Neutral Citation Number: [2020] EWHC 3566 (Admin)

Case No: CO/4441/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/12/2020

Before :

THE HON. MR JUSTICE HOLGATE

- -

Between :

R (SARAH FINCH)	**Claimant**
- and -	
SURREY COUNTY COUNCIL	**Defendant**
- and –	
HORSE HILL DEVELOPMENTS LIMITED	**1st Interested Party**
SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT	**2nd Interested Party**
- and –	
FRIENDS OF THE EARTH LIMITED	**Intervenor**

- -

Marc Willers QC and Estelle Dehon (instructed by **Leigh Day**) for the **Claimant**
Harriet Townsend and Alex Williams (instructed by **Surrey County Council Legal Department**) for the **Defendant**
David Elvin QC and Matthew Fraser (instructed by **Hill Dickinson LLP**) for the **1st Interested Party**
Richard Moules (instructed by **Government Legal Department**) for the **2nd Interested Party**
Nina Pindham (instructed by Ms de Kauwe Solicitor) written submissions for the **Intervenor**

Hearing dates: 17 and 18 November2020

- -

Approved Judgment

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be at 4pm on 21.12.2020.

Mr Justice Holgate

Introduction

1. The main issue raised by this challenge is whether a developer's obligation under the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017 No. 571) ("the 2017 Regulations") to provide an environmental statement ("ES") describing the likely significant effects of a development, both direct and indirect, requires an assessment of the greenhouse gas ("GHG") emissions resulting from the use of an end product said to have originated from that development.

2. Surrey County Council ("SCC") granted planning permission to the First Interested Party, Horse Hill Developments Limited ("HHDL"), on the Horse Hill Well Site at Horse Hill, Hookwood, Horley, Surrey ("the site") to retain and expand the site (including two existing wells), and to drill four new wells, for the production of hydrocarbons over a period of 25 years ("the development").

3. The ES assessed the GHG that would be produced from the operation of the development itself. However, this challenge concerns the non-assessment by the ES of the GHG that would be emitted when the crude oil produced from the site is used by consumers, typically as a fuel for motor vehicles, after having been refined elsewhere. The issue posed in [1] above arises in a very striking manner in the present case. It is agreed that once the crude oil produced from the development is transported off site it enters, in effect, an international market and the refined end product could be used anywhere in the world, far removed from the Surrey Weald.

4. Furthermore, the issue raised by the claimant has ramifications far beyond the legal merits of the present challenge as they relate to the production of crude oil. It would apply to the winning of other minerals for subsequent use in the generation of energy. Furthermore, the extraction of minerals or the production of raw materials for use in industrial processes, leading eventually to the consumption or use of an end product, will generally result in GHG emissions at each stage. For example, the production of metals, followed by their use to manufacture parts for motor vehicles and the assembly of such vehicles, will result in GHG emissions from the cars, vans and lorries when they are eventually purchased and driven.

5. Oil may be refined to produce aviation fuel. But, in addition, the manufacture of components in a number of factories, leading to the construction of aircraft in another, will result in GHG emissions, not just from each industrial process but ultimately from the use of the aircraft for aviation.

6. The examples of vehicle and aircraft production also illustrate a further point. The GHG emissions eventually resulting from the use of those products (in those cases for transportation) will flow not from just one source, but from a number of different contributing sources. They may include sites for the production of raw materials, sites for the manufacture of components, sites for the assembly of the products and sites for distribution of those products.

7. The issue raised in the present challenge may also arise in the case of other industries. For example, each of the successive stages which may be involved in the handling of waste, recycling, recovery and disposal to landfill can generate GHG.

8. Mr Marc Willers QC who, together with Ms. Estelle Dehon, appeared on behalf of the claimant, acknowledged that if the court should decide in the present case that GHG emissions from the combustion of oil products resulting from the extraction at the site had to be assessed as an "indirect effect" in the ES relating to the development permitted by SCC, then the same must hold good for the other examples referred to above, and for GHG emissions generally resulting from the use or consumption of end products emanating from a development. Indeed, Mr Willers QC submitted that this court is obliged so to hold by virtue of decisions of the Court of Justice of the European Union ("CJEU").

9. The response of the international community and the UK Government to the global problem of climate change has been summarised in a number of cases, notably *R (Spurrier) v Secretary of State for Transport* [2020] PTSR 240 at [558-592]; *R (Plan B Earth) v Secretary of state for Transport* [2020] PTSR 1446 at [187] to [195] and [205] to [216]; and *R (Packham) v Secretary of State for Transport* [2020] EWCA Civ 1004 at [83] to [87].

10. The UK Government's fundamental objective in relation to climate change is enshrined in s.1(1) of the Climate Change Act 2008 ("CCA 2008") which, as amended with effect from 27 June 2019, imposes a duty on the Secretary of State to ensure that the net UK carbon account for 2050 is at least 100% lower than the 1990 baseline. This is generally referred to as "the net zero target".

11. It goes without saying that the extraction of crude oil resulting in the supply of fuel will result in GHG emissions when that end product is used. It is common ground that that is addressed by Government policy on climate change and energy, aimed *inter alia* at reducing the use of hydrocarbons. The issue raised in the present challenge is whether, by virtue of the 2017 Regulations, it was necessary for the planning authority to go further than apply those policies in its decision on whether to grant planning permission for the development, by requiring those GHG emissions to be estimated and assessed as part of the Environmental Impact Assessment ("EIA") of the development.

12. This challenge arises because those opposed to the development have serious concerns about the effects which the extraction and use of hydrocarbons has on climate change. At this point it is important to emphasise the nature of the court's role in dealing with an application for judicial review. As the Divisional Court recently stated in *R (Rights: Community: Action) v Secretary of State for Housing, Communities and Local Government* [2020] EWHC 3073 (Admin) at [6]:-

> "It is important to emphasise at the outset what this case is and is not about. Judicial review is the means of ensuring that public bodies act within the limits of their legal powers and in accordance with the relevant procedures and legal principles governing the exercise of their decision-making functions. The role of the court in judicial review is concerned with resolving questions of law. The court is not responsible for making political, social, or economic choices. Those

decisions, and those choices, are ones that Parliament has entrusted to ministers and other public bodies. The choices may be matters of legitimate public debate, but they are not matters for the court to determine. The court is only concerned with the legal issues raised by the claimant as to whether the defendant has acted unlawfully".

Procedural history and grounds of challenge

13. The claimant's Statement of Facts and Grounds raised a number of grounds in addition to the main issue already identified, including a failure to take into account the impact of the development on seismicity and on the openness of the Green Belt. It was also said that SCC had failed to give adequate reasons on principal important, controversial issues.

14. The application for permission to apply for judicial review was refused by Laing J on the papers and by Lang J at a renewed hearing. On 15 July 2020 Lewison LJ granted permission to apply for judicial review in relation to grounds 1(a) and (b). He also identified an oblique challenge in the claimant's skeleton to national planning policy on the ground that it is not in conformity with EU law. He stated that that was a point of some importance which ought to be considered at a full hearing. The claim then proceeded in the High Court pursuant to CPR 52.8(6).

15. In September 2020 the High Court ordered the amendment of the Statement of Facts and Grounds to reflect the order of Lewison LJ. Grounds (2) to (5) as originally pleaded were deleted and new grounds were added to address the issue identified in the order granting permission.

16. By an order made on 20 October 2020 the Secretary of State for Housing, Communities and Local Government ("the Secretary of State") was joined as the Second Interested Party, to respond to the new grounds relating to national planning policy. In addition, Friends of the Earth Limited was granted permission to intervene by way of written submissions.

17. As amended, the grounds of challenge are now as follows:-

(1) SCC failed to comply with the obligations of Directive 2011/92/EU (as amended) ("the EIA Directive") and the 2017 Regulations by:-

(a) failing to assess the indirect GHG impacts of the development arising from the combustion of the oil it produces; and/or

(b) failing to take into account the environmental protection objectives established by the UK which are relevant to the project, namely the urgent need to address the climate crisis and the requirement to reduce GHG emissions by at least 100% below the 1990 baseline.

(2) SCC failed to comply with the obligations of the EIA Directive and the 2017 Regulations and/or erred in law by interpreting paragraph 183 of the National Planning Policy Framework ("NPPF") and paragraphs 12 and 112 of the Minerals Planning Practice Guidance ("Minerals PPG") so as to permit the

downstream GHG emissions from the oil produced by the proposed development to be excluded from assessment.

(3) Alternatively, paragraph 183 of the NPPF and paragraphs 12 and 112 of the Minerals PPG are unlawful because they are not in conformity with the obligations of the EIA Directive and their application in this instance vitiated the defendant's decision.

18. Under ground 1(a) the claimant contends that the GHG emissions arising from the combustion of the refined oil should have been quantified, even if that would have been a difficult and uncertain exercise. Under ground 1(b) the claimant argues that an estimate of the GHG emissions from the operation of the development on the site and from the combustion of refined products emanating from the site should have been compared to a "metric" for carbon reduction, notably the net zero target at national level, national carbon budgets, and sectoral allowances. Mr Willers QC accepted that if ground 1(a) fails then each of the remaining grounds must fail. For that reason, most of the oral submissions focused on ground 1(a), as does this judgment.

19. I wish to express my gratitude to all counsel for their helpful written and oral submissions.

20. The remainder of this judgment is set out under the following headings:-

- Statutory Framework
- National Planning Policy
- Factual Background
- Ground 1(a)
- Ground 1(b)
- Grounds 2 and 3

Statutory Framework

EU Directives

21. Directive 2011/92/EU consolidated requirements for Member States to provide regimes for EIA in relation to development consents for projects likely to have significant effects on the environment.

22. For the purposes of this claim the amending Directive 2014/52/EU, dated 16 April 2014, is also relevant. Recital (7) recorded that over the previous decade a number of environmental issues, including climate change, had become more important for environmental assessment and decision-making. Recital (13) provided:-

> "Climate change will continue to cause damage to the environment and compromise economic development. In this regard, it is appropriate to assess the impact of projects on climate (for example greenhouse gas emissions) and their vulnerability to climate change."

Accordingly, the EIA Directive was amended so as to require EIA to address the direct and indirect effects of a project on climate change.

23. Recital (2) of the EIA Directive refers to article 191 of the Treaty on the Functioning of the European Union, which declares that the Union's policy on the environment focuses on a high level of protection and is based on the precautionary principle. Accordingly, "effects on the environment should be taken into account at the earliest possible stage in all the technical planning and decision-making processes."

24. Recital (7) provides:-

> "Development consent for public and private projects which are likely to have significant effects on the environment should be granted only after an assessment of the likely significant environmental effects of those projects has been carried out. That assessment should be conducted on the basis of the appropriate information supplied by the developer, which may be supplemented by the authorities and by the public likely to be concerned by the project in question"

Two key principles are to be noted. First, EIA is concerned with the likely significant environmental effects *of a project*. Second, EIA is a process which comprises information which is supplied not only by a developer but also by the authorities and by the public.

25. Article 1(1) provides:-

> "This Directive shall apply to the assessment of the environmental effects of those public and private projects which are likely to have significant effects on the environment".

26. A "project" is defined by article 1(2)(a):-

> "'project' means:
>
> - the execution of construction works or of other installations or schemes,
>
> - other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources."

27. Article 2(1) provides:-

> "Member States shall adopt all measures necessary to ensure that, before development consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with

> regard to their effects on the environment. Those projects are defined in Article 4."

28. Article 3(1) provides:-

> "The environmental impact assessment shall identify, describe and assess in an appropriate manner, in the light of each individual case, the direct and indirect significant effects of a project on the following factors:
>
> (a) population and human health;
>
> (b) biodiversity, with particular attention to species and habitats protected under Directive 92/43/EEC and Directive 2009/147/EC;
>
> (c) land, soil, water, air and climate;
>
> (d) material assets, cultural heritage and the landscape;
>
> (e) the interaction between the factors referred to in points (a) to (d)."

29. Article 5(1) provides:-

> "Where an environmental impact assessment is required, the developer shall prepare and submit an environmental impact assessment report. The information to be provided by the developer shall include at least:
>
> (a) a description of the project comprising information on the site, design, size and other relevant features of the project;
>
> (b) a description of the likely significant effects of the project on the environment;
>
> ……… "

30. Article 5(1)(f) requires the developer to provide in addition the information specified in Annex IV. That includes an estimate of emissions which will be produced during the construction and operation phases (paragraph 1(d)) and a "description of the likely significant effects of the project on the environment" resulting from "the impact of the project on climate (for example the nature and magnitude of greenhouse gas emissions)" (paragraph 5(f)). The description should cover, *inter alia*, the direct effects and any indirect effects "of the project."

31. Article 7 provides for the assessment of transboundary effects where *a project* is likely to have significant effects on the environment in another Member State.

32. Article 8a requires a decision to grant development consent to incorporate *inter alia*

"the reasoned conclusion" defined by article 1(2)(g)(iv), that is "the reasoned conclusion by the competent authority on the significant effects of the project on the environment…"

The 2017 Regulations

33. There is no dispute for the purposes of this claim about the adequacy of the transposition of the EIA Directive by the 2017 Regulations.

34. The development falls within schedule 1 and was therefore "EIA development" (regulation 2(1)). Regulation 3 prohibited SCC from granting planning permission unless an EIA was carried out. EIA is defined by regulation 4 (see regulation 2(1)) which provides *inter alia*:-

> "(1) The environmental impact assessment ("EIA") is a process consisting of—
>
> (a) the preparation of an environmental statement;
>
> (b) any consultation, publication and notification required by, or by virtue of, these Regulations or any other enactment in respect of EIA development; and
>
> (c) the steps required under regulation 26.
>
> (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 the following factors—
>
> (a) population and human health;
>
> (b) biodiversity, with particular attention to species and habitats protected under Directive 92/43/EEC and Directive 2009/147/EC ;
>
> (c) land, soil, water, air and climate;
>
> (d) material assets, cultural heritage and the landscape;
>
> (e) the interaction between the factors referred to in sub-paragraphs (a) to (d).
>
> (3) ……..
>
> (4) ……..
>
> (5) …….. "

35. Regulation 26(1) reflects article 8 of the EIA Directive:-

> "When determining an application or appeal in relation to which an environmental statement has been submitted, the relevant planning authority, the Secretary of State or an inspector, as the case may be, must—
>
> (a) examine the environmental information;
>
> (b) reach a reasoned conclusion on the significant effects of the proposed development on the environment, taking into account the examination referred to in sub-paragraph (a) and, where appropriate, their own supplementary examination;
>
> (c) integrate that conclusion into the decision as to whether planning permission or subsequent consent is to be granted; and
>
> (d) if planning permission or subsequent consent is to be granted, consider whether it is appropriate to impose monitoring measures."

36. The "environmental information" referred to in regulation 26 is defined in regulation 2(1):-

> ""environmental information" means the environmental statement, including any further information and any other information, any representations made by any body required by these Regulations to be invited to make representations, and any representations duly made by any other person about the environmental effects of the development;"

37. Regulation 15 enables a person who is minded to make an application for planning permission for EIA development to ask the relevant planning authority to give a scoping opinion, that is their written opinion as to "the scope and level of detail of the information to be provided in the environmental statement". Such a request must give "an explanation of the likely significant effects of the development on the environment" (regulation 15(2)(a)). Regulation 15(4) requires the authority to consult with the "consultation bodies" defined by regulation 2(1), including the Environment Agency, before adopting a screening opinion. The adoption of a scoping opinion does not preclude the authority from requiring additional information from the party who requested that opinion when an environmental statement is subsequently submitted for the same development (regulation 15(9)).

38. Regulation 18(3) to (4) defines what must be contained in an ES. So far as relevant it provides:-

> "(3) An environmental statement is a statement which includes at least —
>
> (a) a description of the proposed development comprising information on the site, design, size and other relevant features of the development;

(b) a description of the likely significant effects of the proposed development on the environment;

(c) a description of any features of the proposed development, or measures envisaged in order to avoid, prevent or reduce and, if possible, offset likely significant adverse effects on the environment;

(d) a description of the reasonable alternatives studied by the developer, which are relevant to the proposed development and its specific characteristics, and an indication of the main reasons for the option chosen, taking into account the effects of the development on the environment;

(e) ……. ; and

(f) any additional information specified in Schedule 4 relevant to the specific characteristics of the particular development or type of development and to the environmental features likely to be significantly affected.

(4) An environmental statement must—

(a) where a scoping opinion or direction has been issued in accordance with regulation 15 or 16, be based on the most recent scoping opinion or direction issued (so far as the proposed development remains materially the same as the proposed development which was subject to that opinion or direction);

(b) include the information reasonably required for reaching a reasoned conclusion on the significant effects of the development on the environment, taking into account current knowledge and methods of assessment; and

(c) ……. ”

39. Regulation 18(3)(f) (which reflects article 5(1)(f) of the EIA Directive) refers to the information specified by schedule 4, in so far as that is "relevant to the specific characteristics of the particular development or type of development and to the environmental features likely to be significantly affected". Thus, the requirements of schedule 4 are not open-ended. They are limited by *relevance* to *both* the qualities of the development for which planning permission is sought and "the environmental features which are likely to be significantly affected". Given the overarching principles contained in articles 1(1), 2(1) and 3(1) of the EIA Directive and the requirements of regulations 4(2) and 26(1) and the definition of "environmental information" in the 2017 Regulations, that second limb must be limited to environmental features which are likely to be significantly affected *by the proposed development*.

40. That last conclusion is confirmed by the provisions of schedule 4.

41. Paragraph 1 of schedule 4 requires the ES to describe the development including its physical characteristics, the main characteristics of the operational phase and:-

> "(d) an estimate, by type and quantity, of expected residues and emissions (such as water, air, soil and subsoil pollution, noise, vibration, light, heat, radiation and quantities and types of waste produced during the construction and operation phases."

42. Paragraph 3 of schedule 4 requires the ES to describe "the relevant aspects of the current state of the environment (baseline scenario) and an outline of the likely evolution thereof without implementation of the development…".

43. Paragraph 4 of schedule 4 requires the ES to describe "the factors specified in regulation 4(2) likely to be significantly *affected by the development*" (emphasis added), including "climate (for example greenhouse gas emissions)".

44. Paragraph 5 of schedule 4 requires:-

> "A description of the likely significant effects of the development on the environment resulting from, inter alia:
>
> (a) the construction and existence of the development, including, where relevant, demolition works;
>
> (b) the use of natural resources, in particular land, soil, water and biodiversity, considering as far as possible the sustainable availability of these resources;
>
> (c) the emission of pollutants, noise, vibration, light, heat and radiation, the creation of nuisances, and the disposal and recovery of waste;
>
> (d) the risks to human health, cultural heritage or the environment (for example due to accidents or disasters);
>
> (e) the cumulation of effects with other existing and/or approved projects, taking into account any existing environmental problems relating to areas of particular environmental importance likely to be affected or the use of natural resources;
>
> (f) the impact of the project on climate (for example the nature and magnitude of greenhouse gas emissions) and the vulnerability of the project to climate change;
>
> (g) the technologies and the substances used.
>
> 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. This description should take into account the environmental protection objectives established at Union or Member State level which are relevant to the project, including in particular those established under Council Directive 92/43/EEC and Directive 2009/147/EC."

45. The apparently broad language of some of the sub-paragraphs in paragraph 5 of schedule 4 is limited by the very opening words of that paragraph. For an environmental effect to qualify as something which should be included in the EIA it is insufficient that it simply *results* from one or more of the matters described in sub-paragraphs (a) to (f). It must also be an effect *of the development*.

Climate Change Act 2008

46. The CCA 2008 was passed on 27 November 2008. As the long title makes clear, in addition to setting a target for 2050 for the reduction of "targeted greenhouse gas emissions", the Act provides for a national system of carbon budgeting through to that year, the establishment of trading schemes to limit GHG and to encourage activities reducing or removing such emissions, financial incentive schemes to reduce and recycle domestic waste, and renewable transport fuel obligations.

47. Part 1 of the CCA 2008 deals with the carbon target for 2050 and budgeting. In *Packham*, the Court of Appeal gave the following summary of steps taken under the Act:-

> "83. We start with a short outline of the relevant provisions of the Climate Change Act. Section 4(1) imposes on the Secretary of State a duty to set carbon budgets to cap carbon emissions in a series of five-year periods (subsection (1)(a)), and to ensure that the net United Kingdom carbon account for a budgetary period does not exceed the carbon budget (subsection (1)(b)), thus ensuring progress towards the 2050 target in the period before that year. Carbon budgets must be set with a view to meeting the target for 2050 (section 8(2)). Before he sets a carbon budget, the Secretary of State for Business, Energy and Industrial Strategy must take into account the advice of the Committee on Climate Change (section 9(1)(a)). In setting a budget, he must take into account a number of things, including "scientific knowledge about climate change" (section 10(2)(a)), "technology relevant to climate change" (section 10(2)(b)), "economic circumstances …" (section 10(2)(c)), and "social circumstances …" (section 10(2)(e)). He is also required to prepare proposals and policies for meeting carbon budgets (section 13(1)). After a new carbon budget is set, he must lay before Parliament a report setting out proposals and policies for meeting carbon budgets for the current and future budgetary periods (section 14(1)). The Secretary of State is required to report to Parliament in an annual statement of emissions "[in] respect of each greenhouse gas", setting out the steps taken to

calculate the net carbon account for the United Kingdom (section 16(2)) – which will show whether or not carbon budgets are being met. The Committee on Climate Change, whose function, in part, is to provide advice to the Government on climate change mitigation and adaptation (section 38(1)), is required to report annually to Parliament on the progress made towards meeting the carbon budgets (section 36), and the Secretary of State is required to respond (section 37).

84. The first five carbon budgets have now been set in legislation, for the period from 2008 to 2032. The sixth, for 2033 to 2037, will be set in 2021. The most recent of the Secretary of State's annual statements recorded emissions for 2018, the first year of the third budgetary period (2018 to 2022).

85. In October 2017, the Secretary of State published the Clean Growth Strategy, setting out the Government's policies and proposals for decarbonising the national economy, fixing policy milestones as far as 2032, describing "illustrative pathways" for spreading decarbonisation throughout the economy, but allowing the Government to respond to changes in technology in those 15 years. The Clean Growth Strategy does not prescribe one particular "pathway" in the period to 2050. It envisages various means of managing emissions – such as taxation, regulation, investment in innovation, and establishing a UK Emissions Trading Scheme. And it leaves the Government to choose how to manage increases in emissions from major infrastructure projects within its strategy for meeting the target of "net zero" emissions by 2050.

86. Energy and Emissions Projections are regularly published, which quantify the contribution of policies and proposals to the reduction of emissions and the achievement of the climate change targets in the legislation, and enable the Government to monitor progress in meeting the United Kingdom's carbon budgets.

87. As Mr Mould submitted, the statutory and policy arrangements we have described, while providing a clear strategy for meeting carbon budgets and achieving the target of net zero emissions, leave the Government a good deal of latitude in the action it takes to attain those objectives – in Mr Mould's words, "as part of an economy-wide transition". Likely increases in emissions resulting from the construction and operation of major new infrastructure are considered under that strategy. But – again as Mr Mould put it – "it is the role of Government to determine how best to make that transition"."

48. The statutory carbon budgets are expressed in terms of a total number of tonnes of carbon dioxide equivalent but are not sub-divided into sectors. In December 2011 the

Government presented to Parliament a report pursuant to s. 14 of the CCA 2008 on how it proposed to meet the first four carbon budgets covering the period 2008 to 2027: "The Carbon Plan: Delivering our low carbon future". This policy document does sub-divide GHG emissions by sector, by reference both to sources and end users, notably power stations, industry, buildings, transport, agricultural and land use, waste and exports.

49. The most recent statistics presented in the Secretary of State's annual report to Parliament under s. 16 of CCA 2008 (22 April 2020) deal with GHG emissions in 2018 subdivided between a number of sectors.

50. In a joint note agreed by SCC and HHDL, and not materially disputed by the claimant, the following additional points are made:-

(1) The methods used to calculate all GHG emissions take into account the latest international guidance, research and data sources. But emission inventories always have some uncertainty because it is not possible to measure directly all the emissions from a particular country, and so the figures are largely based on statistical activity data and emissions factors;

(2) The estimation of GHG emissions from downstream combustion of oil (eg. in the use of petrol and diesel in road transport) and the subsequent control through carbon budgets under the CCA is carried out at a national level annually;

(3) The annual statistics provide estimates of GHG emissions by sector, which can inform the methods used by Government to manage emissions, for example, by taxation, regulation, policy or investment in innovation (*Packham* at [85]);

(4) Emissions of GHG from road transport is the subject of national policy which is designed to reduce such usage as part of the steps being taken to achieve the 2050 net zero target (see e.g. "The Road to Zero" (2018) and the "Clean Air Strategy" (2019)).

51. The UK's Emission Trading Scheme, referred to in *Packham* at [85], was established by the Greenhouse Gas Emissions Trading Scheme Regulations 2012 (SI 2012 No. 3038) ("the 2012 Regulations"). In a legal challenge to a development consent order for gas-fired energy generating units (*R (ClientEarth) v Secretary of State for Business, Energy and Industrial Strategy* [2020] PTSR 1709) the High Court noted at [213] to [214]:-

> "213. The 2012 Regulations were made in order to give [effect] to a series of EU Directives establishing a scheme for trading in emission allowances for GHG, otherwise referred to in EN-1 as EU ETS. The monitoring arrangements they contain were made in order to give effect to Commission Regulation (EU) No 601/2012 of 21 June 2012 on the monitoring and reporting of greenhouse gas emissions pursuant to Directive 2003/87/EC and Commission Regulation (EU) No 601/2012 of 21 June 2012 on the monitoring and reporting of greenhouse gas emissions pursuant to Parliament and Council Directive 2003/87/EC (Text with EEA relevance) (OJ 2012 L181, p 30)

> and Commission Implementing Regulation (EU) 2018/2067 of 19 December 2018 on the verification of data and on the accreditation of verifiers pursuant to Parliament and Council Directive 2003/87/EC (Text with EEA relevance) (OJ 2018 L334, p 94). The scheme is focused on achieving decarbonisation.
>
> 214. Regulation 9 prohibits the carrying on of a "regulated activity" at an "installation" without a permit issued by the Environment Agency. This would apply to the operation of the gas-fired generating units. The application for a GHG emissions permit may be granted if the Agency is satisfied that the applicant will be able to monitor and report emissions from the installation in accordance with the requirements of the permit (regulation 10(4)). An application for a permit must contain a defined monitoring plan and procedures (paragraph 1(1) of Schedule 4). The permit must contain (inter alia) the monitoring plan, monitoring and reporting requirements (to cover "the annual reportable emissions of the installation") and a requirement for verification of the report (paragraph 2(1) of Schedule 4)."

52. A "regulated activity" is defined by reference to activities listed in Annex 1 to Directive 2003/87/EC (as amended), including the energy industry, chemical industry, metals and minerals industries and oil refineries (but not oil extraction or production).

53. The EU ETS operates by putting a limit or allowance each year on the GHG emissions from each installation carrying on a regulated activity. The relevant limit is reduced annually. Operators buy and sell emissions allowances according to whether their actual emissions are in deficit or in surplus relative to their own individual allowance. It is a "cap and trade" system.

54. The Greenhouse Gas Emissions Trading Scheme Order 2020 (SI 2020 No. 1265) was made on 11 November 2020 under part 3 of the CCA 2008 to replace the EU ETS.

National Planning Policy

55. Paragraph 205 of the NPPF published in February 2019 states that in the determination of a planning application great weight should be given to the benefits of mineral extraction, which includes oil. Mineral planning authorities should "plan positively for" the three phases of oil and gas development, namely exploration, appraisal and production (paragraph 209b).

56. On 6 March 2019 Dove J quashed paragraph 209a of the NPPF in *R (Stephenson) v Secretary of State for Housing, Communities and Local Government* [2019] PTSR 2209. On 23 May 2019 the Secretary of State made a Written Ministerial Statement:-

> "For the avoidance of doubt the remainder of the National Planning Policy Framework policies and, in particular, Chapter

> 17 on 'Facilitating the Sustainable Use of Minerals' remain unchanged and extant.
>
> For the purposes of the National Planning Policy Framework, hydrocarbon development (including unconventional oil and gas) are considered to be a mineral resource. Specific policy on the planning considerations associated with their development is set out at paragraphs 203-205 and the remainder of 209 of the National Planning Policy Framework. In particular, paragraph 204(a) of the National Planning Policy Framework states that planning policies should "provide for the extraction of mineral resources of local and national importance" with paragraph 205 stating that "[w]hen determining planning applications, great weight should be given to the benefits of mineral extraction, including to the economy".
>
> In addition, the Written Ministerial Statements of 16th September 2015 on 'Shale Gas and Oil Policy' and 17th May 2018 on 'Planning and Energy Policy' also remain unchanged and extant. The Written Ministerial Statements sit alongside the National Planning Policy Framework. Planning Practice Guidance is also unaffected by the ruling."

57. Chapter 14 of the NPPF addresses "the challenge of climate change". The planning system should support the transition to a low carbon future. It should help to shape places in ways that contribute to radical reductions in GHG emissions and support renewable and low carbon energy infrastructure (paragraph 148). New development should be planned for in ways that "can help to reduce greenhouse gas emissions, such as through its location, orientation and design" (paragraph 150). Development plans should provide a positive strategy for energy from renewable and low carbon energy sources (paragraph 151).

58. Paragraph 183 of the NPPF (which is relevant to grounds 2 and 3) provides:-

> "The focus of planning policies and decisions should be on whether proposed development is an acceptable use of land, rather than the control of processes or emissions (where these are subject to separate pollution control regimes). Planning decisions should assume that these regimes will operate effectively. Equally, where a planning decision has been made on a particular development, the planning issues should not be revisited through the permitting regimes operated by pollution control authorities."

59. In the same context, paragraph 012 of the Minerals PPG states that the planning and other regulatory regimes are "separate but complementary", with the former focusing on whether new development would be appropriate for the location proposed. The paragraph concludes with:-

> "….. the focus of the planning system should be on whether the development itself is an acceptable use of the land, and the

> impacts of those uses, rather than any control processes, health and safety issues or emissions themselves where these are subject to approval under regimes. Mineral planning authorities should assume that these non-planning regimes will operate effectively".

60. Paragraph 112 of the Minerals PPG addresses the issue of what hydrocarbon issues can be left by mineral planning authorities to other regulatory regimes. The passages relevant to the challenge under grounds 2 and 3 read as follows:-

> "Some issues may be covered by other regulatory regimes but may be relevant to mineral planning authorities in specific circumstances. For example, the Environment Agency has responsibility for ensuring that risk to groundwater is appropriately identified and mitigated. Where an Environmental Statement is required, mineral planning authorities can and do play a role in preventing pollution of the water environment from hydrocarbon extraction, principally through controlling the methods of site construction and operation, robustness of storage facilities, and in tackling surface water drainage issues.
> There exist a number of issues which are covered by other regulatory regimes and mineral planning authorities should assume that these regimes will operate effectively. Whilst these issues may be put before mineral planning authorities, they should not need to carry out their own assessment as they can rely on the assessment of other regulatory bodies. However, before granting planning permission they will need to be satisfied that these issues can or will be adequately addressed by taking the advice from the relevant regulatory body…"

Factual background

61. The claimant lives in Redhill, six miles from the site. She represents the Weald Action Group. Since 2013 they have objected to drilling at the site. She submitted two objections to the application for the development, one in February 2019 and another in June 2019.

62. The site is situated within Surrey and the Borough of Reigate and Banstead. It is approximately 3.1 km west of Horley town centre, 2.3km northeast of the village of Charlwood and 1.6 km northwest of the village of Hookwood. Gatwick Airport's main runway is 3.5 km southeast of the site.

63. The site has previously been developed for the exploration and appraisal phases of hydrocarbon extraction. On 16 January 2012 planning permission was granted for the construction of an exploratory well site, including plant and buildings and use for the drilling of one exploratory borehole and the subsequent short-term testing for hydrocarbons.

64. Following the discovery of oil, on 1 November 2017 HHDL obtained planning

permission to drill and test an appraisal well and a sidetrack well. On 10 September 2018 HHDL declared the extraction of oil to be commercially viable.

65. On 20 December 2018, HHDL applied to the defendant for planning permission for the retention and extension of the existing well site (comprising two wells) and to allow the drilling of four new hydrocarbon wells, so as to enable the production of hydrocarbons from six wells ("the development"). The development would be carried out over six phases of operation (with estimated durations):-

    Phase 1 - modifications to well site and construction works - 3 months;

    Phase 2 - well management and drilling - 17 months;

    Phase 3 - installation of facilities for exporting crude oil from the site - 4 months;

    Phase 4 - production and well management - 20 years;

    Phase 5 – plugging and decommissioning – 5 months;

    Phase 6 - site restoration and aftercare - 2 months.

    The development would take place over a total period of about 25 years.

66. The area of the site would be increased from 2.08 hectares to about 2.8 hectares. There would be four newly-drilled hydrocarbon production wells and one new water re-injection well, four gas-to-power generators, a process and storage area, tanker loading facility and seven oil tanks each with a capacity of 1300 barrels.

67. In bringing the oil to the surface, a quantity of water and natural gas would also be produced. The fluids would be separated on site. The natural gas would be used to provide power for the site during the production phase, with any excess electricity being fed into the national grid. There would be provision for gas flaring in the event of an emergency or for maintenance.

68. The crude oil would be tankered off site to refineries for processing. It cannot be used without being refined. The refined product is likely to be used predominantly for transportation. There would also be some use for heat, manufacturing and the petrochemical industry. The amount of oil to be produced over the lifetime of the development is not known, but the parties have agreed that the development could in theory produce up to about 3.3m tonnes of crude oil over the 20 year production period.

69. It is not possible to say at this stage where the oil produced would be refined or subsequently used. It could be refined and used in the United Kingdom or exported and then refined and used abroad. It might be refined overseas and then imported back into the UK.

Surrey County Council's Scoping Opinion

70. Before submitting their planning application for the development, HHDL requested SCC to adopt a scoping opinion under the 2017 Regulations. On 25 October 2018 SCC adopted an Opinion in which it set out matters to be covered by the ES. Paragraph 3.9 stated:-

> "The County Planning Authority is of the opinion that the primary focus for the EIA should be the potential effects of the scheme on population and human health (Regulation 4(2)(a)), on the water environment (Regulation 4(2)(c)), and on the global climate (Regulation 4(2)(c))."

71. Paragraph 3.11 stated that the request "did not appear to include detailed consideration of the question of the likely impact of the proposed development on the global climate."

72. Paragraphs 3.12 and 3.13 stated:-

> "3.12 Direct emissions associated with the construction and operation of the well site, and the consumption of fuel by vehicle, plant and equipment associated with the well site, would likely be small in scale, and whilst contributing to increased concentrations of greenhouse gases in the atmosphere could not be classed as significant in their own right.
>
> 3.13 The direct emissions associated with the combustion of natural gas (methane) arising from the hydrocarbon extraction process, and the indirect effects associated with the production and sale of fossil fuels which would likely be used in the generation of heat or power, consequently giving rise to carbon emissions, cannot be dismissed as insignificant. It is acknowledged that the contribution of the proposed development would be modest when considered in a national or regional context."

73. The Opinion set out this "recommendation" in paragraph 3.14:-

> "Given the nature of the proposed development, which is concerned with the production of fossil fuels, the use of which will result in the introduction of additional greenhouse gases into the atmosphere, it is recommended that the submitted EIA include an assessment of the effect of the scheme on the climate. That assessment should consider, in particular, the global warming potential of the oil and gas that would be produced by the proposed well site."

The treatment of greenhouse gas emissions in the Environmental Statement

74. Chapter 6 of the Environmental Statement ("ES") submitted by HHDL dealt with GHG emissions. Paragraph 107 stated that "the scope of the assessment was confined to the direct releases of greenhouse gases from within the well site boundary resulting from the site's construction, production, decommissioning and subsequent restoration over the lifetime of the proposed development".

75. Under "Assessment Methodology" paragraph 123 identified the GHG releases during the development considered in the ES, namely those arising from:-

(1) The combustion of diesel fuel in construction plant;
(2) The combustion of diesel fuel in HGVs servicing the development;
(3) The combustion of diesel fuel in on-site engines and generation plant;
(4) The combustion of natural gas.

76. HHDL's explanation for this approach was set out at paragraphs 121-122 of the ES:

> "121. The assessment considers direct releases of greenhouse gases consistent with all phases of the proposed development as described in detail within ES Chapter 4. The essential character of the proposed development is the extraction and production of hydrocarbons and does not extend to their subsequent use by facilities and process beyond the planning application boundary and outwith the control of the site operators.
>
> 122. The assessment methodology pays regard to national planning policy and guidance that establishes that decision-makers should *'focus on whether the development is an acceptable use of land, rather than on control of processes or emissions where these are subject to approval under pollution control regimes'*. These non-planning regimes regulate hydrocarbon development and other downstream industrial processes and decision-makers can assume that these regimes will operate effectively to avoid or mitigate the scope for material environmental harm." (original emphasis)

77. Paragraph 144 of the ES concluded that the direct GHG impacts of the development itself would be of *"negligible"* significance.

SCC's review of the Environmental Statement

78. In June 2019 Dr. Jessica Salder, SCC's duly delegated officer, carried out a review of the ES on behalf of the Council ("the ES Review"). She concluded that the ES contained sufficient information to comply with the 2017 Regulations. Section 4.C of the Review addressed the scope of the assessment carried out in the ES. Paragraph 4.12 stated that the ES had responded "in an appropriate and proportionate manner to the requirements of Regulation 4(2) and to the relevant parts of schedule 4 of the EIA Regulations." It is common ground that the decision of a planning authority on the adequacy of the ES and EIA is not subject to a duty to give reasons under the 2017 Regulations or the EIA Directive.

79. Section 5.B of the Review considered chapter 6 of the ES dealing with GHG emissions and the climate. The ES Review referred to paragraph 3.14 of the Opinion. It then concluded at paragraph 5.15:-

> "The assessment presented in the submitted ES focusses on the direct greenhouse gas emissions of the development and operation of the proposed wellsite. The potential contribution of the hydrocarbons that would be produced over the lifetime of the wellsite is not covered in the submitted ES, the reasons for excluding those emissions are set out in paragraphs 121 and 122 (p.35) of the submitted ES. The [County Planning Authority] accepts the argument set out in paragraphs 121 and 122 (p.35) of the ES and the justification provided for excluding consideration of the global warming potential of the produced hydrocarbons from the scope of the EIA process."

Consideration of the planning application

80. SCC's Planning and Regulatory Committee considered the application on 11 September 2019. They had the benefit of a detailed and carefully prepared officer's report which recommended the grant of planning permission subject to conditions.

81. The report summarised the EIA process. It had included three consultation exercises. The officer's report records that a total of 1658 written representations had been received by September 2019, although some people may have written more than once. Approximately 921 supported the proposal and 717 objected.

82. However, the ES Review was not subject to any public consultation, it was not referred to in the officer's report and it was not in the public domain before SCC provided the document in response to the claimant's pre-action correspondence.

83. The report summarised objections to the proposal including those from the Weald Action Group. Paragraph 83 identified the issue of climate change as one of over 30 "main points of public concern." Paragraphs 92 to 101, dealing with the EIA, included a summary of how the ES had dealt with GHG emissions and climate change:-

> "Greenhouse gas emissions and the climate – the question of the direct impacts of the proposed development on emissions of greenhouse gases and associated climate change is addressed in chapter 6 of the submitted ES. The question of the development's impact on climate change and global atmospheric composition is discussed in greater detail in paragraphs 102 to 162 of this report. On balance, and having taken account of the information and evidence submitted by all parties with an interest in the determination of the current planning application, the CPA has concluded that the proposed development would not give rise to significant impacts on the climate as a consequence of the emissions of

> greenhouse gases directly attributable to the implementation and operation of the scheme."

Paragraphs 102 to 162 of the officer's report dealt with climate change as one of the key strands of Government policy, along with the need for security of energy supply and UK production of oil and gas.

84. The officer's report set out the EU and national policy context in the section entitled "Need for Hydrocarbon Development" (paragraphs 102-162). The report summarised relevant parts of the NPPF. It referred to the amendment of the CCA 2008 in June 2019 to include the net zero target. Paragraph 134 of the report referred to the quashing of paragraph 209(a) of the NPPF in *Stephenson* (see [56] above), along with the need for the local planning authority to "consider reasonable and recent scientific evidence in relation to climate change and CO2 and methane emissions".

85. Paragraph 135 of the report referred to objections that the development would be incompatible with international and national objectives on climate change. The report stated at paragraph 159:-

> "As can be seen from Government policy and guidance above, the Government makes it clear that oil and gas remains an important part of the UK's energy mix. Policies recognise the continuing importance of fossil fuels but aim to manage reliance on them, their potential environmental effects and the risks associated with security of supply. While the Government manages the transition to a low carbon energy mix this will mean that oil and gas remain key elements of the energy system for years to come (especially for transport and heating). Based on the UK Government's current policy, it is … recognised that the proposed development would not be in conflict with the Government's climate change agenda".

86. In paragraph 421 of the section headed "Conclusion" the report returned to the subject of climate change:-

> "Officers consider that given the production function of the development, it is not in conflict with the Government's policy and the climate change agenda. … This leads Officers to conclude that on the basis of Government guidance there is a national need for the development subject to the proposal satisfying other national policies and the policies of the Development Plan."

87. A number of representations contained objections to the proposal on the ground of climate change, including the following:-

    (1) Mr Keith Taylor, MEP referring to The Intergovernmental Panel on Climate Change ("IPCC") report "*Global Warming of 1.5˚C*" (October 2018) said "it is clear from this report that greenhouse gas emissions need to be curbed as a matter of urgency to stay within the 1.5C limit. The

report says we have only 12 years to steer a course away from catastrophic climate change so a 25-year greenhouse gas intensive project is grossly inconsistent with that advice.";

(2) In a letter dated 7 September 2019 the Weald Action Group referred to the report of the Committee on Climate Change ("CCC"): "*The UK's Contribution to Stopping Global Warming*" (May 2019). This report recommended that the Government adopt a target of net zero GHG emissions by 2050. The Group also referred to the amendment of the CCA 2008 in June 2019 and asked how the proposed development over a 25 year period squared with the net zero target. The letter contended that the analysis in the officer's report of the interaction between policies on energy need and climate change was incomplete and out of date (but it should be noted that this claim has not raised that issue at all);

(3) Objectors also relied upon the quashing of paragraph 209a of the NPPF in *Stephenson* and contended that that had undermined the analysis of need in the officer's report based on Government policy.

88. Matters raised after the production of the officer's report were addressed in an "Update Sheet" for the Committee's meeting. In relation to questions raised about the *Stephenson* case and the relationship between the proposal and government policy on energy supply and climate change, the approved minutes record that the Written Ministerial Statement made on 23 May 2019 (see [56] above) was read out in its entirety to the members at the meeting.

89. The Committee resolved to approve the application on 11 September 2019. SCC issued the decision notice granting planning permission for the development on 27 September 2019.

Ground 1(a)

90. The claimant submits that the GHG emissions which would inevitably result from the combustion of end products emanating from crude oil produced at the site had to be estimated and assessed as an indirect, long-term, negative effect of the development on the site. It is common ground that the EIA before SCC contained no information on this source of GHG emissions, as opposed to GHG emissions directly resulting from oil production on the site itself.

91. The claimant had also contended at paragraphs 61 to 63 of her skeleton that the failure to assess GHG emissions from combustion of the oil product involved a breach of regulation 18(4) of the 2017 Regulations by failing to follow SCC's scoping opinion adopted on 25 October 2018. In his oral submissions Mr Willers QC did not pursue this complaint, rightly in my judgment. He accepted that it is not supported by any authority.

92. Regulation 15(1) provides that a scoping opinion states the *opinion* of the planning authority as to the scope and level of detail to be provided in the ES. The opinion does not fix or determine what *must* be provided in the ES. Regulation 15 recognises that more than one scoping opinion may be issued over time.

93. Regulation 18(4)(a) simply requires that the ES be "based on" the most recent scoping opinion, but only in so far as the proposed development remains materially the same as that which was the subject of the opinion. The 2017 Regulations do not go so far as to require the ES to contain information which complies with the scoping opinion.

94. In this regard, regulation 18(4)(a) is to be contrasted with regulation 18(4)(b). The latter requires the ES to *include* "the information reasonably required for reaching a reasoned conclusion on the significant effects of the development on the environment…". Likewise, regulation 18(3) provides that an ES is a statement which *includes* at least the matters set out in sub-paragraphs (a) to (f). Sub-paragraph (b) refers to "a description of the likely significant effects of the proposed development on the environment". If an applicant submits an ES which does not provide details specified in a scoping opinion, it is open to the authority to notify the applicant under regulation 25 that further information *must* be provided. Furthermore, the authority is not bound by the terms of its scoping opinion, in that regulation 15(9) expressly allows the authority to *require* additional information to be provided (ie. under regulation 25). For all these reasons, the mere fact that an applicant produces an ES which does not comply with the terms of a scoping opinion does not of itself amount to a breach of the 2017 Regulations.

95. Next, it should be noted that the claimant accepts that, for the purposes of the 2017 Regulations, the relevant project or development in this case is that authorised to take place on the site by the planning permission granted on 27 September 2019. It is not suggested that GHG emissions from the combustion of end products was required to be assessed because the development permitted on Horse Hill by SCC formed part of some bigger project. The claimant does not contend that the ES should have addressed, for example, GHG emissions from a refinery used to produce end products. In other words, this is not a case where the claimant complains about the true overall project having been "salami-sliced" so as to avoid, or artificially affect, the application of the 2017 Regulations.

96. It is convenient to deal with the issues raised by the parties under the following headings:-

- Whether the 2017 Regulations, correctly interpreted, required the EIA to assess GHG emissions from the combustion of refined oil products;
- Whether SCC's reasons for not requiring an assessment of GHG from the combustion of refined oil products discloses an error of law.

Whether the 2017 Regulations required the EIA to assess GHG emissions from the combustion of refined oil products

97. Mr Willers QC submitted that something may be treated as an environmental effect "of a project" if it is *attributable to* that project.

98. In essence the Intervenor adopted the same approach in paragraph 56 of their written submissions: -

> "the question which then arises is how the court is to interpret the meaning of "*indirect effect*". It is submitted that indirect effects are likely environmental effects more remote than direct

> effects (whether in time or location), but not so remote they cannot be attributed to the development at all, having regard to the purpose, nature, and any end product of the development, including the environmental impacts liable to result from the use and exploitation of the end product. It is then a question for the decision maker whether those are "*significant*".

99. As I pointed out at the beginning of this judgment, this argument, if correct, would apply very much more widely than simply to climate change and the GHG emissions upon which this case focuses. The combustion of oil produces other emissions, such as particulate matter and NOx, which may also give rise to environmental and public health concerns. Many upstream forms of mineral and industrial development will inevitably result in end products, the making and consumption of which will involve downstream environmental effects, including GHG and other emissions. Those effects may include not just emissions to air, but also to land and water. They may be significant and indeed important.

100. Both the claimant and the intervenor seek to reinforce their submissions by relying upon matters of common ground: it is inevitable that oil produced from the site will be refined and, as an end product, will eventually undergo combustion, and that that combustion will produce GHG emissions.

101. In my judgment, 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. The extraction of a mineral from a site may have environmental consequences remote from that development but which are nevertheless inevitable. Instead, the true legal test is whether an effect on the environment is an effect of the development for which planning permission is sought. An inevitable consequence may occur after a raw material extracted on the relevant site has passed through one or more developments elsewhere which are not the subject of the application for planning permission and which do not form part of the same "project".

102. The inevitability that the crude oil to be transported off site will eventually lead to additional GHG emissions when the end product is consumed is simply a response to the defendant's point that when the oil leaves the site it becomes an indistinguishable part of the international oil market, so that the GHG emissions generated by combustion in vehicles cannot be attributed to any particular oil well or well site. Like the debate between the witness statements as to whether the oil produced on the site would only displace oil production elsewhere or would instead increase overall net consumption, these are forensic arguments about the market consequences of extracting oil at the site which do not address the real legal issues raised by ground 1(a).

103. One of the main concerns raised by the claimant is that unless the 2017 Regulations are interpreted so that, in the present case, GHG emissions from the use of an end product are required to be assessed in the EIA for the development, there is no other mechanism, it is said, by which those emissions can be controlled as a contribution to achieving the net zero target in the CCA 2008. The claimant relies upon *Abraham v*

Wallonia (case C-2/07; [2008] Env. L.R. 66) at [32] and *Ecologistas en Accion - CODA v Ayuntamiento de Madrid* Case C-142/07; [2009] PTSR 458 at [28] for the proposition that a broad purposive interpretation should be given to the EIA Directive for the protection of the environment and the assessment of environmental effects.

104. Nevertheless, as was pointed out during argument, it is also well established that that approach cannot disregard the clearly expressed wording of the legislation *Brussels Hoofdstedelijk Gewest v Vlaams Gewest* (Case C-275/09) [2011] Env. L.R. 26 at [AG28] and [29]. Effect must be given to that language even if the result is that some environmental effects are not assessed (see by analogy *R (Buckinghamshire County Council) v Secretary of State for Transport* [2014] 1 WLR 324 at [120] and *R (Rights: Community: Action) v Secretary for State for Housing, Communities and Local Government* [2020] EWHC 3073 (Admin) at [91] to [94]).

105. Although it is not essential to my conclusions on this challenge, I should record in passing that I do not accept the proposition that there are no other measures in place within the UK for assessing and reducing GHG emissions from the combustion of oil products in motor vehicles. The measures include the net zero target in the CCA 2008, and the various matters referred to in [46] to [54] above. The overall responsibility for the economy-wide transition to a low carbon society is the responsibility of the UK Government (*Packham* at [87]). A range of measures is being pursued to achieve a reduction in the consumption of oil products including road pricing, taxation and future controls on the source of energy which may be used by vehicles. The object of these measures is to reduce substantially the demand for diesel and petrol from UK consumers.

106. The claimant fairly says that these measures do not affect the consumption of oil products by consumers in other countries. But, on the other hand, the Paris Agreement was signed by many countries throughout the world and it is the responsibility of each such country to determine its contribution to achieving the global target for 2050. Whether these issues are thought to be adequately addressed in other countries, or even in the UK, can provide no guide to the interpretation of our domestic legislation on EIA for the consenting of new development.

107. It has to be recognised that development control and the EIA process have a specific and, to some extent, limited ambit, namely to assess and control proposals for new development and in some circumstances, the retention of existing development. But, because the incidence of planning control depends upon whether planning permission is required, or enforcement action is possible, these regimes do not regulate the environmental effects of the general use of all land in the country. So, for example, the use of motor vehicles in connection with, or GHG emissions from, development which has already been permitted is generally not regulated by the development control system. Whatever the outcome of ground 1(a), that would remain the position.

108. The jurisdiction of this Court is only concerned with questions of law. It is therefore necessary to return to the language and scheme of the relevant statutory law which the Court must apply, the 2017 Regulations (and, if necessary, the EIA Directive), together with any relevant case law.

109. No help is to be gained by substituting different language for that contained in the

legislation. The word "attributable" simply means "able to be attributed to" (see Shorter Oxford English Dictionary). But the verb "attribute" can mean "ascribe to as an inherent quality or characteristic" or "ascribe to as an effect or consequence".

110. It is common ground that an EIA should assess both the direct and indirect effects of the development for which planning permission is sought which are likely to be significant. "Indirect effects" cover these consequences which are less immediate, but they must, nevertheless, be effects which *the development itself* has on the environment.

111. One difficulty with the claimant's argument is that Mr Willers QC was not able to offer any test or criteria by which decision-makers could distinguish between indirect effects which qualify for EIA from those which do not, if the former were to be treated as including matters as indirect as GHG emissions from the downstream combustion of refined oil products.

112. The 2017 Regulations do not require EIA to cover the environmental effects of other development on a different site unless separate applications have artificially been made for several developments which in reality form part of an overall project ("salami slicing"), or it is relevant to assess the effects of one development cumulatively with other projects (see paragraph 5 of schedule 4 to the 2017 Regulations). Where that holistic approach is taken, EIA is still only carried out in relation to the effects of "development", whether that development has already been consented or is yet to be approved. Essentially, development control and the EIA process are concerned with the use of land for development and the effects of that use. They are not directed at the environmental effects which result from the consumption, or use, of an end product, be it a manufactured article or a commodity such as oil, gas or electricity used as an energy source for conducting other human activities.

113. A further problem with the claimant's argument is that it is not contended that the EIA for HHDL's development should have taken into account the GHG emissions (or indeed other emissions) from the intervening stage of refining crude oil obtained from the site. If the GHG resulting from combustion of the end product in vehicles qualifies for EIA in the present case, it is impossible to see why GHG resulting from the operation of an essential oil refinery would not do so as well. It is no answer to say that emissions in the latter case are taken into account in the development control and regulatory regimes applied to refineries. That of itself would not prevent those emissions from being taken into account as cumulative effects under paragraph 5 of schedule 4 to the 2017 Regulations.

114. Mr Willers QC submitted that the claimant's approach is supported by authority. He relied in particular upon the judgment of the CJEU in *Abraham* at [43]. But it is necessary to read that passage in the context of the preceding paragraph. Together they read:-

> "42. As stated at [32] of this judgment, the Court has frequently pointed out that the scope of Directive 85/337 is wide and its purpose very broad. In addition, although the second subparagraph of Art.4(2) of Directive 85/337 confers on Member States a measure of discretion to specify certain types of projects which will be subject to an assessment or to

> establish the criteria and/or thresholds applicable, the limits of that discretion are to be found in the obligation set out in Art.2(1) that projects likely, by virtue inter alia of their nature, size or location, to have significant effects on the environment are to be subject to an impact assessment. In that regard, Directive 85/337 seeks an overall assessment of the environmental impact of projects or of their modification.
>
> 43. It would be simplistic and contrary to that approach to take account, when assessing the environmental impact of a project or of its modification, only of the direct effects of the works envisaged themselves, and not of the environmental impact liable to result from the use and exploitation of the end product of those works."

115. The project in that case was for the widening of runways at an airport and the construction of a new control tower, runway exits and aprons, to enable the airport to be used more intensively. The issue was whether the EIA was required to assess the effects of the projected increase in the activity of the airport as a result of the modification It was in that context that the court decided that the environmental effects requiring assessment were not limited to the direct effects of the works to be carried out but also had to include the environmental impact resulting from the use of the improved airport. These overall effects could properly be regarded as effects of the *development*, namely the increased usage of the airport enabled by the works to improve the existing infrastructure. The phrase "end product" was simply used by the Court to describe the *outcome* of the project. *Abraham* cannot be taken as laying down any principle that an EIA should assess the environmental effects of the use by consumers of an "end product", that is an article or item sold or distributed from a processing facility using a raw material produced on the development site.

116. It is plain from [44] and [45] of its judgment, that the CJEU was simply dealing with the impact of the increased use of infrastructure which would be enabled by works modifying that infrastructure. That impact was an environmental effect *of the development.* The opinion of Advocate General Kokott was to the same effect ([AG31]).

117. Next, Mr Willers QC relied upon the *Ecologistas* case. At [39] the court set out the same statement of principle as in *Abraham* at [43]. The case concerned the improvement of the Madrid urban ring road. The CJEU decided that the project was liable to EIA, which could not be avoided by being split into sub-projects, and that the impact of the use of the road as altered should be assessed, and not simply the direct effect of the construction work. Like *Abraham*, this decision lends no support to the claimant's argument.

118. Mr Willers QC stated that he was not aware of any other decision of the CJEU which had applied the requirement for EIA to the environmental effects of using an "end product" in any way analogous to the use of refined oil products deriving from a development for the production of crude oil.

119. Mr Willers QC submitted that the domestic authority which was most supportive of his

argument is *R (Squire) v Shropshire Council* [2019] Env. L.R.835. A farmer obtained planning permission to build 4 poultry buildings. The facility was to operate on a 48-day cycle, under which 210,000 chicks would be brought into the buildings, reared for 38 days, and moved elsewhere before the next flock was brought in. About 1.57m chickens would be reared in a year and over 2000 tonnes of manure produced annually. The manure was to be spread on farmland close to residential areas, about half on land owned by the farmer, and the remainder on unidentified third-party land ([73]). Not surprisingly, it was common ground that odour and dust arising from the storage and spreading of manure on land outside the site of the poultry buildings were indirect effects of the development [39]. But the ES did not describe the arrangements in respect of third-party land or make an assessment of odour and dust impacts in relation to any of the spreading of manure on farmland ([65] to [66]). The ES placed some reliance upon the environmental permit regime operated by the Environmental Agency, but it did not recognise that that control would not apply to third party land ([58] and [67]).

120. So, the challenge in *Squire* succeeded because of a "patent defect" in the ES and EIA (*Plan B Earth* at [137]). It was plainly irrational for the local authority to have based their decision on an EIA which had completely failed to address an "obviously material consideration" *(R (Blewett) v Derbyshire County Council* [2004] Env. L.R. 29 and *Gathercole v Suffolk County Council* [2020] EWCA Civ 1179 at [53] to [55]). *Squire* does not lend any support at all to the far-reaching proposition for which the claimant contends. The case was concerned with a failure to assess an obvious environmental effect of the proposed development, namely the disposal of the waste it would generate and, moreover, on land in the locality.

121. Mr Willers QC sought to rely upon *H J Banks & Co. Ltd v Secretary of State for Housing, Communities and Local Government* [2019] Env. L.R. 433. There the developer challenged the Secretary of State's refusal to grant planning permission for a surface coal mine. The developer accepted that GHG emissions from the burning of coal for power generation were capable of being a material planning consideration in the determination of the application ([69]). The challenge was successful because of the Secretary of State's failure to explain why coal extraction, which he had found to be necessary, should be refused on the basis of GHG emissions without explaining how that need would be addressed from sources resulting in fewer emissions ([93] to [96]). As Mr Willers QC rightly accepted, the ground of challenge upheld by the Court did not involve any decision on the issue which arises in the present case. That point was not in contention and was not argued.

122. Several of the cases cited in the hearing were to do with defining the "project" requiring EIA. Although that issue does not arise in the present case, I refer to them because they confirm that it is necessary to define the extent of a project correctly, because that is one determinant of the scope of the EIA that may lawfully be required under the 2017 Regulations. The EIA cannot be required to include effects which go beyond the effects *of the project or development.*

123. So, in *R (Brown) v Carlisle City Council* [2011] Env. L.R. 71 the Court of Appeal held that where the acceptability in planning terms of a proposal for a freight distribution centre was contingent upon the provision of improvements to the runway and terminal at Carlisle Airport (which was reflected in a planning obligation under s. 106 of the Town and Country Planning Ac 1990) the airport improvement formed part of the

overall project comprising the distribution centre. Consequently, the EIA was required to assess the environmental effects of that overall project and not just the distribution centre.

124. By contrast, in *Preston New Road Action Group v Secretary of State for Communities and Local Government* [2018] Env. L.R. 440 the Court of Appeal held that exploratory wells to test the commercial feasibility of extracting shale gas at a site was a freestanding project which did not include any subsequent phase for commercial exploitation, distinguishing the *Carlisle* case. Lindblom LJ stated at [68]:-

> "…. On the facts, in contrast with cases such as *Brown v Carlisle City Council*, the exploration and monitoring project under consideration here was a free-standing project of development, which did not depend on any other project, present or future, including any future proposals for the commercial extraction of shale gas. That is a material difference between this case and *Brown v Carlisle City Council*, where an environmental statement for the development of a freight distribution centre at an airport had not included an assessment of the effects of the associated improvements to the airport itself, which were part of the same project though the subject of a separate application for planning permission (see paras [29] and [30] of Sullivan J.'s judgment). In this case, the environmental statement for the project under consideration was a comprehensive environmental statement for that whole project, undertaken on the basis of what was known at the time, and without speculation as to the content and timing of some other future project, which might never happen. However broad a construction is placed on the expression "the direct and indirect significant effects of a project …" in art.3(1) of the EIA Directive, and the expression "any indirect, secondary, cumulative … effects of the project" in paragraph 5 of Annex IV, *these concepts cannot be stretched to include effects that are not effects of the project at all* (see paragraph 31 of Advocate General Kokott's Opinion in *Abraham*)." (emphasis added)

125. The Court of Appeal made a separate, additional point, namely that there had been no obligation to assess in the EIA process GHG emissions from the use of gas produced by a development for extracting shale gas where no evidence was placed before the decision-maker that the gas, which would become an indistinguishable part of a general market supply, would result in an increase in the overall consumption of gas and hence additional GHG emissions ([72] to [73]). I appreciate that this factor did not form part of the reasoning in the ES in the present case as to why GHG emissions from combustion of oil products were not included in that assessment. But the Court was not shown any attempt by objectors to the Horse Hill proposal to address this additional reason given by the Court of Appeal as to why criticism made of the EIA in the *Preston New Road* case was unjustified.

126. The upshot is that the case law confirms that EIA must address the environmental

effects, both direct and indirect, of the development for which planning permission is sought, (and also any larger project of which that development forms a part), but there is no requirement to assess matters which are not environmental effects of the development or project. In my judgment the scope of that obligation does not include the environmental effects of consumers using (in locations which are unknown and unrelated to the development site) an end product which will be made in a separate facility from materials to be supplied from the development being assessed. I therefore conclude that, in the circumstances of this case, the assessment of GHG emissions from the future combustion of refined oil products said to emanate from the development site was, as a matter of law, incapable of falling within the scope of the EIA required by the 2017 Regulations for the planning application.

Whether the reasons for not requiring an assessment of GHG from the combustion of refined oil products disclose an error of law

127. For the reasons given above, ground 1(a) must fail. But what if, contrary to my conclusion, the view were to be taken that it was legally possible under the 2017 Regulations for the assessment of GHG emissions from the use of refined oil products to fall within the scope of EIA for the extraction development proposed at Horse Hill? It is well established that the decision on whether such an assessment should be carried out as part of an EIA is a matter of judgment for the planning authority, subject to judicial review applying the *Wednesbury* standard, in particular irrationality (see eg. *Gathercole* at [53] to [55] and *R (Friends of the Earth Limited v Heathrow Airport Limited* [2020] UKSC 52 at [142] to [145]). The threshold for establishing irrationality in such circumstances is high (see e.g. *Newsmith Stainless Limited v Secretary of State for the Environment, Transport and the Regions* [2017] PTSR 1126). The issue is whether the reasons accepted in SCC's Review of the ES (see [76] and [79] above) disclose any error of law.

128. In my judgment it is clear that they do not. In summary, HHDL stated and SCC accepted that the essential character of the proposed development of the site is for the extraction and production of hydrocarbons. The character of that land use did not include subsequent processing, distribution, sale and consumption of end products.

129. The ES went on to refer to national policy stating that the planning system should focus on land use issues rather than the control of process or emissions for which there are other specific regulatory regimes. This part of the reasoning was based upon *inter alia* paragraph 183 of the NPPF and case law such as *Gateshead Metropolitan Borough Council v Secretary of State for the Environment* [1994] Env. L.R. 37 and *R (An Taisce, the National Trust for Ireland) v Secretary of State for Energy and Climate Change* [2013] EWHC 4161 (Admin); [2015] PTSR 189, summarised by Gilbart J in *R (Frack Free Balcombe Residents Association) v West Sussex County Council* [2014] EWHC 4108 (Admin). Paragraph 122 of the ES makes it clear that it was only referring to "hydrocarbon development and other downstream industrial processes" as being regulated by pollution control regimes. In other words, this passage in the ES explained why no assessment was being made of emissions from, for example, oil refineries. Likewise, the reference at the end of paragraph 121 to "facilities and process" beyond the site boundary and outwith HHDL's control should be understood in that same sense. It is plain that the ES did not rely upon lack of control or the existence of other regulatory regimes to justify the non-assessment of GHG from the combustion of

refined oil products. The same applies to SCC's acceptance of that reasoning in paragraphs 121 to 122 of the ES.

130. The claimant's challenge does not relate to the non-assessment of GHG emissions once the crude oil has left the site, except for those arising from the consumption of the end products. There is no challenge to the non-assessment in the ES of GHG from, for example, the process of refining. Accordingly, once paragraphs 121 to 122 of the ES are read properly, the criticism made of the reliance placed upon lack of control and alternative regulatory regimes falls away.

131. We are left with the real reason given in paragraph 121 of the ES and paragraph 5.15 of the ES Review for non-assessment of GHG emissions from the use of refined oil products. This was that the essential character of the proposed development is the extraction and production of crude oil, and not the subsequent process of refining the crude oil at separate locations remote from Horse Hill, followed by the use of infrastructure and/or transport for the distribution of the end products, whether in the UK or elsewhere in the world. That explanation is sufficient to deal with any suggestion of irrationality. But it is further supported by the broad thrust of the elucidation of her contemporaneous thinking (as it was described by Mrs Townsend for SCC at the hearing) in paragraphs 15 to 31 of Dr. Salder's witness statement.

132. I conclude that no legal criticism can be made of SCC's focus on the land use and development proposed because that was the "project" which was the subject of the planning application and the related EIA. Viewed in that way it is impossible to say that SCC's judgment that GHG emissions from the combustion of refined fuels were not an environmental effect of the proposed development was, as a matter of law, irrational. SCC's judgment was not beyond the range of conclusions which rational decision-makers could lawfully reach.

133. For these reasons, ground 1(a) must be rejected. As I have previously explained, the remaining grounds may be dealt with more briefly, given that the claimant accepts that they would fall away if ground 1(a) failed.

Ground 1(b)

134. Given that I have found that there was no legal requirement for the amount of GHG emissions from the combustion of refined oil products to be estimated in the EIA of the proposed development at Horse Hill, it follows that there was no requirement, in this context, for that estimate to be compared to any GHG or climate change metric. That is why Mr Willers QC accepted that ground 1(b) falls away if ground 1(a) fails.

135. Having said that, I have noted that several objectors to this project made representations to SCC that it would be inappropriate for planning permission to be granted for the production of hydrocarbons given the national policy objective to reduce their consumption as a contribution to achieving the net zero target. I have referred to national policy stating that the planning system should support the transition to a low carbon future and have regard to climate change ([57] above), while at the same time providing some support for oil and gas developments ([55] above).

136. It is not the Court's role to deal with the merits of these policies or their application. On the other hand, the Court may review the consideration given to a planning application by a planning authority to see whether the authority failed to take into account a relevant policy which it was legally obliged to consider, or whether it has misinterpreted the language of a relevant policy.

137. The main document to be considered is the officer's report to committee. The document summarised in some detail the representations made by objectors. For example, Friends of the Earth said the proposal was incompatible with the need to tackle climate change and to reduce the use of fossil fuels. A number of other objections regarding effects on climate change were summarised as follows:-

> "Concern that production and burning of fossil fuels will contribute to global warming and climate change; does not accord with Climate Change agreements such as the Paris Agreement and UN targets; UK has legal commitments to reduce carbon emissions; not green/carbon neutral footprint; need for diesel is decreasing with advancements in electric cars; local authorities have to consider the impact on climate change."

On the other hand, supporters of the proposal said that there was a national need for the oil at Horse Hill to meet UK policy on energy security, to reduce the need for imports and to meet a continuing need for oil until sustainable renewable resources provide sufficient energy. Plainly, SCC took these competing views into account.

138. In [83] above I have referred to that part of the officer's report which explained how far GHG had been addressed in the ES and that the broad impact on global climate change would be addressed in paragraphs 102 to 162 of the report. Paragraphs 106 to 118 summarised development plan and national planning policy. Paragraphs 119 to 136 dealt with EU and UK policy on the relationship between energy supply and climate change. The policy objectives include reduction in the use of fossil fuels, whilst also maximising economic production in the UK of fossil fuels of the kind proposed in this case, and maintaining energy security. Having summarised relevant policies, the officer's report dealt with the need for hydrocarbon supply at paragraphs 137 to 162, arriving at the conclusion that there is a national need for the development. That was a matter for the judgment of SCC, not the Court.

139. Some members of the public wrote to SCC to criticise the officer's report, before it was considered by the Committee, for failing to refer to more recent policy or other official documents on these subjects. There is no dispute that that material was sufficiently drawn to the attention of the members of the Committee. So, taken overall, it would be impossible for the Court to say that the Committee did not have an adequate picture of relevant policies, or that any policy was misinterpreted. Very properly, Mr Willers QC accepted that that was the case.

140. For all these reasons, ground 1(b) must be rejected.

Grounds 2 and 3

141. It is appropriate to consider grounds 2 and 3 together. Under ground 2 the claimant submitted that paragraph 183 of the NPPF and paragraphs 012 and 112 of the Minerals PPG have been misinterpreted by SCC as allowing the downstream GHG emissions from the combustion of refined oil products to be excluded from the EIA for this development. Under ground 3 the claimant submitted in the alternative that if SCC had not misinterpreted those policies, then the policies were unlawful in so far as they allowed *inter alia* planning permission to be granted for an oil production development without requiring GHG emissions from the combustion of end products to be assessed in EIA, in breach of the EIA Directive and the 2017 Regulations.

142. These grounds assume that the non-assessment of GHG emissions from the use of end products involved a breach of the EIA Directive and the 2017 Regulations. I have rejected that argument under ground 1(a). But even if I am wrong in that conclusion, it turns out that grounds 2 and 3 do not arise on the facts of this case. As I have explained in [129] above, the reasoning in paragraph 122 of the ES, which was accepted by SCC, simply applied the policies in question to processing facilities used in the production of end products, notably refineries, and not to the combustion of those end products in, for example, vehicles being driven by consumers. The claimant accepts that emissions from these processing facilities did not have to be included in the EIA for the development of the site. Accordingly, grounds 2 and 3 do not arise from the way in which the ES and SCC dealt with these EIA issues.

143. However, I think it appropriate to add that I do accept the analysis on this part of the case by Mr. Richard Moules on behalf of the Secretary of State. The national policies in question do not purport to limit the scope of ES or EIA under the 2017 Regulations and so there is no question of those policies being unlawful on the grounds of conflict with the EIA Directive or those Regulations. The policies, like the case law which they reflect, do not allow a planning authority (or ES) to disregard a relevant environment effect of a particular development proposal, but do allow an authority to exercise judgment as to the extent to which such an effect should be assessed in the development control process, taking into account the existence of other dedicated regulatory regimes (see eg. Sullivan LJ in *An Taisce* [2015] PTSR at [47] to [51]). The existence of such regulatory regimes may also inform a planning authority's judgment as to the extent of the project or of the environmental effects which should be the subject of EIA for a particular planning application (see eg. Lang J in *R (Friends of the Earth) v North Yorkshire County Council* [2017] Env L.R. 497).

144. For these reasons grounds 2 and 3 must be rejected.

Evidence

145. A substantial amount of evidence was produced in this case, particularly in the form of witness statements. Some of this material was, on its face, inadmissible in proceedings for judicial review. The admissibility of certain other passages was either unclear or dubious. This necessitated attempts by parties to clarify the status of the material, which were not wholly successful. Fortunately, I was not asked to make, nor, as it turns out, did I need to make, formal rulings on this subject. The reasoning in this judgment does not depend upon the resolution of any such issue.

146. The principles governing the admissibility of evidence in proceedings for judicial review are well-established and should, by now, be well-known. They were summarised, for example, in *Flaxby Park Limited v Harrogate Borough Council* [2020] EWHC 3204 (Admin) at [15] to [20].

147. It is also important to draw attention to the observations of the Court of Appeal, presided over by Lord Burnett LCJ, in *R (Dolan) v Secretary of State for Health and Social Care* [2020] EWCA Civ 1605 at [116] to [121]. There is an increasing concern about the need for procedural rigour in judicial review in order for justice to be done. Prolix documents conceal rather than illuminate the case being advanced and the real issues genuinely needing to be resolved. This makes the Court's task more difficult, it is wasteful of costs and it may lead to delay. It can also lead to a disproportionate and unjustifiable use of the Court's resources for one case at the expense of other litigants waiting to have important issues raised by their cases resolved. The delivery of justice by allocating an "appropriate share" of the Court's resources to a case, while taking into account the needs of other cases underlies the overriding objective in CPR1.1 and other recent decisions, such as *R (Wingfield) v Canterbury City Council* [2020] EWCA Civ 1588 at [5] to [11]. These are matters to which practitioners, their clients and litigants need to pay careful attention in accordance with CPR 1.3, both in their own interests and in the interests of all court users.

Conclusion

148. For all the reasons set out above the claim is dismissed.