A SURVEY OF CLIMATE LITIGATION: USING ENVIRONMENTAL REVIEW TO OPPOSE OFFSHORE OIL AND GAS PROJECTS IN COMMON LAW JURISDICTIONS

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I. INTRODUCTION

This Note presents a cross-jurisdictional survey and analysis of recent climate litigation against offshore oil and gas projects. Part I begins with a background on offshore oil and gas production and then provides an overview of the relevant legal tool underpinning much recent climate litigation: the environmental impact assessment. Part II analyzes recent cases in three jurisdictions: the United States, the United Kingdom, and Australia. Finally, Part III discusses lessons from these cases to inform future climate litigation development and strategy.

A. *To Tackle the Climate Crisis, Offshore Oil and Gas Production Must End*

There is no mincing words: according to the U.N. Environmental Programme (UNEP), "if the world is to achieve the Intergovernmental Panel on Climate Change's 1.5°C scenario, no new oil and gas production projects can be sanctioned and existing production must be

significantly and urgently reduced towards full transition to sustainable renewable energy."[1] In spite of this, investments in oil and gas are soaring.[2] Capital expenditures for offshore oil and gas projects are expected to exceed $300 billion in 2025 alone.[3] Offshore crude oil production represents almost one-third of all oil production globally.[4] The UNEP estimates that about half of all technically recoverable global oil reserves are located offshore and so predicts that offshore production will grow as a proportion of total oil production.[5]

Offshore oil and gas production has devastating costs, both for the immediate ecosystem and for the global climate. Offshore oil drilling carries an ever-present risk of oil spills, which can impair the biologic functions of marine species for decades, can cost billions of dollars to clean up, and cannot be fully remediated with current methods.[6] Thousands of oil spills happen each year in the United States alone.[7] Oil and gas drilling also "produces many toxic wastes and other forms of pollution, including tens of thousands of gallons of waste that contains mercury, lead, and cadmium" which "'bioaccumulate[s] and biomagnif[ies] in marine organisms' and actually appear[s] in seafood consumed by humans."[8]

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1. U.N. Environmental Programme, Harmful Marine Extractives: Understanding the risks & impacts of financing non-renewable extract industries, Offshore Oil and Gas 10 (2022).

2. Benjamin Storrow, *Offshore oil is about to surge*, E&E News (Mar. 22, 2023, 6:43 AM), https://www.eenews.net/articles/offshore-oil-is-about-to-surge/; Stephen Stapczynski et al., *A $290 Billion Investment Cements Natural Gas's Relevance for Decades*, Bloomberg (Jan. 10, 2024, 6:00 PM), https://www.bloomberg.com/news/features/2024-01-11/natural-gas-boom-to-hit-warming-world-trying-to-quit-fossil-fuels

3. Matthew Hale, Offshore energy capex to grow again in 2025 led by Asia, Middle East, Offshore Magazine (Jan. 8, 2025) https://www.offshore-mag.com/field-development/article/55253513/offshore-energy-capex-to-grow-again-in-2025-led-by-asia-middle-east.

4. *Distribution of onshore and offshore crude oil production worldwide from 2005 to 2025,* Statista Rsch. Dep't (Dec. 20, 2023), https://www.statista.com/statistics/624138/distribution-of-crude-oil-production-worldwide-onshore-and-offshore/.

5. U.N. Env't Programme, Global Climate Litigation Report 2023 Status Review 20-21 (2023).

6. Ursa Rose Heidinger, *A Proposal to End Offshore Lease Sales on the Outer Continental Shelf*, 32 N.Y.U. Env't L. J. 395, 423 (2024).

7. *Id.* at 424 (citing *Largest Oil Spills Affecting U.S. Waters Since 1969*, NOAA, https://response.restoration.noaa.gov/oil-and-chemical-spills/oil-spills/largest-oil-spills-affecting-us-waters-1969.html (last updated May 30, 2024)).

8. *Id.* (citing Nat. Res. Def. Council, Protecting Our Ocean and Coastal Economies 3 (2009), https://www.nrdc.org/sites/default/files/offshore.pdf).

Oil and gas production and use also account for the majority of all greenhouse gas (GHG) emissions globally.[9] According to the International Energy Agency (IEA), emissions associated with the "production, transport and processing of oil and gas resulted in 5.1 billion tonnes" of CO2 equivalent emissions[10] in 2022 (so-called scope 1 and 2 emissions), accounting for approximately 15% of total energy-related global GHG emissions.[11] The end use of oil and gas contributes another 40% of all GHG emissions (scope 3 emissions).[12] Using the U.S. Environmental Protection Agency's (EPA) estimated social cost of CO2 for 2020 emissions of $190/metric ton of CO2, just the scope 1 and 2 emissions of oil and gas production in 2022 will result in nearly $1 trillion in social costs.[13] These costs will only increase over time: the EPA estimates that a single ton of CO2 in 2030 will generate $230 in social costs.[14] Offshore production also releases high levels of methane, far higher than previously thought.[15] Methane is a GHG that is

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9. *See* Int'l Energy Agency, Emissions from Oil and Gas Operations in Net Zero Transitions 2 (2023), https://www.iea.org/reports/emissions-from-oil-and-gas-operations-in-net-zero-transitions.

10. CO_2 equivalent (CO_2-eq) emissions are a standardized measure of the amount of CO_2 emissions that "would have an equivalent effect on a specified key measure of climate change, over a specified time horizon, as an emitted amount of another greenhouse gas." Intergovernmental Panel on Climate Change, Climate Change 2021: The Physical Science Basis 2224 (2021).

11. Int'l Energy Agency, *supra* note 9 at 4. In the context of the oil and gas industry, the IEA defines scope 1 emissions as those "that come directly from the oil and gas industry itself (e.g. emissions from powering the engines of drilling rigs or methane emissions that arise during oil and gas extraction or transport). It defines scope 2 emissions as those that "arise from the generation of energy that is purchased by the oil and gas industry (e.g. from the generation of electricity taken from a centralised grid to power auxiliary services[).]" *Id.* at 7 n.1.

12. *Id.* Scope 3 emissions are emissions which "are the result of activities from assets not owned or controlled by the reporting organization, but that the organization indirectly affects in its value chain." Env't Prot. Agency, *Scope 3 Inventory Guidance* https://www.epa.gov/climateleadership/scope-3-inventory-guidance (Dec. 9, 2024). In the context of the oil and gas industry, scope 3 emissions primarily include downstream emissions by end users. *See* Energy Bar Ass'n, *Scope 3 Emissions and the Energy Transition: A Glimpse into the Regulatory Challenges and Corporate Disclosure Practices in the Oil and Gas Industry* (Dec. 23, 2024), https://www.eba-net.org/scope-3-emissions-and-the-energy-transition/.

13. Env't Prot. Agency, EPA Report on the Social Cost of Greenhouse Gases: Estimates Incorporating Recent Scientific Advances 101 (2023), https://www.epa.gov/system/files/documents/2023-12/epa_scghg_2023_report_final.pdf.

14. *Id.*

15. Lamar Johnson & E&E News, *Gulf Oil Platforms Emit Even More Methane than Reported*, Sci. Am. (Apr. 7, 2023), https://www.scientificamerican.com/article/gulf-oil-platforms-emit-even-more-methane-than-reported/.

80 times more harmful than CO2 because it traps far more heat per molecule released into the atmosphere.[16]

It is clear that oil and gas production must be wound down if the world is to meet the 1.5°C goal. However, governments are not, in fact, winding down oil and gas projects; they are instead approving even more.[17] Thus, it becomes necessary to consider avenues for preventing new projects from coming online. Climate litigation— "cases before judicial and quasi-judicial bodies . . . that involve material issues of climate change science, policy, or law"[18]—is becoming an increasingly important and viable tool for challenging oil and gas projects and influencing climate policy.[19] One basis for these lawsuits that arises across jurisdictions is the environmental impact assessment.

B. *Environmental Impact Assessments Are a Global Legal Standard*

Environmental impact assessments (EIAs) are a form of environmental review that involve "the process of identifying, predicting, evaluating and mitigating the biophysical, social, and other relevant effects of development proposals prior to major decisions being taken and commitments made."[20] In simpler terms: when a governmental body proposes some action, an EIA is meant to inform both decisionmakers and the public about its potential effects. EIAs are primarily a procedural tool.[21] EIA statutes and regulations generally impose a set of duties encompassing "the requirement to generate particular types of impact information, actual consideration of such information by the decision-maker, governmental transparency and accountability, and engagement of the public."[22]

In his article The Emergence of the Environmental Impact Assessment Duty as a Global Legal Norm and General Principle of Law, Professor Tseming Yang provides an in-depth overview of the history

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16. *What's the deal with methane?,* U.N. Env't Programme (Oct. 18, 2022), https://www.unep.org/news-and-stories/video/whats-deal-methane.

17. *See* Ivan Penn, *Oil Companies Expand Offshore Drilling, Pointing to Energy Needs*, N.Y. Times (May 9, 2024), https://www.nytimes.com/2024/05/03/business/energy-environment/shell-offshore-oil-gulf-of-mexico.html.

18. Joana Setzer & Catherine Higham, Global Trends in Climate Change Litigation: 2023 Snapshot 8 (2023).

19. U.N Env't Programme, *supra* note 5, at 7.

20. Int'l Ass'n for Impact Assessment, *What Is Impact Assessment?* 1 (2009), http://www.iaia.org/uploads/pdf/What_is_IA_web.pdf.

21. *Id.*

22. Tseming Yang, *The Emergence of the Environmental Impact Assessment Duty as a Global Legal Norm and General Principle of Law*, 70 Hastings L. J. 525, 529 (2019).

and development of EIAs.[23] Given his recent scholarship, this Note provides only a brief summary of EIAs, without some of the nuance of Yang's fuller treatment. Yang's critical insight is that EIAs have become an international norm in environmental law.[24] In his 197-country survey, Yang found that "at least 183 jurisdictions have now adopted the EIA duty as part of their environmental governance system, about ninety-three percent."[25] Yang argues that the "EIA is no longer a hortatory admonition of good practice or authorization for discretionary application, but has in fact become a globally accepted legal norm."[26] The requirement that public actors assess potential harm to the environment before acting has become a part of most nations' domestic laws and overarching international law, through, for example, the Rio Declaration, the United Nations Convention on the Law of the Sea, and the Convention on Biological Diversity.[27]

As EIAs have become all but universal in environmental governance, Yang is able to provide an overview of the way they generally operate.[28] As Yang describes, EIAs work in the following manner:

When a project proposal triggers the EIA duty, a government agency will engage in a "screening" step that identifies potentially significant impacts of the project. If it is determined that the project does not have any significant impacts, usually an abbreviated assessment document is generated (an "Environmental Assessment" under [the United States's statute, the National Environmental Policy Act, or NEPA]) and the process comes to an early end. Alternatively, if any impacts will or could be significant, a full-blown impact assessment is initiated. A "scoping" process then determines what impacts, including cumulative and indirect effects, as well as project alternatives are to be included in the impact analysis. Once the relevant information has been collected and analyzed, a written impact assessment document ("Environmental Impact Statement" under NEPA) is prepared for review by the agency decision-maker. The public is usually involved in the assessment process during the information collection stage and in review of the draft document. Based on the impact assessment document, the decision-maker then decides whether to go forward with the proposed project or to choose an alternative action.[29]

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23. *Id.* at 525.
24. *Id.* at 526-27.
25. *Id.* at 527.
26. *Id.*
27. *Id.* at 532.
28. *Id.* at 529–30.
29. *Id.*

This consistency of EIAs in legal operation across national boundaries enables this Note, then, to analyze how EIAs are used in litigation, specifically climate litigation against oil and gas projects. This is because, in many states, citizens may sue public actors for failing to conduct an adequate EIA.[30] In the United States, NEPA requires agencies to conduct an EIA for "major Federal actions."[31] The United Kingdom has the Town and Country Planning (Environmental Impact Assessment) Regulations 1999 (1999 Regulations) and the Environmental Assessment of Plans and Programmes Regulations 2004 (2004 Regulations). Australia has the Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2023.

While these statutes vary, all adhere to the general outline described above: for some set of government actions, an EIA must be conducted beforehand to assess potential impacts, and citizens may challenge the promulgation of the EIA or approval of the project on the grounds that the EIA was deficient in some way.[32] Climate litigation frequently relies on EIA requirements as a way to challenge projects or actions that may exacerbate climate change.[33] Recent cases around the world have in particular focused on whether and to what extent governments must take scope 3 emissions into account.[34] The case studies that follow analyze the differing judicial interpretations of a state's EIA responsibilities as to climate change.

II. CASE STUDIES

This section analyzes recent EIA litigation against offshore oil and gas projects in three countries: the United States, the United Kingdom, and Australia. These three jurisdictions were chosen because they are all common law systems; thus, there is some overlap in the basic underpinnings of their legal systems. All the cases in these countries are also available in English. Importantly, all three countries engage in substantial offshore oil and gas production. In 2024, the United States produced "approximately 668 million barrels of oil and 700 billion cubic feet of gas" from offshore resources and consistently ranks as the top global producer of offshore oil.[35] In 2022, the United Kingdom

30. *See* U.N. Env't Programme, *supra* note 5, at 47–49 (discussing climate litigation "premised on EIA and similar planning requirements.").

31. 42 U.S.C. § 4332(C).

32. *See* discussion *infra* Part II.

33. Setzer & Higham, *supra* note 18 at 42.

34. *Id.*

35. Bureau of Ocean Energy Mgmt., *Oil and Gas Energy,* https://www.boem.gov/oil-and-gas-energy (last visited May 5, 2025); Umar Ali, *Top*

produced approximately 340 million barrels of oil and 1.1 trillion cubic feet of natural gas from offshore resources.[36] In 2021, Australia produced approximately 168 million barrels of oil,[37] and approximately two-thirds of Australia's production is from offshore resources.[38] In 2020, Australia produced approximately 5 trillion cubic feet of gas in total, though it is unclear what proportion came from offshore.[39] These similarities lend themselves to cross-jurisdictional legal analysis.

A. *United States*

In the United States, offshore oil and gas leasing is overseen by the Bureau of Ocean Energy Management (BOEM).[40] The leasing process is governed primarily by two statutes: NEPA, which provides the duty to conduct an EIA, and the Outer Continental Shelf Lands Act (OCSLA), which regulates federal oil and gas leasing and extraction.[41] This section will focus on the impact assessment requirements of and litigation opportunities under NEPA, though OCSLA governs the actual leasing framework.[42] NEPA was, in fact, the progenitor of the entire concept of EIA as a legal tool.[43] Much climate litigation in the United States is based on NEPA,[44] and so understanding its requirements is critical for successful litigation development.

At a high level, "NEPA requires the preparation of environmental impact statements (EIS) [U.S. terminology for an EIA] for major federal actions that have a significant environmental impact on the human environment. In addition, it requires that agencies consider

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ten countries by oil production, Offshore Technology (May 2, 2019), https://www.offshore-technology.com/features/oil-production-by-country/.

36. U.S. Energy Info. Inst., Country Analysis Executive Summary: United Kingdom 1 (2022), https://www.eia.gov/international/content/analysis/countries_long/United_Kingdom/archive/pdf/uk_2022.pdf.

37. U.S. Energy Info. Inst., Country Analysis Executive Summary: Australia 4 (2022), https://www.eia.gov/international/content/analysis/countries_long/Australia/australia.pdf.

38. Geoscience Australia, *Australia's Energy Commodity Resources 2021: Oil*, https://www.ga.gov.au/digital-publication/aecr2021/oil#summary-section (last visited May 2, 2024).

39. U.S. Energy Info. Inst., *supra* note 37.

40. *Leasing,* Bureau of Ocean Energy Mgmt., https://www.boem.gov/oil-and-gas-energy (last visited May 3, 2024).

41. *See* Ctr. for Biological Diversity v. Bernhardt, 982 F.3d 723, 731 (9th Cir. 2020).

42. See Heidinger, *supra* note 6, for a helpful overview of OCSLA.

43. Yang, *supra* note 22, at 530.

44. David Markell & J.B. Ruhl, *An Empirical Survey of Climate Change Litigation in the United States*, 40 Envtl. L. Rep. 10644, 10647 (2010).

'alternatives' to proposed actions, even with respect to those actions that do not require the preparation of an EIS."[45] While NEPA itself does not provide a private right of action, private plaintiffs can challenge agency action for noncompliance under the Administrative Procedure Act (APA).[46] In the context of offshore oil production, "NEPA requires BOEM to draft an [EIS] evaluating the environmental consequences of the drilling and oil extraction. The EIS must contain, among other things, a statement of purpose, a description of the project, and a comparison of the . . . project with other reasonable alternatives for extracting oil. It must also include a 'no action' alternative, in which BOEM evaluates the relative consequences of not approving any drilling . . ."[47]

A trio of recent cases have clarified the requirements of NEPA in the context of offshore oil leasing and serve as the basis for this case study. Namely, these cases demonstrate that U.S. agencies must consider the global impact of emissions and their transboundary harm.

In Center for Biological Diversity v. Bernhardt, a number of environmental NGOs challenged BOEM's approval of oil drilling and production facilities off the coast of Alaska.[48] Under NEPA, agencies must "evaluate the direct and indirect effects of the proposed action."[49] In its EIS approving of the offshore lease, BOEM calculated anticipated upstream (scope 1 and 2) and downstream (scope 3) emissions for the project as well as potential alternatives, including a no-action alternative.[50] However, BOEM specifically declined to calculate any scope 3 emissions "resulting from foreign oil consumption."[51] For failing to either provide a "'quantitative estimate of the downstream greenhouse gas emissions' that will result from consuming oil abroad, or 'explain[ing] more specifically why it could not have done so,'" the Ninth Circuit held that BOEM acted arbitrarily and capriciously, in violation of NEPA and the APA.[52] The court confirmed that BOEM has both the statutory authority and responsibility to consider and act on "the

45. Richard L. Revesz et al., Revesz, Livermore, Cecot, and Hein's Environmental Law and Policy 954 (4th. ed. 2019) (first citing 42 U.S.C. § 4332(2)(C); and then 42 U.S.C. § 4332(2)(E)).

46. *Id.* at 957.

47. Ctr. for Biological Diversity v. Bernhardt, 982 F.3d at 731 (first citing 42 U.S.C. § 4332(C); then 40 C.F.R. § 1502.12–1502.14; and then 40 C.F.R. § 1502.14(c)).

48. *Id.* at 731-32.

49. *Id.* at 737 (citing 40 C.F.R. § 1502.16).

50. *Id.* at 735.

51. *Id.* at 736.

52. *Id.* at 740.

emissions resulting from foreign oil consumption."[53] As net social costs of oil production and consumption are not limited to the United States's borders, the fact that BOEM has the legal duty to consider costs beyond the United States is critical. From a policy perspective, it would be irrational to only consider harms to U.S. persons when climate change is a global phenomenon. Legally, this holding will magnify the costs of oil production that BOEM must account for, as foreign oil consumption will produce more emissions and thus more harm, which should make it harder to justify oil leasing in EIAs and amplify avenues of attack.[54]

Center for Biological Diversity v. Bernhardt was the first case to explicitly hold that BOEM must consider emissions resulting from foreign oil consumption. In the intervening years, other courts have had occasion to affirm that holding. In Sovereign Iñupiat for a Living Arctic v. Bureau of Land Management, the Bureau of Land Management (BLM, the agency tasked with managing onshore oil and gas resources on federal lands) also refused to consider foreign oil consumption resulting from approval of an oil and gas project.[55] BLM attempted to offer a lengthier explanation for its refusal (something the Bernhardt court had left the door open to), but the district court nonetheless held that BLM acted arbitrarily and capriciously because it did not "describe the research it relied upon to reach [its] conclusions."[56]

In Friends of the Earth v. Haaland, the D.C. District Court relied on these prior cases to hold that BOEM's exclusion of foreign oil consumption from its EIA approving a lease sale in the Gulf of Mexico was arbitrary and capricious.[57] While this decision was overturned on separate grounds,[58] the District Court's legal analysis and conclusions are useful in showing a consistent interpretation of NEPA as requiring consideration of scope 3 emissions outside the United States.[59]

The final U.S. case meriting discussion is Environmental Defense Center v. Bureau of Ocean Energy Management, in which the Ninth Circuit put teeth on NEPA's requirement that the agency take a "hard

53. *Id.*

54. *Cf.* Michigan v. EPA, 576 U.S. 743, 752 (2015) ("No regulation is 'appropriate' if it does significantly more harm than good.").

55. Sovereign Iñupiat for a Living Arctic v. Bureau of Land Mgmt, 555 F. Supp. 3d 739, 767 (D. Alaska 2021).

56. *Id.* at 763–65.

57. Friends of the Earth v. Haaland, 583 F. Supp. 3d 113, 137–44 (D.D.C. 2022).

58. Friends of the Earth v. Haaland, No. 22-5036, 2023 U.S. App. WL 3144203, *1 (D.C. Cir. April 28, 2023).

59. Friends of the Earth v. Haaland, 583 F. Supp. 3d 113, at 144–45.

look" at the environmental impacts of offshore oil drilling.[60] The procedural background to this case is also enlightening as an example of a government body attempting to completely circumvent the environmental review process. Here, BOEM had initially completely failed to engage in any environmental review before approving permits for offshore well stimulation treatments.[61] Environmental groups, upon learning of this, brought a successful action to compel BOEM to conduct a NEPA review.[62] BOEM then conducted a cursory environmental assessment and issued a finding of no significant impact, refusing to prepare a full EIS.[63] BOEM assumed that certain well stimulation activities "would happen so infrequently that any adverse environmental effects would be insignificant."[64] However, in their legal challenge, the environmental groups were able to show that this assumption was incorrect.[65] The Ninth Circuit concluded that, in relying on "incorrect assumptions or data," BOEM failed to take a "hard look" at the environmental impacts of the project, and thus ordered BOEM to produce a full EIS.[66]

For creative plaintiffs, NEPA offers many ways to successfully challenge government approvals of offshore oil and gas projects. The fact that courts have consistently determined that NEPA requires consideration of the effects of scope 1, 2, and 3 emissions both domestically and internationally is critically important as it raises the costs of oil and gas projects that agencies must account for, making it more difficult to show that project approval is warranted.

B. *United Kingdom*

Recent litigation against offshore projects in the United Kingdom has focused on whether downstream, or scope 3, emissions must be considered at all. In contrast with the United States, two recent cases have held that the U.K. government has no obligation to consider scope 3 emissions in the offshore context. The British courts have displayed a high degree of deference to agencies' decision not to assess downstream emissions, stating that the "issue is essentially a political

60. Envtl. Def. Ctr. v. Bureau of Ocean Energy Mgmt., 36 F.4th 850, 866 (2022).
61. *Id.* at 863.
62. *Id.*
63. *See Envtl. Def. Ctr.*, *supra* note 60, at 865–67.
64. *Id.* at 873.
65. *Id.* at 873–74.
66. *Id.* at 872, 882.

and not a legal one."[67] However, this area of law is contested; in a recent case in the onshore drilling context, the U.K. Supreme Court held that scope 3 emissions must be considered, which could impact all future EIA litigation.

Directive 2011/92/EU of the European Parliament and Council imposes a duty on member states to conduct an EIA of certain projects.[68] It provides that "Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects."[69] The EIA must "identify, describe and assess . . . the direct and indirect significant effects of a project on . . . [the] climate."[70]

Although the United Kingdom is no longer a member of the European Union, Directive 2011/92/EU has been incorporated into U.K. law by the Offshore Petroleum Production and Pipelines (Assessment of Environmental Effects) Regulations 1999 (1999 Regulations).[71] The 1999 Regulations require offshore permit applicants to conduct an EIA (known as an environmental statement) which "identif[ies], describe[s] and assess[es] . . . the direct and indirect significant effects of the relevant project on . . . [the] climate."[72] The Secretary of State for Energy Security and Net Zero may not grant "consent" for oil extraction unless they are satisfied that these requirements "have been substantially met."[73] As the King's Bench Division of the English High Court summarized, "a 'person aggrieved' . . . can apply to the court to quash (reduce) the consent if it was, inter alia, granted, in contravention of [the EIA regulations]."[74]

In the United Kingdom, oil and gas regulation has undergone some changes in recent years. The North Sea Transition Authority (NSTA) "regulates the oil, natural gas, and carbon storage industries."[75] However, before 2022, it was known as the Oil and Gas Authority

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67. Greenpeace Ltd. v. SOS for Bus., Energy and Indus. Strategy (2021) CSIH 53, [¶ 68] (Scot.).

68. Directive 2011/92 of the European Parliament and of the Council of 13 December 2011 on the Assessment of the Effects of Certain Public and Private Projects on the Environment, 2011 O.J. (L 26) 1.

69. *Id.* at art. 2.

70. *Id.* at art. 3.

71. Greenpeace Ltd. v. SOS for Bus., *supra* note 67, at ¶¶ 4–13.

72. *Id.* ¶¶ 4, 8.

73. *Id.* ¶¶ 8–9.

74. *Id.* ¶ 13.

75. U.S. Energy Info. Inst, *supra* note 36, at 4.

(OGA).[76] NSTA is an independent regulatory agency within the Department for Energy Security and Net Zero;[77] however, prior to 2023, it was housed within the Department of Business, Energy and Industrial Strategy.[78] The energy regulatory portfolio was spun off when the Department for Energy Security and Net Zero was created in 2023.[79] The text of these cases refers to the OGA, but for simplicity's sake, this Note uses NSTA. Most of the United Kingdom's offshore production occurs in the North Sea and is transported to "coastal terminals in Scotland and northern England."[80]

The first of the three U.K. cases of note is Greenpeace Ltd. v. Secretary of State for Business, Energy and Industrial Strategy, wherein Greenpeace challenged the Secretary's approval of a permit for BP to drill for 30 million barrels of oil in the Vorlich oil field in the North Sea.[81] The EIA prepared by BP, and approved by the Secretary, only discussed "emissions generated by the projects itself," not scope 3 emissions (i.e., those generated by end use).[82] Greenpeace challenged the approval, arguing that the scope 3 emissions are "indirect significant effects," which must be assessed.[83] The Scottish Court of Sessions held that "the consumption of oil and gas by the end user, once the oil and gas have been extracted from the wells, transported, refined and sold to consumers, and then used by them are [not] 'direct or indirect significant effects of the relevant project'" within the meaning of the regulations.[84] As such, scope 3 emissions did not have to be accounted for in the EIA.[85] The only effects the Secretary had to assess were the "effects of drilling the two wells and removing the oil and gas," not their end use.[86] In stark contrast to the U.S. cases discussed above, the court determined "[i]t would not be practicable, in an assessment of the environmental effects of a project for the extraction of fossil fuels,

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76. Thompson Reuters*, North Sea Transition Authority (NSTA): roles, powers and duties*, https://uk.practicallaw.thomsonreuters.com/w-011-6335 (last visited May 6, 2024).

77. *Id.*

78. *Id.*

79. National Security and Investment Act 2021 Order 2023, c. 424 (UK), https://www.legislation.gov.uk/uksi/2023/424/made.

80. Greenpeace Ltd. v. SOS for Bus., *supra* note 67, at ¶ 5.

81. *Id.* at 1–2; *see also Greenpeace v. United Kingdom*, Sabin Center for Climate Change Law, https://climatecasechart.com/non-us-case/greenpeace-v-united-kingdom/ (last visited May 6, 2024).

82. Greenpeace Ltd. v. SOS for Bus., *supra* note 67, at ¶ 25.

83. *Id.* ¶ 63.

84. *Id.* ¶ 64.

85. *Id.*

86. *Id.*

for the decision maker to conduct a wide ranging examination into the effects, local or global, of the use of that fuel by the final consumer."[87] This is despite the fact that methods do, in fact, exist for such assessment.[88] The court made the following statement, in contravention to all other accepted positions concerning transboundary harm and climate science, that "it is difficult to argue that [this project] would have any material effect on climate change."[89] Ultimately, the court stated that this issue was political, not legal.[90]

In a subsequent case, Greenpeace Ltd. v. Secretary of State for Energy Security and Net Zero, the English High Court of Justice largely affirmed the reasoning of the Scottish Court of Sessions.[91] This case concerned the new Offshore Energy Plan, which governs future licensing of offshore oil and gas production.[92] In creating this plan, the Secretary was required to conduct a strategic environmental assessment.[93] Greenpeace alleged that this EIA was deficient for declining to assess end use emissions and for its assumption that, in a no-action alternative (wherein no more licenses for oil and gas exploration would be granted) there would be perfect substitution from foreign sources.[94]

The court found for the government on both counts. It deferred to the government's characterization of the plan as a narrow planning document which "only sets the framework for licensing oil and gas exploration . . . [and] does not set a framework for decisions on . . . downstream development."[95] Since the plan "does not set a framework for the use of petroleum products in vehicles . . . the end uses of the extracted oil and gas are not 'likely significant effects' of the Plan."[96] This appears to rest on a faulty assumption that a scenario exists where the extracted oil and gas do not result in scope 3 emissions.

The court also approved of the government's analysis of a no-licensing alternative.[97] It determined that a no-license alternative would

87. *Id.* ¶ 68.

88. *See* Friends of the Earth v. Haaland, 583 F. Supp. 3d 113, 137 (D.D.C. 2022) (discussing BOEM's use of market simulation models which calculated changes in oil consumption based on different project scenarios).

89. Greenpeace Ltd. v. SOS for Bus., Energy and Indus. Strategy, *supra* note 67, at ¶ 68.

90. *Id.*

91. Greenpeace Ltd. v. SOS for Energy Sec. and Net Zero [2023] EWHC (KB) 2608 (Eng.).

92. *Id.* ¶ 26.

93. *Id.* ¶ 2.

94. *Id.* ¶¶ 30, 118-19.

95. *Id.* ¶ 105.

96. *Id.*

97. *Id.* ¶ 135.

result in either no change in demand or negative effects "due to the higher emissions intensity of most imports."[98] The government relied on a perfect substitution argument, whereby a decrease in domestic production would necessitate an increase in importation of oil and gas, rather than a transition to non-fossil fuel-based energy sources.[99] The court deferred to the government's analysis on this point.[100] As the government properly determined that end use emissions were not a likely significant effect of the plan, changes in end use demand also did not have to be taken into account.[101]

These two decisions are highly concerning for their disregard of international priorities and transboundary harm. They fly in the face of the UNEP's assessment that new fossil fuel projects are incompatible with the 1.5°C goal.[102] Furthermore, these decisions run counter to the ethos of EIAs, which are intended to require governments to consider the likely effects of their actions. The burning of fossil fuels is not only a likely effect of oil and gas extraction, but an inevitable one. The U.K. government's contention that end-use emissions are not likely effects of oil and gas licenses is at odds with this fact. Notwithstanding this false reality, the government's decisions and reasoning now have the imprimatur of the courts. Climate litigation always carries the risk that harmful government activities will be sanctioned, but these results are discouraging.

A final U.K. case deserves mention for reaching the opposite result as the previous cases, albeit in the onshore context: Finch v. Surrey County Council.[103] Here, the Surrey County Council had approved a permit for an onshore oil drilling project, but declined to require the applicant to consider scope 3 emissions in the requisite EIA.[104] Onshore oil drilling in the United Kingdom is governed by the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (2017 Regulations) which, like the 1999 Regulations, require a permit applicant to produce an EIA.[105] In contrast to the 1999 Regulations, it vests approval of permit applications with "the county council for the area in which it is proposed that the extraction will take

98. *Id.* ¶ 122.

99. *Id.*

100. *Id.* ¶ 129-30.

101. *Id.* ¶ 122.

102. U.N. Environmental Programme, *supra* note 1.

103. R v. Surrey County Council [2024] UKSC 20 (appeal taken from [2022] EWCA Civ 187).

104. *Id.* ¶ 37.

105. *Id.* ¶¶ 9, 27.

place," rather than a national authority.[106] While the focus of this paper is on offshore drilling, Surrey County Council is nevertheless relevant because the 2017 Regulations implement the exact same EU Directive as the 1999 Regulations.[107] Thus, interpretations of the requirements of onshore drilling may influence interpretations of the offshore regulations.

In Surrey County Council, the U.K. Supreme Court held that the permit approval was unlawful because "the EIA for the project failed to assess the effect on climate of the combustion of the oil to be produced."[108] The court reached this conclusion based on an analysis of both the 2017 Regulations and the EU EIA Directive.[109] The Directive requires consideration of "direct and indirect … effects of a project."[110] The court considered the European Commission's report Guidance on Integrating Climate Change and Biodiversity into Environmental Impact Assessment, which defines indirect effects as those that "occur away from the immediate location or timing of the proposed action" or those "that occur as a consequence of a primary effect or as a result of a complex pathway."[111] In discussing the nature of scope 3 emissions, the court explained that:

> The fact that the combustion emissions would emanate from activities beyond the well site boundary which were not themselves part of the project was not a valid reason to exclude them. An impact is not precluded from being an effect of a project by the fact that its immediate source is another activity that occurs away from the project site. As already discussed, it is in the very nature of "indirect" effects that they may occur as a result of a complex pathway involving intermediate activities away from the place where the project is located.
>
> . . . The combustion emissions are manifestly not outwith the control of the site operators. They are entirely within their control. If no oil is extracted, no combustion emissions will occur. Conversely, any extraction of oil by the site operators will in due course result in GHG emissions upon its inevitable combustion.[112]

Thus, the court concluded that "combustion emissions are 'indirect effects' of the project in issue here."[113] Therefore, the EIA had to

106.*Id.* ¶¶ 27-28.
107.*Id.* ¶ 9.
108.*Id.* ¶ 174.
109.*Id.* ¶¶ 25-30, 61-64.
110.Directive 2011/92, *supra* note 68, at art. 3.
111.R v. Surrey County Council, *supra* note 103, at ¶¶ 20, 24, 88.
112.*Id.* ¶¶ 102-03.
113.*Id.* ¶ 92.

consider scope 3 emissions.[114] Because the EIA did not do so, the county's approval of the permit was unlawful.[115]

This decision, by the highest court in the United Kingdom, is the first major U.K. case to require EIAs to assess scope 3 emissions.[116] It is also noteworthy for its implicit rebuke of the analysis in the Greenpeace cases and could minimize their impacts, in particular the Scottish Court of Session's conclusion that scope 3 emissions are not indirect effects of fossil fuel extraction.[117] Because both the offshore regulations and the onshore regulations implement the same EU Directive, it is possible that the Supreme Court's ruling in Surrey County Council could offer an avenue for litigation in both contexts. Nothing in Surrey County Council necessarily limits its interpretation of "indirect effects" as including scope 3 emissions to just onshore projects. This case could provide a boost to climate litigation throughout the United Kingdom and make it easier to use EIA litigation to stop future fossil fuel projects.[118]

C. *Australia*

In contrast to the United States and the United Kingdom, where recent EIA litigation has focused on whether and to what extent agencies must consider downstream emissions, recent EIA litigation in Australia has concerned indigenous consultation and land rights. This section traces the litigation history around the Barossa gas field, a multi-billion-dollar project to drill for and transport natural gas in the Timor Sea, off the northern coast of Australia.[119] The present legal challenges were brought by residents of the Tiwi Islands, which are a series of islands in the Timor Sea and the home of several indigenous

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114.*Id.* ¶ 174.

115.*Id.*

116.Daisy Dunne, *Q&A: What does the 'landmark' Horse Hill judgment mean for UK fossil fuels?*, Carbon Brief (June 28, 2024, 13:23 PM), https://www.carbonbrief.org/qa-what-does-the-landmark-horse-hill-judgment-mean-for-uk-fossil-fuels/.

117.Greenpeace Ltd. v. SOS for Bus., Energy and Indus. Strategy, *supra* note 67, ¶ 64.

118.*See* Sarah Finch, *Our incredible win could change the future of oil and gas in the UK*, The Guardian (Jun 21, 2024, 11:46 AM), https://www.theguardian.com/commentisfree/article/2024/jun/21/win-future-oil-gas-uk-surrey-fossil-fuel.

119.Australian Associated Press, *Santos given approval for gas drilling in Timor Sea despite Tiwi Islanders' objections*, The Guardian (Dec. 17, 2023, 22:09 PM), https://www.theguardian.com/australia-news/2023/dec/18/santos-gas-drilling-approved-timor-sea-barossa-project; Lisa Cox, *Santos's $5.8bn Barossa gas pipeline project can go ahead after Tiwi Islanders lose court battle*, The Guardian (Jan. 15, 2024, 20:05 PM), https://www.theguardian.com/australia-news/2024/jan/15/santos-barossa-gas-pipeline-project-tiwi-islander-court-battle-heritage-claim.

communities, collectively, the Tiwi.[120] These cases explore some of the intersections of indigenous and climate issues.

In the first case, Tipakalippa v National Offshore Petroleum Safety and Environmental Management Authority, Dennis Tipakalippa, "a senior lawman of the Munipi clan, the traditional owners of the northern Tiwi Islands," sought to vacate the approval of natural gas drilling in the Barossa gas field.[121] In Australia, the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA) is the federal agency charged with regulating offshore oil and gas activities through implementation of the Offshore Petroleum and Greenhouse Gas Storage Act.[122] This includes accepting an EIA, which in Australia is prepared by the private entity seeking to develop an oil or gas project—in this instance, Santos NA Barossa, an Australian oil and gas company.[123] NOPSEMA may accept an environment plan if it is "'reasonably satisfied' that the plan meets the criteria specified in the Regulations, including that the plan demonstrates that the 'titleholder' (in this case Santos) has carried out the consultations required by the Regulations."[124] The relevant regulations require that titleholders preparing an EIA "must consult each 'relevant person', being a person 'whose functions, interests or activities may be affected by the activities to be carried out under the environment plan.'"[125] In Australia, the Administrative Decisions (Judicial Review) (AJDR) Act, akin to the APA of the United States, "provides that a person who is 'aggrieved by a decision' to which the ADJR Act applies may apply to [the courts] for an order of review in respect of a decision," thus enabling judicial review of agency action in violation of the law.[126]

120.Aleksandra Bliszczyk*, Santos Wins Legal Battle Against Tiwi Islands Elders to Build Gas Pipeline*, Vice (Jan. 15, 2024, 12:15 AM), https://www.vice.com/en/article/bvja8z/tiwi-islands-elders-santos-gas-pipeline; Tiwi Land Council, *The Tiwi Islands*, https://www.tiwilandcouncil.com/index.cfm?fuseaction=page&p=224&l=2&id=56&smid=139 (last visited May 5, 2024).

121.*Tipakalippa v Nat'l Offshore Petroleum Safety and Env't Mgmt Auth. [No. 2]* (2022) FCA 1121, ¶ 8 (Austl.) [hereinafter *Tipakalippa v NOPSEMA*], *aff'd Santos NA Barossa Pty Ltd. v Tipakalippa* (2022) FCAFC 193, ¶ 5 (Austl.); Ben Butler & Lisa Cox, *Tiwi Islanders win court battle with Santos over drilling in traditional waters*, The Guardian (Sept. 21, 2022, 3:12 AM), https://www.theguardian.com/environment/2022/sep/21/tiwi-islanders-win-court-battle-with-santos-over-drilling-in-traditional-waters.

122.*See Tipakalippa v NOPSEMA*, FCA 1121, ¶ 1.

123.*Id.*; Lewis Jackson & Echha Jain, *Australia's Santos receives drilling approval for $4.3 bln Barossa gas project*, Reuters (Dec. 17, 2023, 10:30 PM), https://www.reuters.com/business/energy/australias-santos-says-barossa-environment-plan-accepted-by-regulator-2023-12-17/.

124.*See Tipakalippa v NOPSEMA*, FCA 1121 ¶ 1.

125.*Id.* ¶ 9.

126.*Id.* ¶ 23.

Tipakalippa challenged NOPSEMA's approval of the Barossa gas field on the ground that Santos had not carried out the requisite consultation with the "traditional owners of the Tiwi Islands."[127] The Federal Court of Australia held that Santos's consultation was insufficient and, as such, NOPSEMA's approval was invalid because, as a matter of law, it could not have been "reasonably satisfied" that the EIA fulfilled the consultation requirement.[128] Santos's EIA did not include "any traditional owners" as persons to be consulted.[129] Tipakalippa asserted that he and the Munupi clan, as the traditional owners of the Tiwi Islands, "have 'sea country' in the Timor Sea to the north of the Tiwi Islands, extending to and beyond the [Barossa gas field]. Their asserted rights to that sea country are based upon longstanding spiritual connections as well as traditional hunting and gathering activities in which they and their ancestors have engaged."[130] The court accepted that Tipakalippa and the Munupi clan have an interest in the sea country that includes the Barossa field, and thus count as relevant persons within the meaning of the regulations.[131] This was affirmed on appeal, where the appellate court confirmed that "[w]ithin this regulatory framework, 'interests' includes cultural and spiritual interests of the kind described in the sea country material."[132] Given Australia's large indigenous population, these decisions affirming the legal significance of indigenous communities' cultural and spiritual interests is noteworthy. These holdings present unique litigation opportunities to challenge EIAs on the grounds that consultation with indigenous communities and consideration of their interests were insufficient.

While the Tipakalippa case was successful, the Tiwi Islanders litigation also represents the limits of EIA litigation. Following the above case, Santos submitted a revised drilling plan, which NOPSEMA approved.[133] A new group of Tiwi Islanders brought a lawsuit challenging approval of the pipeline that is to transport the natural gas from the Barossa gas field, rather than the drilling plan itself.[134] NOPSEMA had approved a 262km pipeline to connect the Barossa gas field to

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127.*Id.* ¶ 10.

128.*Id.* ¶ 15.

129.*Id.* ¶ 217.

130.*Id.* ¶ 10.

131.*Id.* ¶¶ 257-58; *Santos NA Barossa Pty Ltd. v Tipakalippa* (2022) FCAFC 193 at 80.

132.*Santos NA Barossa Pty Ltd. v Tipakalippa* (2022) FCAFC 193, ¶ 80 (Austl.).

133.Jackson & Jain, *supra* note 123.

134.*Munkara v. Santos NA Barossa Pty Ltd [No. 3]* (2024) FCA 9, ¶¶ 1–10 (Austl.) https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2024/2024fca0009#_Ref156228455./.

mainland Australia, whose path would cross just 7km to the west of the Tiwi Islands.[135] The Tiwi plaintiffs argued that their tangible and intangible cultural heritage in the waters near their island would be adversely affected by the construction of the pipeline.[136] The plaintiffs described their tangible cultural heritage as potential (but unidentified) Tiwi archaeological sites under the sea.[137] They described their intangible cultural heritage as including the sea country because of the Tiwi people's connection to "ancestral or spiritual beings" which are said to reside in the sea.[138] As the EIA did not address potential risks to Tiwi cultural heritage, the plaintiffs argued that Santos was required to prepare a revised EIA.[139]

Ultimately, the court ruled against the plaintiffs on all claims.[140] As to the tangible cultural heritage, the court determined that "the evidence . . . is insufficient to show anything other than a negligible chance that there exists one or more objects of archaeological value along the pipeline route and situated at a depth at which it might be at risk of damage, destruction or loss."[141] Since the plaintiffs were unable to establish to the satisfaction of the court the existence of any archeological sites on the seabed, the court determined it was unnecessary to assess any risk of impacts to tangible cultural heritage, and thus a revised EIA was unnecessary.[142] As to the claim of impacts to intangible cultural heritage, the court determined that the plaintiffs had not shown that their professed beliefs in a spiritual or cultural connection to the sea country were representative of the beliefs of the Tiwi people generally.[143] By discrediting a belief in a spiritual or cultural connection to the territory, the court effectively determined there was no intangible cultural heritage and thus no new EIA was warranted.

The court also took the further step of criticizing the litigation tactics of the lawyers representing the Tiwi Islanders, the Environmental Defenders Office (EDO). The court admonished EDO for allegedly "coaching" witnesses "to tell their cultural stories in a way that would extend them to the area of the pipeline."[144] The court

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135.*Id.* ¶ 3.
136.*Id.* ¶ 11.
137.*Id.* ¶ 19.
138.*Id.* ¶ 14.
139.*Id.* ¶ 10.
140.*Id.* ¶ 26.
141.*Id.* ¶ 1306.
142.*Id.* ¶ 1308.
143.*Id.* ¶¶ 1003, 1012-14.
144.*Id.* ¶ 994.

discounted the testimony of certain witnesses as a result.[145] The court went on to state that some testimony and evidence submitted by EDO "involve[d] 'confection' or 'construction'" and were "so lacking in integrity that no weight can be placed on them."[146] The court separately noted that Santos alleged that EDO was "pursuing an ideological agenda," though declined to make any rulings on the matter.[147] In the end, EDO was made to pay over $9 million in legal costs to Santos.[148] Taken together, these portions of the opinion, which strike neither to the facts nor the merits of the case at hand, as well as EDO's being made to bear Santos's litigation costs, may have a chilling effect on other indigenous or environmental groups considering similar litigation.

The Tiwi Islanders cases demonstrate some of the limitations and risks of EIA litigation. While government authorities can be made to consider certain factors and risks, or to consult with affected communities, not all effects will be deemed relevant enough to merit review in an EIA. Additionally, if the relevant actors conducting EIA assessments comply with the procedural requirements, as the court here determined, then courts may decline to use EIAs to dictate substantive outcomes, such as project vacatur. While the Barossa gas field project and pipeline were delayed, the project is ultimately on track, with "full-scale [natural gas] production to commence in 2025 as initially planned."[149] Consultation can be a beneficial end in-and-of-itself, but in climate litigation, the goal of parties interested in complying with international climate guidelines is ultimately to halt oil and gas production.[150]

III. DISCUSSION

As the above survey shows, EIA requirements and attendant litigation present significant upsides as well as some risks. This section presents several takeaways from the above survey. EIA litigation can

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145.*See id.*

146.*Id.* ¶ 1027.

147.*Id.* ¶ 1320.

148.Lisa Cox, *Environmental Defenders Office to pay $9m in costs to Santos over failed challenge to Barossa gas project*, The Guardian (Nov. 28, 2024, 6:40 AM), https://www.theguardian.com/environment/2024/nov/28/santos-barossa-gas-project-edo-costs-payment-ntwnfb.

149.Lee Yeon-woo, *Tiwi islanders challenge Korea's investment in Barossa gas project*, The Korea Times (Mar. 11, 2024, 9:33 AM), https://www.koreatimes.co.kr/southkorea/environment-animals/20240303/stop-investing-in-barossa-gas-project-that-hurts-our-sea-tiwi-islanders.

150.*See* Setzer & Higham, *supra* note 18, at 20.

compel consideration of climate impacts as well as delay, raise the costs of, and even stop harmful projects. However, litigation poses risks of generating harmful precedent. Furthermore, EIAs can be used to stop beneficial projects just as they can be used to stop harmful ones.[151] Ultimately, EIA litigation presents a useful but limited path to addressing some elements of the climate crisis.

A. *EIA Litigation Can Force Accountability and Terminate Some Projects*

The foundational purpose of EIAs is to require decision-makers to generate and consider information about project impacts, increase governmental transparency, and engage the public. Litigation can force governments to comply with these procedural steps, a benefit in and of itself. EIAs have been called a form of "informational regulation."[152] Litigation to force the production and consideration of information is important because "you manage what you measure."[153] Governments and project sponsors cannot remedy a problem that they are unaware of. While EIAs generally do not dictate substantive outcomes, the mere production of impact information can force decision-makers to mitigate the worst environmental impacts.[154] As Yang notes in the U.S. context, "one of NEPA's most important positive effects may thus be immeasurable and likely unknowable: the 'anonymous thousands of destructive . . . projects that [were] withdrawn, or never proposed in the first place, in anticipation of NEPA scrutiny.'"[155]

In a review of studies concerning EIAs in the European Union, Frans Oosterhuis concluded that "[r]adical changes in projects due to EIA seem to be rare, but this can in part be explained by the higher environmental awareness that EIA creates among project developers, making them incorporate environmental concerns in project design

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151.*See* Michael Bennon & Devon Wilson, *NEPA Litigation Over Large Energy and Transport Infrastructure Projects*, 53 Envtl. L. Rep. 10836, 10851 (2023) (noting that, in their survey of NEPA litigation from 2010-2018 across different sectors, "solar energy projects have the highest rate of litigation: 64% of all solar projects in the data set are associated with litigation.")

152.Revesz et al., *supra* note 45, at 951.

153.Bradley C. Karkkainen, *Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm*, 89 Geo. L.J. 257, 299 (2001) (*quoting* Louis Lowenstein, *Financial Transparency and Corporate Governance: You Manage What You Measure*, 96 Colum. L. Rev. 1335, 1342–43 (1996)).

154.*Id.* at 296.

155.Yang, *supra* note 22, at 531 (quoting Zygmunt J.B. Plater et al., Environmental Law and Policy: Nature, Law, and Society 320 (4th ed. 2010)).

from the outset."[156] In addition to affecting decision-making, information forcing can increase governmental transparency, which promotes democratic accountability.[157] Citizens and civil society groups cannot effectively challenge government action without knowing what is being decided and why.

Although EIAs are meant to be a procedural tool, successful EIA lawsuits can have substantive outcomes, namely: project delay, revocation of project approvals, and ballooning costs. When EIAs fail to account for climate impacts and other effects of oil and gas development, successful litigation can result in vacatur of project approvals.[158] While in theory a party can almost always return with a fuller accounting, loss in court and subsequent delay can add years to a project. "Delays are frequent in [EIA] preparation," and these delays can be costly.[159] The costs of litigation and delay can result in projects being abandoned.[160] Furthermore, a fuller accounting of costs can generate public attention, making some projects politically unviable.

In the United States, costs to prepare an environmental analysis (a truncated EIA) can range from $5,000 to $200,000; the cost to prepare an environmental impact statement (a fuller EIA) can range from $250,000 to $2,000,000.[161] While in the United States much of these costs are borne by the government,[162] in jurisdictions where the applicant must bear the cost of an EIA, as in many European jurisdictions,[163] raising these costs can make some projects unviable. In the European Union, EIA preparation costs are often under 1% of overall

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156.Frans Oosterhuis, Costs and benefits of the EIA Directive 2 (2007) (in a survey of the costs and benefits of the European Union's EIA directive, notes that the costs of performing an EIA are usually borne by the developer).

157.See Daniel C. Esty, *Environmental Protection in the Information Age*, 79 N.Y.U. L. Rev. 115, 167–70 (2004).

158.E.g., Nathan Bevan, *Oil drilling stops after planning permission axed,* BBC (Oct. 29, 2024), https://www.bbc.com/news/articles/c7896q62e5go.

159.*See* H. Paul Friesema & Paul J. Culhane, *Social Impacts, Politics, and the Environmental Impact Statement Process*, 16 Symp. on Env't Impact Statements 339, 352 (1976) (noting that "Delay is a particularly potent threat, of course, during a time of rapid inflation.").

160.*See id.*

161.Revesz et al., *supra* note 45, at 954.

162.*See id.*

163.Institute for Environmental Studies, Costs and benefits of the EIA Directive 2 (2007) (in a survey of the costs and benefits of the European Union's EIA directive, notes that the costs of performing an EIA are usually borne by the developer).

project costs, but can vary widely.[164] Delays associated with EIA preparation are also common.[165]

Notwithstanding the effects of EIAs on decision-making and project approval, it can be difficult to establish causation between EIA litigation and permanent project cancellation. Typically, when a project proponent loses an EIA-based claim, the project is not permanently enjoined; the project proponent generally has the option of developing a new EIA. For example, there have been multiple successful NEPA suits against the U.S. Bureau of Land Management's approvals of coal mines in the Powder River Basin in Wyoming, where approximately 40% of all U.S. coal originates.[166] These lawsuits have added multiple years of delay to project approvals. In 2024, it was reported that coal production in the Powder River Basis was down 21% from a year earlier.[167] The article attributes this to various factors, including "low prices for natural gas that have displaced coal for burning at power plants."[168] While delays from litigation necessarily raise costs (thus making it harder to compete with lower priced natural gas), it is difficult to know to what extent, if any, the successful NEPA lawsuits directly contributed to falling production in the Powder River Basin.

Michael Bennon and Devon Wilson conducted a recent empirical study that sheds some light on the impacts of NEPA litigation in the United States.[169] They analyzed "355 major transportation and energy infrastructure projects that completed a federal environmental study between 2010 and 2018," assessing rates of litigation, completion, and cancellation.[170] While their data set unfortunately did not include any oil and gas development projects, it did include energy infrastructure such as coal- and gas-fired power plants, wind and solar farms, and transmission lines, as well as transportation projects such as highways and light rail transit.[171] They found that the litigation rate for projects in their data set was 28%.[172] However, this rate can vary widely by

164.Oosterhuis, *supra* note 156, at 2, 7–11.

165.*Id.*, at 10–11.

166.WildEarth Guardians v. Bureau of Land Mgmt., 870 F.3d 1222 (10th Cir. 2017); W. Org. of Res. Councils v. U.S. Bureau of Land Mgmt., 2022 U.S. Dist. WL 3082475 (D. Mont. 2022); Pat Maio, *Coal Production In Wyoming's Powder River Basin Falls 21%*, Cowboy State Daily (Apr. 29, 2024), https://cowboystatedaily.com/2024/04/29/coal-production-in-wyomings-powder-river-basin-falls-21/.

167.Maio, *supra* note 166.

168.*Id.*

169.Bennon & Wilson, *supra* note 151.

170.*Id.* at 10836.

171.*Id.* at 10854.

172.*Id.* at 10850.

sector.[173] For example, 64% of solar projects were subject to litigation, while just 11% of regional rail projects were subject to litigation.[174] By way of explanation for the varying rates of litigation, Bennon and Wilson offer that the "comment-and-litigation process established by NEPA is naturally predisposed toward the local environmental and social impacts of projects, because those are the impacts that motivate stakeholders and interest groups to intervene in the permitting process."[175] Thus, projects with outsized impacts on local communities are more likely to draw attention, and litigation, even when those projects are considered environmentally beneficial, as with utility-scale solar projects.[176]

Bennon and Wilson also assessed rates of project completion and cancellation.[177] Of note, pipelines had a cancellation rate of about 22%, liquefaction projects had a cancellation rate of about 14%, and coal mines had a cancellation rate of about 25%.[178] They note that sectors with higher rates of private financing, such as energy projects, have both higher cancellation rates and high completion rates.[179] This perhaps suggests that such sectors are more vulnerable to litigation, but such projects are also more likely to be finished, in contrast with projects featuring greater public sector backing, which often take longer to complete.[180] While Bennon and Wilson do not establish that the litigation led to the cancellation of projects, their research suggests a correlation at the very least and provides insights into the occurrence and impacts of litigation.

More research should be done to establish causal links between EIA litigation and project cancellation. In their review of studies assessing the effectiveness of EIAs, Loomis and Dziedzic note that "[w]hile some progress has been made on the substantive contributions of EIA, there are still no studies that empirically measure the direct influence of EIA on decision-making, especially behavioral changes

173.*See id.* at 10854.

174.*Id.*

175.*Id.* at 10856.

176.*See id.* In contrast, Bennon & Wilson note that "New rail transit lines were increasingly sited according to existing rights-of-way to avoid potential conflicts over property acquisitions." *Id.* at 10843.

177.*Id.* at 10852–56.

178.*Id.* at 10856.

179.*Id.* at 10853.

180.*See id.*

resulting from the preventative nature of EIA."[181] A greater understanding of the impacts of EIA litigation could improve litigation strategy, providing insight into when to bring EIA claims and against which types of projects.

B. *EIA Litigation Poses Risks of Generating Harmful Precedent*

As with all strategic litigation, EIA litigation poses certain risks, especially for generating harmful precedent, visible across the spectrum of the above survey. NEPA litigation in the United States has successfully required government agencies to account for scope 3 emissions. Litigation in the United Kingdom has had mixed success, with some cases permitting government action despite a lack of scope 3 consideration, though a more recent case explicitly required such consideration. In Australia, while the Tiwi Islanders were able to successfully force Santos to consult them on the gas project, they were unable to stop the project, and the environmental group litigating on their behalf exposed itself to financial risks and potential funding cutoffs.

As another example, litigation in Canada resulted in portions of the country's EIA statute being declared unconstitutional.[182] Canada's Impact Assessment Act was a new federal statute requiring EIAs for "designated projects . . . within federal jurisdiction."[183] The Canadian Supreme Court, however, held that the statute "exceed[ed] federal legislative authority by regulating projects in their entirety (rather than limiting the assessment to areas of federal authority) and by defining effects within federal jurisdiction too broadly."[184] The case turned on some nuances of Canadian constitutional law concerning the federal-provincial balance of powers.[185] The important takeaway for our purposes is that EIA litigation can have serious downsides. This lawsuit has thrown into question the ability of the Canadian government to regulate greenhouse gasses and address the climate crisis.[186] The

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181. John J. Loomis and Maurício Dziedzic, *Evaluating EIA systems' effectiveness: A state of the art*, Env't Impact Assessment Rev. (2018), 34 https://www.sciencedirect.com/science/article/pii/S0195925516303420.

182. Reference re Impact Assessment Act, [2023] S.C.R. 23 (Can.); *see also* Maureen Killoran et al., *Supreme Court of Canada finds the federal Impact Assessment Act unconstitutional*, Osler, (Oct. 13, 2023), https://www.osler.com/en/resources/regulations/2023/supreme-court-of-canada-finds-the-federal-impact-assessment-act-unconstitutional.

183. Killoran et al., *supra* note 182.

184. *Id.*

185. *Id.*

186. *See Lost focus: Supreme Court finds Impact Assessment Act unconstitutional*, Dentons (Oct. 18, 2023), https://www.dentons.com/en/insights/articles/2023/october/18/lost-focus-supreme-court-finds-impact-assessment.

Canadian parliament's latest proposed legislation to comply with this holding drew criticism from environmental groups for exempting many high-emitting projects from environmental review.[187]

This survey shows that cases must be chosen with care. There may be some projects that are better left unchallenged or challenged under bases other than environmental review. EIA compliance is rarely the only grounds for challenging oil and gas infrastructure, even if it may be the most obvious in many instances. Legislative change could ameliorate some of the risks and uncertainty around EIA litigation. Some of the difficulties in adapting EIAs to climate litigation is that many of the statutes requiring environmental review predate the climate crisis. Legislation reforming EIAs to explicitly require consideration of climate impacts, including scope 3 emissions, could solve some of these issues, and make EIAs a tool better adapted to addressing the climate crisis.

IV. CONCLUSION

Strategic litigation is an increasingly important tool in the fight against the climate crisis.[188] The strategy and legal claims for climate cases vary widely.[189] The legal requirement to conduct an EIA is an important basis for many of these lawsuits.[190] This Note has shown some of the successes and failures of EIA-based litigation in three jurisdictions: the United States, the United Kingdom, and Australia. Because of the status of EIAs as a global legal norm, many of the lessons of these cases can be transported across jurisdictions. EIAs can be used to hold governments accountable, generate information, force private and public actors to account for their climate impacts, and delay and stop projects. However, EIAs are a limited procedural tool that cannot guarantee substantive outcomes. Ultimately, as Yang notes, "EIA processes were never intended to be the sole tool for protecting the environment, but one part, albeit a significant one, of a larger environmental governance system."[191] Even with some reform, the inherently procedural tool of the EIA cannot achieve the level of systemic change required to address the climate crisis. Broader political and legislative change are necessary. However, as long as governments continue

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187.David Thurton, *Green groups outraged after Ottawa changes the rules on environmental assessments*, CBC News (May 5, 2024, 4:00 AM), https://www.cbc.ca/news/politics/environmental-assessments-climate-change-1.7192998.

188.U.N. Env't Programme, *supra* note 5, at IX.

189.*See id.* at 25–60.

190.*See id.* at 47–49.

191.Yang, *supra* note 22, at 531.

approving oil and gas projects, EIA litigation will be a useful, if imperfect, tool to challenge these projects.