

**Planning Act 2008 (as amended) and The Infrastructure Planning (Examination Procedure) Rules 2010 (as amended) – Rule 17**

**Application by Transport for London (TfL) for an Order Granting Development Consent for the Silvertown Tunnel Project**

**Further response of Friends of the Earth England Wales & Northern Ireland following request for further information re. Clientearth judgment**

1. Friends of the Earth England Wales & Northern Ireland (“FoE”) believes that there remain significant outstanding questions concerning compliance of the development with UK air quality law in light of the Clientearth judgments. FoE consider that any decision to grant development consent at this stage would be premature and unsafe pending greater clarity on key aspects of UK air quality policy.
2. FoE reminds the ExA that fundamental aspects of air quality policy in this country are subject to change as a result of the Clientearth judgment. DEFRA is required to undertake fresh modelling; to adopt a new air quality plan; and set earlier dates for compliance including in London. Re-modelling on less optimistic assumptions is expected to mean more air pollution than previously assumed. FoE also reiterates that it is no longer lawful to assess impacts by reference to whether they affect overall compliance by the relevant date (see representations of 15 November).
3. Given the uncertainty in this area, any decision to grant development consent at this stage may be unsafe, on the basis that it pre-supposes a degree of clarity about the impacts of future activity which, *a posteriori*, is currently unattainable. For example, the developer cannot make robust assumptions about levels of pollution in particular areas (as a result of the development), because this is necessarily subject to change through fresh modelling. The proposal that air quality assessment be carried out *after* permission is granted is flawed. The ExA must know, with a reasonable degree of certainty, the likely impacts of the development and whether it is likely to comply with air quality law *before* granting consent.
4. Case law concerning Environmental Impact Assessment simply underlines these points. Leading decisions make clear the importance of adopting a precautionary approach to EIA development where uncertainty exists as to environmental impacts:

“The decision maker must have regard to the precautionary principle and to the degree of uncertainty, as to environmental impact, at the date of the decision. Depending on the information available, the decision maker may or may not be able to make a judgment as to the likelihood of significant effects on the environment. There may be cases where the uncertainties are such that a negative decision cannot be taken.”<sup>1</sup>

The precautionary nature of Environmental Impact Assessment has also been underlined by the Supreme Court<sup>2</sup>.

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<sup>1</sup> R (Loader) v SSCLG [2013] Env LR 7 (at [43]) by Pill LJ

<sup>2</sup> R v North Norfolk District Council ex parte Champion 2013] EWCA Civ 1657 as per Lord Carnwath at Para 51 ‘Application of the precautionary principle, which underlies the EIA Directive, implies that cases of material doubt should generally be resolved in favour of EIA’