

Boris Johnson
Mayor of London
City Hall
The Queen's Walk
More London
London SE1 2AA

26 October 2009

Dear Mayor Johnson

The Mayor's draft air quality strategy

I am writing on behalf of ClientEarth in response to the recent publication of the Mayor's draft air quality strategy (the 'Strategy').

Whilst the Strategy contains some potentially helpful measures, it fails in our view to adequately address the severity and urgency of the challenge of London's air quality problems. The purpose of this letter is to highlight the legal implications of these shortcomings.

Your statutory duties as Mayor in relation to the Strategy are contained in the Greater London Authority Act 1999 (the 'GLA Act'). In addition to the general duty to produce an air quality strategy, the GLA Act imposes a number of specific requirements relating to what the Strategy must achieve. The Strategy, as currently drafted, fails to meet a number of these statutory requirements.

1. Achievement of national air quality standards

The GLA Act requires that the Strategy contain '*...policies and proposals - for the achievement in Greater London of the air quality standards and objectives prescribed in regulations made under [the Environment Act].*'¹

These standards are currently prescribed in the Air Quality Standards Regulations 2007 (the 'Regulations') which transpose the requirements of a 1999 European Directive.² The Regulations impose legal limits, known as limit values, for airborne particulates (PM₁₀) and nitrogen dioxide (NO₂). The limit values for PM₁₀ have been legally binding since 2005, whereas the limit values for NO₂ will become legally binding on 1 January 2010.

However, the 1999 Directive has been superseded by a 2008 Directive (the '2008 Directive'), which has yet to be transposed into UK law.³ By the time the Strategy has been finalised the

¹ GLA Act, Section 362 (2)(b).

² Directive 1999/30/EC relating to limit values for sulphur dioxide, nitrogen dioxide and oxides of nitrogen, particulate matter and lead in ambient air.

³ Directive 2008/50/EC on ambient air quality and cleaner air for Europe.

Regulations will have been superseded by new regulations which transpose the 2008 Directive. So for the purposes of this analysis, the 2008 Directive can be considered as containing the relevant air quality standards for the purposes of the GLA Act.

The 2008 Directive prescribes the same limit values for PM₁₀ and NO₂ as the 1999 Directive but includes a provision which allows member states to delay compliance with these limit values where strict criteria are satisfied. The limit values for PM₁₀ have been breached in Greater London every year since 2005, so the UK government has applied for a time extension. If the European Commission approves this application, the government will have until 11 June 2011 to comply with these limit values (however see section 2 below).

Given that concentrations of NO₂ in Greater London are projected to greatly exceed the limit values under the 2008 Directive, it is anticipated that the government will also apply for a time extension in relation to NO₂. If the Commission were to approve this extension, the government would have until 1 January 2015 to ensure compliance with these limit values (however see section 2 below).

The Strategy does not demonstrate with any certainty that compliance with PM₁₀ limit values will be achieved by 11 June 2011 (the extended deadline if the time extension is approved by the Commission). First, the Strategy does not include projections for concentrations of PM₁₀ in 2011, which makes any assessment of whether compliance will be achieved by the extended deadline impossible. Second, most of the measures in the Strategy have implementation dates in 2012 or later. The Strategy therefore relies on a range of vague, unquantified and untested measures to ensure the limit values are met by 2011. Finally, you recently stated in Mayor's Question Time that achieving the limit values by 2011 was subject to detailed concentration modelling that has not yet been carried out and to full funding of the programme.⁴

The Strategy does not demonstrate how compliance with NO₂ limit values will be achieved by 1 January 2015 (the extended deadline if a time extension is applied for and approved by the Commission). The limit values relate to nitrogen dioxide (NO₂), but the Strategy focuses on tackling concentrations of oxides of nitrogen (NO_x). NO₂ is one of the oxides of nitrogen that make up NO_x, so reducing levels of NO_x will not necessarily reduce levels of NO₂. Further, there is evidence that levels of NO₂ do not decrease in line with decreases in NO_x.⁵ This focus on NO_x and the absence of any projections for concentrations of NO₂ prevents a proper assessment of the extent to which the Strategy will deliver legal compliance with NO₂ limit values by 2015. However, the Strategy acknowledges that the Strategy will fall well short of meeting the limit values. For example, the Strategy states that in order to meet the limit values for NO₂, NO_x emissions would need to be 80% lower in 2015 than current projections, whereas the Strategy will only deliver reductions of 35-40% by that date.⁶

⁴ Answer to question from Mike Tuffrey AM, 14 October 2009 (Question number 2981/2009).

⁵ See for example D Carslow et al, *Change-point detection of gaseous and particulate traffic-related pollutants at a roadside location* 40 Environ. Sci. Technol. 6912, 6913 (2006).

⁶ The Strategy, pages 25 and 78.

The Strategy therefore fails to demonstrate compliance with the limit values for either PM₁₀ or NO₂ by the extended deadlines and so fails to discharge your duty under the GLA Act to produce a Strategy containing measures which achieve prescribed air quality standards. Please rectify this failing before a revised draft of the Strategy is published for full public consultation.

2. Time extension notifications

The above analysis assumes that time extensions will be approved by the Commission for compliance with both the PM₁₀ and NO₂ limit values. However, this is highly unlikely. ClientEarth wrote to the Commission earlier this year explaining why the government was ineligible for a time extension for PM₁₀ limit values in Greater London.⁷ The Strategy further weakens the case for a time extension being granted for PM₁₀ and, if one was applied for, NO₂.

One of the criteria for obtaining a time extension under the 2008 Directive is that the application must demonstrate measures that will ensure that compliance with the limit values will be achieved by the extended deadline. The government's application relied on measures to be included in the Strategy to satisfy this requirement. For example, it relied on the implementation of phase 3 of the Low Emission Zone ('LEZ 3') in 2010 for its baseline calculations for demonstrating compliance by 2011, but the Strategy postpones LEZ 3 until 2012. By failing to demonstrate how compliance will be achieved by 2011, the Strategy undermines the government's application for a time extension on PM₁₀. This increases the likelihood that the Commission will reject the application and escalate infringement action against the UK, with the possibility of large fines being imposed by the European Court of Justice. By failing to demonstrate how compliance will be achieved with NO₂ limit values by 2015, the Strategy would also undermine a successful application for a time extension on NO₂ being made by the government.

If the Commission does not approve these time extensions, the relevant deadlines for compliance are 1 January 2005 for PM₁₀ and 1 January 2010 for NO₂. As both these deadlines will have passed by the time the final Strategy is adopted, the Strategy would need to deliver immediate compliance with both limit values.

Even if the Commission were to ignore the requirements of the 2008 Directive and approve the time extension for PM₁₀ and a future time extension for NO₂, the 2008 Directive requires that the member state remains within specified margins of tolerance during the extension period. The Strategy must therefore demonstrate that it would immediately bring concentrations of NO₂ and PM₁₀ within the margins of tolerance. This would require, for example, that the average annual concentration of NO₂ was immediately brought below 60 micrograms/m³ and that this was maintained until 2015.

The Strategy fails to demonstrate compliance with the limit values for PM₁₀ and NO₂ by the original deadlines under the 2008 Directive. At an absolute minimum the revised Strategy must target compliance with the limit values as soon as reasonably practicable and

⁷ See letter dated 27 July 2009 enclosed as Annex 1.

demonstrate immediate and sustained compliance with the margins of tolerance. Please rectify this failing before the revised draft Strategy is published for full public consultation.

3. Duty to consider health implications

The GLA Act requires that when preparing or revising any strategy (including the Strategy), the Mayor shall *'include such available policies and proposals as he considers best calculated - to promote improvements in the health of persons in Greater London.'* Further, the Mayor is required to mitigate any detriment to health which would otherwise be occasioned by the strategy or revision.⁸

The Strategy does not include the policies which would best deliver health improvements for people in Greater London. Further, it fails to mitigate fully the detriment to health which will be caused by the postponement of LEZ 3 until 2012 and the abolition of the western extension to the congestion charging zone (the 'WEZ').

The Strategy estimates that the introduction of LEZ 3 in 2012 will reduce emissions of PM₁₀ by around 20-25 tonnes and emissions of NO_x by around 200 tonnes.⁹ It follows therefore that delaying this measure by two years will result in similar amounts of these pollutants being discharged in both years of postponement. The health impacts of PM₁₀ and NO₂ are well understood, so this delay will undoubtedly have a detrimental effect on health. The GLA Act therefore requires the Mayor to mitigate these health effects in full. However, the Strategy does not set out clear, quantified measures which will fully mitigate the negative health effects of these decisions, instead relying on a number of unclear measures such as pre-compliance and air quality action days.

There is also an equivalent duty which applies generally to the Greater London Authority (therefore both to you as Mayor and the London Assembly) when exercising its powers under the GLA Act. Where the Authority exercises any power conferred by the GLA Act it is required to do so in the way which it considers best calculated to promote improvements in the health of persons in Greater London.¹⁰

In view of these statutory duties, your recent admission in Mayor's Question Time that *'...concentrations modelling of the package of measures in the Strategy has not been undertaken and no estimates of the associated health impacts have been made...'* is deeply concerning.¹¹ Whilst you have promised that this work will be commissioned and will inform the public draft of the Strategy, this delay prevents the London Assembly from carrying out their duties under the GLA Act in the current process of scrutiny. Further, you cannot possibly have discharged your duty to mitigate the health effects of delaying/postponing

⁸ GLA Act, Section 41(7).

⁹ The Strategy, page 48.

¹⁰ GLA Act, Section 30(5).

¹¹ Answer to question from Mike Tuffrey AM, 14 October 2009 (Question No: 2978/2009).

measures such as LEZ 3 and the WEZ if you have not first assessed and quantified these health effects.

We therefore request that you produce a detailed study which quantifies the Strategy's health impacts. This needs to evaluate the impacts of particular decisions such as the removal of the WEZ and the suspension of LEZ 3, and put forward measures which will mitigate fully these impacts in a clear and quantifiable way. This needs to be made available in adequate time before the revised draft of the Strategy is published for public consultation to allow the Assembly to fulfil their statutory duties.

4. Health inequality

Under the Greater London Authority Act 2007, you are required to prepare a 'health inequalities strategy' containing your proposals and policies for promoting the reduction of health inequalities between persons living in Greater London. The GLA Act requires that the Strategy be consistent with your other strategies, including the health inequalities strategy, a draft of which was published for consultation on 24 September 2009. The period of consultation on this strategy closes on 10 January 2010.

The government has acknowledged that the decision to apply for a time extension for compliance with PM₁₀ limit values would have a disproportionately high impact on low income and ethnic minority communities.¹² By failing to include measures which deliver compliance with limit values with the least possible delay, the Strategy will similarly exacerbate existing inequalities and is therefore inconsistent with your draft health inequality strategy.

We therefore request that in order to adequately discharge your duties under both the Strategy and the health inequality strategy, and to ensure consistency between them, you conduct a full race equality impact assessment in relation to your decision to postpone LEZ 3 and suspend the WEZ. The results of this assessment will need to be taken into account in amending the Strategy before it is published for public consultation. Please provide me with copies of these assessments once they have been carried out.

5. Consistency with other strategies

Many of the points raised in this letter apply equally to your other draft strategies, particularly the Mayor's Transport Strategy. We will be responding to consultations on these strategies, and to consultations on individual measures such as the WEZ and LEZ 3, in order to ensure that they comply with legal obligations under the GLA Act and particularly the requirement that the strategies are consistent with each other. Please ensure that the consequential impacts that your various strategies have on each other are taken into account.

The failure to produce an adequate Strategy is a clear breach of your mandatory statutory duties under the GLA Act. This will have serious consequences for the health and quality of life of the

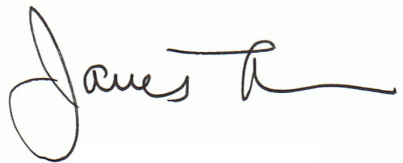
¹² See racial equality impact assessment report, August 2009, enclosed as Annex 2.

people of London who you owe a duty of care to protect. We will be closely monitoring the Strategy's progress towards legal compliance in the coming months. I would be happy to assist you and your team with any queries as to how this might be achieved.

If you eventually adopt a Strategy which does not comply with the statutory obligations under the GLA Act, this decision would be vulnerable to legal challenge for failure to meet your statutory duties by concerned citizens. Given the seriousness of the breaches in this case I am confident that any such challenge would be successful.

This letter is copied to (amongst others) the members of the London Assembly Environment Committee in order to assist them in their meeting with your Environment Advisor, Isabel Dedring, on 29 October.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'James Thornton', is centered on a light green rectangular background.

James Thornton
CEO, ClientEarth

Cc Murad Qureshi AM
Darren Johnson AM
Gareth Bacon AM
James Cleverly AM
Nicky Gavron AM
Roger Evans AM
Mike Tuffrey AM
Isabel Dedring
Rt Hon Hilary Benn MP
Jim Fitzpatrick MP