Preliminary Draft Negotiated Rule (Draft 1)

Docket No. 20-0304-1901

20.03.04 – Rules for the Regulation of Beds, Waters, and Airspace Over Navigable Lakes in the State of Idaho

020. APPLICATIONS.

01. Encroachment Applications. No person shall hereafter make or cause to be made any encroachment on, in or above the beds or waters of any navigable lake in the state of Idaho without first making application to and receiving written approval from the department. The placing of dredged or fill material, refuse or waste matter intended as or becoming fill material, on or in the beds or waters of any navigable lake in the state of Idaho shall be considered an encroachment and written approval by the department is required. If demolition is required prior to construction of the proposed encroachment, then the application must describe the demolition activities and the steps that will be taken to protect water quality and other public trust values. No demolition activities may proceed until the permit is issued. (4-2-08)

02. Signature Requirement. Only persons who are littoral owners or lessees of a littoral owner shall be eligible to apply for encroachment permits. A person who has been specifically granted littoral rights or dock rights from a littoral owner shall also be eligible for an encroachment permit; the grantor of such littoral rights, however, shall no longer be eligible to apply for an encroachment permit. Except for waterlines or utility lines, the possession of an easement to the shoreline does not qualify a person to be eligible for an encroachment permit. (4-2-08)

03. Other Permits. Nothing in these rules shall excuse a person seeking to make an encroachment from obtaining any additional approvals lawfully required by federal, local or other state agencies. (9-13-90)

04. Repairs, Reinstallation of Structures. No permit is required to clean, maintain, or repair an existing permitted encroachment, but a permit is required to completely replace, enlarge. or extend an existing encroachment. Replacement of single-family and two-family docks may not require a permit if they meet the criteria in Section 58-1305(e), Idaho Code. Reinstalling the top or deck of a dock, wharf or similar structure shall be considered a repair; reinstallation of winter damaged or wind and water damaged pilings, docks, or float logs shall be considered a repair. Repairs, or replacements under Section 58-1305(e),Idaho Code, that adversely affect the bed of the lake will be considered a violation of these rules. (4-7-11)

05. Dock Reconfiguration. (4-2-08)

a. Rearrangement of single-family and two-family docks will require a new application for an encroachment permit. (4-2-08)

b. Rearrangement of community docks and commercial navigational encroachments may not require a new application for an encroachment permit if the changes are only internal. The department shall be consulted prior to modifications being made, and shall use the following criteria to help determine if a new permit must be submitted: (4-2-08)

i. Overall footprint does not change in dimension or orientation; (4-2-08)

ii No increase in the square footage, as described in the existing permit and in accordance with Paragraph 015.13.a., occurs. This only applies to community docks; (3-29-10)

iii. The entrances and exits of the facility do not change. (4-2-08)

06. Redredging. Redredging a channel or basin shall be considered a new encroachment and a permit

is required unless redredging is specifically authorized by the outstanding permit. Water quality certification from the Idaho Department of Environmental Quality is required regardless of how redredging is addressed in any existing or future permit. (4-2-08)

07. Forms, Filing. Applications and plans shall be filed on forms provided by the Department together with filing fees and costs of publication when required by these rules. Costs of preparation of the application, including all necessary maps and drawings, shall be paid by the applicant. (4-11-19)

a. Plans shall include the following information at a scale sufficient to show the information requested: (4-11-19)

i. Lakebed profile in relationship to the proposed encroachment. The lakebed profile shall show the summer and winter water levels. (4-2-08)

ii. Copy of most recent survey or county plat showing the full extent of the applicant's lot and the adjacent littoral lots. (4-2-08)

iii. Proof of current ownership or control of littoral property or littoral rights. (4-2-08)

iv. A general vicinity map. (4-2-08)

v. Scaled air photos or maps showing the lengths of adjacent docks as an indication of the line of navigability, distances to adjacent encroachments, and the location and orientation of the proposed encroachment in the lake. (4-2-08)

vi. Total square footage of proposed docks and other structures, excluding pilings, that cover the lake surface. (4-2-08)

vii. Names and current mailing addresses of adjacent littoral landowners. (4-2-08)

b. Applications must be submitted or approved by the littoral owner or, if the encroachment will lie over or upon private lands between the natural or ordinary high water mark and the artificial high water mark, the application must be submitted or approved by the owner of such lands. When the littoral owner is not the applicant, the application shall bear the owner's signature as approving the encroachment prior to filing. (4-2-08)

c. If more than one (1) littoral owner exists, the application must bear the signature of all littoral owners, or the signature of an authorized officer of a designated homeowner's or property management association. (4-2-08)

d. Applications for noncommercial encroachments intended to improve waterways for navigation, wildlife habitat and other recreational uses by members of the public must be filed by any municipality, county, state, or federal agency, or other entity empowered to make such improvements. Application fees are not required for these encroachments. (4-2-08)

e. The following applications shall be accompanied by the respective nonrefundable filing fees together with a deposit toward the cost of newspaper publication, which deposit shall be determined by the director at the time of filing: (4-2-08)

i. Nonnavigational encroachments require a fee of one thousand dollars ($1,000); except that nonnavigational encroachments for bank stabilization and erosion control require a fee of five hundred fifty dollars ($550). (4-11-19)

ii. Commercial navigational encroachments require a base fee of two thousand dollars ($2,000). If the costs of processing an application exceed this amount, then the applicant may be charged additional costs as allowed by Title 58, Chapter 13, Section 58-1307, Idaho Code; (4-2-08)

iii. Community navigational encroachments require a fee of two thousand dollars ($2,000); and (4-2-08)

iv. Navigational encroachments extending beyond the line of navigability require a fee of one thousand dollars ($1,000). (4-2-08)

f. Applicants shall pay any balance due on publication costs before written approval will be issued. The Department shall refund any excess at or before final action on the application (9-13-90)

g. Application for a single-family or two-family dock not extending beyond the line of navigability or a nonnavigational encroachment for a buried or submerged water intake line serving four or less households shall be accompanied by a nonrefundable filing fee of ~~three hundred dollars ($300)~~ four hundred twenty-five dollars ($425). ~~(4-7-11)~~(_____)

h. No publication cost is required for application for noncommercial navigational encroachment not extending beyond the line of navigability or for application for installation of buried or submerged water intake lines and utility lines. (9-13-90)

i. Applications and plans shall be stamped with the date of filing. (7-1-98)

j. Applications that are incomplete, not in the proper form, not containing the required signature(s), or not accompanied by filing fees and costs of publication when required, shall not be accepted for filing. The department shall send the applicant a written notice of incompleteness with a listing of the application's deficiencies. The applicant will be given thirty (30) days from receipt of the notice of incompleteness to resubmit the required information. The deadline may be extended with written consent of the department. If the given deadline is not met, the department will notify the applicant that the application has been denied due to lack of sufficient information. The applicant may reapply at a later date, but will be required to pay another filing fee and publication fee, if applicable. (4-2-08)

021. -- 024. (RESERVED)

025. PROCESSING OF APPLICATIONS FOR SINGLE-FAMILY AND TWO-FAMILY NAVIGATIONAL ENCROACHMENTS WITHIN LINE OF NAVIGABILITY.

01. Single-Family and Two-Family Navigational Encroachments. Applications for single-family and two-family navigational encroachments not extending beyond the line of navigability will be processed with a minimum of procedural requirements and shall not be denied except in the most unusual of circumstances. No newspaper publication, formal appearance by the applicant, or hearing is contemplated. (4-2-08)

~~**02. Adjacent Littoral Owners**. If a proposed encroachment referred to in Subsection 025.01 may infringe upon the littoral right lines of an adjacent littoral owner, the department shall require the applicant to secure the written consent of the adjacent littoral owner. (4-2-08)~~

03. Notification of Adjacent Littoral Owners. ~~If the signature of the adjacent littoral owner is not required, the~~ The ~~D~~department ~~shall~~ will provide a copy of ~~such~~ the application to the littoral owners immediately adjacent to the applicant's property. If the applicant owns one (1) or more adjacent lots, the department ~~shall~~ will notify the owner of the next adjacent lot. If the proposed encroachment may infringe upon the littoral rights of an adjacent owner, the department will provide notice of the application by certified mail, return receipt requested; otherwise, ~~This~~ the ~~notification~~ notice will be sent by regular mail. Notification will be mailed to the adjacent littoral owners' usual place of address, which, if not known, ~~shall~~ will be the address shown on the records of the county treasurer or assessor. The applicant may submit the adjacent littoral owners' signatures ~~as concurring with the application~~, consenting to the proposed encroachment, in lieu of the department's notification. ~~(4-2-08)~~(_____)

04. Written Objections. (4-2-08)

a. If an adjacent littoral owner files written objections to the application with the department within

ten (10) days from the date of service or receipt of notice of the completed application, the department shall fix a time and a place for a hearing. In computing the time to object, the day of service or receipt of notice of the application shall not be counted. Objections must be received within the ten (10) day period by mail or hand delivery in the local department office or the director's office in Boise. If the last day of the period is Saturday, Sunday or a legal holiday, the time within which to object shall run until the end of the first business day thereafter. (4-2-08)

b. The applicant and any objectors may agree to changes in the permit that result in the objections being withdrawn. Department employees may facilitate any such agreement. Participation by department personnel in this informal mediation shall not constitute a conflict of interest for participation in the hearing process. A withdrawal of objections must be in writing, completed prior to a scheduled hearing, and contain: (4-2-08)

i. Signatures of the applicant and the objecting party; (4-2-08)

ii. A description of the changes or clarifications to the permit that are acceptable to the applicant, the objecting party, and the department. (4-2-08)

05. Unusual Circumstances. Even though no objection is filed by an adjacent littoral owner to a noncommercial navigational encroachment, if the director deems it advisable because of the existence of unusual circumstances, he may require a hearing. (4-2-08)

06. Hearings. Hearings fixed by the director following an objection pursuant to Subsection 025.04 or the Director's own determination pursuant to Subsection 025.05 shall be fixed as to time and place, but no later than sixty (60) days from date of acceptance for filing of the application. At the hearing the applicant and any adjacent riparian owner filing timely objections may appear personally or through an authorized representative and present evidence. The department may also appear and present evidence at the hearing. In such hearings the hearing coordinator shall act as a fact finder and not a party. The Director, at his discretion, shall designate a Department representative to sit as the hearing coordinator. Provided, however, that the parties may agree to informal disposition of an application by stipulation, agreed settlement, consent order, or other informal means. (4-2-08)

07. Decision Following a Hearing. The director shall, within forty-five (45) days after close of the hearing provided for in Subsections 025.04 or 025.05 render a final decision and give notice thereof to the parties appearing before him either personally or by certified or registered mail. The final decision shall be in writing. (4-2-08)

08. Disposition Without Hearing. If a hearing is not held under Subsection 025.04 or Subsection 025.05, then the department shall act upon a complete application filed under Subsection 025.01 as expeditiously as possible but no later than sixty (60) days from acceptance of the application. Failure to act within this sixty (60) day timeframe shall constitute approval of the application. Applications determined to be incomplete under Subsection 020.07 are not subject to the sixty (60) day timeframe until the information requested by the department and required by the rules has been submitted. (4-2-08)

09. Judicial Review. Any applicant aggrieved by the Director's final decision, or an aggrieved party appearing at a hearing, shall have a right to have the proceedings and final decision reviewed by the district court in the county where the encroachment is proposed by filing a notice of appeal within thirty (30) days from the date of the final decision. An adjacent littoral owner shall be required to deposit an appeal bond with the court, in an amount to be determined by the court but not less than five hundred dollars ($500) insuring payment to the applicant of damages caused by delay and costs and expenses, including reasonable attorney fees, incurred on the appeal in the event the district court sustains the action of the director. The applicant need post no bond with the court to prosecute an appeal. (4-2-08)

(BREAK IN CONTINUITY OF SECTIONS)

065. ASSIGNMENTS.

01. Assignment of Encroachment Permit. Encroachment permits may be assigned upon approval of the department provided that the encroachment conforms with the approved permit. The assignor and assignee must complete a department assignment form and forward it to the appropriate area office. (4-2-08)

02. Assignment Fee. The assignment fee shall be ~~one hundred fifty dollars ($150)~~ three hundred dollars ($300). The fee shall be paid at the time the assignment is submitted to the department. ~~(4-2-08)~~( )

03. Approval Required for Assignment. An assignment is not valid until it has been approved by the department. (4-2-08)

04. Assignment With New Permit. Encroachments not in compliance with the approved permit may be assigned only if: (4-2-08)

a. An application for a new permit to correct the noncompliance is submitted at the same time. (4-2-08)

b. The assignee submits written consent to bring the encroachment permit into compliance. (4-2-08)