

WYOMING PRESCRIBED BURNING REGULATIONS:

REVIEW OF POLICY, GUIDELINES, AND CASE LAW FOR PRIVATE LANDS



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INTRODUCTION

Prescribed burning is the application of intentionally set fires to meet specific resource management objectives in native and agricultural ecosystems. These include enhancing wildlife habitat, reducing fuel loads and wildfire risk, burning crop residue and cleaning irrigation ditches. Prescribed burning should be carefully used because of air quality concerns and escaped fires can injure people and damage property. As a result, burning in Wyoming is subject to regulation and individuals may be liable when regulations are violated or where failure to exercise reasonable care results in an escaped fire that causes damage or injury. This bulletin provides an overview of the law and regulations regarding prescribed burning on private land in Wyoming.

PREScribed BURNING OVERSIGHT AND REGULATIONS

State Regulation

Prescribed fires may be subject to prior approval (depending on the size and amount of smoke released) and should only be lit under a pre-determined set of specific conditions including specific parameters for wind speeds, relative humidity, air temperatures, crew size, equipment availability, and fire guard installation. Restrictions and requirements on specific burning practices are codified in Chapter 10 of the Wyoming Air Quality Standards and Regulations. Section 2 (smaller burns) and Section 4 (larger burns) of this chapter regulate prescribed burns. The Wyoming Department of Environmental Quality (WY DEQ) provides information

regarding burning on their website (<http://deq.wyoming.gov/aqd/open-burning/>).

Smaller prescribed burns (with lower emissions) are regulated under Section 2, subject to obligations to notice, supervision and location restrictions. Section 2 provides guidelines for Wyoming's Open Burning Program. This section regulates refuse burning; open burning of trade wastes, for salvage operations, for fire hazards and for firefighting training; and open burning of vegetative material. The emissions thresholds for small burns restrict aggregate emissions for a contiguous land area of a person or organization and cannot exceed 0.25 tons of PM₁₀ emissions per day (PM₁₀ is particulate matter that is 10 micrometers or less in diameter). According to WY DEQ, this is approximately 8 acres of shrubland or 25 acres of grass per day – an estimate that can serve as guidelines for burners that do not have access to an emissions calculator (<http://bit.ly/WYDEQ>).

If a prospective prescribed burn does not meet the requirement provided for within Section 2, cannot meet one of the other exemptions within Section 4 (details provided in next section), or exceeds 0.25 PM₁₀ emissions per day, then the fire will be subject to the requirements of Section 4. Section 4 regulates larger burns for the purpose of protecting air quality emissions and impacts from smoke on public health and visibility. Section 4 is divided into two categories of fires, Smoke Management Plan (SMP) I and SMP-II.

1. Smoke Management Plan I (SMP-I)

SMP-I burns are for projects that produce 0.25 tons PM₁₀ to 2 tons of PM₁₀ per day. SMP-I plans must notify the Air Quality Division Administrator at the WY DEQ (<http://deq.wyoming.gov/aqd/>), and provide contact information, burn information and any other information requested by the Administrator. The burner also must notify the public of the prospective burn. This notification must come no earlier than 30 days and no later than two days before the prospective burn. If the burner can show that there is a low density population located within a 0.5-mile radius of the fire, the burner only has to notify the Administrator of the burn. The burner also has to manage for smoke attempting to ignite the fire when there is no downwind population within 0.5 miles, and when the smoke will disperse. The burner may apply for



a waiver of this requirement. Finally, the burner must attend and observe the burn and file an after burn report no later than six weeks after the burn.

2. Smoke Management Plan II (SMP-II)

SMP-II burns exceed 2 tons of PM10 per day and require higher standards of training, notice, supervision and reporting. SMP-II plans must be complete by January 31 or no later than two weeks prior to the ignition of the burn unit. To complete the form, burners must have reviewed smoke management material and/or attended a smoke management training program. The burner must also have considered the use of an alternative to burning the unit. For the burn, the project must include at least one emission reduction technique, however, this requirement can be waived if approved by the Administrator. The burner also has to manage for smoke and only light the fire when the ventilation category is “good” or “better”, or “fair” if there is no population within 10 miles of the burn project in the downwind trajectory. These ventilation categories are a function of mixing height (in feet) and transport winds (in knots) (Table 1).

The burner must provide the Administrator of the Division notice prior to igniting the planned burn. This notification shall include the planned burn project identification information, planned burn date(s), daily burn area or daily pile volume, and other information required by the Administrator of the Division. When there is population within 10 miles of the planned burn unit, the burner also must notify the public of the prospective burn. This notification must come no earlier than 30 days and no later than two days before the prospective burn. Finally, the burner must attend and observe the burn and file an after burn report no later than six weeks after the burn.

Table 1. Smoke dispersion and ventilation categories.

Ventilation Category	Knot-Feet
Excellent	≥ 150,000
Very Good	100,000 – 149,000
Good	60,000 – 99,999
Fair	40,000 – 59,999
Poor	≤ 40,000

<http://bit.ly/WySMPDEQ>

What is Negligence and How is it Legally Defined?

Negligence – A breach of a legal duty that harms another. Negligence is the tort of failing to perform a legal duty, which causes a distinct injury to another person, or to another person's property, or to another person's legal interests. In a prescribed fire context, an example of negligence could be lighting a fire without a burn plan or adequate resources to contain it.

Gross Negligence – the extraordinary form of negligence in which a person not only fails in the ordinary duty of care but does so either in a manner that exhibits such disregard of care that a reasonable observer would foresee that an injury would be likely to occur, or in circumstances when the person should know that a failure of care risks an injury of unusual magnitude. Gross negligence could be lighting a fire knowing there were cabins that were likely occupied within the area you planned to burn and not notifying the cabin owners that there was a fire.

Contributory Negligence – Contributory negligence is a defense to a claim of negligence that [can] bar recovery for a plaintiff who is to a degree responsible for the injury the plaintiff suffered. Contributory negligence could be when a landowner fails to clear ladder fuels from their home, or improperly stores flammable or combustible materials, which leads to their home being consumed when the fire came through.





When conducting a burn, it is important to adhere to any DEQ requirements. If a burner has questions on a particular definition, or whether and activity falls into a certain category, the burner should consult with the Wyoming DEQ to ensure compliance.

3. Exceptions

Some burn projects are not subject to certain subsections within the SMP, including they do not require notification of the Administrator or the public, a report following the conclusion of the burn, or grant Division representatives the right to enter or inspect property:

These are the burn projects that are not subject to the subsections noted below this list:

Planned burning of vegetative materials incident to:

- (A) Weeds along fence lines;
- (B) Weed growth in and along ditch banks incident to clearing ditches for irrigation purposes;
- (C) Vegetative materials related to agricultural croplands.

- (D) Vegetative materials related to rangeland and/or pasturelands, if the project area is less than 68 acres.

Are not subject to the following subsections within Section 4. Smoke Management Requirements:

Permission for property inspection: 4(e)(ii):

“Authorized representatives of the Division shall be given permission by the burner or responsible jurisdictional fire authority to enter and inspect a property, premise or place on or at which a planned burn project or unplanned fire event is or was located solely for the purpose of investigating actual sources of air pollution, and for determining compliance or non-compliance with any applicable rules, regulations, standards or orders. This permission shall extend for a maximum time of ten business days after the completed reporting form is received by the Division. Site inspections during this period shall be initiated only after notification of the burner conducting the planned burn project or the jurisdictional fire authority responsible for the unplanned fire event.”

WY DEQ Notification: 4(f)(i): “For each planned burn project, the burner shall notify the Division prior to the ignition of the planned burn project, in accordance with the notification process approved by the Administrator of the Division. This notification shall include the burner contact information, the location of the planned burn project, and other information required by the Administrator of the Division.”

Public Notification: 4(f)(ii)(B): “When there is a population within a 0.5-mile radius of the planned burn project, conduct public notification no sooner than 30 days and no later than two days in advance of the ignition of the planned burn project. Documentation of public notification shall be submitted on the reporting form required in Subsection (f)(v). When it can be shown that the population within a 0.5-mile radius of the planned burn project is in an area of low population density, compliance with Subsection (f)(ii)(A) shall satisfy this requirement. An average of one dwelling unit per ten acres shall be used as the definition of areas of low population density.”

Completion Report: 4(f)(v): “For each planned burn project, the burner shall submit to the Division a completed reporting form, provided by the Division, no later than six weeks following completion of the planned burn project.”

When in doubt always check with WY DEQ to make sure you are in compliance.

County or City Regulations

Cities and counties may also have ordinances that restrict burning. For example, many cities in Wyoming prohibit open burning of rubbish containing paper products and require a permit for other open burning within city limits. County ordinances or regulations may also apply in unincorporated areas of the county. Although many counties reference DEQ requirements, some regulations may be more restrictive or require specific notice requirements. Furthermore, counties may adopt seasonal burning prohibitions during times of extreme fire danger. Accordingly, landowners should reference city and county regulations and contact local fire authorities prior to burning.

CIVIL AND CRIMINAL LIABILITY FOR ESCAPED FIRES

In addition to fines for failing to follow DEQ requirements, burners may also be liable for damages caused by their burning activities, even if the burner had filed a burn plan and complied with other WY DEQ requirements. The degree of negligence and thus the liability for damages in a private action may depend on the extent to which the burner failed to exercise sufficient care or the extent to which the injured party bore responsibility for the damage.

A burner can be liable both civilly and criminally for damages or injury to persons or property as a result of negligence in the context of prescribed burning. While an escaped fire is never the intent of prescribed burning, failure to exercise sufficient care may result in a civil lawsuit, imprisonment, fines or some combination of the three.

Wyoming Statute 6-3-105 “Negligently burning woods, prairies or grounds; penalties” is a criminal law (not civil) (Title 6: Crimes and Offenses, Chapter 3 – Offenses Against Property) that stipulates that a person may be guilty of a misdemeanor and subject to either imprisonment or a fine of up to seven hundred and fifty dollars for allowing a fire to escape and cause injury or destruction of any property of another. However, this statute applies *only if the burner is criminally negligent* and did not have permission to burn from the property owner. Wyoming Statute 6-1-104 provides that “A person acts with criminal negligence when, through a gross deviation from the standard of care that a reasonable person would exercise, he fails to perceive a substantial and unjustifiable risk that the harm he is accused of causing will occur, and the harm results. The risk shall be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.” In the event that an escaped fire causes death or injury to persons, burners could also face liability for criminally negligent homicide or reckless endangerment. Wyoming Statute 6-3-106 “Failure to extinguish or contain fire outside; penalty” stipulates that a person may be guilty of a misdemeanor and subject to a fine of up to seven hundred and fifty dollars if “he, *outside of normal agronomic or forestry practices*, lights a fire outdoors and leaves the vicinity of the fire without extinguishing

it or containing it so it does not spread or conditions are such that the fire is not reasonably likely to spread". Full details of these Statutes are available at: www.wyoleg.gov/statutes/compress/title06.docx.

However, a burner who negligently causes damage or injury to persons or property through prescribed burning may also be liable for civil damages. In order to bring a suit for damages resulting from negligence, the damaged party must bring evidence sufficient to establish the circumstances and requirements of the basic claim. The degree of negligence and thus the

liability for damages in a private action may depend on the extent to which the burner failed to exercise sufficient care or the extent to which the injured party bore responsibility for the damage. For instance, a party could be civilly liable for negligence if it started a fire without a burn plan or adequate resources to contain it. As shown in the 1965 Wyoming Supreme Court case of *Douglas v. Nielsen*, negligence can also be demonstrated for failure to take adequate precautions to control and contain the burning area. Although not negligence per se, failure to follow established regulations for prescribed burning may indicate a lack of care. In civil

What is Liability and How is it Legally Defined?

Strict Liability – Strict liability is the strictest form of liability for a fire manager. Strict liability is when an activity is not so unreasonable as to be prohibited altogether, but the activity is sufficiently dangerous or provides unusual risks. An example of this type of activity would be conducting a prescribed burn. In the states that have strict liability, like California, Oregon and Wisconsin, prescribed burning is considered a dangerous activity, but not an illegal one. If a person chooses to manage their property using a prescribed burn, they do so at their own peril. If the fire were to escape for any reason and cause damages, they would be liable for those damages. In these states, a prima facie case requires that a person set the fire, the fire escaped and the fire damaged the property of another. If all three of these are proven, then the person is liable even if there was no negligence.

Negligent unless Proven Otherwise – The second type of fire liability is negligent unless proven otherwise. There are 22 states that have adopted this type of fire liability. Five of the 22 states have laws that state that an escaped fire is prima facie evidence of negligence. In order to overcome the prima facie evidence, the person who started the fire, or defendant, has the burden of proof. The defendant must prove that they exercised due care in creating and implementing their fire plan. If they are unable to do so, then they will be liable for the damages caused by the escaped fire even if the fire escaped due to something beyond their control.

Not Negligent Unless Proven Negligent – The final type of fire liability is not negligent unless proven negligent. This standard is the most forgiving for fire managers and six states currently have this type of standard codified in state law. Under this standard the burden of proof rests with the person claiming the fire manager was negligent, i.e., the plaintiff. The plaintiff must show that the burn plan was insufficient to contain the fire. It is important to note that under this standard, an escaped fire is not prima facie evidence of negligence on behalf of the burner. Rather, a fire could have escaped under a perfectly planned out burn due to an unforeseen event and the fire manager would not be held liable.

There are currently 16 states that do not have some form of fire liability statute codified. In these states, negligence is proven on a case by case basis for fire similar to other negligence cases within each state.

cases involving fire, a burner may be required to prove that they were not negligent and exercised an appropriate level of care in order to defend against damage. Although some states have statutorily imposed strict liability for damages resulting from escaped fire or assumed negligence until refuted, Wyoming has no statute regarding the assumed standard of liability for the spread of fires that are intentionally set for legitimate purposes.

The 1965 case of *Douglas v. Nielsen* may provide a helpful example regarding liability for escaped fires. In that case, fire escaped from an intentional refuse fire at the town's dump and ignited surrounding grass and vegetation. The plaintiff asserted that the town had failed to exercise the requisite degree of care by lighting the fire at an elevation where it was subject to high winds and for failing to take sufficient precautions to control or contain the fire, particularly after town officials had been warned of the danger of the spreading fire. The plaintiff was able to recover for damages to his property resulting from the escaped fire.

CONCLUSION

Prior to engaging in prescribed burns, Wyoming land owners should carefully research and comply with state and county regulations, and where applicable, federal requirements. Burners should exercise reasonable care to avoid the spread of intentionally set fires by only burning during acceptable weather conditions and preparing a burn unit with fire breaks before the start of the fire. Where fires do “escape” and damage the property of others, landowners may face both civil liability and criminal penalties for negligence.

***This report on burn regulations in Wyoming should not be relied upon when conducting a burn. This summary is meant to be informal and anyone considering conducting a burn should consult with their local fire manager and/or an attorney to determine the risks associated with intentionally starting a fire.*





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