



Review of National Highways' compliance with licence conditions

ORR/CT/23-54

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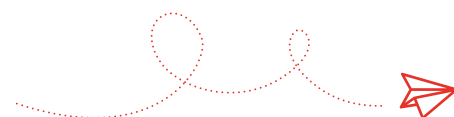
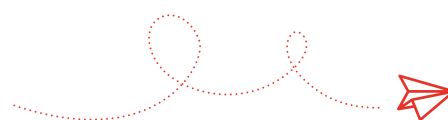


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0. Executive Summary

The Licence for National Highways forms part of a suite of arrangements implementing Roads Reform. The overarching aim is to provide National Highways with the operational independence to carry out its activities efficiently and effectively; while providing appropriate monitoring given the public importance of the Strategic Road Network (SRN), and the funding provided by taxpayers. As well as the specific targets and commitments within the Road Investment Strategy (RIS) set for five years at a time, the Licence provides broader obligations and guidance as to how National Highways undertakes its functions. The Licence plays an extremely important role in how the Office of Rail and Road (ORR) holds National Highways to account.

Rebel has been engaged to assess whether National Highways is compliant with four selected licence conditions. These conditions focus on safety, public interest and National Highways' self-assurance and notification process with regards to potential licence non-compliance. Our work has also included assessing the strength of evidence provided by National Highways and utilising our experience from comparable industries to identify areas of improvement and transferable best practice.

To better understand the context of the selected conditions, we have considered the role of the Licence within the suite of documents which define the governance framework for National Highways. From this, we have looked to understand 'what compliance is' for each condition and to review the processes used by National Highways to assess and record evidence against them.

Based on our review of the evidence provided, it is our opinion that National Highways is, on the balance of probability, compliant with the Licence conditions assessed in this exercise. However, the team has identified a number of key recommendations which if followed would improve overall confidence in National Highway's compliance with the Licence and ensure that the Licence best delivers its important role as part of the overall framework.

We have highlighted the key recommendations below, these and our findings are set out in more detail later in the report. The recommendations are designed to provide ORR with increased confidence that National Highways is effectively evidencing licence compliance and undertaking an appropriate level of self-assurance:

Recommendation 2.1	The licence conditions should be subject to an enhanced legal review, in collaboration with the ORR, to effectively define the requirements.
Recommendation 2.2	To provide ORR confidence in National Highways' approach to recording evidence, an appropriate evidence system should be developed and utilised.
Recommendation 2.3	ORR needs to satisfy itself that National Highways is effectively self-assessing and recording its evidence to demonstrate compliance with the Licence. To help achieve this, National Highways needs to implement a greater focus on training across all of its business areas to ensure a consistent recording of evidence and approach to compliance. National Highways could also helpfully make clear to ORR how responsibility and accountability for licence compliance and escalating issues is cascaded throughout the organisation.

Recommendation 2.5	There should be a requirement from the ORR for a standardised and periodic reporting of licence conditions, and compliance against these by National Highways, through a dashboard or similar.
Recommendation 2.6	Given resource constraints at the ORR, external support should be sought to audit National Highways' licence compliance until an ORR team is appropriately developed.
Recommendation 3.2	To provide ORR confidence in the strength of National Highways' compliance evidence, National Highways should include more targeted evidence to ensure it is directly relevant to the Licence condition.
Recommendation 3.3	To provide ORR confidence in the strength of National Highways' compliance evidence, National Highways should evidence actual decision making process/consideration relevant to a licence condition - documenting how these decisions are made.
Recommendation 4.3	In the event that National Highways does not provide regular reporting, ORR should use its information gathering powers to gain access to the evidence that helps assist it in discharging its statutory duties.
Recommendation 4.4	ORR could helpfully set out guidance around what it expects in relation to reporting of a material breach. We would expect that this could be incorporated into the Holding to Account policy, but could equally be standalone guidance.

1. Context & overview

1.1 The role of the Licence in Monitoring National Highways

A key aim of Roads Reform that created National Highways as a government owned company was to provide clarity around the long-term aims for the SRN, in order to generate greater efficiency, improved value for users and stakeholders, and better asset management. As with other utilities in the UK and around the world, a key part of how this is implemented is through the five-year funding deals (the Road Investment Strategy) which sets out a range of required outputs and the funding required to achieve them. The focus of this is about the 'what' (i.e. determining what is achieved in exchange for what level of funding) – along with assessing the robustness of underlying plans to deliver these outputs in an efficient manner.

The policy framework in regulated industries typically includes a Licence or similar – which will cover 'how' a company undertakes its activities and can include specific obligations and requirements. For National Highways, the presence of the licence reflects the strategic importance of the roads network

and the role that it plays in the functioning of society as well as the considerable funding provided by tax-payers.

This document [the Licence]... makes clear, to both Highways England and the wider community of road users and stakeholders, what we expect Highways England to achieve and how they must behave in discharging their duties and in delivering our vision and plans for the network, set out in the Road Investment Strategy.

The Licence emphasises that the role of Highways England is about more than just complying with the letter of the law. We expect the company to go the extra mile in the way it engages with road users and collaborates with other organisations to develop shared solutions. And they must take a lead in promoting and improving the role and performance of roads in respect of broader communal responsibilities, such as the aesthetics of design, safety and the environment, as well as driving forward wider progress on technology and innovation.

The [Licence issued to Highways England \(renamed National Highways\)](#), page 4

More specifically, the Licence is a mix of statutory guidance that National Highways should have regard to, and requirements that must be delivered. These are quite different in nature, but both obligations need to be interpreted on a case-by-case basis within the relevant context.

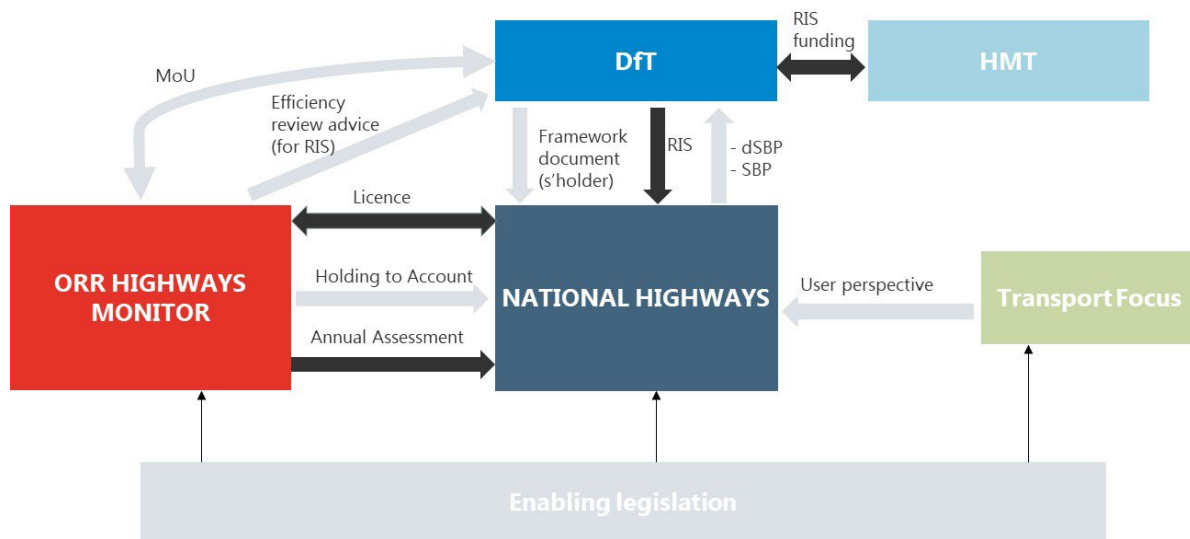
This 'purposive' approach complements the specific targets set as part of the RIS. The Licence plays an exceptionally important role in how National Highways behaves as an organisation, and the corporate governance that it has in place. We are nearly 10 years into the new industry structure created by Roads Reform which on the one hand might be considered relatively early in the evolution. On the other hand, it is reasonable to expect progress toward a maturing framework around how National Highways demonstrates its compliance and in turn the interaction with ORR as it holds National Highways to account. This study is an important further step in this evolution.

The ORR was appointed by the Department for Transport (DfT) as the independent Highways Monitor, set up under the Infrastructure Act 2015, with regulatory powers to hold National Highways to account regarding its performance, costs and efficiency. This includes National Highways' compliance with the conditions of its Licence. Should National Highways fail to comply with these conditions then there are enforcement options available to the ORR.

1.2 Where the Licence sits in the overall framework

In the previous section we described the importance of the Licence in complementing the RIS, where the RIS sets out a number of concrete output requirements, available funding, and a number of headline KPIs along with supporting Performance Indicators (PIs).

It is worth putting the role of the Licence into even broader context, because this is important to how it is designed and likely how it is implemented. In this section we set out a summary of the main parties, interactions and 'tools' that are used to guide the performance of National Highways and provide the right accountabilities and incentives.



The diagram shows that there is significant input into how National Highways undertakes its functions, from a variety of sources. DfT sets the RIS which provides five-years of funding and associated outputs, this also involves discussion with HMT around funding for roads vis-à-vis all other government spending. ORR as the Highways Monitor provides advice to DfT in the RIS setting process through an efficiency review of National Highways' draft Strategic Business Plan (dSBP). This assesses whether the plan is both challenging and deliverable. ORR then has direct interaction with National Highways in terms of holding it to account and enforcing the Licence and the RIS, including through the publication of the Annual Performance Assessment and Annual Safety Report. Transport Focus has a statutory role in providing the perspective of road users. As well as providing ORR and Transport Focus with their powers and duties; the legislation also imposes a number of duties and requirements on National Highways.

This is a complex set of provisions across a number of parties. The challenge – as set out in the Framework Document which establishes the shareholder arrangement between DfT and National Highways, is to achieve the optimal balance between: *appropriate operational independence* [for National Highways] *while at the same time providing the necessary assurance for taxpayers.*

1.3 The purpose of this study

As part of its responsibility in ensuring compliance with Licence Conditions, ORR engaged Rebel to independently assess data, evidence and information held by National Highways which is recorded as evidence of compliance against three areas of the Licence covering a total of four licence conditions:

- **Condition 4.1** – Operation and management of the network in the public interest
- **Condition 5.15 and 5.16** - Safety
- **Condition 8.5** – Notification of Licence breach

The scope of this task is to independently test the evidence provided by National Highways as an audit of Licence compliance and to ensure that the evidence is fit for purpose and can be identified as best

practice. The study should also highlight any areas where changes could assist delivery of best practice.

2. The current approach to Licence compliance

2.1 ORR holding National Highways to account

A key part of ORR's role is to hold National Highways to account on its performance, costs and efficiency. This includes National Highways' compliance with the conditions of its licence. Should National Highways fail to comply with these conditions then there are enforcement options available to the ORR – to be coordinated with the DfT (as the sole shareholder of National Highways).

ORR undertakes its role through its 'holding to account' policy which sets out how National Highways will be assessed in terms of its performance and compliance with both the RIS and the licence. Importantly, ORR states in its policy that its approach to enforcement should be targeted and proportionate; and that any potential enforcement action is likely to consider informal resolutions first, depending on the severity of any potential breach.

It is noted that during the writing of this report, an investigation by ORR¹ commenced, noting that National Highways' 'performance has dipped and some targets are not currently on track'. The investigation will, amongst other areas, test National Highways' Licence compliance. This is the first such investigation.

2.2 National Highways compliance process

From Road Period 1 (RP1), National Highways has self-assured its compliance with the licence conditions. National Highways has developed its own internal process which allows it to make the declaration of compliance in its Annual Report and Accounts.

National Highways' initial step to self-assure its licence compliance has been to seek a legal definition of each licence condition. This definition is a plain English note which looks to assess the critical deliverable(s) and requirements of each condition. From this, National Highways records evidence to display compliance against this interpretation.

To assess the strength of compliance, National Highways uses its own system to rank compliance with four different rankings: "Substantial", "Moderate", "Limited", "Unsatisfactory" or "No obligation". The interpretation of the licence, ranking and supporting evidence is currently captured on a single excel spreadsheet for all licence conditions with links to external evidence files.

National Highways also allocates a level of risk to each of the licence conditions (Tier 1 with the highest risk and Tier 3 the lowest) – there are many factors used to determine the risk level including emerging issues, whether they are new or existing conditions, tangible obligations to deliver, previous ranking of compliance etc. The higher the level of risk, the more frequently the strength of compliance against the licence conditions is reviewed.

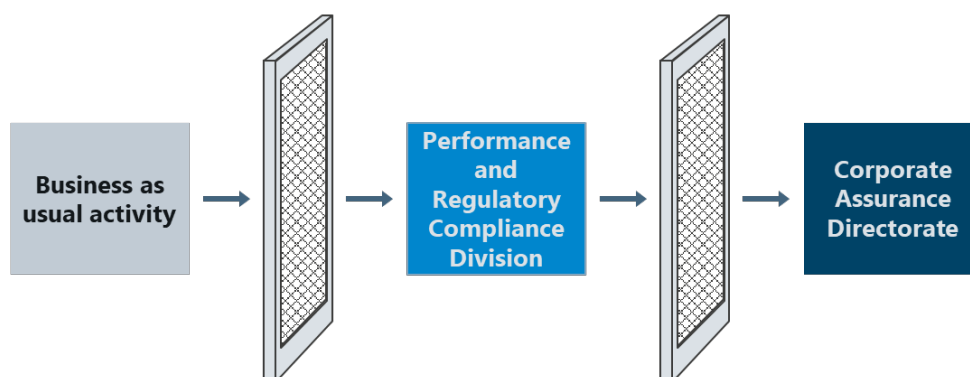
¹ <https://www.orr.gov.uk/search-news/orr-undertake-investigation-national-highways-performance>

To enhance the credibility of National Highway's self-assurance, National Highways has implemented a 'three lines of defence' approach. This approach stretches from business owners to the internal audit team within the assurance directorate.

The three line of defence approach is undertaken as follows:

1. Business owners undertake work in-line with licence conditions, compliance is delivered through business-as-usual decisions and practices.
2. The Performance and Regulatory Compliance Division (PRC) review the process and decision making of the business owners. Any review is risk-based, prioritising conditions for review depending on previous compliance scores and risk level. The team is responsible for recording and managing evidence and self-evaluating evidence.
3. The Corporate Assurance Directorate (CAD) periodically review the work of PRC ahead of the formal declaration in the annual report. The review covers evidence, PRC's process, risk tiers and compliance ratings. The team feedback directly to PRC and upwards to the Executive Committee and board ahead of annual reports.

National Highways three lines of defence



The 'fourth line' of defence is the external independent agency – effectively fulfilled by the ORR in this case. The National Highways approach to assurance is consistent with good practice across a number of sectors in process terms. The key for this study is how it is implemented in practice.

2.3 Managing emerging issues

National Highways has a process which is used to identify risks to RIS and licence compliance. This helps with transparency, and efficiently dealing with emerging issues to make sure there is an agreed process. National Highways has a set of internal meetings where such issues are discussed, and then these can be raised in bilateral meetings between ORR and National Highways allowing diagnosis and action planning until resolution. Any actions are coordinated by PRC but (in most cases) delivered by the business owner.

As well as being important to managing any emerging issues – it is also directly relevant to how National Highways demonstrates compliance with Licence Condition 8.5.

3. Our framework for analysis

3.1 What does compliance mean?

Compliance is about meeting the requirements of the relevant provision. This is quite straightforward for a KPI – there is a quantified target that is either met or not met. Of course, even for a KPI there may be legitimate reasons and arguments around why the target is not met.

Defining exactly what compliance means for Licence Conditions is not straight-forward. This is a common feature across regulated sectors where there is a need to balance a desire for certainty with a need to be flexible and make sure that the requirements are appropriate in all of the situations that arise in practice. As a result, the following approach is taken:

- The Licence is deliberately *subjective in nature* to complement the quantitative specification of KPIs and budget constraints;
- The interpretation needs to be *case-by-case* within the specific circumstances that arise;
- Allowance needs to be given for *what is feasible* within the available funding, the range of other commitments, as well as any hierarchy of requirements to the extent there is overlap between legislative and Licence requirements; and
- Consideration should be given to *external factors* outside of National Highways' control which impact on licence compliance, and ORR's response to the impact of these should be proportionate.

When considering all of this and applying the thought-experiment of 'what would it require to be non-compliant', it can be seen that non-compliance is a high-bar. We consider that in line with principles of proportionate and risk-based monitoring, then non-compliance is likely to mean a significant / material impact in a strategically important area of service delivery. This can be seen from the relatively limited number of times regulators have found companies in breach of their licence conditions. For example, ORR has found Network Rail in breach of its Licence once since 2016, and on eight occasions between 2005 and 2016.

A number of investigations have been initiated during that time, and penalties have also been issued for breach of either legislative provisions or commitments under the funding settlements. This is consistent with how we consider that the Licence is intended to be used – as an early-warning device that allows detection and correction of challenges within the industry.

Taking these points into consideration, our view is that reaching compliance with the conditions of this licence is a relatively low bar to achieve.

3.2 The Licence Conditions in this review

As set out in section 1.3, in this study we are focusing on 4 licence conditions within 3 distinct areas. In this section we set out some initial thoughts about what these conditions mean, and the key elements for interpretation.

A key point to note about the licence is that there is a distinction between where the provisions state that something '**must**' be done – which is a requirement, and the use of '**should**' which is to be interpreted as statutory guidance.

Licence Condition 4.1 is reproduced in the left-hand box below, with initial discussion points contained in the right-hand box. The 'public interest' is a classic use of the licence – where it is difficult to define precisely and can only be interpreted on a case-by-case basis. But it is nonetheless extremely important – because the public interest is the core reason for National Highways' existence.

The public interest is taken into account in various legislation – certain information can be published for example if it is in the public interest; as well as in competition and merger cases. What it means continues to be debated in each new circumstance and the build up of precedent over time. Mergers used to habitually use the public interest test whereas it is now primarily on competition grounds, except in certain areas where the Secretary of State can decide to take the decision instead of the relevant body (the Competition and Markets Authority)².

It is worth highlighting the difference in approach between the Licence for National Highways and the Licence for Network Rail set by ORR. Rather than have a 'public interest' requirement as a Licence Condition, the provisions within the Licence are seen as what are necessary to achieve the public interest³. It shows the broad nature of what falls within the public interest.

4.1 The network for which the Licence holder is responsible is a critical national asset, which the Licence holder **must** operate and manage in the public interest, in respect of both current activities and needs and in providing effective stewardship of its long-term operation and integrity.



DISCUSSION: The bold 'must' indicates a statutory direction from the Secretary of State to the Licence Holder which requires compliance – such compliance is of course monitored by the ORR. Clearly the nature of 'public interest' is wide and varied and very much reflects the specific circumstances within which National Highways operates. It is not a defined term so considerable interpretation needs to be applied. Further, this must be delivered alongside the significant number of targets, requirements and General Duties that National Highways faces.

The following graphic sets out the *licence provisions in relation to safety*, as well as our highlighting of relevant points. The Licence conditions can be seen to be 'underpinning' or 'complementary' to the key targets that National Highways faces. Currently – as reported in the ORR's Second Annual Safety Assessment published in December 2023 – there is focus on the safety KPI and associated PIs, as well as recommendations arising from the Transport Select Committee's review of smart motorways. It is instructive that the ORR annual safety assessment does not explicitly reference the licence condition, but this should inform the approach that National Highways undertakes.

Safety provisions differ significantly for National Highways as compared to other industries – where overall safety outcomes are a product of the interaction between National Highway's responsibilities, driver behaviour, vehicle condition and weather conditions. Driver behaviour and vehicle condition is subject to licensing and other checks by the DVLA, along with clear legal duties for drivers of the vehicles to notify the DVLA of fitness to drive and for the roadworthiness of the vehicle. The Driver and Vehicle Standards Authority (DVSA) complements this with standards applying to those wishing to be driving instructors or MOT testers, amongst other activities. And the police have an important role in

² See: <https://www.regulation.org.uk/competition-public-interest-cases.html>

³ See: [https://www.orr.gov.uk/monitoring-regulation/rail/networks/network-rail/network-licence#:~:text=Network%20Rail's%20network%20licence%20requires,\(SO\)%20within%20Network%20Rail](https://www.orr.gov.uk/monitoring-regulation/rail/networks/network-rail/network-licence#:~:text=Network%20Rail's%20network%20licence%20requires,(SO)%20within%20Network%20Rail)

monitoring and enforcing driver action. National Highways is therefore one of a number of parties with important safety contributions, and it is clear that the ORR is not the safety regulator though does have responsibility for holding National Highways to account for its safety KPI, relevant safety licence conditions and publishes an annual safety report.

This contrasts with the provisions in the rail industry where ORR is the rail safety regulator as well as economic regulator. For rail, ORR has wide-ranging powers and duties from a number of sources such as the Health and Safety and Work etc Act, the Railway and Other Guided Transport Systems (Safety) Regulations (ROGS), and other Regulations⁴. This establishes a framework where the exact responsibilities of each party are laid out – for example Network Rail vs train operators – and there are investigative provisions to establish liability in the event of an incident. These provisions are considerably more far-reaching than exist in relation to National Highways.

5.15 In complying with 4.2(e) and its general duty under section 5(2) of the Infrastructure Act 2015 to have regard to safety, the Licence holder should, when exercising functions related to safety, have due regard to the need to protect and improve the safety of the network as a whole for all road users, including:

- a. Ensuring that protecting and improving safety is embedded into its business decision-making processes and is considered at all levels of operations;
- b. Seeking to achieve the best possible safety outcomes across its activities, while working in the context of sustainable development and delivering value for money; and
- c. Taking opportunities to engage with and support wider efforts to improve safety for road users.

5.16 The Licence holder **must** develop and implement strategic plans that demonstrate how it will meet its legal duties and other obligations with regard to safety, including the requirements of 5.15, to be published to timescales specified in the Licence holder's Delivery Plan.



DISCUSSION: safety is a key requirement of National Highways and there are not only requirements in the enabling *Infrastructure Act 2015* but also the safety KPI as part of the RIS. Licence Condition 5.15 adds guidance to how National Highways should undertake its safety functions – emphasising the holistic and overarching nature of safety across the whole of the network for all users. This talks about making sure that safety is considered as part of all decision-making and by all levels of operational personnel.

Licence Condition 5.16 is more straight-forward in that it requires the production of plans with specified content and according to specified timescale. Key issues are around the interpretation of exactly what constitutes 'strategic plans' and how National Highways evidences the requirement that it 'implements' the plans, and how the plans 'demonstrate' that National Highways is meeting its various obligations.

The final chart outlines the *Licence Condition relating to notification around actual or potential breach*. This underpins the self-assurance approach – that there is transparency about reporting all material news. As noted in the box below, implementing this process is not trivial and requires both important judgements and also strong corporate governance arrangements.

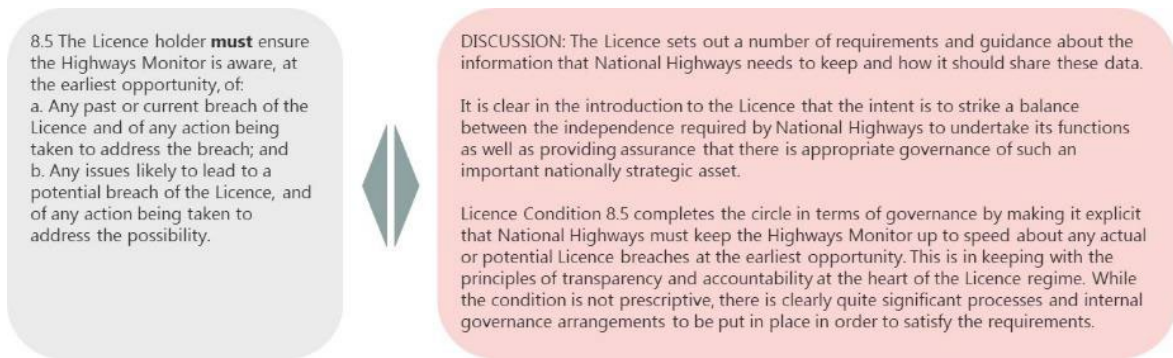
Self-reporting has an explicit and strong focus in Ofgem's Enforcement Guidelines in relation to retail licence compliance. It sets out an explicit expectation that the company will engage fully and proactively in helping to ensure a successful resolution of an action in the retail compliance process:

[Ofgem] strongly encourage[s] companies to promptly self-report potential breaches that may give rise to material harm to consumers, the market or to Ofgem's ability to regulate; [Ofgem's] expectation is that they will do so. Companies should promptly open a dialogue with Ofgem and provide as much detail as possible about the potential breach (or breaches), what caused it, the harm that may have resulted, including to customers, and the steps that have been or will be taken (including proposed timings) to remedy the situation. [Ofgem] recognise[s] that the need to self-report promptly might mean companies have not necessarily established the full extent of problems but that should not

⁴ See: <https://www.orr.gov.uk/guidance-compliance/rail/health-safety/laws>

prevent prompt and accurate self-reporting of the facts as they stand and taking steps, in a timely manner, to determine the full extent of problems and put things right.

Ofgem also explicitly states that not only it is more likely to seek to resolve matters through its retail compliance processes (rather than take formal enforcement action) when there is self-reporting, but that self-reporting will be taken into account in the outcome of any enforcement action (for example in the size of any penalty and in its use of language).



3.3 Assessing the 'strength' of compliance

As well as providing assurance around ongoing compliance with the licence conditions, we have been asked to assess how good National Highways' compliance is, and where National Highways sits in relation to 'best practice'. To make such an assessment requires the development of a suitable scale of achievement.

As noted above, National Highways currently uses its own system to rank its compliance activity, going from best to worst: "Substantial", "Moderate", "Limited", "Unsatisfactory" or "No obligation". The criteria used to determine which rating is applicable takes into consideration a number of factors: for example whether the conditions cover a tangible obligation with a set requirement, are timebound or are a broader condition by definition amongst other factors.

Those conditions with evidence assessed as Limited are given a higher risk rating as National Highways seek to improve them to at least Moderate. Similarly, actions are put in place to strengthen Moderate evidence to Substantial. The interaction between rankings and risk status is recorded in its internal governance process document. We have considered whether it would be appropriate to use the same National Highways ranking system or to use our own RAG status or similar to rate the strength of evidence sampled. We've considered the pros and cons of each of these approaches, and summarise this in the following table.

Option	Pros	Cons
Utilise National Highway's rankings	<ul style="list-style-type: none"> • Allow a direct comparison against the self-review from National Highways 	<ul style="list-style-type: none"> • Effectively a subjective view by Rebel using existing descriptors • Weakens the ability to challenge the justification

Option	Pros	Cons
	<ul style="list-style-type: none"> • Already defined and considered approach, applicable to this licence 	<ul style="list-style-type: none"> • of the descriptors themselves
Create own RAG status or similar	<ul style="list-style-type: none"> • Provide new considerations to drive the assessment of evidence strength 	<ul style="list-style-type: none"> • Such an exercise should take a considerable amount of resource to do 'properly' • Would continue to be a subjective judgement, unclear whether this would be stronger than existing descriptors
Identify alternative industry approach	<ul style="list-style-type: none"> • Provide new considerations to drive the assessment of evidence strength • An alternative industry may bring in new factors that have not been considered 	<ul style="list-style-type: none"> • May not be as appropriate to use other industry descriptors for this licence • Would continue to be a subjective judgement, unclear whether this would be stronger than existing descriptors

Considering all of the points above, we do not believe there is true value in using any one of the possible approaches. We consider that trying to come up with a bespoke evaluation framework is counter-productive and resource intensive given the short timescales of this project.

There is no existing 'best practice' ranking system that relates to the specifics of this licence therefore we have decided that there is more value in reviewing the evidence submitted and highlighting areas of improvement for National Highways. We've outlined our recommendations in our key finding section, which we consider should improve the strength of compliance by National Highways against its Licence Conditions, regardless of the current base position.

When these changes are implemented, there is also the opportunity to revisit the descriptors used by National Highways to better understand if these are appropriate and whether there would be benefit in developing and agreeing these with ORR.

3.4 Our methodology

In undertaking this task, we have primarily undertaken the following tasks:

- Review of information provided by National Highways;
- Interviews with a number of relevant colleagues at both National Highways and ORR Highways Monitor;
- Consideration of relevant examples from other sectors; and
- Analysis based on the above as well as our own experience and expert judgement.

We are extremely grateful for the professionalism of National Highway's colleagues who have provided prompt and open engagement with this review, allowing us to complete the project within tight timelines.

4. Assessment of Licence Condition compliance

As set out above, we believe that achieving compliance to the conditions within the licence is a relatively low bar to meet. Our conclusion for the four licence conditions sampled is that National Highways is, on the balance of probability, compliant. This section details the evidence we have looked at and how we have assessed it in order to come to this opinion. We also highlight opportunities to move toward best practice.

4.1 Licence condition 4.1

The network for which the Licence holder is responsible is a critical national asset, which the Licence holder must operate and manage in the public interest, in respect of both current activities and needs and in providing effective stewardship of its long-term operation and integrity.

There are 25 pieces of evidence recorded for this licence condition. The majority of the evidence relates to publications and internal guidance documents, often National Highway's approach to consultations. We would not expect it to be challenging for National Highways to evidence compliance with this licence condition as public interest really should be engrained in every decision made by a public owned body providing a taxpayer funded service.

One of our main findings when reviewing the evidence is the length of documents included. The public facing publications and internal guidance documents can be over 100 pages and it can be challenging and time consuming to identify the relevant areas of each document which are applicable to a particular licence condition. The process for gathering evidence would benefit from a system where specific paragraphs or chapters are referenced and rationale is provided as to why these meet the licence conditions, rather than providing documents in full and leaving the evidence open to interpretation of the individual reviewer. It may be helpful to use the approach in other sectors to present the information in 'layers' with an overarching description of the structure and where to find items of interest⁵.

There are also some documents which are time dated such as the annual public sector equality report, which was delivered in 2020, there needs to be an appropriate review to ensure that evidence which is time bound is removed following its endpoint or replaced by the latest document. There are also draft documents included as evidence, some of which are several years old and need to be replaced with final documents for completeness.

Most of the documentation focuses on road-users. In a way this makes complete sense given they are the primary user of the SRN. However, based on the analysis set out in section 1.2 and 3.2 above, there are many parties with an interest in or linkage to the activities of National Highways. We would expect

⁵ See for example: <https://www.southwestwater.co.uk/about-us/business-planning/business-plan-2025-30>

that consideration of the public interest would touch on each of these parties – including taxpayers, government departments, parties living adjacent to the SRN, wider society with an interest in the biodiversity and other outputs of the SRN, and cyclists and other users that need to cross or navigate around the SRN. This is the approach embodied in the Government's Transport Analysis Guidance (TAG) framework.

Finally, while there is clearly an appropriate content and quantity of relevant evidence here, it is nearly always forward-looking and theoretical in its nature. The evidence base would be significantly improved by showing how actual decisions are made and implemented with public interest as a key consideration.

The importance of doing this has been recognised by the Water Industry Commission Scotland (WICS) which has been engaged on a change in regulatory approach to explicitly recognise the long-term impacts of regulation and the need for open and transparent dialogue about how to best meet the needs of water customers and communities affected by environmental and other issues. WICS is aiming to adopt the principles of 'ethical business regulation'. This is enshrined in its description of its role: *We're the economic regulator of Scottish Water, a publicly owned business that serves millions of people and businesses across Scotland. We work for customers, communities and the environment.* The intent is that WICS explicitly monitors and reports on how Scottish Water meets these tests, which is an emerging challenge and not yet completely visible in its Annual Reports on Scottish Water's performance.⁶

4.2 Licence condition 5.15 & 5.16

In complying with 4.2(e) and its general duty under section 5(2) of the Infrastructure Act 2015 to have regard to safety, the Licence holder should, when exercising functions related to safety, have due regard to the need to protect and improve the safety of the network as a whole for all road users, including:

- a. Ensuring that protecting and improving safety is embedded into its business decision-making processes and is considered at all levels of operations.*
- b. Seeking to achieve the best possible safety outcomes across its activities, while working in the context of sustainable development and delivering value for money; and*
- c. Taking opportunities to engage with and support wider efforts to improve safety for road users.*

⁶ <https://wics.scot/what-we-do/our-role-scottish-water-industry/longer-term-approach>

The Licence holder must develop and implement strategic plans that demonstrate how it will meet its legal duties and other obligations with regard to safety, including the requirements of 5.15, to be published to timescales specified in the Licence holder's Delivery Plan.

There are 15 pieces of evidence recorded for the two licence conditions – National Highways records the evidence separately for each of the Conditions given their different nature (5.15 is 'should' and 5.16 is 'must'). We find the investigation report into the Knutsford Bowden accident to be a strong a piece of evidence in this context as it shows real life learnings and safety implications – similar reports would add further value here. The new road safety division created in 2022 also adds credibility to National Highways' safety focus. Another strong piece of evidence in this area is the extract from the National Safety Control review group, the internal facing document which logs issues and decisions and summaries in regard to safety – over a period of time and across several deliverables. This is a strong piece of evidence because it shows application of the proposed safety approach in several different projects.

The evidence base also includes areas of public interest such as smart motorways and suicide prevention.

The one obvious area for improvement would be to increase the quantity of evidence to demonstrate that 5.15 has been met in regard to working in the context of sustainable development and delivering value for money. While safety is undoubtedly the main focus of these two conditions it would be beneficial to highlight how subclause b of 5.15 has been appropriately evidenced.

4.3 Licence condition 8.5

The Licence holder must ensure the Highways Monitor is aware, at the earliest opportunity, of:

- a. Any past or current breach of the Licence and of any action being taken to address the breach; and*
- b. Any issues likely to lead to a potential breach of the Licence, and of any action being taken to address the possibility.*

There are 5 pieces of evidence recorded for licence condition 8.4 which appears light in quantity for a fundamental condition.

The evidence includes 3 occasions on which National Highways has engaged with ORR around potential breaches. However, these all refer to potential failings or errors relating to KPIs as opposed to risk of breaches to licence conditions. Therefore, it is not clear how these pieces of evidence are relevant to recorded potential licence breach, other than demonstrating that National Highways has a system in place to identify potential breaches of its overall requirements. If there have not been any examples of risks of licence compliance communicated to ORR then this raises material questions, considering the licence has now been in place for 10 years it seems unlikely that there would be no conditions would have been at risk of breach during that time. Of course, this does demonstrate the difficulty of proving the 'absence of an issue'.

We would expect to see evidence of potential licence breaches being identified and communicated to ORR as opposed to KPI related issues as this is what the specific licence condition is asking for. The evidence would also be improved by including evidence of bilateral meetings where the potential for licence breach has been discussed and showing evidence of items which have been resolved over time.

There is also an early warning form relating to poor performance from subcontractors and an extract from National Highways' intranet about raising potential future issues of licence compliance. It would also be beneficial to see examples of where contractors have completed this form in practice.

Meeting the requirements of this licence condition requires that all relevant parties within the organisation are aware of the duty to report issues that might lead to non-compliance or are already likely to have breached the Licence. It also requires a process that facilitates monitoring and updating against the requirements. Clearly this is challenging in an organisation of the scale and breadth of National Highways. We understand that National Highways has undertaken a number of training sessions and operates a whistle-blower policy – these could helpfully be included within the evidence.

5. Findings & recommendations

Based on the analysis & evidence set out in this report, we have developed **five areas** in which we make findings and associated recommendations. These reflect our view of the components of licence compliance – as set out in the sections above.

We have also developed a finding that touches on the *nature* of the Licence. To some extent this is beyond the scope of this project – however we think there is a relationship between how the Licence is drafted and the compliance approach. This also begs some important questions around how the Licence can best meet its intended purpose.

5.1 Licence compliance

The key question we have been asked is to provide independent assurance about National Highways' ongoing legal compliance with the identified conditions.

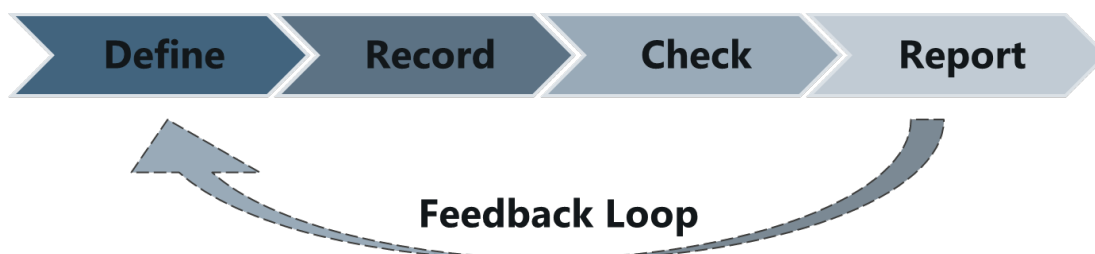
Finding 1.1: We consider that, on the balance of probability, National Highways currently complies with the identified conditions.

We have considered compliance by the thought-experiment of what would constitute potential or actual 'non-compliance'. Through the application of the risk-based principles within the ORR Holding to Account policy, and the nature of the Licence as being subjective to interpretation and needing to be on a case-by-case basis depending on the prevailing context; we consider that compliance is a relatively low bar. It would take a clear and material deviation for there to be consideration of 'non-compliance'.

5.2 Quality of National Highway's approach to recording evidence against licence conditions

As set out above, our view is that it is not straight forward to evidence non-compliance which in-turn indicates that the threshold for meeting compliance is relatively low. Before we consider the quality of evidence recorded, we must consider the process for recording evidence. We have broken this down into five key steps; define, record, review, report and feedback leading to iterative improvement. We

have found key findings and recommendations relating to these stages for consideration below, these reflect our view on how the process can be improved to support a greater quality of evidence.



Recommendation 2.1 *The licence conditions should be subject to an enhanced legal review, in collaboration with the ORR, to effectively define the requirements.*

As noted in Finding 1.1, we consider National Highways to be compliant with the licence conditions captured in our review. Having a mutual understanding of what compliance means between National Highways and the ORR, including a shared legal interpretation, would provide a higher confidence that National Highways will provide appropriate evidence to support compliance.

We understand that there are wider discussions as to the possibility of revisiting the licence and its conditions, this recommendation may be a key consideration for both parties as this workstream progresses, to ensure that future conditions are suitably defined.

Recommendation 2.2 *To provide ORR confidence in National Highways' approach to recording evidence, an appropriate evidence system should be utilised.*

Recommendation 2.3 *ORR needs to satisfy itself that National Highways is effectively self-assessing and recording its evidence to demonstrate compliance with the Licence. To help achieve this, National Highways needs to implement a greater focus on training across all of its business areas to ensure a consistent recording of evidence and approach to compliance. National Highways could also helpfully make clear to ORR how responsibility and accountability for licence compliance and escalating issues is cascaded throughout the organisation.*

A specific system needs to be in place to ensure that targeted evidence can be effectively recorded. The current excel spreadsheet is not user friendly and is not sufficient for the detail required. Effective training for best practice should also be arranged to ensure that the evidence saved is proportionate, clear and relevance can quickly be identified by an independent user – as opposed to simply referencing lengthy documents with minimal context.

There needs to be a single point of contact responsible for the recording of evidence to ensure consistency across National Highways – this would benefit from being a permanent member of staff such as a contract or compliance manager.

Finding 2.4 *In the check stage, we believe there is a suitable internal process to ensure compliance and to highlight areas for improvement.*

The three lines of defence approach appears appropriate, there is indication that the quality of evidence is increasing as the CAD and PRC teams continue to review licence compliance. Through our interviews, the team at National Highways anecdotally recognised that there has been a cultural shift

within the organisation in recent years and there are still further steps to go to continue to make the process more robust.

Recommendation 2.5 *There should be a requirement from the ORR for a standardised and periodic reporting of licence conditions and compliance against these by National Highways, through a dashboard or similar to be produced and shared with ORR.*

Recommendation 2.6 *Given resource constraints at the ORR, external support should be sought for an ORR audit National Highways' licence compliance until an ORR team is appropriately developed.* There is an absence of oversight from the ORR. Given the timing of the current investigation and the submission of this report, and considering best practice identified in other industries, it is clear that there should be a requirement for an external audit, on an annual basis with a sample approach to review of different conditions. This would continue to sharpen the mind and actions of National Highways and ensure that ORR is effectively holding National Highways to account with regards to licence compliance. This is not a criticism of the considerable effort and expertise that National Highways applies in its internal audit process, and we expect that these internal audits continue as they are an important part of the assurance framework. This is more aimed at the role of ORR in the process and the extra steps we consider they should take.

We recognise that ORR has ongoing resource constraints in this area. The investigation will have increased focus in the organisation, but the ORR team acknowledges it is critical to further develop an assurance function ahead of the next Road Period, to ensure National Highways is being held to account. However, this requires permanent resource for effective delivery. Until ORR has an appropriate resource in this area, external parties would be best placed to undertake compliance audits on behalf of ORR.

5.3 Quality of evidence

We have reviewed the evidence set against the four licence conditions selected by ORR. Our overall finding is that evidence should be more targeted, at times more relevant and include how decisions are actively considered in view of the licence. National Highways uses its own descriptors to rate the quality of evidence submitted against each licence condition.

Finding 3.1 *Where considerable data and information has been recorded, further work is required to highlight specific elements of the document, to better understand how these provide evidence of compliance*

Recommendation 3.2 *To provide ORR confidence in the strength of National Highways' compliance evidence, National Highways should include more targeted evidence to ensure it is directly relevant to the licence condition*

This is most relevant to condition 8.5 where we found that the items that had been flagged as potentially being non-compliant related to the performance against KPIs and not necessarily relating to risk of non-compliance against licence conditions. The evidence would more appropriately focus on non-compliance with the licence and how that has been detected and communicated. It could also helpfully provide a commentary on the risk of not knowing about non-compliance – which is effectively about how well embedded an understanding of this provision is within the wider business.

For 4.1, 5.15 and 5.16 a more targeted recording of evidence, as opposed to including lengthy documents in full with minimal context, would be appropriate to ensure it is clear for an independent review.

Recommendation 3.3 *To provide ORR confidence in the strength of National Highways' compliance evidence, National Highways should evidence actual decision making process/consideration relevant to a licence condition - documenting how these decisions are made.*

This is relevant for all of the licence conditions we have reviewed. The discussion focussed on each of the individual conditions is set out below:

- 4.1 – in this condition there are considerable public facing and internal guidance documents. The rationale for including these are sound and they do include an ambition and/or guidance in terms of operating and managing assets in the public interest. However, there is an absence of seeing this in action through actual decisions.
- 5.15/5.16 – similar to the condition above, there are several relevant statements and documents showing an ambition and approach to safety. There is some evidence of actual in-life learnings and decisions, the evidence would be strengthened if these were increased.
- 8.5 – as noted, emerging issue identified are not strictly tied to the performance of the licence condition. Equally, while National Highways describes its process of collating and discussing potential issues of non-compliance with ORR, there is no evidence of items being discussed, advanced or resolved. We would also expect evidence of the use template documents which are provided as evidence under this condition.

Finding 3.4 *It would be helpful to set out the principles used for data quality, referencing external benchmarks and standards if/where appropriate.*

There are global standards for data quality and management, such as ISO 8000. There is no outline as to how National Highways is attempting to achieve this standard or alternative accreditation – recognising that not all of ISO 8000 may be relevant for National Highways. Being clear about how data quality is defined and measured would increase confidence that National Highways is being effective in its self-compliance and data management. Recommendation 2.2 would support a move towards improved evidence reporting and data management.

5.4 Oversight by ORR & DfT

We have identified that National Highways could usefully provide more information in regular reports to ORR in its role as the Highways Monitor. We have also considered how ORR can best discharge its statutory powers and duties.

Finding 4.1: *While ORR can reasonably expect National Highways to fulfil the primary role of tracking and evidencing Licence compliance under the self-assurance framework in place, ORR should also develop its own views about the requirements of the Licence Conditions, and the circumstances in which there might be considered to be non-compliance.*

Finding 4.2: *ORR and National Highways could usefully work together to consider the range of possible interpretations of the Licence Conditions and what is considered to be good evidence – without of course fettering the discretion of ORR in any particular circumstance.*

Recommendation 4.3: *In the event that National Highways does not provide regular reporting, ORR should use its information gathering powers to gain access to the evidence that helps assist it in discharging its statutory duties.*

Recommendation 4.4: *ORR could helpfully set out guidance around what it expects in relation to reporting of a material breach. We would expect that this could be incorporated into the Holding to Account policy but could equally be standalone guidance.*

Finding 4.5: *It is clear that for both ORR and for the National Highways team responsible for coordinating Licence Compliance, that insufficient resource is available to fulfil the complex obligations of the Licence. Given the importance of the Licence to the sectoral arrangements, we consider that further resource should be made available. The resource implications should also be considered as part of our Findings in section 5.5 below around a more fundamental review of the Licence.*

5.5 Structure & operation of the Licence

The Licence for National Highways differs in its coverage and design from the Licences in place in other utility sectors. There is more subjectivity within the drafting and the Conditions we have examined do not have a clear parallel in other sectors. There are two related questions:

- To what extent is the nature of the evidence gathered by National Highways driven by the nature of the Licence Conditions? and/or
- Are the Licence Conditions fit for purpose?

To some extent this line of enquiry is beyond the original scope of our remit – in particular because the Licence is owned by the DfT with ORR having an advisory role only. We include our view for consideration by ORR due to the inter-relationship with the evidence collected and the impact on compliance behaviour.

Finding 5.1: *We consider that the subjective nature of the Licence Conditions requires a closer understanding of the interpretation of the requirements, including the original intent so that the purpose of the Licence can be fulfilled. We do not consider that the appropriate response is less-targeted evidence gathering.*

Finding 5.2: *We consider that ORR should advise DfT as to the benefits of a more fundamental review of the Licence Conditions – in line with best-practice to check if the original regulatory framework remains fit for purpose after nearly ten years of operation. We consider that ORR could usefully highlight the following aspects for inclusion in the review:*

- *Whether the original intent of the Licence Conditions remains valid in the current context, and whether the evolution of the SRN and National Highways requires new Conditions. Any such proposals would of course need to pass a high bar of being likely to materially improve the issue of interest – and be clear given the range of other requirements.*
- *Consideration of whether the definitions of some provisions could be expanded and/or refined – for example the public interest test as highlighted in this report. This could help National Highways target its resources in a more effective way as well as better address the underlying point of interest.*
- *The function of the Licence within the suite of tools used to hold National Highways to Account – across the many organisations (ORR, DfT, Transport Focus, wider stakeholders, taxpayers and HMT, etc) that have their own relationship with and demands on National Highways. Do the Licence Conditions continue to best serve the purpose for which they were created or are there other more effective means? Related, are the Licence Conditions*

rendered ineffectual by being 'trumped' by other requirements such as legislative and/or performance specifications.

- *The experience of collecting evidence and views around the likelihood of non-compliance, and hence how effective the Licence Conditions are in practice.*

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