To:
Secretary of State for Transport
c/o Silvertown Tunnel Case Team
The Planning Inspectorate
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From:
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Response to the Secretary of State's invitation for interested parties to comment on his letter of 26 February 2018 (https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/TR010021/TR010021-002207-DfT%20Consultation%20letter%206%20FINAL.pdf)

Friends of the Earth has some comments on the Updated Air Quality Assessment (https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/TR010021/TR010021-002203-Applicant%20Response%20-%20Updated%20Air%20Quality%20Assessment.pdf) including the following:

We refer to our most recent previous submission on the issue of air pollution and the Silvertown Tunnel proposal: https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/TR010021/TR010021-002096-Friends%20of%20the%20Earth.pdf, which in turn refers to previous submissions.

Friends of the Earth welcomes the publication of EFTv8 and the request to TfL to re-assess their air quality assessment using EFTv8 tools (as per our request in our most recent previous submission).

Overall however, while TfL state that their assessment does not change their view that the scheme complies with requirements, our view is also unchanged in that it is clear that the scheme still fails to meet legal requirements, particularly as TfL continue to rely on guidance which is not in line with legal requirements, rather than assessing the scheme against actual legal requirements. As a consequence the scheme must be rejected on current information, or would at least need mitigation, but would be expected to continue to pose serious risks and should anyway be rejected, if the Mayor does not scrap his proposals.

In relation to DfT request 1, we question the adjustment of EFTv8 to fit with the TfL 2012 base year (as referred to at 1.1.3), and whether the calculations could have been done the other way around, and what impact that might have had on results.

In relation to DfT request 2, we have serious concerns and do not consider TfL's approach adequate, or in line with legal requirements.

TfL introduces the test of whether the scheme would affect the ability of London to achieve compliance within the most recent timescales reported by Defra in their latest AQ plan, and say that they make this assessment in accordance with IAN 175/13 (at 1.2.5).

However IAN 175/13 is listed as: “A new version of the IAN is pending” as is the supporting CRA, and there is not even a link to it (or the supporting CRA) on the IANs website: http://www.standardsforhighways.co.uk/ha/standards/ians/.
Perhaps this is due to it needing to be revised to reflect legal requirements, which its tests certainly don’t reflect, as they stood.

However it is not just IAN 175/13 which doesn’t reflect legal requirement, as for instance we consider the related National Networks NPS (which has effectively the wording TfL use in 1.2.5) to not reflect legal requirements, which must take ultimate precedence.

From IAN 175/13:

- A compliant zone becoming non-compliant; and / or

- Delay Defra’s date for achieving compliance for the zone i.e. the change on a road link would result in concentration higher than the existing maximum value in the zone.

From the NN NPS:

5.13 The Secretary of State should refuse consent where, after taking into account mitigation, the air quality impacts of the scheme will:

- result in a zone/agglomeration which is currently reported as being compliant with the Air Quality Directive becoming non-compliant; or
- 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.

(https://www.gov.uk/government/collections/national-networks-national-policy-statement)

The key paragraphs in relation to tests which are inadequate to assess compliance with legal requirements are those in Chapter 3 on the ‘Baseline’ projection from the government’s 2017 AQ Plan for NO2 (paras 3.17 to 3.1.11), and on that for ‘with CAZ’ projection (paras 3.1.12 to 3.1.16), and related Tables C1 and C2 in Annex C.

For the Baseline scenario, in C1, there are x9 places which Friends of the Earth considers to have an issue, x7 of which would see levels already over legal limits further worsened, and 2 new breaches, as a result of the schemel.

For the CAZ scenario, in C2, there are x6 places which would see levels already over legal limits further worsened.

However TfL discount nearly all of these due to the change as a result of the scheme being 0.4 µg/m³ or less (as per paras 3.1.7 and 3.1.12, and Tables 3-1 and 3-2, respectively).
However Friends of the Earth don’t consider that those places with lesser degrees of worsened levels should be discounted - EU law doesn’t give a threshold and 0.1 should be relevant – that is a material change in the levels recorded, and thus significant.

However TfL admits 1 place which would see levels already over legal limits further worsened, by a 0.7 µg/m³ change - in each projection (as per paras 3.1.8 and 3.1.13 respectively).
However Friends of the Earth considers that it shouldn’t be just 1 place in each of the projections, but rather x9 places with issues in the Baseline projection, and x6 in the with CAZ one.

Further, TfL claim that even the 1 place for each projection (which they admit would see levels already over legal limits worsened by a 0.7 μg/m³ change) doesn't count as elsewhere in London (unaffected by the scheme) would have even higher levels, and so they argue that the scheme doesn't delay the London AQ Zone complying with EU limits (paras 3.1.9 and 3.1.14 respectively).
However Friends of the Earth considers that whether elsewhere in London would have even worse air is irrelevant– see below

TfL claim that the scheme passes all their tests (paras 3.1.10 and 3.1.15 respectively).
However Friends of the Earth considers that the tests, and TfL's reliance on guidance for the tests rather than on legal requirements themselves, are inadequate and not in line with legal requirements:

a. TfL claim that the scheme does not "delay the timescales in which the Greater London Urban Area is expected to achieve compliance with the Air Quality Directive"…
   However Friends of the Earth considers that a test just of whether the scheme would delay the London complying with EU limits (using the argument that it wouldn't delay it if elsewhere in London unaffected by the scheme has even worse air), is not adequate, and that a worsening of air pollution already over legal limits anywhere in London is not compatible with legal requirements.

b. TfL claim that the scheme does not "change the compliance status of the Greater London Urban Area" …..
   However Friends of the Earth considers that just a test of whether the scheme would take London from compliant to non-compliant (ie only the first time levels went over) is not adequate, and that a new breach (ie going from under to over limits) anywhere in London is not compatible with legal requirements.

Friends of the Earth refers to some supporting material (also previously also referred to) – an EU clarification letter to Clean Air in London, the McCracken QC opinion, and Client Earth judgements (CE 2 and CE3), links to which are at the bottom.

The McCracken QC opinion at para 3 sets out the point on worsening pollution where it is already in breach: "Where a development would in the locality either make significantly worse an existing breach …. It must be refused." (with a caveat cited as paras 49 and 50, but which may actually be meant to be 48 and 49) There are further detail in para 50.

There is further support for not worsening air already over limits from the Client Earth 2 High Court ruling of November 2016, as set out in the conclusions where it states that the Secretary of State "must choose a route to that objective [of aiming to achieve compliance by the soonest date possible] which reduces exposure as quickly as possible" (paragraph 95 i). Adding to levels already over limits anywhere is not reducing exposure for those people.

And that conclusion is repeated in the recent Client Earth ruling (CE3):

> "73. As I explained in the November 2016 judgment, the proper construction of Article 23 imposes a three-fold obligation on the Secretary of State; he must aim to achieve compliance by the soonest date possible; he must choose a route to that objective which reduces exposure as quickly as possible; and that he must take steps which mean meeting the value limits is not just possible, but likely. ….."

The McCracken QC opinion, at para 2 refers to the issue of a new breach: "Where a development would cause a breach in the locality of the development they must refuse permission" (with a caveat cited as paras 49 and 50, but which may actually be meant to be 48 and 49).

The McCracken QC opinion, at para 42 also refers to EU law applying everywhere in a Zone, ie 'throughout' it, with the EU clarification to Clean Air in London (point 2) making that clear: "…Limit Values must indeed be complied with throughout the territory of any given air quality zone".

c. TfL claim the scheme "does not …. result in an overall increase in concentrations on roads that exceed, as presented in Table 3-2." (for the CAZ projection). However Friends of the Earth considers that linking the place which would see levels already over legal limits worsened, with the place which would see an improvement in Table 3-2 (for the with CAZ projection) is not compatible with EU law, as compliance can't be assessed as an average of concentrations within an AQ Zone.

The EU clarification to Clean Air in London states that "compliance should not be determined nor assessed as an 'average' of concentrations measured in different locations within the same zone" - at point 2. And as per above, the McCracken QC opinion section from para 42 on the need to meet limits throughout Zones refers to not averaging, and point 2 of the clarification to CAL also refers to needing to meet limits throughout a Zone.

It is not clear whether there has been any assessment of the uncertainty in relation to air quality assumptions set out in the government's 2017 AQ Plan for NO2 of +/- 29%, but presumably the results are based on the central case, with no sensitivity case of levels being +29%. This means however that there is a high risk that levels could be considerably higher, meaning further worsening of levels already over limits, and further new exceedances from levels currently assessed as below limits with the scheme (though of course levels could also be lower).

In addition we have previously set out how there are various reasons why the transport assessments could well be underestimates, and also how the cost differential planned from tolling so essential to assumptions about controlling traffic levels, could be undermined by different charging regimes in London such as a London-wide Ultra Low Emission Zone.

And these are just the locations assessed for legal compliance, when the Directive applies everywhere (generally where the public has access, with a few exceptions), and thus issues at other locations such as those assessed for meeting AQ Objectives (which seem to number 17 in total – Table 4-1) should also be relevant.

In relation to DfT request 3, we are clear that the risk of compliance TfL have come to is completely inadequate, and that the scheme would clearly fail proper compliance tests. Thus this should clearly result in an assessment of a significant impact.
This would be even on the basis of IAN 174/13, which we do not consider adequate – for instance we do not consider that number of receptors experiencing an improvement versus those experiencing a deterioration is relevant.

Thus the scheme must be rejected on current information, or would at least need mitigation, but would be expected to continue to pose serious risks and should actually anyway be rejected if the Mayor does not scrap his proposals.

TfL's assurance (at para 5.1.10) that a further assessment would be carried out prior to opening to determine user charges is no comfort or alternative – if the scheme then showed it should not have been built it would be too late.

An alternative maximum non-road package of measures to address current problems has never been evaluated, but must be.

LINKS:

McCracken QC opinion
http://cleanair.london/legal/clean-air-in-london-obtains-qc-opinion-on-air-quality-law-including-at-heathrow/attachment/cal-304-letter-of-clarification-from-the-commission-190214_redacted-5/

EU clarification to Clean Air in London
http://cleanair.london/legal/clean-air-in-london-obtains-qc-opinion-on-air-quality-law-including-at-heathrow/attachment/cal-322-robert-mccracken-qc-opinion-for-cal_air-quality-directive-and-planning_signed-061015/

Client Earth 2: http://www.documents.clientearth.org/library/download-info/high-court-ruling-on-clientearth-no-2-vs-ssefra-uk-air-pollution-plans/

Client Earth 3: https://www.judiciary.gov.uk/judgments/the-queen-on-the-application-of-clientearth-no-3-claimant-v-secretary-of-state-for-environment-food-and-rural-affairs-and-othrs/ or http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/Admin/2018/315.html&query=(clientearth)