Environmental Law Update

20 April 2023

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R (on the application of Friends of the Earth Limited) -v- Secretary of State for International Trade and others [2023] EWCA Civ 14

R (on the application of Friends of the Earth Limited) -v- Secretary of State for International Trade and others [2023] EWCA Civ 14

Facts

- Friends of the Earth sought judicial review of the Government's decision to approve export finance worth $1.15bn in respect of a liquefied natural gas project in Mozambique. One of the project's aims was to help Mozambique move away from using coal and oil.
- Friends of the Earth argued that:
  - The Government was required to adopt a view that its decision was aligned with the UK's obligations under the Paris Agreement that was more than merely tenable, and that there was no rational basis on which the respondents could conclude that the investment decision was compatible with the Paris Agreement; and
  - The Government had failed in their duty of enquiry to obtain a quantification of the indirect emissions (besides purchased energy) occurring in the project's value chain (Scope 3 emissions) –i.e. their decision was irrational for failing to do so

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The Divisional Court could not agree on the outcome and dismissed the claim but granted permission to appeal

The Court of Appeal unanimously rejected the appeal for the following reasons…

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Paris Agreement

- Article 2 of the Agreement did not create an obligation on the Government to demonstrate its investment decisions were consistent with a *pathway* towards limiting global warming to well below 2c and pursuing 1.5c
- It is an unincorporated international treaty that does not give rise to domestic legal obligations but the Government had decided to take it into account among other factors and considered that funding the project was consistent with the UK's obligations.
- The Court of Appeal found the decision that funding the project was consistent with the UK's obligations was tenable, i.e. within the margin of reasonable decisions that could be taken and therefore not irrational.
- The Court did not accept Friends of the Earth's argument that the investment decision was irrational because the Government later acknowledged that the financing of the project did not align with the UK's obligations under the Paris Agreement. The decision is assessed based on when it was taken, not with the benefit of hindsight

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Scope 3 Challenge

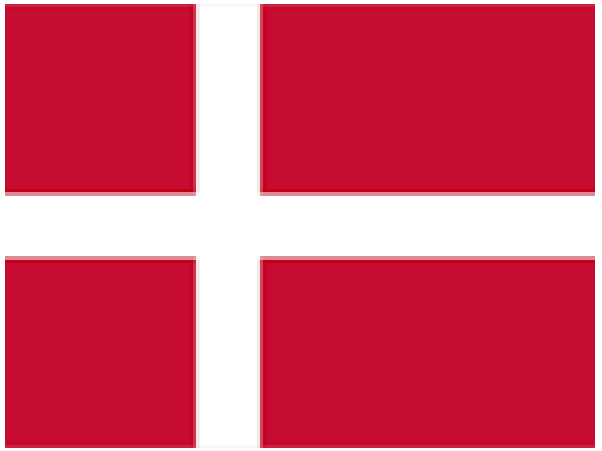
- Whilst Scope 3 emissions were not quantified, it was always understood they would be significantly larger than Scope 1 and 2 emissions.
- Quantifying the Scope 3 emissions would not answer "*the far more difficult question*" of whether, and to what extent, gas from the project would replace more polluting fossil fuels and over what timescale
- The Court concluded that the Government's decisions as to the quantification of the Scope 3 emissions and the adequacy of the project's climate change report were "*well within the substantial margin of appreciation allowed to the decision-makers*". A failure to make an estimate of the Scope 3 emissions as part of a multifaceted decision-making process did not itself render the decision irrational.

R (on the application of Friends of the Earth Limited) -v- Secretary of State for International Trade and others [2023] EWCA Civ 14

- The Court of Appeal also noted that the court cannot and should not second guess the executive's decision-making in the international law arena where there is no domestic legal precedent or guidance. The standard for judicial review may be, and is in this case, less intense where the issue is one that is not properly within the province of the domestic court

- *Appeal pending to the Supreme Court – issued at the end of February 2023 but no decision yet made.*

Dansk Akvakultur v Miljo-Og Fodevareklagenavnet (C-278/21)



Dansk Akvakultur v Miljo-Og Fodevareklagenavnet (C-278/21)

Overview

A Danish Court asked the ECJ to give a preliminary ruling on whether Article 6(3) of the Habitats Directive required an appropriate assessment to be carried out where an authorisation is sought to continue an operation in unchanged conditions.

Article 6(3) provides that:

> *"Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public"*

Dansk Akvakultur v Miljo-Og Fodevareklagenavnet (C-278/21)

Factual Background

- In 1999 a fish farm near a Natura 2000 site was given permission to breed rainbow trout which resulted in the discharge of chemicals including nitrogen.
- In 2006, the owners requested authorisation to increase the quantity of nitrogen that could be emitted.
- Following an assessment of the individual site's impact on the Natura 2000 site the authorisation sought was granted by the competent authority
- This was appealed against and it was noted that the competent authority had not taken into account the nitrogen emitted by three neighbouring fish farms. Nevertheless, the Appeal Board considered that the defect did not justify annulment of that decision.
- The 2006 authorisation required the owners to seek further authorisation in 2014. This was requested in March 2014 and granted in December 2014. The competent authority noted the amount of nitrogen emitted would remain unchanged from 2006 and that it was apparent from a HRA carried out as part of a River Basin Management Plan that the operation, and three neighbouring operations, were unlikely to have a significant effect on the Natura 2000 site.

Dansk Akvakultur v Miljo-Og Fodevareklagenavnet (C-278/21)

Factual Background

- The 2014 decision was also challenged.
- In March 2018 the Environmental and Food Board of Appeals annulled the 2014 decision. On the basis that:
  - The 2006 authorisation had not been proceeded by a compliant HRA The existence of the River Basin Management Plan and HRA completed before its implementation did not affect the obligation on the competent authority to carry out a specific assessment of the operations by the fish farm in order to determine whether that project was likely to have a significant effect on the Natura 2000 site
- The fish farm owners challenged the Appeal Board's decision before the High Court of Eastern Denmark

Dansk Akvakultur v Miljo-Og Fodevareklagenavnet (C-278/21)

Factual Background

- The High Court requested a preliminary ruling from the ECJ on the requirements of Article 6(3) in the circumstances and posed three questions:
  - 1) Is an Art6(3) assessment required where an authorisation is sought to continue an operation in unchanged conditions
  - 2) Would the existence of the National River Basin Management plan be relevant to consider in answering whether or not an Art6(3) assessment was required;
  - 3) If an Article 6(3) assessment is required, is the relevant authority required to take into account he limits on the discharge of nitrogen set aside in the River Basin Management Plan 2015–2021 and any other relevant information and assessments which might arise from the River Basin Management Plan or the Natura 2000 plan for the area

Dansk Akvakultur v Miljo-Og Fodevareklagenavnet (C-278/21)

The ECJ's Judgment

- Question one
  - The Court held that a continuation of an existing operation in an unchanged manner is not a new or separate project within the meaning of the Directive
  - In principle therefore the continuation, under unchanged conditions, of the activity of an operation which has already been authorised at the planning stage must not, in principle, be subject to the assessment obligation laid down in that provision.
  - However, where the earlier assessment was not compliant with the Directive, an application for continuation must be preceded by a new assessment that complies with the Directive

Dansk Akvakultur v Miljo-Og Fodevareklagenavnet (C-278/21)

The ECJ's Judgment

- Questions two and three
  - In order to determine whether the renewed authorisation of a continuing activity requires a new HRA and, if so, in carrying out that HRA the authority must take into account other assessments carried out in the meantime, such as those preceeding the adoption of a National River Basin Management plan, if those assessments are relevant and their findings, assessments and conclusions contained therein are complete, accurate and definitive.
  - It is for the competent authority to decide what conclusions should be drawn from those earlier assessments.
  - However, even if the previous assessments are relevant and taken into account, that does not release the competent authority from its own obligation to take into consideration all the factors existing at the date on which that decision and that assessment took place.

Dansk Akvakultur v Miljo-Og Fodevareklagenavnet (C-278/21)

Impact

- Not binding on E&W - *may* be taken into account to interpret Article 6(3) (s6(2) EU (Withdrawal) Act 2018)
- Government guidance on HRAs does not directly address the first question raised in the decision. Gist = previous HRA can support but not replace a subsequent HRA in respect of the same site. On questions two and three, the guidance is discretionary in respect of whether the competent authority should consider previously completed HRAs.
- Both slightly different to the ECJ's interpretation.
- Therefore - Given legislation and Government guidance do not explicitly deal with the points raised in *Dansk Akvakultur*, the ECJ's decision is one that may, in the right circumstances, be worth raising

R (on the application of Sarah Finch) v Surrey County Council [2022] EWCA Civ 187

R (ono Finch) v Surrey CC [2022] EWCA Civ 187

- Case concerned a decision of Surrey CC to grant planning permission for the retention of two hydrocarbon wells for commercial production of hydrocarbons, and the drilling of four new wells.

- The case turned on the proper interpretation of the EIA Directive and Regulations. The question was whether Surrey CC had been wrong not to require the assessment of the downstream environmental impact of the hydrocarbons extracted by the development.

- It was common ground that it was inevitable that the extracted oil would be refined and eventually be combusted so that GHGs were produced.

R (ono Finch) v Surrey CC [2022] EWCA Civ 187

- Issue 1: the appropriate test for identifying an indirect 'likely significant effect of the development on the environment'.
  - The assessment of environmental impact was to be limited to direct and indirect environmental effects of the proposed development.
  - EIA is not an ends in itself but a means of informing and strengthening the planning permission decision.
  - The question is whether the indirect effect is truly an effect of the proposed development. What needs to be considered is the necessary degree of connection between the development and the putative effects.
  - Assessment of downstream GHGs was not incapable of falling within this assessment. It was a matter for the judgment of the decision-maker. Such a judgment would be the subject of the normal public law grounds of review.
  - This assessment does not require a gloss on the words in the legislation.

R (ono Finch) v Surrey CC [2022] EWCA Civ 187

- Issue 2: is EIA directed to environmental impacts arising from the utilization of an 'end product'?
  - The 'end product' is not a term of art. The law does not compel the inclusion of the impact of end products (i.e. the downstream GHGs). The 'end product' really refers to the outcome of the project or development being undertaken.

- Issue 3: is EIA directed to impacts of downstream GHG emissions arising from combustion of refined products?
  - Ultimately, the question is sufficient causal connection between the project and the particular impact. Inevitability may be relevant but it does not compel the inclusion of these impacts in the assessment.

R (ono Finch) v Surrey CC [2022] EWCA Civ 187

- Issue 4: was the CC's conclusion that these downstream GHGs need not be assessed a lawful one?
  - Sir Keith Lindblom SPT: on a fair reading of the report it was lawful.
  - Lewison LJ: difficult, but lawful. The potential global warming effect of the development was implicitly considered and excluded.

- Dissent (Moylan LJ):
  - Ultimately the focus of the development was the extraction of hydrocarbons for commercial purposes. That was the project for which indirect effects were to be assessed.
  - The end product is not confined to the development site. Did not accept the CC lawfully explained its exclusion of downstream GHGs.

R (ono Finch) v Surrey CC [2022] EWCA Civ 187

- Permission to appeal granted to the Supreme Court.
- Permission to intervene has been given to the Office for Environmental Protection.
- Lindblom SPT para 67:

Whether in other cases, in different circumstances, involving development for the extraction of hydrocarbons, "downstream" impacts might properly be regarded as "indirect" effects on the environment, so that it would be reasonable and lawful for a local planning authority in those circumstances to require assessment, is not a question we have to decide. The specifics of such projects will vary greatly from one kind of "fossil fuel" to another. The need for a wider assessment of greenhouse gas emissions may sometimes be appropriate, and possibly not contentious. One can imagine possible scenarios. […].

- On the OEP see also *R (ono Wild Justice) v The Water Services Regulation Authority* [2022] EWHC 2608 (Admin).

R (on the application of Harris) v Environment Agency [2022] EWHC 2264 (Admin)

R (ono Harris) v Environment Agency [2022] EWHC 2265 (Admin)

- Question turned on whether the Environment Agency had erred in its review of 240 groundwater abstraction licenses in the Norfolk Broads SAC.

- In its restoring sustainable abstraction (RSA) investigation, the EA chose to focus on the impact on three SSSIs (of a total of 28 making up the broads SAC). Claimants argued that impact across the entire SAC SSSIs should have been considered.

- Case turned on the interpretation of Article 6(2) of the Habitats Directive and Reg 9(3) of the Habitats Regulations.

R (ono Harris) v Environment Agency [2022] EWHC 2265 (Admin)

- Issue 1: proper interpretation of 'have regard' to the Directive in reg 9(3) of the Habitats Regulations.
  - The Claimants argued that the requirement to 'have regard' in reg 9(3) of the Regulations imposed a requirement on the EA to secure compliance with the Directive (here Article 6(2)). The EA argued that 'have regard' was more limited.
  - Unlike reg 9(3), reg 9(1) requires the Secretary of State to secure compliance with the requirements of the Directive. This is an important distinction.
  - On the other hand, 'have regard' typically refers to codes, guidance and advice. Here it refers to requirements.
  - The key point is that the EA is one of a number of competent bodies holding the reg 9(3) duty; thus securing compliance could not be applied to those overlapping bodies.
  - However, where the EA is effectively the sole public body for determining abstraction licenses, only it can secure compliance with Article 6(2). Thus, its obligation is to discharge the obligation.

R (ono Harris) v Environment Agency [2022] EWHC 2265 (Admin)

- Issue 2: whether Article 6(2) had direct effect such that it remained extant in domestic law following EU Exit Day.
  - In *Waddenzee* [2005] All ER (EC) 353 the ECJ held Article 6(3) had direct effect. Section 4(3) of the EU (Withdrawal) Act 2018 applies to rights 'of a kind'.
  - Article 6(2) has a close relationship with Article 6(3); for the purposes of s 4(3) it is 'of a kind' such that the right was recognised in domestic law.
  - Another UT case had also confirmed this in *Warren* [2020] PTSR 565.

R (ono Harris) v Environment Agency [2022] EWHC 2265 (Admin)

- Issue 3: Whether the EA breached Article 6(2) of the Habitats Directive.
  - Cannot object to a site-centric rather than license-centric approach.
  - Article 6(2) is not engaged if a license has been compatibly granted under Article 6(3).
  - However, the EA accepted that there was not no risk to other sites in this case; potential risk existed.
  - Such generalised risk was sufficient to engage Article 6(2) applying the precautionary principle.
  - For new license and time-limited licenses, the appropriate procedures were in place for assessing those licenses and securing compliance.
  - The same was not the case for permanent licenses. The test applied to adjusting such licenses was if they were 'seriously damaging'. This was too high.
  - Lacking a systematized approach to reviewing these licenses, there is a failure to comply with Article 6(2).

R (ono Harris) v Environment Agency [2022] EWHC 2265 (Admin)

- Issue 4: whether the EA had acted irrationally.
  - The decision not to expand the RSA programme had been based on a rational cost/benefit analysis.
  - The decision was also not necessarily inconsistent with Article 6(2); the RSA programme was not the only means by which the EA could legitimately discharge its obligations.
  - However, the EA's current programme of works would not discharge the Article 6(2) obligation. Having committed itself to discharge that obligation, it was irrational not to expand the programme in circumstances where no other mechanism was in place to secure compliance.
  - This means the decision is flawed at common law even if the Directive cannot be enforced directly.

Investment Guidance for charities: *Butler-Sloss and others v Charity Commission for England and Wales* [2022] Ch. 371

Facts

- Claimants: trustees of two charities, Ashden Trust and Mark Leonard Trust
- Charities both have principal purposes of environmental protection and improvement and relief from poverty
- Proposed a new investment policy – aligned with goals in Paris Agreement
- Question: should the charities be able to adopt an investment policy that excludes many potential investments because the trustees consider that the conflict with their charitable purposes?
- *Harries v Church Comrs for England* [1992] 1 WLR 1241

Context

- Paris Agreement, Article 2(1)(c): "*Making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development*."
- Special report from IPCC on effect of 2°C warming to 1.5°C warming: *"Realizing the transformations towards a 1.5°C world would require a major shift in investment patterns … pursuing 1.5°C mitigation efforts requires a major reallocation of the investment portfolio, implying a financial system aligned to mitigation challenges."*
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Charities

- Both established by trust deeds
- The deeds contain charitable purposes and a power of investment (in addition to s 3 of the Trustee Act 2000)
- Current investment policies (approved in 2015) – excluded investments considered to be contributing to climate change (fossil fuel companies) and favoured companies with policies/products
- Concern: some of their holdings in the portfolio conflict or might conflict with the charitable purposes inc shares not aligned with the Paris Agreement goals
- So proposed a new policy…

New investment policy

- "The trustees also consider that investments in sustainable sectors and climate solutions provide opportunities to increase the trust's financial return and support its charitable objectives. Zero and low carbon technologies, energy, resource efficiency and nature based solutions and adaptation investments will continue to grow in the developed and developing world. The trustees seek to increase their exposure to these investments."

- Investment goals and objectives:
  - "[…] trust's total investment portfolio should be constructed on the basis that its GHG [greenhouse gas] emissions are aligned with the long-term global warming target of well below 2°C, and preferably 1.5°C, above pre-industrial levels, accepting that individual investments will differ in their carbon intensity."
  - "The investment objective for the trust is to generate capital growth in excess of inflation over the long-term whilst generating a sustainable spending level to support the trust's ongoing grant making activities. The trustees wish to express their overall investment return objective as UK consumer price inflation (CPI) + 5% per annum on average over five-year rolling periods. The return objective will be reviewed regularly."
  - "The trustees are comfortable with meeting their spending needs from a combination of income and capital and therefore have adopted a total return approach to investing."

Aligned with Paris Agreement goals?

- Constrain the portfolio's exposure to sectors highly exposed to climate change (see investment exclusions);
- On average a minimum of a 7% yearly reduction in GHG emissions intensity until 2050;
- Starting from 2020, a 50% minimum reduction in GHG emissions intensity compared to the market index and an absolute reduction of 50% by 2030;
- At least four times more green assets than the market index of brown assets;
- Scope 3 emissions analysis should be factored in over the next four years."

Legal framework

- Charities: structures? Trusts for a public benefit purpose
- Protected and supervised by AG, CC and High Court: *Gaudiya Mission v Brahmachary* [1998] Ch 341
- Overriding duty of the trustees – further purpose of the charity: *Children's Investment Fund Foundation (UK) v Attorney General* [2022] AC 155
- Trustee Act 2000
  - S 1 – trustees have a duty of care
  - S 3 – general power of investment
  - S 4 – standard investment criteria: (i) suitability to the trust of the investment of the same kind as any particular investment proposed (ii) for diversification of investments
  - S 5 – trustees must obtain and consider proper advice

Harries v Church Comrs for England [1992] 1 WLR 1241
"Bishop of Oxford case"

69. The important issue for this case arising out of the Bishop of Oxford case is whether there is an absolute prohibition against making investments that directly conflict with the charity's purposes or objects (i e whether there is a category 1 conflict) or whether it is always a discretionary exercise by trustees and a direct conflict is a major but not decisive factor in the balancing process.

Principles (1) – Trustees taking into account non-financial considerations

1. Trustees' power of investment from trust deeds/governing instruments and Trustee Act 2000
2. Primary duty – further purposes of the trust i.e. charitable purposes
3. Normally achieved by maximising financial returns on investments; applying standard criteria and taking investment advice – best financial return
4. Social investments or impact or programme-related investments made using separate powers of investment
5. If specific investment prohibited (e.g. trust deed), they are prohibited

Principles (2)

6. Reasonable view of trustees that particular investments conflict with charitable purposes then discretion re exclusion of those investments; discretion exercised reasonably

7. Considering financial effect – risk of losing support from donors / beneficiaries

8. Care: re decisions on moral grounds because differing legitimate moral views

9. Trustees act honestly, reasonably and responsible; difficult decisions re appropriate investments then good judgement

10. Balancing exercise done properly – reasonable and proportionate investment policy – complied with legal duties

Charity Commission's response

- Charities and investment matters: a guide for trustees (CC14)
- Endorsed Green J's 10 principles
- Confirmed that progressing a "wider redesign of CC14"
  - Recognised investment practice evolved – ESG and climate change
  - Ensure the guidance is easier to follow and an updated explanation of "social investment"
  - Further guidance - Summer 2023 (and no further consultation)

FCA Handbook – ESG sourcebook

- Disclosure of climate-related financial information
- Rationale? Meet information needs of the market (firm's institutional clients, inc pension trustees, employers) and consumers (pension scheme members etc)
- Applies to certain types of firm:
  - Asset managers and asset owners
  - Assets over £5bn calculated as rolling average
- Reporting?
  - Entity level – how firm takes climate-related matters into account
  - Product level – disclosures on firm's products and portfolios
- First set out reports – due 30 June 2023

Law Society Guidance "The impact of climate change on solicitors" (1)

- *"[H]ow, when approaching any matter arising in the course of legal practice, to take into account the likely impact of that matter upon the climate crisis in a way which is compatible with their professional duties and the administration of justice?"*
- Part A: how to manage business in manner consistent with net zero
  - Set targets and reduce climate impact of organisation:
    - GHG Emissions – scope 1, 2 and 3 [GHG Protocol]
    - Analysis of impact of procurement and supply chains
  - Climate risk disclosure frameworks
  - Advised emissions – "*emissions associated with matters on which solicitors advise, as a proxy for understanding whether these are reducing, alongside those of your clients*"
  - Greenwashing - possible breaches: (i) Competition and Markets Authority – guidance on environmental claims (Green Claims Code) (ii) SRA's stadnarda dna regulations

Law Society Guidance "The impact of climate change on solicitors" (2)

- **Part B**: climate change risks/climate legal risks relevant to client advice; interplay between legal advice, climate change and solicitors' duties; solicitor-client relationship
  - **Climate change risk:** major global risk; (i) physical risk (ii) transition risk (iii) liability risk
  - **Professional duties:** (i) duty of care (climate legal risk?) (ii) duty to warn (iii) duty to disclose all info material to that matter on which you have actual knowledge (iv) duty in respect of service and competence levels
  - **Solicitor-client relationship:**
    - Access to justice and right to legal representation – fundamental (discrimination)
    - Solicitor – wide discretion in choosing whether to accept instructions; climate-related issues maybe valid considerations - apparent conflict with client's stated values and potential impact on climate change

Bristol Airport Action Network Co-ordinating Committee v Secretary of State for Levelling Up, Housing and Communities [2023] EWHC 171 (Admin)

- Focus: interpretation of local plan policies and NPPF, para 188 – how policy, properly interpreted, requires aviation emissions to be treated?
- "…I should make clear that nothing in this judgment is to be taken as contradicting what is said in its opening paragraph, regarding the significance of climate change and GHGs. As will by now be apparent, the main issue in this case is not whether emissions from any additional aircraft using Bristol Airport should be ignored. Plainly, they should not. Rather, it is about how and by whom those emissions should be addressed."

Future climate change litigation?

- Disconnect:
  - Across Government
  - Between national policy and local planning decisions

- Other types of claim:
  - Derivative shareholder claims: Companies Act s172 (duty to promote the success of the company) and s.174 (duty to exercise reasonable care and skill) of the Act.
  - Private law nuisance and/or trespass: *Manchester Ship Canal Company Ltd v United Utilities Water* – Supreme Court…

Watch this space…

1. **Water:** *R (Marine Conversation Society, Richard Haward's Oysters (Mersea), and Tagholm) v SSEFRA* and *R (Wild Fish Conservation) v SSEFRA* – Storm Overflows Reduction Plan allows the discharge of untreated sewage into water bodies
2. **Airports: P**ermission granted in challenge to decision to grant development consent for Manston Airport in Kent
3. **Coal**: Permission has been refused on the papers in the challenge in relation to Whitehaven coal mine in Cumbria but it is understood that the claimants have requested an oral renewal
4. **Gas:** Protect Dunsfold - permission granted in relation to the grant of planning permission for an exploratory gas well in Surrey – AONB and inconsistent approach downstream economic benefit but not downstream climate benefit
5. **Air quality:** Permission has been granted in a claim brought by five councils challenging the Mayor of London's decision to expand London's Ultra Low Emissions Zone ("ULEZ")

Thanks for listening!

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