

frESH Law Horizons

September 2019



Proceeds of Crime Statistics

The Home Office has published the [Asset Recovery Statistical Bulletin](#), which includes data on amounts collected from confiscation orders and cash forfeitures and compensation to victims from confiscation orders, as part of a “snapshot” of assets recovered using Proceeds of Crime Act powers, as amended by the Criminal Finances Act 2017. The data shows that in 2018/19, just under £217 million of “proceeds of crime” were collected, which represents a 21% increase compared with 2013/14. Proceeds of crime powers are used by some authorities regularly in relation to corporate and regulatory offences, such as prosecutions for breaches of environmental or product safety law.

Director Fined and Given Suspended Sentence After Health and Safety Executive (HSE) Investigation

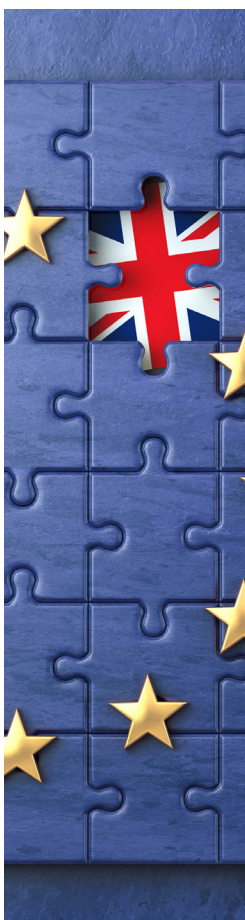
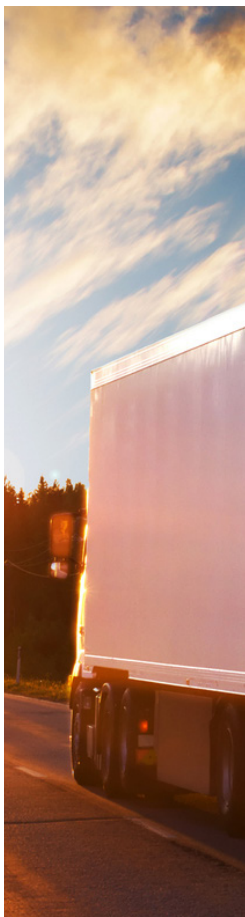
The case involved a worker being impaled on a spike using a crane, which had “severe defects”, including a disabled safety system and part of the safety guard had been cut off. The HSE [report](#) confirms that the director of the company was sentenced to 12 months’ imprisonment, suspended for two years and ordered to complete 200 hours of community service. The case is a reminder that custodial sentences can be imposed on company officers in appropriate cases.

Allergen Labelling Laws for Foods Prepacked for Direct Sale – New Legislation

New legislation implementing the announcement of the government to introduce full ingredient labelling for foods that are “prepacked for direct sale” was put before Parliament on 5 September and will become law on 1 October 2021, as [reported](#) by DEFRA. Foods which are “prepacked for direct sale” are those which are prepared and packed on the same premises from which they are sold, so this will be a relatively narrow category of foods (guidance is due to be published by the Food Standards Agency [FSA] on what this will cover on 1 October 2019). However, it is possible that there may be changes to the way allergen information is provided for other types of “non-prepacked” foods in the future, as views on other foods were also sought as part of the consultation. We published an [article](#) on the consultation in January. The FSA has also [announced](#) this month a number of actions it intends to take to protect people with allergies and intolerances, including implementation of a “pilot project to develop better reporting of allergic reactions”, and an update of the “Safer Food Better Business” guide, to include a review of on the allergens information within that guide.

Fine of £7.8 Million for Breach of Money Laundering Regulations

HM Revenue and Customs (HMRC) has [announced](#) the “record fine” against a business that reportedly ignored anti-money laundering regulations. This month, HMRC also [published](#) a list of businesses that are not complying with obligations, including compliance and registration penalties issued and details of persons who have received a Prohibition on Management. The fine and the publication of the list both demonstrate that HMRC will take non-compliance seriously.



Delivery Vehicles – Preliminary Hearings for Bridge Strikes

Traffic Commissioners are focusing attention on reports of goods vehicles colliding with bridges, following concerns being raised by Network Rail as to the frequency of bridge strikes nationally and the financial and potential safety implications, including due to train cancellations and delays. Commissioners are keen to ensure that companies are taking responsibility for route planning for drivers, including the avoidance of hazards such as low bridges, as well as matters such as appropriate training and maintenance of vehicles. Any bridge strikes could result in a hearing before the Commissioner, possibly leading to a public inquiry. Therefore, transport managers should be reminded of the importance of training/driver briefings on height checks, signage awareness and other relevant safeguards and critically review what is provided to drivers for route planning purposes. This is one of the issues that will be addressed at the [FTA Transport Manager 2019](#) event in the autumn.

Port Operator Fined £300,000 After Worker Injured During Loading Operations

A Liverpool port operating company was sentenced by Liverpool Magistrates Court after a worker was struck by a load falling from two forklift trucks. The HSE [press release](#) indicates that no suitable risk assessment relating to the hazards arising from loading bundles of rebar onto reversing flatbed trailers had been carried out, and the fork lift truck lifting operation was also not properly planned, supervised or carried out in a safe manner. The company pleaded guilty to breach of s.3(1) of the Health and Safety at Work etc. Act 1974.

Government Consultation on Proposed Mandatory Installation of Sprinkler Systems in Residential Buildings of 18 Metres

Industry news [reports](#) refer to this requirement affecting all buildings six storeys and higher (whereas, the current requirement relates to buildings approximately 10 storeys and higher). The [consultation](#) closes on 28 November 2019, and seeks views on proposals to improve wayfinding signage within blocks of flats, and to install evacuation alert systems for use by fire and rescue services.

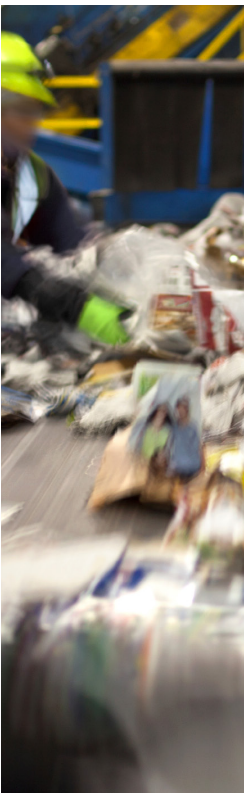
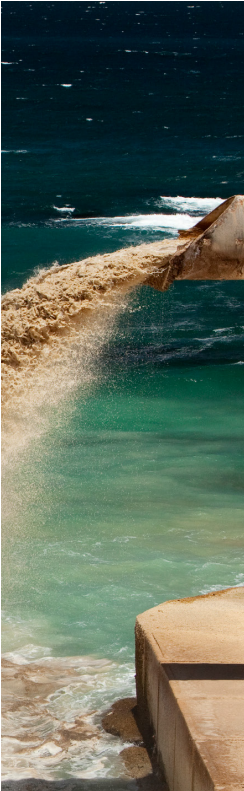
A two-year investigation into the destruction of a site of special scientific interest (SSSI) in Yorkshire, which resulted in a [£600 fine](#), has apparently cost Natural England [£61,000](#),

but it was only able to claim back £300 in costs, according to the [ENDS Report](#). A farmer was fined for building a track through an SSSI under the Wildlife and Countryside Act. Whilst Natural England issued information about the prosecution, it did not state the amount of money involved in the prosecution. However, ENDS has apparently seen an internal DEFRA memo showing that Natural England spent £61,000 in bringing the case to the courts; meaning it recovered less than 0.5% of its expenses.

ClientEarth has [warned](#) 105 local councils that they could face legal action if they fail to meet duties to include emissions reductions targets and policies in their local plans, in order to contribute to the achievement of the net zero carbon target in the Climate Change Act 2008. The councils in question are currently developing their new local plans, and ClientEarth has given them eight weeks to respond to their letter.

The International Standards Organisation (ISO) Is Developing a [Standard](#) for Radiative Forcing

Existing climate-related standards, like ISO 14064 focus on greenhouse gases, but this new draft standard, which will become ISO 14082, is based on radiative forcing (the difference between radiation absorbed from the sun and that radiated back into space). This standard will look at the climate footprint of so-called climate forcers, such as black carbon and other particulates, which have an impact on radiative forcing and, therefore, climate change impacts. When finalised, the standard will provide principles and guidance for quantifying radiative forcing footprints, helping to identify actions to manage and reduce radiative forcing.



The Commission's latest communication on [no-deal Brexit preparedness](#) indicates that only **52% of UK-based REACH registrants have transferred their registrations** to an EU 27 company. This will be a pre-requisite if companies want to continue to supply into the EU after Brexit without interruptions (unless their EU customers agree to register instead). ECHA subsequently issued a press release urging companies to [act and prepare for no-deal Brexit to stay on the market and keep supplies](#). ECHA has left open its "Brexit window", allowing companies to transfer registrations, and any companies that do hold UK REACH registrations should be taking steps to set up the transfers in REACH-IT, ready to complete them as and when a no-deal Brexit takes place.

Indonesia is [sending 547 containers of waste back](#) alleging contamination, of which 19 are headed back to the UK. Indonesia, following China's action in 2018, is also clamping down on acceptance of waste consignments, and making sure that they contain what they claim to contain. Waste company Biffa has recently pleaded not guilty to allegations of illegal exports of waste to India and Indonesia, and is appealing a conviction for exporting contaminated waste to China in 2015, for which it was fined £350,000 with £240,000 costs and a confiscation order of £9,912. The Environment Agency (EA) has also recently confirmed that it is to investigate the contents of 42 containers of plastic waste that are being repatriated to the UK from Malaysia. UK businesses are rapidly having to find alternative ways of dealing with the wastes that they used to send to these countries, and any wastes that are still being sent are subject to significantly increased scrutiny.

The government's recent speech on spending priorities included a number of high-profile environmental aspects, including an announcement that DEFRA would be given £432 million of funding to set "world leading environmental standards", £30 million each to tackle air quality and biodiversity, and new funding for BEIS to develop programmes to meet the net zero carbon 2050 target. Of course, it remains to be seen if this government will still be in office to implement these statements!

Start of Enforcement Regime for EU Invasive Alien Species Has Been Delayed

The [Invasive Alien Species \(Enforcement and Permitting\) \(Amendment\) Order 2019](#) amends the Invasive Alien Species (Enforcement and Permitting) Order 2019, which introduces an enforcement regime for the EU Invasive Alien Species Regulation 2014. The commencement date has been moved back from 1 October 2019 to 1 December 2019 to allow for consultation on IAS management measures that will be licensed under the Order. The deadline for the Secretary of State to publish a report on its review of the Order has also been deferred from 1 October 2024 to 1 December 2024.

A House of Commons Housing, Communities and Local Government Committee's [Report](#) Advises Flexibility for Councils to Meet Waste Strategy Recycling Targets

In a report about the government's Resources and Waste Strategy for England, the Committee highlighted in particular that if councils are not given flexibility to determine the most effective strategies for their communities, the strategy risks placing a needless burden on local authorities by enforcing a prescriptive national approach to recycling and waste management. It also called for more information on the additional sources of funding to councils to meet the additional costs, including set-up costs and ongoing operation and clarification on how money from the proposed extended producer responsibility scheme for packaging waste will be passed on to councils.



The EA Has [Announced](#) Review of Quality Protocols That Establish End-of-Waste Criteria

The 13 existing quality protocols govern when specified types of waste, including glass, compost and aggregates, cease to be waste and, therefore, are no longer governed by waste legislation. The EA believes that some or all of the protocols may now be out of date, and "might not meet current technical or legal standards, or might not support the latest waste processing technologies". The EA is considering three options for each protocol: (i) The EA supports the protocol and will keep current wording or make minor amendments and reissue as a "Resources Framework"; (ii) the EA does not support it but industry wants it to be retained and will meet the costs of a complete overhaul before being reissued as a Resources Framework; or (iii) the EA no longer supports it and industry will not fund revision, so the protocol would be removed and waste would have to be assessed on a case-by-case basis for end of waste. The review will take place in stages between now and 2020, and any companies currently relying on the protocols should follow the review closely and get involved in any consultations.

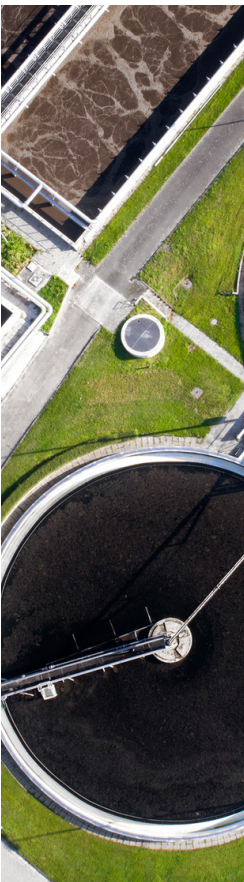
Anglian Water has been [fined £146,000 for polluting a stream with sewage in August 2016](#), and ordered to pay £10,676 in costs. Leicester Magistrates' Court found a lack of maintenance led to a number of failures at Anglian Water's Yardley Hastings sewage plant and resulted in pollution affecting more than a kilometre of a tributary of the river Nene. EA officers found levels of ammonia downstream of the spill were toxic to aquatic life and 20 times higher than upstream.

The Court of Appeal Upheld a Decision to Refuse Planning Permission for a Housing Development on Air Quality Grounds

In [Gladman Developments Ltd. v Secretary of State for Communities and Local Government and Swale BC and CPRE Kent](#), the developer had offered a substantial financial contribution in line with Defra's methodology, to mitigate air pollution impacts, but the Inspector concluded that there was no clear evidence to demonstrate the likely effectiveness of these mitigation measures (particularly in light of the criticism of overly-optimistic emissions modelling in the ClientEarth air quality litigation). The court held that the Inspector was entitled to consider the impacts of the proposed mitigation measures, and did not have to accept that just because the sum had been correctly calculated, they would necessarily be effective. The developer had also argued that the Inspector should have accepted the assumption in the air quality modelling that the revised national air quality strategy would be in place and working by the time the development was completed, but the court accepted that the Inspector was right not to speculate about the timing and likely effectiveness of the government's revisions to this strategy. This is an important judgment in the developing line of cases about properly taking account of air quality considerations in decision and policy making, and not just falling back on or assuming the effectiveness of, existing or planned policy measures.

Natural Capital Committee (NCC) Publishes Response to DEFRA Plans

NCC published a [response](#) to the DEFRA net environmental gain commission, which builds on [advice](#) it issued in April. The response answers questions commissioned by DEFRA on broad principles, metrics and delivery of net environmental gain and addresses questions related to marine net environmental gain. On the same day, NCC also published a [response](#) to DEFRA's first progress report on its 25-year environment plan, giving its assessment of the progress report and [advice](#) on the development and implementation of the 25-year environment plan, including NCC's thoughts on what the plan should aim to achieve, how it will do that and what success will look like. In assessing the 25-year plan progress report, NCC highlighted in particular that DEFRA has not provided an assessment of whether the natural environment in England has improved, and that there is some worrying evidence of declines in England's environment, and that there is an urgent need to establish a comprehensive baseline of England's natural capital assets through an environmental baseline census.





The EA is [launching a review](#) of permitted waste sites in the bio-waste sector, which includes composting, anaerobic digestion and mechanical biological treatment. This will begin with a standard rules permitting consultation in the autumn. The EA states that this sector is “critical to a closed loop, circular economy and is particularly important as it helps support agriculture, reduces the need for inorganic fertilisers, mitigates against decreasing soil quality as well as helping to meet renewable energy targets and reducing our reliance on fossil fuels.” The review is intended to embed recent changes in legislation to ensure compliance with best available techniques and emission limits, and will seek to improve the quality of recovered material and improve the performance of the sector. Affected businesses should ensure that they consider the upcoming consultations and respond where applicable.

EA Brings Waste [“Outlaws” Merry Adventures](#) to an End in Prosecution of Company Directors

The directors of two Bradford-based businesses were prosecuted by the EA for waste offences and were given suspended sentences, unpaid community work and fines after the discovery of illegally stored mixed household, commercial and industrial waste material at their company’s (Robin Hood Group Ltd) premises in Bradford. Over 275 tonnes of waste were taken to the site between January and March 2017. Despite both men claiming that they intended to ship the waste abroad to burn as fuel, the vast majority still remains at the site, two years later. One of the directors was also served with a Regulation 44 Notice under the Environmental Permitting Regulations 2016, which obliges him to clear the offending waste within six months or face a contempt of court hearing. The EA’s officer said, “This was a clear case of a rogue operator trying to circumnavigate environmental law for their own financial gain. This sentence sends out a strong message that the Environment Agency and Courts will hold businesses and individuals to account for harm to the environment”.

We have just published a post on our [frESH Law blog](#) called [Japanese Knotweed, Hybrids and UK Case Law – a growing concern?](#), examining some of the latest developments in relation to the ongoing concerns over Japanese Knotweed and its hybrid forms, including the so-called “Bohemian Knotweed”.

Environmental Audit Committee’s (EAC) new [report on planetary health, Our Planet, Our Health](#), highlights the extent to which climate change could affect the health and well-being of the UK’s population. The Planetary Health inquiry considered the effect of environmental damage and climate change on health, food security, life in cities and air quality. The report claims that the government has failed to ensure that the UK is prepared to face the public health consequences of widespread environmental damage, and warns in particular of climate-related risks. The EAC has also repeated its call for a new Clean Air Act to mitigate against the impact of poor air quality on human health.

Chinese Food Company Has [Received a Record Fine for Polluting a Sewer](#)

Thames Water prosecuted one of the UK’s largest Chinese kitchens, resulting in a fine of over £420,000 (the largest fine ever received for this type of offence) for illegally allowing trade waste to enter the sewers, which could create “fatbergs”. Hypergood Ltd, trading as Royal Gourmet, which supplies restaurants across London, admitted 20 offences under the Water Industry Act 1991. Thames’ investigation found uncontrolled trade effluent from the company’s Park Royal site was not only entering foul waste sewers, but also surface water sewers, which flow directly into rivers and streams. The discharges took place in 2017 and 2018, and despite numerous warnings and attempts to resolve the issue, the company continued to make the discharges





European Commission Decides to Move Ahead With Classification of Titanium Dioxide (TiO₂) in Inhalable Powder Form as a Category 2 “Suspected Human Carcinogen”

In its [2017 opinion](#), the European Chemicals Agency’s Risk Assessment Committee (RAC) proposed to classify TiO₂ as a substance suspected of causing cancer *by inhalation* (category 2). The Committee, which is composed of member state experts, could not agree upon whether and how to classify the controversial chemical. After a legislative change in the applicable procedure (please see [frESH Law Horizons April 2019](#)), the Commission now consulted a different body, [CARACAL](#), the meeting of the Competent Authorities for REACH and CLP, on its most recent proposal. After the Commission adopts it, the European Parliament and the Council will have two months if they want to formally object to it. Otherwise, it will enter into force.

European Chemicals Agency (ECHA) Committee for Socio-Economic Analysis (SEAC) Adopts [Final Opinion](#) on the Proposal to Restrict Eight Polycyclic Aromatic Hydrocarbons (Pahs) Found in Granules and Mulches

The opinion supports a [proposal](#) by the Dutch National Institute for Public Health and the Environment (RIVM) in August 2018 to restrict PAHs, which are used notably in synthetic turf pitches and playgrounds. In 2016, the RIVM had found that playing sports on synthetic turf fields was safe; yet it [recommended](#) adjusting the standard for rubber granulate to one that is closer to consumer products’ standards. In 2017, ECHA [found](#) that levels of PAHs measured in granular infill material and mulches are of low concern. However, in a [study](#) published in July 2018, the RIVM said that the use of rubber granulate on synthetic turf pitches can be harmful to the environment in the close vicinity of these pitches. The Commission will now consider the final opinion and could submit a draft restriction measure to Member States experts in the REACH Committee for approval.

European Chemicals Agency (ECHA) [Publishes](#) Information Requirements for the Future Waste Database

The database will contain information on substances of very high concern (SVHCs), which are included in the REACH Candidate List, in articles or complex objects (products). The revised Waste Framework Directive entrusted ECHA with the responsibility to set up and maintain such a database. While contributing to a more circular economy, this database serves three main purposes: “making information available”, “decreasing the generation of waste containing hazardous substances” (and replacing it with safe alternatives), and “allowing authorities to monitor the use of substances of concern and initiate appropriate actions over the whole lifecycle of articles”. From January 2021 onwards, companies supplying articles containing SVHCs will need to communicate information on their safe use to ECHA. This obligation, which extends the REACH duty of suppliers to communicate throughout the supply chain about SVHCs in their articles, covers all products placed on the EU market containing a SVHC in a concentration above 0.1% w/w. ECHA provided a list of [“Detailed Information Requirements”](#) and will launch a user test group and a stakeholder workshop during Autumn 2019, with the prototype version of the database due to be ready by early 2020.





EU Court Upholds Decision by the European Chemicals Agency (ECHA) to [List Bisphenol A \(BPA\)](#) as an Endocrine Disrupting Chemical With an Impact on Human Health

BPA is an industrial additive used in the manufacturing of plastic products. In the EU, it has been banned in certain products, such as baby bottles, since 2011, and has been classes as toxic for reproduction since 2016. Additionally, BPA has been included in the REACH Candidate List of SVHC, including for endocrine disrupting properties. European trade body PlasticsEurope [lost a court case](#) against the SVHC listing as toxic for reproduction in July 2019 (case T-185/17; please see [frESH Law Horizons July 2019](#)). PlasticsEurope brought another action for annulment (case T-636/17), this time in respect of ECHA's decision to classify BPA as a substance with endocrine disrupting properties that may have serious effects on human health. Among other arguments, PlasticsEurope submitted that ECHA had failed to establish the endocrine disrupting properties and had not provided scientific evidence of BPA's serious effects on human health, which would give rise to the very high level of concern referred to in REACH. NGO ClientEarth and the France intervened before the court to support ECHA's decision. The General Court dismissed PlasticsEurope's claim on the basis that it had failed to effectively contest the scientific assessment conducted by ECHA. The court notably emphasised that "there is enough evidence to suspect that bisphenol A possesses other endocrine disruptor modes of action in addition to that which has already been identified". PlasticsEurope has also challenged the identification of bisphenol A as an endocrine disruptor with impact on the environment; the hearing for this third case is expected in October.

European Commission Opens [Public Consultation](#) on Amending Annex II of REACH on Safety Data Sheets (SDS)

Hazardous chemicals manufactured in or imported into the EU must be accompanied by an SDS pursuant to REACH Annex II. The Commission proposes amendment of Annex II as a way to "align the data sheets with new UN requirements and requirements for nanomaterials, and clarify certain aspects on information issued by poison centres." The feedback period ends on 10 October.

Member State Experts Unanimously [Back a Proposal of the European Commission](#) to Increase the Compliance Check Target for REACH Registration Dossiers

Based on the [findings](#) of ECHA, the non-compliance of registration dossiers constitutes a key issue hampering progress in REACH implementation. ECHA and the Commission launched a [Joint Evaluation Action Plan](#) to address the lack of compliance of the information in the registration dossiers. The REACH Committee approved the Commission [proposal](#), under which ECHA must check "by 2023 20% of dossiers for substances registered in very high volumes (over 100 tonnes per year) and by 2027 20% of dossiers for substances registered in lower volumes (1-100 tonnes per year), covering approximately 30% of all registered substances". The Commission will adopt the amendment to REACH after a period of three months of scrutiny by the European Parliament and the Council. The Commission is currently also working on an Implementing Regulation to further specify by which timelines registration dossiers must be updated. In addition, it intends to specify certain REACH information requirements to facilitate industry compliance and evaluation procedures. The REACH Committee is expected to discuss these changes before the end of this year.



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