

Local Control of Oil and Gas Waste

10 Questions and Answers

These are ten questions and answers about control of oil and gas waste by cities and counties. They are a chapter from a new online class called “Local Control of Oil and Gas Waste” that is available from Texas Illegal Dumping Resource Center (www.tidrc.com). The purpose of the class is to provide basic education to cities and counties about the Texas criminal laws that they can immediately use to respond to oil and gas waste dumping and illegal hauling.

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1. Isn't it the Railroad Commission's job to respond to *oil and gas waste* dumping and mishandling?

Yes, but not by themselves alone.

The State Legislature has given the Railroad Commission the job of regulating most things happening in the oil and gas industry, including regulating *oil and gas waste*. They do their job in regulating waste by issuing various kinds of waste hauling permits, and regulating the permit holders to be sure they are staying within the bounds of their permits. This is the world of administrative and civil enforcement.

Given the size and growth of the regulated oil and gas exploration and production community (and the due processes required by administrative law) the Railroad Commission does a great job of responding to most violators. It should be noted that virtually all of the rule violations to which the RRC responds are discovered by the RRC investigators doing their job. For instance, the report to the State Legislature for FY 2012 showed the RRC performed 118,484 field inspections and discovered 55,960 violations through their efforts. During the same time the agency received 727 complaints from other sources and resolved 561 of them. By any standards, that's impressive.

There are three ways that any activity can be regulated: through administrative enforcement, through civil enforcement, and through criminal enforcement. The RRC uses the first two of these approaches, but, having no criminal enforcement unit, does not undertake the third.

Criminal environmental enforcement in general is provided almost exclusively by police, constables, deputies, fire marshals, and other certified peace officers working for local governments. If a local community is to benefit from criminal enforcement of Texas criminal laws regulating *oil and gas waste*, it will most likely be through the efforts of its own officers.

Our state has extremely limited resources to use in policing general environmental crimes, and even fewer resources to police environmental crimes involving *oil and gas waste*. Moreover, most of the criminal statutes available are misdemeanors. Consequently, just about all government response to criminal violations involving *oil and gas waste* will come from cities and counties, just as the State Legislature anticipated.

It is important, however, for local police to keep the RRC informed of cases involving *oil and gas waste*. The strongest approach is for local peace officers doing these cases to get to know the district RRC field investigators.

2. Can local governments enforce criminal laws against persons with a Waste Hauler's Permit?

Yes.

Local governments have primary response authority within their jurisdictions to respond to most criminal violations, regardless of whether a person holds a state permit or not. Just like an oil and gas waste hauler must obey the Texas traffic code, he must also obey the criminal laws the State Legislature has provided cities and counties to fight *oil and gas waste* dumping.

The enforcement and regulation system works best when everybody does their thing — the Railroad Commission does administrative and civil enforcement of violations involving *oil and gas waste*; local peace officers respond to criminal cases, and local prosecutors resolve the criminal charges, either through agreements with

the guilty party or local trials — and everybody keeps in touch.

The criminal laws used to deal with *oil and gas waste* violations are just more criminal laws. Instead of being found in the Penal Code, they are found in the Water Code, the Health and Safety Code, and in the Natural Resources Code.

3. What are the easiest criminal laws for local governments to use to deal with *oil and gas waste*?

Read more about these in Section 3 of the online class at tidrc.com.

1. THSC Chapter 341 for basic health nuisance criminal violations [Fine for individual: \$10 - \$200; Confinement: None]. Sometimes the provisions of THSC Chapter 343 can also be useful;
2. THSC Chapter 365 for illegal dumping of just about everything EXCEPT *oil and gas waste* (i.e., “man-camp” waste dumping);
3. 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]. Illegal disposal fires may be stopped through local enforcement of TWC Sec. 7.177 (misdemeanors) and Secs. 7.182 and 7.183 (felonies);
4. TWC Chapter 29 for common misdemeanor violations by *oil and gas waste* haulers [Fine: \$200 - \$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.

5. 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 and/or confinement in the county jail for up to ten days];
6. 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 gauges [Fine to \$10,000 and/or confinement from 2 to 5 years];
7. 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*);

8. Penal Code Sec. 37.10, setting a penalty for tampering with a government record, such as forging or altering a waste hauling permit [third or second degree felony, depending on the situation];
 9. Statewide Rule 8, 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 this rule is also a criminal act under NRC Sec. 91.002 [Fine of up to \$10,000 per day per offense and/or confinement in the county jail for up to ten days]; and,
 10. TWC Sec. 7.351 Civil Suits by local governments where it makes sense to impose major financial civil penalties rather than apply criminal laws, including violations of TWC Chapter 26, which regulates dumping any waste or pollutant (including saltwater) into water. This is complicated and not always applicable, so get outside help.
4. Does the Railroad Commission have to give it's permission for local governments to act?

No. The RRC does it's thing on administrative and civil violations, and local government does its thing on criminal violations.

However, it's always good policy for local officers doing criminal enforcement to know and work with their RRC district counterparts doing field investigations. Local officers should always let the district RRC office know about cases that local government is working and resolving.

5. Why can't local government use the same law it does to stop general illegal dumping?

Because the State Legislature says it can't.

The most commonly used law to stop illegal dumping is the Texas Litter Abatement Act — Texas Health and Safety Code Chapter 365. This law sets fines and confinement for various illegal dumping acts (i.e., dumping, allowing dumping, receiving illegally dumped waste, hauling for dumping) based on the weight or volume of *solid waste* or *litter* involved.

Since this law deals specifically with *solid waste* and *litter*, officers pay strict

attention to what's included — and not included — in those two definitions.

1. The State Legislature has provided language in the definition of *solid waste* used in THSC Chapter 365 that specifically removes *oil and gas waste* from that definition:

THSC Sec. 361.003(36)(A) The term (i.e. solid waste) does not include ...
(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.

2. Moreover, since *oil and gas waste* is also *industrial waste* — a category excluded from the definition of *litter* used in THSC Chapter 365 — you can't consider oil and gas waste to be litter either.

As it turns out, however, not being able to use the Litter Abatement Act is not a real problem; the State Legislature has provided several specific criminal laws to use in dealing with various sorts of waste and situations that will fill this gap.

6. Can local government use other general anti-pollution laws to control *oil and gas waste*?

Yes. Often times, it can.

As long as they're not using THSC Chapter 365 — the Texas Litter Abatement Act — they can use many of the general environmental criminal laws to respond to *oil and gas waste* issues.

Local governments knowing and using the laws listed at Question 3 above should be all set.

Also, note that sewage and general trash generated as a byproduct of the oil and gas exploration and production process at a well or other related location is considered to be *oil and gas waste*. Please help educate the general public — and elected officials — that these waste items generally under the jurisdiction of the Texas Commission on Environmental Quality are NOT, if they are classified as *oil and gas waste*.

However, trash and sewage improperly disposed at trailer camps, “man-camps,” and other places folks live off-site when they are not working are not considered to be exempt from any of the state criminal environmental laws and rules. Local government can use the standard environmental criminal laws to respond to violations in these places — including using THSC Chapter 365 to deal with illegal dumping.

7. Why isn't the TCEQ acting to control *oil and gas waste* in our community?

Because the State Legislature has specifically assigned that task to the Railroad Commission ... and to local government.

For a clarification of the overall decisions of the State Legislature concerning which agency is to handle various types of waste, read the Memorandum of Understanding between the Railroad Commission of Texas (RRC) and the Texas Commission on Environmental Quality (TCEQ) at Title 16 T.A.C. Sec. 3.30.

The attorneys and managers from the two agencies have followed the direction of the State Legislature for decades, and are regularly updating this document that expresses their common understanding. One useful section to help understand this reads:

16 T.A.C. Sec. 3.30(d)(1). Several types of waste materials can be generated during the drilling, operation, and plugging of these [oil, gas, or geothermal resource] wells. These waste materials include drilling fluids (including water-based and oil-based fluids), cuttings, produced water, produced sand, waste hydrocarbons (including used oil), fracturing fluids, spent acid, workover fluids, treating chemicals (including scale inhibitors, emulsion breakers, paraffin inhibitors, and surfactants), waste cement, filters (including used oil filters), domestic sewage (including waterborne human waste and waste from activities such as bathing and food preparation), and trash (including inert waste, barrels, dope cans, oily rags, mud sacks, and garbage). Generally, these wastes, whether disposed of by discharge, landfill, land farm, evaporation, or injection, are subject to the jurisdiction of the RRC. Wastes from oil, gas, and geothermal exploration activities subject to regulation by the RRC when those wastes are to be processed, treated, or disposed of at a solid waste management facility authorized by the TCEQ under 30 TAC Chapter 330 are, as defined in 30 TAC §330.3(148) (relating to Definitions), "special wastes."

So the Railroad Commission handles the enforcement of administrative violations concerning *oil and gas waste*, and local government handles the enforcement of criminal violations.

The TCEQ may be able to answer questions for local government as part of their Small Business and Local Government Assistance program, but the State Legislature has placed responsibility for *oil and gas waste* administration with the RRC and local government.

But in all honesty, the problem in controlling *oil and gas waste* is not at the state level. Most problems arise from local governments not using the criminal enforcement powers given by the State Legislature, as is true when the issue is controlling general illegal dumping, water pollution, and other environmental violations.

8. We're smart people here in our local government; why have we never heard of our enforcement powers?

You mean, "Why don't we know what we don't know?"

Environmental criminal laws are almost never covered in law enforcement academies, so the peace officers trained in these academies are generally unaware of the state criminal laws protecting our air, land, and water resources. The criminal laws provided to local governments to control *oil and gas waste* are even more unknown.

The same situation exists in Texas law schools, where most of our criminal prosecutors are trained. If a law student wants to study environmental law, he or she may be limited to one class that covers federal law and the administrative enforcement thereof. Specific classes on Texas criminal law — and on the criminal laws that can be used for *oil and gas waste* — are simply not available. Moreover, when the city administrator decides to further his or her education and earns a Masters of Public Administration degree, it's extremely likely that the entire program had no mention at all of the criminal environmental laws that can be used to control waste, including *oil and gas waste*.

This general lack of training can result in a situation where several local officials

find themselves agreeing with each other (incorrectly) that “This is a state problem; there’s nothing we can do.” If police, deputies, the sheriff, prosecutors, city attorneys, and other elected officials all agree that “There is nothing that we can do,” it can be difficult to break through that mental road block.

In some situations, local officials may even be under the impression that citizens don’t expect them to respond to *oil and gas waste* violations. However, as citizens become wiser as to what to expect, so do local officials.

All local officials have to do is to look around. Many cities and counties have developed outstanding programs of local environmental protection through enforcing state criminal laws. Now more and more counties and cities in the oil patch are learning that criminal laws exist to stop bad hauling and dumping of *oil and gas waste*, and that using these laws just takes a little learning and a decision.

9. Doesn’t local criminal enforcement of laws against *oil and gas waste* make the industry mad?

No. Just the opposite.

The only folks that enforcing criminal law makes mad are the criminals.

Moreover, if a law is on the books affecting the oil and gas industry in Texas, the oil and gas industry definitely supports it. Otherwise, it probably wouldn’t be on the books at all.

Virtually all handling, hauling, and disposal of *oil and gas waste* is done by the industry in a very responsible and lawful manner. The companies doing things right certainly don’t want to be underpriced by outlaws.

Moreover, when outlaws make a mess, it reflects on the entire oil and gas industry, not just on the bad actors. Since virtually all oil and gas operators want to be in a long, stable, friendly relationship with their neighbors, there is wide support for using state and local authorities to keep things clean.

As local officers get to know the oil and gas operators in their community, they will find that virtually all of the industry supports enforcement against violators.

10. What if local government doesn't want to act to control *oil and gas waste* dumping?

Well, that would be pretty weird. They'll probably have a needlessly messy, and dangerous, city or county.

They'll have very upset citizens too, when they discover that city or county government has turned its back on local enforcement.

Local government has to get involved to solve this problem: it's a matter of math. The RRC has a limited number of inspectors — around 150 oil and gas field inspectors statewide — and they are looking at the entire oil and gas exploration and production business. Their work is not limited to *oil and gas waste* violations: they have to deal with every facet of the industry.

Moreover, Texans and others are drilling more and more wells in our state every day. The well count for February 2013 showed almost 400,000 wells of all types (oil and gas, active, capped, monitoring, and injection/disposal) in Texas, of which about 290,000 are active oil and gas production wells.

Every one of these wells produces some kind of waste throughout its active life. The American Petroleum Institute estimates that about 1.21 barrels of waste are generated per foot drilled, over the life of a well. [See note below]

In FY 2012, the RRC reports that its inspectors performed 118,484 inspections of these wells and other permitted facilities. That's a lot of work for a small crew trying to cover about 8.4% of the land mass of the "Lower 48" states, and what's the chance that a RRC field inspector will be immediately present when an event of outlaw hauling or *oil and gas waste* dumping happens? It's not like these folks are sitting around their district offices waiting for someone to call: they are busy out working. Isn't it much more likely that local police, deputies, constables, fire marshals, and other sworn officers already working to protect the city and county will be lots closer?

The RRC investigators are doing all they can to respond to *oil and gas waste* problems throughout the state, but if local government watches problems happen without responding, there's not much chance things will get better as fast as citizens want and deserve.

[Note: The estimate of 1.21 barrels (42-gallons) of waste per foot drilled was calculated in a 2000 paper from the American Petroleum Institute called “Overview of Exploration and Production Waste Volumes and Waste Management Practices in the United States.” The estimate was based on a 1985 API study, which the paper asserts was still a valid estimate in 1995. This is a widely used figure in the literature discussing *oil and gas waste*, both for and against various practices. This figure is used, for instance, (1) in a 2011 series of articles in the Denton Record Chronicle called “Practice lays waste to land” that reports on some negative effects of land farming; (2) in various presentations oil and gas well service companies; and, (3) in a government presentation called “Environmental Benefits of Advanced Oil and Gas Exploration and Production Technology” by the Department of Energy. When everybody — from all points of view — agrees on a particular figure, and that figure comes from one twenty-or-thirty-year old source, it’s reasonable to question it. Technology moves forward in most fields, including reducing the amount of *oil and gas waste* generated in the exploration and production process. What seems beyond debate is that (1) there is a lot of *oil and gas waste* generated, in spite of efforts to reduce the volume; (2) most of it is in the form of produced saltwater; (3) most of it winds-up in injection/disposal wells; (4) all waste handling methods — including land farming — are controversial; (5) the RRC doesn’t have enough field inspectors to be everywhere at once; (6) when the cat’s away the mice will play; and, (7) local governments are not doing all they can to control oil and gas wastes in their boundaries, simply because they don’t know they can.]