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Planning & Water Appeals Commission
4th Floor
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9 October 2024

By e-mail: [REDACTED]

Dear Commissioner,

Public Inquiry: Curraghinalt Project (Dalradian)

On 20 March 2024, employees of Friends of the Earth attended the Pre-Inquiry meeting on the above public inquiry at Strule Arts Centre in Omagh.

As attendees on the day, we observed the arrangements in place to facilitate public engagement in this pre-inquiry meeting. As an environmental justice charity supporting the inclusion of grassroots local communities in all aspects of environmental decision making, we are concerned that the ability of the public to participate fully in the inquiry proper could be severely impacted should these unsatisfactory arrangements continue.

While the Arts Centre venue was adequate in terms of its local location as a venue for the pre-inquiry hearing, we are concerned that its capacity presents restrictions in participation which would disproportionately affect members of the general public who have indicated their intention to provide submissions to the inquiry.

The Commission will appreciate that decisions around planning in Northern Ireland fall within the scope of article 6 of the European Convention on Human Rights – a right to a fair hearing. It will also appreciate that procedural fairness forms an integral part of securing that right. It is therefore important that arrangements that facilitate public participation are fair and that they are seen to be fair.

A further key aspect of ensuring that procedural fairness is upheld is that all parties entitled to make representations at a hearing are able to put forward their case under such conditions that they are not placed at a disadvantage. At the pre-inquiry hearing, we noted that not all parties wishing to make representations were able to access the tables at the front of the venue and had to split their representatives with some sitting alongside the general public in the auditorium which made attempting to communicate with those on the stage at best impractical and at worst, impossible. We observed that the majority of the Applicant's team and the Departments were convened on the stage adequately and it was in the most part, only members of the public that were affected by this restriction on space.

In terms of general public observation and participation at the pre-inquiry meeting, we further observed security personnel in the auditorium section of the venue refusing to let members of the public refer to their electronic devices during the meeting. Despite assurances that the proceedings were being streamed live on the Commission's YouTube channel, the prohibition of using electronic devices meant that members of the public were unable to rely on them to take notes or to note questions that they wished to raise.

We witnessed one such occurrence where a member of the public was unable to use their mobile telephone to take notes relating to a question they wished to ask and had to leave the venue to acquire pen and paper to make notes. When they returned sometime later, the topic of discussion had moved on significantly. We also noted that this prohibition on the public using electronic devices was disproportionately applied with some members of the public sitting in the auditorium using laptops and others unable to use phones for the same activity. Meanwhile the representatives of some interested parties on the stage part of the venue had an array of electronic devices open and in use during the entire meeting.

A further concerning feature of the operation of the inquiry is the Commission's view that children are not permitted in the venue during proceedings, nor is breastfeeding permitted within the venue. This will impact the ability of those with childcare responsibilities, which are disproportionately women, from partaking in proceedings. Not only does this raise potentially significant issues with the provisions on access to justice of the Aarhus Convention, but it also raises concerns regarding the various legislative provisions relating to equality and sex discrimination in Northern Ireland and the protected characteristics of age, sex, pregnancy and maternity.

An additional concerning issue which materialised from the pre-inquiry meeting is that the live screening of the meeting was promptly removed from the Commission's YouTube channel and is no longer available to watch retrospectively.

From the Commission document on 'Procedures for the Curraghinalt Project (Dalradian Gold) conjoined Public Local Inquiries' we note the following relevant excerpt,

'The Commission intend to broadcast the inquiries on its YouTube Channel. A link will be posted on the Commission's website the week prior to the opening of the inquiries. The press may attend but there will be no live coverage on radio or television. Recording of the session will not be undertaken by PACWAC and it is not permitted for any other party to record or broadcast the event. Thus no-one is permitted to make any video or audio or other recording or image whatsoever of any part of the proceedings. This absolute prohibition includes a 'screenshot' or 'screengrab' or other related images of the proceedings.'

Should this practice continue into this inquiry set to resume in January 2025 it could deny those who cannot attend the proceedings due to work or childcare commitments the opportunity to reflect on what is discussed and consider making representations themselves at the relevant opportunity in this inquiry which is due to take place over many weeks. Coupled with the prohibition on members of the public using electronic devices, the inaccessibility of a visual record of the meeting could give rise to inaccuracies and hearsay which may complicate evidence and impede progress in this complex inquiry.

Given the hugely controversial nature of the proposal being discussed at this inquiry and the many thousands of objections to it, we feel that it is essential that not only are the proceedings live streamed, but that a recording remains available as a point of reference for those not able to engage with the process in real time.

In its correspondence dated 11 September 2024, the Commission has outlined details for the resumption of the inquiry proper after it was suspended following uncertainty. A timetable was set out for the exchange of submissions with the inquiry set to begin in January 2025. Friends of the Earth take this opportunity to raise significant concerns about the fairness of the timetabling and its effect on public participation.

This inquiry deals with one of the most controversial development proposals ever seen in Northern Ireland. The documents which form the planning application number in the many thousands. Despite a loose word limit on statements of case and rebuttals it is anticipated that the information that must be exchanged, understood and responded to by many interested parties will be hugely complex. The five-week time period between submitting a statement of case to rebuttals is not sufficient and places an unfair advantage on those who have the resources to invest in planning experts and legal experts capable of considering such complex planning information quickly. Most members of the public are not equipped with such specialist planning knowledge and the timetable set out is prejudicial to them participating fully at this inquiry and providing informed submissions. Friends of the Earth are concerned about the impact this timeframe has in terms of the requirement to ensure equality of arms and a fair hearing.

As a global environmental charity with experience in participating in controversial public inquiries, Friends of the Earth are intending to submit a Statement of Case in addition to making oral representations at this Inquiry. However, Friends of the Earth are also dedicated to encouraging public participation in environmental decisions that will affect them. We take this opportunity to remind the Commission of its obligations under both the European Convention on Human Rights and the Aarhus Convention to ensure that the public have access to environmental information and are afforded every opportunity to participate fully in a process that will have lasting implications for both current and future generations.

Yours sincerely,




Solicitor
Friends of the Earth



CONJOINED PUBLIC LOCAL INQUIRIES

References: 2021/C005:LA10/2017/1249/F; 2021/C006: LA10/2019/1386/F;
2021/C007:LA11/2019/1000/F; 2021/WHR01; 2021/WHR02; 2021/WHR03;
2021/WHR04; 2021/DR001

Applicants: Dalradian Gold Ltd and NIE Networks

Executive Summary

Friends of the Earth England Wales and Northern Ireland (FoE) has prepared this Statement of Case in response to the Planning Appeals Commission's correspondence dated 9th February 2024. FoE, a leading environmental campaigning organisation, aims to address key issues in the planning applications submitted by Dalradian Gold Ltd, focusing on carbon neutrality, failure to provide necessary information, and carbon offsetting.

Key Points:

1. Carbon Neutrality Claims:

- The Applicant claims the Curraghinalt Gold Mine will be carbon neutral through on-site efficiency measures, renewable electricity, and carbon offsets.
- FoE argues that the Applicant has not provided sufficient details or updated information to substantiate these claims, especially in light of recent legislation and case law.

2. Failure to Provide Necessary Information:

- The Applicant's Environmental Statement lacks up-to-date and comprehensive greenhouse gas emissions data.
- FoE places emphasis on the need for accurate greenhouse gas assessments as part of the Environmental Statement, as required by the Planning (Environmental Impact Assessment) Regulations 2017.

3. Carbon Offsetting:

- FoE criticises the reliance on carbon offsetting, highlighting its temporary nature and potential to perpetuate unsustainable practices.
- The Applicant's offsetting projects in India and Zambia are questioned for their effectiveness and feasibility, given the lack of detailed emissions data.

Conclusion: FoE expresses concern over the absence of crucial climate change-related information in the Applicant's documentation, making it difficult to assess the validity of their claims. FoE reserves the right to comment further in its rebuttal submissions.



CONJOINED PUBLIC LOCAL INQUIRIES

References: 2021/C005:LA10/2017/1249/F; 2021/C006: LA10/2019/1386/F;
2021/C007:LA11/2019/1000/F; 2021/WHR01; 2021/WHR02; 2021/WHR03;
2021/WHR04; 2021/DR001

Applicants: Dalradian Gold Ltd and NIE Networks

STATEMENT OF CASE

FRIENDS OF THE EARTH ENGLAND WALES AND NORTHERN IRELAND LIMITED

INTRODUCTION

1. This Statement of Case is prepared on behalf of Friends of the Earth England Wales and Northern Ireland pursuant to the Planning Appeals Commission's correspondence dated 9th February 2024.
2. It is also served further to our correspondence dated 9 October 2024 following the Pre-Inquiry meeting of 20 March 2024¹, cognisant of the issues in terms of the Inquiry and without prejudice to them.

¹ Friends of the Earth to Planning Appeals Commission 9.10.24

EXPERIENCE AND EXPERTISE OF FRIENDS OF THE EARTH

3. Friends of the Earth England Wales and Northern Ireland Limited (abbreviated to “FoE” in the course of this submission for ease of reference) is a not-for-profit company limited by guarantee that undertakes campaigning and strategic legal interventions in furtherance of its core organisational objectives to ensure that each generation enjoys an environment that’s getting better, a safer climate, abundant nature, healthy air, water and food nurturing people to come together to transform our environment into one which is flourishing, sustainable and socially just.
4. Since its founding in 1971, FoE has become a leading environmental campaigning organisation. Its central office is based in London with regionally based offices throughout England, Wales and Northern Ireland. It works alongside community groups across the nations making it the largest grassroots environmental campaigning organisation in the UK.
5. FoE has as its primary aim (as set out in its Memorandum of Association²):

“to promote and otherwise further by all means: -

3.1 Understanding and appreciation of the need for the conservation and restoration of nature both in the UK and the rest of the world.

3.2 The enhancement and rational use of all aspects of the environment.

3.3 Socially just sustainable development.”

6. As well as its unique network of community groups and affiliates, it counts well over three hundred thousand supporters comprising of regular financial donors and/or those who actively support its work, such as supporting campaigning actions or events. It is also part of a wider international Friends

² [Memorandum and Articles of Association: Friends of the Earth Limited](#)

of the Earth network. This international network is the world's largest grassroots environmental and social justice campaigning organisation, with 74 member/national groups across six continents³.

7. FoE's work in Northern Ireland works in harmony with the various other regions in the UK to carry on these wider organisational aims in the context of the distinctive social, environmental and political situation in Northern Ireland.
8. Key issues that inform FoE's work in Northern Ireland in this regard involves campaigning on the unnecessary proliferation of extractive industries, the poor standard of environmental regulation in Northern Ireland, climate justice, a just transition to net zero greenhouse gas emissions targets and diverting the various threats associated with climate change.
9. Based on its organisational expertise in the course of this Statement of Case, FoE wishes to address three key areas of the planning application(s) prepared by the Applicant:
 - **CARBON NEUTRALITY**
 - **FAILURE TO PROVIDE NECESSARY INFORMATION**
 - **CARBON OFFSETTING**

THE CONTEXT

10. The context to FoE's submissions on this point is contextualised by measures taken within Northern Ireland to tackle climate change. An agreed metric in this submission is the path to net zero targets by 2050 which followed the signing of the Paris Agreement in 2016 and ensuing legislation. As a result, Northern Ireland has alongside the rest of the United Kingdom committed to net zero targets by 2050. This involves the urgent reduction of greenhouse gas

³ [Friends of the Earth Website: Who we are](#)

emissions and promotion of renewable technology aligned with a just transition. This intention was underscored in a legislative context within the Climate Change Act (Northern Ireland) 2022 (“the 2022 Act”) which the Northern Ireland Assembly passed on 6 June 2022.

11. The 2022 Act background and objectives as set out in the explanatory notes provides a useful synopsis of the current position and the history:

“Background and Policy Objectives

4. Climate change is a defining crisis of our time on a global and national scale. In June 2019, the UK amended the Climate Change Act 2008 to set a ‘net zero target’ which commits the UK to reduce net greenhouse gas emissions by “at least” 100 per cent below 1990 levels by 2050. While the Climate Change Act 2008 extends to Northern Ireland, specific greenhouse gas emission reduction targets for Northern Ireland are not included in it, or any other legislation.

5. In order to address this legislative gap, the Northern Ireland Executive, through the New Decade, New Approach agreement, made a commitment that it will ‘introduce legislation and targets for reducing carbon emissions in line with the Paris Climate Change Accord.’ Under the Climate Change section at Appendix 2 of that agreement it further states that ‘The Executive should bring forward a Climate Change Act to give environmental targets a strong legal underpinning.’

6. Northern Ireland is not immune to the severity of the impacts of a changing climate, and it is important that it plays its part in the global and UK effort to tackle climate change. The Act aims to achieve this by creating a framework that will establish a pathway to achieving emission reduction targets which will ensure that Northern Ireland makes a contribution to the achievement of the UK 2050 Net Zero target. In doing so this will help to ensure that Northern Ireland develops a greener, low carbon circular economy in which the environment can prosper and be protected.”

12. Section 52 of the 2022 Act places a duty on all Northern Ireland departments, including the Department for Infrastructure to exercise their functions, so far

as is possible to do so, in a manner consistent with the achievement of the net zero Northern Ireland emissions targets. Section 1 requires net Northern Ireland emissions to be reduced by 100% from 1990 levels by 2050; section 3 requires the net Northern Ireland emissions account for 2040 to be in line with the target for 2050; and section 4 requires net Northern Ireland GHG emissions to be reduced by at least 2030. The 2022 Act provides for sectoral plans showing how each sector will contribute to the achievement of the emissions targets. It also requires DAERA to set carbon budgets by regulations.

CARBON NEUTRALITY CLAIMS

13. It is against this backdrop of the threat that climate change poses and the need to drastically reduce greenhouse gas emissions that the Applicant asserts its position.
14. As per section 3 of the 2019 Addendum to the Environmental Statement, the Applicant commits to delivering the proposed Curraghinalt Gold Mine as a “carbon neutral” project. It insists that carbon neutrality will ensure that climate change impacts from the project are “fully mitigated”.
15. It states that carbon neutrality will be achieved and maintained across all project stages (construction, operation and closure) through the lifetime of the project for both direct and indirect (Scope 1,2 and 3) emissions, by a combination of on-site efficiency measures, the procurement of 100% renewable electricity, and the use of high-quality carbon offsets to address unavoidable emissions.
16. It further states that it will enter into a contract with a suitable third-party organisation to ensure the delivery of carbon neutral status is legally enforceable and independently verified throughout the Project life cycle and

which can be secured by a Planning Agreement under section 76 of the Planning (NI) Act 2015.

17. It is FoE's position that should the Applicant intend to rely on such a Planning Agreement, this should be submitted to the Inquiry in order that the enforceability and likely effect of the proposed mechanism can be fully scrutinised as part of the proceedings.
18. Very little further information is included about the specifics of such claims and so based on additional information taken from the Applicant's public website⁴, it suggests that it will use "*conveyor belts instead of trucks, and biodiesel and electric vehicles where possible*". A credited carbon offsetting scheme in the form of a support for a 200MW solar power project in Rajasthan, India is identified as bringing the emissions of the development to net zero. This solar power project eliminates greenhouse gas emissions by displacing power from thermal/fossil fuel-based power plants connected to the Indian electricity grid with clean solar power.
19. In terms of assessing the accuracy and credentials of any information provided in relation to claims of carbon neutrality, the latest submitted information on the proposed plan for carbon neutrality is dated 2019. Since this time there has been key legislation passed in the form of the Climate Change (NI) Act 2022 and key case law precedents set down in relation to calculating greenhouse gas emissions – the ruling on what constitutes scope 3 greenhouse gas emissions as defined in the recent June 2024 *Finch* Supreme Court judgment (*R (Finch) v Surrey County Council [2024] PTSR 988*) being a particularly crucial yet its consideration is absent from any information provided by the Applicant in relation to greenhouse gas emissions. The Applicant has yet to clarify how the proposed development sits alongside these important considerations.

⁴ Dalradian Gold Limited: [Website article, "Dalradian Reduces Carbon Footprint by 75%"](#)

THE FINCH CASE

20. In its crucial judgment in the Finch case (*R(Finch) v Surrey County Council [2024] PTSR 988*), The Supreme Court recognised that indirect effects resulting from the development may occur outside the direct scope of the development even if they take place off site and as a result of other operations (in that case, the end use emissions from the burning of refined oil as fuel) provided the emissions can clearly be shown to be caused by the instant development and that they are not merely conjectural or speculative.

21. The fact that such emissions may also be assessed in the course of another process consent is not itself a reason for not assessing them at this stage. As Lord Leggatt held at paragraph 77 of the Finch judgment that such indirect effects can be required to be assessed,

“only if it is information on which a reasoned conclusion could properly be based. Conjecture and speculation have no place in the EIA process.”

22. FoE brought a legal intervention in support of the Applicant in the case⁵. Its submissions stated that the failure to consider end-use emissions was unlawful, as it breached the requirement to consider the indirect effects of the project, as per the EIA Regulations. The Court agreed with this approach.

23. The Finch judgment makes it clear that it is feasible to calculate the scale of end-use emissions and at paragraph 81 of the judgment references guidance on this published by the Institute of Environmental Management and Assessment⁶.

⁵ Supreme Court- Finch Case- FoE Written Submissions

⁶ [The Institute of Environmental Management and Assessment: New Guide on Measuring Scope Three Emissions.](#)

24. The Applicant has failed to provide any evidence of its intended operations to include a full bandwidth of all its emissions based on the ruling in Finch and as such, the required accurate Environmental Impact Assessment cannot be produced in relation to the proposed development.

FAILURE TO PROVIDE NECESSARY INFORMATION

25. In addition to the specifics concerning scope 1,2 and 3 emissions in light of the Finch judgment, as a general point, the developer's limited information is very much out of date. That which is supplied fails to quantify the projected greenhouse gas emissions in the standard rate of MtCO_{2e} to allow an accurate assessment as to the feasibility that "conveyor belts" and "electric vehicles and biomethane" will reduce its emissions sufficiently. It does not appear that any such greenhouse gas assessment would be prepared until the project begins construction.

26. It is FoE's position that accurate greenhouse gas assessments should form part of the Environmental Statement. Schedule 4 of the Planning (Environmental Impact Assessment) Regulations 2017 states that a description of climate with specific reference to greenhouse gas emissions are matters for inclusion in an Environmental Statement. Greenhouse gas emissions of the project have not been addressed in the latest version of the Environmental Statement provided by the Applicant and in the absence of further environmental information is defective.

27. As Northern Ireland ramps up its efforts to firstly account for its sectoral greenhouse gas emissions, and to secondly reduce those as a point of urgency, it is important that all future developments and particularly those with an intended lifespan such as this development are adequately and transparently assessed against the best available standards.

28. The developer has failed to provide crucial verifying information as to its claims of carbon neutrality nor has it provided any commentary or factual data in relation to its consideration of the Finch case and Northern Ireland's dedication to accounting for and reducing its total emissions via the Climate Change (Northern Ireland) Act 2022.

CARBON OFFSETTING

29. The use of carbon offsetting as a viable mechanism by which this development intends to secure carbon neutrality is gravely problematic.

30. In its 2021 Report, *"Dangerous Distractions – Why Offsetting Will Worsen The Climate and Nature Emergencies"*⁷ FoE sets out its concerns using real-world illustrative examples, that carbon offsetting is at best, a way to perpetuate our unsustainable reliance on producing extreme greenhouse gas emissions, or at worse a mechanism that actively catalyses the climate crisis.

31. The report looks at the use of nature, for example tree planting as a mechanism to offset greenhouse gas emissions. It is noted that the Applicant has pursued a tree planting scheme and seeks to pursue more in the future. There is no doubt that genuine nature conservation measures like more of the right trees in the right place, restoration of damaged peatlands, establishment of sea grass meadows, restoration of mangroves are important for mitigating climate change.

32. However the use of such schemes to carbon offset is problematic because research has shown that due to the worsening climate crisis, the carbon offsetting from these schemes is temporary and likely to cover decades worth of emissions when in reality the emissions generated from greenhouse gas

⁷ [2021 M.Childs and P.DeSylva: Dangerous Distractions – Why Offsetting Will Worsen The Climate and Nature Emergencies](#)

intensive processes are likely to exist in our atmosphere for much longer than that. In addition, the nature restoration projects themselves are subject to the nature and biodiversity crisis that is encompassed by the climate crisis. As such solutions are unreliable.

33. In terms of the Applicant's stated goal to offset its carbon emissions, it states the following on its website⁸;

"To offset emissions, Dalradian supported an internationally certified 300MW solar power project in Rajasthan, India. The project eliminates greenhouse gas emissions by displacing power from thermal/fossil fuel-based power plants connected to the Indian electricity grid with clean solar power."

Similarly, on another part of its website⁹, the Applicant states the following,

"to render its carbon emissions 'net zero', Dalradian has chosen to support an internationally certified safe water project in Zambia".

34. Despite the obvious concerns about the detail in relation to how these two projects interrelate and how either singularly or combined they have adequately offset carbon emissions which have not yet been quantified by the Applicant, FoE has further concerns that relate specifically to the feasibility of carbon offsetting to renewable energy development in other countries. These concerns are highlighted in a recent June 2024 report by Carbon Market Watch entitled, "Hidden in Plain Sight: Flawed Renewable Energy Projects in the Voluntary Carbon Market".¹⁰

35. However, before even addressing the validity of such schemes it is impossible from the information currently available to assess what emissions are to be

⁸ Dalradian Gold Limited Website article: ["Dalradian Reduces Carbon Footprint by 75%"](#)

⁹ Dalradian Gold Limited Website article: ["How Dalradian Will Minimize Its Environmental Impact"](#)

¹⁰ [2024 Carbon Watch, "Hidden in Plain Sight ; Flawed Renewable Energy Projects in the Voluntary Carbon Market"](#).

offset from the operation and in what quantities they present. Without this crucial information from the Applicant a further assessment of the effectiveness and enforceability of carbon offsetting is impossible.

CONCLUSION

36. The absence of crucial climate change related environmental information in the documentation already supplied by the Applicant is a matter of concern for FoE. The absence of such key information makes it virtually impossible to make accurate representations on the veracity of the Applicant's climate change claims. With the potential that these may be addressed in its Statement of Case, FoE reserves the right to comment further in its rebuttal submissions.

18 October 2024

ON APPEAL FROM THE COURT OF APPEAL
CIVIL DIVISION (ENGLAND AND WALES)
[2022] EWCA Civ 187

BETWEEN:

**R (on the application of
SARAH FINCH on behalf of the WEALD ACTION GROUP)**

Appellant

and

**(1) SURREY COUNTY COUNCIL
(2) HORSE HILL DEVELOPMENTS LTD.
(3) SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND
COMMUNITIES**

Respondents

and

**(1) FRIENDS OF THE EARTH LIMITED
(2) GREENPEACE UK
(3) THE OFFICE FOR ENVIRONMENTAL PROTECTION
(4) WEST CUMBRIA MINING LIMITED**

Interveners

FIRST INTERVENER'S WRITTEN SUBMISSIONS
Submissions in writing only for hearing 21 June 2023

References: SFI §X are to paragraphs in the Statement of Facts and Issues

AWS §Z are to the Appellant's Written Submissions

INTRODUCTION

1. The First Intervener (“FoE”) is a leading not-for-profit organisation concerned with the protection of the environment. It is the largest grassroots environmental campaigning community in the country, and one of the oldest and largest worldwide. Its network includes approaching 400 local and affiliated groups across England, Wales and Northern Ireland, with over 300,000 members and supporters.
2. FoE has extensive experience working alongside local communities resisting environmentally damaging developments, including major infrastructure developments and fossil fuel developments. For example, it has been a Rule 6 main party at several public inquiries into proposals for fossil fuel extraction, including an application for an opencast coal mine at Druridge Bay (planning permission for which was ultimately refused by the Secretary of State for Housing, Communities and Local Government in September 2020) and more recently, the application for a new deep coal mine at Whitehaven, West Cumbria, where the consideration of downstream emissions and the extent of their impact, were key issues. FoE has filed a claim for statutory review in relation to the grant of planning permission for the Whitehaven coal mine, on climate grounds. Alongside local residents, FoE also campaigned against an application to continue mining at the Ffos Y Fran open cast coal mine (the application for which was rejected by Merthyr Tydfil County Borough Council in April 2023).
3. FoE was the legal intervener in the present case in the High Court and the Court of Appeal, and was granted permission to intervene in these proceedings at the Supreme Court by the Order of Reed LJ, Kitchin LJ and Sales LJ dated 11 April 2023. FoE supports the Appellant’s appeal, permission for which was granted on the following grounds:

1. **Error of law in excluding downstream GHG emissions from “indirect, secondary, cumulative, transboundary effects” because the GHG impacts were “dependent on a series of intermediate processes”.** There is no basis in the statutory wording for excluding these effects because of intermediate processes. The thrust of an “indirect” effect is that it will be mediated by intervening processes; that is what differentiates it from a “direct” effect. Moylan LJ’s dissent at §136 sets out the correct legal approach to this issue.

2. **Error of law in holding that EIA is “project-centric” and excluding downstream GHG emissions from being indirect effects because the use of products generated by refinement of the oil “was not part of [the] project”.** There is no requirement for every part of the causal chain of an effect to be part of “the project” in order to be an indirect effect of the project, and EIA is as much “effect-centric” as it is “project-centric”. Moylan LJ’s dissent at §128 set out the correct legal interpretation on this issue.

3. **Error of law in finding compliance with the EIA Regulations entirely a matter of “planning judgment”, even if assessment of an indirect effect is wholly absent.** As a matter of law, the EIA Regulations require the assessment of both direct and indirect effects on climate, including transboundary effects. The environmental information before the First Respondent omitted any assessment of the indirect effects from downstream GHG emissions. The Court of Appeal:

- a) Erred in finding that the question of whether the ES was unlawful for failing to assess indirect effects was a matter of planning judgment, rather than a matter of law based on the meaning of regulations 4 and 18 and Schedule 4 of the EIA Regulations; and

b) Alternatively, the majority erred in failing to interpret the EIA Regulations so as to conclude that: the inevitable effects of the extraction of oil by the Second Respondent for commercial purposes were clearly indirect effects for which assessment should have been undertaken; that very good reasons were required for not undertaking that assessment; and, absent such reasons, the contrary conclusion was irrational.

4. Error of law in accepting that downstream GHG emissions were a material consideration for the planning decision but were not indirect environmental effects. What amounts to a “material consideration” is a matter of law. A consideration can only be material in so far as it relates to the use or character of the land and fairly and reasonably relates to the development. In the present case, it was common ground (and the Court of Appeal agreed) that downstream emissions were a material consideration, in the same way that downstream benefits derived from the use of the gas were material. Downstream GHG emissions cannot logically be a material consideration which is fairly and reasonably related to the Development but at the same time be so remote as not to be an indirect environmental effect.

4. FoE notes that the AWS incorporate the international jurisprudence previously referred to by FoE in the Court of Appeal. FoE does not, therefore, repeat those submissions here, but agrees with the Appellant that these cases demonstrate the feasibility of assessing scope 3 emissions. The fact that they are all decisions taken in relation to a system of EIA means that they are highly persuasive on the point of whether or not scope 3 emissions from fossil fuel developments are indirect effects for the purpose of EIA in this country. In relation to the US authorities such as *WildEarthGuardians v Zinke* 368 F. Supp. 3d 41, 73 (D.D.C. 2019), FoE notes that the European Directive (and hence the UK’s EIA regime) are

modelled on the American EIA system, where the use of EIA as a mandatory regulatory procedure originated in the National Environmental Policy Act of 1969.

5. Beyond this (and without duplicating the Appellant’s submissions, other than to the extent necessary to provide context) FoE makes the following points.

SUBMISSIONS

Ground 1: Erroneous “intermediate processes” restriction

A. Approach to Interpreting the Regulations

6. In FoE’s submission, the consideration of whether any impact, said to be the consequence of a proposed development, should be the subject of EIA should start on the following basis:

- i. It is well-established that the EIA Directive (which the EIA Regulations were intended to transpose into domestic law) “has a very wide scope and a very broad purpose”, and that “the notion of indirect effects is to be construed broadly”: see *Abraham v. Wallonia* (Case C-2/07) [2008] Env LR 66 at §32 and 42 and *Ecologistas en Accion – CODA v Ayuntamiento de Madrid* (Case C -142/07) [2009] PTSR 458, at §28 . For these reasons (and as Lindblom SPT recognised at §15(1)) “a broad and purposive approach to the interpretation of [the Directive] is appropriate”.
- ii. The objective of the EIA Directive is to ensure a high level of protection for the environment (Recital 41 to Directive 2014/52/EU, which amends Directive 2011/92/EU).

- iii. The Directive must be interpreted in accordance with the precautionary principle. In *R (oao Champion v North Norfolk District Council [2015] UKSC 52*, the Supreme Court referred (at §4) to recital 2 of the Directive 2011/92/EU, observing that “Union policy on the environment is based on the precautionary principle”, and (at §51) held that application of this principle “implies that cases of material doubt should generally be resolved in favour of EIA”.
- iv. The purpose of EIA is not to dictate the outcome of a planning application, but to ensure that the decision on that application is properly informed by a *full* (as opposed to partial) understanding of the environmental consequences of the grant of permission (subject only to those consequences being “significant”).¹ The process is designed not only to inform decision-making but also to inform measures which may be necessary to mitigate or avoid certain effects. There is considerable value to this process: that the improved provision of information enhances the quality of decisions being taken has long been recognised. It is recorded, for example, in Recital 10 to the Aarhus Convention.²
- v. Under recital §2 of the EIA Directive, the effects on the environment should be taken into account “at the earliest possible stage in all technical planning and decision-making processes”.

¹ See e.g. national planning guidance 002 Reference ID:4-002-20140306

² The EIA Directive implements the requirements of Article 6 of the Aarhus Convention, which is concerned with public participation in decisions on specific activities or projects.

- vi. Both the EIA Regulations and the Directive which those Regulations were intended to transpose expressly require EIA to identify, describe and assess “the direct and indirect significant effects of the proposed development” on a range of factors, which include “climate”: reg 4(2). Schedule 4 to the Regulations amplifies this, requiring an ES to “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.” The reference to such a comprehensive range of effects requiring assessment is important: the additional wording has been included for a reason, not so as to duplicate or be synonymous with other wording. Put simply: direct and indirect effects must mean different things.

- vii. In so far as there is an express requirement to address “indirect” and “secondary” effects, it is self-evident that the effects which are to be assessed may be separated from the development for which permission is sought, including (e.g.) by geographic location and/or some other, intermediate step. For the reasons given in (i) above, these words should be interpreted in a broad, purposive manner. The intent of the language is clearly to encompass a broad range of effects, even where the connection to the development is indirect or the effect is not a ‘primary’ effect. To exclude effects which all parties agree inevitably arise from the development (see, e.g. Court of Appeal Judgment § 42) runs directly contrary to such a purposive reading.

- viii. With regard to the status of downstream CO₂ equivalent emissions, in particular it should be noted that Schedule 4 of the EIA Regulations was amended (in response

to the 2014 Directive) so as to expressly require Environmental Statements (“ESs”) to include a description of “the impact of the project on climate change (for example the nature and magnitude of greenhouse gas emissions)”. As Moylan LJ observed (at §107-8, underlining added, italics in original):

“Paragraph 5(f), which sets out wording added by the 2014 Directive, shows that the ‘impact of the project on climate’ is a specific category of its own which goes beyond the effects from ‘the construction and existence of the development’ and which expressly includes its impact on climate because of ‘the nature and magnitude of greenhouse gas emissions’. The concluding words at the end of paragraph 5 were previously in a footnote and perhaps gain some additional emphasis by being included in the body of this provision: they are very broad and, clearly, intentionally very broad.”

108. It can be seen, therefore, that the amendments implemented in 2014, for the reasons explained in the recitals, introduced a specific and increased focus on climate change and greenhouse gas emissions and emphasised the breadth of the required ‘description of the likely significant’ direct and indirect effects of a development.”

B. The Reliance on “Intervening stages”

7. At various points in his judgment, Lindblom SPT states that the “essential” or “crucial” question for the “relevant planning authority” is whether there is, in fact, a “sufficient causal connection” between the project under consideration and a particular impact on the environment for that impact to constitute an “indirect significant effect” of the development

impact: see §§60, 64 and 70. However, despite this emphasis on the need for a causal connection, at §39 the Senior President rejects the use of tests such as “reasonable foreseeability”, “likely to arise as a result of”, “attributable to” or “an inevitable result of” as a means of deciding whether that connection exists and/or is “sufficient”.

8. In FoE’s submission, this approach is manifestly inconsistent, and plainly wrong. Irrespective of the point at which the threshold is set, tests such as “reasonable foreseeability”, “likelihood” and “inevitability” all inherently require a causal connection.
9. In this regard, FoE notes that the use of the concept of “reasonable foreseeability” to define “indirect effects” is well-established in other jurisdictions. Hence (for example) US regulations on EIA specifically define “indirect effects” as those “caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable”³ (emphasis added).
10. Moreover, setting the threshold in this way is important, because it gives greater legal certainty and clarity to any determination of whether the causal connection is “sufficient”. As further developed under Ground 3 below, it is highly unsatisfactory that the test of “what is a sufficient connection?” (as distinct from the question of whether the threshold of sufficiency is passed) is simply a matter of discretion.

³ CFR Title 40, Chapter V, Sub-chapter A, Part 1508.1, as referred to in *Sierra Club v. Federal Energy Regulatory Commission* 867 F.3d 1357 (2017) where the US Court of Appeals (DC Circuit) held that the Federal Energy Regulatory Commission had erred in law in failing to assess the downstream GHG emissions of gas that was to be delivered by a pipeline to power plants in Florida. That was the purpose of the project and it was reasonably foreseeable that such impacts would result. Note also, in this regard, *Mid States Coal. for Progress v. Surface Transport Board*, 345 F.3d 520 (8th Cir. 2003) where the Court held that the Board was required to consider the air quality effects from burning coal delivered by trains despite their destinations being unknown, because the “nature of the effect” was “far from speculative”.

11. In the present case, Lindblom SPT concluded that the First Respondent was justified in concluding downstream emissions were not causally connected because (see §§65 and 66), (emphasis added):

“the crude oil extracted at the application site could only find its way to the various uses that might be responsible for the impacts in question once it had passed through several other distinct processes and activities, including, initially, its refinement, followed by the onward transportation and distribution of the refined products, and their eventual sale for use as fuel, which would only then, in various places at various times, produce emissions of greenhouse gases. The refinement of the extracted oil to render it useable as fuel was not part of the project. Neither was the future combustion of the refined products, or any infrastructure in which that might occur...

66. In this case the environmental effects of such emissions could reasonably be seen as far removed from the proposed development itself, and not causally linked to it, because of the series of intervening stages between the extraction of the crude oil and the ultimate generation of those emissions – remote enough, therefore, for the council lawfully to conclude that it did not qualify as one of the ‘likely significant effects of the proposed development’ on the environment.”

12. In FoE’s submission, this reliance on intervening processes is not justified, and is incompatible with the purpose of the Regulations. Reg. 4(2) simply refers to “indirect significant effects”. Reg. 18(3) and para. 5 of Schedule 4 refer to “likely significant

effects”. The language of para. 5 of Schedule 4 (any “indirect, secondary, cumulative, transboundary, short-term, medium-term and long-term, permanent and temporary, positive and negative effects”) is broad. As noted above, it is inherent in the words “indirect” and “secondary” that there will be some kind of separation between the development for which permission is sought and the effect which is to be assessed. There is no basis in the wording of either the Directive or the Regulations for interpreting indirect/secondary/transboundary effects as excluding effects by reference simply to the existence of intermediate processes. Indeed, such an approach would render those words redundant.

13. The Senior President’s approach on this is inconsistent: on the one hand, he rejects the Appellant’s and the First Intervener’s proposed legal tests on the basis that “Neither the words of the legislation nor the relevant authorities support any of these alternative concepts” (§39) but on the other, he finds that it was lawful for the First Respondent to conclude that downstream emissions of the project were not indirect effects, because there were intervening steps, even though these words are also absent from the legislation and the caselaw.

14. In contrast, the European Commission’s guidance supports a broad interpretation of indirect effects, and is consistent with the inclusion of downstream emissions from fossil fuel projects in EIA. For example:

- i. indirect effects are defined in the European Commission’s *Guidelines for the Assessment of Indirect and Cumulative Impacts as well as Impact Interactions*⁴

⁴ at p.iii; extract is enclosed with these written submissions. The full document is available here: <https://ec.europa.eu/environment/archives/eia/eia-studies-and-reports/pdf/guidel.pdf> It was referred to in the Office for Environmental Protection’s application for permission to intervene at §21

[1999] as “Impacts on the environment, which are not a direct result of the project, often produced away from or as a result of a complex pathway. Sometimes referred to as second or third level impacts, or secondary impacts.” (emphasis added).

- ii. the European Commission’s guidance on EIA in relation to unconventional hydrocarbon projects⁵, published in 2012, states that “environmental information should assess the likely significant (direct and indirect) effects from all related associated works and sub-activities intrinsically linked to the implementation and purpose of the unconventional hydrocarbon project (e.g. new infrastructure necessary to serve the project in question, storage facilities, etc.)”. This Guidance is relevant, given the purpose of the production of fossil fuels is the ultimate *combustion* of the extracted product.
- iii. European Commission *Guidance on Integrating Climate Change and Biodiversity into Environmental Impact Assessment* published in 2013 defines “indirect effects/impacts” as “Effects/impacts that occur away from the immediate location or timing of the proposed action e.g. quarrying of aggregates elsewhere in the country as a result of a new road proposal, or as a consequence of the operation of the project” (emphasis added)⁶. By contrast, it defines “direct effects” as “Environmental effects directly caused by the preparation, construction or operation of a project in a particular location”⁷. It also acknowledges the need for action on

⁵ *Application of the EIA Directive to projects related to the exploration and exploitation of unconventional hydrocarbon* (2012) at p2; extract is enclosed with these written submissions The full document is available here: <https://circabc.europa.eu/ui/group/3b48eff1-b955-423f-9086-0d85ad1c5879/library/7ea3c7f2-32f2-443c-96c0-cd24be8ae0ef/details>

The production process for this oil development is unconventional, in that it involves acidisation.

⁶ At p7; extract is enclosed with these written submissions. The full document is available here: <https://circabc.europa.eu/ui/group/3b48eff1-b955-423f-9086-0d85ad1c5879/library/d5fb5675-e7c1-4a5f-b4aa-06ab02ac0b5e/details>

⁷ Ibid p6; extract enclosed.

climate change and biodiversity loss: “it is vital to fully integrate these issues in the plans, programmes and projects implemented across the EU.”⁸

15. These arguments become even more compelling when it is recognised that the harm from fossil fuel extraction (contribution to climate change arising from the downstream greenhouse gas emissions) is unaffected by the processes the extracted oil must go through before it is combusted. Those processes merely facilitate that harm, which, as was accepted by all the parties in this case, is an inevitable consequence of the project. It is common ground that the development will increase the global supply of GHG by adding up to 3.3 million tonnes of combustible fossil fuels to the global supply. That will have a significant impact on the climate. It follows that the GHG emissions should (and could) have been assessed in the ES.

16. In this respect, the Senior President’s reasoning is (again) internally inconsistent. At §42 he records (and appears to accept) the common ground at the hearing before Holgate J that the eventual combustion of the refined oil was “inevitable”. However, at §65 he rejects the conclusion that downstream emissions are an indirect effect, inter alia because “decisions yet to be made ‘downstream’ would determine how much of the oil would end up being combusted, and whether the economic demand for it would rise or fall.” This reasoning is impossible to reconcile with either the inevitability of the impact or the subsequent recognition (at §71, referencing the decision in *Vereniging Milieudefensie v. Royal Dutch Shell plc* and the UNEP 2019 Production Gap Report) that “a reliable estimate” of the CO₂ emissions is “not impossible”, notwithstanding the steps between extraction and combustion; and that there is a causal relationship between fossil fuel production and consumption of fossil fuels: “studies using elasticities from the economics literature have

⁸ Ibid; p3; extract enclosed.

shown that for oil, each barrel left undeveloped in one region will lead to 0.2 to 0.6 barrels not consumed globally over the longer term”.

17. At various points in his judgment, Lindblom SPT⁹ also places great importance on location (see e.g. §60, §63 and §65, and the references to the “application site” and the “relevant site”). This is misconceived. Since the purpose of the development is to extract fossil fuels for combustion, the impact of extraction on GHG emissions is essentially binary: whereas it is obvious that if fossil fuels are left in the ground, they will not be burnt and will not release GHG, it is common ground that once the oil has been extracted, it will be burnt, even if that combustion does not take place at the extraction site.

18. Just as importantly, the significance of the environmental effect of combustion does not depend on where combustion takes place. Unlike the impacts which may be caused by other kinds of downstream emissions (for example, those which are relevant to air quality) the effects of GHG emissions are not localised: it does not matter where the oil is refined; and it does not matter if the fuel is burned in a factory in Malaysia or an SUV in Chelsea. The matter combusted in all cases would be the same: hydrocarbons from the site. The environmental effect is, in substance, the same: a worsening of global warming.

19. It follows that the mere existence of intervening processes should not govern and does not assist when determining the question of the actual environmental impact of the development. Moylan LJ (at §138) was therefore correct in stating that:

⁹ But not Lewison LJ: see §147

“ I do not consider that the effects of the extraction of the oil for commercial purposes stop at or with its extraction or with its processing at a refinery somewhere in the world. A broad, purposive approach to the interpretation of the provisions applicable in this case points strongly towards their application not being so limited.”

20. As the Appellant submits (at AWS §101-102) and as was accepted by the Court of Appeal, there are established methodologies to quantify downstream emissions. There is therefore no issue as to the workability of including scope 3 emissions in EIA. Beyond the field of EIA, it is clear that the direction of travel is likewise towards consideration of quantified scope 3 emissions. For example, in *Vereniging Milieudefensie and others v Royal Dutch Shell PLC C/09/571932*, English version: HA ZA 19-379, it was noted that Royal Dutch Shell reports on its greenhouse emissions using the World Resources Institute GHG Protocol, which categorises the relevant emissions as scope 1, 2 and 3 (see §2.5.4 of the judgment).

Ground 2: Defining “the project”

21. FoE’s submissions under ground 1 above apply equally to the Senior President’s acceptance (at§38) that EIA is “project centric”. Whilst recognising that there must be some connection between the project and the effect, the fact that effects can be “indirect” or “secondary” is itself a clear indication that they do not have to be brought about as part of the operation of the project itself.

22. Alternatively, if and so far as the EIA process is “project-centric”, it is essential to recognise that the “project” is not necessarily the same as (and will often be wider than) the limited development for which permission is being sought. Hence:

- i. in *Burridge v Breckland District Council* [2013] EWCA Civ 228, the Court concluded that two interlinked planning permissions (one for a biomass renewable energy plant, the other for a combined heat and power plant about 1.1km away, but connected by an underground gas pipe to carry the fuel between the two sites) should have been treated as a single “project” for the purposes of EIA.
- ii. in *R (Squire) v Shropshire Council* [2019] Env LR 36 the development for which planning permission was sought did not include the production and offsite storage, transport, or spreading of chicken manure, but these were obvious significant environmental consequences of the development, and so had to be assessed.

23. In the present case (and as Lindblom SPT recorded at §32) the “project” includes “the commercial activity of extracting crude oil from the site for export to refineries”. This commercial activity cannot be construed in isolation. Inherent to the ‘project’ is that oil is extracted precisely so it can be refined and then used. As Moylan LJ observed at §127 and §137:

“127. The key elements of the present development, the ‘Extraction’ of ‘petroleum’ exceeding 500 tonnes per day for ‘commercial purposes’, have to be considered together with the obligation, set out in paragraph 5 of Schedule 4, to describe the development's impact on climate including, expressly, ‘the nature and magnitude of greenhouse gas emissions’. When these elements are viewed collectively, in my view,

applying the requisite broad and purposive approach, they point strongly towards the impact of the development, or an effect of the development, being the greenhouse gas emissions resulting from the ‘inevitable’ commercial use of the oil.

“137... First, even if the essential character is correctly described as “the extraction and production of crude oil”, I do not consider that this means that the subsequent use of the oil, once refined, cannot be an effect of the development, Further as referred to above, I would describe the essential character of the development as being (a) the extraction of oil and (b) its extraction for commercial purposes.”

24. Moylan LJ’s conclusion is consistent with the CJEU’s judgment in *Abraham*, where it was said (emphasis added):

“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.”

25. It follows that the EIA process is directed at the environmental impact liable to result from the consumption (use) or exploitation of the end product. Those are the clear words of the CJEU’s judgment. As Moylan LJ concluded at §128,

“The key nature of the development, its essential character, is the extraction of oil for commercial purposes. That is the project. In my view, the relevant or applicable “outcome” (as referred to by the Senior President in paragraphs 46 and 47) of the extraction of oil for commercial purposes is the use of that oil.” (emphasis added)

26. To limit EIA solely to the environmental effects of what the developer says it is trying to do, or what requires planning permission, rather than the development's actual and inevitable environmental effects, is an artificially narrow approach that will result in reduced environmental protection. That is of particular concern in the context of the worsening climate crisis. The impacts of climate change are already manifesting in the UK and elsewhere in the world, such as the record-breaking heatwaves of 40 °C and the wildfires this country experienced in July 2022. The actual combustion of the fossil fuel from this development will take place in myriad locations many of which fall entirely outside the scope of the planning system, and even the Climate Change Act 2008, given that there is no guarantee that the oil will be used in this country. There is therefore the potential for a complete lacuna in the environmental protection regime (with no assessment either at local level or at national level), if the downstream emissions are not assessed at the point of the production of the oil itself.

Ground 3: Error in finding that consideration of emissions is purely a matter of planning judgment

27. FoE notes and adopts (but does not repeat) the submissions of the Appellant and the Office for Environmental Protection (“OEP”) in its application to intervene on the question of whether (as Lindblom SPT concluded at §15(7), §57 and §63) something is a “direct” or “indirect” effect is purely a matter of fact and evaluative judgment for the planning decision-maker.

28. Given the importance of the EIA process in the context of the need to address climate change, and in the absence of any significant difference between two applications for fossil fuel extraction, it is highly unsatisfactory that two different local planning authorities should be able to reach different (but “lawful”) decisions on whether downstream emissions are an indirect effect. As the OEP has observed,¹⁰ the Court of Appeal’s approach is likely to result in repeated litigation (or, at the very least, argument with individual planning authorities) on the same point.

29. In FoE’s submissions, this issue is merely exacerbated by the differences of opinion (and consequent lack of clarity) in the judgments in the Court of Appeal as to the basis on which decision-makers should approach the exercise of that judgment. In particular:

- i. As noted in para 7 above, whilst espousing the requirement of a causal connection, Lindblom SPT has rejected the standard yardsticks (a “but for” test, tests of reasonable foreseeability, likelihood and inevitability) by which the sufficiency of that connection could be established.
- ii. In contrast, the Senior President appears to have favoured an approach under which any difference between the location of the development and the location of the effect was key: see §60, §63 and §65. However, Lewison LJ expressly indicated that location was not determinative (although it may be relevant): see §147, whilst Moylan LJ concluded that a location-centric approach was contrary to *Abraham v. Wallonia* and to the wide purpose of the EIA Directive not to assess something just because it takes place at another location: see §136.

¹⁰ application to intervene paras 14-17

30. FoE respectfully echoes the OEP's request for the Court to elaborate on the general principles which local planning authorities should apply, in order to bring clarity and consistency to decision-making in this area.

Ground 4: If, as the Court of Appeal has held, Downstream GHG emissions are sufficiently connected to the development to be a material consideration, they must logically be an "effect" for the purposes of EIA

31. In FoE's submission, there is a fundamental disconnect between the Court of Appeal's conclusions (a) that the Council lawfully took the downstream climate change impacts of the oil development into account as a material consideration within the officer's report when granting planning permission, but (b) that the Council also lawfully excluded those impacts from the scope of indirect effects of the development to be assessed in the environmental statement.

32. The Court of Appeal was clearly of the view that both downstream emissions and the supposed downstream benefits of extraction (such as the use to which the hydrocarbons would be put) were material: see §91-92. In FoE's submission, that was obviously correct:

- i. Unlike many other forms of development, mineral extraction (including fossil fuel extraction) is not an end in itself: there is no inherent benefit in simply having a stockpile of extracted minerals. Rather, the benefit lies in the use to which the minerals will be put.

- ii. This is reflected in (e.g.) paras 209 of the National Planning Policy Framework (“the NPPF”):

“209. It is essential that there is a sufficient supply of minerals to provide the infrastructure, buildings, energy and goods that the country needs...

211. When determining planning applications, great weight should be given to the benefits of mineral extraction, including to the economy” (emphasis added)

- iii. Indeed, because it is often impossible to extract minerals without some adverse environmental effects, it is generally only because of these “downstream” benefits that extraction is permitted.

- iv. There is nothing unusual or surprising about this. EIA frequently has regard to downstream or “knock on” consequences. For example, the assessment of the economic benefits of a proposed new tourist attraction will routinely take into account not only the employment which would be generated at the attraction itself, but also the likely increase in employment resulting from additional spend (whether by employees or patrons of the attraction) at other existing shops and services in the area.

- v. However, if the downstream benefits are a material consideration in determining an application for mineral extraction, it would be perverse to ignore inevitable downstream harms which are associated with achieving those benefits: see **R**

(Ashchurch Rural Parish Council) v. Tewkesbury Borough Council [2023]

EWCA Civ 101 at §43, §64.

33. In the circumstances, the Court of Appeal was right to conclude that both the downstream benefits of extraction, and the CO₂ equivalent emissions which would inevitably be produced when the oil was combusted, were material considerations in the decision whether or not to grant permission for the extraction of the oil. Indeed, no party before the Court of Appeal argued otherwise.

34. This conclusion is, however, completely at odds with the parallel conclusion of Lindblom SPT and Lewison LJ that the Council's decision that downstream emissions were not an "indirect effect" of the extraction for the purposes of EIA, was lawful. As a matter of principle, something can only be a material planning consideration if it is related to the use of the land and is fairly and reasonably related to the development. Given this, downstream greenhouse gas emissions cannot logically be both so remote that they *are not* effects of the development at all for the purpose of EIA, and yet also fairly and reasonably related to the development, such that they *are* material planning considerations.

35. Since the whole purpose of EIA is to provide information on the likely significant consequences of the development consent, if there is sufficient connection for downstream effects to be a material consideration, it would be entirely contrary to the precautionary principle and to the "broad and purposive approach" to interpretation to exclude them from the scope of EIA on the grounds that they are not even an indirect effect. This is still more striking here, given that (whilst EIA is concerned with environmental effects which are

likely and significant), the downstream emissions from this oil development are *inevitable* and significant.

36. Conversely, if an inevitable and significant environmental consequence is not captured by the EIA regime (which is expressly designed to capture all relevant likely significant environmental effects) because it is not even an “indirect effect” of the development, it is difficult to see how it could nonetheless constitute a material consideration. Although that was not the Court of Appeal’s conclusion (nor did any party before the Court suggest otherwise) the inherent contradiction between the Court’s conclusion on materiality and its finding that downstream emissions were not an indirect effect creates a real risk that downstream emissions will be deemed immaterial to the planning balance for decisions on whether to grant permission for fossil fuel extraction projects, such as at Horse Hill.

37. FoE has first-hand experience of applicants for planning permission using the decision in *Finch* in this way: in its closing submissions to the inquiry into proposals for a new coal mine at Whitehaven, West Cumbria Mining Ltd (the Fourth Intervener in this appeal) expressly contended that it would be unlawful for the Secretary of State even to have regard to the consequences of the grant of permission such as the downstream emissions and the effect on the government’s aspirations for the United Kingdom to be a world leader in the fight against climate change, on the basis that, if these matters were not “effects” of the development, they could not be material considerations.

38. In FoE’s submission, that is plainly wrong in law. It would be at odds with the Secretary of State’s own position in these proceedings, and with the approach taken by him in cases such as Whitehaven and similar proposals for fossil fuel extraction. It would severely limit

the ability of both local authorities and central government to take action to address climate change. It would also call into question the extent to which decision-makers were entitled to take into account the downstream benefits of mineral extraction.

39. In FoE's submission, decision makers should not be entitled to conclude that harmful downstream greenhouse gas emissions are not effects of the development, whilst taking into account the positive economic benefits of the fossil fuel (here oil) which was to be extracted and the contribution it would purportedly make to meeting the United Kingdom's energy needs (see the Court of Appeal judgment at §79). The NPPF is clear that the purpose of the planning system is to contribute to the achievement of sustainable development, which includes "mitigating and adapting to climate change" (§8 of the 2019 NPPF (the version in force at the time of the Council's decision)). The NPPF further states that the planning system should "support the transition to a low carbon future in a changing climate" (§148 of the 2019 NPPF). All relevant factors – both harmful and beneficial – must feature within this overall aim to transition to a low carbon future.

40. In summary, if a consequence is sufficiently connected to the development to be "material" for the purposes of deciding whether permission should be granted then it is contrary to the purpose of the EIA regime to exclude it from the scope of EIA on the basis that it is not an "effect" of the development. Critically, this does not mean that it is necessary for EIA to address all material considerations: the requirement for EIA is that a consideration is "likely" to have a "significant" effect.

COSTS

41. FoE's intervention is made on the basis that the organisation would neither be eligible to claim its costs against, nor be liable for, the costs of any other party to the litigation by RSC 46(3).

CONCLUSION

42. For the reasons advanced by the Appellant and those set out above, the appeal ought to be allowed.



Landmark Chambers


Cornerstone Barristers

9 May 2023

ANNEX



General

Water

Land

Air

Industry

Waste

Nature

Urban

Funding

Law

Economics

Assessment

Nuclear issues

Risks

Education

Guidelines for the Assessment of Indirect and Cumulative Impacts as well as Impact Interactions

May 1999



EXECUTIVE SUMMARY

Introduction

These Guidelines consider the Assessment of Indirect and Cumulative Impacts as well as Impact Interactions within the Environmental Impact Assessment (EIA) process. It presents the results of research and consultations conducted by Hyder, commissioned by the European Commission: Directorate-General XI (Environment, Nuclear Safety and Civil Protection).

These Guidelines are intended for use by the Environmental Impact Assessment (EIA) practitioner and developer. The aim is to provide guidance on practical methods and approaches to assess indirect and cumulative impacts of a project as well as impact interactions. The Guidelines are not intended to be formal or prescriptive but are designed to assist EIA practitioners in developing an approach which is appropriate to a project, and to consider these impacts as an integral part of the EIA process.

Although these guidelines are primarily addressing the EIA at the project level, the reader interested in the assessment of indirect and cumulative impacts as well as impact interactions at the more strategic level of plans, programmes or policies will find these guidelines useful and to a large extent applicable.

The Guidelines have been designed to apply to a wide range of projects and to assist in the EIA process throughout the Member States. They give advice on how to approach these kinds of impacts during the various stages of EIA, how to adapt the approach to a specific project and suggests methods and tools for identifying and assessing indirect and cumulative impacts, as well as impact interactions.

Including an assessment of the indirect and cumulative impacts, and interactions in an EIA is required by legislation, contributes towards sustainable development, is good practice and aids the decision making process.

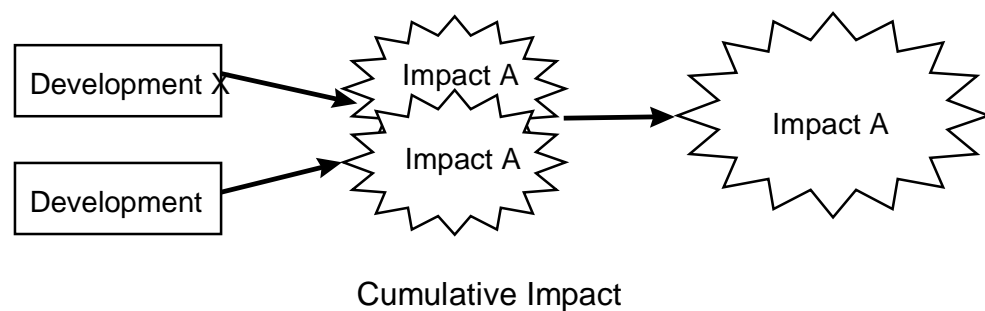
Indirect and Cumulative Impacts and Impact Interactions: A Definition

A key problem identified in the study was how to define indirect and cumulative impacts and impact interactions. The definitions of these three types of impact overlap, although there are no agreed and accepted definitions. For the purposes of these guidelines, definitions have been developed:

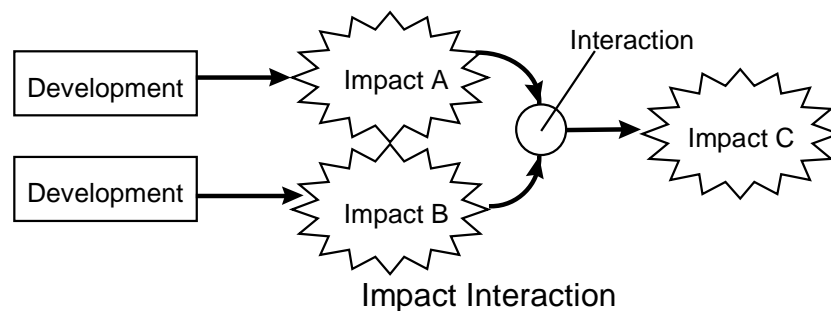
Indirect Impacts: Impacts on the environment, which are not a direct result of the project, often produced away from or as a result of a complex pathway. Sometimes referred to as second or third level impacts, or secondary impacts.



Cumulative Impacts: Impacts that result from incremental changes caused by other past, present or reasonably foreseeable actions together with the project.



Impact Interactions: The reactions between impacts whether between the impacts of just one project or between the impacts of other projects in the areas.



Adopting an Integrated Approach

The assessment of indirect and cumulative impacts, and impact interactions should not be thought of as a separate stage in the EIA process. Indeed the assessment of such impacts should be an integral part of all stages of the process. Establishing an appropriate project team is also of key importance.

The purpose of these Guidelines is not to recommend a single method for assessing indirect and cumulative impacts and impact interactions, but to suggest various approaches which the practitioner can adapt and combine to suit the particular project.

ANNEX

Subject: Guidance note on the application of Directive 85/337/EEC to projects related to the exploration and exploitation of unconventional hydrocarbon

The exploration and exploitation of unconventional hydrocarbon have to comply with the requirements of the EU legislation. A comprehensive legislative framework on environmental protection and non-discriminatory access to hydrocarbon resources is already in place and applies to all hydrocarbons, conventional and unconventional, from planning to aftercare of sites following exploitation. Within this framework Member States have to ensure appropriate licensing and permitting regimes. The letter sent on 12/12/2011 by the Commission services refers to the EU environmental legislation applicable to unconventional hydrocarbon projects using advanced technologies such as hydraulic fracturing and horizontal drilling. The present note provides further guidance on the applicability of Council Directive 85/337/EEC to the above projects.

Council Directive 85/337/EEC¹, as amended, on the assessment of the effects of certain public and private projects on the environment (known as the Environmental Impact Assessment or the EIA Directive) is an essential part of the permitting process. In fact, the EIA Directive plays a central role, as it ensures that the environmental implications of projects are taken into account in the permitting process, before the final decisions are made, and it involves the public in the decision-making process making it more transparent.

The services of the European Commission are of the opinion that both the exploration and exploitation of unconventional hydrocarbons fall within the scope of the EIA Directive. This conclusion has been presented and discussed during the meeting of the Commission Group of EIA/SEA national experts, held in Budapest on 14-15 April 2011. During this meeting held, the EIA/SEA national experts agreed with the views presented by the Commission². This position has also been confirmed by the Commission in the letter of 12/12/2011.

The present note aims at summarizing the main requirements of Directive 85/337/EEC, known as the Environmental Impact Assessment (EIA) Directive, which are relevant for projects related to the exploration and exploitation of unconventional hydrocarbon, in particular shale gas projects using advanced technologies such as hydraulic fracturing and horizontal drilling.

1. Guiding principle of the EIA Directive

- The fundamental objective of the EIA Directive is to ensure that projects likely to have significant effects on the environment by virtue, *inter alia*, of their nature, size or location, are made subject to an assessment of their environmental effects prior to development consent.
- This has been stressed by the Court in several occasions³. Hence, when applying the EIA Directive (e.g. decide whether an EIA is required or assess the effects of projects), the above objective should be taken into consideration.

¹ OJ L 175, 5.7.1985, p.40; OJ L 73, 14.3.1997, p.5; OJ L 156, 25.6.2003, p.17; OJ L 140, 5.6.2009, p.114.

² The minutes of the meeting are available on <http://ec.europa.eu/environment/eia/meetings.htm>.

³ E.g. C-287/98, *Linster*, §52; C-486/04 *Commission/Italy*, §36; C-215/06, *Commission/Ireland*, §49.

2. Unconventional hydrocarbon projects listed in Annex I of the EIA Directive

- An EIA is mandatory for projects falling within **Annex I.14** of the Directive, i.e. extraction of natural gas where the amount of gas extracted exceeds 500.000 m³ per day.
- A **scoping** procedure is recommended prior to the preparation of the environmental information to be submitted by the developer. "Scoping" is the stage of the EIA process that determines the content and extent of the matters to be covered in the environmental information to be submitted to a competent authority. Even though the scoping procedure is optional under the EIA Directive, it can be helpful for adequately assessing the environmental effects of unconventional hydrocarbon projects, for which there is not sufficient knowledge. A scoping procedure would not only improve the quality of the environmental information to be submitted, but it would also save time for the developer, as the content and extent of the environmental information required will be known in advance.
- This environmental information should assess the likely significant (direct and indirect) effects from all related **associated works and sub-activities** intrinsically linked to the implementation and purpose of the unconventional hydrocarbon project (e.g. new infrastructure necessary to serve the project in question, storage facilities, etc.)⁴.
- For infrastructure projects, the question of **alternatives** is often raised and this is likely to be the case for unconventional hydrocarbon projects. In this regard, the preparation of energy plans and the application of Directive 2001/42/EC (known as the Strategic Environmental Assessment – SEA Directive) can be helpful. The SEA aims to encourage a more integrated and efficient approach to territorial planning where environmental considerations are taken into account much earlier on in the planning process and at a much more strategic level. This usually translates itself into fewer conflicts further down the line at the level of individual projects and it allows for a more appropriate siting of future developments.
- For public acceptability and transparency purposes, the public participation stage of the EIA process is crucial. It is therefore recommended that the Member States should take particular care to ensure that public consultations are widely open using appropriate means of communication, e.g. internet, open discussions, workshops, hearings. Furthermore, it is important that the Member States ensure that the comments made by the public are adequately taken into account in the development consent process.

3. Unconventional hydrocarbon projects listed in Annex II of the EIA Directive

- Projects listed in Annex II of the EIA Directive are made subject to a **screening** procedure, in accordance with Articles 2(1), 4(2)-(4) and Annex III of the EIA Directive. This procedure determines whether projects are likely to have significant effects, requiring thus an EIA.

⁴ Case C-215/06, §§102-110.



Guidance on Integrating Climate Change and Biodiversity into Environmental Impact Assessment

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Glossary

Term	Definition
Adaptation (climate change)	The term used to describe responses to the effects of climate change. The Intergovernmental Panel on Climate Change (IPCC) defines adaptation as ‘adjustment in natural or human systems in response to actual or expected climatic stimuli or their effects, which moderates harm or exploits beneficial opportunities.’ Adaptation can also be thought of as learning how to live with the consequences of climate change.
Adaptive capacity	The ability of a system to adjust to climate change (including climate variability and extremes), to moderate potential damages, to take advantage of opportunities and to cope with the consequences. (CLIMATE-ADAPT Glossary)
Adaptive management	A systematic process for continually improving management policies and practices by learning from the outcomes of previously implemented policies and practices.
Article 6(3) on appropriate assessment	Article 6(3) of the Habitats Directive requires an appropriate assessment (also referred to as ‘Habitats Directive assessment’ or ‘Natura 2000 assessment’) to be carried out where any plans or projects that are not directly linked to the management of that site may have a significant effect on the conservation objectives and would ultimately affect the integrity of the site. Integrity can be defined as the ability of the site to fulfil its function to continue to support protected habitats or species. Annex I to the Habitats Directive includes a full list of protected habitats and Annex II of protected species.
Baseline	A description of the present and future state if the project is not implemented, taking into account changes resulting from natural events and other human activities.
Biodiversity	‘The variability among living organisms from all sources including, <i>inter alia</i> , terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems’ (Article 2 of the Convention on Biological Diversity).
Biodiversity offsets	Measurable project outcomes designed to compensate for significant residual adverse impacts of development plans or projects on biodiversity, after appropriate prevention and mitigation measures are taken.
Birds Directive	Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds [codified version], OJ L 20, 26.1.2010, p.7.
Carbon sequestration	The removal of carbon from the atmosphere and its storage in carbon sinks (such as oceans, forests or soil). Carbon sequestration is achieved through physical or biological processes, such as photosynthesis.
Carbon sink	An absorber of carbon (usually in the form of CO ₂). Natural carbon sinks include forests and other ecosystems that absorb carbon, thereby removing it from the atmosphere and offsetting CO ₂ emissions. (Modified from EEA Glossary)
Climate	Usually defined as the ‘average weather’, or more rigorously, as the statistical description in terms of the mean and variability of relevant quantities of variables such as temperature, precipitation, and wind, over a period of time. The conventional period of time over which weather is averaged to calculate climate is 30 years, as defined by the World Meteorological Organisation (WMO). (Modified from IPCC Glossary)
Climate change	IPCC defines climate change as ‘... any change in climate over time, whether due to natural variability or as a result of human activity.’ The United Nations Framework Convention on Climate Change (UNFCCC) defines it specifically in relation to human influence, as ‘a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods’.
CO₂ equivalent	A metric measure used to compare emissions of various greenhouse gases (GHGs) based upon their global warming potential (GWP). Carbon dioxide equivalents are commonly expressed as ‘million metric tonnes of carbon dioxide equivalents (MMTCDE)’.
Cumulative effects	The incremental effects of an action when added to the effects of past, present, and reasonably foreseeable future actions. Cumulative effects result from individually minor but collectively significant actions taking place over a period of time.
Direct effects	Environmental effects directly caused by the preparation, construction or operation of a project in a particular location.
Disaster risk management plan	A document that sets out goals and specific objectives for reducing disaster risks and includes a list of actions needed to accomplish them. It can be prepared by an authority, sector, organisation or enterprise.

Ecosystem services	<p>Ecosystems serve a number of basic functions that are essential for using the Earth's resources sustainably. The Economics of Ecosystem Services and Biodiversity (TEEB) study defines ecosystem services as: 'the benefits people receive from ecosystems'. TEEB also sets out the basis of human dependence on the natural environment. The European-led study builds on the United Nations Millennium Ecosystem Assessment, which defined four categories of ecosystem services that contribute to human well-being:</p> <ul style="list-style-type: none"> • provisioning services e.g. wild foods, crops, fresh water and plant-derived medicines; • regulating services e.g. filtration of pollutants by wetlands, climate regulation through carbon storage and water cycling, pollination and protection from disasters; • cultural services e.g. recreation, spiritual and aesthetic values, education; • supporting services e.g. soil formation, photosynthesis and nutrient cycling. (TEEB, 2010)
Effort Sharing Decision	A decision that sets annual binding greenhouse gas (GHG) emission targets for Member States for the 2013–2020 period. These targets concern emissions from sectors not included in the EU Emissions Trading System (ETS), such as transport, construction, agriculture and waste.
EIA Directive	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 [codification], OJ L 26, 28.1.2012. The EIA Directive requires Member States to ensure that projects likely to have significant effects on the environment because of their nature, size or location are subject to an assessment of their environmental effects, before development consent is given.
Emissions trading scheme and EU Emissions Trading System (EU ETS)	A market mechanism that allows those bodies (such as countries, companies or manufacturing plants) that emit/release GHGs into the atmosphere to buy and sell these emissions (as allowances) amongst themselves. Emissions mean the release of GHGs and/or their precursors into the atmosphere over a set area and period of time. The European Union Emissions trading system (EU ETS) is based on the idea that creating a price for carbon offers the most cost-effective way to achieve the significant cuts in global GHG emissions that are needed to prevent climate change from reaching dangerous levels.
Environmental limits	<p>Following the publication of the Millennium Ecosystem Assessment, it is widely accepted that ecosystems provide a range of benefits. External pressures (e.g. pollution) may impact ecosystems and diminish ecosystem services. In the long run, the system may reach a tipping/critical point beyond which the reduction in benefit is no longer acceptable or tolerable. Such a critical level can best be described as an environmental limit.</p> <p>There are several frequently used terms that fall within the category of environmental limits, including:</p> <ul style="list-style-type: none"> • Threshold (also referred to as a biophysical threshold or a tipping point): a tolerance point at which the conditions necessary to maintain a prevailing ecosystem state are exceeded (e.g. pollutant levels may have a small effect until a critical point is reached and the impact becomes significant); and • Carrying capacity: the concept that a particular system could indefinitely sustain a particular intensity of use providing it is at its capacity or use limit, but, beyond this, additional pressure would produce undesirable resource degradation. (SNIFFER, 2010)
European Climate Change Programme	A programme launched by the European Commission in June 2000. Its goal is to identify and develop all the necessary elements of the EU strategy for implementing the Kyoto Protocol.
Fauna	The animals of a particular region or habitat.
Flora	The plants of a particular region or habitat.
Green infrastructure	Green infrastructure serves the interests of both people and nature. It can be defined as a strategically planned and delivered network of high quality green spaces and other environmental features. It should be designed and managed as a multifunctional resource capable of delivering a wide range of benefits and services. Green infrastructure includes natural and semi-natural areas, features and green spaces in rural and urban, terrestrial, freshwater, coastal and marine areas. Areas protected as Natura 2000 sites are at the core of green infrastructure.
Greenhouse gas (GHG)	Any atmospheric gas (either natural or anthropogenic in origin) which absorbs thermal radiation emitted by the Earth's surface. This traps heat in the atmosphere and keeps the surface at a warmer temperature than would otherwise be possible.
Habitats Directive	Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, as amended, OJ L 206, 22.7.1992, p.7.
Indirect effects/impacts	Effects/impacts that occur away from the immediate location or timing of the proposed action, e.g. quarrying of aggregates elsewhere in the country as a result of a new road proposal, or as a consequence of the operation of the project (see also secondary effects).
Kyoto Protocol	The Kyoto Protocol was adopted at the Third Session of the Conference of the Parties (COP) to the UNFCCC in Kyoto (Japan) in 1997. It contains legally binding commitments. Countries included in Annex B of the Protocol (most OECD countries and Economies in Transition countries) agreed to reduce their anthropogenic emissions of GHGs (CO ₂ , CH ₄ , N ₂ O, HFCs, PFCs, and SF ₆) by at least 5% below 1990 levels between 2008 and 2012.
Maladaptation	An action or process that increases vulnerability to climate-change-related hazards. Maladaptive actions and processes often include planned development policies and measures that deliver short-term gains or economic benefits, but increase vulnerability in the medium- to long-term.

Maximum sustainable yield (MSY)	Maximum sustainable yield (MSY) is the largest long-term average catch or yield that can be taken from a stock or stock complex under prevailing ecological and environmental conditions.
Mitigation (climate change)	A term used to describe the process of reducing GHG emissions that are contributing to climate change. It includes strategies to reduce GHG emissions and enhance GHG sinks.
Mitigation (EIA)	Measures to 'prevent, reduce and where possible offset any significant adverse effects on the environment'. (EIA Directive)
Natura 2000	An EU-wide network of nature protection areas established under the Habitats Directive. The aim of the network is to ensure the long-term survival of Europe's most valuable and threatened species and habitats. It is comprised of Special Areas of Conservation (SAC) designated by Member States under the Habitats Directive and Special Protection Areas (SPAs) designated under the Birds Directive.
No-regret measures	'No-regret' measures are activities that yield benefits even in the absence of climate change. In many locations, implementing these actions constitutes a very efficient first step in a long-term adaptation strategy. For example, controlling leakages in water pipes or maintaining drainage channels is almost always considered a very good investment from a cost-benefit analysis point-of-view, even in the absence of climate change. Improving building insulation norms and climate-proofing new buildings is another typical example of a no-regret strategy, since it increases climate robustness and any additional cost can be paid back within a few years. Once no-regret measures have been identified, it is important to know why they are not yet implemented. Reasons can include: (i) financial and technological constraints; (ii) lack of information and transaction costs at the micro-level; and (iii) institutional and legal constraints. These obstacles can be addressed through adaptation planning, as a first step in a long-term adaptation strategy. (CLIMATE-ADAPT relevant webpage)
Proxy indicator	Indirect measure that approximates or represents a phenomenon in the absence of a direct measure.
Public	One or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organisations or groups. (EIA Directive)
Public concerned	The public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law are included.
Residual effects	Effects that remain after mitigation action.
Resilience	The ability of a social or ecological system to absorb disturbances, while retaining the same basic structure and ways of functioning, as well as its capacity to self-organise and adapt to stress and change. There are different ways in which resilience can be framed; the Dutch Climate Changes Spatial Planning research programme provides a list . (Adapted from CLIMATE-ADAPT Glossary)
Risk	The probability that something will cause injury or harm.
Scoping	The process of determining the scope and level of detail of an EIA, including the environmental effects and alternatives which need to be considered, the assessment methods to be used, and the structure and contents of the environmental report.
Screening	The process of deciding whether a project requires an EIA.
SEA Directive	Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment, OJ L 197, 21.7.2001, p.30. The SEA Directive requires that the environmental effects of a broad range of plans and programmes (PPs) are assessed and taken into account while PPs are still being developed. The public must be consulted on the draft PP and environmental assessment, and their views must be taken into account.
Secondary effects	Effects that occur as a consequence of a primary effect or as a result of a complex pathway (see also indirect effects).
Sensitivity	The degree to which a system is affected, either adversely or beneficially, by climate-related stimuli. The effect may be direct (e.g. a change in crop yield in response to a change in the temperature) or indirect (e.g. damages caused by more frequent coastal flooding due to rising sea levels).
Short-term effects	Effects that may occur during construction stage of a development, e.g. the increased traffic going to and from the site during the construction period.
Significant effects	Effects that are significant in the context of the project, i.e. a function not just of magnitude or size of effect, but of the nature, sensitivity and scale of the receptor.
Synergistic effects	Effects that interact to produce a total effect greater (or less than) than the sum of the individual effects.
Vulnerability	The degree to which a system is susceptible to, or unable to cope with, adverse effects of climate change, including climate variability and extremes. Vulnerability is a function of the character, magnitude, and rate of climate variation to which a system is exposed, its sensitivity, and its adaptive capacity.