



Six Pump Court

IMPLICATIONS OF BREXIT FOR AIR QUALITY LEGISLATION

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IAPSC

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OUTLINE

- Current framework
 - Ambient AQ
 - NO₂
 - ClientEarth cases
- Brexit Bill
- AQMA etc
 - Planning Court cases



Air Pollution in the UK 2016

September 2017



THE CURRENT FRAMEWORK

- The UK air quality framework is derived from legislation regulating
 - total emissions of air pollutants – the UK is bound by both EU law (e.g. National Emission Ceilings Directive) and international law (e.g. 1979 Geneva UNECE Convention on Long-range Transboundary Air Pollution);
 - concentrations of pollutants in the air; and
 - emissions from specific sources, such as legislation implementing the Industrial Emissions Directive (-> environmental permitting) and the Clean Air Act.

THE CURRENT FRAMEWORK - CONCENTRATIONS OF POLLUTANTS IN THE AIR

- Current sources of national AQ law:
 - Environment Act 1995 Part IV
 - requires a National Air Quality Strategy
 - AQMA local duty, and AQ Action Plans
 - AQ Regulations 2000 (as amended)
 - Air Quality Objectives are said to be at least as stringent as the limit values of the relevant EU Directives
- Regulations transposing EU AQ Directive
 - Air Quality Standards Regulations 2010

NATIONAL OBJECTIVES FOR POLLUTANTS

- Environment Act 1995
- Air Quality (England) Regulations 2000
- The Secretary of State, in exercise of the powers conferred on him by section 87(1) and (2) and 91(1) of the Environment Act 1995 and of all other powers enabling him in that behalf, having, in accordance with section 87(7) of the 1995 Act, consulted the Environment Agency, such bodies or persons appearing to him to be representative of the interests of local government and of industry as he considers appropriate, and such other bodies or persons as he considers appropriate, hereby makes the following Regulations, a draft of which has, in accordance with section 87(8) of the 1995 Act, been laid before, and approved by a resolution of, each House of Parliament:
- air quality standards, action plans timing



NATIONAL OBJECTIVES FOR POLLUTANTS

- Air Quality (England) Regulations 2000
- 4. It is an air quality objective for each substance listed ... in the Schedule to these Regulations that the level at which that substance is present in the air is restricted to a level set out ... for that substance by no later than the date set out ... for that substance and level.
- “objective” ... only

EU LIMIT VALUES

- Air Quality Standards Regulations 2010
 - Coming into force, 11th June 2010
- The Secretary of State, having been designated for the purposes of section 2(2) of the European Communities Act 1972 in relation to the environment, makes the following Regulations under the powers conferred by that section.

EU LIMIT VALUES

- Air Quality Standards Regulations 2010
 - The Secretary of State must divide the territory of England into zones and agglomerations.
 - SoS must install sampling points etc
 - SoS must ensure that levels of sulphur dioxide, nitrogen dioxide, benzene, carbon monoxide, lead and particulate matter do not exceed the limit values
 - SoS must ensure that all necessary measures not entailing disproportionate costs are taken to ensure that concentrations of PM2.5, ozone, arsenic, cadmium, nickel and benzo(a)pyrene do not exceed the target values

EU LIMIT VALUES AND PLANS

- Air quality plans
- 26.—(1) Where the levels of sulphur dioxide, nitrogen dioxide, benzene, carbon monoxide, lead and PM10 in ambient air exceed any of the limit values ... or the level of PM2.5 exceeds the target value ..., the Secretary of State must draw up and implement an air quality plan so as to achieve that limit value or target value.
- (2) The air quality plan must include measures intended to ensure compliance with any relevant limit value within the shortest possible time.

NO₂ AQO EXAMPLE

National air quality objectives and European Directive limit and target values for the protection of human health							
Pollutant	Applies	Objective	Concentration measured as ¹⁰	Date to be achieved by and maintained thereafter	European obligations	Date to be achieved by and maintained thereafter	New or existing
Nitrogen dioxide	UK	200µg.m ⁻³ not to be exceeded more than 18 times a year	1 hour mean	31 December 2005	200µg.m ⁻³ not to be exceeded more than 18 times a year	1 January 2010	Retain existing
	UK	40µg.m ⁻³	annual mean	31 December 2005	40µg.m ⁻³	1 January 2010	
Ozone	UK	100µg.m ⁻³ not to be	8 hour mean	31 December 2005	Target of 120µg.m ⁻³ not to	31 December	

CLIENTEARTH [2015] RECAP

- High Court [2011] and Court of Appeal [2012] said leave to the European Commission to enforce
- Supreme Court [2015] made a declaration that the UK was in breach of Article 13 of the Directive on ambient air quality and cleaner air for Europe (2008/50/EC)
 - *“The new government, whatever its political complexion, should be left in no doubt as to the need for immediate action to address this issue.”*
 - fails to comply with Art. 23(1) of the AQ Directive and Reg.26(2) of Air Quality Standards Regulations 2010.

CLIENTEARTH (No.2) [2016] RECAP

- the proper construction of Art. 23:- the SoS must aim to achieve compliance by the soonest date possible, that she must choose a route to that objective which reduces exposure as quickly as possible, and that she must take steps which mean meeting the value limits is not just possible, but likely;
- the SoS fell into error in fixing on a projected compliance date of 2020 (and 2025 for London);
- the SoS fell into error by adopting too optimistic a model for future emissions; and
- appropriate to make a declaration that the 2015 AQP fails to comply with Art. 23(1) of the Directive and Reg.26(2) of the Air Quality Standards Regulations 2010

GREAT REPEAL BILL (CURRENTLY)

- Repeals European Communities Act 1972
- Converts EU law (only as it stands when we exit) into domestic law;
- Old caselaw remains binding authority, apart from on the Supreme Court;
- Power to use statutory instruments to amend legislation ('Henry VIII power');
- Appears to remove environmental 'principles' (in the Treaties) post-Brexit

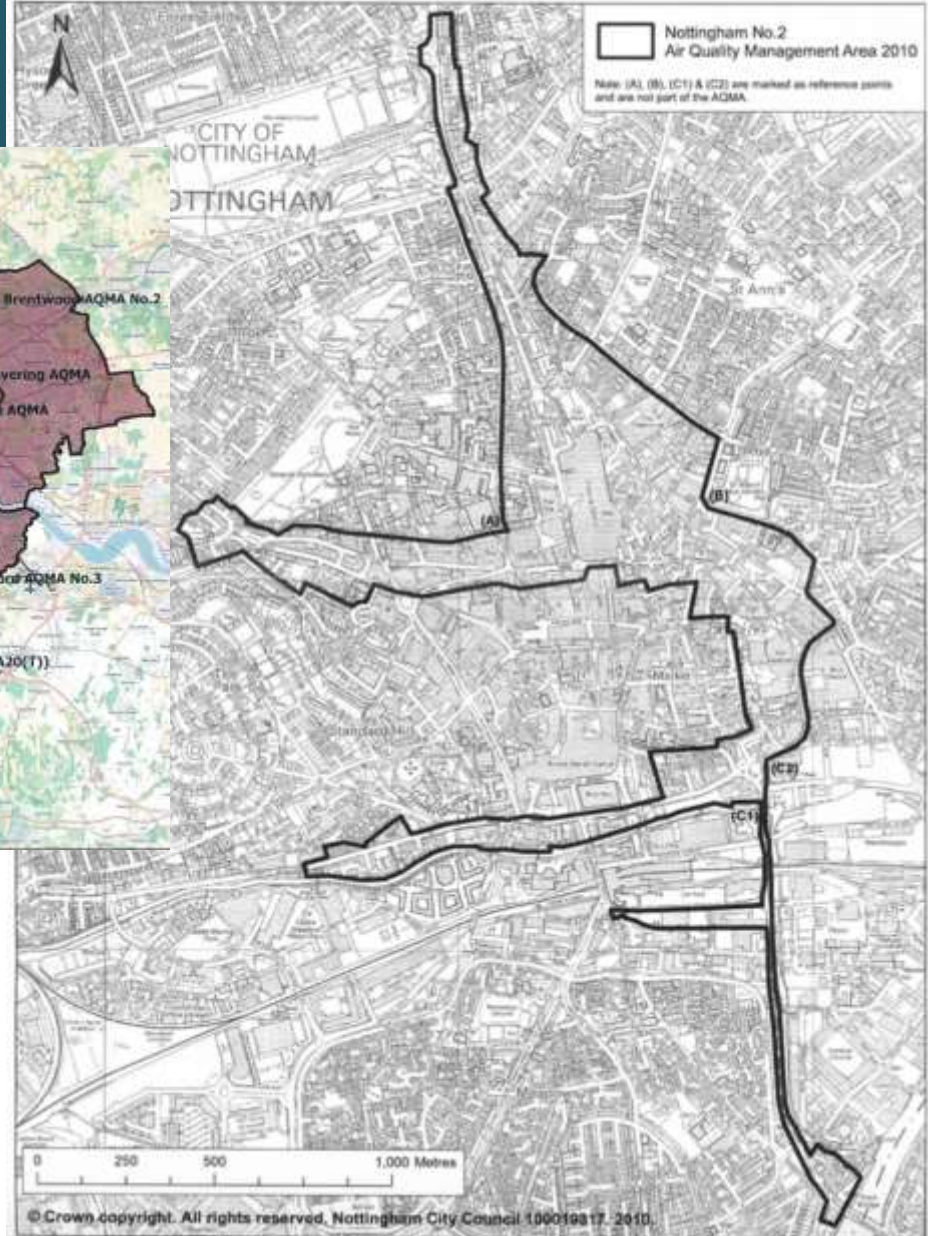


BREXIT OMISSIONS

- No jurisdiction for the Court of Justice
- No jurisdiction for European Commission
 - No infraction proceedings threat
 - No cost-free complaints, investigations, Court of Justice cases, and possible fines vs. UK
 - No reporting requirements
- There may be plans for a new UK-based 'Commission' to supervise it (Gove)
 - It had been said it was not needed: the government will be accountable to Parliament.

AQMAs

Map referred to in the
Nottingham No.2 Air Quality Management, 2002 (Nitrogen Dioxide)
Variation Order 2010



AQ AS A MATERIAL PLANNING CONSIDERATION

- NPPF is explicit about what is unacceptable when it comes an AQMA area:
 - “124. Planning policies should sustain compliance with and contribute towards EU limit values or national objectives for pollutants, taking into account the presence of Air Quality Management Areas and the cumulative impacts on air quality from individual sites in local areas. Planning decisions should ensure that any new development in Air Quality Management Areas is consistent with the local air quality action plan.”

AQ AS A MATERIAL PLANNING CONSIDERATION

- Planning Practice Guidance:
- “Will the proposed development (including mitigation) lead to an unacceptable risk from air pollution, prevent sustained compliance with EU limit values or national objectives for pollutants or fail to comply with the requirements of the Habitats Directives ?”
- If the answer to this is ‘yes’, the PPG advises the LPA to
 - “consider how proposal could be amended to make it acceptable or, where not practicable, consider whether planning permission should be refused.”

PLANNING COURT CASES

- *Gladman Developments Ltd. v SSCLG and others* [2017]
 - Refusal of 330 houses on AQMA grounds and poor mitigation
- Ashdown Forest cases
 - Nitrogen deposits from traffic, and European Sites
 - Local plans quashed: *Wealden DC v SSCLG & Lewes DC & South Downs NPA* [2017]
 - Local development quashed: *Wealden DC v SSCLG (and Knight Developments Ltd)* [2017]
- Future ?

THANK YOU ...

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(with thanks to Mark Davies, 6 Pump Court)

