

PROPOSED INTER-TIDAL MUDFLAT RECHARGE LYMINGTON RIVER

1. INTRODUCTION

- # 1.1. This report is concerned with a proposal by Wightlink to carry out a recharge of inter-tidal mudflats on land leased by this Council at Boldre Foreshore, Lymington. This report solely relates to New Forest District Council's position as leasehold owner and seeks consent to works being undertaken on land in which the Council has a legal interest through a grant of a Licence. Cabinet considered this matter back in September 2009 (Report attached at Appendix A) when consent was granted to Wightlink to carry out a 'trial' of its intended works.

2. BACKGROUND

- 2.1 New Forest District Council leases extensive areas of the Boldre foreshore from the Crown Estates. The lease in question runs for a period of 25 years from June 1993 to May 2018. The land is in turn sub-let to the South Hampshire Wildfowling Association and the Hampshire and Isle of Wight Wildlife Trust. New Forest District Council's interest is therefore only as an intermediary landlord for the residual 6 ½ years of the lease left to run. The Council has no other direct land ownership interest in this matter.
- 2.2 In early 2009 Wightlink Ferries introduced three new "W Class" ferries on the Lymington to Yarmouth crossing. The introduction of the new ferries requires certain alterations to the berthing facilities at Lymington Pier terminal. These works require planning permission.
- 2.3 Natural England has previously advised Wightlink of a risk of adverse effect on the designated features within the Solent Maritime SAC and Solent and Southampton Water SPA / Ramsar (the European sites) through the long term operation of the new W Class ferries. Consequently Wightlink have proposed certain "Recharge and Habitat Creation Works" within Lymington Estuary to offset any risk of adverse effect on the integrity of the sites that can be attributable to the ferries.
- 2.4 In this report Wightlink propose to recharge or replenish areas of mud flat at Boldre Foreshore that are eroding due to natural processes, with material arising from the annual maintenance dredging undertaken in Lymington River and marinas. To do so, Wightlink require the consent of this Council and the other interested parties as set out in paragraph 2.1 above.

3. LICENCE TO UNDERTAKE WORKS

- 3.1 Wightlink wish to obtain the consent of all the relevant parties to carry out the works and to document the consent through the completion of a Licence to deposit material. The Licence will run for a period of years in order to give sufficient time for the new habitat to establish and to replenish the recharge site in future years if required. As one of the parties with an interest in the land, the Council would be a signatory to the Licence.

- 3.2 A draft Licence has been drafted by Wightlink which is attached at Appendix B. Following amendments agreed between the parties' legal representatives it is in an acceptable form subject to the consent of Cabinet.

4. THIRD PARTY CONSULTATION

- 4.1 Officers have consulted with the Wildfowlers Association and the Wildlife Trust and the Crown Estate as all three bodies also have an interest in the land. Although there is some concern about the impact of these works on the activities that the interested parties enjoy on the land, the general consensus is that the replenishment of the mudflats, if successful, will have a beneficial effect and should be supported.

5. FINANCIAL IMPLICATIONS

- 5.1 There are no financial implications arising from this report.
- 5.2 Wightlink have agreed to underwrite the District Council's legal costs in this matter. The District Council obtains no rent from its tenants and pays only a nominal rent to the Crown Estate; it is therefore not appropriate for rental compensation to be paid.

6. ENVIRONMENTAL IMPLICATIONS

- 6.1 No parties having an interest in the land in question are able to conclude at this time that the scheme will be successful. They will rely on Natural England's assessment of the proposals to determine success (as the competent expert in matters such as these).
- 6.2 If approved, the proposal could be expressed as having a positive environmental impact. Natural England support the Recharge Scheme as appropriate to offset the potential impact of the W Class ferries subject to Wightlink entering into a S106 planning obligation to ensure that they are legally obliged to deliver the Scheme and to provide assurance that adverse effects, which would otherwise be attributable to the operation of the W Class ferries, will not occur.
- 6.3 It is emphasised (as it was in the 2009 Report) that in becoming a party to the Licence, the Council is not exercising any "competent authority" functions under the relevant environmental legislation, now the Conservation of Habitats and Species Regulations 2010. The rights granted by the Licence will only be exercised if planning permission is granted for the Recharge Scheme. The National Park Authority is the local planning authority for the land in question. Wightlink applied to the NPA for planning permission in 2010, and that application is now pending on appeal against non-determination. A decision expected within the next few months. The inspector is the competent authority for determining the environmental issues on the appeal. There is also a pending duplicate application before the NPA for which the NPA is competent authority. Planning permission can only be granted on either application if the competent authority decides the legal and technical issues under the Habitats Regulations in Wightlink's favour. The overall result is that those issues are not relevant to this Council's decision whether to agree to the Licence.

7. PORTFOLIO HOLDERS COMMENTS

7.1 Councillor Vickers; Planning and Transportation Portfolio Holder

“Although the NFDC has only a minor land ownership interest in the area of the proposed recharge, we are also mindful of the fact that we are the Planning Authority for the required landside works. Whilst it is not clear how much of the erosion can be attributed specifically to the ferry operation compared to natural processes, we accept Natural England's assessment of the situation. We therefore support the proposed recharge in the hope that it may demonstrate a methodology that could potentially slow the natural deterioration that is currently occurring throughout the salt marshes.”

7.2 Councillor Wise; the Finance and Efficiency Portfolio Holder

"It is part of my responsibility to ensure that our assets are protected. The advice we have received would indicate that recharging the marsh with dredgings may well help to mitigate the serious marsh erosion which continues to take place. Given that this is effective it will, in turn, help to protect the shore line which it is our statutory responsibility to protect.

As the portfolio holder responsible for the Council's assets I support the recommendation.”

8. CRIME & DISORDER AND EQUALITY & DIVERSITY IMPLICATIONS

8.1 There are none arising directly from this report.

9. RECOMMENDATION

9.1 It is recommended that Members agree to enter into a Licence in the form attached at Appendix B to undertake works on Boldre Foreshore.

#

Further information

Land ownership issues

Andy Groom

Valuer

023 8028 5634

Email: andy.groom@nfdc.gov.uk

Planning Issues

Chris Elliott

Head of Planning and Transportation

023 8028 4444

Email: chris.elliott@nfdc.gov.uk

Legal Issues

Grainne O'Rourke

Head of Legal & Democratic Services

023 8028 5285

Email: grainne.orourke@nfdc.gov.uk

Background Papers

Report A

Cabinet 2nd September 2009

Proposed intertidal mud-flat recharge
Lymington River.

CABINET – 2 SEPTEMBER 2009

PORTFOLIOS: FINANCE AND EFFICIENCY
PLANNING AND
TRANSPORTATION**PROPOSED INTERTIDAL MUD-FLAT RECHARGE LYMINGTON RIVER****1. INTRODUCTION**

- 1.1 This report briefly looks at a request by Wightlink Ferries Limited to carry out a trial intertidal mud flat recharge on land leased by New Forest District Council.

2. BACKGROUND

- 2.1 New Forest District Council lease extensive areas of the Boldre foreshore from the Crown Estates. The lease runs for a period 25 years from June 1993 and expires in May 2018. The land is in turn sub-let to the South Hampshire Wildfowlers Association and the Hampshire and Isle of Wight Wildlife Trust Limited for the same period less one day. New Forest District Council's interest therefore is only as an intermediary Landlord and the Council has no direct land ownership interests.
- 2.2 Earlier this year Wightlink Ferries introduced three new vessels on the Lymington to Yarmouth crossing. The introduction of the new ferries requires certain works to the ferry terminal, which require planning consent.
- 2.3 Although opinion differs as to the likelihood and extent of the ferry operation causing adverse harm to the Designated Areas, Natural England's advice, which was accepted by the District Council's Planning Committee earlier this year, is that some harm could be established.
- 2.4 As part of the consents required to obtain permission to undertake the works to the berthing facilities at Lymington Pier, Wightlink will have to provide mitigation measures to offset erosion and loss of Designated Habitat caused by the operation of the ferries along the Lymington River.

3. THE PROPOSALS

- 3.1 In order to mitigate for the loss of habitat, Wightlink propose to recharge or replenish areas of mud flat that are eroding due to natural processes, using material arising from the annual maintenance dredging within the Lymington River and marinas, undertaken by the Harbour Commissioners. The two potential areas of recharge regarded as providing the greatest environmental or habitat benefit are identified on the attached plan, coloured red.
- 3.2 The recharge areas have been chosen as the salt marsh immediately to the north of the proposed site has been identified as an area at risk of natural erosion (these are identified as the "protected areas" on the attached plan coloured black). Should the marshes be breached at this point the foreshore immediately behind would be at risk of increased rates of erosion from natural

processes. Wightlink, through discussions with Natural England anticipate that the recharge may prolong the life of the marshes and intertidal habitats in this area by a significant number of years.

- 3.3 The proposal, if approved, would involve pumping maintenance dredged materials from a barge positioned in the vicinity of the Pylewell Post in the Lymington River to the recharge site via a floating pipeline. To assist in retention of the material brushwood poldering would be installed on the seaward edges of the site.
- 3.4 It is anticipated that the work would be undertaken in January and February to coincide with the dredging season. This could be undertaken in 2010 if all the necessary consents were in place. In order to supply sufficient material or replace any material lost due to high tides or storms, the work may have to be repeated in subsequent year(s) but it would not become a regular undertaking.
- 3.5 For some years the recharge of intertidal mudflats has been considered as a means to reduce the effects of erosion through natural processes. While there is no established precedent in the locality to conclude the scheme will ultimately succeed, there are real benefits that can be taken from these proposals.
- 3.6 Being part of a trial on a meaningful scale, that was carefully monitored and reported, would provide beneficial and important lessons and possibly have implications for repeating at other sites. It would also be useful to develop a better understanding of the processes involved in seeking and obtaining consents for similar schemes in the future.

4. NECESSARY APPROVALS

- 4.1 The land ownership in this area, as outlined above, is complex. The freehold is owned by the Crown Estate, leased to New Forest District Council and sublet to The Wildfowlers Association and Wildlife Trust.
- 4.2 The area itself comes within the New Forest National Park and the works may require a separate planning consent from the National Park Authority.
- 4.3 As the works would impact upon part of the European Designated Site, Natural England's consent will also be required not only for approval as to the extent of the mitigation they offer but also to advise that the works themselves do not have an adverse impact upon the Designated Site.
- 4.4 Consultation has commenced with the Crown Estate and the District Council's tenants. Although all parties have some concerns about the method of works and effect on land ownership interests, the general consensus is that the replenishment of the mudflats, if successful, would have a beneficial effect.
- 4.5 None of the land ownership parties are able to conclude that the scheme would be successful and to a large extent they all will rely on Natural England's assessment of the proposals.
- 4.6 Natural England would not endorse the recharge if, on the weight of scientific evidence, it was anticipated that it would either be unsuccessful, would not provide adequate habitat mitigation or the works would have a detrimental impact upon the habitat. There is therefore a tacit acceptance that should

Natural England approve the scheme all the other parties will likewise consent.

- 4.7 As with any scheme of this nature there are significant technical aspects that need to be resolved and officers will continue to work with both Wightlink and other parties with a land ownership interests over the coming months.

5. FINANCIAL IMPLICATIONS

- 5.1 There are no financial implications arising from this report.
- 5.2 Wightlink have agreed to underwrite the District Council's costs in this matter. The District Council obtain no rent from our tenants and pays only a nominal rent to the Crown Estate; it is therefore not appropriate for rental compensation to be paid.
- 5.3 Although Wightlink would benefit from the proposals as it would enable them to carry out the desired works to the Lymington Pier, there may be alternative sites that Wightlink could use; however, these may be less beneficial in terms of prolonging the life of the mud flats.
- 5.4 The Crown Estate consider that the proposals will add extra value to their land holding by adding extra years to their interest and will not be seeking additional considerations to allow the proposals to proceed.
- 5.5 It is recommended that the District Council take a similar view as the greatest benefit is deemed to be derived from establishing whether the scheme works and monitoring the processes involved. It is therefore not proposed to seek financial consideration for consenting to Wightlink's request.

6. ENVIRONMENTAL IMPLICATIONS

- 6.1 A concern has been raised by the Wildfowlers that dredged material from the river may contain high levels of toxins from boat's anti-fouling, which may contaminate the trial site. Officers would look to Natural England to provide assurances that the scheme would not be permitted if it were deemed to be environmentally damaging. There are clear environmental benefits accruing from the proposals if they successfully slow down or reverse mud flat erosion and it can be established that this is a satisfactory method for future protection schemes elsewhere.

7. PORTFOLIO HOLDER'S COMMENTS

- 7.1 Councillor Treleaven; Planning and Transportation Portfolio Holder,

Cllr Treleaven has been consulted on this report he concurs with the conclusions as far as the landownership issue are concerned. Whether this is a viable ecological scheme particularly as a "compensation" measure, he agrees that the Council should look to Natural England for advice.

7.2 Councillor Wise, the Finance and Efficiency Portfolio Holder comments:

"It is part of my responsibility to ensure that our assets are protected. The advice we have received would indicate that recharging the marsh with dredgings may well help to mitigate the serious marsh erosion which continues to take place. Given that this is effective it will, in turn, help to protect the shore line which it is our statutory responsibility to protect.

As the portfolio holder responsible for the Council's assets I support the recommendation."

8. CONCLUSIONS

8.1 Whilst the science behind the proposals is yet unproven there are real tangible benefits that could be taken from being part of the trial scheme as proposed by Wightlink. Should the recharge ultimately prove successful the scheme may establish a sustainable mechanism to protect or enhance areas of mud flat at risk from coastal erosion through natural processes.

8.2 It is recognised that the ultimate endorsement of the science behind the proposals will be established if Natural England gives their consent to the works being adequate mitigation.

9. RECOMMENDATION

9.1 It is recommended that Members authorise officers to continue negotiations with Wightlink to allow the proposed trial inter tidal habitat recharge to take place;

9.2 This consent relates only to the District Council's position as landowner and that Wightlink be advised that all other necessary consents and permissions will still need to be obtained.

For Further Information Please Contact:

Land ownership issues

Andy Groom
Valuer
Tel (023) 8028 5634
Email: andy.groom@nfdc.gov.uk

Coastal protection issues

Andrew Colenutt
Coastal Projects Office
Tel (023) 8028 5818
Email: andrew.colenutt@nfdc.gov.uk

Background Papers:

Draft Assessment of proposal by ABP Mer.

DATED 2011

HER MAJESTY THE QUEEN

and

THE CROWN ESTATE COMMISSIONERS

and

THE DISTRICT COUNCIL OF NEW FOREST

and

THE SOUTH HAMPSHIRE WILDFOWLERS ASSOCIATION

and

THE HAMPSHIRE AND ISLE OF WIGHT WILDLIFE TRUST LTD
as Licensors

WIGHTLINK LIMITED
as Licensee

DEED OF LICENCE

to deposit material on the foreshore at Lymington

Contents

Clause	Name	Page
1	Definitions and interpretation.....	11
2	Grant of the Licence	12
3	Personal Licence.....	12
4	Obligations of the Licensee.....	12
5	Determination of the Licence	13
6	Obligations of the Licensors.....	13
7	Notices	13
8	Exclusion of implied rights	13
9	Jurisdiction and service of process	13
10	Counterparties.....	14
11	indemnity	14
12	Waiver of Breach	15
Schedule	Name	Page
1	The Works	16
2	Form of Deed of Covenant	17
Execution Pages		20
Appendix	Name	Page
	Plan.....	22

THIS DEED IS DATED

2011

PARTIES

- (1) **HER MAJESTY THE QUEEN**
- (2) **THE CROWN ESTATE COMMISSIONERS** of 16 New Burlington Place, London W1S 2HX (the "**Commissioners**")
- (3) **THE DISTRICT COUNCIL OF NEW FOREST** of Appletree Court, Lyndhurst, Hants SO43 7PA (the "**Council**")
- (4) **THE SOUTH HAMPSHIRE WILDFOWLERS ASSOCIATION** of 77 Calmore Road, Calmore, Totton, Hants (the "**Wildfowlers**")
- (5) **THE HAMPSHIRE AND ISLE OF WIGHT WILDLIFE TRUST LTD** of 71 The Hundred, Romsey (the "**Trust**")
- (6) **WIGHTLINK LIMITED** (company no 1059267) of Sea Containers House, 20 Upper Ground, London SE1 9PF (the "**Licensee**")

THIS DEED WITNESSES THAT

BACKGROUND

- (A) The Commissioners are the owners of the freehold interest in the Property registered at the Land Registry with title number HP 688493.
- (B) The Council is the owner of a leasehold interest in the Property registered at the Land Registry with title number HP 483936 pursuant to a lease dated 25 August 1993 between (1) the Crown and (2) the Council due to expire on 31 May 2018.
- (C) The Wildfowlers are the owners of a leasehold interest in the Property registered at the Land Registry with title number HP 487750 pursuant to a lease dated 14 February 1994 between (1) the Council (2) the Wildfowlers and (3) the Trust due to expire on 30 May 2018.
- (D) The Trust is a licensee in respect of the Property pursuant to the lease referred to in Recital (C) above (and is therefore not in possession of the Property). In entering into this Deed the Trust is satisfied that the works are of benefit to the environment generally and in respect of the operation of the 'W' class ferries between Lymington and Yarmouth however the Trust reserves its position as to whether the Works are "mitigation" or "compensation" for the purposes of compliance with Articles 6(3) and 6(4) of the EU Habitats Directive and Regulations 61 and 62 of the Conservation of Habitats and Species Regulations 2010.
- (E) Whichever Licensor is in possession of the Property from time to time during the subsistence of this Deed grants the rights contained in this Deed and the other Licensors not in possession of the Property from time to time consent to the grant of the rights contained in this Deed to the extent of their respective interests in the Property.

OPERATIVE PROVISIONS

1 DEFINITIONS AND INTERPRETATION

1.1 In this Deed:

"**Applicable Laws**" means an act of parliament and any instruments, rules, orders, regulations, notices, directions, bye-laws, permissions and plans for the time being made under or deriving validity from it, and any European Directives or Regulations.

"**Licensors**" means the Crown, the Council, the Wildfowlers and the Trust and includes their respective successors in title to their respective interests in the Property.

"**Permitted Period**" means the period from 1 January to 31 March in each year.

"**Property**" means the land being part of the foreshore at Lymington shown edged red on the plan annexed to this Deed as Appendix 1.

"**Required Consents**" means all necessary planning permissions and all other approvals, permissions, licences and consents required pursuant to any Applicable Law and any other third party consents rights and agreements required for the carrying out of the Works.

"**Section 106 Agreement**" means an agreement to be entered into by the Licensee under section 106 of the Town and Country Planning Act 1990 (as amended) pursuant to the planning application submitted to New Forest National Park Authority for planning permission for the Works (ref: 10/95896).

"**Works**" means the works of deposition of silt upon the Property more particularly described in the Schedule 1 to this Deed.

1.2 The Clause and paragraph headings in this Deed are for ease of reference only and shall not be taken into account in the construction or interpretation of the Clause or paragraph to which they refer.

1.3 References in this Deed to a Clause or Schedule are references where the context so admits to a Clause in or Schedule to this Deed.

1.4 Words importing the singular meaning include where the context so admits the plural meaning and vice versa.

1.5 Words of the neuter gender include the feminine and masculine genders and words denoting natural persons include corporations and firms and all such words shall be construed interchangeably in that manner.

1.6 Words denoting an obligation on a party to do any act, matter or thing include an obligation to procure that it be done and words placing a party under a restriction include an obligation not to permit infringement of the restriction.

1.7 Where the Licensee comprises two or more parties the obligations of the Licensee are in relation to each such party joint and several.

2 GRANT OF THE LICENCE

2.1 Subject to the terms of this Deed the Licensors (subject to the grant of planning permission authorising the undertaking of the Works) permit the Licensee its contractors and agents:

- (a) at any time during the Permitted Period to carry out the Works at the Property;
- (b) at any time to enter onto to the Property to monitor the state and condition of the Works and or the Property in accordance with the Monitoring Protocol in the Section 106 Agreement or as subsequently amended further to the terms of the Section 106 Agreement.

and in connection with the rights conferred by Clauses 2.1(a) and 2.1(b) above the Licensors grant to the Licensee its contractors and agents the right of access to and egress from the Property with or without vehicles vessels and/or equipment.

2.2 This Deed takes effect from the date of this Deed and shall continue until 31 December 2044 subject to earlier termination in accordance with Clause 5 (*Determination of the Licence*).

2.3 This Deed confers on the Licensee only the rights set out in Clause 2.1.

3 PERSONAL LICENCE

3.1 This Deed is personal to the Licensee and not assignable except to the permitted assignee of the lease of foreshore and seabed at the Lymington Ferry Terminal dated 15 November 1977 between (1) the Commissioners and (2) British Railways Board (in respect of which the Licensee is the tenant at the date of this Licence) as amended by a deed of variation dated 13 December 1994 between (1) The Commissioners and (2) the Licensee and any subsequent renewal or replacement lease (the **Lease**).

3.2 The Licensee shall procure that any assignee of the Lease shall be bound by the terms of this Deed and shall upon any disposition or dealing with its interest in the Property procure the provision to the Licensor of a deed of covenant to comply with the terms of this Deed, such deed being in the form reasonably required by the Commissioners.

3.3 The grant of this Deed does not confer the right of exclusive possession upon the Licensee nor does it create any relationship of landlord and tenant.

4 OBLIGATIONS OF THE LICENSEE

The Licensee agrees with the Licensors:

- 4.1 to obtain all Required Consents prior to commencing any relevant part of the Works and thereafter
- 4.2 to comply with all Applicable Laws and conditions of the Required Consents relating to the undertaking and monitoring of the Works and
- 4.3 to monitor compliance with all Required Consents.

5 **DETERMINATION OF THE LICENCE**

- 5.1 This Deed may be terminated by the Licensee at any time on giving to the other parties not less than one month's previous notice in writing.
- 5.2 This Deed may be terminated by the Licensor in possession of the Property at the relevant time where the Licensee is in material breach of its obligations in this Deed and fails to remedy the same to the relevant Licensor's reasonable satisfaction within a reasonable period (having regard to the nature of the breach but in no instance being less than 30 days) from the date of a notice served by the relevant Licensor upon the Licensee specifying the nature of the breach or breaches complained of.
- 5.3 This Deed may be terminated by any party by notice to the others where the Required Consents have not been obtained by the date which is [two years] from the date of this Deed provided that the notice is served prior to such Required Consents being obtained.
- 5.4 Termination of this Deed shall be without prejudice to any accrued right of action by any party against the others.

6 **OBLIGATIONS OF THE LICENSORS**

- 6.1 The Licensors shall procure that any successor in title of their respective interests in the Property or those deriving title under any of them shall be bound by the terms of this Deed and shall upon any disposition or dealing with the Property procure the provision to the Licensee at the Licensee's reasonable expense of a deed of covenant in the form set out in Schedule 2 to this Deed (unless the Licensee (acting reasonably) confirms that no such deed is required having regard to the nature of the disposition) but (for the avoidance of doubt) shall have no other obligations in respect of the Works.
- 6.2 The obligations of each of the Council, the Wildfowlers and the Trust as Licensors shall subsist only so long as their respective leasehold interests and (in the case of the Trust) licence in respect of the Property (which for the avoidance of doubt shall include any continuation, holding over renewal or replacement of the leases referred to in Background paragraphs (B) and (C) of this Deed); but that is without prejudice to any accrued right of action against any of them in relation to any such obligation.

7 **NOTICES**

- 7.1 Any notice or notification served or given under or in connection with this Deed shall be in writing.
- 7.2 Section 196(4) of the Law of Property Act 1925 (as amended by the Recorded Delivery Service Act 1962) shall apply to all notices required to be given or served under this Deed.

8 **EXCLUSION OF IMPLIED RIGHTS**

It is not intended that a third party should have the right to enforce a provision of this Deed under the Contracts (Rights of Third Parties) Act 1999.

9 **JURISDICTION AND SERVICE OF PROCESS**

- 9.1 This Deed shall be governed by and construed in accordance with English Law.

9.2 The parties irrevocably agree that the Courts of England shall have exclusive jurisdiction in relation to any claim, dispute or difference concerning this Deed or any matter arising from it.

10 COUNTERPARTIES

This Deed may be executed and delivered in any number of counterparts, each of which is an original and which, together have the same effect as if each party had signed the same document.

11 INDEMNITY

11.1 Subject to Clause 11.5 below, the Licensee (the "**Indemnifying Party**") shall indemnify and keep indemnified any and all of the Licensors ("**Indemnified Party**") from any loss, liability, cost, claim, expense (including, without limitation, reasonable legal fees and disbursements) ("**Loss**") which the Indemnified Party reasonably suffers or incurs directly as a result of the carrying out of the Works ("**Event**") (a "**Relevant Claim**").

11.2 The Indemnified Party has no right to an indemnity under Clause 11.1 for a Relevant Claim to the extent that it fails to comply with Clause 11.3 or Clause 11.4(b) and the Loss arises or increases as a result.

11.3 If the Indemnified Party becomes aware of a matter which might give rise to a Relevant Claim:

- (a) the Indemnified Party shall give notice in writing to the Indemnifying Party as soon as reasonably practical of the matter setting out full details of the relevant claim (including the grounds on which such claim is based and the amount claimed to be payable in respect thereof) and consult with the Indemnifying Party with respect to the matter; if (and when) the matter has become the subject of proceedings the Indemnified Party shall notify the Indemnifying Party within sufficient time to enable the Indemnifying Party to contest the proceedings before final judgment;
- (b) the Indemnified Party shall provide to the Indemnifying Party and its advisers reasonable access to premises and personnel and to all relevant assets, documents and records that it possesses or controls for the purposes of investigating the matter and enabling the Indemnifying Party to take the action referred to in Clause 11.3(d);
- (c) the Indemnifying Party may take copies of the documents or records, and photograph the premises or assets, specified in Clause 11.3(b);
- (d) the Indemnified Party shall at the Indemnifying Party's reasonable expense:
 - (i) take any action and institute any proceedings, and give any information and assistance the Indemnifying Party may reasonably request:
 - (A) in relation to the matter (including disputing, resisting, appealing, compromising, defending, remedying or mitigating any claim or demand arising in relation to or in connection with the matter); or

(B) to enforce against a person (other than the Indemnifying Party) the Indemnified Party's rights in relation to or in connection with the matter; and

(e) the Indemnified Party may not admit liability in respect of or settle the matter without first obtaining the Indemnifying Party's written consent (such consent not to be unreasonably withheld or delayed).

11.4 The Indemnified Party shall:

(a) take reasonable steps to mitigate any loss it incurs as a result of a matter giving rise to a Relevant Claim; and

(b) not encourage or promote any demand, claim or proceeding by any third party against it in relation to any Event.

11.5 The indemnity in this Clause 11 shall not apply to the extent that the relevant Loss resulted from the negligence or default of the Indemnified Party.

12 **WAIVER OF BREACH**

For the avoidance of doubt, to the extent that the grant of this Deed and the grant of the rights pursuant to it constitute a breach of any of the terms of the leases referred to in Background paragraphs (B) and (C) of this Deed the relevant parties to this Deed hereby waive any such breach or breaches, and release the relevant parties from any claim or claims arising from any such breach or breaches.

IN WITNESS of which the parties have executed this Deed on the date set out above.

Schedule 1 : The Works

Schedule 1
The Works

The beneficial use of the dredge arisings/sediment from the Lymington Harbour and upper channel annual maintenance work of the marinas and berths in Lymington Harbour by pumping the dredge material onto the Property from a stud/barge jackup pontoon (or similar) and the placement of structures on the Property such as heather bales or brushwood to retain the dredge material in situ.

**Schedule 2
Form of Deed of Covenant**

DATED

2011

[•]
as Covenantor

WIGHTLINK LIMITED

DEED OF COVENANT

relating to Deed granting licence to Deposit Material on the Foreshore at Lymington

Schedule 2 : Form of Deed of Covenant

DATED

2011

PARTIES

- (1) [●] (company no [●]) whose registered office is at [●] (the "**Covenantor**")
- (2) **WIGHTLINK LIMITED** (company no 1059267) of Sea Containers House, 20 Upper Grand, London SE1 9PF ("**Wightlink**")

BACKGROUND

- (A) By virtue of a deed granting licence to deposit material on the foreshore of Lymington dated [●] 2011 between (1) The Queen's Most Excellent Majesty in Right of her Crown (2) The Crown Estate Commissioners (3) The District Council of New Forest (4) The South Hampshire Wildfowlers Association (5) The Hampshire and Isle of Wight Wildlife Trust Ltd and (6) Wightlink (the "**Deed**") the parties to the Deed agreed that any successor in title to their respective interests in the Property (as that term is defined in the Deed) or any person deriving title under any of them shall deliver a deed of covenant in favour of Wightlink in the form of this deed.
- (B) The Covenantor has on the date of this deed acquired [*specify nature of interest*] in the Property from [*insert name of disponor*] and has agreed to enter into this deed in favour of Wightlink.

OPERATIVE PROVISIONS

COVENANTOR'S COVENANT

The Covenantor covenants with Wightlink to be bound by and give effect to the terms of the Deed as if it was a party to the Deed as one of the Licensors (as that term is defined in the Deed).

This Deed has been executed as a deed and delivered on the date stated at the beginning of this Deed.

Schedule 2 : Form of Deed of Covenant

EXECUTION

Signed as a Deed by [name of party] in)
the presence of [name of witness])

Name of witness:

Signature of witness:

Address:

Occupation:

Executed as a deed by **WIGHTLINK**)
LIMITED acting by:)

Director

Director/Secretary

EXECUTION PAGE

THE OFFICIAL SEAL of)
THE CROWN ESTATE COMMISSIONERS)
placed here was confirmed as authentic by:)

THE COMMON SEAL of **THE DISTRICT**)
COUNCIL OF NEW FOREST was hereunto)
affixed in the presence of:)

Signed as a DEED by **THE SOUTH**)
HAMPSHIRE WILDFOWLERS)
ASSOCIATION by the Trustees in the)
presence of:)

[] of [] in the
presence of

Name of witness:

Signature of Witness:

Address:

Occupation:

[] of [] in the
presence of

Name of witness:

Signature of Witness:

Address:

Occupation:

[] of [] in the
presence of

Name of witness:

Signature of Witness:

Address:

Occupation:

THE COMMON SEAL of **THE HAMPSHIRE**)
AND ISLE OF WIGHT WILDLIFE TRUST)
LIMITED was hereunto affixed in the)
presence of:)

EXECUTED as a DEED by **WIGHTLINK**)
LIMITED acting by:)
)

Director

Director/Secretary

**Appendix
Plan**