

**PEND OREILLE
SUPERVISORY AREA**

2550 Highway 2 West
Sandpoint ID 83864

Phone (208) 263-5104

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WINSTON A WIGGINS, DIRECTOR
EQUAL OPPORTUNITY EMPLOYER

STATE BOARD OF LAND COMMISSIONERS

Dirk Kempthorne, Governor

Ben Ysursa, Secretary of State

Lawrence G. Wasden, Attorney General

Keith L. Johnson, State Controller

Marilyn Howard, Sup't of Public Instruction

Friday, February 18, 2005

Waterfront Property Management, LLC

Attention: Mr. Ralph Sletager

120 East Lake Street

Sandpoint, ID 83864

Re: Dover Marina, Application for Permit #L-96-S-1643A

Dear Mr. Sletager,

I am the designee of the Idaho Department of Lands Director, Mr. Winston Wiggins. I have reviewed the Findings of Fact and Conclusions of Law prepared by the hearing officer, Mr. Scott Nichols. The January 6, 2005 hearing was conducted as part of Waterfront Property Management's commercial navigational encroachment permit application.

It is my decision to affirm the hearing officer's Findings of Fact, Conclusions of Law, and Recommendation regarding your application for permit, #L-96-S-1643A and approve Waterfront Property Management's application contingent on the stipulations listed in the Recommendation section. A copy of the Findings of Fact, Conclusions of Law and Recommendation is enclosed.

If you have questions, please contact me at (208) 263-5104.

Sincerely,

EDWARD ROBINSON

Area Supervisor, Pend Oreille Supervisory Area
Idaho Department of Lands

Enclosure

Jim Brady, IDL Resource Manager, Mica Supervisory Office

Roger Jansson, Operations Chief-North

Denise Mills, Assistant Director - Minerals, Lands and Range

Scott Nichols, Bureau Chief - Surface and Mineral Resources

DEPT. OF LANDS
05 FEB 22 AM 9:54
BOISE, IDAHO

**BUREAU OF SURFACE AND
MINERAL RESOURCES**
954 West Jefferson
Post Office Box 83720
Boise ID 83720-0050
Phone (208) 334-0200
Fax (208) 334-3698



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February 18, 2005

MEMORANDUM

TO: Edward Robinson, Area Supervisor, Pend Oreille Supervisory Area

FROM: Scott Nichols, Bureau Chief, Surface and Mineral Resources

SUBJECT: Waterfront Property Management LLC – Dover Marina, Encroachment
Application #L-96-S-1643A

FINDINGS OF FACT/CONCLUSIONS OF LAW

Event: Public Hearing – January 6, 2005
Applicant: Waterfront Property Management LLC
Application: Encroachment Permit #L-96-S-1643A – Commercial Marina at Dover
Hearing Officer: Scott Nichols, Bureau Chief, Idaho Department of Lands

Findings of Fact

1. On October 29, 2004, Waterfront Property Management LLC ("WPM") submitted an application to the Idaho Department of Lands ("IDL") seeking approval to build a commercial navigational encroachment (a marina) south of the City of Dover on the north shore of the Pend Oreille River.
2. WPM's application and maps, incorporated into this document by reference, show two phases of the proposal. The first phase of the encroachment would include repair and realignment of an existing private dock and three (3) boat garages. Part of phase one would be the construction of a public boat launch and the installation of a public boardwalk above the shoreline. A floating breakwater would extend 390 feet waterward of the artificial high water mark along approximately 440 feet of shore that will accommodate transient day use side ties for the public. The application states 94 boat slips would be constructed as part of phase one.
3. Phase two of WPM's proposal would extend the marina approximately another 440 feet west along the shoreline. WPM would construct approximately 180 additional boat slips.
4. The entire facility, when complete, would provide moorage for 274 boats, a public launch ramp, and marine support services all of which would occupy 9.63 acres of the Pend Oreille River surface. In the application, WPM proposes that rip rap and commercial navigational encroachments be placed waterward of the artificial high water mark of the Pend Oreille River.

5. The Pend Oreille River is a navigable water and a public trust resource. The river's ordinary high water mark is recognized as 2,051.0 feet above mean sea level. The river's established artificial high water mark of 2,062.5 feet above mean sea level is maintained by the Albeni Falls dam.
6. The proposed marina site was historically utilized as a commercial log storage and log processing facility with little or no public access.
7. There are limited boat launch facilities available for public use on the north side of the Pend Oreille River. Further, there is no other public launch facility, which offers the services proposed at this facility, along the north side of the Pend Oreille River.
8. On or about November 1, 2004, IDL Resource Manager Jim Brady forwarded the application to, and requested comments from local, state and federal agencies including: the Idaho Department of Fish and Game ("IDFG"), the Department of Environmental Quality ("DEQ"), the Department of Water Resources; U.S. Army Corp of Engineers in Coeur d'Alene ("the Corps"); Bonner County Planning and Zoning, Bonner County Commissioners, Bonner County Public Works Marine Division; Panhandle Health District One; Tri-State Water Quality Council ("the Council"); The Lakes Commission; City of Dover; Bryan Quayle; the U.S. Coast Guard in Seattle; Northern Lights Incorporated; and Pacific Gas Transmission. The application was also provided, by Jim Brady, to adjacent property owners for comment.
9. Bonner County Public Ordinance 406 requires a 200-foot no wake zone around the shoreline and within 200 feet of any structure located at the shoreline.
10. In addition to IDL's encroachment permit application, WPM sought water quality certification from the DEQ under Section 401 of the Clean Water Act ("CWA") and a permit from the Corps under Section 404 of the CWA.
11. On July 30, 2004, DEQ issued a letter to the applicant providing a conditional water quality certification under Section 401 of the CWA. WPM's proposed public boardwalk along the shoreline and placement of fill was not certified. DEQ noted that the proposed boardwalk is not a water-dependent activity and that the boardwalk should be moved at least 30 feet back from the shoreline to protect riparian areas, to protect water quality, and to encourage riparian habitat development. WPM's November 2004 application is consistent with these requirements. DEQ's letter is incorporated into this document by reference.
12. The Corps is evaluating the proposal and has been required by the U.S. Fish and Wildlife Service (Service) to "amend the biological evaluation and include cumulative effects analysis and additional conservation measures to minimize the effect of the action on bull trout and bald eagles and then must initiate formal section 7 consultation with the Service for the project." Furthermore, the Service has stated that because the Pend Oreille River is not designated as critical habitat for bull trout, "there is no need for the Corps to consult on the project effects to critical habitat for bull trout."
13. IDL published a legal notice in the *Bonner County Daily Bee* newspaper on November 4 and November 11, 2004. The legal notice stated that, "Pursuant to Section 58-104 (g) and 58-1301 Idaho Code the (Lake Protection Act) and the rules of the State Board of Land Commissioners notice is hereby given that Waterfront Property Management of 120 East

Lake Street, #101, Sandpoint, Idaho 83864, made application to construct a new 274 slip commercial marina. The site is proposed to be located on the Pend Oreille River near Dover, Idaho, adjacent to Sections 31 and 32, Township 57 North, Range 2 West, Boise/Meridian in Bonner County." The notice further stated that, "Written objections to, or requests for hearing in the matter must be on file with the Department of Lands at 3706 Industrial Avenue South, Coeur d'Alene, Idaho 83815, within 30 days after the first appearance of the notice. Specific information regarding the application may be obtained from Jim Brady, Resource Manager for Minerals and Navigable Waters at the above address or by calling (208) 666-8607."

14. A public hearing was conducted on January 6, 2005. Written and oral testimony was presented to the public hearing officer, Scott H. Nichols, Chief, Bureau of Surface and Mineral Resources for the Idaho Department of Lands. An audio tape of the meeting was recorded and subsequently transcribed. Attendees of the meeting included three IDL representatives, the applicant and their consultants, and approximately 110 individuals. A list of the registered attendees and a transcript of the hearing are incorporated into this document by reference. The testimony received at the hearing is incorporated into this document by reference.
15. The information obtained by IDL at the public hearing indicate the following benefits related to the project:
 - Additional public access through construction of a public boat launch facility;
 - Additional public access to Lake Pend Oreille and the Pend Oreille River through 274 moorage spaces available to the public;
 - Development of a public boardwalk to allow lake viewing and fishing access;
 - Development of marine support facilities including fuel and sewage pump-out stations;
 - Consolidated moorage facilities for property owners.
16. Information provided to IDL indicated the following negative issues and impacts related to the project:
 - Large scale commercialization and increased use of Lake Pend Oreille or the Pend Oreille River is not in the best interest of the public or the waterway;
 - Water quality impacts, including nutrient loading and potential fuel releases, to the Pend Oreille River from storm water runoff and marina operation;
 - Potential permanent loss and adverse impacts to wetlands, riparian areas, and fish and wildlife habitat;
 - Potentially adverse impacts to threatened and endangered species such as bull trout and bald eagles;
 - The marina extends too far across the river and will lead to increased congestion and safety concerns. The marina, as proposed, will reduce the active boating channel by 390 feet from a width of 1,550 feet to 1,160 feet.
 - Increased opportunity for spread of noxious and invasive aquatic plant species.

Conclusions of Law

1. The Idaho State Board of Land Commissioners ("Board") is designated by Idaho Code § 58-104(g) 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, Idaho Code § 58-119.

2. The Pend Oreille River is a navigable water as defined by Idaho Code § 58-1302(a). Encroachments of any kind on, in or above the beds of navigable waters require an encroachment permit prior to construction of the encroachment. The area of the proposed project is considered part of the bed of Lake Pend Oreille. Idaho Code § 58-1302(b).
3. WPM is the owner of real property contiguous to the Pend Oreille River and is therefore eligible to make application for an encroachment permit. See Idaho Code § 58-1302(f). The application was processed pursuant to Idaho Code § 58-1306 as a commercial navigational encroachment.
4. Pursuant to Idaho Code § 58-1301, lake encroachments must be regulated to protect property and 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.
5. IDL must make decisions on proposed encroachments in accordance with the public trust doctrine as set forth by the Idaho Supreme Court in Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club, Inc., 105 Idaho 622, 671 P.2d 1085 (1983) and subsequent cases and Idaho Code §§ 58-1201 through 1203. The bed of Lake Pend Oreille and the Pend Oreille River are public trust resources. The IDL must examine the degree of the effect of the project on public trust uses such as: navigation, fishing, recreation, and commerce; the impact of the individual project on the public trust resource; the impact of the individual project when examined cumulatively with existing encroachments to full use of the public trust resource; the impact to the public trust resource when that resource is examined in light of the primary purpose for which the resource is suited (i.e., navigation, fishing, recreation or commerce); and the degree to which broad public uses are set aside in favor of more limited private ones. Kootenai Environmental Alliance, 105 Idaho at 629-30.
6. IDL has determined the proposed marina would be located at least 4,000 shoreline feet away from the closest property owner to the East and the proposed marina would be located at least 3,500 shoreline feet away from the closest property owner to the West. Although not adjacent to the project, the proposed marina will be located approximately 1,500 feet from property across the Pend Oreille River. Due to distance between the proposed marina and adjacent ownership, the proposal does not appear to have an unacceptable adverse impact on adjacent land owner's aesthetic values, scenic views, or property values.
7. The proposed marina will physically occupy approximately 9.63 acres of Pend Oreille River surface. The proposed marina site was historically used for commercial purposes as log storage and processing with little or no public access. Had the log storage activity been continued, the site could have remained a commercial facility with limited or no public access. Although current use of the water surface would be converted from public boating channel to moorage, the proposed marina will provide publicly available moorage for 274 boats that was previously not available. The proposed commercial use will provide previously non-existent day use and additional public access to the Pend Oreille River.

8. In conjunction with Bonner County's no wake zone requirements, the intrusion will reduce the width of the active boating channel from 1,550 to 1,160 feet. However, the encroachment has not been shown to be a navigational hazard and no adverse comments have been received from U.S. Coast Guard. The marina will provide a public recreational launch facility with required upland parking availability. Thus, public access will be enhanced and will not unacceptably displace public navigation.
9. The Corps is working with the Service to further evaluate the cumulative effects of the project on bald eagles and establish additional conservation measures to minimize the effect of the action on bald eagles and bull trout. Based on consultation, evaluation, and development of conservation measures by the Service and the Corps, potential adverse impacts to fish and wildlife resources will be reduced or limited.
10. The IDFG did not indicate that the proposed commercial use would adversely affect fish or wildlife resources.
11. The limited private uses and economic benefit have been offset by:
 - Reducing the size of the proposed project;
 - Reducing impacts to public navigability;
 - Providing additional public access to the lake via otherwise private lands; and
 - Committing to installing Coast Guard approved navigational lights and fuel absorbent booms on the inside of the marina.
12. The applicant provided information to indicate parking would be available in accordance with the administrative rules regarding Regulation of Beds, Waters, and Airspace over Navigable Lakes in the State of Idaho IDAPA 20.03.04, Rule 060.06, which requires commercial navigational encroachments shall provide upland vehicle parking equivalent to one (1) parking space per two (2) watercraft moorages. Local or county ordinances governing parking will apply if such have been enacted.
13. IDL concludes that the proposed commercial encroachment is not in conflict with the Public Trust Doctrine.
14. Any finding of fact deemed to be a conclusion of law is hereby adopted as such; any conclusion of law deemed as a finding of fact is adopted as such.

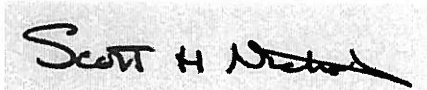
Recommendation

WPM's proposed Dover Marina is a large, multi-phase project requiring approval by multiple state, federal, and local government agencies. IDL received comments from the public and agencies both supporting and opposing this proposal. Written comments cited in the foregoing Findings of Fact are incorporated into this recommendation by reference.

Based on the information provided to me as the hearing officer, the requirements of Idaho Code § 58-1301 *et. seq.* (the Lake Protection Act); and IDAPA 20.03.04 (the administrative rules regarding Regulation of Beds, Waters, and Airspace over Navigable Lakes in the State of Idaho) and for the reasons set forth above, I recommend that IDL approve the encroachment permit application submitted by WPM (#L-96-S-1643A) with standard encroachment terms and supplemental encroachment terms as follows:

1. Approval and issuance of this permit is contingent upon the facility providing a public boat launch facility and associated day use boat tie areas.
2. Approval and issuance of this encroachment permit is contingent upon WPM's compliance with other local, state, and federal permits required to construct and maintain the facility and WPM's compliance with local, state, and federal safety and lighting requirements.
3. Following the recommendations of Northern Lights, Inc.'s letter dated November 16, 2004, no slip or boat canopies may be constructed below the high power lines within Northern Lights, Inc.'s easement.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Scott H. Nichols", is written over a light gray rectangular background.

Scott H. Nichols, Hearing Officer
Bureau of Surface and Mineral Resources
Idaho Department of Lands

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954 West Jefferson
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February 18, 2005

MEMORANDUM

TO: Edward Robinson, Area Supervisor, Pend Oreille Supervisory Area
FROM: Scott Nichols, Bureau Chief, Surface and Mineral Resources
SUBJECT: Waterfront Property Management LLC – Dover Marina, Encroachment
Application #L-96-S-1643A

FINDINGS OF FACT/CONCLUSIONS OF LAW

Event: Public Hearing – January 6, 2005
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Application: Encroachment Permit #L-96-S-1643A – Commercial Marina at Dover
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Findings of Fact

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4. The entire facility, when complete, would provide moorage for 274 boats, a public launch ramp, and marine support services all of which would occupy 9.63 acres of the Pend Oreille River surface. In the application, WPM proposes that rip rap and commercial navigational encroachments be placed waterward of the artificial high water mark of the Pend Oreille River.

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8. On or about November 1, 2004, IDL Resource Manager Jim Brady forwarded the application to, and requested comments from local, state and federal agencies including: the Idaho Department of Fish and Game ("IDFG"), the Department of Environmental Quality ("DEQ"), the Department of Water Resources; U.S. Army Corp of Engineers in Coeur d'Alene ("the Corps"); Bonner County Planning and Zoning, Bonner County Commissioners, Bonner County Public Works Marine Division; Panhandle Health District One; Tri-State Water Quality Council ("the Council"); The Lakes Commission; City of Dover; Bryan Quayle; the U.S. Coast Guard in Seattle; Northern Lights Incorporated; and Pacific Gas Transmission. The application was also provided, by Jim Brady, to adjacent property owners for comment.
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4. Pursuant to Idaho Code § 58-1301, lake encroachments must be regulated to protect property and 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.
5. IDL must make decisions on proposed encroachments in accordance with the public trust doctrine as set forth by the Idaho Supreme Court in Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club, Inc., 105 Idaho 622, 671 P.2d 1085 (1983) and subsequent cases and Idaho Code §§ 58-1201 through 1203. The bed of Lake Pend Oreille and the Pend Oreille River are public trust resources. The IDL must examine the degree of the effect of the project on public trust uses such as: navigation, fishing, recreation, and commerce; the impact of the individual project on the public trust resource; the impact of the individual project when examined cumulatively with existing encroachments to full use of the public trust resource; the impact to the public trust resource when that resource is examined in light of the primary purpose for which the resource is suited (i.e., navigation, fishing, recreation or commerce); and the degree to which broad public uses are set aside in favor of more limited private ones. Kootenai Environmental Alliance, 105 Idaho at 629-30.
6. IDL has determined the proposed marina would be located at least 4,000 shoreline feet away from the closest property owner to the East and the proposed marina would be located at least 3,500 shoreline feet away from the closest property owner to the West. Although not adjacent to the project, the proposed marina will be located approximately 1,500 feet from property across the Pend Oreille River. Due to distance between the proposed marina and adjacent ownership, the proposal does not appear to have an unacceptable adverse impact on adjacent land owner's aesthetic values, scenic views, or property values.
7. The proposed marina will physically occupy approximately 9.63 acres of Pend Oreille River surface. The proposed marina site was historically used for commercial purposes as log storage and processing with little or no public access. Had the log storage activity been continued, the site could have remained a commercial facility with limited or no public access. Although current use of the water surface would be converted from public boating channel to moorage, the proposed marina will provide publicly available moorage for 274 boats that was previously not available. The proposed commercial use will provide previously non-existent day use and additional public access to the Pend Oreille River.

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10. The IDFG did not indicate that the proposed commercial use would adversely affect fish or wildlife resources.
11. The limited private uses and economic benefit have been offset by:
 - Reducing the size of the proposed project;
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14. Any finding of fact deemed to be a conclusion of law is hereby adopted as such; any conclusion of law deemed as a finding of fact is adopted as such.

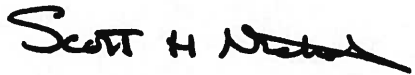
Recommendation

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Respectfully submitted,

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Scott H. Nichols, Hearing Officer
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Idaho Department of Lands