

BEFORE THE STATE BOARD OF LAND COMMISSIONERS
STATE OF IDAHO

In the Matter of Encroachment Permit)	Case No. PH-2019-PUB-20-001
Application No. L-96-S-0904C)	
)	FINAL ORDER
Robin Behrens,)	
)	
Applicant.)	
)	

I. NATURE OF PROCEEDINGS

Encroachments, including single-family docks, seawalls, and riprap, placed in or on the beds of navigable lakes 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 or around May 24, 2019, IDL received an updated encroachment permit application filed by Robin Behrens. A contested case hearing was held on October 9, 2019. Andrew Smyth served as duly appointed hearing officer. On November 4, 2019, the hearing officer issued his Preliminary Order, which contains Findings of Fact and Conclusions of Law.

As Director of IDL, my responsibility is to render a decision pursuant to Idaho Code §§ 58-1305 and 58-1306(c) and IDAPA 20.03.04.025 and .030 on behalf of the State Board of Land Commissioners and based on the record, which I have reviewed in the context of my personal expertise gained through education, training, and experience. I relied on the record for this

matter, including examining the hearing officer's Preliminary Order in light of the entire record in this contested case.

II. FINDINGS OF FACT

I concur with the Preliminary Order's Procedural Background and Findings of Fact.

III. CONCLUSIONS OF LAW

I concur with the Preliminary Order's Conclusions of Law, except to amend the following parts of the Preliminary Order's Heading "D. The Application is Conditionally Approved" as described below:

- On page 7, I amend paragraph 2.a's first sentence to read:

IDAPA 20.03.04.015.13.e provides that "[i]t will be presumed, subject to rebuttal that . . . non-navigational encroachments will have [an] adverse effect upon adjacent littoral rights if located closer than twenty-five (25) feet to adjacent littoral right lines."

- On page 9, I add the following two sentences to the end of paragraph 4:

When analyzing an application for non-navigational encroachment, IDL considers "unreasonable adverse effect upon adjacent property, and undue interference with navigation the most important factors" in granting or denying the application. Idaho Code § 58-1306(e). IDL shall grant the permit when "the benefits, whether public or private, to be derived from allowing such encroachment exceed its detrimental effects." *Id.*

- On page 9, I add the following sentence to the end of paragraph 5:

Mr. Behrens also testified that the riprap was needed to stop the wave action. The reduction in wave action on the shore and seawall is an additional benefit to the proposed encroachment. Rec, 32:20 -33:20.

IV. ORDER

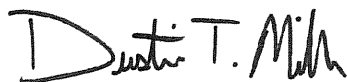
I conclude that the hearing officer's Findings of Fact and Conclusions of Law presented in the Preliminary Order are based on substantial evidence in the record, and I adopt those Findings of Fact and Conclusions of Law with the amendments set forth herein as my decision in this matter. I hereby incorporate by reference the Preliminary Order's Procedural Background, Findings of Fact, and Conclusions of Law into this Final Order except as specifically set forth herein. I have enclosed and served the Preliminary Order along with this Final Order.

Based on the adopted Findings of Fact and Conclusions of Law, I HEREBY ORDER that Encroachment Permit Application L-96-S-0904C is **CONDITIONALLY APPROVED**. Mr. Behrens shall provide written evidence of the correct county parcel number no later than thirty (30) days after the issuance of this Final Order. If the required written evidence is not provided within thirty (30) days after the issuance of this Final Order, then the conditional approval of the permit application shall expire.

This is a final order of the agency. Pursuant to Idaho Code § 58-1305(c), Idaho Code § 58-1306(c), and IDAPA 20.03.04.025.09 and .30.09, the Applicant or any aggrieved party who appeared at the hearing have a right to have the proceedings and Final Order reviewed by the district court in the county where the encroachment is proposed by filing a notice of appeal within thirty (30) days from the date of the final decision. Pursuant to Idaho Code § 58-1305(c), Idaho Code § 58-1306(c), and IDAPA 20.03.04.025.09 and .30.09, an adjacent littoral owner or other aggrieved party shall be required to deposit an appeal bond with the court in an amount to be determined by the court but not less than five hundred dollars (\$500) insuring payment to the Applicant of damages caused by delay and costs and expenses, including reasonable attorney fees, incurred on the appeal in the event the district court sustains the Final Order. The Applicant does not need to post a bond with the district court for an appeal. The filing of the petition for

review to the district court does not itself stay the effectiveness or enforcement of the order under appeal. Idaho Code § 67-5274.

Dated this 8th day of November, 2019.

A handwritten signature in black ink that reads "Dustin T. Miller". The signature is written in a cursive style with a large initial "D".

DUSTIN T. MILLER

Director, Idaho Department of Lands

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of November, 2019. I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Robin Behrens
84 Stewarts Drive
Sagle, ID 83860

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

Charlie Kramer
CE Kramer Crane and Contracting, Inc
495670 Hwy 95
Naples, ID 83847

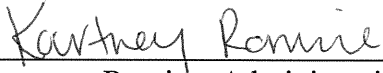
- U.S. Mail, postage prepaid
- Hand Delivery
- Federal Express
- Email: cekramer3@me.com

Carter Payne
PO Box 214
Sandpoint, ID 83864

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

Angela Kaufmann
P.O. Box 83720
Boise, ID 83720-0010

- Statehouse Mail
- Hand Delivery
- Federal Express
- Email: angela.kaufmann@ag.idaho.gov



Kourtney Romine, Administrative Assistant

BEFORE THE STATE BOARD OF LAND COMMISSIONERS
STATE OF IDAHO

In the Matter of Encroachment Permit)	
Application No. L-96-S-0904C)	Case No. PH-2019-PUB-20-001
)	
Robin Behrens,)	PRELIMINARY ORDER
)	
Applicant.)	
)	
)	
)	

I. PROCEDURAL BACKGROUND

On or around May 24, 2019¹, the Idaho Department of Lands (“IDL”) received a complete encroachment permit application (“Application”) filed by Mr. Robin Behrens (“Applicant” or “Mr. Behrens”). Agency Record (“AR”) pp. Behrens 00048 – 00065.² IDL assigned application number L-96-S-0904C to the Application. In the Application, the Applicant seeks authorization for a single-family dock, an eight-foot (8’) by forty foot (40’) cement retaining wall with eighteen (18) cubic yards of riprap along the face of an existing seawall on Lake Pend Oreille, as well as to extend a thirty-six inch (36”) wide culvert by twenty feet (20’). AR, pp. 48 – 65.

IDL processed the Application pursuant to Idaho Code §§ 58-1305 and 1306 as well as IDAPA 20.03.04.025 and 030.

1. On or around May 6, 2019, IDL provided notice of the Application to various government and tribal agencies, adjacent neighbors, and other organizations. AR pp. 26 – 40.

¹ Multiple revisions were made to the Application. The last update to the Application was received by IDL on May 24, 2019.

² All citations to the AR are hereinafter designated by using the Bates numbers only, not the preceding “Behrens 0000.”

2. A Notice of Application was published in the Bonner County Daily Bee on May 8 and 15, 2019. AR p. 42.
3. On May 28, 2019, IDL provided another notice of the Application to Ms. Carter Payne, an adjacent littoral owner. AR pp. 66.
4. On or around July 1, 2019, IDL received an objection along with a \$75 publication deposit for a public hearing from Ms. Payne. AR pp. 84.
5. Pursuant to Idaho Code §§ 58-1305(c) and 1306(c), IDL ordered a hearing in this matter. On August 30, 2019, Mr. Dustin T. Miller, IDL Director, appointed Mr. Andrew Smyth to be the Hearing Coordinator to preside over the proceedings. AR pp. 93 – 95.
6. On September 5, 2019, A Notice of Hearing was issued to the parties scheduling the hearing for 9:00 a.m. Pacific Time on Wednesday, October 9, 2019, at the IDL Office located in Sandpoint, Idaho. AR, pp. 96 – 98.
7. On September 25 and October 2, 2019, notice of the hearing was published in the Bonner County Daily Bee. AR, pp. 102 – 103.
8. Pursuant to Idaho Code §§ 58-1305(c) and 1306(c), a hearing regarding the Application was held on October 9, 2019. The participants appearing at the hearing were as follows: Mr. Behrens and his son, Jake Behrens; Ms. Carter Payne; Mr. Justin Eshelman, IDL Resource Specialist, Sr.; Mr. Mike Ahmer, IDL Resource Supervisor; and Ms. Angela Kaufmann, Deputy Attorney General, counsel for IDL. AR, p. 175 and Hearing Recording.³

³ The hearing was recorded pursuant to IDAPA 20.01.01.651. A hearing transcript has not been prepared. The agency or any party may have a transcript prepared at its own expense. All references to the hearing recording in this Preliminary Order will be described by reference to the minute(s) and second(s) location on that recording. For example: Rec, mm:ss.

Evidence admitted into the administrative record during the hearing consisted of sworn witness testimony and a written statement prepared by IDL. AR, p. 179 and Ex. 1.

II. FINDINGS OF FACT

1. Mr. Behrens owns property in Bonner County.⁴ AR p. 50, 54, and 86.
2. Mr. Behrens' property is located adjacent to Lake Pend Oreille and consists of 350 feet of waterfront footage. AR pp. 50 and 54.
3. If approved, Mr. Behrens would be authorized to construct a 365 square foot single-family dock consisting of a five foot (5') by twelve foot (12') ramp and a fifty-seven foot (57') by five foot (5') dock; a forty foot (40') long seawall with a riprap toe; and extend an existing thirty-six inch (36") wide culvert by twenty feet (20') away from the lake. AR, pp. 60 and 176.
4. The proposed dock and seawall would be located at least, ten feet (10') from the Payne littoral right line, but the riprap toe would be tied into existing riprap on Ms. Payne's upland property. AR, p. 60 and Rec 24:55.
5. The proposed extension to the existing culvert would be located on the landward side of the culvert. AR, p. 65 and Rec, 18:11 and 28:15.
6. Ms. Payne owns the littoral property adjacent and to the east of Mr. Behrens' property. Rec, 35:28. During the hearing, Ms. Payne had several questions regarding upland aspects of Mr. Behrens' project, which are outside the scope of the Application and the jurisdiction of the Hearing Coordinator. Ms. Payne also had some questions regarding the nonnavigational and navigational components of the project, including hypothetical future circumstances regarding her littoral property. However, after receiving some information from the Applicant, Ms. Payne did not

⁴ The record contains conflicting information regarding the subject property. The Application identifies county parcel RPP00000112286A, but the IDL inspection report identifies parcel RPP00000112252A. AR, pp. 50 and 86.

present any express objections to the any aspect of the Application, or evidence in support of possible objections. Rec, 12:21.

III. CONCLUSIONS OF LAW

A. IDL Has Jurisdiction Over Lake Pend Oreille.

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

2. The Land Board exercises its authority through the instrumentality of IDL. *See* I.C. §§ 58-101 and 58-119. 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. The Hearing Coordinator is authorized by the Director to issue this Preliminary Order. AR p. 94; I.C. § 67-5245. The hearing in this matter began at approximately 9:00 a.m. PST and concluded at approximately 9:59 a.m. PST on October 9, 2019. With all evidence submitted, the matter is fully before the Hearing Coordinator.

4. In accordance with Idaho Code § 67-5206 and the Lake Protection Act, Title 58, Chapter 13, Idaho Code (“LPA”), IDL has promulgated rules for navigable waters encroachment permits – the Rules for the Regulation of Beds, Waters and Airspace Over Navigable Lakes in the State of Idaho (“Rules”). IDAPA 20.03.04.000 *et seq.*

5. In enacting the LPA, the Idaho Legislature declared its intent that:

[T]he 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. “IDL is required to balance the competing interests involved while determining whether to approve permits for navigational encroachments.” *Brett v. Eleventh St. Dockowner’s Ass’n Inc.*, 141 Idaho 517, 523, 112 P.3d 805, 810 (2005); IDAPA 20.03.04.012.

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

[A]ny 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); IDAPA 20.03.04.010.024. Lake Pend Oreille is a navigable lake under the LPA; and therefore, IDL has jurisdiction to regulate the proposed encroachments. *See State v. Hudson*, 162 Idaho 888, 407 P.3d 202 (2017).

B. Mr. Behrens is Qualified to Make Application.

1. IDAPA 20.03.04.010.033 states, in part, “[o]nly persons who are littoral owners or lessees of a littoral owner shall be eligible to apply for encroachment permits.” I find that Mr. Behrens, as owner of property adjacent to Lake Pend Oreille, is a littoral owner, as defined in IDAPA 20.03.04.010.33, and is qualified to make application for an encroachment permit.

C. The Burden of Proof Is With the Applicant.

1. 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).

2. 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).

D. The Application is Conditionally Approved.

1. Single-family dock:

a. IDAPA 20.03.04.010.36 defines a Single-Family Dock as “[a] structure providing noncommercial moorage that serves one (1) waterfront owner whose waterfront footage is no less than twenty-five (25) feet.” I find that the proposed dock meets the definition of a single-family dock. The dock will be used for private purposes at Mr. Behrens’ property, which consists of 350 feet of waterfront footage.

b. IDAPA 20.03.04.015.01.a provides the following parameters governing the size and dimension of single-family docks: “No part of the structure waterward of the natural or ordinary high water mark or artificial high water mark shall exceed ten (10) feet in width, excluding the slip cut out.” I find that Mr. Behrens’ dock meets this requirement, as the widest portion of the dock is five feet (5’) wide.

c. IDAPA 20.03.04.015.01.b states that: “Total surface decking area waterward of the natural or ordinary or artificial high water mark shall not exceed seven hundred (700) square

feet, including approach ramp and walkway for a single-family dock” I find that Mr. Behrens’ dock meets this requirement, as the total surface decking area is 365 square feet.

d. Regarding single-family docks, IDAPA 20.03.04.015.01.c states: “No portion of the docking facility shall extend beyond the line of navigability. Shorter docks are encouraged whenever practical and new docks normally will be installed within the waterward extent of existing docks or the line of navigability.” Mr. Eshelman testified that the dock does not extend beyond the line of navigability. AR, p. 178 and Rec, 47:10. I find that the single-family dock meets this requirement.

e. IDAPA 20.03.04.015.13.e, states, in applicable part, that: “It will be presumed, subject to rebuttal, that single-family and two-family navigational encroachments will have an adverse effect upon adjacent littoral rights if located closer than ten (10) feet from adjacent littoral right lines.” The proposed dock would be located ten feet (10’) from the Payne littoral right line and over ten feet from the western littoral right line⁵. I find that the proposed dock would meet this standard.

2. Seawall and riprap:

a. IDAPA 20.03.04.015.07 states, “[s]eawalls 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.” Mr. Behrens confirmed IDL’s understanding that the seawall would be located at the high water mark of Lake Pend Oreille. AR, 48:56. I find that the proposed seawall meets this requirement.

⁵ The Application does not identify the distance the dock will be located from the western littoral right line. However, it can be estimated by taking the total length of the shoreline, 350, and subtracting the width of the encroachment (less than forty two feet (42’)) and the distance from the eastern littoral right line (ten feet (10’)) which would be approximately 288 feet.

b. IDAPA 20.03.04.015.13.e, states, in applicable part, that “nonnavigational encroachments will have [an] adverse effect upon adjacent littoral rights if located closer than twenty-five (25) feet to adjacent littoral right lines.” The proposed seawall and riprap would be located only ten feet (10’) from the Payne littoral right line and over twenty five feet (25’) from the western littoral right line⁶. The entire basin that the seawall is located within is currently riprapped, including Ms. Payne’s property. AR, pp. 60 and 87 – 91 and Rec, 39:59. Mr. Behrens testified that his riprap would tie into Ms. Payne’s riprap at their property line. Rec, 23:45. Ms. Payne did not offer an objection to this proposed plan. Since the proposed seawall and riprap will tie into the existing riprapped shoreline, I find that they would not cause an adverse effect upon adjacent littoral rights.

3. Culvert extension:

a. The culvert would be extended away from the lake. AR, p. 65 and Rec, 18:11 and 28:15. The extended culvert would be located above the high water mark. AR, p. 65. IDL does not have jurisdiction above the high water mark in regards to encroachments on navigable waters. I.C. §§ 58-104(9)(a) and 58-1303; Rec, 20:05. Based on IDL’s oral and written testimony regarding this application, it did not even consider the culvert extension in its review of this Application. AR, p. 176 – 179 and Rec, 41:52 – 48:00.

b. I find that the upland extension to the culvert is outside IDL’s jurisdiction, and, by extension, is outside the authority of the Hearing Coordinator. Therefore, I make no determination regarding Mr. Behrens’ plan to extend the upland end of the culvert.

⁶ The Application does not identify the distance the seawall will be located from the western littoral right line. However, it can be estimated by taking the total length of the shoreline, 350, and subtracting the width of the encroachment (forty feet (40’)) and the distance from the eastern littoral right line (ten feet (10’)) which would be approximately 300 feet.

4. The littoral rights of an upland owner adjacent to navigable waters include the right “to maintain their adjacency to the lake and make use of their rights” as littoral owners by “building or using aids to navigation.” I.C § 58-1302(f). However, the proposed encroachments must be weighed against the other Lake Values itemized in Idaho Code § 58-1301:

[A]ll 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.

5. As to the economic necessity or justification for or benefit derived from the proposed encroachment, Mr. Behrens testified that seawall is needed to reduce the grade of his access road down to ten percent (10%) to meet county requirements. Rec, 11:06.

6. The economic necessity or justification or benefit derived must be weighed against the protection of property, navigation, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty and water quality, i.e., the “Lake Values”.

a. There is no evidence that the proposed encroachments would negatively impact navigation, fish and wildlife habitat, aquatic life, aesthetic beauty, or water quality.

b. Protection of property: Ms. Payne expressed her desire to make sure the area remains stable as she has invested a lot of money to stabilize her property by reinstalling riprap and placing drains. Rec, 25:40 and 38:49. There is no evidence in the record that the proposed dock, seawall or riprap will destabilize the uplands at this location.

7. I find that the proposed single-family dock, seawall and riprap comply with Rules, and the economic justification for and benefits of the proposed encroachments are not outweighed by the Lake Values.

8. I conclude that the Application is conditionally approved for the single-family dock, seawall, and riprap, as set forth below with the condition that the Applicant confirms with IDL the correct county parcel number no later than thirty (30) days after issuance of the Final Order.

IV. ORDER

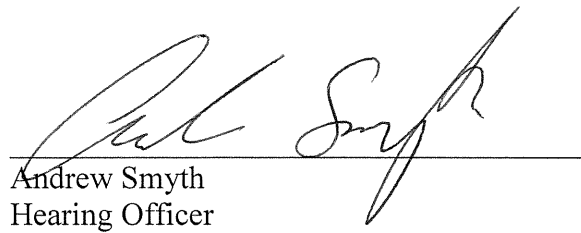
Based upon the foregoing findings of fact and conclusions of law, IT IS HEREBY ORDERED that Encroachment Permit Application No. L-96-S-0904C is CONDITIONALLY APPROVED, subject to any conditions imposed by the Director of the Idaho Department of Lands.

IT IS FURTHER ORDERED that the order issued herein is a Preliminary Order, pursuant to Idaho Code §§ 58-1305 and 1306(c) and the Notice of Appointment of Hearing Officer issued on August 30, 2019, which states as follows:

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 (30) days after the conclusion of the hearing.

IT IS FURTHER ORDERED that if the Director issues a Final Order, pursuant to Idaho Code §§ 58-1305(c) and 1306(c), any applicant or other aggrieved party has the right to have this decision reviewed by the district court in the county where the encroachment is proposed by filing notice of appeal within thirty (30) days from the date of the final decision. Idaho Code § 58-1306(c). Because the final decision would be for approval of an encroachment permit, any aggrieved party, other than the Applicant, appealing this final decision must file a bond with the district court in accordance with Idaho Code § 58-1306(c). The filing of an appeal to the district court does not itself stay the effectiveness or enforcement of the order under appeal. Idaho Code § 67-5274.

DATED this 4th day of November, 2019.



Andrew Smyth
Hearing Officer