

From: [Douglas Cram](#)
To: [Mason, Wendy, EMNRD](#)
Subject: [EXTERNAL] NM Rx Burning Act - Draft Rule Comments - RITF
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Attachments: [RITF Comments - NM Rx Burning Draft Rule .pdf](#)

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Wendy,

Please find attached comments from the Range Improvement Task Force.

Thanks and regards,

-dsc



Range Improvement Task Force

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December 14, 2021

Wendy Mason
New Mexico Forestry Division
Energy, Minerals and Natural Resources Department
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Santa Fe, New Mexico 87505

Dear New Mexico Forestry Division,

Thank you for the opportunity to provide comments on this important rule as it relates to the Prescribed Burning Act. We have concerns upon seeing the act and draft rule together for the first time. Concerns include punitive double damages tied to maladapted proficiency standards and certification barriers characterized by logistical bottlenecks, opportunity costs and a legal nexus resulting in potential regression of prescribed fire use for natural resource management on private property in New Mexico. The vision shared with stakeholders before the legislative session was to provide unmistakable benefits with little to no chance of unintended or unforeseen consequences. We suggest the pathway forward is to build a culture of burning in New Mexico over a 20-year period by enabling landowners. The Oklahoma prescribed burning act provides an example of how this can be achieved. The draft rule as written creates a gatekeeper model requiring landowners to seek permission while navigating a cumbersome certification rule and associated pitfalls (Fischer et al. 2016). We offer recommendations for consideration to address these concerns in order to benefit ecological resiliency of New Mexico's natural resources.

General Comments

The draft rule creates a proficiency standard – a barrier by definition – that does not realistically address insurance challenges and access to training. The proposed proficiency standards do not meet any recognized national standard that would necessarily empower underwriters to offer insurance policies to certified individuals. Further, because of the double damages clause for uncertified burners, it may be difficult for individuals to acquire experience and access training in order to pass proficiency standards. This general circumstance was highlighted in the House Memorial 42 report (hereafter HM42) entitled *Expanding the Use of Prescribed Fire in New Mexico* as follows:

“A new training requirement must function as a tool to reduce barriers to implementation, not create new requirements that do not specifically address the liability, insurance, and training access challenges discussed above. A new training requirement could itself become a barrier if not thoughtfully designed, implemented, funded, and established specifically for the purpose of reducing other existing barriers to implementation.” HM42 p.17&18.

HM42 also recommended a “voluntary” training and certification program. For example:

*“The working group’s recommendation is to establish a state-wide **voluntary** training and certification program...”* HM42 p.2.;

and

*“The working group agrees that participation should be **voluntary** to avoid a new training program becoming a barrier to implementation.”* HM42 p.18. (Bold font added for emphasis.)

In the context of burning by private landowners voluntary is understood to mean: get certified and receive a benefit (e.g., lower liability standard and/or access to insurance), or choose not to get certified but still be able to burn without the benefit. However, because uncertified landowners face a punitive double damages clause with the potential for crippling financial outcomes, there is not a reasonable choice for landowners; either get certified or do not burn. This cannot be considered a voluntary training opportunity nor does it promote a culture of burning. Further complicating matters is a draft rule that creates a cumbersome, logistically challenging, and legally troubling (e.g., legal nexus) certification process that is not reasonably accessible for landowners thereby creating a barrier to implementation.

The act states the certification process should be “accessible” to private landowners. However, the draft rule requires a demonstration component to certification that may create logistical bottlenecks, opportunity costs and an uncomfortable legal nexus.

The draft rule states:

*“Individuals shall successfully complete the proficiency requirement, which consists of burning experience in the role of pile burn manager, which shall include demonstration of general knowledge of fire behavior, weather, holding, fire techniques, control lines, smoke management, firing devices, tools and equipment. Successful **demonstration** of those elements shall be documented in a division approved proficiency workbook. The burning experience must be documented in the proficiency workbook by [an individual.]”* [19.20.5.9 A. (3)]

and

*“An applicant shall provide a letter ... from a ...[certified] burn manager...**attesting** they have **observed** the applicant conducting pile burns as a pile burn manager and that the applicant has satisfactorily conducted pile burns as a pile burn manager and demonstrated the proficiency requirement”* [19.20.5.9 D. (1)]

and

*“Individuals shall successfully complete the proficiency requirement, which consists of Successful **demonstration** of those elements shall be documented in the applicant’s proficiency workbook by [an individual.]”* [19.20.5.10 A. (3)] [Bold added for emphasis.]

In the fifth largest state characterized by its rural and remote nature, consider the following questions as they relate to accessibility. How will a landowner find a certified burner? Will the certified burner be willing to accept liability for the burn? Will signing off on a proficiency workbook create a legal nexus for the signee? Will the certified burner charge a fee or have insurance? Aligning landowner schedule with certified burn boss schedule with a narrow burn-weather forecast will likely prove challenging. If the certified burner leaves the burn property (pile or broadcast), and three days later it creeps off site and causes damage, is the burn still considered a certified event? In order for a landowner to become certified without leaving their property, these are the logistical bottlenecks and legal burdens that need to be addressed and solved.

There are just under 9000 landowners in New Mexico. If landowners continue to use fire as they have in the past but now without being certified, they would be putting themselves in a precarious legal and financial circumstance. In the event of damage, this reality may incentivize lawsuits by potential litigants looking for a significant monetary payout. Few if any farm and ranch policies in New Mexico cover prescribed burning and none cover double damages.

A recommendation to address this potential circumstance would be to offer a waiver for low complexity pile and broadcast burns. Of New Mexico's 77 million acres, only 8.9% are characterized as mixed conifer and ponderosa pine – the primary target of forested acres in need of prescribed fire treatments. Of those acres, only 1.8 million are privately held. In other words, 98% of New Mexico is characterized by something other than forested ponderosa pine and mixed conifer acres in private ownership. Pile and broadcast burning in rangeland conditions are generally considered low complexity environments. Data collected largely from private landowners in the Great Plains indicated prescribed burning is overwhelmingly conducted without incident 99% of the time (Weir et al. 2020). Providing a waiver for low complexity burns would allow landowners to continue using fire as they have for years and not be funnel into a situation where they are burning without certification and exposing their livelihoods to a double damages lawsuit. For example, 10 or fewer piles per day that are each less than 15 cubic feet in volume; and woodland and rangeland broadcast burns less than 300 acres and 1000 lbs/ac of fine fuels.

Minor comments and suggestions:

- Without the ability to see the proficiency workbooks, it is difficult to fully understand the depth of the rule as it relates to broadcast burning.
- Requiring S-190 and module # 4 (fire behavior) is redundant for broadcast burning certification.
- NWCG S-110 is exclusively designed for federal employees preparing for a federal wildland fire assignment; it has no relevancy for private landowners preparing to conduct a pile burn; suggest deleting this NWCG requirement.
- The draft rule calls for 40 hours of NWCG coursework for broadcast certification. A landowner might reasonably conclude that 40 hours of NWGC courses represent an opportunity cost, and thereby decide against pursuing certification.

Conclusion

The overarching goal was to expand the use of prescribed fire in New Mexico. The draft rule, as written, tied to an act with double damages makes the reality of achieving that goal unlikely at this time. Efforts to suppress and exclude fire have resulted in deleterious outcomes for New Mexico landscapes, watersheds, and residents. This circumstance has been coined “the fire paradox” – that is, the harder we try to suppress and exclude fire, the worse the outcomes (for landscapes, watersheds, and residents).

Respectfully,



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Range Improvement Task Force



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