



## **Draft Enforcement Policy for Highways England**

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



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# 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<sup>1</sup>.

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## 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**)<sup>2</sup>; 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**)<sup>3</sup> 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 This is the draft enforcement policy, which is subject to consultation from 3 July – 25 September 2015. We intend to publish a final enforcement policy before the end of November 2015.

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

<sup>2</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/382808/dft-ris-overview.pdf](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>.

<sup>3</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/431389/strategic-highways-licence.pdf](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.

## Background

- 1.5 ORR carries out monitoring and enforcement activities of Highways England in accordance with sections 10 – 13 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 exercising its functions in accordance with its legal duties and obligations.

## 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. In addition, we are also required to have regard to a number of other factors when exercising our enforcement functions<sup>4</sup>. These factors are not in any order of priority and it is for us to give appropriate weight to all factors when considering enforcement in each individual case. 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.

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<sup>4</sup> See section 12(2) and 12(3) of the Act.

1.9 We will also exercise our enforcement functions in accordance with the following principles<sup>5</sup>:

- 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;
- 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, 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 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 that we will go through a staged enforcement approach. This involves following 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.

## Stage 1 – deciding whether to take enforcement action

1.12 Where a potential or actual contravention has been identified we would generally expect to follow a staged approach to enforcement. The first stage of this approach

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<sup>5</sup> 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 (cut and paste link):

<http://webarchive.nationalarchives.gov.uk/20100407162704/http://archive.cabinetoffice.gov.uk/brc/upload/assets/www.brc.gov.uk/principlesleaflet.pdf>

involves consideration of the nature of the potential or actual contravention and whether it requires enforcement action from ORR.

- 1.13 Having gone through Stage 1 and if we determine enforcement action is required, we would generally expect to go through Stage 2 and take non-statutory enforcement action before, in the case of an actual contravention, going on to Stage 3 and considering statutory enforcement action.
- 1.14 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 was committed deliberately such as a deliberate or serious misreporting of data by Highways England.

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

- **Step 2** – this involves an escalation of non-statutory enforcement action and involves 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.

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

## Stage 3 – statutory enforcement action

1.16 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 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 above stages, we would expect to follow the steps set out below.

1.17 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 it<sup>6</sup>; and/or
- require Highways England to pay a fine to the Secretary of State<sup>7</sup>.

1.18 Stage 3 is only applicable where we are considering an actual (as opposed to potential) contravention<sup>8</sup>. 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 and 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.

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<sup>6</sup> Section 11(2)(a) of the Act.

<sup>7</sup> Section 11(2)(b) of the Act.

<sup>8</sup> 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.



- **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 on-going contravention as well as making Highways England’s failure to comply with the notice public.
- **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.

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, in accordance with the steps set out above, 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 Our starting point in determining whether to issue a fine will normally be the seriousness of the contravention. We will consider a number of factors in determining whether a fine is appropriate including the seriousness of the contravention, our duties under section 12 of the Act, guidance issued to us by the Secretary of State and HM Treasury and any mitigating or aggravating factors.

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.

1.23 In setting our current policy on fines we recognise that Highways England is a public 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. For most contraventions where we decide to issue a fine we would not normally expect to issue a fine which exceeds £2.5 million. 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 they are likely to be of an amount up to £25 million (although they 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 the 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 company<sup>9</sup>, to set a RIS<sup>10</sup> and to give Highways England statutory directions and guidance as to the manner in which it is to exercise its functions<sup>11</sup> such as the Licence.

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<sup>12</sup>. ORR must exercise its functions in the way that it considers most likely to promote the performance and the efficiency of Highways England in exercising its functions<sup>13</sup>.
- 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)<sup>14</sup>.
- 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<sup>15</sup>.

### 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 the Overview<sup>16</sup> and

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<sup>9</sup> Section 1 and section 2 of the Act.

<sup>10</sup> Section 3 of the Act.

<sup>11</sup> Section 6 of the Act.

<sup>12</sup> Section 10 of the Act.

<sup>13</sup> Section 12 of the Act.

<sup>14</sup> Section 11 of the Act.

<sup>15</sup> Section 13 of the Act.

<sup>16</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/382808/dft-ris-overview.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/382808/dft-ris-overview.pdf).

the Strategic Vision, the Investment Plan (which includes the Statement of Funds Available) and the Performance Specification<sup>17</sup>.

## **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<sup>18</sup>. Highways England must, in exercising its functions, comply with any such direction and have regard to any such guidance<sup>19</sup>.
- 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 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 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.
- 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.

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<sup>17</sup> <https://www.gov.uk/government/publications/road-investment-strategy-for-the-2015-to-2020-road-period>.

<sup>18</sup> Section 6(1) of the Act.

<sup>19</sup> Section 6(3) 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<sup>20</sup>. We must have regard to this guidance (paragraphs 19 – 24) when exercising our statutory enforcement powers.

### **Actions 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 or Statutory Directions and Guidance, the Secretary of State will co-ordinate and agree with ORR the application of sanctions.

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<sup>20</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/411076/statutory-guidance-on-fines.pdf](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 will ensure that Highways England is carrying out its functions appropriately and in accordance with its duties under the Act, and in particular ensuring it complies with the RIS and Statutory Directions and Guidance.
- 3.3 We encourage Highways England to deliver its objectives, 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 Highways England performs its functions efficiently to deliver a safe and reliable SRN which represents value for money.
- 3.4 Our primary objective in undertaking enforcement action is to change the future behaviour of Highways England so as to deter non-compliance with Statutory Directions and Guidance and the RIS (both specifically and in general).

### Enforcement principles

- 3.5 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).
- 3.6 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

- 3.7 We will focus our investigation on those contraventions of the RIS and 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.

- 3.8 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.
- 3.9 We will, however, 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.
- 3.10 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 statutory enforcement action. We will also consider the urgency of addressing any contravention in deciding on the appropriate course of action.

## Targeted

- 3.11 As set out in paragraph 3.9, we will target our activities at those areas where contravention of the RIS 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 other stakeholders or on asset management.

## Consistency

- 3.12 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.

- 3.13 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<sup>21</sup>. However, this does not necessarily mean we will take the same approach or course of action for Highways England as we do in rail 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.

## Transparency

3.14 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.

3.15 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 Statutory Directions and Guidance and the RIS), we will make this clear to Highways England in accordance with the process and procedures set out in this policy.

3.16 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, whether we are taking non-statutory or statutory enforcement action, and the next steps; and
- where we consider statutory enforcement action is appropriate, we will seek Highways England's views before proceeding with statutory enforcement action.

3.17 We may, from time to time, choose to engage with certain stakeholders and take advice to inform our view on what would be appropriate action to take in a particular circumstance and will make it clear when and where we have done so.

## Accountability

3.18 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.

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<sup>21</sup> 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>.

- 3.19 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.
- 3.20 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.
- 3.21 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 involves 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<sup>22</sup>.
- 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 Our staged approach to enforcement is set out in paragraphs 4.11 – 4.32 below.

### 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 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<sup>23</sup>.
- 4.7 This 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.

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<sup>22</sup> 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.

<sup>23</sup> 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 will intervene and take action. This will ensure that steps are taken and plans put in place to address these concerns and to put 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 involving review, investigation and escalation, within reasonable timescales according to the urgency of the case, leading ultimately to consideration of statutory enforcement action.

4.10 However, in certain circumstances we may choose not to follow the staged approach and instead go straight to consideration of 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 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; and
- the reason for the contravention, e.g. 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 consider 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 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 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 or carries out its obligations under the Licence or other Statutory Directions and Guidance and/or publish 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. 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 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 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;
- making public comment on Highways England's response and action. 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;
- giving advice to the Secretary of State pursuant to section 10(2) of the Act;
- 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 on-going 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; and
- 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 Licence, any other Statutory Directions and Guidance and/or the RIS 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 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 our 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 on-going 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 and its failure to comply with the terms of the notice.

#### **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 or not 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 principles of enforcement 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.



## 5. Statement of policy on fines

- 5.1 We will have regard to this statement in deciding whether to levy a fine pursuant to section 11(2)(b) of the Act and in determining the scale of that fine.
- 5.2 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).
- 5.3 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 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.
- 5.4 We are able to levy a fine for a past or current contravention, irrespective of whether we have issued a notice.
- 5.5 We will inform the Secretary of State of any intention to issue a fine including the amount of such fine. 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.
- 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 current 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 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, after 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 Statutory Directions and Guidance and to deter it from future non-compliance.

5.11 Our starting point in determining whether to issue a fine will normally be the seriousness of the contravention. 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.

5.12 In deciding whether a fine is appropriate and the level of that fine we will also:

- take full account of the particular facts and circumstances of the contravention, including the seriousness of the contravention and 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 principles set out in the Macrory report – 'Regulatory Justice: Making Sanctions Effective'<sup>24</sup> 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 Act<sup>25</sup>;

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<sup>24</sup> (cut and paste link):

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

- 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 mitigating or aggravating factors; and
- act in a manner best calculated to fulfil the duties placed upon us by section 12 of the Act.

5.13 If, having followed this process we conclude it is not appropriate to issue a fine for that particular contravention we will not go on to consider the issue of proportionality and the other factors relevant to determining the amount of a fine.

### **Issuing a fine – adjustments for mitigating or aggravating factors**

5.14 Where we decide that a fine is appropriate, in determining the amount, we will adjust any fine (up or down) to take account of relevant mitigating and aggravating factors, taking into account 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.

5.15 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 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;

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<sup>25</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/411076/statutory-guidance-on-fines.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/411076/statutory-guidance-on-fines.pdf).

- any steps which have been taken to minimise the risk of the contravention recurring including reviewing the internal control framework regarding Statutory Directions and Guidance and/or the RIS;
- repeated or continuing contravention of Statutory Directions and Guidance and/or the RIS, particularly if subsequent non-compliance occurs after Highways England becomes aware of, or is made aware of, the initial contravention;
- the extent to which Highways England co-operates with our investigation.

5.16 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.

5.17 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.

## Seriousness of the contravention

5.18 We distinguish five levels of seriousness of a contravention of Statutory Directions and Guidance and the RIS. These are:

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

5.19 The table below outlines some examples of how we may categorise the seriousness of a contravention. The aim of these levels 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 where we have decided, in accordance with this policy, to proceed with statutory enforcement action. Where we may impose a fine we have set out an indicative level as to the likely maximum amount we will fine for each level of seriousness.

5.20 The aim of this is to help us determine the starting amount for a fine to which the other factors in this statement might then lead us to make adjustments. 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.

5.21 The figures in brackets in the table below 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 down to give an approximate figure of £2.5 billion per annum.

5.22 Table of levels of seriousness

Seriousness of a contravention	Example	Indicative statutory enforcement action and level of fine
<b>Technical or de minimis</b>	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"> <li>• Usually no statutory enforcement action.</li> </ul>
<b>Less serious</b>	<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"> <li>• Issue a notice setting out actions to be taken and timeframe.</li> <li>• Unlikely to consider imposing a fine but may do if appropriate in accordance with the provisions of Chapter 5.</li> <li>• Any fine levied in this category would not normally exceed £2.5 million (0.1%).</li> </ul>
<b>Moderately serious</b>	<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 could impact on Highways England’s wider programme.</p>	<ul style="list-style-type: none"> <li>• Issue a notice setting out actions to be taken and timeframe.</li> <li>• Unlikely to consider imposing a fine but may do if appropriate in accordance with the provisions of Chapter 5.</li> <li>• Any fine levied in this category would not normally exceed £2.5 million (0.1%).</li> </ul>
<b>Serious</b>	<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"> <li>• Issue a notice setting out actions to be taken and timeframe and/or impose a fine.</li> <li>• If a fine is levied, the amount of the fine will be determined in accordance with the provisions of Chapter 5.</li> <li>• Any fine levied in this category would not normally exceed £2.5 million (0.1%).</li> </ul>

Seriousness of a contravention	Example	Indicative statutory enforcement action and level of fine
<b>Very serious</b>	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"> <li>• Issue a notice setting out actions to be taken and timeframe and/or impose a fine.</li> <li>• If a fine is levied, the amount of the fine will be determined in accordance with the provisions of Chapter 5.</li> <li>• Any fine levied in this category would not normally exceed £25 million (1%).</li> </ul>

## Reaching a conclusion on the amount of the fine

5.23 Having considered, to the extent appropriate, all the factors set out above, we will determine an appropriate amount for a fine.

5.24 The amount of a fine will be determined on a case-by-case basis but taking into account the general principles set out below.

## Level of Fines

5.25 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 contravention and relevant factors in a particular case are such that we consider it is appropriate to impose a fine in excess of £25 million.

5.26 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 a 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<sup>26</sup>.

5.27 The following paragraphs set out the likely level of fines we will impose for the five levels of seriousness.

<sup>26</sup> 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.

## **Contraventions falling into the technical or de minimis, less serious and moderately serious categories**

5.28 We will consider each case that falls into one 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.

5.29 As a general rule we would not expect to impose a fine for a contravention which falls into the technical or de minimis category, 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 categories, the level of any fine would not normally exceed £2.5 million although we would expect it to be at the lower end of the scale.

## **Contraventions falling into the serious category**

5.30 Where there is a contravention that falls within 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**

5.31 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.

5.32 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.

5.33 We would expect to utilise the whole spectrum and would only expect to levy a fine towards the upper end in very limited circumstances.

## **Procedural requirements**

5.34 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

5.35 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;
- 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.

5.36 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.

5.37 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.

5.38 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.



5.39 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 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 in relation to an actual or potential contravention of the RIS and/or Statutory Directions and Guidance by Highways England. This may include making public comment in relation to a contravention or where we are concerned about an aspect of Highways England's performance.
- 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 enforcement policy following appropriate consultation.
- 6.6 We will carry out a first review of this enforcement policy no later than two years after the date of publication.

# Annex A – ORR’s statutory duties

## 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.

Use of the name, the Office of Rail and Road, reflects the new highways monitor functions conferred on ORR by the Infrastructure Act 2015. Until this name change is confirmed by legislation, the Office of Rail Regulation will continue to be used in all documents, decisions and matters having legal effects or consequences.



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