

Air quality investigation

Case ID – IESS.21.013

Body under investigation – Scottish Government

Reasons for investigation – Air pollution (including the pollutant nitrogen dioxide – NO₂) is widely recognised to cause significant health effects and is estimated to account for over 2000 premature deaths per year in Scotland. Governments across Europe have acknowledged these impacts and many, including Scotland, have passed legislation to achieve ‘limit levels’ as required by the Cleaner Air For Europe Directive 2008/50/EC. Meeting air quality limit levels in respect of nitrogen dioxide is a legal requirement and governments must have in place adequate action plans to achieve the set limit levels within the ‘shortest time possible’. In March 2021 the European Court of Justice (ECJ) delivered its judgment that, across the UK, exceedances of statutory air quality limit levels in respect of nitrogen dioxide had remained ‘systematic and persistent’ for at least seven years (2010- 2017). As a result of the ECJ’s judgment the ESS Board considered this issue from a Scottish perspective, including any role ESS could have. The outcome of this work demonstrates a complex regulatory landscape and, whilst efforts to improve air quality continue, questions are raised as to whether air quality limit levels will be met going forward. In view of this, and taking into account the serious, longstanding and intractable nature of the failure to meet limit levels, ESS has taken the decision to launch an investigation into the arrangements put in place by the Scottish Government to execute compliance with statutory air quality limit levels in respect of nitrogen dioxide.

Current status – Report being prepared

Q&A

Why is ESS investigating this matter?

The ECJ’s judgment brought into sharp focus the serious, longstanding and intractable nature of the unsuccessful attempts to meet air quality limit levels. Although efforts to improve air quality continue, doubts remain over whether air quality limit levels will be met going into the future, and therefore there are questions raised over compliance with, and the effectiveness of, environmental law in this area.

Who will ESS seek information from during its investigation?

Public authorities are under a duty to co-operate with ESS and we have significant powers to require information from them. Given the complexity of the landscape, there may be a number of public authorities holding information relevant to our investigation.

Although the Scottish Government is the body under investigation, ESS will also obtain relevant information from any public authority which we identify as holding it. We are also keen for anyone who believes they have relevant information to get in touch with us.

How will you investigate?

The investigation will progress through various stages, from initial planning to devising lines of enquiry and seeking information, after which all of the information we receive will be carefully analysed. We will thereafter draw our conclusions, seeking expert advice should this be considered necessary.

How long will the investigation take?

As the nature and complexity of each investigation is different, providing a general timescale is difficult. Having said this, we will endeavour to work as quickly and efficiently as possible and will provide relevant parties with an estimate of the completion date of each investigation as soon as we can.

Will parties be updated on the progress of the investigation?

Yes – all relevant parties to an investigation will be regularly updated on our progress. A dedicated staff member will also be available should relevant parties have any questions or queries in this regard.

Will you issue a report of your findings?

Yes – ESS intends to work openly and transparently. At the conclusion of our investigations we will issue draft reports to relevant parties for comment, after which we will finalise and publish on our website.

What are the possible outcomes of your investigation?

Our governing legislation requires us to set out how we intend to engage with the public authorities we investigate with a view to swiftly resolving matters without recourse to our formal powers (what we call 'informal resolution'). As informal resolution can be a relatively quick and efficient way of securing appropriate outcomes, we will actively consider this option throughout the life of an investigation. ESS also has significant formal enforcement powers and, where we find a public authority has not complied with environmental law, we can issue a compliance notice which the public authority must implement. We can also issue improvement reports which must be acted upon through the submission of an improvement plan to Parliament.