real property owners under the United States Constitution or the Texas Constitution. The adoption also will not affect private real property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of the governmental action. Therefore, the adopted rulemaking will not cause a taking under Texas Government Code, Chapter 2007.

#### **Consistency with the Coastal Management Program**

The commission reviewed the adopted rule and found that it is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will it affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the adopted rule is not subject to the Texas Coastal Management Program.

The commission invited public comment regarding the consistency with the coastal management program during the public comment period. No comments were received regarding the consistency with the coastal management program.

### **Effect on Sites Subject to the Federal Operating Permits Program**

Chapter 106 is an applicable requirement under 30 TAC Chapter 122, Federal Operating Permits Program. This rulemaking would not directly affect existing authorized sources unless those sources are modified and require new authorization or make changes to their operation that require them to re-register their authorization. As noted previously in this preamble, this rulemaking is not expected to result in any change to current authorizations under §106.494, and therefore, the commission is not requiring any facility currently authorized by this permit by rule to re-register the facility.

### **Public Comment**

The commission offered a public hearing on June 4, 2018. The comment period closed on June 12, 2018. The commission received comments from Texas Values.

### **Response to Comments**

#### *Comment*

Texas Values commented that the proposed preamble implies that a crematory

operating under an existing §106.494 registration would need to re-register before it could start accepting embryonic and fetal tissue remains. Texas Values stated that this is inconsistent with other statements in the proposed preamble that assert that this rulemaking would not directly affect existing authorized sources unless those sources are modified and require new authorization or make changes to their operation that require them to re-register their authorization.

***Response***

**The commission has evaluated the permit by rule registering requirements in conjunction with the acknowledgement that this rulemaking does not change any technical requirements, design requirements, or operational conditions under §106.494, or change the character of the authorized emissions. Based on this evaluation, and as noted earlier in this preamble, the commission has determined that a crematory operating under an existing §106.494 registration would not need to re-register before it could begin accepting embryonic and fetal tissue remains.**

## **SUBCHAPTER V: THERMAL CONTROL DEVICES**

### **§106.494**

#### **Statutory Authority**

The amendment is adopted under Texas Water Code (TWC), §5.013, concerning General Jurisdiction of Commission; TWC, §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; and TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission. The rulemaking is also adopted under Texas Health and Safety Code (THSC), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; 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 proper control of the state's air; THSC, §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue permits for construction of new facilities or modifications to existing facilities that may emit air

contaminants; and THSC, §382.05196, concerning Permits by Rule, which authorizes the commission to adopt permits by rule for certain types of facilities.

The adopted amendment implements THSC, §§382.001, 382.002, 382.051, 382.05196, and §§697.002 - 697.004.

**§106.494. Non-commercial Incinerators and Crematories [Pathological Waste Incinerators].**

(a) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Pathological waste [(as defined in 25 TAC §1.132 (relating to Definitions))]~~--This term is assigned the meaning as defined in 25 TAC §1.132 (relating to Definitions)~~ [Includes, but is not limited to:]

[ (A) human materials removed during surgery, labor and delivery, autopsy, or biopsy, including:]

[ (i) body parts;]

[ (ii) tissues or fetuses;]

[(iii) organs; and]

[(iv) bulk blood and body fluids;]

[(B) products of spontaneous or induced human abortions, including body parts, tissues, fetuses, organs, and bulk blood and body fluids, regardless of the period of gestation;]

[(C) laboratory specimens of blood and tissue after completion of laboratory examination; and]

[(D) anatomical remains.]

(2) Human remains (as defined in Texas Health and Safety Code [(H&SC)], §711.001)--The body of decedent.

(3) Embryonic and fetal tissue remains--This term is assigned the meaning as defined in Texas Health and Safety Code, §697.002. The umbilical cord, placenta, gestational sac, blood, or body fluids from the same pregnancy may be disposed of in the same manner as embryonic and fetal tissue remains in accordance with Texas Health and Safety Code, §697.004.

(4) [(3)] Carcasses--Dead animals, in whole or part.

(5) [(4)] Crematory [(as defined in the H&SC, §711.001)]--A building or structure containing one or more furnaces [a furnace] used, or intended to be used, for the reduction (by burning) of human remains, and/or embryonic and fetal tissue remains to cremated remains [cremation of human remains].

(6) [(5)] Animal feeding operations--A lot or facility (other than an aquatic animal feeding facility or veterinary facility) where animals are stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period, and the animal confinement areas do not sustain crops, vegetation, forage growth, or post-harvest residues in the normal growing season.

(7) [(6)] Non-commercial incinerator--An incinerator which does not accept pathological waste, embryonic and fetal tissue remains, or carcasses generated off-site for monetary compensation.

(8) [(7)] Stack height--Elevation of the stack exit above the ground.

(b) Conditions of permit by rule. Crematories used for the cremation of human remains, embryonic and fetal tissue remains, and appropriate containers which meet

the following conditions of this section are permitted by rule. [and non-commercial]  
Non-commercial incinerators used to dispose of pathological waste, embryonic and fetal tissue remains, and carcasses which meet the following conditions of this section are permitted by rule. Incinerators used in the recovery of materials are not covered by this section.

(1) Design requirements.

(A) The manufacturer's rated capacity (burn rate) shall be 200 pounds per hour (lbs/hr) or less.

(B) The incinerator shall be a dual-chamber design.

(C) Burners shall be located in each chamber, sized to manufacturer's specifications, and operated as necessary to maintain the minimum temperature requirements of subparagraphs (D) or (E) of this paragraph at all times when the unit is burning waste.

(D) Excluding crematories, the secondary chamber must [much] be designed to maintain a temperature of 1,600 degrees Fahrenheit or more with a gas residence time of 1/2 second or more.

(E) In lieu of subparagraph (D) of this paragraph, incinerators at animal feeding operations that:

(i) are used to dispose of carcasses generated on-site; and

(ii) are located a minimum of 700 feet from the nearest property line, shall be designed to maintain a secondary chamber temperature of 1,400 degrees Fahrenheit or more with a gas residence time of 1/4 second or more. Alternatively, incinerators may be located in accordance with Table 494 of this clause, provided the total manufacturer's rated capacity (burn rate) of all units located less than 700 feet from a property line shall not exceed 200 lb/hr. Setback distances shall be measured from the stack exit.

**Figure: 30 TAC §106.494(b)(1)(E)(ii)** (No change to the figure as it exists in TAC.)

**Table 494**

Stack Height (feet)	Property Line Distance (feet) For 24-hour Operation	Property Line Distance (feet) For *Daytime-only Operation
8 or less	210	150
>8 and ≤ 12	200	140
>12 and ≤ 16	180	130

>16 and $\leq$ 20	160	110
> than 20	140	90

\*One hour after sunrise to one hour before sunset

(F) There shall be no obstructions to stack flow, such as by rain caps, unless such devices are designed to automatically open when the incinerator is operated. Properly installed and maintained spark arresters are not considered obstruction.

(2) Operational conditions.

(A) Before construction begins, the facility shall be registered with the commission using Form PI-7.

(B) The manufacturer's recommended operating instructions shall be posted at the unit and the unit shall be operated in accordance with these instructions.

(C) The opacity of emissions from the incinerator shall not exceed 5.0% averaged over a six-minute period.

(D) Heat shall be provided by the combustion of sweet natural gas, liquid petroleum gas, or Number 2 fuel oil with less than 0.3% sulfur by weight, or by electric power.

(E) Incinerators installed and operated in accordance with the conditions of this section shall not be used to dispose of any medical waste, other than pathological waste, embryonic and fetal tissue remains, and/or carcasses, as defined under subsection (a) of this section.

(F) Incinerators installed and operated in accordance with the conditions of this section shall also meet the requirements of §§111.121, 111.125, 111.127, and 111.129 of this title (relating to Single-, Dual-, and Multiple-Chamber Incinerators; Testing Requirements; Monitoring and Recordkeeping Requirements; and Operating Requirements).

(G) Crematories shall be used for the sole purpose of cremation of human remains, embryonic and fetal tissue remains, as well as the umbilical cord, placenta, gestational sac, blood, or body fluids in accordance with Texas Health and Safety Code, §697.004, and appropriate containers.

(b) Services are billed according to the appropriate Medicaid fee schedule or negotiated rate with a managed care organization.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on April 26, 2018.

TRD-201801917

Karen Ray

Chief Counsel

Health and Human Services Commission

Earliest possible date of adoption: June 10, 2018

For further information, please call: (512) 438-3076



## TITLE 30. ENVIRONMENTAL QUALITY

### PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

#### CHAPTER 106. PERMITS BY RULE SUBCHAPTER V. THERMAL CONTROL DEVICES

##### 30 TAC §106.494

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes to amend §106.494.

##### Background and Summary of the Factual Basis for the Proposed Rule

Senate Bill (SB) 8, 85th Texas Legislature, 2017, amended Texas Health and Safety Code (THSC) by adding THSC, Chapter 697, relating to the disposition of embryonic and fetal tissue remains. Under SB 8: THSC, §697.002 (Definitions), defined the term "Embryonic and fetal tissue remains"; THSC, §697.003 (Applicability of Other Law), stated that embryonic and fetal tissue remains are not considered pathological waste under state law; and THSC, §697.003, stated that unless otherwise provided by this chapter, THSC, Chapter 711 (General Provisions Relating to Cemeteries), Chapter 716 (Crematories), and Texas Occupations Code, Chapter 651 (Cemetery and Crematory Services, Funeral Directing, and Embalming), do not apply to the disposition of embryonic and fetal tissue remains. Additionally, SB 8 requires health care facilities which are subject to THSC, §241.010 (Disposition of Fetal Remains), to ensure that embryonic and fetal tissue remains that are passed or delivered at the facility are disposed by interment, cremation, incineration followed by interment, or steam disinfection followed by interment. SB 8 became effective on September 1, 2017; however, THSC, Chapter 697, as added by SB 8 applies only to the disposition of embryonic and fetal tissue remains that occurs on or after February 1, 2018. The disposition of embryonic and fetal tissue remains that occurs before February 1, 2018, is governed by the law in effect immediately before the effective date of SB 8.

While the legislation does not require TCEQ to adopt any rules to implement SB 8, revisions to Chapter 106 are necessary to align TCEQ definitions with those in SB 8 and other references to 25 TAC Chapter 1, Miscellaneous Provisions, which are under the jurisdiction of the Texas Department of State Health Services

(DSHS) and the Texas Health and Human Services Commission (HHSC).

The legislation requires the executive commissioner of HHSC to adopt any rules necessary to implement THSC, Chapter 697 no later than December 1, 2017. At the time of this rulemaking proposal, HHSC has adopted new 25 TAC Chapter 138, Disposition of Embryonic and Fetal Tissue Remains (See January 26, 2018, issue of the *Texas Register* (43 TexReg 465)) and DSHS has proposed amendments to 25 TAC Chapter 1 to implement SB 8 (See March 16, 2018, issue of the *Texas Register* (43 TexReg 1558)).

In order to adhere to the directives of the legislature and maintain consistency with the regulations of DSHS and HHSC, TCEQ initiates this rulemaking proposal to revise §106.494.

Under §106.494, crematories and non-commercial incinerators which meet the conditions of this section and which are used to dispose of pathological waste, human remains, and carcasses are permitted by rule. Under existing §106.494, certain defined terms in the section refer to the terms as defined in THSC, §711.001, and 25 TAC §1.132, Definitions. In their current form, the terms as defined in THSC, §711.001, and 25 TAC §1.132 are not consistent with new THSC, §697.003 and §697.004.

Specifically, §106.494 defines "Pathological waste" by referencing 25 TAC §1.132 and restating the definitional language, in slightly different form, found in 25 TAC §1.132; 25 TAC §1.132 and §106.494 currently state this term includes products of spontaneous or induced human abortions, including tissues and fetuses. The definition "Crematory" under §106.494 refers to the definition in THSC, §711.001, which specifies the use of the crematory furnace is for the cremation of human remains. The definition "Human remains" is also defined under §106.494 and refers to the definition in THSC, §711.001. Under SB 8, and as specified by newly added THSC, §697.002 and §697.003, "Embryonic and fetal tissue remains" are specifically not pathological waste and THSC, Chapters 711 and 716 are not applicable to the disposition of embryonic and fetal tissue remains. Current state law, as enacted by SB 8, provides for cremation of embryonic and fetal tissue remains as a form of disposition of those remains. The commission is proposing this rulemaking to conform its rule to SB 8 and remove all references that would define embryonic and fetal tissue remains as pathological waste. The amendment to §106.494 clarifies that a facility operating under §106.494 is authorized to burn any materials meeting the definition of "Embryonic and fetal tissue remains," whether done by a non-commercial incinerator, or by a crematory used for the cremation of human remains.

No technical requirements, design requirements, or operational conditions under §106.494 are affected as part of this rulemaking. The rulemaking is not expected to result in any change to current authorizations under §106.494.

##### Section by Section Discussion

The commission proposes to make various stylistic, non-substantive changes, such as grammatical correction and correct use of reference. These changes are non-substantive and generally are not specifically discussed in this preamble.

##### §106.494, *Pathological Waste Incinerators*

The commission proposes to amend the title of §106.494, "Pathological Waste Incinerators" to "Non-commercial Incinerators and Crematories" to clarify the types of facilities authorized under this permit by rule.

The commission proposes to amend §106.494(a)(1), which currently defines "Pathological waste" by specifying the term is as defined in 25 TAC §1.132 and also lists materials that are included in that definition under §106.494(a)(1)(A) - (D). As mentioned earlier in the Background and Summary of the Factual Basis for the Proposed Rule section of this preamble, DSHS has proposed amendments to 25 TAC §1.132 to conform to SB 8. "Pathological waste," as currently defined in §106.494(a)(1)(A) - (D), closely mirrors the definition and materials listed under current 25 TAC §1.132(42)(A) - (D). Currently under §106.494(a)(1)(B), and corresponding 25 TAC §1.132(42)(B), "Pathological waste" is defined as including products of spontaneous or induced human abortions including body parts, tissues, fetuses, organs, and bulk blood and body fluids.

In accordance with SB 8 and THSC, §697.003, embryonic and fetal tissue remains are not pathological waste under state law. Therefore, the commission proposes to delete all of the materials that are considered to be pathological waste under §106.494(a)(1)(A) - (D), and proposes a minor rephrasing of §106.494(a)(1) to clarify that the definition of "Pathological waste" will have the meaning as it is defined in 25 TAC §1.132, which is also being amended to comply with SB 8. The amendment to §106.494(a)(1) will align with the changes to 25 TAC §1.132 proposed by the executive commissioner of HHSC. Both amendments are being made in concurrent, but separate, rulemakings to comply with state law. As such, the term will still capture all other materials listed under the definition and continue to align the commission's definition of "Pathological waste" with any subsequent changes to the definition made under 25 TAC §1.132.

The commission proposes §106.494(a)(3) to add the definition of "Embryonic and fetal tissue remains" and to specify that the term is prescribed the meaning given in THSC, §697.002. The proposed amendment is necessary to reflect the addition of THSC, §697.002, as enacted by SB 8, and the proposed changes in §106.494(a)(5) and (7) and (b), (b)(2)(E), and (G). The commission also proposes to renumber existing §106.494(a)(3) as §106.494(a)(4) and renumber subsequent existing paragraphs §106.494(a)(4) - (7) as §106.494(a)(5) - (8) to accommodate the proposed changes to §106.494(a)(3).

The commission proposes to amend renumbered §106.494(a)(5). Under existing §106.494(a)(4), "Crematory" as defined under THSC, §711.001, is a structure containing a furnace used or intended to be used for the cremation of human remains. The term "Human remains" within this definition restricts a crematory from cremating "Embryonic and fetal tissue remains" since both terms are assigned their own individual definitions and do not overlap. "Crematory" is defined in 25 TAC §1.132 as being used for the reduction (by burning) of pathological waste. "Crematory" is defined in 25 TAC §138.2 as being used for the reduction (by burning) of human remains or embryonic and fetal tissue remains.

The proposed amendment would remove the existing reference to THSC, §711.001, from the definition of "Crematory" and would clarify the definition to be consistent with the definition under the DSHS and HHSC rules. It will clarify that crematory furnace(s) are used for the reduction (by burning) of human remains, and/or embryonic and fetal tissue remains.

The commission proposes to amend renumbered §106.494(a)(7) to clarify that a non-commercial incinerator includes an incinerator which does not accept for monetary

compensation embryonic and fetal tissue remains generated off-site.

The commission proposes to amend §106.494(b) to specify that crematories and non-commercial incinerators which are used to cremate embryonic and fetal tissue remains are required to meet the conditions of this section to be permitted by rule. This change is necessary to maintain consistency with the addition of THSC, §697.002 - §697.004, enacted by SB 8, and with proposed changes to §106.494(a)(5) and §106.494(b)(2)(G).

The commission proposes to amend §106.494(b)(2)(E) to add language to clarify the types of materials which are authorized to be cremated by incinerators installed and operated under this section.

The commission proposes to amend §106.494(b)(2)(G) to add language to clarify that embryonic and fetal tissue remains are authorized to be cremated using a crematory. The proposed change is necessary to be consistent with THSC, Chapter 697, enacted by SB 8, and with the proposed changes to §106.494(a)(5).

#### Fiscal Note: Costs to State and Local Government

Jené Bearse, Analyst in the Budget and Planning Division, determined that for the first five-year period the proposed rule is in effect no fiscal implications are anticipated for the agency or other units of state or local government as a result of administration or enforcement of the proposed rule.

The rulemaking is proposed in order to align with SB 8, which states that embryonic and fetal tissue are not considered pathological waste under state law. The proposed rulemaking would establish a new definition in §106.494 to define embryonic and fetal tissue remains for inclusion in the air quality regulations for crematories and non-commercial incinerators.

Under §106.8(c)(1), the facilities authorized to be constructed and operate under §106.494 may claim the permit version in effect at the time of installation or changes to an existing facility, whichever is the most recent; therefore, they would not directly be affected unless they require new authorization or make changes to their operation that require them to re-register their authorization. For example, a crematory operating under an existing §106.494 authorization with the intention of now accepting embryonic and fetal tissue remains, as defined in the section, would need to re-register its authorization.

Several entities of local and state government operate incinerators that are regulated under Chapter 106, but no fiscal implications are expected from the proposed rulemaking because it should not change the level of staff or equipment needed to comply with the regulations.

#### Public Benefits and Costs

Ms. Bearse also determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated from the changes seen in the proposed rule will be compliance with state law, consistency with the regulations of the DSHS and HHSC, and greater clarity of regulatory provisions.

Under §106.8(c)(1), the facilities authorized to be constructed and operate under §106.494 may claim the permit version in effect at the time of installation or changes to an existing facility, whichever is the most recent; therefore, they would not directly be affected unless they require new authorization or make changes to their operation that require them to re-register their authorization. For example, a crematory operating under an ex-

isting §106.494 authorization with the intention of now accepting embryonic and fetal tissue remains, as defined in the section, would need to re-register its authorization.

The proposed rule is not expected to result in fiscal implications for businesses or individuals because it should not change the level of staff or equipment needed to comply with the regulations. The proposed rulemaking establishes a new definition in §106.494 to define embryonic and fetal tissue remains for inclusion in the permit by rule for crematories and non-commercial incinerators.

#### Local Employment Impact Statement

The commission reviewed this proposed rulemaking and determined that a Local Employment Impact Statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

#### Rural Communities Impact Assessment

The commission reviewed this proposed rulemaking and determined that the proposed rule does not adversely affect rural communities in a material way for the first five years that the proposed rule is in effect. The proposed amendment would apply statewide and have the same effect in rural communities as in urban communities.

#### Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses due to the implementation or administration of the proposed rule for the first five-year period the proposed rule is in effect.

#### Small Business Regulatory Flexibility Analysis

The commission reviewed this proposed rulemaking and determined that a Small Business Regulatory Flexibility Analysis is not required because the proposed rule does not adversely affect a small or micro-business in a material way for the first five years the proposed rule is in effect.

#### Government Growth Impact Statement

The commission prepared a Government Growth Impact Statement assessment for this proposed rulemaking. The proposed rulemaking does not create or eliminate a government program and will not require an increase or decrease in future legislative appropriations to the agency. The proposed rule does not require the creation of new employee positions, eliminate current employee positions, nor require an increase or decrease in fees paid to the agency. The proposed rulemaking does not create, expand, repeal, or limit an existing regulation, nor does it increase or decrease the number of individuals subject to its applicability. During the first five years, the proposed rule should not impact positively or negatively the state's economy.

#### Draft Regulatory Impact Analysis Determination

The commission reviewed the proposed rulemaking in light of the Draft Regulatory Impact Analysis requirements of Texas Government Code, §2001.0225, and determined that the proposed rulemaking is not subject to Texas Government Code, §2001.0225, because it does not meet the definition of a "Major environmental rule" as defined in that statute, and in addition, if it did meet the definition, would not be subject to the requirements to prepare a Regulatory Impact Analysis (RIA).

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.

Therefore, the proposed amendment will not 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.

In addition, a RIA is not required because the rule does not meet any of the four applicability criteria for requiring a regulatory analysis of a "Major environmental rule" as defined in the Texas Government Code. Texas Government Code, §2001.0225, applies only to a major environmental rule the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking does not exceed a standard set by federal law. In addition, this rulemaking does not exceed an express requirement of state law and does not exceed a requirement of a delegation agreement or contract to implement a state or federal program. Finally, this rulemaking is not proposed solely under the general powers of the agency but is specifically authorized by the provisions cited in the Statutory Authority section of this preamble.

The requirement to provide a fiscal analysis of regulations in the Texas Government Code was amended by SB 633 during the 75th Texas Legislature, 1997. The intent of SB 633 was to require agencies to conduct a RIA of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded, "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted rules from the full RIA unless the rule was a major environmental rule that exceeds a federal law. Because of the ongoing need to meet federal requirements, the commission routinely proposes and adopts rules incorporating or designed to satisfy specific federal requirements. The legislature is presumed to understand this federal scheme. If each rule proposed by the commission to meet a federal requirement was considered to be a major environmental rule that exceeds federal law, then each of those rules would require the RIA contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board in its fiscal notes. The commission contends that the intent of SB 633 was only to require the full RIA for rules that are extraordinary in nature. Any impact the proposed rule may have is no greater than is necessary or appropriate to meet the requirements of the Federal Clean Air Act and, in fact, creates no additional impacts since the proposed

rule does not exceed the requirement to attain and maintain the National Air Ambient Quality Standards. For these reasons, the proposed rule falls under the exception in Texas Government Code, §2001.0225(a), because it is required by, and does not exceed, federal law.

The commission consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature revised the Texas Government Code, but left this provision substantially unamended. It is presumed 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); *Berry v. State Farm Mut. Auto Ins. Co.*, 9 S.W.3d 884, 893 (Tex. App. Austin 2000, no writ); *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)).

The commission's interpretation of the RIA requirements is also supported by a change made to the Texas Administrative Procedure Act (APA) by the legislature in 1999. In an attempt to limit the number of rule challenges based upon APA requirements, the legislature clarified that state agencies are required to meet these sections of the APA against the standard of "substantial compliance" (Texas Government Code, §2001.035). The legislature specifically identified Texas Government Code, §2001.0225, as falling under this standard. As discussed in this analysis and elsewhere in this preamble, the commission substantially complied with the requirements of Texas Government Code, §2001.0225.

The purpose of the proposed amendment to the permit by rule is to align definitions in the permit by rule with the statutory changes required by SB 8. The proposed amendment is not developed solely under the general powers of the agency, but is authorized by specific sections of the THSC, Chapter 382, and the Texas Water Code, which are cited in the Statutory Authority sections of this preamble. Therefore, this proposed rulemaking action is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b).

Written comments on the Draft Regulatory Impact Analysis Determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

#### Takings Impact Assessment

Under Texas Government Code, §2007.002(5), taking means a governmental action that affects private real property, in whole or in part, or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or the Texas Constitution, §17 or §19, Article I, or restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action, and is the producing cause of a reduction of at least 25 percent in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect with the market value of the property as if the governmental action is in effect.

The commission completed a takings impact analysis for the proposed rulemaking action under Texas Government Code, §2007.043. The primary purpose of this proposed rulemaking action, as discussed elsewhere in this preamble, is to adhere to the directives of the legislature, and maintain consistency with the regulations of the DSHS and HHSC. The proposed rulemaking action will not create any additional burden on private real property. The proposed rulemaking action will not affect private real property in a manner that would require compensation to private real property owners under the United States Constitution or the Texas Constitution. The proposal also will not affect private real property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of the governmental action. Therefore, the proposed rulemaking will not cause a taking under Texas Government Code, Chapter 2007.

#### Consistency with the Coastal Management Program

The commission reviewed the proposed rule and found that it is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will it affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the proposed rule is not subject to the Texas Coastal Management Program.

#### Effect on Sites Subject to the Federal Operating Permits Program

Chapter 106 is an applicable requirement under 30 TAC Chapter 122, Federal Operating Permits Program. This rulemaking would not directly affect existing authorized sources unless those sources are modified and require new authorization or make changes to their operation that require them to re-register their authorization. For example, a crematory operating under an existing §106.494 authorization with the intention of now accepting embryonic and fetal tissue remains, as defined in the section, would need to re-register its authorization. In those cases, owners or operators subject to the federal operating permit program must, consistent with the revision process in Chapter 122, incorporate into their operating permit any changes made due to the amended Chapter 106 requirements.

#### Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on June 4, 2018, at 10:00 A.M. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services at (512) 239-1802 or (800) RELAY-TX (TDD). Requests should be made as far in advance as possible.

#### Submittal of Comments

Written comments may be submitted to Paige Bond, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: <http://www6.tceq.texas.gov/rules/ecomments/>.

File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2018-019-106-AI. The comment period closes on June 12, 2018. Copies of the proposed rulemaking can be obtained from the commission's website at [http://www.tceq.texas.gov/rules/propose\\_adopt.html](http://www.tceq.texas.gov/rules/propose_adopt.html). For further information, please contact Kati Wooten, TCEQ Air Permits Division, Operational Support Section, (512) 239-0837.

#### Statutory Authority

The amendment is proposed under Texas Water Code (TWC), §5.013, concerning General Jurisdiction of Commission; TWC, §5.102, concerning General Powers, which provides the commission with the general powers to carry out its duties under the TWC; TWC, §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; and TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission. The rulemaking is also proposed under Texas Health and Safety Code (THSC), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; 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 proper control of the state's air; THSC, §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue permits for construction of new facilities or modifications to existing facilities that may emit air contaminants; and THSC, §382.05196, concerning Permits by Rule, which authorizes the commission to adopt permits by rule for certain types of facilities.

The proposed amendment implements THSC, §§382.001, 382.002, 382.051, 382.05196, and §§697.002 - 697.004.

#### §106.494. Non-commercial Incinerators and Crematories [Pathological Waste Incinerators].

(a) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Pathological waste-- This term is assigned the meaning as defined in 25 TAC §1.132 (relating to Definitions). [(as defined in 25 TAC §1.132 (relating to Definitions))--Includes, but is not limited to:]

[(A) human materials removed during surgery, labor and delivery, autopsy, or biopsy, including:]

[(i) body parts;]

[(ii) tissues or fetuses;]

[(iii) organs; and]

[(iv) bulk blood and body fluids;]

[(B) products of spontaneous or induced human abortions, including body parts, tissues, fetuses, organs, and bulk blood and body fluids, regardless of the period of gestation;]

[(C) laboratory specimens of blood and tissue after completion of laboratory examination; and]

[(D) anatomical remains;]

(2) Human remains (as defined in Texas Health and Safety Code [(H&SC)], §711.001)--The body of decedent.

(3) Embryonic and fetal tissue remains--This term is assigned the meaning as defined in Texas Health and Safety Code, §697.002.

(4) [(3)] Carcasses--Dead animals, in whole or part.

(5) [(4)] Crematory [(as defined in the H&SC, §711.001)]--A building or structure containing one or more furnaces [a furnace] used, or intended to be used, for the reduction (by burning) of human remains, and/or embryonic and fetal tissue remains to cremated remains [cremation of human remains].

(6) [(5)] Animal feeding operations--A lot or facility (other than an aquatic animal feeding facility or veterinary facility) where animals are stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period, and the animal confinement areas do not sustain crops, vegetation, forage growth, or post-harvest residues in the normal growing season.

(7) [(6)] Non-commercial incinerator--An incinerator which does not accept pathological waste, embryonic and fetal tissue remains, or carcasses generated off-site for monetary compensation.

(8) [(7)] Stack height--Elevation of the stack exit above the ground.

(b) Conditions of permit by rule. Crematories used for the cremation of human remains, embryonic and fetal tissue remains, and appropriate containers which meet the following conditions of this section are permitted by rule. Non-commercial [and non-commercial] incinerators used to dispose of pathological waste, embryonic and fetal tissue remains, and carcasses which meet the following conditions of this section are permitted by rule. Incinerators used in the recovery of materials are not covered by this section.

(1) Design requirements.

(A) The manufacturer's rated capacity (burn rate) shall be 200 pounds per hour (lbs/hr) or less.

(B) The incinerator shall be a dual-chamber design.

(C) Burners shall be located in each chamber, sized to manufacturer's specifications, and operated as necessary to maintain the minimum temperature requirements of subparagraphs (D) or (E) of this paragraph at all times when the unit is burning waste.

(D) Excluding crematories, the secondary chamber must [much] be designed to maintain a temperature of 1,600 degrees Fahrenheit or more with a gas residence time of 1/2 second or more.

(E) In lieu of subparagraph (D) of this paragraph, incinerators at animal feeding operations that:

(i) are used to dispose of carcasses generated on-site; and

(ii) are located a minimum of 700 feet from the nearest property line, shall be designed to maintain a secondary chamber temperature of 1,400 degrees Fahrenheit or more with a gas residence time of 1/4 second or more. Alternatively, incinerators may be located in accordance with Table 494 of this clause, provided the total manufacturer's rated capacity (burn rate) of all units located less than 700 feet from a property line shall not exceed 200 lb/hr. Setback distances shall be measured from the stack exit.

Figure: 30 TAC §106.494(b)(1)(E)(ii) (No change.)

(F) There shall be no obstructions to stack flow, such as by rain caps, unless such devices are designed to automatically open when the incinerator is operated. Properly installed and maintained spark arresters are not considered obstruction.

(2) Operational conditions.

(A) Before construction begins, the facility shall be registered with the commission using Form PI-7.

(B) The manufacturer's recommended operating instructions shall be posted at the unit and the unit shall be operated in accordance with these instructions.

(C) The opacity of emissions from the incinerator shall not exceed 5.0% averaged over a six-minute period.

(D) Heat shall be provided by the combustion of sweet natural gas, liquid petroleum gas, or Number 2 fuel oil with less than 0.3% sulfur by weight, or by electric power.

(E) Incinerators installed and operated in accordance with the conditions of this section shall not be used to dispose of any medical waste, other than pathological waste, embryonic and fetal tissue remains, and/or carcasses, as defined under subsection (a) of this section.

(F) Incinerators installed and operated in accordance with the conditions of this section shall also meet the requirements of §§111.121, 111.125, 111.127, and 111.129 of this title (relating to Single-, Dual-, and Multiple-Chamber Incinerators; Testing Requirements; Monitoring and Recordkeeping Requirements; and Operating Requirements).

(G) Crematories shall be used for the sole purpose of cremation of human remains, embryonic and fetal tissue remains, and appropriate containers.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on April 27, 2018.

TRD-201801922

Robert Martinez

Director, Environmental Law Division

Texas Commission on Environmental Quality

Earliest possible date of adoption: June 10, 2018

For further information, please call: (512) 239-2613



## TITLE 34. PUBLIC FINANCE

### PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

#### CHAPTER 3. TAX ADMINISTRATION

#### SUBCHAPTER O. STATE AND LOCAL SALES AND USE TAXES

##### 34 TAC §3.364

The Comptroller of Public Accounts proposes amendments to §3.364, concerning professional employer services. The following amendments implement Senate Bill 745, 85th Legislature, 2017, transferring Tax Code, §151.057 (Services by Employees)

to §151.3503 (Services by Employees). Senate Bill 745 was effective September 1, 2017.

The comptroller changes the title of this section from "Professional Employer Services" to "Services by Employees" to follow the statutory language.

The comptroller amends subsection (a) to add definitions of terms contained in Senate Bill 745 and to add definitions of terms used in this section, but not previously defined. The comptroller renumbers the existing paragraphs accordingly.

The comptroller adds new paragraph (1) to define "affiliated group" which has the meaning given in Tax Code, §151.3503(c)(1) and §171.0001(1) (General Definitions).

The comptroller adds new paragraph (6) to define the term "controlling interest," which appears in the definition of "affiliated group." The comptroller gives this term the meaning assigned by Tax Code, §171.0001(8).

The comptroller adds new paragraph (7) to define "host employer" as defined in Tax Code, §151.3503(c)(2).

The comptroller deletes former paragraph (8), defining the term "temporary help," based on the statutory changes made by Senate Bill 745.

The comptroller amends renumbered paragraph (10)(A), defining professional employer services, to replace the phrase "temporary help" with the new defined term "temporary employee."

The comptroller adds new paragraph (11) to define the term "temporary employee."

The comptroller adds new paragraph (12) to implement Senate Bill 745 by defining the term "temporary employment service" based on the meaning in Tax Code, §151.3503(c)(3) and Labor Code, §93.001 (Definitions), with one revision. The comptroller replaces the phrase "the clients of the service" with the defined term "host employer."

The comptroller amends subsection (b)(4) to update the title change to §3.285 of this title.

The comptroller amends subsection (d) to implement Senate Bill 745 by deleting existing language addressing temporary help services and replacing it with language describing the tax responsibilities of temporary employment services under §151.3503(a)(2). The comptroller adds paragraph (2) explaining that a temporary employment service may rely upon a host employer's blanket exemption certificate.

The comptroller adds new subsection (e) to implement existing law by explaining when services performed by an employer's own employees are exempt. This section also adds that employees are not required to provide exemption certificates to their employers.

Tom Currah, Chief Revenue Estimator, has determined that during the first five years that the proposed amendment is in effect, the amendment: will not create or eliminate a government program; will not require the creation or elimination of employee positions; will not require an increase or decrease in future legislative appropriations to the agency; will not require an increase or decrease in fees paid to the agency; will not increase or decrease the number of individuals subject to the rules' applicability; and will not positively or adversely affect this state's economy. This proposal amends a current rule.

§290.46(s)(2)(C)(i), by failing to verify the accuracy of the manual disinfection residual analyzer at least once every 90 days using chlorine solutions of known concentrations; 30 TAC §290.46(s)(1), by failing to calibrate the facility's well meter at least once every three years; 30 TAC §290.45(b)(1)(C)(ii), by failing to provide a minimum total storage tank capacity of 200 gallons per connection; 30 TAC §290.117(f)(3)(A) and §290.122(b)(2)(A) and (f), by failing to submit a recommendation to the ED for optimal corrosion control treatment within six months after the end of the January 1, 2016 - December 31, 2016, monitoring period during which the lead action level was exceeded and failing to provide public notification and submit a copy of the public notification to the ED regarding the failure to submit a recommendation to the ED for optimal corrosion control treatment; and 30 TAC §290.117(g)(2)(A) and §290.122(b)(2)(A) and (f), by failing to submit a recommendation to the ED for source water treatment within 180 days after the end of the January 1, 2016 - December 31, 2016, monitoring period during which the lead action level was exceeded and failed to provide public notification and submit a copy of the public notification to the ED regarding the failure to submit a recommendation to the ED for source water treatment; PENALTY: \$700; ENFORCEMENT COORDINATOR: Steven Hall, (512) 239-2569; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(39) COMPANY: Roundup Partners, L.P. dba Star Stop; DOCKET NUMBER: 2018-0067-PST-E; IDENTIFIER: RN101436673; LOCATION: Haskell, Haskell County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.50(b)(1)(A) and (2), and TWC, §26.3475(a) and (c)(1), by failing to monitor the underground storage tank (UST) for releases at a frequency of at least once every month, and failing to provide release detection for the pressurized piping associated with the UST system; and 30 TAC §334.10(b)(2), by failing to assure that all UST recordkeeping requirements are met; PENALTY: \$4,924; ENFORCEMENT COORDINATOR: Melissa Castro, (512) 239-0855; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (325) 698-9674.

(40) COMPANY: RSK Group Incorporated dba Clark Gas and Convenience Store; DOCKET NUMBER: 2016-1651-PST-E; IDENTIFIER: RN105674204; LOCATION: Duncanville, Dallas County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to monitor the underground storage tank for releases at a frequency of at least once every month; 30 TAC §334.72, by failing to report a suspected release to the TCEQ within 24 hours of discovery; and 30 TAC §334.74, by failing to investigate a suspected release of regulated substance within 30 days of discovery; PENALTY: \$37,225; ENFORCEMENT COORDINATOR: Rahim Momin, (512) 239-2544; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(41) COMPANY: RYDER TRUCK RENTAL, INCORPORATED dba Ryder 0588A; DOCKET NUMBER: 2017-1649-PST-E; IDENTIFIER: RN102226016; LOCATION: Farmers Branch, Dallas County; TYPE OF FACILITY: fleet refueling facility; RULES VIOLATED: 30 TAC §334.74, by failing to investigate a suspected release of regulated substance within 30 days of discovery; and 30 TAC §334.72, by failing to report a suspected release to the TCEQ within 24 hours of discovery; PENALTY: \$12,603; ENFORCEMENT COORDINATOR: Rahim Momin, (512) 239-2544; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(42) COMPANY: SAHAR BUSINESS INCORPORATED dba Quick Stop; DOCKET NUMBER: 2017-1512-PST-E; IDENTIFIER: RN101444354; LOCATION: Highlands, Harris County; TYPE OF

FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to monitor the underground storage tanks (USTs) for releases at a frequency of at least once every month; and 30 TAC §334.10(b)(2), by failing to assure that all UST recordkeeping requirements are met; PENALTY: \$3,600; ENFORCEMENT COORDINATOR: Tyler Richardson, (512) 239-4872; REGIONAL OFFICE: 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(43) COMPANY: Victoria County Water Control and Improvement District Number 2; DOCKET NUMBER: 2017-1457-MWD-E; IDENTIFIER: RN101612331; LOCATION: Placedo, Victoria County; TYPE OF FACILITY: wastewater treatment facility; RULES VIOLATED: TWC, §26.121(a)(1), 30 TAC §305.125(1), and Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0012743001, Effluent Limitations and Monitoring Requirements Number 1, by failing to comply with permitted effluent limitations; 30 TAC §305.125(1) and (17) and §319.7(d), and TPDES Permit Number WQ0012743001, Monitoring and Reporting Requirements Number 1, by failing to submit discharge monitoring reports at the intervals specified in the permit; and 30 TAC §305.125(1) and (17) and TPDES Permit Number WQ0012743001, Sludge Provisions, by failing to submit the annual sludge report for the monitoring period ending July 31, 2016, to the TCEQ Corpus Christi Regional Office and the Enforcement Division by September 30, 2016; PENALTY: \$7,188; ENFORCEMENT COORDINATOR: Had Darling, (512) 239-2520; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5839, (361) 825-3100.

(44) COMPANY: VISION TOP SOIL LLC; DOCKET NUMBER: 2017-1546-MSW-E; IDENTIFIER: RN109570663; LOCATION: San Antonio, Bexar County; TYPE OF FACILITY: unauthorized municipal solid waste (MSW) disposal site; RULES VIOLATED: 30 TAC §330.7(a) and §330.15(a), by failing to obtain a permit or other authorization prior to conducting storage, processing, or disposal of MSW, and failing to not cause, suffer, allow, or permit the unauthorized disposal of MSW; PENALTY: \$1,275; ENFORCEMENT COORDINATOR: John Paul Fennell, (512) 239-2616; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

TRD-201802153

Charmaine Backens

Director, Litigation Division

Texas Commission on Environmental Quality

Filed: May 15, 2018

### Correction of Error

The Texas Commission on Environmental Quality (commission) published a proposed amendment to 30 TAC Chapter 106 as well as a related public hearing notice in the May 11, 2018, issue of the *Texas Register* (43 TexReg 2943) and (43 TexReg 3150), respectively. Errors in the text as submitted by the commission should be corrected as follows:

On page 2946, Proposal Preamble Notice, under "Submittal of Comments", first paragraph, second sentence: "Electronic comments may be submitted at: <http://www6.tceq.texas.gov/rules/ecomments/>." should be corrected to read, "Electronic comments may be submitted at: <https://www6.tceq.texas.gov/rules/ecomments/>."

On page 2947, rule text for 30 TAC §106.494(a)(2): "Human remains (as defined in Texas Health and Safety Code)." should be corrected to read, "Human remains (as defined in Texas Health and Safety Code)"

On page 3150, Public Hearing Notice, fifth paragraph, second sentence: "Electronic comments may be submitted at: <http://www6.tceq.texas.gov/rules/ecomments/>." should be corrected to read, "Electronic comments may be submitted at: <https://www6.tceq.texas.gov/rules/ecomments/>."

TRD-201802159

## Enforcement Orders

An agreed order was adopted regarding Riverside Commodities LLC, Docket No. 2015-0081-MLM-E on May 15, 2018 assessing \$5,350 in administrative penalties with \$1,070 deferred. Information concerning any aspect of this order may be obtained by contacting Farhaud Abbaszadeh, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding R. a. D. Trucking, Ltd., Docket No. 2015-1641-MLM-E on May 15, 2018 assessing \$4,375 in administrative penalties with \$875 deferred. Information concerning any aspect of this order may be obtained by contacting Austin Henck, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding Bizome Investments, LLC dba TJS SUPER STOP, Docket No. 2016-1655-PST-E on May 15, 2018 assessing \$4,687 in administrative penalties with \$937 deferred. Information concerning any aspect of this order may be obtained by contacting Ross Luedtke, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding Mr Sam's Food Mart, LLC, Docket No. 2016-1790-PST-E on May 15, 2018 assessing \$3,375 in administrative penalties with \$675 deferred. Information concerning any aspect of this order may be obtained by contacting Alejandro Laje, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding REDBIRD SUPPLY, INC., Docket No. 2017-0067-IHW-E on May 15, 2018 assessing \$3,438 in administrative penalties with \$687 deferred. Information concerning any aspect of this order may be obtained by contacting Danielle Porras, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding Apex Homes, Inc., Docket No. 2017-0308-WQ-E on May 15, 2018 assessing \$6,312 in administrative penalties with \$1,262 deferred. Information concerning any aspect of this order may be obtained by contacting Steven Van Landingham, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding City of La Villa, Docket No. 2017-0657-MWD-E on May 15, 2018 assessing \$7,500 in administrative penalties with \$1,500 deferred. Information concerning any aspect of this order may be obtained by contacting Caleb Olson, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding SARFRAZ BUSINESS INC dba Fuel Express, Docket No. 2017-0887-PST-E on May 15, 2018 assessing \$5,313 in administrative penalties with \$1,062 deferred. Information concerning any aspect of this order may be obtained by contacting Ken Moller, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding Bryan's Convenience & Food Store, LLC dba Bryan Food Stop, Docket No. 2017-1350-PST-E on May 15, 2018 assessing \$3,687 in administrative penalties with \$737 deferred. Information concerning any aspect of this order may be obtained by contacting Tyler Gerhardt, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

TRD-201802173

Bridget C. Bohac

Chief Clerk

Texas Commission on Environmental Quality

Filed: May 16, 2018

## Notice of Hearing

JAMES TRIMBLE

SOAH Docket No. 582-18-3569

TCEQ Docket No. 2018-0546-LIC

APPLICATION. James Trimble, P.O. Box 1424, Willis, Texas 77378, has applied to the Texas Commission on Environmental Quality (TCEQ) for renewal of an On Site Sewage Maintenance Provider License. The Executive Director denied Mr. Trimble's application for cause. Mr. Trimble has requested a formal hearing on the Executive Director's decision. During the review of Mr. Trimble's application, the Executive Director discovered that Mr. Trimble had continually received citations from Montgomery County. The Executive Director denied Mr. Trimble's application because these citations were for offenses that directly relate to On Site Sewage Facilities.

CONTESTED CASE HEARING. The State Office of Administrative Hearings (SOAH) will conduct a formal contested case hearing on this application at:

10:00 a.m. - June 21, 2018

William P. Clements Building

300 West 15th Street, 4th Floor

Austin, Texas 78701

The purpose of a preliminary hearing is to establish jurisdiction, name the parties, establish a procedural schedule for the remainder of the proceeding, provide an opportunity for settlement discussions, and address other matters as determined by the administrative law judge. The preliminary hearing will be held unless all timely hearing requests are withdrawn or the parties agree to waive the preliminary hearing.

The evidentiary phase of the contested case hearing, to be held at a later date, will be a legal proceeding similar to a civil trial in state district court to determine whether Mr. Trimble should be issued an On Site Sewage Maintenance Provider License. Unless agreed to by all parties in attendance at the preliminary hearing, an evidentiary hearing will not be held on the date of this preliminary hearing. **If James Trimble fails to appear at the preliminary hearing or evidentiary hearing, the Executive Director will request that the hearing be canceled and that the appeal of the Executive Director's decision be dismissed.**

**SOAH's rules allow for participation by telephone or videoconference. Permission must be obtained from SOAH at least ten days before the hearing.**

Legal Authority: Texas Water Code Chapters 5 and 37; Texas Occupations Code Chapter 53; Texas Government Code, Chapter 2001; 30 Texas Administrative Code (TAC) Chapter 30, and the procedural rules

# Texas Commission on Environmental Quality



## ORDER ADOPTING AMENDED RULES

**Docket No. 2018-0216-RUL**

**Rule Project No. 2018-019-106-AI**

On June 27, 2018, the Texas Commission on Environmental Quality (Commission) adopted amended § 106.494 in 30 Texas Administrative Code Chapter 106 concerning Permits by Rule. The proposed rule was published for comment in the May 11, 2018, issue of the *Texas Register* (43 TexReg 2943).

IT IS THEREFORE ORDERED BY THE COMMISSION that the amended rule is hereby adopted. The Commission further authorizes staff to make any non-substantive revisions to the rule necessary to comply with *Texas Register* requirements. The adopted rule and the preamble to the adopted rule is incorporated by reference in this Order as if set forth at length verbatim in this Order.

This Order constitutes the Order of the Commission required by the Administrative Procedure Act, Tex. Gov't Code Ann., Chapter 2001 (West 2016).

If any portion of this Order is for any reason held to be invalid by a court of competent jurisdiction, the invalidity of any portion shall not affect the validity of the remaining portions.

TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY

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Bryan W. Shaw, Ph.D., P.E., Chairman

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Date Signed