



**Graham Richards**  
**Director, Planning and Performance**  
**30 March 2020**

Dear Stakeholder

**Consultation conclusion: Holding Highways England to account – ORR’s monitoring framework and enforcement policy for Highways England**

The second Road Investment Strategy (RIS2) sets out the funding available to Highways England covering the financial years 2020/21 to 2024/25.

Ahead of the start of RIS2, we consulted on an updated monitoring framework and enforcement policy for Highways England, titled *Holding Highways England to account*. The consultation on our draft policy ran from 6 January to 14 February 2020.

I would like to thank all those who took the time to respond to our consultation. The responses we received have allowed us to reflect on stakeholder views on our proposals and their impact.

This marks the conclusion of a piece of work which we had always intended to complete ahead of the second road period, though many of us are of course working in very different circumstances at present.

We have been engaging closely with Highways England in recent days and weeks, and will be continuing to do so in the weeks ahead, taking a pragmatic approach to our work as Monitor in the present circumstances.

**Overview of consultation responses**

We received 17 responses from a range of parties including Highways England, Transport Focus, Sub-national Transport Bodies (STBs) and local government, as well as trade associations, a community group and other respondents spanning the vehicle recovery industry, the supply chain, and academia.<sup>1</sup>

Of those who responded directly to our consultation questions, all supported our proposal to bring our monitoring framework and enforcement policy into a single document, and almost all supported our intent to focus on early resolution to resolve issues wherever possible. Almost all agreed with our proposal to introduce hearings as an additional tool in our policy. Most respondents agreed that fines should always be a last resort. While many respondents supported our approach of seeking to

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<sup>1</sup> We agreed to accept late responses from the Highways Term Maintenance Association (HTMA), the RAC and No Expressway Group (Woburn Sands)

avoid fines being taken from money that would otherwise be spent on the network, there were some differing views on how this should be achieved.

We also identified a number of wider themes across the consultation responses which are discussed in turn below. We have also set out where we have made changes to our policy in response to the issues raised.

Some respondents also chose to highlight to us concerns which were not directly related to the matters on which we were consulting. We will be considering these matters as part of our business as usual activities as Monitor and will respond to those concerns as appropriate.

Our final published policy is available on our [website here](#).

Yours sincerely

A handwritten signature in blue ink, appearing to read 'G. Richards', written in a cursive style.

Graham Richards

## **Consultation: summary of themes arising and ORR's response**

### **Combining our monitoring framework and enforcement policy**

Of those who responded directly to our consultation questions, all agreed with our approach in setting out a single document covering our monitoring framework and enforcement policy. A number of respondents felt this was an appropriate change given that the activities of monitoring and enforcement are interlinked. Highways England also agreed that combining the two documents was appropriate as this reflects the continuum of activity which occurs in practice.

One respondent, No Expressway Group (Woburn Sands), provided comments on our Monitoring Highways England's network investment document,<sup>2</sup> which sets out more information about how we monitor Highways England's network investment plans. We are currently considering our approach to that document and will consider the feedback received in the context of that work stream.

### **Focusing on early resolution**

Of those who answered, almost all agreed that we should focus on early resolution to resolve issues wherever possible. Norfolk County Council felt that ORR should be able to meaningfully intervene on projects either at an individual scheme level, or clusters of schemes, and highlighted specific concerns relating to the delivery of improvement schemes on the A47.

Regarding the points raised by Norfolk County Council, there is an established change control process through which government can approve changes to the RIS and investment plan. This can include changes to the original timescales that were envisaged for RIS1 schemes to start work. Once changes have been approved by government, we then monitor and report on delivery of the revised programme. Three of the schemes raised by Norfolk County Council have been subject to this process, and are now expected to start work in road period 2, meaning that we will monitor delivery against the revised programme. RIS2 states that the fourth scheme (A47 Great Yarmouth Junctions) is also committed for road period 2 (2020-25), though its scope is under review in light of the new Great Yarmouth third river crossing.<sup>3</sup>

Midlands Connect said the early resolution principle is helpful but that it lacks a vital component, and recommended that there should be a clear and regular check that Highways England has sought external and expert views on if/how their schemes can be delivered more effectively and/or efficiently. Transport for the North made the point that it may be that the best investment for the Strategic Road Network (SRN) is improving the Major Road Network (MRN). While we recognise the points raised by

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<sup>2</sup> [https://orr.gov.uk/\\_data/assets/pdf\\_file/0009/23400/Monitoring-network-investment-conclusion.pdf](https://orr.gov.uk/_data/assets/pdf_file/0009/23400/Monitoring-network-investment-conclusion.pdf)

<sup>3</sup> See RIS2:  
[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/872252/road-investment-strategy-2-2020-2025.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/872252/road-investment-strategy-2-2020-2025.pdf)

STBs, ultimately it is for government to set the investment plan for the SRN and MRN. In this context we note and support the intent, as set out in DfT's investment planning guidance for the MRN and Large Local Majors Programme for decision-making across both these and the RIS programmes to be joined up.

## **Hearings**

We asked respondents whether they agreed with our proposal to include hearings as a tool in our policy. Of those who answered this question, almost all were supportive of having hearings as a tool in our policy. The Chartered Institution of Highways and Transportation (CIHT) agreed with option 2, (as set out in our impact assessment), to focus the use of hearings on the investigation and early resolution stage.

Survive and Transport for the South East (TfSE) felt that hearings should bring additional transparency to our process. Other respondents commented on the importance of allowing affected parties or representative groups to be included in hearings, and that hearings should be able to take into account the views of localities, especially those of the local transport authority.

Balfour Beatty disagreed with the inclusion of hearings as a tool, and thought that hearings seem unlikely to be necessary, given our ability to investigate directly, or use other tools in our policy. Other respondents, while recognising the role that hearings could play, raised wider comments. For example, the Mineral Products Association (MPA) noted that hearings could risk being more about blame than evidence, while the Highways Term Maintenance Association (HTMA) said it was important for ORR to retain the capacity to hear views and evidence in private.

We welcome the engagement on hearings, and intend to proceed with the inclusion of hearings as set out in our policy, where consideration of their use would be focused in stage 2, investigation and early resolution. As well as being a useful mechanism to collect information and evidence, we expect the inclusion of hearings to provide an incentive for Highways England to resolve issues in order to avoid the need for a hearing. Therefore we believe that the addition of hearings serves a useful function in its own right, in addition to the other tools available to us.

With regard to the comments raised by respondents, a hearing is only one tool available to us. We continue to expect to be able to engage with and/or take evidence from stakeholders outside of the forum of a hearing. And, whilst we expect hearings to be "on the record", we are not proposing that hearings are open to the general public. Any published record of a hearing would also respect commercial confidentiality.

Highways England accepted that hearings can be a useful addition, and said that it would be happy to work with ORR to further develop the concept to enable clarity around the expectations, who may be involved and when a hearing may be used. The company was also keen to understand our approach to transparency in relation to hearings.

We recognise that hearings are a new tool in our policy, and therefore we consider it important that we retain flexibility to use them in a variety of circumstances, and to determine which parties are involved based on the nature of the issue, whilst also considering the most proportionate approach and the other tools available to us. We agree that transparency is an important principle, and we have therefore added additional text to our policy on hearings to make it clear that we would expect to agree the accuracy of any written record with those involved.

### **Fines**

We asked respondents whether they agreed that a fine should always be a last resort. Of the 12 stakeholders who answered, 9 were in agreement with this approach, including Highways England, who said that any additional financial demand would reduce its ability to deliver service and outputs that benefit customers and the economy.

The MPA and Norfolk County Council both provided narrative responses and identified the risks associated with fines. For example the MPA identified the risk of depleting the company's operating budget which could have further consequential impacts, and as such agreed that other measures should probably be sought first. Norfolk County Council disagreed with fines being sanctioned where this would only reduce the amount of funding for scheme delivery. In its response Balfour Beatty said that fines are inappropriate and meaningless as monies are just being returned to government.

We recognise that some stakeholders may disagree with the principle of imposing fines when money is returned to government. However, as Monitor we have been given the power to issue fines as part of our enforcement powers under the Infrastructure Act 2015, and our enforcement policy is expected to set out when and how this power may be used. We agree that a fine should be a last resort, and our policy makes this clear.

We also asked respondents about our approach to setting the level of any fine, and whether they agreed that we should seek to avoid taking money out of the business that would otherwise be spent on operating and maintaining the network and, where appropriate, consider setting fines at a level that enables Highways England to fund fines from management remuneration should it choose to do so. In practice, this would mean performance related or variable pay, which is by its nature discretionary.

Of the 13 respondents who addressed this point, 7 agreed with our approach.<sup>4</sup> Another respondent (HTMA) was sympathetic, but was also concerned about the possibility that it may promote unintended consequences, and wanted further clarity

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<sup>4</sup> Although it did not respond to the individual questions, the RAC agreed with the proposals in the consultation document.

on how this system would operate in practice. The MPA said that any fines should be commensurate with the seriousness and culpability of the contravention. In its response Balfour Beatty presumed that performance bonuses would already be impacted through a failure to meet targets.

TfSE and Midlands Connect disagreed with our approach, stating that fines should be reinvested in other transport projects. On this point, our powers under the Infrastructure Act allow us to require Highways England to pay a fine to the Secretary of State. We do not have powers to direct government on the use of these funds – and therefore it is beyond our remit to determine how the monies levied from any fine are spent once they are returned to government.

Highways England agreed that we should seek to avoid taking money out of the business that would otherwise be spent on operating and maintaining the network. However it disagreed with our proposed approach. It said that sizing fines to be capable of being funded from management remuneration, which in practice would mean Performance Related Pay (PRP) or variable pay, encroached on the remit of its Board and Remuneration Committee. It pointed out that PRP can and has already been reduced in relation to performance. It was also concerned that such an approach could create a public pressure for ORR to issue a fine, and for it to then reduce PRP/variable pay. It also raised practical considerations, such as timing, and the impact on positive incentives to deliver. In conclusion, it proposed that we seek to set the level of fines by alternative means.

After continued discussion with Highways England about its representation Highways England suggested alternative wording for our policy. In particular it thought that the reference point for the size of fine being management remuneration should be removed from our policy. We have considered this as a hybrid between the two options we originally set out in our impact assessment. It maintains the intent of option 2 to protect the funding for Highways England's day-to-day operations. But, without a specific alternative mechanism for sizing fines, it reflects the open-ended flexibility of option 1.

We have reflected carefully on the points raised, particularly by Highways England, who would be most directly impacted by our approach to fines.

Under our current enforcement policy, which has been in place during the first road period, we set out the likely maximum amount we would fine Highways England at 1% of Highways England's average annual funding, around £25m. We set this significantly below the 10% of turnover limit that is typical in other regulated sectors to reflect Highways England's status as a public sector body, and where fines are likely to have a reputational impact. Given the increase in funding announced for the second road period, without changes our policy could create an impression we could fine Highways England around £50m for the most serious instance of non-compliance.

Overall respondents supported our objective of seeking to minimise the risk that fines reduce the funding for Highways England to do its day job. And Highways England considers any additional financial demand (which would logically include any fine we impose) would reduce its ability to deliver. Therefore we believe the option to scale fines so they could be funded from resources that would otherwise be used for management remuneration (meaning discretionary pay, like PRP) remains the best way to achieve our objective, whilst maintaining fines as an appropriate and proportionate tool to incentivise the company.

It is important to note that our proposed approach provides a mechanism for setting the size of fines. It does not direct Highways England to fund fines from management PRP. Our policy is clear that the decision on how to fund any fine remains for Highways England to make. Our policy also retains the flexibility to scale fines differently, if we determine it to be appropriate. We have made some amendments to the wording of the key clause in our policy in order to make this intent clearer.

We have also considered the points raised by Highways England and others on the need for our approach to avoid unintended consequences, as well as the practical considerations raised by Highways England relating to timing and impact on positive incentives to deliver. We have made some changes to our policy as a result.

We have amended our policy so that it is clear that any decisions the company has already taken to reduce PRP would be a factor both in determining whether to proceed with a fine, and also, when calculating the quantum of any fine. Taken together the net effect of these and any mitigating and aggravating factors could potentially reduce a fine to zero (or increase it, depending on the circumstances). We have also clarified the process for notifying Highways England of our intent to take statutory enforcement action, should we decide to do so.

### **Other themes arising from consultation responses**

We also identified a number of wider themes across the consultation responses which are discussed in turn below. We have also set out where we have made changes to our policy in response to feedback.

### **Economic and environmental outcomes**

Some STB responses said that we should set out more clearly how and who we will engage to monitor Highways England's performance in relation to economic and environmental outcomes, or that there should be a clearer focus on monitoring performance in these areas. A number of respondents were also interested in how our approach to monitoring fits into wider government policy on climate change. For example, England's Economic Heartland commented on the need for our monitoring to ensure Highways England's approach is consistent with the government's 2050 target to achieve net zero emissions.

Our approach will be guided by the expectations that are set out for Highways England in the RIS and in its Licence. The performance specification sets out government's high-level expectations for Highways England and the SRN during each road period, and draws on specific aspects of the government's long-term vision for the road network and how it supports the economy and the environment, as well as safety and mobility. Much of the detail of what we monitor is therefore set out in the performance specification and investment plan which will necessarily change from RIS to RIS. Therefore we have not attempted to capture the detail of all of the outcomes we monitor in our policy.

However, the RIS2 performance specification will cover more aspects of Highways England's environmental performance than in RIS1. This means that in RIS2 we will monitor and report on Highways England's performance against a new KPI on air quality, as well as a new biodiversity metric. We will also monitor and publicly report on Highways England's progress towards reducing its own carbon emissions. The target for this measure will be set during road period 2. We will also monitor and publicly report on carbon emissions from the supply chain. And we will continue to monitor the company's work to mitigate noise important areas, as well as delivery of the Designated Funds programme. In RIS2 this will include a new Environment and Wellbeing Fund to support environmental and community wellbeing outcomes across the SRN.

We also expect Highways England to continue to carry out post-opening project evaluations (POPEs) during RIS2, which assess whether the expected costs and benefits of schemes have been achieved. We will monitor Highways England on its use of intelligence from POPEs to build the evidence base to support future investment decisions across the whole portfolio.

### **Stakeholder engagement**

Stakeholder engagement was a further theme in the consultation responses. For example some STB respondents wanted us to state more explicitly how local and regional bodies such as local highways authorities (LHAs) and STBs will be involved in the monitoring process.

To allow us to assess Highways England's performance in the round we gather information from a range of sources, including talking to key stakeholders and members of the supply chain. This helps us understand issues and risks to Highways England delivering its objectives. We expect our ongoing programme of stakeholder engagement to continue to support this. We currently attend quarterly liaison meetings with STBs – and welcome the opportunity to develop and build on these relationships during road period 2.

There are also specific aspects of our monitoring work that might require us to consider how Highways England is engaging with its stakeholders. For example, as part of the RIS2 performance specification we will report on a new performance indicator relating to the company's work with local highways authorities to review





diversion routes for unplanned events, as well as monitoring a commitment to investigate a new metric on delays on the local road/SRN boundary.

We also recognise that the landscape in which Highways England operates is changing with the advent of new stakeholders such as STBs, and where the MRN also means greater focus on the interaction between the SRN and the local road network. Against this context we are commissioning work this year to review how Highways England engages with key local and regional partners. This will include exploring which aspects of Highways England's functions are most important to local and regional stakeholders, engaging with Highways England to understand how it is already involving local and regional stakeholders in its planning and delivery of its functions, and identifying any barriers to engagement. We expect this work to make recommendations to us on how we could incorporate local and regional stakeholder feedback into our routine monitoring functions. In response to the feedback received via the consultation we have added new text to our policy that recognises that we may need to draw on the insight of stakeholders, including local and regional bodies, when gathering information.

We have also considered the request made by England's Economic Heartland to name STBs as a key stakeholder in the monitoring process, and to amend our policy to reflect how effective Highways England has been in meeting the priorities identified by STBs. We have considered this within the context of our remit and role. And particularly, that in advising government on future RISs, we do not make decisions about the investment programme, or which schemes go ahead.

As Monitor we want to retain the flexibility to engage with a broad range of stakeholders where it may assist our work monitoring the RIS and assessing Licence compliance, and also advising on future RISs. There is a risk that by naming specific stakeholder groups in our policy, we may exclude others whose views we may wish to seek when carrying out our work.

Highways England's Licence also sets out a duty to cooperate for the purposes of coordinating day-to-day operations, and long-term planning, and includes a wide range of stakeholders with whom the company should co-operate when complying with this duty. And, as above, the RIS might also set further expectations on Highways England in terms of working with stakeholders. In other words, there are a number of sources which may determine who we need to engage with when carrying out our work. Therefore we are not persuaded that naming specific stakeholder groups in our policy is beneficial.

However, we recognise the important role of STBs, and also, that STBs are seeking a collaborative approach to the development of RIS3. We set out our approach to advising on RIS2 in December 2016, where looking at how plans were informed by stakeholder engagement formed part of our assessment. We will consider how our approach may need to evolve to consider this new environment ahead of RIS3.

## **User focus**

Transport Focus agreed with our proposals but felt that our draft *Holding to account* document missed an opportunity to put the interests of those using Highways England's roads at the heart of our approach. It felt that both the framework and document should be geared to the consumer, including the impact on road users of Highways England failing to deliver a requirement of the RIS or its Licence. It felt that our strategic objective could be re-defined to make this clearer.

The Infrastructure Act sets out a number of factors we must have regard to when carrying out our duties as Monitor. These include the interests and safety of users, and also, the economic and environmental impact of the way Highways England achieves its objectives, as well as the long-term maintenance and management of highways. 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. However our policy is clear both when assessing concerns, and when determining whether to take statutory enforcement action, we will consider the impact of the contravention on users of the SRN.

ORR's overall objective is to protect the interests of rail and road users, both now and in the future. And our role as Monitor is focused on delivering better outcomes for road users and taxpayers. In defining our strategic objective we are clear that our role is focused on benefiting all those who use, or are affected by, the SRN. In response to feedback from Transport Focus we have amended our policy to set out in more detail the user groups this includes (whilst recognising that this may not be an exhaustive list). On our strategic objective specifically, we welcome the feedback received. Our strategic objectives are considered on a cyclical basis and we will take into account the views expressed by Transport Focus in the next iteration of this cycle.

## **Safety**

Survive, which brings together the roadside recovery industry, urged us to consider the position of roadside breakdown/recovery workers when we are reviewing the safety performance of Highways England. As with the economic and environmental areas discussed above, our safety monitoring is based on the RIS and Licence. It includes reporting on Highways England's progress towards the target to reduce the number of people killed or seriously injured (KSIs) on the SRN, and a suite of supporting indicators. KSI data would include recovery workers in the wider population, although the KSI data we report on, which is collected by police forces in England, does not disaggregate KSIs for recovery workers as a group. We therefore welcome the opportunity to engage with Survive to understand its views and consider this in our wider monitoring of safety.

Survive also urged ORR to monitor the effectiveness of smart motorways in all their formats. The government has recently published the results of its stocktake on smart motorway safety. ORR will now need to give consideration to any implications arising for our work as Monitor.



## **Lorry parking**

The Road Haulage Association highlighted the importance of addressing lorry parking provision through RIS2. We expect improvements to lorry parking to come within the scope of the company's Designated Funds programme, under the Users and Communities Fund. Unlike the enhancements programme, these funds are not specified in advance, but instead Highways England will work with stakeholders to invest the funds over the course of road period 2. Our role will be to monitor the company's management of its designated funds. The RHA also felt that there was more to do to achieve better planning of roadworks. We will consider this feedback in our engagement with Highways England.