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A duty to assess an oil project's downstream greenhouse gas emissions: The UK Supreme Court in *Finch*

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Abstract

National environmental impact assessment (EIA) frameworks have generally been applied as requiring an assessment of the effects of projects on greenhouse gas emissions and, thus, on climate change. Yet, a question that has repeatedly been asked is whether an EIA should only consider a project's direct, on-site emissions, or also its indirect emissions. In *R (Finch) v County of Surrey*, the UK Supreme Court found that the approval of an oil project was unlawful on the ground that the EIA had not considered the downstream emissions that would result from the combustion of the oil by its end users. This judgment contributes to the emergence of a global consensus on the need for the EIAs of fossil-fuel projects to consider downstream combustion emissions. Yet, it leaves many questions open as to how far indirect emissions are to be assessed.

1 | INTRODUCTION

Most national legal systems require an environmental impact assessment (EIA) to be carried out before a project which is likely to have significant environmental impacts can be approved.¹ EIA frameworks were originally focused on a project's local impacts.² They have increasingly been applied as a tool to assess the global effects of a project's greenhouse gas (GHG) emissions and, thus, its diffuse impact on the climate system.³ In this context, a question has repeatedly been asked as to whether an EIA should only consider a project's direct, on-site GHG emissions, or whether it should also assess the

project's indirect GHG emissions. The question is particularly relevant to fossil fuel production projects, given the significance of downstream emissions associated with the combustion of these fuels.

EIAs are generally construed broadly,⁴ as a way to provide the public and decision-makers with a clear picture of a project's environmental impacts.⁵ As such, most national courts internationally have required the assessment of indirect GHG emissions when they were likely to be significant.⁶ Nonetheless, objections have repeatedly been raised against the assessment of indirect GHG emissions on the

¹See J Glasson and R Therivel, *Introduction to Environmental Impact Assessment* (5th edn, Routledge 2019).

²See, e.g., Town and Country Planning (Assessment of Environmental Effects) Regulations 1988, sch 3 para 2; Environmental Assessment (Scotland) Regulations 1988, sch 3 para 2.

³See, e.g., *R (Friends of the Earth Limited and others) v Heathrow Airport Limited* [2020] UKSC 52. See generally J Peel, 'Environmental Impact Assessment and Climate Change' in M Faure (ed), *Elgar Encyclopedia of Environmental Law* (Edward Elgar 2016) 348, 251; B Mayer, 'Climate Assessment as an Emerging Obligation Under Customary International Law' (2019) 68 International and Comparative Law Quarterly 271; B Mayer, *Environmental Assessment as a Tool for Climate Change Mitigation* (Oxford University Press 2024).

⁴See, e.g., *Case C-72/95, Aannemersbedrijf PK Kraaijeveld BV v Gedeputeerde Staten van Zuid-Holland* [1996] ECR I-5431 [31]; *Abraham v Wallonia* (Case C-2/07) [2008] Env LR 32 para 43 (where the CJEU observed that the scope of the 1985 EIA Directive 'is very wide and its purpose very broad').

⁵*Robertson v Methow Valley Citizens Council* (1989) 490 US 332, 351; *R v North Yorkshire County Council, ex p Brown* [2000] 1 AC 397, 404 (Lord Hoffmann noting, 'The purpose of the [1985 EIA] Directive ... is to ensure that planning decisions which may affect the environment are made on the basis of full information'); *Berkley v Secretary of State for the Environment* [2001] 2 AC 603, 615.

⁶See, e.g., *Mid States Coalition for Progress v Surface Transportation Board* (8th Cir 2003) 345 F.3d 520; *Gray v Minister for Planning* [2006] 152 LGERA 258; *Earthlife Africa Johannesburg v Minister of Environmental Affairs* [2017] 2 All SA 519 (GP). See generally B Mayer, *Environmental Assessment as a Tool for Climate Change Mitigation* (n 3) 55–61.

grounds that they are not entirely within the control of the project,⁷ often occur overseas,⁸ and are not always entirely foreseeable.⁹ Any project may have effects extending ad infinitum, like ripples in a pond, and it would be neither realistic nor desirable for an EIA to try to assess *all* indirect effects of a project, however remote.¹⁰ By necessity, a line needs to be drawn between relevant indirect effects and indirect effects that are too remote to be assessed, and there have been different views as to where precisely this line should be drawn in relation to GHG emissions.

This debate has unfolded, among other contexts, in relation to the EU's EIA Directive.¹¹ A 2014 amendment clarified that an EIA should assess, when relevant, 'the impact of the project on climate (for example the nature and magnitude of greenhouse gas emissions').¹² Yet, the EIA Directive does not specify whether and, if so, in what circumstances a project's indirect GHG emissions are among the 'indirect significant effects' that are to be assessed.¹³ National courts have adopted conflicting views in decisions applying national instruments transposing EU law. On the one hand, the Inner House of the Scottish Court of Session held in *Greenpeace Ltd v Advocate General* that the EIA for the exploitation of the Vorlich oil field did not need to consider downstream emissions associated with the combustion of the oil, on the ground that this effect was too remote and unforeseeable.¹⁴ On the other hand, in *Greenpeace Nordic Association v Ministry of Energy*, the District Court of Oslo held that the development of several other oil-and-gas fields in the North Sea could not be authorised without assessing the climate impact of downstream emissions.¹⁵

⁷*Xstrata Coal Queensland Pty Ltd v Friends of the Earth* [2012] QLC 13 [559]. But see, e.g., *Eagle County, Colorado v Surface Transportation Board* (DC Cir 2023) 82 F.4th 1152, 1180, cert. Granted sub nom. *Seven County Infrastructure Coal v Eagle County* (2024) 144 US 2680.

⁸See *Natural Resources Defense Council Inc v Nuclear Regulatory Commission* (DC Cir 1981) 647 F.2d 1345, 1365–1366; *NEPA Coalition of Japan v Aspin* (D DC 1993) 837 F.Supp. 466, 467 (both invoking foreign policy consideration to justify that an assessment of transboundary impacts in foreign countries is not required); *Basel Action Network v Maritime Administration* (D DC 2005) 370 F.Supp.2d 57, 71–72 (holding that NEPA does not require an assessment of impacts occurring in the high sea). See generally Mayer, *Environmental Assessment as a Tool for Climate Change Mitigation* (n 3) 44–47.

⁹*Adani Mining Pty Ltd, Department of the Environment (Cth)*, 2010/5736, Statement of Reasons (13 October 2015) http://epbcnotices.environment.gov.au/_entity/annotation/45c02035-e672-e511-b93f-005056ba00a7/a71d58ad-4cba-48b6-8dab-f3091fc31cd5?t=1712258955789 para 140.

¹⁰*North Carolina Alliance for Transportation Reform Inc v US Department of Transportation* (MD North Carolina 2010) 713 F.Supp.2d 491, 520–521; *Coalition for Advancement of Regional Transportation v Federal Highway Administration* (6th Cir 2014) 576 F.Appx 477, 491; *An Taisce – National Trust for Ireland v An Bord Pleanála* [2022] IESC 8, [2022] 2 IR 173.

¹¹Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment [2012] OJ L 26/1.

¹²Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment [2014] OJ L 124/1 Annex IV para 5(f).

¹³Directive 2011/92/EU (n 11) art 3(1).

¹⁴*Greenpeace Ltd v Advocate General* [2021] CSIH 53, 2021 Scot (D) 9/10 [64]–[65], [68]. The underlying instrument transposed the EU EIA directive into national law, and the Court noted that it 'should be purposively interpreted in light of the [EIA] Directive' (at [2]). See Offshore Petroleum Production and Pipe-lines (Assessment of Environmental Effects) Regulations 1999, as amended by The Offshore Oil and Gas Exploration, Production, Unloading and Storage (Environmental Impact Assessment) Regulations 2020.

¹⁵*Greenpeace Nordic Association v Ministry of Energy* (2024) Case No 23-099330TVI-TOSL/05 (District Court of Oslo).

The case of *Finch*, the focus of this case note, concerned the EIA of the Horse Hill project, a much smaller oil extraction project.¹⁶ An EIA was conducted in application of the Town and Country Planning (Environmental Impact Assessment) Regulations 2017, which transposed the EU Directive into English law.¹⁷ The EIA documented the GHG emissions from on-site processes such as production and drilling, but not the indirect emissions from the combustion of the oil.¹⁸ Surrey County Council granted planning permission in 2019.¹⁹ Like *Greenpeace Ltd*, *Finch* concerned facts that occurred before Brexit became effective, although it is noteworthy that the legal instruments in question have remained in force in UK law as 'retained' and, then, 'assimilated' EU law.²⁰

The central question before the courts, in *Finch*, was whether the EIA had to assess the project's downstream GHG emissions from oil combustion. The answer differed between courts and judges. In the first instance, the High Court ('HC') upheld the planning permission on the ground that downstream emissions were, 'as a matter of law, incapable of falling within the scope of EIA', as they were not an 'effect' of the project.²¹ The Court of Appeal ('CA') agreed with the HC that Surrey County Council's decision had to be upheld, but on different grounds: the CA suggested that the planning authority was entitled to determine, 'as a matter of lawful evaluative judgment', whether there was 'a sufficient causal connection' to justify an assessment of downstream emissions.²² In a concurring judgment, Lewison LJ found that the County Council's reasons to exclude downstream emissions 'just about pass[ed] muster'.²³ Moylan LJ dissented: he viewed the planning decision as unlawful due to its failure to assess the 'relevant and required effects' from the combustion of oil.²⁴ By contrast, the Supreme Court ('SC') allowed the appeal, finding that downstream emissions were a foreseeable and significant effect of the project which had to be included in the EIA.²⁵ Two of the five judges dissented as they did not consider that downstream emissions were sufficiently closely related to the oil project to justify their assessment.²⁶

This case note discusses the main issues raised in the SC judgment from a comparative perspective, that is, by situating the

¹⁶*Zetland Group Limited on behalf of Horse Hill Developments, Environmental Statement for Horse Hill Well Site Hydrocarbon Production, Decommissioning and Restoration* (30 November 2018) Doc Ref HHDL-HH-ES-V1 7 para 4.

¹⁷Town and Country Planning (Environmental Impact Assessment) Regulations 2017, SI 2017/571 reg 4(2)(c) and Sch 4 paras 4, 5(f).

¹⁸Zetland Group Limited on behalf of Horse Hill Developments (n 16) ES Figure 12, 38.

¹⁹Surrey County Council, 'Decision Notice – FINAL' (27 September 2019) RE18/02667/CON <<https://planning.surreycc.gov.uk/Planning/Display/SCC%20Ref%202018/0152#>>.

²⁰See UK Government, 'Research and Analysis: Retained EU law and assimilated law dashboard' (23 July 2024) <<https://www.gov.uk/government/publications/retained-eu-law-dashboard>>.

²¹*R (Finch) v Surrey County Council and others* [2020] EWHC 3566 (Admin), [2021] PTSR 1160 [126] (hereinafter, 'Finch HC').

²²*R (Finch) v Surrey County Council and others* [2022] EWCA Civ 187, [2022] All ER (D) 93 (Feb) [60], [63] (hereinafter, 'Finch CA').

²³*ibid* [149].

²⁴*ibid* [139].

²⁵*R (Finch) v Surrey County Council and others* [2024] UKSC 20, [2024] All ER (D) 71 (Jun) [135], [174] (opinion of Lord Leggatt, with whom Lord Kitchin and Lady Rose agreed) (hereinafter, 'Finch SC').

²⁶*ibid* [260] (opinion of Lord Sales, with whom Lord Richards agreed).

judgment among the other EIA developments that have considered downstream emissions in EU and elsewhere. The case note shows that, while the SC's decision is convincing overall, some arguments require more nuance and important questions remain unresolved. Section 2 considers whether it is the role of courts to decide the scope of assessment of climate impacts as part of an EIA. Section 3 discusses objections to characterising downstream emissions as an impact of a fossil fuel project. Section 4 considers whether a new fossil fuel project would cause additional fossil fuel consumption or merely substitute for other projects. Section 5 discusses concerns relating to the fact that downstream emissions may occur overseas. Section 6 examines the practicality of predicting indirect GHG emissions. Section 7 concludes by highlighting some of the judgment's implications and identifying outstanding questions.

2 | WHAT IS THE ROLE OF COURTS IN DETERMINING THE SCOPE OF AN EIA?

A key issue in *Finch* is whether it should be a matter for courts to decide on the need for a project's EIA to assess indirect GHG emissions. Courts, in particular in common law jurisdictions, tend to accord a high degree of deference to the determination of climate policies by the elected branches of government.²⁷ This deference has occasionally extended to decisions regarding the scope of EIA procedures, particularly in the UK, where courts have recognised that such decisions may involve policy issues.²⁸

As such, the judgments in *Finch* involved first of all a discussion of the deference to accord to the decision of Surrey County Council not to assess the project's downstream GHG emissions, in the light of complex implications for national climate, energy and foreign policies. Absent a procedural flaw, the HC and the CA applied the well-established principle that the scope of the EIA—and thus the question of whether to include downstream emissions—was ultimately for the evaluative judgement of the decision maker, reviewable only on grounds of obvious (i.e., 'Wednesbury') unreasonableness.²⁹ In other words, the courts will only intervene where the decision in question is so unreasonable that no reasonable decision maker acting reasonably could have made it.

The SC rejected this analysis: it found this approach to be a recipe for inconsistency between decision-makers faced with similar issues.³⁰ The majority of the SC held that downstream emissions had

to be included within the scope of the EIA as a matter of law.³¹ This appears as a sound conclusion in the case at hand: the public and decision-makers could not have a clear understanding of the climate impact of an oil project without an assessment of combustion emissions. Yet, questions remain about what precisely is to be considered as an impact of a project as a matter of law, and on what grounds.

3 | ARE DOWNSTREAM EMISSIONS AN IMPACT OF THE PROJECT?

A critical issue in *Finch*, thus, is whether downstream emissions should be considered to be an impact of the project. Legislation providing for the assessment of 'indirect' impacts,³² while hinting that 'impact' is to be understood broadly, does not clarify the scope of indirect impacts that are to be assessed. Beyond downstream GHG emissions, the Horse Hill project would have all sorts of remote effects, including on the climate. For instance, the combustion of the oil from the project may produce aerosols, with a short-term, regional climate-cooling effect.³³ And, by increasing the supply of oil, the project may facilitate economic growth in the short term (though arguably not in the long term). This could cause more GHG emissions, while also enhancing the financial capacity of various actors to implement climate action. Of necessity, a line needs to be drawn between the indirect impacts of a project that are to be assessed and those that are simply too remote, speculative, or trivial to warrant an assessment.

The courts disagreed on where to draw this line. The HC considered that an EIA should only consider the impact of the 'development itself',³⁴ thus excluding the downstream emissions that would follow from the combustion of the oil in different facilities.³⁵ In contrast, the CA asserted that the causal link between the production and combustion of oil was 'sufficient' to allow the planning authority to require an assessment of downstream emissions,³⁶ although it was not sufficient to require this assessment.³⁷ The HC and CA both found support in the fact that the Horse Hill project's crude oil would have to be refined and transported before it could be consumed, thus suggesting that combustion emissions were a rather remote effect of the project.³⁸ However, the SC held more persuasively that downstream emissions had to be considered among the effects of the project on the ground that refinement and combustion were both 'expected'

²⁷See, e.g., *Native Village of Kivalina v ExxonMobil Corp* (ND Cal 2009) 663 F.Supp.2d 863, 883; *West Coast ENT Inc v Beller Coal Ltd* [2013] NZSC 87, [2014] 1 NZLR 32 [173]; *Juliana v United States* (9th Cir 2020) 947 F.3d 1159; *R (Rights Community Action) v Secretary of State for Housing, Communities and Local Government* [2020] EWHC 3073 (Admin) [6]; *La Rose v Her Majesty the Queen* [2023] FCA 241, Docket A-289-20 [83]; *Smith v Fonterra Co-Operative Group Ltd* [2024] NZSC 5.

²⁸E.g., *Bristol Airport Action Network Co-Ordinating Committee v Secretary of State for Levelling UP, Housing and Communities and others* [2023] EWHC 171 (Admin), [2023] PTSR 853 [170]–[171]; *R (on the application of Goesa Limited) v Eastleigh Borough Council v Southampton International Airport Limited* [2022] EWHC 1221 (Admin), [2022] PTSR 1473 [100].

²⁹*Finch* HC (n 21) [127]–[133]; *Finch* CA (n 22) [63]; *Finch* SC (n 25) [138]–[139], [174] (implicitly). See also, e.g., *R (Friends of the Earth) v Heathrow Airport* (n 3), [142]–[145].

³⁰*Finch* SC (n 25) [60], [323]–[324].

³¹ibid [59]–[60]. But see ibid [327].

³²See, e.g., Directive 2011/92/EU (n 11) art 5; Town and Country Planning (Environmental Impact Assessment) Regulations 2017, reg 4(2); Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2017, reg 4(1)(2).

³³See S Szopa et al, 'Short-Lived Climate Forcers' in V Masson-Delmotte et al, *Climate Change 2021: The Physical Science Basis. Working Group I Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (CUP 2021) 817, 819; CA Kontovas, 'Integration of Air Quality and Climate Change Policies in Shipping: The Case of Sulphur Emissions Regulation' (2020) 113 Marine Policy 103,815.

³⁴*Finch* HC (n 21) [110].

³⁵ibid [126].

³⁶*Finch* CA (n 22) [60], [63].

³⁷ibid [66] (concluding that the Council had a 'reasonable and lawful basis for deciding [that those downstream] emissions were not, in truth, effects "of the proposed development" it was dealing with').

³⁸*Finch* HC (n 21) [126]; *Finch* CA (n 22) [66].

and ‘intended’ to follow from the production of the oil.³⁹ The SC insisted that the number of ‘intervening stages between the extraction of the oil and the ultimate generation of emissions does not itself provide any rational basis for denying that the two are causally linked’.⁴⁰

The SC thus followed the approach of several other jurisdictions in relation to the EIA to fossil-fuel production projects.⁴¹ For instance, the New South Wales Land and Environment Court held that downstream emissions were ‘sufficiently connected’ to a coal mine for their assessment to be legally required as part of its EIA based on its understanding that the combustion of the fossil fuels was the ‘only purpose’ of the projects.⁴² Likewise, the US Council on Environmental Quality interpreted the National Environmental Policy Act as requiring the assessment of ‘[t]he reasonably foreseeable indirect effects’ of fossil-fuel projects, including ‘effects associated with the processing, refining, transporting, and end-use of the fossil fuel being extracted, including combustion of the resource to produce energy’.⁴³

It remains however that an EIA cannot be expected to assess all indirect GHG emissions, however remotely related to the project. US Courts have suggested that the effects to be assessed are only those that a person of ‘ordinary prudence’ would consider when making their decision on the project.⁴⁴ Yet, reasonable agreement is possible as to what constitutes ordinary prudence. The Supreme Court of Ireland’s decision in *An Taisce* provided an illustration of indirect effects it deemed too remote to be considered: the upstream effect of the operation of a proposed cheese factory on the methane emission of dairy cows.⁴⁵ And the High Court of South Africa found that upstream emissions from the extraction and transportation of natural gas did not have to be documented in the EIA of a natural gas-fired power plant.⁴⁶ In both cases, however, one might think that it would be useful for the EIA to at least acknowledge the existence of these indirect emissions, perhaps even to provide a rough estimate, in order to inform the public and decision-makers.⁴⁷

In *Finch*, the HC expressed concern that requiring the assessment of the downstream emissions of an oil project would inevitably imply

imposing a similar assessment in relation to many other activities. Would the EIA for an iron mine, for instance, have to consider the GHG emissions from the use of cars made of iron?⁴⁸ The SC seeks to assuage these concerns by stating that indirect effects do not need to be assessed when they involve ‘conjecture or speculation’.⁴⁹ The use of metals, according to the SC, depends on ‘innumerable decisions made “downstream”’, so as to make it impossible to identify likely effects on GHG emissions.⁵⁰ Even there, however, the line might not be as clear as the SC seems to assume. On the one hand, some uses of oil do not involve its combustion (e.g., the production of asphalt, plastics and solvents).⁵¹ On the other hand, iron mining is almost systematically associated with downstream emissions from coal combustion for steel production, so that no conjecture or speculation is needed to ascertain the existence of these emissions.⁵² As such, a reading of *Finch* could suggest that the EIA for an iron mine would need to look at the downstream emissions associated with steel production.

4 | WOULD A NEW OIL PROJECT MERELY BE A SUBSTITUTE FOR OTHER PROJECTS?

A recurring argument in debates on the EIA of fossil-fuel projects is that, in a competitive market, a new fossil-fuel project would merely substitute for other projects, existing or projected, thus causing no additional climate impact.⁵³ The Queensland Land Court held that stopping a coal mine project would ‘have no impact on the global demand for coal’ because this demand, the Court assumed, would inevitably be ‘satisfied from another source’.⁵⁴ Similarly, the Scottish Court of Session appeared to accept the Secretary of State’s contention that ‘[t]he production of oil from the Vorlich field [would] not increase the use of oil’.⁵⁵ While market substitution has generally been invoked to object to the assessment of downstream emissions, it could just as well be used against the assessment of on-site GHG emissions.

However, most courts have rightly denounced the hypothesis of a perfect market substitution: under the economic laws of supply

³⁹*Finch* SC (n 25) [118].

⁴⁰*ibid* [134].

⁴¹For a comprehensive survey, see Mayer, *Environmental Assessment as a Tool for Climate Change Mitigation* (n 3) 140–178.

⁴²See Gray (n 6) [84]. See also *Mullaley Gas and Pipeline Accord Inc v Santos NSW (Eastern) Pty Ltd* [2021] NSWLEC 110 [141].

⁴³Council on Environmental Quality, ‘National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change’ (9 January 2023)

⁴⁴8 Federal Register 1196, 1204. See also, e.g., *WildEarth Guardians v Zinke* (DC Cir 2019) 368 F.Supp.3d 41, 64; *Eagle County* (n 7) 34–35; *Food & Water Watch v FERC* (DC Cir 2024) 104 F.4th 336, 346.

⁴⁵*EarthReports Inc* (DC Cir 2016) 828 F.3d 949, 955. Applied in, e.g., *Sierra Club* (n 6) 1371; *Food and Water Watch* (n 6) 285–286.

⁴⁶*An Taisce* (n 10) [111].

⁴⁷*South Durban Community Environmental Alliance v Minister of Forestry, Fisheries and the Environment* [2022] ZAGPPHC 741 [29].

⁴⁸See, e.g., N Craik, *The International Law of Environmental Impact Assessment: Process, Substance and Integration* (Cambridge University Press 2008) (characterising public participation as the ‘soul’ of EIA at 31). See generally, PC Stern and others, *Public Participation in Environmental Assessment and Decision Making* (National Academies Press 2008).

⁴⁸*Finch* HC (n 21) [4].

⁴⁹*Finch* SC (n 25) [122], [77].

⁵⁰*ibid* [121]–[122].

⁵¹‘Oil and petroleum products explained: Use of oil’ (US Energy Information Administration, n/d) <<https://www.eia.gov/energyexplained/oil-and-petroleum-products/use-of-oil.php#:~:text=We%20use%20petroleum%20products%20to,intermediate%20and%20end%2Duser%20goods.>>. Some, but not all, of these products are eventually incinerated. The percentage of non-combustion use of oil likely depends on the national market where oil is sold and may evolve over time.

⁵²‘Iron and Steel Technology Roadmap: Towards more sustainable steelmaking’ (International Energy Agency 2020) 27 <https://iea.blob.core.windows.net/assets/eb0c8ec1-3665-4959-97d0-187ceca189a8/Iron_and_Steel_Technology_Roadmap.pdf

⁵³See, e.g., J Bell-James and B Collins, ‘“If We Don’t Mine Coal, Someone Else Will”: Debunking the “Market Substitution Assumption” in Queensland Climate Change Litigation’ (2020) 37 Environmental and Planning Law Journal 167, 169; Mayer, *Environmental Assessment as a Tool for Climate Change Mitigation* (n 3) ch 4, 30.

⁵⁴*Xstrata Coal Queensland* (n 7) [559]. See also *Environment Council of Central Queensland Inc v Minister for the Environment and Water* (No 2) (2023) 413 ALR 318 [161]; *West Coast ENT Inc v Buller Coal Ltd* [2013] NZSC 87, [2014] 1 NZLR 32 [122].

⁵⁵*Greenpeace Ltd* (n 14) [40], upheld at [68].

and demand, constraining supply can be expected to cause a price increase, which, in turn, would reduce consumption.⁵⁶ Similarly, the SC in *Finch* noted that ‘[l]eaving oil in the ground in one place does not result in a corresponding increase in production elsewhere’.⁵⁷ Like other courts, the SC only admitted the existence of *partial* market substitution, based on the understanding that the decrease in the price of oil as a result of the Horse Hill project would prompt a decrease in supply from other sources. Extrapolating from a study of the Californian oil market, the Court assumed that 20 to 60% of a new oil project’s production would substitute for existing sources.⁵⁸

On the other hand, *Finch* did not consider other types of substitution. Those include intermodal substitution: new oil supply could substitute for coal or natural gas, with significantly different carbon contents.⁵⁹ Substitution could also occur between projects with a different emission intensity, for instance, if a well-regulated project in the UK was to replace other projects operating under laxer environmental standards, or with more energy-intensive techniques (as in the case of unconventional oil and gas).⁶⁰ Accounting for these different types of substitution would be essential to understanding an oil project’s actual net climate impact.

5 | CAN A NATIONAL EIA PROCESS CONSIDER OVERSEAS EMISSIONS?

Another objection to the assessment of the Horse Hill project’s downstream emissions was that these emissions might occur overseas.⁶¹ The HC expressed the view that an EIA could not extend to the assessment of emissions that would occur ‘in locations which are unknown and unrelated to the development site’,⁶² as many of these emissions should be regulated by foreign governments.⁶³ The CA and SC disagreed, with the latter holding that, as the EIA Directive does not set any geographical limit on the geographical scope of the effects to be assessed, ‘all likely significant effects of the project must be assessed, irrespective of where ... those effects will be generated or

felt’.⁶⁴ A dissenting minority cautioned that this interpretation of the Directive would give it ‘exorbitant jurisdictional effect ... in ways that cannot have been intended’ by the European legislator.⁶⁵

Courts in other countries have also been divided about the ability of a national EIA regime to consider indirect GHG emissions occurring overseas. The Supreme Court of Norway assumed the existence of a ‘division of responsibilities between states in accordance with international agreements’, including a ‘clear principle’ that ‘each state is responsible for [fossil-fuel] combustion on its own territory’.⁶⁶ In reality, however, climate treaties do not generally limit states’ obligation to mitigate climate change to their own territory,⁶⁷ and states have occasionally sought to limit extraterritorial GHG emissions, for instance by managing potential spillover effects such as carbon leakage and technology innovation.⁶⁸ As such, several courts have accepted, like the SC in *Finch*, that a national agency may have the ‘authority to act on the emissions resulting from foreign oil consumption’,⁶⁹ including by deciding not to authorise a project out of concern for its downstream emissions.⁷⁰

It remains that, as the HC noted, a fossil-fuel project could have multiple other extraterritorial effects related to the combustion of the oil, including effects on air, land and water pollution, and, thus, on public health.⁷¹ The SC makes no effort to clarify whether the EIA for the Horse Hill project should also assess those non-GHG effects overseas, and why. The response might be that these other extraterritorial effects need not be assessed because they are less predictable. The impact of local air pollution on public health, for instance, depends in part on how, where and when the oil is burnt, although it can certainly be predicted that a large amount of oil production would have at least some diffuse impact on public health somewhere.

⁵⁶Mid States Coalition for Progress (n 6) 549; *WildEarth Guardians v United States Bureau of Land Management* (10th Cir 2017) 870 F.3d 1222, 1237–1238; *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7 [545]. The Queensland Land Court, once a strong supporter of perfect market substitution, turned away from this argument. See *Waratah Coal Pty Ltd v Youth Verdict Ltd (No 6)* [2022] QLC 21 [1005].

⁵⁷*Finch* SC (n 25) [2].

⁵⁸ibid, citing *The Production Gap: The Discrepancy Between Countries’ Planned Fossil Fuel Production and Global Production Levels Consistent with Limiting Warming to 1.5°C or 2°C* (UNEP 2019) 50, itself referring to P Erickson and M Lazarus, ‘Would Constraining US Fossil Fuel Production Affect Global CO₂ Emissions? A Case Study of US Leasing Policy’ (2018) 150 *Climatic Change* 29.

⁵⁹*Hancock Coal Pty Ltd v Kelly (No 4)* [2014] QLC 12 [227], [232].

⁶⁰See C Hilson, ‘Emissions Intensity: Do We Need a CBAM for Oil and Gas Imports?’ (2024) 17 *Journal of World Energy Law & Business* 136. See also MS Masnadi et al, ‘Global Carbon Intensity of Crude Oil Production: New Data Enable Targeted Policy to Lessen GHG Emissions’ (2018) *Science* 361; Y Dixit et al, ‘Carbon Intensity of Global Crude Oil Trading and Market Policy Implications’ (2023) 14: 5975 *Nature Communications*.

⁶¹*Finch* HC (n 21) [69]; *Finch* SC (n 25) [31].

⁶²*Finch* HC (n 21) [126].

⁶³ibid [106].

⁶⁴*Finch* SC (n 25) [93].

⁶⁵ibid [264].

⁶⁶*Greenpeace Nordic Association v Ministry of Petroleum and Energy* (2020) Case No 20-051052SIV- HRET (Supreme Court) (unofficial translation by the Court) [159]. See also *Greenpeace v Netherlands*, ECLI:NL:RBDHA:2020:12440 (District Court of The Hague, 9 December 2020) s 4.4; *Australian Conservation Foundation Inc v Minister for the Environment* (2016) 251 FCR 308 [51].

⁶⁷See, e.g., United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994), 1771 UNTS 107 art 4(1)(b), 4(2)(a); Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) 3156 UNTS 79 art 4(2). For a historical exception, see Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 2303 UNTS 162 art 3. While national GHG inventories focus on territorial emissions to avoid double-counting, this limitation does not apply to substantive obligations.

⁶⁸A Pirlot, ‘Carbon Leakage and International Climate Change Law’ (2024) 13 *Transnational Environmental Law* 61. See also J Scott and L Rajamani, ‘EU Climate Change Unilateralism’ (2012) 23 *European Journal of International Law* 469.

⁶⁹*Center for Biological Diversity* (n 6) 740. See also *Gloucester* (n 56) [556]; *Verein Klimaseniorinnen Schweiz v Switzerland* [2024] ECHR 53600/20 para 383 (suggesting that a state’s jurisdiction ‘should encompass all emissions under the State’s effective control’).

⁷⁰See *Gloucester* (n 56); *Waratah* (n 56).

⁷¹*Finch* HC (n 21) [99].

⁷²See *Greenpeace Ltd* (n 14) [68]; *Australian Conservation Foundation Inc* (n 66) [140]; *The National Trust for Ireland v An Bord Pleandála* [2022] IESC 8 [110].

6 | ARE DOWNSTREAM EMISSIONS PREDICTABLE?

Another frequent argument against the assessment of indirect GHG emissions is that it is difficult to predict them,⁷² although courts have generally been unreceptive to this argument.⁷³ US courts, for instance, have carefully scrutinised agencies' justifications for their inability to provide a quantitative estimate of downstream emissions.⁷⁴ Going further, the SC in *Finch* asserts that predicting downstream emissions 'is not a difficult task'.⁷⁵ Based on the expected production from the Horse Hill project and a default conversion factor, the Court calculates that the project's lifetime downstream emissions would approach 10.6 Mt of carbon dioxide emissions.⁷⁶

The SC appears to overstate its point: while a (rough) assessment of downstream emissions is certainly feasible, it is not an easy task. Useful methodologies exist to predict GHG emissions, but they necessarily rely on assumptions, the making of which is an important source of difficulty. The SC's own back-of-the-envelope calculation glosses over at least three of these difficulties. First, the Court assumes that all oil from the Horse Hill project would be combusted,⁷⁷ thus ignoring the small but non-negligible non-combustion use of oil.⁷⁸ Second, the Court ignores downstream emissions from sources other than combustion, such as methane leakage, which can be considerably more difficult to predict as it depends on how fuels are transported, stored and used.⁷⁹ Third, and perhaps most importantly, the Court does not consider, at this point in its judgment, the significant uncertainty associated with market substitution, and it does not acknowledge other substitution effects anywhere in the judgment, even though substitution could be an important source of uncertainty as to the project's net climate effect.⁸⁰

The SC's dissenting minority, on the other hand, expresses concern with the 'disproportionate costs and burdens' of requiring the assessment of indirect emissions.⁸¹ There may indeed be circumstances where an assessment of indirect emissions would appear

⁷²See *Greenpeace Ltd* (n 14) [68]; *Australian Conservation Foundation Inc* (n 66) [140]; *The National Trust for Ireland v An Bord Pleanála* [2022] IESC 8 [110].

⁷³*Sierra Club* (n 6) 1374; *Gloucester* (n 56); *WildEarth Guardians v Zinke* (n 43) 70; *Eagle County* (n 7) 1179.

⁷⁴*WildEarth Guardians v Zinke* (n 43) 43.

⁷⁵*Finch* SC (n 25) [81]. See also *Finch* CA (n 22) [71] ('a reliable estimate [of downstream emissions] is not impossible').

⁷⁶*Finch* SC (n 25) [81].

⁷⁷*Ibid* [2], [81]. The parties agreed that all of the oil would eventually be burnt. *Finch* HC (n 21) [24], [100]. Yet it is unclear how they could come to this conclusion without knowing how the oil would eventually be used. See *ibid* [69]; *Finch* CA (n 22) [17].

⁷⁸See *supra* n 51.

⁷⁹K Tibrewal et al, 'Assessment of Methane Emissions from Oil, Gas and Coal Sectors Across Inventories and Atmospheric Inversions' (2024) 5 *Communications Earth & Environment*. Whether these other downstream emissions should be considered is one of the questions considered by the Department for Energy Security and Net Zero in the follow-up of the judgment. See 'Environmental Impact Assessment (EIA) – Assessing Effects of Scope 3 Emissions on Climate: Consultation on Draft Supplementary Guidance for Assessing the Effects of Scope 3 Emissions on Climate from Offshore Oil and Gas Projects' (Department for Energy Security & Net Zero, 30 October 2024) 9 (question 2).

⁸⁰See text at n 58. See also *Friends of the Earth v Secretary of State for Levelling Up, Housing and Communities* [2024] EWHC 2349 (Admin), [2024] 9 WLUK 177 [178]–[187] (hereinafter, 'Whitehaven Coal Mine').

⁸¹*Finch* SC (n 25) [259].

unwarranted, especially if these emissions are difficult to predict and unlikely to be significant. In *Finch*, in particular, an argument could have been made that an assessment of downstream emissions was not necessary at all given the very small size of the project—indeed, an EIA was barely, if at all, necessary for the project to be implemented.⁸² Not considering downstream emissions in relation to (far) larger projects would appear more difficult to justify. For instance, the Galilee basin coal mine at issue in *Waratah Coal Pty Ltd v Youth Verdict Ltd*, in Queensland, was expected to result in downstream combustion emissions equivalent to 1.58 Gt of carbon dioxide during its lifetime,⁸³ which would be the equivalent of nearly four times Australia's annual GHG emissions.⁸⁴ It is difficult to see how the cost of assessing downstream emissions of this magnitude could be 'disproportionate' to the benefit, in terms of informing the public and the decision-makers.

The difficulty of predicting an impact should not automatically justify excluding this impact from the scope of an EIA. The role of an EIA is, in part, to deal with such difficulties⁸⁵: a scientific study would have little added value if all of a project's impacts were simple and obvious to all. In other words, it is arguably *because*—rather than *in spite of*—uncertainties that an EIA can play a useful role in informing the public and the planning authority about both the most likely estimate and the level of confidence associated with this estimate.⁸⁶ On the other hand, a balance needs to be found between the costs of assessing various potential effects and the benefits that the public and decision-makers may realistically draw from information that might still be incomplete and uncertain. For what concerns the downstream combustion emissions of large fossil-fuel projects, at least, the balance is strongly in favour of conducting the assessment.

7 | WHAT ARE THE IMPLICATIONS OF THE DECISION?

The SC's decision in *Finch* has direct consequences for future fossil-fuel projects in the UK, including offshore projects.⁸⁷ Already, the government has conceded the invalidity of two other planning

⁸²*Ibid* [31] (mentioning an estimated production of 3.3 million tonnes over a 20 year period, which would imply about 425 t per day on average); The Town Planning (EIA) Regulations (n 17) sch 1 para 14 (requiring an EIA for oil projects producing more than 500 t per day). Following the judgment of the SC, the proponents announced that they would implement the project while ensuring that 'future production will fall below the levels at which an EIA is needed'. See 'Supreme Court makes significant oil and gas ruling' (Barbour Consolidated 20 June 2024) <<https://cedrec.com/r/news/0624-supreme-court-makes-significant-oil-and-gas-ruling>>.

⁸³*Waratah* (n 56) [649].

⁸⁴Australian Government, 'National Inventory Report: The Australian Government Submission to the United Nations Framework Convention on Climate Change' (Vol 1, April 2024) 3.

⁸⁵See Glasson and Therivel (n 1) 122.

⁸⁶M Raff, 'Ten Principles of Quality in Environmental Impact Assessment' (1997) 14 *Environmental and Planning Law Journal* 207, 217; The Greenhouse Gas Protocol, 'The GHG Protocol for Project Accounting' (World Business Council for Sustainable Development and World Resources Institute 2005) 23.

⁸⁷See 'Environmental Impact Assessment (EIA) – Assessing effects of scope 3 emissions on climate' (n 79) 4 (noting that the *Finch* precedent should also apply to EIA under the Offshore EIA Regulations).

permissions for oil-and-gas projects,⁸⁸ and it is developing guidance for the oil-and-gas industry on the requirement to assess indirect climate impacts in EIAs.⁸⁹ Meanwhile, the HC has quashed the planning permission of the Whitehaven coal mine on the ground that the EIA failed to assess downstream emissions.⁹⁰ This new case law puts the UK in line with the prevailing position, among courts that have looked at the issue, of requiring an assessment of the downstream GHG emissions of fossil-fuel production projects.

There remain, however, difficult questions for UK courts to decide in future cases. First, they will need to determine in what other circumstances indirect GHG emissions are to be assessed. Other jurisdictions have already seen cases ranging for instance from the upstream emissions of a power plant or a cheese-making factory,⁹¹ to the effects of new roads⁹² and airports⁹³ on vehicle emissions. Most recently, several jurisdictions have imposed an EIA requirement on data centres, including crypto-mining and possibly AI facilities, to assess the GHG emissions embedded in their electricity consumption, even when these projects have no direct environmental impact otherwise triggering an EIA requirement.⁹⁴ Whether such indirect climate impacts need to be assessed should depend on their likely significance as well as their causal proximity to the project. On the other hand, if EIA is to inform decisions on projects, the difficulty of assessing an indirect effect should not be a reason to ignore this effect entirely.

DATA AVAILABILITY STATEMENT

Data sharing is not applicable to this article as no new data were created or analyzed in this study.

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⁸⁸‘Certainty for Oil and Gas Industry in Light of Landmark Ruling’ (UK.Gov, 29 August 2024) <<https://www.gov.uk/government/news/certainty-for-oil-and-gas-industry-in-light-of-landmark-ruling>>.

⁸⁹‘Environmental Impact Assessment (EIA) – Assessing Effects of Scope 3 Emissions on Climate’ (n 79).

⁹⁰Whitehaven Coal Mine (n 80) [188].

⁹¹See (n 45–46).

⁹²Coalition for Advancement of Regional Transportation (n 10); Conseil d’État (State Council) (10ème– 9ème chambres réunies), 30 December 2021, 438,686, ECLI:FR:CECHR:2021:438686.20211230; *R (Boswell) v Secretary of State for Transport* [2024] EWCA Civ 145, [2024] 2 WLUK 345.

⁹³*Barnes* (n 10); Verfassungsgerichtshof (Constitutional Court, Austria) VfGH E 875/ 2017 (1 June 2017); *Bristol Airport* (n 28); Cour administrative d’appel (Administrative Court of Appeal, Nantes, France), 14 December 2023, 22MA02967.

⁹⁴See Hawaii Code R (2024) §11–200.1–13; Minnesota Environmental Quality Board, ‘Environmental Assessment Worksheet’ (December 2022) s 18.