

## **Application to the Aarhus Convention Compliance Committee**

Communication on alleged non-compliance with Articles 6 and 9 of the  
Aarhus Convention

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### **I. Information on correspondent submitting the communication**

1. This is a communication by Dr Caroline Robertson, an individual, living at 37 Lakeside Oxford OX2 8JF United Kingdom. The numbers of residents adversely affected by the proposed work in this communication are in excess of 5,000.

### **II. Party concerned**

2. The state concerned is the United Kingdom acting via Network Rail. Under a Network Framework Agreement, 1 September 2014, with the Department for Transport, Network Rail including all its subsidiaries (together referred to as "Network Rail") is now classified by the Office for National Statistics as a central government body.

### **III. Facts of the communication**

3. This communication relates to the decision issued by the Secretary of State for Transport on 17 October 2012 (Appendix 1) which led to the enactment of the *Transport and Works Act 1992 the Chiltern Railways (Bicester to Oxford Improvements) Order 2012* ("TWA Order", Appendix 2) which came into force on 13 November 2012. This order covers all the planning permission required for the installation of a double track mainline railway between Oxford and Bicester for both Chiltern Railways' new passenger service from Oxford to London Marylebone and the first section of East West Rail between Oxford and Cambridge.
4. There were two sittings of the public inquiry before the TWA Order was granted. After the first sitting, East West Rail, which had no funding, was found to be an impediment to the scheme and that it would form part of another Transport and Works Act Application (Appendix 3, page 264, 9.2.13):

*If the East West Rail Link were to proceed, the Scheme would form part of its western section [4.1.14, 4.1.15]. Only the most general evidence of the benefits of East West Rail was brought to the Inquiry, and that scheme is not currently before the Secretaries of State. The Milton Keynes and South Midlands Sub-Regional Strategy takes the view that any decision on the East West Rail Western Section should be informed by the results of an expected study on transport and growth there [4.3.3]. East West Rail is not expected to be authorised until 2014, probably following a Transport and Works Act Order application [4.1.15, 4.3.10]. I conclude that there is no currently demonstrated need to facilitate the East West Rail Link, but that such a need may arise in future.*

5. Objectors were not allowed to discuss East West Rail at the second sitting of the public inquiry.
6. After the close of the public inquiry and before the TWA Order was granted, the UK Government announced funding for East West Rail and East West Rail was included in the TWA Order (Appendix 1, page 8, paragraph 34):

*The Department for Transport announced on 16 July 2012 that the East West Rail project (the western end of which would, if authorised, use the Oxford-Bicester line) had been included in the High Level Output Specification (“HLOS”) for 2014 to 2019 as a committed scheme for funding purposes. The Secretary of State considers that this does not alter the case for approving Chiltern’s scheme because the likely impacts of East West Rail operations have been taken into account in assessing the effects of Phase 2 of Chiltern’s scheme and have been sufficiently addressed in the proposed mitigation measures. He is satisfied that while the East West Rail project remains to be fully defined and authorised, the HLOS announcement does not lead him to a different conclusion on the matters before him in deciding Chiltern’s application.*

7. Planning conditions were attached to the TWA Order (Appendix 1, Annex 1, page 11) to be discharged by the relevant local authority. Works covered by the TWA Order cannot commence until part of Condition 19, concerning predictions and mitigation for operational noise and vibration, is discharged (Appendix 1, Annex 1, page 21).
8. The TWA Order does not place any restrictions on how the railway between Oxford and Bicester can be used once the railway is operational as section 42(1) (Appendix 2) contains the power to “operate and use the railway and other authorised works as

a system, or part of a system, of transport for the carriage of passengers and goods.” There are no restrictions or limitations in the use of the railway in terms of numbers, types, lengths, timings or speeds of trains.

9. Since the TWA Order was granted and before partial discharge of Condition 19, work began along the railway corridor, such as occupation of land, whose occupation is only authorised under the TWA Order, and clearance of significant numbers of trees, in excess of 1,000 along the railway corridor.

### **First Turn Bridge**

10. On 13 November 2014, a notice (Appendix 4) was published in the local newspaper giving details of Network Rail’s intention to close First Turn road in January 2015 for 10 months so that Network Rail could demolish and replace First Turn Bridge. This work was not mentioned at the public inquiry nor formed part of the environmental impact assessment and until the notice appeared, residents were not aware that the bridge would need to be demolished and replaced. The bridge did not close in January 2015 as work could not commence until partial discharge of Condition 19.
11. The notice claimed that the work is authorised under Clause 10, temporary stopping up of streets, and Schedule 5, streets to be temporarily stopped up, of the TWA Order, (Appendix 2, page 10 and page 38). First Turn is included in the TWA Order so that the remedial work proposed to the public inquiry and mentioned in the Environmental Statement could be carried out.
12. The TWA Order does not cover work to demolish and replace First Turn Bridge. All “the scheduled works” are defined as follows (Appendix 2, page 5 and page 32):

*“the scheduled works” means the works specified in Schedule 1 (scheduled works) or any part of them*

#### *Schedule 1:*

*In the County of Oxfordshire, District of Cherwell and the City of Oxford—Work No. 2— A double track railway (17,600 metres in length) commencing in the county of Oxfordshire, district of Cherwell by a junction with the termination of Work No.1 and terminating in the city of Oxford by a junction with the commencement of Work No.3 at a point 370 metres north of Aristotle Lane Crossing. Work No.2 includes the reconstruction of Bicester Town and Islip Stations; construction of a station at Water Eaton; extensions to bridges OXD37, OXD38, OXD39 and OXD40; remedial works to*

*bridges OXD42, OXD44, OXD46 and OXD49; demolition of bridge OXD47; lowering of track through Wolvercot Tunnel and the provision of a signalling power supply point at the proposed Elm Tree Farm Langford Lane overbridge (Work No.11).*

13. The only bridge mentioned in Schedule 1 to be demolished is Northfield Farm Bridge OXD47. The work to First Turn Bridge, OXD49, is described as “remedial works”. There has been no environmental assessment about the impact of the demolition and replacement of this bridge on the local community or Oxford Meadows SAC.
14. The works listed do not include First Turn Bridge and Inquiry Document CD/1.9.1 (Condition 2(a), Approved drawings, Appendix 1, page 12) which provides all the plans does not include the plans to demolish and replace First Turn Bridge.
15. Without public consultation, Network Rail agreed with Oxfordshire County Council a “like for like” replacement. Residents got to view the plans on 12 February 2015 and were told the work was necessary to provide clearance for electrification. Electrification was mentioned at the public inquiry and the work to gauge enhance Wolvercote Tunnel and provide clearance for electrification was included in the TWA Order. Network Rail has known since 2009 that gauge clearance and clearance for electrification would be required.
16. After speaking with residents, the correspondent raised the issue of lack of public consultation with Network Rail on 3 March 2015 (Appendix 5, page 7). This would have been a great opportunity for First Turn Bridge to be upgraded and made suitable for modern use. At present the pavements are not wide enough for two pushchairs to safely pass each other and the road is not wide enough for two cars or buses to safely pass each other. The bridge is very close to the local school and is one of only two roads that directly connects Wolvercote with north Oxford.
17. Network Rail raised the issue with Oxfordshire County Council on 3 March 2015 and finally informed the correspondent on 12 June 2015 that a “like for like” replacement would still be made (Appendix 5, page 1).
18. Oxford City Council partially discharged Condition 19, on 16 June 2015, with the official decision published on 30 June 2015.
19. On 8 July 2015, Network Rail e-mailed a copy of the notice to notify the local community about the closure of First Turn four days later, on Sunday 12 July 2015.

***Planning assumptions used to predict noise and vibration of operating trains***

20. When the Secretary of State for Transport granted the TWA Order, the responsibility

to discharge planning conditions was delegated to the local planning authority. Oxford City Council, the local planning authority for Oxford, has interpreted this very narrowly and concluded that whilst the responsibility was delegated, the Secretary of State's powers to enforce the conditions were not.

21. Since the scheme was first announced, residents have always been concerned that more freight trains would use the railway line than those on which public consultation has been allowed. Condition 19, concerning operational noise and vibration, refers to a Noise and Vibration Mitigation Policy ("NVMP") which was made available at the first public inquiry. The NVMP sets out thresholds for noise and vibration which must not be exceeded, sets out planning assumptions for the numbers of trains that will use the line, provides that mitigation is based on the planning assumptions and for post-operational monitoring to verify the effectiveness of the mitigation based on the planning assumptions.
22. Many residents requested that Network Rail updated the NVMP planning assumptions as Network Rail's own documents<sup>1</sup> and presentations (for example, Appendix 6<sup>2</sup>, pages 11, 12 and 14) indicated that the railway line would be used by many more freight trains than those on which mitigation would be based. The "core" East West Rail scheme (Appendix 6, page 11) has more train services than contained in the NVMP. An "enhanced" East West Rail scheme (Appendix 6, page 12) shows a three fold increase in freight trains from the "core" scheme. Page 14 of Appendix 6 shows the interaction of the proposed HS2 line with East West Rail so that East West Rail can serve the HS2 Infrastructure and Maintenance Depot at Calvert.
23. Throughout the process to discharge Condition 19, Oxford City Council has capitulated to Network Rail in spite of conflicting evidence. Oxford City Council has allowed noise and vibration to be considered separately although they come from the same source, and has allowed Network Rail to make assumptions about types, lengths, weights, times and speeds of trains which have the effect of bringing the predicted noise and vibration to just within the required thresholds. Any increase in numbers and speed of certain types of trains, for example stone trains, means that the thresholds for noise and vibration will be exceeded. Oxford City Council has

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<sup>1</sup> CP5 Enhancements Delivery Plan March 2015, page 41 (not included with this communication)

<sup>2</sup> Presented by Patrick O'Sullivan who also gave evidence to the public inquiry

allowed Network Rail to use an unrealistic low planning scenario in order to meet the obligations of Condition 19, concluding (Appendix 7, page 3):

*Limiting the services run or imposing speed limits are outside the scope of this application. Considering the impact of any proposals which did not have consent was outside the scope of this application. Current use of the railway, for example for construction freight, was outside the scope of the application. The mix of trains was part of the assumptions used to model the impact and the committee was not asked to sanction or require a particular set of train movements. The committee could not challenge or change or speculate on the Secretary of State's assumptions or decision, including the decision to delegate this matter.*

24. Oxford City Council's special advisor for vibration, Arup, warned the Council that there are no controls over Network Rail increasing the frequency, speeds and types of trains above those on which mitigation has been assessed (Appendix 8, 11 March 2015, page 5):

*"....., there are no safeguards or provisions that we are aware of which limits the type, timing or condition of trains which could operate on the scheme in the future nor obliges the operator to mitigate vibration generated by these trains if they are different from those assumed in the VSoA. Therefore there is a possibility that, in the future, trains could operate and there is a possibility such trains could generate vibration levels which exceed the numerical criteria contained in Condition 19."*

25. In spite of the obvious flaws in the planning scenario on which mitigation for noise and vibration was assessed, Oxford City Council partially discharged Condition 19, Section H, on 16 June 2015 so that construction could begin. The Council did impose conditions which it was advised could not be enforced (Appendix 7, page 4):

*The legal adviser said these conditions could not be imposed as proposed, and advised that the committee should understand that such conditions cannot be legitimately imposed.*

26. Since Condition 19 was discharged, Network Rail has already admitted that trains will be travelling faster than those in the planning assumptions and when passenger trains started operating from the new Oxford Parkway to Bicester at the end of October last year, the numbers of passenger trains operating at night-time was 40%

higher than the numbers, for those passenger services, used in the planning assumptions.

***Participation in other schemes which will use the Oxford to Bicester railway***

27. Oxford City Council and Network Rail both suggested that concerned residents could consider participating “in those processes making representations at the appropriate time to the relevant bodies when they consider future schemes which may put additional pressure on this line, as to the impact of noise and vibration on local residents which must be carefully considered” and that the impacts “including cumulative impacts will be assessed within those processes”<sup>3</sup>.
28. The draft HS2 Hybrid Bill refers to East West Rail as the Bicester to Bletchley line. The part of East West Rail covered by the TWA Order, between Bicester and Oxford, has been excluded. The railway between Bicester and Oxford has not been considered in the HS2 Phase One Environment Statement neither has the environmental impact of freight trains using other parts of East West Rail to provide construction materials and to serve the proposed HS2 Infrastructure and Maintenance Depot at Calvert. The correspondent submitted a petition to the HS2 Select Committee (reference AP2/00179) in August 2015. The Secretary of State for Transport objected to the petition on the basis that the correspondent does not have *locus standi*. The correspondent appeared before the HS2 Select Committee on 16 November 2015 and the HS2 Select Committee found in favour of the Secretary of State for Transport as the correspondent “is not sufficiently, especially or directly affected by HS2 to have locus.”<sup>4</sup>

**IV. Provisions of the Convention alleged to be in non-compliance**

29. Article 6 of the Aarhus Convention provides:

*Each party:*

1. (a) *Shall apply the provisions of this article with respect to decisions on whether to permit proposed activities listed in annex 1*

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<sup>3</sup> West Area Planning Committee, Oxford City Council, Agenda and briefing note, Tuesday 16 June 2015, page 32, paragraphs 53 and 55 (not included with this communication)

<sup>4</sup> Tuesday 1 December 2015, page 59, Minutes of Oral Evidence (not included with this communication)

30. Article 6 applies to decisions on whether to permit a particular project, activity or action to proceed. A list of some of the specific activities covered by article 6 is set out in annex 1 to the Aarhus Convention.

31. The construction of the Oxford to Bicester line under the TWA Order falls under paragraph 8 of annex 1:

*8.(a) Construction of lines for long-distance railway traffic .....*

32. It is presumed that the construction of railway lines may have a significant effect on the environment. The construction authorised under the TWA Order will allow railway traffic to travel from Oxford to London Marylebone and is also the first step in the construction of East West Rail which will connect Oxford to Cambridge and beyond. Even if the TWA process is not covered under annex 1, paragraph 8.(a), it did involve an environmental impact assessment, which falls under paragraph 20 of annex 1:

*Any activity not covered by paragraphs 1-19 above where public participation is provided for under an environmental impact assessment procedure in accordance with national legislation.*

33. The letter announcing that the TWA Order would be granted confirms that an environmental impact assessment procedure was used (Appendix 1, paragraph 23):

*With regard to Mr Feeney's representations, the Secretary of State is satisfied that the Environmental Statement ("ES") submitted by Chiltern, taken with the two Addendums to the ES, is adequate since it describes all the likely significant effects of the scheme identified during the environmental impact assessment ("EIA") process; and that all requirements as to public consultation on the ES have been complied with.*

34. The decision to permit the construction of the Oxford to Bicester railway falls under Article 6 as it is for construction of railway lines for long-distance railway traffic, required under paragraph 8.(a) of annex 1, and/or involves an environmental impact assessment process, required under paragraph 20 of annex 1.

*Changes and extensions to the project under paragraph 22 of annex 1*

35. Since the public inquiry, there have been changes and extensions to the project which have not been the subject of public consultation. These changes are covered



under paragraph 22 of annex 1:

*Any change to or extension of activities, where such a change or extension in itself meets the criteria/thresholds set out in this annex, shall be subject to article 6, paragraph 1(a) of this Convention. Any other change or extension of activities shall be subject to article 6, paragraph 1(b) of this Convention.*

*Changes in operating conditions under Article 6 (10)*

36. Changes in the operating conditions of projects covered by Article 6, paragraph 1, fall under paragraph 10 of article 6:

*Each Party shall ensure that, when a public authority reconsiders or updates the operating conditions for an activity referred to in paragraph 1, the provisions of paragraphs 2 to 9 of this article are applied mutatis mutandis, and where appropriate.*

37. Article 6 (10) requires public authorities which reconsider or update the operating conditions for such activities to apply that article's public participation requirements, *mutatis mutandis*, and where appropriate. It need not be certain that a proposed activity will definitely have a significant effect on the environment. The Parties must determine the applicability of article 6 where the proposed activities *may have* a significant effect on the environment (the likelihood of significant effect triggers the obligation). The test of significance should be applied objectively and not in a manner to avoid public participation. Consideration should be given to the production of waste, pollution, nuisance, risk of accidents, duration, frequency and reversibility.

*Ability to challenge acts or omissions that may contravene EU directives and EU regulations*

38. Article 9 (3) deals with whether national law effectively bars members of the public from challenging acts or omissions that may contravene EU directives and EU regulations relating to the environment:

*In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the*

*environment.*

## **V. Nature of alleged non-compliance**

### ***First Turn Bridge***

39. Paragraph 22 of annex 1 deals with physical changes or extensions to activities. The demolition and rebuild of First Turn Bridge should have been considered as part of the TWA application and included in the TWA Order. This should have formed part of the project from the beginning. However, due to the lack of public consultation, it is not clear when it was first known that the works to First Turn Bridge were more than just “remedial” and that it would have to be demolished and rebuilt requiring its closure for far longer than anticipated. The extension of the works should have involved a public consultation in which residents could have had input into the design, materials and possible widening of the bridge to take into account the huge increase in road traffic since the bridge was first built in the 1850s.

40. The work to First Turn Bridge requires public participation in accordance with Article 6, paragraphs (2), (3), (4), (7) and (8):

*2. The public concerned shall be informed, either by public notice or individually as appropriate, early in an environmental decision-making procedure, and in an adequate, timely and effective manner, inter alia, of:*

*(a) The proposed activity and the application on which a decision will be taken;*

*(b) The nature of possible decisions or the draft decision;*

*(c) The public authority responsible for making the decision;*

*(d) The envisaged procedure, including, as and when this information can be provided:*

*(i) The commencement of the procedure;*

*(ii) The opportunities for the public to participate;*

*(iii) The time and venue of any envisaged public hearing;*

*(iv) An indication of the public authority from which relevant information can be obtained and where the relevant information has been deposited for examination by the public;*

*(v) An indication of the relevant public authority or any other official body to which comments or questions can be submitted and of the time schedule for transmittal of comments or questions; and*

*(vi) An indication of what environmental information relevant to the proposed activity is available; and*

*(e) The fact that the activity is subject to a national or transboundary environmental impact assessment procedure.*

*3. The public participation procedures shall include reasonable time-frames for the different phases, allowing sufficient time for informing the public in accordance with paragraph 2 above and for the public to prepare and participate effectively during the environmental decision-making.*

*4. Each Party shall provide for early public participation, when all options are open and effective public participation can take place.*

*7. Procedures for public participation shall allow the public to submit, in writing or, as appropriate, at a public hearing or inquiry with the applicant, any comments, information, analyses or opinions that it considers relevant to the proposed activity.*

*8. Each Party shall ensure that in the decision due account is taken of the outcome of the public participation.*

41. Whilst Network Rail did give notice that First Turn Bridge would be demolished and replaced, no public consultation in accordance with Article 6 (2) was invited.
42. The public participation required by Article 6 (3) and (4) is required to be “*effective*” and “*when all options are open*”. The decision for a “like for like” replacement was announced without any public consultation when Network Rail was keen to start work suggesting that the time when options may have been open was past.
43. No comments about the new bridge have been invited from the public and so public opinion was not considered in the decision to make a “like for like” replacement as required by Article 6 (7) and (8).
44. The extra work to First Turn bridge may also fall within the scope of Article 6 (10) as more material has been removed and the work is taking far longer than anticipated.

### ***Network Rail’s Permitted Development Rights***

45. Network Rail has Permitted Development Rights (“PDRs”) under the Town and Country Planning (General Permitted Development) Order 1995 (“GPDO”, Appendix 9) which allows it to operate without interference from the local planning authority, as planning permission is deemed to be granted. Only the construction of new railway lines requires planning permission, which in the case of the line

between Oxford and Bicester is provided by the TWA Order (Appendix 2). The PDRs pre-date the Aarhus Convention.

46. Network Rail asserts it PDRs under Parts 11 (Appendix 9, page 36) and 17 (Appendix 9, page 41) of the GPDO up to 1,000 times each year<sup>5</sup>. Network Rail expects to use these rights more frequently in the future for major line upgrades.
47. Network Rail also has a statutory defence to any legal actions for nuisance, including noise and air pollution, which may result from operation of the railway, (Appendix 10, The Railways Act, section 122):

*Statutory authority as a defence to actions in nuisance etc.*

*(1) Subject to the following provisions of this section—*

*(a) any person shall have authority—*

*(i) to use, or to cause or permit any agent or independent contractor of his to use, rolling stock on any track, or*

*(ii) to use, or to cause or permit any agent or independent contractor of his to use, any land comprised in a network, station or light maintenance depot for or in connection with the provision of network services, station services or light maintenance services, and*

*(b) any person who is the owner or occupier of any land shall have authority to authorise, consent to or acquiesce in—*

*(i) the use by another of rolling stock on any track comprised in that land, or*

*(ii) the use by another of that land for or in connection with the provision of network services, station services or light maintenance services, if and so long as the qualifying conditions are satisfied in the particular case.*

*(2) For the purposes of this section, the “qualifying conditions” are—*

*(a) in relation to any use of rolling stock on track—*

*(i) that the track is comprised in a network, station or light maintenance depot, and*

*(ii) that the operator of that network, station or light maintenance depot is the holder of an appropriate licence or has the benefit of an appropriate licence exemption; and*

*(b) in relation to any use of land for or in connection with the provision of network services, station services or light maintenance services, that the operator of the*

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<sup>5</sup> Page 115, 15.8, Review of Permitted Development Rights, Office of the Deputy Prime Minister, September 2003 (not included with this communication)

*network, station or light maintenance depot in question is the holder of an appropriate licence or has the benefit of an appropriate licence exemption.*

*(3) The authority conferred by this section is conferred only for the purpose of providing a defence of statutory authority—*

*(a) in England and Wales—*

*(i) in any proceedings, whether civil or criminal, in nuisance; or*

*(ii) in any civil proceedings, other than proceedings for breach of statutory duty, in respect of the escape of things from land;*

*(b) in Scotland, in any civil proceedings on the ground of nuisance where the rule of strict liability applies, other than proceedings for breach of statutory duty.*

*(4) Nothing in this section shall be construed as excluding a defence of statutory authority otherwise available under or by virtue of any enactment.*

48. Network Rail can use its PDRs to alter the frequency, types, lengths, weights, times and speeds of trains at will. Its statutory defence to nuisance actions means that unacceptable levels of noise, vibration and air pollution can be inflicted on the local population.

### ***Operating trains***

49. At present, residents do not have to be consulted about any increase in the speed and numbers of trains that use the railway line constructed in accordance with the TWA Order even-though such increases were anticipated before construction began. Network Rail's PDRs allow the public to be excluded from public consultation about activities which will have a direct and adverse effect on the local environment. Any change to the operating pattern of trains, such as type, frequency, timing and speed do not amount to further operating development or a material change in the use from that already deemed permitted under s42(1) of the TWA Order. Excluding public consultation in relation to a change in the operation of the railway which will have a detrimental environmental impact and without any consideration of any environmental impact is in breach of Article 6 (10) of the Aarhus Convention.
50. UK diesel freight locomotives are not yet compliant with the EU Emissions Directive. Encouraging freight to be carried on trains in the UK takes lorries off motorways, away from urban areas, and onto trains running through urban areas. Oxford is a declared city wide air quality management area and, so far, no Health Impact Assessment has been conducted. Whilst the Great Western mainline is currently

being electrified, there are no immediate plans to also electrify the Oxford to Bicester line. Even if it is electrified, freight trains will still be operated by diesel engines.

51. Providing Network Rail with the right to change operating conditions without public consultation, even when it is likely the changes will have a negative environmental impact, and at the same time giving Network Rail a statutory defence to nuisance actions from operating its trains, removes the public's ability to enforce environmental law in breach of Article 9 (3) of the Aarhus Convention.

## **VI. Use of domestic remedies**

### *The decision to grant the TWA Order*

52. At the time the decision to grant the TWA Order was made in October 2012 and within the three month time limit allowed for judicial review of that decision, residents were unaware that:
  - The proposed works to First Turn Bridge would involve the bridge being demolished and rebuilt/replaced with First Turn road, which goes over the bridge, closed for up to ten months. In the Environmental Statement, the impact from daytime and nighttime construction, at any location, was between one week and three and a half months. The extent of the works to First Turn Bridge was not known until 2015;
  - The draft HS2 Hybrid Bill, first published over a year later in November 2013, would provide for realignment of East West Rail with HS2 so that freight trains using East West Rail can serve the proposed HS2 Infrastructure and Maintenance Depot at Calvert; and
  - Many more freight trains than those predicted in the NVMP would use East West Rail (Appendix 7, March 2014) such as stone trains and other freight trains using the line to provide building materials for both East West Rail Phase 2 and HS2.
53. By the time residents became aware that First Turn Bridge needed to be rebuilt and that the railway line could be used by many more freight trains than those used in the planning scenario, it was too late to challenge the decision to grant the TWA Order.

### *The decision to partially discharge Condition 19*

54. After Condition 19 was partially discharged in June last year, a group of local residents sought legal advice over whether the decision to partially discharge Condition 19 could be challenged (there is a now six week time limit for challenging planning decisions (Civil Procedure Rules Part 54.5(5)). The conclusion was that there had been no error in law<sup>6</sup>. The planning committee did not act inconsistently or irrationally by determining that the predictions of future noise and vibration to be robust, whilst at the same time imposing additional conditions, which may not be enforceable, to protect against any actual breaches of the noise and vibration thresholds when trains were operating.

55. In the case of *Mark Whitby v Secretary of State for Transport and others*<sup>7</sup>, Mrs Justice Lang concluded (paragraph 77) that only errors of law could be reviewed in planning decisions:

*In conclusion, although I acknowledge that these were controversial decisions, with which the Claimant, Historic England and no doubt many others disagree, I am not satisfied that they disclose any error of law, for the reasons I have set out above. The merits of planning judgments cannot be reviewed in High Court challenges; only errors of law.*

56. The environmental issues of additional freight trains using the line to provide construction materials for East West Rail Phase 2, being used as part of a strategic freight network, being used as a diversionary freight route to allow nighttime maintenance work, or to provide HS2 construction materials and to serve the proposed HS2 Infrastructure and Maintenance Depot have not been considered under the TWA Order. Due to UK legislation, these environmental issues will not be considered.

## **VII. Use of other international procedures**

57. The correspondent submitted a complaint to the European Commission on 13 December 2012, which was unsuccessful, and the file was closed the file in October

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<sup>6</sup> Private communication.

<sup>7</sup> [2015] EWHC 2804 (Admin) (not included with this communication)

last year.

### **VIII. Confidentiality**

58. Please do not publish the correspondent's e-mail address on the internet to avoid unsolicited e-mails.

### **IX. Supporting documentation**

Appendix 1: Secretary of State for Transport's decision on 17 October 2012

Appendix 2: TWA Order 2012

Appendix 3: Inspector's report 15 July 2011

Appendix 4: Notice to close First Turn Bridge 13 November 2014

Appendix 5: Correspondence with Network Rail

Appendix 6: Delivering East West Rail, Patrick O'Sullivan, EWR Consortium Consultant, 13 March 2014

Appendix 7: West Area Planning Committee minutes 16 June 2015

Appendix 8: Arup 15 March 2015

Appendix 9: Town and Country Planning (General Permitted Development) Order 1995

Appendix 10: The Railways Act, section 122

### **X. Signature**

Dr Caroline Robertson

12 February 2016

### **XI. To:**

Secretary to the Aarhus Convention Compliance Committee

United Nations Economic Commission for Europe

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