EXPLANATORY MEMORANDUM TO

THE HIGHWAY AND RAILWAY (NATIONALLY SIGNIFICANT INFRASTRUCTURE PROJECT) ORDER 2013

2013 No. 1883

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

2. Purpose of the instrument

2.1 The purpose of the Highway and Railway (Nationally Significant Infrastructure Project) Order 2013 ("the Order") is to amend the Planning Act 2008 ("the Act") to ensure that only developments that can genuinely be considered to be 'nationally significant infrastructure projects' are subject to the planning regime set out in the Act. The Order amends sections 22 and 25 of the Act which set out the circumstances in which construction, alteration and improvement of a highway and the construction and alteration of a railway are considered to be nationally significant infrastructure projects for the purposes of the Act. The intention of the changes is to ensure that highways and rail projects which would not generally be considered to be nationally significant will now proceed instead under the planning regimes set out in the Highways Act 1980, the Transport and Works Act 1992 and the Town and Country Planning Act 1990 as applicable.

2.2 Section 22 of the Act is amended so that the construction or alteration of a highway is only considered a nationally significant infrastructure project where the Secretary of State is the highway authority. The circumstances in which the construction or alteration of a highway is to be considered a nationally significant infrastructure project is further limited by introducing area thresholds (15 hectares for motorways, 12.5 hectares for trunk roads other than motorways, where the speed limit is expected to be 50mph or greater and 7.5 hectares for all other trunk roads) in section 22 of the Act, and only projects that exceed these thresholds would be subject to the planning regime set out in the Act. It will continue to be necessary for the highway which is being constructed or altered to be wholly in England.

2.3 The Order also amends section 22 of the Act so that where any order under the Highways Act 1980 listed in section 33(4) of the Act has been made before 1st March 2010 for any highway-related development and a further order is needed in relation to that development, then the development will not be considered a nationally significant infrastructure project, provided the new order is applied for within seven years of the making of the earlier order. In addition, a highway-related development will not be considered a nationally significant infrastructure project under the Act where the development consists of an alteration to a highway and is required as a consequence of a separate development for which planning permission has already been granted (known as

developer-led highway mitigation works) where the developer has asked the Secretary of State to make the alteration. Finally, highway-related development consisting of an alteration to a highway will not be a nationally significant infrastructure project where an order has been made under section 33(4) of the Act in relation to local authority development (local highway works) and the alteration to the highway is necessary as a result of the local highway works and the local authority has asked the Secretary of State to make the alteration.

2.4 Under section 25, as amended, the construction or alteration of a railway will continue, as at present, only to be classed as a nationally significant infrastructure project if the construction or altered part of the railway is wholly in England, the railway in question is part of a network operated by an approved operator (i.e. a licensed operator under the Railways Act 1993 or a subsidiary of such an operator) and the construction or alteration is not covered by permitted development rights.

2.5 In addition to meeting those existing criteria, under the amended section 25, the construction or alteration of a railway is only classed as a nationally significant infrastructure project, if the construction or alteration work includes the laying of a continuous stretch of more than 2 kilometres of track on land that is not railway operational land before the start of the project.

2.6 A further amendment is made to section 25 to exclude all railway construction or alteration work taking place on existing operational land from the scope of the Act's planning regime. This means that even if a development falls, under the amended section 25, to be classed, overall, as a nationally significant infrastructure project under the Act, meaning development consent will be needed for it, the development consent requirement will not extend to any parts of the project where the work is to be done on existing railway operational land.

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

None.

4. Legislative Context

4.1 The Order has been made under sections 14(3) and 14(4) of the Act. Section 14(3) enables the Secretary of State to make an order which amends the categories of nationally significant infrastructure project ("NSIP") listed in section 14(1) of the Act. This Order varies existing types of project listed in section 14(1) (h) – highway-related development and in 14(1) (k) – the construction or alteration of a railway.

4.2 Section 14(4) permits amendments to be made to the Act. Section 22 (highways) and section 25 (railways) of the Act are being amended by this Order. Section 232(2) of the Act requires that any such order is made by statutory instrument. The amendments are intended to provide greater clarity and to ensure that only those road and rail schemes that are genuinely NSIPs are within the remit of section 14(1) of the Act.

4.3 Section 22 of the Act sets out the circumstances in which the construction, alteration or improvement of a highways-related development is considered to be a NSIP. Where the criteria set out in section 22 are met, the developer is required to make an application for an order for development consent ("development consent") in accordance with the Act. This Order amends the criteria in section 22 for the types of highway-related developments which must be considered NSIPs. It also sets area limits for highway-related development which have to be exceeded before such developments would be considered NSIPs.

4.4 Similarly section 25 of the Act sets out the circumstances in which construction or alteration of the railway is to be considered to be a NSIP. The aim of the amendments (which supplement existing criteria) is to ensure that the only railway developments considered to be NSIPs are construction or alteration projects which include the laying of a stretch of continuous railway track exceeding 2 kilometres in length on land which is not existing railway operational land. In addition, where a development includes track construction or alterations on non-operational land exceeding that threshold, any parts of the overall development that do take place on operational land will not require development consent under the Act.

4.5 These amendments have been made with the intention of restricting the ambit of the Act to developments which can appropriately be considered to be nationally significant and to avoid capturing developments which are not.

5. Territorial Extent and Application

This instrument applies to England only. Although the Act extends to the United Kingdom the provisions being amended apply solely to England.

6. European Convention on Human Rights

The Secretary of State, Patrick McLoughlin has made the following statement regarding Human Rights:

"In my view the provisions of the Statutory Instrument on Infrastructure Planning – The Highway and Railway (Nationally Significant Infrastructure Project) Order 2013 are compatible with the Convention rights."

7. Policy background

7.1 The Government has put planning reform at the centre of their growth agenda. This is because investment and economic growth can be hampered by lengthy and disproportionate planning processes.

7.2 In their statement to the House of Commons on the 6th September 2012, the Prime Minister and Deputy Prime Minister set out further reforms on planning which included

looking at how the Planning Act was supporting economic growth and to explore where any improvements could be made to reduce delays to delivery of developments.

7.3 The Act created a new system of development consent for NSIPs in the fields of energy, transport, water, waste water and waste. While the planning regime in the Act is beneficial for developments that can properly be considered to be NSIPs, it is not suitable for smaller, less complex or more discrete developments. Some of the fields mentioned above include thresholds which mean that developments which fall below the threshold do not have to obtain development consent as they are not considered to be a NSIP. However, highway and railway developments which would not be considered nationally significant in the usual sense have nonetheless been required to obtain development consent due to the criteria set out in the Act which also captured smaller, less complex and discrete developments. For example, a 500 metre siding improvement is treated in the same way as a new railway line and a local trunk road improvement is treated in the same way as a new motorway.

7.4 This lack of proportionality has also meant that developers have been faced with excessive burdens in order to deliver small, less complex or discrete but still important transport infrastructure improvements. Alternative planning regimes under the Highways Act 1980 and the Transport and Works Act 1992 along with the Town and Country Planning Act 1990 offer this proportionality while still protecting individual rights and environmental needs. Under these regimes, schemes are able to be delivered to ensure earlier start times and increase responsiveness to funding changes and work programmes.

7.5 The Department had also, prior to the review, been approached by local highway authorities whose local highway works were being delayed due to the wording in sections 22(2) and (4) of the Act. The phrase in those subsections *"for a purpose connected with a highway for which the Secretary of State is (or will be) the highway authority"* was causing them to incur costs and delays while they sought legal advice on whether their development came within the remit of this wording. At the same time the Planning Inspectorate were also being approached for advice on the same matter but were unable to help due to the variance of legal interpretation of the Act.

7.6 To try to clarify when local highway works would be seen as having a purpose connected with a road for which the Secretary of State is, or will be the highway authority (i.e. the Strategic Road Network), the Department, the Department for Communities and Local Government ("DCLG") and the Planning Inspectorate (PINs) drew up guidance but due to the individual circumstances of each development, the guidance could not take account of each and every development and therefore had a limited impact in clarifying the Act.

7.7 In addition, the Department had been approached by the Highways Agency and developers to help resolve an issue which was delaying much needed housing and commercial sites. Mitigation works which had already been agreed with the Agency and were included within the overall development planning consent, still needed to obtain development consent pursuant to the Act. This meant that developers were required to go through the full Planning Act regime to obtain the Orders to deliver the works, thereby

incurring greater costs and delays. In policy terms this undermined the stated need for sustainable economic growth.

7.8 With regard to railway development it had been recognised by the network operator and the Department that developments that would not be considered to be "nationally significant" in the usual sense were subject to the requirement to obtain development consent and this caused delays in the delivery of some developments that were to be undertaken mainly on railway operational land and which would deliver improvements for the operational railway.

7.9 These issues were recognised as requiring amendments to the Planning Act as part of the reform package identified by the Department and DCLG. The Department and DCLG had a number of discussions with Network Rail and the Highways Agency in relation to the types of highway-related developments and developments for the construction and alteration of a railway that should be subject to the requirement to obtain development consent. As a result of these discussions, the Department decided to launch a formal consultation on the removal of the following types of development from the ambit of the development consent regime:

- the construction or alteration of highways for which the Secretary of State is the highway authority which are below specified area limits, due to their small scale and limited impact on third parties;
- all local highway works even where they are constructed for a purpose connected with a highway for which the Secretary of State is the highway authority;
- all works carried out on a developer's behalf that were constructed for a purpose connected with a highway for which the Secretary of State is the highway authority;
- highway developments which, having gone through the Highways Act 1980 planning regime under which orders had already been made, required further orders for supplemental development;
- railway developments which consist of, or include construction or alteration works involving a continuous length of railway track up to 2 kilometres outside operational land, or which do not involve track at all; and
- any railway development that takes place on operational land.

Further details on the changes are set out below.

7.10 In the amended section 22, the words "*for a purpose connected with a highway for which the Secretary of State is (or will be) the highway authority"* have now been deleted. In addition, the developments that were required to obtain development consent as a result of this provision would not generally be considered to be NSIPs. By virtue of the Order, Sections 22(2) and (3) now require that the Secretary of State is or will be the highway authority for a highway for its construction or alteration to be a NSIP.

7.11 In addition the amended planning regime in the Act will not apply to:

- a development where an order under the 1980 Act has, before 1st March 2010, been made in relation to that development. If a further order is subsequently required, the supplemental development relating to that order would currently become a NSIP. However, the new section 22(6) of the Act removes such supplemental development

from the ambit of the Act, provided that the new order is applied for within seven years of the original orders having been made;

- new section 22(7) excludes from the ambit of the Act development which already has planning permission under an alternative planning regime, and where an alteration to a highway is required as a result of that development (known as highway mitigation schemes) and the developer has asked the Secretary of State for the alteration to be made; and
- new section 22(8) excludes from the ambit of the Act local highway works for which an order set out in section 33(4) of the Act has been made and which requires an alteration to a highway which has been requested by the local highway authority responsible for the local highway works.

7.12 It was felt necessary to further restrict the ambit of the Act to ensure it captured only appropriate development, by setting area limits for development consisting of the construction or alteration of a highway. The new section 22(4) sets out those area limits. The limits ensure that even where the area of development for a construction or alteration of a highway meet the requirements of section 22 they are nonetheless to be treated as a NSIP only if the development exceeds the area limits set out in that subsection. These limits are 15 hectares for a motorway, 12.5 hectares for a highway other than a motorway where the speed limit is expected to be 50 miles per hour or greater and 7.5 hectares for any other highway. The threshold would permit the construction or alteration of a single junction without the need for development consent. Although such works may be of sub-regional or local significance, they are unlikely to impact at the national level. However, it should be noted that authorisation still may be required under the provisions of the 1980 Act.

7.13 No amendments have been made to the thresholds for improvement of a highway which is now replicated in section 22(5).

7.14 The position for railway developments under section 25 of the 2008 Act has similarly resulted in developments which would not ordinarily be considered "nationally significant" being subject to the requirement to obtain development consent pursuant to the Act, and with similar consequences. In the absence of a threshold, any development which involves the construction or alteration of a railway, and which cannot progress using permitted development rights under the Town and Country Planning Act 1990 regime, becomes a NSIP, and can only be authorised in accordance with the Act, regardless of the size and scale of the development involved.

7.15 The amendments to section 25 of the Act will mean that rail construction or alteration developments will only be considered to be NSIPs if they include the laying of a stretch of railway track (whether single or multiple path) more than 2 continuous kilometres long (i.e. measured along the track) on land that is not existing railway operational land. Development under permitted development rights will continue to be outside the ambit of the Act. So a construction or alteration project that included the laying of 3 continuous kilometres of railway track outside existing railway operational land and a new bridge etc would require development consent for the whole of the development, (except for any

part of the works authorised under permitted development rights or taking place on railway operational land).

7.16 Three examples illustrate how this would work for a railway development partly on operational land and partly on non operational land.

7.17 In example A, a track construction development 13 kilometres long has a continuous stretch of railway track of 1.5 kilometres long on non-operational land at each end, with 10 kilometres of track in the middle constructed on operational land. In this example, the whole development would be excluded from the requirement to obtain development consent as there are not more than 2 continuous kilometres of track constructed on non operational land. This would apply regardless of whether the track constructed was single, double or multiple track.

7.18 In example B, the track construction development is again 13 kilometres long. However, in this case there are 3 kilometres of track constructed on non-operational land, followed by 10 kilometres on operational land. The first 3 kilometres will require development consent. The 10 kilometres constructed on operational land will not however require development consent.

7.19 In example C, no track is constructed or altered and the railway development works carried out are works forming part of an electrification scheme. Some of the work is authorised by permitted development rights and the majority of it is on operational land. The whole development will be excluded from the requirement to obtain development consent.

7.20 The introduction of a threshold, in section 25 of the Act, requiring rail construction or alteration projects to include the laying of more than 2 continuous kilometres of track on previously non-operational land and the exclusion of all works on railway operational land, provides for a more proportionate authorisation process to be followed for developments that cannot ordinarily be considered as nationally significant. The works (so far as not covered by permitted development rights) would still need to be authorised but such authorisation could be obtained by the grant of a specific planning permission, with any other necessary consents being acquired independently, or by means of a Transport and Works Act Order.

7.21 Section 35 of the Act continues to provide a mechanism through which a request can be made to the Secretary of State to direct that a development which would not otherwise come within the ambit of the Act should be considered to be an NSIP. If the Secretary of State directs that a development should be considered an NSIP, the developer is then required to apply for development consent pursuant to the Act.

7.22 The Order also contains transitional arrangements for circumstances where an application for an order for development consent (whether for a rail or highways-related development) has been submitted prior to the making of this Order. The application process in such a case will continue to proceed under the Act as if the Order had not been

made and development consent will then either be granted or refused. Finally, any provisions in an order for development consent that is granted following the conclusion of the process under the Act will continue to have effect and any provisions of the Act that would have applied if the Order had not been made will continue to apply.

7.23 Transitional provisions have also been included where development consent has already been granted or refused prior to the making of this Order. The options for challenge as provided for in the Act will continue to apply to any development consent granted or to any refusal. Also any provisions of an order for development consent made prior to the coming in force of this Order will continue to have effect and the provisions of the Act will continue to apply to the development consent that has been granted.

8. Consultation outcome

8.1 As well as carrying out its formal consultation exercise, the Department also had a number of prior discussions on the proposals set out in the consultation document with various industry bodies including, the Highways Agency, Network Rail, local authorities, developers, consultants, the Planning Inspectorate and DCLG as set out in paragraphs 7.5 to 7.9 above. We also asked other bodies such as the Environment Agency and the Chartered Institute of Highways and Transport for their views. The consensus was that the measures were generally considered to be sensible.

8.2 The Government carried out a consultation in accordance with the Government's consultation principles as set out in its guidance for holding consultations which can be found on the Inside Government website at www.gov.uk/government/publications/consultations-principles-guidance which was published on 17th July 2012. The consultation started on the 18th December 2012 and ran for five weeks to the 22 January 2013. The consultation was published on the Inside Government website at https://www.gov.uk/government/consultations/nationally-significant-highways-and-rail-schemes-amendments-to-planning-act-2008-definitions. A five week consultation period was considered sufficient in this case, as the changes to the Act included in the consultation document had already been discussed with various industry participants and the changes, if implemented, would also continue to provide broadly equivalent protections to any objectors to a development under alternative planning regimes. It was also decided that should any potential respondents ask for more time we would accept their representations within a reasonable time limit. During the consultation period we were approached by 2 respondents (Campaign for Better transport and the Chartered Institute of Highways and Transport) seeking an extension to the deadline which we agreed. The consultation period for these two respondents lasted for 6 weeks.

8.3 A total of 34 responses were received regarding the proposals. These were analysed for general views and the specific questions set out in the consultation.

8.4 Respondents included a number of local authorities, consultants who act on behalf of developers, environmental groups, various transport interest groups and a number of organisations from the environment sector. The overall balance of opinion was supportive of the proposals. Some of the concerns or queries raised related to the positive or negative effects on particular developments rather than the underlying approach. In some cases the points raised related to clarification of certain phrases. No single response provided detailed input to all the questions set out in the consultation.

8.5 Most (27) respondents recognised the need for greater proportionality for developments which were not "nationally significant" in the usual sense and welcomed the amendments to include thresholds in the Act for highway-related development and railway development. There were 6 respondents who did not express an opinion and there were none against the proposals in principle. Two respondents expressed concern around the use of thresholds for highway-related development in National Parks and Areas of Outstanding Natural Beauty but these bodies did not object to the principle of applying thresholds. Their concern was however that the lowest applicable threshold for trunk roads should be applied to these areas. The Department considers, however, that the introduction of a threshold does not in any way remove the need to take into account any protected landscape which would be affected by a proposed development. A development no longer considered a NSIP pursuant to the Act will nonetheless fall to be considered by an appropriate planning regime, ensuring that the impacts of the development continue to be properly considered.

8.6 More specifically, questions 3, 4 and 5 in the consultation asked for opinions on the thresholds for road and rail developments. Over half thought the thresholds suggested were reasonable, 10 respondents did not express an opinion, and of the remaining 6, 4 expressed the view that the rail thresholds were too low, suggesting that for rail these should be raised to between 5km to 15km of track length. The remaining two respondents suggested that the thresholds should be based on local plans and local infrastructure plans to allow a local influence in deciding what is nationally significant. Taking note of typical rail developments and of the majority views of respondents, the Department considered that the 2 kilometre length for rail developments provides the right balance in differentiating between projects that are genuinely nationally significant in the normal sense and those that are not.

8.7 Question 6 asked whether respondents had any other suggestions on thresholds and 26 respondents did not express a view. Of the three respondents who expressed concerns over the thresholds and made suggestions; one suggested that a different formula be used based on funding sources rather than development length. However, as the test for considering whether a development should be included within the planning regime set out in the Act is whether it is one that can be considered to be nationally significant, we do not consider the manner in which a development is to be funded is relevant to determining the thresholds. Another respondent expressed concern that there may still be some ambiguity as to when a development would be considered nationally significant, despite the application of thresholds. However, the consultation document made it clear that where a development would be considered genuinely nationally significant, then the

Secretary of State would continue to have the power to make a direction for the development to be considered in accordance with the planning regime under the Act. The last of the three who expressed concerns suggested that the threshold should be based on the local circumstances and should be plan led. However, this approach would lead to confusion and greater uncertainty as it would conflict with the nationally significant test of the Act and introduce varying thresholds depending where the development was in the country.

8.8 Question 7 concerned removing the purposive phrase from the Act so that only those highway-related developments which had or would have the Secretary of State as the highway authority should remain within the remit of the Act. 22 respondents fully supported this proposal while 11 did not express a view. One respondent suggested that the purposive phrase be amended to create exemptions from the planning regime in the Act. However, this could lead to the same level of confusion as each development would seek to define why it should or should not be within the ambit of the Act.

8.9 Questions 8 and 9 dealt with removing from the remit of the Act those developments which already had planning permission as part of a development and required the Secretary of State to undertake works on the strategic road network. The majority of respondents (25) did not express an opinion, 8 were supportive although a few expressed the view that the identity of the developer should not be a factor in determining whether a development was genuinely nationally significant. One respondent did not agree with these developments automatically falling outside the remit of the Act but felt that we should instead rely on impact and thresholds. When considering these points we felt that the impact and scale of the mitigation works would have already been assessed and dealt with at the planning permission stage and that where the works would be considered to be genuinely nationally significant then an application could be made to the Secretary of State to direct the development be treated as a NSIP.

8.10 When asked if respondents considered that the proposals met the stated policy objectives, again the majority (25) agreed, 7 did not express a view and 2 did not agree. Of the two who did not agree, one respondent felt that there was a risk that some smaller developments which could be genuinely nationally significant could fall outside the Planning Act regime. The stated aims of the proposals, however, are to ensure that the most appropriate planning regime is used to authorise these developments. We agree that there may be occasions where some small developments may still be genuinely nationally significant and in those cases the Secretary of State can be invited on application to make a direction that such development should be considered in accordance with the Act. The second respondent who did not agree was concerned that while the proposals were likely to lead to more certainty, the focus of the consultation was on growth rather than sustainable economic growth. They were also concerned that where these developments could lead to less congestion and better journey times as set out in the Impact Assessment, this would move congestion rather than reduce it and therefore they disagreed with the assessment on carbon impact.

8.11 While we agree that there will be an element of congestion relief, where a development is likely to generate significant traffic impacts, the National Planning Policy Framework requires that a Transport Assessment must accompany the application for planning permission. The Transport Assessment must assess transport impacts and include mitigation options to reduce them. This would include the use of sustainable transport measures. Where negative transport impacts remain, highway improvements are then investigated by the applicant and the highway authority. Therefore we do not believe that removing these types of schemes from the Planning Act regime would increase any negative impacts.

8.12 On the question of when the changes should be implemented 11 respondents were of the opinion that it should happen as soon as possible with one suggesting that it should happen in April. A further 6 agreed with the suggested June date and 17 did not have a view on when the changes should come in to play. There were some comments on communicating the changes to relevant parties and that clear transitional arrangements should be made. One respondent suggested that there should be guidance provided on the use of section 35 of the Act. Overall the transitional arrangements as set out in the consultation were supported.

8.13 In view of the level of support for the Order to come into force by June, our decision is to proceed with the process of introducing the Order to come into force as soon as possible. On the issue of communicating the changes, we will publish a press notice to inform relevant parties to the changes. On the point raised on guidance on the s35 application for the Secretary of State to direct a development into the Planning Act regime, we do not consider that this would be appropriate as it would introduce a new threshold and/or new tests to determine whether a scheme was genuinely "nationally significant". As each development is different, such guidance would either need to be very detailed to allow for every possible scenario or vague to allow a wide interpretation. We do not believe that this would be helpful to developers, scheme promoters or other interested parties in deciding to make an application.

8.14 Views were also sought on the transitional arrangements and whether developers who had begun pre-application work but had not yet submitted an application for a DCO under section 37 of the Act should be able to continue with the Planning Act process and, if so, on what basis. In total, 17 respondents felt that developers should have a choice as to whether to continue under the Planning Act regime. Of these17, the majority (12) supported an "opt out" as opposed to an "opt in" position. They also said that depending on where the developer was in the process, they should be allowed to continue with the Planning Act regime if they wished to avoid nugatory work. One respondent stated that it felt the cut off point of submission of an application was a clear, workable and sensible one and did not support the suggestion that there should be a choice. The remaining 16 respondents expressed no view at all on the transitional provision issue.

8.15 Two of the 17 respondents who supported a choice, were local councils which had begun preparatory work for an application for a order for development consent but who did not expect to be ready to submit their application under section 37 of the Act before the

proposed June coming into force date. These two councils also made representations suggesting that the transitional provisions should be linked to the pre-application stage. (Sections 41 to 50 of the Act set out a "pre-application procedure" which applicants for an order for development consent must have complied with before submitting their section 37 development consent application; as part of the pre-application procedure, applicants are required under section 46 of the Act to notify the Secretary of State of the proposed application).

8.16 The consultation was clear that the proposals sought to allow the use of the most proportionate and appropriate planning regime for developments. The Department considers that work undertaken during the pre-application stage would not need to be wasted as most of this would still be needed and could still be used for the alternative planning regimes. For example, although the Transport and Works Act 1992 process does not have statutorily prescribed consultation procedures, it is likely that consultation outcomes from the pre-application process under the Act would generally be able to be used for the purposes of an Order under the Transport and Works Act 1992; similarly it may also be possible to use an environmental impact assessment prepared in readiness for an application under the Act for a Transport and Works Order application. In the Department's view, it was also felt necessary to ensure that the transitional provisions identified a clear and unambiguous point in the process under the Planning Act which a developer should have reached to proceed to obtain development consent pursuant to the Act. In the Department's view, the most clear and unambiguous point in the process is when the application for development consent has been submitted under section 37 of the Act, at which point the scope of the proposed development will be more clear than might be so at any earlier point (for instance at the pre-application notification stage under section 46 of the Act) and where it is also more certain that the application will definitely be taken forward.

8.17 The Department also considered the suggestions that developers might be permitted to "opt in" or "opt out" of the Planning Act or other relevant procedures. The development consent regime under the Planning Act applies where a project is a "nationally significant infrastructure project" within the terms of the Act. Section 14 of the Act (under which this Order is made) allows the Secretary of State to make further provision about the types of project which will or will not be classified as NSIPs. However, there is no Order making power under the Act which would enable an order to be made which could provide developers with an option as to which planning regime they can use in relation to any particular type of development. It would not be possible therefore to provide for an "opt in" or "opt out" process without more extensive changes to the Planning Act and its structure than could be made under a section 14 Order.

8.18 Nevertheless, if a development does not meet the criteria to be an NSIP for the purposes of the Act, it will still remain open to the developer or any other person to make an application under section 35 of the Act for the Secretary of State to direct that development to be treated as a development for which development consent is required as an alternative to its proceeding under another planning regime. For the Secretary of State to make such a direction, however, a transport development would need to be wholly in

England (at least in the case of a highways or rail project) and in addition the Secretary of State would also have to have reached the view that the project is of national significance either by itself or when considered with one or more other projects or proposed projects in the same field.

8.19 It has therefore been decided to keep to the transitional arrangements put forward in the consultation to allow certainty and in recognition of the majority support for them.

8.20 The Department's formal response to the consultation on the proposals to amend the Planning Act is due to be published in July. It will be then be put on the Department's website. Further information relating to the consultation responses can be found in Annex 1.

9. Guidance

9.1 The nature of this order makes it unnecessary to publish guidance in relation to it. There has also as noted been extensive consultation with interested parties alerting them to the changes. A press release will also be issued notifying interested parties when the changes under the Order have come into effect.

10. Impact

10.1 The Impact Assessment which accompanied the consultation set out some bases for possible cost or resource savings. These could not be quantified as each development is different in its circumstances. The consultation asked for further evidence in this matter but none was received from respondents.

10.2 The impact on developers' businesses will be positive as the proposal will remove the delay and costs of an examination under the development consent order regime where the development is uncontested. The effect of the change would be neutral or marginally positive where Public Inquiries might be needed under the alternative planning regimes to deal with Highways Act Orders.

10.3 The impact on the public sector and civil society is again difficult to quantify as developments vary but the use of the Transport and Works Act 1992, the 1980 Act or Town and Country Planning Act 1990 regimes for developments that are not genuinely nationally significant to use is seen as positive as this allows more accurate programming of works and lower cost.

11. Regulating small business

The legislation will not in practice affect small businesses as the scheme developers are local authorities, Network Rail and the Highways Agency. Where a developer is a private business their schemes are large scale with an impact on the strategic road network. In these cases the works would be undertaken by the Highways Agency (or their contractors)

on behalf of the developer. Therefore the micro business exemption would not apply to these changes.

12. Monitoring & review

12.1 Monitoring of the implementation of these amendments will not be required as no further action is required once the Order comes into effect.

12.3 The Department will carry out a review within 3 years after the implementation of the amendments in order to establish whether the thresholds are still appropriate.

13. Contact

Maureen Pullen at the Department for Transport, tel: 0207 944 8016 or e-mail: Maureen.pullen@dft.gsi.gov.uk can answer any queries regarding the instrument.

Annex 1

The Consultation

The consultation ran from 18 December 2012 until 21 January 2013 and the response to the consultation can be found at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/204571/response.pdf

Analysis of the responses:

The consultation was made available to the public on the Department's website.

The following organisations were alerted of the consultation by e-mail:

Campaign for Better Transport
Town and Country Planning Association
Campaign for the Protection of Rural England
Royal Town Planning Institute
Living Streets
Sustrans
Chartered Institute of Highways and Transport

The breakdown of responses

The following table provides a breakdown of the responses received.

Breakdown of responses	**Number received**
Organisations	11
Transport sector	5
Consultant sector	4
Local Authorities	13
Conservation sector	3
Total	**34**

Of the responses

28 agreed that the amendments had reasonable grounds, 6 were neutral or did not respond.

On the thresholds, 18 agreed with the thresholds, while 6 were opposed, 3 of which asked for higher thresholds and 1 asked that the lowest highway threshold should be applied to National

Parks and Areas of Outstanding National Beauty. The remaining were neutral or did not express an opinion.

On restricting developments to highways where the Secretary of State is the highway authority, 24 supported with only 1 against. The remaining consultees did not have a view or did not respond to this question.

On the transitional arrangements, 17 supported the suggested implementation time of June with 17 not expressing a view. On the question of allowing scheme developers to opt in or out of the Planning Act regime where a submission had not yet been made by the Implementation date, 17 supported this with the majority suggesting an opt out, 16 did not express a view and one respondent did not agree that there should be the option to ensure certainty of process.