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MEMORANDUM

To: Mike Denney, Area Supervisor, Mica Supervisory Area

Date: July 8, 2005

From: Denise Mills, Assistant Director, LMR

A handwritten signature in cursive script, appearing to read "Denise Mills".

Re: Marina Yacht Club, LLC – Blackwell Island Marina
Encroachment Application No. L-95-S-4999

Pursuant to § 58-1306, Idaho Code, Marina Yacht Club, LLC ("MYC") made application to the Idaho Department of Lands ("IDL") on or around March 29, 2005, for approval to rebuild and expand a commercial navigational encroachment (a marina) on Lake Coeur d'Alene at the outlet to the Spokane River. MYC's proposal will expand the existing marina consisting of 321 boat slips and 18 boathouse slips, to a marina that consists of 368 leased slips¹ and 119 moorages for jet skis. According to MYC's application, the project will require dredging approximately 127,500 cubic yards of sediment from the lake bed below the ordinary high water mark.

In addition to IDL's encroachment permit application, the applicant is required to obtain a Section 401 water quality certification from the Idaho Department of Environmental Quality ("DEQ"), as required by the Clean Water Act ("CWA") and a CWA Section 404 permit from the U.S. Army Corps of Engineers ("Corps").

The Corps cannot issue a permit until DEQ has issued or waived the water quality certification, as required by Section 401 of the Clean Water Act (Exhibit 1). On June 10, 2005, in response to three requests for a draft preliminary certification, DEQ sent a letter to the Corps requesting an extension of DEQ's Section 401 certification deadline to August 15, 2005 (Exhibit 2). In response to this request, on June 24, 2005, the Corps extended the time allowed for DEQ to act on the Corps' request for water quality certification (Exhibit 3).

PUBLIC NOTICE AND HEARING

Following receipt of the encroachment application and pursuant to § 58-104(g) and Title 58, Chapter 13, Idaho Code (Lake Protection Act) and IDAPA 20.03.04 (The Regulation of Beds, Water, and Airspace Over Navigable Lakes in Idaho), more specifically §§ 58-1306(c), Idaho Code and IDAPA 20.03.04.030.01, IDL published a legal notice in the *Coeur d'Alene Press* newspaper on April 1 and April 8, 2005, to provide notice to the public that the application was

¹ J-U-B ENGINEERS, Inc., 2005. *Marina Yacht Club, LLC, Blackwell Island Marina, Permit Application Supplemental Information*. Prepared for Marina Yacht Club, LLC. March 2005.

available for public review and comment. Numerous comments were received both in support of and in opposition to the project. In response to several requests for a public hearing, IDL convened a public hearing which was conducted on June 9, 2005. Scott Nichols, Chief of IDL's Bureau of Surface and Mineral Resources presided over the hearing. Oral and written testimony was provided at the hearing; all oral proceedings were recorded on an audio tape and the proceedings have since been transcribed into the record.

Pursuant to Idaho Code, § 58-1306(c), IDL is required to render a decision within 30 days after holding a hearing on an encroachment application. It is clear that the DEQ's and Corps' decisions will not be made within the same 30-day period in which IDL is required to act. More specifically, the Corps cannot issue a 404 permit until the DEQ has issued or waived a water quality certification and, as noted above, the DEQ has requested an extension until August 15 to complete the draft preliminary water quality certification.

RECOMMENDATION

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.

IDAPA 20.03.04.060.04 (Excavated or Dredged Channel) states,

An excavated or dredged channel or basin to provide access to navigable waters may be authorized only when the applicant can show that it will provide a clear environmental, economic, or social benefit to the people of the state and will not result in appreciable environmental degradation. A channel or basin shall not be approved if it appears that the cumulative effect of the proposed channel or basin plus all reasonably foreseeable future basins or channels in the same navigable lake would be adverse to fisheries or water quality.

Thus, an applicant seeking approval to excavate or dredge a channel or basin must demonstrate in its application that such activity will not result in appreciable environmental degradation and will not result in adverse impacts of fisheries or water quality. These considerations are extremely important because the State, as the landowner, does not want to incur liability for potential releases from dredging.

The DEQ and the Corps have not yet made the determinations whether to issue certifications. Absent a decision by the Corps to issue or deny a Section 404 permit and DEQ's decision to issue or deny a 401 permit, the information provided in Encroachment Application No. L-95-S-4999 is insufficient for IDL to determine whether the project will cause any impacts to water quality, fish habitat, aquatic resources or other environmental impacts, or the extent of any impacts that might occur, as required by § 58-1301, Idaho Code and IDAPA 20.03.04.060.04.

Because IDL must make its decision within 30 days of the public hearing and because the record is incomplete, my recommendation is to deny the application at this time. The applicant may resubmit the application or a new application after receiving the necessary approvals and documentation from the DEQ and the Corps.

Exhibits

Exhibit 1 – U.S. Army Corps of Engineers, Walla Walla District, Public Notice of Application for Permit, dated May 19, 2005.

Exhibit 2 – Letter from June Bergquist, Department of Environmental Quality, to Gregg Raynor, U.S. Army Corps of Engineers, Coeur d'Alene Regulatory Office, dated June 10, 2005.

Exhibit 3 – Letter from A. Bradley Daly, U.S. Army Corps of Engineers, Walla Walla District, to June Bergquist, Department of Environmental Quality, dated June 24, 2005.