

# Climate change mitigation and the planning process – is there a gap in the law which allows mineral planning authorities to ignore the real climate impacts of onshore oil and gas applications?



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## At a glance

This article explores:

- The apparent lacuna between climate and planning policies which means that indirect greenhouse gas emissions of onshore oil and gas planning applications are not being assessed or considered in the planning process.
- UK energy policy's promotion of more oil and gas production despite the need for the rapid transition to net zero carbon.
- The issue of the hidden carbon emissions that are apparently not subject to environmental impact assessment.
- Policy recommendations on what needs to change.

2020 won't just be remembered for the global coronavirus pandemic. It was also the year when the climate emergency bared its teeth, with devastating wildfires, melting polar ice caps and glaciers, storms, droughts and floods.

Science is clear that one of the key ways to avert the worst impacts of climate change is to transition rapidly away from fossil fuels. In the UK, the Climate Change Committee's (previously known as the Committee on Climate Change) net zero report states that 'our net-zero scenarios result in a reduction in oil consumption of 82% by 2050'.<sup>1</sup>

Yet, according to the UN Environment Programme, countries are currently aiming to produce 120% more fossil fuels by 2030 than would be consistent with limiting global warming to 1.5°C.<sup>2</sup> In the UK, despite existing laws and policies, including the Climate Change Act 2008 and net zero obligation and the declaration of climate emergencies at national and local levels, companies are still applying for and receiving planning permission for onshore fossil fuel developments.

How can this happen? A recent judicial review, *R (Sarah Finch) v Surrey County Council et al* (Horse Hill case), sheds light on an apparent contradiction between national climate policies and other policies which promote maximum economic recovery of oil and gas.

## Horse Hill, Surrey: 20 years of oil production approved in 2019

During the November lockdown, climate campaigners gathered around their laptops for a judicial review of Surrey County Council's failure to require an assessment of the total carbon emissions when they granted planning permission to Horse Hill Developments Ltd. for 20 years of commercial oil production at Horse Hill.<sup>3</sup>

Horse Hill is an oil site near Gatwick Airport where a consortium of oil companies led by UK Oil & Gas plc (UKOG) is currently testing oil flows under a 2016 permission. The September 2019 permission that was the subject of the judicial review was for four new oil wells, a water reinjection well and oil production, followed by decommissioning. The site has been the focus of protests and is now the subject of an injunction banning peaceful protest.

Sarah Finch, who lives in nearby Redhill, has been an objector to the oil site since 2013 and, when the 2019 permission was granted, applied for a judicial review of the decision on several grounds. The application was granted on the third attempt and went ahead with the main ground being the failure to assess indirect carbon emissions from combustion of the oil that would be produced at the site. Ms Finch's lawyers argued that the Council was required by the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 to include, within the environmental impact assessment (EIA) process, an assessment of the greenhouse gas emissions resulting from the eventual combustion of the oil produced by the development ('Scope 3' emissions). Instead, the Council only assessed emissions from the development site and energy used on the site itself ('Scope 1 and 2' emissions).

The judge disagreed.<sup>4</sup> Mr Justice Holgate said the case was 'very interesting and important' but was concerned about the wider implications regarding the assessment of the impacts of downstream emissions.<sup>5</sup> He concluded the EIA did not need to:

include the environmental effects of consumers using (in locations which are unknown and

unrelated to the development site) an end product which will be made in a separate facility from materials to be supplied from the development being assessed.

The Horse Hill case has been written up by David Hart QC<sup>6</sup> and in Drill or Drop.<sup>7</sup>

The decision is subject to an application for permission to appeal to the Court of Appeal. Nevertheless, we are left asking, if the judge is right, how can these emissions, which have a tangible and measurable impact on the global climate, be assessed? No regulatory process is directly measuring and mitigating them. If the oil was not extracted from the ground, refined and then burned to generate energy, the emissions would not arise.

## UK energy policy seeks to maximise the extraction of domestic oil and gas

Current energy and national planning policies, which pre-date the UN Paris Agreement<sup>8</sup> and the UK's legally binding net-zero commitment,<sup>9</sup> make it difficult for mineral planning authorities to outright reject oil and gas applications on the basis of their impact on emissions and hence climate change. Whilst changes made over the last few years to the National Planning Policy Framework do give decision-makers some ammunition to question applications on this basis and on their compliance with sustainable development objectives, they do not go far enough.

The Horse Hill case is a good example of these conflicts. While the Surrey County Council Planning Committee that approved the Horse Hill application made some tentative references to the net zero target, the main national policies referenced were the 2007 UK Energy White Paper, the 2010 and 2014 annual energy statements and the requirement in the National Planning Policy Framework to give great weight to minerals applications. The Committee thus appeared unwilling to use the EIA to its full potential.

Councillors clearly recognised the difficulty: Surrey County Council's own Climate Change Strategy asks the government to make explicit that planning authorities have the right to reject planning applications where there are identifiable and material climate impacts.<sup>10</sup>

Surrey County Council did not require Horse Hill Developments Ltd. to estimate its Scope 3 emissions. However, there are established methodologies for assessing these emissions<sup>11</sup> and the industry now has sustainability reporting guidance for this purpose.<sup>12</sup> The EIA process could have included an assessment of these emissions at the planning consent stage.

## A different approach is possible

In 2018, Rt Hon Sajid Javid MP, then Secretary of State for Communities and Local Government, rejected an application for a coal mine at Druridge Bay in Northumberland on the grounds of its impact on climate change and damage to the landscape and community.<sup>13</sup> He wrote that the project would lead to greenhouse gas emissions that would have 'an adverse effect of substantial significance' and that 'the effects of carbon in the atmosphere would have a cumulative effect in the long term'. The coal company successfully challenged this decision in the High Court<sup>14</sup> and the plans were returned to Mr Javid's successor, Rt Hon Robert Jenrick MP, who refused permission a second time.<sup>15</sup> The developer, the local authority, the Secretary of State and the Court took a very different approach to the assessment of the greenhouse gas emissions when determining the environmental impact of the proposed development than in the Horse Hill case. This Environmental Statement assessed the emissions from extraction, processing *and combustion* of the coal to be produced.

The UK also appears to be out of step with other countries in its approach. The courts of both Australia and the United States<sup>16</sup> have held that environmental impact of fossil fuel extraction projects must include Scope 3 emissions.<sup>17</sup> As a result, a proposal to develop an open-cut coking coal mine in the Gloucester Valley in New South Wales, for over 20 years of production of coking coal for export and use in the manufacture of steel, was refused because it would 'increase global total concentrations of greenhouse gas (GHG) at a time when what is urgently needed [...] is a rapid and deep decrease in GHG emissions'.<sup>18</sup> This decision is in stark contrast to the recent approval for a new coking coal mine in Cumbria.<sup>19</sup>

## What needs to happen?

The urgent nature of the climate emergency and the close correlation between the extraction of fossil fuels and the carbon emissions arising from their use makes this issue important to address.

Frustrated by inaction, climate campaigners are increasingly turning to the courts for a remedy, with some successes.

The environmental group Talk Fracking successfully argued in 2016 that paragraph 209a of the National Planning Policy Framework should be removed because of failings by the Government to take into account the scientific evidence on carbon emissions in its consultation process.<sup>20</sup> However, the policy has yet to be reviewed to address this, beyond removing paragraph 209a.

The Good Law Project's 2020 judicial review<sup>21</sup> succeeded in persuading the Government<sup>22</sup> to review its outdated Energy Policy which includes a presumption in favour of fossil fuels.

The recommendations of the Weald Action Group are the following:

- First, clear guidance must be issued, either by the relevant professional bodies or, better still, by the Government, that Scope 3 emissions must be included in EIAs and in particular that the emissions from combustion of fossil fuels must be included.
- Second, there needs to be a decisive break with pre-net zero energy policy. The National Planning Policy Framework should be amended so that the broadly worded support for mineral development no longer extends to fossil fuel extraction (at any stage, be it exploration or production).
- Third, the Government needs to take urgent policy action and bring forward its net zero strategy, alongside the other policies called for by the Climate Change Committee in its Sixth Carbon Budget documents.<sup>23</sup> This must include properly empowering local authorities, as mineral planning authorities, to make decisions in line with the net zero obligation – i.e. making it clear that the action necessary to meet the net zero target is not just one for central government, but also requires local authorities to make planning and other regulatory decisions taking into account both the overall 2050 target but also the intermediate targets around 2030 and 2035.

## In conclusion

The Horse Hill judicial review raises important questions. David Hart QC's review of the case sums it up well:

So when we come up against the problem in this case, we are surprised to find that no-one is required to assess the total impact of a particular development, including the effect of what it produces. According to Holgate J, that is not required by the planning system, and he articulates policy reasons why the EIA wording should not be read too widely. But there is no other system generally applicable to hydrocarbon extraction which does so on a site by site basis. One can readily see the complexities of so requiring, and the assumptions and counterfactuals which would need to be built into the predictions of total impact, but does all that negate the benefits of at least trying to do so?<sup>24</sup>

As long as decision-makers and law-makers fail to require the assessment of all carbon emissions arising

from a fossil fuel project, these emissions remain uncounted at the key point – before the decision is made to grant planning permission – and the emissions contribute to a cumulative climate impact that is only felt when it is too late to mitigate. A review of National Planning Policy to reframe the delivery of our energy needs through the planning system is urgent.

Ultimately, even if we think the EIA process does require an assessment of Scope 3 emissions from oil and gas applications, mineral planning authorities should not have to rely on just this to be able to justify rejecting a planning application on the basis of its likely climate impacts. What we really need is a clear and updated energy policy and planning guidance that is brought in line with the net zero target and makes it explicit that Councils have the authority to reject applications on climate grounds.

*Sarah Finch, supported by the Weald Action Group<sup>25</sup> was represented by Marc Willers QC, Estelle Dehon and Leigh Day in the Horse Hill case.*

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*The Weald Action Group has published detailed briefings on [Onshore Oil](#) and [Hydrogen](#) in the transition to net zero.*

## Endnotes

- 1 Committee on Climate Change, *Net Zero: The UK's Contribution to Stopping Global Warming* (May 2019) <https://www.theccc.org.uk/wp-content/uploads/2019/05/Net-Zero-The-UKs-contribution-to-stopping-global-warming.pdf> accessed 20 January 2021.
- 2 UN Environment Programme, *The Production Gap Report 2020* (2 December 2020) <https://www.unenvironment.org/resources/report/production-gap-2020> accessed 20 January 2021.
- 3 *R (Finch) v Surrey County Council et al [2020] EWHC 3559 (QB)* <https://www.bailii.org/ew/cases/EWHC/Admin/2020/3566.html>.
- 4 *ibid.*
- 5 *ibid.*

- 6 David Hart QC, 'Do Environmental Assessments apply to products derived from a development?' (*UK Human Rights Blog*, 23 December 2020) <https://ukhumanrightsblog.com/2020/12/23/do-environmental-impact-assessments-apply-to-products-derived-from-a-development> accessed 20 January 2021.
- 7 Ruth Hayhurst, 'Surrey campaigner closes legal fight over climate effects of 20 years of oil production at Horse Hill' (*Drill or Drop*, 21 December 2020) <https://drillordrop.com/2020/12/21/breaking-surrey-campaigner-loses-legal-fight-over-climate-effects-of-20-years-of-oil-production-at-horse-hill> accessed 20 January 2021.
- 8 The Paris Agreement 2015 (the United Nations Framework Convention on Climate Change 12 December 2015) <https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement> accessed 20 January 2021.
- 9 The Climate Change Act 2008 (2050 Target Amendment) Order 2019, SI 1056 <https://www.legislation.gov.uk/uksi/2019/1056/contents/made> accessed 20 January 2021.
- 10 Surrey County Council (2020) *Surrey's Climate Change Strategy*, page 18 [https://www.surreycc.gov.uk/\\_data/assets/pdf\\_file/0003/225615/Surreys-Climate-Change-Strategy-2020.pdf](https://www.surreycc.gov.uk/_data/assets/pdf_file/0003/225615/Surreys-Climate-Change-Strategy-2020.pdf) accessed 20 January 2021.
- 11 IPIECA (2016) *Estimating petroleum industry value chain scope 2 greenhouse gas emissions. Overview of methodologies* <https://www.ipieca.org/resources/good-practice/estimating-petroleum-industry-value-chain-scope-3-greenhouse-gas-emissions-overview-of-methodologies/> accessed 20 January 2021.
- 12 IPIECA (2020) *Sustainability Reporting Guidance for the oil and gas industry* [https://www.ipieca.org/media/5110/ipieca\\_sustainability-guide\\_2020\\_mod3-cce.pdf](https://www.ipieca.org/media/5110/ipieca_sustainability-guide_2020_mod3-cce.pdf) accessed 20 January 2021
- 13 APP/P2935/V/16/3158266 <https://www.gov.uk/government/publications/called-in-decision-land-at-highthorn-widdrington-northumberland-ne61-6ee-ref-3158266-23-march-2018>.
- 14 [2018] EWHC 3141 (Admin); [2019] Env. L.R. 20.
- 15 APP/P2935/V/16/3158266 [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/914860/Combined\\_DL\\_IR\\_R\\_to\\_C\\_Highthorn.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/914860/Combined_DL_IR_R_to_C_Highthorn.pdf).
- 16 27 countries produce the coal, oil and gas that ultimately lead to 90% of global fossil fuel CO<sub>2</sub> emissions. The US, Australia and the UK are, respectively, the 2<sup>nd</sup>, 6<sup>th</sup> and 27<sup>th</sup> largest producers of fossil fuels. The Production Gap Report (UN Environment Programme November 2019) <https://www.unenvironment.org/resources/report/production-gap-report-2019> accessed 20 January 2021.
- 17 See the cases referred to by Preston J in *Gloucester Resources v Minister for Planning* [2019] NSWLEC 7 at [486-513].
- 18 Tim Power, "Wrong Place... Wrong Time – Key implications of the Gloucester coal mine decision" (*White and Case*, 20 February 2019) <https://www.whitecase.com/publications/alert/wrong-place-wrong-time-key-implications-gloucester-coal-mine-decision?s=coal%20mine> accessed 20 January 2021.
- 19 Roger Harrabin, 'Coal mine go-ahead "undermines climate summit"', (*BBC News*, 19 January 2021) <https://www.bbc.co.uk/news/uk-politics-55721919> accessed 20 January 2021.
- 20 *Claire Stephenson v Secretary of State for Housing and Communities and Local Government* CO3511/2018.
- 21 *Dale Vince, George Monbiot, the Good Law Project Ltd v The Secretary of State for Business Energy and Industrial Strategy* CO/1832/2020.
- 22 The Government Conceded (Good Law Project 2 October 2020) <https://goodlawproject.org/update/government-conceded> accessed 20 January 2021.
- 23 Committee on Climate Change, *Sixth Carbon Budget* (9 December 2020) <https://www.theccc.org.uk/publication/sixth-carbon-budget> accessed 20 January 2021.
- 24 David Hart QC, 'Do Environmental Assessments apply to products derived from a development?' (*David Hart QC UK Human Rights Blog*, 23 December 2020) <https://ukhumanrightsblog.com/2020/12/23/do-environmental-impact-assessments-apply-to-products-derived-from-a-development> accessed 20 January 2021.
- 25 The Weald Action Group is an umbrella for local groups campaigning against the extraction of oil and gas in the South of England, <http://www.wealdactiongroup.org.uk>.