

BEFORE THE IDAHO STATE BOARD OF LAND COMMISSIONERS

In the Matter of Encroachment Permit Application)	Case No. PH-2020-PUB-22-002
No. L-ERL-95-S-1378B)	
)	FINAL ORDER
North Idaho Maritime,)	
)	
Applicant.)	
_____)	

I. NATURE OF PROCEEDINGS

Encroachments, including commercial docks and work areas, 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 21, 2020,¹ IDL received an encroachment permit application filed by North Idaho Maritime (“NIM or Applicant”). A public hearing was held on July 23, 2020. Chris Bromley served as duly appointed hearing coordinator. On August 12, 2020, the hearing coordinator issued his Preliminary Order, which contains a Factual and Procedural Background and Conclusions of Law.

As Director of IDL, my responsibility is to render a decision pursuant to Idaho Code § 58-1306(c) and IDAPA 20.03.04.030 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

¹ The Application was received on or around October 17, 2019, but the last update to the Application was received on November 22, 2019.

through education, training, and experience. I relied on the record for this matter, including examining the hearing coordinator's Preliminary Order in light of the entire record in this matter.

II. FINDINGS OF FACT

I adopt the paragraphs 1 – 44 of the Preliminary Order's Factual and Procedural Background as my Findings of Fact, except for the following:

- **Paragraph 10:** Add the following sentence to the end of the paragraph:
 - The Application also requests a trapezium shaped "summer work area." That proposed summer work area is 120 feet by 80 feet on its longest two sides with approximately 328 square feet of total perimeter and 560 square meters. *Application* p. 9. The summer work area would be used for the assembly of modular dock sections. *Id.* Powered vessels would not be necessary in that area. *Id.*
- **Paragraph 23:** Add the following sentence to the end of the paragraph:
 - The Department of Agriculture included example language of a condition related to those strategies: "applicant shall consult the County Weed Superintendent, Idaho State Department of Agriculture or regional aquatic natural resource management designee. . . on the distribution of aquatic invasive species (AIS) and noxious weeds in travel lanes. Areas with known noxious weed infestations shall be avoided or treated prior to disturbance through commuting from the business to other project sites within the Lake."
- **Paragraph 41:** The last sentence is struck and replaced with the following:
 - Lastly, Mr. Ahmer stated that the Applicant has no IDL permit for Cougar Bay, a notice of non-compliance was issued to the Applicant by IDL for Cougar Bay, the Applicant had submitted an application for Cougar Bay, and the application for Cougar Bay will go to hearing.

- **Paragraph 42:**

- Add the following sentence after the second sentence of that paragraph:
 - On June 20, 2020 and June 27, 2020, the Coeur d'Alene Press ran advertisements about the application and specific details about the July 23, 2020 public hearing. *IDL Statement*.
- Add the following sentence to the end of that paragraph:
 - IDL also included suggested terms and conditions to apply to the permit if it were approved.

Certain additional pertinent findings of fact are set forth in the Conclusions of Law.

III. CONCLUSIONS OF LAW

I adopt the Preliminary Order's Conclusions of Law, except for the following amendments:

- **Paragraph 13:** Add the following to the end of paragraph 13:

NIM checked the box for commercial marina on its application. IDAPA 20.03.04.010.09 defines commercial marina as "A commercial navigational encroachment whose primary purpose is to provide moorage for rental or for free to the general public." However, NIM's application does not indicate that it will provide moorage for rental or for free to the general public. Thus, it does not propose a commercial marina and the encroachment standards in IDAPA 20.03.04.015.03 are not applicable.

- **I decline to adopt paragraphs 14-23, and instead substitute the following paragraphs:**

14. Idaho Code § 58-1306(e) provides:

In recognition of continuing private property ownership of lands lying between the natural or ordinary high water mark and the artificial high water mark, the board 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 a nonnavigational encroachment, a commercial navigational

encroachment, or a community navigational encroachment not extending below the natural or ordinary high water mark.

IDAPA 20.03.04.030.10 provides:

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 will 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 (emphasis added).

The high water mark of the Lake is 2128. See *Erickson v. State*, 132 Idaho 208, 211, 970 P.2d 1, 4 (1998). Thus, Idaho Code § 58-1306(e) and IDAPA 20.03.04.030.10 do not apply in this case because the Application proposes encroachments that extend below the ordinary high water mark.

15. IDAPA 20.03.04.015.13.e. provides:

It will be presumed, subject to rebuttal, . . . that commercial navigational encroachments, community docks or nonnavigational encroachments will have a [] adverse effect upon adjacent littoral rights if located closer than twenty-five (25) feet to adjacent littoral right lines. Written consent of the adjacent littoral owner or owners will automatically rebut the presumption.

The record indicates that the proposed dock would be located more than 180 feet from the eastern property boundary and over 300 feet from the western property boundary. Thus, the encroachments are over twenty-five feet from adjacent littoral rights and there is no presumed adverse effect on adjacent littoral rights.

16. IDAPA 20.03.04.015.13.d provides the following requirements for commercial navigational encroachments:

Docks, piers, or other works may extend to a length that will provide access to a water depth that will afford sufficient draft for water craft customarily in use on the particular body of water, except that no structure may extend beyond the normal accepted line of navigability established through use unless additional length is authorized by permit or order of the Director. If a normally accepted line of navigability has not been established through use, the Director may from time to time as he deems necessary, designate a line of navigability for the purpose of effective administration of these rules.

The Lakebed profile and the bathymetric map indicate at high water there will be at least six feet draft for water craft. *Application* p. 8-9. The IDL comment states there is no “line of navigability” because there are no docks in the area. I.C. § 58-1302(g); IDAPA 20.03.04.010.20. “NIM owns all of the southern shoreline back to the east, and the bay continues to get more shallow as you move back deeper into the bay towards the east.” *See also Map attached to Comment of Ron Ayers* (July 23, 2020). Wolf Lodge Bay “is approximately 1,470 feet wide at the location where the pier is proposed, and approximately 1,050 feet wide at the narrowest point where a finger of land protrudes southward into the lake. *IDL Comment* at 3. IDL determined the proposed pier dock would not constitute a Hazard to Navigation. Based on IDL’s determination and the length of the dock in comparison to the width of the entire bay, the Director also determines there is no undue interference with navigation and the proposed encroachments meet the requirements of IDAPA 20.03.04.015.13.d.

- **Paragraph 25:** The following additional sentence is added to the end of paragraph 25:

In evaluating the factors set forth in Idaho Code § 1301 and *KEA*, and as will be explained below, the Application is not in conflict with the public trust doctrine. After weighing those lake values against the benefit of the project, the preponderance of the evidence leans in favor of approving the Application.

- **I decline to adopt paragraphs 26-27, and instead substitute the following paragraphs:**

26. As to the protection of property, several adjacent property owners identified in the Application testified. Comments opposed to the application were received from Janie (Fink) Veltkamp and the Harrison Family. Ms. Veltkamp opposed the application because of its conflicting nature with the area and impacts to fish and wildlife, particularly kokanee and bald eagles. In addition to their many comments about impacts to the general public and the area in general, the Harrison family articulated concerns with possible impacts to their private property.

Comments in support of the proposed encroachment were received from Ron Ayers, on behalf of adjacent owner Devon Mountain LLC, who consented to the Application. *Comment of Ron Ayers* (July 23, 2020). BLM commented and did not oppose the application. These adjacent neighbors testified as to different potential impacts to their property and differed as to whether potential impacts would be negative.

(a) The project is approximately one-half mile from the Harrison home. *Testimony of Rand Wichman; see also Testimony/Comment of Stanley Harrison* (“My property line is only 750 yards [2,220 feet] from the proposed development and my house sits up on the hill at the end of the lake and looks directly down at the site.”). The record does not contain a precise distance from the project to Ms. Veltkamp’s property. The Harrison home is on the opposite side of the Highway 97 bridge as the project, with the I-90 corridor on the opposite side of Wolf Lodge Bay. The width of the Lake is approximately one-quarter mile. *IDL Comment* at 3. The appearance of Wolf Lodge Bay on the south side at the site of the project will change. Wolf Lodge Bay, however, is already bounded by highways and traffic including I-90, the interchange with Highway 97, a bridge, and Highway 97 itself that wraps around Wolf Lodge Bay.

(b) There will be noise associated with the project. Given the width of Wolf Lodge Bay in comparison to the distance from the proposed site to the Harrison home, the noise from the site may or may not be greater than the noise associated with vehicles on I-90 and Highway 97. While there will be noise, the applicant stated he would operate during daylight hours, five to six days a week; subject to any emergencies. The business will operate during the high water period, which is typically May through September, and cannot operate during the low water period, typically October through April. Therefore, the business will operate for approximately five months during daylight hours for five or six days a week, then be shut down for approximately

seven months of the year. Other than general statements, the record does not contain information as to the intensity of the project noise and how far away the noise will be heard.

(c) Comments from the Harrisons and Ms. Veltkamp can be contrasted with the comment made in support by Mr. Ayers. “I [] do not think the operation will in any way negatively impact the wildlife that we all love to see in Wolf Lodge Bay. Interstate 90 and Highway 97 and the thousands of cars and trucks daily have far greater potential for damage than this small operation- and the fish and eagles have thrived despite all this traffic, for years. We have resident bald eagles, elk, moose, beaver and many other species at Camp- we even have three treasured great blue heron that reside here and are quite timid...but they stay and thrive, in spite of all of our traffic, camp fires, noise and carrying on. NIM’s operation will not have a negative impact here, and I consider us...even our guests...to be careful guardians of all our resident wildlife friends.” *Comment of Ron Ayers* (July 23, 2020).

(d) Neighbors to NIM’s operations on other lakes submitted comments that NIM’s operations have had minimal impact on their property. Randy and Nancy Reish, neighbors to NIM’s commercial dock at Hayden Lake, wrote: “Since we have occupied our home, we have enjoyed watching the North Idaho Maritime team go about their routine activities. Our interactions with North Idaho Maritime employees have shown them to be courteous, professional and cooperative with a desire to maintain good community relations and extending every effort to minimize any negative impact their activities may impose. North Idaho Maritime has demonstrated their concern for nearby residents by keeping their property clean and through their efforts improved the safety and appearance of their location. . . . We believe that NIM[] would conduct operations at Wolf Bay in a similar professional and environmentally conscientious manner. . . . In summary we consider North Idaho Maritime to be good neighbors and excellent stewards of the environment who conduct their operations in a professional manner

with an eye to minimize any disruption to their neighbors.” *Comment from Randy and Nancy Reish* (July 1, 2020). According to Shawn Taylor, another adjacent neighbor at Hayden Lake: “Mr. Condon has a commercial dock at the west end of Hayden Lake that myself and many of my neighbors originally opposed for many of the same reasons I see this project being opposed. Since the construction of Mr. Condon’s commercial dock he has been nothing but a good and conscientious neighbor, we hardly notice his activities, and he provides a needed service on the lake. I support Mr. Condon’s application.” *Comment from Shawn Taylor* (July 21, 2020).²

(e) The evidence that is in the record about the potential effects to adjacent properties demonstrate differing perspectives as to the impacts in relationship of potential property impacts in the area of the already busy intersection that surrounds Wolf Lodge Bay. IDL’s recommended conditions, including no work activities in the winter, removing all existing pilings, and ensuring the pier, dock, and summer work area are cleaned up and free of debris by October 1, would assist in addressing and limiting possible impacts, as well as in protecting other lake values.

27. Here, the Applicant owns “over 600 lineal feet” of private waterfront property on the south side of Lake Coeur d’Alene. *IDL Comment* at 3. The Applicant’s property is located on both sides of the Highway 97 bridge. The Application proposes an encroachment on the western side of the Highway 97 bridge, below the OHWM. The record indicates that the proposed dock and work area would be located more than 180 feet from the eastern property boundary and over 300 feet from the western property boundary, leaving some distance between the proposed encroachment and the adjacent littoral owners. Thus, the adjacent littoral owners will still be able to access the lake and exercise their own littoral rights from their own properties. Additionally, NIM testified at hearing about its reasons for choosing the site and provided letters detailing

² The Preliminary Order stated that “The Applicant should take these comments to heart and conduct himself in a manner consistent with the statements made therein.” The Director agrees.

NIM's efforts to seek additional sites. Those indicate that this is a unique site as an accessible location that maintains distance from neighboring residential properties.

- **Paragraph 33: I strike the last sentence of the Paragraph 33 and the insert the following amended sentence:**

Given that DEQ told IDL that DEQ will monitor water quality near the site, and given that the Harrisons raised the possibility of contamination to domestic wells in the area, the Applicant should consult with DEQ on whether it is possible for DEQ to include domestic wells – potentially the Harrisons' well if they are willing – as part of DEQ's monitoring network.

ORDER

I conclude that the hearing coordinator's Factual and Procedural Background and Conclusions of Law presented in the Preliminary Order are based on substantial evidence in the record, and I adopt the Preliminary Order's Factual and Procedural Background 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 Factual and Procedural Background 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 Factual and Procedural Background and Conclusions of Law and the above amendments, I HEREBY ORDER that Encroachment Permit Application L-ERL-95-S-1378B is APPROVED, subject to the following conditions:

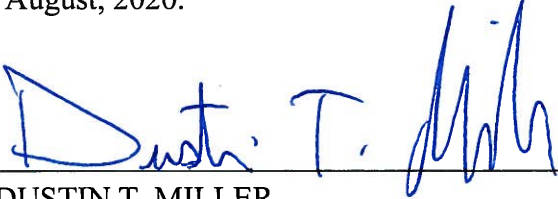
1. Initial dock building activities shall take place no earlier than February 1, 2021, to minimize the impact to fish spawning and bald eagles.
2. Best Management Practices shall be employed during construction and until disturbed areas are fully stabilized.
3. No winter dock storage.

4. No dredging or bulkhead construction under this Application and Permit.
5. No dock construction or work activities shall take place during low water to limit impact on fish spawning sites and bald eagles.
6. To prevent scouring, no dock construction or work activities shall take place during low water.
7. The pier, dock, and summer work area shall be cleaned up and free of debris by October 1 of each year.
8. Remove and properly dispose of all existing pilings.
9. Applicant shall consult the County Weed Superintendent, Idaho State Department of Agriculture or regional aquatic natural resource management designee on the distribution of aquatic invasive species and noxious weeds in travel lanes. Areas with known noxious weed infestations shall be avoided or treated prior to disturbance through commuting from the business to other project sites within the Lake.
10. Construction and all operations must comply with Idaho's water quality standards in IDAPA 58.02.02. Applicant should consult with DEQ on whether it is possible for DEQ to include area domestic wells as part of DEQ's monitoring for water quality effects due to the construction and operation of the project.

This is a final order of the agency. Pursuant to Idaho Code § 58-1306(c) and IDAPA 20.03.04.30.09, 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 § 58-1306(c) and IDAPA 20.03.04.30.09, 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 24th day of August, 2020.


DUSTIN T. MILLER

Director, Idaho Department of Lands

CERTIFICATE OF MAILING

I hereby certify that on this 24th day of August 2020. 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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**BEFORE THE DEPARTMENT OF LANDS
OF THE STATE OF IDAHO**

In the Matter of:

Encroachment Permit Application
No. ERL-95-S-1378B

North Idaho Maritime,
Applicant.

Case No. PH-2020-PUB-22-022

PRELIMINARY ORDER

FACTUAL AND PROCEDURAL BACKGROUND

A. Background

1. In a letter dated April 7, 2020, the Idaho Department of Lands (“Department” or “IDL”) informed the Coeur d’Alene Press regarding legal notice of an application the Department received from North Idaho Maritime/John Condon (“NIM” or “Applicant”) for a commercial dock and a commercial work area, located on Lake Coeur d’Alene, Tax #5934, Lt. 7, Coeur d’Alene, adjacent to Section 6, Township 49 North, Range 2 West, Boise Meridian, in Kootenai County.

2. On April 7, 2020, the Department sent a Memorandum to various public agencies, the Kootenai Environmental Alliance (“KEA”), the Idaho Conservation League, and adjacent neighbors of the Application: “Enclosed is an application requesting permission to build a commercial dock and have a commercial work area on Lake Coeur d’Alene. Please submit your comments, recommendations or objections to IDL by May 11, 2020”

3. On April 7, 2020, courtesy letters of notification were sent notifying neighbors of the application and the ability to comment. One of these letters was sent to the United States Department of Interior, Bureau of Land Management (“BLM”).

4. On April 27, 2020, KEA sent written comments to the Department regarding deficiencies in the application, particularly the absence of “required supporting documents and proposed project information as per IDAPA 20.03.04 Rules for the Regulation of Beds, Waters and Airspace Over Navigable Lakes in the State of Idaho.”

5. Around this same time, the Idaho Department of Environmental Quality (“DEQ”) filed a list of “questions and concerns” with IDL. Questions and concerns listed by DEQ include: when will operations take place; provide a recent bathymetry map; is dredging anticipated; discuss best management practices; will the project violate the Coeur d’Alene Lake Management Plan or violate Idaho water quality standards; will the project use treated wood products; and will pilings be removed?

6. On April 29, 2020, the Department sent a Memorandum noticing the recipients of a revised application “to build a commercial dock and have a commercial work area on Lake Coeur d’Alene. Please submit your comments, recommendations or objections to IDL by May 28, 2020.”

7. On May 5, 2020, the Department received consent from an adjacent property owner, Devon Mountain LLC, agreeing to the encroachment.

8. On May 6, 2020, the Department received written comments from BLM. In the comments, BLM said it “manages public land directly to the west of NIM’s proposed lakefront commercial operation. The BLM operates the Mineral Ridge Boat Launch” “Mineral Ridge Boat Launch is a very popular public boat launch on a heavily traveled state highway.

The boat launch was designed and constructed as a recreational boat launch for public use. The BLM must continue to provide the public the opportunity to safely launch and recover recreational boats at this site and public safety for recreational boaters is a concern at Mineral Ridge. It is due to that concern that our comments are primarily from a public safety perspective.” “It is our understanding that if the NIM’s application were to be approved, there would be commercial heavy truck traffic generated from this operation and that the Idaho Transportation Department (ITD) has limited heavy trucks to right turns only from NIM’s property. Mr. Condon has stated that he would like to use Mineral Ridge Boat Launch as a turnaround for those heavy trucks. The safety issues resulting from such heavy traffic is a critical issue that must be addressed should this encroachment permit be approved, and the property subsequently developed as proposed.” “BLM is concerned about the expected increase in commercial/industrial boating traffic on Lake Coeur d’Alene resulting from the proposed development of NIM’s property. Currently, Wolf Lodge Bay is almost exclusively utilized by recreational boating pursuits (e.g. fishing, sight-seeing, skiing, wildlife viewing, etc.) Commercial usage in Wolf Lodge Bay during the peak recreational season will provide the recreational public additional impediments to safely enjoy their pursuits on the lake.” “BLM is “not opposed to commercial activities.”

9. Notice of the application was published in the Coeur d’Alene Press for two consecutive weeks starting on April 10, 2020. *Affidavit of Publication*.

B. The Application

10. On May 21, 2020, a *Joint Application for Permits* (“Application”) was received by the Department from NIM. The Application states that fees were received by IDL on March 18, 2020. *Application* at 1. According to the Application, the “[p]urpose of the project is to

install a Pier that leads down to a floating dock. Piling will be driven to secure [the] floating dock. Dock and pier will be used for commercial purposes.” *Application* at 1, ln. 15. A “2-3 man crew will Drive 14 12” steel piling[s] to support [the] Pier. This will be done with a barge and crane. . . . Pier will be 70’x10’ with 50’ of it protruding over the high water mark. Of the 14 pile, 10-12 of which will be in the water at high pool.” *Id.* at 2, ln. 16. “Floating dock will be 10’x100’. . . . Dock will be brought in by tug boat. 4 piling[s] will be driven by a crew with a barge and crane in order to secure dock. Piling will be driven about 10’ into the ground and will elevate about 10’ higher than the high water mark. . . . Work will be done at high pool to minimize turbidity caused from entering and existing the bay. Hydrological changes are not expected. . . . Excess material will be hauled out and disposed of at a certified location. Work will be done with water at summer level.” *Id.* “If work must be done at low pool, as much as possible will be done from the upper bank.” *Id.* at 2, ln. 17. “Mitigation plan is not necessary because impacts to waters are minimal.” *Id.* at 2, ln. 18. It is anticipated that “14 sq. ft.” of impacts will be caused due to steel pilings. *Id.* at 2, ln. 20.

11. Attachments to the Application include a *Commercial/Community/Non-Navigational Encroachment Permit Application* (“Encroachment Application”) in which NIM states the type of encroachment is a “commercial marina.” The encroachment will extend 150 feet beyond the ordinary high water mark (“OHWM”). According to the Encroachment Application, necessary attachments were included (county plat map, tax record identifying the owner, lakebed profile, general vicinity map, scaled air photos). According to the Encroachment Application, the littoral rights are, “Owned, fee simple title holder.” In support, a Kootenai County tax record was attached showing the owner of the upland property is the “John and Gaila Condon Living Trust.” The Kootenai County tax record was “generated on 5/21/2020.” The

address of record for the property is, 6719 S. Highway 97, Coeur d'Alene. An *Idaho Commercial Lease Agreement* ("Lease") was attached, showing the upland property is owned by "John and Gaila Condon," but leased by NIM: "Landlord is the owner of the land and improvements at the address 6719 S. Highway 97, Coeur d'Alene, ID 83814." The Lease was signed on April 6, 2020.

12. Another attachment to the Application explains the "[p]rimary use of site will be for mooring of work boats, barges, and other vessels." A list of services and work to be performed were stated as follows: loading/unloading, storage of materials and supplies for work to be performed; loading/unloading of materials, supplies, and personnel in support of emergency services; assembly and maintenance/repair of floating docks.

13. A photo attached to the Application shows what appear to be existing pilings already in the water at what may be the project site. A "previously issued permit" was attached to the Application, showing what was later discussed during the hearing as the former "Green Dolphin" restaurant.

C. Appointment of the Hearing Coordinator and Notice of the Public Hearing

14. On June 8, 2020, the Director appointed the hearing coordinator to preside over a public hearing to be held on July 23, 2020. According to the *Notice of Appointment of Hearing Coordinator and Public Hearing*, and in light of the current public health climate and COVID-19,¹ the public hearing would be held both in-person at the Department's office in Coeur d'Alene, as well as by Zoom. "You may attend and present comments at the public hearing. You may also submit written comments In order to be considered, all written comments must be received by the close of the hearing."

¹ See <https://coronavirus.idaho.gov/>.

D. Written Comments

15. Written comments were received by the Department, many of which opposed the Application. Comments opposing the Application generally discussed that if a commercial marina were built, it would adversely effect natural aesthetics, fish and wildlife (particularly kokanee salmon and their spawning grounds, westslope cutthroat trout, bull trout, and bald eagles), the economic damages that would occur if the fish and wildlife are disturbed, the relative undeveloped nature of Wolf Lodge Bay, increased traffic on a state highway and surrounding roads, public safety concerns due to increased traffic, impacts to water quality, potential stirring-up of Lake bed sediments that contain heavy metals, turbidity, oil/fluid spills, noise pollution, additional crowding on the Lake itself, negative impacts to recreation, boating (motorized and non-motorized), fishing, and violation of the public trust doctrine.

16. A “change.org” petition was made part of the record by KEA, with nearly two thousand signatures opposing the Application. KEA also filed twenty years of accident reports for “the stretch of HWY97 where NIM commercial operations [are] proposing to take place.” The accident reports were obtained from the Idaho Transportation Department. “As you can see, the applicant’s property is located on a VERY dangerous blind curve where commercial vehicles such as semi’s and large trucks are proposing to be turning on and off of the HWY. Traffic concerns and public safety have been cited by ITD and BLM in their comment letters for this case.” KEA also questioned whether there is conflicting bathymetry data between what is available from DEQ and what was written in the application.²

17. Comments supporting the Application generally discuss the upstanding nature of the applicant, the services that NIM provides, that NIM is a good neighbor at Hayden Lake, that

² A comment from Colton Carlson, dated July 22, 2020, questioned whether there was a conflict after taking his own measurements. Whether there was a conflict was addressed by John Condon at the hearing.

NIM provides good paying jobs to the community and supports community organizations, the property is zoned correctly, the public needs that would be met if the Application were approved, NIM's prior role assisting first responders when there are accidents on the Lake, and improved safety if a tug and barge were located at Wolf Lodge Bay. A comment from Kootenai County, Parks & Waterways, supporting the Application, explained: "It is important that local marine contractors have reasonable access to our local waterways in order to construct and repair these facilities for the benefit of the public."

18. A comment from David A. Armes, a wildlife Biologist with Environmental, Inc., retained by NIM and dated July 21, 2020, said as to kokanee salmon: "No Kokanee spawning areas are located on or adjacent to the Property. As such, the proposed Encroachment Permit will not alter kokanee spawning habitat and will have no effect on kokanee spawning." As to bald eagles, he said: "The closest known nesting location for bald eagles is located over 3.5 miles west of the parcel. The area of the Property is subject to the winter drawdown of Coeur d'Alene Lake and will not result in an increase in activities occurring during bald eagle winter feeding activities. As such, the proposed Encroachment Permit will have no effect on bald eagle winter feeding or nesting activities."

19. Conversely, a July 23, 2020, comment from Janie (Fink) Veltkamp, an adjacent property owner who is also a raptor biologist stated, the "commercial dock installation in Wolf Lodge Bay will negatively impact the wintering population of Bald Eagles and Kokanee Salmon population that coexist there. . . . I strongly encourage Idaho Department of Lands to consider not destroying the huge gains we've made re-establishing the wintering Bald Eagle population at Wolf Lodge Bay." "I, Janie (Fink) Veltkamp, own the 97 acres adjacent to the proposed rezoning at Wolf Lodge Bay and the property will be negatively impacted by this change!

The property has historically been used as a campground and for recreation, not for industrial uses. The proposed industrial and commercial dock installation use is in violent disagreement with present and future uses of all adjacent property.”

20. According to a 2019 comment from Charles “Chip” Corsi, Regional Supervisor, Panhandle Region, Idaho Department of Fish & Game (“IDFG”): “As I recalled, the peninsula and submerged private lands are in the shallow portion of the bay, and thus are not within the area that kokanee spawn. Wolf Lodge Bay, in the deeper portions of the Bay . . . is the primary spawning area for kokanee in Coeur d’Alene Lake.” “All of Wolf Lodge Bay is used by the eagles that congregate to feed on kokanee during/following the kokanee spawning period. Whether or not any development at the site would affect eagle usage is difficult to say. Eagles during this winter feeding period have demonstrated they can be pretty tolerant of disturbances. Eagles also use the timber across the highway for perching during the time kokanee are readily available; it would be speculative at this point to suggest a positive or negative effect from development of the site.”

21. A comment from Jim Brady, a former, long-tenured IDL employee was received, providing some historical context regarding the working nature of the Lake: “Lake Coeur d’Alene has a rich history of activities from steamers, to recreation, to lumber mills, to miles of long log tows and marine construction. The tug companies used to be very good stewards of the lake by gathering debris and dead heads and then disposing of it to ensure safe boating and recreation.” “Over the last 20 years significant residential growth has occurred on the lake. Kootenai County has seen 20% growth as well. Some developed properties on the lake are only boat accessible. This growth has put a significant burden on the lake requiring more support activities such as more public access points, dock building, recovery operations, fire support,

mail service, invasive weed control and operations that support safe boating and recreation.

This growth and public demand on the lake has obviously consumed a majority of locations where commercial activity can take place.” “For the Lake Coeur d’Alene as a whole, this encroachment application will not produce any measurable increase in commercial traffic than already exists, yes, it will produce a bit more commercial traffic in Wolf Lodge Bay.”

22. A comment from Mr. Corsi with IDFG, dated April 22, 2020, did not support or oppose the Application, but did mention the potential need to “mitigate[]” for adverse effects to fish, wildlife, and their habitat. That said, “Shoreline modifications such as docks and breakwaters tend to benefit species such as smallmouth bass and northern pike, which have become widespread in the lake. Pike predation is a (sic) considered to be a significant threat to the small but important population of adfluvial westslope cutthroat that uses Wolf Lodge Creek for spawning and rearing habitat.” The “150 foot encroachment into the public waterway of Lake Coeur d’Alene will have little impact on angling opportunity” “We recommend keeping the footprint of the waterward portion of the facility to the smallest size practical.” “We recommend construction be completed during low water, that all appropriate erosion/sediment control and sound/vibration suppression BMPs be employed

Additionally, we recommend all pilings removed from the property be properly disposed of due to the probability of heavy metals contamination.”

23. According to the Idaho Department of Agriculture, it “did not notice any language related to strategies for preventing Eurasian watermilfoil spread (EWM) through their commercial operations, since Wolf Lodge is an active EWM treatment area (report with map attached).”

24. A comment from DEQ stated its “concerns that activities . . . in the nearshore area [] could cause local exceedances of Idaho’s water quality standards (IDAPA 58.01.02; e.g. turbidity, lead) which could negatively affect beneficial uses (e.g. aquatic life). . . . DEQ recommends this permit include the condition that construction and all operations comply with Idaho’s water quality standards (IDAPA 58.02.02).”

E. The July 23, 2020 Public Hearing

25. On July 23, 2020, a public hearing took place at the Department’s office in Coeur d’Alene and via Zoom. The hearing started shortly after 6:00 p.m. Pacific time.

26. Testimony on behalf of the applicant was given by Rand Wichman, who used a PowerPoint in aid of his comments. Mr. Wichman showed an aerial image that located the Condons’ private property on Wolf Lodge Bay in relation to Interstate 90 (“I-90”), and Highway 97. A more focused aerial image was also shown depicting the I-90 interchange with Highway 97 on the north side of the Lake, the Highway 97 bridge over the Lake from the Interstate, and the Condons’ private property on the south side of the Lake that is both west and east of the bridge. According to another image provided by Mr. Wichman, Wolf Lodge Bay has two privately owned parcels, with most of the waterfront bounded by I-90 to the north and Highway 97 to the south. Both private parcels are on the south side of the Lake. According to Mr. Wichman, the site that is the subject of the Application is approximately 3,000 feet (more than ½ mile) from the house on the other private parcel. The house on the other private parcel is on the eastern side of the bridge, whereas the site itself is on the western side of the bridge. Mr. Wichman also provided some history of the Condons’ property, which formally housed the “Green Dolphin” floating restaurant.

27. Mr. Wichman explained the Application was for a 10' x 50' pier, a 10' x 100' floating dock, and an 80' x 120' work area. Bathymetry showed the structures and work area in relation to the depth of water and the distance from the shoreline. A slide presented by Mr. Wichman superimposed the extent of the encroachments on an aerial image.

28. Mr. Wichman explained the services NIM provides are essential for public agencies and private property owners.

29. Responding to prior, written comments concerning kokanee salmon and bald eagles, Mr. Wichman explained the site is generally only usable from May through September, when the level of Lake Coeur d'Alene is high. Therefore, as the water recedes, and during low water periods, the site is unusable. It is during this time that kokanee salmon are spawning and bald eagles are in the area eating the spawned out kokanee. As to water quality, construction will occur during low water, with the Applicant committed to using best management practices. More particularly to heavy metal contamination, Mr. Wichman presented a map showing lead concentrations are relatively low in Wolf Lodge Bay, compared with other areas of the Lake.

30. Following Mr. Wichman, comments were given by the Applicant, John Condon. Mr. Condon explained the nature of his business, the services it provides, the years it took him to find the site at Wolf Lodge Bay, and his subsequent due diligence. In response to questions asked by the hearing coordinator, Mr. Condon said he is authorized to bind the John and Gaila Condon Living Trust. Also in response to a question from the hearing coordinator, Mr. Condon explained the bathymetry that accompanies the Application was taken by hand to be as accurate as possible. Mr. Condon's method was more fully discussed in the July 22, 2020 comment from Colton Carlson.

31. After the Applicant concluded, comments were taken into the record from the public. Most of the oral comments were opposed to the project, for the same or similar reasons given in writing. Some comments were in favor of the project, also for the same or similar reasons given in writing.

32. Oral comments were given by nine members of the Harrison family, owners of the private parcel east of the bridge. The comments given by the Harrison family appear to have been read into the record, as there were written comments received by IDL shortly before the hearing started that are substantially similar to the oral comments. Because of this, the hearing coordinator will discuss the written comments in the order in which the Harrisons appeared at the hearing.

33. Stanley Harrison provided comment first. According to Stanley, “my kids are sixth generation North Idahoans, our family has lived at Wolf Lodge Bay over 50 years and this change is going to have a huge impact to our quality of life.” Stanley stated his property line is “only 750 yards from the proposed development and my house sits up on the hill at the end of the lake and looks directly down on the site. My family and I are some of the most affected by this change because if it goes through we’ll be forced to have the sights and sounds of a permanent construction-zone out our view 24/7.” According to Stanley, “It is clear that this industrial use is 100% incompatible with all the adjacent uses. You have my residential acreage where I grew up and now raise my family, the Camp CDA which is completely recreational, Janie Fink’s property which was historically a recreational campground . . . and you have two major BLM recreation sites on both sides of the bay including one of the most beautiful and popular hiking trails in the whole area located directly above the site.” Stanley also explained the site is improperly “zoned” and there are traffic problems associated with Highway 97. In

conclusion, Stanley said, “We’re not against North Idaho Maritime. We’re just against them buying this land cheap on speculation and expecting the public to pay the cost for the benefit of one company. They can operate in other places, they already are just fine, but this is absolutely the wrong location. Please deny this application- it’s not right for this area and will cause considerable harm.”

34. Next, comments were given by Kristie Harrison. Kristie spoke about traffic concerns and the ability/inability to make turns in and out of the site, the vagueness of words used in the Application, and that NIM already operates out of Cougar Bay.

35. Next, comments were given by Alahna Harrison. Alahna spoke about the nature of the watershed, specifically questioning whether the Applicant is required to obtain permitting from the Idaho Department of Water Resources (“IDWR”) for work in Wolf Lodge Creek as well as from DEQ. Particular to water quality, Alahna said the type of equipment that will be used by NIM will leak, will cause impacts to Wolf Lodge Creek, and the Harrison’s drinking water well: “As a cold water tributary, recreational hotspot, and drinking water source any and all proposed changes that affect Wolf Lodge Creek must receive the most **severe analysis**. That has not happened yet and I would ask that Mr. Condon’s proposal not be accepted until it does. . . . Not only would potential leaks harm wildlife, but it will damage the drinking water safety of Wolf Lodge Creek including our well which is located alongside.” Emphasis in original.

36. Next, comments were given by Isaac Harrison. Isaac spoke about the need for permitting due to the implication of the National Environmental Policy Act, the Clean Water Act, the Rivers and Harbors Act, and the jeopardy to endangered bull trout, as well as to kokanee salmon, and westslope cutthroat trout.

37. Next, comments were given by Isaiah Harrison. Isaiah spoke about the changing nature and growth of Coeur d'Alene, particularly the value of tourism and sustainable development. Isaiah sees the project as "a non-conforming use. . . . This piece of property has been very clearly zoned commercial recreational, and Mr. Condon clearly wants to use it for an industrial purpose, meaning this change should not be permitted."

38. Next, comments were given by Addison Harrison. Addison spoke of the scenic beauty, peace, and quiet of the area, which would be harmed if the Application is approved.

39. Next, comments were given by Elijah Harrison. Elijah mentioned Wolf Lodge Bay "is flanked by two major roads, Highway 97 and I-90." The roads allow for use of the Lake by many people, with two boat launches, Higgins Point and Mineral Ridge. "If you introduce huge barges, dock building supplies, and tug boats, along with loading and unloading cranes, into the area you reduce the recreational use of Wolf Lodge Bay while increasing the dangers of large equipment used in a high recreational area."

40. The final comments from the Harrison family were given by Alyssa Harrison. Alyssa spoke of the Mineral Ridge national recreation trail, parts of which look at Wolf Lodge Bay: "The pier will be viewed from Caribou Cabin and Blue Bird over look. It will also be viewed from Royal and Silver Wave benches. The noise from below the trail will make this sound like a construction zone all the time."

41. After comments were taken from the public, Mike Ahmer, Resource Supervisor – Public Trust, Department of Lands, read his written comments into the record ("IDL Comment"). The IDL Comment was made part of the record at the hearing. Prior to reading the IDL Comment, Mr. Ahmer addressed concerns regarding construction of a bulkhead and dredging, neither of which are part of the Application and would not be allowed without an additional

application(s). Mr. Ahmer addressed the jurisdictional interplay between IDL and IDWR as it relates to stream channel alternations and work below the OHWM and/or artificial high water mark. Lastly, Mr. Ahmer stated the Applicant has no IDL permit for Cougar Bay, that a notice of non-compliance was issued to the Applicant by IDL for Cougar Bay, and the matter will go to hearing.

42. The IDL Comment explains the initial application was received on March 18, 2020, but that application was incomplete. Following a series of conversations with NIM and other agencies, the Application was deemed complete on May 21, 2020. The Application proposes a 10' x 70' pier, a 10' x 100' floating commercial dock, and an approximately 80' x 120' "summer work area." *IDL Comment* at 1. After reviewing pertinent sections of Idaho Code and IDL's rules, the IDL Comment stated there "are no IDAPA requirements or restrictions on sizes for commercial navigational encroachments, like there are for single-family and community docks." *Id.* at 3. "There are no other docks in the area that would set or determine a Line of Navigability (LON) in this location, NIM owns all of the southern shoreline back to the east, and the bay continues to get more shallow as you move back deeper into the bay towards the east." *Id.* at 3-4. "The proposed pier dock appears to be located more than 300 feet from the western property boundary and 180 feet from the eastern property boundary; well beyond the required 25-foot setback required of commercial facilities." *Id.* at 4. Based on its review of the Application, the Department concludes: "the proposed application appears to meet the standards and specific IDAPA requirements pertaining to commercial navigational encroachments." *Id.* First, as to comments in the record directed at uplands issues, IDL made clear its jurisdiction ends at the high water mark. Second, as to comments in the record pertaining to fish and wildlife, water quality, and traffic, the Department states: "IDL is not the expert when it comes

to fish and wildlife habitat, water quality, or traffic. As part of the processing of the application, IDL sent copies of the application to IDEQ, IDFG, IDWR, ITD, Lakes Highway District, Kootenai County Community Development, USACOE, KCSD, Panhandle Health and KEA. IDL relies on our sister agencies with expertise in their fields to provide comments and concerns regarding a proposed project.” *Id.* Comments the Department received from IDFG and DEQ were discussed. As to comments from IDFG, it was recommended that the encroachment be kept “to the smallest size possible.” As to an email from DEQ regarding water quality, “NIM had ‘addressed all of the issues, so I won’t be submitting comments on the updated application.’ IDEQ also mentioned they will collect background lead data in the immediate vicinity and will perform future monitoring in the same location to determine whether activities related to the permit resulted in an exceedance of water quality standards. If an exceedance is detected, IDEQ will take appropriate action and would work with NIM to bring the activities into compliance with water quality standards (IDEQ email dated 7/21/2020).” *Id.*

43. After the Department gave its comments, a reply was given by Mr. Wichman and John Magnuson, an attorney representing the applicant. Mr. Magnuson provided a historical overview of the elevation of Lake Coeur d’Alene as a result of the construction and operation of Post Falls dam, explained that the project is within the scope of the prior IDL permit issued for the Green Dolphin restaurant, said that no public agency has yet taken issue with the project, and stated that no one on the Lake can provide the service that NIM will provide from Wolf Lodge Bay. In response to a question from the hearing coordinator as to hours and days of operation, which was asked in the context of the comments given by the Harrisons, Mr. Wichman explained NIM will operate five to six days a week during daylight hours, subject to the necessities of an emergency.

44. After the hearing, some additional comments were received. As stated at the hearing, the additional “comments” had to be received by IDL by 5:00 p.m. Pacific time on July 24, 2020 to be considered. The hearing coordinator agreed to take documents that were used in aid of oral comments, not new comments or rebuttals to other comments given.

CONCLUSIONS OF LAW

1. The Hearing Coordinator was tasked by the Department to issue a preliminary order. Idaho Code § 67-5245 governs preliminary orders and states as follows:

- (1) A preliminary order shall include:
 - (a) A statement that the order will become a final order without further notice; and
 - (b) The actions necessary to obtain administrative review of the preliminary order.
- (2) The agency head, upon his own motion may, or, upon motion by any party shall, review a preliminary order, except to the extent that:
 - (a) Another statute precludes or limits agency review of the preliminary order; or
 - (b) The agency head has delegated his authority to review preliminary orders to one (1) or more persons.
- (3) A petition for review of a preliminary order must be filed with the agency head, or with any person designated for this purpose by rule of the agency, within fourteen (14) days after the service date of the preliminary order unless a different time is required by other provision of law. If the agency head on his own motion decides to review a preliminary order, the agency head shall give written notice within fourteen (14) days after the issuance of the preliminary order unless a different time is required by other provisions of law. The fourteen (14) day period for filing of notice is tolled by the filing of a petition for reconsideration under section 67-5243(3), Idaho Code.
- (4) The basis for review must be stated on the petition. If the agency head on his own motion gives notice of his intent to review a preliminary order, the agency head shall identify the issues he intends to review.
- (5) The agency head shall allow all parties to file exceptions to the preliminary order, to present briefs on the issues, and may allow all parties to participate in oral argument.
- (6) The agency head shall:
 - (a) Issue a final order in writing, within fifty-six (56) days of the receipt of the final briefs or oral argument, whichever is later, unless the period is waived or extended with the written consent of all parties, or for good cause shown;
 - (b) Remand the matter for additional hearings; or

- (c) Hold additional hearings.
- (7) The head of the agency or his designee for the review of preliminary orders shall exercise all of the decision-making power that he would have had if the agency head had presided over the hearing.

I.C § 67-5245.

2. According to the *Notice of Appointment of Hearing Coordinator and Hearing*, “the Hearing Coordinator shall submit a preliminary order to the Director of IDL, who shall then issue a Final Order no more than thirty (30) days after the conclusion of the hearing. As provided in Idaho Code § 67-5240, the contested case provisions of the Administrative Procedures 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 thirty (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* at 1-2.

3. According to Idaho Code § 58-1306(c):

All such hearings shall be public and held under rules promulgated by the board under the provisions of chapter 52, title 67 of the Idaho Code. The board shall render a decision within thirty (30) days following conclusion of the hearing and a copy of the board’s decision shall be mailed to the applicant and to each person or agency appearing at the hearing and giving testimony in support of or in opposition to the proposed encroachment. Any applicant or other aggrieved party so appearing at a hearing shall have the right to have the proceedings and decision of the board 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 board’s decision.

I.C. § 58-1306(c).

A. The Applicant Bears the Burden of Persuasion

4. The applicant bears the burden of persuasion. “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). “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).

B. The Application Meets the Procedural Requirements of Idaho Code § 58-1306 and IDAPA 20.03.04

5. Certain requirements contained in Idaho Code § 58-1306 and IDAPA 20.03.04 must be met for an application to be considered by IDL.

6. First, “Applications for construction, enlargement or replacement of a nonnavigational encroachment, a commercial navigational encroachment, a community navigational encroachment, or for a navigational encroachment extending beyond the line of navigability shall be submitted upon forms to be furnished by the board and accompanied by plans of the proposed encroachment containing information required by section 58-1302(k).” I.C. § 58-1306(a); *see also* IDAPA 20.03.04.020.07. Plans are defined as meaning, “maps, sketches, engineering drawings, aerial and other photographs, word descriptions, and specifications sufficient to describe the extent, nature and approximate location of the proposed encroachment and the proposed method of accomplishing the same.” I.C. § 58-1302(k); *see also* IDAPA 20.03.04.020.07. Here, the Application was submitted on the *Joint Application for Permits* form, approved for use by the Department. Through maps, aerial images, and site plans,

the applicant describes the work that will occur. Therefore, the Application meets the requirements of Idaho Code § 58-1306(a), Idaho Code § 58-1302(k), and IDAPA 20.03.04.020.07.

7. Second, applications must be signed by the persons who are the “littoral owners or lessees of a littoral owner” IDAPA 20.03.04.020.02. Here, the Application was filed in the name of John Condon and NIM. *Application* at 1, ln. 1. The Application was signed by John Condon. *Id.* at 2, ln. 30. According to the Encroachment Application, the littoral rights are, “Owned, fee simple title holder.” As required by the Department’s rules, documents were required to be filed to verify “Proof of current ownership.” IDAPA 20.03.04.020.07.a.iii. In support, a Kootenai County tax record was attached showing the owner of the upland property is the “John and Gaila Condon Living Trust.” The Kootenai County tax record was “generated on 5/21/2020.” The address of record for the property is, 6719 S. Highway 97, Coeur d’Alene. An *Idaho Commercial Lease Agreement* (“Lease”) was attached, showing the upland property is owned by “John and Gaila Condon,” but leased by NIM: “Landlord is the owner of the land and improvements at the address 6719 S. Highway 97, Coeur d’Alene, ID 83814.” The Lease was signed on April 6, 2020. At the hearing, Mr. Condon affirmed that he is authorized to sign on behalf of the John and Gaila Condon Living Trust. “The rules in this chapter will be liberally construed to secure just, speedy and economical determinations of all issues presented to the agency.” IDAPA 20.01.01.052. The Application meets the requirements of IDAPA 20.03.04.020.02.

8. According to Idaho Code, “Within ten (10) days of receipt of an application . . . the board shall cause to be published . . . once a week for two (2) consecutive weeks, a notice advertising of the application and describing the proposed encroachment and general location

thereof.” I.C. § 58-1306(b); *see also* IDAPA 20.03.04.030.01. As explained in the IDL Comment, an application was initially received on March 18, 2020, with IDL informing the applicant on March 30, 2020 that the application was incomplete. *IDL Comment* at 1. On April 6, 2020, the applicant provided additional information to the Department. *Id.* On April 7, 2020, the Department deemed the information sufficient, and caused the application to be published in the Coeur d’Alene Press on April 10 and April 17. *Id.* Notice of the application was published in the Coeur d’Alene Press for two consecutive weeks starting on April 10, 2020. *Affidavit of Publication*. Therefore, the Application was timely published in accordance with Idaho Code § 58-1306(b) and IDAPA 20.03.04.030.01.

9. According to Idaho Code, “Any resident of the state of Idaho, or a nonresident owner or lessee of real property adjacent to the lake, or any state or federal agency may, within thirty (30) days of the first date of publication, file with the board an objection to the proposed encroachment and a request for a hearing on the application.” I.C. § 58-1306(c); *see also* IDAPA 20.03.04.030.04. The first notice was published on April 10, 2020. The first written comment was received by the Department on April 27, 2020 from KEA. Written comments were taken into the record up until the close of the hearing. All oral testimony and timely received written comments were considered by the hearing coordinator. Therefore, the Department provided more than the statutorily required period of thirty days for receiving comments.

10. According to Idaho Code, a hearing may be held if an objection requesting a hearing is made, or upon the Department’s own discretion. I.C. § 58-1306(c); *see also* IDAPA 20.03.04.030.05. Here, the Director ordered a hearing be held, noticing the same through

publication in the Coeur d'Alene Press. Therefore, the hearing requirement of Idaho Code § 58-1306(c) and IDAPA 20.03.04.030.05 is satisfied.

C. The Department Possess the Authority to Regulate Coeur d'Alene Lake

11. The Department is vested with the authority, in the interest of “public health, interest, safety and welfare [to regulate] all encroachments upon, in or above the beds of waters of navigable lakes of the state . . . 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.” I.C. § 58-1301.

12. The Applicant proposes to construct a commercial marina and work area in and around the bed of Lake Coeur d'Alene. The work is discussed in the Application, drawings, aerial images, and other attachments, as well as through comments given by the applicant and his representatives at the hearing. Lake Coeur d'Alene is a navigable body of water that is regulated by the Department. *Lake CDA Investments, LLC v. Idaho Dept. of Lands*, 149 Idaho 274, 277, 233 P.3rd 721, 724 (2010); *In re Sanders Beach*, 143 Idaho 443, 446, 147 P.3d 75, 78 (2006); *Kootenai Env. Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 105 Idaho 622, 629-30, 671 P.2d 1085, 1092-93 (1983) (hereinafter “KEA”). The high water mark of the Lake is 2128 feet. *See Erickson v. State*, 132 Idaho 208, 211, 970 P.2d 1, 4 (1998).

D. The Application Meets the Requirements for a Commercial Navigational Encroachment

13. Here, the Application is for a “commercial marina” that will extend 150 feet beyond the OHWM and/or artificial high water mark of Lake Coeur d'Alene. *Commercial/Community/Non-Navigational Encroachment Permit Application*. Beyond the high water mark, the encroachment is made up of 10' x 50' pier, a 10' x 100' floating dock, and an 80' x 120'

work area. There are no size limitations for commercial navigational encroachments. *See* IDAPA 20.03.04.015.13.d; IDAPA 20.03.04.030. Comments from IDFG recommend keeping the footprint of the project to the smallest size practical. Other than comments requesting that a permit not be issued for this project in Wolf Lodge Bay, there were no comments in the record addressing a more limited scope of the project. Wolf Lodge Bay “is approximately 1,470 feet wide at the location where the pier is proposed, and approximately 1,050 feet wide at the narrowest point where a finger of land protrudes southward into the lake.” *IDL Comment* at 3. Based on the record, the size of the encroachment appears reasonable given the width of Wolf Lodge Bay and the characteristics of the site.

14. “Factors” to be considered in evaluating a commercial navigational encroachment are stated as follows: “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 will 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” IDAPA 20.03.04.30.10.

15. Here, the applicant owns “over 600 lineal feet” of private waterfront property on the south side of Lake Coeur d’Alene. *IDL Comment* at 3. The Applicant’s property is located on both sides of the Highway 97 bridge. The Applicant’s property is on the opposite side of Wolf Lodge Bay from the I-90 corridor. As stated above, Wolf Lodge Bay “is approximately 1,470 feet wide at the location where the pier is proposed, and approximately 1,050 feet wide at the narrowest point where a finger of land protrudes southward into the lake.” *Id.* The Application proposes an encroachment on the western side of the Highway 97 bridge, below the OHWM or artificial high water mark. The north side of Wolf Lodge Bay is bounded by I-90 and

the interchange with Highway 97. To the west of the proposed encroachment is the BLM boat launch at Mineral Ridge.

16. As to interference with navigation, the IDL Comment states there is no “line of navigability” because there are no docks in the area. I.C. § 58-1302(g); IDAPA 20.03.04.010.20. “NIM owns all of the southern shoreline back to the east, and the bay continues to get more shallow as you move back deeper into the bay towards the east. Therefore, IDL does not feel the proposed pier dock would constitute a Hazard to Navigation.” When reviewing the aerial images that were presented by Mr. Wichman, and consistent with the IDL Comment, the hearing coordinator agrees there is no “undue interference with navigation” IDAPA 20.03.04.30.10. *See also* Map attached to *Comment of Ron Ayers* (July 23, 2020).

17. As to the impacts on “adjacent property” owners, the question is more difficult. Adjacent property owners were identified in the Application. *Application* at 4, ln. 29. Of the adjacent property owners, comments opposed to the Application were received from Janie (Fink) Veltkamp and the Harrison family. Ron Ayers, on behalf of Devon Mountain LLC consented to the Application. Mr. Ayers is also the owner of Camp Coeur d’Alene. *Comment of Ron Ayers* (July 23, 2020). BLM did not oppose the Application. Ms. Veltkamp opposed the application because of its conflicting nature with the area and impacts to fish and wildlife, particularly kokanee salmon and bald eagles. The Harrison family articulated legitimate concerns with the impact to their private property.

18. According to IDAPA, a commercial navigational encroachment may be denied if there is an “unreasonable adverse effect upon adjacent property” IDAPA 20.03.04.30.10 (emphasis added). Therefore, IDAPA allows adverse effects to adjacent property, provided they

are not unreasonable. While there may very well be adverse effects to adjacent property, the record does not support a conclusion that those effects will be unreasonable.

19. First, the project is approximately one-half mile from the Harrison home.

Testimony of Rand Wichman; see also Testimony/Comment of Stanley Harrison (“My property line is only 750 yards [2,220 feet] from the proposed development and my house sits up on the hill at the end of the lake and looks directly down at the site.”) The record does not contain a somewhat precise distance from the project to Ms. Veltkamp’s property. The Harrison home is on the opposite side of the Highway 97 bridge as the project, with the I-90 corridor on the opposite side of Wolf Lodge Bay. The width of the Lake is approximately one-quarter mile.

IDL Comment at 3. Certainly, the appearance of Wolf Lodge Bay on the south side at the site of the project will change. Wolf Lodge Bay, however, is already bounded by I-90, the interchange with Highway 97, a bridge, and Highway 97 itself that wraps around Wolf Lodge Bay. There will be noise associated with the project. Given the width of Wolf Lodge Bay in comparison to the distance from the project site to the Harrison home, the noise from the site may or may not be greater than the noise associated with vehicles on I-90 and Highway 97. Other than general statements, the record does not contain information as to the intensity of the project noise and how far away the noise will be heard. While there will be noise, the applicant stated he would operate during daylight hours, five to six days a week; subject to any emergencies that might arise. The business will operate during the highwater period, which is typically May through September, and cannot operate during the low water period, typically October through April. Therefore, the business will operate for approximately five months during daylight hours for five or six days a week, then be shut down for approximately seven months of the year.

20. Second, the comments from the Harrison family and Ms. Veltkamp can be contrasted with the comment made in support by Mr. Ayers, owner of Devon Mountain LLC and Camp Coeur d'Alene, also an adjacent property owner. "I [] do not think the operation will in any way negatively impact the wildlife that we all love to see in Wolf Lodge Bay. Interstate 90 and Highway 97 and the thousands of cars and trucks daily have far greater potential for damage than this small operation- and the fish and eagles have thrived despite all this traffic, for years. We have resident bald eagles, elk, moose, beaver and many other species at Camp- we even have three treasured great blue heron that reside here and are quite timid...but they stay and thrive, in spite of all of our traffic, camp fires, noise and carrying on. NIM's operation will not have a negative impact here, and I consider us...even our guests...to be careful guardians of all our resident wildlife friends." *Comment of Ron Ayers* (July 23, 2020).

21. Third, concluding that the adverse effect on adjacent property owners will not be unreasonable is supported by the comments from Randy and Nancy Reish and Shawn Taylor, neighbors to NIM's commercial dock at Hayden Lake. In his PowerPoint presented at the hearing, Mr. Wichman asked the hearing coordinator to give these comments "careful consideration." *Rand Wichman Planning PowerPoint* at 18. According to Randy and Nancy Reish: "Since we have occupied our home, we have enjoyed watching the North Idaho Maritime team go about their routine activities. Our interactions with North Idaho Maritime employees have shown them to be courteous, professional and cooperative with a desire to maintain good community relations and extending every effort to minimize any negative impact their activities may impose. North Idaho Maritime has demonstrated their concern for nearby residents by keeping their property clean and through their efforts improved the safety and appearance of their location. We believe that NIM[] would conduct operations at Wolf Bay in a similar

professional and environmentally conscientious manner. . . . In summary we consider North Idaho Maritime to be good neighbors and excellent stewards of the environment who conduct their operations in a professional manner with an eye to minimize any disruption to their neighbors.” *Comment from Randy and Nancy Reish* (July 1, 2020). According to Shawn Taylor: “Mr. Condon has a commercial dock at the west end of Hayden Lake that myself and many of my neighbors originally opposed for many of the same reasons I see this project being opposed. Since the construction of Mr. Condon’s commercial dock he has been nothing but a good and conscientious neighbor, we hardly notice his activities, and he provides a needed service on the lake. I support Mr. Condon’s application.” *Comment from Shawn Taylor* (July 21, 2020).

22. The Applicant should take these comments to heart and conduct himself in a manner consistent with the statements made therein.

23. The preponderance of the evidence does not support a conclusion that the project will create an “unreasonable adverse effect upon adjacent property” IDAPA 20.03.04.30.10.

E. The Application is not in Conflict with the Public Trust Doctrine

24. A legal principle overlying the Application is the public trust doctrine.

Consideration of an application for encroachment requires the balancing of interests:

The legislature of the state of Idaho hereby declares 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.

25. The public trust doctrine is “a limitation on the power of the state to alienate or encumber title to the beds of navigable waters as defined in this chapter.” I.C. § 58-1203(1). As explained by the Idaho Supreme Court, the following factors should be considered in evaluating an application for encroachment:

[T]he degree of effect of the project on public trust uses, navigation, fishing, recreation and commerce; the impact of the individual project on the public trust resource; the impact of the individual project when examined cumulatively with existing impediments to full use of the public trust resource, i.e. in this instance the proportion of the lake taken up by docks, moorings or other impediments; the impact of the project on the public trust resource when that resource is examined in light of the primary purpose for which the resource is suited, i.e. commerce, navigation, fishing or recreation; and the degree to which broad public uses are set aside in favor of more limited or private ones

KEA at 629-30, 671 P.2d at 1092-93.

26. As stated previously, the Application meets the requirements for a commercial navigational encroachment. In evaluating the factors set forth in Idaho Code § 58-1301 and *KEA*, and as will be explained below, the Application, is not in conflict with the public trust doctrine.

27. Idaho Code § 58-1301 requires “the protection of property, navigation, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty and water quality be given due consideration” *See also KEA* at 629, 671 P.2d at 1092 (“[t]he degree of effect of the project on public trust uses, navigation, fishing, recreation and commerce should be reviewed.”)

28. As to navigation, and as stated previously, given the design there should not be an impact to navigation. *IDL Comment* at 4 (“IDL does not feel the proposed pier dock would constitute a Hazard to Navigation.”).

29. As to fishing, the evidence in the record supports there will be some enhancement of habitat for smallmouth bass and northern pike. *Comment from Chip Corsi* at 1 (April 22,

2020) (“In this case, the 150 foot encroachment into the public waterway of Lake Coeur d’Alene will have little impact on angling opportunity due to the location being in a shallow, backwater area of the lake. . . . Shoreline modifications such as docks and breakwaters tend to benefit species such as smallmouth bass and northern pike . . .”).

30. As to fish and wildlife habitat, the evidence in the record is conflicting on its impacts to kokanee salmon and bald eagles. That said, because the project is on the south side of Wolf Lodge Bay, the preponderance of the evidence suggests it should not impact kokanee salmon, provided construction occurs during low water. *Comment from David A. Armes* (July 21, 2020); *Comment from Chip Corsi* (April 22, 2020). After the project to completed, it will not operate during low water; therefore, there should be no impacts to kokanee salmon then. Similarly to bald eagle habitat, the evidence suggests the project will not be operating when bald eagles are in the area to feed on spawned out kokanee salmon because the water level of the Lake will be low. *Id.* For these reasons, construction should not take place until late January when spawning is complete and bald eagles have moved on. *Comment from Chip Corsi at 2* (April 22, 2020).

31. As to recreation, Wolf Lodge Bay is used by the public for a variety of uses from motorized to non-motorized boating and paddling. This conclusion is supported by many comments in the record, along with the comments from BLM. BLM’s Mineral Ridge boat launch is just west of the project. BLM’s comments are somewhat reflective of the comments from the public: “BLM is concerned about the expected increase in commercial/industrial boating traffic on Lake Coeur d’Alene resulting from the proposed development of NIM’s property. Currently, Wolf Lodge Bay is almost exclusively utilized by recreational boating pursuits (e.g. fishing, sight-seeing, skiing, wildlife viewing, etc.) Commercial usage in Wolf

Lodge Bay during the peak recreational season will provide the recreational public additional impediments to safely enjoy their pursuits on the lake.” The applicant should take all necessary steps to ensure the safety of recreational boaters.

32. As to aesthetics, Coeur d’Alene Lake does have a history as a working lake with commercial navigational encroachments. While the Green Dolphin was located at the site, it was a restaurant, not a facility for the types of commercial uses proposed in the Application.

Aesthetics are clearly in the eye of the beholder: “Perhaps if nothing else, it indicates that commercial development does not per se conflict with aesthetic considerations. Aesthetic considerations are highly subjective and dependent largely on the eye of the beholder. What may be aesthetically pleasing as green and verdant fields in the spring, may be highly offensive in the fall if the farming practice of burning those fields is permitted. A commercial structure with a tastefully constructed rustic exterior may remain offensive to the eye of a Sierra Club member but be highly acceptable to a county official or taxpayer who sees a highly desirable addition to the county's tax base. A commercial property need not necessarily be aesthetically offensive albeit it is difficult for anyone except the owner to truly love an automobile junk yard or asphalt plant.” *Dawson Enterprises, Inc. v. Blaine County*, 98 Idaho 506, 521, 567 P.2d 1257, 1272 (1977) (J. Shepard specially concurring) (overruled on other grounds). “The [Lake Protection Act] requires the state to consider aesthetic beauty to protect *public* health, safety, and welfare when considering encroachments.” *Newton v. Idaho Dept. of Lands et al.* at 11, Docket No. 46334 (Id. Sup. Ct., July 30, 2020) (emphasis in original). Here, many comments truly appreciate the natural beauty of the site, while some comments appreciate the presence of tug boats and a working lake.

33. As to water quality, there were general comments about whether the project would stir up heavy metal contaminants on the bed of the Lake. More particular comments were submitted by the Harrisons, who questioned the possible impact to their drinking well. The comments from DEQ support a conclusion that water quality will be monitored and action will be taken if there are exceedances: “activities . . . in the nearshore area [] could cause local exceedances of Idaho’s water quality standards (IDAPA 58.01.02; e.g. turbidity, lead) which could negatively affect beneficial uses (e.g. aquatic life). . . . DEQ recommends this permit include the condition that construction and all operations comply with Idaho’s water quality standards (IDAPA 58.02.02).” According to the IDL Comment, “IDEQ also mentioned that they will collect background lead data in the immediate vicinity and will perform future monitoring in the same location to determine whether activities related to the permit resulted in an exceedance of water quality standards. If an exceedance is detected, IDEQ will take appropriate action” *IDL Comment* at 4. Given that DEQ will monitor water quality in the Lake near the site, and given the possibility of contamination to domestic wells that was raised by the Harrisons, the Applicant should consult with DEQ on including domestic wells in the area – potentially the Harrisons’ well if they are willing – as part of DEQ’s monitoring network.

34. According to Idaho Code § 58-1301, lake 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.” *See also KEA* at 629, 671 P.2d at 1092 (a proposed encroachment should be “examined cumulatively with existing impediments to full use of the public trust resource”). Furthermore, “the impact of the individual project on the public trust resource” should be examined. *KEA* at 629, 671 P.2d at 1092. From the standpoint of economic necessity or justification, the record supports a conclusion that the service provided

by the Applicant is needed. As a lake community, docks need to be built and serviced. When accidents occur, a staging area at Wolf Lodge Bay may provide first responders the time they need to save property and lives. When the project is examined cumulatively with existing impediments, Wolf Lodge Bay is bounded by I-90 and an interchange with Highway 97 to the north, a bridge to the east, Highway 97 to the east, south, and west, and BLM's Mineral Ridge boat launch to the west. The impact of the project on the public trust resource is conflicting, depending on one's perspective. From a development standpoint, there is benefit to the project as it will promote commerce; however, there is no question that the project will alter the shoreline as it looks today.

35. The balancing of factors in Idaho Code § 58-1301 requires consideration of a proposed encroachment's purpose. *See also KEA* at 630, 671 P.2d at 1093 (a proposed encroachment should be examined "in light of the primary purpose for which the resource is situated, i.e. commerce, navigation, fishing or recreation . . ."). A primary purpose of Lake Coeur d'Alene was not discussed. That said, the record supports a conclusion that the Lake supports a variety of purposes such as sightseeing, fishing, recreation, boating, and commerce.

36. Idaho Code § 58-1301 requires a balancing of lake values with the justification for or benefit of a proposed encroachment. *See also KEA* at 630, 671 P.2d at 1093 (consideration should be given to "the degree to which broad public uses are set aside in favor of more limited or private uses."). Here, when balancing the values of Lake Coeur d'Alene with the project, the preponderance of the evidence tips in favor of granting the Application. The project is not for a limited, private use like a boat launch or dock. The project will provide services to property owners around the Lake, services that the record shows are needed, as well as a staging area for first responders.

F. Dredging and Bulkheads are Not Part of the Application

37. Comments were raised concerning dredging and bulkheads. It was confirmed by the Applicant and by IDL that dredging is not part of the Application. Bathymetry was hand measured by the Applicant, to provide better insight into depth than could be gained from the more general bathymetry.

38. If the bathymetry is wrong and dredging is needed, a separate application(s) will need to be filed with the Department for dredging. Moreover, if a bulkhead is needed, a separate application(s) will also have to be filed.

G. The Role of Other Agencies

39. Comments ask IDL to look at traffic plans, zoning, the Clean Water Act, the Rivers and Harbors Act, and Idaho's stream channel alteration laws, to name a few. The comments raise legitimate questions, all of which should be addressed through the responsible agencies. The Idaho Department of Lands' authority is to "regulate encroachments below either the OHWM or the AHWM." *State v. Hudson*, 162 Idaho 888, 892, 407 P.3d 202, 206 (2017). Here, the Application was correctly filed on the *Joint Application for Permits* form ("Joint Application"). The Joint Application is filed with IDL, IDWR, and the United States Army Corps of Engineers ("USACE"). No comments were received from either IDWR or USACE. Furthermore, on April 7, 2020, IDL sent courtesy notification of the Application to a host of state, federal and local agencies, including: IDFG; DEQ; IDWR; ITD; USACE; Kootenai County Parks; Recreation/Waterways, Kootenai County Marine Division; Kootenai County Building & Planning & Zoning; and Panhandle Health District 1—Kootenai County. The comments that were received from the other agencies were duly considered. In this proceeding, the Department can only review those items for which it is given responsibility. "An administrative agency is a

creature of statute, limited to the power and authority granted it by the Legislature. . . .” *In re Board of Psychologist Examiners' Final Order Case No. PSY-P4B-01-010-002 ex rel. Wright*, 148 Idaho 542, 548, 224 P.3d 1131, 1137 (2010) citing *Welch v. Del Monte Corp.*, 128 Idaho 513, 514, 915 P.2d 1371, 1372 (1996).

H. Comments Submitted After the Hearing were not Considered

40. After the hearing, some additional comments were received. According to the *Notice of Appointment of Hearing Coordinator and Public Hearing*, comments had to be received by the close of hearing in order to be considered and made part of the record.

Comments received after the close of the hearing were not considered.

41. Because some people were participating via Zoom, the hearing coordinator gave those persons until 5:00 p.m. Pacific time on July 24, 2020 to submit documents in aid of oral testimony. At a traditional, in-person hearing, documents used in aid of oral testimony would have been given to the Department by the close of the hearing, then incorporated into the record for consideration. The reason for allowing the post-hearing submission of documents in aid of oral testimony was done out of fairness for those who participated via Zoom. The hearing coordinator agreed to take documents used in aid of oral comments, not new comments or rebuttals to other comments given. None of the documents received by the Department following the close of the hearing met these criteria; therefore, they were not considered.

ORDER

Based on the foregoing findings of fact and conclusions of law, IT IS HEREBY ORDERED that Encroachment Permit Application No. ERL-95-S-1378B is GRANTED, subject to the following conditions:

1. Initial dock building activities shall take place no earlier than February 1, 2021 to minimize the impact to fish spawning and bald eagles.

2. Best management practices shall be employed during construction and until disturbed areas are fully stabilized.
3. No winter dock storage.
4. No dredging or bulkhead construction under this Application and Permit.
5. No dock construction or work activities shall take place during low water to limit impact on fish spawning sites and bald eagles.
6. To prevent scouring by propeller wake, no dock construction or work activities shall take place during low water.
7. The pier, dock, and summer work area shall be cleaned up and free of debris by October 1 of each year.
8. Remove and properly dispose of all existing pilings.
9. Applicant shall consult the County Weed Superintendent, Idaho State Department of Agriculture, or regional aquatic natural resource management designee on the distribution of aquatic invasive species and noxious weeds in travel lanes. Areas with known noxious weed infestations shall be avoided or treated prior to disturbance through commuting from the business to other project sites within the Lake.
10. Applicant shall consult the Idaho Department of Environmental Quality on monitoring of domestic wells in the area for degradation of water quality due to construction and operation of the project.

IT IS FURTHER ORDERED that the order issued herein is a PRELIMINARY ORDER.

I.C. § 67-5245. The hearing in this matter was completed on July 23, 2020. Consistent with the *Notice of Appointment of Hearing Coordinator and Hearing*, “The Hearing Coordinator shall submit a preliminary order to the Director of IDL, who shall then issue a Final Order no more

than thirty (30) days after the conclusion of the hearing.” This Preliminary Order is submitted fewer than thirty days after conclusion of the hearing.

Dated this 12th day of August, 2020.



CHRIS M. BROMLEY
Hearing Coordinator

CERTIFICATE OF SERVICE

I certify that on this 12th day of August, 2020, I caused to be served a true and correct copy of the foregoing was served upon the following persons by the method(s) indicated:

Kourtney Romine Administrative Assistant Idaho Dept. of Lands P.O. Box 83720 Boise, ID 83720-0050	<input checked="" type="checkbox"/> Email: kromine@idl.idaho.gov
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CHRIS M. BROMLEY