

GEORGE B. BACON  
Director  
Idaho Department of Lands  
300 N. 6<sup>th</sup> St., STE 103  
P.O. Box 83720  
Boise, Idaho 83720-0050

BEFORE THE STATE BOARD OF LAND COMMISSIONERS  
STATE OF IDAHO

In the Matter of; )  
)  
Encroachment Permit No. L-95-S-3212B ) **FINAL ORDER**  
Marina Yacht Club, LLC )  
)  
Applicant )  
\_\_\_\_\_ )

### I. NATURE OF PROCEEDINGS/ISSUES

A public hearing was held on June 4, 2009 at 6:00 pm PST at the Idaho Department of Lands Supervisory Office in Coeur d'Alene, Idaho. Eric Wilson served as Hearing Coordinator. The Hearing Coordinator issued his Recommendations on July 1st, 2009.

My responsibility is to render a decision on the behalf of the State Board of Land Commissioners based on the record reviewed in the context of my personal expertise gained through education, training, and experience. In making this determination I have relied on the record provided. Specifically;

- I have read the transcript of the public hearing conducted in Coeur d'Alene, Idaho on June 4, 2009.
- I have reviewed the record including all documents and exhibits.
- I have examined the Hearing Coordinator's Recommendations in light of the entire record.

Encroachments, including commercial marinas, placed on navigable waters, and dredging conducted in navigable waters require a permit issued by the Idaho Department of Lands pursuant to the requirements of Title 58, Chapter 13, Idaho Code, and the Rules for the Regulation of Beds, Waters and Airspace over Navigable Lakes in the State of Idaho, IDAPA 20.03.04, as promulgated by the State Board of Land Commissioners.

## II. FINDINGS OF FACT

I concur with the Findings of Fact presented by the Hearing Coordinator.

## III. CONCLUSIONS OF LAW

I concur with the Conclusions of Law presented by the Hearing Coordinator.

## IV. FINAL ORDER

On the basis of the record, it is my order that Encroachment Permit L-95-S-3212B be issued with the following conditions:

- 1) Applicant shall install a layer of filter fabric, or similar material, between the contaminated sediments and their cover materials in the CDF-1 and CDF-2 facilities.
- 2) Applicant shall use a portable XRF unit, or similar device, to assist with the categorization of sediments during dredging.
- 3) Applicant shall compact the clay in the marina basin, or use additional volumes or types of clay, or use a combination of these two efforts, to achieve the targeted permeability.
- 4) Applicant shall work with the City of Coeur d'Alene to properly design and implement relocation of their waterline.
- 5) Dewatering pumps shall be screened to prevent uptake of fish, and all fish that get caught between the dewatering bladders must be quickly transported to the lake or river.
- 6) Prior to beginning construction the Applicant must submit to the Department of Lands a copy of the DEQ Section 401 certification, a copy of the final Corps 404 permit, and a copy of the highway encroachment permit from ITD.
- 7) The permit shall have the following condition, "The Permittee shall indemnify, defend and save harmless, the Idaho Department of Lands, its officers, agents and employees from and against any liability, claims, damages, losses, debts, obligations, judgments, expenses or actions, including reasonable attorneys' fees from action related to this permit. If it becomes necessary for the Idaho Department of Lands to defend any action seeking to impose any such liability, Permittee agrees to pay the Idaho Department of Lands all costs of court and attorneys' fees incurred by the Idaho Department of Lands in effecting such defense in addition to all other sums that the Idaho Department of Lands may be called upon to pay by reason of the entry of a judgment against it in the litigation in which such is asserted."


- 8) Applicant shall apply for a submerged lands easement from IDL for the utility corridor under the marina basin.
- 9) Phase 1 sediment dredging, disposal facility construction and close out, and bank stabilization must be completed prior to the start of Phase 2 dredging.
- 10) Applicant shall discuss all proposed commercial activities pertaining to the marina with the IDL staff in the Mica Area Office so IDL can adequately modify the existing submerged lands lease to cover the proposed uses and locations. Boat sales, launching fees, boat rentals, office space, moorage, and other uses should be included. The lease adjustment shall also require Applicant to estimate the cost of properly closing out Phase 1 sediment disposal facilities and implementing the proposed shoreline protections for the Phase 1 area.
- 11) Applicant shall provide a bond in favor of IDL in the amount provided by the Applicant to properly close out Phase 1 sediment disposal facilities and implement the proposed shoreline protections for the Phase 1 area. The amount required to similarly guarantee the Phase 2 work is similar to the amount required for the Phase 1 work, so the bond amount shall remain constant through the project. This bond shall ensure the proper operation of dredging activity and closure of CDF-1 and CDF-2 such that the contaminated dredged sediments cannot re-enter the lake or river. The bond shall be required prior to the start of construction, and will be released after a final inspection by IDL and the Corps indicates that the dredging has been successfully completed, the shorelines are stabilized, and the dredge spoil areas have been properly constructed and closed so that the contaminated sediments cannot reenter the lake or other waterways.
- 12) Applicant shall either redesign the south end of the marina to stay within 300 feet of the shoreline, or shall provide more public trust benefits. Benefits to the public trust must include:
  - a) Redesigning a portion of the dock access by the western gravel point to allow non-motorized craft access underneath the dock for travel between Cougar Bay and the west channel of the Spokane River.
  - b) Providing free moorage for the Kootenai County Sheriff's Department, adequate in location and size to meet the County's needs for year-round access and use. Free moorage includes at least two permanent slips plus seasonal moorage, unless some other mutually agreeable arrangement is made between the County and the Applicant. The Applicant will also provide permission to the County to construct and maintain boat houses and other amenities the County deems necessary to protect the County's property and interests. The Applicant can reasonably control design of amenities to conform to the style of other improvements on the leased area.

- c) Providing free moorage for Kootenai County Fire & Rescue, adequate in location and size to meet the County's needs for year-round access and use. Free moorage includes at least two permanent slips plus seasonal moorage, unless some other mutually agreeable arrangement is made between the County and the Applicant. The Applicant will also provide permission to the County to construct and maintain boat houses and other amenities the County deems necessary to protect the County's property and interests. The Applicant can reasonably control design of amenities to conform to the style of other improvements on the leased area.

As long as these changes do not expand the marina size, they could be approved under IDAPA 20.03.04.020.05 without going through a full application process. Extensive public involvement has already occurred for this project.

This is a final order of the agency. If the Applicant, or a party who appeared at the hearing, is aggrieved by the director's final decision, they shall have the right to have the proceedings and final decision of the director reviewed by the district court in the county in which the encroachment is proposed. A notice of appeal must be filed within thirty (30) days from the date of the final decision in accordance with IDAPA 20.03.04.030.09.

DATED this 16<sup>th</sup> day of July, 2009.

  
\_\_\_\_\_  
GEORGE B. BACON  
Director

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 10<sup>th</sup> day of July, 2009, I caused to be served a true and correct copy of the foregoing document, by the method indicated:

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STATE BOARD OF LAND COMMISSIONERS

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Ben Ysursa, Secretary of State  
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Tom Luna, Sup't of Public Instruction*

July 1st, 2009

## MEMORANDUM

TO: George B. Bacon, Director

FROM: Eric Wilson, Navigable Waters/Minerals Program Manager

SUBJECT: Public Hearing – Navigational Encroachment L-95-S-3212B for Marina Yacht Club, LLC

### I. INTRODUCTION

The following document, which includes a recommendation for your consideration, was prepared following a joint public hearing conducted by the Idaho Department of Lands (IDL) and the U.S. Army Corps of Engineers (Corps). The public hearing was conducted in conjunction with the processing of an encroachment permit (L-95-S-3212B) on Lake Coeur d'Alene, a navigable lake in Idaho. The application proposes to dredge an existing channel, dispose of the dredge spoils in upland containment areas, improve shoreline erosion protection, and replace and expand the existing marina facility. Jurisdiction in this matter rests with IDL pursuant to Idaho Code § 58-1303, which empowers the State Board of Land Commissioners to regulate, control, and permit encroachments on, in, or above the beds or waters of the navigable lakes of Idaho.

### II. FINDINGS OF FACT

1. The applicant submitted an application in March 2005 for dredging and marina improvements at the Marina Yacht Club. That application was L-95-S-4999. IDL determined at that time that a new application number should be issued for the extensive upgrade to this marina. The application was denied due to uncertainties associated with the Corps 404 permit application and 401 certification from the Idaho Department of Environmental Quality (DEQ).

2. On April 13<sup>th</sup>, 2009, Marina Yacht Club, LLC (Applicant) submitted to IDL an encroachment permit application (L-95-S-3212B) requesting approval to construct encroachments on Lake Coeur d'Alene. IDL determined at that time that the existing

permit number should be retained with the letter "B" extension, as is the standard practice. The application is incorporated into this document by reference. Please refer to Attachment 1 for a list of the application materials. Most of the information is contained in Document D of Attachment 1. Document D will be referred to as the Supplement in this document. The applicant refers to the materials as a supplement to the previously withdrawn 404 application to the Corps. IDL considers the material to be a new application submittal.

3. L-95-S-3212B proposes the following actions:
  - a. The placement of temporary cofferdams within the marina so areas can be dewatered and excavated in the dry.
  - b. Dredge approximately 121,000 cubic yards (yd<sup>3</sup>) of lake sediments from below the ordinary high water mark (OHWM) of Lake Coeur d'Alene. Another 41,000 yd<sup>3</sup> will be excavated from above the OHWM. Sediments contaminated with heavy metals (approximately 47,000 yd<sup>3</sup>) will be selectively handled and placed in lined repositories on the adjacent uplands.
  - c. Discharge approximately 3,400 yd<sup>3</sup> of clean dredged sediments below the OHWM.
  - d. Place the remainder of clean dredged and excavated sediments on the adjacent uplands to elevate them above the 100-year floodplain.
  - e. Construct approximately 2,000 feet of modular block sea walls.
  - f. Regrade and riprap approximately 2,900 feet of shoreline.
  - g. Place approximately 5,100 yd<sup>3</sup> of riprap material below the OHWM.
  - h. Discharge approximately 3,000 yd<sup>3</sup> of clay below the OHWM into the dredged area to re-seal the bottom of the lake.
  - i. Construct a concrete boat ramp and vertical launch bay to be used for commercial purposes.
  - j. Construct a 5,103 square foot wetland mitigation area to offset 1,211 square feet of wetlands that will be disturbed.
  - k. Construct a commercial marina with 405 slips and 128 personal watercraft stations, 15 sales slips, an office, a fuel dock, a pump out station, and 571 parking spaces.
  - l. Construct stormwater collection systems to capture stormwater from the adjacent parking lots.

The application, including supporting documents on a computer disc, is incorporated into this document by reference.

4. IDL initiated the processing of L-95-S-3212B as a navigational encroachment pursuant to the Lake Protection Act (Idaho Code § 58-1306) and the associated Rules (IDAPA 20.03.04.030). The applicant requested that a hearing be scheduled, and IDL agreed based on the past application for this site and the ongoing public interest in this project. On April 28<sup>th</sup>, 2009 and May 5<sup>th</sup>, 2009, IDL published a joint Notice of Application and Notice of Public Hearing in the Coeur d'Alene Press newspaper for the encroachment permit application submitted by Applicant. The Notice of Application and

Public Hearing is incorporated into this document by reference.

5. In a letter dated April 23<sup>rd</sup>, 2009, IDL notified several agencies, organizations, and persons of the encroachment permit application and the scheduled hearing, and requested that the parties provide comments to IDL. Those notified included:

- Idaho Department of Fish and Game
- Idaho Department of Environmental Quality
- Idaho Department of Water Resources
- US Army Corps of Engineers-CDA
- Panhandle Health District 1
- Kootenai County Parks, Recreation, and Waterways
- Kootenai County Marine Division
- Kootenai County Building, Planning, & Zoning
- Kootenai Environmental Alliance
- Lakes Commission
- City of Coeur d'Alene
- Hauser Lake Fire Department
- Larry Simms
- North Idaho Maritime
- Blackwell Island RV Park

The letter is incorporated into this document by reference.

7. The term "fairway" is widely used in this document. Section 10.C of the IDL Navigable Waters Procedures defines a fairway as "The watercourse within a marina where boats or other watercraft travel to access marina slips or moorage."

8. Many letters and emails commenting on the application were received. The comments in these letters and emails are summarized below. All the letters and emails are incorporated into this document by reference.

- a. **The Marina Yacht Club is in need of some repairs.** John Condon, Tom Addis, Dennis Wheeler, Jeremiah Neal, Kevin Ward, Jack Gustavel, Steve La Tourette, Donald Smock, Robert Nonini, Ronnee McGee, and Theodore Rusnak stated the marina was in need of upgrading and repair. Mr. Condon, Mr. Smock, and Mr. Rusnak also stated that the proposed shoreline work will provide a safer and more stable shoreline.

- b. **The marina will improve public access.** Mr. Condon and Mr. Nonini stated the project would enhance the public's ability to access the lake. Amy Reagan stated that the marina with the fuel dock was needed.
- c. **The fueling dock should be moved or removed.** Mr. Larsen, Julie Dalsaso, Pat Behm, Ms. McGee and Martha Cornwall stated that the fuel dock should be located at the southern end of the marina to reduce congestion in the fairway. Mr. Larsen also stated this would reduce wave action on the non-motorized traffic and the slips adjacent to the fairway. Wes Hanson also stated that the fuel dock should be at the southern end of the marina. Theresa Shaffer stated the same concern, as did several signatories in an undated statement. In a joint letter several conservation groups and the Spokane Riverkeeper stated that the refueling dock was not needed and should be removed or moved to the south end. Daniel M. Ryan, Division Chief with Kootenai County Fire & Rescue, stated that the fueling area would need to meet the requirements of the International Fire Code Section 2210 and spill equipment should be located on site. Wendy Gabriel, Administrator for City of Coeur d'Alene, expressed support for Mr. Ryan's comments.
- d. **The pump out station should be in a different location.** Mr. Larsen stated that placing the pump out at the southern end of the marina would better serve the public and discourage illegal dumping. Ms. Shaffer, Ms. Dalsaso, Ms. McGee, and Mr. Behm also stated this concern.
- e. **The personal watercraft slips should be denied.** Mr. Larsen stated that an influx of 120 personal watercraft to Cougar Bay would negatively impact wildlife and other public trust values. Mr. Larsen also stated that Cougar Bay should remain a no wake area. Mr. Hanson also had concerns with impacts to Cougar Bay. Ms. McGee also objected to the jet-ski moorage.
- f. **The proposed project takes up too much lake surface.** Mr. Larsen stated that the marina was an excessive encroachment on the lake surface. Mr. Hanson, Ms. Dalsaso, and Mr. Behm stated that the new marina should not extend beyond the existing marina. Ms. Shaffer, John Osborn, and a coalition of conservation groups also expressed concern with the marina's expanded size. Susan Drumheller stated that more public benefit was needed to offset the expanded size, similar to the floating green at Sanders Beach. Sandra Raskell with the Coeur d'Alene Tribe stated that the revised marina should expand as little as possible to keep more lake surface available for public use.
- g. **Public availability was questioned by some respondents.** Mr. Larsen asked if the large slips would act as a wet trailer park, and he asked if a yacht would have to be purchased from the applicant's dealership in order to acquire a slip. Mr. Larsen also asked if current renters would be allowed to retain their slips under the current contractual conditions. Ralph Shay stated that public access should be preserved even during the remediation.

- h. **Boat traffic between the BLM launch and the lake will be difficult and dangerous do the heavy boat traffic in the fairway.** Mr. Hanson stated that the congestion at the northern end of the marina would be especially difficult with the refueling and launching activities. He also expressed concern for the nonmotorized boaters contending with the large boats, as did several other members of the public. Keith Shannon stated that some compensation for nonmotorized use is needed.
- i. **The public will be losing access at the applicant's boat ramp.** Charles E. Corsi, Regional Supervisor for Idaho Department of Fish and Game, stated that this ramp was often used to access Cougar Bay by people with small boats, and the loss of this access point will be unfortunate. Mr. and Mrs. Cook stated that the loss of public access is troubling. Mr. Hanson and Mr. Behm stated that the nearby BLM ramp is closed during the winter, and therefore public access should be allowed at the applicant's boat ramp during the winter. Ms. Shaffer stated that more public access points are needed, not less. The conservation groups, Ms. Dalsaso, Ms. McGee, and Ms. Drumheller stated that the ramp should remain open to the public.
- j. **Additional moorage is needed on the lake.** Mr. Larsen stated this, as did the conservation groups in their joint letter.
- k. **The project would provide a benefit to public safety by including a two-slip boathouse for the Kootenai County Sheriff.** Rocky Watson, Kootenai County Sheriff, stated that this boathouse would be accessible all year due to deeper dredging and the raising of the jetty to a level above the 100-year floodplain. Daniel M. Ryan stated that the applicant has promised to provide accommodation for a boathouse to be used by Kootenai County Fire and Rescue, and four to five hydrants will be installed. Ms. Dalsaso stated that moorage for the County boats should be required by the permit.
- l. **The proposed timeline is too long.** Mr. Larsen and Ms. Dalsaso stated that the permit should be restricted to the same timeline as other permits, and the additional time leaves more opportunity for the applicant to modify the original permit. Wes Hanson agreed that six years was too long.
- m. **The proposed dredging is not needed.** John and Jeri Sahlin stated that other deep water slips and service areas already exist on the lake. Ms. Dalsaso stated that the marina could be improved without the dredging.
- n. **The proposed dredging will cause harm by disturbing sediments contaminated with heavy metals.** Mr. & Mrs. Sahlin stated that the sediments are stabilized and disturbing them will cause a catastrophe. Karen E.N. Hayes stated that dredging contaminated sediments commonly results in soil

contamination. Ms. Hayes also stated that increased turbidity can cause bioaccumulation of heavy metals, and that no guidelines had been created for dredging or disposing of sediments. Mr. Osborn, Ms. McGee, and Mr. Shay agreed that dredging should not occur, as did several other members of the public. Ms. Drumheller stated doubt that the sediments could be carefully segregated as proposed by the applicant.

- o. **The effectiveness of the proposed clay liners is suspect.** Mr. Behm stated that the installation and steep underwater slopes are problematic. Ms. Drumheller, Ms. Raskell, and Mr. Hanson also stated concerns with the proposed clay seal.
- p. **The dewatering plan is suspect.** Mr. Hanson stated concerns with the handling of residual water when dewatering occurs, and contingency plans for cofferdam failure. Ms. Raskell questioned whether fish would get caught in the pumps.
- q. **The adjacent disposal areas for the contaminated sediments that are dredged are too risky.** Mr. & Mrs. Sahlin, Mr. Shay, Ms. Cornwall, Mr. Behm, and Ms. Dalsaso stated that the island is in a floodplain. William and Diane Clark, Ms. Drumheller, Mr. Hanson, and the Spokane Riverkeeper stated that the storage of toxic materials in a floodplain is a cause for concern. Mr. Hanson, Mr. Osborn, and the conservation groups stated that independent oversight of the construction work and institutional controls are needed to address threats to human and aquatic health. Ms. Shaffer, Mr. Shay, and Ms. Drumheller also stated that independent oversight is needed for all project stages. Ms. Raskell requested several specific institutional controls. Ms. Shaffer stated that surface or ground water could become contaminated with metals, and that the pumped water should be either treated or disposed of off-site. Ms. Shaffer also stated that the sediments should be disposed of in an off-site repository. Ms. Hayes stated that a high potential exists for post-remediation pollution from the stored sediments. Ms. Dalsaso, Mr. Hanson, Ms. Raskell, and the Spokane Riverkeeper stated that long term monitoring was needed for the project. Ms. Raskell stated several concerns with design parameters of the disposal facilities.
- r. **Liability associated with the storage of contaminated materials should remain with the applicant, as stated by the Spokane Riverkeeper.** They recommended that the Corps include a special permit term to keep the applicant responsible for liability. Ms. Raskell also stated concerns with liability if the disposal facilities fail.
- s. **The retaining walls may have drainage issues.** Ms. Raskell stated that drainage was not addressed, and some stormwater infiltration areas are adjacent to the walls.
- t. **The public comment period should be extended to June 15<sup>th</sup>.** In a letter dated May 21<sup>st</sup>, 2009 Rick Eichstaedt stated that the U.S. Army Corps of

Engineers' comment deadline is June 15<sup>th</sup> and IDL's comment deadline should be extended to match.

- u. **A 12 inch water main for the City of Coeur d'Alene will have to be relocated along the north boundary of the property.** Wendy Gabriel stated that the City of Coeur d'Alene did not oppose the relocation. The city would just like to review the plans and coordinate the work with the applicant.
- v. **The Flood Hazard Development Permit from Kootenai County and the Storm Water Pollution Prevention Plan are needed.** Ms. Gabriel stated that the City of Coeur d'Alene supported these requirements. Mr. Hanson stated the applicant's flood studies may not be applicable for the marina.
- w. **The project will benefit fish habitat.** Mr. Corsi stated that the design of the west side of the marina basin will benefit largemouth bass, which are desirable in this shallow area. Joe Roope also stated that the project will improve fish habitat.
- x. **Spills could occur at the facility and pollute the lake.** Mr. and Mrs. Cook stated concern with the fuel storage, pumpout, and crane. Ms. Shaffer stated that spills would be hard to catch because they could quickly enter the channel that flows under Highway 95.
- y. **The additional moorage is not needed.** Mr. and Mrs. Cook stated that many slips are available at Silver Beach Marina and other locations. They stated concern with the number of very large yachts on the lake. Ms. Shaffer and the conservation groups also questioned the need for additional large moorages. Ms. Dalsaso stated that the additional boat and jet ski traffic will erode the proposed shoreline improvements. Ms. Raskell stated that the lake is already near capacity for recreational boating, and the additional slips may result in excessive boat traffic.
- z. **The shoreline stabilization should use less riprap.** Ms. Shaffer stated that other, and more fish-friendly, methods are used in the State of Washington. Mr. Hanson stated that riprap is not good fish habitat. U.S. Fish and Wildlife Service stated that the project may impact bull trout, and a Section 7 consultation would be needed prior to the Corps issuing a permit.
- aa. **The testing and characterization of the site was quite thorough.** Steve Burchett stated that the proposed dredging and sediment containment will decrease the risks to water quality and aquatic life.
- bb. **The project will encroach on the Highway 95 right of way.** Don Davis with the Idaho Transportation Department (ITD) stated that a right of way encroachment permit would be needed from ITD. Mr. Davis requested additional



information on slope stability and the bridge over the west channel of the river.

cc. **The proposal would create a traffic hazard at the entrance from Highway 95.** Mr. Larsen stated that the entrance is extremely dangerous, and the personal watercraft moorage would exacerbate the traffic danger. Mr. Davis stated concerns with construction related traffic and its impact on the highway.

dd. **Trail corridors through the project site should be preserved.** Ms. Raskell stated that a north-south link between the Trail of the Coeur d'Alenes and the Centennial Trail could follow the old Highway 95 alignment. A series of letters and photos regarding a link from the Centennial Trail to the Trail of the Coeur d'Alenes was entered into the record by Julie Dalsaso. These materials expressed support for the trail from the North Idaho Centennial Trail Foundation, the Coeur d'Alene Tribe, Friends of the Centennial Trail, and Bill Scudder.

ee. **Archeological testing should be implemented across the project site.** Susan Pengilly with the State Historic Preservation Office stated that in-situ features and artifacts in the cutbanks should be mapped. Ms. Pengilly also stated that the wetlands and adjacent upland areas, including the disposal facilities, should be tested and a final report prepared.

9. On June 4<sup>th</sup>, 2009 IDL held a joint public hearing with the Corps at 6:00 pm in the IDL Staff Office in Coeur d'Alene, Idaho. Mr. Eric Wilson, Navigable Waters/Minerals Program Manager, and LTC Michael J. Farrell, District Commander Walla Walla District of the Corps, served as hearing co-coordinators. Also in attendance were Mr. Carl Washburn, IDL Navigable Waters Specialist; Mr. Mike Denney, IDL Area Manager for Mica Supervisory Area; other representatives from IDL and the Corps; Mr. John Barlow, representing Applicant; and sixty eight (68) members of the public. The public hearing was recorded on audio tape and was subsequently transcribed. The transcript of the public hearing is incorporated into this document by reference.

a. The Applicant, through the testimony of Mr. Barlow, provided a brief history and overview of the project. He described the original application submitted four years ago, when they proposed to dredge the marina basin in the wet. Due to concerns with the contaminated sediments and the dredging potential impacts on surface and ground waters, the proposal was withdrawn. At this same time the Corps was developing a new protocol to assess the impacts of projects that proposed dredging. As a result of the Corps new guidelines, the Mr. Barlow stated that the applicant completed over ninety (90) boreholes to characterize the sediments in the area to be dredged. From these holes, they could characterize the depth, thickness, and areal extent of the contaminated sediments. They also tested the contaminated sediments with a TCLP test to determine the leachability of the metals in the sediments. This is a rigorous test that used conditions more acidic than those found in nature. The tests indicated that the available metals had already leached out. Plans for site characterization and disposal area design was done under the direction of the Corps, the

Environmental Protection Agency (EPA), and DEQ. EPA did not want the contaminated material to leave the site because that would create a new area containing waste. Capping on site was also done with the Rails to Trails project on the Coeur d'Alene river, so the Applicant's proposal does not really set a precedent.

Mr. Barlow then explained that the main contaminant of interest is zinc. Studies indicate that surface and ground water levels are closely linked in this area, but the surface water has much higher levels of zinc. Water from the lake seeps into the ground, and the zinc levels drop before the aquifer is reached. The Idaho Department of Environmental Quality (DEQ) then gave the applicant two choices: Either do the dredging as planned and monitor extensively during the work, or install a liner in the bottom of the marina basin that allows no more seepage than the current basin bottom. The liner option was ultimately chosen. A combination of clay addition and compaction will be done until the target permeability is reached on the basin floor. Mr. Barlow stated that the containment areas were not designed by the applicant, but by EPA, DEQ, and the Corps. Oversight will occur during the dredging. A portable x-ray unit can be used to segregate the dredged materials.

When questioned about institutional controls, Mr. Barlow stated that they are not opposed to deed restrictions but the exact wording would be critical. DEQ certification is not expected until later in July, and the applicant would not be opposed to a permit term relating to that certification. He agreed that an easement from IDL would be needed for the utility corridor under the marina basin. Mr. Barlow also agreed that a City of Coeur d'Alene waterline along the north boundary of the marina would be relocated in coordination with the city.

Mr. Barlow confirmed that all the boat sheds and float homes would be removed from the marina. When questioned about the commercial activities being conducted and how the submerged lands lease would accommodate that, Mr. Barlow agreed that the state should receive a portion of any launch fees associated with the boat launching. The west entrance of the marina would be locked because of security concerns and limited parking for the moorage accessed from that side of the marina. The applicant operates three marinas at the north end of the lake, and has always had a waiting list. Their marketing research indicates that the demand for moorage is high enough to support this expansion. The number of slips is needed to make this project financially feasible. The gas dock was placed at the north end of the marina so it would be close to the boat ramp where the boats are fueled and serviced when launched. Spills are easily handled and generally quite small. The water current during the summer season is negligible, so spills will be contained. At least one pump out station would be installed in the marina. Alternatively, a pump out boat might service the vessels moored in the marina.

Mr. Barlow is not opposed to prohibiting motorized use in the channel between Highway 95 and the BLM boat ramp. The main problem with opening up the

applicant's boat ramp to public use is the need for parking. Not enough space exists. Traffic is also an issue during the early and late seasons when the applicant is hauling boats in or out of the lake. The marina will reduce the demand for boat ramp use because of the number of slips and the fact that the boats are not constantly pulled out of the water during the summer. The size of the marina's fairway is actually quite large and will accommodate the expected traffic. It is much straighter than the current situation. The south end of the marina is designed to deflect spring flows and debris away from the marina. The shoreline designs will greatly reduce erosion and stormwater issues. The wetland mitigation area was designed with input from the Idaho Department of Fish and Game, and will be much better than the existing wetlands based on size, vegetation, and structure. Exhibits from Mr. Barlow were entered into the record at the hearing and are incorporated into this document by reference. These exhibits included a Powerpoint presentation, information on portable XRF equipment, clay liner specifications, information on flood studies, and correspondence with other agencies.

b. Public testimony in support of the project focused on the need for improvements at this marina. Donald Gross, Gary Greenleaf, John Beutler, Jim Custer, Jason Wing, Dennis Hinrichsen, Murray Danzig, Bev Twillmann, Don White, and James Addis stated that the marina needs to be replaced due to visual aesthetics. Mr. Gross, Jerry Gilbreath, Mr. Beutler, Terry Cooper, Mr. Hinrichsen, and Mr. Addis stated that the jobs are needed in the current economy. Mr. Danzig stated that refueling docks have containment equipment so spills are taken care of. Skip Murphy and Don White stated that existing shallow water creates a problem because prop wash stirs up the contaminated sediments and the sediments move down the river. Mr. Murphy believes that dredging these sediments and containing them is a good thing. Mr. Beutler stated that erosion would be reduced and stormwater controls would be improved. Pete Fairchild stated that wakes from boats have decreased the last two years, and suggested that wakes are no longer an issue. Mr. White stated that his boat does not create a large wake when moving at five miles per hour. Mr. Danzig stated that large boats do not enter Cougar Bay due to the shallow depths, so the boat traffic will not affect the bay. John Condon stated that the moorage is needed. Mr. Greenleaf stated that the moorage would be used by the public. Mr. Greenleaf and Mr. Hinrichsen stated that moorage for the Sheriff's boat would provide an additional public benefit. Duane Hanna stated that the applicant would provide space for the fire boat along with the Sheriff's boat. Mr. Greenleaf stated that the shoreline protection is needed. Mr. Beutler stated that the current wetlands are low quality and the habitat would be improved by the project.

c. Public testimony in opposition to the project focused on the dangers of the contaminated sediment, the lack of habitat improvement, and the impact on public access. Terry Harris, representing the Kootenai Environmental Alliance, stated that the toxic sediments would be removed from the lake bottom with no protocols. Susan Drumheller, representing the Idaho Conservation League,

stated that their primary concern was remobilization of metals in the channel and creating new pathways of contamination to groundwater and surface water. Julie VanMiddlesworth also stated concerns about contamination of the Rathdrum aquifer. Mr. Harris and James Fillmore stated that independent monitoring during and after construction is not proposed. Ms. Drumheller also stated a need for independent oversight funded by the applicant and controlled by the Corps. Wes Hanson also called for independent oversight. Ms. Drumheller is concerned that the clay proposed for use is untested and no backup plan, such as bentonite clay, was proposed. Ms. Drumheller also stated concern with how contaminated sediments could be surgically removed without contaminating clean fill materials. Mr. Harris and Ms. VanMiddlesworth stated that institutional controls were needed. Mr. Harris also stated that the proposed disposal area in a flood plain was a permanent risk. Kelly Owings, representing the Center for Justice, Pat Behm, and Mr. Hanson also opposed storing the toxic sediments in the flood plain. Ms. Owings, Ms. VanMiddlesworth, Colleen Robisch, and Ms. Twillman stated that the proposal lacked long term monitoring and maintenance. Ms. Drumheller, Ms. Twillman, and Jeff Merkley stated that the contaminated sediments should be stored off site and out of the flood plain. Ms. Owings stated that liability associated with a release from the storage area should remain with the applicant, but Section 107 of CERCLA may release the applicant from liability associated with a release from a site that obtained a 404 permit. Mr. Merkley and Mr. Fillmore stated that a bonding mechanism was needed to cover the applicant's liability. William Rust questioned whether EPA or DEQ had approved the planned containment area. Ms. VanMiddlesworth and Dan Robisch stated that approval of this project will set a precedent and similar proposals will follow. Mr. Hanson and Ms. Dalsaso questioned why six (6) years were needed to complete the project.

Mr. McCain stated that the refueling area should not be at the northern end of the marina because it could pollute the slough and the Spokane River. Mr. Robisch was also concerned about activities in the marina area polluting the river.

Mr. Harris stated that the hardened shorelines will limit fish habitat.

Ms. Dalsaso stated that the public comments from the 2005 application should be incorporated into the current administrative record.

Mr. Harris stated that this was a private encroachment on a public resource. Mr. Harris and Mr. Fillmore stated that it will occupy an additional three to four acres of the lake without giving anything back to the public. Julie Dalsaso stated that the marina should not occupy any more space than is currently does. When questioned, Mr. Harris did admit that this marina did not differ from other commercial marinas except for the three more acres of lake surface it will occupy. Susan Melka, Sue Flammia, Ms. Robisch, and Ms. Twillman also stated that the project is a private use of a public resource. Mr. Harris, Mr. Wing, Mr. Robisch, Mr. Behm, and David Larsen stated that it will create more congestion and boat wakes in the canal, and conflict with non-motorized uses will increase.

Dwight McCain, Mr. Wing, Mr. Fillmore, Ms. Dalsaso, and Ms. Owings stated that these conflicts will occur due to the location of the refueling dock and boat launch. Ms. Melka stated that the additional area occupied on the lake surface is already very congested, and the benefits just do not seem to outweigh the impacts. Ms. Dalsaso stated that public safety would be improved by limiting the extension of the marina into the main part of the lake. Mr. Larsen, Ms. Flammia, and Ms. Robisch stated that the increased moorage will degrade the quality of Cougar Bay due to the associated increase in boat traffic. Ms. Flammia stated that the increased boat traffic will increase wakes and cause more sediment issues along the shore. Ms. Drumheller stated that the example of the floating green should be followed, such that a public benefit is realized through this commercial enterprise. Ms. Drumheller, Mr. Hinrichsen, and Mr. Fillmore stated that the boat launch should be made available to the public.

Mr. Larsen stated that traffic problems will result from the entrance onto Highway 95.

10. Several exhibits from the applicant and members of the public were given to the agencies on the night of the hearing. These materials are included in the summary of written materials in item 8 above. The materials are mostly letters expressing support or opposition to the proposal. Ms. Dalsaso also submitted some past letters from other agencies and organizations, some newspaper articles, photos, and other documents. Mr. Behm also submitted a video of the marina during a flood. All of the written materials, and the video, are incorporated into this document by reference. Some are referred to later in this document.

11. A series of letters were exchanged between the applicant, Kootenai County Fire and Rescue, and Kootenai County Parks and Waterways after the June 4, 2009 public hearing. Through these letters, it became apparent that the applicant and county agencies did not have the same understanding of their agreement for county moorage at the marina. As a result, the agreement has essentially dissolved and the county no longer has guaranteed moorage at the Marina Yacht Club. Kootenai County Fire & Rescue sent a letter dated June 18, 2009 to the Governor requesting that this moorage be made a condition of the permit. The applicant sent a letter dated June 19, 2009 to the hearing coordinator informing him of the agreement's dissolution. All of these letters are incorporated into this document by reference.

12. The Idaho Transportation Department (ITD) sent an e-mail dated March 18, 2009 to IDL requesting a copy of the application. A reply from IDL on the same date indicated that the application would be sent to ITD. A follow up e-mail from ITD was sent on April 7, 2009. IDL's reply on April 7, 2009 stated that a Notice of Application was not published and IDL was waiting for additional information from the Applicant. Another follow up e-mail from ITD was sent on June 4<sup>th</sup>, the night of the public hearing. An e-mail dated June 10, 2009 indicated that ITD received a copy of the application on that day. In that e-mail, ITD stated that the proposed work appeared to be within the ITD right of way for Highway 95 and the bridge over the west channel of the Spokane River. Another e-mail from ITD dated June 10, 2009 stated that an ITD encroachment

permit would be needed, but it could be obtained after other permits were obtained. In a letter dated June 12, 2009 from ITD to the Corps, ITD stated that the Applicant would need a highway encroachment permit. ITD also stated that they would like additional information on the shoreline slope stability and the scour potential on the bridge over the west channel of the Spokane River. All of the letters and e-mails regarding ITD are incorporated into this document by reference.

13. One of the exhibits submitted by Julie Dalsaso was a letter dated July 14, 2006 from ITD to the Coeur d'Alene City Council. This letter stated that ITD had analyzed information regarding the proposed dredging and had determined that no impacts to the highway would occur. This letter also stated that ITD did have concerns regarding traffic impacts.

14. The existing Marina Yacht Club facility has 339 slips (Section 2.2 of Supplement).

15. Concerns for groundwater contamination due to the dredging of contaminated sediments was a major factor in the 2005 application denial. The applicant submitted a sampling and analysis plan in November 2006 to the Corps, the Environmental Protection Agency (EPA), and DEQ (Page 54 of Supplement). This plan included 85 samples from 25 locations in the marina basin (Page 11 of Supplement). The agencies approved the plan in December of 2006 (Page 10 of Supplement). The applicant submitted a groundwater model and seepage evaluation to DEQ for review in June of 2007 (Page 5 of Supplement).

16. The U.S. Army Corps of Engineers, in conjunction with other State and Federal Agencies, prepared the Northwest Regional Sediment Evaluation Framework, Interim Final, in September of 2006. This document provided guidelines and requirements for evaluating the removal and disposal of sediments in navigable waters in the Pacific Northwest (Section 2.1 of Supplement).

17. A letter from DEQ to Applicant dated September 14, 2007 was part of the applicant's exhibit submitted at the hearing. This letter informed the applicant of the results of DEQ's review of the groundwater and seepage model submitted by the Applicant in June of 2007. DEQ stated that the applicant should either plan to monitor groundwater quality in conjunction with the dredging, or install a liner in the dredged basin to match the existing conditions. The Applicant has chosen to line the bottom of the dredged basin with clay (Section 1.5 of Supplement).

18. An e-mail dated September 16, 2008 was part of the applicant's exhibit submitted at the hearing. This e-mail was from the Corps to the Applicant. It stated that the sediment sampling was adequate, and that the revised dredging and sediment disposal plan was adequate to address previous concerns.

19. Threshold contaminant concentrations were approved by EPA and Corps. These concentrations were used to determine if the sediments should be placed in a confined

disposal facility (CDF) or used as general fill (Pages 11 and 12 of Supplement).

20. Except for lead and zinc, the TCLP test results (Table 7.1 in Supplement, and Table 2-1 in Appendix A) suggest that the readily mobile metals in the contaminated sediments have largely leached out. Arsenic levels were quite low or nondetect in the TCLP results.

21. Zinc concentrations in ground water decrease with depth and distance from the lake due to attenuation in the sediments (Page 23 of Appendix C).

22. Dredging will be done in the dry (Section 4.1 of Supplement). Temporary cofferdams will be used to isolate the work areas. The dredged area extends from the bridge over the west channel of the Spokane River to the area between the gravel points at the south end of the marina basin (Figure 4.1 of Supplement). Excavation will be done with traditional earthmoving equipment. The contaminated sediments are in discrete layers, and sediments below the contaminated layers are suitable for use as general fill (Section 4.2 of Supplement).

23. Dredging will take place between October 1 and December 15 when lake levels are low and seasonal flooding risk is low (Section 4.3 of Supplement). The elevation of the cofferdam will be 2,128 feet, and the highest lake level recorded during this time frame was 2,127.14 feet. Contingency plans exist for higher lake levels. The excavation area will be protected from erosion by installing geotextile fabric and riprap. Water can be pumped back into the work area to equalize the water levels and prevent scouring (Section 4.3 of Supplement). Excavation can then resume after water levels drop and the work area is again dewatered.

24. The proposed dredging would take place over three or more seasons (Section 4.3 of Supplement). It will be conducted in several phases (Figure 4.1 of Supplement).

25. 20 separate dredged material management units (DMMUs) were developed in and adjacent to the marina basin (Figures 7.1 through 7.14 of Supplement). Materials high in lead or arsenic would be placed in a CDF (CDF-1) with an underliner and protected from infiltration with an engineered cover that eliminates most infiltration (Section 7.3.1 of Supplement). Materials with elevated Cadmium, Copper, Silver, and/or Zinc will be placed in a CDF (CDF-2) that is designed to contain the sediments, minimize infiltration, and contain stormwater runoff in treatment swales (Section 7.3.1 of Supplement). Tables 4.1 and 7.2 in the Supplement lists the volumes from each DMMU to be hauled to the CDFs or used as fill. Table 7.1 of the Supplement provides a detailed list of the DMMUs with the total concentrations of contaminants in several different sediment layers within each DMMU. Figures 7.2 through 7.15 of the Supplement show cross sections of the dredged areas and the depths and thicknesses of the different types of dredged materials.

26. CDF-1 will have a surface elevation just above the 2,136 elevation of the 100-

year flood (Figure 7.16 of Supplement). The sides of the facility are completely buried and lined with a compacted clay liner. As a result, no effects from these floods are anticipated.

27. CDF-2 will also have a surface elevation just above the 2,136 elevation of the 100-year flood (Figure 7.17 of Supplement). The east side of the facility does have an edge that is not buried. This edge does, however, have 20 feet of clean fill material on the outside of the contained sediments. If vegetated, it should be stable during the 100-year flood events (Sections 7.3.2, 7.4.1 and 7.4.2 of Supplement). Based on recent flood events, the water velocities and depths are not expected to be high enough to erode the cover materials (Section 7.5 of Supplement).

28. CDF-1 will be part of a paved parking lot for the marina, and is not expected to be disturbed in the future. Installation of minor facilities in the future, such as additional light poles, signs, planters, etc, do have the potential to disturb the contaminated sediments underneath the parking areas. A simple layer of filter fabric, or similar material, under an engineered cap and directly on top of contaminated sediments is commonly used as a reminder and visual guide for ground disturbing activities on other disposal facilities. This is a form of institutional control for the contaminated sediment.

29. CDF-2 will be largely outside the parking and other facilities associated with the marina. The Applicant stated on Page 62 of the Supplement that the area covered by CDF-2 will be developed in the future. As described above, a simple layer of filter fabric could also be used on this facility as an institutional control.

30. The applicant has conducted a hydraulic study related to the impact of fill placed on Blackwell Island. This fill is not predicted to raise the elevation of the 100-year flood either upstream or downstream of the site (Section 7.5 of Supplement, and Appendix G).

31. EPA stated that they would prefer to keep the contaminated sediments at an on-site facility instead of hauling them off-site and creating another potential source of contamination (Applicant's testimony).

32. Section 4.5 of the Supplement, Mitigation Measures and Construction Monitoring, describes Best Management Practices (BMPs) that would be used during and after construction. This section also states that a Storm Water Pollution and Prevention Plan (SWPPP) will be prepared and submitted to EPA prior to construction. Monitoring of surface water quality for turbidity and metals will be conducted as per the draft 401 certification prepared by DEQ. Daily reports will be maintained to document water quality impacts.

33. Idaho Code § 58-1308 allows IDL to assess civil penalties in the amount of \$10,000, or \$1,000 per day for violations that cause harm to water quality, fisheries, or other public trust values. In addition, IDL may assess a civil penalty equal to the cost of



enforcing or terminating any nuisance, source of environmental degradation, cause of sickness, or health hazard. These authorities may be used to ensure that the dredging and other activities are conducted as planned and they do not harm water quality or other public trust values.

34. Shoreline erosion in parts of Lake Coeur d'Alene and some of its tributaries continue to mobilize contaminated sediments. The proposed shoreline protections (walls and riprap) should eliminate any further shoreline erosion in the marina basin. The Idaho Department of Fish and Game stated that the riprap will benefit the warm water fish species using the marina basin.

35. The existing marina extends approximately 100 feet into the lake from the west gravel point, and 225 feet into the lake from the east gravel point. The proposed marina would extend approximately 375 feet into the lake from the west gravel point, and 500 feet into the lake from the east gravel point. The width of the marina in this area is about 600 feet. This indicates that the marina is expanding approximately 3.75 acres into the lake.

36. The existing marina is open to the current and debris flowing north out of the lake. The proposed marina includes a wave attenuator on the outside, or southern edge of the dock structure. This is expected to deflect the current and debris away from the marina. A need for this wave attenuator is demonstrated in the application.

37. The 70-foot wide fairway and low boat speeds should not adversely affect nonmotorized traffic in the marina basin. The existing marina has at least two places where the fairway is approximately 50 feet wide, and several others that are approximately 70 feet wide.

38. The proposed marina would have a large commercial component to it. These commercial activities are concentrated at the north end of the marina and will include use of the vertical launch bay, boat ramp, sale dock, and office. The main purpose of the commercial component is to provide full service moorage with off-site boat storage. A customer's boat will spend all winter in dry, warehoused storage. The customer will contact the Applicant in the spring and request that their boat be ready for use on a certain date. Prior to that date, the Applicant will remove the boat from storage, haul it to the Marina Yacht Club, launch it, gas it up, and secure it in the customer's slip. Once a customer makes an initial delivery of their boat, they will not need to transport it again unless they wish to visit a different lake. All of the boat sheds will be removed from the marina, so boats will be exposed to the elements if they are not removed from the lake. In addition, several boat sale slips are located next to the boat ramp, as is a business office.

39. Other commercial encroachments that have occupied significant space on navigable waters provided associated benefits to the public. As stated in testimony from Ms. Dalsaso, and as shown in one of the exhibits she submitted, the floating green in Coeur d'Alene was approved with a requirement that income be used to improve

public access provided by Kootenai County and that public access to Sanders Beach be allowed to continue. The exhibit submitted by Ms. Dalsaso was a letter dated June 22, 1988 from Governor Andrus. The public boardwalk surrounding the marina at the Coeur d'Alene resort is another example of public benefits accompanying a commercial encroachment. Ms. Drumheller stated that the Willow Bay Marina & Yacht Club provided several benefits to the public with their marina project. Several other members of the public stated that the Applicant's project did not provide sufficient public benefits.

40. IDAPA 20.03.04.020.05 allows commercial marinas to rearrange their components without going through a full permitting process in certain circumstances.

41. No trailer parking spaces are included in the design.

42. The proposed boat ramp would not be available for public use due to the commercial activities and lack of trailer parking.

43. IDAPA 20.03.04.015.03(c) states in part "Commercial marinas shall provide a minimum of upland vehicle parking equivalent to one (1) parking space per two (2) watercraft moorages, and one (1) parking space per two (2) float home moorages. Local city or county ordinances governing parking requirements for marinas will apply if such have been enacted." Kootenai County does not have parking requirements specific to marinas, so the IDL standard applies. No distinction is made between boat slips and personal watercraft stations in IDAPA 20.03.04.015.03(c). With 405 boat slips and 128 personal watercraft stations, 267 parking spaces are required. According to diagrams 3.5 through 3.7, the project contains 571 parking spaces, so the requirements of IDAPA 20.03.04.015.03(c) appear to be satisfied for the current application.

44. IDAPA 20.03.04.010.15 includes channels and basins in the definition of "encroachments in aid of navigation". IDAPA 20.03.04.012.02 requires all encroachments to be approved by IDL.

### **III. CONCLUSIONS OF LAW**

1. The Idaho Board of Land Commissioners (Board) is designated in Idaho Code § 58-104(9) and § 58-1303 to regulate, control and permit encroachments on, in, or above the beds of navigable lakes in the state of Idaho. IDL is the administrative agency of the Board, as per Idaho Code § 58-119.

2. Lake Coeur d'Alene is a navigable lake as defined by Idaho Code § 58-1302(a). Pursuant to IDAPA 20.03.04.012.02, encroachments of any kind on, in, or above the beds of a navigable lake require a permit prior to encroaching on the lake.

3. Pursuant to Idaho Code § 58-1301, lake encroachments must be regulated to protect property and the lake value factors of navigation, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, and water quality. These values must be

given due consideration and weighed against the navigational or economic necessity or justification for, or benefit to be derived from, the proposed encroachment.

4. IDL shall make decisions on proposed encroachments in accordance with the Public Trust Doctrine as set forth in Idaho Code § 58-1201 through 1203. This statute protects the property rights of private land owners, including the ability to utilize their riparian rights as a means to access the waters of the navigable lakes of Idaho.

5. IDL shall also make decisions on proposed encroachments in accordance with the Public Trust Doctrine as explained by the Idaho Supreme Court in Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club, Inc., 105 Idaho 622, 671 P.2d 1085 (1983) (KEA) and subsequent cases. The Supreme Court in KEA determined that public trust uses include those of fish and wildlife habitat, recreation, aesthetic beauty, and water quality. The court in KEA also stated that mere compliance of IDL with its' legislative authority is not sufficient to determine if their actions comport with the requirements of the Public Trust Doctrine.

6. Idaho law, including Idaho Code § 58-1301 *et. seq.* (the Lake Protection Act), delegates no authority to IDL for the regulation of boats and water craft. Water craft are regulated by the United States Coast Guard through the Idaho Department of Parks and Recreation, local County Sheriff's Departments, and Title 67, Chapter 70, Idaho Code (Idaho Safe Boating Act).

7. Kootenai County Waterways Ordinance No. 279D, Section 6 - Limits for Certain Waterways establishes a 5 mph "no-wake" zone within 100' of shoreline, docks, and structures in Lake Coeur d'Alene. In addition, Cougar Bay has been designated by Kootenai County as a no wake zone.

8. The current application differs substantially from the 2005 application in method and scope of dredging, as well as the marina design. As a result, the application at hand must be judged on its own merits. Data submitted in support of, and comments pertaining to, the 2005 application are not relevant and will not be considered in the decision at hand.

9. The site characterization has adequately identified metals-contaminated sediments and, as stated by the applicant, it was done with the approval of DEQ, EPA, and the Corps.

10. Dry dredging, resealing the basin bottom, and encapsulation of the contaminated sediments is not expected to harm surface or ground water quality, and may actually improve water quality of the Spokane River and the aquifer. The contaminated materials will be removed from the lake, groundwater will maintain approximately the same infiltration rates, and the contaminated sediments will be contained in a drier and more stable configuration. The sampling and site characterization plans were approved by the Corps, DEQ, and EPA. Monitoring will be conducted during construction and BMPs will be implemented. The dredging and sediment disposal plan appears to

adequately protect surface and ground water quality.

11. The ability of IDL to ensure proper construction of the disposal facilities is not entirely clear. A performance bond would help ensure that they are constructed and completed in a timely manner. If the disposal facilities will be significantly disturbed in the future, it must be handled by the local jurisdictions and DEQ. Once the marina is constructed, the dredged materials are secured from reentering the lake, and the disposal facilities are properly closed, then the disposal facilities are outside the jurisdiction of IDL.

12. IDAPA 20.03.04.015.11.b requires dredging to have a clear environmental, economic, or social benefit to the citizens of Idaho. The applicant has demonstrated that the proposed dredging will meet this standard by providing more public moorage and by cleaning up a portion of the bed of the lake.

13. No authority is delegated to IDL over roads and road safety. Any concern about traffic on Highway 95 is an issue for state and local highway authorities.

14. The proposed riprap and retaining walls are needed to stabilize the shoreline within the marina. Section 3.3 of the supplemental information provides a description of how vegetation will be incorporated in the design, and how other fish friendly methods will be used.

15. IDL neglected to notify ITD of the application before the hearing. Past correspondence with ITD suggests that additional information concerning stability of the reconstructed slopes below the highway and potential scour of the bridge will address their right of way concerns. The Applicant may need a right of way encroachment permit, and ITD stated that this permit could be applied for after other permits are issued.

16. IDAPA 20.03.04.010.09 defines a commercial marina as "A commercial navigational encroachment whose primary purpose is to provide moorage for rental or for free to the general public."

17. IDAPA 20.03.04.010.10 defines a commercial navigational encroachment as "A navigational encroachment used for commercial purposes."

18. The applicant is proposing a major reconstruction of this facility. That reconstruction would also alter the type of moorage service being offered. This is the first marina in Idaho that automatically provides off-season boat storage with slip rental, and it is a significant change from the previous business model used at this facility. The boat ramp is an integral part of the commercial activities at the proposed marina. Those activities require uninterrupted access to the boat ramp. In addition, trailer parking is no longer being provided due to the large area required for such parking. The primary purpose of a commercial marina is to provide moorage for rental or for free to the

general public. While the proposed project does have moorage available for rent to the general public, it also has characteristics of a commercial navigational encroachment. Many other commercial marinas do not have any boat ramps, and some commercial navigational encroachments do not provide any public access. Based on these precedents, and the commercial nature of the north end of the marina, public access on the proposed boat ramp should not be required by IDL.

19. The department's procedures, in Section 25.E, state that the permit for a commercial marina "should typically specify" that a boat ramp will be open to the public. The extent of the commercial use, however, constitutes an unusual circumstance and IDL has the latitude to not require general public use. No rule or statute requires that public access to a boat ramp be provided at a privately operated marina. The marina operator is the only party who will use this boat ramp to launch and dry dock his customer's boats that are moored at the marina.

20. The new marina configuration will alter the traffic patterns for nonmotorized vessels traveling between the BLM recreational site and Cougar Bay. This nonmotorized use is well established, as shown by the written and oral testimony, and complements the designated natural area and designated no wake zone in Cougar Bay. Nonmotorized vessels would be required to travel farther out into the lake at the head of the Spokane River. This area is heavily used due to the river-to-lake boat traffic and the presence of several marinas and community docks in the vicinity. This heavy use creates rough water that makes nonmotorized use difficult, if not dangerous, in this area

21. The proposed design pushes the line of navigability farther into the lake than it was previously, especially on the east side. The Cedars restaurant, located east of the marina, extends approximately 300 feet into the lake/river and establishes the line of navigability on the west side of the river in the immediate vicinity. While additional public access through moorage is being provided with the increased use of the lake surface, no other public benefit is provided. The removal of a public boat ramp, and replacement with a commercial boat ramp, reduces the public benefits of the marina.

22. The correspondence regarding the breakdown of the agreement between county agencies and the applicant was received after the June 4, 2009 hearing. While the reasons for this breakdown may be in dispute, the end result is not disputed by the applicant or Kootenai County. As a result, that correspondence cannot be disregarded by IDL. At this point in time, IDL is assuming that no facilities will be available for use by the Kootenai County agencies. This is a further reduction in the public benefits provided by the overall project.

23. While 3.75 acres is not a significant portion of the overall lake surface, the location of the 3.75 acres at the head of the Spokane River is significant. This area contains numerous obstacles to navigation including a floating restaurant and numerous piling from past log storage operations. Due to the high levels of boat traffic at the head of the river, a reduction of navigable lake surface must be carefully weighed against the public trust values provided by the associated encroachment. Idaho Code § 58-1301

requires that public trust values be weighed against the navigational or economic necessity or justification for, or benefit to be derived from, the proposed project. The additional 194 moorage spaces, clean up of the contaminated sediments, and improved visual aesthetics are the benefits provided by the project. Loss of the public boat ramp, impact to nonmotorized traffic, loss of moorage for county agencies, impacts to navigation at the head of the Spokane River, and additional occupancy of the lake surface are the adverse impacts to the public trust values. The proposed project does not appear to justify the use of the additional lake surface. The floating green, Coeur d'Alene Resort public boardwalk, and other projects have provided public benefits in exchange for occupying significant lake surface. The Marina Yacht Club design should either restrict the marina to within 300 feet of shore, or provide more public benefits.

#### **IV. HEARING COORDINATOR CONCLUSIONS AND RECOMMENDATIONS**

Based upon the information provided to me as the hearing coordinator, the fact that the concerns regarding dredging of the contaminated sediments appear to have been addressed, the fact that the proposed fill will not raise the 100-year flood elevations in adjacent areas, the fact that the proposed marina will have a substantial commercial component, and the fact that the additional encroachment into the lake does not appear to be justified, I recommend that the Director of IDL issue a Final Order stating that the Mica Supervisory Area of IDL should **approve** the encroachment permit application with the following conditions:

1. Applicant shall install a layer of filter fabric, or similar material, between the contaminated sediments and their cover materials in the CDF-1 and CDF-2 facilities.
2. Applicant shall use a portable XRF unit, or similar device, to assist with the categorization of sediments during dredging.
3. Applicant shall compact the clay in the marina basin, or use additional volumes or types of clay, or use a combination of these two efforts, to achieve the targeted permeability.
4. Applicant shall work with the City of Coeur d'Alene to properly design and implement relocation of their waterline.
5. Dewatering pumps shall be screened to prevent uptake of fish, and all fish that get caught between the dewatering bladders must be quickly transported to the lake or river.
6. Prior to beginning construction the Applicant must submit to the Department of Lands a copy of the DEQ Section 401 certification, a copy of the final Corps 404 permit, and a copy of the highway encroachment permit from ITD.
7. The permit shall have the following condition, "The Permittee shall indemnify, defend and save harmless, the Idaho Department of Lands, its officers, agents and employees from and against any liability, claims, damages, losses, debts, obligations, judgments, expenses or actions, including reasonable attorneys' fees from action related to this permit. If it becomes necessary for the Idaho Department of Lands to defend any action seeking to impose any such liability, Permittee agrees to pay the Idaho Department of Lands all costs of court and

attorneys' fees incurred by the Idaho Department of Lands in effecting such defense in addition to all other sums that the Idaho Department of Lands may be called upon to pay by reason of the entry of a judgment against it in the litigation in which such is asserted."

8. Applicant shall apply for a submerged lands easement from IDL for the utility corridor under the marina basin.
9. Phase 1 sediment dredging, disposal facility construction and close out, and bank stabilization must be completed prior to the start of Phase 2 dredging.
10. Applicant shall discuss all proposed commercial activities pertaining to the marina with the IDL staff in the Mica Area Office in order to develop a suitable lease modification for the IDL submerged lands lease. Boat sales, launching fees, boat rentals, office space, moorage, and other uses should be included. The lease adjustment shall also require Applicant to estimate the cost of properly closing out Phase 1 sediment disposal facilities and implementing the proposed shoreline protections for the Phase 1 area.
11. Applicant shall provide a bond in favor of IDL in the amount provided by the Applicant to properly close out Phase 1 sediment disposal facilities and implement the proposed shoreline protections for the Phase 1 area. The amount required to similarly guarantee the Phase 2 work is similar to the amount required for the Phase 1 work, so the bond amount shall remain constant through the project. This bond shall ensure the proper operation of dredging activity and closure of CDF-1 and CDF-2 such that the contaminated dredged sediments cannot re-enter the lake or river. The bond shall be required prior to the start of construction, and will be released after a final inspection by IDL and the Corps indicates that the dredging has been successfully completed, the shorelines are stabilized, and the dredge spoil areas have been properly constructed and closed so that the contaminated sediments cannot reenter the lake or other waterways.
12. Applicant shall either redesign the south end of the marina to stay within 300 feet of the shoreline, or shall provide more public trust benefits. Benefits to the public trust must include redesigning a portion of the dock access by the western gravel point to allow nonmotorized craft access underneath the dock for travel between Cougar Bay and the west channel of the Spokane River. Additional public trust benefits are also needed, and could include allowing public use of the boat ramp, providing free moorage for the county agencies, or other negotiated benefits. As long as these changes do not expand the marina size, they could be approved under IDAPA 20.03.04.020.05 without going through a full application process. Extensive public involvement has already occurred for this project.

DATED this 1st day of July, 2009.



ERIC WILSON  
Hearing Coordinator

**Attachment 1**  
**Application Materials for Permit Application L-95-S-3212**

The application was provided on a computer disc. It contained the following documents:

- A. New Application 3-27-09. Two (2) page PDF document consisting of the standard application form.
- B. DOL Map 1000 Scale 03. A jpg image of an air photo covering the project area and parts of Lake Coeur d'Alene and the Spokane River.
- C. ACOE Figures. A forty seven (47) page PDF document containing all the figures from the new application.
- D. Marina Yacht Club Supplement to Application for USACE 3-27-09. A one hundred ten (110) page PDF document containing a detailed description of the new application and supporting information. The chapters in this document are:
  1. Project Overview
  2. Dredged Material Management Units (DMMU) and Confined Disposal Facilities (CDF)
  3. Proposed Marina – Geometry
  4. Construction Approach
  5. Sampling and Analysis Plan and Evaluation
  6. Hydro-geologic Evaluation and Groundwater Protection
  7. Conceptual Site Model, CDF Construction and Material Disposal
  8. Wetlands
  9. Stormwater Control
- E. Volume 2 Appendices 3-29-09. A three hundred twenty four (324) page PDF document containing more information supporting the application. These Appendices are:
  1. Appendix A Sampling and Analysis Plan
  2. Appendix B Proposed Marina Plan – Full Size
  3. Appendix C Hydrogeologic Analysis Of The Blackwell Island Area
  4. Appendix D Sediment Characterization and Sampling Data
  5. Appendix E Wetland Delineation Report
  6. Appendix F Preliminary Draft Certification for USACE NWW No. 051200031
  7. Appendix G Flood Hazard Hydraulic Study for the City of Coeur d'Alene



**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 10<sup>th</sup> day of July, 2009, I caused to be served a true and correct copy of the foregoing document, by the method indicated:

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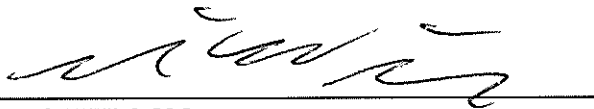
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