

BEFORE THE IDAHO STATE BOARD OF LAND COMMISSIONERS

In the Matter of Encroachment Permit Application No.)	Case No. PH-2021-PUB-20-001
L-96-S-0691E)	
)	FINAL ORDER
Laurence Smith – Riser Creek Marina,)	
)	
Applicant.)	
_____)	

I. NATURE OF PROCEEDINGS

The Idaho Department of Lands (“IDL”), through the State Board of Land Commissioners, “shall regulate, control and may permit encroachments in aid of navigation or not in aid of navigation on, in or above the beds or waters of navigable lakes” as provided in the Lake Protection Act, title 58, chapter 13, Idaho Code. Idaho Code § 58-1303. The corresponding administrative rules promulgated by the State Board of Land Commissioners are IDAPA 20.03.04, “Rules for the Regulation of Beds, Waters, and Airspace over Navigable Lakes in the State of Idaho.”

On or around March 18, 2021, IDL received an encroachment permit application filed by Laurence Smith for Riser Creek Marina. A public hearing was held on June 9, 2021. Eric Wilson served as duly appointed hearing coordinator. On August 3, 2021, the hearing coordinator issued his Preliminary Order, which contains a Background, Findings of Fact, 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 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 Preliminary Order's Background & Findings of Fact as my Background & Findings of Fact.

III. CONCLUSIONS OF LAW

I adopt the Preliminary Order's Conclusions of Law, except as follows:

- I delete paragraph 18 on page 10 and add the following amended paragraph 18 in its place.

18. IDAPA 20.03.04.020.07.a details items required in Applications, providing "Plans shall include the following information at a scale sufficient to show the information requested: ... (ii) Copy of most recent survey or county plat showing the full extent of the applicant's lot and the adjacent littoral lots." Applicant did not provide a copy of the most recent survey or county plat showing the full extent of Applicant's lot and the adjacent littoral lots as part of the Application as required by IDAPA 20.03.04.020.07.a.ii.

- I delete paragraph 24 and replace it with the following paragraph 24:

24. Based on the record, there is insufficient evidence to establish whether the requirements of IDAPA 20.03.04.015.13.e have been met or that sufficient notice was provided to the northern littoral owner, so as to enable that owner's written consent.

- I amend paragraph 32 with two changes:

- I delete the citation to "IDAPA 20.03.02" and replace it with "IDAPA 20.03.04."

- In subparagraph d, I delete the word “southern” and replace it with the word “northern.”

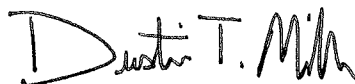
ORDER

I conclude that the hearing coordinator’s Preliminary Order is based on substantial evidence in the record, and I adopt the Preliminary Order’s Background, Findings of Fact, and Conclusions of Law as my decision in this matter, except as specifically set forth herein. I hereby incorporate by reference the Preliminary Order’s 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 Findings of Fact and Conclusions of Law, I HEREBY ORDER that Encroachment Permit Application L-96-S-0691E is DENIED.

This is a final order of the agency. Pursuant to Idaho Code § 58-1306(c) and IDAPA 20.03.04.030.09, the Applicant and any aggrieved party appearing at a 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. 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 9th day of August 2021.



DUSTIN T. MILLER

Director, Idaho Department of Lands

CERTIFICATE OF MAILING

I hereby certify that on this 9th day of August 2021. 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 STATE BOARD OF LAND COMMISSIONERS
STATE OF IDAHO

In the Matter of:)	Case No. PH-2021-PUB-20-001
)	
Encroachment Permit Application)	PRELIMINARY ORDER
No. L-96-S-0691E)	
)	
Laurence Smith – Riser Creek Marina,)	
Applicant.)	
_____)	

I. BACKGROUND

On March 18, 2021, Laurence Smith for Riser Creek Marina, (Applicant) submitted to the Idaho Department of Lands (IDL) an encroachment permit application, identified as number L-96-S-0691E (Application), requesting approval to expand an existing commercial marina and install an integrated wave attenuator on Lake Pend Oreille. The new construction consists of a four-slip dock measuring approximately 104 feet by 56 feet extending north from the end of the existing dock. Agency Record (AR) Document (Doc) 3. The wave attenuator would be built into the outer portion of the dock that is 104 feet long. AR Doc 16. A 20-foot by 8-foot bridge would connect the new dock off the north side of the end of the existing dock. AR Doc 3.

IDL processed the Application pursuant to Idaho Code § 58-1306 as well as IDAPA 20.03.04.030. Following is the timeline of events and documents that make up the administrative record in this matter:

1. In a letter dated March 19, 2021, IDL provided notice of the Application to several government agencies, and non-governmental organizations. AR Docs 4 and 5.

2. In a letter dated March 19, 2021, IDL provided notice of the Application to Beyond Hope Inc. (Hope Marina), the adjacent neighbor to the south. AR Doc 6.

3. IDL caused a Notice of Application to be published in the *Bonner County Daily Bee* on March 23 and 30, 2021. AR Doc 8.

4. On March 22, 2021, IDL received comments from the Idaho Department of Agriculture regarding invasive species known to be present in the area and the need for equipment to be cleaned before leaving this area. AR Doc 7.

5. On April 8, 2021, IDL received a statement from the Idaho Department of Environmental Quality that they had no comment on the Application. AR Doc 9.

6. On April 9, 2021, IDL received a statement from the Idaho Department of Fish and Game that they had no comment on the Application. AR Doc 10.

7. On April 20, 2021, IDL received two comments from the Idaho Department of Transportation (ITD). ITD stated that they did not support the Application, for the following reasons: a) the right of way was being used as a staging area for the Applicant's business, b) overflow parking will be needed on the opposite side of the highway requiring pedestrians to cross with no crossing facilities, c) a parking plan with trip generation report was needed, and d) the highway approach for the marina was only approved for residential use. AR Docs 11 and 12.

8. On April 20, 2021, IDL received an objection to the Application from Rick Auletta of the Hope Marina. AR Doc 13.

9. In accordance with Idaho Code § 58-1306(c) and IDAPA 20.03.04.030, IDL initiated a public hearing process for the proposed commercial marina. On May 4, 2021, a Notice of Appointment of Hearing Coordinator and Hearing was sent to the Applicant, the objector Hope Marina, and other parties that had submitted comments. Exhibits and testimony were requested to be delivered to IDL by 5:00 p.m. on June 7, 2021. The public hearing was scheduled for 6:00 p.m. on June 9, 2021, through video conference or at the IDL office located at 3258 W. Industrial Loop, Coeur d'Alene, ID 83815. AR Doc 14.

10. On May 26, 2021, Toby and Tani Carlson submitted public comments in support of the Application and describing the shortage of moorage on the lake that could accommodate their boat. AR Doc 15.

11. On June 7, 2021, Applicant submitted Exhibits A through D into the record, as follows:

- A. Response to the concerns of the Idaho Department of Agriculture stating that care will be taken to not transfer invasive species to or from the project location.
- B. Response to the concerns of the Idaho Department of Transportation stating that they will no longer use the other side of the highway for overflow parking. This would also remove the need for a commercial highway approach on the other side of the highway. They already have a commercial highway approach for the marina itself from Bonner County. Overflow parking can occur as needed within the right of way, as the adjoining Hope Marina does. A parking plan and commitment to remove items from the right of way were also included.
- C. Response to concerns from Rick Auletta with Hope Marina. The external breakwater is removed and replaced with an integrated wave attenuator built into the outmost portion of the proposed dock. This will reduce navigational issues with patrons at the adjacent Hope Marina. Several other concerns related to highway access, marina size, parking, and customer access were also addressed.
- D. Parking management plan for seven vehicles within Applicant's property, and not utilizing the highway right of way.

AR Doc 16.

12. On June 7, 2021, the Idaho Department of Agriculture thanked Applicant for their response to the invasive species concerns. AR Doc 17.

13. On June 7, 2021, the Idaho Department of Lands submitted a Hearing Statement. AR Doc 18. IDL staff noted the following information:

- A. Scope of the Application, dimensions of the existing marina docks, and other encroachments currently permitted.
- B. A kayak dock internal to the existing marina should be added to the permit if the Application is approved.
- C. The littoral owner is the Curtis Richard Smith 1993 Revocable Living Trust, which has leased the property to Riser Creek Marina.
- D. Citations and text of portions of Title 58, Chapter 13, Idaho Code, and IDAPA 20.03.04 applicable to the current Application.
- E. Analysis of the Application that confirmed Applicant has littoral rights and is within the line of navigability. The analysis also recommended that more information be collected from Applicant on the distance from littoral right lines, design suitability of the breakwater or wave attenuator, and how private or public moorage will be handled at the facility.

14. On June 7, 2021, Rick Auletta of Hope Marina submitted a list of the following three concerns, and three photographs.

- A. "Breakwater traffic flow."
- B. "Additional boat traffic this will cause while entering/exiting restaurant parking."
- C. "Additional foot traffic between marinas."

AR Doc 19.

15. On June 8, 2021, ITD responded to Applicant's Exhibit B. AR Doc 20. Among other points, ITD stated that Bonner County's approval of the marina's highway approach does not satisfy the needs of ITD and Applicant will need to apply to ITD for a commercial approach. In addition, vehicles parked within the right of way will be subject to towing or removal at the owner's expense. AR Doc 20.

16. On June 9, 2021, Applicant submitted Exhibits E through G, which can be summarized, as follows:

- E. Statement confirming the public status of all moorage at the marina. AR Doc 21.
- F. Statement concerning the integrated nature of the proposed wave attenuator with photos and diagrams of the attenuator. AR Doc 22.
- G. Statement responding to ITD's June 8, 2021 concerns. AR Doc 23, *see* AR Doc 20. Applicant explained they are pursuing a change in status of the

highway approach, but no physical work is anticipated. They will not park in the right of way as they have sufficient space for parking.

AR Docs 21 to 23.

17. On June 9, 2021, IDL held a public hearing at 6:00 p.m. in IDL's office located at 3258 W. Industrial Loop, Coeur d'Alene, ID 83815. In physical attendance were Mr. Mike Ahmer, IDL Resource Supervisor; and Ms. Angela Kauffman, Deputy Attorney General assisting IDL staff. Managing the virtual participation during the hearing was Mr. Chris Gozzo, IDL Information Specialist. Participating via Zoom were Mr. Laurence Smith and Mr. Curtis Smith, partners in Riser Creek Marina, and Mr. John King, advisor to Riser Creek Marina. Also participating via Zoom were Mr. and Mrs. Auletta, owners of the adjacent Hope Marina. The Hearing Coordinator and his advisory counsel, Deputy Attorney General Joy Vega, were present via Zoom. The public hearing was digitally recorded.¹ Testimony concluded at approximately 7:18 p.m. Due to the number of materials submitted in the record up through the afternoon of the hearing, the substantive nature of those materials, and the need for additional information identified by the Hearing Coordinator, the hearing record was conditionally kept open past the end of the hearing.

18. On June 10, 2021, IDL submitted the revised statement that covered the IDL testimony received during the hearing on June 9, 2021. The statement reflected IDL's understanding regarding the Applicant's change from an external breakwater to an integrated wave attenuator, confirmed that the proposed wave attenuator is consistent with similar designs approved in the past, and reiterated the Applicant's representation that all slips will be public in nature. AR Doc 24.

19. On June 10, 2021, an Order Continuing Matter for Submission of Supplemental Evidence was sent to the Applicant, the objector, IDL, and other parties that submitted comments. AR Doc 25. Applicant was requested to provide the following supplemental materials by June 24, 2021:

- A. At a scale sufficient to show the information, a lakebed profile, in relationship to the existing and proposed encroachments, that shows the depth of the water from the shore to the end of the proposed dock; and that shows the summer and winter water levels (IDAPA 20.03.04.020.07.a.i);
- B. Either, 1) a scaled drawing that accurately depicts the location of both littoral lines and the distances between the encroachments and the littoral lines, at the shore and the end of the proposed encroachments; or 2) a copy of the most recent survey or county plat showing the full extent of the Applicant's leased lot and the adjacent littoral lots with the littoral lines and distances from the

¹ 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 hour(s), minute(s), and second(s) location on that recording. For example: Rec, hh:mm:ss.

existing and proposed encroachments accurately depicted (IDAPA 20.03.04.020.07.a.ii);

- C. Total square footage of the existing encroachment that covers the lake surface and the proposed encroachments that would cover the lake surface (IDAPA 20.03.04.020.07.a.vi);
- D. A scaled drawing of the proposed wave attenuator, with all dimensions, including depth, accurately stated;
- E. Documentation regarding known wave heights and lengths, and the ability of the proposed attenuator to counter such wave action (IDAPA 20.03.04.015.06); and
- F. A complete copy of any permits or approvals issued by Bonner County relating to Riser Creek Marina.

Any additional documentation responsive to Applicant's supplemental submissions, from Mr. and Mrs. Auletta, IDL, or any other agency or member of the public were due on July 8, 2021, and the record was closed on July 9, 2021. AR Doc 25.

20. On June 24, 2021, Applicant submitted supplemental materials pursuant to the June 9, 2021 Order. AR Doc 26. These materials included:

- A. Bathymetric map and lakebed profile in relationship to the existing and proposed encroachments showing the depth of the water from the shore to the end of the proposed dock.
- B. A scaled drawing showing the location of both littoral right lines and the distances between the north and south littoral lines at the shore and the end of the proposed encroachments. Distance from the north littoral right line to the proposed dock extension is also given.
- C. Total square footage of the existing encroachment.
- D. A scaled drawing of the proposed wave attenuator.
- E. Documentation regarding known wave heights and lengths, and the ability of the proposed attenuator to counter such wave action.
- F. A copy of the Bonner County Conditional Use Permit, dated 11/9/2010.

21. On July 8, 2021, IDL submitted a Supplemental Hearing Statement that focused on littoral right line setbacks. AR Doc 27.

22. On July 14, 2021, Applicant submitted an additional document to IDL. However, as stated in the Order Continuing Matter for Submission of Supplemental Evidence, the record in

this matter was closed on July 9, 2021. The late-filed submission by Applicant has not been considered by the Hearing Coordinator in reaching the decision on the Application. AR Doc 25.

II. FINDINGS OF FACT

1. Laurence Smith with Riser Creek Marina is the Applicant. AR Doc 3, and Rec 7:54.

2. Applicant holds the littoral rights for this marina on Lake Pend Oreille through a lease agreement with the Curtis R. Smith Living Trust, of which Mr. Curtis Smith is the Trustee. AR Docs 1 and 3, and Rec 7:59 and 20:10.

3. Riser Creek Marina will have 100% of their moorage available for use by the general public on either a first come, first served basis for rent, or a rent or lease agreement for a period of time up to one (1) year. Moorage contracts may be renewed annually, so long as a renewal term does not exceed one (1) year. Moorage for use by the general public will not include conditions that result in a transfer of ownership of moorage or real property, or require membership in a club or organization. AR Doc 21.

4. The Application is for an expansion of a commercial marina and an integrated wave attenuator. The existing marina has a total of 1,640 square feet and extends 280 feet into Lake Pend Oreille. The proposed expansion increases the square footage by 2,320 square feet to a total of 3,960 square feet and an overall length of 338 feet. The proposed expansion adds four slips to end of the existing dock. The outmost portion of the new slip dock would contain the wave attenuator. AR Docs 3, 16, 22, and 26.

5. The wave attenuator is 8 feet wide, extends below the water line approximately 5 feet, and has steel braces around the cross section and through the middle. The surface of the dock is approximately 2 feet above the water line. AR Doc 26.

6. Applicant stated that the proposed wave attenuator is designed to handle the largest waves expected at this location. Wave heights of about 4 feet may be expected in this location. AR Doc 26, and Rec 35:40. IDL staff testified that the proposed wave attenuator is consistent with the design of others approved by IDL in the past. Rec 1:02:37.

7. Applicant estimated in the Application and testimony that the end of the proposed dock would be located approximately 90 feet from the south littoral right line, and more than 25 feet from the north littoral right line. AR Doc 3, and Rec 17:30 and 18:40.

8. Additional material submitted by Applicant following the hearing shows the end of the proposed dock would be located a minimum of 27 feet from the north littoral right line. This is consistent with Applicant's testimony at the hearing. AR Doc 26. The distance from the end of the proposed dock to the south littoral right line is not specifically depicted in Applicant's supplemental materials. *But see* AR Docs 3 and 26, and Rec 17:30 and 18:40.

9. Upon evaluation of Applicant's supplemental materials, IDL staff determined that the proposed dock would likely extend over the northern littoral right line using either of two different methods of drawing littoral right lines. Using the Chord Method of drawing littoral

right lines results in the proposed dock being well over the northern littoral right line. Using extensions of the upland property lines to draw littoral right lines is applicable in some circumstances, and this method also results in the proposed dock being over the northern littoral right line. AR Doc 27.

10. The Application identified Beyond Hope, Inc. as the only adjacent littoral owner. AR Doc 3.

11. The Application did not include a recent survey or county plat showing both the full extent of Applicant's lot and the adjacent littoral lots. AR Docs 3, 16, 21, 22, 23, 26. The record, at pages 8, 9, and 11 of AR Doc 3 and page 4 of AR Doc 26, show Hope Marina adjacent to the south side of the Applicant's property, but the entire extent of the Hope Marina littoral property is not shown. Additionally, page 6 of AR Doc 26 shows a large portion of Hope Marina, although the entire littoral parcel for Hope Marina is not shown.

12. Beyond Hope, Inc. was notified of the Application in a letter dated March 19, 2021. AR Doc 6. Beyond Hope, Inc. owns the Hope Marina south of Applicant's parcel. AR Doc 13.

13. Applicant testified that the adjacent littoral owner to the north is Charley Kramer at Kramer Marina approximately 500 yards away, and that the area in between is presumed to be part of the highway owned by ITD. Rec 32:55.

14. IDL testified that the closest littoral landowner north of the Riser Creek Marina is Charley Kramer, and no littoral owner appears to exist adjacent to the north boundary of Riser Creek Marina. Rec 1:06:17. A footnote in AR Doc 27 submitted by IDL states that the littoral owner north of the Riser Creek Marina appears to be the Idaho Transportation Department, and Kramer Properties LLC is approximately 1,600 feet north of the Riser Creek Marina parcel.

15. ITD was notified of the application in an email and memo dated March 19 20, 2021. AR Docs 4 and 5.

16. The Notice of Application was advertised. AR Doc 8.

17. The record does not contain evidence that the Notice of Appointment of Hearing Coordinator and Public Hearing was advertised.

18. Objections to the Application generally covered the following issues:

- A. Breakwater traffic flow. Boaters would be confused by the addition of another breakwater and may not enter the correct marina. AR Doc 13.
- B. Additional boat traffic. More boat traffic from Applicant's marina and around the proposed external breakwater will cause congestion as patrons attempt to reach the restaurant, sewer pump out, and gas dock at Hope Marina. AR Doc 13. The restaurant is accessed from the south side of Hope Marina near the

adjacent Pend Oreille Shores Resort, and the sewer pump out and gas docks are both inside the Hope Marina's breakwater. Rec 43:50 and 44:55.

- C. Additional foot traffic. Applicant's patrons often spill over to the Hope Marina for restroom and other services. AR Doc 13.
 - D. Inadequate parking. Parking in the highway right of way is not allowed. AR Docs 11, 13, and 20. Larger slips mean larger boats that carry more people and require more parking. Parking is already an issue with Hope Marina and their other neighbor Pend Oreille Shores. Doubling the size of Riser Creek will make this worse. Rec 41:30.
 - E. Access to Highway 200 is dangerous and must be approved by ITD for commercial use. AR Docs 12, 13, and 20; and Rec 38:12.
 - F. Applicant is not being required to provide a shadowing study, a wave study, or traffic study. AR Docs 11 and 13, and Rec 37:50.
 - G. Applicant is not being required to provide a sewer pump out. AR Doc 13, and Rec 39:31 and 47:19.
 - H. Applicant is not being required to provide for handicap access. Rec 39:37 and 50:35.
 - I. Applicant is not being required to provide a public restroom. AR Doc 13, and Rec 39:25 and 51:20.
 - J. Applicant must comply with stormwater requirements. AR Doc 13.
 - K. Applicant should be required to get other approvals from Bonner County and ITD before IDL approves the encroachment permit. Rec 42:35.
19. Moorage is scarce on Lake Pend Oreille. AR Doc 15. Mr. Auletta did agree that more slips and public access are needed on the lake. Rec 43:06.
20. Applicant identified seven parking spaces for the total of 14 moorages that would exist with the proposed expansion. AR Doc 16, and Rec 23:40 and 25:25. IDL staff testified that Bonner County does have parking requirements for marinas. Rec 1:03:00.
21. An application for a commercial access permit from ITD has been submitted. Rec 31:40.

III. ANALYSIS AND CONCLUSIONS OF LAW

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

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

3. Lake Pend Oreille is a navigable lake as defined by Idaho Code § 58-1302(a). *Id.*; *Gasman v. Wilcox*, 54 Idaho 700, 702, 35 P.2d 265, 266 (1934).

4. Pursuant to Idaho Code § 58-1301, lake encroachments must be regulated to protect property, and the public trust values of navigation, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty and water quality. These values must be given due consideration and weighed against the navigational or economic necessity or justification for, or benefit to be derived from, the proposed encroachment.

5. No encroachments on, in, or above the waters of any navigable lake in Idaho shall be constructed until approval has been granted pursuant to the Idaho Lake Protection Act, at Idaho Code § 58-1301, *et seq.* (LPA).

6. Idaho Code § 58-1304 gives IDL authority to adopt such rules and regulations as are necessary to implement the LPA. IDL has exercised that authority and promulgated the Rules for the Regulation of Beds, Waters and Airspace Over Navigable Lakes in the State of Idaho, IDAPA 20.03.04.000, *et seq.* (Rules).

7. “Littoral rights” are defined by IDAPA 20.03.04.010.32 as: “The rights of owners or lessees of land adjacent to navigable waters of the lake to maintain their adjacency to the lake and to make use of their rights as riparian or littoral owners or lessees in building or using aids to navigation but does not include any right to make any consumptive use of the waters of the lake.”

8. IDAPA 20.03.04.020.02 provides that: “Only persons who are riparian owners or lessees of a riparian owner shall be eligible to apply for encroachment permits.”

9. Applicant has demonstrated that Riser Creek Marina has littoral rights for the adjacent littoral upland through a lease agreement with the littoral owner.

10. A “commercial marina” is defined by IDAPA 20.03.04.010.09 as: “A commercial navigational encroachment whose primary purpose is to provide moorage for rental or for free to the general public.”

11. IDAPA 20.03.04.015.03.a states that: “Commercial marinas must have a minimum of fifty percent (50%) of their moorage available for use by the general public on either a first come, first served basis for free or rent, or a rent or lease agreement for a period of time up to one (1) year. Moorage contracts may be renewed annually, so long as a renewal term does not exceed one (1) year. Moorage for use by the general public may not include conditions that result in a transfer of ownership of moorage or real property, or require membership in a club or organization.”

12. IDAPA 20.03.04.015.03.e states that: “Moorage that is not available for public use as described in Paragraph 015.03.a. of these rules is private moorage.”

13. Riser Creek Marina is a commercial marina as defined and described in IDAPA 20.03.04.

14. IDAPA 20.03.04.015.06 states, in part, that: “The breakwater must be designed to counter wave actions of known wave heights and wave lengths.”

15. The proposed wave attenuator built into the dock structure is designed to counter wave actions expected in this part of Lake Pend Oreille, and is similar to others already permitted in the same area.

16. IDAPA 20.03.04.015.03.c states, in part, that: “If local city or county ordinances governing parking requirements for marinas have not been adopted, commercial marinas must provide a minimum of upland vehicle parking equivalent to one (1) parking space per two (2) public watercraft or float home moorages.”

17. Applicant has met the parking requirement in IDAPA 20.03.04.015.03.c, and affirmed that their parking will be not utilized the ITD highway right of way.

18. Applicant did not provide a copy of the most recent survey or county plat showing the full extent of the Applicant’s lot and the adjacent littoral lots as part of the Application as required by IDAPA 20.03.04.020.07.a.ii.

19. IDAPA 20.03.04.020.07.a.vii provides that an applicant is required to identify the adjacent littoral owners as part of their application.

20. Applicant identified the southern littoral neighbor as Beyond Hope, Inc., that owns and operates the adjacent Hope Marina. Applicant stated that the northern littoral neighbor was Charley Kramer who owns and operates Kramer’s Marina. This does not seem likely since it is approximately 500-600 yards from Applicant’s northern property line to Kramer’s Marina. In addition, while a state highway is adjacent to the lake over this distance, there is no evidence indicating who owns the intervening littoral area. Two possible littoral owners include ITD or the upland property owner on the upland side of the highway. IDL included a footnote in AR Doc 27 that states, “It appears that Idaho Transportation Department is the owner of the littoral rights to the north of the marina, as the next closest owner appears to be Kramer Properties LLC approximately 1,600 feet to the north.” However, the Idaho Supreme Court has ruled that “an

easement for a public street, road, or highway that extends down to the ordinary high water mark of a navigable lake does not terminate the littoral rights of the landowner whose property is subject to the easement.” *Lake CDA Investments, LLC v. Idaho Dept. of Lands*, 149 Idaho 274 (2010). No information in the record documents whether the highway is on an easement or owned by ITD. On the record before this tribunal, no finding of fact or requisite conclusion of law can be made regarding who the littoral owner of the 500-600 yards of lakeshore north of Applicant’s property.

21. IDAPA 20.03.04.015.13.e provides that: “It will be presumed, subject to rebuttal, that ... commercial navigational encroachments, community docks or nonnavigational encroachments will have [an] 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.”

22. The Application showed the proposed dock would be located approximately 25 feet from the north littoral right line. AR Docs 3 and 26. However, Applicant did not identify which method of littoral right line determination was used. Additionally, with no survey or county plat in the record that shows the full extent of the adjacent littoral lot(s) to the north, it cannot be determined if the Applicant’s littoral right lines are drawn correctly.

23. IDL staff determined that the proposed dock would extend over the northern littoral right line using either the chord method or the property line extension method. AR Doc 27. “The Department, based on its experience and expertise, is in the best position to determine the proper placement of docks based on the requirements of the Act and the parties’ respective littoral rights. Under the Act, the Department may determine whether a proposed dock infringes upon a neighbor’s littoral right.” *Lovitt v. Robideaux*, 139 Idaho 322, 78 P.3d 389 (2003).

24. Based on the record, the requirements of IDAPA 20.03.04.015.13.e have not been met for the minimum setback from the northern littoral right line, or that sufficient notice to the northern littoral owner was provided, so as to enable that owner’s written consent.

25. The proposed dock would be located more than 25 feet from the southern littoral right line. With Applicant’s change to the integrated wave attenuator, the actual distance between the proposed expansion and the southern littoral right line is unclear. *See* AR Doc 26, page 6. However, even based on the original plan to install the longer breakwater, Hope Marina did not dispute that the proposed encroachment would be at least 25 feet from the shared littoral right line. During the hearing, Applicant’s witnesses estimated that the space between the end of the proposed dock and the south littoral right lines, would be close to 90 feet. Rec 17:30. The requirements of IDAPA 20.03.04.015.13.e are met for the southern littoral right line.

26. IDL initiated processing of the Application pursuant to Idaho Code § 58-1306 and the related administrative Rules. A Notice of Application was published in the Bonner County Daily Bee on March 23 and March 30, 2021. AR Doc 8.

27. IDL did not publish a Notice of Hearing as required by Idaho Code 58-1306(c) IDAPA 20.03.04.030.05.

28. IDL staff testified that IDL has no authority to require septic pump outs. Rec 53:16.

29. Title 58, Chapter 13, Idaho Code and IDAPA 20.03.04 do not contain any authority for IDL to require handicap access, public restrooms, compliance with local planning and zoning regulations, compliance with ITD highway access regulations, compliance with stormwater regulations, etc. IDL staff did testify that a standard condition for every encroachment permit is compliance with other laws and regulations. Rec 53:00. In addition, IDAPA 20.03.04.020.03 states that: "Nothing in these rules shall excuse a person seeking to make an encroachment from obtaining any additional approvals lawfully required by federal, local or other state agencies."

30. The objector, Mr. Auletta, stated in his testimony that elimination of the separate breakwater and addition of the integrated wave attenuator is a better plan that he supported. Rec 36:55.

31. Boat slips in the proposed expansion will be accessed from the north side of the Riser Creek Marina. With the change to an integrated wave attenuator and the removal of the external breakwater, boat traffic at the adjacent Hope Marina should not be impacted by the proposed expansion.

32. I find that the Application for a commercial marina does not meet the minimum requirements of IDAPA 20.03.02 due to the following deficiencies:

- a. Inadequate identification of the adjacent littoral owner north of the littoral land leased by Riser Creek Marina.
- b. Potentially inadequate notification to the adjacent littoral owner north of the littoral land leased by Riser Creek Marina.
- c. The end of the proposed four-slip dock appears to cross the northern littoral right line; which, if correct, results in a presumed adverse effect on the adjacent littoral rights.
- d. Inconclusive information from Applicant on the distance from the end of the proposed dock to the southern littoral right line.
- e. The public hearing on the Application was not advertised as required by I.C. § 58-1306(c).

IV. PRELIMINARY ORDER

Based on the foregoing findings of fact and conclusions of law, IT IS HEREBY ORDERED that Encroachment Permit Application No. L-96-S-0691E is DENIED, subject to any conditions imposed by the Director of the Idaho Department of Lands.

This order issued herein is a Preliminary Order, pursuant to Idaho Code §§ 58-1306(c), 67-5270 and 67-5272, and the Notice of Appointment of Hearing Coordinator and Public Hearing, issued on May 4, 2021, which states as follows:

In accordance with Idaho Code § 67-5245, the Hearing Coordinator shall submit a preliminary order to the Director of IDL, who shall issue a Final Order no more than thirty (30) days after the conclusion of the hearing.

The Preliminary Order can and will become final without further action of the agency if the Director does not issue a Final Order within thirty (30) days of the close of the hearing.

If this Preliminary Order becomes final, or if the Director issues a Final Order, pursuant to Idaho Code § 58-1306(c), the 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). 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 3rd day of August, 2021

A handwritten signature in black ink, appearing to read "Eric Wilson", is positioned above a horizontal line.

ERIC WILSON
IDL Resource Protection and Assistance Bureau Chief

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Laurence Smith – Riser Creek Marina,
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