Former Marchon Site, Pow Beck Valley and area from Marchon Site to St Bees Coast, Whitehaven, Cumbria

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APPLICANT'S FURTHER SUBMISSIONS ON

THE COURT OF

APPEAL'S

JUDGMENT IN *FINCH*

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1. In accordance with the Inspector's request of 24 February 2022 these written submissions are provided by the Applicant to address the implications of the recent decision of the Court of Appeal in *R (Finch) v Surrey CC* [2022] EWCA Civ 187 for the matters on which the Secretary of State wished to be informed, in response to the Inspector's request dated 24 February 2022.

2. These submissions are provided on the basis of the law as it stands following the decision of the Court of Appeal in *Finch*.

3. As requested these submissions address the meaning of the Court of Appeal's judgment and not the correctness of the judgment.

4. **Findings of the Court of Appeal in *Finch***

5. The case of *Finch* involved an application for judicial review of Surrey County Council's decision to grant planning permission to Horse Hill Developments Limited to retain and expand the existing Horse Hill Well Site (including two existing wells) and to drill four new wells for the production of hydrocarbons over a period of 25 years. Although the Environmental Statement ("ES") assessed the greenhouse gas ("GHG") emissions that would be produced from the operation of the development, the challenge related to the non-assessment by the ES of GHG emissions caused by the subsequent use of oil produced from the site after being refined elsewhere.

6. At first instance, Holgate J. dismissed the challenge, holding that:

    a. The fact that the environmental effects of consuming an end product will flow inevitably from the use of a raw material in making that product does not provide a legal test for deciding whether they can properly be treated as effects of the development on the site where the raw material will be produced for the purposes of exercising planning or land use control over that development. Instead, the true legal test is whether an effect on the environment is an effect of the development for which planning permission is sought [101].
    b. The scope of the obligation to assess environmental effects of a development or project does not, as a matter of law, include the environmental effects of consumers using an end product which will be

made in a separate facility from materials to be supplied from the development being assessed [126].

c. Alternatively, the county council's judgement that GHG emissions from the combustion of refined fuels were not an environmental effect of the proposed development, because the essential character of the proposed development was the extraction and production of crude oil and not the subsequent process of refining and using the oil, was not beyond the range of conclusions which rational decision-makers could lawfully reach [131] – [132].

7. As Lindblom SPT set out at paragraph 4 of the Court of Appeal's judgment in *Finch,* the appeal raised the following 4 issues:

    a. First, was the judge wrong to hold that the "true legal test" of whether an impact constitutes an indirect likely significant effect of the development on the environment is whether it is "an effect of the development for which planning permission is sought"?
    b. Secondly, was he wrong to hold that the EIA regulations are not directed at environmental impacts which result merely from the consumption, or use, of an "end product" – for example, a manufactured article or a commodity such as oil, gas or electricity?
    c. Thirdly, was he wrong to hold that the EIA Directive and the EIA regulations did not require the assessment of "scope 3" or "downstream" greenhouse gas emissions arising from the combustion of the refined products of the oil which would be extracted by the development?

d. Fourthly, was he wrong to hold that the county council's reasons for not requiring an assessment of those greenhouse gas emissions were lawful?

8. The appeal was dismissed by Lindblom SPT (with whom Lewison LJ agreed), with a dissenting judgment given by Moylan LJ.

9. In respect of the first issue, the Court of Appeal held that:

   a. The Judge was correct to emphasise the project-centric focus of the EIA Directive and Regulations. The *regime* is not intended to regulate the environmental effects of economic or commercial activity, or the use of land, in general. It is only engaged when a grant of development consent for a particular project of development is necessary and the EIA legislation only requires the assessment of effects of the proposed development or project [35] – [40].
   b. The question of whether a particular impact on the environment is truly a likely significant effect of the proposed development – be it direct or indirect – is ultimately a matter of fact and evaluative judgment for the authority [40]. What needs to be considered is the necessary degree of connection that is required between the development and its putative effects [41]. This is not simply a pure matter of law for the courts, it is a question for the decision-maker subject to the scrutiny of the court on public law grounds [42] – [43].

10. On the second issue, the Court of Appeal held that the EIA Directive and Regulations do not compel the assessment of environmental effects resulting from the ultimate consumption or use of an "end product" where those

environmental effects are not actually effects of the proposed development itself [49].

11. Under the third issue, the Court of Appeal held that:

    a. The submission that the county council was legally obliged to require an assessment of "scope 3" GHG emissions, and that its failure to do so was irrational, was incorrect [52], [57]. It is a matter for the relevant authority to consider whether the information contained in the ES is sufficient to meet the requirements of the EIA Directive and Regulations [58] – [59].
    b. The essential question for the decision-maker is whether there is, in fact, a sufficient causal connection between the project under consideration and a particular impact on the environment for the impact to constitute one of the indirect significant effects of the proposed development. The fact that certain environmental impacts are inevitable may be relevant to this question, but it does not compel the conclusion that they are effects of the proposed development [60].
    c. In the circumstances of this case, the environmental effects of downstream GHG emissions could reasonably be seen as far removed from the proposed development, and not causally linked to it, because of the series of intervening stages between the extraction of the crude oil and the ultimate generation of those emissions, so that the county council could lawfully conclude that they did not qualify as one of the likely significant effects of the proposed development on the environment [66].
    d. It makes no difference to the understanding of the EIA regime that the impacts of GHG emissions might not come to be assessed under that regime in the course of a decision-making process for another

development in the future, and does not mean that it must therefore be made subject to EIA now [68].

12. In respect of the fourth issue, the Court of Appeal held (Moylan LJ dissenting), that the county council did not rely on immaterial considerations in judging how far the EIA should go in assessing GHG emissions [80]. Taking a straightforward approach to the officer's report, the essential lawful basis for the county council's decision not to require an assessment of the impacts of scope 3 emissions was its judgement that such impacts were not, in fact, effects of the proposed development [85]. In doing so, the Court of Appeal held that there was nothing inconsistent, let alone "*Wednesdbury*" unreasonable, in a planning authority taking into account a relevant planning need when considering the merits of the application for planning permission before it but not requiring the environmental statement to include an assessment of impacts which it lawfully judges to lie beyond the direct and indirect significant effects of the proposed development. This did not result in an unlawful failure to balance the scales [92][1].

Implications of decision for present case

[1] The dissenting judgment of Moylan LJ is not relevant, since it does not reflect the ultimate decision of the Court of Appeal. However, it is worth pointing out two very prominent factors in the reasoning of that judgment that can be distinguished from the present case.
First, Moylan LJ placed considerable emphasis on the fact that the EIA Directive was amended in 2014 to ensure that climate change and GHG emissions were taken into account in the decision-making process, which he regarded as "significant" [103] – [108]. However, it is common ground that this proposal is being considered under the previous version of the EIA Directive and Regulations, which pre-dated this amendment. Second, Moylan LJ found it to be particularly significant that one of the specific features of the development under consideration in that which warranted its inclusion within Schedule 1 of the EIA Regulations, and therefore triggered the requirement for an EIA, was the quantum of oil being extracted for "commercial purposes" [125]. Similar wording is not found in the applicable trigger for EIA of underground mining, which simply applies to all development except the construction of certain buildings (see the table at paragraph 2 of Schedule 2 to the EIA Regulations).

13. There are two main implications for the purposes of the present case, which arise from the Court of Appeal's decision in *Finch*.
    a. The first relates to the approach which should be taken in the ES when considering whether downstream (or "Scope 3") GHG emissions should be assessed as indirect effects of the proposed development.
    b. The second relates to the alleged inconsistency which the Rule 6 Parties submitted would arise from taking the need for coking coal into account without also taking the environmental impacts caused by the use of coking coal into account.

Approach to indirect effects

14. After the application was called in, the Planning Inspectorate (and ultimately the Secretary of State) became the competent authority for the purposes of the EIA Regulations.

15. After reviewing the ES, the Planning Inspectorate issued a regulation 22 request dated 30 June 2021 seeking further environmental information on various matters. The letter referred to the High Court's decision in *Finch,* which held that downstream GHG emissions caused by the end use of a product were incapable of being an indirect effect (for EIA purposes) of the development which extracted that product, and noted that the decision was currently subject to an appeal. The letter went on to state that:

> "The Applicant is advised that should the legal position established in the *Finch* judgement change during the course of the Inquiry, there may be a need to request further information on the environmental effects from the use of the coal originating from the development. This may

result in the Inquiry being adjourned for the parties to consider this matter further and to submit any necessary evidence."

16. Following the decision of the Court of Appeal in *Finch*, the authority considering the application needs to consider whether, as a matter of evaluative judgement on the facts of this case, there is a sufficient causal connection between the proposed development and downstream GHG emissions from any blast furnace using WCM coal to constitute one of the indirect significant effects of *the* proposed development (*Finch* at [60]).

17. When this question is considered, it is plain in the present circumstances that downstream GHG emissions arising from the use of WCM coal, as part of a coke mixture going into the blast furnace, should not be regarded as an indirect effect of the proposed development for the following reasons:

    a. As in *Finch* at [65], there are number of distinct and intervening processes from the extraction of coking coal as part of the proposed development and its use in a blast furnace to make steel. First, the coal will be transported to a coke-plant, which may or may not be at the steelworks and blast furnace site. At the coke plant the WCM coal will be blended with up to 20 other coking coals, in different proportions depending on the desired characteristics of the final blend. The blended coal will then be heated in an oven to produce coke. This coke may be blended with other coke, and would then be placed into a blast furnace (which could be at the same site or a different site), along with various proportions of iron ore, limestone and other materials or fuels, such as PCI coal, natural gas or hydrogen, depending on the operation of the particular blast furnace. The blast furnace operation then produces GHG emissions, the quantity of

which will depend upon the efficiency of the blast furnace and any mitigation measures installed to reduce GHG emissions.[2]

b. The precise nature and use of WCM coal, including the location of the coke ovens to make coke, and blast furnaces in which it may be used and the point of use, is still subject to decisions yet to be made "downstream" (*Finch* at [65]).

c. Just as in *Finch* at [65], it is also not suggested by the Rule 6 Parties in this case that the GHG emissions from any of the intervening processes, such as the making of the coke, should be taken into account as indirect effects of the proposed development. Nor is it suggested that other likely significant environmental effects from the use of WCM coal, such as noise or air quality, should be taken into account.

d. The Applicant would have no control over the avoidance and mitigation measures employed by any particular blast furnace when using coke made from its coal, or coke maker when using its coal, which the Court of Appeal held to be a relevant (although not singly determinative) factor (*Finch* at [70]).

e. Unlike *Finch,* the Applicant does not accept that it is inevitable that a particular quantity of coal from this development will be used in blast furnaces. Furthermore, and more significantly, as explored in evidence before the inquiry, this development will not result in an inevitable increase in GHG emissions from blast furnaces. As above, this will ultimately depend on downstream decisions around the demand for its coal compared to other coals. Moreover, even if the quantum of additional end-use GHG emissions were inevitable, it does not mean that they must be indirect effects of the proposed development (*Finch* at [60]).

[2] For further detail, see the description at paras. 10 – 15 of CD1.69 and CD1.72.

18. Accordingly, the Applicant's position is that, although the decision-maker now needs to consider whether there is a sufficient causal connection between the proposed development and additional downstream scope 3 GHG emissions from a blast furnace using coke that includes WCM coal, when this exercise is carried out, it is clear that there is no such connection and therefore these emissions should not be regarded as a likely significant indirect effect of the proposed development

Alleged inconsistency in the approach to benefits and harms of the need / use for coking coal

19. In their closing submissions, both Rule 6 Parties asserted that it was inconsistent for the Applicant to rely on the need for coking coal, and the benefits of the proposed development which are associated with this need, while also maintaining that "scope 3" GHG emissions from the use of its coal were not indirect effects or material to the decision.[3]

20. Similar arguments were also raised by the (partially) same legal teams in *Finch* at [90] – [92]. These arguments were rightly rejected by the Court of Appeal, which held that:

> "In principle, there is nothing inconsistent, let alone "Wednesbury" unreasonable, in a planning authority taking into account a relevant planning need when considering the merits of the application for planning permission before it but not requiring the environmental statement to include an assessment of impacts which it lawfully judges to lie beyond the "direct and indirect significant effects of the proposed development". Contrary to Ms Dehon's submission, there was no unlawful failure here to "balance the scales"."

[3] See para. 73 of the FoE's closing submissions and para. 62 of SLACC's closing submissions.

21. Furthermore, the Applicant has not maintained that downstream GHG emissions are not capable, as a matter of law, from being a material planning consideration. As is set out at paras. 97 – 102 of the Applicant's Closing Submissions, the Applicant's case is that they are not fairly and reasonably related to the proposed development on the facts of this case, for the same reasons that they should not be regarded as indirect effects of the proposed development for EIA purposes. In the further alternative, the Applicant's position is that they should not be given any weight for the same reasons.

22. The decision in *Finch* supports the Applicant's approach, noting that there is nothing inconsistent between giving weight to the benefits arising from a general national need whilst not having regard to a detailed assessment of downstream GHG emissions that would arise from the satisfaction of that need (*Finch* at [92]). That is plainly correct, since each matter needs to be considered separately, and it is too simplistic simply to assert that one cannot have regard to the benefits of the need for a mineral without having regard to the very specific environmental effects arising from the use of that mineral.

23. Furthermore, the position is even stronger in the present case because the Applicant's case is that it is fulfilling a need for a closer source of coking coal to Europe, which (on the particular facts of this case, as set out in the Applicant's closing submissions) means that the benefits from fulfilling that need can exist without an increase in adverse environmental effects, such as downstream GHG emissions. In this respect, it should also be noted that the position can clearly be distinguished from the approach that was taken in the cases involving *HJ Banks*, which were referred to by both Rule 6 Parties,[4] and

[4] See para. 70 of FoE's closing submissions and para. 51 of SLACC's closing submissions.

which were in any event dealing with the use of thermal coal which does not need to be blended and then made into coke before being used.

Reply

24. Finally, notwithstanding the indication from the Inspector that he did not consider that it would be necessary for the Applicant to have a final right of reply, the Applicant reserves the right to respond to any new submissions that are advanced by either of the Rule 6 Parties. As matter of procedural fairness, the Applicant must be entitled to respond to new points that are raised, particularly where they concern legal submissions.

Conclusion

25. For the reasons stated above the position remains as presented by the Applicant at the inquiry and in its closing submission, that based upon the latest Finch decision by the Court of Appeal, the approach adopted for the consideration of "Scope 3" downstream GHG emissions, arising from the use of WCM coal, should not be regarded as an indirect effect of the proposed development for the purposes of EIA and whilst in principle capable of being material considerations the emissions in this case are not material to the decision to grant consent or in the alternative should only be given little or no weight

GREGORY JONES QC
ALEXANDER GREAVES

Francis Taylor Building
Inner Temple
London, EC4Y 7BY
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