

# Clean Air: Our Right but Whose Responsibility?

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## Introduction

The state of the air that we breathe is integral to our health and quality of life. Whilst as individuals we can take steps to minimise our own pollution impact and exposure, we have little control over the quality of the air around us and rely heavily on effective regulatory frameworks being in place to ensure that the air we breathe is clean and safe.

This paper explains why air pollution is a problem in the UK, and summarises its major sources and impacts. It sets out the legal framework for action and explains the duties placed on both national Governments and local authorities; focusing in on the role played by planning policy and development control. It then highlights some continuing issues with the present framework and speculates why it has so far been ineffective at delivering clean air in this country, before anticipating what might be round the corner in terms of air quality policy, law and legal challenges.

## Air pollution: What's the problem?

Whilst the pea-souper fogs of the 1950s are thankfully a thing of the past in this country, unfortunately our air pollution problems are not. Dangerous and illegal levels of pollution still persist across the UK.

The Clean Air Acts of 1956 and 1968 introduced welcome measures to reduce industrial and domestic emissions from coal burning in our towns and cities. However, the landscape of our pollution problem has changed dramatically since then. Whilst industry and domestic heating continue to play a part, they have taken more of a back-seat. Emissions of largely invisible pollutants from the increasing number of motor vehicles on our roads now serve as the main culprit for illegal levels of air pollution across the country.

The major contemporary ambient air pollutants in the UK are nitrogen dioxide (“NO<sub>2</sub>”) and coarse and fine particulate matter (“PM<sub>10</sub>” and “PM<sub>2.5</sub>”). Both are emitted as a result of fossil fuel combustion. PM can also arise directly from natural sources as well as tyre and brake wear, and can form within the atmosphere as a result of the reaction of other chemicals in the air, such as ammonia or nitrogen oxides (“NO<sub>x</sub>”).

NO<sub>2</sub> persists at levels in excess of European legal limits across the UK.<sup>1</sup> Although legal limits for PM are being met, throughout the country this pollutant remains at concentrations which are damaging to human health and exceed health-based guidelines set by the World Health Organisation (“WHO”).

Poor air quality is recognised as the “largest environmental risk to public health in the UK”.<sup>2</sup> It affects us at every stage of life, from the womb into old age, and studies have suggested that the most deprived areas bear a disproportionate weight of the health burden.<sup>3</sup> The biggest impact is through cardiovascular disease, where it can trigger heart attacks and strokes. It is also linked to respiratory conditions and aggravates their symptoms, increasing the risk of hospitalisation and death. Air pollution has been shown to cause cancer and there is increasing evidence suggesting links to a wide range of health conditions from

<sup>1</sup> An interactive map showing roadside NO<sub>2</sub> exceedances in 2015, as modelled by the national Pollution Control Model is at <https://uk-air.defra.gov.uk/data/gis-mapping> [accessed 8 October 2018].

<sup>2</sup> Defra, “UK plan for reducing roadside nitrogen dioxide concentrations: detailed plan” 2017.

<sup>3</sup> Mitchell, G., and others, “Who benefits from environmental policy? An environmental justice analysis of air quality change in Britain, 2001–2011”, 2015, Environmental Research Letters.

diabetes to dementia,<sup>4</sup> as well as loss of cognitive ability,<sup>5</sup> and lower birth weights. In the UK, air pollution has an estimated social cost of £22.6 billion annually.<sup>6</sup>

The UK is not alone, and air pollution continues to represent a serious threat to public health in many countries across Europe and the rest of the world. The latest official figures from 2015 show that the European legal limit for NO<sub>2</sub> was exceeded in 22 of 28 EU Member States, with limits for PM<sub>10</sub> breached in 20 Member States.<sup>7</sup> Globally, the WHO has modelled that 92% of the world's population lives in places where pollution levels exceed WHO guidelines, with the equivalent of three million premature deaths a year linked to exposure to outdoor (ambient) air pollution.<sup>8</sup>

## Who is responsible for taking action?

The legal landscape in the UK is complex and fragmented. Responsibilities for monitoring air pollution and taking action to meet air quality standards lie with both central and local government and originate from both domestic and EU-derived legislation. Planning policy also plays an important role in dictating how air quality considerations are taken into account during both development plans and development control decisions.

This section offers only to summarise the framework for action to reduce air pollution, and as a result it inevitably fails to include detail on a number of regulatory elements that contribute to the wider picture—including, for example, Smoke Control Zones, anti-idling regulation, building control, emissions standards and environmental permitting.

### *National Government has ultimate responsibility under EU law for meeting ambient air quality standards and air pollution emission reduction commitments*

EU legislation regulates the level of pollutants present in the air we breathe. It also sets limits on the absolute quantity of pollution that Member States can emit.

### Ambient air quality

Directive 2008/50 on Ambient Air Quality and Cleaner Air for Europe (the “AAQ Directive”)<sup>9</sup> sets limits for the ambient concentrations of a number of air pollutants, including NO<sub>2</sub> and PM (commonly referred to as “limit values”—see table 1). Member States are required to assess the levels of pollutants according to minimum monitoring requirements,<sup>10</sup> and ensure that legal limits are achieved throughout their reporting zones by a given deadline.<sup>11</sup> The Court of Justice of the European Union (“CJEU”) has clarified that the obligation to achieve limit values pursuant to the AAQ Directive is one of result<sup>12</sup> and Member States

<sup>4</sup> World Health Organisation, “Review of evidence on health aspects of air pollution—REVIHAAP Project” 2013 at [http://www.euro.who.int/\\_\\_data/assets/pdf\\_file/0004/193108/REVIHAAP-Final-technical-report-finalversion.pdf?ua=1](http://www.euro.who.int/__data/assets/pdf_file/0004/193108/REVIHAAP-Final-technical-report-finalversion.pdf?ua=1) [accessed 8 October 2018].

<sup>5</sup> “Air pollution causes ‘huge’ reduction in intelligence, study reveals” *The Guardian* 27 August 2018 at <https://www.theguardian.com/environment/2018/aug/27/air-pollution-causes-huge-reduction-in-intelligence-study-reveals> [accessed 8 October 2018].

<sup>6</sup> Royal College of Physicians, “Reducing air pollution in the UK: Progress report 2018” 2018.

<sup>7</sup> European Environment Agency, “Air quality in Europe—2017 report” 2017 at <https://www.eea.europa.eu/publications/air-quality-in-europe-2017> [accessed 8 October 2018].

<sup>8</sup> WHO, “WHO releases country estimates on air pollution exposure and health impact” 2016 at <http://www.who.int/news-room/detail/27-09-2016-who-releases-country-estimates-on-air-pollution-exposure-and-health-impact> [accessed 8 October 2018].

<sup>9</sup> Directive 2008/50 on Ambient Air Quality and Cleaner Air for Europe [2008] OJ L152/1.

<sup>10</sup> Directive 2008/50 on Ambient Air Quality and Cleaner Air for Europe [2008] OJ L152/1 art.5-11, Annex III.

<sup>11</sup> Directive 2008/50 on Ambient Air Quality and Cleaner Air for Europe [2008] OJ L152/1 art.13. However, limit values do not apply to workplaces (which are governed by EU health and safety legislation); the carriageways of roads and central reservations (unless there is regular pedestrian access to such reservations); or locations where members of the public do not have access and there is no fixed habitation—see the definition of “ambient air”, art.2 and Annex III.

<sup>12</sup> See *R. (on the application of ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs* (C-404/13) EU:C:2014:2382; [2015] 1 C.M.L.R. 55 at [42]; *Commission v Bulgaria* (C-488/15) at [66]–[70]. See also Opinion of AG Kokott in *Commission v Bulgaria* at [69]–[79], for an in-depth analysis of the nature of the obligation to comply with limit values.

cannot invoke socio-economic or technical difficulties to justify breach.<sup>13</sup> Where limit values are exceeded in an area, Member States are required to ensure a plan is in place which sets out appropriate measures to ensure that the period of exceedance is kept as short as possible.<sup>14</sup>

Limit values are expressed by reference to a certain period of time. Typically, there are both annual average limits and shorter term limits—e.g. daily or hourly limits. The former aim to protect from long-term (chronic) exposure, while the latter aim to protect from short-term (acute) exposure to episodes of high pollution that last only hours or days.

**Table 1: Limit values for NO<sub>2</sub> and PM ambient concentrations set by the AAQ Directive**

Pollutant	Period	Limit values (µg/m <sup>3</sup> )	Allowed exceedances in one calendar year	Compliance deadline
NO <sub>2</sub>	1 year	40	—	1/1/2010
	1 hour	200	18	1/1/2010
PM <sub>10</sub>	1 year	40	—	1/1/2005
	24 hours	50	35	1/1/2005
PM <sub>2.5</sub>	1 year	25	—	1/1/2015

In England, the AAQ Directive is transposed into domestic law by the Ambient Air Quality Standards Regulations 2010.<sup>15</sup> Pursuant to these Regulations, legal responsibility for meeting limit values and ensuring air quality plans are in place falls on the Secretary of State.<sup>16</sup> Equivalent regulations apply to Wales, Scotland and Northern Ireland, which impose corresponding obligations on the Welsh Ministers, Scottish Ministers and Department for the Environment of Northern Ireland.<sup>17</sup>

Several judgments of the CJEU have clarified that citizens and NGOs have the right to go before national courts where the limit values set by the AAQ Directive are breached, and that those courts must substantively review air quality plans to determine whether they meet legal requirements.<sup>18</sup> Where limit values are not met or air quality plans are inadequate, national courts are required to provide an effective remedy. This effective “right to clean air” has formed the basis of ClientEarth’s legal action against the UK Government, as well as a wave of successful clean air cases across the rest of Europe. These challenges have led to courts ordering the adoption of more ambitious air quality plans in several European countries, including the UK,<sup>19</sup> Germany,<sup>20</sup> Italy,<sup>21</sup> France<sup>22</sup> and the Czech Republic.<sup>23</sup>

Through the course of ClientEarth’s UK litigation, the domestic courts have cast light on the proper interpretation of the requirement for air quality plans to set out measures to ensure that the period of exceedance is kept “as short as possible”. Most notably, the High Court judgment in *R. (on the application*

<sup>13</sup> See *Commission v Bulgaria* (C-488/15) at [75]–[77]; *Commission v Italy* (C-88/11) at [63].

<sup>14</sup> Directive 2008/50 on Ambient Air Quality and Cleaner Air for Europe [2008] OJ L152/1 art.23. The CJEU has clarified that “while Member States have a degree of discretion in deciding which measures to adopt, those measures must, in any event, ensure that the period during which the limit values are exceeded is as short as possible”, see *R. (on the application of ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs* (C-404/13) EU:C:2014:2382 at [57].

<sup>15</sup> Ambient Air Quality Standards Regulations 2010 (SI 2010/1001).

<sup>16</sup> Ambient Air Quality Standards Regulations 2010 (SI 2010/1001) reg.17, reg.26

<sup>17</sup> Air Quality Standards (Wales) Regulations 2010 (WSI 2010/1433) regs 13 and 20; Air Quality Standards (Scotland) Regulations 2010 (SSI 2010/204) regs 17 and 24; Air Quality Standards Regulations (Northern Ireland) 2010 (NISI 2010/188) reg 18 and 25.

<sup>18</sup> See *R. (on the application of ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs* (C-404/13) EU:C:2014:2382 at [56]–[58].

<sup>19</sup> *R. (on the application of ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs* [2015] UKSC 28; [2015] 4 All E.R. 724; *R. (on the application of ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs* [2016] EWHC 2740; *R. (on the application of ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs (No.3)* [2018] EWHC 315 (Admin); [2018] Env. L.R. 21.

<sup>20</sup> See <https://www.clientearth.org/market-changing-moment-germanys-highest-court-orders-diesel-bans/> [accessed 8 October 2018].

<sup>21</sup> See <https://www.cittadiniperlaria.org/ricorso-al-tar-contro-regione-lombardia/> [accessed 8 October 2018].

<sup>22</sup> See <https://www.clientearth.org/highest-administrative-court-grants-access-justice-upholds-right-clean-air-france/> [accessed 8 October 2018].

<sup>23</sup> See <https://www.clientearth.org/czech-court-dismisses-pragues-inadequate-air-quality-plan/> [accessed 8 October 2018]; <https://www.clientearth.org/czech-court-dismisses-brnos-inadequate-air-quality-plan/> [accessed 8 October 2018].

of *ClientEarth (No.2) v Secretary of State for the Environment, Food and Rural Affairs*<sup>24</sup> set out a three-part test, which requires that air quality plans must:

- aim to achieve compliance as soon as possible;
- choose a route to compliance which reduces human exposure as quickly as possible; and
- ensure that compliance with the limit values is not just possible but likely.

The *ClientEarth (No.2)* judgment also made it clear that air quality plans must include those technologically feasible measures that will bring about compliance in the shortest time possible, and, in doing so, cost can only be secondary to efficacy. As Garnham J expressed himself:

“... I reject any suggestion that the state can have any regard to cost in fixing the target date for compliance or in determining the route by which the compliance can be achieved where one route produces results quicker than another. In those respects the determining consideration has to be the efficacy of the measure in question and not their cost.”<sup>25</sup>

Since the deadline for meeting the NO<sub>2</sub> limit value passed in 2010, Defra and the devolved administrations have produced three successive UK air quality plans aimed at addressing ongoing NO<sub>2</sub> exceedances—published in September 2011, December 2015 and July 2017. Each plan has been the subject of successful judicial review by ClientEarth, with each challenge culminating in a mandatory order from the court requiring the Secretary of State to draw up a compliant updated (or supplementary) plan.

As a result of ClientEarth’s latest challenge, the 2017 air quality plan was declared unlawful by the High Court in February 2018. It failed to include a legally compliant plan for Wales, as well as 45 local authority areas in England, which were projected to suffer from illegal levels of NO<sub>2</sub> for years to come, but with which Defra had taken a “less formal approach” to ensuring that local measures to reduce pollution were identified and implemented.<sup>26</sup>

The High Court ordered that the Secretary of State publish a supplemental English plan by 5 October 2018 to account for these additional local authorities. The Welsh Ministers separately undertook to the court to publish a supplementary Welsh air quality plan by 31 July 2018. Within days of that deadline, and as a result of issues with the draft plan identified by ClientEarth, the Welsh Ministers applied to the court for an extension to 31 November—stating that “the situation has proved more complicated than initially thought”.<sup>27</sup> We are, therefore, still waiting for a fully compliant air quality plan for addressing illegal levels of NO<sub>2</sub> in the UK.

## Emission reduction targets

Directive 2016/2284 on the Reduction of National Emissions of Certain Atmospheric Pollutants (the “NEC Directive”)<sup>28</sup> sets national emission reduction commitments for a number of harmful air pollutants, including PM<sub>2.5</sub> and NO<sub>x</sub>.<sup>29</sup> These limit the total amount of each pollutant that can be emitted within each Member State every year, with binding reduction commitments set for 2020 and 2030, compared to 2005 emissions.

<sup>24</sup> *R. (on the application of ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs* [2016] EWHC 2740; [2017] P.T.S.R. 203.

<sup>25</sup> *R. (on the application of ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs* [2016] EWHC 2740 at [50].

<sup>26</sup> *R. (on the application of ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs (No.3)* [2018] EWHC 315 (Admin).

<sup>27</sup> “Welsh Government misses air pollution deadline” *BBC News* 24 July 2018 at <https://www.bbc.co.uk/news/uk-wales-44947192> [accessed 8 October 2018].

<sup>28</sup> Directive 2016/2284 on the Reduction of National Emissions of Certain Atmospheric Pollutants [2016] OJ L344/1.

<sup>29</sup> NO<sub>x</sub> emissions include both primary NO<sub>2</sub> and nitric oxide (NO) with the latter reacting in the atmosphere to produce secondary NO<sub>2</sub>.

**Table 2: UK’s emission reduction commitments pursuant to the NEC Directive, by reference to 2005 emission levels**

Pollutant	2020 (Kilotonnes)	2030 (Kilotonnes)
Sulphur dioxide	59%	88%
NO <sub>x</sub>	55%	73%
Ammonia	8%	16%
PM <sub>2.5</sub>	30%	49%

Pursuant to the NEC Directive, the UK is obliged to publish a national air pollution control programme (“NAPCP”) by April 2019 to show how it will meet these reduction commitments. The draft “Clean Air Strategy” recently consulted on by Government is a precursor to this document. NAPCPs are distinct from the air quality plans the UK is obliged to ensure are in place pursuant to the AAQ Directive. However, they must take account of the need to reduce air pollutant emissions for the purposes of reaching compliance with ambient air quality limit values.<sup>30</sup> The final UK NAPCP must therefore set out measures to reduce NO<sub>x</sub> emissions that are complimentary to the 2017 UK air quality plan’s objective to comply with the NO<sub>2</sub> limit values in the shortest time possible.

In the UK, the NEC Directive is transposed into domestic law by the National Emission Ceilings Regulations 2018/129,<sup>31</sup> which came into force on 1 July 2018.

### Local authorities also have a role to play

Local authorities also have a role to play in assessing and addressing air pollution in their areas. Pursuant to the Environment Act 1995 Pt IV, local authorities are required to review and assess air quality against national air quality standards and objectives. These standards and objectives are set by the national Air Quality Strategy<sup>32</sup> and broadly mirror the limit and target values established by the AAQ Directive.

Where national air quality objectives are not being met, local authorities must designate Air Quality Management Areas (“AQMAs”) and draw up an associated action plan which sets how the authority will exercise its powers “in pursuit of” the achievement of air quality standards in the AQMA.<sup>33</sup> AQMAs can, therefore, have implications for the exercise of local authority planning functions both in plan making and development control contexts.

Whilst Defra has published detailed technical guidance to assist local authorities in England, Scotland and Wales in carrying out their Pt IV duties,<sup>34</sup> this does not set minimum monitoring requirements relating to the number, technical specification or location of local authority monitoring sites. Nor does the Environment Act 1995 impose any hard-edged legal requirement on local authorities to actually meet the national objectives. In this context, they are just that—objectives. However, where air quality standards or objectives are not being met in a local authority area, the Secretary of State (or the Mayor of London, Welsh Ministers or Scottish Environmental Protection Agency) does have the power (but not the duty) to issue directions to the local authority, requiring specified steps to be taken.<sup>35</sup>

The statutory air quality framework provided under the Environment Act 1995 Pt IV is commonly referred to as the Local Air Quality Management (“LAQM”) regime. It is distinct from the framework of

<sup>30</sup> Directive 2016/2284 on the Reduction of National Emissions of Certain Atmospheric Pollutants [2016] OJ L344/1 art.6(2)(b).

<sup>31</sup> National Emission Ceilings Regulations 2018 (SI 2018/129).

<sup>32</sup> Available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/69336/pb12654-air-quality-strategy-vol1-070712.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/69336/pb12654-air-quality-strategy-vol1-070712.pdf) [accessed 8 October 2018].

<sup>33</sup> Environment Act 1995 s.83 and s.84.

<sup>34</sup> Defra, “Local Air Quality Management: Technical Guidance (TG16)” February 2018.

<sup>35</sup> Environment Act 1995 s.85(3).

obligations placed on the Secretary of State under the AAQ Directive. However, more recently the line between the two has blurred somewhat.

In July 2017, alongside the UK's 2017 air quality plan and pursuant to his powers under the Environment Act 1995, the Secretary of State issued directions to 23 English local authorities, requiring each to carry out a "feasibility study" and come up with its own proposals as to how NO<sub>2</sub> concentrations are to be reduced to within legal limits in its area in the shortest possible time. The resulting individual local authority air quality plans are due by the end of 2018. Further Ministerial Directions followed in December 2017, formally requiring five major cities (Southampton, Derby, Birmingham, Nottingham, and Leeds), to complete a similar process, and produce their own plans by 15 September 2018. Following the ruling in *ClientEarth (No.3)*, and in order to facilitate compliance with the High Court's order to produce compliant supplemental English and Welsh air quality plans, in March 2018, the Secretary of State issued further directions to an additional 33 English local authorities and the Welsh Ministers did the same for Cardiff CC and Caerphilly CBC.<sup>36</sup>

### *Plan-making and local development control form an important part of the picture*

Historically, air pollution was principally addressed through the law of nuisance,<sup>37</sup> the pollution control regime, and controls on the burning of solid fuel<sup>38</sup>—with a focus on industrial point-sources. However, the lion's share of air pollution in the UK now arises from dispersed sources, with road transport emissions being responsible for up to 80% of illegal levels of NO<sub>2</sub> where these occur.<sup>39</sup> Domestic heating is also a significant contributor, particularly to PM pollution.

There is no doubt that planning policies and development control decisions can and do have important implications for air quality. Our built environment can influence the amount of air pollution that is emitted into our environment (for example, by affecting the mode and extent of our travel), how those emissions are dispersed within our environment (for example, by creating street canyons which can lead to a local build-up of pollutants), as well as who is exposed to those emissions and for how long (for example, by determining where people live, work and study in relation to major sources of pollution).

Whilst spatial planning and development control alone cannot solve air pollution problems, they have key roles to play in making sure new development does not make matters worse, but rather delivers long-term air quality improvements and ensures that exposure to harmful pollution is reduced—particularly for those most vulnerable to its effects.

Both formal and informal guidance exists to steer local planning authorities in their consideration of air quality in plan-making and decision-taking.

## National Planning Policy Framework and Planning Practice Guidance

Planning authorities must take the National Planning Policy Framework ("NPPF") into account when preparing development plans. The NPPF is also a material consideration in planning decisions.

Paragraph 181 of the recently revised NPPF requires that:

"Planning policies *and decisions* should sustain and contribute towards compliance with relevant limit values or national objectives for pollutants, taking into account the presence of Air Quality Management Areas *and Clean Air Zones*, and the cumulative impacts from individual sites in local

<sup>36</sup> The full list of directions to the 61 English local authorities is available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/701305/air-quality-directions-2017-2018.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/701305/air-quality-directions-2017-2018.pdf) [accessed 8 October 2018]. The Welsh Directions are available at <https://cardiff.moderngov.co.uk/documents/b10179/Air%20Quality%20Cardiff%2027th-Mar-2018%2017.00%20Environmental%20Scrutiny%20Committee.pdf?T=9> [accessed 8 October 2018] p.42.

<sup>37</sup> e.g. *Halsey v Esso Petroleum Co Ltd* [1961] 1 W.L.R. 683; [1961] 2 All E.R. 145.

<sup>38</sup> Clean Air Act 1956, Clean Air Act 1968, Clean Air Act 1993.

<sup>39</sup> Defra, "UK plan for reducing roadside nitrogen dioxide concentrations: detailed plan" 2017.

areas. *Opportunities to improve air quality or mitigate impacts should be identified, such as through traffic and travel management, and green infrastructure provision and enhancement. So far as possible these opportunities should be considered at the plan-making stage, to ensure a strategic approach and limit the need for issues to be reconsidered when determining individual applications. Planning decisions should ensure that any new development in Air Quality Management Areas and Clean Air Zones is consistent with the local air quality action plan ...*” (new text in emphasis)

Subject to the implementation provisions in Annex 1, the new NPPF came into force in July 2018.<sup>40</sup> Notably, para.181 now specifies that it is not just planning policy, but also individual development decisions that should “sustain and contribute” towards compliance with limit values and national objectives. Its predecessor (para.124) did not. According to the newly introduced text, the strategic environmental assessment/sustainability appraisal of plans submitted for examination post January 2019 will also need to pay more attention to opportunities to improve or mitigate impacts on air quality.

In addition, para.102 of the revised NPPF now exhorts that transport matters should be considered from the earliest stages of both plan-making and development proposals, requiring that opportunities to promote walking, cycling and public transport are identified and pursued, and the environmental impacts of traffic and transport infrastructure be identified, assessed and taken into account.

Specific Planning Practice Guidance (“PPG”) for Air Quality supports the NPPF. Relevant extracts from the PPG are set out below.

*Extracts from the PPG for Air Quality*

*“What is the role of Local Plans with regard to air quality?”*

... Drawing on the review of air quality carried out for the local air quality management regime, the Local Plan may need to consider:

- the potential cumulative impact of a number of smaller developments on air quality as well as the effect of more substantial developments;
- the impact of point sources of air pollution (pollution that originates from one place); and,
- ways in which new development would be appropriate in locations where air quality is or likely to be a concern and not give rise to unacceptable risks from pollution. This could be through, for example, identifying measures for offsetting the impact on air quality arising from new development including supporting measures in an air quality action plan or low emissions strategy where applicable.” (para.002)

*“When could air quality be relevant to a planning decision?”*

... Concerns could arise if the development is likely to generate air quality impact in an area where air quality is known to be poor. They could also arise where the development is likely to adversely impact upon the implementation of air quality strategies and action plans and/or, in particular, lead to a breach of EU legislation (including that applicable to wildlife). The steps a local planning authority might take in considering air quality are set out in this flow diagram.

When deciding whether air quality is relevant to a planning application, considerations could include whether the development would:

- Significantly affect traffic in the immediate vicinity of the proposed development site or further afield. This could be by generating or increasing traffic congestion; significantly changing traffic volumes, vehicle speed or both; or significantly altering the traffic composition on local roads ...
- Introduce new point sources of air pollution. This could include furnaces which require prior notification to local authorities; or extraction systems (including chimneys) which require approval under pollution control legislation or biomass boilers or biomass-fuelled CHP plant; centralised boilers or CHP plant burning other fuels within or close to an air quality management area or introduce relevant combustion within a Smoke Control Area;
- Expose people to existing sources of air pollutants. This could be by building new homes, workplaces or other development in places with poor air quality.
- Give rise to potentially unacceptable impact (such as dust) during construction for nearby sensitive locations ...” (para.005)

<sup>40</sup> The previous para.124 provided that: “Planning policies should sustain compliance with and contribute towards EU limit values or national objectives for pollutants, taking into account the presence of Air Quality Management Areas and the cumulative impacts on air quality from individual sites in local areas. Planning decisions should ensure that any new development in Air Quality Management Areas is consistent with the local air quality action plan.”

*“How detailed does an air quality assessment need to be?”*

Assessments should be proportionate to the nature and scale of development proposed and the level of concern about air quality, and because of this are likely to be locationally specific. The scope and content of supporting information is therefore best discussed and agreed between the local planning authority and applicant before it is commissioned. Air quality is a consideration in Environmental Impact Assessment, if one is required, and also in a Habitats Regulations Appropriate Assessment ...” (para.007)

*“How can an impact on air quality be mitigated?”*

Mitigation options where necessary will be locationally specific, will depend on the proposed development and should be proportionate to the likely impact. It is important therefore that local planning authorities work with applicants to consider appropriate mitigation so as to ensure the new development is appropriate for its location and unacceptable risks are prevented. Planning conditions and obligations can be used to secure mitigation where the relevant tests are met.

Examples of mitigation include:

- the design and layout of development to increase separation distances from sources of air pollution;
- using green infrastructure, in particular trees, to absorb dust and other pollutants;
- means of ventilation;
- promoting infrastructure to promote modes of transport with low impact on air quality;
- controlling dust and emissions from construction, operation and demolition; and
- contributing funding to measures, including those identified in air quality action plans and low emission strategies, designed to offset the impact on air quality arising from new development.” (para.008)

Notably, the decision-tree flow diagram referred to in the PPG para.005 suggests that where a development (including mitigation) leads to an “unacceptable risk” from air pollution or prevents compliance with EU limit values or national objectives for pollutants, the planning authority should “consider refusal of consent”.

Therefore, whilst the new NPPF requires that individual development decisions should sustain compliance with limit values, the PPG suggests that there remains space for consent to be granted for developments even where they would lead to breach of a limit value, or exacerbate an existing exceedance. The NPPF and PPG appear contradictory in this respect. Even so, as planning authorities must seek to secure compliance with EU law, they should look to exercise their decision-making functions so as not to undermine the UK’s compliance with its obligation of result not to exceed limit values, pursuant to the AAQ Directive art.13. On this basis, and in spite of the ambiguity present in the PPG, any application for consent for development that would cause limit values to be exceeded should be refused.

## Development plans

Applications for planning permission must be determined in accordance with the development plan unless there are material considerations that indicate otherwise.<sup>41</sup> Although many local development plans do not contain detailed air quality policies that add detail to or go beyond the position set out in the NPPF/PPG, some establish a more prescriptive approach to incorporating air quality considerations into the exercise of development control. Most notably:

- *The London Plan 2016: Policy 7.14 Improving Air Quality* provides that all “major” development proposals should be at least “air quality neutral” and not lead to further deterioration of existing poor air quality. The explanatory paragraphs provide that “where additional negative air quality impacts from a new development are identified, mitigation measures will be required to ameliorate these impacts”.

The Sustainable Design and Construction SPG 2014<sup>42</sup> provides explanation of the meaning of “air quality neutral”. It sets projected emission rate benchmarks, based on estimated grams of PM and NO<sub>x</sub> emissions per meter squared of proposed development. Different emission rates apply to different use classes, with separate benchmarks set for both transport and

<sup>41</sup> See the Town and Country Planning Act 1990 s. 70(2) and the Planning and Compulsory Purchase Act 2004 s.38(6).

<sup>42</sup> *Sustainable Design and Construction: Supplementary Planning Guidance*, Mayor of London (2014).



building operation impacts. If a proposed development is assessed as falling below these benchmarks it will: “be considered to avoid any increase in NO<sub>x</sub> and PM emissions across London as a whole and therefore be ‘air quality neutral’.” Where the benchmarks are exceeded, and cannot be mitigated on-site, developers may mitigate impacts off-site. Suggested mitigation includes green planting/walls and screens; combustion plant upgrade or abatement and exposure reduction.

- *The Draft New London Plan: Policy S11 Improving Air Quality* builds on the existing London Plan by providing that development proposals should not “create any new areas that exceed air quality limits, or delay the date at which compliance will be achieved in areas that are currently in exceedance of legal limits” or “create unacceptable risk of high levels of exposure to poor air quality”. The development of large-scale redevelopment areas, such as Opportunity Areas and those subject to an Environmental Impact Assessment should propose methods of achieving an “Air Quality Positive” approach through the new development.<sup>43</sup> All other developments should be at least Air Quality Neutral. Air quality assessments (“AQAs”) should be submitted with all major developments, unless they can demonstrate that transport and building emissions will be less than the previous or existing use. This would appear to be an improvement on the existing London Plan, by introducing the need for some developments to positively contribute to delivering air quality improvements. However, the draft is yet to be formally adopted, and much will hang on what “Air Quality Positive” actually means in practice. Guidance on which is pending.

## Local authority guidance

Some local authorities have adopted informal air quality planning guidance. Whilst such documents do not have the status of formal development plans (and therefore local authorities are not bound to decide applications in accordance with their terms), they can guide how planning authorities consider air quality impacts as part of development control decision-making.

Notably the West Yorkshire Air Quality and Emissions Technical Guidance and the Emissions Mitigation Guidance for Sussex set out suggested mechanisms for determining when a detailed AQA should be carried out, the types of mitigation that should be considered, and the basis for calculating the level of mitigation required for individual developments (see below).

<sup>43</sup> The Plan suggests that “this could be achieved, for example, by the provision of low or zero-emission heating and energy, or improvements to public transport, walking and cycling infrastructure, and designing out features such as street canyons that prevent effective dispersion of pollutants”.

*Examples of local planning guidance for air quality*

*The West Yorkshire Air Quality and Emissions Technical Planning Guidance*<sup>44</sup> sets out a three-stage process which requires local planning authorities.<sup>45</sup>

- First, classify the proposed development as either “minor”, “medium” or “major”, based on factors, including proposed use class, gross floor area, unit number, location relative to AQMAs, impact on traffic flows and proposed parking space numbers.
- Secondly, carry out an air quality assessment. “Minor” and “medium” development proposals require only a simple exposure assessment, which assesses the likelihood of the development leading to additional exposure. This is based on factors such as whether the development is adjacent to an AQMA or a busy road, and whether it includes residential, medical service or educational use. All “major” development proposals require a detailed AQA to assess the cumulative impact of the development on pollutant concentrations, as well as the calculation of “pollutant emission costs” based on estimated trip rates from the transport assessment and Defra figures for damage costs per tonne of PM and/or NO<sub>x</sub> generated.
- Finally, determine the necessary level and type of mitigation. The air quality impact and damage costs identified as part of the AQA determine the level of mitigation required. The guidance sets default mitigation measures for each development class, which can be adapted for particular locations and needs. If on-site mitigation is not possible then the local planning authority will seek compensation for the identified air quality impacts through a s.106 agreement.

*Emissions Mitigation Guidance for Sussex*<sup>46</sup> suggests a detailed AQA is required for all developments within an AQMA, all EIA developments, schemes that deliver threshold levels of vehicle parking or extra vehicle movements, as well as those that introduce sensitive receptors in proximity to an AQMA. For all other “major” developments,<sup>47</sup> a less detailed mitigation assessment is required, which determines the suggested level of mitigation by calculating the damage costs and emissions impacts of the development (on a similar basis to the West Yorkshire guidance described above).

The Sussex guidance goes a step further in that it provides prescriptive suggestions as to when planning applications should be refused based on the outcome of the AQA. This includes a recommendation that a planning application be refused if, after all reasonable means to mitigate the impacts on air quality have been exhausted, the impact of the proposal is assessed to lead to a breach of national air quality objectives, or an overall ambient concentration increase of over 10%. The guidance has been endorsed by all Sussex authorities.<sup>48</sup> However, it is of some vintage.

## Informal air quality guidance

The National Institute for Health and Care Excellence (“NICE”), alongside Public Health England, has published guidelines on road traffic related air pollution.<sup>49</sup> These guidelines put forward recommendations relating to local plan-making and development control, and set out suggested mitigation measures to be considered by local authorities (which include supporting active travel, provision of charging facilities for electric vehicles, and managing street trees and vegetation to reduce the risk of restricting street ventilation).

Environmental Protection UK and the Institute for Air Quality Management have also produced more detailed guidance that is commonly referred to by practitioners.<sup>50</sup>

Whilst informative, the NICE and EPUK guidance do not have formal status as planning documents. As such, their application is discretionary and patchy.

<sup>44</sup> This covers the City of Bradford MDC; Calderdale Council; Kirklees Council; Leeds CC; and Wakefield Council at <https://www.bradford.gov.uk/media/3591/air-quality-and-emissions-planning-guide.pdf> [accessed 8 October 2018].

<sup>45</sup> Bradford Council, Wakefield Council, Kirklees Council and Leeds CC have adopted this guidance. A number of local planning authorities outside of the West Yorkshire region have also drawn on the guidance in developing their local plans and supplementary planning documents. e.g. North Hertfordshire Air Quality Planning Guidance relies heavily on the West Yorkshire document.

<sup>46</sup> Sussex Air Quality Partnership, “Air quality and emissions mitigation guidance for Sussex authorities” 2013 (January 2014 update) at <http://www.sussex-air.net/PDF/SussexAQGuidanceJan2014.pdf> [accessed 8 October 2018].

<sup>47</sup> As defined pursuant to the Town and Country Planning (Development Management Procedure) Order (England) 2010 (SI 2010/2184).

<sup>48</sup> Including Arun DC, Wealden DC, Eastbourne Council, Chichester DC, West Sussex CC, Brighton and Hove Council, East Sussex CC, Worthing BC, Crawley BC, Adur DC, Mid Sussex DC, Horsham DC, Lewes District Council, Rother DC, and Hastings BC.

<sup>49</sup> NICE, “Air pollution: outdoor air quality and health (NG70)” 2017.

<sup>50</sup> See <http://www.iaqm.co.uk/text/guidance/air-quality-planning-guidance.pdf> [accessed 8 October 2018].

*The Secretary of State must consider air quality when exercising development control functions*

The Secretary of State has responsibility for determining development consent applications for Nationally Significant Infrastructure Projects (“NSIP”s) pursuant to the Planning Act 2008.<sup>51</sup> A number of designated national policy statements (“NPS”s) contain provisions prescribing how air quality should be incorporated into decision making for different NSIP classes. Table 3 sets out some examples of relevant provisions.

**Table 3: Provisions relating to air quality in National Policy Statements**

National Policy Statement	Provision and extract (emphasis added)
Overarching National Policy Statement for Energy (EN-1)	5.2.9 The IPC should generally give air quality considerations substantial weight where a project would lead to a deterioration in air quality in an area, or leads to a new area where air quality breaches any national air quality limits. However, air quality considerations will also be important where substantial changes in air quality levels are expected, even if this does not lead to any breaches of national air quality limits.
	5.2.10 In all cases the IPC must take account of any relevant statutory air quality limits. Where a project is likely to lead to a breach of such limits the developers should work with the relevant authorities to secure appropriate mitigation measures to allow the proposal to proceed. <i>In the event that a project will lead to non-compliance with a statutory limit the IPC should refuse consent.</i>
National Networks Policy Statement	5.10 The Secretary of State should consider air quality impacts over the wider area likely to be affected, as well as in the near vicinity of the scheme. In all cases the Secretary of State must take account of relevant statutory air quality thresholds set out in domestic and European legislation. Where a project is likely to lead to a breach of the air quality thresholds, the applicant should work with the relevant authorities to secure appropriate mitigation measures <i>with a view to ensuring so far as possible that those thresholds are not breached.</i>
	...
	5.13 <i>The Secretary of State should refuse consent</i> where, after taking into account mitigation, the air quality impacts of the scheme will:
	<ul style="list-style-type: none"> <li>• <i>result in a zone/agglomeration which is currently reported as being compliant with the Air Quality Directive becoming non-compliant; or</i></li> <li>• <i>affect the ability of a non-compliant area to achieve compliance within the most recent timescales reported to the European Commission at the time of the decision.</i></li> </ul>
National Policy Statement for Ports	5.7.6 The decision-maker should generally give air quality considerations substantial weight where a project would lead to deterioration in air quality in an area, or leads to a new area, where the air quality breaches any national air quality limits. However, air quality considerations will also be important where substantial changes in air quality are expected, even if this does not lead to any breaches of any national air quality limits.
	5.7.7 In all cases the decision-maker must take account of relevant statutory air quality limits. Where a project is likely to lead to a breach of such limits, the developers should work with the relevant authorities to secure appropriate mitigation measures to allow the proposal to proceed. <i>In the event that a project will lead to non-compliance with a statutory limit, the decision-maker should refuse consent.</i>
Airports National Policy Statement	5.42 The Secretary of State will consider air quality impacts over the wider area likely to be affected, as well as in the vicinity of the scheme. <i>In order to grant development consent, the Secretary of State will need to be satisfied that, with mitigation, the scheme would be compliant with legal obligations that provide for the protection of human health and the environment.</i>
	5.43 Air quality considerations are likely to be particularly relevant where the proposed scheme:
	<ul style="list-style-type: none"> <li>• is within or adjacent to Air Quality Management Areas, roads identified as being above limit values, or nature conservation sites (including Natura 2000 sites and Sites of Special Scientific Interest);</li> </ul>

<sup>51</sup> Planning Act 2008 s.103.

National Policy Statement	Provision and extract (emphasis added)
	<ul style="list-style-type: none"> <li>• would have effects sufficient to bring about the need for new Air Quality Management Areas or change the size of an existing Air Quality Management Area, or bring about changes to exceedances of the limit values, or have the potential to have an impact on nature conservation sites; and</li> <li>• after taking into account mitigation, would lead to a significant air quality impact in relation to Environmental Impact Assessment and/or to a deterioration in air quality in a zone or agglomeration.</li> </ul>

The Secretary of State must decide any application for development consent in line with the relevant NPS,<sup>52</sup> subject to specific exemptions. Notably, decisions can stray from the terms of the NPS where the decision would otherwise be unlawful by virtue of “any enactment”.<sup>53</sup> In determining development consent applications, the Secretary of State must therefore also ensure that the decision does not run contrary to its duties pursuant to the AAQ Directive and corresponding Air Quality Standards Regulations 2010.

The Secretary of State also enjoys wider development control functions. For example, he has the duty to determine planning appeals against the refusal of planning permission.<sup>54</sup> He also has the power to “call-in” planning applications for his own determination.<sup>55</sup> Questions regarding the relationship between that call-in power and the Secretary of State’s ultimate responsibility for meeting air quality limits pursuant to the AAQ Directive were raised in the recent case of *R. (on the application of Shirley) v Secretary of State for Communities and Local Government*.<sup>56</sup>

*Shirley* concerned a challenge against the Secretary of State’s refusal to call in an application for planning permission for a 4,000 home urban extension development to the south east of Canterbury that was alleged to risk worsening existing exceedances of the NO<sub>2</sub> annual mean limit value in the central Canterbury AQMA. The primary argument advanced by the claimants was that calling in the application was mandated by the Government’s obligations under the AAQ Directive.

Dove J rejected the claim, holding, in essence that the Secretary of State’s responsibilities do not go beyond the obligation in the AAQ Directive to produce an air quality plan, and do not require intervention in specific planning decisions. As Dove J put the point:

“There is in my view simply no room within the scheme set out in the [AAQ Directive] for any freestanding responsibility to take any specific actions in relation to permits or development consents ... The [AAQ Directive] does not in its terms require any other action to be taken apart from the preparation and implementation of an [air quality plan].”<sup>57</sup>

This represents a worrying precedent and appears to suggest a limited the direct legal effect of the AAQ Directive on the Secretary of State’s exercise of planning functions.

However, the proposition that the production and implementation of an air quality plan in and of itself is a sufficient response to breaches of limit values seems open to question, given the force of the AAQ Directive art.13 that the courts have confirmed to be an “obligation of result”. If the boundaries of the Secretary of State’s duties pursuant to the AAQ Directive are drawn as narrowly and absolutely as suggested in *Shirley*, this risks related functions and powers being exercised in a way that seriously undermines the effectiveness of national and/or local air quality plans drawn up pursuant to art.23. This would not align with a purposive interpretation of the AAQ Directive and its overarching objective to protect human health.<sup>58</sup> However, it may be that the above authority can be distinguished from applying more generally

<sup>52</sup> Planning Act 2008 s.104(4).

<sup>53</sup> Planning Act 2008 s.104(6).

<sup>54</sup> Town and Country Planning Act 1990 s.79.

<sup>55</sup> Town and Country Planning Act 1990 s.77.

<sup>56</sup> *R. (on the application of Shirley) v Secretary of State for Communities and Local Government* [2017] EWHC 2306 (Admin); [2018] J.P.L. 298.

<sup>57</sup> *R. (on the application of Shirley) v Secretary of State for Communities and Local Government* [2017] EWHC 2306 (Admin); at [49].

<sup>58</sup> See Directive 2008/50 on Ambient Air Quality and Cleaner Air for Europe [2008] OJ L152/1 recital 2.

to limit the effect of the AAQ Directive on the fulfilment of wider planning duties, given that the challenge in *Shirley* specifically related to the exercise of a call-in power with respect to which the Secretary of State has a very wide margin of discretion.

In March 2018, Arden LJ granted permission for *Shirley* to be heard in the Court of Appeal. The hearing has been scheduled for 18–19 September 2018. The court will hopefully shed some clearer light on the relationship between the Secretary of State’s obligations in the Directive and individual planning decisions.

### **Is this working to achieve clean air?**

Is the existing framework working to achieve clean air? Unfortunately not.

Exceedances of EU legal limit values for NO<sub>2</sub> continue across the UK, eight years after they should have been met. The Government’s latest figures show that 37 out of 43 reporting zones exceeded legal limits in 2016, with some areas not modelled to achieve compliance until 2028.<sup>59</sup>

PM pollution also remains a serious and widespread issue, with much of the population living in areas, which suffer from harmful concentrations in excess of WHO guidelines.

When it comes to emission reductions—unless further action is taken, recent analysis has shown that the UK is projected to miss its legally binding 2030 emission reduction targets for a number of pollutants including NO<sub>x</sub>, PM<sub>2.5</sub>, and ammonia (a harmful environmental pollutant in its own right, but also a pre-cursor of secondary PM). The UK is also not on track to achieve its more immediate 2020 targets for ammonia and PM<sub>2.5</sub>.<sup>60</sup>

It is clear that serious air pollution problems remain, and people’s health continues to suffer as a result. So, what is going wrong?

### *AQMAs have proved largely ineffective at addressing local air quality issues*

The LAQM regime has proved ineffective at prompting swift and effective action to tackle pollution where it is identified on a local scale.

There are 556 AQMAs remaining in England, the vast majority of which have been established with respect to failures to meet NO<sub>2</sub> national objectives relating to road-based sources, and some of which have been in place since 2010.<sup>61</sup> Only 166 AQMAs have so far been revoked. This reflects the fact that the LAQM regime has not provided a robust tool for addressing local air quality issues.

The action plans local authorities are obliged to draw up with respect to identified AQMAs lack either a hard-edge or effective enforcement. The Environment Act 1995 only requires that they “act in pursuit of” national objectives, and there is no explicit obligation on local authorities to carry out the measures set out in AQMA action plans. Whilst the Secretary of State has the power to issue directions requiring action, this power has been left largely un-exercised until relatively recently, and only then in response to court orders to take action.

Furthermore, local authorities are limited in the powers and resources they have available to them to address many of the root causes of the pollution exceedances experienced in their areas.

### *Successive national governments have failed to get to grips with NO<sub>2</sub>*

The courts have found that successive UK air quality plans to address illegal levels of NO<sub>2</sub> have failed to satisfy the requirements of the AAQ Directive. Despite having long been aware of the principle causes

<sup>59</sup> Defra, “UK plan for reducing roadside nitrogen dioxide concentrations: detailed plan” 2017.

<sup>60</sup> National Emission Ceilings (NEC) Directive reporting status 2018, European Environment Agency [2018] at <https://www.eea.europa.eu/publications/nec-directive-reporting-status-2018> [accessed 8 October 2018].

<sup>61</sup> Defra, “Summary AQMA data: UK Air Information Resource” 2018 at <https://uk-air.defra.gov.uk/aqma/summary> [accessed 8 October 2018].

and sources of this pollutant, governments have failed to set out measures to reduce levels to within legal limits in the shortest possible time. They have chosen to fight legal battles rather than adopt the necessary level of ambition. In the meantime, we are still left waiting for a compliant air quality plan for the UK.

The European Commission is not convinced that Government is doing enough to comply with its AAQ Directive obligations. In May 2018, it ramped up its infringement proceedings and referred the UK to the CJEU over its continued breaches, alongside France, Germany, Hungary, Italy, and Romania.<sup>62</sup> This could lead to hefty fines eventually being imposed unless compliance is achieved.

### *Local government has been “passed the buck” of producing air quality plans*

Recent national air quality plans have loaded an extra layer of responsibility onto a number of local authorities. Both the UK 2017 air quality plan and the 2018 draft Welsh supplementary plan effectively represent “plans for further plans”. Rather than setting out concrete measures to be adopted throughout the country, these plans provide the basis under which a total of 63 local authorities in England and Wales have been directed to carry out their own feasibility studies over the course of 2018/2019 to identify preferred local measures to achieve compliance with limit values in their areas.<sup>63</sup>

The 2017 UK air quality plan justifies the approach taken by stating that “[g]iven the local nature of the problem, local action is needed to achieve improvements in air quality”. The 2018 draft Welsh supplemental plan states that “[a] leading role for local authorities responsible for roads which are non-compliant is essential”.

Whilst local authorities should no doubt play a role in ensuring pollution reduction measures are designed for and adapted to local conditions, the approach adopted involves delays and missed opportunities for effective action in a number of respects:

- **The requirement for local authorities to come up with their own bespoke proposals has been adopted late in the day.**

Legal limits for NO<sub>2</sub> should have been met in 2010. Government has been aware of the issue and the solutions available to deal with it for a very long time. However the first formal Ministerial Directions requiring local authorities to conduct feasibility studies were only issued in July 2017. Some of the individual local authority air quality plans that are due to come out of this feasibility study process will not be finalised until 2019. This delay means that we have to wait yet longer before effective pollution reduction measures are put in place and compliance is achieved.

- **Local authorities do not have the capacity or funding necessary to comprehensively tackle this issue on their own.**

The UK Government has established a £255 million Implementation Fund available to develop and deliver local air quality plans in England, as well as a £250 million Clean Air Fund to fund measures to mitigate impacts on people and businesses. This pot will not be sufficient to address the continuing illegal air pollution in all 61 English local authority areas that have been mandated to take action—it will simply be spread too thinly to fund the extent of action required. The courts have been clear in their ruling that cost cannot be a factor in determining the target date for compliance. Adequate funding will need to be provided if Government is to ensure that its AAQ Directive obligations are satisfied.

<sup>62</sup> European Commission Press Release, “Air quality: Commission takes action to protect citizens from air pollution” 2018 at [http://europa.eu/rapid/press-release\\_IP-18-3450\\_en.htm](http://europa.eu/rapid/press-release_IP-18-3450_en.htm) [accessed 8 October 2018].

<sup>63</sup> See above.

- Defra’s own evidence shows a national network of charging clean air zones (“CAZs”)<sup>64</sup> represents the most effective route to compliance for the majority of exceedances.<sup>65</sup> *However, Government has failed to show leadership in mandating the introduction of CAZs in the areas most impacted by pollution and most in need of rapid action to address the problem.* Conversely, the 2017 UK air quality plan required that local authorities assess and prefer alternative options, despite the fact that the UK Government has not been able to identify these itself. A national CAZ Framework has been established on paper.<sup>66</sup> However, it lacks key details—for example with respect to the setting of charges, standardised signage, and charge payment arrangements. Greater national leadership is needed to roll out a network of CAZs across the country, which is effective and consistent.
- **The current approach diverts attention from the need for urgent action on a national scale.**

Whilst hotspots may be localised, the broader issue is not. Limit values are exceeded at locations across the country. Defra’s draft Clean Air Strategy recognises that a “transformational change in our transport network and how we use it” is needed in order to deliver the pollution reductions we need. The policy levers required to deliver this change are at national Government’s fingertips but remain untouched. Nationally, more needs to be done to incentivise and support people to switch to cleaner forms of transport. For example, greater strategic investment in public transport and walking and cycling infrastructure, reform of fiscal policies such as Vehicle Excise Duty and Company Car Tax to dis-incentivise purchase of the most polluting diesel vehicles, a national scrappage scheme to get the most polluting vehicles off the road, and the introduction of further fiscal incentives to drive the uptake of ultra-low emission vehicles.

- **There remains an unhelpful disconnect between the local air quality plans being drawn up pursuant to the AAQ Directive and the LAQM regime.**

Local authorities are having to juggle their requirements under the LAQM regime, as well as their newly-realised responsibility for drawing up air quality plans under the AAQ Directive. Differences between the two regimes often create confusion for local authorities, especially with respect to how locally-collected data can provide an evidence base to inform action.

Existing LAQM technical guidance does not prescribe minimum standards regarding the number, type or location of the monitoring equipment used to assess air quality within local authority areas. As such, according to Defra, much of the data collected by local authorities to inform their understanding of local air pollution problems does not satisfy the technical standards set by the AAQ Directive for fixed sampling points. The Government has repeatedly used this as a basis on which to exclude such data from informing the contents of air quality plans drawn up pursuant to the Directive. This has resulted in a confusing and fragmented picture in some local authority areas.

There are instances where locally-collected data measure limit value exceedances on roads which are either modelled by Defra’s national pollution control model to be in compliance, or which are not covered by the national model at all. In some cases such data have been excluded from the feasibility study process local authorities have been directed by the Secretary of State to carry out. Therefore, despite having

<sup>64</sup> Defra defines a charging CAZ as a defined geographical area used as a focus for action to improve air quality, which vehicle owners are required to pay a charge to enter, or move within, if they are driving a vehicle that does not meet the particular standard for their vehicle type in that zone.

<sup>65</sup> Defra, “UK Plan for tackling roadside nitrogen dioxide concentrations: Technical Report” 2017.

<sup>66</sup> *Clean Air Zone Framework: Principles for setting up Clean Air Zones in England, Defra and DfT* (2017).

information which suggests that illegal levels of air pollution exist, some local authorities have been blocked from using it into inform their local proposals, rather than being permitted to account for the data on a precautionary basis.<sup>67</sup> As central government funding will not be made available to address these identified exceedances, the resulting national and local authority air quality plans risk lacking the level of ambition required to adequately address local air quality issues in these areas.

### *Planning policy and local development control do not fill the gaps*

The NPPF and PPG offer no clear guarantee of avoiding air pollution exceedances as a result of development, but introduce air pollution as another material consideration against which conflicting economic, social and environmental objectives can be traded. Whilst the planning framework cannot form the only basis for tackling air pollution, there is room for improvement to ensure that development plans and decisions do not cause new local problems or contribute to existing ones and to provide a clearer basis on which developers should be required to play their part in providing solutions and mitigating impacts.

There is no formal detailed guidance to assist local authorities in determining when an AQA might be required or how mitigation measures should be considered in balancing out identified impacts. The PPG suggests that air quality assessments “should be proportionate to the nature and scale of development proposed and the level of concern about air quality” and that mitigation “should be proportionate to the likely impact”. Whilst local technical guidance has been adopted in some areas to fill the gaps, it is patchy, and tends not to account for issues associated with effectively determining the type and extent of mitigation required to fully offset air quality impacts.

Due to paucity of evidence and the uncertainties associated with air quality modelling, it can be difficult to quantify the possible pollution reduction benefits of proposed mitigation measures with accuracy. Whilst improvements to bus services, cycle lanes or the installation of electric vehicle charging infrastructure, for example, will positively contribute to reducing road transport emissions associated with any one development, assessing whether such measures would in fact fully offset the anticipated negative air quality impacts can be problematic, especially for smaller schemes.

Furthermore, the impact of mitigation may be significantly delayed—for example, financial contributions can remain unspent by planning authorities for years after the development is occupied. Measures’ effectiveness may also be restricted by factors outside of developers’ control—for example, where national level fiscal incentives for the purchase of ultra-low emission vehicles are lacking, the impact of the installation of electric vehicle charging points within a development may be limited.

The West Yorkshire guidance referred to above requires the level of mitigation to be calculated based on a “damage-cost” assessment of air pollution impacts. However, financial parity does not necessary equate to a full off-set of impacts, and the calculation of damage-cost does not assist with ensuring mitigation measures are effectively targeted. Mitigation risks sounding good on paper, whilst failing to deliver in practice.

Inspectors and planning authorities widely accept mitigation measures as capable of effectively tipping the planning balance against negative air quality impacts, even where there is limited evidence as to whether those measures are in fact likely to lead to tangible pollution reductions. For example, in following the inspector’s recommendation on appeal, in 2016, the Secretary of State granted permission for a 260 dwelling development in Witney, despite evidence showing that the development would lead to a significantly increased traffic burden on junctions within an existing nearby AQMA. The mitigation offered consisted of a financial contribution to highway improvements. However, that contribution would not be payable until occupation of the 75th dwelling, and the local authority’s delivery of the proposed

<sup>67</sup> e.g. the Government currently only uses Oxford’s three continuous monitoring stations to measure air pollution, and does not take into account the city council’s 72 other monitoring locations.



highway improvement scheme was not fully committed. The Secretary of State granted permission despite the delivery or effectiveness of the mitigation being a long way from certain.<sup>68</sup> In doing so, he took an approach which runs contrary to his duty to ensure that measures are in place to ensure that compliance with limit values is likely, rather than just possible, as established by the third limb of the legal test set out in *ClientEarth (No.2)*.

The approach across the country is far from consistent, however, and instances are emerging where uncertainties associated with proposed air quality mitigation have formed the basis for refusal of consent. *Gladman Developments Ltd v Secretary of State for Communities and Local Government*<sup>69</sup> provides an example of such a refusal having been upheld by the courts. *Gladman* involved a proposed 470 home development in Kent, which was predicted to have adverse impacts on pollution levels in two AQMAs. Although the local planning authority had not raised air quality objections within its initial refusal, on appeal the Secretary of State (on the inspector's recommendation) upheld the decision on the basis that the proposed development conflicted with the original NPPF para. 124. The applicant had offered financial contributions, calculated according a damage-cost analysis, to fund proposed mitigation measures including electric vehicle charging points for each dwelling, green travel measures and incentives to encourage active travel, public transport and electric or low emission vehicles. However, the inspector concluded that there was "no clear evidence to demonstrate [the mitigation's] likely effectiveness ..." and "the proposed development was likely to have an adverse effect on air quality" in the relevant AQMAs and it thus conflicted with the NPPF. The High Court ruled that the inspector was entitled to exercise his planning judgement to make such a determination.

### *Nationally Significant Infrastructure Projects do not provide a robust approach*

NPSs incorporate air quality considerations into the DCO decision-making process to differing effect, and do not provide a consistent or clear approach.

For example, whilst the NPS for Ports and the Overarching NPS for Energy require refusal where a project will lead to "non-compliance with a statutory limit value", there is no provision to explain how decision makers should approach instances where the proposed development exacerbates existing exceedances, rather than leads to new ones.

In some cases, the terms of the NPS do not just lack clarity but appear to run directly contrary to the Secretary of State's legal duties pursuant to the AAQ Directive. Notably, the National Networks NPS is worded in a way that suggests that, as long as a scheme does not delay the period in which the reporting zone is projected to come into compliance with pollution limit values, developments that exacerbate existing poor air quality in the interim may be permitted:

"The Secretary of State should refuse consent where, after taking into account mitigation, the air quality impacts of the scheme will:

... *affect the ability of a non-compliant area to achieve compliance within the most recent timescales reported to the European Commission at the time of the decision.*" (emphasis added)

This would suggest that a scheme could be permitted within the terms of the NPS even where it worsens existing exceedances, as long as it does not delay the projected compliance date of the wider reporting zone.

This aspect of the National Networks NPS was applied in the Secretary of State's recent confirmation of the Silvertown Tunnel DCO. Whilst the AQA of the proposed scheme predicts that it is likely to result in worsening of air quality at a number of receptors that are already over legal limits for NO<sub>2</sub>, the decision

<sup>68</sup> *Gladman Developments Ltd v West Oxfordshire DC* [2017] P.A.D. 3.

<sup>69</sup> *Gladman Developments Ltd v Secretary of State for Communities and Local Government* [2017] EWHC 2768 (Admin); [2018] J.P.L. 448.

letter confirms that the Secretary of State was “satisfied that the Development will not result in a delay to the Greater London urban area (which is currently not compliant) being able to achieve compliance with the [AAQ Directive]” and therefore “with regard to air quality the circumstances when the Secretary of State should refuse consent after taking into account mitigation measures, as detailed in the [National Networks NPS], have not been established ...”.<sup>70</sup> In other words, the Secretary of State determined that increases in already illegal levels of air pollution were justified by there being worse air quality elsewhere in Greater London reporting zone.

The justification of bad air quality with worse in this way seems perverse, and contradictory to the second limb of the legal test set out by Garnham J in *ClientEarth (No.2)*. The Secretary of State is obliged to choose a route to compliance within each reporting zone that reduces human exposure as quickly as possible, rather than exercising his powers in a way that increases pollution within the zone in the run up to the eventual projected compliance date.

### *Existing legal limits and national objectives are not tight enough to protect people’s health*

Research has shown that there is no “safe” level of PM pollution.<sup>71</sup> In other words, no threshold concentration has been identified below which adverse health effects are avoided.

Based on expert evaluation of scientific evidence, in 2005 the WHO set guideline concentrations for a number of air pollutants, aimed to minimise mortality impacts.<sup>72</sup> These are lower (and therefore more stringent) than a number of the existing EU legal limit values and corresponding national standards and objectives, most notably for both PM<sub>2.5</sub> and PM<sub>10</sub>, as highlighted in table 4 below.

**Table 4: AAQ Directive limit values for PM compared with existing WHO guidelines**

Pollutant	Period	WHO guidelines (µg/m <sup>3</sup> )	EU AAQ Directive limit values (µg/m <sup>3</sup> )
PM <sub>10</sub>	One year	20	40
	24 hours	50 (not to be exceeded more than three times per year)	50 (not to be exceeded more than 35 time per year)
PM <sub>2.5</sub>	One year	10	25
	24 hours	25 (not to be exceeded more than three times a year)	No limit value

The WHO is currently in the process of revising its global guidelines for a number of pollutants. Based on the significant additional evidence that has appeared since the latest guidelines were established, it is likely that some will be revised downwards. Even by reference to the 2005 standards, figures from 2016 show that 44 out of 51 major UK cities exceeded the WHO guideline level for PM<sub>2.5</sub>, whilst 13 exceeded the guideline level for PM<sub>10</sub>.<sup>73</sup> Therefore, whilst existing EU legal limit values for PM<sub>2.5</sub> and PM<sub>10</sub> are being met throughout the country, this belies the true extent of the continuing impact this type of pollution is having on people’s health. The PM problem has not been solved. Legal limits are simply not set tightly

<sup>70</sup> Silvertown Tunnel DCO, Decision Letter, Department for Transport, dated 10 May 2018 para.48 at <file:///C:/Users/kathe/Documents/Joint%20Planning%20Law%20Conference/TR10021-002294-180510%20Decision%20Letter%20-%20Silvertown%20-%20Final.pdf> [accessed 8 October 2018].

<sup>71</sup> Di, Qian, “Air pollution and mortality in the Medicare population” [2017] *New England Journal of Medicine* 376.26: 2513–2522.

<sup>72</sup> WHO air quality guidelines for particulate matter, ozone, nitrogen dioxide and sulphur dioxide; Global update 2005 [2005] at [http://apps.who.int/iris/bitstream/handle/10665/69477/WHO\\_SDE\\_PHE\\_OEH\\_06.02\\_eng.pdf?sequence=1](http://apps.who.int/iris/bitstream/handle/10665/69477/WHO_SDE_PHE_OEH_06.02_eng.pdf?sequence=1) [accessed 8 October 2018].

<sup>73</sup> Lancet Countdown and the Royal College of Physicians [2017] Lancet Countdown 2017 Report: Briefing for UK Policymakers at <https://bit.ly/2hd4sub> [accessed 8 October 2018]; WHO *Global Ambient Air Quality Database* [2018] at <http://www.who.int/airpollution/data/cities/en/> [accessed 8 October 2018].

enough to trigger action to address the main sources of this pollutant, or integrate PM as a common consideration in planning decisions.

When compared to the PM<sub>2.5</sub> air quality standards set in other countries, the UK and EU lag behind. The annual PM<sub>2.5</sub> limit value is not only higher than WHO guidelines, but is set at a level that is looser than the standards applied in other developed countries (e.g. the US, Australia and Canada) and in some developing countries (e.g. Mexico) (see table 5).

**Table 5: Comparison of PM2.5 standards in different countries (µg/m<sup>3</sup>)<sup>74</sup>**

Period	Developed countries				Developing countries			WHO
	EU/UK	US	Australia	British Columbia	Mexico	China	India	
24 hour	—	35.98%	25	25	65	50	60	25
Annual	25	15	8	8	15	40	40	10

Scotland has set a national objective for PM<sub>2.5</sub> that is in line with WHO guidelines (annual mean of 10µg/m<sup>3</sup> to be met by 2020), as well as a standard for PM<sub>10</sub> that is even lower than WHO guideline levels (annual mean of 18µg/m<sup>3</sup> to be met by 2010). Defra's draft Clean Air Strategy also commits to halve the number of people living in locations where concentrations of PM<sub>2.5</sub> are above the WHO guideline by 2025. Whilst these are promising steps, national standards, objectives and exposure reduction targets lack the bite of absolute legally binding commitments against which public bodies can be properly held to account. More ambition is needed.

## What does the future hold?

There is a lot on the horizon when it comes to air quality plans, policy, legislation and case law. So what can we expect in the coming months?

### *A whole lot of local authority air quality plans for NO<sub>2</sub>*

This is a very busy year for a number of local authorities.

As explained in above, plans setting out measures to achieve compliance with NO<sub>2</sub> limit values in 63 local authority areas in England and Wales are due over the course of 2018/2019, subject to the following deadlines:

- **15 September 2018:**

Birmingham, Derby, Leeds, Nottingham, and Southampton to submit air quality plans to Defra.

- **5 October 2018:**

The Secretary of State to publish the final supplementary air quality plan covering an additional 33 English local authority areas.

- **31 December 2018:**

23 English local authorities to submit air quality plans to Defra.

<sup>74</sup> Own elaboration of data from S. Gulia Nagendra, M. Khare, I. Khanna, "Urban air quality management a review, table 3, Comparative analysis of NAAQS for criteria pollutants" at <https://doi.org/10.5094/APR.2015.033> [accessed 8 October 2018] p.290.

- **30 June 2019:**

Cardiff and Caerphilly to submit air quality plans to the Welsh Ministers.

The Scottish Government has also committed to introducing four low emission zones by 2020 in Aberdeen, Dundee, Edinburgh, and Glasgow. Glasgow’s low emission zone is due to be in place by the end of this year.

Each of these local plans will need to meet the requirements of the AAQ Directive, and the associated legal tests set out in *ClientEarth (No.2)*—they will need to set out measures to achieve legal air pollution limits in the shortest possible time, by a route which reduces human exposure as quickly as possible, and ensures compliance by the target date is not just possible but likely.<sup>75</sup>

Ultimately it remains the Secretary of State’s responsibility under the Air Quality Standards Regulations 2010 (or the Welsh Ministers or Scottish Environmental Protection Agency, under corresponding domestic legislation) to ensure that these plans are compliant and properly implemented. He cannot evade overall responsibility by simply passing the plan-making baton down.

We have already seen draft proposals from Birmingham, Leeds, Southampton, Nottingham, and Derby, which were consulted on over the summer.

Leeds and Southampton are both proposing to introduce CAZs that charge heavy goods vehicles, buses, coaches, taxis and private hire vehicles that do not meet minimum emissions standards to drive in the city. Birmingham is proposing a CAZ that also includes private cars and light goods vehicles. Nottingham is intending to rely on a bus retrofit programme, as well as taxi licencing requirements, alongside the continuation of their existing workplace parking levy to deliver the necessary pollution reductions. The preferred option put forward by Derby CC is a targeted scrappage scheme.

It is already evident that a number of these City Councils have missed the 15 September deadline pursuant to the Ministerial Direction—Southampton’s and Nottingham’s consultations closed days before the deadline (on 13 and 10 September, respectively) and Derby’s consultation closed nine days after it (on 24 September). On 10 September, Therese Coffey, Parliamentary Under Secretary of State, wrote public letters to both Derby and Southampton CCs to highlight their failure to comply with the legal deadline.<sup>76</sup> These letters suggest that final plans for both cities will not be ready until 30 November 2018. The Government’s failure to coordinate the timely production of this initial batch of local plans is worrying and does not support much faith regarding its ability to manage the urgent implementation of the measures identified.

### *More powers for local authorities?*

Defra’s draft Clean Air Strategy sets out a number of high level commitments with respect to how Government intends to reduce pollution from farming, transport, industry and domestic sources. This includes a commitment to introduce “a comprehensive set of new powers to enable targeted local action in areas with air pollution problems”. However, we are yet to see detail regarding what these proposed new powers are. Furthermore, this broad commitment to provide additional power is not complimented by the promise of a step up in central funding or support. Whilst local authorities should be empowered to take action to address local hotspots and reduce air pollution where they can, it is essential that this is combined with sufficient leadership, guidance, participation and financial support from central Government

<sup>75</sup> ClientEarth has published a detailed briefing which discussed what the *ClientEarth (No.2)* legal tests mean in the context of the local authority feasibility studies: “What do ClientEarth’s legal cases mean for Feasibility Studies for nitrogen dioxide compliance in England” April 2018 at <https://www.documents.clientearth.org/wp-content/uploads/library/2018-04-18-legal-test-for-feasibility-studies-ce-en.pdf> [accessed 8 October 2018].

<sup>76</sup> See [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/739696/air-quality-tc-letter-to-southampton-city-council.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/739696/air-quality-tc-letter-to-southampton-city-council.pdf) [accessed 8 October 2018] and [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/739698/air-quality-tc-letter-to-derby-city-council.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/739698/air-quality-tc-letter-to-derby-city-council.pdf) [accessed 8 October 2018].

in order to prompt swift, effective, widespread and coordinated action. Additional powers will not contribute to addressing local air pollution problems if local authorities do not have the capacity or resources to exercise or enforce them; and at present many do not.

Furthermore, simply providing local authorities absolute discretion as to whether or not to exercise new powers will not on its own be effective at meeting ambient concentration or exposure reduction targets. Where local authorities are not bound by a hard-edge legal duty to take action, the incentive to exercise that discretion risks being limited.

As mentioned, whilst there is no doubt that certain pollution reduction measures need to be designed for and adapted to local circumstances, the focus on local powers and measures risks diverting attention from the need to exercise policy levers at a national scale.

### *New (and improved?) planning guidance?*

The draft Clean Air Strategy commits Government to “strengthen statutory planning guidance on air quality and help share good practice where it is already happening”.<sup>77</sup> As explained in above, there are weaknesses and ambiguities in the current PPG, and inconsistencies in the approaches taken by different planning authorities. Government’s commitment to revisit this guidance provides a promising opportunity to improve on it. In particular, clarity is needed on the requirement for planning authorities to refuse consent where a proposed development would lead to or exacerbate limit value exceedances—the terms of the new NPPF provides the framework for this, but the PPG muddies the water.

### *A more adaptive approach to mitigation?*

The new Town and Country Planning (Environmental Impact Assessment) Regulations 2017<sup>78</sup> (implementing Directive 2014/52<sup>79</sup>) impose a legal requirement on planning authorities to consider whether to impose monitoring requirements<sup>80</sup> on EIA developments and take steps to ensure that mitigation and monitoring measures are implemented.<sup>81</sup> These provisions may assist in supporting planning authorities wishing to take a robust approach to the effectiveness of mitigation measures for EIA development.

The recently confirmed Silvertown Tunnel DCO sets some interesting precedent for ongoing monitoring and mitigation of air quality impacts. It requires TfL to install additional air quality monitoring equipment and to continue to monitor air quality for at least three years once the scheme is operational. If the expert review of the collected data shows that there has been a material worsening in air quality as a result of the scheme (beyond that predicted within the Environmental Statement), TfL is required to develop a scheme of additional mitigation and for approval by the Mayor of London.<sup>82</sup>

Will we see this type of adaptive approach to mitigation providing a means of overcoming issues relating to uncertainty of impact? If so, this may only be feasible and appropriate for larger-scale developments.

### *A greater emphasis on plan-making?*

The new NPPF places greater emphasis on the need to consider opportunities to mitigate air quality impacts at plan-making stage, to ensure a more strategic approach and limit the need for issues to be reconsidered

<sup>77</sup> *Clean Air Strategy 2018*, Department for Environment Food & Rural Affairs [2018] at [https://consult.defra.gov.uk/environmental-quality/clean-air-strategy-consultation/supporting\\_documents/Clean%20Air%20Strategy%202018%20Consultation.pdf](https://consult.defra.gov.uk/environmental-quality/clean-air-strategy-consultation/supporting_documents/Clean%20Air%20Strategy%202018%20Consultation.pdf) [accessed 8 October 2018].

<sup>78</sup> Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017/571).

<sup>79</sup> Directive 2014/52 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment [2014] OJ L124/1.

<sup>80</sup> Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017/571) reg.26(1)(d).

<sup>81</sup> Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017/571) reg.26(3).

<sup>82</sup> *Silvertown Tunnel Monitoring & Mitigation Strategy*, Document Reference: 8.84 at <https://infrastructure.planninginspectorate.gov.uk/wp-content/uploads/projects/TR010021/TR010021-001476-TfL%208.84%20Monitoring%20and%20Mitigation%20Strategy.pdf> [accessed 8 October 2018].

when determining individual applications. It also encourages that opportunities to promote walking, cycling and public transport are identified and pursued at the earliest stages of development planning. In practice, will this lead to a more strategic approach to ensuring that individual developments contribute to wider air quality improvements? In particular, could better strategic plan-making address difficulties associated with effectively mitigating the air quality impact of cumulative smaller-scale development?

### *An uncertain role for the courts*

The legal action started by ClientEarth some eight years ago has played a key role in requiring action from national Government. If the measures set out in the pending local air quality plans fail to meet the requirements of the AAQ Directive, those too risk legal challenge. But how will the role of the courts extend beyond the substantive review of air quality plans?

The courts have not to date held that any free-standing duty arises from the AAQ Directive in relation to planning decisions. However, how the AAQ Directive should influence the Secretary of State's exercise of planning functions will very shortly be the subject of consideration by the Court of Appeal in the *Shirley* case. Related questions will also be central to the challenge recently launched by a group of London local authorities, the Mayor and Greenpeace against the designation of the Airports National Policy Statement.<sup>83</sup>

With local residents becoming increasingly aware and concerned about air quality (especially around sensitive sites such as schools and hospitals), air quality has already started to become a more lively consideration as part of challenges to individual planning determinations. It is at least arguable that air quality standards must be treated by planning authorities as more than just another material consideration. Given a legal framework that establishes the achievement of limit values as an obligation of result that presides over other socio-economic and technical factors and provides for enforceable rights to air quality standards, air quality should be capable of being an "overriding" consideration. That status is recognised to some extent in the new NPPF, requiring that planning decisions must sustain and contribute towards compliance with limit values.

However, difficult questions remain. Can exacerbating breaches of air quality in non-complying areas ever be justified? The National Networks NPS and the Silver Town DCO decision suggests that the Secretary of State considers that they can be. Yet the London Plan takes a different approach. If development can ever be justified in making illegal air pollution worse, what considerations need to be taken into account?

### *Brexit, the Environment Bill and the need for new clean air legislation*

As outlined above, much of the key legislation regulating air pollution in the UK stems from EU law. Although the domestic Regulations implementing both the AAQ Directive and the NEC Directive will initially continue to have effect following the UK's exit from the EU,<sup>84</sup> their status as statutory instruments will leave these rules open to future amendment/repeal without proper parliamentary scrutiny as the Directives, and the obligation to implement them, fall away. To avoid this risk, and strengthen the weaknesses in the existing framework, new primary clean air legislation is essential. ClientEarth has long been calling for this.

Defra's draft Clean Air Strategy commits Government to "bring forward primary legislation at the earliest opportunity in order to secure a more coherent legislative framework for action to tackle air pollution". When giving oral evidence to the Liaison Committee on 18 July, the Prime Minister also committed to including clean air as part of the upcoming Environment Bill. Whilst this apparent appetite for new law is promising, the scope and ambition of the Government's proposals remain unclear.

<sup>83</sup> CO/3089/2018 filed on 6 August 2018.

<sup>84</sup> European Union (Withdrawal Act 2018) s.2.

Any new legislation should improve on what we have, rather than provide an opportunity to weaken it. In doing so, it will need to include provisions to:

- **Set tighter limit values for ambient concentrations of all air pollutants which are in line with WHO guideline levels**

It is essential that the Secretary of State continues to be bound by a clear obligation of result not to exceed legal limits of ambient air pollution, and where those limit values are exceeded, to implement plans to ensure compliance is achieved in the shortest possible time. These obligations have provided the key basis for requiring action to reduce harmful levels of NO<sub>2</sub>. However, as explained above, the existing limits for a number of other pollutants are weaker than current WHO guideline levels. Most notably the limit values for both PM<sub>10</sub> and PM<sub>2.5</sub> are well above the WHO recommendations and are not tight enough to protect human health. New legislation should establish the WHO recommendations as a minimum benchmark, with a mechanism to revise limit values down over time to reflect the latest scientific evidence.

- **Enshrine the right to clean air in domestic law**

ClientEarth's litigation to date has proved to be a key tool in prompting action to address illegal levels of NO<sub>2</sub>. In his judgment on remedies in *ClientEarth (No.3)*, Garnham J recognised that ClientEarth had "acted as a valuable monitor of the government's efforts to improve air quality to date". As explained above, ClientEarth's court action against the UK Government and public bodies across Europe has hung off the "right to clean air" established by the CJEU *ClientEarth* judgment.

The European Union (Withdrawal) Act 2018 provides that retained EU law must be interpreted in accordance with existing CJEU and domestic case law.<sup>85</sup> Our right to enforce clean air law will therefore continue to have effect post-Brexit for the purposes of the Air Quality Standards Regulations 2010. This is subject to some important limitations, however. First, the Supreme Court is not bound by the retained case law. Secondly, if the relevant provisions of the Regulations are substantively amended, the CJEU ruling risks becoming obsolete. The relevant provisions of the Withdrawal Act are unhelpful and unclear in the instructions that they provide to the courts regarding the future status of retained case law. To ensure that our right to clean air is protected following UK exit from the EU, the ability of the public and NGOs to hold the Government to account where they breach air quality law should be given a clear statutory footing. The processes provided for must comply with the requirements of the Aarhus Convention: they must be timely and affordable, allow the substantive review of government air quality plans by the courts and provide the basis for effective judicial remedies to be granted where those plans are inadequate, including injunctive relief and mandatory orders. While the watchdog that will be established will be a valuable tool, it cannot be (nor can it be seen as) a replacement for proper access to the courts for civil society.

- **Clarify the roles and responsibilities of all levels of government**

Whilst the duty to meet limit values and draw up air quality plans lies firmly with the Secretary of State, and should continue to do so, there is a need to clear up the framework of responsibility which sits underneath these overarching obligations.

<sup>85</sup> European Union (Withdrawal Act 2018) s.6.

For the purposes of addressing air pollution across the UK, Government has recently pushed local authorities into centre stage—with the promise of new powers, as well directions to draw up local air quality plans to meet NO<sub>2</sub> limits.

However, as explained in the preceding sections of this paper, there is currently no hard-edged duty on local authorities to take action to reduce pollution. Nor are there minimum statutory technical requirements for local monitoring, modelling or the public dissemination of this information. New legislation should fill these gaps. This should provide clarity as to how local authorities and other public bodies should exercise their powers and functions (including those relating to development control) to contribute to achieving clean air, avoid risking breach of limit values, and reduce the exposure of vulnerable members of society. Where central Government requires action to be taken by local authorities, Treasury should be required to provide funding to support this. In other words, responsibility should be accompanied with adequate resources.

The boundaries of the Secretary of State’s duties also need clearer statutory definition, as highlighted by the recent *Shirley* judgement. If existing duties are interpreted by the courts as not extending any further than a requirement to draw up and implement an air quality plan, there is a danger that the Secretary of State’s related powers and functions may be exercised in a way which directly undermines the effectiveness of the measures set out in that plan. This cannot be in line with an overall objective of protecting human health.

- **Establish a new watchdog body to scrutinise air quality policy and hold the Government to account**

The compliance and enforcement mechanisms currently provided by European institutions need to be replaced by equivalent or stronger domestic mechanisms to ensure that the Government will continue to be held to account against limit values and emission reduction targets.

A new, properly independent, watchdog should be tasked with holding public bodies to account against their environmental responsibilities, including those for meeting legally-binding limit values and emission reduction targets. The body should also have a role in scrutinising air quality policy’s compliance with legal obligations. Considerable improvement will be needed on the Government’s first proposals for this watchdog as contained in their recent consultation paper. The watchdog will need to have the power to serve binding notices enforceable by the court that set out the precise steps that must be taken in order to reach compliance. Its engagement with the public must also be drastically improved: the watchdog should involve communities in identifying problems and in developing solutions to those problems. Finally, the watchdog must have available as a last resort the ability to issue meaningful sanctions, such as transferral of powers and significant fines.<sup>86</sup>

There is wide recognition of the urgent need for new, improved legislation, both amongst politicians and civil society. Clean Air Bills have been introduced in both the House of Commons<sup>87</sup> and the House of Lords,<sup>88</sup> by Geraint Davies MP and Baroness Jones of Moulsecomb, respectively. Government has gone

<sup>86</sup> ClientEarth, “A new Nature and Environment Commission: Speaking up for nature and holding the powerful to account” 2018 at <https://www.documents.clientearth.org/library/download-info/a-new-nature-and-environment-commission/> [accessed 8 October 2018].

<sup>87</sup> The Bill has its first reading on 22 November 2017. A copy is available at <https://services.parliament.uk/bills/2017-19/cleanair.html> [accessed 8 October 2018].

<sup>88</sup> The Bill had its first reading on 5 July 2018. A copy is available at <https://services.parliament.uk/bills/2017-19/cleanairhumanrights.html> [accessed 8 October 2018].



some way in recognising this need, but it is clear that there is much work to do to ensure that the clean air provisions of the Environment Bill go far enough. We eagerly watch this space and ClientEarth will continue to scrutinise the Government's proposals to make sure that our future involves a legal framework that is better capable of delivering clean air in the UK.