

The State of South Carolina



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October 12, 1989

Robert J. Gould
Acting State Forester
South Carolina Forestry Commission
Post Office Box 21707
Columbia, South Carolina 29221

Dear Mr. Gould:

This Office has been advised that, in areas of this State devastated by Hurricane Hugo, an unusual situation exists in that there is a tremendous amount of fuel (i.e., fallen trees and branches) on the ground which will most probably be burned as a means of removal. There is great concern that such burning, which must be done in compliance with certain statutory provisions, could pose a real threat to the remaining forests of this State. For example, in the affected areas, trees have fallen and it would be impossible to maneuver fire-fighting equipment should a forest fire erupt. You have advised that the State Forestry Commission would like to more strictly regulate burning in the near future to prevent wildfires in the disaster areas and have inquired as to the means to do so.

You advise that the procedures outlined in Section 48-35-10 et seq. of the Code of Laws of South Carolina (1976) are presently being followed with respect to burning. Section 48-35-10 provides:

It shall be unlawful for any owner or lessee of land or any employee of such owner or lessee or other person to start, or cause to be started, a fire in any woodlands, brushlands, grasslands, ditchbanks, or hedgerows or in any debris, leaves or other flammable material adjacent thereto, except under the following conditions:

- (a) Proper notification shall be given to the State Forester, or his duly authorized representative or other persons designated by the State Forester. The notice shall contain all information required by the State Forester or his representative.

- (b) Such persons shall have cleared around the area to be burned and have immediately available sufficient equipment and personnel to adequately secure the fire and prevent its spread.
- (c) The person starting the burning shall supervise carefully the fire started and have it under control prior to leaving the area.

Section 48-53-50 provides that the "State Forester may direct at any time, when deemed necessary in the interest of public safety, that fires covered by this chapter not be started." Section 48-35-60 provides criminal penalties for violations of Chapter 35 of Title 48. Additionally, within the Forest Fire Protection Act, Section 48-33-10 et seq., the State Commission of Forestry is given the authority to make and enforce rules and regulations "necessary for the administration of forest fire protection." Section 48-33-70 of the Code.

Presently, an individual wishing to start a fire as described in Section 48-35-10 et seq. must give "proper notification" to the State Forester or his duly authorized representative, giving all information required by the State Forester or his representative. To comply with this statute, the individual reports orally to the local tower that he desires to start a fire. Permission is given orally, and the tower personnel keep a log of such permission granted for burning.

The Commission of Forestry would like to more strictly regulate burning, as noted above. Toward that end, the Commission might contemplate inspecting the site of a proposed fire and give written permission prior to starting the fire. What mechanism should be followed is the question.

In interpreting a statute such as Section 48-35-10, it is the primary objective of the courts and this Office to determine and effectuate legislative intent as far as possible. Bankers Trust of South Carolina v. Bruce, 275 S. C. 35, 267 S.E.2d 424 (1980). Words used in the statute will be given their plain and ordinary meanings. Worthington v. Belcher, 274 S. C. 366, 264 S.E.2d 148 (1980). In the absence of ambiguity, words must be applied literally. Martin v. Ellisor, 266 S. C. 377, 223 S.E.2d 415 (1976).

We note that Section 48-35-10 requires that "proper notification" be given to the State Forester or his representative, such "notification" containing whatever information the State Forester or his representative may require. "Notification" is the "act of notifying," General Motors Corp. v. Swan Carburetor Co., 88 F.2d 876, 885 (6th Cir. 1937), or the informing of a "fact by adequate or specified means." Restatement, Second, Agency §9(2). To notify is to make known. Rapid Motor Lines v. Cox, 134 Conn. 235, 56 A.2d

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519 (1947); Huntington v. City of Calais, 105 Me. 144, 73 A. 829 (1909); Boland v. Beebe, 186 Misc. 616, 62 N.Y.S.2d 8 (1946). Upon receipt of such notification, the State Forester may direct that a fire not be started, in accordance with Section 48-35-50, if he deems that such direction is necessary in the interest of public safety. The State Forester is the appropriate entity to determine what would constitute "proper notification" in the absence of statutory direction; hence, such notification could be oral or written, as the State Forester deems proper.

If a requirement such as inspection of a site prior to burning is contemplated, it may be necessary to promulgate a regulation, emergency or otherwise, to impose such a requirement. The act of notifying does not appear to encompass any act more than the individual wishing to burn, to provide the required information. No other statute within Chapter 35 of Title 48 covers an on-site inspection prior to granting permission to burn.

As noted above, Section 48-33-70 permits the Commission of Forestry to adopt and enforce rules and regulations for the "administration of forest fire protection" in the counties. That same section requires the Commission to prepare, on a county-by-county basis, plans for forest fire protection. Reading Sections 48-33-70 (adoption of regulations), 48-35-10 (notification and precautionary provisions), and 48-35-50 (as to when State Forester may prohibit fires), together and giving effect to each, as must be done if possible, Columbia Gaslight Co. v. Mobley, 139 S. C. 107, 137 S.E. 211 (1927), would permit a regulation to be adopted which would give the State Forester or his representative the authority to establish criteria (i.e., through an on-site inspection) which would promote the prevention of forest fires and aid in determining when the public interest could best be served by banning burning.

Adoption of regulations is accomplished by following the Administrative Procedures Act, Section 1-23-10 et seq. of the Code. Promulgation of an emergency regulation, if the Commission on Forestry determines that "an imminent peril to the public health, safety or welfare requires immediate promulgation of an emergency regulation" is accomplished by following Section 1-23-130 of the Code.

Whether a different notification procedure may be required or followed in disaster areas, as opposed to areas of the state not so affected, was also asked. As stated in 52 Am.Jur. 2d Logs and Timber §64,

if the [regulation] advanced for [the purpose of forest promotion and conservation] may fairly be said to be general and of uniform operation under similar circumstances upon all persons, subjects, and localities affected, it is not open to the challenge that it is a special or local enactment. ...

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If the regulation described specifically under what circumstances an on-site inspection prior to burning were to occur, so that the public interest in prohibiting burning may be determined, such should pass muster according to the authorities in Am.Jur.2d Logs and Timber §64, as long as all persons, subjects, and localities similarly situated are treated similarly. Thus, it would be permissible to adopt a regulation requiring an on-site inspection prior to issuing a permit for burning, in an area in which a forest has already been ravaged or devastated by a previous disaster such as a hurricane or tornado.

The public necessity in preventing and controlling forest fires, the importance of forestry in this State's economy, and other considerations such as conservation and recreation in relation to forestry are valuable and cannot be overlooked. The exigent circumstances created by Hurricane Hugo in certain areas of this State may well call for increased measures of fire protection in some areas of the State. Toward that end, it is our conclusion that the State Forester has discretion to require that the "proper notification" required by Section 48-35-10 be written. The Commission on Forestry would have the authority pursuant to Section 48-33-70 to promulgate a regulation requiring on-site inspections prior to giving permission to start a fire. If not every request to start a fire will require an on-site inspection, those persons and localities similarly situated must be accorded the same treatment.

With kindest regards, I am

Sincerely,

Patricia D. Petway

Patricia D. Petway
Assistant Attorney General

PDP/nnw

REVIEWED AND APPROVED BY:

Robert D. Cook

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