



# Immingham Green Energy Terminal

TR030008

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9.83 Applicant's Update to SC Decision on Finch

Planning Act 2008

Infrastructure Planning (Applications: Prescribed  
Forms and Procedure) Regulations 2009 (as  
amended)

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On 20 June 2024 the Supreme Court handed down its judgment in *Finch v Surrey County Council* [2024] UKSC 20. In its responses to the Examining Authority's First Round of Written Questions [REP1-024] (Q1.3.1.2 and Q1.3.2.5(a)), the Applicant addressed the implications of the judgment of the Court of Appeal in that case. This note explains the implications of the Supreme Court's judgment for the Applicant's responses to the specified questions. The Supreme Court judgment does not affect any of the conclusions drawn.

### **Q1.3.1.2 Case Law on Downstream Effects**

**The Judgement in *Finch v Surrey County Council* [2022] EWCA Civ 187 dealt with an issue under Directive 2011/92 EU of the European Parliament and of the Council and the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 and whether it was unlawful for the council not to require the EIA for a project of crude oil extraction for commercial purposes to include an assessment of the impacts of downstream GHG emissions resulting from the eventual use of the refined products of the extracted oil.**

- a) Provide the Judgement in full for the purposes of Examination.**
- b) Explain what downstream effects are, and whether they are relevant with reference to the Proposed Development.**
- c) Explain whether this Judgement, or any subsequent Judgement handed down by the Supreme Court, should have a bearing on how the Proposed Development is examined.**

A copy of the judgment of the Supreme Court is attached to this note.

The conclusions drawn by the Applicant in its response to Q1.3.1.2 are not changed by the Supreme Court's judgment, which reinforces the Applicant's position that it is correct to treat the downstream effects of the use of the hydrogen generated at the Project (i.e. the savings in greenhouse gas ("GHG") emissions) as the indirect effects of this Project for the purposes of Environmental Impact Assessment ("EIA").

The Court of Appeal in *Finch* concluded that the question of whether the downstream environmental effects in that case (i.e. the effects of the combustion of refined hydrocarbon fuel produced from the crude oil extracted from the site) should be taken into account in the EIA as the effects of the project depended on whether there was a "*sufficient causal connection*" between the project and the impact on the environment, which was said to be a matter of fact and evaluative judgment for the planning authority.

The Supreme Court disagreed with that approach, finding that the concept of a "*sufficient causal connection*" is "*intrinsically vague*" and would leave a wide range of cases in which the question whether a particular environmental impact is or is not an "*effect of the project*" has no single right or wrong answer [59]. This would mean that there would be no consistency, or means of ensuring consistency, between decisions made by different planning authorities when faced with similar issues, or even between decisions made by the same authority on different occasions in relation to similar projects [60].

The Supreme Court held that determining the “*effects of a project*” is a question of causation [65]. To say whether X is a cause of Y is, in the first place, a question of fact [66]. However, it is also a question of law – EIA legislation only requires assessment of ‘likely’ significant effects, which is assessed on the basis of the evidence available [74] – [76] (to determine whether there is sufficient evidence to found a reasoned conclusion that a possible environmental effect is ‘likely’) and requires evaluative judgment [78].

The Supreme Court repeatedly emphasised that there was no uncertainty about the facts of the case before them. The extraction of oil at the proposed well site would initiate a causal chain inevitably leading to the combustion of the oil and the release of GHG into the atmosphere – this chain of events and the resulting effects are not merely likely but agreed to be inevitable [79]. The intermediate step of refining the crude oil was similarly inevitable and was not sufficient to break the causal connection between the extraction of the oil and its subsequent end use [118]. On that basis the Supreme Court found that the ‘downstream’ effects of combustion were effects of the proposed development and should have been assessed. They had not been assessed and so the decision to grant planning permission was therefore unlawful and quashed.

The Supreme Court did identify potential reasons why the view might reasonably be taken that it was not necessary to include an assessment of impacts in the EIA. One potential reason was that there was insufficient information available on which to make a reasonable assessment of the relevant impacts [138].

The conclusions set out in the Applicant’s response to Q1.3.1.2 in relation to hydrogen are not affected by this judgment:

- The essential content and character of the hydrogen production facility element of the Project is to produce low carbon hydrogen – this is the sole purpose for importing and processing green ammonia.
- That product (in liquid or gaseous form) will be used directly either as a fuel (likely displacing higher carbon fuels) or a feedstock into another process (again likely displacing higher carbon feedstock).
- The hydrogen is sold direct to customers for immediate use and is not subject to subsequent refinement before use (noting that the Supreme Court has confirmed such a process would not necessarily disrupt the causal chain in any case).
- Considering the causal chain on the facts, the Project is therefore likely to lead to the displacement of GHG emissions (that being an inevitable outcome of the use of the low carbon hydrogen in place of higher carbon fuels or feedstocks) and that outcome is identifiably an effect of the Project. As such, it was correct for the GHG assessment in **ES Chapter 19: Climate Change [APP-061]** to take account of those downstream effects.

The potential use of the jetty for carbon dioxide imports and exports to facilitate carbon capture and storage was considered in the **ES Chapter 19: Climate Change [APP-061]** on a

qualitative basis. The benefits were not taken into account in the quantitative GHG assessment. That approach is consistent with and unaffected by what is said in the Supreme Court judgment. Such a use of the jetty is considered likely for the purposes of EIA, and therefore the likely significant environmental effects in terms of GHG emissions associated with that use have been assessed so far as is reasonably practicable at this stage. The beneficial effects are a likely effect of the Project, but at this stage there is insufficient factual information to support a robust quantitative assessment of those benefits. Robust assumptions can, however, be made to support a quantitative assessment of the likely adverse effects and so those have been reported (resulting in a highly precautionary assessment).

#### **Q1.3.2.5 GHG Emissions from Beginning of Supply Chain**

**The ES [APP-061, Table 19-3] does not include primary emission sources derived from the beginning of the supply chain. For example, the processing of ammonia in Saudi Arabia, or other such locations, before shipping to the UK.**

**a) Should these primary emission sources be factored into the GHG assessment, and if not, should this be identified as a limitation in the ES [APP-061, Table 19-12]?**

The decision of the Supreme Court in *Finch* does not affect the conclusions set out by the Applicant in its response to this question [REP1-024], i.e. that the primary emissions sources derived from the beginning of the supply chain should not be factored into the GHG assessment.

Whether the issue is considered by reference to the identification of the 'Project' for the purposes of EIA or by reference to causation, the answer remains the same.

As set out in the Applicant's response, the focus of any assessment under the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 ("EIA Regulations") must be on the 'development' that is subject to the application for development consent. Subject to considering any indirect effects caused by the proposed development, it is not an assessment of the environmental effects of a particular commercial activity more generally. Whilst the Supreme Court's judgment affects the approach to identifying the effects of a project, it does not (and does not purport to) overturn the significant body of case law on what constitutes the proposed development or project for the purposes of the EIA Regulations (including the Court of Appeal judgement in the case of *Together Against Sizewell C Limited* [2023] EWCA Civ 1517 which is cited in the Applicant's response to Q1.3.2.5. It can be noted that the Supreme Court recently rejected an application by Together Against Sizewell C for permission to appeal against the Court of Appeal's judgment in that case).

The Applicant's response to WQ1.3.2.5 explains why the 'upstream' facility at Saudi Arabia is a separate project for the purposes of the EIA Regulations in accordance with the relevant legal tests:

- It has been separately consented in accordance with the requirements of that jurisdiction.

- It has been promoted independently and is already under construction, there has not been simultaneous determination.
- The two projects are in separate ownership.

The two projects are not dependent on each other – the facility at Saudi Arabia is being developed and will continue to be developed irrespective of whether the Project comes forward. It is a freestanding project in its own right, and if the ammonia produced is not imported to the UK at Immingham it will continue to be produced in the same quantities and exported to other destinations.

The initial import of green ammonia from Saudi Arabia to Air Products' proposed hydrogen production facility at Immingham is likely, given that facility is under development and Air Products is one of a number of current investors in its development. However, it is not the only potential source of green ammonia to be imported to the Project.

It follows that the environmental impacts associated with the construction and operation of the facility in Saudi Arabia are not environmental impacts of the project for which consent is sought in this application, and do not therefore need to be assessed.

None of that analysis is affected by the Supreme Court's judgment in *Finch*.

The same answer emerges if the issue is considered as a matter of causation and the 'indirect' effects of the Project.

The Supreme Court in *Finch* has confirmed that whether an effect is an 'indirect' effect of a project is a question of causation. In terms of 'upstream' effects, the Supreme Court decision referred to an Irish Supreme Court case (the "Kilkenny Cheese case") ([163]–[168]) where the central issue was whether or to what extent there was an obligation to include in the EIA for the proposed cheese factory the environmental effects of producing the milk needed to supply the factory (as an indirect effect of the project) noting that the milk would come from existing sources and was going to be produced in any event.

While the Irish Supreme Court in the Kilkenny Cheese case accepted that establishing a new factory which would take 4.5% of the national milk supply may have some wider economic effects by increasing the overall demand for milk (and therefore GHG emissions), these were not found to be "*indirect significant effects of a project*". In short, the Court held that there was not sufficient proof of causality for the purposes of EIA. The UK Supreme Court considered that the facts in *Finch* could be distinguished from those in the Kilkenny Cheese case with reference to paragraph 110 of the Kilkenny Cheese decision which "*clearly articulates*" the distinction between the two [167–168]:

*"110. One may thus observe that, viewed from an economic level, any enhanced milk production in the State which follows in the years to come is likely not to be entirely independent of the operation of the factory. Beyond this, however, proof of causality such would satisfy the requirements of the EIA in respect of "direct and or indirect significant environmental effects" remains entirely elusive, contingent and speculative. Its very elusiveness means that it is incapable of measurement or assessment and,*

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*hence, cannot be the sort of significant indirect environment effect which Article 3(1) of the Directive must be taken necessarily to contemplate. In these circumstances the present case must be judged to be at the opposite end of the “indirect environmental effects” spectrum...”*

In *Finch*, as the Supreme Court repeatedly emphasised, it was agreed that the ‘downstream’ combustion of the oil extracted from the well, which will produce GHG emissions, was an inevitable consequence of its extraction.

On the facts of this case, there is no causal connection between the production of the green ammonia in Saudi Arabia and the Project. The environmental effects of the Saudi Arabian green ammonia project are occurring now and will continue whether this Project goes ahead or not. Those effects cannot therefore be said to arise as a result of a decision to approve the Project. They are entirely independent of the Project and there is no causal connection that could properly be said to make those effects ‘indirect’ impacts of the Project. The Project will not be the only recipient of the green ammonia produced in Saudi Arabia – that facility will serve multiple hydrogen production facilities and its continued development and operation is not dependent on the Project.

The development of the Project would not change the level of production of ammonia in Saudi Arabia. In the event that development consent is not granted for the Project, the ammonia will still be produced in the same quantities at the Saudi Arabian facility. Air Products has entered into an agreement to purchase 100% of the ammonia produced at the facility in Saudi Arabia; if the Project does not obtain consent, Air Products will still purchase the ammonia and it will simply be diverted to other hydrogen production facilities (e.g. those to be developed in Rotterdam and Hamburg or elsewhere).

Accordingly, the facts of this case are much clearer than those considered by the Irish Supreme Court in the *Kilkenny Cheese* case. There is no evidence that demand from the Project might stimulate an increase in the production of green ammonia, above that which would occur in any event. Even if that was a possibility, any proof of causality would be subject to the same limitations identified in the *Kilkenny Cheese* case but to an even greater extent given the growing global market and the intended export of green ammonia from Saudi Arabia to multiple international destinations. Either way there would be no obligation to include the impacts associated with the Saudi Arabian facility within the scope of the EIA for this Project.

The Supreme Court decision in *Finch* does not therefore change the Applicant’s position that it is neither necessary nor appropriate for the Project’s EIA to take into account the likely significant effects of the construction and operation of the upstream facility at Saudi Arabia for the purposes of the EIA Regulations.