

20 February 2014

Europe at its 'best' takes legal action against UK at its 'worst' on air pollution

European Commission (Commission) has sent the UK a 'Letter of formal notice' for breaching nitrogen dioxide (NO₂) limit values in 16 of 43 zones. The UK is the first of the EU's 28 Member States to receive enforcement action on NO₂. Commission has also responded to a request from Clean Air in London for clarification on certain provisions of Directive 2008/50/EC on ambient air quality and cleaner air for Europe

London has the highest levels of NO₂ of any capital city in Europe and the UK has the highest proportion of zones breaching legal limits. Information obtained from Mayor Johnson shows that exhaust emissions from passenger cars (including private hire vehicles) of NO₂ and dangerous airborne particles (PM_{2.5}) are expected to rise from 39% and 49% of transport exhaust emissions respectively in 2010 to a staggering 47% and 54% respectively in 2015

Clean Air in London thanks particularly Jean Lambert MEP (Green), Sarah Ludford MEP (Liberal Democrat), Claude Moraes MEP (Labour), Keith Taylor MEP (Green) and Barry Gardiner MP (Labour) for their incredible efforts in championing this public health issue over many years

World Health Organisation says both short- and long-term studies have found adverse health effects at concentrations that were at or below the current EU limit values. Leading scientists say there is evidence for a long-term effect of NO₂ on natural mortality as high as that of PM_{2.5}

Mayor Johnson estimates UK faces fines of £300m per annum for London alone if compliance is not achieved

The European Commission (Commission) has sent the UK a 'Letter of Formal Notice' (First written warning) for failing to comply with nitrogen dioxide (NO₂) limit values in 16 of 43 UK zones including London. The Commission's announcement can be seen at:

http://europa.eu/rapid/press-release_IP-14-154_en.htm

Levels of NO₂ in London are the highest of any capital city in Europe. But NO₂ is not just a London problem. The UK has the highest proportion of zones exceeding the NO₂ annual limit value plus margin of tolerance of any country in Europe. Cities affected outside London include Birmingham, Glasgow, Kingston upon Hull, Leeds, Manchester and Southampton and so-called 'zones' such as Eastern, East and West Midlands, North East, North West and Merseyside, South East, Teeside, The Potteries and Yorkshire. As an example of the scale of this public health crisis, annual mean levels of NO₂ are averaging well over three times the World Health Organisation (WHO) guideline and legal limit in Oxford Street and are well over twice legal limits near many of our busiest streets.

In proportion to the scale of this crisis, little or nothing is being done by the UK authorities including the Mayor of London. For example, evidence from the Mayor shows that exhaust emissions from passenger cars (including private hire vehicles) of NO₂ and dangerous airborne particles (PM_{2.5}) are

expected to rise from 39% and 49% of transport emissions respectively in 2010 to a staggering 47% and 54% respectively in 2015.

Today's legal action follows the announcement of the Commission's Clean Air Policy Package on 18 December which committed to two general objectives to attain air quality levels that do not give rise to significant negative impacts on, or risks for, human health and the environment:

- to ensure compliance with present air quality policies, and coherence with international commitments, by 2020 at the latest; and
- to achieve substantial further reduction in health and environmental impacts in the period up to 2030.

It also follows the Supreme Court judgment in May 2013 that ruled the UK is breaching NO₂ limit values in 16 of 43 zones. The Supreme Court also referred ClientEarth's case to the Court of Justice of the European Union (CJEU) for a ruling on next steps including 'remedies'. Clean Air in London (CAL) understands the UK is the first of the 28 Member States in Europe to receive a 'Letter of formal notice' on NO₂, perhaps as a direct result of the Supreme Court judgement. Today's legal action also responds to CAL's formal complaint to the Commission dated 15 January 2012 about widespread breaches of air pollution laws in London and efforts by the Government to mislead the Commission.

A 'Letter of formal notice' is the first step of the formal five stage infraction process to enforce European laws. It is now often preceded by an EU Pilot 'investigation' that may last several months. Member States are typically given two months to respond to a 'Letter of formal notice' after which the Commission can send a 'Reasoned opinion' (final written warning). Two or more months after that the Commission can choose to refer the case to the CJEU for a ruling. Thereafter, if the Member State fails to comply with the CJEU's ruling, the Commission can return to the CJEU seeking lump sum and daily fines against the Member State. Mayor Johnson has estimated these fines could total £300m per annum per pollutant for London alone.

Clarification on certain provisions of Directive 2008/50/EC

In a closely related development the Commission responded yesterday to CAL's request for clarification on certain provisions of Directive 2008/50/EC. The Commission's response states:

"The authoritative interpretation of EU law is the prerogative of the EU Court of Justice; subject to that caveat, your understanding of the Directive largely coincides with the way we would interpret the relevant provisions, if requested by the Court. In particular:

1. The obligation to achieve compliance with the limit values includes the obligation to maintain such air quality status once compliance is achieved (Article 13, first paragraph).
2. With the only three exceptions listed in Annex III (Section A, paragraph 2), limit values must indeed be complied with throughout the territory of any given air quality zone, and compliance

3. should not be determined nor assessed as an “average” of concentrations measured in different locations within the same zone.
4. Unlike target values, which create an objective to be achieved “where possible” or “where not entailing disproportionate costs”, limit values create an obligation of result which is unconditional and absolute, irrespective of costs (Article 2, paragraphs 5 and 9).
5. Where air quality is already good, Article 12 of the Directive applies. This provision spells out in legal terms the “non-deterioration” principle, according to which Member States shall not only maintain the levels below the limit values, but also “endeavour to preserve the best ambient air quality compatible with sustainable development”.

“Finally, I have no objection to the disclosure or dissemination of this letter, to whom it might concern.”

This clarification confirms that Mayor Johnson has repeatedly misunderstood the requirements of Directive 2008/50/EC including during the removal of the western extension of the congestion charge and in his plans for the Olympic Route Network. CAL is therefore publishing today the Commission’s excellent, timely and authoritative letter and will be drawing it to the attention of the Mayor, the Government and others.

Repeated failures

The UK has failed repeatedly to comply with NO₂ limit values in legislation since 1999 to be complied with by 1 January 2010. These failures include:

Taking no action to comply by 2010	Failed
Not applying for a time extension to 2015 for 16 zones	Failed
Frequently misleading the European Commission	Failed
No national plan to comply as soon as possible	Failed
No London plan to comply as soon as possible	Failed
Defra losing to ClientEarth in the Supreme Court	Failed
Successive Governments encouraging the purchase of diesel vehicles	Failed
London having the highest NO ₂ of any EU capital	Failed
UK having highest percentage of zones breaching limits	Failed
1.7 million Londoners exposed to illegal levels of NO ₂ in 2012	Failed
NO ₂ hourly limit value breached within five days in 2014	Failed
Treating limit values with contempt when removing M4 bus lane	Failed
Not warning the public about the dangers of NO ₂	Failed
Not reducing city NO ₂ levels (rain reduced background NO ₂ recently)	Failed

Health

The Government and the Mayor have downplayed the health impacts of NO₂, failing to mention that it is the only ‘modern’ molecule within the whole gaseous component of air pollution subject to WHO guidelines and legal limits. Whereas the particle component of air pollution is regulated by its total

mass concentration, gases other than NO₂ are largely ignored. It is vital therefore that levels of NO₂ are reduced to avoid: its direct health effects and those of other toxic pollutants from combustion; and its contribution with nitrogen monoxide as a precursor to the formation of deadly particles. Sulphur dioxide, which is also regulated, has been largely eliminated as a problem by the use of ultra-low sulphur fuels.

The WHO classified diesel exhaust carcinogenic to humans in June 2012 and outdoor air pollution and particulate matter as carcinogenic to humans in October 2013. A state of the art report by the WHO earlier last year said “Many studies have documented associations between day-to-day variations in NO₂ and variations in mortality, hospital admissions, and respiratory symptoms. Also, more studies have now been published showing associations between long-term exposure to NO₂ and mortality and morbidity. Both short- and long-term studies have found these adverse associations at concentrations that were at or below the current EU limit values, which for NO₂ are equivalent to the WHO Air Quality Guidelines”. Last September, another leading group of scientists said there is evidence for a long-term effect of NO₂ on natural mortality as high as that of PM_{2.5} which has long been considered the most dangerous air pollutant.

Air pollution is also an equality issue. Policy Exchange found, in its report titled *Something in the Air: The forgotten crisis of Britain’s poor air quality* that in the worst 10% of London for NO₂, 5-10 year old children are 47% more likely than the London average to be eligible for free school meals and residents are 26% more likely than the London average to be on income support.

Sources

Diesel vehicles and gas heating and cooking, together increasingly with new local sources of combustion, are the main sources of NO₂ in London. Policy Exchange has estimated that diesel vehicles are responsible for 91% of dangerous airborne particles (PM_{2.5}) and 95% of NO₂ exhaust emissions from road transport in London. The Mayor estimates that 82% of NO₂ emissions in London are generated within the city.

In summary, NO₂ laws are the most powerful tool citizens have to hammer down carcinogenic diesel exhaust and other toxic pollutants from combustion.

Quotes

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

“Europe at its ‘best’ is taking legal action against the UK at its ‘worst’ on air pollution.

“Clean Air in London (CAL) congratulates Commissioner Potočnik on the European Commission's Clean Air Policy Package announced on 18 December at the end of the ‘Year of Air’ which prioritised full compliance with air pollution laws throughout Europe by 2020 and reductions of the most harmful emissions by 2030. CAL has wanted the Package to be backed by early infraction action and binding emission limits in 2025 and so today’s announcement of infraction action commencing is very welcome.

“Commissioner Potočník was right to delay legal action on nitrogen dioxide (NO₂) while ClientEarth's case was progressing to the Supreme Court and the Clean Air Policy Package was being negotiated across Europe over nearly three years. He was also right choose to enforce not reopen the Directive on ambient air quality and cleaner air for Europe (Directive 2008/50/EC) in the Clean Air Policy Package, despite overwhelming health evidence showing the need for tighter air pollution laws, given the UK and some European cities and regions were actively lobbying for the existing laws to be weakened. Some mistook last December's announcement to mean infraction would begin not end in 2020 but today's news confirms they were wrong. Member States and cities need to understand they will be paying fines (or perhaps Ministers and Mayors should face jail?) from 2020 if they do not comply with these public health laws.

“This enforcement action against the UK is much needed. The UK has failed repeatedly to comply with NO₂ limit values in legislation since 1999 to be complied with by 1 January 2010.

“In many ways the Government's failure to address air pollution mirrors its failure to prepare for flooding. Free market anarchy, caused by having no constraints on money-making, will always lead to public health and environmental catastrophes.

“The Mayor has also been at fault. In particular, his refusal for six years to take action to reduce harmful pollution from passenger cars means its proportion of deadly pollution emissions is forecast to grow by a staggering 20% between 2010 and 2015. Almost as bad, his claims of reductions in concentrations and computer modelled emissions are misleading at best. Transboundary or background levels of NO₂ have reduced, no doubt partly or entirely due to two or three years of heavy rainfall, while the London component of regulated concentrations (i.e. what we breathe) appears to be relatively unchanged over many years. Last but not least, the Mayor has also misunderstood Directive 2008/50/EC and is irresponsible to say “natural justice demands that authorities should only be held accountable for the things it can do” seemingly ignoring that he has the powers and influence necessary to reduce air pollution.

“The Mayor should stop spending months or years consulting legacy industries behind closed doors about possible measures that get watered down again and again and instead take all action necessary to tackle the biggest public health risk after smoking. Mayor Johnson needs to:

1. ban carcinogenic diesel exhaust from the most-polluted parts of London by 2020 with an intermediate step by May 2018. This policy needs to be backed by investment in infrastructure to deliver zero emission vehicles in the medium term;
2. stop forcing taxi drivers to buy one of two large diesel vehicles when replacing their vehicles and invest in a rapid charging network. His plans for hybrid taxis in 2018 are too little, far too late;
3. fit the latest emission filters to thousands of buses and non-road mobile machinery (construction equipment and trains) now to reduce the most harmful diesel emissions;
4. reduce building emissions with a moratorium on new incinerators and combined heat and power plants and biomass burning in London until legal limits are met; and

5. warn Londoners during smog episodes to reduce hospitalisations, save lives and build public understanding of air pollution.

“All of these measures need to be backed by real-world testing of emissions and the best scientific evidence.

“In this context, the Mayor’s repeated backward steps and lack of ambition for his so-called ultra-low emission zone by 2020 and other measures look ridiculous or worse. Action to restrict diesel passenger cars must be an urgent priority not least within an ultra-low emission zone within the area bounded by North and South Circular roads. No-one wants fines but the end of any [five stage] enforcement process must have a final sanction of fines or jail (for Ministers and/or Mayors) and the UK will deserve them at this rate.

“In the end, it all boils down to protecting public health and reducing inequalities. CAL therefore wants to thank particularly Jean Lambert MEP (Green), Sarah Ludford MEP (Liberal Democrat), Claude Moraes MEP (Labour), Keith Taylor MEP (Green) and Barry Gardiner MP (Labour) for their incredible efforts in championing this public health issue over many years. They are amazing!”

“Clean Air in London urges voters to ask all politicians standing for election in the European and London elections on 22 May what action they will take to reduce air pollution by May 2018.”

Notes

1. Clean Air in London’s ‘Quick guide to air pollution’ and summary table

<http://cleanairinlondon.org/news/quick-guide-to-air-pollution/>

http://cleanairinlondon.org/wp-content/uploads/CAL-256-UK-AQ-Zones-and-AQ-as-reported-September-2013_Updated-draft-3112131.pdf

2. London has the highest levels of nitrogen dioxide of any capital city in Europe (again)

<http://cleanairinlondon.org/hot-topics/highest-no2-of-any-capital-city-in-europe-again/>

3. European Commission's Clean Air Policy Package, 18 December 2013

http://ec.europa.eu/environment/air/clean_air_policy.htm

4. European Commission guidance on infraction and fines

http://ec.europa.eu/eu_law/infringements/infringements_en.htm

http://ec.europa.eu/eu_law/infringements/infringements_dommages_en.htm

5. ClientEarth’s case at the Supreme Court

<http://www.clientearth.org/201307172236/news/press-releases/supreme-court-calls-on-europe-to-fast-track-uk-air-pollution-case-2236>

6. Clean Air in London's complaint to the European Commission dated 15 January 2012 about widespread breaches of air pollution laws and efforts by the Government to mislead the European Commission

<http://cleanairinlondon.org/legal/clean-air-in-london-lodges-complaint-over-breaches-of-air-pollution-laws-in-london/>

7. London Air Quality Network monitoring results and conference papers

<http://www.londonair.org.uk/london/asp/LAQNSeminar/>

http://www.londonair.org.uk/london/asp/LAQNSeminar/pdf/June2013/Gary_Fuller_Air_pollution_in_London_trends_&_challenges.pdf

8. Mayor's assessment of nitrogen dioxide in London

<http://cleanairinlondon.org/wp-content/uploads/CAL-256-GLA-breakdown-of-NO2-by-borough-to-2020-based-on-LAEI-2010.pdf>

http://questions.london.gov.uk/QuestionSearch/searchclient/questions/question_48367

<http://data.london.gov.uk/dashboard-summary/environment>

Oral evidence to the Environmental Audit Committee on 5 January 2010 (page 15)

“On PM₁₀ we are trying to kind of cobble it together out of two bits of TfL funding, and the more you keep pushing, the more you are able to put something together, but it is just not where we need to be, and actually the fact that the European Union have talked about up to a £300 million is fantastic because it is a great force for us to say, Right, well, we should all be prepared to pay up to £299 million to address this issue.”

<http://www.publications.parliament.uk/pa/cm200910/cmselect/cmenvaud/229/229ii.pdf>

See attached TfL document, paragraph 5.34 on page 19 which stated:

“It is important to also consider the wider context. Should the EU limit values for PM₁₀ and NO₂ not be met, infraction proceedings against the Government could lead to significant fines. The figure of £300m has been suggested for some years as the amount that the UK Government could be fined if it was found to be in breach of limit values. It is not clear what basis there is for this, but it might not be unrealistic. The fine would be calculated on the basis of a lump sum (min 11m Euros) plus a periodic payment, based on the seriousness of the offence and the capacity of the Member State to pay. As an example, in 2005 France was fined a lump sum of 20m Euros plus a

payment of 58m Euros for every six months that the country was in breach of an environmental directive.”

9. Nitrogen dioxide hourly limit value for whole of 2014 breached in five days in Oxford Street

http://www.londonair.org.uk/london/asp/publicstats.asp?region=0&site=WM6&la_id=&network=All&postcode=&MapType=Google&VenueCode=

10. World Health Organisation and other health advice particularly in relation to nitrogen dioxide

<http://www.euro.who.int/en/health-topics/environment-and-health/air-quality/publications/2013/review-of-evidence-on-health-aspects-of-air-pollution-revihaap-project-final-technical-report>

<http://ehp.niehs.nih.gov/ehbase/13/p-2-05-23/>

11. Low emission zones in Europe

<http://www.lowemissionzones.eu>

12. Government admits widespread breaches of air pollution laws

<http://cleanairinlondon.org/legal/government-admits-widespread-breaches-of-air-pollution-laws/>

Government's report to the European Commission on legal breaches in 2012 showed:

34 of 43 UK zones have breached NO₂ limit values in 2012 which have been in legislation since 1999 to be complied with by 1 January 2010

Pages 24/25 of the report state:

Five [of 43] zones met the annual mean limit value for NO₂ in 2012:

Blackpool Urban Area (UK0022)
Preston Urban Area (UK0023)
Highland (UK0039)
Scottish Borders (UK0040)
Northern Ireland (UK0043)

The remaining 38 zones had locations with measured or modelled annual mean NO₂ concentrations higher than the annual mean limit value (40 µg/m³).”

Note: Four zones exceeded the NO₂ annual limit value but obtained limited time extensions.

Time extensions granted by the European Commission in June 2012 for Leicester, North Wales, Nottingham and Portsmouth to comply with the NO₂ limit values have been breached again in

2012. Cardiff has now also breached the terms of its time extension. Bournemouth and Coventry have not met the terms of the conditional time extensions granted on 25 June 2012 i.e. to adjust relevant air quality plans with a view to ensuring compliance with the NO₂ annual limit value by 1 January 2013 and 1 January 2014 respectively

Government claims Marylebone Road had the highest exceedances of NO₂ at an annual mean of 94 µg/m³ Tab 11 when far higher levels were recorded at other locations e.g. Putney High Street (155 µg/m³) and Oxford Street.

The Government's own report shows annual average concentrations of NO₂ have not declined during the last 10 years at eight long-running traffic urban sites that include Bath Roadside, Camden Roadside, Glasgow Kerbside, Exeter Roadside, Haringey Roadside, London Marylebone Road, Oxford Centre Roadside, and Tower Hamlets Roadside) (Figure 5-6 on page 43 of the full report).