

Insights

SIGNIFICANT IMPLICATIONS FOR ENVIRONMENTAL ASSESSMENT OF MAJOR PROJECTS

FOLLOWING THE SUPREME COURT'S LANDMARK DECISION IN FINCH

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SUMMARY

The Supreme Court's judgment in *R(Finch) v Surrey County Council* [2024] UKSC 20 has potentially significant implications on how environmental impacts of major projects are assessed. The question at the heart of the case was how far 'downstream' from a development project the decision-maker has to look when assessing its likely environmental effects. The answer, according to a slim majority of the Supreme Court, is further than had previously been thought necessary. However, it's not panic stations for all EIA development.

BACKGROUND

This case resulted from a decision by Surrey County Council in 2019 to grant planning permission for the expansion of an existing oil production well in Surrey to enable crude oil extraction from six wells over a 20-year period. The proposed development was an 'EIA development' for the purpose of 2017 EIA Regulations, meaning an Environmental Statement was submitted with the planning application, following the carrying out of an Environmental Impact Assessment ("EIA") to allow the planning decision to be taken with knowledge and awareness of the likely significant environmental consequences of the proposal.

The planning permission was unsuccessfully challenged by judicial review in 2020 and then appealed in the Court of Appeal in 2022 on grounds that the Council failed to assess the climate effects of the combustion emissions from the oil extracted from the well and being refined and burnt as fuel at some point 'downstream'.

LEGAL SCOPE OF THE 2017 EIA REGULATIONS

At its heart this case examined the legal scope of the 2017 EIA Regulations, and the original EIA Directive of the EU, which requires an assessment of the likely "direct and indirect significant

effects” of a project that falls within its scope on the environment, including (among other factors) the impact on climate. And in particular, how far ‘downstream’ from a development project is a decision-maker required to look when assessing the likely environmental effects of a proposed development. In other words, is the scope of the 2017 EIA Regulations confined to an assessment of the direct releases of greenhouse gasses from within the well site boundary during the lifetime of the project or does it extend to combustion emissions when the oil extracted from the wells is refined is burnt elsewhere as fuel?

It also considered whether such an assessment of the ‘downstream’ impacts is a matter of evaluative judgment for the Council.

The Supreme Court allowed the appeal on a slim majority of two to three and held that the Council’s decision was unlawful because the emissions that will occur when the oil produced is burnt as fuel are an inevitable ‘indirect effect’ and therefore within the scope of the EIA required by law. But it rejected the view of the Court of Appeal that this question requires an evaluative judgment by the Council about whether there is a sufficient causal connection between the extraction of the oil and its eventual combustion.

COMMENT

This decision complicates further the already complex process of environmental assessment for major projects. But it is important not to overstate its implications.

Importantly, it distinguishes between the specific nature of the project in this case and other project types, concluding that the fossil fuel extraction process in this case leads inevitably to the outcome of its burning at some stage (with undisputed climate change implications). But that will not be the case for all – or even many – similar development processes.

Steel production is cited as an alternative example. Whilst the steel might find its way into motor vehicle or aircraft production, equally it might not because there are many different uses to which steel can be put. It does not therefore follow that an assessment of the environmental effects from future vehicle emissions becomes a necessary part of the environmental assessment of a steel manufacturing plant.

The reasoning of Mr Justice Holgate in the High Court though, in which he claimed it is impossible to determine where exactly the oil extracted will be burnt (whether in the United Kingdom or overseas) may still be relevant. To use an alternative hypothetical, it may be argued that a motor vehicle manufacturing plant will inevitably result in significant carbon emissions from the use of the end product on the roads. However, to what extent those motor vehicles will end up on foreign roads is a matter which cannot be predicted.

That element of the Court’s reasoning is likely to prove the focus for scrutiny in the future, with clients and consultants having to anticipate in much more detail the likely end use for the products

of their developments when undertaking EIAs and preparing Environmental Statements to ensure their lawfulness. However, this case will likely have significant implications for other natural resource extraction projects.

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