FLORIDA'S REVISED PRESCRIBED FIRE LAW: PROTECTION FOR RESPONSIBLE BURNERS

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ABSTRACT

In Florida, natural communities require periodic fires for maintenance of their ecological integrity. Because of public concerns, wildfires can no longer be allowed to perform this mandatory function so prescribed burning is essential to manage these plant and animal communities. We discuss the importance of prescribed fire in Florida, outline a history of the state's interest and involvement in promoting the judicious use of prescribed fire, describe the situation that led to Florida's fire management statutes, and provide an overview of the 1977 and 1990 statutes and the 1999 changes to the 1990 Prescribed Burning Act that significantly strengthen the law. The State of Florida passed landmark legislation in 1990 to protect responsible burners from civil liability with one goal in mind: to increase the number of acres treated with prescribed fire. The reason for introducing this bill was the clear message coming from the land management community that "burning the land was too risky," not because of potential fire control problems, but because of potential smoke management problems that were beyond the control of the burner. During a Florida land manager's conference on prescribed burning issues held January 1999, the four most common reasons cited by land managers for not using prescribed fire pertained to liability. The 1990 Prescribed Burning Act has been nationally recognized as landmark legislation protecting a landowner's right to use fire as a management tool. In the wake of the disastrous 1998 fire season in Florida, which was partially blamed on abnormal fuel accumulations, the Florida legislature modified this law so that a prescribed burner cannot be found civilly liable unless a court demonstrates that the burner was "grossly negligent." This unprecedented modification is a huge step in protecting the right to prescription bum in Florida.

keywords: fire prevention, Florida, liability, negligence, prescribed fire, wildfire.

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INTRODUCTION

Fire has long held our imagination hostage. We continue to be fascinated by fires of any size. Land management practices throughout the New World have produced a constantly changing landscape. During the past several millennia, accidental and deliberate anthropogenic fires have been superimposed upon, and markedly expanded, Florida's natural fire environment. Thus sustainability of the flora and fauna has become even more intermingled with and dependent upon fire (Martin and Sapsis 1992). The attempted exclusion of fire during the 20th century created an ecological disaster, though one often camouflaged because it accompanied other, equally damaging and more visible practices. The bottom line is that carbon cannot be sequestered like money in a bank; biologic preserves are not a kind of Fort Knox for carbon. Terrestrial ecosystems store carbon, but withdrawals are demanded on a regular basis, a "fire tithe" so to speak. This tithe can be given voluntarily, or it will be extracted by force (Pyne 1992). Storing carbon also stores fuel; this fuel accumulates awaiting the inevitable spark that will ignite an inferno that is likely to be outside the historical range of natural variability for that ecosystem. When fire is excluded from the system, it sets the stage for ever-larger conflagrations and associated negative outcomes such as continual insect and disease epidemics. Refuse to manage the "domestic" tire and the "feral" fire will come in its own time, wiping out everything in its path, threatening life and property in the process.

KEEPERS OF THE FLAME

Most state forestry agencies now have the statutory responsibility to authorize prescription burns, but this was not always the case. During the early part of the 20th century, the use of fire as a management tool by state and federal agencies was seen by the forestry community as anathema. (See Wade et al. [2000] for a summary of southern U.S. fire history.) Some private land managers, both timber and ranch, continued to use tire in direct violation of state and federal laws. This disregard of the law occurred because fire had been used on these lands for generations and the owners knew both the benefits of the frequent use of low-

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intensity fire as well as the consequences of attempted fire exclusion. Although ignored by officials, published observations showing the necessity of fire were abundant. Early accounts include one by Ellen Call Long, daughter of the Territorial Governor of Florida, who observed (I 889:94):

> The annual burning of the wooded regions of the South is the prime cause and preserver of the grand forests of *Pinus palustris* [longleaf pine] to be found there; but for the effects of these burnings . . . the maritime pine belt would soon disappear and give place to a jungle of hardwood and deciduous trees. . . The statute books of almost every southern state contain enactments prohibitory of setting fires to the woods, and severe penalties are attached to violation of the law. There may be sound reason for such legislation, since great loss of property often results from burning fences and buildings. But viewed from a forestry standpoint we believe that total abolition of forest fire in the South would mean the annihilation of her grand lumbering pineries.

Forty years earlier, in 1849, the English geologist Charles Lye11 commented (Biswell 1989:82):

> These hills were covered with longleaf pines and the large proportion they bear to hardwoods is said to have been increased by the Indian practice of burning the grass; the bark of the oaks and other kinds of hardwoods being more combustible, and more easily injured by fire, than most of the fir tribe. Everywhere the seedlings of the longleaved pine were coming up in such numbers that one might have supposed the ground to have been sown by them.

Research results documenting the benefits of fire in southern pine ecosystems had also been accumulating until this fact could no longer be denied. The severe 1943 fire season, which was exacerbated by the fact that most able-bodied men were overseas at this time, presented an opportunity to show U.S. Forest Service leadership the inevitable outcome of attempted fire exclusion. Joe Kircher, the Southern Area Regional Forester, invited Lyle Watts, Chief of the Forest Service, to come to Florida and personally survey conditions. After viewing the holocausts that resulted from fire exclusion, Watts was clearly distressed (Biswell 1989). He wrote to Florida Forest Supervisor Frank Albert (Biswell 1989:92–93):

> I assure you that I will not soon forget the ten days that I spent with Regional Forester Kircher and others in the deep South. Certainly I will not forget that in Florida there is an acute fire problem and that adequate heavy equipment is one of the essential requirements for getting on top of the job. I must admit that control burning has me somewhat confused. However, the way that the big fire substantiated your own judgment of things to happen, within a week after you explained it to me, lends a lot of emphasis to your own ideas.

Soon thereafter national forests were given permission, on a case-by-case basis, to use prescribed fire for the reduction of unnaturally high fuel accumulations. This policy change gave tacit recognition to the wisdom of managing the landscape with fire as practiced during the previous several thousand years by Native Americans and the European settlers who replaced them.

Florida has led the nation in acreage treated with prescribed fire every year since records have been kept, reaching a high of about 3.9 million acres during the 1970s. At the same time, retirees were discovering the advantages of Florida's climate to the extent that the state has been a leader in population growth over the past 5 decades. Wildlands were subdivided and lots sold worldwide. The vast majority of these landowners were absentee, and virtually none of them practiced fuel reduction on their lands. In 1977, Florida passed the Hawkins Bill, which contained procedures under which the Division of Forestry could prescribe burn hazardous accumulations of wildland fuels on private land FS 590.125(4) (Wade and Long 1979). The intent of the law was to reduce the conflagration potential on these absentee land holdings. Thousands of acres are burned in Florida each year under its auspices.

By the 1980s, however, the acreage annually treated with prescribed fire was declining. Reasons for this decline were varied and included worries about liability. In 1990, the case *Midyette* v. *Madison* reached the Florida Supreme Court regarding landowner responsibility for a prescribed fire that escaped from a contractor and caused a smoke-related fatality. The court held both the contractor and landowner liable even though the landowner had no knowledge of the technical aspects of prescribed fire and was not present during the burn. The court ruled that "setting a fire was clearly a dangerous agency because it possesses an inherently dangerous propensity." Additionally, the court found that "it is equally self evident that smoke blowing across a heavily traveled traffic corridor also possesses a dangerous propensity." The court went on to state "we are mindful of the concerns about good forestry practices. However, we do not believe that anything in this opinion will undermine the responsible use of fire." This ruling, although not directly responsible for the development of the Prescribed Fire Act, certainly created an atmosphere in which the land management community believed that some kind of legislation in support of the intentional use of fire was necessary.

PRESCRIBED BURNING ACT OF 1990

A blue-ribbon committee translated Florida's prescribed burning concerns into proposed legislation that was introduced into the 1990 legislative session. Floridians concerned with forest production and environmental protection worked together to make sure ev-

eryone understood the critical need for such legislation, which recognized the ecological necessity and mutual benefits of maintaining a strong prescribed fire program. Thanks to these citizens and the strong support of several members of the Florida Legislature, that body determined that "prescribed fire is a land-management tool that benefits the safety of the public, the environment, and the economy of Florida." State Statute 590.026 (now State Statute 590.125(3)), the Florida Prescribed Burning Act, became law on 1 October 1990. This legislation, with its associated administrative rules, outlined accepted forestry burn practices in the state (Brenner and Wade 1992). It also protected prescribed burners from civil liability as long as they or their agents were not found generally negligent as defined in the 1990 Florida Supreme Court ruling *Midyette* v. *Madison,* No. 74,09 1. In addition, prescribed burns conducted in accordance with the statute could no longer be terminated because of nuisance complaints.

This law authorized and promoted the continued use of prescribed burning for ecological, silvicultural, and wildfire management purposes. The statute promoted the use of fire, described the benefits of prescribed fire, the value of public outreach initiatives, and the need for continued prescribed burner training as follows:

1) Prescribed burning reduces vegetative fuels within wildland areas. Reduction of the fuel load reduces the risk and severity of wildfire, thereby reducing the threat of loss of life and property, particularly in urban areas.

2) Most of Florida's natural communities require periodic fire for maintenance of their ecological integrity. Prescribed burning is essential to the perpetuation, restoration, and management of many plant and animal communities. Significant loss of the state's biological diversity will occur if fire is excluded from fire-dependent ecosystems.

3) Forestland and rangeland constitute significant economic, biological, and aesthetic resources of statewide importance. Prescribed burning on forest land prepares sites for reforestation, removes undesirable competing vegetation, expedites nutrient cycling, and controls or eliminates certain forest pathogens. On rangeland, prescribed burning improves the quality and quantity of herbaceous vegetation necessary for livestock production.

4) The state purchased hundreds of thousands of acres of land for parks, preserves, wildlife management areas, forests, and other public purposes. The use of prescribed burning for management of public lands is essential to maintain the specific resource values for which these lands were acquired.

5) A public education program is necessary to make citizens and visitors aware of the public safety, resource, and economic benefits of prescribed burning.

6) Proper training in the use of prescribed burning is necessary to ensure maximum benefits and protection for the public.

7) As Florida's population continues to grow, pressures from liability issues and nuisance complaints inhibit the use of prescribed burning. Therefore, the division (i.e., the Division of Forestry) is urged to maximize the opportunities for prescribed burning conducted during its daytime and nighttime authorization process.

Florida's Prescribed Burning Act coupled with certified burner training (see Certification and Re-certification Procedures, below) appears to be the best answer to mitigate the specter of liability. Some burners consider the requirements for burn management certification to be too strict and have abandoned burning, but in our experience, most continue to conduct burns without being certified, which is still legal in Florida. Lack of certification may, however, become a distinct disadvantage in the event of a liability claim. One potential benefit of this law is that commercial insurers may be more inclined to underwrite qualified burners. Since its passage, seven other southern states have passed identical or very similar legislation including Georgia, Mississippi, Alabama, Louisiana, North Carolina, South Carolina, and Tennessee. Several other states are considering such legislation.

Courtroom challenges may reshape certain provisions of this law. At this stage, however, there is no evidence of the legal defensibility of this law or data to reflect whether it will change burning costs or practices. We note that several cases have been headed toward court and then dropped or settled by plaintiffs at the last minute. One industrial prescribed burner in Georgia has successfully defended itself in court under the Georgia version of this statute.

LEGAL REQUIREMENTS AND LIABILITY ISSUES OF 1999

During 1998, Florida suffered under the most acute drought since the 1950s. More than 500,000 acres burned in essentially an 8-week period, forcing the evacuation of an entire county (Wade 1998). One of the factors cited as a major contributor to the destructiveness of the fires was the unnaturally high accumulation of fuel. A diverse group of public and private land managers met in Gainesville in January 1999 to discuss why more acreage was not being treated with prescribed tire. The reason for the meeting stemmed from language in the just-released Environmental Protection Agency "Interim Wildland Fire Policy" and the wildfires of 1998. During this meeting, land managers reiterated that their chief concern was liability. The top four reasons given why private landowners do not use prescribed fire: 1) liability in general; 2) liability in particular; 3) liability that would cause economic loss (time, expertise, etc.); and 4) liability including, but not limited to, fear of lawsuits, legal proceedings, etc.

Armed with the results of this meeting and a long-range weather forecast calling for the drought to extend through the spring 1999 fire season, the Florida Legislature modified the 1990 Prescribed Burning Act. The new Florida statute (590.125(3)), which goes by the same name, is intentionally general. It allows the

Florida Department of Agriculture and Consumer Services, Division of Forestry, through the rule-making process, to establish and update specific guidelines as necessary. In order to receive protection under this law, at least one certified prescribed burn manager (CPBM) must be present from ignition to completion of the prescribed burn. In addition, a written prescription must be prepared before the Division of Forestry can grant an authorization to burn (under this law) and this prescription must be on-site during the burn. Permission or consent of the landowner or their designee must also be obtained prior to requesting authorization from the Division of Forestry. The person getting the authorization must certify that the area to be burned has been properly prepared, including adequate firebreaks, and sufficient personnel and firefighting equipment will be on-site to assure control of the fire.

Prescription burns that adhere to these conditions receive the following protection under the law:

1) The burn is considered to be in the public interest and does not constitute a public or private nuisance when conducted under applicable state air pollution statutes and rules.

2) The burn is considered to be a property right of the property owner if vegetative fuels are burned as required in this subsection.

3) A property owner or his or her agent is neither liable for damage or injury caused by the fire or resulting smoke, nor considered to be in violation of subsection (2) for burns conducted in accordance with this subsection unless gross negligence is proven.

The addition of the term "gross negligence" in place of "general negligence" in the 1999 law is, according to many legal minds, very significant. The generally accepted definition for "gross negligence" from *Blacks Law Dictionary* is "a failure to use even the slightest amount of care in a way that shows recklessness or willful disregard for the safety of others." The Florida Division of Forestry believes that this change to the law will mitigate the concerns of many land managers concerning liability, especially after it is tested in court.

The Florida Division of Forestry has also expanded its open burning rules to include specific language that outlines the responsibilities of both the Department and the burner. One of the most important requirements of Florida's prescribed burn law is the written plan or prescription. The rules define exactly how this document is to be prepared. It must include, but is not limited to: 1) stand or site description; 2) map of the area to be burned; 3) personnel and equipment to be used on the prescribed burn; 4) desired weather factors, including, but not limited to, surface wind speed and direction, transport wind speed and direction, minimum mixing height, minimum relative humidity, maximum temperature, and fine-fuel moisture; 5) desired fire behavior factors such as type of burn, firing technique, flame length, and rate of spread; 6) the time and date the prescription was prepared; 7) the authorization date and the time period of the authorization; 8) an evaluation of the anticipated impact of the proposed burn on pertinent smoke-sensitive areas; and 9) the signature and number of the Certified Prescribed Burn Manager.

The rules require that the CPBM screen the prescription for possible negative smoke impacts on the surrounding landscape prior to signing it (which constitutes approval of all facets of the plan), and to submit his or her certified prescribed burn number at the time of the authorization request. As indicated above, the Florida Supreme Court found that land managers can only be found negligent if they do not follow "accepted forestry practices." The Division of Forestry modified these rules in 1999, and again in 1999 to more clearly define accepted forestry practices.

Additional changes that affect the CPBM include a change in the daytime authorization time period to now read from 9:00 AM to 1 hour after sunset; this gives the CPBM an extra 2 hours of burning in the late afternoon. The availability of nighttime authorizations depends upon the forecast nighttime Lavdas Dispersion Index (LDI; a measure of atmospheric stability that indicates the atmosphere's ability to dilute smoke). CPBMs are permitted to burn with a dispersion value as low as 6, while non-certified burners can only burn when the LDI is forecast to be 8 or above. In areas specifically designated as rural by the Division of Forestry, CPBMs are permitted to burn with a dispersion as low as 3.

CERTIFICATION AND RE-CERTIFICATION PROCEDURES

Individuals become CPBMs in Florida by completing one of two fire classes, submitting a completed prescription to a Division of Forestry field office for review, conducting the burn, and having the results inspected by a Division of Forestry representative. The fire class tailored to people with considerable prescribed burning experience is the Certified Burners Correspondence Course; this course takes 2 months, during which time the trainee must complete two tests and a final exam. An instructor is supplied by the Division of Forestry to answer any questions and to administer both the take-home tests and the final exam. The course is offered twice a year, once in the fall and once in the spring.

The Inter-Agency Basic Prescribed Fire Course is designed for people with less experience. It provides 80 hours of intensive training that includes 30-40 hours of pre-work, which requires a completed prescription, classroom discussions, and field exercises. A prerequisite to course completion and certification is experience in both the planning and execution phases on at least three prescribed burns. The demand for this course has been very high. Class size is limited to 35 trainees, and the number of applicants far exceeds the number of available slots, so many trainees have to wait several years to take the training. Since the course began in 1989, there have been 55 sessions totaling just over 1,800 participants.

Changes made in Florida's Administrative Code (FAC) in 1999 now require that CPBMs maintain their

certification by burning under their certification number at least twice every 5 years and taking at least 8 hours of approved prescribed fire training (participation in the North, Central, or South Florida Prescribed Fire Council meetings is approved training). Because many CPBMs work together, and not all their individual numbers are used, a letter from a current CPBM to the Division certifying that an individual participated in five or more burns (documented with authorization numbers) will substitute for the burning experience. If, however, a CPBM does not meet these requirements, he or she will either have to retake the training or be dropped from the CPBM list. The Commissioner of Agriculture will revoke the certification of any CPBM whose practices and procedures repeatedly violate Florida law or agency rules or are a threat to public health, safety, or property.

THE FUTURE

Florida's ability to maintain and improve fire protection services to meet public demand requires the integration of ecosystem management and fire protection into a comprehensive dynamic approach to fire management. Rapid effective initial attack coupled with the extensive use of prescribed fire are the keystones of Florida's overall fire management strategy. But implementation is site specific because the interaction between population density, ownership, and vegetation creates a vast array of fire management environments, each of which requires a customized fire management strategy comprised of prescribed fire, wildfire suppression, and post-fire management options. The successful melding of these strategies depends upon active participation by citizens, local government, and the private sector, with an obvious increased emphasis on prescribed fire management.

The concept of using intentional fire to manage Florida's wildlands has polarized the general populace for over 100 years. Sometimes those on the side of managed fire tend to go too far, supporting the idea that all fire is good, while those who oppose fire are convinced that every fire is bad. However, fire is neither good nor bad: It is simply an ecosystem process without which fire-dependent ecosystems will disappear. We must thus find ways to manage it responsibly.

Resource managers will have to become even more skillful in applying prescribed fire and in educating the public about the ramifications of the continued intentional use of this two-edged sword. Society has given fire managers the authority to use prescription fire as they deem necessary. Land managers must use this privilege wisely or the public will soon tire of the negative impacts from poorly managed burns, the eventual result being that use of this valuable tool will undoubtedly become more restrictive.

Firm answers to specific liability questions are difficult to find in prescribed burning activities. Precedent cases are few. The "reasonable prudent person" standard eludes clear, precise definition. Facts vary greatly from one case to another. The alarming trend toward strict liability for prescribed burners has been replaced with the standard of gross negligence by Florida's legislature, which recognized the societal need for preserving this valuable land management tool. However, even armed with new laws defining responsibilities and procedures, prescribed burners would do well to recognize that the law may not be a complete shield and recall the old saying, "Fire and smoke are the responsibility of the burner-no matter where they go."

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