

**BEFORE THE DEPARTMENT OF WATER RESOURCES**

**OF THE STATE OF IDAHO**

**IN THE MATTER OF STREAM CHANNEL ) PRELIMINARY ORDER  
ALTERATION PERMIT NO. S65-20105 IN ) AFFIRMING ISSUANCE  
THE NAME OF L.B. INDUSTRIES, INC. ) OF A PERMIT  
\_\_\_\_\_ )**

These matters having come before the Idaho Department of Water Resources (“Department”) as a petition for hearing, the Department finds, concludes, and orders:

**PROCEDURAL HISTORY**

In administering the Stream Channel Protection Act, the Department shares an application form with the Idaho Department of Lands and the U.S. Army Corps of Engineers. The shared application form is called a *Joint Application for Permit*. On September 5, 2007, L.B. Industries, Inc. (“Applicant”), submitted a *Joint Application for Permit* (“application”) to the U.S. Army Corps of Engineers. A copy of the application was forwarded to the Department, where it was labeled S65-20105 for record-keeping purposes.

Application S65-20105 proposed to “[c]onstruct a gabion reinforced bank along a portion of the Payette River to protect access to the West Side Sewer District lift station.”

Pursuant to Idaho Code § 42-3804, the Department sought comment on the application from the U.S. Army Corps of Engineers, Idaho Dept. of Fish and Game, Idaho Department of Environmental Quality, Valley County, Idaho Rivers United, and owners of property adjoining the parcel that is the subject of the application. Over time the Department received comment from:

- Several owners of adjacent property
- The U.S. Army Corps of Engineers
- Valley County
- Idaho Rivers United
- Idaho Department of Fish and Game
- Idaho Department of Environmental Quality
- Idaho Department of Lands

The Applicant submitted amended versions of the application on December 12, 2007, and September 1, 2009.

On March 6, 2008, the Department issued a letter approving the application subject to certain conditions.

On June 13, 2008, the Department rescinded approval of the application pending further investigation.

On June 6, 2010, the Department issued a letter approving the amended application subject to certain conditions.

On June 16, 2010, the Department received a petition for hearing from the Payette River Subdivision #1 Home Owners Association contesting the Department's approval of the permit. In subsequent proceedings, the Department determined that the party requesting the hearing is more appropriately termed the Payette River Property Owners Association, Inc. ("Petitioner").

On October 6, 2010, the Department received the Petitioner's *Supplement Petition for Hearing and Motion for Stay of Permit*. Among the motions in this document, the Petitioner sought award of its attorney's fees.

On October 18, 2010, the Department held a pre-hearing conference with the Applicant and the Petitioner to discuss the application, the petition, and the procedures for resolving the matter.

On November 1, 2010, the Department issued a *Preliminary Order Granting Motion for Stay* of the permit.

On November 2, 2010, the Department sent the Applicant and the Petitioner ("parties") a *Notice of Hearing, Order Authorizing Discovery, and Pre-Hearing Order* ("order").

On January 5, 2011, the Department issued an order denying the Applicant's motion to dismiss the petition, granting the petitioner's motion to amend and supplement the petition, granting the petitioner's motion for stay of permit, and dismissing the Applicant's objection to the Petitioner's first set of interrogatories, request for production of documents, and requests for admission.

On January 28, 2011, the Department issued an *Order Denying Motion to Compel and Request for Continuance of Hearing*.

On February 8, 2011, the Department issued an *Order Granting Petition for Disqualification of Hearing Officer* disqualifying hearing officer John Westra. In the cover letter for the order, the Department notified the parties that Shelley Keen would be the hearing officer.

On February 22, 2011, the Department issued an *Order Granting Applicant's Motion to Compel Discovery*.

On February 23, 2011, the Department issued an *Order Denying Applicant's Motion in Limine* authorizing the petitioner to introduce evidence at the hearing that is not already in the Department's record for the application.

On February 24, 2011, the Department issued an *Order Requiring Petitioner to Disclose Expert Witnesses and Exhibits*.

On March 3 and 4, 2011, at the Department's State Office in Boise, Idaho, the hearing officer conducted a hearing in connection with the application.

Attorney Bruce Smith represented the Applicant at the hearing. Attorney Kahle Becker represented the Petitioner at the hearing.

The issues raised by the Petitioner include:

- What is the purpose of doing the work?
- What is the necessity and justification for the proposed alteration?
- Is the proposal a reasonable means of accomplishing the purpose?
- Will the alteration be a permanent solution?
- Will the alteration pass anticipated water flows without creating harmful flooding or erosion problems upstream or downstream?
- What effect will the alteration have on fish habitat?
- Will the materials used or the removal of ground cover create turbidity or other water quality problems?
- Will the alteration interfere with recreational use of the stream?
- Will the alteration detract from the aesthetic beauty of the area?
- What modification or alternative solutions are reasonably possible which would reduce the disturbance to the stream channel and its environment and/or better accomplish the desired goal of the proposed alteration?
- Is the alteration to be accomplished in accordance with the adopted minimum standards?
- Are there public safety factors to consider?
- Does the Department have authority to authorize the removal of islands, which are state land?

The following witnesses testified at the hearing:

- Joe Pachner, P.E., of KM Engineering LLP
- Randall Zuniga
- Michael S. Chapman
- Alan Wright
- Dale Welch, P.E.
- Aaron Golart of the Department
- Judy Secrist
- John Lund

At the hearing, the hearing officer admitted the following items into evidence:

<b>Exhibit No.</b>	<b>Exhibit Description</b>
Applicant A	Judy Secrist comment letter dated Jan. 6, 2008
Applicant B	Email from Judy Secrist to Kathy Gale dated Dec. 6, 2007
Applicant C	Email from Judy Secrist to Kathy Gale dated Dec. 10, 2007
Applicant D	Email from Judy Secrist to Aaron Golart dated Jan. 18, 2008
Applicant E	Email from Judy Secrist to Western Region dated Jan 18, 2008
Applicant F	Email from Judy Secrist to Western Region dated Jan. 18, 2008
Applicant G	Email from Judy Secrist to Western Region dated Jan. 18, 2008
Applicant H	Email from Judy Secrist to Western Region dated Jan. 18, 2008
Applicant I	Email from Judy Secrist to Western Region dated Jan. 18, 2008

Applicant J	Email from Judy Secrist to Western Region dated Jan. 18, 2008
Applicant K	Email from Kathy Gale to Aaron Golart & Barbara McEvoy
Applicant L	Email from Mark Mason IDEQ to Judy Secrist dated Feb. 26, 2008
Applicant M	IDWR Invoice for Special Services dated Aug. 27, 2010
Applicant N	Granting of Amended Joint App S65-20105
Applicant O	Letter from Judy Secrist to Aaron Golart dated Dec. 10, 2009
Applicant P	Letter from Judy Secrist to Aaron Golart dated Nov. 16, 2009
Applicant Q	Letter from Judy Secrist to Aaron Golart dated Mar. 3, 2008
Applicant R	US Army Corps of Engineer's authorization (NWP 13)
Applicant S	Revised Joint Application for Permit
Applicant T	Hydraulic Analysis Bank Stabilization Project
Applicant U	Email from Mark Mason IDEQ to Judy/Bob Secrist dated Feb. 26, 2008
Applicant V	Email from Jeff Lappin to Judy/Bob Secrist dated Jan. 14, 2008
Applicant W	Emails from Robin Richardson to Judy/Bob Secrist dated Jan. 24, 2008
Applicant X	Emails from Cynda Herrick, Valley County P&Z to Judy/Bob Secrist
Applicant Y	Email from Jack Gantz to Kathy Gale dated Oct. 7, 2009
Applicant Z	Conversation notes from John Westra's meeting with the Secrists
Applicant AA	Office day referral form dated Dec. 27, 2007
Applicant BB	Stream Channel Staff Analysis
Applicant CC	1 <sup>st</sup> pg. of US Army Corps of Engineer's authorization (NWP 13) and maps
Petitioner 277-283	Joint Application and Attachments
Petitioner 285-291	Letter from Shaun Fielding
Petitioner 149-150	Preliminary Plat
Petitioner 105	Letter from Scott Corkill - IDL
Petitioner 106	Letter from Sima Muroff
Petitioner 159	Picture of Site
Petitioner 151	Valley County Minimum Standards
Petitioner 138-142	Comments of Randal Zuniga 2009
Petitioner 143	Letter from Judy Secrist enclosing comments of Randal Zuniga
Petitioner 184-185	Comments of Randal Zuniga 2007
Petitioner 137	Comments of Dale E. Welch
Petitioner 121-122	Letter from IDFG to Aaron Golart
Petitioner 275	June 13, 2008 IDWR Letter
Petitioner 156, 158, 160	Site Photographs
Petitioner 305	Email of Aaron Golart
Petitioner 220	Letter from T-O to Golart
Petitioner 153, 155	Site Photographs
Petitioner 100, 101, 102, 104	Letters
Petitioner 117-120	Emails to/from Judy Secrist
Petitioner 103	Emails between Herrick & Secrist
Petitioner 123-136	Warranty Deed
Petitioner 183	Letter from Lund to IDWR
D 1	Diagram 1 – aerial view of project site
D 2	Diagram 2 – drawing of spruce tree revetment
D 3	Diagram 3 – cross-sectional view of stream channel, bank and roadway

The hearing officer also indicated for the record that he may rely on:

- The Department's cumulative file for the application, including the application, correspondence related to the application, and other information typically included in the file which is and has been available for review by the parties.
- Holdings in past decisions and orders of the Department as the holdings may apply to the application

- Streamflow records for the North Fork of the Payette River published by the United States Geological Survey

At the hearing the Petitioner withdrew its motion for award of attorney's fees.

Based on the evidence presented at the hearing, the hearing officer finds, concludes, and orders as follows:

### **FINDINGS OF FACT**

1. The Applicant proposes to alter the channel of the North Fork Payette River ("river") to protect approximately 340 linear feet of the left (south) bank (the "riverbank") in the S½, Section 30, Township 18 North, Range 3 East, B.M., about four miles southwest of the City of McCall.
2. The Applicant owns the riverfront property that is the subject of the stream channel alteration application. The Applicant's parcel of land lies adjacent to the river for approximately 0.75 miles. The parcel is several hundred feet wide on its southwest end. On the east end, however, it forms a narrow neck or panhandle between the river and the lots of the Payette River Subdivision No. 1. This narrow panhandle is approximately 56 feet wide. The road which provides access to the Applicant's parcel of land runs the length of this panhandle. In 2008 the Applicant's engineering consultant drafted a preliminary plat showing how the Applicant's parcel of land might be subdivided into building lots. The proposed stream channel alteration project is intended to prevent further erosion of the riverbank along this panhandle.
3. At the location of the proposed stream channel alteration, a sewer line owned by West Mountain Sewer and Water, Inc., is buried in the ground parallel to the river about ten to fifteen feet from the riverbank. The exact distance of the sewer line from the riverbank is not known. A sewer lift pump station is also located on the Applicant's property west of the location of the proposed stream channel alteration. The road along the panhandle of the Applicant's property provides access to the lift station.
4. Structural failure of the sewer line would cause raw sewage to flow into the North Fork Payette River.
5. West Mountain Sewer and Water, Inc., has not sought help from the Applicant to secure its sewer line, nor has West Mountain Sewer and Water, Inc., advocated for approval of the application.
6. The river bottom land along the North Fork Payette River in the vicinity of the proposed stream channel alteration project is characterized by numerous meander scars, which indicate a long history of side-to-side bank erosion. The pace of bank erosion is erratic. Depending on river flows, it can be gradual or catastrophic.

7. At the location of the proposed stream channel alteration, the river bends from a southerly course to a westerly course. The panhandle of the Applicant's property lies on the outside of the bend where the highest velocity flows are typically concentrated. Consequently, the riverbank has a recent history of erosion caused by the hydraulic action of the North Fork Payette River. Fill and heavy boulder riprap were placed along the riverbank approximately 10 years ago, more or less, to armor it. Despite the placement of fill and riprap in the past, the riverbank is undergoing further fluvial erosion.
8. A series of islands lies in the river channel immediately upstream from the subject riverbank. The two islands located farthest upstream are a few hundred feet long. They separate the river into two channels and deflect the velocity of the river current away from the center of the river toward the banks.
9. The Applicant proposes to stabilize the riverbank with the following measures:
  - Upstream from the riverbank, the Applicant proposes to construct up to seven rock barbs with tree root wads extending from the bank into the river channel south of the islands. The rock barbs are intended to slow the current of the river and deflect it back into the center of the river channel. The barbs would be more or less evenly spaced along a 408-foot long section of riverbank across from the islands. Thus, the barbs will direct current away from the bank and toward the islands for virtually the whole length of the islands. The Applicant expects the change in current to result in removal of the islands by natural erosive processes over time.
  - Along the riverbank for approximately 338 feet the Applicant proposes to protect the existing bank by constructing a revetment consisting of horizontally laid spruce trees underlain by rock and gravel fill. The spruce trees will be anchored to the riverbank. This "spruce tree revetment" is intended to armor the riverbank and slow the velocity of the stream flow along the riverbank. The proposed revetment would extend only 6 feet to 9 feet into the river channel. It would not widen the Applicant's property with extensive filling of the river channel. Although spruce trees are biodegradable, the Applicant does not anticipate long-term maintenance to be necessary once the current of the river runs mid-channel.
10. During construction of the spruce tree revetment, the Applicant proposes to reduce turbidity and sedimentation in the stream channel by constructing a cofferdam to redirect the stream flow around the construction site and provide a more or less dry area in which to work.
11. The Applicant proposes to plant willow bushes along the riverbank upslope from the spruce tree revetment to provide further erosion control and to enhance the aesthetic appearance of the altered riverbank.
12. The Applicant abandoned a plan to create a scour channel across the gravel bar on the northern bank of the river across from the riverbank. Natural changes to the river during high flows removed the need for the proposed scour channel.

13. The permit authorized the excavation of scour channels across the two large islands to speed up the process by which the river current, deflected by the barbs into the center of the river, would remove the islands. The Applicant now hopes to avoid creating the scour channels because it will be expensive to create them and because installation of the barbs may be enough to cause the current of the river to remove the islands.
14. The islands are accretion lands owned by the State of Idaho and managed by the Idaho Department of Lands.
15. Altering the current of the river so that fluvial processes erode the islands will cause the river to redeposit the island material somewhere. The Applicant's engineering consultant believes the material will be redeposited along the banks of the river as the current is redirected into the center of the channel.
16. The Applicant's engineering consultant prepared a hydraulic model to analyze the potential impacts of the proposed stream channel alteration project on the flows of the North Fork Payette River. The model predicts a maximum increase of 0.11 feet in river surface elevation during a 100-year flood event. The model predicts an increased channel velocity downstream from the proposed alteration of no more than 0.3 feet per second. The model does not account for redeposition of the island material.
17. The stretch of river beginning upstream from the islands and extending downstream past the riverbank is popular for fishing. Fishing has improved in recent years, and fishermen use the islands to access the river.
18. The stretch of river beginning upstream from the islands and extending downstream past the riverbank is popular for canoeing and kayaking. At least initially, installation of the revetment and barbs would likely complicate navigation down the river, possibly requiring portage.
19. The Applicant proposes to construct the stream channel alteration during the early winter when streamflows typically are low.
20. Bald eagles nest within half a mile of the proposed stream channel alteration project. The Idaho Department of Fish and Game recommends avoiding disturbance of the nesting eagles by limiting the construction period to the time from mid-August through January.
21. Besides eagles, other large wild animals frequent the area where the proposed stream channel alteration would occur.
22. The Idaho Department of Environmental Quality (IDEQ) has established Total Maximum Daily Load (TMDL) limits for pollutants in the segment of the North Fork Payette River where the proposed alteration would occur. Consequently, IDEQ recommends taking measures to minimize turbidity and instream activity during construction.

23. The Payette River Subdivision No. 1 sits on high ground south of the riverbank where the proposed stream channel alteration would occur.
24. On June 6, 2010, the Department issued Stream Channel Alteration Permit S65-20105 (“permit”) to L.B. Industries, Inc. (“Applicant”). The permit authorizes the completion of the proposed project subject to the minimum construction standards in Stream Channel Alteration Rules 56 (Construction Procedures), 59 (Drop Structures), and 63 (Removal of Sand and Gravel Deposits). The permit is also subject to a set of general conditions typically applied to Stream Channel Alteration Permits and to a set of special conditions unique to this permit. The special conditions include the following:

Construction shall take place during low flow to minimize turbidity and protect water quality. Spruce tree revetment and riprap construction shall take place in the dry. A temporary cofferdam of non-erodible material shall be installed and properly functioning before construction commences.

Woody stream bank vegetation shall be protected to the extent practical during construction. Willows or other native woody vegetation shall be planted within disturbed stream banks and constructed structures.

Disturbed areas not protected with willows or native woody vegetation shall be seeded with a perennial grass/forb/shrub mixture to reduce erosion, restore bank cover and habitat, and inhibit invasion of noxious weeds.

Silt fencing or other erosion/sedimentation control measures shall be installed between any area of earth disturbance and the water. Erosion and sediment control measures shall be installed according to the manufacturer’s specifications, during construction, and must be maintained until construction is completed and the disturbed ground is revegetated and stable.

This permit shall expire December 31, 2012.

## **CONCLUSIONS OF LAW**

### **Governing Statutes and Rules**

1. Idaho Code § 42-3801 states:

The legislature of the state of Idaho hereby declares that the public health, safety and welfare requires that the stream channels of the state and their environments be protected against alteration for the protection of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, and water quality. No alteration of any stream channel shall hereafter be made unless approval therefor has been given as provided in this act.



2. Idaho Code § 42-3803(a) states, in pertinent part:

No person shall engage in any project or activity which will alter a stream channel without first applying to and receiving a permit therefor from the director.

3. Idaho Code § 42-1701A(3) states:

Unless the right to a hearing before the director or the water resource board is otherwise provided by statute, any person aggrieved by any action of the director, including any decision, determination, order or other action, including action upon any application for a permit, license, certificate, approval, registration, or similar form of permission required by law to be issued by the director, who is aggrieved by the action of the director, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action. The person shall file with the director, within fifteen (15) days after receipt of written notice of the action issued by the director, or receipt of actual notice, a written petition stating the grounds for contesting the action by the director and requesting a hearing. The director shall give such notice of the petition as is necessary to provide other affected persons an opportunity to participate in the proceeding. The hearing shall be held and conducted in accordance with the provisions of subsections (1) and (2) of this section. Judicial review of any final order of the director issued following the hearing shall be had pursuant to subsection (4) of this section.

4. Stream Channel Alteration Rule 35.01 (IDAPA 37.03.07.035.01) states:

The following items shall be among those considered by the Director prior to issuing a permit:

- a. What is the purpose of doing the work?
- b. What is the necessity and justification for the proposed alteration?
- c. Is the proposal a reasonable means of accomplishing the purpose?
- d. Will the alteration be a permanent solution?
- e. Will the alteration pass anticipated water flows without creating harmful flooding or erosion problems upstream or downstream?
- f. What effect will the alteration have on fish habitat?
- g. Will the materials used or the removal of ground cover create turbidity or other water quality problems?
- h. Will the alteration interfere with recreational use of the stream?

- i. Will the alteration detract from the aesthetic beauty of the area?
  - j. What modification or alternative solutions are reasonably possible which would reduce the disturbance to the stream channel and its environment and/or better accomplish the desired goal of the proposed alteration?
  - k. Is the alteration to be accomplished in accordance with the adopted minimum standards?
  - l. Are there public safety factors to consider?
5. Neither Idaho Code Title 42, Section 38, nor Idaho Code § 42-1701A, nor the Stream Channel Alteration Rules (IDAPA 37.03.07), nor the Department's Rules of Procedure (IDAPA 37.01.01) establishes the burden of persuasion for the items listed in Stream Channel Alteration Rule 35.01 (IDAPA 37.03.07.035.01).

**Satisfaction of Rule 35.01 (IDAPA 37.03.07.035.01) Review Criteria**

**What is the purpose of doing the work?**

6. The purpose for doing the work is to prevent the North Fork Payette River from further eroding the Applicant's parcel of land.

**What is the necessity and justification for the proposed alteration?**

7. The proposed alteration is necessary and justified in two ways. First, it protects a narrow strip of land across which the Applicant must travel to access most of its land. Without this narrow strip of land, the applicant likely would have to purchase an easement for access to its land. Second, the proposed alteration would protect a sewer line from structural failure in a catastrophic fluvial erosion event. Such a structural failure would discharge raw sewage into the North Fork Payette River, causing environmental damage and a public health hazard. It would also seriously inconvenience many homeowners throughout the area.

**Is the proposal a reasonable means of accomplishing the purpose?**

8. The Applicant has a responsibility to accomplish the objective of the proposed alteration without compromising other riverine values more than necessary. Armoring the riverbank and deflecting the current of the river away from the eroding bank into the center of the river channel should accomplish the objective. Using natural-looking materials, working during a low-water period, minimizing the intrusion of construction equipment into the river channel, and revegetating the altered riverbank are reasonable and effective methods for minimizing the effect of the project on other values.

**Will the alteration be a permanent solution?**

9. The alteration will be a permanent solution only if the current of the North Fork Payette River

is redirected into the middle of the channel and it stays there over time. Armoring the bank with the proposed spruce tree revetment alone would not be a permanent solution because the spruce trees are biodegradable and would eventually rot away, leaving the bank exposed to the erosive power of the river's current. Consequently, altering the current of the river with the proposed root wad barbs is a necessary component of the plan. What remains a question, however, is how many barbs may be necessary to accomplish the change in current. To minimize the impact of the proposed change on aesthetic, wildlife, and recreational values, the number of barbs should be kept to a minimum, perhaps through phasing their installation until the desired objective is accomplished.

**Will the alteration pass anticipated water flows without creating harmful flooding or erosion problems upstream or downstream?**

10. The hydraulic model prepared by the Applicant's engineering consultant shows that the proposed project would increase the river elevation and increase downstream channel velocities by insignificant amounts. However, it does not predict what will happen to the material that would be redeposited if the redirected river current removes the islands. The potential for unintended consequences caused by redeposition of the island material within the river channel is perhaps the most troubling aspect of this case. The most likely outcome for the island material, that it would be redeposited by the altered current along the river banks where stream velocities are slower, is the most benign outcome. However, if the material is redeposited in some other way, it could cause unintended erosion or flooding. This risk must be weighed against the risk of a structural failure of the sewer line. The hearing officer finds the sudden failure of the sewer line to be the greater risk, but cautions that a phased approach to changing the river's course and obliterating the islands would provide time to observe the river's response and mitigate unintended consequences.

**What effect will the alteration have on fish habitat?**

11. The proposed stream channel alteration project is likely to have very little negative impact on fish habitat and could even benefit fish by providing cover and resting areas near the root wad barbs and spruce tree revetment.

**Will the materials used or the removal of ground cover create turbidity or other water quality problems?**

12. The Applicant's proposal combined with the approval conditions of the permit should minimize turbidity and other water quality problems. First, the Applicant proposed and the Department required construction to occur when river flows are low. Second, the Applicant proposed and the Department required the revetment to be constructed "in the dry" behind a temporary cofferdam that redirects stream flow around the construction site. Third, the Department required disturbed areas to be replanted to reduce erosion. Fourth, the Department required silt fencing or other erosion/sedimentation control measures to be installed during construction. Fifth, the Department required the Applicant store and pour fuel and other hazardous chemicals away from the stream channel. Sixth, the minimum standards in Stream Channel Alteration Rules 56, 59, and 63 emphasize measures to prevent water quality issues, and the Department required compliance with these minimum standards.

**Will the alteration interfere with recreational use of the stream?**

13. The record does not quantify how popular the subject segment of the North Fork Payette River is for recreation. There is anecdotal evidence that it is popular with canoers, kayakers, and fishermen. The rock and root-wad barbs would be navigational hazards for canoers and kayakers. However, with the barbs in place there would still be opportunity to navigate along the opposite bank or, if the barbs accomplish their intended purpose, with the current in the center of the river channel. Therefore, the proposed project is likely to be an annoyance, but not a total impediment, to recreational navigation.
14. Anecdotal evidence suggests the islands are popular with fishermen. Removal of the islands might alter how fishermen use the river, but it would not limit access to the river.

**Will the alteration detract from the aesthetic beauty of the area?**

15. The proposed stream channel alteration will likely detract somewhat from the aesthetic beauty of the area. The level of aesthetic detraction must be weighed against the potential benefits of the project. The Applicant's proposal is designed to minimize impact on local aesthetics in a couple of ways. First, the Applicant proposes using natural woody material – spruce trees and root wads – instead of unnatural-looking gabions or angular rock riprap. Second, the Applicant proposes planting native willow bushes upslope from the spruce tree revetment to further maintain the natural appearance of the altered riverbank. These measures are reasonable efforts to accomplish the proposed objective without fundamentally compromising the aesthetic beauty of the area.

**What modification or alternative solutions are reasonably possible which would reduce the disturbance to the stream channel and its environment and/or better accomplish the desired goal of the proposed alteration?**

16. The permit did not limit the construction period to the months of August through January, as requested by the Idaho Department of Fish and Game to minimize disturbance of bald eagles. The Department should alter the permit to provide for this limitation. A bigger question, however, is whether the proposed redirection of the stream current could be accomplished with fewer rock barbs. Using fewer rock barbs would minimize the navigation hazard, maintain a more natural appearance, perhaps accomplish the objective without completely removing all the islands, and provide time to monitor results and mitigate unintended consequences caused by redeposition of the island material. The Department should require the Applicant to phase construction of the rock barbs to determine if the necessary alteration of the river current can be accomplished with fewer than seven barbs.

**Is the alteration to be accomplished in accordance with the adopted minimum standards?**

17. The Department required compliance with the applicable minimum standard rules, Stream Channel Alteration Rules 56, 59, and 63.

**Are there public safety factors to consider?**

18. The proposed alteration would protect a sewer line and lift station from structural failure in a catastrophic fluvial erosion event. Such a structural failure would discharge raw sewage into the North Fork Payette River, causing environmental damage and a public health hazard.

**Does the Department have authority to authorize the removal of islands, which are state land?**

19. The Applicant clarified at hearing that it does not seek to mechanically remove the islands or to create scour channels across the islands. Rivers create and remove islands through fluvial processes, just as they alter their banks and channels. Islands in rivers have no more legal protection than lands adjacent to rivers. The Department can authorize stream channel alterations, which may affect a river's flow. In this instance, the altered flow is intended to remove at least some material from the islands. If the river removes or alters the islands, it is a better outcome than the erosion of the nearby riverbank and the endangerment of the whole river from spilled sewage. Permitting may also be required by Idaho Department of Lands, which has a specific duty to protect and manage state trust lands.

**Overall**

20. The issuance of Stream Channel Alteration Permit S65-20105 should be affirmed with additional special conditions addressing the authorized construction period, recognizing abandonment of the plan to construct scour channels, and phasing of construction of the rock barbs.
21. The stay of permit should be lifted.
22. The term of the permit should be extended a year to account for the time required to hold the hearing and issue a decision.

**ORDER**

**IT IS HEREBY ORDERED** that the issuance of Stream Channel Alteration Permit S65-20105 is **AFFIRMED** with the following additional special conditions:

Construction in connection with this permit shall occur only during September, October, November, December, and January.

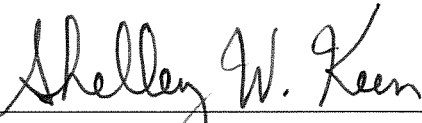
Prior to construction in connection with the permit, the permit holder shall submit to the Department a plan for phasing the construction of the rock barbs and monitoring the redeposition of the island material that may be removed by the redirected current of the river. The permit holder shall not construct the proposed rock barbs until the Department has approved the plan.

Construction of scour channels across the islands in the river channel is not authorized.

IT IS FURTHER HEREBY ORDERED that the stay of permit is **LIFTED**.

IT IS FURTHER HEREBY ORDERED that the permit shall expire on **December 31, 2013**.

Dated this 24<sup>th</sup> day of May, 2011.

  
\_\_\_\_\_  
SHELLEY W. KEEN  
Hearing Officer

**CERTIFICATE OF SERVICE**

I hereby certify that on the 25th day of May, 2011, I mailed a true and correct copy, postage prepaid, of the foregoing **Preliminary Order Affirming Issuance of Permit** to the persons listed below:

**RE: Stream Channel Alteration Permit No. S65-20105**

**LORI BARNES-GIRDNER  
L B INDUSTRIES INC  
776 E RIVERSIDE DR STE 200  
EAGLE ID 83616**

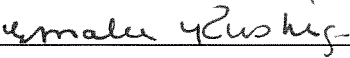
**CARL WITHROE &/OR BRUCE SMITH  
MOORE SMITH BUXTON & TURCKE  
950 W BANNOCK ST  
BOISE ID 83702**

**JOE PACHNER  
T O ENGINEERS  
9777 CHINDEN BLVD  
BOISE ID 83714**

**JUDY SECRIST  
PAYETTE RIVER PROPERTY OWNERS ASSN INC  
119 E OLD SAYBROOK DR  
BOISE ID 83706**

**J KAHLE BECKER, ATTY  
1020 W MAIN ST STE 400  
BOISE ID 83702**

**GREG MARTINEZ  
ARMY CORPS OF ENGINEERS  
BOISE REGULATORY OFFICE  
10095 EMERALD ST  
BOISE ID 83704-9754**

  
\_\_\_\_\_  
**Emalee Rushing  
Office Services Supervisor**

## **EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER**

**(To be used in connection with actions when a hearing was held)**

The accompanying order is a **Preliminary Order** issued by the Idaho Department of Water Resources (Department) pursuant to section 67-5243, Idaho Code. **It can and will become a final order without further action of the Department unless a party petitions for reconsideration or files an exception and brief as further described below:**

### **PETITION FOR RECONSIDERATION**

Any party may file a petition for reconsideration of a preliminary order with the hearing officer within fourteen (14) days of the service date of the order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The hearing officer will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5243(3) Idaho Code.

### **EXCEPTIONS AND BRIEFS**

Within fourteen (14) days after: (a) the service date of a preliminary order, (b) the service date of a denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing support or take exceptions to any part of a preliminary order and may file briefs in support of the party's position on any issue in the proceeding to the Director. Otherwise, this preliminary order will become a final order of the agency.

If any party appeals or takes exceptions to this preliminary order, opposing parties shall have fourteen (14) days to respond to any party's appeal. Written briefs in support of or taking exceptions to the preliminary order shall be filed with the Director. The Director retains the right to review the preliminary order on his own motion.

### **ORAL ARGUMENT**

If the Director grants a petition to review the preliminary order, the Director shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. If oral arguments are to be heard, the Director will within a reasonable time period notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.



## **CERTIFICATE OF SERVICE**

All exceptions, briefs, request for oral argument and any other matters filed with the Director in connection with the preliminary order shall be served on all other parties to the proceedings in accordance with Rules of Procedure 302 and 303.

## **FINAL ORDER**

The Department will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The Director may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The Department will serve a copy of the final order on all parties of record.

Section 67-5246(5), Idaho Code, provides as follows:

Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:

- (a) The petition for reconsideration is disposed of; or
- (b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

## **APPEAL OF FINAL ORDER TO DISTRICT COURT**

Pursuant to sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of this preliminary order becoming final. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.