

# What do ClientEarth's legal cases mean for Feasibility Studies for nitrogen dioxide compliance in England

ClientEarth briefing

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## Introduction

In July 2017 the Secretary of State for the Environment, Food and Rural Affairs (“Defra”) directed 23 Local Authorities in England<sup>1</sup> to undertake Feasibility Studies to identify the option that will deliver compliance with legal limits for nitrogen dioxide (NO<sub>2</sub>) in the shortest possible time. A Feasibility Study to inform an Initial Plan was required by 31 March 2018 at the latest and a Final Plan is required by 31 December at the latest. These plans will then be reviewed by Defra in early 2019, which will then reject or approve them.

In 2015, Defra had already identified five other Local Authorities in England required to implement Clean Air Zones (CAZs) by 2020. In December 2017, Defra issued a series of Directions<sup>2</sup> to these five Local Authorities to prepare, as part of their Feasibility Studies, a Full Business Case, to be submitted to the Secretary of State no later than 15 September 2018.

Following the recent judgment in *ClientEarth (No.3) v Secretary of State for Environment, Food and Rural Affairs & Ors (2018)*, 33 additional English Local Authorities will be required to undertake Feasibility Studies no later than 31 July 2018. A final Supplement to the Air Quality Plan setting out the measures identified by those Feasibility Studies must be prepared no later than 5 October 2018.

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<sup>1</sup> Environment Act 1995 (Feasibility Study for Nitrogen Dioxide Compliance) Air Quality Direction 2017

<sup>2</sup> E.g. Environment Act 1995 (Birmingham City Council) Air Quality Direction 2017

A list of the relevant Local Authorities is included at Annex A, alongside other UK Local Authorities identified in the 2017 Air Quality Plan as breaching the Directive.

This briefing explains the legal requirements arising from the judgments in *ClientEarth (No.2) v Secretary of State for the Environment, Food and Rural Affairs (2016)* and *ClientEarth (No.3) v Secretary of State for Environment, Food and Rural Affairs & Ors (2018)* and what is required by the Ambient Air Quality Directive 2008/50/EC (the "Directive") and its proper interpretation.

The plans adopted by Local Authorities must meet the tests laid down by the High Court in *ClientEarth (No. 2)*. Any decision by Defra to approve plans that do not meet the tests or to reject plans that do meet the test will be vulnerable to judicial review. Similarly, any decision by a Local Authority to adopt a plan that does not meet the test could be subject to judicial review.

**This briefing is not intended as legal advice.** Local Authorities should obtain independent legal advice and seek guidance from Defra where appropriate.

## Background

In 2010 the formal deadline passed for EU Member States to comply with legal limits for NO<sub>2</sub> concentration levels set under the Directive to protect human health. Where a breach of the limits takes place after the relevant deadline, air quality plans must be prepared to achieve compliance "*in the shortest time possible*".

For the purposes of the Directive the UK is split into 43 zones and agglomerations. Eight years on from the deadline, the UK continues to breach legal limits in 37 out of 43 zones.

Since 2011, ClientEarth has been on a lengthy journey through every level of the UK courts, seeking to secure clean air across the UK. In April 2015 the Supreme Court found the Secretary of State to be in breach of the Directive and ordered an updated Air Quality Plan be prepared to achieve NO<sub>2</sub> limits as soon as possible.<sup>3</sup>

In December 2015, Defra published the ordered Air Quality Plan. Unfortunately, that plan had a range of problems and, following a judicial review challenge brought by ClientEarth, in November 2016 the High Court ordered Defra to publish a modified Air Quality Plan. This judgment gave a detailed and definitive ruling on the proper interpretation of the obligations flowing from the Directive and, in particular, the requirement in Article 23 that air quality plans must be prepared to achieve compliance "*in the shortest time possible*".

A final revised Air Quality Plan was published in July 2017. Defra's own evidence indicates that implementing CAZs, where vehicles that do not meet minimum emissions standards are charged to enter,<sup>4</sup> is likely to be the quickest route to compliance. However, the 2017 Air Quality Plan delegates responsibility for preparing air quality plans to 23 Local Authorities and asks

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<sup>3</sup> <https://www.documents.clientearth.org/library/download-info/4296/>

<sup>4</sup> Clean Air Zones (CAZs) are also known as Low Emission Zones (LEZs). These are areas where vehicles are restricted from entering if they do not meet minimum standards for emissions of air pollutants. Non-compliant vehicles can either be charged to enter the CAZ or banned from entering with fines applied if they do enter the CAZ.

Local Authorities to first consider whether there are other equally effective options which don't involve CAZs. Defra, therefore, directed 23 Local Authorities to undertake Feasibility Studies “*in accordance with the HM Treasury's Green Book approach*”, to identify the option which will deliver compliance with legal limits for NO<sub>2</sub> in the shortest possible time.

The 2017 Air Quality Plan did not require action to be taken in 45 additional Local Authorities, which are currently in breach of the NO<sub>2</sub> limit values. Their reasoning was that it will take up to 3 years to put in place a CAZ, so in these 45 Local Authorities where compliance is predicted to be achieved by 2021, no further action was needed.

Following another judicial review by ClientEarth, on 21 February 2018 the High Court declared the 2017 Air Quality Plan unlawful in that, in its application to the 45 local authority areas, it did not contain measures sufficient to ensure substantive compliance with the Directive or the information necessary to comply with the Directive (i.e. the measures and timelines for bringing about compliance). The Court granted a mandatory order requiring the urgent production of a Supplement to the 2017 Plan to ensure that feasibility studies and plans to address NO<sub>2</sub> exceedances are developed in an additional 33 local authority areas. The measures identified in these areas are likely to be quicker to implement and more localised than CAZs.

## The Legal Test

Alongside the draft of the 2017 Air Quality Plan, Defra published a Clean Air Zone Framework for England. This framework sets out the principles for setting up a CAZ in England. Unfortunately, it does not explicitly describe the important legal tests, which were set out by the High Court in November 2016 in ClientEarth (No. 2).

This judgment gave a detailed and definitive ruling on the proper interpretation of the obligations flowing from the Directive and, in particular, the requirement in Article 23 that air quality plans must be prepared to achieve compliance “in the shortest time possible”. In his ruling, Mr Justice Garnham set out a three-part test for assessing air quality plans.<sup>5</sup> The test requires that plans must:

1. Aim to achieve compliance as soon as possible;
2. Choose a route to compliance which reduces human exposure as quickly as possible;  
and
3. Ensure that compliance with the limit values is not just possible but likely.

In a further hearing in July 2017, Mr Justice Garnham gave further clarification on these tests saying that:

*“At the heart of my judgment in this case of 2 November 2016 were the conclusions that the proper construction of Article 23 of the ambient air quality directive had three consequences. [...]*

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<sup>5</sup> ClientEarth (No. 2), Paragraph 95. <https://www.judiciary.gov.uk/wp-content/uploads/2016/11/clientearth-v-ssenviron-food-rural-affairs-judgment-021116.pdf>

*It is important to emphasise that the first and second of those requirements demand different things. The first is directed at the time by which the objective is to be achieved. The second is directed at the exposure to nitrogen dioxide that persists whilst that final objective is being achieved.*<sup>6</sup>

## 1.1 Compliance as soon as possible

The deadline for compliance with the legal limits set out in the Directive was 2010. Where those limits were not met, Member States were required to prepare air quality plans in accordance with Article 23 of the Directive, which requires that they set out appropriate measures to keep the exceedance period as short as possible.

The Court did not set a particular date by which compliance must be achieved, but in ClientEarth (No. 2) it ruled that Defra had acted unlawfully by fixing on 2020 as a date for compliance, which it viewed as "*too distant*". Defra's subsequent 2017 Plan required 23 Local Authorities to conduct Feasibility Studies to ascertain whether there are any measures other than a CAZ that would be equally effective and could be brought into effect as quickly. Following the decision in ClientEarth (No. 3) a further 33 Local Authorities have been asked to conduct a Feasibility Study to look for measures which will bring down air pollution as soon as possible.

The correct approach is to include in the air quality plan all technically feasible and effective measures to bring forward compliance. The Court clarified that such obligation is not qualified by the cost of the different measures to tackle air pollution:

*"there can be no objection to a Member State having regard to cost when choosing between two equally effective measures. [...] But I reject any suggestion that the state can have any regard to cost in fixing the target date for compliance or in determining the route by which the compliance can be achieved where one route produces results quicker than another. In those respects the determining consideration has to be the efficacy of the measure in question and not their cost. That, it seems to me, flows inevitably from the requirements in the Article to keep the exceedance period as short as possible".*<sup>7</sup>

In other words, when selecting measures to tackle air quality, the determining factor must be their efficacy not their cost. Local Authorities must identify which measures will meet the legal limits in the shortest time.

The primary obligation is to protect human health through the achievement of the limit values by the earliest possible date. Considerations such as cost or unpopularity of measures are not lawful reasons for excluding effective measures from a plan.

The only situation in which cost can be taken into consideration is where there are two equally effective measures i.e. only where two measures can be shown to be equally effective at

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<sup>6</sup> ClientEarth (No.2), [2017] EWHC (Admin) 1966, Paragraphs 9 and 10, <https://www.documents.clientearth.org/library/download-info/high-court-ruling-on-clientearth-no2-vs-ssefra-aqp-consultation/>

<sup>7</sup> ClientEarth (No. 2), Paragraph 50, <https://www.judiciary.gov.uk/wp-content/uploads/2016/11/clientearth-v-ssenviron-food-rural-affairs-judgment-021116.pdf>

bringing forward the likely date of compliance can the authority lawfully choose the lowest cost option.

Consequently, cost benefit analysis is not an appropriate primary method for selecting measures for inclusion in an air quality plan. Measures which would be most effective in bringing forward the likely compliance date should be included in an air quality plan.

Local Authorities will need to be aware of this important legal test when commissioning or carrying out Feasibility Studies and in subsequent decision-making. Whilst Local Authorities are directed to undertake their Feasibility Study in accordance with the Treasury Green Book approach, this should not override this important legal test set out by the High Court.

## 1.2 Reducing human exposure

This element of the test recognises the Directive's primary purpose of protecting human health by reducing exposure to air pollution. It recognises that compliance might not be achievable immediately, but the responsible authorities must reduce exposure as much as possible whilst they are trying to meet final objective of meeting the limit values.

A plan which aimed to achieve compliance by a certain date throughout the zone, would not meet the legal test, if there were additional or alternative measures which could also reduce human exposure during the period of non-compliance. In other words, while aiming at achieving compliance in the pollution hotspots by the target date, Local Authorities should take any measures available to reduce exposure at the same time.

ClientEarth considers that this means that Local Authorities should also refrain from taking actions that, whilst they may not affect the final compliance date for the overall zone, would increase exposure, or delay reduction of exposure in any part of the zone.

## 1.3 Compliance must be "likely" not just possible

In ClientEarth (No. 2), the Court heavily criticised the 2015 Air Quality Plan for making overly optimistic projections of future compliance with limit values. Its third test requires that measures chosen to tackle air pollution must make compliance not just possible, but likely.

To meet this test, ClientEarth considers that Local Authorities should:

- Include in air quality plans only concrete, impact-assessed measures, with a defined timetable for implementation and impact. Local Authorities should not rely upon the benefits hoped to flow from uncertain, aspirational or non-modelled measures.
- Adopt the most rigorous and up-to-date emissions factors and dispersion models to estimate future compliance scenarios.
- Adopt conservative estimates to projecting future compliance. When faced by margin of uncertainties on the expected impact of measures, Local Authorities should pick the most-likely scenario, rather than the optimistic, best-case scenario.

## European Commission infringement proceedings

The UK is also the subject of ongoing infringement action by the European Commission. The next step in that procedure would be a referral to the Court of Justice of the EU ("CJEU"). The Commission is expected to announce in April 2018 whether it will be taking the UK government to court.

The CJEU ultimately has the power to issue large daily and lump sum fines to Member States that breach the Directive. The UK government has already highlighted that these fines could be passed down to Local Authorities under the Localism Act 2011.

It is currently uncertain what, if any, role the European Commission and CJEU will have in enforcing EU environmental laws in the UK during any transition period. The UK government has committed to create a national regulator to ensure compliance with environmental law after the UK leaves the EU.

## Conclusion

The legal test set out in ClientEarth (No. 2) applies to Local Authorities in preparing air quality plans. The adoption of local air quality plans that do not meet the tests above will be vulnerable to legal challenge.

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ClientEarth is a non-profit environmental law organisation based in London, Brussels and Warsaw. We are activist lawyers working at the interface of law, science and policy. Using the power of the law, we develop legal strategies and tools to address major environmental issues.

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## Annex A – List of relevant English Local Authorities required to produce action plans by the UK government

Local Authority	Forecast compliance year in the 2017 AQP without further action
Greater London Authority	2028
<b>The five English Local Authorities mandated to implement CAZs by the end of 2019 (submitting Full Business Cases by 15 September and Final Plans by the end 2018)</b>	
Birmingham City Council	2025
Derby City Council	2024
Leeds City Council	2024
Nottingham City Council	2024
Southampton City Council	2024
<b>The 23 English Local Authorities required to produce Feasibility Studies by 31 March and a Final Plan by 31 December 2018 under the 2017 Air Quality Plan</b>	
Basildon District Council**	2022
Bath & North East Somerset Council**	2022
Bolton Metropolitan Borough Council*	2022
Bristol City Council*	2022
Bury Metropolitan Borough Council*	2022
Coventry City Council*	2022
Fareham Borough Council**	2022
Gateshead Metropolitan Borough Council*	2022
Guildford Borough Council**	2022
Manchester City Council*	2022
Middlesbrough Borough Council*	2024

New Forest District Council <i>(Single stretch of road in exceedance, modelled as part of the Southampton CAZ)</i>	2022
Newcastle City Council*	2022
North Tyneside Council*	2022
Rochford District Council**	2022
Rotherham Metropolitan Borough Council*	2022
Rushmoor Borough Council**	2023
Salford Metropolitan Borough Council*	2021
Sheffield City Council*	2023
Stockport Metropolitan Borough Council*	2022
Surrey Heath District Council**	2022
Tameside Metropolitan Borough Council*	2022
Trafford Metropolitan Borough Council*	2021
<b>The 33 English Local Authorities required to produce Feasibility Studies following the ClientEarth (No. 3) judgment by 31 July with Final Plans by 5 October 2018</b>	
Ashfield District Council	2019
Basingstoke and Deane Borough Council	2020
Blaby District Council	2019
Bolsover District Council	2020
Bournemouth Borough Council	2021
Bradford City Council	2021
Broxbourne Borough Council	2019
Burnley Borough Council	2020
Calderdale Metropolitan Borough Council	2019

Cheltenham Borough Council	2019
Dudley Metropolitan Borough Council	2020
Kirklees Metropolitan Council	2019
Leicester City Council	2020
Liverpool City Council	2020
Newcastle-under-Lyme Borough Council	2020
Oldham Metropolitan Borough Council	2021
Oxford City Council	2019
Peterborough Council	2020
Plymouth City Council	2021
Poole Borough Council	2020
Portsmouth City Council	2021
Reading Borough Council	2020
Sandwell Metropolitan Borough Council	2020
Sefton Metropolitan Borough Council	2020
Solihull Metropolitan Borough Council	2021
South Gloucestershire District Council	2020
South Tyneside Metropolitan Borough Council	2019
Southend Borough Council	2019
Stoke-on-Trent City Council	2021
Sunderland City Council	2019
Wakefield Metropolitan District Council	2021
Walsall Metropolitan Borough Council	2021

Wolverhampton City Council	2021
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\* Required to produce local action plans by March 2018 on the basis of modelling which indicates a number of roads need a solution.

\*\* Required to produce local action plans by March 2018 on the basis of a single stretch of road needing a solution.