

frESH Law Horizons

May 2019



NHS Trust fined after employees and contractors Exposed to Asbestos during refurbishment work.

There was no indication that members of the public at the hospital were exposed to asbestos, but the case is a reminder of requirements in relation to control measures to prevent exposure to asbestos. [The Health and Safety Executive \(HSE\) Press Release](#) includes comments from an inspector that the NHS Trust should have identified the type, location and condition of any asbestos-containing materials, by implementing suitable precautions to prevent its disturbance. The HSE website has advice on asbestos and numerous guidance notes, including various [task sheets](#) for building, maintenance and allied trades on how to safely carry out non-licensed work involving asbestos, and frequently asked questions with guidance for employees and members of the public, as well as employers.

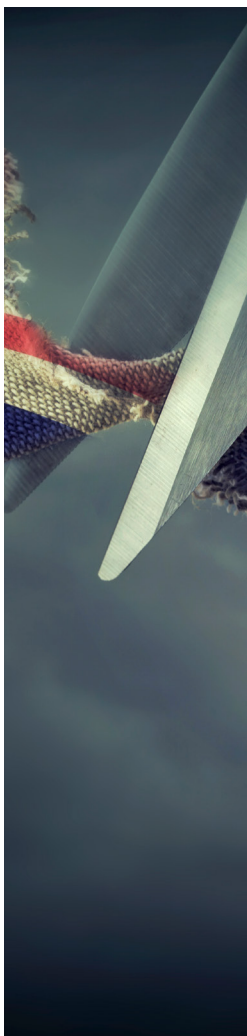
Court fine for obstructing inspections. The Food Standards Agency (FSA) took action against a meat cutting plant that prevented its inspectors from entering its site in 2018. The [press release](#) confirms that Thames magistrates' court fined the company £9,000 and ordered it to pay £1,000 costs.

Corporate manslaughter charges dropped on guilty pleas in relation to health and safety failings. [BBC news reports](#) into the case, involving an American engineering company, following the death of an employee at a plant in Omagh in 2016, indicate that the sentencing hearing will proceed in June.

National Crime Agency seeks investment of £2.7 billion in connection with serious and organised crime. It has published a [Strategic Assessment](#), which refers to serious organised crime gangs targeting businesses. It also includes a focus on exploitation of the vulnerable, including in connection with modern slavery and human trafficking. The assessment notes that car washes, construction and agriculture are the sectors in which labour exploitation is most often uncovered, with victims predominantly male. However, in the past year, referrals of potential victims in the catering sector have also increased significantly, according to the report. The assessment includes advice for anyone who suspects modern slavery to contact the Modern Slavery Helpline.

FSA and Food Standards Scotland (FSS) announce support for full ingredient labelling for foods prepacked for direct sale. The announcements from the [FSA](#) and [FSS](#) follow the Consultation earlier this year. We issued a summary of the key issues arising from the Consultation, available on our website.

Company and director fined for failing to comply with Improvement Notice. This is a reminder of the importance of engaging with the HSE. Its [press release](#) reports that there had been three extensions to the improvement notices, but two notices remained outstanding months after the expiry date. The HSE maintains a public register of enforcement notices, including both improvement and prohibition notices. An improvement notice is a statutory notice issued in accordance with the Health and Safety at Work etc. Act 1974 where an inspector believes that there is a contravention of requirements. It must specify a period for compliance, not less than 21 days from the date of service of the notice. There is an appeal process available.



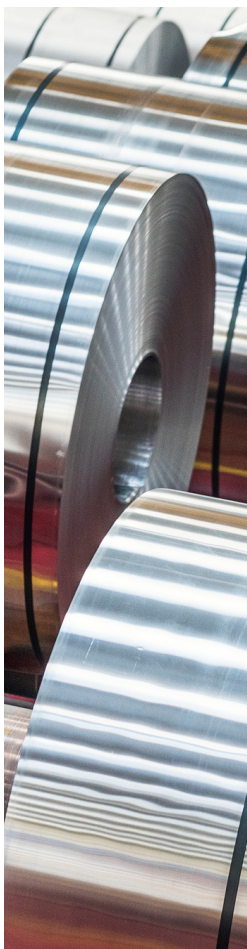
Fine of more than £1 million imposed by Aberdeen Sheriff Court for gas release at offshore platform on Boxing Day 2016. The fine followed a guilty plea by the defendant and is one of the largest imposed for such incidents, despite the fact that the incident did not result in injury. The HSE commented in its [press release](#) that the incident was a reminder of hazards in oil and gas production, that can result in a potentially life-threatening event if not properly managed. However, the case is also a reminder that sentencing for health and safety offences is based on risk of harm, as opposed to actual harm.

Manslaughter conviction of business owner overturned in connection with death of customer caused by allergic reaction to a takeaway. The owner of the food takeaway business had been convicted of gross negligence manslaughter. However, the Court of Appeal has quashed his conviction as unsafe, [holding](#) that when the trial judge directed the jury, he had treated the giving notice of allergies to the restaurant as sufficient to demonstrate notice to the restaurant manager and the appellant (as owner). Although the restaurant manager had received the order form, the owner had not been notified about the terms of the order. The Court nevertheless observed that the responsibilities of a restaurant owner cannot be avoided simply because the owner does not see specific orders and allergy requirements; and that such owner or manager would be guilty of regulatory offences unless an appropriate system was in place (in practice, this would likely include offences under the Food Safety Act 1990 and associated regulations). It also commented on the duty of care owed to customers (which could be the basis of a claim for compensation under common law rules around negligence). The decision certainly does not mean that business owners cannot be liable in these, or similar, circumstances. However, enforcement agencies should, of course, consider the most appropriate offence(s) to charge.

Environment (Principles and Governance) Bill under scrutiny. The Environmental Audit Committee (EAC) has [reported](#) on its review of the draft bill, which provides measures for environmental governance post Brexit, including the proposed Office for Environmental Protection (OEP). The EAC was very critical, highlighting in particular the weakening of environmental principles and lack of accountability. The Commons Select Committee for Environment, Food and Rural Affairs has also published its [report](#) on the Bill and considers that it does not provide the same level of environmental protection as current EU laws, and that the OEP is not sufficiently independent. Lack of provision for climate change governance after Brexit was also highlighted by both committees.

Furore over Natural England (NE) general licences for control of wild birds continues. Following legal action by environmental non-governmental organization (NGO) Wild Justice in April, which resulted in NE [withdrawing the general licences](#) allowing controls of certain birds to protect agricultural interests and for other public health reasons, the system seems to have fallen into disarray. In early May, the Department for Environment, Food and Rural Affairs (Defra) took over decision-making powers from NE on general licences for wild birds, and issued an urgent call for evidence on the impact of the general licence withdrawals. In the meantime, those who previously relied upon the general licences are required to obtain [new licences](#) (although three more specific general licences have now been issued by Defra). In the latest development, it has been reported that Defra is considering reclassifying wood pigeons as quarry to avoid restrictions applying to them. Any land management or game businesses will need to keep abreast of developments on this topic.

Increased focus on use of flame retardants in furniture. The Environmental Audit Committee's [inquiry into toxic chemicals in everyday life](#) heard evidence about the UK's Furniture Regulations' continued encouragement of the use of flame retardants when there is increasing evidence that certain types of retardants can be toxic, and despite consulting on proposed changes in 2014. Suggestions included a producer responsibility scheme for furniture so that it is correctly handled at end of life. In response to allegations raised in this inquiry that two former BEIS employees "sought to hinder the review of the regulations, delayed publishing responses to the 2014 consultation, misinformed ministers and added amendments to require a further consultation and delay in 2016" the government responded that there was "no evidence was found to substantiate" such allegations. Separately, the 2017 [annual report of the advisory Committee on Toxicity of Chemicals in Food, Consumer Products and the Environment](#) has recently been published by Defra, and this also highlights risks of exposure to brominated and organophosphate-based flame retardants.



Committee on Climate Change (CCC) [report](#) calls for net zero by 2050 and UK parliament declares climate emergency. The CCC's latest major report advises the national target for reducing greenhouse gas emissions should be 100% by 2050 compared with 1990, rather than the current 80% target in the Climate Change Act, if the UK is to meet its commitment under the Paris Agreement. This is also known as "net zero emissions". The evening before the report was issued, the UK parliament approved a motion declaring an [environment and climate emergency](#) and calling on the government to, amongst other things, increase the targets under the Climate Change Act to achieve net zero emissions by 2050. This declaration is not binding on the government, but it shows strong support for this issue, and Michael Gove, participating in the debate on this motion, acknowledged that there was a climate emergency, even though he did not support Labour's motion to officially declare one. Achieving these tough targets will require major changes in all economic sectors, including energy-intensive industries, waste, agriculture, infrastructure, transport and buildings.

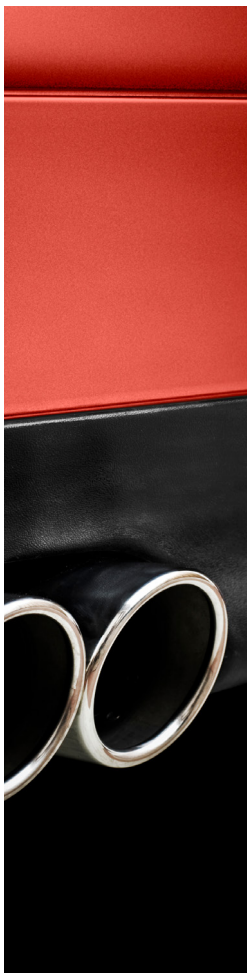
"Reckless and negligent" operator [fined](#) for landfill and asbestos breaches. John Sheehan (Oxford) Ltd, the operator of two waste sites, was fined £17,000 and ordered to pay £25,000 in costs for failing to control leachate levels at its landfill site, for disposing of plasterboard in the landfill, and for storing asbestos outside of the terms of its permit.

Government [steps in](#) to save British Steel from a £500 million EU ETS fine. Under the terms of British Steel's participation in the EU Emissions Trading Scheme (EU ETS), it was due to have surrendered carbon allowances for the previous compliance period by the end of April. However, it seems that the company had sold all of the allowances that it had been allocated for that period, in order to raise capital, in anticipation of being able to use some of its 2018/19 allocation to meet the previous compliance period's requirements. However, Brexit intervened and no new allowances have been issued to UK companies, so British Steel was faced with buying around £120 million government of carbon credits by the end of April, or risk the prospect of penalty of around £600 million for not complying. Not being in a position to do either, the company sought and secured a loan from the government to pay for the allowances. Unfortunately, it seems the company's struggles were more widespread and it has since been announced that the company will now enter an insolvency process.

PFOA [ban agreed](#) under the Stockholm Convention. At the most recent [conference of the parties](#), it was agreed to ban the use and production of perfluorooctanoic acid (PFOA) and its salts and related compounds, as a result of risks to the environment. PFOA is best known for being in fire-fighting foams. Existing exemptions for using and producing perfluorooctane sulfonate (PFOS) and perfluorooctane sulfonate fluoride (PFOSF) were also reduced but they were not banned as recommended by a UN expert committee last year, although PFOS is already banned in the EU.

At the same meeting, which was also a [conference of the parties to the Basel Convention](#) on transboundary shipments of waste, it was agreed that [mixed plastic wastes should be subject to the Basel Convention's prior consent procedure](#). This means that, in future, only plastic waste which has been pre-sorted and destined for actual recycling can follow the "green list" simplified procedure. This move is a response to the large quantities of mixed plastics shipped to the Far East, much of which is not actually recycled.

Welsh Water has prosecuted a wood panel manufacturer for polluting its sewer network. [Kronospan Ltd was fined £80,000](#) and ordered to pay £48,000 costs for breaching its consent to discharge trade effluent when high levels of ammonia were discharged from its facility in Chirk. The discharges are understood to have been related to plant cleaning activities and the company stated that since the incident the site has changed substantially and equipment has been updated.



A government [consultation](#) on carbon pricing and emissions trading post-Brexit looks at different options such as a UK emissions trading scheme linked to the EU one, a separate UK only trading system, and continued participation in EU ETS. In light of its Clean Growth Strategy, the government sets out its commitment to a system which is at least as ambitious as the current EU ETS, and its preferred option is a UK scheme linked to the EU. Comments are invited, and the consultation is open until 12 July.

The Environment Agency has imposed its first [order restricting access to a waste site](#) using powers in The Waste Enforcement (England and Wales) Regulations 2018. A company had been operating the site without an environmental permit, and this order restricts access to the site and prohibits waste acceptance for six months. This is further evidence of the Environment Agency's "crack-down" on waste crime and its use of alternative and additional enforcement mechanisms to achieve this.

Environmental judicial review over Heathrow expansion rejected by High Court. In the case of *R (Spurrier) v The Secretary of State for Transport*, two NGOs had challenged the Airports National Policy Statement and the third runway expansion at Heathrow Airport on environmental grounds, including inconsistency with climate change emission targets. The court acknowledged the serious concerns of the claimants, but could only consider the legality of the decisions and the court did not consider the relevant decisions to be unlawful on any of the grounds raised by the claimants. It remains to be seen whether this will continue to be the position following the CCC report calling for new zero emissions by 2050, which followed shortly after this decision, and which will require more drastic changes to be made if it is to be achieved.

Defra is considering dedicated environmental law tribunals post Brexit, according to recent comments made by Michael Gove when he recently gave evidence to the Scottish Parliament's [Environment, Climate Change and Land Reform Committee](#). He said that the government was "exploring whether there should be a new system of environmental law tribunals, not to mirror but to emulate some of the good work that immigration and employment tribunals do, by developing a body of expertise in the legal profession that ensures that we have rapid adherence to regulations and laws that guarantee environmental protection". There have been various moves to establish environmental tribunals to date but, so far, this has been very limited in scope, and it will be interesting to see how this develops.

EU adopts Single-use Plastics Directive (SUPD). As a final step in the legislative process, the Council of the EU [adopted](#) the SUPD, which is supposed to reduce the impact of certain plastic products on the environment. All member states [voted](#) in favour, except Hungary, which abstained. The European Commission [welcomed](#) the adoption. Prior to the adoption, the Commission formally [expressed concerns](#) about certain procedures and deadlines provided for implementing acts and guidelines. The Directive will enter into force after being published in all official languages of the EU in its Official Journal. Its text has not substantially changed since December. [We have drafted a client alert on the new law.](#)

European Commission highlights plastic measures. In its [contribution to the informal EU27 leaders' meeting and the EU's strategic agenda 2019-24](#), the Commission once more highlighted that "initiatives, including the Plastics Strategy and the ban on single-use plastics, are making Europe a global pioneer in transitioning towards a more circular economy" and listed the "the ban on single-use plastics" as number five of the top 20 EU achievements 2014-19.

ECHA withdraws its intention to investigate the need for a restriction of oxo-degradable plastics. The European Chemicals Agency (ECHA) [followed](#) a request from the European Commission due to the ban of oxo-degradable plastics foreseen in the Single-use Plastics Directive (please see above).



Legal opinion casts doubt over microplastics restriction proposal. [ChemicalWatch reported](#) that a legal assessment commissioned by Cefic (the EU chemical sector association) found that ECHA's proposal does not meet the legal requirements for such a measure under REACH, as it does not identify a hazard or risk posed by substances. By assessing a group of substances identified generically, rather than individually, the restriction proposal would not comply with the requirements provided by REACH. ECHA's [consultation on the proposed restriction](#) started in April and ends on 20 September.

European Commission advisors issue scientific opinion on microplastics. The Commission's Group of Chief Scientific Advisors [published](#) a "Scientific Opinion on Environmental and Health Risks of Microplastic Pollution", which makes the following general recommendations: (1) Broaden policy cover to prevent and reduce microplastics pollution from the marine environment and freshwaters to all water, air and soil, using existing instruments and extending the focus to nanoplastics; (2) Address wider socio-economic and trade-off implications following the Circular Economy rationale (taking into account the risk of regrettable substitution); (3) Promote global cooperation, high-quality scientific exchange and policy coherence, including by creating a global scientific platform on plastics and microplastics pollution, and sharing standardised data globally. The Group of Chief Scientific Advisors provides independent scientific advice to the Commission to support its decision-making regarding specific policy issues.

European Commission appeals annulment of lead chromates authorisation. The Commission has reportedly appealed the decision of the EU General Court to annul the REACH authorisation that it granted for six uses of lead sulphochromate yellow and lead chromate molybdate sulfate red to Dominion Colour Corporation (DCC) in case [T 837/16](#) (please see frESH Law Horizons March 2019). The General Court had found the Commission's handling of the burden of proof regarding the unavailability of suitable alternatives to those uses for which DCC applied to be illegal. [ChemicalWatch reported](#) that the appeal relates to the findings regarding the lawfulness to grant an authorisation for an application that has shortcomings, if the Commission also attaches conditions to the authorisation; and the immediate effect of the judgment, meaning that the applicant must stop placing the substances at hand on the market, whereas it was allowed to do so while its authorisation application was pending. At the time of preparing this newsletter, the court had not yet registered the appeal.

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