TOWN AND COUNTRY PLANNING ACT 1990

Application by West Cumbria Mining Ltd

Development of a new underground metallurgical coal mine and associated development at Former Marchon Site, Pow Beck Valley and area from Marchon Site to St Bees Coast

Planning Inspectorate Reference: **APP/H0900/V/21/3271069**

Local Planning Authority Reference: **4/17/9007**

Date of Inquiry: **7 September 2021**

LEGAL SUBMISSIONS ON THE *FINCH* JUDGMENT
by
SOUTH LAKES ACTION ON CLIMATE CHANGE *TOWARDS TRANSITION* (SLACC)

4 March 2022

Introduction

1. These submissions are made in response to the Inspector's request, dated 24/2/22 and clarified on 28/2/22, for submissions on the Court of Appeal's decision in *R(Finch) v Surrey County Council* [2022] EWCA Civ 187.

2. In short, SLACC submits that the Court of Appeal's decision means that a number of submissions in WCM's Closing Submissions are wholly incorrect:
   2.1 WCM is incorrect at §§88-89 in relying on the "unequivocal" position, set out by Holgate J, that scope 3 emissions are legally incapable of being indirect effects of the project. This has been overturned unanimously by the Court of Appeal (Lindblom LJ §57; Lewison LJ §141(ii); Moylan LJ §95).
   2.2 The "true legal test" relied on by WCM in §89 of its Closing Submissions has similarly been overturned unanimously by the Court of Appeal (Lindblom LJ §43; Lewison LJ §141(ii); Moylan LJ §95).
   2.3 The assertion at §98 of WCM's Closing, that the downstream emissions were "impossible to effectively quantify" (§98), is wholly incorrect, both on the facts of this case, and in light of Court of Appeal's explicit acceptance that scope 3 emissions can be calculated, using recognised methodology, contrary to the Defendant's argument in that case (including an argument about substitution) (Lindblom LJ §§71 & 79; Lewison LJ §§147-149; Moylan LJ §95).
   2.4 The assertion at §100 of WCM's Closing, that the downstream greenhouse gas ("**GHG**") emissions are not considered significant environmental effects of the development and thus "cannot be capable of being a material consideration and certainly not one to which any weight could be given" is wholly incorrect. All three Court of Appeal judges accepted that downstream emissions could be significant environmental effects; Lindblom LJ and Lewison LJ held that, even in the case of the downstream emissions from the oil development (which involved "several other distinct processes" including refining to create useable fuels, and further onward distribution and sale of the refined products), they were <u>capable</u> of being a material consideration (Lindblom LJ §§22, 91 and 148; Lewison LJ §§148-149; Moylan LJ §§95 & 129).

3. Rather, SLACC's position on downstream GHG emissions as a material consideration, set out in §§45-46 of its Closing Submissions, has been shown to be correct.

4. Finally, the *Finch* decision reinforces the importance of the environmental impact assessment of the proposed development dealing properly with downstream GHG emissions. Under the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 (the **"EIA Regulations"**), the Inspector cannot grant planning permission for the proposed development "unless [he has] first taken the environmental information into consideration" (regulation 3). In light of the *Finch* decision, the Inspector is required, as the decision-maker, to consider whether he has sufficient information on the downstream GHG effects of the proposed development in order to comply with that obligation.

The Court of Appeal's Decision in *Finch*

5. The case concerned Surrey County Council's decision to grant planning permission for the commercial extraction of oil at Horse Hill in Surrey and the main issue in the appeal concerned the requirement to include within the EIA an assessment of the significant indirect effects of the development on the climate. The Appellant argued that, as a matter of law, the downstream GHG emissions were required to be assessed in an EIA, and that Surrey County Council's reasons for deciding they did not have to be assessed were legally flawed.

6. The majority of the Court of Appeal dismissed the appeal, but on a different basis from the High Court's decision, which was partly overturned. All three Court of Appeal judges held that the downstream emissions could be required to be assessed and that the question of whether downstream emissions must be assessed is a question of fact and judgment for the planning decision-maker (Lindblom LJ §42; Moylan LJ §129 and Lewison LJ §141(v)). Two of the judges held that the decision-makers reasons were adequate (Lindblom LJ §88; Lewison LJ §149); Moylan LJ found that they were not and would have allowed the appeal on that basis.

7. The key points to note from the judgment in the context of this inquiry are:

7.1 All three judges overturned Holgate J's articulation of the "true legal test" for determining if an effect was an indirect effect of the proposed development (Lindblom LJ §43; Lewison LJ §141(ii); Moylan LJ §95). All of the Judges accept that the downstream greenhouse gas emissions of a fossil fuel development could be an environmental effect requiring assessment.

7.2 All three judges overturned Holgate J's decision that downstream emissions are 'legally incapable' of being indirect effects of the project, (Lindblom LJ §57; Lewison LJ §144(iv); Moylan LJ §95).

7.3 Lindblom LJ explicitly accepted that it is scientifically possible to calculate scope 3 emissions, using recognised methodology (§71). Lindblom explicitly rejected as relevant to whether the scope 3 emissions can be calculated, the argument made by the Council based on 'substitution', and that it was uncertain that there would in fact be an increase in scope 3 emissions (§79). Lewison and Moylan LJJ agreed (Lewison LJ §§147-149; Moylan LJ §95)

7.4 Lindblom LJ at §§49-50 accepted and reinforced the correctness of the judgments in *Squire* (off-site impact of the development can be a significant indirect effect) and *Catt* (off-site activities carried out by third parties can be cumulative indirect effects). Moylan LJ explicitly rejected the fact that the combustion of the oil would be "outside the site boundary means that use is not an effect of the extraction of the oil" (§136).

7.5 All three Court of Appeal judges accepted that downstream emissions could be significant environmental effects; Lindblom LJ and Lewison LJ held that, even in the case of the downstream emissions from the oil development which did not amount of significant emissions from an EIA perspective, they were capable of being a material consideration (Lindblom LJ §§22, 91 and 148; Lewison LJ §§148-149; Moylan LJ §§95 & 129).

Implications for WCM's case

8. As set out in §2 above, two key tenets of WCM's case have been overturned by the Court of Appeal's decision: first, WCM's reliance on the finding by Holgate J that scope 3 emissions are legally incapable of being indirect effects of the project (Closing §§88-89); second, WCM's reliance on the "true legal test" for indirect effects (Closing §89). Those paragraphs are now incorrect as a matter of law. This is important because it wholly undermines WCM's justification for failing to assess the downstream GHG impacts of the proposed development.

9. The Court of Appeal's decision has also removed two of the other arguments used by WCM to justify its failure to assess the downstream emissions: that they are "impossible to effectively quantify" (Closing §98), in particular because of "substitution" (Closing §101).

10. Finally, WCM's assertion in §100 of its Closing, that downstream GHG emissions which are not considered significant environmental effects of the development thus "cannot be capable of being a material consideration and certainly not one to which any weight could be given" is legally incorrect in light of the approach taken by all three Court of Appeal judges. It is notable that, in fact, WCM's witness, Mr Thistlethwaite, articulated the correct position: that downstream emissions which are not significant indirect effects for the purposes of EIA may nevertheless be capable of being a material consideration in the determination of the planning application (see the citations given at §49 of SLACC's Closing Submissions).

11. Accordingly, the position in light of *Finch* is that WCM has incorrectly failed to assess the downstream GHG emissions of the proposed development; has given no cogent reason for this failure and has failed properly to weigh the downstream GHG emissions in the planning balance.

Environmental Impact Assessment

12. As set out at §5 above, the *Finch* decision means that the Inspector is required, as the decision-maker, to consider whether he has sufficient information on the downstream GHG effects of the proposed development in order to comply with his

obligations under the EIA Regulations. As all three Court of Appeal Judges held in *Finch*, if the decision-maker's view is that EIA of the downstream emissions is not required, then cogent reasons must be given for such a determination; and in any event the downstream emissions may be a material planning consideration. It is notable that the Council's original Scoping Opinion stated that the "ES should include detailed information about the nature of the coking coal, the carbon implications of its extraction and utilisation." [CD1.80 §3.67 pg 360, emphasis added].

13. PINS made it clear to WCM and the parties in the Regulation 22 letter of 30 June 2021 that, were the position in the *Finch* judgment to change, there may be a need to request further information on the environmental effects from the use of the coal. WCM's position in Closing at §103 was that no alternative GHG emissions assessment had been provided by the Rule 6 Parties. If that remains its position, then it must follow that WCM is now required to provide further information assessing the downstream GHG emissions, or to give cogent reasons why such an assessment is not required, in light of the correct legal position expressed in *Finch*.

14. SLACC's position, articulated in §§47-48 of its Closing, is that the EIA is not deficient for failing to assess the downstream emissions because the Inspector has evidence, provided by both Prof Grubb and Prof Barrett, of the extent of those emissions and of their significance. Prof Grubb's evidence was that those emissions amounted to 8.80 million tonnes of CO2e per annum, meaning if the mine were to produce for a period of 25 years, the total downstream emissions would be in the range of 220 million tonnes of CO2e over the life of the mine (SLACC/MG/1 §6.7). That is, on any analysis, a very serious climate change impact.

15. It is plainly open to the Inspector to consider that evidence is sufficient for the purposes of regulation 3 of the EIA Regulations 2017, and so to treat that information as the required assessment and to utilise that information to reach a conclusion on the significant effects of the proposed development on the environment, and integrate that into his conclusion on whether to grant planning permission.

16. If the Inspector does not agree that the Rule 6 Parties' evidence is sufficient, then, as flagged in the Regulation 22 letter, WCM should provide full assessment of the downstream emissions and all other parties should be afforded the opportunity to comment on that information.

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