

**Kootenai Environmental Alliance
Idaho Conservation League * The Lands Council
Spokane Riverkeeper * Idaho Rivers United**

Comments to Idaho Department of Lands and
Preliminary Comments to the U.S. Army Corps of Engineers
Re: Blackwell Island Marina Proposal
Applications: NWW No. 051200031, L-95-S-3212

June 4, 2009

Applicant Marina Yacht Club, LLC is seeking a permit from Idaho Department of Lands (IDL) and the U. S. Corps of Engineers for its plan to enlarge and renovate Blackwell Island Marina. The marina has been in existence since 1944, and the Applicant intends to make very significant changes to the existing facilities. It is expected that the enlargement and renovation of the marina will allow bigger boats to use the marina, including 50 to 60 foot yachts. Relevant to the IDL application, the Applicant intends to enlarge the entire marina including an extension of the marina further into the lake; it plans to relocate the marina's fuel pump to the narrowest end of the marina; it proposes a reconstruction and upgrade of the marina's private boat launch; and the application proposes the addition of an industrial lift at the marina's northern end. Moreover, the Applicant intends to deepen the marina's channel by excavating contaminated material from the lake bed and then permanently storing that material onsite within the flood plain. The proposed plan includes the excavation of toxic sediments containing lead, arsenic, cadmium, zinc, silver, and other metals.

The joint permit application is for both the Corps of Engineers and IDL, yet the comment periods for the two agencies do not coincide. We intend these comments to apply to both agencies. More specifically, we intend our comments to IDL to be incorporated with our comments to the Army Corps of Engineers and vice versa. Additional written comments will be provided to the Army Corps by the close of its comment period.

DISCUSSION

I. The IDL permit must appropriately balance the requested encroachment with the statutorily and administratively prescribed factors.

All proposed encroachments upon the waters of navigable lakes within the state of Idaho are forbidden unless approved by the state. Idaho Code §58-1301. In deciding whether a proposed encroachment should be allowed the state must give due consideration to “the protection of property, navigation, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty and water quality...” *Id.* These considerations must be “weighed against the navigational or economic necessity or justification for, or benefit to be derived from the proposed encroachment.” *Id.* IDL is required to balance these competing interests while deciding whether to approve a permit for navigational encroachments. *Brett v. Eleventh Street Dockworkers Association*, 141 Idaho 517 (2005).

A. The Marine Yacht Club’s proposed action is an encroachment because the marina’s expansion constitutes an encroachment in the aid of navigation, the marina itself is a commercial marina, and the proposed action includes the dredging and excavation of a channel.

An encroachment in the aid of navigation “includes docks, piers, floats, pilings, breakwaters, boat ramps, channels or basins...” in the waters of a navigable lake. *See* Idaho Code §58-1302 and IDAPA 20.03.04.015. A commercial marina is a “navigational encroachment whose primary purpose is to provide moorage for rental or for free to the general public. IDAPA 20.03.04.09. The redredging or excavation of a channel that provides access to navigable waters requires an encroachment permit. IDAPA 20.03.04.011.

The expansion of Blackwell Island Marina constitutes an encroachment in the aid of navigation because it includes additional docks, piers, floats, and pilings that are to be placed in the waters of a navigable lake. In addition, the marina itself is an encroachment because it is a commercial marina whose primary purpose is to provide moorage for rental to the general public. Lastly, the proposed dredging and excavation of the marina is an encroachment because the channel being dredged and excavated provides access to navigable waters.

B. The proposed encroachment may be denied or subject to conditions because the threat to public safety, public health and the environment may outweigh the benefits provided by the encroachment.

The statutorily required factors in determining whether a permit should be approved include the protection of property, navigation, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, water quality, and economics. Idaho Code §58-1301. In addition, when an encroachment is created by redredging and excavation the IDL must determine that the action has “a clear environmental,

economic, or social benefit to the people of the state, and shall not result in any appreciable environmental degradation.” IDAPA 20.03.04.011.

1. The proposed plan impacts public health, public safety, and the environment.

(a) Storage of sediments on-site presents a risk.

The proposal includes permanent, on-site storage of toxic sediments in a private repository within the flood plain of a heavily populated area. Any toxic sediment released from the proposed confined disposal facilities would almost certainly end up in the Lake, Spokane River or the Spokane Valley - Rathdrum Prairie Aquifer.

The release of these toxic sediments into Coeur d’Alene Lake, the Spokane River, and the Spokane Valley-Rathdrum Prairie Aquifer poses numerous threats to human health. For example, scores of families, many from immigrant communities, recreate both in and around the Spokane River. The Washington State Department of Ecology has made great strides in cleaning up popular recreation sites to make them safer and more attractive to recreationists. Toxic releases from the proposed repository would compromise these expensive, time-consuming clean-up efforts and put public health at risk once again. Furthermore, any contamination of the Spokane Valley-Rathdrum Prairie Aquifer could have serious human health consequences on the 500,000+ people that depend on it as a sole source of drinking water.

The sediment storage facilities are designated CDF1 and CDF2. CDF1 is proposed to be lined and capped and is intended to provide permanent containment of the toxic materials. However, the plan does not provide an estimate for how long the containment is designed to last, plans for long-term monitoring or maintenance, and lacks engineering details needed to make a reasonable assessment of the future risks to human health and the environment. Furthermore, the plan does not describe how, in the likely event that water eventually leaks into CDF1, such leachate would be monitored, pumped and/or treated. Also, the plan fails to anticipate the possibility of hydrostatic pressure from a rising water table underneath the CDF1 liner. CDF1 is to be lined with local clay from a local source that may not have the hydrologic characteristics necessary to perform as a functional, long-term barrier to leaching metals. The plan does not include a back-up plan in the event the testing of the clay liner shows it does not have the same characteristics as commercially available material that is certified for this purpose. CDF2, which will contain water soluble cadmium and zinc, is designed to be unlined and capped by permeable material. Thus, if CDF1's structure fails or CDF2 is exposed to a flood, toxins are likely to be released. All of these factors make water contamination and dispersal of toxic sediments likely.

Finally, the Plan does not provide for institutional controls on the future land use and potential pathways for human exposure to the contaminants contained in CDF1 or CDF2.

(b) There is no plan for monitoring or for ongoing protection and maintenance of the CDFs.

The application does not provide for any independent monitoring and oversight – during construction or afterward. Independent inspections should take place during dredging and sediment storage operations and should continue periodically throughout the life of the marina to ensure dissolved and excavated toxic materials are not making their way back into the environment. The location of the proposed repository makes independent monitoring that much more important as it is a busy recreation area near the urban core of Coeur d’ Alene. Moreover, measures designed to protect the integrity of the CDFs, such as deed restrictions, should be placed to ensure that future development or other potentially damaging actions does not occur on the CDFs. Toxic material should not be stored onsite in a flood plain unless the storage operation is subject to rigorous independent monitoring and long term protection.

(c) The plan impacts public and boater safety.

Enlargement of the marina will allow larger boats and a greater number of jet skis to enter and use the Lake. Larger boats have an increased displacement which leads to larger wakes. These wakes create a greater strain on the banks of the lake and make increased bank erosion likely. Jet skis increase both noise and air pollution on the lake.

The proposed plan seeks to use riprap and vegetation or a seawall to stabilize the banks of the marina. The design may threaten native species of fish as it

provides habitat for invasive species. The plan should include more up-to-date stabilization methods that do not threaten native species.

The proposal is likely to impact safety. The proposed location of the fuel dock will increase boater congestion and decrease the marina's ability to respond to a petroleum spill. The enlarged marina's addition of larger boats will increase congestion in the marina channel. This increased boater congestion will not only threaten the safety of boaters; it will increase the threat that kayakers face when navigating the marina's channel. The fuel dock, which may be unnecessary and not economically viable, should be eliminated, or at the very least, it should be moved to the Southern end of the marina. The marina should probably include "kayaker only" lanes for safety. The proposed plan also includes an industrial lift which requires increased dredging of the entirety of marina's channel. To reduce the amount of material to be dredged, the lift should be relocated to the Southern end of the marina.

(d) The Plan impacts Cougar Bay habitat.

Cougar Bay is a quiet natural area. Increasing the size of the Blackwell Island marina to allow more large boats and jet-skis will put unnecessary pressure on the wildlife that inhabits Cougar Bay and as a result diminish its quality.

2. The proposed plan is not beneficial to the public.

The plan is essentially a private encroachment on a public lake. The plan increases the existing marina's footprint on the lake from 15 acres to 18 acres. The plan's three acre expansion into the lake does not coincide with any additional

public benefit. On its face, the expansion violates the public trust because it gives the use of public space to a private entity without adequate compensation to the public.

The plan does not offer genuine public access to the marina's boat ramp. IDL's procedural manual requires commercial marinas to have public boat ramps unless unusual circumstances exist. (Navigable Waters Procedures, Section 25.) The plan does not assert any unusual circumstances that would allow them to have a private boat launch. Therefore, the marina owners/operators should be required to allow public access to the boat launch.

Lastly, it is not clear that the enlarged marina is necessary. There is no evidence that the public needs additional moorage capacity, and permitting large boat slips that will probably only be used as house boats may prove to be unwise.

3. The Plan is Inconsistent with Special Resource Water Protection.

Lake Coeur d'Alene and the Spokane-Valley Rathdrum Prairie Aquifer are designated "Special Resource Water." This designation requires a higher level of protection for water quality to protect the Aquifer's sole-source drinking water resources and the Lake's outstanding ecological, recreational and aesthetic qualities. The reconstruction of the marina may negatively impact water quality, fish and wildlife habitat, and the exceptional recreational and aesthetic values of the area.

Idaho code (IDAPA 20.03.04.010.20) requires the State to ensure that the use of public trust resources is consistent with identified public trust values. Based on

the probable impacts of this project, it is highly unlikely that the proposed project is consistent with the public trust values associated with the Lake.

CONCLUSION

The proposed plan, detailed in the permit application constitutes an encroachment governed by IDL. As such, it must weigh the statutorily prescribed factors when deciding whether or not a permit for an encroachment should be approved. This application includes a proposed plan that has the potential to threaten public health, public safety, and the environment. And it does so while encroaching on a public resource and providing little actual public benefit. On balance, the benefits are few, the risks serious, and therefore the plan should be amended or otherwise conditioned to reduce risks and to protect the public interest.

Respectfully submitted,

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