

Implications of the Judgement on Air Quality

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The Supreme Court issued on 29th April 2015 a final [judgment](#) on the 'ClientEarth' case, which has been to the High Court, Court of Appeal, Supreme Court, Court of Justice of the European Union (CJEU) and back to the Supreme Court again. It is all about compliance with the [EU Ambient Air Quality Directive](#), issued in its current form in 2008.

In following the directive, the UK has been divided into 43 air quality 'zones or agglomerations'. For the pollutant nitrogen dioxide in particular, the acceptable levels of it are currently being exceeded in 40 of the 43 zones. The three that are OK are the Highlands, the Scottish Borders, and somewhat surprisingly, Blackpool. Full details are on page 9-11 of [this document](#).

To be fair to the UK, 16 other member states also have exceedances, and this is partly due to the ineffectiveness of the EU standards on emissions from diesel engines. These are the main contributors to NO₂ pollution and 'real world' rather than laboratory tested emissions from these vehicles are actually worse than they were in 1992 – and there are a lot more of them due to cheaper fuel.

If you exceed a pollutant in a zone, you are supposed to make it compliant by 2010. If you don't or can't, that's where opinions differed. One part of the directive says that you can apply for an extension of up to five years, another says that you must issue a plan saying how the zone will be brought into compliance as soon as possible.

The UK decided these were alternative options and chose the latter (conveniently) without applying for an extension, originally saying that the last zone, London, won't be compliant until 2025, and now saying that that was a bit optimistic and in fact London, the West Midlands and West Yorkshire won't be compliant until an unspecified time after 2030. It was quite hard to find the plans, but they are on the EU website [here](#).

After much wrangling the Supreme Court has decided that they aren't alternatives, that the UK is therefore in breach of its obligations, that it is up to it to decide what to do about that, and that its decision is that the UK must produce updated plans for all 40 zones by the end of this year, or else.

The judgment is interesting on a couple of side points too. First, the Supreme Court expressed frustration that it asked four questions of the CJEU, who then reformulated them and answered them so ambiguously that both sides in the case thought they had won.

Secondly, the Supreme Court asked the government if it would give an undertaking to produce the plans by the end of the year, to be told that because it is the purdah period it couldn't, so had to be mandated to produce them. I hadn't thought that the effect of purdah would reach that far.

Implications

Various types of nationally significant infrastructure project (NSIP) could affect air quality, but the two most likely to be affected are highways and airports.

For highway schemes, paragraph 5.13 of the [National Networks National Policy Statement](#) says:

The Secretary of State should refuse consent where, after taking into account mitigation, the air quality impacts of the scheme will affect the ability of a non-compliant area to achieve compliance within the most recent timescales reported to the European Commission at the time of the decision.

From the above, this paragraph applies to every highway scheme in England that isn't in Blackpool (and in Blackpool a scheme can't make the zone non-compliant). This already makes it difficult, but not impossible, to permit a highway project that will worsen air quality. Presumably it could still do so temporarily as long as it didn't slow down compliance with the standards – the zone could be worse somewhere else that is effectively the critical path towards compliance.

That issue is largely unaffected by this week's judgment for the moment, but presumably updated plans will make it more obvious whether a highway scheme will affect the compliance timescale for the zone it is in. If the plans shorten the compliance date that might make things more difficult, but they could lengthen the date.

The other type of NSIP most affected by air quality is airport expansion. Heathrow is covered by the [London air quality plan](#), and Gatwick is covered by the [South East air quality plan](#). Heathrow is treated as a special case in the London plan, and did not comply in 2008 – see the diagram on page 19 – although it is predicted to comply by 2025. Gatwick was OK and is predicted to continue to be so – the only exceedance in the South East was in Oxford. Neither of those take into account airport expansion, however.

It is quite likely that expansion of Heathrow would slow down achievement of compliance in London, but could be OK for Gatwick in the South East as the critical path appears to be elsewhere in that zone – [something not lost on Gatwick](#).

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