



Welcome to Landmark Chambers, Pinsent Masons and Mott MacDonal
d' 'Defining a Project and its Effects – impacts and future challenges in light of recent case law' webinar

The recording may be accessed [here](#).

Your speakers today are...



Paul Brown QC (Chair)
Landmark Chambers

Topic:
Defining the project and
its effects: why does it
matter?



Matthew Fraser
Landmark Chambers

Topic:
Finch and other recent case
law on “indirect effects”



Nick McDonald
Pinsent Masons

Topic:
Defining a Project Post *Finch*



Stephanie Baldwin
Mott MacDonald

Topic:
Indirect Effects /
Downstream Emissions in
EIA

Defining the project and its effects: why does it matter?



Paul Brown QC
Barrister, Landmark Chambers

Introduction/Structure

- **Defining the project and its effects: why does it matter?**
 - Paul Brown QC, Landmark Chambers
- **The recent case law: *Finch*; *Greenpeace*, *An Taisce***
 - Matt Fraser, Landmark Chambers
- **Practical thinking: the importance of defining the project**
 - Nick McDonald, Pinsent Masons
- **Practical thinking: “indirect effects”, supporting decisions and decision-makers**
 - Stephanie Baldwin, Mott MacDonald
- **Q&A**

Why does this matter? Applicants and LPAs

The risk of judicial review

- Hard-edged principles rather than matters of judgment? E.g. case law on salami slicing:
 - *Burridge v. Breckland* [2013] EWCA Civ 228
 - *R (Larkfleet Ltd) v. South Kesteven DC* [2015] EWCA Civ 887
 - *Bowen-West v. SSCLG* [2012] EWCA Civ 321

“the courts have been concerned, energetically, to put a stop to the device of using piecemeal applications as a means of excluding larger developments from the discipline of EIA”
- The importance of EIA and the (historically) more limited scope for refusing relief
 - *Berkeley (No. 1)* [2010] AC 603

Why does it matter?

The retreat from hard edged principles:

- ***Walton v. Scottish Ministers***
- ***Champion***
- ***Wingfield v. Canterbury City Council [2019] EWHC 1975***
- ***Finch***

But the residual question: if it's a matter of judgment, what are the guidelines?

Why does it matter?

Shifting the emphasis from “whether it can be predicted” to “is it an effect”?

- Arguments based on the difficulty of carrying out an assessment
- Not just “what is the project”, but also “what are the ‘effects’”?
 - And can you separate the two?

Why does it matter? Campaign Groups and Objectors

- Ensuring that the consequences of development are properly taken into account
- The oxygen of publicity
- The particular difficulties with climate change: extraction almost always leads to combustion ... but combustion is not part of the development for which permission is sought
- Arguments about substitution: the shift from “whether it will happen” to whether it is an effect

Why does it matter

The link between “effects” and “material considerations”

- Things can be material planning considerations even though they are not the subject of EIA
- **Finch** is only about what needs to go in an ES. So why is it a big deal?
- Because **Finch** turns on whether downstream emissions are an “effect”. If they are not an “effect”, how can they be attributed to the development so as to be a material consideration?

Why does it matter?

- The cross-over with SEA: is there any?

Finch and other recent case law on “indirect effects”



Matthew Fraser
Barrister, Landmark Chambers

“Indirect effects”

Town and Country Planning (Environmental Impact Assessment) Regulations 2017 ("the EIA Regs")

Reg. 4(2):

“The EIA must identify, describe and assess in an appropriate manner, in light of each individual case, the direct and indirect significant effects of the proposed development on ... [various factors]”

Para. 5 of Sch. 4:

"[the] description of the likely significant effects on the factors specified in regulation 4(2) should cover the direct effects and any indirect, secondary, cumulative, transboundary, short-term, medium-term and long-term, permanent and temporary, positive and negative effects of the development ..."

The effects of “the project”

An assessments of the likely significant effects extends to the effects of the use of the works in question, as well as their construction.

- *Commission v Spain* (Case C-227/01) [2005] Env LR 20, noise impact from the use of the expanded railway;
- *Abraham v Wallonia* (Case C-2/07) [2008] Env LR 32, increased activity resulting from expanded airport;
- *Ecologistas en Accion - CODA v Ayuntamiento de Madrid* (Case C-142/07) [2009] PTSR 458, impacts of the use of improved urban ring road
- *R. (on the application of Preston) v Cumbria County Council* [2020] Env. L.R. 3, discharge of temporary discharge pipe into a river.

What are the “indirect” effects of a project?

The existence and nature of "indirect", "secondary" or "cumulative" effects will always depend on the particular facts and circumstances of the development under consideration:

- *Brown v Carlisle City Council* [2010] EWCA Civ 523, para. 21;
- *Bowen-West v Secretary of State for Communities and Local Government* [2012] Env LR 22, para. 28.

Adequacy of assessment of indirect effects

If the “indirect” effects need to be assessed, the assessment must be adequate.

See e.g. *R. (on the application of Squire) v Shropshire Council* [2019] EWCA Civ 888, failure to consider, in an EIA of an intensive poultry rearing development, the impact of odour and dust produced by poultry manure spread on farmland.

R (Finch) v Surrey County Council

[2022] EWCA Civ 187 (17 February 2022)

1. Judicial review of a grant of planning permission for 4 new oil wells on a site in Surrey to produce hydrocarbons over a period of 25 years.
2. Key question (para. 1 of judgment):

whether it was unlawful for a planning authority not to require the environmental impact assessment for a project of crude oil extraction for commercial purposes to include an assessment of the impacts of greenhouse gas emissions resulting from the eventual use of the refined products of that oil as fuel

Finch – High Court

Holgate J. (December 2020)

Claim dismissed.

Downstream emissions could not as a matter of law be an effect of the development for the purposes of EIA.

Finch – Court of Appeal

Disagreement with Holgate J.

1. Not possible to say that such impacts are legally incapable of being an effect requiring assessment in an EIA.
2. Instead, all three judges agreed that the question of whether any particular impact, including the impact in this case, is truly a “likely significant effect” of the proposed development – be it a “direct” or “indirect” effect – is ultimately a matter of fact and evaluative judgment for the authority.

How to exercise the judgment on “indirect” effects

In determining the “direct” or “indirect” effects, what needs to be considered is the necessary degree of connection that is required between the development and its putative effects.

Application to the facts

- The relevant “project” is the construction and use of a working well site for the commercial extraction of crude oil for onward transport to refineries.
- It was then a matter of fact and evaluative judgment for the mineral planning authority to determine whether the impacts arising from the GHG emissions arising from the eventual use of the refined products of that oil as fuel constituted “indirect” effects of the project.

Adequacy of reasons for excluding downstream effects

- Court of Appeal majority found the county council’s reasons for not requiring the EIA to assess the end-use GHG emissions to be lawful. An “elaborate explanation” was not required, and it was common ground that there was no duty on the authority to give reasons for a decision on the adequacy of an EIA. Taking a straightforward approach, the Senior President found that the county council had provided “terse” but legally adequate reasons, and Lewison LJ concluded “(not without hesitation) that the reasons just about pass muster”.
- Moylan LJ did not disagree with the majority on the points of law but in his assessment of the adequacy of the reasons given by the Council, which he regarded as legally flawed.

Application for permission to appeal

Application made by Ms Finch for permission to appeal to the Supreme Court

Submissions in support by Friends of the Earth

Greenpeace v Advocate General

[2021] CSIH 53

1. Project: extraction of oil in an oil field in North Sea.
2. Question: should the EIA have included the downstream impacts of consumed oil?

Court: ultimate consumption of oil and gas did not give rise to direct or indirect significant effects of the project.

Argument was said to be “academic” (para. 68) because exploitation would not increase or even maintain the current level of oil and gas consumption.

Application for PTA to the Supreme Court – likely to be considered with *Finch*.

An Taisce – National Trust for Ireland

[2022] IESC 8

Project: cheese factory (requiring 450m litres of milk per year)

Argument: milk production for supply of factory would increase emissions – an “indirect” impact needing assessment in EIA

Irish Supreme Court: indirect effects of milk production were already known and measured in Govt policy on dairy sector emissions. In any case, too remote. Rejected “open-ended” test for determining “indirect” effects, and found it was “simply not feasible” to assess the impact of the factory on the milk production farms.

Big questions

1. Can it be right to leave it to judgment of LPA? Will that generate uncertainty and inconsistency, and leave out relevant effects from assessment?
2. Could there be an effective obligation in law to require a particular effect to be assessed? I.e. when can exclusion be a “patent defect”?
3. What is the relevance of intermediate processes between project and effects?
4. What is the relevance of the practicability of assessment?
5. Is it always possible to distinguish a project from its effects?
6. How does the judgment on indirect effects interact with the question of what is a material planning consideration?
7. If the downstream effects had been assessed, what impact would that have on the decision whether to grant planning permission?



Defining a Project Post *Finch*



Nick McDonald
Partner
Pinsent Masons LLP

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Context

- What is an indirect effect is now a matter of planning judgment, subject to the Court's review on *Wednesbury* grounds
- An indirect effect needs to be associated with the project
- Can you draw your project tightly and consequently influence the indirect effects said to relate specifically to your project?
- Defining the project important to set the 'fence' against which your effects are drawn



Scoping

- Scope of assessment \neq definition of your project, but it has direct implications
- EIA Regs – ES to be “based on” the most recent scoping opinion. Comments in *Finch* in High Court judgment regarding this obligation
- Need to allow for flexibility in design whilst accounting for *Finch* issues. Consider the purpose of the project, the objectives it seeks to achieve, and its definition
- Definition needs to account both for upstream effects and downstream effects. A cheese factory / a dairy farm; a biomass plant / the planting of pellet-producing forests; a housing development / its future generations of residents



Salami slicing and 'unassessed' effects

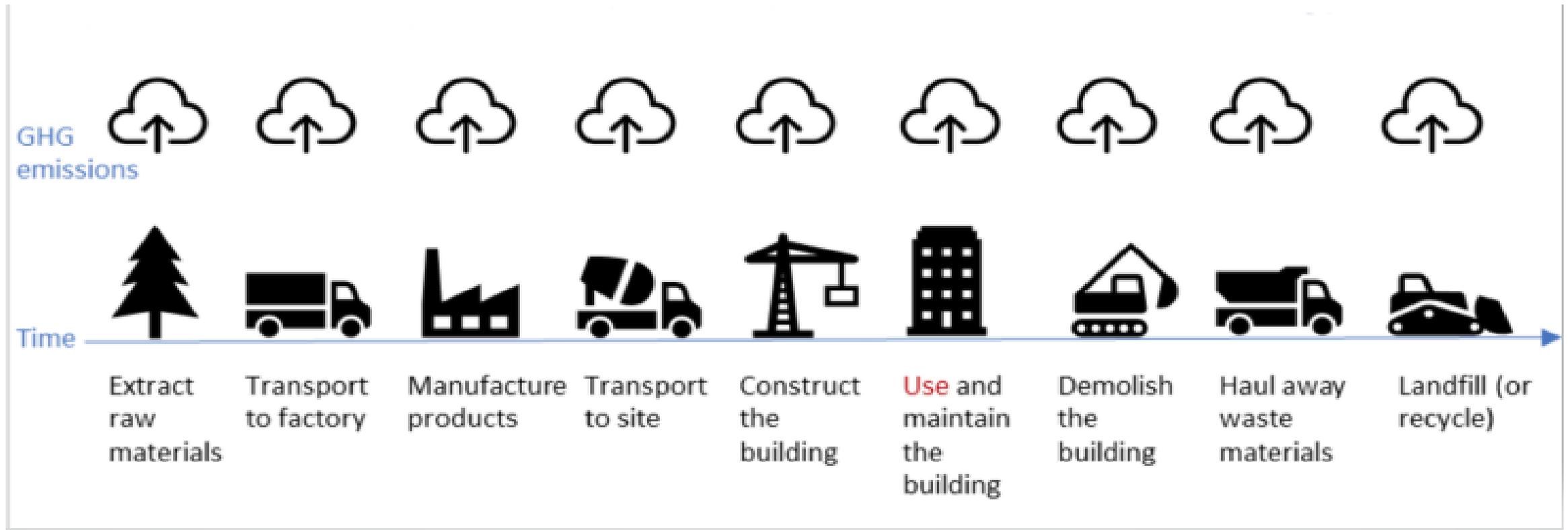
- Cannot use project definition process to artificially split up the EIA consideration of a project
- In considering this, the 'mischief' for the Courts is a promoter seeking to avoid EIA scrutiny
- Not suggested in *Finch* that the later refining / combustion of the oil was properly part of 'the project'
- There may be indirect effects which are not considered in any ES

The causal link between project and effects

- CoA noted that there was no 'gloss' to be put on the judgment of a degree of connection between a project and an effect
- Challenges to LPA's judgment on that connection only challengeable on public law grounds
- Scoping Report and ES will need to make a clear case as to why there is not sufficient causal connection, partly through the project definition
- Case by case judgment to decide whether you need to get into this debate for your project or particular potential effects



In conclusion....



What is the project, and which effects are sufficiently connected?

Indirect Effects / Downstream Emissions in EIA



Stephanie Baldwin

Technical Director, Environment & Sustainability
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23 May 2022

Non-confidential - Standard



Scoping and assessment considerations

Guidance to help clarify:

- Which projects need to be considered for this?
- Size and type of project – thresholds and exemptions
- Project boundaries
- What constitutes ‘significant’?
- It will be essential that scope and assumptions are clearly stated to communicate the scope of the assessment.
- Pre applications discussions with planning authorities will be critical.

EIA approach considerations

The environmental assessment could include:

- Analysis of on-site, upstream, and downstream emissions from the project
- A life cycle analysis of the proposals, inputs or feedstocks, and outputs or products

Assessment methods require the use of best available science and current data:

- Complex issues and data can be subject to different interpretation by various parties
- Defining aspects such as baseline vs development project scenario – and alternatives

Mitigation?

Avoid – Minimise - Restore - Offset

- Mitigation requirements...what elements would form a mitigation plan? What would need to be included (such as emissions from extraction and transporting)?
- Effects / emissions 'downstream' that are not within the proponent's control – how should these be dealt with?
- Decarbonisation strategies - how should mitigation for emissions from projects that support decarbonisation be considered?
- What reporting or performance monitoring would need to be committed to demonstrate achieving these goals?

Q&A

We will now answer as many questions as possible.

Please feel free to continue sending any questions you may have via the Q&A section which can be found along the top or bottom of your screen.

Thank you for listening

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