

# 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](http://www.cleanairinlondon.org)

The Lord Hunt of Kings Heath  
Minister for Sustainable  
Development and  
Energy Innovation  
and Deputy Leader  
of the House of Lords  
Nobel House  
9 Millbank  
c/o 17 Smith Square  
London SW1P 3JR

By registered post

25 April 2009

Dear Lord Hunt,

## **Request for binding commitments in relation to Phase 3 of the Low Emission Zone and the western extension of the Congestion Charge Zone**

The Campaign for Clean Air in London (‘CCAL’) writes further to its letter of 22 February 2009 responding to the ‘Consultation on the draft UK notification to the European Commission to secure additional time to meet the limit values for particulate matter for certain zones/agglomerations in accordance with the Council Directive 2008/50/EC on Ambient Air Quality and Cleaner Air for Europe’ (‘the new AQ Directive’) (‘the Consultation’), and to its letter of 12 March regarding the consultation process to be followed by the Government.

CCAL notes that the Department for Environment, Food and Rural Affairs (‘Defra’) submitted yesterday the United Kingdom (‘UK’) application to the European Commission (‘the Commission’) for an extension to meet the European Union (‘EU’) limit values for dangerous airborne particles (PM<sub>10</sub>) (‘TEN’). See:

<http://www.defra.gov.uk/environment/airquality/eu-int/eu-directives/airqual-directives/notification.htm>

CCAL is greatly encouraged by the Government’s publication, on 8 April, of its response to the Consultation mentioned above (‘the Response’) prior to submitting the TEN to the Commission. Thank you also for your personal response to our letter of 12 March. We appreciate the Government’s observance of its obligations under Article 26(1)(d) of the Directive to ensure adequate publication of its plans for meeting ambient air quality standards.

CCAL does remain deeply concerned that the Government has failed to demonstrate, in the Response or its TEN or otherwise, that it meets any of the necessary pre-conditions under Article 22(2) of the Directive for submitting a TEN. We will, however, correspond separately on this matter, given the Government’s stated view that *‘The European Commission will judge of the adequacy of the UK notification’*. CCAL is firmly of the view that the UK does not yet have adequate plans to comply fully with the obligations of the new AQ Directive in respect of PM<sub>10</sub> (or NO<sub>2</sub>).

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We write currently in respect of the particular indication in the Response that ‘*Should the Mayor decide to suspend Phase 3 of the LEZ we would expect him to put in place other measures that would deliver equal, if not greater, improvements to air quality. Furthermore, the UK Government and the Mayor of London have committed to working together to identify further measures, to ensure the UK will meet the limit value for PM<sub>10</sub> in 2011.*’ CCAL also notes the article which appeared in the Guardian newspaper on 14 April 2009, by Helene Mulholland, quoting a Defra spokesman to the same effect.

CCAL welcomes the acknowledgment that Phase 3 of the LEZ (or an equivalent policy) is a bare minimum measure that must be in place as part of the UK’s air quality plans for London, if the UK is to comply with the obligations in the Directive to ensure that ambient air quality values are met, and to ensure the integrity of the UK’s plans for achieving those values. CCAL wholeheartedly agrees.

CCAL is concerned, however, that in view of this acknowledgment the Government has not proposed an adequate response to meet the risk of Phase 3 of the LEZ not being implemented. CCAL is particularly concerned to see in the Response that the Government ‘*...cannot rule out the possibility that additional measures, above and beyond those contained in the baseline, may be needed to secure and maintain full compliance with the limit values. Monitoring will be ongoing and the need for additional action will be kept under review. In relation to London, the commitment by the Mayor of London and the Government to work together to ensure compliance reflects this.*’ (emphasis added). It appears that the possibility of additional measures being required is acknowledged as having particular application to London. It also appears that the Government intends to rely on a ‘commitment to work together’ to ensure that if Phase 3 of the LEZ is abandoned by the Mayor a measure of equal or greater benefit will be adopted in its place.

In CCAL’s carefully considered view, reliance on this ‘commitment’ is simply not adequate to meet the UK’s obligations under Community law. In particular:

- a) The Community obligation to ensure compliance with ambient air quality standards attaches to the Government as a whole, the obligation being upon the UK as a Member State. It is no answer for one Government department, in this case Defra, to point the finger at another, in this case the Office of the Mayor of London, and suggest that compliance is beyond their control, or the other’s responsibility. If Phase 3 of the LEZ, or an equivalent policy which delivers equal if not greater benefits, is not implemented, the UK will fail to meet its obligations in London, and it will be wholly irrelevant for Community law purposes that that arose as a result of the Mayor’s actions rather than Defra’s.
- b) The Directive is clear, in its express terms, that only *measures already taken* by Member States are relevant for the purpose of gaining an extension of time to secure compliance with ambient air quality standards. In particular, Article 22(2) of the Directive states that Member States are to be exempt from the obligation to comply with PM<sub>10</sub> limit values until 11 June 2011 ‘*provided that...the Member State shows that all appropriate measures have been taken at national, regional and local levels to meet the deadlines*’ and Article 22(4) states that in assessing TENs the Commission ‘*shall take into account estimated effects on ambient air quality in the Member States, at present and in the future, of measures that have been taken by Member States as well as estimated effects on ambient air quality of current Community measures and planned Community*

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*measures to be proposed by the Commission.*’ (emphasis added). It is clear that planned future measures are relevant only insofar as they are proposed at a Community level. The planned, or indeed hypothetical, measures of Member States are nowhere mentioned in Article 22; they are not relevant for the purpose of gaining an extension of time. In CCAL’s view, a mere ‘commitment’ by two departments to work together cannot be said to be a ‘measure that has been taken’ by the UK that can be taken into account in assessing the TEN today.

In view of this, CCAL considers that it is no response to the concerns raised in its letter of 12 March to suggest that the risk of the Mayor deciding not to implement Phase 3 of the LEZ is hypothetical on the basis that his announcement remains subject to public consultation. The obligation, upon the Government as a whole under Article 22, is to submit a TEN based on measures which have already been taken – that obligation extends equally to future risks which have already been identified. Likewise it is no answer to this risk to rely on a ‘commitment to work together’, which has no binding force whatsoever, and cannot be considered a ‘measure’ taken to ensure the UK complies with its Community law obligations. Rather, it is a non-binding indication that measures may be developed in future.

The UK must, as CCAL urged in its letter of 12 March, confront the vagaries of the political interactions between the Government and the Office of the Mayor of London. The Government can only properly submit a TEN which complies with Article 22 if a tangible measure is already in place to achieve this.

**CCAL therefore requests that the Government give a binding commitment that should the Mayor proceed to abandon Phase 3 of the LEZ it will exercise its powers to direct him to adopt either Phase 3, or other measures that would deliver equal, if not greater, improvements to air quality. CCAL requests a similar binding commitment from the Government in respect of the western extension of the Congestion Charge Zone since the issues and the principles are the same.**

CCAL considers such commitments the only way in which a TEN which complies with Article 22 (in respect of the requirements of air quality plans) can be submitted properly by the UK, as it is the only means by which the Government can be said to have based its notification on *existing measures*. Otherwise, the UK plan is based on hypothetical future measures, which may or may not be taken, which may or may not prove to be adequate, which in any event are not relevant under the terms of Article 22, and which respond to risks the materialisation of which are in fact within the Government’s control (in view of the availability of its powers to issue directions to the Mayor).

Further, if the Government’s indication in its Response (and apparently repeated to Ms Mulholland of the Guardian) is genuine and meaningful then there can be no difficulty in confirming that to be the case, and reassuring the people of London that the Government’s indication has teeth.

Should the Government decline to offer such a binding commitment, CCAL will urge the Commission to reject the UK’s TEN on the basis that it manifestly has not been duly made, and on its face fails to comply with the requirements of the Directive. CCAL also reserves its right to challenge any such decision in the Administrative Court.

Once again, CCAL regrets the formal nature of this letter and sincerely hopes that such action will not be necessary. However, it remains deeply concerned that although the Response has been published, which

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is very much welcomed, and the TEN has been lodged they do not properly take into account the events that have intervened since the Consultation was launched. These events are a fundamental threat to the integrity of the UK Plan which is not adequately addressed in the Response or the TEN. On that basis alone the Government’s proposed TEN does not advance a robust and realistic solution to the problem of PM<sub>10</sub> pollution in London, and nor indeed does it comply with the plain and express requirements of Article 22.

We therefore look forward to receiving binding commitments from the Government at the earliest possible opportunity, and in any event prior to the Commission formally acknowledging the UK’s TEN by publishing it on its webpage ‘Notifications of time extensions submitted by Member States together with Commission decisions’:

[http://ec.europa.eu/environment/air/quality/legislation/time\\_extensions.htm](http://ec.europa.eu/environment/air/quality/legislation/time_extensions.htm)

CCAL notes that some 17 countries have already had their TEN acknowledged on that webpage.

**CCAL believes you are aware of its view that the Government and the Mayor should implement together a meaningful further package of measures that will ensure early compliance with all air quality laws in London. CCAL hopes that the Government and the Mayor will negotiate a ‘win-win’ that meets both their needs and the public health needs of Londoners. If such a ‘win-win’ is not possible, the Government should not hesitate or delay in issuing ‘Directions’ to the Mayor (not least since it is the Government not the Mayor that is responsible for complying with the EU limit values).**

**CCAL believes further that if the Government and the Mayor put in place a credible plan to improve air quality in London, backed by all necessary resources and linked to a tight implementation timetable, that none of us or the Commission might be so worried by the current inadequateness of the UK’s TEN.**

We look forward to hearing from you shortly. Please reply to the email address provided separately.

With best wishes.

Yours sincerely

Simon Birkett  
Principal Contact  
Campaign for Clean Air in London

Cc:

PS Lord Hunt, Defra and DECC (By email)  
Commissioner Dimas  
Boris Johnson, Mayor of London  
Gareth Bacon AM, Conservative, London Assembly Member

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Darren Johnson AM, Green, Chair of the Environment Committee, London Assembly  
Murad Qureshi AM, Deputy Chair, Environment Committee, London Assembly  
Mike Tuffrey AM, Liberal Democrat, Environment Committee, London Assembly  
Elizabeth Williams, Scrutiny Manager, Environment Committee, London Assembly