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## WISCONSIN LEGISLATIVE COUNCIL INFORMATION MEMORANDUM

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### Managed Forest Law Program

The Managed Forest Land (MFL) program is the primary forest tax law program in Wisconsin. In exchange for following a written forest management plan and program requirements, MFL landowners pay MFL program rates for property enrolled in the program instead of property taxes. The program was created in 1985 and has been amended numerous times since its enactment. In the 2013-2015 Legislative Session, Assembly Bill 700 and Senate Bill 543 proposed an additional set of revisions to the MFL program; however, these bills did not pass the Legislature before the end of session. Legislative interest in changing the MFL program remains high and additional revisions to the program will likely be proposed in the 2015-2017 Session.

#### **OVERVIEW**

A landowner who enters land in the MFL program must comply with certain conditions. These conditions require that the land be able to produce a certain amount of timber, preparation and compliance with a forest management plan, and payment of an application fee, as well as certain other provisions. In general, land entered in the MFL program must be open to specific public uses. The property owner is subject to penalties for unauthorized cutting of timber and must pay a tax at the time of harvest. Land is entered in the MFL program for either a 25- or 50-year period.

The benefits of the program to the state are set out in the statement of legislative purpose, which was enacted by the Legislature in 1985 when the MFL program was created:

**77.80 Purpose.** The purpose of this subchapter [the MFL program] is to encourage the management of private forest lands for the production of future forest crops for commercial use through sound forestry practices, recognizing the objectives of individual property owners, compatible recreational uses, watershed protection, development of wildlife habitat and accessibility of private property to the public for recreational purposes.

In turn, a landowner who enters land in the MFL program receives certain benefits from that entry. The benefits to the owner include payment of a reduced annual amount (compared to regular property tax rates), assistance with timber management, and authorization for the landowner to close up to 160 acres of land in each municipality and to exercise control over who may enter the closed portion of the MFL land.

## **ELIGIBILITY AND APPLICATION REQUIREMENTS**

To be eligible for enrollment in the MFL program, a parcel of land must satisfy several requirements. The parcel must consist of at least 10 contiguous acres and at least 80% of the parcel must be producing, or capable of producing, a minimum of 20 cubic feet of merchantable timber per acre per year. The statutes specify that parcels developed for commercial recreation, industry or uses incompatible with forestry are not eligible. In addition, a parcel developed for a human residence, as defined by the Department of Natural Resources (DNR) in the Administrative Code<sup>1</sup>, is not eligible to be enrolled. [s. 77.82 (1), Stats.]

An MFL applicant must provide the DNR with certain information about the location, acreage, physical characteristics and ownership of the parcel proposed to be included in the program and pay an application fee. In addition, an applicant must provide a proposed management plan and a statement of the owner's forest management objectives for the production of merchantable timber, in sufficient detail to provide direction for the DNR to approve the plan. An applicant may choose to include additional forest management objectives, including wildlife habitat management, aesthetic considerations, watershed management, and recreational use. [s. 77.82 (2), Stats.]

A proposed management plan must be prepared by an independent certified plan writer<sup>2</sup>, or by the DNR if it determines the applicant is unable to have a plan prepared by an independent certified plan writer. If the DNR prepares or completes an applicant's management plan, the DNR may contract with a certified plan writer to do so.

A proposed management plan must include several provisions, such as a description of the mandatory and non-mandatory forestry practices, including harvesting, thinning, and reforestation, that will be undertaken during the term of the MFL order and the time period in which each practice will be completed. An MFL owner and the DNR may mutually agree to amend a management plan. [s. 77.82 (3), Stats.; s. NR 46.18 Wis. Adm. Code.]

## **TERM OF MFL ORDER AND CHANGES TO AN ORDER**

If an application is approved, the DNR issues an "order" enrolling the property in the MFL program. An MFL applicant must choose whether their MFL order will be in effect for 25 or 50 years. An order remains in effect for the period specified in the application unless the land is withdrawn from the program.

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<sup>1</sup> "Developed for human residence" means land that contains a building for habitation that is constructed or used as a domicile or that has a minimum of five of the following eight characteristics: (a) 800 sq. ft. or more in total area, using exterior dimensions of living space, including each level and not including porches, decks, or uninsulated screen porches; (b) indoor plumbing including water and sewer, piped to either municipal or septic system; (c) central heating or cooling, including electric heat, a furnace or heat with a circulation system; (d) full or partial basement, excluding crawl spaces and frost walls; (e) electrical service by connection to the lines of a power company; (f) attached or separate garage, not to include buildings for vehicles used primarily for work or recreation on the property; (g) telephone service based locally; (h) insulated using common insulation products. A Note following this subsection provides: "Developed for human residence" is not meant to include storage or workshop buildings. If there is living space as part of such buildings, the living space will be compared against the eight characteristics. [s. NR 46.15 (9) (a) – (h), Wis. Adm. Code.]

<sup>2</sup> The DNR is required to certify plan writers and promulgate rules specifying the qualifications a person must satisfy to become a certified plan writer. These requirements have been created in s. NR 46.165, Wis. Adm. Code.

The statutes provide that an amendment to or a repeal of the MFL statutes, in most cases, does not affect the terms of an existing order or management plan, except as expressly agreed to in writing by the owner and the DNR. [s. 77.82 (11), Stats.] However, since the MFL program was created in 1985, the Legislature has enacted changes to the program that have applied to existing MFL orders without regard to whether the land owner agrees to the changes. Two recent court decisions appear to hold that despite the statutory limit on charges to existing orders, the Legislature generally may change the terms of an existing MFL order and that no contractual rights attach to the property owner under an MFL order. [*State v. Lautenbach*, 2014 WI App 16 (2013); *Tigerton Lumber Company v. State of Wisconsin, Wisconsin Department of Revenue and Wisconsin DNR*, Case No. 08 CV 4426 (2009).]

### **LAND ADDITIONS**

The MFL program allows land to be added to existing orders if certain conditions are met. The requirements are different for MFL orders that took effect on or after April 28, 2004 and orders that take effect later.

For post-April 28, 2004 orders, an owner may apply to the DNR to add a parcel of land to his or her MFL order if the parcel is at least three acres and contiguous to the owner's MFL land.

In general, owners with MFL orders that took effect before that date cannot add land to their existing orders. An owner may apply to designate an additional three acres that are contiguous to the existing MFL land but that do not meet eligibility requirements; however, the owner must withdraw the original acreage from the program and file an application with the DNR for a new order covering both the original withdrawn land and the additional land. The withdrawal tax and fee do not apply in this situation. Alternatively, if these owners wish to add land that satisfies eligibility requirements, including the 10 contiguous acre minimum, the new acreage must be entered as a new, and separate, MFL order. [s. 77.82 (4) and (4g), Stats.]

### **OPEN AND CLOSED DESIGNATIONS; PUBLIC ACCESS; LEASING**

Unless an MFL owner designates land enrolled in the program as "closed" or the MFL land is within a proposed ferrous mining site that meets certain conditions, the owner must permit public access to the land for hunting, fishing, hiking, sight-seeing, and cross-country skiing. [s. 77.83 (2) (a) and (2m), Stats.]

Generally, an MFL owner may designate up to 160 acres<sup>3</sup> in a single town, village, or city or one or a combination of any two of the following in each municipality as closed: (1) a quarter-quarter section; (2) a fractional lot; or (3) a government lot. An MFL owner is allowed to modify a designation of open or closed land two times during the term of the MFL order. [s. 77.83 (1) and (1m), Stats.]

The statutes prohibit an owner from leasing his or her MFL land to another person for the purpose of allowing them to engage in a recreational activity on the MFL land. A recreational activity is defined to include hunting, fishing, hiking, sight-seeing, cross-country skiing, horseback riding, and staying in cabins. This provision became effective on January 1, 2008 and applied to MFL orders in existence at that time and to future MFL orders. A person who had already leased his or her MFL land for recreational activities was required to terminate the lease

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<sup>3</sup> Of the allowable 160 closed acres, only 80 acres may be land designated as MFL before April 28, 2004.

before January 1, 2008 in order to continue receiving the benefits of the MFL program<sup>4</sup>. [s. 77.83 (2) (am), Stats.]

### **ACREAGE SHARE PAYMENTS AND CLOSED ACREAGE FEES**

MFL participants make “acreage share payments” and pay “closed acreage fees” instead of property taxes. The amount of acreage share payments and closed acreage fees an MFL owner must pay differs depending on when the MFL order became effective.

For MFL orders in effect prior to April 28, 2004, each owner must make an annual acreage share payment to the municipality (town, village, or city) where the land is located. The amount of this payment for “open” acreage was set at \$.74 per acre. In addition to this amount, each owner is required to pay annually \$1 for each acre that is designated as closed to public access.

The amount of acreage share payments and closed acreage fees is different for MFL orders that took effect on or after April 28, 2004. For these orders, an owner’s annual acreage share payment is 5% of the average statewide property tax for an acre of productive forest land for each acre of managed forest land. In addition to this amount, each owner must pay 20% of the average statewide property tax for an acre of productive forest land for each closed acre of managed forest land.

Since 1992, the Department of Revenue (DOR) has been required to adjust the amounts of acreage share payments and closed acreage fees for all MFL orders every five years based on a formula provided in the statutes.

The most recent acreage share payment and closed acreage fee amounts are available on the DNR website at: <http://dnr.wi.gov/topic/ForestLandowners/taxRates.html>.

### **CUTTING REGULATED**

Before an MFL owner may cut timber on his or her MFL land, the owner must file a notice of intent to cut and request approval of the proposed cutting from the DNR. This notice must be filed at least 30 days before the cutting is to take place. If the proposed cutting conforms to the owner’s management plan and is consistent with sound forestry practices, the DNR must approve the request. If not, then the DNR is required to assist the owner in developing an acceptable proposal. The cutting approved by the DNR must begin within one year after approval. Within 30 days after any approved cutting is completed, the owner must report to the DNR a description of the species of wood, kind of product, and the quantity of each species cut. This report is used in calculating the “yield tax” described below.

A person who fails to file this report, files a false report, or does not file a notice of intent to cut before cutting is subject to a forfeiture of up to \$1,000.

An MFL owner is also prohibited from cutting merchantable timber on MFL land on which the acreage share or closed acreage payments are delinquent. Any owner who cuts merchantable

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<sup>4</sup> In the Tigerton case, noted above, the Dane County Circuit Court evaluated whether this requirement could be enforced. The court ruled that the MFL program does not create a contractual relationship between MFL participants and DNR and that this recreational lease requirement did not result in an impairment of a contract between DNR and Tigerton, and there was no “taking” as a result of the invalidation of leases. The court did determine that the retroactive invalidation of Tigerton’s leases as of January 1, 2008, was an unconstitutional impairment of contract, and that any leases that Tigerton had in place as of that date continue until the expiration date of the contracts.

timber in violation of this provision is subject to a forfeiture of 20% of the current value of the merchantable timber cut, based on the stumpage values<sup>5</sup> of the timber.

These provisions do not apply to an owner who cuts wood on MFL land for use as fuel in the owner's dwelling. [s. 77.86, Stats.]

### **YIELD TAX**

The DNR is required to assess a yield tax against each MFL owner who harvests timber during the term of his or her MFL order. This tax must equal 5% of the value of the merchantable timber cut, based on the stumpage value of the timber. The DNR is required to collect interest of 12% per year on the amount of any unpaid yield tax. [s. 77.87 (3), Stats.] For an MFL order that takes effect on or after April 28, 2004, the owner is generally exempt from paying the yield tax for the first five years of the order. [s. 77.87 (1) and (1g), Stats.]

An unpaid yield tax becomes a lien against the merchantable timber that was cut. In addition, the municipality must list the amount of the unpaid yield taxes, together with any interest that has accrued, as a special charge on the MFL owner's property tax bill. [s. 77.87 (4) and (5), Stats.]

### **NONCOMPLIANCE ASSESSMENT**

If an MFL owner fails to complete a mandatory forestry practice during the time period specified in the owner's MFL management plan, the owner may be assessed \$250 for each failure. An unpaid assessment becomes a lien against the merchantable timber cut. In addition, if a noncompliance assessment is not paid, the municipality must enter the delinquent amount on the MFL owner's property tax bill as a special charge. [s. 77.876 (4), Stats.]

### **WITHDRAWAL FROM THE MFL PROGRAM; WITHDRAWAL TAX**

An MFL owner may decide to voluntarily withdraw his or her land from the program or the DNR may, under certain circumstances, order that an owner's MFL land be removed from the program. In general, a \$300 withdrawal fee and a withdrawal tax are assessed on managed forest land withdrawn from the program before the end of an MFL order. The withdrawal taxes due, as calculated by the Department of Revenue, are generally the higher of either:

- The MFL owner's past tax liability (calculated using the assessed value of the property and net tax rate in the municipality in the year prior to withdrawal multiplied by the years the land was designated as MFL); or
- Five percent of the stumpage value of merchantable timber on the land (minus any acreage share and yield taxes paid by the owner). [s. 77.88 (5) (a), Stats.]

No withdrawal tax or withdrawal fee may be assessed against an MFL owner who transfers ownership of the managed forest land for a public road, railroad, a utility right-of-way, park, recreational trail, wildlife or fish habitat area or a public forest to the federal government, the state, or a local unit of government. In addition, no withdrawal tax or withdrawal fee may be

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<sup>5</sup> Very generally, stumpage value calculation includes the volume, species, and value of standing timber sold each year. The DNR is annually required to establish reasonable stumpage values. If the DNR finds that stumpage values vary in different parts of the state, it may establish different zones and specify the stumpage value for each zone. The DNR may not establish these values in administrative rule. [s. 77.91 (1), Stats.]

assessed on the transfer or lease of not more than 10 acres of managed forest land to a county, city, village, or town for siting a public safety communications tower.

#### ***VOLUNTARY WITHDRAWAL***

An MFL owner may ask the DNR to withdraw all or part of the owner's land (all of an owner's managed forest land within a quarter-quarter section, or all of an owner's managed forest land within a lot or fractional lot as determined by the U.S. government survey plat) from the program. The DNR is then required to issue a withdrawal order and must assess the withdrawal tax and withdrawal fee against the owner. [s. 77.88 (3), Stats.]

The statutes specifically authorize an MFL owner to voluntarily withdraw his or her land from the MFL program for the purpose of constructing a residence under certain circumstances. The DNR must order such a withdrawal if all of the following conditions apply: the purpose of the withdrawal is to construct a residence; the land was designated as MFL before October 11, 1997; if the land is not subject to a city, village, town, or county zoning ordinance that establishes a minimum acreage for the construction of a residence, the owner requests that the DNR withdraw no more than three acres of land; and if the land is subject to a city, village, town, or county zoning ordinance that establishes a minimum acreage for the construction of a residence that is more than one acre, the owner requests that the DNR withdraw no more than the acreage of land required by the applicable zoning ordinance for construction of a residence. An MFL owner may exercise this option one time. [s. 77.88 (3g), Stats.]

#### ***REQUIRED WITHDRAWAL***

The DNR may order the withdrawal of all or any part of a parcel of managed forest land for any of the following reasons after the DNR conducts an investigation:

- Failure of the land to conform to an MFL program eligibility requirement.
- The MFL owner's failure to comply with the MFL program or the management plan.
- Timber cutting on the managed forest land violates the cutting requirements of the MFL program.
- The owner's development or use of any part of the parcel for a purpose which is incompatible for the purposes of the MFL program.
- The owner's posting of signs or otherwise denying access to open managed forest land.

An MFL owner may sell or otherwise transfer ownership of all or part of the owner's managed forest land. However, if the land that is transferred does not meet the MFL program eligibility requirements or if the land remaining after a sale or transfer does not meet these requirements, the DNR must issue an order withdrawing the land from the program and must assess the withdrawal tax and withdrawal fee against the owner. [s. 77.88 (2) (am), Stats.] If the transferred land complies with program eligibility requirements, the transferee, within 30 days after the transfer, must certify to the DNR an intent to comply with the existing management plan and provide proof that each person holding any encumbrance on the land agrees to the MFL designation. If the transferee does not provide the DNR with this certification, the DNR must issue an order withdrawing the land and must assess the withdrawal tax and withdrawal fee against the new owner. [s. 77.88 (2) (e) and (f), Stats.]

The DNR may also order the withdrawal of land from the MFL program for an owner's failure to pay personal property taxes due for a building located on managed forest land. [s. 77.88 (3m), Stats.]

## **MFL REVENUE DISTRIBUTION AND STATE AID TO MUNICIPALITIES**

### ***MUNICIPALITIES AND COUNTIES***

A municipality (town, village, or city) where managed forest land is located receives 80%, and the county receives 20%, of the following payments made by MFL owners:

- Acreage share payments.
- Noncompliance assessments.
- Yield taxes.
- Withdrawal taxes.

[s. 7.89 (1) and (2) (a), Stats.]

### ***THE DNR***

The DNR receives the following payments from MFL owners:

- Withdrawal fees.
- Closed acreage fees. The DNR is required to credit all closed acreage fees to the conservation fund and must use this revenue for land acquisition, resource management activities and grants for land acquisitions for outdoor activities.

[s. 77.89 (2) (b), Stats.]

### ***STATE AID TO LOCAL GOVERNMENTS FOR MANAGED FOREST LAND***

The state is required to make certain annual aid payments to municipalities where managed forest land is located, as follows:

- The DNR pays each municipality 20 cents per acre of land designated as MFL. The municipality keeps 80% of these payments and sends 20% of the payments to the county.
- The DNR pays each county that has more than 40,000 acres within its boundaries that are entered in the MFL program. The amount paid to each county is equal to the number of MFL acres in the county divided by the total number of MFL acres that are within the boundaries of counties that are eligible for payments, multiplied by the amount appropriated for these payments.

[ss. 77.85 and 23.09 (18) (a) and (b), Stats.]

This memorandum is not a policy statement of the Joint Legislative Council or its staff.

This memorandum was prepared by Rachel Letzing, Principal Attorney, on April 10, 2015.