EXPLANATORY MEMORANDUM TO

THE INFRASTRUCTURE PLANNING (CHANGES TO, AND REVOCATION OF, DEVELOPMENT CONSENT ORDERS) REGULATIONS 2011

2011 No. 2055

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

2. Purpose of the instrument

2.1 The Regulations contain provisions in respect of the procedure for making an application for a change to, or the revocation of an order granting development consent, the determination of such an application, the effect any subsequent order and the assessment of compensation.

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

3.1 This is first use of the powers in paragraphs 2, 4 and 6 of Schedule 6 to the Planning Act 2008 ("the Act"). Section 153 of and Schedule 6 to the Act (so far as they are not yet in force) shall come into force, in relation to England and Wales and, to the extent specified in section 240(4) of the Act, to Scotland, on 1st October 2011.

3.2 Regulation 70 amends the Infrastructure Planning (Compulsory Acquisition) Regulations 2010 No. 104 in accordance with the Memorandum dated 9th March 2010 submitted by this Department in response to a request from the Joint Committee on Statutory Instruments.

4. Legislative Context

4.1 These Regulations are made under the Planning Act 2008. 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 grant of development consent for development consisting of nationally significant infrastructure projects. The Act also provides for the establishment of the Infrastructure Planning Commission ("IPC") which examines and, where a national policy statement ("NPS") has been designated, determines applications for development consent. Where no national policy statement has been designated, the Secretary of State determines applications.

4.2 Section 153 of and Schedule 6 to the Act contain provisions concerning changes to, and the revocation of orders granting development consent after they have been granted. Paragraph 2 of Schedule 6 to the Act

enables the appropriate authority to make a change to a development consent which is non-material. Paragraph 3 of Schedule 6 to the Act gives the appropriate authority a general power to make a change to, or revoke a development consent order ("DCO"). Paragraph 6 of Schedule 6 to the Act contains provisions in respect of the claiming and payment of compensation following the exercise of the power in paragraph 3.

4.3 These Regulations set out procedural provisions in respect of applications under Schedule 6 to the Act and their consideration and determination. It also provides for the payment of fees for such applications. Section 4 of the Act gives the Secretary of State the power to make regulations for the charging of fees by the Infrastructure Planning Commission.

4.4 The Localism Bill, which is currently being considered, contains provisions which abolish the Infrastructure Planning Commission and returns to a position where the Secretary of State takes the final decision on major infrastructure proposals of national importance.

5. Territorial Extent and Application

5.1 This instrument applies to England, Wales and Scotland in accordance with the scope to of the Planning Act 2008 (see section 240).

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***

Background

7.1 The Act created a new regime for applications for Nationally Significant Infrastructure Projects. The projects that are or will be covered by the new regime are defined in section 14 of the Act. The Act also created a new independent body - the Infrastructure Planning Commission - to take over responsibility for considering and deciding such applications.

7.2 When the Act was introduced it was stated publicly that there would be tranches of regulations prescribing the detail needed for the new regime to operate. Regulations have already been made under the powers in the Act to prescribe how an application must be made and how it should then be considered. The Regulations prescribe: the pre-application stage, where requirements are set about consultation and publicity: the application itself and what it must contain; the examination process; and the decision. Regulations have also been made to ensure that the requirements on environmental and habitats issues are taken into account. These Regulations form the last of those previously announced tranches.

7.3 Applications will be decided in accordance with national policy statements which will be produced by the Government. These will set out the national need for infrastructure development and set the policy framework for the Infrastructure Planning Commission's decisions. The overall goal is to speed up the process of delivering infrastructure.

7.4 If the Infrastructure Planning Commission is content that the development which is the subject of the application should go ahead it will issue a development consent order. This will contain the detail of what can be done as part of the development. The development can then proceed in accordance with that order, but only in accordance with that order.

These Regulations

7.5 If after the order is granted it is found that changes to the proposed development are necessary there needs to be a process by which such changes can be considered. The Regulations that are the subject of this Explanatory Memorandum prescribe that process.

7.6 In Part 1, the Regulations prescribe a relatively light touch process where the change applied for is non-material.

7.7 In Parts 2 and 3 there are provisions in respect of applications for a material change to, or revocation of a development consent order. As a material change is not limited in its scope it is conceivable that it could be a very large change and, as such, we have modelled the process for dealing with such changes on the processes that would apply to the original application for a development consent order. The intention here is to maintain the integrity of the regime, and to provide a transparent process that encompasses the right for people to be heard and to make their views about the proposed change known.

7.8 We have also been mindful of burdens on applicants and have provided in the Regulations that where information has already been provided as part of the original development consent order it does not need to be provided again. Only new and changed information must be provided. We have also been very clear, in both the regulations and in the consultation document that was issued, that an application for a change to a development consent order does not re-open that order for a re-run of the original arguments. The only decision to be taken when an application for change is received is whether or not to allow that change to be made.

7.9 Part 4 of the Regulations contains provisions relating to the application for and assessment of compensation. These are based on equivalent provisions in the Town and Country Planning Act 1990 as the intention is that that compensation should be assessed on the same basis as applies when planning permission is revoked or modified.

7.10 Schedule 1 to the Regulations sets out the persons that must be consulted and notified about applications for an order under paragraph 3(1) of

Schedule 6 to the Act. These are the same as those that must be consulted about an application for development consent order.

7.11 Schedule 2 specifies the fees that are payable on an application to the Infrastructure Planning Commission for an order under paragraph 3(1) of Schedule 6 to the Act. The principles that underpin the fees structures and levels for making applications under these Regulations are closely based on those that were used for establishing the fees for development consent order applications.

8. Consultation outcome

8.1 The Government carried out a consultation between 1 November and 24 December 2010, on draft Regulations that set out the proposed processes for revoking or making changes to a development consent order. The consultation document can be found at

http://www.communities.gov.uk/publications/planningandbuilding/dcosconsultation

8.2 The consultation period ran for eight weeks rather than twelve as many of the proposals, and their underlying principles, had already been consulted on previously as part of consultations on the application and examination procedures relating to an application for a development consent order.

8.3 The Government received 21 responses, a summary of which is set out below along with how we have responded to the key points raised. A more detailed account of how the responses have been taken into account is set out in the Impact Assessment attached to this memorandum.

Key Points

General comments

8.4 Many of the comments related to both the process proposed for non-material changes and the one for material changes. There was general agreement for there to be a relatively light touch process for non-material change applications, with those for material changes being subject to more substantial processes. The clear statement that consideration of an application for change is limited to only the proposed change, and is not an opportunity to reopen the consideration of the original application, was widely welcomed.

8.5 Most respondents felt there was a need for the terms ‘non-material’ and ‘material’ to be more clearly defined and thereby distinguished from each other. A few suggested this should be done within the Regulations. However, as was stated in the consultation document, the Act does not provide the necessary enabling power for such definitions to be defined. But we will consider if there are other ways in which we can assist, albeit it is important to stress that it will always be for the appropriate authority to decide if the

change would be non-material or material, as the decision will ultimately depend on the circumstances of each case.

8.6 Several respondents were concerned that it was possible for persons other than the holder of the development consent order to apply to make changes to it, particularly as they felt it afforded an opportunity for them to deliberately cause delays in the implementation of the development consent order by withholding their concerns when the actual development consent order application was being considered. However, the Act provides for such persons to have the opportunity to make an application, and so we are obliged to provide for this in the Regulations. It will be for the appropriate authority to decide such applications on the merits of each case.

8.7 Several respondents requested clarity on the format that was required to be used for setting out the detail of the proposed changes within the application documents, such as whether an addendum to the extant development consent order would be acceptable. We have decided to not prescribe the format as we consider it appropriate to allow applicants the flexibility to utilise a format that is most relevant for their particular case. Applicants may wish to discuss their intended approach at the pre-application stage with the appropriate authority.

8.8 A few suggestions were made for altering the proposed list of statutory consultees, so as to either include additional organisations or remove ones which no longer exist. The proposed list was of the same organisations that were previously designated as statutory consultees within the suite of Regulations that prescribe the process for obtaining a development consent order, and which came into force in 2009 and 2010. We have reviewed the proposed list in light of the consultation responses. We have also had regard to proposals being brought forward under the public bodies review, as well as any other changes that may have occurred to the organisations within the proposed list since their designation within the other Regulations. Accordingly, we have made the following amendments to the proposed list. The Regional Planning Bodies have been removed as these no longer exist. We have replaced the Rail Passengers Council with Passenger Focus, which has absorbed the functions of the former. The Marine Fisheries Agency has been removed as its functions have been transferred to the Marine Management Organisation (MMO). However, we have not added the Marine Management Organisation to the list as it is already a statutory consultee by virtue of amendments to the Act. We have, though, included references to this organisation at places in the Regulations where it was still necessary to do so in order to ensure it is correctly consulted or notified. The Scottish Fisheries Protection Agency has been removed as its functions have now been transferred to a department within the Scottish Executive, and which is already on the list.

The list will be subject to review over time, and amended as appropriate, so as to ensure it continues to contain those organisations that we consider are necessary to undertake the role of statutory consultee for nationally significant

infrastructure projects. In terms of the public bodies review, the list will be amended to reflect any relevant changes and when those changes are being enacted.

Comments on the non-material change process

8.9 Several felt that the publicity, consultation and notification requirements were disproportionate. We accept that national publicity for non-material change cases is not necessary, and so we have removed this requirement. In response to suggestions that it may not always be necessary to consult all of the statutory consultees and other prescribed persons, we have now provided for the appropriate authority to use its judgement, on a case by case basis, when considering which persons it would be appropriate to consult.

8.10 The draft Regulations prescribed processes for only some of the stages that are needed for considering and determining an application, whereas some respondents felt that the Regulations should contain all of them. However, we are unable to do this. Some of the other stages are already prescribed in the Act, and in such circumstances the protocol is to not duplicate those provisions by also prescribing them in the Regulations. Other stages cannot be prescribed in Regulations as the Act does not provide the necessary enabling powers to do so. For those stages, it will be for the appropriate authority to decide on the processes that it will follow.

8.11 A few, opposing comments were made on the proposed fee, with a couple of respondents feeling that it was too low and a couple felt that it was too high. One respondent suggested the fee had not allowed for the cost of an initial legal consideration of whether or not the proposed change would be non-material. We agree with this latter point, and have increased the fee slightly from £6,534 to £6,891 to reflect that cost.

8.12 A couple of local authorities felt that they should have a role in deciding whether the proposed changes were non-material or material, and that they should be responsible for determining non-material applications. However, the Act does not allow for local authorities to have such roles.

Comments on the material change process

8.13 Most felt that, overall, it was appropriate to closely follow the procedures for a development consent order application, but that some flexibility should be allowed for in the publicity, consultation and notification requirements. We are retaining the requirement for both local and national publicity, as we consider both forms of publicity are necessary to enable people to be aware of proposed changes that are expected to have a significant effect. However, we agree with respondents' suggestions that it may not always been necessary to consult and notify all statutory consultees and other prescribed persons. Accordingly, we have decided to enable the appropriate authority to direct, on a case by case basis, that the applicant does not have to

consult and notify any statutory consultee and other prescribed person that the appropriate authority considers it to be unnecessary to do so.

8.14 A few respondents felt it was unnecessary to require applicants to produce a statement of community consultation and a consultation report. We disagree and have decided to retain both. They have an important role to play in material change applications, and that the effort needed to fulfil these requirements will be self-limiting to the nature of the changes that are proposed. The statement will help ensure the applicant identifies all of those in the community that should be engaged in respect of those proposals. The consultation report is an important tool with which the applicant is able to demonstrate how its consultation with local communities, statutory consultees and any other bodies has helped to shape the proposals that are actually submitted in the application.

8.15 A few respondents also felt it unnecessary to always require a preliminary meeting to be held given that, for relatively smaller material changes in particular, the main issues may well already be known when the application is submitted. We disagree, as the main purpose of the preliminary meeting is to discuss procedural issues, such as the timetable for the examination, and therefore it is necessary to require that such a meeting is always held.

8.16 Respondents felt that it was necessary to stipulate deadlines for the completion of the examination and the making of the decision, and that these should be the same ones that are required for a development consent order application. We agree, and have amended the Regulations accordingly.

9. Guidance

9.1 Guidance to accompany these Regulations has not been produced. As the bulk of these Regulations use established procedures for which guidance is already available separate guidance has not been seen as a priority. However this will be kept under review.

10. Impact

10.1 The impact on business, charities or voluntary bodies has been assessed with regards to the cost in application fees and other costs associated with making an application, relative to the benefit that these Regulations provide. The principal benefit is that, without these Regulations, the holder of a development consent order would only be able to request changes to be made to that order by submitting a further application for the whole order, rather than just for the changes that it wanted to make. Making an application for a whole new order would be more costly than for an application to make changes. These Regulations, therefore, constitute a net benefit to business.

10.2 The impact on the public sector has been assessed with reference to the resource cost of determining applications submitted under these Regulations,

and the amount of this cost that it is feasible and appropriate to recover in fees. This cost is normally recoverable through fees where the Infrastructure Planning Commission is required to determine the application, but under the terms of the Act the cost is not recoverable where the Secretary of State has that responsibility. For local authorities, their roles under these Regulations are essentially the same as for when an application is for a development consent order, and so are activities for which they already have responsibility and funding.

10.3 An Impact Assessment is attached to this memorandum

11. Regulating small business

11.1 The legislation applies to small business, but the government believes it is unlikely that a small business will apply for a development consent order for a nationally significant infrastructure project under the Planning Act 2008.

12. Monitoring & review

12.1 These Regulations are subject to a duty to review. The review is required to have been completed within five years of the day in which the Regulations came into force. The Regulations will also be monitored and reviewed in accordance with the Post Implementation Review Plan in Annex 1 of the Impact Assessment. A review is likely to be undertaken within 2 to 3 years of these Regulations coming into force.

13. Contact

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