Neutral Citation Number: [2025] EWCA Civ 495

Case No: CA-2023-002107

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT
Lieven J.
[2023] EWHC 2548 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/04/2025

Before:
SIR KEITH LINDBLOM
(Senior President of Tribunals)
LORD JUSTICE SINGH
and
LORD JUSTICE HOLGATE

- -

FRACK FREE BALCOMBE RESIDENTS' ASSOCIATION	**Appellant**
- and -	
SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT	**First Respondent**
- and -	
ANGUS ENERGY WEALD BASIN No.3 LIMITED	**Second Respondent**
- and -	
WEST SUSSEX COUNTY COUNCIL	**Third Respondent**

- -
- -

Dr David Wolfe KC and **Ruchi Parekh (**instructed by **Leigh Day Solicitors)** for the **Appellant**

Mr Tom Cosgrove KC and **Mr Ben Du Feu (instructed by the Government Legal Department)** for the **First Respondent**

Mr Hereward Phillpot KC and **Mr Mark O'Brien O'Reilly (instructed by Fieldfisher)** for the **Second Respondent**

The Third Respondent did not attend and was not represented.

Hearing dates: 28 and 29 January 2025

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Judgment Approved by the court
for handing down
(subject to editorial corrections)

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The Senior President of Tribunals:

Introduction

1. When dealing with a legal challenge to a planning decision the court must have in mind what the decision actually was. That might seem obvious. But in this case the point is put to the test. Did an inspector deciding an appeal against the refusal of planning permission to carry out exploration for hydrocarbons err in law by failing to consider the effects of a future development of commercial production, which would only proceed if a viable resource were found and a further planning permission granted?

2. The appellant, Frack Free Balcombe Residents' Association, appeals against the order of Lieven J. dated 14 November 2023, dismissing their claim for planning statutory review, under section 288 of the Town and Country Planning Act 1990, of a decision made by an inspector appointed by the first respondent, the Secretary of State for Housing, Communities and Local Government. The inspector allowed an appeal by the second respondent, Angus Energy Weald Basin No.3 Ltd., against the refusal of planning permission by the third respondent, West Sussex County Council, for development at the Lower Stumble Exploration Site, near the village of Balcombe. The proposal was described in the decision notice as "exploration and appraisal comprising the removal of drilling fluids and subsequent engineering works with an extended well test for hydrocarbons along with site security fencing and site restoration".

3. The site is in the countryside south of Balcombe, within the High Weald Area of Outstanding Natural Beauty. It contains the Balcombe 2Z borehole, sunk in 2013 after previous exploration for hydrocarbons which began in 1986. The wellbore extends into the Lower Stumble geological formation of the Kimmeridge layers. Angus Energy believe it has potential for the commercial production of hydrocarbons. They applied for planning permission in August 2020. Frack Free Balcombe objected.

4. The development would be carried out under a temporary planning permission for a period of 30 months, in four phases. The final phase would involve the restoration of the site after the extended well test had been completed, if no commercial production was to follow.

5. On 2 March 2021 the county council's Planning Committee resolved, against the planning officers' recommendation, that planning permission be refused. That was done on 10 March 2021. In its single reason for refusal the county council said the proposal would be "major development in the High Weald Area of Outstanding Natural Beauty", for which there were "no exceptional circumstances", and which was "not in the public interest"; that there were "alternative sources of hydrocarbon supply, both indigenous and imported, to meet the national need"; that there was "scope for meeting the need in some other way, outside of the nationally designated landscapes"; and that the development "would therefore be contrary to Policies M7a and M13 of the [West Sussex Joint Minerals Local Plan] (2018) and paragraphs 170 and 172 of the National Planning Policy Framework ["NPPF"] (2019)".

6. Angus Energy appealed against that decision to the Secretary of State under section 78 of the 1990 Act in September 2021. The inspector's decision letter is dated 13 February 2023. Frack Free Balcombe's challenge to his decision came before Lieven J. at a hearing in July 2024. She rejected it on all six grounds.

The issues in the appeal

7. Permission to appeal was granted on four grounds, which correspond to grounds 1, 2, 3 and 6 in the claim. They present us with four issues: first, whether the inspector erred in taking into account the benefits, but not the harm, of a future development of "commercial production" of hydrocarbons (ground 1); second, whether he misdirected himself by applying Policy M7a of the joint minerals local plan, rather than Policy M7b (ground 2); third, whether he erred in failing to consider alternative sites and proposals outside the AONB (ground 3); and fourth, whether he failed to consider the likely effects of the development on Ardingly Reservoir (ground 6).

Decision-making on proposals for hydrocarbon exploration

8. In this case, as in others where the issues touch important questions of public policy, we must make sure that we, as judges, concern ourselves only with the lawfulness of the decision under review. The merits of national energy policy, or of individual proposals for hydrocarbon development, are not for the court. Judges are citizens too. But we fail in our duty, and the rule of law itself is diminished, if we venture into the realms of public debate and personal opinion.

9. Some essentials of planning decision-making, and of the court's jurisdiction to intervene, are worth recalling here.

10. Decisions on development of the kind and scale proposed in this case are not within the regime for "nationally significant infrastructure projects" under the Planning Act 2008. They have been entrusted by Parliament to mineral planning authorities for determination at the local level. When making its decision the authority will have regard to the policies of its own development plan, and to any relevant national planning policy and guidance. If an environmental impact assessment is required under the relevant legislation – which was not so in this case – it will have the "environmental information", including an environmental statement in which the likely effects of the proposed development are assessed. It will receive from its professional officers a report assessing the proposal on its planning merits. Its decision will reflect its own exercise of planning judgment. If it refuses planning permission an appeal against its decision can be made to the Secretary of State.

11. On appeal, the Secretary of State or an inspector will consider the planning merits afresh. The decision may be challenged only on public law grounds. The principles on which the court will act are familiar (see the leading judgment in *St Modwen Developments Ltd. v Secretary of State for Communities and Local Government* [2017] EWCA Civ 1643; [2018] PTSR 746, at paragraphs 6 and 7; and, on error of

fact, the judgment of Carnwath L.J., as he then was, in *E v Secretary of State for the Home Department* [2004] EWCA Civ 49; [2004] Q.B. 1044, at paragraph 66).

12. If the meaning of relevant planning policy guidance is in issue the task of interpretation is for the court. Policies must be interpreted objectively in accordance with the language used, read in its context. The court will be aware that planning policy is intended to promote reasonable consistency, predictability and coherence in decision-making (see the judgment of Lord Reed in *Tesco Stores Ltd. v Dundee City Council* [2012] UKSC 13; [2012] PTSR 983, at paragraphs 18 and 19).

The joint minerals local plan

13. So far as it bears on this case, Policy M7a of the joint minerals local plan states:

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

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

Activity beneath or proximate to designated areas:

(c) Proposals for exploration, appraisal and production of oil and gas, not involving hydraulic fracturing, will be permitted underneath or in close proximity to designated areas, assets and habitats, which demonstrate that special care will be taken to avoid harming these areas and the special qualities of the South Downs National Park and/or setting and value of the Chichester Harbour AONB, High Weald AONB and other designated areas, assets and habitats."

14. Frack Free Balcombe maintain that Policy M7b was also relevant. That policy states:

"Policy M7b: Hydrocarbon development involving hydraulic fracturing

Exploration and Appraisal:

(a) Proposals for exploration and appraisal for oil and gas, involving hydraulic fracturing, including extensions to existing sites will be permitted provided that:

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

i. …
ii. …
iii. High Weald AONB
iv. Any other area given specific protection from hydraulic fracturing in legislation

(ii) …
(iii) any adverse impacts … can be minimised, and/or mitigated, to an acceptable level;
(iv) restoration and aftercare of the site to a high-quality standard would take place … whether or not oil or gas is found;
(v) No unacceptable impacts would arise from the on-site storage or treatment of hazardous substances and/or contaminated fluids above or below ground.

Production:

(b) Proposals for oil and gas production, involving hydraulic fracturing, including extensions … to existing sites, will be permitted provided that:

(i) they accord with (a)(i-iv) above;
(ii) no unacceptable impacts would arise from the transport, by vehicle or other means, of oil/gas, water, consumables and wastes to or from the site;

Activity beneath or proximate to designated areas:

(c) Proposals for exploration, appraisal and production of oil and gas, involving hydraulic fracturing underneath or in close proximity to designated areas, assets and habitats, will be permitted provided that there

will be no unacceptable harm to these areas … and/or the setting and intrinsic character and value of the … High Weald [AONB]. Hydraulic fracturing will not be permitted above 1,200 metres underneath National Parks, Areas of Natural Beauty, World Heritage Sites, and areas covered by Groundwater Source Protection Zone 1.

…".

15. In the supporting text paragraphs 6.7.3 to 6.7.5 state:

"6.7.3 The relevant strategic objective for oil and gas is:

- 11: to protect the environment and local communities in West Sussex from unacceptable impacts of any proposal for oil and gas development, whilst recognising the national commitment to maintain and enhance energy security in the UK.

6.7.4 The strategy for oil and gas is to make provision, subject to there being no unacceptable impact in West Sussex, and the use of hydraulic fracturing, within the definition used in the Infrastructure Act 2015 (and related amendments), does not take place within, or have an unacceptable impact on, the South Downs National Park, Areas of Outstanding Natural Beauty, or other protected areas including groundwater zones. Major oil and gas development not involving high volume hydraulic fracturing should only take place within the South Downs National Park or Areas of Outstanding Natural Beauty in exceptional circumstances and when it is in the public interest.

6.7.5 This approach meets the national policy requirement to make provision for oil and gas development whilst also reflecting the Government commitment to "ensure that hydraulic fracturing cannot be conducted from wells that are drilled at the surface of National Parks and other protected areas". Therefore, Policy M7a is the default policy for considering all development proposals associated with the extraction of both conventional and unconventional hydrocarbon resources, with the exception of those involving hydrocarbon fracturing, defined by the Infrastructure Act 2015 (and related amendments), which should be addressed by Policy M7b."

16. Paragraph 6.7.8 says that "[oil] and gas development has several stages, exploration, testing (appraisal) and production", and that "[planning] permission is required for each phase, as well as the relevant regulating licences and/or environmental permits from other agencies". Paragraph 6.7.10 states:

"6.7.10 At any stage, only the application for that phase can be considered. There is no presumption that granting permission for one stage will lead to permission being granted for a subsequent phase."

17. Again so far as it bears on this case, Policy M13 states:

"Policy M13: Protected Landscape

…

(c) Proposals for major mineral development within protected landscapes will not be permitted unless there are exceptional circumstances and where it is in the public interest as informed by an assessment of:

(i) the need for the development, including in terms of any national considerations, and the impact of permitting it, or refusing it, upon the local economy;
(ii) the cost of, and scope for, developing elsewhere outside the designated area, or meeting the need for the mineral in some other way; and
(iii) any potential detrimental impact on the environment, landscape, and recreational opportunities, and the extent to which identified impacts can be satisfactorily mitigated."

18. Paragraphs 8.3.6 to 8.3.8 of the supporting text state:

"8.3.6 Minerals can only be worked where they occur and there is a close correlation between the location of mineral resources and areas of high-quality landscape and scenic beauty. …

8.3.7 Within designated landscapes the requirements of paragraph 116 of the NPPF will need to be addressed. This will include provision of information about the national need for the mineral, as well as the benefits of permitting or refusing the application on the local economy. The expectation is that the search for alternatives outside the designated landscape should not be limited to the Plan area (or Licence Area for hydrocarbons) but should extend elsewhere within those areas subject to national landscape designations.

8.3.8 There is also a need for applicants to demonstrate whether the financial cost of developing outside the designated area is such that the development cannot take place elsewhere. The assessment should also consider the detrimental effect on the environment, landscape, and recreational opportunities. Consideration of these impacts can be undertaken under each topic area but they must then be evaluated as part of the overall paragraph 116 assessment."

The NPPF

19. In the version of the NPPF published in July 2021 and current when Angus Energy's appeal was determined, the policy in paragraph 177 – the successor to paragraph 116 in the 2012 version – stated:

"177. When considering applications for development within National Parks, the Broads and Areas of Outstanding Natural Beauty, permission should be refused for major development other than in exceptional circumstances, and

where it can be demonstrated that the development is in the public interest. Consideration of such applications should include an assessment of:

a) the need for the development, including in terms of any national considerations, and the impact of permitting it, or refusing it, upon the local economy;
b) the cost of, and scope for, developing outside the designated area, or meeting the need for it in some other way; and
c) any detrimental effect on the environment, the landscape and recreational opportunities, and the extent to which that could be moderated."

20. Paragraph 188 said:

> "188. The focus of planning policies and decisions should be on whether proposed development is an acceptable use of land, rather than the control of processes or emissions (where these are subject to separate pollution control regimes). Planning decisions should assume that these regimes will operate effectively. Equally, where a planning decision has been made on a particular development, the planning issues should not be revisited through the permitting regimes operated by pollution control authorities."

21. Paragraph 209 said "[it] is essential that there is a sufficient supply of minerals to provide the infrastructure, buildings, energy and goods that the country needs", and "[since] minerals are a finite natural resource, and can only be worked where they are found, best use needs to be made of them to secure their long-term conservation". Paragraph 211 said that "[when] determining planning applications, great weight should be given to the benefits of mineral extraction, including to the economy".

The inspector's decision

22. The inspector began his decision letter by referring to the description of the development: "exploration and appraisal comprising the removal of drilling fluids and subsequent engineering works with an extended well test for hydrocarbons along with site security fencing and site restoration" (paragraph 1). This, he said, was "taken from the refusal notice as appropriately describing the operations proposed" (paragraph 2).

23. He identified the "Main Issue" in the section 78 appeal: whether the proposal, as "major development" in the AONB was "justified by exceptional circumstances or the public interest, taking into account … its effects on the landscape of the AONB, and on amenity and other environmental interests; the level of need for the development; the availability and cost of alternatives to the proposal outside the AONB; and any economic benefit to the community" (paragraph 6).

24. In a passage headed "Law, Policy and Guidance" the inspector noted that the joint minerals local plan contained "two policies of particular relevance to [the] appeal" (paragraph 13), namely Policy M7a (paragraph 14) and Policy M13, whose "specific requirements" he set out (paragraph 15). The development plan policies were, he said,

"essentially consistent" with national policy in paragraphs 176 and 177 of the NPPF (paragraph 17).

25. He also referred to the National Policy Statement for Energy 2011, adding that "[in] the medium term, the UK faces the challenge of reducing energy demand and maximising economic production from declining domestic oil and gas reserves, with increasing reliance on imports of oil and gas in the context of rising world demand" (paragraph 19); the Energy Security Strategy 2012, which "seeks to maximise economic production of UK oil and gas reserves to provide reliable energy supplies not exposed to international supply risks" (paragraph 20); the Annual Energy Statement 2013, which referred to "oil and gas remaining key to the energy system for years to come despite increasing renewable energy sources" (paragraph 21); the Climate Change Committee, which "still forecast a national need for oil by 2025 of 82 million barrels" (paragraph 22); the Energy White Paper 2020, which recognises "the critical role of oil in maintaining energy security" (paragraph 23); the Oil and Gas Authority data of 2021, which "records UK oil production of some 0.79 million barrels per day of which only 1.82% is from onshore sources, with some 84% of that currently being produced by a single facility, Wytch Farm, in Dorset", and the fact that the UK "has recently become a net exporter of oil for the first time since 2004" (paragraph 24); and the North Sea Transition Authority data of October to December 2022, which records a "17% decline in domestic oil and gas production" (paragraph 25).

26. In his assessment of "Planning Effects" he concluded that "the effect of the development on the protected landscape and natural beauty of the AONB would … be moderately adverse …", and that this attracted "great [weight] according to the NPPF" (paragraph 29).

27. Under the sub-heading "Hydrology, Water Pollution, Flood Risk and Ground Stability" he said (in paragraphs 33 to 36):

> "33. First, it is clear that the proposed development would not involve hydraulic fracturing, or fracking, which raises public reaction and fear of ground movement. Any acidization would relate to wellbore clean-up operations.
>
> 34. The submitted hydrogeological risk assessment confirms that the appeal site is not hydrologically linked to the Ardingly Reservoir, noting an intervening watershed. Nor is the site within or close to any groundwater source protection zones. The only evident significant risk of water pollution concerns streams, as close as 15m from the site boundary, from [run-off] or structural failure of the wellbore itself.
>
> 35. The site is within Flood Zone 1 of low flood risk and the submitted flood risk assessment identifies no significant surface water flow routes across it. Surface soils would be protected by the over-site pad membrane included within the Phase 2 civil engineering works. The wellbore is subject, under separate legislation, to approval and monitoring by the Health and Safety Executive and the Environment Agency, who have approved the proposals.

36. In these circumstances, I [*sic*] not consider that the proposed development poses any unacceptable risk with respect to ground stability, water pollution or flooding."

28. On the "Need for the Development", he said (in paragraphs 46 to 50):

"46. In the ongoing transition to a net zero-carbon energy economy, over 98% of the decreasing, but for some years substantial, domestic demand for oil and gas will be met by North Sea reserves. Aside from a recent reversal due to reduced home demand, the UK has long been a net importer of oil. It is currently very uncertain to what extent demand will return to its level before the Covid pandemic lockdowns of 2020-22. This uncertainty is compounded by the continuing hostilities between Ukraine and Russia, disrupting international oil and gas supplies.

47. In the circumstances, it would plainly be [inappropriate] to rely upon imported oil both from the point of view of security of supply and with regard to sustainability in its broader sense.

48. There is nothing in current national or local policy to restrict the appraisal or production of hydrocarbons or to say that a proposal to explore and test a known hydrocarbon reserve should be refused on grounds that its yield might be of small scale. It is precisely the point of proposals like that in this appeal, to obtain such information and it would not be appropriate to anticipate the result of the EWT with conjecture that the ultimate yield of the well might be minimal.

49. The proportion of domestic supply won from onshore sources, currently mostly from a single facility in Dorset, is clearly of relatively small scale but that is not to say that it is insignificant or unimportant. The present proposal should not be refused merely because it might lead only to a small additional contribution, or even no contribution at all to essential domestic oil supplies.

50. There remains a significant national need for onshore hydrocarbon exploration and assessment for [a] considerable time to come. This weighs greatly in favour of this appeal, given also the great policy weight still attributed nationally to the benefits of mineral extraction."

29. He considered next the "Availability and Cost of Alternatives to the Proposed Development" (in paragraph 51):

"51. No estimate has been provided of the cost of any alternative way to achieve the exploration and testing objectives of the present proposal. However, it is evident that the known Lower [Stumble] hydrocarbon resource could not be explored outside the AONB. Furthermore, the cost of constructing an alternative wellbore would plainly be uneconomic, given the prospect of the prior investment of £5.2 million in the present facility. For reasons set out above, it would not be appropriate to rely on alternative imported oil

supplies. In the circumstances, the availability and cost of alternatives has little bearing upon the planning balance in this case."

30. On "Other Matters", under the sub-heading "Public Protests", the inspector noted the "clear assurance that this proposal does not involve fracking" (paragraph 53). And he went on to say, under the sub-heading "Precedent" (in paragraphs 54 and 55):

> "54. Another fear, very understandable in this … case, is that approval of this proposed testing operation on an existing well over a known reserve would be a portent, if the EWT were successful, of a long-term commercial oil extraction operation on the appeal site. Emphatically, however, the scope of the present appeal is strictly limited to the specific testing and restoration operations which are self-contained and time-limited.
>
> 55. If, as a result of a successful EWT, the developer sought permission for commercial extraction, that would require to be the subject of a further entirely separate planning application for assessment on its individual merits under national and local planning and energy policy prevailing at the time. Such an eventuality also cannot be regarded as material to the present appeal."

31. In his "Conclusions" he said that "[with] reference to the provisions of … Policies M7a and M13 and NPPF paragraphs 176, 177, 209 and 211 … there [were] no evident comparable accessible or cost-effective alternatives to the appeal proposals …" (paragraph 57). There would be "moderate adverse impact on the landscape of the AONB, contrary to the … NPPF" (paragraph 58). Even such moderate harm carried "great weight in terms of the NPPF". Against this he balanced "the evident national need … for continued hydrocarbon exploration and assessment in the interests of energy supply security pending ultimate transition [to] net carbon-zero energy provision" (paragraph 59). The "national need" was "the overriding consideration and … amounts to the requisite exceptional justification for permitting this major development within the High Weald AONB" (paragraph 60). The appeal should therefore be allowed and planning permission granted, subject to conditions (paragraph 61).

32. Condition 4 requires that "… [within] twelve months of the completion of the extended well test, the operator shall restore the site in accordance with the scheme approved under Condition 5". Condition 5 states "… For the avoidance of doubt, high pressure hydraulic fracturing shall not be undertaken as part of this development".

The judgment of Lieven J.

33. On ground 1 of the challenge, Lieven J. said the case closest to this on its facts was *R. (on the application of Preston New Road Action Group) v Secretary of State for Communities and Local Government* [2018] EWCA Civ 9; [2018] Env. L.R. 18 (paragraph 15 of the judgment). The inspector understood that the application was for exploration only and that he should "focus on the benefits and disbenefits of that phase" (paragraph 18). The "disbenefits of production" were not relevant to the decision on exploration alone (paragraph 20). There were benefits to establishing

whether hydrocarbon extraction was commercially viable in the area. The "weighing up exercise of the planning balance on production" was "appropriately done at the next phase" (paragraph 21).

34. The argument for Frack Free Balcombe on ground 2 was, said the judge, "plainly wrong". The application was not for hydraulic fracturing; Policy M7a "had to apply" (paragraph 28). To have applied Policy M7b would have been "a clear error" (paragraph 29). The judge saw no evidence that Angus Energy were using the proposal to get their "foot in the door" (paragraph 30).

35. Ground 3 related closely to ground 1. Whether there were alternatives under Policy M13 "had to be restricted to alternatives for the purpose or benefit of the exploration in issue, not alternatives to the production of hydrocarbons from the site" (paragraph 38). It made no sense of the policy to say there should be no planning permission for exploration if there were alternatives for production elsewhere. Such an exercise would be "pointless at the exploration stage" (paragraph 39). The inspector's approach was a "rational one that fell within the scope of his planning judgment" (paragraph 40).

36. On ground 6, the argument was best described as alleging a "mistake of fact", as considered by Carnwath L.J. in *E v Secretary of State for the Home Department* (paragraph 77). It was "not necessarily apparent" that the inspector did make a mistake when he said the site was "not hydrologically linked to Ardingly Reservoir". There was "no natural pathway between the two sites because there is a watershed between the River Ouse and the [reservoir]". However, what the inspector had said was "open to different interpretations". He had not referred to the possibility of pumping indicated by the Environment Agency in an email in 2013 (paragraph 78). But if there was any "mistake of fact", it was "not material to the decision". The inspector was "entitled to rely on the permitting regime, which was designed to ensure there was no pathway for water to run off the site" (paragraph 79). The possibility of water getting into the River Ouse, and then being pumped into the reservoir, appeared "very slight". It was also "subject to further regulatory control". Any pumping would be "subject to the licence or permit conditions, and this would allow further monitoring of water quality for any potential risk of contamination". Thus the water pathway from the site into the reservoir, though "theoretically possible", appeared on the evidence to have been "unlikely and subject to full regulation". The risk was, therefore, "so slight as not to be a material matter upon which the [inspector] needed to give further reasons or consideration" (paragraph 80).

Did the inspector err in failing to take into account the possible effects of production?

37. For Frack Free Balcombe, Mr David Wolfe K.C. submitted that Lieven J. had misunderstood the inspector's decision letter, wrongly concluding that he did not take into account the benefits of the future commercial production of hydrocarbons and therefore did not need to take the harm into account.

38. I cannot accept Mr Wolfe's argument. As was submitted by Mr Tom Cosgrove K.C., for the Secretary of State, and Mr Hereward Phillpot K.C., for Angus Energy, it gains

no strength from either of the two most relevant Court of Appeal decisions: *Europa Oil and Gas Ltd. v Secretary of State for Communities and Local Government* [2014] EWCA Civ 825; [2014] PTSR 1471 and *Preston New Road Action Group*.

39. In this case, as in *Preston New Road Action Group*, there was never any doubt about the nature and extent of the development proposed. It was solely a development of hydrocarbon "exploration and appraisal". It was not a development of commercial production. This was clear in the application for planning permission itself and in the material submitted in support; in the consultation undertaken by the county council and in the responses to it; in the officers' consideration of the proposal in their report to the committee; in the decision notice refusing planning permission; in Angus Energy's section 78 appeal; in the inspector's decision letter, both in the passage where he described the proposal and in his assessment of it on its merits; and in the conditions he imposed on the planning permission he granted.

40. The difference between "exploration and appraisal" and "production" as separate operations in hydrocarbon development is recognised in national planning policy. The guidance on "Minerals" in the Planning Practice Guidance ("PPG") issued by the Government in March 2014, at paragraph 27-092-20140306, identifies "[three] phases of onshore hydrocarbon extraction: exploration, testing (appraisal) and production".

41. The same distinction is also apparent in the development plan policies with which we are concerned in this case. In structure and content both Policy M7a, for hydrocarbon development "not involving hydraulic fracturing", and Policy M7b, for hydrocarbon development "involving hydraulic fracturing", are divided to address proposals for "Exploration and Appraisal" separately from proposals for "Production".

42. In *Europa Oil and Gas* the proposal was exploratory drilling for hydrocarbons in the Green Belt. The point at issue was the interpretation of government policy in paragraph 90 of the NPPF published in March 2012, which included "mineral extraction" as a form of development which was not "inappropriate" in the Green Belt so long as it preserved the "openness" of the Green Belt and did not conflict with the purposes of including land in it. On-shore oil and gas development, it was agreed, comprised three specific phases or components: exploration, appraisal and production. Richards L.J. (in paragraph 16 of his judgment) rejected the argument that the expression "mineral extraction" in NPPF policy referred only to production. It also embraced exploration and appraisal. But this was not to say, and the court did not hold, that the considerations arising on a proposal for exploration and appraisal will encompass those arising on a proposal for production. Indeed, the question of interpretation only arose because exploration and appraisal were distinct from production.

43. The distinction between exploration and appraisal on the one hand and production on the other was not lost on the inspector here. He emphasised it. He knew "the scope of the present appeal [was] strictly limited to the specific testing and restoration operations which are self-contained and time-limited" (paragraph 54 of the decision letter), and that "[if], as a result of a successful EWT, the developer sought permission for commercial extraction, that would require to be the subject of a further entirely separate planning application for assessment on its individual merits under national

and local planning and energy policy prevailing at the time" (paragraph 55). His assessment of the proposal reflected that understanding.

44. I can see no reason why we should not follow the approach of this court on similar issues in *Preston New Road Action Group* – even if we were not bound to do so. Though the circumstances there were different, the same essential reasoning applies. The proposal was for exploratory works to test the feasibility of the commercial production of shale gas by hydraulic fracturing – or "fracking" – on two sites in Lancashire. The court accepted that it was not only unnecessary but also impossible for the effects of a future development of commercial production on the appeal site to be taken into account at the exploration stage. Such effects would remain conjectural until a firm proposal was submitted for further development at the site.

45. In my judgment in that case I agreed with the judge at first instance that the Government's guidance in paragraph 27-120-20140306 of the PPG made it plain that proposals for exploration should be considered on their own merits "without speculation or hypothetical assumptions" on future activities which would entail their own consenting and EIA processes (paragraph 62). The "crucial point" was that "the scheme before the Secretary of State was a single, clearly defined project limited to exploration for shale gas on the two sites, and the associated monitoring", and that this was "not a "multi-stage consent process"" (paragraph 63). The Government's guidance also emphasised that "[individual] applications for the exploratory phase should be considered on their own merits" and "should not take account of hypothetical future activities, for which planning consent [had] not yet been sought, since the further appraisal and production phases [would] be the subject of separate planning applications and assessments" (paragraph 66).

46. I also said that "[exploration] for shale gas [was] necessary before a commercial decision [could] be taken on the viability of production, and a planning decision on the merits of such development, if ever proposed". The Secretary of State's conclusion "did not anticipate those future decisions", but "acknowledged that such decisions would only be possible if the present proposals for exploration went ahead" (paragraph 81). His conclusion that "no weight" should be given to the "national economic benefits" of possible commercial production in the future was "not at odds with those earlier conclusions". He "plainly had in mind … the policy in para.147 of the NPPF, … amplified … in para.27-120-20140306 of the PPG – in effect, that decision-makers must be careful to distinguish between "exploration" for hydrocarbons, "appraisal", and subsequent commercial "production" if proposed" (paragraph 82).

47. In this case, like the Secretary of State in *Preston New Road Action Group*, the inspector did not make the mistake of taking into account the possible effects of some future scheme for the commercial production of hydrocarbons. What he did was to recognise the importance of energy security and the economic advantages of maintaining sufficient domestic oil and gas reserves, and hence the advantage inherent in the present scheme of hydrocarbon exploration and appraisal, which would establish whether a commercially viable resource was present here – although the county council's officers thought this "unlikely given the geology" (paragraph 4.3 of their report). That was not an error. I reject the argument that ascertaining the commercial viability of a site for hydrocarbon development is only beneficial because

future production will itself be commercially advantageous, and that the likely effects of production must therefore be taken into account when a proposal merely for exploration and appraisal is being considered. That proposition cannot be reconciled with this court's reasoning in *Preston New Road Action Group*.

48. As always, one must read the inspector's decision letter fairly and as a whole. On a fair reading, one finds no support for the contention that he had regard to the unknown merits of a future proposal for commercial production on the site. His reasons throughout the relevant parts of his decision letter were adequate and intelligible. It is quite clear that he understood the distinction between the benefits and harm attributable to the present proposal for exploration and appraisal and those of a subsequent development of commercial production – which might itself be followed by other activities requiring further grants of planning permission, such as refinement of the raw material, and ultimately by the combustion or other use of the end-products.

49. In paragraph 18 of the decision letter he acknowledged national planning policy in paragraphs 209 and 211 of the NPPF, which recognised the requirement for a sufficient supply of minerals and the economic and other benefits of mineral extraction. In paragraphs 19 to 25 he mentioned various statements of strategy, guidance and objectives pertaining to the United Kingdom's oil and gas reserves, drawn from several sources of national energy policy, and related data. Those paragraphs demonstrate the inspector's awareness of the continuing role of hydrocarbons in maintaining energy security. He was entitled to have regard to those considerations and give them appropriate weight when assessing this proposal on its own planning merits.

50. In paragraphs 46 to 50 the inspector considered the need for the proposed development. In paragraph 48 he acknowledged that it was "precisely the point of proposals like that in this appeal, to obtain … information [on possible yield] and it would not be appropriate to anticipate the result of the EWT with conjecture that the ultimate yield of the well might be minimal". Crucially, in paragraph 50 he concluded that "[there] remains a significant national need for onshore hydrocarbon exploration and assessment for [a] considerable time to come", and that "[this] weighs greatly in favour of the appeal, given also the great policy weight attributed nationally to the benefits of mineral extraction".

51. In paragraphs 59 and 60, when striking the balance between benefit and harm, the inspector took the same approach. In paragraph 59 he acknowledged the "great weight" it was necessary to give to the harm the development would cause to the AONB. He then referred explicitly to "the evident national need [he had] identified for continued hydrocarbon exploration and assessment in the interests of energy supply security pending ultimate transition [to] net carbon-energy provision". His reference in paragraph 60 to "the national need", which he considered sufficient to justify permitting this major development in the AONB, was plainly a reference to that same need, for exploration and assessment. His approach reflected national policy in paragraphs 209 and 211 of the NPPF.

52. Three things emerge. First, the inspector did not try to estimate what level of "production" might be achieved on the site if such development ever took place.

Secondly, however, and rightly, he did take into account the fact that the proposal before him was intended to establish whether the site would be capable of contributing to the supply of oil, even if its yield proved to be minimal. This was, after all, the essential purpose of exploration and appraisal. And thirdly, he gave weight to the benefit of exploration and appraisal as an activity in its own right, but not to the supposed benefits, or the supposed harm, of a project of commercial production on this site in the future.

53. It follows, in my view, that the judge's conclusions on this issue were sound. Following the decision of this court in *Preston New Road Action Group*, she took a similar view in the parallel circumstances of this case. The same basic point was involved. As the inspector clearly understood, the benefits of the proposed development of exploration and appraisal on this site came not from the assumed benefits of a possible future development of commercial production, but from the opportunity to discover whether there existed here a commercially viable resource of hydrocarbons capable of contributing to energy security. Whether the benefits – and the harm – attributable to a development of commercial production would ever come about was, at this stage, a matter of speculation. They depended on the outcome of some future proposal, which might never be made. But the benefits of exploration and appraisal did not depend on a future proposal. They depended, as the inspector knew, on the proposal now before him. That was the thrust of the judge's conclusions in paragraphs 18 to 21 of her judgment. I think she was right.

54. I should add, finally, that Mr Wolfe's argument gains nothing from the decision of this court in *Ashchurch Rural Parish Council v Tewkesbury Borough Council* [2023] EWCA Civ 101; [2023] PTSR 1377. The facts there were quite different. The case concerned housing development, access to which would require a bridge to be built over a railway line. Not surprisingly, it was held to be "irrational" for the local planning authority, when considering the proposal for the bridge, "to treat the prospective benefits of the wider development as material factors … without taking account of any adverse impact that the envisaged development might have, to the extent that it was possible to do so" (see the judgment of Andrews L.J., at paragraph 64).

Did the inspector misdirect himself by applying Policy M7a rather than Policy M7b?

55. Mr Wolfe submitted that both the inspector and the judge misunderstood Policy M7a of the joint minerals local plan. The inspector failed to explain how he concluded it was Policy M7a, rather than Policy M7b, that was relevant here, and why he thought this question turned only on the content of the proposal for exploration, without taking into account the future production phase.

56. I do not see any force in that argument. As Mr Cosgrove and Mr Phillpot submitted, the inspector was clearly right to apply Policy M7a. That policy explicitly applies to hydrocarbon development not involving hydraulic fracturing. Policy M7b explicitly applies to hydrocarbon development which does involve hydraulic fracturing. The judge's analysis was correct. The question of whether Policy M7a applied, and not Policy M7b, is answered by looking at the content of the proposal itself. The proposed development did not involve hydraulic fracturing. No application had been made for

planning permission for such development. That the Planning Committee knew what it had to decide, and under which policy, is clear from the officers' report and from the decision notice, which referred to Policy M7a, and not to Policy M7b. The proposal was assessed, as it had to be, under Policy M7a. That was the relevant policy here.

57. This the inspector understood. As he said in paragraph 33 of the decision letter, it was "clear that the proposed development would not involve hydraulic fracturing, or fracking …". He also imposed a specific and unambiguous restriction on the planning permission itself, in condition 5, whose effect is to preclude hydraulic fracturing on the site. A subsequent grant of planning permission under section 73 of the 1990 Act would therefore be required for hydraulic fracturing to be undertaken lawfully on the site.

58. It cannot conceivably be said that the inspector was wrong to apply Policy M7a to a development described and restricted in that way. A proposal for hydrocarbon development could not be subject to both policies. The policy applicable to "hydrocarbon development not involving hydraulic fracturing" is the one which says so. That is Policy M7a, whose heading spells it out: "… [hydrocarbon] development not involving hydraulic fracturing". The policy applicable to hydrocarbon development which does involve hydraulic fracturing is Policy M7b. Again, the heading spells it out: "… [hydrocarbon] development involving hydraulic fracturing". And the words used in the headings are repeated in the policy itself. A similar structure is adopted in both policies. Each is set out in several parts, which combine to provide a free-standing approach for the relevant category of development. The first part addresses "Exploration and Appraisal" only. "Production" is addressed separately. Here too, the policy drafting, with its deliberate divide between exploration and appraisal on the one hand and commercial production on the other, is completely clear.

59. The supporting text confirms that a separate regime applies to proposals for hydraulic fracturing. Paragraph 6.7.5 says that Policy M7a is "the default policy for considering all development proposals associated with the extraction of both conventional and unconventional hydrocarbon resources, with the exception of those [involving] hydraulic fracturing … , which should be addressed by Policy M7b". If clarification were needed beyond the words of the policies themselves, this would be it.

60. In my view, therefore, the idea that the application before the inspector was a proposal within Policy M7b is untenable. Had he applied Policy M7b he would have been misdirecting himself. The judge's conclusion to that effect, in paragraph 29 of her judgment, was right.

61. I reject the submission that because hydraulic fracturing remained a possibility in the future, the inspector should have applied Policy M7b. No basis for that contention is to be found in the words of either policy, or in the supporting text. Neither Policy M7a nor Policy M7b extends to a form or phase of development outside the four corners of the application for planning permission before the decision-maker, or requires the decision-maker to anticipate such development and attempt to assess its planning merits. Any such approach would be contrary to the supporting text in paragraph 6.7.10, which stresses that "[at] any stage, only the application for that phase can be considered".

62. Getting "a foot in the door" by obtaining planning permission for a development of exploration and appraisal not involving hydraulic fracturing before going on to seek permission for a development of production extraction which did involve such activity, is, in my view, a false concept. The considerations arising on the second proposal would be different from those on the first. Under Policy M7b, there would be no precedent or presumption favouring approval. Any uncertainty about that is dispelled by the warning in the second sentence of paragraph 6.7.10: "[there] is no presumption that granting permission for one stage will lead to permission being granted for a subsequent phase".

63. The spectre of precedent was raised before the inspector. In paragraph 54 of the decision letter he referred to the "fear … that approval of this proposed testing operation … would be a portent … of a long-term commercial oil extraction operation on the appeal site". But he answered that concern, correctly and emphatically: "the scope of the present appeal is strictly limited to the specific testing and restoration operations which are self-contained and time-limited". And as he acknowledged in paragraph 55, any future proposal for "commercial extraction" would require a further application for planning permission, which would have to be assessed on its own merits under policy prevailing at the time.

64. Mr Wolfe argued that Policy M7b applied now because, whatever the present intentions of Angus Energy might be, the possibility remained that hydraulic fracturing would occur in the production phase. I disagree. The suggestion that Policy M7b would apply to any proposal for exploration and appraisal unless the applicant had "ruled out" a future proposal for hydraulic fracturing is misconceived. The possibility of a section 106 planning obligation being used to prevent Angus Energy and their successors in title pursuing such a proposal was raised in argument before us. There was no legal need for that to be done. Nor was it a requirement of policy. The present proposal had to be judged on its own planning merits in the light of the relevant policies, including the first part of Policy M7a. As paragraph 6.7.10 indicates, and in accordance with planning principle and common sense, any future proposal for commercial production, whether involving hydraulic fracturing or not, would be dealt with if and when the time came. This would be done by applying whichever policy of the joint minerals local plan was then relevant. If Policy M7b of the joint minerals local plan were still extant, and if it were relevant, the proposal would have to be assessed against it. All of this, I think, is elementary.

Did the inspector err in failing to consider alternatives outside the AONB?

65. For Frack Free Balcombe, Ms Ruchi Parekh submitted that the inspector misinterpreted the "exceptional circumstances" test for "major development" in the AONB, in Policy M13 of the joint minerals local plan and paragraph 177 of the NPPF. He ought to have considered "alternatives" outside the AONB. He failed to base his assessment, as he should have done, on "the need for the mineral", concentrating solely, and wrongly, on the Lower Stumble hydrocarbon resource itself.

66. I am unpersuaded by that argument. As Mr Cosgrove and Mr Phillpot submitted, when one reads the decision letter fairly and as a whole it is clear that the inspector

dealt properly with "alternatives", lawfully applying the relevant policies – in particular Policy M13(c) – to this proposal for hydrocarbon exploration, in this location. And his conclusion, as a matter of planning judgment, that the "exceptional circumstances" test was met was lawful.

67. In their relevant provisions, the two policies in question – Policy M13 of the joint minerals local plan and the policy in paragraph 177 of the NPPF – are in similar terms, though not identical. Part (c) of Policy M13 also corresponds to the provisions in Policy M7a(a)(i). The policy in paragraph 177 of the NPPF relates generally to "major development" in protected landscapes. Like Policy M13, it presumes against planning permission being granted for such development "other than in exceptional circumstances, and where it can be demonstrated that the development is in the public interest". And it requires the consideration of such proposals to include an assessment of three considerations, similar to those referred to in Policy M13.

68. Beyond the essential requirements that "exceptional circumstances" exist to justify planning permission being granted and that it is shown to be "in the public interest" to do so, neither Policy M13 of the joint minerals local plan nor the corresponding policy in paragraph 177 of the NPPF is expressed in a series of tests that the applicant for planning permission is obliged to satisfy. Both policies refer to matters that the decision-maker should take into account and assess. That assessment is directed to the overarching question, which is whether approval is justified by "exceptional circumstances" and "the public interest".

69. Both Policy M13 and the policy in paragraph 177 of the NPPF apply to a wide range of different developments. Policy M13 embraces all forms of mineral development. The policy in paragraph 177 covers "major development" of every kind. Both policies set broad principles for decision-making. The two matters on which the decision-maker must be satisfied under part (c) of Policy M13 – that there are "exceptional circumstances" and that "it is in the public interest as informed by an assessment of" the three considerations referred to – admit different conclusions on different facts. These are classic questions of planning judgment.

70. Paragraph 8.3.7 of the supporting text ties the policy to the requirements of government policy, then in paragraph 116 of the 2012 version of the NPPF, which, it says, "will need to be addressed". It amplifies the provisions in part (c)(i) of Policy M13. Paragraph 8.3.8 amplifies the provisions in parts (ii) and (iii). Here too, a realistic exercise of planning judgment is called for.

71. This court has already considered the meaning and effect of the predecessor to the policy in paragraph 177 of the NPPF. In *Wealden District Council v Secretary of State for Communities and Local Government* [2017] EWCA Civ 39;| [2018] Env. L.R. 5, when looking at the second bullet point in the policy, which referred to the "cost" of, and "scope" for, development "elsewhere outside the designated area" and the possibility of meeting the need for the development "in some other way", I said that "the policy [did] not prescribe for the decision-maker how alternative sites are to be assessed in any particular case". It "[did] not say that this exercise must relate to the whole of a local planning authority's administrative area, or to any area larger or smaller than that". And "[this would] always depend on the circumstances of the case in hand" (paragraph 63 of my judgment).

72. The complaint made by Frack Free Balcombe is that the inspector failed to understand and apply the provision in Policy M13(c)(ii) – "the cost of, and scope for, developing elsewhere outside the designated area, or meeting the need for the mineral in some other way" – and its counterpart, the second of the three specific considerations mentioned in paragraph 177 of the NPPF.

73. I do not think the inspector was at fault in that way. He had in mind the essential point. Reflecting Policy M13, his description of the "main issue" in paragraph 6 went to the overarching question: "whether the proposed development is justified by exceptional circumstances or the public interest", taking into account the several considerations he then mentioned, including "[the] effects [of the development] on the landscape of the AONB … ; the level of need for the development; [and] the availability and cost of alternatives to the proposal outside the AONB …". These considerations reflect the provisions in Policy M13(c). The inspector came back to them in paragraph 15 of the decision letter, where he referred to the "specific requirements" of Policy M13(c)(i), (ii) and (iii).

74. In this case the Lower Stumble hydrocarbon resource was the resource which the development was intended to explore and appraise. The whole purpose of the proposal was to establish whether a commercially viable resource was present in that location. To have attempted an assessment of alternatives at large, beyond that geological limit, would have been inconsistent with that purpose. This approach seems consistent with the proviso in Policy M7a(a)(ii) – "alternative sites from which the target reservoir may be accessed …". Policy M13(c) allows the decision-maker a discretion to adapt the assessment of alternatives to the type and nature of the development proposed, its location, and the relevant need. There may be a different and possibly narrower range of potential alternatives for a development of exploration and appraisal than for a development of commercial production. Here, the inspector's application of Policy M13(c) was informed, quite properly, by his view that it would be unrealistic to contemplate the development taking place outside the AONB or the need for the mineral being met in some other way. There was nothing legally amiss in that approach.

75. Having directed himself appropriately on the requirements of Policy M13(c) and on the matters he had to consider in judging whether those requirements were met, he went on to make his assessment. And in my view he did so without falling into error.

76. As for the consideration in Policy M13(c)(i), "the need for the development", he concluded in paragraph 50, for the reasons given in the preceding paragraphs, that there remained "a significant national need for onshore hydrocarbon exploration", and this would be so "for [a] considerable time to come". He found that this need "weighs greatly in favour of [the] appeal, given also the great policy weight still attributed nationally to the benefits of mineral extraction". That conclusion cannot be criticised.

77. In accordance with Policy M13(c)(ii), he assessed "the cost of, and scope for, developing elsewhere outside the designated area, or meeting the need for the mineral

in some other way". In paragraph 51 of the decision letter he considered the "Availability and Cost of Alternatives to the Proposed Development". His conclusions in that paragraph were based on his recognition of the need to which he had referred in paragraph 50. This was logical, and lawful.

78. The inspector noted that no estimate had been provided of the "cost of any alternative way" of achieving the objectives of the proposed development of "exploration and testing". He then stated an important finding, which, as I understand it, is not in dispute in these proceedings. It was, he said, "evident that the known Lower [Stumble] hydrocarbon resource could not be explored outside the AONB". He added that the "cost of constructing an alternative wellbore would plainly be uneconomic, given the prospect of the prior investment of £5.2 million in the present facility". No criticism is made of that conclusion. It was a lawful exercise of decision-making judgment under Policy M13(c)(ii). The substantial investment already made on the appeal site when the existing borehole was sunk in 2013 and the cost of drilling a new borehole elsewhere to explore the same "hydrocarbon resource" were plainly relevant to the inspector's assessment. In the penultimate sentence of paragraph 51 he concluded "[for] reasons set out above" that "it would not be appropriate to rely on alternative imported oil supplies". This too was a legitimate exercise of planning judgment, applying Policy M13(c)(ii) to the circumstances of this case. It matched the inspector's assessment of the "Need for the Development" in paragraphs 46 to 50. He was plainly well aware – as had been acknowledged in the officers' report (at paragraphs 9.25 and 9.36) and in Angus Energy's appeal statement (at paragraph 8.22) – that there were other sources and supplies of oil, both globally and nationally. But he was entitled to take the view that this was not a basis for assessing "alternatives" here.

79. In my view, therefore, the inspector's conclusion in the last sentence of paragraph 51, that "[in] the circumstances, the availability and cost of alternatives has little bearing upon the planning balance in the case", was one he could rationally and lawfully reach. It was the result of an assessment consistent both with Policy M13 of the joint minerals local plan and its supporting text and with the policy in paragraph 177 of the NPPF. And the reasons given for it were both adequate and intelligible.

80. That the inspector assessed the cost of, and scope for, alternatives focusing on the Lower Stumble hydrocarbon resource, and not more widely, was not to misunderstand or misapply Policy M13. As Mr Cosgrove and Mr Phillpot submitted, this was not a "self-fulfilling prophecy". The inspector's approach was both realistic and appropriate. It was faithful to the policy, properly understood, and the supporting text in paragraphs 8.3.7 and 8.3.8. The text in those paragraphs, like the policy itself, calls for reasonable flexibility when the policy is applied in the circumstances of the particular case. It does not compel decision-makers to apply the policy in precisely the same way to every sort of hydrocarbon development – for example, in the case of a development of hydrocarbon exploration, by requiring a consideration of alternatives remote from the relevant hydrocarbon resource or the licence area where such exploration is proposed.

Did the inspector fail to consider the likely effects of the development on Ardingly Reservoir?

81. Mr Wolfe submitted that the inspector failed to consider, as he should have done, the possibility that water pollution caused by the development would affect Ardingly Reservoir. As the judge evidently accepted, the inspector had misunderstood the facts. But she relied on an assessment that had formed no part of his conclusions. She also failed to apply the right legal test, which – Mr Wolfe submitted – was in *Simplex GE (Holdings) Ltd. v Secretary of State for the Environment* [2017] PTSR 1041; (1989) 57 P. & C.R. 306.

82. Mr Wolfe applied for permission to rely on further evidence, filed on 24 January 2024: the "Environmental Information Request" submitted to South East Water dated 27 November 2023, the letter in response dated 15 December 2023, the data disclosed, and a bar chart based on that data. This material was said to show that the judge proceeded on incorrect facts. Mr Wolfe said it was obtained after she gave judgment, and was unavailable before then. He submitted that it could have affected the judge's conclusions, and was credible. We admitted it provisionally. In the end, little or no reference was made to it in argument before us. But in any case I cannot see why it could not have been obtained at an earlier stage, or how it could have had any material influence on the outcome of the appeal. I would therefore refuse the application to admit fresh evidence under CPR 52.21(2)(b).

83. The allegation here is that the inspector failed to consider "issues around the [Ardingly] Reservoir linkage". It was presented in different ways: as an argument that the possible effects of the development on the reservoir were an obligatory material consideration, which the inspector failed to take into account; as an argument that his reasons were inadequate; and as an argument that he made an error of fact.

84. None of those arguments is well-founded. As Mr Ben Du Feu, for the Secretary of State, and Mr Phillpot submitted, the inspector concluded, by a lawful exercise of planning judgment, that the development did not pose any unacceptable risk of water pollution. The assessment on which that conclusion rested was not flawed by any error of fact, or by any other unlawfulness. Given the mitigation measures proposed and the regulatory regime in place, the conclusion itself was unsurprising. Frack Free Balcombe had not suggested that there was any risk of water pollution occurring in Ardingly Reservoir unless water from the site escaped to the River Ouse. But the mitigation measures had been designed to provide hydraulic containment of the site from the river. And the Environment Agency had not objected to the proposed development.

85. To begin with familiar principles: in *Gateshead Metropolitan Borough Council v Secretary of State for the Environment* (1996) 71 P. & C.R. 350, at p.354, Glidewell L.J. endorsed statements in emerging government policy emphasising that "[it] is not the job of the planning system to duplicate controls which are the statutory responsibility of other bodies", and "[nor] should planning authorities substitute their own judgment on pollution control issues for that of bodies with relevant expertise and the responsibility for statutory control over those matters" (see also the judgment of Sullivan L.J. in *R. (on the application of An Taisce (National Trust for Ireland) v Secretary of State for Energy and Climate Change* [2014] EWCA Civ 1111; [2015]

Env. L.R. 2, at paragraphs 46 to 54). And in *Gladman Developments Ltd. v Secretary of State for Communities and Local Government* [2019] EWCA Civ 1543 [2020] PTSR 128, at paragraph 43, I referred to "the essential principle … that the planning system should not duplicate … other regulatory controls, but should generally assume they will operate effectively".

86. Those principles were recognised in paragraph 188 of the July 2021 version of the NPPF. In the sphere of minerals planning, paragraph 27-112-20140306 of the PPG, under the heading "What hydrocarbon issues can mineral planning authorities leave to other regulatory regimes?", says that the Environment Agency has responsibility for ensuring that risk to groundwater is appropriately identified and mitigated. It goes on to say that "[there] exist a number of issues which are covered by other regulatory regimes and mineral planning authorities should assume that these regimes will operate effectively". Authorities "should not need to carry out their own assessment as they can rely on the assessment of other regulatory bodies", but "before granting planning permission they will need to be satisfied that these issues can or will be adequately addressed by taking advice from the relevant regulatory body".

87. As well as requiring planning permission, the proposed activities on the site were subject to regulation by the Environment Agency under the Environmental Permitting (England and Wales) Regulations 2016 and by the Health and Safety Executive under the Control of Major Accident Hazards Regulations 2015. The 2016 regulations are a framework of regulation, integrating pollution prevention and control, water discharge consenting and groundwater authorisations. Paragraph 6 of Schedule 22 to those regulations states that "[the] regulator must, in exercising its relevant functions, take all necessary measures … (a) to prevent the input of any hazardous substance to groundwater; and … (b) to limit the input of non-hazardous pollutants to groundwater so as to ensure that such inputs do not cause pollution of groundwater. …".

88. The hydrogeological risk assessment submitted by Angus Energy with their application for planning permission dealt with the possible effects of the development on both groundwater and surface water. Subsection 4.3, "Predicted Effects" said that "[the] proposed mitigation measures … , along with the natural geology and groundwater regime beneath the Site means that the magnitude of the predicted effects from surface contamination is likely to be temporary and easily dealt with during decommissioning (i.e. reversible)", and that "[the] likelihood of surface contamination or hazardous chemicals affecting groundwater within the underlying secondary aquifer" was "very low". Paragraph 9.9 of Angus Energy's statement of case for the section 78 appeal said that "effects on Ardingly Reservoir had been "scoped out" of the assessment, because the site was "not hydraulically linked" to the reservoir and was "separated from it by higher ground, which forms the watershed".

89. In its response to consultation, dated 17 September 2020, the Environment Agency said it had "reviewed the updated hydrogeological report and [had] no objection to the proposal as submitted", and that it was "satisfied with the fundamental findings and recommendations". It advised the county council and Angus Energy that "[additional permits] and/or variations of existing permits are required in association [with] the proposed works". It said that "additional work will be required, which will need to be assessed as part of the Environmental Permitting determination". This "would include, but may not be limited to … [ensuring] that a suitably robust and

comprehensive, groundwater monitoring strategy is in place[,] … [providing] a detailed Construction Quality Assurance report confirming proposed engineered containment and contamination controls are installed correctly and provide robust pollution controls", and "[confirmation] on the construction of pre-existing contamination control being suitably robust". It was pointed out that "[the] need for an environmental permit is separate to the need for planning permission" and that "[the] granting of planning permission does not necessarily lead to the granting of a permit".

90. That the measures proposed would be effective was accepted by the county council's officers, and by the county council itself. No mention was made of any likely effects on Ardingly Reservoir in the decision notice refusing planning permission. In their report to the Planning Committee the officers advised that the county council "must assume that other, non-planning regimes operate effectively (PPG: Minerals, paragraph 112)", and that "the construction, design and operation of the borehole have been undertaken appropriately, in accordance with Health and Safety Executive (HSE) requirements" (paragraph 9.71). The county council had "consulted with the Environment Agency and HSE, neither of which [had] objected" (paragraph 9.72).

91. In their statement of case, Angus Energy pointed out that the Environment Agency had "reviewed the Hydrogeological Risk Assessment and … raised no objection to the proposed development as submitted, stating that it is satisfied with the fundamental findings and recommendations of the report" (paragraph 9.11). And "no adverse effects upon Ardingly Reservoir are anticipated; it is not hydraulically linked to the Site", and therefore "no health effects are expected relating to the pollution of surface water or groundwater resources" (paragraph 9.62).

92. The relevant part of Frack Free Balcombe's objection, stated in their written representations dated 10 March 2022, was this:

> "When the reservoir runs low the water company pumps water from the River Ouse to replenish it. The stream next to the site [runs] into the River Ouse. So contamination from the site can end up in the reservoir which provides drinking water for much of Sussex. The impact of the site on the Ardingly Reservoir should never have been ruled out of scope of Angus's Hydrological Risk Assessment."

93. The concern here, therefore, was that pollution arising from activities on the site might enter a stream nearby and reach the River Ouse, from which it might then be pumped into the reservoir. As Mr Du Feu and Mr Phillpot submitted, if there was no material risk of pollution from the site getting into the stream in the first place and from the stream to the River Ouse, the possibility of harmful effects on water in the reservoir could properly be disregarded.

94. The point was not new. It had been raised in correspondence when the previous proposal for hydrocarbon exploration on the site was being considered in 2013. In an email to a local resident, Mr Norman Hawkins, dated 21 October 2013, the Environment Agency had confirmed that "there [was] not a direct hydraulic connection between Ardingly reservoir and the River Ouse". There was "an indirect

connection because it can only take place if South East Water pumps from the river to the reservoir". South East Water had an abstraction point on the River Ouse, "which they could use to refill the reservoir when levels are low". But "typically this abstraction point [was] not used as the reservoir will normally refill naturally and operation of pumps incurs significant cost".

95. That explanation is not at odds with the relevant passages in the hydrogeological risk assessment, and in Angus Energy's statement of case, to the effect that the application site is "not hydraulically linked" to the reservoir.

96. It should also be noted here, as Mr Wolfe accepted, that the Lower Stumble Exploration Site Hydrogeological Risk Assessment Technical Review undertaken by the Tapajos consultancy for Frack Free Balcombe did not state a conclusion on the possibility of the development causing water pollution in the reservoir. But Mr Wolfe submitted that the matter needed to be investigated properly, and Angus Energy had not done that.

97. Against that background, I cannot see anything unlawful in the inspector's handling of the issue of water pollution in paragraphs 33 to 36 of the decision letter. He noted, in paragraph 35, the absence of objection from the Environment Agency as well as the Health and Safety Executive, and the requirements for approval and monitoring under a separate legislative regime. He concluded unequivocally, in paragraph 36, that the proposed development would not present "any unacceptable risk with respect to … water pollution …". As he made clear in paragraph 34, this conclusion was reached in the light of Angus Energy's hydrogeological risk assessment, and taking into account the fact that "the appeal site is not hydrologically linked to the Ardingly Reservoir", the fact that there was "an intervening watershed", the fact that it was not "within or close to any groundwater source protection zones", and his own finding that "[the] only evident significant risk of water pollution concerns streams, as close as 15m from the site boundary, from run-[off] or structural failure of the wellbore itself". He clearly accepted as sound the relevant conclusions in the hydrogeological risk assessment, and what it said about the efficacy of the proposed mitigation measures.

98. As the judge held (in paragraph 79 of her judgment), the inspector was entitled to rely on the "permitting regime which was designed to ensure that there was no pathway for water to run-off the site". She was right to say (in paragraph 80) that the risk of water getting into the River Ouse and then being pumped into Ardingly Reservoir "both appears to have been very slight, but [was] also subject to further regulatory control", and that whilst this indirect connection between site and reservoir was "theoretically possible", it appeared "unlikely and subject to full regulation". I also agree with her conclusion that, in the circumstances, the risk was "so slight as not to be a material matter" to which the inspector needed to give "further reasons or consideration". The question for the inspector was a matter for him to resolve on the evidence before him: whether or not, given the facts as he found them to be, there was an unacceptable risk of water pollution, including to the reservoir. This was a classic matter of fact and judgment for a planning decision-maker. The inspector concluded that there was no unacceptable risk. This conclusion, in its context, is unimpeachable.

99. Even if the risk of the proposed development causing water pollution in Ardingly Reservoir was, as Mr Wolfe maintained, a "mandatory material consideration" to which the inspector was bound to have regard, I cannot accept that he failed to do that. He explicitly had regard to that specific risk, on the basis that, as he said in paragraph 34 of the decision letter, the site was "not hydrologically linked" to the reservoir. This was part of a more general assessment of the risk of water pollution being caused by the development, culminating in the conclusion stated in paragraph 36.

100. Nor was there any deficiency or lack of clarity in the inspector's relevant reasons. They were, in the circumstances, appropriately succinct. It must be remembered that his conclusions on hydrology and water pollution, together with the other parts of his planning assessment, were intended to be read by parties familiar with the relevant evidence and submissions (see the speech of Lord Brown of Eaton-under-Heywood in *South Bucks District Council v Porter (No.2)* [2004] UKHL 33; [2004] 1 W.L.R. 1953, at paragraph 36). Knowing as he did that the relevant regulatory body, the Environment Agency, were not asking him to dismiss the appeal, there was no need for him to go into greater detail on this issue than he did. He was not obliged to refer specifically to the risk of water pollution affecting Ardingly Reservoir.

101. To contend that the inspector's assessment was based solely on the supposed lack of any hydraulic connection between the site and Ardingly Reservoir is to overlook the ample material that was before him on the risk of water pollution, which he plainly took into account. It confines the analysis artificially to a single point, and it betrays a misunderstanding of the relevant facts. The inspector's conclusions were informed by the expert consideration given to the possibility of water pollution in the hydrogeological risk assessment, by his understanding of the mitigation measures proposed on the site, and by the relevant representations made on either side in the section 78 appeal. They acknowledged the statutory regime of regulation under which the proposed development would operate. And they gave due weight to the fact that the Environment Agency, when consulted on the proposal, had been content for planning permission to be granted. The possibility of water having to be pumped from the River Ouse into the reservoir, and the relevant regulatory control, was of course known to the Environment Agency when it decided not to object.

102. Mr Wolfe urged us to accept that the potential harmful effects on water in Ardingly Reservoir had been wrongly "scoped out" of the hydrogeological risk assessment, on the erroneous basis that the site was not "hydraulically linked" to the reservoir. His contention was that the inspector relied, wrongly, on the false proposition that there was no hydraulic link between the site and the reservoir, either direct or indirect, and that his assessment was thus built on a misconception. I do not accept this argument. The premise on which it is founded is itself a fallacy.

103. Like the judge, I am unable to accept that when the inspector said the site was "not hydrologically linked to the Ardingly Reservoir" he made an established error of fact, because there could be an indirect hydraulic connection. The legal test for error of fact – formulated by Carnwath L.J. in *E v Secretary of State for the Home*

Department, not *Simplex* as Mr Wolfe suggested – is not satisfied. *Simplex* is concerned only with the logically later question of what the court should do if there has been a public law error, whereas here the question is whether there was a public law error, namely an established error of fact, in the first place. No factual error occurred. In reality, there could be no hydrological link between the site and the reservoir unless one was created deliberately. As the judge said, there was "no natural pathway" between the River Ouse and the reservoir, because the watershed precludes it. The inspector's observation was scientifically good. The "indirect connection" to which the Environment Agency had previously referred in correspondence could only come about if water had to be pumped from the River Ouse to the reservoir via an abstraction point. The error of fact argument fails at the outset.

104. Here too there was no public law error.

Conclusion

105. For the reasons I have given, I would dismiss the appeal.

Lord Justice Singh:

106. I agree.

Lord Justice Holgate:

107. I also agree.