

OFFICE OF ADJUDICATIONS

IN THE MATTER OF : **APPLICATION #200201644-JW**

MICHAEL MEARS : **FEBRUARY 1, 2008**

PROPOSED FINAL DECISION

**I
SUMMARY**

Michael Mears has applied to the Department of Environmental Protection (DEP) Office of Long Island Sound Programs (OLISP) for a permit to install a fixed pier, ramp and floating dock for private recreational boating access to Ash Creek, Fairfield. The proposed dock is subject to the structures, dredging and fill provisions of General Statutes §§22a-359 through 22a-363f, the Coastal Management Act, §§22a-90 through 22a-112, and the Tidal Wetlands Act and regulations, §§22a-28 through 22a-35; Regs., Conn. State Agencies §§22a-30-1 through 22a-30-17.

Public comments on the application were received during a May 15, 2007 hearing on this application at the Fairfield Town Hall. Written comments were also submitted after the hearing. Public comments focused on such issues as the fragility of the tidal estuary and the cumulative impacts of permitted docks in Ash Creek, including impacts on shellfish beds and migratory shorebirds.

On September 18, 2007, the applicant and OLISP staff jointly filed the attached Agreed Draft Decision for my review and consideration. (Attachment A.) Regs., Conn. State Agencies §22a-3a-6(1)(3)(A). Staff has also prepared a revised draft permit authorizing the applicant's proposed project. (Attachment B.)

I have reviewed the record, the Agreed Draft Decision and the relevant law in this matter. I have also considered all relevant public comments and exhibits. That Decision, as supplemented herein, sets forth findings that support the conclusion that the proposed regulated activity, if conducted in accordance with the conditions and recommended modification of the revised draft permit, would comply with all relevant statutes and regulations and would be consistent with all applicable goals and policies of the Coastal Management Act. This includes the fact that the activity would incorporate “all reasonable measures mitigating any adverse impacts of such actions on coastal resources.” General Statutes §22a-98. I therefore recommend that the Commissioner issue the requested permit, with the additional condition outlined herein.

II

DECISION

A

FINDINGS OF FACT

I adopt the findings set forth in the Agreed Draft Decision and make the following additional findings of fact.

1. The Ash Creek estuary and the site of the proposed dock are state designated natural shellfish beds that support an active seed-oyster fishery. The Ash Creek area is unique as its shores are less developed than other Connecticut coastal areas and boating traffic is light due to the shallow waters. Ash Creek is an important feeding ground for shore birds, including migratory shorebirds. (Exs. APP-1, 2, exs. DEP-1, 9.)

2. In May 2002, the Town of Fairfield Shellfish Commission recommended approval of the application on the condition that the applicant shorten the pier to thirty feet to avoid interference with shellfish habitat and to provide access to seed oyster beds. The Commission also recommended a permit condition that would require the applicant to remove the boat, float, and ramp upon their request. The Fairfield Conservation Commission recommended denial of the application. The Fairfield Harbor Management Plan does not include Ash Creek. (Ex. APP-1, 3, 8, ex. DEP-9.)

3. In June 2006, the Department of Agriculture, Bureau of Aquaculture (BOA) determined that the applicant's proposed project would *significantly impact* a shellfish area in Ash Creek. The BOA was primarily concerned that use of the dock during periods of low water could result in prop-dredging, which would impact oyster habitat and resources. The BOA noted that the applicant's drawings do not allow a determination that a boat launch could occur "without impacting the bottom habitat." The BOA renewed its determination of *significant impact* on November 1, 2006. (Ex.APP-2, exs. DEP-6, 9.)

4. According to the BOA, prop-dredging from motorboats, which can occur in low water conditions, "would re-distribute fine sediments into the water column during the summer, ... the most critical time of the year for oyster spawning and recruitment." Prop-dredging could also cause re-suspension of potentially contaminated sediments from the mud flats that "could be concentrated by shellfish in the area." Prop-dredging by powerboats during July through September and the suspension of fine sediments "would cover any available hard substrate that larval oysters require for setting and any newly settled oysters would succumb to additional siltation." (Ex. APP-2.)

5. In his final revisions to his application, the applicant reduced the length of the pier and ramp to fifteen feet each and modified the float to be supported by pilings with float stops attached at the mean high water mark. The BOA reviewed the applicant's revised application and on November 21, 2006, issued a determination of "no significant impact", which included "permit conditions ... recommended to minimize impacts." In particular, BOA recommended the permit condition that the "davits should be constructed to support only small light canoes, kayaks or small sail boat." (Exs. DEP-5, 7-9.)

6. The record in this matter closed on May 22, 2007, and on September 18, 2007, the parties submitted an Agreed Draft Decision. In an October 20, 2007 memorandum, the BOA advised OLISP that while the applicant's final plans "include...davits, there is no indication that [the davits] will not be constructed in a manner to support a larger powerboat. Based upon the plans submitted it is not possible to tell the size of vessel that could be supported by the proposed davits." The BOA noted that its November 21, 2006

determination of no significant impact was “contingent upon the design of the dock incorporating davits that could only support small light craft such as canoes, kayaks, or a small sail boat.” (Ex. HO-1.)

7. The record in this matter was subsequently re-opened for the purpose of admitting the BOA memorandum, an affidavit from staff regarding the effect of the BOA’s determination on this permit application, and a revised draft permit. In its affidavit, staff agrees that “operating motorized vessels in shallow water can create adverse impacts to benthic resources, shellfish (specifically oysters in Ash Creek), and other shallow water habitat.” OLISP does not authorize, as part of a dock permit, the size or type of boats to be used by a permittee. However, boats that are routinely berthed or tied to the dock during the boating season are considered encroachments associated with the dock. (Exs. HO-1, 2, 3, ex. DEP-11R.)

8. The revised draft permit provides that a water based barge shall conduct all work associated with the driving of piles. The barge shall operate only during periods of high water and must move to deeper waters during periods of low water and shall not rest on or come in contact with the bottom of Ash Creek. (Ex. DEP-11R.)

9. The permit requires the applicant to remove the ramp and float no later than November 15 of calendar year and store the structures at an upland location until no sooner than April 15. The applicant must also make best efforts to ensure that the pier, ramp, and float do not impede access to shellfish resources by the Town of Fairfield Shellfish Commission. (Ex. DEP-11R.)

B

CONCLUSIONS OF LAW

I adopt the Conclusions of Law set forth in the Agreed Draft Decision to the extent they are consistent with the following supplemental conclusions.

The proposed dock would be located in coastal waters, tidal wetlands and in a natural shellfish concentration area. Therefore, this regulated activity must comply with

the statutes and regulations relevant to the application that protect those resources. The application was reviewed under the applicable provisions of General Statutes §§22a-28 through 22a-35, §§22a-359 through 22a-363f, and Regs., Conn. State Agencies §§22a-30-1 through 22a-30-17. The application was also reviewed for consistency with the policies and provisions of the Coastal Management Act. §§22a-90 through 22a-112.

Section 22a-361 authorizes the Commissioner to permit the erection of structures, dredging, or the placement of fill, obstructions or encroachments or the maintenance of structures, dredging or fill “in the tidal, coastal or navigable waters of the state.” §22a-361(a). The Commissioner’s decision to authorize such regulated activity must be made

with due regard for indigenous aquatic life, fish and wildlife, the prevention or alleviation of shore erosion and coastal flooding, the use and development of adjoining uplands, the improvement of coastal and inland navigation for all vessels, including small craft for recreational purposes, the use and development of adjacent lands and properties and the interests of the state, including pollution control, water quality, recreational use of public water and management of coastal resources, with proper regard for the rights and interests of all persons concerned. §22a-359(a).

Section 22a-30-10 of the Regulations of Connecticut State Agencies implements this provision by setting out the criteria for granting, denying, or limiting permits and the consideration to be given to the impact of this proposal on, among other things, shellfisheries. As set out in the Agreed Draft Decision, the proposed project complies with the criteria for review of this application. §22a-30-10 (a). Therefore, these supplemental conclusions of law are limited to further consideration of the impact of this proposal on shellfish habitat and resources.

To determine that the proposed activity will not result in significant adverse impacts on shellfisheries, the Commissioner must, as applicable, find that:

- (a) The existing biological productivity of any wetland will not be unreasonably affected.
- (b) Habitat areas, such as habitat of rare and endangered wildlife and fish species, will not be destroyed, filled or otherwise unreasonably affected;
- (c) Wildlife and their nesting, breeding or feeding habitats will not be unreasonably reduced or altered.

- (d) Erosion from the proposed activity will not result in the formation of deposits harmful to any fish, shellfish or wildlife habitat.
 - (e) Shellfish beds will not be adversely affected by changes in:
 - (1) Water circulation and depth patterns around and over the shellfish beds.
 - (2) Natural relief of shellfish beds.
 - (3) Grain size and distribution of sediment in shellfish beds.
 - (f) The timing of construction activities takes into consideration the movements and lifestages of fish, shellfish and wildlife.
 - (g) The proposed activity will not unreasonably interfere with the harvesting or maintenance of leased, franchised or natural shellfish beds.
- Regs., Conn. State Agencies 22a-30-10(e).

The applicant has demonstrated that the tidal wetlands, consisting primarily of spartina alterniflora, would not be unreasonably affected by the proposed structure. There are no habitats of rare and endangered wildlife and fish species that would be destroyed, filled or otherwise unreasonably affected. The draft permit includes a condition that restricts the time for construction of the dock to avoid interference with the feeding patterns of migratory shorebirds in Ash Creek. There would be no erosion resulting from the construction of the dock.

The construction activities and the resulting structures would not necessarily result in adverse impacts to shellfish beds or in unreasonable interference with any harvesting or maintenance of natural shellfish beds. The applicant has shortened the length of the fixed pier and ramp and reduced the number of pilings necessary to support the structure to mitigate the impact of construction on the resources in the area and provide access to shellfish beds. In addition, the float will be elevated during periods of low water to avoid contact with the mudflats and shellfish beds.

However, the impacts of the applicant's proposal extend beyond the actual construction and presence of the dock. Although the BOA determined that the dock structure would not permanently and significantly adversely impact shellfish resources, the BOA consistently expressed concern that the use of powerboats in Ash Creek during periods of low water could destroy vital shellfish habitat as a result of prop-dredging and this dock, as designed, could support powerboats. Staff agrees that motorized vessels can

adversely impact the shellfish beds in Ash Creek but regulation of boats, once underway, is not authorized by the relevant permitting statutes and regulations.

The Commissioner's authority to regulate activities in the tidal, costal or navigable waters of the state waterward of the high tide line extends beyond construction activities and the dock structure to include *encroachments* in such locations. §22a-361(a). In the case of docks permitted pursuant to that section, boats or other vessels berthed or routinely tied to the dock are necessarily encroachments on the waters of the state. As encroachments, they may adversely impact any of the uses or resources specified in §22a-359, including natural shellfish habitat. Given the unique circumstances of Ash Creek, a shallow waterway in a relatively underdeveloped area that supports significant coastal resources, it is reasonable to consider the impacts from the foreseeable uses to which the proposed dock might be put.

There appears to be no boating regulations or local ordinances that could address the type of impacts raised by the BOA in Ash Creek. However, the Commissioner is authorized to regulate dredging activities in Ash Creek. §22a-361(a). The Commissioner is therefore authorized to impose permit conditions that would prohibit dredging activities, including prop-dredging, associated with the proposed dock.¹ A permit condition that prohibits prop-dredging could prevent the operation of powerboats routinely berthed or tied at the dock during periods of low water and mitigate against the use of these powerboats during periods of low water throughout Ash Creek. I therefore recommend that the Commissioner consider the following additional Special Condition, or an equivalent condition, for inclusion in the revised draft permit:

“Except as specifically authorized by this permit, the Permittee shall not conduct, cause, or permit dredging activities, including but not limited to prop-dredging resulting from the operation of powerboats routinely

¹ Section 22a-361 (a) does not specifically define the term “dredge.” The plain meaning of the term is “to clean, deepen or widen with a dredge; to bring up with a dredge, to come up with; unearth.” American Heritage Dictionary, (New College Edition, 1979.) Prop-dredging is a form of dredging, as its effect is to stir up or “bring up” creek bottom sediments.

berthed at the dock, to avoid impacts to shellfish beds and other coastal resources in the area of the dock.”

III

RECOMMENDATION

The application complies with the criteria outlined in the relevant statutes and regulations. The proposed regulated activity, if conducted in accordance with the terms and conditions and recommended modification of the revised draft permit, would strike a proper balance between the applicant’s riparian right to access navigable water and the state’s responsibility to minimize navigational and environmental impacts and encroachments into public trust land and waters. General Statutes §§22a-90 through 22a-113c. I therefore recommend that the Commissioner issue the permit that is the subject of this application.

/s/ Jean F. Dellamarggio
Jean F. Dellamarggio, Hearing Officer

P A R T Y L I S T

Proposed Final Decision In re Micheal Mears
Application No. 200201644-JW

PARTY

REPRESENTED BY

The Applicant
Michael Mears
44 Bay Edge Court
Fairfield, CT 06430

Department of Environmental Protection

OLISP
79 Elm Street
Hartford, CT 06106

Jeffrey Westermeyer

Petitioner

Genevieve Barthe
87 Bennett Street
Bridgeport, CT 06605

ATTACHMENT A

AGREED DRAFT DECISION

COASTAL PERMIT APPLICATION # 200201644-JW

INSTALLATION OF A PIER, RAMP AND FLOATING DOCK

July 2, 2007

(v4)

Michael Mears

44 Bay Edge Ct
Fairfield, CT, 06824

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1) Executive Summary

On March 22, 2001 Michael Mears of 44 Bay Edge Ct, Fairfield Ct submitted an application to undertake regulated activities in tidal, coastal and navigable waters of the State waterward of the high tide line and in an area of tidal wetlands. The modified final application received and agreed upon by the OLISP staff is for the proposed activities:

- a) The removal of 5 concrete pilings from the previous dock structure
- b) Removal of a wooden boat ramp
- c) Retain an existing rock seawall extending the length of the property
- d) Construction of a Piling supported timber pier, ramp and float.

This application seeks a permit to undertake said regulated activities under the provisions of the Structures, Dredging and Fill provisions of the Connecticut General Statutes ("General Statutes") sections 22a-359 through 363f, in accordance with the Connecticut Coastal Management Act, sections 22a-90 through 22a-112 of the General Statutes, and Tidal Wetlands Act and regulations, sections through 22a-28 through 22a-35 of the General Statutes and sections 22a-30-1 through 22a-30-17 of the Regulations of Connecticut State Agencies.

2) Background

a) Site Location and Character

The site is located at 44 Bay Edge Ct, on the Fairfield side of the Ash Creek. The landward area of the site is a loose rock Stone wall. The Ash Creek is an estuarine embayment that is subject to an average tidal range of 7.0'. Tidal wetland vegetation, *Spartina Alterniflora*, is present along the length of the property extending out 15ft to the north from the landward side of the proposed site of the project. The Fixed Pier and Dock will be in the exact location of the previous jetty structure. There are not any rare or protected species of plant life or nesting birds in the vicinity of the proposed fixed pier, ramp or float. The

proposed structure will span 35 feet over the intertidal flats. (DEP-7, DEP-8, APP-6)

b) Application History

The initial application was received on March 22nd, 2001 requesting authorization to install an elevated 4' wide by 50' long fixed pile and timber pier, a 3.5' wide by 20' long ramp to a 8' wide by 20' long floating dock with four (4) anchor piles and seven (10) associated tie-off piles.(DEP-1).

On December 29, 2003 Jeffrey Westermeyer of the DEP OLISP staff sent a letter to the applicant stating the application was incomplete. (DEP-2) The additional materials requested were sent to the DEP OLISP in a letter dated July 5th, 2004 (DEP-3) a second letter requesting changes to the application and additional information was sent by the DEP OLISP on October 27, 2005 (DEP-4). The changes to the application requested from the second letter were made in an updated letter received by the DEP OLISP on March 14, 2006 (DEP-5). After conversations with the DEP Staff and correspondence from the Bureau of Aquaculture the project plan for the proposed Pier and Float was changed to a 15' long fixed pile and timber pier, a 15' ramp extending to a 5' x 20' float. In addition the float will have "Float Stops" at the MHW mark to prevent the float from touching the intertidal flats during periods of low tide. The modifications to the float design were made to address the concerns of the Bureau of Aquacultures relating to boating traffic during periods where there is minimal water depth and its affect on the shellfish resource. Those concerns were addressed in a letter dated November 6th, 2006. (DEP-7, APP-2)

The changes based on the letters of correspondence and conversations of the original application are listed below:

- i) Authorization for a pre-1980 seawall on the property.
- ii) Change of the application from a, Structures, Dredging & Fill CGS 22a-361 to a Structures, Dredging & Fill and Tidal Wetlands permit CGS. 22a-32
- iii) Change the height of the Pier to be 1' above the tidal wetland vegetation.

- iv) Remove the 5 concrete pilings of the previous pier structure
- v) Remove the wooden boat ramp at the end of the property
- vi) Shortening the Pier from 50' to 15'
- vii) Add "Float Stops" to prevent the float from falling below MHW.

The final application including the recommended changes was received by the CT-DEP November 6 2006 (DEP-5).

On January 19, 2007, OLISP staff recommended tentative approval of the application and issued a Notice of Tentative Determination to Approve and Intent to Waive a Public Hearing (DEP-10). The notice was published in The Connecticut Post, a daily newspaper published in Bridgeport, CT. Because the project spans an area of tidal wetland vegetation, section 22a-32 of the General Statutes required a 40-day comment period on the application and also required that a public hearing be held upon request if twenty-five (25) individuals signed a petition to do so. The public comment period closed on February 28th, 2007. On February 28, 2007 OLISP staff received a petition from Genevieve Barthe (the "Petitioners") with 46 signatures requesting that a public hearing be held on the application.

In accordance with statutory requirements, upon receipt of the petition a public hearing was scheduled on the application. The hearing officer, Jean Dellamarggio, of the DEP Office of Adjudications, held a status conference on March 22, 2007. A final Prehearing Conference was held on April 27, 2007. Ms. Barthe did not attend either of the Prehearing conferences nor file a petition to be an intervening party, nor did any other person apply to intervene. On March 29, 2007, a Notice of Public Hearing was published in The Connecticut Post newspaper. The hearing took place in the Fairfield Town Hall on May 15th, 2007, 6:30 PM. A public viewing of the site took place earlier at 1:00 pm the same day.

3) Project Description

The Application is to approve the following activities:

- a) Remove, by hand, the following existing structures
 - i) 5 Concrete pilings located in the center of the property
 - ii) A wooden ramp located on the south side of the property
- b) Install a 4' x 15' fixed pier, a 3' x 15' ramp and a 5' x 20' float oriented parallel to the shoreline, held in place by six (6) anchor piles with float cradles and two (2) davits, located in the center of the property.
- c) Retain an approximately 105 linear foot stone seawall which extends along almost the entire shoreline of the property.

4) Purpose of Proposed Dock

The purpose and design of the proposed structure strikes a balance of the public's right to use and enjoy public trust waters and waterfront property owners' rights of reasonable access to those same waters. The proposed structure has been designed to not interfere with public access while permitting safe access to the water from the property. The purpose is to provide the applicant with private recreational boat access (DEP-9).

5) Compliance and Enforcement History

There are no previous 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.

6) Tidal Wetlands Vegetation

The OLISP staff conducted a site visit to verify the location of tidal wetland vegetation within the project location. Although on the Natural Diversity Database there are historic records indicating the existence of saltmarsh bulrush (*Scirpus cylindricus*) in the vicinity of the project. During the site inspection conducted on July 21, 2004 the analyst, Jeffrey Westermeyer, determined that the saltmarsh

bulrush does not grow in the vicinity of the proposed project or anywhere else on site. To minimize shading the project plan calls for the proposed pier to be at an elevation 1' above the *Spartina Alterniflora*. The pilings for the proposed pier will occupy 2 sq feet of space in the area of *Spartina*. Therefore there will be minimal impact on tidal wetlands vegetation (DEP-9).

7) Shellfish

The site is classified as an area with sensitive oyster habitat. The Fairfield Shellfish Commissions letter of May 10, 2002 approves the dock project with conditions. The Town of Fairfield has asked the DEP OLISP permit to contain language that the Float and Ramp should be removed during times of commercial harvesting if asked. The Bureau of Aquaculture in a letter dated November 1, 2006, (DEP-6) stated that the area of the Ash Creek is very sensitive to the affects of boating traffic during periods of low tide. Based on a previous letter from the Bureau of Aquaculture dated June 9, 2006, which suggested some alternatives to the original float design, the float design was changed so that the float will not fall below MHW. The Bureau of Aquaculture accepted the change and gave approval of the final design. (APP-2, DEP-7)

8) Wildlife

As per the DEP OLISP in (DEP-7) "The intertidal flats of Ash Creek are considered an important feeding ground for migratory shorebirds. During the review of the application for permit #200300739-KZ, issued to Paul Ganim for construction of a private residential dock on the east shore of Ash Creek, directly across from the project site, concerns were raised regarding the potential disruption to feeding patterns from the construction of a dock. Through consultation with DEP/Wildlife it was determined that migratory shorebirds are most likely to be present in Ash Creek from mid March to May 1st and from July 1st through the end of September. Therefore to minimize impacts to migratory shorebirds from construction of the dock, permit #200300739-KZ contained a special condition prohibiting dock construction from March 15th through June 1st and from July 1st through September 30th. Given the similar site characteristics at the project site this condition is also recommended for any permit issued for dock construction at this property."

There aren't any endangered species in the area or near the area of the proposed structure. In addition, there aren't any nesting species or active nests in the proposed area.

9) Intertidal Mudflats

The proposed structure will span 25' of intertidal flat. The fixed pier has been designed to span this area to minimize contact and disturbance of the intertidal flat. The only impact of the pier will be the pilings. The float will have "Float Stops" built into the piling structure which will prevent the float from falling below MHW (DEP-7, DEP-9).

The structure is designed to prevent degrading of tidal wetlands, so as to not significantly alter the natural characteristics of the area.

10) Finfish

The proposed project will not adversely impact fisheries resources and habitat in Ash Creek (DEP-9).

11) Coastal Flooding and Water circulation

There will be no impact to coastal flooding or water circulation patterns. The structure is built on pilings with minimal interference.

The structure design will have minimal impact on natural erosion and will not increase the exposure of the property, or surrounding properties from storms. In addition, the structure will not significantly alter transport of sediments and deposits. (DEP-9)

12) Navigation Impacts

The encroachment associated with the proposed pier, ramp and floating dock is approximately 35' waterward of the existing high tide line. The proposed project is the minimum length necessary at this particular location to provide the applicant with reasonable boating access to Ash Creek during the period's high water. The Army Corp of engineers has determined that the proposed structure will not interfere with Navigation. The Town of Fairfield Harbor Management plan does not include Ash Creek. (DEP-7)

13) Public Trust

The DEP 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 fixed pier complies with this policy. The Ash Creek, as a different water body type than normal, requires a more conservative approach.

The structure is high enough over the Intertidal mud flats and the *Spartina alterniflora* so that the public will be able to have access to the area under the structure. The Pier will be elevated to be 10' above MLW, 5' at its lowest point at the landward side of the property (DEP-7). As proposed, the dock is centrally located on the Applicant's frontage and in the same area as the previous structure, thus minimizing impacts on neighboring riparian owners. To minimize impact into the Shellfish beds, the float will stop at the MHW mark.

14) Environmental Impacts

Environmental impacts associated with the proposed pier, ramp and floating dock have been minimized to the greatest extent practicable. The Applicant understands that use of this dock to berth vessels may not be possible at all tidal cycles due to shallow depths in Ash Creek. The permit allows Boat Davits to be installed so that a boat can be moored at the dock above the substrate during periods of low tide. The installation of the ramp and float will not adversely impact existing intertidal flats, tidal wetlands, shellfish or finfish resources. (DEP-9).

15) Permit Conditions

OLISP proposed the inclusion of a Special Condition in the draft permit that would prevent the construction of the proposed Pier structure during periods when migratory birds are active. The special condition will prohibit dock construction from March 15th through June 1st and from July 1st through September 30th

16) Alternatives

As per DEP statements on the subject related to the final decision for the Ganim dock directly opposite of the proposed structure on the same body of water, "to protect tidal wetlands resources, docks are more acceptable when they span tidal

wetlands, rather than encouraging access through it. (proposed final decision App#200300739-KZ)

- a) A simple ramp from the property would have a severe impact on the Spartina directly under the ramp.
- b) The alternative of no dock was considered and rejected because it prevents the applicant from exercising their right of riparian access to the waters of the Ash Creek. In addition, to access the water by walking through the Spartina, Mussels and intertidal mudflats will have a greater impact and result in injuring the area of access.
- c) After balancing all of the relevant concerns, a dock structure consisting of a fixed pier, ramp and float as proposed by the Applicant was determined to provide reasonable access to public trust waters for boating while minimizing both overall encroachment and impacts to coastal resources. This proposal represents the least intrusive and most environmentally sensitive of those alternatives considered.

17) Town of Fairfield Recommendations

The Town of Fairfield Director of Conservation Thomas J. Steinke has written to the CT DEP as a representative of the Fairfield Shellfish commission recommending approval of the application with some changes. Mr. Steinke wrote a recommendation to the Conservation Committee approving the updated design. In a personal email to me, Mr. Steinke wrote that he has inspected the site many times and has found it to have supported a boat dock and a boat ramp in the past. He also mentions that the redesign of the structure will have much less impact than the previous structure. In his opinion he believes the structure satisfactorily meets the concerns of the town and the standing committees (APP-1, APP-3 & APP-8)

18) Environmental Impact of the Proposed Action

The proposed project would provide the Applicant with reasonable access to public trust waters, while eliminating the need for repeated crossings through the area of tidal wetland vegetation, mussel beds and mudflats with a boat. 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 designed, 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 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, which provides for the protection of 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, (iii) are located to assure optimal distribution of state owned facilities to the state wide boating public, 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; and 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 of tidal flats;
- e) Section 22a-92(b)(2)(E) of the General Statutes, which requires the preservation of tidal wetlands and the prevention of despoliation and destruction of tidal wetlands in order to maintain their vital natural functions;

- f) Section 22a-92(c)(1)(B) of the General Statutes, which disallows any filling of tidal wetlands and nearshore, offshore and intertidal waters for the purpose of creating new land from existing wetlands and coastal waters which would otherwise be undevelopable unless it is found that adverse impacts on coastal resources are minimal;
- g) Section 22a-92(c)(2)(A) of the General Statutes, which requires the management of estuarine embayment so as to insure that coastal uses proceed in a manner that assures sustained biological productivity, the maintenance of healthy marine populations and the maintenance of essential patterns of circulation, drainage and basin configuration; and to protect, enhance and allow natural restoration of eelgrass flats except in special limited cases, notably shellfish management, where the benefits accrued through alteration of the flat may outweigh the long-term benefits to marine biota, waterfowl, and commercial and recreational fisheries;
- h) 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;

Section 22a-359 of the General Statutes, which establishes the criteria for review of applications seeking permission for dredging and erection of structures and placement of fill in tidal, coastal or navigable waters;

- i) Section 22a-33 of the General Statutes, which establishes the criteria for review of Tidal Wetlands Act applications;
- j) Section 22a-30-10 of the Tidal Wetlands Regulations, which further explains the criteria for Tidal Wetland Act review;
- k) Section 22a-30-11(b)(2) of the Tidal Wetlands Regulations, which defines the use guidelines for small residential docks.

19) Consistent with All Applicable Standards

The proposal is consistent with applicable standards, goals and policies of sections 22a-28 through 22a-35 and 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.

a) Section 22a-30-10(b) Preservation of tidal wetlands

There is no other alternative that will accomplish the objective of access to the water while protecting the resource

b) Section 22a-30-10(c) Recreational and Navigational uses

The Structure will not unreasonably interfere with established public rights of way or access to the use of the wetlands

c) Section 22a-30-10(e) Marine fisheries, shellfish and wildlife

The impact will be minimal by the extended use of pilings

d) Section 22a-30-10(f) Circulation and Quality of water flow

The structure will not alter water flow or create any adverse alterations of sediment

e) Section 22a-30-10(g) Protection of Life and property from natural disaster

f) Section 22a-30-10(f) Criteria for water dependent uses of Tidal waters

All reasonable measures have been taken to create a structure that will not interfere with the public right of way or the riparian rights of neighbors

20) 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.


21) 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 Draft Permit, attached hereto.

Department of Environmental Protection Applicant, Michael R. Mears

By  7/12/07

Brian P. Thompson, Director
Office of Long Island Sound Programs
Department of Environmental
Protection
79 Elm Street
Hartford, CT 06106-5127

By  8/10/07

Michael R. Mears
44 Bay Edge Ct
Fairfield, CT 06824

ATTACHMENT B

DRAFT PERMIT

Permit No: 200201644-JW

Town: Fairfield

Work Area: Ash Creek off property located at 44 Bay Edge Court

Permittee: Michael Mears
44 Bay Edge Court
Fairfield, CT 06824

Pursuant to section 22a-359 through 22a-363f and section 22a-28 through 22a-32 of the Connecticut General Statutes (“General Statutes”) and in accordance with section 22a-98 of the General Statutes, and the Connecticut Water Quality Standards dated December 2002, a permit is hereby granted by the Commissioner of Environmental Protection (“Commissioner”) to retain an existing seawall for shoreline flood and erosion control, remove concrete piles and a wooden ramp and install a dock for private recreational boating use as is more specifically described below in the SCOPE OF AUTHORIZATION, in Ash Creek off property identified as the “work area” above.

*******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, 200201644-JW including 4 sheets of plans attached hereto as follows: Sheet 1 of 4 dated November 15, 2005 and sheets 2 through 4 of 4 dated November 6, 2006, submitted by the Permittee to the Commissioner, as follows:

1. remove, by hand, the following existing structures as follows:
 - a. five (5) concrete piles located in the center of the property; and
 - b. a wooden ramp located on the south side of the property; and
2. install a 4’ x 15’ fixed pier, a 3’ x 15’ ramp, and a 5’ x 20’ float oriented parallel to the shoreline, held in-place by six anchor piles with float cradles and two davits, located in the center of the property;

3. retain an approximately 105 linear foot stone seawall located almost the entire shoreline of the property.

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 as well as the location of the relocated boulders.
4. Prior to construction of the dock authorized herein the Permittee shall remove the concrete piles and wooden ramp identified on SCOPE OF AUTHORIZATION paragraph 1., above, by hand using hand held tools.
5. 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 only during periods of high water 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.
6. 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 Ash Creek.
7. The Permittee shall install and maintain a float support structure consisting of timber bracing attached to the anchor piles authorized herein. The Permittee shall ensure that said bracing is installed so as to maintain a minimum float elevation of 7.0' MLW.

8. The Permittee shall construct the fixed pier authorized herein such that the bottom stringers of said pier are located at elevation 11.0' mean low water.
9. The Permittee shall remove the ramp and float authorized herein no later than November 15 of any calendar year and shall not install such ramp and float before April 15 of any calendar year. Upon removal of the ramp and float authorized herein, the Permittee shall store such structures at an upland location on the mainland, landward of the high tide line and outside of any wetlands. The Permittee shall make best efforts to insure that the structures authorized herein do not impede access by the Town of Fairfield Shellfish Commission to shellfish resources.
10. The Permittee shall not construct the dock authorized herein from March 15th through June 1st, inclusive, and from July 1st through September 30th, inclusive, of any given year to avoid impacts to migratory shorebirds from such work.

GENERAL TERMS AND CONDITIONS

1. All work authorized by this permit shall be completed within three 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, sections 22a-28 through 22a-35 and sections 22a-359 through 22a-363f of the General Statutes.
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.
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 section 22a-423 of the General Statutes.
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. This permit may be revoked, suspended, or modified in accordance with applicable law.
12. 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.

13. 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.
14. 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.
15. 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.
16. 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.
17. 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 section 22a-359 et. seq. and/or section 22a-32 et. seq. of the General Statutes.
18. 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.

19. 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."

20. 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 _____, 2008.

STATE OF CONNECTICUT
DEPARTMENT OF ENVIRONMENTAL PROTECTION

Gina McCarthy
Commissioner

Permit Application No. 200201644-JW, Fairfield
Michael Mears

JW/jw

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: Michael Mears
44 Bay Edge Court
Fairfield, CT 06824

Permit No: 200201644-JW, Fairfield

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)