EXPLANATORY MEMORANDUM TO

THE PLANNING ACT 2008 (RAILWAYS DESIGNATION) ORDER 2010

2010 No. 124

1. This explanatory memorandum has been prepared by the Department for Transport and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This Order designates Network Rail Infrastructure Limited and Network Rail (CTRL) Limited for the purposes of section 25 of the Planning Act 2008. Section 25 of the Planning Act 2008 (when read with section 14) provides for the construction or alteration of a railway to be, in certain circumstances, a nationally significant infrastructure project for the purposes of the Act. Applications for such projects are subject to the new planning regime introduced by the Planning Act 2008.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Legislative Context

4.1 The Planning Act 2008 ("the Act") makes provision for the creation of a new independent body, the Infrastructure Planning Commission (IPC), which will take over responsibility for considering and deciding on nationally significant infrastructure project applications; and for the Government to produce National Policy Statements (NPS) which will provide clarity on what the national need for infrastructure is and set the policy framework for IPC decisions.

4.2 The Planning Bill was introduced to Parliament on 27 November 2007, and received Royal Assent on 26 November 2008 as the Planning Act 2008. Parts 1 to 8 of the Act provide for the determination of applications for development consent for development consisting of nationally significant infrastructure projects (NSIPs). Where development consent is required under the Act, there is no need for certain other consents to be obtained, such as planning permission. The IPC will examine and, where a National Policy Statement has been designated, determine such applications for development consent.

4.3 The Department of Communities and Local Government is planning to lay in Parliament a suite of statutory instruments implementing the Planning Act 2008 on 1 February 2010, which includes a Commencement Order commencing section 25. Guidance in connection with the IPC's examination procedures will also be published.

4.4 Under section 25 of the Act, to fall within the definition of an NSIP, the construction or alteration of the railway must be wholly within England. It must not be part of a rail freight interchange, i.e. a facility for the transfer of goods between railway and road or another form of transport. It must not be a "permitted development", i.e. it must not have been authorised by article 3 of the Town and Country Planning (General Permitted Development) Order 1995. Finally, it must be part of a network operated by an approved operator. An "approved operator" is one who is authorised to be the operator of a network by a licence granted under section 8 of the Railways Act 1993 or a wholly-owned subsidiary of a company which is such a person (section 25(5)). An "approved operator" must be designated, or of a class which has been designated, by an order of the Secretary of State (section 25(6)).

4.5 This is the first use of the power under section 25(6) of the Act.

5. Territorial Extent and Application

5.1 This instrument applies to England and Wales.

6. European Convention on Human Rights

6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

- What is being done and why

7.1 The Barker Review and the Eddington Study recommended in their December 2006 reports a series of reforms to clarify the policy framework for decisions on major infrastructure applications, simplify the procedures for applications, and streamline examination procedures. In particular, they recommended that an independent commission should be established to manage inquiries and determine individual applications for major schemes.

7.2 The Government accepted the principal conclusions of these reports and set out its detailed proposals in the White Paper *Planning for a Sustainable Future* which was published on 15 May 2007. The White Paper was subject to public consultation between May and August 2007.

7.3 The Act provides for a more efficient, transparent and accessible planning system for nationally significant transport, energy, water, waste and waste-water infrastructure projects – in other words, the kinds of large scale facilities that support the everyday life of the country. In particular, the Act makes provision for the creation of the IPC and for the Government to produce National Policy Statements which will provide clarity on what the national need for infrastructure is, and set the policy framework for IPC decisions.

7.4 Projects are dealt with by the IPC if they are of a certain size or importance. These thresholds are set out in sections 15 to 30 of the Act. The rail threshold is set out in section 25 of the Act. Provided that the construction or alteration of a railway is in England and is not permitted development or a strategic rail freight

interchange (which has its own threshold), such development is a NSIP if it forms part of the railway networks operated by an "approved operator". The companies listed in this Order fulfil the conditions for being "approved operators" which are that they must be authorised to be the operator of a network by a licence granted under section 8 of the Railways Act 1993 or a wholly owned subsidiary of a company which is such a person, and must be designated in an order made by the Secretary of State. The networks operated by the "approved operators" covered by this Order comprise the national rail network, the Channel Tunnel Rail Link (now known as HS1), and the spur line connecting Heathrow Airport to the national rail network.

7.5 Designation of these two companies ensures that alterations or additions to the national rail network in England will benefit from the improved planning approval system introduced by the Act. Absent such a designation, changes to existing or construction of new railway infrastructure would continue to be subject to the existing approval regimes under the Town and Country Planning Act 1990 and the Transport and Works Act 1992.

8. Consultation outcome

8.1 The policy to which the Order gives effect, namely the Planning Act, was the subject of a White Paper, and of debates in Parliament. During those debates the designation of the national railway network as being within the scope of the Act was signalled by the Minister for Local Government[1]. A four week consultation period was therefore agreed by Ministers.

8.2 The Government consulted 25 stakeholders on a draft version of the Order between 17 December 2009 and 13 January 2010. The consultation document can be found at: http://www.dft.gov.uk/consultations/closed/. The Government received two responses to this consultation, a brief summary of which is set out below along with the Government's response to the issue raised.

8.3 Two consultees pointed out that the company HS1 is the infrastructure owner and operator of the Channel Tunnel Rail Link whilst Network Rail (CTRL) Limited is the contractor for operations on HS1. One of these consultees concluded that the Order should therefore refer to HS1 Limited rather than Network Rail (CTRL) Limited. This proposal has not been considered further because in addition to designation, in order to be an approved operator within the meaning of section 25, a person must also fulfil the requirement in section 25(5), being either a person who is authorised to be the operator of a network by a licence granted under section 8 of the Railways Act 1993 or a wholly-owned subsidiary of a company which is such a person. Neither HS1 nor its parent company have such a licence and therefore could not be designated.

9. Guidance

9.1 No guidance will be produced to accompany this Order because there are no issues on which guidance is required, and Network Rail has been involved in the development of the policy throughout the passage of the Planning Bill and

1 Hansard, 2 June 2008, column 515

subsequently. General guidance on the detailed procedures under the Planning Act 2008 can be found on the Communities and Local Government, and IPC, websites at: http://www.communities.gov.uk/planningandbuilding/planning/; and http://www.independent.gov.uk/infrastructure.

10. Impact

10.1 An Impact Assessment has not been prepared for this instrument as it does not have an additional impact on business, charities or the public sector beyond that examined in the Impact Assessment that accompanied the Planning Act 2008. The Impact Assessment on the Planning Bill can be found at: http://www.communities.gov.uk/documents/planningandbuilding/pdf/561912.pdf
and an update to this document was posted when the Planning Bill received Royal Assent:
http://www.communities.gov.uk/publications/planningandbuilding/annexeimpactassessment.

11. Regulating small business

11.1 The Act applies to small businesses, but the Government believes it is unlikely that a small business will apply for a development consent order under the Act, given the nature and scale of NSIPs. The two companies designated by the instrument are not small businesses.

12. Monitoring & review

12.1 Ministers have promised that there will be a review of the way in which the IPC is operating, 2 years after the first application is accepted. This Order may need to be updated over time, for example if the operator of a rail network changes. The Department for Transport will revise it as appropriate.

13. Contact

13.1 Stephen Wolstenholme at the Department for Transport tel: 020 7944 8317 or email: Stephen.wolstenholme@dft.gsi.gov.uk can answer any queries regarding the instrument.

Annex C

Summary of Responses

PLANNING ACT 2008
NATIONALLY SIGNIFICANT RAIL INFRASTRUCTURE PROJECTS

Consultation on designation of "approved operators".

Consultation dates

17 December 2009 to 13 January 2010.

Scope

England

Issue

The Planning Act 2008 allows the Secretary of State to prescribe "approved operators" for the purposes of defining rail nationally significant infrastructure projects (NSIP). The consultation paper sought views on the bodies to be prescribed as approved operators.

The proposal

The rail threshold for nationally significant infrastructure projects is set out in section 25 of the Planning Act. To fall within the definition of an NSIP, the construction or alteration of the railway must be wholly within England. It must not be part of a rail freight interchange, i.e. a facility for the transfer of goods between railway and road or another form of transport (which has its own threshold in the Act). It must not be a "permitted development", i.e. it must not have been authorised by article 3 of the Town and Country Planning (General Permitted Development) Order 1995. Finally, it must be part of a network operated by an approved operator. An "approved operator" is one who is designated, or is of a class which has been designated, by an Order of the Secretary of State. Only the persons authorised to be the operators of a railway network by a licence under section 8 of the 1993 Act, or their wholly-owned subsidiaries, may be designated.

The consultation paper proposed that Network Rail Infrastructure Limited and Network Rail (CTRL) Limited should be designated as approved operators. As a consequence, the alteration or construction of a railway that is part of a network operated by these companies would become a nationally significant infrastructure project as defined by section 14 of the Act. Applications for such projects are subject to the new planning regime introduced by the Planning Act 2008.

Consultation and responses received

The Government consulted 25 stakeholders on a draft version of the Order. The consultees included rail infrastructure owners and operators; bodies representing train

operators, passengers, the railway supply industry and Parliamentary Agents; airport owners; freight interests; and environmental groups. The Government received two responses to the consultation paper.

The two responses both pointed out that the company HS1 is the infrastructure owner and operator of the Channel Tunnel Rail Link whilst Network Rail (CTRL) Limited is the contractor for operations on HS1. One of the respondents concluded that the Order should therefore refer to HS1 Limited rather than Network Rail (CTRL) Limited. This proposal was not considered further because in addition to designation, in order to be an approved operator within the meaning of section 25 of the Planning Act, a person must also fulfil the requirement in section 25(5), being either a person who is authorised to be the operator of a network by a licence granted under section 8 of the Railways Act 1993 or a wholly-owned subsidiary of a company which is such a person. Neither HS1 nor its parent company have such a licence and therefore could not be designated as suggested by the respondent.

Outcome

No strong objections were raised about the provisions of the draft Order and the issue surrounding the operator of the Channel Tunnel Rail link could not be addressed by changes to the draft Order. The Department has laid the Order before Parliament in substantially the same form as the draft version for consultation.

Next Steps

Subject to Parliamentary procedure, the Government intends to bring the Order into force on 1 March 2010. Stakeholders will be notified when the Order comes into force. The Order will be kept under periodic review to ensure that it remains up to date.