

GEORGE B. BACON
Director
Idaho Department of Lands
300 North 6th Street, 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-96-S-74L)	FINAL ORDER
Waterford Park Homes, LLC)	
)	
Applicant.)	
_____)	

I. NATURE OF PROCEEDINGS/ISSUES

A reconsideration hearing was held on November 13, 2007 at 1:00 pm PST at the Idaho Department of Lands Mica Supervisory Area office in Coeur d'Alene, Idaho. Eric Wilson served as Hearing Coordinator. The Hearing Coordinator issued his Recommendations on December 6, 2007.

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 reconsideration hearing conducted in Coeur d'Alene, Idaho on November 13, 2007.
- 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 docks, placed on the navigable waters require a permit issued by the 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-96-S-74L be approved and the permit be issued by the Pend Oreille Supervisory Area to the Applicant with the following exception:

1. The hearing officer recommended and concluded that the proposed non-navigational encroachment of a public restroom benefits the general public and therefore could be considered in accordance with IDAPA 20.03.04.030.02. While there may be some public benefit for having a restroom located over the waters of the state, such an amenity could also be located on the uplands as a feasible alternative. Furthermore, I deem the kokanee spawning beds have a

higher public and environmental value than the restroom. Although the additional risk to the spawning beds from the restroom may be minor in light of the other necessary and/or beneficial sewage management activities associated with this permit (pump out station and float home hookups), the restroom is an additional unnecessary risk to the spawning beds, and is denied.

On the basis of the record, it is my order that Encroachment Permit L-96-S-74L be approved and the permit be issued by the Pend Oreille Supervisory Area to the Applicant with the following conditions:

1. Denying approval of the public restroom.
2. Prohibiting the driving of any piling into the kokanee spawning beds.
3. Requiring implementation of appropriate BMPs to prevent unacceptable levels of turbidity or impacts to fish or fish habitat when piles are driven.
4. Requiring a pre-work conference with the applicant and/or applicant's representative, IDL, IDFG, and any other regulatory entities to ensure agreement on:
 - Spawning bed locations
 - Piling locations
 - BMPs to be used by the applicant during all phases of facility construction
 - Boat slips requiring use restrictions
 - Methods to enforce boat slip use restrictions
 - Any other issues

5. Requiring the applicant to prevent the use of the two landward slips on both Docks B and C, for a total of four slips, when the lake level drops to 2051 or lower.

This is a final order of the agency.

DATED this 26 day of December, 2007.



GEORGE B. BACON
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of December, 2007, I caused to be served a true and correct copy of the foregoing document, by the method indicated:

Mr. Steve Strack
Idaho Department of Lands
PO Box 83720
Boise, ID 83720-0050

- ☐ U.S. Mail, postage prepaid
- ☒ Hand Delivery
- ☐ Federal Express
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Mr. Dennis Scott
Waterford Park Homes, LLC
PO Box 339
Bayview, ID 83803

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GEORGE B. BACON, DIRECTOR
EQUAL OPPORTUNITY EMPLOYER

STATE BOARD OF LAND COMMISSIONERS
C.L. "Butch" Otter, Governor
Ben Ysursa, Secretary of State
Lawrence G. Wasden, Attorney General
Donna M. Jones, State Controller
Tom Luna, Sup't of Public Instruction

December 6, 2007

MEMORANDUM

TO: George B. Bacon, Director

FROM: Eric Wilson, Navigable Waters Program Manager

SUBJECT: Reconsideration Hearing – Waterford Park Homes, LLC
Encroachment Permit L-96-S-74L

I. INTRODUCTION

The following document, which includes a recommendation for your consideration, was prepared following a reconsideration hearing conducted by the Idaho Department of Lands (IDL). This hearing was conducted in conjunction with the processing of an encroachment permit for a commercial marina on Lake Pend Oreille, a navigable lake in Idaho. 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. On July 23, 2007, Waterford Park Homes, LLC (Applicant) submitted to IDL an encroachment permit application (L-96-S-74L) requesting the approval to construct a commercial marina on Lake Pend Oreille. The site is known as the Harborview Marina. The application is incorporated into this document by reference.

2. IDL initiated the processing of the encroachment permit application as a navigational encroachment pursuant to the Lake Protection Act (Idaho Code § 58-1306) and the associated Rules (IDAPA 20.03.04.030). A public hearing for this application was held on August 30, 2007. The permit was then approved in a Final Order signed on October 1, 2007. The hearing transcript and exhibits, Final Order, and the related recommendation, is incorporated into this document by reference.

3. Requests for reconsideration of the Final Order for Encroachment Application L-96-S-74L were received from Elmer Rick Curry on October 22, 2007 and Hobart Jenkins on behalf of the Bayview Chamber of Commerce Development Analysis Committee on October 19, 2007. The letters of request are incorporated into this document by reference.

4. In a letter dated October 30, 2007, IDL notified the following parties that a reconsideration hearing for Encroachment Application L-96-S-74L would be held:

- Mr. Dennis Scott, Waterford Park Homes, LLC
- Mr. Elmer R. Currie
- Mr. Hobart Jenkins, Bayview Chamber of Commerce, Development Analysis Committee

The letters are incorporated into this document by reference.

5. The reconsideration hearing for Encroachment Application L-96-S-74L was held at 1 pm on November 13, 2007 in IDL's Mica Supervisory Area office. Eric Wilson, Navigable Waters Program Manager, was the hearing coordinator. In attendance were Mr. Jim Brady, IDL Navigable Waters Specialist; Mr. Ed Robinson, IDL Area Supervisor; and several representatives from the applicant and the objecting parties. Testimony was given

by the applicant and the objectors. The transcript of the hearing is incorporated into this document by reference.

a. Mr. Dennis Scott, representing Applicant, addressed each of the nine points raised by the Bayview Chamber of Commerce in their letter dated October 19, 2007. Mr. Scott pointed out that these points were already addressed in the public hearing and the October 1, 2007 order, but he would address them again. The first point was the objection to the location of the public restroom over the lake. Mr. Scott stated that the restroom is an amenity for boat owners and their guests. The next closest public restroom is approximately 1,500 feet from the furthest boat slip. Due to the 25-foot no build zone above the lake, the only other location for a public restroom is upland that will be occupied by condominiums and parking lots. Corrosion of connector clamps has not been an issue to date and float homes have used them for many years. After a restroom is used, the waste immediately goes through a grinder pump and is piped shoreward to a holding tank. Any overflows will be of clean water. It is no different than the system used for the float homes and the pumpout station. The second point Mr. Scott addressed was the objection to having electrical and water lines buried in, or lying on, the lakebed. The waterlines can not be attached to the underside of the docks or left on the surface because they will freeze. The water lines must be buried to prevent freezing. Electrical lines also must lie on the lake bed due to the location of the new electrical platforms that are being brought up to code. Utility lines are commonly left on the lake bottom and have not caused problems. If installed properly, they do not move around on the lake bottom. Other engineering solutions are available, but if they will be held to such a high standard then all marinas should be required to do it. The third point Mr. Scott addressed is the 25-foot wide

waterfront setback. Kootenai County has a strict site disturbance ordinance and they have an active code enforcement program. The Idaho Department of Fish and Game can easily call the county and request a compliance inspection if a problem occurs. In addition, the applicant has two site disturbance plans approved by the county. The fourth point Mr. Scott addressed is the wave action inhibition due to the boardwalk extension. The wave action is allegedly needed to clean the spawning gravels, but Mr. Scott stated that most of the boardwalk will be above the 2055 water level and subsequently outside the spawning area. A short section will cross the lake below the 2055 level, but no piling will be placed in the spawning area. This occurs where it connects with the existing permitted boardwalk. Denying the boardwalk extension will require access to C and D docks through the float home dock, and it will require that all boats travel above the spawning area to enter the slip area. This will be a greater impact on the spawning area than the proposed marina design. The proposed boardwalk location will allow access from the adjacent boat ramp area and will be more convenient for the marina users. The fifth point Mr. Scott addressed is the effect of prop wash from boats in the near-shore slips. The application proposed locating the smaller slips close to shore because the smaller boats would have a shallower draft and disturb the water less. The applicant also proposes to prevent the use of slips when the water depth under the slip is six feet or less. This should be sufficient because these slips are at the edge of the spawning area and studies of prop wash in shallow depths suggest bottom disturbance would likely not be an issue in this instance. This six-foot depth is when the lake is down to the low, low level of 2051. The usual low water level is 2055. At this level, the water depth will be well over eight feet at the slips closest to shore. In addition, the spawning area was not accurately outlined until the gravel cleaning project was undertaken. The previous maps made by Fish and Game merely sketched where fish

were observed. The revised spawning area delineation is more accurate and the new marina design will impact the spawning area less than the previous marina. The sixth point Mr. Scott addressed is the objection to riprap placed below the 2062 lake level. The only place riprap is proposed is at the southern end of the seawall. Mr. Scott stated that the bank in this location is too steep for other stabilization methods to work, and Fish and Game did not object if that was the only place riprap was proposed. Riprap will not be placed at the base of the rest of the seawall, as agreed to with Fish and Game. The seventh point Mr. Scott addressed is the claim that too many critical environmental issues are left to negotiations instead of issuing guidelines. The applicant stated that permits issued by IDL and the U.S. Army Corps of Engineers typically contain more conditions of operation than were included in a final order. This permit should be expected to have the same treatment, if not more so due to the many issues associated with the Harborview Marina. One of these conditions could be the piling locations. While the diagram may have been hard to read, the pilings were on the diagram. The piling locations can also be modified so that the piling closest to shore are moved out to the next slip finger. This should remove all piling from the spawning beds. The eighth point Mr. Scott addressed is mitigation. The applicant believes that mitigation is not a part of the permit, and mitigation is being dealt with as a separate issue. In addition, IDL, Fish and Game, and the U.S. Army Corps of Engineers appear to be satisfied with the mitigation. Mr. Scott also addressed the parking concerns. The applicant stated that they are required to provide 44 parking spaces for the redesigned Harborview Marina. They are providing 83 spaces total, although 69 of them are dedicated to Harborview and 14 are dedicated to the adjacent Boileaus facility.

Mr. Scott also commented on the objectors desire to have the pumpout facility on the north side of the facility instead of the south side. The space on the north side of the dock, however, is being considered as a space for an additional float home. In addition, expansions soon to be proposed for Boileaus and Vista Bay will also include pumpout facilities, making them more abundant and convenient. Objections to the permanent roofs for the covered slips do not recognize that they are a replacement of a grandfathered structure. If they were not allowed to replace the roofs, it would be a taking. Objections to piecemeal permitting are understandable, but market conditions and other factors do not always allow a master plan to be created and followed. They are, however, trying to work with the local community and address design issues prior to submitting applications.

Mr. Scott then stated that they understood no piling would be driven until July 1, 2008. He stated that they would be seeking approval to assemble the docks outside the spawning area after spawning season. The docks would be anchored by concrete blocks lowered to the lakebed with the assistance of divers. This would allow final installation to proceed quickly after July 1st. He acknowledged that this was not a part of the application, and he only stated this in the interests of disclosure. Mr. Scott gave IDL a letter with their response to the eight points raised by the objectors, a paper copy of his Powerpoint presentation, and a diagram of the parking lot. All these materials are incorporated into this document by reference.

b. Mr. Elmer Rick Currie was not able to be present, but he submitted a letter that was read into the record. Mr. Currie stated that the recommended decision and the final order did not reference the county's requirements for work conducted within the 25-

foot lakeshore buffer. These requirements are due to Kootenai County's site disturbance ordinance. Mr. Currie also stated that the final order did not adequately consider the reasoning contained in the findings of fact and conclusions of law prepared by the previous hearing officer, Ed Lockwood. Mr. Lockwood found several discrepancies in the evidence presented at the August 30, 2007 public hearing. These discrepancies concern the location of the spawning beds, the proposed number of pilings, and the proposed locations of the pilings. Mr. Currie's letter is incorporated into this document by reference.

c. Mr. Skip Wilcox from the Bayview Chamber of Commerce Development Analysis Committee stated that the applicant has submitted or will be submitting additional modifications to the Harborview Marina. These modifications include 11 more float homes. The department should review the current application and all these other changes at the same time instead of piece meal the permitting. This will ensure that adequate electrical and plumbing utilities are included to accommodate the additional float homes. Since no construction can occur until July because of spawning issues, the applicant has sufficient time to cover all the changes in one application. Mr. Wilcox also stated that he has concerns about the cement blocks the applicant stated would be used to temporarily anchor the docks this winter. The blocks and docks could damage the spawning gravels while the eggs are still present. Mr. Wilcox also submitted their original letter of objection dated October 17, 2007, a letter to Ford Elsaesser with a hand written date of 6/10/07, and a pamphlet on the Kootenai County site disturbance ordinance. These items are incorporated into this document by reference.

d. Mr. Hobart Jenkins from the Bayview Chamber of Commerce Development Analysis Committee stated that they are not trying to stop the Harborview Marina

development. It is an improvement over the previous facility, but some things could be done better. The location of the public restroom is still a concern. The proposed restroom will be subject to vandalism, and overflows will go into the lake. Other lakefront condos have public restrooms built into the outside. All risks of pollution should be reduced. The application should also try to remove the utility lines from the lake bed. The rise and fall of the lake level presents engineering difficulties, but those can be overcome. Mr. Jenkins clarified the boardwalk issue by stating that they are concerned about the extension to the north, not the south. Not extending the boardwalk from dock A to the boat ramp would not inhibit access to docks A through D. The boardwalk extension would increase the bass habitat in that area. Mr. Jenkins then stated that the water depth of the slips closest to the spawning gravels presents an unacceptable risk to the spawning area. Due to the depth of the propeller, it will really only be about three and a half feet above the lake bed in six feet of water. Even low speeds can be seen to move water around. An eight-foot water depth would be better and would not place a hardship on the applicant. Monitoring can not be done effectively because the Fish and Game do not have enough people to do the monitoring. If two slips on each side of A, B, C, and D docks were blocked from use during low water the spawning area would be better protected. Mr. Jenkins clarified the riprap issue by stating they were opposed to the use of riprap near the north boardwalk extension because it would also provide bass habitat. Riprap encourages bass populations that prey on young Kokanee. Mr. Jenkins also stated that only restoration has been addressed at this time, and both mitigation and restoration should be specifically included in the final order. Mitigation would be for the reduced size of the 2011 spawning class. The application should address replacement of those fish as mitigation. Another issue was the location of the proposed pump-out station on the inside of the marina. Users will have to

travel by all the float homes and the covered slips. It should be located on the same side as the launch ramp to make it more accessible and convenient. Mr. Jenkins stated that the covered slips should not be allowed. The roofs will just collect bird droppings and dust that will wash down into the lake. Fabric covers are adequate for summer boat use, and roofs are not necessary. Mr. Jenkins also stated that the assembling of the docks and anchoring with concrete blocks prior to July 1 is not in the application and not germane to the reconsideration hearing. In closing, the marina continues to be improved, but they would like these issues better addressed by the applicant. Mr. Jenkins submitted a letter dated November 10, 2007 and a letter dated November 13, 2007. These letters are incorporated into this document by reference.

6. The applicant did not have a copy of the prop wash article at the hearing, so the record was kept open pending receipt of that article. It was received on or about November 14, 2007. The reference is Hill, D.F. and Beachler, M.M., 2002, "ADV Measurements of Planing Boat Prop Wash in the Extreme near Field", Conference Proceedings of the Hydraulic Measurements and Experimental Methods Conference. The article presents evidence that suggests boat speeds of 5 miles per hour (MPH) will not disturb medium sand at water depths of 6 feet. The article is incorporated into this document by reference.

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, Idaho Code § 58-119.

2. Lake Pend Oreille is a navigable lake as defined by Idaho Code § 58-1302(a). Pursuant to IDAPA 20.03.04.011.02, encroachments of any kind on, in, or above the beds of Lake Pend Oreille 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 public trust values 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 by the Idaho Supreme Court in Kootenai Environmental Alliance, LLC v. Panhandle Yacht Club, LLC, 105 Idaho 622, 671 P.2d 1085 (1983) and subsequent cases and Idaho Code § 58-1201 through 1203.

5. Idaho Code § 58-1201 *et. seq.*, the Public Trust Doctrine, 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.

6. The purpose of the reconsideration hearing was to review the previous decision in light of the objections raised and evaluate the application based on the economics of the navigational necessity, the public or private justification or benefit of the proposed encroachment, the potential for detrimental effects upon adjacent real property, and the public trust values such as navigation, fish and wildlife habitat, aquatic life, recreation,

aesthetic beauty or water quality.

7. IDAPA 20.03.04.010.10 defines nonnavigational encroachments as encroachments on, in or above the beds or waters of a navigable lake, including landfills, bridges, utility and power lines, or other structures not constructed primarily for use in aid of navigation.

8. IDAPA 20.03.04.030.02 states “encroachments not in aid of navigation in navigable lakes will normally not be approved by the Department and will be considered only in cases involving major environmental, economic, or social benefits to the general public. Approval under these circumstances is authorized only when consistent with the public trust doctrine and when there is not other feasible alternative with less impact on public trust values.”

9. IDAPA 20.03.04.060.06 states that commercial navigational encroachments shall provide upland vehicle parking equivalent to one (1) parking space per two (2) watercraft moorages. Local city or county ordinances governing parking requirements for marinas will apply if such have been enacted.

10. Kootenai County regulations under Title 11, Chapter 2, Section 6B establish a 25-foot wide no disturbance zone adjacent to the lakeshore.

11. Applicant and IDL satisfied all procedural requirements in the processing of the application included in Idaho Code § 58-1306 and IDAPA 20.03.04.

IV. HEARING COORDINATOR CONCLUSIONS AND RECOMMENDATIONS

Many of the issues raised in the reconsideration hearing are the same as those raised during the original hearing, but some additional issues were also raised.

The proposed restroom is a non-navigational encroachment. As such, it must involve a benefit to the general public as stated in IDAPA 20.03.04.030.02. The next closest public restroom is 1,500 feet away from the farthest slip, which is more than a quarter mile. This same restroom also serves the public using the boat ramp, patrons of Boileaus, and the general public walking along the waterfront. The combination of high use and a long walk may discourage some from using a restroom, which could lead to them using the lake instead. In addition, the economy of Bayview is heavily dependent on tourism and tourists like to visit places with numerous public amenities, such as restrooms. Lastly, the plumbing on the restroom will be similar to that used by the float homes and the proposed pumpout station, so it does not pose any greater threat than these other facilities. It is situated outside of the spawning areas. On balance, the restrooms do provide a substantial benefit to the general public, and the impacts appear to be minimal.

The water lines and utility lines at marinas are commonly buried or placed on the lake bed. If installed correctly, they do not move around and should not unduly impact the lakebed. Hundreds of water intake lines are permitted around Lake Pend Oreille, and they are installed in a similar fashion.

The 25-foot no disturbance zone is a valuable tool for the county to protect the water quality of lakes in Kootenai County. County enforcement, however, is not dependent on IDL including this ordinance in encroachment permits, and the county did not submit any

objections to the original hearing decision. If greater coordination is needed between the county and IDL, it is an issue beyond the scope of IDL's review of this application.

The boardwalk is almost entirely outside the spawning area, and can be constructed such that no piling would be driven into the spawning area. In addition, the boardwalk will be located landward of the spawning gravels, so any wave action that travels past the float homes and the boat slips can still wash the gravels. The photos of the marina area suggest that the previous structures and floating debris covered more of the near shore area than the new structures with the north boardwalk extension. As a result, the net amount of bass habitat appears to be smaller with the new design.

The article by Hill and Beachler, 2002, states that near-bed water velocities of 25 centimeters per second (cm/s) are required to disturb medium sand. The article presents data that indicates the medium sand will not be disturbed by outboard boats traveling at speeds of 5 mph or less in water 6 feet deep. The restoration work at Harborview has removed most of the materials in the spawning area that were smaller than pea-sized gravel, so if the near-bed water velocities will not disturb the sand they will certainly not disturb the spawning gravels. Requiring the applicant to block use of the slips closest to the spawning gravels at low water conditions appears to be a reasonable precaution, and the other slips could be used without restrictions.

The location of the spawning gravels is now known with a greater degree of certainty than when the original application was submitted. During the course of these proceedings, the applicant has responded to concerns about impacts on spawning gravels by using such

information to modify the marina design. These improvements, such as locating piling outside the spawning area, are minor adjustments largely within the footprint of the original proposal and they serve to benefit the public trust values of the lake.

Riprap will be placed at the south end of the seawall to prevent erosion on a steep slope, and Fish and Game has not objected to this riprap placement. This riprap will be placed above the high water mark. No other riprap is planned under this permit.

All lake encroachment permits are issued subject to several conditions. Many conditions of approval are standard terms used in all permits. Sometimes conditions are crafted for specific reasons that relate to issues unique to individual permits. If these conditions can be used to address concerns brought to light through the review and hearing process, and if the conditions do not create additional concerns for the general public and the adjacent landowners, then the permit is issued subject to such conditions without re-initiating the review and hearing process. If an objector still believes that the application is too flawed to be approved, they may seek judicial review of the decision as outlined in IDAPA 20.03.04.030.10.

The determination of mitigation and restoration for previous damage to the spawning area is beyond the scope of a decision on this permit application. The original decision included a condition that required the restoration to be completed prior to the start of construction. That was an appropriate condition because the work required under the restoration was already determined by IDL in coordination with the Idaho Department of Fish and Game (IDFG). In addition, the restoration had to be done prior to the 2007 spawning season or

another year class of fish could be in jeopardy, and dock construction could have interfered with the restoration. The restoration work is now complete. At the current time, IDL and IDFG do not anticipate requiring any additional restoration or mitigation. If the objectors are not satisfied with the response of IDL and IDFG regarding resolution of the previous violations, they should address their concerns directly to the agencies.

IDAPA 20.03.04.060.06 only requires one (1) parking space for two (2) watercraft moorages. Since watercraft does not include float homes, this requirement does not extend to float home moorages. The Harborview application proposes fifty (50) boat slips, so IDL can only require twenty-five (25) parking spaces and not forty-four (44) as the applicant stated. The applicant is providing sixty-nine (69) parking spaces for the Harborview marina, and has therefore exceeded the IDL parking requirements.

While the location of the pumpout station may be more convenient for the general public if placed on the north side of the facility, IDL does not normally require encroachments to have the most efficient designs possible. The proposed location of the facility appears to be a business decision. The proposed location does not pose an obstruction to navigation nor impact the adjacent landowners, so IDL does not have a substantive reason to require the pumpout station be moved.

The previous Navy boatsheds were demolished with the understanding that the applicant would be able to rebuild them. The applicant could have proposed to rebuild them in the same location with the same number of piling. Instead, the applicant proposed moving them slightly and using less piling to reduce impacts to the spawning area. The new slip

covers appear to be a good compromise between honoring the rights associated with the previous boat sheds and improving the near shore habitat. Seasonal covers could also have problems with dust and bird droppings, and do not appear to have an advantage over the permanent covers in regards to this issue.

The Lake Protection Act, Idaho Code § 58-13, and associated rules (IDAPA 20.03.02) do not place a restriction on how often a new permit can be applied for on the same facility. IDL can not evaluate a current application based on other changes that may or may not be proposed in the future. Each application is judged on its own merits. To do otherwise would be a violation of the applicant's right to due process.

The applicant's desire to temporarily assemble the docks in deeper water and anchor them with concrete blocks prior to July 1 was not formally requested as an addition to this application and will not be evaluated in this decision. Construction and installation details are generally handled by IDL's area offices.

The Director of IDL reviews the entire hearing record prior to signing a decision. The record generally consists of the application, all comments and letters received regarding the application, the application and hearing notices, the hearing transcript, all exhibits presented at the hearing, and the hearing coordinator's recommendation. This review ensures that the Director is confident the recommendation is consistent with the facts in the hearing record, case law, and the governing statutes and administrative rules. If inconsistencies are found, the director is not bound by the hearing officer's recommendation and he should issue a final order that addresses the inconsistencies such

that the decision would likely be upheld at judicial review. Apparently the Director found some inconsistencies with the previous recommendation, and therefore issued a decision that did not follow the hearing officer's recommendation. IDAPA 20.03.04.030.07 states that the Director shall render a final decision following a hearing, so his actions appear to be consistent with the administrative rules.

Based upon the information provided to me as the hearing coordinator and based upon the fact that the encroachment permit application, as modified by applicant to protect spawning gravels, meets all the requirements of Idaho Code § 58-1301 *et. seq.* (the Lake Protection Act) and IDAPA 20.03.04, I recommend that the Director of IDL issue a Final Order stating that the Pend Oreille Supervisory Area of IDL should **approve** Applicant's request for a commercial navigational encroachment permit with the following conditions:

1. Prohibiting the driving of any piling into the kokanee spawning beds.
2. Requiring implementation of appropriate BMPs to prevent unacceptable level of turbidity or impacts to fish or fish habitat when piles are driven.
3. Requiring a pre-work conference with the applicant and/or applicant's representative, IDL, IDFG, and any other regulatory entities to ensure agreement on:

- Spawning bed locations
- Piling locations
- BMPs to be used by the applicant during all phases of facility construction
- Boat slips requiring use restrictions
- Methods to enforce boat slip use restrictions
- Any other issues

4. Requiring the public restroom to meet the setback requirements of the United States Navy.
5. Requiring the applicant to prevent the use of the two landward slips on both Docks B and C, for a total of four slips, when the lake level drops to 2051 or lower.

Other conditions may also be added as appropriate.

DATED this 6th day of December, 2007.



ERIC WILSON
Hearing Coordinator

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of December, 2007, I caused to be served a true and correct copy of the foregoing document, by the method indicated:

Mr. Steve Strack
Idaho Department of Lands
PO Box 83720
Boise, ID 83720-0050

- ☐ U.S. Mail, postage prepaid
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Mr. Dennis Scott
Waterford Park Homes, LLC
PO Box 339
Bayview, ID 83803

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Mr. Elmer R. Currie
2608 Honeysuckle
Coeur d'Alene, ID 83815

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Mr. Hobart Jenkins
PO Box 253
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Ed Robinson
Idaho Department of Lands
2550 Highway 2 West
Sandpoint, ID 83864-7305

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George B. Bacon
Idaho Department of Lands
PO Box 83720
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ERIC WILSON

IDL Program Manager - Navigable Waters and Minerals