Understanding the Broader Context for Forest Stewardship in New Jersey

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Key Take-Aways

* The Forest Stewardship program IS Farmland Assessment, just with a tweak or two.
* The Forest Stewardship Plan is completely new. Don’t try to compare it to a Woodland Management Plan or the old federal Forest Stewardship Plan.
* The Forest Stewardship program/Forest Stewardship Plan dovetail nicely with existing environmental rules and regulations.
Framework for NJ Forest Stewardship Program

* State Constitution
* New Jersey Statutes
* New Jersey Administrative Code
* Policies, procedures, case law, and individual decisions

* Disclosure: I am not a lawyer, nor do I play one on TV. This does not constitute legal advice.
* Reduced assessment only for land that is “actively devoted to agricultural or horticultural use” (Article VIII, Section I, Chapter 1(b))
* Note the emphasis on active devotion
* Not “casual” devotion...
* Not “passive” devotion (Atlantic Coast LEH, LLC vs. Twp. Of Little Egg Harbor)
* Not “merely incidental” devotion (City of East Orange vs. Twp. Of Livingston)
Farmland Assessment Act of 1964
... as amended in 1986 (woodland provisions)
... as amended in 2010 (NJ Forest Stewardship Act)
... as amended in 2013 (Beck amendments)
N.J.S.A. 54:4-23.1 et seq.
How did the NJ Forest Stewardship Act alter the NJ Statutes?

- Altered the method for determining if land is in agricultural use to include land in compliance with the provisions of a Forest Stewardship Plan (NJSA 54:4-23.3(a))
- Altered the requirement for “gross sales, payments, imputed income and fees received” (minimum income requirement) so as not to apply to land subject to a DEP-approved Forest Stewardship Plan (NJSA 54:4-23.5(b))
- *N.B. in terms of property tax abatement, the NJ Forest Stewardship Act did not create a new set of statutes, but rather inserted those two alternate requirements into the statutes created by the Farmland Assessment Act, as amended.*
State Constitution remains unchanged, and NJ Statutes concerning agricultural property tax abatement received two alternate requirements. Therefore, the traditional Farmland Assessment program remains unchanged. Therefore, properties applying under the new NJ Forest Stewardship program should be viewed through the lens of Farmland Assessment, just with certain alternate requirements. BUT WHY?
Active devotion “to agricultural or horticultural use” (NJ Constitution) remains unchanged.

Annual activity requirement remains unchanged:

NJSA 54:4-23.3 et seq.: “Land shall be deemed to be in agricultural use when devoted to the production for sale of plants and animals useful to man... except that land which is ... devoted as sustainable forestland... fulfills the following additional conditions... [follows Forest Stewardship Plan, annual attestation by forester, and annual application] (emphases added)

This reading of “additional conditions” also appears in Estell Manor City vs. Stern
And what about that annual application?

* NJSA 54:4-23.3(c):
* Written documentation of compliance [with the FSP]
* “...woodland data form setting forth woodland management actions taken in the pre-tax year,”
* The type and quantity of tree and forest products sold,
* The amount of income received or anticipated for the same...
Every other aspect of the Farmland Assessment Act (as amended) remains in place!

Every bit of case law associated with the Farmland Assessment Act (excluding those directly related to income) still applies to Forest Stewardship properties!

If a landowner ends up on tax appeal, they (and their forester!) had better be able to make a strong case that the land is actively devoted to agriculture...

And that still ties directly back to production for sale of tree and forest products, even if they are not being sold

...and establishing the dominant use

But wait, the Act said we don’t need to sell forest products! Yes, BUT...
Suppose 8 acres of cropland harvested (“wide open” with no intention to reforest) + 15 acres of non-appurtenant woodland (under a Forest Stewardship Plan)

NJSA 54:4-23.5(b) “The gross sales [requirement]... shall not apply to land that... is the subject of a forest stewardship plan...”

NJAC 7:3-1.3 “Forest Stewardship Plan’ means a plan that is prepared and implemented by an owner of forest land...”

NJAC 7:3-5.1(c) “…land is forest land if it... (1) Has at least 10% canopy cover; or (2)...” is regenerating or will be reforested within the term of the plan

Therefore, the 8 acres of cropland harvested is subject to the gross sales requirement.
But wait, I thought this was supposed to be completely different!

- No, and yes.
- Where the Forest Stewardship program is completely different from traditional Farmland Assessment is the Plan...
- ...and the monitoring.
- Completely different regulations, separate and distinct from those governing Woodland Management Plans.
If a client wanted Farmland Assessment, then a Woodland Management Plan (requirements found in NJAC 18:15-2.10)

If a client wanted cost-share funding through NJ Forest Service/US Forest Service, then a federal Forest Stewardship Plan (requirements found in guidelines published by NJ Forest Stewardship Committee dated 6/16/2016, resulting from USDA Forest Service’s Forest Stewardship Program National Standards and Guidelines document dated October 2015)

A federal Forest Stewardship Plan met the requirements for a woodland management plan.

But wait! There’s more...
What kinds of plans were out there prior to the publication of the rules?

* If you wanted cost-share through USDA NRCS or if you wanted subsequent forestry activities to qualify for cost share through USDA NRCS programs such as EQIP, then a Forest Stewardship Plan Conservation Activity Plan (106-Forestry) (requirements found in USDA NRCS’s Field Office Technical Guide).

* A federal Forest Stewardship Plan met the standards for a CAP plan... so many of us assumed a federal Forest Stewardship Plan and a Conservation Activity Plan (106-Forestry) were the same thing... nope!
What kinds of plans are out there right now?

* If a client wants Farmland Assessment, either a Woodland Management Plan (requirements found in NJAC 18:15-2.10)...
* ...or a Forest Stewardship Plan (requirements found in NJAC 7:3-5.2)
* A Forest Stewardship Plan can (might?) be cost-shared through NJ Forest Service/US Forest Service.
* *N.B. I’ve dropped the word “federal” from the name. The new rules essentially replace the old guidelines.*
* But wait! There’s more...
If you want cost-share through USDA NRCS or if you want subsequent forestry activities to qualify for cost share through USDA NRCS programs such as EQIP, then a Conservation Activity Plan (106-Forestry) (requirements found in USDA NRCS’s Field Office Technical Guide).

N.B. This fall, USDA NRCS’s NJ State Office sent clarification of the name of this type of plan and removed all references to Forest Stewardship Plans to avoid confusion.

A Forest Stewardship Plan meets the standards for a CAP plan.

A Woodland Management Plan, with additional information such as T&E species considerations, can meet the requirements for a CAP Plan (refer to the Field Office Technical Guide).
Today, we need to think of Forest Stewardship Plans as being COMPLETELY DIFFERENT from Woodland Management Plans.

In the past, a federal Forest Stewardship Plan was essentially a Woodland Management Plan with a couple of tweaks. No more!

Completely different legislative mandate = COMPLETELY DIFFERENT PLANS!!!

Can an existing federal Forest Stewardship Plan be “upgraded” to be a Forest Stewardship Plan in accordance with the new rules? Yes, but it is not easy. Why not? Because they are COMPLETELY DIFFERENT!
Being able to apply for property tax abatement through the NJ Forest Stewardship program is a clear environmental benefit for forest landowners...

- ...with smaller properties
- ...with forests already at optimal stocking levels
- ...whose properties are dominated by wetlands, *bona fide* steep slopes, and other sensitive environmental factors
- ...whose properties are dominated by low-economic-value trees
- And more...
Which non-appurtenant woodland owners should receive reduced property tax assessment under the traditional Farmland Assessment program?

- Those following a DEP-approved Woodland Management Plan or Forest Stewardship Plan
- Annual filing is timely and complete
- Annual agricultural activity requirement
- Annual agricultural income requirement
Decision-making

* Which non-appurtenant woodland owners should receive reduced property tax assessment under the NJ Forest Stewardship program?
* Those following a DEP-approved Forest Stewardship Plan
* Annual filing is timely and complete
* Annual agricultural activity requirement
  - Can there be other activities, whose primary objectives are for wildlife, rare plants, etc.? Yes.
  - BUT there must be enough agricultural activities related to production of wood or forest products.
  - Treat those other activities as the icing on the cake.
  - Treat those other activities as other agricultural activities had been treated, such as boundary marking, and access trail maintenance.
Which activities are related to production in a forest?

- Forest stand improvement thinning
- Vine and brush control
- Tree planting
- Prescribed burning
- Site preparation
- Protection from pests
- Restoration activities following loss
- Related to production of non-traditional forest products such as maple syrup, ginseng, etc.
- *(This is not an exhaustive list.)*
Which activities are not related to production in a forest?

- Inventory/resource assessment
- Monitoring
- Erecting deer exclosure fences (unless there is clear evidence that deer – and not light conditions or invasive plants – are having a major impact on forest health)
- Erecting bird or bat houses
- Planting of non-woody vegetation in meadows
- *This is not an exhaustive list.*
- Am I saying these activities shouldn’t happen? No.
- But in and of themselves, they are not sufficient to gain preferential tax treatment.
What about other environmental laws in NJ? Where does this fit in?

- Freshwater Wetlands Protection Act
- Flood Hazard Area Control Act
- Highlands Water Protection and Planning Act
- Pinelands Protection Act
- Municipal tree cutting ordinances
NJAC 7:7A-2.4(d) exempts “…activities, in accordance with a forest management plan approved by the State Forester before the conduct of those activities…”

Provided that the plan and activities conform to BMP’s (NJAC 7:7A-2.4(b)4)

Further specifies that Woodland Management Plans must address wetlands (BMP’s) (NJAC 7:7A-2.4(d))
Flood Hazard regs

* Permit-by-rule at NJAC 7:13-7.26(a) “…provided [activities] are conducted in accordance with a forest management plan that has been approved by the New Jersey State Forester…”

* “Forest management plan” is undefined in the Administrative Code promulgated under either FWPA or FHACA, so therefore it defaults to DEP Forest Service policies and procedures.

* DEP guidance document “Re: Forest Management Plans and DEP Division of Land Use Regulation Permits” dated August 24, 2009 specifies that a “forest management plan” is either a Forest Stewardship Plan, a Woodland Management Plan that includes criteria found in the BMP manual, or a Harvesting Plan.

* By synchronizing the old federal Forest Stewardship Plan requirements to the new Forest Stewardship Plan requirements, Forest Stewardship Plans qualify for exemptions and permits-by-rule under FWPA and FHACA.
* NJ Forest Stewardship Act amended the forestry exemption to add Forest Stewardship Plans to the types of DEP-approved plans allowed.
* Is this a free pass for forestry? No.
* It recognizes DEP Forest Service as the correct regulator for forestry activities in the Highlands region.

Final Report did not specifically reference the old federal Forest Stewardship Plan requirements and monitoring is specified as optional on private lands.

No change to planning requirements.
Municipal ordinances (excepting Pinelands ordinances)

- NJ Forest Stewardship Act supersedes ordinances, rules, and resolutions enacted prior to the enactment of the Act.
- Local governments may not pass ordinances, rules, and resolutions that “conflicts with, prevents, or impedes the implementation of” a DEP-approved Forest Stewardship Plan, or impose a fee of more than $100 for the cutting of trees in accordance with a DEP-approved Forest Stewardship Plan.
- NJSA 13:1L-34
- *Does anyone want to hire a lawyer to press this issue?*
Municipal ordinances (examples)

* Exemption reads: “Trees cut down or removed in accordance with a forest or agricultural management plan that has been approved by the proper state or federal authority.”
* Yes!

* Exemption reads: “Trees cut down or harvested in accordance with a woodland management plan approved by the DEP State Forester...”
* Yes! Why? NJSA 13:1L-31(d) “A Forest Stewardship Plan approved pursuant to this section shall be considered to be a woodland management plan...”
Restricts tree cutting generally.

Exemption for “…trees in compliance with a woodland management plan that has been approved by NJDEP pursuant to NJSA 54:4-23.3 and NJAC 18:15-2.7 as part of an approved farmland assessment that is on file with the [tax assessor]”

NJSA reference includes Forest Stewardship Plans, but NJAC reference does not.

Ordinance is so specific it shoots itself in the foot.

In reality, since Forest Stewardship Plans are more robust than Woodland Management Plans written to minimum standards, enforcement would be unlikely.
Grey areas and Unresolved questions

- How much weight will be given by assessors, tax boards, and the tax courts to forestry activities furthering objectives that are not directly or indirectly related to production?
- What will the first tax appeal on a Forest Stewardship Plan look like? (And what consulting forester would want to be that test case?)
- Is there an opportunity for NRCS and professional foresters to draft plain-language guidance for additional requirements for a Woodland Management Plan to be a CAP 106-Forestry plan?
- How to tax-exempt private lands and municipal and county lands fit in (i.e. lands not applying for Farmland Assessment, or not in the Forest Stewardship program)?
- Is there an opportunity to re-approach municipalities regarding updating their tree cutting ordinances?
Questions?

* Thank you.