

BEFORE THE STATE BOARD OF LAND COMMISSIONERS
STATE OF IDAHO

In the Matter of:)	
)	
Encroachment Permit Application)	FINAL ORDER
No. L-95-S-5576.)	
)	
Diamond Cup Unlimited, LLC - Applicant.)	

I. NATURE OF PROCEEDINGS/ISSUES

Encroachments, including docks, placed on navigable waters require a permit issued by the Idaho Department of Lands (IDL) pursuant to the requirements of the Lake Protection Act, Title 58, Chapter 13, Idaho Code, and the corresponding administrative rules promulgated by the State Board of Land Commissioners, IDAPA 20.03.04, Rules for the Regulation of Beds, Waters and Airspace over Navigable Lakes in the State of Idaho.

On February 17, 2014, Diamond Cup Unlimited, LLC, Inc. (Applicant), applied for an encroachment permit to deploy ecology blocks, removable piling, EZ Docks, and concrete anchors, in Lake Coeur d'Alene, to facilitate the Diamond Cup hydroplane races. IDL deemed the application complete on April 24, 2014.

A public hearing was held on June 10, 2014 at the Coeur d'Alene Inn. Brandon Lamb served as Hearing Coordinator. The Hearing Coordinator issued his Findings of Fact, Conclusions of Law, and Recommendation (Recommendation) on July 3, 2014.

My responsibility is to render a decision pursuant to Idaho Code § 58-1306(c) and IDAPA 20.03.04.030.07 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 for this matter. Specifically,

- I have read the transcript of the public hearing conducted in Coeur d'Alene, Idaho on June 10, 2014.
- I have reviewed the record including all documents and exhibits.
- I have examined the Hearing Coordinator's Recommendation in light of the entire record.

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

I conclude the Hearing Coordinator's Recommendation is based on substantial evidence in the record, and I adopt the Recommendation as my decision in this matter. The Recommendation is incorporated by reference herein and attached to this Final Order. The Applicant is qualified to make application for an encroachment permit to deploy ecology blocks, removable piling, EZ Docks, and concrete anchors, in Lake Coeur d'Alene, to facilitate the Diamond Cup hydroplane races; and the proposed encroachment is in conformance with the applicable standards.

On the basis of the record, it is my order that Encroachment Permit No. L-95-S-5576 is approved by IDL with the following stipulations to ensure that Public Trust values are protected during the demolition of the existing docks and construction of the new docks:

1. All anchors/blocks should be lowered as slowly as feasible to reduce the amount of bottom sediment disturbance on impact;
2. All blocks and anchors should be left in place permanently after 2016;
3. IDEQ staff are notified when the placement of the blocks/anchors has begun and when it has been completed; and
4. Each race boat and support vessel should have documentation that they have passed an Idaho invasive species boat inspection and that this proof be available on race day at a designated location where it can be verified.
5. A submerged land lease for the piling and anchors shall be required.
6. As part of the submerged land lease a bond commensurate with mitigating any potential noncompliances shall be required.

This is a final order of the agency. Pursuant to Idaho Code § 58-1306(c) and IDAPA 20.30.04.030.09, the Applicant or any aggrieved party who appeared at the hearing shall have the right to have the proceedings and Final Order reviewed by the district court in the county in which the encroachment is proposed by filing a notice of appeal within thirty (30) days from the date of this Final Order.

DATED this 11th day of July, 2014.



THOMAS M. SCHULTZ, JR.
Director, Department of Lands

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of July, 2014, I caused to be served a true and correct copy of the foregoing by the method indicated below and addressed to the following:

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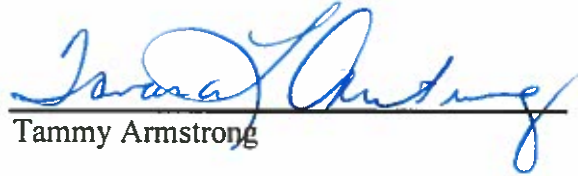
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TOM SCHULTZ, DIRECTOR
PATRICK HODGES, DEPUTY DIRECTOR

Date: July 7, 2014

Hearing Coordinator's Findings of Fact, Conclusions of Law, and Recommendation

TO: Tom Schultz, Director

FROM: Brandon Lamb, Resource Protection & Assistance Bureau Chief

SUBJECT: Encroachment Application L-95-S-5576 – Diamond Cup Unlimited, LLC

I. INTRODUCTION

The following document, which includes a recommendation for your consideration, was prepared following a public hearing conducted by the Idaho Department of Lands (IDL) in conjunction with the processing of an application for various encroachments to facilitate the Diamond Cup Hydroplane Race, on Lake Coeur d'Alene, 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 February 17, 2014, Diamond Cup Unlimited LLC, (Applicant) submitted to IDL an encroachment permit application, identified as number L-95-S-5576 (Application), requesting approval to deploy ecology blocks, removable piling, EZ Docks, and concrete anchors, in Lake Coeur d'Alene, to facilitate the 2014 Diamond Cup Hydroplane race. The Application listed Doug Miller, of Diamond Cup Unlimited LLC, as the Applicant contact and Doug Knight, of EZ Dock Construction, as the agent contact.
2. On March 4, 2014, a Notice of Incomplete Encroachment Application for 2014 Diamond Cup Races was issued to Mr. Knight. An electronic copy was issued to Mr. Miller. The notice requested the following information and clarifications: list of adjacent neighbors, number of anchors, number of floats, engineer stamped drawings, number of anchors on outside boundary line, number of floats on outside boundary line, how the race course would be marked, location of temporary docks, location of temporary piling, number of locations used to retrieve successive years buoys, how retrieval locations would be marked, presence of a start line barge, race course set up, and timeframes for deconstruction of the course. In addition, the Notice informed the Applicant that a permit could be issued for up to a three year term if the Application was intended for multiple years.

3. On March 12, 2014, Len Schwenk, Lake Coeur d'Alene Anglers Association member and lake shore resident, emailed a letter to Mr. Tom Fler, IDL Area Manager, stating that "I want the races to come back but the lake needs to also be kept in the same shape it was before the races."
4. On March 28, 2014, Mr. Miller paid the \$2,075.00 encroachment application fee to IDL.
5. On April 1, 2014, Mr. Michael Burgan, U.S Army Corp of Engineers Environmental Resource Specialist (USACEERS), issued a letter, in response to the February 27, 2014, permit application, to Mr. Miller, requesting additional information regarding the following: 5,000 foot log booms, floating grandstand, pits, number of anchors, volume of anchors, arrangement of anchors, use of previous placed anchors, map of structures, map of race course, section location, and inclusion of the previous Nationwide Permit. In addition, the letter expressed concern for the disturbance of contaminated sediment and possible need for an amended biological assessment.
6. On April 2, 2014, Mr. Scott Reed, Kootenai Environmental Alliance and Anglers Association representative, issued a letter to Mr. Eric Besaw, North Operations Chief, in opposition to the Diamond Cup Hydroplane races. The letter expressed concern of Diamond Cup Unlimited, LLC's ability to remove race course materials and alleged debt. The letter also stated that the race was a violation of the Public Trust Doctrine.
7. On April 14, 2014, Mr. David Callahan, of Kootenai County, issued a letter to Mr. Miller, with an electronic copy to Mr. Jim Brady, IDL Public Trust Resource Supervisor. The letter requested a general description of the following: location of event, hours of event, expected attendance numbers, support services, and various site plans.
8. On April 24, 2014, IDL received an updated encroachment application for the Coeur d'Alene Diamond Cup Hydroplane Race for the years 2014, 2015, and 2016. The updated Application describes 87 cubic yards of concrete ecology blocks totaling approximately 98 individual permanent anchors to be used for boat tie-up lines and boat set-back lines. The Application also describes 60 temporary race course anchors marked with buoys. A total of two race boat pits and three VIP barges are also described. The Application states that approximately 14 pilings placed in 2013 will remain and be used annually for the floating docks and pit areas. Diagrams are also included illustrating the location and placement of the race course gear. Lastly, detailed plans are provided for the placement, storage and removal of the race course gear.
9. On April 29, 2014, Mr. Brady issued a memorandum, titled Request for Director to Order a Public Hearing be held for Diamond Cup for 2014, 2015 and 2016, to Mr. Eric Besaw, IDL North Operations Chief; Brandon Lamb, IDL Resource Protection & Assistance Bureau Chief (RPABC); and Mr. Steve Schuster, Idaho Deputy Attorney General. The memorandum requested that IDL Director order a hearing pursuant to IDAPA 20.03.04.030.01 as well as assign a hearing officer.
10. On April 30, 2014, Mr. Tom Schultz, IDL Director, ordered a hearing regarding the Diamond Cup Unlimited, LLC, encroachment application and assigned Mr. Lamb as the hearing officer.

11. On April 30, 2014, IDL issued a Notice of Public Hearing and Encroachment Application L-95-S-5576 – Diamond Cup Unlimited, LLC, pursuant to IDAPA 20.03.04.030.03. In the Notice, IDL informed the following recipients of the complete Application, upcoming public hearing, and where to file comments:
 - US Army Corps of Engineers – Coeur d'Alene
 - Idaho Department of Fish and Game
 - Idaho Department of Environmental Quality
 - Idaho Department of Water Resources
 - Idaho Department of Transportation
 - Kootenai County Parks & Waterways
 - Kootenai County Marine Division
 - Kootenai County Community and Development
 - Kootenai County Environmental Alliance
 - Panhandle Health District 1 Kootenai County
 - Lakes Commission
 - Idaho Conservation League
 - Tri-State Water Quality Control
 - Adjacent Neighbors
12. On May 5 and 12, 2014, IDL published a Notice of Public Hearing and Application in the Coeur d'Alene Press L-95-S-5576 – Diamond Cup Unlimited, LLC, pursuant to Idaho Code § 58-1306(b) and IDAPA 20.03.04.030.01.
13. On May 12, 2014, IDL received a comment letter from Mr. Charles Corsi, Idaho Department of Fish and Game Regional Supervisor. In the letter, Mr. Corsi expressed concern that the Applicant did not discuss the purpose of the EZ docks, the fact that Lake Coeur d'Alene is considered critical habitat for bull trout (a threatened species), and the potential hazard of fishing gear getting entangled in the submerged lines. The comment letter concluded by recommending that all tethers be removed and that each block is marked with a GPS location. The comment letter further recommends that if the aforementioned is not feasible, then a marker buoy with a cable of no more than two feet off of the lake bottom should be utilized.
14. On May 12, 2014, Mr. Burgan sent an email to Mr. Miller, Mr. Brady, and June Bergquist of the Idaho Department of Environmental Quality. In the email, Mr. Burgan expressed concern over the temporary anchors being deployed and pulled up annually. As a result, Mr. Burgan requested that the Biological Assessment (BA) be revised to describe the use of only permanent anchoring systems.
15. On May 13, 2014, Mr. David Callahan, of Kootenai County, issued a letter to Mr. Miller, with an electronic copy to Mr. Brady and eight other unidentified people. The email requested that Mr. Miller submit a detailed site plan and event description including security, access, crowd management, traffic management, parking, waste control, litter control and any other reasonable information requested by the director.

16. On May 23, 2014, Mr. Reed issued a letter to Mr. Brady regarding the Application of Coeur d'Alene Diamond Cup. In the letter Mr. Reed, requested that the Application made by Diamond Cup Unlimited, LLC, be denied without further public hearing. Mr. Reed stated in the letter the following reasons for denial:
 - Serious occupation of the public trust lands;
 - Disturbance of the lake bed;
 - Failure to apply to Kootenai County Board of Commissioners for a special event permit;
 - Five (5) of the eight (8) Diamond Cup Unlimited, LLC, Directors have resigned;
 - Substantial debt to contractors; and
 - The race is a most unusual situation.
17. On June 4, 2014, IDL received a letter of objection from Pam Davies, Coeur d'Alene resident, which stated that the Diamond Cup Unlimited, LLC, violated the parameters of the 2013 encroachment permit and that the placement of permanent piling and Ecoblocks is a navigational hazard.
18. On June 4, 2014, IDL received letter of support from Brandon Clearwater, which asked to allow the regatta to continue for the enjoyment of both the "...young and the old..." as well as the historical value. In addition, the letter addressed the noise concern by stating that you cannot hear the boats on the water but only in the pit areas.
19. On June 5, 2014, IDL received a letter of support from Dave White, Washington State resident, which addressed concerns of water quality by explaining that there are plans and resources available to clean up any fugitive oil.
20. On June 8, 2014, IDL received a letter of support from Steve Olson, Washington State resident, which stated hydroplane races do not "mess" up the Northwest pristine lakes and rivers.
21. On June 9, 2014, IDL received a letter of objection from Jean Nelson, Lake Coeur d'Alene east side resident, which stated that the Diamond Cup Unlimited, LLC, violated the parameters of the 2013 encroachment permit and that the placement of permanent piling and Ecoblocks is a navigational hazard.
22. On June 9, 2014, IDL received a letter of support from Robert Shafer, owner of Shafer Heating & Cooling, Inc., which stated that the hydroplane races do not impact Lake Coeur d'Alene more than the 4th of July Fireworks or annual Iron Man Triathlon.
23. On June 9, 2014, IDL received a letter of support from Stephen Shepperd, Kellogg, ID resident, who stated that the hydroplane races only disturb the silt layer on a minimal basis, the permanent piling have no more impact than current shoreline development, the restriction to the lake is no more than the annual Ironman Triathlon, there could not be long term effects on wildlife and that there are plans in place for any pollutants such as fugitive oil.

24. On June 9, 2014, IDL received an updated encroachment application and BA, from Mr. Miller of Diamond Cup Unlimited, LLC. The updated Application described approximately 158 permanent anchoring systems and updated description of the Second Work Phase which illustrated how the permanent anchors will be retrieved and re-used during future race events. The amended plan describes the non-use of temporary anchoring systems for the race course: "The boat line tie up and the boat set-back line anchors are the large ecology blocks and they will remain in place as with the race course anchors to reduce yearly lake bottom disturbance."
25. On June 10, 2014, IDL received a letter of support from Bob Bolam, Hayden, ID resident, which stated that the hydroplane races were good for the youth.
26. On June 10, 2014, IDL received a letter of support from Joshua Wardell, Kirkland, WA resident, who questioned the hydroplanes significant negative impact on water quality and wildlife.
27. On June 10, 2014, IDL received a letter of support from Dan Yates, Lake Stevens, WA resident, who questioned the hydroplanes significant negative impact on water quality and wildlife. In addition, Mr. Yates described the amount of money spent during the hydroplane races.
28. On June 10, 2014, IDL received a follow up comment letter from Mr. Reed which alleged that the Diamond Cup Unlimited, LLC, had significant debt and therefore IDL "...should not award a permit to an entity that did not pay for all that it did last year."
29. On June 10, 2014, IDL received an email from the Idaho Transportation Department which stated "ITD has no comments."
30. On June 10, 2014, IDL received a comment from the Idaho Department of Environmental Quality (DEQ). The letter outlined the current situation of heavy metals in the bed of Lake Coeur d'Alene. Furthermore, the letter supports the amended encroachment application and BA. However, the letter provides the following recommendations:
 - All anchors/blocks should be lowered as slowly as feasible to reduce the amount of bottom sediment disturbance on impact;
 - All blocks and anchors should be left in place permanently after 2016;
 - DEQ staff are notified when the placement of the blocks/anchors has begun and when it has been completed; and
 - Each race boat and support vessel should have documentation that they have passed an Idaho invasive species boat inspection and that this proof be available on race day at a designated location where it can be verified.
31. On June 10, 2014, IDL held a public hearing at 6:00 pm at the Coeur d'Alene Inn. Mr. Lamb served as hearing coordinator. In attendance were Mr. Fleer, Mr. Brady, Mr. Schuster, Mr. John Magnuson, representing Diamond Cup Unlimited, LLC, Mr. Miller, eight (8) members of the public who testified, and 24 members of the public who did not testify. The public hearing was digitally recorded and subsequently transcribed.

32. During the hearing, Mr. Miller first provided an overview of Diamond Cup Unlimited, LLC, application process and status to date. Mr. Miller testified that the race would be active approximately 58 out of 72 hours. Mr. Miller also addressed the concerns of noise by stating that the noise of a hydroplane race boat is approximately 95 decibels at 328 feet, where as fireworks are about 140 decibels. Mr. Miller stated that he wanted to make it professional and as safe as possible. Next, Mr. Miller's representative, John Magnuson, spoke stating that all impacts have been mitigated through the updated BA and that the encroachment should be granted based on the public benefit.
33. Out of the eight members of the public who testified, two were in opposition to IDL issuing the encroachment permit. The points made in opposition were as follows:
 - Not enough space for landward spectators;
 - Diamond Cup Unlimited, LLC's, failure to pay debts;
 - The lines and buoys were left in the water after the 2013 deadline for removal; and
 - Obstruction to Higgins Point, Centennial Trail System and personally owned private docks.

Those in favor of issuing the permit made the following points:

- Minimal impact to water quality and wildlife;
- Current cooperation with anglers;
- No link between debt and permitting process;
- Enough space for spectators;
- Family oriented event; and
- Current plan is sufficient to not negatively impact anglers.

III. CONCLUSIONS OF LAW

1. The Idaho State Board of Land Commissioners (Land 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 Land Board, as per Idaho Code § 58-119.
2. Lake Coeur d'Alene is a navigable lake as defined by Idaho Code § 58-1302(a).
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. No encroachments on, in, or above the waters of any navigable lake in Idaho shall be constructed until approval has been granted pursuant to the Idaho Lake Protection Act, Idaho Code § 58-1301 et seq (LPA).
5. IDL shall make decisions on proposed encroachments in accordance with the Public Trust Doctrine as set forth in Title 58, Chapter 12.

6. IDL shall also make decisions on proposed encroachments in accordance with the Public Trust Doctrine as set forth by the Idaho Supreme Court on *Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 105 Idaho 622, 671 P.2d 1085 (1983) (KEA), and subsequent cases.
7. The proposed Diamond Cup Unlimited, LLC's Hydroplane race meets the definition of "navigation."
8. IDAPA 20.03.04.010.02 defines "Aids to Navigation" as "Buoys, warning lights, and other encroachments in aid of navigation intended to improve waterways for navigation."
9. IDAPA 20.03.04.010.02 defines "Encroachments in Aid of Navigation" to include "...docks, piers, jet ski and boat lifts, buoys, pilings, breakwaters, boat ramps, channels or basins, and other facilities used to support water craft and moorage on, in, or above the beds or waters of a navigable lake. The term 'encroachments in aid of navigation' may be used interchangeable herein with the term 'navigational encroachments.'"
10. The proposed encroachments described in Diamond Cup Unlimited, LLC's, Application meet the definition of "Encroachments in Aid of Navigation."
11. Title 58, Chapter 13 states in part that the "...public health, interest, safety and welfare requires that all encroachments upon, in or above the beds or waters of navigable lakes of the state be regulated in order that the protection of property, navigation, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty and water quality be given due consideration and weighed against the navigational or economic necessity or justification for, or benefit to be derived from the proposed encroachment."
12. According to DEQ, the following permit conditions are needed to minimize impacts on fish, wildlife habitat, aquatic life, and recreation from the proposed encroachments and race:
 - All anchors/blocks should be lowered as slowly as feasible to reduce the amount of bottom sediment disturbance on impact;
 - All blocks and anchors should be left in place permanently after 2016;
 - DEQ staff are notified when the placement of the blocks/anchors has begun and when it has been completed; and
 - Each race boat and support vessel should have documentation that they have passed an Idaho invasive species boat inspection and that this proof be available on race day at a designated location where it can be verified.
13. If the above permit conditions are implemented, the impacts to fish, wildlife habitat, aquatic life, and recreation appear to be outweighed by the navigational necessity, economic necessity, and public benefit.
14. Objectors raised concerns about public access to trails and park areas on the shoreline near the boat race area. IDL's jurisdiction in this matter extends waterward from the ordinary high water mark and does not include upland activities. Idaho Code §§ 58-104(9) and 58-1303. The activities referenced are above the ordinary high water mark and thus outside of IDL's jurisdiction in this matter.

15. Complaints regarding past debt have no bearing on the current encroachment permit application.
16. Objectors to the Application have stated that issuing a permit for this activity would be a violation of the public trust doctrine. This contention, however, is not supported by any specific facts or legal argument. The proposed activity is a commercial navigational use of the lake, which is a traditional public trust use of the lake. No specific concerns about water quality, fisheries or other wildlife have been documented. Public use of the lake surface will displace general public use for a holiday weekend, but the event will be open to viewing by the public for a fee or to the extent it can be viewed from adjacent areas without paying. The anchors will remain on the lake bed, but, as proposed, will appear to have minimal, if any, impact on commerce, navigation, fisheries, public recreation or the public values on the lake.
17. IDAPA 20.03.04.055.01 states that "As a condition of the encroachment permit, the department may require a submerged land lease or easement for use of any part of the state-owned bed of the lake where such lease or easement is required in accordance with 'Rules Governing Leases on State-owned Submerged Lands and Formerly Submerged Lands,' IDAPA 20.03.17." Furthermore, IDAPA 20.03.17.025.02 states that "The director may grant leases for uses that are in the public interest and consistent with these rules." Additionally, IDAPA 20.03.17.065.01 provides for bonding, "Bonds may be required for commercial navigational, community dock, and non-navigational leases. The need for bond shall be at the discretion of the director who shall consider the potential for abandonment of the facility, harm to state-owned submerged land and water resources, the personal and real property of adjacent upland owners and the personal and real property owned by the encroachment owner that is appurtenant to and supportive of the encroachment."
18. Although it is difficult to quantify, there does appear to be broad public economic benefit to the proposed use. IDL has determined that the navigational and economic benefit of the proposed activity outweighs any minimal adverse impacts to commerce, navigation, fisheries or other wildlife habitat, or public recreation. IDL concludes that permitting the proposed activity is consistent with the State's trust duty under the public trust doctrine.

IV. RECOMMENDATION

Based on the evidence in the record, I recommend that IDL approve Diamond Cup Unlimited, LLC's application. In response to concerns raised by DEQ, and to help ensure compliance with IDAPA 20.03.04.012.01, the previous concerns shall be addressed through conditions in the permit to ensure that Public Trust values are protected:

1. All anchors/blocks should be lowered as slowly as feasible to reduce the amount of bottom sediment disturbance on impact;
2. All blocks and anchors should be left in place permanently after 2016;
3. DEQ staff are notified when the placement of the blocks/anchors has begun and when it has been completed; and
4. Each race boat and support vessel should have documentation that they have passed an Idaho invasive species boat inspection and that this proof be available on race day at a designated location where it can be verified.

Furthermore, I recommend that IDL require a submerged land lease for the piling and anchors. As part of the submerged land lease a bond commensurate with mitigating any potential noncompliance should also be required.

DATED this 7th day of July, 2014



Brandon Lamb
Hearing Coordinator
Resource Protection & Assistance Bureau Chief
Idaho Department of Lands