

CAMPAIGN FOR CLEAN AIR IN LONDON

“The cross-party campaign to achieve urgently and sustainably at least World Health Organisation recommended standards of air quality throughout London”

Campaign website: www.cleanairinlondon.org

CAMPAIGN UPDATE: Working draft last updated 17 January 2009

Legal protections and breaches of air quality standards in 2008

Breaches of air quality limit values and objectives in the United Kingdom in 2008

The overall air quality situation is assessed through a mixture of monitoring and computer modelling (with the monitoring sites providing reference points). For example see government maps showing where limit values for particulate matter (PM₁₀) are still expected to be being breached in London in 2011:

<http://www.cleanairinlondon.org/attachments/3862679/PM10%20London%20maps%20080812%20London%20overview%20slide%20only.pdf>

See also page 9 of the City of Westminster’s publication - Developing a new Air Quality Strategy and Action Plan (Consultation on Issues):

http://www3.westminster.gov.uk/docstores/publications_store/Developing%20a%20new%20Air%20Quality%20Strategy%20and%20Action%20Plan%20-%20Consultation%20on%20Issues.pdf

Exceedance statistics can be obtained from the UK Air Quality Network. See:

http://www.airquality.co.uk/archive/data_and_statistics.php?action=exceedence_pre_step&go=Go

In 2008, Air Quality Strategy Objective (PM₁₀) annual mean > 40 µg/m³ (i.e. limit value from 1 January 2005)

London

http://www.airquality.co.uk/archive/data_and_statistics.php?f_exceedence_id=E20&f_year=2008&f_network_id=Array&f_group_id=2&f_region_reference_id=1&f_sub_region_id=9999&f_output=screen&f_parameter_id=GE10&action=exceedence3&go=Go

In 2008, Air Quality Strategy Objective for 2004 (PM₁₀) daily mean > 50 µg/m³ on more than 35 days (i.e. limit value from 1 January 2005):

Includes Glasgow and London

http://www.airquality.co.uk/archive/data_and_statistics.php?f_exceedence_id=E22&f_year=2008&f_network_id=Array&f_group_id=2&f_region_reference_id=1&f_sub_region_id=9999&f_output=screen&f_parameter_id=GE10&action=exceedence3&go=Go

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In 2008, Air Quality Strategy Objective for 2005 (NO₂) annual mean > 40 µg/m³ (i.e. limit value from 1 January 2010):

Includes over 100 cities and towns across the United Kingdom (UK)

http://www.airquality.co.uk/archive/data_and_statistics.php?f_exceedence_id=E1&f_year=2008&f_network_id=Array&f_group_id=2&f_region_reference_id=1&f_sub_region_id=9999&f_output=screen&f_parameter_id=NO2&action=exceedence3&go=Go

In 2008, Air Quality Strategy Objective for 2005 (NO₂) hourly mean > 200 µg/m³ for more than 18 hours (i.e. limit value from 1 January 2010):

Includes Aberdeen, Bury, Glasgow and London

http://www.airquality.co.uk/archive/data_and_statistics.php?f_exceedence_id=E2&f_year=2008&f_network_id=Array&f_group_id=2&f_region_reference_id=1&f_sub_region_id=9999&f_output=screen&f_parameter_id=NO2&action=exceedence3&go=Go

Legal protections

Legal protections exist under European Union and UK law.

EU directives on air quality and The Air Quality Standards Regulations 2007

Air quality laws, based on WHO recommendations, have been put in place to protect public health. Details of the general legal framework, which is intended to achieve minimum standards of public health across the European Union (EU) (while treating all countries equally), can be found at:

<http://ec.europa.eu/environment/air/legis.htm>

The EU laws are required to be transposed into UK law. Recently, the Air Quality Standards Regulations 2007 (AQSR 2007 or the Regulations), which entered into force on 15 February 2007, designate the Secretary of State as the competent authority for the purposes of article 3 (implementation and responsibilities) of the EU's Council Directive 96/62/EC (the Framework Directive). See respectively:

AQSR 2007:

http://www.opsi.gov.uk/si/si2007/uksi_20070064_en_1

The Framework Directive:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31996L0062:EN:NOT>

Explanatory Memorandum to the AQSR 2007:

http://www.opsi.gov.uk/si/si2007/em/uksiem_20070064_en.pdf

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Further requirements were set out in Directive 1999/30/EC (the First Daughter Directive):

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31999L0030:EN:NOT>

The new EU directive on ambient air quality and cleaner air for Europe which entered into force on 11 June 2008 (the 2008 AQ Directive) states that ‘Directives 96/62/EC, 1999/30/EC, 2000/69/EC and 2002/3/EC shall be repealed as from 11 June 2010’. They will be replaced simultaneously then by similar provisions.

The 2008 AQ Directive:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32008L0050:EN:NOT>

These Regulations give the relevant Secretary of the State many duties and powers to improve air quality including:

1. Limit values must be assessed in outdoor air everywhere, excluding work places

Article 2(1) of the Framework Directive defines ‘ambient air’ as meaning outdoor air in the troposphere, excluding work places. Article 6(1) states ‘Once limit values and alert thresholds have been set, ambient air quality shall be assessed throughout the territory of the Member States in accordance with this article’.

The Explanatory Memorandum states for Article 6(1) of the Framework Directive that ‘The transposition of this Article is set out in detail below. It has to be read together with Article 7 of Directive 1999/30/EC and Article 5 of Directive 2000/69/EC’.

The AQSR 2007 set out, in Regulation 13 and elsewhere, how ambient air quality is to be measured.

2. Limit values must be attained and measures must be taken in the short term

Article 2(5) of the Framework Directive defines a ‘limit value’ as a level to be attained within a given period and not to be exceeded once attained.

The limit values for PM₁₀ were due to be attained by January 2005 and those for NO₂ are due to be attained by January 2010.

Article 7(1) of the Framework Directive says ‘Member States shall take the necessary measures to ensure compliance with the limit values’. Article 7(3) states that ‘Member States shall draw up action plans indicating the measures to be taken in the short term where there is a risk of the limit values and/or alert thresholds being exceeded, in order to reduce that risk and limit the duration of such an occurrence. Such plans may, depending on the individual case, provide for measures to control and, where necessary, suspend activities, including motor-vehicle traffic, which contribute to the limit values being exceeded.’

The Explanatory Memorandum confirms that Articles 7(1) and 7(3) were transposed into Regulations 7(1) and 11 respectively of the AQSR 2007.

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Regulation 7(1) of the AQSR 2007 makes clear that ‘The Secretary of State shall take the necessary measures to ensure that the air quality standards ... are attained’. Regulation 11 of the AQSR 2007 states that ‘The Secretary of State shall prepare and implement action plans’ and that ‘when he considers that [there is a the risk that a limit value will be exceeded] within a zone, he shall implement the measures indicated in the relevant action plans within that zone to the extent that he considers necessary in the circumstances’.

3. Limit values cannot be exceeded once achieved

Article 2(5) of the Framework Directive defines a ‘limit value’ as a level to be attained within a given period and not to be exceeded once attained.

The Explanatory Memorandum states that Article 2 of the Framework Directive was transposed into Regulation 2 of the AQSR 2007. However, the definition in Regulation 2 of the AQSR 2007 refers only to ‘limit values’ being a maximum concentration.

4. Penalties are required to be effective, proportionate and dissuasive

Article 11 of the First Daughter Directive says that ‘Member States shall determine the penalties applicable to breaches of the national provisions adopted pursuant to this Directive. Those penalties shall be effective, proportionate and dissuasive.’

The Explanatory Memorandum stated on page 11 that ‘regulations rely on public law remedies in relation to breach by the Secretary of State. Penalties in relation to specific polluters are set out in applicable sectoral legislation’.

5. The Secretary of State has power to give directions to local authorities and the Mayor of London

Regulation 30 of the AQSR gives the Secretary of State ‘the same power to give directions under these Regulations to: local authorities in Greater London; and the Mayor of London, as the Secretary of State has under section 85(5)(a) of the Environment Act 1995 in relation to local authorities outside Greater London’.

Section 85(5)(a) of the Environment Act 1995 states that ‘The Secretary of State shall also have power to give directions to local authorities requiring them to take such steps specified in the directions as he considers appropriate for the implementation of any obligations of the United Kingdom under the Community Treaties ... so far as relating to the quality of air’.

In other words, the AQSR 2007 (and other air quality laws) give the Secretary of State:

- duties to attain the limit values;
- duties to maintain them once met; and
- the power to give directions to the Mayor of London and/or local authorities in London to meet any such obligation.

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Judgement of the European Court of Justice: Dieter Janacek v Freistaat Bayern

Please note the important Judgement of the European Court of Justice in Case C-237/07: Dieter Janacek v Freistaat Bayern. Press release no. 58/08 dated 25 July 2008 made clear that ‘Where there is a risk that the limit value for particulate matter may be exceeded, persons directly concerned can require the competent authorities to draw up an action plan’.

The full press release can be seen at:

<http://curia.europa.eu/en/actu/communiqués/cp08/aff/cp080058en.pdf>

and the full Judgement can be found at:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62007J0237:EN:HTML>

The European Commission has welcomed the preliminary ruling and the recognition by the ECJ that individual citizens have the right under the Framework Directive to require national authorities to draw up a short term action plan with the aim of maintaining or achieving compliance with the air quality limit values. It is clear from the Judgement that citizens are entitled to require that action plans are prepared and implemented to improve air quality in the short term i.e. not a short term after a long time has been taken to prepare such plans.

This Judgement may be relevant to some or all of the 227 local authorities across the UK that have declared an Air Quality Management Area (which is required if they expect air quality standards to be breached) as well as to some or all of those that should have declared an AQMA and have failed to do so. For a list of the 227 local authorities mentioned please see:

<http://www.airquality.co.uk/archive/laqm/list.php>

Local authorities are required to put together a plan to improve air quality once it has declared an AQMA. An AQMA could be just one street or it could be much larger. In this context, it is surprising to see in Defra’s recent ‘Report to the European Commission concerning UK plans and programmes to meet exceedances of EU air quality limit Values in 2005 and 2006’ that some 52 Borough Councils, London Boroughs, District Councils, Metropolitan Borough Councils and City Council seem not to have produced such plans. Defra’s list includes the London Boroughs of Bromley and Havering. See:

<http://cdr.eionet.europa.eu/gb/eu/aqpp/envsqrw7q>

Commissioner Dimas confirmed in his letter dated 16 December 2008 to Edward Davey, Shadow Foreign Secretary of the Liberal Democrats, that the European Commission is preparing the launch of infringement proceedings against the UK for exceeding the PM₁₀ limit values.

Significantly, Commissioner Dimas, the Environment Commissioner, referred to this Judgement in his letter to Edward Davey when he said: “The Commission welcomed this ruling in which the Court confirmed that EU citizens concerned by air pollution have the right to require before national courts, not only that air quality limit values are complied with, but also that local authorities draw up air quality action plans when there is a risk that limit values

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set under EU legislation are exceeded. It is expected that this ruling will provide a further incentive at all levels of governance to take appropriate measures to comply with air quality legislation”.

Commitments made by The Environment Agency

The Environment Agency (the EA) made significant commitments to protect air quality in a policy guidance memorandum dated 14 July 2008 (AQPG3). See page 7 of the memorandum:

<http://www.defra.gov.uk/environment/airquality/local/pdf/regulation-improve-air-qualitypdf.pdf>

In this policy statement, the EA makes the following commitments:

"The Environment Agency is committed to ensuring that any industrial installation or waste operation we regulate will not contribute significantly to breaches of an [Air Quality Strategy] objective.

"It is a mandatory requirement of [Environmental Permitting Regulations] legislation that we ensure that no single industrial or waste operation we regulate will be the sole cause of a breach of an [European Union (EU)] air quality limit value. Additionally we have committed that no installation or waste management operation will contribute significantly to a breach of an EU air quality limit value.

"We will ensure that [Best Available Techniques] and other appropriate measures are used to deliver the maximum improvements to air quality where UK exposure reduction objectives or EU air quality target values are being exceeded."

Department for Transport Guidance on Transport Assessments

The Department for Transport has published important Guidance on Transport Assessments (TAs) including in respect of air quality. For the overall document, please see:

<http://www.dft.gov.uk/pgr/regional/transportassessments/guidanceonta>

and more particularly paragraphs 4.39 to 4.42:

<http://www.dft.gov.uk/pgr/regional/transportassessments/guidanceonta?page=6#a1022>

The text reads:

“4.39 The potential for environmental impacts that would breach a statutory limit should be addressed. LHAs and the HA have a statutory duty to prevent a breach of statutory limits (e.g. air quality) due to incremental change of volumes of vehicular traffic on their networks.

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“4.40 If a development is likely to generate significant vehicle trips on the local highway network or [Strategic Road Network], which in turn would be likely to cause a breach of statutory limits, the relevant authority could be held legally responsible if a breach were to occur. In these circumstances, the developer may be required to propose mitigation measures that will avoid such a breach. If a breach remains likely, this could be a material consideration in the assessment of the planning application and may result in the refusal of planning permission.

“4.41 Therefore, where a development proposal is likely to generate significant traffic-related environmental impacts, the TA should address such matters. Alternatively, if the development requires a formal environmental impact assessment (EIA), which deals with these issues separately, this should be cross-referenced in the TA.

“4.42 In any event, it is likely that the developer would be required to provide mitigation measures to address any adverse environmental impacts arising from the proposed development and not simply those where breaches of statutory limits may be likely to occur.”