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15 January 2012

Dear Secretary-General Day and Commissioner Potočnik

Complaint against UK for infringements of EU air quality law. Request for infraction action by 30 April 2012 to enforce PM₁₀ and NO₂ limit values

‘Part one’ of the Complaint is that UK obtained unlawfully a time extension to comply with the PM₁₀ daily limit value in London. Even if a time extension is sustained, the PM₁₀ daily limit value was breached anyway in Neasden Lane in London in 2011

‘Part two’ of the Complaint is that UK breached the NO₂ annual mean and daily limit values in London and 16 other zones in 2010 (and 2011) and has not applied for a time extension. UK’s High Court says only the European Commission can enforce air quality laws

NO₂ levels in London and UK are the highest in Europe and similar to those in Beijing before the 2008 Olympics. In sharp contrast to the People’s Republic of China, there is no evidence Europe is seeking to enforce or comply with air quality standards during the Olympics

I am writing on behalf of Clean Air in London (CAL) to lodge formally with the European Commission (Commission) a two-part complaint against the United Kingdom (UK) for measures or practices incompatible with one or more provisions or principles of European Union (EU) law (the Complaint).

Details of the Commission’s complaint process can be seen at:

http://ec.europa.eu/eu_law/your_rights/your_rights_en.htm

http://ec.europa.eu/eu_law/your_rights/your_rights_forms_en.htm

‘Part one’ of the Complaint is that: the UK obtained unlawfully a time extension to comply with the daily limit value for dangerous airborne particles (PM₁₀) in London; and, without prejudice to that part of the Complaint, even if a time extension is sustained for the PM₁₀ daily limit value, it was breached in

Neasden Lane (again) in 2011. ‘Part two’ of the Complaint is that: the UK breached the annual mean and hourly limit values for nitrogen dioxide (NO₂) in London and 16 other zones in 2010 (and 2011); and has not applied for a time extension for those zones (i.e. Article 22 plans were submitted for 23 zones and Article 23 plans were submitted for London and 16 other zones).

CAL urges the Commission to launch infraction against the UK by no later than 30 April 2012 to enforce the PM₁₀ daily limit value and the NO₂ annual mean and hourly limit values.

In accordance with the rules of the Commission, please will the Secretary-General of the Commission acknowledge receipt of this Complaint within 15 working days of receipt (providing an official reference number) and examine it within one month regarding the decision to classify it as a complaint. I understand that the Commission will endeavour to take a decision on the substance (either to open infringement proceedings or to close the case) within 12 months of registration of a complaint with its Secretariat-General.

CAL would welcome a meeting with Commissioner Potočnik and/or his senior team or the Secretariat-General to discuss this Complaint.

‘Part one’ of the Complaint: Dangerous airborne particles

‘Part one’ of the Complaint relates to dangerous airborne particles (PM₁₀).

On 11 March 2011, the Commission granted the UK a temporary and conditional exemption until 11 June 2011 to comply with the PM₁₀ daily limit value in London. The condition required the UK to amend its air quality plan for London by 11 June 2011 and submit it to the Commission by 30 November 2011. The Commission’s media release and formal decision can be seen at:

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/285&format=HTML&aged=0&language=EN&guiLanguage=en>

http://ec.europa.eu/environment/air/quality/legislation/time_extensions.htm

The Commission’s media release stated that *“the Commission considers there may still be a risk of the [PM₁₀] daily limit value being exceeded after the exemption period. The request is therefore granted on the condition that short-term measures are introduced to control, or, where necessary, suspend activities which contribute to the risk of the limit values being exceeded”*.

Regulation 28 of the Air Quality Standards Regulations 2010 (AQSR 2010) requires the Secretary of State to consult the public when preparing an air quality plan. This Regulation implements Article 2 of Directive 2003/35/EC:

“2. Member States shall ensure that the public is given early and effective opportunities to participate in the preparation and modification or review of the plans and programmes required to be drawn up under the provisions listed in Annex I.”

http://www.legislation.gov.uk/ukxi/2010/1001/pdfs/ukxi_20101001_en.pdf

The UK submitted an ‘Update to the Air Quality Plan for London’ to the Commission in May or June

2011 but it did so unlawfully having failed to consult the public on it:

<http://www.archive.defra.gov.uk/environment/quality/air/airquality/docs/air-qual-plan-london.pdf>

CAL understands that in July 2011 the Commission granted the UK a time extension until 11 June 2011 to comply with the PM₁₀ daily limit value in London. As you may know, ClientEarth launched legal proceedings against the Secretary of State for Environment Food and Rural Affairs citing *inter alia* the UK's failure to consult on its 'Update to the Air Quality Plan'. As a result, Defra launched a public consultation on the 'Update to the Air Quality Plan for London' on 12 October 2011 which closed on 6 January 2012. The UK cannot retrospectively comply lawfully with the deadline of 30 November 2011.

<http://www.defra.gov.uk/consult/2011/10/12/particulate-matter-pm10/>

Please see attached CAL's response to that consultation which shows *inter alia* that the UK failed to control exceedances of the PM₁₀ daily limit value in London after 11 June 2011. **Exhibit 1.**

On 16 December 2011, the UK submitted 'Air Pollution in the UK 2010 – Compliance Assessment Summary' to the Commission. That report confirmed the UK had breached the PM₁₀ daily limit value in London in 2010.

http://cdr.eionet.europa.eu/gb/eu/annualair/envtom4wa/air_pollution_UK_2010_Compliance_Assessment_Summary.pdf

<http://cdr.eionet.europa.eu/gb/eu/annualair/envtom4wa>

Complaint: 'Part one' of CAL's Complaint is that the UK failed to submit lawfully an amended air quality plan for London to the Commission by 30 November 2011 and therefore failed to comply with the Commission's condition for a time extension to comply with the PM₁₀ daily limit value in London. The UK has therefore not obtained a time extension to comply with the PM₁₀ daily limit value in London and remains in breach of that legal requirement every year since 2005.

Remedy: The Commission is requested immediately to revoke the UK's time extension to comply with the PM₁₀ daily limit value in London and refer the UK to the Court of Justice of the European Union for breaching the PM₁₀ daily limit value in London in 2010. Please make an announcement to this effect by 30 April 2012.

Further information I: London Air Quality Network shows breach anyway at Neasden Lane

Without prejudice to 'Part one' of its Complaint on PM₁₀, CAL wishes to bring to your early attention that, even if the UK's time extension for PM₁₀ is sustained, the PM₁₀ daily limit value was breached in Neasden Lane in London in 2011 i.e. allowing for the limit value plus 50% (i.e. 75 micrograms per cubic metre (µg/m³)) from 1 January 2011 until and 11 June 2011 and the limit value for the remainder of the year (i.e. 50 µg/m³). The excellent London Air Quality Network (LAQN) shows eight and 31 exceedances of the two thresholds respectively in the relevant periods of 2011 and therefore 39 in total:

1 January to 11 June 2011 inclusive:

<http://www.londonair.org.uk/london/asp/advstatsvariousresults.asp?site1=BT5&site2=&site3=&site4=&stattype=xcreadings&xvalue=50&zunits=none&startdate=01-01-2011&enddate=11-06-2011&submit=View&period=dailymean&species=PM10>

12 June to 31 December 2011 inclusive:

<http://www.londonair.org.uk/london/asp/advstatsvariousresults.asp?site1=BT5&site2=&site3=&site4=&stattype=xcreadings&xvalue=50&zunits=none&startdate=12-06-2011&enddate=31-12-2011&submit=View&period=dailymean&species=PM10>

The Neasden Lane monitoring station is not part of Defra's official monitoring network and so has not been reported previously to the Commission and might not be reported in future. However, Defra has confirmed in writing to CAL that such a site is relevant if it changes the status of the London zone (which it would do as Defra's official monitoring site at Marylebone Road in London shows compliance in 2011). CAL has been assured the Neasden Lane monitoring station satisfies the quality control and micro-siting requirements of Directive 2008/50/EC.

Further information II: Mayor using 'dust suppressants' to reduce PM₁₀ levels at official monitors

CAL wishes to bring to your attention that the Mayor of London has used and plans to continue using 'dust suppressants' directly in front of official air quality monitoring stations. In particular:

- Mayor published on 16 August 2011 a detailed report on a trial of dust suppressants
<http://www.tfl.gov.uk/corporate/projectsandschemes/17246.aspx>
<http://www.tfl.gov.uk/corporate/media/newscentre/archive/20765.aspx>
- Mayor estimates dust suppressants will reduce local PM₁₀ concentrations by 10-14%
<http://mqt.london.gov.uk/mqt/public/question.do?id=38228>
- Mayor has confirmed that dust suppressants are used in the nearside lane immediately in front of monitoring stations
<http://mqt.london.gov.uk/mqt/public/question.do?id=37325>
- Mayor's trial of dust suppressants focused on Marylebone Road (which is the monitoring station used by Defra for reporting to the Commission) and Upper Thames Street (which was the first monitoring site to confirm a breach of the PM₁₀ daily limit value in 2010)
<http://mqt.london.gov.uk/mqt/public/question.do?id=39276>
- Mayor announced on Friday 23 December 2011 that he plans to use dust suppressants more widely in 2012 including in Neasden Lane.
<http://www.tfl.gov.uk/corporate/media/newscentre/archive/22163.aspx>
- Mayor has confirmed he plans to spend £1.5m on dust suppressants in 2011/12

<http://mqt.london.gov.uk/mqt/public/question.do?id=37414>

CAL condemns unreservedly the Mayor's use of dust suppressants in front of monitoring stations or in any other way that might affect the reporting of monitored air quality.

Further information III: Defra not reporting the highest monitored exceedances to the Commission

In January 2011, CAL alerted the Commission to Defra's failure to report the highest monitored exceedances for PM₁₀ in London to the Commission e.g. Horn Lane, Neasden Lane and Upper Thames Street.

In response to a request for environmental information, Defra wrote to CAL in a letter dated 11 May 2011 refusing to release information relating to its five year review of the air quality monitoring network. In doing so, Defra stated *inter alia*, that to do so would 'risk drawing resources away from the review itself and potentially delaying a process that the Secretary of State has a statutory duty under the AQSR 2010 to complete every five years'. That letter is attached (**Exhibit 2**). Further correspondence is available if you wish to see it.

CAL considers that Defra should acknowledge data from monitoring stations in Marylebone Road and a portfolio of other sites likely to breach the EU limit values and report transparently the facts to the Commission particularly where, as in 2011 at Neasden Lane, one of those sites changes the status of the London zone. In any event, once ratified, there will be no question the PM₁₀ daily limit value was breached in Neasden Lane in London in 2011.

Nitrogen dioxide

'Part two' of the Complaint relates to nitrogen dioxide (NO₂).

The UK submitted 'Updated Air Quality Plans and Programmes to meet European Union (EU) limit values for nitrogen dioxide (NO₂) in the UK' to the Commission on 22 September 2011.

http://circa.europa.eu/Public/irc/env/ambient/library?l=/extension_notifications/notifications_extensions/uk/notification_22092011/official_notification/110921_measurespdf/EN_1.0_&a=d

In that letter the UK said:

"Air quality plans and association forms have been produced for the 40 air quality zones in the UK where full compliance with one or more of the NO₂ limit values was not expected by 2010. Each plans sets out how this will be achieved as soon as possible."

In the accompanying UK Overview Document, paragraph 1.1 on page seven states:

"Air quality limit values for NO₂ are already met across 99% of the UK land area and 97% of the population and further improvements are expected in coming years. However, parts of 40 of the 43 UK zones have not achieved full compliance with the annual NO₂ limit value in 2010. Parts of three of the 40 zones are also non-compliant with the hourly limit value in 2010. The UK is therefore submitting to the European Commission air quality plans with a view to postponement of the

compliance date to 2015 where attainment by this date is projected.” CAL emphasis.

Paragraph 3 on page seven of the same document states:

“Table 1 summarises compliance in the baseline reference year of 2008, the projections to 2010 and the estimated compliance date for each zone. The table shows that of the 40 zones with exceedances in 2010, compliance may be achieved by 2015 in 23 zones, 16 zones are expected to achieve compliance between 2015 and 2020 and that compliance in the London zone is currently expected to be achieved before 2025.” CAL emphasis.

On 16 December 2011, the UK submitted ‘Air Pollution in the UK 2010 – Compliance Assessment Summary’ to the Commission. That report confirmed the UK had breached the NO₂ limit value in London and 39 of 42 other zones in 2010.

http://cdr.eionet.europa.eu/gb/eu/annualair/envtom4wa/air_pollution_UK_2010_Compliance_Assessment_Summary.pdf

<http://cdr.eionet.europa.eu/gb/eu/annualair/envtom4wa>

Please see also CAL’s response dated 4 August 2011 to Defra’s consultation on NO₂ Plans and Programmes. Exhibit 3.

Complaint: ‘Part two’ of the Complaint is that the UK breached the NO₂ annual mean and hourly limit values in 2010 in London and 16 other zones. The UK has failed to submit a valid time extension application to comply with the NO₂ limit values in London (and at least 16 other zones around the UK).

For the avoidance of doubt, the UK has applied under Article 22 for a time extension to comply with the NO₂ limit values in up to 23 zones only and has submitted Plans and Programmes for London and 16 other zones under Article 23 to comply with the NO₂ limit values in the ‘shortest time possible’. The UK Government confirmed that position in the UK’s High Court on 13 December 2011 when defending itself against ClientEarth’s request for judicial review. In the same Court Hearing, the UK Government confirmed to the Judge that the UK had breached the NO₂ limit values in 2010. CAL would be pleased to send you the transcript from the Court hearing as soon as it is available.

Please do not allow the UK to obscure those facts as it seems to be doing with ambiguous wording.

Remedy: The Commission is therefore requested to commence by 30 April 2012 infraction action against the UK for failing to comply with the NO₂ limit values in London and 16 other zones in 2010.

Further information I: No new measures are included in the UK plans and programmes for NO₂

CAL asked Defra whether it had undertaken an equalities assessment in relation to the Plans and Programmes submitted to the Commission for NO₂. Defra confirmed to CAL’s solicitors in a letter dated 22 December 2011 (**Exhibit 4**) that ‘we do not consider that we are making any policy decisions that impinge on these duties’ i.e. not one single new measure is included in the Plans and Programmes. Measures included date back to 2006; some may sound ambitious but have

never been implemented.

Year of Air in 2013

CAL wrote to Commissioner Potočnik responding to the Commission's consultation on the 'Year of Air' planned for 2013 (**Exhibit 5**) in a letter dated 30 September 2011. In that letter, CAL emphasised the need to enforce existing air quality laws and for any new proposals to ensure continuity and the further tightening of health and legal protections.

<http://cleanairinlondon.org/health/year-of-air-in-2013-must-deliver-continuity-and-the-further-tightening-of-health-and-legal-protections/>

In that letter, CAL said:

"The UK and London in particular have some of the worst air pollution in Europe. The World Health Organisation (WHO) this week estimated more deaths in the UK were attributable to long-term exposure to particles in 2008 than any other country in the EU 27. The UK has a higher percentage of zones exceeding the NO₂ annual limit value plus margin of tolerance than any other country in the EU 27 (i.e. 40/43). The Government has admitted that 698,543 people in London near 1,481 km of roads in an area of 91 km² were exposed to unlawful levels of NO₂ in London in 2010. Nationally, the numbers are: 925,095 people; 3,634 km; and 242 km²."

In that letter, CAL recommended:

"the Commission must pursue in parallel: infraction action against Member States responsible for the worst breaches of NO₂ (e.g. the UK in respect of London) at a steady pace that maintains legal pressure on Member States and the prospect of unlimited fines; and any consideration of a new legal regime"

Please therefore commence infraction action against the UK by 30 April 2012.

London 2012 Olympics

You will be aware that the UK is due to host the London 2012 Olympic and Paralympic Games.

Air quality was a serious concern before the Beijing 2008 Olympic and Paralympic Games despite Beijing not breaching, as far as CAL is aware, any air quality laws. **Exhibit 6** shows concentrations of NO₂ in London and Beijing and the success the People's Republic of China achieved in reducing them for those Games.

The LAQN shows annual mean NO₂ of 97 micrograms per metre cubed (µg/m³) in 2011 and 205 exceedances of the NO₂ hourly limit value compared to the legal limit of 40 µg/m³ and 18 hours over 200 µg/m³ respectively. The World Health Organisation guideline is an annual mean of 40 µg/m³ and an hourly mean of 200 µg/m³.

http://www.londonair.org.uk/london/asp/publicstats.asp?statyear=2011&MapType=Google®ion=0&site=MY1&postcode=&la_id=&objective=All

Exhibit 6 shows comparable concentrations of NO₂ in London and Beijing. As set out above, NO₂

limit values are exceeded by a factor of two or more near London's busiest streets.

At the moment, in sharp contrast to the efforts of the People's Republic of China before the Beijing 2008 Olympic and Paralympic Games, there is no evidence Europe is seeking to enforce or comply with air quality standards during the Olympics. On the contrary, please see **Exhibit 7**.

Please launch infraction action against the UK by 30 April 2012 to enforce the PM₁₀ and NO₂ limit values and ensure that London, the UK and Europe lead the world in their efforts to protect public health and comply fully with air pollution laws.

I look forward to hearing from you.

With best wishes.

Yours sincerely

Simon Birkett
Founder and Director
Clean Air in London

CC:
Elena Višnar Malinovská, Cabinet Member
Karl Falkenberg, Director-General
Soledad Blanco, Director
Thomas Verheye, Head of Unit
Scott Brockett
Beatrice Zaremba
Andre Zuber

Exhibits

1. Letter to Defra dated 6 January 2012 on consultation on Update to Air Quality Plan for London
<http://cleanairinlondon.org/legal/defras-belated-consultation-on-short-term-plans-for-pm10/>
2. Letter from Defra dated 11 May 2011 on five year review of official monitoring network
http://cleanairinlondon.org/wp-content/uploads/CAL-166-Exhibit-2_Defra-response-110511.pdf
3. Letter to Defra dated 4 August 2011 on consultation on Plans and Programmes for NO₂
<http://cleanairinlondon.org/legal/defra-consultations-on-report-and-plans-and-programmes-for-no2/>
4. Letter from Defra to CAL's solicitors dated on 22 December 2011 on Equalities Assessments
http://cleanairinlondon.org/wp-content/uploads/CAL-166-Exhibit-2_Defra-response-110511.pdf
5. Letter to Commissioner Potočník dated 30 September 2011 on the Year of Air in 2013
<http://cleanairinlondon.org/health/year-of-air-in-2013-must-deliver-continuity-and-the-further-tightening-of-health-and-legal-protections/>
6. Air pollution in Beijing and London
http://cleanairinlondon.org/wp-content/uploads/CAL-166-Exhibit-6_Nitrogen-dioxide_Beijing-London-Olympics_Draft-130112.pdf
7. Letter to Transport for London dated 12 September 2011 on the Olympic Route Network
<http://cleanairinlondon.org/olympics/plans-for-the-olympic-route-network-remain-unlawful-and-vulnerable-to-legal-challenge-through-judicial-review/>