Neutral Citation Number: [2023] EWHC 2548 (Admin)

Case No: CO/1119/2023

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/10/2023

Before :

MRS JUSTICE LIEVEN

- -

Between :

FRACK FREE BALCOMBE RESIDENTS ASSOCIATION

Claimant

and

SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES

First Defendant

and

ANGUS ENERGY WEALD BASIN NO.3 LIMITED

Second Defendant

and

WEST SUSSEX COUNTY COUNCIL

Third Defendant

- -
- -

Dr David Wolfe KC and Merrow Golden (instructed by **Leigh Day Solicitors**) for the **Claimants**
Mr Tom Cosgrove KC and Mr Ben Du Feu (instructed by **Government Legal Department**) for the **First Defendants**
The Second Defendants did not attend and **were not represented**
Ms Jenny Wigley KC (instructed by **West Sussex County Council**) for the **Third Defendants**

Hearing dates: **19 July 2023**

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Approved Judgment

This judgment was handed down remotely at 10.30am on 13 October 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE LIEVEN

Mrs Justice Lieven DBE :

1. This is a statutory challenge under the Town and Country Planning Act 1990 ("TCPA") to the decision of an Inspector appointed by the Secretary of State to grant planning permission for "exploration and appraisal comprising the removal of drilling fluids and subsequent engineering works with an extended well test for hydrocarbons along with site security fencing and site restoration" at Lower Stumble, Balcombe, Haywards Heath ("the Decision").

2. The Claimant was represented by Dr David Wolfe KC and Merrow Golden. The First Defendant was represented by Tom Cosgrove KC and Ben Du Feu. The Second Defendant ("the Developer") was not represented. The Third Defendant was represented by Jenny Wigley KC and only appeared in respect of Ground Four.

3. The Second Defendant applied for permission for exploration and appraisal operations to assess site suitability for commercial hydrocarbon production ("the Development"). The Development would have four phases, including an Extended Well Test ("EWT") for up to 12 months including operation of a continuous flare and generator. The site is in the High Weald Area of Natural Beauty ("AONB") and the proposal is agreed to be "major development" in the AONB for policy purposes. The Third Defendant ("WSCC") refused permission for the Development on 10 March 2021 on the basis that the AONB "exceptional circumstances" test in national and local policy (see further under Ground 3 below) was not met. The Developer appealed that refusal which led to the Decision.

4. The Claimant raises six grounds of challenge, and Lang J granted permission on all of them. The Grounds are:

> Ground 1: Unlawful to rely on the benefits without the harms of hydrocarbon extraction
>
> Ground 2: Flawed interpretation of M7 of the West Sussex Joint Minerals Local Plan
>
> Ground 3: Unlawful failure to consider alternatives to proposal outside the AONB
>
> Ground 4: Failure to comply with the EIA Regulations
>
> Ground 5: Failure to consider the impacts on climate change
>
> Ground 6: Unlawful failure to assess impact on water resources

<u>The Decision Letter</u>

5. The Inspector set out the main issues at DL6 and the description of the site at DL7-12.

6. At DL14 he accurately summarises M7a of the West Sussex Joint Local Minerals Plan 2018 ("WSMLP") which deals with "hydrocarbon development not involving hydraulic fracturing". At DL15 he summarises M13, which covers major development in the AONB.

7. At DL19-25 there is a section headed "Other National Guidance and Data". This refers to the National Policy statement on Energy, EN-1, and the importance of the UK having secure and reliable sources of energy, and to the Energy White Paper 2020.

8. At DL24-25 he refers to the quantum of domestic production of oil and the fact that domestic production is declining.

9. The DL 26-49 then deals with the planning effects of the proposal, including landscape and visual impact; local amenity; water impacts; highway impacts; health of safety; ecology; heritage and climate change. Most of which are not relevant to this challenge. I will refer to the specific relevant paragraphs under the Grounds below.

10. At DL46-50 he refers to the need for the development.

> *"46. In the ongoing transition to a net zero-carbon energy economy, over 98% of the decreasing, but for some years substantial, domestic demand for oil and gas will be met by North Sea reserves. Aside from a recent reversal due to reduced home demand, the UK has long been a net importer of oil. It is currently very uncertain to what extent demand will return to its level before the Covid pandemic lockdowns of 2020-22. This uncertainty is compounded by the continuing hostilities between Ukraine and Russia, disrupting international oil and gas supplies.*
>
> *47. In the circumstances, it would plainly be inappropriate to rely upon imported oil both from the point of view of security of supply and with regard to sustainability in its broader sense.*
>
> *48. There is nothing in current national or local policy to restrict the appraisal or production of hydrocarbons or to say that a proposal to explore and test a known hydrocarbon reserve should be refused on grounds that its yield might be of small scale. It is precisely the point of proposals like that in this appeal, to obtain such information and it would not be appropriate to anticipate the result of the EWT with conjecture that the ultimate yield of the well might be minimal.*
>
> *49. The proportion of domestic supply won from onshore sources, currently mostly from a single facility in Dorset, is clearly of relatively small scale but that is not to say that it is insignificant or unimportant. The present proposal should not be refused merely because it might lead only to a small additional contribution, or even no contribution at all to essential domestic oil supplies.*
>
> *50. There remains a significant national need for onshore hydrocarbon exploration and assessment for considerable time to come. This weighs greatly in favour of this appeal, given also the great policy weight still attributed nationally to the benefits of mineral extraction."*

11. At DL51 he deals with availably and costs of alternatives.

12. DL57-61 covers the conclusions:

> *"57. With reference to the provisions of JMLP Policies M7a and M13 and NPPF paragraphs 176, 177, 209 and 211, I have found that there are no evident comparable accessible or cost-effective alternatives to the appeal proposals and that the site could be restored to a high standard under the agreed planning conditions. There is no evidence that harm would occur due to the storage of hazardous substances on the site. I give modest weight to such benefit as would result to the local economy.*
>
> *58. I have found that all adverse impacts of the development could be acceptably mitigated in planning terms but with the notable exception that there would be moderate adverse impact on the landscape of the AONB, contrary to the MSDP and NPPF.*
>
> *59. Even such moderate harm to the AONB carries great weight in terms of the NPPF. Against that is to be balanced the evident national need I have identified for continued hydrocarbon exploration and assessment in the interests of energy supply security pending ultimate transition net carbon-zero energy provision.*
>
> *60. In my overall judgement, the national need is the overriding consideration and furthermore amounts to the requisite exceptional justification for permitting this major development within the High Weald AONB."*

Ground One

13. The Claimant argues that the Inspector took into account the benefits of the production of hydrocarbons that might ultimately flow from the site but did not take into account the disbenefits of production. The Claimant relies heavily on the Court of Appeal decision in *Ashchurch Rural Parish Council v Tewkesbury BC* [2023] EWCA Civ 101. This was a somewhat odd case where the Local Planning Authority ("LPA") had granted permission for a road bridge over a railway, but with no connections to the wider road network. This was because funding existed for the bridge but at that time not for the connecting roads.

14. The LPA took into account the benefits of the wider future development, but not the disbenefits. The Court summarised the position at [64]:

> *"64. On a fair reading of the OR, the Planning Officer did place substantial weight on the contingent benefits that, in his assessment, would accrue from the development in Phase 1, and he invited the Committee to do the same. His overall approach was to invite the Committee to attribute substantial or significant weight to the prospective benefits of the wider development whilst directing them that they must leave out of account entirely any possible harms. Whilst it was open to the decision maker to treat the prospective benefits of the wider development as material factors, and it is understandable why they did, it was irrational to do so without taking account of any adverse impact that the envisaged development might have, to the extent that it was possible to do so, (which it was, albeit at a high level). The two go hand in hand; you cannot have one without the other. Ground 1 is therefore made out."*

15. The case which is closest to the facts of the present case is *R (Preston New Road Action Group) v Secretary of State for Communities and Local Government* [2018] Env LR 18 ("*PNRAG*"). That concerned an application for hydrocarbon exploration through hydraulic fracturing at a site in Lancashire. One ground of challenge in that case was that the Secretary of State had taken into account the benefits of the production phase, but had not taken into account the disbenefits, see [6(3)]: *"... inconsistency because he took into account the benefits of shale gas production but left out of account the harmful effects it would have…".* At [81]-[82] Lindblom LJ said:

> *"81. One should not read more into paragraphs 28, 36 and 37 than is actually there. The conclusion in paragraph 28, that the need for shale gas exploration should have "great weight", was one the Secretary of State was entitled to reach in the light of government policy. And it was consistent with his conclusions in paragraphs 36 and 37 that the written ministerial statement and the NPPF encourage shale gas exploration as an activity consistent with the Government's objectives "to achieve lower carbon emissions and help meet its climate change target", and "to support the transition to a low carbon future in a changing climate"; and that the proposed development would "represent a positive contribution towards the reduction of carbon". The Secretary of State was not saying – nor could he – that this development would itself bring about a reduction in carbon emissions, or that such a benefit should weigh for it in the planning balance. Contrary to Mr Willers' submission, he did not give "significant weight", or any weight, to that supposition. He was merely recognizing, quite properly, that the development would help to achieve the objective of reducing carbon by establishing whether or not a commercially viable resource of shale gas existed on these sites. That makes sense. Exploration for shale gas is necessary before a commercial decision can be taken on the viability of production, and a planning decision on the merits of such development, if ever proposed. The Secretary of State's conclusion in paragraph 37 did not anticipate those future decisions. Rather, it acknowledged that such decisions would only be possible if the present proposals for exploration went ahead.* [emphasis added]
>
> *82. The conclusion in paragraph 47 of the decision letter, that "no weight" should be given to the "national economic benefits" of possible future "commercial production" was not at odds with those earlier conclusions. It was, however, a different conclusion from the inspector's in paragraph 12.757 of her report, which was not that "no weight" should be given to such benefits, but that they should have "very limited weight". The difference here was not simply one of degree; it was a difference of principle. The Secretary of State meant to stress it. He said that he noted – not that he agreed with – the inspector's conclusion as to weight, and he deliberately distanced himself from it. He plainly had in mind here the policy in paragraph 147 of the NPPF, which is amplified in the guidance in paragraph 27-120-20140306 of the PPG – in effect, that decision-makers must be careful to distinguish between "exploration" for hydrocarbons, "appraisal", and subsequent commercial "production" if proposed. He also referred to "commercial production" of shale gas on*

> *the appeal sites and its potential benefits – carefully and correctly – in uncertain terms: "... benefits which could flow from commercial production ... at some point in the future (my emphasis)."*

16. Dr Wolfe submits that the Inspector erred at a number of points in the DL but in particular at DL47-49 (see above) when he went "over the line" in directly taking into account the benefits of the production of the hydrocarbons and not merely the benefits of the exploration and assessment stages. He submits that if the Inspector was to consider the benefits of production then he also had to consider the disbenefits, and that he wholly failed to do.

17. Mr Cosgrove submits that it is clear from reading the DL as a whole, that the Inspector fully understood the need to focus on the exploration stage and the benefits that flowed from that, and not to take into account the benefits of the production phase.

18. In my view, the Inspector did not err in law in this regard. He plainly in the DL understood that the application was for exploration only and that he should focus on the benefits and disbenefits of that phase. This is apparent from reading the DL as a whole but also from the conclusion in DL59 when he refers back to the benefit of exploration and assessment.

19. However, in determining whether there were benefits from the application it was inevitable, and necessary, that he had to consider matters relating to what would happen if viable hydrocarbons were found in the exploration phase. If there was no policy or economic support for hydrocarbon extraction then there would be no benefit in exploring and assessing them. There is an inextricable linkage between the two phases, which is what the Inspector is referring to in DL46-50. This is the same point as that made by Lindblom LJ in ***PNRAG*** at [81]: *"He was merely recognising, quite properly, that the development would help to achieve the objective of reducing carbon by establishing whether or not a commercially viable resource of shale gas existed on these sites. That makes sense…."*.

20. The Inspector did not need to refer to the disbenefits of production when considering the benefits of exploration because they would be fully considered and weighed in the balance at the production phase, if that is reached. However, they are not relevant to the decision whether to approve exploration alone.

21. The decision in ***Ashchurch*** is a very different case. There was no "exploration" benefit in ***Ashchurch***. The bridge itself had no benefit, and indeed no use, unless the rest of the project was built. Therefore, in deciding whether to permit the bridge the LPA had to consider both the benefits and disbenefits of the entire project, including the rest of the road scheme. It made no planning sense to assess the benefits of the bridge without the disbenefits because there were no benefits to the bridge alone. In the present case, there are benefits to establishing whether hydrocarbon extraction is commercially viable in the area and the weighing up exercise of the planning balance on production is appropriately done at the next phase.

22. For these reasons I dismiss Ground One.

Ground Two

23. Ground Two is that the Inspector misdirected himself by applying policy M7a rather than M7b of the WSMLP.

24. The relevant parts of the two policies state:

> *"**Policy M7a: Hydrocarbon23 development not involving hydraulic fracturing***
>
> *Exploration and Appraisal:*
>
> *(a) Proposals for exploration and appraisal of oil and gas, not involving hydraulic fracturing, including extensions to existing sites will be permitted provided that:*
>
> *(i) with regard to development proposals deemed to be major, the site is located outside the South Downs National Park, High Weald AONB or Chichester Harbour AONB unless it has been demonstrated that there are exceptional circumstances and that it is in the public interest, and in accordance with Policy M13;*
>
> *(ii) the site selected represents an acceptable environmental option in comparison to other deliverable alternative sites from which the target reservoir can be accessed, taking into account impacts from on-site activities including HGV movements;*
>
> *(iii) any unacceptable impacts including (but not limited to) noise, dust, visual intrusion, transport and lighting, on both the natural, historic and built environment and local community, including air quality and the water environment, can be minimised, and/or mitigated to an acceptable level;*
>
> *(iv) restoration and aftercare of the site to a high-quality standard would take place in accordance with Policy M24 whether or not oil or gas is found;*
>
> *(v) no unacceptable impacts would arise from the on-site storage or treatment of hazardous substances and/or contaminated fluids above or below ground.*
>
> *….*
>
> *"**Policy M7b: Hydrocarbon development involving hydraulic fracturing***
>
> *Exploration and Appraisal:*
>
> *(a) Proposals for exploration and appraisal for oil and gas, involving hydraulic fracturing, including extensions to existing sites will be permitted providing that:*

(i) any surface development is located outside the following areas (as shown on the policies map):

i. …

ii. …

iii. High Weald AONB

iv. Any other area given specific protection from hydraulic fracturing in legislation

(ii) …

(iii) any adverse impacts including (but not limited to) noise, dust, visual intrusion, transport, and lighting, on both the natural, historic and built environment and local community, including air quality and the water environment, can be minimised, and/or mitigated, to an acceptable level;

(iv) restoration and aftercare of the site to a high-quality standard would take place in accordance with Policy M24 whether or not oil or gas is found;

Production:

(b) Proposals for oil and gas production, involving hydraulic fracturing, including extensions (see footnote 26) to existing sites, will be permitted providing that:

(i) they accord with (a)(i)-(iv) above;

(ii) no unacceptable impacts would arise from the transport, by vehicle or other means, of oil/gas, water, consumables and waste to or from the site;

Activity beneath or proximate to designated areas:

(c) Proposals for exploration, appraisal and production of oil and gas, involving hydraulic fracturing underneath or in close proximity to designated areas, assets and habitats, will be permitted provided that there will be no unacceptable harm to these areas and the special qualities of the South Downs National Park and/or the setting and intrinsic character and value of the Chichester Harbour and High Weald AONBs. Hydraulic fracturing will not be permitted above 1,200 metres underneath National Parks, Areas of Natural Beauty, World Heritage Sites, and areas covered by Groundwater Source Protection Zone 1.

…"

25. Dr Wolfe relies on policy 6.7.4 and 6.7.5 of the supporting text which states:

> *"The strategy for oil and gas is to make provision, subject to there being no unacceptable impact in West Sussex, and the use of hydraulic fracturing, within the definition used in in the Infrastructure Act 2015 (and related amendments), does not take place within, or have an unacceptable impact on, the South Downs National Park, Areas of Outstanding Natural Beauty, or other protected areas including protected groundwater zones. Major oil and gas development not involving high volume hydraulic fracturing should only take place within the South Downs National Park or Areas of Outstanding Natural Beauty in exceptional circumstances and when it is in the public interest.*
>
> *6.7.5. This approach meets the national policy requirement to make provision for oil and gas development whilst also reflecting the Government commitment to 'ensure that hydraulic fracturing cannot be conducted from wells that are drilled from the surface of National Parks and other protected areas'. Therefore, Policy M7a is the default policy for considering all development proposals associated with the extraction of both conventional and unconventional hydrocarbon resources, with the exception of those involved hydrocarbon fracturing, defined by the Infrastructure Act (2015) (and related amendments), which should be addressed by Policy M7b."*

26. The Developer's position was set out in their Statement of Case and in the application. Those documents make it clear that the application did not itself involve any hydraulic fracturing. The Inspector was therefore correct in what he said in DL33.

27. Dr Wolfe submits that any future production on the site may involve hydraulic fracturing and that therefore on the basis of the explanatory text, the application should have been considered under policy M7b. He says the Claimant is very concerned about the Developer getting a "foot in the door" by establishing a case for production of hydrocarbons through this application and then making an application involving hydraulic fracturing at the production stage.

28. In my view Dr Wolfe's argument is plainly wrong. The LPA could only deal with the application before them. That application was not for hydraulic fracturing, and therefore M7a had to apply. The supporting text is not entirely clear, although on balance 6.7.5 seems itself to be focusing on projects "involving" hydraulic fracturing which would exclude this application. But in any event the policy is entirely clear. M7a covers applications which do not involve hydraulic fracturing, and M7b, those that do. The policies therefore in principle allow for the possibility of an application for exploration on one basis and then production on another.

29. For the LPA to have applied M7b would in my view have been a clear error.

30. I add that there is no evidence that the Developer was approaching the application to get its foot in the door. The Officers' Report had indicated that fracturing was unlikely "given the geology" and there was no basis for the officers' to doubt this position.

Ground Three

31. Ground Three is that the Inspector failed to consider alternatives to the proposal which fell outside the AONB, and therefore erred in his interpretation of policy M13 of the WSMLP.

32. M13(c) provides that:

> *"**Policy M13: Protected Landscape***
>
> *...*
>
> *(c) Proposals for major mineral development within protected landscapes will not be permitted unless there are exceptional circumstances and where it is in the public interest as informed by an assessment of:*
>
> *(i) the need for the development, including in terms of any national considerations, and the impact of permitting it, or refusing it, upon the local economy;*
>
> *(ii) the cost of, and scope for, developing elsewhere outside the designated area, or meeting the need for the mineral in some other way; and*
>
> *(iii) any potential detrimental impact on the environment, landscape, and recreational opportunities, and the extent to which identified impacts can be satisfactorily mitigated."*

33. Dr Wolfe relies upon the supporting text at 8.3.7-8:

> *"8.3.7. Within designated landscapes the requirements of paragraph 116 of the NPPF will need to be addressed. This will include provision of information about the national need for the mineral, as well as the benefits of permitting or refusing the application on the local economy. The expectation is that the search for alternatives outside the designated landscape should not be limited to the Plan area (or Licence Area for hydrocarbons) but should extend elsewhere within those areas subject to national landscape designations. [emphasis added]*
>
> *8.3.8. There is also a need for applicants to demonstrate whether the financial cost of developing outside the designated area is such that the development cannot take place elsewhere. The assessment should also consider the detrimental effect on the environment, landscape, and recreational opportunities. Consideration of these impacts can be undertaken under each topic area but they must then be evaluated as part of the overall paragraph 116 assessment."*

34. Policy M13 reflects the equivalent policy in the NPPF at paragraph 177.

35. Dr Wolfe submits that in both the NPPF and policy M13 the focus is on the search for alternative sources of "the mineral", see the Explanatory Text at 8.3.7 above. Therefore the issue for the decision maker has to be whether there are alternative sources of the mineral, here hydrocarbons, outside the AONB. The Inspector was therefore wrong to

focus on whether there was any way to assess the particular geology, the Lower Stumble strata, outside the AONB at DL51.

36. Dr Wolfe draws a contrast between the wording on policy M7a and b, which do focus on exploration and production of the hydrocarbon in the particular location, and M13 that simply focuses on alternatives to the mineral extraction within the AONB.

37. Mr Cosgrove submits that the Inspector has a broad discretion as to how he applies a relevant policy, see *SSCLG v Wealden DC* [2018] 1 Env LR 5. M13(c) (ii) only required the Inspector to be "informed by an assessment….", it was therefore open to him to consider the scope of the assessment before him. In the DL the Inspector fully considered the issue of alternatives and concluded that the Lower Stumble could not be explored outside the AONB.

38. In my view this Ground relates closely to the issue in Ground One. The application was for exploration and assessment, not for production, of hydrocarbons. The exploration was to determine whether there were commercially viable hydrocarbons in the Lower Stumble layer. It was not to determine whether there should be production of any hydrocarbons from the site. Therefore, whether there were alternatives under M13, applying the policy rationally to the facts of the case, had to be restricted to alternatives for the purpose or benefit of the exploration in issue, not alternatives to the production of hydrocarbons from the site.

39. It makes no sense of the policy, in the context of hydrocarbon exploration, to say that there should be no permission if there are alternatives for production elsewhere. It is completely obvious that there will be alternative hydrocarbon production sites both in the UK (onshore and offshore) and in other countries. Such an exercise would be pointless at the exploration stage but is likely to be highly relevant if there is ever a production application.

40. I therefore consider that the Inspector's approach to the issue of alternatives was a rational one that fell within the scope of his planning judgement.

Ground Four

41. Ground Four is an alleged failure to comply with the Environmental Assessment Regulations. There are two limbs to Ground Four; Limb (a) is that the LPA and the Secretary of State failed to properly consider the "project" as a whole; and (b) that there was no consideration of the emissions relevant to climate change.

42. The development was subject to a screening opinion, dated 24 July 2020, which concluded that the proposal was not EIA development, and therefore did not require an Environmental Statement.

43. The scheme of the Regulations is extremely well-known and does not require detailed repetition. The Court of Appeal in *Ashchurch* set out a helpful summary of the provisions relevant to the issue in this case at [70]-[81]:

> *"71. Regulation 3 of the EIA Regulations provides that:*

"The relevant planning authority… must not grant planning permission or subsequent consent for EIA development unless an EIA has been carried out in respect of that development."

72. "EIA Development" is defined in regulation 2 as:

" development which is…

(b) Schedule 2 development likely to have significant effects on the environment by virtue of factors such as its nature, size or location."

The bridge was correctly identified in the OR as a Schedule 2 development.

73. These provisions implement article 1(1) of the Environmental Impact Assessment Directive 2011/92/EU ("the EIA Directive"). The Directive requires the effects of the "project" to be assessed; the reference in the EIA regulations to the assessment of the effects of the "proposed development" is intended to give effect to this: R (Larkfleet) v South Kesteven District Council [2015] EWCA Civ 887, [2016] Env LR 4 ("Larkfleet") . As a general principle, if an EIA is required it should be carried out as early as possible.

74. "Project" is defined in art 1 of the Directive as "the execution of construction works or of other installations or schemes" and "other interventions in the natural surroundings and landscapes". The term has to be understood "broadly, and realistically." The decision-making authority should consider "the degree of connection… between the development and its putative effects" and whether a particular consequence is "truly an effect": see R(Finch) v Surrey County Council [2022] EWCA Civ 187, [2022] PTSR 958 especially at [15](4), [33], [42] and [60] .

75. "Likely" in this context means "possible", in the sense of "something more than a bare possibility, though any serious possibility would suffice": R (Bateman) v South Cambridgeshire DC [2011] EWCA Civ 157, ("Bateman") at [15]-[21]; Bowen-West v Secretary of State for Communities and Local Government [2012] EWCA Civ 321, [2012] Env LR 22 at [28] .

76. Regulation 5 contains general provisions relating to screening: the Judge quoted relevant aspects in his judgment at para 94. The requirement in Article 5(2) to provide "information on the site, design and size of the project" is a flexible one, which enables the planning authority to provide more or less information on those factors depending on the nature and characteristics of the project to be assessed. In R v Rochdale Metropolitan Borough Council ex parte Milne [2001] Env LR 22, ("Rochdale") Sullivan J (as he then was) said at [H7] and [H8]:

"If a particular kind of project was, by its very nature, not fixed at the outset, but was expected to evolve over a number of years … there was no

reason why a "description of the project" for the purposes of the Directive should not recognise that reality….

The Directive sought to ensure that as much knowledge as could reasonably be obtained, given the nature of the project, about its likely significant effect on the environment was available to the decision taker. It is not intended to prevent the development of some projects because, by their very nature, "full knowledge" was not available at the outset."

77. As Moore-Bick LJ pointed out in Bateman at [20], a screening opinion is designed to identify those cases in which the development (i.e. the project) is likely to have significant effects on the environment. That assessment is necessarily based on less than complete information. It is not intended to involve a detailed assessment of factors relevant to the grant of planning permission, nor a full assessment of any identifiable environmental effects.

78. The identity of the "project" for these purposes is not necessarily circumscribed by the ambit of the specific application for planning permission which is under consideration. The objectives of the Directive and the Regulations cannot be circumvented (deliberately or otherwise) by dividing what is in reality a single project into separate parts and treating each of them as a "project" – a process referred to in shorthand as "salami-slicing": see e.g. the observations of the CJEU in Ecologistas en Accion-CODA v Ayuntamento de Madrid [2008] ECR 1-6097 at [48] (adopting the approach taken in para [51] of the Advocate-General's opinion).

79. In Larkfleet , it was held that a proposed urban extension development and a link road were not a single project because despite the connections between them, there was a "strong planning imperative" for the construction of the link road as part of a town by-pass, which had nothing to do with the proposed development of the residential site. By contrast, in Burridge v Breckland District Council [2013] EWCA Civ 228, ("Burridge") the Court of Appeal held that a planning application for a biomass renewable energy plant and a planning application for a combined heat and power plant linked to it by an underground gas pipe were a "single project," on the basis that they were "functionally interdependent and [could] only be regarded as an "integral part" of the same development."

80. It follows that the identification of the "project" is based on a fact-specific inquiry. That means other cases, decided on different facts, are only relevant to the limited extent that they indicate the type of factors which might assist in determining whether or not the proposed development is an integral part of a wider project.

81. Lang J, in her judgment in R(Wingfield) v Canterbury City Council and another [2019] EWHC 1975 (Admin), [2020] JPL 154, ("Wingfield") stated at [63] that the question as to what constitutes the "project" is a matter of judgment for the competent planning authority, subject to

> *challenge on grounds of Wednesbury rationality or other public law error. At [64] she set out a non-exhaustive list of potentially relevant criteria, which serves as a useful aide-memoire. These include whether the sites are owned or promoted by the same person, functional interdependence, and stand-alone projects. In relation to the last of these factors she said:*
>
> *"where a development is justified on its own merits and would be pursued independently of another development, this may indicate that it constitutes a single individual project that is not an integral part of a more substantial scheme".*
>
> *The reverse may also be true, and that reflects the position in this case."*

44. Dr Wolfe places considerable reliance upon ***Ashchurch*** and the analysis of the Court of Appeal that there was one project, comprising both the bridge and the later connecting roads.

45. A similar, although not identical, argument to the present one was raised in ***PNRAG***, see [59] onwards. In that case it was submitted by the Claimant that the EIA should have included the extended flow test phase, when the gas produced went into the grid, and the flaring stage. However, the case was different from the present because an Environmental Statement ("ES") had been produced in that application, and therefore the arguments turned on the adequacy of the ES, rather than the lawfulness of the screening process.

46. In relation to Limb (b), Dr Wolfe submits that the screening opinion should have considered the Greenhouse Gas impacts of the application, including the emissions from the flare, and had failed to do so.

47. Mr Cosgrove, supported by Ms Wigley, relies on ***In R. (Birchall Gardens LLP) v Hertfordshire CC*** [2017] Env. L.R. 17. At [66] – [67] Holgate J stressed that:

> *"…The court should not impose too high a burden on planning authorities in relation to "what is no more than a procedure intended to identify the relatively small number of cases in which the development is likely to have significant effects on the environment."*
>
> *67.The issues of whether there is sufficient information before the planning authority for them to issue a screening opinion and whether a development is likely to have significant environmental effects, are both matters of judgment for the planning authority. Such decisions may only be challenged in the courts on grounds of irrationality or other public law error…"*

48. As to the identification of a project in any particular case, see Holgate J's discussion of the relevant principles in ***R (Together Against Sizewell C Limited) v SSESNZ*** [2023] EWHC 1526 (Admin) at [69] – [92].

49. Mr Cosgrove submits that the present situation is analogous to that in ***PNRAG***, where the project was limited to the exploration and monitoring at the site. This was a clearly defined project and did not comprise any future commercial production. As such it was

not part of a more extensive "project" and limiting the ES to the production and assessment process was lawful. At [66] the Court of Appeal endorsed the language of the Planning Policy Guidance at paragraphs 27-120, which identifies exploration and production as being separate projects.

50. In my view, the approach in the screening opinion was lawful. Although ***PNRAG*** is not binding upon me, because of the different legal context, the approach there was directly analogous to the situation in the present case. As the Court said at [63] the scheme was *"a single, clearly defined project limited to exploration and … associated monitoring" and "did not include any subsequent commercial production".*

51. Again, ***Ashchurch*** was a different situation because the bridge was not a definable separate project, but rather one part of a wider scheme which had no benefit or purpose unless the entire scheme was built. As such it was a paradigm example of "salami-slicing", as referred to in the seminal case of ***Ecologistas v Ayuntameinto de Madrid*** (Case C-142/07) [2009] PTSR 458.

52. The position of an application for exploration and assessment, which may or may not subsequently lead to an application for production, is quite different conceptually from an application of one element, e.g. the bridge, which is part of an inevitably larger single project.

53. For these reasons Ground Four (a) is rejected.

54. Ground 4 (b) asserts that the LPA should have had regard to the development's potential to release emissions to air. In his skeleton argument Dr Wolfe referred to the "environmental effects of emissions" and suggested that the screening opinion had erred by not considering emissions to air. The skeleton argument suggests that the LPA erred in its consideration of other regulatory processes. However, in oral argument he focused upon Green House Gas ("GHG") emissions rather than other emissions to air.

55. The table within the screening opinion does at box 6 refer to releases to air, but does not expressly refer to GHG, as opposed to "pollutants". The proposal involves flaring of the gas that is released from the site, so there undoubtedly will be some GHG emissions from the site.

56. Dr Wolfe submits that the LPA erred in law in not expressly considering this matter. He contrasts the position to that in ***PNRAG*** where GHG emissions from flaring was considered within the ES.

57. There is in my view some confusion in Mr Cosgrove's response on this point. Mr Cosgrove in his skeleton argument refers to mitigation measures and other environmental controls and submits that the case is a rerun of an earlier case relating to the same site ***R (Frack Free Balcombe Residents Association)*** [2014] EWHC 4108, where Gilbart J considered the relevance of other permitting processes.

58. However, as it now stands, Dr Wolfe's argument is not about the relevance of other permitting processes, but rather the failure to take into account GHG emissions. The type of pollution control which was relevant in Gilbart J's case, has little if any relevance to GHG emissions (as opposed to what might be considered more traditional "pollutants").

59. Ms Wigley submitted that the LPA was entitled to reach the conclusion it did without expressly considering GHG emissions because the scale of the project was key. At the last paragraph of the screening opinion it states:

> *"In this case, taking into account the temporary period over which the operations would take place, the small scale of physical development, and the controls in place through the Environmental Permitting regulations, and through HSE, and taking into account the criterial in Schedule 3 of the EIA Regulations, it is considered that the proposal does not have the potential for significant environmental impact within the meaning of the EIA Regulations."*

60. She refers to the fact that the indicative threshold in the PPG for development of this type is 10ha, but this site is only 0.73ha. Further, the LPA plainly knew that there was proposed to be flaring, and that would release GHG, and there was nothing irrational about concluding that, given the scale, the level of GHG emissions was not such as to meet the relevant thresholds for EIA development.

61. I do not consider that there was an error of law in this regard. The screening opinion suggests that the LPA did not expressly consider the GHG emissions that would result from the development. However, relative to the indicative thresholds the scale of this development was small. It is important to have an element of realism in cases such as this. The LPA would obviously have known that the flare would emit GHG and must have had this in mind. But for the development to be EIA development there needed to be "significant likely effects". It is extremely unlikely that the GHG emissions alone or in combination with other effects would have met this threshold. There are some impacts which are sufficiently unpredictable, or potentially completely ignored, which might need to be expressly referred to. But climate change, and the impact of GHG emissions, are matters which every planning officer and LPA is acutely aware of. This does not mean it can be ignored, quite the contrary. But the submission that the failure to have express regard to it, when the evidence overwhelmingly indicates that it was not a significant likely effect, is not sustainable.

Ground Five

62. Ground Five is closely related to Ground 4(b). It is alleged that the Inspector failed to consider the impacts of climate change from the development. He referred to the High Weald AONB Management Plan and in particular G3 "To help secure climatic conditions and rates of change which support continued conservation and enhancement of the High Weald's valued landscape and habitats", but then failed to apply it.

63. Dr Wolfe submits that there was no evidence on the climate change impacts of the proposal and the Inspector's only reference was at DL45. His case in essence is that the Inspector should have considered the assessed and quantified level of GHG which would be emitted and he failed to do so.

64. Mr Cosgrove submits that the Inspector's consideration of the role that the development would have in moving towards "net-zero" was sufficient consideration of the climate change impacts of the proposal.

65. There is no requirement, whether in statute or caselaw, that every planning decision has to expressly refer to or quantify the GHG emissions that will result. Climate change is likely to be a material consideration in every planning decision given the policy context as well as the much wider issues, but that does not mean that every decision has to have reference to specific figures or assessment. Each case will depend on its own factual and policy context. In my view the reference made here by the Inspector was adequate in the context of this case.

Ground Six

66. Ground Six alleges that the Inspector unlawfully failed to consider the impact of the development on Ardingly Reservoir, even though this was a principal important controversial issue and needed to be considered under national and local policy.

67. Policy M16 of the WSMLP states:

> *"**Policy M16: Water Resources***
>
> *Proposals for mineral development will be permitted provided that they would:*
>
> *(a) not cause unacceptable risk to the quality and quantity of water resources;*
>
> *(b) not cause changes to groundwater and surface water levels which would result in unacceptable impacts on:*
>
> *(i) adjoining land;*
>
> *(ii) the quality of groundwater resources or potential groundwater resources; and*
>
> *(iii) the potential yield of groundwater resources, river flows or natural habitats such as wetlands or heaths; and*
>
> *(c) protect and where possible enhance, the quality of rivers and other watercourses and water bodies (including within built-up areas)."*

68. There was a high level of local concern about the impacts of the proposal on water quality and hydrogeology, it being raised in the highest number of representations on the application, as an issue of concern. The Claimant commissioned an independent expert (Mr Mutan) to review the hydrogeological report and in its objection stated that the Second Defendant had not accurately assessed the risk to groundwater.

69. In the Statement of Case at paragraph 9.9 it was stated:

> *"The Hydrogeological Risk Assessment concluded that there is a very low likelihood of groundwater impact from the development, and that this will be monitored and managed, with the full engagement of the EA during all phases. Effects upon Ardingly Reservoir were scoped out of the hydrogeological risk assessment, as the Site is not hydraulically linked to it, and is separated from it by significantly higher ground which forms the*

> *watershed. The watercourses surrounding the Site are monitored in compliance with EA permits."*

70. And at 9.62:

> *"With regard to the risk of human health implications which may arise from water pollution, the Hydrogeological Risk Assessment submitted with the application concluded that there is a very low likelihood of groundwater impact from the development, and that this will be monitored and managed, with the full engagement of the EA, during all phases. As stated above, no adverse effects upon Ardingly Reservoir are anticipated; it is not hydraulically linked to the Site. Therefore, no health effects are expected relating to the pollution of surface water or groundwater resources."*

71. The Claimant responded to this in a representation dated 10 March 2022 where, in reliance on Mr Mutan's research, it was asserted that there was a hydrological link between the site and the Ardingly Reservoir. They stated, inter alia:

> *"We argue that no such reliance can be put on the HRA as it is based on incorrect and incomplete information. There is a hydrological link between the site and the Ardingly Reservoir. The poor state of the cementing of the well bore should have been disclosed as this risks hydrocarbons leaking into the aquifer. The Appellant has not been able to satisfy the requirement that per M13 c iii) "any potential detrimental impact on the environment, landscape and recreational opportunities and the extent to which identified impacts can be satisfactorily mitigated."*

72. In the attachments to Mr Mutan's report there was an email exchange with the Environment Agency from October 2013, which was produced during the process of earlier applications on the site.

> *"Dear Mr Hawkins*
>
> *We apologise if we have mislead you though we did state at the meeting that there is not a direct hydraulic connection between Ardingly reservoir and the River Ouse.*
>
> *It is an indirect connection because it can only take place if South East Water pumps from the river to the reservoir. We did state that South East Water does have an abstraction point on the River Ouse which they can use to refill Ardingly reservoir when levels are low. Due to the very low reservoir levels in early 2012 South East Water would have used the abstraction point to provide additional refill to the reservoir when there was enough water in the river to meet their licence conditions.*
>
> *However as you point out the rapid change in weather conditions meant that it would have only been for a relatively brief time period. Typically this abstraction point is not used as the reservoir will normally refill naturally and operation of pumps incurs significant cost. Normal*

> *operation for the Ouse catchment is that the abstraction at Barcombe provide the main source for public water supply.*
>
> *I trust this clarifies the situation."*

73. It therefore appears from this email that there is some hydrological linkage from the site to Ardingly Reservoir, but only if there is pumping from the River Ouse into the reservoir.

74. At DL34 -35 the Inspector said:

> *"34. The submitted hydrogeological risk assessment confirms that the appeal site is not hydrologically linked to the Ardingly Reservoir, noting an intervening watershed. Nor is the site within or close to any groundwater source protection zones. The only evident significant risk of water pollution concerns streams, as close as 15m from the site boundary, from run-ff or structural failure of the wellbore itself.*
>
> *35. The site is within Flood Zone 1 of low flood risk and the submitted flood risk assessment identifies no significant surface water flow routes across it. Surface soils would be protected by the over-site pad membrane included within the Phase 2 civil engineering works. The wellbore is subject, under separate legislation, to approval and monitoring by the Health and Safety Executive and the Environment Agency, who have approved the proposals."*

75. Dr Wolfe submits that hydrological impact was a principal important controversial issue and the Inspector made a material error in relying on the Second Defendant's hydrological assessment and ignoring the Claimant's representations, and in particular the email from the Environment Agency from 2013.

76. Mr Cosgrove submits that there was no material error. The Inspector was entitled to assume that the Environment Agency would do their regulatory job properly, and as such they and the Health and Safety Executive would properly monitor the site and control any potential water pollution from the site. The only possible pathway to Ardingly Reservoir was through the human intervention of pumping from the Ouse and that would be fully protected through the permitting and licensing regime.

77. In my view Dr Wolfe's argument is best characterised as an alleged mistake of fact, as analysed by Carnwath LJ in *E v Secretary of State for Home Department* [2004] QB 1044 at [66]. The error must be "established" and it must have played a "material" but not necessarily decisive part in the decision.

78. It is not necessarily apparent that the Inspector did make a mistake at DL34 when he said the site was not hydrologically linked to Ardingly Reservoir. There is no natural pathway between the two sites because there is a watershed between the River Ouse and the Reservoir. However, I accept that what he said is open to different interpretations, and he certainly has not referred to the possibility of pumping as indicated by the EA in their email of 2013.

79. However, in my view, to the degree there was any mistake of fact, it was not material to the decision. Firstly, the Inspector was entitled to rely on the permitting regime which was designed to ensure that there was no pathway for water to run-off the site. This would include both surface and groundwater through the use of a membrane and ensuring the integrity of the borehole.

80. Further, in respect of the risk of water getting into the Ouse and then being pumped into the Ardingly, the possibility of this occurring both appears to have been very slight, but also subject to further regulatory control. The only occasion that the Claimant could refer to when pumping occurred was in 2013. Any pumping would be subject to the licence or permit conditions, and this would allow further monitoring of water quality, for any potential risk of contamination. Therefore the water pathway from the site into the Reservoir although theoretically possible, appears on the evidence to have been unlikely and subject to full regulation. As such, the risk was so slight as not to be a material matter upon which the Inspector needed to give further reasons or consideration.

81. For this reason I dismiss Ground Six.

82. All the Grounds having been refused, I reject this challenge.