

BEFORE THE STATE BOARD OF LAND COMMISSIONERS
STATE OF IDAHO

In the Matter of Encroachment Permit Application No.) Case No. CC-2022-NAV-20-001
L-96-S-2772,)
) **FINAL ORDER**
Teague Mullen – Bonner Land Company,)
)
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 September 9, 2022, IDL received an encroachment permit application for a single family dock and riprap filed by Teague Mullen of Bonner Land Company. A hearing was held on November 28, 2022. Lincoln Strawhun served as duly appointed hearing officer. On December 23, 2022, the hearing officer issued his Preliminary Order, which contains the following sections: Issue, Findings of Fact, Discussion, and Conclusion of Law.

As Director of IDL, my responsibility is to render a decision pursuant to Idaho Code § 58-1305, Idaho Code § 58-1306, and IDAPA 20.03.04.025 on behalf of the State Board of Land Commissioners and based on the record, which I have reviewed in the context of my

personal expertise gained through education, training, and experience. I relied on the record for this matter, including examining the hearing officer's Preliminary Order in light of the entire record in this 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 add the following sentence to the end of Paragraph 9:

IDL observed visible erosion to the bank during its inspection.

I keep paragraph 10, but delete paragraph 10.a and add the following new paragraph 10.a:

IDL and the Applicant had a dialogue during the hearing about whether there was potential to permit a revised application for a shorter dock (40 feet out, no pilings in the winter channel, and the dock would stay out of the channel). IDL stated that it would likely not recommend denial in that case, but also noted that it cannot pre-approve or pre-deny any application based only on a verbal discussion.

In paragraph 11, I amend the reference to "IDAPA 20.03.04.015.01" to instead read "IDAPA 20.03.04.015.01.a and IDAPA 20.03.04.015.01.b"

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 the first line of page 6 between the sentence ending in "riprap" and the sentence beginning in "Applicant's," I add the following new sentence:

IDL's site inspection in November 2022 found there was erosion at the site.

On page 6, in the second full paragraph, I delete the last sentence, which begins with "During" and ends with "channel." I insert the following three sentences in its place:

During the hearing, several Objectors said they would not oppose a shorter dock that did not go into the channel. IDL said that it would likely not recommend denial of a dock 40 feet or less in length that would stay out of the channel. However, such a dock is not proposed in the application in this matter.

IV. ORDER

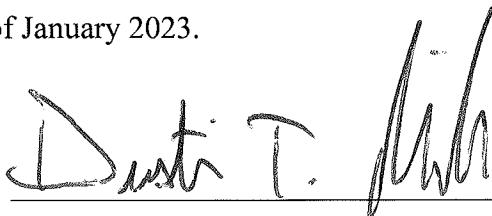
I conclude that the hearing officer's Preliminary Order is based on substantial evidence in the record, and I adopt the Preliminary Order's Issue, Findings of Fact, Discussion, and Conclusion of Law with the amendments set forth herein as my decision in this matter. I hereby incorporate by reference 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-2772 is DENIED. 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-2772 is APPROVED.

This is a final order of the agency. Pursuant to Idaho Code § 58-1305(c), Idaho Code § 58-1306(c), and IDAPA 20.03.04.25.08, 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), and IDAPA 20.03.04.25.08, 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 10th day of January 2023.

A handwritten signature in black ink, appearing to read "Dustin T. Miller", written over a horizontal line.

DUSTIN T. MILLER

Director, Idaho Department of Lands

CERTIFICATE OF MAILING

I hereby certify that on this 11th 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:

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BEFORE THE IDAHO STATE BOARD OF LAND COMMISSIONERS

In the Matter of:)
) Case No. CC-2022-NAV-20-001
ENCROACHMENT PERMIT APPLICATION)
No. L-96-S-2772)
) **PRELIMINARY ORDER**
Teague Mullen – Bonner Land Company,)
)
Applicant.)
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After a hearing on this matter, held November 28, 2022, the hearing officer recommends to the Director of the Idaho Department of Lands (“IDL”) to *deny* Encroachment Permit Application No. L-96-S-2772 (“Application”) for the single-family dock because the proposed dock exceeds the line of navigability for Boyer Slough and would restrict boater access; and to *approve* the riprap portion of the application because the proposed riprap meets 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 in Boyer Slough, Lake Pend Oreille.

Upon receiving the application, IDL sent notices to adjacent neighbors, and received several objections to Applicant’s proposed dock.

On November 3, 2022, IDL sent *Notice of Appointment of Hearing Officer and 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 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
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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 officer finds the following facts:

1. On September 9, 2022, Applicant applied for a 60' long single-family dock consisting of a 6' x 32' approach and 30' x 28' single-slip fixed pier, comprising 696 square feet.
2. On September 20, 2022, IDL sent adjacent neighbor notices to Whiskey Jack One Owners Association, Inc., Cox Partnership, Willingham Trust, and sent a copy of the application to applicable federal, state, and local agencies and organizations. IDL also ran an advertisement of the application in the Bonner County Daily Bee newspaper (which ran on September 23, 2022, and September 30, 2022).
3. On September 26, 2022, IDL received an objection from Lana Willingham, and a separate objection from Susan Wiley.
4. On October 11, 2022, IDL received consent on an adjacent neighbor notice form from Chris Aiken.
5. On October 14, 2022, IDL received a "no comment" from Idaho Department of Fish and Game ("IDFG"); and an email from Objector Patricia Thurston, who requested a contested case hearing.
6. On October 18, 2022, IDL received an adjacent neighbor notice form from Willingham Trust expressing concerns but not requesting a hearing.
7. On November 10, 2022, IDL received correspondence from the Idaho Department of Environmental Quality ("IDEQ") with water quality concerns; that navigability would be challenged by the proposed dock; that the slough would either need to be excavated/dredged, or boaters would carve depth with their props; that Boyer Slough is in bad shaped because it's impaired for total phosphorus, which promotes excess

vegetation and algae grown; that if boaters churn up shallow sediments with their props, phosphorus will be liberated back into the water column, adding to the problem.

8. On November 11, 2022, IDFG followed up on their initial “no comment” that it would be nice for the dock not to have pilings in the middle of the channel, and that that may be the answer.
9. On November 21, 2022, IDL performed a site inspection.
10. As an exhibit for hearing, and in testimony at hearing, IDL recommended denial of application NO. L-96-S-2772 for the single-family dock because the proposed dock exceeds the line of navigability for Boyer Slough and would restrict boater access; and to approve the riprap portion of the application because the proposed riprap meets the legal standards.
 - a. IDL and the Applicant had a dialogue during the hearing, that if Applicant revised his application to make the proposed dock shorter (40’ out and no piling in the channel and to stay out of the channel), then the application would likely be approved.
11. Applicant’s proposed dock meets the legal requirements of IDAPA 20.03.04.015.01, however is 18’ longer than the average dock in the slough, would be the only dock to extend past or into the winter channel of Boyer Slough, and exceeds the line of navigability for Boyer Slough and would restrict boater access. IDL received concerns about water quality from IDEQ if the proposed dock is approved.
12. The Applicant’s proposed riprap meets the standards set forth in IDAPA 20.03.04.015.08. Three other parcels in the slough have riprap. IDL did not receive any comments from IDEQ regarding water quality issues related to the proposed riprap. IDFG did not comment on the riprap.

DISCUSSION

Applicant’s position. Applicant asserted that his application is straightforward; that he builds a lot of docks; that he has worked with IDL for years; that he does not see an issue with this dock; that the length of the proposed dock is to maximize moorage; that it is 185’ from the closest dock across the way; that he is concerned for the environment too; that he has replanted native plants to help the shoreline; but that riprap is a standard feature on many docks.

That he revised his dock design after speaking with IDL regarding the pilons; that he clarified with IDL, that if he further revised his application to go only 40' out and no piling in the channel and to stay out of the channel), then the application would likely be approved.

Objector's position. Objector Willingham explained she is concerned about the encroachment into the yearlong stream use after the water is reduced to a winter pool on the lake; that her family has used the streambed to float in the fall and spring; that she has also ice fished in the stream in winter; that she has followed the streambed in their boat—it's the only part of the slough to not cause boating issues with the pond weeds that fill the shallower portion of the slough near their boat basin; that the streambed is their navigable entrance into Boyer Slough; that they follow that stream, then cross the slough to dock their boats; that a 60' dock on Lot 1 and 2 will create a choke point for boating out to the lake; that they would be okay with a dock that parallels the shoreline and does not cross the navigable stream.

Objector Wiley explained that the dock will impede and cross over the only channel in the slough, which is no concern in the summer, but in the winter there would not be enough room for even a canoe or kayak to maneuver; that there is no way a 60' dock would not cross the property lines of Lots 4, 5, 6, and 7; that the regulations speak to using common sense in approving applications; that an application must be reasonable and sensitive to the situation; that a 60' dock is not necessary; that the applicant mitigated his plans only after the objectors went to every agency to complain; and that the fact that there is only one channel in Boyer Slough should give pause, in addition to crossing property lines.

Objector Thurston explained that she has been on her property since 1980 and expressed concerns for navigation, fish and wildlife habitat, aquatic life, recreation, water quality, and

property protection since this first dock will set a precedent for other lots in the Cove; that her property goes across the channel; that kayakers will be stopped by Appellant's proposed dock.

That his dock does not need to be so long; that it does not make sense; that she would be ok with a shorter dock; that she does not want his dock to cross the littoral line.

IDL's position. IDL recommends denial of the dock because it is too long and approval of the riprap because it meets legal requirements of IDAPA 20.03.04.015.08; that three other parcels in the slough have riprap; that IDL did not receive any comments from IDEQ regarding water quality issues related to the proposed riprap; and IDFG did not comment on the riprap.

That Applicant's proposed dock (696 square feet) meets the legal requirements of IDAPA 20.03.04.015.01, however just because a single-family dock can be up to 700 square feet does not mean it has to be allowed; the dock would be 18' longer than the average dock in the slough, would be the only dock to extend past or into the winter channel of Boyer Slough, and exceeds the line of navigability for Boyer Slough and would restrict boater access. IDL received concerns about water quality from IDEQ if the proposed dock is approved.

That IDL believes that a dock could be designed for Applicant's Lot 8 that would provide sufficient depth for boat moorage, while not blocking the deepest part of Boyer Slough, without constricting access during non-summer months, and would not jeopardize water quality; that Applicant did revise his application with drawings that showed no pilings in the channel; that a shorter (40') dock with no pilings in the channel and that stayed out of the channel would alleviate much of the objector's concerns.

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. The Objectors did not raise

arguments against the riprap and IDL recommends approval of the riprap. Applicant's proposed riprap meets legal requirements of IDAPA 20.03.04.015.08

Per IDAPA 20.03.04.015.01.c, no portion of the docking facility may extend beyond the line of navigability. Shorter docks are encouraged whenever practical and new docks normally will be installed within the waterward extent of existing docks or the line of navigability.

Here, Applicant's proposed dock—60' in length—exceeds the line of navigability for Boyer Slough, would restrict boater access, and per IDEQ, would jeopardize water quality. During the hearing, both IDL and several Objectors said they would not oppose a shorter dock—closer to 40' in length, that did not go into the channel.

CONCLUSION OF LAW

Applicant's Encroachment Permit Application for a single-family dock does not comply with IDAPA 20.03.04.015.01.c. Applicant's Encroachment Permit Application for riprap complies with IDAPA 20.03.04.015.08 and Idaho Code § 58-13.

PRELIMINARY ORDER

The hearing officer recommends that the Director of IDL issue a Final Order that *denies* Application No. L-96-S-2772 for a single-family dock; and *approves* the application for riprap.

DATED: December 23, 2022.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By: Lincoln Strawhun
LINCOLN STRAWHUN
Hearing Officer

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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 Officer and Hearing, November 3, 2022*, and Idaho Code § 58-1306, which requires a final order to be issued within 30 days of the hearing date.

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