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Dear Jon,

POLICY FRAMEWORK FOR INVESTMENTS: INITIAL CONSULTATION FEBRUARY 2005

Thank you for the opportunity to comment on ORR's 'Policy Framework for Investments: An Initial Consultation'. HSE has considered the proposed framework for its coverage of safety by the duty holders and the implications for safety regulation. We have given a summary and detail on points for your consideration. There are no requirements on this response being made confidential.

1. Summary

1.1 The document does not create significant problems on the requirements of duty holders on safety nor the regulation of safety by HMRI. The response is therefore limited on the specific questions asked, however my comments are given below.

1.2 It may be advantageous for ORR to modify the document to account for ORR's increased safety responsibilities that will be acquired under the Railways Act 2005. I have made some suggestions on this.

1.3 There are parts of the document where the references to safety may benefit from being more explicit and I make points to this effect.

2. Comments

2.1 **ORR Role:** The framework addresses investments principally on the economic requirements but it does also cover investments required to meet safety obligations. Under the Railways Act 1993, the ORR already has to account for safety provisions as well as economic. The Railways Act 2005 is expected to come into force by the end of 2005 and will of course result in ORR acquiring safety policy and regulatory responsibilities including the Health and Safety at Work etc Act 1974 and hence ORR will be operating with different statutory requirements. In anticipation of this change the document may wish to reflect the forthcoming change and hence promote a more unified approach to investment, risk management and regulatory compliance. With



the Railways Act, ORR will be making arrangements to encourage and assist in furthering railway safety and this current document could explicitly be part of this process.

It may be appropriate to reflect the change to ORR's role and requirements of Network Rail and other duty holders by heightening the profile of safety particularly in investment decisions by referencing it in either the Chairman's foreword or in the introduction.

2.2 Additional investment funded through the Regulatory Asset Base:

The document includes safety-related schemes as being able to be included in the 'logging-up' process (2.13). However since such schemes will often be statutory requirements such as meeting 'ALARP' (As Low As Reasonably Practicable) rather than optional it may be appropriate to raise their profile by including them under section 2.10 with other criteria for investments being logged up.

Section 2.13 suggests that a change in safety law may result in additional safety investment. Whilst this is of course true there are other factors that may result in a need for further investment. For example there may be an awareness of a risk not previously addressed or adequately addressed, there may be a change in technology and/or costs that result in new safety measures becoming reasonably practicable, or there may be changes to the network that result in new or changed risks. The inclusion of the reopener provision contained in ACR2003 is a constructive facility for safety improvements.

2.3 Securing these obligations: Section 2.13 gives a list of means of securing Network Rail's investment obligations. The Health and Safety at Work etc Act 1974 could also, and probably should be included, with infrastructure investments often producing performance, economic and safety improvements. Hence under the question to consultees, 2.51, the use of safety legislation also can provide both a means and an incentive to secure Network Rail obligations.

2.4 Risk allocation: The basic principles of risk allocation are given (3.6) but in law there can be risks and liabilities that cannot readily be transferred. Under safety legislation there will be duties for example on designers, suppliers, installers, maintainers, and individuals, which will continue unaffected or be shared. Network Rail may take overall responsibility for the risks associated with a particular project but this may not absolve other parties from safety responsibilities. The subsequent section (3.7) states that responsibilities for risk allocation should be established at the start. Within the complexity of the rail sector, in safety it is an important point that stakeholders understand, agree and act on their responsibilities.



2.5 **Operational risk:** Similarly under section 3.14 and 3.15 the operational risk will be allocated to the facility operator, Network Rail, but safety risks and responsibilities will continue with other parties.

2.6 **Risks and levels of contingency for different schemes:** No comment (3.24)

2.7 **Efficiency assessment:** In safety there is a requirement for implementing reasonably practicable measures of risk control. Within this there is a cost-benefit analysis which means that the assessment would be carried out ex ante. For this reason where the efficiency of schemes are assessed (3.42), then to align with safety the assessment may be better in advance of commencement.

2.8 **Written-off development costs:** No comment (3.49).

2.9 **Industry risk fund:** There is support by ORR for a fund to cover contingencies on schemes that seek to manage low probability- high impact industry risk (3.55). This line is supported, particularly as in safety risk management across business sectors such events are often not effectively addressed by virtue of there not being the perception of the risks or the data to motivate actions. This comment supports the approach under 3.64.

Yours sincerely,

A handwritten signature in black ink that reads 'Jeane Anderon'.

JEANE ANDERON
Rail Policy – Stakeholder Relations Team