**CHAPTER 17**

**Forest Management Plans for State Tax and Regulatory Programs: A Menu of Ethical Issues for Discussion**

In many states, management plan requirements figure prominently in programs for use-value taxation or for protecting key habitats or water quality on private lands. Private foresters and resource specialists prepare and implement management plans that meet the requirements of these programs. The degree of oversight by state officials can range from meticulous (and frustrating) to virtually none. Many fuzzy lines exist. This essay reviews a number of the ethical questions that can arise. It was stimulated by a conference on recertification under the Maine Tree Growth Tax, sponsored by the local chapter of the Association of Consulting Foresters.

The issues, however, are widely encountered around the country. Some of them may be evident to foresters in states in which public agency approval of plans is required. Environmental consultants may encounter similar issues in some states.

Maine’s foresters are facing a surplus of ethical questions in preparing and submitting Tree Growth Tax plans now. Administrative practice has not settled all the specific questions. This is not surprising, as we are just entering the period of heavy work on recertifications. All the questions could not have been foreseen by writers of laws and regulations.

---

4 Based on a presentation at an Association of Consulting Foresters meeting, April 29, 2002.
As a result, many foresters are faced with detailed questions that are handled differently by different local governments, or for which no clear answers have been supplied by the state. Often, both a forestry agency and a tax agency are involved. But work must be done, papers filed, plans done, decisions made. Maine foresters have been thrown back on their own ethical and professional judgment to get things done.

In time, more of these gray areas will be cleared up. The number of questions that really require ethical judgment should shrink. To the extent that we can increase the number of questions that are clearly answered as a matter of administrative practice, ethical dilemmas will be less numerous. But given the complexity of such programs, the various landowner motives, and the complexity of situations on the ground, ethical issues will never entirely disappear.

**TENSION BETWEEN LEGAL STANDARDS VERSUS FORESTRY STANDARDS**

In our work helping clients, we often feel tension between different standards. Our ethical duties require us to act properly under the law, and also to practice in accord with good standards of forest practice. Often, however, the minimum standard to comply with a tax program is lower than what would be suggested by standards of “good forestry.” It will aid our thinking to keep these two things straight.

A serious obstacle is lack of professional consensus on what a management plan ought to contain. How much detail is required? How specific should recommendations be? Foresters do not agree on these points. They understandably resist highly prescriptive regulations specifying plan content, but this can leave all concerned with no effective guidance.

**WHAT SHOULD THE STANDARD OF FOREST PRACTICE BE — SAINTLINESS OR JUST THE MINIMUM?**

Foresters are often torn between what we like to think of as “good forestry,” and what seems to be the minimum legal requirement. Many foresters want to see a public program fostering “good forestry,” not just some bare minimum. Society is not unreasonable to expect something in return for a tax break. Something more than “trees are still growing on it.”
We might think of three levels of standards for forest practice:

**Saintliness** – This would be the highest quality, ecosystem friendly, productive, and far-seeing forest practice that we all like to do once in a while. It would be the dream client, the woodlot we’d like to have written up in a national magazine. Or, the way we’d manage our own lot – if we had the time.

**Professional, “good forestry”** – We like to think of “good forestry,” management that balances practical limits, and is flexible to meet income needs. But it never slips into exploitation. It may place a very high priority on income but does not step over the line. We would all like to have more clients like these. With this owner, you know they will do what the management plan says.

We may disagree about what the specifics of good forestry might be. There is no clear, written, shared understanding of what this is, and there may never be. As they say, “you know it when you see it.” Perhaps it’s more the attitude and time perspective of a forester, a logger, and a landowner than any set of particulars.

**The legal minimum** – Many clients cannot be brought to the level of what we consider good management. They have other objectives. For them, we still have to ensure legal compliance. In many instances, there is no clear bright line defining the legal minimum. Some owners may want to take very aggressive positions to push that line in the direction that expediency and momentary profit might demand. If we meekly fall into the habit of going along with this every time, against our own better instincts, professional forestry and our own self respect will suffer in time (not to mention the forest).

Use-value taxes are intended to provide a tax environment that permits reasonable, forward-looking forest practice and reduces the tax pressure to cut excessively or subdivide just to pay taxes. This does not require saintly forestry. Nor does it necessarily require (as a legal matter, that is) professional “good quality” forestry. Other regulatory schemes may be aimed at regeneration, habitat, or water quality.

When a client seeks, over time, aggressively to push the limits, their behavior invalidates the assumption that the client wants to do what is right. These situations test us. We know there are operators who buy timberland in order to exploit it for the highest immediate income and then sell immediately. It is hard to see what such activity has to do with forestry.
As a matter of professional ethics, foresters try to make the best possible case for good forest practice as we see it. But if we do not convince the client, there is nothing unethical about conducting operations to the lowest legal standard... so long as we do not give in to mere expediency in deciding where the line is. The problem arises when there is continuous pressure to aggressively interpret the legal limits, to ignore them, or to wink at uncertain or minor instances. Honest errors are defensible. But they are more defensible if we have a client with the proper attitude, and when errors are repaired if they can be.

Professional foresters need to consider the long-term political context. It is far more critical that we preserve the availability of use-value taxation for all owners. If foresters spend their time advocating bottom of the barrel forestry, participating in a “race to the bottom,” we can clearly compromise political support for retaining such programs.

**WHAT CODE APPLIES?**

Only Maine Licensed Professional Foresters (LPF’s) can sign the forms to the towns attesting to the existence of a Management Plan, and attest that compliance has been achieved. Employees of landowners who do not work on other private lands need not be LPFs or members of any professional group. Unless licensed, however, they cannot sign the tax paperwork.

All Maine LPF’s must abide by the State Licensing Board’s Ethics Code, which was revised in 2002. In addition, members of SAF or ACF must abide by those codes as well. This creates a potentially complicated situation as these codes vary in content and wording.

**SPECIFIC QUESTIONS**

In this discussion, points of ethics inevitably blend with points concerning professional standards and mere administrative rules. Also, suggestions about ways to prevent problems are made. The worst problems seem to hit us with looming deadlines, or with troublesome landowners or assessors. But there are ways to reduce these problems in the future.

1. **Can a Plan be Amended... If the Intent is Obviously to Evade the Law?**

Not uncommonly, some event such as an ice storm may invalidate the assumptions and schedules in a woodlot management plan. The wind, the ice, or the spruce budworm takes over the management of the
forest, or at least the decision as to timing the cut. Changes in markets or in owner circumstances may suggest plan amendments. The use of formal amendments for such purposes should be encouraged. Maine state officials indicate that assessors are unlikely to raise objections; the situation may differ in other states.

What about the occasional case in which an owner simply forgets to carry out reasonable, even needed, activities in a plan and then runs out of time? They could ask for a plan amendment that eliminates all previously planned activity, even going so far as to defer it beyond the next decade as well. But what if there is a fairly good basis for believing that the plan was a sham to begin with?

There is apparently no legal or ethical difficulty in setting off a small house lot for sale or for owner use, within the limits provided in the law. There is certainly no compromise of forestry standards involved. What if a large property is purchased, heavily cut, and resold as an immediate large-lot subdivision? How extreme does the situation have to be before the owner’s intent in filing a plan is plainly to disguise a de facto change of use to evade the withdrawal penalty? For this owner, a management plan is a fig leaf to cover evading the law. The owner is not entitled to expect the forester to be their advocate for this. For the classic coastal owner who wants never to cut, the recommendation would be to urge them to switch to Open Space, and suggest selling or donating development rights.

2. How Can Foresters be Confident of an Owner’s Intentions to Follow a Plan?

A consultant would like to avoid being in the position of judging a landowner’s good faith. It is safe to assume good faith will apply in most instances. Yet this does not dispose of the matter. The situations that come up for discussion most frequently involve either indifference (a version of bad faith?) or suspicions that no actual management is intended at all, just the enjoyment of the tax reduction. A consultant bears no formal or ethical obligation to ensure follow-through. The obligation is entirely on the landowner. Yet, is this all there is? The best remedies – for both forester and client – are those arranged well in advance of final deadlines. All the more reason for a practice of advising clients of pending management actions from their plans.
Wouldn’t sound client service include reminding owners of plan recommendations, as an eye doctor prompts a patient to report for a three-year exam? Isn’t it good business to avoid the missed deadline or last-month rush by helping clients stay on schedule? That would avoid being in the position of being unable to certify compliance with a plan you wrote ten years ago. If you have offered reminders and advice, it would help ward off any effort by a landowner to persuade you to certify compliance when they have failed to follow through.

After giving an owner the benefit of reasonable doubt, a consultant would be justified in “firing the client” if they repeatedly ignore plan commitments that are not burdensome or even would yield income. The client won’t pay you anyway when you decline to certify their compliance. Why not just avoid the trouble.

3. What is Landowner/Consultant Obligation to Report on Recertification at Deadline?
Maine law states that the obligation is entirely the landowner’s. As a matter of good business practice, though, a consultant may wish to act as a partner with the client in ensuring continued access to the benefit of Tree Growth treatment. Most towns issue no reminders. Failure of a town to issue reminders or even keep good records does not excuse failure to report. Reminders when practices are scheduled, or when inspections are warranted, even a periodic suggestion that they walk the lot, could bring a consultant added work, and could prevent at least some instances of owners being penalized over plan compliance issues.

In sum, the consultant has no ethical obligation to ensure follow through, but does have good business reasons to assist the client in doing so.

4. What Constitutes “Compliance” with a Management Plan?
Apparently, within the strict rules of the Maine law, local assessors are not bound to accept any excuses – ice storms, trespass, memory lapses, etc. They may informally grant extension of time, but they are not bound to do so. Their attorneys will advise them not to. Plans ought to be drawn up in such a way that a third party can tell whether or not they have been followed. This much is simply clarity. In the instances where it is clearly evident that no actions are prescribed that ought to be easy. Other areas can be grey.
Good evidence for compliance would be that an owner acts on their own to initiate contacts when the plan indicates some activity. That they visit the land regularly and keep a log. They maintain a separate checking account for the forest enterprise, its incomes and expenses. They cut their own firewood in accordance with some sensible rule that will improve stands instead of degrading them. They themselves suggest amendments when it seems desirable. They can even follow through and brush and paint the lines. Even on a parcel with minimum needs, such a pattern of interest can be followed and be documented. Few assessors would dispute a record such as this as compliance with a plan. If questioned, a forester could attest to the existence of these items without handing over the plan itself. Such a record may also be helpful on certain income tax matters.

The best evidence, in contrast, for noncompliance would be the absence of all the above. It would be a record in the forester’s file that an owner has displayed a pattern of not returning calls, not responding to reminders, and declining to follow simple and low cost recommendations in a plan. Additional evidence would be a refusal to simply amend a plan to drop practices the owner no longer wishes to support. A pattern of behavior over time is a far more reliable indicator of compliance than is any particular instance or plan provision.

5. When Do You “Fire the Client”?
You fire the client if there is a continued pattern of pressure: to not comply with the law (clients have asked consultants to not file legally required notifications, for example), to act in plainly exploitive ways, or to interpret laws and rules so aggressively as to render them meaningless. In my opinion, exploitive land management does not require a forester’s advice. A technician or certified logger can see to compliance with BMP’s and similar rules. It arguably contravenes the broad ethical standards implied in the SAF Land Ethic Canon and that appear in some state ethics codes as well.

6. How to Prevent the “Shopping for a Compliant Forester” Merry-Go-Round?
A concern has been raised that clients can promote a “race to the bottom.” They would do this by “shopping” for the forester with the most permissive view of the rules. This is known to be done for soil scientists, lawyers, appraisers, and others.
If a forester declines to certify an owner’s compliance, in Maine this is between the owner and the forester. Given that confidentiality is considered an important obligation for professionals, there may be nothing the individual forester is required to do, or able to do about this. The remedy would lie in efforts over time to prevent the situation from arising in the first place.

**CONCLUSION**

State programs for use-value taxation or other purposes often require a management plan prepared by a private professional forester. That forester, over time, may be required to attest to landowner compliance, some of these programs are not administratively mature, and the many unanswered questions leave foresters to fall back on judgment and on ethical sensibilities to get on with the work.

If a professional consensus on what constitutes an adequate management plan could be developed, that would help – in some states. Programs need to find the right balance between clarity of the rules and definitions defining an adequate plan and compliance, and avoid becoming excessively detailed and prescriptive on the other. Proper use of provisions’ for needed amendments will help. In most instances, adopting a more active program of reminding clients of activity dates, and keeping records of owner actions, would be a sensible way for foresters to help their clients prevent the problem from coming up in the first place.