

Report From Agency

REPORT TO LEGISLATURE

NR 46, Wis. Adm. Code

Board Order No. FR-23-16
Clearinghouse Rule No. 18-086

Basis and Purpose of the Proposed Rule The proposed rule addresses language changes to NR46, Wis. Adm. Code, to become consistent with statutory changes in ch. 77, Wis. Stats. Additional changes are proposed to incorporate longstanding policy into rules as well as streamline and clarify administration of the Managed Forest Land (MFL) and Forest Crop Law (FCL) programs.

Summary of Public Comments The public comment period for the Draft Rule occurred from January 15, 2019 through February 15, 2019 to include offering two public hearings held on February 12, 2019 and February 13, 2019 in Madison and Rhinelander respectively. A total of 12 comments were received, however, one did not include a direct comment to NR46 proposed language and one was a customer service inquiry. Comments were evaluated and considered in modifications to the final proposed rule.

Modifications Made Comments were evaluated and considered in modifications to the final proposed rule.

Appearances at the Public Hearing

The following attended and the following provided comment:

| Person | Topic | DNR Response | Comment Type | Date |
|--------------------|--|---|-----------------|---------|
| Ken Price | Changing minimum acreage of areas that must be considered in the non-productive land calculation | Updated language in Productivity Eligibility Criteria | Electronic mail | |
| Brian Hubbard | Revenue sharing with public schools | No changes made | Electronic mail | 10/2/18 |
| Larry Lindholm | Negative economic impacts to businesses based on open and closed public access | No changes made | Electronic mail | |
| Tim & Susan Deneen | Increased change in acreage that can be closed to public access | No changes made | Electronic mail | 2/4/19 |
| Robert Paddock | Building conflicts on MFL (existing buildings and proposing the idea of allowing small sheds on MFL) | No changes made | Electronic mail | 1/29/19 |
| Steven Foust | Taxation of MFL | No changes made | Electronic mail | 1/30/19 |
| Tom Culbert | On-site storage of Forestry equipment, MFL signage | No changes made | Electronic mail | 2/6/19 |

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| Tom Bernhardt | Building conflicts on MFL (existing buildings) | No changes made | Electronic mail | 2/15/19 |
| Tim Fitzgerald | Building conflicts on MFL (existing buildings – old log cabin ruins) | No changes made | Electronic mail | 1/28/19 |
| Troy Brown | Alternatives to mapping proposals, Large landowners supplying additional information upon request | No changes made | Electronic mail | 2/15/19 |
| Richard Wedepohl <i>WAFO</i> | Minimum acreage requirement | Minimum acreage changed to 1 or more acres for the non-productive land calculation | Electronic mail | 2/15/19 |
| Richard Wedepohl <i>WAFO</i> | Density term and language in NR 46.17 (1) (c) should be adjusted to clarify that 80% of the parcel should be capable of producing at least 20 cubic feet of timber per acre per year | If land is capable of meeting timber production requirement but not density requirements, may be eligible for MFL if density standards can be achieved in a reasonable timeframe. Density standards described in a table. | Oral & Written Comments | 2/12/19 |
| <i>WAFO</i> | Eliminate DNR's ability to change management plan without landowner's concurrence | NR46.18(10) changed to encourage amendments to management plans with mutual agreement between DNR and the landowner | Oral & Written Comments | 2/12/19 |
| <i>WAFO</i> | Building conflicts on MFL (on-site storage of Forestry equipment) | No changes made | Oral & Written Comments | 2/12/19 |
| <i>WAFO</i> | Broaden the allowance for land additions | No changes made | Oral & Written Comments | 2/12/19 |
| Richard Wagner <i>WVOA</i> | Eliminate DNR's ability to change management plan without landowners concurrence | No additional changes made | Written Response | 2/6/19 |
| Richard Wagner <i>WVOA</i> | Building conflicts on MFL (on-site storage of Forestry equipment) | No changes made | Written Response | 2/6/19 |
| Thomas Hittle <i>Steigerwaldt</i> | <i>Productivity Eligibility Criteria</i> - Revise density term and adjust language to clarify minimum eligibility | 80% of parcel maintained as eligibility minimum. DNR has the ability to designate parcels as managed forest land if this requirement isn't met. Density standards defined | Written Response | 2/13/19 |
| Thomas Hittle <i>Steigerwaldt</i> | <i>Productivity Eligibility Criteria</i> - Changing minimum acreage of | Minimum acreage changed to 1 or more acres for the non-productive land | Written Response | 2/13/19 |

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| | areas that must be considered in the non-productive land calculation | calculation | | |
| Thomas Hittle <i>Steigerwaldt</i> | <i>Large Ownerships</i> - Additional burden on large ownerships – alternative mapping technologies | Alternative mapping technologies may be used if approved by DNR | Written Response | 2/13/19 |
| Thomas Hittle <i>Steigerwaldt</i> | <i>Large Ownerships</i> - Eliminate request for “any additional information required” for large ownerships as it is overly broad and may easily put a large landowner in conflict with the DNR | Additional information defined in 77.82(2) and 77.82(3) | Written Response | 2/13/19 |
| Thomas Hittle <i>Steigerwaldt</i> | <i>Contracts and Management Plans</i> – add language about situations which may lead to revision of management plans, agreeable to the landowner, not as dictated by the Department. | NR46.18(10) changed to encourage amendment to management plans with mutual agreement between landowner and DNR. Reasons for amending a plan were added. | Written Response | 2/13/19 |
| Thomas Hittle <i>Steigerwaldt</i> | <i>Withdrawals</i> – NR46.22(3) requiring the landowner to provide “sufficient documentation, as determined by the Department” is overly broad and could be beyond reason. | List of landowner responsibilities for Voluntary Withdrawal added to NR46.22(3) No additional changes made | Written Response | 2/13/19 |
| Thomas Hittle <i>Steigerwaldt</i> | <i>Additions</i> – is the eligibility of adding land to MFL evaluated by examining the eligibility of the entire acreage? | Response clarifies that eligibility is determined by examining the entire acreage (no changes made) | Written Response | 2/13/19 |
| Thomas Hittle <i>Steigerwaldt</i> | <i>Large Ownerships</i> – seeking clarification on information being requested in NR 46 (4) (a) 4 and states that it is unrealistic for a large ownership to update a management plan for every land sale that occurs. | No changes made | Written Response | 2/13/19 |

Changes to Rule Analysis and Fiscal Estimate A 30-day public comment period on the Draft EIA occurred from September 18, 2018 through October 2, 2018. Comments and DNR responses are listed below. An additional comment was shared regarding the potential additional administrative hardships concerning the proposed draft language pertaining to the productivity evaluation which was considered in the final rule proposal.

Response to Legislative Council Rules Clearinghouse Report

The Legislative Council Rules Clearinghouse submitted comments on Statutory Authority, Form, Style and Placement, Adequacy of References, and Clarity, Grammar and Use of Plain Language.

Changes to the proposed rule were made to address all recommendations by the Legislative Council Rules Clearinghouse.

Final Regulatory Flexibility Analysis

Minimum Acres and Renewals

2015 Wisconsin Act 358 increases the minimum managed forest land (MFL) forest parcel size requirement for entry into the MFL program from 10 to 20 acres. With this change, a provision was added to allow parcels that are currently enrolled but do not meet the new acreage requirement to be renewed in the program once if certain requirements are met, including all other eligibility criteria. Section NR 46.18(8) provides landowners the flexibility needed for reenrolling in the program, allowing all existing management plans to be updated by a certified plan writer in order to facilitate and streamline the renewal process.

For one time renewals of parcels less than 20 acres, those parcels must be identical, as required in s. 77.82 (12) (a) 2., Stats. If such parcels contain an ineligible building or improvement, the landowner may withdraw the building or improvement site using a voluntary withdrawal under s. 77.88 (3j), Stats. To be considered identical, and eligible for renewal, the withdrawal application must be submitted before the department can approve the application for renewal.

Buildings and Improvements

2015 Wisconsin Act 358 prohibits the enrollment of a parcel if it contains a building or improvement associated with a building. The definition of "building" in s. NR 46.15 (1m) was clarified to administer this provision, and provides an exception for recreational vehicles (e.g., campers and RVs). For purposes of administration, what it means to be an improvement associated with a building has also been defined in s. NR 46.15 (17r), using guidelines developed to assess improvements for purposes of taxation. With the passage of Act 358, certain exemptions from improvements were outlined, including exemptions for hunting blinds and structures and fixtures needed for sound forestry. Hunting blinds has been defined in s. NR 46.15 (17) (g). Structures and fixtures needed for sound forestry has been defined in s. NR 46.15 (30m). Clarification regarding which building rules apply to which orders, since the change affecting building rules was prospective only, was created in s. NR 46.15 (3) (b).

Accessibility

2015 Wisconsin Act 358 provides that the public must be able to access any land designated as open-MFL on foot. Section NR 46.20 states that this requirement can be satisfied if the land designated as open-MFL is (1) contiguous to other public land, (2) contiguous to other land under the same ownership as the open-MFL parcel, or (3) if the landowner secures an easement or agreement that allows the public to cross neighboring lands. Additionally, to be designated as open-MFL landowners must certify that they will inform the department if their access changes and that they are aware their land may need to be closed or withdrawn if they cannot provide public access. Posting standards and map requirements in s. NR 46.21 were also updated to reflect this requirement.

Additions

2015 Wisconsin Act 358 allows all MFL entries to have land added to them if certain criteria are met. Section NR 46.16 (7), interprets and clarifies the requirements for additions in s. 77.82 (4), Stats., including that the additional parcel must be at least 3 contiguous acres, must be contiguous to the existing entry, and all eligibility requirements must be met. For eligibility purposes, productivity is evaluated on the parcel as a whole (existing MFL land plus added MFL land), not just the portion being added. Furthermore, in s. NR 46.16 (5), this rule removes the requirement that qualifying contiguous land in a separate municipality to be on a separate order, now all lands eligible to be an addition can be added to an existing order.

Yield and Severance Tax

2015 Wisconsin Act 358 eliminated severance and yield taxes. As a result of this repeal, references to the assessment and collection of these taxes have been repealed from this chapter of administrative code. This rule also repeals s. NR 46.16 (1) (cm) as a result of the statutory repeal of the mechanism to calculate Forest Crop Law termination tax in Wisconsin Act 358. Now that there is no termination tax, there is no reason to provide FLC landowners additional time to apply to the MFL program after a land conveyance occurs.

Contracts

2015 Wisconsin Act 358 provides that department orders designating land as MFL are contracts. When a material change occurs in statute or administrative code, the department will contact landowners impacted by the change. Section NR 46.27 (2) provides the process that the department will use to contact landowners and establishes a timeline for landowner response to be eligible for withdrawal from the program without assessment of a withdrawal tax and fee following a material change. To implement the process for contacting landowners after a material change, s. NR 46.31 provides that landowners are responsible for supplying the department with updated contact information if it has changed since the time of entry, and that the department's attempt to notify the landowner at a supplied address is considered to meet the requirement of contacting a landowner.

As a result of all orders designating land as MFL being contracts, s. NR 46.18 (9) was created to clarify amendments to management plans that may need to occur during an order period for the management plan to remain in compliance with the program

Department orders

To codify long-standing policy, s. NR 46.27 (1) was added to clarify when the department may issue orders to correct or alter existing MFL entries. Additionally, a long-standing policy whereby orders may be rescinded if a land sale occurs prior to the effective date was clarified in s. NR 46.16 (1) (d).

Large Ownerships

2015 Wisconsin Act 358 changed a number of aspects related to MFL entries. Now that orders are considered contracts and land is eligible for withdrawals without tax and fee when certain criteria are met, it is increasingly important that more information is obtained and the program is implemented more consistently across order types. Section NR 46.16 (4) requires large ownerships to have available for department audit, information that more closely aligns to what is required for other entry types. This will allow the department to evaluate when large ownerships are eligible for certain withdrawal types. In addition, now that landowners can sell any description of land, productivity must be evaluated at the time of transfer to determine if land eligible to remain in the program.

Opportunities to Withdraw Land

2015 Wisconsin Act 358 provides new voluntary withdrawal options for landowners enrolled in MFL. Section NR 46.22 (3) provides requirements for landowners who choose to voluntarily withdraw land using the construction and small land sale withdrawal type. In using this withdrawal type, landowners

are responsible for following zoning requirements and providing the department with information on where the withdrawal will occur. Additionally, this provision allows landowners to use this small acreage withdrawal to rectify enforcement situations.

As a result of Act 358, landowners can request to withdraw land with no penalty if the withdrawal is needed for a parcel of managed forest land to resume compliance with the MFL productivity requirements. Section NR 46.22 (4) establishes the requirements that need to be met for a landowner to use this withdrawal type.

Productivity Eligibility Criteria

Changes in how productivity is evaluated as an eligibility requirement were made to address potential administrative issues that could arise as a result of the new productivity withdrawals. Specifically, s. NR 46.17 was amended to clarify that if land is part of the 80% productive portion of the entry and the land is capable of producing at the level required, but is not currently meeting the density requirements established in s. NR 46.18 (2) (d) at the time of entry, mandatory practice to address density requirements must be included in the management plan. Such practices are not eligible for a withdrawal without tax or fee based on productivity issues until restoration measures have been sufficiently attempted. The density requirement table, previously called the minimum medium density table was moved and renamed to clarify density requirements of land entered in the program.

In addition to clarifications regarding what it means to be capable of producing merchantable timber at the required level, clarification was also made to the method of evaluating productive and non-productive areas within an entry. This change was made in s. NR 46.17(1)(b) wherein non-productive areas comprising of 1 or more contiguous acres will be used in the calculation of productivity levels for new MFL orders moving forward.

Restoration

As a result of Act 358, landowners may have a period of time in which their land does not meet productivity requirements if they have a restoration plan in place. Section NR 46.215 was added to outline when restoration may be required or offered as a solution when a parcel no longer meets productivity requirements defined in s. 77.82 (1) (a) 2., before land is withdrawn from the program, without tax and fee. If it is possible for the parcel to resume productivity through restoration within a reasonable timeframe and it is an economically feasible solution, restoration practices will be required and the management plan will be amended.

Additional requirements were added in s. NR 46.17 (4) for land that has been withdrawn for a failure to meet productivity requirements. This change makes land withdrawn for productivity or sustainability reasons ineligible for re-entry unless the department determines there has been a change that would allow the land to meet productivity requirements in s. NR 46.18 (2) (d) since the time of withdrawal. This change reduces the amount of land that can be re-entered in the program if the landowner is unable or unwilling to restore the land to meet density requirements needed to establish merchantable timber. This reduces the burden on the local units of government who would otherwise receive back taxes for land that is removed from the program.

Cutting Notices

2015 Wisconsin Act 358 added categories of individuals who can submit a cutting notice without department approval. Sections NR 46.10 and 46.185 clarify requirements for individuals to be able to submit a cutting notice without department approval. Such individuals will have to certify on the cutting notice form that they meet the requirements of submitting a cutting notice without department approval, and if the cutting notice is complete and adheres to sound forestry and the management plan and the landowner does not request department approval, then department approval is not required. For all other situations department approval is required.

In addition to changes relating to who can submit a cutting notice without approval, long-standing policy was also incorporated allow cutting notices to be renewed if no significant change has occurred, the

cutting will occur within a reasonable timeframe and the submitter is in contact with the department. This alleviates burden on an industry where harvesting contracts are often more than one year long.

Closed Land

2015 Act 358 increases the amount of acreage a landowner can close to public access to 320 acres per landowner, per municipality. Changes were made in s. NR 46.19 to allow for this and remove differences between lands enrolled before or after 2004 as those were also removed with Act 358.

Leasing

Clarification on eligible leases and agreements was added in s. NR 46.17. Landowners may enter into any lease or agreement if it does not conflict with the program.

Transfer of Ownership

2015 Act 358 allows landowners to sell or otherwise convey any amount of MFL land. After being notified of a land sale, the department will evaluate land retained and land conveyed to determine MFL eligibility. If the conveyed land does not meet eligibility requirements because it exceeds the non-productive requirement, the landowner can use the productivity/sustainability withdrawal, without tax and fee, to resume compliance with the productivity standards if the land sold/conveyed meets parcel size requirements after the withdrawal. If after the withdrawal, the rest of the parcel does not meet parcel size requirements, the remaining land will be withdrawn with a tax and fee. This same evaluation will be used for land retained after a land conveyance, if any. If land conveyed or retained does not meet size requirements that land will be withdrawn with a tax and fee.

For land that is conveyed from a large ownership, the department will transfer the land if it meets parcel size requirements established in s. 77.82 (1) (a) 2., Stats., and the new owner will have one year to develop a management plan and determine if any land needs to be withdrawn due to productivity issues.

Summary and comparison of federal regulations:

There are no known federal rules which apply to stumpage rates or Managed Forest Law petitions.

Comparison of Adjacent States:

Checks with the surrounding states of Minnesota, Michigan, Iowa and Illinois indicate that while they offer some type of incentive program to forest landowners, none of the states have similar forestry practice requirements.

Summary of factual data and analytical methodologies:

The department is proposing rules consistent with state regulations, incorporating longstanding policy and providing consistency with statutory changes, which did not require use of any factual data or analytical methodologies.

Analysis and supporting documentation used to determine effect on small business or in preparation of an economic impact analysis:

It is anticipated that the proposed changes will have minimal to moderate economic impacts and will not have an impact on small businesses.

Effect on small business:

The proposed changes will not have an impact on small businesses.

Response to Small Business Regulatory Review Board Report

The Small Business Regulatory Review Board did not prepare a report on this rule proposal