

Holding the strategic highways company to account

3. Enhanced monitoring

Introduction

3.1 The work we do as part of enhanced monitoring is designed to allow us to gather the information we need to decide on, and take, the most appropriate course of action to achieve a positive outcome for road users, taxpayers, communities and the wider public. It is intended to allow us, working with National Highways, to resolve issues early and agree action without having to rely on enforcement.

3.2 Many, if not all, of our enhanced monitoring activities or tools could be deemed to be 'investigatory' in a common-sense use of the term because we use them to look in-depth into what National Highways is doing, how and why. We use these tools to reach a shared understanding with the company as to the root of a problem or concern and how it can remedy it. We try not to use the term 'investigatory' in this informal way as it can create confusion, preferring 'enhanced monitoring' instead.

3.3 Our enhanced monitoring activities represent what we refer to as a 'toolbox' approach. This aligns with the better regulation principles to which we must have regard under the Infrastructure Act 2015 (paragraph 1.46), in particular the need to act in a proportionate and targeted way. This means that we may choose to use some of the tools available to us and not others.

3.4 What we choose to use, when and how depends on the individual circumstances. This approach allows us to achieve the best results by tailoring our activities to the issue at hand rather

than proceeding systematically through a series of predefined steps that may be burdensome and onerous on the company and us. We have explained this approach, and the tools available to us, in more detail in this chapter.

Level of concern

3.5 Issues that are in enhanced monitoring are matters that we have 'escalated' with National Highways. This refers to our level of concern. As illustrated in Annex A, enhanced monitoring covers all our activity between routine monitoring and assessment and enforcement.

3.6 Accordingly, the level of our concern can range from, for example, something that is unlikely to be suggestive of wider failings in National Highways (with a detrimental impact on users, funders, and/or stakeholders) but requires enhanced monitoring and that we have raised with the company to respond and provide accountability all the way up to a very serious concern affecting the company's users, funders, and/or stakeholders at a national level and for which there is a reasonable prospect of us taking enforcement action.

3.7 When we identify an issue, we are clear in setting out the nature of our concern(s), any information and actions we require from National Highways, and why. If and when we have sufficient information to do so, we set out what outcomes we want to see from the company to reduce, mitigate and/or eliminate our concern(s).

3.8 We expect National Highways to assign responsibility so that our concern can be addressed and any requirements and actions are understood, followed up, and reported back on.

Assessing concerns

3.9 Where we identify a potential concern with National Highways' delivery of, or compliance with, the RIS and/or SD&G we will consider the nature of the issue and whether it requires action from ORR. This may include considering:

- a. how we became aware of the actual or potential non-compliance, for example whether National Highways promptly and openly reported the problem to us in accordance with condition 8.5 of its licence;
- b. the reason for the actual or potential contravention, for example whether it was wholly or partly within National Highways' control;

- c. the significance of the issue, including whether it is a one-off or minor failure or forms part of a wider sustained, systemic or persistent failure, along with the impact of the non-compliance on users of the strategic road network (SRN), communities located next to the SRN, taxpayers and any other affected persons;
- d. whether the issue is one for ORR, the Secretary of State or another body to address and/or whether the Secretary of State or another body has taken enforcement action against National Highways or intends to do so;
- e. any action National Highways has taken or is taking to address the actual or potential non-compliance;
- f. the gap between what is required from National Highways, what it is currently delivering and the likely impact of non-delivery;
- g. the reputational impact on National Highways of a particular course of action; and
- h. the statutory enforcement tools available to us and their appropriateness in this matter.

What we do

3.10 Where National Highways informs us of, or our routine monitoring identifies, a potential issue or concern relating to the company's compliance with the RIS and/or SD&G, we consider the nature of the concern and decide whether we need to take action and the benefit of doing so.

3.11 Where we identify potential or actual non-compliance, we consider how best to resolve the issue. This enables us to give National Highways the opportunity to explain the context of potential or actual non-compliance, the reasons for it and any measures the company is taking to mitigate and correct it, without the need to consider the use of our enforcement powers.

3.12 Our routine monitoring and assessment take a forward-looking approach, the aim of which is to enable us to identify risks to National Highways' delivery of the RIS and/or compliance with SD&G as early as possible. Additionally, under condition 8.5 of its licence the company must ensure that it makes us aware at the earliest opportunity of any issues likely to lead to a potential contravention of the licence and of any action it is taking to address the possibility. By virtue of condition 6.25 of its licence this includes any risk to delivery of its strategic business plan, delivery plan for the road period or annual delivery plan updates.

3.13 In the case of National Highways' actual non-compliance with the RIS and/or SD&G, we may proceed straight to enforcement action, if, in our view, the circumstances and seriousness warrant it.

Gathering data and information

3.14 As an initial step we are likely to ask National Highways to provide further data and/or information to help us understand our concern(s). These requests are likely to be in addition to the data and information we receive through our routine monitoring (the regular reporting we require as set out in our monitoring reporting guidelines and which the company is required to provide under conditions 7.1 and 7.2 of its licence). We can use our statutory information gathering powers (sections 10(3) to 10(6) of the Act), if required.

3.15 However, in order to quickly and effectively remedy our concern, we expect the company to work with us constructively and proactively to provide the data and information we need to help us form a judgement on the actions we, or it, may need to take. This means we do not need to have recourse to our statutory powers or place onerous requirements on the company.

3.16 In addition to information and data requests, we may require National Highways to attend meetings and/or provide briefings, as appropriate.

3.17 We also recognise that other organisations and/or stakeholders, including local and regional bodies, may have relevant information to share that is pertinent to our concern(s). We may draw on their insight where appropriate.

A toolbox approach

3.18 As explained in paragraphs 3.29–3.30, we express our level of concern to National Highways in a clear and consistent way. We talk to the company about what it needs to do to resolve our concern, and we escalate that concern where it does not take appropriate action and/or outcomes/delivery do not improve and to reflect what in our judgement is the urgency and/or seriousness of the matter.

3.19 This is intended to provide a clear opportunity – and incentive – for National Highways to resolve issues as early as possible, before our level of concern is so serious that we are considering taking enforcement action.

3.20 The actions that we may take, short of enforcement action, sit in the toolbox. We use what we consider to be the right tool at the right time, in a proportionate and targeted way, to achieve an effective resolution. These are ‘investigatory activities’ that form part of enhanced monitoring. In addition, as explained in paragraph 3.34, we may use one or more of these tools as part of an

investigation that we have placed on a more formal footing. The rest of this section describes the tools that we use: improvement plans, external advisors and consultants, public comment ORR hearings, and/or engagement with National Highways.

Improvement plans

3.21 We may require National Highways to develop or engage with us on improvement plans. We would expect the company to design and implement any such plan to remedy or address a specific and/or linked/systemic issue(s). Chapter 4 explains improvement plans in the context of statutory enforcement notices.

3.22 We may require National Highways to engage with stakeholders on improvement plans. Who those stakeholders should be and for what purpose they would be engaged would be determined on a case-by-case basis, depending on the issue. We may also encourage the company to publish any such improvement plan, if, in our view, this will incentivise the right actions and/or behaviours and hold the company effectively to account.

External advisers and consultants

3.23 We may require National Highways to cooperate with third party external advisers that we appoint to support and inform our enhanced monitoring. We may appoint advisors at any stage for any purpose in furtherance of our statutory duties.

3.24 We may require National Highways to cooperate with third party expert consultants to do deep dives into areas of the company's capability, performance and delivery and advise us on areas for improvement. Sometimes these studies are co-funded with the company where there is a strong shared impetus and where it represents a more effective spend of public funds. We would usually publish these reports on our website.

Public comment

3.25 We have statutory duties that require us to publish information, and we apply the better regulation principles (paragraph 1.46) including transparency. We may publicly comment on National Highways' performance, delivery and/or efficiency and the nature of any potential or actual non-compliance if, in our view, this will incentivise the right actions and/or behaviours and hold the company effectively to account. We may publish related correspondence with the company.

ORR hearings

3.26 We may choose to hold a hearing between ORR and National Highways to gather evidence and/or explore in more depth issues of concern. We may choose to involve affected parties or representative groups, if we determine it to be relevant, appropriate and proportionate.

3.27 The timing, scope and exact format of hearings will be determined by ORR on a case-by-case basis, based on the nature of the issue under enhanced monitoring. Hearings will be on the record, and we would expect to publish a written account of proceedings on our website. This would respect commercial confidentiality and those involved would have the chance to review for factual accuracy prior to publication.

3.28 We may undertake visits and/or engagement with other stakeholders to collect evidence, without a hearing. We will consider the most effective and proportionate approach when deciding on our chosen course of action.

Engagement with National Highways

3.29 We use regular meetings with National Highways to provide check and challenge to the company for those issues of concern and to review its progress addressing them. These meetings inform our consideration of whether:

- a. the risk of non-compliance has increased, decreased or remained stable; and/or
- b. actual non-compliance has been sufficiently explained, its impacts mitigated, the cause(s) identified, and the progress made to bring the non-compliance to an end.

3.30 Where we are not content with National Highways' response and/or the progress made, our activities may include but are not limited to:

- a. requiring National Highways to explain why the risk of potential non-compliance has not decreased, or in the case of actual non-compliance, why satisfactory progress has not been made to remedy it;
- b. holding meetings at Director and/or CEO level to discuss our concerns and the actions we require;
- c. requiring National Highways to take further action to implement its improvement plan(s);
- d. using any of the other tools described in this section; and
- e. giving advice to the Secretary of State under section 10(2) of the Act.

3.31 Our engagement with National Highways informs regular conversations with the department where we discuss areas of concern, including those that have been resolved.

Investigations

3.32 An investigation is something that happens when we put our enhanced monitoring activities onto 'a more formal footing'. This happens when we consider it appropriate, including where we have failed to gain sufficient traction with National Highways. It involves issuing an investigation initiation letter. In deciding whether to do this, we will consider the level of engagement that has gone before. A letter would set out our concerns and the scope of an investigation.

3.33 The decision to issue a letter to National Highways is likely to follow a period of enhanced monitoring against one or more deliverables, and/or failure by the company to deliver one or more outputs in the RIS and/or for us to reasonably believe it is or has been non-compliant with SD&G. However, we may issue an investigation initiation letter to the company at any point if we believe it is appropriate.

3.34 An investigation may encompass some or all of the activities in our toolbox. It can include carrying out research, analysing specific areas of under-performance, using transparency and data to highlight issues and considering the findings of reviews by independent external experts, as appropriate.

Possible outcomes

3.35 The activities we undertake as part of enhanced monitoring could result in one of several outcomes for National Highways. We would expect the vast majority to fall within (a), (b) or (c):

- a. concern has been resolved/remedied – no further action is necessary and routine monitoring is resumed;
- b. concern has been resolved/remedied – no further action is necessary, but a period of enhanced monitoring is required to prevent recurrence/ensure the resolution is effective;
- c. concern has not been resolved/remedied – on assessment of the evidence provided to us we conclude that National Highways has done everything we could reasonably expect to resolve/remedy the concern and there is nothing else that could reasonably be achieved by taking further action. No further action is necessary and routine or enhanced

monitoring is resumed; or

- d. concern has not been resolved/remedied – on assessment of the evidence provided to us, likely but not always as a result of an investigation undertaken following the issue of an investigation initiation letter, we conclude that National Highways has not done everything we could reasonably expect to resolve/remedy the concern and it has been or is non-compliant with the RIS (section 3 of the Act) and/or SD&G (section 6 of the Act). Further action is necessary up to and including a decision as to whether to take enforcement action.

3.36 If we consider that there is past or ongoing non-compliance with the RIS and/or SD&G in the circumstances set out in paragraph 3.35(d), we will issue National Highways with a case to answer letter.

3.37 The purpose of the case to answer letter is to provide National Highways the opportunity to respond formally to the instance of non-compliance and the evidence supporting that finding prior to ORR's Board considering the matter (see chapter 4). It will inform the company of the grounds on which ORR considers there is or has been non-compliance with the RIS and/or SD&G, and where appropriate, the enforcement action being considered. The letter will inform the company of the date by which it must:

- a. provide any representations, objections or evidence in defence of National Highways' actions, or lack of the same;
- b. indicate steps that National Highways has taken or is taking to remedy its non-compliance and as appropriate mitigate any impacts and/or prevent recurrence; and/or
- c. where appropriate, make representations on the proposed enforcement action.

3.38 The ORR Board will consider all the evidence and the response of National Highways to the case to answer letter, alongside its duties. Enforcement decisions are reserved to the Board. It will decide:

- a. if National Highways has contravened or is contravening the RIS and/or SD&G; and, if it has,
- b. what action ORR should take.

Chapter 4 sets out the enforcement actions available to us, and the processes we follow.

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