

**6 December 2010**

**Clean Air in London considering suing Mayor of London over air pollution consequences of removing the western extension of congestion charging zone (WEZ)**

**Clean Air in London issues Letter before Action to Mayor of London to show how seriously it takes the increase in air pollution that would arise if Mayor Johnson removes the WEZ without adequate mitigation**

**Letter before Action sent also to Caroline Spelman, Secretary of State for Environment, Food and Rural Affairs highlighting concerns over Government's PM<sub>10</sub> time extension reapplication**

**Mayor requested to: (i) ensure air pollution is not worsened; or (ii) delay implementing his Decision until he can ensure air pollution is not worsened; or (iii) reverse his Decision**

**“This is about defending (and improving) air quality not defending road tax”**

Clean Air in London (CAL) has instructed Harrison Grant Solicitors to issue a Letter before Action (LBA) to Mayor Johnson to show how seriously it takes the increase in air pollution that would arise if Mayor Johnson removes the western extension of the congestion charging zone (WEZ) without full mitigation. For details of the WEZ and the consultation on its removal see:

TfL media release on 20 October:

<http://www.tfl.gov.uk/corporate/media/newscentre/archive/17091.aspx>

TfL general information about WEZ: <http://www.tfl.gov.uk/roadusers/congestioncharging/17094.aspx>

TfL publications on WEZ: <http://www.tfl.gov.uk/roadusers/congestioncharging/6722.aspx>

The proposed claim for Judicial Review relates to the Mayor's Decision, announced on 20 October 2010, to remove the WEZ, without putting in place measures to maintain the air quality throughout the WEZ area, in accordance with the obligations of United Kingdom (UK) and European Union (EU) law.

The LBA was also issued to Caroline Spelman, Secretary of State for Environment Food and Rural Affairs, since Defra is responsible for the UK's compliance with UK and EU air quality laws. The LBA highlights concerns over the Government's failure to intervene in relation to the WEZ and its reapplication to the European Commission for a time extension until 2011 to comply with the daily limit value for dangerous airborne particles (PM<sub>10</sub>) which mistakenly included the WEZ as a planned measure.

Simon Birkett, Founder of Clean Air in London, said:

“Air pollution in London is much worse than most of us have realised. For example, the Mayor has estimated some 4,300 premature deaths in London in 2008 were attributable to long-term exposure to the smaller PM<sub>2.5</sub>.

“Clean Air in London has instructed Harrison Grant to issue a ‘Letter before Action’ (LBA) to show

how seriously it takes: the increase in air pollution that would arise if Mayor Johnson removes the WEZ without adequate mitigation; and the Government's mistaken inclusion of the WEZ in its reapplication to the European Commission for a time extension until 2011 to comply with legal standards for dangerous airborne particles (PM<sub>10</sub>) and avoid £300m fines. Clean Air in London is separately urging the European Commission to reject within weeks the UK's flawed reapplication for a time extension on PM<sub>10</sub>.

"To put the issue in context, the Mayor's own consultation documents estimate that emissions of PM<sub>10</sub> would increase by 3-4% on average across the WEZ area if the scheme is removed compared with an estimate in his draft Air Quality Strategy, of a 13% average reduction between 2008 and 2011 for London as a whole.

"Ambient air quality concentrations are much harder to reduce than emissions.

"The Mayor has chosen a seemingly populist route despite Transport for London's (TfL's) analysis of the traffic, environmental, revenue, economic and social impacts showing overwhelmingly negative results. At least one impact – the need to comply with health-based air quality laws, if necessary through mitigation measures – must not be dismissed. We should expect the Mayor of a large and complex city to 'walk and chew gum' at the same time.

"Clean Air in London hopes that when these matters have been considered further by the Mayor – who says he is keen to seek improvements in the environment and public health – he will act decisively to bring down air pollution in the WEZ area.

"Any legal action must always be a last resort. This is about defending (and improving) air quality not defending road tax."

## **Proposed Grounds of Challenge**

The Proposed Grounds of Challenge would be that the Mayor's Decision to remove the WEZ without adequate mitigation measures is unlawful amongst other reasons because removal of the WEZ will mean that:

- a. the PM<sub>10</sub> daily limit value will be breached in 2011 at locations within the WEZ area where members of the public have access;
- b. NO<sub>2</sub> annual mean and hourly limit values will be breached at locations within the WEZ area where members of the public have access;
- c. there will be aggravated breaches of the NO<sub>2</sub> hourly limit value whereby it would be exceeded in 2011 at locations having been attained in 2010;
- d. there will be aggravated breaches of the requirement to ensure that the limit value for annual mean concentrations of NO<sub>2</sub> is not exceeded by more than the maximum margin of tolerance that would apply from 1 January 2010 if the UK obtains a time extension to comply with the NO<sub>2</sub> annual limit value as the Mayor is assuming; and
- e. air pollution will worsen within the WEZ area.

## **Action that the Mayor and the Secretary of State are expected to take**

The LBA requests the Mayor:

- a. to agree to ensure that annual mean and peak concentrations of nitrogen dioxide (NO<sub>2</sub>) and other pollutants in ambient air throughout the WEZ area will not exceed those in 2010 following removal of the WEZ;
- b. alternatively, to agree to delay implementation of his Decision removing the WEZ until mitigation measures have been put in place to ensure that annual mean and peak concentrations of nitrogen dioxide (NO<sub>2</sub>) and other pollutants in ambient air throughout the WEZ area will not exceed those in 2010 following removal of the WEZ;
- c. alternatively, to reverse his Decision removing the WEZ.

The Secretary of State is requested to:

- a. confirm that if the Mayor fails to act as requested, she will exercise her powers to prevent the Mayor removing the WEZ pending the adoption of alternative measures appropriate for the implementation of UK and EU law; and
- b. in any event, to write to the European Commission's Environment Directorate notifying it: (1) of the planned removal of the WEZ in London; (2) the full consequences of that Decision for the UK's ability to comply with UK and EU air quality laws; and (3) of the impact on the UK's pending reapplication for a time extension until 2011 to comply with the PM<sub>10</sub> daily limit value throughout London (which included the WEZ as a measure being taken).

Mayor Johnson and the Secretary of State are both also asked to consent, under the Aarhus Convention requirements for access to justice in environmental cases, to a protective costs order limiting liability for adverse costs against CAL if the matter were to progress.

#### Notes:

1. Clean Air in London highlighted concerns to Mayor Johnson in September 2008

Clean Air in London wrote to Mayor Johnson on 27 September 2008 saying "Keep the WEZ or an even tougher, additional, inner low emission zone will be needed by early 2010". See:

<http://cleanairinlondon.org/solutions/mayors-consultation-on-the-future-of-the-congestion-charge-western-extension-the-wez/>

2. WEZ consultation and other documents

TfL's report to the Mayor on the Congestion Charging Scheme Variation Orders Consultation dated

October 2010 states on page 67:

*"The Mayor will need to weigh the public support for removal against the potential adverse impacts highlighted in Chapter 5".*

Note: Chapter 5 is titled "Impacts of the proposals" Key impacts of the proposals are:

- Traffic: 30,000 extra vehicles per day; congestion 15% to 21% worse
- Environmental emissions: average increases for PM<sub>10</sub> (3-4%); NO<sub>x</sub> (2-3%); and CO<sub>2</sub> (4-6%)

- Revenue: net reduction in region of £55m per year and £5m one-off removal cost
- Economic: disbenefit of £50-70m per year; saving of £40m per year for charges and penalties
- Social include Equalities, Health and Safety.

Results of public consultation which closed on 2 August 2010 referred to in TfL report:

- Headline total reported: 13,962 responses; 61% of individuals and 66% of businesses supported removal of the WEZ
- Stakeholders: 39% stakeholders said WEZ should not be removed. 34% wanted it removed.
- No attitudinal survey was undertaken

Results of initial consultation which closed on 5 October 2008

<http://www.tfl.gov.uk/static/corporate/media/newscentre/archive/10590.html#>

- Headline total reported: 28,000 responses; overall 67% of individual and 86% of businesses supported removal of the WEZ
- Attitudinal survey:
  - Of three options: 41% of public preferred removal; 30% of public preferred keeping it; and 15% of public preferred changing it.
  - Of three options: 50% of businesses preferred removal; 23% supported keeping it; and 14% preferred changing it
  - Around half of stakeholders in favour of keeping WEZ although some made support conditional on other changes. A quarter of stakeholders supported removal of the WEZ

See Blog by Dave Hill of the Guardian on 24 September 2009 for comment:

<http://www.guardian.co.uk/uk/davehillblog/2009/sep/24/boris-johnson-congestion-charge-evening-standard>

And the report on the 2008 attitudinal survey:

<http://www.tfl.gov.uk/assets/downloads/annex-2-report-on-the-attitudinal-survey-of-Londoners.pdf>

### 3. Mitigation measures

#### Proposed mitigation

TfL report states on page 88:

*“It is reasonable to expect that the measures set out in the draft MAQS, and those in the MTS and WEZ complementary measure [note typos], would more than offset any undesirable air quality impacts from WEZ removal, and deliver greater reductions in emissions. In particular, the proposal to apply age-based limits to taxis set out in the draft MAQS will be important, given the relatively high number of taxis in the area, and their contribution to road transport emissions.”*

Note: the final MAQS has not yet been published; the age-limits might be expected to apply from

2012; and Phase 3 of the low emission zone was postponed from 4 October 2010 to 3 January

#### 2012. Possible alternative mitigation measures

- Abatement of harmful emissions from buses
- Pre-Euro 4 taxis permitted to drop-off in the WEZ area but not pick-up fares
- Berlin-style inner low emission zone incorporating at least the WEZ area
- Campaign to build public understanding of the dangers of air pollution with advice on mitigation and adaptation

#### 4. Expected process for the proposed Claim

Possible timetable of proposed Claim

20 October	Mayor of London announces Decision to remove the WEZ
3 December	Letter before action issued to Mayor of London and Secretary of State
17 December	Substantive responses required under Judicial Review Pre-action Protocol
4 January	WEZ due to be removed
December/January	Clean Air in London takes advice and decides whether or not to proceed with claim
20 January	Deadline for Clean Air in London to issue proceedings

A Judicial Review of the Mayor's Decision to remove the WEZ would need to be lodged in the High Court. The proposed claim would relate to the Mayor of London's Decision, announced on 20 October 2010, to remove the WEZ without first putting in place measures to maintain the air quality throughout the WEZ area in accordance with the obligations of the United Kingdom under Directive 2008/50/EC.

Any Judicial Review is likely to be heard pretty quickly but the precise timing would be unknown.

If CAL launches a Judicial Review and is successful, the Mayor would be required to think again. In CAL's view, this is likely to mean – as everyone has been wanting – that serious action would be taken to reduce air pollution in London and protect public health.