Before the
State of Wisconsin
DIVISION OF HEARINGS AND APPEALS

In the Matter of Manual Code 3565.1 for The Approval Authorizing the Department of Natural Resources to Grade More Than 10,000 Square Feet On the Bank of North Lake, Install a Boat Ramp Structure and Two Outfall Structures on the Bed of North Lake, Install Four Culvert Crossings Over Wetlands, and Fill Up to 0.16 Acres of Wetlands for Construction of a Public Boat Launch on North Lake And Adjacent Property Located in the Town of Merton, Waukesha County	Case Nos. IP-SE-2009-68-05745 IP-SE-2009-68-05746 IP-SE-2009-68-05747 IP-SE-2009-68-05748 IP-SE-2009-68-05749 IP-SE-2009-68-05750

RRNA BRIEF IN RESPONSE TO THE DNR'S MOTIONS FOR VARIOUS ORDERS REGARDING THE CONTESTED CASE HEARING

INTRODUCTION

The RRNA wishes to begin by addressing the DNR's assertion that the "[p]etitioners have not prevailed in any proceeding to date, but nonetheless continue their strategy to prevent construction of the DNR public boat launch…. It appears that petitioners hope to force DNR and DHA to spend time and money addressing meritless issues." DNR 9-12-11 Brief, p. 8.

The DNR Brief is replete with complaints about how the NLMD and the RRNA have pursued a meritless course of prolonged litigation against the

hapless DNR. In fact, the Manual Code Approval which is the subject of this hearing was only issued on November 4, 2010. Before that date, there may have been extensive negotiations, public hearings and a couple of quiet title actions, but very little in the way of litigation under Chapter 227. There was a short lived lawsuit which was commenced eight weeks before DNR issued the Manual Code Approval, but that was dismissed without prejudice by stipulation shortly after issuance of the Manual Code Approval. The DNR purchased the Kraus Site (which is where the DNR plans to build their launch) in 2005. Any delay in starting construction cannot fairly be attributed to the Petitioners because it was the DNR that did not get around to issuing a Manual Code Approval until November 4, 2010.

In point of fact, before the Manual Code Approval was issued the RRNA and the NLMD were powerless to seek any significant relief concerning the proposed construction at the Kraus Site under Chapter 227, which counsel for the DNR has often pointed out repeatedly is the only way to sue the DNR.

The DNR cites eight alleged "suits" against the DNR as proof of the litigious nature of the RRNA and the NLMD (hereafter, the "Petitioners"). DNR Brief, pp. 7-8. In fact, the first two actions the DNR lists (Ruesch and Hanson) were in the nature of quiet title actions between the owners of private property on Reddelien Road and the DNR concerning the extent of an easement over the owners' private property. Moreover, these two actions

actually involved efforts by the DNR to curtail the property rights of private citizens and were not an attack on the DNR. The third and fourth actions (regarding an "EA" and Case 09CV502) involved an environmental assessment challenge and related in large part to an entirely different boat launch site than the Kraus Site. The sixth and seventh actions (regarding the NLMD's petition for judicial review in Case No. 10CV5085 and RRNA's petition for judicial review in Case No. 10CV5096) are really part of this action and have been stayed until there is a decision in this pending contested case hearing.

The eighth action is interesting, in view of the DNR's assertion that the "[p]etitioners have not prevailed in any proceeding to date." It concerns a storm water permit (or grant of coverage) issued by the DNR to itself which is now the subject of an action pending before Judge Davis as Waukesha Circuit Court Case No. 10CV5341. In that case, the DNR applied to itself for a permit and then only served the permit on itself. The RRNA first discovered the existence of this permit 43 days after its issuance and immediately sought judicial review. The DNR moved to dismiss on the grounds that the 30 day deadline for appealing the permit under Wis. Stats. §227.52 had expired.

On July 29, 2011 Judge Davis ruled in favor of the RRNA and denied the DNR's motion to dismiss. The following are Judge Davis' comments from the official transcripts of the June 17, 2011 and July 29, 2011 hearings concerning the DNR's actions:

> I find it kind of interesting [that] the DNR applied to itself. Most people in this world would like to be both the applicant and the judge on their application.… So how can you ignore the neighbors [like Fritz Hanson] with a 275 foot or longer property line immediately adjacent to your football size field proposed parking lot [by] saying that they don't have any right to get notice when you decide to let the lot be put there? … How can the 30 days start running against anybody until you serve somebody? [Doesn't the DNR] have to serve somebody?… It's … my conclusion that the DNR website posting that was argued about is not service on anyone, it's not notice [to] anyone, it's irrelevant. It's simply -- might qualify as an open records access, or a public service, or a good idea, but there is no legal basis to conclude that that constitutes any notice of service on anyone. It is the Court's view here that until the subsequent service was made on one of the plaintiffs that the DNR had not given or served notice on anyone.… I don't see how the DNR can give anything that is called a notice to itself.

The Petitioners aren't certain how the DNR defines "prevailed," but it is hard to understand how anyone could characterize Judge Davis' ruling as a win for the DNR.

I. A Site Visit Should only Occur After the Hearing.

Some of the counsel representing the Petitioners has had experience with field visits during other civil litigation. It has been their experience that when a field visit is requested a judge will order that it occur during the requesters' case-in-chief. The DNR has made it abundantly clear that the Petitioners must go first and have the burden of proof. And yet, they want to dictate what occurs during the Petitioners' case-in-chief.

This invades the prerogatives of the Petitioners' counsel to present their case-in-chief according to their strategic plan and further compromises the due process rights of the Petitioners. This is because subpoenas have been issued,

schedules arranged and a plan of presentation planned which will be disrupted if the Petitioners are forced to delay the commencement of their case-in-chief. In addition, the Petitioners have a plan which requires the careful laying of a foundation before calling certain witnesses. Finally, the Petitioners have arranged to have two witnesses travel to Wisconsin from out of state. One has to leave Monday afternoon and cannot return. DNR's proposal asking for an onsite visit at the start of the proceeding would disrupt Petitioners' case. If there is to be an onsite visit it should occur during the DNR's case-in-chief.

II. There Should be an Order of Proceeding.

Petitioners agree that an Order of Proceeding will be conducive to an orderly and productive hearing. However, who has the burden of proof on any particular issue, or when the burden shifts, are matters which should be addressed in post hearing briefs. The hearing itself should be confined to the taking of testimony and receiving of exhibits, subject of course to questions of relevance and admissibility.

The DNR attempts to limit their proposed Order of Proceeding in Section I of their Brief to two issues: "[Proving the DNR is incorrect] 1) in its determination that there are no navigable water bodies on or adjacent to the DNR site except for North Lake, an unnamed ditch/swale/stream on the North side of the DNR property and a large wetland complex west of the DNR property, and 2) its determination as to the extent and boundaries of those water bodies as they abut or lie upon DNR property." *Id.* at p. 2. There is a

suggestion that the Petitioners must proceed to address just those issues in that order and yet the rest of the DNR's Brief suggests just the opposite.

The DNR contradicts itself just two pages after its pronouncement of the two issues in its Order of Proceeding when it states that the RRNA may also provide evidence regarding: 1) Whether the area circled in orange on [RRNA] Ex. E … contains navigable waters. 2) Whether the presence of navigable waters within the orange circled area render the MC Approval of proposed activities in navigable waters on or adjacent to the DNR property invalid. 3) Whether DNR is required to conduct further navigability tests on or adjacent to the DNR property. 4) Whether the MC Approval identified any navigable waters impacted by the activities approved in the MC Approval with sufficient specificity.

The DNR also fails to fully express the issues as to which the DNR granted a contested case hearing. At the top of p. 5 of its Brief, the DNR states that the NLMD is limited to its Issue 18e, which provides "Did the WDNR understate the Proposal's impact on navigable waters at the Department Site?" In fact, the DNR's December 23, 2010 decision on the NLMD's petition for a contested case hearing states as follows: DNR GRANTS a hearing… on "whether DNR erroneously failed to identify navigable waters at the DNR site." That grant goes on to incorporate various other sections of the NLMD's petition, including NLMD's Pet. pp. 8-9, par. 12c and p. 24, par. 16 b. The NLMD's petition at p. 8, par. 12c reads as follows:

> [T]he WDNR failed to identify precisely which portions of the Department Site are navigable-in-fact and failed to consider additional navigable waters at the Department Site which should have been factored into the WDNR's decision, because permits are required to build structures or place deposits on the bed of navigable streams. See Wis. Stats. §§30.10(2), 30.12, 30.20 and 281.31(1).

Therefore, based on the foregoing a more proper formulation of the issues for the hearing, all of which relate to "navigability," are as follows:

1) Was the DNR correct when it determined that there are no navigable water bodies on or adjacent to the DNR Site except for North Lake, an unnamed ditch/swale/stream on the North side of the DNR property and a large wetland complex west of the DNR property?

2) Was the DNR correct when it determined the extent and boundaries of the navigable water bodies as they abut or lie upon DNR property?

3) Does the area circled in orange on [RRNA] Ex. E … contain navigable waters? If yes, does the presence of navigable waters within the orange circled area render the MC Approval of proposed activities in navigable waters on the DNR property invalid?

4) Did the DNR understate the proposed project's impact on navigable waters at the Department Site?

5) Does the MC Approval identify navigable waters impacted by the activities approved in the MC Approval with sufficient specificity?

6) Did the DNR fail to consider additional navigable waters at the Department Site which should have been factored into the WDNR's decision, because permits are required to build structures or place deposits on the bed of navigable streams. See Wis. Stats. §§30.10(2), 30.12, 30.20 and 281.31(1)?

The DNR goes on to assert at the bottom of p. 5 of its Brief that a number of issues must be excluded "unless the petitioners prove such

evidence directly bears on the only issues at hearing – the navigable water issues." It then enumerates 8 issues it asserts should be excluded. As it does so often in its Brief, the DNR is attempting to anticipate the evidence which the Petitioners will present before they are even given an opportunity to present it. Its seems as if they are attempting to short circuit the hearing process; to hurry it along so that the DNR can get this "due process" business out of the way.

The Petitioners should be allowed to present all of their evidence. If the ALJ decides that certain evidence is not relevant or cumulative when he hears it, that is when a ruling should be made on admissibility, relevance, etc. The Petitioners should be afforded their due process rights to at least present their evidence and have the ALJ rule on that evidence **as it is presented**.

When the DNR asserts, as it does at the bottom of p. 5 of its Brief, that "DNR asks the ALJ to completely prohibit evidence that has no bearing on the issue of the existence, location areal extent and legal effect of navigable water bodies on the DNR property" the DNR is asking for the ALJ to rule in a vacuum without hearing evidence or arguments concerning its relevance or admissibility.

The DNR is asking the ALJ to speculate and issue rulings without even allowing the Petitioners an opportunity to try to make a case for the presentation of particular evidence and attempt to tie it into issues regarding navigability. The DNR's request would deprive the Petitioners of elemental due process and force the ALJ to rule on issues in advance of the hearing

without benefit of any facts. Even motions to dismiss and motions for summary judgment require allegations of fact or affidavits setting forth facts. The DNR would do away with facts in favor of edicts laid down without reference to any facts.

The foregoing applies to a number of the DNR's claims. For example, at p. 6 of the DNR's Brief the DNR would have the ALJ preclude the Gestra Report out of hand without allowing the Petitioners to at least present evidence and argue why the Gestra Report may be relevant to issues of navigability. Similarly, the DNR speculates that the Petitioners are trying to "get evidence admitted" about storm water, long before the Petitioners are even given a chance to present any evidence or make any arguments grounded in fact. It is as if the DNR is afraid to allow the Petitioners to even try because it does not trust the ALJ to make sound decisions based on facts actually proffered at a hearing. The ALJ should be allowed to do his job as the evidence comes in. DNR evidently would prefer to attack imagined problems that may never even come to pass.

The same applies to DNR's speculative arguments regarding Surveyor Mark Powers (DNR Brief p. 6). Why can't the DNR do like other litigants and allow a witness to testify before raising imagined problems which may never come to pass? If Mr. Powers or any other witness begins to stray from issues relating to navigability, DNR can object and the ALJ can deal with it then. Neither due process nor the perception of fundamental fairness are served by

speculating about what a witness will testify to before he is sworn and asked a single question.

The same is true for the other witnesses mentioned by the DNR. The DNR is engaging in a feast of speculation concerning what each lay witness may or may not say and trying to prevent the ALJ from hearing any testimony which may be irrelevant or repetitive long before the witnesses are sworn. Petitioners represent that it is their intent to have their witnesses address issues only going to navigability. If a witness starts to go astray, it can be handled during the hearing.

III. An Order Limiting the Number of Witnesses Petitioners May Call will Violate the Petitioners' Due Process.

The DNR asserts that Petitioners should be limited to "calling 3-4 lay witnesses between them . . . ." DNR Brief, p.9. Coming from an Agency of the State of Wisconsin, such a request is positively breathtaking. We assume that the DNR has overlooked the fact that the Constitutions of Wisconsin and the United States also apply to the DNR. Beyond that, the DNR's request is just one more example of its speculative fears about what the Petitioners' witnesses may say before they testify. The DNR is again asking the ALJ to protect it from its imagined fears.

It is at this point (*id. at* p. 9) that the DNR first complains of the litigiousness of the Petitioners. As noted *supra,* for there to be litigiousness there has to be litigation. Litigation concerning the Manual Code Approval under Chapter 227 was not even possible until November 4, 2010 and the

hearing which is scheduled to begin next week is the very first evidentiary hearing that has been conducted regarding the DNR's Manual Code Approval.

The DNR's insinuation that the imagined litigation inflicted on the DNR has been both meritless and done for the improper purpose of costing the DNR and the State of Wisconsin money and time is very troubling. Perhaps the DNR may be suggesting that Petitioners are attempting to block all public access to North Lake, but nothing could be farther from the truth. The Petitioners favor public access to North Lake. And in fact for several years the NLMD has presented the DNR with another viable option for public access at a location know as the "Kuchler Site" which would offer the same access in a downtown Northern Lake location instead of the scenic, wooded Kraus Site. To date, DNR has rejected this option.

In Petitioners' view, the DNR's proposed Kraus Site is very similar to what it did twenty years ago when it took down Funks Dam and caused inestimable damage to North Lake. In *Froebel v. DNR*, 217 Wis. 2d 652, 579 N.W.2d 774 (Ct. App. 1998), the DNR was sued for the damage it had done when it violated its own rules and took down Funks Dam, thus causing a great deal of harm to North Lake. The *Froebel* Court ruled that it could not force the DNR to clean up the mess it had caused. However, Judge Nettesheim lamented this fact and wrote the following:

> We join in the ALJ's criticisms of the DNR's practices in this case. We would expect the DNR, as the protector of this state's natural resources and the chief enforcer of our laws protecting those assets, to abide by the rules which it imposes and enforces

> on others. We also would expect it to abide by the promises and representations it makes to the public regarding its own activities. These expectations may perhaps explain why the legislature has not deemed it necessary to create laws which make the DNR subject to the requirements imposed on others. However, we cannot rewrite the existing laws to accommodate Froebel's legitimate complaints. His arguments and his criticisms are more properly directed to the legislature.

Id. at 673.

Now the DNR is back again with assurances that the citizens of North Lake have nothing to fear from the proposed boat launch on the Kraus Site. It appears to take umbrage that the citizens of North Lake want to insist that the DNR proceed with special care so that the calamity of Funks Dam is not repeated. It obviously would prefer that Petitioners drop this due process nonsense so that it can get on with putting an aircraft carrier-sized asphalt parking lot into a residential neighborhood. And what if the DNR is wrong about the harm that may result? Will it say what it said about Funks Dam? "Sorry folks, but it's not our problem."

Despite the fact that experts say that more silt or pollution could create further harm to beautiful North Lake, the DNR says don't worry, trust us. In this case, the fact is that the citizens of North Lake are simply exercising their due process rights to be heard **before** the DNR acts at the Kraus Site, because we know from *Froebel,* once harm has been inflicted the DNR can simply wash its hands and move on.

The DNR suggests that the Petitioners intend to present too many witnesses in what it says is, after all, just a garden variety case about

navigability. However, in a case where the DNR was attempting to prove navigability just like as the Petitioners are in this case, the DNR did not hesitate to call many more witnesses, often offering very repetitive and duplicative testimony.

Attached "Exhibit A" contains several pages of the DNR Brief to the ALJ following the contested case hearing that finally led to the decision in *Village of Menomonee Falls v. DNR*, 140 Wis. 2d 579, 412 N.W.2d 505 (1987). The contested case hearing in the *Menomonee Falls* case was held in three segments over a period of 5 weeks. Testimony was taken from forty-one witnesses (most of them called by the DNR) and one-hundred and twenty-four exhibits were received. The transcript of the hearing was 1,116 pages in length. Ex. A, p. 1. The Village of Menomonee Falls sought a contested case hearing on the DNR's finding that Lilly Creek was navigable. *Id.* at p. 2.

One of Petitioners' experts, Dr. O'Reilly, was a witness for the DNR in the *Menomonee Falls* case and could speak to the extraordinary lengths the DNR went to prove navigability, often calling many multiple witnesses to prove the same point. In fact, the attached brief makes clear that the DNR called over eight lay witnesses, who were also neighbors of Lilly Creek, in order to proof the Agency's contention that Lilly Creek was navigable.

In the *Menomonee Falls* case the DNR made a very great deal of just how precious even a small amount of navigable water is to the public. The DNR quoted at p. 12 of the attached as follows from a Wisconsin Supreme

Court case (from *Hixon v. PSC,* 32 Wis. 2d 608, 146 N.W.2d 577 (1966) at pp. 631-632):

> There are over 9,000 navigable lakes in Wisconsin covering an area of over 54,000 square miles. A little fill here and there may seem to be nothing to become excited about. But one fill, though comparatively inconsequential, may lead to another, and another, and before long a great body of water may be eaten away until it may no longer exist. Our navigable waters are a precious natural heritage; once gone, they disappear forever [Emphasis supplied by the DNR in the original].

Now, it is the Petitioners who are trying to prove navigability. When the shoe is on the other foot, the DNR claims that the Petitioners may call too many witnesses. To put it mildly, that is ironic.

Regarding the last points made by the DNR concerning certain witnesses which the Petitioners might call (like Mr. Morrissey or Ms. McCutcheon), again why don't we wait for them to be called? Let's cross one bridge at a time, as we ordinarily do in other civil litigation.

CONCLUSION

The Petitioners strenuously object to any prior constraints on their due process rights to be heard by the ALJ. If the testimony comes in and the ALJ deems it to be far afield or irrelevant, that is when the ALJ should act.

The citizens of North Lake are just as important as any other citizens in Wisconsin. They fear that the DNR will do serious environmental damage to a beautiful wetlands and wooded area and destroy navigable waters. The Petitioners want and deserve to have the opportunity to receive a full and fair hearing and to be accorded the same due process rights which the DNR was

only too happy to claim for itself in the *Menomonee Falls* case. To put it succinctly, what is good for the goose is good for the gander.

Dated: September 16, 2011

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State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

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BOX 7921
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8300

August 7, 1985

Mr. Patrick Currie
Hearing Examiner
Division of Hearings and Appeals
310 North Midvale Boulevard
Madison, WI 53705

RE: Menomonee Falls, Lilly Creek, Docket Numbers 3-SE-84-038; 3-SE-84-402; and 3-SE-84-736

Dear Mr. Currie:

Enclosed please find the brief of the Department of Natural Resources in the above-entitled matter.

I have on this date mailed a copy to Mr. Hayes of the Village. It is my understanding that the other persons who made appearances at the hearing are not involved in the briefing process.

I will very probably also be filing a response brief in this matter.

Sincerely,
BUREAU OF LEGAL SERVICES

Michael J. Cain
Attorney at Law

MJC/e

cc: Attorney Stephen Hayes
411 East Wisconsin Avenue
Milwaukee, WI 53202

Exhibit A

BEFORE THE
STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS

Application of the Village of Menomonee Falls for a Permit to Construct Channel Modifications of the Bed of Lilly Creek, in the Village of Menomonee Falls, Waukesha County, Wisconsin.	)	3-SE-84-038 3-SE-84-402 3-SE-84-736

BRIEF OF THE STATE OF WISCONSIN DEPARTMENT OF NATURAL RESOURCES

FACTS

The Village of Menomonee Falls (hereinafter Village) made application to the Department of Natural Resources (DNR) for permits under Sections 30.12, 30.19, and 30.195, Stats., to allow the Village to undertake channel modifications in Lilly Creek.

Lilly Creek is a stream which is approximately 3.3 miles long with a watershed of approximately 5.16 square miles. The creek is a tributary to the Menomonee River.

The Village proposes to modify the channel of Lilly Creek for a length of between 2.5 to 2.9 miles. The proposed project would consist of dredging out the stream to deepen and straighten it, grading the banks of the stream, and installing either a concrete liner over the bed of the existing stream or installing rock riprap over the bed of the stream in the same configuration as the proposed concrete channel. If a concrete liner is used, it is proposed to install 400 feet of rock riprap at the lower (northern) end of the project.

At the upper (southern) end of the project the Village has proposed the dredging of a detention basin between Silver Spring Drive and the Chicago and Northwestern Railroad. The portion of the detention basin which is the bed of the stream is proposed to be lined with concrete or rock riprap in the same configuration as that proposed through the rest of the channel.

The Department of Natural Resources, as well as other parties and individuals, objected to the proposed project.

A contested case hearing was held in three segments over a period of approximately 5 weeks (March 12 and 13, 1985; April 3 and 4, 1985; and April 15, 16 and 17, 1985). Testimony was taken from forty-one witnesses and one-hundred and twenty-four exhibits were received in evidence. The hearing transcript contains 1,116 pages.

Lilly Creek is not an isolated body of water. It is a natural tributary to the Menomonee River and actions taken on Lilly Creek are directly related to, and have an effect upon, that larger system.

The Hearing Examiner must take note of Section 144.265(1), Stats., which was created by 1983 Act 416, and which states, in pertinent part:

> To aid in the fulfillment of the state's role as trustee of its navigable waters, to promote public health, safety and general welfare and to protect natural resources, it is declared to be in the public interest to make studies, establish policies, make plans, authorize municipal construction site erosion control and stormwater management ordinances . . . . The purposes of the municipal ordinances and state plan shall be to . . . prevent and control water pollution, prevent and control soil erosion; prevent and control the adverse effects of stormwater; protect spawning grounds, fish and aquatic life; control building sites, placement of structures and landuses; preserve ground cover and scenic beauty; and promote sound economic growth. (Emphasis added.)

This declaration of "public interest" in protecting the public trust in waters through proper stormwater management must, under Reuter, be considered. This will be discussed more below.

Another factor which must be considered by the Hearing Examiner is the public trust responsibility borne by the DNR to protect and preserve the waters of the state. See the discussion of the trust doctrine in Muench v. PSC, 261 Wis. 492 (1952).

The Village has attempted to minimize the value of Lilly Creek and characterize it as a nuisance rather than as a resource. While Lilly Creek has been somewhat battered by pollution spills and channelization through the years, it does, in its natural state, have significant value. This value must be considered by the Hearing Examiner and Lilly Creek must be viewed as part of the larger "trust." The cumulative impacts of this proposed type of construction are significant and must be considered. As the Wisconsin Supreme Court said in Hixon v. PSC, 32 Wis. 2d 608 (1966):

> There are over 9,000 navigable lakes in Wisconsin covering an area of over 54,000 square miles. A little fill here and there may seem to be nothing to become excited about. But one fill, though comparatively inconsequential, may lead to another, and another, and before long a great body of water may be eaten away until it may no longer exists. Our navigable waters are a precious natural heritage; once gone, they disappear forever. pp. 631-632. (Emphasis added)

The Court went on to uphold the denial of a s. 30.12 structure permit, stating that the PSC had "carried out its assigned duty as protector of the overall public interest in maintaining one of Wisconsin's most important natural resources." Hixon, supra, at p. 632.

recreational uses of the stream; and will destroy the natural scenic beauty of Lilly Creek. The cumulative impacts of this type of activity are obvious, and are graphically demonstrated by the account given by Mr. Wawrzyn of the current status of the other Menomonee River tributaries.

If these permits are denied, as they clearly should be, the DNR will cooperate with the Village to address any existing problems in a manner which will serve the interests of the Village while preserving the public trust in Lilly Creek.

Submitted this 7th day of August, 1985.

Michael J. Cain
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Enforcement, Resource Management and
Environmental Standards of the
Department of Natural Resources

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