

John Larkinson
Chief Executive



Nick Harris
Chief Executive
National Highways

Via email

28 June 2024

Dear Nick

ORR Board decisions on National Highways' compliance with its licence and whether to take enforcement action

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].

On 22 May 2024 I wrote to you setting out our preliminary views subsequent to our investigation in a case to answer letter. We also provided a copy of our investigation evidence report to National Highways on 7 June 2024. My thanks to you and your team for your detailed and constructive response to the case to answer letter, provided on 5 June 2024, and for the factual check of the evidence report, received on 12 June 2024.

Case to answer

In my letter of 22 May 2024, I stated that subject to considering any further representations from National Highways, our preliminary view, based on the evidence available, was that the company was and is non-compliant with its licence, specifically:

- 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.

Decisions of the ORR Board

We have considered carefully your constructive response to the case to answer letter. We welcome the tone and the approach that you took.

Compliance with licence condition 7(3)(e)

Based on all the evidence received from National Highways and having regard to all relevant circumstances of the case, **the ORR Board has decided that National Highways was and is non-compliant with condition 7.3(e) of its licence.**

ORR has statutory duties that contribute to driving more efficient and effective performance by the company for the benefit of road users, communities and the taxpayer. To enable ORR to fulfil these statutory duties, National Highways must collect, record and provide data or information under this condition. The ORR Board's reasons for this finding are as follows:

- a) the examples under this condition that we provided to National Highways in the case to answer letter, that were identified during the investigation, show evidence of non-compliance with regards to the provision of data and information to ORR over the past year;
- b) National Highways acknowledges that “some of” the information provided to ORR in the investigation “could have been provided ... earlier as part of routine or enhanced monitoring”; and the need to address “...the perceived reticence, on behalf of [the company]” to share specific data and information. We welcome your acknowledgement of these points and commitment to change; and
- c) we do not consider that National Highways has correctly understood condition 7.3(e). The condition relates specifically to **other** data or information that we may reasonably require, where relevant to the fulfilment of our statutory functions. ‘Other’ implies additionality to the data and information we require under condition 7.1, that we specify under our Monitoring Reporting Guidelines (condition 7.2). This is our formal reporting requirement of the company. Condition 7.3(e), in contrast, includes data and information that we request on an ad-hoc basis as part of business as usual and enhanced monitoring. The examples highlighted in our case to answer letter were drawn from these instances. We request – or expect the company to proactively provide – this type of data or information primarily when an emerging concern or risk has been identified by us or the company. We use the data and information to help us understand how the company manages and mitigates these risks before they crystallise into issues that have negative impacts on road users. This is fundamental to ensuring that we can fulfil our statutory role and help to drive more efficient delivery and effective performance from the

company. Ultimately this protects the interests of road users, taxpayers and communities.

Compliance with licence conditions 4.2(a), (b) and (c) and condition 5.6(b)

Together, conditions 4.2(a), (b) and (c) and condition 5.6(b) of National Highways' licence set out the requirement to "act in a manner which it considers best calculated" in exercising its functions and complying with its legal duties and to 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".

After consideration of the additional evidence provided by National Highways in response to our case to answer letter, **the ORR Board has decided that there are insufficient grounds to find that National Highways is non-compliant with these conditions.** The ORR Board's reasons for this finding are as follows:

- a) we consider that on balance National Highways has provided satisfactory evidence of how it tries to balance what are sometimes competing statutory duties and business priorities. It has explained the corporate processes and frameworks that it has in place (including those it has improved) in its response to the case to answer letter; and
- b) we further note that National Highways has acknowledged that there have been recent instances where it has not been able to effectively evidence this decision making to us when asked to do so. In particular, the company recognises that "... the transparency and visibility for ORR of the reasoning behind some of our decisions can be improved and we would want to work with you to deliver these improvements". This reflects the ORR Board's decision on 7(3)(e) above, that the company may believe that it is acting in a manner that it considers is best calculated to balance its sometimes competing functions and duties, but there are weaknesses in how it records and evidences its decision making to us.

Statutory enforcement action for non-compliance with condition 7.3(e)

Alongside its decision on non-compliance with condition 7.3(e), the ORR Board considered whether it would be appropriate to take statutory enforcement action against National Highways. **The ORR Board has decided not to take statutory enforcement action.**

The ORR Board weighed all the evidence and considered the factors listed in paragraphs 5.7 and 6.7 of our holding to account policy. On balance, it concluded that we can together achieve a positive outcome without the need for enforcement action at this time.

National Highways' attitude and approach to engaging with the investigation, the tone of its response to the case to answer letter, its acceptance that it must improve and its proactivity in identifying specific areas where it would seek to do so, gave us confidence that the company will engage closely with us as it develops a formal, timebound improvement plan to bring it back into compliance with its licence. This is further supported by your inclusion of a commitment to do this in your draft Delivery Plan Update (DPU) for 2024-25. We welcome this and expect to see it in the final version of the DPU, once published.

Improvement plan

Engaging with us, finalising and implementing a formal, timebound improvement plan is how National Highways should demonstrate to us that it is coming into compliance with condition 7.3(e). Failure to do so could see this matter return to the ORR Board for enforcement consideration at a later date.

Effective resolution will require openness and agility within National Highways; cultural change that embraces the importance of transparency and a commitment to mature as a data and information manager.

As explained above, condition 7.3(e) speaks directly to the types of requests we make when we have concerns about performance and delivery, including, but not limited to, when an issue goes into enhanced monitoring (as set out in our holding to account policy). We must receive the right information to mitigate risks and avoid them crystallising into issues that can affect road users' journeys and safety and/or undermine the efficient spend of public money. The ORR Board's decision was based on the evidence provided by National Highways as part of the investigation. Other concerns around the provision of data and information, for example as part of the third road investment strategy (RIS3) efficiency review, did not inform the decision. We will continue to work with the company separately to understand the reasoning behind these instances and how to avoid recurrence.

It is important that National Highways continues to engage with us, finalises and implements an appropriate plan to remedy the deficiencies we identified during the investigation. The plan should also support additional improvements identified by ORR in the investigation and by the company in its response to our case to answer letter. The actions in the plan should also have positive longer-term impacts and help to set the company up for success in the future.

As set out in our case to answer letter, should National Highways' performance continue on its current trajectory, resulting in missed KPI targets and/or an increase in the number of missed commitments by the end of the second road period (RP2),

we will consider at that time whether this potentially means that it is non-compliant with RIS2 and/or condition 6.25 of its licence.

Next steps

The ORR Board's decisions conclude this investigation.

We will publish this letter, our case to answer letter and your response and the investigation evidence report on our website in due course.

We will liaise with National Highways over the coming weeks to finalise an improvement plan. This should be in place by the end of Q2 2024-25. We will then monitor the delivery of the plan and keep track of its progress and success through our Highways Committee (a committee of our Board) and through enhanced monitoring.

Yours sincerely

A handwritten signature in black ink, appearing to read 'John Larkinson', is positioned below the 'Yours sincerely' text.

John Larkinson
Chief Executive

CC: Emma Ward – Department for Transport