

R2077



North Dakota Prescribed Burning Rules and Regulations

The grasslands of North Dakota evolved with the episodic occurrence of fires. It is estimated that naturally ignited fires occurred every five to 10 years in mesic areas with higher fine fuel loads and about every 25 years in the drier portions of the state. However, land use and land tenure have altered these naturally occurring fire regimes, negatively altering the way these grasslands look and function.

Prescribed burning is a land management practice where a manager prescribes a specific fire treatment to a specific tract of land to reach specific management objectives. Reintroduction of fire through prescribed burning may be one of the best ways to restore native grasslands in the North Dakota, but perceptions of liability and risk limit its use. Having a better understanding of prescribed burning rules, regulations and liability in North Dakota is an important step in helping land managers perform a prescribed fire when needed to meet their land management needs.

Definitions

In North Dakota open burning is considered any burning that takes place in an unenclosed space. This definition includes controlled burning of cropland and rangeland and the burning of refuse. Open burning is subject to numerous rules and regulations that can vary in different regions of the state. In addition, local rules or ordinances may also apply.

Applicable Rules and Regulations

Chapter 18-08 of the North Dakota Century Code contains the general provisions for permissible open burning as well as liability and possible penalties for failing to follow the law. The Code states, "a person may set any grass or stubble lands on fire at the time the person commences to break or plow such lands if, at the time the fire is set, there is a strip at least fifty feet [15.24 meters] wide of well-plowed or burned land completely encompassing the land where the fire is set" *N.D. Cent. Code. § 18-08-02*.

The North Dakota Department of Environmental Quality (DEQ) has also promulgated regulations that must be adhered to in order for open burning to be considered permissible. Section 33.1-15-04-02 of the North Dakota Administrative Code contains these regulations. According to the DEQ, the following types of open burning are allowed subject to certain conditions:

1. Fires purposefully set for training or instruction of public and industrial firefighting personnel.
2. Fires set for the elimination of a fire hazard that cannot be abated by any other means when authorized by the department or its designee.

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3. Fires set for the removal of dangerous or hazardous material, where there is no other practical or lawful method of disposal and burning is approved in advance by the department. Where there is imminent danger to human health or safety and where there is no other practical or lawful method of disposal, burning may be initiated without prior notice to the department, provided notice is furnished as soon as practical.
 4. Campfires and other fires used solely for recreational purposes, ceremonial occasions or outdoor preparation of food.
 5. Fires purposely set to forest or rangelands for a specific reason in the management of forest, rangeland or game in accordance with practices recommended by state or federal agencies, as appropriate, and the burning is approved in advance by the department. The state or federal agency shall, upon request by the department, submit an annual report that estimates the number of acres burned, the fuel loading and the amount of emissions.
 6. The burning of trees, brush, grass, wood and other vegetable matter in the clearing of land, right-of-way maintenance operations and agricultural crop burning.
 7. The burning of refuse and other combustible materials generated in the operation of a domestic household if (1) there is no municipal or other governmental entity waste collection and disposal service, (2) the material being burned is from a building accommodating no more than one family, and (3) the burning is conducted on the property where the waste is generated.
 8. The burning of liquid hydrocarbons that are spilled or lost as a result of pipeline breaks or other accidents involving the transportation of such materials or which are generated as wastes as the result of oil exploration, development, production, refining or processing operations if (1) the material cannot be practicably recovered or lawfully disposed of in another manner and (2) the burning is approved in advance by the DEQ, unless there is an imminent danger to human health or safety.
- The DEQ has placed the following conditions on the permissible open burnings listed above:
1. Burning is prohibited if the fire index is in the extreme category as issued by the National Weather Service or if a burning ban is declared by state or local officials.
 2. The burning must not create "air pollution" as defined in the DEQ regulations, which means "the presence in the outdoor atmosphere of one or more air contaminants in such quantities and duration as is or may be injurious to human health, welfare or property, or animal or plant life, or which unreasonably interferes with the enjoyment of life or property." *North Dakota Admin. Code 33.1-15-01-04.*
 3. The burning must not be conducted upwind of, or in proximity to, an occupied building such that the ambient air of such occupied building may be adversely affected by the air contaminants being emitted.
 4. Care must be used to minimize the amount of dirt on the material being burned and the material must be dry enough to burn cleanly.
5. Oils, rubber and other materials that produce unreasonable amounts of air contaminants may not be burned.
 6. The burning may be conducted only when meteorological conditions favor smoke dispersion and air mixing.
 7. The burning must not be conducted adjacent to any highway or public road so as to create a traffic hazard.
 8. The burning must not be conducted adjacent to any operational military, commercial, county, municipal or private airport or landing strip in such a manner as to create a hazard.
 9. Except in an emergency, burning may not be conducted in such proximity of any class I area, as defined in chapter 33.1-15-15, that the ambient air of such area is adversely impacted. Class I areas are considered the following:
 - a. International parks.
 - b. National wilderness areas which exceed 5,000 acres in size.
 - c. National memorial parks which exceed 5,000 acres in size.
 - d. National parks which exceed 6,000 acres in size.
 10. Except in an emergency, the visibility of any class I area cannot be adversely impacted as defined in chapter *North Dakota Admin. Code 33.1-15-19*. Adverse impact is defined as: visibility impairment which interferes with the management, protection, preservation or enjoyment of the visitor's visual experience of the federal class I area. This determination must be made on a case-by-case basis, taking into account the geographic extent, intensity, duration, frequency and time of visibility impairment, and how these

factors correlate with times of visitor use of the federal class I area and the frequency and timing of natural conditions that reduce visibility.

11. Burning activities must be attended and supervised at all times burning is in progress.
12. If state or local fire officials determine conditions to be unsafe for open burning, such burning must cease until conditions are deemed safe by such officials.

Note: The DEQ website (<https://deq.nd.gov/AQ/permitting/OpenBurning.aspx>) contains a brief summary of the above rules and regulations.

The DEQ also may allow a person to conduct an open burn of materials not listed above if that person receives an approved variance. To receive an approved variance, a person must submit an application (<https://deq.nd.gov/Forms/AQ/OpenBurning/SFN8509.pdf>) to the DEQ. Prior to submission to the DEQ, the application must be signed by the local or district health unit and the city or rural fire department.

City, county and rural fire protection districts may also have their own ordinances or burn bans regulating open burning. Prior to commencing an open burn, always contact the local fire department in order to ensure that the open burning is permissible.

Criminal Penalties and Civil Liability

Failure to follow the statutes and regulations outlined above may result in both criminal penalties and civil liabilities.

Criminal liability. Any person who unlawfully sets or causes to be set on fire any woods, marsh, prairie, hay, weeds, or any grass or stubble lands, except as hereinafter provided, is guilty of a class A misdemeanor. *N.D. Cent. Code §18-08-01*. A class A misdemeanor carries a maximum penalty of 360 days of imprisonment, a fine of \$3,000 or both.

Any person that fails to extinguish a lawful fire that they have set is guilty of a class B misdemeanor. *N.D. Cent. Code §18-08-07*. A class B misdemeanor carries a maximum penalty of 30 days imprisonment, a \$1,500 fine or both.

Civil liability. A person can be held civilly liable if a lawful grass fire or burning crop stubble accidentally and without negligence escapes the person's control and damages another's property. *N.D. Cent. Code §18-08-04*. Additionally, a mere occupant of property, such as a lessee, may also recover damages if the property that person occupies is damaged. *N.D. Cent. Code §18-08-08*.

Applicable Caselaw

North Dakota judicial decisions outlining the duty of a person setting a lawful fire are limited. However, courts have made several decisions concerning the matter:

- *Hogan v. Bragg*, 41 N.D. 203 (1918). In this case, the defendant was sued for damages caused by a fire to the plaintiff's property. The court determined that the defendant was not liable because the fire that he had set was extinguished properly and then reemerged after 12 days due to strong winds. The court stated that it was unreasonable for the defendant to be held liable after such a long amount of time.
- *Sorensen v. Switzer*, 37 N.D. 536 (1917). Here, the court determined that a landowner is not liable for a damages caused by a fire set on his land by another person unless the landowner directed how the fire was to be set.
- *Schmeet v. Schumahcer*, 137 N.W.2d 789 (N.D. 1965). The court held that a landlord was responsible for damages to the tenant after the landlord set fire to the leased grazing land, making it unusable for the tenant's use.



Best Practices

Steps should be taken to ensure that lawful fires do not accidentally get out of control. The following are some basic, common-sense steps that can be taken:

- Contact ND DEQ and the local fire department to learn about specific ordinances and permits needed for the area to be burned and type of burning to be done.
- When planning a prescribed burn, write a burn plan that, at the very least, includes goals and objectives of the burn, burn site description, fire prescription, desired weather conditions to achieve objectives, fire operation and control, and post-fire cleanup.
- Ensure there is not a local or state burn ban in effect.
- Ensure that appropriate fire breaks surround the area being burned in accordance with state law. See *N.D. Cent. Code §18-08-02*.
- Notify the local fire department before commencing a burn.
- Stay apprised of local weather conditions, especially wind direction and speeds.
- Never leave a fire unattended.
- When complete, ensure that the fire is adequately out.

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