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Dear Andrew,

### **CONSULTATION ON THE PUBLICATION OF ORR ENFORCEMENT NOTICES**

Thank you for the opportunity to comment on your proposed changes to publication of ORR enforcement notices.

East Midlands Trains are extremely disappointed that ORR feels a need to publish summary details of enforcement notices within 3 days of issuing them. I believe that we are not alone in taking this view.

Your consultation document acknowledges that the ORR preferred option of publicising enforcement notices will differ from HSE policy, so a railway industry Duty Holder regulated by ORR under the Health and Safety and Work etc Act 1974 will be treated differently to a wider industry Duty Holder regulated by HSE under the same legislation. We believe that this is both unfair and unjustified.

The principal justification for this change appears to arise from a potential need to avoid having to explain why action has not been publicised in advance of the recipient's right to appeal being exercised. Whilst we acknowledge the need for ORR to comply with the Environment and Safety Information Act 1988 (ESIA) we believe that your proposed Option 3 would adequately satisfy this obligation. This has the advantage, as you acknowledge, of ensuring that ORR's approach is consistent with that adopted by HSE.

We accept that there is a "reverse burden of proof" in respect of offences under the Health and Safety at Work etc Act 1974 (i.e. the onus is on the defendant to prove they have met the legal requirement being challenged). However the right to be considered innocent until proven guilty is a key guiding principle under UK law, and the right to appeal against an enforcement notice enshrines this right. If the issuing of an enforcement notice is publicised in advance of the right to appeal being discharged, we believe that this will seriously devalue this process. It will, in practice, create a situation where a Duty Holder could be publicly judged and potentially condemned, even if the enforcement notice is incorrectly or inappropriately issued and successfully appealed against.

Your consultation document identifies that in 4% of cases, enforcement notices are appealed, and one enforcement notice has been withdrawn following appeal (and work carried out by the Duty Holder to address the deficiency). Whilst this is a commendably low number of enforcement notices challenged by Duty Holders, it still indicates that on average one Duty Holder per year will have their right of appeal and potential innocence undermined, and could be impacted by unnecessary and unwarranted adverse publicity.

The Rail Accident Investigation Branch have a policy of consulting affected parties on their investigation reports and recommendations in advance of publication. They provide structured feedback on any points raised and will amend reports and recommendations in light of additional information provided or work carried out. ORR might usefully consider such a process if option 2 is progressed regardless.

The desire for transparency from ORR is commendable, but this should not be achieved through disadvantaging Duty Holders and devaluing their right of appeal against enforcement notices.

In summary, we believe that the justification for this change in policy is weak. The consultation document does not indicate how often ORR have actually been questioned 'about what action has been taken and why it has not been publicised', and does not consider other means to avoid this, such as stressing the Duty Holder's right of appeal to any recipients of a notice under HSWA s.28(8) and requesting that they do not make the privileged information they have received public until the right of appeal has been exercised.

We hope that you will reconsider your preferred approach in light of the points we have raised and instead adopt option 3, to meet the requirements of ESIA without compromising the existing Duty Holder right of appeal against enforcement notices. This would be consistent with HSE policy and would maintain fair and equal rights for Duty Holders regardless of the enforcing body.

Yours sincerely

David Maxwell  
Safety and Environment Director  
East Midlands Trains Limited