


**Date:** July 23, 2010

**To:** Environmental Quality Commission

**From:** Dick Pedersen, Director 

**Subject:** Agenda item K, Rule adoption: Willamette Valley field burning rule revisions August 18-19, 2010 EQC meeting

**Why this is important** This proposed rulemaking implements 2009 legislation to reduce the practice of open field burning in the Willamette Valley and establish new rules for emergency field burning and for critical non-burn areas.

**DEQ recommendation and EQC motion** The Department of Environmental Quality recommends that the Environmental Quality Commission adopt the revisions to Division 266 Field Burning Rules (Willamette Valley) as presented in attachment A-1, as a revision to the Oregon State Implementation Plan.

**Background and need for rulemaking** The burning of grass seed and cereal grain fields in the Willamette Valley is a summertime practice to dispose of leftover straw after harvest, to control weeds, insects and plant diseases in order to maintain grass seed purity, reduce pesticide and herbicide use and improve yield. This practice produces smoke and fine particulate matter that can cause health problems, depending on the level and duration of exposure. The elderly, children and people with pre-existing respiratory conditions are at greatest risk from inhalation of this smoke.

This proposed rulemaking implements Senate Bill 528, adopted by the 2009 Oregon Legislature, which affects field burning as follows:

- Eliminates regular field burning in the Willamette Valley, starting in 2010. Prior to the bill, the limit was 40,000 acres per year.
- Reduces burning of “identified species”<sup>1</sup> and fields on “steep terrain” from 25,000 acres to 15,000 acres per year. These fields are located almost entirely in Marion County, in the northeastern part of the Willamette Valley. Prohibits burning in Benton, Lane, and most of Linn County.
- Allows up to 2,000 acres per year of “emergency burning” to address major disease outbreaks or insect infestations. Requires a finding of “extreme

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<sup>1</sup> “Identified species” means a grass seed field consisting of Creeping Red Fescue, Chewings Fescue or Highland Bentgrass, or as identified by the director of the Oregon Department of Agriculture.

hardship” by the commission.

- Gives EQC the option to adopt rules to prohibit burning in “critical non-burn areas” that may include, but are not limited to, areas under industrial power transmission lines.
- Limits stack burning and propane flaming to 1,000 and 500 acres per year, respectively, until 2013, and then none after that.
- Doubles the fees associated with all remaining field burning.

Both EQC and the Oregon Department of Agriculture must revise administrative rules on field burning to adopt these changes. Under state law, EQC is required to enter into a memorandum of understanding with ODA to operate the Willamette Valley field burning program. Since 1995, ODA has handled all aspects of the operation and enforcement of the program.

At the Feb. 19, 2010 EQC meeting in Portland, DEQ provided the commission with an update on the key issues associated with this rulemaking. It was recognized that this rule should be designed to maximize protection to public health, while also being practical for a grower to use and efficient for DEQ and EQC to implement.

**Effect of rule**

If this proposed rulemaking is adopted, it would have the following effects:

1. Incorporate into DEQ rule the acreage limitations, prohibitions and fee increases in Senate Bill 528, as described above.
2. Based on Senate Bill 528, establish a new rule for “emergency burning” and the criteria and procedures for approval, delegate EQC authority to the DEQ director for approving emergency burning under this rule and require fees to cover administrative and smoke management related costs.
3. Based on Senate Bill 528, establish a new rule for “critical non-burn areas” in the Willamette Valley and define these areas as grass seed or cereal grain fields with 230 kilovolt or greater power transmission lines present, and fields within 500 feet of any school, airport, or hospital.
4. Change requirements for fire department training fires conducted on grass fields to align with existing statutes that allow firefighting training, providing it is for official training purposes and approval is first obtained from ODA, based on air quality considerations.
5. Clarify existing requirements that restrict or prohibit field burning in certain areas of the Willamette Valley, such as near cities, highways and airports.
6. Include a new rule that requires a burn fee for any field burning conducted outside the Willamette Valley. This fee is already required under existing state law, but it is not currently reflected in DEQ rules.
7. Propose miscellaneous changes to better align DEQ and ODA field burning rules.

<b>Commission authority</b>	The commission has authority to take this action under ORS 468.020 and ORS 468A.025.
<b>Stakeholder involvement</b>	In December 2009, DEQ convened a field burning advisory committee to provide comments on preliminary draft rule changes and discuss key issues associated with the proposed rulemaking. Committee members included grass seed growers, environmental groups, the Oregon Seed Council, OSU Crop Science, State Fire Marshal Office and Lane Regional Air Protection Agency.
<b>Public comment</b>	<p>DEQ held an initial public comment period April 1 to April 30, 2010, with two public hearings in Salem and Eugene. DEQ reopened the comment period between May 12 and May 21, 2010. DEQ received 200 individual comments. One letter was submitted on behalf of 104 persons, and another was submitted on behalf of 83 persons. As a result, DEQ received 387 comments.</p> <p>The majority of the comments focused on burning allowed on 15,000 acres of identified species/steep terrain in the northern portion of the Willamette Valley, and the 2,000 acres that could be approved for emergency burning anywhere in the Willamette Valley. The primary emphasis of these comments was the concern that the remaining field burning be managed so as not to pose a threat to public health. See the discussion in “Key Issues” for specific issues raised during the comment period.</p> <p>DEQ has summarized the comments and provided detailed responses in attachment B. A summary of the public hearings and testimony is in attachment C.</p> <p>In response to comments received during the public comment period, DEQ is proposing several additional changes. Attachment A-2 shows both the original proposed rule changes and additional substantive changes made by DEQ; the latter highlighted in the shaded text. The following is a brief summary of the additional changes, with rule citation and the page number in the rules where they can be found:</p> <ol style="list-style-type: none"><li>1. Changing the policy statement in OAR 340-266-0020(1) to remove outdated language and replace with language that refers to the reduction in field burning and need to protect public health, pursuant to Senate Bill 528. Page 3.</li><li>2. Changing the definition of “emergency open burning” in OAR 340-266-0030(12) to reflect the language in Senate Bill 528. Page 5.</li><li>3. Adding a definition of “extreme hardship” to OAR 340-266-0030(13), in response to the lack of a definition of this term in Senate Bill 528, and to provide more clarity to DEQ’s emergency burning rule. Page 5.</li><li>4. Adding to the emergency burning rule in OAR 340-266-0065(4)(b)(C) the term “crop rotation” as one of the alternatives to burning that must be evaluated by the grower when submitting a burn petition to DEQ. Page 20.</li></ol>

5. Changing the emergency burning rule in OAR 340-266-0065(4)(b)(D) to require documentation from a third-party expert (extension agent, agronomist or consultant) to verify the severity of the disease outbreak or insect infestation. This was voluntary under the original proposed rule. This change will provide greater certainty that a severe disease outbreak or pest infestation exists, and shorten the time needed by DEQ to review burn petitions. Page 21.
6. Providing further clarification in the emergency burning rule in OAR 340-266-0065(4)(c) that the determination of extreme hardship must consider the total number of grass seed fields that are part of grower's farming operation, in order to show the extent of the financial impact from the disease outbreak. Page 21.
7. Adding to the emergency burning rule in OAR 340-266-0065(7)(c) that prior to approving any burn petitions, DEQ will post each field specific burn plan on its website for public review and comment for a period of seven days, and consider revising the burn plan based on the comments received. Page 22.
8. Providing further clarification to the critical non-burn area rules in OAR 340-266-0075(2)(a)(C) by defining when a school is not "in-session" so that a limited amount of field burning can be authorized within 500 feet. Also OAR 340-266-0075(2)(d) prohibits any burning upwind of the school, and requires the grower to verify no children are present on school grounds prior to burning. Page 28.
9. Adding to the critical non-burn area rules in OAR 340-266-0075(2)(e) that special precautions shall be taken by ODA smoke management staff when burning next to a school or hospital critical non-burn area to ensure that prevailing winds do not cause smoke impacts. Page 28.
10. Changing the training fire rules in OAR 340-266-0080(3) to add back a requirement that fire departments first obtain ODA approval when conducting training fires on grass seed fields, in order to ensure the burning occurs under appropriate weather conditions and does not cause air quality problems. Page 29.
11. Changing the definition of "wildfire" in OAR 340-266-0030(59) to include fires that are started by negligence or an intentional act, and changing the provisions in OAR 340-266-0040(9) to be consistent with this definition, related to actions taken by growers in response to wildfires. Page 10.

**Key issues**

The following are key issues related to the proposed rule changes. Please see attachment B for more details.

**1. Emergency burning new rule**

By setting a limit on emergency burning at 2,000 acres per year in Senate Bill 528, the Legislature intended to keep burning as an option for addressing major disease and insect outbreaks. However, there were many comments stating that the proposed emergency burning rule was not stringent enough, and did not meet the intent of Senate Bill 528. These comments focused specifically on the bill

language that requires emergency burning to be in response to an “extreme hardship,” and that the need to burn must “outweigh the dangers to public health and welfare.” There were concerns that extreme hardship was not defined in the rules, the criteria for determining extreme hardship were not stringent enough, and that the rule did not go far enough to ensure public health would be protected. Citing lack of stringency, there were also concerns the 2,000-acre limit for emergency burning would be routinely burned each year.

There were also comments from the Oregon Seed Council, Oregon Farm Bureau and several grass seed growers that the proposed rule was too stringent by placing too many restrictions on growers, and would deter them from applying for emergency burning. These comments supported making the rule simpler and less bureaucratic, so that growers could respond quickly to severe disease and insect problems.

In response to comments, DEQ made six changes to this rule section, as described in the section above. These changes included adding a definition of “extreme hardship” to provide more clarity to the rule, requiring third-party verification of a disease or insect outbreak by an extension agent or agronomist, and posting burn plans to solicit public comments prior to DEQ approving any emergency burning petition . The other three changes noted above also provided further clarification to the rule.

The proposed changes satisfy the intent of Senate Bill 528, are protective of human health and the environment and are practical and reasonable for growers. The key features of this rule, with the above changes included, can be summarized as follows:

- Growers may submit emergency burning petitions at two times during a year, which makes it easier for the grower to seek approval and have adequate opportunity for burning. Acreage allocation provisions in the rule will provide growers with equitable access to the 2,000-acre limit for emergency burning.
- The time for review and approval of petitions will be expedited by the delegation of authority from the EQC to the DEQ director, and the change to require third-party verification.
- Adding a definition of “extreme hardship” to the rule further clarifies that the approval of emergency burning takes into account both the severity of the agronomic and economic impact on a grower due to a disease outbreak or insect infestation, and helps clarify what documentation needs to be submitted.
- In addition to demonstrating an extreme hardship, a field specific burn plan must be developed and approved. The burn plan will be subjected to the most stringent smoke management controls. This will provide the maximum level of protection to public health from the smoke.
- As part of developing each burn plan, there will be an opportunity for the public to review and comment on each plan, and for DEQ to make improvements to

the plan before final approval.

There is the possibility that some burn petitions will not be approved, as some may not meet the criteria of extreme hardship, and others may not be approvable because of the constraints identified in the burn plan. Emergency burning approved in any field may only occur under the wind, weather conditions and other required criteria in the burn plan.

## **2. Critical non-burn areas new rule**

Critical non-burn areas are allowed, but not required, under Senate Bill 528. In addition, the size of these areas is not defined, and only “power transmission lines” are cited in the bill. Comments supported and opposed the new provisions to establish 500-foot critical non-burn areas around schools, hospitals and airports. Based on a review of fields near schools, hospitals, and airports, DEQ estimates that 10 to 30 fields, all near schools, could be affected by this 500-foot critical non-burn area.

### *A. Size of critical non-burn areas*

Many of the comments on the proposed 500-foot critical non-burn area cited the lack of scientific data to justify the size of this area, which DEQ acknowledges. The 500 feet was based DEQ and ODA smoke management experience in observing fire and smoke behavior, and meteorological knowledge about what is a reasonable distance to provide additional protection, in the event that unexpected wind turbulence causes smoke to drift toward these areas, even though the primary wind direction is away from these areas. Also, under ODA’s current field burning program, field burning near these sensitive areas is carefully managed, and the program has been effective in protecting these areas.

### *B. Additional protective measures added*

DEQ added additional provisions for critical non-burn areas near schools and hospitals to ensure public health is protected. ODA may authorize a limited amount of field burning within 500 feet of a school that is not in-session under the proposed rules. DEQ defined the phrase “in-session” and added provisions that prevent any burning upwind of a school if within 500 feet and require the grower to verify there are no children or other persons present on the school grounds prior to burning.

### *C. Limiting critical non-burn areas to the Willamette Valley*

Senate Bill 528 focused primarily on field burning in the Willamette Valley; however, under this statute EQC may be authorized to create critical non-burn areas in other parts of the state. DEQ’s proposed rules would establish critical non-burn areas only in the Willamette Valley. Neither DEQ nor ODA has the infrastructure or resources to regulate field burning outside the valley, as most of this burning is regulated at the county level. The original legislative discussion focused only on protecting power lines in the Willamette Valley, and there were no known areas in the state where other critical non-burn areas were needed. Should this change in the future, EQC could establish new critical non-burn areas

outside the Willamette Valley.

### 3. Revisions to training fires rule

Some comments opposed the removal of certain rule restrictions on fire departments' training fires on grass fields. This change was proposed to make DEQ rules more consistent with state laws regarding fire-fighter training. The leftover straw on grass fields can pose a fire hazard, and some rural fire departments believe it is important to have this training to respond to any wildfires. The proposed rule changes specify that any training fire conducted on a grass seed field must be consistent with state law and for official training purposes. Fire departments will be required to obtain ODA approval and use smoke management techniques for training fires on grass seed fields to prevent smoke impacts and air quality problems.

**Next steps** If approved, DEQ will submit the revised rules to EPA as a revision to the Oregon State Clean Air Act Implementation Plan.

**Attachments**

- A. Proposed rulemaking
  - 1. Proposed revisions to Division 266 – Field Burning Rules (Willamette Valley)
  - 2. Highlighted rule changes (in response to comments)
- B. Summary of public comments and agency response
- C. Hearing Officer's report on public hearings
- D. Relationship to Federal Requirements questions
- E. Statement of Need and Fiscal and Economic Impact
- F. Land Use Evaluation statement

**Available upon request**

- 1. Summary from the Dec. 15, 2009 field burning advisory committee meeting
- 2. DEQ Proposed Rulemaking Announcement
- 3. Legal Notice of Hearing
- 4. Written comments received
- 5. Proposed revisions to ODA Field Burning Division 603 Rules
- 6. Senate Bill 528 as adopted June 29, 2009
- 7. Rule Implementation Plan

Approved:

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