

UK SUPREME COURT DELIVERS LANDMARK DECISION ON DOWNSTREAM (SCOPE 3) GREENHOUSE GAS EMISSIONS - *R(Finch) v Surrey County Council*

In a [landmark climate decision](#), the UK Supreme Court has found, by a majority, that downstream greenhouse gas (GHG) emissions (also known as Scope 3 emissions) that would ultimately arise from combustion of refined oil products should have been considered in the environmental impact assessment (EIA) conducted for a proposed oil production project. The Supreme Court's decision could have important implications for applications for similar future projects and sets a new benchmark for what EIAs for such projects should include.

Key takeaways

The Supreme Court's decision comes at a pivotal time ahead of next month's general election which may bring with it a new Government and significant changes in national energy and climate policies. See our briefing on [UK Energy and Infrastructure: Reviewing Conservative and Labour Manifestos](#) for more details.

Irrespective of the outcome of the general election, the Supreme Court's decision could have important implications for similar future projects. However, the Supreme Court's findings were confined to a particular set of agreed facts in this case. In making its decision, the Supreme Court took care to limit the reach of its findings to other types of projects, such as manufacturing, where the end use of products is less certain and not "inevitable" or emissions are not so readily quantifiable as was the case here. The Supreme Court also emphasised the procedural nature of the EIA process, making clear that its purpose is not concerned with the substantive decision on whether to grant planning consent, but to ensure that the planning authority makes a reasoned conclusion on the environmental impact of a project and takes this into account in reaching its decision.

The Supreme Court's decision will, however, lead to greater scrutiny of the EIA processes for similar projects in future and a greater expectation that downstream emissions will feature as part of assessments. Developers will need to work closely with relevant public authorities on the question of whether quantifiable downstream emissions fall within the scope of EIAs on a project-by-

project basis and be prepared to justify their position where such emissions are not included.

It remains to be seen how the UK courts will interpret the Supreme Court's findings in several judicial review challenges of similar energy projects which have been stayed pending the outcome of this case, including challenges to the UK Government's decisions to approve a new coal mine in Cumbria and oil and gas projects in the North Sea. The Supreme Court's decision could also have wider implications for EIAs across Europe which are based on the same EU legislation.

Background

A local resident (representing a local campaign group), applied for judicial review of a decision by Surrey County Council to grant planning permission to a developer to expand oil production from an onshore oil well site in Surrey. The proposed project involved the extraction of oil from six wells over a 20-year period. The EIA required to be conducted as part of the planning process considered only the direct releases of GHGs from within the boundary of the oil well site during the lifetime of the project.

To lawfully grant planning permission for the project, the council was required to carry out an EIA in accordance with the [Town and Country Planning \(Environmental Impact Assessment\) Regulations 2017](#), one of several statutory instruments which implement the [EU EIA Directive](#) (as amended). The EIA had to comply with the obligation to "identify, describe and assess in an appropriate manner...the direct and indirect significant effects" of the project on (among other factors) the climate.

The High Court and the Court of Appeal (by a majority) rejected the claimant's application. The High Court did so on the basis that combustion emissions were not within the legal scope of the relevant legislation. The EIA was said to include assessment only of effects of the development for which planning permission was sought, not the environmental effects of use of the end product which would be created in a different location using the oil extracted from the proposed project. The Court of Appeal upheld the High Court's decision but on an alternative basis, finding that determination of the relevant effects was a matter for evaluative assessment by the council and therefore the council's decision to

grant planning permission was challengeable only on limited public law grounds.

The Supreme Court's decision

The Supreme Court allowed the appeal by a 3:2 majority, finding that combustion emissions from burning the extracted oil were “direct and indirect significant effects of a project” for the purposes of the EIA legislation. As the EIA failed to assess combustion emissions, the council’s decision to grant planning permission for the project was therefore unlawful and has been set aside. The Supreme Court’s decision does not mean, however, that the developer will not be able to obtain planning permission for the project. The council will need to reconsider the developer’s planning application in light of the Supreme Court’s findings, including conducting an EIA which takes into account downstream emissions.

A matter of legislative interpretation

The Supreme Court considered that the question of whether downstream emissions should be included in the EIA was a matter of interpretation of the relevant legislative regime. The Supreme Court unanimously rejected the Court of Appeal’s view that the question was one of evaluative judgment for the council. This approach was said to be unsatisfactory as it would lead to inconsistency between decisions made by different planning authorities when faced with similar issues or even between decisions made by the same authority for similar projects. However, the Supreme Court disagreed on the natural interpretation of the legislation.

The majority of the Supreme Court (in a leading judgment by Lord Leggatt) noted that the legislation requires an EIA to include “any indirect, secondary, cumulative, short, medium and long term, permanent and temporary, positive and negative effects of the development.” The Supreme Court considered it “would be hard to devise broader wording than this.” The express requirement in the legislation to assess the indirect as well as the direct effects of a project was intended to emphasise the wide reach of the assessment.

The underlying legislation does not impose geographical limits on the scope of the environmental effects of a project to be assessed, including where, as in the case of GHG emissions, the effects extend across national borders (i.e. outside of the UK). It is also in the very nature of “indirect” effects that they may occur away from the location of the project. The Supreme Court observed that “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.”

Similarly, the Supreme Court rejected an argument that national planning and climate policies were relevant to

the scope of the EIA. The Supreme Court considered that the UK’s national policy on domestic oil and gas production is relevant to a planning authority’s decision whether to grant planning permission. The Supreme Court did not consider this to mean, however, that the requirement to assess the environmental impact of a project before a planning decision is taken can be dispensed with or that the scope of that assessment can be limited. The Court emphasised that the underlying legislation is not concerned with the substantive decision whether to grant planning permission, but with how decisions are taken. The purpose of an EIA is to ensure that planning decisions are made with full knowledge and public awareness of the likely significant environmental consequences of a project.

Causation

The Supreme Court considered that the question of what are or are not “effects of a project” is a question of causation. Downstream emissions could therefore constitute a likely significant environmental effect of a project where there is causation. Determining whether a potential effect of a project is “likely” to have a significant effect on the environment (as required by the legislation) may involve evaluative judgment in which different decision-makers may rationally take different views. In this case, however, it was agreed that it was not merely likely, but “inevitable”, that all the oil extracted would be refined and eventually undergo combustion, thereby releasing GHG emissions that would have a significant impact on the environment. Therefore, the strongest possible form of causal connection was established, much stronger than the typical “but for” legal causation test.

Intervening steps between extraction and combustion away from the well site, such as refinement processes, did not break the causal chain. The refinement of crude oil did not alter the basic nature or the intended use of the oil and it was agreed here that the oil produced would inevitably undergo such a process. There was no legal difference between combustion emissions from oil and other fossil fuels such as coal which do not undergo any intermediate processes before combustion.

Similarly, the Supreme Court dismissed arguments that the combustion emissions were outside of the control of the operators of the well site; instead finding that such emissions were “entirely within their control” in the sense that if no oil was extracted, no combustion emissions would occur.

Quantifiable estimates

The Supreme Court highlighted that it was common ground in this case that the combustion estimates could readily be estimated. The Supreme Court noted that the environmental effects of the project had been described as “negligible” in the environmental statement, which had been based on the estimated “direct” CO₂ emissions (140,958 tonnes) for the lifetime of the project.

However, had combustion emissions been included in the assessment, which would have increased the estimate to 10.6 million tonnes, the effects of the project “could not have been dismissed as ‘negligible’ in that way”.

Relevance to other projects

In reaching its decision, the Supreme Court acknowledged concerns raised by the High Court about the implications for other projects and the risk of making the EIA process unduly onerous and unworkable if downstream emissions are to be subject to assessment.

The Supreme Court considered, however, that such concerns were misplaced. The Supreme Court’s finding that combustion emissions are effects of producing crude oil “does not open the floodgates in the way the judge feared” and there are sound reasons for distinguishing the present case from other projects. Oil is a “very different” commodity from iron or steel, for example, which have many potential uses and can be incorporated into many different types of end product used for different purposes. In the case of the manufacture of steel, for example, it could reasonably be said that the environmental effects of the use of the products which the steel will be used to make are not effects of manufacturing steel. The indeterminacy of future use would also make it impossible to identify such effects as “likely” for the purposes of the legislation or to make a meaningful assessment of them at the time of a planning

decision for construction of a steel factory. Similar considerations apply in relation to the manufacture of components for use in the construction of motor vehicles or aircraft, for example.

Dissenting views

Lord Sales (with whom Lord Richards agreed) delivered a lengthy dissenting judgment (almost equal in length to the decision of the majority), taking a narrower interpretation of the legislation.

Lord Sales considered that whilst the legislation contemplates that planning permission decisions will often be taken by local or regional authorities, downstream emissions are a matter for central governments as part of national policy. It would be constitutionally inappropriate therefore for a local planning authority to assume practical decision-making authority based on its own views of downstream emissions.

Lord Sales did not agree that the legislation should be interpreted to include downstream emissions and considered that this was clear from its text. The formula used in the legislation indicated that indirect effect must still be effects “of the project” which on a natural reading does not include downstream emissions. Lord Sales therefore agreed with the approach of the High Court at first instance.

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