

HOW TO REDUCE LEGAL LIABILITY FOR PRESCRIBED BURNS

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WHY IS LIABILITY SUCH A CONCERN?



PUBLIC PERCEPTION OF FIRE



SMOKE



PROXIMITY TO URBAN AREAS/HIGHWAYS



WEATHER

HOW CAN A PRESCRIBED BURNER LIMIT LIABILITY EXPOSURE?

Get training - in NC, become a “Certified prescribed burner”

Follow all applicable laws

- State laws & regulations
- Local laws & regulations

Check weather

Monitor burn throughout

???

NORTH CAROLINA PRESCRIBED BURNING ACT

N.C. Gen. Statutes, Chapter 106, Article 80

N.C. Gen. Stat. 106-965

Legislative findings

“The General Assembly finds that prescribed burning of forestlands is a management tool that is beneficial to North Carolina’s public safety, forest and wildlife resources, environment, and economy.” The General Assembly finds that the following are benefits from prescribed burning:

- Reduces naturally occurring buildup of vegetative fuels, reducing risk and severity of wildfires and lessening loss of life & property
- Substantially reduces risk of wildfires that cause damage in woodland-urban interface areas
- Essential to the perpetuation, restoration, and management of many plant & animal communities
- Increase productivity of land

“

As North Carolina’s population grows, pressures resulting from **liability issues** and smoke complaints discourage or limit prescribed burning so that these numerous benefits to forestlands often are not attainable.

”

N.C. Gen. Stat. 106-965

SO WHAT DID THE LEGISLATURE DO TO HELP?



N.C. Gen. Stat.
106-967
Immunity
from Liability

- ▶ (a) Any prescribed burning conducted in compliance with G.S. 106-968 is in the public interest and does not constitute a public or private nuisance.

What is a public or private nuisance?

Nuisance is the unlawful and unreasonable interference with the enjoyment of the property of another (ex. Noise, odor, smoke)

Public Nuisance is one that affects a large group of members of the public, must be brought by a governmental agency, and criminal charges can also be brought against the wrongdoer

Private Nuisance involves a particular injury to a specific individual landowner, civil case can be brought by individual landowner, may recover monetary damages or injunctive relief

Must be in compliance with G.S. 106-968

Landowner must obtain a prescription for the prescribed burning prepared by a certified prescribed burner and filed with the NCFS

Prescribed burn shall be conducted by a certified prescribed burner who must be present on site and in charge of the burning throughout the period of the burning.

Exception for landowner who is burning 50 acres or less of land owned by landowner and following all conditions in prescription prepared by certified prescribed burner

Obtain an open-burning permit from NCFS. Must comply with following:

Terms & conditions of open burning permit

State's air pollution control statutes

Any applicable local ordinances

Smoke management guidelines adopted by NCFS

Any rules adopted by the NCFS

NCFS may accept prescribed burner certification from another State or entity

(b) A landowner or landowner's agent who conducts a prescribed burning in compliance with G.S. 106-968 **shall not** be liable in any civil action for any damage or injury caused by or resulting from smoke.

Civil action vs. Criminal Action

Civil Action



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Criminal Action



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ALWAYS AN EXCEPTION

- ▶ (c) Notwithstanding subsections (a) and (b), this section does not apply when a nuisance or damage results from a **negligently** or improperly conducted prescribed burning.

What is Negligence?



DUTY

BREACH

**PROXIMATE
CAUSE**

DAMAGES



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WHAT WOULD
A
REASONABLE
PERSON
DO?????

An individual can only sue the **State** based on the alleged negligence of a specific named State employee(s) acting during the course and scope of their employment.

N.C. Tort Claims Act

N.C. Gen. Stat. 143-291 *et seq.*

Benefits of being a State employee

- ▶ Can only sue State Agency
- ▶ If sued individually can ask to be represented by the AG's office
 - ▶ Must be within the course & scope of employment
 - ▶ Cannot be intentional/criminal behavior



Overview of Southern States' Law

Simple Negligence

- ▶ North Carolina
- ▶ South Carolina
- ▶ Virginia (almost identical to NC)
- ▶ Alabama
- ▶ Louisiana
- ▶ Mississippi
- ▶ Tennessee

Gross Negligence

- ▶ Georgia
- ▶ South Carolina (smoke)
- ▶ Florida (1999-benefits outweighed risks)

HYPOTHETICAL #1

- ▶ Carl, the Forester
 - ▶ Carl is hired to burn 100-acres of pine forest
 - ▶ Carl is a certified prescribed burner
 - ▶ Carl has prepared a prescription
 - ▶ Carl obtained an open burning permit
 - ▶ Carl checked and continuously monitored the weather
 - ▶ Carl puts in necessary fire breaks
 - ▶ Carl gives notice to adjacent landowners
- ▶ **The fire escapes onto the adjoining property destroying valuable timber**



HYPOTHETICAL #1

Carl, the Forester

Liability?

Strict Liability? YES!

Negligence? NO,

Carl took reasonable care to make sure the fire was safe

(Accidents can & do happen)

Gross Negligence? NO!

HYPOTHETICAL #2

- ▶ Carl, the Forester
 - ▶ Carl is hired to burn 100-acres of pine forest
 - ▶ Carl is a certified prescribed burner
 - ▶ Carl has prepared a prescription
 - ▶ Carl puts in necessary fire breaks
 - ▶ Carl gives notice to adjacent landowners
 - ▶ Carl and his crew initiate the fire on a day when weather conditions are ideal
 - ▶ Carl used the predicted weather forecast from the day before the burn and did not get an updated forecast the morning of the burn since the weather conditions that morning were ideal
- ▶ **The weather changes resulting in thick smoke on the highway, which causes a major motor vehicle accident.**



HYPOTHETICAL #2

Carl, the Forester

Liability?

Strict Liability? YES!

Negligence? Maybe?

Jury must decide whether it was reasonable for Carl not to check the weather

Gross Negligence? NO!

Carl showed some level of care in starting the fire.

Is Insurance an Option?

- ▶ Insurance coverage for prescribed burning is relatively new to the insurance market but is available from several companies in the Southeast under an extended Forester's policy or as a separate insurance policy specifically for prescribed burning.
- ▶ Most require (at a minimum) that the policy holder be a certified burner within their respective state and provide proof of experience in prescribed burning.



Real Case Scenario

- ▶ Plaintiff contracted with NCDA&CS to conduct controlled burns on various plots of land.
- ▶ One of the burns was scheduled to be a low intensity burn with scorch heights not exceeding 15 feet.
- ▶ The burn exceeded the scorch height.
- ▶ Plaintiff then treated the sight with herbicides.
- ▶ Plaintiff alleges that the hot burn resulted in timber dying and weakening of trees so that beetles moved in and killed the timber.
- ▶ Plaintiff's alleged damages:
 - ▶ Timber loss: \$9801.00
 - ▶ Reforestation: \$4760.00
 - ▶ Site Investigation and Damage Appr. \$3621.00
 - ▶ Hazard Reduction burn cost: \$5505.00
 - ▶ 4yrs of growth loss \$1695.00.
 - ▶ Grand Total: \$25382.00.

SETTLE OR
LITIGATE???

ANALYZE THE
CLAIM

A. REVIEW THE BURN PLAN

B. COMPARE PHOTOGRAPHS OF THE BURN SITE BEFORE AND
AFTER THE FIRE

C. REVIEW INSPECTIONS OF THE BURN SITE

D. REPORTS OF WEATHER CONDITIONS

E. STATEMENTS OF ALL PERSONNEL WORKING ON THE BURN

F. EXPERT WITNESS OPINIONS & FEES

G. LITIGATION COST

QUESTIONS / FINAL THOUGHTS

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**A. DOCUMENT
COMPLIANCE
WITH APPLICABLE
LAWS**

**B. TAKE GOOD
NOTES &
PICTURES FOR
YOUR FILES**