

# **Scottish Environment Protection Agency**

**July 2015**

## **Guidance on the use of enforcement action**

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**Published by:**

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## Purpose of this guidance

This guidance has been published to explain how we will use enforcement action. It aims to:

- make clear what enforcement action we can take, and under what circumstances different types of enforcement action might be appropriate;
- explain the pro-active, voluntary enforcement action that can be offered to make amends and prevent recurrence;
- give an overview of what to expect and the options available to any person against whom we take enforcement action.

This guidance is directed at any person (including a business) carrying on any activity where we are the enforcing authority. In this document this person is referred to as the responsible person. This includes a very wide range of activities and people, for example: a householder with a septic tank, a waste carrier, farmers, waste disposal companies and manufacturing companies etc.

In addition this guidance supports our enforcement policy and aligns with the [Scottish Regulators' Strategic Code of Practice](#).<sup>1</sup>

This guidance does not include information about how we use civil penalties under the [Emissions Trading Scheme \(ETS\)](#)<sup>2</sup> and [Carbon Reduction Commitment and Energy Efficiency Scheme \(CRC\)](#)<sup>3</sup> or fixed penalty notices under the [Transfrontier Shipment of Waste Regulations 2007](#).<sup>4</sup> Separate guidance on them is available (this does not form part of this Guidance)

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<sup>1</sup> <http://www.gov.scot/Resource/0046/00467429.pdf>

<sup>2</sup> <http://www.sepa.org.uk/regulations/climate-change/eu-emissions-trading-system/>

<sup>3</sup> <http://www.sepa.org.uk/regulations/climate-change/carbon-reduction-commitment/>

<sup>4</sup> <http://www.sepa.org.uk/regulations/waste/transfrontier-shipment-of-waste/>

## Background

The Regulatory Reform (Scotland) Act 2014 (the Act) has set up a new environmental enforcement framework in Scotland. It builds upon existing environmental legislation and the enforcement action available under that legislation. The framework comprises several components that work together to provide a robust framework with appropriate safeguards:

- **The Regulatory Reform (Scotland) Act 2014 (the Act)**

The Act has strengthened the sentencing powers of the criminal courts in relation to environmental crime and has imposed a requirement on the courts to consider any financial benefit accrued as a result of offending in deciding the amount of fines.

- **The Environmental Regulation (Enforcement Measures) (Scotland) Order 2015 (the Order)**

A link to the Order will be available when the Order is made under the Act. It will give SEPA the power to impose monetary penalties and accept voluntary undertakings, and set the framework and procedure for their use. It will also extend the jurisdiction of the [Scottish Land Court](#)<sup>5</sup> to hear appeals in relation to these matters.

- **The Lord Advocate's Guidelines under the Act**

In addition, as required by the Act, the Lord Advocate will give SEPA guidance on the exercise of its functions in relation to monetary penalties and voluntary undertakings. When we consider using monetary penalties or accepting a voluntary undertaking we must have regard to the [Lord Advocate's Guidelines](#)<sup>6</sup> under the Act. The guidelines are an important safeguard in the system. Where SEPA is considering issuing monetary penalties or accepting a voluntary undertaking, they provide a framework for deciding whether SEPA may take such action, or whether the case should instead be referred to the Crown Office and Procurator Fiscal Service (COPFS) for consideration of prosecution.

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<sup>5</sup> <http://www.scottish-land-court.org.uk/>

<sup>6</sup> Web address to be inserted

- **SEPA's Enforcement Policy on the use of enforcement action**

Our [enforcement policy](#) sets out our approach to enforcement. This Policy is underpinned by the better regulation principles, which are that regulatory functions should be exercised in a way that is:

- proportionate;
- consistent (fairness and legal correctness);
- transparent;
- accountable;
- targeted (efficient, effective and evidence based).

These principles and the principle of taking a timely approach, form the foundations of our approach to enforcement and this guidance.

- **SEPA's Enforcement Guidance**, which sets out our approach to enforcement in more detail. This following guidance meets our requirement under Sections 30 (2) (e) and 31 (5) of the Act to publish guidance on:

- how we use monetary penalties and voluntary undertakings;
- how offences are enforced;
- the action that we might take to enforce those offences;
- the circumstances where we are likely to take that enforcement action, and the different sanctions (including criminal sanctions) that a person who commits an offence may be liable to.

## Why SEPA needs enforcement powers

One of our most important roles, as Scotland's principal environmental regulator, is to protect the environment, human health and the wellbeing of people in Scotland.

Where a responsible person causes, or risks causing, harm or fails to comply with the conditions of their authorisation or other legislative requirements, or fails to obtain an authorisation we need to be able to take action to rectify this. Ideally, we would seek to work with a responsible person and use advice and guidance to achieve our enforcement outcomes. However, there are situations when this type of partnership approach will not secure our desired enforcement outcomes and another form of enforcement action is appropriate from the outset.

## Our approach to enforcement

Regulation is about changing behaviour in a way that generates positive outcomes for the environment, communities and the economy. In individual cases where we identify non-compliance the enforcement outcomes we seek to achieve are:

- to secure compliance with regulatory requirements designed to protect and improve the environment and bring the activity under regulatory control and stop offending;
- to remove financial benefits from illegal activity;
- to stop harm or reduce the risk of harm to an acceptable level;
- to restore or remediate the harm caused by regulatory non-compliance, where appropriate;
- to deter future non-compliance and re-offending.

## The types of enforcement action available

The form of enforcement action, or combination of enforcement actions, which we use to achieve our enforcement outcomes, will differ depending on the nature of the non-compliance, the harm caused and the compliance history of the responsible person in question. We will also consider what immediate action is needed to protect the environment. How we decide what enforcement action is needed is described in the [enforcement decision making](#) section of this guidance.

Although the use of almost all enforcement actions will be initiated by us, there is one particular enforcement action that is initiated by a responsible person.

### **The enforcement action a responsible person can offer**

An enforcement undertaking provides an opportunity, primarily to otherwise compliant people or businesses, to remedy non-compliance. The responsible person **voluntarily** offers to us a solution to non-compliance that provides for:

- the restoration and remediation of environmental harm, where appropriate;
- steps to prevent recurrence;
- the removal of any financial benefit;
- environmental benefits that go beyond the minimum needed to restore the position.

It is important to note that these are not available for all offences and, even where these are available, we will decide whether or not to accept the undertaking. When considering acceptance, we will consider a number of factors. Detailed information can be found on a separate page about [enforcement undertakings](#).

### **The enforcement action we might take**

The table A below identifies the different enforcement actions that are available for us to initiate. An overview of the circumstances in which their use may be appropriate is included. It should be noted that this is not a hierarchy of enforcement actions or a series of sequential enforcement steps. We will take whatever action is the most appropriate to achieve our outcomes and to change behaviour. Also, we are not limited to choosing one type of enforcement action and that in some circumstances a combination of enforcement actions may be required.

Links are provided to more detailed information for each type of enforcement action.

**Table A: The different types of enforcement actions that are available for SEPA to initiate**

Enforcement Action	The role of the enforcement action	When would its use be appropriate?
<a href="#">Advice and guidance including warning letters (in response to non compliance)</a>	We will provide advice and guidance to inform and raise awareness and where it is the most appropriate action to achieve our desired outcome(s).	<p>This may be used where there is a minor non-compliance, and there is no or little direct harm and no evidence of deliberate, repeat or continued offending.</p> <p>Advice and guidance will usually be appropriate on its own where a change in behaviour will result from giving the responsible person a better understanding of what needs to be done to comply with environmental obligations.</p> <p>We will ordinarily continue to offer advice and guidance at all stages irrespective of any other enforcement action that we consider appropriate.</p>
<a href="#">Civil court action</a>	The role of a court order is to instruct a responsible person to take a particular course of action. E.g. to stop an activity being carried on, or to carry out restoration or remedial works. If the responsible person ignores the order, they risk being in contempt of court.	Where other enforcement actions are ineffectual, we may use the civil courts to remedy non-compliance. For example, by seeking an interdict to stop someone from doing something that they are not allowed to do or by asking the court to enforce the terms of a statutory notice if it has not been fully complied with.
<a href="#">Final warning letter</a>	<p>We will use a final warning letter to raise awareness of non-compliance and as a final attempt to change behaviour without using, for example, a statutory notice, a monetary penalty or referring non-compliance to the Crown Office and Procurator Fiscal Service.</p> <p>The final warning letter will make it clear to the responsible person that a failure to take preventative steps to stop the non-compliance will not be tolerated.</p>	A final warning letter will be more appropriate than advice and guidance alone where we consider that the threat of further enforcement action being taken is needed. Advice and guidance will also be provided on how to comply with environmental obligations.

Enforcement Action	The role of the enforcement action	When would its use be appropriate?
* <a href="#">Fixed monetary penalty (FMP)</a> (£300, £600, £1000)	FMPs aim to change behaviour, deter future non-compliance and punish non-compliance.	<p>These are not available for all criminal offences – a link to the <a href="#">table of offences</a><sup>7</sup> where FMPs may apply will be available when the Order is made. There is no flexibility to use an FMP in any other circumstances or to change the amount of the penalty.</p> <p>They are normally appropriate where an offence involves no direct harm or minimal harm, with no lasting effects or impact on communities, and when little (if any) financial benefit arises from the offence.</p>
<a href="#">Prosecution</a> (Referring matters to the Crown Office and Procurator Fiscal Service (COPFS) for consideration of prosecution)	The role of the criminal justice system is to punish significant and serious offending and, where possible, to remove financial benefit resulting from that offending. Prosecution is a strong deterrent for future non-compliance. Sentencing options available to the courts may allow publicity to be given to convictions, and allow compensation or restoration orders to be made which contribute towards remediation or restoration of harm.	Prosecution is available for all criminal offences. As the most severe form of enforcement action, this is generally used for those offences that are most serious.

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<sup>7</sup> Web address to be inserted



Enforcement Action	The role of the enforcement action	When would its use be appropriate?
<p><u>Statutory notice</u></p>	<p>Different statutory notices fulfil different roles, and their availability is dependent on the precise wording of the relevant legislation.</p> <p>The most commonly used Notices are:</p> <p>An <b>enforcement notice</b> - useful if remedial steps or preventative steps need to be taken to address non-compliance.</p> <p>A <b>section 59 notice</b> under the Environmental Protection Act 1990 - only applicable where waste has been deposited on land illegally.</p> <p>A <b>suspension or prohibition notice</b> – requires the responsible person to stop an activity from taking place until steps are taken to address non-compliance. Once the steps are taken the activity can resume.</p> <p>A <b>revocation notice</b> - appropriate where we consider that the activity needs to stop and we do not consider that the activity should be resumed in the future.</p> <p>This is not an exhaustive list of statutory notices.</p>	<p>We might use these for offences where we wish to specify the steps that need to be taken to stop the activity or harm from continuing, or the steps needed to prevent the harm or risk of harm in the future. In some circumstances they can also be used to restore the environment.</p> <p>A statutory notice will usually be appropriate when we wish to specify the steps that need to be taken, to secure compliance and restore the position.</p>

Enforcement Action	The role of the enforcement action	When would its use be appropriate?
<a href="#"><u>*Variable monetary penalty (VMP)</u></a>	<p>VMPs aim to change behaviour, deter future non-compliance and punish more significant non-compliance than is proportionate to deal with using a FMP.</p> <p>Additionally they can be used to remove the money that has been made or the costs that have been avoided as a result of the non-compliance.</p>	<p>These are not available for all criminal offences – a link to the <a href="#"><u>table of offences</u></a><sup>8</sup> where VMPs may apply will be available when the Order is made.</p> <p>We might use VMPs where the circumstances of the offence need to be taken into account in delivering a fair and proportionate sanction; where harm has, or might have, been caused or there has been disruption to the regulatory system and/or there has been financial benefit. An example of disruption could be failure to submit monitoring data or failure to register with an appropriate producer responsibility scheme.</p>
<a href="#"><u>*Variable monetary penalty undertaking</u></a>	<p>VMP undertakings provide the opportunity to the responsible person to use their resources to restore harm caused rather than paying a penalty.</p> <p>The VMP undertaking will also remove any financial benefit and offer environmental benefits that go beyond the minimum needed to restore the position (for example, the condition of land or quality of a watercourse).</p> <p>Steps offered by the responsible person must also secure compliance.</p>	<p>These are only available to a responsible person when we issue a VMP notice of intent.</p> <p>When considering if a VMP undertaking is appropriate, a key factor for us is the responsible person's compliance history and the likelihood that they will comply with the undertaking.</p>

\* introduced under the Environmental Regulation (Enforcement Measures) (Scotland) Order 2015.

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<sup>8</sup> Web address to be inserted

## Examples of offences that the enforcement actions apply to

There are many offences set out in the legislation we enforce. For example:

- Section 33(6) of **Environmental Protection Act 1990** (unauthorised or harmful depositing, treatment or disposal etc. of waste; breaching conditions of a waste management licence).
- Regulation 44(1)(a) of **Water Environment (Controlled Activities)(Scotland) Regulations 2011** (carrying on a controlled activity (i.e. activity liable to cause pollution, abstraction of water or impoundment) without having an appropriate authorisation from SEPA or complying with a general binding rule)).
- Regulation 67(1)(b) of **Pollution Prevention and Control (Scotland) Regulations 2012** (failure to comply with conditions of a permit).
- Regulation 44(1)(d) of **Water Environment (Controlled Activities) (Scotland) Regulations 2011** (failure to comply with a water use licence).
- Section 34(6) of **Environmental Protection Act 1990** (failure to comply with duty of care requirements).
- Section 59(5) of **Environmental Protection Act 1990** (failure to comply with notice requiring removal of waste).
- Regulation 11 of **Control of Pollution (Silage, Slurry and Agricultural Fuel Oil) (Scotland) Regulations 2003** (failure to comply with requirements under regulation 2(1), 2(2), 3(1) or 6).
- Regulation 28(6) of **Waste Management Licensing (Scotland) Regulations 2011** (carrying on an exempt activity in breach of the registration obligations).
- Regulation 44(1)(b) of **Water Environment (Controlled Activities) (Scotland) Regulations 2011** (failure to comply with general binding rules).
- Regulation 67(1)(a) of **Pollution Prevention and Control (Scotland) Regulations 2012** (operating without a permit).
- Section 32(1) of **Radioactive Substances Act 1993** (offences relating to registration or authorisation, including failure to comply with a condition of an authorisation)

## How the use of enforcement actions will be governed

When we consider using fixed and variable monetary penalties or accepting an enforcement undertaking we must have regard to the [Lord Advocate's Guidelines](#)<sup>9</sup> under the Act. For these particular enforcement actions, the Lord Advocate's Guidelines under the Act:

- set the framework for their use by us;
- are the safeguard that prevents us from imposing our own penalties, or accepting undertakings, in cases which should go through the criminal courts.

We also have robust internal governance arrangements for enforcement decisions which ensure that decisions about the use of enforcement action are made at an appropriate level in the organisation.

From time to time we may publish regulatory position statements on our web site. Where relevant we will consider these in deciding if, or what, enforcement action may be appropriate.

## Other safeguards

There are additional safeguards that relate to a fixed or variable monetary penalty. These include:

- A responsible person who receives from us a notice of intent to serve a monetary penalty (fixed or variable) is entitled to make representations to us. The process for making representations is described in more detail in the section related to each of these actions.
- A responsible person who receives a final monetary penalty notice (fixed or variable) from us following receipt of a notice of intent is entitled to appeal against the decision to serve the penalty notice, whether or not they have already made representations. The process for making an appeal is described in more detail in the section related to each of these actions.

These additional safeguards for FMPs and VMPs ensure that there is a mechanism for challenging our actions, just as there are appeal mechanisms for statutory notices. When we issue a statutory notice, we always include information on any right of appeal against that notice.

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<sup>9</sup> Web address to be inserted

## How SEPA determines which enforcement action is appropriate

Having first taken any immediate action to protect the environment or human health we will collect the facts and/or evidence about the offence before making a decision on what enforcement action(s) may be appropriate.

The form of enforcement action which we use will differ depending on:

- the enforcement outcome(s) we are seeking to achieve; and
- the significance of the offence, which is dependent on several [enforcement factors](#).

The [enforcement decision making section](#) describes how we make enforcement decisions systematically and consistently and the [enforcement decision making diagram](#) illustrates how enforcement decisions are made.

It is important to understand that, because of the wide range of circumstances under which offences occur, there is significant overlap between the lists of offences for which fixed and variable monetary penalties and enforcement undertakings will be available. A link to the [table of offences](#)<sup>10</sup> which identifies the relevant enforcement actions that can be used will be available when the Order is made.

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<sup>10</sup> Web address to be inserted

## Who can action be taken against

Where an offence has been committed or harm caused by a responsible person carrying on any activity where we are the enforcing authority, we may take enforcement action against the responsible person. In general, employers are responsible for the actions of their employees and would be considered as a responsible person where non-compliance is the result of their employees' actions.

If an investigation identifies a number of persons who are responsible for having committed an offence or offences, and we have enough evidence to take action against each responsible person, we may progress multiple actions.

Other examples of when someone is a responsible person include where an offence has been committed by:

- A company in circumstances where its directors have also committed an offence. We may take action against each of the responsible directors who has committed an offence.
- A firm or partnership, in circumstances where individual partners have also committed an offence. We may take action against each of the responsible partners who has committed an offence as well as or instead of the firm or partnership.
- An unincorporated association, in circumstances where its governing body or management committee, office bearers and/or members have also committed an offence. We may take action against each of the responsible members who has committed an offence as well as, or instead of, the association.

In summary, for any offence:

- We may take action against each of the responsible persons who have committed an offence.
- We may take the same or a different enforcement action or impose the same or a different penalty on each of the responsible persons who have committed an offence. This is to reflect any difference in the behaviour of the different parties involved.

In practice, this approach could result in actions being taken against company directors and the company itself for the same offence.

## Combining the different types of enforcement action

We may combine either fixed monetary penalties or variable monetary penalties with any of our other enforcement actions where we consider this will achieve the desired enforcement outcomes.

However, for the same offending it is not possible to combine:

- fixed monetary penalties with variable monetary penalties;
- criminal proceedings with fixed or variable monetary penalties;
- criminal proceedings or monetary penalties with enforcement undertakings, unless the commitments given in an enforcement undertaking are not delivered, and SEPA issues a certificate of non-compliance to that effect.

If we have used enforcement action to deal with an offence but this fails to change behaviour and the offending is repeated or continues, or an additional offence has been committed, we will consider all the available enforcement actions in deciding the appropriate action to take next. However, it is unlikely we would use the same type of enforcement action, if this has previously failed to change behaviour.

We are not prevented from using a fixed monetary penalty or variable monetary penalty or from accepting an enforcement undertaking because we have used this type of enforcement action for a similar previous offence or a different offence. A penalty notice or undertaking will specify the time and/or period of an offence to make clear that the same non-compliance occurring at a different time or over a different period is a different offence.

Also, if we identify a referral to COPFS for consideration of prosecution as the most appropriate enforcement action for repeat or additional offending we may refer the matter to COPFS even if we have used a fixed or variable monetary penalty or accepted an enforcement undertaking to deal with a similar previous offence or a different offence.

Further information about the circumstances when it may be appropriate to combine enforcement action is included in a [separate page](#).

## Publication of offences

We will be required to publish information about fixed monetary penalties, variable monetary penalties, non compliance penalties and cost recovery notices issued by us and undertakings accepted by us. We will report details of enforcement actions on the website and also in the annual enforcement report. We may also publicise the use of particular enforcement actions in other ways when we consider it appropriate to secure one or more of our enforcement outcomes.

## How SEPA will evaluate the effectiveness of our approach to enforcement

We will review this guidance and our governance procedure and make any necessary amendments in light of experience.

We will also review the circumstances in which the various enforcement actions have been used and how effective they were in achieving the desired enforcement outcome(s).

## Cost recovery

In line with the polluter pays principle, we consider that the costs of carrying out an investigation into an environmental offence should be borne in a proportionate way by the responsible person rather than the public purse. For this reason, we will seek to recover at least part of the costs we have incurred in investigating offences in certain circumstances. These circumstances include recovering costs from the recipient of the penalty notice where we impose a variable monetary penalty to the extent permitted under the Order. We will also expect the recovery of our costs to be included in any enforcement undertaking or variable monetary penalty undertaking that is offered to us.

Further information about the process for recovery of the costs incurred by us is set out in the guidance about each of the types of enforcement action. We are unable to recover our investigation costs from the recipient of the penalty notice when we impose a fixed monetary penalty.



## How enforcement action interacts with compliance schemes

### **SEPA's compliance assessment scheme (CAS)**

For Part A and some Part B activities under the Pollution Prevention and Control (Scotland) Regulations 2012, our [CAS](#)<sup>11</sup> takes account of the effort invested by us in poorly performing sites by increasing charges for those sites based on their previous compliance assessment record. This means that costs are recovered for the additional work that we need to do to bring these sites into compliance.

A failing PPC site might therefore be subject to a monetary penalty for a specific non compliance and may also have to pay an increased charge or fee as a result of our CAS.

### **General binding rules, cross compliance and single farm payments**

Where there has been non-compliance, land managers may face the possibility of both Scottish Government's Rural Payments and Inspections Directorate (SGRPID) and us taking enforcement action. We and SGRPID share information on non-compliance; however, the decision to impose a cross compliance penalty or to impose a monetary penalty is a matter for each separate agency. This is because the purpose of each enforcement response differs.

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<sup>11</sup> <http://www.sepa.org.uk/regulations/authorisations-and-permits/compliance-assessment-scheme/>

## Enforcement decision making

### Choosing what enforcement action we will take

For any non-compliance, our priority will be to identify whether, and if so what, immediate action is needed to protect the environment and human health. If any immediate action is needed we will take action to ensure the responsible person is clear what steps they must take. In some circumstances we may take steps ourselves to ensure the environment and communities are protected.

When we identify potential non-compliance we undertake an investigation, appropriate to the circumstances, to collect the available evidence regardless of what any eventual enforcement action may be. Any enforcement action we take must be supported by sufficient evidence.

Having identified through investigation that offending has occurred, in general we seek to achieve restoration of any harm caused and to change behaviour to prevent future offending or harm. In each individual case where we identify offending, the enforcement outcomes we seek to achieve are one or more of the following:

- to secure compliance with regulatory requirements designed to protect and improve the environment and bring the activity under regulatory control and stop offending;
- to remove financial benefits from illegal activity;
- to stop harm or reduce the risk of harm to an acceptable level;
- restore or remediate the harm caused by regulatory non-compliance, where appropriate;
- to deter future non-compliance and re-offending.

For any non-compliance there may be a number of different enforcement outcomes we want to achieve. We will then identify what enforcement action is required to secure the desired enforcement outcome(s).

In deciding which action to take we consider how effective that action will be at achieving our desired outcomes alongside the significance of the offending using our [enforcement factors](#). Deciding on the right enforcement action is not simply about applying a set of prescriptive rules that determine the type of enforcement action depending on the number of factors involved. Using the facts and/or evidence we will decide how important each factor is in the circumstances of each case.

By taking into account all these factors and how effective enforcement action is expected to be in the individual circumstances, we will be able to make an informed and reasoned judgement about which enforcement action(s):

- is most likely to produce the desired outcome(s)
- is proportionate to the significance of the offending.

In any event and taking into account all the circumstances of the case, we must be satisfied that whatever action we take is reasonable.

The things we consider in reaching an informed decision about the appropriate action are illustrated in our [enforcement decision making diagram](#).

### Example

We will consider which enforcement action, or combination of actions, would best change behaviour in light of the responsible person's behaviour towards the offence.

If the responsible person provides us with the details of an offence voluntarily or through a self-reporting mechanism then we may consider that advice and guidance might be an appropriate response – depending on other factors.

However, if the responsible person is uncooperative with the investigation or remediation then we may consider that advice and guidance is unlikely to change behaviour - depending on the other factors - and another type of enforcement action is needed.

Table B below indicates the most common outcomes associated with each enforcement action. However, this table is only indicative because we will consider the facts of each individual case when deciding which enforcement action(s) are likely to be effective at delivering the outcomes for an individual case.

### Example

If removal of financial benefit is the outcome most likely to drive change in behaviour, then the most effective actions for doing this are a variable monetary penalty or referral to the Crown Office and Procurator Fiscal Service (COPFS) for consideration of prosecution, including recovery under the Proceeds of Crime Act 2002.

However, that is not to say that giving advice and guidance might not, in individual circumstances, also deter future non-compliance.

## Guidance on the use of enforcement action

Table B: Enforcement actions and their principle outcomes

	Restore / remediate harm	Secure compliance	Stop harm/reduce risk	Deter future non- compliance	Remove financial benefit
Advice and guidance	✓	✓		✓	
Final warning letter/warning letter		✓		✓	
Statutory notice – enforcement notice	✓	✓	✓	✓	
Statutory notice – revocation notice		✓	✓		
Statutory notice – section 59 notice (Environment Protection Act 1990)	✓				
Statutory notice – prohibition notice		✓	✓		
Statutory notice – suspension notice	✓	✓	✓		
Variation of conditions		✓			
Enforcement undertaking	✓	✓			✓
Variable monetary penalty undertaking	✓	✓			✓
Fixed monetary penalty				✓	
Variable monetary penalty				✓	✓
Civil court actions	✓		✓		
Criminal sanctions	✓			✓	✓

## What are the enforcement factors

To determine what enforcement action, or combination of actions, is most appropriate or proportionate to secure the outcome(s), we will review the facts and/or evidence against our enforcement factors. In all cases we will consider:

- [intent](#);
- [foreseeability](#);
- [impact](#);
- [financial implications](#);
- [deterrent effect](#);
- [previous history](#).

However, this is not an exclusive list and depending on the particulars of an individual case other factors may need to be considered.

In general terms the more significant the impact, the greater the scale of the offending and/or the more deliberate the behaviour, the more likely it is that the appropriate form of enforcement action is a referral to COPFS for consideration of prosecution.

## Using fixed or variable monetary penalties or accepting enforcement undertakings

Where harm to the environment or human health has occurred, wherever possible that harm should be restored or remediated. We will consider if it may be more appropriate in those circumstances for money to be put towards remediation or upgrading of equipment, rather than monetary penalties being imposed. In these circumstances we would encourage a responsible person to consider offering an enforcement undertaking.

When we consider using a fixed monetary penalty (FMP), a variable monetary penalty (VMP) or accepting an enforcement undertaking (EU) as the appropriate measure to use to deal with non-compliance, we must have regard to the Lord Advocate's Guidelines under the Act. We have to be mindful that using a FMP, or a VMP or accepting an EU will mean that criminal proceedings cannot generally be taken for the same offending. The Lord Advocate's Guidelines under the Act make sure that the appropriate kinds of offences remain part of the criminal justice system.

## Examples of how SEPA will use the enforcement actions

Example(s) of where we have used the different enforcement actions are available [here](#).<sup>12</sup>

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<sup>12</sup> Web address to be inserted

## Enforcement Factors

What are the enforcement factors that SEPA always considers

### Intent

We will consider the following questions to help determine the level of intent:

- Was the offence committed deliberately, recklessly or with negligence?
- Was the offence proactively reported to SEPA?
- Was any false or misleading information provided?
- Has the responsible person cooperated fully and helpfully with our investigation?
- Was the responsible person aware of their legal obligations i.e. were they aware of permit requirements, or have they had correspondence, information or previous SEPA warnings or discussion?
- Was the offence the result of a genuine accident or exceptional events?

Where an offence was committed as a result of an accident or a genuine mistake this is less likely to result in referral to COPFS for consideration of prosecution.

### Foreseeability

Here, we will consider the following questions:

- Could the circumstances leading to the offence reasonably have been foreseen?
- Was the responsible person aware of the hazards associated with the activity, and the preventative measures that might have been taken?
- Were preventative measures taken or not taken?

Where the circumstances could have reasonably been foreseen we will normally apply a form of enforcement action beyond advice and guidance or the issuing of a warning.

### Impact

There are three aspects that we will consider here:

- The extent and significance of the potential and/or actual harm to people and the environment.
- Whether steps have been taken to mitigate any harm or remediate and restore the environment.
- Whether the offending impacts on our ability to be an efficient and effective regulator, for instance where our staff are seriously obstructed in the conduct of their duties.

Where the harm caused is significant or there is serious obstruction we would normally refer the offence to COPFS for consideration of prosecution.

### Financial implications

We will ask the following questions when determining the level of financial benefit:

- Is legitimate business being undercut?
- Has revenue accrued or have costs been avoided, such as costs saved by not obtaining an authorisation?

If the responsible person has gained financial benefit and if removal of financial benefit is the main outcome that we want to achieve, we will normally consider serving a VMP or a referral to COPFS for consideration of prosecution. These are the enforcement actions which are most effective at removing financial benefit. Enforcement undertakings are another possible enforcement measure that might be effective in these circumstances.

There may be other cases where there is a broader economic impact e.g. on the local community, local and other private businesses, disruption to public services or infrastructure. We will take this into account when considering the appropriate enforcement action.

### Deterrent effect

We will consider the deterrent effect, both on the responsible person and others, when choosing which form of enforcement action is most appropriate.

### Previous history

We will consider how well the responsible person has responded to advice and guidance, or other enforcement actions that we have taken in the past.

We will also take into account the degree of previous offending (including site-specific offending or previous offending by the responsible person (or companies/directors associated with that person) at other sites) and any evidence of wider criminality.

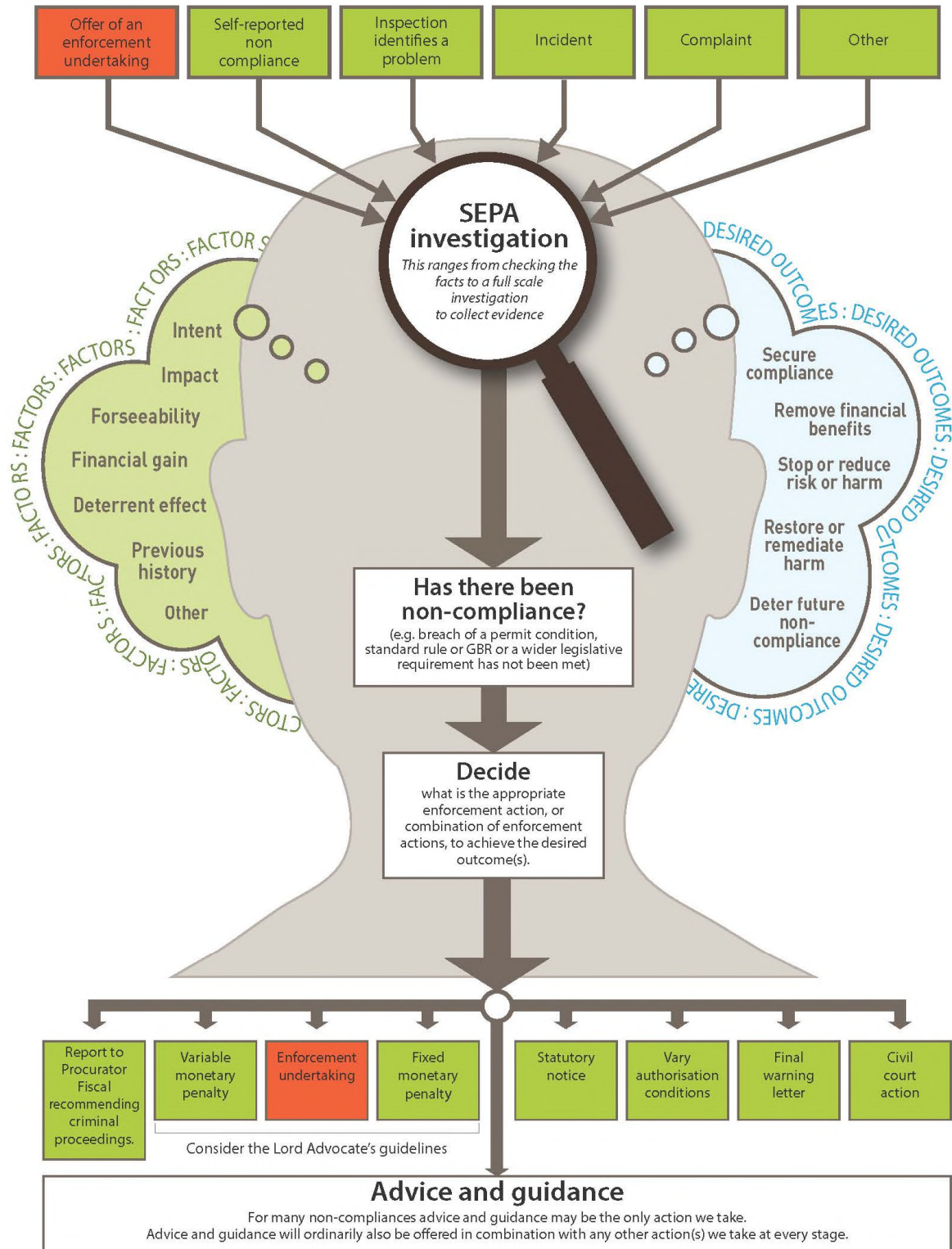
We will also have regard to our compliance assessment scheme (CAS), where appropriate, and previous enforcement actions taken against the responsible person.

We will also take into account the general attitude of the responsible person towards meeting their regulatory obligations and SEPA in general. For example, in the past has the responsible person worked proactively and constructively with SEPA?

Where offending has continued or been repeated, despite us taking enforcement action, we will normally change our enforcement response to pursue a more effective course of enforcement action.



## Enforcement decision making diagram



## Enforcement undertakings

### What is an enforcement undertaking

An enforcement undertaking (EU) is an offer, made voluntarily by a responsible person and formally accepted by us, to make amends for non-compliance and its effects and to prevent recurrence. We also expect the offer to go beyond compliance and provide commitment to continual improvement in environmental performance.

An enforcement undertaking might be offered before SEPA is aware of the non-compliance. In addition to these pro-active undertakings, we may also consider accepting an EU, offered reactively by the responsible person, after we have investigated the non-compliance provided we have not already reached a decision on what enforcement action to take.

An enforcement undertaking is intended to encourage positive behaviour by allowing broadly compliant responsible persons or businesses to use their resources to the greater benefit of the environment and communities affected rather than a penalty being imposed or prosecution for the offence.

It is beneficial to a responsible person (and to us) to offer an undertaking as early in the process as possible. For example when non-compliance is first identified, rather than waiting until we have carried out a detailed investigation and are considering what enforcement action we might take in response to the non-compliance, a responsible person might offer an EU. The responsible person has control of the scope of the undertaking, is able to reduce investigation costs incurred by us, and is able to better manage the quick resolution of non-compliance.

If we accept the offer, the agreed actions become the terms of the undertaking, and the responsible person must comply with them. Whilst we are under no obligation to accept any offer of an EU we have included below guidance about making an acceptable offer.

The responsible person may wish to seek independent legal advice before making an offer of an EU.

Enforcement undertakings are not available for all criminal offences - a link to the [table of offences](#)<sup>13</sup> where enforcement undertakings may apply will be available when the Order is made.

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<sup>13</sup> Web address to be inserted

## What are the benefits of an enforcement undertaking

The flexibility of an EU provides an opportunity to someone who is not compliant to design their own undertaking rather than us imposing requirements, which has a number of benefits for that responsible person and us including:

- An EU enables a responsible person to address offending in a constructive way.
- An undertaking that is tailored to the circumstances, which includes addressing any impact on the local community.
- A faster and more effective resolution because the responsible person designing the offer has ownership of the actions.

The underpinning principles of an EU mean that:

- The focus of the undertaking will be on restoration and remediation of the local environment and preventing repeated non-compliance.
- We expect the EU to extend 'beyond compliance' to improve the wider environmental performance of the responsible person making the offer.
- The responsible person making the offer is protected from both criminal proceedings and monetary penalties if the offer is accepted by us.
- The responsible person making the offer avoids the stigma of a criminal prosecution and any subsequent damage to their reputation if they comply with the EU.
- The responsible person making the offer avoids potential reputational damage from other forms of enforcement action.

## When an enforcement undertaking may be acceptable

Where an EU is offered at a time when we are not aware of an offence, we must have reasonable grounds to suspect that the responsible person making the offer has committed the offence before accepting that offer. In addition to making this assessment we may carry out an investigation so that evidence is available so that we can proceed with further enforcement action should the EU not be complied with.

Where we have already become aware of an offence, we will undertake an investigation and there will be circumstances where it will be appropriate for a responsible person to offer an EU in response.

Irrespective of how the EU arises, when considering whether to accept an offer, we will take into account the following factors:

- the nature of the offence and the significance of any environmental harm caused as a result of the offence;
- whether the EU delivers a better environmental outcome and goes beyond regulatory requirements;
- the likelihood that the responsible person will comply with the EU in light of their compliance history;
- the prospects of securing a timely outcome.

## When an enforcement undertaking is inappropriate

In the following circumstances, we will not usually consider an EU to be appropriate enforcement action:

- where the offence has caused significant environmental harm;
- where the Lord Advocate's Guidelines under the Act preclude acceptance of an EU;
- where the offer includes a clause denying liability;
- where we believe the responsible person will not comply with the EU offered.

In addition we cannot accept an EU when we have already decided:

- to impose a fixed monetary penalty or a variable monetary penalty in respect of the offence or
- to refer the offence to COPFS for consideration of prosecution.

In addition, there will be [circumstances](#) where it is not appropriate to accept an EU. This will be determined when reviewing the circumstances of the non-compliance against our [enforcement factors](#).

## Preparing a suitable offer for determination by SEPA

Given the advantages of offering an EU, whilst we will give some feedback on a draft proposal if requested and where appropriate, we do not intend to enter into protracted negotiations about the offer. We will either accept or decline an offer based on its content. We expect the responsible person to address the following points when making an acceptable offer:

- to prevent recurrence;
- to go beyond the minimum required to comply;
- to demonstrate commitment to continual improvement in environmental performance;
- to go beyond the minimum required to restore the environment or if not possible to make a compensatory offer - we do not consider that actions to be made as part of an EU should simply equate to restoration of harm caused;
- to remove more than the financial advantage gained - we do not consider that payments to be made as part of an EU should simply equate to the financial advantage gained by offending;
- to reflect the costs incurred by us (see below).

We will look more favourably on an offer:

- that demonstrates commitment to continual improvement in environmental performance;
- where it delivers restoration and/or compensatory benefits to the environment or the community directly affected by the offence.

We will confirm in writing our decision about whether or not we accept an offer.

## How SEPA will recover the costs we have incurred

The responsible person making an offer will be expected, as part of the EU, to pay the costs borne by us in investigating the offence and considering the EU, and the costs of any subsequent compliance monitoring and other activities to be carried out by us to assess compliance with the EU.

To enable the operator to offer a suitable amount, we will provide information about the costs incurred. The amount may not necessarily represent the full costs incurred by us for the particular offence.

## Is there a right of appeal

If we reject the offer of an EU, the responsible person making the offer has no right of appeal against that decision.

## Variation of enforcement undertakings

If it becomes impossible for the responsible person to comply with the EU as accepted by SEPA, the responsible person may apply to SEPA for amendment of the EU. It is at our discretion whether or not to agree to any proposed amendments. Any amendment to an EU will need to provide equivalent benefit to the environment or communities, equivalent financial commitment and address the additional cost incurred by SEPA in considering the amendment.

### Example

Where an EU commits funding to a third party to support a local improvement project but the third party decides not to proceed, the responsible person may apply to SEPA for amendment of the EU.

## When a responsible person does not comply with the terms of the EU

If we are satisfied that the responsible person has not complied with any or all of the terms of their EU, we may issue a certificate of non-compliance.

This certificate of non-compliance will set out:

- the details of the EU;
- the grounds for considering that the terms of the EU have not been complied with.

If a non-compliance certificate has been issued, we may subsequently take any form of enforcement action in relation to the specified offence, including referral of the matter to COPFS for consideration of prosecution. When considering what other enforcement action to take, we will take into account any partial compliance with the terms of the EU.

If we issue a certificate of non-compliance, an appeal can be made to the Scottish Land Court within 28 days of receiving the certificate of non compliance on the basis that:

- The decision was based on an error of fact.
- The decision was wrong in law.
- The decision was unreasonable.
- Any other reason.

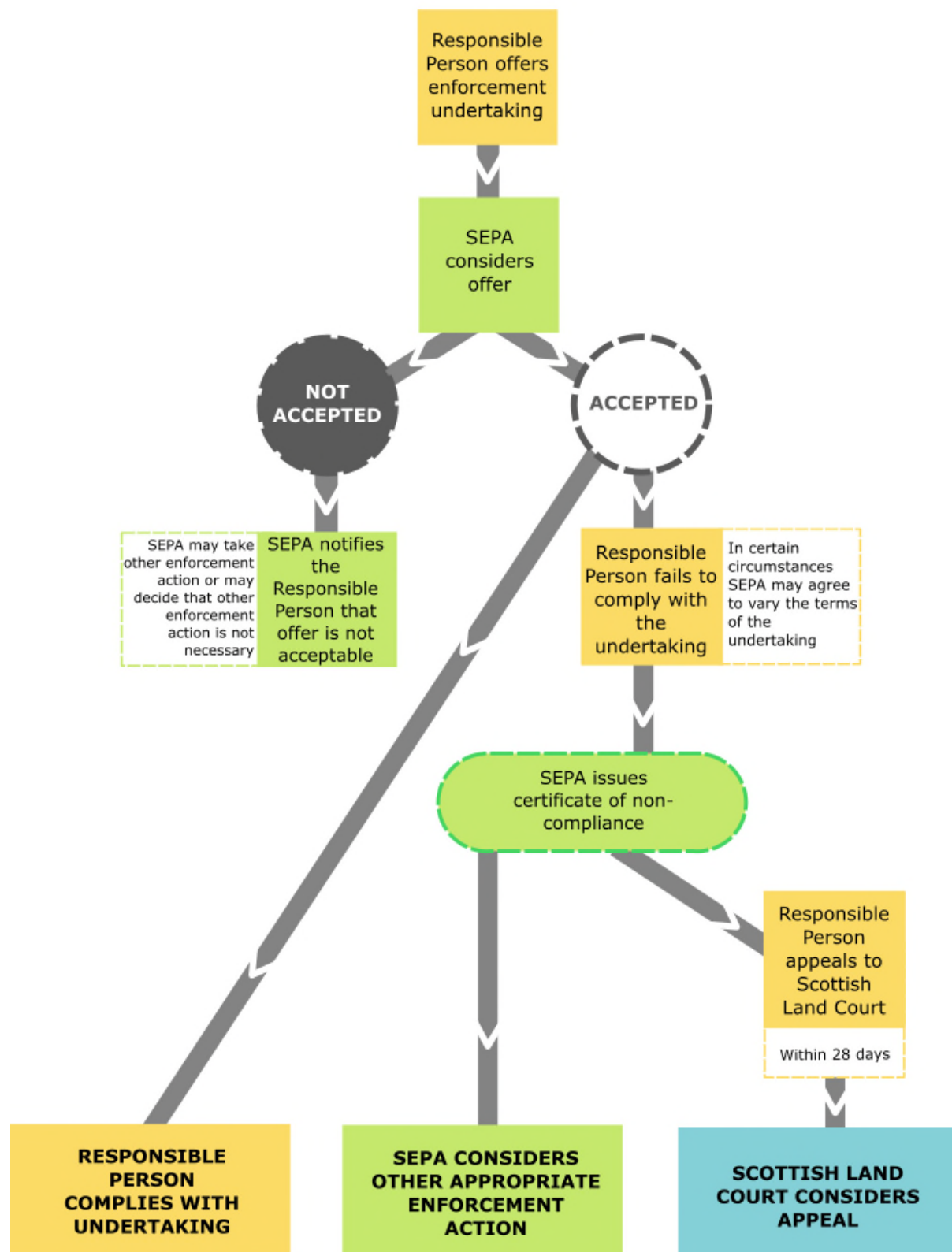
We will provide detail in the certificate of non-compliance about how to make an appeal and about the timescale and consequences of making an appeal. However, the process for submitting an appeal and the relevant forms are also available on the [Scottish Land Court](#) website.

An appeal means that the certificate of non-compliance does not take effect until after the appeal has concluded. This means that we cannot impose monetary penalties and there can be no criminal proceedings for the offence until the appeal has concluded.

## Combining the use of different types of enforcement action

The underpinning principles and benefits of an EU mean that they are not intended to be used in conjunction with other types of enforcement action.

## Enforcement undertaking flowchart





## Civil court actions

### What are civil court actions

We may seek an interdict (or interim interdict) from the civil courts, which is a court order that requires a responsible person to stop doing something.

We may also seek a court order to enforce the terms of a statutory notice, for example under regulation 35 of the Water Environment (Controlled Activities) (Scotland) Regulations 2011 or under regulation 68 of the Pollution Prevention and Control (Scotland) Regulations 2012, if it has not been partially or fully complied with.

If the responsible person ignores the order, they risk being in contempt of court.

### When SEPA may consider civil court actions

We will consider civil court actions (i.e. non-criminal) where:

- The use of statutory notices or other enforcement action would fail or has failed to protect the environment or human health.
- Those who are operating a particular process or carrying on a particular activity are doing so without an authorisation or licence and refuse to cease activities.

### When SEPA will not use a civil court action

If other enforcement action would be more effective at achieving our enforcement outcomes, we will not be likely to use civil court actions to achieve those outcomes.

For example, if we consider that an enforcement notice will ensure that an activity that is causing environmental harm ceases, then we will not seek an interdict or interim interdict to do so.

In addition, there will be circumstances where it is not appropriate to use civil court actions. This will be determined when reviewing the circumstances of the non-compliance against our [enforcement factors](#).

### Is there a right of appeal

There may be a right of appeal against the interdict or interim interdict or other remedy that has been awarded if the court dealing with the action allows it.

## Combining the use of different types of enforcement action

A civil court action will usually only be appropriate in exceptional cases where other enforcement action has not been effective at delivering the enforcement outcome sought by us. It will usually be the case, therefore, that civil court actions are sought where other forms of enforcement action have been used or considered in order to achieve those outcomes.

## **Final warning letters**

### **What is a final warning letter**

A final warning letter is a written warning about a particular non-compliance. It provides a reasonable opportunity for the responsible person to address that non-compliance and take preventative steps to stop the non-compliance from continuing or recurring.

If we issue a final warning letter, we will be clear about the steps to be taken to rectify or prevent further non-compliance in order to avoid further enforcement action being taken.

The final warning letter provides a final chance for responsible persons to change their behaviour and come into compliance before we take further enforcement action.

Any subsequent prosecution might relate to the non-compliance covered by a final warning letter.

### **When a final warning letter may be used**

The use of a final warning letter is primarily aimed at those without a history of offending and where there is:

- no or minimal environmental harm with no lasting effects or impacts on communities;
- a low level of culpability;
- no evidence of financial benefit.

A final warning letter may be an appropriate response in circumstances where:

- Advice and guidance, or other warnings, has not been effective.
- Giving a final warning is expected to change the behaviour of the responsible person.
- The responsible person should be given an opportunity to remedy the non-compliance or to take preventative steps to ensure that the non-compliance does not recur. This may apply where, for example, there is no history of offending.
- A monetary penalty is not required to change the behaviour of the responsible person.

## When SEPA will not use a final warning letter

We may take enforcement action, where it is appropriate to do so, without issuing a final warning letter. A final warning letter is not a prerequisite to us taking another form of enforcement action, including imposing a fixed or variable monetary penalty or referral to COPFS for consideration of prosecution.

We will not use a final warning letter in circumstances where:

- A notice of intent for a fixed or variable monetary penalty will be served.
- A final warning letter has previously been issued to the same responsible person for similar non-compliance.
- Advice and guidance alone is likely to change the behaviour of the responsible person and the threat of further enforcement action is unnecessary.
- Where there has been significant financial benefit.
- Where there has been significant environmental harm

In addition, there will be [circumstances](#) where it is not appropriate to use a final warning letter. This will be determined when reviewing the circumstances of the non-compliance against our [enforcement factors](#).

## Fixed monetary penalties

### What is a fixed monetary penalty

A fixed monetary penalty (FMP) is a fine that we may impose for a specified offence. There are 3 levels of fine which will be fixed in legislation: £300; £600 and £1000. Therefore, the amount of the FMP is fixed in law.

FMPs are not available for all criminal offences – a link to the [table of offences](#)<sup>14</sup> where fixed monetary penalties may apply will be available when the Order is made. This table will also explain what level of penalty applies to the different offences that are listed there.

Common offences where we have previously taken enforcement action are set out in the following table C. This table identifies the amount of the FMP that might be associated with that offence (subject to provision made in the Order).

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<sup>14</sup> Web address to be inserted

Table C – Common offences and FMP amounts

Offence	Fixed Penalty
Section 33(6) of the <b>Environmental Protection Act 1990</b> (unauthorised or harmful depositing, treatment or disposal etc. of waste; breaching conditions of a waste management licence)	£600
Reg 44(1)(a) of <b>Water Environment (Controlled Activities) (Scotland) Regulations 2011</b> (carrying on a controlled activity (i.e. activity liable to cause pollution, abstraction of water or impoundment) without having an appropriate authorisation from SEPA or complying with a General Binding Rule)	£600
Reg 67(1)(b) of <b>Pollution Prevention and Control (Scotland) Regulations 2012</b> (failure to comply with conditions of a permit)	£600
Reg 44(1)(d) of <b>Water Environment (Controlled Activities) (Scotland) Regulations 2011</b> (failure to comply with a water use licence)	£600
Section 34(6) of <b>Environmental Protection Act 1990</b> (failure to comply with duty of care requirements)	£300
Section 59(5) of <b>Environmental Protection Act 1990</b> (failure to comply with notice requiring removal of waste)	£600
Reg 11 of <b>Control of Pollution (Silage, Slurry and Agricultural Fuel Oil) (Scotland) Regulations 2003</b> (failure to comply with requirements under regulation 2(1), 2(2), 3(1) or 6)	£600
Reg 28(6) of <b>Waste Management Licensing (Scotland) Regulations 2011</b> (carrying on an exempt activity in breach of the registration obligations)	£600
Reg 44(1)(b) of <b>Water Environment (Controlled Activities) (Scotland) Regulations 2011</b> (failure to comply with general binding rules)	£600
Reg 67(1)(a) of <b>Pollution Prevention and Control (Scotland) Regulations 2012</b> (contravention of permit requirements)	£600

## When a fixed monetary penalty may be used

Before imposing a FMP, we must have enough evidence that the responsible person has committed the offence to which the penalty relates.

The use of a FMP is appropriate where:

- The offence has not caused environmental harm or has caused minimal environmental harm with no lasting environmental effects or impacts on communities.
- Little financial benefit (if any) has arisen.
- When no environmental harm has been caused but the regulatory system has been undermined, e.g. failure to register with SEPA or a failure to submit monitoring data.

Other factors that we will consider include whether:

- this is a first time offence;
- advice and guidance has been given previously;
- a relatively low monetary penalty is likely to change the responsible person's behaviour and deter future non-compliance;
- the FMP will deter others.

The following examples provide an indication of the level of offending when a FMP may be the most appropriate enforcement action:

- administrative breaches, such as a failure to return data;
- very minor breaches of an authorisation.

Where there has been an offence occurring over consecutive days, and we have decided that a FMP is an appropriate action to use, we will normally impose a single FMP for the period of offending, rather than imposing a FMP for each day that the offending continues. The FMP notice will state the time period of offending it covers and any further offences may result in further enforcement action being taken by us.

## When SEPA will not use a fixed monetary penalty

The use of a FMP is not appropriate where:

- A FMP has already been imposed on that person for the same offence.
- A variable monetary penalty notice has been served on that person for the same offence.
- An enforcement undertaking from the same person dealing with the same offence has been accepted by us and complied with.
- Criminal proceedings have already commenced in relation to the offence.

In addition, there are [circumstances](#) where it may not be appropriate to use a FMP. This will be determined when reviewing the circumstances of the non-compliance against our [enforcement factors](#).



## What to expect in a FMP notice of intent

Where we have decided that we intend to impose a FMP, the first thing we have to do is to issue a 'notice of intent' that sets out the reasons for our decision. This will include:

- a description of the offence which we consider to have been committed;
- the amount of the proposed penalty;
- information about the right to make representations in relation to that proposed penalty.

A responsible person may wish to seek independent legal advice if we serve a notice of intent or a final penalty notice for a FMP.

## Can a proposed fixed monetary penalty be challenged

Anyone who has received a notice of intent for a FMP can challenge the notice by making written representations to us within 28 days of having received the notice. How to do this will be set out in the notice of intent.

We have the discretion to extend the 28 day period e.g. if the circumstances are complicated or the responsible person needs independent support in order to make a representation. However, it is important that the person on whom the notice of intent has been served contacts us within the 28 days to request an extension, explaining the circumstances and reasons for the request.

A representation may include information that:

- The offence alleged in the notice did not occur or was not committed by the recipient of the notice.
- There is a defence available.

Representations about a proposed FMP should include:

- the FMP reference number;
- full name and address;
- the address of the site or place where the offence was committed;
- a copy of any evidence (including any documentary evidence such as a photograph) which supports the representations;
- an explanation why the proposed penalty should not be imposed.

We will consider any representations, and make a decision on whether we intend to impose a FMP at the earliest practicable time but in any event within 6 months of receiving the representation (or a longer period if agreed with the responsible person). If we decide to impose the FMP we will serve a final FMP notice. If we decide not to impose the FMP we will confirm this in writing.

If after the period for representations has expired no representation has been made we will issue the final FMP notice, unless other evidence has come to light that changes our

decision. If we decide not to issue the FMP final notice on the basis of any other evidence that may have come to light, the responsible person will be informed.

### What to expect in a FMP final notice

Where we have decided to impose a FMP, we will issue a final FMP notice. This sets out the grounds for us imposing the penalty and will include:

- a description of the offence that has been committed;
- the amount of the penalty;
- how payment can be made;
- when payment must be made;
- the consequences of non-payment and any late payment penalties;
- information about the right to appeal against the penalty.

The FMP has to be paid within 56 days from the date of the penalty notice. Late payment will result in the amount payable being increased by 40%.

If the FMP is not paid on time, the responsible person is liable for the amount of the penalty and any late payment penalty as a civil debt. We will take action to recover that debt.

### Is there a right of appeal

The responsible person can make an appeal to the Scottish Land Court within 28 days of receiving the final FMP notice, on the basis that:

- The decision was based on an error of fact.
- The decision was wrong in law.
- The decision was unreasonable.
- Any other reason.

However, an appeal cannot be made against the amount imposed. This amount will be fixed by the Order.

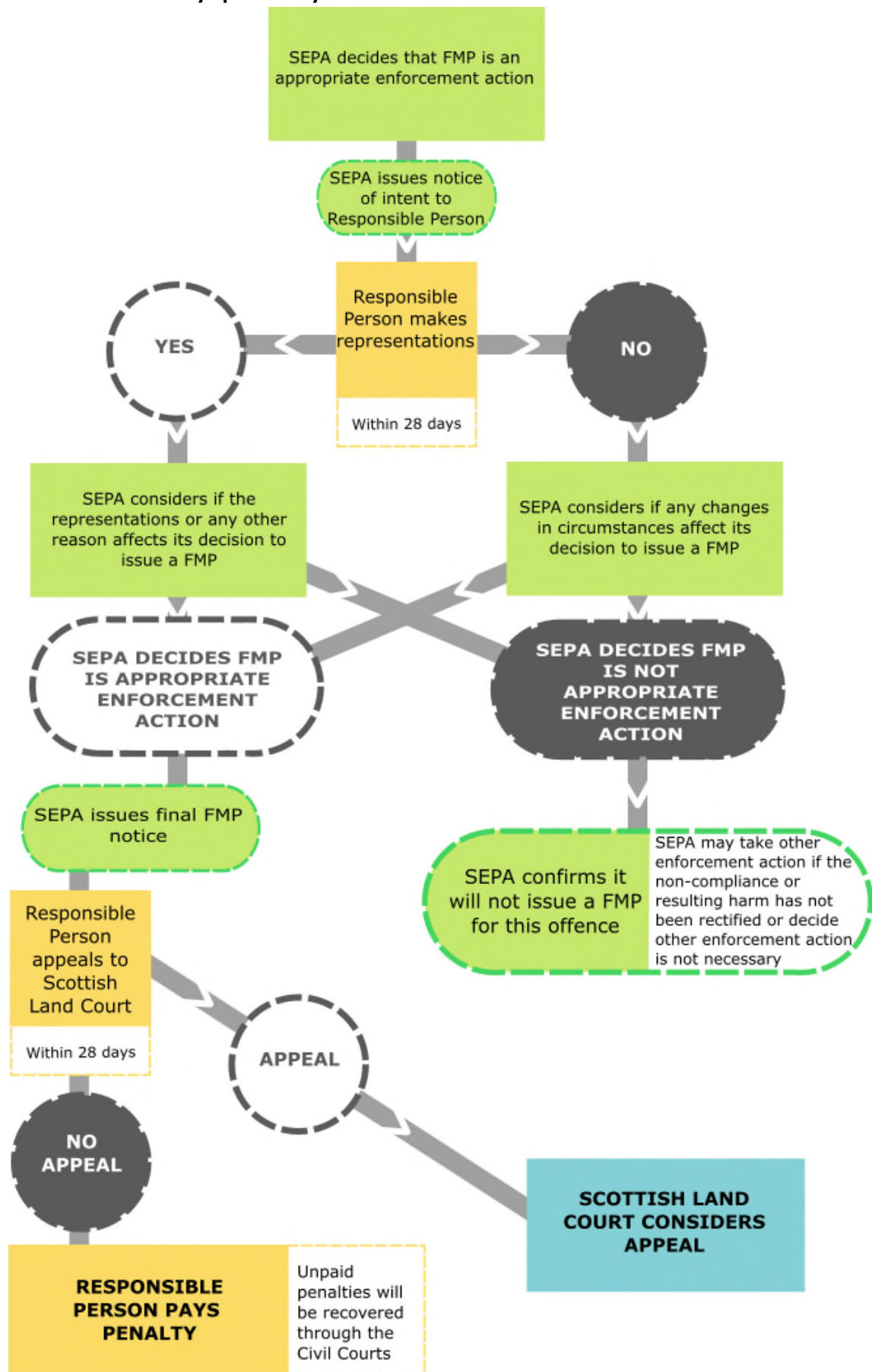
We will provide details in the final FMP notice about how to make an appeal and about the timescale and consequences of making an appeal. However, the process for submitting an appeal and the relevant forms are also available on the [Scottish Land Court](#) website.

An appeal means that payment of the penalty is postponed until after the appeal has concluded.

## Combining the use of different types of enforcement action

A FMP may be used alone or in [conjunction](#) with other enforcement action (except a variable monetary penalty, enforcement undertaking or prosecution) to secure our enforcement outcomes.

## Fixed monetary penalty flowchart



## Prosecution

### Prosecution and the Procurator Fiscal's role

We have the ability to refer offences to the Crown Office and Procurator Fiscal Service (COPFS) for consideration of prosecution. Their role includes assessing the sufficiency of evidence and assessing whether or not it is in the public interest to pursue criminal proceedings.

### When prosecution may be appropriate

Available for all criminal offences, we will normally refer to COPFS for consideration of prosecution those offences that are most serious.

Once we have referred a case, the decision on whether or not to take court proceedings or to deal with the case by way of a fiscal warning letter or fiscal fine is a matter for COPFS alone.

We may impose a fixed monetary penalty or variable monetary penalty or accept an enforcement undertaking if COPFS decides not to take court proceedings or to otherwise deal with the case. This could happen, for example, if we consider that an offence is serious but COPFS decides that there is not a public interest in prosecution, taking the wider context of the offending into account.

The legislation that establishes an offence also establishes the maximum fine for each offence and in some circumstances will provide that imprisonment or an unlimited fine may be imposed.

### When prosecution is not an option

Criminal proceedings cannot be taken for a particular offence when we have:

- imposed a fixed monetary penalty (FMP) for that offence;
- imposed a variable monetary penalty (VMP) for that offence;
- accepted a VMP undertaking for that offence;
- imposed a VMP and accepted a VMP undertaking for that offence;
- accepted an enforcement undertaking (EU) for that offence unless the offender fails to adhere to any or all of the terms of the EU.

In addition, there will be [circumstances](#) where it is not appropriate to prosecute. This will be determined when reviewing the circumstances of the non-compliance against our [enforcement factors](#).

## Statutory notices

### What is a statutory notice

A statutory notice is a formal notice, served by us, which states the non-compliance or a risk of non-compliance or addresses negative environmental impacts. It will inform the recipient what they need to do and failure to comply with these steps is an offence in most cases.

### When a statutory notice may be used

A statutory notice may only be used where the relevant legislation allows for it.

Generally, a statutory notice is used when we wish to specify the measures to be taken to prevent, stop or remediate environmental harm, address a risk of environmental harm or to prevent, stop or remedy non-compliance.

There is a range of statutory notices available to us across numerous regimes and these may be used wherever appropriate. They include:

- **Enforcement notices** identifying a breach or likely breach or significant impact or likely impact and requiring steps to be taken (e.g. regulation 32 of the Water Environment (Controlled Activities) (Scotland) Regulations 2011 (CAR), section 42(5) of the Environmental Protection Act 1990 (EPA90), regulation 55 of the Pollution Prevention and Control (Scotland) Regulations 2012 (PPC 2012) and section 21 of the Radioactive Substances Act 1993).
- **Suspension notices** which have the effect of temporarily suspending the authorisation of an activity until a particular time or until particular steps are taken (e.g. regulation 29 of CAR, sections 38 and 42(6) of EPA90, regulation 56 PPC 2012).
- **Revocation notices** prohibiting a responsible person from carrying on an environmental activity (e.g. regulation 29 of CAR, section 38 of EPA90, regulation 50 of PPC 2012).
- **Removal of waste notices** requiring an occupier to remove waste from land (e.g. section 59 of EPA90).
- **Works notices** requiring steps to be taken (e.g. Control of Pollution (Silage, Slurry and Agricultural Fuel Oil) (Scotland) Regulations 2003).
- **Prohibition notices** identifying an activity with an imminent risk of pollution or harm, and directing which steps need to be taken to remove the risk, and suspending any authorisation related to the activity (e.g. section 22 of the Radioactive Substances Act 1993).

## When is a statutory notice not likely to be used

We are unlikely to use a statutory notice in circumstances where an enforcement undertaking or a VMP undertaking, which achieve the same outcome, has been offered and accepted by us.

## What to expect in a statutory notice

A statutory notice will usually state the legislation which allows SEPA to issue the notice, and will specify the grounds for SEPA issuing the notice. This might include the details of the contravention that SEPA has identified. The statutory notice will also set out:

- who needs to take action;
- the steps to be taken which might include stopping an activity or part of an activity;
- by when the steps must be taken;
- whether or not an appeal can be made (see below).

The notice may also set out what the consequences of the notice are and/or what the consequences of failing to comply with the notice are.

A responsible person may wish to seek independent legal advice if we serve a statutory notice.

### **A Notice requiring removal of waste under section 59(1) might include for example, the following information**

Environmental Protection Act 1990, Waste Management Licensing (Scotland) Regulations 2011 i.e. the legislation which allows SEPA to issue the notice.

The name and address of the person who is required to comply with the notice i.e. who needs to action.

That SEPA is satisfied that controlled waste has been deposited in contravention of section 33(1) of the Environmental Protection Act 1990 i.e. the details of the contravention that SEPA has identified.

Requiring the removal of controlled waste identified in the notice from land identified in the notice by a specified date i.e. the steps to be taken, and by when.

Explaining that failure to comply with the notice is a criminal offence, and that if someone fails to comply with a notice SEPA may itself take the steps required and then recover the cost of doing that i.e. the consequences of the failure to comply with the notice.

Explaining that the person may appeal to the sheriff.

## Appealing against a statutory notice

Whether the responsible person can appeal against the notice depends on the legislative framework of the particular notice served. Details explaining how to appeal a statutory notice will be included with the notice.

## When SEPA can recover costs it has incurred

Where an enforcement notice under the Water Environment (Controlled Activities) (Scotland) Regulations 2011 is served on a responsible person, we may recover the costs of carrying out the investigation from them. We will issue a notice requiring the responsible person to pay the amount of those costs.

## Combining the use of different types of enforcement action

A statutory notice may be used alone or in [conjunction](#) with other enforcement action to secure our enforcement outcomes.



## Variable monetary penalties

### What is a variable monetary penalty

A variable monetary penalty (VMP) is a discretionary fine, which we can impose. The maximum penalty amount is set out in the legislation creating that offence, and is not the same for all environmental offences.

VMPs are not available for all criminal offences – a link to the [table of offences](#)<sup>15</sup> where variable monetary penalties may apply will be available when the Order is made.

### When a variable monetary penalty may be used

Before imposing a VMP, we must have enough evidence that the responsible person has committed the offence to which the penalty relates.

The use of a VMP is aimed at offences where the circumstances of the offence need to be taken into account in delivering fair and proportionate enforcement action. For some cases we may need to liaise with the Crown Office and Procurator Fiscal Service (COPFS) to decide whether referral to COPFS is more appropriate.

The use of a VMP may be appropriate where any of the following apply:

- environmental harm has been caused or is likely to be caused;
- when no environmental harm has been caused but the regulatory system has been undermined, e.g. failure to register with an appropriate producer responsibility scheme or a failure to submit monitoring data;
- when there has been an adverse impact on communities;
- there has been financial benefit.

Other factors that we will consider include:

- whether this is a first time offence;
- whether advice and guidance has been given previously;
- whether the VMP is likely to change the responsible person's behaviour;
- whether a VMP will lead to faster resolution of the non-compliance;
- whether the VMP will deter others.

Where there has been an offence occurring over consecutive days, we will normally impose a single VMP rather than a series of VMPs. The VMP notice will state the time period of offending it covers.

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<sup>15</sup> Web address to be inserted

If the offence continues or recurs, we are not prevented from taking further enforcement action in relation to that continuing or recurring offending or referring that continuing or recurring offending to COPFS for consideration of prosecution.

### When SEPA will not use a variable monetary penalty

- The VMP is unlikely to change the behaviour of the responsible person.
- The matter is to be referred to COPFS for consideration of prosecution.
- A fixed monetary penalty has already been imposed on that responsible person for the offence.
- A VMP has already been imposed on that responsible person for the offence.
- A VMP undertaking has been accepted.
- An enforcement undertaking has been accepted and complied with.

In addition, there are [circumstances](#) where it may not be appropriate to use a VMP. This will be determined when reviewing the circumstances of the non-compliance against our [enforcement factors](#).

### What to expect in a VMP notice of intent

Where we have decided that we intend to impose a VMP, the first thing we have to do is to issue a 'notice of intent' that sets out the reasons for our decision. This will include:

- a description of the offence which we consider to have been committed;
- the amount of the proposed penalty and how we have determined it;
- information about the right to make representations in relation to that proposed penalty;
- information about the availability of a [variable monetary penalty undertaking](#).

A responsible person may wish to seek independent legal advice if we serve a notice of intent or a final penalty notice for a VMP.

### What is a variable monetary penalty undertaking

When we have served a notice of intent, the responsible person may choose to make an offer to use their resources to the greater benefit of the environment in place of paying the penalty proposed. If accepted by us, this replaces the VMP. Such an offer is known as a VMP undertaking. More information about what a VMP undertaking is and how it could be used is set out in a [different section](#) of this guidance.

## Can a proposed variable monetary penalty be challenged

Anyone who has received a notice of intent for a VMP can challenge the notice by making written representations to us within 28 days of having received the notice. How to do that will be set out in the notice of intent.

We have the discretion to extend the 28 day period e.g. if the circumstances are complicated or the responsible person needs independent support in order to make a representation, but it is important that the responsible person on whom the notice of intent has been served contacts us within the 28 days to request an extension, explaining the circumstances and reasons for the request.

Representations may include information:

- that the offence alleged in the notice did not occur or was not committed by the recipient;
- that there is a defence available;
- that the amount of the penalty is incorrect or unreasonable;
- regarding inability to pay and proposing an alternative payment strategy. For example, this might involve staged or regular instalments.

Representations about a proposed VMP should include:

- the VMP reference number, full name and address;
- the address of the site or place where the offence was committed;
- a copy of any evidence (including any documentary evidence such as a photograph or, in relation to ability to pay, audited accounts), which supports the representation;
- an explanation why the proposed penalty should not be imposed.

We will consider any representations, and make a decision on whether we intend to impose a VMP at the earliest practicable time but in any event within six months of receiving the representation (or a longer period if agreed with the responsible person). We will make one of the following decisions:

- to impose a VMP for the amount in the notice of intent;
- to impose a VMP for a reduced amount;
- not to impose a VMP.

If we decide not to impose a VMP, we will confirm this in writing. If we decide to impose a VMP, a final VMP notice will be issued.

If after the period of representations has expired no representations have been made we will issue the final VMP notice, unless other evidence has come to light that changes our decision. If we decide not to issue the VMP final notice on the basis of any other evidence that may have come to light, the responsible person will be informed.

## What to expect in a final VMP notice

Where we have decided to impose a VMP, we will issue a final VMP notice. This sets out the grounds for us imposing the penalty and will include:

- a description of the offence that has been committed;
- the amount of the penalty and how we have determined it;
- how payment can be made and when payment must be made;
- the consequences of non-payment and any late payment interest;
- information about the right to appeal against the penalty.

The VMP has to be paid within 56 days from the date of the final VMP notice. Late payment will result in interest at a rate of 8% per annum being applied to the amount that is outstanding.

If the VMP is not paid on time, the responsible person is liable for the amount of the penalty and any late payment interest as a civil debt. We will take action to recover that debt.

Where the responsible person is unable to pay the full amount of the penalty within the statutory timescales we may, at our discretion, choose to accept an alternative payment proposal.

## Is there a right of appeal

The responsible person can appeal to the Scottish Land Court within 28 days of receiving the final VMP notice, on the basis that:

- The decision was based on an error of fact.
- The decision was wrong in law.
- The amount of the penalty is unreasonable.
- The decision was unreasonable for any other reason.
- Any other reason.

We will provide details in the final notice about how to make an appeal and about the timescale and consequences of making an appeal. However, the process for submitting an appeal and the relevant forms are also available on the [Scottish Land Court](#) web site.

An appeal means that payment of the penalty is postponed until after the appeal has concluded.

## How SEPA will calculate a variable monetary penalty

The Order will give us discretion to decide the amount of the variable monetary penalty. We have published information on how we will calculate the level of that penalty separately. [Note: this information is not available at this stage and there will be a separate consultation on the calculation of the VMP]. That information does not form part of this guidance.

The methodology for calculating the penalty amount is based on three elements:

- financial benefit;
- gravity;
- mitigating and aggravating behaviours.

The formula we use is:

Penalty amount = (financial benefit) + (gravity x (mitigating and aggravating behaviour))

The **financial benefit** is determined from the evidence gathered during the investigation. This takes account of costs avoided, operational savings and money obtained through the commission of the offence.

The **gravity** component reflects the degree of harm or potential harm to the environment. Where there is no harm or risk of harm, the level of disruption to the regulatory system caused by the offence will be taken into account, for example failure to report data that we must in turn report to the European Commission or the failure to register with an appropriate producer responsibility scheme.

The **mitigating and aggravating behaviours** adjust the level of the **gravity** component in our calculation. The impact of mitigating behaviour is to reduce the penalty amount while aggravating behaviour will increase it.

## How SEPA will recover the costs we have incurred

We will recover from the responsible person the costs that we have incurred during the process of imposing a VMP up to a maximum of 30% of the amount of the VMP. This will be done by issuing a costs recovery notice at the same time or shortly after we serve the final VMP notice. These costs can include the expense involved in:

- investigating the offence resulting in the notice of intent being issued;
- carrying out additional monitoring to identify environmental impact;
- installing monitoring equipment that is needed to assess environmental impact;
- assessing representations made including any assessment of financial benefit;
- carrying out further investigating work after the notice of intent but before the penalty is imposed;
- administering the penalty;
- obtaining any legal or other advice as part of that process.

We will not recover any costs incurred by us after the imposition of the VMP final notice, such as the costs of recovering any penalty that is due.

We will not seek to recover any costs that are incurred by us in carrying out routine inspections which may have resulted in further investigations being carried out but which are not directly related to the imposition of the penalty. These are an aspect of our charging scheme.

We anticipate that in most cases the amount to be paid will not reflect the full expense incurred by us and we will provide a breakdown of the full costs incurred by us if requested. This approach will be reviewed two years after publication of the guidance with a view to assessing the appropriateness of moving to full cost recovery in the future.

The costs have to be paid within 56 days from the date of the costs recovery notice. Late payment will result in 8% interest per annum being applied to the amount that is overdue. If the costs are not paid on time, the responsible person is liable for the amount of the penalty as a civil debt and we will take action to recover that debt.

We may withdraw a costs recovery notice or reduce the amount of those costs at any time.

The responsible person can appeal against a costs recovery notice or the amount of those costs, particularly if the responsible person considers that some or all of those costs were unnecessarily incurred. However, we will not reduce the amount of costs on the basis of representations made by the responsible person concerning their inability to pay the amount due.

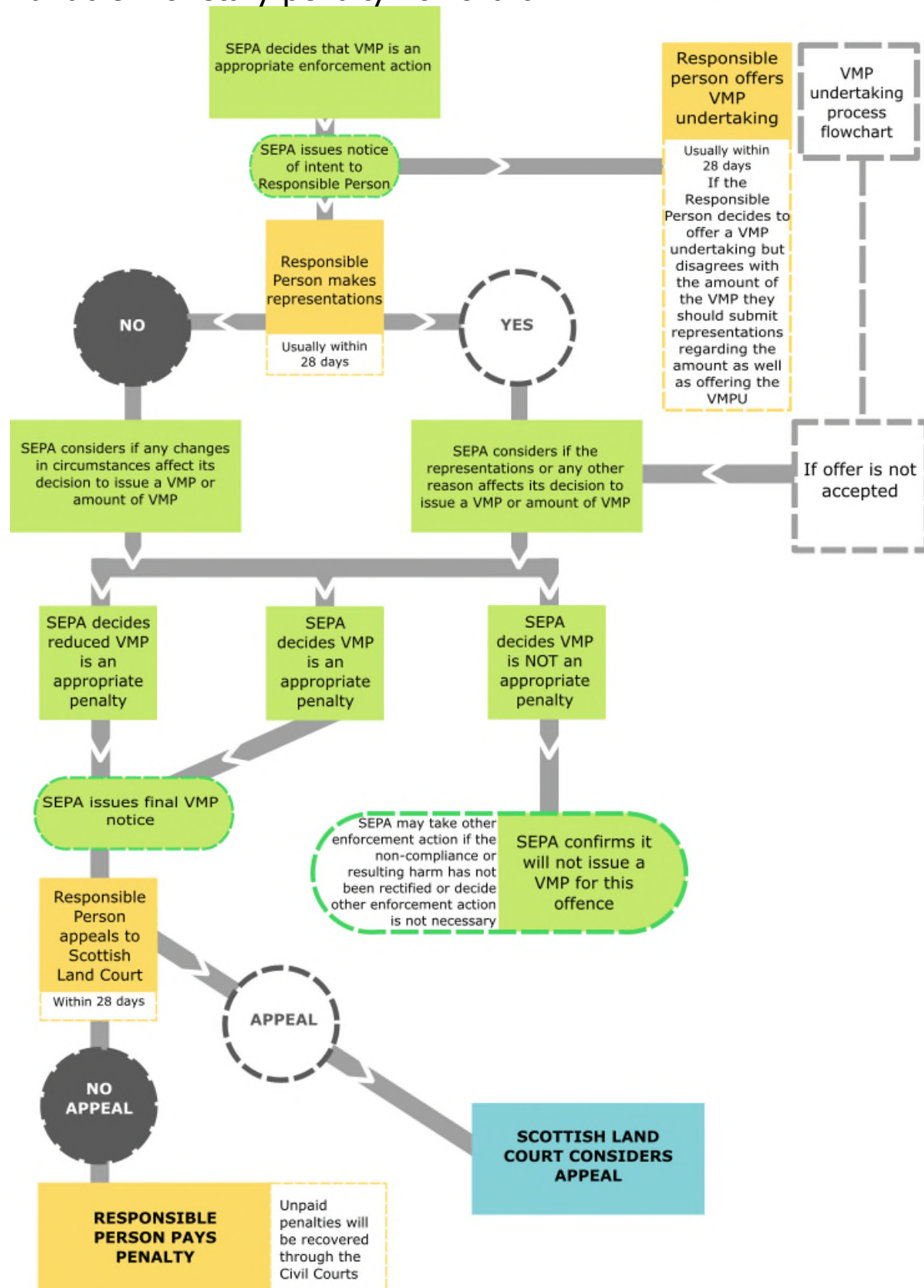
The responsible person can make an appeal to the [Scottish Land Court](#) within 28 days of receiving the costs recovery notice, against the decision to impose the costs recovery notice or the amount of the costs, including that some or all of the costs were unnecessarily incurred.

We will provide detail in the costs recovery notice about how to make an appeal and about the timescale and consequences of making an appeal. An appeal means that payment of the costs is postponed until after the appeal has concluded.

## Combining the use of different types of enforcement action

A VMP may be used alone or in [conjunction](#) with other enforcement action e.g. a statutory notice to secure our enforcement outcomes. The costs associated with complying with the steps set out in a statutory notice will be taken into account when setting the amount of the VMP.

## Variable monetary penalty flowchart





## **Variable monetary penalty undertakings**

### **What is a variable monetary penalty undertaking**

In response to us issuing a VMP notice of intent a responsible person may choose to offer a variable monetary penalty (VMP) undertaking to make amends for non-compliance and its effects and to prevent recurrence. We also expect the offer to go beyond compliance and provide commitment to continual improvement in environmental performance.

The offer will have to comprise a range of actions for any or all of the following purposes:

- To ensure the position, including the condition of the environment, is restored to what it would have been if the offence had not been committed.
- Where environmental restoration is not possible, to provide benefit to the local environment that matches the extent of harm arising from the offence.
- To secure that no financial benefit has accrued to the responsible person as a result of the offence being committed.

VMP undertakings are intended to encourage positive behaviour by allowing the responsible person to use their resources to the greater benefit of the environment, usually in place of paying the penalty imposed.

If we accept the offer, the agreed actions become the terms of the undertaking, and the responsible person must comply with them. Whilst we are under no obligation to accept any offer of a VMP undertaking we have included below guidance about making an acceptable offer.

The responsible person may wish to seek independent legal advice before making an offer of a VMP undertaking.

### **What are the benefits of a VMP undertaking**

Whilst we would encourage a responsible person to offer an [enforcement undertaking](#) before we issue a VMP notice of intent, offering a VMP undertaking in response to us issuing a VMP notice of intent can provide benefits:

For the responsible person:

- A financial penalty may be avoided as long as the VMP undertaking is complied with.
- The undertaking is flexible and can reflect the responsible person's approach to remedying the non-compliance, rather than remedial measures required by us under a statutory notice.
- It enables a responsible person to address offending in a constructive way.
- An undertaking is tailored to the circumstances, which includes addressing any impact on the local community.
- A faster and more effective resolution because the responsible person designing the offer has ownership of the actions.
- It will also usually avoid any other legal requirement being imposed on the responsible person to address the non-compliance.

The underpinning principles of a VMP undertaking mean that:

- The focus of the undertaking will be on restoration and remediation of the local environment and preventing repeated non-compliance.
- We expect the VMP undertaking to extend 'beyond compliance' to improve the wider environmental performance of the responsible person making the offer.
- The responsible person making the offer is protected from both criminal proceedings and monetary penalties if the offer is accepted by us and the undertaking is complied with.

For us and for communities affected by non-compliance it can be more effective than other options in:

- improving environmental compliance;
- ensuring that remediation and restoration measures are carried out.

### When a VMP undertaking may be acceptable

Aimed at broadly compliant responsible persons or businesses, we will consider an offer of a VMP undertaking in the following circumstances where:

- Any financial benefit accrued has been negated by the undertaking.
- The measures are likely to ensure no repeat offending.
- The undertaking includes appropriate remediation or restoration measures and goes beyond regulatory requirements.
- We believe the responsible person will comply with the conditions of the undertaking.

We may accept a VMP undertaking as an alternative to serving a VMP, or may accept a VMP undertaking in addition to serving a reduced VMP.

### When SEPA will not consider the use of a VMP undertaking

One of the underpinning principles of a VMP undertaking is that the responsible person will comply with the terms of the undertaking. We consider our acceptance of an undertaking inappropriate when:

- The responsible person has failed to comply with the mandatory requirements of a statutory notice.
- The responsible person appears to us, for any other reason, to be unlikely to comply with the undertaking or is likely to use the undertaking as a delaying tactic.

## Preparing a suitable offer for determination by SEPA

Given the advantages of offering a VMP undertaking, as outlined above, whilst we will give some feedback on a draft proposal if requested and where appropriate, we do not intend to enter into protracted negotiations about the offer. We will either accept or decline an offer based on its content. We expect the responsible person to address the following points when making an acceptable offer:

- to prevent recurrence;
- to go beyond the minimum required to comply;
- to demonstrate commitment to continual improvement in environmental performance;
- to go beyond the minimum required to restore the environment or if not possible to make a compensatory offer - we do not consider that actions to be made as part of an VMP undertaking should simply equate to restoration of harm caused;
- to remove more than the financial advantage gained - we do not consider that payments to be made as part of a VMP undertaking should simply equate to the financial advantage gained by offending;
- to reflect the costs incurred by us (see below).

We will look more favourably on an offer:

- that demonstrates commitment to continual improvement in environmental performance;
- where it delivers restoration and/or compensatory benefits to the environment or the community directly affected by the offence.

A VMP undertaking is offered as an alternative to paying the full amount of the VMP, as set out in the notice of intent. If you disagree with the amount of the VMP you must submit [representations](#) at the same time as submitting the offer of a VMP undertaking and within the period allowed for representations (usually 28 days). SEPA will consider any representations and the amount of VMP that would have been included in a final VMP notice will be stated as part of our acceptance of the offer (where it is accepted). This amount will be used to calculate the non compliance penalty should the undertaking not be complied with.

We will confirm in writing our decision about whether or not we accept an offer.

## How SEPA will recover the costs we have incurred

The responsible person making an offer will be expected, as part of the VMP undertaking, to pay the costs borne by us in investigating the offence and considering the undertaking, and the costs of any subsequent compliance monitoring and other activities to be carried out by us to assess compliance with the undertaking.

To enable the responsible person to offer a suitable amount, we will provide information about the costs incurred. The amount may not necessarily represent the full costs incurred by us for the particular offence.

## Is there a right of appeal

If we reject the offer of VMP undertaking, the responsible person making the offer has no right of appeal against that decision.

## Variation of VMP undertakings

If it becomes impossible for the responsible person to comply with the VMP undertaking as accepted by SEPA, the responsible person may apply to SEPA for amendment of the VMP undertaking. It is at our discretion whether or not to agree to any proposed amendments. Any amendment to a VMP undertaking will need to provide equivalent benefit to the environment or communities, equivalent financial commitment and address the additional cost incurred by SEPA in considering the amendment.

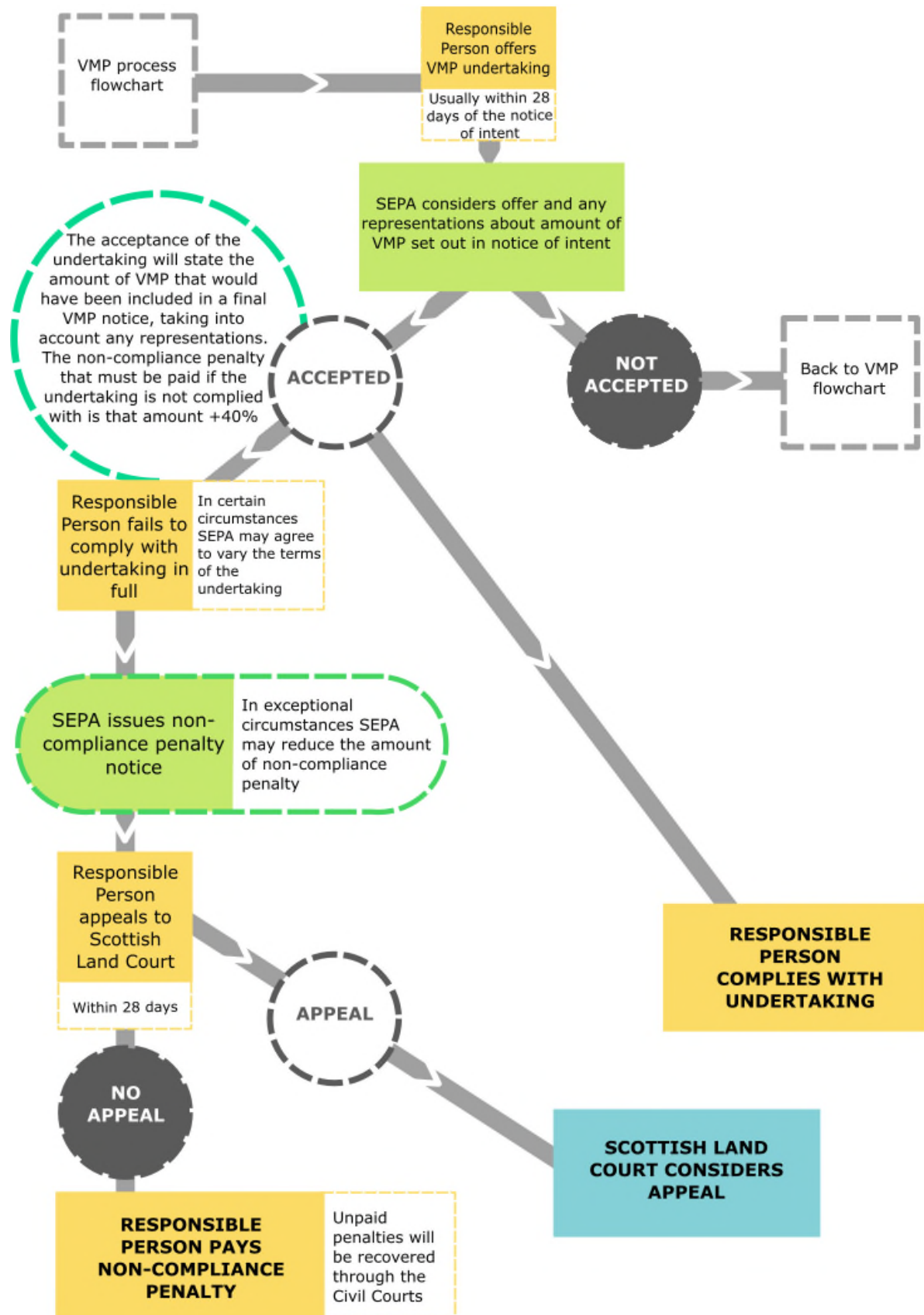
### Example

Where a VMP undertaking commits funding to a third party to support a local improvement project but the third party decides not to proceed, the responsible person may apply to SEPA for amendment of the VMP undertaking.

## When a responsible person does not comply with the terms of the VMP undertaking

We may serve a [non-compliance penalty](#) if a responsible person fails to comply with their undertaking. This includes circumstances when a responsible person uses their undertaking to delay coming into compliance or to delay the remediation or restoration of the environment.

## Variable monetary penalty undertaking flowchart



## Non-compliance penalties

### What is a non-compliance penalty

A non-compliance penalty (NCP) is a monetary penalty that we may impose only when the responsible person has failed to comply with a [variable monetary penalty \(VMP\) undertaking](#). This means that the responsible person has failed to deliver one or more of the agreed actions. We will impose the penalty by serving a non-compliance penalty notice.

### When a non-compliance penalty may be used

We can impose a NCP where there has been whole or partial non-compliance with the VMP undertaking i.e. either all or only some of the actions have been delivered. We will consider the reasons for the non-compliance before imposing a NCP.

We will endeavour to make a decision on whether to issue a NCP at the earliest practicable time, and in any event within 6 months of identifying the VMP undertaking in question has not been complied with in part or completely.

### When SEPA will not use a non-compliance penalty

We are unable to use a NCP when the responsible person has failed to comply with:

- a fixed monetary penalty;
- a variable monetary penalty;
- an enforcement undertaking;
- a statutory notice.

### How SEPA will calculate a non-compliance penalty

If the undertaking is not complied with, the level of penalty will be the amount (in pounds sterling) stated in the acceptance of the VMP undertaking - together with an additional 40% uplift. The amount stated in the acceptance of the VMP undertaking is the amount of VMP that would have been included in the final VMP notice had the undertaking not been accepted. In deciding this amount we will take into account any representations made to us within the period for representations (usually 28 days from having received the notice of intent) regarding the amount specified in the VMP notice of intent.

We may, at our discretion and in exceptional circumstances, adjust the amount of the non-compliance penalty where satisfied that non-compliance with the VMP undertaking was due to circumstances outwith the responsible person's control.

The NCP has to be paid within 56 days of the date of the notice. Late payment will result in interest at a rate of 8% per annum being applied to the amount that is overdue.

## Is there a right of appeal

The responsible person has the right to appeal against the imposition of an NCP on the basis that:

- The decision to serve the notice was based on an error of fact.
- The decision was wrong in law.
- The decision was unreasonable for any reason (including that the amount is unreasonable).
- Any other reason.

We will provide detail in the notice about how to make an appeal and about the timescale and consequences of making an appeal. However, the process for submitting an appeal and the relevant forms are also available on the [Scottish Land Court](#) website

An appeal means that payment of the penalty is postponed until after the appeal has concluded.



## How we may combine the use of different enforcement actions

### Example One

Someone fails to comply with conditions of an environmental authorisation by failing to submit data on time. This happens on three separate occasions over a six month period.

We respond by issuing a fixed monetary penalty (FMP) and a statutory notice requiring an investigation into the reasons for the late reporting to be carried out and recommendations to prevent future non-compliance to be submitted to us. Then a further notice might require those recommendations to be implemented to ensure compliance with the particular licence condition. We would continue to offer advice and guidance throughout.

By using the FMP and the statutory notice together, we aim to change behaviour and to deter future non-compliance.

### Example Two

Someone has failed to take preventative steps to stop construction works from having an adverse effect on the environment.

We might respond by issuing a statutory notice requiring the works to stop and steps to be taken to mitigate the effect on the environment. This response deals with the immediate harm to the environment.

The responsible person has received a statutory notice from us at another site for a similar problem. It is obvious that their behaviour has not changed despite that earlier intervention. We might, therefore, issue a notice of intent for a variable monetary penalty (VMP), where the VMP seeks to remove financial benefit (excluding the avoided costs relating to steps that should have been taken to mitigate the effect on the environment where these steps have subsequently been, or are now being, taken) and address the gravity of the offence.

We would continue to offer advice and guidance to the developer throughout.

### Example Three

Someone is storing waste without having an appropriate environmental authorisation.

In cases where authorising the activity is not appropriate, we might issue a statutory notice requiring steps to be taken to mitigate the effects on the environment, and would require the activity to stop. We might also issue a notice of intent to serve a variable monetary penalty (VMP). The VMP would seek to remove financial benefit (excluding the avoided costs relating to steps that should have been taken to mitigate the effect on the environment where these steps have subsequently been, or are now being, taken), punish the person for carrying on an unauthorised activity, and to deter future non-compliance.

If they do not comply with the statutory notice by carrying out the steps specified in the notice, further enforcement action might be merited, including a second VMP to remove the avoided costs associated with steps to be taken to mitigate the effects on the environment.

We would continue to offer advice and guidance throughout.