

Reading for class:
TIDRC004
Illegal Outdoor Burning

Selections from
Illegal Dumping Enforcement
Officer's Guide
Texas 2026 Edition

Chapter 9: Illegal Outdoor Burning
(Pages 190 – 246)

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Chapter 9: Illegal Outdoor Burning

Texas law addresses outdoor burning in several ways. Some approaches are easy to understand, and others are not. Misdemeanor outdoor burning can be the most complex part of local environmental enforcement. In its current form that statute contains contradictory sentencing specifications.

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

A. Local Government Enforcement

1. **Municipal Code** [see page 194] enforcement in cities that have local Outdoor Burning Ordinances (many do) and using other codes or state laws¹ to force the cleaning of debris left from burning. Because of the number of cities in Texas, municipal code enforcement of burning ordinances is the most common type of control;
2. **Misdemeanor Illegal Burning** [206] enforcement mostly for violations of TEXAS OUTDOOR BURNING RULE [30 T.A.C. Sec. 111] (Subchapter B)] (“TOBR”)² and occasionally THSC Chapter 382 TEXAS CLEAN AIR ACT. This is a common criminal

¹ In addition to using “refuse on a lot” or substandard structure codes (inside cities) to clean property after fires local governments may also use THSC Chapter 365 and/or THSC Chapter 341 for the same purpose. Counties may adopt the optional rules as described in THSC Chapter 343, Subchapter C.

² Misdemeanor enforcement of violations of the Texas Outdoor Burning Rule can be a problem because of the contradictory sentencing language in TWC Sec. 7.175(c). This is explained below.

charge in unincorporated areas, although contradictions in the sentencing provisions can make this a difficult law to directly apply;

3. **Felony Illegal Burning** [223] enforcement under Texas Water Code Sec. 7.182 and Sec. 7.183. These are the clearest violations in terms of elements to be proven and carry the highest possible penalties;
4. **County Burn Bans** [234] enforcement in droughts and other possible circumstances under Local Government Code Sec. 352.081;
5. **Local Disaster Declaration** [238] enforcement under Government Code Sec. 418.004 and Sec. 418.108;
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 largely removed this option for cities and counties, but this approach may still be useful in some very unusual circumstances. This rarely used option is not discussed in this book.

B. State Only Enforcement

7. **Administrative Enforcement** by the TCEQ of violations of TOBR.

Most illegal burning enforcement is done by cities using local Municipal Codes and counties enforcing Texas criminal laws. Anti-burning felonies and misdemeanors, like all criminal laws, have been adopted by the Texas Legislature and are in force throughout the state. They do not have to be adopted by local governments. The only question is, *“Are cities and counties enforcing these criminal laws or ignoring them?”*

Municipal Codes are specific to individual cities and are only in force in cities where city councils have adopted them. Although Google AI states that “*Virtually all of Texas's 1,225 incorporated municipalities have adopted some form of municipal code or ordinances.*” More accurately, only 952 municipal courts exist in Texas,³ with major cities usually having multiple courts. Some of these are organized geographically and others are organized by the types of cases they hear. About 75% of Texas cities routinely use municipal codes to control pollution, and often these include codes regulating open burning.

County Burn Bans and Local Emergency Declarations only come into effect with an action of the commissioners court in a county and last for a specific length of time or until rescinded by the commissioners court. Violations of either may result in a criminal charge by local law enforcement.

Administrative Enforcement is reserved to the Texas Commission on Environmental Quality applying TOBR. Although cities may structure their local burning ordinance on TOBR, either by adopting its language in full or in part, only the TCEQ can directly enforce TOBR as administrative violations. Often counties will enforce violations of TOBR as criminal violations on smaller fires, which will often be extinguished before TCEQ can respond administratively.⁴

Sidebar on Droughts and Fires

Local governments should anticipate devoting more resources to fighting woodland and grass fires in unincorporated areas in coming years.

³ FY 2023 Annual Statistical Report for the Texas Judiciary, State of Texas Judicial Branch, < <https://www.txcourts.gov/media/1459429/ar-statistical-fy23.pdf>>, p. vii,

⁴ See the section on *Using Municipal Codes to Stop Illegal Burning*. p. 206

Historic climate patterns have shaped water availability in Texas over the centuries, and this water distribution determines just about everything else we do now and will do in the future.

From around 1880, the dividing line between the humid and arid parts of the United States has been along the 100th meridian. In Texas this imaginary boundary runs north to south, straight down the side of the Panhandle between Texas and Oklahoma and then continues down, passing west of Abilene, to the Rio Grande, which it crosses just downriver from Eagle Pass. Because of wind flows across the Rocky Mountains and up from the Gulf of Mexico, over the millennia rain fell much less to the west of the 100th meridian, producing that drier part of Texas and the United States. The 2007 and 2012 versions of the State Water Plan both have good chapters and illustrations discussing the climate of Texas.⁵

But the dry line hasn't stayed put: it's been moving eastward from the 100th meridian at a good pace. A 2018 study by Columbia University concluded that *"... data collected since about 1980 suggests that the statistical divide between humid and arid has now shifted closer to the 98th meridian, some 140 miles east. (In Texas this would move it roughly from Abilene to Fort Worth.)"*⁶ From there the 98th meridian runs south between Austin and San Antonio then straight down through Pharr at the tip of Texas.

There's also an outstanding 2025 article in The Texas Trib-

⁵ Chapter 5: Climate of Texas, *2007 State Water Plan*, Texas Water Development Board, https://www.twdb.texas.gov/publications/State_Water_Plan/2007/2007StateWaterPlan/CHAPTER%205_final%20112906.pdf

⁶ Kevin Krajick, The 100th Meridian, Where the Great Plains Begin, May Be Shifting, *Columbia Climate School: State of the Planet*, (2018) <https://news.climate.columbia.edu/2018/04/11/the-100th-meridian-where-the-great-plains-used-to-begin-now-moving-east/> [Accessed Sep 13, 2025]

une that helps explain the current and long-term vulnerability of Texas to drought as our population increases and water availability decreases.⁷ As a professor of biology who is a friend sums up our situation, “*Long term water prospect for Texas is no bueno.*”

You might also gain from reviewing the Texas A&M Forest Service web site *Historical Fire Statistics*.⁸

It's not that the climate of Texas *will* change. It's that the climate of Texas *is constantly changing* and will continue to do so. As the historic dry line in Texas continues move to the east, more of Texas will become dryer and hotter, punctuated by heavier storms with more flash flooding from rapid runoffs over the baked soil. Planning for this continued change and the related increase in range fires is not a matter of politics but prudence.

Using Municipal Codes to Stop Illegal Burning

Any local ordinance that a municipality decides to adopt to regulate outdoor burning must comply with state laws, rules, permits, and orders. The state controls all aspects of outdoor burning, even at the municipal code level. The law that the legislature has passed to control air emissions in Texas is the Texas Clean Air Act, Health and Safety Code Chapter 382. It controls all air emissions and provides the broad structure for the detailed rules controlling outdoor burning in our state.

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

⁷ Texas is running out of water. Here's why and what state leaders plan to do about it, *The Texas Tribune* < <https://www.texastribune.org/2025/03/13/texas-water-explained-supply-demand/>>

⁸ <<https://fire-information-tfgis.hub.arcgis.com/pages/historical-fire-statistics>>

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 adopted 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 administrative rules allow cities to adopt municipal codes with provisions that exceed those found in the rule, such as is the case in municipal regulation of scrap tires.⁹ For illegal outdoor burning, however, a local code must not be tougher than 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 conditions shown in (b) above.

⁹ See 30 T.A.C. Sec. 328.52 (a) *This subchapter does not preempt local ordinances regarding the management of used or scrap tires that are as or more stringent than the regulations in this subchapter.*

The *Subject to Section 381.002* highlighted in (a) of THSC Sec. 382.113 (above) is somewhat puzzling, since there is no Chapter 381 of the Texas Health and Safety Code. It may be a typographical error that crept-in when drafters were attempting to reaffirm the importance of the policy statement that appears at THSC Sec. 382.002. In this interpretation the subsection (a) may simply be encouraging municipalities adopting local codes to aggressively enforce them, which is the policy at the state level.

Texas Outdoor Burning Rule

To provide the details of how persons may use outdoor burning, TCEQ predecessor agencies enacted *Title 30 Texas Administrative Code Section 111, Subchapter B Outdoor Burning* — the Texas Outdoor Burning Rule (“TOBR”).

As elated to municipal codes:

1. The TCEQ controls all outdoor burning in Texas, by agreement between the State of Texas and the federal government in what is called the Texas State Implementation Plan, or S.E.P.¹⁰
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 THSC Chapter 382. CLEAN AIR ACT and the TCEQ’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, closely read, the

¹⁰ See ‘Texas State Implementation Plan,’ *Texas Commission on Environmental Quality*, < <https://www.tceq.texas.gov/airquality/sip> > for a discussion of the Texas State Implementation Plan that assures state compliance with the federal Clean Air Act.

International Fire Code supports the requirement that in Texas the state controls all outdoor burning.

A few cities and counties have been slow to accept the fact that the state controls outdoor burning. One major county in the north of the state had for years, without any legal authority, 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 thought differently from those sitting when the idea to sell permits to burn was initially approved, the county had collected a lot of unauthorized fee income.

I had occasion to ask a county 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?"* Her answer was a terse, *"No."* I guess that's one way to fund local government: collect an unauthorized fee from the citizens for years, then after discovering the error, stop the practice (good) but decide to just keep the money illegally collected to date (maybe not so good).

Having the state control all outdoor burning is not as bad as one might think. When we read TOBR, we'll see that it covers just about any case imaginable where a person might want to burn outdoors. It is very comprehensive.

Moreover, 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** burning violations. They can always enforce related criminal laws:

1. The TCEQ has the responsibility for enforcing TOBR *administratively* throughout the state. However, the violation of a provision of this rule is not only an *adminis-*

trative violation but also a misdemeanor *criminal* violation in Texas that is enforced by local peace officers.¹¹ As with many other environmental issues, the TCEQ handles *administrative* violations and local law enforcement officers handle similar violations as a *criminal* act. TWC Sec. 7.076 keeps the state and local governments synchronized.

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 burning violation, the person to call is a local law enforcement officer having jurisdiction where the violation occurred, not the TCEQ.*" The notion that all violations of TOBR 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 one point of such enforcement partnerships is not to swamp the state with things one could do oneself. Responding to criminal violations is generally a local responsibility, and police, deputies, and fire marshals are usually close enough to the location of the crime to act quickly. Local law enforcement and fire fighters will be able to identify those burning situations where the TCEQ must be called immediately.

The Problem with Municipal Fire Codes

On a practical level, municipal codes in general 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. One real problem with codes is that local officers don't always know their content.

¹¹ Violation of TOBR is a criminal violation of Texas Water Code Sec. 7.177(a)(5).

Most code officers do a great job reading, understanding, and applying the narrow set of ordinances in which they specialize. But the fact is that few code officers are sufficiently familiar with their entire set of municipal codes as to be able to spot potential violations outside their area of specialization. Too often we don't know local codes well enough to serve as each other's "eyes."

Who's Read The IFC?

Overspecialization in code enforcement is the root of this problem, and it raises a related knowledge issue: *"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 they vote, which is 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 work of their staff and the political deals they make in supporting each other's bills.

This is true at the local level too. City council members usually rely on city staff in these matters, but several hundred pages of a proposed ordinance is a lot to read for anybody.¹²

Both nationally and locally, citizens on the receiving end of the potential misunderstanding suffer when the proposed codes, rules, and statutes become simply too thick to digest before adopting. In our online environment, it may also mean that a

¹² International Fire Code, 2024 Edition, 664 pages.

citizen may have read and pondered a particular municipal code interesting him or her more closely than the officer assigned to the situation.

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 City 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. Thank you Internet.

With reference to fire codes, this can be a particularly difficult situation. For instance, there are many Texas cities and a few counties that have adopted the International Fire Code as their local ordinance or rule. The City of Dallas, my boyhood home, for instance, has adopted the IFC 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 first 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. The 2024 paperback edition of the IFC was listed at \$143.92 on Amazon in September 2025.]

Perhaps your community has also adopted a version of the International Fire Code as your burning ordinance. If so, here

are four questions for your consideration:

1. Which city council members read the code's 664 pages (2024 Edition) before they voted its adoption?
2. Of the officers working at your agency with responsibilities for enforcing this code, how many have read it all?
3. How many general and other specialized code enforcement officers working in your city have read even one page of the city's fire code, and are thereby able 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, 2024 Edition (or the edition you may be using) say about open burning in its SECTION 307 OPEN BURNING, RECREATIONAL FIRES AND PORTABLE OUTDOOR FIRE-PLACES?

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.**

Fair enough. 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 plant waste, 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 it means that IFC Sections 307.1.1 through 307.5 are totally replaced in Texas by the provisions of TOBR, which controls all outdoor — “open” — burning in Texas.

Any of the duties assigned to the *fire control officer* or *fire code official* in Section 307 of the IFC model ordinance are reserved in Texas to the TCEQ and those persons designated in TOBR.

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 outdoor burning. That is reserved for the state.

Cities and counties adopting the International Fire Code must make sure that it is being used locally in such a way that it is consistent with the commission’s rules (see THSC Section 382.113).

Section 307 of the International Fire Code cannot be a valid local ordinance, if a Texas city adopts it as written and elects to follow its own process to issue permits for open burning. That would not be consistent with the Texas Clean Air Act, which takes precedence.

I have also 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, almost always adopted without being read by anyone in its entirety. In Texas, municipal codes must 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 TOBR.

However, your city council does not have to "adopt" TOBR — *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). Like most criminal laws, the State Legislature has adopted it for you.

This rule and criminal law are both already in force everywhere in the state. However, if your city wants to adopt the entire TOBR 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.

Also, since 2017 if an action inside a city is simultaneously a criminal violation of TOBR *and* a violation of a city ordinance, that the first occurrence of this "dual violation" must initially be treated as a municipal ordinance violation. That 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* or *fire code 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 TOBR's liability section too:

TOBR 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 unanticipated 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. What your fire department or fire marshal's office really wants to be doing is handing out copies of TOBR and encouraging local police and other TCOLE-certified peace officers to enforce violations of the rule as the misdemeanor it is.

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 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, some 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 TOBR, a person has disposed (*of waste*) in a manner that may cause the pollution of the surrounding land, the contamination of groundwater or surface water. The partially burned trash, commercial

rubbish, and chemical residue “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 per day (see THSC Sec. 341.091), but it gets the violator in front of a judge. Please read *Chapter 6. Public Health Nuisance Enforcement* for details on using this law.

As you more deeply reflect on the difficulties of dealing with the policy issues surrounding the proper sentencing for misdemeanor or 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.

Using Misdemeanor Criminal Law to Stop Illegal Burning

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

This section of 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. TOBR, an administrative violation of which is also a criminal violation of the statute in the first item.

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) TOBR 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 TOBR is an *administrative* rule, which is generally enforced by *administrative* officers of the TCEQ. But a violation of TOBR 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 debris from his business — not household trash — on his ranch 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 that he wanted to burn non-household waste too.

Unfortunately, the person answering the phone the VFD is probably unaware of the content of TOBR 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 the cost of 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 TOBR, (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 TOBR commits a crime [specifically, a violation of TWC Sec. 7.177(a)(5)]. This can be initially puzzling.

There is a lot of discussion about misdemeanor outdoor burning over such issues as what the law 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 let's see specifically how violating TOBR 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. The resulting rule, modified several times since originally created, is the current TOBR. 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.¹³

Occasionally a local peace officer or sheriff will say, *"This is the TCEQ's rule, and I'm not bound by it."* 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 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 TOBR administratively through following the process set out in Texas Water Code Sec. 7.051 through Sec. 7.075. However, local communities enforce violations of TOBR 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.

TOBR is, in fact, a *"rule adopted under Chapter 382, Health and Safety Code,"* so a violation of TOBR is a criminal violation of TWC Sec. 7.177(a)(5).

¹³ TOBR 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.

Although there was an attempt to make violations of TOBR a C Misdemeanor several sessions ago, penalties for violating this law by an individual were to be a fine of not less than \$1,000 nor more than \$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.

Here's the sentencing problem. Over a decade ago, on September 1, 2009, the 81st Legislature passed a law to revise the penalties for misdemeanor burning in Texas. 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.

The provisions of the 81st Legislature's HB 857, 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. PENALTIES.

(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 prob-

lem arises: THSC Sec. 382.018 is the section of the Texas Clean Air Act that allows the TCEQ to draft rules such as the TOBR. It 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 should 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 TOBR 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 statute. We'll look at the contents of TOBR 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 TOBR. 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) with its ambiguous penalty problem.

But let's 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 section:

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 must 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 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 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*, which have 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 may arrive at the notion that if a person is operating a *facility* that emits *air contaminants* from a stationary *source*, the question from an investigating officer is some-

thing 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 construction 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. This would avoid the contradictory sentencing of TWC Sec. 7.177(a)(5).

A clandestine drug lab, for instance, is probably a “facility” and the fumes it emits are “air contaminants.” Not to have obtained a TCEQ permit before building it could constitute an expensive misdemeanor, regardless of other crimes committed.

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 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 increased 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:

30 TAC Sec. 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 advice 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 able to undertake the professional, highly technical analysis to determine if the annoying emission 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.

Stay close to the alleged air nuisance case as the TCEQ investigates, 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 section, when the alleged violation falls under TOBR, with a little training and some reading, local officers are fully able to undertake criminal cases on their own, although they should keep the administrative officers in the TCEQ regional air program informed of what is happening.

3. TOBR, an administrative violation of which is also a criminal violation of the statute in item (1)

At this point, please look at TOBR, 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 TOBR, 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 TOBR 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 introduce 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.¹⁴

¹⁴ This concept also appears in violations of oil and gas waste hauling controlled administratively by the Texas Railroad Commission in 16 T.A.C. Sec. 3.8. WATER PROTECTION. A violation of that rule is also a criminal violation of Texas Natural Resources Sec. 91.002. CRIMINAL PENALTY, enforced by local peace officers. Selected provisions of the rule have also been adopted as criminal offenses at TWC Chapter 29. OIL AND GAS WASTE HAULERS.

Additionally, the TCEQ has developed an outstanding 20-page publication that explains TOBR 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 TOBR Constitutional?

Yes, it is. Back in mid-2005, a man up in Denton County decided to burn some things outside, without a permit, including crossties, fiberglass, tires, and PVC pipe. An officer from the Denton County Fire Marshal's office caught him and he was eventually charged with violating TWC Sec. 7.177(a)(5), since the burning was in violation of TOBR.

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

He argued that under the Texas Constitution, only the Legislature can write laws, and when it created Sec. 382.018 — this is the section that allowed the TNRCC the option of writing TOBR — it unconstitutionally passed this power to the Executive (i.e., the TNRCC). Consequently, the defendant hadn'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 several 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 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, the defendant 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 the violator had a good attorney after all, although it would be hard to say how much he paid altogether for the results. But having a record of having committed a Class C misdemeanor is certainly preferable to having one showing a Class B conviction.

TOBR — 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 discussed above, several cities and counties I've encountered are using one of these three primary “work-around” 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 TOBR 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. Or, maybe a city can tie their fire ordinance with that concerning “dumping of refuse,” which can carry now include a fine to \$4,000 now.¹⁵ Note that “refuse” is not defined in the Local Government Code.¹⁶
2. Call it “**Illegal Dumping** and Subsequent Burning” in the Unincorporated areas - and prosecute for the dumping.

¹⁵ See Local Government Code Sec. 54.001. GENERAL ENFORCEMENT AUTHORITY OF MUNICIPALITIES; PENALTY.

¹⁶ Probably the “best” definition of *refuse* is at THSC Sec. 342.011(9): “*Refuse*” means garbage, rubbish, paper, and other decayable and nondecayable waste, including vegetable matter and animal and fish carcasses.

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 pollution 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 TOBR to identify situations in which the disposal of the waste by burning was done outside the rule, and therefore improperly.

Using Felony Criminal Law to Stop 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 in imminent 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 Texas 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.

The smoke coming from a burn barrel, structure being burned, fumes coming from a paint booth, dust, and the odors from a shop down the street or some other of the listed material are all *air contaminants*, while the odors coming from a pig farm 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 imminent danger of death or serious bodily injury by the smoke or fumes, it was not necessarily intended. This 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 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.

Person is defined as 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 several 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 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 verify these stories. 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 statute.

TWC Sec. 7.182 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 TWC Sec. 7.182, 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.

In the eight years ending in 2022, a total of eight arrests statewide were made by local officers for violations of TWC Sec. 7.182. On the other hand, no arrests were made by local officers during the same period for violations of TWC Sec. 7.183, the next violation described.

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

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 imminent 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.

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 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 TWC Sec. 7.183, 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 ENDAN-

GERMENT is the one uniformly 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 TOBR (discussed below). This may include some sort of *commercial waste* (which TOBR 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 this later, but 30 T.A.C. Sec. 111.219(7) of TOBR provides a list of items not allowed to be burned:

TOBR Sec. 111.219(7)

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 in TOBR 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 most cases, respond to the violation as a case of misdemeanor illegal burning.

If, 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 situation arises more often than 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 TOBR. 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 imminent 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 *possibly* available to the owner under TWC Sec. 7.252 is *probably* not available because of the circumstances, 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, probably much easier to enforce than misdemeanor illegal burning, as the previous section discussed. At least the potential penalties are unambiguous.

County Burn Bans

Controlling routinely criminal outdoor burning often gets confused with the subject of county burn bans. There are certain acts of burning that are *always* felonies or misdemeanors. On the other hand, *occasionally* a County Burn Ban may be in place that additionally limits burning for some period of time.

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 is 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 TOBR. Few decisions about outdoor burning are left to counties, but the ones that are really do matter and are very practical.

County Burn Ban Statute

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 defi-

ciency 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 out-

door 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 TOBR.

(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.

(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.

Local Disaster Declarations

County judges and mayors have powers to declare local emergencies 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 TOBR), 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.

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, confusing, 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 orien-

- tation training and ongoing in-service education;
- i. County Emergency Management Coordinators in their mandated training;
- j. Television and radio reporters in journalism school;
- k. The public as part of their basic 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 on the identification and control of illegal outdoor burning.

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. TOBR 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;
- 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 a new but ignorant city manager in a small community — will direct the Chief of Police to burn old municipal records on the parking lot at the Police Department and then fire the code enforcement officer who points out the criminal nature of this activity. From the specifics you can tell that was an actual situation in central Texas community, but it makes a point. When government managers in small Texas communities knowingly

violate the law — and then direct others to do so under threat 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:

- a. TOBR 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 TOBR;
- 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;
- 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 (the city council) 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" collec-

tion, 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 if the city council is neither "providing" nor "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.

- c. TCEQ does not have all the answers.

Not all 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 TOBR. Be sure your question is put to the right place at TCEQ.

- d. Volunteer firefighters are put in a bad position.

Because of the complexity of TOBR, 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 TOBR, 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.