Coordinated Local Environmental Enforcement

TIDRC012 - 2022

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Original Issue: October 1, 2018 Last Update: September 19, 2022

Welcome

Welcome to the online class in **Coordinated Local Environmental Enforcement**. In this class we'll discuss the ways that local governments can best organize to respond to illegal dumping and other forms of pollution.

The written material for this class is slightly longer than those for other courses in this series. This is done to provide you with one document that summarizes all environmental enforcement options available to local governments. Additional detailed information on any of the topics here can be found in the other courses and the book Illegal Dumping Enforcement, which can be obtained through the TIDRC.com website.

The process for completing this class is simple: (1) study the material available in this document; (2) pass a test with a score of 70% correct; and, (3) receive your certificate. You can take as long or as short a time to do this as you require to pass the test, but most folks take about a day to complete the process. If you don't pass the test the first time, that's fine. Just take it until you DO reach 70% correct. In fact, the more times you take the test, the more you'll be learning as you read the discussion of your error. When you reach that score, you're finished with the class. The testing system will let us know that it's time to make sure your records are complete here (we keep your information for five years, as required by state law) and to send you your Certificate of Completion.

If something happens at your end and you need another copy of your certificate, just let us know (email me at ockels@tidrc.com) and we'll send you another one for free.

At TIDRC our mission is to help Texas cities and counties get better at responding to illegal dumping and other kinds of local pollution, including using municipal codes and state laws to deal more effectively with these issues. In addition to these online classes, we've presented hundreds of in-seat day-long classes around Texas over the past several years on these topics. If you haven't attended one, I'd encourage you to do so. They're a lot of fun, you earn continuing education credits, and you might even learn something useful to you in your job. You can find out more about our in-person classes on the TIDRC.com website, and if you want to host a class in your community just drop me an email.

You can take any of our online classes and pay the low fee as you go, or you can register for unlimited access to these classes for a year at a reduced fee. Lots of individual officers do this; multiple officers from the same city or county receive a group discount. More information is at: http://tidrc.com/continuingstudnt.html.

TDLR required continuing education for code enforcement officers is defined in TDLR Rule 62.24 Continuing Education. The acceptable curriculum listed at sub-section (i) in Section 62.24 names twelve specific areas where training is authorized, including (6) nuisance violations; (9) health ordinances; (10) basic processes of law related to code enforcement; and, (11) professional, supervisory or management training related to the profession of code enforcement. Those are some of the topics addressed in this particular class.

TIDRC is an Approved Continuing Education Provider by TDLR and is listed on their web page at http://s.coop/26asr. This means that the hours you earn from TIDRC — either in a classroom or online — will be readily accepted by TDLR in meeting your continuing education requirements.

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Section One: Local Enforcement Context

The challenge in stopping illegal dumping is USUALLY persuading local elected officials to require the enforcement of existing state criminal laws in their community. If local officials don't want a cleaner, healthier, more beautiful community, it probably won't happen.

Problem: Dumping Comes from Mishandling Waste

Local enforcement usually begins with waste being mishandled or disposed in the wrong place, including waste being dumped on one's own personal property. This is as much a crime in Texas as dumping waste in any other unauthorized place.

The truth is that not everybody is willing to pay to properly dispose of their waste.

Americans generate an enormous amount of waste, which makes perfect sense when one considers these observations from Scientific American:

It is well known that Americans consume far more natural resources and live much less sustainably than people from any other large country of the world. "A child born in the United States will create thirteen times as much ecological damage over the course of his or her lifetime than a child born in Brazil," reports the Sierra Club's Dave Tilford, adding that the average American will drain as many resources as 35 natives of India and consume 53 times more goods and services than someone from China.

Tilford cites a litany of sobering statistics showing just how profligate Americans have been in using and abusing natural resources. For example, between 1900 and 1989 U.S. population tripled while its use of raw materials grew by a factor of 17. "With less than 5 percent of world population, the U.S. uses one-third of the world's paper, a quarter of the world's oil, 23 percent of the coal, 27 percent of the aluminum, and 19 percent of the copper," he reports. "Our per capita use of energy, metals, minerals, forest products, fish, grains, meat, and even fresh water dwarfs that of people living in the developing world."

As the biggest consumer of resources, it only makes sense that we are also generators of the largest amount of waste. Studies by the E.P.A. have found that Americans generate more waste per-person than anywhere else in the world. Estimates of the actual amount of waste generated annually in the United States

vary widely: from the EPS's estimate of 4.4 pounds per person per day to highs of over twice that amount. Unfortunately, not all of that waste finds its way to landfills.

E.P.A. analysis breaks waste down into six categories: durable goods; nondurable goods; containers & packaging; food; yard trimmings; and, other wastes. All of these may be illegally dumped rather than properly disposed. For the issue of local control of dumping, however, it's more useful to think of the actors:

There's really two sources of dumping in Texas communities:

- (1) Dumping by individuals, such as household trash dumping; and,
- (2) Commercial dumping by <u>non-individuals</u>, such as companies (usually smaller ones), partnerships, and property managers, including individual landlords who dump waste removed from rental houses before re-leasing.

Often a particular dump site will have dumping from both sources present, although the enforcement techniques for these two categories differ.

Texas Health and Safety Code Chapter 365 is the primary law used to fight illegal dumping, and it's penalties break things down into two categories: (1) dumping NOT done for the purpose of making or saving money, that is, dumping done for the purpose of economic gain; and, (2) dumping done to FOR the purpose of economic gain. These pretty well correspond to the two sources above. Generally, the penalties for "commercial dumping" under THSC Chapter 365 are more severe than dumping done by residents (commercial dumping usually involves greater weights or volumes).

Overall, "illegal dumping" in Texas can be said to have happened anytime that waste of any sort is disposed of anywhere except a state-approved location. It's pretty easy to drive around any part of Texas and find illegal dumping. In fact, finding illegal dumping is never a challenge; the challenge is for local governments to motivate themselves to stop it.

Dumping Is a Dangerous Crime

Illegal dumping is an extremely dangerous crime; the danger is easiest to see when drinking water is polluted.

Water Pollution.

If you're old enough to have watched cowboy movies in your youth, one of the recurring themes was the heroes crossing parched land, searching for the life-supporting water hole, only to find that the bad guys has poisoned the water. That was generally a hanging offense. Poisoning the water supply is still seen as a horrible crime, and penalties reflect this fact.

The environmental resource that will limit the economic and human development of Texas is water, and there's only two things that government can do to protect it:

(1) Our state government can control who has legitimate access to the water under one's own property. The current Texas policy is called "right-tocapture," and it's a little strange. Essentially, any water that you can pump from a hole dug on your property is yours to use. Considering that the water in the aquifer underfoot is like a big lake, with water flowing unseen, the rightto-capture rule gives the person with the most powerful pump the right to grab the most water from under his property, even at his neighbor's expense. Change the circumstances a little and the weakness of this policy is easy to see. Imagine a group of people living on a lake, each having their own boat dock. If a person drilled a hole in his dock and began pumping the water from the lake for his own use, without state authorization, he would be committing a crime. But put a couple of hundred feet of dirt on top of the under-ground lake, and you can pump all you want through the pipe you stick into the water, with no regard for your neighbors. The policy of "everybody grab as much as he can" will soon fail in the face of the need to manage Texas water resources for our common use.

Allocating scarce water resources will lead to the biggest fights Texans will have with each other, far beyond fighting over politics. Cities want to grow, which means having access to more-and-more water to service new residents; balancing competing needs between cities where the resource itself is already scarce will be a difficult process. There will be places that literally go dry. Additionally, many cities have already found that Texans have a *very* hard time voluntarily reducing water use when asked to do so: too

- many of us want to be "free to waste water" if we want to. Attempts to control the access to and use of this vital resource will continue to put the state, cities, and residents all in conflict with each other.
- (2) The second way that government can protect water resources is to severely punish those who pollute water. Existing penalties are sufficient to stop polluters, provided that local prosecutors are willing to impose them. Often in controlling pollution, uneducated and/or unwilling police and prosecutors simply fail at protecting the present and future of Texas. Instead, they ignore these laws.

If a person were to be caught by police dumping hazardous waste into the reservoir that was the town's water supply, people would immediately see the extreme danger. If the police and prosecutor knew Texas criminal environmental law, the person could be arrested and charged with a number of crimes, perhaps even including "attempted murder" of the inhabitants of the town. The specific environmental crimes he might be charged with include:

- (a) Texas Water Code Sec. 7.145 INTENTIONAL OR KNOWING UNAUTHORIZED DISCHARGE (also known as felony water pollution) with penalties for an individual of confinement to five (5) years and/or a fine of \$1,000 to \$100,000;
- (b) TWC Sec. 7.162. VIOLATIONS RELATING TO HAZARDOUS WASTE with penalties for <u>transporting</u> hazardous waste anywhere except an authorized location of confinement to ten (10) years and/or a fine of \$1,000 to \$50,000;
- (c) TWCSec. 7.162. VIOLATIONS RELATING TO HAZARDOUS WASTE with additional penalties for <u>disposing</u> hazardous waste anywhere except an authorized location of confinement to ten (10) years and/or a fine of \$1,000 to \$50,000;
- (d) TWC Sec. 7.163. VIOLATIONS RELATING TO HAZARDOUS WASTE AND ENDANGERMENT for disposing the hazardous waste in a way that knowingly places another person in imminent danger of death or serious bodily injury, carrying a penalty of confinement to 15 years and/or a fine of \$2,000 to \$500,000. If a person should actually die or suffer serious bodily occurs, the fine increases to than \$5,000 or more than \$1,000,000 and confinement increases to a maximum of 30 years.

A person who intentionally attacks our water resources is attacking our health and our future as well.

Hazardous Waste; Medical Waste; Used Motor Oil

The crime may not involve the direct attack on water. It may simply consist in dumping dangerous chemicals that could pollute water if it reached it. Here in Grayson County of North Texas, for example, cities and others draw water from the Woodbine and Trinity Aguifers. Both aguifers have their outcropping/recharge zone in western Grayson County and in the county to the immediate west, Cooke County. Dumping hazardous waste on the ground in the outcropping is the same as dumping it into the aquifer itself. However, dumping hazardous waste in these recharge zones has never, to my knowledge, been prosecuted as a water pollution crime in our county. In fact, criminally mishandling hazardous waste ... for example, unauthorized storage in public storage sheds ... is rarely prosecuted at the local level, although state environmental criminal law is designed for local use. The only reason for this is lack of local experience in addressing these problems ... and perhaps occasional displays of political evasion. Dumping used motor oil is particularly dangerous to our water resources.

The EPA reminds us that:

Used motor oil can contain concentrations of toxic heavy metals such as zinc, lead, and cadmium that affect the environment, including wildlife, vegetation, surface water and drinking water supplies when not disposed of properly. One quart of oil poured down a storm drain can contaminate one million gallons of water. Water that goes down storm drains does not go to treatment plants.

Texas criminal law provides serious penalties for mishandling and dumping hazardous waste, medical waste, and used motor oil. Convictions for violating these laws impose the largest potential penalties in Texas criminal law. TWC Sec. 7.176, for instance, allows for a penalty of up to five years confinement and/or a fine of \$1,000 to \$50,000 for any introduction of waste motor oil into the environment.

Specific THSC Chapter 365 Crimes

Most illegal dumping is controlled locally by the Liter Abatement Act, Texas Health and Safety Code Chapter 365. This law can be used when waste defined in this statute as "litter" or "solid waste" is disposed at any location not authorized by the state. The penalty to be imposed is based on the weight or volume (the officer decided the proper unit measure) of the litter or solid waste dumped, and may range from a Class C Misdemeanor (dumping less than five pounds) to a State Jail Felony [for individuals] (dumping over 200 pounds for the purpose of economic gain; dumping over 200 cubic feet for any purpose; and, dumping a closed drum or barrel, regardless of the content. Non-individuals such as companies and partnerships face greater possible fines.

Additional charges commonly filed under this law include <u>transporting</u> solid waste or litter to an unauthorized location for disposal and allowing someone to dispose of solid waste or litter on your own property. Consequently, any one act of dumping may carry additional charges for transporting and/or receiving, each separate charge being based on the weight or volume of the waste improperly handled or disposed.

THSC Chapter 365 is often the law used when non-hazardous chemicals are dumped. Not all chemicals used in the United States meet the criteria to be classified as "hazardous," although many are dangerous to the plants and animals we depend on for life. Two significant problems arise: (1) the estimates of how many chemical compounds commonly used in commerce range from 84,000 (a commonly cited number by the EPA) to over 350,000 chemical substances (Chemical and Engineering News, "Number of chemicals in commerce has been vastly underestimated," https://cen.acs.org/policy/chemical-regulation/Number-chemicals-commerce-vastly-underestimated/98/i7). Only a few hundred of these have been tested for the impact they might have on humans. When dumped they may constitute a potentially serious danger when the waste is discovered by children, livestock, and improperly trained officers. Any amount of waste in a closed drum or barrel ... which is frequently how

waste chemicals are handled ... is defined as a State Jail Felony under THSC Chapter 365.

Public Health Nuisance THSC Chapter 341

Although the risks from direct exposure to dumped materials may be significant, the waste itself may become a shelter and/or breeding location for rats, mosquitoes, and other disease carrying vermin. Such places are "Public Health Nuisances" and are very common in Texas. Any dumping usually creates a Public Health Nuisance, which is a second offense. THSC Sec. 341.013(c) is probably the most general description of places that my constitute Public Health Nuisances:

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.**

If America has learned nothing else over the past several years, it is that we can be made very sick or even killed by things that are far too small to see. Although COVID has not yet been linked to being spread by mosquitoes, many other dangerous diseases have, including West Nile virus, various forms of encephalitis, Chikungunya, Dengue fever, Yellow fever, Zika, and malaria.

Unfortunately, while Local Health Authorities have statutory responsibility for working with offenders and local prosecutors to abate Public Health Nuisances [see THSC Sec. 341.012(b)-(d)], few Local Health Authorities actually follow these mandatory provisions.

Dumping Is Often Not Recognized As Being Dangerous

Even thought dumping can easily create dangerous chemical situations and Public Health Nuisances, dumping is often not recognized as being the danger it is. In some instances, this is simply a failure of knowledge; in others it is a failure

of imagination by law enforcement, health authorities, and officials.

In one north Texas city a few years ago an individual dumped several thousand pounds of broken automobile windshield glass on a vacant lot. On windy days, shards from the glass would blow into the backyard play areas of the immigrant families living nearby. They were afraid to complain. Police had repeatedly run children off the lot where they were playing around the large piles of glass. Local police were able to force the dumper, who was keeping the city away with his stories that the broken glass was "a very valuable commodity awaiting recycling," to put up a portable fence to keep the kids out. Experts told the city that there was no known process to recycle the glass.

The police never attempted to simply arrest the dumper for a felony violation of THSC Chapter 365 and let his defense attorney attempt to move the discussion into court.

This situation persisted until the mayor informed the dumper that he would be charged for police protection of his "valuable commodity," which forced the dumper to move the waste to another city. There his attempt to run the same scam was met with daily code violation charges ("refuse on a lot") and, once he pled guilty to stop the daily code violations and admitted the glass was actually a waste, prosecution for illegal dumping. This same "code + criminal law" approach could have worked in the first town also, but was never tried. The difference was the dedication of an individual code officer in the second location. She was more confident than the dumper and was able to get local police activated to enforce criminal law. With knowledge and desire this same result could have happened in the first town.

Minority communities, including neighborhoods of recent immigrants who are afraid to insist on proper protection by law enforcement, are often the locations of commercial dumping. Often these communities have received less attention from code and law enforcement than more up-scale parts of town.

Although local law enforcement and community leaders don't always understand the danger of failing to control pollution, the State Legislature certainly does. In 1996 the Texas Legislature created Texas Water Code Chapter 7.

ENFORCEMENT. Its Subchapter E covers criminal environmental violations beyond illegal dumping and creating a Public Health Nuisance. This Subchapter addresses the dumping and mishandling of hazardous waste, medical waste, used motor oil, used lead acid (car) batteries, and other violations such as water pollution and illegal outdoor burning. TWC Chapter 7, for example, sets the

largest statutory fines in Texas criminal law.

Recklessly emitting an air contaminant — including smoke — from an unpermitted fire that results in the imminent danger of death OR of serious bodily injury of a bystander carries the potential penalty of a fine from \$1,000 to \$250,000 and/or confinement to five years (TWC Sec. 7.182). If the violator is a non-individual, the maximum fine increases to \$500,000.

If we can't find the resolve to control the dumping of refuse in our community, where will we ever find the will to control the dumping of heat into our atmosphere? The first determines our health and property value; the second determines our very ability to live on the planet. And, as is our sad way, the poor and communities of color will suffer first and the greatest in both cases.

Dumping Is an Assault On the Whole Community

It is easy to imagine the response of local law enforcement and civic leaders ... and the Department of Homeland Security ... if a credible threat was uncovered of an impending attack on the community water supply. This would immediately be labeled as the terrorist attack it is, no matter who the plotters might be. The potential for such an act to have immediate impact on the community would be the factor driving law enforcement response.

However, if the same person were to dump the same chemical in the aquifer recharge zone with the intent of more slowly contaminating the aquifer (and, by the way, there is no known method for cleaning a contaminated aquifer), the great likelihood is that such an act would be undetected and unpunished. If anything, it would probably be treated as an unreported chemical spill or possibly as dumping of a hazardous waste. In most of the state, there would be no response at all.

The recognition that illegal dumping and many other forms of polluting create Public Health Nuisances has been slow to dawn in the heads of community leaders. What's even more remarkable is the wholesale state-wide ignoring of state law instructing elected and appointed officials to respond to these threats. If Local Health Authorities and local prosecutors would follow the state law concerning their required response to Public Health Nuisances, Texas would be

Dumping is Profoundly Unspiritual

Through personal conversations over the years I have come to appreciate that many code and law enforcement officers are deeply spiritual people. I have met very few who are just drifting through their jobs or who are "in it for a paycheck." Working to reduce the pollution and disorder in one's community is Holy work from each of the three classical views of the expressing of God as Truth, Goodness, and Beauty. I'd invite you to meditate when you get a chance on this last factor of Beauty and use it as confirmation of the spiritual value of your work.

The book of Genesis reminds us that God poured His spirit into Creation, and our hearts respond accordingly. A Beautiful sunset may bring to mind the the words from the 19th Psalm: "The heavens declare the glory of God; the skies proclaim the work of his hands." This applies to the entire world God created too: He created it as Beautiful. When you see creation made ugly by illegal dumping and something whispers in your soul, "This isn't Beautiful as it should be!" you're responding to the call to restore Creation. Working to make the world a more Beautiful place includes applying your municipal codes and the anti-pollution laws provided by the State Legislature. Working to restore the world to being the Beautiful place it was created to be is certainly doing God's work.

Coordinated Response To Dumping Required

In virtually all parts of Texas there is a need for a more coordinated response to illegal dumping that brings all responsible areas of local government into the process. Although many pollution violations are crimes in Texas, local police and deputies are not always involved ... in fact, the "normal" response state-wide is for police and prosecutors to not consider these to be "real crimes." Moreover, not all code enforcement officers are trained to recognize environmental crimes when they are present, although not all violations can be handled with municipal codes. In any event, only around 75% of Texas' 1,200 cities and towns have municipal courts, which is a good measure of the use of municipal codes.

Although Local Health Authorities certainly acted throughout Texas in our response to the COVID pandemic, very few Local Health Authorities are aware of their statutory responsibilities where Public Health Nuisances are involved. In fact, the sequence of responses of most formal Local Health <u>Departments</u> to Public Health Nuisances actually result in the delayed abatement of the waste. In too many places District and County Attorneys have yet to be given their first criminal case by police concerning pollution. Overall fumbling around is too often the response by officials not knowing local powers under state criminal law.

In response to massive citizen complaints, in August 2022 the U.S. Department of Justice announced that it would be investigating alleged bias in response by the City of Houston to illegal dumping in communities of color. This will be the first time that the DOJ has done such an investigation of response bias as an Environmental Justice issue. The mayor is livid, as one can expect. The delayed responses are explainable by other factors (such as the failure of police to vigorously enforce commercial illegal dumping violations in these communities by contractors and other waste-generating businesses). The Houston response has been to try to hire sufficient staff to clean-up neighborhoods behind dumpers, although this approach is limited by these facts:

- It is difficult to hire sufficient city solid waste staff to clean neighborhoods behind dumpers. Efforts to clean will always be seen by residents as being too slow;
- (2) Dumping waste is more efficient that cleaning it up ... dumping may only take 10 minutes ... the waste may lay where it is dumped for weeks ... to actually clean the location takes more equipment, time, and manpower than the dumping; and,
- (3) Dumping waste generally saves somebody significant money but cleaning it up costs all of us even more.

These factors are also in effect in every Texas city and county. By the time illegal dumping becomes noticeable, it has often grown to being beyond a problem solvable by a casual local response: more focus is required to be effective. A coordinated local response, activating all available resources, will be needed. Whether it is only for your city, a combination of your city and county, or made up of multiple counties, the response organization created to deal with illegal dumping is often called an "Illegal Dumping Task Force."

The TCEQ Isn't Going to Do This For You

There's more about this below, but this is a good time to emphasize that the TCEQ has responsibility for setting policies that protect the environment statewide. To that end they have worked with the State Legislature to create a solid set of criminal environmental anti-pollution laws that apply everywhere in Texas. The TCEQ also has direct administrative enforcement responsibilities for 73 unique programs that regulate the actions of over 350,000 separate entities statewide. They do this with around 2,600 highly professional, very busy people. None of their duties include directly enforcing criminal laws in the 1,200 cities, 256 counties, and over 3,000 special government districts in our state. That responsibility falls on local police, deputies, constables, fire marshals, and other local law enforcement, exactly as does the enforcement of all other state criminal laws. If a particular police department or sheriff's office is prepared to ignore the major misdemeanors and felonies the State Legislature has provided to keep Texas clean, prosperous, and healthy, there's not much the TCEQ can do. Making sure that local law enforcement does their job is up to the elected officials in the jurisdiction and, ultimately, up to the voters.

Section Two: Organizing a Local Illegal Dumping Task Force

Cooperation between local officials to stop pollution can take many forms. It may be as simple as environmental enforcement officers from adjacent counties meeting occasionally for coffee and sharing information on cases, or it may be much more formal, such as the Capitol Area Regional Environmental Task Force, which I take to be a model for multi-jurisdictional cooperation in environmental enforcement (Contact: Ken May, Regional Programs Manager, Capital Area Council of Governments; Kmay@capcog.org). Regional planning authorities — Councils of Governments — would logically be the source of local multi-jurisdictional task forces. Governments cooperating to solve regional problems of other kinds would naturally undertake shared efforts to stop illegal dumping, which often extends across city and county lines. However, this has not yet been the case among regional planning bodies. CAPCOG's long success at operating the Regional Environmental Task Force in Travis and adjoining counties has been because it has, alone among the twenty-four COG's, been willing to dedicate sustained funding and staffing to the effort.

If a community wants to successfully combat illegal dumping, it will take sustained, focused effort.

Establishing the Project

Identify and Empower "Champion"

This is the most important managerial decision in the project. As every good Texan knows, nothing begins itself. In government and out, things happen when some individual decides that they will create and apply a solution to the problem he or she perceives. The initial problem faced in increasing focus on illegal dumping or pollution control, is "Who is going to Champion the project?" that is to ask, "Who is going to personally take responsibility for making this project a success?"

There are actually two decisions here:

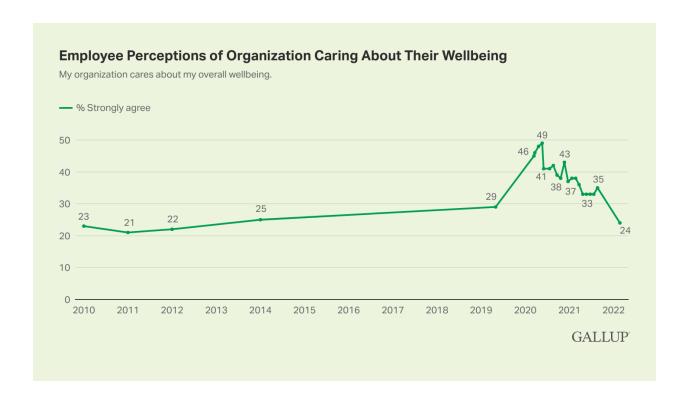
- (1) What senior elected official will take personal responsibility for the success of the project?
- (2) Who will be assigned overall operational responsibility for leading the operation?
- (1) <u>Senior Elected Official</u>. The first of these may well be the city council endorsing the interest of a member and formally appointing him or her as the focus of the project. Perhaps a council person has recently run on a platform that includes cleaning the city, or has otherwise indicated their interest in building a cleaner and healthier community. Or perhaps the Mayor, being the focus of local governmental activities, will be endorsed by the other embers of the council as being the project Champion. No matter how this is done, until senior elected leadership takes responsibility for the project, results will probably be disappointing. Stopping illegal dumping often is a matter of changing what has become, over the years, accepted practice. This will take a combination of strong enforcement and education, both of the government staff involved in the project and local businesses and residents.

In many communities, illegal dumping is actually a combination of

- (1) Commercial dumping ON the community by local businesses (such as rental property clean-out services; small tire shops needing to get rid of scrap tires; and, remodelers and roofers looking for a free way to dump demolition waste); and,
- (2) Subsequent illegal dumping IN their community by local residents. These are two separate problems requiring simultaneous <u>separate</u> solutions.

Dealing with the commercial dumping aspect of the problem may well put elected officials in conflict with friends and even family members. Over the years there have been plenty of cases where a member of a city council was also operating a small business of some sort that was dumping. Or perhaps a city council member known for his criticisms of code enforcement has a brother in the real estate rental business who faces the expenses of bringing his structures up to city standards. Whomever the elected official heading the project is going to be, it needs to be someone with sufficient stature within the city ... or county ... to bring resources together and increase their focus to include illegal dumping enforcement.

(2) Operational Manager. This is the most important hire or re-allocation of duties since this individual will be the day-to-day operational head of the project. Take a look at the following chart of a February 2022 survey of full-and part-time workers in the United States. Notice the sudden decline through the COVID years.



Although this poll was not specifically of local government employees, there no reason to think things are different in our public sector.

Another way to state the findings would be that 76% of American workers disagree with the statement, "My organization cares about my wellbeing."

Avoid selecting a person with this view when identifying an Operational Manager for this project.

If a city or county has generated the notion in its employees' heads that it is simply using them in exchange for a (often too small) paycheck, that city or county will have difficulty asking employees to expend extra effort in beginning and managing a new program.

If you want to do some additional reading in this subject, a good (if a little dense) book you can get from Amazon is titled Alienation (New Directions in Critical Theory Book 4) by the German ethical philosopher Rahel Jaeggi. In selecting your Operational Manager for this enforcement and education project, be careful to not select a person who has "retired on duty," the term used in law enforcement for someone who is winded and all out of his or her creative energy.

Initial Considerations

Keeping your city or county clean of illegal dumping, Public Health Nuisances, water pollution and other such things requires the efforts of multiple parties.

At a minimum these include:

Overall Operations Manager

Code Enforcement Manager

Law Enforcement Manager

City Attorney

Prosecutor (DA and CA Offices)

City/county elected officials to support the process

Each of these has to have an interest — hopefully a passion — to follow existing municipal codes and Texas criminal environmental laws designed to protect the beauty of our state, our property values, and the health of our people.

When these functions work together, a lot can be done toward keeping their community clean. If any one of these fails to do their part — either because of politics, laziness, or ignorance — efforts to keep the community clean never go as well as they might.

Don't forget: For the most part, illegal dumping enforcement ... and dealing with Public Health Nuisances ... are YOUR problem, and not the TCEQ's. The policy in the state since 1996 has been that, except for extreme circumstances, responding to illegal dumping is a local responsibility. Fortunately, the State Legislature has provided all the criminal laws that local government needs to deal with dumping. However, not all cities and counties have yet learned or decided to use them.

Everybody Will Need More Training

Of the three factors inhibiting local enforcement ... politics, laziness, or ignorance ... the biggest problem over the years has proven to be ignorance. The state criminal laws that can be used to fight pollution are not studied in the law enforcement academies, law schools, and public administration training programs around the state.

Law enforcement officers don't study this material in their basic training.

Officers in Texas are trained at one of 114 Academies, mostly provided by Regional Planning Commissions (Councils of Governments), community colleges, and larger police departments and sheriff offices. The length and rigor of Police Academies providing basic officer training in Texas vary. For example, cadets at the TEEX Central Texas Police Academy in College Station receive 728 hours of instruction over an 18-week period, which is a pretty common length of officer training time in Texas. However, big city police departments usually have a longer training, such as that at the Academy operated by the Dallas Police Department. It is is 36 weeks long, and consists of 1,431 hours of instruction (749 hours in

Phase 2 of the Dallas training renders the cadet eligible to take the Texas Commission on Law Enforcement Licensing Examination). The balance of the 1,431 hours is what the City of Dallas considers the requirements for graduation from their Academy, given the complex population being policed in Dallas. But long or short in duration, I can't find any Academy in Texas that requires even a basic introduction to Environmental Enforcement. What that means is that in Texas no matter how well a cadet is trained, when she begins her work as a law enforcement officer she is very likely unaware of the misdemeanors and felonies associated with controlling pollution. Additional training will be necessary.

Same way with code enforcement officers.

The basic TEEX class for code enforcement officers doesn't have time to include instruction on Texas criminal environmental law, even though the first city official to spot illegal dumping in the community is likely to be a code officer. We are of the opinion that municipal code enforcement officers, because they know their city very well, should be the most proficient of all city officers at recognizing when a code violation has developed into being a criminal offense, even though they lack the authority to directly enforce these criminal violations. Unless city police are already involved in criminal anti-pollution enforcement, they may well initially resist adding those duties to their busy agenda (even though Texas criminal environmental laws provide police and deputies with an entirely new set of violations that may be enforced directly but also use as valuable "probable case" for obtaining warrants). Knowledgeable code officers can help local police transition into effective anti-pollution enforcement.

Prosecutors and judges are in the same situation.

They all begin as trained attorneys, and then, sooner or later, decide to run for office and get elected. To the best of my knowledge, no law school in Texas offers as much as an elective in Texas criminal environmental law. If a law student attends a school where an elective in Environmental

Law is offered, it is most likely to be a class in federal administrative law, covering such things as the federal Clean Air Act, the Resource Conservation and Recovery Act, and the Comprehensive Environmental Response, Compensation, and Liability Act (Superfund). None of these are directly enforced by the State of Texas. For the most part, where federal law is used civil prosecution rather than criminal prosecution is the most common response to a violation. If there is a federal criminal issue, the Special Agents at the EPA Criminal Investigations Division do the investigation, with cases brought by prosecutors in Federal District Courts. Exposure to federal environmental law is no help to the newly elected County or District Attorney being faced with enforcing illegal dumping, water pollution, illegal outdoor burning, and other state criminal laws ... often laws that she has never heard of before a peace officer brings her the first such case. Again, additional training will be necessary.

The same holds for most local elected officials.

These are the people who decide to fund or not fund local efforts against illegal dumping and other forms of pollution. After all, "No budget = No program." The requirements to hold most key public offices in Texas are pretty easy to meet. If you are 18 years old on the day you'll assume office; a resident of the state for at least 12 months; and, a resident of the district you'll represent for 6 months, you are eligible to run for most local offices. These include such offices as county judge, county commissioner, justice of the peace, mayor, and city council member. There are no basic education requirements at all for any of these positions, although several have statutory requirements for continuing job-related annual education. In practice, however, these office holders are usually responsible adults, well thought of by at least a majority of the people who voted for the position (sometimes this is a lot of people voting and sometimes just a few). On the subject of local application of Texas anti-pollution law, most off these officials will need additional training.

So as you begin to think about how multiple parties in the community might coordinate their activities to reduce pollution, be sure that everybody begins with the same knowledge base.

Training Content

As far as the content of such training is involved, I'd suggest the following training be done by anyone involved in the start-up or joining what is, in essence, a local Anti-Pollution Task Force:

- Take our free class <u>TIDRC000: Orientation to Environmental</u> Enforcement.
- Use this document for an overall study guide on the subject. This is the summary document of the various ways these laws can be enforced locally. It is used in the TIDRC001 Legal / Legislative Update class, but it is as good a summary as we have. Feel free to distribute it to local officials.
- Focus on training in THSC Chapter 365 for Illegal Dumping Enforcement (see our class TIDRC003 Illegal Dumping Enforcement).
- Include training in identifying and responding to Public Health Nuisances (THSC Sections 341.001 through 341.014; 341.019; and 341.091 (Criminal Penalties).
- If you are working on improving unincorporated areas, include THSC Chapter 343, which deals with rural Public Nuisances.
- Our class TIDRC007 Enforcing Public Health Nuisance Laws covers THSC Chapters 341 and 343. If there are questions about any of this suggested training material, please contact me at ockels@tidrc.com.

More Things To Consider At the Start

Immediately, there are several lessons that I have learned by discussing these issues and reviewing programs around the state.

1. You'll not stop illegal dumping without law enforcement involvement lt turns out that your local government already has all the power it needs to

stop illegal dumping, water pollution, illegal outdoor burning, and other forms of pollution. But if the state criminal laws are not applied by local law enforcement, you will not be able to stop illegal dumping. Dumping is a social and economic problem that goes beyond municipal code enforcement. And of course it you are outside the incorporated area, you have no access to municipal code enforcement anyway, so using constables, deputies, and sometimes specialized environmental enforcement officers will be the starting point.

2. You'll not stop illegal dumping by ignoring small businesses

You not be able to stop intentional polluting if you only focus on activities done by individuals and residents. Where dumping has economic benefit for small businesses, dumping takes place. Such commercial dumping can be well over half of the total dumped volume, where it is tolerated.

There are at least three data points that support the notion that dumping by small business is not remarkable:

- Small businesses in Texas do a disproportionate share of environmental violations. The Texas Commission on Environmental Quality TCEQ reports that in FY2017 of the 1,496 administrative orders issued that year to businesses and governments for confirmed environmental violations, 61.3% were issued to small businesses (under 100 employees).
- 2. Penalties for commercial dumping are usually far less than the value of the crime. In its review of 80 representative TCEQ administrative cases in 2001, 2002, and 2003, the Texas State Auditor's Office determined that fines imposed equalled approximately 19% of the economic benefit from being out of compliance. There's nothing to suggest this has changed over the last twenty years.
- 3. Where investigated, small businesses are often represented in environmental crime violations. Businesses are one-half of the 700 or more criminal environmental cases processed by the Harris County District Attorney's Office, year after year. In most prosecutor's offices around our state, however, criminal cases are only undertaken against individuals.

The fact that many communities simply are not as clean as citizens and elected officials want them to be generally points to one or two underlying problems:

- 1. Most commonly, officials in local government simply don't know what their local enforcement powers actually are, and consequently may do nothing; and.
- 2. In some cases, local officials know their powers, but for some reason are reluctant to focus them on non-individual violators: companies may simply not be held responsible for their environmental crimes.

Many local officials in Texas are finding that it takes a combined approach of code enforcement, health authority enforcement, and criminal law enforcement to clean up their communities ... along with a lot of public education. Code enforcement alone is simply not enough.

Consider, for instance, the problems created by a small tire dealer dumping waste — ten scrap tires (total weight: 220 pounds) — on somebody's property. Telling the victim that she must clean the mess herself because, otherwise, a code violation of having "refuse on a lot" would result is simply not enough. But that is the usual approach taken by code enforcement officers across the state. Who is going to go after the dumper for the two State Jail Felonies he has committed? (It is a State Jail Felony to dispose of over 200 pounds of solid waste commercially at an unauthorized location; it is also a separate State Jail Felony to transport over 200 pounds of waste commercially to an unauthorized location for disposal.) If local police or deputies do not respond to these two felonies, no one will. Hence code enforcement officers need to know the laws pertaining to criminal legal dumping so they will know when to get local police involved. And local police have to know these laws to be able to respond.

Occasionally a major contributor to a local official's campaign may be a longtime polluter. This is just the next version of a slumlord who is on the city council and who tries to use his position to block code enforcement on the substandard properties he owns. Fortunately, this situation does not occur that frequently in Texas communities. When it does, the potential political consequences of supporting criminal activities — and that's what illegal dumping, water pollution, and related activities are — needs to be brought to the official's attention. Condoning criminal acts is never a good public policy, nor is it a sound platform on which to run for local office.

3. Ultimately, the citizens decide how clean they want their community to be, working through their elected representatives

In this class we want to strongly suggest that the decision as to *how clean a community should be* is in the final analysis not the decision of elected officials; this decision properly belongs to the citizens who live there. Hence improving the appearance of one's community is usually a matter of changing inertia — inertia of the mind and inertia of the spirit.

Your community can be as clean or as dirty as citizens want — and as local government tolerates — because the state is pretty well going to leave locals alone to live as they wish (within very wide limits). Trashy or clean, the state will leave locals free to communicate their values about *how to relate to one's surroundings* to their children, for their good or to their detriment. Families alone decide what to communicate to the next generation about civic responsibility and civic pride, remembering that most people learn primarily from what they see. If the place looks trashy, then that's what is presented as appropriate to the next generation.

The stakes riding on citizen involvement in these efforts are pretty clear. If citizens and officials decide not to bother with cleaning up their community, they get decreased property values, increased health and safety risks, and increased fire risks, among other bad things. Worst of all, however, they get downtrodden spirits. Without a doubt, we are influenced spiritually by the appearance and condition of our surroundings. A run-down, dirty neighborhood seems to seep into the very souls of the people who live there, including the children who are our hope. Despair perpetuates itself, in a dance with its physical setting. Where beauty is suppressed, so is the spirit of the people who live there.

On the other hand, if citizens and their governments decide to tackle the job of cleaning up their community, they get the opposite of all of these. Moreover, they get to participate in the basic point of democracy: they get to help empower their community to do a great thing. Communities that come together to clean their neighborhoods — undertaking public education and enforcement programs to keep them clean, and celebrating doing so — inevitably use the spirit of shared success to go on to even greater things. Where the spirit starts to move, it generally keeps on moving. What's really wonderful about this is that Texans get to decide what kind of community they want to live in, and what could be better than that?

It is news to many that Texas actually has strong anti-pollution laws, but developing our own set of strong laws was the only way the state could avoid having more enforcement of federal environmental laws here. Dating from the days of President Nixon, the overarching principle is that state environmental laws and rules should be compatible with federal environmental laws and rules, and ours here in Texas generally are. In most states, including ours, the federal government will allow the states to perform the enforcement task, as long as an acceptable way to do that can be agreed upon. Developing good state criminal enforcement laws has been tied to these realities.

4. Local criminal environmental enforcement is NOT the responsibility of the TCEQ.

The Texas Commission on Environmental Quality ("TCEQ") is the state agency responsible for most environmental regulation in Texas. This agency cooperated with local cities, counties, and special districts to help us keep our surroundings clean, healthy, and tidy. The TCEQ operates from its central offices in Austin and thirteen regional offices around the state. It currently employees approximately 2,600 persons. Most of its regulatory efforts involve enforcing administrative laws ("Rules"). The TCEQ currently regulates over 385,000 active entities in 73 program areas. Their Central Registry can be accessed by the public online at anytime you want to see who they are regulating where you live and work.

The TCEQ simply doesn't have the staffing, response ability, or certification to enforce illegal dumping criminal statutes in your city or county. They are not a law enforcement agency as are your city police and county sheriff. The officers in the TCEQ's Criminal Enforcement section are themselves "environmental crime investigators" rather than certified law enforcement officers. They work through a law enforcement agency (such as Texas Parks & Wildlife or a local police or sheriff agency) when environmental criminals are to be arrested or warrants served.

Most illegal dumping occurs where local communities (over 1,200 cities in 254 counties) will discover it long before the TCEQ. Moreover, trying to respond from one agency to large and small violations around the state would be prohibitively expensive.

In January 1996 the Texas Natural Resource Conservation Commission (the earlier name of the TCEQ) informed all counties that henceforth all routine illegal dumping enforcement would be a local responsibility. This remains state policy. Consequently, should the TCEQ themselves receive a complaint of illegal dumping, their normal action is to forward that complaint to local government for investigation and enforcement.

If local your police departments and sheriff's office do not enforce the Texas criminal laws against dumping and polluting in your community, they most likely simply will not be enforced by anyone.

Section Three: Detailed Enforcement Options

There are six ways that environmental enforcement can take place in Texas. A discussion of each of these follows. They are:

- A. State administrative rule enforcement by one or more state agency;
- B. Local municipal code enforcement in Texas cities;
- C. Public Health Nuisance enforcement by health departments and Local Health Authorities;
- D. Local criminal anti-pollution law enforcement by police, deputies, constables, fire marshals, and other sworn officers;
- E. Local enforcement of oil and gas waste criminal laws by the same law enforcement officers; and,
- F. Possible civil suits against violators by cities and counties (less of an option now than in past years).

With the exception of the first shown — *administrative* enforcement by the Texas Commission on Environmental Quality, Railroad Commission of Texas, Texas Parks and Wildlife Department, or other state agency — local governments have most of the antipollution enforcement powers. Consequently, if enforcement of state anti-pollution laws isn't taking place where you are, most likely it's because local government has not yet joined the party.

As to item F, recent State Legislature decisions have limited the ability of cities and states to sue violators under the provisions of TWC Sec. 7.351. Dollar limits on the size of the recovery were imposed by the 84th Legislature, and the 85th Legislature imposed procedural steps that will greatly restrict the ability of local governments to protect their citizens using environmental suits. We'll say more about these limits below, but for now just note that the State Legislature has acted to limit the powers of cities and counties (once again). I honestly think the problem that generated these actions by our legislature on the side of polluting companies was that a few local governments were being too effective in using their suit powers and business lobbyists complained. As long as local governments were restricting their enforcement activities to INDIVIDUALS the State Legislature followed their normal law-and-order policies. But when local

government turned their eyes on polluting COMPANIES, campaign contributions became threatened and the State Legislature acted to protect bad-acting companies from expensive lawsuits.

When polluting businesses get effectively brought into line by citizens — in this case citizens acting in the form of cities and counties — you can petty well bet that our State Legislature will act on behalf of the polluters. That's just the political reality of today's Texas; who knows what the future will bring.

However, one of the results of effectively removing civil environmental suit powers from cities and counties will probably be local governments using criminal laws more aggressively. But in some situations the State Legislature's limiting civil suits has probably eliminated the only effective tool available.

For example, consider the case of an older, large illegal dump in any Texas city. Perhaps the dumping occurred so long ago that it can no longer be prosecuted as a violation of THSC Chapter 365, the most commonly used anti-dumping criminal law. Under Texas Code of Criminal Procedures Sec. 12.01(7) prosecution for illegal dumping must occur within three years following the commission of a felony; or, Sec. 12.02 prosecution must occur within two years following the commission of a misdemeanor. But what if the officer cannot prove that the dumping actually took place within these time limits? He or she may have to use a law other than THSC Chapter 365.

Further suppose in this case that no Texas Water Code violation is apparent and the city, for some reason, doesn't want to proceed under their municipal ordinances or a provision of the Texas Health and Safety Code that would treat the violation as an ongoing public health nuisance (THSC Chapter 341). In this case, historically all that would be left for the city to do would be to exercise the powers previously granted by the State Legislature in TWC Sec. 7.351 and bring a civil suit to get the "un-permitted landfill" to be closed and the site cleaned. Courts could have imposed civil penalties of up to \$25,000 a day in these cases, and negotiations between the city and the violator's attorneys would have lead to an early clean-up. But the use of civil suits in environmental cases has pretty well been eliminated from city and county options. The city can now either (1) simply tolerate the presence of the dump; or, (2) attempt to use less effective laws, such as declaring the entire site to be a Public Health Nuisance and filing charges for multiple days (at a maximum fine of \$200 per day) under THSC Chapter 341.

There was a similar attempt in years past to prevent local governments from undertaking *any* CRIMINAL enforcement against local polluters. Again, several counties had been "too effective" in using criminal laws to stop corporate polluters. A bill was introduced that wold remove ALL criminal enforcement powers from cities and counties where environmental violations were involved. The state would receive notice from the city or county of the crime and then totally take over the process on all cases from that point. Given the limited effectiveness of the TCEQ, the formula that would have emerged would have been:

[The size of our state X the limited manpower of the TCEQ X the economic incentive of small businesses to pollute X lack of local criminal prosecution of businesses = Widespread filth in Texas].

However, wiser heads prevailed. Now instead of referring ALL criminal cases to the TCEQ for enforcement, only CERTAIN cases are to be referred for a pre-enforcement review. These are cases where a criminal violation is suspected by the holder of a state-issued permit or registration AND when the actual violation pertains to the permitted activity. So at this time, the only criminal cases that mast be referred to the TCEQ for review (and possible action by that agency) are those where criminal violations of a permit or registration are involved. Since this almost never happens, local governments are pretty well free to apply state criminal laws to all polluters.

In spite of the loss of the city or county powers to effectively sue a violator, it is still true that no matter what the environmental violation, if local government wants it stopped and the site cleaned, it probably has the powers to make this happen. The only question that remains is "Does the local government also have the knowledge and political will?"

There are six levels of enforcement on the list above, arranged by the volume of cases that each level is facing (except for the first category of Administrative Rule enforcement). Generally, those categories higher on the list handle more cases than those at each lower level, but we'll see that by far most situations are handled through enforcing municipal codes against pollution.

In this section we'll be discussing three general types of enforcement across the six levels shown on the list: (1) administrative; (2) criminal; and, (3) civil.

Administrative enforcement is essentially the enforcement of regulations – "rules" – by state or federal agencies. Here we're focusing on general environmental administrative enforcement by the TCEQ, and enforcement of oil and gas administrative rules by the RRC, the Railroad Commission of Texas. Both of these agencies are part of the executive branch of Texas state government, and the administrative regulations they enforce apply everywhere in the state. The enforcement process may come about through routine inspections of regulated entities conducted by TCEQ or RRC officers or through agency response to complaints generated from inside or outside the agency. In the case of the RRC, virtually all of the complaints they investigate are generated by the field investigators themselves. This is the world of administrative courts, notices of violations, administrative hearings, and administrative penalties.

Criminal enforcement is the enforcement of the Texas state criminal laws, most frequently by local police, sheriff's deputies, constables, and fire marshals. These may be criminal laws found in the Texas Penal Code, the Texas Health and Safety Code, the Texas Water Code, the Texas Agricultural Code or any other state statute containing criminal enforcement provisions. These criminal laws apply everywhere in the state and are not subject to local government modification; they are set by the state legislature. This is the world of *JP, Municipal, County, and District Courts, fines, jails*, and *prison*.

Two recurring questions arise around the state when jurisdictions begin to enforce these laws:

(1) "Do these laws apply to private property?" Of course they do. Like virtually all criminal laws, the misdemeanor and felony laws controlling illegal dumping and other forms of pollution absolutely apply to things that happen on private property. In fact, most crimes in Texas happen on private property, including polluting. There are a few limits: one criminal environmental law does not apply to land

designated as *agricultural* at the county tax office (this limit applies to THSC Chapter 343 only); another does not apply to anything used to raise crops or livestock (applies to THSC Chapter 365 only). Additionally, the Litter Abatement Act may allow some very limited disposal of residential rubbish on one's own property (provided a list of strict conditions are met), but other laws are most likely to severely limit this activity. None of the criminal environmental laws explicitly allow pollution of private property, and several others specifically name private property as one of the locations where their law applies. Across the state, experienced enforcement officers routinely and successfully apply these laws to dumping on or otherwise polluting private as well as public property.

(2) "Does the officer have to witness the dumping or other pollution before enforcing these laws?" Absolutely not. One of the inconvenient aspects of law enforcement is that criminals generally don't commit crimes when police, deputies, fire marshals, and constables are watching (except for traffic violations). Almost all criminal law enforcement requires some application of police investigation skills to determine just who the violator was. Evidence is routinely collected and presented by prosecutors to juries for exactly this purpose: to prove the identity of a person committing a crime when no police officer was present. Criminal environmental laws are the same as all other criminal laws in this regard. Experienced enforcement officers routinely dig through dumped waste looking for clues as to the names of the "owners" of the trash; interviews with suspects often point to other persons or result in a confession; witnesses to the act of pollution are seldom available, but when they are their accounts of what happened are carefully considered and used for the basis of further interviews; sometimes samples of dumped chemicals are taken and traced back to unique sources through industrial records; in some sophisticated jurisdictions, greasy fingerprints are recovered from bottoms of barrels and drums; sometimes wrappers of shingle bundles and markings on containers can be traced back to specific vendors, whose own records show the specific items that were sold to a local contractor who subsequently dumped; current and former employees of a suspected commercial dumper may be patiently interrogated (using lists provided by state records) for information reflecting corporate violators or individual bad actors. A

wide range of other skillful means are regularly used by deputies in developing evidence pointing to the violator.

The basic point of this is that if an officer tells you that he has to actually see the violation before he can do anything, he is actually admitting to not knowing how to respond to this sort of crime. This is simply a training deficiency since it is not a requirement in any environmental criminal law that it happen within the view of a law enforcement officer.

Officers in all areas of the state routinely use the above techniques and many, many more — now including drones, cameras, and other technical means — to solve these crimes, virtually none of which happen in the view of an officer. There is absolutely no reason why your chief law enforcement officers and prosecutors cannot develop the local protocols to be followed in developing evidence for juries for these crimes. There are simply too many jurisdictions around the state successfully solving these crimes for the excuse ... "We have to see it to respond!" ... or any other misunderstanding of legal requirements to be taken seriously.

Civil enforcement is based on the body of laws regulating ordinary private matters, such as the rights and duties private citizens owe each other. This is the world of *District Courts*, *suits*, *injunctions*, and *civil damages*. Cities and counties have the same civil powers as does the state Attorney General to sue polluters to stop their activities, force cleanup, and win civil damages. However, as mentioned elsewhere, recent state legislatures have severely limited this form of enforcement.

So try to keep these three areas of enforcement separate in your mind, with the understanding that each has its uses. Thus a TCEQ expert on *administrative* enforcement will most likely be <u>uninformed</u> on corresponding *criminal* laws covering the same issues, or a local prosecutor who is expert on *criminal* enforcement may be out of her depth when considering the details of bringing a *civil* enforcement suit.

For example, I have had TCEQ experts on *administrative* enforcement of water quality rules ask me to whom they should report *criminal* illegal dumping they saw while in the field [answer: the county sheriff in unincorporated areas and the police inside cities are responsible for responding to all crimes]. And I have seen the eyes of local

experts in *criminal* environmental enforcement literally glaze over when faced with having to understand the details of the *administrative* rule governing illegal outdoor burning [the violation of which is simultaneously an *administrative* matter to be handled by the TCEQ and a *misdemeanor criminal* case to be handled independently by local law enforcement agencies].

Sometimes clever *criminal* defense attorneys, with clients that have broken Texas criminal environmental laws, will call their regional TCEQ offices until they can find some *administrative* enforcement expert to say that the alleged *criminal* act that the client did was perfectly fine. The defense attorney will then try to use this oral "authorization" from some unknown TCEQ administrative officer as part of the criminal defense effort, generally by trying to persuade the criminal prosecutor that "The TCEQ said it was OK!"

The absolutely best response by local prosecutors faced with this ploy is to request the defense attorney to produce a letter from the TCEQ retroactively authorizing his client to violate the particular criminal law under which the person is being prosecuted. Such letter will never be issued by the agency, of course. Unauthorized phone chats with defense attorneys aside, the TCEQ seems to have a policy against authorizing criminal acts.

Before we discuss these sources of enforcement in a little more detail, here's another very interesting fact about environmental enforcement: a particular act of polluting, such as an act of illegal dumping, may violate administrative rules, municipal codes, health nuisance laws, criminal laws, and be the basis for civil suits, all at the same time. Moreover, an act, such as dumping waste into or adjacent to water, may violate several different criminal laws and health nuisance laws simultaneously, including laws against illegal dumping, water pollution, public health nuisance creation and other environmental criminal statutes.

The fact that a single act of polluting frequently violates multiple criminal environmental laws is really valuable for cleaning up your community. It means that your city or county officers will commonly find themselves able to use any one of several approaches to respond to the polluter. By knowing all of the options, your local government can set response policies that make sense where you live.

Note also — and this question arises with some regularity — that you <u>do not</u> have to use these approaches discussed in this section and shown above in any order.

For instance, your city doesn't have to first exhaust all attempts to use its municipal codes to solve a problem before turning to criminal law. If the person has violated the criminal law, along with an ordinance and a Public Health Nuisance law or two, your police can just go immediately to enforcing the criminal law violations.

It is fairly common for people dumping waste into or adjacent to water, for instance, to be charged with (1) illegal dumping under THSC Chapter 365; (2) felony water pollution under TWC Sec. 7.145; and, (3) a Public Health Nuisance under THSC Chapter 341. The prosecutor then has several different charges he or she can work with to bring about the result desired.

Your community will almost always have several good ways to stop a polluter; the only "wrong" choice is to think there is nothing that can be done.

I've yet to see an environmental pollution situation where there wasn't a good way to go forward, as long as you know your options and are willing to use them. If you and your colleagues don't like the enforcement response choices your elected officials select, you can suggest that they try other approaches until the one that works is found in a particular situation. So if a local government official tells you, "There's nothing we can do about it!" it's a pretty clear signal that they are simply misinformed. Hopefully theirs will be a statement that is just based on having incorrect information, since most local governments still just don't know all of their powers. Admittedly, in a few cases local officials know the options, but still refuse to act. In a democracy, there is a fix for this problem: elections.

A. State Administrative Rule Enforcement

This category, the first on the list above, is included in the overall enforcement options for completeness more than anything else, but you do need to know about it. When your local staff member or officials says, "Just let the TCEQ do it," this level of enforcement is what they mean. Most of the environmental enforcement in the state happens at the local level by code officers — and more by law enforcement — but the

Texas Commission on Environmental Quality and Railroad Commission of Texas have enforcement responsibilities too.

The TCEQ's mission statement is:

"The Texas Commission on Environmental Quality strives to protect our state's human and natural resources consistent with sustainable economic development. Our goal is clean air, clean water, and the safe management of waste."

The mission statement of the Railroad Commission is:

"We serve Texas by: Our stewardship of natural resources and the environment; Our concern for personal and community safety, and Our support of enhanced development and economic vitality for the benefit of Texans."

The folks who work at these agencies generally do their level best at trying to make their mission statements true. However, Texas is a very big state, and these two agencies have neither sufficient staff nor adequate funding to achieves their missions by themselves. Their goals have to become the goals of every local government.

The TCEQ primarily interacts with your community through its sixteen regional offices, where the officers that are responsible for *administrative* enforcement of the state environmental statutes and the rules, orders, and permits issued by the agency under those statutes work. Major *administrative* enforcement decisions take place in the TCEQ central offices in Austin.

Note that the enforcement job the agency does is almost exclusively *administrative* enforcement, although the agency does provide *criminal* law enforcement through a dozen-or-so investigators in its Environmental Crimes Unit. That's right, there are just twelve TCEQ *criminal* environmental investigators — and two specialized, smart attorneys — for the whole state. Although these officers are very, very good and well experienced, they are not Texas peace officers as defined in the Texas Code of Criminal Procedure. If they want to arrest somebody, they have to do the same thing you do: go get a policeman, sheriff's deputy, constable, or some other peace officer. In many other states their counterparts are commissioned peace officers. On major cases, the TCEQ

ECU staff frequently works with Texas Parks and Wildlife Department's Environmental Crimes Unit, whose fine officers will arrest you if needed, and units of local law enforcement. There are six of these specialized officers at Parks and Wildlife, with an outstanding Captain.

The *administrative* enforcement done by the TCEQ falls roughly into two areas that affect your community. First, if an individual or business where you live has a permit issued by the TCEQ – and remember that a "permit" is state authorization to do some controlled, predetermined level of polluting – then the agency has the primary responsibility for assuring that the permit holder follows its restrictions. Second, the TCEQ has primary *administrative* enforcement power of the many environmental rules that are designed to protect our state's land, air, and water.

Your city or county may also be able to directly enforce these rules and permits, but only through fairly rare *civil suits* (*see* Texas Water Code Section 7.351; note the reduced powers of cities and counties to use this option, thanks to recent restrictions imposed by the State Legislature). However, your city may <u>indirectly</u> enforce an *administrative* rule by adopting all or part of a specific rule as a local ordinance.

The environmental rules that the TCEQ enforces administratively are mostly found in Title 30 (Environmental Quality) of the Texas Administrative Code, which also are shown as "rules" on the TCEQ website. Thus the Texas Outdoor Burning rule may be located on the TCEQ site as "Rule 111(b)," or may be found in the Texas Administrative Code as "30 T.A.C. 111(b)." It's the exact same thing. Proposed and actual changes to these rules can be found in the <u>Texas Register</u>, published in print and online each Friday. The Texas Secretary of State has this to say about this important publication:

"A weekly publication, the <u>Texas Register</u> serves as the journal of state agency rule-making for Texas. Information published in the <u>Texas Register</u> includes proposed, adopted, withdrawn and emergency rule actions, notices of state agency review of agency rules, governor's appointments, Attorney General opinions, and miscellaneous documents such as requests for proposals. After adoption, these rule-making actions are codified into the Texas Administrative Code."

All the TCEQ proposed and final enforcement orders are published there. This publication makes interesting reading if you want to keep up on *administrative* enforcement by the TCEQ in your community.

You can study the process followed by the TCEQ in undertaking their administrative enforcement job in Chapter 7 of the Texas Water Code (the title says "Water" but it defines all TCEQ administrative enforcement processes, among other things) at Sections 7.051 through 7.075. For instance, if your city has received a *Notice of Violation* from the TCEQ for breaking a rule or exceeding some permit limits (for example, for operating outside the parameters of its wastewater discharge permit by discharging too much treated effluent into receiving waters), the TCEQ and your city will be following the process in these sections to resolve the issue. You should carefully track any administrative violations of your city or county; after all, it's your money that will be used to pay the administrative penalties set for the thoughtless action of some employee.

Of course, the TCEQ does an enormous amount of work other than responding to complaints, such as issuing and monitoring permits, performing routine inspections of thousands of Texas businesses, assuring rule compliance among the regulated community (estimated to currently be over 350,000 active Texas entities), promulgating new rules as directed by the legislature, and maintaining cooperative relations with the other states, the federal government, and the Republic of Mexico. Take a couple of hours sometime afternoon and just go through the TCEQ website.

But the TCEQ's job does <u>not</u> include cleaning up your community any more than you mother's job included cleaning up your room.

Most of the TCEQ administrative actions were aimed at protecting you and your neighbors from the effects of other individuals and companies polluting your air, water, and land resources. So while the TCEQ is a player in the environmental enforcement process, it is certainly not functioning at the same level as the combined municipal code enforcement officers in the state, simply considered from a volume level. Nor do the dozen unsworn Environmental Crimes Unit investigators, even when supplemented by their highly efficient sworn colleagues at Texas Parks and Wildlife, come close to

matching the total number of criminal law enforcement officers working for local governments.

In addition to the direct administrative enforcement investigators, there are many great TCEQ staff members who work totally behind the scenes, doing outstanding jobs, every day. I would just single out the folks in the Waste Tire Program for special mention as being the best public servants I have ever encountered at the state level, at any agency.

In doing administrative enforcement, the TCEQ staff face the following and more:

- (1) Administrative enforcement is by necessity paper-intensive and can be very slow, in situations where citizens want immediate results;
- (2) TCEQ staff frequently have to travel great distances from their sixteen regional offices to inspect the alleged violation;
- (3) Violations have often disappeared by the time they arrive;
- (4) Staff spends a LOT of time responding to nuisance complaints that are found to be outside TCEQ remit and often are better addressed by local government;
- (5) Budget restrictions on travel and hiring may slow or delay response;
- (6) Sometimes politically connected violators and the political pressures they can exert may affect an investigation;
- (7) Staff consequently face a significant work load; and,
- (8) Local governments around the state vary enormously as to the level of responsibility they will themselves take for keeping their community clean, which impacts the number of calls the TCEQ gets from the public.

Frankly, to my way of thinking there is sometimes too much second-guessing of individual enforcement officers from higher in the agency. This is not always a fun job. From your perspective as a citizen who has reported an apparent environmental violation, you may find yourself saying, "I called the TCEQ, but nothing happened!" Perhaps you feel frustrated by your experience. Actually, lots of things happened as the process of administrative enforcement unfolded at the agency, hidden from your view, not least of which is the fact that the TCEQ staff absolutely must follow state rules in

conducting their investigations.

Over recent years critics and friends of the agency have undertaken an enormous amount of research concerning the effectiveness of the TCEQ enforcement process. Much of this analysis has centered on the question of whether it "pays to pollute" in Texas. Unfortunately, the general conclusion is that it often did twenty years ago and may still today. There are simply too few TCEQ investigators doing too few inspections of too many regulated facilities; too much reliance is put on the regulated community to manage and report on themselves; administrative penalties, when applied, are set far below the economic benefit of non-compliance; and, administrative penalties are levied but not always collected.

As part of their preparation for the 2023 Sunset Review of the TCEQ, the Texas Sunset Advisory Commission issued their <u>Sunset Staff Report 2022-23 88th Legislature on the Texas Commission on Environmental Quality (https://tinyurl.com/bdeefhy3</u>). This report will be reviewed by the TCEQ, which will provide their comments prior to a final report from the Sunset Commission. This is a process that happens every twelve years and provides a regular review on the effectiveness of state agencies.

This initial review of TCEQ operations by Sunset Commission staff included the following general observation:

Overall, the Sunset review found TCEQ performs admirably administering its complex programs and should be continued. However, the Sunset review also observed confusion and misperceptions about how and why TCEQ makes certain decisions, which contributes to a concerning level of distrust of the agency — by regulated entities, environmental advocates, public officials, and the general public.

This staff report identifies the following areas for agency focus:

- TCEQ's Policies and Processes Lack Full Transparency and Opportunities for Meaningful Public Input, Generating Distrust and Confusion Among Members of the Public.
- 2. TCEQ's Compliance Monitoring and Enforcement Processes Need Improvements to

Consistently and Equitably Hold Regulated Entities Accountable.

- 3. TCEQ's Oversight of Water Could Better Protect the State's Scarce Resources.
- 4. TCEQ and OPIC (i.e., Office of Public Interest Counsel within the TCEQ) Lack Certain Transparent and Efficient Processes for OPIC to More Effectively Represent the Public's Interest.
- 5. The State Has a Continuing Need for the Texas Commission on Environmental Quality.

So, in summary conclusion: keep them around for twelve more years, try to have them be more open in their processes, hold regulated industry more accountable, and make sure that keep their eye on our water resources.

This seems like a pretty mild set of recommendations, although the Sunset Commission Staff do acknowledge (and in places describe why) that there is an attitude of public distrust surrounding the TCEQ.

As to Issue 3, the oversight of water use, the Sunset Commission Staff report states:

Intensifying demand for water in Texas over the coming decades underscores the need to address gaps in TCEQ's regulatory oversight of this natural resource. First, an unclear statutory framework has stalled the state's process for developing environmental ow standards — the minimum water flows required to sustain aquatic life — leaving participants unsure how to proceed with adopting and updating ow standards for the state's river basins and bays. Next, TCEQ's reticence to enforce a statutory prohibition on chronic nonuse of water right permits undermines the state's efforts to ensure surface water availability. Finally, TCEQ's process for initiating priority groundwater management area studies would benefit from taking place in a public setting to help identify critical groundwater shortages.

The "Agency at a Glance" section beginning on Page 7 is the best summary description of the TCEQ I've seen. If you want to understand the TCEQ, that's a great place to begin, but please read the whole report.

If you are of the opinion that the TCEQ administrative and civil enforcement process

will assure the regulated entities in your city or county will comply with state laws and your citizens will be protected, be sure to read the section of the Report entitled *TCEQ's Compliance Monitoring and Enforcement Processes Need Improvements to Consistently and Equitably Hold Regulated Entities Accountable*, which begins on page 27. You may change your mind.

Struggles in the enforcement area have been a regular problem identified by the Sunset Commission:

Over the past two decades, Sunset reviews have consistently found TCEQ struggles to strike an appropriate balance between incentivizing compliance and taking enforcement action. ... Once again the Sunset review found TCEQ's efforts do not effectively discourage violations and would benefit from adjustments to better incentivize compliance and focus attention on the riskiest actors. (Report, P. 28)

As you read through the technical issues and sometimes seemingly arbitrary approaches taken by the TCEQ in attempting to regulate such a large number of entities over so many programs, you may come to the same conclusion I did:

Cities and counties have a duty to put the protection of their citizens first through assuring local individuals and entities comply with criminal antipollution laws. The state isn't going to do it.

However, in reflecting on the actions and struggles of the TCEQ, please consider the following:

- If the state enforcement process results in imposing fines equal to "approximately 19 percent of the economic benefit gained from being out of compliance," as a report by the State Auditor's Office found twenty years ago, how does your county or city compare today?
- Is there any criminal penalty <u>at all</u> levied by your local government against individuals and businesses who are polluting your community?
- Instead of imposing fines equal to 19 percent of the value gained from polluting, isn't your local rate actually zero?

If the TCEQ catches a polluter — and they certainly don't catch them all — the

penalty set may cost the polluter 19% of his profits from polluting. But the TCEQ can't be everywhere because we're not willing to fund them to be so, nor do we like intrusive state agencies. Hence pollution enforcement, if it is to happen, can only be done effectively at the local level.

With little-to-no local enforcement, in many parts of Texas, pollution costs the polluter very little or nothing.

Either the laws are not enforced at all by the local authorities, or the fines are set without regard to the economic gain of polluting, especially by treating virtually all violations as Class C misdemeanors. Yet we all agree that polluting hurts community health, property values, and spiritual development. This seems to be a strange approach to take to stopping pollution by bad actors.

Beware when a local official assures you that "We've turned this over to the TCEQ. It's their responsibility to act."

In some cases, local officials may themselves actually believe that only the TCEQ can act to address pollution. But occasionally this is a case of the local official simply dodging his or her responsibility to enforce specific Texas criminal laws. The official may be intentionally relying on your ignorance in offering this explanation to you, hoping that you'll accept it and leave them alone. For example, in one case in our own county, our environmental enforcement officer was ordered by his lackadaisical boss to report a local school district to the TCEQ. The school's agriculture program had generated a large manure pile outside their barn that washed into a creek during a heavy rain, and a neighbor complained. The well-experienced officer could have quickly handled this situation through working with the agricultural sciences teacher or the school principle to make sure this didn't happen again. Instead, the officer's boss was concerned that the county might be seen as adversarial in the eyes of the school, and directed the officer to report the incident to the TCEQ. My question at the time was, "It's less adversarial to turn a local government in to the state regulators?"

What could have been handled easily at the local level was needlessly elevated to the state administrative enforcement level. The officer's boss was perhaps betting that the incident was so small and remote from the TCEQ's nearest regional office that the agency probably wouldn't immediately respond. More likely, he was betting on the state not responding at all, so he directed the officer to report the local school district to the TCEQ. The boss clearly didn't have the interest of the county or the school in mind; he was just trying to dodge a potential conflict (at least, in his own mind), and reporting the school to the state was perfectly fine with him. Should you ever encounter this sort of cynical dereliction of duty, try to get the "boss" in your own story replaced. There is no room for one with such lack of integrity on the public payroll.

In summary, TCEQ administrative enforcement officers are good people to know and can be very helpful, but they absolutely have their hands full doing permit and rule administrative enforcement across our state in an always difficult political environment. However, the truth of the matter is that the job of stopping pollution is too big for one state agency. Success requires local involvement: keeping your community clean is up to you and can be accomplished only through the intentional and thoughtful use of local law enforcement, code, and public health resources.

B. Local Municipal Code Enforcement

Various state laws give cities the right to regulate certain human activity in their community through adopting civil or criminal ordinances. These include local municipal ordinances that fight pollution. Fines for violating municipal ordinances are generally limited to \$500, but may be as great as \$2,000 for violations of codes governing fire safety, zoning, and public health (including activities that pollute). Code violations involving dumping can now carry local penalties of as much as \$4,000 (see Local Government Code Sec. 54.001). Some cities, including Houston, have with great fanfare adopted these higher potential penalties where rubbish is involved.

Code enforcement officers and registered sanitarians, usually issue notices of violations at this level. Most problems generating violations are fixed pretty quickly, and, as a percentage of all code cases handled by local officers, few eventually go to court. When this is necessary, cases are heard in municipal court, which can impose fines and

order clean up of the property. Municipal ordinances are generally written in such a way that each day of a continuing violation is a separate offense. Code enforcement officers and sanitarians are certified through the Texas Department of Licensing and Regulation in Austin, which does an excellent job in this regard.

It's important for code enforcement officers to know the basics of Texas criminal environmental law. Because they know their communities best, they are in a position to see when code violations have grown into illegal dumping, water pollution, or Public Health Nuisances. Often the dumping they are responding to in their work is actually a combination of code violations (which are within their purview) and criminal illegal dumping (which will require police to resolve). It's important for code officers to fully understand both processes of response.

Because of the large volumes of cases they handle municipal code enforcement officers are the tip of the spear in fighting pollution. Without the constant efforts of the code enforcement officers in our state, humans couldn't live jammed together in cities. Counties are political subdivisions of the state and as such don't have codes to enforce: code enforcement is a municipal activity in Texas routinely used by the largest 75% of our 1,200 cities (but not by the 25% of our cities too small to have budgets to afford code enforcement and municipal judges).

Where code enforcement is used and the violation reaches court, code cases are about 6% of the total number of cases handled by municipal courts in Texas; they may get lost in the shuffle sometimes. Municipal codes regularly address such things as having refuse on one's property (note that codes in many cities have a separate violation for actually disposing waste on any property), having dilapidated structures, mishandling sewage, conducting illegal burning, tolerating stagnant water where mosquitoes breed, and other such matters.

Frequently, cities make their codes available online at the city website. In other

cases they may be available through the mayor, city clerk, or may be on file at the city library. More and more, local code enforcement officers say that citizens call them to report violations of specific sections and sub-sections of the codes, which shows that citizens are becoming more aware of the ordinances controlling their communities. In my opinion, code enforcement officers get better with such encouragement from the citizens. However, please consider the fact that all code enforcement in Texas entails a lot of letter writing to the violator, and more letter writing, and then more letter writing, eventual municipal court appearances, the *possible* issuance of court orders, additional time to comply, and other procedural steps that can greatly add to the time required to fix a problem. Somewhere along the way in that process the violator decides to come into compliance. All that takes time. The person owning or controlling the property may live out of town, may be deceased with absent or missing heirs, may perhaps be an out-of-state bank, or may live locally and want to fight. All of these complex factors may slow the process.

Occasionally we'll come across a smaller city where the code enforcement officers have been told to only enforce ordinance violations occurring at residences and to ignore those occurring at local businesses. This is an absurd policy and is certainly not the normal practice across the state. If your city has adopted this approach, you are experiencing, in effect, organized local business interests blocking city anti-pollution efforts. These illogical practices will usually cease as soon as you shine light on them. Citizens generally don't just want their residential areas to be the only clean part of their city; they usually want the whole town pollution free.

To my way of thinking, there are two critically important issues that affect code enforcement officers:

(1) There is no specific required training for officers to help them deal with the many emotionally-challenged and addicted individuals they routinely encounter. Texas police officers must complete 16 hours every two years training on how to deal with emotionally disturbed individuals, and many officers have completed week-

long training in this subject.

Effective September 2017, SB 1849 required Texas law enforcement officers to complete an 8-hour class in *De-escalation Techniques for Limiting the Use of* Force in Public Interaction " ... within the basic peace officer course, every 48 months for those with a basic or no proficiency certificate, or to obtain an intermediate or advanced proficiency certificate." (Language of the bill). But there is no similar requirement for code enforcement officers, even though code enforcement officers regularly encounter emotionally disturbed and addicted individuals. A few Texas cities have a system to alert code enforcement officers like police are usually notified by dispatch — when a complaint involves an address where interactions with emotionally disturbed individuals have occurred in the past. But in most cities there is no formal program of alerting code officers called to "problem" addresses: just departmental and office memory. One code officer reported, "When I hear of a complaint at a certain address, every hair on the back of my head stands up!" He is not alone in having this response. Basic safety training for code enforcement officers and address alert systems should be routine in Texas, but they are not.

(2) Code enforcement officers often do not receive the assistance of local police to investigate illegal dumping and criminal pollution cases. Police officers may be readily available to accompany code enforcement officers on dangerous calls to provide personal protection, but too many police departments look the other way when asked to enforce laws against misdemeanor and felony polluting. Failure of a community to use all the criminal justice resources at its disposal simply makes the problem worse. In any case, deciding to not apply city or county criminal enforcement resources to an entire class of crimes — such as illegal dumping or water pollution — is a decision that is above the pay level of all but elected officials. Deciding to avoid enforcing these laws is a decision that should be taken only with the input of the city or county attorney. Health impacts on citizens aside, it is never good public policy for a city or county to intentionally avoid using state criminal laws. We reassert our overall position:

You'll not stop illegal dumping without law enforcement involvement.

c. Public Health Nuisance and Public Nuisance Enforcement

There are two state <u>criminal</u> health nuisance laws that are already in force where you live that your city or county can use to fight pollution.

Inside your city, your law enforcement officers can use the first of these (THSC Chapter 341) in addition to using your municipal ordinances.

Out in the unincorporated areas, your county officials can use <u>both</u> of them (THSC Chapter 341 and THSC Chapter 343) to fight pollution, although some provisions of THSC Chapter 343 have additional limits on the areas where they apply.

Since they are both state laws, they don't have to be "adopted" by your city or county before they apply to your community. They are in force now; they just have to be used.

Additionally, with or without having created a formal Local Health Department, you county has a <u>Local Health Authority</u> responsible for the health of the citizens. Depending on the size of your community, this may be the physician who is the core of a local full-service Health Department, or may operate without a formal organization having been created. When the health of the community is put as risk, the Local Health Authority goes into action and becomes much more visible, as happened in the recent COVID pandemic.

Both THSC Chapter 341 and 343 take about the same basic approach. They list a series of "Public Health Nuisances" (THSC Chapter 341) or "Public Nuisances" (THSC Chapter 343) and set a low-level criminal penalty for their violation. However, both statutes require that each day of an ongoing violation be treated as a separate offense, so even the small daily fines can quickly become substantial.

It it fairly common that a violation of THSC Chapter 343 also be a violation of THSC Chapter 341 because the condition is a Public Health Nuisance. Consequently THSC Chapter 341 has the widest applicability of the two.

In addition to the general provisions available in these laws, there is one definition that is absolutely outstanding in THSC Chapter 341. It is widely used to deal with many common Public Health Nuisance situations:

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.

This language describes just about every Public Health Nuisance I have ever seen, and can easily be applied by police, deputies, constables, and other peace officers. This definition goes beyond situations of "clutter" often seen in Texas, and focuses on the health effects of the mess. If rats or mosquitoes are living in a mess, it's very likely a Public Health Nuisance under *THSC Sec.* 341.013(c).

Faced with an alleged Public Health Nuisance, if the officer sees a situation defined by the above language, the officer can simply cite the "possessor" (including the owner or person living at the location or whose name is on the lease) of the property or generator of the condition for their violation and then go to the next call. Everybody meets later at the JP or municipal court — because this provision applies both inside and outside cities — to let the judge set the penalty for having the Public Health Nuisance. Each day the Public Health Nuisance has been allowed to exist is defined as being a separate offense under state law, carrying its own penalty [see THSC Sec. 341.091(c)].

Getting the nuisance abated is a separate process involving the Local Health Authority and a local prosecutor.

But exactly how does the mess get cleaned-up? Who forces the violator to do this, if he is unwilling to do so voluntarily?

This is where things can get a little tricky, because we have a history in Texas of many Local Health Authorities simply not following the mandates of the State Legislature to force possessors of messes to clean up their messes. This is a major reason that so many places in our state are so trashy: local governments are not following the mandatory abatement statutes for Public Health Nuisances.

The controlling abatement statute is at THSC Sec. 341.012, which is as follows:

Sec. 341.012. ABATEMENT OF NUISANCE.

- (a) A person shall abate a public health nuisance existing in or on a place the person possesses as soon as the person knows that the nuisance exists.
- (b) A local health authority who receives information and proof that a public health nuisance exists in the local health authority's jurisdiction shall issue a written notice ordering the abatement of the nuisance to any person responsible for the nuisance. The local health authority shall at the same time send a copy of the notice to the local municipal, county, or district attorney.
- (c) The notice must specify the nature of the public health nuisance and designate a reasonable time within which the nuisance must be abated.
- (d) If the public health nuisance is not abated within the time specified by the notice, the local health authority shall notify the prosecuting attorney who received the copy of the original notice. The prosecuting attorney:
 - (1) shall immediately institute proceedings to abate the public health nuisance; or
 - (2) request the attorney general to institute the proceedings or provide assistance in the prosecution of the proceedings, including participation as an assistant prosecutor when appointed by the prosecuting attorney.

The first point at **(a)** is that it is a person's responsibility to abate health nuisances on property the person possesses as soon as the person learns of the nuisance — not when the state, county, or city tells him to clean up his place. The way that a possessor comes to be aware that he or she has property having a Public Health Nuisance is irrelevant: that awareness is expected to trigger their abatement response. No formal notice from local government is required. Many men are put on notice of possessing a Public Health Nuisance by their wife, who is certainly an authority greater than the county or Local Health Authority! As mentioned above, "possessing" property includes such relationships as owning, leasing, or renting the property. Thus multiple parties could be responsible for allowing a Public Health Nuisance to exist on a particular property.

Notice the use of the word "shall" in (a). In THSC Sec. 341.012, the legislature uses that word <u>five times</u>, which has got to be a record for mandatory enforcement language coming from the legislature in one section of law. The State Legislature is so insistent that Public Health Nuisances be abated because doing so is extremely important to the health of the entire state.

But suppose a person fails to follow his duty as a property possessor and the government has to get involved. Then sections **(b) through (d)** come into play. The element of local government that responds when the property possessor won't is the "Local Health Authority." This is the physician designated by the city or county as the interface between it and the state and federal governments on health issues. Virtually every county in Texas has a *Local Health Authority*. A Local Health *Department* is simply an administrative structure that a city or county has created — under its authority to do so as expressed in THSC Chapter 121 — to support the ongoing activities of the Local Health Authority. There are only around 125 Local Health *Departments* in the state, but there are pretty close to 254 Local Health *Authorities* (some very small county may share a Local Health Authority with a neighbor).

Failure of most Local Health Authorities to follow their statutory duties as defined in THSC Sec. 341.012 is routine in Texas, to the detriment of our citizens.

If the property possessor won't keep his place free of Public Health Nuisances — and don't forget the definition in THSC Sec. 341.013(c) quoted above — then the State Legislature at **(b)** directs the Local Health Authority to act. The word, again, is "shall." The Local Health Authority gives the violator notice to abate the nuisance **and** sends a copy to the local prosecutor. In practice, few local prosecutors ever receive notice from their Local Health Authority that this process is underway at a particular location.

The content of the notice is given at **(c)** where the Local Health Authority gives the possessor a reasonable amount of time — differing for each situation — to abate the nuisance. If the violator abates the nuisance, when the Local Health Authority gets there for follow-up inspection, **(d)**, then all is well. If not, the Local Health Authority goes back to the prosecutor who then takes the violator to court for a judge's order to abate the mess.

As to which process is the fastest way to abate a Public Health Nuisance:

- The quickest way to abate a Public Health Nuisance is by (a) the property
 possessor cleans up the mess on his own without being told to do so by local
 government.
- The second fastest way to abate a health nuisance is for the Local Health
 Authority and prosecutor to follow the process mandated by the State Legislature
 in steps (b) through (d).
- The next-to-the-slowest way to abate a nuisance is the way we normally do things in Texas. The Local Health <u>Department</u> (where one has been created) gives the required notice in (b) but fails to send a copy of the notice to the local prosecutor. When the violator doesn't clean up the mess, the Local Health <u>Department</u> officer files a notice of violation of THSC Chapter 341 with the JP or Municipal Court having jurisdiction. When the case finally appears on the JP docket, the judge fines the violator but does NOT order the mess abated. For THSC Chapter 341 violations, only the Local Health Authority can force an abatement by working with the local prosecutor and getting the situation elevated to the proper court; the JP or Municipal Judge hearing the complaint on the violation itself has no statutory power to order an abatement under this particular law.
- The absolutely slowest way to handle a Public Health Nuisance is the way that most counties respond: do nothing. Simply ignore the entire process and say something like, "Well, a man can do what he wants with his own property." No, actually a man can't commit a crime on his own property nor attack the health of Texans, as expressed by the laws adopted by the State Legislature. How reasonable is it that a man should be able to create any kind of health risk for his neighbors without local government eventually getting involved?

It's easy to see Local Health <u>Departments</u> learning to follow state law in this area; it's a little harder to see counties using the provision of THSC Sec. 121.003 to designate a county employee to be a representative of the physician appointed to serve as the Local Health Authority's agent. Since so many Local Health Authorities are apparently unaware of their responsibilities under THSC Sec. 341.012 — and since the county usually has appointed no employee to represent the Local Health Authority and bring

him or her evidence as required in **(b)**— nothing gets abated. If you complain about a particular Public Health Nuisance in these counties, you'll be assured by several elected officials that "There is nothing we can do," which, with all due respect, is just ignorance talking.

Now, turning to the content of these two nuisance laws — THSC Chapters 341 and 343 — let me repeat the value of responding to as many violations as possible as violations of THSC Sec. 341.013(c), detailed above. This is such a general statement of what a Public Health Nuisance is that it ought to cover just about all situations a local peace officer encounters. Twelve other Public Health Nuisances are defined at Section 341.011, but most of these all seem to fit nicely into the more general definition at Section 341.013(c).

I call these two "fire ant" laws: the first bite is annoying, but if the violator doesn't handle the problem quickly, they can really eat you up. These are both very powerful small-penalty laws that your community should absolutely be enforcing now to fight local pollution. Both are already law in Texas, and local governments do not have to "adopt" them before they can be used, any more than local government has to adopt the Penal Code before its police can enforce those criminal laws. (Note that there IS a section in THSC Chapter 343 that a <u>county</u> would have to adopt IF the county wanted to use taxpayer funds and clean up a mess in situations where the owner won't. But these two criminal laws as written and adopted by the State Legislature and Governor are ready to be used now, without local adoption).

Here's more detail on each of these statutes:

<u>Texas Health and Safety Code Chapter 341. Minimum Standards of Sanitation and</u> Health Protection Measures

You can get a copy of this law online by searching on that title, and we encourage you to have a copy before you in reading this section. This law is titled "Minimum Standards of Sanitation and Health Protection Measures," and does just that. It sets the minimum sanitation standards that people owning and controlling property have to meet in Texas to avoid criminal or civil prosecution.

For our purposes, we'll focus on Section 341.011 (where "Public Health Nuisances" are defined); Section 341.012 (concerning the responsibilities of Local Health Authorities — and we've already discussed this important section above); Section 341.013 (addressing garbage, refuse, and other waste); Section 341.014 (addressing disposal of human excreta); and, Section 341.091 (criminal penalty).

Cities and counties can use these provisions to put enormous pressure on violators to clean up their messes and stop polluting Texas.

The other sections of this law are interesting reading too, but not really what this class addresses. They cover such things as protecting the public drinking water supply and the operation of icehouses. Subchapter D (Sections 341.061 through 341.069) address the levels of sanitation required for various public facilities. Some of these provisions may be useful in addressing specific issues in your community (*i.e.*, swimming pools, public buildings, schools, hotels, and other locations).

Section 341.019 is interesting and potentially valuable too. It details the process under which a city or county employee can enter an "apparently vacant" house or one in foreclosure to abate mosquitos at that property. That section reads:

Sec. 341.019. MOSQUITO CONTROL ON UNINHABITED RESIDENTIAL PROPERTY.

- (a) Notwithstanding any other law, a municipality, county, or other local health authority may abate, without notice, a public health nuisance under Section 341.011(7) that:
 - (1) is located on residential property that is reasonably presumed to be abandoned or that is uninhabited due to foreclosure; and
 - (2) is an immediate danger to the health, life, or safety of any person.
- (b) A public official, agent, or employee charged with the enforcement of health, environmental, or safety laws may enter the premises described by Subsection (a) at a reasonable time to inspect, investigate, or abate the nuisance.
- (c) In this section, abatement is limited to the treatment with a mosquito larvicide of stagnant water in which mosquitoes are breeding.
- (d) The public official, agent, or employee shall post on the front door of the residence a notice stating:
 - (1) the identity of the treating authority;
 - (2) the purpose and date of the treatment;
 - (3) a description of the areas of the property treated with larvicide;
 - (4) the type of larvicide used; and
 - (5) any known risks of the larvicide to humans or animals.

Now looking at each of these sections in greater detail:

Section 341.011. Nuisance

This section defines twelve public health nuisances. If you're familiar with the municipal codes of your community, you'll notice that these nuisances seem to address the same range of topics as your codes. Of the twelve, local law enforcement and health department officers can effectively use at least nine to stop local pollution. The term "sanitary" is defined in this law to mean "a condition of good order and cleanliness that precludes the probability of disease transmission." Here are the nine that may be most useful locally. Each of the following is a Public Health Nuisance (the number given to each is from the statute):

- (1) a condition or place that is a breeding place for flies and that is in a populous area;
- (2) spoiled or diseased meats intended for human consumption;
- (3) a restaurant, food market, bakery, other place of business, or vehicle in which food is prepared, packed, stored, transported, sold, or served to the public and that is not constantly maintained in a sanitary condition;
- (4) a place, condition, or building controlled or operated by a state or local government agency that is not maintained in a sanitary condition;
- (5) sewage, human excreta, wastewater, garbage, or other organic wastes deposited, stored, discharged, or exposed in such a way as to be a potential instrument or medium in disease transmission to a person or between persons;
- (6) a vehicle or container that is used to transport garbage, human excreta, or other organic material and that is defective and allows leakage or spilling of contents;
- (7) a collection of water in which mosquitoes are breeding in the limits of a municipality or a collection of water that is a breeding area for mosquitoes that can transmit diseases regardless of the collection's location other than a location or property where activities meeting the definition of Section 11.002(12)(A), Water Code, occur;
- (8) a condition that may be proven to injuriously affect the public health and that may directly or indirectly result from the operations of a bone boiling or fat rendering plant, tallow or soap works, or other similar establishment;
- (9) a place or condition harboring rats in a populous area;
- (10) the presence of ectoparasites, including bedbugs, lice, and mites, suspected to be disease carriers in a place in which sleeping accommodations are offered to the public;
- (11) the maintenance of an open surface privy or an overflowing septic tank so that the contents may be accessible to flies; and,
- (12) an object, place, or condition that is a possible and probable medium of disease

transmission to or between humans.

All of these are specific violations and can be enforced by law enforcement and Local Health Department officers.

Public Health Nuisance (3) listed above is interesting because it is typically what Local Health Department officers are enforcing when they do restaurant inspections. Law enforcement officers can also enforce this provision. Moreover, if you have a Local Health Department doing restaurant inspections, those officers can also enforce the other nuisance violations listed above while they are at the location.

Since these dozen provisions establish the basic set of public health nuisances for the entire state, there is absolutely no reason at all why they shouldn't be enforced where you live. There is no reason to refer any of these nuisances for enforcement to the Department of State Health Services. In situations where cities and counties have a Local Health Authority who is reluctant to act, local police can also act. Their actions can be in conjunction with — or independent of — DSHS inspectors in dealing with these issues.

Local governments can use the powers they have been given by the State Legislature at Sections 341.091 (criminal penalty) to stop these nuisances. Again, if your local government tells you there is nothing they can do about these Public Health Nuisances, they are either uninformed or willfully looking the other way.

Section 341.013. Garbage, Refuse, and Other Waste

This section has four very interesting provisions affecting your efforts to keep your community clean:

- (a) It directs that premises used for businesses and residents be kept in a sanitary condition. [This can be used to enforce basic hygiene <u>inside</u> residences where needed as well as used to keep businesses in a sanitary condition.] The statute defines "sanitary" as "a condition of good order and cleanliness that precludes the probability of disease transmission."
- (b) It prohibits discharging such things as laundry waste and sewage into public places such as gutters or streets. [This can be used to stop people living in trailers from running a pipe to the borrow ditch in the country.]

(c) It prohibits storing or discharging waste in a way that may contaminate land or water or become a breeding place for insects or rodents — probably the most useful law of the bunch and cited above as the one for your law enforcement folks to learn and use:

Section 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.

(d) It establishes responsibility for maintaining vacant or abandoned property as being that of the person owning or controlling the property. [This is the basis for enforcing municipal code violations against owners and loan servicers of foreclosed and vacant properties.]

Section 341.013 (e) A person may not permit vacant or abandoned property owned or controlled by the person to be in a condition that will create a public health nuisance or other condition prejudicial to the public health.

Since "a person commits an offense if the person violates this chapter or a rule adopted under this chapter" (Section 341.091), violating any of these is a criminal offense.

Section 341.014. Disposal of Human Excreta

This section establishes several technical requirements for properly handling human waste, the most important of which is the statement that *Human excreta in a populous area shall be disposed of through properly managed sewers, treatment tanks, chemical toilets, or privies constructed and maintained in conformity with the department's specifications, or by other methods approved by the department.* [Section 341.014(a)]. Failing to abide by this provision would be subject to the same criminal penalties discussed above in Section 341.091.

Note also that (looking ahead) human waste is <u>specifically EXcluded</u> from the Texas Litter Abatement Act, which addresses most illegal dumping in Texas. Consequently, dumping human excreta will be handled with the law we're discussing, a municipal ordinance, or the Texas Water Code.

Faced with one of the twelve defined public health nuisances in Sec. 341.011; a situation that includes garbage, refuse, or other waste, or an unsanitary condition as defined in Sec. 341.013; human excreta as addressed in Sec. 341.014, or another violation of this chapter, what enforcement options are available to local jurisdictions?

- 1. Forced Abatement. If the nuisance is one of the twelve listed in Sec. 341.011 or defined by Sec. 341.013(c) the local government involved may want to force the immediate abatement of the situation, following the process detailed in Sec. 341.012 for the Local Health Authority and discussed above.
- 2. Criminal Enforcement Under Sec. 341.091. Unrelated to the issue of forced abatement, local law enforcement may file criminal charges for any violation of this chapter. The criminal penalties described in § 341.091 may be described as "fire ant" in nature. Each bite is only slightly painful, but the cumulative effect of multiple bites is unbearable, each day a situation exists is a separate violation. Any violation of this chapter may initially be fined \$10 to \$200. Notice that this citation may be issued immediately; there is no grace period that the officer has to wait before issuing the citation. The "reasonable time" phrase discussed in § 341.012 pertains to the time given by the Local Health Authority who is following a civil process to force abatement. A peace officer becoming aware of a violation of Chapter 341 can simply file charges in JP or municipal court. Subsequent conviction under this law within one year carries the potential penalty of an increased fine (\$10 to \$1,000) and up to 30 days in jail, hence the necessary greater involvement of the county attorney and the county court system for subsequent offenses.
 - (a) Persons re-offending within one year following their most recent conviction can be arrested and jailed for the second apparent violation, since reoffending within that time period can carry up to 30 days in jail as a penalty. Just warning an offender that re-offending within a year will result in immediate arrest can help underline the seriousness with which local governments face Public Health Nuisances; or,
 - (b) Continue to treat each violation as a first offense to avoid crowded county court at law docket and keep the offender before the same JP or municipal

judge.

(c) Note that each day of an ongoing offense is mandated by statute to be be treated as a separate violation by the court. However, many JP's and municipal judges regularly ignore this mandate. The statute on this point at THSC Sec. 341.091(c) reads: Each day of a continuing violation is a separate offense. Making this provision optional, for which there is no statutory basis, simply encourages Public Health Nuisances to be tolerated for long periods of time.

In general, THSC Chapter 341 is a very powerful law that can be used to assure basic health protections throughout the state. It tends to be more used where there is a local public health department, but Texas law enforcement officers can certainly enforce its provisions immediately themselves. However, in the unincorporated areas in counties without health departments, sheriff deputies and constables rarely enforce this law, even though using it would often help a lot. In my experience it's because they are simply unaware of its existence.

Texas Health and Safety Code Chapter 343. Abatement of Public Nuisances

This second public nuisance law — notice, however, that the word "health" is not mentioned in this statute — is a lot like THSC Chapter 341. Texas peace officers and Local Health Authority agents can enforce it also. The major difference between the two laws is that THSC Chapter 341 <u>applies everywhere</u> in the state, but THSC Chapter 343 only <u>applies in **certain** unincorporated areas</u>. So the primary peace officers working these violations would be the sheriff deputies and the constables.

This law developed historically to address dilapidated buildings and houses in unincorporated areas of Harris County. However, over the years its focus has expanded to deal with other public nuisances, and it is now applicable in all 254 Texas counties. Structurally, it looks a lot like THSC Chapter 341, but it has a unique county-government focus.

The definitions used in this law are particularly important. Here are a few of them as defined in Section 343.010:

- "Building" means a structure built for the support, shelter, or enclosure of a person, animal, chattel, machine, equipment, or other moveable property;
- "Neighborhood" means: (A) a platted subdivision; or (B) property contiguous to and within 300 feet of a platted subdivision;
- "Platted subdivision" means a subdivision that has its approved or unapproved plat recorded with the county clerk of the county in which the subdivision is located; and,
- "Premises" means all privately owned property, including vacant land or a building designed or used for residential, commercial, business, industrial, or religious purposes. The term includes a yard, ground, walk, driveway, fence, porch, steps, or other structure appurtenant to the property.

There are several other definitions provided, but these are the most useful for our purposes. You'll need these to understand the points being made by its provisions.

Section 343.011. Public Nuisance

Similar to Chapter 341, this chapter provides a list of public nuisances that are illegal to allow on property one possesses in various unincorporated areas of your county. Many, but not all, of these are useful for cleaning up your community. These include (following statute numbering):

- (1) keeping, storing, or accumulating refuse on premises in a neighborhood unless the refuse is entirely contained in a closed receptacle;
- (2) keeping, storing, or accumulating rubbish, including newspapers, abandoned vehicles, refrigerators, stoves, furniture, tires, and cans, on premises in a neighborhood or within 300 feet of a public street for 10 days or more, unless the rubbish or object is completely enclosed in a building or is not visible from a public street;
- (3) maintaining premises in a manner that creates an unsanitary condition likely to attract or harbor mosquitoes, rodents, vermin, or other disease-carrying pests;
- (4) allowing weeds to grow on premises in a neighborhood if the weeds are located within 300 feet of another residence or commercial establishment;
- (5) maintaining a building in a manner that is structurally unsafe or constitutes a hazard to safety, health, or public welfare because of inadequate maintenance, unsanitary conditions, dilapidation, obsolescence, disaster, damage, or abandonment or because it

constitutes a fire hazard;

- (6) maintaining on abandoned and unoccupied property in a neighborhood a swimming pool that is not protected with:
 - (A) a fence that is at least four feet high and that has a latched and locked gate; and
 - (B) a cover over the entire swimming pool that cannot be removed by a child;
- (7) maintaining on any property in a neighborhood in a county with a population of more than 1.1 million a swimming pool that is not protected with:
 - (A) a fence that is at least four feet high and that has a latched gate that cannot be opened by a child; or
 - (B) a cover over the entire swimming pool that cannot be removed by a child;
- (8) maintaining a flea market in a manner that constitutes a fire hazard;
- (9) discarding refuse or creating a hazardous visual obstruction on:
 - (A) county-owned land; or
 - (B) land or easements owned or held by a special district that has the commissioners court of the county as its governing body;
- (10) discarding refuse on the smaller of:
 - (A) the area that spans 20 feet on each side of a utility line; or
 - (B) the actual span of the utility easement;
- (11) filling or blocking a drainage easement, failing to maintain a drainage easement, maintaining a drainage easement in a manner that allows the easement to be clogged with debris, sediment, or vegetation, or violating an agreement with the county to improve or maintain a drainage easement;
- (12) discarding refuse on property that is not authorized for that activity; or
- (13) surface discharge from an on-site sewage disposal system as defined by Section 366.002.

There is a provision in this law that imposes an OVERALL restriction against using this law on locations that are considered "agricultural land" by the county tax appraiser.

Additionally, others of these thirteen definitions may further restrict its application. For instance public nuisance (3) applies to the entire "non-agricultural, unincorporated" areas of the county. Numbers (1) and (4), however, only apply to "neighborhoods" (defined in this law as platted subdivisions) located in "non-agricultural, unincorporated" areas. Number (2) applies to "neighborhoods" AND anywhere within 300 feet of a public street in "non-agricultural, unincorporated" areas. This provision

ALSO gives a further 10 days past the 30 days mandated for all locations under this chapter.

So it is very important to read the definitions of public nuisance VERY carefully to be sure that the violation can actually take place on the physical area it has been seen. By comparison, THSC Chapter 341 simply applies everywhere in the county, including inside cities, on oil well drilling sites in the middle of fields, etc. State law never allows Public Health Nuisances to legally exist, no matter where they are found.

Most people familiar with rural Texas are shocked when they see this list of rural public nuisance violations for the first time in THSC Chapter 343, but please be assured that many counties in the state are using this law to clean their rural areas.

Notice item (12) on the list, "discarding refuse on property that is not authorized for that activity." This was a creation of the 80th Legislature in 2007 and will probably be very useful. Notice that there are no weight or volume considerations in using this violation; any amount of refuse dumped at any unauthorized site is sufficient to trigger the use of this law for a criminal or civil action.

Looking ahead to Section 343.013, if you dump in your backyard in a subdivision in the unincorporated area, you may find yourself being sued by your neighbor or the homeowners association, or paying a fine, for violating this or one of the other nuisance violations in THSC Chapter 343.

Also, item (13) surface discharge from an on-site sewage disposal system as defined by Section 366.002 is a new public nuisance and probably shouldn't have been added to this law. NONE of these thirteen becomes an actual violation under THSC Chapter 343 until 30 days have past from the time the county has formally notified the property possessor of the possible violation. No particular form of the notice is defined in the law, but until at least 30 days have past after its issuance, no citation can be issued. This might make sense with the first twelve of these where some reasonable period of time might be needed to remedy a situation, and a "standard" 30 days may work fine. But the thirteenth violation is different. It amounts to sewage being allowed to flow onto the ground, and allowing a mandatory 30 days to stop the discharge seems contrary to public health. So allowing a "public nuisance" has contributed to the creation of a "Public

Health Nuisance" as defined in THSC Chapter 341. What the support staff at the State Legislature should have done was to simply read THSC Chapter 341 and see that surface discharges in violation of THSC Chapter 366 was already addressed as a Public Health Nuisance. If such a situation is in existence, it requires the immediate attention available from Local Health Authorities under THSC Chapter 341, not a mandatory 30 day delay before any attention can be forced by local government.

Section 343.012. Criminal Penalties

It is an offense to "cause, permit, or allow a public nuisance" as defined in Section 343.011 to exist for more than 30 days after receiving notice from a "county official, agent, or employee to abate the nuisance." The criminal penalty for doing so is a fine of from \$50 to \$200 for the first conviction, and a fine of \$200 to \$1,000 and/or up to six months jail for a subsequent conviction.

Like the parallel section in THSC Chapter 341, each day of an ongoing violation is a separate offense. A Justice Court would hear an initial case against an accused, since these violation only occur in the unincorporated areas. As in the case of THSC Chapter 341, many JP's ignore the legislative mandate to treat each day of an ongoing violation as a separate offense.

However, because of the possibility of confinement, where there was a prior conviction, a subsequent case would be heard in a county court, which necessitates the involvement of the county attorney.

Also note that the judge "shall" order the abatement of the nuisance if the person is convicted. This requirement to order an abatement upon conviction differs from THSC Chapter 341, which is simply silent on the court's obligation or authority to order an abatement upon conviction. In that law, any court order concerning abatement would come through a hearing forced under Section 341.012.

Section 343.013. Injunction

"A county or district court may by injunction prevent, restrain, abate, or otherwise remedy a violation of this chapter in the unincorporated area of the county." This seems appropriate and parallels some of the civil suit powers found in Chapter 341. However, this next provision is unique: "A county or a person affected or to be affected by a violation under this

chapter, including a property owner, resident of a neighborhood, or organization of property owners or residents of a neighborhood, may bring suit under" the same subsection.

Moreover, "if the court grants the injunction, the court may award the plaintiff reasonable attorney's fees and court costs." So, a homeowners association in a rural subdivision — or an individual neighbor — can bring a suit under this chapter against anyone who is creating a public nuisance as defined in Section 343.011. Moreover, if the HOA wins, which they will, the court may direct the nuisance-generating resident to pay the homeowners association's attorney fees and court costs.

Considering the constant feuding that goes on in many rural homeowners associations and their willingness to duke it out for small sums and matters of honor, this provision should result in many HOA suits against dirty neighbors as these provisions become better known.

Sections 343.021 through 343.025 Abatement of Nuisance

IF a county will adopt an optional procedure that meets the specifications detailed in this section, the county **may** (but is not obligated to) enter rural property, abate the nuisance itself, and place a lien on the property. More and more counties are adopting these procedures, and your county may already have them in place. However, counties should do everything they can, using this law and others, to force the person possessing the property, or "owning or controlling" vacant or abandoned property under Chapter 341 enforcement efforts, to handle the problem.

Counties deciding NOT to adopt these abatement procedures may still enforce the criminal penalties for violating this law as described in Subchapters A and B. Like almost all other Texas criminal law, there is no requirement for a county or city to "adopt" a law before it can be enforced by law enforcement officers.

Using taxpayer resources to enter and abate nuisances on private property should generally be the last resort for the simple reason that liens are easy to set, but often very difficult to collect. There will be times, however, when the owner has died and no heirs can be found — or when there is mental illness and no resources available — when the public nuisance on a property become such that the county has to abate the nuisance itself. In those cases, it's good to have the procedures in place to avoid

needless delays.

In summary of these two laws:

- (1) Both are currently already in force; no city or county has to "adopt" them; they are already state law;
- (2) THSC Chapter 341 applies <u>everywhere</u> in the state; THSC Chapter 343 applies <u>only</u> in the unincorporated areas only (and excludes agricultural land and sometimes other locations);
- (3) Both can be enforced right now by the law enforcement officers having jurisdiction where the violations occur; THSC Chapter 341 violations can be immediately enforced; THSC Chapter 343 violations require 30-day notice from the county to allow clean up time prior to charges being filed;
- (4) Both can also be enforced by Local Health Authority officers;
- (5) THSC Sec. 341.012 mandates Local Health Authority involvement in the abatement of the Public Health Nuisance, although this is seldom applied as directed by the statute.
- (6) THSC Chapter 343 mandates the court to order abatement upon conviction; the judge has no power to order abatement in THSC Chapter 341 cases (except for judges holding Section 341.012 hearings);
- (7) Both can be enforced criminally and civilly;
- (8) Affected parties, including homeowner associations in unincorporated areas, have suit powers to enforce THSC Chapter 343;
- (9) The county can adopt optional procedures that can be followed to use county resources to abate nuisances under THSC Chapter 343 when all else fails;
- (10) Under both laws, each day of a continuing violation is to be treated as a separate offense, although JP's and municipal judges widely ignore this requirement; and,
- (11) There is no clarity on how the 30-day notice provision would be applied to repeat offenses under Chapter 343 (i.e., does a 30-day warning have to be

issued before each day of an ongoing offense can be charged?).

These are powerful laws that local officials can use to clean up their communities, <u>if</u> they want to.

If a city or county would use THSC Chapter 341 in a consistent manner, it could effectively create enough public awareness of the dangers of Public Health Nuisances to clean up the jurisdiction. What is usually missing is the will by local officials to fully apply this law.

D. Local Criminal Law Enforcement

Texas has a good set of misdemeanor and felony criminal laws that can be used locally to stop illegal dumping, water pollution, and other forms of pollution. These can be enforced by local peace officers, including the police of your town and the deputy sheriffs and constables in the county, just like the criminal laws against theft, assault, fraud, and making and selling drugs.

Most of the criminal laws in Texas are found in the Penal Code and the Traffic Code, but there are other criminal penalties scattered throughout state statutes. For example, the criminal laws prohibiting minors from possessing alcoholic beverages are found in the Alcoholic Beverage Code. And under the Family Code, a parent can give permission for his or her child to marry when the child is between 16 and 18 years old; however, the parent commits a third degree felony for lying about the child's age and giving consent if the child is under the age of 16 or giving consent if the child already married to somebody else. Criminal violations are scattered throughout various places in many state laws.

Most of the criminal environmental laws are found in the <u>Texas Health and Safety</u> <u>Code</u> and in <u>Chapter 7 (Subchapter E) of the Texas Water Code</u>. Your local peace officers are familiar with working from the Texas Health and Safety Code since that's where the Texas criminal drug laws are found (see THSC Chapters 481 through 486). Looking for criminal violations in the Texas Water Code may be a new concept.

THSC Chapter 365 Litter Abatement Act

This is the primary state criminal law used to fight illegal dumping onto land and into water. Probably 90% of illegal dumping and water pollution cases can be effectively handled using this one short law (online copy available at TIDRC.com).

This law establishes penalties from a Class C misdemeanor (fine to \$500) to a state jail felony (fine to \$10,000 and/or up to two years in confinement) for various dumping-related activities for most waste substances. Like all criminal laws, this one can be enforced by any peace officer in his or her jurisdiction. Officers of your Local Health Authority can also enforce this law at the Class C misdemeanor level, like all Health and Safety Code violations. For non-individual violators (i.e., companies, partnerships, religious groups, local governments, etc.) Texas Penal Code Sec. 12.51 provides an alternative fine structure ranging from \$500 for convictions of Class C Misdemeanors to \$20,000 for convictions at the State Jail Felony level. Since a great deal of illegal dumping is done by small business in Texas, imposing these alternative fines against the company can be enough to simply put the dumping operation out of business, if that is the intent of the District Attorney.

There is a chart showing the penalties for various levels of illegal dumping convictions at the end of this section.

Also like virtually all criminal laws, <u>THSC Chapter 365 applies to illegal dumping</u> done on private as well as public property, located everywhere in Texas. The concept that "This is my property, and I can do whatever I want with it!" is incorrect. Historically, it's never been the case that I can do things with my property that negatively impacts yours. Moreover, you can't commit a crime on your own property and expect to evade prosecution forever. Granted, it may be *easier* to get away with a crime for a while if you do it on your own property, but it's still a crime.

Section 365.002. Water Pollution Controlled By Water Code

THSC Chapter 365 covers dumping of most wastes into or adjacent to water — including dry creek beds — as well as dumping onto land, and it can be used effectively to prosecute most sorts of dumping. It does NOT cover "dumping" waste into the air in

the form of carbon from burning. The Illegal Outdoor Burning Rule covers that activity.

There are several key statutes we'll discuss below in the Texas Water Code that also can also be used to fight water pollution, but the law we're discussing now will work fine to prosecute most dumping solid waste or litter into water and dry water courses, which we call "water pollution" in the most general sense.

Section 365.005. Venue and Recovery of Costs

Violations of this law may be filed in one of the three counties indicated: (1) where the violator resides; (2) where the crime took place; or, (3) Travis County (Austin).

Until a few years ago, local police facing disinterested local prosecutors would sometimes file their cases directly in Travis County, who would accept the case, prosecute the criminal, and keep the fine money! Of course that lead to big disputes, so now the policy of Travis County (as I understand it) is to accept a case from your police or deputies only upon request from your county or district prosecutor, provided that the case also meets the screening requirements of Travis County prosecutors. After all, their resources are necessarily limited too. Sometimes your prosecutor will welcome the help of Travis County in handling one of these cases, perhaps because your local prosecutor is unfamiliar with these violations. Or perhaps your prosecutor will not want cases filed outside his county because of the potential embarrassment of reading about his apparent prosecutorial indifference or inability in the local press. It's usually bad politics not to handle these cases locally.

Sometimes just the *possibility* of filing a case in Travis County can still be a spur to a reluctant prosecutor.

Mayor's conversation with prosecutor: "You won't do these cases yourself, and you even won't let the officers file in Travis County, who are ready to proceed. Why won't you help us clean up our community?"

Prosecutors, who are elected officials, generally don't like to have this conversation, and it can be a great spur to action. Note also that this section provides for the recovery of attorney fees and investigative costs.

This would probably be a good place to talk about occasional peace officer and prosecutor reluctance to handle dumping and other pollution cases.

Peace officers.

Back in the day, it was common to see peace officers who didn't want to enforce anti-pollution laws because they "hated environmentalism." That response has gone totally away over the last twenty years. The only "anti-environmentalists" one sees now are the guys being handcuffed for illegal dumping and other forms of pollution. Peace officers are always delighted to discover new felonies and misdemeanors to use, and the close ties between dumping hazardous waste and illegal drug manufacturing has made believers of law enforcement management. The rise of professional criminal environmental enforcement officers (learn about the Texas Environmental Law Enforcement Association at www.telea.us) — and the publicity generated from successful cases — have also helped other officers see this area of enforcement as legitimate. However, the fact remains that new officers are not routinely trained in these laws during their long hours of basic instruction at police academies. Consequently, the only way to learn to enforce these laws is usually through peers, on-the-job training, or in continuing education classes.

Local Prosecutors.

There are still some counties and districts in Texas where local prosecutors are reluctant to accept these cases, primarily, I suspect, because they are unfamiliar with these laws and are afraid of losing if they go to trial. Texas prosecutors are generally products of Texas law schools, where they most likely did not take an elective in environmental law (which might have not even been available). Even if they had taken such an elective, it would have covered *federal* environmental administrative laws rather than in those that are unique to our state. Consequently, when the young attorney has completed law school, passed the bar, and joined the local prosecutor's office or hung out her shingle as a criminal defense attorney, she is as ignorant as could be on the intricacies of Texas criminal environmental law. In fact, just by virtue of having read this far, you already know more on the subject than most attorneys on prosecutor staffs. When a police officer or deputy files a felony violation of the Texas Litter Abatement Act, that case may well be the first time the prosecutor has seen such a filing. Through being over worked, or in fear of looking ignorant to the peace officer, the

prosecutor may accept the case and put it on the bottom of the stack or find some superficial excuse to not accept it for prosecution. "Ignorance of the law is no excuse" if you are trying to push for a case to be prosecuted, but such ignorance on the part of a prosecutor may result in her moving a pollution case to the back burner. Actually, this is one time when the pronoun "him" might be more appropriate. There is actually an easy fix for this situation, depending on the source of the case.

- (1) City originated. If the case rejected or needlessly delayed was filed by a city police officer, then the mayor needs to set a meeting with the prosecutor, the police chief, the city manager, and any other elected officials from the city who are available (city council people). At the meeting, the mayor says to the prosecutor, "Mr. Jones, we're trying to use state criminal law to clean up our community, and I understand that it is the policy of your office to not help us." That will result in the prosecutor assuring the mayor that this is not the case, but that different procedures have to be followed, that these are sensitive matters, etc., etc., etc. When the face-saving is done, the pollution cases will receive priority, because there's not a prosecutor in Texas who would risk publicly insulting an entire town by adopting a policy of not helping its citizens clean up the place when asked to do so by the mayor.
- (2) County originated. If the case being rejected or delayed originates from a county officer, the same meeting should be arranged. This time the attendees are the prosecutor, the sheriff, the commissioner for the precinct where the case originated, and the county judge if possible. Here the commissioner or county judge says to the prosecutor, "We have a mutual problem here. We've got to do something different, because we're looking disorganized on these dumping cases. We've got two parts of county government working against each other. Either we have got to stop spending money generating these cases, or Prosecutor Bob, you're going to have to start pushing them through the system. It doesn't make any sense to spend money on the font-end but not do the work on the back. Now, personally I don't care what we do, but I'm tired of getting the phone calls. But Bob, old pal, you're going to have to take the hit with the voters for not being willing to help clean up the county. It's not going to

be on us. The story in the paper will read <u>Prosecutor Refuses To Help</u>

<u>Commissioners Clean County</u>." The ensuing discussion will produce a solution that the voters will like.

In general, peace officers and prosecutors can simply be a little out of sync on handling these cases, and sometimes the system doesn't work to move them through in a routine manner. These situations should be treated as an opportunity for a senior policy meeting, as described above, between the all the elected officials charged with setting policy and all those who will be held accountable by voters. Elected officials at all levels really do want to keep the voters happy. No elected official wants to take the position of "We don't care about your health or property values!"

Section 365.011. Definitions

This is the most important sections of this short but powerful law. Under this law, it's illegal to dispose of *solid waste* or *litter* in an *unapproved site*. It's also illegal to *transport* such waste to an unapproved site for disposal, and if you own an *unapproved solid waste site* it is illegal to *receive* waste for disposal at that location. The penalties for these separate but related crimes are based on the *weight* or *volume* of waste involved, with the officer determining which to use.

It may seem a little too detailed to dwell on the definitions in this section, but if the specifics of the case don't fall within their parameters, your community will have to use another law to respond. And there's almost *always* another law you can use.

"Approved solid waste site" means: (A) a solid waste site permitted or registered by the Texas Natural Resource Conservation Commission; (B) a solid waste site licensed by a county under Chapter 361; or (C) a designated collection area for ultimate disposal at a permitted or licensed municipal solid waste site.

If the material dumped is not either "liter" or "solid waste" as defined here,

[&]quot;Commercial purpose" means the purpose of economic gain.

[&]quot;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.

[&]quot;Dispose" and "dump" mean to discharge, deposit, inject, spill, leak, or place litter on or into land or water.

you'll have to use another law.

"Litter" means:

- (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 byproducts; 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.
- "Solid waste" has the meaning assigned by THSC Section 361.003, [which reads: "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 material 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

Note the broad term "and other discarded material" in the definition of solid waste. If you discard anything not excluded from the definitions of *litter* and *solid waste*, the material discarded is most likely included.

Also note that the definitions of *litter* and *solid waste* both <u>exclude domestic sewage</u> and human body waste. If you have a dumping case with these substances, they should be handled under a municipal ordinance, the Public Health Nuisance law (THSC Chapter 341), or a provision of the Texas Water Code.

Also, note that *motor vehicles* are specifically listed in the definition of *litter* as "discarded or worn-out manufactured materials and machinery." Whatever else an abandoned car is, it is about 2,000 pounds of *litter* (a State Jail Felony if discarded illegally) as are discarded boats and house trailers. Because of their weight, dumping such items are normally a State Jail Felony.

Also note the two other exceptions to the definition of *solid waste* in addition to human body waste. The first of these is for *soil, dirt, sand and similar inert (i.e., not interacting with the environment) materials*. If you want a load of dirt placed on your property so that you can make surface improvements, fine; however, if somebody puts the very same dirt on your property against your will — or even with your agreement are just using your property as an unapproved disposal site — then they have illegally dumped *solid waste*.

The other exception is for <u>waste generated as a byproduct of the oil and gas</u> <u>exploration or production business</u>. This waste is generally regulated by the Texas Railroad Commission and is not covered by this law.

So, if a wastewater hauler takes a truckload of produced salt water to an injection well, the driver is operating within the RRC permit and his actions are not subject to this law.

<u>But</u> if the driver simply opens the drain on his truck as he drives down a country road and lets the same wastewater flow out as he goes, then he's probably guilty of felony water pollution under TWC Section 7.145, even though THSC Chapter 365 still cannot be used.

RRC field officers occasionally appreciate local peace officers making arrests in

these cases, or they may be totally indifferent. Please see more on using local officers to stop oil and gas waste dumping in the next section. (The State Legislature has provided TWC Chapter 29 and Texas Natural Resources Code Sec. 91.002 to deal with dumping of oil and gas waste. There's more on this below.)

Section 365.012. Illegal Dumping; Criminal Violations

This is the heart of this particular law and sets out the violations and the penalties, most of which are based on the *weight* or *volume* of the solid waste or litter dumped. There are four essential ways to violate this law:

- (1) A person commits a crime if the person "... disposes or allows or permits the disposal of litter or other solid waste at a place that is not an approved solid waste site..." including on private property. You can't dump on your own property. In fact, you can't commit any crime on your own property.
- (2) A person commits a crime if the person "... receives litter or other solid waste for disposal at a place that is not an approved solid waste site..." regardless of whether he owns the waste being disposed or the site being used. Thus I could be charged with this violation for receiving waste to be dumped on your property, which would be a great way for me to make money, unless your local peace officers stop me.
- (3) A person commits a crime if the person "... transports litter or other solid waste to a place that is not an approved solid waste site for disposal at the site." Officers generally let the driver actually dump something to prove the "for disposal at the site" aspect of the violation.
- (4) A person commits a crime if the person uses someone else's dumpster without permission. The language at Section 365.012(j) reads: *The offenses prescribed by this section include the unauthorized disposal of litter or other solid waste in a dumpster or similar receptacle*. Using this law to deal with unauthorized dumpster use makes more sense that to file a theft of services case under the Penal Code. Here the officer just uses the *weight* or *volume* of what was disposed to file the misdemeanor or felony complaint.

Section 365.012 then lists the appropriate charge, based on the weight or volume of

the solid waste or litter being disposed, received for disposal, or transported for disposal at an unauthorized site. You can read through provisions of (d) through (g) in this section of the law, but we've included a reference chart of the penalties at the end of this section.

Since the charges are based on the *weight* or *volume*, enforcement officers often carry fish scales and tape measures with them to develop evidence in the field of the *weight* or *volume* that has been dumped. If the violator has a previous conviction (anytime) under this law, the penalties for conviction on the current charge can be elevated to the next level at the time of sentencing.

Under the section of the Code of Criminal Procedures pertaining to this law (Chapter 59 FORFEITURE OF CONTRABAND), a vehicle used in this crime may be seized upon the second conviction, if there has been proper warning issued concerning possible vehicle seizure after the first conviction. However, as the required post-first-conviction warning is seldom made, seizing a vehicle used in illegal dumping will practically never happen.

There is also a statutory language problem affecting forfeitures at CCP Sec. 59(2)(B) (v). This restricts forfeiture in THSC Chapter 365 cases to ONLY following convictions for <u>Class A Misdemeanor</u> violations. Since virtually all commercial illegal dumping cases of significance are filed at the State Jail Felony level, a conviction would apparently preclude and forfeiture of a vehicle or other equipment used in the commission of the crime.

Consequently, a common enforcement practice is to impound any vehicle used in a dumping case as evidence until the case is resolved, thus putting additional pressure on the violator to settle the case. Impounding a cement truck and arresting the driver for washing out the tub in a borrow ditch, for instance, can immediately stop such practices as the word spreads. "Keep the driver," the company will say. "Just tell us what we have to do to get our equipment back, and we'll do it." Releasing the truck, which is evidence in the case, would be determined by the District Attorney.

The same charges and penalties for dumping on the ground apply to a person using

somebody else's dumpster to dispose of solid waste or litter without that person's permission. Using this provision [Section 365.012(j)] is generally easier than using the Theft of Services provisions at Sec. 31.07 of the Penal Code. Based on the value of the dumpster space being "stolen," the violation if handled under the Penal Code will be a Class C or Class B misdemeanor — and will take some calculating with the provider and user of the service to determine the amount stolen. The officer can avoid this by charging the violator using THSC Sec. 365.012(j) based on the *weight* or *volume* of waste disposed in the dumpster. Since such dumping is done for the purpose of avoiding paying for proper disposal, anything weighing over 5 and under 200 pounds will be a Class A misdemeanor and anything weighing over 200 pounds — or having a volume of over 200 cubic feet — will be a State Jail Felony.

Exemptions: When This Law Can't Be Used

There are several issues in this section that officers have had to learn to handle.

- (1) First, this entire law does not apply to the **temporary storage** for later disposal of waste by a person on land owned by that person or his agent. For instance, if a roofer is accumulating waste shingles from several roofing jobs before making a trip to the landfill for proper disposal (to avoid paying minimum land fill fees for each small load, for instance), the roofer may temporarily store the waste on his own property. The problem is that the term "temporary storage" isn't defined in this law, so officers have devised skillful means to determine if the roofer is actually engaged in "temporary storage" or is dumping the waste on his own property (a violation) and lying. Usually devising some sort of form to be used that will give proper notice to the potential violator, memorialize the discussion, and provide evidence to the prosecutor if she finds herself in court actively prosecuting the case is a good idea. If you would like to read an interesting decision concerning temporary storage — JAMES F. GLENDENING, Appellant V. THE STATE OF TEXAS, Appellee — it's case number No. 05-06-00001-CR in the state criminal court appeals system. It is also available in our book Illegal <u>Dumping Enforcement, Texas 2022 Edition.</u>
- (2) The second issue revolves around the topic of whether an individual can **dump** on his own land. Generally, the answer is "No." However, an individual may be

able to avoid *criminal* liability for disposing of some domestic waste on his own property, <u>if</u> he follows <u>all four</u> of the items listed at Section 365.012(I). Also, the possible exception <u>only</u> applies to an *individual*, and not a *person*, which term includes companies, organizations, partnerships, and other groups of people as well as individuals. So if you are a company seeking to use this exemption, forget it. If you look at the four criteria in the law, they really boil down to a few concepts.

- (a) The possible exemption *only* applies to individuals;
- (b) The individual's waste <u>can't</u> have been generated from a commercial activity <u>nor</u> can its disposal be for a commercial purpose (remember that the definition of "commercial purpose" is "the purpose of economic gain," which can cover a wide range of activities); and,
- (c) The individual's waste must have been generated on <u>land</u> (not "property or "premises") the individual <u>owns</u> and disposal has to be on <u>land</u> he <u>owns</u>, but not necessarily the same property.

Pretty simple, except there is no definition of the word "generated" anywhere in this law. In Harris County, where probably the majority of local illegal dumping cases are prosecuted in our state, the District Attorney's Office has decided that the only thing that is "generated" on land (as opposed to "property" or "premises") is plant growth. Everything else was first brought onto the land, to their way of thinking, and not "generated" there. So only what grew there was actually "generated" on the land. Frankly, I haven't been able to find anyone else in Texas that thinks like they do, except me. I happen to agree with this logic.

Elsewhere in the state, the officers generally ask the individual, "Why did you dump that stuff on your own land?" And the answer is almost always, "To save disposal costs! Why else?" To which the officer replies, "Very interesting. Turn around and put your hands behind you, please," assuming correctly that the individual has just confirmed that his dumping was for the purpose of economic gain.

Also note that the TCEQ enforces a series of solid waste rules that impose administrative penalties on individuals improperly disposing waste on their own land. Their longer list of criteria begins with the same four requirements detailed by the law in this section but goes on to include other factors (some of which are separate criminal violations themselves). So if the person cannot be stopped from disposing waste on his own land using this particular law, don't despair. He is sure to be violating a *municipal ordinance*, *health nuisance law*, some *other criminal environmental law*, such as those prohibiting water pollution, or committing some other transgression that the your community can use to stop the dumping. This provision is simply never a problem when the circumstances are analyzed.

- (3) Third, there is a provision allowing a city or county to pay a \$50 reward for information leading to a successful prosecution. This is totally unnecessary, a waste of money, and I've never seen any city or county do it. Just let the word get out that your jurisdiction is enforcing illegal dumping and give the public a phone number to call. You'll be covered up with cases.
- (4) Finally, there's a slightly difficult-to-follow provision at 365.012(o) that can actually be the basis of a useful public education process following a storm. The original idea expressed there is for a waste *generator* to escape criminal dumping liability for his *hauler's* illegal dumping, if the generator has a signed statement from the hauler that the hauler will dispose of the waste legally. The generator also has to have the hauler's apparently valid Texas driver's license number. I can see a public education brochure for citizens faced with hiring debris haulers or roofers who will generate and dispose of debris with a statement for the hauler to sign and leave behind with the generator/homeowner. The need to have an apparently valid Texas driver's license number might also reduce the number of out-of-state vultures who frequently flock to disaster areas to do shoddy repair work, dumping debris in the process.

Section 365.013. Rules and Standards; Criminal Penalties

This generally ignored provision mandates the TCEQ to establish rules for "processing and treating litter disposed in violation of this subchapter." A violation of those rules would be a Class A misdemeanor (a fine to \$4,000 and/or up to a year in jail).

The trouble with this is that I can't find any such rules ever having been promulgated by the TCEQ or the TNRCC, nor can any of my friends at the agency. Solid waste management rules are generally promulgated under THSC Chapter 361 SOLID WASTE DISPOSAL ACT rather than Chapter 365. Including Chapter 365 in the promulgating language would create another of those places where *breaking a certain administrative rule* would be, at the same time, *a criminal offense*.

Personally, I think it would be great if violation of any solid waste rule that had specifically been crafted to further THSC Chapter 365 was an A misdemeanor, but that is not the case at present. If you read those sections of the <u>Texas Register</u> — the official publication for many state things, including rule changes — concerning solid waste rule adoption, you'll not find where any of the major rules the TCEQ has promulgated makes any reference to its having been created to further THSC Chapter 365.

There are some aggressive prosecutors in the state who would file an A misdemeanor for a rule violation anyway — such as for a violation of 30 T.A.C. 330 Municipal Solid Waste — but I think a decent defense attorney would throw a wrench into the works pretty quickly. All he or she would have to do is read those sections of the Texas Register describing the adoption and modification of Rule 330 to see that THSC Chapter 365 is not cited as statutory authority for the rule. The defense attorney will fine several other Texas laws cited there, but not THSC Chapter 365.

Section 365.014. Application of Subchapter; Defenses; Presumptions

There are two agriculture-related exemptions that I can find in the various Texas criminal environmental laws. The first was back in THSC Chapter 343 — Abatement of Public Nuisance — which removes all land registered by the county tax assessor as agricultural from the provisions of that particular chapter.

The other is the exemption found here in Chapter 365 that removes its application to farmers

- (1) in handling anything necessary to grow, handle, and care for livestock; or
- (2) in erecting, operating, and maintaining improvements necessary to handle, thresh, and prepare agricultural products or for conservation projects.

So that old tractor sitting out in the field is not considered by this chapter to be illegally dumped; however if the farmer gives it to his nephew for scrap and the kid

dumps it in a borrow ditch down the road, then the tractor becomes "discarded or wornout manufactured materials and machinery" as detailed in the definition of "litter" and is then subject to this law.

Also, this section establishes that anything weighing over five pounds — or having a volume of over 13 gallons — dumped from a commercial vehicle is being discarded for a commercial purpose and is, therefore, at least an A misdemeanor. The "13 gallons" term is probably an error. The law already defines an A misdemeanor for dumping over 5 gallons or 5 pounds, so I'm not sure where the "13 gallons" criteria came from. Of interest, in all of Texas laws and codes, the term "13 gallons" appears only here. Maybe the drafting attorney was not aware of the penalty range already established for A misdemeanor commercial dumping ... or maybe he thought a 13 gallon garbage bag made more sense. I've never heard of a case making reference to this volume.

Another item in this section sets the criteria to escape criminal prosecution for an innocent landowner who has been dumped on by somebody else. Of course, the landowner is still responsible for cleaning his property, even if he didn't do the dumping, unfairly or not.

This raises the interesting question of finding resources to clean properties where dumping has occurred. Dumped material has to be removed to a landfill or other authorized disposal place, but who is going to pay for its removal? I'd suggest that picking the person to fund the clean up should follow this order:

- (1) The criminal who dumped the waste, either through officer-encouraged pretrial "voluntary" clean up or court ordered abatement;
- (2) An accused in another case, who cleans up not only his own dumping but also dumping done by unknown violators elsewhere, either as a pre-trial show of good faith to the judge or as part of an agreement to have his own case dismissed;
- (3) The city or county using supplemental environmental project funds (see Texas Water Code Section 7.067) generated from other enforcement cases;
- (4) The city or county using state solid waste implementation grant funds obtained through their regional planning commission ("COG");
- (5) The landowner where the material was dumped;

- (6) The taxpayers;
- (7) Nobody ever cleans it up This happens all too often in Texas.

Sometimes local church groups, volunteers, or community service folks can provide additional labor where needed. However, most of such linking activity is not done on an organized basis.

The dumped waste laying around waiting for a ride to the landfill may well constitute a health or safety problem for the neighbors. It may also easily be a violation of a municipal ordinance or another criminal law. For sure, it's a violation of that part of 30 Texas Administrative Code 330 (TCEQ Rule 330) that, among other things, requires waste disposal sites to be authorized by the state, or be subject to state administrative and local civil enforcement. So, something has to happen to force the removal of these materials. They can't just lie there. I suggest that the sequence above for funding their disposal is a sound one. Leaping immediately to (6) on the above list seems a poor public policy when there are so many better options, including getting serious about local enforcement and using court-ordered abatement. But I guess (6) is better than (7).

Simply treating old dumps as long-standing Public Health Nuisances is probably the best approach, providing the JP actually applies the "each day of a ongoing violation is a separate offense" provision of THSC Sec. 341.091(c).

Sec. 365.017. Regulation of Litter in Certain Counties.

This provision is, to my way of thinking, unnecessary and politically unlikely to be much used. It allows a commissioners court to adopt county regulations that can be used to force a person to remove litter dumped on his own land, upon 30 days notice. The county or district attorney presses a law suit to force compliance. This provision become unnecessary if the Local Health Authority will simply follow the process at THSC Sec. 341.012 (described above) and force the abatement the nuisance, as mandated by the State Legislature.

In the remote possibility that the commissioners court is itching to adopt a waste abatement order, they would do better to adopt the process detailed in THSC Chapter 343 at Subchapter C. The detailed provisions for notice and hearing there are very good and would probably save the county a lawsuit, especially following the state supreme

court's ruling in *City of Dallas v. Stewart* concerning takings of alleged nuisance property.

However, the chance that a county attorney will draft a county regulation with all of the protections found in THSC Chapter 343, Subchapter C seems pretty remote to me. If you want your county to direct the property possessor to abate the mess, use THSC Sec. 341.012; if your want the county to do the abating itself, adopt the procedures at THSC Chapter 343, Subchapter C. Jumping directly to "the county will abate" is financially unsustainable.

Section 365.034. County Regulation of Litter Near Public Highway; Criminal Provision.

I've yet to see a commissioners' court act under this provision, although I've seen a few run from it and refuse to act. Before deciding to press yours to become the first to adopt these provisions, please go back and read THSC Chapter 343, which also applies to your county right now. It sets a criminal violation for the activities that this section would try to control through an order from the commissioners court. Since Section 343 is already the law, perhaps it would be easier to use it, or the old favorite section: THSC Sec. 341.013(c).

Those are the major provisions of using THSC Chapter 365 to fight illegal dumping, and I'd reinforce that this law is the best starting place for your police and sheriff's deputies to begin the local enforcement process ... at least the best after using THSC Sec. 341.013(c) to reduce public health nuisances. The remaining provisions, such as establishing an A misdemeanor for second violations of littering at Lake Lavon, I'll leave you to dig out on your own.

THSC Chapter 365 also contains provisions against something called "lighted litter," such as disposed burning cigarettes, cigars, matches, and such things. If this discarded material starts a fire, then the charge against discarding "lighted litter" apply. Of course, there is the question of the discarded evidence having been destroyed in the fire s well as the question of "Should an officer see a person discard lighted litter, should he wait until a fire starts to intervene ... or should he just charge the Class C misdemeanor for small volume dumping?" These "lighted litter" provisions were adopted in an attempt to assign responsibility for actions that start grass fires, but it's hard for me to see how they

might actually work on a practical level. They are, to my knowledge, totally ignored.

If local police are new to illegal dumping and anti-pollution enforcement, THSC Chapter 365 is the one law you'll want to encourage them to use, along with THSC Chapter 341 to reduce Public Health Nuisances. It penalizes the dumping; THSC Chapter 341 penalizes the person for (in the process of dumping) creating a Public Health Nuisance ... or for refusing to abate a Public Health Nuisance on property he possesses, no matter how it got there.

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 o	f economic gain")

(a) 5 pounds or less; or, having a volume of 5 gallons or

less

Class C Misdemeanor (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 under 100 cubic feet

Class B Misdemeanor (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 under 200 c.f.

Class A Misdemeanor (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

State Jail Felony (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

Class C Misdemeanor (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 under 200 c.f.

Class A Misdemeanor (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

State Jail Felony (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

State Jail Felony (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)

<u>Texas Water Code Chapter 7 (Subchapter E)</u>

Here's more criminal environmental law your local police, deputies, constables, fire marshals and others can use. TWC Chapter 7 itself is a long but very valuable law to use in cleaning your city or county. It contains the procedures that the TCEQ uses to enforce administrative rules (Subchapter C); the procedures the Attorney General or your city or county attorney would follow to bring civil suits against violators (Subchapter D); and, most importantly for our understanding, about 40 additional criminal environmental laws that your local peace officers can use to clean your community (Subchapter E).

We're not going to go through all of these criminal laws found in Subchapter E for reasons of space, but I do want to point you to several that might be useful.

First, note that Subchapter E addresses many issues other than water pollution, even though this is part of the Texas Water Code. Why is that? Back in 1996 the State Legislature pulled together these 40-or-so environmental crimes from different statutes and assembled them in one place where you could find them: TWC Chapter 7, Subchapter E. Here you'll discover the state criminal laws on water pollution, hazardous waste mishandling, medical waste dumping and transporting, used oil dumping, leadacid battery dumping, and a number of other forms of pollution, even including the state laws on illegal outdoor burning.

Generally, the structure followed throughout TWC Section 7 (Subchapter E) is the same in each section: one group of laws will set criminal penalties for specific acts, and the provisions immediately following will describe additional tough penalties for virtually the same act when accompanied by injury or death to another person (generally not including first responders).

The fines throughout this section are often very large, especially when compared to the standard \$10,000 fine assessed in Texas in most felony cases. For example, the range of fines for an <u>individual</u> convicted of violating TWC Sec. 7.145 — felony water pollution — is from \$1,000 to \$100,000 [and up to five years confinement]; for a <u>company or association</u>, the maximum fine for the same violation is \$250,000. For water pollution, each day of an ongoing violation is considered to be a separate offense. Note also that for most of these charges, the maximum penalties for a subsequent conviction of the same violation doubles (TWC Section 7.188).

As an inducement to local governments to enforce these criminal laws, TWC Section 7.190 establishes a state policy of allowing local government to retain 1/2 to 3/4 of any fine money.

Water Pollution

Water Pollution Has Long Been a Problem

Consider this story from the life of the prophet Elisha from the book of 2nd Kings 2:19-25. This took place while the prophet was in the town of Jericho. He had just become the primary prophet for Israel following Elijah's ascension to heaven in a whirlwind. These are some of my favorite Bible verses:

The men of the town said to Elisha, "Look, the town is a pleasant place to live in, as my lord can see; but the water is bad and the land causes bereavement." He responded, "Bring me a new dish and put salt in it." They brought it to him; he went to the spring and threw salt into it. And he said, "Thus said the LORD: I heal this water; no longer shall death and bereavement come from it!" The water has remained wholesome to this day, in accordance with the word spoken by Elisha.

From there he went up to Bethel. As he was going up the road, some little boys came out of the town and jeered at him, saying, "Go away, baldhead! Go away, baldhead!" He turned around and looked at them and cursed them in the name of the LORD. Thereupon, two she-bears came out of the woods and mangled forty-two of the children. He went on from there to Mount Carmel, and from there he returned to Samaria.

This is scripture that will make you break out your Bible to see if it is being correctly quoted. Today we're not able to do as the prophet Elisha did and easily "heal" polluted water through the Lord's intervention and salt. Our tools are much more limited in dealing with both problems he faced. As to cleaning polluted water, in fact, there are some bodies of water — such as underground aquifers — for which there is no known way to remove pollution other than the Lord's direct intervention. Once an aquifer becomes fouled, it will probably stay that way for a very long time, so we have to stop pollution before it happens.

I'm not sure what this verse means in dealing with annoying teenagers, however.

One rabbi observed that this was a double miracle: there was no forest where this took place nor were bears known to be in the area. Another rabbi observed that these were

the children of men who were making money hauling clean water to the folks living where the water had been polluted. The kids had been told by their fathers that the good times were over and they would have to go to work. Personally, speaking as a bald man, I find great comfort in the conclusion that the Lord will go to great lengths to help us deal with unruly teens.

TWC Section 7.145. Intentional or Knowing Unauthorized Discharge

This section establishes a five-year felony for individuals for polluting water in the state. You can read the language of this statute online. Note that such terms as "water," "waste," "pollutant," "pollution," and "point source" are all technical terms with exact meanings. "Water," for instance, includes the banks and beds of all watercourses, whether they are dry or wet, and is defined at TWC Chapter 26.001(5) as

Groundwater, percolating or otherwise, lakes, bays, ponds, impounding reservoirs, springs, rivers, streams, creeks, estuaries, wetlands, marshes, inlets, canals, the Gulf of Mexico, inside the territorial limits of the state, and all other bodies of surface water, natural or artificial, inland or coastal, fresh or salt, navigable or nonnavigable, and including the beds and banks of all watercourses and bodies of surface water, that are wholly or partially inside or bordering the state or inside the jurisdiction of the state.

So if a place is wet, or ever thought about being wet, it's probably included in the definition of "water"— including some very unusual places, such as as roadside borrow ditches. There are two ways to commit felony water pollution, and the second one is easier to prove than the first for most local governments:

(1) If a person discharges a *waste* or a *pollutant* into or adjacent to *water* that *pollutes* or threatens to pollute the water, and has no permit to do so, he has committed the violation. All the words in italics have highly specific meaning and whose definitions can be found in Chapter 26 of the Texas Water Code. Notice that the term "adjacent to" is undefined, but is generally taken to mean "up hill from" rather than "contiguous to." If your officers use this set of elements, they will have to take tests or otherwise develop evidence to show that the water was "polluted" or was threatened with becoming "polluted" by the dumper's activities. Where cases are based on accurate testing being

- done, trouble can rapidly appear for inexperienced local officers. Where testing looks unavoidable, be guided by the TCEQ's or Parks & Wildlife's Environmental Crimes Unit.
- (2) A second way to prove this crime is: If a person discharges any waste or pollutant from a point source [defined at TWC Section 26.001(21) as any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants or wastes are or may be discharged into or adjacent to any water in the state] in violation of TWC Chapter 26, then the person has committed the felony.

Note that you don't have to prove that the water was actually polluted under the second approach, just that the violator used a pipe, ditch, truck, wheelbarrow, or some other *point source* to get the waste <u>into</u> or <u>adjacent to</u> the water (which may be a dry ditch or creek), and that he violated TWC Chapter 26 in the process. The easiest provision of TWC Chapter 26 to show as having been violated is often TWC Sec. 26.121(a)(1):

Sec. 26.121. UNAUTHORIZED DISCHARGES PROHIBITED.

- (a) Except as authorized by the commission, no person may:
 - (1) discharge sewage, municipal waste, recreational waste, agricultural waste, or industrial waste into or adjacent to any water in the state.

So a methamphetamine cook (or city councilman) discharging human or chemical waste out of a pipe from his trailer lab/home into the borrow ditch is actually "discharging a *waste* or *pollutant* from a *point source* in violation of TWC Chapter 26."

As mentioned above, the potential penalties for an individual or company or association violating this law are pretty stiff. All of this is enforced by your local police and prosecutors ... or ignored by them. The voters of your community will decide how these cases are approached over time, but my bet is that as our population growth comes into direct conflict with our need for pure water, prosecutors will come under considerable pressure to take more of these cases. After all, local governments have few real options on managing water: (a) conserve or ration its use and (b) assure that it

remains unpolluted. All populations of living things — animals and plants alike — are dependent on the quality and availability of water. Unless we can become more effective in protecting and using water resources, our population growth eventually will be limited.

TWC Section 7.147. Unauthorized Discharge.

This is the special misdemeanor charge for water pollution. To violate this law, one has to discharge the waste or pollutant *into* the water (not just adjacent to it); that waste or pollutant has to *pollute* or *threaten to pollute* the water (so some sort of samples or other evidence of pollution will have to be discovered); the pollution can't be a trace amount of waste motor oil that rainwater might carry off a gas station parking lot (for instance); and, the violator can't have a permit to discharge the waste or pollutant.

Many people, including me, have concluded that it's often easier to prove the felony at TWC Section 7.145 rather than this misdemeanor, since you have to prove the water was <u>actually polluted</u> or was <u>threatened to be polluted</u> by the accused in order to use the misdemeanor statute.

Punishment for individuals convicted of violating this misdemeanor statute is a fine of \$1,000 to \$50,000 and up to one year in jail. Punishment for non-individual offenders (companies and such) is a fine of from \$1,000 to \$100,000. Considering that most misdemeanors carry a maximum fine of \$4,000, these possible fines are a little astonishing, and, if actually applied, would be enough to stop most water pollution.

Remember that the Texas Litter Abatement Act (THSC Chapter 365) also covers dumping into water as well as onto the land (including banks of creeks). Many officers use that law rather than misdemeanor and felony water pollution statutes to avoid having to prove that actual or threatened *pollution* took place. Just prosecute the offender for one or more Class A misdemeanors or State Jail Felonies for the illegal dumping violations.

TWC Section 7.152. Intentional or Knowing Discharge and Knowing Endangerment

This is another water pollution criminal statute. In this situation a person makes a discharge into or adjacent to water, and by that act knowingly places "another person in imminent danger of death or serious bodily injury," unless they had a permit to make the discharge. The penalty for an individual is a fine of from \$1,000 to \$250,000 and/or up

to ten years confinement. If the potential injury or death occurs, the penalty increases. The penalty for a non-individual violator is a fine of \$2,000 to \$500,000 or more of injury or death actually occurs (\$5,000 to \$1,000,000).

Because of the need to prove the "knowingly" level of intent on the endangerment section of this law, this violation is seldom charged in Texas. When the discharge results in someone being harmed, there is perhaps this next approach that will be more successful.

TWC Section 7.153. Intentional or Knowing Discharge and Endangerment

Remove the "knowingly" intent from the endangerment section from TWC Sec. 7.152, and you arrive at the next lower level of violation. Here the person intentionally or knowingly discharged the waste or pollutant into or adjacent to water, and in so doing put another person in imminent danger of death or serious bodily injury <u>but</u> had no intent for this endangerment to happen. The penalty for an individual convicted of this is a fine of from \$1,000 to \$250,000 and/or up to five years confinement. If the potential injury or death occurs, the penalty increases. The penalty for a non-individual violator is a fine of \$2,000 to \$500,000 or more if injury or death actually occurs (\$5,000 to \$1,000,000). As with all of these anti-pollution crimes defined in TWC Chapter 7, Subchapter E, there is no requirement for the violator of this particular statute to know that he was committing a crime:

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 Section 7.154. Reckless Discharge and Endangerment

This violation is most commonly charged when a waste or pollutant is being recklessly discharged into or adjacent to water <u>and</u> somebody is put in immanent danger of death or serious bodily injury in the process, unless the discharge is done under a permit. A guy was reckless in his operation, discharged a waste or pollutant into or adjacent to water, and somebody got hurt in the process. The penalty for an individual is a fine of \$1,000 to \$100,000 and/or confinement not to exceed a year, more if there is an actual injury or death. For a non-individual the fine is from \$1,000 to \$250,000 and up. Using this law is becoming a favorite when there is a combination of

(1) waste being discharged into or adjacent to water; and, (b) somebody is threatened with injury or death or actually sustains injury or death.

For example, in one case a trailer court operator in the unincorporated part of the county had no sewage processing system, so he just ran the pipes out back to where a natural wastewater pond was being created. As soon as the wastewater hits the ground, it becomes part of the "water" regulated by the state (see the definition of "water" above). Moreover, discharge of the sewage, from a point source (i.e., the pipes) was being done without a permit (i.e., in violation of TWC Chapter 26.121). So all the elements for a felony water crime under TWC Section 7.145 were in place. But there's more. In this case the children of the workers living in the trailers were playing in the drainage pond, thereby being put in immanent danger of serious death or serious bodily injury from the cholera or hepatitis they might contract. In this actual case, the operator of the trailer court resisted fixing the problem when encouraged to do so through several THSC Chapter 341 violations. Faced with a criminal conviction under TWC Section 7.154 against their company and a fine of \$1,000 to \$250,000, he quickly changed his mind, brought the facility into compliance, and paid a smaller fine. There's always a level of enforcement that a local government can use to stop pollution, once it finds the political will to do so.

All of these endangerment statutes also were accompanied by filings of TWC Secs. 7.145 or 7.147. Those cover the basic pollution charge; the endangerment statutes are extra because someone was hurt, wither intentionally or accidentally.

Hazardous Waste

TWC Sections 7.162 and 7.163 — both of which contain a series of related violations — address various crimes pertaining to hazardous waste. Following the standard structure of the Subchapter E, the first of these sections (Sec. 7.162) describes various crimes committed mishandling hazardous waste, and the second section (Sec. 7.163) covers approximately the same activities when an individual is also put in immanent danger of death or serious bodily injury. It doesn't take much for a waste to met the criteria of being "hazardous": very low or very high pH in a substance will cause a waste to be classified as hazardous, as will a flashpoint under 140 degrees Fahrenheit, and any number of other criteria.

The crimes covered in these sections include such things as (a) transporting, for

storage, processing, or disposal, any hazardous waste to any location that does not have all required permits (fines of \$1,000 to \$50,000 and/or ten years confinement); (b) the actual storage, processing, or disposal itself (same penalty); and, (c) various related paperwork crimes. An example of the last would be transporting without the required manifests, which is a crime punished by a fine of \$1,000 to \$50,000 and/or two years confinement.

Crimes involving hazardous waste almost always have multiple charges filed by the officer. Additionally, if your peace officers suspect that they are dealing with a hazardous waste case, they should immediately contact the Environmental Crimes section at the TCEQ and seek the involvement of one of their trained staff. Dealing safely and effectively with hazardous waste cases should be considered beyond the capability of all but the most experienced local environmental enforcement programs. When the violation is included in those listed in TWC Section 7.163 and a death has occurred, the fines involved may be as high as \$1,500,000 and confinement for a convicted individual may be as long as thirty years. These are the highest potential penalties available for any environmental crime in Texas.

This would be a good place to mention that environmental crimes often have components that can be prosecuted as more familiar Penal Code violations. These include such things as fraud, theft, manslaughter, falsification of government documents, and assault. Your police agency will probably be much more familiar with these violations than those covered by the various environmental laws of the state. If they decide to prosecute for a related violation under the Penal Code and ignore the environmental crime, be happy!

Medical Waste

TWC Sections 7.164 through 7.171

These provisions cover the various crimes that one can commit with medical waste and set the criminal penalties for individuals and non-individual violators. These several laws make a distinction between "large" and "small" quantity generators of medical waste, the cut-off being the generation of fifty pounds of medical waste a month.

"Medical waste" is defined at 30 T.A.C. Sec. 326.3:

30 T.A.C. Sec. 326.3 Definitions.

- (23) Medical waste--Treated and untreated special waste from health care-related facilities that is comprised of animal waste, bulk blood, bulk human blood, bulk human body fluids, microbiological waste, pathological waste, and sharps as those terms are defined in 25 TAC §1.132 (relating to Definitions) from the sources specified in 25 TAC §1.134 (relating to Application), as well as regulated medical waste as defined in 49 Code of Federal Regulations §173.134(a)(5), except that the term does not include medical waste produced on a farm or ranch as defined in 34 TAC §3.296(f) (relating to Agriculture, Animal Life, Feed, Seed, Plants, and Fertilizer), nor does the term include artificial, nonhuman materials removed from a patient and requested by the patient, including, but not limited to, orthopedic devices and breast implants. Health care-related facilities do not include:
- (A) single or multi-family dwellings; and
- (B) hotels, motels, or other establishments that provide lodging and related services for the public.

"Sharps" defined at 25 T.A.C. Sec. 1.132 include

- (44) Sharps--Sharps include, but are not limited to the following materials: (A) when contaminated: (i) hypodermic needles; (ii) hypodermic syringes with attached needles; (iii) scalpel blades; (iv) razor blades, disposable razors, and disposable scissors used in surgery, labor and delivery, or other medical procedures; (v) intravenous stylets and rigid introducers (e.g., J wires); (vi) glass pasteur pipettes, glass pipettes, specimen tubes, blood culture bottles, and microscope slides; (vii) broken glass from laboratories; and (viii) tattoo needles, acupuncture needles, and electrolysis needles;
- (17) **Contaminated**--The presence or the reasonably anticipated presence of blood or those body fluids as defined elsewhere in this section.

The "health-care related sources" defined at 25 T.A.C. Sec. 1.134 include:

(1) ambulatory surgical centers; (2) abortion clinics; (3) birthing centers; (4) blood banks and blood drawing centers; (5) clinics, including but not limited to medical, dental, veterinary; (6) clinical, diagnostic, pathological or biomedical research laboratories; (7) educational institution health centers; (8) educational institution research laboratories; (9) electrolysis facilities; (10) emergency medical services; (11) end stage renal dialysis facilities; (12) freestanding emergency medical care facilities; (13) funeral establishments; (14) home and community support services agencies; (15) hospitals; (16) long term care facilities; (17) facilities providing mental health and intellectual disability services, including but not limited to hospitals, schools, and community centers; (18) minor emergency centers; (19) occupational health clinics and clinical laboratories; (20) pharmacies; (21) pharmaceutical manufacturing plants and

research laboratories; (22) professional offices, including but not limited to the offices of physicians, dentists, and acupuncturists; (23) special residential care facilities; (24) *tattoo studios*; and (25) veterinary clinical and research laboratories.

These definitions can be very useful to local officers. For example, when an individual closes his tattoo studio and throws his kit in the dumpster, he can be charged with a medical waste crime under this section (since the tattoo needles are included in the definition of "sharps" and the tattoo studio is a "health-care related source" as long as the sharps can be shown to be "contaminated"). He can also be charged with illegal dumping under THSC Chapter 365. Penalties for violating laws in this section run from the very small (for example, an individual who transports a small quantity of medical waste without a manifest is subject to a fine not to exceed \$1,000) to the very large (an individual who intentionally releases medical waste without a permit, and some other person dies or is seriously injured as a result, faces a fine of \$2,000 to \$500,000 and/or confinement to ten years).

Used Oil Violations

TWC Section 7.176. Violations Relating to Handling Used Oil

Just about anything your Daddy taught you to do with waste oil is a five-year felony under this law. This includes pouring used oil on weeds, fire ant hills, fence posts, or rock roads for dust suppression. It also includes pouring it down a drain, into a septic tank, a drainage ditch, a lake, or otherwise putting it onto land or into water. It also includes putting it in dumpsters, trashcans and any other thing that will result in it winding up in a landfill. It also includes carefully pouring the waste oil back into the quart bottles and scattering them around your backyard. It also includes putting it on your dog to cure mange and kill ticks as well as carefully daubing it on your children to cure ringworm and kill their ticks too, just to name a couple of favorite practices in some parts of Texas.

It also includes violating the detailed provisions of 30 T.A.C. 324 (Rule 324 Used Oil Standards), including the state standards for used oil storage, and the federal Standards for the Management of Used Oil (40 C.F.R, Part 279).

If you do anything but recycle waste motor oil, you!re probably going to violate this felony law. The fine is from \$1,000 to \$50,000 and/or confinement not to exceed five

years for an individual's first offense. If an individual has been previously convicted of this same violation, the repeat conviction carries a possible fine of \$1,000 to \$100,000 and/or confinement not to exceed fifteen years.

The State Legislature is serious about preserving our water resources, and just a little used oil in the wrong place can ruin a lot of it. Because the penalties for violating this law are so high, many jurisdictions will prosecute small quantity violations of this law as illegal dumping under THSC Chapter 365 or as misdemeanor water pollution under TWC Section 7.147. However your community decides to respond, using this law to get waste oil out of your community and in its proper place makes good sense.

Lead-Acid Batteries

TWC Section 7.185. Knowing or Intentional Unauthorized Disposal of Lead- Acid Batteries

This section establishes a **Class A misdemeanor** (fine to \$4,000 and/or confinement to one year) for each lead-acid battery and for each day that this section is violated. These are such things as car, motorcycle, lawnmower, and boat batteries. This section mandates that one follow the proper handling procedures set forth in THSC Section 361.451. That law says that there are three ways for an individual to dispose of a lead-acid battery: (1) giving it to a battery retailer or wholesaler; (2) giving it to a secondary lead smelter; or, (3) giving it to a state or federally authorized collection or recycling facility. Lead-acid batteries are dangerous and need to be properly discarded. Throwing them around out back should earn a few Class A misdemeanors for the violator under this law. Instead of using this specific statute, one could use the Texas Litter Abatement Act, or one of the water pollution laws, or a municipal code, or some other approach to solve the problem. There is always more than one way to stop illegal dumping.

Illegal Outdoor Burning

Finally, this Subchapter addresses felony and misdemeanor illegal outdoor burning. Like the other items covered in TWC Chapter 7(Subchapter E), illegal burning violations should be enforced at the local level. The laws against <u>felony</u> illegal burning are easy to understand and apply; those against <u>misdemeanor</u> illegal burning are now officially hopelessly confusing.

TWC Section 7.182. Reckless Emission of Air Contaminant and Endangerment TWC Section 7.183. Intentional or Knowing Emission of Air Contaminant and Knowing Endangerment

These two felony laws address emitting an "air contaminant," which is defined at THSC Section 382.003(2) as

"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."

If you release any of these items into the air without a permit or other state authorization, and in doing so you place another person (other than the first responders and other officials whose job it is to be present at the scene) in imminent danger of suffering death or serious bodily injury, then you most likely have committed one of these two felonies. Convictions for either of these carries a term of confinement to five years; both carry large fines: \$1,000 to \$250,000 in the case of Section 7.182 and to \$500,000 in the case of Section 7.183 violations by an individual, with significantly greater fines for non-individuals convicted. The difference between the two revolves around whether the violator knew that he was placing another person in danger (or intended to). If he did, the proper charge is Section 7.183; if the endangerment was a byproduct of *recklessly* emitting the smoke or other air contaminant, then the proper charge is Section 7.182.

For example, suppose a person had stolen some wire and was burning off the insulation before selling it. Further suppose that his 9-year-old nephew was playing in the smoke, was asthmatic, had a reaction, and had to be taken to the emergency room. Of course the "wire burner" had no permit to release the air contaminant, and, in fact, was in violation of several rules in doing so. That set of facts would satisfy the elements for a violation of Section 7.182 in most prosecutor's eyes. In this actual case, an emergency room physician provided testimony that the child was indeed put in immanent danger of serious bodily injury, and that was sufficient for the district attorney to proceed with the case. So, if there is an air contaminant released without a permit or contrary to a rule, and somebody is hurt by the contaminant, be thinking of these two possible felony charges.

Misdemeanor Air Pollution Is a Problem

Misdemeanor air pollution is a little more complex. Under this concept, the primary way of charging this crime follows a violation of one of several *administrative rules*, often of the Texas Outdoor Burning Rule. Of course, the TCEQ could respond *administratively* to these violations, or (better) a *criminal* response could come from local peace officers. The crime being committed is a violation of TWC Section 7.177 Violations of Clean Air Act. We're particularly interested in Section 7.177(a)(5), which states:

- (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.

THSC Chapter 382 is better known as the Texas Clean Air Act. So this little snippet of law is saying, "If you intentionally or knowingly, in respect to your actions, violate a rule enacted to put the Texas Clean Air Act into effect, you've committed a crime."

The crime you've committed is a violation of this section we're discussing, Section 7.177(a)(5). The penalty for an individual for breaking this particular law is a fine of \$1,000 to \$50,000 and/or confinement for up to six months. For a person other than an individual, the penalty is a fine of from \$1,000 to \$100,000. Many administrative rules have been promulgated under the Texas Clean Air Act, but just two administrative rules are commonly involved in most TWC Section 7.177(a)(5) criminal cases for cities and counties: (1) the rule covering air nuisances; and (2) the Texas Outdoor Burning Rule.

(1) Air Nuisance

The administrative rule defining an air nuisance is found at 30 Texas Administrative Code Sec. 101.4 and reads:

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.

Enforcing violations of the above rule as a criminal act under TWC Section 7.177(5) first requires that one prove that an air nuisance is present, and this can be remarkably difficult. An air nuisance is certainly not simply an unpleasant smell. Local agencies should call in the TCEQ administrative specialists in air pollution to make this determination. If an air nuisance is found to be present, local officers can use that determination to enforce the related criminal violation of TWC Section 7.177(a)(5), or simply allow the TCEQ to handle this class of violation administratively. Except for the very largest and most sophisticated law enforcement organizations and Health Departments, proving the presence of an air nuisance is probably outside the capability of local officers.

(2) Texas Outdoor Burning Rule

The most commonly broken rule adopted under the Texas Clean Air Act is the rule created to regulate Illegal Outdoor Burning [30 Texas Administrative Code Chapter 111(Subchapter B), also known as Rule 111(Subchapter B) on the TCEQ website]. The prosecutor may ask the officer, "Where is it written that the <u>Texas Outdoor Burning Rule</u> was adopted under THSC Chapter 382?" And the officer will answer, "Why, right there in the <u>Texas Register</u> on September 3, 1996, of course, on page 8505!" If you know this obscure fact, you are well on your way to becoming as obsessed with Texas criminal environmental law enforcement as I am.

The <u>Texas Outdoor Burning Rule</u> is the administrative rule that asserts total state control over virtually all outdoor burning. If an outdoor fire is not authorized by this rule or an order from the TCEQ, it can't legally happen.

Please note well that local fire departments sometimes are under the impression that they have the authority to allow burning. This is an error; only the state can allow burning. If you encounter a fire department that thinks it has the authority to allow burning, kindly ask the officer which Texas statute he is relying on in doing this. Local fire departments "allowing" outdoor burning may well be assuming the consequences for any destruction the fire they allowed might cause under Section 111.221 (Responsibility for Consequences of Outdoor Burning) of the Texas Outdoor Burning Rule.

Some local fire departments do issue "burn permits," but these are badly

misnamed documents since no fire department in Texas can authorize or "permit" burning. What these so-called burn permits actually are is unclear, but they often seem to be an acknowledgement by the fire department that the person is going to have a fire at a particular time and place. The documents I have seen are mostly a restatement of certain sections of the Texas Outdoor Burning Rule, and these are valuable for education purposes. But given the assignment of liability in Section 111.221 for the consequences of damages from an otherwise legal fire, I'd think that local fire departments would never want to give the impression that they have authorized or "permitted" any fire. There's simply too much liability. Local fire departments should give out "information sheets" instead, or copies of the Texas Outdoor Burning Rule, which can be obtained in bulk for free from the TCEQ (regional Small Business & Local Government Assistance program).

One of the many situations this rule addresses is outdoor burning for *waste disposal*. Unless you have a permit or permission from the TCEQ, or are following this rule, you simply cannot have outdoor waste disposal fires in Texas. The rule, at Section 111.209, lists and discusses all of the various disposal fires that are authorized in Texas, and I'll just mention several of the common categories of authorized disposal fires.

- (1) Outdoor *disposal fires for commercial waste* (as is generated when City Hall is remodeled or a house is built and there's waste) are <u>never</u> authorized without a permit from the TCEQ. So when you see outside commercial debris burning, you're almost always observing a crime, no matter who's doing it.
- (2) Next consider disposal fires for domestic waste (household trash). Under the Texas Outdoor Burning Rule [See Section 111.209(1)], it is perfectly legal to burn domestic waste, on the site where it originates, from a residence housing not more that three families, when the local government (city or county) doesn't provide or authorize others to provide waste collection services at the residence. So, if you live inside a city, you most likely can't legally burn your domestic waste, because the city either provides waste collection services or has authorized some private company to provide this service. Now, if your city government has neither provided nor authorized waste collection services and I and I know of only one very tiny and remote community in south Texas that can't find a waste

collection company to hire – then you can legally burn your domestic waste inside the city limit. Out in the unincorporated areas of the county, it's the same story. Until the commissioners court *provides* or *authorizes* waste collection in the rural areas, you can legally burn your domestic waste (I only know of three or four counties where this has taken place). It makes absolutely no difference if there is already actual waste collection service available throughout the rural area, until the commissioners' court formally votes to *provide* or *authorize* the service, you can't burn your domestic waste. And, before you ask, *providing* or *authorizing* means actual collection service at the property where the waste was generated, not a citizens drop-off station somewhere in the county where you have to take your trash.

(3) The <u>Texas Outdoor Burning Rule</u> has another interesting disposal fire provision at Section 111.209(5) under which you can legally *burn brush and other plant growth* on the property where it grows. A city can prohibit this plant growth burning inside the city by ordinance. Brush burning in counties with "bad air" (i.e., those not in attainment of National Ambient Air Quality Standards) is somewhat restricted. NAAQS non-attainment counties are generally limited to major population centers in Texas. You can learn the NAAQS status of your county at the TCEQ website or by calling your regional TCEQ office and speaking with someone in the air program.

If you want to burn outside in Texas, and avoid the possibility of being charged with a criminal violation of TWC Section 7.177, you'll want to carefully read the <u>Texas</u> <u>Outdoor Burning Rule</u> before proceeding.

Misdemeanor Penalty Problem

In 2009 the 81st State Legislature attempted (HB 857) to modify the criminal punishment for burning that violates the <u>Texas Outdoor Burning Rule</u>. Senior governmental environmental enforcement attorneys with whom I have discussed this bill seem to concur that HB 857: (1) Was badly drafted and confusing; (2) Made no effective changes in the underlying <u>Texas Outdoor Burning Rule</u>; (3) Imposed no duties on the TCEQ to do anything; and, (4) Made no coherent change in the penalties associated with misdemeanor outdoor burning violations.

The apparent intent of the House, where this bill originated, was to create a Class C misdemeanor for burning most things that originated from residences; a Class B misdemeanor for subsequent convictions; and, a Class A misdemeanor for burning anything from a list of dangerous or prohibited items if they originated from a residence. The rest of the penalties for other burning violations would stay intact.

However, the Senate eliminated all the House language and attempted to apply the Class C misdemeanor (and the Class B and Class A misdemeanors) to all violations of the <u>Texas Outdoor Burning Rule</u>. The language the Senate used to do this was unfortunately chosen, no doubt hastily drafted in the closing confusion of other business, and the resulting change is, to my way of understanding anyway, meaningless.

In a nutshell, what the new law actually does is apply a new statewide Class C-B-A misdemeanor concept to any "offense" under THSC Sec. 382.018. This is the section of law that authorizes, but doesn't required, the TCEQ to draft the Texas
Outdoor Burning Rule itself back in the day. However, THSC Sec. 382.018 contains no "offenses" itself. Consequently it is impossible to commit an offense under this section.

Hence nothing in this new law actually affects the penalties for illegal outdoor burning; the current penalties for violating the rule apparently remain in place. In short, HB 857 apparently created a penalty for a non-existent offense.

All this, even though the statute changed in 2009, continues to result in a great amount of confusion around the state as local jurisdictions try to follow the statute in setting misdemeanor burning penalties. If you are working in this area of misdemeanor enforcement, be sure to draw this to your prosecutor's attention before some defense attorney does it first. We believe this is an issue for which your prosecutor needs to set local policy until the state legislature clarifies its position.

In an attempt to overcome this contradiction on sentencing, some jurisdictions avoid charging "misdemeanor burning" by charging "illegal dumping ... with subsequent burning" instead. The idea is to charge the guy with illegal dumping of the debris that he then burned, but to "overlook" the illegal burning violation. In jurisdictions using this approach, an estimate of the volume of waste or litter that was burned becomes the basis for the illegal dumping charge; or, in some cases, the amount of debris remaining after the fire is used to determine the correct level to

charge for illegal dumping. When the *illegal outdoor burning* aspect of this crime is forgiven by the prosecutors, defendant's are generally very happy. They think their defense attorney has really earned his fee, when what has actually happened is a savvy prosecutor has found a way around the sentencing problems inherent in misdemeanor outdoor burning cases.

Note that commissioners courts can ban virtually all outdoor burning during droughts by imposing a "burn ban" for up to 90 consecutive days for part or all of the unincorporated part of the county (Local Government Code, Section 352.081). The question that arises during burn bans is, "Can I still burn my household trash out in the county?" Some commissioners' courts have made their ban as absolute as they can and do not allow household waste burning during the ban; others have allowed household waste burning in enclosed containers covered with grates. In the latter case the logic seems to be that if the commissioners court can stop trash burning altogether by mandating the use of a waste collection service, their general powers allow them to regulate trash burning short of actual banning the practice. No one seems to be arguing with any commissioners court I can find against the notion that they can treat rural domestic waste burning as they wish during burn bans.

County judges and mayors can also, on their own, issue a declaration of a local emergency and ban burning (and other things) for up to seven days before a commissioners' court or city council has to meet to confirm the continuation of the declaration (Government Code, Section 418.108).

Some Other Chapter 7 Criminal Charges

Altogether, there are around 40 criminal charges in TWC Chapter 7 (Subchapter E) that can be used to protect local air, water, and land resources. The very best way to understand these is to simply sit down and start reading. A few of the more commonly used charges, with their penalties, are:

Water Pollution

Sec. 7.145 Felony water pollution;

[Individual: \$1,000 to \$100,000 and/or 5 years confinement]

[Other than individual: \$1,000 to \$250,000]

Sec. 7.147 Misdemeanor water pollution;

[Individual: \$1,000 to \$50,000 and/or 1 year confinement]

[Other than individual: \$1,000 to \$100,000]

Sec. 7.154 Reckless unauthorized discharge into water and endangerment;

[Individual: \$1,000 to \$100,000 and/or 1 year confinement]

[Other than individual: \$1,000 to \$250,000] [Greater penalties if the endangered person dies]

Hazardous Waste Violations

Sec. 7.162 Various mishandling, improper storage, and dumping violations;

Sec. 7.162(a)(1) - Transportation violations

[Individual: \$1,000 to \$50,000 and/or 10 years confinement]

[Other than individual: \$1,000 to \$250,000]

Sec. 7.162(a)(2) - Storage violations

[Individual: \$1,000 to \$50,000 and/or 10 years confinement]

[Other than individual: \$1,000 to \$250,000]

Sec. 7.162(a)(4) - Paperwork violations

[Individual: \$1,000 to \$50,000 and/or 2 years confinement]

[Other than individual: \$1,000 to \$250,000]

Sec. 7.162(a)(7) - Release into the environment

[Individual: \$1,000 to \$100,000 and/or 1 year confinement]

[Other than individual: \$1,000 to \$250,000]

Sec. 7.163 The same sorts of violations, with added endangerment elements;

[Penalties range from \$1,000 to \$500,000 or more and/or 15 years confinement]

[Greater penalties if the endangered person dies]

Medical Waste Violations

Sec. 7.164 Various violations by large quantity medical waste generators;

[Individual: \$1,000 to \$50,000 and/or 10 years confinement]

[Other than individual: \$1,000 to \$50,000]

Sec. 7.165 Similar violations by small quantity generators;

[Individual: not more than \$1,000]

[Other than individual: \$1,000 to \$50,000]

Sec. 7.166 Medical waste transportation violations:

[Individual: \$1,000 to \$50,000 and/or 1 year confinement]

[Other than individual: \$2,000 to \$500,000]

Sec. 7.171 Reckless release of medical waste into the environment with endangerment;

[Individual: \$1,000 to \$250,000 and/or 1 year confinement]

[Other than individual: \$2,000 to \$500,000]

Used Oil Violations

Sec. 7.176 Improper discharging used motor oil;

[Individuals: \$1,000 to \$50,000 and/or 5 years confinement]

[Other than individual: \$1,000 to \$50,000] [Fines triple for subsequent conviction]

Illegal Burning and Other Air Pollution

Sec. 7.177(a)(5) Misdemeanor outdoor burning in violation of Outdoor Burning Rule;

[Individual: \$1,000 to \$50,000 and/or 180 days confinement]

[Other than individual: \$1,000 to \$100,000]

Sec. 7.182 Felony outdoor burning (reckless emission with endangerment)

[Individual: \$1,000 to \$250,000 and/or 5 years confinement]

[Other than individual: \$2,000 to \$500,000]

Sec. 7.183 Felony outdoor burning (knowing emission with knowing endangerment);

[Individual: \$2,000 to \$500,000 and/or 5 years confinement]

[Other than individual: \$5,000 to \$1,000,000]

Lead-Acid Batteries

Sec. 7.185 Knowing or intentional unauthorized disposal

[Individual: Class A Misdemeanor]

[Other than individual: Use Penal Code Sec.12.51 to fine to \$10,000]

E. Local Control of Oil and Gas Waste

As the successes of Ector County show, most Texas cities and counties can do a lot more to control oil and gas waste being incorrectly hauled and illegally dumped than they have so far. Administrative control of this sort of waste has been given to the Texas Railroad Commission by the State Legislature, but state criminal laws exist for uses by cities and counties to do their part.

This is a complex field of enforcement, made more difficult by the actions of the Texas Railroad Commission, considered by many observers to be a "captive" regulatory body, more interested in serving the oil and gas industry than the citizens of the state.

As far as oil and gas waste are concerned, local governments can do a lot to control the dumping of this material, 90% of which over the life of a well will be *produced water* separated from the oil or gas being extracted. Well service companies are issued annual Waste Hauler Permits that allow them to collect, haul, and dispose oil and gas waste at permitted sites. This can be such a lucrative business that "outlaw" haulers often operate in oil and gas production areas in violation of state criminal laws, and will continue to do so until stopped by local governments.

My experience is that oil and gas operators themselves want state criminal laws enforced in order (1) to protect themselves from being the victim of illegal dumping at well leases; and, (2) to help control any illegal activities by the waste haulers and other service companies with whom the operators themselves do business.

Most local enforcement revolves around two issues of criminal law enforcement:

- (1) The violation of the provisions of Waste Hauler Permits by a permit holder service companies; and,
- (2) Violation of general criminal statutes against water pollution by these waste haulers when they illegally dump into or adjacent to water.

Other general anti-pollution laws may be used in some circumstances, remembering that THSC Chapter 365 specifically excludes handling oil and gas waste under that general illegal dumping statute.

The easiest criminal laws for local governments to use to deal with *oil and gas waste* (items d, e, f, and g below) as well as general violations occurring around the oil and gas industry (a, b, and c) include:

- a. THSC Chapter 341 for basic public health nuisance criminal violations [Fine for individual: \$10 \$200; Confinement: None]. Sometimes the provisions of THSC Chapter 343 can also be useful, but the best statute to use is often THSC Sec. 341.013(c) [read more about this law in Section C. Public Health Nuisance and Public Nuisance Enforcement]; County employees serving as Designated Representatives of the TCEQ On-Site Sewage Facility program may not enforce THSC Chapter 366 where the sewage is oil and gas waste. Other county officers and employees can use various sections of THSC Chapter 341 instead with good results.
- b. <u>THSC Chapter 365</u> for illegal dumping of just about everything EXCEPT *oil* and gas waste (i.e., "man-camp" waste dumping is covered, but dumping at a well site generally is not); *This specific law cannot be used to deal with oil and gas waste dumping; use others instead for this particular waste.*
- c. TWC Chapter 7, Subchapter E for water pollution and several other criminal charges especially TWC Sec. 7.145 and TWC Sec. 7.147 [Large fines and confinement]; If a person or company has "discharged a waste or pollutant from a point source in violation of TWC Chapter 26," a felony violation of TWC Sec. 7.145 has probably occurred. This would include somebody discharging produced salt water from a waste tanker into a ditch or creek without a TCEQ permit to do so;
- d. TWC Chapter 29 for common misdemeanor violations by *oil and gas waste* haulers [Fine: \$100 \$1,000; Confinement: To 10 days in county jail]:

TWC Sec. 29.041. HAULING WITHOUT PERMIT.

TWC Sec. 29.042. EXCEPTIONS.

TWC Sec. 29.043. USING HAULERS WITHOUT PERMIT.

TWC Sec. 29.044. DISPOSING OF OIL AND GAS WASTE.

TWC Sec. 29.045. USE OF UNMARKED VEHICLES.

TWC Sec. 29.046. PENALTY.

- e. NRC Section 91.002 setting a criminal penalty for *oil and gas waste* handling that violates Section 91.101 or a rule, order, or permit issued by the RRC under that section, such as Statewide Rule 8 [Fine of up to \$10,000 per day per offense];
 - Some of the provisions of Statewide Rule 8 can be easily applied by local governments, and others will require the assistance of RRC field investigators.
- f. NRC Section 91.143 includes felony provisions for creating or using false documents such as forged or false Waste Hauling Permits or for tampering with required RRC-monitoring devices. The RRC is likely to resolve these felonies with \$1,000 administrative violations [Fine to \$10,000 and/or confinement from 2 to 5 years if handled criminally; \$1,000 administrative penalty if handled by the RRC]. Note that Sec. 91.143(a)(5) covers tampering with monitoring devices probably covers such things as stealing batteries from RRC-regulated equipment that runs gauges [this provision can be enforced by local law enforcement as a felony under this law];
- g. NRC Section 91.458 (setting a criminal penalty for certain violations concerning unauthorized saltwater disposal pits) and NRC Section 91.604 (setting a criminal penalty for violations concerning oil and gas hazardous waste) [these are both probably beyond the technical capability of most local law enforcement agencies to apply];
- h. <u>Penal Code Sec. 37.10</u>, setting a penalty for tampering with a government record, such as an altered or forged Waste Hauling Permit [third or second degree felony, depending on the situation]; and,
- i. <u>Statewide Rule 8</u>, more formally known as Title 16 Texas Administrative Code Section 3.8, which is the rule developed by the RRC to issue waste hauling permits and control the disposal of *oil and gas waste*. However, violating any provision this rule is also a criminal act under NRC Sec. 91.002 [fine to \$10,000 for each violation, imposed in county where the violation occurs by loans law enforcement and courts].

The regulation of the oil and gas industry in Texas is an area of conflict, which makes perfect sense. In may ways the oil and gas industry IS traditional Texas, and is still the most important industry in our state.

At the same time, the end of the age of unlimited burning fossil fuel is in sight. Virtually without opposition the world has taken the position that the excess heat produced by such burning is the major contributor to global warming; extreme weather events in unexpected places, which are occurring more frequently, are routinely attributed to global warming.

As we are already witnessing, the cycle of drought and hurricanes that has crushed local agriculture in the Northern Triangle states of Central America (El Salvador, Guatemala, and Honduras) has served, along with resulting economic hardships and violence, to push hundred of thousands of migrants towards Texas borders. It is very likely that these are simply the first of millions of climate immigrants who will be headed our way as higher temperatures and reduced rainfall continue to hammer that area and Mexico.

As more awareness focuses on the climate-related impact of the oil and gas industry, the issue of regulating it will become even more of an issue than now. National and even international attention will increasingly focus on Texas.

In 2022 the EPA was in the process of possibly declaring large areas of the Permian Basin to be non-attainment as far as National Ambient Air Quality is involved owing to the release of methane during oil and gas operations. If it comes to pass, this will be the third such non-attainment area in Texas (following the Houston and Dallas/Ft Worth areas), and is likely to have an impact on oil and gas production there.

All local governments can do is make their best efforts at controlling as much of the visible waste the industry produces as possible, through the application of the laws provided above. Attempts to control any methane "waste" vented in the extraction and movement of oil and gas will probably remain outside the power of local governments, although it will be a major focus going forward. I write "probably," remembering the efforts of the City of Denton a few years ago which adopted a local ordinance controlling fracking at wells inside their city. Their power to do so was quickly ended by the State

Legislature, which prohibited local government control of sub-surface activities at wells. I'm not aware of any current law that would prohibit a city from attempting to regulate through an ordinance at least *some* methane venting. If a city were to effectively do so, however, I imagine that the State Legislature would act as they did in response to the City of Denton and quickly declare this an issue to be regulated only by the state.

You can keep current on this discussion by reading the <u>Railroad Commission's Oil & Gas Enforcement and Monitoring Plan for Fiscal Year 2023 (https://www.rrc.texas.gov/media/2bwbeqtk/o-g-monitoring-enforcement-plan-fy-2023.pdf)</u> as well as the public comments found at https://www.rrc.texas.gov/oil-and-gas/compliance-enforcement/ enforcement-activities/.

F. Local Government Civil Suits and Crimes by Permit-Holders

Returning to our enforcement options, we have reached the final level of local enforcement powers.

TWC Sec. 7.351 provides that cities and counties can sue violators of a number of environmental statutes listed at that section, including violations of any rule, order, or permit that arises under one of those statutes.

Once they had discovered these suit powers, several cities successfully brought major suits against corporate offenders. These victories produced the predictable actions of the State Legislature to protect businesses, and in 2012 the laws governing suits were changed.

In that year the State Legislature acted to severely limit the financial penalties that can be paid to cities and counties winning civil environmental suits.

More importantly, any city or county contemplating a civil suit must now submit the allegations of the proposed suit to the TCEQ and Attorney General's Office for review. If the TCEQ decides to pursue administrative enforcement or the Attorney General decides to pursue civil enforcement against the violator for ANY provision of the complaint, local government loses all power to pursue a civil suit under TWC Sec. 7.351 in the matter.

Who would ever have thought that our State Legislature would have been so controlled by business interests that it would effectively eliminate the power of local government to control polluters through civil suits?

Now local governments are left with using codes and state criminal laws to control polluters. One suspects that as long as the targets of such enforcement are individuals, all will be well. But too many successful cases against corporate polluters will most likely result in the re-entry of the State Legislature into the process.

Crimes by Permit-Holders

Several years ago there was an attempt to remove <u>criminal</u> enforcement powers in environmental cases from local governments. Under the proposed legislation, all

proposed criminal cases were to be referred to the Attorney General's Office for resolution. This was, most likely, an attempt by polluting businesses to push back against the effectiveness of the Harris County District Attorney's Office and avoid criminal scrutiny. Intense negotiating in the bill-making process resulted in the law we have today at TWC Sec. 7.203. CRIMINAL ENFORCEMENT REVIEW.

Unless the target is a TCEQ permit holder (or an employee of a permit holder) who is criminally violating the provisions of the permit, local governments can proceed to enforce criminal violations. Otherwise the TCEQ and AG's Office may become involved.

Where criminal violation of the provisions of a permit are suspected, the peace officer investigating the situation is require to provide detailed information on the case to the TCEQ and the Office of the Attorney General. These two entities have 45 days to review the situation and decide to act. The TCEQ and AG's Office have 45 days consider the situation and decide to undertake administrative or civil enforcement. If either entity decides to so proceed, the peace officer will be notified and informed that one of these state agencies will proceed. At this point the peace officer no longer can file his case with his local prosecutor. Knowledgeable environmental prosecutors have commented that this process is most likely a violation of the Texas Constitution, but as yet no test case has come forth. Most environmental peace officers are busy. Should they discover that a holder of a TCEQ permit is violating that permit, they are most likely to simply inform the TCEQ and proceed with other matters. That recognizes the requirement for the TCEQ to regulate its permit holders, in spite of how busy they might be.

Should the 45-day period pass without the TCEQ and AG's Office informing the peace officer of its intent to proceed with the case, the peace officer may proceed with the criminal case locally. Should the local government succeed in the case, since the state failed to abide by the 45-day requirement, any fines paid by the defendant will be totally kept by the local government. Should the state inform the peace officer within the

45-days that he or she is free to proceed with the criminal case, should thee local government win then 70% of any fines will be paid to the state.

One Texas environmental prosecutor remarked on reading this language, "I'd better not catch one of the law enforcement officers in my jurisdiction interacting with the TCEQ or AG's Office before they file a criminal case!"

The net result of TWC Sec. 7.203. CRIMINAL ENFORCEMENT REVIEW and the attempts to shield possible polluting companies and other permit-holders from local criminal enforcement is likely to be this rule of thumb for local law enforcement: If the target of a criminal case is a permit-holder (or the employee of a permit holder) AND the alleged violation pertains to the process regulated by the permit, inform your prosecutor and recommend that the TCEQ be advised of the apparent violation. Then go work on something else. Let the TCEQ regulate its permit-holders for permit-related violations.

Section Four: Practical Application

Well, that's a lot of information. Maybe applying it to a few commonly seen situations might be helpful.

Situation #1:

The code enforcement officer observed young children playing in a pool of sewage dumped from a group of trailers in a trailer court inside the city limit. The waste was being piped from the trailers to a ditch that empties into a creek. Using Municipal Codes

Officers officials enforcing the municipal codes can issue daily notices of code violations for sewage cases, since this happened inside the city. Of course, if a city is too small to have a municipal court, this approach is probably not available, so it will have to use something else. A fine of up to \$2,000 per day can be assessed for municipal code violations impacting public health (\$4,000 in the case of solid waste violations), but usually will not exceed \$500.

Using Public Health Nuisance and Public Nuisance Laws

THSC Chapter 343 cannot be used since it only applies to the unincorporated areas and this happened inside the city. However, several sections of THSC Chapter 341 can be used, including some of the twelve nuisances listed at Section 341.011, such as:

- (5) sewage, human excreta, wastewater, garbage, or other organic wastes deposited, stored, discharged, or exposed in such a way as to be a potential instrument or medium in disease transmission to a person or between persons, and
- (12) an object, place, or condition that is a possible and probable medium of disease transmission to or between humans.
- Our stand-by provision at THSC Sec. 341.013(c) can almost always be used: 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.

The entire section at THSC 341.014 can also be used. If there is a Local Health Authority willing to follow the mandate of the State Legislature, it may order the nuisance abated under Section 341.012. If the Local Health Authority is dysfunctional — that is, doesn't have the understanding, capacity, or will to follow state mandate to force abatement of public health nuisances — then perhaps this abatement section won't work. Criminal or civil charges may be entered against the trailer court operator and/or the company under Sections 341.091 for the various violations noted above. First offense criminal and civil offenses are processed through the municipal court (or justice court) and carry fines and civil penalties of \$10 to \$200 per day. Subsequent convictions are more expensive. Each day the condition exists is a separate violation.

Using the Litter Abatement Act

The Texas Litter Abatement Act (THSC Chapter 365) is most commonly used for illegal dumping enforcement, but it <u>cannot</u> be used in this situation. Human body waste is specifically excluded from both the definition of *litter* and *solid waste*.

<u>Using TWC Chapter 7 (Subchapter E) Laws</u>

Several sections of TWC Chapter 7(Subchapter E) could possibly be used to respond to this situation, unless the violator has a permit from the TCEQ governing waste water discharges. If so, the provisions of TWC Sec. 7.203 may apply.

TWC Section 7.145 Intentional or Knowing Unauthorized Discharge
The sewage meets the definition of a waste, the pipes would be point sources and the operator has been determined NOT to have a discharge permit. The ditch/creek — wet or dry — is no-doubt included in the definition of water. So all the elements necessary to prove this felony are present.

Charge the manager [\$1,000 to \$100,000 and/or 5 years confinement] as well as the company [\$1,000 to \$250,000]. Each day is a separate charge.

Since this is a felony, police will file this with the District Attorney's Office.

TWC Section 7.147. Unauthorized Discharge

This is the special misdemeanor charge for water pollution. To violate this law, one has to discharge the *waste* or *pollutant* into the *water* (not just

adjacent to it), that *waste* or *pollutant* has to *pollute* or *threaten to pollute* the *water* (so some sort of evidence photos or samples will have to be taken), the pollution can't be a trace amount of waste motor oil that rainwater might carry off a gas station parking lot (for instance), and the violator can't have a permit to discharge the waste or pollutant (see TWC Sec. 7.203). All the ward italicized have defined meanings in TWC Chapter 26. If the local law enforcement agency — perhaps with the assistance of the water lab — can correctly sample the water and have it analyzed, the city may possibly be able to use this misdemeanor charge. Charge the manager [\$1,000 to \$50,000 and/or 1 year confinement] as well as the company [\$1,000 to \$100,000].

TWC Section 7.154 Reckless Unauthorized Discharge and Endangerment Here the operator and company have recklessly discharged the waste into or adjacent to the ditch, and by that action have place the children at risk of contracting several diseases. Determine that the company hold no discharge permit from the TCEQ. So all the elements necessary to prove this felony are present. Charge the manager [\$1,000 to \$100,000 and/or 1 year] as well as the company [\$1,000 to \$250,000]. Each day is a separate charge. Since this is a misdemeanor, police will file this with the County Attorney's Office.

TWC Section 7.153 Intentional or Knowing Unauthorized Discharge and Endangerment

Local law enforcement officers may charge this felony if the elements are met instead of the misdemeanor found at Section 7.154 (for "reckless" discharge). The "intentional or knowing" requirement here only runs to the violator's knowledge that he was doing the act. TWC Section 7.185 specifically holds that the violator doesn't have to know that his act was a crime; he just had to know he did the act, in this case, making the discharge. Evidence of such knowledge might include the visible discharge pipes, earlier municipal notices to cease the practice, and testimony of the workers at the facility. TWC Sec. 7.153 covers cases where the discharge of the waste or pollutant was made into or adjacent to water and was an action that resulted

in the death or serious bodily injury of another person. The potential penalties for this violation can be very severe, reflecting the seriousness with which the State Legislature takes this violation. Charge the manager [\$1,000 to \$250,000 and/or 5 years confinement] as well as the company [\$2,000 to \$500,000]. On the charge against the individual, if one of the kids were to be killed or receive a serious bodily injury from the discharge, the potential penalty increases to a fine of \$2,000 to \$500,000 and/or 10 years confinement. On the charge against the company, the death or serious bodily injury of one of the children increases the penalty range to a fine of \$5,000 to \$1,000,000. Each day is a separate charge. There are few violations in state law with more substantial possible penalties than this one; simply paying for the defense of such a serious charge is probably enough to close most companies that might behave in such an intentional manner. Since this is a felony, police will file this with the District Attorney's Office.

There is a defense to the various violations involving endangerment to others:

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.

The children certainly didn't give their consent under (1), and it would be difficult to argue that the employee — the manager — is somehow protected by (2). Committing a crime is not a normal business activity, and this violation alleged the manager acted with knowledge.

Using Local Civil Suits

No longer a realistic option for local governments.

Situation #2:

A reliable witness reported seeing fifty tires being dumped in a creek outside the city from a truck with "Joe's Garage" painted on the side. This is a garage in the next county.

Using Municipal Codes

Municipal codes can't be used outside the city where they are in force. Since this case happens in the unincorporated area, there simply are no municipal codes to be used.

Using Public Health Nuisance and Public Nuisance Laws

Both nuisance laws can be used: THSC Chapter 341 (applies throughout the state) and THSC Chapter 343 (applies only outside the city limits). To use Chapter 341, look at the violations listed in Section 341.011. Several could be used, including:

(5) sewage, human excreta, wastewater, garbage, or other organic wastes deposited, stored, discharged, or exposed in such a way as to be a potential instrument or medium in disease transmission to a person or between persons, and

Section 341.011(12) an object, place, or condition that is a possible and probable medium of disease transmission to or between humans.

Our friend, THSC Sec. 341.013 (c) can certainly be used, and the Local Health Authority can certainly use THSC Sec. 341.012 to force abatement of the health nuisance. Criminal Public Health Nuisance charges may be entered against the driver who did the dumping and/or Joe's Tires under Sections 341.091 and/or Section 341.092. First offense criminal offenses are processed through the municipal court (or justice court) and carry fines and civil penalties of \$10 to \$200 per day. Subsequent convictions are more expensive. Each day the condition exists is a separate violation.

THSC Chapter 343 seems made for this situation, but the requirement to allow 30 days to pass following notice really slows things down. So using a

combination of THSC Sec. 341.013(c) and THSC Sec. 341.012 will probably be the best approach in situations such as this, even when the violation takes place on public property and in an unincorporated area.

Using the Litter Abatement Act

The Texas Litter Abatement Act (THSC Chapter 365) is the law most commonly used to respond to this type of case since it covers dumping on land or into water. Waste tires meet both he definition of *litter* and *solid waste*. Each tire weighs about 22 pounds, so the 50 in the creek will weigh about 1,100 pounds, well above the 200 pounds required for a state jail felony for this commercial dumping (*i.e.*, dumping from a commercial vehicle OR dumping for the purpose of economic gain). The potential penalty is a fine of as much as \$10,000 and/or up to two years in a state jail facility for an individual, and/or a fine to \$20,000 for the company. There will be a debate over whether the driver or the company should be charged. While the driver is not absolved from his responsibility to obey state criminal laws, in this case he — and other, former drivers — may make good witnesses against the company. If the company is convicted, a fine of up to \$20,000 for committing a state jail felony is authorized by Penal Code Sec. 12.51. This case would be filed in the District Attorney's office regardless of who is charged.

<u>Using TWC Chapter 7 (Subchapter E) Laws</u>

As in the first situation discussed above, several sections of TWC Chapter 7 (Subchapter E) can be used to respond to this situation. TWC Section 7.145 Intentional or Knowing Unauthorized Discharge could easily apply. The tires meet the definition of a *waste*, the truck would be a *point source* and the driver could not possibly have a discharge permit. The dry creek is included in the definition of *water*. So all the elements necessary to prove this felony are present. As in the case of using THSC Chapter 365, there will be a debate over who to charge — the driver or the company. The Assistant District Attorney of Harris County — who, until his recent retirement, was easily the most experienced environmental crimes prosecutor in the state — says that of the 500 to 700 environmental crimes cases processed through his office annually, approximately <u>one-half</u> are filed against corporations or associations. Charge the driver [\$1,000 to \$100,000

and/or 5 years] as well as Joe's Tires [\$1,000 to \$250,000]. Each day the tires are in the creek is a separate charge under this law. Since this is a felony, police will file this with the District Attorney's Office.

Using Local Civil Suits

Using local civil suits is no longer a realistic option for local governments.

One approach would be to charge illegal dumping (THSC Chapter 365) and water pollution (TWC Sec. 7.145) as well as having the Local Health Authority attempt to force abatement of the dump under THSC Sec. 341.012.

Situation #3:

A methamphetamine cook bulldozed his house and buried it in a hole in his own backyard on a lot he owns in the in city; and,

Situation #4:

The best friend of the city manager bulldozed his house and buried it in a hole in his own backyard on a lot he owns in the in city.

These two situations rely on the same laws, but are, of course, handled differently in many cities. Their appearance together tries to get at the issue that frequently vested interests within your community may have reached an accommodation with local government to allow certain acts of pollution.

<u>Using Municipal Codes</u>

The city probably has a municipal code against dumping or disposing waste on a city lot. It may not have been drafted with the act of burying the waste in mind and may not address this topic, but it probably does. Situation #3 could be handled with such a municipal code; Situation #4 probably could not be so handled, unless the city manager had enormous integrity and the code officer lots of courage.

Using Public Health Nuisance Laws

THSC Chapter 343 only applies outside the city limit and cannot be used. However, using Chapter 341, which applies everywhere, should be a fairly straightforward process. You could argue that the burial of the waste creates a general health nuisance as defined at Section 341.011(12): Section 341.011(12)

an object, place, or condition that is a possible and probable medium of disease transmission to or between humans. More appropriately, Section 341.013(c), which speaks directly to waste disposed of in such a manner as to be a pollutant, probably makes more sense:

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.

Creating a mini-landfill without a permit would surely amount to disposing waste in such a manner that *may* pollute land or contaminate groundwater, so using THSC Sec. 341.013(c) would probably be in order. As with virtually all health nuisance violations, THSC Sec. 341.012 should routinely be used to force a clean-up by the violator. Criminal or civil charges may be entered against the actors who buried the waste, under Section 341.091 and/or Section 341.092. First offense criminal and civil offenses are processed through the municipal court (or justice court) and carry fines and civil penalties of \$10 to \$200 per day. Subsequent convictions are more expensive. Each day the condition exists is a separate violation.

Using the Litter Abatement Act

The Litter Abatement Act (THSC Chapter 365) would be the law most likely to be used by local police in responding to this situation, if they know it and the policy decisions have been made directing them to enforce it. The dumping itself — disposing the waste house in an unauthorized site — is a criminal violation of Section 365.012(a), and because of the volume of waste involved (*i.e.*, over 200 cubic feet), the charge is a state jail felony, unless there is an exception that allows such dumping. The possible exception that might save the methamphetamine cook and the city manager's friend from being charged with felony dumping is found at Section 365.012(l):

Sec. 365.012(I) This section does not apply to an **individual's** disposal of litter or other solid waste if:

- (1) the litter or waste is generated on land the individual owns;
- (2) the litter or waste is not generated as a result of an activity related to a commercial purpose;
- (3) the disposal occurs on land the individual owns; and
- (4) the disposal is not for a commercial purpose.

Notice the "and" after (3), indicating that all four of these conditions would have to be true for an individual to be able to successfully use this exception to avoid being convicted of illegal dumping. This case will come down to deciding those policy issues that determine the sort of city you want to live in. If waste from a demolished house is considered (by the police chief and District Attorney) to have been "generated on land the individual owns," as described in the general statement before the four conditions, then that test has been met, and you can move on to the four specifics. Note that the term "generated on land" is not defined in this law, so it's meaning will pretty well be a local policy issue. As mentioned earlier, in Harris County, where the most experienced prosecutors have been working with these situations for years, their policy decision has been that the word "generated" means "grew" and is limited to plant waste. If the property where the waste has been generated or the (possibly other) property where the disposal takes place is not owned by the individual, then (1) or (3) or both conditions are not met, and the dumping is unlawful. If the house was one that the individual was renting to someone — or was otherwise part of a commercial operation — then condition (3) would not be satisfied. Or perhaps exception (4) is being violated by the individual burying the house: he is disposing the waste for a "commercial purpose" (defined in this law as "the purpose of economic gain"). If the individual is trying to save significant disposal fees by burying the waste on his own property, then condition (4) would have failed too. If the person is a company or individual — not an individual — or if any of the other four conditions fail, then the exception is not met and the burial is a violation. So what local police have on their hands is a question of deciding (1) has a felony actually occurred; and, (2) should it be uniformly be applied or just used to hammer people they don't like. This will take a meeting or two with the police, District Attorney, and city elected officials.

In the real case of Situation #4, the city manager involved was actually looking for a reason to stop his friend from burying the house. When he read the definition of "commercial purpose" in the law and heard that his friend had been telling everybody in town that he was going to bury the waste to save landfill fees, that was all he needed to stop it. The city manager was just looking for something in writing to stop his friend. Frequently some of the town's "best" citizens are owners of legacy dumps, abandoned businesses, and other sources of local pollution. When your community decides to tackle pollution — and pollution <u>always</u> lowers local property values for everybody — invariably the supposed "right" of commercial interests to dump on the community has to be faced (as if there is ever a "right" to commit a crime). It's best, in my opinion, to address these situations head-on, because they present the opportunity for open discussion about what sort of community your fellow citizens want to have.

Using TWC Chapter 7 (Subchapter E) Laws

Unless the owner is also burying hazardous waste, polluting water, or burying some covered category of waste, the provisions of TWC Chapter 7 (E) probably don't apply in this case. If the methamphetamine cook is burying some of the hazardous waste he routinely generates, then the provisions of TWC Section 7.162 may possibly have been violated too. I did speak to one very good officer from a county on the Texas Gulf coast. I asked him how he would charge in a case where a quy duq a hole and buried his house. He responded, "Water pollution." Puzzled, I asked, "Because it might rain in the hole while he was working?" To which the officer patiently explained, as if he were talking to an inquisitive child, "No, because we have such a very shallow water table here. Any waste put in a hole has been disposed of adjacent to water." I found this response fascinating. Later I found an officer who regularly charged "water pollution" for any dumping in the 100-year flood plain using the same logic. The DA and judge were happy that this constituted dumping "adjacent" to water in the state — or maybe even was dumping "into" a water course. "OK," says I to myself, "What about charging 'water pollution' for dumping in the recharge outcropping zone of an aguifer, especially one that is used as a source of municipal drinking water?" Well, so far I have yet to find an example of such a case being filed, but I can certainly foresee a situation — say one involving

dumping a liquid waste in a recharge zone — that actual pollution of the aquifer would result. So perhaps charging TWC Sec. 7.145 water pollution for general dumping in a recharge zone — where the dumping was down without a permit and from a point source of some sort (i.e., a truck) — will become routine as we move into the next stage of protecting state water from polluters.

Using Local Civil Suits

Using local civil suits is no longer a realistic option for local governments.

Situation #5

In a large metropolitan county/district attorney's office, the prosecutor in charge of screening cases submitted for prosecution received from officers sent a particular illegal dumping case back to the presenting officer. The case was for several bags of household trash found dumped in a ditch inside the city. The officer was presenting the case as a Class B misdemeanor violation of THSC Chapter 365, the Texas Litter Abatement Act, based on the weight of the waste dumped. The screening prosecutor attached a note to the case asking, "How do you know it didn't just fall off a truck?" The written details of the case submitted said that the waste collection company had cancelled service to home the week before trash was found (bad check), and the ditch where the waste was found dumped wasn't on collection truck route.

The actual case presented above involved a violation of the Texas Litter Abatement Act, the primary criminal law used to fight illegal dumping in the state. Although the officer could have submitted a case alleging a violation of Section 7.145 of the Texas Water Code, in this case the officer was concentrating on the illegal dumping violation.

At issue here is the relationship between the presenting officer and the prosecutor who screens cases for possible prosecution. It's a problem for your city or county when officers spend your money developing cases that are then rejected by the prosecutor's office. Usually, this only happens in communities where the cost of cleaning up isn't being tracked. When elected leaders and citizens realize the costs of failing to enforce local cleanup, they quickly meet with prosecutors to work out the kinks in the system that prevent enforcement. Between using municipal codes, public health nuisance laws, and, state criminal laws your community can achieve whatever level of cleanliness it wants.

Conclusions

Before we end this class on the basic powers your city or county has to stop illegal dumping and other forms of pollution and the value of working with other departments and jurisdictions, I'd like to just say a few words about several related topics.

Local News Media

You'll find that your local newspaper and television stations absolutely love to run stories about local polluters being arrested, tried, and convicted. These stories sell papers and increase television viewers. If you educate local reporters on these laws and your local enforcement process, or lack of it, they'll become your allies in cleaning your community. Keep Texas Beautiful — KTB — now has 400 local affiliates around the state, each one working to keep its community clean. You'll find that the KTB organization in Austin (ktb.org) will give you enormous support in starting a local chapter in your community. If you already have a KTB chapter where you live, that's marvelous. You'll want to join and participate to make your local chapter an even stronger advocate for ending local pollution through aggressive local enforcement.

Churches

More and more churches of all denominations are taking strong positions on educating their members and others to treat God's creation with respect. Churches and other religious bodies frequently will join with others in their community to fight local pollution. This is the appropriate section to discuss the ethical topic of local corruption. Virtually all local elected officials in Texas take their oath of office seriously: "I promise to the best of my ability to preserve, protect, and defend the Constitution and laws of the United States and of this State, so help me God." For an ethical person, that's sufficient to get the anti-pollution laws enforced, once that person becomes aware of their existence. However, for an elected official whose parents failed to teach the basic lesson of keeping one's word, this responsibility is easily ignored.

Consequently, we occasionally — not frequently — encounter situations where large-scale local polluters are paying local officials, often in the form of "campaign contributions," to look the other way while the polluter ignores permit limits, treats administrative rules and municipal codes like speed-bumps, and condones the breaking

of criminal laws.

The polluting enterprise frequently threatens to "leave and take these jobs with us" in a form of cruel blackmail. Their message is, "Sorry, but we're just not good enough managers to run our operation within the permits and criminal laws of the state; we'll need to break the criminal laws and we'll have to bribe officials to look the other way too."

When this way of thinking prevails, the polluter often can't be controlled until he has done such enormous harm to the community that even the bought politicians can't provide cover.

The problem with such corruption is that it allows the polluter to transfer his costs of disposing waste directly onto the people who live in the community. The health costs and eventual clean up costs often far outweigh the benefit of jobs created on the sands of corruption.

These situations are, fortunately, becoming more rare each day. But if you encounter one you are facing a symptom of a moral cancer that has gripped your community. Good businesses can easily operate within the limits set by the criminal laws of our state. Local officials knowingly allowing violations to take place should not be allowed to keep their jobs.

Leader and Public Education

Often the underlying problem for many of our problems is lack of education. Citizens are generally aware that dumping and other forms of pollution are illegal. Only those with their heads in the sand — and those newly arrived from countries where waste disposal is handled in a casual manner — are ignorant of these laws. However continuous public education is always in order. This can happen with articles in newspapers, utility bill inserts, and other forms of educational outreach. Contact your regional COG for good suggestions and possible funding.

Additionally, your police, deputies, game wardens, and constables are very likely unaware of the criminal laws they can use. Your elected officials, and city and county administrators, are probably unaware of the wide range of their policy options for stopping local pollution. Your county and district attorney may not know of the specialized laws they can use and of the State Bar educational projects that would benefit them.

Note that your community is already paying the cost of applying all of the the tools in this class: you're either paying for the cleanup using taxpayer funds or you're paying the economic and health price of not enforcing the laws.

Often getting a community headed in the right direction is simply a matter of teaching the current enforcement officers, police, constables, deputies, prosecutors, and elected officials — and the local health authority — how to go about using these tools. In a few cases officials will have to be made aware of the political costs of turning their backs on the desire of citizens to live in a clean and well-ordered community.

We do live in an interlocking web of creation, which has both physical and psychological effects on us and the generations that follow. This is no longer remotely debatable: we're simply not independent of each other. When we ignore pollution in our community and avert our eyes for the ten-thousandth time, we are making a statement about our relationship to all of life: we are pretending to be separate and apart, entire unto ourselves, unaffected by our surroundings. This is simply an act of ego that will ultimately break our hearts if pursued long enough. It is neither spiritually nor scientifically sound.

On the other hand, if we acknowledge the truth of our engagement with the life process and our links to the generations before and after, we will appropriately take responsibility for the cleanliness and order of where we live and raise our children.

I remember once when I was a boy, over 65 years ago, riding in the car with my mother in Oak Cliff in Dallas. I must have been somewhere around seven. We were driving down Clarendon Avenue, right at the place where it ran between the Dallas Zoo and the railroad tracks. There was a little frame house up close to the tracks, with a little fence around the front yard and a shade tree. Even though I was a young boy, I remember that it had been very dry in Dallas that year, and it was late in the afternoon on a very hot day. There was a lady out in the front yard of that little house sweeping the ground with a house broom. The yard was so dry and barren that she was actually just sweeping the dirt. I asked my mother, "Momma, look at that lady sweeping the yard! What's she doing?" My other answered, "Son. Those folks are poorer than we are, and they don't have much. But she's taking care of the little that she does have. She's cleaning up her front yard, and the best way is to just sweep it with a broom. That's called pride." I've never forgotten that image or that conversation. Putting energy into

helping your community to be as clean and orderly as possible is all about pride and is the sound path forward, no matter where you live in Texas.

Please feel free to contact me personally at ockels@tidrc.com, and to watch our website at tidrc.com, for information about professional training opportunities, including in-person and additional online classes.

Next Steps

That concludes the reading material for this class. You are now ready to take the open book test covering this material. Just follow the instructions in Step 3 on the Class Home Page to access the test. The passing score is 70%. You can take as much time as you need with the exam, and unlimited tries are allowed (with no waiting period between tries).

Note that the first question on all our tests is on whether you have gone through all the class material (namely, this document) prior to attempting the exam. This is the one question that you have to get right to pass — along with sufficient other correct answers to reach a grade of 70%.

Upon successful completion of the test, our system will send me a message that you are ready for your certificate to be issued. I'll then do a personal check of everything and, assuming all is well, send your certificate by email. We usually complete this process and send your certificate the evening of the day that you pass the exam. However, in some rare cases there may be a slight delay. If it has been 24 hours since you passed the test, please email me at ockels@tidrc.com.

I hope that you have enjoyed this class and even learned a little. Please feel free to send any follow-up questions that you might have.

All the best, and I hope to see you online again or in a classroom in the near future.

Adios!