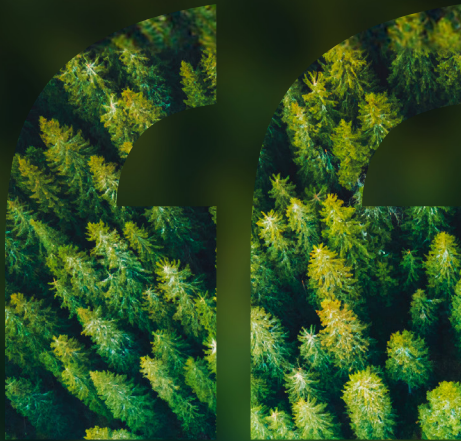


C L I F F O R D

C H A N C E



**WILL DOWNSTREAM
SCOPE 3 EMISSIONS HAVE
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ALL MAJOR PROJECTS?
THE SUPREME COURT
DECISION IN FINCH**



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WILL DOWNSTREAM SCOPE 3 EMISSIONS HAVE TO BE CONSIDERED FOR ALL MAJOR PROJECTS? THE SUPREME COURT DECISION IN FINCH

In a landmark judgment, for the first time the Supreme Court has decided that, when assessing the environmental impacts of an oil extraction project, the planning authority should have considered the downstream (scope 3) emissions generated by the oil products from the project. This could have significant ramifications for the consenting of fossil fuel and other energy & infrastructure projects, and potentially other industrial projects, where there are major carbon emissions in the project's downstream value chain. This briefing considers the court's decision in *Finch* and its potential implications for business.

Key issues

The Judgment:

- The Supreme Court has ruled that downstream scope 3 combustion emissions are an indirect effect of an oil extraction project and must be considered in the EIA for the project as a matter of law (and this is not subject to evaluative judgement by the determining authority).
- The fact that oil has to be refined off-site does not change this conclusion.
- It is not inappropriate for local authorities to consider downstream emissions even though the Government is responsible for implementing national policy.

Implications:

- Judgment does not mean oil projects will necessarily have to be refused.
- This decision will have implications for all fossil fuel extraction projects, as well as other projects where likely downstream emissions can be assessed (e.g. ports, airports, roads, and potentially other industrial projects).
- Successful intervention by the Office for Environmental Protection may lead it to intervene in cases more frequently.

Introduction

Horse Hill Developments Ltd (the Developer) applied for planning permission from the mineral planning authority (Authority) to drill four new wells at an oil extraction site in Surrey. The application was accompanied by an Environmental Impact Assessment (EIA) under the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 which implemented the EIA regime under EU Directive 2011/92/EU, as amended (the EIA Directive). The 2017 Regulations require "assessment of the likely significant environmental effects" of relevant projects (including oil extraction projects). The Authority issued a scoping opinion for the Environmental

Statement to be prepared by the developer stating, among other things, that the global warming effects of the oil and gas produced by the well should be assessed in its Environmental Statement. However, the Developer restricted its statement to considering emissions from within the well site boundary, since downstream emissions (e.g. from later processing and combustion of the refined oil products, "Combustion Emissions"): (i) were not part of the development, (ii) were not within the control of the site operators; and (iii) any downstream emissions would be regulated by other environmental control regimes. The Authority accepted this argument and went on to grant permission.

A local resident and representative of a campaign group, the Weald Action Group, challenged the decision on the basis that the EIA should have considered the Combustion Emissions. The claim was rejected by the High Court on the basis that Combustion Emissions were not capable of falling within the required scope of the EIA; alternatively, that if they could fall within the required scope, the Authority's view that the Combustion Emissions were not indirect effects of the development was not irrational or unlawful.

The Court of Appeal, confirming the High Court's decision by majority, felt that the Combustion Emissions could come within the required scope of EIA, but that the requirement arose only if there was a "sufficient causal connection" between well project and Combustion Emissions, which was an "evaluative judgement" that the Authority was entitled to take; in this case the Court had lawfully decided to exclude the Combustion Emissions from the EIA, in particular since it was not known where or by whom such combustion would take place, and in light of the intervening refining process necessary before such combustion occurred. This decision was appealed to the Supreme Court on the questions of whether: (i) the Combustion Emissions were or were not effects of the project that the EIA needed to assess, and (ii) whether this was a question of law, or a matter of evaluative judgement by the Authority.

The Supreme Court's judgment

The five-member panel of the Supreme Court decided by a majority of 3 to 2 to reverse the Court of Appeal's decision, thereby quashing the decision to grant planning permission and remitting it to the Authority to be determined again. The majority decision was given by Lord Leggatt who considered it clear that the Combustion Emissions should form part of the EIA. His key reasoning was as follows:

- Whether the Combustion Emissions are an 'effect of the project' is a question of causation. The oil produced at the well would inevitably be subject to combustion, and emissions from that

combustion will inevitably lead to greenhouse gas (GHG) emissions and these emissions can be estimated. This chain of events meets the 'but for' legal test but also *"the extraction of the oil is not just a necessary condition of burning it as fuel; it is also sufficient to bring about that result because it is agreed that extracting the oil from the ground guarantees that it will be refined and burnt as fuel. As discussed above, a situation where X is both necessary and sufficient to bring about Y is the strongest possible form of causal connection - much stronger than is required as a test of causation for most legal purposes"*. Combustion Emissions are thus "effects of the project".

- The causal connection between the project and the combustion of emissions is not a question of *evaluative judgement*, as the EIA Directive could not be read as allowing inconsistent answers by different decision-makers or for different projects on this question of causation.
- An argument against including Combustion Emissions in the assessment on grounds that this would require transboundary assessment of effects under the EIA Directive in all relevant EU or third countries where combustion took place is misplaced: *"Climate change is a global problem precisely because there is no correlation between where GHGs are released and where climate change is felt. Wherever GHG emissions occur, they contribute to global warming. This is also why the relevance of GHG emissions caused by a project does not depend on where the combustion takes place."*
- The impacts assessed in the EIA should not be restricted to those at the project site since the EIA Directive does not impose such a geographical limit, and indirect effects will frequently occur at a distance from their source. It is also not right to say that emissions are *"outwith the control of the site operators"*, as they could decide to leave the oil in the ground.
- The fact that the oil produced at the site has to be refined at a different facility does not alter its nature or intended use, and so does not break

the causal connection needed to demonstrate that the Combustion Emissions are an effect of the project. The judge at first instance had been concerned that finding otherwise could cause significant problems for other projects. He specifically mentioned the production of steel, which could be used, for example, for motor vehicles or aircraft whose emissions which might themselves be regarded as indirect effects of the steel production process. However, this concern is misplaced as, in that case, no meaningful assessment or estimate of such emissions could be made and their assessment would therefore not be required. In the case of oil, however, as mentioned above, the inevitability of its burning, and the ability to assess emissions means there is no such uncertainty.

- It was not inappropriate for a local authority to be considering Combustion Emissions on grounds that the issues arising could only be dealt with at a national level. In the same way as the indirect benefits of oil production had to be considered under national policy (the National Planning Policy Framework) in determining the planning application, so the adverse indirect effects should also be considered as a material planning consideration. If the decision to grant consent is directed by national policy, this does not mean that the scope of EIA should be restricted and that obtaining the information is unnecessary; it is still important that a decision on the project is taken with the benefit of full knowledge of the consequences. Separately in the judgment, Lord Leggatt had also noted the importance of the public participation requirements in the Aarhus Convention for increasing democratic legitimacy and allowing the public to understand environmental issues that affect them.
- The Oslo District Court judgment in the case of *Greenpeace Nordic v The State of Norway (represented by the Ministry of Petroleum and Energy)*, Case No 23-099330TVI-TOSL/05 (currently under appeal) is also persuasive. This

case also involved a challenge to an EIA in respect of an oil extraction project where Combustion Emissions had not been considered. In that case, the Court determined that combustion emissions should have been considered in the EIA, dismissing arguments that combustion emissions do not occur on-site, but later, following the carrying out of other intermediate steps.

The minority view

In a lengthy dissenting judgment, Lord Sales agreed with the High Court that Combustion Emissions did not amount to effects of the development as a matter of law. He felt it would be “constitutionally inappropriate” for the local planning authority to address ‘*big picture*’ issues which a local planning authority such as the Council is simply not in a position to address in any sensible way”, and where its views might be “*in conflict with Government decision-making and its ability to set national policy*”. He also went through the EIA Directive in great detail to explain his views on the text of the Directive and subsequent proposals to amend the Directive to better incorporate climate change considerations. He felt that the texts made it clear that downstream impacts such as Combustion Emissions should not be treated as indirect effects of the Project, as otherwise, this would have been clearly expressed. In particular, the fact that different projects for parts of the value chain of an oil product are included separately in the Directive (e.g. upstream production, refinery) meaning that they would in any event have to be assessed, meant that it would be disproportionate to have to assess them twice. This might, in particular, cause difficulty for the practical assessment of emissions, for example, arising at a refinery in a non-UK / EU state. Lord Sales also largely disagreed with Lord Leggatt on interpretation of the relevant case law and, in particular, considered the *Greenpeace Nordic* case (mentioned above) not to be persuasive given its short reasoning “*which was not critical for its decision*”.

Implications

Will all oil projects have to be rejected now?

At a basic level, this judgment does **not** mean that oil extraction projects have to be rejected by consenting authorities. Consenting decisions will still be a matter of planning judgement for those authorities based on material considerations including the outcome of the EIA and national policy.

What will developers and consenting authorities have to do?

Clearly, developers will now have to include analysis around Combustion Emissions in their Environmental Statements relating to new UK oil production projects or extensions and local authorities will have to take this information into account in carrying out their EIA. It is worth noting that the Environmental Statement had considered the emissions from the project itself as negligible. Lord Leggatt considered, by contrast, that the 3.3m tonnes total estimated output from the proposed project amounting to 10.6m TCO₂ over its lifetime “*could not have been dismissed as ‘negligible’*”. He also considered that “*leaving oil in the ground in one place does not result in a corresponding increase in production elsewhere*”. This would appear to limit the possibilities of using arguments around the minimal nature of emissions in planning submissions to avoid dealing with, or glossing over, Combustion Emissions.

What is less clear is how authorities would or could properly assess the information and factor in Combustion Emissions to their decision-making (a point Lord Sales made clear in his dissenting judgment). There will need to be additional Government guidance, and possibly regulation, dealing with how Combustion Emissions should be dealt with in Environmental Statements, EIA and local authorities’ decision-making. One particular issue is that there is no clear and settled methodology for determining downstream emissions. As contemplated by Lord Sales – how would you determine the downstream emissions

of, possibly unknown, refineries in third countries without clear guidance?

There are also a number of ongoing legal challenges to oil and coal projects that will now be determined in the light of this judgment. It remains to be seen whether the judgment, and the need to consider Combustion Emissions, will make any substantive difference to the decisions made by the consenting authorities in redetermining the Horse Hill planning application or other quashed permissions, or indeed, other future project applications. At the very least, the issue of downstream emissions analysis in EIAs is likely to encourage more objections to applications, and challenges to grants of permission. At the same time the issue is likely to weigh more heavily with authorities given the increasingly high-profile debate about continuing fossil fuel development. However, where authorities refuse permissions, one can expect robust appeals by developers based on national policy considerations.

What about other types of project?

While the picture looks likely to be similarly clear for gas and coal mining projects (West Cumbria Mining became an intervener in the court proceedings in this case; a challenge to its Whitehaven coal mine project is on hold pending conclusion of the *Finch* case). The decision leaves considerable uncertainty over the extent to which Environmental Statements for other types of project might have to include analysis around downstream emissions. Some examples like airports, ports, roads or railways, have clear downstream emissions associated with the post-construction use of the consented assets by third parties. While the emission impacts of operating these assets would already need to be assessed to some degree (e.g. transport within the port / airport), this decision is likely to massively extend the scope of emissions to be considered to those of the shipping / aviation customers using the asset. Whether downstream emissions for other types of industrial project, for example chemical manufacturing projects, will need to be considered is likely to depend on a judgement as to whether there is

sufficient evidence of likely emissions from the products created by the projects as to make their assessment meaningful in an EIA. There is significant prospect for legal challenges in this area.

Office for Environmental Protection intervention

Significantly, the Office for Environmental Protection (OEP) made its first intervention in a legal challenge in this case. Lord Leggatt noted the helpful nature of that intervention and of the OEP's views which expressed concern at the potential impact "on sound environmental decision-making" if the

High Court's and Court of Appeal's decisions were to be upheld. We may well see more challenges of this nature by the OEP, buoyed by its successful reception in this case.

If you would like to discuss the implications of this for your projects, please contact a member of the team.

Link to Supreme Court Judgement: [R \(on the application of Finch on behalf of the Weald Action Group\) \(Appellant\) v Surrey County Council and others \(Respondents\) \[2024\] UKSC 20](#)



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