



## **Holding Highways England to account**

**ORR's monitoring framework and  
enforcement policy for Highways  
England**

**30 March 2020**

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# 1. Introduction

- 1.1 The Office of Rail and Road (ORR) is an independent non-ministerial government department. We protect the interests of current and future rail and road users, in the public interest.
- 1.2 As Highways Monitor ORR independently monitors Highways England's management of the motorways and main A-roads in England. In doing so, we provide independent assurance to users of the Strategic Road Network (SRN), government and wider stakeholders that Highways England is held to account.
- 1.3 This document sets out how we monitor Highways England's performance, and how we identify, escalate and resolve areas of concern. It also sets out our enforcement policy for Highways England and the actions we may take to secure improvement, ranging from investigation and early resolution through to using our statutory enforcement powers.
- 1.4 Once finalised, this document will supersede and replace the monitoring framework<sup>1</sup> and enforcement policy<sup>2</sup> that ORR adopted in 2015, and will take effect from 1 April 2020.<sup>3</sup>

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<sup>1</sup> [REDACTED]

<sup>2</sup> [REDACTED]

<sup>3</sup> When considering enforcement action, in instances where we are considering a contravention which completely predates the publication of this policy, we will have regard to the version of our enforcement policy that was published at the time.

## 2. The scope of the Highways Monitor role

### Our role defined in the Infrastructure Act 2015

- 2.1 Our highways monitoring role is defined in the Infrastructure Act 2015 (the Act). It requires us to monitor how Highways England is carrying out its functions. As such, our monitoring relates to the SRN in England and not, for example, to the local road network in England or roads in the rest of the UK.<sup>4</sup>
- 2.2 Highways England operates under a Licence (issued in the form of statutory directions and guidance<sup>5</sup>) which sets out how it must act in carrying out its functions. It is also required to deliver outputs for levels of funding that are set out in the government's road investment strategy (RIS).
- 2.3 Our monitoring and enforcement activity focuses on Highways England's delivery of the RIS and its compliance with the Licence.<sup>6</sup> The Act gives us the power to require Highways England to provide the information we need to carry out our role. It also gives us the power to carry out enforcement action where Highways England has failed to or is failing to comply with the RIS or its Licence. Under our enforcement powers we can require Highways England to take certain actions ('issuing a notice') or, require it to pay a fine. When exercising our statutory enforcement powers we must have regard to statutory guidance issued by the Secretary of State and HM Treasury.<sup>7</sup>
- 2.4 Further details of the scope of our role are set out in a Memorandum of Understanding (MoU) between DfT and ORR.<sup>8</sup> This policy focuses on our monitoring and enforcement activities. Further information about our benchmarking work and our approach to advising on future road investment strategies is set out on our website.<sup>9</sup>

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<sup>4</sup> See here for map of roads managed by Highways England  
[REDACTED]

<sup>5</sup> The statutory directions and guidance are referred to as the Licence for the remainder of this document.

<sup>6</sup> At present the directions and guidance that have been issued to Highways England are in the form of its [REDACTED] However the Secretary of State may from time to time give Highways England any further directions or guidance as to the manner in which it is to exercise its functions, which may be published in such a manner as the Secretary of State considers appropriate.  
[REDACTED]  
[REDACTED]  
[REDACTED]

<sup>9</sup> See here for ORR's work benchmarking Highways England's performance and efficiency:  
[REDACTED]

## Respective roles of the Highways Monitor and DfT

- 2.5 We work closely with DfT and it is important that our respective roles are clearly defined. DfT is responsible for setting the RIS (with input from our efficiency review) and varying the RIS if required (supported by advice from ORR). Once the RIS is finalised we monitor Highways England's delivery of it.

## The scope of our monitoring and enforcement

- 2.6 While our role is defined at a high level through the Act and MoU, much of what we monitor is set out in the performance specification and investment plan sections of the RIS, and in Highways England's Licence. We also monitor delivery of Highways England's plans as set out in its strategic business plan (SBP) and delivery plan. We monitor compliance with the Licence partly through monitoring compliance with the RIS, and carry out investigations into other areas of Licence compliance as appropriate.

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And here for ORR's role in the second road investment strategy:

### 3. What are we aiming to achieve through monitoring and enforcement?

#### Introduction

- 3.1 Our role as Monitor is focused on delivering better outcomes for road users and taxpayers. We are outcomes-focused, and forward-looking in our approach – seeking to identify and resolve issues early rather than waiting until things go wrong to take action. We seek to encourage the right behaviours within Highways England, maintaining positive and constructive engagement, recognising where performance is good and/or exceeds targets in our reporting, as well as areas where targets are at risk and/or the company can improve. We publish reports on our assessment of Highways England's performance, increasing transparency about how it is managing the SRN. And we engage with stakeholders so that we can take account of their views in our work. This chapter sets out more across those broad themes.

#### Our duties in the Act

- 3.2 The Act sets out general duties that cover our monitoring and enforcement functions. It requires us to carry out our role in a way that we consider most likely to promote the performance and efficiency of Highways England.<sup>10</sup> We are also required to have regard to a number of other factors.<sup>11</sup> They are:

- the interests of users of highways;
- the safety of users of highways;
- the economic impact of the way in which the strategic highways company (i.e. Highways England) achieves its objectives;
- the environmental impact of the way in which the strategic highways company achieves its objectives;
- the long-term maintenance and management of highways; and

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<sup>10</sup> See Section 12 of the Infrastructure Act 2015

<sup>11</sup> These factors are not in any order of priority and it is for us to give appropriate weight to all factors when considering enforcement in each individual case.

- the carrying out of regulatory activities in a way which is transparent, accountable, proportionate, consistent, and targeted only at cases where action is needed.

## Our intent

- 3.3 We have developed a strategic objective which reflects our duty and captures the purpose of our monitoring and enforcement activities. Our strategic objective is:

**Secure improved performance and value for money from the strategic road network:** Secure improved performance, including efficiency, safety and sustainability, from the strategic road network, for the benefit of road users and the public, through proportionate, risk-based monitoring, increased transparency, enforcement and robust advice on future performance requirements.

- 3.4 In defining our strategic objective we are clear that our role is focused on benefiting all those who use, or are affected by, the SRN, including:

- Commuters, business users, and those making leisure journeys;
- The freight and logistics sector;
- Coach operators, and their passengers;
- Vulnerable users – motorcyclists, cyclists, pedestrians and equestrians; and
- Neighbouring communities affected by road noise and pollution

- 3.5 In monitoring the performance and efficiency of Highways England, we aim to secure its compliance with the Licence and delivery of the RIS, and to provide robust, transparent and independent reporting which meets the needs of all stakeholders. Our monitoring also informs our advice to the Secretary of State to support the setting of future RISs, along with our ongoing programme of benchmarking work.

- 3.6 Our monitoring provides scrutiny of Highways England's performance and efficiency, and gives assurance to stakeholders that the company is delivering the requirements of the RIS. By improving transparency, we allow other stakeholders

to play a more informed role in holding the company to account to complement our work.

## Engaging stakeholders

- 3.7 It is essential that we listen to, understand and act on the views of road users and those affected by the SRN. Transport Focus's role as watchdog, surveying and representing the views of all road users, provides an important input to our work and the work of DfT and Highways England. We have extensive engagement with Transport Focus and this forms a central part of our monitoring framework. When we review Highways England's plans for future delivery we consider the extent to which it has sought and responded to the views of road users, including the user priorities identified by Transport Focus's research, and those affected by the SRN. Our advice to the Secretary of State on future RISs considers stakeholder priorities.
- 3.8 Stakeholder engagement forms an integral part of our monitoring regime, and we will continue to work collaboratively with stakeholders to have good sight of the needs of the industry, its stakeholders and their key concerns.

## Our approach

- 3.9 We are outcomes-focused, which means we monitor key outcomes that matter to users and funders rather than routinely monitor every detailed aspect of Highways England's performance. Where we want to understand more, we look in more detail at outputs and inputs. This is a proportionate approach that also allows Highways England to be innovative in how it delivers its requirements.
- 3.10 In delivering our work, we will continue to be guided by the following principles:
- Transparency – we consult on and publish our key policies and keep them under review to ensure they remain fit for purpose. We set out clearly our monitoring analysis, our decisions and the reasons for them. In our enforcement work, transparency means helping Highways England to understand what is expected of it and what it should expect from us. This means publishing this policy, our decisions on taking statutory enforcement action and the reasons for them, and being open about the action we are taking. We will also promote greater transparency on the part of Highways England in its operations and plans.
  - Proportionality – this means focusing our monitoring and enforcement activity on those aspects of Highways England's activities that are most important for stakeholders. As a general principle, we focus our resources and priorities on



sustained failure to deliver outputs, or on individual events of material significance, rather than one-off minor failures. This is because some measures of performance may be subject to variability over short periods of time. For example, delays, or the time taken to clear incidents, may fluctuate from day to day, or be subject to seasonal variability. In other cases the significance that we attach to Highways England missing a deadline or target may be influenced by the impact it has on road users, government and other relevant stakeholders. We will however consider where one-off failures may form part of a wider systemic failure and consider action where appropriate.

- Consistency – this means, as far as possible, taking a similar approach in similar circumstances to achieve similar ends. We do this through the application of published policies and agreed processes. In deciding on a course of action we have regard to any guidance from the Secretary of State and Treasury. We also consider our duty and balance those factors which are set out for consideration in the Act.
- Targeted – we target our detailed monitoring, escalation and enforcement at those areas where an issue, such as a potential non-compliance, has been identified and is material to delivery of the RIS and/or Licence requirements. Where enforcement is concerned, we will target our activities at those areas where contravention has been identified and where action is needed.
- Accountable – we are accountable to the public for our actions through Parliament and through the courts. We have an obligation to comply with the rules of administrative law and good public administration. Ultimately, our decisions are subject to judicial review and scrutiny by the courts.

## Independence

- 3.11 We see our independence as a vital aspect of our role. Being independent helps to ensure that our analysis, advice and decisions are based on objective evidence and are not subject to changing government policy. Our independence provides assurance to all stakeholders that our assessment of Highways England's operational and financial performance is fair and unbiased.

## Assuring our work

- 3.12 Our monitoring, reporting, advice and decisions must be based on the best available evidence, high-quality analysis and robust processes. ORR governance arrangements will serve to ensure the quality of our outputs. ORR's Highways Committee reviews our assurance processes to ensure the quality of our work and our road expert panel, made up of technical and other specialists, provides our highways monitoring function with high-quality advice and support.

## What we publish

- 3.13 As a minimum, we publish an annual assessment report of Highways England's operational and financial performance, which is laid before Parliament. We also publish reports from our targeted reviews of Highways England's activities where appropriate.
- 3.14 Our public reporting aims to:
- provide an incentive for Highways England to perform;
  - provide transparency on Highways England's performance to meet our obligations to Parliament, stakeholders and the wider public;
  - hold the company to account;
  - support Highways England, road users and wider stakeholders by reinforcing positive performance and tackling poor performance; and
  - encourage and support innovation as well as facilitate the spread of best practice across the sector.

## How our monitoring is linked to enforcement

- 3.15 Where our routine monitoring identifies a potential issue or concern relating to Highways England's compliance with the RIS and/or Licence, we intend to go through a staged approach. This will usually involve considering how best to resolve the issue informally before going on to more formal action. Our aim is to work with Highways England to identify issues and resolve problems early, either before they become contraventions, or without the need to use our statutory enforcement powers.
- 3.16 However, if we find Highways England has failed or is failing to comply with the RIS and/or its Licence, we have powers under the Act to issue a notice and/or fine – and this document also sets out our enforcement policy. It sets out how and when we may take enforcement action and the nature of such action.
- 3.17 Setting out our policy on enforcement ensures that Highways England, users of the SRN, government and other stakeholders understand our approach and the circumstances in which we might use our enforcement powers. It also provides transparency as to how we are likely to handle enforcement in individual cases, including when we will take non-statutory enforcement action and when we will take statutory enforcement action in accordance with our powers under the Act.

- 3.18 For transparency, our standard policy is to publish appropriate details of concluded investigations, including any “case to answer” letters and formal responses to them, as well as final decisions setting out the enforcement action we are taking, along with notices and fines issued under the Act. We may also include the details of contraventions and our enforcement action in other reports that we publish.
- 3.19 We may also publish details of any correspondence, action and/or reports we have undertaken, and which relate to an actual or potential contravention of the RIS and/or Licence. This could include publicly commenting on a contravention or where we are concerned about an aspect of Highways England’s performance.
- 3.20 In the case of all of the above, we will consider the appropriate time to make public comment and/or publish documents taking into account the circumstances of the individual case.
- 3.21 We will publish documents on our website unless we are of the opinion that all or part of these documents are of a sensitive or confidential nature. In these circumstances we will consider whether parts of the document can be published, or consider redactions where appropriate.
- 3.22 The rest of this document sets out our approach in each of the three broad stages illustrated in Figure 1 below, including our policy on the third stage, enforcement.

**Figure 1: Summary of Holding Highways England to account:**

If Highways England is failing or has failed to comply with the RIS or with its Licence then we may choose to take statutory enforcement action. The enforcement actions we can take are:

- issuing a notice (which can require Highways England to take certain action); and/or
- requiring it to pay a fine.

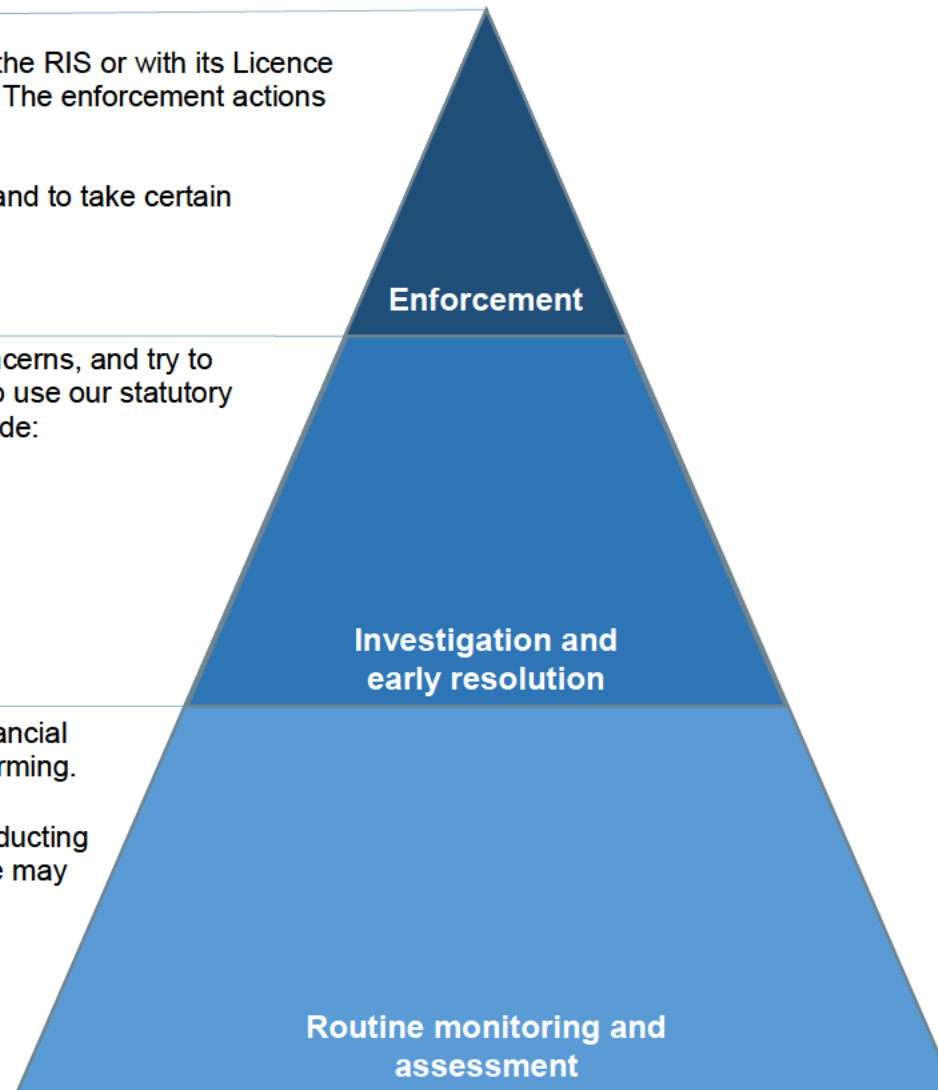
We take a staged approach to escalating performance concerns, and try to resolve issues and agree actions early, without the need to use our statutory enforcement powers. Our activities in this phase may include:

- gathering information;
- engaging on/requiring an improvement plan;
- engaging external advisers;
- making public comment;
- initiating an investigation; and
- holding an ORR hearing.

Routine monitoring involves assessing operational and financial performance to determine how Highways England is performing.

Our activities in this phase involve reviewing data and conducting more in-depth monitoring and analysis where required. We may also engage external experts to assist us with our work.

Our routine monitoring alerts us to whether obligations or commitments are at risk and whether we or Highways England need to take action.



## 4. Routine monitoring and assessment

### Introduction

4.1 ORR routinely monitors how well Highways England is performing in managing the SRN. Our monitoring alerts us to whether any obligations and commitments are at risk and whether it and/or we need to take any action. We monitor:

- The detailed provisions in the RIS<sup>12</sup>, including:
  - the investment plan: ORR holds Highways England to account for the delivery of the major schemes portfolio in line with the agreed baseline and scope. The investment plan also sets expectations of Highways England in maintaining and renewing the network and delivering designated funds. We monitor these areas to ensure the company has the appropriate processes in place to plan and deliver the required outcomes.
  - the performance specification: this sets out government's expectations for Highways England and the SRN in each road period and measures performance through a range of metrics consisting of Key Performance Indicators (KPIs), Performance Indicators (PIs) and requirements or commitments.<sup>13</sup> In most cases, numerical targets have been set for KPIs. We monitor Highways England's performance against these targets and its delivery of the requirements or commitments. Where KPIs do not have associated targets we will monitor and report on them, and form a judgement on performance. We will also monitor and report on PIs, which provide important context on performance in their own right. ORR will use all reported performance information to support our assessment of Highways England's performance in delivering the outcomes specified in the performance specification.
- Delivery of Highways England's plans, as set out in its strategic business plan (SBP), its 5-year delivery plan and its annual delivery plan updates.

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<sup>12</sup> RIS2 is published here: [REDACTED]

[REDACTED] We also monitor changes to the RIS that are agreed through the formal change control process.

<sup>13</sup> Highways England collects the data for most KPIs and PIs and reports its performance to us. However, the KPIs and PIs we monitor include metrics from user surveys carried out by Transport Focus, including the Strategic Roads User Survey (SRUS).

- Delivery of the duties as set out in Highways England's Licence. Highways England must comply with or have due regard to (as appropriate) the conditions set out in the Licence.
- Delivery of any other relevant plans and/or revisions thereof that Highways England may have agreed and/or shared with us (such as, for example, action plans or improvement plans).

4.2 In monitoring Highways England's performance in relation to the above, we also monitor its financial performance relative to the Statement of Funds Available (SoFA) – the funds government has made available to deliver the RIS.

## How we monitor

- 4.3 Our main legal duty is to monitor how Highways England is carrying out its functions. The legal framework puts the onus on us to monitor key outcomes that matter to users and funders rather than routinely monitor every detailed aspect of Highways England's performance. Where we want to understand more, we look in more detail at outputs and inputs.
- 4.4 We are forward-looking in how we monitor performance, which means understanding risks to future delivery with a view to working with Highways England to address and mitigate these before they materialise. Where appropriate we require Highways England to assess its future performance and proactively highlight risks to delivery. This allows us to understand if actual performance is deviating from plans.
- 4.5 To allow us to assess Highways England's performance in the round we gather information from a range of sources, including talking to key stakeholders and members of the supply chain. This helps us understand issues and risks to Highways England delivering its objectives.
- 4.6 The next sections set out the information we need to carry out our work, as well as the scope of our activity in the routine monitoring and assessment phase.

## Information required for our monitoring

- 4.7 We need a range of information to understand how Highways England is performing. This includes historical, forecast and trend information in the following areas:
- the operational performance of the company: to assess delivery against the requirements or commitments of the RIS, including the metrics set out in the performance specification;

- the delivery of the investment programme: to assess progress in delivering the enhancements, maintenance and renewals work, and the designated funds set out in the SoFA and investment plan;
- the financial performance of the company: to assess delivery of the efficiency requirements set out in the performance specification and reflected in the SoFA, and to assess the company's financial position more widely, including its expenditure against the funding available; and
- the compliance of the company with its Licence, to provide assurance that it is delivering its requirements.

4.8 Wherever possible, we build up the above information from Highways England's internal business management information. Much of this is provided to us in the form of regular submissions:

- an annual delivery plan which the company submits to the Secretary of State and publishes at the start of each financial year, setting out its projections of expenditure and output delivery for the year ahead and the remainder of the road period;
- annual performance monitoring statements which are published following the financial year-end, and provide the detailed information required to carry out a full review of operational and financial performance during the previous financial year and, where requested, over the road period to date. It also provides information required for us to assess the company's compliance with its Licence. The annual performance monitoring statements include narrative to explain its outturn performance and efficiency; and
- regular updates on in-year operational and financial performance, which provide an early indication of whether performance requirements may be at risk.

4.9 We set out the information we require in performance monitoring templates and monitoring reporting guidelines. These capture Highways England's performance, cost and efficiency information in a way that will best support our analysis of whether it has delivered its objectives. They also set out our requirements for narrative explanation of performance.

4.10 In addition to Highways England's regular reports, we gather information on specific areas of concern and intelligence through engagement with Highways England and its stakeholders. This might include requesting more detailed information on user satisfaction (and the user experience) from Transport Focus

on either a regular or an ad hoc basis. Where particular issues are identified, we may require bespoke data and information to support our monitoring, and any investigations we undertake.<sup>14</sup>

## Data quality and assurance

- 4.11 Our monitoring depends on Highways England providing us with good quality data and information. Over time, we expect Highways England will improve and broaden the data it collects so it has a better understanding of its performance and enhances its data management capability. This should also result in improvements in the quality of its reporting to us.
- 4.12 We require all of the information that Highways England reports to us to be subject to an appropriate level of quality assurance. Our expectations regarding the performance monitoring statements are set out in our monitoring reporting guidelines. We expect other information it reports to us to be subject to a level of assurance that is appropriate to the circumstances. For example, we may expect the company to share information or data with us in draft form where it facilitates a more timely understanding of performance. The company should notify ORR of any weakness or inconsistency in data sets.
- 4.13 We may also test data quality and the company's processes for assuring data through targeted reviews that we undertake.

## The monitoring process

- 4.14 We have a clear process for analysing Highways England's performance and reporting our findings. This process works as follows:
- our analysts and technical experts review Highways England's regular data and information submissions. This provides an ongoing view of current financial and operational performance, with particular focus on how Highways England is performing against its RIS requirements and Licence conditions;
  - where there is information or evidence which indicates (or Highways England alerts us to) a risk of RIS requirements not being met and/or a risk to compliance with the Licence, we will consider conducting more in-depth monitoring and analysis to understand the issue. This may focus on financial or operational performance and may require a review of data which is not routinely reported to ORR. Where appropriate, we will use external experts to

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<sup>14</sup> We will seek to deliver our activities in a way which limits the burden on the company, whilst acting in line with our duties under the Act.



provide assurance and commentary on the information we receive from Highways England or to assist us with our work.

- 4.15 In assessing both operational and financial performance it is important to have a clear understanding of the baseline against which performance is being assessed. That means being clear up front (that is, ideally before the start of the road period) about the total level of funding that is available, the assumptions underpinning the funding and the disaggregation of the funding (i.e. the opening baseline assumptions). It also means being clear about what should be delivered with the funding, which allows for robust monitoring.
- 4.16 Once the baseline is set, there may need to be changes to it. This is done through a formal change control process where amendments to enhancement schemes and other aspects of operational and financial performance are approved. Any changes need to be reported accurately and transparently so we understand the nature and reasons for any changes to the baseline, so we can hold Highways England to account effectively.

## **Analysing operational performance**

- 4.17 Our monitoring of operational performance includes assessing:
- Highways England's performance against its KPIs, PIs and requirements/commitments specified in the performance specification, the SBP and the delivery plan; understanding the reasons for variances between actual performance and targets or plans;
  - delivery of the projects, programmes and designated funds specified in the investment plan against the funding, milestones, scopes and outputs set out in the RIS, SBP, delivery plan and relevant annual updates and Highways England's detailed baselines; understanding the reasons for variances between actual performance and targets or plans, and the reasons for any changes to plans;
  - whether Highways England has met the operational performance requirements of its Licence; and
  - concerns and risks identified through our monitoring, or those received from our stakeholders or Highways England.
- 4.18 We monitor Highways England's maintenance and renewal works at a programme level. This means that we seek to understand whether Highways England is delivering a robust programme of maintenance and renewal works in a timely and efficient way. We report on the company's performance and delivery in the round

rather than committing excessive resources to monitoring individual schemes. We focus on the quality and comprehensiveness of Highways England's strategies and plans and key measures of output to form our view of its performance.

- 4.19 We monitor Highways England's major schemes portfolio in two ways. First, through high-level metrics to assess delivery at a programme level. Second, we look at high level indicators for individual major schemes to understand their status, risks, cost position and schedule performance.
- 4.20 Whilst we monitor some data for individual major schemes, we do not primarily hold Highways England to account for delivery on a scheme-by-scheme basis. A proportionate approach is to focus on systemic and significant issues by monitoring trends in the delivery of the major scheme programme of work. However, we recognise that individual major schemes have the potential to have a material impact on road users and stakeholders and that there should be scrutiny of their delivery performance, e.g. significant cost or schedule changes.
- 4.21 We set out in detail how we monitor Highways England's network investment performance in our *Monitoring Highways England's network investment, ORR's approach* document.<sup>15</sup>
- 4.22 In assessing whether Highways England has met the operational performance requirements of its Licence, reporting against the performance specification and investment plan provides strong supporting information, but we will also require certain bespoke reporting. For example, we require Highways England to demonstrate that it is:
- applying a long-term approach to asset management and seeking to minimise whole life asset costs;
  - co-operating with other persons and organisations for the purposes of coordinating day-to-day operations and long-term planning. In particular, we assess how it is: bringing the views of all relevant stakeholders into its plans; coordinating with other highways authorities and local and regional stakeholders; and interfacing with its supply chain to ensure delivery – including having the skills and capability to deliver investment efficiently;

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<sup>15</sup> Please see [REDACTED]  
[REDACTED] We will keep this document under review.

- applying and implementing effective processes to ensure the resilience of the SRN (such as winter resilience preparedness), as well as supplying detailed asset condition and risk management reporting; and
- publishing data and information in an open and transparent way. This includes making publicly available the information required in the Licence, to facilitate sharing of data with relevant parties and to improve information to road users.

4.23 It is important that Highways England sets out clear longer-term strategies, policies and plans to deliver what is required. The company should set out action plans in areas where it has identified a need to improve. Monitoring and providing transparency about the delivery of these will form an important part of our monitoring.

## **Analysing financial performance**

4.24 The Act requires ORR to understand at what cost Highways England has achieved its objectives under the RIS. Similarly, the Licence describes ORR as the organisation responsible for monitoring the costs, efficiency and performance of the company.

4.25 To understand Highways England's financial performance, including delivery of efficiency and value for money, it is not sufficient to look only at Highways England's expenditure compared to its funding allowance. We also consider what Highways England has delivered, and whether outputs are being delivered effectively.

4.26 Our role in monitoring financial performance includes:

- assessing Highways England's actual spending against the funding available, as set out in the SoFA and revised through delivery plan updates;
- understanding the reasons for variances between actual expenditure and funding; and
- assessing Highways England's efficiency by reviewing the company's performance against the relevant KPIs, PIs and requirements in the delivery plan.

4.27 Monitoring Highways England's efficiency performance against the KPI is complex. To ensure the company is delivering efficiency rather than reduced outputs our monitoring considers:

- bottom-up evidence of how efficiency has been delivered, principally through the use of detailed case studies; and
- top-down evidence that outputs or outcomes are being delivered for the (post-efficient) funding and that productivity and capability improvements are being delivered.

4.28 The balance of evidence between these two areas can differ depending on the type of expenditure on which efficiency is reported.

4.29 The efficiency and inflation monitoring manual (EIMM) sets out how Highways England captures and reports its efficiency performance and how it takes account of inflation in its reporting.

## 5. Investigation and early resolution

### Introduction

- 5.1 This chapter sets out how we escalate and resolve areas of concern with Highways England's performance identified through our routine monitoring. The outcomes from this phase could be a decision on whether there is evidence of a contravention of compliance with the RIS and/or Licence, and lead to a decision on whether to take statutory enforcement action. Alternatively, we could decide that no further action is necessary and resume either routine or, if appropriate, a period of enhanced monitoring.
- 5.2 This stage in the process is designed to allow us to gather all the information we need to take the best course of action. It also allows us, working with Highways England, to resolve issues early and agree action without having to rely on statutory enforcement. This may mean that we choose to use some of the tools available to us and not others. We will achieve the best results by tailoring our activities to the issue at hand rather than proceeding systematically through a series of predefined steps.

### Our approach

- 5.3 Where our routine monitoring identifies a potential issue or concern relating to Highways England's compliance with the RIS and or Licence, we consider the nature of the concern and decide whether we need to take any action.
- 5.4 Where we identify a potential or actual contravention we go through a staged escalation approach. This will usually involve considering how best to resolve the issue informally before going on to more formal action, such as the use of our statutory enforcement powers. This enables us to give Highways England the opportunity to explain the context of a potential or actual contravention, the reasons for it and any measures the company is taking to mitigate and correct it, without the need to consider the use of our statutory enforcement powers.
- 5.5 As our monitoring takes a forward-looking approach, it enables us to anticipate and highlight issues with delivery of the RIS and/or compliance with the Licence (or any other statutory directions and guidance) and identify future risks as early as possible. Additionally, under the Licence, Highways England must ensure that it makes us aware at the earliest opportunity of any issues likely to lead to a

potential contravention of the Licence and of any action it is taking to address the possibility.<sup>16</sup>

- 5.6 In the case of actual contraventions, we may proceed straight to statutory enforcement action, if the circumstances warrant it.

## Assessing concerns

- 5.7 Where we identify a potential concern we will consider the nature of the issue and whether it requires action from ORR. This may include considering:

- how we became aware of the actual or potential contravention, for example whether Highways England promptly and openly reported the problem to us in accordance with Condition 8.5 of the Licence;
- the reason for the actual or potential contravention, for example whether it was wholly or partly within Highways England's control;
- the significance of the issue, including whether it is a one-off or minor failure or forms part of a wider sustained, systemic or persistent failure, along with the impact of the contravention on users of the SRN, government, and other affected persons;
- whether it is necessary to carry out a targeted investigation and/or a risk assessment, which may include carrying out research, analysing specific areas of under-performance, using transparency and data to highlight issues and considering the findings of reviews by independent external experts, as appropriate;
- whether the issue is one for ORR, the Secretary of State or another body to address and/or whether the Secretary of State or another body has taken enforcement action against Highways England or intends to do so;
- any action Highways England is taking to address the actual or potential contravention;
- the gap between what is required, what is currently being delivered and the likely impact of non-delivery;

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<sup>16</sup> Condition 8.5 of the Licence

- the reputational impact on Highways England of a particular course of action; and
- the enforcement tools available to us and their appropriateness in this matter.

## Gathering information

- 5.8 Either as part of assessing concerns or afterwards, as an initial step we are likely to ask Highways England to provide further information to help us understand the concerns. These requests are likely to be in addition to the information we receive through our day-to-day monitoring. We can use our statutory information gathering powers, if required, but we expect the company to work with us constructively and proactively to provide the information needed to help us form a judgement on the actions we, or it, may need to take.
- 5.9 As well as information and data requests, this could also involve requests for meetings and briefings, as appropriate.
- 5.10 We also recognise that other organisations and/or stakeholders, including local and regional bodies, may have relevant information to share, and we may need to draw on their insight where appropriate.

## A staged approach to escalation

- 5.11 After reviewing the evidence and information, we will adopt a staged approach to escalating our concerns. This is intended to provide a clear opportunity – and incentive – for Highways England to resolve issues at an early stage, prior to the consideration of enforcement action. However, this does not prevent us from proceeding to a later stage depending on the urgency or seriousness of the matter.
- 5.12 When we identify an issue we will be clear in setting out the nature of our concerns, any information and actions we require from Highways England, and why. If and when we have sufficient information to do so, we will set out what outcomes we want to see from Highways England in order to de-escalate our concerns. We expect Highways England to ensure that our concerns are cascaded to the responsible parts of the business clearly and promptly, so that its internal stakeholders are briefed, and any requirements and actions are understood, followed up, and reported back on.
- 5.13 Depending on the circumstances of the issue, the following sections set out other actions we may take as part of this investigation and early resolution phase.



## Requiring an improvement plan

- 5.14 We may require Highways England to develop or engage with us on improvement plans. We may require it to engage with stakeholders on such plans and publish them, if we think this will help to incentivise the right actions and hold the company to account.

## Engaging external advisers

- 5.15 We may require Highways England to co-operate with us in respect of an investigation of a potential or actual contravention, which may include requiring it to engage with external advisers.
- 5.16 We may also insist on the use of independent expert consultants to do deep-dive reviews if appropriate.

## Making public comment

- 5.17 We may publicly comment on Highways England's performance and efficiency and the nature of the potential or actual contravention, and/or publish related correspondence sent to Highways England, as set out in our policy on publication in chapter 3.

## ORR hearings

- 5.18 Either as part of an investigation, or when looking into an issue as part of assessing concerns, we may choose to hold a hearing between ORR and Highways England in order to gather evidence and/or explore issues further. We may choose to involve affected parties or representative groups, if we determine it to be appropriate.
- 5.19 The timing, scope and exact format of hearings will be determined by ORR on a case-by-case basis, based on the nature of the issue under investigation. Hearings will be "on the record" and we expect to publish a written record of proceedings on our website (respecting commercial confidentiality). We would also expect to agree the accuracy of any written record with those involved.
- 5.20 Any investigation we undertake may involve visits and/or engagement with other stakeholders to collect wider evidence, without the need for a hearing. We will consider the most proportionate approach when deciding our preferred course of action.



## Engagement with Highways England

- 5.21 We use regular meetings with Highways England to monitor issues and to review progress in addressing them. We will consider whether the risk of a contravention has increased, decreased or remained stable.
- 5.22 As well as engaging with Highways England, we will also report on our concerns to DfT through quarterly meetings, including where concerns have been resolved.
- 5.23 Where we are not content with the response or progress made, our activities may include but are not limited to:
- requiring Highways England to explain why the risk of a potential contravention has not decreased, or in the case of an actual contravention, why satisfactory progress has not been made to remedy it;
  - holding meetings at Director and/or CEO level to discuss our concerns and actions we require;
  - requiring Highways England to take further action regarding its improvement plans;
  - using any of the tools set out above – such as requiring Highways England to co-operate with us in respect of an investigation which may include requiring it to engage with external advisers, holding an ORR hearing, and/or making public comment;
  - giving advice to the Secretary of State under section 10(2) of the Act.
- 5.24 Where we consider it is appropriate, or where we have failed to gain sufficient traction with Highways England, we may choose to put the investigation onto a more formal footing by issuing an **investigation initiation letter**. In deciding whether to do this, we will consider the level of engagement that has gone before. Our investigation initiation letter would formally set out our concerns and the scope of an investigation.
- 5.25 Although we would normally expect to pursue informal means first to explore a concern, we may issue an investigation initiation letter at any point in the process.

## Possible outcomes

- 5.26 The possible outcomes of the activities during this investigation and early resolution phase could be:
- deciding no further action is needed, and reverting to our routine monitoring;

- if we are satisfied that Highways England is taking the appropriate actions, conducting a period of enhanced monitoring, and/or monitoring progress against any improvement plans; or
- in the event we consider there is a contravention, we will issue Highways England with a **case to answer** letter.

5.27 The purpose of the case to answer letter is to provide Highways England the opportunity to respond formally with its views on our findings, prior to ORR's Board considering the matter. It will inform the company of the grounds on which ORR considers there is or has been a contravention of compliance with the RIS and/or Licence, and where appropriate, the enforcement action being considered. The letter will inform the company of the date by which it must:

- provide any representations, objections or evidence in defence of its actions
- indicate steps being taken to rectify the cause of the contravention, and/or
- where appropriate, provide representations on the proposed enforcement action.

5.28 The ORR Board will consider all of the evidence and the response of Highways England to the case to answer letter, alongside its duties. If the Board is satisfied there is a contravention of compliance with the RIS and/or Licence, it will then decide whether to take statutory enforcement action. The next chapter sets out the enforcement actions available to us, and the process we will go through.

## 6. Enforcement

### Introduction

- 6.1 ORR's Board makes the final decision on whether there is or has been a contravention of the RIS or Licence, and what (if any) statutory enforcement action to take. For the avoidance of doubt, where we find such non-compliance this does not necessarily mean that we will take statutory enforcement action. Our course of action depends on a wide range of factors set out in this document, in particular the provisions of paragraph 5.7, and also those at 6.7, along with our duties under the Act. This chapter describes the statutory enforcement actions we can consider, and the process we will go through.

### Our approach

- 6.2 Statutory enforcement action is applicable only where there is or has been an actual (as opposed to potential) contravention by Highways England of compliance with the RIS, or its Licence.<sup>17</sup>
- 6.3 The purpose of enforcement is to secure Highways England's compliance with the RIS and Licence, and also to deter non-compliance. In doing so, the interests of users of the SRN, government and wider stakeholders are protected.
- 6.4 We may choose to engage with certain stakeholders and take advice to inform our view on what would be appropriate enforcement action to take in a particular circumstance.
- 6.5 If ORR's Board is satisfied that Highways England has contravened or is contravening compliance with the RIS and/or the Licence or any other statutory directions and guidance it will then consider if it is appropriate to issue a notice and/or a fine.
- 6.6 In deciding whether to issue a notice and/or a fine for a contravention, ORR's Board will take full account of the particular facts and circumstances of the contravention and will take into account any representations, objections or evidence provided by Highways England and the impact of our course of action on the company.

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<sup>17</sup> As set out in paragraph 2.3, this could also include any additional statutory directions and guidance issued and published from time to time by the Secretary of State outside the Licence.

6.7 ORR's Board will also consider a range of factors which may include – as well as the factors listed at 5.7:

- the attitude of Highways England to the contravention and its willingness to proactively take action to resolve it and, where non-statutory enforcement action has been taken, Highways England's response and behaviour during that process;
- any representations made by Highways England in response to our case to answer letter;
- whether the cost of any required remedial action outweighs the detrimental impact of the contravention on users of the SRN, government and other affected persons;
- the likely speed of resolving the contravention and the extent to which Highways England has a robust, adequately resourced plan to achieve compliance within a reasonable period of time;
- the likely effectiveness of any statutory enforcement action;
- consideration of the views of any affected party and/or other stakeholders, where appropriate;
- any mitigating factors put forward by Highways England and whether the contravention was wholly or partly within its control;
- any decisions the company may already have taken to reduce performance related pay (PRP) or variable pay, and
- any other factors (including aggravating or additional mitigating factors) relevant to the specific case.

6.8 ORR's Board will also take account of the principles set out in Chapter 3 and the duties set out in the Act, including the principle that regulatory activities should be targeted only at cases in which action is needed. We will also have regard to any statutory guidance, and, if considering a fine, our policy on fines as set out below. We will also act in a manner best calculated to fulfil our legal duties

6.9 ORR's Board may require further information prior to making a final decision on whether or not take enforcement action. Therefore, we may write to Highways England stating that ORR is satisfied there has been a contravention and invite Highways England to make any further representations in relation to proposed enforcement action and any further steps it has taken to rectify the contravention.

Any decision to proceed or not to proceed will be communicated to the company through a final decision letter.

- 6.10 While we do not need to secure the approval of the Secretary of State before taking statutory enforcement action, we will inform the Secretary of State of the grounds on which we intend to take action and whether we will be issuing a notice and/or imposing a fine on Highways England and, in the case of a fine, the amount.
- 6.11 We would expect any statutory enforcement action we take to be taken into account by Highways England when determining the performance of its senior management and therefore their remuneration.

## Issuing Highways England with a notice under the Act

- 6.12 If we decide to proceed with statutory enforcement action, we would expect to issue Highways England with a notice and monitor compliance with that notice before considering whether to impose a fine. We will generally consider issuing a notice as a means to secure compliance without the need to impose a fine.
- 6.13 When issuing a notice we will:
- set out the condition of the RIS and/or Licence which Highways England has contravened or is contravening;
  - specify the acts or omissions which, in ORR's opinion, contravene the RIS and/or Licence and the facts which, in ORR's opinion, justify us issuing a notice; and
  - specify the steps which Highways England must take to remedy the contravention and any associated timeframes.
- 6.14 We will serve a copy of this notice on Highways England and provide a copy to the Secretary of State. We will also publish the notice in such manner as we consider appropriate.
- 6.15 We will monitor compliance with all notices we issue. If the contravention is not rectified we will consider levying a fine for the ongoing contravention in accordance with our policy on fines, as well as making Highways England's failure to comply with the notice public.
- 6.16 In more serious cases we may also give advice to the Secretary of State, under section 10(2) of the Act, with regard to the failure of Highways England to achieve

its objectives under the RIS and/or its failure to have regard to statutory directions and guidance.

## Issuing Highways England with a fine under the Act

- 6.17 We will generally consider issuing a notice as a step prior to the issuing of a fine. However, we can impose a fine on Highways England for a contravention irrespective of whether we have issued a notice and may do so where we consider it appropriate.
- 6.18 It is for ORR's Board to determine the size of a fine and to ensure that the size of fine is proportionate to the contravention. Taking into account Highways England's public sector status and that it is funded by government, from money collected from vehicle excise duty (i.e. road users), we consider that a fine should always be a last resort.
- 6.19 In line with the statutory guidance issued by the Secretary of State and HM Treasury to ORR, we will also inform the Secretary of State where we consider the size of fine we intend to impose is likely to risk delivery of the RIS or Highways England's strategic duties and obligations. However, we do not envisage we would seek to impose a fine at a level that would be likely to do so.
- 6.20 Any fines issued to Highways England under the Act are paid by Highways England to the Secretary of State, who will ensure they are paid into the Consolidated Fund.

### Is a fine appropriate?

- 6.21 The principle for imposing a fine is to incentivise Highways England to comply with the RIS and or statutory directions and guidance and to deter it from future non-compliance.
- 6.22 In deciding whether a fine is appropriate we will normally, as a starting point, consider the seriousness of the contravention. In doing so we will look at:
- Highways England's culpability in the contravention, including whether the company has acted knowingly or intentionally with regard to the contravention;
  - the actual and potential impact caused to third parties, including users of the SRN and government, because of the non-compliance; and

- the public interest purpose of the condition in the Licence or other statutory directions and guidance and/or the RIS that Highways England has contravened or is contravening.

6.23 We will also take account of the facts and circumstances of the contravention, including any representations and objections made to us, and any evidence provided, whether we have issued a notice in respect of the contravention, and Highways England's compliance with it. We will also take account of the six penalty principles set out in the Macrory report,<sup>18</sup> the principles set out in chapter 3, and have regard to statutory guidance.

## Calculating the amount

6.24 If we decide a fine is appropriate, the amount will be determined on a case-by-case basis, taking account of the seriousness of the contravention.

6.25 In reaching a conclusion on the amount we will seek to ensure it is proportionate, and take into account that levying a fine has a reputational effect. The reputational effect is capable of being a powerful tool to encourage compliance and deter future non-compliance.

6.26 We will then consider any mitigating or aggravating factors. These may include the extent to which the contravention is considered to be within the control of Highways England's management and the extent of involvement of directors, senior management or the Board in the action or inaction which caused it, or their lack of appropriate involvement to remedy it. It may also include any steps taken to rectify the contravention – and whether these were initiated proactively or in response to our actions, and to minimise the risk of it recurring. Aggravating factors may include the extent to which this is a repeated or continuing contravention of the statutory directions and guidance and/or the RIS. We may also consider the extent to which Highways England cooperated with our investigation.

6.27 We may also consider any decisions the company may already have taken to reduce PRP or variable pay.

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<sup>18</sup> See the Macrory Report - 'Regulatory Justice: Making Sanctions Effective'. The six penalty principles are: (i) aim to change the behaviour of the offender; (ii) aim to eliminate any financial gain or benefit from noncompliance; (iii) be responsive and consider what is appropriate for the particular offender and regulatory issue; (iv) be proportionate to the nature of the offence and the harm caused; (v) aim to restore the harm caused by regulatory non-compliance, where appropriate; and (vi) aim to deter future non-compliance.

- 6.28 We will also consider any reparations<sup>19</sup> offered by Highways England not already taken into account as a means of determining whether or not a fine is appropriate.
- 6.29 Taken together, the net effect of these and any mitigating and aggravating factors may be significant and have a material impact on the size of the fine. They could potentially reduce a fine, including to zero, or increase it, depending on the circumstances.
- 6.30 Having considered the factors listed above, the ORR Board will determine an appropriate amount for a fine.
- 6.31 Given that Highways England is funded entirely by government, via money raised from road users (i.e. via vehicle excise duty), we may choose to scale any fine so that it is capable of being funded from management remuneration (meaning discretionary pay, like performance related pay). While it is for Highways England to decide how to fund any fine, this would have the effect of enabling the company to protect the funding available for the operation and maintenance of the network. This however does not remove ORR's discretion to scale a fine by other means, if our Board considers it appropriate.
- 6.32 We will work with DfT to ensure that any fines we impose have an appropriate impact. This means we will consider the size of any fines we impose in conjunction with DfT's proposed course of action in its shareholder role.

### Proceeding with a fine

- 6.33 If we intend to issue a fine, where appropriate we will publish a notification regarding our intention to impose a fine, and the proposed amount of the fine, in such manner as we consider appropriate. We will serve a copy of this notification on Highways England and provide a copy to the Secretary of State.
- 6.34 We will give any representations and objections that are made (and not withdrawn) due consideration in determining whether to proceed with a fine.

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<sup>19</sup> There may be circumstances where Highways England offers reparations as an alternative to imposing a fine or as a mitigation in determining the amount. Any offer should be made as early as possible including, where appropriate, ahead of an investigation. We may consider reparations that are offered later, but would be unlikely to do so where it threatens the timely conclusion of our enforcement action. Where an offer is made, we may engage with government to seek their views and consider the impact of potential non-delivery on users and wider stakeholders. Any offer of reparations should be: genuinely additional to the commitments already made in the RIS and statutory directions and guidance – or any other existing commitments not covered by these; appropriately targeted and proportionate to the harm done so far as is possible – in considering this we may consult with appropriate stakeholders; deliverable, and value for money. An offer of reparations will not necessarily be accepted by ORR.



- 6.35 Having followed the steps set out above and if we have decided to impose a fine, we will issue a further notification which will:
- state that ORR is imposing a fine on Highways England and the amount of the fine;
  - set out the condition of the RIS and/or statutory directions and guidance that Highways England has contravened or is contravening;
  - specify the acts or omissions that, in ORR's opinion, constitute contraventions of that condition of the RIS and/or statutory directions and guidance and any other facts that, in ORR's opinion, justify the imposition of a fine and its amount;
  - specify the manner in which the fine must be paid; and
  - specify the date (being not less than 14 days from the date of publication of this notification) by which the fine must be paid.
- 6.36 We will publish the notification of the imposition of a fine in such manner as we consider appropriate. We will serve a copy of this notification on Highways England and provide a copy to the Secretary of State.



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