

BEFORE THE STATE BOARD OF LAND COMMISSIONERS  
STATE OF IDAHO

In the Matter of:	)	
	)	Case No. PH-2019-PUB-22-003
Encroachment Permit Application	)	
No. L-95-S-5538B	)	<b>FINAL ORDER</b>
	)	
AJJC, LLC,	)	
Applicant.	)	
<hr/>		)

**I. NATURE OF PROCEEDINGS/ISSUES**

Encroachments, including fills and shoreline protection, 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.

AJJC, LLC (Applicant), applied for an encroachment permit consisting of fill and shoreline protection in Hayden Lake on March 7, 2019. A public hearing was held on June 17, 2019 in Coeur d’Alene, Idaho. Eric Wilson served as Hearing Coordinator. The Hearing Coordinator issued his Findings of Fact, Conclusions of Law, and Recommendation (Recommendation) on July 16, 2019.

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 listened to the public hearing conducted in Coeur d’Alene, Idaho on June 17, 2019.
- 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 the fill and shoreline protection, 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-5538B is approved by IDL with a three year sunset period for construction and the following additional stipulation:

- "Riprap will be placed at the base of the new wall section, similar to what was placed at the base of the existing wall sections."

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. Because this Order is for approval of a permit, any party appealing this Final Order must file a bond with the district court in accordance with Idaho Code § 58-1306(c).

DATED this 17<sup>th</sup> day of July, 2019.

  
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DUSTIN T. MILLER  
Director, Department of Lands

## CERTIFICATE OF MAILING

I hereby certify that on this 18<sup>th</sup> day of July, 2019. I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

John F. Magnuson  
Attorney at Law  
PO Box 2350  
Coeur d'Alene, ID 83816

- U.S. Mail, postage prepaid
- Hand Delivery
- Federal Express
- Email: john@magnusononline.com

Joy Vega  
P.O. Box 83720  
Boise, ID 83720-0010

- Statehouse Mail
- Hand Delivery
- Federal Express
- Email: joy.vega@ag.idaho.gov

  
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Kourtney Romine, Administrative Assistant

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In the Matter of:	)	
	)	Case No. PH-2019-PUB-22-003
Encroachment Permit Application	)	
No. L-95-S-5538B	)	<b>PRELIMINARY ORDER</b>
	)	
AJJC, LLC,	)	
Applicant.	)	
_____	)	

**I. BACKGROUND**

On March 7, 2019, the Idaho Department of Lands (“IDL”) received the final amendment to an encroachment permit application (“Application”) filed by AJJC, LLC (“AJJC”). In this Application, AJJC is seeking authorization to place fill and shoreline protection in or adjacent to Hayden Lake, a navigable lake in Kootenai County, Idaho. Exhibit 3. The purpose of these proposed encroachments is to decommission a private boat launch. IDL assigned number L-95-S-5538B to the Application.

On March 19, 2019 IDL provided Notice of Appointment of Hearing Coordinator and Hearing to the Applicant. Exhibit 4. IDL staff called for this hearing pursuant to IDAPA 20.03.04.030.01.

On May 9, 2019 several emails were exchanged between John Magnuson representing the Applicant, and Joy Vega, a Deputy Attorney General representing IDL. These emails discussed hearing rescheduling. Exhibit 6.

On May 9, 2019 IDL provided an order Vacating Hearing and Remanding Back to IDL to the Applicant. Exhibit 5.

On May 10, 2019, IDL provided notice of the Application to various government agencies as well as to the adjacent littoral owners. Exhibits 7 and 8. IDL also caused a notice of application

to be published in Coeur d'Alene Press (a newspaper with general circulation in Kootenai County) on May 17 and 24, 2019, pursuant to Idaho Code § 58-1306(b). Exhibit 10.

On May 15, 2019 IDL provided a Notice of Rescheduled Hearing to the Applicant. Exhibit 9.

On May 24, 2019 IDL received a Signed Consent of Adjacent Riparian or Littoral Property Owners from Timothy J. Conley. Exhibit 11.

IDL did not receive any comments from the public or the neighbors in opposition to the encroachment permit application. The concerns with the Application as set forth by IDL can be summarized as follows:

1. The area below the ordinary high water mark should not be filled and walled off. This reduces the size of Hayden Lake.
2. Other methods may be used to reduce erosion on the upland and the delivery of sediment to the lake.

On June 17, 2019, IDL held a public hearing. At the hearing, Mr. John Magnuson, attorney for AJJC, and Mr. Joshua Tripp, consultant for AJJC, presented testimony in support of the Application. Mike Ahmer, IDL Resource Supervisor, provided testimony on behalf of IDL in opposition to the Application.

## **II. FINDINGS OF FACT**

1. AJJC owns the parcel and littoral rights located adjacent to Hayden Lake where the proposed project is located. The shoreline on the parcel is approximately 143 feet. Exhibit 3, page 13. AJJC also owns the two adjacent parcels on either side. The parcel to the west is Tax No. 117170 with an unknown length of littoral frontage, and the parcel to the east is Tax No. 324219

with 308 feet of littoral frontage. Exhibit 3, page 14. In total, the applicant owns five contiguous littoral parcels. Recording 10:10.

2. AJJC's existing encroachment permit, L-95-S5538A, authorizes a single family dock consisting of a 3'x17' launch, 4'x18' approach, and a 30'x25' single slip dock w/2 piling. Permit L-95-S5538A, Recording at 23:15.

3. Permit L-95-S5538A does not include a retaining wall or the boat launch. Recording at 23:50 and 30:10.

4. The ordinary high water mark (OHWM) of Hayden Lake is elevation 2242.8 feet using the NAVD-88 DATUM. Page 2 of Exhibit 2, Pages 1 and 3 of Exhibit 3, and Recording at 29:45 and 1:05:25. This is equivalent to the elevation of 2239 feet using the NAVD-29 DATUM. Recording at 28:30. Prior to the NAVD-88 DATUM, elevation 2239 feet was the recognized OHWM for Hayden Lake. *Hayden Lake Protective Association, Inc. v. Dalton Gardens Irrigation District et al, Kootenai County*, Judge Spear (1962); Recording at 28:15.

5. According to the Application, a rock wall will be extended across the boat launch and the area upland of the wall will be backfilled. Exhibit 3, page 15 and Rec, 19:50. The existing walls adjacent to both sides of the boat launch are located just above the OHWM, and the walls would be connected to form one seamless wall across the boat launch. Approximately 19.49 cubic yards of fill would be placed in the former boat launch area covering about 171 square feet, and about 12.5 feet of retaining wall would be constructed. Exhibit 3, pages 1 and 15, Recording at 10:00, 10:50, and 14:00.

6. Mr. Magnuson stated that the boat launch was constructed by prior land owners before the Lake Protection Act. Recording at 8:40 and 45:30. The block wall shown in the photo on page 45 of Exhibit 3 has elevation lines superimposed on it that show it was placed below the

OHWL. Page 15 of Exhibit 3. This wall was replaced as described in a permit issued by Kootenai County on November 28, 2018. Pages 25 to 44 of Exhibit 3, Recording at 10:30 and 55:35. The new wall is above the OHWL. Recording 10:30. Page 4 of Exhibit 3 is a drawing with the location of the existing wall and the OHWL in regards to the boat launch. The existing wall has riprap installed at the base, and lake water will touch the base of the riprap. Recording at 48:55.

7. Mr. Tripp restated the proposed activity and the purpose of the application. He described additional regrading and other uplands work that will also reduce sediment delivery into Hayden Lake. Recording at 18:50.

8. The boat launch was excavated mostly from land above the OHWL, which caused the OHWL to veer into the excavated boat launch. Pages 4, 5, and 13 of Exhibit 3, Recording at 44:30, 45:30.

9. IDL staff provided comments to Kootenai County in 2018 for the county permit on Pages 25 to 44 of Exhibit 3, but all the work appeared to be above the OHWL. Recording at 30:55. IDL staff do not believe fill was placed below the OHWL for construction of the previous block wall or the current wall. Recording at 31:30. IDL staff have no specific evidence of past fill being placed into the lake at this parcel. Recording at 33:00. IDL staff did not do a site inspection while reviewing this application. Recording at 32:30.

10. IDL staff entered some emails into the record at the hearing:

- a. Exhibit 12, 1 page. Email correspondence between IDL and Jeremy Roberts with U.S. Army Corps of Engineers. No concerns noted from Mr. Roberts, but a Nationwide Permit may be needed under Section 404 of the Clean Water Act.
- b. Exhibit 13, 3 pages. Email correspondence between IDL and Thomas Herron with Idaho Department of Environmental Quality (DEQ). Mr. Herron visited the site and

observed the erosion and sedimentation issue. He supports the application due to the removal of a possible vector for invasive species and the elimination of a sediment source into Hayden Lake. He estimated that tons of sediment were delivered into the lake due to the roads and boat launch.

11. IDL believes an easement or lease will be required if the permit is granted, as required by IDAPA 20.03.034. Recording at 25:50.

12. IDL objects to the application because of the proposed placement of fill and the wall below the OHWM where the boat launch currently is, and because other methods of sediment control can be implemented on the uplands. Recording at 35:50 and 36:20.

13. IDL stated that if the base of the existing wall is touching water, then a permit is needed and the base of the wall should be riprapped. Recording at 37:50.

### III. ANALYSIS AND CONCLUSIONS OF LAW

#### A. IDL Has Jurisdiction Over Hayden Lake

1. The State of Idaho Board of Land Commissioners (“Board” or “Land Board”) is authorized to regulate, control, and permit encroachments in, on or above the beds of navigable lakes in the state of Idaho. I.C. §§ 58-104(9) and -1303.

2. The Board exercises its authority through the instrumentality of IDL. *See* I.C. §§ 58-101 and -119. As a result, “the duty of administering the Lake Protection Act falls upon the IDL.” *Kaseburg v. State, Bd. of Land Comm’rs*, 154 Idaho 570, 578, 300 P.3d 1058, 1066 (2013).

3. IDL’s authority under the LPA includes the authority to adopt such rules and regulations as are necessary to effectuate the purposes of the Lake Protection Act, Title 58, Chapter 13, Idaho Code (“LPA”) I.C. § 58-1304. IDL has exercised that authority and



promulgated the Rules for the Regulation of Beds, Waters and Airspace Over Navigable Lakes in the State of Idaho, IDAPA 20.03.04.000 *et seq.* (“Rules”).

4. In enacting the LPA, the legislature expressed its intent 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. No encroachment on, in or above the beds or waters of any navigable lake in the state shall hereafter be made unless approval therefor has been given as provided in this act.

I.C. § 58-1301.

5. Under the LPA and Rules, a navigable lake is defined as

any permanent body of relatively still or slack water, including man-made reservoirs, not privately owned and not a mere marsh or stream eddy, and capable of accommodating boats or canoes. This definition does not include man-made reservoirs where the jurisdiction thereof is asserted and exclusively assumed by a federal agency.

I.C. § 58-1302(a); *see also* IDAPA20.03.04.010.024. Hayden Lake is a navigable lake under the LPA.

6. For purposes of the LPA, the “beds of navigable lakes” are defined as “the lands lying under or below the ‘natural or ordinary high water mark’ of a navigable lake and, for purposes of this act only, the lands lying between the natural or ordinary high water mark and the artificial high water mark, if there be one.” I.C. § 58-1302(b); IDAPA 20.03.04.010.04. The proposed fill and shoreline protection will be placed below the current high water mark of a navigable lake. IDL therefore has jurisdiction to regulate the proposed encroachment.

7. “Encroachments not in aid of navigation” or “nonnavigational encroachments” includes “all other 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 . . . .” I.C. § 58-1302(i). The proposed fill is a nonnavigational encroachment.

8. “Boat ramp” is defined as “[a] structure or improved surface extending below the ordinary or artificial high water mark whereby watercraft or equipment are launched from land-based vehicles or trailers.” IDAPA 20.03.04.010.08. The boat launch proposed to be eliminated is also a boat ramp.

**B. The Burden of Proof for Permit Approval Is With the Applicant.**

9. AJJC, as the Applicant, generally bears the burden of proof in this matter. “The customary common law rule that the moving party has the burden of proof – including not only the burden of going forward but also the burden of persuasion – is generally observed in administrative hearings.” *Intermountain Health Care, Inc. v. Bd. of County Comm’rs of Blaine County*, 107 Idaho 248, 251, 688 P.2d 260, 263 (Ct. App. 1984) *rev’d on other grounds* 109 Idaho 299, 707 P.2d 410 (1985).

10. Under Idaho law, “preponderance of the evidence” is generally the applicable standard for administrative proceedings, unless the Idaho Supreme Court or legislature has said otherwise. *N. Frontiers, Inc. v. State ex rel. Cade*, 129 Idaho 437, 439, 926 P.2d 213, 215 (Ct. App. 1996). “A preponderance of the evidence means that when weighing all of the evidence in the record, the evidence on which the finder of fact relies is more probably true than not.” *Oxley v. Medicine Rock Specialties, Inc.*, 139 Idaho 476, 481, 80 P.3d 1077, 1082 (2003).

**C. The Burden of Proof for Ownership Is With IDL.**

11. In a dispute over ownership of the beds of navigable waters, the party challenging ownership bears the burden of proof. *Idaho Forest Industries, Inc. v. Hayden Lake Watershed Improvement District et.al.*, 135 Idaho 316, 17 P.3d 260 (2000).

**D. Compliance with Legal Requirements for Nonnavigational Encroachments.**

12. IDAPA 20.03.04.030.02 provides that

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 no other feasible alternative with less impact on public trust values.

As stated in the Application, removal of the boat launch is intended to reduce the delivery of sediment into Hayden Lake. Page 13, Exhibit 3. The proposed removal of the boat launch satisfies the requirement for approval of a nonnavigational encroachment by providing a major environmental benefit, reflected in the email from DEQ to IDL. AJJC's consultant, Mr. Tripp, also stated that work on the uplands will also help reduce erosion and sedimentation into the lake. Recording at 20:00. In its testimony, IDL suggested that other methods could be implemented on the uplands to reduce sediment input into the lake, but did not have any site specific recommendations or alternatives because no inspection was performed following receipt of the Application. Recording at 25:20.

13. Based upon the record, as further detailed in the Findings of Fact above, I find that the elimination of the boat launch will remove a possible vector for invasive species introduction and reduce sediment pollution into Hayden Lake, thereby providing major environmental benefits; therefore, the proposed fill and wall meet the standard of approval for a nonnavigational encroachment.

**E. Compliance with Legal Requirements for Private Submerged Lands.**

14. IDAPA 20.03.04.030.10 states:

In recognition of continuing private property ownership of lands lying between the natural or ordinary high water mark and the artificial high water mark, if present, the department shall consider unreasonable adverse effect upon adjacent

property and undue interference with navigation the most important factors to be considered in granting or denying an application for either a nonnavigational encroachment or a commercial navigational encroachment not extending below the natural or ordinary high water mark. If no objections have been filed to the application and no public hearing has been requested or ordered by the director, or, if upon reconsideration of a decision disallowing a permit, or following a public hearing, the department determines that the benefits, whether public or private, to be derived from allowing such encroachment exceed its detrimental effects, the permit shall be granted.

The OHWM for Hayden Lake is presumed by IDL to be elevation 2242.8 feet using NAVD-88 DATUM. Page 2 of Exhibit 2, Recording at 28:10 and 1:05:00. While it is unknown if elevation 2242.8 feet is an artificial or ordinary high water mark, for the purposes of administering the Lake Protection Act this question is irrelevant. Permits are required for all encroachments into a navigable lake below the high water mark, regardless of whether or not the high water mark is ordinary or artificial. *State v. Hudson*, 162 Idaho 888, 892-83, 407 P.3d 202, 206-07 (2017).

15. The boat launch was excavated into the shore of the lake, so the boat launch area was most likely not below the OHWM at statehood on July 3, 1890. Recording at 45:30. As a result, the boat launch area is not public trust land subject to state ownership. *Shively v. Bowlby*, 152 U.S. 1, (1894). The proposal to fill in the boat launch should also be reviewed using the standard in IDAPA 20.03.04.030.10 because of this private submerged land excavated into the uplands.

16. AJJC owns both parcels immediately adjacent to this parcel, and no objections were filed by neighbors adjacent to those other parcels.

17. The proposal will reduce the current surface of Hayden Lake by approximately 171 square feet, but this is a very small portion of the approximately 3,800-acre lake. The elimination of a significant sediment source should improve navigation over time.

18. Based upon the record, as further detailed in the Findings of Fact above, I find that the most important factors to be considered in granting or denying this application are unreasonable adverse effects upon adjacent property and undue interference with navigation; therefore the proposed fill and wall meet the standard of approval for private submerged lands.

**F. Compliance with Seawall Standards.**

19. IDL raised questions about the wall placement below the ordinary high water mark, and stated that they are normally not approved. Recording at 24:05. IDAPA 20.03.04.015.07 states: “Seawalls should be placed at or above the ordinary high water mark, or the artificial high water mark, if applicable. Seawalls are not an aid to navigation, and placement waterward of the ordinary or artificial high water mark will generally not be allowed.” The Application proposes to fill in a boat launch that was excavated into the shoreline, essentially restoring this portion of the lake perimeter to the perimeter that existed prior to its construction. The existing walls on both sides of the boat launch are above the OHWM. The proposed wall would be placed toward the lower end of the boat launch, presumably near the OHWM prior to the excavation of the boat launch. As stated by Mr. Herron with DEQ, elimination of the boat launch will remove a possible invasive species vector and eliminate a sediment source.

20. Based upon the record, as further detailed in the Findings of Fact above, I find that the benefits provided by the application outweigh the benefits normally provided by the seawall standard.

**G. Compliance with Requirement for an Easement or Lease.**

21. IDL believes an easement or lease will be needed for the proposed fill and wall. Recording at 25:50. IDAPA 20.03.04.055.02 provides that “[s]eawalls, breakwaters, and quays on or over state-owned beds, designed primarily to create additional land surface, will be

authorized, if at all, by an encroachment permit and submerged land lease or easement, upon determination by the department to be an appropriate use of submerged lands.” The proposed fill and wall will be placed mostly on former uplands that were excavated to create the boat launch. As a result, the boat launch is likely not state-owned public trust lands. The proposed wall will tie into two existing walls, which IDL staff have determined are above the OHWM. The primary purpose of the proposed wall is to eliminate the boat launch and associated sediment delivery into Hayden Lake, not to create additional land surface.

22. Based upon the record, as further detailed in the Findings of Fact above, I find that no easement or lease will be required for the proposed fill and wall.

**H. Compliance with Requirement for a Permit and Riprap at the Base of the Wall.**

23. IDL stated that if the base of the existing wall is touching water, then a permit is needed and the base of the wall should be riprapped. Recording at 37:50. Subparagraph IDAPA 20.03.04.015.08.b states that “[r]iprap used to protect the base of a seawall or other vertical walls may not need to be keyed into the bed and may not require a filter layer, at the department’s discretion.” IDL had already determined in 2018 during the Kootenai County permitting process that a permit from IDL was not needed for the existing wall. If an encroachment permit is needed for the existing wall, that is now a compliance issue and not a permitting issue related to the current application. The wall and fill in the current application appear to be located at or above the OHWM as it existed on July 3, 1890. No evidence to the contrary was presented. A permit is being sought due to the wall and fill being placed on the privately owned submerged lands within the boat launch. Riprap at the base of a wall along the shoreline is generally needed to prevent undermining of the wall, but it is not required by IDAPA 20.03.04. The existing wall does have

riprap material at the base, but the application does not specifically state that riprap material will be used for the proposed wall.

24. Based upon the record, as further detailed in the Findings of Fact above, I find that the status of the existing wall is beyond the scope of the current application, and that riprap should be required at the base of the proposed wall to provide continuity with the existing wall and to help prevent undermining of the wall.

### **PRELIMINARY ORDER**

Based on the foregoing findings of fact and conclusions of law, IT IS HEREBY ORDERED that Encroachment Permit Application No. L-95-S-5538B is APPROVED, subject to any conditions imposed by the Director of the Idaho Department of Lands and the following condition:

1. Riprap will be placed at the base of the new wall section, similar to what was placed at the base of the existing wall sections.

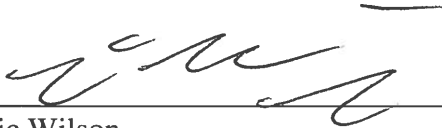
IT IS FURTHER ORDERED that the order issued herein is a PRELIMINARY ORDER. Idaho Code § 58-1306(c); Idaho Code § 67-5240; Idaho Code § 67-5245; *Notice of Appointment of Hearing Coordinator and Hearing*. The hearing in this matter was completed on June 17, 2019. Consistent with the *Notice of Appointment of Hearing Coordinator and Hearing*, “The Hearing Coordinator shall submit a preliminary order to the Director of the Idaho Department of Lands, who shall issue a Final Order no more than thirty days after the conclusion of the hearing.” This Preliminary Order is submitted fewer than thirty days after conclusion of the hearing.

As provided in Idaho Code § 67-5240, the contested case provisions of the Administrative Procedure Act do not apply where the legislature has directed the use of

alternative procedures. Because the Legislature has enacted specific alternative procedures in Idaho Code § 58-1306 that require a final order to be issued within 30 days of the hearing, and leave insufficient time to consider petitions for review of the preliminary order, the procedures of Idaho Code § 67-5245 addressing petitions for review of preliminary orders are not applicable.

*Notice of Appointment of Hearing Coordinator and Hearing.*

DATED this 16<sup>th</sup> day of July, 2019.



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Eric Wilson  
Hearing Coordinator