Outlook

Fw: PA/SCR/2025/4 – Egdon Resources, Lodge Farm, Clapp Gate, Wressle

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Sent: 11 March 2025 21:01
To: Planning <Planning@northlincs.gov.uk>
Subject: PA/SCR/2025/4 – Egdon Resources, Lodge Farm, Clapp Gate, Wressle

Dear Sirs

PA/SCR/2025/4 – Egdon Resources, Lodge Farm, Clapp Gate, Wressle

Without prejudice to any comments which I may seek to make regarding the adequacy of the emissions reports supporting the screening application, I believe that the applicant's approach (screening out of EIA) would be unlawful for the following reasons.

The applicant has suggested that the effects of burning the hydrocarbons produced by the proposed development would not be significant in the context of the national and local carbon budgets, and that the application should therefore be screened out of the need for EIA. Please see

the enclosed opinion of Estelle Dehon KC, Lois Lane and Leigh Day, which discusses the implications of R (Finch) v Surrey County Council and others [2024] UKSC 20 and R(Friends of the Earth & others) v Secretary of State for Levelling Up, Housing & Communities [2024] EWHC 2359 (Admin). I urge you to read the opinion in full, but with particular regard to paragraphs 26 to 32, which discuss the implications of those judgments in the context of EIA screening decisions. The opinion concludes:

“In most circumstances, however, we consider that it would be irrational for a decision maker to screen out Schedule 2 development giving rise to likely indirect effects on climate, without having first made a proper assessment of whether such effects would be significant. This assessment would usually be included within the ES, and it follows that the judgment in Finch gives rise to a presumption that Schedule 2 proposals for hydrocarbon extraction ought to be screened in and be subject to EIA as a matter of course. The screening decision takes place at a point when less-than-full information is available and a careful precautionary approach needs to be adopted.”

On the basis of this opinion, I believe that it would be irrational and unlawful for the council to screen out the need for EIA for a development of the type proposed, and the screening opinion and any subsequent grant of planning permission would be susceptible to judicial review.

Yours faithfully
Sandie Stratford

In the matter of the Town and Country Planning (Environmental Impact Assessment) Regulations 2017

Re: The implications of *R (Finch) v Surrey County Council and others* [2024] UKSC 20 for environmental impact assessment for onshore hydrocarbon extraction applications

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OPINION

INTRODUCTION

1. We are instructed by SOS Biscathorpe to advise on the implications of the Supreme Court's decision in *R (Finch) v Surrey County Council and others* [2024] UKSC 20 ("***Finch***") for the environmental impact assessment ("**EIA**") process in respect of applications for planning permission for onshore hydrocarbon extraction. We are further instructed to advise on any implications for applications for permission for exploration. This advice has been prepared for the benefit of SOS Biscathorpe only. We understand that it may be shared with third parties. Specific legal advice may be needed for any individual circumstances.

2. *Finch* concerned a legal challenge to the grant of planning permission by Surrey County Council for the extraction of 3.3 million tons of oil over a 25-year period from a site at Horse Hill. The central issue was whether the inevitable greenhouse gas ("**GHG**") emissions, which would occur when the oil extracted from the proposed development was eventually burned, were a "likely significant indirect effect" of the development within the meaning of the Directive 2011/92/EU of the European Parliament and of the Council, as amended by Directive 2014/52/EU ("**the EIA Directive**"), as implemented domestically by the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 ("**the 2017 Regulations**"), such that they should have been included in the EIA process for the project.

3. By a majority of 3–2, the Supreme Court held that the combustion emissions from the proposed development were a "likely significant indirect effect" of the project on the climate, which fell to be assessed as part of the EIA process.[1] The Court also found that the reasons given by the County Council for not treating the combustion emissions as likely significant indirect effects of the project were legally flawed. The planning permission was therefore quashed.

4. Since *Finch*, a further judgment has been handed down that has applied and developed the Supreme Court's findings, namely *R (Friends of the Earth & ors) v Secretary of State for Levelling Up, Housing & Communities* [2024] EWHC 2359 (Admin) *("**Whitehaven**")*.[2] This case was a statutory review challenging the decision of the Secretary of State for Levelling Up, Housing and Communities to grant planning permission for a new underground coal mine in Whitehaven, Cumbria. Applying *Finch*, Mr Justice Holgate found that the Secretary of State had acted in breach of the predecessor regulations to the 2017 Regulations by deciding that the combustion emissions from the coal to be extracted from the proposed development were not a likely significant indirect effect of the project.

5. This Opinion addresses the implications of the judgment of the Supreme Court in *Finch* and the High Court in *Whitehaven* for the application of the EIA regime to proposed hydrocarbon extraction developments. Specifically, it outlines what is now required from planning decision makers and developers at the screening, scoping and environmental statement ("**ES**") stages of the EIA process. This opinion focuses on hydrocarbon production applications, but briefly addresses potential impacts on applications for exploration.

6. For the reasons set out in detail below:

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[1] References to the Supreme Court refer to the decision of the majority unless otherwise specified.

[2] In addition to *Whitehaven,* the case of *R (Mathilda Dennis on behalf of SOS Biscathorpe) v Secretary of State for Levelling Up, Housing and Communities ("**Biscathorpe**")* settled after both the Secretary of State and developer accepted that the failure to consider emissions from combustion of oil to be produced at the proposed development constituted an error of law in light of the Supreme Court's findings in *Finch.*

(a) When assessing applications for hydrocarbon extraction projects, planning decision makers must ensure that information on the eventual combustion emissions arising from the project is before them. This applies to all types of hydrocarbon extraction, including coal.

(b) It will still be for planning decision makers to determine whether these emissions are 'significant' as a matter of planning judgement, but they are undoubtedly an effect as a matter of law and the conclusion on significance must be reached with all the relevant information before them.

(c) At the screening stage of the EIA process, the fact that combustion emissions are always an indirect effect of hydrocarbon extraction projects indicates that Schedule 2 extractive hydrocarbon developments ought to be presumed to be screened in, so that a proper assessment of the significance of their effect on climate can be undertaken.

(d) At the scoping stage, all projects for the commercial extraction of hydrocarbons must scope in combustion emissions as an effect of the development which must be assessed. Quantification of these emissions should be required by planning authorities and included by developers within the ES.

(e) The judgment in *Finch* did not deal directly with applications for exploration but several aspects of the Supreme Court's decision suggest that such applications should also include information on the likely combustion emissions depending on the volume of recoverable hydrocarbons eventually discovered.

THE EIA REGIME

7. Regulation 3 of the 2017 Regulations prohibits the grant of planning permission for 'EIA development' (as defined in the regulations) without an EIA having been carried out for the development. EIA requires the relevant decision maker (i.e. the planning authority, Secretary of State or planning inspector) to determine whether or not a proposed project falls within the remit of the EIA regime ("**screening**"), the extent of issues to be considered in the EIA

("**scoping**"), and consult on and consider an ES submitted by the applicant for planning permission.[3]

8. The object of an EIA, as set out in *Finch* at §3 is to:

> *"ensure that the environmental impact of a project is exposed to public debate and considered in the decision-making process. The legislation does not prevent the competent authority from giving development consent for projects which will cause significant harm to the environment. But it aims to ensure that, if such consent is given, it is given with full knowledge of the environmental cost."*

9. Under Article 3(1) of the EIA Directive and regulation 4(2) of the 2017 Regulations, where an EIA is required, it must include the assessment of "direct and indirect significant effects" of a project on a range of environmental factors including climate.

KEY FINDINGS IN *FINCH*

10. It was agreed between the parties in *Finch* that it was inevitable that the crude oil extracted from the development would be refined and ultimately combusted somewhere in the world, giving rise to GHG combustion emissions (also referred to more broadly as "scope 3" or "downstream" emissions).[4] It was also agreed that those emissions were capable of being quantified. Pausing there, it is important to note that the factors that drove this agreement are likely to be present in almost all developments for the commercial production of fossil fuel: the whole purpose of the extraction is to produce fossil fuel to be combusted and the physics of the climate impact of this combustion producing GHG emissions is unassailable.

11. The EIA carried out by the applicant excluded consideration of combustion emissions and the County Council accepted the developer's argument that they fell outside the requirements for EIA and were not an "indirect effect" of the project. The Supreme Court found that this conclusion was unlawful.

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[3] For a summary see *R (Friends of the Earth & ors) v Secretary of State for Levelling Up, Housing & Communities* [2024] EWHC 2359 (Admin) (*"**Whitehaven**")*, para 62

[4] See §§39-43 of *Finch* for a further explanation of the classification of GHG emissions into 'scopes'.

12. Giving judgment for the majority, Lord Leggatt set out at §53 that:

> *"The council could not lawfully grant planning permission for the project unless an EIA had been carried out which complied with the obligation to "identify, describe and assess in an appropriate manner....the direct and indirect significant effects" of the project on (among other factors) "climate": see regulation 4(2), reflecting article 3(1) of the EIA Directive. If the significant effects of the project on climate include the combustion emissions, the council was therefore obliged to assess them as part of the EIA and the failure of the Council in Finch to do so renders the decision to grant planning permission unlawful."*

13. The Court held that the EIA Directive and the 2017 Regulations must be interpreted in their proper context (§11). That context includes the key principles underlying the EIA regime (§§12–17) and related principles of international law, such as the Aarhus Convention.[5]

14. Central among these principles is the importance of public participation in environmental decision-making. The Court held at §21:

> *"Public participation is necessary to increase the democratic legitimacy of decisions which affect the environment. Second, the public participation requirements serve an important educational function, contributing to public awareness of environmental issues. Guaranteeing rights of public participation in decision-making and promoting education of the public in environmental matters does not guarantee that greater priority will be given to protecting the environment. But the assumption is that it is likely to have that result, or at least that it is a prerequisite. You can only care about what you know about."*

15. It further held at §153:

> *"153. Looking at the matter more broadly, it needs to be recognised that the process of EIA takes place in a political context and that the*

[5] The Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (signed at Aarhus, Denmark, on 25 June 1998 and in force from 30 October 2001) is a multilateral international treaty, which grants the public a number of rights around access to environmental information, public participation in environmental decision making, and access to justice in relation to issues affecting the local, national and transboundary environment.

> *information generated by an EIA will be considered within a political decision-making arena. It is therefore inevitable that economic, social and other policy factors will outweigh environmental factors in many instances. But this does not avoid or reduce the need for comprehensive and high quality information about the likely significant environmental effects of a project. If anything, it enhances the importance of such information. Nowhere is this more so than where issues arise relating to climate change.*

16. The question of what constitutes an 'effect' of a project in EIA terms is a matter of law and causation, not a matter of planning judgement as the Court of Appeal had considered it to be (§§65, 131–139). The Supreme Court pointed to several potential legal thresholds for establishing the necessary degree of causation between a project and its effects and did not make any final determination as to which test was the most appropriate (§§67–71). However, it concluded that by any definition of causation – even the strictest "*necessary and sufficient condition*" test – combustion emissions are effects of an oil extraction project where, as in this case, they are inevitable (§§79–80).

17. Ease of assessment is also a relevant factor to whether an impact must be assessed as an effect of a project because it goes to the question of whether an effect is 'likely' within the meaning of the 2017 Regulations. Only effects which "evidence shows are likely to occur and which are capable of meaningful assessment must be assessed" (§167). This must, however, be understood in light of the precautionary principle, which "*underlies the EIA Directive*" and "*implies that cases of material doubt should generally be resolved in favour of EIA*": Supreme Court in *R (Champion) v North Norfolk* [2015] 1 WLR 3710 at §51.

18. In *Finch* all parties were agreed that the downstream emissions were capable of assessment through an agreed methodology. Assessing them was "not a difficult task" (§81); again, the factors that drove that agreement will apply to all developments for the commercial production of fossil fuel. However, in other circumstances with more uncertainty around whether or not an effect will

occur there must be sufficient information upon which a reasoned conclusion should be based, which goes beyond mere conjecture or speculation (§77).

19. Ultimately the Supreme Court concluded that the ES in the *Finch* case was flawed because it assessed only direct emissions from the operation of the site and not downstream combustion emissions and the decision to grant planning permission for the project was therefore unlawful (§174).

20. It was irrelevant that combustion might occur anywhere in the world. As the Court held at §97:

> *"Climate change is a global problem precisely because there is no correlation between where GHGs are released and where climate change is felt. Wherever GHG emissions occur, they contribute to global warming. This is also why the relevance of GHG emissions caused by a project does not depend on where the combustion takes place. If an activity is carried on which will inevitably result in significant GHG emissions, people who carry on the activity cannot be heard to say: "These emissions are not effects of our activity because they are occurring far away among people of whom we know nothing."*

21. It was irrelevant that there were to be intermediate stages of refinement of the oil (§§118, 134) or that its end use was outside the control of the developer (§§102–103). Indeed, applying something akin to a 'polluter pays principle', the Court concluded that the combustion emissions were, in any event, within the control of the developer, even if they were to occur elsewhere, because "if no oil is extracted, no combustion emissions will occur" (§103). Intervening stages were insufficient to break the chain of causation between extraction and combustion emissions.

22. It was also irrelevant to the validity of the EIA that other pollution control regimes might exist or that national planning policy (currently para 194 of the National Planning Policy Framework, "**NPPF**") sets out a planning presumption that such regimes should be assumed to operate effectively (§§106–111). Lord Leggatt held at §108 that:

> *"It was a clear legal error to regard this aspect of planning policy as a justification for limiting the scope of an EIA. An assumption made for planning purposes that non planning regimes will operate effectively to avoid or mitigate significant environmental effects does not remove the obligation to identify and assess in the EIA the effects which the planning authority is assuming will be avoided or mitigated."*

23. It should be noted that, although the question of whether a downstream impact is an effect of a project is now understood to be a matter of law, the question of whether it is likely to be *significant* is still a matter of planning judgement for the decision maker (*Finch* at §58, confirmed in *Whitehaven* at §68).

24. The decision in *Whitehaven* also confirmed that the findings of the Supreme Court would not be confined by the courts to oil extraction projects but also apply to other fossil fuel developments where combustion emissions would inevitably arise; in this case a development for the extraction of coking coal to be used in steelmaking.

IMPLICATIONS OF *FINCH*

25. The immediate implications of *Finch* are straightforward and may be uncontroversially stated. In assessing the likely significant effects of a fossil fuel extraction project, the effects of burning the fossil fuels must be taken into account. This section addresses the implications at each stage of the EIA process.

Implications for screening decisions

26. The screening stage of an EIA determines whether or not a proposed development is an "EIA development" such that it requires an EIA to be carried out. Under the 2017 Regulations, an "EIA Development" means development which is either Schedule 1 development or Schedule 2 development "likely to have a significant effect on the environment" by virtue of certain factors, including climate change.

27. In *Finch* and *Whitehaven,* the question of whether or not the development was an EIA development was not relevant, as the scale of the projects plainly brought them within Schedule 1 of the 2017 Regulations.

28. For Schedule 2 developments, regulation 5(4) of the 2017 Regulations provides:

> *"Where a relevant planning authority or the Secretary of State has to decide under these Regulations whether Schedule 2 development is EIA development, the relevant planning authority must take into account in making that decision:*
> *(a) any information provided by the applicant;*
> *(b) the results of any relevant EU environmental assessment which are reasonably available to the relevant planning authority or Secretary of State; and*
> *(c) such of the selection set out in Schedule 3 as are relevant to the development."*

29. Schedule 3 sets out selection criteria for screening Schedule 2 development. These criteria include the impact of the development on "factors specified in regulation 4(2)", including the impact of the development on "(c) land, soil, water, air and <u>climate</u>…" (emphasis added).

30. It is difficult to see how Schedule 2 proposals for hydrocarbon extraction (i.e. "Extractive industries and surface industrial installations for the extraction of coal, petroleum, natural gas and ores, as well as bituminous shale, which cover an area of development that exceed 0.5 hectares") could not be found to entail likely effects on the climate in light of the judgment in *Finch*.

31. Whether such an effect is deemed to be significant remains a matter of planning judgement for the decision maker. The High Court in *Whitehaven* made it clear that the legal question of causation between fossil fuel extraction and its combustion emissions – which governs whether the combustion emissions are by law indirect effects of the project – must not be elided with the separate question of the potential significance of those effects (§106). Significance goes to the <u>extent</u> of the effects. Just because it may also have a quantitative aspect does not mean that cause and effect should be elided.

32. In most circumstances, however, we consider that it would be irrational for a decision maker to screen out Schedule 2 development giving rise to likely indirect effects on climate, without having first made a proper assessment of whether such effects would be significant. This assessment would usually be included within the ES, and it follows that the judgment in *Finch* gives rise to a presumption that Schedule 2 proposals for hydrocarbon extraction ought to be screened in and be subject to EIA as a matter of course. The screening decision takes place at a point when less-than-full information is available and a careful precautionary approach needs to be adopted.

Implications for scoping and the contents of an environmental statement

33. The scoping stage of an EIA determines the extent of the issues to be considered in the environmental statement. As the Court held at §32 in *Finch*:

> *"The 2017 Regulations (in regulation 15, which implements article 5(2) of the EIA Directive) allow the developer, before making an application for planning permission for EIA development, to ask the relevant planning authority for a "scoping opinion" on the information to be provided in the environmental statement. There is nothing which prevents the planning authority from deciding to grant planning permission if the environmental statement does not conform to the scoping opinion. But there is an expectation that, where there is a scoping opinion, the environmental statement will be based on it. This is explicit in regulation 18(4), giving effect to article 5(1), which states that, where a scoping opinion has been issued, the environmental statement "must … be based" on that opinion."*

34. The Supreme Court acknowledged that determining the scope of an EIA involves an evaluative judgment on the part of the decision-maker and noted that there may be cases where there is insufficient evidence to reach a reasoned conclusion that a possible environmental effect is likely (§78–79). However, on the facts of *Finch*, and as would be the case for any project involving the extraction of hydrocarbons for commercial purposes, the Court found there was no uncertainty because the extraction of the fuel would inevitably initiate a causal chain that would lead to combustion and the release of GHG emissions. For that reason, the impacts of the burning of the fossil fuels must be scoped in

for any such project and any planning authority of whom a scoping opinion is requested for such a project ought to make this clear.

35. The Supreme Court also noted the ease with which GHG emissions can be calculated in accordance with guidance issued by the Institute of Environmental Management and Assessment (§193). Given the availability of such methodology, downstream emissions should now be quantified in the ES for every fossil fuel extraction project.

Implications for exploratory applications

36. The developments at issue in *Finch* and *Whitehaven* were both applications for hydrocarbon extraction and production. The Court's finding on causation – namely that the fuel produced at these sites would inevitably be burned and release emissions – was central to its conclusion that the combustion emissions were a likely indirect effect of the proposed development. The question of causation in applications for exploratory drilling raises two separate questions. **First**, where exploration involves a stage commonly referred to as extended well testing, the reasoning in *Finch* applies and there would likely be a sufficiently robust factual and legal chain of causation between the development and the combustion emissions from the anticipated level of fossil fuel that will be extracted during the extended well test.

37. **Second**, the factual and legal chain of causation is less clear cut between an application for exploratory drilling and the eventual combustion of any commercially viable fossil fuels extracted at a later production stage, given that there would inevitably be a level of uncertainty as to whether or not any viable hydrocarbons would be discovered and extracted. The courts will likely be required to consider this question in due course.

38. However, three points suggest that the reasoning of the Court in *Finch* applies to exploratory applications as well as applications for extraction and

production, such that the combustion emissions from eventual production should be assessed.

39. **<u>First</u>**, the Court's focus on the need for "full knowledge" (§§3, 62, 152) and its rejection of arguments regarding intervening processes breaking the chain of causation (§§118, 134) strongly suggests that <u>all</u> likely significant effects should be addressed, no matter how many potential intervening stages. Provided there is sufficient information on the potential extent of an extractable hydrocarbon reserve at the application stage to enable an assessment to be made, these aspects of the Court's judgment suggest that the downstream emissions from the potential reserves should be quantified.

40. **<u>Second</u>**, in *R (Frack Free Balcombe Residents Association v Secretary of State for Levelling Up, Housing & Communities & ors* [2023] EWHC 2548 (Admin), a statutory review of an exploratory planning application, the High Court found that, in determining whether there were benefits from the application, it was inevitable and necessary to consider matters relating to what would happen if viable hydrocarbons were found in the exploration phase (§19). The same point was made by Lindblom LJ in *R (Preston New Road Action Group) v Secretary of State for Communities and Local Government* [2018] Env LR 18 ("***Preston New Road***") at §81.

41. In *Finch*, the Supreme Court found that, where the benefits of hydrocarbon production are to be taken into account, then the corresponding adverse impact must also be considered (§150):

> *"But it does not follow that the planning authority has to ignore adverse effects on climate of a proposed project or adopt an interpretation of what constitute such adverse effects which is contrary to reality. Just as beneficial indirect effects of a project on climate – for example, the "green" energy that would be generated by a project to develop a wind farm or solar farm – are clearly a relevant matter for the planning authority to consider, so corresponding adverse effects are also a material planning consideration."*

42. It follows that, if it is lawful to consider the beneficial effects of viable hydrocarbons at the exploratory stage, the adverse effects on climate of the viable hydrocarbons should also be taken into account at the same stage. Such a calculation might take the form of numerical range, depending upon the volume of hydrocarbons ultimately found to be recoverable, but it should not be omitted altogether.

43. **Third**, the Supreme Court held that it was a "*clear legal error*" to regard an assumption made for planning purposes, via planning policy, as justification for limiting the scope of an EIA (§108). The correct approach is to produce an environmental statement setting out the likely significant effects and the measures which can be taken to mitigate them, so that both the public and the decision-maker can understand any assumptions made about the extent of any impact. One of the main reasons that applications for exploration have been treated as completely separate from any subsequent applications for commercial production flowing from the exploratory work is that current para 221 of the NPPF strongly differentiates between "*three phases of development (exploration, appraisal and production)*".

44. In the *Preston New Road* decision, taken in the context of fracking exploration, the Court of Appeal upheld the reasoning of the High Court decision that the indirect impacts of the succeeding production stage did not need to be assessed because the proposal before the Secretary of State was "*strictly limited in time and solely for the purpose of exploration of the potential gas resource*"; "*had to be addressed on its own terms*"; that future production would be the subject of a new planning application with a new environmental statement (§60); and that the relevant planning guidance differentiated between proposals for exploration and for production, with the former being '*considered on their own merits 'without speculation or hypothetical assumptions in relation to future activities which will require their own consenting and EIA processes'*'. For those reasons the Court of Appeal accepted that there was no obligation to consider or assess emissions from future production (§63).

45. Neither the High Court nor the Court of Appeal applied the approach which *Finch* has now clarified to be correct: they did not ask whether the factual and legal causation between the exploration and potential future production (which would only follow as a result of exploration) was such that the climate impacts of future production were indirect effects of exploration. Nor did they consider and interpret the EIA regime separately from the assumptions made by the planning regime about the distinction between the types of project. Arguably, this authority will need to be reconsidered in light of *Finch*.

46. It is difficult, in the abstract, to know whether a court would find that factual and legal causation were made out between an application for exploration and the eventual combustion of an estimated viable hydrocarbon resource. Much would depend on the extent of information about the estimated viable resource and on which test of legal causation were applied: on the weakest "*but for*" test (§68) and, arguably, on the intermediate "*ordinary event*" test (§70), such causation might be made out; on the strictest "*necessary and sufficient condition*" test (§69), arguably it would not.

CONCLUSION

47. A summary of our advice may be found at §6 above. Taken together, the clear implication of the Supreme Court's judgment in *Finch* and the judgment of the High Court in *Whitehaven* is that the safest approach for planning decision makers in relation to future applications for onshore hydrocarbon development of any type will be to screen them into the EIA process where applicable and to require information from the developer on the anticipated combustion emissions arising from the project. This will allow decision makers to determine applications on the basis of the best possible information regarding the adverse effects of such projects on the climate, as well as insulating them from future legal challenges.

Estelle Dehon KC

Dr Lois Lane

Leigh Day

23 September 2024