

Illegal Dumping Enforcement

Officer's Guide

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Reading for class:
TIDRC003 Illegal Dumping
Enforcement

Chapter 10: Primary
Illegal Dumping Enforcement

(Pages 172 – 197)

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Chapter 10: Primary Illegal Dumping Enforcement

This law and THSC Chapter 341 make a powerful team in dealing with illegal dumping statewide.

Texas Health and Safety Code Chapter 365 (Texas Litter Abatement Act) is the most commonly used statute to control illegal dumping of *litter* and other *solid waste* in Texas. There's a copy of this law in the Appendix, and you probably want to refer to it as you read this chapter.

This law applies to all land in Texas, publicly or privately owned, as does all state criminal law. This law is already in force in all Texas cities and unincorporated areas. County and city governments do not have to adopt this law or pass any enabling ordinance or rule in order for it to be applicable in their jurisdiction. If you're in Texas, this law is already in force where you live. The only question is whether local peace officers and prosecutors are using it to control illegal dumping.

Immediately following it in the Appendix is the Court of Criminal Appeals 2006 decision on the James F. Glendening case, which focused on THSC Sec. 365.012(k) of this law. This is the section allowing "temporary storage" of waste prior to disposal. Unfortunately, this is not a defined term in this law, so some negotiation on this point may be required. One officer commented that he knew the term "temporary" meant at least four months. His logic was that was how long the prosecutors in his county had been arguing about it among themselves after he asked them what it meant! But it's an undefined word, so its meaning will undoubtedly vary with the situation.

While it is certainly legal to temporarily store waste prior to disposal – in fact we do it every week as we accumulate household trash prior to the hauling service arriving – it is not legal to dump solid waste or litter and pretend that you are "storing" it. Enforcement officers have worked out good ways to determine if waste is actually being stored, and we'll discuss a few of those ways later in this chapter.

In some jurisdictions, however, THSC Chapter 365, even at this late date, is ignored, usually out of ignorance of its existence. Some cities attempt to deal with dumping exclusively using municipal codes.

Some places attempt to control dumping through the use of public health nuisances or public nuisance statutes alone. Other places may just ignore the problem altogether, to the detriment of community appearance and health. However, when local elected officials direct the police, deputies, constables, specialized environmental officers, TCOLE-certified fire marshals, or other local peace officers to stop illegal dumping, THSC Chapter 365 is usually the law they use.

This is a very flexible law. It sets misdemeanor to felony levels of punishment for dumping based on the weight or volume of waste dumped (the officers and prosecutors get to use the measure that they want, depending on the circumstances of the dumping). Punishment also is structured in such a way that *commercial* dumping — dumping for “the purpose of economic gain” or from a commercial vehicle as defined by this law — is punished more severely than *I-was-cleaning-out-the-garage-and-the-landfill-was-closed* dumping. For example, dumping waste for a commercial purpose weighing over five (5) pounds is at least an A Misdemeanor, and commercial dumping over 200 pounds is a State Jail Felony.

Since this is a state criminal law, enforcement is limited to peace officers. Sometimes a county will have a specialized environmental enforcement officer for these cases, but that isn’t absolutely necessary. And more counties are assigning this specialized enforcement to fire marshals. But the provisions of this law are very clear, and any certified peace officer can easily learn how to use it. However, if you’re not a peace officer, you’ll need to get one involved to effectively use this law. We’re of the opinion that code enforcement offices should know this law because they will often be the first in their community to observe a violation.

Definitions Used in This Law

As with all Texas laws, the definitions used are extremely important, and are found in Sec. 365.011 (see Appendix). This law covers two types of waste: *solid waste* as defined in THSC Sec. 361.003(35) and *litter* as defined in THSC Chapter 365 itself. Both of these include

some surprising items and exclude others. If the items being dumped do not meet the definitions of *litter* or *solid waste*, officers simply cannot use this particular law. In this case, using THSC Chapter 341 or 343 may be possible, or, if the dumping has happened adjacent or into water, one of the water pollution statutes (TWC Sections 7.145 or 7.147) may be appropriate to use. But to use THSC Chapter 365, the waste material involved must be either *litter* or *solid waste* as defined in the statute. Both of these definitions contain some useful surprises.

The definition of *litter* is at Sec. 365.011(6):

(A) *decayable waste from a public or private establishment, residence, or restaurant, including animal and vegetable waste material from a market or storage facility handling or storing produce or other food products, or the handling, preparation, cooking, or consumption of food, but **not including sewage, body wastes, or industrial by-products**; or*

(B) *nondecayable solid waste, **except ashes**, that consists of:*

(i) **combustible** waste material, including paper, rags, cartons, wood, excelsior, furniture, rubber, plastics, yard trimmings, leaves, or similar materials;

(ii) **noncombustible** waste material, including glass, crockery, tin or aluminum cans, metal furniture, and similar materials that do not burn at ordinary incinerator temperatures of 1800 degrees Fahrenheit or less; and

(iii) **discarded or worn-out manufactured materials and machinery**, including motor vehicles and parts of motor vehicles, tires, aircraft, farm implements, building or construction materials, appliances, and scrap metal.

This is the most detailed breakdown of the term *litter* you'll see anywhere in Texas law; after this definition it's just called *litter* and none of these distinctions are used. I've highlighted a few concepts of interest:

(1) **Sewage** and **human body waste** are not included in this definition (nor are they included in the definition of *solid waste*), so you

simply can't use this particular law to deal with such material. It could presumably be used for non-human waste. Consider using the public health nuisance law (THSC Chapter 341) discussed previously or, possibly, one of the water pollution laws discussed later.

(2) **Industrial by-products** are not included in the definition of *litter*. However, you'll find that they *are* included in the definition of *solid waste*. Consequently, you can use this law to deal with most industrial waste as *solid waste* but not as *litter*. This distinction makes no practical difference under this law. Industrial waste is included in the definitions used under this law; in fact commercial dumping is often industrial waste of some kind.

(3) **Ashes** are not covered by this law, and that would include ashes from your fireplace, ashes from commercial brush burning burn pits, and ashes from cremation. Since ashes are not included in the definition of *litter* – and they're not included in the definition of solid waste either – you can't use this law to deal with them.

(4) The definition of *litter* covers just about anything that is **combustible**, including **yard trimmings and leaves**. So if an individual throws a load of yard trimming waste on a vacant lot someplace, it is probably illegal dumping under this law. If you want to be picky, the cut grass blown into the street by commercial lawn services is also included in the definition of *litter*.

(5) The definition of *litter* covers things that are **noncombustible**, too, such as the bottles and cans left over from legally or illegally burning trash. In fact, some jurisdictions enforce misdemeanor outdoor illegal burning violations by applying the Litter Abatement Act [or THSC Sec. 341.013(c) for creating a public health nuisance] to the mess remaining after the fire is complete. And some particularly aggressive counties charge "illegal dumping" rather than "illegal burning," which acknowledges that misdemeanor burning enforcement can be overly complex, and most illegal burning consists of two crimes: first the waste is dumped, and then it is burned. So some county attorneys will charge the dumping under this law and "give" the burning to the defendant in the negotiations.

(6) Probably the most surprising part of this definition of *litter* is the fact that it covers **discarded or worn-out manufactured materials and machinery** and that this includes worn-out or discarded *motor vehicles*. Rather than using the definitions of a junk or abandoned vehicle found in the Transportation Code, some jurisdictions use the Litter Abatement Act to deal with “discarded” motor vehicles, regardless of the presence or absence of current tags or safety inspection sticker. *“That abandoned object over there isn’t a ‘car,’ it’s actually a car-shaped piece of discarded or worn-out manufactured material or machinery, which is actually about 2,000 pounds of litter.”* By weight, this would be a state jail felony.

The definition the law uses for *solid waste* is found in THSC Chapter 361, also known as the Texas Solid Waste Act:

*THSC Sec. 361.003(35) “solid waste” means garbage, rubbish, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility, and **other discarded material**, including solid, **liquid**, semisolid, or contained gaseous material resulting from **industrial**, municipal, commercial, mining, and agricultural operations and from community and institutional activities. The term:*

*(A) **does not include:***

*(i) solid or dissolved material in **domestic sewage**, or solid or dissolved material in irrigation return flows, or industrial discharges subject to regulation by permit issued under Chapter 26, Water Code;*

*(ii) soil, dirt, rock, sand, and other natural or man-made **inert solid materials** used to fill land **if the object of the fill is to make the land suitable for the construction of surface improvements**; or*

*(iii) waste materials that result from activities associated with the **exploration, development, or production of oil or gas** or geothermal resources and other substance or mate-*

rial regulated by the Railroad Commission of Texas under Section 91.101, Natural Resources Code; and,

(B) **does include** hazardous substances, for the purposes of Sections 361.271 through 361.277, 361.280, and 361.343 through 361.345.



Solid waste or inert fill for surface Improvements?



Discarded manufactured material is *litter* by definition

As in the case of the definition of *litter*, I've highlighted several things you should note about *solid waste*:

- (1) Notice how broad this definition is, including **other discarded material** and **liquid** wastes. Thus if a person puts the wrong kind of fuel in his truck, realizes his error, and decides to drain the fuel onto the ground, the liquid fuel is *solid waste* which the person is illegally dumping onto the ground. Or perhaps a carpet cleaning company runs a hose out to the curb in front of your home and discharges the waste water into the storm sewer. The discharged water could be treated as a liquid form of *solid waste* (officers would also want to consider using Texas Water Code Sec. 7.145, which covers felony water pollution, in this situation).
- (2) Notice that the definition of *solid waste* includes waste generated from **industrial** activities, which was not included in the definition of *litter*. Because it is included here, however, this law can be used to deal with waste generated from industrial activities.

(3) Although the definition of *litter* listed a few noncombustible kinds of waste that were to be included in the definition, here the definition of *solid waste* specifically **does not include** three categories of waste.

(a) As in the case of the definition of *litter*, this definition excludes human sewage. If that's the problem, you'll need to use another law, such as THSC Chapter 341.

(b) Also excluded are ***inert solid materials*** under one condition: if these inert materials are being used ***to make the land suitable for the construction of surface improvements***. But if the inert materials — sand, rock, gravel, concrete without re-bar — are simply being disposed on the land and NOT being used to get the land ready for surface improvements, then the material, even though it is inert, is *solid waste* and cannot be disposed in any unauthorized location.

For example, I was driving from north Texas to Cuero not too long ago on State Highway 77 and I crossed a little bridge that was being re-surfaced by a TXDOT contractor. They were using a Roadtec milling machine to remove the old surface. The surface had been there a long time, and the waste coming off of the conveyor belt was almost like sand. It was certainly inert, and could have easily been used as fill for surface improvements. But this contractor had decided on another approach: rather than have the conveyor feed the waste from the milling machine into a dump truck for transport to a disposal or re-use location, this particular contractor had simply swung the conveyor belt out over bridge railing and was dumping the waste into the creek. Was this a violation of the Litter Abatement Act? Absolutely. Granted, the waste was inert. But since the inert waste was not being used for fill for surface improvements, the waste remained solid waste and THSC Chapter 365 applied. Because of the weight or volume of waste being dumped into the creek certainly weighed over 200 pounds,

this was a State Jail Felony level violation. Moreover, since a corporation or association was the party doing the violation, the maximum fine became \$20,000 per event of dumping (the maximum Litter Abatement Act fine being enhanced by the provisions of Penal Code Sec. 12.51). Discharging waste in this manner was also a violation of Texas Water Code Sec. 7.145, which is the state's felony water pollution provision. The maximum penalty for a non-individual convicted of violating TWC Sec. 7.145 is a fine of \$250,000 per day per event. I imagine that by hiring a contractor based on the lowest bid, and then not actively supervising the job, a state agency may inadvertently encourage these kinds of criminal shortcuts.

(c) The definition of *solid waste* also excludes wastes generated from the **exploration, development, or production of oil or gas**. Those wastes are regulated by the Railroad Commission of Texas under Section 91.101, Natural Resources Code. The actual definitions of such waste are provided in NRC Sec. 91.1011, and include such things as drilling mud, waste from hydraulic fracturing and other well completion or work-over activities, and production salt water that is generated along with the oil or natural gas produced. These wastes are regulated administratively by the Railroad Commission under the permitting process set forth in 16 Texas Administrative Code Sec. 3.8 — what the RRC calls “Statewide Rule 8 Water Protection” — and may be addressed criminally by local law enforcement through application of Texas Water Code Chapter 29 and Natural Resources Code Sec. 91.002. There’s a discussion of these wastes in Chapter 13, but for now just know that *oil and gas wastes* are regulated by the Railroad Commission and are not included in those *solid wastes* that are subject to the Litter Abatement Act (including trash and sewage generated at well sites). Of course, it’s not always apparent that a “dark, oily substance” found dumped somewhere is actually *oil and gas*

waste; it may have originated from some other industrial process. In these cases, officers usually proceed to enforce this law as if the materials were included in the definition of *solid waste*. Should that be seen as an error as the case develops, corrections can be made and other laws used.

There are a few other definitions to note that this law uses:

Sec. 365.011 (3) "Commercial purpose" means the purpose of economic gain.

This is generally interpreted to mean (1) charging some other party to dump somewhere not an approved site; or, (2) avoiding paying disposal fees one self by dumping somewhere. This definition makes a difference in two ways: (1) when deciding the level of violation involved (based on the weight or volume of the waste); and, (2) when considering if a person can dispose of waste on his or her own property. One of the requirements found in Sec. 365.012(l)(4) [the section that addresses disposal on one's own property] is that the disposal not be for "commercial purposes." Disposing on one's own property for a commercial purpose without a permit is simply dumping.

Sec. 365.011 (4) "Commercial vehicle" means a vehicle that is operated by a person for a commercial purpose or that is owned by a business or commercial enterprise.

This is an important definition because there is a provision at Sec. 365.014(b) that a person dumping over 5 pounds or 13 gallons "from a commercial vehicle in violation of this subchapter" is assumed to be dumping for a commercial purpose. That would mean that the correct charge would be at least a Class A misdemeanor for dumping over 5 pounds or 13 gallons in these situations, since there is no Class B misdemeanor available for commercial dumping.

Sec. 365.011 (5) "Dispose" and "dump" mean to discharge, deposit, inject, spill, leak, or place litter on or into land or water.

Note that *abandoned spills* are included in this definition. Also,

this definition covers dumping onto land or into water, so using THSC Chapter 365 may be a useful alternative to charge a person with water pollution in some situations. This particular law does not cover illegal outdoor burning; however, dealing with the residue left from illegal burning as *litter* is fairly common. As mentioned earlier, some jurisdictions approach illegal burning as the second of a two-step process: the guy first illegally dumped, so charge him with that. Then, having illegally dumped, he burned the evidence. Since the misdemeanor illegal burning laws can be difficult to apply, this approach may actually make some sense ... but discuss it with your prosecutor first.

In general, read all of the definitions carefully each time you seek to apply this law, especially the two key definitions of *litter* and *solid waste*. Each environmental law has its own definitions ... *a common error is using the definition provided in one law as the basis for another*. For example, don't try to use the definitions of *waste* or *pollutant* under the Texas Water Code to determine if the materials are regulated as *litter* or *solid waste* under the Litter Abatement Act. Each environmental law has its own unique definitions ... *to a much greater degree than found in the Texas Penal Code*.

Venue: Where can these cases be filed?

Most Texas criminal violations are filed in the county or district in which the violations are alleged to have happened. The two nuisance laws considered in the last two chapters — THSC Chapters 341 and 343 — not only are filed in the county where the violation is alleged to have taken place, but usually in the JP court located in the precinct where the violation happened (in the case of THSC Chapter 343) or the municipal court in the city where the violation took place (in the case of THSC Chapter 341). If the violation is of THSC Chapter 341 and happens inside a city, the case may also be filed in the JP court for the precinct or in the municipal court run by the city since these courts have concurrent jurisdiction. As a practical matter, both nuisance law violations are generally resolved in courts near to the location of the crime.

But when you come to the Texas Litter Abatement Act and Texas Water Code Chapter 7 (Subchapter E), which covers additional environmental crimes, things change significantly. All of the environmental violations defined in these two laws may be filed:

- (1) In the county where the violation is alleged to have taken place;
- (2) In the county where the alleged violator lives;
- (3) If the charge involves transportation, every county in which the alleged violator drove in committing the violation; and,
- (4) In Travis County.

While virtually all misdemeanor and felony violations of these two laws are filed in the county where the violation took place, they can in theory just as well be filed in these other locations too. In fact, where a violator has crossed a county line it is common to find officers in those counties discussing the best approach to the case and where to file the charges. This ability to possibly file cases in several local counties is what gives rise to Regional Environmental Crime Task Forces and other kinds of multi-county enforcement cooperation.

Both the Travis County Attorney and Travis County District Attorney offices are also authorized to take these cases statewide, with actual court proceedings taking place in Austin. When the cases originate from the TCEQ Environmental Crimes Unit or Texas Parks and Wildlife Environmental Crime Unit, they are often (but not exclusively) prosecuted in Travis County. Cases originating in other Texas counties may eventually be filed in Travis County also, especially where the case shows promise of involving a major fine or settlement. This is more likely to happen in the case of Texas Water Code violations – where the fines can be very large – rather than violations of the Texas Health & Safety Code.

However, if a local peace officer becomes frustrated with the reluctance of local prosecutors to move ahead on a particular case, the answer is not for the officer to attempt to file the case in Travis County directly. Travis County usually works to supplement local prosecutors, not be in conflict with them.

The answer to this “unresponsive local prosecutor” situation is for the prosecutor, police management, and local senior elected officials to work through the policy issues that are causing the prosecutor to refuse environmental cases. Perhaps there is a misunderstanding of the content of the law itself — remembering that neither peace officers nor prosecutors are routinely trained in these statutes in police academies and law schools — or perhaps the policy issue revolves around how evidence is of the violation is to be determined.

Perhaps the prosecutor simply doesn’t feel or recognize his responsibility to protect natural resources and public health, in which case local newspapers may need to help voters understand this needlessly risky policy. All sorts of excuses and rationalizations have been offered over the last decade, and most have eventually been resolved in favor of better local enforcement.

But where a local prosecutor simply is uninterested in pursuing resource pollution and health threatening cases, there may be some fairly easy ways around this roadblock ... such as using the venue of a neighboring county, if the violator lives there, or even in some cases under-filing the charges in a lower court. These will only work for a little while, however.

When the officer eventually finds himself considering filing what is a felony case in JP court, it becomes pretty clear that the “workarounds” are not actually working at all. Eventually the city or county being prevented from using state criminal laws to effectively keep its community clean and its citizens healthy will elevate the prosecutor’s reluctance to a higher political level, where it can be solved in the newspapers, by public opinion, and, finally, by the voters.

If your local prosecutors – or police – are not initially willing to use Texas resource and health protection laws, they will often change their position when they realize that supporting a clean and healthy community is in the best interest of the community, and of themselves and their families.

Statute of Limitations

Article 12 of the Code of Criminal Procedures sets various time limits to prosecuting crimes in Texas. These usually do not come into play for environmental violations since so often a new violation is generated daily by an ongoing condition. Thus when somebody throws a barrel of waste into a creek, for example, each day the waste is there can constitute a separate water pollution charge under TWC Sec. 7.145 or TWC Sec. 7.147; or, each day hazardous waste is stored in violation of TWC Sec. 7.162(a)(1) can be charged as a separate felony (there's a ten-year prison sentence involved for conviction in this particular violation).

However, in using the Texas Litter Disposal Act, this is not the way things are handled. Under this law, the criminal act of disposing solid waste or litter at an unauthorized location — or of receiving the waste for disposal at an unauthorized location or of transporting the waste to an unauthorized location for disposal — **are all events that happened on a specific day**. Granted, the *result* of the dumping may be ongoing water pollution or an ongoing public health nuisance to be handled under those “daily violation” laws, but the dumping itself happened on a specific date, so the issue of limitations has to be considered.

The issue of how long a prosecutor has to take action following a crime is set forth in CCP Article 12 LIMITATION. There is no specific section for the limitations to prosecution for illegal dumping, so the general provisions set in Article 12.01(7) for felonies (three years) and in Article 12.02 for misdemeanors (two years) are used for violations of THSC Chapter 365. Indictments for felony and informations for misdemeanor illegal dumping violations of the Litter Abatement Act must be presented within these time periods, which begin with the date of the illegal act of dumping, receiving, or transporting — not the day when the officer first finds the waste involved. These periods may be extended — under CCP Article 12.05 — by whatever time the accused was out of Texas, which may make a difference in some situations.

Unfortunately, illegal dumping in Texas is not always detected within these time limits. However, in some cases charges under THSC

Chapter 365 are prepared anyway (in spite of the time limitations) and may even be presented by the prosecutor, out of ignorance. This is a risky policy that should never be followed.

Unfortunately, not all case management systems used by prosecutors in Texas require entry of the limitation deadline date into the system, although good systems will require that as a data field. Consequently, officers working and presenting cases under THSC Chapter 365 should take personal responsibility to make sure the limitation dates are observed from the beginning of the case and brought to the attention of the prosecutor. You have to be able to prove the dumping, receiving, or transporting took place within the two or three year limit, and if this is not possible you'll simply have to find another law to use.

When the Dumping Happened Too Long Ago to Use Chapter 365

In situations where the dumping happened far enough in the past to no longer be eligible for prosecution under THSC Chapter 365, the officer should consider using the public health nuisance law (THSC Chapter 341) or the public nuisance statute (THSC Chapter 343) discussed in the preceding chapters. Regardless of where the dumping took place, the best statute to use for older dumping is often THSC Sec. 341.013(c). This is the most general violation available to deal with old dump sites, no notice is required to the violator before a citation can be issued, the health department and prosecutor have definite duties (see THSC Sec. 341.012) to cause the abatement of the nuisance, and each day is a separate offense. Potential cumulative fines can be significant (up to \$73,000 per year @ \$200 per day maximum).

Additionally, if the dumping was done into or “adjacent” to water — including dry creeks and borrow ditches — consider using TWC Sec. 7.145 or Sec. 7.147 water pollution statutes (fully discussed in Chapter 12). These are not impacted by limitations since every day the waste is *in or adjacent to* water, it is either “polluting” or “threatening to pollute” the water, which is a crime in Texas. The violation is continuous from the time of initial discharge. Likewise, if the violation involves some amount of medical waste or hazardous waste or lead-acid batteries or waste motor oil mixed in with the other waste, consider using the crimi-

nal statutes in TWC Chapter 7 against those substances. All of those are “per day” violations, so the potential penalties – and incentives to abate the dumpsites – can be large.

Violations: What Are the Crimes Defined by THSC Chapter 365?

For this discussion, please consult Sec. 365.012 of the law in the Appendix. This long section is the core of the statute and contains the violations, penalties, and major defenses to the violations.

There are four sections defining violations:

Sec. 365.012(a): **disposing** or allowing or permitting the disposal of litter or other solid waste at a place that is not an approved solid waste site.

Sec. 365.012(b): **receiving** litter or other solid waste for disposal at a place that is not an approved solid waste site (for pay or not).

Sec. 365.012(c): **transporting** litter or other solid waste to a place that is not an approved solid waste site for disposal.

Sec. 365.012(j): unauthorized disposal of litter or other solid waste in a **dumpster**.

Penalties (based on weight or volume, as best fits the situation) are found in Sections 365.012(d) through 365.012(g), and are shown in the chart on the following page.

“Lighted Litter”

Section 365.012(a-1) was created several legislative sessions ago and defines a violation concerning disposing “lighted litter” on open land and roads, provided that such disposal causes a fire to take place. The penalty is set at Sec. 365.012(d-1), with other governing provisions at Sections 365.012(p), (q), and (r). Given the requirement that the probably small item of “lighted litter” disposed must be what causes a fire, and the difficulty in proving these elements, makes it probable that this particular set of provisions will be seldom used. The penalty provided in Sec. 365(d-1) for disposing “lighted litter” also seems a little strange to me: a fine of \$500 and/or up to 30 days confinement if the lighted litter (which presumable was destroyed by the fire) weighs 500 pounds or less. Violations involving “lighted litter” are seldom charged.

THSC Chapter 365 Litter Abatement Act Penalties

[Sections 365.012(d) through 365.012(g)]

I. Dumping Not Done for Commercial Purpose (i.e., “The purpose of economic gain”)

(a) 5 pounds or less; or, having a volume of 5 gallons or less	<u>Class C Misdemeanor</u> (fine to \$500); (If done by corporation or association: Fine to \$500 under Penal Code Sec. 12.51)
(b) Over 5 pounds but under 500 pounds; or, over 5 gallons but less than 100 cubic feet	<u>Class B Misdemeanor</u> (fine to \$2,000 and/or confinement to 180 days); (If done by corporation or association: Fine to \$10,000 under Penal Code Sec. 12.51)
(c) 500 pounds but under 1,000 pounds; or, 100 cubic feet but less than 200 c.f.	<u>Class A Misdemeanor</u> (fine to \$4,000 and/or confinement to 1 year); (If done by corporation or association: Fine to \$10,000 under Penal Code Sec. 12.51)
(d) 1,000 pounds or more; or, 200 c.f. or more	<u>State Jail Felony</u> (fine to \$10,000 and/or confinement of 6 months to 2 years); (If done by corporation or association: Fine to \$20,000 under Penal Code Sec. 12.51)

II. Dumping Done for Commercial Purpose

(a) 5 pounds or less; or 5 gallons or less	<u>Class C Misdemeanor</u> (fine to \$500); (If done by corporation or association: Fine to \$500 under Penal Code Sec. 12.51)
(b) Over 5 pounds but under 200 pounds; or, over 5 gallons but less than 200 c.f.	<u>Class A Misdemeanor</u> (fine to \$4,000 and/or confinement to 1 year); (If done by corporation or association: Fine to \$10,000 under Penal Code Sec. 12.51)
(c) Over 200 pounds; or, 200 c.f. or more	<u>State Jail Felony</u> (fine to \$10,000 and/or confinement of 6 months to 2 years); (If done by corporation or association: Fine to \$20,000 under Penal Code Sec. 12.51)

III. Dumped for Any Reason (Commercial or Non-Commercial)

(a) Any amount of waste in a closed drum or barrel	<u>State Jail Felony</u> (fine to \$10,000 and/or confinement of 6 months to 2 years); (If done by corporation or association: Fine to \$20,000 under Penal Code Sec. 12.51)
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Other Interesting Provisions

The balance of THSC Sec. 365.012 addresses various situations that clarify the application of the law:

Sec. 365.012(h) provides for penalizing a **repeat offender** at the next higher level than the penalties stated for the volume or weight he dumped. So if, for example, a person had a previous conviction at any level and is convicted this time for dumping that would earn a Class A Misdemeanor, the judge can sentence him at the State Jail Felony level, regardless of the level and date of the earlier conviction. Note that the prosecutor will have to present positive proof that the person being convicted now is actually the same person as convicted previously.

Most environmental criminal laws have some sort of enhancement for subsequent convictions. When we get to the Texas Water Code, those mostly double the range of possible sentencing for repeat offenders. In the case of TWC Sec. 7.176 – waste motor oil dumping – the \$50,000 and five years potential penalty for initial conviction actually triples for a subsequent conviction. Given the current and forecast water shortages for Texas – along with the anticipated doubling of our population by 2050 – the State Legislature supports the idea that dumping waste motor oil has to be taken seriously.

Sec. 365.012(i) provides for the possibility of seizing equipment used in the dumping under the **forfeiture** provisions of the Code of Criminal Procedure. Note that the section of the CCP cited requires that forfeiture could only happen after a second illegal dumping conviction, provided that good notice of the risks had been given at the time of the first conviction. I've never encountered an agency that has actually seized a vehicle or anything else as the result of this section based on illegal dumping. Few prosecutors have included the warnings as part of the court order in the first conviction, so the historic notice requirement hasn't been met. An even bigger potential problem is that the "initial conviction" specified in CCP

Chapter 59 FORFEITURE OF CONTRABAND for dumping must specifically be a misdemeanor under THSC Chapter 365. Apparently it has been a while since the forfeiture provision has been updated, but it's more likely that the actual initial dumping conviction would be a state jail felony. So I don't think we'll see many vehicles seized under the current provisions. However, it is common practice to impound a vehicle used in dumping as evidence in the criminal case until such time as the case is resolved.

Sec. 365.012(k) allows for **temporary storage** of waste prior to disposal. If you are actively using this law, you'll want to read and fully understand the Glendening appeals case in the Appendix. If you are dealing with situations where you think the alleged violator is going to assert that he is not *dumping* any waste (but is just *temporarily storing* it prior to disposal), you'll need to work out a strategy to avoid this defense. One good way, in my view, is simply to ask the alleged violator if he is, in fact, temporarily storing the waste prior to disposal. When he says that's what he's doing, work out how long the person needs to complete this process, and document the agreement. Then if in fact later it turns out that the person was dumping, you'll have the documentation for your prosecutor. The important thing is to make sure your prosecutor is aware of this possible defense. Give him or her a copy of the Glendening decision and discuss it with before the situation arises. When the prosecutor understands the issue, she will direct you in how to proceed with these cases. As mentioned earlier, I have heard from one officer who referred the question of the meaning of "temporary" to his prosecutors for them to determine. Four months later the prosecutors were still discussing the meaning of the term. A better approach is probably for the officer and the violator to come to an agreement of how long the "temporary" storage is to be, document that agreement, and present it to the prosecutors if an illegal dumping case is eventually filed on the individual.

Just as local police, deputies, prosecutors, and elected officials are learning these laws, so are violators. One enforcement officer reports catching a man in the act of burying a large amount of commercial waste in a hole he had dug on his property. When the officer asked the man what he was doing, the guy replied, "It's OK, officer. I'm just temporarily storing this waste prior to disposal." After he stopped laughing, the officer worked out a period for the man to dig up the waste, properly dispose of it, and bring the officer a landfill receipt. When criminals start learning the exact phrases to use from the law, I suppose that's some kind of progress.

Sec. 365.012(l) addresses **disposing waste on one's own land**.

Note the five conditions specified in this section must all be true for the exemption to work. The first requirement is that the exemption from prosecution may only apply to "individuals" rather than "persons." This means that corporations, partnerships, and other forms of non-individual entities are not allowed to take this exemption. None of these entities are free to dispose of waste on property they own without some sort of permit from the state. Only individuals can attempt to use this section. But there are four additional requirements. If the waste wasn't generated on land that the individual owns (not leases), **or** if the waste came from any commercial activity, **or** if the disposal itself isn't on land the same individual owns (maybe different land, but owned by him nevertheless), **or** if the disposal is for a commercial purpose ("the purpose of economic gain"), **then** the protection of this provision wouldn't apply and the dumping would probably be criminal. An interesting question arises as to "What does it mean to say that waste is generated on land some individual owns as opposed to being generated on premises that he or she owns?" Jurisdictions that have considered this question – including Harris County – have often concluded that the only sort of waste that is generated on "land" – as opposed to "premises" – is plant growth waste. Jurisdictions thinking this way limit the use of this provision to plant growth waste. Many other

jurisdictions have concluded that any disposal to save costs – thus achieving “economic gain” – is sufficient to prevent the use of this provision. Talk this over with your prosecutor and see how he or she would like to proceed. The State Legislature gave jurisdictions some additional flexibility here by not providing a specific definition of “generate.” It’s pretty clear, however, that the State Legislature did not intend to allow individuals the right to dump large quantities of waste in backyards; waste disposal needs to be at landfills.

Sec. 365.012(m) allows municipalities or counties to offer a \$50 **reward** for information leading to the prosecution of a dumper. I’d suggest that you don’t offer a reward. If you need more dumping cases to work on, just put a little notice on your web site or in the paper, and you’ll be absolutely covered-up with business.

Sec. 365.012(n) removes the requirement to prove criminal intent at the misdemeanor level. Misdemeanor dumping and misdemeanor water pollution under TWC Sec. 7.147 are specifically both strict liability statutes. This may be a reason to charge an A Misdemeanor in an otherwise weak state jail felony case. Be sure to bring this to your prosecutor’s attention.

Sec. 365.012(o) gives a waste generator the ability to avoid being held responsible for the criminal dumping of a waste hauler he hires *provided* the generator has, prior to the hauling, received a signed statement from the hauler that the solid waste will be disposed of legally, with the statement to include the apparently valid Texas driver’s license number of the hauler. So, suppose there was a storm and crews from Oklahoma or Louisiana showed-up to do roofing jobs. But instead of taking the waste to a landfill, they dumped it somewhere. If the homeowner had obtained the document described here, he would avoid any potential liability for the waste dumped by the hauler. Otherwise, there is a possibility that the homeowner would be charged in some circumstances, since he may have colluded with the roofer. Note the requirement for the valid driver’s license to have been issued by the State of Texas for

this exemption to apply, so in the above example the homeowner would apparently be unable to use this defense.

Sec. 365.012(s) requires the court to include up to 60 hours of community service work (as defined in Article 42A.304(e), Code of Criminal Procedures) in addition to other punishment if the individual is convicted of several different violations found in this chapter. This was added by the 85th Legislature.

What else is important about this law?

The points made above pretty well highlight the important aspects of using this statute on a day-to-day basis. Note that it may be an easier law to use for minor water pollution than the ones we'll review in the next chapter, and it is an alternative your peace officers can use when municipal codes or health nuisance laws are insufficient to control dumping. Before leaving this section, please note several additional points:

Sec. 365.013 sets a Class A misdemeanor for violating "rules and standards regarding processing and treating litter disposed in violation of this subchapter." This would be a very handy provision to have available, but there are some problems with its use. When rules — such as Rule 330 covering Municipal Solid Waste — are created they are based on particular statutes. In each case, the State Legislature has directed some agency of state government to develop and maintain a set of rules for use (in this case, the agency is the Texas Commission for Environmental Quality). There is a closely defined process for such rule development, which includes publishing details of the proposed rule in the Texas Register at various times along the way. One of the things required to be published by any agency proposing a new rule — or a modification to an existing one — is the exact law under which they are proposing the new rule. State agencies can propose rules only as authorized by the State Legislature in specific statutes.

Now here's the problem in this situation: when you work through the process for the various rules that have been created to deal

with solid waste in Texas, you'll see that most of them are based on THSC Chapter 361 SOLID WASTE DISPOSAL ACT, the general solid waste statute for the state. At no place in the Texas Register's documentation of the processes followed for *any* solid waste rule — including Rule 330, the largest solid waste rule we have — does it indicate that a particular rule is based on THSC Chapter 365; all the rules cite THSC Chapter 361 instead. So while it would *maybe* be nice to criminalize violations of various solid waste rules — and not everybody would agree that this would be good — be aware that whatever rule you're attempting to designate as carrying a Class A misdemeanor for its violation under THSC Sec. 365.013, there is this problem: No solid waste rule currently in effect, according to the Texas Register, was, in fact, created by the agency to further THSC Chapter 365. Please bring this to the attention of anyone who suggests using Sec. 365.013 to set Class A misdemeanors for violating various rules. It's not likely that any conviction would survive an appeals process, if one were forthcoming. Even poor defense attorneys would probably catch this point. Had the state specifically promulgated rules regulating waste disposal, storage, and processing in such a way that the rules were clearly created in response to Sec. 365.013, as the State Legislature directed, then the Class A misdemeanor that the State Legislature envisioned could be used to deal with old dumps that pre-date the statute of limitations. Since this is not the case, officers must another criminal laws, as suggested, to force the abatement of the mess and impose a penalty. Once again we are faced with a state agency not doing the job it was directed to do by the State Legislature. Another example of this was the State Legislature requiring the Texas Department of Transportation to post signs everywhere highways crossed water, showing a phone number to be used to report dumping. TXDOT simply ignored the State Legislature, and as the phrase goes, "not a dog barked."

Sec. 365.014 removes certain items used to grow and handle crops from the jurisdiction of this particular law. So the old tractor

sitting in the field is probably exempt from being covered under this law, but when the farmer gives the tractor to his nephew to sell as scrap metal and the kid abandons the project and pushes the tractor off in a borrow ditch beside a road, the boy has committed an act of illegal dumping. This section is also where the provision is found that declares anything weighing over 5 pounds or having a volume of over 13 gallons thrown from a commercial vehicle (as defined in this law) to be commercial dumping, which would earn at least a Class A misdemeanor for such actions. THSC Sec. 365.012(f) sets the threshold for a “commercial purpose A Misdemeanor” at 5 pounds or 5 gallons. So the question becomes, “Where did the 13 gallons in Sec. 365.014 come from?” That is either a cosmic mystery or a drafting error, and I’m thinking the latter. I do know that this section is the only place anywhere in all state laws where the phrase “13 gallons” is used. So if the waste is thrown from a commercial vehicle, before charging the A Misdemeanor, I suppose the 5 pound minimum weight threshold should be used rather than the volume.

Sec. 365.035 sets a penalty for knowingly possessing a glass beverage container in what amounts to Uvalde County. This is interesting in that it is the first time that a law such as this has been successfully passed, although there have been several attempts over the years to impose this restriction state-wide. We can reasonably expect that there will be attempts in future sessions of the State Legislature to expand this law to include other counties, but for now it only applies to this one small (26,000 population) sparsely populated county (17 persons per square mile vs. 96 people per square mile for all of Texas). The first attempt to expand this law to other counties (85th State Legislature) failed.

Environmental Crimes of Local Governments

Unfortunately, it should be noted that occasionally local governments become part of the problem too. As an example, there is an extremely interesting article about an illegal dumping case that happened in the mid-to-late-1990’s in Dallas. At the time it happened, the city had

no specialized environmental law enforcement officers, as they do now, and it's hard to see how this particular situation could happen again, especially the part where the city was using the facility itself. There is an well-written narrative of this case at <https://tinyurl.com/y2tlk6up>, called *Garbage In, Misery Out: Dump Operators Ruined a Neighborhood - with Dallas' Help*. This 2004 case is well worth reading.

Often, when local governments commit environmental crimes it usually happens because somebody takes a shortcut, which then becomes routine, and that eventually becomes a standard way of doing business. Usually one or both of these things are at the root of these criminal violations: *ignorance* and *arrogance*. The ignorance comes into play when city and county workers simply don't know the law. The second comes into play when some supervisor says, "*I don't give a dang what you and the law says: I'm the boss around here, and if you want to keep your job you'll do what I tell you!*" If this is what you're running into, get some light put on this situation before the "interesting article" in the newspaper is about your own city or county.

Here a few of the common ways that local governments may violate state criminal anti-pollution laws include (unfortunately, each of these is from an actual situation in Texas). The criminal violation in some of these will make more sense after you have done more reading, but here they are in one place:

- *Bribes paid at municipal landfills for accepting hazardous waste illegally (there is no telling what is still buried in some of these old city dumps that have been closed for twenty years);*
- *Routine use of unpermitted disposal sites for construction and demolition debris by city;*
- *Intentionally buying hazardous waste contaminated soils for city fill projects;*
- *Forcing city employees to work with hazardous waste or substances without proper protection (i.e., asbestos abatement; drug chemical handling; raids at clandestine drug laboratories);*
- *Dealing with (hiring) unregistered hazardous waste haulers to save disposal fees;*
- *Helping a contractor by using city staff and trucks to dump de-*

- molished material from a city hall remodeling job to avoid late penalties in a demolition contract;*
- *Disposal of waste anti-freeze in a creek that runs behind the vehicle maintenance facility; (also, dumping waste motor oil from another city maintenance operation into creek);*
- *Falsification of periodic reports to TCEQ: the sewer treatment plant operator quits and the city manager starts signing the mandatory operational reports;*
- *Dumping wastewater into creek by municipal pumping activities;*
- *Various UST violations at commissioner's yards (failure to register, close properly, or bring up to regulation);*
- *Mayor conspiring with local businesses to violate NPDES/TPDES permits by bypassing required on-site wastewater pretreatment steps with mayor's "authorization";*
- *Utility district dumping waste directly onto surface (POTW couldn't accept volume ... might as well dump it in a nearby field);*
- *Illegal dumping at school districts by employees in charge of maintenance;*
- *Violation of pesticide storage and application laws (state and Federal);*
- *Intentional fresh water and wastewater sampling violations;*
- *Failure to report spills of various chemicals to state as required;*
- *Water pollution and fish kill by draining the city swimming pool's chlorinated water into a nearby creek;*
- *City hall is remodeled and the contractor decides to save disposal costs by burning the demolition waste (without a TCEQ permit, on a vacant lot next door to the local newspaper);*
- *The new city manager orders the chief of police to burn old city records in a barrel behind the police station inside city limits, and the chief complies (the new city manager also fired the code enforcement officer when she pointed out the illegality);*
- *Venting CFCs into the air from public vehicles and at city-managed recycling centers;*
- *Actively obstructing the enforcement of criminal environmental laws in the jurisdiction;*
- *Bid fixing and collusion on contracts for environmental services;*

and,

- *Code enforcement and other local environmental enforcement accepting bribes to ignore violations.*

I'd like to omit the last item, but unfortunately I've heard too many first-person stories by officers to do so. If you're doing this yourself from time to time, stop it. If you know of others, get it stopped.

There's a simple policy issue at stake here with the rest of these violations: Cities and counties cannot enforce anti-pollution laws against individual and company violators if they, the cities and counties, are violating these laws themselves.

So if you work for a local government that is violating any environmental (or other) criminal laws, you simply must do something to stop the crimes. Perhaps an anonymous letter to the city attorney that (1) reports the criminal violation and (2) makes the statement that it is never good public policy to commit a crime will do the trick. In other cases, the same tip to a friendly reporter can help things. It's not that employees or cities and counties are bad people who like to pollute and create health problems. It's more the case that we are simply not always as thoughtful as we should be. And we're also far too quick to look the other way, because few of us enjoy conflict with work mates. Moreover, we are creatures of habit. Clean water, air, land and good public health are important to any community, and we all benefit when state laws protecting our natural and human resources are enforced. So as the phrase goes, "If you see something, say something."