LEGAL RESEARCH AND INDEPENDENT PROJECT COURSEWORK

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Introduction

Environmental Impact Assessment ("EIA") is an instrument which integrates environmental considerations into the planning process with the aim of protecting the environment[1]. Since its creation in 1969, the scope of EIA has extended from an assessment of predominantly construction-related effects, such as noise and light pollution, to consider diverse factors including the operational impacts of a development to effects from the use of an end product. These changes are the result of international, European, and domestic legislation, and through judicial review national courts have been tasked with the important role of interpreting key terms, specifically 'indirect, secondary and cumulative' ("ISC") effects.

Ascertaining the robustness of EIA, the scope of key terms such as ISC effects, and the purview of judges to scrutinise planning decisions is crucial to understanding the degree of influence EIA holds within the planning system, and its effectiveness as a preventative tool. Here we examine how the judiciary have interpreted legislative extensions to the scope of EIA, and evaluate the judicial reasoning underpinning their approach.

By reviewing recent decisions in key areas including 'foot in the door'[2] cases, transport infrastructure, and mineral and gas extraction, we will analyse the extent to which courts have provided workable definitions for the concepts of ISC effects, and evaluate the core arguments concerning the inclusion of the use of the end product. The essay is structured in four parts; part one outlines the development of EIA, what EIA is, and an overview of the EIA process; part two provides legislative context for the extended scope of EIA, and outlines the judicial response to the addition of ISC effects. Part three comprises the review of recent decisions in the afore-mentioned key areas, and part four evaluates the core arguments in relation to end product usage, with reference to the recent High Court decision in *Finch v Surrey County Council*[3].

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[1] Ministry of Housing, Communities and Local Government, 'Guidance: Environmental Impact Assessment' (6 March 2014) <https://www.gov.uk/guidance/environmental-impact-assessment> accessed 21 May 2021.
[2] *Brown v Carlisle City Council* [2010] EWCA (Civ) 523, [2011] Env. L.R. 5 [39].
[3] [2020] EWHC 3566 (Admin), [2020] 12 WLUK 412.

Part One

1.1 Development of Environmental Impact Assessment

Although planners may argue they have always considered the environmental implications of projects[4], the introduction of EIA formalised this consideration into the decision-making process. The development of EIA was international and originated in the USA, when the National Environmental Policy Act 1969 (NEPA) introduced EIA for 'any proposed legislation or major federal action which may significantly affect the quality of the human environment'[5]. NEPA was well-received internationally, and lauded by Sax as 'the crucial tool putting the environment on everyone's agenda'[6].

After NEPA, individual countries adopted their own EIA schemes. The EU became concerned that 'disparities between the laws in the various Member States [...] may create unfavourable competitive conditions and affect the functioning of the common market'[7], therefore in 1985 the first EIA Directive was passed to harmonise the principles of EIA. The Directive was implemented into UK law and EIA introduced into the UK planning regime in 1988.

By 1992, EIA had gained popularity worldwide. 175 countries signed the Rio Declaration, Principle 17 of which provided that 'environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to the decision of a competent authority'[8]. Meanwhile, revisions and amendments to the original EIA Directive made the system more robust in areas such as the trans-

[4] Joe Weston, 'Screening for Environmental Impact Assessment Projects in England: What is Screening?' (2011) 29(2) Impact Assessment and Project Appraisal 90, 96.
[5] National Environmental Policy Act 1969, s102(c).
[6] Letter from Joseph Sax to William H Rodgers Jr (10 March 1998).
[7] Council Directive 1985/337/EEC of the European Parliament and of the Council of 27 June [1985] on the assessment of the effects of certain public and private projects on the environment OJ 1985 L175/40, 40.
[8] 'Rio Declaration on Environment and Development' UN Conference on Environment and Development (Rio de Janeiro 3-14 June 1992) (12 August 1992) UN Doc A/CONF.151/26, 4.

boundary effects of projects[9], and the adoption of the Aarhus Convention in 2001 provided for greater public participation in EIA[10].

EIA has become 'the most widely adopted environmental management tool across the world'[11]. It has developed over time in diverse jurisdictions as a result of a growing understanding of environmental issues. EIA has never been a static or uniform concept; since its introduction in England in 1988, the statute and common law governing EIA have evolved significantly. We will evaluate one key area of change: the addition of ISC effects of a development, and the interpretation of these terms by national courts. The addition was introduced in the 1999 regulations, and extended under the current statute, the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 ("the 2017 Regulations").

1.2 What is Environmental Impact Assessment?

Environmental Impact Assessment in England is an integrated process within the planning regime[12]. It was construed as a preventative policy for environmental protection, because where an EIA is required, the potential impact of a project on the environment is assessed, and that assessment is taken into account by the relevant planning authority before they decide whether to grant planning permission. The philosophy underpinning EIA is contended, because although its purpose is environmental protection, it operates within complex planning and regulatory systems, and does not in itself dictate whether a project is permitted or control how it operates.

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[9] Council Directive 1997/11/EC of the European Parliament and of the Council of 3 March [1997] amending Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment OJ 1997 L73/5; Council Directive 2003/35/EC of the European Parliament and of the Council of 26 May [2003] providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment OJ 2003 L156/17; Council Directive 2009/31/EC of the European Parliament and of the Council of 23 April [2009] on the geological storage of carbon dioxide OJ 2009 L140/114; Council Directive 2011/92/EU of the European Parliament and of the Council of 13 December [2011] on the assessment of the effects of certain public and private projects on the environment OJ 2011 L26/1; Council Directive 2014/52/EU of the European Parliament and of the Council of 16 April [2014] amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment OJ 2014 L124/1.

[10] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted 25 June 1998, entered into force 30 October 2001) 2161 UNTS 447 (Aarhus Convention), Article 6(1)(a), Annex I.

[11] Tseming Yang and Robert Percival, 'The Emergence of Global Environmental Law' (2009) 36 Ecology Law Quarterly 615, 627.

[12] E Fisher and B Lange and E Scotford, *Environmental Law: Text, Cases & Materials* (2nd ed, OUP, 2019) ch 20, 693-742, 693.

While the regulatory system is not open to legal challenge, EIA planning decisions are judicially reviewable, which has led to litigation by environmental groups and individuals hoping to rely on EIA to ensure developments are sustainable.

1.3 The EIA Process

EIA consists of six steps: screening; scoping; assessment; public participation; decision-making; and appeal.

1.3.1 Screening

An EIA is only required where a development is likely to have 'significant effects on the environment'[13], therefore it applies to a small proportion of projects, commonly those relating to the energy, mineral and transport sectors, or where a development is likely to produce high volumes of waste products. The first step of EIA is screening to determine whether the development falls under these categories.

Regulation 2(1) of the 2017 Regulations provides that a development will be an 'EIA Development' if it falls within the list of activities provided in Schedule 1 of the Regulations, or if it falls within the list of activities provided in Schedule 2 and meets the applicable thresholds and criteria outlined in Schedules 2 and 3. Schedule 1 lists activities that prima facie have a significant impact on the environment. Schedule 2 lists activities which may have a significant impact, depending on the circumstances.

1.3.2 Scoping

The second step of EIA is scoping, where the relevant planning authority (or Secretary of State in certain circumstances) will identify the key issues that should be reviewed within the assessment. Under Council Directive 2014/52/EU, member states could implement mandatory or voluntary scoping, with the former encouraged as it 'helps to ensure that the environmental information used for decision-making provides a comprehensive picture of the Project's important effects'[14].

[13] Town and Country Planning (Environmental Impact Assessment) Regulations 2017, SI 2017/571, regulation 2(1).

[14] European Commission, 'Environmental Impact Assessment of Project: Guidance on Scoping' [2017] <https://ec.europa.eu/environment/eia/pdf/EIA_guidance_Scoping_final.pdf> accessed 20 May 2021.

However, the UK chose a weak implementation method, in which developers can choose to apply for a scoping opinion, and may depart from the scoping opinion with impunity.[15]

For the purposes of this essay it is important to distinguish between references to 'scoping' and 'scope'. Scoping refers to the second step of EIA whereas scope refers more broadly to the range of effects which may be included in an EIA, particularly those covered by the terms indirect, secondary and cumulative.

1.3.3 Assessment

The third step of EIA relates to the preparation of an Environmental Impact Statement ("EIS") by or on behalf of the developer. This step involves several tasks, which Fisher, Lange and Scotford outline as 'describing the project and environmental baseline, identifying and predicting impacts from a project, evaluating their significance, and assessing whether those impacts can be mitigated or other alternatives can be considered'.[16]

1.3.4 Public Participation

The fourth step, public participation, has become more significant due to the Aarhus Convention 2001. Planning Authorities must now invite consultation from a wide section of the public as early as possible in the decision-making process, and consideration is given to both the results of the consultation and the findings of the EIS.[17]

1.3.5 Decision-Making

The fifth step is decision-making. The planning authority or Secretary of State can either grant permission outright, refuse permission, or grant permission subject to conditions. To be valid, any conditions imposed must comply with section 72 of the Town and Country Planning Act 1990. Under the 2017 Regulations, a decision-maker may also impose monitoring measures[18] to review the accuracy of environmental impact predictions. Arabadjieva hopes this may make EIA 'a more dynamic process that is self-correcting in some respects and more akin to environmental management and 'reflexive' environmental regulation.'[19]

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[15] See *Finch v Surrey County Council* [2020] EWHC 3566 (Admin), [2020] 12 WLUK 412 [79].
[16] E Fisher and B Lange and E Scotford, *Environmental Law: Text, Cases & Materials* (2nd ed, OUP, 2019) ch 20, 693-742, 695.
[17] Town and Country Planning (Environmental Impact Assessment) Regulations 2017, SI 2017/571, pt 5.
[18] ibid regulation 29(2)(b)(i)(dd).
[19] Kalina Arabadjieva, "'Better Regulation" in Environmental Impact Assessment: The Amended EIA Directive' (2016) 28(1) Journal of Environmental Law 159–168, 168.

1.3.6 Appeal

The final step of EIA is appeal. Where a decision is challenged, it may be open to Judicial Review. This step is critical to ensuring EIA operates in accordance with its purpose of environmental protection, however Judges are limited in their purview.

The policies governing EIA are descriptive, rather than prescriptive. As Tewdwr-Jones states, 'central government sets down the legal framework and broad policy for local government to interpret'[20]. Therefore, Judges are not dealing with rigid rules which can be followed to the letter. Instead, planning authorities have considerable discretion and independence in the exercise of their decision-making functions, so much so that they have been described as 'quasi-judicial'[21], albeit they are guided by non-legally binding documents such as the National Planning Policy Framework ("NPPF"). Where a planning decision is subject to judicial review, the Court will review the decision-maker's discretion, which is more ambiguous than a standard judicial review, which will consider whether there has been compliance with an established decision-making process.

The grounds of review are also limited. Planning authorities have the discretion to choose how to weigh factors in their decision-making. Where a claimant feels the planning authority has given insufficient or disproportionate weight to a material consideration this will not render the decision unlawful unless it amounts to Wednesbury irrationality[22], which will only apply in extreme cases.

As Fisher, Lange and Scotford identify, 'the court in carrying out such judicial review must balance restraint and activism'[23]; it must respect the legitimate discretion of the decision-maker whilst also taking account of the purpose of the legislation. Within these limitations, judges have been able to shape aspects of the EIA process. We will explore how they have done so, the approach taken, and the judicial reasoning underpinning this in relation to the addition of ISC effects. We begin by outlining the legislative context.

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[20] Mark Tewdwr-Jones, 'Plans, Policies and Inter governmental Relations: Assessing the Role of National Planning Guidance in England and Wales' (1997) 34 Urban Studies 141, 142.
[21] *R (Alconbury) v Environment Secretary* [2001] UKHL 23, [2003] 2 AC 295 [139].
[22] Established in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, [1947] 2 All ER 680.
[23] E Fisher and B Lange and E Scotford, *Environmental Law: Text, Cases & Materials* (2nd ed, OUP, 2019) ch 20, 693-742, 698.

Part Two

2.1 Extending the scope of EIA

EIA has evolved to keep pace with our growing understanding of environmental issues and climate change. In England, EIA has been subject to frequent statutory changes.

The impacts considered in an assessment are decided on a case-by-case basis, however broad limits are imposed by statute. When the 1988 regulations first introduced EIA into the UK, an Environmental Impact Statement was required to include a description of the 'likely significant effects, direct and indirect, on the environment of the development'[24] with the option to include other effects 'by way of explanation or amplification of any specified information'[25]. This was extended in 1999, implementing Council Directive 97/11/EC, to include:

> the direct effects and any indirect, secondary, cumulative, short, medium and long-term, permanent and temporary, positive and negative effects of the development, resulting from:
>
> a) the existence of the development;
> b) the use of natural resources;
> c) the emission of pollutants, the creation of nuisances and the elimination of waste[26]

This was further extended in 2017 to include 'the cumulation of effects with other existing and/or approved projects', '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' and to 'take into account the environmental protection objectives established at Union or Member State level which are relevant to the project'[27].

From a position where EIAs were principally concerned with the effects on the environment of the developments themselves (e.g through noise and light pollution from construction onsite), their scope under statute has expanded to include a wide range of effects, and to recognise the interrelation of environmental effects, and the concerns of climate change.

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[24] Town and Country Planning (Assessment of Environmental Effects) Regulations 1988, SI 1988/1199, schedule 3 paragraph 2 subsection c.
[25] ibid schedule 3, paragraph 3.
[26] The Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999, SI 1999/293, schedule 4 part 1 paragraph 4.
[27] The Town and Country Planning (Environmental Impact Assessment) Regulations 2017, SI 2017/571, schedule 4 paragraph 5.

However, as the EU Commission acknowledged in guidelines to accompany Council Directive 97/11/EC, 'a key problem identified was how to define ISC impacts; the definitions overlap, and there are no agreed and accepted definitions'[28]. Similarly, Cooper and Sheate criticise 'the lack of guidance and frameworks for the assessment of these effects'[29] for EIA practitioners in the English regime.

2.2 **Lack of Legal Certainty**

For these additions to operate effectively, we would expect there to be legal certainty as to the definitions of the different types of effect listed. As definitions were not provided in the EIA Directives or domestic legislation, it was left to the judiciary to provide legal definitions. However, they have not done so.

Instead, as Laws LJ states in *Bowen-West v Secretary of State for Communities and Local Government*, Judges have decided that 'what are and what are not indirect, secondary or cumulative effects is a matter of degree and judgment'[30] in each case. Much of the 2017 Regulations concerns the assessment, offsetting, and monitoring of the 'significant' effects of a project on the environment, but even this term has not been defined beyond the idea that it 'probably requires something more than a bare possibility'[31]. As Carnwath LJ states in *Jones v Mansfield*, 'the word 'significant' does not lay down a precise legal test', instead it 'requires the exercise of judgment, on technical or other planning grounds, and consistency in the exercise of that judgment in different cases.'[32]

One of the foundational rules of law is the principle of legal certainty: laws must be sufficiently clear to allow citizens to regulate their conduct. Therefore, it is surprising that Judges would choose to interpret EIA regulations in a way that is likely to cause uncertainty. To exercise judgment consistently in cases with diverse facts, heard by different judges, many unreported, does not seem possible. Indeed, Carnwath LJ admits so, concluding in *Jones v Mansfield* 'that is a function for which the courts are ill-equipped.'[33]

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[28] LJ Walker and J Johnston, 'Guidelines for the Assessment of Indirect and Cumulative Impacts as well as Impact Interactions' [2001] <https://ec.europa.eu/environment/archives/eia/eia-studies-and-reports/pdf/guidel.pdf> accessed 20 May 2021, ii.
[29] L Cooper and W Sheate, 'Cumulative effects assessment: A review of UK environmental impact statements' (2002) 22(4) Environmental Impact Assessment Review 415 – 439, 417.
[30] [2012] EWCA (Civ) 321, [2012] 1 WLUK 310 [30].
[31] *Evans v Secretary of State for Communities and Local Government* [2013] EWCA (Civ) 114, [2013] 2 WLUK 655 [23].
[32] [2003] EWCA (Civ) 1408, [2004] Env LR 21 [61].
[33] ibid.

Why then have the Judiciary made this choice? Laws LJ offers an explanation in paragraphs 30-31 of *Bowen-West*:

> There is in my judgment nothing in the Regulations nor indeed the Directive to suggest that the European legislature or domestic legislature implementing the Directive contemplated an approach that could be categorised by so rigid a rule [...] Mr Dabble submitted yesterday that the Secretary of State has to get the legal meaning of "cumulative effects" right. If this is anything more than a statement of the obvious proposition that the meaning of a text is for the court to ascertain, then it is to restate the supposed rule: which, in my judgment, is no rule.

Laws LJ applies the mischief rule[34] and concludes that the lawmakers did not intend this legislation to produce rigid rules, and there are justifications for this. Environmental issues are complex; each EIA application presents a unique set of facts and interrelated environmental factors. It is possible that any strict definition may thwart the exercise of discretion by planning authorities and be too rigid to accommodate the nuanced approach required for Judges to review EIA decisions.

Nonetheless, we can sympathise with Mr Dabble's entreaty 'to get the legal meaning right'. From a claimant's perspective, the absence of definitive statutory or common law definitions creates uncertainty as to what may constitute an ISC effect whose omission may cause a decision to be quashed. It is in the claimant's interest that the definitions be as wide as possible. Therefore, key questions have been whether larger projects interdependent on the development could qualify, or the operational impacts of a development, or impacts from products originating from the development. We will consider decisions in the areas of 'foot in the door' cases, transport infrastructure, and mineral and gas extraction, to establish possible answers.

Part Three

3.1 'Foot in the Door' Cases

'Foot in the door' cases refer to EIAs done for preliminary or exploratory developments which form part of a larger project. These cases provide insight into the circumstances under which a development should be assessed in isolation from or in conjunction with other projects.

[34] See definition at WJ Stewart, *Collins Dictionary of Law* (2006) <https://legal-dictionary.thefreedictionary.com/mischief+rule> accessed 20 May 2021.

In *Brown v Carlisle City Council* [2010], the grant of planning permission for a freight distribution centre at Carlisle Airport was held to be unlawful because, under a section 106 agreement, the centre could only be built in combination with other major airport works, which had not been assessed within the EIS. The impacts of the major works were held to be cumulative effects of the development for which planning permission was sought, and the permission was quashed.

In contrast, in *Bowen-West v Secretary of State for Communities and Local Government* [2012], the grant of planning permission to dispose of low-level radioactive waste at a hazardous-waste landfill site was upheld because the application was found to be 'a stand-alone proposal'[35]. Although the developer had plans to extend the period of usage and size of the landfill site, the challenged application did not depend on those plans, therefore it was held that the impacts of those plans did not constitute cumulative effects for the purpose of the EIA.

'Foot in the door' cases will therefore turn on whether the preliminary development depends on the larger project, or whether the development could stand alone. Where the former is established, the Court is likely to quash the decision because the object of the EIA Regulations is to ensure that all relevant environmental effects are considered **before** any decision is taken.

Where the preliminary project does stand alone, Laws LJ poses the argument that 'if the larger scheme is in due course applied for, it will as a whole (including that part of it which is in effect the present scheme) be the subject of an EIA; and thereby it seems to me the purpose of the Directive will be fulfilled.'[36] This argument has been cited in subsequent cases[37] in support of the ratio in 'foot in door' cases, however the argument may be questionable in practice. Preliminary or exploratory developments can be costly. If planning permission is refused for the larger project after the preliminary development has been completed, this may limit the profitability of that land, and another use may have been more acceptable.

3.2 Transport Infrastructure

As claimants have tested the boundaries of whether operational impacts of a development may constitute ISC significant effects, two EU cases, *Abraham v Région Wallonne* and the *Ecologistas case*,

[35] [2012] EWCA (Civ) 321, [2012] 1 WLUK 310 [25].
[36] ibid [35].
[37] *Preston New Road Action Group v Secretary of State for Communities and Local Government* [2018] EWCA (Civ) 9, [2018] 1 WLUK 89 [75-78].

have attracted attention. Both relate to transport infrastructure developments, and although they are screening cases, both consider the question of operational impacts.

In *Abraham v Région Wallonne* [2008], the Court of Justice of the European Union ("CJEU") was asked to give a preliminary ruling on whether modifications to the infrastructure of an airport required an EIA. The Court found that even though the EIA Directive at that time referred to the construction of airports as opposed to airports in general, it would be contrary to the purpose of the Directive to exclude modifying works from EIA. The Court went further, ruling that an EIA must also 'take account of the projected increase in the activity of an airport when examining the environmental effect of modifications made to its infrastructure with a view to accommodating that increase in activity'[38].

Later the same year, the CJEU considered the *Ecologistas case*, which concerned whether an EIA was required for a project to refurbish the Madrid urban ring road. The project was predicted to increase traffic on the road by 25%. Madrid City Council had split the development into 15 independent sub-projects to evade the need for EIA at the screening stage for the majority of the works. The decision is summarised by Holgate J in *Finch v Surrey County Council* who states 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'[39].

These cases indicate that impacts from the operation of a development may constitute indirect effects for the purposes of EIA, however there has yet to be a domestic case to apply this. Furthermore, the Courts have been reluctant to use ratio from screening cases like these as authority for other types of EIA review. As Laws LJ states in paragraph 32 of *Bowen-West*:

> It is in this type of case, screening cases, that the courts have been concerned, energetically concerned, to put a stop to the device of using piecemeal applications as a means of excluding larger developments from the discipline of EIA. That approach cannot simply be read across to a case which is not about screening at all.

Most EIA litigation arises in relation to screening, due to the eagerness of developers to avoid the delay and expense of EIA. Decisions regarding one aspect of EIA may be applicable to others and segregating the authorities will delay the development of comprehensive common law definitions. Furthermore, to quash a screening decision because it did not consider an indirect effect, but then

[38] Case C-2/07 *Abraham v Region Wallonne* [2008] ECR I-1197 [46].
[39] [2020] EWHC 3566 (Admin), [2020] 12 WLUK 412 [117].

not require that indirect effect to be included in an EIS calls into question the legitimacy of the first decision.

3.3 Mineral and Gas Extraction

Developments for the extraction of minerals and gas are among the most controversial in EIA, a recent example being the Woodhouse Colliery in Cumbria, which is currently subject to a public inquiry following protests after the project was granted planning permission in January 2021.[40]

Interest in extending the scope of ISC effects as far as possible has led to a reliance on the argument in *Abraham v Région Wallonne* which concerns inclusion of the end product:

> It would be simplistic and contrary [...] 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.[41]
> (emphasis added)

This argument was made in reference to a decision that the impacts of increased activity (particularly noise) at an improved airport constituted an indirect effect. But the term 'end product' is broad as is the phrase 'use and exploitation', which raised hopes that the scope of ISC effects may be extended beyond operational impacts to include impacts from end product usage.

The majority of greenhouse gases from fossil fuels are emitted as a result of combustion. In 2020, fossil fuel combustion in the UK produced an estimated 301.5 megatons of carbon dioxide[42]. If an EIA could consider the impact of the percentage of those emissions attributable to a subject development, that could radically increase the influence of EIA in determining whether the project should be granted planning permission. Several notable judicial review proceedings of mineral and gas extraction projects have followed, putting the argument that end product usage should be included to the test.

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[40] 'Cumbria coal mine: Company 'disappointed' by public inquiry move' BBC (15 March 2021) <https://www.bbc.co.uk/news/uk-england-cumbria-56405836> accessed 20 May 2021.

[41] Case C-2/07 *Abraham v Region Wallonne* [2008] ECR I-1197 [43].

[42] Department for Business, Energy and Industrial Strategy, '2020 UK greenhouse gas emissions, provisional figures' (25 March 2021) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/972583/2020_Provisional_emissions_statistics_report.pdf> accessed 20 May 2021 1-22, 13.

3.3.1 Case Study One

In *Friends of the Earth Ltd v North Yorkshire County Council* [2016], the grant of planning permission to carry out fracking on the site of a former gas well was challenged on the basis that the EIS did not take account of the ISC impacts of end product usage - in this case emissions from burning the extracted gas at the nearby site of Knapton. The review was dismissed on the basis that, even though the sites were connected, the Knapton site stood alone from the fracking site and was subject to its own planning permission and controls. Here, the principle of dependence derived from earlier 'foot in the door' cases excluded assessment of impacts from end product usage.

3.3.2 Case Study Two

In *H J Banks & Co. Ltd v Secretary of State for Housing, Communities and Local Government* [2019], the refusal of planning permission for a surface mine for the extraction of coal was held to be unlawful. The Secretary of State had erred by giving significant weight to the greenhouse gas emissions which would be produced from burning the extracted coal in power stations to generate electricity. In his decision, the Secretary of State held that emissions from end product usage were capable of being a 'material consideration'[43] in the determination of a planning application, and the adverse effects of emissions on the climate outweighed the national and local benefits of the additional coal supply.[44]

The High Court quashed the refusal but didn't reject the reasoning that emissions from fossil fuel combustion may be an indirect effect of a development. Instead, their decision was based on the strength of opposing arguments, one of which being that if coal was not extracted indigenously it would be imported, and the transportation would lead to higher overall emissions. Although the decision was negative, the case was an indication from a national court that impacts from end product usage may constitute an ISC effect.

3.3.3 Case Study Three

In *Finch v Surrey County Council* [2020] the grant of planning permission to retain and expand an existing oil well site and drill four new wells to produce hydrocarbons was appealed. One of the grounds of appeal was that the EIS failed to assess the impact of emissions arising from the combustion of the oil when used as fuel for motor vehicles, as an indirect effect of the development, contrary to the scoping opinion from Surrey County Council, which provided that:

> 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

[43] [2019] EWHC 3141 (Admin), [2018] 11 WLUK 388 [3].
[44] ibid [16].

> 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.[45]

The claimant argued that the developer was obligated under the 2017 Regulations, and following *Abraham v Région Wallonne* and the scoping opinion, to assess the emissions resulting from the use of an end product which is said to have originated from that development.

The Court disagreed, and held that the developer was only obliged to assess the environmental effects of the development itself, which could not include emissions from customers in unknown locations using an end product which had been made in a separate facility. Holgate J concluded that '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."[46]

This judgment represents a reversion from the indicated position under *H J Banks & Co Ltd* back to a traditional view of EIA, that it is concerned only with the effects of the development itself and therefore emissions from the use of an end product by consumers, particularly where a product has passed through a separate processing facility, is not capable of constituting an indirect effect. We could infer from this that where an EIA application concerns a processing site as opposed to an extraction site, emissions from end product usage may be more likely to constitute an indirect effect. However, the issue of consumers using the product in locations which are unknown and unrelated to the development will still apply.

It is worth noting that there is an appeal outstanding on this High Court decision. However, the commentator McManus holds out little hope for the challenge, which to her 'seemed doomed at the outset'[47]. McManus paints an insular portrait of EIA, positioning it 'in sharp contrast to an assessment of the more global environmental impact resulting from the refinement and use by customers of the mineral which would be extracted'[48]. Is it therefore the case that the scope of EIA is ineluctably limited by locality?

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[45] [2020] EWHC 3566 (Admin), [2020] 12 WLUK 412 [73].
[46] ibid [126].
[47] Francis McManus, 'Environmental assessment restricted to impacts of the proposed development' (2021) 204 Scottish Planning and Environmental Law, 45.
[48] ibid.

Considering the UK's commitment under section 1(1) Climate Change Act 2008 to Net Zero by 2050, the decision in *Finch* may seem counterintuitive. Statutory extensions to the scope of EIA could have been interpreted by the Courts to build on the ratio in *Abraham v Région Wallonne* to accelerate the transition to a low carbon future. Why then did the High Court choose to interpret the law conservatively?

Part Four

4.1 Judicial Reasoning for Excluding End Product Usage

4.1.1 Paragraph 183 National Planning Policy Framework 2019

One justification given in both *Finch* and *Friends of the Earth Ltd*[49] is a provision under the NPPF which sets out guidelines for the application of planning policies. Paragraph 183 provides that:

> The focus of planning policies and decisions should be on whether the 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.

It is uncontroversial that the focus of planning decisions should be whether a development is an acceptable use of land. However, setting this consideration in opposition to the control of processes or emissions has led to accusations[50] that the paragraph is not in conformity with the 2017 Regulations, which direct that an EIS should assess 'the emission of pollutants, noise, vibration, light, heat and radiation, the creation of nuisances'[51]. While prima facie the two provisions appear incompatible, it should be noted that the provision in NPPF is directed at planning authorities, whereas the provision in the 2017 Regulations provides for a developer's obligations. Under the 2017 Regulations, a developer is obliged to assess the emissions of pollutants. The planning authority has a duty to consider all material considerations, but under paragraph 183 NPPF they must not seek to control the same where they are subject to separate controls. On this understanding, the argument is sound.

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[49] *Finch v Surrey County Council* [2020] EWHC 3566 (Admin), [2020] 12 WLUK 412 [31]; *Friends of the Earth Ltd v North Yorkshire County Council* [2016] EWHC 3303 (Admin), [2017] Env LR 22 [39].

[50] *Finch v Surrey County Council* [2020] EWHC 3566 (Admin), [2020] 12 WLUK 412 [17].

[51] Town and Country Planning (Environmental Impact Assessment) Regulations 2017, SI 2017/571, schedule 4 paragraph 5 subsection e.

4.1.2 Inability to Trace Emissions

A key argument raised in *Finch*, *Friends of the Earth Ltd* and a third planning case, *Preston New Road Action Group v Secretary of State for Communities and Local Government*[52] is that where a fuel enters the international market, it will become indistinguishable. Once minerals leave their site of extraction, pass through a processing facility, enter the international market, are bought and eventually used by consumers, it is not possible to trace the emissions back to the specific site of extraction.

This argument is correct; it is currently impossible to trace emissions back, and this may not change with the development of new technologies, due to the sheer scale of the industry. However, it is likely that as part of the transition to a low carbon future, societies will want to more closely monitor emissions along the supply chain, and it may become acceptable to predict the estimated end-use emissions of a development. Such an estimate could be given by calculating the average combustion emissions per tonne or gallon of product[53], multiplied by the predicted yield for the term that planning permission would be granted. Unacceptable unknowns may arise with sites such as oil refineries, where a development processes a raw material to produce a variety of differently emitting products, and the ratio of products may change over time based on market trends. However, an approach along these lines could be practical for some sectors.

4.1.3 Impact of Development on Overall Energy Consumption and Emissions

Another argument raised in these cases is that the granting of planning permission for new mineral or gas extraction sites may not lead to an overall increase in energy consumption or emissions because it will 'displace production elsewhere'[54]. While it is true that an increase in supply in this sector is unlikely to trigger an increase in demand, partly due to price controls, this reasoning contradicts our first argument under paragraph 183 NPPF that a planning decision should not be concerned with controlling emissions. It also raises the question as to why new sites are required, the construction and operation of which invariably cause some adverse environmental impacts, if there is already sufficient supply.

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[52] *Finch v Surrey County Council* [2020] EWHC 3566 (Admin), [2020] 12 WLUK 412 [102 and 125]; *Friends of the Earth Ltd v North Yorkshire County Council* [2016] EWHC 3303 (Admin), [2017] Env LR 22 [39]; *Preston New Road Action Group v Secretary of State for Communities and Local Government* [2018] EWCA (Civ) 9, [2018] 1 WLUK 89 [72].

[53] US Energy Information Administration, 'Carbon Dioxide Emissions Coefficients' (2 February 2016) <https://www.eia.gov/environment/emissions/co2_vol_mass.php> accessed 21 May 2021.

[54] *Finch v Surrey County Council* [2020] EWHC 3566 (Admin), [2020] 12 WLUK 412 [102].

Furthermore, the introduction of a new site may not lead to an overall increase in consumption or emissions in the present, but it may lead to an overall increase in the future by extending the UK's reliance on non-renewable energy at a time when, as Keith Taylor MEP observed in *Finch*, 'greenhouse gas emissions need to be curbed as a matter of urgency to stay within the 1.5C limit [...] 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.'[55]

4.1.4 The Floodgates Argument

Where there is an opportunity to extend the law, it is often argued that doing so would open the floodgates to an insupportable number of claims. This was clearly a consideration for Holgate J, who states at paragraph 4 of *Finch* that:

> 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 [...] the extraction of minerals or the production of raw materials for use in industrial processes, [...] 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.

Holgate J posits that the scope of indirect effects should not be extended in this way without a test or criteria to enable decision-makers to distinguish between indirect effects which qualify for EIA from those which do not.[56] Without such a test, any judicial decision to include end product usage may lead to crises in numerous sectors. Holgate J's comments are redolent of Mr Dabble's entreaty to 'get the legal meaning right'[57], but it is unclear given the court's reluctance to provide rigid definitions, the discretionary nature of planning authorities, and the non-prescriptive character of planning policies, who would produce such a test.

Were such a test produced, it may still be inappropriate for the judiciary to extend the law given the significance of the ramifications, particularly on the activities of high carbon sectors. Instead, the decision should be made by Parliament. However, the current government is unlikely to advocate for this, as the Prime Minister recently announced plans to use post-Brexit freedoms to 'simplify environmental assessments' and 'significantly decrease the time it takes for developments

[55] ibid [87].
[56] ibid [111].
[57] *Bowen-West v Secretary of State for Communities and Local Government* [2012] EWCA (Civ) 321, [2012] 1 WLUK 310 [31].

to go through the planning system"[58] as part of a new scheme called 'Project Speed'[59], a key element of the Planning Bill 2021.

Conclusion

The scope of EIA in England has extended considerably since its introduction in 1988. The judiciary have played an important role in clarifying new terms including indirect, secondary and cumulative effects, however not with the expected degree of certainty. The unique facts of each case, coupled with difficulties in measuring environmental impacts, the protected discretion of decision-makers, and the potential ramifications of significant changes to the common law have deterred judges from adopting either a rigid or liberal approach when interpreting the regulations. The recent decision in *Finch* to uphold the traditional scope of EIA and restrict assessments to effects solely of the development is therefore unlikely to be overruled by a superior court, or by Act of Parliament in light of the political will to simplify and expedite the planning process.

Therefore, the effectiveness of EIA as a preventative tool remains limited despite legislative extensions to the scope. As Fisher, Lange and Scotford point out, EIA 'is not a magic wand for dealing with disputes concerning the environmental implications of development'[60], and the enforcement mechanism under judicial review has not provided certainty. As the deadline for Net Zero approaches, the decision in *Finch* and proposals under Project Speed denote a growing disparity between the UK's legal commitment under the Climate Change Act 2008 and the realities of the planning process. To attain Net Zero, it is likely more rigorous controls will be required. Greater clarification of ISC effects, including end product usage, may enable EIA to achieve its environmental aim; however, this is unlikely to occur without a significant attitudinal shift from the executive.

[58] Prime Minister, 'The Queen's Speech 2021' (11 May 2021) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/986770/Queen_s_Speech_2021_-_Background_Briefing_Notes..pdf> accessed 20 May 2021, [62].
[59] ibid [60].
[60] E Fisher and B Lange and E Scotford, *Environmental Law: Text, Cases & Materials* (2nd ed, OUP, 2019) ch 20, 693-742, 700.

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