

BEFORE THE STATE BOARD OF LAND COMMISSIONERS
STATE OF IDAHO

In the Matter of
Application for Encroachment Permit,

Long Bridge Land Holding Company, LLC,
Benjamin Milbrath,

APPLICANT.

Agency Case No. PH-2023-NAV-20-005

OAH Case No. 24-320-01

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 December 22, 2023, IDL received an encroachment permit application for the placement of a seawall and riprap at and below the artificial high water mark (AHWM) on Lake Pend Oreille. A hearing was held on March 5, 2024. Leslie Hayes served as duly appointed hearing officer. On March 27, 2024, the hearing officer issued her Findings of Fact, Conclusions of Law, and Recommended Order ("Recommended Order").

As Director of IDL, my responsibility is to render a decision pursuant to Idaho Code § 58-1306 and IDAPA 20.03.04.030, 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 officer's Recommended Order in light of the entire available record.

II. FINDINGS OF FACT

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

III. CONCLUSIONS OF LAW

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

IV. ORDER

I conclude that the hearing officer's Recommended Order is based on substantial evidence in the record and consistent with the Conclusions of Law with one exception. The hearing officer recommended approving Applicant's request for an encroachment permit for work completed above the AHWM. Recommended Order at 7. Yet, IDL's authority in this matter is limited to encroachments "on, in or above the beds or waters" of Lake Pend Oreille. Idaho Code § 58-1303; *see also Byrd v. Idaho State Bd. of Land Comm'rs*, 169 Idaho 922, 929 (2022) (explaining that "The State has authority to regulate encroachments *below* either the ordinary or artificial high water marks.") (emphasis added). Therefore, I decline to adopt the hearing officer's recommendation to approve work completed above the AHWM, because such approval is outside the scope of IDL's jurisdiction.¹ Save that small difference with the hearing officer's recommendations, I adopt the Recommended Order as my decision in this matter. I hereby incorporate by reference the Recommended Order's Preliminary Evidentiary Rulings, Findings of

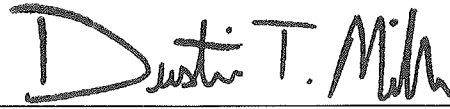
¹ Declining to approve or not approve of work above the AHWM makes no difference to the outcome of this matter, as IDL only objected to Applicant's encroachment permit request as to work performed below the AHWM. IDL Exhibit 1, p. 10.

Fact, Conclusions of Law, and Recommended Order into this Final Order. I have enclosed and served the Recommended 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-96-S-0884F is DENIED to the extent that it seeks authorization of fill and seawall placed below the AHWM. Removal of the unauthorized fill and seawall is subject to the following conditions: (1) IDL will not require an additional application or permit to remove the seawall and fill below the AHWM; (2) Applicant will provide IDL with a revised plan and timeframe prior to beginning work to remove the seawall and fill below the AHWM; (3) Applicant will not begin work on removal of the seawall and fill below the AHWM until IDL approves the plan and timeline; (4) Applicant will restabilize the bank with native vegetation; and (5) Applicant will complete work prior to January 1, 2025.

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 5th day of April, 2024.

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

DUSTIN T. MILLER
Director, Idaho Department of Lands

CERTIFICATE OF MAILING

I hereby certify that on this 5th day of April 2024, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Long Bridge Land Holding Co., LLC
Benjamin Milbrath
P.O. Box 1942
Spokane, WA 99210
Applicant

- U.S. Mail, postage prepaid
- Email: lblhco@outlook.com

HMH Engineering, LLC
Justin Shaw
Agent for Long Bridge Land Holding Co., LLC

- Email: jshaw@hmh-llc.com

Idaho Department of Lands
Deputy Attorney General
JJ Winters
Allison Olson
P.O. Box 83720
Boise, ID 83720-0010
Counsel for IDL

- Statehouse Mail
- Email: jj.winters@ag.idaho.gov
allison.olson@ag.idaho.gov

Idaho Department of Lands
Marde Mensinger
300 N. 6th Street
Boise, ID 83720
IDL Program Manager, Navigable Waters

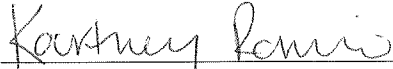
- Hand Delivery
- Email: mmensinger@idl.idaho.gov

Idaho Department of Lands
Mike Ahmer
3258 W. Industrial Loop
Coeur d'Alene ID 83815
IDL Resource Supervisor, Navigable Waters

- U.S. Mail, postage prepaid
- Email: mahmer@idl.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
elaine.maneck@oah.idaho.gov
leslie.hayes@oah.idaho.gov



Kourtney Romine, Workflow Coordinator

BEFORE THE IDAHO DEPARTMENT OF LANDS

In the Matter of)	
)	AGENCY Case No. PH-2023-NAV-20-005
Application for Encroachment Permit,)	
)	OAH Case No. 24-320-01
Long Bridge Land Holding Company, LLC,)	
)	FINDINGS OF FACT, CONCLUSIONS
Benjamin Milbrath,)	OF LAW, AND RECOMMENDED
)	ORDER
Applicant.)	
_____)	

This matter was assigned to Hearing Officer Leslie Hayes on January 4, 2024. A public, in-person administrative Hearing was set for March 5, 2024. A prehearing conference was held and recorded on March 1, 2024. The hearing was held on March 5, 2024, in Sandpoint, Idaho, at the Sandpoint VFW, Post 2453, commencing at 5:00 p.m. Pacific Time. Present at the hearing were Hearing Officer Leslie Hayes, Deputy Attorney General Allison Olson, counsel for Idaho Department of Lands (“IDL”), Mike Ahmer, IDL Lands Resource Supervisor, and Justin Shaw, representative for Long Bridge Land Holding Co., LLC (“Long Bridge”). Also present were IDL representatives Amidy Fuson, Lynn Buhl, Erik Sjoquist, C.R. Christians, and Gwen Victorson. Appearing via Zoom were Eric Wilson and Marde Mensinger for IDL; Ryan Hanna and Jenny Roman for ISDA; and J.J. Winters, Deputy Attorney General, for IDL. The record for these proceedings closed on March 6, 2024.

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

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PRELIMINARY EVIDENTIARY RULINGS

The parties stipulated to all exhibits, including IDL Exhibit 5 (exhibit made at the hearing) and IDL Exhibit 6 (additional public comments received and not distributed prior to the hearing). IDL Exhibits 1-6 are admitted into the agency record.

FINDINGS OF FACT

1. Applicant Benjamin Milbrath is the manager member of Long Bridge Land Holding Company, LLC, seeking an after-the-fact encroachment permit for riprap and a seawall on private submerged lands near the long bridge over Lake Pend Oreille on Highway 95. IDL Exhibit 1, p. 1.

2. On May 11, 2023, IDL completed a site inspection and noticed that seawall and riprap had been placed at and below the Artificial High Water Mark (AHWM). IDL subsequently issued a stop work Order on the construction. IDL Exhibit 2, p. 3.

3. At the time of the stop work Order, neither Long Bridge nor its contractor had applied for a land use permit for the construction. IDL Exhibit 1, p. 10.

4. Construction was halted due to the stop work Order, and on May 19, 2023, Applicant applied for a temporary land use permit allowing for installation of emergency riprap to stabilize the shoreline. IDL Exhibit 2, p. 24.

5. IDL issued the land use permit which became effective on May 26, 2023. IDL Exhibit 2.

6. The permit was issued because the stop work Order resulted in “the bank not being stabilized prior to the elevation of the lake rising to summer pool levels, which could lead to property loss and water quality degradation.” IDL Exhibit 1, p. 10.

7. On December 22, 2023, IDL received a completed application from Applicant seeking an encroachment permit to allow for the previously completed construction to be retroactively authorized. IDL Exhibit 1, p. 3.

8. The Application seeks to “regrade and pave a pedestrian path adjacent to the waterfront to promote better access to the waterfront” by placing seawall and riprap at and below the AHWM on Lake Pend Orielle. IDL Exhibit 2, p. 4.

9. The project creates a safer pathway for waterfront access for the general public. IDL Exhibit 2, p. 2.

10. There is no evidence that this project will have any impact on adjacent property owners or have any undue interference with navigation. *See* IDL Exhibit 4.

11. IDL has no objection to the work completed at or above AHWM. IDL Exhibit 1, p. 10. IDL opposes work that was completed below the AHWM which is within IDL’s jurisdiction to regulate. I.C. § 58-1303.

12. IDL’s objection is to the “approximately 80 lineal feet and 470 square feet of fill, seawall and riprap [that] were constructed below the AHWM[.]” IDL Exhibit 1, p. 10.

13. IDL’s objection impacts a small portion of the pathway. IDL Exhibit 5, p. 2 (noting the area to the right of the red line is the area of impact); Hearing Recording at 18:25-18:55, 19:20-20:00.

14. Mr. Shaw testified, on behalf of Applicant, that the constructed plan deviated from the original design plan by pushing the fill into the lakebed below the AHWM in order to create a path that is more accessible to the public and safer for the public to use. Hearing Recording at 16:30-16.56.

15. Mr. Shaw further testified that Applicant understands that these types of non-navigational encroachments are normally not allowed, but request that the Application be granted because of the increased benefit of public access to the marina and the increased safety of the path. Hearing Recording 17:20-17:50.

16. IDL sent adjacent neighbor notices to the Idaho Transportation Department (ITD), Glen Harvey, and Leslie Wood, as well as to applicable federal, state, and local agencies and organizations. IDL Exhibit 1, p. 3.

17. An advertisement ran in the Bonner County Daily Bee February 14 and 21, 2024. IDL Exhibit 3, p. 11.

18. IDL received public comments from Idaho Department of Environmental Quality (IDEQ), Idaho Conservation League (ICL), and Idaho Department of Fish and Game (IDFG). IDL Exhibit 4.

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 weighed 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 therefore has been given as provided in this act.

I.C. § 58-1301.

2. 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

of waters of navigable lakes[.]” I.C. § 58-1303; I.C. § 58-119(1); see also *Newton v. MJK/BJK, LLC*, 167 Idaho 236, 242 (2020).

3. Through its statutory authority, IDL promulgated Rules for 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. IDL’s authority in this matter is limited to encroachments “on, in or above the beds or waters” of Lake Pend Orielle. *See* I.C. § 58-1301; *see also Byrd v. Idaho State Bd. of Land Commissioners*, 169 Idaho 922, 929 (2022).

6. The seawall and riprap are “on, in or above the beds or waters” of Lake Pend Orielle.

7. Encroachments not in aid of navigation or non-navigational encroachments include encroachments not constructed for the primary use in aid of navigation of the lake. IDAPA 20.03.04.010.16. *See also* I.C. § 58-1302(i).

8. The seawall and riprap are non-navigational encroachments. *See* IDAPA 20.03.04.015.07, .08.

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

10. IDL complied with the IDAPA 20.03.04.030.01 and .03 notice requirements after it received the Application.

11. In considering an application for a non-navigational encroachment, the following conditions apply:

In recognition of continuing private property ownership of lands lying between the natural or ordinary high water mark and the artificial high water mark, the board shall consider unreasonable adverse effect upon adjacent property and undue interference with navigation the most important factors to be considered in granting or denying an application for a . . . community navigational encroachment not extending below the natural or ordinary high water mark. . . . [After a hearing, if] the board determines that the benefits, whether public or private, to be derived from allowing such encroachment exceed its detrimental effects, it shall grant the permit.

I.C. § 58-1306(e).

12. Non-navigational encroachments will not normally be approved by IDL unless the project involves major economic, environmental, or social benefits available to the general public. IDAPA 20.03.04.030.02. “Approval under these circumstances is authorized only when consistent with the public trust doctrine and when there is no feasible alternative with less impact on the public trust values.” IDAPA 20.03.04.030.02.

13. IDL provided testimony through Mr. Ahmer that the non-navigational encroachment fails to provide a major economic, environmental, or social benefit. Hearing Recording at 11:58-12:01. This Hearing Officer disagrees as to the social benefit. Applicant has demonstrated that the safety of the path has vastly increased access to the waterfront, especially for individuals that may be disabled. *Compare* before and after photos from IDL Exhibit 2, p. 2.

14. Despite this social benefit, however, this Hearing Officer finds that the area of impact is insignificant and unlikely to impact the social benefit of the path, and the Hearing Officer agrees with IDL that there are feasible alternatives available. IDL Exhibit 1, p. 10; Hearing Recording at 12:01-12:18 (“Here, the riprap and seawall could have been constructed and built at or above the AHWM and still provided a path down to the water for customers and the public.”)

15. Only a portion of the asphalt path will be impacted if the seawall and riprap are required to be removed. Hearing Recording at 18:25-18:55; 19:20-20:00 and IDL Exhibit 5 (area of impact to the right of the red line).

16. Applicant raised concerns that because the work has already been performed, removing the seawall and riprap would cause disturbance to the lakebed especially since the issue addresses such a small portion of the lakebed. Hearing Recording at 28:43-29:14; *see also* IDL 5.

17. This Hearing Officer expresses similar concerns on the disturbance of the lakebed, but ultimately finds that due to the small size of the area of impact and that most of the path will remain and provide a social benefit that these concerns will be mitigated by IDL and Applicant working together to decrease any negative impact.

19. IDL has requested that if the seawall and fill are removed below the AHWM that Applicant restabilize the bank with native vegetation, complete the project by January 1, 2025, and provide a revised plan to IDL staff prior to beginning work. IDL Exhibit 1, p. 11. IDL will not require a permit for this work. *Id.*

18. Applicant does not object to restabilizing the bank with native vegetation or the timeline requested by IDL. Hearing Recording at 21:20-21:45.

RECOMMENDED ORDER

Based on the foregoing Findings of Facts and Conclusions of Law, the Hearing Officer recommends that Applicant's request be GRANTED as to the work at or above the AHWM and that the Applicant's request be DENIED as to the work below the AHWM. It is further recommended that the following conditions be applied to this Application: (1) IDL will not require an additional application or permit to remove the seawall and fill below the AHWM; (2) Applicant will provide IDL with a revised plan and timeframe prior to beginning work to remove the seawall

and fill below the AHWM; (3) Applicant will not begin work on removal of the seawall and fill below the AHWM until IDL approves the plan and timeline; (4) Applicant will restabilize the bank with native vegetation; and (5) Applicant will complete work prior to January 1, 2025.

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 close of the evidentiary portion in this case, which occurred on March 5, 2024. *See* I.C. § 58-1306(c). The agency head's final order in this case must be issued no later than **April 5, 2024.**

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 two (2) business days after the service date of this recommended order or no later than March 29, 2024. Public witnesses under Idaho's Administrative Procedure Act are not considered parties and, therefore, exceptions from the public cannot be accepted. *See* IRAP Rules 5.13, 150, 158, and 355 (found at IDAPA 04.11.01). 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 March 27, 2024.

OFFICE OF ADMINISTRATIVE HEARINGS

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

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of March, 2024, I caused to be served a true and correct copy of the foregoing by the following method to:

Long Bridge Land Holding Co., LLC
Benjamin Milbrath
P.O. Box 1942
Spokane, WA 99210
(612) 245-9665
Applicant

U.S. Mail
 Email: lblhco@outlook.com

HMH Engineering, LLC
Justin Shaw
Agent for Long Bridge Land Holding Co., LLC

U.S. Mail
 Email: jshaw@hmh-llc.com

Idaho Department of Lands
Deputy Attorneys General
J.J. Winters
Allison Olson
P.O. Box 83720
Boise, ID 83720-0010
(208) 334-2400
Counsel for Respondent IDL

U.S. Mail
 Email: jjwinters@ag.idaho.gov
allison.olson@ag.idaho.gov

Idaho Department of Lands
Marde Mensinger
300 N. 6th Street
Boise, ID 83720
(208) 334-0248
IDL Program Manager for Navigable Waters

U.S. Mail
 Email: mmensinger@idl.idaho.gov

Idaho Department of Lands
Mike Ahmer
IDL Resource Specialist

U.S. Mail
 Email: mahmer@idl.idaho.gov

Kourtney Romine
Service Contact for IDL

U.S. Mail
 Email: kromine@idl.idaho.gov

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

U.S. Mail

Email:

filings@oah.idaho.gov

/s/ Leslie M. Hayes

Leslie M. Hayes