

Heathrow Airport Expansion Consultation

ClientEarth written response

This is ClientEarth's written response to the current Heathrow Airport Expansion Consultation. Specifically, this document sets out some of ClientEarth's concerns regarding the air quality impacts of the proposed DCO Project and the conclusions reached in Chapter 7 of the Preliminary Environmental Information Report (the "PEIR").

The 5,000 character limit to consultation response submissions via the online platform does not provide ClientEarth with sufficient opportunity to respond with a level of detail that it considers is useful to inform the Applicant's approach going forward. This response has therefore been submitted via email.

ClientEarth has not set out in this document every point of disagreement nor every legal point which it or others may wish to rely on in the future. ClientEarth reserves its right to comment further on the Applicant's full Environmental Statement.

Capitalised terms are as defined in the consultation documents.

Background and context

Throughout the UK, concentrations of nitrogen dioxide ("NO₂") continue to breach the annual mean legal limit value established by the Ambient Air Quality Directive (2008/50/EC) (the "Air Quality Directive"). Levels of this pollutant at locations across Greater London are amongst the worst in the country and concentrations at roadside locations around Heathrow airport continue to reach levels well above the 40µg/m³ legal threshold.

Where limit values continue to be breached, the Secretary of State is under a legal duty to identify and implement measures to ensure that compliance is achieved in the "shortest possible time".¹ The Airports National Policy Statement (the "ANPS") requires that, as part of its application for development consent, the Applicant must demonstrate that the construction and operation of the DCO Project will not affect the UK's ability to comply with legal obligations, including those that

¹ See Article 23 of the Air Quality Directive and Regulation 26 of the Air Quality Standards Regulations 2010

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flow from the Air Quality Directive. The ANPS is clear that failure to demonstrate this will result in refusal of development consent.²

The published consultation documents suggest that the Applicant's assessment of the air quality impacts of the proposed DCO Project would "*not affect the UK's ability to comply with legal obligations, including EU limit values...*".³ For the reasons set out below, ClientEarth has serious concerns about the basis on which the Applicant has reached this conclusion and the factors against which it has and continues to carry out its assessment of the DCO Project's projected impact on the UK's compliance with the Air Quality Directive.

High risk of impact on compliance with the Air Quality Directive

The Applicant's preliminary assessment suggests that the construction phase of the DCO Project will exacerbate existing illegal and dangerous levels of NO₂, both around Heathrow and at locations elsewhere in central London. The Project is set to increase exceedances of the annual mean limit value on six modelled PCM road links in the vicinity of the airport in 2022 and cause otherwise compliant pollution levels on one PCM road link to be pushed into exceedance.⁴ The PEIR states that the DCO Project is also expected to worsen pollution levels in central London; causing increases in illegal levels of pollution projected along stretches of the A4.⁵

On this basis, the preliminary assessment of the risk of non-compliance with the Air Quality Directive concludes that the scheme is "High Risk" when considering construction impacts in 2022.⁶ The equivalent risk in the years 2023-2026 does not appear to have been assessed.

Despite these findings, the PEIR concludes that the overall effects of the scheme on NO₂ concentrations at PCM locations are "not significant". This conclusion has been reached on the basis that "*the DCO Project will not:*

- a. result in a zone or agglomeration which is reported as being compliant with the Ambient Air Quality Directive (2008/50/EC) ('the Air Quality Directive') becoming non-compliant; or*
- b. affect the ability of a non-compliant zone or agglomeration to achieve compliance within the most recent timescales reported to the European Commission."*⁷

The Applicant appears to have concluded that as long as the scheme does not delay compliance of the whole Greater London zone, the substantial increase of already illegal NO₂ concentrations should not be deemed "significant" for the purposes of the assessment. This two-limbed test is also reflected in the proposed limit set out in the Applicant's Environmentally Managed Growth Framework. This is a concerning and contradictory approach. Permitting a scheme that worsens

² See Section 5.32

³ See PEIR Chapter 7, Table 7.2

⁴ See PEIR, Chapter 7, Table 7.48

⁵ See PEIR, Chapter 7, paragraph 7.10.153

⁶ See PEIR, Chapter 7, paragraph 7.10.161

⁷ see Chapter 7, Table 7.52

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the already dangerous levels of air pollution experienced in London on the basis that pollution levels will continue to be even higher elsewhere in the zone cannot be acceptable.

Such an approach also runs contrary to established legal tests. The courts have been clear that when addressing continuing exceedances of limit values, the approach taken by the Secretary of State must:

1. aim to achieve compliance as soon as possible;
2. choose a route to compliance which reduced human exposure as quickly as possible;
and
3. ensure that compliance with the limit values is not just possible but likely.⁸

This means that the Air Quality Directive not only requires measures to be taken to reduce pollution to within legal limits as soon as possible, it also requires that in the meantime concentrations are reduced as quickly as possible at all locations across the zone. Higher levels of pollution elsewhere in Greater London should not preclude the need for urgent action to address exceedances and reduce pollutant concentrations at all points across the zone nor enable the approval of schemes that undermine such action.

Both the European Commission and the Court of Justice of the EU have clarified that Member States' obligation of result to achieve pollution concentrations within legal limit values applies throughout all zones and that compliance is relevant at each sampling point, not simply across the zone as a whole.⁹ However, this does not appear to have been reflected in the approach being applied by the Applicant.

While the PEIR suggests that in the assessment carried out for the Environmental Statement mitigation measures will “*avoid or reduce*” the effect on compliance with NO₂ limit values during the construction phase, no evidence has yet been provided to substantiate this claim.

As part of the Applicant's full assessment, it will need to show that the scheme will not (a) exacerbate existing exceedances of the NO₂ limit value, (b) cause new exceedances or (c) delay the date by which compliance will be achieved. This is necessary with respect to all individual road links throughout the Greater London zone, as well as all years of the construction and operational phases of the DCO Project. If the Applicant fails to evidence this, the proposed DCO Project risks failing to satisfy the conditions of the ANPS.

ClientEarth is concerned that at present the projected air quality impacts of the proposed scheme between 2023 and 2026 have not yet been published. Given that the PEIR shows that NO₂ concentrations at a number of modelled locations in the vicinity of the airport are projected to

⁸ R (on the application of ClientEarth (No.2)) v Secretary of State for the Environment Food and Rural Affairs and otherst [2016] EWHC 2740, see paragraph 95

⁹ See Case C-723/17 Lies Craeynest and Others v Brussels Hoofdstedelijk Gewest and Others; and letter to Clean Air London from the European Commission dated 19 February 2014, available here: https://cleanair.london/app/uploads/CAL-269-Letter-of-clarification-from-the-Commission-190214_Redacted.pdf

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remain well above the $40\mu\text{g}/\text{m}^3$ limit value in 2022, there is a clear risk that the DCO Project will continue to worsen exceedances in the years that follow, as well delay the year by which NO_2 concentrations on individual road links are projected to fall into compliance. In order to provide a more complete understanding of the impact upon NO_2 concentrations and the UK's compliance with limit values (and thus the DCO Project's compliance with the relevant ANPS conditions), as part of the full assessment in the Environment Statement we urge the Applicant to estimate the projected pollutant concentrations in all years between 2022 and 2027, both in the vicinity of the airport and across the rest of the London zone.

ClientEarth is a non-profit environmental law organisation based in London, Brussels and Warsaw. We are activist lawyers working at the interface of law, science and policy. Using the power of the law, we develop legal strategies and tools to address major environmental issues.

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