

JOINT COMMITTEE ON GOVERNMENT AND FINANCE
WEST VIRGINIA OFFICE OF THE LEGISLATIVE AUDITOR

POST AUDIT DIVISION

LEGISLATIVE AUDIT REPORT

Managed Timberland Program

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GENERALLY ACCEPTED GOVERNMENT
AUDITING STANDARDS STATEMENT

We conducted this performance audit in accordance with Generally Accepted Government Auditing Standards (**GAGAS**). Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

POST AUDIT DIVISION
Justin Robinson, Director

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Managed Timberland Program

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Background

In 1946, the *Forestry Amendment* to the West Virginia Constitution was ratified, which allowed for the definition and classification of forest lands. This amendment was intended to provide for cooperation by contract between the State and the landowner in the planting, cultivation, protection, and harvesting of forest lands. Forest lands that were included in any such contract could be exempted from taxation at any rate as determined by the Legislature. The tax measured by valuation cannot exceed the aggregate rates authorized by section one of article ten of the WV Constitution.

During the 1990 Regular Session of the Legislature, the *Managed Timberland Program Act* was passed, and in the subsequent Regular Session of 1991, legislative rules for the act were passed. These rules remained in effect until 1998, when the Legislature amended the law to incorporate a new appraisal method, which resulted in the adoption of updated Legislative rules to govern the Managed Timberland Program.

The Managed Timberland Program encompasses two distinct actions within the program, classification and valuation, that are performed by two separate state entities, the Division of Forestry (Forestry), and the State Tax Department (Tax). Landowners that seek the tax relief available for property classified as managed timberland under the Managed Timberland Program submit applications to Forestry.

The first step in the Managed Timberland Program is Forestry classifying a property as managed timberland, or not, at the request of a landowner. Forestry is responsible for the assessment of a property owner's application to determine if the property meets the criteria to be certified as a managed timberland. Forestry then communicates the properties that have been certified as managed timberland to Tax.

Subsequently, Tax then categorizes the managed timberland reported by Forestry into the correct property valuation class to report to each respective county assessor. Once the managed timberland has been placed into the proper valuation class the tax assessed on the property is a lesser amount than would have been assessed in the original valuation class.

Managed Timberland Program Requires Updates to Modernize the Program

The Legislative Auditor reviewed the Managed Timberland Program and identified several areas of weakness within the program that, if addressed, could lead to the program operating more effectively for all stakeholders. These issues included an outdated Legislative Rule, a lack of internal policies and procedures at Forestry, a lack of inspections for enrolled properties, an annual certification process that may be unnecessary, and demographic data from Tax and Forestry that doesn't reconcile. Despite these issues it appears the Managed Timberland Program continues to serve the purpose for which it was intended upon its adoption.

Legislative Rule

W.Va. Code §11-1C-11(1) gives Forestry the responsibility of managing the Managed Timberland Program while giving the Tax Commissioner complete authority for rulemaking. Under the authority granted by W.Va. Code §11-1C-5(a)(2)(B), the Tax Commissioner developed Legislative Rule §110-1H "Valuation of Timberland and Managed Timberland" for the Managed Timberland Program which became effective on May 1, 1999. Even though portions of the Rule

pertain to responsibilities of Forestry, the Rule developed by Tax for the Managed Timberland Program is all included within the tax code. No rules for the Managed Timberland Program are provided within Legislative Rule title 22, the title for the Division of Forestry.

Although W.Va. Code does authorize the Tax Commissioner to promulgate rules for the valuation, classification, and certification of managed timberland, in a legal opinion from Legislative Services it was stated that the Tax Department cannot promulgate rules that encompass the classification of managed timberland, when the Division of Forestry bears the sole responsibility for determining the classification of property as managed timberland. Legislative Services also stated that a Legislative Rule promulgated by the Tax Department that encompasses processes and responsibilities of the Division of Forestry poses conflicts with W.Va. Code. Were the Tax Department to create its own separate Legislative Rule that does what the code empowers the Division of Forestry to do, this would be pose a significant conflict of authority.

Because W.Va. Code provided the Tax Commissioner authority to promulgate the Rule for the Managed Timberland Program, Forestry does not have the power to directly make the necessary changes when functions of Forestry are outdated and need to be changed. This prevents the program from efficiently meeting the goals of the program which are to actively manage forest as a long-term sustainable economic resource for the state and a healthier forest overall. Forestry stated that administrating the Managed Timberland Program with the way the rule is currently written is cumbersome and inefficient. Forestry specified three things about the Legislative Rule that could be changed to make the Managed Timberland Program more efficient. These changes included modifying the stumpage price, modernizing the mapping and grading systems, and requiring a written agreement or contract.

With regard to the modification of the stumpage price, or the market value of standing trees prior to felling and removal, Forestry indicated accurate stumpage prices can be difficult to come by and are highly individualistic in nature. Obtaining a good statistical sample to come up with an accurate number is unlikely. Forestry stated that they would find another way to incorporate stumpage prices from the valuation methodology or remove it entirely and go with another method. Assessing the use of stumpage prices is beyond the scope of the audit and a policy question.

As far as the mapping and grading systems delineated in the Rule, the current mapping and grading systems for the Managed Timberland Program utilize soil site indexes from soil maps which shows county lines in the data. With this system the forest productivity may change entire grades when it crosses a county line. These systems are from 1998 and there have been huge improvements in technology that can be taken advantage of that are more accurate. As an example, using the Forest Inventory and Analysis (FIA) program of the U.S. Forest Service provides the information needed to assess America's forests. The FIA Forest productivity layer is a prediction of how many cubic feet of wood an acre of land can produce in a year.

Currently the Legislative Rule for the Managed Timberland Program does not require the landowner to develop a written managed timberland plan. A managed timberland plan is a plan that determines priorities, sets goals, and identifies the management activities to be utilized to reach those goals. These plans can guide activities of the property for decades and provide continuity through successive generations of owners. The only requirement is that a management plan be developed and implemented within two years of acceptance into the Managed Timberland Program. This requirement for a plan does not require the plan to be a formally memorialized document. The Legislative Rule states that the application shall include either (a) a commitment

to maintain and protect timberland certified as managed timberland by demonstrating land-use objectives to include resource management and soil and water protection; or (b) a written plan prepared by a professional forester. Based on the current Legislative Rule, property owners could just have an unwritten plan, and as long as it meets the broad goals in the Legislative Rule, it qualifies as a plan, and requires no approval from a forester. Legislative Rule §110-1H-13.1.2 states that “if a written plan is provided in accordance with Section 13 of this rule, that plan shall be approved and signed by a registered timber management forester.” Since the Rule does not require a written plan in all instances but does require a written plan to be approved by a registered timber management forester, it disincentivizes managed timberland plans from being written, and thus more easily enforceable.

Internal Procedures

In addition to W.Va. Code and the Legislative Rule only providing general guidance for the Division of Forestry’s role in the Managed Timberland Program, the Division of Forestry, as the oversight body of the program, has not developed internal policies and procedures for the management of the Managed Timberland Program. W.Va. Code §19-1A-4(b)(3) states that the director of the Division of Forestry has the power “to promulgate rules and regulations, subject to the provisions of chapter twenty-nine-a” of W.Va. Code. W.Va. Code §29A-3-3(a) states that:

Each agency shall adopt procedural rules governing the formal and informal procedures prescribed or authorized by this chapter. Procedural rules shall include rules of practice before the agency, together with forms and instructions. (b) To assist interested persons dealing with it, each agency, shall so far as deemed practicable, supplement its rules or regulations with descriptive statements of its procedures.

When asked for its internal policies and procedures, Forestry stated, “the West Virginia Division of Forestry abides by the relevant provisions of West Virginia State Code and the West Virginia Code of State Rules to administer the program which includes penalties; therefore, additional policies and procedures were not necessary.” W.Va. Code provides general instruction for Forestry’s role in the Managed Timberland Program. Given the outdated nature of the Legislative Rule, Forestry’s inability to modify the rule as necessary, and no clearly defined appeal procedure included in the Rule, internal policies and procedures delineating the specific process of the program would be beneficial to Forestry and the external stakeholders. A lack of internal policies and procedures could inhibit the ability of Forestry to take consistent actions in its application of the Rules governing the program. This is especially true for legislative rules that Forestry has no control over, that are outdated, and in some instances ambiguous.

Inspections

The Managed Timberland Program is operated with little verification the property enrolled in the program is being managed in accordance with the managed timberland plan. Forestry does not conduct onsite inspections of managed timberland during the initial application stage nor during the renewal stage, without being prompted by an outside entity. These onsite visits are conducted when requested by the Tax Commissioner, the county assessor, or when there are landowner disputes. Most requests come from landowners who disagree with assertions from the Tax Commissioner and/or the county assessor.

Neither W.Va. Code or Legislative Rule §110-1H directly require the Division of Forestry to physically inspect, outside of requests from the Tax Commissioner or the assessor. They also do not provide procedures for observing management plans of properties to determine whether the property initially qualifies, or continues to qualify, for preferential valuation as managed timberland, or determine if the plan had been implemented within the twenty-four-month requirement.

Applications and renewal applications are accepted and approved without any onsite observation. If the information provided on the applications meet the requirements set forth in the Legislative Rule, they are approved. Forestry provides the Tax Division with a list of those properties that are certified as managed timberland and those properties that have been denied certification with a breakdown of district, map, parcel, sub-parcel, surface acres, residual, total managed timber approved, and owners. A clerk at Tax will verify that information received from Forestry matches the information in the Integrated Assessment System (IAS), which is the shared system used by the state and counties to record, calculate, and issue tax assessments.

The number of owners per parcel are reviewed to ensure the interest owned matches the legal description. Woodland acres are compared to total managed timber approved. Once information from Forestry is received and entered, the managed timberland special valuation is calculated automatically through IAS. Any variations are noted and sent back to Forestry. Forestry generally accepts the classification made by the Tax Commissioner unless the landowner disputes the Tax Commissioner's determination in which case Forestry sends an employee to conduct an audit to determine the status of the property.

Prior to 2013, Forestry was performing annual audits of managed timberland properties, but according to Forestry this practice was discontinued due to budget and staffing issues, as well as there being no requirement for Forestry to inspect managed timberland properties. In 2013, Forestry decided to operate the Managed Timberland Program on an honor system by ceasing annual audits and reducing them to the mandated minimum, in which audits were performed by request only.

Between 2013 and 2021, audits were performed via an informal method primarily done through email only when received by special request. When an audit is requested, the Forestry requests to see the management plan, if one is documented. The Forester will review the plan and determine if it does or does not qualify for managed timberland valuation and explains the shortcomings. Forestry will normally give the property owner until the renewal deadline for the coming year to get the plan into compliance, or they are removed from the program and subject to penalties. The Legislative Auditor requested all audit requests from 2015 through 2021 to determine how many properties were audited. Forestry was able to provide seven audit requests. The audit sheet was not saved beyond notifying the county and/or the landowner of their findings.

Beginning in Fiscal Year 2022, Forestry began conducting random audits of properties in the Managed Timberland Program located in the Eastern Panhandle. The resumption of random property audits are a result of Forestry receiving a 5-year Regulatory Accountability grant from the Environmental Protection Agency (EPA) through Chesapeake Bay funds, as a pass-through grant, for \$20,600 per year. The grant provided resources to conduct fifty audits annually in the Eastern Panhandle only, to encourage landowners to sign up for a riparian¹ addition to the

¹ Riparian zones or areas are lands that occur along the edges of rivers, streams, lakes, and other water bodies.

management plans, or for the landowners who don't have a management plan to get a plan written that includes a riparian buffer, either planning or protection. The Eastern Panhandle project provides for a random list of eligible parcels to be generated in January that must be audited prior to June 1 with notification to the landowner of deficiencies prior to the new tax year on July 1st. For Tax Year 2021 there were 55 audits conducted in the Eastern Panhandle. Of those 55 properties audited, only two were found to not be in compliance with the program, one made the necessary corrections to regain compliance, while the other was rejected for noncompliance. Outside of the counties in the Eastern Panhandle project, annual audits continue to be suspended.

It is possible that without annual audits of land parcels managed timberland properties could receive a reduced tax basis for the property while also not adhering to the managed timberland plan. This would ultimately result in a reduction in the property taxes paid to a county by a landowner without the benefits that would be realized by a property utilizing a managed timber plan. However, the results of the most recent random audits indicate the likelihood of noncompliance would be low, thus the costs associated with performing random audits of all managed timberland properties does not appear to be an efficient use of state resources.

While the results of the audits performed did not provide results that would support the increased cost associated with performing regular random audits, consideration must be given to either a methodology for assessing the implementation of the plan within 24 months of program acceptance or modifying W.Va. Code to minimize the impact of properties that do not follow the managed timberland plan. Currently, W.Va. Code §11-1C-11a(c) indicates that if Forestry determines that a landowner in the Managed Timberland Program fails to implement a managed timberland plan within 24 months of being certified in the Managed Timberland Program, the property is removed from the program, and the owner is subject to a fine equal to the amount of property taxes saved due to the property being assessed as managed timberland plus interest. This section of code minimizes the risk of landowners not complying with the managed timberland plan, but only within the first 24 months of program acceptance. If a landowner is in the program for 10 years and subsequently removed for noncompliance with the plan there is not a methodology within the W.Va. Code that recoups the property taxes that were avoided by the landowner when they were in the program but not in compliance with the managed timberland plan. Modifying W.Va. Code §11-1C-11a(c) to be applicable during the entire time a property is part of the Managed Timberland Program would reduce the impact of the landowners that do not comply with the managed timberland plan.

Recertification

To qualify as managed timberland for property tax purposes the owner must annually, on or before September 1st, certify in writing to Forestry, that the property meets the definition of managed timberland as defined under W.Va. Code. Property not recertified by the deadline would be disqualified from the program. If a property is disqualified from the program W.Va. Code grants authority to rescind the disqualification or allow the property owner a reasonable amount of time to qualify the property. Additionally, a property owner may appeal disqualification to the circuit court of the county where the property is located.

While W.Va. Code and the Legislative Rule 110-1H require that renewal applications are to be done annually to remain in the Managed Timberland Program, this annual certification equates to little more than busy work for Forestry and has basically become a year-to-year paper shuffle. Forestry prepares the information on the annual renewal application based on the previous

year’s information and sends it to the landowner(s). The landowner(s) review the information, and if there are no changes to make, mails the renewal application form back to Forestry. If there are changes necessary, the changes are made on the renewal application and then returned to Forestry. Forestry then updates its internal information, and the process repeats each subsequent year. If there are no issues with the property owner providing the annual application by September 1st, and if there is no dispute by the county or the tax division, the property is approved for the next year. The annual renewal applications provide very little benefit to the program overall, uses resources that could be better allocated to other management opportunities for the Managed Timberland Program, and is an unnecessary burden to landowners.

The Legislative Auditor conducted a comparison of policies for recertification of all 50 states for the Managed Timberland Program to identify possible alternatives to annual certification of all managed timberland properties. The Legislative Auditor found that there is no standardized method for managing the timberland across the 50 states; however, there were seven states that utilize only the Ad Valorem property tax (Current Use Tax), as WV does, while also having a more cost effective and stakeholder friendly recertification policy. The recertification policies of these states range from an automatic annual renewal in Montana to an indefinite classification as long as there is no change in ownership. Each of the seven states and the recertification policies are listed on table one below.

Table 1: Recertification Policies for States with Similar Property Taxes	
State	Recertification Policies
Georgia	10-year covenant
Maine	10-years
Maryland	15 years
Montana	Automatic annual renewal of initial application
South Carolina	Indefinite as long as ownership does not change.
South Dakota	5 years
Tennessee	Indefinite as long as ownership does not change.
West Virginia	Annually

Data obtained from Legislative Auditor analysis.

If a modification is made to the length of time that can elapse before a landowner is required to request recertification, consideration must be given to events that can occur that should require the landowner to apply for recertification. Examples of a triggering event would include a change in ownership composition, whether owners were added, subtracted, or the property was sold, or a modification in the use of the property. Any potential risk associated with extending the recertification requirement for a length of time greater than the current annual requirement could be offset if W.Va. Code §11-1C-11a(c) were modified to change the period of time the recovery of taxes is subject to mirror the length of time the certification of managed timber is set for. As discussed above, W.Va. Code §11-1C-11a(c) limits the recovery of avoided taxes and penalties to the first 24 months of certification.

Data

The Managed Timberland Program is a single program that requires cooperation between the Division of Forestry and the West Virginia State Tax Department to accomplish its intended purpose. Being a single program, the operation has one population of participating parcels of land. The population land parcels participating in the Managed Timberland Program should be the same

whether it is obtained from Forestry or from Tax. However, the records provided by Forestry and Tax show differences in number of parcels, as well as total managed timberland acres.

To obtain an understanding of the Managed Timberland Program demographics, the Legislative Auditor attempted to determine the population of parcels within the program by individual county for Tax Year 2021. From spreadsheets of parcels in each county provided by the Forestry, the Legislative Auditor was able to determine that out of 55 counties, 54 have properties that participate in the program. Hancock County, in the Tax Year 2021 information, did not have any parcels participate in the Managed Timberland Program. The Legislative Auditor received similar information from Tax and attempted to reconcile the two data sets to verify that the population of the Managed Timberland provided was accurate.

According to the information provided by Forestry, there are 15,251 parcels with 2,651,695 acres that qualified for the Managed Timberland Program in 2021. However, according to the information provided by Tax for 202, there are 15,910 parcels where 2,590,313 acres qualified for the Managed Timberland Program. It is obvious there are discrepancies between the data sets maintained by Tax and Forestry just based on these totals alone. In sum, for the 54 counties with managed timberland there was a 1,235 net difference in the number of parcels and 61,413 net acreage difference of managed timberland. These differences are summarized by county in Appendix D. Furthermore, it was found that, from the information provided by the Division of Forestry and that provided by the Tax Department, only four of the 54 counties (Brooke, Jackson, Tucker, and Wayne) agree on the number of parcels in the Managed Timberland Program, and four counties (Boone, Brooke, Ohio, and Wayne) agrees on the amount of managed timberland in the county. In only two counties (Brooke and Wayne) are both, the number of parcels and the total managed timberland acres, the same in the Forestry and the Tax documentation.

Since the two sets of data provided by Forestry and Tax do not match it is not possible to provide an accurate representation of the participants in the Managed Timberland Program. Additionally, there may exist the possibility that the parcels and acreage included in the program is not accurate. Determining which set of data was accurate would have been beyond the scope of this audit; however, both Forestry and Tax should explore the cause for the discrepancy and develop an appropriate remedy for the issues.

Communication

In the January 2019 term of the Supreme Court of Appeals of West Virginia (the Court), there was a case, *Penn Virginia Operating Co., LLC, vs. Assessors from Randolph, Barbour, and Upshur counties, the State Tax Commissioner, and the Director of the Division of Forestry*, in which a property owner was denied qualification of land as managed timberland because he submitted his renewal application sixteen days after the September 1, 2015, deadline. This caused his liability for Tax Year 2016 to substantially increase. In a letter dated September 21, 2015, from Forestry, the property owner was informed that his application was untimely and that his properties would not be certified as managed timberland for Tax Year 2016. The letter concluded that his only recourse was to file a grievance of valuation as per W.Va. Code §11-1C-11b(e). Pursuant to W.Va. Legislative Rule §110-1H-13.3, the property owner could have appealed the denial to Forestry's Director but was advised otherwise. An appeal to the Court concluded that the property owner was deprived of his right to an administrative appeal of the denial of his application due to incorrect information received from the Division of Forestry. The Court held that "the West

Virginia Division of Forestry has the exclusive authority to classify forest lands as managed timberland under this State's Managed Timberland Program." As Rule §110-1H-13 states that on or before September 1, the owner shall file an application for certification as managed timberland with Forestry, late applications were not considered for appeal until after the *Penn Virginia* decision. Forestry indicated it did not retroactively apply the court decision to past denials as the appeals date had already expired for those persons. However, it did revise the denial notification to include the appeals process language in all cases going forward.

Since the *Penn Virginia* court case indicated that Forestry misinformed the landowner of his right to an appeal, the Legislative Auditor reviewed the communications provided by Forestry and Tax to the landowner to determine if communications related to the Managed Timberland Program clearly delineate the rights, responsibilities, and deadlines for landowners. The Communications from both Forestry and Tax clearly delineate the rights, responsibilities, and deadlines for landowners. All information required to be provided to the property owner by is provided in the applications, application instructions, denial letters and approval letters and the requirement for the Tax Department to inform landowners of appraisal increases are done by Notice of Increase letters.

Additionally, the Legislative Auditor reviewed all denials for certification of managed timberland valuation in Tax Years 2019 through 2021 to determine if the denials were appealed, and if reversals of denials, when provided, were provided without bias. In Tax Years 2019 and 2020 there was a total of seventeen denials, none of which were appealed by the landowners. In Tax Year 2021, there were ten properties that were denied qualification for the Managed Timberland Program because the recertification applications were not provided by the required date set by the Legislative Rule. Four appealed the denial, one of which was approved for health-related reasons, which would be within the discretion granted to Forestry by the Legislative Rule, and the other three were denied.

Carbon Capture Concerns

One final issue that is not explicitly contemplated in the W.Va. Code or Legislative Rule governing the Managed Timberland Program is the development of carbon capture offset agreements that have begun to proliferate as a response to climate concerns. Carbon capture offset agreements are a means by which entities, such as businesses or individuals, may compensate for their own emissions of carbon dioxide by financially supporting endeavors that aim to either remove or decrease the amount of the gas from the atmosphere. These initiatives can range from afforestation and renewable energy ventures to carbon capture and storage technologies. The objective of carbon capture offset agreements is to alleviate the negative ecological consequences of carbon emissions and work towards mitigating climate change. In addition to offsetting their own emissions, carbon offset agreements may also be utilized to offset the emissions of other parties through the acquisition of carbon credits.

The first carbon capture offset agreement was an offset of a coal-fired power plant by financing an agroforest. The earliest formal initiatives to use forests for carbon sequestration was the United Nations Framework Convention on Climate Change's (UNFCCC) Clean Development Mechanism (CDM), which was established in 1997 as part of the Kyoto Protocol. The CDM allowed developed countries to invest in emission-reducing projects in developing countries and earn credits towards meeting their own emission reduction targets. Many of these projects involved

reforestation and afforestation efforts to increase the carbon sequestration capacity of forests. In the decades that have elapsed since the Kyoto Protocol the use of forests in the United States has increased in the usage of carbon capture to sequester an estimated 13% of the country's annual CO2 emissions through carbon capture offset agreements.

It is possible for carbon capture offset agreements involving forests to include provisions that require the landowner to not cut any trees. This approach, known as conservation or preservation carbon offset projects, aims to protect existing forests and the carbon they sequester. By preventing the cutting of trees, these projects can help to maintain the carbon sequestration capacity of the forest and offset a portion of the carbon emissions of a company or individual. However, it is also possible for carbon capture offset agreements involving forests to include provisions for sustainably managing the forest, rather than prohibiting tree cutting altogether. Sustainable forest management practices, such as selective logging and replanting, can maintain or even increase the carbon sequestration capacity of a forest over the long term. By replanting trees or allowing for the natural regeneration of the forest, it is possible to offset carbon emissions while also providing economic benefits to the landowner.

The specific terms of the arrangements entered by WV landowners are not made public; thus, there is no central repository of land parcels that are currently enrolled in a carbon capture agreement. According to a report from the West Virginia Division of Regulatory and Fiscal Affairs (RAFA), there is little regulatory oversight of the carbon capture agreements in WV which could cause potential economic harm to the state. The lack of regulatory oversight creates a situation where it is extremely difficult to ascertain the number of acres in the state that are included in carbon capture agreements. According to RAFA, WV has approximately 12.2 million acres of forestland, of which there was a minimum of 616,044 acres in active carbon offset projects in 2021. Since there are approximately 2.6 million acres in the Managed Timberland Program the possibility exists that there are instances of overlap with landowners signing carbon capture agreements that violate the terms of the Managed Timberland Program.

Table 2: Managed Timberland Acreage Comparison		
Total Forestland Acres	Managed Timberland Acres	Known Carbon Capture Acres
12.2 million	2.6 million	616,044
<i>Data obtained from Legislative Auditor analysis</i>		

As indicated above, one of the ways these agreements can negatively impact the state is through the potential ability for landowners to agree to a carbon capture agreement while concurrently enrolling in the Managed Timberland Program. According to State Tax Commissioner Matt Irby:

...if a carbon credit lease agreement imposes restrictions on the harvesting of timber from the subject property, as some of these agreements may do, the property should no longer receive preferential treatment as managed timberland.

At the time the *Managed Timberland Program Act* was passed the Legislature attempted to ensure the long-term applicability of the program to align with its desired outcomes. W.Va. Code §11-1C-2 excludes properties subject to deed restrictions, deed covenants, or a zoning regulation that limits the commercial production and harvesting of timber. Since carbon capture was not a widespread phenomenon, the limitations did not explicitly include carbon capture, nor was there any method for validating landowners weren't conjointly holding conflicting agreements with managed timberland and carbon offsets to their own financial benefit.

The risk of negative impacts to the state can be mitigated by taking a series of interconnected actions. The Legislature could modify the definition of “holder” in W.Va. Code §20-12-3 to include any entity that enters into a carbon capture agreement for a parcel of land located in the state. The Legislature could then clarify in W.Va. Code §20-12-3 that “maintaining or enhancing land, air or water quality” includes carbon offset agreements, which would then classify carbon agreements as a type of conservation easement that must be recorded on a deed in the county in which the property is located. This statutory language would then classify carbon offset agreements as deed restrictions, thus clearly excluding them from the Managed Timberland Program. This statutory change would also create a method to track the agreements in the state at the county level. Since county assessors would be in possession of records for both the properties in the Managed Timberland Program as well as the properties with a deed restriction for a carbon offset agreement, the county with a vested interest in collecting the taxes it is owed would be in the best position to oversee local land use. Any properties discovered by county assessors that were found to have a carbon capture agreement that conflicts with an existing managed timber agreement can be referred to Forestry for an audit, and then removed from the Managed Timberland Program. Additionally, requiring county assessors to submit all properties with a conservation easement annually to the Tax Department would make Tax aware of the carbon capture agreements to better enforce the collection of taxes owed as a result of the income derived from the carbon capture agreements.

Conclusion

The Managed Timberland Program serves a wide variety of stakeholders across the state and provides many benefits to both industry and private citizens. The management of the program and the requirements therein should be flexible enough to adapt to ever changing technologies and be easily navigated by all stakeholders. One of the technological changes not specifically contemplated when the Act was passed were carbon capture offset agreements, which have emerged as a way to mitigate the negative ecological impacts of carbon emissions and address the issue of climate change. Carbon capture offset agreements involving forests can either prohibit tree cutting entirely or allow for sustainable forest management practices such as selective logging and replanting. It is unclear how common these agreements are in West Virginia, as the specific terms of these agreements are not publicly disclosed. While there are not systemic issues preventing the program from achieving the goals of the program making changes to modernize the program would decrease the costs associated with overseeing it, make it more user friendly to the stakeholders that utilize the program, and protect the interests of the state as carbon capture agreements proliferate.

Recommendations:

1. The Legislative Auditor recommends the Legislature provide rulemaking authority to the Division of Forestry for their role in the Managed Timberland Program.
2. The Legislative Auditor recommends the Division of Forestry develop internal policies and procedures for their role in the Managed Timberland Program, including the appeals process.
3. The Legislative Auditor recommends the Division of Forestry and the State Tax Department work together to update the current Legislative Rule to minimize weaknesses

in the processes and procedures of the Division of Forestry and the Tax Division regarding the operations of the Managed Timberland Program.

4. The Legislative Auditor recommends the Legislature consider amending W.Va. Code §11-1C-11a(c) to remove the language restricting the repayment of taxes avoided to those in the first 24 months of acceptance.
5. The Legislative Auditor recommends the Legislature consider if the annual certification process is in the best interest of all stakeholders.
6. The Legislative Auditor recommends the Division of Forestry and the West Virginia State Tax Department work together to reconcile the data sets for the Managed Timberland Program properties, correct errors discovered and develop a process for ensuring the data is accurate in the future.
7. The Legislative Auditor recommends the Legislature consider amending W.Va. Code §20-12-3 modify the definition of holder and to clarify the classification of carbon capture agreements as conservation easements to be recorded on the deed of the property, as well as require county assessors to report the conservation easements in their respective counties to the Tax Department annually.
8. The Legislative Auditor recommends the Division of Forestry and the West Virginia State Tax Department modify communications to participants in the Managed Timberland Program indicating property involved in carbon capture agreements that prohibit managed timberland activities cannot be classified as managed timberland.

Appendix A

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Director Cover,

This is to transmit a draft copy of the Post Audit Division's report on the Managed Timberland Tax Incentive Program. This report is scheduled to be presented during the January interim meeting of the Post Audits Subcommittee. The exact time and date of the meeting has not been set however the January interim meetings are currently scheduled for January 8-10, 2023. We will inform you of the exact time and location once the information becomes available. It is recommended that a representative of the agency be present at the meeting to respond to the report and answer any questions committee members may have during or after the meeting.

We would also like to schedule an exit conference with the WV Division of Forestry to discuss the draft report and address any concerns you may have. Please contact Terri Stowers, Executive Assistant, at 304-347-4880 by close of business Friday, December 30, 2022, to arrange this meeting. For your convenience, the exit conference may be conducted virtually. In addition, if you would like to provide a written response to be included in the report, please provide this response by 12:00 pm on Thursday, January 5, 2023, in order for it to be included in the final report. Thank you for your cooperation and feel free to contact me with any questions or concerns.

Sincerely,

A handwritten signature in blue ink that reads "Justin Robinson".

Justin Robinson

WEST VIRGINIA LEGISLATIVE AUDITOR'S OFFICE

Post Audit Division

1900 Kanawha Blvd. East, Room W-329
Charleston, WV 25305-0610
(304) 347-4880

Justin Robinson
Director



December 20, 2022

Matthew Irby, Commissioner
WV State Tax Department
1001 Lee St. E
Charleston, WV 25301

Commissioner Irby,

This is to transmit a draft copy of the Post Audit Division's report on the Managed Timberland Tax Incentive Program. This report is scheduled to be presented during the January interim meetings of the Post Audits Subcommittee. The exact time and date of the meeting has not been set however the January interim meetings are currently scheduled for January 8-10, 2023. We will inform you of the exact time and location once the information becomes available. It is recommended that a representative of the agency be present at the meeting to respond to the report and answer any questions committee members may have during or after the meeting.

If you would like to schedule an exit conference to discuss the draft report and address any concerns you may have prior to its release, please contact Terri Stowers, Executive Assistant, at 304-347-4880 by close of business Friday, December 30, 2022, to arrange this meeting. For your convenience, the exit conference may be conducted virtually. In addition, if you would like to provide a written response to be included in the report, please provide this response by 12:00 pm on Thursday, January 5, 2023, in order for it to be included in the final report. Thank you for your cooperation and feel free to contact me with any questions or concerns.

Sincerely,

A handwritten signature in blue ink that reads "Justin Robinson".

Justin Robinson

Appendix B

West



Division of Forestry
Players Club Drive
Charleston, West Virginia 25311
Phone: (304)-558-2788

Tony Evans
Acting Director/State Forester

January 5, 2023

Mr. Justin Robinson
Director
WV Legislative Auditor's Office
1900 Kanawha Blvd. East
Charleston, WV 25305

Dear Mr. Robinson,

This letter serves as the Division's response to the legislative audit performed by you and your staff and to the draft report issued to our office on December the 20th, 2022 by Mr. Kenneth Jones. In general, we agree that the report serves as an accurate picture of some of the challenges faced by the WVDOF in the administration of the MTL Property tax incentive program.

There is one point mentioned in the report that we wish to offer some insight and feedback on. When the Managed Timberland rule was revised and the current obligations given to Forestry, the Division was in great part funded by the 3.22% severance tax on timber. That tax was first reduced, then later fully repealed by the legislature in 2016 which resulted in a staffing reduction of nearly a third of our field staff. Though some of that funding was replaced through general revenue, our agency was never able to fully recover from that loss of personnel.

As to the recommendations given on the last page of the report, the Division offers the following information: On recommendation 2, given as there seems to be great interest in revising the Managed Timberland code or rule, we plan to wait until after the session is finalized to begin moving our informal procedures to a more formal written list of procedures. On recommendation 6, we have already begun identifying and fixing some of the issues with record keeping that have caused the discrepancies in acreage as exhibited in the report. We believe it to be primarily because of the double reporting of parcels where multiple owners exist that reside at separate addresses. Lastly as to recommendation 8, we did update our application and reapplication forms last year to include a question regarding whether the properties are under a carbon offset agreement, which prompted a great deal of communication between the landowners and the Division regarding eligibility.

Thank you for the opportunity to respond and should you need anything further, please contact myself or Jeremy McGill at (304) 545-0172 or Jeremy.R.McGill@wv.gov.

Sincerely,



Tony Evans

Objectives, Scope, and Methodology

The Post Audit Division of the Office of the Legislative Auditor conducted this post audit as authorized by Chapter 4, Article 2, Section 5 of the West Virginia Code, as amended. The post audit was conducted in accordance with the standards applicable to performance audits contained in the 2018 generally accepted government auditing standards (GAGAS) issued by the Government Accountability Office. Those standards require the audit to be planned and performed to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. The Legislative Auditor believes that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

The Legislative Auditor's Office reviews the statewide single audit and the DOH financial audit annually with regards to any issues related to the wvOASIS financial system. The Legislative Auditor's Office on a quarterly basis request and reviews any external and internal audits of the wvOASIS financial system. Through its numerous audits, the Legislative Auditor's Office is constantly testing the financial information contained in the wvOASIS financial system. In addition, the Legislative Auditor's Office has sought the professional opinion of the reliability of wvOASIS from the Joint Committee on Government and Finance's Fiscal Officer who, along with her staff, uses the wvOASIS system daily. Based upon these actions, along with the audit tests conducted on the audited agency, it is our professional judgement that information in the wvOASIS system is reliable for auditing purposes under the 2018 Yellow book. However, in no manner should this statement be construed as a statement that 100 percent of the information or calculations in the wvOASIS financial system is accurate.

Objectives

The objectives of this audit were to:

1. Determine if the Division of Forestry and the State Tax Department are in compliance with Legislative Rule 110 series 1H and West Virginia Code §11-1C-2; §11-1C-11; §11-1C-11A; §11-1C-11B.
2. Determine if the internal policies and procedures related to the Managed Timberland Program of the Division of Forestry and the State Tax Department align with legislative rule 110 series 1H and WV Code.
3. Determine if communications related to the Managed Timberland Program from the Division of Forestry and the State Tax Department to landowners clearly delineate the rights, responsibilities, and deadlines for landowners.
4. Determine how the annual recertification of the managed timberland compares to the recertification of other timber taxes in all 50 states. Additionally, determine if the recertification is a necessary component of the process.
5. Determine if there are weaknesses in the processes and procedures of the Division of Forestry and the Tax Division regarding the operations of the managed timberland program and make recommendations to correct those identified weaknesses.

Scope

The scope of this audit is (1) for the entire current population of the Managed Timberland program for determining demographics, (2) current recertification policies of all 50 states for determining optional recertification strategies, (3) current documents provided by the Division of Forestry as well as the West Virginia State Tax Department to the landowners for determining if the documentation clearly delineate the rights, responsibilities, and deadlines for landowners, and (4) all recertification applications that had been denied and appealed from 2019 through 2021 to determine if reversal of appeals were provided without bias.

Methodology

Reviewed the Legislative Rule 110 series 1H and West Virginia Code §11-1C-2; §11-1C-11; §11-1C-11A; §11-1C-11B and determined that the Division of Forestry and the State Tax Department follow the provided requirements. Reviewed provisions of the laws and regulations and determined if they are effective in managing the Managed Timberland tax incentive program for both the Division of Forestry and the State Tax Department. Reviewed any internal policies and procedures, written and unwritten, related to the Managed Timberland Program of the Division of Forestry and the State Tax Department and verified if each align with legislative rule 110 series 1H and the relevant portions WV Code. Obtained sample documents of communications related to the Managed Timberland Program from the Division of Forestry and the State Tax Department to landowners including acceptance letters, rejection letters, contracts, notices, etc. and tested for clear communication of the rights, responsibilities, and deadlines for landowners as delineated in the relevant sections of WV Code and Legislative Rule 110 series 1H. Reviewed the demographic information provided by the West Virginia Division of Forestry and the West Virginia State Tax Department to determine if the records between the two agencies were the same.

Appendix D

Summary of Managed Timberland Record Discrepancies Between WV Division of Forestry and WV State Tax Department - 2021 Data by County

County	Number of Parcels by County			Managed Timberland Acres by County		
	Tax Department Number of Parcels	Forestry Number of Parcels	Error Difference (# of Parcels)	Tax Department Acreage Total	Forestry Acreage Total	Error Difference (Acres)
Barbour	271	244	27	23,694.18	24,516.67	822.49
Berkeley	172	188	16	10,078.18	10,443.17	364.99
Boone	172	171	1	107,215.92	107,215.92	-
Braxton	384	355	29	37,197.67	37,690.75	493.08
Brooke	3	3	-	85.10	85.10	-
Cabell	13	14	1	1,422.83	1,477.81	54.98
Calhoun	205	210	5	13,148.38	13,482.05	333.67
Clay	156	128	28	76,961.53	76,965.83	4.30
Doddridge	168	157	11	11,040.52	11,111.82	71.30
Fayette	274	310	36	130,558.71	141,370.38	10,811.67
Gilmer	253	249	4	29,477.40	30,733.42	1,256.02
Grant	121	119	2	39,981.58	40,192.53	210.95
Greenbrier	395	394	1	178,676.42	178,968.21	291.79
Hampshire	928	1,008	80	88,353.64	96,666.27	8,312.63
Hardy	312	317	5	56,366.47	59,559.57	3,193.10
Harrison	131	129	2	6,279.07	6,332.59	53.52
Jackson	54	54	-	5,275.02	5,550.03	275.01
Jefferson	22	29	7	936.29	1,033.71	97.42
Kanawha	152	146	6	73,272.22	73,574.07	301.85
Lewis	714	626	88	42,802.06	44,257.41	1,455.35
Lincoln	48	44	4	11,172.49	11,172.46	0.03
Logan	186	189	3	135,418.08	136,417.73	999.65
Marion	660	693	33	25,190.50	27,121.98	1,931.48

Marshall	104	98	6	5,645.03	5,642.27	2.76
Mason	80	78	2	5,674.71	5,708.01	33.30
McDowell	94	104	10	59,943.93	66,409.49	6,465.56
Mercer	33	37	4	5,381.07	5,516.07	135.00
Mineral	346	365	19	32,092.94	33,941.91	1,848.97
Mingo	120	117	3	49,235.26	49,235.24	0.02
Monongalia	166	165	1	10,444.49	11,116.41	671.92
Monroe	214	219	5	35,264.14	35,605.03	340.89
Morgan	417	432	15	24,032.20	25,441.14	1,408.94
Nicholas	651	505	146	162,442.93	165,348.45	2,905.52
Ohio	4	3	1	83.06	83.06	-
Pendleton	267	284	17	36,755.89	39,549.15	2,793.26
Pleasants	67	70	3	4,348.64	4,683.23	334.59
Pocahontas	380	389	9	43,036.33	46,200.89	3,164.56
Preston	737	706	31	80,974.97	81,425.21	450.24
Putnam	149	117	32	13,684.48	13,861.91	177.43
Raleigh	442	452	10	154,477.06	156,483.45	2,006.39
Randolph	1,242	1,188	54	211,768.55	214,188.38	2,419.83
Ritchie	544	539	5	34,691.48	35,811.91	1,120.43
Roane	240	228	12	15,098.40	15,312.74	214.34
Summers	96	102	6	12,080.37	12,528.36	447.99
Taylor	83	84	1	6,515.20	6,790.76	275.56
Tucker	202	202	-	47,262.34	47,329.52	67.18
Tyler	112	104	8	7,797.75	8,854.82	1,057.07
Upshur	1,071	706	365	57,120.50	57,682.18	561.68
Wayne	117	117	-	11,772.46	11,772.46	-
Webster	935	877	58	173,590.59	173,895.29	304.70
Wetzel	412	411	1	30,462.43	31,032.23	569.80
Wirt	423	410	13	34,899.20	34,886.85	12.35
Wood	132	135	3	8,317.68	8,603.32	285.64
Wyoming	236	230	6	110,814.46	110,815.85	1.39
Grand Totals	15,910	15,251	1,235	2,590,312.80	2,651,695.07	61,413



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WEST VIRGINIA OFFICE OF THE LEGISLATIVE AUDITOR
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