

Smoke Regulation and Liability Laws: How the Current Legal Scheme Discourages the Optimal Use of Prescribed Fire

Prepared by Madeleine Weisz
for the Northern California Prescribed Fire Council

Prescribed fire is increasingly recognized as an important and even essential tool for improving forest health and reducing the risk of catastrophic wildfires.¹ Despite legislation explicitly addressing the need to implement prescribed fire to reduce uncharacteristically severe wildfire effects, there are multiple aspects of the current legal scheme that tend to discourage the optimal use of prescribed fire.² This paper will focus on two areas of law affecting the use of prescribed fire. It will first address the current regulations associated with managing smoke from prescribed fires and the adverse incentives that arise as a result of the disparate treatment of prescribed fire smoke and wildfire smoke. The second section of the paper will focus on the liability laws that are implicated when prescribed fires escape and how liability laws may differ by jurisdiction.

Smoke Regulations

Smoke regulations are mandated at a federal level, but implemented at a state level.³ The regulations involve both air quality standards and visibility standards.⁴ Smoke regulations impede prescribed fire use by providing exemptions for smoke produced by wildfire but not for smoke that comes from prescribed fire. The result is that smoke from prescribed fire is included in measuring air quality and visibility and counted against regional airshed attainment goals, but

¹ Jonathan Yoder, Liability, Regulation, and Endogenous Risk: The Incidence and Severity of Escaped Prescribed Fires in the United States, 51 J.L. & Econ. 297, 298 (2008).

² Health Forest Restoration Act, 16 U.S.C.A. § 6512 (2003); Lenya N. Quinn-Davidson & J. Morgan Varner, Impediments to Prescribed Fire Across Agency, Landscape and Manager: An Example from Northern California, 21 Int'l J. Wildland Fire 210, 213 (2012) (stating that “there is widespread agreement among managers on the need for expanded application of prescribed fire”).

³ Joseph M. Feller, Non-Threshold Pollutants and Air Quality Standards, 24 Env'tl. L. 821, 829 (1994).

⁴ The Clean Air Act in a Nutshell: How it works, http://www.epa.gov/air/caa/pdfs/CAA_Nutshell.pdf (last visited Jan. 20, 2014).

smoke from wildfires is not.⁵ To fully flesh out the implications of these exemptions, this paper will explore the national regulatory scheme under the Clean Air Act, California's implementation of the regulations, and finally, what type of smoke will be exempted from measurement under this scheme.

Regulatory Scheme

The federal Clean Air Act, administered by the Environmental Protection Agency (EPA), is the primary legislation regulating smoke from prescribed fires.⁶ The Clean Air Act contains regulations concerning two aspects of prescribed fire smoke. First, it addresses the effects smoke (and other air pollutants) has on air quality, putting standards in place to protect public health and welfare.⁷ Second, the Clean Air Act contains provisions aimed toward limiting regional haze and preventing impaired visibility in national parks, national wilderness areas, and national monuments.⁸

Air Quality Regulations

Under the Clean Air Act, each state is responsible for ensuring the air quality within the geographic region of that state.⁹ The Clean Air Act requires a state to submit an implementation plan that specifies the manner in which national ambient air quality standards (NAAQS) “will be achieved and maintained within each air quality control region” of that state.¹⁰ Each region in the state is designated as being in attainment, nonattainment, or unclassifiable with respect to compliance with the NAAQS.¹¹ The Clean Air Act contains deadlines, requiring regions in nonattainment to reach the level of air quality required by the NAAQS within five years of

⁵ Kirsten H. Engel, Perverse Incentives: The Case of Wildfire Smoke Regulation, 40 Ecology L.Q. 623, 664 (2013).

⁶ *Id.* at 647.

⁷ 42 U.S.C. § 7407 (2013).

⁸ *Id.* § 7491.

⁹ *Id.* § 7407(a).

¹⁰ *Id.*

¹¹ *Id.* § 7407(d); Engel, *supra* note 3, at fn 162.

being declared in nonattainment.¹² If a deadline for achieving attainment is not met, serious legal and economic sanctions may apply, including federal highway funding cuts, if the failure is a result of inadequate implementation efforts.¹³ Smoke from a prescribed fire or a wildfire is a significant contributor to air pollution. Every year, smoke produces several tons of fine particulate matter, one of the six common pollutants the NAAQS regulate.¹⁴ The volume of fine particulate matter produced by fire can affect human health, including causing or aggravating respiratory illnesses.¹⁵ The actual amounts and impacts of fine particulate matter produced by wildfire depend on a range of factors including vegetation type, topography, and weather.¹⁶ Fine particulate matter from either wildfires or prescribed fires can also result in significant visibility impairment.

Visibility Regulations

The U.S. Environmental Protection Agency (U.S. EPA) promulgated the Regional Haze Rule in 1999 to address the national goal put forth by the Clean Air Act to prevent future, and remedy current, visibility impairment.¹⁷ The regional haze regulatory program requires states, in conjunction with federal land managers and other interested parties, to develop and implement visibility protection plans to reduce man-made air pollution that causes visibility impairment in selected national parks and wilderness areas of the United States (known as “Class 1 Areas”).¹⁸ The long term goal of the Regional Haze Rule is to achieve natural conditions in these Class 1 Areas, by 2064.¹⁹

¹² *Id.* § 7502(a)(2)

¹³ *Id.* § 7509

¹⁴ Engel, *supra* note 3, at 647.

¹⁵ Lindsay F. Wiley, Adaptation to the Health Consequences of Climate Change As A Potential Influence on Public Health Law and Policy: From Preparedness to Resilience, 15 *Widener L. Rev.* 483, 488 (2010)

¹⁶ Rich Raiders, How EPA Could Implement A Greenhouse Gas Naaqs, 22 *Fordham Env'tl. L. Rev.* 233, 273 (2011)

¹⁷ Regional Haze Regulations, 64 *Fed. Reg.* 35,714, 35,715 (Jul. 1, 1999) (codified at 40 C.F.R. pt. 51).

¹⁸ *Id.*

¹⁹ *Id.*

The U.S. EPA funded five Regional Planning Organizations to coordinate regional haze related rules between states in each region. California is part of the Western Regional Air Partnership (WRAP), which consists of the governors of thirteen Western states, federal agencies and tribal governments.²⁰ WRAP oversees analyses of monitoring data, prepares technical reports regarding regional haze, and provides policy guidance for the purpose of fulfilling the requirements of the Regional Haze Rule.²¹ Because of the significant impact smoke has on both air quality and visibility, complying with the Clean Air Act can prove to be a substantial hurdle to land managers' utilization of prescribed fire.

California's smoke management program and regional haze regulatory program

The Air Resources Board (ARB), a department within the California Environmental Protection Agency, is charged with the mission of promoting and protecting public health, welfare and ecological resources through the effective and efficient reduction of air pollution.²² The ARB is responsible for monitoring the regulatory activity of California's 35 local air districts.²³ The ARB is also tasked with complying with the U.S. EPA's Regional Haze Rule to improve visibility in California's 29 mandatory Class 1 areas.²⁴ California's smoke management plan and regional haze program are described in slightly more detail below.

California's Air Quality Regulations

²⁰ Engel, supra note 3, at 654.

²¹ See Natural vs. Anthropogenic Task Team, W. Reg'l Air P'ship, Guidance for Categorizing Natural vs. Anthropogenic Fire Emissions, (2005), available at <http://www.wrapair.org/forums/fejf/documents/nbtt/WRAPFEJFNAGuidance.pdf>.

²² See Cal/Epa Departments, <http://www.calepa.ca.gov/CalEPA/default.htm> (last visited Jan. 19, 2014).

²³ Air Resources Board – Laws and Regulations, <http://www.arb.ca.gov/html/lawsregs.htm> (last visited Jan. 19, 2014).

²⁴ Air Resources Board – Regional Haze, <http://www.arb.ca.gov/planning/reghaze/reghaze.htm> (last visited Jan. 19, 2014).

In compliance with the Clean Air Act, California has implemented “Smoke Management Guidelines for Agricultural and Prescribed Burning.”²⁵ Known as the “smoke management program,” the guidelines are an integrated state and local effort that apply to the Air Resources Board, and all air districts in California.²⁶ The guidelines are intended to provide flexibility to districts in the implementation of their smoke management plans, minimize any significant impacts burning may have on air quality or public health and ensure adequate state oversight.²⁷ The guidelines represent the minimum standards that must be met in regulating agricultural and prescribed burns. The guidelines allow local or regional authorities to establish stricter standards, but explicitly provide that no local or regional authority can outright ban agricultural or prescribed burning.²⁸

To comply with the smoke management plan, prior to a prescribed burn, a land manager must complete required planning steps.²⁹ Those steps include registering the burn with the regional air district, obtaining a burn permit, submitting a smoke management plan to the regional air district and obtaining approval of that plan.³⁰ The smoke management plan must contain information about the fire, including, but not limited to, burning method and fuel type, planned burn time, monitoring procedures, location and size of the burn, duration of the burn, smoke travel projections, expected air emissions, and public notification procedures.³¹ Land managers attempting to utilize prescribed fire must also abide by the California Regional Haze Plan.

California’s Visibility Regulations

²⁵ Cal. Code Regs. tit. 17, § 80102(a).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* § 80102(b).

²⁹ Air Resources Board – Prescribed Burning and Smoke Management, http://www.arb.ca.gov/smp/nif/appendix_e.pdf (last visited Jan. 19, 2014).

³⁰ *Id.*

³¹ *Id.*

The California Regional Haze Plan was adopted in January 2009 and approved in June 2011.³² The primary focus of the Regional Haze Plan is to protect visibility in national parks and scenic areas for the enjoyment of the public.³³ The greatest potential in the West for reducing visibility-impairing pollutants will come from installing “best available retrofit technology” at power plants.³⁴ However, fires can also have a substantial impact on visibility in protected areas.³⁵

Unfortunately, because of certain determining factors in how fire emissions are regulated under the Regional Haze Plan, the potential to use prescribed fires to reduce the visibility impairing consequences of unplanned wildfires is not accounted for under the Plan. Accordingly, the Regional Haze Plan acts as a further restriction on the ability of land managers to utilize prescribed fires. In addition to abiding by state smoke management and regional haze plans, land managers who manage federal public lands also have to comply with federal planning requirements, as well as federal environmental legal requirements.³⁶ The extensive procedural requirements and regulations land managers face when attempting to utilize prescribed fire prove to restrict the optimal use of prescribed fire.³⁷ This result is further accentuated because of the discrepancy in the way smoke is dealt with depending on whether it was produced by prescribed fire or wildfire under both the Smoke Management Plan and the Regional Haze Plan.

Exemptions under the Smoke Management Plan and the Regional Haze Plan

³² Air Resources Board – Regional Haze, *supra* note 19.

³³ *Id.*

³⁴ Engel, *supra* note 3, at 654.

³⁵ *Id.*

³⁶ *Id.* at 656.

³⁷ Ribe et al., Smoke Signals: The Need for Public Tolerance and Regulatory Relief for Wildland Smoke Emissions, Firefighters United for Safety, Ethics, and Ecology (FUSEE), 5 (2011).

Certain fire events will be exempted from measurement under either the Smoke Management Plan or the Regional Haze Plan, or both, depending on slightly different criteria. These exemptions distort the incentives for prescribed burning.³⁸ Prescribed fire has been shown to substantially decrease the uncharacteristic and sometimes negative effects of severe wildfires by mimicking the natural periodic fire cycles that took place before fire suppression practices were implemented.³⁹ In addition, prescribed fire minimizes the quantity of smoke produced per acre.⁴⁰ Ultimately, if prescribed fire were used more frequently, the effects of major wildfires would be less severe.

But, because wildfire smoke is not internalized under the smoke management plan or the regional haze plan, the potential of prescribed fire to reduce the severity of wildfire effects is not recognized under the current legal scheme. Under a state smoke management plan, a state can apply to have certain data excluded under the EPA's "exceptional event policy." Similarly, under the regional haze plan, fires are classified as either "natural" or "anthropogenic," and only smoke from anthropogenic sources are subject to the regional haze regulatory regime. Each of these exemptions will be more thoroughly explained below.

Exemptions provided in measuring air quality

Under the Clean Air Act's NAAQS, there are specific regulations specifying how air quality monitoring data influenced by "exceptional events" should be treated.⁴¹ An exceptional event is defined as an event that (1) affects air quality; (2) is not reasonably controllable or preventable; (3) is an event caused by human activity that is unlikely to recur at a particular location, or a natural event; and (4) is determined by the Administrator to be an exceptional

³⁸ Engel, *supra* note 3, at 638.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Draft Guidance Available on Treatment of Air Quality Monitoring Data Influenced by Exceptional Events, 22 Air Pollution Consultant 2.44 (2012).

event.⁴² To have data excluded from ambient air quality measurements under the exceptional events policy, states will “flag” data believed to have been influenced by exceptional events and submit documentation demonstrating to the EPA that the event resulted in the specific air pollutant concentration at a particular monitoring station.⁴³

The demonstration to justify data exclusion must include evidence that there is a clear causal relationship between the measurement under consideration and the event that is claimed to have affected the air quality in the area, and that there would have been no exceedance or violation but for the event.⁴⁴ In its guidance document, the EPA has given examples of events that will qualify as exceptional events. Those events include structural fires, chemical spills and industrial accidents, volcanic and seismic activities, high wind events, unplanned wildfires, and depending on certain factors, prescribed fires.⁴⁵

The EPA draws a distinction between natural fires versus anthropogenic (man-made) fires when determining whether their impacts should be excluded pursuant to the exceptional events policy.⁴⁶ Whereas an unplanned wildfire is considered to be within the meaning of a “natural event” and thus is eligible for treatment as an exceptional event, the EPA ties the qualifying criteria for a prescribed fire’s potential to be considered an exceptional event to the state’s smoke management program.⁴⁷ The EPA will judge on a case by case basis whether a prescribed fire will qualify as an exceptional event, taking into consideration whether the state has ensured appropriate smoke management practices.⁴⁸ If an exceptional event occurs despite

⁴² 42 U.S.C. § 7619(b)(1)(A) (2013).

⁴³ Draft Guidance Available on Treatment of Air Quality Monitoring Data Influenced by Exceptional Events, 22 Air Pollution Consultant 2.44 (2012)

⁴⁴ Treatment of Data Influenced by Exceptional Events, 72 FR 13560-01

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

compliance with the basic smoke management plan, the State must undertake a review of their approach, to ensure public health is being protected.⁴⁹

While the disparate treatment between prescribed fires and wildfires under the exceptional events policy may appear minimal, the practical effects have proven more significant. Since the 2007 promulgation of the exceptional events policy, the EPA has approved the exclusion of dozens of air quality readings influenced by unplanned wildfire.⁵⁰ In contrast, the EPA has not excluded a single prescribed fire-influenced air quality reading.⁵¹ Furthermore, not a single state petitioned to have a prescribed-fire-influenced air quality reading excluded, perhaps because of the scrutiny a state's smoke management plan might receive as a result of such a petition.⁵²

Exemptions provided in measuring visibility

Similarly to the EPA's policy of excluding air quality data originating from exceptional events, the Western Regional Air Partnership (WRAP) distinguishes between "anthropogenic" and "natural" fire in regulating visibility requirements.⁵³ In a guidance document for categorizing fire emissions as natural or anthropogenic, WRAP establishes that the person or entity that initiates a fire or manages the land where the fire occurs is responsible for categorizing those emissions and will be subject to oversight by the applicable air quality regulatory authority.⁵⁴ The purpose of categorizing the emissions as either anthropogenic or natural is to create an emissions inventory to establish and document reasonable progress towards the 2064 "natural" conditions goal.

⁴⁹ *Id.*

⁵⁰ Engel, *supra* note 3, at 652.

⁵¹ *Id.*

⁵² *Id.*

⁵³ See, Natural vs Anthropogenic Task Team, W. Reg'l Air P'ship, Guidance for Categorizing Natural vs Anthropogenic Fire Emissions (2005), available at <http://www.wrapair.org/forums/fejf/documents/nbtt/WRAPFEJFNAGuidance.pdf>.

⁵⁴ *Id.* at 2.

Under WRAP’s guidance document, all emissions from anthropogenic sources “will be controlled to the maximum extent feasible subject to economic, safety, technical and environmental considerations.”⁵⁵ In classifying prescribed fire as natural or anthropogenic the guidance document provides that the default category for prescribed fire is anthropogenic. However, a prescribed fire may be considered “natural” if it is used to “maintain an ecosystem that is currently in an ecologically functional and fire resilient condition.” But, a prescribed fire used to restore an ecosystem is classified as anthropogenic.⁵⁶ The WRAP guidance also distinguishes between different types of Native American burning. Any Native American vegetative burning that is not for traditional, religious, or ceremonial purposes will be considered prescribed burning and will only be classified as natural if the prescribed fire is being used to maintain an ecosystem that is already considered in a healthy ecological state.⁵⁷

Wildfires are defined in WRAP’s guidance document as “any unwanted, non-structural fire” that occurs on wildlands or agricultural lands whether it was ignited by natural causes or human causes (including accidental ignitions or escaped prescribed fire).⁵⁸ In effect, the definition of a wildfire according to WRAP is any fire that is suppressed by management action. A wildfire that is managed for resource objectives is classified in the same manner as a prescribed fire.⁵⁹ The result of this classification scheme is that Western states are not under an obligation to reduce emissions from any fire classified as a wildfire (basically meaning that it is being actively suppressed) in order to comply with federal visibility requirements.⁶⁰

⁵⁵ *Id.* at 4.

⁵⁶ *Id.*

⁵⁷ *Id.* at 6.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Engel, *Supra* note 3, at 655.

Classifications of fire by federal land agencies

From the above discussion, it is clear that how a particular fire is defined dictates how it will be treated under the different legal regimes managing air quality and visibility. The importance, therefore, of having set definitions of different types of fire to determine a fire's appropriate classification is evident. Unfortunately, classifying fire based on its characteristics is difficult and ambiguous and can lead to undesired requirements for managing that fire.⁶¹ Currently a federal land agency's response to a fire depends on whether the cause of that fire was (1) intentionally ignited and (2) whether the person who started the fire had the authority to ignite the fire.⁶² Since 2010, prescribed fires falling under the above definition have been classified as "planned ignitions" while fires not meeting that definition are referred to as "unplanned ignitions" pursuant to a policy guidance issued by the National Wildfire Coordinating Group (NWCG).⁶³

However, because historical terminology generally classified fire as either prescribed fire or wildfire, additional terms developed to describe fires that fell somewhere in between.⁶⁴ The terms "wildland fire use," "prescribed natural fire," "natural prescribed fire," and "wildfire managed for resource benefit" are still used by some federal land agencies (USFS, for example) to describe fires that are not planned ignitions but are managed for ecological or fuel reduction

⁶¹ Robert H. Palmer III, A New Era of Federal Prescribed Fire: Defining Terminology and Properly Applying the Discretionary Function Exception, 2 Seattle J. Envtl. L. 279, 290 (2012)

⁶² *Id.* at 291.

⁶³ See Memorandum from the NWCG Chair to NWCG Committee Chairs and Geographic Area Coordinating Group, NWCG#030-2010, at 1 (July 8, 2010), [hereinafter NWCG#030-2010] available at <http://www.nwcg.gov/general/memos/nwcg-030-2010.pdf> (describing the additional guidance for communicating about managing wildland fire in light of changes in policy guidance and terminology).

⁶⁴ Palmer, *Supra* n. 61, at 291.

reasons rather than immediately suppressed.⁶⁵ In 2010, the NWCG recognized that classifying fire based on its cause could lead to undesirable results in fire management.⁶⁶

For example, once a fire was classified as a wildfire, federal land agencies were mandated to aggressively suppress the fire without having the freedom to manage the unplanned fire for multiple objectives. The NWCG recommended that instead of classifying a fire by cause, a fire should be described by a federal land agency's response.⁶⁷ This allows an agency to suppress certain portions of an unplanned fire, while allowing the fire to burn in other areas for ecosystem benefit.⁶⁸ The most recent classification scheme for fires as either unplanned ignitions or planned ignitions encompasses the ability to manage fires using a broad range of actions on a case by case basis.⁶⁹ The new terminology and classification scheme (planned ignition and unplanned ignition verses prescribed fire and wildfire) is seen generally as a positive development for land managers.⁷⁰ However, the historical definitions of fire are still widely used by federal land agencies, courts and the public, and the inconsistent terminology often leads to confusion and a general lack of clarity.⁷¹

Unfortunately, the different treatment of prescribed fire verses wildfire in both the air quality and visibility legal regimes results in incentives for land managers to under-utilize prescribed fire. The unclear and ambiguous classifications of fire as either wild, natural, unplanned, anthropogenic, prescribed or planned, which differ slightly depending on the governing agency or jurisdiction, only serve to confuse matters more. The uncertain definitions

⁶⁵ *Id.*

⁶⁶ NWCG#030-2010, *Supra* n. 63.

⁶⁷ *Id.*

⁶⁸ Palmer, *Supra* n. 61, at 295-96.

⁶⁹ NWCG#030-2010, *Supra* n. 63.

⁷⁰ Palmer, *Supra* n. 61, at 296.

⁷¹ *Id.*, at 290.

of different types of fire also play a key role in the second topic of this paper: land manager liability for prescribed fires.

Land Manager Liability

The question of whether land managers will be liable for an escaped prescribed fire is complex and not entirely settled. In order to describe prescribed fire liability from a land manager's perspective, the second part of this paper will start with an explanation of California's liability laws. Then the more complicated arena of the Federal Torts Claim Act will be explored along with a discussion of the role that the "discretionary function exception" plays when an escaped prescribed fire causes damage. The paper will conclude with an examination of recent cases and what they might mean for land managers' liability for prescribed fires in the future.

Tort rules and simple negligence

Prescribed fire liability falls into the category of tort law.⁷² A tort is a civil wrong which results because of some type of socially unreasonable or unacceptable behavior on the part of the tortfeasor.⁷³ In the context of prescribed fires, tort law provides the method of resolving disputes between the tortfeasor (landowner or manager) and the victim of damage caused by the fire.⁷⁴ There are three main types of tort rules: strict liability torts, intentional torts or negligence torts (either gross or simple). California law related to prescribed fires is a simple negligence rule.⁷⁵

In relation to other states, California's simple negligence rule falls somewhere in the middle on a spectrum of laws conducive to prescribed fire use and laws that inhibit prescribed

⁷² Changyou Sun, Liability of Using Prescribed Fires on Forestlands and State Legislation Evolution, Department of Forestry, Mississippi State, available at: <http://sofew.cfr.msstate.edu/papers/0519sun.pdf>

⁷³ *Id.* at 227.

⁷⁴ *Id.*

⁷⁵ *Id.* at 229.

fire use. For example, most states with statutory laws relating to prescribed fire specify a negligence rule, but four states (Connecticut, North Dakota, New Hampshire and Oklahoma) impose strict liability on prescribed fire users.⁷⁶ A strict liability standard holds a burner liable for damage caused by an escaped prescribed fire regardless of the amount of care taken to prevent damage.⁷⁷ On the other hand, states such as Georgia and Florida impose a gross negligence standard which is a weaker liability law than a simple negligence standard. Gross negligence laws require a burner to extend a certain amount of care to ensure that a fire will not escape, but the level of care required is less than what is required under a simple negligence rule.⁷⁸

Simple negligence, the California prescribed fire liability standard, requires a plaintiff to show harm, causation and breach of a duty in order to recover damages. A defendant can avoid liability if they are able to prove that they met all the applicable standards of care and acted as a reasonably prudent person.⁷⁹ California's Health and Safety Code provides: "Any person who allows any fire burning upon his property to escape to the property of another, whether privately or publicly owned, without exercising due diligence to control such fire, is liable to the owner of such property for the damages to the property caused by the fire."⁸⁰ Additionally, a person who is responsible for negligently allowing a fire to escape onto public or private property will be liable for the expenses associated with suppressing that fire.⁸¹

It is well settled that private individuals will be held liable for negligently setting fires or negligently allowing fires to escape.⁸² For example, in *People v. Southern Pac. Co.*,⁸³ the court

⁷⁶ Yoder, *Supra* n. 1, at 307.

⁷⁷ *Id.*

⁷⁸ *Id.* at 300-01.

⁷⁹ *Id.* at 228.

⁸⁰ Cal. Health & Safety Code § 13008 (West)

⁸¹ *Id.* at 1309

⁸² *Anderson v. United States*, 55 F.3d 1379, 1381 (9th Cir. 1995).

held that a railroad company was responsible for damages caused when fire spread from its right-of-way to other property, even though the railroad company did not negligently set the fire.⁸⁴ In *Gould v. Madonna*,⁸⁵ a private contractor negligently maintained fires that he ignited for clearing sections of a U.S. highway and was held liable for damages caused when the fire escaped and burned the plaintiff's land.⁸⁶ In a case as early as 1946, a California court held that "private individuals must reimburse the California Department of Forestry for expenses incurred in extinguishing negligently set fire that spread to other properties."⁸⁷ While seemingly straightforward, this simple negligence rule will not always apply to state and federal agents because of state and federal immunity laws.

California State Immunity Laws

The California Constitution provides that "suits may be brought against the State in such manner and in such courts as shall be directed by law."⁸⁸ California's government code states that except where provided otherwise, "a public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person."⁸⁹ Essentially, this statute, authorized by the California Constitution, eliminates common law tort liability for public entities.⁹⁰ However, public entities may be liable under the doctrine of respondeat superior for the actions of their employees (see below).⁹¹

⁸³ 139 Cal. App. 3d 627, 633-34 (1983).

⁸⁴ *Anderson*, at 1381 (citing *People v. Southern Pac. Co.*, 139 Cal. App. 3d 627, 633-34 (1983)).

⁸⁵ 5 Cal. App. 3d 404, 406 (1970).

⁸⁶ *Anderson*, at 1381 (citing *Gould v. Madonna*, 5 Cal. App. 3d 404, 406 (1970)).

⁸⁷ *Anderson*, at 1381 (citing *People v. Zegras*, 29 Cal. 2d 67 (1946)).

⁸⁸ Cal. Const. art. III, § 5

⁸⁹ Cal. Gov't Code § 815

⁹⁰ *Lloyd v. Cnty. of Los Angeles*, 172 Cal. App. 4th 320, 330 (2009);

⁹¹ *Id.*

A public employee is generally liable for an injury resulting from negligence to the same extent as a private person.⁹² Under the doctrine of respondeat superior, if the employee's negligence occurs within the scope of their employment, the public entity will be held vicariously liable for the employee's actions.⁹³ However, a public employee will be immune to suit if the act or omission at issue resulted from an exercise of discretion that was vested in the employee.⁹⁴

In deciding whether certain acts are discretionary, California courts have rejected a rigid approach, but instead focus on the policy considerations behind the grant of immunity. Immunity is granted to public employees when their acts are a result of basic policy decisions that have been committed to the executive or legislative branches of government.⁹⁵ Whether decisions associated with prescribed burning qualify as "discretionary" has not been explored thoroughly in California case law. However, federal law, which has similar sovereign immunity laws and a similar exception for discretionary decisions, has devoted more attention to whether public employee decisions associated with prescribed fire qualify as discretionary, thereby immunizing the public entity from liability.

Federal Sovereign Immunity Laws

The doctrine of sovereign immunity prevents the U.S. government and its agencies from being subject to suit without the government's consent.⁹⁶ However, the Federal Torts Claim Act (FTCA) has waived federal sovereign immunity in certain circumstances.⁹⁷ The FTCA provides that the U.S. government shall be liable for the acts or omissions of its employees "under

⁹² Cal. Gov't Code § 820

⁹³ *Lloyd*, 172 Cal. App. 4th at 330.

⁹⁴ Cal. Gov't Code § 820.2

⁹⁵ *Odello Bros. v. Cnty. of Monterey*, 63 Cal. App. 4th 778, 792-93 (1998).

⁹⁶ *State of Florida Dep't of Agric. & Consumer Servs. v. United States*, 4:09-CV-386/RS-MD, 2010 WL 3469353 (N.D. Fla. Aug. 30, 2010)

⁹⁷ *Id.*

circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.”⁹⁸ There is an exception in the FTCA’s rule subjecting the U.S. to liability in situations where a private person would be liable: the discretionary function exception.⁹⁹

The discretionary function exception provides that the waiver of sovereign immunity in the FTCA does not apply to:

any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.¹⁰⁰

This means that if a government employee is acting within the scope of their employment and exercising discretion as authorized by their position, they will not be held liable, nor will their employer (The United States), for any damages that result, provided they were exercising due care. The burden is on the government to establish that the discretionary function exception applies, which involves a two-step inquiry.¹⁰¹

The first prong of the inquiry is whether the employee’s conduct at issue involved an element of “judgment or choice.”¹⁰² The employee’s conduct will be considered to involve judgment or choice unless a “federal statute, regulation, or policy specifically prescribes a course of action embodying a fixed or readily ascertainable standard.”¹⁰³ The second prong is whether the judgment is of the kind that the discretionary function exception was designed to

⁹⁸ 28 U.S.C. § 1346(b); *Anderson v. United States*, 55 F.3d 1379, 1381 (9th Cir. 1995)

⁹⁹ 28 U.S.C. § 2680(a).

¹⁰⁰ *Id.*

¹⁰¹ *Hieda v. United States*, 836 F. Supp. 2d 1105, 1109 (D. Haw. 2011)

¹⁰² *Cranford v. United States*, 466 F.3d 955, 958 (11th Cir. 2006)

¹⁰³ *Id.* (citing *United States V. Gaubert*, 499 U.S. 315, 322 (1991)).

shield.¹⁰⁴ The discretionary function exception is meant to “prevent judicial second-guessing of legislative and administrative decisions grounded in social, economic and political policy through the medium of an action in tort.”¹⁰⁵ Whether a public employee’s decisions are discretionary in the context of prescribed fire has not been explicitly answered, but there have been cases discussing the application of the discretionary function exception in regard to prescribed fire and fire suppression.

*Graves v. U.S.*¹⁰⁶ involved an Incident Commander’s decision to order a burnout of fuels surrounding the plaintiff’s home, resulting in what the plaintiff called “unnecessary damage.” The court held that the discretionary function did apply in this case and therefore granted the government’s motion to dismiss.¹⁰⁷ The court reasoned that the Forest Service Manual provided objectives and policies for fighting fires but did not mandate a course of action for an employee to follow.¹⁰⁸ In fact, the court recognized, the Ninth Circuit has specifically held that the Forest Service “retained considerable discretion in deciding how to allocate suppression resources.”¹⁰⁹ In considering the second prong of the test, the court found that the considerations listed in the Forest Service Manual “reflect the type of economic, social and political concerns that the discretionary function exception is designed to protect.”¹¹⁰

A subsequent case out of Florida in 2010, while not binding on suits arising in California, has drawn attention to the importance of taking into account the nature of the fire when determining whether the discretionary function exception applies.¹¹¹ In *State of Florida v.*

¹⁰⁴ *Graves v. United States*, CIVS05-1661 FCD GGH, 2007 WL 776101 (E.D. Cal. Mar. 12, 2007)

¹⁰⁵ *Cranford*, 466 F.3d at 958.

¹⁰⁶ CIVS05-1661 FCD GGH, 2007 WL 776101 (E.D. Cal. Mar. 12, 2007)

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 4

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 6.

¹¹¹ *State of Florida Dep't of Agric. & Consumer Servs. v. United States*, 4:09-CV-386/RS-MD, 2010 WL 3469353 (N.D. Fla. Aug. 30, 2010).

U.S.,¹¹² a controlled burn ignited by the Forest Service in Osceola National Forest escaped and caused damage to the plaintiff's timber.¹¹³ The Florida court found the Ninth Circuit decisions cited by the defendant unpersuasive because they all dealt with Forest Service Decisions regarding "fire suppression" of wildfires.¹¹⁴ The court cited Forest Service Manual policies regarding prescribed fire treatments, but declined to decide whether the discretionary function exception applied to ignited prescribed fires.¹¹⁵ Instead, the court stated that the discretionary function did not apply in this case because the defendant admitted to not creating a sufficient Burn Plan and acted contrary to the Burn Plan, and therefore had clearly disobeyed mandates that were not discretionary.¹¹⁶

Whether the discretionary function exception applies for management ignited prescribed fires in the Eleventh Circuit therefore remains unanswered. Likewise, there is no case directly on point to establish whether or not the Ninth Circuit would find prescribed fire management within the discretionary function exception. That question remains open, but it is likely that courts will be careful to distinguish prescribed fires from fire suppression efforts in making that determination. It is also clear from the Florida case that land managers would be wise to carefully and thoroughly draft and abide by their burn plans, because as the Florida Court stated: "the judgments made by Forest Service officials within the Burn Plan itself may reflect public policy decision for which Defendant would be entitled to freedom from judicial review. However a failure to adequately perform the Plan, followed by significant deviation from the Plan, receives no such deference."¹¹⁷

¹¹² *Id.*

¹¹³ *Id.* at 1.

¹¹⁴ *Id.* at 3.

¹¹⁵ *Id.* at 3-4.

¹¹⁶ *Id.* at 4

¹¹⁷ *Id.*

Conclusion

From the above examination of regulations relating to smoke and the liability resulting from escaped prescribed fire, it is clear that land managers face many conflicting incentives when deciding whether to use prescribed fire. On the one hand, prescribed fire has been recognized as an important and necessary tool for managing resources and preventing the degree of uncharacteristic and sometimes negative effects that result from unplanned wildfires. On the other hand, the smoke regulations that are currently in place make the process of using prescribed fire very difficult and they do not account for the benefits prescribed fire offers in mitigating the negative effects of wildfire. Additionally, there is uncertainty regarding whether a public or private entity's use of prescribed fire will subject that entity to liability. That uncertainty makes the use of prescribed fire risky and further discourages the optimal use of prescribed fire.