

## Frequently Asked Questions

### Public Consultation on how SEPA intends to determine the amount of a Variable Monetary Penalty

#### **Why are SEPA consulting on this issue now?**

We need to consult on how we intend to determine the amount of a Variable Monetary Penalty (VMP) as part of our revised Enforcement Policy.

#### **Does this consultation mean that the availability of Variable Monetary Penalties as a new enforcement measure for SEPA is now up for debate?**

No, VMPs were made available to SEPA under the Environmental Regulation (Enforcement Measures) (Scotland) Order 2015 ('the Order') and is part of the environmental enforcement framework introduced under the Regulatory Reform (Scotland) Act 2014. We have already consulted on the framework.

This consultation is seeking views on the approach SEPA intends to take in determining the amount of a VMP.

#### **How long does the consultation last?**

We are consulting for 12 weeks, 7 September to 28 November.

#### **How can I respond to the consultation?**

Details are provided on how to do this in the consultation document and via the Citizen Space portal.

During the consultation period, we would welcome the opportunity to explain our approach and to answer questions before responses are submitted if this helps.

#### **How can I find out more?**

The consultation is available on the [SEPA Website](#). For further information on VMPs as an enforcement tool, see our published [Guidance](#).

We would be pleased to provide information and explain our proposals at face-to-face meetings and, as part of this, ensure that we provide any wider context (e.g. as to the fit with our new Regulatory Strategy and the implementation of other components of the Better Environmental Regulation programme).

## When does SEPA propose to start using Variable Monetary Penalties?

It is envisaged that VMPs will be available for use early in 2017 after we have analysed the consultation responses. We will publish guidance on the finalised approach to determining the amount of a VMP on our website.

## What is a Variable Monetary Penalty?

Our [Enforcement Guidance](#) explains what a VMP is and how and when we will use a VMP.

In brief, a VMP is a discretionary financial penalty which SEPA can impose directly. The maximum penalty amount is set out in the legislation creating that offence, and is not the same for all environmental offences.

The offences for which we can impose a VMP are set out in [Schedule 4 of the Order](#)<sup>1</sup>. VMPs are not available for all offences.

## How does SEPA intend to determine the amount of a Variable Monetary Penalty?

The approach and criteria we intend to use are set out in the consultation. This relies on structured professional judgement and the use of criteria by our staff in deciding what VMP level to impose.

We have discretion to decide the amount of the VMP and we think that this should be based on three elements:

- **Financial benefit** - as determined from the evidence gathered during the investigation. This takes account of direct and indirect gains through money made through commission of the offence and avoided operational costs.
- **Impact** - this reflects the severity of harm or risk of harm to the environment. Where there is no harm or risk of harm, the statutory risk, timeliness and level of completeness caused by the offence will be taken into account.
- **Behaviour and context** - our assumption will be that behaviours that support compliance and positive actions to notify, remediate and restore are a baseline expectation. Conversely, poor level of cooperation and disruptive behaviour are likely to increase the penalty imposed.

## Has SEPA put in place governance arrangements to ensure Variable Monetary Penalties are proportionate?

Yes, we will have robust internal governance arrangements for the decisions to impose a VMP and will ensure that these are made at an appropriate level.

We must also have regard to the Lord Advocate's Guidelines issued to us under the Regulatory Reform (Scotland) Act 2014. These guidelines give guidance on the cases which SEPA should be considering referring to Crown Office for their consideration of prosecution, rather than using one of the new enforcement measures.

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<sup>1</sup> [www.legislation.gov.uk/ssi/2015/383/made](http://www.legislation.gov.uk/ssi/2015/383/made)

## **Are there additional safeguards?**

Our [Enforcement Guidance](#) sets out some additional safeguards and explains the process for making representations and appealing a decision to serve a final VMP notice.

These safeguards are intended to help to ensure that there is a mechanism for challenging our decisions.

## **What is SEPA's approach to enforcement?**

Our Enforcement Policy sets out the principles that underpin our approach. Enforcement is one of the actions that will help us deliver our Regulatory Strategy.

Our Regulatory Strategy sets out our approach as a 21<sup>st</sup> Century EPA. Part of this approach is about focusing on 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;
- remove financial benefits arising from illegal activity;
- stop harm or reduce the risk of harm to an acceptable level;
- restore or remediate the harm caused by non-compliance, where appropriate;
- deter future non-compliance and re-offending.

## **What sorts of penalty can we expect to be imposed by SEPA?**

VMPs will vary to the specific circumstances of an offence and the previous history and context of offending. The overall penalty imposed cannot exceed £40,000, including the removal of financial benefit.

Our approach relies on placing an offence in one of three Impact Categories based on evidence of:

- Actual Harm;
- Risk of Harm;
- Technical / Administrative breach.

A penalty range has been developed for each of these categories.

We will then assess the evidence of the seriousness / significance of the impacts associated with a breach and assign this to one of three Impact Bands.

The final step assumes the VMP level to be imposed will be at the lowest level unless behaviour and context suggests that this should be adjusted upwards. We will use the enforcement factors in our published [Guidance](#) to make decisions on intent, foreseeability, actions taken and previous history.

**Can a VMP exceed the maximum fine specified for relevant offences on summary conviction?**

All of the offences specified in relation to a VMP are triable summarily and punishable with a fine which means that SEPA must take into consideration the maximum amount of the fine that may be imposed on summary conviction (whether or not also triable on indictment or whether or not punishable by imprisonment).

We are aware that we cannot exceed this amount in deciding to impose a VMP.

**Will SEPA take account of an offender's ability to pay?**

Yes, our intention is not to put offenders out of business but to achieve a proportionate outcome in terms of punishment, deterrent effect and to drive better compliance and improved sustainability through a focus on behaviour change.

Evidence to support ability to pay is the responsibility of the offender, however, and should accompany any representations made to us after a notice of intent has been served.