



ORR's enforcement policy for Highways England

Policy outlining enforcement action
that may be taken by the Highways
Monitor

December 2015



Contents

1. Executive Summary	4
Purpose of this policy	4
Background	4
Enforcement principles	5
Application of our enforcement policy	6
2. The legal framework for enforcement	10
The Infrastructure Act 2015	10
The Road Investment Strategy	10
Statutory Directions and Guidance issued by the Secretary of State to Highways England	11
Statutory enforcement powers	11
Statutory guidance issued by the Secretary of State and HM Treasury to ORR	12
Action taken by the Secretary of State	12
3. Enforcement	13
Purpose of enforcement	13
Enforcement principles	13
4. ORR's enforcement policy	17
Application of our enforcement policy	17
Stage 1 – deciding whether to take enforcement action	19
Stage 2 – proceeding with non-statutory enforcement action	20
Stage 3 – statutory enforcement action	22
Reparations	25
Senior management remuneration	27
5. Statement of policy on fines	28
Is a fine appropriate?	29
Seriousness of the contravention	30
Determining the amount of a fine	32
Level and scale of fines	34
6. General	37
Publication	37

Revision of policy

37

Annex A – ORR’s statutory duties under the Act

38

1. Executive Summary

This document sets out the enforcement policy of the Office of Rail and Road (**ORR**) in its role as Monitor of Highways England. Highways England is responsible for operating, maintaining and improving the Strategic Road Network (the **SRN**) in England.¹

Purpose of this policy

- 1.1 The purpose of this policy is to describe how we intend to use our enforcement powers to ensure that Highways England:
 - complies with the Road Investment Strategy (the **RIS**)²; and
 - complies with statutory directions and has regard to guidance given by the Secretary of State (**Statutory Directions and Guidance**). The licence issued to Highways England by the Secretary of State (the **Licence**)³ constitutes Statutory Directions and Guidance.
- 1.2 In particular, this policy sets out how and when we will take enforcement action and the nature of such action.
- 1.3 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 Infrastructure Act 2015 (the **Act**).
- 1.4 The publication of this policy follows consultation on our draft policy between 3 July 2015 and 25 September 2015.

Background

- 1.5 ORR carries out monitoring and enforcement activities of Highways England in accordance with sections 10 – 13 of the Act.

¹ The Strategic Road Network comprises the motorways and major 'A' roads in England.

² https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/382808/dft-ris-overview.pdf
<https://www.gov.uk/government/publications/road-investment-strategy-for-the-2015-to-2020-road-period>

³ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/431389/strategic-highways-licence.pdf Condition 3.1 of the Licence states that the Licence holder must, without prejudice to the Licence holder's legal duties or other obligations, comply with or have due regard to (as appropriate) the conditions set out in the Licence, which constitute statutory directions and guidance issued by the Secretary of State to the Licence holder as provided for in section 6 of the Act.

- 1.6 Our role as Monitor of Highways England has been established to provide independent assurance to users of the SRN, government and wider stakeholders that Highways England is held to account for its management of the SRN by monitoring and enforcing the performance and efficiency of Highways England.

Enforcement principles

- 1.7 The purpose of enforcement is to secure Highways England's compliance with the RIS and Statutory Directions and Guidance and in doing so, to protect the interests of users of the SRN, government and wider stakeholders.

- 1.8 We will use our enforcement powers firmly but fairly in a timely manner and in accordance with our duties under section 12 of the Act. Section 12 of the Act requires us to exercise our enforcement functions in the way that we consider most likely to promote the performance and the efficiency of Highways England.⁴ In addition, we are also required to have regard to a number of other factors when exercising our enforcement functions.⁵ 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. 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
- the carrying out of regulatory activities in a way which is transparent, accountable, proportionate and consistent and targeted only at cases in which action is needed.

- 1.9 We will exercise our enforcement functions in accordance with the following principles⁶:

- proportionality – we are proportionate in our approach to enforcement. The action we take will depend on the nature of the contravention and the potential consequences of non-compliance;

⁴ See section 12(1) of the Act.

⁵ See section 12(2) and 12(3) of the Act.

⁶ The Better Regulation Task Force devised these five principles which any policy intervention and its enforcement should meet. A paper setting out these principles of good regulation can be found at: <http://webarchive.nationalarchives.gov.uk/20100407162704/http://archive.cabinetoffice.gov.uk/brc/upload/assets/www.brc.gov.uk/principlesleaflet.pdf>

- targeted – we target our enforcement at those areas where a contravention has been identified and action is needed;
- consistency – we are consistent in our approach to enforcement. This does not mean uniformity but rather taking a similar approach in similar circumstances to achieve similar ends where appropriate;
- transparency – we are transparent in the way we enforce. We publish our enforcement policy, our enforcement decisions and reasons and ensure that we are open about the action we are taking; and
- accountability – we are accountable to the public for our actions through the courts and through Parliament.

Application of our enforcement policy

- 1.10 We recognise that it is for the benefit of Highways England and its stakeholders that proactive action is taken where a potential or actual contravention of the RIS and/or Statutory Directions and Guidance has been identified. This enables action to be taken to prevent a potential issue from developing into a contravention or to remedy an actual contravention as quickly and effectively as possible.
- 1.11 It is our intention that where a potential or actual contravention has been identified, we will usually go through a three staged enforcement approach. The first stage is consideration of whether enforcement action is necessary and if we decide it is, we would then expect to follow an escalation process of non-statutory enforcement action before, in the case of an actual contravention, going on to consider exercising our statutory enforcement powers under the Act. This approach provides Highways England the opportunity to explain the context of a potential or actual contravention, the reasons for it and any measures being taken to mitigate and correct it.
- 1.12 Having gone through Stage 1 of our enforcement approach, and if we determine enforcement action is required, we would generally expect to go to Stage 2 and proceed with taking non-statutory enforcement action before, in the case of an actual contravention, going on to Stage 3 and considering whether to take statutory enforcement action.
- 1.13 We may, however, in the case of an actual contravention go straight to Stage 3 if we consider the nature of the contravention is such that we should proceed immediately with consideration of whether to take statutory enforcement action. This may be where we consider the contravention and/or the particular individual circumstances of a case warrant it. For example, where the contravention creates a serious risk to Highways England's compliance with the Licence, its delivery of

the RIS or its funding for the SRN, or where it is a persistent contravention or is committed deliberately, such as a deliberate or serious misreporting of data by Highways England.

Stage 1 – deciding whether to take enforcement action

1.14 Where a potential or actual contravention has been identified, we will consider the nature of the potential or actual contravention and whether it requires enforcement action from ORR. If enforcement action is considered necessary, we would normally move to Stage 2.

Stage 2 – proceeding with non-statutory enforcement action

1.15 Where we determine that non-statutory enforcement action is required we may carry out various action and activities in accordance with the following steps:

- **Step 1** – this involves proceeding with non-statutory enforcement action, which includes investigating the actual or potential contravention and carrying out various activities as part of that investigation.

This may include meetings with Highways England, requiring Highways England to provide further data and information, taking certain action and making public comment on the issue, if appropriate.

If, having been through this process, we consider the matter needs to be escalated, we will go to Step 2.

- **Step 2** – this involves an escalation of non-statutory enforcement action and includes the carrying out of further activities.

This may include requiring an explanation from Highways England as to why satisfactory progress to remedy the potential or actual contravention has not been made, holding meetings at a senior level, publishing correspondence on the issue, making public our reports and/or giving advice to the Secretary of State pursuant to section 10(2) of the Act, if appropriate.

In respect of an actual (as opposed to potential) contravention, it may also involve going to Stage 3 of the process and considering whether statutory enforcement action should be taken.

Stage 3 – statutory enforcement action

1.16 We have statutory enforcement powers under section 11 of the Act. Where we are satisfied that there has been or is currently a contravention by Highways

England of the RIS and/or Statutory Directions and Guidance we may (but are not required to):

- give notice to Highways England as to the contravention and the steps Highways England must take in order to remedy it⁷; and/or
- require Highways England to pay a fine to the Secretary of State.⁸

1.17 Where we have been through Stage 1 and Stage 2 and the contravention in question has not been adequately resolved by Highways England, or alternatively, where we consider the contravention to be such that it is appropriate to proceed straight to consideration of statutory enforcement action without going through the previous stages, we would expect to follow the steps set out below.

1.18 Stage 3 is only applicable where we are considering an actual (as opposed to potential) contravention.⁹ It involves five steps:

- **Step 1** – this involves deciding whether to take statutory enforcement action having regard to various factors. If we determine that statutory enforcement action is required we will go on to the second step.
- **Step 2** – this involves notifying Highways England of our intention to proceed with statutory enforcement action, the action we intend to take and the grounds on which action is being taken.

We will provide Highways England with the opportunity to make any representations in defence of its own actions or to indicate steps being taken by it to rectify the contravention before making a final decision on whether to proceed with issuing a notice and/or a fine.

- **Step 3** – this involves issuing a notice to Highways England pursuant to section 11(2)(a) of the Act.
- **Step 4** – this involves monitoring Highways England's compliance with the notice. If the contravention is not rectified, we will consider levying a fine for the ongoing contravention as well as making Highways England's failure to comply with the notice public.

⁷ Section 11(2)(a) of the Act.

⁸ Section 11(2)(b) of the Act.

⁹ Our statutory enforcement powers only extend to issuing a notice and/or a fine in respect of a past or current contravention of the RIS and/or Statutory Directions and Guidance.

- **Step 5** – this involves issuing a fine pursuant to section 11(2)(b) of the Act. In deciding whether a fine is appropriate and the amount of the fine we will have regard to our statement of policy on fines, set out in Chapter 5.
- 1.19 While we will generally expect to issue a notice for a contravention and monitor Highways England's compliance with that notice before determining whether to issue a fine, we may not always do so. There may be circumstances where we decide to impose a fine on Highways England for a contravention irrespective of whether we have issued a notice or we may choose to issue a notice and a fine simultaneously for the same contravention.

Statement of policy on fines

- 1.20 We will have regard to our statement of policy on fines (Chapter 5) in deciding whether to levy a fine and in determining the scale of that fine.
- 1.21 We will consider a number of factors in determining whether a fine is appropriate including the seriousness of the contravention, any mitigating or aggravating factors, our duties under section 12 of the Act and any statutory guidance issued to us by the Secretary of State and HM Treasury.
- 1.22 Where we have decided to impose a fine it is for us to determine its amount and to ensure that the level of fine is proportionate to the contravention. We may, as an alternative to a fine or as mitigation in determining the amount of a fine, take into account any offer of reparations made by Highways England. Any such offer of reparations will need to comply with the principles set out in Chapter 4.
- 1.23 In setting our policy on fines we recognise that Highways England is a government owned company and receives public funding. Imposing fines could therefore have an impact on its financial sustainability and its ability to comply with the RIS, the Licence and other Statutory Directions and Guidance. We have taken this into account in determining the indicative levels of fines we may impose on Highways England.
- 1.24 We will generally impose fines at a level which will have a reputational as opposed to a punitive impact on Highways England and this is reflected in the indicative level of fines for less serious, moderately serious and serious contraventions. However, where we issue a fine for a very serious contravention, it is likely to be at a level which has a more significant financial impact on Highways England. Consequently for such contraventions where we decide to issue a fine it is likely to be of an amount up to £25 million (although it could be higher) to reflect the seriousness of the contravention.

2. The legal framework for enforcement

The Infrastructure Act 2015

2.1 The following are key provisions of the Act that relate to our enforcement role:

- The Act provides for the Secretary of State to appoint Highways England as a strategic highways company¹⁰, to set a RIS¹¹ and to give Highways England statutory directions and guidance as to the manner in which it is to exercise its functions.¹²

The RIS sets the objectives to be achieved by Highways England and the financial resources to be provided. The Licence sets out how Highways England must behave in discharging its duties.

- The Act sets out the role of the Monitor. ORR must carry out activities to monitor how Highways England exercises its functions and may, when appropriate, direct Highways England to provide information for the purpose of carrying out its activities.¹³ ORR must exercise its functions in the way that it considers most likely to promote the performance and the efficiency of Highways England.¹⁴
- The Act gives ORR the power to issue a notice and/or a fine to Highways England if ORR is satisfied Highways England has contravened or is contravening section 3(6) of the Act (*compliance with the RIS*) or section 6(3) of the Act (*compliance with directions and regard to guidance*).¹⁵
- The Act requires the Secretary of State and HM Treasury to give ORR guidance as to the circumstances in which the payment of a fine should be required. ORR must have regard to this guidance.¹⁶

The Road Investment Strategy

2.2 The Act allows the Secretary of State to set the RIS. The RIS sets out the objectives that must be achieved by Highways England during the road period to which it relates and the funds available for that purpose. RIS documents include

¹⁰ Section 1 and section 2 of the Act.

¹¹ Section 3 of the Act.

¹² Section 6 of the Act.

¹³ Section 10 of the Act.

¹⁴ Section 12 of the Act.

¹⁵ Section 11 of the Act.

¹⁶ Section 13 of the Act.

the Overview¹⁷ and the Strategic Vision, the Investment Plan (which includes the Statement of Funds Available) and the Performance Specification.¹⁸

Statutory Directions and Guidance issued by the Secretary of State to Highways England

- 2.3 The Act allows the Secretary of State to issue directions or guidance to Highways England as to the manner in which it is to exercise its functions.¹⁹ Highways England must, in exercising its functions, comply with any such directions and have regard to any such guidance.²⁰
- 2.4 The Licence constitutes Statutory Directions and Guidance. It sets out what the Secretary of State expects Highways England to achieve and how it must behave in discharging its duties and in delivering the RIS. For example, the Licence requires Highways England to efficiently operate, maintain, renew, ensure resilience of and enhance the SRN.

Statutory enforcement powers

Notices

- 2.5 Where we decide to issue a notice in respect of a contravention the notice will set out the contravention and the steps Highways England must take to remedy it in order to secure compliance with the Statutory Directions and Guidance and/or the RIS, as the case may be.
- 2.6 Paragraphs 4.24 – 4.27 of Chapter 4 sets out our approach with regard to issuing a notice under section 11(2)(a) of the Act.

Fines

- 2.7 Where we decide to issue a fine in respect of a contravention we must have regard to statutory guidance given by the Secretary of State and HM Treasury (see paragraphs 2.10 – 2.11 below).
- 2.8 A fine requires Highways England to pay a specified sum to the Secretary of State, which is then paid into the Consolidated Fund.

¹⁷ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/382808/dft-ris-overview.pdf

¹⁸ <https://www.gov.uk/government/publications/road-investment-strategy-for-the-2015-to-2020-road-period>

¹⁹ Section 6(1) of the Act.

²⁰ Section 6(3) of the Act.

2.9 Chapter 5 sets out our statement of policy on fines and the approach we will take with regard to issuing a fine under section 11(2)(b) of the Act.

Statutory guidance issued by the Secretary of State and HM Treasury to ORR

2.10 Section 13(2) of the Act requires the Secretary of State and HM Treasury, acting jointly, to give ORR guidance as to the circumstances in which the payment of a fine under section 11 of the Act should be required.

2.11 This guidance has been published.²¹ We must have regard to this guidance (paragraphs 19 – 24) when exercising our statutory enforcement powers.

Action taken by the Secretary of State

2.12 The Secretary of State remains the sole shareholder of Highways England. Our statutory enforcement powers do not affect the Secretary of State's right to take action against Highways England in his or her role as shareholder or under wider legislative powers.

2.13 However, where the Secretary of State intends to take enforcement action against Highways England for reasons that may relate to a contravention of the RIS and/or Statutory Directions and Guidance, the Secretary of State will co-ordinate and agree with ORR the application of sanctions.

²¹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/411076/statutory-guidance-on-fines.pdf

3. Enforcement

Purpose of enforcement

- 3.1 Highways England operates, maintains and improves the SRN in England. Our role has been established to provide independent assurance to users of the SRN, government and wider stakeholders that Highways England will be held accountable for its management of the SRN.
- 3.2 We encourage Highways England to deliver its objectives under the RIS and Statutory Directions and Guidance and to deliver them efficiently. We see the possibility of enforcement action as providing a strong incentive for Highways England to ensure its compliance with the RIS and Statutory Directions and Guidance. It also enables us to take action to ensure that the public interest is protected and that Highways England delivers a safe and reliable SRN which represents value for money.
- 3.3 Our primary objective in undertaking enforcement action is to change the future behaviour of Highways England so as to deter non-compliance with the RIS and Statutory Directions and Guidance (both specifically and in general).

Enforcement principles

- 3.4 Our approach is one of firm but fair enforcement applied in a timely manner. In considering our enforcement role we will take account of our general duties under section 12 of the Act. This requires us to exercise our enforcement functions in the way that we consider most likely to promote the performance and the efficiency of Highways England. In addition, in exercising our enforcement functions under the Act, we are required to have regard to a number of other factors set out in section 12(2) and section 12(3) of the Act (see Chapter 1, paragraph 1.8).
- 3.5 We will consider each contravention based on the individual circumstances. The statements in this policy must therefore be considered in that context. However, we recognise that Highways England, government and wider stakeholders wish to understand how we will use our powers. Our approach is informed by best practice and the principles set out below.

Proportionality

- 3.6 We will focus investigations on those contraventions of the RIS and/or Statutory Directions and Guidance which are most important for users of the SRN, government and other stakeholders and where the contravention causes the most serious consequences.

- 3.7 As a general principle we will focus our resources and priorities on sustained failure to deliver outputs or on individual events of material significance, rather than on one-off minor failures. This is because, in some cases, outputs may fluctuate over a short period of time. For example, network availability or delays may fluctuate from day to day and have to be considered over a reasonable period of time. In other cases the significance of Highways England missing a deadline or target will depend on the overall effect on users of the SRN, government and other relevant stakeholders.
- 3.8 We will investigate one-off failures which we consider to be significant or which may form part of a wider sustained, systemic or persistent failure and consider enforcement action where appropriate, taking into account the public interest and our duties under the Act. A decision on when a series of one-off failures is deemed to be a sustained, systemic or persistent contravention will depend on the nature and seriousness of the failures and on the progress of Highways England in rectifying the issue.
- 3.9 Our proportionate approach includes a staged process of issue identification and escalation, as set out in more detail in Chapter 4. We will carefully consider the circumstances of each individual case before deciding whether to take enforcement action. We will also consider the urgency of addressing any contravention in deciding on the appropriate course of action.

Targeted

- 3.10 As set out in paragraph 3.7 and 3.8, we will target our activities at those areas where contravention of the RIS and/or Statutory Directions and Guidance has been identified and where action is needed. For example, where a contravention has a detrimental effect on users of the SRN, government and/or other stakeholders or on asset management.

Consistency

- 3.11 Consistency of approach does not mean uniformity. It means taking a similar approach in similar circumstances to achieve similar ends. We will normally explain the reasons for any apparent differences in approach. Through the adoption of common principles, including those set out in this policy, consideration of the approach taken by other authorities, and by being transparent in our actions, we aim to ensure consistency in our approach to enforcement.
- 3.12 In carrying out our enforcement role as Monitor of Highways England, we will seek to learn from and have regard to our approach and experience as the

regulator for the rail industry in Great Britain.²² However, this does not necessarily mean we will take the same approach or course of action for Highways England as we do for rail licence holders and vice versa, recognising that these are different industries with different obligations imposed on the respective licence holders and that our role, obligations and legal duties as a monitor and a regulator also differ.²³

Transparency

3.13 Transparency means helping Highways England to understand what is expected of it and what it should expect from us. It 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.

3.14 We publish information on the performance and efficiency of Highways England exercising its functions. Where we are concerned about an aspect of performance (including whether Highways England is complying with the RIS and Statutory Directions and Guidance), we will make this clear to Highways England in accordance with the process and procedures set out in this policy.

3.15 Where we have decided to take statutory enforcement action against Highways England, we recognise that Highways England, users of the SRN, government and other stakeholders must be able to understand why we are concerned about a particular matter, the options open to us, and any opportunity to make representations. Therefore:

- we will always set out the issue, explain why we are concerned, what action we are taking and the next steps; and
- we will seek Highways England's views before proceeding with statutory enforcement action.

3.16 We may, from time to time, 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. We will make it clear when and where we have done so.

²² In this respect we have also had regard to the House of Commons Transport Committee Seventh Report of Session 2014-15 'Investing in the Railway', Chapter 9 para 80:
<http://www.publications.parliament.uk/pa/cm201415/cmselect/cmtran/257/25702.htm>

²³ The Economic Enforcement Policy and Penalties Statement for railway licence holders can be found at the following link: http://orr.gov.uk/_data/assets/pdf_file/0018/4716/economic-enforcement-policy.pdf

Accountability

- 3.17 We are accountable to the public for our actions through Parliament and through the courts. We have an obligation to give written and oral evidence to the Committees of Parliament.
- 3.18 ORR is subject to scrutiny by the National Audit Office and we are answerable to the Parliamentary Commissioner for Administration in cases of alleged maladministration.
- 3.19 We also have an obligation to comply with the rules of administrative law and good public administration. We consult on, and publish our policies and keep them under review to ensure that they remain fit for purpose. As a matter of policy and good practice, we will consider any representations made to us about our approach to monitoring, enforcement, or the levying of fines and respond to them. Ultimately, our decisions are subject to judicial review and scrutiny by the courts.
- 3.20 It is our intention to publish an annual report. Any report we publish pursuant to our powers under section 10(2) of the Act must be laid by the Secretary of State before Parliament.

4. ORR's enforcement policy

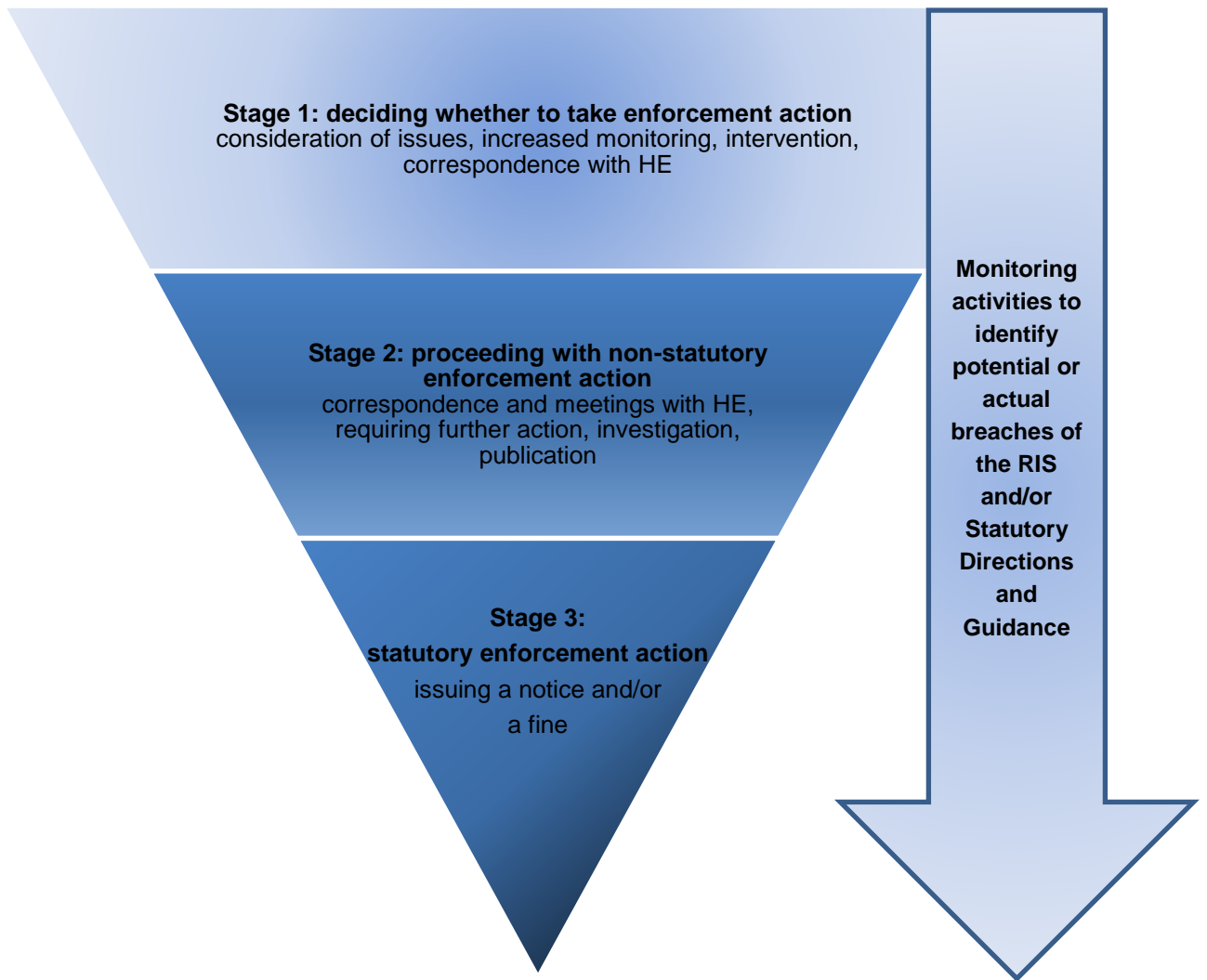
Application of our enforcement policy

- 4.1 Enforcement action will be determined on a case-by-case basis and in light of the general principles set out in this policy.
- 4.2 We recognise that contraventions of the RIS and/or Statutory Directions and Guidance, whether potential or actual, will require different approaches to enforcement depending on the contravention, its nature and the impact it causes.
- 4.3 It is our intention that where a potential or actual contravention has been identified we will go through a staged enforcement approach. This will usually involve consideration and use of non-statutory enforcement action before, in the case of an actual contravention, going on to consider the use of our statutory enforcement powers.²⁴ The following table summarises the available enforcement action we can take for the various types of contraventions:

Type of contravention	Non-statutory enforcement action	Statutory enforcement action: issuing a notice	Statutory enforcement action: imposing a fine
Past	X	X	X
Current	X	X	X
Potential	X		

- 4.4 A staged process of enforcement 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 being taken to mitigate and correct it. It also enables us to work with Highways England to try to resolve a potential contravention before it becomes a contravention and to seek to remedy an actual contravention without the need to consider the use of our statutory enforcement powers.
- 4.5 The below diagram illustrates the various actions we may take during our staged enforcement approach where there is a potential or actual contravention of the RIS and/or the Statutory Directions and Guidance. Our staged approach to enforcement is set out in paragraphs 4.11 – 4.32 below.

²⁴ Our statutory enforcement powers only extend to issuing a notice and/or a fine in respect of a past or current contravention of the RIS or Statutory Directions and Guidance.



Potential contraventions

4.6 With respect to potential contraventions, we consider early intervention is important in helping to prevent an issue from developing into an actual contravention. 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 we are made aware at the earliest opportunity of any issues likely to lead to a potential contravention of the Licence and of any action being taken to address the possibility.²⁵

4.7 This approach enables us to detect potential contraventions and, through our staged approach to enforcement, manage them with Highways England to try to prevent them from becoming contraventions in the future.

²⁵ Condition 8.5(b) of the Licence.

- 4.8 An example of where we may take early intervention action and follow the staged approach to enforcement for a potential contravention is in relation to Highways England's Key Performance Indicators (**KPIs**). If trends and/or leading indicators for a particular KPI suggest that Highways England's performance in relation to that KPI has started to plateau or is deteriorating, such that there is a likelihood that Highways England may not meet its target, we may, in accordance with the staged enforcement approach require steps to be taken and plans put in place to address these concerns with the aim of putting Highways England in a position where it is better able to meet the applicable KPI and avoid an actual contravention.

Actual contraventions

- 4.9 With respect to actual contraventions, we will usually, depending on the nature and seriousness of the contravention, follow the staged approach to enforcement within reasonable timescales according to the urgency of the case, leading ultimately to consideration of statutory enforcement action if required.
- 4.10 However, in certain circumstances we may choose not to go through each of the stages consecutively and may instead go straight to Stage 3 and consideration of whether to proceed immediately with taking statutory enforcement action. This will be where we consider the contravention and/or the particular individual circumstances of a case warrant it. For example, where the contravention creates a serious risk to Highways England's compliance with the Licence, its delivery of the RIS or its funding for the SRN or where it is a persistent contravention or was committed deliberately, such as a deliberate or serious misreporting of data by Highways England.

Stage 1 – deciding whether to take enforcement action

- 4.11 Where a potential or actual contravention has been identified, we will consider the nature of the potential or actual contravention and whether it requires enforcement action from ORR. This may include considering:
- how we became aware of the contravention, for example whether Highways England promptly and openly reported the contravention to us in accordance with Condition 8.5 of the Licence;
 - 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;

- 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;
- the enforcement tools available to us and their appropriateness in this matter;
- the reputational impact on Highways England of a particular course of action;
- 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;
- the reason for the contravention, for example whether it was wholly or partly within Highways England's control.

4.12 If, having gone through this Stage, we determine enforcement action is required we would normally move to Stage 2 and proceed with non-statutory enforcement action before going on to Stage 3 and consideration of statutory enforcement action. However, in some cases we may go straight to Stage 3 if we determine the nature of the contravention is such that we should proceed immediately with consideration of whether to take statutory enforcement.

Stage 2 – proceeding with non-statutory enforcement action

Step 1 – taking non-statutory enforcement action

4.13 Where we determine that non-statutory enforcement action is required we may carry out various activities, generally in the order outlined below, to the extent such activities are relevant to the potential or actual contravention under investigation, and are appropriate in the circumstances. Our activities may therefore include:

- identifying and raising the issue with Highways England in writing;
- requiring Highways England to provide such information and supporting data as we consider necessary in relation to the potential or actual contravention;
- requiring an initial management meeting with Highways England to discuss the issue and next steps;
- requiring an explanation from Highways England as to the reason(s) for the potential or actual contravention and any remedial action it has taken or intends to take;

- requiring Highways England to take certain action, such as requiring it to develop plans (including recovery plans or corrective action plans), make improvements to the way it delivers the RIS and/or carries out its obligations under the Licence or other Statutory Directions and Guidance and/or publish such improvement plans;
- requiring Highways England to co-operate with us in respect of an investigation of a potential or actual contravention, which may include jointly engaging external advisers at Highways England's cost;
- holding regular meetings with Highways England to discuss matters, progress made and action required;
- requiring Highways England to take all reasonably practicable steps to remedy the potential or actual contravention as effectively and efficiently as possible;
- making public comment on Highways England's performance and efficiency and the nature of the potential or actual contravention and/or publication of correspondence sent to Highways England in relation to this matter in accordance with our policy on publication (see Chapter 6). We will consider the appropriate time to make public comment in the circumstances of the individual case, bearing in mind our commitment to transparency (see Chapter 3).

4.14 Regular management meetings with Highways England will be used to monitor the issue and to find out what progress has been made since the last meeting. In respect of a potential contravention we will consider whether the risk of contravention has increased, decreased or remained stable.

4.15 If we are not satisfied with the progress that has been made to deal with a potential contravention or steps taken to remedy an actual contravention, we may take further action to escalate the matter in accordance with Step 2 below.

Step 2 – escalation of non-statutory enforcement action

4.16 Where we determine that further action is required and it is appropriate to escalate the matter, we may carry out various activities, generally in the order outlined below, to the extent such activities are relevant to the potential or actual contravention under investigation and are appropriate in the circumstances. Our activities may therefore include:

- requiring an explanation from Highways England as to the reason why, in the case of a potential contravention, the risk of contravention has not decreased, or in the case of an actual contravention, satisfactory progress has not been made to remedy the contravention;

- holding meetings at Director and/or CEO and Board level to discuss our concerns and the actions we require from Highways England;
- requiring Highways England to take further action with regard to any recovery plans or corrective action plans, its delivery of the RIS and/or the carrying out of its obligations under the Licence or other Statutory Directions and Guidance or any other improvement plans;
- requiring Highways England to co-operate with us in respect of an investigation of a potential or actual contravention, which may include jointly engaging external advisers at Highways England's cost;
- making public correspondence in relation to the matter and/or making public comment on Highways England's response and action in accordance with our policy on publication (see Chapter 6). We will consider the appropriate time to make public comment in the circumstances of the individual case, bearing in mind our commitment to transparency (see Chapter 3);
- making public our reports on the matter, in accordance with our policy on publication (see Chapter 6);
- giving advice to the Secretary of State pursuant to section 10(2) of the Act, where appropriate;
- in respect of an actual contravention only, proceeding to consider whether to take statutory enforcement action in accordance with Stage 3 below.

Stage 3 – statutory enforcement action

4.17 Stage 3 is only applicable where there has been an actual (as opposed to potential) contravention by Highways England of the RIS and/or Statutory Directions and Guidance.

4.18 Where we have been through the staged approach of non-statutory enforcement action set out above and the contravention in question has not been adequately resolved or dealt with by Highways England, or alternatively, where we consider it appropriate to proceed straight to Stage 3 due to the nature of the contravention and/or the particular individual circumstances of a case, we would expect to follow the steps set out below.

Step 1 – deciding whether to take statutory enforcement action

4.19 In deciding whether to proceed with statutory enforcement action we will give consideration to a range of factors, which may include:

- how we became aware of the contravention, for example whether Highways England promptly and openly reported the contravention to us in accordance with Condition 8.5 of the Licence;
- any action that is already being taken by Highways England to remedy the contravention;
- the significance of the contravention, including whether it is a one-off or minor failure or forms part of a wider sustained, systemic or persistent failure;
- 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;
- the likely need for ongoing monitoring of the issue that led to the contravention;
- 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 other factors (including aggravating or additional mitigating factors) relevant to the specific case;
- any statutory guidance to which we must have regard;
- our statement of policy on fines (set out in Chapter 5) when we are considering whether to impose a fine.

4.20 We will consider the most effective, efficient and expeditious solution with regard to the contravention and will do so in light of our legal duties and powers under the Act and in accordance with this policy.

Step 2 – notifying our intention to take statutory enforcement action

4.21 If we are satisfied that Highways England has contravened or is contravening the RIS and/or the Licence or any other Statutory Directions and Guidance and, in

accordance with this policy, we have decided to proceed with statutory enforcement action under section 11 of the Act we will:

- notify Highways England of the action we intend to take and the grounds on which action is being taken;
- inform Highways England of the date by which it must provide any representations, objections or evidence in defence of its own actions or to indicate steps being taken by it to rectify the contravention;
- take into account any representations, objections or evidence provided by Highways England before deciding whether to proceed with statutory enforcement action; and
- having gone through the above steps, communicate our decision to proceed or not to proceed with statutory enforcement action to Highways England in writing.

4.22 In deciding whether to issue a notice and/or a fine for a contravention we will take full account of the particular facts and circumstances of the contravention, including any representations and objections made to us and/or any evidence that is provided. We will also take account of the principles of enforcement set out in Chapter 3 and, in the case of a fine, our statement of policy on fines set out in Chapter 5. We will also act in a manner best calculated to fulfil the duties placed upon us by section 12 of the Act.

4.23 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 as to 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.

Step 3 – issuing a notice

4.24 If, having gone through steps 1 and 2 above, we decide to proceed with taking statutory enforcement action we would normally 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 the issuing of a notice as a means to secure compliance without the need to impose a fine.

4.25 We have the power to issue a notice to Highways England pursuant to section 11(2)(a) of the Act.

4.26 When issuing a notice we will:

- set out the condition of the RIS and/or Statutory Directions and Guidance which Highways England has contravened or is contravening;
- specify the acts or omissions which, in ORR's opinion, constitute contraventions of that condition of the RIS and/or Statutory Directions and Guidance and the facts which, in ORR's opinion, justify the issuing of a notice; and
- specify the steps which Highways England must take to remedy the contravention and any associated timeframes.

4.27 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.

Step 4 – monitoring compliance with a notice

4.28 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 statement of policy on fines set out in Chapter 5, as well as making Highways England's failure to comply with the notice public.

4.29 In more serious cases we may also give advice to the Secretary of State, pursuant to 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.

Step 5 – issuing a fine

4.30 We will generally consider the issuing of 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.

4.31 In deciding whether a fine is appropriate and the amount of the fine we will take account of the enforcement principles set out in Chapter 3 and our statement of policy on fines set out in Chapter 5.

4.32 We have the power to issue Highways England with a fine pursuant to section 11(2)(b) of the Act.

Reparations

4.33 It is our intention that imposing a fine on Highways England would be a last resort, having carefully considered the nature and circumstances of a contravention of the RIS and/or Statutory Directions and Guidance. Where we

have determined that issuing a fine would be appropriate in accordance with our statement of policy on fines, as an alternative to imposing a fine or as mitigation in determining the amount, there may be circumstances in which Highways England puts forward an offer of reparations as part of the statutory enforcement process.

- 4.34 In the event that Highways England makes an offer of reparations, we would expect such an offer to be made as early as possible, including, where appropriate, ahead of a formal investigation. We may consider reparations which are offered at a later stage in the statutory enforcement process, but we would be unlikely to do so where it threatens the timely conclusion of our enforcement action.
- 4.35 Reparations will normally constitute public commitments so that there is a reputational incentive to deliver what is promised. For an offer of reparations to be considered instead of a fine or as mitigation in determining the amount of a fine, the offer would need to provide a comprehensive description of the actions to be taken by Highways England and the associated timeline for their delivery (including a description of what actions have already been taken where relevant).
- 4.36 Any offer of reparations from Highways England should also demonstrate how it complies with the following four principles:
- **Genuinely additional** to the commitments already made in the RIS and any other relevant provision in the Statutory Directions and Guidance. We will also ensure that any offer is additional to existing commitments on Highways England as a strategic highways company that may not be covered by the RIS and/or Statutory Directions and Guidance. This will include any circumstance where Highways England has been or may be funded to perform certain activities that would be covered by the offer of reparations. We will engage with the Department for Transport to ensure that any offer of reparations is genuinely additional.
 - **Appropriately targeted and proportionate** to the harm done so far as is possible. That is, reparations being offered are sufficient to compensate for the harm done to some meaningful degree and are targeted at those that have been affected by the failings that have given rise to such enforcement action. When considering this, we will consult with appropriate stakeholders including interest groups and representative organisations, as appropriate.
 - **Deliverable** by Highways England. Highways England should set out clearly how it proposes to deliver the reparations proposed, when it will do so, the timeline for their delivery and how it will ensure it has the desired effect.

- Provides **value for money** such that the benefits of the reparations exceed the costs using a standard cost/benefit methodology.
- 4.37 Where an offer of reparations is proposed by Highways England, as a matter of course we would engage with government to seek their views. We will also consider the impact of potential non-delivery on users of the SRN and wider stakeholders when assessing whether to accept reparations. However, an offer of reparations will not necessarily be accepted by ORR.
- 4.38 Depending on the facts of each case, acceptance of an offer of reparations may result in ORR deciding that a fine is no longer appropriate, or alternatively, that the amount of the proposed fine should be reduced because of the mitigating effect of the reparations.
- 4.39 If an offer of reparations is accepted, the conditions attached to accepting any such offer, the monitoring arrangements we will adopt and the repercussions of non-compliance will be set out to Highways England. We will closely monitor how Highways England delivers any agreed reparations. A failure to deliver agreed reparations will be treated very seriously by ORR.

Senior management remuneration

- 4.40 Taking statutory enforcement action against Highways England implies a serious failure of the organisation to comply with the RIS and/or Statutory Directions and Guidance, particularly when a fine is involved and/or an offer of reparations is accepted. We would therefore expect that any statutory enforcement action and/or any reparations we agree with Highways England are taken into account by Highways England when determining the performance of its senior management and therefore their remuneration.

5. Statement of policy on fines

- 5.1 We will have regard to this statement in deciding whether to impose a fine pursuant to section 11(2)(b) of the Act and in determining the amount of that fine.
- 5.2 We have the power under section 11(2)(b) of the Act, to require Highways England to pay a fine to the Secretary of State if we are satisfied that Highways England has contravened or is contravening the RIS and/or Statutory Directions and Guidance. It is for us to determine the appropriate level for a fine and to ensure that the level of fine is proportionate to the contravention. While imposing a fine is likely to be a last resort, the particular circumstances of a case may mean a fine is the most suitable action.
- 5.3 We are able to levy a fine for a past or current contravention, irrespective of whether we have issued a notice.
- 5.4 Pursuant to section 12(1) of the Act, we must exercise our enforcement functions under section 11 of the Act in the way that we consider most likely to promote the performance and efficiency of Highways England. We must also, in exercising these functions, have regard to a number of other factors set out in section 12(2) and section 12(3) of the Act (see Chapter 1, paragraph 1.8).
- 5.5 We will inform the Secretary of State of any intention to issue a fine including the amount of such fine. In accordance 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 level 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 currently envisage we would be likely to seek to impose a fine at a level that would be likely to do so.
- 5.6 Any fines issued to Highways England pursuant to section 11(2)(b) of the Act are paid by Highways England to the Secretary of State, who will ensure they are paid into the Consolidated Fund.
- 5.7 In setting our policy on fines we are aware that Highways England is a new organisation working within a new framework. We therefore consider it important to be able to be flexible in our approach. We expect our approach on enforcement and fines will evolve over time as we, Highways England and the industry learn from experience and gain a better understanding of how the regime operates, what levers are the most effective and how best to incentivise Highways England to efficiently and effectively deliver the RIS and ensure compliance with Statutory Directions and Guidance in order to deliver its objectives.

- 5.8 Taking this into account, we consider that the levying of a fine on Highways England in the current circumstances would, regardless of amount, have a significant reputational impact and therefore is expected to be effective in ensuring compliance. Consequently, any fine we impose on Highways England would normally be at the lower end of the scale of indicative fines set out below, while being sufficient in value to have a reputational impact.
- 5.9 Notwithstanding the above, we will consider contraventions on a case-by-case basis and may therefore decide to impose a larger fine where, taking into account our duties under section 12 of the Act and the public interest, we consider it is warranted. Any consideration of the amount of a fine will be determined in accordance with the provisions of this Chapter 5.

Is a fine appropriate?

5.10 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. In deciding whether a fine is appropriate we will:

- consider the seriousness of the contravention (see paragraphs 5.12 – 5.17);
- take full account of the particular facts and circumstances of the contravention, including any representations and objections made to us and any evidence provided;
- take into account whether we have issued a notice to Highways England in respect of the contravention and Highways England's compliance with that notice;
- take account of the six penalty principles²⁶ set out in the Macrory report – 'Regulatory Justice: Making Sanctions Effective'²⁷ – and the principles of enforcement set out in Chapter 3;
- have regard to guidance provided by the Secretary of State and HM Treasury under section 13(2) of the Act²⁸.

²⁶ The six penalty principles are: (i) aim to change the behaviour of the offender; (ii) aim to eliminate any financial gain or benefit from non-compliance; (iii) be responsive and consider what is appropriate for the particular offender and regulatory issue, which can include punishment and the public stigma that should be associated with a criminal conviction; (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.

²⁷ <http://webarchive.nationalarchives.gov.uk/20121212135622/http://www.bis.gov.uk/files/file44593.pdf>

²⁸ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/411076/statutory-guidance-on-fines.pdf

- take into consideration any offer of reparations by Highways England in accordance with the principles set out in Chapter 4, paragraphs 4.33 – 4.39; and
- act in a manner best calculated to fulfil the duties placed upon us by section 12 of the Act.

Seriousness of the contravention

5.11 In deciding whether a fine is appropriate we will normally, as a starting point, consider the seriousness of the contravention. We distinguish five levels of seriousness of a contravention of the RIS and/or Statutory Directions and Guidance. These are:

- technical or de minimis;
- less serious;
- moderately serious;
- serious; and
- very serious.

5.12 In considering the seriousness of the contravention we will look at:

- the actual and potential impact caused to third parties, including users of the SRN and government, because of the non-compliance with the RIS and/or Statutory Directions and Guidance;
- 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; and
- whether Highways England has acted knowingly or intentionally with regard to the contravention.

5.13 The table below outlines some examples of how we may categorise the seriousness of a contravention. The aim is to help us determine, in the case of a contravention by Highways England, the starting point as regards the likely statutory enforcement action we will take and whether we would impose a fine, where we have decided, in accordance with this policy, to proceed with statutory enforcement action.

5.14 In particular, the levels of seriousness categorisations help us determine the amount of a fine to which the other factors in this statement might then lead us to make adjustments. The table also sets out an indicative level as to the likely maximum amount we will fine for each level of seriousness (see paragraphs 5.24

– 5.32 for further details on level and scale of fines). However, as we consider the particular facts and circumstances of each individual case, we may consider it appropriate to deviate from this in certain situations.

5.15 Table of levels of seriousness:

Seriousness of a contravention	Example	Indicative statutory enforcement action and level of fine
Technical or de minimis	A contravention would probably involve minimal responsibility on Highways England's part and/or cause no impact or potential impact to users of the SRN, government or other stakeholders.	<ul style="list-style-type: none"> • Usually no statutory enforcement action.
Less serious	<p>A contravention would be likely to involve some responsibility on Highways England's part and is likely to have some impact on SRN users, government or other stakeholders.</p> <p>For example, impacting or potentially impacting on SRN users' ability to plan journeys.</p>	<ul style="list-style-type: none"> • Issue a notice setting out actions to be taken and timeframe. • Unlikely to impose a fine but may do so if appropriate in accordance with the provisions of Chapter 5. • Any fine levied in this category would not normally exceed £0.5 million (0.02%).
Moderately serious	<p>A contravention might involve greater responsibility on Highways England's part and will impact on SRN users, government or other stakeholders.</p> <p>For example, leading to disruption for users of the SRN for a significant period of time or impacting on Highways England's wider programme.</p>	<ul style="list-style-type: none"> • Issue a notice setting out actions to be taken and timeframe. • Unlikely to impose a fine but may do so if appropriate in accordance with the provisions of Chapter 5. • Any fine levied in this category would not normally exceed £1 million (0.04%).
Serious	<p>A contravention might involve significant responsibility on Highways England's part and continuing failure by Highways England to adequately address and put in place action plans to remedy the issue.</p> <p>The contravention may form part of a wider sustained, systemic or persistent failure, and there may be the potential for further similar harm to be repeated if the problems are not addressed.</p>	<ul style="list-style-type: none"> • Issue a notice setting out actions to be taken and timeframe and/or impose a fine. • If a fine is levied, the amount of the fine will be determined in accordance with the provisions of Chapter 5. • Any fine levied in this category would not normally exceed £2.5 million (0.1%).

Seriousness of a contravention	Example	Indicative statutory enforcement action and level of fine
Very serious	A contravention might involve significant harm, or the risk of significant harm, being caused to a wide range of third parties and/or greater culpability on the part of the Highways England, for example, where Highways England was intentionally misleading.	<ul style="list-style-type: none"> • Issue a notice setting out actions to be taken and timeframe and/or impose a fine. • If a fine is levied, the amount of the fine will be determined in accordance with the provisions of Chapter 5. • Any fine levied in this category would not normally exceed £25 million (1%).

5.16 The figures in brackets in the table show the amount as a percentage of Highways England’s average annual funding. This is based on the total funding of Highways England for RP1 (as set out in the Statement of Funds Available in Part 3 of the RIS) averaged out and rounded to give an approximate figure of £2.5 billion per annum.

Determining the amount of a fine

5.17 Where we have decided that, in accordance with the principles set out in this Chapter 5, a fine is appropriate, the amount of that fine will be determined on a case-by-case basis, taking into account the levels of seriousness and the general principles set out below.

Reaching a conclusion on the amount

5.18 In determining the amount of the fine we will:

- seek to ensure the fine is proportionate to the seriousness of the contravention. We will also take into account that levying a fine has a reputational effect and, to a lesser extent, a punitive effect. The reputational effect in particular is capable of being a powerful tool and can have an incentivising impact to encourage compliance, as set out in paragraph 5.8;
- take into consideration any mitigating or aggravating factors in accordance with paragraphs 5.20 – 5.23;
- take into consideration any offer of reparations by Highways England in accordance with Chapter 4, paragraphs 4.33 – 4.39; and
- act in a manner best calculated to fulfil the duties placed upon us by section 12 of the Act.

Adjustments for mitigating or aggravating factors

5.19 In determining the amount of the fine, we will adjust any fine (up or down) to take account of relevant mitigating and aggravating factors, having regard to the particular facts and circumstances of each case. The appropriate adjustment will be a matter of judgement, taking any previous cases where fines have been issued against Highways England into account for consistency. We will apply an overall adjustment reflecting the net effect of all the relevant mitigating and aggravating factors.

5.20 We may consider the following factors as mitigating or aggravating factors, as appropriate:

- the extent to which the contravention is considered to be within the control of Highways England's management;
- the extent of involvement of directors or senior management at Highways England in the action or inaction which caused the contravention or their lack of appropriate involvement to remedy the contravention;
- the extent to which Highways England was proactive in making us aware of the contravention;
- any steps which have been taken to rectify the contravention including whether these steps were initiated proactively by Highways England or in response to our actions;
- any steps which have been taken to minimise the risk of the contravention recurring including reviewing the internal control framework regarding the Statutory Directions and Guidance and/or the RIS;
- the extent to which this is a repeated or continuing contravention of the Statutory Directions and Guidance and/or the RIS, particularly if subsequent non-compliance occurs after Highways England becomes or is made aware of, the initial contravention;
- any reparations offered in accordance with our criteria for reparations (see Chapter 4, paragraphs 4.33 – 4.39) and not already taken into account as a means of determining whether or not a fine is appropriate and/or any other actions that do not meet the criteria for reparations but which have been or will be taken by Highways England in order to make worthwhile restoration to those who have suffered the consequences of the contravention; and
- the extent to which Highways England co-operates with our investigation.

- 5.21 Other mitigating or aggravating factors may arise depending on the particular facts and circumstances of a specific case and will be taken into account accordingly.
- 5.22 The net effect of all mitigating and aggravating factors may be significant. Potentially, taken together these adjustments could reduce a fine to zero, or significantly increase it.

Level and scale of fines

- 5.23 While we would not normally expect to levy a fine on Highways England that would exceed £25 million or 1% of Highways England's average annual funding, we will consider the amount of a fine on a case-by-case basis and in accordance with the provisions of this Chapter and the general principles of enforcement set out in Chapter 3. There could therefore be certain circumstances where the seriousness of the contravention and the relevant factors in a particular case are such that we consider it is appropriate to impose a fine in excess of £25 million.
- 5.24 We recognise that in other regulated sectors, such as rail, aviation and energy, there is a statutory maximum of 10% of turnover as to the amount that can be levied in respect of a fine for a breach of a licence. While there is no such maximum limit specified in the Act or related legislation, we do not envisage we would impose a fine that would be close to 10% of Highways England's average annual funding.²⁹
- 5.25 The following paragraphs set out the indicative scale of fines for each of the five levels of seriousness. We would expect to utilise the whole spectrum and would only expect to levy a fine towards the upper end in very limited circumstances.

Contraventions falling into the technical or de minimis category

- 5.26 We would not normally expect to impose a fine for a contravention which falls into the technical or de minimis category.

Contraventions falling into the less serious and moderately serious categories

- 5.27 We will consider each case that falls into either of these categories on its merits to determine whether a fine is appropriate. Any such consideration would be in accordance with the provisions of this Chapter and the general principles of enforcement set out in Chapter 3.

²⁹ In the context of Highways England, 10% of its average funding for a year would be around £250 million. This is based on the total funding for Highways England for RP1, as set out in the Statement of Funds Available in Part 3 of the RIS, averaged out on a per annum basis to provide a figure of £2.5 billion per annum.

5.28 As a general rule we would not expect to impose a fine for a contravention which falls into the less serious category or the moderately serious category. Notwithstanding this, if we determine that a fine should be imposed on Highways England for a contravention that falls into one of these two categories, the level of any fine would not normally exceed £0.5 million for a contravention falling into the less serious category and would not normally exceed £1 million for a contravention falling into the moderately serious category.

Contraventions falling into the serious category

5.29 Where there is a contravention that falls into the serious category and we determine, in accordance with the provisions of this Chapter and the general principles of enforcement set out in Chapter 3 that a fine is appropriate, any such fine would not normally exceed £2.5 million.

Contraventions falling into the very serious category

5.30 Where there is a contravention that falls within the very serious category we would expect to impose a fine that would have a more significant reputational and financial impact on Highways England to reflect the seriousness of the contravention and the impact caused.

5.31 Accordingly, where there is a contravention that falls within this category and we determine, in accordance with the provisions of this Chapter and the general principles of enforcement set out in Chapter 3 that a fine is appropriate, any such fine would not normally exceed £25 million.

Procedural requirements

5.32 The Act does not set out any procedural requirements that we must follow when we issue a fine to Highways England. However, the procedural requirements we intend to follow when we are proposing to impose a fine are set out below.

Procedure

5.33 Prior to issuing a fine, we will issue a notification that we intend to impose a fine on Highways England. This will:

- state that ORR proposes to impose a fine on Highways England and the amount of the fine proposed;
- set out the condition of the RIS and/or Statutory Directions and Guidance which Highways England has contravened or is contravening;
- specify the acts or omissions which, in ORR's opinion, constitute contraventions of that condition of the RIS and/or Statutory Directions and Guidance and any

other facts which, in ORR's opinion, justify the imposition of a fine and the amount of the fine proposed; and

- specify the period (not being less than 21 days from the date of publication of this notification) within which representations or objections with respect to the proposed fine may be made.

5.34 We will publish the notification regarding our intention to impose 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.

5.35 We will give any representations and objections that are made (and not withdrawn) due consideration in determining whether to proceed with the imposition of a fine.

5.36 Having followed the procedure set out above and if we have determined to proceed with imposing 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 being levied;
- 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 which, in ORR's opinion, constitute contraventions of that condition of the RIS and/or Statutory Directions and Guidance and any other facts which, 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 (not being less than 14 days from the date of publication of this notification) by which the fine must be paid.

5.37 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.

6. General

Publication

- 6.1 It is our intention to publish all notices, final decision letters and formal responses from Highways England where we have taken statutory enforcement action. Any details of a contravention and enforcement action taken in relation to such contravention may also be included in reports published by us.
- 6.2 We may make public a failure by Highways England to comply with a notice issued pursuant to section 11 of the Act.
- 6.3 We may also, from time to time and as appropriate bearing in mind our commitment to transparency (see Chapter 3) and as set out in this policy, publish details of any correspondence, action and/or reports where we have taken non-statutory enforcement action against Highways England in relation to an actual or potential contravention of the RIS and/or Statutory Directions and Guidance. This may include making public comment in relation to a contravention or where we are concerned about an aspect of Highways England's performance. We will consider the appropriate time to make public comment and publish documents taking into account the circumstances of the individual case.
- 6.4 Any documents we publish will be published on our website unless we are of the opinion that all or part of these documents are of a sensitive or confidential nature and restricting publication is compliant with the Freedom of Information Act 2000 and/or the Environmental Information Regulations 2004.

Revision of policy

- 6.5 We may, from time to time, revise this policy following appropriate consultation.
- 6.6 We will carry out a first review of this policy two years from the date of this publication.

Annex A – ORR’s statutory duties under the Act

Sections 10 – 13 of the Infrastructure Act 2015

10 Monitor

- (1) The Office of Rail Regulation must carry out activities to monitor how a strategic highways company exercises its functions.
- (2) Those activities may include investigating, publishing reports or giving advice to the Secretary of State on--
 - (a) whether, how and at what cost a strategic highways company has achieved its objectives under a Road Investment Strategy,
 - (b) objectives for a future Road Investment Strategy, and
 - (c) the effect of directions and guidance given by the Secretary of State to a strategic highways company under this Part.
- (3) The Office may direct a strategic highways company to provide such information as the Office considers necessary for the purpose of carrying out activities under subsection (1).
- (4) A direction under subsection (3) may specify the form and manner in which the information is to be provided.
- (5) A direction under subsection (3) may not require--
 - (a) production of a document which the strategic highways company could not be compelled to produce in civil proceedings, or
 - (b) provision of information which the company could not be compelled to give in evidence in such proceedings.
- (6) The strategic highways company must comply with a direction under subsection (3).
- (7) The Secretary of State must, in exercising functions under this Part, have regard to any advice given to him or her by the Office under this section.
- (8) The Secretary of State must lay a report published by the Office under this section before Parliament.
- (9) In Part 2 (Office of Rail Regulation) of the Railways and Transport Safety Act 2003, after section 15 insert--

"15A Change of name

- (1) The Secretary of State may by regulations make provision for the body established by section 15 to be known by a different name.
- (2) Regulations under this section may amend this Act or any other enactment, whenever passed or made.
- (3) Regulations under this section are to be made by statutory instrument.
- (4) A statutory instrument which contains regulations under this section is subject to annulment in pursuance of a resolution of either House of Parliament."

11 Monitor: compliance and fines

- (1) If the Office of Rail Regulation is satisfied that a strategic highways company has contravened or is contravening--
 - (a) section 3(6) (compliance with the Road Investment Strategy), or
 - (b) section 6(3) (compliance with directions and regard to guidance),

the Office may take one or more of the steps mentioned in subsection (2).

- (2) The Office may--
 - (a) give notice to the company as to the contravention and the steps the company must take in order to remedy it;
 - (b) require the company to pay a fine to the Secretary of State.

12 Monitor: general duties

- (1) The Office of Rail Regulation must exercise its functions under sections 10 and 11 in the way that it considers most likely to promote--
 - (a) the performance, and
 - (b) the efficiency,

of the strategic highways company.

- (2) The Office must also, in exercising those functions, have regard to--
 - (a) the interests of users of highways,
 - (b) the safety of users of highways,
 - (c) the economic impact of the way in which the strategic highways company achieves its objectives,

- (d) the environmental impact of the way in which the strategic highways company achieves its objectives,
 - (e) the long-term maintenance and management of highways, and
 - (f) the principles in subsection (3).
- (3) The principles are that--
- (a) regulatory activities should be carried out in a way which is transparent, accountable, proportionate and consistent, and
 - (b) regulatory activities should be targeted only at cases in which action is needed.

13 Monitor: guidance

- (1) The Secretary of State may from time to time give the Office of Rail Regulation guidance as to the manner in which it is to carry out its activities under section 10.
- (2) The Secretary of State and the Treasury, acting jointly, must give the Office guidance as to the circumstances in which the payment of a fine under section 11 should be required.
- (3) The Office must have regard to guidance given to it under this section.
- (4) Guidance under this section must be published by the Secretary of State in such manner as he or she considers appropriate.



© Crown copyright 2015

This publication is licensed under the terms of the Open Government Licence v3.0 except where otherwise stated. To view this licence, visit nationalarchives.gov.uk/doc/open-government-licence/version/3 or write to the Information Policy Team, The National Archives, Kew, London TW9 4DU, or email: psi@nationalarchives.gsi.gov.uk.

Where we have identified any third party copyright information you will need to obtain permission from the copyright holders concerned.

This publication is available at orr.gov.uk.

Any enquiries regarding this publication should be sent to us at orr.gov.uk