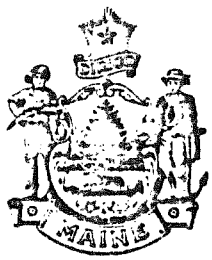
JAMES E. TIERNEY
ATTORNEY GENERAL



STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

January 20, 1982

Raymond L. Halperin
State Tax Assessor
Bureau of Taxation
Room 500, State Office Building
Augusta, Maine 04333

Dear Mr. Halperin:

This responds to your request for advice concerning the recent amendments to the Tree Growth Tax Law by which the Legislature has imposed additional requirements for tree growth classification. See 36 MRSA § 571 et seq. as amended by P.L. 1981, c. 517. You have inquired whether the penalties established by Article IX, Section 8 of the Maine Constitution and 36 MRSA § 581 should be imposed on the landowners who no longer qualify for tree growth classification under P.L. 1981, c. 517.[1]

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1. You also have asked whether, because of the changes made by P.L. 1981, c. 517, all owners of parcels currently classified under the tree growth statute must reapply for classification in 1982. In answer to this question, we believe that it is clear that annual applications for classification under the statute are not required and that the blanket submission of the statements, plans, and affidavits required by statute would only be necessary in the first year of the new statute's operation, and thereafter, only when a landowner changes the use of his land. This statement should be qualified of course by the fact that it may become necessary in the ordinary course of business for the State Tax Assessor or the municipal assessors to request certain landowners to make special filings at various times, and 36 MRSA § 579 authorizes assessors to request such filings (schedules) "at such other times as the assessor may designate upon 90-days' written notice."

As you know, P.L. 1981, c. 517, changed the definition of "forest land" under the tree growth statute. Prior to this change, forest land was defined as "land used primarily for growth of trees and forest products . . . ." P.L. 1973, c. 308 § 2. Forest land is now defined, however, as "land used primarily for growth of trees to be harvested for commercial use . . . ." (emphasis added). As proof of such "commercial harvesting" of trees, an applicant for tree growth classification now must present the following evidence or fulfill the following conditions in order to meet the requirements of the statute, according to the manner in which his land is to be used:

> 1. Business. A sworn statement from the landowner establishing that the landowner is engaged in the business of selling or processing forest products and that the land is used in such business;
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> 2. Inspection by registered professional forester. A sworn statement from the landowner that the land has been inspected by a registered professional forester within the past 5 years and that the landowner is following the recommendations of that forester;
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> 3. Written forest management plan for commercial use. A written forest management plan for commercial use of the land, accompanied by a sworn statement from the landowner that he is following that plan; or
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> 4. Land of less than 100 acres. The land is less than 100 acres and the landowner is managing the land according to accepted forestry practices designed to produce trees having commercial value. P.L. 1981, c. 517, § 4

Finally, P.L. 1981, c. 517 removed the mandatory classification under the tree growth statute of forest land parcels exceeding 500 acres.

As you know, Article IX, section 8 of the Maine Constitution provides for the automatic imposition of a penalty when a landowner changes the use of land which is classified under the tree growth statute to a use which is higher than that permitted by the statute. Specifically, Article IX, section 8, provides:

> In implementing paragraphs A, B and C [paragraphs describing classes of property which can be valued at current use value], the Legislature shall provide that any change of use higher than those set forth in paragraphs A, B and C, except when the change is occasioned by a transfer resulting from the exercise or threatened exercise of the power of eminent domain, shall result in the imposition of a minimum penalty equal to the tax which would have been imposed over the 5 years preceding that change of use had that real estate been assessed at its highest and best use, less all taxes paid on that real estate over the preceding 5 years, and interest, upon such reasonable and equitable basis as the

Legislature shall determine.

In addition, 36 MRSA § 581 provides an identical penalty and states more specifically how such a penalty is to be imposed. Section 581 states in pertinent part:

> If the assessor determines that land subject to this subchapter no longer meets the requirements of this subchapter, the assessor may withdraw the parcel from taxation under this subchapter. The owner of land subject to this subchapter may at any time request withdrawal of any parcel, or portion thereof, from taxation under this subchapter by certifying to the assessor that the land is no longer to be classified under this subchapter.
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> . . . .
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> In either case, and except when the change is occasioned by a transfer to the State or other entity holding the power of eminent domain, resulting from the exercise or threatened exercise of that power, withdrawal shall impose a penalty upon the owner which shall be the greater of (a) an amount equal to the taxes which would have been assessed on the first day of April for the 5 tax years, or any lesser number of tax years starting with the year in which the property was first classified, preceding such withdrawal had such real estate been assessed in each of those years at its fair market value on the date of withdrawal less all taxes paid on said real estate over the preceding 5 years, and interest at the legal rate from the date or dates on which said amounts would have been payable or (b) an amount computed by multiplying the amount, if any, by which the fair market value of the real estate on the date of withdrawal exceeds the 100% valuation of the real estate pursuant to this subchapter on the preceding April 1st, by the following rates: 10% from April 1, 1973 to March 31, 1978, 20% from April 1, 1978 to March 31, 1983 and 30% after March 31, 1983. Fair market value at the time of withdrawal is the assessed value of comparable property in the municipality adjusted by the municipality's certified assessment ratio.

This office has previously concluded, with some uncertainty, that when a withdrawal of property from tree growth classification was to be effected by legislative action rather than landowner action, the penalties for withdrawal under Article IX, section 8 of the Maine Constitution, and 36 MRSA § 581 should not apply. Opinion of the Attorney General, February 23, 1980 (letter to Senator Teague and Representative Post). The legislative action which was the subject of that opinion was a proposed bill, L.D. 1775 (109th Leg., 1980) which would have removed mandatorily from tree growth classification all forest land within 250 feet of certain bodies of water. Implicit in

the reasoning of our opinion regarding L.D. 1775, however, was that the mandatory legislative removal from tree growth classification of all land in Maine within 250 feet of certain waterways would be closely analagous to the exercise by the State of the power of eminent domain, a situation which both Article IX, section 8 of the Maine Constitution and 36 MRSA § 581 both expressly exclude from the automatic imposition of the penalty. Under proposed L.D. 1775, there was no possible action that persons who were using their land for purposes which were consistent with the statute could take to avoid the loss of tree growth classification, and the removal from tree growth classification of all land in certain categories under L.D. 1775 was to be accomplished mandatorily by the state.

In interpreting the recent changes made by P.L. 1981, c. 517, however, we believe that we are faced with a different situation. Persons who are currently legitimately using tree growth classification for their forest land will find little difficulty in continuing to comply with the statute. All that is required of such persons who desire to continue to qualify under the tree growth law is the filing of relatively simple statements, plans, or affidavits which affirm that land is, in fact, being used for purposes which are consistent with the statute. In addition, we believe that the filing of such factual statements, plans, or affidavits in no way rises to the dignity of the exercise or threatened exercise of the power of eminent domain by the state, and both the Maine Constitution and the tree growth statute itself say that, unless such a situation is present, the penalties for withdrawal of land from tree growth classification shall apply.

Also, we believe that the statutory scheme of the tree growth law has always been to encourage the most efficient commercial use of the State's forest lands, and that truly noncommercial forest land was never intended to receive the benefits of tree growth classification. Prior to the amendments effected by P.L. 1981, c.517, the definition of forest land eligible for tree growth classification was "land used primarily for the growth of trees and forest products . . ." (emphasis added), and we believe that the use of the words "forest products" clearly denotes some kind of commercial use of tree growth land. Further support for this interpretation is provided by the statement of purpose of the original tree growth statute, unchanged by the amendments of P.L. 1981, c. 517, which specifically stated:

> Therefore, this subchapter is enacted for the purpose of taxing forest lands generally suitable for the planting, culture and continuous growth of forest products on the basis of their potential for annual wood production in accordance with the following provisions.[2] P.L. 1971, c. 616, § 8 (emphasis added).

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2. See also, Opinion of the Justices, 335 A.2d 904, 912 fn.1 (1975), in which the Maine Supreme Judicial Court specifically recognized the essential policy of the tree growth statute as that of promoting "commercial forestry".

Therefore, it appears to us that the amendments to the tree growth statute effected by P.L. 1981, c. 517, in large part simply clarify the applicability of a consistent policy regarding the taxation of commercial forest lands which has been in effect since the original enactment of the statute. Because of this, and because we believe that the filing requirements established by P.L. 1981, c. 517 will not impose unreasonable burdens upon persons who are currently legitimately availing themselves of the benefits of the statute, we believe that the penalty provisions of Article IX, section 8 of the Maine Constitution and 36 MRSA § 581 are applicable against persons who do not fulfill the new filing requirements of the tree growth statute.

I hope that this opinion is of assistance to you, and if you have any other questions, please do not hesitate to contact this Office.

Sincerely,

JAMES E. TIERNEY
Attorney General

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