

Finch and other recent case law on “indirect effects”



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“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?

Thank you for listening

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