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.

(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)

(2) Human remains (as defined in Texas Health and Safety Code, §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) Carcasses--Dead animals, in whole or part.

(5) Crematory --A building or structure containing one or more furnaces used, or intended to be used, for the reduction (by burning) of human remains, and/or embryonic and fetal tissue remains to cremated remains.

(6) 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) 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) 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

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 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 ≤ 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.