

Clean Highways
20 Kingsend
Ruislip, Middlesex
HA4 7DA
01895 625770
07799 404766

Mr Grant Shapps MP
Secretary of State for Transport
Department for Transport
Great Minster House
33 Horseferry Road
London
SW1P 4DR

10th February 2020

Dear Mr Shapps,

Letter before claim for a Judicial Review
RIS 2 - Failure to consult on an objective and KPI for litter*

1. Proposed defendant: The Secretary of State for Transport
2. Claimant: Peter Silverman MA MSc 20 Kingsend, Ruislip, Middlesex HA47DA - Principal of Clean Highways www.cleanhighways.co.uk
3. Defendant's previous correspondence for reference: See [AA DfT e-mails Jan 2020](#) and [RC ORR e-mail of 27th Jan](#)
4. I will represent myself.
5. The matters being challenged:

The 2020 /2025 Road Investment Strategy, RIS 2, is due to come into force on 1st April i.e. in under 2 months' time.

RIS 1 did not include an Infrastructure Act 2015 S3 (a) objective or a Key Performance Indicator in respect to "litter*" / Highways England's duty under S89(1)* of the Environment Protection Act 1990 to keep its roads and land clear of litter.

There is no information available to indicate whether these will be included in RIS 2. This is because the DfT chose not to publish the Draft RIS 2 and neither the DfT nor the ORR are prepared to provide any information on the issue.

It seems therefore that RIS2 will come into force without proper consultation having taken place on litter. It may appear as a *fait compli* without an objective and KPI for litter* or with inadequately worded ones.

This will be to the continuing detriment of our environment and it should not be allowed to happen.

6. Interested parties to whom a copy of this letter is being sent: The Office of Rail and Road.

7. The issues:

Since their inception in April 2015 HE has failed to comply with their statutory duty under EPA S89 (1)* to ensure, so far as is practicable, that they keep the motorways and certain of the trunk roads on their network clear of litter and refuse.

Please refer to [Clean Highways – Have your say](#) and [Channel 4 News 3rd Feb 2020 Motorway Litter](#)

A contributory factor is the failure of the DfT to include an Infrastructure Act 2015 S3 (a) objective or a Key Performance Indicator in respect to “litter*” / Highways England’s duty under S89(1)* of the Environment Protection Act 1990 in RIS 1 and the consequent failure of the ORR to treat compliance with that duty as a function of Highways England and therefore subject to monitoring by it.

Exposing Highways England to scrutiny in this way would have drawn attention to the previous failure of the Secretary of State to comply with the same duty prior to April 2015.

It appears to me that to avoid this the DfT have covered their tracks through a series of fudges (= adjusting in a false or clumsy way, to evade a problem) and obfuscation as evidenced by the following facts, statements and observations:

S10 (1) of the [Infrastructure Act 2015](#) says the Office of Rail Regulation must carry out activities to monitor how a strategic highways company exercises its functions. In the Act’s table of contents under *Part I Strategic highways companies* there is a heading – “*Functions*” but no functions (at least of a strategic highway company) are listed or referred to in the two subsidiary sections.

[The ORR stated in January 2017](#) “We interpret the reference in section 10(1) to relate primarily to monitoring Highways England’s compliance with the RIS ...” and “that assessing Highways England’s compliance with the specific provisions in s.89 is outside the scope of ORR’s functions”

While RIS 1 lays down [Environmental Key Performance Indicators](#) for “noise” and “biodiversity” and Performance Indicators for “air quality” and “greenhouse gases” there is no KPI or PI for “litter*”. There is also no objective specified relating to litter.

Ministers were not apparently aware of this. On page 58 of the [Litter Strategy for England April 2017](#) co-authored by Ministers John Hayes MP (DfT), Lord Gardiner of Kimble (DEFRA) and Marcus Jones MP (Communities & Local Government) they wrote in reference to Highways England “We.... will consider developing a revised litter cleaning KPI for the next Performance Specification period”.

John Hayes’ successor as Roads Minister, Jesse Norman MP, was similarly ill-informed when I met with him on 2nd July 2018 being unaware that there was no litter KPI. The DfT officer present at the meeting wrote to me to say that “HE, DEFRA and the DfT were developing a robust metric for the RIS2. Robust data on the state of roadside littering on the Strategic Road Network would be delivered”. [See Jesse Norman MP meeting follow up correspondence](#)

However on 23rd January 2019 when [I asked the Permanent Secretary if this work had been completed](#) and, if so, whether I could have a copy, I received no reply.

In June 2017 Transport Focus in its report [Road users’ priorities for Road Investment Strategy 2020-25](#) said on page 6 that “RIS 2 should ensure that the funding provided to Highways England is sufficient to discharge its duties effectively under the Environmental Protection Act 1990”.

RIS 1 does not specify any such funding and no earmarked funds are provided to HE for this purpose.

IA S3 (3) (b) says that an RIS must specify the financial resources provided to achieves its objectives.

Baroness Randerson after meeting with me [asked the government on 4th June 2019](#) “whether litter removal is a key performance indicator for Highways England; and if not, why not”. She was told “*There is currently no key performance indicator as part of the Road Investment period (2015 – 2020)*. This is due to Highways England having a statutory duty under Section 89 of the Environmental Protection Act 1990 to ensure, so far as is practicable, that its land and highways are kept clear of litter and refuse”.

If the statutory duty “currently” precludes a KPI for litter being introduced in RIS 1 then that would equally apply to RIS 2 unless the EPA was going to be amended. So why has the government said it is considering developing a “revised” litter KPI for it?

According to Part 6 of HE’s License the Secretary of State has to produce a Draft RIS 2 for assessment by the ORR as part of a process for the development of the final version.

In October 2018 they published a document entitled [Draft Road Investment Strategy 2 Government Objectives](#).

In the ministerial forward Jesse Norman MP stated that “The statutory process that has been established for setting a Road Investment Strategy (RIS) is designed to ensure that decisions about the future of the SRN draw on a wide evidence base which has been consulted on publicly”.

On page 16 under “Being environmentally responsible” it says “We want to build on the progress made in RIS1 to improve environmental outcomes. For RIS2 we want a wider range of issues to be monitored and also to widen the scope of the outcome area to cover issues relating to public health and impacts on communities”.

Current position

I have been told by the DfT and ORR (23rd – 26th January) that RIS 2 was awaiting the Minister’s signature prior to publication. They were not able to share with me what the KPIs were or to confirm, one way or the other, whether there was one for “litter”. The ORR had received a detailed Draft RIS inclusive of KPIs but they said this information was not in the public domain. See [AA DfT e-mails Jan 2020](#) and [RC ORR e-mail of 27th Jan](#)

I can see no evidence that there has been any meaningful public consultation with regard to an objective or KPI for litter* for RIS 2. Over the years I have met with three roads ministers and with the ORR on two occasions to discuss litter issues on the HE network. The ORR refer to me as one of their senior stakeholders, yet I have not been consulted on this by either the DfT or the ORR and I can see no evidence that any other independent stakeholders have been so consulted.

In view of this paucity of information, on 23rd January I put this question to your department’s Senior Policy Lead, RIS Futures

“how can I now, or could I have had in the past, made representations to the Minister or your department re the need for a kpi for litter and what it should say, if no draft RIS (inclusive of

kpis) has ever been available and you cannot even tell me if there is one in the version awaiting final approval?"

See [AA DfT e-mails Jan 2020](#) . I have not received a reply.

8. I would like the Secretary of State to take the following actions:

(a) Answer the above question.

(b) Provide me with a copy of the "Environmental KPIs and PI's", and any "litter*" KPI/PI separately if one is not included under this heading, as they appear in the most up to date draft / version of RIS 2 regardless of whether or not it has been finalised or signed by the relevant minister or published.

(c) Provide me with a copy of those sections of same version / draft of RIS 2 which refers to any Infrastructure Act 2015 S3(a) objective(s) set for HE in respect to litter / compliance with EPA S89((1)*,

(d) To complete the above by e-mail by 5.00 pm Friday on 14th February.

(e) Include in RIS2 an IA S3(a) objective and a KPI for litter* which would:

(i) Be consistent with HE's duty under EPA S89(1)*

(ii) Enable the ORR to independently monitor compliance with the KPI through random checks without relying on data provided by HE or their contractors.

(f) Confirm to me by e-mail by 5.00 pm on 28th February that this will be the case and provide me with a copy of your proposed or final text.

9. Alternative dispute resolution

I believe the urgency of this matter precludes any arbitration, but I am open to any suggestions you might want to make on this. I am also prepared to meet you or your civil servants to try to resolve my concerns to avoid recourse to the High Court.

10. Information sought

See 8 (a), (b) and (c) above.

11. Relevant documents

Please action the hyperlinks included in this document.

12. Please response to me by e-mail at petersilverman@cleanhighways.co.uk in the first instance and then by post to me at the address shown in 2 above.

13. Proposed reply date – see 8 (d) and (f) above.

*References to "litter" should be interpreted as references to "litter and refuse". References to Environmental Protection Act S89(1) should be interpreted as references to it and S89(2).

Yours sincerely,

Peter Silverman MA Msc
www.cleanhighways.co.uk

01895 625770
07799 404766