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To: The Airports Commission
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By email only to Air.quality@airports.gsi.gov.uk

28 May 2015

Dear Sir/Madam,

Airports Commission: Consultation on Air Quality Assessment

I write on behalf of ClientEarth in response to the above consultation. Paragraph numbers below refer to the Jacobs air Quality Assessment, Detailed Emissions Inventory and Dispersion Modelling document (the "Report"):

1. **Compliance with Directive 2008/50/EC on ambient air quality and cleaner air for Europe (the "Directive")**

By its judgment dated 29 April 2015[1] the Supreme Court ordered the Government to prepare revised Air Quality Plans in respect of 16 zones and agglomerations in the UK, including the Greater London Urban Area and the South East. Final updated plans must be submitted to the European Commission by 31 December 2015.

These plans must comply with Article 23(1) of the Directive, which states as follows:

"In the event of exceedances of those limit values for which the attainment deadline is already expired, the air quality plans shall set out appropriate measures, so that the exceedance period can be kept as short as possible."

Any development which is likely to prevent the period of exceedence from being kept "*as short as possible*" is therefore unlikely to be compliant with the Directive.

In addition, we note the reference in paragraph 1.1.4 and Appendix A of the report to "background pollution". The Directive requires compliance with limit values to be assessed at areas where the highest concentrations occur to which the population is likely to be exposed.[2] With nitrogen dioxide this will typically by at kerbside locations. Any assessment which does not take into account kerbside levels of pollution as well as background levels is likely to be overly optimistic and is unlikely to meet the requirements of the Directive.

[1] R (on the application of ClientEarth) v Secretary of State for Environment Food and Rural Affairs [2015] UKSC 28 & [2013] UKSC 25
[2] The Directive, Annex III, B (1).

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We note the conclusions[3] of the Report that both an unmitigated Heathrow North West Runway scheme and an unmitigated Heathrow Extended Northern Runway scheme would delay DEFRA complying with the limit value in the London zone.

This is a cause for great concern. The deadline for compliance with Article 13 of the Directive passed some 5 years ago. As the Supreme Court notes at paragraph 30 of its judgment "*during the five years of breach the prospects of early compliance have become worse, not better*"[4]. It is clear that compliance with the Directive is already posing some difficulty to the UK Government and any development which could delay compliance further will compound a situation where the UK is already in breach of its obligations.

Proposed mitigation measures are set out in the report in respect of each scheme. The reality is that if these measures are feasible, they ought to form part of an Air Quality Plan which seeks compliance in as short a time as possible, regardless of whether any development goes ahead. These mitigation measures should therefore form part of the baseline, and the development of any scheme should be considered only after the implementation of those measures has been taken into account.

We very much hope that the new revised Air Quality Plans will take a much more ambitious approach to compliance. However, the current uncertainty around the content of the plans, and the measures DEFRA will need to put in place to achieve an earlier compliance date should be given full consideration. Whilst we appreciate that the Airports Commission must make its report before those plans are published, given the uncertainty surrounding their content the Airports Commission should take a precautionary approach to the likelihood of delayed compliance resulting from the proposed schemes.

2. Directive 2001/81/EC of the European Parliament and the Council on National Emission Ceilings for certain pollutants (hereafter the NEC Directive)

In respect of all three schemes the Report concludes that "*The Scheme would not affect compliance with the current National Emissions Ceiling Directive (NECD) and Gothenburg Protocol obligations. If the NECD is tightened in line with current proposals, the UK would exceed the obligations with or without [each scheme]. The incremental change to emissions associated with [each scheme] represents only a very small fraction of the proposed obligations*".

ClientEarth is very concerned by the suggestion that because the UK is predicted to be in breach of its NEC Directive obligations, the schemes would not affect compliance. Any development which could delay compliance further will compound a situation where the UK is already in breach of its obligations.

However, it should also be noted that the NEC Directive requires Member States to develop national programmes that aim to meet national emissions reduction commitments. If the National Atmospheric Emissions Inventory projections project non compliance with the 2030 target, the Government will be required by the NEC Directive to come up with a National Programme containing appropriate measures to remedy that situation. To state that the scheme would not affect compliance simply because compliance is not projected by 2030

[3] Paragraph 5.7 and 6.7 of the Report
[4] https://www.supremecourt.uk/cases/docs/uksc-2012-0179-judgment.pdf

suggests a fundamental misunderstanding of the legal obligations imposed by the NEC Directive. .

Compliance must be achieved and decision makers must consider whether any proposed development might compound a situation where the UK is struggling to meet its obligations.

3. **An exceedence of critical levels of NOx at the South West Waterbodies SPA and Wraysbury Reservoir SSSI**

The Report concludes that that the Heathrow North West Runway scheme[5] and the Heathrow Extended Northern Runway scheme[6] would cause a new exceedence of the Critical Level for NOx at the South West London Waterbodies RAMSAR/SPA and Wraysbury Reservoir SSSI. We also note existing exceedences at other protected sites in the vicinity of all three schemes.

The note following Table 2.1 in the Report explains that:

"The macroscale siting criteria in the Directive states that sampling points for the protection of vegetation and ecosystems should be sited a) more than 20 km from an agglomeration (about 250,000 people), and b) more than 5 km from Part A industrial sources, motorways and built up areas of more than 5,000 people. The UK Government interprets this to infer that the critical level for NOx does not apply within these areas".

This is a misinterpretation of the Directive. Article 14 of the Directive requires Member States to "*ensure compliance with the critical levels specified in Annex XIII*".

Annex III B(2) of the Directive simply lays down the criteria for the location of sampling points for vegetation and ecosystems. These criteria aim to ensure that the air sampled is representative of a large area (1000km). It does not follow that the critical levels do not apply in areas which are unsuitable for siting of monitoring stations.

Indeed Annex III C states that *"A Member State may provide for a sampling point to be sited at a lesser distance or to be representative of air quality in a less extended area, taking account of geographical conditions or of the opportunities to protect particularly vulnerable areas*".

Conclusions

The Report makes it clear that an unmitigated scheme at Heathrow would exacerbate breaches of the Directive and make compliance more difficult. The mitigation measures set out in relation to each scheme should in any event be implemented as part of a revised Air Quality Plan in order to achieve compliance with the limit value in as short a time as possible.

[5] Paragraph 5.4.6 of the Report
[6] Paragraph 6.9 of the Report

We consider that any decision maker or body recommending a scheme should take a precautionary approach to their assessment of the likely impacts of all three schemes on air pollution and should carefully consider the relevant legal constraints implications of giving consent to development which could aggravate existing breaches of EU law.

Yours faithfully,

[redacted]

[redacted]