

Air quality issues affecting development plans following *Wealden v SSCLG*

Andrew Byass

Outline



- Directive 2008/50/EC on ambient air quality and cleaner air for Europe ('the Air Quality Directive')
- ***R (ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs:***
 - (1) [2015] PTSR 909 (CJEU & Sct)
 - (2) [2017] PTSR 203, Garnham J
 - (3) [2016] EWHC 3613 (Admin), Garnham J
 - (4) [2017] EWHC 1966 (Admin), Garnham J
 - (5) [2018] EWHC 315 (Admin), Garnham J
- ***Shirley v SSCLG*** [2017] EWHC 2306 (Admin)
- ***Wealden DC v SSCLG*** [2017] EWHC 351 (Admin)

Context



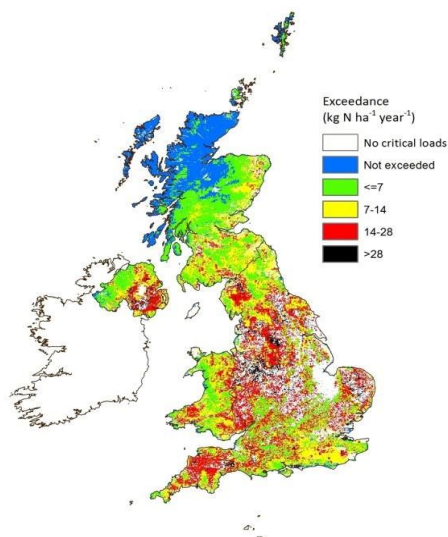
- Nitrogen (N) essential for plant growth
- 78% of atmosphere = N, but inert and not available to most plants as a nutrient
- “Nutrient” N = forms of N that are available to plants:
 - nitrogen dioxide (NO_2)
 - ammonia (NH_3)
 - nitrate (NO_3)
 - ammonium (NH_4)

Context



- Fuel combustion and traffic emissions increase concentrations of “nutrient” N
- Plant communities become dominated by limited number of species that thrive on high N levels at expense of most species adapted to low nitrogen levels
- Species diversity declines
- Scientists have developed concept of “critical loads” for pollutants such as N:
 - estimate of acceptable exposure level to pollutant “below which significant harmful effects on specified sensitive elements of the environment do not occur”

Context

$$\frac{L}{C}$$


- Current nutrient N deposition exceeds “critical loads” through much of UK, esp. England
- Over 90% of sensitive habitat in E&W exceeding critical loads

The Air Quality Directive: background (1)

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- Air Quality Framework Directive 96/62
 - purpose: to establish objectives for ambient air quality in the EU designed to avoid, prevent or reduce harmful effects on human health and the environment as a whole
 - Art 4(1): EU Commission required to submit proposals on setting limit values for various atmospheric pollutants taking into account the factors in Annex II, including “economic and technical feasibility”
- Directive 1999/30
 - set limit values for sulphur dioxide, nitrogen dioxide and oxides of nitrogen, particulate matter and lead in ambient air

The Air Quality Directive: background (2)

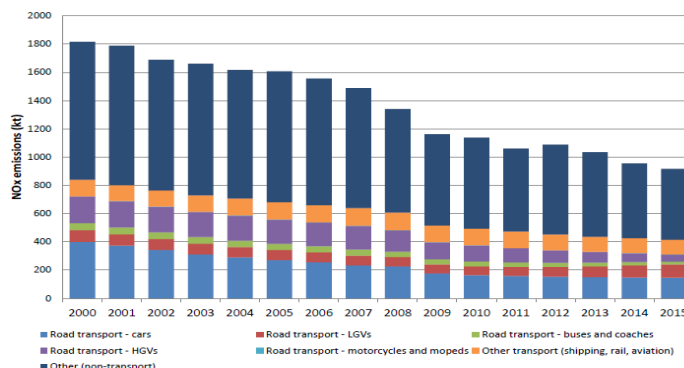


- Nitrogen dioxide (NO₂)
 - Gas formed by combustion at high temperatures
 - Main sources in UK urban areas: road traffic and domestic heating
 - NO₂ is a component of particulate matter (PM10 and PM2.5) which have an effect equivalent to 23,500 premature deaths each year in the UK
- Air quality in the UK
 - UK divided into 43 zones and agglomerations
 - In 2010, 40 zones/agglomerations were in breach of one or more of the NO₂ limit values
 - In 2015, 37 zones were in breach

The Air Quality Directive: background (3)



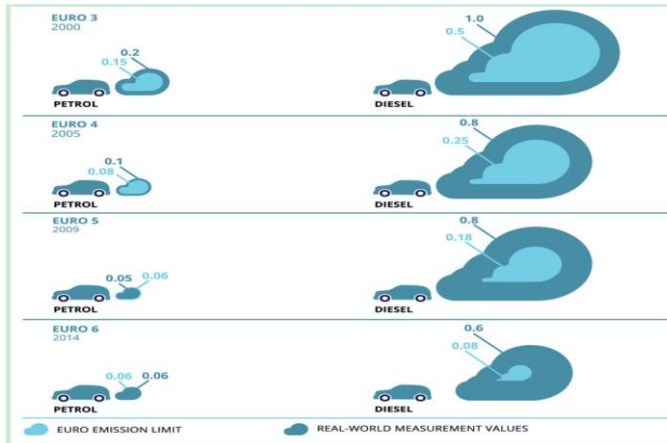
Annual UK emissions of NO_x since 2000: road transport being responsible for c.80% of NO_x concentrations at roadside, with diesel the largest source.



The Air Quality Directive: background (4)



The emissions scandal, pictorially represented:



The Air Quality Directive: key provisions (1)



- Air Quality Directive repealed and replaced Framework Directive and Directive 1999/30 (but retained the same limit values)
- Article 2(5)
 - “Limit Values”: levels fixed on the basis of scientific knowledge, with the aim of avoiding, preventing or reducing harmful effects on human health and/or the environment as a whole, to be attained within a given period and not to be exceeded once attained

The Air Quality Directive: key provisions (2)



- Article 12
 - in zones where the levels of NO₂ are below the relevant Limit Value, “Member States shall maintain the levels of these pollutants below the Limit Values and shall endeavour to preserve the best ambient air quality, compatible with sustainable development”
- Article 13
 - obliges Member States to ensure that throughout zones, levels of NO₂ in ambient air do not exceed the Limit Values specified in Annex XI from 1 January 2010. [Plainly, the UK has been in breach of this requirement for some time...]

The Air Quality Directive: key provisions (3)



- Article 23(1)
 - where pollutants exceed any Limit Value, Member States must ensure that air quality plans are established for the relevant zone or zones
 - if relevant attainment deadline has already expired, the plan must set out appropriate measures so that the exceedance period can be kept “as short as possible”



The Air Quality Directive: Summary



- Member States cannot exceed the limit value for NO₂ after 1 January 2010
- Art 23 imposes a general duty to prepare action plans for areas where limit values exceeded.
- Where the attainment deadline has passed such plans must set out appropriate measures to keep the exceedance period “as short as possible”





R(ClientEarth): the AQ plan challenges



- ***Client Earth No. 1***: the Supreme Court quashed the 2011 AQ plan and granted a mandatory order requiring SofS to prepare new AQP by 31 December 2015
- Presciently indicated [33] that a question which “may well arise in connection with the new plans” concerning the interpretation of the words “as short as possible” in Article 23(1)
- Cases cited by the Commission “indicate that the scope for arguing “impossibility” on practical or economic grounds is very limited”.

R(ClientEarth): the AQ plan challenges



- ***Client Earth No. 2***: challenge to the December 2015 AQP put in place following the SC order
- Plan's projections of emissions were modelled at 5-yearly intervals with a compliance date of 2020 for regional zones and 2025 for London
- ClientEarth successfully challenged the AQP on the basis that DEFRA had erred in its approach to the requirement that periods of exceedance should be "as short as possible"
- No evidence to suggest that 5-yearly emission forecasts cycles were sufficient when a Member State was faced with the urgent task of bringing its pollutant levels within the limits of the Directive.



UK plan for tackling roadside nitrogen dioxide concentrations

Detailed plan

July 2017

The Air Quality Plan (1)



- There is “An Overview”, a “Detailed Plan” and a “Technical Report”
- The Government’s solution:
 - Investing in ultra low emission vehicles or ULEVs (including infrastructure), low carbon and clean buses, cycling and walking and roads (to reduce congestion)
 - In England, delegation to local authorities: **“Local knowledge is vital to finding solutions for air quality problems”**
 - The options to be considered in the first instance are: changing road layouts at congestion and air pollution pinch points; encouraging public and private uptake of ULEVs; using innovative retrofitting technologies and new fuels; encouraging use of public transport
 - Thereafter: charging zones or measures to prevent certain vehicles using particular roads at particular times

The Air Quality Plan (2)



- Areas of local authorities not co-terminus with areas of 43 AQ zones, creating potential problems with delegated approach
- Three types of local authorities identified in the AQP:
 - (1) GLA, and five cities of Birmingham, Derby, Leeds, Nottingham and Southampton – assumes CAZ for these areas
 - (2) 23 local authorities required to produce local action plans by March 2018 (those with greatest problem) – allows non-CAZ solutions so long as these are at least as effective at reducing NO₂, i.e. there is benchmarking
 - (3) 45 local authorities for which no specific measures were (initially) proposed, predicted to be compliant by 2021

The Air Quality Plan (3)



- The 23 Local authorities must set out initial plans by March 2018 with final plans in place by December 2018
- Subject to approval by Government, assessed on the basis of whether compliance with NO₂ levels achieved in the shortest time possible, effects have been properly assessed, and proposals requiring Government funding demonstrate value for money
- BUT the Technical Report identifies charging CAZs as the measure able to achieve limit values in the shortest possible time [detailed report; 95]. Any alternative to a charging CAZ must be “at least as effective”

R(ClientEarth): the AQ plan challenges



- ***Client Earth No. 3***: there were intervening challenges to the draft 2017 plan. This claim [2018] EWHC 315 (Admin) challenged the final plan
- Ground 1: the lack of specific measures for the 45 local authorities did not comply with the requirement to achieve compliance in the shortest possible time
- Ground 2: the lack of a timetable for the 5 cities to implement a CAZ failed to meet the EU law requirement for clear and legally enforceable timetable

R(ClientEarth): the AQ plan challenges



- Ground 1 succeeded; ground 2 did not (because there was a Direction from the SofS under s. 85(5) of the Environment Act 1995 requiring full business cases for CAZs to be submitted by 15 September 2018)
- Under ground 1, the error was the lack of any mandatory step imposed upon the 45 local authorities, thereby failing to “ensure” that compliance would be in the shortest time possible [79]
- Court minded to effectively keep the claim open and grant continuing liberty to apply given repeated failures to get it right [109]

Development plan implications



- The principal measure to resolve AQ issues is an AQ Plan (see **Shirley**, discussed below), which can however encourage development plan led solutions
- Development plan led solutions can be an alternative to CAZs, e.g. highways improvements
- Yet further emphasis on walking, cycling and the use of public transport
- Developments being required to meet heightened air quality standards
- Consequential impacts on habitats and consideration of e.g. Habitats Directive per **Wealden**



Wealden DC v SSCLG [2017] EWHC 351 (Admin) 

- Challenge to decision of two LPAs to adopt a joint core strategy (JCS)
- JCS covered Ashdown Forest SAC, designated under Habitats Directive because it had large areas of lowland heath vulnerable to NO₂ pollution from motor vehicles
- 2 major A-roads intersected SAC
- Natural England (NE) had advised two LPAs that additional traffic from development planned in JCS not likely to have a significant impact on SAC because less than 1,000 cars per day would use the critical roads (in fact, it was 190 cars per day)
- Two LPAs accepted that advice and examining SSCLG inspector did not challenge it

Wealden DC v SSCLG: judgment (1)



- Jay J:
 - Article 6(3) of the Habitats Directive requires an assessment of possible in-combination effects [85]
 - NE failed to advise that more modest levels of traffic anticipated from the JCS (190 cars per day) should be assessed in-combination with traffic arising from development planned in Wealden's adopted CS (950 cars per day)
 - In-combination, the total increase in cars was above NE's threshold of 1,000 cars after which significant impacts may arise. NE's advice accordingly could not be supported logically or empirically [101]
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Wealden DC v SSCLG: judgment (2)



- Jay J (cont.):
 - The Habitats Regulations Assessment relied on NE's advice, and so was flawed and should not have been relied upon
 - Two LPAs should have made further inquiries of NE (ordinary public law); in any event the flawed HRA directly infected the decision-making process
 - The examining inspector wrongly accepted the HRA's conclusions and wrongly concluded that an appropriate assessment was not required
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Wealden DC v SSCLG: broader context



- Judgment follows earlier judgment of Court of Appeal in another case involving Wealden DC and the Ashdown Forest SAC: ***Wealden DC v SSCLG*** [2017] EWCA Civ 39
- Planning application for 103 houses, granted on appeal
- Court of Appeal upheld Lang J's order quashing the permission
- Key issue: whether assessment of likely significant effects should include "in-combination effects" and so trigger need for AA
- NE: in-combination assessment not required unless *inter alia* project contributed more than 1% of critical loads

Wealden DC v SSCLG: broader context



- INS took more precautionary approach: risk of "significant in-combination effects" so LSE conclusion unsafe unless those effects taken into account
- Court held: matter for INS how much weight to give to NE's advice, but he had erred in concluding that no AA required because there was insufficient evidence to conclude that the proposed mitigation would be effective
- Developer sought to rely on a contribution to a SAMMS (Strategic Access Management and Monitoring Strategy), BUT no evidence that SAMMS would provide required mitigation for nitrogen deposition

Conclusion



- In-combination effects with other plans and projects should be considered at the stage of screening for LSE
- Insofar as NE, the EA or NRW have been advising otherwise based on their own internal guidance documents – documents need to be reviewed and advice received in the meantime scrutinized
- Mitigation of AQ impacts a matter in its own right, not simply an aspect or “by-product” of mitigating recreational impacts
- Challenge to ecological sector to provide robust evidence of how increased N loads can be mitigated or compensated. How to enable development in areas where cumulative N loads are leading to LSE?



R(Shirley) v SSCLG [2017] EWHC 2306 (Admin)



- Challenge to refusal to call-in following LPA's resolution to grant permission for 4,000 homes on outskirts of Canterbury
- An AQMA had been designated for centre of city and on one version of the scheme it was accepted that development would have moderate adverse impact on AQ in one location although LPA concluded that the threshold value for NO₂ would not be exceeded
- Claimant and others argued that on the facts Canterbury was already in exceedance and development would lead to a breach of the 40µg/m³.

Shirley v SSCLG: Claimants' argument



- SoS was the "competent authority" under AQD and obligated to take all measures to ensure compliance with AQD
- This includes all measures required to meet the obligation to comply with AQ limit values under Article 13 – which, it was argued, is not to be remedied solely by the production of an AQP.
- Duty to meet limit values an overriding consideration in circumstances where either the thresholds were exceeded or the development would have the potential to impact upon the requirement to reduce exceedances in a period which has to be kept as short as possible.

Shirley v SSCLG: judgment



- Dove J
 - Dismissed argument that designation of competent authority gave Defendant responsibilities beyond those set out in Article 3(a)-(f); obligation to comply with limit values in Article 13 was on MSs
 - AQD contains its own remedy for breaches of Article 13: the requirement under Article 23 to establish and implement an AQP which is effective and reduces any periods of exceedance. See **ClientEarth** in CJEU [40]-[42].
 - Therefore no basis for reading in a duty to take particular actions in relation to permits or development consents.

Conclusions



- Per **Shirley**, if an individual project might cause increase in limit values, the remedy is found in the production of an AQP
- AQ plans may require action in development plans, e.g. to enable measures to improve air quality in an area (though the AQ position is improving in any event including through the ongoing **ClientEarth** litigation)
- Per **Wealden**, AQ impacts on a SAC have to be considered in combination with existing plans and may require mitigations within the plan in order to avoid causing adverse effects