

STAFF REPORT

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| Agenda Item No.: | Consent Item (A) |
| Work Plan: | Fire Protection |
| Topic: | Certified Burn Manager and Prescribed Fire Liability Fund |
| Presentation Title: | Proposed Rulemaking |
| Date of Presentation: | September 5, 2024 |
| Contact Information: | Chris Cline, (Interim) Chief – Fire Protection 541-505-4521, Christopher.L.Cline@odf.oregon.gov Tim Holschbach, Deputy Chief – Policy & Planning 503-945-7434, Tim.J.Holschbach@odf.Oregon.gov |

SUMMARY

The purpose of this agenda item is to seek the Board of Forestry (Board) adoption of the proposed administrative rules regarding amending the administrative rules of the Certified Burn Manager Program and promulgate administrative rules for the Prescribed Fire Liability Pilot Program in Oregon Administrative Rule 629-042.

CONTEXT

Senate Bill 80 expanded the applicable lands that Certified Burn Managers could be utilized, from originally lands designated as forestland under ORS 526.005(6) to all lands within a forest protection district. This expansion of program scope, as well as technical adjustments identified with practitioners, training providers, and the Certified Burn Manager Advisory committee are included.

Draft rules for the Prescribe Fire Liability Pilot Program were collaboratively developed, as directed by the legislation, utilizing a rules advisory committee, an internal workgroup, DCBS and various other resources.

Draft rules were submitted to the Secretary of State and public hearings were held following the June Board meeting. The public comment period opened July 1 and closed August 15, 2024. No comments were received on the proposed administrative rules.

BACKGROUND

The Governor’s Council on Wildfire Response offered 37 recommendations to improve Oregon’s wildfire protection system. Many of the recommendations required legislative action to be carried out.

Senate Bill 762 captured many of the recommendations of the Governor’s Council on Wildfire Response, providing legislative direction to the Board of Forestry regarding the wildland-urban interface; statewide fire risk mapping; prescribed fire; directed the Department to review and clarify the enforcement of rules pertaining to forestland; and baseline standards for unprotected and under-protected lands in Oregon.

Furthermore, Senate Bill 80 in the 2023 Legislative session modified the Certified Burn Manager program, and also directed the Oregon Department of Forestry to establish, in coordination with the Department of Consumer and Business Services (DCBS), a

Prescribed Fire Liability Pilot Program. House Bill 4016 in the 2024 Legislative session provided additional clarification as to the Prescribed Fire Liability program details.

ANALYSIS

Certified Burn Manager Program

This section is intended to provide a basis for the amended and proposed, and were based on the use of objective, scientific, quantifiable data as the cornerstone of the recommendation and decision-making.

629-042-1005 - Definitions

This rule change is intended to align with the change of geographic scope change, and also clarify the purpose of the certification book, and alignment of the definition of prescribed burning with OAR 629-042-2005.

629-042-1030 – Tests

This rule change is intended to streamline the appeals process for a failed exam to align with the Administrative Procedures Act requirements.

629-042-1050 – Limitation on the use of Certified Burn Managers

This rule change is intended to account for the increased geographic scope of the Certified Burn Manager program.

629-042-1065 – Training Providers

This rule change is intended to clarify the duality of requirements, of teaching adults and practical experience in the subject matter.

Prescribed Fire Liability Pilot Program

629-042-2000 -- Purpose

The purpose of OAR 629-042-2005 to 629-042-2040 is to set forth the standards, requirements, and procedures by which the Prescribed Fire Liability Program pilot program will be operated, pursuant to Chapter 611, Oregon Laws, Sections 14 through 17.

629-042-2010 - Definitions

The definitions proposed for this rule division are to provide clarification and context that was not clear in the law. Many of the proposed definitions provide clarification for terminology for implementation of the Prescribed Fire Liability Pilot Program.

629-042-2020 - Enrollment

This rule is intended to clarify the Prescribed Fire Liability Pilot Program enrollment requirements and parameters.

629-042-2030 - Damages

This rule is intended to clarify what damages may be considered eligible or ineligible with the program.

629-042-2040 – Claim Eligibility Requirements

The intent of this rule is to establish and clarify the claim eligibility requirements.

629-042-2050 – Claim Considerations

This rule is intended to clarify what claims may be considered for reimbursement purposes.

629-042-2060 – Incident Report Requirements

This rule is intended to establish what is required within the Incident Report.

Describe the alternatives considered and the rationale for the chosen recommendation.

The Hearing Officer’s Report, Attachment 1, summarizes the public hearing process. Based on questions the Department received pertaining to the proposed rules, clarifying edits were made to the final rule set.

RECOMMENDATION

The Board directs the Department to proceed with the promulgation of the proposed rules and rules changes in September 2024, as written in the draft rule language for Chapter 629, Division 42.

NEXT STEPS

- Pending the Board of Forestry’s direction, the Department submits the rule package to the Secretary of State and Legislative Counsel for filing.
- The Department is anticipating an October program launch date for the Prescribe Fire Liability and a similar timeline as the effective date for the Certified Burn Manager rules updates.

RULE REVIEW TIMELINE

June 06, 2024 – Department presents proposed rules to the Board to seek permission to conduct public hearings.

June 15, 2024 – Notice of Proposed Rulemaking and Fiscal Impact Statement sent to Secretary of State. Notify legislators and interested parties.

July 2024 – Conduct public hearings.

September 04, 2024 – Department submits final rule draft with public comments to Board for consideration and approval.

September 15, 2024 – Submit rule to Secretary of State and Legislative Counsel for filing. Effective date October 1, 2024.

ATTACHMENTS

- (1) Hearing Officer’s Report
- (2) Certified Burn Manager administrative rules
- (3) Proposed Prescribed Fire Liability Pilot Program administrative rules

Date: August 16, 2024

To: Oregon Board of Forestry

From: Nicole Stapp, Forest Resources Division Policy Advisor

Subject: Public Comment on Prescribed Fire Liability Pilot Program & Certified Burn Manager Rulemaking

Background: At the June 6th, 2024 Board of Forestry meeting, the Board directed the Department to move forward with the public hearing process to amend rules related to the Certified Burn Manager Program and promulgate rules for the Prescribed Fire Liability Pilot Program which will apply statewide. The Department filed the required Notice of Proposed Rulemaking and held a public comment period from July 1st to August 15th at 5 PM.

Hearing Information

Hearing Date & Time: July 30, 2024 @ 10:00 AM.

Hearing Location: Virtual Zoom meeting

Hearing Officer: Nicole Stapp

The Public Hearing on Prescribed Fire Liability Fund and Certified Burn Manager was formally convened at 10:00 AM. The information session began at 10:02 AM. At 10:15 AM a general introduction to the hearing process and instructions were given. At 10:17 AM the formal hearing began and at 10:21 AM the hearing concluded. The meeting was closed at 10:27 AM.

Summary of Oral Comments

A member of the media had background questions related to the Prescribed Fire Liability Program but stated that he did not wish to submit oral comment on the rule. A participant joining the hearing late, clarified that he was virtually attending to observe but did not wish to provide testimony. No public comment was received during the hearing.

Summary of Written Comments

No written comments were received in the manner indicated on the Notice of Proposed Rulemaking.

CERTIFIED BURN MANAGER ADMINISTRATIVE RULES

629-042-1005

Definitions

- (1) The definitions set forth in ORS 526.005, ORS 477.001, and OAR 629-041-0005 shall apply to OAR Chapter 629, Division 042.
- (2) The following words and phrases, when used in OAR Chapter 629, Division 042, shall mean the following:
- (a) "Accreditation" means approval from the Forester to conduct and document training required by OAR 629-042-1065.
 - (b) "Certificate" means a Certified Burn Manager certificate issued by the Oregon Department of Forestry pursuant to ORS 526.360(3) and OAR 629-042-1015.
 - (c) "Certification period" means a period of five years, beginning on the date a certificate is issued.
 - (d) "Certified Burn Manager" means an individual who has a current and valid certificate.
 - (e) "Committee" means the Certified Burn Manager Advisory Committee.
 - (f) "Dangerous or adverse situation" means conditions that are a significant deviation from a prescribed burn plan and resulting or has the potential to result in negative consequences, as determined by the professional judgement of the Forester or a Certified Burn Manager.
 - (g) "Field certification book" means a publication provided by the Forester in which successful operational field training required by OAR 629-042-1025(2) is documented.
 - (h) "Forester" means the State Forester or authorized representative.
 - (i) "Prescribed Fire" or "Prescribed burning" means the planned application and confinement of fire to wildland fuels as defined in OAR 629-044-1005(k) on lands selected in advance of that application.
 - (j) "Prescribed burn plan" is a plan prepared to conduct a prescribed burn, in accordance with OAR 629-042-1040(1).
 - (k) "Successfully completed" and "successful performance" means completion of a training requirement of OAR 629-042-1025, or a test required by OAR 629-042-1030, and which has been properly documented.
 - (l) "Training provider" means a certified instructor who is accredited to conduct and/or document training required by OAR 629-042-1065.

629-042-1020

Certified Burn Manager certification requirements. Application procedures.

Individuals applying for a Certified Burn Manager certificate shall provide to the State Forester's Representative:

- (1) A properly completed field certification book showing that the applicant has satisfactorily completed all training required by OAR 629-042-1025 and all tests required by OAR 629-042-1030; and
- (2) All fees required by OAR 629-042-1070.

629-042-1025

Certified Burn Manager certification requirements. Training.

- (1) The Forester shall provide a field certification book. An applicant for a certificate must complete a field certification book prior to applying for an initial certificate, or applying for a new certificate if the applicant was issued a certificate which was not renewed pursuant to OAR 629-042-1015(7):
 - (a) Prior to receiving a field certification book, an individual shall submit documentation to the Forester of successful completion of:
 - (A) Educational training that is provided by an approved training provider or the Forester; and
 - (B) A test in accordance with OAR 629-042-1030 with a passing score.
 - (b) An applicant will not receive credit for educational training that was completed more than three years prior to the applicant's request for a field certification book. The Forester may waive this three-year limitation if the individual is applying for historical recognition.
- (2) After verification of documentation required under 629-042-1025(1), the Forester shall issue the applicant a field certification book.
 - (a) The field certification book shall consist of field training that the applicant must complete, including:
 - (A) General proficiencies;
 - (B) Pile burning proficiencies; and
 - (C) Broadcast burning proficiencies.
 - (b) To apply for a certificate to conduct pile burns, field training described in Sections 2(a)(A) and 2(a)(B) of this rule must be completed.
 - (c) To apply for a certificate to conduct pile burns and broadcast burns, all the field training described in the field certification book must be verified of completion with a signature by a Certified Burn Manager, by the Forester, or by a training provider in a field certification book.
 - (d) The field certification book will be valid for three years after the date of issuance by the Forester.
 - (e) The Forester will not accept documentation of field training which was completed more than three years prior to the date of application for a certificate. The Forester may waive this three-year limitation if the individual is applying for historical recognition.

(3) The Forester may consider educational and field training requirements completed prior to January 1, 2023 through historical recognition. In lieu of the initial training requirements of (1) and (2) above, an individual may submit to the Forester:

(a) A copy of a Prescribed Fire Burn Boss Type 2 Task Book which is complete. The Task Book shall indicate successful performance in the planning and implementation of prescribed fire; or

(b) Documentation that the individual holds a valid Certified Burn Manager certification in a state with comparable requirements to the State of Oregon; or

(c) Such evidence of experience as the Forester determines is equivalent to the initial training requirements of (1) and (2) above. The testing requirements of OAR 629-042-1030 shall still be required.

(4) An individual shall complete the following actions, prior to applying for a renewal of their certificate:

(a) An individual shall successfully complete sixteen hours of continuing education within the certification period. The continuing education must be related to prescribed burning and approved in advance by the Forester.

(A) The Forester may approve training presented in a classroom format, a conference format, a correspondence course format, or in another format the Forester determines is acceptable.

(B) The Forester will not accept educational training which was completed more than five years prior to the applicant's date of application for renewal of a certificate.

(b) An individual shall supervise one prescribed burn and participate in two additional prescribed burns during their certification period and prior to applying for a renewal.

629-042-1030

Certified Burn Manager certification requirements. Tests.

(1) The Forester:

(a) Shall provide for the development and administration of all tests required by this rule;

(b) Shall establish a passing score for all tests required by this rule;

(c) May not administer the same test to an individual more frequently than once every 30 calendar days; and

(d) May not prohibit the use of written reference material by individuals taking tests.

(2) Individuals taking tests required by this rule:

(a) Shall display an approved government issued picture identification to the Forester or authorized Training Provider, prior to taking a test; and

(b) Shall comply with all test taking requirements established by the Forester or authorized Training Provider.

(3) Individuals shall successfully pass a test prior to requesting a field certification book from the Forester.

(4) An individual who was unsuccessful in passing the test may appeal in accordance with ORS 183.484.

629-042-1035

Certified Burn Manager certificate investigation and revocation procedures

(1) The Forester may investigate any reported or observed dangerous or adverse situations for which a Certified Burn Manager has been alleged to be responsible.

(a) Upon the receipt of an allegation under this rule, the Forester may:

(A) Investigate and prepare a written report; or

(B) Direct that a certified wildfire investigator to investigate, prepare a written report and forward it to the Forester for review and approval.

(b) Upon receipt of the written report required in (1)(a) above, the Forester shall determine as to whether the Certified Burn Manager was responsible for the reported dangerous or adverse situation.

(c) If the Forester determines that the Certified Burn Manager was responsible for a dangerous or adverse situation, the Forester shall determine as to whether the actions of the Certified Burn Manager constitute grounds to revoke the certification of the Certified Burn Manager.

(2) The Forester may revoke a certificate if:

(a) A Certified Burn Manager has submitted false information pertaining to any aspect of the Burn Manager program, such as, but not limited to, the entry of false information into a field certification book submitted to the Forester pursuant to OAR 629-042-1020;

(b) A Certified Burn Manager has been found to have violated ORS 477.515, 477.625, 477.720, 477.740, or OAR 629-043-0026(4);

(c) A Certified Burn Manager fails to comply with the required actions and activities set forth in OAR 629-042-1040; or

(d) A Certified Burn Manager terminated their responsibility for supervision of a prescribed burn in violation of OAR 629-042-1045(2).

(3) The Forester shall provide written notice to the Certified Burn Manager of the intent to revoke a certificate. The Forester may not revoke the certificate until after 30 calendar days from the date of notice.

(4) Certificate revocation review and appeals procedures.

(a) A Certified Burn Manager may request that the Certified Burn Manager Advisory Committee review a decision to revoke a certificate, by submitting a request within 30 calendar days after service of the written notice required by subsection (3) of this rule. Service is completed at the earlier of actual notice or

depositing a properly addressed written notice in first class mail or sending an email to an address established by the Certified Burn Manager.

(b) The Certified Burn Manager Advisory Committee shall conduct the requested review at its next scheduled meeting after the receipt of a request for review.

(c) Following completion of the review requested, the Certified Burn Manager Advisory Committee shall either affirm or withdraw the revocation by majority vote.

(d) The Forester or the Certified Burn Manager whose certificate has been revoked may appeal the decision of the Certified Burn Manager Advisory Committee to the Board of Forestry, in the same manner as appeals under ORS 477.260(2).

(e) Any final resolution by the Board of the matter raised under section (4)(d) of this rule shall be prepared as a final order, and any further appeal of the Board's final action shall be as prescribed by ORS 183.484.

(5) An individual who has had their certification revoked is ineligible to apply for another certification for a period of 3 years from the date of revocation unless waived by the committee.

629-042-1050

Limitations on the use of Certified Burn Managers

A Certified Burn Manager shall only supervise:

- (1) Prescribed burning activities as identified within an approved prescribed burn plan;
- (2) Prescribed burning for which they are certified to conduct; and
- (3) Prescribed burning conducted within a forest protection district, as identified in OAR 629-041-0500 to 629-041-0575.

629-042-1065

Training Provider Accreditation, Suspension, and Revocation

(1) A training provider shall obtain accreditation from the Forester prior to conducting or documenting training required by OAR 629-042-1025.

(2) To request accreditation, prospective training providers shall make application to the Forester and sign an accreditation agreement.

(3) Training providers will not be considered accredited until the Forester reviews and approves their application.

(4) Applications shall include, but will not be limited to:

- (a) A list of the specific training, either initial, renewal, or both to be provided or documented; and

(b) Evidence the person has had at least two years of experience in teaching adults and also two years of experience as a practitioner of the specific training to be provided or documented.

(5) Accreditation agreements shall include, but will not be limited to:

(a) A requirement to provide training using only curricula or course manuals approved by the Forester;

(b) A requirement to send all training completion records to the Forester within the period of time required by the Forester;

(c) A requirement to maintain training completion records for a minimum of six years;

(d) A requirement to document successful completion of a training requirement of OAR 629-042-1025 or a test required by OAR 629-042-1030 only for which they are accredited and for which they have personal knowledge that the person has properly completed the task being documented; and

(e) A requirement that no entry of false information be made into a field certification book to be submitted to the Forester.

(6) Temporary Suspension of documentation authority.

(a) The Forester may immediately suspend the documentation authority of a training provider at any time the Forester determines that the training provider has failed to comply with all requirements of the accreditation agreement. A training provider may appeal the temporary suspension of documentation authority in the same manner as section 7(c) of this rule.

(b) Within 30 calendar days of suspending the documentation authority of a training provider, the Forester must either initiate action to revoke the accreditation of the training provider or restore the documentation authority of the training provider.

(7) Revocation of accreditation

(a) The Forester may revoke the accreditation of a training provider at any time the Forester determines that the training provider has failed to comply with all requirements of the accreditation agreement.

(b) The Forester shall provide written notice to the training provider of the intent to revoke an accreditation. The Forester may not revoke an accreditation until after 30 calendar days from the date of notice.

(c) Accreditation revocation review and appeals procedures:

(A) A training provider may request that the Certified Burn Manager Advisory Committee review a decision to revoke an accreditation, by submitting a request within 30 calendar days after service of the written notice required by subsection (b) above. Service is completed at the earlier of actual notice, or depositing a properly addressed written notice in first class mail, or sending an email to an address established by the training provider,

- (B) The Certified Burn Manager Advisory Committee shall conduct the requested review at its next scheduled meeting after the receipt of a request for review.
- (C) Following completion of the review requested, the Certified Burn Manager Advisory Committee shall either affirm or withdraw the revocation by majority vote.
- (D) The Forester or the training provider whose accreditation has been revoked may appeal the decision of the Certified Burn Manager Advisory Committee to the Board of Forestry, in the same manner as appeals under ORS 477.260(2).
- (E) Any final resolution by the Board of the matter raised under section (7)(c) of this rule shall be prepared as a final order, and any further appeal of the Board's final action shall be as prescribed by ORS 183.484.
- (8) Nothing in these rules creates a right for review of revocation of training provider accreditation for employees of the Oregon Department of Forestry.

629-042-2000

Purpose

The purpose of OAR 629-042-2000 to 629-042-2060 is to set forth the standards, requirements, and procedures by which the Prescribed Fire Liability Pilot Program will be operated, pursuant to Sections 14 – 17, chapter 611, Oregon Laws 2023.

629-042-2010

Definitions

- (1) “Claimant” means:
 - (a) Any party that has incurred economic or property damages as described in ORS 477.089(2); or
 - (b) The State Forester or forest protective association that has borne recoverable suppression expenses as described in ORS 477.068, and subject to the provisions of ORS 477.120.
- (2) “Fund” means the Prescribed Fire Claims Fund established by Section 15, chapter 611, Oregon Laws 2023.
- (3) “Prescribed Fire” or “Prescribed burning” means the planned application and confinement of fire to wildland fuels as defined in OAR 629-044-1005(k) on lands selected in advance of that application.

629-042-2020

Enrollment

- (1) Prior to burning, the entity conducting the burning must enroll the Prescribed Fire or Cultural Burn to reserve liability coverage on the Oregon Prescribed Fire Liability website.
- (2) Enrollment does not guarantee fund availability.
- (3) Enrollment may be limited based on fund availability.
- (4) The enrollment period begins on July 1 of each year and ends on June 30 of the following year. If a project is not completed during the enrollment period, the entity conducting the burning must re-enroll the project as a new project on or after July 1 to be considered eligible for reimbursement.
- (5) The entity conducting the burning must update the status of the burn as “completed” on the Prescribed Fire Liability website no later than 7 calendar days after completion.

629-042-2030

Damages

- (1) Damages eligible for a claim include:
 - (a) Economic and property damage that occurs outside of a planned burn unit;
 - (b) Property (real and personal) damage, personal injury and death;
 - (c) Smoke damage to real property, other than to agricultural or natural resources, and losses, physical injury, or death resulting from vehicle accidents solely caused by smoke; and
 - (d) Recoverable suppression expenses incurred by the State Forester or forest protective association as described in ORS 477.068, and subject to the provisions in ORS 477.120.
- (2) Damages ineligible for a claim include:
 - (a) Smoke damage to agricultural crops or natural resources;
 - (b) Claims for damages within the planned burn unit for trees, carbon stocks or other assets; or
 - (c) Damages resulting from a Prescribed Fire or Cultural Burn activities not enrolled prior to burning.

629-042-2040

Claim Eligibility Requirements

- (1) To be eligible for reimbursement, a claim must meet the following conditions:
 - (a) The Prescribed Fire or Cultural Burn was enrolled on the Oregon Prescribed Fire Liability website prior to burning.
 - (b) The claim was submitted within 14 days of discovery of damage.
 - (c) Discovery of damage must occur within the burn period for which the Prescribed Fire or Cultural Burn was enrolled, or within 45 days of burning; whichever is greater.
 - (d) The claim was submitted by an eligible Claimant.

629-042-2050

Claim Considerations

- (1) Claims must be submitted in the manner indicated on the Oregon Prescribed Fire Liability website.
- (2) A claim may be denied if it does not meet the criteria in these rules, or Chapter 611, Oregon Laws 2023.
- (3) Claims that have been denied may be resubmitted with corrected information provided it is still within the original 14-day submission deadline.
- (4) Claims submitted after the 14-day deadline may not be considered for reimbursement.

629-042-2060

Incident Report Requirements

- (1) The Oregon Department of Forestry must complete an Incident Report.
- (2) To be eligible to for reimbursement, the Incident Report must indicate that:
 - (a) The incident was not a result of willful, malicious, or negligence in the origin or subsequent spread;
 - (b) All necessary and appropriate burn plans, permits, and provisions were in place;
 - (c) The Prescribed Fire or Cultural Burn complied with any requirements under a burn plan or permit; and
 - (d) The damages resulted from a fire that was:
 1. A prescribed fire conducted or supervised by the State Forester, a forest protective association or a rangeland protection association pursuant to ORS 477.315 to 477.325.
 2. A prescribed fire in a forest protection district, as described in ORS 477.205 to 477.281, that is conducted or supervised by a Certified Burn Manager pursuant to ORS 526.360.
 3. A cultural burn conducted or supervised by a cultural fire practitioner.