

## frESH Law Horizons

August 2019



### **Magistrates court case highlights requirement for contractor management and planning of work.**

A Health and Safety Executive (HSE) [press release](#) reports that Dudley magistrates court issued a fine to contractors in relation hired to repair pipework on a factory roof, but also ordered a higher fine for the company which owned the warehouse. The relevant inspector said after the case that the incident “highlights the need for contractors to be managed properly” and that “both the contractors and those engaging them must assess the risks of the site and the specific work to ensure it can be done safely”.

### **Serious Fraud Office (SFO) publishes corporate co-operation guidance.**

The intention of the [guidance](#) is to assist corporate organisations by explaining what the SFO considers to be co-operation. It gives examples of co-operation and, conversely, what would be inconsistent with co-operation, but ultimately makes clear that even full robust co-operation does not guarantee any particular outcome, and that each case will turn on its own facts. The SFO is actually dropping a significant proportion of cases, according to its [annual report](#) for the year up to 31 March, which recorded that 14 cases were closed without charge this year. The report also includes details of the conviction rate (53% of defendants) and the number of confiscation orders under Proceeds of Crime legislation (POCA).

### **Court of Appeal dismisses appeal by Thames Water against £2 million fine imposed by the Crown Court.**

We reported on the case and the fine in our [January](#) edition of *frESH Law Horizons*. The Court of Appeal held that although the sentencing remarks had failed to set out clearly how the judge reached the level of fine and had not fully engaged in the step-by-step approach set out in the relevant sentencing guidelines, the Environmental Sentencing Definitive Guideline, this of itself did not invalidate the fine, which was not wrong in principle or manifestly excessive. The Court of Appeal stressed the need to achieve the Guideline objectives of “punishment, deterrence and removal of gain”, as well as endorsed the principles for sentencing very large organisations for environmental offences as set out in an earlier *Thames Water* case from 2015. The decision will also have relevance for matters sentenced under other guidelines, such as those that apply to health and safety and food safety offences.

### **Royal Society for Prevention of Accidents (RoSPA) Awards 2019 announced.**

The government’s website, gov.uk, has [reported](#) this month on the gold and silver awards for Sellafield Limited, to recognise safety performance of the company and its contractors working at Sellafield.



**Construction company fined £1 million, and employee, a site supervisor, given suspended custodial sentence following death.**

The HSE [report](#) of the case notes that its investigation concluded that the construction company, which was the principal contractor, failed to ensure the safety so far as is reasonably practicable of its employees and of others who were not their employees working on the site; and that the site supervisor, who was also operating the excavator at the time of the incident, failed to take reasonable care for other persons on site at the time. The case was heard by Southwark Crown Court and the company had pleaded not guilty; therefore, there would have been no reduction in the fine on the basis of plea. The trade press have [reported](#) the comments of a spokesperson for the defendant, acknowledging the importance of striving toward an ever-safer construction sector and the comments of the HSE inspector in the case, that informing all site operatives of the specific risks they face when carrying out such tasks and the control measures required of exclusion zones, the importance of communication and the mandatory use of [excavator](#) safety levers, were simple actions that should have been put in place. This is a reminder to those in the industry to monitor the continuing effectiveness of safeguards in place on site.

**Contingency legislation published covering regulation of medicines and medical devices in the event of a no-deal Brexit.**

The Medical Healthcare Products Regulatory Authority (MHRA) has [reported](#) on the legislation, which relates to MHRA being able to take on regulatory processes for human medicines and devices that are currently undertaken by the European Medicines Agency and other bodies.

**Government seek comments on draft Statutory Guidance for proposed implementation of Offensive Weapons Act 2019, including provisions on remote (online) sales of knives and other bladed articles and new offence for sale of corrosive product to underage person.**

The [legislation](#) (which is approved but is not yet in force) requires that for remote sales, age verification takes place both when a sale is accepted and at the point when the item is delivered. In particular, it provides that a “due diligence defence” can only be relied on in the event of a remote sale, if the seller can show that they took precautions to ensure that the package could only be delivered to someone over 18. Some local authorities are already conducting test purchase operations aimed at online sales of knives, relying on existing provisions under the Criminal Justice Act 1988. The [Consultation](#) closes on 9 October 2019. The draft Guidance is primarily intended for the police and trading standards, but also for retailers; and additionally, is likely to interest manufacturers and suppliers of bladed articles and corrosives.

**Fine increased from £35,000 to £60,000 after Crown Court rejects appeal relating to offence under animal disease regulations.**

A [press release](#) from the FSA gives details of the case, involving a meat cutting plant in Preston. The FSA inspector comments that the case underlines how seriously breaches of public health regulations are taken. However, the case is also a reminder for businesses that appeals can result in fines going up, as well as down.

**HSE issues Safety Notice relating to maintenance and operation of steam pressure systems and the known vulnerability of “Condensate Induced Water Hammer”.**

The Safety Notice follows an investigation by the Office of Nuclear Regulation into injuries caused by a non-nuclear heating system and is available on the [HSE website](#).



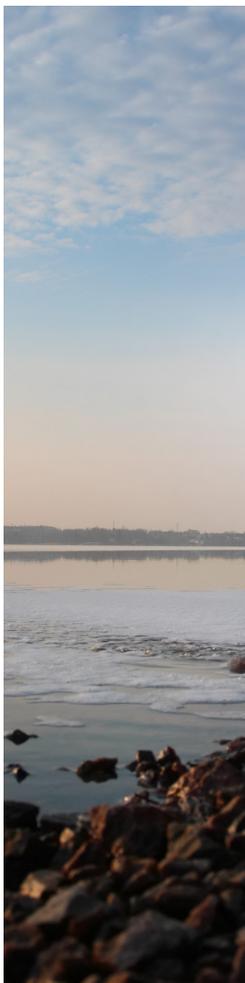


**Almost 60 chemical manufacturers commit to re-evaluating the safety data in their reach registration dossiers.** As reported in *frESH Law Horizons* in June, data was published earlier this year by a German NGO with respect to compliance and completeness of REACH registration dossiers, and the European Chemicals Agency (ECHA) has since raised its target for the percentage of dossiers that will be subject to compliance checks. In response, Cefic, the EU chemical industry association, launched an [action plan](#) for companies to review and, where necessary, bring the registration data on chemicals in line with the most recent guidelines, together with a co-operation agreement between Cefic and ECHA. Cefic has [announced](#) that so far 59 companies have signed up to its plan.

**ClientEarth succeeds in shareholder action against Polish power plant developer.** In a growing trend of cases where corporate law mechanisms are being used for environmental and climate protest actions, ClientEarth has succeeded in challenging a decision by Enea, co-owner of a coal-fired power plant project in Poland, to proceed with the project. ClientEarth is a shareholder in Enea and so is entitled to bring certain legal actions that it would not otherwise have standing to bring. It challenged the resolution on the grounds, among others, that (i) it was an impermissible instruction to the management board of the company and therefore legally invalid and (ii) would harm the economic interests of the company and should therefore be annulled. The court ruled in ClientEarth's favour on the first ground, so did not need to determine the second ground. The decision may be subject to appeal.

**Electrical waste fraudster receives further substantial custodial sentences for non-payment of financial penalties.** Terry Dugbo is currently serving a record seven year and six month custodial sentence for electrical waste recycling fraud, imposed in 2016. In February 2019, he was further ordered to repay more than £1.3 million in a proceeds of crime order. However, he has failed to make any payments toward this order, and insufficient payments toward previous connected fines. Therefore, on 22 August, a court ruled that there was no realistic prospect of Dugbo paying the outstanding amount, and imposed further custodial sentences eight years, 14 months and two months (to be served consecutively and after the completion of his current sentence). Dr Paul Salter, Environment Agency waste crime officer, said: "Dugbo's defiance has led to an extended jail sentence which he will be forced to serve until all the money is paid. This is a clear signal that waste crime does not pay. We take a hard line against anyone that intentionally sets out to profit from defrauding recycling systems."

**Caerphilly County Borough Council has approved the purchase and subsequent demolition of houses in an air pollution hot-spot.** The houses in Hafodyrnys are believed to be on one of the UK's most polluted roads, and this decision follows a 2018 direction from the Welsh government requiring the Council to propose measures to meet the requirements of the EU's Air Quality Directive. The Council has approved the demolition of the properties on the south side of the affected section of the A472 and realignment of the southern footpath to allow it to achieve air quality compliance in the shortest possible timeframe (by 2022), but has been criticised since the measure does not directly address the vehicle emissions that have caused this problem. The Council will buy the properties for 50% above the market rate, and the Welsh Government has agreed to fund the estimated £5 million demolition costs.



**The Committee on Climate Change (CCC) has published advice on carbon pricing,**

including views on the establishment of a UK emissions trading scheme. The advice is accompanied by a [report by consultants Vivid Economics](#). The key messages are that the government should not rely on carbon pricing alone and that it should be part of a suite of policy instruments. CCC agree with the government's preferred option of a post Brexit UK trading scheme linked to the EU scheme, if possible, and recommend that the cap for the UK scheme should be based on the cost-effective path to the UK's net-zero target. CCC will provide that trajectory in their advice on the sixth carbon budget (for 2033-2037), due in 2020. BEIS has said it welcome the CCC's advice and will give due consideration to their analysis of the policy options.

**DEFRA has written to Bristol City Council, threatening legal action if the Council does not submit its already delayed air quality plan.**

There have been numerous delays and previous letters from Defra, and the latest letter gives a further extension, from the end of September to 23 December, for the delivery of the full business case on how the Council will achieve the necessary clean air targets in the shortest possible time, which it had previously been directed by Order to provide much earlier. The letter confirms that "any delay or non-compliance ... will result in me being forced to consider legal action against Bristol City Council which may include issuing proceedings without further notice". It has also been [reported](#) that ClientEarth have also written to the Council threatening legal action over its "seriously flawed" clean air plans. A number of other councils have received similar warnings and threats, and pressure is mounting on local authorities to take decisive action over air pollution.

**In October 2019, new legislation will be laid before Parliament, which will introduce a mandatory Biodiversity Net Gain requirement on most forms of development.**

Following government consultation responses and the release of a new biodiversity metric, we are now able to anticipate to some degree of accuracy what is expected to be contained in the new legislation. For developers and local planning authorities alike, this will represent a new mandatory process, which will likely have implications as to the approach to existing ecological features and potentially viability for the overall scheme. For more details on these proposals, please read our planning team's [article](#) on Biodiversity Net Gain.

**A group of 36 NGOs have written a highly critical letter about the government's proposal for post-Brexit environmental governance.**

It particularly highlights that the Office of Environmental Protection (OEP), which will investigate complaints about public authorities breaking environmental laws would be able to withhold most of the information about its investigations from public scrutiny (except for having to disclose that it was investigating a particular authority). In their letter, the NGOs assert that this "would impose a degree of secrecy which does not apply to any other UK environmental regulator" and "is wholly at odds with the public's right to information".

**Meanwhile, Boris Johnson has said that the UK's environmental standards could "diverge" from EU standards after Brexit.**

In a [letter to European Council President, Donald Tusk](#), the prime minister said, "Although we will remain committed to world-class environmental, product and labour standards, the laws and regulations to deliver them will potentially diverge from those of the EU. That is the point of our exit and our ability to enable this is central to our future democracy". This has led a number of commentators to express concerns about environmental standards being eroded after Brexit, on the basis that divergence could mean lower rather than higher standards.

**The Intergovernmental Panel on Climate Change (IPCC) published a special report on climate change and land.**

This highlights that keeping global warming to well below 2°C, if not 1.5°C, can only be achieved by reducing greenhouse gas emissions from all sectors, including land and food and that governments must, therefore, take early, far-reaching action across several areas of land management. It also states that plant-based foods and sustainable animal-sourced food are key to tackling land degradation, and to preventing or adapting to further climate change.



**20 organisations have signed a letter to the [Times](#) newspaper raising concerns about lack of funding for enforcement bodies.** The signatories to the letter, coordinated by a body called [Unchecked.UK](#), include Green Alliance, RSPB, the Angling Trust, the Institute of Environmental Management and Assessment and the Chartered Institute of Environmental Health. The letter says, "...local authorities and key regulators, including the Food Standards Agency, the Environment Agency, the Health and Safety Executive and others, to do their work with on average 50 per cent less funding than ten years ago". It refers to a steep decline in inspections and monitoring, which risks undermining the achievement of public policy objectives, and states that the shift to self-reporting leaves the regulatory system vulnerable to abuse.

**Three men have been prosecuted for a major fly-tipping operation in Havant.** The Environment Agency discovered the site in September 2018 and found orchestrated dumping of household and commercial waste by trespassers. It cost around £100,000 to clear the site. Three men were convicted at Portsmouth magistrates' court for dumping the waste illegally, and received fines and suspended prison sentences. The men had operated under separate trading names but had all used the same site to deposit waste that they had collected. A fourth man pleaded not guilty and his case was adjourned.

**South West Water has offered a £350,000 enforcement undertaking after a serious pollution incident.** In August 2016, the Environment Agency responded to reports of dead fish in a stream, which was traced to an overflowing manhole on South West Water's combined sewer network. South West Water stopped the discharge the following morning, but substantial damage had been done to the local fish population, with more than 100 brown trout killed. The payment will be made to the Westcountry Rivers Trust to help the river recover from the incident. The enforcement undertaking is a civil sanction, which can be used as an alternative to prosecution. This is a further example of significant financial undertakings being offered by water undertakers, and accepted by the EA, rather than the matter proceeding to prosecution.

**The Environment Agency (EA) has responded to the consultation on changes to standard rules for environmental permits for medium combustion plant (MCP) and specified generators.** Only six responses were submitted, of which five agreed with the proposed revisions, so the EA is proceeding with the proposal to amend existing standard rules for a specified generator, so that they also apply to new MCPs. The EA will publish the revised standard rules permits shortly.

**The CEO of Tesco, writing in the [Guardian](#), has indicated that Tesco will delist brands that use excessive packaging.** Tesco is working with its suppliers to increase efforts to cut down on plastic packaging and, from next year, it will "assess the size and suitability of all packaging as part of our ranging decisions, and if it's excessive or inappropriate, we reserve the right not to list the product". The article also emphasises the need for the government to introduce a more consistent and coordinated recycling framework, with "a standardised national collection and a truly complete and national recycling infrastructure" because, without this, "industry efforts to improve the recyclability of materials used in packaging will not have the impact we need".

**ECHA launches public consultation on authorisation of chromium trioxide.** The 27 applications cover 39 uses of chromium trioxide, used in the manufacture of electrolytic chromium/chromium oxide coated steel (ECCS). Currently, 201 substances of very high concern (SVHC) are on the candidate list for eventual inclusion in Annex XIV of REACH based on various properties. There are 43 substances on that authorisation list (Annex XIV), whose use requires authorisation by the European Commission, which is based on the opinions by ECHA committees. ECHA's eight-week-long [public consultation](#) is part of the process of those committees. The deadline for submission of comments is 9 October.





**ECHA publishes guidance for preparing a scientific report on occupational exposure limits.** The [guidance document](#) follows the conclusions of the [REACH review by the Commission](#) in 2018, which assessed the implementation of [REACH](#) over the period 2013-2017. It highlighted a lack of coherence between the REACH framework and other EU laws, including occupational safety and health legislation. The Commission mandated ECHA to “align methodologies to establish safe levels of exposure to chemicals at the workplace”, in accordance with the findings of a joint task of ECHA’s Committee for Risk Assessment and the Commission’s Scientific Committee on Occupational Exposure Limits.

**European Food Safety Authority (EFSA) opines that the approval of the pesticide chlorpyrifos should not be renewed.** In particular, EFSA identified “concerns about possible genotoxic effects as well as neurological effects during development, supported by epidemiological data indicating effects in children”. In accordance with Commission Implementing Regulation 844/2012, the European Commission had asked EFSA to provide a human health assessment of chlorpyrifos as approval of the active substance (for both chlorpyrifos and chlorpyrifos-methyl) is about to expire in 2020. Based on [EFSA’s assessment](#), the Commission will draft a decision not to renew the approval and put it forward to a technical committee of EU Member States experts. Sweden, Germany, Finland, Denmark, Slovenia, Lithuania, Latvia and Ireland have already banned the use of chlorpyrifos in their territories.



**EFSA asks for comments on chlorinated paraffins (CPs) present in feed and food.** The Commission requested EFSA’s Panel on Contaminants in the Food Chain to investigate the impact of CPs on animal and human health. CPs may be released into the environment during product use and improper disposal. Food is considered the main source of human exposure to CPs. EFSA has launched an [open consultation](#) to get feedback from interested parties on the [draft scientific opinion](#). The deadline for submitting comments is 17 September.

**European Consumer Organisation (BEUC) highlights the presence of chemical substances in printed-paper and board food packaging.** The [study](#) suggests that harmful substances might originate from the inks used for printing after migrating from food packaging to food itself. Paper and board are estimated to be the second most-used type of food packaging in the EU. Yet, as opposed to plastic food contact material, EU rules regarding food packaging have not yet been harmonised. The European Parliament judged this to be detrimental to public health in a [2016 report](#). According to BEUC, the Commission’s Plastics Strategy might even “further exacerbate these concerns as business operators switch to alternatives for which adequate EU rules are not in place”. For that reason, BEUC calls on to the EU to start regulate all food packaging – not just plastic.

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