

# Legislating the right to burn

An overview of prescribed burning statutes and regulations

Carissa L. Wonkka

USDA Agricultural Research Service, Northern Plains Agricultural Lab



# Statutory Reform

## “Right to Burn” Acts

- Codify the right of a landowner to burn
- Establish liability standard
- Place burden of proof on the plaintiff to prove burner negligence
- Establish CPBM programs
- Incentivise certification
- Establish regulatory requirements



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# FL Right to Burn Law

The application of prescribed burning is a land management tool that **benefits the safety of the public, the environment, and the economy of the state.** The Legislature finds that:

Prescribed burning reduces vegetative fuels within wild land areas. Reduction of the fuel load reduces the risk and severity of wildfire

Most of Florida's natural communities require periodic fire for maintenance of their ecological integrity. Prescribed burning is **essential** to the perpetuation, restoration, and management of many plant and animal communities. Significant loss of the state's biological diversity will occur if fire is excluded from fire-dependent systems.

# GA Right to Burn Law

It is declared by the General Assembly that prescribed burning is a resource protection and land management tool which **benefits the safety of the public, Georgia's forest resources, the environment, and the economy of the state**. The General Assembly finds that:

As Georgia's population continues to grow, pressures from liability issues and smoke nuisance complaints cause prescribed burn practitioners to limit prescribed burn activity, thus reducing the above-mentioned benefits to the state;

It is the purpose of this part to authorize and promote the continued use of prescribed burning for community protection, silvicultural, environmental, and wildlife management purposes.

# Legislative intent

DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES, DIVISION OF FORESTRY, STATE OF FLORIDA, and the BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND, STATE OF FLORIDA, Appellants, v. SHULER LIMITED PARTNERSHIP

CASE NO. 1D13-0592 (Fla. Dist. Ct. App. May. 12, 2014)

That atmospheric conditions subsequently intervened **do not lessen the legislative intent** that burns conducted in accordance with the subsection of the certified burn statute at issue were to be adjudged under a gross negligence standard. Any other interpretation renders the gross negligence standard illusory.

To impose a lesser standard of tort liability after-the-fact based on unpredicted weather events, even though a property owner or agent has complied with the terms of a prescription plan, **thwarts the legislative purpose of the certified burn statute**.

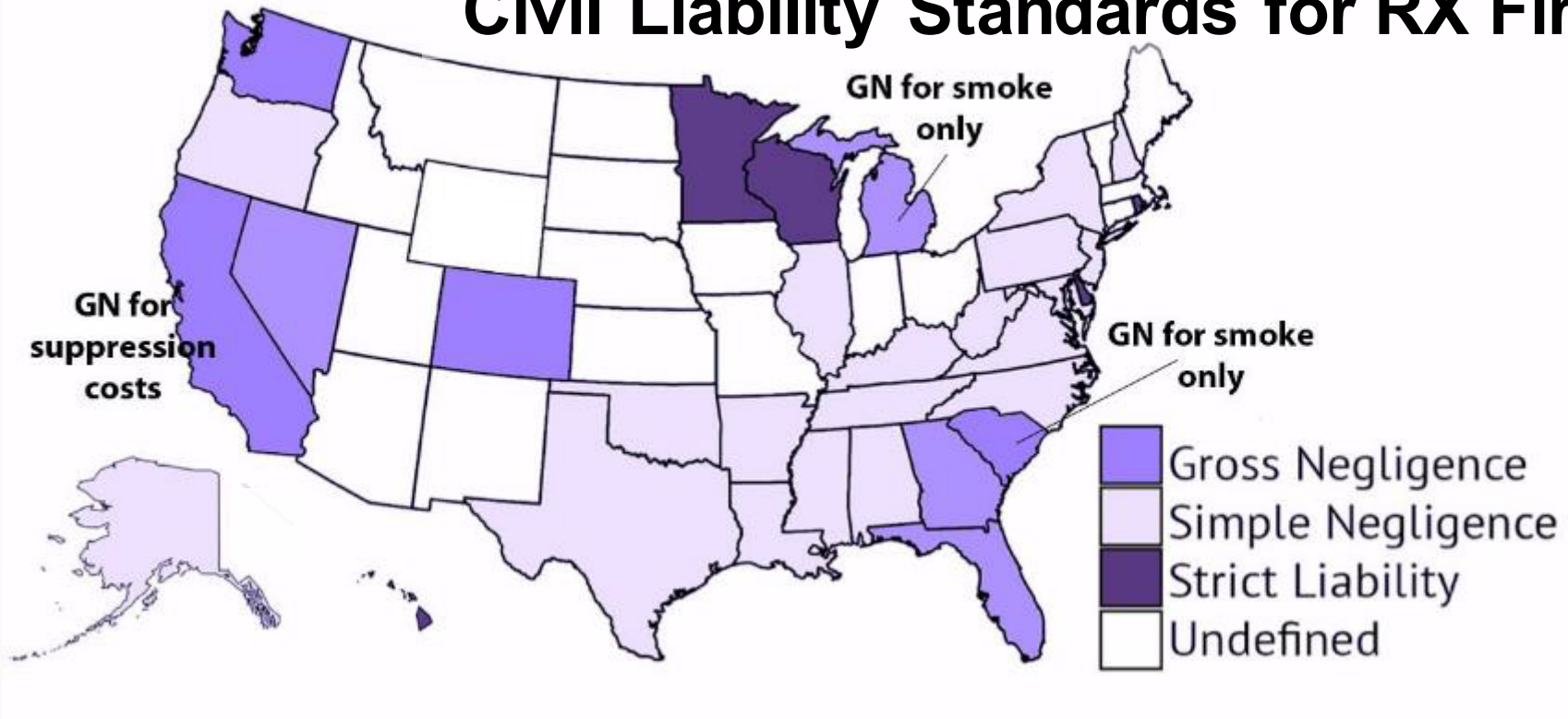
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# Civil Liability Standards for RX Fire



*Strict Liability (SL)* – burner liable for any damage caused by an escaped prescribed fire, regardless of action of burner

*Simple Negligence (SN)* – requires burner to practice reasonable care in applying prescribed burn (most common, including TX & OK)

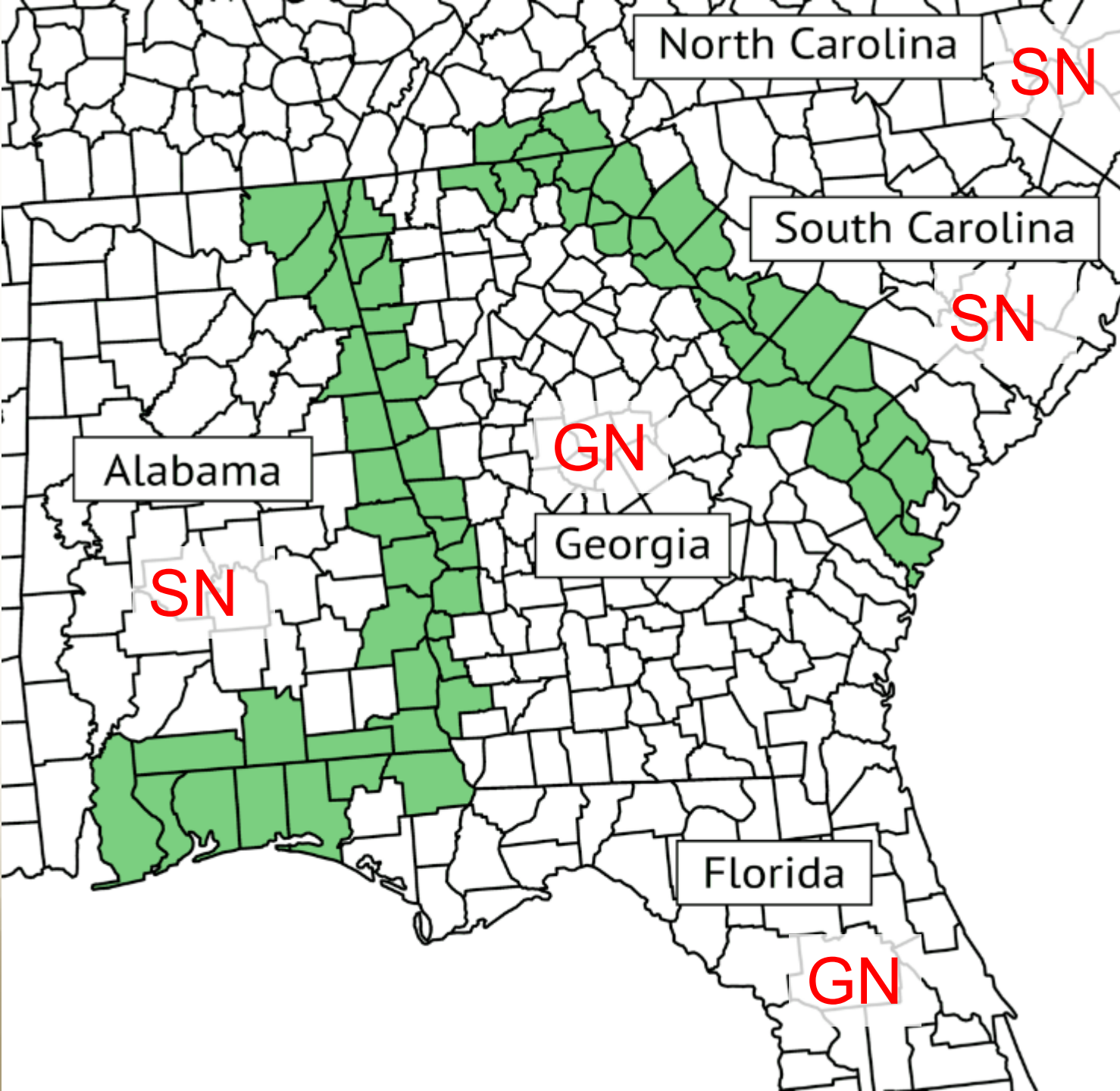
*Gross Negligence (GN)* – if burner follows codified regulations regarding burning, plaintiff must show reckless disregard of the duty of care owed others by the burner



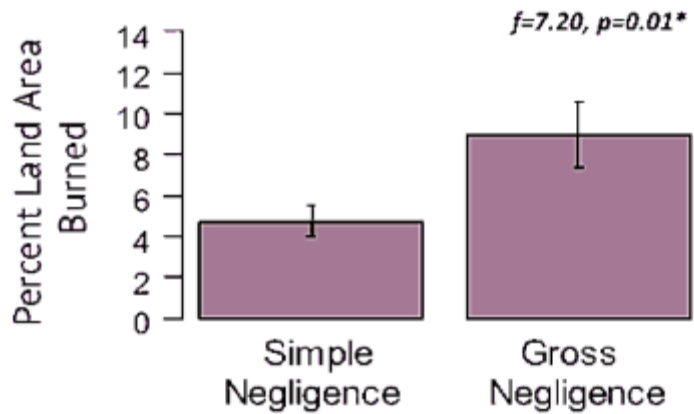
# Gross negligence liability standards as incentive

- Incentivizes training/certification and adherence to regulatory requirements
  - Shifts burden of liability away from burner

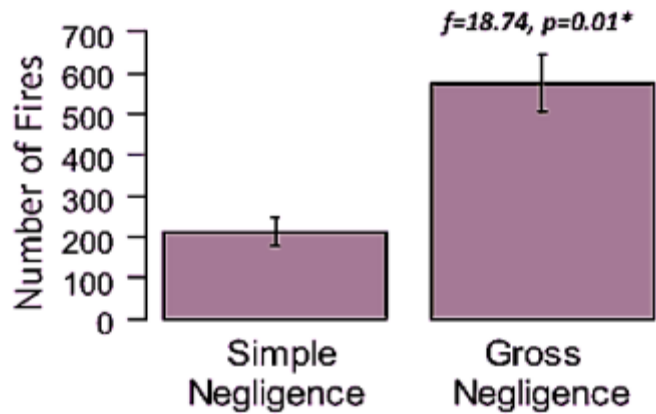




**Objective:  
Determine  
affect of  
liability  
standard on  
prescribed  
burning**



Landowners in counties with *gross negligence* standards burned more land than in those in counties with *simple negligence* standards



Wonkka, C.L., W.E. Rogers, U.P. Kreuter. 2015. Legal barriers to effective ecosystem management: Exploring linkages between liability, regulations, and prescribed fire. *Ecological Applications* 25(8):2382-2393. DOI: 10.1890/14-1791.1

2% increase in acres burned for counties with gross negligence compared to counties with simple negligence

AL study area  
includes 7,398,848  
acres...

147,977 more  
acres burned/yr



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# Wolfe v. Carter (GA 2012)

Opinion of the appellate court states:

Statute says:

“No property owner or owner's agent conducting an authorized prescribed burn under this part shall be liable for damages or injury caused by fire or resulting smoke unless it is proven that there was gross negligence in starting, controlling, or completing the burn.”

"Gross negligence" is defined under OCGA § 51-1-4, as the absence of even slight diligence, and slight diligence is defined in the Code section as “that degree of care which every man of common sense, however inattentive he may be, exercises under the same or similar circumstances.” In other words, gross negligence has been defined as equivalent to the failure to exercise even a slight degree of care or lack of the diligence that even careless men are accustomed to exercise.

We find no evidence from which a jury could reasonably conclude that Carter failed to exercise even slight care and was therefore grossly negligent

# Survey of District Court Judges

District Court Judges: most likely to hear a case of first impression for a prescribed fire case

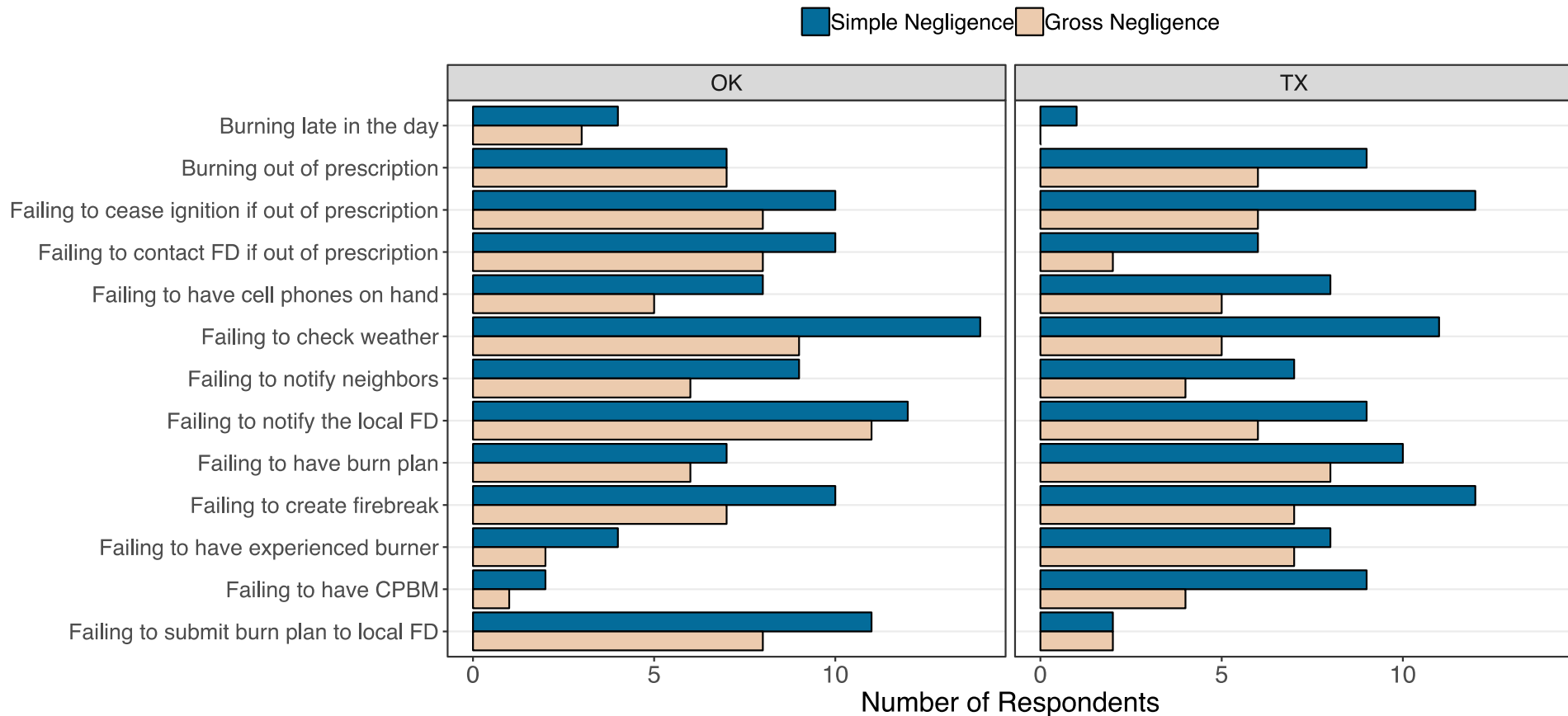
Objective: Obtain preliminary info about Judges perceptions on:

- The role of prescribed fire
- The statutes and regulations affecting fire
- Decisions they might make if they preside over an escaped fire case
- How those decisions would change if legislated liability standard changed from simple to gross negligence

# Evidence of simple and gross negligence

Expected number of variables listed as factors that would alone constitute evidence of:

- simple negligence -  $6.95 \pm 1.12$
- gross negligence -  $4.60 \pm 1.11$





- Both states' judges cited fewer factors as evidence of gross negligence than simple negligence
- This suggests that a change in statutory liability standard (from simple to gross negligence) would result in more favorable judgments for RX burners in cases of escaped fire damages



# Additional tools for limiting liability

- **Catastrophe Funds** – balance public good with private loss from rare but impactful all-hazard events that overwhelm private insurance
  - Can be tax-based or based on activity fees (e.g. new home construction in WUI)
  - Can be private-investment based (reinsurance companies as sponsors)
  - Can use fees from certification, etc.
- **Private Insurance**
- **Liability Limits**




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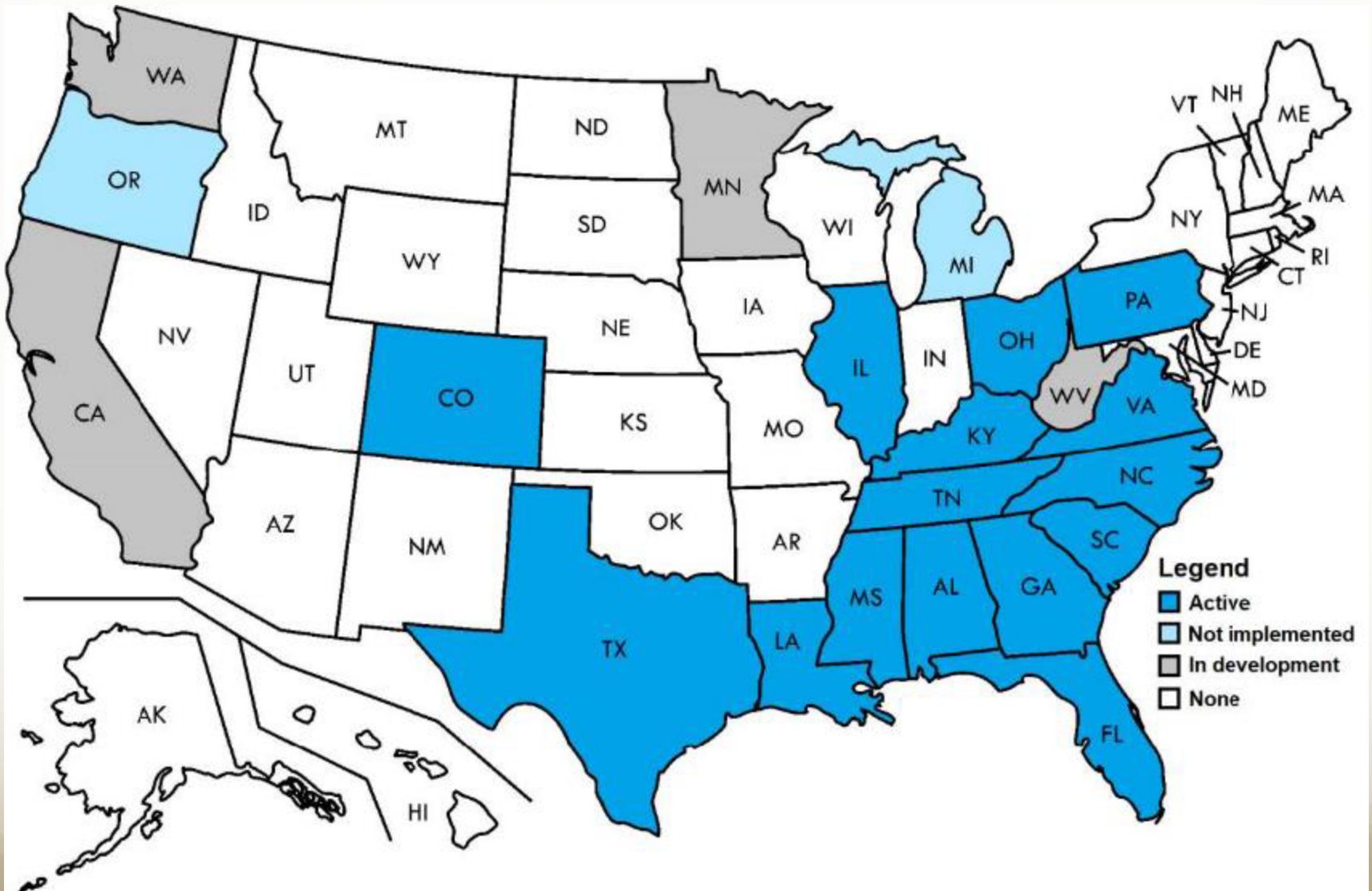
A photograph showing a person in a yellow jacket operating a tractor in a field. The tractor is moving along a path, and a large fire is burning in the background, consuming tall grasses. The sky is overcast and grey.

Right-to-burn Acts: provide a management-based approach

Traditional administrative law – performance-based regulation:  
require that certain out-comes will be achieved or avoided

Prescribed fire regulation – management-based regulation:  
directs regulated organizations to engage in a planning process  
that aims toward the achievement of public goals

# States with certification programs that are linked to state prescribed burn laws or regulations



From: Insights and suggestions for certified prescribed burn manager programs

Megan S. Matonis, Forest Stewards Guild, Feb. 2020

# Requirements for prescribed burn certification in states with formal and active CPBM programs

State - track / tier	Prior burning experience <sup>1</sup>	Online course	In-person course <sup>2</sup>	Field course		Written exam	Additional burning experience <sup>3</sup>	Task book	Alternative certification <sup>4</sup>
				Live burn demo	No burn demo				
Alabama - new burners			X (32 hrs)						
Alabama - experienced burners	X		X (12 hrs)						CPBM
Colorado - burner B			X (32 hrs)			X	L	X	RXB1/2
Colorado - burner A	X		X					X	
Florida - new burners			X (23 hrs)			X	P + L		
Florida - experienced burners	X	X				X	L		
Georgia - experienced burners	X		X (16 hrs)			X			
Illinois - all burners		X	X (8 hrs)	X			P + L	X	RXB1/2; CPBM; GC
Kentucky - experienced burners	X		X (24 hrs)	X			L	X	RXB1/2/3; GC
Louisiana - new burners			X (20 hrs)	X		X	L		
Louisiana - experienced burners	X		X (8 hrs)	X		X	L		
Mississippi - all burners			X (23 hrs)		X	X			CPBM
Ohio - experienced burners	X		X (24 hrs)	X		X			RXB1/2; GC
North Carolina - all burners			X (16 hrs)		X		L		RXB1/2; CPBM
Pennsylvania - all burners <sup>5</sup>	X		X				L	X	RXB1/2/3; GC
South Carolina - all burners	X		X (8 hrs)			X			
Tennessee - all burners		X (24 hrs)	X (16 hrs)	X					
Texas - new burners			X (24 hrs)	X		X	L		
Texas - experienced burners	X		X (24 hrs)	X		X			
Virginia - new burners			X (24 hrs)			X			
Virginia - experienced burners	X		X			X			

From: Insights and suggestions for certified prescribed burn manager programs  
Megan S. Matonis, Forest Stewards Guild, Feb. 2020

# Enrollment



- Rigor of the program affects enrollment
- Colorado (since 2014)
  - 20 Burner B
  - 5 Burner A
- Florida: 5032 burners certified since start of program
  - Currently 1700 CPBMs
  - 1200 certified pile burners
- Goals and rigor vs achievability
  - Increase public trust – more rigorous
  - Promote private land burning – more achievable

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# Benefits of Certification



- Liability protection from damages and personal injury
  - Fire
  - Smoke
  - Suppression costs
- Exemptions to burn during burn bans
- Extended hours for burning
- Exemptions from seasonal burn windows
- Easier filing for permits

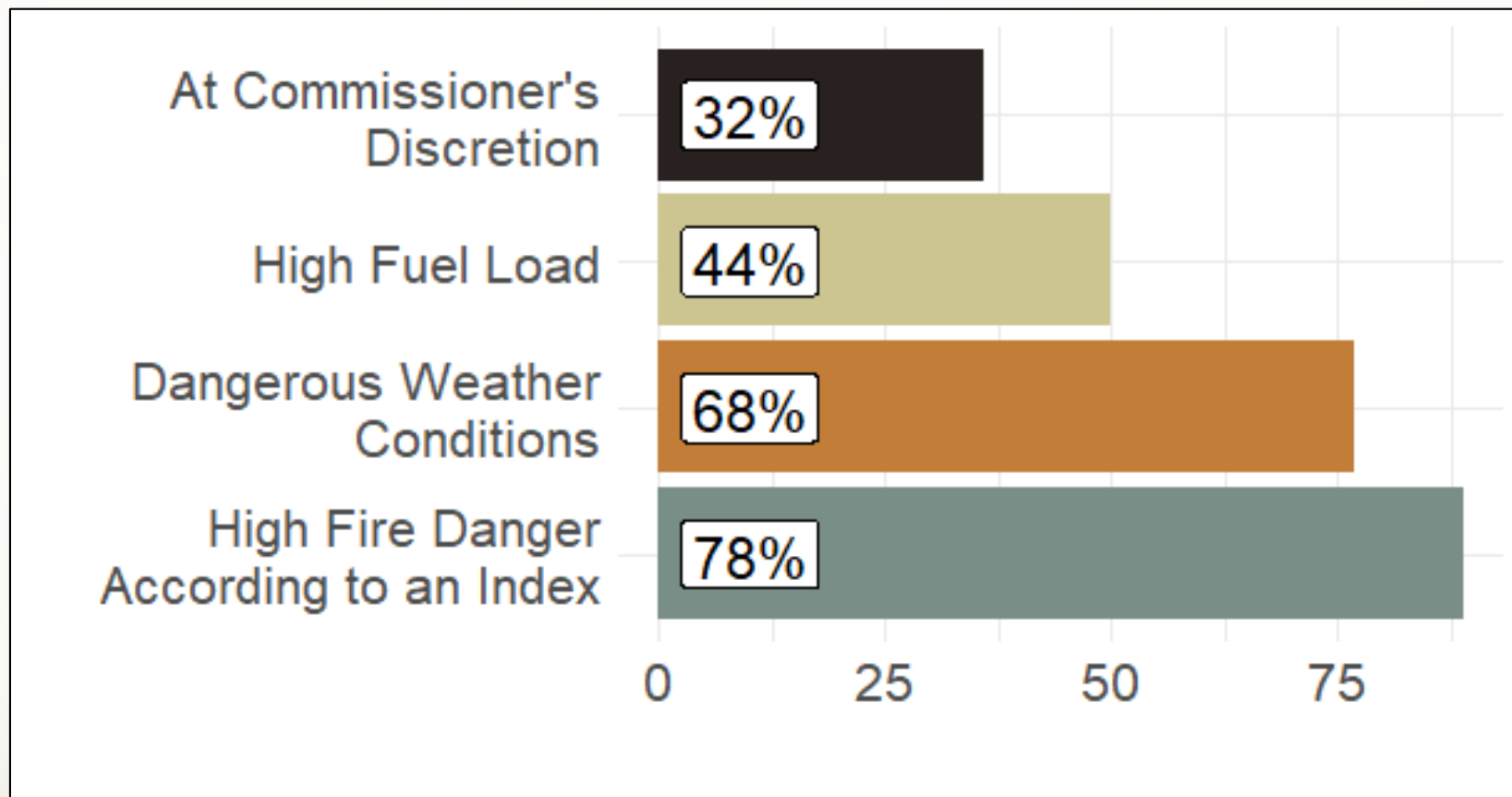
# Survey of County Commissioners

County Commissioners: elected public officials whose responsibilities in Texas and Oklahoma include the implementation and repeal of countywide bans on outdoor burning

## Objectives:

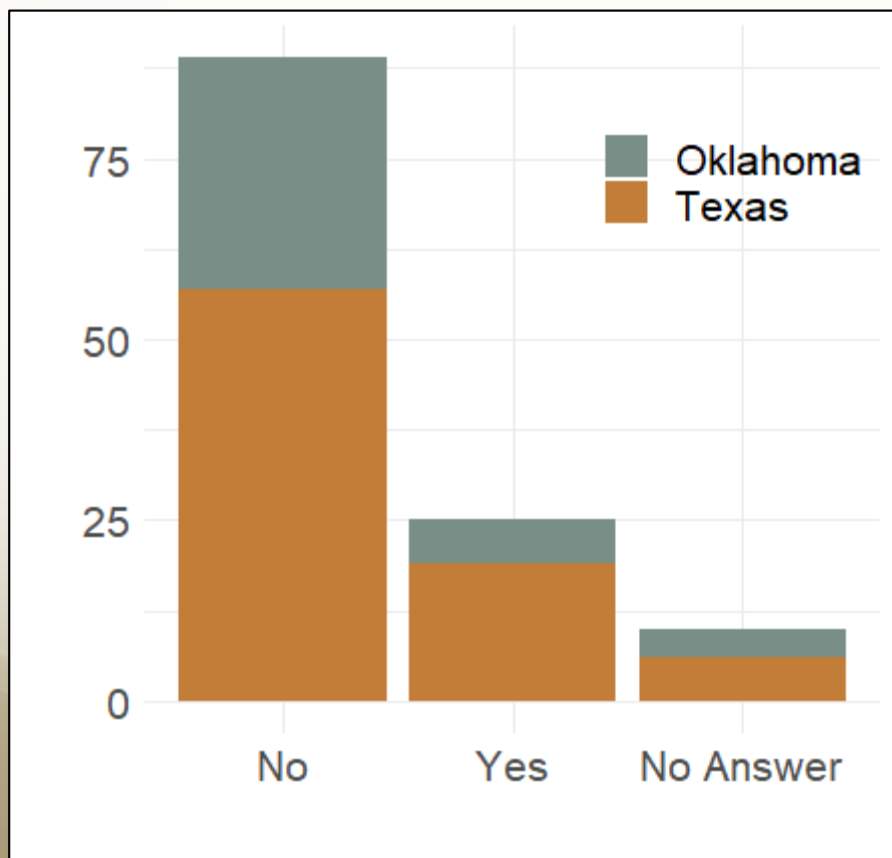
1. Determine factors that influence commissioners' decision to enact burn bans
2. Identify criteria they are using to make that decision
3. Determine whether their comfort level with prescribed fire plays a role
4. Determine if shift to gross negligence would lead to more pressure to enact burn bans
5. Determine if shift to gross negligence would impact their decision to enact burn bans

# What are the criteria that must be met for placing a burn ban?

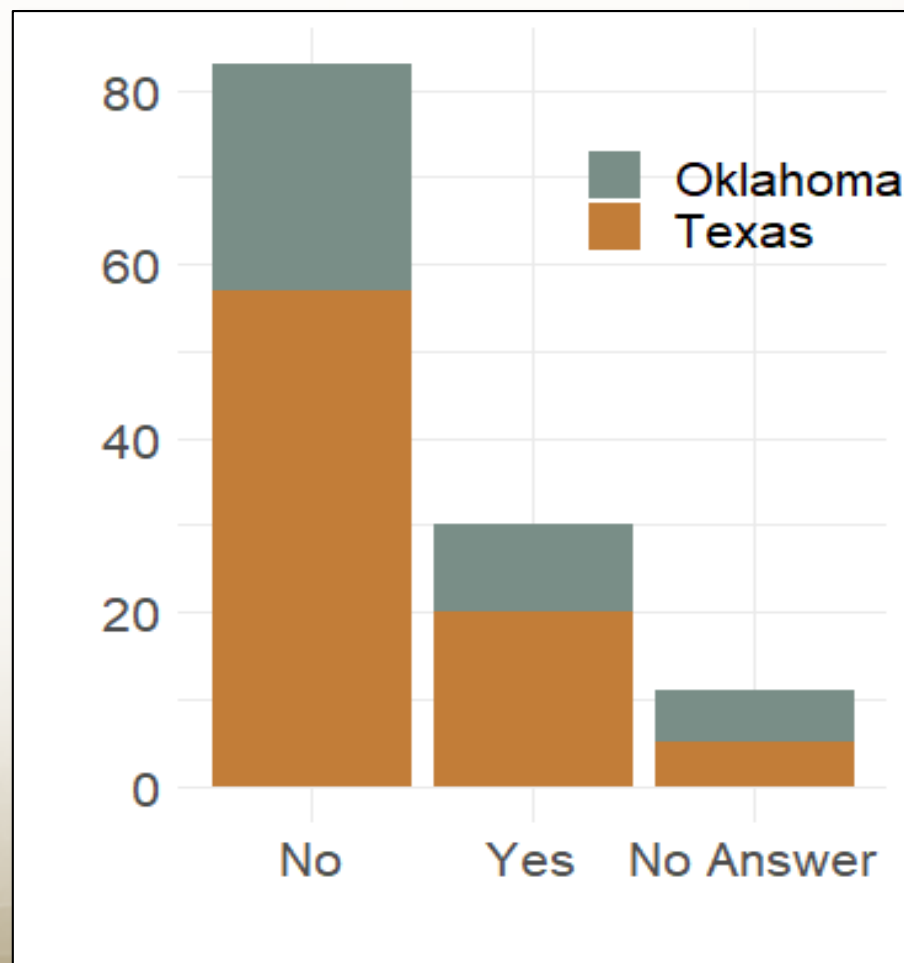


\*Commissioners who identified as very familiar with fire selected high fire danger most often

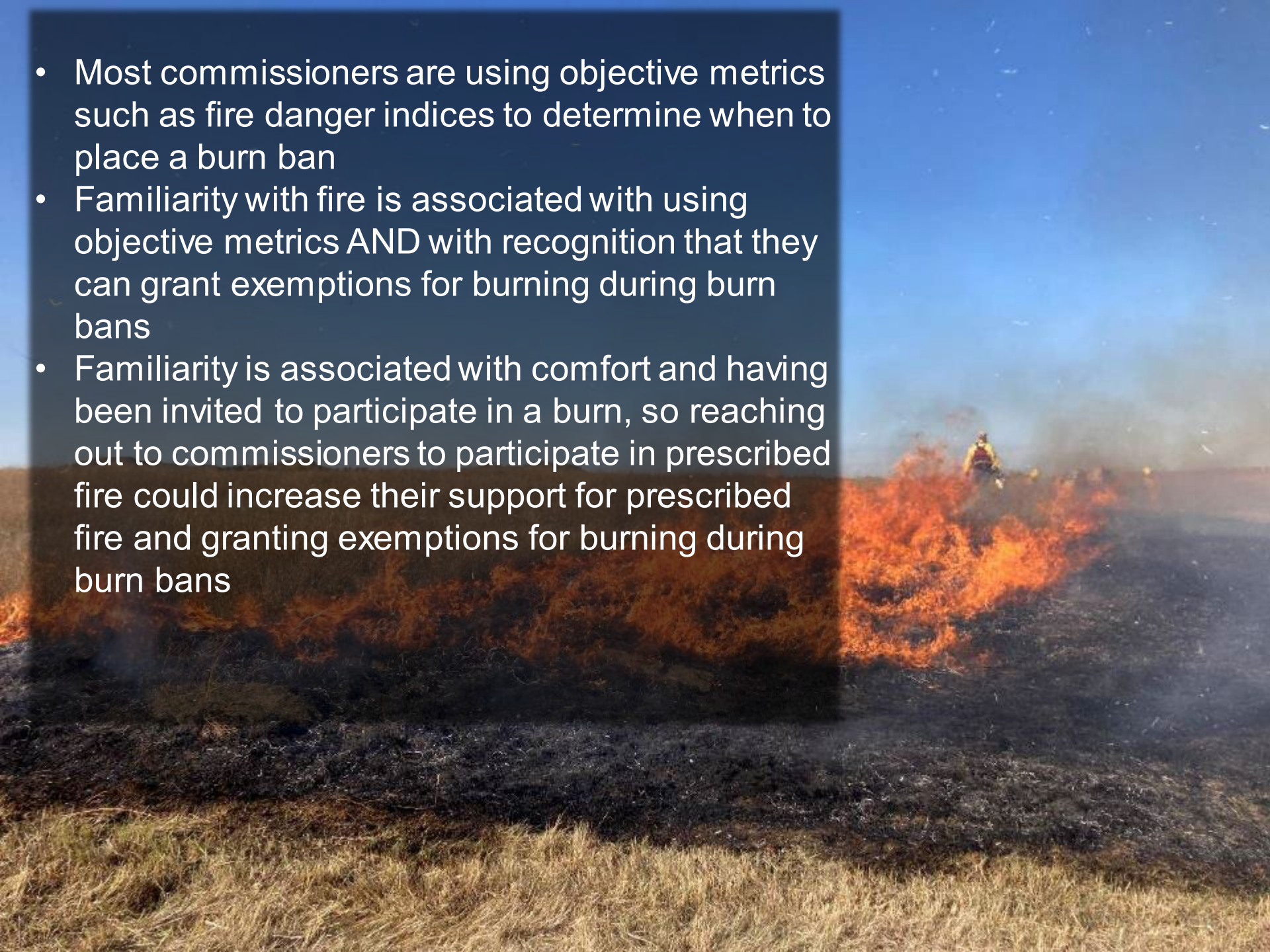
Would a shift in the legislated negligence standard from simple to gross negligence change amount of pressure the public puts on you to enact burn bans?



Would a shift in the legislated negligence standard from simple to gross negligence change the frequency with which you enact burn bans?



- Most commissioners are using objective metrics such as fire danger indices to determine when to place a burn ban
- Familiarity with fire is associated with using objective metrics AND with recognition that they can grant exemptions for burning during burn bans
- Familiarity is associated with comfort and having been invited to participate in a burn, so reaching out to commissioners to participate in prescribed fire could increase their support for prescribed fire and granting exemptions for burning during burn bans



# Prescribed Burning Communication Kit

The Communications Kit provides resources to facilitate discussion and interactions within and between those who conduct prescribed burning and local communities

Focused on identifying and engaging officials who have some regulatory oversight of prescribed burning

Includes tips for engaging with media, neighbors, general public



## INSTRUCTIONS FOR USING THE COMMUNICATIONS KIT

The Communications Kit provides resources to facilitate discussion and interactions within and between those who conduct prescribed burning and local communities.

### Resources Found in this Kit:

- 1. Instructions for Using the Communication Kit.** How is the kit organized? This document provides a list and short description of the kit contents.
- 2. Introduction.** Why is it important to communicate about prescribed burning? This document gives an overview of why the kit was developed.
- 3. Overview.** What were the research discoveries, and how are they relevant to prescribed burn associations (PBAs)? This document covers attitudes and beliefs of local elected officials—and who they turn to for expert opinion when making prescribed burning-related decisions.
- 4. Best Practices for Working With Stakeholders.** How can a PBA build support for prescribed burning? This document gives tips and strategies for working with local government officials and community members to present a positive view of prescribed burning by addressing concerns and information needs in a clear, professional manner.
- 5. Stakeholder Identification Chart.** How can you find the right person with whom to initiate discussion? This document gives tips and links to assist you in locating local government and media contacts.

- 6. Talking Points for Discussing Prescribed Burning with Stakeholders.** What topics should you discuss, and what do you say? This document gives you key messages to convey.
- 7. Prescribed Burn Notification.** What type of information is best to inform neighbors about upcoming burns? This document gives an example of what and how to tell about your plans and reassure them about safety measures that are in place.
- 8. Reporting Prescribed Burns.** How can you contribute to the science of prescribed burning? This document describes how PBAs and others can report about their burning activity to advance knowledge about the use and safety of prescribed burning.
- 9. References and Resources.** What web-based resources are available for PBAs? This document lists links to online documents, websites, and other items where you can find additional helpful information.

## COMMUNICATION KIT INTRODUCTION

Discussions about prescribed burning can be fraught with tension and misunderstanding. How can the benefits and safety of prescribed burning be better communicated, specifically to local government authorities who regulate and resolve conflict?

The contents of this kit are the direct result of a Joint Fire Science Program-funded research project—Fighting Wildfire with Prescribed Burning in the Southern Great Plains. This research was funded by the Bureau of Land Management, the Texas A&M University System, and the Texas Department of Agriculture.

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(b) Certified prescribed burning pertains only to broadcast burning for purposes of silviculture, wildland fire hazard reduction, wildlife management, ecological maintenance and restoration, and agriculture. It must be conducted in accordance with this subsection and:

1. **May be accomplished only when a certified prescribed burn manager is present on site with a copy of the prescription and directly supervises the certified prescribed burn until the burn is completed**, after which the certified prescribed burn manager is not required to be present.

2. Requires that a **written prescription** be prepared before receiving authorization to burn from the Florida Forest Service.

3. Requires that the **specific consent** of the landowner or his or her designee be obtained before requesting an authorization.

4. Requires that an **authorization to burn be obtained from the Florida Forest Service** before igniting the burn.

5. Requires that there be **adequate firebreaks at the burn site and sufficient personnel and firefighting equipment to contain the fire** within the authorized burn area.



# Regional Cooperation

## Legal Constructions

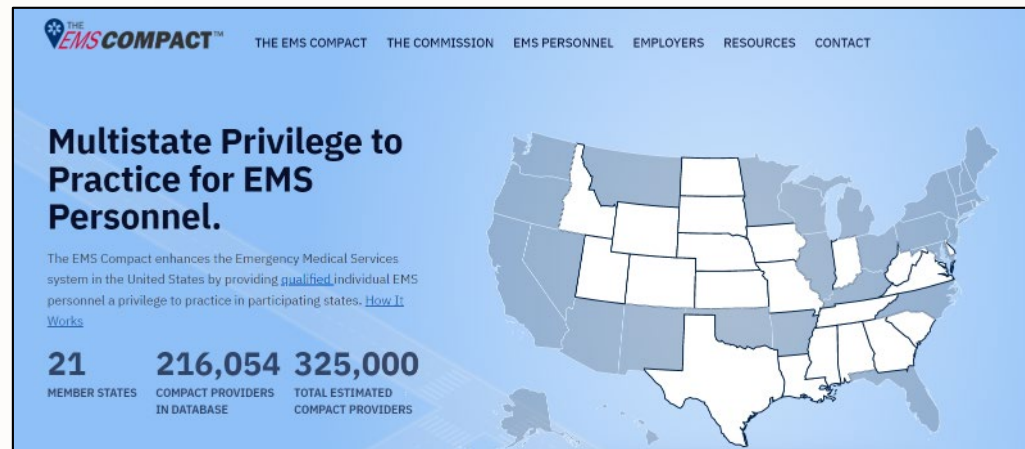
- Interstate Compacts
- Uniform State Laws
- Model Laws



# Interstate Compacts

Cross-state partnerships created to facilitate funding and information sharing

- Formal legislatively enacted to bind states to compacts' provisions
- Typically non-regulatory
- Creates independent multi-state governing authorities
- Establish uniform standards, guidelines, procedure
- Assists states in developing and enforcing standards while providing adaptive structure



## Regional Coordination

Department of the Interior leadership supports state-led priorities identified by regional ocean partnerships (ROPs) and other regional organizations.



# Legislative Uniformity

## Uniform Laws

- Collaboratively written model laws intended to facilitate the enactment of identical or similar laws by the separate states
- Uniform Law Commission
- Promotes uniformity in state laws where it is deemed desirable and practicable
- ULC drafts but states must adopt independently
- All states represented by commissioners appointed for specified term
- ULC committee on Scope and Programs selects areas of law to draft by reviewing proposals

## Model Acts

- Guideline legislation that states can enact in whole or part
- Drafted by ULC and American Law Institute
- Meant to be models adapted to fit particulars within states
- Promoted when similarity across borders helps with transparency but flexibility is desired by states

# Questions?

[Carissa.Wonkka@usda.gov](mailto:Carissa.Wonkka@usda.gov)

