

IDAHO DEPARTMENT OF LANDS

HEARING STATEMENT

CASE NO. PH-2020-PUB-22-002-NORTH IDAHO MARITIME

ENCROACHMENT PERMIT APPLICATION ERL-95-S-1378B

Good evening, my name is Mike Ahmer, and I am the supervisor of the Public Trust Program at the Idaho Department of Lands (IDL). My purpose in being here today is to provide you with information regarding IDL's assessment of Application for Encroachment Permit No. ERL-95-S-1378B, filed by North Idaho Maritime (NIM). As shown on the application in the record, the applicant is seeking an encroachment permit to install a 10' wide by 70' long commercial pier, with 50' of that length below the ordinary high water mark (OHWM), a 10' wide by 100' long floating dock, and a work area.

Existing Permit

The original encroachment permit for this property, ERL-95-S-1378, was issued on February 1, 1978 to Lobo Lodge, Inc. for moorage and piling as part of the old Green Dolphin floating restaurant.

Application

The applicant is seeking to permit a 10'x70' pier (with 50' below the OHWM) and 10'x100' floating commercial dock and an approximately 80'x120' "summer work area".

Timeline

- 03/18/2020 – NIM submits original encroachment permit application.
- 03/30/2020 – IDL emails NIM informing them application is incomplete.
- 04/03/2020 – IDL emails NIM following up on incomplete application.
- 04/06/2020 – NIM submits requested information for application.
- 04/07/2020 – IDL submits application for agency review and comment.
- 04/10/2020 and 04/17/2020 – CDA Press runs advertisement regarding NIM application.
- 04/16/2020 – IDL coordinates Zoom meeting with NIM and IDEQ to address questions IDEQ has regarding application.
- 04/22/2020 – IDFG submits comment letter.
- 04/23/2020 – NIM submits information responding to IDEQ's questions and concerns.
- 05/01/2020 – IDEQ emails IDL stating that all IDEQ concerns have been addressed by NIM's response.
- 05/04/2020 – Kootenai Environmental Alliance (KEA) emails IDL asking for additional information on the application.
- 05/08/2020 – Bureau of Land Management submits comment letter.
- 05/11/2020 – IDL emails NIM asking for additional information per KEA's request.

- 05/21/2020 – NIM submits additional information and IDL deems application complete on this date.
- 06/08/2020 – Notice of Appointment of Hearing Coordinator and Public Hearing is distributed.
- 06/20/2020 and 06/27/2020 – CDA Press runs advertisement regarding revised NIM application and specific details regarding the Public Hearing on 07/23/2020.

Applicable Provisions of the Lake Protection Act, Title 58, Chapter 13, Idaho Code

I.C. § 58-1301 (see also IDAPA 20.03.04.012):

The legislature of the state of Idaho hereby declares that the public health, interest, safety and welfare requires that all encroachments upon, in or above the beds or waters of navigable lakes of the state be regulated in order that the protection of property, navigation, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty and water quality be given due consideration and weighed against the navigational or economic necessity or justification for, or benefit to be derived from the proposed encroachment. No encroachment on, in or above the beds or waters of any navigable lake in the state shall hereafter be made unless approval therefor has been given as provided in this act.

I.C. § 58-1302:

(f) "Riparian or littoral rights" means only the rights of owners or lessees of land adjacent to navigable waters of the lake to maintain their adjacency to the lake and to make use of their rights as riparian or littoral owners or lessees in building or using aids to navigation but does not include any right to make any consumptive use of the waters of the lake. (See also IDAPA 20.03.04.010.32)

(g) "Line of navigability" means a line located at such distance waterward of the low water mark established by the length of existing legally permitted encroachments, water depths waterward of the low water mark, and by other relevant criteria determined by the board when a line has not already been established for the body of water in question. (See also IDAPA 20.03.04.010.20)

(h) "Encroachments in aid of navigation" means and includes docks, piers, floats, pilings, breakwaters, boat ramps, channels or basins, and other such aids to the navigability of the lake, on, in or above the beds or waters of a navigable lake. The term "encroachments in aid of navigation" may be used interchangeably herein with the term "navigational encroachments." (See also IDAPA 20.03.04.010.25)

I.C. § 58-1306:

(a) . . . Applications for nonnavigational, community navigational, or commercial navigational encroachments must be submitted or approved by the riparian or littoral owner.

Applicable IDAPA Rules Pertaining to Subject Application

IDAPA 20.03.04.010 DEFINITIONS

10. Commercial Navigational Encroachment. A navigational encroachment used for commercial purposes.

33. Riparian or Littoral Owner. The fee owner of land immediately adjacent to a navigable lake, or his lessee, or the owner of riparian or littoral rights that have been segregated from the fee specifically by deed, lease, or other grant.

34. Riparian or Littoral Right Lines. Lines that extend waterward of the intersection between the artificial or ordinary high water mark and an upland ownership boundary to the line of navigation. Riparian or littoral right lines will generally be at right angles to the shoreline.

IDAPA 20.03.04.015. ENCROACHMENT STANDARDS.

13.e. Presumed Adverse Effect.

It will be presumed, subject to rebuttal, . . . that commercial navigational encroachments, community docks or nonnavigational encroachments will have a like adverse effect upon adjacent littoral rights if located closer than twenty-five (25) feet to adjacent littoral right lines. Written consent of the adjacent littoral owner or owners will automatically rebut the presumption. All boat lifts and other structures attached to the encroachments are subject to the above presumptions of adverse affects [sic].

IDAPA 20.03.04.055.LEASES AND EASEMENTS.

01. Lease or Easement Required. As a condition of the encroachment permit, the Department may require a submerged land lease or easement for use of any part of the state-owned bed of the lake where such lease or easement is required in accordance with “Rules Governing Leases on State-owned Submerged Lands and Formerly Submerged Lands,” IDAPA 20.03.17, or “Rules For Easements On State-owned Submerged Lands And Formerly Submerged Lands,” IDAPA 20.03.09. A lease or easement may be required for uses including, but not limited to, commercial uses. Construction of an encroachment authorized by permit without first obtaining the required lease or easement constitutes a trespass upon state-owned public trust lands. This rule is intended to grant the state recompense for the use of the state-owned bed of a navigable lake where reasonable and it is not intended that the Department withhold or refuse to grant such lease or easement if in all other respects the proposed encroachment would be permitted.

IDL’s Analysis of the Application’s Compliance with the LPA and IDAPA Rules

- IDL recognizes that NIM, is a lessee of a littoral owner, whose lot has over 600 lineal feet of waterfront in the immediate area. As a littoral owner, NIM has littoral rights and is eligible to make application for an encroachment permit.
- IDL has determined that NIM is seeking an encroachment permit for a pier and floating dock along with a summer work area.
- There are no IDAPA requirements or restrictions on sizes for commercial navigational encroachments, like there are for single-family and community docks.
- The proposed pier and dock extend 150 feet from the OHWM of Lake Coeur d’Alene. Wolf Lodge Bay is approximately 1,470 feet wide at the location where the pier dock is proposed, and approximately 1,050 feet wide at the narrowest point where a finger of land protrudes southward into the lake. There are no other docks in the area that would set or determine a Line of

Navigability (LON) in this location, NIM owns all of the southern shoreline back to the east, and the bay continues to get more shallow as you move back deeper into the bay towards the east. Therefore, IDL does not feel the proposed pier dock would constitute a Hazard to Navigation

- The proposed pier dock appears to be located more than 300 feet from the western property boundary and 180 feet from the eastern property boundary; well beyond the required 25-foot setback required of commercial facilities.

Conclusion

IDL concludes that the proposed application appears to meet the standards and specific IDAPA requirements pertaining to commercial navigational encroachments. Many of the public comments IDL received touched upon fish and wildlife habitat (mainly salmon and eagles), water quality, aesthetics, and traffic concerns. Idaho Code § 58-1301 “requires that all encroachments upon, in or above the beds or waters of navigable lakes of the state be regulated in order that the protection of property, navigation, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty and water quality be given due consideration and weighed against the navigational or economic necessity or justification for, or benefit to be derived from the proposed encroachment.”

IDL first notes that it has no regulatory authority above the OHWM, or AHWM. Therefore, IDL does not have jurisdiction over traffic issues on roads or highways. In addition, IDL is not the expert when it comes to fish and wildlife habitat, water quality, or traffic. As part of the processing of the application, IDL sent copies of the application to IDEQ, IDFG, IDWR, ITD, Lakes Highway District, Kootenai County Community Development, USACOE, KCSD, Panhandle Health and KEA. IDL relies on our sister agencies with expertise in their fields to provide comments and concerns regarding a proposed project.

In the case of the NIM application at Wolf Lodge Bay, IDFG stated the proposed pier dock “will have little impact on angling opportunity due to the location being in a shallow, backwater area of the lake.” They further recommended that if the permit is approved, all work should take place in the low water season, preferably after January, to limit impacts to fish spawning sites, bald eagles and associated tourism. IDFG also recommended keeping the footprint of the dock facility to the smallest size possible. The proposed dock would extend 150 feet from the OHWM, to a depth of 9 feet in the summer and 1.5 feet in the winter, with the overall width of the bay being approximately 1,475 feet across in that location. While IDL acknowledges that the proposed pier dock is longer than a typical single-family dock, the proposed pier dock does not appear to be excessive, based on water depth and the fact it is a commercial facility.

IDEQ had some questions regarding the application and IDL helped facilitate a meeting between NIM and IDEQ to address those questions and concerns. NIM provided a written response to IDL and IDEQ regarding IDEQ’s questions. IDEQ responded by stating that NIM had “addressed all of the issues, so I won’t be submitting comments on the updated application.” IDEQ also mentioned that they will collect background lead data in the immediate vicinity and will perform future monitoring in the same location to determine whether activities related to the permit resulted in an exceedance of water quality standards. If an exceedance is detected, IDEQ will take appropriate action and would work with NIM to bring the activities into compliance with water quality standards (IDEQ email dated 7/21/2020).

Again, IDL does not have any jurisdiction on the uplands, especially as it relates to traffic, right-turns only, and turning around at the BLM boat launch. Similarly to IDL relying on IDFG to provide comments in relation to fish and wildlife species, IDL has to rely on ITD for their expertise in regulating traffic.

If the project is approved, IDL recommends the following specific terms and conditions be applied to the permit:

1. Initial dock building activities must take place no earlier than February 1st to minimize the impact to fish spawning sites as well as the bald eagles who use the area in winter. Additionally, BMP's must be employed during construction, and until disturbed areas are fully stabilized.
2. No winter dock storage in this area.
3. No dredging is allowed as part of this application and permit.
4. No dock construction or work activities take place in the low water season, to limit impact on fish spawning sites and bald eagles, as well as ensuring the bottom of the lake bed is not being scoured by prop wake given the depth is only 1-1.5 feet deep at the end of the proposed pier dock.
5. The summer dock work area is cleaned up and free of debris by October 1st of each year before the water level recedes.
6. Remove and properly dispose of all existing piling.
7. Applicant shall consult the County Weed Superintendent, Idaho State Department of Agriculture or regional aquatic natural resource management designee (i.e. Avista Utilities) on the distribution of aquatic invasive species (AIS) and noxious weeds in travel lanes. Areas with known noxious weed infestations shall be avoided or treated prior to disturbance through commuting from the business to other project sites within the Lake.

