



# Enforcement Policy for Highways England

Consultation document

3 July 2015

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# 1. Introduction

## Enforcement role

- 1.1 The Office of Rail and Road (**ORR**) is the Monitor for Highways England. Highways England is responsible for operating, maintaining and improving the Strategic Road Network in England<sup>1</sup>.
- 1.2 We carry out monitoring and enforcement activities as Monitor of Highways England in accordance with the provisions of Part 1 of the Infrastructure Act 2015 (the **Act**).
- 1.3 We have enforcement powers under the Act 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.
- 1.4 Section 11 of the Act enables us to take statutory enforcement action where we are satisfied that Highways England has contravened or is contravening compliance with the RIS and/or Statutory Directions and Guidance. Where we are satisfied that there has been or is such a contravention 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; and/or
  - require Highways England to pay a fine to the Secretary of State.
- 1.5 In addition to our statutory enforcement powers, we recognise that non-statutory enforcement action is also a valuable enforcement tool. Consequently we intend to take a staged approach to enforcement and 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 is set out in our policy.

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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).

1.6 Our statutory and non-statutory enforcement powers mean we can hold Highways England to account to ensure it delivers the RIS and carries out its functions in accordance with the provisions of the Licence and any other Statutory Directions and Guidance.

## Our objective

1.7 To provide clarity to Highways England, government and stakeholders we intend to publish an enforcement policy. This will set out how we intend to enforce compliance by Highways England with the RIS and Statutory Directions and Guidance, as well as the options available to us in taking enforcement action (both statutory and non-statutory) against Highways England.

1.8 Our enforcement approach is informed by best practice from other regulatory and monitoring regimes and the following principles:

- proportionality;
- targeted;
- consistency;
- transparency; and
- accountability.

1.9 The above are the principles of the Better Regulation Task Force and are the principles used by us in respect of our enforcement functions in our role as the regulator of railways in Great Britain. We believe these enforcement policy principles are sound and consistent with the wider regulatory environment as well as our enforcement functions in rail.

1.10 In developing our enforcement policy we have had regard to our approach and experience as the regulator for the railway in Great Britain, in particular our on-going review of our economic enforcement policy and penalties statement for rail following consultation on options for improvement<sup>4</sup>.

1.11 We expect our approach on enforcement will evolve over time as we, Highways England and the industry learn from experience. We consider it important to be flexible in our approach, recognising that this is a new role and a new approach for us and Highways England.

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<sup>4</sup> This consultation was issued on 8 December 2014 and closed on 6 February 2015. It can be viewed here: <http://orr.gov.uk/consultations/policy-consultations/closed-consultations/closed-consultations-2015/economic-enforcement-policy-consultation>

## Seeking your views

1.12 This is the second consultation document in connection with ORR's roles as Monitor of Highways England. Our first consultation, "*Monitoring Highways England - First consultation document*"<sup>5</sup>, closed on 19 June 2015 and we are now considering the responses we received and how to reflect these in our final monitoring framework.

1.13 Our draft enforcement policy is attached at Annex A.

1.14 We welcome views on any aspect of this consultation and the draft enforcement policy. However we are particularly interested in your views with respect to the following questions:

1. Do you have any general comments on the policy, for example, comments on how ORR can improve the format and style of the document to make it a more practical reference document?
2. Do you agree that ORR's enforcement role should also be forward-looking and identify potential non-compliance with the RIS and/or Statutory Directions and Guidance before there is a contravention?
3. Do you agree with ORR's staged approach to enforcement and whether we have captured all relevant and necessary activities and action? Should anything else be listed?
4. Do you think the policy should allow for consideration of an offer of reparations by Highways England to be taken into account? If yes, do you think the policy should provide for an offer of reparations to be taken into account in the following situations on a flexible basis depending on the circumstances of each case?
  - During consideration of whether to issue a fine;
  - As a mitigating factor once it has been decided that a fine is appropriate when determining the amount of the fine.
5. Do you consider there are any other situations where an offer of reparations should be taken into account?
6. Do you think the seriousness categories set out in the table in Chapter 5, paragraph 5.22 of the policy are appropriate and helpful to Highways

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<sup>5</sup> Our first consultation can be viewed here: <http://orr.gov.uk/consultations/policy-consultations/open-consultations/monitoring-highways-england>

England and stakeholders? Do you agree with our approach to assessing the seriousness of non-compliance?

7. Do you agree with our indicative scale of fines set out in Chapter 5 of the policy and our expectation that fines imposed on Highways England will generally be set at a level to have a reputational as opposed to punitive impact?
8. Do you agree that fines should be a last resort and, as a general rule, intended to be used infrequently and for serious and very serious breaches as per the seriousness categories set out in the table in Chapter 5, paragraph 5.22 of the policy?

## Responding to this consultation

1.15 The consultation period begins on 3 July 2015 and will run until 25 September 2015. Please ensure that your response reaches us before the closing date. If you would like further copies of this consultation document, it can be found at [http://www.orr.gov.uk/data/assets/pdf\\_file/0013/18310/highways-england-draft-enforcement-policy.pdf](http://www.orr.gov.uk/data/assets/pdf_file/0013/18310/highways-england-draft-enforcement-policy.pdf) or you can contact us on the details below if you need alternative formats (Braille, audio CD, etc.).

1.16 Please send your consultation responses to:

**Richard Coates**

**Head of Performance, Highways Monitor**

**Office of Rail and Road, 3rd Floor, One Kemble Street, London W2B 4AN**

**Email: [highwaysmonitor@orr.gsi.gov.uk](mailto:highwaysmonitor@orr.gsi.gov.uk)**

**Telephone: 020 7282 2166**

1.17 When responding, please state whether you are responding as an individual or representing the views of an organisation. If responding on behalf of a larger organisation, please make it clear who the organisation represents and, where applicable, how the views of members were assembled.

1.18 You should indicate clearly if you wish all or part of your response to remain confidential to ORR otherwise we will publish it on our website and may quote from it. Where you send us a response in confidence, you should attach a summary, excluding the confidential information, which can be published freely. We may also publish the names of respondents in future documents or on our website, unless a respondent indicates that they wish their name to be withheld.

## **Freedom of Information**

- 1.19 Information provided in response to this consultation may be subject to publication or disclosure in accordance with the Freedom of Information Act 2000 or the Environmental Information Regulations 2004.
- 1.20 ORR will process your personal data in accordance with the Data Protection Act 1998. In the majority of circumstances this will mean that your personal data will not be disclosed to third parties.

## 2. Legal framework and enforcement principles

### Legal framework

2.1 Our new role is defined in the Act. The Act provides that:

- ORR must carry out activities to monitor how Highways England exercises its functions – section 10;
- ORR may take enforcement action by giving notice and/or issuing a fine to Highways England if ORR is satisfied that Highways England has contravened or is contravening compliance with the RIS or Statutory Directions and Guidance – section 11;
- ORR must exercise its monitor and enforcement functions in the way that it considers most likely to promote the performance and the efficiency of Highways England while also having regard to certain other factors– section 12;
- ORR must have regard to guidance given to it by the Secretary of State and HM Treasury – section 13.

### Enforcement principles

2.2 Our enforcement approach is informed by the following principles:

- 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 non-compliance 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.

2.3 In addition, we will exercise our enforcement powers in accordance with our duties under section 12 of the Act.



## Staged approach to enforcement

- 2.4 The purpose of enforcement is to ensure Highways England delivers the RIS and complies with Statutory Directions and Guidance.
- 2.5 It is our intention that where there has been or is a contravention of the RIS and/or Statutory Directions and Guidance or where a potential contravention has been identified, we will adopt a staged approach of review, investigation and escalation.
- 2.6 We have a range of non-statutory enforcement tools available to us which we can use to hold Highways England to account as part of our staged approach to enforcement. Our policy sets out the non-statutory enforcement actions that we may take.
- 2.7 This staged approach enables us to give Highways England the opportunity to explain the context of any non-compliance, the reasons for the actual or potential contravention and any measures being taken to mitigate and correct it. With respect to an actual (as opposed to potential) contravention, it also provides an opportunity for Highways England to achieve compliance without the need for statutory enforcement action, which may not always be the optimal outcome.
- 2.8 We want to encourage Highways England to work constructively with us. Our enforcement approach will take account of when issues are proactively flagged to us by Highways England along with the action and steps it intends to take to resolve the issue.

## Our statutory enforcement powers

- 2.9 Our policy also sets out the statutory enforcement action we may take.
- 2.10 However, there is no obligation on ORR to take statutory enforcement action where there has been or is a contravention. There is also no requirement that we issue a notice before issuing a fine. It is therefore for us to determine whether or not to proceed with statutory enforcement action and the nature of such action.

## Notices

- 2.11 Under section 11(2)(a) of the Act, where we are satisfied that Highways England has contravened or is contravening the RIS and/or the Licence we may take enforcement action by giving notice to Highways England as to the contravention and the steps it must take in order to remedy it.
- 2.12 The Act does not set out any procedural requirements as regards the process or requirements for issuing a notice. The guidance issued by the Secretary of State and

HM Treasury with regard to enforcement provides that ORR's published enforcement policy should make the process around taking enforcement action clear.

2.13 We have set out in our policy details regarding the process and procedure we will follow when we issue a notice pursuant to section 11(2)(a) of the Act.

## **Fines**

2.14 Under section 11(2)(b) of the Act, where we are satisfied that Highways England has contravened or is contravening the RIS and/or the Licence we may take enforcement action by requiring Highways England to pay a fine to the Secretary of State.

2.15 The Act does not set out any procedural requirements as regards the process or requirements for issuing a fine. The guidance issued by the Secretary of State and HM Treasury with regard to enforcement provides that ORR's published enforcement policy should make the process around taking enforcement action clear and any fine must be proportional to the contravention.

2.16 We have set out in our policy a statement of policy on fines (although this is not a requirement of the Act) which outlines the process and procedure we will follow when we issue a fine pursuant to section 11(2)(b) of the Act.

## 3. Key Issues

### Staged approach to enforcement

- 3.1 We see real value in early intervention and engagement with Highways England where there has been a contravention or there is a risk of a contravention developing in the future. Intervention at the early stages of an issue can be very effective in resolving concerns or contraventions so that further enforcement action, including taking statutory enforcement action, is not required.
- 3.2 The interface between early intervention and enforcement under our policy takes a staged approach. Our monitoring aims to identify and highlight issues as early as possible so that Highways England can manage risks effectively. As part of our approach to enforcement we intend to adopt a staged approach of review, investigation and escalation leading ultimately to consideration of statutory enforcement action for actual contraventions.
- 3.3 Our staged approach to enforcement includes three stages.

#### Stage 1 – deciding whether to take enforcement action

- 3.4 The first stage is consideration of the nature of the potential or actual contravention to determine whether enforcement action is required from ORR. 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 action.

#### Stage 2 – proceeding with non-statutory enforcement action

- 3.5 If we determine action is required, we would normally move to the second stage and proceed with non-statutory enforcement action.
- 3.6 The first step of Stage 2 involves carrying out various activities as part of the investigation into the actual or potential contravention. This may include holding meetings with Highways England, requesting Highways England to take certain action and making public comment on the issue.
- 3.7 If, having followed this process, we determine that further action is required and the matter should be escalated, we would move to the second step of our non-statutory enforcement approach. This would involve carrying out further activities such as requiring an explanation from Highways England as to why satisfactory progress to remedy the contravention has not been made, holding meetings at a senior level, making public our reports, giving advice to the Secretary of State pursuant to section

10(2) of the Act and, in respect of an actual (as opposed to potential) contravention, going on to consider whether statutory enforcement action should be taken and a notice and/or fine issued to Highways England.

### **Stage 3 – statutory enforcement action**

- 3.8 Stage 3 sets out our approach with regard to taking statutory enforcement action and involves five steps. The first step involves deciding whether to take statutory enforcement action. If we determine that we should take statutory enforcement action we will go on to the second step.
- 3.9 Step 2 involves notifying Highways England of our intention to proceed with statutory enforcement action and of the action we intend to take and the grounds on which action is being taken. We will also 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 statutory enforcement action.
- 3.10 Steps 3 to 5 set out the action we may take where we have decided to proceed with statutory enforcement action.
- 3.11 Step 3 involves issuing a notice to Highways England pursuant to section 11(2)(a) of the Act. Where we issue a notice, we will monitor Highways England's compliance with it (step 4). 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.
- 3.12 Step 5 is the issuing of a fine pursuant to section 11(2)(b) of the Act.
- 3.13 While we 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 can impose a fine on Highways England for a contravention irrespective of whether we have issued a notice or not. This means that notwithstanding the above, we may issue a fine without first issuing a notice or alternatively we may choose to issue a notice and a fine simultaneously for the same contravention.

### **Questions**

1. Do you have any general comments on the policy, for example, comments on how ORR can improve the format and style of the document to make it a more practical reference document?

2. Do you agree that ORR's enforcement role should also be forward-looking and identify potential non-compliance with the RIS and/or Statutory Directions and Guidance before there is a contravention?
3. Do you agree with ORR's staged approach to enforcement and whether we have captured all relevant and necessary activities and action? Should anything else be listed?

## Reparations

- 3.14 Our policy does not currently include any provision to take into account an offer of reparations from Highways England where it has contravened the RIS and/or Statutory Directions and Guidance. We recognise that in other regulated sectors, offers of reparations can be relevant to consideration of whether to impose a fine and/or as a mitigating factor when deciding the amount of a fine.
- 3.15 Reparations can provide an opportunity to enable funds to remain within the industry to provide additional benefits to stakeholders as opposed to a fine, which is paid to the Secretary of State with the funds ultimately being returned to government.
- 3.16 However, we also recognise that while reparations may keep money within the industry, the intention of reparations is that they should go towards something which is genuinely additional to the requirements Highways England is otherwise obliged to deliver. Consequently, reparations could be regarded as still diverting funds away from their original intended purpose.
- 3.17 We would be interested in receiving views from consultees on whether our enforcement policy should include reference to reparations as a factor to be taken into account when we are considering whether to issue a fine and/or the amount of the fine.

## Questions

4. Do you think the policy should allow for consideration of an offer of reparations by Highways England to be taken into account? If yes, do you think the policy should provide for an offer of reparations to be taken into account in the following situations on a flexible basis depending on the circumstances of each case?
  - During consideration of whether to issue a fine;
  - As a mitigating factor once it has been decided that a fine is appropriate when determining the amount of the fine.
5. Do you consider there are any other situations where an offer of reparations should be taken into account?

## Fines

- 3.18 We see benefit in having a range of options and enforcement tools at our disposal in order to create an effective enforcement regime. We consider the use of non-statutory enforcement action and statutory enforcement action can create a package of effective measures although we recognise that there may be circumstances where a fine is the most suitable course of action.
- 3.19 While we believe that financial penalties remain an important part of the enforcement toolkit, it is our intention that a fine will, in most cases, be a last resort after we have utilised all other enforcement tools at our disposal.
- 3.20 We generally see fines as a tool to encourage good performance and are of the view that fines do not necessarily have to be large to have a reputational and deterrent effect. Generally we would expect that any fine we impose on Highways England is likely to be at a level which will have a reputational rather than a punitive impact, while recognising that it is important to have the ability to levy a larger fine where the contravention or circumstances of the contravention require it.
- 3.21 In determining the level of fines that should be imposed on Highways England, we have had regard to a number of factors. In particular that Highways England is wholly owned and funded by government and imposing fines could have an impact on its financial sustainability and its ability to meet its obligations under the RIS and Statutory Directions and Guidance. We have also had regard to the fact that Highways England is a new organisation working within a new industry framework. Consequently it is important for us to be able to be flexible in our approach. Our enforcement policy sets out our current approach on fines within this context.
- 3.22 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 comply with Statutory Directions and Guidance to deliver its objectives.

## Questions

6. Do you think the seriousness categories set out in the table in Chapter 5, paragraph 5.22 of the policy are appropriate and helpful to Highways England and stakeholders? Do you agree with our approach to assessing the seriousness of non-compliance?

7. Do you agree with our indicative scale of fines set out in Chapter 5 of the policy and our expectation that fines imposed on Highways England will generally be set at a level to have a reputational as opposed to punitive impact?
8. Do you agree that fines should be a last resort and, as a general rule, intended to be used infrequently and for serious and very serious breaches as per the seriousness categories set out in the table in Chapter 5, paragraph 5.22 of the policy?

## 4. Next steps

### Stakeholder engagement

- 4.1 We are keen to hear the views of all of our stakeholders through this consultation.
- 4.2 We welcome opportunities to meet with stakeholders through individual meetings during the consultation period. Any stakeholder who wishes to meet with us to discuss this consultation and the draft enforcement policy should contact Richard Coates as per the details set out in paragraph 1.16 above.

### Responses

- 4.3 This consultation commences on 3 July 2015. The final date for responses is 16:00 on 25 September 2015.
- 4.4 Following the conclusion of the consultation period we will analyse responses and review our draft enforcement policy in light of them.
- 4.5 Approval of our enforcement policy is a reserved matter for approval by ORR's Board.
- 4.6 Our proposed enforcement policy is expected to be agreed by ORR's Board for publication by the end of November 2015.



# Annex A: Draft Enforcement Policy for Highways England

[http://www.orr.gov.uk/data/assets/pdf\\_file/0013/18310/highways-england-draft-enforcement-policy.pdf](http://www.orr.gov.uk/data/assets/pdf_file/0013/18310/highways-england-draft-enforcement-policy.pdf)

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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