

BEFORE THE STATE BOARD OF LAND COMMISSIONERS  
STATE OF IDAHO

In the Matter of  
Modification of Breakwater Application,  
Beyond Hope Marina  
Applicant.

Agency Case No. PH-2023-NAV-20-002

OAH Case No. 23-320-05

**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, 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 § 58-103. 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 21, 2023, IDL received an encroachment permit application to replace and repurpose a breakwater near the Beyond Hope commercial marina on Lake Pend Oreille. A hearing was held on July 26, 2023, Leslie Hayes served as the duly appointed hearing officer. On August 24, 2023, the hearing officer issued her Recommended Order, which contains the following sections: Nature of Proceedings and Objections, 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.

## **II. FINDINGS OF FACT**

I adopt the Preliminary Order's Findings of Fact as my Findings of Fact except for the correction of the date the application was received by IDL.

## **III. CONCLUSIONS OF LAW**

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

## **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 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 PH-2023-NAV-20-002 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 31<sup>st</sup> date of August, 2023.

  
DUSTIN T. MILLER  
Director, Idaho Department of Lands

## CERTIFICATE OF MAILING

I hereby certify that on this 1st day of September 2023, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Toby McLaughlin  
Sandpoint Law, PC  
312 S. First Avenue, Ste. A  
Sandpoint, ID 83864  
*Attorney for Applicant*

- U.S. Mail, postage prepaid
- Email: [toby@sandpointlaw.com](mailto:toby@sandpointlaw.com)

Riser Creek Marina  
Curtis and/or Laurence Smith  
99 Mariner Way  
P.O. Box 24  
Hope, ID 83836  
*Objector*

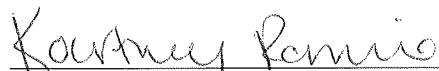
- U.S. Mail, postage prepaid
- Email: [risercreek2@hotmail.com](mailto:risercreek2@hotmail.com)  
[risercreek@hotmail.com](mailto:risercreek@hotmail.com)

JJ Winters  
Deputy Attorney General  
P.O. Box 83720  
Boise, ID 83720-0010  
*Counsel for IDL*

- Statehouse Mail
- Email: [jj.winters@ag.idaho.gov](mailto:jj.winters@ag.idaho.gov)

Office of Administrative Hearings  
816 W. Bannock St., Suite 203  
P.O. Box 83720  
Boise, ID 83720-0104

- Statehouse Mail
- Email:  
[filings@oah.idaho.gov](mailto:filings@oah.idaho.gov)  
[elaine.maneck@oah.idaho.gov](mailto:elaine.maneck@oah.idaho.gov)  
[leslie.hayes@oah.idaho.gov](mailto:leslie.hayes@oah.idaho.gov)

  
\_\_\_\_\_  
Kourtney Romine, Workflow Coordinator

**BEFORE THE STATE BOARD OF LAND COMMISSIONERS  
STATE OF IDAHO**

In the Matter of	)	AGENCY Case No. PH-2023-NAV-20-002
	)	
Modification to Breakwater Application,	)	OAH Case No. 23-320-05
	)	
Beyond Hope Marina,	)	<b>FINDING OF FACT, CONCLUSIONS</b>
	)	<b>OF LAW, AND RECOMMENDED</b>
Applicant.	)	<b>ORDER</b>
_____	)	

This matter was assigned to Hearing Officer Leslie Hayes on June 20, 2023. An in-person administrative hearing was set for July 26, 2023. A prehearing status conference was held on July 24, 2023. This prehearing status conference was recorded and discussed rules of procedure for this proceeding, stipulations/objections to any prehearing filings, remote attendance at the hearing, and the burden of proof pursuant to Idaho Code section 58-1306.

The hearing was held on July 26, 2023, at North Idaho College, in the DeArmond Building, classroom 107, located at 901 W. River Avenue, Coeur d’Alene, Idaho 83814. Present at the hearing were the Hearing Officer Leslie Hayes, Office of Administrative Hearings staff Scott Zanzig (Hearing Officer), and Amanda Bartlett (Extern); counsel for Applicant Beyond Hope Marina, Toby McLaughlin, and his legal intern, Brian Karsann; Pauletta and Rick Auletta, owners of Beyond Hope Marina, Inc. (“Beyond Hope”); and Kiera Bortz, General Manager of Beyond Hope. Also attending via Zoom were Objectors Laurence and Curtis Smith, owners of Riser Creek Marina, and Jon King. Idaho Department of Lands (IDL) appeared through Deputy Attorney General Angela Schaer Kauffman; also present for IDL were Mike Ahmer, Marde Mesinger, Eric Wilson, Amidy Fuson, Gwen Victorson, Jennifer Barker, and Rachel King (via Zoom). No witnesses were excluded from the proceedings.

All parties stipulated to the admission of each participant's exhibits, reserving the right to object on the grounds of relevance at the hearing.

At the conclusion of the July 26, 2023 evidentiary hearing, Objectors Riser Creek Marina requested that they be permitted to submit a written closing statement, which they filed August 2, 2023. The hearing record was closed at the filing of Riser Creek's closing statement on August 2, 2023.

The Hearing Officer, having considered the matter herein, including documents contained in the Administrative Record, makes the following Findings of Fact and Conclusions of Law pursuant to Idaho Code section 58-1306.

#### **NATURE OF PROCEEDINGS AND OBJECTIONS**

This matter involves two adjacent marinas: Beyond Hope Marina ("Applicant" or "Beyond Hope") and Riser Creek Marina ("Objector" or "Riser Creek"). The nature of the objection to Beyond Hope's application is outlined in Riser Creek's prehearing statement, which was submitted on July 19, 2023. *See* Docket No. 4. In that statement, Riser Creek noted four issues, two of which (points 1 and 2) were resolved through the testimony of Beyond Hope and IDL at the hearing. Beyond Hope objected to the relevance of the fourth issue (parking), which was sustained as outside the scope of the Application and outside the scope of IDL's authority because Bonner County has established parking ordinances that govern the marina. *See* IDAPA 20.03.04.015.03.c. The final objection (objection three) relates to the littoral line as depicted on the application. At the hearing, there did not appear to be a dispute as to where the littoral line between Riser Creek and Beyond Hope exists, which indicates that the line drawn on the application is likely a scrivener's error. Finally, in Riser Creek's closing statement, for the first time, safety concerns were raised as to the proposed walkway between the docks/slips and the proposed breakwater.

The Hearing Officer will not address those concerns as they were raised for the first time in closing argument.

### **FINDINGS OF FACT**

1. On May 15, 2023, IDL received a completed Application for Encroachment Permit No. L-96-S-0032G (“Application”), filed by Rick Auletta of Beyond Hope. IDL Ex. 1, p. 1.

2. Applicant owns an upland property in Ellisport Bay on Lake Pend Oreille, in Hope, Idaho, identified as Parcel ID RP56N01E018118A. IDL Ex. 1, p. 1. The parcel is along the shoreline of the lake and there are no other parcels separating littoral ownership from the Applicant’s parcel. IDL Ex. 1, p. 9.

3. Applicant owns approximately three hundred and five (305) feet of water frontage. IDL Ex. 1, p. 9.

4. Applicant is the littoral owner and has not granted permission for anyone else to permit a dock from this parcel. IDL Ex. 1, p. 10.

5. The Application seeks permission for an encroachment permit to replace and re-purpose the breakwater located just beyond the existing marina and floating restaurant, a commercial facility, in Ellisport Bay, on Lake Pend Oreille. IDL Ex. 1, pp. 9-10.

6. It is undisputed that Lake Pend Oreille is a navigable lake.

7. It is undisputed that Beyond Hope is a commercial marina as defined in IDAPA 20.03.04.010.09.

8. On May 16, 2023, IDL sent adjacent neighbor notices to the Smith Living Trust and Pend Oreille Shores Resort, submitted a copy of the application to applicable federal, state, and local resource agencies and organizations, and contacted the Bonner County Daily Bee newspaper to run advertisements regarding the application. IDL Ex. 1, p. 1.

9. A public notice for the Application was published in the Bonner County Daily Bee on May 18 and 25, 2023. IDL Ex. 1, p. 1.

10. On May 30, 2023, IDL received an objection email from adjacent neighbors Curtis and Laurence Smith (Smith Family Trust), on behalf of Riser Creek. IDL Ex. 1, p. 1.

11. On June 5, 2023, IDL received neighbor approval for the Application from Pend Oreille Shores Resort. IDL Ex. 1, p. 1.

12. On June 6, 2023, IDL received a comment letter from Idaho Department of Fish and Game (IDFG). IDL Ex. 1, p. 1. There is no evidence that IDFG raised any objections or concerns about the proposed breakwater.

13. On June 20, 2023, IDL received a “No Comment” letter from Idaho Department of Environmental Quality. IDL Ex. 1, p. 1.

14. The existing breakwater is in disrepair. It is 525 feet long and does not meet the twenty-five (25) foot setback from the shared littoral line (to the north) with Riser Creek Marina. Hearing Testimony and IDL Ex. 1, p. 10.

15. The proposed breakwater is no closer to the northern littoral line (Riser Creek) than the current breakwater. IDL Ex. 1, p. 10.

16. The southern littoral owner, Pend Oreille Shores Resort, has no objection to the proposed breakwater. IDL Ex. 1, pp. 1, 10.

17. The existing breakwater extends approximately 57 feet, four inches from the end of the marina dock. BHM Exs. 1 and 2.

18. The proposed re-purposed and repaired breakwater would extend twenty-five (25) feet farther from shore than the existing breakwater. It would be beyond the line of navigability.



Breakwaters are typically installed beyond the line of navigability to protect the shoreline and docks.

19. The proposed breakwater would benefit the general public who use the marina, and the proposed breakwater would have lighting on it for safety purposes. IDL Ex. 1, p. 9.

20. Beyond Hope's current breakwater presumptively interferes with Riser Creek's littoral rights. However, the application is for a new breakwater, not the existing breakwater, that will lessen that interference by moving the breakwater an additional 25 feet out. The proposed breakwater does not interfere with Riser Creek's littoral rights any more than the existing breakwater.

21. Riser Creek and Beyond Hope agree that the existing breakwater requires repair to continue to operate safely.

#### **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 State 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 Pend Oreille is a navigable lake and is within IDL's authority to regulate encroachment permits. *See Kaseburg v. Bd. of Land Comm'rs*, 154 Idaho 570 (2013) (applying LPA to Lake Pend Oreille encroachment).

5. Idaho Code section 58-1302(h) and IDAPA 20.03.04.010.15 identify breakwaters as an Aid to Navigation. The Application seeks permission for a navigational encroachment extending beyond the line of navigability.

6. The Application complies with IDAPA 20.03.04.020.02's signature requirement because Applicant is the littoral owner and has not granted permission for anyone else to permit an encroachment from its property.

7. IDL complied with IDAPA 20.03.04.030.01 and .03's notice requirements after it received the Application.

8. Applicant owns approximately three hundred and five (305) feet of water frontage, which is sufficient water frontage for a navigational encroachment. *See IDAPA 20.03.04.010.36.*

9. The proposed breakwater extends beyond the line of navigability, but that fact alone does not justify denying the Application.

10. IDAPA 20.03.04.015.13.e provides a rebuttable presumption that commercial navigational encroachments will have an adverse effect upon adjacent littoral rights if located closer than twenty-five (25) feet to adjacent littoral right lines. The proposed breakwater would be closer than twenty-five (25) feet from the littoral line to the north shared with Riser Creek.

11. The evidence at the hearing rebutted the presumption that the proposed breakwater would interfere with Riser Creek's littoral rights because the current breakwater interferes with

Riser Creek's littoral rights. The testimony provided demonstrated that by moving the breakwater further waterward, the interference will be lessened. Further, the testimony demonstrated that the current breakwater that is in disrepair creates a potential safety issue for both Beyond Hope and Riser Creek. The proposed breakwater lessens the safety risk by replacing the old breakwater and providing additional space within Beyond Hope's marina to reduce the impact on Riser Creek. Similarly, there was no evidence that the proposed breakwater would interfere with access to Riser Creek Marina.

### **RECOMMENDED ORDER**

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer recommends that Applicant's request for an encroachment permit be **GRANTED**.

### **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 thirty (30) days of the hearing in this case, which was concluded August 2, 2023, when Objectors filed their written closing argument. *See* I.C. § 58-1306(c). The agency head's final order in this case must be issued **no later than Friday, September 1, 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 August 24, 2023.

By       /s/ Leslie M. Hayes        
Leslie M. Hayes  
Hearing Officer

**CERTIFICATE OF SERVICE**

I hereby certify that on this 24th day of August, 2023, I caused to be served a true and correct copy of the foregoing by the following method to:

Toby McLaughlin  
Sandpoint Law, PC  
312 S. First Avenue, Ste. A  
Sandpoint, ID 83864  
(208) 263-4748  
*Attorney for Applicant*

U.S. Mail  
 Email:  
[toby@sandpointlaw.com](mailto:toby@sandpointlaw.com)

Riser Creek Marina  
Curtis and/or Laurence Smith  
99 Mariner Way  
P.O. Box 24  
Hope, ID 83836  
*Objector*

U.S. Mail  
 Email:  
[risercreek@hotmail.com](mailto:risercreek@hotmail.com)  
[risercreek2@hotmail.com](mailto:risercreek2@hotmail.com)

J.J. Winters  
Deputy Attorney General  
700 W. State St., 2<sup>nd</sup> Floor  
P.O. Box 83720  
Boise, ID 83720-0010  
(208) 334-2400

U.S. Mail  
 Email:  
[jjwinters@ag.idaho.gov](mailto:jjwinters@ag.idaho.gov)

Kourtney Romine  
*Service Contact for IDL*

U.S. Mail  
 Email:  
[kromine@idl.idaho.gov](mailto:kromine@idl.idaho.gov)

OAH  
P.O. Box 83720  
Boise, ID 83720-0104  
Located at: 816 W. Bannock St., Suite 203  
(208) 605-4300

Email:  
[filings@oah.idaho.gov](mailto:filings@oah.idaho.gov)

/s/ Leslie M. Hayes  
Leslie M. Hayes  
OAH Hearing Officer