

Air Quality: an update

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Overview

- Air quality issues arise principally in the context of two major Directives:
 - Directive 2008/50/EC on ambient air quality and cleaner air for Europe ('the Air Quality Directive')
 - Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora ('The Habitats Directive')
- This talk will focus on the Air Quality Directive ("AQD")

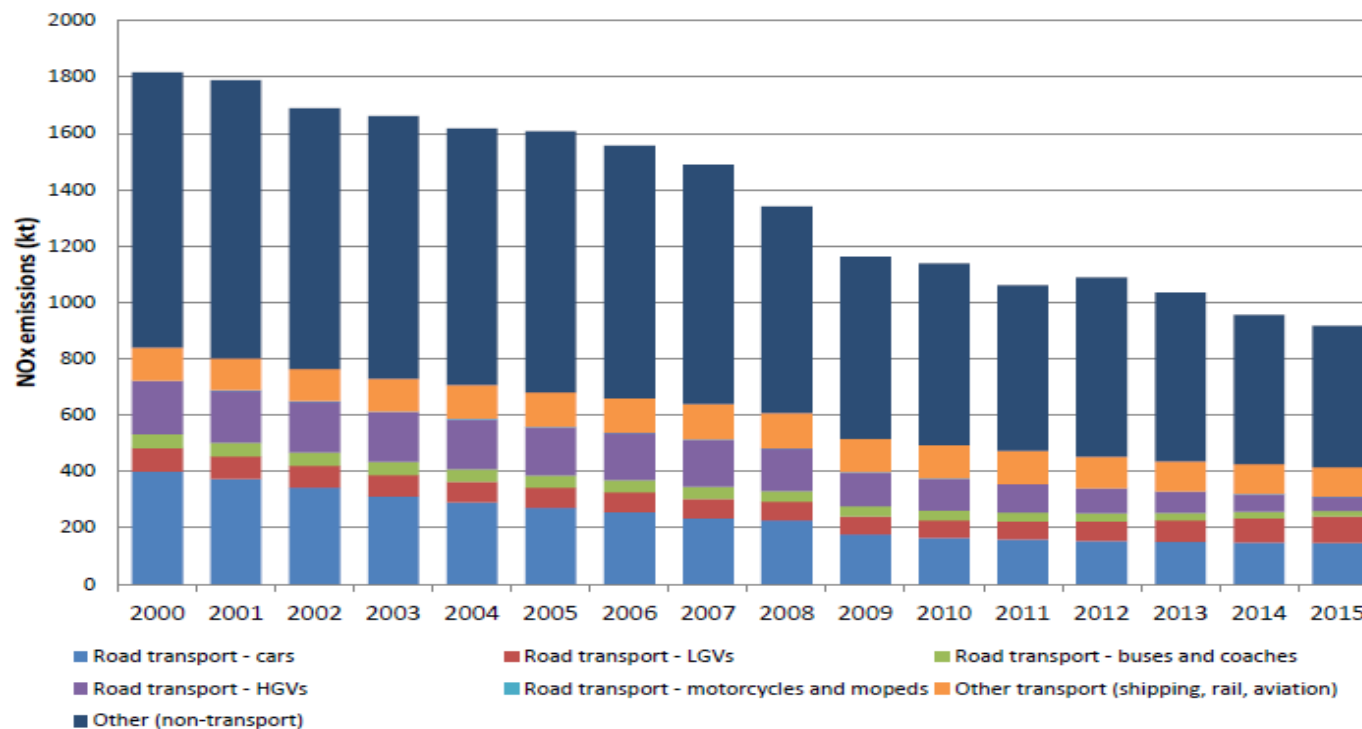
Ambient air quality: the background (1)

- 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 29,000 premature deaths each year in the UK (DEFRA's own number is 23,500)

- 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

Ambient air quality: the background (2)

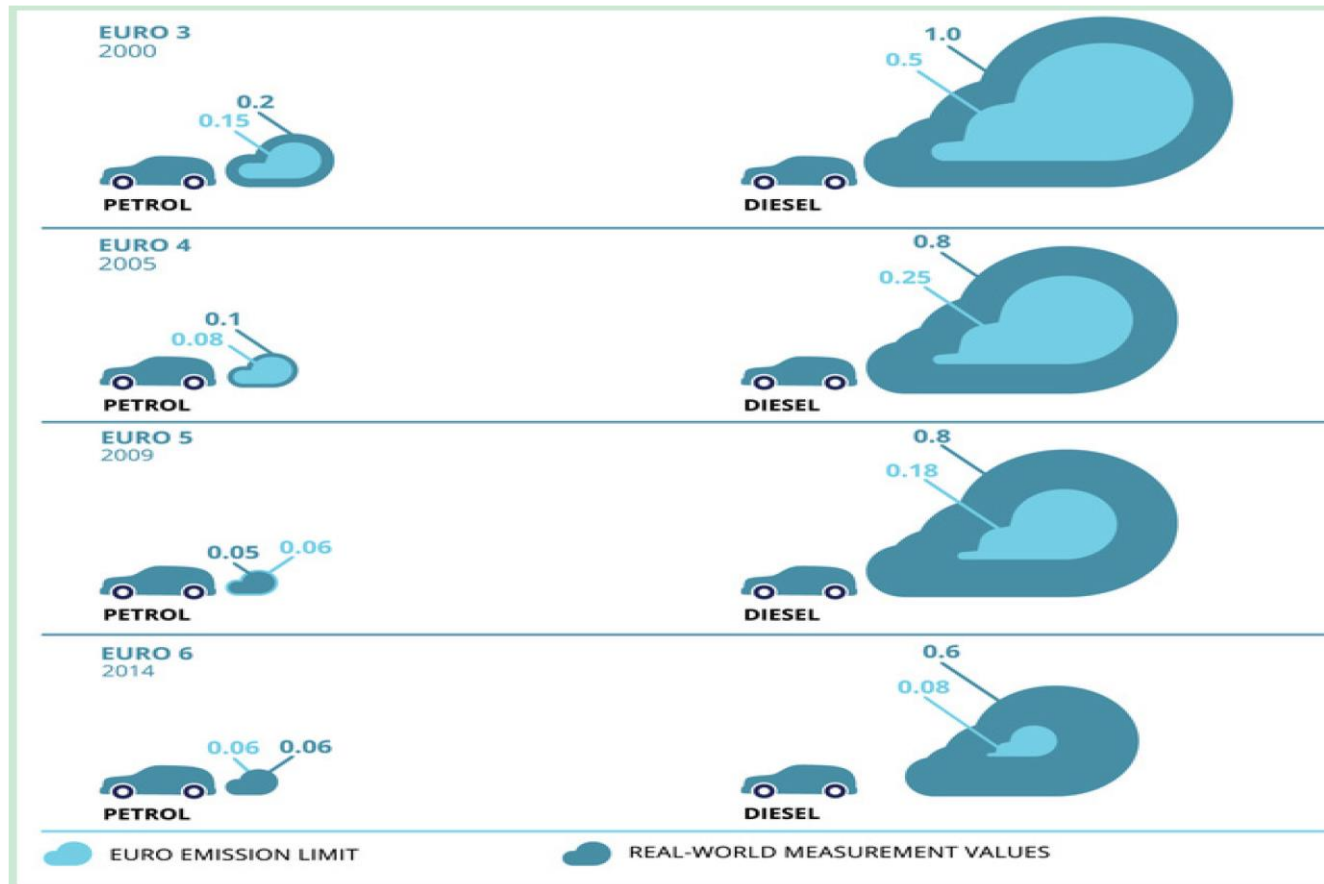
Annual UK emissions of NO_x since 2000: road transport being responsible for c.80% of NO_x concentrations at roadside, with diesel the largest source.





Ambient air quality: the background (3)

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- Air Quality Directive repealed and replaced Framework Directive and Directive 1999/30 (but retained the same limit values)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.

The Air Quality Directive: key provisions (3)

- Contrast Article 13 with Article 16
 - Art 16 only requires Member States to take “all necessary measures not entailing disproportionate costs” to achieve the “target value” for concentrations of PM_{2.5}

- Article 22
 - allows Member States to postpone the deadlines specified in Annex XI, **but only for a maximum of 5 years** and on condition that an air quality plan under Article 23 is established
 - plan is to be supplemented by information listed in Section B of Annex XV demonstrating how conformity will be achieved before the new deadline

The Air Quality Directive: key provisions (4)

- 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 22 procedure allows postponement for 5 years BUT that is conditional on establishing an action plan demonstrating how compliance would be achieved before the new deadline
- 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”

Key litigation in UK

- The **ClientEarth** litigation:
 - (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

- The **Shirley** litigation:
 - [2017] EWHC 2306 (Admin)
 - [2019] EWCA Civ 22

ClientEarth (No.3) [2018] EWHC 315 (Admin)

- Challenge third attempt to provide an AQP that met requirements of Art. 23
- AQP published 26 July 2017. Distinguished between 3 groups:
 - 5 cities
 - 23 local authorities not predicted to comply by 2021
 - 45 local authorities forecast to comply by 2021
- Directed 23 local authorities to undertake feasibility studies to identify the option for their area which will achieve compliance in shortest possible time.

ClientEarth (No.3) [2018] EWHC 315 (Admin)

- Garnham J
 - Accepted that AQP unlawful in that it did not contain sufficient measures in relation to the 45 local authority areas;
 - Did not include a compliant AQP for Wales.
- Continuing liberty to apply: *“the time has come for the Court to consider exercising a more flexible supervisory jurisdiction in this case than is commonplace”*
- Supplement published in March 2018

Other key point

- Obligation to achieve limit values one of result. Member States cannot have regard to socio-economic, cost or technical difficulties in justifying breaches.

Position in the South West

- South West AQP contains a range of measures
- 2015 modelling showed 31.8km of roadside at which annual limit value was exceeded.
 - Plymouth modelled to have three sections of exceedance at A386, A374, A38; local modelling shows compliance in 2017
 - Also exceedances at Bath, Bristol, and Cheltenham
- Compliance projected to be achieved in 2021 under baseline conditions (includes measures in tables to plan)

When is AQD relevant to planning applications?

1. Material consideration under NPPF 181

“Planning policies and decisions should sustain and contribute towards compliance with relevant limit values or national objectives for pollutants...”

2. Can justify refusal: *Gladman Developments*

3. Also now present in local and national policy;

–National Networks NPS para 5.13

–NPS for Ports para 5.7.7

–Airports NPS 5.42:

“In order to grant development consent, [the SOS] will need to be satisfied that, with mitigation, the scheme would be compliant with legal obligations that provide for the protection of human health and the environment”

R(Shirley) v SSCLG: when does AQD mandate particular outcomes?

- 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.

Mountfield Park, South Canterbury - Illustrative Master Plan



Shirley: Claimant's argument

- SoS is the “competent authority” under AQD and, it was argued, is obliged 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 under .
- 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.
- Irrational to think that deficiencies in LPA's approach would be remedied by reconsideration or JR.

Shirley in the Court of Appeal

1. Whether the preparation and implementation of a compliant AQP would be a sufficient response to breach of limit values?
2. Whether the SoS has a duty as “competent authority” to use his planning powers to avoid worsening or prolonging breaches of limit values, and was thereby obliged to call in?
3. Whether it was irrational for the SoS to assume that any errors in the LPA’s approach could be put right through its consideration/supervisory JR?

Issue 1: Is AQP a sufficient remedy?

- Accepted Article 23 is the “relevant specific remedy” provided for by AQP, relying in part on CJEU’s decision in *ClientEarth*.
- This does not mean that Member States may not also adopt other measures in addition, but they are not compelled to by AQD.
- Caselaw on other directives (particularly the *Naturshutz Deutschland* case where the CJEU had held that development consent must be refused where grant would lead to deterioration in water quality status) was not helpful.

Issue 2: SoS's duties as “competent authority”

- Terms of AQD did not allocate more responsibility to the SoS than the specific duties provided for.
- This was consistent with Article 288 TFEU which provides for directives to bind member states, but leaves it to them to choose the “form and methods”.
- Dove J was right to describe the responsibilities of the “competent authority” under Article 3 AQD as “*specific and circumscribed*”
- Structure of regulations in UK does not imply additional duties in relation to planning. Nothing in Regs or AQD sought to adjust arrangements for decision-making in land use planning

- Therefore, fact that a planning permission would cause limit value to be breached or delay remediation does not require refusal – although it may be a material consideration and may (SoS conceded) even be a decisive factor (para 44)
- Might even be a material consideration in decision to call-in but SoS is not constrained.

Issue 3: was SoS irrational not to call-in?

- Wrong to think that call-in power needed to be exercised to remedy some deficiency in the LPA's powers and duties under the statutory planning scheme.
- Irrationality not established as:
 - SoS knew LPA was bound by same duties as himself
 - SoS knew LPA was bound to consider all material considerations including factual position in respect of air quality – which was in dispute between developer and claimant
 - LPA now made clear that it would reconsider in accordance with *Kides* principle

Conclusions

- As law stands, compliance with AQD limit values is a material consideration in planning decisions but the directive does not itself specify that planning decisions must be determined in a particular way or by a particular body.
- Yet to be tested whether decision-maker can ‘balance’ non-compliance with the AQD: i.e. grant permission in knowledge that this would lead to breach or delay in attainment of limit values. Shirley was a challenge to a call in decision not grant of consent.
- AQ Plans now established. Should provide significant cover to those seeking development consents. Worth keeping tabs on the ongoing monitoring.