

The Law

- 8 Areas that deal with code that can be specific to prescribed fire and/or outdoor burning
- Cover liability related to:
 - Landowners
 - Associations
 - Burn managers
 - Commissioner courts

GENERAL BURNING RULES AND REGULATIONS

(Brandon Belt, Coryell County Attorney)

- **Chapter 382, Health and Safety Code;**
Clean Air Act
 - **Allows TNRCC, now TCEQ to adopt rules to control and prohibit outdoor burning, with little limitation.**

Location: Texas Administrative Code.

GENERAL BURNING RULES AND REGULATIONS

- Title 30 T.A.C. §111, Subchapter B, Outdoor Burning
 - General prohibition on Outdoor Burning; then there are exceptions:
 - Exceptions:
 - Firefighter Training
 - Recreation, Ceremony, Cooking, Warmth
 - Disposal Fires (including “Domestic Waste”)
 - Prescribed Burns
 - Hydrocarbon Burning
 - Executive Director Approval

Location: Texas Administrative Code.

GENERAL BURNING RULES AND REGULATIONS

- Title 30 T.A.C. §111, Subchapter B, Outdoor Burning
 - **General Requirements for Allowable Outdoor Burning:**
 - Can't smoke out a road
 - Must stay away from “sensitive receptors”
 - Can't burn earlier than 1 hr. after sunrise
 - Must complete burn not later than 1 hr. before sunset
 - No burning unless wind > 6mph, and <23 mph
 - List of things that can't be burned (plastic, oils, rubber, treated lumber etc.)
- 30 TAC § 101.1(26) Domestic waste--The garbage and rubbish normally resulting from the functions of life within a residence.

GENERAL BURNING RULES AND REGULATIONS

- **Title 30 T.A.C. §70, Subchapter A, Enforcement Generally**

[Big Mess]

- **Civil Enforcement &**
- **Process to refer for prosecution on criminal complaints**
- **BUT, does not limit Class C citations by law enforcement responders.**

PROSECUTION OF VIOLATIONS OF CLEAN AIR ACT

- **Water Code §7.177, Violations of Clean Air Act**
- **Intentionally or Knowingly violate:**
 - H&S Code §382.0518(a); (Preconstruction Permit for facility emitting air cont.)
 - H&S Code §382.054; (Federal Operating Permit)
 - H&S Code §382.056(a); (Publication requirements for facility under §382.0518)
 - H&S Code §382.058(a); (Permit to Build Concrete Plant)

OR,

 - an order, permit, or exception issued or a **RULE ADOPTED** under Chapter 382 H&S Code (ie: T.A.C. §111 Rules)

PUNISHMENT:

- Violation of §382.018, and accompanying rules adopted under that section:
- General or first violation:
 - Class C misdemeanor, up to \$500 fine.
- Second or Subsequent violation:
 - Class B misdemeanor, fine up to \$2,000, or up to 180 days in county jail, or a combination

PUNISHMENT:

- Violation involving 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:
- Class A Misdemeanor, fine up to \$4,000, or up to 1 year in county jail, or a combination

REGULATION OF OUTDOOR BURNING: (BURN BAN)

- **§352.081 Local Government Code**
 - Gives Comm. Ct. authority to, by order, Prohibit **OR** Restrict
- Outdoor Burning: In general **OR** of a particular substance
 - In: All **OR** a part of the county
 - IF**: drought conditions exist (defined in sub. (a), determined as set out in sub. (b))
 - OR**
circumstances present create a public safety hazard that would be exacerbated by outdoor burning
- Texas Forest Service: Predictive Services,
<http://ticc.tamu.edu/drought.htm>

REGULATION OF OUTDOOR BURNING: (BURN BAN)

- **DOES NOT APPLY TO:** Outdoor Burning Activities Related To:

1. Public Health and Safety that are **authorized by TCEQ** for:

- Firefighter Training (T.A.C. §111.205, Prior TCEQ approval req'd),
- Public utility, natural gas pipeline, or mining operations (T.A.C. §111.215, Prior approval of TCEQ req'd), or
- Planting or harvesting of agricultural crops (T.A.C. §111.215, Administrative Orders(RG-049).

OR

2. Burns conducted by Prescribed Burn Managers under §153 Natural Resources Code (Sets up Prescribed Burn Board, Prescribed Burn Standards, Certified Prescribed Burn Managers, Liability Limitations for Landowners, and Insurance Requirements for Prescribed Burn Managers)

- Violation of Burn Ban Order is a Class C misdemeanor, up to \$500 fine.

DECLARATION OF DISASTER

- §418.108 Government Code
 - County Judge can declare a local disaster for 7 days, w/out Comm. Ct. action:
 - “Disaster” includes occurrence or imminent threat of bad stuff happening from **fire**.

Prescribed Burn Legislation

- **Nat. Res. Code § 153.001 - § 153.104; Prescribed Burning**
- **Tex. Nat. Res. Code § 153.081. Limitation of Owner Liability**

(a) Subject to Section 153.082, an owner, lessee, or occupant of agricultural land is not liable for property damage or for injury or death to persons caused by or resulting from prescribed burning conducted on the land owned by, leased by, or occupied by the person if the prescribed burning is conducted under the supervision of a certified and insured prescribed burn manager.

Prescribed Burn Legislation

- **T.A.C. Title 4, Chapters 225-229.**

TITLE 4. AGRICULTURE

PART 13. PRESCRIBED BURNING BOARD

CHAPTER 226. STANDARDS FOR CERTIFIED

PRESCRIBED BURN MANAGERS

§ 226.6. Requirements for Certified Prescribed Burn
Managers Conducting Burns During a County Burn Ban

Prescribed Burn Legislation

- (a) All TCEQ, state and local requirements for open burning shall apply at all times.
- (b) No burn during Declaration of Emergency or Disaster is in effect that expressly prohibits all outdoor burning.
- (c) The county commissioners court, county judge or designee must be notified in writing of the location where the prescribed burn is to take place prior to the burn. The commissioners court and county judge must be provided with the name, address, and emergency contact telephone numbers for the certified prescribed burn manager.

Prescribed Burn Legislation

(d) The county sheriff's office, TCEQ and TFS regional fire coordinator must be notified prior to the burn and when the burn is complete.

(e) All necessary fire suppression entities serving the area where the burn is located must be notified prior to the burn and when the burn is complete.

(f) The board will adopt a burn/do not burn checklist that must be adhered to during a county burn ban.

Criminal Concerns

- Clean Air Act Violations
- Burn Ban Violations
- Burning During Emergency Declaration
- Burning During Burn Ban, without following all the rules (ie. 4 T.A.C. § 226.6)

Criminal Concerns

Tex. Penal Code Chapter 28. Arson

§ 28.01. Definitions

(5) "Open-space land" means real property that is undeveloped for the purpose of human habitation.

(6) "Controlled burning" means the burning of unwanted vegetation with the consent of the owner of the property on which the vegetation is located and in such a manner that the fire is controlled and limited to a designated area.

Criminal Concerns

§ 28.02. Arson

(a) A person commits an offense if the person starts a fire, regardless of whether the fire continues after ignition, or causes an explosion with intent to destroy or damage:

(1) any vegetation, fence, or structure on open-space land; or

(2) any building, habitation, or vehicle:

(A) knowing that it is within the limits of an incorporated city or town;

(B) knowing that it is insured against damage or destruction;

(C) knowing that it is subject to a mortgage or other security interest;

(D) knowing that it is located on property belonging to another;

(E) knowing that it has located within it property belonging to another; or

(F) when the person is reckless about whether the burning or explosion will endanger the life of some individual or the safety of the property of another.

Criminal Concerns

(a-1) A person commits an offense if the person recklessly starts a fire or causes an explosion while manufacturing or attempting to manufacture a controlled substance and the fire or explosion damages any building, habitation, or vehicle.

(a-2) A person commits an offense if the person intentionally starts a fire or causes an explosion and in so doing:

- (1) recklessly damages or destroys a building belonging to another; or
- (2) recklessly causes another person to suffer bodily injury or death.

(b) It is an exception to the application of Subsection (a)(1) that the fire or explosion was a part of the controlled burning of open-space land.

(c) It is a defense to prosecution under Subsection (a)(2)(A) that prior to starting the fire or causing the explosion, the actor obtained a permit or other written authorization granted in accordance with a city ordinance, if any, regulating fires and explosions.

Criminal Concerns

(d) An offense under Subsection (a) is a felony of the second degree, except that the offense is a felony of the first degree if it is shown on the trial of the offense that:

(1) bodily injury or death was suffered by any person by reason of the commission of the offense; or

(2) the property intended to be damaged or destroyed by the actor was a habitation or a place of assembly or worship.

(e) An offense under Subsection (a-1) is a state jail felony, except that the offense is a felony of the third degree if it is shown on the trial of the offense that bodily injury or death was suffered by any person by reason of the commission of the offense.

(f) An offense under Subsection (a-2) is a state jail felony.

Criminal Concerns

§ 6.03. **Definitions** of Culpable Mental States

(c) A person acts **recklessly**, or is reckless, with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

Criminal Concerns

Tex. Code Crim. Proc. Art. 42.037. Restitution

(a) In addition to any fine authorized by law, the court that sentences a defendant convicted of an offense may order the defendant to make restitution to any victim of the offense or to the compensation to victims of crime fund established under Subchapter B, Chapter 56, to the extent that fund has paid compensation to or on behalf of the victim. If the court does not order restitution or orders partial restitution under this subsection, the court shall state on the record the reasons for not making the order or for the limited order.

Civil Liability Concerns

Three things that must be shown to maintain a cause of action for Negligence:

- Breach of Duty
 - Negligence
 - Negligence per se
- Proximate Cause
- Compensable Harm

Civil Liability Concerns

Charitable Immunity and Liability Act, § 84.001:

Applies to a limited number of non-profit organizations engaging in a limited list of activities. Does not apply to prescribed burn associations formed for the purpose of rangeland management activities. Would not rely on it for any protection from liability for members of a PBA doing prescribed burns without a TDA licensed burn boss.

Insurance Policy Issues

Farm Liability Coverage

Primary source of liability protection for most land owners but may be ineffective for Prescribed Fire

- Only designated premises are covered- the policy does not travel with the land owner for a prescribed fire. (What happens if you volunteer for your neighbor to assist in a burn and your policy does not cover you?)
- Policies are “silent” on defining prescribed fire. Not included by definition but also not excluded. Insurers generally believe the notion if the exposure is not excluded coverage is included.
- Fire suppression expenses may be limited. There is no trigger for fire suppression expense per se in the farm liability policy.
- Smoke as a pollutant (except from a hostile fire) is not defined.
- Volunteers are not defined as a “named insured.”
- Policy excludes liability when a permit is required and not requested.
- Policy normally excludes coverage for criminal acts.

» This slide mostly stolen from Douglas Rigdon of Rigdon & Associates, Ltd.

Insurance Policy Issues

- Never presume insurance “exists” unless you have verified with a professional insurance broker or company rep., IN WRITING.
- Prescribed fire risks will continue to evolve as claims develop and legal precedents are made. (You do not want to be a part of that process!)
- Talk to your insurance company and make sure your specific insurance needs are being met.
- Talk to your attorney and make sure you understand your liability in your specific situation.

Before You Think, Plan, or Act

- Know what your insurance covers and doesn't cover
- Check with your attorney on your liability
- Educate yourself