DLA PIPER

SPRING/SUMMER 2016

SHE MATTERS

The Safety, Health and Environment newsletter from DLA Piper UK LLP

IN THIS ISSUE

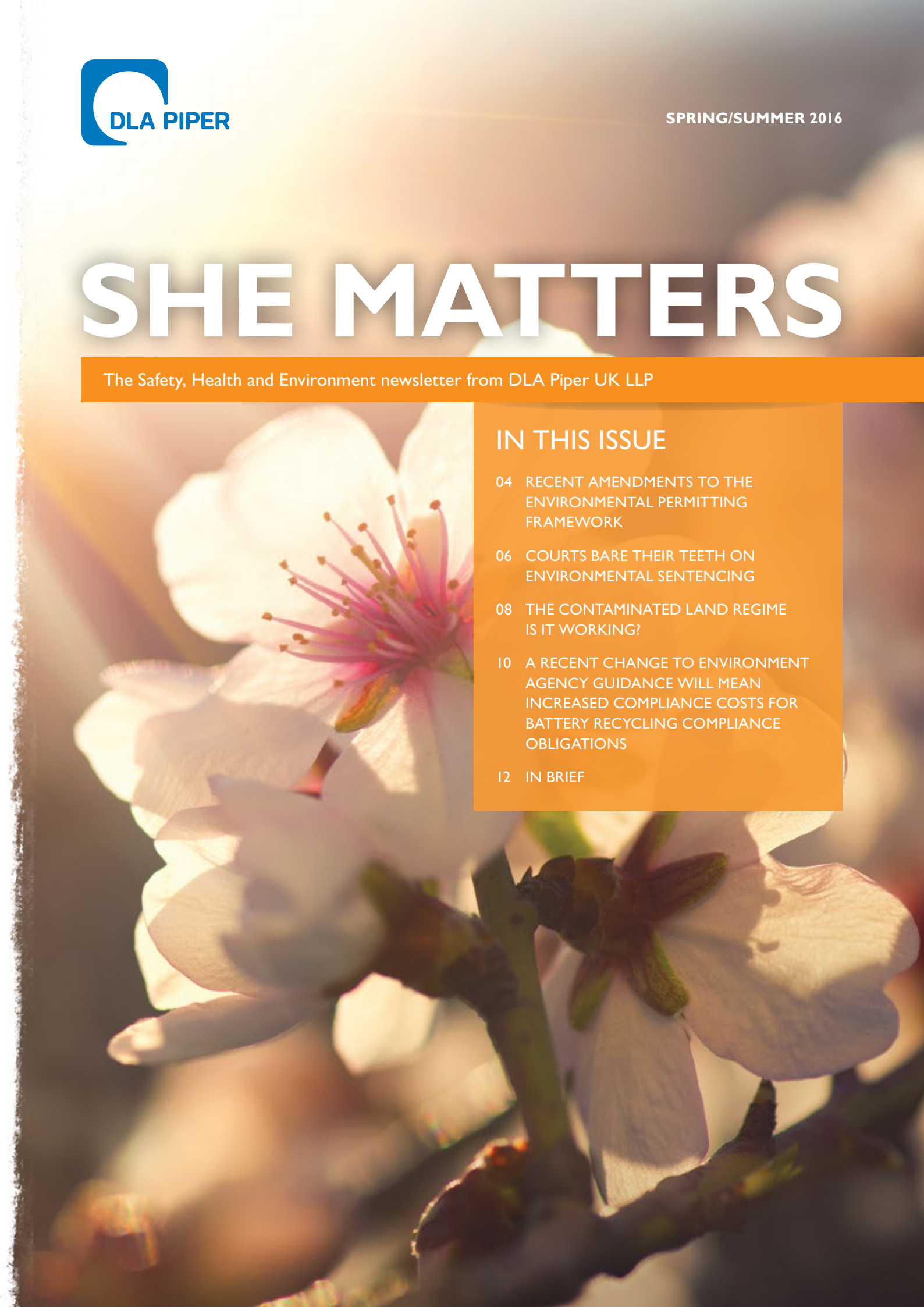
04 RECENT AMENDMENTS TO THE ENVIRONMENTAL PERMITTING FRAMEWORK

06 COURTS BARE THEIR TEETH ON ENVIRONMENTAL SENTENCING

08 THE CONTAMINATED LAND REGIME IS IT WORKING?

10 A RECENT CHANGE TO ENVIRONMENT AGENCY GUIDANCE WILL MEAN INCREASED COMPLIANCE COSTS FOR BATTERY RECYCLING COMPLIANCE OBLIGATIONS

12 IN BRIEF



SHE MATTERS

Teresa Hitchcock
Partner

Following the outcome of a so-called Brexit referendum it is clear that a significant period of uncertainty will follow while this country works out its new trading arrangements with fellow European countries and the rest of the world. The sharp differences in voting outcomes between England and Wales, on the one hand, and Scotland and Northern Ireland on the other may even lead to a re-definition of what this country is. However, from the perspective of the areas of regulatory law on which I advise, it seems unlikely that the outcome of the referendum, will make any very dramatic or immediate difference.

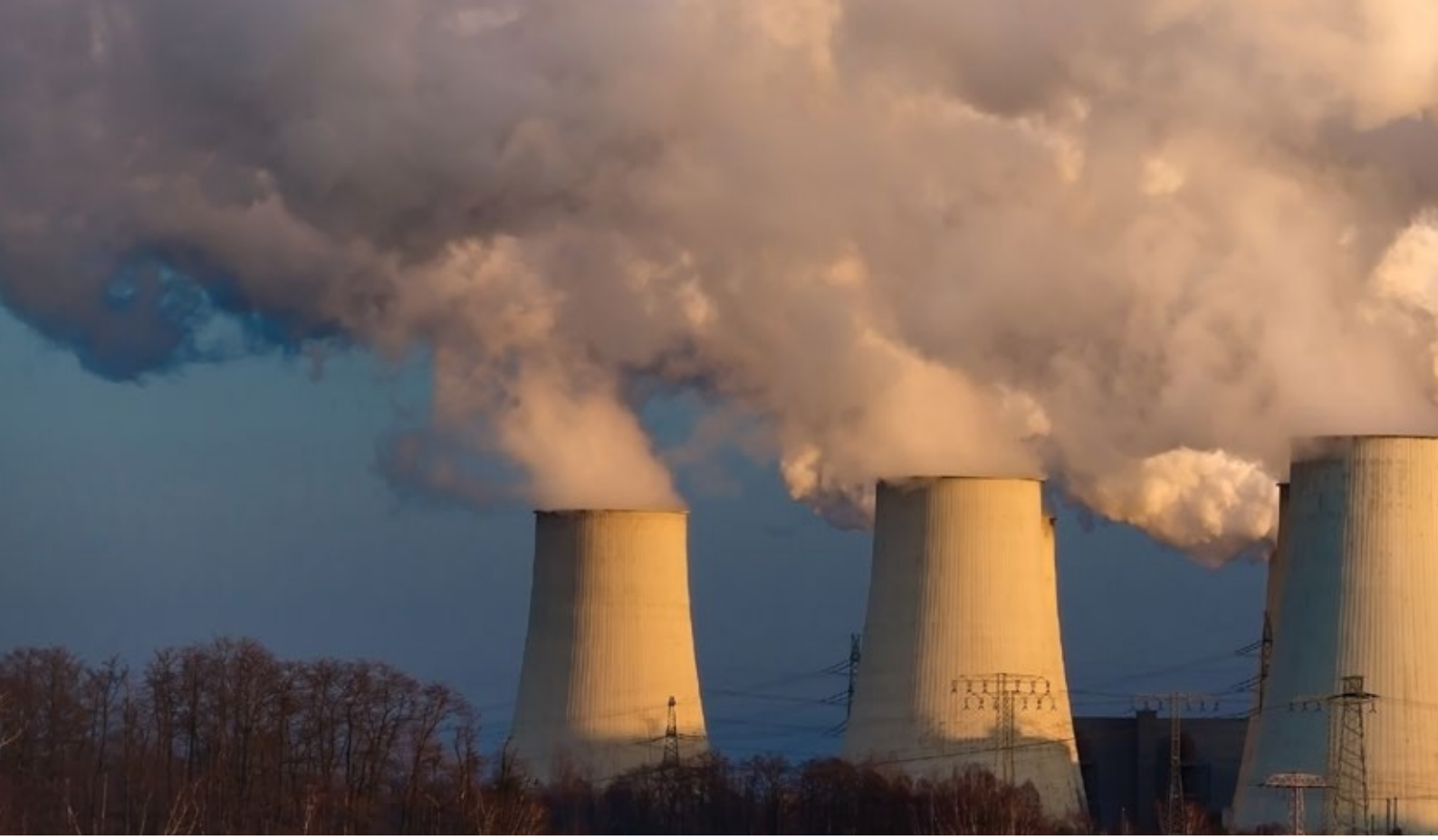
Take environmental law

Environmental law in the UK is now almost exclusively governed by EU law, and in England and Wales in particular, EU legislation is increasingly transposed only indirectly, by reference to the relevant EU instrument, rather than being expressly set out in the transposition legislation. In the short to medium term, it would therefore be essential for transitional arrangements to be in place to provide for the EU legislation to continue to have effect. In the longer term, if the model ultimately adopted for our continuing relationship with the EU, with which we must continue to trade to some extent, permits significant change in our environmental laws, the position is less clear. Certain aspects of environmental law, in the areas of waste management policy, or air quality, were forced on the UK by the EU against its will, but there may not now be any great pressure to change them. In other areas, such as climate change and integrated pollution prevention and control, the current law itself results to a significant extent from previous UK initiatives. There are therefore powerful factors operating against a radical change flowing from Brexit. It should perhaps also be pointed out that some aspects of current environmental laws are perhaps unduly prescriptive and the process for seeking agreement amongst Member States for change is cumbersome. Freedom from that process might provide a longer term benefit from Brexit. However, radical and immediate change seems unlikely, regardless the outcome of the referendum.

Product safety law is also likely to require to be maintained in force much as it is, in order to preserve market access to the EU. Furthermore, in the longer term the EU "New Approach" model for sectoral product safety legislation in which only general "essential safety requirements" are imposed and suitable arrangements made for their enforcement, is one which we are likely to wish to follow in any event, in view of its generally happy combination of safety for consumers and the workforce, with flexibility for manufacturers.

Health and safety law as it applies between employers and employees, as opposed to between businesses and third parties, is now also largely set by EU Directives, but following a pattern originally adopted in the UK under the Health and Safety at Work etc Act 1974. As a country with one of the better workplace safety records in Europe, we are unlikely to wish to change the law radically.

It remains to be seen whether the electorate's decision to reject the long term European Union Project in favour of greater national autonomy will involve a cost in terms of national prosperity. However the decision is unlikely to effect a great change in our regulatory law.



RECENT AMENDMENTS TO THE **ENVIRONMENTAL PERMITTING FRAMEWORK**

Environmental Permitting is governed by the Environmental Permitting (England and Wales) Regulations 2010. The Regulations have been subject to a number of amendments since coming into force on 6 April 2010. There have been two recent amendments so far in 2016.

First, to mention briefly is the Environmental Permitting (England and Wales) (Amendment) Regulations 2016 (SI 2016/149). These came into force on 13 May 2016 following a consultation published by Department for Environment, Food and Rural Affairs (DEFRA) in November 2015. It amends the regulations to impose EU Standards in respect of petrol vapour recovery during refuelling of motor vehicles at service stations. This implements the Commission Directive 2014/99/EU October 2014 amending Directive 2009/126/EC.

The other recent amendment to the Environmental Permitting regime came in the form of Environmental Permitting (England and Wales) (Amendment) (No. 2) Regulations 2016 (SI 2016/475). These were made on 24 March 2016 and came into force on 6 April 2016. The scope of the 2010 Regulations is extended to include flood risk activities as a regulated facility, in order to replace previous legislation dealing with flood defence consents.

Previously, flood defence consents to regulate activities on watercourses or near watercourses were fairly complex as they are dealt with under different regimes. The amended Regulations require an environmental permit for flood risk activities and provide for activities such as the variation, transfer, surrender and appeal of a permit.

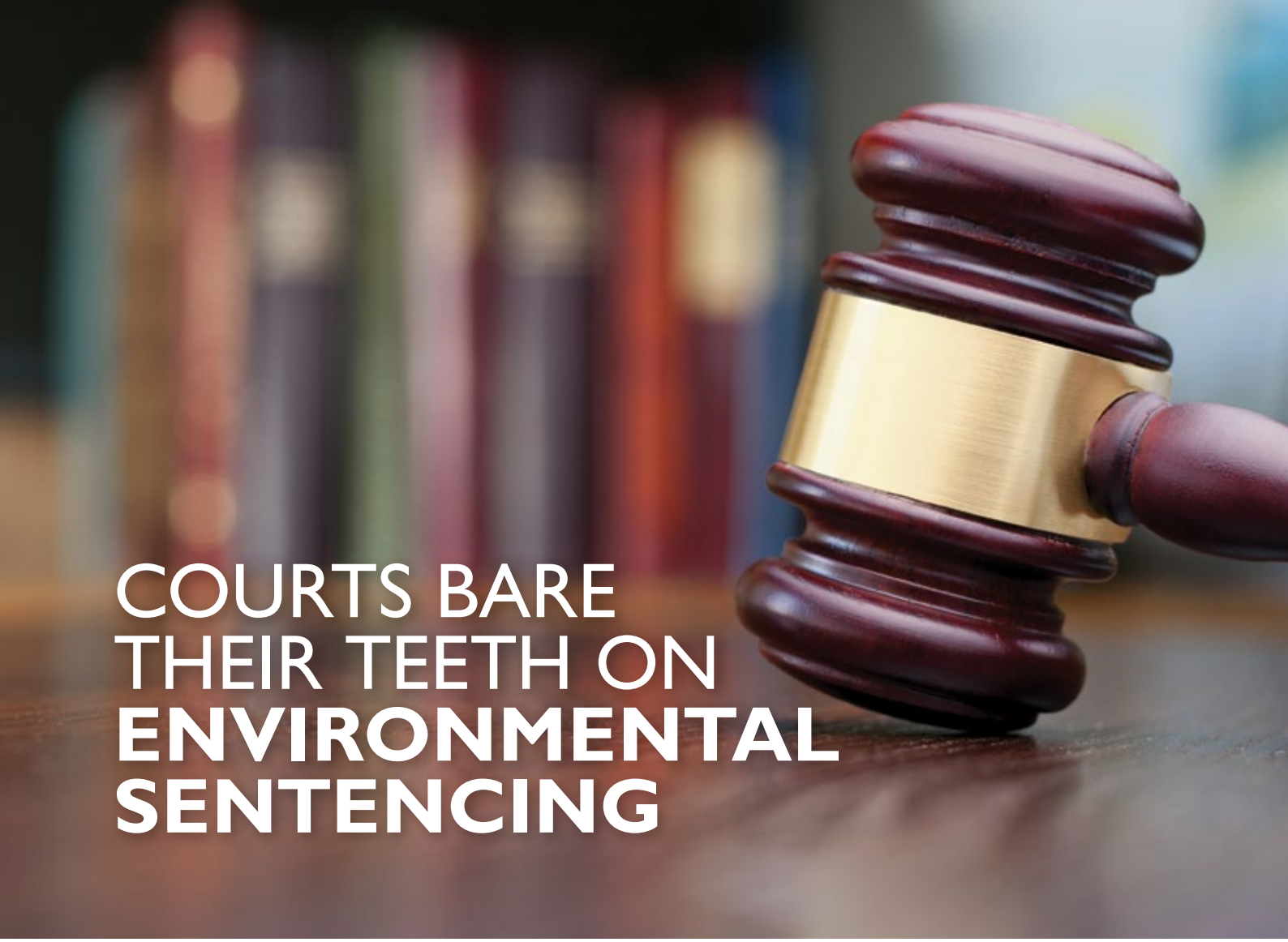
The amended Regulations now include a new Schedule 23ZA, which prescribes the flood risk activities for which a permit is required. The Schedule excludes certain activities from the definition of flood risk activities, provided they meet conditions set out in the Schedule.

The Environment Agency together with DEFRA have issued guidance dealing with changes to Flood Defence Consents after 6 April 2016.

A further change will be the enactment of a consolidated version of the Environmental Permitting (England and Wales) Regulations 2010 and subsequent amendments. A draft which was put out to consultation in the autumn of last year will be revised to take into account the above amendments. The revised consolidation will then be put before Parliament later this year, with a view to coming into force on **1 January 2017**.

For further information, please contact:

Charlotte Gibson
Associate
T +44 (0)114 283 3304
charlotte.gibson@dlapiper.com



COURTS BARE THEIR TEETH ON **ENVIRONMENTAL SENTENCING**

There has been further evidence recently that the Environmental Sentencing Guidelines will lead to the court's flexing their muscles more when it comes to sentencing companies for environmental offences. The most recent demonstration of this is a Lim fine handed down to a waste management company along with almost £250,000 in costs.

The company, which operates mainly in the South-East of England received this huge sentence on 11 April at Harrow Crown Court. The offences related to the receipt and storage of large quantities of hazardous waste at a site in London and the deposit of 3,000 tons of non-hazardous waste at a site in Oxfordshire. Aside from the near £1.25 million that the company has been ordered to pay, it is understood that it has also removed the waste at its own cost from the Oxfordshire site.

This is hot on the heels of some very hefty fines for water companies including a £1 million fine at the start of the year in relation to sewage discharges.

It is also a further example of the Environment Agency's focus on the waste management industry which appears to be being mirrored by the Scottish Environment Protection Agency (SEPA). A recycling firm north of the border has recently been ordered to pay the largest proceeds of crime amount for environmental offences in Scottish history, having received a confiscation order amounting to nearly £350,000 in relation to waste it had stock piled. SEPA indicated that the confiscation order reflected the costs that the company had avoided in undertaking the illegal activities.

As readers will be aware from our previous articles on environmental sentencing, the Court of Appeal made clear last year that in appropriate cases vast fines should be handed down for environmental offences indicating that:

> "To bring the message home to the directors and shareholders of organisations which have offended negligently once or more than once before, a substantial increase in the level of fines, sufficient to have a material impact on the finances of the company as a whole, will ordinarily be appropriate. This may therefore result in fines measured in millions of pounds"

> "In the worst cases..., this may well result in a fine equal to a substantial percentage, up to 100 percent, of the company's pre-tax net profit for the year in question, even if this results in fines in excess of £100 million"

A recent consultation considered how courts should reduce sentences for environmental offences where an early guilty plea is provided. Whilst reductions in sentences for early guilty pleas are not a new concept, the consultation sought views on the levels of reduction that should be available and how those levels should differ dependent upon the stage in the court process at which the guilty plea was provided.

It is clear that the level of sentencing for environmental offences is on a significant upward curve and therefore all organisations should consider reviewing their environmental compliance and management systems to ensure they do not get caught up in this trend. Such proactive measures could, to the extent that unintended environmental incidents occur, help to demonstrate robust environmental policies and procedures, which would assist in trying to mitigate the level of any resultant fine.

For further information, please contact:

Alastair Clough
Legal Director
T +44 (0)114 283 3114
alastair.clough@dlapiper.com

THE CONTAMINATED LAND REGIME
IS IT WORKING?

1. Introduction

The Environmental Protection Act 1990 requires the Environment Agency to produce a report on the state of contaminated land "from time to time". The most recent report (which covers England only) was published in April 2016, and follows reports produced in 2002 and 2009.

Local authorities and the Environment Agency were asked to respond to a survey conducted on behalf of DEFRA, which raised queries on matters such as site inspection, determination decisions, the way in which remediation was carried out and who paid for it. The queries related to the period from April 2000 (when the contaminated land regime came into force) up to 31 December 2013.

Whilst the report will be of interest to a wide range of organisations who could be faced with liabilities under the regime (including owners and occupiers of land used for industrial purposes, property developers and landlords), its findings must be treated with caution, as only 60 percent of local authorities responded to the survey, and of those not all provided a response to every question. Nevertheless, the report provides an interesting snapshot of the implementation of the regime.

2. Site inspection and identification of contaminated land

Approximately half of the local authorities who responded to the survey, noted that they were behind target in terms of making progress towards achieving the objectives set out in their inspection strategies (local councils must have a written inspection strategy in place describing their strategic approach to identifying contaminated land in their areas). Notwithstanding such responses, the survey suggests that the vast majority of potentially contaminated sites had come to the attention of local authorities through their process of carrying out preliminary inspections. For only about 5 percent of those sites identified had a detailed inspection actually been started; it therefore appears that there is a lot of work still to be done.

3. Determining land as being "contaminated"

There was a low response rate to the question of how many sites local authorities had determined as being contaminated under the regime (by way of reminder, land fits within this definition where there is not only a source of pollutant (e.g. arsenic in the soil) but also a receptor which could be impacted (e.g. a nearby stream or people living or working on the land) and a

pathway between the two). According to the report, 511 contaminated land sites had been determined between April 2000 and the end of 2013. This figure is, however, fairly meaningless given that the 2009 report referred to above, indicated that 659 sites had been determined up to March 2007!

From the responses received, it appears that the risk of harm to human health is the main reason given for determining sites as contaminated, followed by risks to water and then to property. In terms of substances, metals are those most frequently identified as leading to a contaminated land determination (and of those, the most frequent are arsenic and lead, then nickel, chromium and cadmium) and then organics (notably benzo(a)pyrene and PAHs).

4. Remediation

For those sites where remediation had commenced (whether completed or not), over 60 percent followed a voluntary agreement, with just over 30 percent taking place following the service of a statutory notice.

So far as treatment options are concerned, capping was the technique used at nearly 70 percent of the relevant sites, followed by excavation with off-site disposal of the source material at 65 percent (noting of course that more than one technique may be used per site).

5. Who bears the cost?

Responses to relevant queries indicate that local authorities pursued the polluter in just over 60 percent of sites, followed by owners and occupiers at 26 percent. However, the report also notes that in 80 percent of the cases for which responses were received, it was the regulator or Environment Agency who actually paid for the remediation. This suggests that in the matters dealt with to the end of 2013, there were difficulties in either finding the polluter (for example companies no longer existing) and/or in getting them to pay (for example because of hardship).

Whilst the relatively low response rate to the survey means that firm conclusions cannot be drawn from the report, it is interesting to note the reasons given for identifying land as contaminated and the substances most frequently referred to. It also seems that despite the regime having been in place for 16 years, local authorities are still in the early stages of the identification process; the issue of contaminated land is not going away!

For further information, please contact:

Ailish Oxenforth
Legal Director
T +44 (0)114 283 3336
ailish.oxenforth@dlapiper.com

A RECENT CHANGE TO ENVIRONMENT AGENCY GUIDANCE WILL MEAN INCREASED COMPLIANCE COSTS FOR BATTERY RECYCLING COMPLIANCE OBLIGATIONS

European Community Directive 2006/66/EC on batteries and accumulators and waste batteries and accumulators sets annual recycling targets for EU members. The UK's 2016 annual recycling target is 45 percent of **portable batteries** placed on the market between 2014 and 2016 (calculated by weight).

Batteries are classified as either portable, industrial or automotive. A portable battery is any battery or battery pack which is sealed and can be hand-carried by an average natural person without difficulty. The recycling targets are geared towards collection and recycling of "everyday use" batteries (for example, AA and AAA batteries).

The UK Waste Batteries and Accumulators Regulations 2009 (Regulations) provide the regulatory regime for ensuring the UK's target is met.

Companies placing batteries (including those in appliances or vehicles) on the market in the UK in quantities greater than one tonne are subject to producer responsibility recycling obligations.

Companies meet their collection and recycling obligations via membership of a compliance scheme (in a similar fashion to those which operate as regards packaging waste and waste electrical and electronic equipment).

Since 2010, there has been significant growth in the amount of portable batteries collected for recycling. Indeed, 2012 saw the UK exceed its annual target. This sounds like a good result, however, a "glitch" in collection and recycling data came to light relatively recently.

It seems that there has been confusion over the categories of battery (portable/automotive/industrial) at both ends of the supply chain – that is, when placing on

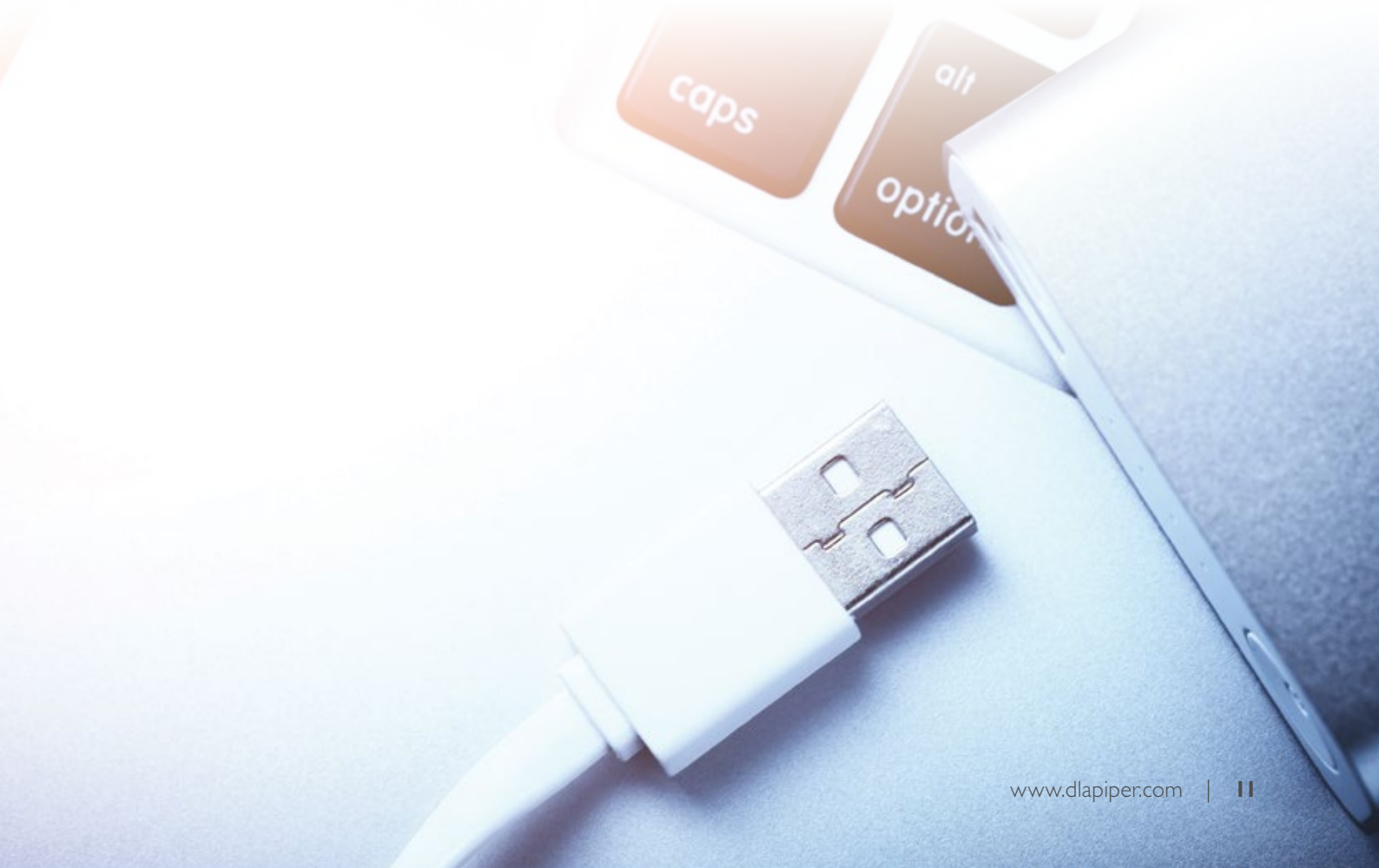
the market and at collection/reprocessing. Part of this problem is the collection of mixed-category lead-acid batteries to meet portable battery compliance obligations. Lead-acid batteries cost less to recover than other portable batteries. In 2012 and 2013, the tonnage of portable lead acid batteries collected for recycling greatly exceeded the declared tonnage being placed on the UK market.

To address the situation, the Department for Environment, Food and Rural Affairs (DEFRA) announced (after consultation) the introduction of a weight threshold of 4kg into the definition of "portable battery" in government guidance. Only batteries weighing 4kg or less can now be classed as portable. Previously batteries weighing between 4kg and 10kg could be "portable or "hand-carriable". As a result, compliance schemes must now collect and recycle higher quantities of non-lead batteries. However, this may make it more difficult and expensive to achieve collection and recycling targets prescribed by the EU Directive.

During the DEFRA consultation, estimates of the increase in costs of collection and recycling ranged from an average of £1,250 per tonne to £2,000 per tonne. It remains to be seen what the actual increase in compliance costs will be.

For further information, please contact:

Melissa Darby
Senior Associate
T +44 (0)114 283 3414
melissa.darby@dlapiper.com



IN **BRIEF**

With effect from 1 April the Government transferred from the Department for Business, Innovation & Skills (BIS) to DEFRA policy responsibility for Producer responsibility regimes such as those for Waste Electrical & Electronic Equipment (WEEE), End-of-life Vehicles, Batteries & Accumulators and Restriction of Hazardous Substances in Electrical & Electronic Equipment (RoHS).

The Wales Bill, which obtained its first reading on 7 June, will devolve further powers to the Welsh Assembly Government. These include responsibilities in respect of considering and granting applications for consent for energy projects with a generating capacity of 50MW – 350MW, and the licensing of onshore wind projects and onshore oil and gas exploration. The Welsh Assembly will also have new powers to legislate on sewerage.

Earlier this year the Welsh Assembly passed the Environment (Wales) Act which deals with the Sustainable Management of Natural Resources, Action on Climate Change in Wales, Powers to extend charging for carrier bags, Waste Recycling, Regulation of fisheries for shellfish, and Marine Licensing.

Increasing divergence between the laws in force in Wales, and those in England on matters within the remit of the Welsh Assembly is creating increasing difficulties in terms of the accessibility of Welsh Law, particularly where the Welsh legislation (which is bilingual) consists of amendments to an existing English text which is held on a common database.

For further information, please contact:

Noy Trounson
Barrister in employed practice
T +44 (0)207 796 6318
noy.trounson@dlapiper.com

www.dlapiper.com