Chapter 5: Illegal Outdoor Burning

Outdoor burning enforcement is not as complicated as it seems. Local criminal enforcement can be at the felony level or the misdemeanor level, with felony enforcement being by far the easiest. Misdemeanor enforcement can get a little complicated when taken as a whole, and has just been made a lot more confusing by the 81st State Legislature, who tried, and in the opinion of many, failed to create a coherent statewide Class C misdemeanor for illegal outdoor burning. At best, the new provisions will force county prosecutors to independently decide what the confusing situation means to local misdemeanor burning enforcement. "Unclear law results in unclear policies."

Felony Illegal Burning

Felony burning is very clear: if somebody emits an air contaminant, including smoke, without state authorization and thereby puts someone else in imminent danger of death or serious bodily injury, he or she has met the elements for the felonies. All that remains is determining the levels of intent behind the actions.

Texas law has two statutes that can be used to respond to felony burning. The laws themselves focus on two levels of criminal intent: (1) where the burner *intentionally* or *knowingly* emits the smoke (i.e., an air contaminant) in such a way that the burner *knowingly* puts another person in imminent danger of death or serious bodily injury; and, (2) where the burner *recklessly* emits an air contaminant and another person is thereby put in imminent danger of death or serious bodily injury (without the burner intending the other person be injured or threatened with injury).

Some may wonder if the element that a person “be put in imminent danger of death or serious bodily injury” sets too high a bar for these cases to be prosecuted locally. This doesn’t seem to be an issue at all in those jurisdictions that have brought cases under these laws. When a person is transported from

a burn scene to a hospital with respiratory problems, physicians seem willing to provide a statement that the exposure to the air contaminant has put the person in imminent danger of serious bodily injury (especially where the patient has a history of respiratory illness). Additionally, at least one officer has been successful in getting an indictment for felony burning without any local physician statement by presenting documentary evidence that smoke from burning the insulation off copper wire put a child playing in the smoke in imminent danger of serious bodily injury.

Both of these felony charges carry very large fines and up to five years imprisonment, signaling that the State Legislature thinks that exposing someone else to air contaminants that kill or endanger them is a very bad thing to do. Both of these laws are found in Chapter 7 of the Texas Water Code, and we'll now look at each.

Felony Burning #1

Texas Water Code Sec. 7.183 Intentional or Knowing Emission of Air Contaminant and Knowing Endangerment

Elements of Sec. TWC 7.183

A person commits an offense if the person

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

I have yet to encounter a situation where this charge has been filed, although I can imagine cases where it might be appropriate. For example, suppose a methamphetamine cook has been fighting with the lady next door for years and knows that the lady suffers from a lung condition. In an attempt to cover the

odors from his cooking, imagine that the violator decides to burn some plastics and other trash to mask the methamphetamine production smells. He rolls his burn barrel under the open window of his neighbor in an attempt to also smoke her out of the house. The ambulance takes her to the hospital where the doctor states, “You were put in imminent danger of serious bodily injury!” or other words to that effect. This situation would meet all the elements of TWC Sec, 7.183, but for ease of prosecution would probably be filed as a TWC 7.182 violation to take advantage of the reduced mental culpability requirement (i.e., “reckless” v. “intentional or knowing”).

Violating TWC Sec. 7.183 carries a penalty of up to 5 years confinement and, for an individual, a fine of $2,000 to $500,000. For companies this penalty increases to a fine of between $5,000 and $1,000,000 (companies can’t be sent to jail, so the law takes more of their money).

Felony Burning #2

Texas Water Code Sec. 7.182 Reckless Emission of Air Contaminant and Endangerment

The elements for this statue are easier to prove that those in Sec, 7.183, but the crime still carries a confinement period of 5 years and significant fines (i.e., $1,000 to $250,000 for an individual or $2,000 to $500,000 for a company).

Elements of Sec. TWC 7.182

A person commits an offense if the person

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

As you can see from comparing these two sets of elements, using those of TWC 7.182 is simply easier because of the reduced level of mental culpability to be proven, including not having to that the action was knowingly harmful to the other person.

Both of these laws make it a crime to emit an “air contaminant” under certain circumstances, and we look to the Texas Clean Air Act, Texas Health and Safety Code Chapter 382, for the definition of this term:

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

Thus the smoke emitted by the methamphetamine cook in the above example would meet the definition of “air contaminant,” as would the vapors being released from an unauthorized and unvented automobile paint booth in a backyard garage.

If a violator is burning any substance, without TCEQ authorization, that is emitting an air contaminant to such a degree that persons are being put in imminent danger of death or serious bodily injury from their exposure, then filing one of these two charges is appropriate. We encourage aggressive enforcement of these two felony burning laws.

Finally, please note that neither of these state laws makes any reference to the Texas Outdoor Burning Rule [30 Texas Administrative Code Sec. 111(b)]. This is the fairly complex rule that the TCEQ uses in is administrative outdoor burning enforcement and which cities and counties use as a basis for their misdemeanor illegal burning enforcement. Unlike these two felony burning laws, criminal enforcement of the Outdoor Burning Rule can be tricky. However, local officers need to learn to navigate its complexities.

Misdemeanor Illegal Burning

There is a lot of discussion about misdemeanor outdoor burning over such issues as what the law actually requires, what substances can and can't be burned, what is the effect of certain county actions on rural trash burning, who is supposed to enforce the law, what are the powers of local firefighters to "authorize" burning, who can stop illegal burning and similar so on. Also at question are the roles of the regional TCEQ enforcement staff and the role of local government in enforcing illegal burning. Thanks to the 81st State Legislature, there is now legitimate debate over what the penalties are too, as we shall see below.

How Violating the Outdoor Burning Rule is a Crime

When the State Legislature created the Texas Clean Air Act, back in 1989, it included Texas Health and Safety Code Sec. 382.018, which allowed the TCEQ to draft rules to govern the "outdoor burning of waste and combustible material," as the section was titled. The agency was allowed to draft rules, but not mandated to do so by the legislature. The resulting rule, modified several times since originally created, is the current Texas Outdoor Burning Rule. This rule was adopted under Chapter 382 of the Texas Health and Safety Code, and governs all outdoor burning in the state. There is a copy of the current rule in the back of this book.

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

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

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

On September 1, 2009, the changes made by the 81st Legislature (H.B. 857) became law, possibly changing the penalties for misdemeanor burning in Texas. I say "possibly," because the changes this bill made to TWC Chapter 7.187 (where the chart of penalties is located) are guaranteed to confuse. The truth is, their intention is not at all clear, and various jurisdictions are likely to spend enormous amounts of time trying to figure out the legislature's intent. At lease some jurisdictions will simply avoid the potential conflicts involved in trying to interpret the new language and stop all misdemeanor burning enforcement for a time. These jurisdictions will probably enforce the Litter Abatement Act or THSC Sec. 343.011(c)(12) [defining a nuisance as *discarding refuse on property that is not authorized for that activity*] on the reasonable notion that what was being burned was first illegally dumped.

Making this situation even more complex is the awaited (as of this writing) decision of the Court of Criminal Appeals on an outdoor burning case from Denton County. Depending on how this decision is rendered, the situation could become even more muddled or simply remain at the new level of confusion achieved by he legislature.

The Denton County case is worth spending a minute to understand, because the issue being raised is whether Sec. 382.018 of the Texas Health and Safety Code (that section that back 1989 gave the TNRCC the option of writing outdoor burning rules), violates something called the *nondelegation doctrine*, and is there itself invalid. This is important, because the State Legislature's

primary purpose in passing THSC Sec. 382.018 was to allow the TCEQ to write rules to control outdoor burning. So if THSC Sec. 382.018 is itself unconstitutional, then "Goodbye, Outdoor Burning Rule" as the basis for misdemeanor criminal charges.

The situation behind this case seems common enough. There was a man in Denton County named Michael Joseph Rhine who decided to burn some things and was caught. From the May 2008 decision of the Texas Court of Appeals, Second District (Fort Worth), the basic facts of the case are:

> *Rhine admitted to starting a fire on July 8, 2005. The materials contained in the fire included crossties, fiberglass, tires, and PVC pipe. On December 12, 2006, Rhine was charged with violating subsection (a)(5) of section 7.177 of the Texas Water Code, entitled "Violations of Clean Air Act." TEX. WATER CODE ANN. SECTION 7.177(a)(5) (Vernon 2000). Rhine filed a motion to quash the information, alleging this provision of the Texas Water Code is void in that the legislature had unconstitutionally delegated authority to an executive branch agency in violation of the nondelegation doctrine. After hearing the argument of counsel, the trial court granted the motion. This appeal resulted.*

Rhine burned this material in summer 2005 and was charged, about 18 months later, with the misdemeanor normally used: a violation of TWC Sec. 7.177(a)(5). The case was set to be tried in Denton County Criminal Court #2, Hon. Virgil Vahlenkamp, Jr. presiding. Rhine had a clever attorney – maybe – who argued before the trial got underway that the information used to charge Rhine was faulty because the section of the Texas Water Code (Sec. 382.018) upon which he charge was made is itself void. Rhine argued that under the Texas Constitution, only the Legislature can write laws, and when it created Sec. 382.018 it unconstitutionally passed this power to the Executive (*i.e.,* the TCEQ). Consequently, argued Rhine, he hasn't committed a crime because the law itself is unconstitutional. Judge Vahlenkamp agreed, and the motion to quash the information was granted.

The state appealed Judge Vahlenkamp's decision in August of 2007 to the

Court of Appeals in Fort Worth, who, a year later in August 2008, reversed the decision of the trial court in Denton and sent it back for trial.

After quoting the Texas Constitution on nondelegation, the Appeals Court cited a number of cases to the point that in today's complex culture, the Legislature simply doesn't have the technical knowledge needed to write detailed laws. Of necessity it would have to defer to the various state agencies to fill in the technical gaps in the legislation. "[I]n our complex society, it is not possible for the Legislature to shoulder the burden of drafting the infinite minutiae required to implement every single law necessary to adequately govern the State of Texas." This point seems well settled in Texas civil law, but not, apparently, in criminal law.

This decision to return the case to Denton County was immediately appealed to the Court of Criminal Appeals, and as of this writing is still under consideration.

In the meantime, the 81st Legislature passed the new law (H.S. 857) apparently linking the penalties for outdoor burning to TWC Sec. 382.018, the exact section that the Rhine case is calling into question. However, more than one senior attorney very familiar with Texas environmental law and specifically with these provisions, have expressed being perplexed. The only thing everybody agrees on is that this is truly a case of very bad legal drafting.

The provisions of HB 857, which make changes in TWC Sec. 7.187 [Penalties], attempts to apply the following new sentencing provisions to something, but it's not at all clear to what these provisions will apply:

> *(1) a Class C misdemeanor of the waste is not a substance described by (3) below;*
>
> *(2) a Class B misdemeanor if the violation is a second or subsequent violation under Subdivision (1);*

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

The question is to what do these new penalties apply, because it's not at all clear that they apply to violations of the Outdoor Burning Rule (i.e., TWC Sec. 7.177(a)(5). There are several possibilities regarding misdemeanor outdoor burning enforcement at this time. Here are five I can think of, as I understand the process, and there are probably others. In all five situations local enforcement officers will need to meet with their County Attorney to establish the local approach to be taken.

(1) The Court of Criminal Appeals, the highest appellate court in Texas in criminal matters, will overturn the Court of Appeals decision and uphold the original Rhine decision from Denton County. In this case, there will be no misdemeanor outdoor burning laws until the State Legislature can address the problem later.

(2) The Court of Criminal Appeals rejects the appeal and upholds the decision of the Court of Appeals to return the case to Denton County for trial. In this situation, the Court of Criminal Appeals is saying that the current structure is fine, as far as the nondelegation doctrine is concerned. Having a violation of the Outdoor Burning Rule be considered a violation of TWC Sec. 7.177(a)(5) will still be in effect. However, thanks to the incomprehensible approach taken by the State Legislature in passing HB 857, four possible local enforcement policies then emerge:

(a) This situation is so unclear that some County Attorneys will simply refuse to take misdemeanor illegal burning cases until clarity comes from future legislature, Court of Appeals ruling, or a practice standard emerges among Texas prosecutors. The policy decision might be

made to treat all illegal burning as a municipal code violation inside the city and as some form of illegal dumping in the unincorporated area.

(b) Some prosecutors will simply continue to handle cases under the pre-September 1, 2009 approach. They will look at the changes that H.B 857 makes to TWC Sec. 7.187 [Penalties] and decide that the new language is nonsense. They will read the new language, *"Notwithstanding Section 7.177(a)(5), conviction for an offense under Section 382.018 Health and Safety Code is punishable as..."* and turn to THSC Sec. 382.018. There they will see that there are no "offenses" in this section, conclude that these changes have nothing to do with the outdoor burning violation at TWC Sec. 7.111(a)(5), and continue to carry on as usual. There conclusion is that the new law creates a penalty for a non-existing offense, and then proceed with business as usual.

(c) Some will read THSC Sec. 382.018, see that sections (b), (c), and (d) describe specific statutory limitations on on-site and consolidated plant growth burning, consider these to be the "offenses" the new law is describing, apply the new Class C misdemeanor to these only, and continue using the enhanced Class B misdemeanor described for violating TWC Sec. 7.177(a)(5) in all other burning cases.

(d) Finally, some will look at THSC Sec. 382.018(a) and read the language there permitting – not mandating – the TCEQ to write rules to control outdoor burning, conclude that the new law must have been directing the local prosecutor to now treat all violations of this rule as "offenses," and treat all outdoor burning violations as Class C misdemeanors (with subsequent offenses being Class B misdemeanors and burning any of a list of prohibited items as Class A

misdemeanors) under the changes brought about by HB 857.

Often prosecutors can look to the intent of the Legislature in drafting a new law, considering the history, the staff analysis, and other factors. This will be very difficult in this situation. The bill passing the House clearly limited the new Class C misdemeanor to "waste generated solely from property designed for and used exclusively as a private residence." Burning household trash would be subject to the new Class C basic penalty; all other burning would continue as an enhanced Class B misdemeanor. The accompanying analysis from the Senate Research Center seems to agree that there will be multiple levels of violation for outdoor burning: "H.B. 857 creates more defined categories for outdoor burning violations and enhances the penalties for subsequent violations and the burning of certain substances." This would hardly support the notion that the House was trying to create a statewide Class C misdemeanor for all illegal outdoor burning. Nothing in the analysis supports that contention.

The Senate version simply stripped out all of the House language, added the incomprehensible reference to non-existing "offenses" in THSC Sec, 382.018, and went on its way. Perhaps the Legislature was trying to create a uniform Class C misdemeanor for illegal outdoor burning in Texas; perhaps not. All of this happened on the last weekend of the session, and perhaps the drafter was just in a hurry. In any case, the lack of clarity as to the misdemeanor penalties to be applied to illegal burning cases from HB 857 means that local enforcement officers will need to seek policy guidance from their County Attorneys on this at the earliest opportunity. Additionally, when the Rhine decision comes from the Texas Court of Criminal Appeals, we'll put a notice on the front page of our site at tidrc.org. But the important thing is to communicate with your Count Attorney as soon as possible to assure everybody is on the same frequency as to how your jurisdiction goes about enforcing misdemeanor outdoor burning violations.

No changes have been made in the substance of the Outdoor Burning Rule itself, and the TCEQ will continue to enforce this rule administratively.

In some of the choices above, local prosecutors will need the detail that the Texas Outdoor Burning Rule was adopted under Chapter 382 (the Texas Clean Air Act) as published in the Texas Register on September 3, 1996 at page 8505 (top of second column). This is cited as 21 TexReg 8505.

Now let's turn to the substance of the rule itself for a few examples. This might be a good time to read the rule, printed in the back of your book. The Texas Outdoor Burning Rule addresses all areas of outdoor burning. The structure of the rule bans all outdoor burning, then establishes a series of exceptions that, in effect, allow certain burning. For example, all outdoor burning is banned; however, fires for recreation, ceremony, cooking, and warmth, if done safely, are allowed at TOB Sec. 111.207. Fires for training fire fighters are allowed at TOBR Sec. 111.205, and so on. If there is no exception listed in the rule, then that category of unauthorized outdoor burning is a violation. Note well that whatever local practice may be, only the TCEQ can authorize outdoor burning. Local fire departments do not have that authority under state law. Here are a few common situations:

1. Burning commercially generated waste

   Conclusion

   It is illegal to burn commercially generated waste without TCEQ authorization.

   Discussion

   The Outdoor Burning Rule ("TOBR") bans all outdoor burning except as allowed by the rule itself or as allowed by the TCEQ. *"TOBR Sec. 111.201: No person may cause, suffer, allow, or permit any outdoor burning within the State of Texas, except as provided by this subchapter or by orders or permits of the commission."* The rule does

not make an exception for commercially generated waste being burned. Therefore commercial waste cannot routinely be burned without TCEQ authorization. Such unauthorized burning is a criminal violation of TWC Sec. 7.177(5) and is punishable as set forth confusingly above.

2. Burning domestic waste on site from private residences housing over three families

   Conclusion

   It is illegal to burn domestic waste on site from residences housing over three families without TCEQ authorization.

   Discussion

   The Outdoor Burning Rule bans all outdoor burning except as allowed by the rule itself or as allowed by the TCEQ. The rule does not allow burning of domestic waste from residences housing over three persons without TCEQ authorization. [*TOBR Sec. 111.209 "(1) domestic waste burning (is authorized) at a property designed for and used exclusively as a private residence, housing not more than three families, when collection of domestic waste is not provided or authorized by the local governmental entity having jurisdiction, and when the waste is generated only from that property."*] Therefore domestic waste from residences housing over three families cannot routinely be legally burned. Such unauthorized burning is a criminal violation of TWC Sec. 7.177(5).

3. Burning domestic waste on site from private residences housing three or fewer families

   Situation #1

   The local government entity having jurisdiction where the residence is located is "providing" or "authorizing" waste collection at the residence.

Conclusion

It is illegal to burn domestic waste on site generated from these residences.

Discussion

The Outdoor Burning Rule bans all outdoor burning except as allowed by the rule itself or as allowed by the TCEQ. The rule allows burning of domestic waste from residences housing three or fewer families IF the local government having jurisdiction neither “provides” nor “authorizes” waste collection at the residence. [*TOBR Sec. 111.209 “(1) domestic waste burning (is authorized) at a property designed for and used exclusively as a private residence, housing not more than three families, when collection of domestic waste is not provided or authorized by the local governmental entity having jurisdiction, and when the waste is generated only from that property.”*] But virtually all cities and a few counties (only Cameron, El Paso and Nueces Counties, to my knowledge) provide or authorize waste collection at the residence where the waste is generated. Hence, in these cities and counties, one cannot legally burn domestic waste. Note that only a few counties have taken the step of providing or authorizing domestic waste collection at the residence where the waste is generated. In all three cases it has led to enforcement problems. Such major counties as Dallas, Tarrant, Harris, Travis and Bexar have yet to "provide" or "authorize" waste collection services. Consequently, rural domestic waste burning in these counties remains legal, even where waste collection companies operate. However, where waste collection has been “provided” or “authorized” by the local entity having jurisdiction, such burning is a criminal violation of TWC Sec. 7.177(5).

Situation #2

The local government entity having jurisdiction where the residence is located is not "providing" or "authorizing" waste collection at the residence.

Conclusion

It is legal to burn domestic waste on-site from these residences.

Discussion

The Outdoor Burning Rule bans all outdoor burning except as allowed by the rule itself or as allowed by the TCEQ. The rule allows burning of domestic waste from residences housing three or fewer families if the local government having jurisdiction neither "provides" nor "authorizes" waste collection at the residence. *[TOBR Sec. 111.209 (1) domestic waste burning (is authorized) at a property designed for and used exclusively as a private residence, housing not more than three families, when collection of domestic waste is not provided or authorized by the local governmental entity having jurisdiction, and when the waste is generated only from that property.]* Virtually all counties (251 of 254, to my knowledge) are neither providing nor authorizing waste collection services (a few very remote cities are in this same group). Consequently, residences housing three or fewer households can burn domestic waste in these jurisdictions. If a county (or a city) wants to stop domestic waste burning, it may do so *only* by the process of *providing* or *authorizing* domestic waste collection at the residence where the waste is generated. It's not sufficient that these waste collection services exist in a jurisdiction; their use has to be mandated by local government (i.e., *provided* or *authorized*) before this sort of burning becomes illegal.

4. Burning plant growth on the property where it grew by owner or designee

   Situation #1

   The property is located (1) in a NAAQS non-attainment county; or, (2) in a county adjacent to a non-attainment county and shares a city with the non-attainment county.

   Conclusion

   Plant growth may be burned on-site by the owner or designee only (1) for right-of-way maintenance, land clearing operations, and maintenance along water canals; and, (2) only when no practical alternative to burning exists.

   Discussion

   The Outdoor Burning Rule bans all outdoor burning except as allowed by the rule itself or as allowed by the TCEQ. In counties not meeting National Ambient Air Quality Standards (Google: NAAQS and check the TCEQ website for current locations), outdoor on-site plant growth burning by the owner or designee can only happen for the three limited reasons cites in Sec. 111.209(4)(A) [i.e., right-of-way maintenance, land clearing operations, and maintenance along water canals] *and* such burning can only take place when there is no practical alternative. TCEQ regions differ as to the definition of “no practical alternative,” so you are advised to make sure that your understanding of this requirement coincides with that your TCEQ region. The affected counties include (1) those with air not meeting NAAQS standards; and, (2) those bordering counties with a city “straddling” the county line.

Situation #2

The property is located (1) in a county that meets NAAQS standards; and, (2) the county is not adjacent to a non-attainment county with which it shares a city.

Conclusion

On-site plant growth burning by the owner or designee is legal, unless prohibited by municipal codes.

Discussion

The Outdoor Burning Rule bans all outdoor burning except as allowed by the rule itself or as authorized by the TCEQ. Rule Sec. 111.209(4)(B) allows on-site burning of plant growth burning for practically any reason (i.e., "this provision includes, but is not limited to, the burning of plant growth generated as a result of right-of-way maintenance, land-clearing operations, and maintenance along water canals"). Consequently, property owners or their designees can burn plant growth waste on-site in these counties. Note that cities can pass ordinances prohibiting such burning inside their city limit, but counties have no such power. Unless cities in these counties adopt prohibiting ordinances, residents can burn plant waste growth inside cities, too. Counties cannot prohibit such burning except under general burn bans of local emergencies.

5. Burning plant growth on consolidated burn sites in smaller counties (under 50,000 population)

   Conclusion

   Public or private entities can operate consolidated plant growth burn sites outside city limits in counties having populations fewer than 50,000 provided they follow all the rules.

Discussion

The Outdoor Burning Rule bans all outdoor burning except as allowed by the rule itself or as allowed by the TCEQ. The provision found in Rule Sec. 111.209(5) allows consolidated plant growth burn sites as long as the rules for operating such sites are followed. The details are printed in the rule at this same location and include such things as (a) having proper signs; (b) designating specific properties sourcing the plant waste; (c) maintaining lists of these properties; (d) assuring that only plant waste is burned; (e) assuring that the waste comes only from the designated properties; and, (f) assuring that each burn is supervised by a full-time, paid professional fire protection person, acting in the scope of his or her employment. This last provision is likely to be a problem, as. Smaller counties that might use this provision are usually protected exclusively by volunteer fire fighters. However, the rule requires that the fire protection person supervising the burn meet the definition at Texas Government Code, Sec. 419.021. Jurisdictions interested in operating consolidated burn sites should carefully read this definition. Interestingly, the rule does not require that the fire protection person supervising each burn have appropriate fire fighting equipment with him or her. Nothing prohibits a city or county operating a consolidated burn site in a smaller county and charging a fee.

6. Burning household refuse in Montgomery County

Conclusion

In addition to the above, outdoor burning of household refuse in parts of rural Montgomery County is a Class C Misdemeanor.

Discussion

This statute does not fall under the Outdoor Burning Rule, which bans all outdoor burning except as allowed by the rule itself or as allowed by the TCEQ. This is a separate statute found in the Local

> Government Code as cited below. So in this case, both the rule and this additional statute apply. If a county commissioners court is unwilling to "provide" or "authorize" waste collection for political or economic reasons, residential trash burning is legal under the Rule. In Montgomery County, citizens didn't like this state of affairs and properly concluded that outdoor trash burning, at least in some parts of the county, is detrimental to the human and economic health of the community. The results was a modification to the Texas Local Government Code at Sec. 352.082 by the 79th Legislature that prohibited household waste burning in parts of that county. The law applies only in parts of the unincorporated area, namely (1) in platted subdivisions (and areas contiguous to and within 300 feet of the platted subdivision), and (2) on rural lots outside subdivisions that are smaller than five acres. Burning household refuse in these locations is a Class C Misdemeanor, which officers report that they are enforcing.

Inside cities, domestic waste burning is still illegal under the Texas Outdoor Burning rule (except in those very rare cities where the city council has not "authorized" or "provided" waste collection), but fire and municipal codes have been so aggressively enforced in most cities that in-town trash burning doesn't happen all that much (although East Texas clearly has a cultural attachment to illegal in-town trash burning by residents).

General Requirement for Burning Under the Outdoor Burning Rule

In all cases, misdemeanor outdoor burning is subject to *none*, *part* or *all* of TOBR Sec. 111.219 General Requirements for Allowable Outdoor Burning, depending on the specific burning being discussed. These are a list of seven "safety rules" that apply in some cases, but not in others. Also note a distinct tendency in some TCEQ regional offices to simply make things up and to apply a personal view rather than the Rule in complex situations. For example, Sec. 111.205 allows fires for training fire fighters and sets rules for such fires.

Sometimes sly volunteer fire chiefs decide to "help" their community by burning an abandoned house and calling it a "fire training exercise." This has happened enough times in the past that the rule specifically warns that fire training burn approval may be withdrawn by the TCEQ if a local jurisdiction is using this approach to get around other provisions, such as the prohibition on commercial debris burning without TCEQ authorization. All this makes perfect sense. However from time to time one will encounter local TCEQ staff simply adding additional requirements to fire training exercise burns, such as a requirement to remove a list of "bad" materials [as listed at TOBR Sec. 111.219(7)] before starting the fire. This is a great idea! It is also absolutely *not* a requirement of the rule authorizing fire-training exercises. This section of the rule makes no reference whatsoever to the general requirements of Section 111.219. Apparently the rule making process thought that local fire chiefs would have enough sense to proceed safely with such training fires. There is no provision of the Texas Outdoor Burning Rule that gives local TCEQ staff the authority to simply add additional requirements on a whim. While the rule does authorize the TCEQ Executive Director (including staff representatives) to allow additional burning where warranted, there are no provisions in the rule allowing staff to simply change the rules locally as they see fit. In fact, arbitrarily changing the rules when it suits oneself, even for "good" reasons, simply undermines the rule of law and is unethical. If there are TCEQ staffers who take issue with this statement, I'd love to hear from you privately at ockels@tidrc.org.

NAAQS Standards

Most counties in Texas simply have never been tested to see if they meet NAAQS standards. Where no testing has taken place, TCEQ policy is to assume the air to be perfectly fine in these counties, in spite of any experiences of the residents. "Untested" = "good air." This can be a bad assumption. For example, a few years ago, TNRCC offered to provide Grayson County, which is immediately north of the D/FW Metroplex, a $75,000 air

monitoring station. The negotiations went on awhile and a meeting between the TNRCC and the county judge was set. A couple of days before the meeting, the TNRCC suddenly withdrew the offer. Apparently the agency had realized that Grayson County would immediately register as "non-attainment" owing to the drift of ozone from Dallas following bad-air days there. Rather than run the risk of having to re-classify Grayson County as being "non-attainment," the agency withdrew its offer to fund a monitoring station. Now Grayson County "officially" has great air. However, residents, having both eyes to see the haze and lungs to respond to the drifted ozone, know better. Aristotle's point was that "A is A," that a thing is what it is. Pretending that the air of Grayson County is great by simply overlooking the phenomenon that occurs the morning following ozone action days in Dallas is simply bad policy, with the residents suffering the consequences. But air policy issues can be particularly difficult in smaller counties.

Contradictory Air Policies

Combined with the rules concerning burning household trash, the rules covering on-site plant waste burning can seem silly. For instance, in the unincorporated areas of Dallas County, one can legally burn household waste from residences having three or fewer families (since the Dallas County Commissioners Court has neither "provided" nor "authorized" waste collection services), but cannot legally burn the brush and grass clippings that grow on the same property (since Dallas County is NAAQS non-attainment). This seems completely backward, since the "worse" materials (i.e., trash) can be freely burned while the more benign plant growth cannot. Another example concerns operating consolidated plant growth sites in counties having populations under 50,000. *On-site* brush burning in those counties classified as NAAQS non-attainment is prohibited except for rare cases, while *consolidated* brush burning is legal (in spite of some regional TCEQ offices attempts to simply change the rule without authorization to do so). In these counties, small on-site fires are prohibited while large consolidated fires are perfectly fine.

These two examples illustrate the point that piece-meal development of public policy often generates silly or contradictory results.

Burning Dangerous Materials

As discussed above, *sometimes* it is legal to burn domestic waste. However, even when domestic waste can be legally burned, there are restricted items. On this point the rule states:

> *Wastes normally resulting from the function of life within a residence that can be burned include such things as kitchen garbage, untreated lumber, cardboard boxes, packaging (including plastics and rubber), clothing, grass, leaves, and branch trimmings. Examples of wastes not considered domestic waste that cannot be burned, include such things as tires, non-wood construction debris, furniture, carpet, electrical wire, and appliances. TOBR Sec. 111.209(1)*

Additionally, several of the burning exceptions specifically reference a list of prohibited items that are unsafe to burn. This list at Sec. 111.219(7) includes "electrical insulation, treated lumber, plastics, non-wood construction/ demolition materials, heavy oils, asphaltic materials, potentially explosive materials, chemical wastes, and items containing natural or synthetic rubber." Unless specifically authorized by the TCEQ, such items can never be burned.

Firefighters "Authorizing" Outdoor Burning

Please note that occasionally a local fire department employee will take it on himself to "authorize" burning in certain circumstances. There is no authority granted by the Outdoor Burning Rule under which a local fire department, or health department, may give someone permission to start a fire. As Ben Bardwell, a wise man in Grayson County says, "Fire departments are supposed to put fires out, not permit them to start." In most of the exceptions under the rule, the only agency authorized to allow burning is the TCEQ. In the case of fire-fighter training, Sec. 111.205, another body that can grant authority to burn is the "local air pollution control agency," if one should exist. This is certainly *not* the local fire department. The sad truth is that many fire

departments, especially in rural areas, are themselves unaware of the outdoor burning rules for Texas. As many fire departments are somehow connected with local governments, fire departments holding the opinion that they can authorize outdoor burning should first check with their city or county attorney. There are potential significant liabilities involved when a government oversteps its authority and a private citizen is damaged. Moreover, through its actions a local fire or health department certainly does not want to become the *de facto* "local air pollution control agency," as such an agency would have massive additional responsibilities and liabilities [for example, "When does it meet?", "Who are the members?", "How does one get on the agenda?", and, "Why isn't the 'local air pollution control agency' following the Texas Open Meetings Act?"]. If you live *inside* a city limit where trash disposal by burning is "allowed" by the local fire department in spite of waste collection being provided or authorized by the city council, there is a problem. You might want to seriously consider bringing the Outdoor Burning Rules to the attention of the fire chief, the city manager, the city attorney or other party who will be responsible for settling the lawsuits. Because if and when an "authorized" backyard trash fire gets out of hand and destroys neighbors' property, the city may well find itself on the receiving end of legal action (Sec. 111.219).

Backyard burn barrels, although popular and usually legal in rural Texas, are in fact dangerous. The EPA says

> Emission measurements from burning typical household trash in 55 gallon drums were done at the EPA's Open Burning Test Facility in North Carolina. The trash included newspapers, books, magazines, junk mail, cardboard, milk cartons, food waste, various types of plastic, and assorted cans, bottles, and jars. No paint, grease, oils, tires or other household hazardous wastes were included in the burning.
>
> The barrel burn results were compared with emission data from a "well controlled incinerator performing better than the dioxin requirements set by recent EPA standards," according to [Paul] Lemieux [an EPA scientist].

> "Recognizing that there are varied wastes and methods of burning, this particular study found that under test conditions, more polychlorinated compounds were emitted from barrel burning than municipal incinerators because of the lower incineration temperatures and poor combustion conditions [in barrels]," says Lemieux.

The full report is found in the February 1, 2000 edition of the journal Environmental Science & Technology.

Outdoor burning can be very dangerous to health and property and should only take place under closely controlled conditions, and in strict accordance with the Outdoor Burning regulations of the state.

County Burn Bans

Counties may restrict outdoor burning during drought and other dry times by action of the commissioners court. This is what's commonly called a "burn ban" and it can be effective for up to 90 days at a time. It is only effective in all or part of the *unincorporated* area of a county. Burn bans are not absolute, but can come close. Counties often set penalties above the $500 Class C authorized by the following statute. Violations of burn bans are often also violations of the Texas Outdoor Burning rule or other Texas statute and would actually carry larger penalties than those set by the county. The Texas statute governing this is:

> TEXAS LOCAL GOVERNMENT CODE
>
> § 352.081. REGULATION OF OUTDOOR BURNING.
>
> (a) In this section, "drought conditions" means the existence of a long-term deficit of moisture creating atypically severe conditions with increased wildfire occurrence as defined by the Texas Forest Service through the use of the Keetch-Byram Drought Index or, when that index is not available, through the use of a comparable measurement that takes into consideration the burning index, spread component, or ignition component for the particular area.

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

(c) The commissioners court of a county by order may prohibit or restrict outdoor burning in general or outdoor burning of a particular substance in all or part of the unincorporated area of the county if: (1) drought conditions have been determined to exist as provided by Subsection (b); or (2) the commissioners court makes a finding that circumstances present in all or part of the unincorporated area create a public safety hazard that would be exacerbated by outdoor burning.

(d) An order adopted under this section must specify the period during which outdoor burning is prohibited or restricted. The period may not extend beyond the 90th day after the date the order is adopted. A commissioners court may adopt an order under this section that takes effect on the expiration of a previous order adopted under this section.

(e) An order adopted under this section expires, as applicable, on the date: (1) a determination is made under Subsection (b) that drought conditions no longer exist; or (2) a determination is made by the commissioners court that the circumstances identified under Subsection (c)(2) no longer exist.

(f) This section does not apply to outdoor burning activities: (1) related to public health and safety that are authorized by the Texas Natural Resource Conservation Commission for: (A) firefighter training; (B) public utility, natural gas pipeline, or mining operations; or (C) planting or harvesting of agriculture crops; or (2) that are conducted by a prescribed burn manager certified under Section 153.048, Natural Resources Code, and meet the standards of Section 153.047, Natural Resources Code.

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

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

Declarations of Local Disaster

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

TEXAS GOVERNMENT CODE

§ 418.004. DEFINITIONS.

In this chapter: (1) "Disaster" means the occurrence or imminent threat of widespread or severe damage, injury, or loss of life or property resulting from any natural or man-made cause, including fire, flood, earthquake, wind, storm, wave action, oil spill or other water

contamination, volcanic activity, epidemic, air contamination, blight, drought, infestation, explosion, riot, hostile military or paramilitary action, other public calamity requiring emergency action, or energy emergency.

TEXAS GOVERNMENT CODE

§ 418.108. DECLARATION OF LOCAL DISASTER.

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

(b) A declaration of local disaster may not be continued or renewed for a period of more than seven days except with the consent of the governing body of the political subdivision or the joint board as provided by Subsection (e), as applicable.

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

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

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

> regardless of whether the airport is located in or outside the boundaries of a political subdivision.
>
> (f) The county judge or the mayor of a municipality may order the evacuation of all or part of the population from a stricken or threatened area under the jurisdiction and authority of the county judge or mayor if the county judge or mayor considers the action necessary for the preservation of life or other disaster mitigation, response, or recovery.
>
> (g) The county judge or the mayor of a municipality may control ingress to and egress from a disaster area under the jurisdiction and authority of the county judge or mayor and control the movement of persons and the occupancy of premises in that area.
>
> (h) For purposes of Subsections (f) and (g): (1) the jurisdiction and authority of the county judge includes the incorporated and unincorporated areas of the county; and (2) to the extent of a conflict between decisions of the county judge and the mayor, the decision of the county judge prevails.

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

It is perfectly sound public policy, but rare, for the county judge and mayors to coordinate their activities in assuring a comprehensive ban on burning is in effect, should that become desirable. Notice that in evacuating and controlling access to disaster areas discussed in the above statute, both the mayor and

county judge have authority (even if the area is inside a city limit). In the event of a conflict, the county judge has final decision power.

Many cities in Texas already have comprehensive bans on all open fires, having adopted the International Fire Code, a specific local ordinance or some other policy requiring such total bans. Cities should have their attorneys review their local ordinances to assure compliance with the restrictions on the scope of such ordinances found in Sec. 382.113 of the Texas Clean Air Act.