

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 Issue and Findings of Fact as my Findings of Fact with the following amendments:

I delete Findings of Fact paragraphs 2 and 2a and add the following new paragraphs 2 and 2a in their place:

2. On September 21, 2022, IDL sent adjacent neighbor notices to Quayle Trust and Scott and Shelby Fletcher. The same day IDL submitted a copy of the Application to federal, state, and local resource agencies and organizations, including the Idaho Department of Environmental Quality ("IDEQ"), the Idaho Department of Fish and Game ("IDFG"), the Idaho Department of Water Resources ("IDWR"), and the United States Army Corps of Engineers.

a. IDL also contacted the Bonner County Daily Bee newspaper to run advertisements regarding the application. The Daily Bee advertisement ran on September 23, 2022 and September 30, 2022.

III. CONCLUSIONS OF LAW

I adopt the Preliminary Order's Discussion and Conclusion of Law as my Conclusions of Law, except that I make the following amendments and additions to the Discussion section:

On page 7, at the end of the first full paragraph in the "Analysis and reasoning supporting recommendation" section, I add the following sentence:

IDL also conducted a site inspection in December 2022 where IDL observed significant erosion occurring along the river bank even though there was ample riparian vegetation along the shoreline.

On page 8, at the beginning the first full paragraph, I change the phrase “Per IDAPA 20.03.04.015.01,” to instead read “Per IDAPA 20.03.04.015.13.e.”

On page 8, I add the following paragraph between the paragraph ending in “application” and the paragraph beginning in “And”:

IDL’s hearing statement stated that during its inspection it did not observe any channels flowing from the upland area into the beach area or main river channel. Because IDL’s inspection took place with heavy snow on the ground, IDL recommended that an approved permit include a term that the riprap shall not block any flow or channel from the upland wetland draining into the main river channel, and if there is flow present, then Applicant will install a culvert or similar structure to keep the movement of the water active and fluid. Several commenters were concerned there was drainage through the property, although applicant was not aware of the wetland draining through their property into the river. While the Applicant’s testimony and IDL’s site inspection indicates there is not a channel flowing, including this condition will ensure that if there is a channel or flow, then an appropriate structure will be installed. Thus, I include IDL’s recommended condition in this order.

IV. ORDER

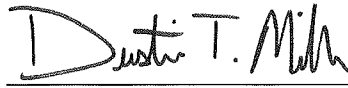
I conclude that the hearing coordinator’s Preliminary Order is based on substantial evidence in the record, and I adopt the Preliminary Order’s Issue, Findings of Fact, Discussion, and Conclusion of Law with the amendments set forth herein as my decision in this matter. I

hereby incorporate by reference the Preliminary Order's Issue, Findings of Fact, Discussion, and Conclusion of Law into this Final Order except as specifically set forth herein. I have enclosed and served the Preliminary Order along with this Final Order.

Based on the adopted Findings of Fact and Conclusions of Law, I HEREBY ORDER that the single family dock portion of Encroachment Permit Application L-96-S-2768 is APPROVED. Based on the adopted Findings of Fact and Conclusions of Law, I HEREBY ORDER that the riprap portion of Encroachment Permit Application L-96-S-2768 is APPROVED subject to the condition that the permit include a term providing that the riprap shall not block any flow or channel from the upland wetland draining into the main river channel; if there is flow present, then Applicant will install a culvert or similar structure to keep the movement of the water active and fluid.

This is a final order of the agency. Pursuant to Idaho Code § 58-1305(c), Idaho Code § 58-1306(c), IDAPA 20.03.04.25.08, and IDAPA 20.03.04.30.09, the Applicant or any aggrieved party who appeared at the hearing has a right to have the proceedings and Final Order reviewed by the district court in the county where the encroachment is proposed by filing a notice of appeal within thirty (30) days from the date of the final decision. Pursuant to Idaho Code § 58-1305(c), Idaho Code § 58-1306(c), IDAPA 20.03.04.25.08, 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 13th day of January 2023.

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

DUSTIN T. MILLER

Director, Idaho Department of Lands

CERTIFICATE OF MAILING

I hereby certify that on this 15th day of January 2023. I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Teague Mullen
Bonner Land Company
402 Cedar St
Sandpoint, ID 83864
Applicant

- U.S. Mail, postage prepaid
- Hand Delivery
- Email: Teague.realm@gmail.com
marissab.realm@gmail.com
tia.realm@gmail.com
puckett.tom@gmail.com

Caleb Mullen
Mountain Scape
PO box 369
Sandpoint, ID 83864
Agent for Applicant

- U.S. Mail, postage prepaid
- Hand Delivery
- Email: caleb.mtscape@gmail.com

Shelby and Scott Fletcher
7327 N Black Rock Trail
Paradise Valley, AZ 85253
Objector

- U.S. Mail, postage prepaid
- Hand Delivery
- Email: shelbydfletcher@icloud.com
scottbfletcher@yahoo.com

Quayle Trust
8552 E Sweetwater Ave
Scottsdale, AZ 85260
Objector

- U.S. Mail, postage prepaid
- Hand Delivery
- Email: quayleaz@aol.com

Shannon and Andrew Meyer
990 West Riverside Drive #14
Burbank, CA. 91506
Objector


- U.S. Mail, postage prepaid
- Hand Delivery
- Email: eqpatrol@sbcglobal.net

Angela Schaer Kaufmann
P.O. Box 83720
Boise, ID 83720-0010
Counsel for IDL

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

Kourtney Romine *on behalf of*
Lincoln Strawhun, Hearing Officer

- U.S. Mail, postage prepaid
- Hand Delivery
- Email: kromine@idl.idaho.gov



Kourtney Romine, Workflow Coordinator

Copy sent via email and/or regular U.S. Mail, postage prepaid to Those Who Have Provided Comments.

Merritt Horsmon
Idaho Department of Fish & Game
2885 W. Kathleen Ave.
Coeur d'Alene, ID 83815
merritt.horsmon@idfg.idaho.gov

Michelle Oakley
67 Teal Lane
Sagle, Idaho 83860
michelleoak.ss2@gmail.com

Jacqueline Layton
41 Teal Lane
Sagle, Idaho 83860
jacquelinelayton08@gmail.com

Don and Cindy Thomas
493 Swan Shores Dr.
Sagle, ID 83860
cindyleebo@gmail.com

Karen Resso
1126 Gypsy Bay Rd
Sagle, ID 83860
kressobooks@gmail.com

Tim & Joyce Roberts
90 Swan Shores Dr.
Sagle, ID 83860
timroberts214@yahoo.com

Ron & Tina Sikora
151 Swan Shores Drive
Sagle ID 83860
ron.sikora@shaw.ca
tina.sikoral@gmail.com

Charles Haigh
121 Teal Lane
Sagle, ID 83860
haighc75@gmail.com

Amy Anderson
Selkirk Conservation Alliance
anderson@scawild.org

Other members of the HOA board:
Lynda Record - gypsybay1@yahoo.com

BEFORE THE IDAHO STATE BOARD OF LAND COMMISSIONERS

In the Matter of:)
) Case No. CC-2022-NAV-20-003
ENCROACHMENT PERMIT APPLICATION)
No. L-96-S-2768)
) **PRELIMINARY ORDER**
Teague Mullen – Bonner Land Company,)
)
Applicant.)
)
)
)
)
)

After a hearing on this matter, held December 14, 2022, the Hearing Coordinator recommends to the Director of the Idaho Department of Lands (“IDL”) to *approve* Encroachment Permit Application No. L-96-S-2768 (“Application”) for the single-family dock and riprap because the proposed dock and riprap meet the legal standards.

In summary, Applicant applied for an encroachment permit to install a single-family dock and riprap located adjacent to a vacant parcel near the Swan Shores neighborhood, along the Pend Oreille River in Sagle, Idaho. Upon receiving the application, IDL sent notices to adjacent neighbors, and received several objections, and numerous comments, to Applicant’s proposed dock.

On November 23, 2022, IDL sent *Notice of Appointment of Hearing Coordinator and Public Hearing* to schedule a contested case hearing in accordance with Idaho Code § 58-1306(c) to the interested parties—the Applicant, Objectors, and IDL. The parties, and public commenters, submitted comments and exhibits before hearing and provided testimony at hearing. All exhibits and testimony are accepted as evidence and part of the record in this matter. The hearing was held via Zoom videoconference.

Idaho Attorney General’s Office – Fair Hearings Unit
Rebecca Ophus • Lincoln Strawhun • Karen Sheehan
P. O. Box 83720, Boise, ID 83720-0010
T: (208) 334-4555 • F: (208) 854-8070 • E: hearing.officer@ag.idaho.gov

After considering the written and testimonial evidence, this Preliminary Order is issued per Idaho Code § 67-5245 and IDAPA 20.01.01.730.02, and is organized by the following sections: *Issue, Findings of Fact, Discussion, Conclusion of Law, and Preliminary Order.*

ISSUE

Whether Applicant's Encroachment Permit Application complies with the Lake Protection Act, Idaho Code § 58-13 and the *Rules for the Regulation of Beds, Waters, and Airspace Over Navigable Lakes in the State of Idaho*, IDAPA 20.03.04.

FINDINGS OF FACT

The Hearing Coordinator finds the following facts:

1. On September 21, 2022, Applicant applied for a single-family dock consisting of a 6' x 85' fixed pier, comprising 510 square feet. Applicant is the littoral owner of the property of where the proposed dock and riprap would be located. Applicant's shoreline is approximately 190 feet (and meets the requirement of owning at least 25 feet shoreline per IDAPA 20.03.04.010.36).
2. On September 21, 2022, IDL sent adjacent neighbor notices to Quayle Trust and Scott and Shelby Fletcher; submitted a copy of the Application to federal, state and local Resource Agencies and organizations—including the Idaho Department of Environmental Quality ("IDEQ"); contacted the Bonner County Daily Bee newspaper to run advertisements regarding the Application.
 - a. The Daily Bee advertisement ran on September 23, 2022, and September 30, 2022.
3. On October 14, 2022, IDL received a "no comment" from Idaho Department of Fish and Game ("IDFG").
4. On October 24, 2022, Shelby Fletcher requested a Contested Case Hearing and submitted a \$75 payment to request a Public Hearing. IDL received a written objection from the Quayle Trust.
5. On October 31, 2022, IDL corresponded with the Applicant and deemed the Application complete following the Applicant's response to several questions and concerns regarding the Application.
6. On December 6, 2022, IDL performed a site inspection and completed an Inspection Report.

7. As an exhibit for hearing, and in testimony at hearing, IDL recommended approval of application NO. L-96-S-2768 for the single-family dock and riprap because the proposed dock and riprap meets the legal standards.
8. In submitted exhibits for hearing, and in hearing testimony, neither objectors nor public commenters cited a single rule or law that the Application violated.
9. IDL received no comments of concern from IDEQ, or any other agency notified of Applicant's application.
10. Applicant's proposed dock meets the legal requirements of IDAPA 20.03.04.015. Applicant's proposed riprap meets the standards set forth in IDAPA 20.03.04.015.08. The proposed riprap did not receive any comments from IDEQ regarding water quality concerns or from IDFG.

DISCUSSION

Applicant's position. Applicant asserted that he understands everyone's interest in their community; that he is not doing something that will harm his neighbors; that he purchased the property a year and half ago; that the shoreline has been eroding for years; that he wants to stabilize the wetlands; that the only access to the property is via a dock; that he wants to figure out what can be done with the property but he has no plans to build a structure on it; that his immediate goal is preservation; that he will abide by any CC&R's affecting the property; that the riprap will help secure the berm; that the dock is in a great location to enjoy the sunset; that he does not want to change the wetlands; that he has lived in the area for 26 years, since he was 18 years old.

Objector's position. Much of objector and public commentary offered similar themes concerned with future land development of Applicant's property, and for the wetlands feature of the property (including potential effect on water supply and wildlife habitat), instead of legal deficiencies of the proposed dock and riprap; the main points were that 1) the property lines of the parcels and Applicant's map were inaccurate; 2) that IDL did not consult IDFG in considering the application; that 3) the proposed dock's location is the number one spot for water skiers and

would interfere with the skier course and prevent the Fletchers from using their dock; that 4) the proposed dock is longer than the Fletcher and Quayle docks.

That f) approving the application would lead to development of the wetlands; that 6) Applicant would not be building a dock if he did not plan to build a structure on his property; that 7) riprap will be on the wetland; that 8) Applicant's dock and riprap will negatively affect the hydrology; that 9) the area's wells are getting lower and will be negatively impacted by a new dock; that 10) that other agencies like the IDEQ need to be involved; 11) that not everyone in the community received a notice of the application; 12) that IDL should do a site inspection before permitting; that 13) the homeowner's association owns and controls the wetlands, not Applicant; 14) all the appropriate places to develop in the area have already been developed and Applicant's property is inappropriate to develop because of the wetlands.

IDL's position. IDL recommended approval of the dock and riprap because they meet the legal requirements; Applicant's proposed dock meets the legal requirements of IDAPA 20.03.04.015.01; Applicant's proposed riprap meets the standards set forth in IDAPA 20.03.04.015.08.

That regarding the riprap, most properties along the Pend Oreille River have some form of bank stabilization due to the fluctuating water levels and large waves creating by the boating public; that water rises 11.5 feet in the spring than drops 11.5 feet in the fall; that it is common to have erosion with the 11.5 foot elevation change; the proposed riprap did not receive any comments from IDEQ regarding water quality concerns or from IDFG; that IDL's inspection took place with heavy snow on the ground, that if approved, IDL recommends that the permit include a term providing that the riprap shall not block any flow or channel from the upland wetland

draining into the main river channel; that if there is flow present, IDL recommends installation of a culvert or similar structure to keep the movement of the water active and fluid.

That IDL expressed concerns to Applicant about the 115-foot-long dock that he originally proposed; that IDL worked with the Applicant to bring the dock within the Line of Navigability created by the Fletcher dock to the north and the Quayle dock to the south; that when creating a line that connects the Fletcher and Quayle docks, the proposed 85 foot dock would be within that line and the shoreline.

That additionally, the shoreline or riverbed in front of Applicant's property is different from the Quayle property shoreline located to the south; that during IDL's inspection, it was observed that the shoreline or riverbed was very steep where the Quayle dock was located, while it was a much smoother and gradual slope at Appellant's parcel.

That although the lot does not have a residence and may not be a buildable lot, those factors do not have a bearing on whether the lot can have a single-family dock; there is no requirement in IDAPA that the upland lot be buildable or contain a residence to obtain an encroach permit.

That the main issue from neighbors is the potential development of the wetland area they were told would never be developed; that IDL is not the agency or entity that controls whether the wetland may or should be developed; that even if a dock is installed, Applicant must still follow applicable County and Army Corps of Engineers requirements for activities, including place fill, within a wetland.

That IDL's representative noted all the comments from the objectors and public commenters and would like to address their concerns; that regarding 1) parcels and Applicant's map not lining up, this is common. The Applicant used Bonner County's GIS parcel webpage, it's well known that the lines are not the bible, the lines shift depending on location and may go right

through someone's residence; that IDL does not rely on those lines, it is more for a visual frame of reference.

2) IDL did notify and speak with IDFG and received no comment. Regarding 3) the skier course, the Fletcher dock is located closer to ski course than proposed dock. The Fletchers said proposed dock would mean they would not be able to use their dock, however the proposed dock would be 285 feet from Fletcher dock, which is more than enough space—a 10-foot buffer is the legal requirement.

Regarding 4) Applicant's dock length, the Fletcher and Quayle shorelines are steeper than Applicant's wetland property, and they can get to a deeper depth closer. Applicant's shoreline is shallower, which requires going out into the river further to get depth. Regarding 5) development, any development on Applicant's upland property would need to be approved by Bonner County and the Army Corps of Engineers, IDL has no jurisdiction over it. As the question of 6) why Applicant wants a dock if there is no structure on his property, there are numerous docks in northern Idaho without structures. There are dozens of properties where people just have docks. The dock allows for recreating—hanging out on the dock, jumping off the dock; the dock is a place to park a boat, hang out and swim.

The 7) riprap will not be on the wetland, it will be at the artificial high-water mark on the river at the interface between the water and the land. Applicant is not proposing for the riprap to be on the back of the berm. 8) There is a berm in place that is the interface between the river and wetland, that berm fluctuates in height depending on location. Regarding hydrology and flow, there's no flow from wetland into the river. There is a channel that terminates in a pond close to Quayle property.

For 9) concern that the wells are getting lower, they were getting lower prior to this project because of increased use from increased development in area. According to IDFG, the hydrology is coming from draining of the Muskrat Lakes Area, not from damming of Pend Oreille River.

10) IDL did send the application to IDEQ, the Dept of Water Resources, Bonner County, IDFG, and other folks. They were aware of the application and offered no comments with concerns. Regarding 11) notice, IDL only notifies adjacent littoral owners, not everyone in community, except by newspapers. Regarding 12) site inspection, IDL did do a site inspection. 13) Bonner Land Company does own property for the dock according to a recorded warranty deed on file with the county. And again, 14) there is no plan of filling in the wetlands. The riprap will be in the water at the interface between the water and the land, separated from the wetland by the berm.

Analysis and reasoning supporting recommendation. Per IDAPA 20.03.04.015.08, riprap is used to stabilize shorelines and consists of rock that is appropriately sized to resist movement from anticipated wave heights or tractive forces of the water flow. Applicant's proposed riprap meets legal requirements of IDAPA 20.03.04.015.08. The objectors and public commentors expressed concern for how the riprap would affect the water and wildlife habitat, but not cite a rule or law that Applicant's proposed riprap violated. And IDL notified IDEQ, IDFG and other agencies about Applicant's riprap and received no comments with concerns.

Per IDAPA 20.03.04.015.01. single-family docks may not exceed 10 feet in width, must not be larger than 700 square feet, and no portion of the docking facility may extend beyond the line of navigability. Here, IDL worked with the Applicant to bring the dock within the Line of Navigability created by the Fletcher dock to the north and the Quayle dock to the south. That when creating a line that connects the Fletcher and Quayle docks, the proposed 85-foot dock would be

within that line and the shoreline and, thus, be within the Line of Navigability. The measurement of Applicant's dock consists of a 6' x 85' fixed pier, comprising 510 square feet. Applicant's proposed dock complies with IDAPA 20.03.04.015.01.

Per IDAPA 20.03.04.015.01, it will be presumed, subject to rebuttal, that single-family and navigational encroachments will have an adverse effect upon adjacent littoral rights if located closer than 10 feet from adjacent littoral right lines. Applicant's proposed dock provides a 90-foot buffer to the south and north of adjacent littoral lines and, thus, complies with the rule.

When receiving the application, IDL notified IDEQ, IDFG, and other agencies and organization to give them an opportunity to express their concerns. IDL received no comments of concern from IDFG, IDEQ, or any other agency notified of Applicant's application.

And while the Hearing Coordinator understands the objector's and public commenter's concern with future potential development of the upland wetland property, they did not identify any rule or law that the Application violated. Accordingly, given IDL's thorough consideration of the application, and the objector's lack of a legal reason for denial, there is no basis to deny Applicant's application.

CONCLUSION OF LAW

Applicant's Encroachment Permit Application for a single-family dock complies with IDAPA 20.03.04.015 and Idaho Code § 58-13. Applicant's Encroachment Permit Application for riprap complies with IDAPA 20.03.04.015.08 and Idaho Code § 58-13.

PRELIMINARY ORDER

The Hearing Coordinator recommends that the Director of IDL issue a Final Order that *approves* Application No. L-96-S-2768 for a single-family dock; and *approves* the application for riprap and that the permit include a term providing that the riprap shall not block any flow or channel from the upland wetland draining into the main river channel; that if there is flow present, then Applicant will install a culvert or similar structure to keep the movement of the water active and fluid.

DATED: January 12, 2023.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By: Lincoln Strawhun
LINCOLN STRAWHUN
Hearing Coordinator

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Idaho Code § 67-5245 and IDAPA 20.01.01.730.02 addressing petitions for review of preliminary orders are not applicable per the *Notice of Appointment of Hearing Coordinator and Public Hearing, November 23, 2022*. Idaho Code § 58-1305 and IDAPA 20.03.04.025 apply to the single-family dock. Idaho Code § 58-1306 and IDAPA 20.03.04.030.05 apply to the riprap.

* * * * *