Thank you for your letter dated 5 October 2017 regarding the revised National Air Quality Plan (NAQP). I apologise for the delay in replying.

Save for repeating a commitment to a single Low Emission Zone (LEZ) in Scotland in 2018 (echoing the 2017 SNP Programme for Government), the NAQP does not describe any additional measures for Scotland over and above those contained in its 2015 predecessor (which was declared unsound by the High Court in 2016). The NAQP does not, therefore, contain measures which make it likely that limit values would be met in all parts of Scotland in the shortest time possible.

However, the Scottish Government’s new Programme for Government (published on 5 September 2017) does contain a commitment to creating a LEZ in one city by the end of 2018 and working to introduce LEZs into Scotland’s four biggest cities by 2020, and to all Air Quality Management Areas by 2023. To this end, the Scottish Government published a consultation on 6 September 2017 making proposals for such LEZs. Please see attached our response (Annexe A) that sets out our concerns about a lack of a firm commitment to introducing LEZs by a certain date.

In order to comply with the law, the Scottish Government must ensure that LEZs are not just in place, but also operational as soon as possible. This should be its primary consideration when reviewing responses to the consultation and, ultimately, when designing, establishing and operating Scottish LEZs. We will be closely monitoring the implementation of measures to determine whether legal requirements are being met.
The proposals for Low Emission Zones (LEZs) in Scotland need to be considered in the light of the judgments in *ClientEarth 1* and *ClientEarth 2* and in particular the Courts' articulation of the obligations that flow from Article 23 of the EU Ambient Air Quality Directive (the "Directive"), which requires that where limit values are breached after the relevant deadline, the competent authorities must prepare an air quality plan containing appropriate measures to keep the exceedence period as short as possible.

In Scotland, these provisions are transposed through the Air Quality Standards (Scotland) Regulations 2010, under which the Scottish Ministers are responsible for achieving air quality standards and preparing air quality plans.

In *ClientEarth 2*, Mr Justice Garnham set out a three-part test for assessing air quality plans, based on the proper construction of Article 23:

1. **Aim to achieve compliance as soon as possible** (meaning that in selecting measures, the determining consideration has to be their efficacy and not their cost);  
2. **Choose a route to compliance which reduces human exposure as quickly as possible**; and 
3. **Ensure that compliance with the limit values is not just possible but likely**.

The Court ruled that the 2015 Air Quality Plan failed this test, and ordered the Secretary of State to prepare a modified plan. A final revised plan (the "2017 AQP") was published in July this year.

*ClientEarth* has filed an application for permission to judicially review the 2017 AQP on the basis that it does not contain measures to achieve compliance with nitrogen dioxide (NO₂) limits in the shortest time possible in all non-compliant zones and agglomerations in England and Wales. The claim names the Welsh Ministers as joint defendants, in view of their responsibilities for achieving air quality standards and preparing air quality plans in Wales, pursuant to the Air Quality Standards (Wales) Regulations 2010.

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1 Paragraph 95.  
2 Paragraph 50.
In particular, our grounds challenge the failure of the 2017 AQP to set out a clear timetable for implementation of specific additional measures and estimated improvements in air quality, as required by Annex XV to the Directive.

We consider that the 2017 AQP similarly fails to set out measures to ensure compliance with NO₂ limits as soon as possible in Scotland.

The 2017 AQP committed to holding a “consultation on detailed proposals for the establishment and operation of Scotland’s first Low Emission Zone by 2018, along with the development of Scotland’s National Low Emission Framework” by the end of August 2017. We had anticipated that this consultation would lay out detailed proposals for the introduction of LEZs in particular cities, alongside full impact assessments demonstrating the impacts that various LEZ scenarios would have on bringing forward projected compliance dates.

However, this consultation explicitly states that it is not about "the design or implementation of any individual town or city-specific LEZ" and no other consultation has been published to do this at the time of writing.

This is an inadequate response to the serious and ongoing legal breaches of air quality standards in Scotland.

**The Low Emission Zone proposals**

We welcome the Scottish government's commitment to ensuring that Scotland has the best air quality in Europe. This is an opportunity for Scotland to show leadership on this important public health issue.

We welcome that the Scottish government is proposing to introduce LEZs where the analysis shows they are needed. In particular, we welcome also the commitment to investigate the scope for urban wide LEZs with a specific focus on carbon dioxide (CO₂) emissions, as well as air pollution.

We also agree that a national framework for LEZs and an Air Quality Fund are essential for ensuring the effective implementation of LEZs.

We also commend the Scottish government for identifying the opportunity to make Scotland a leader in clean air solutions through the introduction an Engine Retrofitting Centre. This could not only support the delivery of LEZs but also support the growth of a more sustainable economy through the creation of new jobs and industries.

However, we are concerned by the lack of progress shown by these proposals, which seem to be at an early stage and do not demonstrate the required urgency to achieve limits as soon as possible. The proposals do not meet the legal test of ensuring compliance in the shortest time possible. In particular, the proposals:

1. Contain no clear and formal commitment to introducing the National Low Emission Framework (NLEF) by a particular date.
2. Contain no clear and formal commitments to introducing LEZs according to a clear and urgent timetable, contrary to Annex XV to the Directive.

3. Are not supported by details on proposed LEZs, such as their likely size and location, classes of vehicle affected or information on the projected impacts of LEZs, contrary to Annex XV of the Directive.

4. Suggest the potential use of "sunset periods" and "lead-in times" that could render the LEZ introduced in 2018 ineffective until 2023 and in the case of the other three proposed LEZs until 2025. This would clearly be contrary to the requirement to achieve compliance as soon as possible.

We trust that these concerns will be adequately addressed in the Scottish Government's response to the consultation, alongside a detailed and urgent timetable outlining the next steps in the process. We would welcome the opportunity to meet with the relevant Ministers and officials to discuss our concerns and suggestions for improving the proposals in more detail.

The following addresses the relevant questions as set out in the consultation:

**Do you support the principle of LEZs to help improve Scottish air quality?**

ClientEarth fully supports the principle of LEZs to help improve air quality. We believe that these should be introduced where the analysis shows they would achieve compliance with air quality standards as soon as possible. According to the Scottish government “Scotland is not meeting European limit values or Scottish Air Quality Objectives at a number of locations across town and cities in Scotland, primarily as a result of transport emissions.” LEZs have been identified by the UK government, in its own technical analysis, as the most effective measure they can model to achieve compliance with legal limits in the shortest time possible.

However, LEZs will only be effective if properly designed and enforced and introduced sufficiently early.

We also welcome the opportunity to comment on the development of the NLEF. The NLEF is also key to ensuring that LEZs operate in a consistent manner, providing a level playing field and making it easier for the public and businesses to adapt to them.

**Do you agree that the primary objective of LEZs should be to support the achievement of Scottish Air Quality Objectives? If not, why not?**

The primary objective of LEZs should be the achievement of the NO₂ limit values laid down in the Directive as transposed by the Air Quality Standards (Scotland) Regulations 2010, in view of the legal obligation to ensure compliance with those limits as soon as possible.

However, LEZs should also support the achievement of Scottish Air Quality Objectives. In the case of NO₂, these are numerically identical to the limit values but
assessed according to different criteria. In some cases this can lead to discrepancies between assessments of compliance with limit values and objectives. Where such discrepancies exist, LEZs should be introduced so as to ensure compliance with both.

LEZs should also be used to support the achievement of Scottish Air Quality Objectives. The Scottish objectives for particulate matter (PM$_{10}$ and PM$_{2.5}$) are lower than the limit values and, therefore, this would be an additional opportunity to deliver greater health impacts by also seeking to reduce concentration levels of PM$_{10}$ and PM$_{2.5}$.

LEZs should also aim to maximise co-benefits for human health and climate change mitigation, by maximising reductions in emissions of CO$_2$ and black carbon - a potent short-lived climate pollutant. LEZs should therefore aim to reduce the number of vehicles on the road and incentivise use of public transport, cycling and walking and accelerate the introduction of ultra-low and zero-emission vehicles.

**Do you agree with the proposed minimum mandatory Euro emission criteria for Scottish LEZs?**

The NLEF should set consistent minimum mandatory emission criteria that encourages the use of the cleanest vehicles available. However, in using the Euro Standards the Scottish government should address the inherent issues with how vehicles perform on the road in comparison to the actual emissions limits set. This is not just an issue with older vehicles: a recent study showed that only 10% of Euro 6 cars tested meet the emission limit under real driving conditions, with some exceeding the standard by a factor of ten or more.

The application of generous "conformity factors" in the new Real-Driving Emissions test and the lack of transparency over how manufacturers achieve these means that many Euro 6 cars are unlikely to achieve the emission limit even after 2021.

The Scottish government should look to develop a vehicle certification scheme to ensure that only those vehicles that meet the Euro 6 emission standard on the road with a conformity factor of 1 can enter LEZs. This could be based on the work by the Mayor of London, Emissions Analytics and the International Council on Clean Transport.

The Scottish government should also take the opportunity to use LEZ emission criteria to set a path towards a zero emissions transport network. This will not only help to meet the more ambitious Scottish objectives for PM but also contribute towards other important policy areas, such as climate change. Setting a path towards zero emissions early on in the process will also help the public and business plan their transport investment with greater certainty.
Do you agree with the proposal to use the NMF modelling in tandem with the NLEF appraisal to identify the vehicle types for inclusion within a LEZ?

LEZs should be designed in response to the best possible analysis of the evidence. The Scottish government has a duty to ensure that this also reflects the legal tests as set out in ClientEarth 2.

Should emission sources from construction machinery and/or large or small van refrigerated units be included in the LEZ scope, and if so should their inclusion be immediate or after a period of time?

There is increasing evidence about the contribution that these sources make towards air pollution levels in urban areas. A comprehensive analysis should be undertaken where legal limits are breached and LEZs should be developed to address all road and non-road sources, making use of all available technologies to deliver compliance in the shortest time possible.

What are your views on adopting a national road access restriction scheme for LEZs across different classes of vehicles?

As set out in the legal tests for ClientEarth 2, if the evidence shows that road access restriction schemes can deliver compliance faster than road charging then they should be the favoured measure.

What are your views on the proposed LEZ hours of operation, in particular whether local authorities should be able to decide on LEZ hours of operation for their own LEZs?

LEZs should be designed to maximise the likelihood that legal limits are achieved in the shortest time possible. The hours of operation should be designed to minimise the risk of displacing emissions to other times of the day or to other geographical areas.

In addition to this, we would support LEZs to operate under a national framework that ensure a basic level of consistency between LEZs. This will not only help people and businesses driving between different LEZs but will also help provide a playing level field for the areas with LEZs.

What are your views on Automatic Number Plate Recognition enforcement of LEZs?

Enforcement is crucial for the effective operation of a LEZ so we would support the use of Automatic Number Plate Recognition technology. We would encourage a national approach to developing and implementing this system to deliver this quickly and efficiently.
What exemptions should be applied to allow LEZ to operate robustly?

Exemptions should be considered for individuals who have a genuine need to drive in LEZs due to health and mobility issues. However, given the urgent and legal requirement to meet legal limits in the shortest time possible a greater emphasis should be placed in supporting those drivers in moving to cleaner forms of transport rather than being exempted from the LEZs. This could include funding a targeted scheme which would help those affected by LEZs to upgrade to a cleaner vehicle (where possible an ultra-low or zero-emission vehicle or other alternatives such as electric bicycles) or benefit from subsidised public transport season tickets or car club membership.

Should exemptions be consistent across all Scottish local authorities?

We would support LEZs adopting a minimum criteria based on a NLEF.

What are your views on LEZ lead-in times and sunset periods for vehicle types shown in Table 2?

We are very concerned about the potential for lead-in times and sunset periods to delay the impact of any LEZ that is introduced. The Scottish government should bear in mind the urgent nature of the obligation to tackle its illegal and harmful levels of air pollution in the shortest time possible.

What are your views about retrofitting technology and an Engine Retrofitting Centre to upgrade commercial vehicles to cleaner engines, in order to meet the minimum mandatory Euro emission criteria for Scottish LEZs?

We support the use of retrofit technology but this should seek to meet the Euro Standard emissions on the road without the application of conformity factors. Certification schemes needs to be developed to deliver these. Retrofitting can be a cost effective option for heavy duty vehicles, but pollution abatement needs to be properly maintained and optimised for urban driving conditions to be effective. Retrofitting must therefore be accompanied by regular testing and appropriate training for those using and maintaining retrofitted vehicles to ensure they are effective in the long-term.

We also support the development of an Engine Retrofitting Centre, which will not only help develop the necessary technology but also help to grow Scotland’s green economy and help make it a world leader in tackling this serious public health problem. Developing a commercially viable retrofit option for diesel vans and cars should be a priority.
How can the Scottish Government best target any funding to support LEZ Consultation on Building Scotland's Low Emission Zones implementation?

The best way for the Scottish government to target funding to cut air pollution would be by having a comprehensive and strategic national plan based on a robust analysis of the problem.

Local Authorities must be given sufficient resources to play their part in tackling NO₂ exceedences. Adequate expertise, staff, financial resources, training and other support must be given to all Local Authorities where limit values are being breached.

LEZs should be complemented by measures to help individuals and businesses move to cleaner forms of transport, such as:

- Greater investment in public transport, walking and cycling infrastructure.
- A targeted diesel scrappage scheme particularly to lower income drivers and small businesses. This scheme should offer a vehicle exchange in return for help with the cost of an ultra-low or zero-emission vehicle, subsidised car club membership, free public transport season tickets or e-bike purchase loan.
- Retrofitting initiatives for private, passenger and commercial vehicles.

What criteria should the Scottish Government use to measure and assess LEZ effectiveness?

ClientEarth considers that the Directive and case law including the High Court judgment in R (ClientEarth) No. 2 v Secretary of State for Environment Food and Rural Affairs [2016] EWHC 2740 (Admin) give a clear indication of the criteria which are to be applied when considering measures to tackle exceedances of limit values. In particular, LEZs should aim to achieve compliance as soon as possible and reduce human exposure as quickly as possible. Enhanced monitoring in and on the periphery of LEZs would help to assess progress towards these goals and identify any "displacement effect" whereby LEZs worsen air pollution on peripheral roads. The results of such monitoring should be made publicly available in real time on social media, relevant websites and electronic signage as part of a high profile awareness raising campaign.

What information should the Scottish Government provide to vehicle owners before a LEZ is put in place, during a lead-in time and once LEZ enforcement starts?

Information about LEZs should be targeted not just at drivers but the general public and businesses. This should be part of a long-term national awareness raising campaign to help people understand how they can protect themselves from air pollution but also reduce their contribution. It should also help build support for policies and measures to tackle the problem.
Information about LEZs should be provided as soon as possible to help individuals and businesses make the necessary preparations so that they can ensure their vehicles comply, make their operations more effective or prepare for alternative transport options. LEZs should also seek to set a path as soon as possible towards a zero emission transport network and help people and businesses make long-term plans.

The Scottish government should also consider creating a vehicle certification scheme to also help drivers and fleet managers ensure they are making the healthiest choices when purchasing new or used vehicles.

**Additional measures to support LEZs**

LEZs should not just be about restricting vehicle access. To be effective they need to help people and business move to cleaner forms of transport, such as:

- Greater investment in public transport, walking and cycling infrastructure.
- A targeted diesel scrappage scheme particularly to lower income drivers and small businesses. This scheme should offer a vehicle exchange in return for help with the cost of an ultra-low or zero-emission vehicle, subsidised car club membership, free public transport season tickets or e-bike purchase loan.
- Retrofitting initiatives for private, passenger and commercial vehicles.