PLEADING BUNDLE

in the

APPEAL

to

THE COURT OF SESSION

under

Regulation 16 of the Offshore Petroleum Production and Pipelines (Assessment of Environmental Effects) Regulations 1999

by

GREENPEACE LIMITED, a company incorporated under the Companies Acts with registered number 01314381 and having its Registered Office at Greenpeace House, Canonbury Villas, London, N1 2PN
Appellant

against

Decisions of the Secretary of State for Business Energy and Industrial Strategy and of the Oil and Gas Authority dated 7th August 2018 and communicated by notice in the London, Edinburgh and Belfast Gazettes dated 3rd April 2020

Rules of the Court of Session 1994

INTIMATED

XA34/20

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GREENPEACE LIMITED

Appellant

against

Decisions of the Secretary of State for Business Energy and Industrial Strategy and of the Oil and Gas Authority dated 7th August 2018 and 20th September 2018 and communicated by notice in the London, Edinburgh and Belfast Gazettes dated 3rd April 2020

Defender

No. Of Process

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Our Ref: JLJ/554938

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The appellant applies to this court under regulation 16 of the Offshore Petroleum Production and Pipelines (Assessment of Environmental Effects) Regulations 1999 for an order of reduction in relation to:

a. The decision by the Secretary of State for Business Energy and Industrial Strategy to agree to the grant of consent for the field development Vorlich project on 7th August 2018.

b. The decision of the Oil and Gas Authority to grant consent to BP Exploration Operating Company Ltd for the field development Vorlich project (licence P1588 and P363).

The decisions are appended to this appeal.

The appellant's application for reduction is made on the following grounds.

GROUNDS OF APPEAL

1. The appellant, being a person aggrieved by the decision of the Oil and Gas Authority to grant

consent to BP Exploration Operating Company Ltd for the field development Vorlich Project, and that grant of consent having been granted in contravention of regulation 5(4) et separatim 5A(1)(a) of the Offshore Petroleum Production and Pipe-lines (Assessment of Environmental Effects) Regulations 1999, the decision should be reduced in accordance with regulation 16 of the 1999 Regulations.

2. The appellant, being a person aggrieved by the decision of the Secretary of State for Business Energy and Industrial Strategy to agree to the granting by the Oil and Gas Authority of consent to BP Exploration Operating Company Ltd for the field development Vorlich project and that decision having been made in breach of the Directive 2011/92/EU as amended by Directive 2014/52/EU, the decision should be reduced.

3. The appellant, being a person aggrieved by the decision of the Oil and Gas Authority to grant consent to BP Exploration Operating Company Ltd for the field development Vorlich Project and by the decision of the Secretary of State for Business Energy and Industrial Strategy to agree to the granting of such consent, and the interests of the appellant having been substantially prejudiced by the failures of the respondents to comply with the Offshore Petroleum Production and Pipe-lines (Assessment of Environmental Effects) Regulations 1999, those decisions should be reduced in accordance with regulation 16 of the 1999 Regulations.

FACTUAL AND LEGAL AVERMENTS IN SUPPORT OF GROUNDS OF APPEAL

1. The appellant is as designed in the instance. The respondents are designed in Part 1 of the Schedule for Service. Service is sought in common form on those designed in Part 2 of the Schedule for Service for any interest that they may have in this appeal. The appellant is the autonomous regional office of Greenpeace, a campaigning organisation which has, as its main object, the protection of the natural environment. The appellant stands for positive change through action. It defends the natural world and promotes peace. It investigates and confronts environmental abuse by governments and corporations around the world. Greenpeace is particularly well known for the campaign work that it carries out at sea. It has worked to preserve marine species and to preserve fish stocks. It also campaigns to prevent the damaging effects of drilling for oil at sea. This appellant seeks to appeal the grant of a licence in relation to an oil field as set out in more detail below. The appellant brings this appeal in accordance with regulation 16 of the Offshore Petroleum Production and Pipelines (Assessment of Environmental Effects) Regulations 1999 (the "1999 Regulations") as a person aggrieved by the grant of consent.

2. On 3rd April 2020, the respondents published in the London, Edinburgh and Belfast Gazettes

(the "Gazettes") notice of the Secretary of State for Business Energy and Industrial Strategy's decision to agree to the grant of consent for the field development Vorlich project on 7th August 2018 and notice of the Oil and Gas Authority's grant of consent for the field development Vorlich project. These proceedings are brought within six weeks of that publication in accordance with the requirements of Regulation 16(3) of the 1999 Regulations.

3. The appellant seeks an order of reduction under Regulation 16 of (i) the decision of the Secretary of State for Business Energy and Industrial Strategy ("the Secretary of State") to agree to the grant of consent and (ii) the decision of the Oil and Gas Authority ("the OGA") to grant consent on the grounds set out in more detail below.

Overview

4. BP Exploration Operating Company Ltd ("BP") and Ithaca Energy (UK) Ltd ("Ithaca") have a licence to search and bore for and get petroleum in the Vorlich field. To drill wells or get or convey petroleum the licence's model clauses require a consent to be obtained from the Secretary of State. That consent process is now administered by the OGA. BP and Ithaca sought permission for the drilling of wells and oil production in April 2018. Consent for these activities is granted by the OGA but an Environmental Impact Assessment is carried out by the Secretary of State (at BEIS) under the 1999 Regulations. By reg 5A(1) "*The OGA shall not grant a consent in respect of a relevant project without the agreement of the Secretary of State.*" Approval for the issue of the consent was given by the Secretary of State and consent then granted by the OGA.

5. The OGA granted consent to BP by way of licence P1588 and P363. The Secretary of State agreed to the grant of consent. The OGA failed to publish the consent when it was granted. This failure was the subject of a judicial review challenge by the appellant in the English Courts (the "English proceedings"). A copy of the English proceedings is produced. Following the grant of permission in the English proceedings, the Secretary of State undertook to publish the details of the grant of consent in the Gazettes for the purposes of commencing the time for lodging a challenge in accordance with regulation 16 of the 1999 Regulations. This appeal is the challenge in accordance with that regulation. Separately, the appellant has lodged a petition for judicial review to challenge the consents. Regulation 16 provides the appellant with a right to challenge the consents but does not prescribe the procedure. *Esto* judicial review is not competent means of challenge, the appellant seeks to pursue its right of appeal by way of a statutory appeal under Rule of Court 41.25.

Legal Framework

6. The European Parliament and Council has published a directive on the assessment of the effects of certain public and private projects on the environment. That directive has been amended from time to time. The current version of the directive is Directive 2011/92/EU as amended by Directive 2014/52/EU (the "EIA Directive"). The UK Government purported to transpose the EIA into domestic law by way of the 1999 Regulations.

7. Insofar as relevant to these proceedings, the EIA Directive provides as follows:

a) Environmental Impact Assessments ("EIAs") may be required for projects for deep drillings and underground mining: Article 2(1); 4(2), Annex 2 point 2(b) and (d);
b) EIAs are defined at Article 1(2)(g);
c) An assessment must be carried out before development consent is granted with regard to the effect of that development on the environment: Article 2(1);
d) Member States may integrate EIAs into existing procedures or devise new procedures that are established in order to comply with the EIA Directive: Article 2(2);
e) EIAs must be publicised in the manner set out at Article 6 with the stated aim of ensuring the effective participation of the public in decision-making procedures;
f) Detailed arrangements are to be put in place for informing the public and for consulting the public concerned: Article 6(5). ;
g) The opportunities that the public concerned is granted under Article 6(4) to participate early in the environmental decision-making process must be effective and the conditions for access to participate must be such as to make it simple for the public to take part: *Flausch v Ypourgos Perivallontos kai Energeias* Case C-280/18 at §31 and §39 of the First Chamber's decision;
h) The public concerned includes non-government organisations promoting environmental protection: (Article 1(2);
i) The results of consultations must be taken into account in the development of consent procedures: (Article 8);
j) The published decision must include at least (i) a reasoned conclusion and (ii) any environmental conditions attached to the decision, a description of any features of the project and/or measures envisaged to avoid, prevent or reduce and, if possible, offset significant adverse effects on the environment as well as, where appropriate, monitoring measures: (Article 8(1));
k) The reasoned conclusion may be issued at the end of the EIA process where this is a discrete procedure but the competent authority must be satisfied that the conclusions are still "up to date" when taking a decision to grant development consent: (Article 8a(3) and (6));

l) When development consent is granted, this must be publicised together with any EIA decision: (Article 9(1));

m) Access to a procedure whereby the grant can be challenged by the public must be available, member states shall determine at what stage decisions, acts or omissions may be challenged and non-governmental organisations shall have sufficient interest to bring proceedings: (Article 11).

8. The '*exclusive right of searching and boring for and getting petroleum*' is vested in Her Majesty: Petroleum Act 1998, s 2. The OGA may license persons to '*to search and bore for and get petroleum*': s 3(1). The licensing process is subject to various regulations. At the time of the original grant of the licence in 1981, the model clauses in the Petroleum (Production) Regulations 1976 (as amended by the Petroleum (Production) (Amendment) Regulations 1978 and the Petroleum (Production) (Amendment) Regulations 1980 were incorporated into the licence. No particular process for the granting of a consent, including the publication of any grant, is contained in the model clauses or elsewhere in the regulations or the Petroleum Act 1998.

9. The relevant EIA Regulations are the 1999 Regulations. These apply to '*relevant projects*' which include '*a development*': reg 3(1). The 1999 Regulations are the regulations that are applicable to the drilling operations in the instant circumstances.

10. The United Kingdom has chosen to split the approval regime between the grant of a consent for drilling and the EIA process. The grant of a consent is given by the OGA. The EIA process is carried out by the Secretary of State. The OGA is not permitted to grant a consent without the agreement of the Secretary of State: 1999 Regulations, reg 5(A1).

11. Regulation 5A(1)(a) provides as follows:
"*When making a decision as to whether to agree to the grant of a consent in respect of a relevant project for which an environmental statement has been submitted, the Secretary of State shall—*
(a) examine the environmental statement, including any information provided under regulation 10, any representations made by any person required by these Regulations to be invited to make representations, and any representations duly made by any other person about the environmental effects of the project"

12. The Secretary of State is required, subject to certain exceptions, to carry out an EIA: 1999 Regulations, reg 5(1). The EIA process is provided at regulation 5A. Where an environmental

statement is submitted by an applicant, the Secretary of State must not make a decision under regulation 5A(1)(c) unless the Secretary of State is satisfied that the requirements of regulations 9 and 10 have been substantially met and that, where necessary, advice has been obtained from persons with appropriate expert knowledge: 1999 Regulations, reg 5(4).

13. Regulation 5(4) provides as follows:
"*Where an application for consent in respect of a relevant project is accompanied by an environmental statement, the Secretary of State shall not make the decision referred to in regulation 5A(1)(c) in respect of that project unless the Secretary of State is satisfied that the requirements of regulations 9 and 10 have been substantially met, and that, where necessary, advice has been obtained from persons with appropriate expert knowledge who have examined the statement.*"

14. An undertaker who submits an environmental statement with an application for consent must publicise it and make it available. The undertaker is required to serve copies of the statement and application on the public authorities specified by the Secretary of State: Regulation 9(1) and (2). The undertaker is required to make copies available for public inspection: Regulation 9(2). The undertaker is required to provide copies of the environmental statement to those who request it: Regulation 9(2). The undertaker is required to publish notice of the application and the availability of the environmental statement: Regulation 9(2). The notice must include a provision indicating that a person aggrieved by a decision of the Secretary of State may make an application to a court under regulation 16. Where a notice is published under regulation 9(2A), the undertaker must publish the notice (i) on such occasions as to be likely to come to the attention of those likely to be interested in or affected by the project and (ii) in such newspapers as the Secretary of State may direct and on a public website and the undertaker shall publish a copy of the application for consent and the environmental statement on that website alongside the notice. A public website means a website accessible to the public where the public can view and download information placed upon it: Regulation 3(1). Publicity and consultation requirements apply to some of that information and to other information which is of material relevance to the decision of the Minister: Regulation 10(2).

15. The Secretary of State is required to publicise the decision whether to agree to the grant of consent: Regulation 5A(7) and (8).

16. Regulation 16(1) of the 1999 Regulations provides as follows:
"*On the application of any person aggrieved by the grant of consent in respect of a relevant project in relation to which an environmental statement was required to be submitted by virtue*

of regulation 5(1) above (agreement of Secretary of State in respect of relevant projects), the court may grant an order quashing the grant of consent where it is satisfied that the consent was granted in contravention of regulation 5(4) or regulation 5A(1)(a) above (consideration of environmental statement etc.) or that the interests of the applicant have been substantially prejudiced by any failure to comply with any other requirement of these Regulations."

17. Regulation 5(4) and 5A(1)(a) are mandatory requirements. If this court is satisfied that one or both of them was not followed by the Secretary of State when making the decision to agree to the grant of consent, it is open to this court to quash – ie to grant a decree of reduction – in relation to the grant of consent. As set out below, the Secretary of State failed to adhere to the requirements of regulation 5(4) *et separatim* regulation 5A(1)(a). Separately, the appellant's interests as an interested environmental campaigning body have been substantially prejudiced by the failures of the Secretary of State and the OGA as set out below. The remedies sought above should, therefore, be granted.

Factual Chronology

18. The original licence (P363) was granted to BP Petroleum Development Limited on 24th March 1981. That original licence was subsequently transferred to BP and Ithaca. The licence incorporates the Petroleum (Current Model Clauses) Order 1999 The licence requires Ministerial consent for works for getting or conveying petroleum: clause 15. The licence provides that the drilling of a well shall not commence without the consent in writing of the Minister: clause 17.

19. The BP/ Ithaca application for consent was submitted on or around 4th April 2018. The application included a Field Development Plan. The Secretary of State requested further information on or around 19th June 2018. The further information requested included habitat assessment and environmental baseline survey reports. On or around 3rd August 2018, the Secretary of State published an Environmental Statement Summary. The Environmental Statement Summary is the Minister's agreement to the issue of the consent by the OGA. The Environmental Statement Summary was not published at the time in the Gazettes. On or around 20th September 2018, the OGA granted consent for carrying out works "*described in the document entitled 'Vorlich Field Development Plan' dated September 2018*". The OGA consent letter has not been made publicly available. The development plan has not been released.

20. Following pre-action correspondence between the appellant's agent and the Secretary of State in June and July 2019, the Secretary of State published in the Gazettes notice of various

Environmental Statement Decisions including that in relation to the Vorlich field. The notice covered decisions by the Secretary of State to agree to the grant of consent by the OGA. The notice did not include decisions by the OGA to grant consents, including the consent granted in relation to the Vorlich field. The English proceedings were commenced on or around 7th November 2019. The consent order in the English proceedings was issued on or around 3rd April 2020. On 3rd April 2020, notice of (i) the Secretary of State's agreement to the consent and (ii) the OGA grant of consent in relation to the Vorlich field were published in the Gazettes.

Failure to transpose

Publication of grant of consent

21. Article 9(1) of the EIA Directive provides "*When a decision to grant or refuse development consent has been taken, the competent authority or authorities shall promptly inform the public … in accordance with the national procedures, and shall ensure that the following information is available to the public … : (a) the content of the decision and any conditions attached thereto as …; (b) the main reasons and considerations on which the decision is based, including information about the public participation process. This also includes the summary of the results of the consultations and the information gathered pursuant to Articles 5 to 7 and how those results have been incorporated or otherwise addressed …".* The 1999 Regulations do not require publication of the OGA consent. Notwithstanding that failure, regulation 16 of the 1999 Regulations permits an application to this court by a person aggrieved by a grant of consent by the OGA. Regulation 16(3) requires that such an application be brought within six weeks of the details of that grant being published in the Gazettes. The Regulations do not set out a requirement that the details of the OGA grant of consent be published in the Gazettes notwithstanding that this provides the trigger for the right to apply to the court. The Secretary of State accepted, correctly, in the English proceedings that the previous failure to publicise notice of the OGA's grant of consent arose from an error in the transposition of the EIA Directive into domestic law. The 1999 Regulations fail to transpose the EIA Directive *quoad* publication of the grant of consent.

Inadequate publicity

22. The consultation of the public concerned (Article 6(4) and (5)) requires them to be given early and effective opportunities to be involved in the process. Article 6(5) of the EIA Directive provides that "*Member States shall take the necessary measures to ensure that the relevant information is electronically accessible through at least a central portal or easily accessible points of access at the appropriate administrative level*." Informing the public is not satisfied simply by putting a notice on a website: see *Kendall v Rochford District Council* [2014] EWHC

3866 (Admin), [2015] Env. L.R. 21 at para 92 to 94 per Lindblom J (on the Strategic Environmental Assessment provisions).

23. The 1999 Regulations fail to require an adequate minimum level of publicity, as is required under the EIA Directive. All the undertaker need do is to put the information on a website. That does not need to be a website which members of the public who are likely to be interested in the application are likely to know about. It may be an entirely new website. Unless a person is searching for the website, they are not likely to come across it. They are unlikely to be searching for the website unless they were already aware of the application. The 1999 Regulations fail to ensure that the relevant information is accessible.

24. "Informed" involves sending information out either to the public or in a way in which it is likely to be seen by the public as they go about their usual activities. It is not satisfied by being capable of being found by someone who searches for it, particularly when they have no warning which gives them reason to do so.

25. The 1999 Regulations accordingly fail to transpose the EIA Directive *quoad* publication of the application.

Publicity of the application

26. The EIA Directive requires the member state to set out the detailed arrangements for informing the public of the application, the Environmental Statement and the EIA process and consulting the public concerned. The 1999 Regulations require the publication of the notice on a website which the public can access along with the application and EIA material. That website is envisaged in the 1999 Regulations as being under the undertaker's control, since that person is required to post the application and the environmental statement on that same website. The 1999 Regulations impose a general obligation to publish the notice on such occasions as are likely to come to the attention of those persons likely to be interested. It also allows the Secretary of State to direct that newspaper notices are made.

27. BP were obliged to publish the notice '*on such occasions as to be likely to come to the attention of those likely to be interested in, or affected by, the relevant project*' (regulation 9(2A)(a)), alongside the specific requirement in regulation 9(2A)(b) to put the notice, application for consent and environmental statement on a public website. The advertisement in the Telegraph and the local Aberdeen newspaper elicited no public attention at all and it was not subsequently searchable electronically. On the Scottish advertising website the notice is not in the 'public notices' section or available by its search facility. The notice given by BP

was not likely to come to the attention of the public concerned.

28. In particular, there was a failure to inform the "*public concerned*" such as environmental non-governmental organisations, including the appellant, despite the fact that it was relatively simple to do so.

29. Article 6(5) requires *'the relevant information to be electronically accessible to the public, through at least a central portal or easily accessible points of access, at the appropriate administrative level*'. Properly construed, this is a reference to being electronically accessible through a government website, since administrative levels refer to government rather than private bodies. An example would be a council's website hosting the details of planning applications which are subject to EIA. Putting the information on the applicant's website is insufficient. Most obviously, the public are less likely to look at private companies' websites (and some companies will be less well known than BP or will be newly created special purpose vehicles). The standard of what is displayed, for how long and the recording of the publicity will be clearer on a public authority website. That is a problem in the present case, with the application not appearing to have been published at all, and the Environmental Statement not being on an obvious link.

30. There were no representations from the public at all. Whilst the scheme is in the North Sea, as opposed to on or adjacent to land, it was of interest to those concerned with the environment – particularly on marine and climate change matters – and fishing and shipping interests in the area. That none of them commented points to the failure of the publicity to accord with the statutory requirements.

31. The Environmental Statement is on the BP website, but the statutory notice is not. Under regulation 9(2A) they have to be 'alongside' on the same website. It was not published on a "*central portal, or easily accessible point of access, at the appropriate administrative level"*: Article 6(5).

32. For the foregoing reasons, the publicity requirements in the 1999 Regulations and the publicity actually carried out in this case were inadequate to comply with the Directive.

Publication of the decisions

33. As a result of the failure to transpose the EIA Directive, the appellant was denied the opportunity under regulation 16 to challenge the decision by the OGA to grant the consent. By publishing the fact of the OGA consent in the Gazettes on 3rd April 2020, Article 11 of the EIA

Directive was complied with to that extent. However, Article 9 of the EIA Directive has not been complied with. The EIA Directive has direct effect. The Vorlich consents have not been published. Incorporated into the consent is the Vorlich Field Development Plan dated September 2018. That document has not been provided to the appellant. It is not possible to see what the consented works are without the approved documents that describe them. The OGA's '*main reasons and considerations on which the decision is based*' have not been provided to the appellant. This is contrary to Article 9(1)(b) of the EIA Directive. The OGA refers to Extended Well Consent tests. These have not been published or provided to the appellant. None of these documents have been made available to the public. That is a breach of the requirements of publication under the EIA Directive as set out above.

34. The failure to make available the unredacted OGA consent, the incorporated plan and the OGA's reasons, as set out above, is a breach of article 9 and article 11 of the EIA Directive. A person cannot know if he or she is aggrieved by a decision and therefore wishes to make an application under regulation 16 if he or she is unaware of the full details of the decision. This challenge has had to be formulated with only a partial copy of the decision. That is not in accordance with the requirements of the EIA Directive as set out above.

Publicity of the additional information

35. Material relevant to the EIA decision must be made available to the public concerned where it is received following the submission of the application: Article 6(3). Regulation 10(2) requires notice to be published and the material made available if in the Secretary of State's opinion it is '*of material relevance to his decision as to whether to grant consent'*. As set out in the chronology above, the Minister requested additional information (the "Additional Information") when the BP/Ithaca application was submitted in June/ July 2018. The Secretary of State's Environmental Statement Summary referred explicitly to the Additional Information three times. He did therefore find it of '*material relevance to his decision*'.

36. This Additional Information has not been published. The Additional Information should have been published. The Secretary of State should have insisted on the Additional Information being published. Having not done so is a failure to abide by regulation 10 of the 1999 Regulations.

Climate change from the operation of the field

37. The Environmental Statement assessed the contribution to greenhouse gas emissions which the proposed operation of the oil and gas field would generate. In the operational stage this would be by burning oil and gas in flaring. The measure given was Global Warming Potential

(GWP) (see Environmental Statement ("ES") para 5.3.1.1). The ES said that flaring would take place once a year for 4 days, burning 1572 tonnes of oil and 690 tonnes of gas a day (see ES table 5-6) but also provided different figures of 1,175 tonnes of oil and 788,563 m^3 of gas a day (para 3.5.6). Table 5-6 showed the daily tonnages burnt, multiplied by the number of days' burning for an annual total and then by 10 for a 10 year figure (so 40 days each for oil and gas).

38. The Additional Information said that that table and paragraph 3.5.6 were inconsistent and sought to correct the table. The 'corrected' table showed a tonnes/day use of 2350 tonnes occurring for two days which was said to give a total fuel use of 2350 tonnes. Over the 10 year field life the daily usage was 11,750 tonnes of oil with a total oil use of 11,750 tonnes over 10 days. The figures simply do not make sense mathematically, and the altered table appears to have overlooked, at the least that each event would last four days (96 hours) see para 3.5.6.

39. The adverse contribution of the scheme's operation to climate change was misstated and understated. These errors of fact (which amounted to legal errors – *E v Home Secretary* [2004] QB 1044) were not identified by the Secretary of State when he was considering the application. The ES forms an essential part of the decision making process for the Secretary of State: Regulation 5A. Incorrect information in the ES undermines the factual basis on which any decision to agree to a grant of consent is based. It amounts to a failure to take account of a material fact relevant to the decision. The decision should be reduced and sent back to the decision-maker to be made again in accordance with the appropriate procedures.

40. Since the Additional Information was not advertised or published in any form and this material was not made available to Greenpeace until after the commencement of proceedings, it was impossible for Greenpeace or any other member of the public or NGO to draw attention to the errors and to comment on the higher Greenhouse gas emissions. The right of the appellant (and the public at large) was undermined as a result of not being able to consider and challenge the grant of consent on the basis of this error. The appellant's interest as an interested environmental campaign group and being 'the public concerned' were substantially prejudiced as a result of the decision not to publish this material in accordance with the requirements of the 1999 Regulations and the EIA Directive.

Climate change from the consumption of the oil and gas

41. As at 2018, the Climate Change Act 2008 imposed a '*duty on the Secretary of State to ensure that the net UK carbon account is at least 80% lower*' (from carbon dioxide and other targeted greenhouse gases) than the 1990 baseline: s 1. From 27th June 2019 that was replaced with

a 100% reduction: so net carbon neutrality. The Secretary of State is required to set carbon budgets for five year periods (s 4) with minimum percentage reductions being required (s 5).

42. Oil which is produced will be consumed in ways which generate greenhouse gas emissions, in addition to the more modest level of emissions generated by the oil exploration and exploitation process. The effect of the consumption of oil on climate change is relevant to the determination of consent for that well, including a consideration of whether the new oil source will increase oil consumption or merely displace imported oil. The relevance of this issue has been accepted by the Courts for onshore shale gas extraction and coal mining: *R(Stephenson) v Secretary of State for Communities and Local Government* [2019] EWHC 519 (Admin) §§ 67, 68). The Commission on Climate Change was required to report on the likely impact of the combustion and fugitive emissions of petroleum got through onshore activity on the carbon budget: Infrastructure Act 2008, s 49. In doing so it devised three tests. Those tests remain in place and must be passed in order for shale gas extraction to be consistent with the requirements of the 2008 Act: *Stephenson* at §72. Test 2 was:
"*Consumption- gas consumption must remain in line with carbon budgets requirements. UK unabated fossil energy consumption must be reduced over time within levels we have previously advised to be consistent with the carbon budgets. This means that UK shale gas production must displace imported gas rather than increasing domestic consumption*." (*Stephenson* at § 9)

43. Similarly the effect of burning coal on climate change was relevant to whether planning permission should be granted for coal extraction, whilst there was a need to consider whether not producing the coal domestically would encourage lower carbon energy sources or just be replaced by imported coal: *H J Banks & Co Ltd v Secretary of State for Housing, Communities and Local Government* [2018] EWHC 3141 (Admin), [2019] PTSR 668 at para 94-96,102-106 per Ouseley J.

44. BP's Environmental Statement considered the generation of greenhouse gases from the oil field development and production process, including flaring, (para 5.3.1.1,6.5) but did not consider the effect of consuming the oil produced by the field. The Secretary of State's Environmental Statement Summary listed under Key Environmental Impacts 'Atmospheric emissions' as identified and discussed in the Environmental Statement. It said that further information requested included '*clarification on atmospheric emissions*'. There was no mention of climate change or greenhouse gases, or any expansion on atmospheric emissions as a topic. The Secretary of State failed to consider at all whether the consumption of the oil produced from Vorlich would affect carbon emissions, climate change and the Secretary of

State's duties under the Climate Change Act: *R (Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214.

45. If oil is extracted from the Vorlich field it will be processed and consumed, usually in ways which will add significant quantities of carbon dioxide to the atmosphere and so contribute to climate change. If the oil is not extracted and remains under the seabed then it will not generate carbon dioxide and will not contribute to climate change. Carbon emissions will be an inevitable consequence of allowing extraction.

46. The effect of consuming the oil – in practice mainly burning it – is a relevant consideration in the determination of the application for an OGA licence and the Secretary of State's consideration of the environmental impacts. That the effect of consuming coal or gas is relevant to the determination of an application for its exploration or extraction has been established by the Courts: *Stephenson*; *H J Banks*.

47. Whether policy is to continue using oil and gas for sometime into the future, does not alter the effect of the consumption of the oil and gas extracted from the Vorlich field on the environment. If the consent was not granted then these hydrocarbons would not be extracted, they would not be used and greenhouse gases would not be emitted as a result of their use. Preventing their use would reduce the overall use of oil and gas and encourage moves to less.

48. Additionally, the 1999 Regulations require the Environmental Statement to include '*A description of the relevant project, including in particular, … an estimate, by type and quantity, of expected residues and emissions (such as water, air, soil and subsoil pollution … produced during the construction and operation phases*'; describe the factors '*likely to be significantly affected by the project*' including '*climate (for example greenhouse gas emissions*' (Schedule 2, para 4). The statement would contain '*A description of the likely significant effects of the project on the environment resulting from … the emission of pollutants … the impact of the project on climate (for example the nature and magnitude of greenhouse gas emissions) … these descriptions … must 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 project and should take into account environmental protection objectives established at EU or at national level relevant to the project.*' (Schedule 2, para 5). The environmental protection objectives established at national level will include the Climate Change Act 2008, which set a "carbon target" for the United Kingdom to reduce its greenhouse gas emissions by 80% from their level in 1990, by 2050 (s1). The Paris

Agreement of December 2015 set a commitment to reduce temperature rises, and so greenhouse gas emissions, to a lower level than had been anticipated in the 2008 Act. The Paris Agreement is, and was at the relevant time, government policy.

49. The consumption of the oil and gas extracted under the project is, at the very least, an indirect or secondary effect of the project. Its effects needed to be considered and were relevant to the merits of the proposal. The appellant would have made all of these representations to the Secretary of State if the application, agreement and grant of consent had been publicised in the manner in which the 1999 Regulations and the EIA Directive envisage. The failure by the Secretary of State to ensure compliance with the 1999 Regulations *et separatim* the EIA Directive has substantially prejudiced the appellant's ability to make such representations. The effects of oil and gas extraction under the development are relevant to the government's policy to reduce greenhouse gas emissions. The Secretary of State has failed to take account of government policy to reduce greenhouse gas emissions. The decisions should be reduced and the Secretary of State should carry out the process *de novo* in order that the correct publication can be carried out, the appellant can make all appropriate and necessary representations in relation to it and government policy is taken into account.

50. The questions of law for the opinion of this court are:

    1. Whether the appellant is a person aggrieved by the decision of the Oil and Gas Authority to grant consent to BP Exploration Operating Company Ltd for the field development Vorlich Project and by the decision of the Secretary of State for Business Energy and Industrial Strategy to agree to the granting of such consent, its interests having been substantially prejudiced by the failures of the respondents to comply with the Offshore Petroleum Production and Pipe-lines (Assessment of Environmental Effects) Regulations 1999.

    2. Whether the appellant is a person aggrieved by the decision of the Secretary of State for Business Energy and Industrial Strategy to agree to the granting by the Oil and Gas Authority of consent to BP Exploration Operating Company Ltd for the field development Vorlich Project that decision having been made in contravention of the Offshore Petroleum Production and Pipe-lines (Assessment of Environmental Effects) Regulations 1999.

    3. Whether the appellant is a person aggrieved by the decision of the Secretary of State for Business Energy and Industrial Strategy to agree to the granting by the Oil and Gas Authority of consent to BP Exploration Operating Company Ltd for the field development Vorlich project that decision having been made in breach of the Directive 2011/92/EU as

amended by Directive 2014/52/EU.

4. Whether the decisions should be reduced.

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Our Ref: JLJ/543174
Solicitor for Appellant

SCHEDULE FOR SERVICE

PART 1: RESPONDENT(S)

1. THE ADVOCATE GENERAL FOR SCOTLAND, Victoria Quay, Edinburgh EH6 6QQ
2. THE OIL AND GAS AUTHORITY, AB1 Building, 48 Huntly Street, Aberdeen AB10 1SH

PART 2: INTERESTED PERSON(S)

1. BP EXPLORATION OPERATING COMPANY LTD, Chertsey Road, Sunbury On Thames, Middlesex, TW16 7BP
2. THE LORD ADVOCATE, Victoria Quay, Edinburgh EH6 6QQ
3. ITHACA ENERGY (UK) LIMITED, 13 Queen's Road, Aberdeen AB15 4YL

IN THE COURT OF SESSION

ANSWERS

For

THE RIGHT HONOURABLE THE LORD KEEN OF ELIE QC, THE ADVOCATE GENERAL FOR SCOTLAND, for and on behalf of **THE SECRETARY OF STATE FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY**, having offices situated at Victoria Quay, Edinburgh, EH6 6QQ

First Respondent

To the Appeal to the Court of Session under regulation 16 of the Offshore Petroleum Production and Pipeline (Assessment of Environmental Effects) Regulations 1999

by

GREENPEACE LIMITED, a company incorporated under the Companies Acts with registered number 01314381 and having its Registered Office at Greenpeace House, Canonbury Villas, London, N1 2PN

Appellant

against

Decisions of the Secretary of State for Business, Energy and Industrial Strategy and of the Oil and Gas Authority dated 7th August 2018 and communicated by notice on the London, Edinburgh and Belfast Gazettes dated 3rd April 2020

Answers to the Grounds of Appeal

1. The Offshore Petroleum Production and Pipe-lines (Assessment of Environmental Effects) Regulations 1999 (the "1999 Regulations") are referred to for their terms beyond which no admissions are made. *Quoad ultra*, denied. Explained and averred that the appellant fails to identify any material breach of regulation 5(4) or regulation 5A(1)(a) of the 1999 Regulations. *Separatim, esto* the appellant identifies a material breach of the 1999 Regulations, which is denied, the Court should, in the exercise of its discretionary powers, refuse to reduce the grant of consent.

2. Directive 2011/92/EU as amended by Directive 2014/52/EU is referred to for its terms beyond which no admissions are made. *Quoad ultra*, denied. Explained and averred that it is not competent to seek to challenge a purported breach of a European Directive in the context of an appeal under regulation 16 of the 1999 Regulations. Regulation 16 of the 1999 Regulations only allows a challenge to be brought in relation to failures to comply with the provisions of the 1999 Regulations. Regulation 16 of the 1999 Regulations states that:

(1) On the application of any person aggrieved by the grant of consent in respect of a relevant project in relation to which an environmental statement was required to be submitted by virtue of regulation 5(1) above (agreement of Secretary of State in respect of relevant projects), ***the court may grant an order quashing the grant of consent where it is satisfied that the consent was granted in contravention of regulation 5(4) or regulation 5A(1)(a) above (consideration of environmental statement etc.) or that the interests of the applicant have been substantially prejudiced by any failure to comply with any other requirement of these Regulations****."* (Emphasis added by the First Respondent)

Separatim, *esto* this ground of challenge is competent in the context of an appeal in terms of regulation 16 of the 1999 Regulations, which is denied, the appellant fails to identify any material breach of Directive 2011/92/EU (as amended by Directive 2014/52/EU) (the "EIA Directive"). *Separatim, esto* the appellant identifies a material breach of the EIA Directive, which is denied, the Court should, in the exercise of its discretionary powers, refuse to reduce the grant of consent.

3. Admitted that: the appellant is a person aggrieved by the decision of the Oil and Gas Authority to grant consent to BP Exploration Operating Company Ltd for the field development Vorlich Project and by the decision of the Secretary of State for Business Energy and Industrial Strategy to agree to the granting of such consent. The 1999 Regulations are referred to for their terms beyond which no admissions are made. *Quoad ultra*, denied. Explained and averred that the appellant fails to identify any material breach of the 1999 Regulations. *Esto* the appellant identifies any material breach of the 1999 Regulations, which is denied, any such breach has not substantially prejudiced the interests of the appellant. The Court should, in the exercise of its discretionary powers, refuse to reduce the grant of consent.

ANSWERS FOR THE FIRST RESPONDENT TO THE FACTUAL AND LEGAL AVERMENTS IN SUPPORT OF GROUNDS OF APPEAL

1. Admitted that: the appellant is as designed in the instance; the respondents are designed in Part 1 of the Schedule for Service under explanation that the Advocate General for Scotland is representing the Secretary of State for Business, Energy and Industrial Strategy; service is sought in common form on those designed in Part 2 of the Schedule for Service for any interest that they may have in this appeal; the appellant seeks to appeal under explanation that the right of appeal is in relation to the grant of consent under a licence for an oil field; the appellant brings this appeal in terms of regulation 16 of the Offshore Petroleum Production and Pipe-lines (Assessment of Environmental Effects) Regulations 1999 (the "1999 Regulations") under explanation that the appellant has also raised a judicial review that contains the same grounds of challenge as those set out in this appeal. Believed to be true that: the appellant is the autonomous regional office of Greenpeace, a campaigning

organisation which has, as its main object, the protection of the natural environment; *Quoad ultra*, denied.

2. Admitted that: on 3 April 2020, the respondents published in the London, Edinburgh and Belfast Gazettes (the "Gazettes") notice of the Secretary of State for Business Energy and Industrial Strategy's decision to agree to the grant of consent for the Vorlich field development project on 7th August 2018 and notice of the Oil and Gas Authority's grant of consent for the Vorlich field development project; and that these proceedings are brought within six weeks of that publication. *Quoad ultra*, denied.

3. Admitted that the appellant seeks the remedies set out in the petition under explanation that there is no merit in the grounds of challenge and the appeal should be refused. *Quoad ultra*, denied.

4. Admitted that: BP Exploration Operating Company Ltd ("BP") and Ithaca Energy (UK) Ltd ("Ithaca") have a licence to search and bore for and get petroleum in the Vorlich field; consent has to be obtained under explanation that the consent must be obtained from the OGA; BP and Ithaca sought permission *inter alia* for the drilling of wells and oil production in April 2018; consent for these activities is granted by the OGA but an Environmental Impact Assessment is carried out by the Secretary of State (at BEIS) under the 1999 Regulations, under explanation that the Environmental Impact Assessment is undertaken by the Offshore Petroleum Regulator for Environment and Decommissioning ("OPRED"), which is part of the Department for Business, Energy and Industrial Strategy ("BEIS"); by reg 5A(1) "*The OGA shall not grant a consent in respect of a relevant project without the agreement of the Secretary of State*."; approval was given by the Secretary of State and

consent then granted by the OGA under explanation that consent by the Secretary of State is a pre-condition to any grant of consent by the OGA. *Quoad ultra*, denied. Explained and averred that the First Respondent is responsible for completing the Environmental Impact Assessment. The assessment is completed by OPRED, which is part of BEIS. The OGA is not involved in assessing the environmental impact of the proposed production and development of fields such as Vorlich. The scrutiny undertaken by the OGA, prior to determining whether to grant consent, relates to technical, financial and competency matters connected with the proposed development. Other than the First Respondent's consent on the Environmental Impact Assessment process being a pre-requisite for the grant of consent by the OGA, the OGA's grant of consent and the reasons for that grant are unconnected to environmental matters covered by the 1999 Regulations and the EIA Directive. In respect of offshore activities, the OGA is subject to the principal objective set out at section 9A of the Petroleum Act 1998, namely "*maximising the economic recovery of UK petroleum*".

5. Admitted that: the OGA granted consent; the Secretary of State agreed to the grant of consent; there was a failure to publish a notice when it was granted; this failure was the subject of a judicial review challenge by the appellant in the English Courts (the "English proceedings") under explanation that the English Proceedings also sought to challenge a range of other matters including the lawfulness of the transposition of the EIA by the First Respondent; following the grant of permission in the English proceedings, the Secretary of State undertook to publish the details of the grant of consent in the Gazettes for the purposes of commencing the time for lodging a challenge in accordance with regulation 16 of the 1999 Regulations; this appeal is the challenge in accordance with that regulation; the appellant has lodged a petition for judicial review to challenge the consents, under

explanation that the judicial review contains the same challenges as the appellant seeks to make in this appeal; regulation 16 provides the appellant with a right to challenge the consents under explanation that it is clear that the proper procedure to bring a challenge under regulation 16 of the 1999 Regulations is a statutory appeal in terms of chapter 41 of the Rules of the Court of Session. The English proceedings are referred to for their terms beyond which no admissions are made. *Quoad ultra*, denied.

6. Admitted that: the European Parliament and Council has published a directive on the assessment of the effects of certain public and private projects on the environment; that directive has been amended from time to time; the current version of the directive is Directive 2011/92/EU as amended by Directive 2014/52/EU (the "EIA Directive"); the UK Government purportedly transposed the EIA into domestic law by way of the 1999 Regulations under explanation that in both *R (Garrick-Maidment) v Secretary of State for Business, Energy and Industrial Strategy* ("*Garrick-Maidment*") and the English Proceedings, the First Respondent accepted that the EIA Directive is not fully transposed by the 1999 Regulations and the First Respondent is in the process of conducting a comprehensive review of the 1999 Regulations. *Quoad ultra*, denied. Explained and averred that in *Garrick-Maidment*, the First Respondent entered into a consent order. In terms of the consent order, the First Respondent accepted that regulations 5A, 6, 9 and 16 of the 1999 Regulations did not fully transpose Articles 9 and 11 of the EIA Directive and this error of transposition should be remedied. In the short-term this has involved changing the working practices of OPRED and the OGA and carrying out a detailed review of the 1999 Regulations and the associated working practices. The First Respondent is committed to amending the 1999 Regulations, following the review and a public consultation. The review commenced in October 2019. The initial review stage has been completed. New

draft Regulations have been prepared and BEIS is expecting to go out to public consultation on the new Regulations this summer. The new replacement regulations are expected to come into force before the end of 2020.

7. The EIA Directive and the cases cited by the appellant are referred to for their terms beyond which no admissions are made. *Quoad ultra*, denied. Explained and averred that Article 6(5) of the EIA Directive expressly leaves to the Member States the task of determining the detailed arrangements both for informing the public and for consulting the public concerned (*Flausch v Ypourgos Perivallontos kai Energeias* Case C-289/18 ("Flausch") at paragraph 26). The 1999 Regulations are effective in enabling the public to participate in the environmental decision-making process. In terms of European Union Law, the 1999 Regulations comply with the principle of effectiveness. They do not render it impossible, or in practice or excessively difficult, for the public to the exercise of rights conferred by the EIA (*Danqua*, C-429/15, EU:C:2016:789, paragraph 29).

8. Admitted that: the '*exclusive right of searching and boring for and getting petroleum'* is vested in Her Majesty: Petroleum Act 1998, s 2; the OGA may license persons '*to search and bore for and get petroleum*': s 3(1); the licensing process is subject to various regulations. *Quoad ultra*, denied.

9. Admitted that: the relevant EIA Regulations are the 1999 Regulations; these apply to '*relevant projects'* which include '*a development*': reg 3(1); the 1999 Regulations are the regulations that are applicable in the instant circumstances. *Quoad ultra*, denied.

10. Admitted that: the United Kingdom has chosen to split the approval regime between the grant of a consent and the EIA process; the grant of a consent is given by the OGA; the EIA process is regulated by the Secretary of State; the OGA is not permitted to grant a consent without the agreement of the Secretary of State: 1999 Regulations, reg 5(A1). *Quoad ultra*, denied.

11. Regulation 5A(1)(a) is referred to for its terms beyond which no admissions are made. *Quoad ultra*, denied.

12. Admitted that: an EIA must be carried out: 1999 Regulations, reg 5(1); regulation 5A is part of the EIA; where an environmental statement is submitted by an applicant, the Secretary of State must not make a decision under regulation 5A(1)(c) unless the Secretary of State is satisfied that the requirements of regulations 9 and 10 have been substantially met and that, where necessary, advice has been obtained from persons with appropriate expert knowledge: 1999 Regulations, reg 5(4). *Quoad ultra*, denied. Explained and averred that, subject to certain exceptions, a developer must submit an environmental statement. This is an important part of the EIA.

13. Regulation 5(4) is referred to for its terms beyond which no admissions are made. *Quoad ultra*, denied.

14. Admitted that: an undertaker who submits an environmental statement with an application for consent must publicise it and make it available; the undertaker is required to serve copies of the statement and application on the public authorities specified by the Secretary of State; the undertaker is required to make copies available for public inspection; the

undertaker is required to provide copies of the environmental statement to those that request it; the undertaker is required to publish a notice of the application and the availability of the environmental statement; where a notice is published under regulation 9(2A), the undertaker must publish the notice (i) on such occasions as to be likely to come to the attention of those likely to be interested in or affected by the relevant project and (ii) in such newspapers as the Secretary of State may direct and on a public website and the undertaker shall publish a copy of the application for consent and the environmental statement on that website alongside the notice. A public website means a website accessible to the public where the public can view and download information placed upon it. The 1999 Regulations are referred to for their whole terms, which are admitted, and beyond which no admission is made. *Quoad ultra*, denied. Explained and averred that in terms of regulation 9(2)(f) of the 1999 Regulations, the undertaker must publish a notice setting out prescribed information. In terms of regulation 9(2A) of the 1999 Regulations:

"The undertaker shall publish the notice referred to in paragraph (2)(f) above—

(a) on such occasions as to be likely to come to the attention of those likely to be interested in, or affected by, the relevant project; and

(b) in such newspapers as the Secretary of State may direct and on a public website and the undertaker shall publish a copy of the application for consent and the environmental statement on that website alongside the notice."

Regulation 3(1) defines "*public website*" as meaning:

"…a website accessible to the public where the public can view and download information placed upon it"

15. Admitted.

16. Regulation 16(1) of the 1999 Regulations is referred to for its terms beyond which no admissions are made. *Quoad ultra*, denied. Explained and averred that regulation 16 provides a right of challenge to a party aggrieved by the grant of consent. The ground of challenge is restricted to a consent granted in contravention of the 1999 Regulations. Wider challenges, such as to the transposition of the EIA, cannot competently be brought in the context of a challenge under regulation 16 of the 1999 Regulations. Reference is made to the answer to ground of appeal 2.

17. Regulation 5(4) and 5A(1)(a) are referred to for their terms beyond which no admissions are made. *Quoad ultra*, denied. The appellant is called upon to make relevant and specific averments as to how its interests have been "*substantially prejudiced*". Its failure to answer this call will be founded upon. Explained and averred that the appellant fails to identify any breach of regulation 5(4) or 5A(1)(a) of the 1999 Regulations. It fails to identify any other breach of the 1999 Regulations that substantially prejudiced the interests of the appellant. Even if the applicant has identified a breach of the 1999 Regulations, which is denied, the Court retains a discretion in relation to whether to reduce the grant of consent. Regulation 16 clearly states that the Court "*may*" grant an order. Moreover, reduction is a discretionary remedy (*King v East Ayrshire Council* 1998 SC 182 at p194-196). In the circumstances of the present case, the Court should, in the exercise of its discretion, refuse to pronounce the remedy sought.

18. Admitted that: the original licences were granted to BP Petroleum Development Limited on 24th March 1981; and that original licences were subsequently transferred to BP and Ithaca. *Quoad ultra*, denied. Explained and averred that the Appellant refers to superseded

legislation. The current model clauses are contained in the Petroleum Licensing (Production) (Seaward Areas) Regulations 2008 (S.I. 2008/225).

19. Admitted that: the BP/ Ithaca application for consent was submitted in early 2018; the application included a Field Development Plan; the Secretary of State requested further information on or around 19th June 2018; the further information requested included habitat assessment and environmental baseline survey reports; in August 2018, the Secretary of State published an Environmental Statement Summary; the Environmental Statement Summary is the agreement to the issue of the consent, under explanation that the agreement is a pre-condition to the grant of consent by the OGA and the decision on whether or not to grant the consent remains that of the OGA; the Environmental Statement Summary was not published at the time in the Gazettes; on or around 20th September 2018, the OGA granted consent for carrying out works "*described in the document entitled 'Vorlich Field Development Plan' dated September 2018*"; the OGA consent letter has not been made publicly available; the development plan has not been released. *Quoad ultra*, denied. Explained and averred that there is no requirement for the Environmental Statement Summary to be published in the Gazettes. That Summary was, however, published on the www.gov.uk website. There is no requirement for the OGA consent letter to be made publicly available.

20. Admitted that: the Secretary of State published in the Gazettes notice of various Environmental Statement Decisions including in relation to the Vorlich field, under explanation that this was in July 2019; the English proceedings were commenced on or around 7th November 2019; the consent order in the English Proceedings was issued on or around 3 April 2020; on 3 April 2020, notice of (i) the Secretary of State's agreement to

the consent and (ii) the OGA grant of consent in relation to the Vorlich field were published in the Gazettes. The pre-action correspondence, the consent order and the notices in the Gazettes are referred to for their terms beyond which no admissions are made except insofar as coinciding herewith. *Quoad ultra*, denied.

21. Admitted that: regulation 16 of the 1999 Regulations permits an application to this Court by a person aggrieved by a grant of consent by the OGA under explanation that regulation 16 sets out the grounds of challenge that are permitted and provides that the Court may grant an order quashing the grant of consent where it is satisfied that the consent was granted in contravention of the 1999 Regulations; regulation 16(3) requires that such an application be brought within six weeks of the details of the grant being published in the Gazettes; the Secretary of State accepted in the English Proceedings that the previous failure to publicise details of the OGA's grant of consent arose from an error in the transposition of the EIA Directive into domestic law; the 1999 Regulations fail to transpose the EIA Directive *quoad* publication of the grant of consent under explanation that this was conceded in the English proceedings. Article 9 of the EIA Directive and regulation 16 of the 1999 Regulations are referred to for their terms beyond which no admissions are made except insofar as coinciding herewith. *Quoad ultra*, denied. Explained and averred that it is neither competent nor appropriate for the applicant to seek to challenge the transposition of the EIA Directive into domestic law in the present appeal. Regulation 16 of the 1999 Regulations only allows a challenge to be brought in relation to failures to comply with the provisions of the 1999 Regulations. Regulation 16 of the 1999 Regulations states that:

(1) On the application of any person aggrieved by the grant of consent in respect of a relevant project in relation to which an environmental statement was required to be

submitted by virtue of regulation 5(1) above (agreement of Secretary of State in respect of relevant projects), ***the court may grant an order quashing the grant of consent where it is satisfied that the consent was granted in contravention of regulation 5(4) or regulation 5A(1)(a) above (consideration of environmental statement etc.) or that the interests of the applicant have been substantially prejudiced by any failure to comply with any other requirement of these Regulations****."* (Emphasis added by the First Respondent)

Accordingly, there is no competent basis to seek to challenge the transposition of the EIA Directive in the context of the present appeal. *Separatim*, this issue was raised by the appellant in the English Proceedings. It was resolved by way of a consent order. The issue is *res judicata*. *Separatim*, any such challenge is both unnecessary and inappropriate. The First Respondent accepted in the English Proceedings that the 1999 Regulations do not fully transpose the Directive and had already agreed to change working practices, undertake a review of the 1999 Regulations and consult on proposed changes to the 1999 Regulations. Reference is made to the averments in answer 6. In the English Proceedings, the First Respondent accepted that the grant of consent should be the subject of a published notice. A notice was duly published. Accordingly, any failure to publish a notice at an earlier point in time has caused no prejudice to the applicant. *Esto* the appellant identifies a material breach of the 1999 Regulations, which is denied, the Court should, in the exercise of its discretionary powers, refuse to reduce the grant of consent. No useful purpose would be served by the matter being re-litigated. A notice has been served and the applicant has a right of appeal in terms of regulation 16.

22. Article 6 of the EIA Directive and the case cited by the appellant are referred to for their terms beyond which no admissions are made. *Quoad ultra*, denied. Explained and averred

that it is neither competent nor appropriate for the applicant to seek to challenge the transposition of the EIA into domestic law in the present appeal. Reference is made to the averments in answer 21. *Separatim*, explained and averred that the 1999 Regulations comply with the requirements of Article 6 of the EIA. Articles 6(4) and (5) of the EIA states that:

"(4) The public concerned shall be given early and effective opportunities to participate in the environmental decision-making procedures referred to in Article 2(2) and shall, for that purpose, be entitled to express comments and opinions when all options are open to the competent authority or authorities before the decision on the request for development consent is taken.

(5) The detailed arrangements for informing the public, for example by bill posting within a certain radius or publication in local newspapers, and for consulting the public concerned, for example by written submissions or by way of a public inquiry, shall be determined by the Member States. Member States shall take the necessary measures to ensure that the relevant information is electronically accessible to the public, through at least a central portal or easily accessible points of access, at the appropriate administrative level."

It is for the Member State to determine how the public are notified. The 1999 Regulations require the operator to publish a notice regarding their submission in newspapers and online. The documents and notice are also published on the operator's website. Where further information is required to be made available to the public, such as under regulation 10 of the 1999 Regulations, the operator will be instructed to publish notices in the same way as the original notice, and to publish the further information alongside the original documentation. The UK Government website, GOV.UK (OPRED pages), holds details of all Environmental Statements received, including the project type, company, public notice end date and a name and number of the operator contact. The uploaded spreadsheet states

'*The purpose of this list is to provide details of the ES currently being considered by the Department and provide contact details for further information.*' The provisions for notification set out in the 1999 Regulations are adequate and comply with the EU law principle of effectiveness. *Esto* there has been a failure to transpose the EIA Directive, which is denied, any such error is not material in the present case. The appellant was aware of the application made by BP for the consent. It has had an adequate opportunity to be involved in the process and to make such representations as it deems appropriate.

23. The EIA Directive and the 1999 Regulations are referred to for their terms beyond which no admissions are made. *Quoad ultra*, denied. Explained and averred that the 1999 Regulations make provision for notices to be published in newspapers. The 1999 Regulations also provide for the information to be made available on a website accessible to the public.

24. Denied. Explained and averred that Article 6(2) of the EIA Directive provides that in order to ensure the effective participation of the public concerned in the decision-making procedures, the public *"…shall be informed electronically and by public notices or by other appropriate means…"* of the relevant issues. It is for the Member State to determine the precise mechanisms for informing the public. The 1999 Regulations require newspaper notices as well as information to be made available on a public website. The 1999 Regulations comply with these requirements of the EIA Directive.

25. The 1999 Regulations are referred to for their terms beyond which no admissions are made. *Quoad ultra*, denied. Explained and averred that it is neither competent nor appropriate for the applicant to seek to challenge the transposition of the EIA Directive into domestic law

in the present appeal. Reference is made to the averments in answer 21. *Separatim, esto* there has been a failure to transpose the EIA Directive, which is denied, any such error is not material in the present case. The appellant was aware of the application made by BP for the consent. It has had an adequate opportunity to be involved in the process and to make such representations as it deems appropriate.

26. Admitted that the 1999 Regulations require the publication of the notice on a website which the public can access. The EIA Directive and the 1999 Regulations are referred to for their terms beyond which no admissions are made. *Quoad ultra*, denied.

27. Admitted that BP were obliged to publish the notice '*on such occasions as to be likely to come to the attention of those likely to be interested in, or affected by, the relevant project'* (regulation 9(2A)(a)), alongside the specific requirement in regulation 9(2A)(b) to put the notice, application for consent and environmental statement on a public website. The advertisement in the Telegraph and the local Aberdeen newspaper are referred to for their terms beyond which no admissions are made. *Quoad ultra*, denied. Explained and averred that it is neither competent nor appropriate for the applicant to seek to challenge the transposition of the EIA Directive into domestic law in the present appeal. Reference is made to the averments in answer 21. *Separatim, esto* there has been a failure to transpose the EIA Directive, which is denied, any such error is not material in the present case. The appellant was aware of the application made by BP for the consent. It has had an adequate opportunity to be involved in the process and to make such representations as it deems appropriate. Further explained and averred that Member States must ensure that the information channels used may reasonably be regarded as appropriate for reaching the members of the public concerned, in order to give them adequate opportunity to be kept

informed of the activities proposed, the decision-making process and their opportunities to participate early in the procedure (*Flausch*, paragraph 32). The 1999 Regulations place the duty to publish the ES and press notices on the undertaker. Formal notice of the application was published in two newspapers. One of those newspapers has national coverage. The other is likely to be read by persons with an interest in oil and gas developments in the North Sea. A link was provided to BP's website, which was available to the public, where the ES, the application for consent and details of how representations could be made could be accessed. BP issued a press release on 10 April 2018 entitled '*BP commits to two new North Sea developments*', which announced the submission of the Vorlich development Environmental Statement. There was same day online coverage by the BBC, the Mirror and the Financial Times, as well as industry press (Oil and Gas UK, Subsea World News, Offshore Energy Today). There was a further press release by BP on 27 September 2018 entitled '*BP receives OGA approval to develop Vorlich field in North Sea*'. This was covered by BBC online, industry and Scottish press , as well as Friends of the Earth Scotland issuing a press release highlighting their concerns regarding the approval. An article in The Independent on 22/10/18 focused on environmental groups' reaction to BP being given consents to produce oil in the North Sea. The Vorlich consent is mentioned expressly, and comments were given by Greenpeace's Chief Scientist.

28. Denied. Explained and averred that the appellant was (and other environmental non-governmental organisations were) well aware of the application that was made by BP for the consent. The appellant has had an adequate opportunity to be involved in the process and to make such representations as it deems appropriate.

29. Admitted that article 6(5) requires '*the relevant information to be electronically accessible to the public, through at least a central portal or easily accessible points of access, at the appropriate administrative level*'. *Quoad ultra*, denied. Explained and averred that publication on a website accessible to members of the public, as was the case here with the Environmental Statement, is sufficient compliance with article 6(5). Properly construed, Article 6(5) of the EIA Directive does not require that the relevant information be electronically accessible via a government website. In any event, in addition to the notices put in local newspapers, and the information on the operator's website, the gov.uk website holds details of all Environmental Statements received. The information on the site includes the project type, company, public notice end date and a name and number of the operator contact. The uploaded spreadsheet states '*The purpose of this list is to provide details of the ES currently being considered by the Department and provide contact details for further information.*' The link is: https://www.gov.uk/guidance/oil-and-gas-environmental-data#offshore-petroleum-production-and-pipelines-assessment-of-environmental-effects-regulations-1999-as-amended. It is a central portal where the relevant information is electronically accessible to the public. The link to BP's website in this case was included in the press notices. BP further publicised the making of the application by public announcement and it received extensive press coverage as narrated above. The publicity in the present case fully complied with all provisions of the EIA.

30. Admitted that there were no representations from the public. *Quoad ultra*, denied. Explained and averred that the mere fact that there were no public representations does not automatically mean that there was a failure to publicise adequately. The making of the application was adequately drawn to the attention of the public by means of the newspaper

notices and public website. Moreover, there was extensive press coverage of the application.

31. Admitted that the Environmental Statement is on the BP website. Regulation 9(2A) and article 6(5) are referred to for their terms beyond which no admissions are made. *Quoad ultra*, denied. Explained and averred that the Respondent acknowledged in the English proceedings that a blank template copy of the notice (rather than the notice itself) was published on the BP website alongside the Environmental Statement. This was an error by BP. Regulation 9(2A) puts this requirement on the undertaker (i.e. BP).

32. The 1999 Regulations and the Directive are referred to for their terms beyond which no admissions are made. *Quoad ultra*, denied. Explained and averred that it is neither competent nor appropriate for the applicant to seek to challenge the transposition of the EIA into domestic law in the present appeal. Reference is made to the averments in answer 21.

33. Admitted that: the respondent failed to transpose the Directive under explanation that this was raised in the English proceedings; the fact of the OGA consent was published in the Gazettes on 3rd April 2020. Articles 9 and 11 of the EIA Directive are referred to for their terms beyond which no admissions are made. *Quoad ultra*, denied. Explained and averred that the First Respondent undertook, in term of the consent order in the English Proceedings, that it would publish notices in the Gazettes. Notices were duly published on 3 April 2020. It is possible to see what the consented works are without the Vorlich Field Development Plan. The development is described comprehensively and adequately in the Environmental Statement.

34. The EIA Directive is referred to for its terms beyond which no admissions are made. *Quoad ultra*, denied. Explained and averred that the OGA decision does not relate to the ES or the impact of the project on the environment. Such decisions are a matter for the First Respondent, acting through OPRED. When the OGA makes its decision, it does not weigh up environmental considerations and balance them against other considerations.

35. Admitted that the Minister requested additional information. Article 6(3) of the Directive, Regulation 10 of the Regulations and the Environmental Statement Summary are referred to for their terms beyond which no admissions are made. *Quoad ultra*, denied.

36. Admitted that the additional information has not been published. Regulation 10 of the Regulations is referred to for its terms beyond which no admissions are made. *Quoad ultra*, denied. Explained and averred that, in terms of regulation 10 of the 1999 Regulations, it is a matter for the discretion of the First Respondent whether to direct that additional information ought to be publicised. Additional material was provided by BP on 6th and 30th July 2018. The First Respondent considered that it neither related to significant effects on the environment nor was of material relevance to the decision to approve the Environmental Statement. BP was therefore not directed to publicise the information or to provide copies to relevant consultees. The First Respondent exercised his discretion. The decision made in respect of the additional material was lawful and rational. The purported ground of challenge is no more than a disagreement with the discretionary decision of the First Respondent.

37. The Environmental Statement is referred to for its terms beyond which no admissions are made. *Quoad ultra*, denied.

38. The Environmental Statement is referred to for its terms beyond which no admissions are made. *Quoad ultra*, denied. Explained and averred that there are some clerical errors apparent in the atmospheric emissions calculations presented within the Environmental Statement and further information. These errors appear in the calculation stages and do not affect the total figures. If the clerical errors had been picked up and corrected at the Environmental Statement stage, it would not have affected the First Respondent's overall conclusion that there was unlikely to be a significant impact on the environment from the atmospheric emissions of the overall project. Accordingly, the error was not material. There has been no substantial prejudice to the appellant.

39. Regulation 5A and the authority cited by the appellant is referred to for its terms beyond which no admissions are made. *Quoad ultra*, denied. Reference is made to the averments in answer 38.

40. The 1999 Regulations and the EIA Directive are referred to for their terms beyond which no admissions are made. *Quoad ultra*, denied. Reference is made to the averments in answer 38.

41. Admitted. Explained and averred that the appellant raised this ground of challenge in the English Proceedings. Ground of challenge 9, in the English Proceedings, was in the following terms

"The Secretary of State failed to take into account a relevant consideration, the effect of the consumption of the oil proposed to be extracted on the UK's carbon budget requirements and so on its contribution to climate change."

Ms Justice Lang refused to grant permission in relation to the above ground. In these circumstances, the appellant is not entitled to seek to re-litigate this issue. The issue was determined in proceedings between the same parties and is *res judicata*. Further explained and averred that the appellant is wrong to suggest that impacts of the use of the produced oil are material to the decision whether to grant consent for a development such as the Vorlich Field. Rather, the carbon budget for the UK is a complex and high level strategic decision. The policy is wide ranging and interacts with the series of carbon budgets which have been set since 2008, for example the fifth Carbon Budget which was set in the Carbon Budget Order 2016. The use of oil forms a part of the UK's energy strategy and will continue to do so, alongside many other measures which ensure a security of energy supply from the most appropriate sources. The issue is a matter of current national energy policy to be found extensively in: the 2017 Clean Growth Strategy (updated in 2018); National Policy Statement for Energy Infrastructure (2011); the UK National Marine Policy Statement 2011; The 2017 Industrial Strategy. Maximising the economic development and recovery of oil and gas resources is a priority of the UK's energy supply and energy security strategies. Indigenous oil and gas development is recognised by the UK Government as being an important part of the UK energy mix during the transition to a low carbon economy and the move towards clean growth. In settling upon these important and overarching strategies for the UK, the carbon impacts of energy use are carefully considered and assessed. The use of the oil to be produced is not part of the development for which consent was sought. The appellant does not argue, nor could it, that the production of oil from the

Vorlich Field increases the use of oil. There is no evidence that such would be the case. Rather, the appellant's case derives from its position that as a matter of principle there should be no new oil. Thus the appellant conflates and confuses different questions. The point as to assessment of effects adds nothing and is in any event inadequately pleaded. The appellant fails to draw attention to the long line of cases which make clear that the scope of environmental assessment is a matter of judgment. It is well-established that it is for the decision maker to assess what information should be in the Environmental Statement, within the constraints detailed in the Directive, and whether the information contained therein is adequate: *R (oao Friends of the Earth Ltd) v North Yorkshire CC* [2017] Env LR 22, per Lang J at [22] citing *R. v Rochdale MBC Ex p. Milne [2001] Env. L.R. 416*; *R. v Cornwall CC, Ex p. Hardy [2001] Env. L.R. 25*; *R. (Blewett) v Derbyshire CC [2004] Env. L.R. 29*. The content of the Environmental Statement is a judgment which may only be challenged on *Wednesbury* grounds. The decision of the respondent was both rational and lawful. The purported ground of challenge is no more than a disagreement with the judgment made by the First Respondent. Further and in any event, the Court should decline to grant orders which would have a disproportionate effect. The prejudice to BP resulting from the granting of the orders sought herein would be substantial, and unwarranted by any defect in the procedures adopted by the First Respondent (no such defect being accepted). In the exercise of its discretion, the Court should decline to grant such orders.

42. The legislation and authorities cited by the appellant are referred to for their terms beyond which no admissions are made. *Quoad ultra*, denied. Reference is made to the averments in answer 41.

43. The authorities cited by the appellant are referred to for their terms beyond which no admissions are made. *Quoad ultra*, denied. Reference is made to the averments in answer 41.

44. BP's Environmental Statement and the Secretary of State's Environmental Statement Summary are referred to for their terms beyond which no admissions are made. *Quoad ultra*, denied. Reference is made to the averments in answer 41.

45. Admitted that if oil is extracted from the Vorlich field it will be processed and consumed. *Quoad ultra*, denied. Reference is made to the averments in answer 41.

46. The authorities cited by the appellant are referred to for their terms beyond which no admissions are made. *Quoad ultra*, denied. Reference is made to the averments in answer 41.

47. Admitted that: if the consent was not granted then these hydrocarbons would not be extracted. *Quoad ultra*, denied. Reference is made to the averments in answer 41.

48. The legislation cited by the Appellant is referred to for its terms beyond which no admissions are made. *Quoad ultra*, denied.

49. The legislation cited by the Appellant is referred to for its terms beyond which no admissions are made. *Quoad ultra*, denied. Reference is made to the averments in answer 41.

50. Admitted that the questions of law for the opinion of the Court are as stated under explanation that it is not competent for the appellant to raise question 3 in the context of a challenge in terms of regulation 16 of the 1999 Regulations. *Quoad ultra*, denied. Explained and averred that the transposition of the EIA Directive is not a matter that can competently be raised in the present appeal. Reference is made to the made in answer to ground of appeal 2. The appellant challenged the lawfulness of the transposition of the EIA Directive in the English proceedings. The Consent Order pronounced therein is *res judicata* and precludes the Appellant from relitigating the points covered thereby. *Separatim*, the consent order in the English Proceedings was granted because the First Respondent accepted that the EIA Directive had not been fully transposed into domestic law. A comprehensive review of the 1999 Regulations commenced in October 2019 and is ongoing. Further explained and averred that the appellant fails to identify any breach of regulation 5(4) or regulation 5A of the 1999 Regulations. The appellant also fails to identify and other breach of the 1999 Regulations that has caused it substantial prejudice. The appellant has had every opportunity to make representations to the First Respondent and the OGA in relation to the application made by BP for the consent. The grant of consent has been implemented to a very substantial extent by BP and Ithaca. Offshore construction, installation and drilling work for the Vorlich field has been substantially carried out. The Court should, as a matter of its discretion, refuse to reduce the consent (*Walton v Scottish Ministers* 2013 SC (UKSC) 67, at paragraph 112; *King v East Ayrshire Council* 1998 SC 182 at p194-196).

IN RESPECT WHEREOF

R W Dunlop QC

IN THE COURT OF SESSION

ANSWERS

For

THE RIGHT HONOURABLE THE LORD KEEN OF ELIE QC, THE ADVOCATE GENERAL FOR SCOTLAND, for and on behalf of **THE SECRETARY OF STATE FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY**, having offices situated at Victoria Quay, Edinburgh, EH6 6QQ

First Respondent

To the Appeal to the Court of Session under regulation 16 of the Offshore Petroleum Production and Pipeline (Assessment of Environmental Effects) Regulations 1999

by

GREENPEACE LIMITED, a company incorporated under the Companies Acts with registered number 01314381 and having its Registered Office at Greenpeace House, Canonbury Villas, London, N1 2PN

Appellant

against

Decisions of the Secretary of State for Business, Energy and Industrial Strategy and of the Oil and Gas Authority dated 7th August 2018 and communicated by notice on the London, Edinburgh and Belfast Gazettes dated 3rd April 2020

Office of the Advocate General

XA34/20

IN THE COURT OF SESSION

UNTO THE RIGHT HONOURABLE
THE LORDS OF COUNCIL AND SESSION

ANSWERS FOR THE SECOND RESPONDENT

in the

APPEAL

of

GREENPEACE LIMITED, a company incorporated under the Companies Acts with registered number 01314381 and having its Registered Office at Greenpeace House, Canonbury Villas, London, N1 2PN

APPELLANT

against

Decision of the Secretary of State for Business Energy and Industrial Strategy ad of the Oil and Gas Authority dated 7 August 2018 and communicated by notice in the London, Edinburgh and Belfast Gazettes dated 3 April 2020

ANSWERS TO GROUNDS OF APPEAL

1. Denied. The decision of the second respondent ("the OGA") having been taken in compliance with the requirements of the Offshore Petroleum Production and

Pipe-lines (Assessment of Environmental Effects) Regulations 1999 ("the 1999 Regulations"), the decision of the OGA should not be reduced.

2. Denied. It is not competent in an appeal under Regulation 16 of the 1999 Regulations to challenge a purported breach of a European Directive. An appeal under Regulation 16 is limited to an alleged breach of the 1999 Regulations. Separately, *esto,* the grant of consent was made in breach of the EIA Directive, any such breach did not substantially prejudice the interests of the appellant. The grant of consent by the OGA should not be reduced.

3. Denied. The decision of the OGA having been taken in compliance with the requirements of the 1999 Regulations, the decision of the OGA should not be reduced. *Esto*, the decision of the OGA was taken in breach of the 1999 Regulations (which is denied), any such breach has not substantially prejudiced the interests of the appellant. The grant of consent by the OGA should not be reduced.

ANSWERS TO FACTUAL AND LEGAL AVERMENTS IN SUPPORT OF GROUNDS OF APPEAL

1. Admitted that the appellant is the autonomous regional office of Greenpeace, a campaigning organisation. The 1999 Regulations are referred to for their terms beyond which no admission is made. *Quoad ultra* denied. Explained and averred that Regulation 16 of the 1999 Regulations provides a statutory right of appeal on limited grounds. These grounds are that: (i) consent for a relevant project was granted in contravention of regulation 5(4); (ii) consent for a relevant project was granted in contravention of regulation 5A(1)(a); or (iii) the interests of the appellant have been substantially prejudiced by any failure to comply with any other requirement of the 1999 Regulations.

2. Admitted that on 3rd April 2020 the first respondent, the Secretary of State for Business Energy and Industrial Strategy's ("the Secretary of State") published in the London, Edinburgh and Belfast Gazettes ("the Gazettes") notice of the Secretary of State's decision to agree to the grant of consent for the field

development Vorlich project on 7 August 2018 and notice of the Oil and Gas Authority's ("the OGA") grant of consent for the field development Vorlich project under explanation that the OGA's consent was for the development and production of the Vorlich field. Not known and not admitted that these proceedings are brought within six weeks of that publication in accordance with the requirements of Regulation 16(3) of the 1999 Regulations under explanation that these proceedings were served upon the OGA on 17 June 2020, more than 10 weeks after the date of publication in the Gazettes. *Quoad ultra* denied. The consent of the OGA for long term production was granted on 20 September 2018. The grant of the OGA's consent was widely reported in the media, including the BBC website on 27 September 2018. The OGA's grant of consent was published on its website in October 2018. On 3 April 2020 the Secretary of State published its agreement to consent (again) and the OGA's consent to BP Exploration Operating Company Limited and Ithaca Energy (UK) Limited (together the "Licensee") for the development of and production from the Vorlich field. This publication followed judicial review proceedings in England between the appellant and the Secretary of State, in which the OGA was an interested party ("the English Proceedings"). The English Proceedings commenced on 7 November 2019. During pre-action correspondence dated 5 July 2019, it was expressly stated that the OGA had granted consent for long term production at the Vorlich field (the consent now challenged). At the very latest, the appellant was aware that the OGA granted the consent now challenged by 5 July 2019. The English Proceedings were resolved by way of a 'Consent Order', which included a 'Statement of Reasons', dated 1 April 2020. The grounds advanced by the appellant in the English Proceedings were recorded in the Statement of Reasons. Included within the grounds was that the 1999 Regulations failed to lawfully transpose the Environmental Impact Assessment Directive 2011/92/EU as amended by Directive 2014/52/EU ("the EIA Directive"). In particular, the grounds included that: (i) the 1999 Regulations did not lawfully transpose art. 9(1) of the EIA Directive for the reason that publication of the OGA's grant of consent was not required by the 1999 Regulations; and (ii) that since the details of the OGA's grant of consent had not been published there had been a breach of art. 9(1) of the EIA Directive. Those particular grounds of challenge were conceded by the Secretary of State.

The Secretary of State has undertaken to amend working practices and review the 1999 Regulations and consult on any proposed amendments.

3. Admitted that the appellant seeks reduction under Regulation 16 of the 1999 Regulations under explanation that there is no merit in the grounds of appeal and the appeal should be refused. *Quoad ultra* denied.

4. Admitted that the Licensee has a licence to search and bore for and get petroleum in the Vorlich field. Admitted that to drill wells or get or convey petroleum the licence's model clauses require a consent to be obtained under explanation that the model clauses are regulated by statute and the consent requires to be obtained from the OGA. Admitted that consent for these activities is granted by the OGA but an Environmental Impact Assessment is carried out by the Secretary of State under the 1999 Regulations. Admitted that approval for the issue of consent was given by the Secretary of State and consent then granted by the OGA under explanation that consent was granted on 20 September 2018. Regulation 5A(1) of the 1999 Regulations is referred to for its terms beyond which no admission is made. *Quoad ultra* denied. Explained and averred that the Licensee gave notice to the OGA of its intention to apply for development and production consent on 3 April 2018 and that it intended to submit an Environmental Statement to the Environmental Management Team at the Offshore Petroleum Regulator for Environment and Decommission ("OPRED"), in their capacity as environmental regulator acting on behalf of the Secretary of State. The Licensee submitted an Environmental Statement to OPRED on or around 4 April 2018. Further explained and averred that the OGA is a private company, limited by shares, wholly owned by the Secretary of State and established pursuant to the Companies Act 2006. It has day-to-day operational independence from the Secretary of State. The relationship between the Secretary of State and OGA is agreed and provided within an approved Framework Document. Amongst other things, the OGA is responsible for issuing licences for the exploration, production and development of oil and gas and managing the activities of licensees. In respect of offshore activities, the OGA is subject to the principal objective set out at section 9A of the Petroleum Act 1998, namely "maximising the economic

recovery of UK petroleum". The OGA produces (and revises in accordance with statute or when necessary) a strategy to meet the principal objective, known as the MER UK Strategy. The MER UK Strategy is binding upon all licensees. A licensee is also subject to, separate from the OGA, a comprehensive system of regulation under legislation to address potential environmental and safety matters. Therefore, in order to carry out certain activities under the licence, the licensee must obtain the necessary consents and approvals from the OGA as well as other applicable regulators and government. For example, as in the present case, the Licensee applied to the OGA for long term production and development consent under the licences. In order to undertake such activity, the licensee is required by the 1999 Regulations to prepare an environmental statement and environmental impact assessment to the Secretary of State. The environmental regulation of offshore oil and gas activity is the responsibility of OPRED, part of the UK government's Department for Business, Energy and Industrial Services ("BEIS"). The Secretary of State assesses the environmental statement and the impact of the proposed development. Having carried out such assessment, the Secretary of State will determine whether to issue its 'agreement to consent', which is a pre-requisite of the OGA's consent: Regulation 5A(1) of the 1999 Regulations. The OGA does not have responsibility for, or involvement in, the assessment of the environmental statement or the environmental impact of the proposed development. In deciding whether to grant development and production consent, the OGA will consider, amongst other things, whether: the Field Development Plan ("FDP") (a technical document produced by the licensee setting out its understanding of the field and commitments to bring forward development of the field) meets the licensee's obligation to deliver the MER UK Strategy; the OGA has approved a Field Operator for the development; a Supply Chain Action Plan has been agreed with the OGA; and that sufficient funding has been committed for development costs. There are also a number of separate regulatory processes which the OGA will confirm are in place before issuing its consent, including (amongst others) that the Environmental Impact Assessment process has been completed successfully; and that BEIS Offshore Decommissioning Unit are satisfied that appropriate decommissioning financial security arrangements are in place. The documents considered by the OGA will

frequently contain information which is confidential and considered by the licensee to be commercially sensitive.

5. Admitted that the failure to publish the consent was the subject of a judicial review challenge by the appellant in the English Courts. Admitted that following the grant of permission in the English proceedings, the Secretary of State undertook to publish the details of the grant of consent in the Gazettes for the purposes of commencing the time for lodging a challenge in accordance with Regulation 16 of the 1999 Regulations. Admitted that the appellant has lodged a petition for judicial review to challenge the consents under explanation that the judicial review also purports to proceed in accordance with Regulation 16 of the 1999 Regulations. *Quoad ultra* denied. Explained and averred that the English Proceedings contained a number of grounds of challenge, including the lawfulness of the transposition of the EIA Directive into domestic law. The OGA granted consent to the Licensee for development and production by way of the Long Term Production Consent issued in respect of licences P1588 and P363 under explanation that this was granted on 20 September 2018 (a copy of which has already been disclosed to the appellant pursuant to the English Proceedings). The OGA's consent was not published at or around the date of granting because there was no requirement in the 1999 Regulations for this to occur. That practice has changed due to the undertaking provided by the Secretary of State in the English Proceedings. The granting of consent by the OGA is now published by the Secretary of State.

6. The EIA Directive and 1999 Regulations are referred to for their terms beyond which no admission is made. *Quoad ultra* denied. Explained and averred that the objects and terms of the EIA Directive relate and are restricted to matters relating to the assessment of effects of certain public and private projects on the environment.

7. The EIA Directive is referred to for its terms beyond which no admission is made. *Quoad ultra* denied.

8. The Petroleum Act 1998, Petroleum (Production) Regulations 1976 (as amended) are referred to for their terms beyond which no admission is made. *Quoad ultra* denied.

9. The 1999 Regulations are referred to for their terms beyond which no admission is made.

10. Admitted. Explained and averred that the OGA is not involved in assessing the environmental impact of the proposed production and development of fields such as Vorlich. The OGA relies upon the decision of the Secretary of State in respect of environmental matters and does not look behind such decision. The scrutiny undertaken by the OGA, prior to the giving of consent, relates to technical, financial and competency matters connected with the proposed development. Reference is made to answer 4. The OGA does not grant consent based upon its own assessment of environmental matters. It carries out no such assessment. Other than the Secretary of State's consent on EIA process being a pre-requisite for the grant of consent, the OGA's grant of consent and any reasons for that grant are unconnected to the EIA process and any environmental matters covered by the 1999 Regulations and the EIA Directive.

11. Regulation 5A(1)(a) is referred to for its terms beyond which no admission is made.

12. The 1999 Regulations are referred to for their terms beyond which no admission is made.

13. Regulation 5(4) is referred to for its terms beyond which no admission is made.

14. The 1999 Regulations are referred to for their terms beyond which no admission is made.

15. Regulation 5A(7) and (8) are referred to for their terms beyond which no admission is made.

16. Regulation 16(1) of the 1999 Regulations is referred to for its terms beyond which no admission is made. *Quoad ultra* denied. Explained and averred that Regulation 16 provides a right of statutory appeal on restricted grounds.

17. Regulations 5(4) and 5(a)(1) are referred to for their terms beyond which no admission is made. *Quoad ultra* denied. Explained and averred that the appellant has not given notice of any failure to comply with 1999 Regulations by the OGA or why it is contended that they have been significantly prejudiced by such failure.

18. Admitted that the original licence (P363) was granted to BP Petroleum Development Limited on 24 march 1981. Admitted that original licence was subsequently transferred to BP and Ithaca. *Quoad ultra* denied. Explained and averred that the current model clauses are contained in the Petroleum Licensing (Production) (Seaward Areas) Regulations 2008. The model clauses are incorporated into the licence. The model clauses provide that a licensee shall not carry out relevant works for the purpose of getting petroleum or otherwise get petroleum without the consent of the OGA. Reference is made to paragraph 17 of schedule 1.

19. Admitted that on or around 3 August 2018 the Secretary of State published an Environmental Statement Summary. Admitted that the Environmental Statement Summary is the Minister's agreement to the issue of the consent by the OGA. Admitted that on or around 20 September 2018 the OGA granted consent for carrying out works under explanation that the consent was for the long-term production and development of the Vorlich field. Admitted that the OGA's consent letter has not been made publicly available under explanation that the appellant has been disclosed the consent letter and the details of the consent have been published in the Gazettes. Admitted that the field development plan has not been released under explanation that there is no such requirement under the 1999 Regulations and that its contents concern operational matters and not environmental matters. *Quoad ultra* not known and not admitted. Explained and averred that the Environmental Statement prepared by the Licensee was publicly available from 2018. The Environmental

Statement and Environmental Statement Summary contain a detailed description of the works proposed and consented to.

20. Admitted that the Secretary of State published in the Gazettes notice of various Environmental Statement Decisions including that in relation to the Vorlich field under explanation that this occurred on 26 July 2019. Admitted that the notice did not include the decision by the OGA to grant consents, including the consent granted in relation to the Vorlich field. Admitted that the English Proceedings commenced on or around 7 November 2019. Admitted that the Consent Order in the English Proceedings was issued on or around 3 April 2020 under explanation that it was issued on 1 April 2020. Admitted that on 3 April 2020, notice of (i) the Secretary of State's agreement to the consent and (ii) the OGA's grant of consent in relation to the Vorlich field were published in the Gazettes under explanation to follow. *Quoad ultra* denied. Explained and averred that the appellant was aware that the OGA had granted its consent no later than 5 July 2019. Reference is made to answer 2.

21. Admitted that the 1999 Regulations do not require the publication of the OGA consent under explanation that details of the OGA consent are now published by the Secretary of State. Admitted that the Secretary of State accepted in the English Proceedings that the previous failure to publicise notice of the OGA's grant of consent arose from an error in the transposition of the EIA Directive into domestic law. Article 9(1) of the EIA Directive and regulation 16 of the 1999 Regulations are referred to for their terms. *Quoad ultra* denied. Explained and averred that, as is apparent from the English Proceedings and the Consent Order, the lawfulness of the Secretary of State's transposition of Art. 9(1) of the EIA Directive has already been the subject of proceedings between these parties and resolved by way of the Consent Order. The compliance of the transposition of Art. 9(1) of the EIA Directive is: out with the scope of an appeal under Regulation 16; is *res judicata*; subject to judicial review proceedings between these parties (subject to a plea of *res judicata* and that those proceedings are barred by the passage of time) and cannot be considered by this court.

22. The EIA Directive is referred to for its terms beyond which no admission is made. *Quoad ultra* denied.

23. The 1999 Regulations are referred to for their terms beyond which no admission is made. *Quoad ultra* denied. Explained and averred that the OGA has no responsibility for and had no involvement in the transposition of the EIA Directive into domestic law.

24. Not known and not admitted.

25. Not known and not admitted.

26. The EIA Directive and 1999 Regulations are referred to for their terms beyond which no admission is made. *Quoad ultra* denied.

27. Not known and not admitted. Reference is made to answer 2.

28. Not known and not admitted.

29. Art. 6(5) of the EIA Directive is referred to for its terms, beyond which no admission is made. *Quoad ultra* not known and not admitted.

30. Not known and not admitted.

31. The EIA Directive is referred to for its terms beyond which no admission is made. *Quoad ultra* not known and not admitted.

32. Not known and not admitted.

33. Admitted that by publishing the fact of the OGA consent in the Gazettes on 3 April 2020, Article 11 of the EIA Directive was complied with under explanation that the publication was by the Secretary of State and that publication of the reasons for the OGA's decision, which do not relate to the environment, are not required for compliance with the EIA Directive. Admitted that the Field

Development Plan has not been provided to the appellant under explanation that there is no such requirement under the 1999 Regulations and that its contents concern operational matters and not environmental matters. *Quoad ultra denied*. Explained and averred that the adequacy of the transposition into domestic law of Article 9 and 11 of the EIA Directive was the subject of and was determined by the English Proceedings, is currently the subject of judicial review proceedings between these parties (subject to pleas of *res judicata* and that the proceedings are barred by the passage of time) and goes beyond the scope of a Regulation 16 appeal. The EIA Directive is concerned with the assessment of the effects of certain public and private projects on the environment. The environmental aspects of the Vorlich project, or any other project, are assessed by the Secretary of State. The Environmental Statement and Environmental Statement Summary are published. Beyond the fact that the Secretary of State's agreement to consent, by way of the Environmental Statement Summary, is a pre-requisite to the OGA's consent, any reasons and considerations of the OGA for granting consent are unconnected to environmental matters. As such, publication of the reasons for the OGA's consent is not required to comply with the EIA Directive.

34. Denied. Reference is made to the preceding answers. The appellant has available to it the Environmental Statement, the Environmental Statement Summary and notice of the grant of consent. The only redactions made to the OGA consent are to the Schedule containing the production profiles which are considered to be commercially sensitive and, in any event, are within (i.e. cannot be beyond) the maximum production profiles set out in the Environmental Statement to which the appellant has full access.

35. Not known and not admitted.

36. Not known and not admitted.

37. The Environmental Statement is referred to for its terms, beyond which no admission is made. *Quoad ultra* not known and not admitted.

38. Not known and not admitted.

39. Not known and not admitted.

40. Not known and not admitted.

41. The Climate Change Act 2008 is not known and not admitted. *Quoad ultra* not known and not admitted.

42. Not known and not admitted.

43. Not known and not admitted.

44. The Licensee's Environmental Statement and the Secretary of State's Environmental Statement Summary are referred to for their terms beyond which no admission is made*. Quoad ultra* not known and not admitted.

45. Not known and not admitted.

46. Not known and not admitted.

47. Not known and not admitted.

48. The 1999 Regulations, the Climate Change Act 2008 and the Paris Agreement are referred to for their terms beyond which no admission is made. *Quoad ultra* not known and not admitted. Explained and averred that the OGA is not responsible for or directly concerned with establishing environmental protection objectives. In respect of offshore activities, the OGA is subject to the principal objective set out at section 9A of the Petroleum Act 1998, namely "maximising the economic recovery of UK petroleum".

49. Not known and not admitted. Reference is made to answer 48.

50. The questions of law contended for by the appellant are referred to for their terms beyond which no admission is made. Explained and averred that the appellant has given no notice of any failure by the OGA to comply with the 1999 Regulations or why any such failure has caused it substantial prejudice.

PLEAS-IN-LAW

1. The appellant's averments being irrelevant *et separatim* lacking in specification, the Appeal should be refused.

2. The appellants averments in so far as material being unfounded in fact, the appeal should be refused.

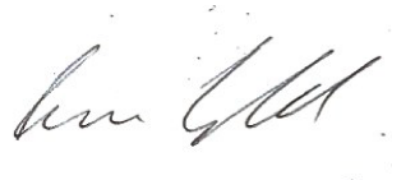
3. The appeal, insofar as concerning the transposition of the Directive, being out with the scope of Regulation 16 of the 1999 Regulations, is incompetent and should be refused.

4. The decision of the Oil and Gas Authority to grant consent to BP Exploration Operating Company Ltd and Ithaca Energy (UK) Limited for the field development Vorlich Project, not being undertaken in breach of the 1999 Regulations the appeal should be refused.

5. *Esto*, the decision of the Oil and Gas Authority to grant consent to BP Exploration Operating Company Ltd and Ithaca Energy (UK) Limited for the field development Vorlich Project, was undertaken in breach of the 1999 Regulations, any such breach not causing substantial prejudice to the appellant, the appeal should be refused.

6. *Esto*, the decision of the Oil and Gas Authority to grant consent to BP Exploration Operating Company Ltd and Ithaca Energy (UK) Limited for the field development Vorlich Project, was undertaken in breach of the 1999 Regulations, in all the circumstances of the case the court should, in the exercise of its discretion, refuse to reduce the consent.

IN RESPECT WHEREOF



Agents for the Second Respondent

MBS Solicitors

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Edinburgh

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8 July 2020

XA34/20

RULES OF THE COURT OF SESSION 1994

IN THE COURT OF SESSION

ANSWERS

for

THE OIL AND GAS AUTHORITY, AB1 Building, 48 Huntly Street, Aberdeen, AB10 1SH

SECOND RESPONDENT

TO THE STATUTORY APPEAL UNDER

Regulation 16 of the Offshore Petroleum Production and Pipelines (Assessment of Environmental Effects) Regulations 1999

BY

GREENPEACE LIMITED. a company incorporated under the Companies Acts with registered number 01314381 and having its Registered Office at Greenpeace House, Canonbury Villas, London, N1 2PN

APPELLANT

against

Decision of the Secretary of State for Business, Energy and Industrial Strategy and of the Oil and Gas Authority dated 7 August 2018 and communicated by notice in the London, Edinburgh and Belfast Gazettes dated 3 April 2020.

2020

[NO OF PROCESS]
[INTIMATED]

Agents for the Second Respondent
MBS Solicitors
150-152 Gorgie Road
Edinburgh
EH11 2NT
Ref: MBS/BILAAL/OGA1.1

IN THE COURT OF SESSION

XA34/20

ANSWERS FOR THE FIRST AND THIRD INTERESTED PERSONS BP EXPLORATION OPERATING COMPANY LIMITED AND ITHACA ENERGY (UK) LIMITED

to the Appeal under Regulation 16 of the Offshore Petroleum Production and Pipelines (Assessment of Environmental Effects) Regulations 1999

by

GREENPEACE LIMITED, a company incorporated under the Companies Acts with registered number 01314381 and having its Registered Office at Greenpeace House, Canonbury Villas, London, N1 2PN

Appellant

against

Decisions of the Secretary of State for Business Energy and Industrial Strategy and of the Oil and Gas Authority dated 7th August 2018 and 20th September 2018 and communicated by notice in the London, Edinburgh and Belfast Gazettes dated 3rd April 2020

ANSWERS TO GROUNDS OF APPEAL

1. Denied. The appellant not being a person aggrieved by the decision of the Oil and Gas Authority to grant consent to BP Exploration Operating Company Limited for the field development Vorlich project and that grant of consent not having been granted in contravention of regulation 5(4) *et separatim* regulation 5A(1)(a) of the Offshore Petroleum Production and Pipelines (Assessment of Environmental Effects) Regulations 1999 ("the 1999 Regulations"), the decision to grant consent should not be reduced or quashed under regulation 16 of the 1999 Regulations. Reference is made to the Answers to the Factual and Legal Averments in support of the Grounds of Appeal. Explained and averred that in summary:

    (a) the appellant essentially complains about certain matters which it claims affected its ability to make representations as part of the environmental impact assessment of the Vorlich project. However, the appellant had a sufficient opportunity to make representations in respect of the application for consent for the Vorlich project but made no such representations. Based on the contents of this appeal, such representations as the appellant says it should have made would not have been relevant or coherent representations in

respect of the environmental impact assessment of the Vorlich project because, among other things, they proceed on an incorrect construction of the 1999 Regulations and of the scope of the development project for which consent was sought in terms of those Regulations. Further, a number of matters complained of in the present appeal have already been resolved in earlier proceedings including proceedings brought by the appellant in England & Wales;

(b) the appeal does not in any event aver any basis for a claim that such consent was granted in contravention of regulation 5(4) *et separatim* regulation 5A(1)(a) of the 1999 Regulations. The Secretary of State duly carried out the environmental impact assessment of the Vorlich project. The arrangements by which the relevant matters were publicised were sufficient to meet the requirements of the 1999 Regulations. In any event, on any view the Secretary of State was entitled to and was correct to consider that those requirements had been substantially met;

(c) further and in any event it is respectfully submitted the decision to grant consent should not be reduced or quashed in the exercise of the Court's discretion, having regard to all the relevant circumstances including that the consent has already been implemented to a very substantial extent.

2. Denied. The appellant not being a person aggrieved by the decision of the Secretary of State for Business Energy and Industrial Strategy to agree to the granting by the Oil and Gas Authority of consent to BP Exploration Operating Company Limited for the field development Vorlich project and that decision not having been made in breach of Directive 2011/92/EU as amended by Directive 2014/52/EU, the decision to agree to the granting of consent should not be reduced. Reference is made to the Answers to the Factual and Legal Averments in support of the Grounds of Appeal. Explained and averred that in summary:

(a) the same points as made in Answer 1(a) above apply here also and reference is made to that Answer;

(b) an alleged breach of an EU Directive does not of itself equate to a ground of challenge under regulation 16 of the 1999 Regulations. In any event, the requirements of the Directive in question were met;

(c) further and in any event it is respectfully submitted that the decision to agree to the grant of consent should not be reduced or quashed in the exercise of the Court's discretion having regard to all the relevant circumstances including that the consent has already been implemented to a very substantial extent.

3. Denied. The appellant not being a person aggrieved by the decision of the Oil and Gas Authority to grant consent to BP Exploration Operating Company Limited for the field development Vorlich project and by the decision of the Secretary of State for Business Energy and Industrial Strategy to agree to the granting of such consent and the interests of the appellant not having been substantially prejudiced by failures of the respondents to comply with the 1999 Regulations, those decisions should not be reduced or quashed under regulation 16 of the 1999 Regulations. Explained and averred that in summary:

(a) the same points as made in Answer 1(a) above apply here also and reference is made to that Answer;

(b) the appeal does not aver any basis for a claim that the interests of the appellant have been substantially prejudiced by any failures of the respondents to comply with the 1999 Regulations. The appellant's complaints are essentially irrelevant as a matter of the proper construction of the 1999 Regulations. In any event those complaints are without substance. Further and in any event, the appeal does not and sensibly cannot aver a basis upon which it can be said that the Secretary of State acted irrationally in respect of the matters in question. The appellant identifies nothing which can properly be described as substantial prejudice to its interests;

(c) further and in any event it is respectfully submitted that the decision to agree to the grant of consent and the decision to grant consent should not be reduced or quashed in the exercise of the Court's discretion having regard to all the relevant circumstances including that the consent has already been implemented to a very substantial extent.

ANSWERS TO FACTUAL AND LEGAL AVERMENTS IN SUPPORT OF GROUNDS OF APPEAL

1. The designations of the appellant and of the respondents are not known and not admitted. The Offshore Petroleum Production and Pipelines (Assessment of Environmental Effects) Regulations 1999 ("the 1999 Regulations") are referred to for

their full terms beyond which no admission is made. *Quoad ultra* denied except insofar as coinciding herewith. Explained and averred that these Answers are lodged for the first and third interested persons. The first interested person is BP Exploration Operating Company Limited ("BP") Chertsey Road, Sunbury On Thames, Middlesex, TW16 7BP. The third interested person is Ithaca Energy (UK) Limited ("Ithaca"), 13 Queen's Road, Aberdeen, AB15 4YL. In these Answers, the Secretary of State for Business Energy and Industrial Strategy is referred to simply as "the Secretary of State" and the Oil and Gas Authority is referred to as "the OGA". Explained and averred that as more fully explained below, the appellant is not properly regarded as a person aggrieved by the grant of consent in terms of regulation 16 of the 1999 Regulations.

2. It is admitted that on 3 April 2020, the Secretary of State published in the London, Edinburgh and Belfast Gazettes ("the Gazettes") notice of the Secretary of State's decision to agree to the grant of consent for the field development Vorlich project on 7 August 2018 and notice of the OGA's grant of consent for the field development Vorlich project which was granted on 20 September 2018 ("the OGA's grant of consent"). It is also admitted that these proceedings were brought within six weeks of publication of the OGA's grant of consent. *Quoad ultra* denied.

3. Admitted that the appellant seeks certain orders in relation to the decisions of the Secretary of State and the OGA under explanation that the appellant is not entitled to those orders or to any other orders in relation to those decisions. *Quoad ultra* denied.

Overview

4. Admitted under explanation as follows. BP and Ithaca hold interests in two licences namely P.363 Block 30/1c Upper (held 80% by BP as operator and 20% by Ithaca as non-operating party) and P.1588 Block 30/1f (held 100% by Ithaca as operator). Licence P.363 dates back to 1981 and was amended by a Deed of Amendment dated 6 December 2016 between the OGA on one hand and BP and Ithaca on the other hand. The area concerned by the Vorlich project, known as the Vorlich field, spans these two licence areas. The Vorlich field is located in the central North Sea approximately 214 kilometres east of the Scottish mainland and approximately 23 kilometres from the UK/Norway median line. The Vorlich project is in the Scottish area for the purposes of regulation 15 of the 1999 Regulations. BP, the operator, in overall terms holds a 66% share of the Vorlich field, while Ithaca holds the remaining 34%. The licences are subject to model clauses which require the consent of the OGA for the production of petroleum. The OGA shall not grant consent without the agreement of the Secretary of State. BP wrote to the OGA on 3 April 2018, on behalf of itself and Ithaca, to apply for the necessary consent for two new production wells, with a sub-sea tie back to a floating production facility – the Stella FPF-1 floating production unit.

In accordance with the 1999 Regulations, BP produced an environmental statement (the "ES") which was submitted to the Offshore Petroleum Regulator for Environment and Decommissioning ("OPRED") which is part of the Department for Business, Energy & Industrial Strategy and fulfils this function for the Secretary of State. As required by direction of OPRED, BP subsequently published the ES on its website and press notices in two newspapers. The notice was also advertised online, although there was an administrative error in relation to one of the online notices (see Answer 18.5 below). The application to the OGA and the submission of the ES were widely reported in the media at the time. On 7 August 2018, OPRED notified BP that it had considered the ES and agreed to the issue of the consent. On 20 September 2018, the OGA notified BP of the grant of consent. The consent was publicised by BP and widely reported on in the media at the time. More detail of the chronology is provided below. The application to the OGA, the ES, the press notices and the online advertisement are referred to.

5. Admitted that the appellant has also lodged a petition for judicial review under reference to the explanation following. *Quoad ultra* denied except insofar as coinciding herewith. Reference is made to Answer 4. Explained and averred that the appellant already sought to challenge the lawfulness of the United Kingdom's transposition of Directive 2011/92/EU as amended by Directive 2014/52/EU ("the EIA Directive") to oil and gas exploration and extraction and the decisions of the Secretary of State and the OGA in relation to authorising oil and gas production in the Vorlich field. That challenge was made by way of an application for judicial review before the High Court of Justice in England & Wales, case number CO/4392/2019 ("the English proceedings"). The outcome of the English proceedings was that the Secretary of State and the OGA agreed to publish the OGA's grant of consent which was published on 3 April 2020 (alongside the Secretary of State's decision which had already been published as referred to below). That outcome was a sufficient remedy for the appellant in respect of the transposition and related issues so far as pertaining to the Vorlich field and was accepted by the appellant as such in light of the outcome of other proceedings in England (known as the "*Garrick Maidment*" or "*Seahorses*" proceedings) in which the transposition issues had been raised and addressed by consent generally. In particular, in the Seahorses proceedings the Secretary of State agreed to amend current working practices and review the 1999 Regulations. In the English proceedings, it was recognised by the Court that a regulation 16(1) application in respect of the Vorlich field would require to be brought in Scotland because the field is in the Scottish area. The appellant sought to convert the English proceedings into a regulation 16(1) application but it was plain that this would have been declined by the Court in the English proceedings. The effective outcome of the English proceedings was that the appellant was afforded the opportunity if so advised to make such an application in respect of the OGA's grant of consent within the six week period

following the publication of the notice on 3 April 2020. The grounds which the appellant may competently seek to argue in the present appeal are limited to those grounds which are provided for in regulation 16(1). Further and in any event, the appellant cannot now complain, as it seeks to do in the present appeal, that it is a person aggrieved in respect of matters which were addressed by the consent order in the English proceedings along with the outcome of the Seahorses proceedings and in respect of the matter in which it was refused permission to proceed in the English proceedings as set out below. The petition for judicial review lodged by the appellant is opposed on a number of grounds including lack of standing, failure to proceed in due time and incompetence in that a petition for judicial review is not a competent means of making an application to the Court under regulation 16(1) of the 1999 Regulations. It is submitted by BP and Ithaca in their answers in the judicial review process that permission to proceed should be refused.

Legal framework

6. Admitted that the current version of the relevant directive is Directive 2011/92/EU as amended by Directive 2014/52/EU being the EIA Directive. Admitted that the purpose of the 1999 Regulations was to transpose the EIA Directive into domestic law. The EIA Directive and the 1999 Regulations are referred to for their full terms beyond which no admission is made. *Quoad ultra* denied.

7. The EIA Directive and the cases cited by the appellant are referred to for their full terms beyond which no admission is made. *Quoad ultra* denied.

8. Admitted that the exclusive right of searching for and boring for and getting petroleum is vested in Her Majesty. Reference is made to the Petroleum Act 1998, section 2. The position now is that the OGA may license persons to search and bore for and get petroleum under a licensing process which is subject to various regulations. Admitted that at the time of the original grant of the licence P.363 in 1981, the model clauses in the Petroleum Production Regulations 1976 (as amended by the Petroleum Production (Amendment) Regulations 1978 and the Petroleum Production (Amendment) Regulations 1980) were incorporated into the licence. *Quoad ultra* denied.

9. Admitted that the 1999 Regulations were applicable to the ES which BP required to submit and did submit to OPRED as explained above. *Quoad ultra* denied.

10. Admitted that the United Kingdom has chosen to split the approval regime in the sense that the grant of consent for field development and long term production is given by the OGA and the EIA process is carried out by the Secretary of State through OPRED. Admitted that the OGA is not permitted to grant a consent without the

agreement of the Secretary of State. Reference is made to regulation 5(A1) of the 1999 Regulations. *Quoad ultra* denied.

11. Regulation 5A(1)(a) of the 1999 Regulations is referred to for its full terms beyond which no admission is made. *Quoad ultra* denied.

12. Admitted that the Secretary of State is required, subject to certain exceptions, to carry out an environmental impact assessment "(EIA") in respect of a relevant project under reference to the explanation following. Reference is made to regulations 5(1) and 5A(1) of the 1999 Regulations. Admitted that where an environmental statement is submitted with an application for consent for a relevant project by the applicant, the Secretary of State must not make a decision under regulation 5A(1)(c) unless the Secretary of State is satisfied that the requirements of regulations 9 and 10 have been substantially met and that, where necessary, advice has been obtained from persons with appropriate expert knowledge. Reference is made to regulation 5(4). *Quoad ultra* denied. Explained and averred that an EIA is a process consisting of the steps set out in regulation 3A(1). In terms of regulation 3B, an environmental statement means a report prepared as part of an EIA in respect of a relevant project which includes, among other things, a description of the likely significant effects of the project on the environment. In regulation 3, the definition of "*relevant project*" includes a development. The definition of "*development*" includes any project which has as its main object the getting of petroleum. An "*effect*" includes any direct or indirect effect. On a proper construction of the 1999 Regulations, this has to be an effect of a part of the project as a relevant project. As was held in the English proceedings, the future use of the oil (read for present purposes as also encompassing gas) removed from the Vorlich field, following removal from the seabed, was not part of the development project for which consent was sought.

13. Regulation 5(4) of the 1999 Regulations is referred to for its terms beyond which no admission is made. *Quoad ultra* denied.

14. Admitted that an undertaker who submits an environmental statement with an application for consent must publicise the environmental statement and make it available in terms of regulation 9 of the 1999 Regulations which is referred to for its full terms beyond which no further admission is made. *Quoad ultra* denied.

15. Admitted that the Secretary of State is required to publicise the decision whether to give agreement to the grant of consent in terms of regulations 5A(7) and (8) of the 1999 Regulations to which reference is made for their full terms.

16. Regulation 16(1) of the 1999 Regulations is referred to for its full terms, beyond which no admission is made. *Quoad ultra* denied. Explained and averred that an application

under regulation 16(1) may only be made by a person who can properly be described as a person aggrieved by the grant of consent.

17. Regulations 5(4) and 5A(1)(a) of the 1999 Regulations are referred to for their full terms beyond which no admission is made. *Quoad ultra* denied. Explained and averred that an applicant who complains only of a procedural failure will be refused a remedy if that failure has caused him personally no substantial prejudice. In any event, substantial prejudice is a requirement of regulation 16(1) of the 1999 Regulations in respect of the grounds of challenge sought to be advanced by the appellant. Further, even in the case of a substantive defect (the existence of which is denied in the present case), the court retains a residual discretion to refuse a remedy (reference is made to *Walton v Scottish Ministers* 2013 SC (UKSC) 67 and *King v East Ayrshire Council* 1998 SC 182).

Factual Chronology

18. The essential chronology is as follows (and Statements 18 - 20 are denied except insofar as coinciding herewith):

18.1 Licence P.363 was granted to BP on 24 March 1981. The licence was amended by the Deed of Amendment dated 6 December 2016. The licence is subject to model clauses which require the consent of the OGA for development works and the production of petroleum.

18.2 The licence start date for licence P.1588 was 12 February 2009. The licence is similarly subject to model clauses. Ithaca acquired its interest in this licence in 2016.

18.3 On 3 April 2018, BP wrote to the OGA to apply for the necessary consent to two production wells at the Vorlich field with sub-sea tie back to a floating production facility - Stella FPF-1 floating production unit.

18.4 In accordance with the 1999 Regulations, BP produced the ES which was submitted to OPRED on 9 March 2018, as part of the application for consent. On 4 April 2018, OPRED wrote to acknowledge receipt of the ES and to direct BP to publish a notice of the relevant information in accordance with regulation 9(2)(f) of the 1999 Regulations and to publish press notices in accordance with regulation 9(2A) of the 1999 Regulations. BP subsequently published the ES on its website on 11 April 2018 and press notices in The Daily Telegraph and The Press and Journal the following day. These press notices gave information on how copies of the ES could be inspected and obtained, and the date by which representations could be made to OPRED. More particularly each press notice:

(a) described the application to the OGA for consent;

(b) explained that the application for consent was supported by an environmental statement;

(c) provided an address at which copies of the application for consent and ES could be inspected by the public (and, in the case of the ES, purchased for a fee);

(d) provided a website link at which the ES could be viewed publicly;

(e) explained how interested parties could make representations in relation to the submission to the Secretary of State, and provided an email and postal address for doing so;

(f) stated that following receipt of all representations, the Secretary of State would either agree to the grant or refusal of the consent (with or without conditions);

(g) provided a date 30 days from the date of the notice by which interested parties could make representations in relation to the project; and

(h) explained that any person aggrieved by the Secretary of State's decision could, within 6 weeks from "the date of publication of the Secretary of State's decision to agree to the grant of consent, an approval as referred to in regulation 11 or the imposition of a relevant requirement in respect of the project", apply to the Court.

18.5 From 12 April 2018, the ES could be accessed via the link in the press notices. The ES can still be accessed via that link and it has been accessed and downloaded by members of the public without any apparent difficulty. The ES accessible via the link appended the application for consent dated 3 April 2018 and OPRED's letter of 4 April 2018 along with the regulation 9(1) notice and the template regulation 9(2)(f) notice. Due to an administrative error, the specific notice which had been published in the press was not itself included but the letter from OPRED contained substantially the same information as required by regulation 9(2)(f) and clearly explained how representations could be made in response to the application.

18.6 The notice, in the form published in the press, was also published in the "Notices" section on the advertising website known as "Scot-Ads".

18.7 Further, in addition to the statutory publicity requirements, the application was reported by a wide variety of organisations online. On 10 April 2018, in advance of publication, BP announced publicly that it intended to proceed with the Vorlich project

and that it had submitted the ES to OPRED. The announcement that BP was applying for consent to proceed with the project was reported by various media outlets including The BBC, The Mirror, The Financial Times, Oil and Gas UK, Offshore Magazine, Sub Sea World News, Offshore Energy Today, Energy Voice and Offshore Source. These media reports are referred to.

18.8 The Secretary of State requested additional information in terms of regulation 10(1) of the 1999 Regulations which was provided by BP on 6 and 30 July 2018. The Secretary of State did not direct that the additional information be publicised. That was a matter for the Secretary of State to decide as more fully set out below.

18.9 On 7 August 2018, OPRED acting for the Secretary of State notified BP that it had considered the ES and additional information provided by BP at OPRED's request and agreed to the issue of consent. It is believed that the Secretary of State's decision was published at the time by OPRED on the gov.uk website. By oversight the Secretary of State's decision was not published in the Gazettes at that time and this was later rectified by publication in the Gazettes on 25 and 26 July 2019 - see below. The notification from the Secretary of State and the publications in the Gazettes are referred to.

18.10 On 20 September 2018, the OGA notified BP of the grant of consent. BP issued a press release on 27 September 2018 announcing the OGA's grant of consent. The fact that the OGA had granted consent in respect of the Vorlich project was widely reported in September and October 2018 including by The BBC, The Times, The Independent, CITY AM, Offshore Energy Today, Energy Voice, The Evening Express, Oil & Gas UK, The Press and Journal, The Scotsman, The Courier, i news, The Scottish Sun, The Daily Star of Scotland, The Metro, The Daily Record, The National, The Herald, Oil and Gas People and Friends of the Earth Scotland. The OGA's grant of consent was discussed in the Scottish Parliament on 27 September 2018. On 22 October 2018, an article about consent for a project for another BP operated field, but which also referred to the Vorlich project, appeared in The Independent which included a comment attributed to Doug Parr, Chief Scientist and Policy Director of Greenpeace UK. The OGA notification, the press release, the media reports and the article are referred to for their terms.

18.11 On the basis of and in reliance upon the consent, BP and Ithaca commenced the project. Contracts were awarded and offshore construction and installation commenced in January 2019. By June 2019 work was substantially complete on an accommodation upgrade to the Stella FPF-1 floating production unit, some items of subsea infrastructure had been installed and pre-assembled units had been completed and shipped offshore to the installation. Drilling operations began at the Vorlich field in late June 2019 and completed in late November 2019. The start of

drilling operations was delayed as a result of a campaign of direct action taken by Greenpeace against the drilling rig. In this regard, on 14 June 2019, BP sought and was granted by the Lord Ordinary an interim interdict against the appellant and others acting under the auspices of the appellant from (among other things) disrupting the transportation or stationing of the drilling rig, and from disrupting drilling/production operations. The start of drilling operations was delayed by approximately 10 days.

18.12 On 21 June 2019, English solicitors for the appellant issued a pre-action protocol letter in advance of the English proceedings.

18.13 On 25 July 2019, notice was published in the London Gazette of the 7 August 2018 Secretary of State decision. The same notice was published in the Edinburgh and Belfast Gazettes the following day. The Secretary of State notified the appellant's English solicitors of this publication at the same time. This publication triggered a six week period in which an application could have been made to this Court in terms of regulation 16 of the 1999 Regulations in respect of the Secretary of State's decision. Reference is made to regulation 16(3). Despite the fact that the appellant's alleged complaints essentially relate to the Secretary of State's decision, for reasons which the appellant has never explained, no statutory application to this Court was brought within that period.

18.14 The English proceedings were commenced by the appellant on or around 7 November 2019. The appellant applied for judicial review on substantially the same grounds as are now advanced in the petition for judicial review before this Court (P393/20) and in the present appeal. The claim in the English proceedings is referred to. Permission to proceed was refused on the papers but granted after an oral hearing save that (i) the Secretary of State conceded certain grounds relating to transposition and the trigger period for an application to the court under regulation 16 and (ii) permission was refused for the remaining ground which challenged the Secretary of State on the ground that he had failed to have regard to the effect of the consumption of the oil proposed to be extracted.

18.15 On 3 April 2020, the English proceedings were concluded by a consent order. The consent order narrated that the Secretary of State had undertaken to publish details of the OGA's grant of consent for the Vorlich project for the purposes of starting time running under regulation 16 of the 1999 Regulations. On that date, notice of the Secretary of State's decision (which had already been published in July 2019 and which was not the subject of the consent order) and the OGA's grant of consent in relation to the Vorlich field were published in the Gazettes. However, the appellant was already well aware of those matters. It is realistically inconceivable that the appellant did not learn of the fact that the OGA had granted consent in respect of the Vorlich project at the time of the media coverage in September and October 2018.

19. See Answer 18.

20. See Answer 18.

Alleged failure to transpose-publication of grant of consent

21. Article 9(1) of the EIA Directive is referred to for its full terms beyond which no admission is made. *Quoad ultra* denied. It is denied that the matters addressed in Statement 21 may be relevantly complained of by the appellant and that the appellant has any standing to make any such complaint in respect of the Vorlich project. The appellant is not properly a person aggrieved in this regard. It is in any event denied that such a complaint may competently be made as a ground for an application under regulation 16(1) of the 1999 Regulations. The English proceedings at the instance of the appellant in respect of the Vorlich project were concluded with the consent order which provided for and led to the publication of notice in the Gazettes on 3 April 2020. The appellant's complaints in respect of and arising from transposition have been addressed in the English proceedings in a manner which the appellant objectively accepted in those proceedings. The agreed statement of reasons appended to the consent order in the English proceedings stated that the Secretary of State had provided a sufficient remedy for the English judicial review by agreeing to publicise details of the OGA's grant of consent for the Vorlich project in the Gazettes by 6 April 2020 for the purposes of starting time running under regulation 16 of the 1999 Regulations. The context was also that the transposition issues generally had already been addressed in the *Seahorses* proceedings. The consent order in the English proceedings is referred to for its terms.

Alleged failure to transpose-publicity

22. Articles 6(4) and 6(5) of the EIA Directive are referred to for their full terms beyond which no admission is made. *Quoad ultra* denied. It is denied that the matters addressed in Statements 22 to 24 may be relevantly complained of by the appellant and that the appellant has any standing to make any such complaint in respect of the Vorlich project. The appellant is not properly a person aggrieved in this regard. It is in any event denied that such a complaint may competently be made as a ground for an application under regulation 16(1) of the 1999 Regulations. Explained and averred that in combination, the press notices, online notice and link to the ES described above, were fully sufficient to meet the requirements of the EIA Directive and the 1999 Regulations. The relevant materials were both publicised and accessible via a variety of means which were both compliant with the EIA Directive and the 1999 Regulations.

23. Denied.

24. Denied.

25. Denied.

Publicity of the application

26. The EIA Directive and the 1999 Regulations are referred to for their full terms beyond which no admission is made. *Quoad ultra* denied.

27. Regulations 9(2A)(a) and 9(2A)(b) of the 1999 Regulations are referred to for their full terms beyond which no admission is made. *Quoad ultra* denied. Explained and averred that the 1999 Regulations place the duty to publish the ES and press notices on the undertaker. Formal notice of the application was published in two newspapers as directed by the Secretary of State. One of those newspapers has national coverage and the other is likely to be read by persons with an interest in oil and gas developments in the North Sea. A link was provided to BP's website, which was available to the public, where the ES, the application for consent and details of how representations could be made could be accessed. In addition to the statutory publicity requirements, the making of the application was the subject of a public announcement by BP and received extensive coverage both by a wide variety of organisations online and in a significant number of media outlets. Reference is made to Answer 18 above. On any view, the Secretary of State was entitled to be and was correct to be satisfied that the requirements of regulation 9 had been substantially met for the purposes of regulation 5(4).

28. Denied. Explained and averred that the appellant was not deprived of any opportunity to make comments on the ES and the application. There is no arguable basis for the claim that there was a failure to inform the public of the application and the ES. The appellant cannot relevantly claim to be a person who is aggrieved in this regard.

29. Denied. Explained and averred that, properly construed, Article 6(5) of the EIA Directive does not require that the relevant information be electronically accessible via a government website. The link to BP's website in this case was included in the press notices. BP further publicised the making of the application by public announcement and it received extensive coverage as explained above. With such a wide breadth of media coverage, it cannot be argued that the application did not come to the attention of the public, including those who might be specifically interested in or affected by the Vorlich project.

30. Admitted that there were no representations from the public. *Quoad ultra* denied. Explained and averred that the making of the application was extensively drawn to the attention of the public by means of the statutory notices, the public announcement and the extensive publicity.

31. Admitted that the ES is on the website but the statutory notice as published was not. *Quoad ultra* denied. Explained and averred that the information available online clearly explained how representations could be made in response to the application. Reference is made to Answer 18 above.

32. Denied. Explained and averred that alleged breach of an EU Directive is not a ground of challenge under regulation 16. Further and in any event the appellant has said nothing to demonstrate that it has suffered substantial prejudice to its interests as a result of any alleged failure.

Publication of the decisions

33. Denied. The appellant sets out no basis for the contention that it was denied the opportunity under regulation 16 of the 1999 Regulations to challenge the decision of the OGA to grant the consent. In particular there is no explanation of what additional information about the consented works the appellant says was required and why. Likewise, there is no explanation of the relevance of the OGA's main reasons and considerations or of the Extended Well Consent tests. The EIA process is carried out by the Secretary of State and not by the OGA.

34. Denied. The appellant claims on the one hand that it cannot know if it wishes to make an application under regulation 16 at the same time as purporting to make such an application. The appellant cannot relevantly claim to be a person who is aggrieved in this regard. Explained and averred that an alleged breach of an EU Directive does not of itself equate to a ground of challenge under regulation 16 of the 1999 Regulations. In any event the appellant has said nothing to demonstrate that it has suffered substantial prejudice to its interests as a result of any alleged failure.

Publicity of the additional information

35. Article 6(3) of the EIA Directive and regulation 10(2) of the 1999 Regulations are referred to for their full terms beyond which no admission is made. *Quoad ultra* denied. Explained and averred that the appellant has set out no basis upon which it is said that additional information was of significance either to its ability to make representations to the Secretary of State or to its ability to make an application to this Court under regulation 16. The appellant cannot relevantly claim to be a person who is aggrieved in this regard. The Secretary of State had discretion under regulation 10(2) of the 1999 Regulations whether to order publication of the additional information. The Secretary of State exercised his discretion. The appeal patently misconstrues the Environmental Statement Summary of the Secretary of State. The Environmental Statement Summary properly construed is to the effect that the additional information addressed issues that had been raised with regard to the ES which were resolved in a manner which supported the validity of the ES.

36. Denied. In terms of regulation 10 of the 1999 Regulations it is a matter for the discretion of the Secretary of State whether to direct that additional information ought to be publicised. The Secretary of State exercised his discretion not to so direct. The appellant has set out no basis upon which it can be said that the Secretary of State was not entitled to exercise his discretion so as not to require publication of the additional information. On any view, the Secretary of State was entitled to be and was correct to be satisfied that the requirements of regulation 10 had been substantially met for the purposes of regulation 5(4). Explained and averred that in any event the appellant has said nothing to demonstrate that it has suffered substantial prejudice to its interests as a result of any alleged failure.

Climate change from the operation of the field

37. Admitted that the ES assessed the greenhouse gas emissions which the proposed production operations at the Vorlich field would generate. Admitted that this would include emissions from burning oil and gas in flaring. The ES is referred to for its full terms beyond which no admission is made. *Quoad ultra* denied.

38. The additional information requested by the Secretary of State and submitted by BP is referred to for its full terms beyond which no admission is made. *Quoad ultra* denied. Explained and averred that the ES contained the necessary assessments of the greenhouse gas emissions which the proposed production operations at the Vorlich field would generate. There were clerical errors in the "Fuel Use (t/d)" column of the emissions input values given in Table 5-6 in relation to the flaring emissions associated with well start-up and flaring events over field life. The Secretary of State raised comments and sought clarification following submission of the ES (as is standard practice). The figures that were presented in Table 5-6 were updated in response to comments to reflect the flaring figures of 1,175te/d oil and 576te/d (equalling 788,563m^3) gas as had been quoted within 3.5.6 of the ES. These amended (reduced) production rates were applied and used within the calculation of the flaring emissions presented in the revised Table 5-6, and were unaffected by the clerical errors in the input values as described. Therefore, the errors in Table 5-6 were not used in the calculation of the total emissions values, were not material to the emissions assessment under consideration and did not change the overall conclusion reached in the ES. The errors were not capable of affecting the outcome of the EIA and the decision of the Secretary of State to agree to the grant of consent.

39. Denied. Reference is made to Answer 38. The appellant sets out no basis for the allegation that the Secretary of State failed to identify and consider information which was material to the decision to agree to the grant of consent and no basis for any contention that the Secretary of State acted irrationally in considering the ES and

agreeing to the grant of consent. The appellant does not identify any claimed failure to comply with any requirement of the 1999 Regulations.

40. Denied. Reference is made to Answers 38 and 39. The Greenhouse gas emissions estimates contained in the additional information were not higher than those published in the ES. The Secretary of State in the exercise of his discretion did not require publication of the additional information. The appellant cannot relevantly claim to be a person who is aggrieved in this regard. On any view, the Secretary of State was entitled to be and was correct to be satisfied that the requirements of regulation 10 had been substantially met for the purposes of regulation 5(4). Explained and averred that in any event the appellant has said nothing to demonstrate that it has suffered substantial prejudice to its interests as a result of any alleged procedural failure.

Climate change from the consumption of the oil and gas

41. The Climate Change Act 2008 is referred to for its full terms beyond which no admission is made. *Quoad ultra* denied. Explained and averred as follows:

41.1 The end use of the oil (read for present purposes as also encompassing gas) to be produced is not part of the development for which consent was sought in terms of the 1999 Regulations. Reference is made to the averments in Answer 12 above regarding the proper construction of the 1999 Regulations. The effect of the end use of the oil to be produced is not an effect of a part of the project as a relevant project.

41.2 The appeal sets out no basis upon which any coherent representation could have been made to the Secretary of State or could now be made to the effect that production of oil from the Vorlich field increases the overall consumption of oil such as to have any impact upon carbon budgets or targets related to climate change or ought to have been assessed in terms of the requirements of the Regulations.

41.3 In relation to the particular position of the UK's national emissions inventory, there would be yet further complications were such end use emissions to be assessed at the project level arising from the potential for produced oil to be exported and consumed elsewhere in the world.

41.4 As the appellant well knows and consistent with the foregoing, the position of the Secretary of State on this matter was explained in the English proceedings *inter alia* as follows (quoting from the Summary Grounds of Resistance of the Secretary of State):

> "*The Claimant is wrong to suggest that impacts of the use of the produced oil are material to the decision whether to grant consent for a development such as the Vorlich Field. Rather the carbon budget for the UK is a complex and high*

level strategic decision.....The use of oil forms a part of the UK's energy strategy and will continue to do so, alongside many other measures which ensure a security of energy supply from the most appropriate sources… Maximising the economic development and recovery of oil and gas resources is a priority of the UK's energy supply and energy security strategies. Indigenous oil and gas development is recognised by the UK Government as being an important part of the UK energy mix during the transition to a low carbon economy and the move towards clean growth. In settling upon these important and overarching strategies for the UK, the carbon impacts of energy use are carefully considered and assessed.…The use of the oil to be produced is not part of the development for which consent was sought. The Claimant does not argue, nor could it, that the production of oil from the Vorlich Field increases the use of oil. There is no evidence that such would be the case. Rather the Claimant's case derives from its position that as a matter of principle there should be no new oil. Thus the Claimant conflates and confuses different questions."

Despite having (i) full knowledge of the position of the Secretary of State on this matter from the English proceedings and (ii) having been told on two separate occasions by the English High Court that the relevant ground was "*unarguable*", the appellant completely fails to address that position in the appeal. It is reasonable to infer from this failure that the appellant has no basis to advance an argument that the position of the Secretary of State on this matter is wrong. The decision in the English proceedings on the substance of the point made in this appeal is *res judicata* in any event.

41.5 That the Climate Change Act 2008, the goals of the Paris Agreement and atmospheric emissions from fossil fuel sources, raise considerations which have to be and are addressed for the UK at the strategic level, is also reflected in the fact that they were addressed in the most recent Offshore Energy Strategic Environmental Assessment (OESEA3, 2016) which acknowledges that reliance on fossil fuel sources will continue during decarbonisation. In the OESEA3 Environmental Report, it is recognised that the emissions of activities which consume fossil fuels (such as energy generation, industry and transport) are emissions from those activities to be accounted for as such and are not emissions from the production of the fossil fuels themselves.

41.6 As the Secretary of State says, ensuring security of energy supply is a key aspect of UK energy policy which includes a strategic objective to maximise the economic recovery of UK petroleum. The emissions implications of that objective have been considered at the strategic level.

41.7 The foregoing matters addressed by the Secretary of State in the English proceedings are matters of national strategic decision making, where the court will only intervene on grounds of bad faith, improper motive and manifest absurdity (*Packham v Secretary of State for Transport and others* [2020] EWHC 829 Admin at [55]). The appeal addresses none of those considerations and in any event would not be a proper process in which to seek to do so having regard to the grounds of challenge specified by Regulation16 of the 1999 Regulations.

41.8 Further, and in the alternative, the appellant's case provides no basis for the Court to be able to say that the position of the Secretary of State is irrational so as to call into question the Secretary of State's assessment of the content of the ES in this regard. (*R (ClientEarth) v Secretary of State for Business, Energy and Industrial Strategy and another* [2020] EWHC 1303 Admin at [254]).

42. The Climate Change Act 2008 and Infrastructure Act 2008 are referred to for their full terms beyond which no admission is made. *Quoad ultra* denied. Reference is made to Answer 41.

43. Denied. Explained and averred that the authority relied on by the appellant in this and the preceding paragraph provides no authority for the propositions advanced.

44. The ES and the Secretary of State's Environmental Statement Summary are referred to for their full terms beyond which no admission is made and under explanation that the ES met the requirements of the 1999 Regulations. *Quoad ultra* denied. Explained and averred that the appeal fails to set out the basis in terms of alleged breach of the 1999 Regulations upon which it is argued that the Secretary of State failed to consider whether or not the consumption of the oil produced from the Vorlich field would affect carbon emissions, climate change and the Ministers' duties under the Climate Change Act. The decision of the Court of Appeal case of *R (Plan B Earth) v Secretary of State for Transport* relating to Heathrow Airport expansion ("the Heathrow case"), relied upon by the appellant, pertained to the designation of a statement of national planning policy under the legislation applicable to such a matter. The national policy in question was to favour a form of expansion to Heathrow Airport as a means of increasing the overall aviation capacity of the United Kingdom. That Court of Appeal decision does not indicate any breach of the 1999 Regulations in the present case which is not a matter of either national policy or overall production capacity but pertains to the consent given for the Vorlich project itself in terms of the 1999 Regulations. The process for such consent is not a venue for national strategic decision making and this appeal is not a venue for review of national strategic decision making. Reference is made to the above averments in Answer 41 and to the position of the Secretary of State in the English proceedings as to the different manner and level at which national strategic decision making takes place. Additionally, the

decision in the Heathrow case affirmed the well established principle that the content of the Environmental Statement is a matter for the judgment of the decision maker which may only be reviewed on *Wednesbury* grounds. No challenge is set out by the appellant on such grounds.

45. Denied. Explained and averred that the appellant confuses and conflates carbon emissions and increased carbon emissions. Reference is made to Answer 41. The appeal sets out no basis upon which any coherent representation could have been made to the Secretary of State or could now be made to the effect that production from the Vorlich field increases the overall consumption of oil such as to have any impact upon obligations and targets related to climate change.

46. Denied. The authorities cited by the appellant are referred to for their terms beyond which no admissions are made. Reference is made to Answer 41.

47. Denied. Explained and averred that the appellant sets out no basis for saying that preventing the use of oil produced from the Vorlich field would reduce the overall use of oil and gas and encourage moves to less. Reference is also made to Answer 44.

48. The 1999 Regulations, the Climate Change Act 2008 and the Paris Agreement are referred to for their full terms beyond which no admission is made. *Quoad ultra* denied. Reference is made to Answers 41-47.

49. The legislation cited by the appellant is referred to for its terms beyond which no admissions are made. *Quoad ultra* denied. Reference is made to Answers 41-48. As hereinbefore averred, the appeal sets out no basis upon which any coherent representation could have been made to the Secretary of State or could now be made to the effect that production from the Vorlich field increases the overall consumption of oil such as to have any impact upon carbon budgets or targets related to climate change. Further and in any event, despite the extensive publicity given to the application for consent in relation to the Vorlich project as described above, the appellant made no representations in relation to the application despite being afforded more than sufficient opportunity to do so (see *Walton*, above and *Lardner v Renfrew District Council* 1997 SC 104). Accordingly, for either or both of these reasons the appellant is not properly regarded as a person aggrieved by the grant of consent in terms of regulation 16(1) of the 1999 Regulations. Even if (which is denied) there has been failure to comply with a requirement of the 1999 Regulations, the appellant has also not demonstrated that its interests have been substantially prejudiced by any such failure. *Separatim*, this Court should not in all the circumstances, including the extreme prejudice liable to be suffered by BP and Ithaca, grant an order quashing the grant of consent. As set out above, following the grant of and in reliance upon the consent BP and Ithaca have carried out the offshore drilling and construction work

required for the project, at a total cost in excess of £200,000,000 and the project in that sense is substantially complete. The works for the Vorlich project for which consent has been granted have accordingly been very largely implemented by BP and Ithaca.

50. For the foregoing reasons, it is respectfully submitted that the Court should simply dismiss the appeal. In the alternative, the four questions of law posed by the appellant should be answered in the negative. In any event, the decisions of the Secretary of State and the OGA should not be reduced or quashed.

IN RESPECT WHEREOF

IN THE COURT OF SESSION

XA34/20

ANSWERS FOR THE FIRST AND THIRD INTERESTED PERSONS

to the Grounds of Appeal

in the appeal under Regulation 16 of the Offshore Petroleum Production and Pipelines (Assessment of Environmental Effects) Regulations 1999

by

GREENPEACE LIMITED, a company incorporated under the Companies Acts with registered number 01314381 and having its Registered Office at Greenpeace House, Canonbury Villas, London, N1 2PN.
Appellant

against

Decisions of the Secretary of State for Business Energy and Industrial Strategy and of the Oil and Gas Authority dated 7th August 2018 and 20th September 2018 and communicated by notice in the London, Edinburgh and Belfast Gazettes dated 3rd April 2020

Pinsent Masons LLP
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Ref: JMH/SJB/BP0066.07139

NOTE OF ARGUMENT FOR THE APPELLANT

in the

APPEAL

to

THE COURT OF SESSION

under

Regulation 16 of the Offshore Petroleum Production and Pipelines (Assessment of Environmental Effects) Regulations 1999

by

GREENPEACE LIMITED, a company incorporated under the Companies Acts with registered number 01314381 and having its Registered Office at Greenpeace House, Canonbury Villas, London, N1 2PN
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_____

1. Introduction

1.1. This note of argument is prepared in relation to the appeal by the appellant of the decisions of the Secretary of State for Business Energy and Industrial Strategy and of the Oil and Gas Authority dated 7th August 2018 and communicated by notice in the London, Edinburgh and Belfast Gazettes dated 3rd April 2020.

1.2. The appellant brings this appeal as a person aggrieved by the grant of consent represented by the decisions. The appellant is the autonomous regional office of Greenpeace, a campaigning organisation which has, as its main object, the protection of the natural environment. The appellant stands for positive change through action. It defends the natural world and promotes peace. It investigates and confronts environmental abuse by governments and corporations around the world. Greenpeace is particularly well known for the campaign work that it carries out at sea. It has worked to preserve marine species and to preserve fish stocks. It also campaigns to prevent the damaging effects of drilling for oil at sea.

1.3. The note first sets out the regulations which govern the matters in dispute in this appeal before turning to the particulars of the decisions that are sought to be challenged and finally addresses the purpose of an Environmental Impact Assessment and the features of a lawful and effective consultation which afford relevant context to the requirements of the regulations

2. The decisions

2.1. For the reasons set out in more detail below, the appellants move this court to reduce:

a. The decision by the Secretary of State for Business Energy and Industrial Strategy to agree to the grant of consent for the field development Vorlich project on 7th August 2018; and
b. The decision of the Oil and Gas Authority to grant consent to BP Exploration Operating Company Ltd for the field development Vorlich project (licence P1588 and P363)

(hereinafter referred to as "the decisions").

2.2. By way of legislative context, the '*exclusive right of searching and boring for and getting petroleum*' is vested in Her Majesty: Petroleum Act 1998, s 2. The OGA may license persons to '*to search and bore for and get petroleum*': s 3(1). The licensing process is subject to various regulations. At the time of the original grant of the licence to BP Petroleum Development Limited in 1981 (licence P363), the model clauses in the Petroleum (Production) Regulations 1976 (as amended by the Petroleum (Production) (Amendment) Regulations 1978 and the Petroleum (Production) (Amendment) Regulations 1980 were incorporated into the licence. No particular process for the granting of a consent, including the publication of any grant, is contained in the model clauses or elsewhere in the regulations or the Petroleum Act 1998.

2.3. Licence P363 was amended by way of deed of amendment dated 6 December 2016 between the Oil and Gas Authority, BP Exploration Operating Company Limited and Ithaca Energy (UK) Limited. The licence requires Ministerial consent for works for getting or conveying petroleum: clause 15. The licence provides that the drilling of a well shall not commence without the consent in writing of the Minister: clause 17.

3. The Regulations

3.1. The decisions bear to have been made under the Offshore Petroleum Production and Pipe-lines (Assessment of Environmental Effects) Regulations 1999.

3.2. Where the court is satisfied that the consent was granted in contravention of regulation 5(4) or regulation 5A(1)(a) or where the interests of the applicant have been substantially prejudiced by any failure to comply with any other requirement of the regulations, the court is empowered to reduce the consent: Reg 16.

<u>The granting of consent</u>

3.3. The Oil and Gas Authority (OGA) is not permitted to grant a consent in relation to a relevant project without the agreement of the Secretary of State: Reg 5(A1).

3.4. The Secretary of State is not permitted to agree to the granting of consent unless *inter alia* the application is accompanied by an environmental statement: Reg 5(1). The environmental statement is the first step of the environmental impact assessment which is defined at Reg 3A.

3.5. When presented with an environmental statement, the Secretary of State may not agree to the granting of consent unless he or she is satisfied that the requirements of Regs 9 and 10 have

been substantially met and that advice has been obtained from persons with appropriate expert knowledge who have examined the statement: Reg 5(4).

3.6. The Secretary of State is under a positive obligation to examine the environmental statement, reach a reasoned conclusion on the significant effects of the project on the environment, and integrate that conclusion into the decision about whether agreement to the grant of consent is to be given: Reg 5A(1).

3.7. The Secretary of State requires to publish his decision in the Gazettes, including the main reasons and considerations on which the decision is based: Reg 5(8)(a)(ii).

Publication Requirements

3.8. Reg 9 sets out the publicity requirements that are incumbent on the applicant. Regulation 9, read short, requires as follows:

a. The undertaker is required to serve copies of the statement and application on the public authorities specified by the Secretary of State: Regulation 9(1) and (2).
b. The undertaker is required to make copies available for public inspection: Regulation 9(2).
c. The undertaker is required to provide copies of the environmental statement to those who request it: Regulation 9(2).
d. The undertaker is required to publish notice of the application and the availability of the environmental statement: Regulation 9(2).
e. The notice must include a provision indicating that a person aggrieved by a decision of the Secretary of State may make an application to a court under regulation 16. Where a notice is published under regulation 9(2A), the undertaker must publish the notice (i) on such occasions as to be likely to come to the attention of those likely to be interested in or affected by the project and (ii) in such newspapers as the Secretary of State may direct and on a public website and the undertaker shall publish a copy of the application for consent and the environmental statement on that website alongside the notice.

3.9. Reg 10 empowers the Secretary of State to ask for further information and to require that it is publicised.

3.10. The 1999 Regulations are the transposing domestic legislation related to Directive 2011/92/EU as amended by Directive 2014/52/EU (the "EIA Directive"). The UK Government purported to transpose the EIA Directive into domestic law by way of the 1999 Regulations. However, the UK Government has acknowledged that it has failed fully to transpose the EIA Directive. The court's attention is drawn to the consent order in *R (Garrick Maidment) v Secretary of State for Business Energy and Industrial Strategy* dated 27th September 2019 and the statement of reasons attached thereto. In particular, it was accepted by the UK Government that regulations 5A, 6, 9 and 16 of the 1999 Regulations do not fully transpose Article 9 and 11 of the EIA Directive. In light

of that consent order, the UK Government undertook to carry out a review of the 1999 Regulations.

3.11. The 1999 Regulations have subsequently been replaced with the Offshore Oil and Gas Exploration, Production, Unloading and Storage (Environmental Impact Assessment) Regulations 2020. The 2020 Regulations contain material changes to the publication requirements of (i) the application, (ii) the agreement of the Secretary of State, and (iii) the grant of consent by the Oil and Gas Authority: Regs 11-16. These changes came about because of the failure under the 1999 Regulations properly to transpose the provisions of the EIA Directive into domestic law. For current purposes, however, the decisions were made under the 1999 Regulations.

3.12. Because the 1999 Regulations are domestic law, designed (as amended) to implement the EIA Directive, this court is required to interpret the national law in the light of the wording and purpose of the directive: *Case C-14/83 Von Colson v Land Nordrhein-Westfalen* [1986] 2 CMLR 430. The 1999 Regulations should be interpreted as if they had fully transposed the requirements of the EIA Directive. To that extent, the principle of the supremacy of EU law survives the Brexit transition period: European Union (Withdrawal) Act 2018, s.5(2).

3.13. Insofar as relevant to these proceedings, the EIA Directive provides as follows:

a. Environmental Impact Assessments ("EIAs") may be required for projects for deep drillings and underground mining: Article 2(1); 4(2), Annex 2 point 2(b) and (d);
b. EIAs are defined at Article 1(2)(g);
c. An assessment must be carried out before development consent is granted with regard to the effect of that development on the environment: Article 2(1);
d. Member States may integrate EIAs into existing procedures or devise new procedures that are established in order to comply with the EIA Directive: Article 2(2);
e. EIAs must be publicised in the manner set out at Article 6 with the stated aim of ensuring the effective participation of the public in decision-making procedures;
f. Detailed arrangements are to be put in place for informing the public and for consulting the public concerned: Article 6(5);
g. The opportunities that the public concerned is granted under Article 6(4) to participate early in the environmental decision-making process must be effective and the conditions for access to participate must be such as to make it simple for the public to take part: *Flausch v Ypourgos Perivallontos kai Energeias* Case C-280/18 at §31 and §38 of the First Chamber's decision;
h. The public concerned includes non-government organisations promoting environmental protection: (Article 1(2));
i. The results of consultations must be taken into account in the development of consent procedures: (Article 8);

j. The published decision must include at least (i) a reasoned conclusion and (ii) any environmental conditions attached to the decision, a description of any features of the project and/or measures envisaged to avoid, prevent or reduce and, if possible, offset significant adverse effects on the environment as well as, where appropriate, monitoring measures: (Article 8(1));

k. The reasoned conclusion may be issued at the end of the EIA process where this is a discrete procedure but the competent authority must be satisfied that the conclusions are still "up to date" when taking a decision to grant development consent: (Article 8a(3) and (6));

l. When development consent is granted, this must be publicised together with any EIA decision: (Article 9(1));

m. Access to a procedure whereby the grant can be challenged by the public must be available, member states shall determine at what stage decisions, acts or omissions may be challenged and non-governmental organisations shall have sufficient interest to bring proceedings, any such procedure to challenge shall be fair, equitable, timely and not prohibitively expensive: (Article 11/ *Flausch* at §§58-59).

4. Application of the regulations to the decision under appeal in these proceedings

4.1. As set out below, the Secretary of State failed to adhere to the requirements of regulation 5(4) *et separatim* regulation 5A(1)(a). Separately, the appellant's interests as an interested environmental campaigning body have been substantially prejudiced by the failures of the Secretary of State and the OGA. The remedies sought by the appellant should, therefore, be granted.

4.2. The BP/ Ithaca application for consent was submitted on or around 4th April 2018. The application included a Field Development Plan. The Secretary of State requested further information on or around 19th June 2018. The further information requested included habitat assessment and environmental baseline survey reports. On or around 3rd August 2018, the Secretary of State published an Environmental Statement Summary. The Environmental Statement Summary is the Minister's agreement to the issue of the consent by the OGA. The Environmental Statement Summary was not published at the time in the Gazettes. On or around 20th September 2018, the OGA granted consent for carrying out works "*described in the document entitled 'Vorlich Field Development Plan' dated September 2018*". The OGA consent letter has not been made publicly available. The Field Development Plan has not been released.

4.3. Following litigation in relation to the failure properly to publicise the decisions, notice of (i) the Secretary of State's agreement to the consent and (ii) the OGA grant of consent in relation to the Vorlich field were published in the Gazettes on 3rd April 2020.

<u>Failure effectively to publicise</u>

4.4. The EIA Directive requires the member state to set out the detailed arrangements for informing the public of the application, the Environmental Statement and the EIA process and consulting the

public concerned. The 1999 Regulations require the publication of the notice on a website which the public can access along with the application and EIA material. However, the publication cannot simply be on any website. Informing the public is not satisfied simply by putting a notice on a website: *Kendall v Rochford District Council* [2015] Env LR 21 at §§92-96. That website is envisaged in the 1999 Regulations as being under the undertaker's control, since that person is required to post the application and the environmental statement on that same website. The 1999 Regulations impose a general obligation to publish the notice on such occasions as are likely to come to the attention of those persons likely to be interested. It also allows the Secretary of State to direct that newspaper notices are made. Publication must be in a manner which is effective so as to enable the participation of the public in the decision making.

4.5. BP were obliged to publish the notice 'on such occasions as to be likely to come to the attention of those likely to be interested in, or affected by, the relevant project' (regulation 9(2A)(a)), alongside the specific requirement in regulation 9(2A)(b) to put the notice, application for consent and environmental statement on a public website. Only very limited advertisement was carried out and it was not carried out in such a manner as to come to the attention of those likely to be interested in or affected by the project. The advertisement in the Telegraph and the local Aberdeen newspaper elicited no public attention at all and it was not subsequently searchable electronically. On the Scottish advertising website the notice is not in the 'public notices' section or available by its search facility. The notice given by BP was not likely to come to the attention of the public concerned.

4.6. In particular, there was a failure to inform the "*public concerned*" such as environmental non-governmental organisations, including the appellant, despite the fact that it was relatively simple to do so. It cannot reasonably be suggested that it was not thought that the appellant would be interested in the relevant project.

4.7. Article 6(5) requires *'the relevant information to be electronically accessible to the public, through at least a central portal or easily accessible points of access, at the appropriate administrative level*'. Properly construed, this is a reference to being electronically accessible through a government website, since administrative levels refer to government rather than private bodies. An example would be a council's website hosting the details of planning applications which are subject to EIA. Putting the information on the applicant's website is insufficient. Most obviously, the public are less likely to look at private companies' websites (and some companies will be less well known than BP or will be newly created special purpose vehicles). The standard of what is displayed, for how long and the recording of the publicity will be clearer on a public authority website. That is a problem in the present case, with the application not appearing to have been published at all, and the Environmental Statement not being on an obvious link. The manner of publication must be assessed by reference to the principle of effectiveness: *Flausch* at §§29-33.

4.8. The Environmental Statement is on the BP website, but the statutory notice is not. Under regulation 9(2A) they have to be 'alongside' on the same website. It was not published on a

" *central portal, or easily accessible point of access, at the appropriate administrative level"*: Article 6(5).

4.9. Stark evidence of the failure adequately to publicise the application is apparent from the fact that there were no representations from the public at all. Whilst the scheme is in the North Sea, as opposed to on or adjacent to land, it was of interest to those concerned with the environment – particularly on marine and climate change matters – and fishing and shipping interests in the area. That none of them commented points to the failure of the publicity to accord with the statutory requirements.

4.10. For the foregoing reasons, the publicity requirements in the 1999 Regulations and the publicity actually carried out in this case were inadequate to comply with the Directive. The requirements of regulation 9 not having been complied with, the Secretary of State was not permitted to agree to the grant of consent under regulation 5A(1)(c) because of the provisions of regulation 5(4). The grant of consent was accordingly granted in contravention of regulation 5(4).

Publication of the decisions

4.11. The Vorlich consents have not been published. Incorporated into the consent is the Vorlich Field Development Plan dated September 2018. That document has not been provided to the appellant. It is not possible to see what the consented works are without the approved documents that describe them. The OGA's '*main reasons and considerations on which the decision is based*' have not been provided to the appellant. This is contrary to Article 9(1)(b) of the EIA Directive. The OGA refers to Extended Well Consent tests. These have not been published or provided to the appellant. None of these documents have been made available to the public. That is a breach of the requirements of publication under the EIA Directive as set out above.

4.12. This failure is a breach of article 9 and article 11 of the EIA Directive. A person cannot know if he or she is aggrieved by a decision and therefore wishes to make an application under regulation 16 if he or she is unaware of the full details of the decision. This challenge has had to be formulated with only a partial copy of the decision. That is not in accordance with the requirements of the EIA Directive as set out above.

Publication of the additional material

4.13. As set out above, the Secretary of State made a request under regulation 10 for further information in relation to the application and that further information was provided by the applicant. The EIA is comprised not only of the Environmental Statement but includes all material submitted during the application process.

4.14. Material relevant to the EIA decision must be made available to the public concerned where it is received following the submission of the application: Article 6(3). Regulation 10(2) requires notice to be published and the material made available if in the Secretary of State's opinion it is '*of material relevance to his decision as to whether to grant consent'*.

4.15. The Secretary of State's Environmental Statement Summary referred explicitly to the Additional Information three times.[1] Further detail about the nature and extent of the Additional Information is provided in the affidavit of Victoria Crossland, provided for the Secretary of State, at paragraphs 9 and 17-20 notwithstanding the assertion therein at paragraphs 11, 12 and 14 that it was "not relevant". If truly irrelevant, then the Secretary of State would not have taken account of the Additional Information and it would not have informed his decision. Clearly he did take the Additional Information into account. He did therefore find it of '*material relevance to his decision*' and it should have been published.

4.16. This Additional Information has not been published. The Secretary of State should have insisted on the Additional Information being published. Having not done so is a failure to abide by regulation 10 of the 1999 Regulations.

4.17. The requirements of regulation 10 not having been complied with, the Secretary of State was not permitted to agree to the grant of consent under regulation 5A(1)(c) because of the provisions of regulation 5(4). The grant of consent was accordingly granted in contravention of regulation 5(4).

4.18. The failures to publicise have deprived interest persons of the ability to make representations. Such representations are required to be taken into consideration in accordance with regulation 5A(1)(a). They have not been taken into account. The grant of consent has been granted in contravention of regulation 5A(1)(a).

Main reasons and considerations on which the decision is based

4.19. Separately, special duties arise where an application involves EIA considerations: *R (CPRE Kent) v Dover District Council* [2018] 1 WLR 108 at §§31-35 per Lord Carnwath JSC. Public participation in the decision making is of vital importance and there is a duty to give proper, adequate and intelligible reasons for any decision that is made: *South Bucks District Council v Porter (No 2)* [2004] 1 WLR 1953 at §36 per Lord Brown of Eaton-under-Heywood. It must be possible for the reader of the decision to understand why the matter was decided as it was and what conclusions were reached on the principal issues: *Clarke Homes Ltd V Secretary of State for the Environment* [2017] PTSR 1081 at 1089 per Sir Thomas Bingham MR. It is not possible in the circumstances of these proceedings to be able to determine why the Secretary of State reached the decision that he reached because the material that he refers to having relied upon has not been made available. He has not satisfied his duty to provide the main reasons and considerations for his decision. In the circumstances of these proceedings, that failure goes to the

[1] "The information requested mainly related to clarification on atmospheric emissions, installation method for the pipeline and umbilical, and justification of the risk matrix conclusions. The additional information received from BP on 6 July 2018 and 30 July 2018 addressed all of the issues that were raised."
"Following the review of the ES, the responses received from consultees and the additional information provided by BP, BEIS OPRED is satisfied that this project will not have a significant adverse impact on the receiving environment …"
"On the basis of the information presented in the ES, the advice received from consultees and the additional information provided by BP, BEIS OPRED is content that there are no objections, and agrees to the Oil & Gas Authority issuing the necessary consent for the proposals."

heart of the justification of the granting of consent and undermines its validity to such an extent that reduction of the decision is the only appropriate remedy: *R (CPRE Kent) v Dover District Council* [2018] 1 WLR 108 at §§61-69 per Lord Carnwath JSC.

Climate change as a relevant factor

4.20. Regulation 3A(2) of the 1999 Regulations very clearly requires that an environmental impact assessment identifies, describes and assesses *inter alia* the direct and indirect significant effects of the relevant project on land, soil, water, air and climate. Furthermore, schedule 2 of the 1999 Regulations expressly includes reference to climate change at paras 4 and 5.

4.21. In this instant matter, the Environmental Statement assessed the contribution to greenhouse gas emissions which the proposed operation of the oil and gas field would generate. In the operational stage this would be by burning oil and gas in flaring. The measure given was Global Warming Potential (GWP) (see Environmental Statement ("ES") para 5.3.1.1). The ES said that flaring would take place once a year for 4 days, burning 1572 tonnes of oil and 690 tonnes of gas a day (see ES table 5-6) but also provided different figures of 1,175 tonnes of oil and 788,563 m^3 of gas a day (para 3.5.6). Table 5-6 showed the daily tonnages burnt, multiplied by the number of days' burning for an annual total and then by 10 for a 10 year figure (so 40 days each for oil and gas).

4.22. The Additional Information said that that table and paragraph 3.5.6 were inconsistent and sought to correct the table. The 'corrected' table showed a tonnes/day use of 2350 tonnes occurring for two days which was said to give a total fuel use of 2350 tonnes. Over the 10 year field life the daily usage was 11,750 tonnes of oil with a total oil use of 11,750 tonnes over 10 days. The figures simply do not make sense mathematically, and the altered table appears to have overlooked, at the least that each event would last four days (96 hours) see para 3.5.6.

4.23. The adverse contribution of the scheme's operation to climate change was misstated and understated. These errors of fact (which amounted to legal errors – *E v Home Secretary* [2004] QB 1044) were not identified by the Secretary of State when he was considering the application. The ES forms an essential part of the decision making process for the Secretary of State: Regulation 5A. Incorrect information in the ES undermines the factual basis on which any decision to agree to a grant of consent is based. It amounts to a failure to take account of a material fact relevant to the decision. The decision should be reduced and sent back to the decision-maker to be made again in accordance with the appropriate procedures.

4.24. Since the Additional Information was not advertised or published in any form and this material was not made available to Greenpeace until after the commencement of proceedings, it was impossible for Greenpeace or any other member of the public or NGO to draw attention to the errors and to comment on the higher Greenhouse gas emissions. The right of the appellant (and the public at large) was undermined as a result of not being able to consider and challenge the grant of consent on the basis of this error. The appellant's interest as an interested environmental campaign group and being 'the public concerned' were substantially prejudiced as a result of the

decision not to publish this material in accordance with the requirements of the 1999 Regulations and the EIA Directive.

4.25. Separately, the Climate Change Act 2008 imposed a '*duty on the Secretary of State to ensure that the net UK carbon account is at least 80% lower*' (from carbon dioxide and other targeted greenhouse gases) than the 1990 baseline: s 1. From 27th June 2019 that was replaced with a 100% reduction: so net carbon neutrality. The Secretary of State is required to set carbon budgets for five year periods (s 4) with minimum percentage reductions being required (s 5).

4.26. The Secretary of State was required to have regard to the use to which the extracted oil and gas would be put when considering the granting of the licence. Oil which is produced will be consumed in ways which generate greenhouse gas emissions, in addition to the more modest level of emissions generated by the oil exploration and exploitation process. The effect of the consumption of oil on climate change is relevant to the determination of consent for that well, including a consideration of whether the new oil source will increase oil consumption or merely displace imported oil. The relevance of this issue has been accepted by the Courts for onshore shale gas extraction and coal mining: *R(Stephenson) v Secretary of State for Communities and Local Government* [2019] EWHC 519 (Admin) §§ 67, 68).

4.27. The effect of burning coal on climate change was relevant to whether planning permission should be granted for coal extraction, whilst there was a need to consider whether not producing the coal domestically would encourage lower carbon energy sources or just be replaced by imported coal: *H J Banks & Co Ltd v Secretary of State for Housing, Communities and Local Government* [2018] EWHC 3141 (Admin), [2019] PTSR 668 at para 94-96,102-106 per Ouseley J.

4.28. BP's Environmental Statement considered the generation of greenhouse gases from the oil field development and production process, including flaring, (para 5.3.1.1,6.5) but did not consider the effect of consuming the oil produced by the field. The Secretary of State's Environmental Statement Summary listed under Key Environmental Impacts 'Atmospheric emissions' as identified and discussed in the Environmental Statement. It said that further information requested included '*clarification on atmospheric emissions*'. There was no mention of climate change or greenhouse gases, or any expansion on atmospheric emissions as a topic. The Secretary of State failed to consider at all whether the consumption of the oil produced from Vorlich would affect carbon emissions, climate change and the Secretary of State's duties under the Climate Change Act: *R (Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214.[2]

[2] The Court of Appeal's decision was overturned by the UKSC ([2021] PTSR 190) but on the basis that the UKSC determined that "This is not a case in which the Secretary of State omitted to give any consideration to the Paris Agreement" (para 125) rather than consideration of the Paris Agreement not being a necessary requirement. To the contrary, in the case before this court, there is no evidence of there having been any consideration of the Paris Agreement or the requirements of the Climate Change Act 2008.

4.29. If oil is extracted from the Vorlich field (and the appellant understands that extraction from the field has now commenced), it will be processed and consumed, usually in ways which will add significant quantities of carbon dioxide to the atmosphere and so contribute to climate change. If the oil is not extracted and remains under the seabed then it will not generate carbon dioxide and will not contribute to climate change. Carbon emissions will be an inevitable consequence of allowing extraction.

4.30. The effect of consuming the oil – in practice mainly burning it – is a relevant consideration in the determination of the application for an OGA licence and the Secretary of State's consideration of the environmental impacts. That the effect of consuming coal or gas is relevant to the determination of an application for its exploration or extraction has been established by the Courts: *Stephenson*; *H J Banks*. In the recent first-instance decision of the English divisional court, *R(Finch) v Surrey CC* [2020] EWHC 3566 (Admin), Holgate J found the future combustion of fossil fuels not to be an environmental effect of the project in question. The applicant invites this court not to follow that decision which is, in any event, under appeal to the English Court of Appeal.

4.31. Whether or not it is policy to continue using oil and gas for some time into the future, that does not alter the effect of the consumption of the oil and gas extracted from the Vorlich field on the environment. If the consent was not granted then these hydrocarbons would not be extracted, they would not be used and greenhouse gases would not be emitted as a result of their use. Preventing their use would reduce the overall use of oil and gas and encourage moves to less.

4.32. The consumption of the oil and gas extracted under the project is, at the very least, an indirect or secondary effect of the project. Its effects needed to be considered and were relevant to the merits of the proposal. The appellant would have made all of these representations to the Secretary of State if the application, agreement and grant of consent had been publicised in the manner in which the 1999 Regulations and the EIA Directive envisage. The failure by the Secretary of State to ensure compliance with the 1999 Regulations *et separatim* the EIA Directive has substantially prejudiced the appellant's ability to make such representations. The effects of oil and gas extraction under the development are relevant to the government's policy to reduce greenhouse gas emissions. The Secretary of State has failed to take account of government policy to reduce greenhouse gas emissions. The decisions should be reduced and the Secretary of State should carry out the process *de novo* in order that the correct publication can be carried out, the appellant can make all appropriate and necessary representations in relation to it and government policy is taken into account.

5. The purposes of an Environmental Impact Assessment

5.1. An EIA is an essential factor to be considered in the decision making process. The report is intended, at least in part, to inform the public through the provision of a comprehensible explanation of the proposed project or development in order to provide an opportunity for representations to be made by interested members of the public: *R (Friends of the Earth) v*

Heathrow Airport Ltd [2020] UKSC 52 at §146. The public must be permitted an early and effective opportunity to comment on – and to seek to influence – the proposed development. This approach is the only approach that satisfies the United Kingdom's obligations under the Aarhus Convention, particularly Article 6.

5.2. An EIA is not a rubber stamping exercise. It simply does not do for the respondents and third parties to come before the court and argue that, even if Greenpeace and others like them had been able to make representations, they would not have made any difference. That is procedurally improper. Article 6 of Aarhus, the EIA Directive and authority from the highest court in the United Kingdom indicate that, whilst it is possible to challenge a decision-maker's decision in light of the EIA on *Wednesbury* grounds, that does not give the decision-maker any authority to ignore representations from the public. The representations and consideration must be considered, even if then rejected.

5.3. It is unlawful, in light of the decision in *R v Rochdale Metropolitan Borough Council ex p Tew* [2000] Env LR 1, to reach a decision without full knowledge of the likely impact of a development on the environment. Greenpeace's submissions – had it been permitted the opportunity to make them – would have been to the effect that the "Rochdale Envelope Approach" should have been followed, identifying a worst case scenario against which the decision-maker could assess the acceptability or otherwise of the environmental impacts of the proposed project or development. Flexibility within those parameters is, of course, permissible, provided that the EIA process has considered the impacts of the project and there are robust and justifiable conclusions. In the instant circumstances, there should have been an assessment on the basis that all of the oil produced would be burned in the UK. How else could it possibly be appreciated what was being permitted?

5.4. Greenpeace was prevented from providing expert evidence and experienced input on the likely effects of accidents and oil spills. There should have been – but there was not – consideration of what will happen as demand for oil declines if the well needs to be closed and the environmental effect of doing so. There should have been – but there was not – consideration of what was to happen in the event of an oil spill or what would happen during decommissioning. Decommissioning causes significant environmental damage. It is not enough to push those matters to a later date for consideration *after* the granting of the licence as is suggested at section 3.7 of the EIA which states that decommissioning "will be the subject of a separate EIA". They form part of the impact of the granting of the licence and it is essential that they form part of the decision-making process. Greenpeace was prevented – as a global expert in such matters – from participating in the process.

5.5. By suggesting that decommissioning be dealt with at a later date by a "separate EIA", what is in fact being sought is to escape the requirement to carry out an EIA. Decommissioning is governed by the Petroleum Act 1998. Under section 29 the Secretary of State may serve notice requiring the licence holder to prepare a decommissioning programme. There is no statutory requirement to

prepare an EIA/Environmental Appraisal in the Petroleum Act. As the UK Government's guidance document says at para 12.4:

> "In order to demonstrate the potential environmental impacts of proposed decommissioning activity on the marine environment, an environmental impact assessment process must be executed. Most operators seemed to assume that the assessment should be aligned with the requirements of the Environmental Impact Assessment (EIA) Directive (Directive 2011/92/EU as amended by Directive 2014/52/EU). However, there is no statutory requirement to undertake an environmental impact assessment that satisfies the EIA Directive requirements for proposed decommissioning activities (for example, there is no expectation to assess all the options considered in the CA, or to assess the impact of accidental events e.g. spills from vessels). Under the Petroleum Act 1998 there is a more straightforward requirement to undertake an assessment of the potential environmental impacts of the proposed decommissioning proposals, and the EA described here fulfils that requirement."

5.6. Preventing participation in the EIA means that the EIA is flawed and the decision to grant the licence based upon its foundation falls to be reduced.

6. Consultation

6.1. There are four requirements of a lawful and effective consultation: (i) that the consultation take place at a time when the proposals are still at a formative stage; (ii) sufficient information about the proposal must be given so as to permit of intelligent consideration and response; (iii) adequate time must be given for consideration and response; and (iv) the product of the consultation must be conscientiously taken into account ("*The Sedley criteria*"), approved in *R (Mosley) v Haringey London Borough Council* [2014] 1 WLR 3947 at para.25 (Lord Wilson); see also: *R v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213 at para.108 (Lord Woolf, MR)); *R (Bloomsbury Institute Ltd) v The Office for Students* [2020] EWCA Civ 1074 at paras. 64-69; *R (Help Refugees Ltd) v Secretary of State for the Home Department* [2018] 4 WLR 168 at para. 90.

6.2. As a result of the failures to effectively publicise the consultation was unfair and therefore unlawful and ineffective.

7. Substantial prejudice

7.1. The publicity failures, and consequent failure to conduct a lawful consultation, all as set out above removed from the appellant the opportunity to make material representations, *inter alia,* on climate change matters and also those matters set out in paras 5.3 – 5.5 above which would have been a relevant factor for the Secretary of State and which he would have required to consider and take into account. The interests of the appellant have accordingly been substantially prejudiced. Further, as set out at paras 4.11-4.12 and 4.19 above, the appellant has been substantially prejudiced through the failures to provide the main reasons and considerations for the decisions.

8. Conclusion

8.1. For the reasons set out above, this court can be satisfied that:

8.1.1. The appellant is a person aggrieved by the grant of consent;

8.1.2. The grant of consent is in contravention of regulation 5(4);

8.1.3. The grant of consent is in contravention of regulation 5A(1)(a); and

8.1.4. The interests of the appellant have been substantially prejudiced by the failure to comply with the 1999 Regulations.

8.2. Therefore, this court should grant the orders for reduction as sought by the appellant.

Ruth Crawford QC **David Welsh, advocate**

Rules of the Court of Session 1994

INTIMATED

XA34/20

IN THE COURT OF SESSION

NOTE OF ARGUMENT FOR THE APPELLANT

in the cause

GREENPEACE LIMITED

Appellant

against

Decisions of the Secretary of State for Business Energy and Industrial Strategy and of the Oil and Gas Authority dated 7th August 2018 and 20th September 2018 and communicated by notice in the London, Edinburgh and Belfast Gazettes dated 3rd April 2020

Defender

No. Of Process

Harper Macleod LLP
Citypoint
65 Haymarket Terrace
EDINBURGH
EH12 5HD

Our Ref: JLJ/554938

IN THE COURT OF SESSION

NOTE OF ARGUMENT FOR THE FIRST RESPONDENT

In the Appeal under Regulation 16 of the Offshore Petroleum Production and Pipelines (Assessment of Environmental Effects) Regulations 1999

by

GREENPEACE LIMITED, a company incorporated under the Companies Acts with registered number 01314381 and having its Registered Office at Greenpeace House, Canonbury Villas, London, N1 2PN

Appellant

against

Decisions of the Secretary of State for Business, Energy and Industrial Strategy and of the Oil and Gas Authority dated 7th August 2018 and communicated by notice in the London, Edinburgh and Belfast Gazettes dated 3 April 2020

Introduction

1. The Appellant seeks to challenge decisions taken by the First Respondent and the Second Respondent in relation to the development of the Vorlich field by BP/ Ithaca. The First Respondent respectfully submits that no material error in law is identified by the Appellant and the appeal should be refused.

2. Separately, even if there has been an error in the procedure in this case (which is denied), the Court should, in the exercise of its discretion, refuse to reduce the decisions taken by the Respondents. The Appellant fails to demonstrate that the outcome could have been different even if there is merit in the grounds of challenge. Moreover, significant prejudice would be suffered by the Respondents and the Interested Parties if reduction was granted given that the Vorlich field is, as of the week commencing 9 November 2020, operational.

Background to the Appeal

3. The appeal is concerned with the Offshore Petroleum Production and Pipelines (Assessment of Environmental Effects) Regulations 1999 (the "1999 Regulations"). The 1999 Regulations sought to implement Directive 2011/92/EU ("EIA Directive"). They have been superseded by the Offshore Oil and Gas Exploration, Production, Unloading and Storage (Environmental Impact Assessment) Regulations 2020 (the "2020 Regulations"). However, the 1999 Regulations are still applicable to the decision challenged in the present appeal.

4. The First Respondent accepted in two judicial review proceedings – one raised by the Appellant – that the 1999 Regulations did not fully transpose the EIA Directive. The First Respondent altered its working practices to ensure compliance with the EIA Directive. The First Respondent also undertook a comprehensive review of the 1999 Regulations which resulted in a new set of regulations, the 2020 Regulations, being produced that fully transpose the EIA Directive. The 2020 Regulations were laid before Parliament on 10 December 2020 and came into force on 31 December 2020. This background issue is addressed in the affidavit of Mr Jonathan Ward.

5. The present appeal is not the first litigation that has been raised by the Appellant in relation to the consents granted by the Respondents in relation to the Vorlich field. Judicial review proceedings were previously raised by the Appellant in the English High Court (the "English Proceedings"). Those proceedings were disposed of by way of a consent order with a notice being published in the Gazettes. The Appellant also raised a petition for judicial review in the Court of Session. Permission to proceed was refused by Lord Boyd (*Greenpeace, petitioner* [2020] CSOH 88 (the "Scottish JR")).

The Statutory Provisions

6. The appeal proceeds on the basis of regulation 16 of the 1999 Regulations, which provides that:

(1) On the application of any person aggrieved by the grant of consent in respect of a relevant project in relation to which an environmental statement was required to be submitted by virtue of regulation 5(1) above (agreement of Secretary of State in respect of relevant projects), the court may grant an order quashing the grant of consent where it is satisfied that the consent was granted in contravention of regulation 5(4) or regulation 5A(1)(a) above (consideration of environmental statement etc.) or that the interests of the applicant have been substantially prejudiced by any failure to comply with any other requirement of these Regulations."

7. The Court will require to assess whether there has been any contravention of regulation 5(4), regulation 5A(1)(a) or any other contravention of the 1999 Regulations that has substantially prejudiced the Appellants. If the Court was satisfied that there has been any such breach, there is a discretionary judgment to be made in terms of whether the consent should be reduced. This staged approach leads to the motion trailed at §§1-2 above: the first step is to consider whether there has been any contravention. If not, the appeal must fail. If the contravention is of a provision other than regulation 5(4) or 5A(1)(a), the Court also requires to determine whether the interests of the Appellant have been substantially prejudiced by the contravention. Even if there has been a contravention there remains a further question for the Court to answer, namely whether in the exercise of its discretion, the Court should reduce the consent.

8. The ultimate consent is granted by the Second Respondent. However, in terms of regulation 5(A1) of the 1999 Regulations, the Second Respondent shall not grant consent without the agreement of the First Respondent. The First Respondent's agreement is an *"…integral part of the consenting process. It is a condition precedent to the OGA granting consent…"* (per Lord Boyd in the Scottish JR, paragraph 13). It is the First Respondent that considers relevant environmental issues associated with a proposed development. This is not part of the remit of the Second Respondent.

The Grounds of Challenge

9. The Appellant raises five grounds of challenge:

   (i) Failure to transpose the EIA Directive (paragraphs 21 to 25);

   (ii) Publicity of the application (paragraphs 26 to 34);

   (iii) Publicity of the additional information (paragraphs 35 to 36);

   (iv) Climate change and the operation of the field (paragraphs 37 to 40); and

   (v) Climate Change from the consumption of oil and gas (paragraphs 41 to 49)

10. The First Respondent shall address each ground of challenge in turn. The First Respondent shall then address whether the Court should, as a matter of discretion, reduce the consents if the Court is satisfied that the Appellant has identified a material error (which the First Respondent denies).

(i) Failure to Transpose

11. At paragraph 21, the Appellant takes issue with the fact that the 1999 Regulations did not require publication of the consent issued by the Second Respondent. At paragraph 22, the Appellant takes issue with the accessibility of information and public engagement provisions set out in the 1999 Regulations.

12. The Respondent accepts that the EIA Directive was not fully transposed in the 1999 Regulations insofar as there was no requirement for publication to be made of the fact the Second Respondent had granted consent for a project. This related to compliance with Article 9 of the EIA Directive. This concession was first made on 16 October 2019 in the case *R (Garrick-Maidment) v Secretary of State for Business, Energy and Industry Strategy*. The same concession is recorded in the consent order in relation to the English Proceedings.

13. In these circumstances, the issue of transposition of the EIA Directive is *res judicata*. Under English law, a consent order "*converts an agreement … into a judicial decision on which a plea of res judicata may be founded"* (Spencer Bower, Turner and Handley *The Doctrine of Res Judicata,* (3rd ed), para 38). Moreover, the matter of transposition is now academic, given that the 1999 Regulations have been superseded by the 2020 Regulations: *R. (on the application of Dolan) v Secretary of State for Health and Social Care* [2020] EWCA Civ 1605 at [39].

14. In the Scottish JR, Lord Boyd noted that:

"The Secretary of State has publically (sic: sc "publicly") accepted that the Regulations are defective and is consulting on a comprehensive review. I do not consider that it is an appropriate use of the supervisory jurisdiction of this court to pronounce on matters which are in effect moot, given the Secretary of State's acceptance of the non-compliance of the Regulations with the Directive" (paragraph 26)

15. The First Respondent respectfully submits that the same approach should be adopted by your Lordships' Court given the discretionary nature of the test in regulation 16 appeals. The First Respondent accepts that the 1999 Regulations did not fully transpose the EIA Directive. However, the Appellant fails to demonstrate that any generic issue in relation to transposition has prejudiced it in any way. Moreover, the fact consent has been granted for the Vorlich field has now been subject to publication in the Gazette, notwithstanding the absence of statutory requirement in that regard. In these circumstances, the Court should not engage with the generic arguments made by the Appellant on transposition or pronounce the order sought. That is particularly so given that the 2020 Regulations, which fully transpose the EIA Directive, came into force on 31 December 2020.

16. The First Respondent contends that generic criticisms regarding transposition are not competent grounds of challenge under regulation 16 of the 1999 Regulations. The challenges that can be brought under regulation 16 are specifically restricted to breaches of the 1999 Regulations. Accordingly, it is not competent to raise wider issues, such as the transposition of the EIA Directive, in the context of a regulation 16 appeal, although

the First Respondent acknowledges that the Court will require to seek to construe the 1999 Regulations in a manner that is consistent with the EIA Directive. Even if it is technically competent for the argument to be pursued in a regulation 16 appeal (which the First Respondent disputes), there is no reason for such generic arguments to be raised in this appeal. They would have no practical purpose.

17. It is important to highlight that the Appellant's concerns in relation to the transposition of the EIA Directive were raised in the English Proceedings. While the First Respondent accepts that the 1999 Regulations do not require notice to be published in the Gazette in relation to the decision taken by the Second Respondent, that has taken place in the present case. The short point is that a notice has been published and the Appellant has a right of appeal which it is exercising.

18. In these circumstances, any transposition error cannot be material or have caused the Appellant any prejudice. There are no averments in paragraph 21 of the appeal concerning any prejudice arising to the Appellant. There can be no prejudice given that the Appellant is currently pursuing an appeal against the decision taken by the Second Respondent.

19. The challenge at paragraph 22 onwards relates to publication requirements. The First Respondent disputes that there was any failure to transpose the EIA Directive in relation to this issue. The 1999 Regulations provided for early and effective notification to the public.

20. However, even if that is not accepted at a generic level, there is no merit in the argument in this particular case as the relevant information was published on a Government website. There was also wide coverage in the local and national press. The First Respondent has addressed this issue in greater detail in the next section of the note of argument.

21. Whether notification to the public is effective is highly fact sensitive. The facts of the present case are radically different to *Kendall v Rochford District Council* [2014] EWHC 3866 (Admin), [2015] Env LR 21 ("Kendall") upon which the Appellant seeks to rely.

22. In *Kendall*, the Council made material available solely on the internet (paragraph 92). The Court was critical of the fact that members of the public were not informed of the existence of the website or how to access it. The Court noted that members of the public were required to *"...find the consultation for themselves on the internet"*. The Court was not critical of the use of the internet *per se*. Indeed, the Court observed that:

*"This is not to say that it was unreasonable for the council to use its website as a means of consulting the public...**Nowadays a website will generally be a convenient and useful means of inviting views on a draft plan and its environmental report. In this case it clearly was.** The consultation material was complete. The invitation to comment was clear. The consultation came at a timely point in the plan-making process. And it allowed enough time for the public to express their opinions on the documents. **Where the council went wrong was not in what it did but in what it failed to do.** In addition to using the website as it did, it ought to have announced and carried out its consultation on the draft plan together with the sustainability appraisal by some other means which would not have excluded those without access to the internet..."* (Paragraph 94. Emphasis added by the First Respondent)

23. In the present case, notification was not restricted to the information available on the BP website. There were newspaper adverts published in the Telegraph and in the Press and Journal informing members of the public about the notice and the consultation process. The notice was also available on the UK Government website, GOV.UK (OPRED pages). In these circumstances, there has been substantial compliance with all necessary requirements both in the 1999 Regulations and the EIA Directive.

(ii) Publicity of the Application

24. In paragraphs 26 to 32, the Appellant argues that there was inadequate publicity of the application. It is asserted that the notice was not likely to come to the attention of the public concerned. However, there is no explanation by the Appellant as to what further steps it contends were necessary to ensure compliance with the 1999 Regulations and/ or the EIA Directive. The submission appears to be that specific notification should

have been given to *"environmental non-governmental organisations, including the appellant"* (paragraph 28) without any articulation of how this should have been done. Such an approach finds no support in either the 1999 Regulations or the EIA Directive. This is a mere assertion of what the Appellant would like the legal requirements to be as opposed to identifying any breach of a legal principle.

25. Regulation 5(4) of the 1999 Regulations provided that, where an application for consent in respect of a relevant project is accompanied by an environmental statement, the Secretary of State shall not make the decision referred to in regulation 5A(1)(c) in respect of that project, unless the Secretary of State is satisfied that the requirements of regulations 9 and 10 have been ***"substantially met"***, and that, where necessary, advice has been obtained from persons with appropriate expert knowledge who have examined the statement.

26. Regulation 9 concerned procedural notification. Regulation 9(1) required that a notice be served on the undertaker specifying environmental authorities (i.e. any person on whom environmental responsibilities are conferred by or under any enactment other than these Regulations: cf. reg.3) which the Secretary of State considered would be likely to be interested in the relevant project by reason of either their particular environmental responsibilities or local or regional competence. It also required that certain documents be made available for public inspection. A notice was also required to be published in terms of regulation 9(2)(f) which:

(i) describes the application and states that it is accompanied by an environmental statement;

(ii) states that the project is subject to an environmental impact assessment procedure and, where relevant, the fact that regulation 12 applies;

(iii) gives the address at which a copy of the application for consent and environmental statement may be inspected;

(iv) states the nature of possible decisions in response to the application;

(v) sets out the arrangements made for consulting the public pursuant to this regulation;

(vi) states that a copy of the environmental statement may be obtained;

(vii) states a date not less than 30 days after the date on which the notice is last published pursuant to paragraph (2A) by which any person may make representations in relation to the application in question to the Secretary of State, and specifies the address to which any such representations are to be sent; and

(viii) provides an explanation of the right of a person aggrieved by a decision of the Secretary of State to make an application pursuant to regulation 16.

27. Regulation 9(2A) provided that:

"The undertaker shall publish the notice referred to in paragraph (2)(f) above—

(a) on such occasions as to be likely to come to the attention of those likely to be interested in, or affected by, the relevant project; and

(b) in such newspapers as the Secretary of State may direct and on a public website and the undertaker shall publish a copy of the application for consent and the environmental statement on that website alongside the notice."

28. Regulation 3(1) defined "*public website*" as meaning:

"...a website accessible to the public where the public can view and download information placed upon it"

29. Article 6(5) of the EIA Directive expressly leaves to the Member States the task of determining the detailed arrangements both for informing the public and for consulting the public concerned (*Flausch v Ypourgos Perivallontos kai Energeias Case* C-289/18

at paragraph 26). The 1999 Regulations were effective in enabling the public to participate in the environmental decision-making process.

30. In terms of European Union Law, the 1999 Regulations complied with the principle of effectiveness. They did not render it impossible, or in practice excessively difficult, for the public to exercise the rights conferred by the EIA Directive (*Danqua*, C-429/15, EU:C:2016:789, paragraph 29). The mere fact there were no representations in response to the advertisements in The Telegraph and the local Aberdeen newspaper does not mean the process was ineffective or that there had not been substantial compliance by BP/ Ithaca.

31. In terms of Article 6(5), Member States shall take the necessary measures to ensure that the relevant information is electronically accessible to the public, through at least a *"...central portal or easily accessible points of access, at the appropriate administrative level."* At paragraph 29, the Appellant returns to the argument that this should be on a central portal. The Appellant seeks to construe this as being a government website. This is not correct. The newspaper adverts directing the public to the BP website were sufficient notification, that website being an easily accessible point of access.

32. However, even if this contention is wrong, the ground of challenge fails as a matter of fact in the present case. The UK Government website, GOV.UK (OPRED pages), holds details of all Environmental Statements received, including the project type, company, public notice end date and a name and number of the operator contact. This is a central portal where the relevant information is electronically accessible to the public. The provisions for notification set out in the 1999 Regulations were adequate and complied with the EIA Directive and the EU law principle of effectiveness.

33. Even if, contrary to the view expressed above, there has been a (now historical) failure to transpose the EIA Directive, which is denied, any such error is not material in the present case. The Appellant has had an adequate opportunity to be involved in the process and to make such representations as it deems appropriate. There was wide press coverage of the fact that BP intended to develop the Vorlich field. For example, the

matter was covered by the BBC on 10 April 2018. It was also covered by newspapers such as the *Financial Times* and *The Mirror*.

34. At paragraph 31, the Appellant states that the Environmental Statement was on the BP website but the statutory notice was not. This is factually accurate. The Secretary of State acknowledged in the English proceedings that a blank template copy of the notice (rather than the notice itself) was published on the BP website alongside the Environmental Statement. This was an error by BP. However, this is not a material error which should result in the consents being reduced. Rather, it is a minor technical issue which did not give rise to any material prejudice to any party.

35. In terms of regulation 9(2A) both documents need to be "*alongside*" on the same website. The failure to comply is entirely technical. The First Respondent submits that it is not material given the publication in the newspapers and the content of the material on the website.

36. This issue is addressed in the affidavit of Victoria Crossland, Environmental Manager in the Environmental Management Team of the Offshore Petroleum Regulator for Environment and Decommissioning ("OPRED"). (at paragraph 6):

"6. The Vorlich public notice was published in the Daily Telegraph and the Press and Journal on 12 April 2018. The newspaper public notices included details of where the Environmental Statement could be inspected (BP's Aberdeen office address), obtained (BP's Aberdeen office address) or accessed (BP's website). The notices also confirmed by when (13 May 2018) and how interested parties could make representations (to OPRED by letter or e-mail) with the Environmental Statement reference number (D/4209/2018). BP published the Environmental Statement on its website on 12 April 2018 with an incomplete version of the public notice template rather than the completed newspaper public notices at the back of the uploaded document. ***The public notice template included in the Environmental Statement on the BP website does explain how representations can be made so interested parties were still able to contact OPRED about the Environmental Statement but the relevant dates for the public notice period given in the newspaper public notices were not included. The Environmental Statement itself included a contact point within BP, which would***

have enabled any interested parties to raise queries about making a representation, if they had not seen the relevant details in the two newspaper public notices*."*

(Emphasis added by the First Respondent)

37. In *Kendall*, Mr Justice Lindblom observed that whenever a Court is exercising its discretion it must do so:

"...with realism and common sense, and having regard to the particular decision-making process it is considering, viewed as a whole." (paragraph 114)

38. The First Respondent respectfully submits that the error in question is of a minor, technical nature. There was wide publicity and the fact a template notice was placed on the BP website obviously caused no prejudice to any party. It is not an error which should vitiate the entire process or the ultimate grant of the consents. Accordingly, the Court, in the exercise of its discretion, should not reduce the consents (*King v East Ayrshire Council* 1998 SC 182 at p194).

Publication of the decisions

39. At paragraph 33, the Appellant asserts that it has been "*denied the opportunity under regulation 16 to challenge the decision by the OGA to grant the consent*". However, that is the very challenge that is being pursued in the present appeal. The fact that the Second Respondent had granted consent was publicised in the Gazette after the English Proceedings and the current appeal is being pursued. There is no merit in this ground of challenge.

40. The Appellant contends that Article 9 of the EIA Directive has not been complied with. This is because the "*Vorlich consents*" and "*Extended well consents*" have not been published. The First Respondent submits that it is possible to see what the consented works are without seeing the Vorlich field development plan dated September 2018 and

the extended well consents. This is addressed in Victoria Crossland's affidavit at paragraph 16.

41. At paragraph 34, the Appellant argues that the failure to make available the unredacted version of the consent issued by the Second Respondent, and the Second Respondent's reasons, is a breach of articles 9 and 11 of the EIA Directive. There is an assertion that there must be "*full details of the decision*". However, that is not what is provided for in the EIA Directive. In terms of Article 9(1)(b) of the EIA Directive, the "*main reasons and considerations on which the decision is based*" require to be provided. In the UK, there is a split in the decision-making process. The ultimate decision rests with the Second Respondent. However, the environmental decision, following assessment of the environmental issues, rests with the First Respondent. There is no bar on a Member State dividing responsibilities. Indeed, the terms of Article 8A suggest that the reasoned conclusion on the environmental issues that were considered is the key issue.

42. In terms of Article 8A of the EIA Directive:

"The decision to grant development consent shall incorporate at least the following information:(a) the reasoned conclusion referred to in Article 1(2)(g)(iv); (b) any environmental conditions attached to the decision, a description of any features of the project and/or measures envisaged to avoid, prevent or reduce and, if possible, offset significant adverse effects on the environment as well as, where appropriate, monitoring measures."

43. The term *"environmental impact assessment"* means a process consisting of:

(i) the preparation of an environmental impact assessment report by the developer, as referred to in Article 5(1) and (2);

(ii) the carrying out of consultations as referred to in Article 6 and, where relevant, Article 7;

(iii) the examination by the competent authority of the information presented in the environmental impact assessment report and any supplementary information provided, where necessary, by the developer in accordance with Article 5(3), and any relevant information received through the consultations under Articles 6 and 7;

(iv) the reasoned conclusion by the competent authority on the significant effects of the project on the environment, taking into account the results of the examination referred to in point (iii) and, where appropriate, its own supplementary examination; and

(v) the integration of the competent authority's reasoned conclusion into any of the decisions referred to in Article 8a.

[Article 1(2)(g) of the EIA Directive]

44. This information has been provided. Consent of the First Respondent is a "*condition precedent*" (Scottish JR, paragraph 13) to the Second Respondent granting consent. It is not part of the Second Respondent's remit to undertake a further assessment of environmental issues. The Second Respondent's primary function, as set out at section 9A of the Petroleum Act 1998, is "*maximising the economic recovery of UK petroleum*". That is precisely why the Secretary of State is required to provide consent. It is the Secretary of State that assesses the relevant environmental issues.

45. The notice in the Gazette records that the Second Respondent has granted consent. The reasons for the Secretary of State consenting to such a grant are provided. It is clear from the reasons provided that the First Respondent fully considered the environmental impacts of the proposed development. The informed reader is left in no real or substantial doubt as to why the First Respondent made the environmental decision that it did. Accordingly, there is no merit in this ground of challenge.

(iii) Publicity of the additional information

46. In paragraphs 35 to 36, the Appellant challenges the fact that additional material requested by the Secretary of State from BP was not published.

47. Article 6(3) of the EIA Directive requires disclosure of relevant information in specified circumstances. This was reflected in regulation 10 of the 1999 Regulations. Where the Secretary of State was of the opinion that information provided pursuant to a request ought to have been included in the Environmental Statement in question because that information relates to the significant effects the project is likely to have on the environment, or where other information became available to the Secretary of State after the date on which the application was made which in the Secretary of State's opinion was of material relevance to his decision as to whether to grant consent, the Secretary of State was required to direct in writing the undertaker to serve notice on any relevant authority and make the information available to the public.

48. Additional material was requested by the Secretary of State from BP. Material was provided by BP on 6 and 30 July 2018. The First Respondent considered that the additional material neither related to significant effects on the environment nor was of material relevance to the decision to approve the Environmental Statement. BP was therefore not directed to publicise the information or to provide copies to relevant consultees. The purported ground of challenge is no more than a disagreement with the discretionary decision taken by the First Respondent.

49. This issue is addressed in the affidavit of Victoria Crossland from paragraph 11 onwards:

"11. On reviewing the information provided by BP, Nienke Mayo determined that the additional information did not change the potential environmental impacts, or the assessment of significance described in the Environmental Statement. Therefore, Nienke Mayo concluded that the additional information was not relevant to the decision and no further public consultation was required. Whilst working jointly with Nienke Mayo on the Vorlich application in early 2020, I have re-visited her reasoning for not

requiring public notice of the further information provided under regulation 10 and I agree with Nienke Mayo's conclusion."

50. The Notice in the Gazette states that:

"Following review of the ES, the responses received from the consultees and the additional information received from BP, BEIS OPRED is satisfied that this Project will not have a significant adverse impact on the receiving environment".

51. The mere mention of the fact that the additional material had been reviewed did not necessitate disclosure. In terms of regulation 10 of the 1999 Regulations, it is a matter for the judgment of the Secretary of State whether to direct that the additional information be publicised. The Secretary of State exercised this judgment in respect of the additional material. The decision was lawful and rational.

(iv) Climate change from the operation of the field

52. The Environmental Statement assessed the contribution to greenhouse gas emissions which the proposed operation of the oil and gas field would generate. The Appellant argues that certain of the figures do not make sense mathematically and, accordingly, the decision should be reduced.

53. The First Respondent accepts that some of the figures submitted by BP were inaccurate (answer 38). However, this had no impact on the decision taken as the ultimate figures for the worst-case scenario were correct. The errors appear in the calculation stages and do not affect the total figures. If the clerical errors had been picked up and corrected at the Environmental Statement stage, it would not have affected the Secretary of State's overall conclusion that there was unlikely to be a significant impact on the environment from the atmospheric emissions of the overall project. Accordingly, the error was not material. In the exercise of its discretion, reduction should not be granted by the Court as the minor error in question made no difference to the decision taken.

54. This is addressed in the Victoria Crossland's affidavit from paragraph 17 onwards. Ms Crossland's position is as follows:

"…the clerical errors did not alter the total CO2-e figure. Consequently, this would not have changed the overall assessment that atmospheric emissions were not significant and therefore were not relevant to the decision. The total atmospheric emissions generated by the Vorlich development project were calculated to account for 0.02% of UK greenhouse gas emissions per year, which was concluded to be of acceptable risk and not significant." (paragraph 19)

55. Atmospheric emissions generated by the project constitute a very small portion of total UK greenhouse gas emissions ((16,251+916+76,920) = 94,087 of 463,000,000 tonnes CO2 equivalent = 0.02% per year). There is no significant effect arising from this issue which would have had a material impact on the decision taken by the First Respondent.

56. In these circumstances, the Appellant has not been substantially prejudiced by the minor arithmetical error. The error should not justify reduction of the decision (*London & Clydeside Estates Ltd v Aberdeen District Council* 1980 SC (HL) 1).

(v) Climate Change from the Consumption of Oil and Gas

57. The Appellant seeks to argue that the impact of oil production on climate change has not been considered and this justifies reduction of the decision (*R (Stephenson) v Secretary of State for Communities and Local Government* [2019] EWHC 519 at 67 and 68; *HJ Banks & Co Ltd v Secretary of State for Housing, Communities and Local Government* [2018] EWHC 3141 at 94-96, 102-106). This challenge is directed at the effect of consuming oil produced from the field.

58. The EIA Directive is concerned with the environmental effect of the individual project itself on the environment and not the wider environmental effects that may result from products subsequently produced from raw material extracted from a project. That is clear from the language used in the EIA Directive. The EIA Directive requires the environmental impact assessment to:

"…identify, describe and assess in an appropriate manner, in the light of each individual case, the direct and indirect significant effects ***of a project****…"* (article 3(1)).

59. The environmental impact assessment requires to address the significant effects "***of the project*** *on the environment*" (EIA Directive, article 1(2)(g)).

60. The term "*project*" is defined as:

"- the execution of construction works or of other installations or schemes,

— other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources"
(Article 1(2)(a) of the EIA Directive)

61. The 1999 Regulations adopted the wording of the EIA Directive and required the assessment to be conducted in relation to the impact "*the project*" was projected to have on the environment (regulations 3A(2) and 3B of the 1999 Regulations).

62. The First Respondent respectfully submits that the definitions set out in the EIA Directive and the 1999 Regulations are important. They provide no support for the Appellant's contention that the end use of raw materials extracted from a particular project – after they have been subject to further processes such as refinement to create a different product – is a relevant consideration to be undertaken in terms of the relevant environmental impact assessment.

63. As Holgate J observed in *R (Finch) v Surrey County Council & Others* [2020] EWHC 3566 ("Finch"), the fact that:

"…the environmental effects of consuming an end product will flow "inevitably" from the use of a raw material in making that product does not provide a legal test for deciding whether they can properly be treated as effects "of the development" on the site where the raw material will be produced for the purposes of exercising planning or land use control over that development. The extraction of a mineral from a site may

have environmental consequences remote from that development but which are nevertheless inevitable. Instead, the true legal test is whether an effect on the environment is an effect of the development for which planning permission is sought. An inevitable consequence may occur after a raw material extracted on the relevant site has passed through one or more developments elsewhere which are not the subject of the application for planning permission and which do not form part of the same "project"." (paragraph 101)

"...development control and the EIA process are concerned with the use of land for development and the effects of that use. They are not directed at the environmental effects which result from the consumption, or use, of an end product, be it a manufactured article or a commodity such as oil, gas or electricity used as an energy source for conducting other human activities." (paragraph 112)

64. The EIA Directive requires that environmental effects, both direct and indirect, of the project must be considered but there is no requirement to assess matters which are not environmental effects of the project. The scope of the obligation does not include the environmental effects of consumers using (in locations which are unknown and unrelated to the project site) an end product which will be made in a separate facility from materials to be supplied from the development being assessed.

65. In *Finch*, Holgate J concluded that an assessment of emissions from the future combustion of refined oil products, said to emanate from a development site is not, as a matter of law, capable of falling within the scope of the assessment required by the EIA Directive. The First Respondent respectfully submits that the Holgate J's analysis and reasoning is applicable to the present case. The future use of the oil and gas removed from the Vorlich field was not part of the development project for which consent was sought. The future use of the oil and gas was not a relevant consideration for the First Respondent in relation to whether or not to agree to the grant of consent.

66. The overall direct emissions from the development of the Vorlich field forms part of the United Kingdom Government's Clean Growth Strategy which includes the setting of carbon budgets for the United Kingdom. The direct emissions from producing oil and gas and emissions from the end use of oil and gas within the UK are able to be

quantified and thus, are considered and taken into account within the UK's Annual Statement of Emissions, which compares UK emissions against carbon budgets to monitor progress. Emissions which arise from combustion of oil or gas which is extracted from the Vorlich field, and which occurs within UK territory, will be captured in the inventory and therefore form part of the net UK carbon account.

67. The extraction of oil and gas, and the acceptable level of overall emissions in the United Kingdom, are matters of political judgment. There is no basis for the Appellant to challenge the policy decisions taken by the United Kingdom Government in the context of an appeal under regulation 16 of the 1999 Regulations.

68. The First Respondent respectfully submits that the ground of challenge is *res judicata*. The Appellant is seeking to re-litigate an issue it was refused permission to argue in the English Proceedings.

69. Ground of challenge 9, in the English Proceedings, was in the following terms

"The Secretary of State failed to take into account a relevant consideration, the effect of the consumption of the oil proposed to be extracted on the UK's carbon budget requirements and so on its contribution to climate change."

70. Ms Justice Lang refused to grant permission in relation to the above ground. The Appellant is not entitled to seek to re-litigate this issue. The issue was determined in proceedings between the same parties and is *res judicata*. Were it otherwise, a party could repeatedly seek to litigate the same issue in the various corners of the United Kingdom, moving on whenever disappointed by a refusal of permission.

71. There is also no merit in the argument. The Appellant is wrong to suggest that impacts of the use of the produced oil are material to the decision whether to grant consent for a development such as the Vorlich Field for the reasons set out in the earlier section of this note of argument.

72. The continued use of oil and gas as part of the United Kingdom's energy strategy is a matter of political judgment. The overall level of emissions is also clearly a matter of

political judgment. There are a wide range of policies that have been formed by the United Kingdom Government in relation to balancing energy policy and climate change. These are addressed in the affidavit of Emily Bourne, Director for the Energy Development and Resilience Directorate at the Department for Business, Energy and Industrial Strategy ("BEIS"). These include the Clean Growth Strategy and the setting of carbon budgets for the United Kingdom.

73. The carbon budget for the UK is a complex and high-level strategic decision. The use of oil forms a part of the UK's energy strategy and will continue to do so, alongside many other measures which ensure a security of energy supply from the most appropriate sources. The issue is a matter of current national energy policy to be found extensively in: the 2017 Clean Growth Strategy (updated in 2018); National Policy Statement for Energy Infrastructure (2011); the UK National Marine Policy Statement 2011; the 2017 Industrial Strategy. Maximising the economic development and recovery of oil and gas resources is a priority of the UK's energy supply and energy security strategies. Indigenous oil and gas development is recognised by the UK Government as being an important part of the UK energy mix during the transition to a low carbon economy and the move towards clean growth. In settling upon these important and overarching strategies for the UK, the carbon impacts of energy use are carefully considered and assessed.

74. The First Respondent respectfully submits that the wider indirect effects of developing an oil and gas field are not material considerations for the purposes of the 1999 Regulations and the EIA Directive. As Ms Bourne outlines in her affidavit:

"OPRED do not consider the wider indirect effects of a project, such as the end use of the oil and gas produced, for three reasons. Firstly, as described above, at paragraphs 16-18, the management of greenhouse gas emissions from the use of oil and gas are carefully considered elsewhere under wider Government policy. Secondly, it would not be possible for OPRED, or the developer, to assess with any degree of certainty the impact of the end use of the oil and gas produced, as the information on the nature and extent of the end use of oil and gas produced will not be known at this stage. OPRED takes the view that extending the geographic and temporal boundary of the impact of the project to such a granular level would be unachievable as the assessment of

emissions can only be based on data that is readily available. Indirect impacts from end use of oil and gas produced cannot be reasonably attributed to a particular development project. Thirdly, the EIA process is concerned with the assessment of the impact of the project on the environment. This process is not concerned with the environmental effects from the end use of a product resulting from the project and as such, GHG emissions from the future combustion of oil and gas produced by the project does not, in the Secretary of State's view, fall within the scope of the issues to be addressed in the EIA required by the Regulations" (Paragraph 33)

75. The Appellant does not argue, nor could it, that the production of oil from the Vorlich Field increases the use of oil. There is no evidence that such would be the case. Rather, the Appellant's argument derives from its position that as a matter of principle there should be no new oil. The Appellant conflates and confuses different questions. The point as to assessment of effects adds nothing.

76. The scope of environmental impact assessment is a matter of judgment. It is well-established that it is for the decision maker to assess what information should be in the Environmental Statement, within the constraints detailed in the EIA Directive, and whether the information contained therein is adequate: *R (oao Friends of the Earth Ltd) v North Yorkshire CC* [2017] Env LR 22, per Lang J at [21] *citing R. v Rochdale MBC Ex p. Milne* [2001] Env. L.R. 416). It is for the relevant decision maker to judge the adequacy of the environmental information, although such decisions are subject to review by the courts on the normal *Wednesbury* principles (*R. v Cornwall CC, Ex p. Ha*rdy [2001] Env. L.R. 25 at paragraph 56).

77. In *R (Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214, the Court of Appeal noted that the Courts will not become embroiled in matters of political judgment (see paragraphs 2 and 281). The Court of Appeal re-iterated that judgments made on environmental issues will only be subject to review on *Wednesbury* grounds:

"136. […] The court's role in ensuring that an authority – here the Secretary of State – has complied with the requirements of article 5 and Annex I when preparing an environmental report, must reflect the breadth of the discretion given to it to decide what information "may reasonably be required" when taking into account the

considerations referred to – first, "current knowledge and methods of assessment"; second, "the contents and level of detail in the plan or programme"; third, "its stage in the decision-making process"; and fourth "the extent to which certain matters are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment". ***These requirements leave the authority with a wide range of autonomous judgment on the adequacy of the information provided. It is not for the court to fix this range of judgment more tightly than is necessary. The authority must be free to form a reasonable view of its own on the nature and amount of information required, with the specified considerations in mind. This, in our view, indicates a conventional "Wednesbury" standard of review – as adopted, for example, in Blewett. A standard more intense than that would risk the court being invited, in effect, to substitute its own view on the nature and amount of information included in environmental reports for that of the decision-maker itself. This would exceed the proper remit of the court".*** (Emphasis added)

78. In *R (Packam) v Secretary of State for Transport* [2020] EWCA Civ 1004, one of the issues was whether the Government failed to take account of greenhouse gas emissions in light of obligations under the Paris Agreement and the Climate Change Act 2008. The Applicant argued that the Government should have considered the "*legal implications*" of emissions generated from HS2 as part of its consideration of HS2. The claim was rejected as no obviously material consideration was disregarded.

79. In *R (Friends of the Earth) v North Yorks CC* [2017] Env LR 22, Lang J dismissed a claim for judicial review of the grant of planning permission to carry out the hydraulic fracking of gas (at a site referred to in the judgment as the "KMA well site") which, once recovered, would be supplied to a gas-fired electricity generating station (referred to as "Knapton") through a pipeline network. At [39], Lang J referred to the national planning framework as being one of several factors that in the circumstances of that case entitled the local planning authority to conclude that the burning of gas from the KMA well site at Knapton did not require environmental impact assessment because it was not an indirect, secondary or cumulative effect of the project:

"37. The Claimants submitted that the ES was defective because of the omission of any assessment of the environmental impacts of burning gas from the KMA well site at

Knapton, which were either part of the direct effects of the project or part of its indirect, secondary or cumulative effects.

38. I do not consider that the Claimants' submissions were well-founded, and I accept the submissions of the Council and Third Energy on this point. In my judgment, the Council was entitled, in the exercise of its judgment, to conclude that an assessment of the environmental impacts of burning gas from the KMA well site at Knapton was not required, for the following reasons.

39. The application for planning permission did not include any development at Knapton. Knapton already had planning permission and it was already authorised by the Environment Agency to burn gas from existing well sites, thus generating potentially harmful emissions, including carbon dioxide. No increase in capacity at Knapton was sought as part of this proposal. ***Any gas produced from the KMA well site and piped to Knapton would be within the existing limits of the permits already conferred by the Environment Agency. Paragraph 122 of the National Planning Policy Framework ("NPPF") advises planning authorities that they should focus on whether the development is an acceptable use of land, rather than on control of processes or emissions where these are subject to approval under pollution control regimes, and it should be assumed that those regimes will operate effectively.*** *The gas supply from KMA would be indistinguishable from the gas piped from other well sites, and so its environmental impact could not be separately quantified. The argument that the proposed development was an integral part of a more substantial project which included Knapton was rightly abandoned by the First Claimant. Applying the guidance given in Hardy and Blewett, I do not consider that the Claimants have established any defect in the ES or any error of law in the Council's reliance upon it".* (Emphasis added by the First Respondent)

80. The same considerations apply to the present case. The use of oil and gas as part of a national energy strategy is a matter of political judgment. The Government has set the permitted levels of emissions for the United Kingdom in the carbon budget. Accordingly, this issue was not a relevant consideration in terms of the judgments that the First Respondent required to make when assessing the Environmental Statement

and making a judgment on whether to consent to the development of the Vorlich field under the 1999 Regulations.

81. In *Preston New Road Action Group & Frackman v SSCLG* [2018] Env. L.R. 18, the Court of Appeal dismissed the appellants' claim that the Secretary of State had erred when granting planning permission for exploration works to test the feasibility of commercial extraction of shale gas in assuming that the regulatory regime system would operate effectively to control emissions and that there would be no health impacts arising from potential exposure to air and water pollutants. At [93] Lindblom LJ held that "*even if the NPPF had not said so, that assumption would surely be a reasonable one for a planning decision-maker, unless there was clear evidence to cast doubt upon it"*.

82. Nothing said by the Appellant is such as to suggest that it was unreasonable to conclude that emissions from the future combustion of produced hydrocarbons were not environmental effects of the development so that they did not form a relevant consideration for the assessment to be made under the 1999 Regulations.

83. There is an existing legal and policy framework set up by the Climate Change Act 2008 ("the CCA") to manage the United Kingdom's progressive decarbonisation in the years leading up to 2050 (see the Court of Appeal's summary of the key provisions in *R (on the application of Christopher Packham) v Secretary of State for Transport* [2020] EWCA Civ 1004). Emissions from the combustion of oil are included within the UK carbon account for the purposes of the CCA, and the setting of Carbon Budgets to ensure that Net Zero is met. Any net emissions increase from the combustion of oil will be managed within the Government's overall strategy for meeting carbon budgets and the Net Zero target, as part of an economy-wide transition, and it is the role of Government to determine how best to make that transition.

84. The decision taken is both rational and lawful. The purported ground of challenge is no more than a disagreement with the judgment made by the First Respondent. The Appellant has not been substantially prejudiced by any failure to comply with the 1999 Regulations.

The discretionary remedy of reduction

85. For the reasons outlined above, the First Respondent does not accept that any material error in law is identified which would justify the orders sought. However, if the contrary view is taken, the Court would need to consider as a matter of discretion whether the consents should be reduced. The First Respondent respectfully submits that the Court should refuse to do so.

86. Reduction is a discretionary remedy (*King v East Ayrshire Council* 1998 SC 182 at p194). In *Walton v Scottish Ministers* 2013 SC (UKSC) 67, the Supreme Court clarified the law on the exercise of judicial discretion in cases where a breach of a European directive governing environmental impact assessment has occurred (per Lord Carnwath, paragraphs 103 to 140; and per Lord Hope, paragraph 155). Lord Carnwath noted that there is no requirement for *"automatic "nullification" or quashing…where there has been some shortfall in the…procedure…"*. Lord Hope observed, at paragraph 156, that:

"[where] there are good grounds for thinking that the countervailing prejudice to public or private interests would be very great …, it will be open to the court in the exercise of its discretion to reject a challenge that is based solely on the ground that a procedural requirement of European law has been breached if it is satisfied that this is where the balance should be struck."

87. Whenever the Court has to exercise its discretion on the granting of relief, it must do so with *"…realism and common sense, and having regard to the particular decision-making process it is considering, viewed as a whole"* (*Kendall*, paragraph 114).

88. This is not a case where no environmental impact assessment has been carried out under the regime established by the EIA Directive and the 1999 Regulations. An environmental statement was prepared. It was sent to the required statutory consultees, none of whom raised any objection on environmental grounds. The fact BP intended to develop the Vorlich field was widely reported in the press. Notices were published in the local (Press and Journal) and national (The Telegraph) press. The relevant

information was available for the public to view on BP's website and on a UK Government website. There has been a detailed examination made by the First Respondent of the environmental impact of the development of the Vorlich field. The key challenges made by the Appellant are ones of form rather than substance. The Appellant claims there has been a lack of publicity but fails to identify any material representation that would have been made. The high water mark for the Appellant is a template notice being provided on the BP website as a result of an administrative oversight rather than the actual notice. However, as Ms Crossland explains in her affidavit, that can have caused no party any real prejudice. The Appellant notes that there were certain errors in the figures provided by BP in the environmental statement. However, the total emissions figures given were correct. Therefore, this minor error cannot in any way have undermined the decision. Moreover, this is in the context of an emission figure that is 0.02% of the UK's greenhouse gas emissions.

89. The only other challenge made by the Appellant is a generic challenge to the use of oil and gas from the field. This is not a valid ground of challenge. The Appellant was not permitted to argue the point in the English Proceedings as it had no prospect of success. The First Respondent has explained above why the issue is not relevant to the decision challenged. It is a matter of political judgment whether oil and gas should be utilised. All oil and gas from the Vorlich field is accounted for in the wider policies set by the United Kingdom Government including the Clean Growth Strategy and the carbon budget.

90. This is not a case in which there was no formal public consultation on the environmental implications of the development of the field. Even if there are shortcomings in the consultation process (which the First Respondent does not accept) an effective process has been conducted. Any partial failure to discharge the requirements for EIA Directive or the 1999 Regulations would need to be balanced against the prejudice to the Respondents and the Interested Parties of the process requiring to be undertaken of new.

91. The prejudice to the First Respondent is addressed in Ms Crossland's affidavit from paragraph 23 onwards. Significant work has been undertaken by BP/ Ithaca on the Vorlich field. Production commenced in the week beginning 9 November 2020. A new procedure, including public consultation, would likely take at least three to six months

to complete. The First Respondent is concerned that there could be health and safety, and integrity issues associated with mothballing the Vorlich field for this period. So to require it in the event of one or more of the highly technical breaches advanced by the Appellant being established would be wholly disproportionate, hugely expensive, and potentially unsafe with a risk of uncontrolled hydrocarbon release.

Conclusion

92. The First Respondent submits that there has been no breach of regulations 5(4) or 5A(1)(a) of the 1999 Regulations. Moreover, there has been no other breach of the 1999 Regulations which has substantially prejudiced the interests of the Appellant. In these circumstances, the appeal should be refused. The First Respondent also submits that the Court should not, in the exercise of its discretion, reduce the consents challenged in this appeal.

93. The 4 questions posed by the Appellant should be answered as follows:

1. No. There has been no failure by the Respondents to comply with the 1999 Regulations. There has been no substantial prejudice caused to the Appellant.

2. No. There has been no failure by the Respondents to comply with the 1999 Regulations.

3. No. There has been no breach of the EIA Directive.

4. No. The decision should not be reduced.

INTIMATED

XA34/20

In the Court of Session

NOTE OF ARGUMENT for the FIRST RESPONDENT

RESPONDENT

In the Appeal by

Greenpeace Limited

APPELLANT

for

In the Appeal under Regulation 16 of the Offshore Petroleum Production and Pipelines (Assessment of Environmental Effects) Regulations 1999

2021

OFFICE OF THE ADVOCATE GENERAL

IN THE COURT OF SESSION

NOTE OF ARGUMENT FOR THE OIL AND GAS AUTHORITY ("the second respondent")

In the Appeal under Regulation 16 of the Offshore Petroleum Production and Pipelines (Assessment of Environmental Effects) Regulations 1999

by

GREENPEACE LIMITED, a company incorporated under the Companies Acts with registered number 01314381 and having its Registered Office at Greenpeace House, Canonbury Villas, London, N1 2PN

APPELLANT

against

Decision of the Secretary of State for Business Energy and Industrial Strategy and of the Oil and Gas Authority dated 7 August 2018 and communicated by notice in the London, Edinburgh and Belfast Gazettes dated 3 April 2020

Introduction

1. This appeal concerns decisions taken in respect of the grant of consent in relation to the development of the Vorlich field (petroleum production licence numbers P1588 and P363) ("the Vorlich Project"). Consent was granted by the second respondent to BP Exploration Operating Company Limited and Ithaca Energy (UK) Limited (together the "Licensee") for the development of and production from the Vorlich field.

2. The appeal is brought in accordance with Regulation 16 of the Offshore Petroleum Production and Pipelines (Assessment of Environmental Effects) Regulations 1999 ("the 1999 Regulations").

3. Regulation 16 (1) details limited grounds of appeal. These are:

    a. That the grant of consent was made in contravention of regulation 5(4) of the 1999 Regulations;

    b. That the grant of consent was made in contravention of regulation 5A(1)(a) of the 1999 Regulations; or

    c. That the interests of the applicant have been substantially prejudiced by any failure to comply with any other requirement of the 1999 Regulations.

4. In the event that any such breach is established a judgment requires to be made about whether the grant of consent should be reduced. This court has discretion in that regard.

5. It is submitted that the appellant fails to demonstrate that any action of the second respondent satisfies these grounds of appeal or that the court should exercise its discretion to reduce the decision to grant consent. The second respondent plays no role in the decision whether to agree to the grant of consent with which Regulations 5(4) and 5A(1)(A) are concerned, that being the decision of the first respondent. Separately, no breach of any other requirement of the 1999 Regulations by the second respondent is contended for. No substantial prejudice is said to arise from any action of the second respondent There is therefore no breach of the 1999 Regulations properly directed at the actions of the second respondent.

6. Insofar as the appellant seeks to rely upon a failure to adequately transpose Directive 2011/92/EU ("the EIA Directive") the second respondent plays no role in this transposition. In any event, the second respondent was not responsible

for or involved in the environmental assessment of the Vorlich project. The second respondent's role is largely restricted to considering technical, financial and competency matters, which are not the subject of the EIA Directive and do not require to be the subject of the 1999 Regulations.

The role of the second respondent in the grant of consent

7. In summary, the first and second respondent carry out different roles in relation to the grant of consent for activity under a licence. The consent is granted by the second respondent. All environmental matters are considered by and dealt with by the first respondent. The first respondent's agreement to the grant of consent for the activity is a pre-requisite of the second respondent granting consent. The second respondent's consideration of any application for the grant of consent is limited to technical, financial and competency matters. This division of responsibilities is expanded upon below.

8. The second respondent is a private company, limited by shares, wholly owned by the first respondent and established pursuant to the Companies Act 2006. It has day-to-day operational independence from the first respondent. The relationship between the first respondent and second respondent is agreed and provided within an approved Framework Document. Amongst other things, the second respondent is responsible for granting licences for searching and boring for and getting, that is, the exploration, development and production of, oil and gas and the regulation of the activities of licensees under the Petroleum Act 1998: s3(1). In respect of offshore activities, section 9A of the Petroleum Act 1998 sets out the principal objective, namely "maximising the economic recovery of UK petroleum". The second respondent produces (and revises in accordance with statute or when necessary) a strategy (or strategies) for enabling the principal objective to be met, formerly known as the MER UK Strategy and (having been so revised) since 11 February 2021, the OGA Strategy. All licensees and the second respondent must act in accordance with the current Strategy.

9. In addition to such regulation by the second respondent, a licensee is also subject to a system of regulation under legislation to address potential and

actual environmental and safety matters. Therefore, in order to carry out certain activities under the licence, the licensee must obtain the necessary consents and authorisations from the second respondent as well as consents, approvals and other authorisations from other applicable regulators and government.

10. In order for a licensee to obtain consent for development and production under a licence at the relevant time, the licensee was required by the 1999 Regulations to prepare and submit an environmental statement to the first respondent[1]. The environmental regulation of offshore oil and gas activity is the responsibility of the first respondent. The first respondent assesses the environmental statement and the impact of the proposed project. Having carried out such assessment, the first respondent will determine whether to give its 'agreement to the grant of consent', which is a pre-requisite of the second respondent's consent: Regulation 5A(1) of the 1999 Regulations.

11. The second respondent does not have responsibility for, or involvement in, the assessment of the environmental statement or the environmental impact of the proposed development. The second respondent does not receive the environmental statement]. In deciding whether to grant development and production consent, the second respondent will consider, amongst other things, whether: the Field Development Plan ("FDP") (a technical document produced by the licensee setting out its understanding of the field and commitments to bring forward development of the field) meets the licensee's obligation to act in accordance with the MER UK Strategy; the second respondent has approved a field operator for the development; a supply chain action plan has been agreed with the second respondent; and sufficient funding has been committed for development costs. These are independent of environmental matters.

12. There are also a number of separate regulatory processes which the second respondent will confirm are in place before issuing its consent, including (amongst others) that the Environmental Impact Assessment process has been

[1] Now subject to the Offshore Oil and Gas Exploration, Production, Unloading and Storage (Environmental Impact Assessment) Regulations 2020 at Regulation 4.

completed and the agreement of the first respondent has been given to the grant of consent; and that first respondent's Offshore Decommissioning Unit are satisfied that appropriate decommissioning financial security arrangements are in place. The documents considered by the second respondent will generally contain information which is considered by the licensee to be commercially sensitive.

13. It is submitted that the separation of the roles of the first and second respondents makes clear that the second respondent's grant of the consent for the Vorlich Project and its reasons for doing so are unconnected to environmental matters and the issues complained of by the appellant. It follows that the actions of the second respondent could not have caused substantial prejudice to the appellant.

Particular grounds of challenge

14. The appellant raises various grounds of challenge. Standing the second respondent's limited role, this note addresses only two of those grounds of challenge. The grounds of challenge are connected and are therefore dealt with together.

Failure to transpose the EIA Directive (paragraphs 21 to 25) & Publication of the decisions (paragraphs 33 – 34)

Res judicata

15. It is submitted that the alleged failure to fully transpose the EIA Directive is *res judicata* and should not be considered by this court. On 7 November 2019 the appellant raised judicial review proceedings in England ("the English Proceedings"). The first respondent was a respondent in those proceedings. The second respondent was an interested party. A ground of challenge in the English Proceedings was:

"*The [1999 Regulations] fail to transpose the EIA Directive since they do not require the publication and making available of the development consent and the reasons for its grant as required by Article 9(1) of the EIA Directive": Statement of Facts and Grounds paragraph 11*."

16. The English Proceedings were resolved by way of a 'Consent Order' dated 1 April 2020. The Consent Order recorded the agreement of the parties that:

"*The [1999 Regulations] fail to transpose the EIA Directive since they do not require the publication and making available of the development consent as required by Article (9)(1) of the EIA Directive. The consent has not been publicised or made available as required by Article 9(1).*"

17. There has therefore been proceedings between the same parties, on the issue of transposition of Art 9(1) of the EIA, including whether or not the reasons for grant of the development consent required to be published, which have been resolved by way of a "Consent Order". A "Consent order" is a judicial document and can amount to res judicata: *Zurich Insurance Co Plc v Hayward* at [47] and [49] in England. There is no reason in principle why the position should be different in Scotland. In these circumstances, the conditions of *res judicata* have been fulfilled and cannot be heard again in this appeal: *Esso Petroleum Co. Ltd v Law* 1956 SC 33 at 38 per Lord Carnworth.

18. The subject of this appeal was also brought by the Appellants in a petition for judicial review, for which permission was refused by Lord Boyd of Duncansby: *Greenpeace Ltd v Secretary of State for Business, Energy and Industrial Strategy* 2020 CSOH 88. At [26] the Court noted that:

"The Secretary of State has publically (sic) accepted that the Regulations are defective and is consulting on a comprehensive review. I do not consider that it is an appropriate use of the supervisory jurisdiction of this court to pronounce on matters which are in effect moot, given the Secretary of State's acceptance of the non-compliance of the Regulations with the Directive."

19. The appeal, insofar as it relates to an alleged failure to transpose Art 9(1) of the EIA Directive, should be refused as being *res judicata*.

No failure to transpose the EIA Directive regarding the second respondents reasons

20. As appears to have been accepted in the English Proceedings, the EIA Directive does not in fact require the publication of the second respondent's reasons for its decision. As its title makes clear, the EIA Directive is restricted to "the assessment of the effects of certain public and private projects on the environment". In other words, to environmental assessment only.

21. The objective of the EIA Directive is stated in recital 41 of Directive 2014/52/EU (which amended the EIA Directive) to be to "ensure a high level of protection of the environment and of human health, through the establishment of minimum requirements for the environmental impact assessment of projects". Recitals 18 and 30 relate to "environmental information".

22. Nothing contained in the EIA Directive requires the publication of the reasons why the consent of the second respondent was granted for the Vorlich Project. The first respondent has published, and (pursuant to the Offshore Oil and Gas Exploration, Production, Unloading and Gas Storage (Environmental Impact Assessment) Regulations 2020 (2020/1497) will publish in future applications, its reasons for providing agreement to the grant of consent. Nothing more is required by the Directive. The EIA Directive, concerned only with environmental impact assessments, should not be read as requiring the publication of reasons which relate to technical, financial and competency matters.

23. That the EIA Directive neither intends or requires this is made plain by Art. 8a, which confines the necessary content of any decision to grant development consent to environmental matters. Art 8a states:

"The decision to grant development consent shall incorporate at least the following information:(a) the reasoned conclusion referred to in Article 1(2)(g)(iv); (b) any environmental conditions attached to the decision, a

description of any features of the project and/or measures envisaged to avoid, prevent or reduce and, if possible, offset significant adverse effects on the environment as well as, where appropriate, monitoring measures."

24. Art. 1(2)(g) defines "environmental impact assessment" and states:

"(g) "environmental impact assessment" means a process consisting of:

(i) the preparation of an environmental impact assessment report by the developer, as referred to in Article 5(1) and (2);

(ii) the carrying out of consultations as referred to in Article 6 and, where relevant, Article 7;

(iii) the examination by the competent authority of the information presented in the environmental impact assessment report and any supplementary information provided, where necessary, by the developer in accordance with Article 5(3), and any relevant information received through the consultations under Articles 6 and 7;

(iv) the reasoned conclusion by the competent authority on the significant effects of the project on the environment, taking into account the results of the examination referred to in point (iii) and, where appropriate, its own supplementary examination.

(v) The integration of the competent authority's reasoned conclusion into any of the decisions referred to in Article 8a"

25. It is clear, therefore, that the reasons which must be published are those relating to the environmental impact assessment, undertaken by the second respondent. There is no basis to extend the effect of the EIA Directive to require

the publication of reasons relating to technical, financial and competency matters.

26. The appeal, insofar as it relates to the alleged failure to publish the second respondent's reasons for grant of consent, should be refused for this reason also.

Absence of substantial prejudice

27. Publication of consent decisions is a matter dealt with by the first respondent: Regulation 5(7) of the 1999 Regulations. Any failure to publish the second respondent's reasons, which relate to technical, financial and competency issues, cannot be said to be a breach of 5(4) or 5A(1) of the 1999 Regulations. As a result, it is necessary for the appellant to demonstrate that any such failure is a breach of the 1999 Regulations and that substantial prejudice results. The appellant fails on both counts.

28. The appellant fails to demonstrate that any failure to adequately transpose the EIA Directive has caused substantial prejudice or would justify reduction of the consent granted. It cannot be said that the appellant is substantially prejudiced as a result of any failure by the second respondent to publish its reasons relating to financial, technical or competency matters. These are matters unconnected to the environmental assessment. The appellant puts forward no reason why substantial prejudice arises from any failure to disclose reasons relating to the matters which are scrutinised by the second respondent.

29. In the absence of any substantial prejudice, the appeal insofar as it relates to the alleged failure of the second respondent to publish its reasons should be refused.

Disposal

30. In the event that an error of law relevant to Regulation 16 is held to be made out, the Court requires to exercise its discretion when considering disposal.

Reduction is a discretionary remedy: *King v East Ayrshire Council* 1998 SC 182 at 194. There is no requirement for a decision to be quashed, for example where a procedural requirement of EU law has been breached": *Walton v Scottish Ministers* 2013 SC (UKSC) 67 at [138] – [140] and [155] – [156].

31. Consideration of all the circumstances in this case favours a refusal by the Court to exercise its discretion and reduce the grant of consent. Insofar as these circumstances are relevant to the second respondent, any breach of domestic or EU Law is a procedural one that does not relate to the environment or cause prejudice. Otherwise, the second respondent notes that there has been an environmental impact assessment, there was considerable publication of the Vorlich project from at least 2018 and that works at the Vorlich project have commenced, no doubt at considerable expense. There is no indication that a repeat of the consent process would result in a different outcome. All of these factors indicate that the appropriate exercise of discretion by the Court is to refuse the order of reduction sought by the appellant.

Conclusion

32. It is submitted that there has been no breach of 5(4) or 5A(1) of the 1999 Regulations by the second respondent]; no other breach of the 1999 Regulations causing substantial prejudice; that the transposition of Art 9(1) of the Directive is res judicata; in any event there has been no such failure beyond that already acknowledged; and that the appeal should therefore be refused. Furthermore, even if there has been any such breach, the exercise of discretion favours refusal of the order of reduction sought. The four questions of law posed by the appellant should therefore be answered in the negative.

IN THE COURT OF SESSION

XA34/20

NOTE OF ARGUMENT FOR THE FIRST AND THIRD INTERESTED PERSONS BP EXPLORATION OPERATING COMPANY LIMITED AND ITHACA ENERGY (UK) LIMITED

in the Appeal under Regulation 16 of the Offshore Petroleum Production and Pipelines (Assessment of Environmental Effects) Regulations 1999

by

GREENPEACE LIMITED, a company incorporated under the Companies Acts with registered number 01314381 and having its Registered Office at Greenpeace House, Canonbury Villas, London, N1 2PN

Appellant

against

Decisions of the Secretary of State for Business Energy and Industrial Strategy and of the Oil and Gas Authority dated 7th August 2018 and 20th September 2018 and communicated by notice in the London, Edinburgh and Belfast Gazettes dated 3rd April 2020

Introduction and summary

1. The first interested person is BP Exploration Operating Company Limited ("bp"). The third interested person is Ithaca Energy (UK) Limited ("Ithaca"). bp and Ithaca hold interests in the two petroleum licences which span the Vorlich field. The consent for the project (the development of the Vorlich field) granted by the Oil and Gas Authority ("OGA"), which is under challenge in this appeal, was granted on the application of bp, submitted for itself and for Ithaca. Following the grant of that consent and in reliance thereon, bp and Ithaca have carried out the offshore drilling and construction work required for the project at a total cost of approximately £230,000,000 to date. The works for the project for which consent has been granted have, accordingly, been implemented by bp and Ithaca. Production commenced in November 2020.

2. bp and Ithaca support the position of the respondents that the present appeal should be refused. The appeal does not aver any basis to establish that the consent was granted

in contravention of regulation 5(4) or regulation 5A(1)(a) as required in terms of regulation 16. It does not demonstrate any other failure to comply with any of the requirements of the 1999 Regulations (as afterwards defined) which substantially prejudiced the interests of the applicant.

3. Further, the fundamental requirement that an application in terms of regulation 16 can be made only by "any person aggrieved" is not met. The appellant cannot claim so to be. The appellant did not participate, or make representations, in the process provided for in terms of the 1999 Regulations. It had sufficient opportunity to do so. The process adopted for publication of the application and for inviting representations met the requirements of the 1999 Regulations.

4. Alternatively, in all the circumstances, it is respectfully submitted that the Court should not make an order quashing the grant of consent for the project. Those circumstances include the appellant's failure to participate in the process, its delay in commencing proceedings and the extreme prejudice that bp and Ithaca would be liable to suffer if the grant of consent was quashed at this stage.

5. This is the third set of proceedings raised by the appellant to challenge the Vorlich consent. The complaints advanced in this application have either been resolved or refused in the earlier proceedings. This appeal should be refused.

The legal framework

6. The present appeal is an application under regulation 16 of the Offshore Petroleum Production and Pipelines (Assessment of Environmental Effects) Regulations 1999 (as amended) ("the 1999 Regulations"). The purpose of the 1999 Regulations was to transpose the EIA Directive into domestic law in this area. The EIA Directive is Directive 2011/92/EU as amended by Directive 2014/52/EU.

7. Regulation 16(1) provides for an application by any person aggrieved by the grant of consent in respect of a relevant project in relation to which an environmental statement was required to be submitted by virtue of regulation 5(1). On such an application, the Court may grant an order quashing the grant of consent where it is satisfied that:

    (a) the consent was granted in contravention of regulation 5(4) or regulation 5A(1)(a) of the 1999 Regulations; or

    (b) the interests of the applicant have been substantially prejudiced by any failure to comply with any other requirement of the 1999 Regulations.

8. Regulation 5(1) requires, subject to certain exceptions, that the Secretary of State shall not agree to the grant of consent in respect of a relevant project unless the application for that consent is accompanied by an environmental statement. Regulation 5A(1)(a) provides that: "*When making a decision as to whether to agree to the grant of a consent in respect of a relevant project for which an environmental statement has been submitted, the Secretary of State shall-(a) examine the environmental statement, including any information provided under regulation 10, any representations made by any person required by these Regulations to be invited to make representations, and any representations duly made by any other person about the environmental effects of the project;*".

9. Regulation 5(A1) provides that the OGA shall not grant consent in respect of a relevant project without the agreement of the Secretary of State.

10. The definition of "*relevant project*" covers a number of different types of project. One of these is a development. There are two limbs to the definition of development and the first limb is any project which has as its main object the *getting* of petroleum. This is as opposed to the establishment of its existence or various other matters which can be regarded as coming under the heading of exploration as opposed to production activity. In terms of regulation 3B(1) an environmental statement is a report prepared as part of the environmental impact assessment ("EIA") in respect of a relevant project which includes a number of listed matters. One of those listed matters is a description of the likely significant effects of the project on the environment. The preparation and submission of an environmental statement is the first stage of the process of EIA set out in regulation 3A(1). The (applicant) undertaker is directed, by regulation 3A(2), to identify, describe and assess in an appropriate manner the direct and indirect significant effects of the relevant project on a number of factors. Those factors include land, soil, water, air and climate.

11. On a proper construction of the 1999 Regulations, it is submitted that an effect has to be an effect of a part of the project as a relevant project. In the present case, this has the impact of excluding from the scope of the EIA the effects of the eventual consumption of the oil and gas which will be extracted during the course of the project. The project is a relevant project as it is a project for the *extraction* of the oil and gas. The consumption of that produced oil and gas during other activities which use oil and gas is not part of the project. Reference is made also to paragraph 73 below.

12. The steps following the submission of an environmental statement are, in summary, consultation in compliance with the relevant regulations, consideration by the Secretary of State of the information in the environmental statement, any further information provided in accordance with regulation 10 and the representations made in consultation, followed by the Secretary of State's reasoned conclusion as required for present

purposes by regulation 5A(1). Such reasoned conclusion is on the significant effects of the relevant project on the environment, taking into account, again in summary, the examination of the information provided in the environmental statement, or subsequently provided, by the undertaker and any representations made in consultation.

13. Regulation 5(4) provides: "*Where an application for consent in respect of a relevant project is accompanied by an environmental statement, the Secretary of State shall not make the decision referred to in regulation 5A(1)(c) in respect of that project unless the Secretary of State is satisfied that the requirements of regulations 9 and 10 have been substantially met, and that, where necessary, advice has been obtained from persons with appropriate expert knowledge who have examined the statement.*"

14. The decision referred to in regulation 5A(1)(c) is the decision as to whether agreement by the Secretary of State to the grant of consent by the OGA is to be given, into which decision the reasoned conclusion on the significant effects of the relevant project on the environment is to be integrated.

15. Regulation 9 addresses service and public notice of the application for consent. In particular, regulation 9(2)(f) provides for the applicant to publish a notice which sets out specified information about the application and about the arrangements for making representations to the Secretary of State in respect of the application. In terms of regulation 9(2A), the notice shall be published on such occasions as to be likely to come to the attention of those likely to be interested in or affected by the relevant project and in such newspapers as the Secretary of State may direct and on a public website. The applicant shall publish a copy of the application for consent and the environmental statement on that website alongside the notice.

16. Regulation 10 contains a power for the Secretary of State to request further information from an applicant in respect of an environmental statement. It also contains a requirement in respect of publication of additional information which only applies if, broadly, the Secretary of State considers the additional information is of material relevance to his decision.

The decision in the present case

17. The Secretary of State's decision to agree to the grant of consent in the present case was recorded in an Environmental Summary Statement dated 3 August 2018 (Appendix document 9) issued by the Offshore Petroleum Regulator for Environment and Decommissioning ("OPRED"). OPRED is part of the Department for Business, Energy and Industrial Strategy and fulfils the relevant function for the Secretary of State. OPRED was satisfied that the project will not have a significant adverse impact on the

receiving environment or the living resources it supports, or on any protected habitats or species or other users of the sea. OPRED was also satisfied that there were no objections.

18. The present appeal is an application under regulation 16(1) of the 1999 Regulations. The grounds of appeal all relate to the decision of the Secretary of State to agree to the grant of consent as opposed to the grant of consent by the OGA (subject to the point covered below in relation to publication of the decisions). The decision of the Secretary of State is however a necessary and integral part of the process leading to the grant of consent by the OGA so that it is, in principle, legitimate for an application under regulation 16(1) to relate to that decision. However, it is submitted that the appellant's grounds of appeal are irrelevant and, in any event, ill-founded, for other reasons. Reference is made to the answers lodged for bp and Ithaca for their full terms.

19. The grounds advanced by the appellant are addressed in turn below. As a general point however, it is to be noted that, although in statement 17 the appellant alleges a failure to adhere to regulation 5A(1)(a), this is not made out in terms of any of the averments setting out the grounds. It is not alleged, nor could it sensibly be alleged, that the Secretary of State failed to examine the environmental statement, information provided under regulation 10 and the position in respect of representations.

Application to the Court only by a person aggrieved

20. An application under regulation 16 can be made only by a *"person aggrieved by the grant of consent"*. For the reasons set out in the answers for bp and Ithaca the appellant cannot so claim. The procedure laid down in the 1999 Regulations allows for the submission of objections and representations. That procedure is designed to give parties claiming an interest in the application, such as the appellant, the opportunity to make representations in a specified time period. The appellant did not do so. Having failed to participate in the process or to make representations on the application, the appellant cannot now claim to be a "person aggrieved" by the decisions taken by the OGA or the Secretary of State in that process. Reference is made to paragraphs 31 – 33 of this note of argument. The position in this regard is sufficient basis to dismiss this appeal.

21. In addition, while the failure to participate in the statutory process prevents the appellant from being able to demonstrate that it is a person aggrieved by the grant of consent, such as would entitle it to bring this challenge under regulation 16, the appellant also fails to establish that it is, in any event, a person aggrieved in respect of a number of the individual complaints raised. This submission is further developed in response to those individual complaints. Reference is made to answer 18.13 of the answers lodged

for bp and Ithaca in respect of the correspondence in July 2019 from the Secretary of State to the appellant's English agents.

Responses to grounds advanced in the appeal

There is no remaining live issue in respect of publication of the grant of consent

22. Statement 21 of the appellant's averments refers to the failure to transpose the EIA Directive in that the 1999 Regulations do not set out a requirement that the details of the OGA consent be published in the Gazette even though this is the trigger for the running of the time period in which an application to the Court can be made under regulation 16.

23. There is no remaining live issue in this appeal in this respect because, following the outcome of the English proceedings already brought by the present appellant (see answer 5 for bp and Ithaca), notice was given in the Gazettes in respect of the OGA consent and this appeal was brought within the 6 week period following such notice having been given. The English proceedings at the instance of the appellant in respect of the Vorlich project were concluded with the consent order (Appendix document 28) which provided for and led to the publication of the notice in the Gazettes on 3 April 2020 (Appendix document 13). The agreed statement of reasons appended to the consent order in the English proceedings stated that the Secretary of State had provided a sufficient remedy by agreeing to publicise details of the OGA's grant of consent for the Vorlich project in the Gazettes for the purposes of starting time running under regulation 16.

24. Following the outcome of the English proceedings, the appellant is not a person aggrieved in this regard. In any event, the appellant's averments do not address any of the grounds of challenge set out in regulation 16(1).

25. The appellant sought also to challenge the failure to transpose the EIA Directive in the petition for judicial review before this court in respect of which permission to proceed was refused. In paragraph 26 of his Note, it is respectfully submitted that the Lord Ordinary correctly characterised the transposition issue as moot standing the position adopted by the Secretary of State in the English proceedings (*Greenpeace, petitioner* [2020] CSOH 88).

26. The appellant's averments in relation to this matter are irrelevant.

The 1999 Regulations do provide for adequate publicity

27. The other aspect of alleged failure to transpose referred to in the appeal relates to publicity of applications and is addressed at statements 22 to 25 of the appellant's

averments. The allegation is that the 1999 Regulations fail to require an adequate minimum level of publicity, as is required under the EIA Directive.

28. In terms of statement 22, the complaint by the appellant appears to be founded upon article 6(5) of the EIA Directive. However, article 6(5) of the EIA Directive provides for the detailed arrangements for informing the public and for consulting the public to be determined by the Member States. In terms of the 1999 Regulations, the matter of bringing the application to the attention of those who may have an interest in it, is addressed by the provision of the notice which is to be published as already identified above both in newspapers and online. The provisions of the 1999 Regulations are in accordance with the EIA Directive. These provisions follow a well-established mechanism and procedure adopted in many statutory frameworks for the publication of applications in which the public might wish to express an interest or make representations.

Adequate publicity was given to the application in the present case and in fact it was widely publicised

29. In statement 27 of the averments, the appellant appears to allege that there was a failure to comply with the requirements of regulation 9(2A)(a) of the 1999 Regulations which, as noted, require the applicant to publish the notice on such occasions as to be likely to come to the attention of those likely to be interested in, or affected by, the relevant project.

30. The complaint does not fall within one of the available grounds in terms of regulation 16. In order for there to be a relevant case of failure to comply with regulation 5(4) it would need to be averred that the Secretary of State had made the decision without being satisfied that the requirements of regulation 9 had been substantially met. This matter is not addressed in the averments for the appellant. Further and in any event, on any view, the Secretary of State was entitled to be and was correct to be satisfied that the requirements of regulation 9 had been substantially met for the purposes of regulation 5(4).

31. Formal notice of the application was published in two newspapers as directed by the Secretary of State. One of those newspapers (the Telegraph) has national coverage and the other (the Press & Journal) is likely to be read by persons with an interest in oil and gas developments in the North Sea. The notice provided a link/address for bp's website, which was available to the public, where the environmental statement submitted by bp for itself and Ithaca (the "ES"), the application for consent and details of how representations could be made could be accessed (there was an immaterial administrative error in this regard - see below). A Notice in the form published in these newspapers, was also published in the "Notices" section on the advertising website

known as "Scot-Ads" (Appendix document 25). In addition to the statutory publicity requirements, the making of the application was the subject of a public announcement by bp which received extensive coverage both by a wide variety of organisations online and in a significant number of media outlets. Reference is made in this regard to answer 18.7 for bp and Ithaca along with the copies of the wide media coverage which have been produced (Appendix document 23 and Appendix document 24).

32. In the circumstances, the appellant was not deprived of any opportunity to make representations to the Secretary of State in relation to the application for consent and the ES. As noted above the appellant cannot relevantly claim to be a person who is aggrieved in terms of the 1999 Regulations. Despite the extensive publicity given to the application for consent in this case, the appellant made no representations in relation to the application having been afforded more than sufficient opportunity to do so. A person who has not participated in the process may nonetheless be aggrieved where some defect in advertisement could have misled him so that he did not object or take part (*Walton v Scottish Ministers* 2013 SC (UKSC) 67 per Lord Reed at paragraph [87]). In the present case, the appellant points to no such defect. The appellant points to no step which it says should have been taken but which was not taken and which, if taken, would have led to the appellant making representations which it wished to make. Standing the level of publicity given to the application, it is difficult to see in practical terms what further steps could have been taken by way of advertisement which would have drawn any more attention to the application than the very high level of attention which must, sensibly, have occurred in light of the level of publicity actually achieved. As Lord Reed recognised in Walton (at paragraph 87) *"Ordinarily....it will be relevant to consider whether the applicant stated his objection at the appropriate stage of the statutory procedure, since that procedure is designed to allow objections to be made and a decision then to be reached within a reasonable time, as intended by Parliament."*. The Notice was publicised in accordance with the requirements of the Regulations. The appellant failed to state its objection at the relevant time. There is no good reason why the appellant could not have participated in the procedure at the appropriate time.

33. The appellant does not address when the application for consent actually came to its attention. It is highly likely that somebody within the organisation of the appellant noticed the coverage in connection with the application. In fact, on 22 October 2018, an article about consent for a project for another bp operated field, but which also referred to the Vorlich project, appeared in The Independent and included a comment attributed to Doug Parr, Chief Scientist and Policy Director of Greenpeace UK (Appendix document 24).

34. The particular circumstances of any case require to be considered and the question must always be whether the appellant can properly be said to be aggrieved by what has

happened (*Lardner v Renfrew District Council* 1997 SC 104 at page 108 A-B). In the particular circumstances, the appellant has not demonstrated that it can properly be said to be a person aggrieved by the grant of consent because it does not set out any proper explanation for why it could not (or indeed did not) make representations at the time. That is a sufficient basis in itself to dismiss the appeal as the appellant cannot meet the pre-condition to making an appeal under regulation 16: it is not a "person aggrieved".

35. Further and in any event, the appellant's case seems to be that it follows from the absence of representations by the public that there was a failure of the publicity to accord with the statutory requirements. In particular, in statement 30, the appellant avers that the scheme (a reference to the project) was of interest to those concerned with the environment-particularly on marine and climate change matters-and fishing and shipping interests in the area. The appellant claims that the position that none of them commented points to the failure of the publicity to accord with the statutory requirements. This however does not follow as a matter of logic. It is not legitimate to work back from an absence of comments from the public to a claim that there was a failure to publicise the application adequately. Such a claim instead requires examination of the nature and extent of the steps which were taken, in the relevant circumstances, when publicity occurred. In the present case the making of the application was extensively drawn to the attention of the public by means of the statutory notices, the public announcement and the extensive publicity. The appellant identifies no additional step by way of publicity which the appellant says ought to have been taken but was not taken. The appellant's only complaint (see below) relates to the host of a website on which the Notice was electronically accessible to the public.

36. In relation to the absence of comments in response to the public notice, it is also notable that the public and representative bodies which were consulted all confirmed they had no objections (Joint Nature Conservation Committee, Scottish Fishermen’s Federation, Marine Scotland, the Maritime and Coastguard Agency and the Ministry of Defence) (Appendix document 9). The reasonable inference is that nobody regarded the application as controversial at the time, so as to generate the making of representations.

37. Statement 29 contains a claim that putting the information on the applicant's website is insufficient. This claim is based upon the appellant's construction of article 6(5) of the EIA Directive as requiring that the relevant information be electronically accessible through a government website. In turn this claim relies on the reference which article 6(5) makes to the appropriate administrative level.

38. Properly construed, article 6(5) does not require that the relevant information be electronically accessible via a government website. The appellant's alleged interpretation does not pay sufficient attention to the first sentence of article 6(5), which

provides that the detailed arrangements for informing the public shall be determined by the Member States. The second sentence of the article leaves it open to the Member State to provide for electronic access through a central portal or easily accessible points of access. It is well within the scope of decision making afforded to Member States in this regard to decide that the relevant information should be electronically accessible on a website provided by the applicant which is accessible to members of the public. The reference to appropriate administrative level does not imply only a government website. The applicant's website is an equally appropriate administrative level to ensure that the relevant information is electronically accessible to the public.

39. Further and in any event, as explained in answer 29 for the Secretary of State, there is a central portal where the relevant information is electronically accessible to the public.

40. The appellant complains in statement 31 that the ES is on the bp website but the statutory notice is not. The appellant refers to regulation 9(2A) of the 1999 Regulations in this regard.

41. In answer 18.5, bp and Ithaca confirm that, due to an administrative error, the specific notice which had been published in the press was not itself included on the bp website. However, the bp website did include the letter from OPRED dated 4 April 2018 which contained substantially the same information as required by regulation 9(2)(f) and clearly explained how representations could be made in response to the application (Appendix document 27). Further the Notice appeared in full in the "Notices" section of the Scot-Ads website.

42. In the circumstances, it cannot sensibly be said that this administrative error had any practical effect on the ability of persons to make representations.

No issue properly arises in respect of the publication of the decisions

43. Statements 33 and 34 effectively contain a complaint that the Vorlich Field Development Plan has not been published, despite having been referred to in the OGA consent.

44. The complaint is irrelevant, in the context of a regulation 16 application. The appellant's complaint is based on the EIA Directive, but the OGA decision does not involve an examination of the environmental statement or the impact of the project on the environment. Those matters are addressed by the EIA process carried out by the Secretary of State. In that regard, extensive information about the development is contained in the ES. The appellant makes no complaint about the ES. The appellant's averments disclose no failure to comply with the 1999 Regulations in this respect. In any event the appellant has said nothing to demonstrate that it has suffered substantial prejudice to its interests as a result of any alleged failure. Indeed, the appellant made no complaint or other representation about the ES at the time, despite having ample

opportunity to do so. The appellant cannot, in any event, properly be said to be a person aggrieved in this respect.

There was no failure in respect of publicity of the additional information

45. In relation to the application, the Secretary of State requested additional information in terms of regulation 10(1) of the 1999 Regulations. The additional information was provided by bp on 6 and 30 July 2018. The Secretary of State did not direct that the additional information be published.

46. Although the appellant, in statement 35, refers to the EIA Directive and the 1999 Regulations, no complaint is made that the EIA Directive has not been adequately transposed in this respect. The appellant seeks to aver a breach of regulation 10(2) of the 1999 Regulations.

47. Regulation 10(1) states to the effect that the Secretary of State may by notice require an undertaker to provide in respect of an environmental statement provided to him pursuant to the Regulations such further information as the Secretary of State may require, including evidence in support of any information in that statement.

48. Under regulation 10(2), the requirement in relation to directing the undertaker to serve and publish additional information applies where "*the Secretary of State is of the opinion that information provided pursuant to a requirement under paragraph (1) above ought to have been included in the environmental statement in question because that information relates to the significant effects the project is likely to have on the environment, or where other information becomes available to the Secretary of State after the date on which the application was made which in the Secretary of State's opinion is of material relevance to his decision as to whether to grant consent….*"

49. The appellant's case in this regard proceeds on the basis that the Secretary of State requested additional information and that it was referred to in the Environmental Statement Summary. The appellant says that it follows that the Secretary of State did find the additional information of "*material relevance to his decision*".

50. Under the heading "Further Information" the Environmental Statement Summary stated as follows: "*Further information was requested from BP to address issues raised during the internal BEIS OPRED review. The information requested mainly related to clarification on atmospheric emissions, installation method for the pipeline and umbilical, and justification of the risk matrix conclusions. The additional information received from BP on 6 July 2018 and 30 July 2018 addressed all of the issues that were raised.*"

51. It does not follow at all that the Secretary of State found the additional information of "*material relevance to his decision*". Read fairly what the Environmental Statement

Summary sets out is that issues were raised during the internal review of the environmental statement within OPRED. Further information was requested and provided in respect of those issues. The Secretary of State was plainly able to conclude that the issues were not material to his decision and were resolved.

52. Both limbs of regulation 10(2) in respect of the publication of additional information require the Secretary of State to form an opinion on the specified matters. The appeal contains no grounds to justify a claim that the Secretary of State erred in this respect. Further and on any view, the Secretary of State was entitled to be and was correct to be satisfied that the requirements of regulation 10 had been substantially met for the purposes of regulation 5(4).

There was no failure in assessment of climate change impacts from the operation of the field

53. The Secretary of State made no error and there was no failure in relation to assessment of the climate change impact from the Vorlich field. The ES assessed (amongst the content of a number of other factors required to be assessed by Article 3(1) of the EIA Directive and regulation 3A(2) of the 1999 Regulations) the estimated greenhouse gas emissions which the proposed operations of the relevant project would generate. This would include emissions from flaring (the controlled burning of oil and natural gas during oil and gas operations) during the initial clean-up of the wells and subsequently during occasional flaring events through the course of the field life. There were clerical errors in certain entries in Table 5-6 of the ES which related to air emissions (Appendix document 4). Reference is made to answers 37-40 for bp and Ithaca.

54. In general, environmental statements are compiled so that they represent early estimations of the likely emissions of the relevant project, including from flaring. Estimates of emissions from flaring are then routinely updated and fine-tuned in annual flaring consent applications to the OGA which control the flaring permitted on an annual basis. Separate permits require to be sought to regulate the emissions of CO_2, and other atmospheric pollutants. In the original Table 5-6 in the ES, the "Fuel Use (t/d)" column of the Table, had estimated values of 1,572 tonnes per day for oil and 690 tonnes per day of gas during each day of flaring, with an assumed frequency of one 4 day event per annum over the 10 year field life (Appendix document 4). However, paragraph 3.5.6 of the ES which addressed flaring and venting (Appendix document 4) correctly stated lower values of 1,175 tonnes per day of oil and 788,563 m3 of gas (equalling 576 tonnes per day). Paragraph 3.5.6 further stated that these volumes had been determined using current well test data and were considered conservative, consistent with the general approach noted above.

55. The Secretary of State raised comments and sought clarification in this regard and such clarification was provided. The clarification was in the form of updating the calculations contained in Table 5-6 with the correct (and lower) values from paragraph 3.5.6 as identified above (Appendix document 26). The updated Table 5-6 contained separate clerical errors. These included, for example, the figures that should have been used in the "Total Fuel Use (t)" column were inadvertently entered into the "Fuel Use (t/d)" column and the "Fuel Use (t/d)" column should have been reduced to show totals of 1,175 tonnes per day for oil and 576 tonnes per day for gas. Whilst errors in the updated table are acknowledged, these errors did not carry through into the calculation for the total CO_2 equivalent emissions figures contained in the updated table. Those emissions were assessed in the terms required by the 1999 Regulations and the Secretary of State was entitled to, and indeed was correct to, proceed on the basis that such was the case. Moreover, as further information became available to the authors of the ES the frequency of flaring was revised downwards in the updated table to two days on start-up and one 24-hour flaring event per year for ten years.

56. The errors in the updated Table 5-6 were not used in the calculation of total CO_2 equivalent emissions values, were not material to the emissions assessment under consideration and were not capable of changing and did not change the overall conclusion reached in the ES. The carbon emissions from the Vorlich field are moreover just one of a range of factors the ES addresses and the Secretary of State is required to consider in making his decision. Therefore, the errors were not capable of affecting the outcome of the EIA and the decision of the Secretary of State to agree to the grant of consent.

57. The contention by the appellant at statement 39, that the adverse contribution of the scheme's operation to climate change was misstated and understated, is accordingly also incorrect. There was no error in this regard on the part of the Secretary of State. The assumptions of the total CO_2 equivalent emissions values were correctly stated. The appeal does not actually set out a basis to contend otherwise.

58. The appellant can show no failure to comply with any requirement of the 1999 Regulations in this regard. There has also been no substantial prejudice to the appellant.

59. It follows that the linked complaint by the appellant, in respect of alleged failure to advertise or publish the additional information in respect of flaring emissions, is also not well founded. There was simply no matter in this regard upon which it would have been relevant for the appellant to make representations to the Secretary of State because the clerical errors were not capable of affecting the outcome of the EIA and the decision of the Secretary of State to agree to the grant of consent. Reference is also made to the

foregoing submissions about there being an absence of any failure in respect of the publication of the additional information.

There was no failure in assessment of climate change from the consumption of the oil and gas produced from the field

60. The Secretary of State made no error and there was no failure in relation to the consideration of climate change from the consumption of the oil and gas produced from the Vorlich field. The core claim made by the appellant in this respect, which is in statement 44, is that the Secretary of State failed to consider at all whether the consumption of the oil produced from the Vorlich field would affect carbon emissions, climate change and the Secretary of State's duties under the Climate Change Act. The appellant goes on to aver, in statement 46, that the effect of consuming the oil (meaning the produced oil) is a relevant consideration in the determination of an application for an OGA licence (presumed to be a reference to an OGA consent) and the Secretary of State's consideration of the environmental impacts. The alleged basis for this appears to be the appellant's averments in statements 45 and 47 to the effect that if oil is extracted from the Vorlich field, it will be used in ways which will emit greenhouses gases whereas, if the oil is left under the seabed, it will not be used and greenhouse gases will not be emitted.

61. However, the end use of the oil (read for present purposes as also encompassing gas) to be produced is not part of the development for which consent was sought in terms of the 1999 Regulations. Reference is made to paragraph 11 above regarding the proper construction of the 1999 Regulations. The effect of the end use of the oil to be produced is not an effect of a part of the project as a relevant project. The effect of the end use of the oil to be produced is an effect of the activities, carried out by others, in which the produced oil is used. As described at paragraph 62 below neither bp nor Ithaca have control over where the product is used. (*R (on the application of Finch) v Surrey County Council* [2020] EWHC 3566 (Admin) referred to at paragraph 73 below).

62. Further, the appeal sets out no basis upon which any coherent representation could have been made to the Secretary of State or could now be made to the effect that the production of oil from the Vorlich field increases the overall consumption of oil such as to have any impact upon carbon budgets, obligations or targets related to climate change. In relation to the particular position of the UK's national emissions inventory, there would be yet further complications were such end use emissions to be assessed at the project level because the eventual use of the produced oil and the place and time that the produced oil is consumed is unknown to the producer and not within their control. There is the potential for produced oil to be exported and consumed elsewhere in the world.

63. One of the grounds advanced by the appellant in the English proceedings was that the Secretary of State failed to take into account a relevant consideration, the effect of the consumption of the oil proposed to be extracted on the UK's carbon budget requirements and so on its contribution to climate change. This is referred to as ground (ix) in the consent order which disposed of the English proceedings (Appendix document 28). As the consent order indicates, permission for judicial review on ground (ix) was not granted in the English proceedings following an oral hearing on 4 February 2020.

64. When the matter of permission was considered on the papers in the English proceedings, the contention contained in ground (ix) was described as unarguable (Appendix document 28). The same result was reached on this ground after the oral hearing (Appendix document 28). That result proceeded on the basis that there is well established authority that it is for the decision maker to assess what information should be in the environmental statement within the constraints of the EIA Directive and the public law principles of rationality and taking into account relevant considerations. The court accepted the Secretary of State's submissions that the UK has an overarching energy strategy which for the foreseeable future includes the continuing use of oil. Issues such as the extent of the oil required by the UK, and, therefore, oil production requirements, follow from that strategy. However, the UK's energy strategy and its consequences were not being considered or determined as part of the Vorlich field application. The future use of the oil from the Vorlich field, following removal from the seabed, was not part of the development project for which consent was sought. The focus of the ES and the consent was rightly on the environmental effects of the development of the Vorlich field, including the generation of greenhouses gases. In those circumstances, the court did not consider it to be arguable that the Secretary of State erred in not taking into account as a relevant consideration the effect of the consumption of the oil (meaning the produced oil) on the UK's carbon emissions.

65. The Secretary of State (it is submitted correctly) takes the position that the decision in the English proceedings on the same point as sought to be raised in this appeal is *res judicata*. The court in the English proceedings heard argument on the point and held it to be unarguable. Having sought, unsuccessfully, to raise the point in the English proceedings, the appellant should not be permitted to seek to reargue the matter here. This can also be seen as an issue of interest because the appellant should not properly be regarded as a person aggrieved in respect of a point which has already been unsuccessfully sought to be litigated by it. Further and in any event, despite having seen the argument of the Secretary of State succeed in the English proceedings, the appellant has done nothing in the present appeal to address that argument. It is hard to escape the conclusion that this is because the argument, against the appellant's

position on this matter, which succeeded in the English proceedings, is well founded and the appellant has no effective counter point to it.

66. The Secretary of State is correct to say that the UK has an overarching energy strategy which for the foreseeable future includes the use of oil. As set out by bp and Ithaca in answer 41.5, that the Climate Change Act 2008, the goals of the Paris Agreement and atmospheric emissions from fossil fuel sources, raise considerations which have to be and are addressed for the UK at strategic level, is also reflected in the fact that they were addressed in the most recent Offshore Energy Strategic Environmental Assessment (OESEA3, 2016), which acknowledges that reliance on fossil fuel sources will continue during decarbonisation. In the OESEA 3 Environment Report, it is recognised that the emissions of activities which consume fossil fuels (such as energy generation, industry and transport) are emissions from those activities to be accounted for as such and are not emissions from the production of the fossil fuels themselves (Supplementary Appendix for Interested Persons document 1). As the Secretary of State also says, ensuring security of energy supply is a key aspect of UK energy policy which includes a strategic objective to maximise the economic recovery of UK petroleum. The emissions implications of that objective have been considered at that strategic level, as OESEA 3 shows (Supplementary Appendix for Interested Persons document 1).

67. There is nothing in the 1999 Regulations which provides that the UK's energy strategy was a matter to be considered and determined as a matter for the EIA in respect of the application for consent relating to the Vorlich field. Indeed, this would have been contrary to what the 1999 Regulations required, which was an assessment of the environmental effects of the development for which consent was sought. The issue sought to be raised in relation to produced oil engages no requirement of the 1999 Regulations in relation to which the appellant can properly claim to be a person aggrieved and which could be a relevant subject of an application under regulation 16(1).

68. In relation to matters of national strategic decision making, the court will only intervene on grounds of bad faith, improper motive and manifest absurdity (*Packham v Secretary of State for Transport and others* [2020] EWHC 829 Admin at paragraph [55]). The appeal addresses none of those considerations and in any event it would not be a proper process in which to do so, having regard to the grounds of challenge specified by regulation 16 of the 1999 Regulations.

69. Further, the appellant simply asserts that the Secretary of State failed to consider whether the consumption of the oil produced from the Vorlich field would affect carbon emissions, climate change and the Secretary of State's duties under the Climate Change Act.

70. The appellant's case is not relevant however because it does not address the point that it was for the Secretary of State to assess what the content of the environmental statement would be within the requirements of the 1999 Regulations. It is a matter for the decision maker to assess the scope of the environmental statement within the requirements of the relevant regulations and whether the information provided is adequate. The appellant would in practical terms need to be able to say that the Secretary of State's assessment was irrational in order to call it into question (*R (ClientEarth) v Secretary of State for Business, Energy and Industrial Strategy and another* [2020] EWHC 1303 Admin at paragraph [254]; reported on appeal at [2021] EWCA Civ 43; R-v- Cornwall CC exp Hardy [2001] Env. L.R 25). However, the appellant neither avers that this was the case nor would there have been any proper bases for the appellant to do so in any event.

71. The appellant's reliance on the Heathrow case *(R Plan B Earth v Secretary of State for Transport* [2020] EWCA Civ 214) (the "Heathrow Decision") in statement 44 of the appeal is misplaced for reasons summarised in answer 44 for bp and Ithaca. As noted there, the decision of the Secretary of State in the present case is not a matter of either national policy or overall production capacity but rather it pertains to the consent given for the Vorlich project itself in terms of the 1999 Regulations. The process for such consent is not a venue for national strategic decision making and this appeal is not a venue for review of national strategic decision making. Further, the decision in the Heathrow Decision affirmed the well-established principle that the content of an environmental statement is a matter for the judgment of the decision maker which may only be reviewed on *Wednesbury* grounds. As already noted, no challenge is set out by the appellant on such grounds. In any event, the Supreme Court overturned the Court of Appeal's judgment in the Heathrow Decision (see [2020] UKSC 52; 2021 PTSR 190).

72. Likewise, the other cases relied on by the appellant at statements 42 and 43 are distinguishable from the present case. *R (Stephenson) v Secretary of State for Communities and Local Government* [2019] EWHC 519 (Admin), 2019 PTSR 2209, concerned a challenge to the adoption of a provision of the National Planning Policy Framework relating to the recognition of the benefits of on-shore oil and gas development and does not bear on the content of the environmental statement in the present case. *H J Banks & Co Ltd v Secretary of State for Housing Communities and Local Government* [2018] EWHC 3141 (Admin), [2019] PTSR, related to the interpretation of a provision of the National Planning Policy Framework which provided that permission should not be given for the extraction of coal unless certain requirements were met. The issue related to the reasoning of the Secretary of State in relation to this provision in the particular case and likewise does not bear on the content of the environmental statement in the present case.

73. None of authorities relied on by appellant support the analysis of the 1999 Regulations or the approach to assessment contended for by them. In contrast, the decision in the recent case of *R (on the application of Finch) v Surrey County Council* [2020] EWHC 3566 (Admin) supports the approach adopted by the Secretary of State (albeit noting that this decision is understood to be subject to a pending appeal). That case relates to the interpretation of the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 which, as with the 1999 Regulations, transpose Directive 2011/92/EU into domestic law. The environmental impact assessment required in the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 also requires assessment of the direct and indirect significant effects of "the development" for which consent is sought. In that case the application was for planning permission for an onshore oil field. Holgate J confirmed (at paragraph 101) that an "*effect on the environment is an effect of the development for which planning permission is sought*" and that an indirect effect relates to those consequences which are less immediate but (applying the decision to the facts of this case) are nevertheless effects of the relevant project itself (paragraph 110). The court also noted (paragraph 102) that once oil is produced it becomes an indistinguishable part of the international oil market and so any emissions from the use of that oil cannot be attributed to a particular oil well. The court held (paragraph 126) that the environmental impact assessment for an onshore oil field did not need to address the future combustion of oil extracted from that site.

74. Lastly, in statement 49, the appellant again contends that it would have made representations to the Secretary of State in respect of the effects of the consumption of the produced oil if the application, agreement and grant of consent had been publicised in the manner in which the 1999 Regulations and the EIA Directive envisage. The matter of publication has already been addressed above (see paragraphs 28 – 40) to show that the appellant's position in this respect is generally ill-founded and that the appellant is not properly regarded as a person aggrieved in that respect. In addition, for the above reasons, the appellant has not been able to show that it would have made any relevant or coherent representations on the topic of the effects of the consumption of the produced oil.

75. This ground of appeal should accordingly also be rejected.

The Court should in any event not exercise its discretion to quash the grant of consent

76. Even if there has been a failure to comply with a requirement of the 1999 Regulations (which is denied), the appellant has not demonstrated that its interests (or the interests of anyone else) have been substantially prejudiced by any such failure.

77. It is respectfully submitted that the Court should not, in all the circumstances, including the extreme prejudice liable to be suffered by bp and Ithaca, grant an order quashing the grant of consent. Those circumstances include the appellant's failure to participate in the application process and its delay in bringing proceedings. On 25 and 26 July 2019, notices were published in the London, Edinburgh and Belfast Gazettes of the 7 August 2018 Secretary of State decision. The Secretary of State notified the appellant's English solicitors of this publication at the same time. This publication triggered a six-week period in which an application could have been made to this Court in terms of regulation 16 in respect of the Secretary of State's decision. Despite the fact that the appellant's alleged complaints essentially relate to the Secretary of State's decision, for reasons which the appellant has never explained, no statutory application to this Court was brought within that period. The Judicial Review raised in the High Court was not commenced until November 2019.

78. The Court should weigh in the balance against any breach that the appellant was able to establish, the potential prejudice to the interests of bp and Ithaca were the consent to be quashed (*Walton*, above, per Lord Hope DPSC at paragraph [155], see also per Lord Carnwath at paragraphs [138] and [139]. Those statements remain applicable standing the judgment of the CJEU in *Gemeinde Altrip v Lan Rheinland-Pfalz* (Case C-72/12) [2014] PTSR 311-see *R (Champion) v North Norfolk District Council and another* [2015] UKSC 52 per Lord Carnwath at paragraph [58] and *The Royal Society for the Protection of Birds v The Scottish Ministers and others* [2017] CSIH 31 per the Lord President, Lord Carloway at paragraph [199]).

79. As set out in the answers for bp and Ithaca, following the grant of and in reliance upon the consent, they have carried out the offshore drilling and construction work required for the project at a cost of approximately £230,000,000 to date. Offshore construction and installation work commenced in January 2019. Production commenced in November 2020. The works for the Vorlich project for which consent has been granted have accordingly been implemented by bp and Ithaca. The project is fully operational. It would not be appropriate to bring the existence of consent for the project into question at this stage on any basis such as put forward by the appellant. The impact of reducing the consent as sought by the appellant would be severe as explained in the affidavit from John Horsburgh of Ithaca (Appendix document 29). Production and operation would require to be suspended at least until a fresh consent came to be granted. There would on any view be considerable delay and uncertainty occasioned by the additional consenting process and, accordingly, significant operational and financial impact. The suspension of production would result in a total loss of revenues from the Vorlich field for bp and Ithaca for the period of suspension whilst significant ongoing and fixed costs associated with the operation of the Vorlich field (including those costs for processing and transportation services) will continue to arise. Further, in order to protect the

infrastructure through which production from the Vorlich field is transported and processed during the period of suspension additional expenditure would be incurred by bp and Ithaca to maintain and preserve the infrastructure. It is estimated by Mr Horsburgh that a period of shut down of the Vorlich field would incur costs estimated to be in the region of £5,000,000 on average per month as committed payments together with ongoing finance costs and additional operational costs which may arise.

80. The objections which the appellant seeks to make to the consent are properly characterised as procedural objections allegedly giving rise to an absence of representations on the part of the appellant. The appellant has not explained how it is that it failed to make representations, standing the arrangements which were implemented to publicise the application and the very high level of publicity which took place in relation to the making of the application. Further the representations which the appellant claims it would have made lack substance for the reasons set out above and it has not been shown that the outcome could or would have been any different. While it is denied that the appellant has shown any breach of the 1999 Regulations, even if it has, such breach should be placed in the balance against the very substantial prejudice to bp and Ithaca if the consent were to be quashed. It is respectfully submitted that the balance in this case in any event is substantially in favour of not quashing the consent.

Conclusion

81. For the foregoing reasons and the reasons set out in the answers for bp and Ithaca, it is respectfully submitted that the Court should simply dismiss the appeal. In the alternative, the four questions of law posed by the appellant should be answered in the negative. In any event, the decisions of the Secretary of State and the OGA should not be reduced or quashed.

N THE COURT OF SESSION

XA34/20

NOTE OF ARGUMENT FOR THE FIRST AND THIRD INTERESTED PERSONS

in the appeal under Regulation 16 of the Offshore Petroleum Production and Pipelines (Assessment of Environmental Effects) Regulations 1999

by

GREENPEACE LIMITED, a company incorporated under the Companies Acts with registered number 01314381 and having its Registered Office at Greenpeace House, Canonbury Villas, London, N1 2PN. **Appellant**

against

Decisions of the Secretary of State for Business Energy and Industrial Strategy and of the Oil and Gas Authority dated 7th August 2018 and 20th September 2018 and communicated by notice in the London, Edinburgh and Belfast Gazettes dated 3rd April 2020

Pinsent Masons LLP
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Ref: JMH/SJB/BP0066.07139

JOINT READING LIST OF THE PARTIES

in the

APPEAL

to

THE COURT OF SESSION

under

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References to page numbers are to the pdf bundle and not the internal page numbering

1. Tab 1 Licence 24 March 1981 (pp5-7, 11)
2. Tab 2 Amended Licence 6 December 2016 (pp13-23, 25)
3. Tab 4 BP Vorlich ES (pp28, 30, 32-43, 55-58, 64-65, 67-69, 73, 76, 84-85, 105, 122-128, 134-135, 142, 160, 162-164, 174-177, 179, 191-193, 197-199, 200-204)
4. Tab 5 Notice 12 April 2018 (p205)
5. Tab 6 BP North Sea Portfolio (pp206-207, 211)
6. Tab 7 BP Press Release (pp219-221)
7. Tab 8 BEIS Environmental Data (pp225 and 234)
8. Tab 9 OPRED Environmental Statement Summary (pp261-264)
9. Tab 11 London Gazette notice 25 July 2019 re ES decisions (pp277-278)
10. Tab 12 Consent Order Garrick Maidment (pp279-284)
11. Tab 13 Edinburgh Gazette notice (pp285-286)
12. Tab 14 Pre-action letter from Harrison Grant 27 April 2020 (pp287-291)
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15. Tab 18 Vorlich Environmental Statement included on .GOV.UK website on 2 May 2018 (p480)
16. Tab 19 High Court Order granting permission to Greenpeace (pp481-482)
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18. Tab 22 OGA Requirements for planning of and consent to UKCS Field Developments – (pp 492 §1 – 3, pp 494 §12, pp 498 §27 – 28, pp501 - 503, pp508 §101 - 103
19. Tab 23 OGA Overview 2018 (pp517, 522, 528 and 553)
20. Tab 24 Judicial review claim form (pp557-606)
21. Tab 25 Licence P1588 (pp607-609, 616)
22. Tab 29 BEIS letter and correspondence re further information (pp701, 703-707, 709, 711-723, 725-734)
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24. Tab 31 John Sauven affidavit (pp742-758)
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