

WIGHTLINK LIMITED

LYMINGTON TO YARMOUTH REPLACEMENT FERRIES

1 Wightlink is a statutory harbour authority in respect of Lymington Pier and therefore has environmental duties under section 48A of the Harbours Act 1964. Under that section, the company has a duty, when formulating or considering any proposals relating to its statutory functions, to have regard to the conservation of the natural beauty of the countryside and natural features of special interest, and to take into account any effect which the proposals may have on those features.

2 By virtue of its statutory functions, Wightlink is also ‘competent authority’ for the purposes of the Conservation (Natural Habitats etc.) Regulations 1994. Regulation 3(4) requires that every competent authority in the exercise of any of their functions shall have regard to the requirements of the Habitats Directive¹ so far as they may be affected by the exercise of those functions. In addition, Regulation 48(1) provides that:

“A Competent Authority, before deciding to undertake, or give any consent, permission or other authorisation for, any plan or project which is likely to have a significant effect on a European site in Great Britain (either alone or in combination with other plans or projects), and is not directly connected with or necessary to the management of the site, shall make an appropriate assessment of the implications for the site in view of that site’s conservation objectives.”

3 Neither the Regulations, nor the Habitats Directive which they implement into English law, define ‘plan’ or ‘project’. However, the European Commission’s communication, *Managing Natura 2000 Sites*, advocates a broad interpretation of these terms. The authors state that ‘plan’ is expressed to relate to land use plans and sectoral plans – such as transport network plans and water management plans. Although the category is to be interpreted broadly, it is difficult to see how the proposed introduction of the new ferries can fall within the definition of ‘plan’.

4 On the definition of ‘project’, *Managing Natura 2000* states that:

“Support for a broad definition of ‘project’ is reinforced, by analogy, if we refer to Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment. ... Article 1(2) of Directive 85/337/EEC (‘the EIA Directive’) provides that ‘project’ means - the execution of construction works or other installations or schemes - other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources.”

¹ Council Directive 92/43/EEC

5 The authors go on to state that the definition of project is ‘very broad’ and ‘not limited to physical construction’. Since the guidance draws an analogy with the EIA Directive, it is worth considering those provisions in more detail.

6 Annex I of the EIA Directive lists those projects for which an Environmental Impact Assessment (‘EIA’) is mandatory. These include:

“8(a) Inland waterways and ports for inland-waterway traffic which permit the passage of vessels of over 1 350 tonnes;

(b) Trading ports, piers for loading and unloading connected to land and outside ports (excluding ferry piers) which can take vessels of over 1,350 tonnes.”

7 Lymington Harbour is not an inland waterway, so 8(a) does not apply. It is difficult to see how 8(b) could apply, since it excludes ferry piers from the definition of ‘project’ under Annex I. Annex II to the EIA Directive identifies projects for which the need for an EIA will be determined either on a case-by-case basis depending on their environmental impact, or by reference to thresholds or criteria set by the member states. These include:

“10(e) Construction of ... harbours and port installations, including fishing harbours (projects not included in Annex I).

10(f) Coastal work to combat erosion and maritime works capable of altering the coast through the construction, for example, of dykes, jetties and other sea defence works, excluding the maintenance and reconstruction of such works.

13 Any change or extension of projects listed in Annex I or Annex II, already authorised, executed or in the process of being executed, which may have significant adverse effects on the environment.”

8 Since the introduction of the new ferries would not constitute construction or coastal work, and is not a change or extension of a project listed under Annex I, it could not be classified as a project under Annex II.

9 The only basis on which the introduction of the new ferries could be considered a ‘project’ by analogy with article 1(2) of the EIA Directive is as ‘an intervention in the natural surroundings’. Whilst this category could potentially cover an extremely broad range of activities, we are not aware of any authority for finding that the introduction of new ferries onto an existing route, constitutes a project for which an appropriate assessment is required under regulation 48. If the alternative view were correct, it would mean that every time a shipping line employed different or larger vessels at any port, there would be a requirement to consider whether an appropriate assessment had, first, to be carried out.

10 In seeking to show that the introduction of the new ferries constitutes a project, Natural England has placed reliance on the *Waddenzee* case in which the European Court of Justice found that the activity of mechanical cockle fishing fell within the

concept of a project for the purposes of article 1(2) of the EIA Directive. However, this part of the case was decided on its own facts and the decision offers no general conclusions on how the concept of project may be interpreted in the case of activities which do not involve construction works except that it draws an analogy with the EIA Directive. We do not consider that the obligation to have regard to the requirements of the Habitats Directive under regulation 3(4) makes any difference to the question of whether or not the introduction of the new ferries constitutes a plan or project (so triggering the requirement for an appropriate assessment under regulation 48).

- 11 However, in any event, given Wightlink's general obligations under s.48A of the Harbours Act and regulation 3(4), it is advisable for the company to carry out an environmental assessment of the effect of introducing the new ferries. That assessment should be equivalent in form and scope to the appropriate assessment process that would otherwise have been required had the introduction of the ferries constituted a plan or project. As part of that process, Wightlink should consult Natural England and have regard to any representations it makes. Having done so, Wightlink should only decide to introduce the new ferries if it has ascertained that the ferries will not adversely affect the integrity of the Natura 2000 site.

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and

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