

BEFORE THE STATE BOARD OF LAND COMMISSIONERS  
STATE OF IDAHO

ANDREW ERICKSON,

Petitioners,

vs.

WILLIAM L. HAMILTON AND LEN  
AND DONNA SCHWENK,

Respondents.

Agency Case No. CC-2023-NAV-22-002

OAH Case No. 23-320-04

**FINAL ORDER**

**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 April 18, 2023, IDL received an encroachment permit application for a single-family dock filed by Andrew Erickson. A hearing was held on June 12, 2023. Scott Zanzig served as duly appointed hearing officer. On July 3, 2023, the hearing officer issued his Recommended Order, which contains the following sections: Background, Findings of Fact, and Conclusions of Law.

As Director of IDL, my responsibility is to render a decision pursuant to Idaho Code § 58-1305 and 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 available record for this matter, including examining the hearing coordinator's Preliminary Order in light of the entire available record in this matter.

## **II. FINDINGS OF FACT**

I adopt the Preliminary Order's Findings of Fact as my Findings of Fact.

## **IV. CONCLUSIONS OF LAW**

I adopt the Preliminary Order's Conclusion of Law as my Conclusions of Law.

## **V. ORDER**

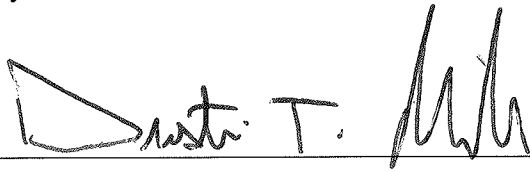
I conclude that the hearing Officer's Preliminary Order is based on substantial evidence in the record, and I adopt the Preliminary Order's Findings of Fact and Conclusion of Law as my decision in this matter. I hereby incorporate by reference the Preliminary Order's Background, Findings of Fact, and Conclusions of Law into this Final Order. 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 Encroachment Permit Application L-95-S-3054C is APPROVED.

This is a final order of the agency. Pursuant to Idaho Code § 58-1305(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) 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 27<sup>th</sup> day of July 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 \_\_27th\_\_ day of July 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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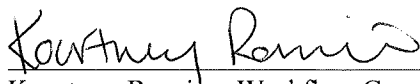
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Kourtney Romine, Workflow Coordinator

**BEFORE THE IDAHO DEPARTMENT OF LANDS**

ANDREW ERICKSON,	)	
	)	AGENCY Case No. CC-2023-NAV-22-002
Petitioner,	)	
v.	)	OAH Case No. 23-320-04
	)	
WILLIAM L. HAMILTON AND LEN AND DONNA SCHWENK,	)	<b>FINDINGS OF FACT, CONCLUSIONS</b>
	)	<b>OF LAW, AND RECOMMENDED</b>
Respondents.	)	<b>ORDER</b>
	)	

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This matter was assigned to Hearing Officer Scott Zanzig on May 17, 2023. An in-person administrative hearing was set for June 12, 2023. A prehearing status conference was held on June 8, 2023. This prehearing status conference was recorded and addressed rules of procedure for this proceeding, including admission of the parties’ exhibits.

The hearing was held on June 12, 2023, at the Jameson Room, Coeur d’Alene Public Library, located at 702 E. Front Street, Coeur d’Alene, Idaho. Present at the hearing were the Hearing Officer, Scott Zanzig; Petitioner, Andrew Erickson; Respondents, William Hamilton and Len and Donna Schwenk; and Lead Deputy Attorney General Angela Schaer Kauffman representing the Idaho Department of Lands (IDL). Also present for IDL were Mike Ahmer and four non-testifying IDL employees: Gwen Victorson; Jennifer Barker; Amidy Fuson; and Josh Petten. A member of the public, Wayne Geanotte, also attended.

The hearing was recorded via audio. It also was reported by Patricia Pullo, a court reporter from M&M Court Reporting, Coeur d’Alene, Idaho, who will prepare a transcript if any party requests it.

No witnesses were excluded from the proceedings. All parties stipulated to the admission of all other parties’ exhibits, reserving the right to object on the grounds of relevance. IDL offered

six exhibits, including a drawing Mike Ahmer prepared at the hearing. Andrew Erickson offered 15 exhibits. The Schwenks offered five exhibits.

The following witnesses testified at the hearing: Mike Ahmer; Andrew Erickson; Len Schwenk; and William Hamilton.

The Hearing Officer, having considered the evidence and arguments offered at the hearing, the documents in the administrative record, and the other papers and pleadings on file, makes the following Findings of Fact and Conclusions of Law pursuant to Idaho Code section 58-1305 and IDAPA 04.11.01.413.01.d. and 20.01.01. 413.01.d.

### **FINDINGS OF FACT**

1. On April 18, 2023, IDL received Application for Encroachment Permit No. L-95-S-3054C from Andrew Erickson (Erickson's Application).
2. Erickson's Application seeks a permit for a mooring buoy and boat lift adjacent to his property east of Bennett Bay along the north shore of Lake Coeur d'Alene. Erickson's property is Parcel 0-4620-000-006-0, AIN 146248, Lot 6 of Lakeshore Addition to Sunnyside Subdivision. Erickson already has an encroachment permit issued May 25, 2012 (L-95-S-3054B), for a single-family dock and water intake line.
3. Erickson's property is adjacent to Lake Coeur d'Alene. No party disputes that Lake Coeur d'Alene is a navigable lake.
4. On April 19, 2023, IDL mailed notification of Erickson's Application to his adjacent littoral neighbors, William Hamilton and Len and Donna Schwenk.
5. On May 8, 2023, IDL received objection letters from Hamilton and the Schwenks.

6. On May 31, 2023, IDL's Mike Ahmer visited Erickson's property and completed an on-site inspection of the property and analyzed the proposed mooring buoy and boat lift in Erickson's Application. *See* IDL-2.

7. Based upon Ahmer's site visit and analysis of Erickson's Application, IDL submitted a hearing statement (IDL-1) and testimony from Ahmer at the June 12 hearing establishing the following facts, which no party disputed:

- a. Erickson is a littoral owner of Parcel 0-4620-000-006-0, AIN 146248, Lot 6 of Lakeshore Addition to Sunnyside Subdivision. He has not granted permission to anyone else to permit a dock from this parcel. He is the permittee of existing Encroachment Permit L-95-S-3054B.
- b. Erickson is seeking a navigational encroachment permit for a mooring buoy and floating boat lift.
- c. Erickson owns approximately 100 feet of water frontage, which is sufficient for a single-family dock navigational encroachment under IDAPA 20.03.04.010.36.
- d. Erickson's existing dock is 673.5 square feet.
- e. The proposed boat lift is landward of the end of the dock, within the line of navigability. The proposed boat lift provides a 10-foot buffer to the west littoral line, and a 70-foot buffer to the east littoral line. The location of the boat lift is "atypical," because it is not inside the slip portion of the dock or along the main dock. But it is adjacent to the slip dock, and would not require a separate ramp or dock. And neither statute, rule, nor IDL's procedures prohibit a dock in this location. In Ahmer's opinion, the atypicality of the boat lift's location does not

rise to the level of “most unusual of circumstances” as that term is used in Idaho Code section 58-1305(a). Ahmer explained that IDL rarely invokes the “most unusual of circumstances” standard to deny a permit application.

- f. The proposed mooring buoy, though waterward of Erickson’s dock, is within the line of navigability. IDL typically does not permit mooring buoys beyond the end of the dock, because they ordinarily would be beyond the line of navigability. But IDL has issued several permits for mooring buoys beyond the end of the dock where, as in this case, the permittee’s dock is shorter than the neighboring docks and the buoy is within the line of navigability. Because the buoy is within the line of navigability, it should not interfere with navigation, because boats should be operating at a no-wake speed in that area. The proposed mooring buoy provides a 30-foot buffer to the west littoral line, and a 69-foot buffer to the east littoral line.
- g. Erickson’s Application proposes anchoring the boat lift and buoy with concrete blocks. The blocks previously were used for an unpermitted log boom. Ahmer had discussions with Erickson about removing the log boom, in which Erickson spoke cooperatively. Nothing in statute, rule, nor IDL’s policies or procedures prohibits repurposing the blocks from a formerly unlawful use to a permitted, lawful use.
- h. There is a “pinch point” between Erickson’s existing, permitted dock and Hamilton’s dock.

8. IDL recommends approval of the Erickson Application because the proposed mooring buoy and boat lift meet the legal requirements for single-family docks. (IDL-1, pp. 8-9).



9. In their objections, submissions in this case, and evidence presented at the hearing, Hamilton and the Schwenks oppose Erickson's Application on various grounds. Some of their concerns are outside IDL's jurisdiction (e.g., gate on road, building above ordinary high-water mark, boat registration). Other concerns more relevant to this case include:

- a. Erickson should not be able to repurpose the concrete blocks that previously were used for an unpermitted log boom; and
- b. Erickson's proposed buoy and boat lift may interfere with Hamilton's access to his dock, or the buoy may interfere with other persons' navigation or fishing.

10. The evidence at hearing confirmed that Erickson previously used the concrete blocks for an unpermitted log boom, but is not currently using the blocks for that purpose. Hamilton and the Schwenks did not present any evidence or cite any law rebutting Ahmer's testimony that nothing in statute, rule, nor IDL's policies or procedures prohibits repurposing the blocks from a formerly unlawful use to a permitted, lawful use.

11. Hamilton did assert that Erickson's proposed encroachments would limit Hamilton's ability to maneuver his boat in the space between his and Erickson's dock. He did not, however, offer evidence demonstrating that the proposed encroachments would prevent him from navigating his boat in the space. IDL's exhibit IDL-5 and Ahmer's testimony indicate that the narrowest space Hamilton must navigate is a "pinch point" between the Hamilton and Erickson docks. IDL's position is that this pinch point is created not by Erickson's proposed encroachments, but instead by the fact that Hamilton's dock extends nearly to the Hamilton-Erickson littoral line, rather than leaving a 20-foot buffer from the line as is permitted. *See* IDL-4 and IDL-5. Hamilton did not concede this point, but offered no evidence to rebut IDL's exhibits and Ahmer's testimony on this point.

## CONCLUSIONS OF LAW

1. The Idaho legislature enacted the Lake Protection Act (“LPA”), Title 58, Chapter 13, Idaho Code, in 1974 stating:

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 of 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 weighted 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.

2. The board of land commissioners, through IDL, “shall regulate, control and may permit encroachments in aid of navigation or not in aid of navigation on, in or above the beds of waters of navigable lakes.” I.C. §§ 58-1303, 58-119(1). *See also Newton v. MJK/BJK, LLC*, 167 Idaho 236, 242 (2020).

3. Through its statutory authority, IDL has promulgated Rules for the Regulation of Beds, Waters and Airspace Over Navigable Lakes in the State of Idaho. IDAPA 20.03.04.

4. Lake Coeur d’Alene is a navigable lake and is within IDL’s authority to regulate encroachment permits. *Lake CDA Investments, LLC v. Idaho Dep’t of Lands*, 149 Idaho 274, 277 (2010)

5. Erickson owns property adjacent to Lake Coeur d’Alene. He is a littoral owner as defined in Idaho Code section 58-1302 and IDAPA 20.03.04.020.02 qualified to submit Erickson’s Application.

6. Hamilton and the Schwenks are adjacent littoral owners to Erickson’s property.

7. Idaho Code section 58-1305(a) provides:

Applications for construction or enlargement of navigational encroachments not extending beyond the line of navigability nor intended primarily for commercial or community use shall be processed by the board with a minimum of procedural requirements and shall not be denied nor appearance required except in the most unusual of circumstances or if the proposed encroachment infringes upon or it appears it may infringe upon the riparian or littoral rights of an adjacent property owner.

8. Encroachments in aid of navigation include boat lifts and mooring buoys. IDAPA 20.03.04.010.15.

9. The “line of navigability” may be “established by the length of existing legally permitted encroachments . . . .” IDAPA 20.03.04.010.20.

10. Erickson’s Application seeks permission for a boat lift and mooring buoy for single-family use, both of which are within the line of navigability established by the adjacent docks. Therefore, Erickson’s Application seeks approval for construction of “navigational encroachments not extending beyond the line of navigability nor intended primarily for commercial or community use.” I.C. § 58-1305(a).

11. The board of land commissioners has promulgated rules governing permits for encroachments in aid of navigation on navigable waters. *See* IDAPA 20.03.04.012.02 (no encroachments without a permit), 20.03.04.015 (encroachment standards), 20.03.04.020 (permit application requirements). These rules include specific requirements for mooring buoys, IDAPA 20.03.04.015.09, as well as boat lifts. IDAPA 20.03.04.015.13.b.

12. Mooring buoys “must be installed a minimum of thirty (30) feet away from littoral right lines of adjacent littoral owners. One (1) mooring buoy per littoral owner may be allowed.” IDAPA 20.03.04.015.09.

13. “A boat lift or jet ski lift within lines drawn perpendicular from the shore to the outside dock edges will not require a separate permit if the lift is outside the ten (10) foot adjacent

littoral owner setback, the lift does not extend beyond the line of navigability, and the lift does not count toward the square footage of the dock as outlined in Subparagraphs 015.13.b.i. and 015.13.b.ii. The permittee must send a revised permit drawing with the lift location as an application to the Department. If the lift meets the above conditions, the application will be approved as submitted.” IDAPA 20.03.04.015.13.b.iii.

14. “Single-family docks are allowed a single boat lift and two (2) jet ski lifts, or two (2) boat lifts, without adding their footprint to the dock square footage.” IDAPA 20.03.04.015.13.b.i.

15. “It will be presumed, subject to rebuttal, that single-family . . . navigational encroachments will have an adverse effect upon adjacent littoral rights if located closer than ten (10) feet from adjacent littoral right lines . . . . Written consent of the adjacent littoral owner or owners will automatically rebut the presumption. All boat lifts and other structures attached to the encroachments are subject to the above presumptions of adverse affects [sic].” IDAPA 20.03.04.015.13.e.

16. As an applicant, Erickson bears the burden of proving that his application satisfies the requirements for mooring buoys and boat lifts in IDL’s regulations.

17. Erickson’s proposed mooring buoy complies with IDAPA 20.03.04.015.09’s requirement that it be 30 feet from littoral right lines. Therefore, Erickson’s buoy application “shall not be denied . . . except in the most unusual of circumstances or if the proposed [buoy] infringes upon or it appears it may infringe upon the riparian or littoral rights of an adjacent property owner.” I.C. § 58-1305(a).

18. Erickson’s proposed buoy does not present “the most unusual of circumstances.” IDL’s regulations recognize that one mooring buoy per littoral owner “may be allowed.”

Moreover, this conclusion is bolstered by Ahmer’s testimony that IDL has permitted mooring buoys waterward of docks so long as they remain within the line of navigability. The only question is, does the proposed buoy “infring[e] upon or . . . appea[r] it may infringe upon the riparian or littoral rights of an adjacent property owner”?

19. IDL staff recommend that the proposed mooring buoy be approved. Hamilton and the Schwenks contend that the proposed buoy will be a navigational hazard. They bear the burden of proof on this issue because the proposed buoy meets the requirements in IDL’s regulations.

20. Hamilton and the Schwenks argue that the buoy may make it more difficult for Hamilton to navigate his boat to his dock, but they offered no evidence at the hearing demonstrating this point. Erickson’s exhibit P-1, page 7, indicates that the distance between the buoy and Hamilton’s dock is more than 33 feet, which is greater than the 25-foot “pinch point” between the Hamilton and Erickson docks. *See* IDL-5. Hamilton and the Schwenks failed to meet their burden establishing that the buoy will impermissibly infringe upon Hamilton’s littoral or riparian rights.

21. Hamilton and the Schwenks also argue that buoys can be a hazard for other boaters and fishermen. They contend that Kootenai County officials have told them that buoys are illegal. But IDL regulations clearly permit mooring buoys if they meet certain standards. IDAPA 20.03.04.015.09. Hamilton and the Schwenks have cited no contrary legal authority, and the Hearing Officer is aware of none.

22. Erickson’s proposed boat lift does not meet all of IDAPA 20.03.04.015.13.b.iii.’s conditions because it is not “within lines drawn perpendicular from the shore to the outside dock edges.” However, it is “outside the ten (10) foot adjacent littoral owner setback [and it] does not

extend beyond the line of navigability.” IDAPA 20.03.04.015.13.b.i. allows single-family docks to have up to two boat lifts without adding to the dock square footage. And because it is outside the 10-foot setback, the proposed boat lift satisfies IDAPA 20.03.04.015.13.e. Therefore, Erickson’s boat lift application “shall not be denied . . . except in the most unusual of circumstances or if the proposed [boat lift] infringes upon or it appears it may infringe upon the riparian or littoral rights of an adjacent property owner.” I.C. § 58-1305(a).

23. Mike Ahmer opined that the location of the proposed boat lift does not rise to the level of section 58-1305(a)’s “most unusual of circumstances” standard. Hamilton and the Schwenks raised questions about the boat lift’s location, which Erickson answered. Neither the questions nor answers established that the boat lift’s location would violate section 58-1305(a)’s “most unusual of circumstances” standard.

24. The location of the proposed boat lift does not justify denying permission for it under section 58-1305(a)’s “most unusual of circumstances” standard. Section 58-1305(a) reflects a legislative intent in favor of permitting encroachments that do not interfere with adjacent owners’ littoral or riparian rights. *See Byrd v. Idaho State Board of Land Commissioners*, 169 Idaho 922, 929 (2022) (“[g]enerally, the board [of land commissioners] should approve a permit application unless the proposed encroachment infringes, or may infringe, upon the littoral rights of an adjacent property owner) (citation omitted).

25. Hamilton and the Schwenks contend that the proposed boat lift may make it more difficult for Hamilton to maneuver his boat in his “L-shaped harbor,” but they offered no evidence at the hearing demonstrating this point. The boat lift is 10 feet from the Hamilton-Erickson littoral line, which complies with IDL regulations. *See* IDAPA 20.03.04.015.13.b.iii.,

20.03.04.015.13.e. Hamilton and the Schwenks failed to meet their burden establishing that the boat lift will impermissibly infringe upon Hamilton's littoral or riparian rights.

26. Hamilton and the Schwenks also contend that the proposed mooring buoy and boat lift incorporate unpermitted, formerly illegal encroachments, *i.e.*, concrete blocks that previously anchored an unpermitted log boom. However, they have not cited, and the Hearing Officer is not aware of, any statute or rule that prohibits repurposing the blocks to a permitted, lawful use.

27. Prior to and at the hearing in this case, Hamilton, the Schwenks, and Erickson submitted evidence about alleged prior and ongoing violations of various regulations on or adjacent to all parties' property. The Hearing Officer admitted such evidence. And the Hearing Officer does not doubt that these matters are important to the parties. But except as specifically noted in these findings and conclusions, evidence about things other than Erickson's Application have little or no relevance to this proceeding, relate to matters outside the scope of the Hearing Officer's authority, and have not affected the Hearing Officer's decision.

### **RECOMMENDED ORDER**

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer recommends that IDL **APPROVE** Petitioner Andrew Erickson's application L-95-S-3054C.

### **RECOMMENDED ORDER NOTICE**

**This is a recommended order of the hearing officer. It will not become final without action of the agency head.** By law, the agency head must issue a final order within forty-five (45) days of the hearing in this case, which was held June 12, 2023. *See* I.C. § 58-1305(c). The agency head's final order in this case must be issued **no later than July 27, 2023.**

Pursuant to Idaho Code section 67-5244, the parties may file an exception to this recommended order with the agency head. Any such exception must be filed within five (5) days

after the service date of this recommended order. Written briefs in support of or taking exception to the recommended order shall be filed with the agency head. If time permits, the agency head may schedule oral argument in the matter before issuing a final order. Following the agency head's issuance of a final order, the parties' rights to seek reconsideration of or appeal that order are prescribed by Idaho Code section 58-1306(c)-(d), and IDAPA 20.03.04.025.08.

IT IS SO ORDERED.

DATED this 3rd day of July, 2023.

OFFICE OF ADMINISTRATIVE HEARINGS

/s/ W. Scott Zanzig

W. Scott Zanzig  
Hearing Officer



## CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of July, 2023, I caused to be served a true and correct copy of the foregoing by the following method to:

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W. Scott Zanzig