

## Kansas Flint Hills Smoke Management Plan: Burning Liability and Kansas Law

The following is a slightly edited transcript of the sixth in a series of K-State's Agriculture Today radio broadcasts on the Kansas Flint Hills Smoke Management Plan. This is an interview with Roger McEowen, Leonard Dolezal Professor in Agricultural Law and Director of the Center for Agricultural Law and Taxation at Iowa State University, and former K-State Extension Ag Law Specialist, conducted by Eric Atkinson of the K-State Radio Network. Podcasts of all Agriculture Today interviews on the Flint Hills Smoke Management Plan can be found at: <http://ksfire.org/p.aspx?tabid=21>

Q: As a rule, open burning in Kansas is governed fairly tightly. But farmers and ranchers are given some latitude when it comes to modified agricultural burning, such as pasture burning. Could you expand on that?

A: Open burning for the purpose of crop, range, pasture, wildlife, or watershed management is permissible in accordance with the rules. In dealing with grass, woody species, crop residue, or dry plant growth for the purpose of cropland or rangeland management, this is exempt from the prohibition on open burning. But you have to meet certain conditions.

Here's what you need to do. If you're conducting the burn, you have to notify the local fire control authority within your jurisdiction before the burning begins. That's the rule unless the appropriate local governing body has a policy that notification is not required. There is some overlap in state rules and local rules. I don't know of any local areas where notification is not required, and it makes common sense to go ahead and notify people anyway. If the fire gets out of control, which can occur sometimes through no fault of the person conducting the burn, it's best if you've already notified people in advance of when and where you're going to conduct the burn so they can get to you quickly to help you out. So in addition to being required by regulations, it just makes a whole lot of sense to notify local authorities.

Secondly, you can't conduct a burn that will create a traffic safety hazard. Obviously, a lot of that depends on where you're located. Some pasture burns are located a long way from roadways, and are not going to be a problem. But if you're burning in the Flint Hills along the Kansas Turnpike, then yes, you'd better notify the local authorities. Don't conduct a burn if it's going to create a traffic hazard. If there are conditions that might result in smoke blowing toward a public roadway, then you have to give adequate notification to the Highway Patrol, sheriff's office, or some other appropriate state or local traffic authority before you burn. That's a good idea in any event because sometimes the wind will shift direction after you get the burn started, or maybe it'll outrun the backfire that you're set. So it's always good to notify local authorities first. The rules say you can't create a traffic hazard. You can be cited or fined for creating a safety hazard.

Q: Are there stipulations for situations where a fire escapes? Let's say a fire jumps a firebreak, or a sudden gust of wind and kicks embers into an unintended area.

A: The state regulations state that the person conducting the burn is supposed to supervise the burn until the fire is extinguished. Sometimes a fire will get out of control even after you think you've got it out then it restarts somehow. There have been some Kansas cases on this. There was one about 15 years ago in south central Kansas. It wasn't actually a pasture burn that was being conducted. But there were some ranch hands that were feeding cattle and there were some smoldering hay piles. They thought they had the fire put out. They went away, the wind whipped up, the fire got started again, and it created a massive burn in south central and southwest Kansas. Kansas courts have ruled that these cases are not to be determined on a strict liability basis. Instead, they are determined based on whether reasonable care was exercised under all the circumstances. That's a key point. The more you are able to take common sense steps to contain a burn so it won't damage someone else -- such as burning when weather conditions are favorable -- the better. If wind conditions are favorable then they subsequently change and become beyond your control, then the questions are: Did you take the extra steps to notify authorities in advance that you were conducting the burn? Did you have adequate water supplies available? Did you have adequate help available? Did you notify the state patrol that roadways might be obscured by smoke? Those all go to the issue of whether you may potentially be found liable.

Basically, the standard negligence principles apply. That is: duty, breach, causation, and damages. Do I have a duty, did I breach the duty, and did the breach of the duty cause damages to someone else? The duty in these situations is to use reasonable care in conducting the burn. It is not a strict liability situation, which would mean that if a fire gets out of control and causes damage to someone else, you would automatically be liable. That's not the rule in Kansas. Agricultural producers can be thankful that's not the rule.

Q: That can apply as well to smoke management. You mentioned not putting smoke over a roadway. But in a very broad sense, this duty of care and common sense practicality can fit in here, too, correct?

A: That's right. There are specific rules with respect to wind speed, when you can and can't burn with respect to weather conditions, how close you can burn to an occupied dwelling unless you notify the occupant of the dwelling before you burn. There are all sorts of rules -- distance rules, air speed rules, fog issues, making sure you're not creating a safety hazard for airplanes trying to take off or land -- there are a very comprehensive set of regulations that have been developed to try to set the ground rules for allowing prescribed burning by agricultural producers while not creating problems for other people. And that's where the rub is. The rules try to give us the framework so we can do this. It's a good management practice for cattle operations, but we need to do it in a way that doesn't disturb the rights of other people. That's what the rules are trying to address.

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