

# STATE OF CONNECTICUT

DEPARTMENT OF ENVIRONMENTAL PROTECTION  
79 ELM STREET HARTFORD, CT 06106-5127



## OFFICE OF ADJUDICATIONS

**IN THE MATTER OF** : **APPLICATION #200801880-KF**

**ANN LUNN** : **FEBRUARY 8, 2010**

## PROPOSED FINAL DECISION

### I

### SUMMARY

Ann Lunn (applicant) has applied to the Department of Environmental Protection Office of Long Island Sound Programs (OLISP/staff) for a permit to install a fixed pier, ramp and float for private, recreational boating access in Scott's Cove in Darien (Town). The proposed dock would be located in coastal waters and tidal wetlands; the dock and review of this application are therefore subject to the provisions of the Structures, Dredging and Fill statutes (commonly referred to as the Structures and Dredging Act), General Statutes §§22a-359 through 22a-363f; the Tidal Wetlands Act, General Statutes §§22a-28 through 22a-35 and Regs., Conn State Agencies §§22a-30-1 through 22a-30-17; and the applicable goals and policies of the Coastal Management Act (CMA), General Statutes §§22a-90 through 22a-112.

An evening hearing was held in Darien on October 1, 2009, for the receipt of public comments. Four members of the public, including representatives of the Darien Environmental Protection Commission and the Land Trust of Darien, commented on the application expressing concern that the proposal violated the spirit of a Conservation Easement and Open Space set aside previously granted to the Town. Comments were also addressed to the question of whether

the dock could be used safely for the applicant's purposes. The evidentiary portion of the hearing was conducted in Hartford on October 28, 2009. The parties to this proceeding are the applicant and staff.

The parties filed the attached Agreed Draft Decision for my review and consideration. (Attachment A) Regs., Conn. State Agencies §22a-3a-6(l)(3)(A). Staff also prepared a revised draft permit that would allow the applicant to build the proposed dock. (Attachment B.) The Agreed Draft Decision contains findings of fact that describe the site, the application and its review history, the project and its purpose. It also contains the characterization of the tidal wetlands in the project area, the proposed activity impacts on shellfish, wildlife, finfish, intertidal mudflats, navigation, the public trust, and the applicant's consideration of alternatives to the proposed activities. The draft decision sets forth conclusions of law that address relevant provisions of the applicable statutes and regulations.

I concur with and adopt the findings of fact and conclusions of law as set forth in the Agreed Draft Decision and supplemented below. However, I do not adopt the parties' recommendation that the revised draft permit be issued. The application meets the applicable environmental standards for permit issuance; the applicant's proposed activities would not cause significant adverse impacts on the coastal resources in the area. However, in this unique circumstance, the scope of the Commissioner's considerations should extend beyond an assessment of the environmental impacts of the applicant's proposal to a consideration of whether there is a better, less hazardous structure that will accomplish the applicant's recreational goals.

An environmentally sound structure that poses a risk to the safety and welfare of its users is counterintuitive to the beneficent purposes of the state's environmental statutes to protect

human safety and well-being. I therefore recommend that the Commissioner deny this application without prejudice to the applicant to submit a modified proposal to obtain a determination of whether there are safer alternatives to the proposed vertical ladder access to the pier that would be consistent with the goals and policies of the Tidal Wetlands, Structures and Dredging and Coastal Management Acts.

*II*

*DECISION*

*A*

*FINDINGS OF FACT*

I adopt the findings of fact set forth in the Agreed Draft Decision and add the following supplemental findings. The supplemental findings are based on my review of the record of this proceeding and consideration of the weight to be given to and reasonable inferences drawn from the evidence.<sup>1</sup>

**BACKGROUND:**

**1. Site Location and Character:**

The applicant's residence is located on the east side of Contentment Island Road. The location of the proposed dock is at the end of a 50-foot wide, 335-foot long parcel of land on the west side of Contentment Island Road. The parcel is encumbered by the Open Space Declaration (Declaration), which is managed by the Darien Planning and Zoning Commission, and the conservation Easement (Easement), which is managed by the Darien Environmental Protection Commission. To access the dock, the applicant will need to pass over this parcel; such use is not restricted by either encumbrance. (Exs. DEP-1, 5, 8, 10 11, APP-7, 10.)

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<sup>1</sup> For ease of reference, the outline and numbering of the paragraphs herein correspond to the outline and numbering in the attached Agreed Draft Decision.

Ownership of the parcel remains with the applicant; however, the Declaration restricts further development of the parcel, including structures or other improvements and changes to the natural contours of the open space. The Easement also restricts future development or any use of the designated area for purposes other than as open space or authorized passive recreation. The Easement specifically provides that the grant of the easement is not intended to prevent the applicant from “having such access to the water as she would otherwise have from this property not inconsistent with this Conservation Easement, and to be able in the future to apply to the appropriate authorities as shall be applicable at that time ... for water-related uses.” (Exs. DEP-8, 11.)

The abutting property south of the parcel is held by the Land Trust of Darien as a nature preserve for “educational, scenic water views and aesthetic purposes.” Property owners residing within the area of the homeowners association, of which these parcels are a part, are permitted to walk on and use the property along with members of the Land Trust. The Land Trust is also authorized to no more than twice annually bring groups of 25 persons on the property to “study wildlife, the shoreline, and plants located on the premises.” Other persons authorized by the Land Trust may enter the property for maintenance purposes. (Exs. DEP-13, APP-9.)

## **2. Application History:**

The applicant first submitted a dock permit application to OLISP in 2005. After reviewing the property deed, Declaration and Easement, staff determined that the existing restrictions on the proposed site applied to the construction of a dock and that it was unclear whether the applicant had sufficient property rights to locate a dock within the encumbered area. For those reasons, the applicant was informed in an August 18, 2006 letter that her 2005 application was closed without further review. (Ex. DEP-2.)

In November, 2006, the applicant was advised that OLISP would consider a new dock permit application provided the applicant received the necessary municipal approvals. The approvals had to be included in the new application and could be evidenced by a determination by the Darien Environmental Protection Commission that the applicant's proposal was consistent with the Easement and by a permit from the Planning and Zoning Commission authorizing the proposed dock. (Ex. DEP-3.)

The applicant subsequently filed an application with the Town for a dock to be located within the area reserved for open space and subject to the Easement. After reviewing the associated coastal site plan<sup>2</sup>, staff determined that the application was "essentially the same proposal" as the 2005 permit application without the requisite local approvals. In a January 12, 2007 comment letter, staff advised the Darien Planning and Zoning Director that the department could not comment on the applicant's coastal site plan review application because it was incomplete without the required municipal approvals. (Ex. DEP-4.)

On July 11, 2008 the applicant filed the permit application that is the subject of this proceeding. The applicant proposes to construct a dock located off her property "but within [her] littoral rights area." The landward end of the structure will be constructed waterward of the mean high water mark, and, therefore, staff and the Town consider the entire structure to be within the jurisdiction of the DEP and outside the jurisdiction of the Town. A draft permit was prepared at the time of publication of the Notice of Tentative Determination to approve the application. (Exs. DEP-5, 11, 12, APP-10.)

3. **Project Description:**

The proposed structure includes a short access pier which begins just waterward of the mean high water line and extends 12 feet to a point just beyond the fringe of tidal wetlands

vegetation. A 30-foot long ramp will extend from the end of the pier to the floating dock. To address concerns of the U.S. Army Corps of Engineers that impacts to the mudflats be minimized by keeping the float off the substrate during low tide, the applicant will use a float stop system which will maintain a minimum of 18 inches clearance between the bottom of the float and the substrate during low tide.<sup>3</sup> The entire structure will extend waterward approximately 52 feet beyond mean high water. (Exs. DEP-10, APP- 1 – 3; test. J. Bajek, 10/28/09.)

The mean high water and high tide line elevations in the area of the proposed dock were derived from various data sources including the National Oceanic and Atmospheric Administration and the United States Coast and Geodetic Survey. Standard survey techniques were used to physically locate the mean high water line at the site. At the time of construction, stakes can be placed at the mean high water line to ensure that the dock is constructed entirely waterward of that line. (Test. J. McDougal, 10/1/09.)

The landward end of the proposed pier will cantilever over the pilings, which will be installed waterward of the tidal wetland vegetation. A vertical ladder will be located within inches of the mean high water line and the landward fringe of the tidal wetland vegetation (*spartina alterniflora*). The ladder will be at least 6 feet high with no hand rails and will not extend higher than the deck of the pier. There will be railings on both sides of the pier. (Ex. DEP-10; test. J. Bajek, 10/28/09.)

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<sup>2</sup> See General Statutes §22a-109(d).

<sup>3</sup> The U.S. Army Corps of Engineers subsequently determined that the applicant's proposed activity "will have only minimal individual or cumulative impacts on waters of the United States including wetlands." The work is therefore authorized under a Federal permit; however, this determination will be valid only after the DEP issues the appropriate permits. (Ex. APP-2.)

#### 4. Purpose and Use of Dock

To access the dock, the applicant and other users will cross over the parcel that is subject to the Declaration and Easement, through a segment of the tidal wetland vegetation and down a gradual incline to the ladder. During periods of high water, the wetland vegetation and the lower portion of the access ladder (at least 1.5 feet) will be underwater. After loading a canoe or kayak<sup>4</sup> onto the deck, users will then need to climb the 6-foot vertical ladder. The rungs of the ladder cannot extend beyond the height of the deck without interfering with loading canoes or kayaks onto the pier. As the ladder height will not extend above the deck, users will need to hoist themselves onto the deck from the ladder and lower themselves in a similar manner when leaving the pier. (Ex. DEP-10; test. J. Bajek, K. Fisk, 10/28/09.)

Only the railings located on the sides of the pier are available to assist users to access or leave the landward end of the pier. The applicant's permit consultant noted that anyone using the ladder will need to be careful; the ability to access the pier will depend on the strength of the individual and "if someone felt unsure of themselves, they certainly shouldn't be using [the ladder]." The consultant noted that the applicant "is perfectly happy with this design." (Test. J. Bajek, K. Fisk, 10/28/09.)

Staff acknowledges that the design of the structure is "unusual in that the proximal end of the dock does not extend landward of the mean high water line;" however, staff determined that there were no adverse impacts associated with that design. Staff's review of the application focused on the relevant considerations regarding the environmental impacts of the construction and maintenance of the structure; staff did not consider the means of accessing or leaving the landward end of the pier in its technical review. Alternate means of accessing and leaving the

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<sup>4</sup> It is likely that canoes and kayaks will be left on the pier or float during the boating season. (Ex. DEP-18; test. J. Bajek, 10/28/09.)

proposed pier were not considered in the design of the dock and therefore not proposed by the applicant. It may be possible to incorporate alternatives to the vertical ladder into the design of the dock such as cantilevered stairs or a removable gangplank. Either of these alternatives would provide a safer, easier means of accessing and leaving the pier. A removable gangplank with hand rails would be easy to install, however, the location of the gangplank might require approval by the Town. (Ex. DEP-18; test. J. Bajek, M. Grzywinski, K. Fisk, 10/28/09.)

The U. S. Army Corps of Engineers questioned whether there could be water between the dock and the applicant's upland property that would prohibit access to the dock from the upland. The applicant's consultant noted that at a very high tide there could be some water in that area but the applicant could still walk through it. In a September 2, 2009 comment letter to staff, the Darien Planning and Zoning Commission sought assurances that the structure would be located entirely waterward of mean high water and questioned whether it is "unusual to have an access ladder to a dock and whether it is "unusual that users have to step off the shore land (above MHW) and to step across a gap to reach a pier structure constructed below MHW." (Exs. APP-1, 10; test. J. Bajek, 10/28/09.)

## 6. Tidal Wetlands

The pedestrian traffic across the tidal wetland vegetation by users of the proposed dock will result in temporary impacts to that resource.<sup>5</sup> The slope of the embankment below the mean high water mark and the waterward fringe of the *spartina alterniflora* increases significantly. Without a dock, there is no reasonable means of accessing the water in this area as it is

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<sup>5</sup> On at least one other occasion, the department has issued a permit for a dock located waterward of the mean high water line causing users of the dock to walk across 270 feet of tidal wetland vegetation. This design was acceptable to the department because the area of the vegetation was sufficiently dry to allow pedestrians to cross over it without sinking into mud and permanently damaging the vegetation. (Ex. DEP-19; test. M. Grzywinski, 10/28/09.)



dangerous to walk down the steep embankment through the muck and slippery vegetation with a kayak or canoe. (Ex. DEP-10; test. K. Fisk, J. Bajek, A. Lunn, 10/28/09.)

The pier will be elevated approximately 2 feet above the tidal wetland vegetation to mitigate shading of the vegetation and 5 feet above the substrate line waterward of the mean high water elevation<sup>6</sup> to facilitate public access. Extending the dock landward of mean high water would not be expected to result in any significant impact on the tidal wetland vegetation. (Exs. DEP-10, 11; test. K. Fisk, J. Bajek, 10/28/09.)

7. **Shellfish:**

The Department of Agriculture/Bureau of Aquaculture (BOA) reviewed the applicant's proposal and issued a determination that the project will not significantly impact any shellfish areas. As part of its determination, the BOA recommended that no vessel be berthed at this float overnight. (Ex. DEP-9.)

13. **Revised Draft Permit<sup>7</sup>:**

General Conditions 11 and 17 of the draft permit address the limits on the work authorized and the Commissioner's reliance on the applicant's representations concerning the purpose and use of the dock, i.e., the launching and retrieval of kayaks and canoes. Staff has recommended additional conditions in paragraphs 6 and 7 of the Special Terms and Conditions in a revised draft permit that expressly provides for restrictions on the berthing or operation of motorized vessels at or near the dock except during periods of high water. The applicant has

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<sup>6</sup> This range in elevation reflects the steep grade in the area waterward of the mean high water elevation. (Ex. DEP-10; test. J. Bajek, 10/28/09.)

<sup>7</sup> During the evidentiary portion of the hearing, staff recommended revisions to certain terms and conditions of the draft permit. In order to allow the applicant sufficient time to consider staff's recommendations, the record remained open until November 19, 2009, at which time staff submitted a revised draft permit (Exhibit DEP-20) and the applicant submitted an affidavit acknowledging her agreement with the recommended revisions (Exhibit APP-11).

indicated that she has no objection to these special conditions. (Exs. DEP-18, 20, APP-11; test. K. Fisk, 10/28/09.)

The draft permit contains a Special Condition that requires the applicant to obtain and submit to the Commissioner written permission from the Darien Environmental Protection Commission prior to commencing the authorized work. Staff recommends that this condition remain in the revised draft permit but be modified to require the applicant to provide such written permission “if required by law.” This revised condition is set forth in paragraph 9 of the Special Terms and Conditions in the revised draft permit. The revised draft permit also provides that issuance of the permit does not relieve the applicant from any obligations to obtain other federal, state or local approvals. The application does not list any other federal licenses, permits or certificates or any local permits that have been or must be obtained for the proposed activity.<sup>8</sup> (Exs. DEP-10, 18, 20; test. K. Fisk, 10/28/09.)

*B*

*CONCLUSIONS OF LAW*

*1*

*The Agreed Draft Decision*

The Agreed Draft Decision sets forth conclusions of law including a determination of the environmental impact of the applicant’s proposed activities. Specifically, the parties agree that the proposed project will allow the Applicant reasonable access to public trust waters and that the record supports a finding that the potential impacts from the proposed project are sufficiently minimized. The conclusions also provide that the application is consistent with the applicable policies enumerated in the CMA, including §22a-92(b)(2)(E), which incorporates the policies of

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<sup>8</sup> The implementing regulations of the Tidal Wetlands Act require that a tidal wetlands application provide a list of state and federal licenses, permits or certificates and any local permits that “have been obtained or which are being sought for the proposed activity”. Regs. Conn. State Agencies §22a-30-6 (10) and (11).

the Tidal Wetlands Act to “preserve tidal wetlands and to prevent the despoliation and destruction thereof in order to maintain their vital natural functions ....” §22a-28. The conclusions further provide that the application is consistent with the “applicable standards, goals and policies of section 22a-359(a) ... which requires the Department to make permit decisions with due regard for indigenous aquatic life, fish and wildlife, the use and development of adjoining uplands, and the recreational use of public water and management of coastal resources, with proper regard for the rights and interests of all persons concerned.”

I agree with and adopt these conclusions of law; however, the conclusions fail to take into account all of the issues raised by the facts in this matter. The record in this case reflects issues that, although not neatly linked to environmental impacts, arise as a result of the environmental standards that govern this proposal and fall squarely within the purview of the state policies articulated in the environmental statutes; these issues therefore warrant consideration in determining whether this permit should be issued.

## 2

### *Additional Factors for Consideration*

The record in this matter reflects the following:

- Notwithstanding the explicit reservation of the applicant’s right to access the water set forth in the Easement, she may be precluded from constructing a dock located within the town’s jurisdiction that would provide the applicant with access to the pier from her upland property.
- The Darien Planning and Zoning Commission has apparent concerns over the use of a vertical ladder to access the pier however, the local regulatory authorities have acknowledged that they have no jurisdiction over the design, construction or use of the

dock provided it is constructed in the proposed location. Therefore, only the DEP will have regulatory oversight of the applicant's proposal.

- The dock will be constructed to allow users to pass over a steep sloped area of muck and slippery vegetation. The height of the dock is necessary to mitigate any shading impacts to the tidal wetland vegetation caused by the pier. A lower pier would not provide sufficient separation between the structure and the wetland vegetation or permit public pedestrian access along the shoreline.
- The dock will be located a considerable distance away from the applicant's residence and adjacent to unimproved reserved open space that abuts land that is dedicated to public use, specifically for observing wildlife, plants and the shoreline. Although there is no specific requirement to do so, there is no evidence in the record that the applicant will take steps to prevent unauthorized use of the dock.
- Portions of the ladder and the area immediately landward of the ladder will be underwater during periods of high water. There are no handrails at the top of ladder to assist with stepping on to the deck of the pier and anyone lacking sufficient strength or unsure of their abilities should not use the ladder.
- There may be better designs than the proposed vertical ladder. Cantilevered stairs or a removable gangplank may provide easier, safer access to the pier. Although the Agreed Draft Decision provides that there are no feasible and prudent alternatives to the proposed structure, alternate means of access to the pier were not proposed by the applicant or evaluated for any adverse environmental impacts to coastal resources.

These facts reflect a unique situation such that limiting the review of this proposal to only an assessment of its environmental impacts will leave the question of whether there is a safer

means of accessing the pier in a state of limbo. Considerations of safety should be inherent in a dock design and the permitting of a dock should consider the safety of dock users because the dock is built for the specific and express purpose of being used routinely to provide access to the water. Although the permit is issued to a specific individual or entity, there is no limitation on who might use the structure. Therefore, this access should be safe for all who will use the dock as well as protective of coastal resources. Moreover, incorporating consideration of the safe use of the dock into the review of the applicant's proposal is neither arbitrary nor contrary to the intent of the legislature.

3  
*Policies of the State*

According to the legislature, it is the policy of the state "to conserve, improve and protect its natural resources and environment and to control air, land and water pollution in order to enhance the health, safety and welfare of the people of the state." General Statutes §22a-1. To carry out this policy, the legislature has established the state's continuing responsibility to, among other things, "attain the widest range of beneficial uses of the environment without degradation, *risk to health or safety*, or other undesirable and unintended consequences..." §22a-1a(b)(3) (emphasis added). With respect to activities conducted pursuant to the Tidal Wetlands Act, the Commissioner must therefore consider the effect of the proposed work with reference to environmental factors *and* the public health and welfare. §22a-33. This declaration of public policy and continuing responsibility suggest that the legislature intended that the Commissioner, while acting within her authority to assess the effects of proposed uses of the environment, consider the health and safety risks associated with those uses.


### *III*

#### *RECOMMENDATION*

The applicant's proposal presents a relatively unique situation that warrants consideration of certain factors beyond the impacts of the proposed structure on the coastal resources in the area. Although the application complies with the statutory and regulatory requirements for permit issuance, the determination of whether to approve the proposal implicates important public policy considerations.

In evaluating the environmental consequences of the applicant's proposed activities, which include the use of the proposed dock, the legislature's declaration of policy clearly reflects an expectation that the Commissioner would at all times consider whether those engaged in such activities are safe and free of hazard. Therefore, it would be counterintuitive to design a structure that is environmentally sound at the risk of public health and safety. This is especially so in light of the fact that there may be alternative designs that are appropriately protective of the environment and provide safer access to the pier.

The permit application review process should explore available alternatives to address any obvious safety concerns and balance the implementation of safer design alternatives with the need to protect the coastal resources in the area. I therefore recommend that the Commissioner deny this application without prejudice to the applicant to submit a modified proposal to obtain a determination of whether there are safer alternatives to the proposed vertical ladder access to the pier that would be consistent with the goals and policies of the Tidal Wetlands, Structures and Dredging and Coastal Management Acts.

  
Jean F. Dellamarggio  
Hearing Officer

*P A R T Y L I S T*

Proposed Final Decision In the Matter of Ann Lunn  
Application No. 200801880-KF

PARTY

REPRESENTED BY

The Applicant

Ann Lunn

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Department of Environmental Protection

Office of Long Island Sound Programs  
79 Elm Street  
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Krista Fisk

**ATTACHMENT A**

**STATE OF CONNECTICUT  
DEPARTMENT OF ENVIRONMENTAL PROTECTION  
OFFICE OF ADJUDICATIONS**

**IN THE MATTER OF** : **APPLICATION NO. 200801880-KF**  
:   
:   
**ANN LUNN** : **NOVEMBER 19, 2009**

**AGREED DRAFT DECISION**

The Parties have submitted an Agreed Draft Decision (Attachment 1) dated November 19, 2009, for my consideration in this matter. Upon my review of the findings of facts and conclusions contained in this Agreed Draft Decision, I adopt it as my Proposed Final Decision, and recommend that the Commissioner issue the attached draft permit (Attachment A).

\_\_\_\_\_  
Date

\_\_\_\_\_  
Jean F. Dellamarggio, Hearing Officer

**RECEIVED**

**NOV 20 2009**

DEPARTMENT OF ENVIRONMENTAL PROTECTION  
OFFICE OF ADJUDICATIONS



**ATTACHMENT 1**  
**AGREED DRAFT DECISION**  
**ANN LUNN**  
**COASTAL PERMIT APPLICATION NO. 200801880-KF**  
**INSTALLATION OF A PIER, RAMP AND FLOATING DOCK**  
**TOWN OF DARIEN**  
**NOVEMBER 19, 2009**

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1. **Introduction:** In July of 2008, Ms. Lunn submitted an application to undertake regulated activities in tidal, coastal and navigable waters of the State waterward of the high tide line, in an area of tidal wetlands, for the installation of a fixed pile supported timber pier, ramp, and floating dock with four timber piles and a float stop support system in Scott's Cove, in the Town of Darien. The applicant seeks a permit to undertake said regulated activities under the provisions of the Structures, Dredging and Fill provisions of Conn. Gen. Stat. §§ 22a-359 through 22a-363f, in accordance with the Connecticut Coastal Management Act, Conn. Gen. Stat. §§ 22a-90 through 22a-112, and the Tidal Wetlands Act and Regulations, Conn. Gen. Stat. §§ 22a-28 through 22a-35, and Conn. Agencies Regs. §§ 22a-30-1 through 22a-30-17.

**RECEIVED**

**NOV 20 2009**

DEPARTMENT OF ENVIRONMENTAL PROTECTION  
OFFICE OF ADJUDICATIONS

2. **Parties:** The parties included in the proceeding are the Applicant, Ann Lunn, and Staff from the Department of Environmental Protection, Office of Long Island Sound Programs ("OLISP" or the "Staff").

The parties have agreed to the admission of all the exhibits listed on the attached exhibit list comprising Application's Exhibits APP-1 through APP-10, and Staff Exhibits DEP-1 through DEP-20.

### **FINDINGS OF FACT**

#### **BACKGROUND:**

1. **Site Location and Character:** The site is located at 9 Contentment Island Road on Scott's Cove, in Darien, Connecticut. Scott's Cove is an estuarine embayment that is subject to an average tidal cycle of approximately 7.0 feet. Tidal wetland vegetation is seen along the entire frontage of the site. In addition, an intertidal mudflat spans the site and is visible at low water. The site consists of a strip of land 50 feet in width between Contentment Island Road and the mean high water line of Scott's Cove. The Applicant's single-family home is located on the main portion of her land across the Contentment Island Road from the site. The Applicant owns title to both the land immediately adjacent to the proposed dock, and the land across Contentment Island Road.

The Applicant's upland property adjacent to the location of the proposed dock is subject to an Open Space Declaration and a Conservation Easement, both of which were

dated December 22, 1987, and recorded on the Darien Land Records at Volume 571, Pages 308 and 311 and, respectively. (DEP-8) Pursuant to the Conservation Easement, the Applicant reserved the right to apply to the appropriate authorities (including "the U.S. Army Corps of Engineers and/or State authorities") for water related uses. Accordingly, the Applicant has the right to seek approval from the Commissioner of Environmental Protection for the proposed dock.

2. **Application History:** The initial application was received on July 11, 2008, and requests authorization to install a 4-foot by 22-foot fixed pile supported timber pier, a 3-foot by 30-foot ramp to a 7-foot by 14-foot floating dock with a float stop support system. After their initial review of the application, Staff determined that the proposed work appeared to be generally consistent with applicable state policies, standards and criteria although some modifications were required. A letter dated August 27, 2008, was sent to the Applicant requesting additional information. (DEP-6) The Applicant supplied the required information in a subsequent submittal dated September 8, 2008. (DEP-7) In March 2009, OLISP recommended tentative approval of the application and on May 28, 2009, the Notice of Tentative Determination on the Application was published in the Darien Times newspaper (DEP-12) for the installation of a 4-foot by 12-foot fixed pile supported timber pier, a 3-foot by 30-foot ramp to a 7-foot by 14-foot floating dock, and a float stop support system. Because the project is in an area of tidal wetland vegetation, regulated by the Tidal Wet-

lands Act, Conn. Gen. Stat. § 22a-32, it required a 40-day comment period on the application and also required that a public hearing be held upon request by 25 individuals. The public comment period closed on July 7, 2009. One comment letter was received by OLISP in response to the public notice. The letter was received on July 8, 2009, from the Darien Land Trust, and included a petition for a public hearing with more than 25 signatures. (DEP-13)

In accordance with statutory requirements, upon receipt of the petition, a public hearing was scheduled on the application. On August 27, 2009, a Notice of Public hearing was published in The Darien Times newspaper. (DEP-15) The hearing was scheduled for September 10, 2009, and rescheduled to October 1, 2009, in Room 206 of the Darien Town Hall. The Hearing Officer conducted a public site visit on September 15, 2009.

3. **Project Description:** The Applicant sought authorization to install a 4 foot by 22 foot fixed pile supported timber pier, a 3-foot by 30-foot ramp to a 7-foot by 14-foot floating dock, and a float stop support system. The project proposal has been revised by reducing the length of the fixed pier to 12 feet. (DEP-10)

4. **Purpose and Use of Proposed Dock:** The purpose of the proposed work is to construct a fixed pier, ramp and floating dock for the Applicant's private, recreational boating use. The application indicates that the proposed use of the dock is for launching and recovering kayaks and canoes as well as for swimming in Scott's Cove.

5. **Permitting, Compliance and Enforcement History:** On July 14, 1960, the State of Connecticut Water Resources Commission issued a Permit to the Applicant's predecessor in title to dredge material from Scott's Cove and place the dredged material on the site and on adjacent property. (APP-4) There are no other permits or certificates issued by the DEP, OLISP that authorized work waterward of the high tide line at this site. The site has not been the subject of a DEP enforcement action for unauthorized activities waterward of the high tide line. (DEP-11)

The Applicant filed a previous application for a dock on March 24, 2005 (Application No. 200500808-JW). On August 18, 2006, the application was deemed insufficient, as the materials provided did not clearly identify the applicant's right to construct a dock on the subject property.

6. **Tidal Wetlands:** On August 26, 2008, Staff conducted a site visit to verify the location of tidal wetland vegetation within the project location. (DEP-11) The inspection revealed that tidal wetlands exist along the entire frontage of the property as shown on the submitted plans. The tidal wetland vegetation in this area at the height of the growing season is approximately 2 to 3 feet in height and extends waterward from the existing high tide line approximately 12 feet. The proposed ramp and floating dock will not impact the tidal wetland vegetation on-site. A field survey was conducted by Judy Slayback, and the following plants were noted and are depicted on the plans: *Phragmites australis*, High Tide

Bush (*Iva frutescens*), Seaside Goldenrod (*Solidago sempervirens*), Saltwater and Salt Meadow Cordgrasses (*Spartina alterniflora* and *Spartina patens*). The proposed structure has been sufficiently elevated to minimize shading of this vegetation. The ramp and float portions of the dock structure will be installed waterward of the extent of the tidal wetland vegetation on site and therefore is not expected to impact this resource. No seasonal removal of the float and ramp is needed due to the installation of float stop pilings. The float stop pilings will keep the float from resting on the substrate during periods of low water. (DEP-10).

7. **Shellfish:** The proposed work will not significantly affect any shellfish areas. (DEP-9)

8. **Connecticut Endangered, Threatened and Special Concern Species:** No species of special concern, and no threatened or endangered species were observed during the field survey. (DEP-11)

9. **Intertidal Mudflats:** The location of mean low water on the project site is approximately 31 feet 6 inches from the high tide line. This is the area where the ramp and float will be installed. Tidal wetland vegetation extends out from the high tide line approximately 12 feet. The area waterward of the tidal wetland vegetation consists of intertidal mudflat that extends from the edge of the tidal wetland vegetation to the mean low water line at the opposite shore. The thalweg of Scott's Cove is approximately 170 feet from the

waterward end of the proposed floating dock, and the mean low water line at the opposite shore is 260 feet from the waterward end of the proposed floating dock. (DEP-10) In order to minimize contact and disturbance of the intertidal flat, the underside of the float will be equipped with a float stop support system, thus preventing the float from resting on the bottom

**10. Finfish:** The installation of the proposed fixed pier, ramp and float will not adversely impact finfish in Scott's Cove. (DEP-11)

**11. Navigation Impacts:** This project site is located in an area of Scott's Cove that is generally navigable by only shallower draft boats during periods of high tide. At low tide, navigation in this area of the cove is virtually impossible. The length of the proposed dock structure does not restrict navigation beyond the natural restriction that already exists in the Cove. It is not anticipated that the proposed structure will present navigational conflicts. (DEP-11)

**12. Public Trust:** OLISP has found that along the Connecticut coast reasonable access for a riparian property owner can generally be achieved by a fixed pier extending to mean low water with a ramp and 100 square foot float. The proposed structure is smaller in design than that standard and thus conforms to this finding. Therefore, the proposed dock does not represent an unreasonable encroachment into public trust waters in Scott's Cove.

**13. Revised Draft Permit:** The draft permit has been modified as follows:

1. The language in the Scope of Authorization including four float stop piles and float support system was corrected to include four timber piles and a float support system. This modification was a result of a clerical error.

2. Special Terms and Conditions paragraph # 6 was created to include language pertaining to the appropriate tide cycles at which a motorized vessel shall be berthed or operated near the structure.

3. Special Terms and Conditions paragraph # 7 was created to include language pertaining to enforcement proceedings if the Commissioner finds such evidence of benthic damage with inappropriate use of the structure.

4. Special Terms and Conditions paragraph # 9 was corrected to include specific language in the beginning of the paragraph, "If required by law". This modification was a result of a clerical error.

**ENVIRONMENTAL IMPACTS:**

Environmental impacts associated with the proposed fixed pier, ramp and floating dock have been minimized to the greatest extent practicable. The proposed pier, ramp and floating dock conform to OLISP policy of a fixed pier to mean low water and a 98 square foot float, and provides the Applicant with reasonable access to public trust waters while



minimizing waterward encroachment and impacts to coastal resources. The Applicant understands that the use of this dock to launch and retrieve kayaks and canoes or otherwise access the dock may not be possible at all tidal cycles due to shallow depths in Scott's Cove. The installation of the fixed pier, ramp, and floating dock are not anticipated to have an adverse impact on any State listed endangered, threatened or special concern species, intertidal flats, tidal wetlands or finfish resources. (DEP-11)

#### **ALTERNATIVES:**

The Applicant considered the following project alternatives:

1. **Shorter Fixed Pier:** A shorter fixed pier was not considered feasible. If the dock were shorter than proposed, the pilings would be installed within the tidal wetland vegetation, instead of the proposed location, which is seaward of the tidal wetland vegetation.
2. **Longer Fixed Pier:** The Applicant initially proposed a longer fixed pier structure of 22 feet in length. The Staff recommended that the pier be shortened to 12 feet, and the Applicant agreed. The existing mudflats at and adjacent to the site do not afford any significantly longer periods of access to navigable water during the tide cycle than the proposed dock.
3. **No Dock:** This alternative was considered and rejected because it would not provide the Applicant with a safe means to exercise her littoral right of access to the waters of Scott's Cove without unreasonably disturbing the existing tidal vegetation along the

shoreline. The proposed dock will reduce the impact resulting from pedestrian access to the Cove through the existing tidal vegetation.

After balancing all of the relevant concerns, a dock structure consisting of a fixed pier, ramp, float, and a float stop support system, as proposed by the Applicant, will afford the Applicant with reasonable access to public trust waters for boating while minimizing both overall waterward encroachment and impacts to coastal resources. This proposal represents the least intrusive and most environmentally sensitive of those alternatives considered.

### CONCLUSIONS

1. **Environmental Impact of the Proposed Action:** The proposed project would provide the Applicant with reasonable access to public trust waters for recreational boating. The record supports a finding that the potential environmental impacts from the proposed project have been sufficiently minimized and the proposed project is consistent with the following policies regarding coastal resources, tidal wetlands, and coastal management:

- a. section 22a-92(a)(1) of the General Statutes, which requires that the development; preservation or use of the land and water resources of the coastal area proceeds in a manner consistent with the capability of the land and water resources to support development, preservation or use without significantly disrupting either the natural environment or sound economic growth.

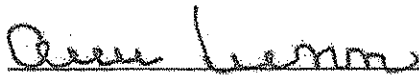
- b. section 22a-92(b)(1)(D) of the General Statutes which requires that structures in tidal wetlands and coastal waters be deigned, constructed and maintained to minimize adverse impacts to coastal resources, circulation and sedimentation patterns, water quality, and flooding and erosion, to reduce to the maximum extent practicable of the use of fill, and to reduce conflicts with the riparian rights of adjacent landowners;
- c. section 22a-92(b)(1)(H) of the General Statutes to protect coastal resources by requiring, where feasible, that such boating uses and facilities (i) minimize disruption or degradation of natural coastal resources, (ii) utilize existing altered, developed or redeveloped areas, and (iv) utilize ramps and dry storage rather than slips in environmentally sensitive areas;
- d. section 22a-92(b)(2)(D) of the General Statutes, which requires the management of intertidal flats so as to preserve their value as a nutrient source and reservoir, a healthy shellfish habitat and a valuable feeding area for invertebrates, fish and shorebirds; To allow coastal uses that minimize change in the natural current flows, depth, slope, sedimentation and nutrient storage functions and to disallow uses that substantially accelerate erosion or lead to significant despoliation;
- e. section 22a-92(c)(2)(A) of the General Statutes, which policies concerning coastal land and other resources within the coastal boundary (in part) are: (A) to manage estuarine embayments so as to insure that coastal uses proceed in a manner that assures sustained biological productivity, the maintenance of health marine populations and the maintenance of essential patterns of circulation, drainage and basin configuration; to protect, enhance and allow natural restoration of eelgrass flats except in special limited cases, notable shellfish management, which the benefits accrued through alteration of the flat may outweigh the long-term benefits to marine biota, waterfowl, and commercial and recreational fisheries.
- f. section 26-310(a) of the General Statutes, which requires that each state agency, in consultation with the commissioner, shall conserve endangered and threatened species and their essential habitats, and shall ensure that any action authorized, funded or performed by such agency does not threaten the continued existence of the endangered or threatened species or result in the destruction or adverse modification of habitat designation as essential to such species, unless such agency has been granted an exemption.

2. **Consistent with All Applicable Standards:** The proposal is consistent with applicable standards, goals and policies of section 22a-359 of the General Statutes which requires the Department to make permit decisions with due regard for indigenous aquatic life, fish and wildlife, the use and development of adjoining uplands, and the recreational use of public water and management of coastal resources, with proper regard for the rights and interests of all persons concerned.

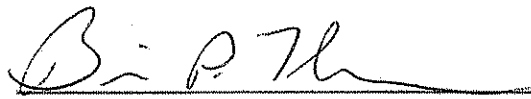
3. **Alternatives to the Proposed Action:** There is no feasible or prudent alternative which would provide the applicant reasonable riparian access which would have less impact on the adjacent coastal resources.

AGREEMENT

Based on the foregoing, the undersigned hereby agree to the granting of a permit subject to the standard and special conditions stated in the attached Draft Permit.



Ann Lunn, Applicant



Brian P. Thompson, Director  
Office of Long Island Sound Programs  
Department of Environmental Protection

ATTACHMENT B  
**Draft**

PERMIT

Permit No: 200801880-KF  
Town: Darien  
Work Area: Scott's Cove off property located at 9 Contentment Island Road  
Permittee: Ann Lunn  
9 Contentment Island Road  
Darien, CT 06820

Pursuant to sections 22a-359 through 22a-363f and sections 22a-28 through 22a-35 of the Connecticut General Statutes ("CGS") and in accordance with CGS section 22a-98, and the Connecticut Water Quality Standards dated December 2002, a permit is hereby granted by the Commissioner of Environmental Protection ("Commissioner") to install a dock for recreational boating use as is more specifically described below in the SCOPE OF AUTHORIZATION, in Scott's Cove off property identified as the "work area" above. The work area is an area of tidal wetlands along Scott's Cove.

\*\*\*\*\*NOTICE TO PERMITTEES AND CONTRACTORS\*\*\*\*\*

**FAILURE TO CONFORM TO THE TERMS AND CONDITIONS OF THIS PERMIT MAY SUBJECT THE PERMITTEE AND ANY CONTRACTOR TO ENFORCEMENT ACTIONS, INCLUDING PENALTIES AND INJUNCTIONS, AS PROVIDED BY LAW.**

SCOPE OF AUTHORIZATION

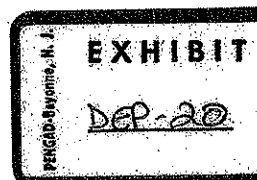
The Permittee is hereby authorized to conduct the following work as described in application, 200801880-KF including four sheets of plans with sheets 1 through 3 revised September 8, 2008 and sheet 4 revised October 16, 2008, submitted by the Permittee to the Commissioner and attached hereto, as follows:

construct a 4' x 12' fixed pier, a 3' x 30' aluminum ramp, and a 7' x 14' floating dock with four timber piles and a float stop support system.

**UPON INITIATION OF ANY WORK AUTHORIZED HEREIN, THE PERMITTEE ACCEPTS AND AGREES TO COMPLY WITH ALL TERMS AND CONDITIONS OF THIS PERMIT.**

SPECIAL TERMS AND CONDITIONS

1. Except as specifically authorized by this permit, no equipment or material including, but not limited to, fill, construction materials, excavated material or debris, shall be deposited, placed or



- stored in any wetland or watercourse on or off-site, nor shall any wetland or watercourse be used as a staging area or accessway other than as provided herein.
2. Not later than two weeks prior to the commencement of any work authorized herein, the Permittee shall submit to the Commissioner, on the form attached hereto as Appendix A, the name(s) and address(es) of any contractor(s) employed to conduct such work and the expected date for commencement and completion of such work.
  3. On or before (a) 90 days after completion of the work authorized herein, or (b) upon expiration of the work completion date or any authorized one year extension thereof, whichever is earlier, the Permittee shall submit to the Commissioner "as-built" plans prepared and sealed by a licensed engineer, licensed surveyor or licensed architect, as applicable, of the work area showing all contours, bathymetries, tidal datums and structures.
  4. The Permittee shall ensure that all work associated with the driving of piles for construction of the dock shall be conducted by a water-based barge during periods of high water only in the area of the proposed dock. Any such barge must move to deeper waters during periods of low water in the area of the proposed dock. It shall not be a defense to this provision for the Permittee to assert that it has no control over the operation of the barge.
  5. During the time that pilings are being driven pursuant to SPECIAL TERMS AND CONDITIONS paragraph 4 above, the Permittee shall ensure that the barge used for such work does not rest on or come in contact with the bottom of the Scott's Cove.
  6. The structure authorized herein is for the purpose of accommodating canoes, kayaks and other human-powered craft. The Permittee shall not berth or operate a motorized vessel at or near the structure except during periods of high water or under other conditions such that the motorized vessel will not adversely impact the benthic substrate.
  7. If the Commissioner finds that prop dredging, scour or other benthic damage associated with inappropriate use of the structure authorized herein has taken place, she shall so notify the Permittee. No later than 60 days after the date of such notification, this permit shall become null and void and the structure authorized herein shall be removed from the waters of the state according to a methodology specified in writing by the Commissioner, unless the Permittee contests in writing the Commissioner's findings, in which case the Permittee's response to the Commissioner's notification shall be considered an answer to an order in accordance with section 22a-3a-6(i) of the Department's Rules of Practice, and further proceedings shall take place in accordance with applicable law.
  8. The Permittee shall install a float stop support system to prevent the entire float surface from resting on the bottom at low water. Such structure shall be maintained in optimal operating condition for the life of the structure.
  9. If required by law, the Permittee shall obtain written permission from the Environmental

Protection Commission (EPC) prior to the commencement of any work authorized herein, and shall submit such authorization to the Commissioner.

### GENERAL TERMS AND CONDITIONS

1. All work authorized by this permit shall be completed within five years from date of issuance of this permit ("work completion date") in accordance with all conditions of this permit and any other applicable law.
  - a. The Permittee may request a one-year extension of the work completion date. Such request shall be in writing and shall be submitted to the Commissioner at least 30 days prior to said work completion date. Such request shall describe the work done to date, work which still needs to be completed and the reason for such extension. The Commissioner shall grant or deny such request in her sole discretion.
  - b. Any work authorized herein conducted after said work completion date or any authorized one year extension thereof is a violation of this permit and may subject the Permittee to enforcement action, including penalties, as provided by law.
2. In conducting the work authorized herein, the Permittee shall not deviate from the attached plans, as may be modified by this permit. The Permittee shall not make de minimis changes from said plans without prior written approval of the Commissioner.
3. The Permittee shall maintain all structures or other work authorized herein in good condition. Any such maintenance shall be conducted in accordance with applicable law including, but not limited to, CGS sections 22a-28 through 22a-35 and CGS sections 22a-359 through 22a-363f.
4. Prior to the commencement of any work authorized hereunder, the Permittee shall cause a copy of this permit to be given to any contractor(s) employed to conduct such work. At the work area the Permittee shall, whenever work is being performed, make available for inspection a copy of this permit and the final plans for the work authorized herein.
5. The Permittee shall notify the Commissioner in writing of the commencement of any work and completion of all work authorized herein no later than three days prior to the commencement of such work and no later than seven days after the completion of such work.
6. All waste material generated by the performance of the work authorized herein shall be disposed of by the Permittee at an upland site approved for the disposal of such waste material, as applicable.
7. In undertaking the work authorized hereunder, the Permittee shall not cause or allow pollution of wetlands or watercourses, including pollution resulting from sedimentation and erosion. For purposes of this permit, "pollution" means "pollution" as that term is defined by CGS section 22a-423.



8. Upon completion of any work authorized herein, the Permittee shall restore all areas impacted by construction, or used as a staging area or accessway in connection with such work, to their condition prior to the commencement of such work.
9. Any document required to be submitted to the Commissioner under this permit or any contact required to be made with the Commissioner shall, unless otherwise specified in writing by the Commissioner, be directed to:

Permit Section  
Office of Long Island Sound Programs  
Department of Environmental Protection  
79 Elm Street  
Hartford, Connecticut 06106-5127  
(860) 424-3034  
Fax # (860) 424-4054

10. The date of submission to the Commissioner of any document required by this permit shall be the date such document is received by the Commissioner. The date of any notice by the Commissioner under this permit, including but not limited to notice of approval or disapproval of any document or other action, shall be the date such notice is personally delivered or the date three days after it is mailed by the Commissioner, whichever is earlier. Except as otherwise specified in this permit, the word "day" as used in this permit means calendar day. Any document or action which is required by this permit to be submitted or performed by a date which falls on a Saturday, Sunday or a Connecticut or federal holiday shall be submitted or performed on or before the next day which is not a Saturday, Sunday, or a Connecticut or federal holiday.
11. The work specified in the SCOPE OF AUTHORIZATION is authorized solely for the purpose set out in this permit. No change in the purpose or use of the authorized work or facilities as set forth in this permit may occur without the prior written authorization of the Commissioner. The Permittee shall, prior to undertaking or allowing any change in use or purpose from that which is authorized by this permit, request authorization from the Commissioner for such change. Said request shall be in writing and shall describe the proposed change and the reason for the change.
12. This permit may be revoked, suspended, or modified in accordance with applicable law.
13. This permit is not transferable without prior written authorization of the Commissioner. A request to transfer a permit shall be submitted in writing and shall describe the proposed transfer and the reason for such transfer. The Permittee's obligations under this permit shall not be affected by the passage of title to the work area to any other person or municipality until such time as a transfer is authorized by the Commissioner.
14. The Permittee shall allow any representative of the Commissioner to inspect the work authorized herein at reasonable times to ensure that it is being or has been accomplished in accordance with

the terms and conditions of this permit.

15. In granting this permit, the Commissioner has relied on representations of the Permittee, including information and data provided in support of the Permittee's application. Neither the Permittee's representations nor the issuance of this permit shall constitute an assurance by the Commissioner as to the structural integrity, the engineering feasibility or the efficacy of such design.
16. In the event that the Permittee becomes aware that he did not or may not comply, or did not or may not comply on time, with any provision of this permit or of any document required hereunder, the Permittee shall immediately notify the Commissioner and shall take all reasonable steps to ensure that any noncompliance or delay is avoided or, if unavoidable, is minimized to the greatest extent possible. In so notifying the Commissioner, the Permittee shall state in writing the reasons for the noncompliance or delay and propose, for the review and written approval of the Commissioner, dates by which compliance will be achieved, and the Permittee shall comply with any dates which may be approved in writing by the Commissioner. Notification by the Permittee shall not excuse noncompliance or delay and the Commissioner's approval of any compliance dates proposed shall not excuse noncompliance or delay unless specifically stated by the Commissioner in writing.
17. In evaluating the application for this permit the Commissioner has relied on information and data provided by the Permittee and on the Permittee's representations concerning site conditions, design specifications and the proposed work authorized herein, including but not limited to representations concerning the commercial, public or private nature of the work or structures authorized herein, the water-dependency of said work or structures, its availability for access by the general public, and the ownership of regulated structures or filled areas. If such information proves to be false, deceptive, incomplete or inaccurate, this permit may be modified, suspended or revoked, and any unauthorized activities may be subject to enforcement action.
18. The Permittee may not conduct work waterward of the high tide line or in tidal wetlands at this permit site other than the work authorized herein, unless otherwise authorized by the Commissioner pursuant to CGS section 22a-359 et. seq. and/or CGS section 22a-32 et. seq.
19. The issuance of this permit does not relieve the Permittee of his obligations to obtain any other approvals required by applicable federal, state and local law.
20. Any document, including but not limited to any notice, which is required to be submitted to the Commissioner under this permit shall be signed by the Permittee and by the individual or individuals responsible for actually preparing such document, each of whom shall certify in writing as follows: "I have personally examined and am familiar with the information submitted in this document and all attachments and certify that based on reasonable investigation, including my inquiry of those individuals responsible for obtaining the information, the submitted information is true, accurate and complete to the best of my knowledge and belief, and I understand that any false statement made in this document or its attachments may be punishable as a criminal offense."

21. This permit is subject to and does not derogate any present or future property rights or powers of the State of Connecticut, and conveys no property rights in real estate or material nor any exclusive privileges, and is further subject to any and all public and private rights and to any federal, state or local laws or regulations pertinent to the property or activity affected hereby

Issued on \_\_\_\_\_, 2009

STATE OF CONNECTICUT  
DEPARTMENT OF ENVIRONMENTAL PROTECTION

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Amey W. Marrella  
Commissioner

Permit Application No. 200801880-KF  
Ann Lunn

KF/

OFFICE OF LONG ISLAND SOUND PROGRAMS

APPENDIX A

TO: Permit Section  
Department of Environmental Protection  
Office of Long Island Sound Programs  
79 Elm Street  
Hartford, CT 06106-5127

PERMITTEE: Ann Lunn  
9 Contentment Island Road  
Darien, CT 06820

Permit No: 200801880-KF, Darien

CONTRACTOR 1: \_\_\_\_\_

Address: \_\_\_\_\_

Telephone #: \_\_\_\_\_

CONTRACTOR 2: \_\_\_\_\_

Address: \_\_\_\_\_

Telephone #: \_\_\_\_\_

CONTRACTOR 3: \_\_\_\_\_

Address: \_\_\_\_\_

Telephone #: \_\_\_\_\_

EXPECTED DATE OF COMMENCEMENT OF WORK: \_\_\_\_\_

EXPECTED DATE OF COMPLETION OF WORK: \_\_\_\_\_

PERMITTEE: \_\_\_\_\_  
(signature) (date)