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Client Alert

Energy

JULY 22, 2024

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UK Supreme Court: Downstream Emissions Must Be Assessed in Environmental Impact Assessments for New Oil and Gas Projects

BACKGROUND

In a highly anticipated judgment, a 3:2 majority of the UK Supreme Court ruled in *R (Finch) v Surrey County Council and others [2024] UKSC 20* that environmental impact assessments (EIAs) for fossil-fuel projects must include the assessment of the "downstream" or "scope 3" emissions which arise when the oil is eventually refined and burned by end users causing greenhouse gas emissions.

The decision considered the correct interpretation of the Town and Country Planning (Environmental Impact Assessment) Regulations 2017, which apply the European Environmental Impact Assessment Directive (together, the "**EIA Regime**"). The EIA Regime requires the assessment of development projects where there are likely to be significant environmental effects.

In 2019, Surrey County Council granted planning permission to a developer to expand an onshore oil project by drilling four new wells. This would enable the extraction of oil over a 20-year period. The EIA for the project evaluated the environmental impacts of "the direct releases of greenhouse gases from with the well site boundary resulting from the site's construction, production, decommissioning and subsequent restoration over the lifetime of the proposed development." It did not, however, examine the environmental impact of the downstream greenhouse gas emissions that would arise from the combustion of the fuel following refinement of the crude oil extracted from the site.

Sarah Finch, a local resident representing Weald Action Group, applied for judicial review of the Council's decision, arguing that the environmental statement should have included these downstream emissions.

FINDINGS ON SCOPE 3 EMISSIONS AND CAUSATION

In determining whether the local planning authority should have required an assessment of the scope 3 emissions when considering the application for oil extraction for commercial production, the Supreme Court reversed the judgments of the High Court and the Court of Appeal.

The Supreme Court emphasized that these emissions were "plainly" an effect of the project, and a foreseeable and inevitable consequence of the oil extraction. Both the majority and minority found that the question of whether something is an effect of a project is a question of law – not, as the Court of Appeal found, a question of judgment for the decision maker. They unanimously agreed that the Court of Appeal's approach allowed for too much uncertainty and inconsistency; it should not be the case that different decision makers could make different decisions on the same facts on an issue such as the relationship between the extraction of fossil fuels and the emissions associated with their end use.

One of the issues which the Supreme Court considered was the appropriate legal test for answering the question of what are or are not the "effects of a project".

Lord Leggatt considered three possibilities: (1) the "but-for" test, i.e. would event Y have occurred but for the occurrence of event X; (2) the intervening act test, i.e. whether there has been an intervening act and whether this is an ordinary event; and (3) the necessary and sufficient condition test, i.e. the occurrence of event X is both a necessary and sufficient condition for the occurrence of Y.

The majority determined that, on the facts in *Finch*, all three of these tests would be satisfied. However, they did not definitively rule on which was the correct test in the context of the EIA Regime, which leaves us waiting for further judicial clarification on the extent to which these tests will apply to other developments.

WHAT DOES THE JUDGMENT MEAN IN PRACTICE?

The obligation to conduct an EIA is a procedural one, designed to ensure that the public is armed with full knowledge of a project's environmental cost so that the environmental impact of a project is exposed to public debate and is considered in the decision-making process. The judgment in *Finch* clarifies that, in the context of an oil and gas project, this information must include the scope 3 emissions associated with the end use of the fossil fuels. However, the process remains outcome agnostic; the legislation does not prevent the competent authority from giving development consent for projects which will cause significant harm to the environment, and nothing in *Finch* changes this.

So, one, obvious practical implication is that applicants for planning permission must calculate and publish the scope 3 emissions associated with any new oil and gas project in the UK. However, given the moratorium on new licences for oil and gas exploration set out in the Labour Manifesto, the practical implications of this in the UK context may prove to be short-lived.

The Supreme Court dismissed concerns about the decision's implications for other projects with substantial greenhouse gas impacts, such as steel production, finding that the EIA Regime does not require that attempts be made to measure or assess putative effects which are incapable of assessment. Whilst crude oil's end use is foreseeable and falls within the scope of the EIA, this may not be the case for other materials, such as steel. The

effects of the manufacturing of steel, for instance, depends on innumerable decisions made “downstream” about how the steel is used and how products made from the steel are used. It would, therefore, be impossible to assess such scope 3 emissions at the time of the decision whether to grant development consent for the construction and operation of the steel factory.

The Supreme Court’s judgment may have consequences beyond the UK. Firstly, it is likely to be cited as persuasive authority in other cases before EU courts involving the EIA regime. At an international level, the International Tribunal on the Law of the Sea has recently published an advisory opinion confirming that the obligation under the UN Convention on the Law of the Sea to produce environmental impact assessments extends to the cumulative risk or effects of pollution of the marine environment from anthropogenic greenhouse gas emissions. The judgment in *Finch* may be cited in support of a broad interpretation of this obligation such as to encompass scope 3 greenhouse gas emissions. Given that UNCLOS has 164 State Parties, this could have a major impact on environmental impact assessments for new oil and gas projects around the globe.