Illegal Dumping Enforcement

Officer's Guide

Texas 2022 Edition

Reading for class:
TIDRC004 Illegal Outdoor Burning

Chapter 14: Illegal Outdoor Burning

(Pages 282 – 333)

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Chapter 14: Illegal Outdoor Burning

Misdemeanor outdoor burning can be the most complex part of local environmental enforcement.

Overall, there are seven ways we can control outdoor burning. Local governments can use six of these, and one is reserved to the enforcement staff of the Texas Natural Resources Conservation Commission: administrative enforcement of the Texas Outdoor Burning Rule [Title 30 Texas Administrative Code Sec. 111 (Subchapter B)].

The TCEQ administrative staff in the regional offices and at their Austin headquarters also enforce other rules issued under the Texas Clean Air Act and related statutes. Their Environmental Crimes Unit enforces a wide range of criminal laws that protect our air, water, and land, including the felony laws against unpermitted burning. There is a complete discussion of the Texas Outdoor Burning Rule below, and a more limited discussion of situations where the violation is an alleged air nuisance. However, most of this chapter will focus on the six ways in which local governments can stop or control outdoor burning.

Six Local Enforcement Options

There are six ways that local government can deal with outdoor burning. Each of these will be discussed in the pages that follow, but for now, just notice their categories. Outdoor burning can be controlled or stopped, depending on the situation and violation, in these ways:

1. **Municipal Codes** for cities that have them (many do) and using state public health nuisance laws (THSC Chapter 341) to clean the debris left from burning;
2. **County Burn Bans** in droughts under Local Government Code Sec. 352.081;
3. **Local Emergency Declarations** under Government Code Sec. 418.004 and Sec. 418.108;
4. **Felony Illegal Burning** under Texas Water Code Sec. 7.182 and Sec. 7.183;

5. **Misdemeanor Illegal Burning** under Texas Water Code Sec. 7.177(a)(5) for violations of the Texas Outdoor Burning Rule (with variations) and under and Texas Water Code Sec. 7.177(a)(1) for using unpermitted burning facilities; and,
6. **Major Civil Suits** by cities and counties under Texas Water Code Sec. 7.351 for violations of the Texas Clean Air Act (THSC Chapter 382) and of the rules, orders, and permits related to that statute. Changes by the 84th and 85th Legislatures have largely removed this option for cities and counties, but they may still be an option in some unusual circumstances.

There may well be other fine ways to control various situations involving outdoor burning, such as using public health nuisance or illegal dumping laws to deal with the waste before it was burned — or the mess created by the burning itself. We'll look at several of the most popular "workarounds," mostly undertaken to avoid dealing with misdemeanor burning head-on. We'll show why such avoidance may be a rational decision in some circumstances. But these six approaches are the most commonly used, and make a good topic for a chapter of this sort.

The most important thing about outdoor burning in Texas is that the state, working through the TCEQ, controls the entire process at every level. In the language of Section 111.201 of the Outdoor Burning Rule: *No person may cause, suffer, allow, or permit any outdoor burning within the State of Texas, except as provided by this subchapter or by orders or permits of the commission.* The state controls all aspects of this issue. In plain language, this means that local communities cannot legally issue "permits" to allow outdoor burning. The word has pretty well spread across Texas on this point, but there are still a few cities and counties acting as if the power to permit burning was in their hands. This simply is not the case. What communities should instead do is provide interested parties with copies of the Texas Outdoor Burning Rules and urge compliance.

1 - Using Municipal Codes

Any local ordinance that a municipality may decide to enact to regulate outdoor burning must comply with state laws, rules, permits, and orders. The state runs the show on outdoor burning enforcement.

The state law that the legislature has passed to control air emissions in Texas is the Texas Clean Air Act, which is Health and Safety Code Chapter 382. Among other sorts of emissions, it sets policy and provides the broad structure for the rules that provide the details of how the state regulates burning.

THSC Sec. 382.002. POLICY AND PURPOSE.
(a) The policy of this state and the purpose of this chapter are to safeguard the state's air resources from pollution by controlling or abating air pollution and emissions of air contaminants, consistent with the protection of public health, general welfare, and physical property, including the esthetic enjoyment of air resources by the public and the maintenance of adequate visibility.

(b) It is intended that this chapter be vigorously enforced and that violations of this chapter or any rule or order of the Texas Natural Resource Conservation Commission result in expeditious initiation of enforcement actions as provided by this chapter.

Any municipal ordinance that is passed to regulate outdoor burning by a city must conform to this state law:

THSC Sec. 382.113. AUTHORITY OF MUNICIPALITIES.
(a) Subject to Section 381.002, a municipality has the powers and rights as are otherwise vested by law in the municipality to:

(1) abate a nuisance; and

(2) enact and enforce an ordinance for the control and abatement of air pollution, or any other ordinance, not inconsistent with this chapter or the commission 's rules or orders.

(b) An ordinance enacted by a municipality ***must be consistent with this chapter and the commission's rules*** *and orders and* ***may not make unlawful a condition or act approved or authorized under this chapter or the commission's rules or orders.***

Some state rules authorize cities to adopt municipal codes with provisions that exceed those found in state rules, such as is the case in municipal regulation of scrap tires. For illegal outdoor burning, however, a local code must not exceed state rules.

Under *THSC Section 382.113*, municipalities can do two things related to air pollution: (1) act to abate a nuisance; and, (2) enact and enforce an ordinance to control and abate air pollution, provided that the ordinance meets both of the conditions shown in (b) above.

The *"Section 381.002"* mentioned in (a) of THSC Sec. 382.113 is somewhat puzzling, since there is no Chapter 38**1** of the Texas Health and Safety Code. It may be a typographical error in the law that intends to reaffirm the importance of the policy statement that appears at *THSC Sec. 38**2**.002*, in which case the subsection (a) may simply be encouraging municipalities adopting local codes to aggressively enforce them, which is the policy at the state level. Moreover, it's not likely that the *"Section 381.002"* mentioned is from some other code: the Chapter 381 in the Local Government Code discusses County Development and Growth, and that chapter number is not used anywhere else in Texas statutes. So it's probably just a typographical error that crept in while the drafter was attempting to encourage local municipalities to protect their citizens' health by aggressively enforcing any ordinance they may adopt.

To provide the details of how persons may use outdoor burning, the TCEQ predecessor agencies enacted Title 30 Texas Administrative Code Section 111, Subchapter B Outdoor Burning — the Texas Outdoor Burning Rule. The Rule itself is provided in the Appendix along with comments and explanatory material.

Most importantly, as mentioned above, please note the opening concept of the statewide Outdoor Burning Rule:

> *TAC Sec. 111.201. General Prohibition No person may cause, suffer, allow, or permit any outdoor burning within the State of Texas, except as provided by this subchapter or by orders or permits of the commission. (Title 30 Texas Administrative Code Section 111, Subchapter B Outdoor Burning).*

The concept is that:

1. The TCEQ controls all burning in Texas, including issuing permits to burn;
2. As part of that control, the state authorizes cities to adopt ordinances to control fires inside their city limit;
3. However, the provisions of any municipal code adopted *must be consistent with this chapter and the commission's rules, which is to say that a local code may not take away any right or power the state has given to the citizens.*

In response to these powers, some cities have created their own outdoor burning ordinances and others have adopted the International Fire Code. As we'll see below, the language of the International Fire Code supports the notion that in Texas the state controls all outdoor burning.

Cities and counties are slowly accepting this point. One major county in the north of the state had for years, without legal authority to do so, issued permits for outdoor burning and had even charged a fee to do so. By the time this practice was eventually halted by the commissioners' court, whose current members were very different from those sitting when the idea to sell permits to burn was approved, the county had actually collected a lot of unauthorized fee income. I had occasion to ask a commissioner involved in correcting this error and getting the county out of the business of selling permits it was not actually authorized to issue even for free, "Are you going to refund the fees you collected in error over the years?" The answer was a curt, "No." I guess that's one way to fund local government: collect an unauthorized fee from the citizens for years, and when discovering the error, stop the practice (good) but decide to just keep the money illegally collected to date (really bad).

Having the state control all outdoor burning is not as bad as you might think. When we read the Outdoor Burning Rule below, we'll see that it covers just about any case you can think of where a person might want to burn outdoors. It is very comprehensive.

But just because the state has control over the outdoor burning process doesn't mean that local governments can't use police powers to respond to related criminal violations. They can always enforce related criminal laws:

1. The TCEQ has the responsibility for enforcing the Outdoor Burning Rule administratively throughout the state. However, the violation of a provision of this rule is not only an administrative violation but also a misdemeanor criminal violation in Texas that is enforced by local peace officers [as a violation of Texas Water Code Sec. 7.177(a)(5)]. As with other environmental issues, the TCEQ handles administrative violations; local peace officers handle the violation as a criminal act.
2. We'll discuss this more when we look at that part of this chapter that deals with *misdemeanor illegal burning*, but for now please begin thinking "If I see a violation of the Outdoor Burning Rule, the person to call is a local peace officer having jurisdiction where the violation occurred, not the TCEQ." The notion that all violations of the Outdoor Burning Rule should simply be reported to the TCEQ and forgotten about is incorrect and bad local operating procedure. The TCEQ and local governments are partners in enforcement, and the point of such enforcement partnerships is not to swamp the other party with things one could do one's self. If you want to report illegal burning, call the TCEQ if you want to, tell them about the burning and how you handled it, and give them the name of the local police agency you have *already* called to report the crime. Responding to criminal violations is generally a local responsibility, and police are usually close enough to the location of the crime to act quickly. Local law enforcement will be able to determine those burning situations where the TCEQ must be called immediately — such as when a recycling operation catches on fire.

The Problem with Municipal Codes

On a very practical level, municipal codes present a big problem: they require a lot of reading, and few of us have the time or, possibly, even the interest to do this. So the real problem with codes is that local code officers don't always know the content of all local codes.

Most code officers do a great job reading, understanding, and applying the particular narrow set of ordinances in which they specialize. But the fact is that few code officers are so familiar with their entire set of municipal codes as to be able to spot potential violations outside their area of specialization, and then report those possible problems to their colleagues for closer inspection by a specialist. Too often we don't know violations well enough to serve as each other's "eyes."

We think this is a problem, and it raises a related issue too: "How many city council officials actually read the ordinances they approve before voting their approval?" This figure is unknown, but probably is about equal to the percentage of nationally elected Representatives and Senators who personally read the bills they adopt before the votes, which is pretty close to zero. There *may* be a staff member someplace who has read an entire bill before a vote is taken, but very, very few of our most senior elected officials have time — and possibly even the interest — in reading the entire statutes they regularly adopt. They instead rely on the political deals they make with each other in supporting each other's bills.

Both nationally and locally, citizens on the receiving end of the resulting shortcuts suffer when the codes, rules, and statutes become simply too thick to digest before adopting. In our online environment, it also means that a citizen himself or herself may have actually read and studied a particular municipal code more closely than the officer assigned to the problem, which can present other problems.

Code officers tell me that it is not at all unusual for citizens to be extremely specific about the exact code to be applied when they call in a complaint: *"Why aren't you enforcing Municipal Code 59-201(c) on the property at 1403 Whitaker?"* The code officer may well have to put the citizen on hold while he or she quickly reads the provisions of that

ordinance.

With reference to fire codes, this can be a particularly difficult situation. For instance, there are many Texas cities that have adopted some edition of the International Fire Code as their local ordinance, the 2018 edition of which contains 600 pages. The City of Dallas, my boyhood home, for instance, has adopted it as Chapter 16 of their set of ordinances with this statement:

> *Chapter 16, "Dallas Fire Code" of the Dallas City Code, as amended, is composed of the most recently adopted editions of the International Fire Code Institute, as adopted and amended by the Dallas City Council. The text of Chapter 16 has been removed from the bound three-volume set of the Dallas City Code and may be obtained by purchasing the Uniform Fire Code, together with City of Dallas amendments, from the Dallas Fire Department, Fire Prevention Education and Inspection Division.*

[As an aside: When I ran across this, I sent an email to the Public Information Officer at Dallas Fire-Rescue Department asking how much this Dallas Edition of the IFC cost. No word back yet, but it seems a little strange to sell access to city codes to the people who will be penalized for not following them.]

Perhaps your community has also adopted a version of the International Fire Code as your burning ordinance. If so, here are four questions about this for your consideration:

1. Which city council members read this code before they voted its adoption?
2. Of the officers working at your agency with responsibilities for enforcing this particular code, how many have read it in its entirety?
3. How many general and other specialized code enforcement officers working in your city have read even one page of the fire code, and are thereby in a position to refer possible violations they see while on properties for other reasons?
4. Most important for us, who has made certain that the code

adopted, with or without amendment, is *consistent with this chapter (i.e., THSC Chapter 382) and the commission's rules?*

Focusing on this last question, what does the International Fire Code, 2018 Edition (and subsequent editions) say about open burning in its SECTION 307 OPEN BURNING, RECREATIONAL FIRES AND PORTABLE OUTDOOR FIREPLACES?

IFC Sec. 307.1 General. A person shall not kindle or maintain or authorize to be kindled or maintained any open burning unless ***conducted and approved in accordance with Sections 307.1.1 through 307.5.***

Those sections — 307.1.1 through 307.5 — discuss the local *fire control official* using a LOCAL permitting process to control various kinds of open fires, such as bonfires and recreational fires, giving due regard for weather conditions, proximity to other property, and other factors. So initially the IFC contemplates that local governments will control local outdoor burning. However, after discussing the times open burning might be allowed, the model code reads:

IFC Sec. 307.2.1 Authorization. Where required by state or local law or regulations, open burning shall only be permitted ***with prior approval from the state or local air and water quality management authority****, provided that all conditions specified in the authorization are followed.*

This section 307.2.1 Authorization is the thing to note, because Sections 307.1.1 through 307.5 are totally replaced in Texas by the provisions of the Outdoor Burning Rule, which controls all outdoor — "open" — burning in Texas. **Any of the duties assigned to the *fire control officer* in Section 307 of the IFC model ordinance are reserved in Texas to the TCEQ and those persons designated in the Texas Outdoor Burning Rule.** If a city follows Sections 307.1 through 307.5 (ignoring Section 307.2.1) and establishes a permitting process to regulate open burning – and some cities have done so – that city would have failed to see that Section 307.2.1 overrides the rest of Section 307 in Texas. Texas cities are simply not authorized to permit out-

door burning.

Cities adopting the International Fire Code must make sure that the IFC is being used locally in such a way that it is consistent with the commission's rules (see THSC 382.113). Section 307 of the International Fire Code can not be a valid local ordinance, if a Texas city adopts it as written and elects to follow a process to issue permits for open burning. That would not be consistent with the Texas Clean Air Act, which takes precedence.

Believe it or not, I have actually had representatives of some local fire departments argue that the IFC takes precedence over state rules. Well, it doesn't. Regardless of the nifty word "International," this is simply more municipal code, usually adopted without being read in its entirety. In Texas, municipal codes have to conform to state law, and in the case of regulating open burning, that state law is the Texas Clean Air Act, Section 382.113 and the Outdoor Burning Rule.

So, make sure any local codes you have adopted are consistent with the Texas Outdoor Burning Rule — some jurisdictions have just adopted that entire rule as a local ordinance — and, if you have adopted some edition of the International Fire Code, be sure Section 307 on open fires is amended to show the permit-issuing procedure in the model IFC is *not* the one the city will be using.

Please don't forget that a violation of the provisions of the Texas Outdoor Burning Rule is also a criminal violation of Texas Water Code Sec. 7.177(a)(5), which local peace officers can enforce immediately (more on this below). Moreover, your city council does not have to "adopt" the Texas Outdoor Burning Rule — Title 30 Texas Administrative Code Section 111, Subchapter B Outdoor Burning — before your local police can enforce it as a criminal violation of Texas Water Code Sec. 7.177(a)(5). This rule and criminal law are already in force everywhere in the state. However, if your city wants to adopt the entire Texas Outdoor Burning Rule as a local ordinance so that it could be enforced by code officers also, be sure to discuss the process you'll need to follow with your city attorney and be guided by his or her wisdom.

Note that there is a new requirement from September 2017 that if an act inside a city is simultaneously a criminal violation of the Outdoor Burning Rule AND a violation of a city ordinance, that the first occurrence of this "dual violation" must be treated as a municipal ordinance violation. The new language reads:

> *THSC Sec. 382.018 (f) If conduct that violates a rule adopted under this section also violates a municipal ordinance, that conduct may be prosecuted only under the municipal ordinance, provided that:*
>
> > *(1) the violation is not a second or subsequent violation of a rule adopted under this section or a municipal ordinance; and*
> >
> > *(2) the violation does not involve the burning of heavy oils, asphaltic materials, potentially explosive materials, or chemical wastes*.

If you personally serve as a *fire control official* and your community or fire department is issuing open burning permits under Section 307 of the International Fire Code, or some other supposed permitting authority, you may want to stop and think about what you're doing. Are you not personally exercising a power you have not been granted under state law? Or if you think you do have statutory authority to issue permits to burn, from what statute is your authority derived? I'd genuinely like to know. Be sure you're not personally exposed on this, and that your fire department is not assuming a liability it doesn't really want.

Reflect on the Texas Outdoor Burning Rule's liability section too:

> *Sec. 111.221. Responsibility for Consequences of Outdoor Burning*
> *The authority to conduct outdoor burning under this regulation does not exempt or excuse any person responsible from the consequences, damages, or injuries resulting from the burning and does not exempt or excuse anyone from complying with all other applicable laws or ordinances, regulations, and orders of governmental entities having jurisdiction, even though the burning is otherwise conducted in compliance with this regulation.*

If something bad happens, and a fire you or your fire department has "permitted" causes damage, you may find yourself becoming way too familiar with this section of the rule. Perhaps what your fire department or fire marshal's office really wants to be doing is handing out copies of the Texas Outdoor Burning Rule and encouraging local police and other TCOLE-certified peace officers to enforce violations of the rule as the misdemeanor it is [TWC Sec. 7.177(a)(5)].

Consider Using Texas Public Health Nuisance Statutes

Texas health nuisance laws were not originally designed to use in fighting illegal outdoor burning. They are more frequently used to suppress illegal dumping, sewage and other minor wastewater pollution, and messes of all sorts that are breeding places of rodents and insect that carry diseases to and between humans.

However, some jurisdictions in Texas are using one provision of the primary Texas public health nuisance law — THSC Chapter 341. Minimum Standards of Sanitation and Health Protection Measures — to deal with the **resulting residue of unauthorized burning**. The jurisdictions taking this approach are doing so because the sentencing requirements under the existing misdemeanor illegal burning law — TWC Sec. 7.177(a)(5) — are not at all clear. Although the State Legislature attempted to create a statewide Class C misdemeanor for most illegal outdoor burning, a careful reading of the law they created leads one to the conclusion that they didn't quite get the drafting right.

Since the penalties for misdemeanor outdoor burning are *probably* (see below for more information on sentencing) still a fine ranging from $1,000 to $50,000 and/or a maximum of 180 days confinement, many Justices of the Peace who want to handle minor outdoor burning cases are having officers file under a provision of THSC Chapter 341:

> *THSC Sec. 341.013. GARBAGE, REFUSE, AND OTHER WASTE*
>
> *(c) Waste products, offal, polluting material, spent chemicals, liquors, brines, garbage, rubbish, refuse, used tires, or other waste of any kind may not be stored, deposited, or disposed of*

in a manner that may cause the pollution of the surrounding land, the contamination of groundwater or surface water, or the breeding of insects or rodents.

The logic at work here is that by burning any of these items in a way that does not strictly follow the provisions of the Texas Outdoor Burning Rule, a person has actually *disposed (of waste) in a manner that may cause the pollution of the surrounding land, the contamination of groundwater or surface water.* The residue of ash, partially burned commercial rubbish, and chemicals "may" be polluting the nearby land or water. The penalty for first offense conviction of a violation of this statute is low: a fine of $10 to $200 (see THSC Sec. 341.091), but it gets the violator in front of a judge. Please read *Chapter 8. Public Health Nuisance Enforcement* for details on using this law.

As you understand the difficulties of dealing with the policy issues surrounding the proper sentencing for misdemeanor illegal burning, you may decide that using a health nuisance law is an approach that you want to discuss with your misdemeanor prosecutor and JPs.

Parallel Logic: First the person illegally dumped … then he burned

Thanks to Mr. Neil Kucera, who was Assistant County Attorney in Travis County when he came up with this idea, which he presented at the annual training and meeting in 2012 of the Texas Environmental Law Enforcement Association (www.telea.us): Why not approach misdemeanor illegal burning by concentrating on what was dumped, and then burned? If you take this approach, you could move against the violator for the illegal dumping under standard state criminal laws (THSC Chapter 365 being the most common).

As in using THSC Sec. 341.013(c), the idea here is to find another way to deal with burning violations rather than possibly make an error in sentencing in your criminal application of TWC Sec. 7.177(a)(5) as a local response to a violation of the Outdoor Burning Rule.

If your county attorney is wiling to consider using this innovative approach to misdemeanor burning, you might want to have him or her get in touch with Neil. He's the smartest guy on the subject of health

nuisances in Texas, and he is also always looking for better solutions to enforcement issues. Since his office has statewide jurisdiction (along with local counties) for misdemeanor environmental violations, you need to know him anyway.

But the notion of treating burning that is in violation of the Outdoor Burning Rule as the second step in a two-step crime, the first step being the dumping, might have merit when faced with smaller burning events in which nobody is hurt by the emissions.

2 - County Burn Bans

Controlling illegal outdoor burning often gets confused with the subject of county burn bans, which is only one small aspect to be considered.

Imposing burn bans is a task given to commissioners' courts by Local Government Code Chapter 352. County Fire Protection. Any burn ban imposed by the commissioners us done so under their powers as set forth in Sec. 352.081. Regulation of Outdoor Burning. The title of this section may incorrectly suggest the idea that the general regulation of outdoor burning is left to the counties. In fact, virtually all decisions concerning outdoor burning are made by the state, and are published as the Texas Outdoor Burning Rule. Few decisions about outdoor burning are left to counties, but the ones that are really do matter and are very practical.

<u>County Burn Ban Statute</u>

Most county burn bans are imposed by commissioners' court because of actual or forecast levels of the Keetch-Byram Drought Index or "KBDI." This is a measure of moisture deficiency in the first eight (8) inches of soil. According to the Texas Forest Service interpretation (cite below) *"A rating of zero defines the point where there is no moisture deficiency and 800 is the maximum drought possible."*

John Keetch and George Byram developed this scale in a paper they wrote in 1968 when they were with the U.S. Forest Service, "A Drought Index for Forest Fire Control."

In 2002 the Texas Forest Service published an interpretation of the

KBDI in which they correlated the potential for fire to various ranges of the scale:

> *0 - 200 Soil and fuel moisture are high. Most fuels will not readily ignite or burn. However, with sufficient sunlight and wind, cured grasses and some light surface fuels will burn in spots and patches.*
>
> *200 - 400 Fires more readily burn and will carry across an area with no gaps. Heavier fuels will still not readily ignite and burn. Also, expect smoldering and the resulting smoke to carry into and possibly through the night.*
>
> *400 - 600 Fire intensity begins to significantly increase. Fires will readily burn in all directions exposing mineral soils in some locations. Larger fuels may burn or smolder for several days creating possible smoke and control problems.*
>
> *600 - 800 Fires will burn to mineral soil. Stumps will burn to the end of underground roots and spotting will be a major problem. Fires will burn thorough the night and heavier fuels will actively burn and contribute to fire intensity*.

The Texas Forest Service updates this index for all Texas counties daily, with actual and forecast KBDI indices. County judges — hopefully at the urging of their county Emergency Management Coordinator or Fire Marshal — monitor this information and bring it to the attention of the commissioners' court for review and possible action. The KBDI current and historical data is at http://twc.tamu.edu/kbdi.

Forward-thinking counties — such as Grayson County, up north of Dallas — establish policies requiring certain actions at certain levels of KBDI. Their burn ban policy has been incorporated into their local Emergency Management Plan (Annex F and Annex U).

With this understanding of the importance of the KBDI for local policy makers in mind, let's look at the statute allowing commissioners' courts to set burn bans, Local Government Code, Section 352.081.

> *Sec. 352.081. REGULATION OF OUTDOOR BURNING.*
> *(a) In this section, "drought conditions" means the existence of a*

long-term deficit of moisture creating atypically severe conditions with increased wildfire occurrence as defined by the Texas Forest Service through the use of the Keetch-Byram Drought Index or, when that index is not available, through the use of a comparable measurement that takes into consideration the burning index, spread component, or ignition component for the particular area.

(b) On the request of the commissioners' court of a county, the Texas Forest Service shall determine whether drought conditions exist in all or part of the county. The Texas Forest Service shall make available the measurement index guidelines that determine whether a particular area is in drought condition. Following a determination that drought conditions exist, the Texas Forest Service shall notify the county when drought conditions no longer exist. The Texas Forest Service may accept donations of equipment or funds as necessary to aid the Texas Forest Service in carrying out this section.

(c) The commissioners' court of a county by order may prohibit or restrict outdoor burning in general or outdoor burning of a particular substance in all or part of the unincorporated area of the county if:

(1) drought conditions have been determined to exist as provided by Subsection (b); or

(2) the commissioners' court makes a finding that circumstances present in all or part of the unincorporated area create a public safety hazard that would be exacerbated by outdoor burning.

Note: The burn ban applies to all or part of the unincorporated areas only, based on drought conditions or commissioners' court finding.

(d) An order adopted under this section must specify the period during which outdoor burning is prohibited or restricted. The period may not extend beyond the 90th day after the date the order

is adopted. A commissioners' court may adopt an order under this section that takes effect on the expiration of a previous order adopted under this section.

Note: The burn ban can roll forward for up to 90 days, although most are for a shorter length of time.

(e) An order adopted under this section expires, as applicable, on the date:

(1) a determination is made under Subsection (b) that drought conditions no longer exist; or

(2) a determination is made by the commissioners' court, or the county judge or fire marshal if designated for that purpose by the commissioners' court, that the circumstances identified under Subsection (c)(2) no longer exist.

(f) This section does not apply to outdoor burning activities:

(1) related to public health and safety that are authorized by the Texas Natural Resource Conservation Commission for:

(A) firefighter training;

(B) public utility, natural gas pipeline, or mining operations; or

(C) planting or harvesting of agriculture crops; or

(2) that are conducted by a prescribed burn manager certified under Section 153.048, Natural Resources Code, and meet the standards of Section 153.047, Natural Resources Code.

Note: Burn bans cannot prohibit all open fires, and commissioners often set other exceptions themselves — to allow for the continued use of grated burn barrels to dispose of domestic waste, for instance. The three activities listed above are free to continue. Notice that this section seems to anticipate that outdoor burning would be authorized during a burn ban for "planting or harvesting of agriculture crops," a term not specifically found in the Texas Outdoor Burning Rule.

(g) Any person is entitled to injunctive relief to prevent the violation or threatened violation of a prohibition or restriction established by an order adopted under this section.

Note: Injunctions are authorized, although I've never heard of one actually being imposed.

(h) A person commits an offense if the person knowingly or intentionally violates a prohibition or restriction established by an order adopted under this section. An offense under this subsection is a Class C misdemeanor.

Note: The penalty is a Class C misdemeanor, although commissioners' courts frequently set other penalties, such as a fine to $1,000. It's hard to imagine where this practice to set higher penalties that allowed by law derives its authority.

In many minds, the regulation of ALL outdoor burning is equaled to imposing and lifting burn bans. Although burn bans are an important way to respond to drought conditions, they are just the start.

3 - Declarations of Local Disasters

County judges and mayors have powers to declare local disasters for their jurisdictions. These declarations are good for up to seven days but must be taken before their commissioners' court or city council to be effective beyond seven days. The definition of a "disaster" and the state laws governing them are:

TEXAS GOVERNMENT CODE
Sec. 418.004. DEFINITIONS.
In this chapter: (1) "Disaster" means the occurrence or imminent threat of widespread or severe damage, injury, or loss of life or property resulting from any natural or man-made cause, including fire, flood, earthquake, wind, storm, wave action, oil spill or other water contamination, volcanic activity, epidemic, air contamination, blight, drought, infestation, explosion, riot, hostile military or paramilitary action, other public calamity requiring emergency action, or energy emergency.

Note: Actual and threatened fires and air contamination fall

within the definition of “disaster.” County judges and mayors may declare local disasters in response to the threat of fire, order the evacuation of all or part of his or her jurisdiction, and impose criminal penalties for non-compliance. (Under Sec. 418.173, a city or county can set a criminal penalty for violating a Local Emergency Management Plan as long as the penalty does not exceed a fine of $1,000 and confinement of more than 180 days. When the disaster is declared and the Emergency Management Plan goes into effect, so does the criminal penalty.)

Sec. 418.108. DECLARATION OF LOCAL DISASTER.
(a) Except as provided by Subsection (e), the presiding officer of the governing body of a political subdivision may declare a local state of disaster.

(b) A declaration of local disaster may not be continued or renewed for a period of more than seven days except with the consent of the governing body of the political subdivision or the joint board as provided by Subsection (e), as applicable. Such declarations by the county judge or mayor can last no more than seven days without the consent of the court or council.

(c) An order or proclamation declaring, continuing, or terminating a local state of disaster shall be given prompt and general publicity and shall be filed promptly with the city secretary, the county clerk, or the joint board's official records, as applicable.

(d) A declaration of local disaster activates the recovery and rehabilitation aspects of all applicable local or interjurisdictional emergency management plans and authorizes the furnishing of aid and assistance under the declaration. The preparedness and response aspects of the plans are activated as provided in the plans.

(e) The chief administrative officer of a joint board has exclusive authority to declare that a local state of disaster exists within the boundaries of an airport operated or controlled by the joint board,

regardless of whether the airport is located in or outside the boundaries of a political subdivision.

(f) The county judge or the mayor of a municipality may order the evacuation of all or part of the population from a stricken or threatened area under the jurisdiction and authority of the county judge or mayor if the county judge or mayor considers the action necessary for the preservation of life or other disaster mitigation, response, or recovery.

(g) The county judge or the mayor of a municipality may control ingress to and egress from a disaster area under the jurisdiction and authority of the county judge or mayor and control the movement of persons and the occupancy of premises in that area.

(h) For purposes of Subsections (f) and (g):

(1) the jurisdiction and authority of the county judge includes the incorporated and unincorporated areas of the county; and

(2) to the extent of a conflict between decisions of the county judge and the mayor, the decision of the county judge prevails.

County burn bans are only effective in the unincorporated parts of the county, outside the city limits. However, through declaring a local disaster and having the city council ratify the declaration within seven days, the mayor of a city can also ban outdoor burning inside the city. Generally, most open burning inside a city is already illegal through local fire codes, even if tolerated by local officials. But this provision is available to control burning and its impact if needed in a true disaster.

It is preferred public policy, but rare, for the county judge and mayors to coordinate their activities in assuring a comprehensive ban on burning is in effect, should that become desirable. Notice that in evacuating and controlling access to disaster areas discussed in the above statute, both the mayor and county judge have authority (even if the area is inside a city limit) to exercise this control in a disaster. In the event of a conflict, the county judge has final decision power.

Many cities in Texas already have comprehensive bans on all open fires, having adopted the International Fire Code, a specific local ordinance, or some other policy requiring such total bans. However, as discussed above, all municipal ordinances relating to open burning are subordinate to state rules (primarily the Texas Outdoor Burning Rule), permits issued by the TCEQ, and orders issued by TCEQ commissioners. Cities should have their attorneys review their local burning ordinances to assure compliance with the restrictions on the scope of such ordinances found in THSC Sec. 382.113 of the Texas Clean Air Act.

4 - Felony Illegal Burning

Texas has two felony burning laws. They both have to do with emitting an *air contaminant* — which is a defined term that includes "smoke" — without a permit that in the process puts a person is put in immanent danger of death or serious bodily injury by the air contaminant. Where these two laws differ concerns (1) the level of intention in emitting the air contaminant; and, (2) the level of intention concerning the injury itself: was it intended or not?

The definition of air contaminant comes from the Clean Air Act:

> *THSC Sec. 382.003 (2) "Air contaminant" means particulate matter, radioactive material, dust, fumes, gas, mist, smoke, vapor, or odor, including any combination of those items, produced by processes other than natural.*

So the smoke coming from a burn barrel, structure being burned, fumes coming from a paint booth, dust, and the odors from a shop across the street or some other of the listed material are all *air contaminants*, while the smells coming from the pig farm down the street are not.

The two felony violations arise when someone is injured from an unauthorized emission of an *air contaminant* … injured not by the flames, but by the air contaminants being emitted.

TWC Sec. 7.182: Reckless Emission and Endangerment

Of the two felony provisions, this is the more general case, where the emission of the air contaminant was done recklessly, with respect

to the conduct of releasing the air contaminant. Although someone was put in immanent danger of death or serious bodily injury by the smoke or fumes, it was not necessarily intended. This particular statute does not require any level of intent that such endangerment was an intended consequence of the emission. Although the release was done recklessly, the absence or presence of intent that the other person be injured is not a consideration. As with all of the violation any of the criminal laws in Subchapter E, ignorance of the law is no defense:

TWC Sec. 7.201. DEFENSE EXCLUDED.
It is not a defense to prosecution under this subchapter that the person did not know of or was not aware of a rule, order, or statute.

TWC Sec. 7.182. RECKLESS EMISSION OF AIR CONTAMINANT AND ENDANGERMENT, presented as a list of elements in section (a) reads:

(a) A person commits an offense

1. *if the person*
2. *recklessly, with respect to the person's conduct,*
3. *emits*
4. *an air contaminant*
5. *that places another person*
6. *in imminent danger of death or serious bodily injury,*
7. *unless the emission is made in strict compliance with Chapter 382, Health and Safety Code, or a permit, variance, or order issued or a rule adopted by the commission.*

Comments

Person is defined at THSC Sec. 382.003(10):

"Person" means an individual, corporation, organization, government or governmental subdivision or agency, business trust, partnership, association, or any other legal entity.

Recklessly is limited to the person's conduct in emitting the air contaminant. It is defined in Texas Penal Code Sec. 6.03. DEFINITIONS OF CULPABLE MENTAL STATES as:

(c) A person acts recklessly, or is reckless, with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

Emit is undefined in THSC Chapter 382. Its common definition is *to throw or give off or out (as light or heat)* [Merriam-Webster].

Places another person does not include first responders or others excluded under TWC Sec. 7.252. Since firefighters and police freely consent to be placed in danger by responding to such burning and, in fact, the possibility of being harmed is a reasonably foreseeable associated hazard. This applies to a number of endangerment offenses found in Subchapter E, including both felony burning violations (bolded below).

*Sec. 7.252. DEFENSES TO ENDANGERMENT OFFENSES. It is an affirmative defense to prosecution under Section 7.152, 7.153, 7.154, 7.163, 7.168, 7.169, 7.170, 7.171**, 7.182, or 7.183** that:*

(1) the conduct charged was freely consented to by the person endangered and that the danger and conduct charged were reasonably foreseeable hazards of the person's occupation, business, or profession or a medical treatment or medical or scientific experimentation conducted by professionally approved methods and the person endangered had been made aware of the risks involved before giving consent; or

(2) the person charged was an employee who was carrying out the person's normal activities and was acting under orders from the person's employer, unless the person

charged engaged in knowing and wilful violations.

Imminent is defined neither in TWC Chapter 7 with respect to air violations nor in THSC Chapter 382. Its common definition is undefined in THSC Chapter 382. Its common definition is *ready to take place; especially: hanging threateningly over one's head* [Merriam-Webster].

Imminent danger of death or serious bodily injury is a determination that is often made in the Emergency Room of the local hospital when the person endangered is transported there from the crime scene. In one smaller county, the officer provided physicians' affidavits to the DA in support of this element in two successive cases (in both cases the victim who was transported was reportedly a minor with a breathing problem). In the third case, which also involved smoke emitted from insulation being burned off wire, nobody was transported to the hospital. However, there were children at the burn scene when the officer arrived. For this case the officer reports that he assembled technical information that the particular smoke being emitted from the burning insulation was carcinogenic and further reports that the district attorney accepted this evidence in support of the charge. I don't know the details of these three cases personally, and cannot support this story. However, they make sense. Using affidavits from ER physicians to the effect that the victim was put *in imminent danger of death or serious bodily injury* seems a good approach, as does the idea that a district attorney who has been successful with a couple of these cases might loosen initial evidence requirements. This may be especially true when the accused is not wealthy enough to hire very good defense attorneys, and virtually all criminal defense attorneys are well out of their depth on cases involving criminal environmental law anyway. Officers will want to discuss with their district attorney the best evidence to present in these cases.

Unless, of course, the person emitting the air contaminant is strictly following a statute, rule, permit, order, or variance. If the person

has been given state permission to pollute, he or she is not going to be charged with violating this particular statute.

This law is commonly used in situations where a person is burning something without state approval, someone else is affected by the smoke, and winds-up going to the emergency room of the local hospital. The violator may be a wire-burner who inadvertently impacts his own family, which can easily happen, or somebody deciding to have a large, unauthorized debris fire, only to have the smoke from that fire harm people in a nearby subdivision.

Punishment

The punishment for an individual convicted of violating this statute, first offense, is a fine ranging from $1,000 to $250,000 and/or confinement for up to five (5) years. For a person other than an individual, the punishment for being convicted, on a first offense, is a fine ranging from $2,000 to $500,000.

For a subsequent conviction, the potential fine and period of confinement are doubled, as provided for in TWC Sec. 7.188.

This is an enormous potential penalty for a person who (1) recklessly emits an air contaminant, (2) without state authorization, (3) thereby putting another person in imminent danger of death or serious bodily injury. However, the penalties for violations of TWC Sec. 7.183 are even bigger.

TWC Sec. 7.183: Intentional/Knowing Emission + Knowing Endangerment

This is the second of the two felony statutes, and I am unaware of it having been used by any local government to this point. However, since we do not record or enumerate convictions for environmental crimes at any level in the state, my understanding may be inaccurate.

The potential confinement time in this law — five years — is the same as Sec. 7.182, but the potential fine is double that found in TWC Sec. 7.182. However, the levels of culpability are much greater in this statute, and consequently more difficult to prosecute. To meet the criminal elements of Sec. 7.183, not only does the violator have to emit the

air contaminant *intentionally or knowingly*, with respect to his conduct (which shouldn't be too difficult to show by itself), but he must also emit the air contaminant *knowing* that he was putting the other person in danger (which generally will be very difficult to prove) and the other person actually as to have been put *in immanent danger of death or serious bodily injury.*

TWC 7.183. INTENTIONAL OR KNOWING EMISSION OF AIR CONTAMINANT AND KNOWING ENDANGERMENT, presented as a list of elements in section (a) reads:

(a) A person commits an offense if the person

1. *intentionally or knowingly, with respect to the person's conduct,*
2. *emits*
3. *an air contaminant*
4. *with the knowledge*
5. *that the person is placing another person*
6. *in imminent danger of death or serious bodily injury,*
7. *unless the emission is made in strict compliance with Chapter 382, Health and Safety Code, or a permit, variance, or order issued or a rule adopted by the commission.*

Comments (see preceding discussion for additional remarks)

Intentionally or knowingly is limited to the person's conduct in emitting the air contaminant. It is defined in Texas Penal Code

Sec. 6.03. DEFINITIONS OF CULPABLE MENTAL STATES: (a) A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.

(b) A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with

knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

Another person: As is true in the endangerment offenses of Chapter 7 (Subchapter E) in generally, *another person* does not include first responders or others excluded under Texas Water Code Sec. 7.252. Since firefighters and police freely consent to be placed in danger by responding to such burning and, in fact, the possibility of being harmed is a reasonably foreseeable associated hazard. See TWC Sec. 7.252 quoted above.

This particular law will probably be rarely used, since the additional burden of proving "knowledge" of the probable result on the victim can be so difficult.

Punishment

The punishment for an individual convicted of violating this statute, first offense, is a fine ranging from $2,000 to $500,000 and/or confinement for up to five (5) years. For a person other than an individual, the punishment for being convicted, on first offense, is a fine ranging from $5,000 to $1,000,000.

As is true of the preceding law, the range of any potential fine and period of confinement for a subsequent conviction are doubled, as provided for in TWC Sec. 7.188.

If an individual or a company (a) intentionally or knowingly emits an air contaminant without authorization (b) knowing that it could cause *an imminent danger of death or serious bodily injury* to a person, the penalty should be severe, as the State Legislature has acknowledged by the size of these penalties.

However, since the injury must have resulted from the actor's knowing that the injury would occur, this charge is very difficult to prove and seldom filed. The potential confinement in the case of this law and TWC Sec. 7.182 — five years — is the same, and the maximum fine is in both statutes beyond the reach of virtually all defendants. Consequently, the charge of RECKLESS EMISSION OF AIR CONTAMINANT

AND ENDANGERMENT is the one generally used because of the lower culpability regarding the endangerment. It's just easier to prove.

It's not unusual for a peace officer to respond to heavy smoke coming from a burn barrel or other fire to discover a person burning some material prohibited by the Texas Outdoor Burning Rule (discussed below). This may include some sort of *commercial waste* (which the Outdoor Burning Rule prohibits being burned without specific approval from the TCEQ) or some *substance or item* that has been specifically prohibited from being burned, even when the purpose of the fire itself is legal. We'll take a closer look at all of this later, but 30 T.A.C. Sec. 111.219(7) of the Outdoor Burning Rule provides a list of items not allowed to be burned:

> *Electrical insulation, treated lumber, plastics, non-wood construction/demolition materials, heavy oils, asphaltic materials, potentially explosive materials, chemical wastes, and items containing natural or synthetic rubber must not be burned.*

Generally, when these items are being burned, the officer responding may handle the violation of the rule as a misdemeanor criminal violation, and that is that (note that for some types of fires — firefighter training, for example — these types of items are not specifically prohibited from being burned). Officers should become alert when they encounter any of these items being burned and, in moist cases, respond to the violation as a case of misdemeanor illegal burning.

However, in the process of responding to the misdemeanor violation, if the officer observes a person other than the burner who is apparently being put in *imminent danger of death or serious bodily injury,* the officer generally will provide additional response, often including having the person transported to a local hospital. The officer should follow this situation closely, including speaking with the attending physician. When evidence supports the notion that the bystander has been put *in imminent danger of death or serious bodily injury*, the officer should immediately recognize that the basic elements of RECKLESS EMISSION OF AIR CONTAMINANT AND ENDANGERMENT have probably been met and file the appropriate felony charges. This situa-

tion arises more often that one would think, but charges are seldom filed.

Here are two more examples just to make this point clearly:

(1) A methamphetamine cook living in a rural neighborhood decides to burn some old tires in an attempt to cover the odor from the chemicals he is using. Even for authorized domestic waste burn barrels (more about this in the next section), tires and rubber are items prohibited from being burned under Sec. 111.219(7) of the Outdoor Burning Rule. The local fire department arrives to put out the fire; a county deputy arrives and places the meth cook under arrest on the drug manufacturing charges. The environmental enforcement officer arrives to investigate crimes pertaining to storage or release of hazardous chemicals and waste associated with the chemical production.

Alerted by the police as to possible injuries, an ambulance arrives and the paramedics transport a neighbor who has been overcome by the tire smoke to the local hospital. Following-up on this, the arresting officer learns from the emergency room that the neighbor was very ill, and takes a statement from the emergency room physician that the neighbor was asthmatic and had been, in fact, put in immanent danger of serious bodily injury by exposure to the smoke. She had been admitted to the hospital for observation. The officer is familiar with TWC Sec. 7.182 and adds a charge of RECKLESS EMISSION OF AIR CONTAMINANT AND ENDANGERMENT to the original drug violations. Or perhaps the person transported to the hospital is a child who was in the house where the methamphetamine was being manufactured, and instead of being overcome by smoke was passed-out from being exposed to fumes. If the “endangerment from fumes” element can be proven (*fumes* are included in the definition of air contaminant), then the charges should include TWC Sec. 7.182.

(2) A commercial nursery in a small town was closing for the season, and the owner directed the workers to burn the old plastic pots, treated railroad ties used for raised flower beds, dead plants,

and other waste items that had accumulated during the summer. This illegal commercial debris fire emitted a lot of smoke and fumes. One of the workers who had been directed by management to tend the fire was overcome by the smoke, passed out, and was taken to a local hospital. Police responding to the ambulance call learned of the worker's situation, and followed-up with the hospital. The emergency room physician provided her opinion that the worker was in very bad shape when omitted, and, but for the fast response of the paramedics, would probably have died. She provided police with a written statement of her professional judgment to this effect. The police learned that the fire itself was unpermitted, and that the elements of TWC Sec. 7.182 had probably been met. The defense available to the owner under TWC Sec. 7.252 is probably not available, although that would be an area of contention by the defense.

Anytime there is a fire and a person is transported to the hospital because of smoke or fume inhalation or because of other respiratory problems, officers should follow-up with the attending physician to see if, in the physician's opinion, the person had been placed *in imminent danger of death or serious bodily injury* from exposure to the air contaminant. If so — and if the fire was not authorized by TCEQ rules, permit, order, or other means — then the officer should be alert to the possibility of a TWC Sec. 7.182 violation by whomever was emitting the air contaminant. These two felony charges certainly can be enforced by local police and are, in fact, much easier to enforce than misdemeanor illegal burning, as the next section will show.

5 - Misdemeanor Illegal Outdoor Burning

This is probably the most confusing area of environmental enforcement. There are lots of possible violations, the criminal violation is failure to follow an administrative rule, and the sentencing provisions are ambiguous. Other than those three things, misdemeanor burning is an easy topic. But if you go through this section step-by-step, things should fall into place easily.

This section of the chapter will address three topics:

1. The criminal misdemeanor burning statute itself: TWC Sec. 7.177(a)(5);
2. Local response to alleged air nuisances under 30 T.A.C. Sec. 101.4; and,
3. The Texas Outdoor Burning Rule, an administrative violation of which is also a criminal violation of the statute in item (1).

There is a great deal of interaction between various local governmental officers, volunteer fire departments, and citizens over outdoor burning. Lots of people burn lots of things, and lots of firefighters respond, and lots of neighbors get upset. Unfortunately, there two things that almost guarantee that these interactions will go badly and be full of confusion and conflict: (1) the Outdoor Burning Rule and TWC Sec, 7.177(a)(5) are a little difficult to read and understand; and, (2) there is very little systematic training provided local government officers and elected officials on legal and illegal outdoor burning.

Adding to this general local confusion is that the Outdoor Burning Rule is an *administrative* rule, which is generally enforced by *administrative* officers of the TCEQ. But a violation of the Outdoor Burning Rule is at the same time a *criminal* violation of TWC Sec. 7.177(a)(5), generally to be enforced by local police, deputies, TCOLE-certified fire marshals, and constables — some of whom themselves may well have an incorrect understanding of all of this. (Note: This is the same approach found in dealing with some oil and gas waste violations, where an administrative violation of 16 T.A.C. Sec. 3.8 (Statewide Rule 8) is at the same time a criminal violation of NRC Sec. 91.002. The administrative violation is enforced by the RRC and the criminal violation by local law enforcement.)

Miscommunication on outdoor burning is very common. For example: Suppose a citizen, who wants to burn some general debris – not household trash – on his place in the unincorporated part of the county, calls 9-1-1 and asks the operator, untrained in misdemeanor burning,

"Is OK to burn some debris?" only to have the 9-1-1 operator respond, "Well, there's not a burn ban currently in effect, but call your local fire department." Things are about to get out of hand. The 9-1-1 operator's answer was not to the question asked; the operator is unaware that commercial disposal fires are prohibited in Texas without a permit from the TCEQ. The citizen asking the question probably didn't know the miscommunication was taking place either. Then the citizen calls his local volunteer fire department and asks the person answering the phone, "Is it OK to burn brush today?" … omitting the fact he wanted to burn non-household waste too. Unfortunately, the person answering the phone the VFD is probably unaware of the content of the Outdoor Burning Rule himself, and says, "Fine. Thanks for telling us. Please be careful." When the VFD later responds to a large grass fire, the origin of which was the citizen burning a pile of brush, tires, and treated lumber, things get tense. The fire marshal – whose first time to hear about this situation was arriving at the fire – suggests that the citizen has committed a misdemeanor and is financially responsible — for the total cost of damage to surrounding property and firefighter response. The citizen responds, "Criminal? You guys are nuts! I specifically cleared this through 9-1-1 and the fire department!" This happens just about any day that the weather is nice enough to have a fire in Texas, with lots of anger and finger-pointing all around. Errors like this are based on ignorance (1) of the content of the Outdoor Burning Rule, (2) of who can authorize a fire, and, (3) of who is responsible for the damages done by any burning, even if the fire was proper and authorized (which this one was not).

After you work through this section you will have accurate information that can avoid situations such as the above. Whether this information is communicated widely enough in a particular community to make a difference remains the problem.

1. The criminal misdemeanor burning statute itself: TWC Sec. 7.177(a)(5)

One who violates this rule [the Outdoor Burning Rule] commits a crime [a violation of TWC Sec. 7.177(a)(5)]. There is a lot of discussion

about misdemeanor outdoor burning over such issues as what the law actually requires, what substances can and can't be burned, what is the effect of certain county actions on household waste burning, who is supposed to enforce the law, what are the powers of local firefighters to "authorize" burning, who can stop illegal burning, and so on. Also at question are the roles of the regional TCEQ enforcement staff and the role of local government in enforcing illegal burning. Thanks to the 81st State Legislature in 2009 – and continuing, thanks to the 85th Legislature – there is now debate over what the penalties for misdemeanor burning are too, as we shall see below. But lets see specifically how violating the Outdoor Burning Rule is a criminal offense.

When the State Legislature created the Texas Clean Air Act, in 1989, it included THSC Sec. 382.018, which allowed the TCEQ to draft rules to govern the "outdoor burning of waste and combustible material," as the section was titled. The agency was allowed to draft rules, but not mandated to do so by the legislature. But the TCEQ predecessor agencies did draft a set of rules, following the usual process, which included widespread public comment, and the resulting rule, modified several times since originally created, is the current Texas Outdoor Burning Rule. Its formal name is 30 Texas Administrative Code Sec. 111, Subchapter B, and it is part of the overall Texas Administrative Code under which all Texans live, work, and play. This rule was adopted under Chapter 382 of the Texas Health and Safety Code, and governs all outdoor burning in the state.

Occasionally a local peace officer or sheriff will say, "This is the TCEQ's rule and I'm not bound by it." Actually, that individual is incorrect on both accounts. It is not the TCEQ's rule at all; it belongs to the people of the state of Texas, and we have adopted it in an attempt to find a rational way to regulate outdoor burning. And of course, we are all bound by the Texas Administrative Code, just like we are bound by every other set of statutes in Texas. Moreover, in the case of local law enforcement officers, governmental managers and elected officials there is always that oath of office that one takes in which he or she agrees to protect the Constitution and the laws of the United States

and Texas.

The TCEQ enforces violations of the Outdoor Burning Rule administratively through following the process set out in Texas Water Code Sec. 7.051 through Sec. 7.075. However, local communities enforce violations of the Outdoor Burning Rule criminally as a violation of TWC Sec. 7.177 Violations of Clean Air Act. This statute reads, in part:

> *TWC Sec. 7.177. (a) A person commits an offense if the person intentionally or knowingly, with respect to the person's conduct, violates ...*
>
> *(5) an order, permit, or exemption issued or a rule adopted under Chapter 382, Health and Safety Code.*

The Texas Outdoor Burning Rule *is*, in fact, a *"rule adopted under Chapter 382, Health and Safety Code,"* so a violation of the Texas Outdoor Burning Rule is a criminal violation of TWC Sec. 7.177(a)(5). Although there was an attempt to make this a C Misdemeanor, penalties for violating this law by an individual are a fine of not less that $1,000 nor more that $50,000 and/or confinement of up to six months. Violations by a person other than an individual are punishable by a fine of not less than $1,000 nor more than $100,000.

Over a decade ago, on September 1, 2009, the changes made by the 81st Legislature (HB 857) became law in an attempt to change the penalties for misdemeanor burning in Texas to a Class C violation, with some possible enhancements. However, the changes this bill made to TWC Chapter 7.187 (where the chart of penalties is located) are guaranteed to confuse those who look closely at the situation. This confusion has been ratified by the actions of the 85th Legislature.

The provisions of the 81st Legislature's HB857, which made changes in TWC Sec. 7.187 [Penalties], attempted to apply the following new sentencing provisions to *something called "an offense under Section 382.018, Health and Safety Code"* :

> *TWC Sec. 7.817 (b) Notwithstanding Section 7.177(a)(5), conviction for an offense under Section 382.018, Health and Safety Code, is punishable as:*

(1) a Class C misdemeanor of the waste is not a substance described by (3) below;

(2) a Class B misdemeanor if the violation is a second or subsequent violation under Subdivision (1);

(3) a Class A misdemeanor if the violation involves the burning of tires, insulation on electrical wire or cable, treated lumber, plastics, non-wood construction or demolition materials, heavy oils, asphaltic materials, potentially explosive materials, furniture, carpet, chemical wastes, or items containing natural or synthetic rubber.

You may wonder, "To what specific offense at THSC Sec. 382.018 do these new penalties apply?" That's where the problem arises: THSC Sec. 382.018 — the section of the Texas Clean Air Act that allows the TCEQ to draft outdoor burning rules — contains no "offenses" that one can violate. In the haste of the final weekend of the session a few years ago, the legislature apparently established a set of penalties for non-existing violations.

Additional changes to the law by subsequent Legislatures failed to correct this drafting problem. The C Misdemeanor penalty for committing a non-existent "offense" under THSC Sec. 382.018 remains.

If your city or county plans to enforce the state law against misdemeanor outdoor burning, you'll have to visit with your county attorney, show him or her the problem on selecting the appropriate way to handle these cases, and let your prosecutor determine how to proceed. You'll also want to mention that at least one county is using THSC Sec. 341.013(c) to deal with the public health nuisance effects of the fire rather than the fire itself, and everybody there seems happy enough. If you're a peace officer, do yourself a big favor and consult with your county attorney before you work yourself into a corner on misdemeanor outdoor burning enforcement.

If they *do* decide to use TWC Sec. 7.177(a)(5) and 30 T.A.C. 111, Subchapter B to handle misdemeanor outdoor burning, local prosecutors will need the detail that the Texas Outdoor Burning Rule was

adopted under Chapter 382 (the Texas Clean Air Act) as published in the Texas Register on September 3, 1996 at page 8505 (top of second column). This is cited as 21 TexReg 8505. That piece of information will save some research time since the prosecutors will have to show that the rule was, in fact, issued under that particular statute. We'll take a look at the contents of the Outdoor Burning Rule shortly, but first here's a little reflection on how TWC Sec. 7.177 might otherwise be used.

A Closer Look at TWC Sec. 7.177

Feel free to skip this section, but it does show what a little extra digging could possibly produce. As discussed immediately above, TWC Sec. 7.177 is used by local peace officers when bringing charges for misdemeanor violations of the Texas Clean Air Act. Almost always the situation an officer faces will be an apparent violation of the Texas Outdoor Burning Rule. Since that rule is *"a rule adopted under Chapter 382, Health and Safety Code,"* any violation of that rule is, in turn, a violation of TWC Sec. 7.177(a)(5). Fair enough as to section (a)(5).

But let's take a look at provisions (a)(1) through (a)(4) and see if there are any concrete situations to which local officers can apply these sections. Here's the entire statute:

> *Sec. 7.177. VIOLATIONS OF CLEAN AIR ACT.*
> *(a) A person commits an offense if the person intentionally or knowingly, with respect to the person's conduct, violates:*
>
> *(1) Section 382.0518(a), Health and Safety Code;*
>
> *(2) Section 382.054, Health and Safety Code;*
>
> *(3) Section 382.056(a), Health and Safety Code;*
>
> *(4) Section 382.058(a), Health and Safety Code; or*
>
> *(5) an order, permit, or exemption issued or a rule adopted under Chapter 382, Health and Safety Code.*
>
> *(b) An offense under this section is punishable for an individual under Section 7.187(1)(B) or Section 7.187(2)(C) or both* [Note: a fine ranging from $1,000 to $50,000 or confinement to 180 days].

(c) An offense under this section is punishable for a person other than an individual under Section 7.187(1)(C) [Note: a fine ranging from $1,000 to $100,000].

Here's what each of those first four sections under (a) covers:

(1) Section 382.0518(a), Health and Safety Code;

Sec. 382.0518. PRECONSTRUCTION PERMIT.
(a) Before work is begun on the construction of a new facility or a modification of an existing facility that may emit air contaminants, the person planning the construction or modification must obtain a permit or permit amendment from the commission.

(2) Section 382.054, Health and Safety Code;
If the facility is to be operated under a provision of the federal Clean Air Act, the person has to obtain a federal permit before operating the source.

(3) Section 382.056(a), Health and Safety Code;
This section requires the applicant to publish different types of notice for different sorts of permit application.

(4) Section 382.058(a), Health and Safety Code;
This section prevents a person from beginning construction on any concrete plant that performs wet batching, dry batching, or central mixing under a standard permit unless the person has complied with certain notice and opportunity for hearing provisions.

The first section above — Section 382.0518(a) —requires a person to obtain a permit from the state before building or modifying any facility that may emit an air contaminant. Although this is probably intended for major facilities, I suppose it could be applied to someone modifying his garage to be paint booth for a backyard body shop. However, I've never run across anyone at the local level actually basing a violation on one of these first four sections, but why not use it if the definition fits? All it takes is a little reading to see if this is a possibility.

If a peace officer were to encounter — in the city or the unincorporated area of the state, on public or private property — an unpermitted backyard paint booth, clandestine drug manufacturing laboratory, illegal trash burning facility, or other *facility* emitting an *air contaminant* as these are defined in the Texas Clean Air Act, I don't know why that officer wouldn't feel confident in filing for violating TWC Sec. 7.177(a)(1) in addition to whatever other charges he or she was considering. The section of the law itself is pretty straight forward:

> *THSC Sec. 382.0518. PRE-CONSTRUCTION PERMIT.*
> *(a) Before work is begun on the* ***construction of a new facility*** *or a* ***modification of an existing facility*** *that may emit* ***air contaminants****, the person planning the construction or modification must obtain a permit or permit amendment from the commission.*

The only defined words used in this section are *facility* and *air contaminant*, having the following meanings. *Source* is a defined word used in the definition of *facility*, so its meaning is shown too.

> *Sec. 382.003. DEFINITIONS.*
> *(6)* ***"Facility"*** *means a discrete or identifiable structure, device, item, equipment, or enclosure that constitutes or contains a stationary* ***source****, including appurtenances other than emission control equipment. A mine, quarry, well test, or road is not considered to be a facility.*
>
> *(2)* ***"Air contaminant"*** *means particulate matter, radioactive material, dust, fumes, gas, mist, smoke, vapor, or odor, including any combination of those items, produced by processes other than natural.*
>
> *(12)* ***"Source"*** *means a point of origin of air contaminants, whether privately or publicly owned or operated.*

Reading these, you arrive at the notion that if a person is operating a *facility* that emits *air contaminants* from a stationary *source*, the questions in sequence from the officer are something like*, "Actually, this is an amazing place. When did you build it?"* and after the proud confession, the officer asks something like *"Cool. Could I see the con-*

struction permit you obtained from the TCEQ before you built this facility?"

If you can show these elements, you have probably shown that the person violated THSC Sec. 7.0518(a), and consequently, TWC Sec. 7.177(a)(1), with its major financial penalties.

A clandestine drug lab, for instance, could be considered a **facility** and the fumes it emits are **air contaminants**.

Of course, you'll have to make sure that any Code of Criminal Procedures Article 12.02 requirements (limitations to filing misdemeanors) can be met. From reading that limitations statute, it looks like as long as you can show that the date of the construction or modification of the facility was within the last two years, the case falls within the required time period. At least, you'd want to discuss this possible violation with your county attorney.

This short thought exercise illustrates what is to me the most interesting aspect of environmental criminal law: if you keep reading, no telling what will show-up that might be useful. Sometimes a unique primary charge will emerge, and sometimes it will be a second charge that will give your district or county attorney something to deal-away in the plea negotiations. Environmental enforcement really is one of those areas where additional knowledge usually results in increases effectiveness.

2. Local response to alleged air nuisances under 30 T.A.C. Sec. 101.4

Beware the "air nuisance" allegation: it's very difficult to prove. The term "nuisance" has an exact meaning when discussing air quality issues and is defined at Title 30 of the Texas Administrative Code at Section 101.4:

> *No person shall discharge from any source whatsoever one or more air contaminants or combinations thereof, in* ***such concentration*** *and of* ***such duration*** *as* ***are or may tend to be injurious*** *to* ***or to adversely affect*** *human health or welfare, animal life, vegetation, or property,* ***or as to interfere with the normal use***

and enjoyment *of animal life, vegetation, or property.*

Notice how restrictive this definition is, especially at the words that are printed in bold text, and ask yourself the question, "How would I prove each of these detailed requirements?" Many of these terms would be open to interpretation in most jurisdictions. Consequently our advise to virtually every local jurisdiction is to acknowledge that proving these elements of the definition is probably beyond your capacity, and fall back on the "Local + State Enforcement Partnership" concept. In short: call the TCEQ air program at the closest regional office.

If it is alleged that a particular emission constitutes a "nuisance" to local air quality, (1) take down the contact information of the person making the allegation, (2) tell the person that proving the existence of a nuisance under Texas rules is a complex operation, and (3) notify the air program at your regional TCEQ office. This office will be in a position to undertake the professional, highly technical analysis to determine if the annoying emission actually rises to the level that it meets the definition of *nuisance*.

If the TCEQ determines that the air emission does not meet the definition, inform the person making the complaint that the smell they reported, annoying though it was to them, did not meet the definition used in state rules. Since there is no violation of the rule, the TCEQ cannot act; additionally, since there is no violation of the rule, local government cannot act to enforce any criminal law pertaining to the alleged air nuisance. However, there may well be public health nuisance generating the odor, and local government can certainly address that [using THSC Sec. 341.013(c), for instance].

If the TCEQ determines that the emission does meet the definition of an air nuisance under 30 T.A.C. Sec. 101.4, encourage the agency to complete the process and handle the case administratively.

In some well-experience jurisdictions, such as City of Houston, Harris County, and a few others, the environmental investigators and District Attorney's Office routinely handle air nuisances. They do this by undertaking criminal enforcement under TWC Sec. 7.177(a)(5) once

their analysis — or the analysis of regional TCEQ administrative officers — has determined that the definition of nuisance has been met.

But in our estimate, most jurisdictions do not have the technical resources to make the determination correctly in the first place, and most county attorneys would have difficulty winning a case for an air nuisance violation.

In air nuisance cases, rely on your "Local + State Enforcement Partnership" with the TCEQ when faced with alleged air nuisances. Stay close to the case, make sure the person making the complaint is communicated with, and learn all you can, but this is a place for administrative enforcement professionals from the state. Or, if it makes more sense in the situation, deal with the issue as a public health nuisance.

As we'll see in the next session, when the alleged violation falls under the Texas Outdoor Burning Rule, with a little training and some reading, local officers are fully able to undertake cases on their own, although they should keep the administrative officers in the TCEQ regional air program informed of what is happening.

3. The Texas Outdoor Burning Rule, an administrative violation of which is also a criminal violation of the statute in item (1)

At this point, please take a look at the Texas Outdoor Burning Rule, provided in the Appendix. This is the primary rule used by the TCEQ to assure that outdoor burning is done within the boundaries of the Texas Clean Air Act, which is THSC Chapter 382.

If a person — an individual, company, or association — violates any provision of this rule, the TCEQ administrative enforcement staff from the regional TCEQ air section may get involved (if they know about it). They will investigate the situation and decide if an administrative violation has occurred and what response is appropriate, given the circumstances.

But violating any of these provisions is also a criminal violation of THSC Sec. 7.177(a)(5), because the rule is a rule that was *"adopted under Chapter 382, Health and Safety Code,"* to use the language of that section.

Consequently, the better local peace officers understand the provisions of the Texas Outdoor Burning Rule, the better they will be at identifying rule violations, and thereby identifying criminal violations under TWC Sec. 7.177(a)(5).

Becoming knowledgeable of the contents of the Texas Outdoor Burning Rule is not something that can happen in a few minutes or with one reading. If you would be competent in understanding and applying the provisions of this rule, it will require study.

But one of the aims of this chapter is to provide an introduction to the content of the rule, make you knowledgeable of where it can be located, and help you understand its almost unique place in criminal environmental enforcement: if a person violates this rule, they have also committed a crime.

Additionally, the TCEQ has developed an outstanding 20-page publication that explains the rule and provides good contact information for the agency. You can download or read a copy at the TCEQ web site. Additional copies of this document can often be obtained from the TCEQ Small Business and Local Government Assistance representative in your region.

But Is the Texas Outdoor Burning Rule Constitutional?

Yes it is. Back in mid-2005, up in Denton County, a man named Michael Joseph Rhine decided to burn some things outside, without a permit, including cross-ties, fiberglass, tires, and PVC pipe. An officer from the Denton County Fire Marshal's office caught him. Mr. Rhine was eventually charged with violating TWC Sec. 7.177(a)(5), since the burning was in violation of the Texas Outdoor Burning Rule.

The case was heard in Denton County Criminal Court #2, Hon. Virgil Vahlenkamp, Jr. presiding. Rhine had a clever attorney – maybe – who argued before the trial got underway that the information used to charge Mr. Rhine was faulty because the section of the Texas Water Code (Sec. 382.018) upon which he charge was made was itself unconstitutional.

Mr. Rhine argued that under the Texas Constitution, only the Leg-

islature can write laws, and when it created Sec. 382.018 — this is the section that allows the TNRCC the option of writing outdoor burning rules — it unconstitutionally passed this power to the Executive (i.e., the TNRCC). Consequently, argued Mr. Rhine, he hasn't committed a crime because the law itself is unconstitutional (arguing that the legislature violated the non-delegation doctrine by passing the job of writing the rules to a state agency). Judge Vahlenkamp agreed, and the motion to quash the information was granted.

The state — Denton County — appealed Judge Vahlenkamp's decision in August of 2007 to the Court of Appeals in Fort Worth. A year later in August 2008, the Court of Appeals reversed the decision of the trial court in Denton and sent it back for trial. After quoting the Texas Constitution on non-delegation, the Appeals Court cited a number of cases to the point that in today's complex culture, the Legislature simply doesn't have the technical knowledge needed to write detailed laws. Of necessity it would have to defer to the various state agencies to fill in the technical gaps in the legislation.

> "[I]n our complex society, it is not possible for the Legislature to shoulder the burden of drafting the infinite minutiae required to implement every single law necessary to adequately govern the State of Texas."

Attorney friends tell me this point was well settled in Texas civil law, but not at that time, apparently, in criminal law. This decision to return the case to Denton County for trial was immediately appealed by Mr. Rhine to the Court of Criminal Appeals, which affirmed the Appeals Court decision in September 2009. The Court of Criminal Appeals decision is published at 297 S.W.3D 301.

Eventually, Mr. Rhine was allowed to plead no contest in May of 2010 in Denton County Criminal Court #2, Hon. Virgil Vahlenkamp, Jr. Presiding, and paid a fine of $475. The official record in Denton County (Case ID: 1430869) shows the charge as a Class C misdemeanor, which is certainly a lesser charge than that associated with TWC Sec. 7.177. So I'd say Mr. Rhine had a good attorney after all, although it would be hard to say how much Mr. Rhine paid altogether for the re-

sults. But having a record of having committed a Class C misdemeanor is certainly preferable to having one showing a Class B conviction.

The Texas Outdoor Burning Rule — which was promulgated by the TNRCC under the authority granted by the State Legislature at THSC Sec. 382.018 — was found to be constitutional.

Possible Workarounds To Avoid Penalty Confusion

There are several approaches that communities take to avoid the confusion over sentencing associated with misdemeanor burning. While there is no requirement to avoid dealing with the sentencing question discusses above, several cities and counties I've encountered are using one of these three primary alternatives. Each seems happy with the approach they have taken.

What's not appropriate is to ignore misdemeanor outdoor burning because it is too complex to deal with; visit with your county attorney and be guided by his or her wisdom in this matter.

Alternatives commonly used:

1. Use an Ordinance Inside a City. Local governments can create ordinances that duplicate provisions of the Texas Outdoor Burning Rule and set penalties appropriate for ordinance violations. Taking this approach, a city can in effect implement the provisions of the Texas Clean Air Act by enforcement in municipal court.
2. Call it "Illegal Dumping and Subsequent Burning" in the Unincorporated areas - and prosecute for the dumping. Texas Health and Safety Code Chapter 365 (Litter) sets a Class C, B, or A misdemeanor or state jail felony for illegal dumping.
3. Call it "Improper Disposal" Under THSC Sec. 341.013(c) and prosecute for being a public health nuisance in JP or municipal court.

   THSC Sec. 341.013*(c) Waste products, offal, polluting material, spent chemicals, liquors, brines, garbage, rubbish, refuse, used tires, or other waste of any kind may not be stored, deposited, or disposed of in a manner that may cause the pollu-*

tion of the surrounding land, the contamination of groundwater or surface water, or the breeding of insects or rodents.

Counties using this approach often rely on the provisions of the Texas Outdoor Burning Rule to identify situations in which the disposal of the waste by burning was done outside the rule, and therefore improperly.

Burning Household Refuse in Montgomery County

Until the legislative session in 2005, rural Montgomery County was under the same misdemeanor enforcement structure as the rest of Texas: (1) use a violation of the Texas Outdoor Burning Rule and TWC Sec. 7.177(a)(5) for misdemeanors, or (2) use a health nuisance or illegal dumping law as an alternative, provided that the local prosecutors and judges agreed with this approach.

All of this changed in 2005 with the creation of Section 352.082 of the Local Government Code. This new law established a Class C misdemeanor for burning household refuse in certain unincorporated areas of that county: (1) on a lot located in a "neighborhood" (i.e., a platted subdivision and 300 feet contiguous thereto); and, (b) on all lots smaller than five acres anywhere in the unincorporated area.

In addition to the potential fine of $500 (plus court costs), the law directs the JPs hearing these cases to also provide community service as directed by the Code of Criminal Procedure — up to 60 hours of community service which *"must consist of picking up litter in the county in which the defendant resides or working at a recycling facility if a program for performing that type of service is available in the community in which the court is located."*

This is the longest potential period of community service set in Article 16, and is, according to officers in Montgomery County, being required by judges on these cases. The 85th Legislature has applied this same community service requirement to most illegal dumping violations.

When Section 352.082 of the Local Government Code was passed, many thought that this section would slowly be increased to

apply to other Texas Counties. However, an attempt to expand it to Harris County in the following legislative session failed, and there have been no additional efforts to increase its reach. The text of this law is:

LOCAL GOVERNMENT CODE
Sec. 352.082. OUTDOOR BURNING OF HOUSEHOLD REFUSE IN CERTAIN RESIDENTIAL AREAS.

(a) This section applies only to the unincorporated area of a county:

(1) that is adjacent to a county with a population of 3.3 million or more; and

(2) in which a planned community is located that has 20,000 or more acres of land, that was originally established under the Urban Growth and New Community Development Act of 1970 (42 U.S.C. Section 4501 et seq.), and that is subject to restrictive covenants containing ad valorem or annual variable budget based assessments on real property.

Note: This boils down to being only applicable to Montgomery County, home of The Woodlands, and, to many, the push behind this law being passed.

(b) In this section, "neighborhood" and "refuse" have the meanings assigned by Section 343.002, Health and Safety Code.

(c) A person commits an offense if the person intentionally or knowingly burns household refuse outdoors on a lot that is:

(1) located in a neighborhood; or

(2) smaller than five acres.

(d) An offense under this section is a Class C misdemeanor. On conviction of an offense under this section, ***the court shall require*** *the defendant, in addition to any fine, to perform community service as provided by Arti-*

cle 42A.304(e), Code of Criminal Procedure.

Note: The violator *"shall perform the amount of service ordered by the court, which may not exceed 60 hours. The community service must consist of picking up litter in the county in which the defendant resides or working at a recycling facility if a program for performing that type of service is available in the community in which the court is located."*

This approach would work in initial violations. However, there are no enhanced penalties for repeated convictions nor for burning hazardous items. Not also that this Class C misdemeanor in parts of Montgomery County only applies to burning household refuse, and not for any of the other provisions of the Texas Outdoor Burning Rule. Also note that the officers in that county are not *required* to use this provision rather than the general statewide misdemeanor provisions described above. It is proving to be useful in Montgomery County.

6 - Major Suits by Cities and Counties

For the most part, this is no longer a viable option for local governments. Successful lobbying over the last few legislative sessions has so constrained local environmental suits that the TCEQ and Attorney General's office are now firmly in control of this process.

Policy Issues Surrounding Illegal Burning

Policy Issue #1: Training

The biggest policy issue to be solved by local government is the general lack of knowledge among so many groups of people concerning the way illegal outdoor burning is managed by Texas laws, rules, and local ordinances. Policy decisions based on inaccurate information are always expensive, and in this case may easily result in the assumption of additional liability by local fire departments.

For example, which of these groups receive instruction on the difference between misdemeanor and felony illegal burning in their professional training?

a. 9-1-1 operators as part of their state-mandated training
b. Sheriff deputies and other officers in police academy basic training
c. Fire marshals and fire fighters in their training at TEEX
d. Local prosecutors in their law school training
e. Justice and county court at law judges as part of their annual training
f. City managers as part of MPA training at Texas universities
g. Municipal code enforcement officers in their formal training from TEEX
h. County judges and commissioners as part of their orientation training and ongoing training
i. County Emergency Management Coordinators in their mandated training
j. Television and radio reporters in journalism school
k. The general public as part of their high school and college education

I'm sure that you already know that the answer is: "None of the above," which is the exact problem. Cities and counties would do well to encourage these various groups to do some level of basic training.

Policy Issue #2: Who can authorize outdoor burning in Texas?

Because of the lack of basic knowledge, there is always confusion around the question of "Who can authorize outdoor burning?" The list is actually very short:

a. The Outdoor Burning Rule authorizes most burning through the exceptions it lists;
b. TCEQ Executive Director or designee in writing under emergencies;
c. TCEQ commissioners through issuing a permit or order; and,
d. A "local air quality board" can authorize fire training exercises (there are 21 local boards in Texas; see the TCEQ website for

a listing).

There are a couple of options not listed. Sometimes a local official — such an ignorant city manager in a small community — will direct someone to burn old records. When government managers in small Texas communities knowingly violate the law — and then direct others to do so under treat of being fired — it just makes me tired. I always wonder, *"What kind of parents did these people have that they would knowingly violate ordinances and criminal laws?"*

The other people who should never get pressed into the position of having to "authorize" outdoor (open) fires of any kind are firefighters and fire marshals. Most of them doing this know that they don't have the authority to authorize outdoor burning in Texas — only the state can do that — and the practice can only put them in a bad spot. As I mentioned earlier, the unfortunate use of the word "permit" in Section 307 of the International Fire Code is probably one source of this error.

Policy Issue #3: Who can prohibit outdoor burning?

The related question is that of "Who can prohibit outdoor burning?" In answer to this question we have:

a. The Texas Outdoor Burning Rule prohibits all outdoor burning in Sec. 111.201, and then relaxes this absolute prohibition through a series of exceptions;

b. Local ordinances may prohibit plant growth burning inside city in attainment areas, if in doing this they are in conformity with the Texas Outdoor Burning Rule;

c. Commissioners' courts can prohibit burning by issuing burn bans;

d. County judges and mayors can prohibit burning for up to 7 days on their own through declarations of local disasters;

e. The TCEQ can prohibit burning through the rule and the actions of their commissioners and Executive Director; and,

f. Local peace officers can stop — if not prohibit — illegal burning through the application of the criminal law.

Policy Issue #4: Ongoing Conflict Areas

All of this leaves us with several recurring areas of conflict between citizens, their governments, and various levels of government.

a. Rural domestic waste burning is generally permitted. Individuals are allowed to burn their domestic waste — but not commercially generated waste (this burning requires TCEQ authorization) — in the unincorporated areas of the state until the commissioners' court "provides" or "authorizes" the collection of waste through a formal process. When the commissioners' court takes this action, domestic waste burning in the unincorporated areas is no longer permitted.

   This does not mean that simply having waste collection service throughout the county means that domestic waste can no longer be burned. Until the county commissioners' court formally acts, rural domestic waste burning is allowed under the rule. To my knowledge, only four counties in Texas have taken this step, and in three (at least) it has resulted in more illegal dumping. Instead of legally burning the household trash as before, now the citizen is faced with the choice between paying for disposal and breaking the law by dumping.

b. Burning domestic waste in cities is usually NOT permitted. This is generally prohibited now throughout the state for the same reason as above. The governing body of the city has "provided" or "authorized" waste collection services through a formal process. (The city is either operating their own collection trucks or has hired a company to provide collection services.) Where the governing body has thus "provided" or "authorized" collection, domestic waste burning cannot legally be done. There may be a few small cities in Texas that are unable to reach an agreement with a waste collection company to provide services (because of the city's remote location or poverty). In these places citizens may still burn household waste as long as the city council is neither "providing" no "authorizing" waste collection services.

c. Local government misdemeanor enforcement is confusing.
Local peace officers generally know neither the felony nor misdemeanor criminal law pertaining to illegal outdoor burning, but the felony laws are easy to understand and apply. However, the enforcement of misdemeanor criminal illegal burning law is totally different from any other type of criminal law enforcement most peace officers have ever done, and the issue of proper penalties must be considered. Consequently, this area of law enforcement is often full of error and reluctance on the part of officers and prosecutors alike.

d. Pyromaniacs vs. Health Nuts
The citizenry seems at times to be divided between two groups: ones that want to burn about everything and the other folks who want no open burning of any kind. Depending on the situation, both groups can be very vocal. Making good policy decisions that conform to state law will often offend one or both groups at some time, and offending citizens is not the aim of most elected officials. Staff will have to spend a lot of time explaining and re-explaining to elected officials, law enforcement officers, and citizens alike the way outdoor burning laws work.

e. TCEQ does not have all the answers.
Not all of the 16 regional TCEQ air programs know everything that is in this chapter, especially those sections dealing with criminal outdoor burning and the use of local civil enforcement in rare cases. The TCEQ Environmental Crimes Unit staff is very knowledgeable on the criminal questions, but probably not on the civil suit issues. On the other hand, the TCEQ staff in regional air programs are very knowledgeable on the contents of the Texas Outdoor Burning Rule. Be sure your question is put to the right place, remembering that the role of the TCEQ is not to replace local governments as the source of enforcement.

f. Volunteer firefighters are put in a bad position.
Because of the complexity of the Texas Outdoor Burning

Rules, the lack of general training on criminal burning, and the fact that 75% of the firefighters in the state are volunteers, not all decisions made by local firefighters will be correct. Because of the potential liability described in Sec. 111.221 of the Texas Outdoor Burning Rule, managers of volunteer fire departments should especially be sure that their staff of firefighters is knowledgeable in all aspects of this subject and never “permits” outdoor burning of any kind. That is the state’s job only.