

**John Larkinson**  
**Chief Executive**



Nick Harris  
Chief Executive  
National Highways

Via email

22 May 2024

Dear Nick

## **Potential contravention of National Highways' licence and delivery of the second road investment strategy (RIS2)**

On 14 February 2024 we wrote to National Highways to inform it that we were launching an investigation into its performance, delivery and capability [ORR, [investigation initiation letter](#), 14 February 2024].

Our letter indicated that the investigation was intended to determine if National Highways:

- was and is compliant with the RIS (sections 3(6) and 10(2) of the Infrastructure Act 2015); and/or
- has contravened or is in contravention of its licence (sections 6(3) and 10(2) of the Act).

We indicated that we would consider in particular the following licence conditions: 4.2 (exercising functions and complying with legal duties); 5.6 (improvement, enhancement and long-term development); 5.10 (asset management); 5.23 (environment); and 7.1 (duty to provide data or information). We said that we would consider additional licence conditions as necessary.

The investigation required the provision of information from and interviews with National Highways. We thank the company for its cooperation in the provision of this information and engaging with the investigation. We did not actively seek evidence from other stakeholders. Some did contact us, and we considered that the information they provided, while useful to support our business-as-usual monitoring, was not directly applicable to this investigation. We have therefore drawn our

conclusions based on the information the company provided as part of the investigation in its written submissions, including in response to requests for information, and in representations made by the company in seven interviews. This is supported by information and knowledge gathered as part of our business as usual and enhanced monitoring, but insofar as reasonably possible we have focused only on what we gathered and were told as part of the investigation.

### **Areas of potential contravention**

Subject to considering any further representations from National Highways, our preliminary view is that the company has contravened, or is contravening, its licence, primarily:

- condition 4.2(a), (b) and (c) on exercising functions and complying with legal duties, and condition 5.6(b) (leading on from 4.2(c)); and
- condition 7.3(e) of the licence on the provision of data and information to ORR that we may reasonably require, where relevant to the fulfilment of our statutory functions.

We consider there is evidence to suggest a past and/or current contravention in the two areas as follows:

#### **1. Condition 4.2(a), (b) and (c) on exercising functions and complying with legal duties, and condition 5.6(b) (leading on from 4.2(c))**

It is a reasonable interpretation of these conditions that if National Highways is to “act in a manner which it considers best calculated”, and have a “clear understanding of the pressures upon and impacts of” its network and “be aware of the actions needed to improve conditions for users, and manage or mitigate existing problems”, the company should be able to demonstrate that:

- its decisions are logical and reasonable and enable National Highways to carry out its functions and to deliver the specified outcomes to which it has committed;
- it is taking decisions based on clear and robust evidence, appropriately recording, and acting on those decisions and considering their full implications on users and network performance (5.6(b)); and
- its decision making is effectively joined up across the business, to maximise effectiveness and efficiency.

National Highways has not been able to demonstrate consistently and reasonably, with evidence, the basis upon which it has taken decisions and

the consequences of doing so on users and network performance. For example, from the evidence provided:

- National Highways told us that it had taken a decision not to “chase” the pavement condition key performance indicator (KPI) for 2023-24. It could not provide evidence for this claim or decision. The company was unable to evidence the basis on which it traded-off between compliance with its asset management policy, delivering pavement renewals in a whole-life cost efficient way, and achieving the national KPI target;<sup>1</sup>
- National Highways’ ability to learn lessons on how to ensure it achieves its pavement condition KPI is unclear. For the last two years the company struggled to evidence in-year whether it will achieve its target. For 2023-24, it shared information that identified that the programme was at risk based on recent trends in deterioration rates. However, the company did not account for this in its programme or appear to put in place additional check points during delivery;<sup>2</sup>
- National Highways was unable to provide evidence that each regional plan for pavement renewals is intended to help achieve the national target as agreed at the outset of RIS2;<sup>3</sup>
- National Highways is forecasting to miss its RIS2 corporate carbon KPI. The company has told us that the amount of work required to achieve the KPI target in the final year of this road period would be detrimental to road users and would not be an efficient use of public money, but it has been unable to provide any analysis or evidence to support this decision;<sup>4</sup>
- National Highways produced a delay action plan setting out its approach to achieving its average delay KPI ambition, but it has been unable to evidence the impact of its planned interventions or justify how it prioritises spending in these areas. It did not proactively look into the sections of the network that are performing worst against the KPI or consider the impact of its interventions at these locations until pressed to do so by ORR;<sup>5</sup>
- National Highways lacked evidence to demonstrate how and if its high-level asset management strategy and organisational level plans are being used on the ground and the benefits and business improvements that are being realised by their implementation;<sup>6</sup> and

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<sup>1</sup> Pavement condition interview 1 and PC1

<sup>2</sup> Pavement interviews 1 and 2, PC9, PC19, NHCI228, NHCI304, NHCI305, and NHCI310

<sup>3</sup> Pavement condition interviews 1 and 2, PC3, PC4

<sup>4</sup> Designated funds interview and NHCI2, supported by information shared as part of enhanced monitoring.

<sup>5</sup> Average delay interview and NHCI168

<sup>6</sup> Asset management strategy interview, AMS9 and NHCI143

- National Highways' monitoring of the impact of its designated funds activities on core deliverables such as KPIs is devolved outside the central designated funds team. There is evidence that performance is being appropriately assessed for some schemes, notably how the LED programme contributes to carbon reduction, but it is difficult for the company to evidence that this is happening across all areas due to absence of central oversight. Therefore, it is unclear how it is ensuring that designated funds are prioritised to meet the needs they were intended for and generate the anticipated benefits.<sup>7</sup>

Where National Highways cannot demonstrate, with evidence, how decisions have been and are being made to achieve its KPIs and comply with its licence obligations, it is difficult to see how it can have undertaken a reasonable consideration of what is “best calculated” in its actions. It is not ORR’s role to determine the best calculated method – this is a matter for the company – but in our statutory role monitoring the company’s compliance with its licence, we must consider whether it has acted properly in its considerations (including of any alternatives identified).

## **2. Condition 7.3(e) of the licence on the provision of data and information to ORR that we may reasonably require, where relevant to the fulfilment of our statutory functions.**

National Highways must collect, record and provide data or information to enable ORR to fulfil its statutory duties. During the investigation we identified instances where the company held material that it could, and should, have shared with ORR sooner, or where it told us it did not hold data or information that we needed to effectively carry out our statutory functions (and that we consider that the company should reasonably have held in order to carry out its own statutory functions).

National Highways provided around 300 pieces of information to us as part of the investigation. This included information that had not been previously provided to us. While we would not have expected to see all this information as part of our business as usual or enhanced monitoring, there was enough across six areas of concern to indicate that there is more information that the company could and should share with us. For example:

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<sup>7</sup> Designated funds interview, NHCI33, NHCI34, NHCI35 and NHCI36

- National Highways has not shared information that previously would have benefited our role in relation to monitoring pavement condition.<sup>8</sup> In particular:
  - National Highways had internal discussions on the pavement KPI and an action plan in both 2022-23 and 2023-24. These actions were not shared with ORR at the time of escalating the concern internally, but they were shared with us as part of the investigation evidence; and
  - during the investigation, National Highways shared a new approach to assessing pavement condition in its regions (amber analysis). We had not been sighted on this previously or received this as evidence in the first interview we held on pavement condition.

It is unknown why National Highways did not proactively offer this information; particularly given the level of concern we had and continue to have about the delivery of this target and the additional correspondence previously sent to the company.

- during the investigation National Highways shared examples of reports and meetings evidencing the positive work that the company is doing around missed commitments. This includes details that supported ongoing conversations and assurance around performance, for example a comprehensive monthly performance report. This information would have been pertinent to addressing concerns that we had raised in December 2023. At interview and in writing afterwards the company was hesitant to share this information with us;<sup>9</sup>
- National Highways shared during interview an in-year delivery dashboard for asset management renewals that it had not previously provided to us. It showed in-year performance against a baseline position.<sup>10</sup> This would have supported on-going discussions and concerns we have around its performance management;
- National Highways shared during the investigation monthly chief analyst updates on average delay performance. This included named owners for actions in the delay action plan and change control forms where actions are delayed.<sup>11</sup> This information had previously not been shared with us; and
- National Highways does not hold appropriate data to show the impact of the actions it takes to manage delay on the average delay KPI or how it

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<sup>8</sup> Pavement condition interview 2 PC19, NHC1304 for 2022-23 evidence. PC4 and NHC1112 for 2023-24 board evidence; and pavement condition interview 2, PC15 and NHC1280 for amber analysis

<sup>9</sup> Missed commitments interview, NHC1249, NHC256, NHC1257, MEC3 and MEC4

<sup>10</sup> NCH1217

<sup>11</sup> NHC1171, NHC1172 and NHC1242

can effectively prioritise delivery to achieve this. This is information we have been requesting as part of our enhanced monitoring of this issue over the past six months and that we would reasonably expect it to have. There is also evidence that in designated funds the central team does not have data to show how schemes that are designated to support performance deliver the expected impacts on KPIs <sup>12</sup>

The annex to this letter sets out broader findings from our investigation. These are set out against three key themes:

- understanding of delivery and performance;
- organisation and capability; and
- data, information, and transparency.

### **Areas for improvement**

We have not identified a case to answer in relation to condition 8.5 (early warnings of potential or actual licence non-compliance) although we do think improvements should be made in this area. For example,

- National Highways evidenced that it knew that it might miss its pavement condition KPI in 2022-23 and 2023-24 before it notified ORR;<sup>13</sup>
- National Highways gave less focus to the average delay KPI number as it was an ambition and not a target;<sup>14</sup> and
- there appears to be a wide range of meetings on missed commitments that feed into quarterly capital portfolio management (CPM) reporting that provide early sight of risks and potential missed commitments. We were not sighted on these meetings and in some instances, we were not informed of relevant data and information until six months after the fact.<sup>15</sup>

We intend to work with National Highways to ensure that we have a clear shared understanding of the company's duties under this condition moving forwards. This will include implementing the recommendations of the Rebel Group consultancy work we recently completed with the company's co-operation to ensure that it has robust processes in place to comply in future.

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<sup>12</sup> Average delay interview and designated funds interview

<sup>13</sup> Pavement condition interview

<sup>14</sup> Average delay interview

<sup>15</sup> Missed commitments interview, NHCI249 and NHCI251

Similarly, there is evidence that National Highways is only partially implementing its asset management strategy and policy in line with condition 5.10 of its licence.<sup>16</sup> We will continue to closely monitor the company's activities and expect to see clear improvements and evidence of how it is compliant with its asset management policy and strategy implementation, as required under the condition, and effectively balancing competing asset management priorities under the licence and the RIS.

### **Potential contravention of RIS2**

We have concluded at this time, based on the evidence gathered in the investigation, that National Highways is currently compliant with RIS2 and there is therefore no case to answer in this regard. However, at the time of writing National Highways is forecasting, or at risk, to be off track to deliver six of its 12 KPIs by the end of RP2. The company has also missed eleven of its enhancements commitments to date. Should National Highways' performance continue on its current trajectory, resulting in missed KPIs and/or an increase in the number of missed commitments by the end of RP2, we will consider at that time whether this means that the company is potentially in contravention of RIS2.

Similarly, National Highways' licence sets out that "the licence holder **must** publish and deliver the final SBP and the associated delivery plan" for the RIS (condition 6.25). The delivery plan is updated on an annual basis, and ORR undertakes a reasonable and pragmatic role in holding National Highways to account, particularly taking into consideration factors outside of its control. We would look at compliance with this licence condition alongside any consideration of a potential breach of the RIS.

### **Next steps**

We invite National Highways to make any further representations in writing by 17:00 on 4 June 2024, focussing on the areas of potential contravention outlined above.<sup>17</sup> We will use this, alongside the evidence already gathered, to inform our consideration of the recommendations that we make to the ORR Board on whether the company has contravened or is contravening its licence and, if so, whether it is appropriate to take enforcement action. This is likely to be at the ORR Board meeting in June 2024.

We may also reflect any information you provide in response to this letter in our evidence report that will be circulated to the ORR Board alongside our recommendations. We will send the evidence report to you to check for accuracy

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<sup>16</sup> Asset management strategy interview

<sup>17</sup> Paragraphs 5.27-5.28 of our holding to account policy provide further details on case to answer letters and responding to this; chapter 6 provides further information on what our Board considers when evaluating the case for enforcement action, particularly paragraph 6.7.

and will publish once the ORR Board has made its decision on licence breach. We will publish this letter and your response on our website at the same time, and the outcome of the investigation.

Yours sincerely

A handwritten signature in black ink, appearing to read 'John Larkinson', is written over a light grey rectangular background.

**John Larkinson**  
Chief Executive

CC: Emma Ward – Department for Transport



## Annex: summary of investigation findings

1. A summary of our broader findings from our investigation is provided below. These are set out against the following key themes: understanding of delivery and performance; organisational issues and capability; and data, information, and transparency. The primary evidence suggesting contravention of the licence is indicated in **bold**.
2. With respect to understanding of delivery and performance:
  - a. Asset management renewals: National Highways relies on its 3D (develop, design, deliver) governance and change control processes. **Key limitations include: an apparent absence of ongoing checks around whether benefits are delivered; benefits not being quantified; and ad hoc levels of engineering engagement during delivery. At the end of a project there are discussions between the project and asset teams to discuss whether the work has delivered the benefits expected. However, the company struggled to evidence that monitoring planned benefits occurred during earlier stages of the project, therefore not giving it assurance that the intended benefits are those delivered at completion.** The change control process appears to only be initiated by changes to cost and programme and not changes to asset need, or outcome/benefits.
  - b. Asset management strategy: there appeared to be a lack of clarity as to how far the achievement of ISO55001 accreditation, required under condition 5.11 of National Highways' licence, represents compliance with the other asset management conditions, for example, 5.10 (to develop, maintain and implement an asset management policy and strategy). The company told us that gaining ISO55001 accreditation demonstrates that the company is taking a long-term approach to asset management. **But it was not clearly elucidated how this supported and complimented what was in the company's asset management strategy and policy, or how ISO55001 accreditation would support its strategy and policy implementation.** It is important that work to achieve ISO55001 is not seen by the company as a stand-in for complying with other licence conditions. This could lead to activity on the ground not necessarily being aligned with helping the company to achieve its legal obligations to implement its asset management policy and strategy.
  - c. Asset management strategy: National Highways has good evidence of how individual actions have been delivered. However, these actions generally stop with the production of an output, such as the asset class handbooks. **The company struggles to demonstrate how these outputs are being implemented to deliver the outcomes expected.** For example, in the

case of the asset class handbooks, there is little evidence to demonstrate how these are being used on the ground and the benefits and improvements to the network that are being realised by their implementation.

- d. Average delay: National Highways has developed its 'Managing Delay on the SRN' plan with the aim to manage delay on the network. It has clear actions and themes that in theory may help minimise delay. The company's approach that the KPI is an ambition rather than a target also means that it is viewed differently internally compared to targeted performance metrics. **There are significant limitations in the development and implementation of the company's plan as it does not include the quantified benefits of intervention. It therefore is not possible to tell whether the actions that the company is implementing are good value for money and/or effective in reducing delay on the network. Similarly, while there is evidence of the company taking corrective actions it has not been able to produce evidence to demonstrate that it is taking the "right" corrective actions at the right cost.**
- e. Designated funds: National Highways demonstrated that it has robust processes in place to manage the financial aspects of designated funds delivery. However, there is currently no central function to oversee the effectiveness of the overall programme in delivering key outcomes and benefits, including KPIs. This omission means that opportunities are missed to learn lessons and share best practice within the business. The company told us that it has plans to change this approach in RP3 and better join up its funding and delivery teams. The company was not able to adequately explain why it **took so long to evaluate the funds' performance or to understand the need for more joined up delivery to ensure that spend is delivering benefits, particularly to KPIs in RP2.**
- f. Missed commitments: National Highways told us that a management plan was in place for major projects, developed for the first time in 2023-24. At the time of the investigation, the plan for 2024-25 was still being finalised and so would not be ready for the start of the reporting year. The company told us that the plan set out the planned improvements and actions for the year – developed both top-down and bottom-up based on its experience of the whole enhancements portfolio (not just missed commitments). On review, the example plan provided was a list showing what the company had to do in the year, but it was unclear as to how it would achieve the objective for which it was intended. It is a good example of where the company has identified a gap and improved the approach to try and bring together all the plans for the year. However, the contents of the plan were

limited. In addition, the impression given in the interview was that commitments are only missed by a few months and as such is it not a significant issue. The company has identified the need to improve its lessons learnt approach, but this was only implemented from 1 April 2024. **The company has missed open for traffic commitments on eleven schemes in this road period. It has a statutory duty to deliver what it has promised and the delay to learning lessons and implementing change indicates that its prior approach was not wholly effective and should have been re-evaluated sooner. The new plan is an example of the company aiming to implement a new plan or innovation – which is welcome – but the change itself does not appear to deliver on the strategic intent as described.**

- g. Pavement condition KPI: National Highways has an established model to forecast deterioration of the road surface and identify what the KPI need is, called PIT (pavement investment tool). However, the company does not use this to determine its renewals programme. The company instead uses plans developed by its regions that we are told are in line with the asset management policy. The regional plans are not initially checked to determine if they will achieve the KPI. Instead, the company reacts to poor KPI performance once surveys have been uploaded to its asset management system at Q2 each year and alters its regional delivery plans and therefore its renewals programme. During our interviews with the company, it provided evidence that it made a conscious decision not to focus on achieving the KPI. **The company continues to choose to develop its annual pavement renewals programme not to target achieving the KPI. It uses a reactive approach to correct, but it has been unable to evidence that this is an effective use of funding or the impacts on users. In addition, the company has not proposed any changes to its KPI methodology or updated its asset management policy to align with the KPI commitment within the RIS. Both actions are within its control.**
3. With respect to organisational issues and capability:
    - a. Asset management renewals: National Highways demonstrated good decision-making evidence using its 3D governance process. However, forums such as the monthly operations performance review, where issues are discussed and resolved regionally including (but not limited to) KPIs, performance indicators (PIs) and programmes undertaken have no terms of reference. **The evidence and reasoning upon which a decision was made at these reviews was limited and/or absent and therefore the basis of decision unclear or unknown.**

- b. Average delay: National Highways collects large amounts of data relating to traffic flows and delays on its network. It has also set out an extensive list of actions it is taking to mitigate delays on the network in RP2. However, **it is unable to bring these two elements together to evidence the impact of its interventions on KPI performance, and therefore spending, in an effective and efficient manner.**
  - c. Pavement condition: there are different teams within National Highways that are integral to pavement condition performance. Safety, engineering and standards (SES) set the standards and report on the KPI; the National Programme Office (NPO) oversees the national performance and reports both up to the company's Board and to regional leads. **There is evidence of misalignment between the objectives of each group that does not allow for efficient programme development and prioritisation to meet all commitments.**
4. With respect to data, information and transparency:
- a. Asset management renewals: National Highways captures lessons learnt data on its CDMT (capital delivery management tool). However, **we have seen no evidence that the company is systemically using or disseminating these lessons. The company has told us about 'meaningful discussions' but was unable to evidence them.**
  - b. Average delay: National Highways was unable to interrogate delay data to understand the local issues affecting delay compared to before the Covid-19 pandemic, and only began analysing delay data in sufficient detail following ORR challenge. **The company has struggled to understand the causes of delay increasing significantly above pre-pandemic levels, even though overall traffic levels remain slightly below pre-pandemic levels.**
  - c. Designated funds: only financial information is collated centrally. The central designated funds function is mostly financial and holds little data or information beyond this, **limiting its effectiveness to be a 'guiding mind' for the programme, identify patterns, learn lessons and disseminate accordingly to realise the benefits for which the funds were intended.**
  - d. Missed commitments: National Highways has a robust reporting structure to check delivery of major projects. Monthly performance meetings are held at every level in the major project structure that feed up into quarterly capital portfolio management (CPM) meetings (attended by ORR). However, ORR was unaware of the scale of this (acknowledged by the company in the interview). Engagement with ORR between CPM meetings is absent and relies on change control meetings. Therefore, **information is**

**not being shared in a sufficiently timely way to allow ORR to most effectively hold to account using close to live data and information and so act in a timely way.**

- e. Asset management strategy: National Highways acknowledges data deficiency in this area. One of the six charters within its asset management development plan is to improve the quality of its data. This work is ongoing, but we are unclear how it will resolve this. **Deficient data has the potential to limit the company's ability to make consistently evidence-based decisions and assess the benefits its investment generates across all asset types. We have seen evidence that data quality varies between asset classes for renewals and the need for improvement, for example on the drainage asset and on-road technology.**