

BEFORE THE STATE BOARD OF LAND COMMISSIONERS
STATE OF IDAHO

ABCD HOMEBUILDERS, LLC,
PETITIONER,

v.

IDAHO DEPARTMENT OF LANDS,
RESPONDENT.

Agency Case No. PH-2023-NAV-20-001

OAH Case No. 23-320-03

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 January 4, 2021, IDL received an encroachment permit application for a breakwater on Garfield Bay in Lake Pend Oreille. Review of the application was placed on hold for some time and a revised application was completed on or around April 10, 2023. A hearing was held on July 26, 2023. Leslie Hayes served as duly appointed hearing officer. On August 25, 2023,

the hearing officer issued her Recommended Order, which contains the following sections: Preliminary Evidentiary Rulings, Background, Findings of Fact, and Conclusions of Law. On September 1, 2023, Applicant filed an Exception to the recommended order, seeking an order remanding this matter for alternative dispute resolution.

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.

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.

The hearing officer's Recommended Order stated that "[p]ursuant to Idaho Code section 67-5244, the parties may file an exception to this recommended order with the agency head." Applicant filed an exception to the hearing officer's Recommended Order on September 1, 2023. Notwithstanding language to the contrary in the Recommended Order, these proceedings are governed by the process set forth in Idaho Code § 58-1306, which does not provide any right to

file an exception. Nonetheless, I have considered Applicant's Exception to the Recommended Order. Applicant has not demonstrated any change in factual circumstances, nor cited any legal authority, to support its requested relief. Accordingly, Applicant's request for this matter to be remanded is DENIED. This Final Order should not be construed as prohibiting Applicant from reapplying for an encroachment permit with a design that is responsive to these Findings of Fact and Conclusions of Law.

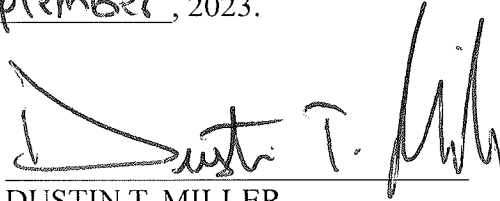
On September 8, 2023, the Idaho Department of Lands filed the Idaho Department of Lands Brief in Support of Recommended Order, which I have reviewed. Based upon the record before me, I find that this document is also not authorized by Idaho Code § 58-1306 and was not considered in this final order.

Based on the adopted Findings of Fact and Conclusions of Law, I HEREBY ORDER that the Encroachment Permit Application L-96-S-2727 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 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 § 58-1306(c) and IDAPA 20.03.04.030.09, 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 11th day of September, 2023.

A handwritten signature in black ink, appearing to read "Dustin T. Miller". The signature is written in a cursive style with a large initial "D" and "M".

DUSTIN T. MILLER
Director, Idaho Department of Lands

CERTIFICATE OF MAILING

I hereby certify that on this 11th 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:

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BEFORE THE IDAHO DEPARTMENT OF LANDS

ABCD HOMEBUILDERS, LLC,)	
)	AGENCY Case No. PH-2023-NAV-20-001
Petitioner,)	
v.)	OAH Case No. 23-320-03
)	
IDAHO DEPARTMENT OF LANDS,)	FINDINGS OF FACT, CONCLUSIONS
)	OF LAW AND RECOMMENDED
Respondents.)	ORDER
)	
)	

This matter was assigned to Hearing Officer Leslie Hayes on May 4, 2023, with an evidentiary hearing deadline of July 7, 2023. ABCD Homebuilders, LLC (“ABCD”) waived that deadline to no later than July 28, 2023. An in-person administrative hearing was held on July 26, 2023. A prehearing status conference was held on July 24, 2023. Both proceedings were recorded and further 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 Chapter 13, Title 58.¹

The hearing was held on July 26, 2023, at North Idaho College, in the DeArmond Building, classroom 107, located at 901 W. River Ave. Coeur d’Alene, ID 83814. Present at the hearing were Hearing Officer, Leslie Hayes; Counsel for Petitioner ABCD, Elizabeth Tellessen and Dalton Reynolds of Winston Cashatt; and Amy Chartrey, Brandon Chartney, and Doug Mayne present for ABCD. 7B Engineering was present as witnesses on behalf of ABCD, which included David Cooper and Daniel Larson. Counsel for Respondent Idaho Department of Lands (IDL), Deputy Attorneys General Angela Schaer Kauffman and J.J. Winters were present; as well as Mike Ahmer,

¹ During the evidentiary hearing it became apparent that there was dispute about whether Idaho Code section 58-1305 or 58-1306 governed these proceedings, each section carrying different burdens of proof and presumptions. Which statute governs will be address below.

Marde Messinger, Eric Wilson, Amidy Fuson, Gwen Victorson, Jennifer Barker, and Rachel King (via Zoom) as witnesses and/or representatives for IDL. 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/weight at the hearing. Prior to the start of the hearing, additional proposed exhibits and an inadvertent late disclosure of a witness list by ABCD were exchanged. IDL had no objection to the additional exhibits or use of the witness list. ABCD objected to IDL's proposed Exhibit 2; that objection was preserved and will be ruled on in this Order below. For the ease of the administrative proceedings, Mr. Ahmer was permitted to testify about the content of proposed Exhibit 2 as if the exhibit had been admitted.

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 Chapter 13, Title 58.

PRELIMINARY EVIDENTIARY RULINGS

While most of the exhibits at issue were admitted by stipulation, there are two exhibits that still need to be addressed and one portion of testimony that should be disregarded. Those rulings are addressed as follows:

Proposed IDL Exhibit 2 is Admitted

At the hearing, IDL offered a late disclosed proposed exhibit described as “[f]our permits for other breakwaters in Idaho[] . . . They're all in North Idaho. And then a series of arial photographs of breakwaters . . . to talk about situations where large breakwaters have been permitted within the state.” Tr. 9:12-19. Mr. Ahmer clarified that the entirety of the exhibit was 12 pages of aerial photographs, and four breakwater permits. Tr. 9:22-23. The Hearing Officer consolidated these pages into a single exhibit marked as IDL Exhibit 2.

The hearing officer recessed the proceedings for ABCD to review the proposed exhibit and offer any objections or stipulation. Tr. 9:24-10:13. ABCD objected on the grounds that the proposed exhibit “bear[s] no relevance to the present application that we can discern from evaluating them in the brief time that we have had.” Tr. 10:18-21. ABCD requested that the exhibits be excluded.

Rule 600 provides that these proceedings are not bound by the Rules of Evidence and further provides that:

Evidence should be taken by the agency to assist the parties’ development of the record, not excluded to frustrate that development. . . . The presiding officer, with or without objection, may exclude evidence that is irrelevant, unduly repetitious, inadmissible on constitutional or statutory grounds, or on the basis of any evidentiary privilege provided by statute or recognized in the courts of Idaho. All other evidence may be admitted if it is of a type commonly relied upon by prudent persons in the conduct of their affairs. The agency’s experience, technical competence and specialized knowledge may be used in evaluation of evidence.

IDAPA 04.11.01.600 (emphasis added).

The Hearing Officer agrees that other applications for encroachment permits to build a breakwater are not necessarily relevant to the application that is at issue in this proceeding. However, ABCD repeatedly took the position that the application must be approved as presented unless unusual circumstances are present. See Tr. 12:24-25:1 (“The regulation and the department’s handbooks direct that breakwaters shall be approved except if they are in very unusual circumstances.”). This exhibit is relevant, as to whether this application presents a “very unusual circumstance[]” as contemplated in IDL’s Encroachment Procedures handbook (Exhibit 3) as argued by ABCD.² The Hearing Officer also finds that the “agency’s experience, . . . and specialized knowledge” is encompassed within Exhibit 2, and therefore, will be admitted and considered for that purpose.

² The weight and legal authority of the policy manual will be addressed below.

Proposed IDL Exhibit 5 is Admitted

During Mr. Ahmer's testimony, alternative options to the proposed breakwater were discussed. These options were drawn on the white board for the Hearing Officer's benefit and offered for the record as proposed Exhibit 5. Tr. 43:18-49:14. ABCD objected to the admission of Exhibit 5 on the grounds of relevance and foundation, and asked that the Hearing Officer afford the hand-drawn examples be given the appropriate weight. Tr. 50:2-17. ABCD renewed this objection on the grounds that the alternatives were not part of ABCD's application. That objection was sustained, and the Hearing Officer reserved ruling on admissibility, foundation, relevance, and the weight these alternatives would carry. Tr. 62:24-63:17. The Hearing Officer hereby finds that Exhibit 5 is admissible and relevant as a demonstrative aid to the Hearing Officer's understanding of technical terms related to navigable encroachments. The Hearing Officer further finds that Mr. Ahmer, based on specialized knowledge and experience during his years as the resource supervisor for the Mica supervisory area office of IDL, has sufficient foundation to testify as to the types of docks and breakwaters that he has become familiar with during his service. Tr. 23:7-9.

As to the weight, the Hearing Officer finds that Exhibit 5 carries little weight. As discussed in the hearing, ABCD is the applicant in these proceedings and is the entity that chose the design characteristics of the application, so while alternatives may be relevant and helpful in understanding these proceedings, the weight is insignificant.

Certain Portions of Testimony Shall be Stricken

Finally, during the proceedings, testimony was offered as to other breakwater applications on Lake Pend Oreille that are subject to a public hearing by this same Hearing Officer. The Hearing Officer **strikes the testimony on page 66:1-67:1 of the transcript and that testimony is not to be considered as any part of these proceedings.**

Conclusion

Based on the above, the following Exhibits are hereby admitted: ABCD Exhibits A-F (marked PET-001 through PET-006) and IDL Exhibits 1-5. **Page 66 and Page 67 Line 1 of the transcript is struck and to be disregarded.** All offered exhibits have been admitted either by stipulation of the parties or pursuant to this evidentiary ruling.

BACKGROUND

Applicant ABCD submitted its Application for Encroachment Permit No. L-96-S-2727 (“Application”) to build a permanent earthen breakwater on Lake Pend Oreille for the benefit of four lots known as the Deepwater Estates (owned by ABCD). Tr. 119:5-6. There is no intent for the public to be able to access the breakwater from the shore and eventually, the parcel where the breakwater is affixed will be owned by Brandon and Amy Chartrey (members of ABCD). Tr. 89:14-23; 108:11-14; 121:19-22. The breakwater is for the protection of ABCD and future landowners of the private property that make up the Deepwater Estates. Tr. 88:21-89:1; 109:13-15; 119:5-6.

IDL’s primary objection to the Application is that ABCD would be creating a large, permanent rock encroachment on the lakebed, designed to benefit only four private lots and that it is rare of IDL to approve permanent rock or earthen breakwaters (or jetties).³ Tr. 65:4-25. IDL has not permitted any rock or earthen breakwaters designed to benefit a single parcel and/or to

³ There is some dispute between a jetty and a breakwater in these proceedings and what this structure should be called. While ABCD’s counsel made a point – and IDL agreed – that a jetty is not defined in statute or administrative code, ABCD members repeatedly used the term “jetty” to describe the structure. Further, ABCD’s application for encroachment permit requests an encroachment of “Other – describe: Jetty.” IDL Ex. 4, p. 17.

Regardless of the title of the structure, the Hearing Officer does not find the distinction important for purposes of this Recommended Order because while the term “jetty” is defined in IDL Exhibit 3, there are no restrictions in the policy manual specific to jetties that would not apply to a breakwater. See IDL Ex. 3, p. 39 (identifying that jetties “shall generally not be permitted” but “only as a method of controlling erosion[,]” which is not what ABCD is requesting here).

protect four or fewer lots on navigable waters. Tr. 27:11-17, 55:10-56:4; 61:22-25; IDL Ex. 3, p. 33; IDL Ex. 1, p. 9. ABCD seems agreeable to transferring ownership and maintenance of the breakwater to the Deepwater Estates Homeowner’s Association, which appears to alleviate the concern that the breakwater would be owned by an individual rather than an entity and is consistent with the IDL policy manual and practice of approving community breakwaters. Tr. 117:20-25; IDL Ex. 3, p. 33.

FINDINGS OF FACT

1. On January 4, 2022, IDL received an application for an earthen breakwater or jetty⁴ in Garfield Bay on Lake Pend Oreille. IDL Ex. 1, p. 1. This application is known as Application for Encroachment Permit No. L-96-S-2727 (“Application”), filed by Brandon Chartrey on behalf of ABCD Homebuilders LLC (ABCD), which owns property identified as RP02388000040A in Sagle, Idaho. IDL Ex. 1, p. 1.

2. On March 1, 2022, ABCD emailed IDL asking to put the Application on hold to allow ABCD to work with the Army Corps of Engineers on a permit. IDL Ex. 1, p. 1.

3. In November 2022, IDL contacted ABCD to inquire about the Application. After multiple communications, on April 10, 2023, IDL received a complete revised application packet for the Encroachment Permit No L-96-S-2727. IDL. Ex. 1, p. 1.

4. On April 12, 2023, IDL sent adjacent neighbor notice to the United States Forest Service, 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

⁴ The parties did not consistently refer to the proposed encroachment as a breakwater or jetty. Instead, they used both terms to describe the proposed encroachment. Unless material to any finding or conclusion, these findings and conclusions will refer to the proposed encroachment as an “encroachment” or a “breakwater.”

regarding the application. IDL Ex. 1, p. 1; *see also* Tr. 24:15-20 (correcting the typo in IDL Exhibit 1).

5. On April 13, 2023, IDL received a “no comment” from Idaho Department of Environmental Quality (DEQ). IDL Ex. 1, p. 2.

6. On April 15 and 22, 2023, an advertisement for the Application ran in the Bonner County Daily Bee. IDL Ex. 1, p. 2.

7. Other than the “no comment” response from DEQ, there is no evidence IDL received any other comments or objections from any notified parties either for or against the Application. IDL Ex. 1, p. 2; *see also* prehearing status conference recorded via Zoom.

8. ABCD’s Application seeks a permit for the encroachment adjacent to a vacant parcel on the east side of Garfield Bay on Lake Pend Oreille. This parcel is described as Parcel ID RP02388000040A, Lot 4 of the Deepwater Estates subdivision. IDL Ex. 1, p. 1.

9. ABCD owns four lots in the Deepwater Estates subdivision, which it intends to develop for sale. Tr. 86:9-17; IDL Ex. 4, p. 1. Members of ABCD may acquire one of the lots for their own use. Tr. 89:14-23; 108:11-24; 121:19-22. ABCD intends to construct the encroachment to protect personal property in the form of docks that may be built on the four lots in the Deepwater Estates subdivision. Tr. 119:5-6 (“So, to me, this is about personal property protection.”).

10. ABCD’s Application describes construction of the proposed project as follows:

The proposed project is to infill into Lake Pend Oreille with clean 2 & 3 man rock to develop a breakwater. The breakwater will be approximately 8’ wide and will extend into the lake approximately 60’ beyond the Southwest property corner. It will be approximately 20’ deep at its deepest point. See attached drawing with projected fill quantities and Elevations.

A mini excavator with rubber tracks will be used to place the rocks in front of itself as it walks its way out. A skid steer track loader with rubber tracks will bring the rocks to the excavator for placement. The breakwater will provide protection to the approximate 800 ft of shoreline and proposed docks. It will also provide protection to the existing marina located to the North of this project. In order to minimize any

potential environmental impact we propose to complete the project during the winter months before the lake is filled in the summer to its ordinary high water. We will use clean rock so that we minimize any billowing and sedimentation. We propose to bring in clean washed crushed rock to lock in the top of the breakwater.

...

IDL Ex. 4, p. 2.

11. The proposed encroachment has been revised since the initial application and as proposed now would extend seventy (70) feet beyond the Artificial High-Water Mark (AHWM) above the water and approximately one hundred and ten (110) feet underneath the water on the lakebed. IDL Ex. 4, p. 19. The width of the proposed breakwater would be eight (8) feet above the AHWM and approximately eighty-five (85) underneath the water on the lakebed, excluding the circular area on the end that has a diameter of eighteen (18) feet. IDL Ex. 4, p. 5 (showing a hand drawn picture of the proposed breakwater), p. 19 (describing the breakwater in the application); IDL Ex. 1, p. 1 (although different measurements were used throughout the application, IDL confirmed in the prehearing statement its understanding of the dimensions of the proposal).

12. ABCD estimates the amount of rock to build the breakwater is between 65-100 truckloads depending on the size of the truck. IDL Ex. 4, p. 19. The project will be built as follows: “the base is built to reach above [ordinary high water] at approx[.] 4-5’, it will have gradually narrowed to approximately 8’ wide – by the time the jetty is narrowed to 8’ the structure will be extremely solid. The equipment operator will continue to walk the machine out and continue building until the jetty reaches 70’ long.” IDL Ex. 4, p. 20.

13. The members of ABCD, namely Brandon Chartrey and Doug Mayne, intend to build the breakwater themselves. Tr. 116:21-117-9.

14. The proposed encroachment would extend out beyond the line of navigability based on the closest adjacent dock. While not clearly in the record, the following testimony was provided to support this finding:

a. “The proposed breakwater would extend outward into the lake approximately 110 feet. The proposed breakwater would be installed out beyond the line of navigability based on the closest adjacent dock. Additionally, breakwaters are typically installed out beyond the line of navigability in order to protect the shoreline and docks.” Tr. 26:11-17.

b. The Application is one for a “[n]avigational encroachment extending beyond the line of navigability” pursuant to Idaho Code section 58-1306. IDL Ex. 4, p. 17; Tr. 41:23-42:7.

c. ABCD’s engineer agrees that the proposed breakwater would extend beyond the line of navigability in order to protect the Deepwater Estates parcels. Tr. 83:14-19.

d. The application was submitted on the form for a commercial, community, or nonnavigational encroachment permit, which includes encroachments extending beyond the line of navigability. IDL Ex. 4.

e. The application pictures show a proposed structure that is further than the only existing dock on ABCD’s property. Ex. 4, p. 14.

f. Based on the foregoing, while the line of navigability is not clearly established in the record, ABCD offered no evidence to contradict IDL’s determination that it was beyond the line of navigability. Therefore, the uncontradicted testimony, the application, and the photographs within the record demonstrate that this a request for an encroachment beyond the line of navigability.

15. IDL presented evidence at the hearing establishing that IDL ordinarily approves such encroachments only when they provide benefit to the public, such as for community marinas or multiple-slip docks that serve an HOA. IDL Ex. 2.

16. Due to the depth of the lake and the steepness of the lakebed at this site, the overall footprint on the lakebed required to create the 8'x70' breakwater/jetty is significant. The overall footprint would be approximately eighty-five (85) feet wide by one hundred and ten feet (110) long. A significant amount of material must be dropped into the lake in order to create the proposed 8'x70' breakwater/jetty.

17. Due to the depth of the bay, it is difficult to estimate the exact dimensions of the proposed breakwater or the amount of material needed to build the breakwater. Tr. 79:8-12 (“The top of [the breakwater] we’re estimating at 50 feet - - 50 to 70 feet. But it - - it was more of a - - we didn’t actually know the depth where the toe of that slope landed. The bay drops off pretty quickly, so it may not be realistic to go out that far.”).

18. The project is further described as requiring 1,960 cubic yards of large rock material to protect 800 feet of shoreline. ABCD Ex. B (marked PET-002-2).

19. ABCD did submit a report that stated the impact to other owners would be insignificant, stating: “[t]he rock jetty could potentially alter the nearshore wave action as it modifies the shoreline, but these effects should be insignificant.” ABCD Ex. B (marked PET-002-4). “Insignificant” is not a quantifiable measure, and therefore, the Hearing Officer finds that this statement lacks credibility for that reason and because any alteration of the shoreline could be detrimental to the public.

20. Garfield Bay experiences extreme weather conditions that can be hazardous to watercraft and docks. The testimony and various reports submitted by ABCD discuss wave heights from five to eleven feet. Tr. 72:9-10.

21. The proposed breakwater is designed to minimize weather impact for the four parcels in Deepwater Estates.

22. The request is to protect private property interests. Tr. 88:21-89:1; 109:13-15; 119:5-6. While the public may be able to seek shelter in the breakwater, the sole motivation and purpose is for private property protection. *Id.*

23. IDL demonstrated that its practice is to only approve breakwaters to benefit the public or a community of individuals. Tr. 27:11-17, 55:10-56:4; 61:22-25; IDL Ex. 3, p. 33; IDL Ex. 1, p. 9.

24. This Hearing Officer makes no finding as to how many parcels/lots would constitute a “community” because it is clear that ownership of the land currently resides with ABCD with an intent to deed the lot affixed to the breakwater to Amy and Brandon Chartrey as individuals.

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 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 IDL, through the 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 of

waters of navigable lakes[.]” I.C. §§ 58-1303, -119; *see also Newton v. MJK/BJK, LLC*, 167 Idaho 236, 242 (2020).

3. Through IDL’s statutory authority, IDL has promulgated Rules for the Regulation of Beds, Waters and Airspace Over Navigable Lakes in the State of Idaho. *See IDAPA 20.03.01.000 et. seq.*

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 (2012) (applying LPA to Lake Pend Oreille encroachment permits).

5. Idaho Code section 58-1306 addresses nonnavigational or commercial navigational encroachments, community navigational encroachments, and navigational encroachments beyond line of navigability. The “line of navigability” means “a line located at such distance waterward of the low water mark established by the length of existing legally permitted encroachments, water depths waterward or the low water mark, and by other relevant criteria determined by the board when a line has not already been established for the body of water in question.” I.C. § 58-1302(g).

6. The evidence in the record demonstrates that the proposed encroachment is beyond the line of navigability. While it would have been helpful for either party to put evidence into the record of what the line of navigability is on east section of Garfield Bay, without any evidence that it is within the line of navigability, this Hearing Officer finds that the proposed request is for an encroachment extending beyond the line of navigability.

7. There was some disagreement at the hearing as to whether this proposed breakwater was a section 58-1305 or a section 58-1306 proceeding. Tr. 56:13-22. Given the finding above

that this is an encroachment beyond the line of navigability, and without any evidence to the contrary, the Hearing Officer finds that this is a section 58-1306 proceeding.⁵

8. The distinction between section 58-1305 and section 58-1306 proceedings is important because of the standard applied. See *Kasenburg*, 154 Idaho at 575 (emphasis added) (“[T]he determination of whether an encroachment extends beyond the line of navigability is crucial: only those encroachments that do not extend beyond the line of navigability are entitled to expedited processing and a presumption in favor or approval[.]”). In other words, encroachments that extend beyond the line of navigability are not entitled to a presumption in favor or approval as argued by ABCD.

9. Here, the evidence demonstrates that the proposed breakwater extends beyond the line of navigability, and therefore, is not entitled to a presumption of approval.

10. Both IDL and ABCD rely on IDL’s policy manual in support of their respective positions. That policy manual states “[g]enerally, breakwaters shall be permitted for community or commercial facilities. Only under unusual circumstances should breakwaters be permitted for other navigational encroachments.” IDL Ex. 3, p. 33. The “unusual circumstances” test cannot be applied here in light of Idaho Code section 67-5207A. Instead, the test to be utilized is that contained in Chapter 13, Title 58.

11. Idaho Code section 58-1306(d) provides the factors for consideration when determining whether the encroachment should be approved.

In the event no objection to the proposed encroachment is filed with the board **and** no hearing is requested or ordered by the board, based upon its investigation and considering the economics of navigational necessity, justification or benefit, public or private, of such proposed encroachment as well as its detrimental effects, if any,

⁵ Under Idaho Code section 58-1306, the statutory deadline for a decision from IDL would have been Friday, August 25, 2023. However, given this dispute as to whether section 58-1305 or section 58-1306 applies, and that this Hearing Officer outlined the timing of any such recommended order and final order and neither party objected, this decision follows the timeline outlined in discussion with counsel rather than the timeline under Idaho Code section 58-1306. Tr. 143:6-14.

upon adjacent real property and lake value factors, the board shall prepare and forward to the applicant by certified mail its decision[.]

I.C. § 58-1306(d) (emphasis added).

12. Here, the Department, through its delegated authority from the Board requested a hearing based on its investigation to consider the following factors: (1) the economics of navigational necessity, (2) justification or benefit, (3) public or private use of encroachment, and (4) detrimental effect, if any, upon adjacent real property and lake value factors.

a. Economics of Navigational Necessity. While testimony was provided by ABCD that the breakwater would provide shelter during high wave activity for the public, the navigational necessity mostly lies in the anticipated future docks for the four individual parcels. While docks and breakwaters are considered encroachments in aid of navigation, it is unclear if there is any true “navigational necessity” from the evidence at the hearing. *See* IDAPA 20.03.04.010.15.

b. Justification or Benefit. The testimony provides that the justification is due to weather patterns on Garfield Bay to benefit four individual parcels.

c. Public or Private Use of Encroachment. While there is some testimony that the public will be able to seek shelter or fish from the encroachment, the substantial evidence in the record demonstrates that the encroachment is to benefit private property. Tr. 89:14-23; 108:11-14; 121:19-22.

d. Detrimental Effect, if any, Upon Adjacent Real Property Owners and Lake Value Factors. The evidence demonstrates that there may be some alteration of the shoreline, which may impact other properties in the area. It is unknown whether it will impact adjacent properties. As to the lake value factors, those include “navigation, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty and water quality.” *Kootnai Env’t*

All., Inc. v. Panhandle Yacht Club, Inc., 105 Idaho 622, 632 (1983); *see also* I.C. § 58-1306(b).

i. During testimony, ABCD provided evidence that the proposed breakwater was chosen because it was more aesthetically pleasing (in addition to being the less expensive option with the longest potentially usable life). See Tr. 132:13-133:16; ABCD Ex. E (labelled PET-005). While that point is well taken, “[t]he LPA requires the state to consider aesthetic beauty to protect *public* health, safety, and welfare when considering encroachments[,]” not personal style preferences. *See Newton*, 167 Idaho at 245 (emphasis original).

ii. The impact on the lake value factors appears unaddressed by the evidence. IDL raised several questions, including sediment flow, expansion, and whether the public could actually utilize the proposed breakwater for recreation. Most of those questions were not answered during the evidentiary hearing.

e. Based on these factors, ABCD has not demonstrated that this application should be approved as currently proposed under Idaho Code section 58-1306.

13. IDL has also raised a concern pursuant to the Public Trust Doctrine. The Public Trust Doctrine is codified at Chapter 12, Title 58.

14. “Under the [Public Trust Doctrine], ‘the state, acting on behalf of the people, has the right to regulate, control and utilize navigable waters for the protection of certain public uses, particularly navigation, commerce and fisheries.’” *Newton*, 167 Idaho at 242 (quoting *Kootenai Env’t All., Inc.*, 105 Idaho at 625). Idaho obtained title to beds and banks of navigable waters below the ordinary high-water mark “subject to a public trust, which ‘preserves the public’s right

of use in such land, and, as a result, restricts the state’s ability to alienate any of its public trust land.” *Newton*, 167 Idaho at 242 (quoting *Mesenbrink v. Hosterman*, 147 Idaho 408, 410 (2008)).

15. The Public Trust Doctrine has been expanded to include not only navigation, but “fish and wildlife habitation, recreation, aesthetic beauty, and water quality.” *Newton*, 167 Idaho at 242.

16. “The public trust doctrine as it is applied in the state of Idaho is solely a limitation on the power of the state to alienate or encumber [the title to the beds off navigable waters,]” and “shall not apply to . . . [t]he protection or exercise of private property rights within the state of Idaho.” I.C. § 58-1203(1), (2)(c). The courts have interpreted this to mean that the Public Trust Doctrine “limits the ability of the [Public Trust Doctrine] to be used to enforce private property rights.” *Newton*, 167 Idaho at 242.

17. While ABCD relies on the percentage or *de minimis* impact this proposed breakwater will have on Lake Pend Oreille in total, pursuant to Idaho Code section 58-1203(2)(c), this application cannot be approved as currently proposed. *Compare Kootenai Env’t All., Inc.*, 105 Idaho at 624 (finding that .01% impediment on encroachment does not violate the Public Trust Doctrine) with *Newton*, 167 Idaho at 242 (“While *Panhandle Yacht Club* is still good law, the Idaho Legislature has since acted on the [Public Trust Doctrine,]” which places limitations on the protection of private property).

18. The undisputed evidence is that this proposed breakwater will be owned (1) by an individual; and (2) to protect a Limited Liability Company’s private property right in the development of these parcels. As currently codified, the Public Trust Doctrine prohibits approval of encroachments that apply to “the protection or exercise of private property rights.”

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RECOMMENDED ORDER

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

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 July 26, 2023. *See* I.C. § 58-1305(c). The agency head's final order in this case must be issued **no later than Monday, September 11, 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 25, 2023.

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

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of August, 2023, I caused to be served a true and correct copy of the foregoing by the following method to:

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Hearing Officer