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BEFORE THE STATE BOARD OF LAND COMMISSIONERS  
STATE OF IDAHO

IN THE MATTER OF

Encroachment Permit Application No.  
L96S2798A

Valiant Idaho, LLC and Valiant Idaho II, LLC

Applicants.

Case No. PH-2024-NAV-20-002

OAH Case No. 24-320-05

**PRE-HEARING STATEMENT**

The Idaho Department of Lands (IDL), by and through its counsel of record Allison Olson, and in accordance with the Hearing Officer's request, submits the following Pre-hearing Statement for the above-entitled matter, which has a public hearing set for October 7 and 8, 2024, at 5:00 p.m. PST. The Department also submits a preliminary exhibit list but reserves the right to modify the list prior to the September 27, 2024, disclosure deadline set in the August 30, 2024, Scheduling Order. *IDL-019.*

**I. FACTUAL BACKGROUND**

On June 27, 2024, IDL received a completed application from Valiant Idaho, LLC / Valiant Idaho II, LLC (Valiant / II or Applicant).<sup>1</sup> The application seeks to permit a commercial marina, to

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<sup>1</sup> This application is the fourth iteration of Valient's attempt at developing the Trestle Creek area. Their applications have differed each time and a short synopsis of them can be found at IDL-005-016 on page two, box 17.

install a breakwater, riprap and a pedestrian bridge, and to dredge on Lake Pend Oreille. *IDL-005*.

Within Lake Pend Orielle, this project would take place near the mouth of the North Branch of Trestle Creek, which is situated in the northern part of the lake – almost directly east of Sandpoint, Idaho. According to the application, the “North Branch of Trestle Creek will be redirected to its historic alignment, stabilized, and restored pursuant to a reciprocal easement for access and utilities between the Applicant and the owner of the parcel on which Trestle Creek flows[.]” *IDL-005-016*.

Valiant’s application states that the purpose of this project is to remove and reconstruct a marina and that this project would fulfill Lake Pend Oreille’s high demand, and deficit availability to that demand, for boat slips and waterfront lots. *Id.*

The application delineates that this project would entail: excavating, contouring, and stabilizing the adjacent shoreline; redirecting the North Branch of Trestle Creek; removal of an existing boat launch; construction of 88 fixed pier docks for a commercial marina, seven shore-affixed docks for the private residences, and one private dock for maintenance; installation of a breakwater to protect the new marina; a boat bilge pump out station; constructing a spanning pedestrian bridge to access the marina; placing 1,310 feet of shoreline rip rap and 2,520 feet of combined vegetated riprap along the shoreline.<sup>2</sup>

The application also discusses upland development, which will include: converting an old RV park into seven private home sights, which is where the seven shore-affixed docks will be placed; parking and boat storage areas, and; minor road development for access to the Idaho Club. *IDL-005-016*. However, in this matter, the proposed upland development falls out of IDL’s jurisdiction.

After receiving the Valiant’s application, IDL published the requisite two-week newspaper notice and description. *IDL-004*. The Department also provided a notice to other agencies and interest groups, *IDL-002*, as well as a notice to adjacent neighbors, *IDL-003*. Since Valiant II is reconstructing

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<sup>2</sup> The Department will note that the application is actually for a total of 96 docks. Eighty-eight of which will be a part of the commercial marina. Seven of which will be shore-affixed for the residential lots. One of which will be for private maintenance.

this area, in part for the public, the Department requested a hearing be held to ensure the public could be heard. *IDL-001*. To date, IDL has received approximately 150 comments – one of which came from the Kalispell Tribe of Indians; one of which came from the Forest Service, and; the remainder of which came from the general public.<sup>3</sup> *See IDL-020-022*.

Pursuant to IDL’s request for an administrative hearing, a hearing officer was appointed on August 15, 2024. *IDL-017*. Shortly after, a Notice of Scheduling Conference was sent to the parties, which set the conference for August 30, 2024. *IDL-018*. At the scheduling conference, disclosure dates were set, a pre-hearing conference was set for September 30, 2024, and the public hearing was set for October 7<sup>th</sup> and 8<sup>th</sup>. *IDL-019*.

## **II. LEGAL BACKGROUND**

The Lake Protection Act (LPA), Title 58, Chapter 13, Idaho Code, governs encroachments upon Idaho’s navigable lakes, and provides in pertinent part that “[n]o 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. IDL, acting on behalf of the State of Idaho Board of Land Commissioners (Board) has the power to “regulate, control and [] 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 herein.” I.C. § 58-1303.

Importantly, the legislature declared its intent that in so regulating IDL, vis-à-vis the Board, weigh certain factors equally:

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 or 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 therefor has been given as provided in this act.

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<sup>3</sup> The public comments submitted to the Department are posted online on a rolling basis and are available at: <https://www.idl.idaho.gov/lakes-rivers/administrative-hearings/idaho-club-trestle-creek-project/>.

I.C. § 58-1301 (emphasis added); IDAPA 20.03.04.012.01.

Applications to IDL for construction of nonnavigational encroachments and community navigational encroachments are governed by § 58-1306. Such applications must be submitted or approved by the riparian or littoral owner. I.C. § 58-1306(a). Within ten days of receiving such application, the Board must publish, in the appropriate newspaper, a notice and description of the application once a week for two consecutive weeks. I.C. § 58-1306(b). Within thirty days of the first publication, any Idaho resident, nonresident owner or lessee of real property adjacent to the lake, or any state or federal agency may file an objection to the proposed encroachment and request a hearing. I.C. § 58-1306(c). The Board may also, as it did in the case at hand, order a public hearing be held in the first instance, within ten days of filing the application. I.C. § 58-1306(c). Regardless of how a public hearing comes about: it is to be held within ninety days of the application's filing date; notice of the hearing is to be given once a week for two consecutive weeks prior to the hearing in the appropriate newspaper, and; the Board has thirty days after the hearing to issue their decision. *Id.*

In addition to the LPA's overarching policy and factors to be considered, found in § 58-1301, the Board must also consider the factors in § 58-1306(e), which provides:

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 nonnavigational encroachment, ..., or a community navigational encroachment not extending below the natural or ordinary high water mark.*

I.C. § 58-1306(e) (emphasis added).

If, after a hearing, the Board “determines that the benefits, whether public or private, to be derived from allowing such encroachment exceeds its detrimental effects, [the Board] *shall grant* the permit.” *Id.* (emphasis added). The applicable rules also provide that nonnavigational encroachments will *normally* not be approved and that they will only be considered in cases involving major environmental, economic, or social benefits to the general public. IDAPA 20.03.04.030.02.

### **III. STATEMENT**

#### **A. Littoral Ownership and Signature Requirement.**

The LPA provides that “applications for nonnavigational, community navigational, or commercial navigational encroachments must be submitted or approved by the riparian or littoral owner.” § 58-1306(a). IDAPA 20.03.04.020.02 states that “[o]nly persons who are littoral owners or lessees of a littoral owner shall be eligible to apply for encroachment permits.”

Here, Valiant Idaho, LLC and Valliant II, LLC, via their agent, submitted this application. The companies are littoral owners and have littoral rights. *IDL-005*. Thus, these requirements are met.

#### **B. Distance from Littoral Lines.**

IDAPA 20.03.04.015.13.e provides a rebuttable presumption that community docks or nonnavigational encroachments will have a like adverse effect upon adjacent littoral rights if located closer than twenty-five (25) feet to adjacent littoral right lines. According to the application, the proposed encroachment(s) will not be closer than twenty-five feet to adjacent littoral right lines. Therefore, this presumption is not applicable in this case.

#### **C. Type of Encroachment.**

The Lake Protection Act separates “navigational” and “nonnavigational” encroachments. “Encroachments in aid of navigation” means and includes “docks, piers, floats, pilings, breakwaters, boat ramps, channels or basins, and other such aids to the navigability of the lake, on, in or above the beds or waters of a navigable lake.” I.C. § 58-1302(h); *see also* IDAPA 20.03.04.010.15 (differing slightly from the statutory definition by adding “jet ski and boat lifts, buoys, and other facilities used to support water craft and moorage on, in, or above the beds or waters of a navigable lake.”).

“Encroachments not in aid of navigation” means and includes “all other encroachments on, in or above the beds or waters of a navigable lake, including landfills or other structures not constructed primarily for use in aid of the navigability of the lake.” I.C. § 58-1302(i); IDAPA 20.03.04.010.16 (differing slightly from the statutory definition by including “bridges, utility and power lines, or other

structures not constructed primarily for use in aid of navigation, such as float homes and boat garages.”).

Here, the Applicant is requesting permission to: (i) permit an eighty-eight-dock commercial marina and eight additional private moorage spaces; (ii) install a breakwater; (iii) install riprap; (iv) install a pedestrian bridge, and; (v) dredge on Lake Pend Oreille. *IDL-005-016*. Per the LPA, these encroachments are a combination of encroachments in aid of navigation (commercial marina, additional docks, breakwater) and encroachments not in aid of navigation (riprap, pedestrian bridge, excavation and dredging).

When granting or denying encroachment applications, the LPA requires that the Board determine whether certain encroachment standards are met *and* appreciably consider several delineated factors. First, encroachment standards will be analyzed and then the factors to be considered will be discussed.

***a. Encroachment Standards – Encroachments in aid of navigation***

***i. Commercial Marinas***

The LPA’s implementing regulations detail requirements for commercial marinas. *See* IDAPA 20.03.04.015.03. Applicable in this case are subsections (a), (c), and (d).

IDAPA 20.03.04.15.03 subsection (a) requires that commercial marinas have at least fifty percent of their moorage available for use by the general public on *either* a first come, first served basis for free or rent, *or* a rent or lease agreement for a period of time up to one year. Subsection (a) also prohibits conditions that require membership in a club or organization to moor. Here, Valient II proposes an eighty-eight-dock commercial marina with an additional eight private docks – seven of which are residential, one of which is for maintenance access. *IDL-005-016*. Thus, the subsection (a)’s fifty percent public to private moorage ratio requirement is met.

Valient’s application does not describe how their marina will allocate moorage spaces. Valient’s previous applications sought to permit a marina for Idaho Club members, however, this

current application for an eighty-eight-dock *commercial* marina does not appear to be private. *IDL-005*. Clarity on how Valient plans to make their marina available to the public would be helpful to determine whether this standard has been met.

IDAPA 20.03.04.15.03 subsection (c) states that “[i]f local city or county ordinances governing parking requirements for marinas have not been adopted, commercial marinas must provide a minimum of upland vehicle parking equivalent to one (1) parking space per two (2) public watercraft or float home moorages[,]” and that “[i]n the event of conflict, the local ordinances prevail.” IDAPA 20.03.04.15.03.c. Here, Bonner County Planning Department, Title 12 Subchapter 4.3 – Parking Standards, Table 4-3 is applicable. According to the Table, “Community docks and marinas” are required to have, at minimum, “0.5 spaces / boat slip (5)”.<sup>4</sup> This 0.5 spaces per one boat slip is the same requirement as IDAPA’s one space per 2 moorages. Valient’s application states that there will be “parking and boat storage areas” but does not detail how many parking spaces there will be. *IDL-005-016*. Since Valient’s application does not identify how many parking spaces there will be, it is unclear whether subsection (c) or Bonner County’s Ordinance has been met.

Finally, IDAPA 20.03.04.15.03 subsection (d) provides that “[i]f a commercial marina can be accessed from a road, marina customers must be allowed access via that road.”. In this case, the marina is and will continue to be accessible via a road.

*ii. Breakwater*

Typically, breakwaters will not be authorized if they are below the normal low water level without an extraordinary showing of need. IDAPA 20.03.04.015.06. However, this *does not* apply to floating breakwaters “secured by piling and used to protect private property from recurring wind, wave, or ice damage, or used to control traffic in busy areas of lakes.” *Id.*

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<https://www.bonnercountyid.gov/media/Planning/Application%20Information/BLP/Commercial%20Handout%2011.20.20.pdf#:~:text=Requirements%3A%20Parking%20spaces%20required%20shall%20be%20exclusive%20of,than%20two%20hundred%20%28200%29%20square%20feet%20in%20area.>

Additionally, the “breakwater must be designed to counter wave actions of known wave heights and wave lengths.” *Id.*; *see also* IDAPA 20.03.04.015.13.f (“Encroachments and their building materials must be designed and installed to withstand normally anticipated weather conditions in the area. Docks, piers, and similar structures must be adequately secured to pilings or anchors to prevent displacement due to ice, wind, and waves.”).

Here, it is the Department’s understanding, based on the application, that the breakwater installation will be secured by piling and will be used to protect private property from the potential wind or wave damage. Valiant has also provided an engineer plan which explains the breakwater. *IDL-005-016*. Therefore, the proposed breakwater installation meets the applicable requirements.

***b. Encroachment Standards – Encroachments not in aid of navigation***

Normally, encroachments not in aid of navigation will not be approved. IDAPA 20.03.04.030.02. They “will be considered only in cases involving major environmental, economic, or social benefits to the general public.” *Id.* Here, the exact environmental benefits are uncertain. The economic benefit to the general public is heightened as the operation and existence of a marina will provide revenue streams for a workers’ and the community in general. The social benefits are also heightened as the public will have additional places to moor and recreate.

***i. Riprap***

IDAPA 20.03.04.015 provides the standard requirements for riprap installation. It requires:

Riprap used to stabilize shorelines will consist of rock that is appropriately sized to resist movement from anticipated wave heights or tractive forces of the water flow. The rock must be sound, dense, durable, and angular rock resistant to weathering and free of fines. The riprap must overlie a distinct filter layer which consists of sand, gravel, or nonwoven geotextile fabric. The riprap and filter layer must be keyed into the bed below the ordinary or artificial high water mark, as applicable.

IDAPA 20.03.04.015.08.a. “If an applicant wishes to install riprap with different standards, they must submit a design that is signed and stamped for construction purposes by a professional engineer registered in the state of Idaho.” *Id.*



Here, the Department does not see any concerns with the proposed riprap installation. The Kalispell Tribe's objection letter does express concern that the proposed riprap to stabilize the shoreline is "heavy-handed". Wave and water activity on Lake Pend Orielle is significant and typically requires more than vegetation to stabilize shorelines. However, the Department typically requires use of vegetative riprap, and the application indicates that vegetative riprap will be used.

*ii. Pedestrian Bridge*

IDAPA 20.03.04.010.16, which defines "encroachments not in aid of navigation", classifies "bridges" as a nonnavigational encroachment. The encroachment standards for bridges can be found in IDAPA 20.03.04.015.13.h, "overhead clearance". This provision requires that the overhead clearance between the water and the structure must be "sufficient to pass the largest vessel that may reasonably be anticipated to use the subject waters in the vicinity of the encroachment." IDAPA 20.03.04.015.13.h.i. However, "[i]n no case will the clearance be required to exceed thirty (30) feet" unless (after a public hearing) the Department determines that it is in the public interest to exceed the thirty feet. *Id.*

Irrespective of the height above the water, "approval of structures presenting a hazard may be conditioned upon adequate safety marking to show clearance and otherwise to warn the public of the hazard" and the Department, after considering the applicable requirements of the "United States Coast Guard, the Idaho Transportation Department, the Idaho Public Utilities Commission and any other applicable federal, state, or local regulations" will "specify in the permit the amount of overhead clearance and markings required." IDAPA 20.03.04.015.13.h.i-ii.

Valiant II's proposed pedestrian bridge proposes about a ten-foot clearance between the high-water and the structure, which is sufficient for most watercraft. On August 12, 2024, the Applicant sent the Department a letter from the U.S. Coast Guard that stated the "bridge crossing an un-named lagoon that is a tributary to Lake Pend O'reille ... will not require a Coast Goard bridge permit." *See*

*IDL-20*; see also *IDL-015* (Applicant's initial request to U.S.C.G.). While there may be applicable requirements from other agencies, the proposed "spanning pedestrian bridge" meets IDL's applicable requirements. *IDL-05-016*.

*iii. Excavated or Dredged Channel*

IDPAPA 20.03.04.015.11 subsection (b) requires that an excavated or dredged channel "must have a clear environmental, economic, or social benefit to the people of the state, and must not result in any appreciable environmental degradation." The subsection goes on to state that "[a] channel or basin will not be approved if the cumulative effects of these features in the same navigable lake would be adverse to fisheries or water quality." IDAPA 20.03.04.015.11.b.

This provision requires significant consideration be given to the environmental ramifications of excavating or dredging. Given the current uncertainty as to the extent of the potential environmental degradation and cumulative effects that may result, the Department cannot adequately determine whether this standard has been met at this time.

*c. Applicable Considerations*

"Unreasonable adverse effect upon adjacent property and undue interference with navigation" are the most important factors the Board is to consider when granting or denying a nonnavigational encroachment and community or commercial navigational encroachments. I.C. § 58-1306(e). If, following a hearing, the Board determines that "the benefits, whether public or private, to be derived from allowing such encroachment[s] exceed[s] its detrimental effects, it shall grant the permit." *Id.* (alternation added).

In this case, the Department sent out notices to the littoral neighbors, one of which is the Kalispel Indian Community of The Kalispel Reservation. See *IDL-003*. The Department received a letter from the Tribe objecting to two elements of the subject permit application. *Id.* These two elements pertain to riprap and dredging, which were discussed above. Given the Tribe's comment's limited scope, the Department does not believe that the Tribe is objecting to the application on the

basis of the applicable considerations under § 58-1306(e) – i.e. “unreasonable adverse effect upon adjacent property and undue interference with navigation”. Likely, there will be minimal, if any, *unreasonable* adverse effects upon adjacent property owners, and the application proposes to improve navigation.

The express legislative intent behind the LPA provides –

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 or 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 therefor has been given as provided in this act.

Idaho Code § 58-1301. This provision outlines the clear intent of the legislature that the Board, i.e. the Department, give due consideration and weight between (a) “the protection of property, navigation, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty and water quality and (b) “the navigational or economic necessity or justification for, or benefit to be derived from the proposed encroachment.” *Id.*

Valiant plans to, in short, reconfigure the North Branch of Trestle Creek. *See IDL-005-016*. Additionally, building a commercial marina will increase the boat traffic which will, presumably, contribute to increased anthropogenic impacts. The full extent to which these impacts will affect the factors outlined in I.C. §58-1301 are not fully known to the Department at this time. I.C. § 58-1301.

The Department does not have the knowledge nor expertise to independently assess impacts to all of the factors outlined I.C. § 58-1301 and relies on comments from appropriate sources that do possess that knowledge and expertise when considering applications such as Valient’s. Accordingly, on August 1, 2024, IDL notified the applicable agencies of the project to “determine the opinion of such state agencies as to the likely effect of the proposed encroachment” on the factors delineated in Idaho Code § 58-1301. I.C. § 58-1306; *see also* § 58-1301. To date, IDL has yet to receive any comments from the notified agencies that speak to any potential effects on the factors delineated in

Idaho Code § 58-1301. However, the comment period for this project remains open and such information may be forthcoming.

#### **IV. CONCLUSION**

Given the information provided in the application, Valiant's proposal complies with the applicable encroachment standards, excepting parking and excavation and dredging standards which require additional information to determine compliance.

Based on the current record, the full potential impacts of this application have not yet been fully determined and additional information may be forthcoming. IDL respectfully reserves the right to supplement, clarify, or modify its statements based on the availability of new information.

DATED this 20<sup>th</sup> day of September, 2024.

A handwritten signature in blue ink, appearing to read "Allison Olson", is positioned above a horizontal line.

ALLISON OLSON  
Counsel for IDL

## **CERTIFICATE OF SERVICE**

I hereby certify that on this 20th day of September, 2024, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Will Haberman Valient Idaho, LLC & Valient Idaho II, LLC 151 Clubhouse Way Sandpoint, ID 83864 (407) 973-7875 <i>Applicants</i>	<input checked="" type="checkbox"/> Email: <a href="mailto:wh@theidahoclub.com">wh@theidahoclub.com</a>
Jeremy Grimm Whiskey Rock Planning + Consulting 218 Cedar St., Suite 208 Sandpoint, ID 83864 (208) 946-9944 <i>Applicants' Agent</i>	<input checked="" type="checkbox"/> Email: <a href="mailto:jeremy@whiskeyrockplanning.com">jeremy@whiskeyrockplanning.com</a>
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OAH General Government Division P.O. Box 83720 Boise, ID 83720-0104 816 W. Bannock St. (208) 605-4300	<input checked="" type="checkbox"/> Email: <a href="mailto:filings@oah.idaho.gov">filings@oah.idaho.gov</a>

A handwritten signature in blue ink, appearing to read "Allison Olson".

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Allison Olson  
Counsel for IDL