

SUMMARY RESPONSE AND ANALYSIS TO:

The Consultation on the Guidance on the use of enforcement action

October 2021

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1. Introduction

Between October and December 2020, the Scottish Environment Protection Agency (SEPA) carried out a series of stakeholder engagement sessions and an online consultation on the Revised Guidance on the Use of Enforcement Action. This involved several minor changes to the guidance. In addition to this, the consultation focused on the major change to the section on Variable Monetary Penalties (VMPs). This document provides an analysis of the responses from the online consultation and sets out our next steps.

Thank you to all who took part in the consultation process.

2. Background

In 2014 the Regulatory Reform (Scotland) Act was introduced laying out SEPA's statutory purpose and establishing a framework for SEPA to be given new enforcement powers. Following this, the 2015 Environmental Regulation (Enforcement Measures) (Scotland) Order gave us the power to impose Variable Monetary Penalties (VMPs) as well as giving us the power to use other enforcement measures, all where a relevant offence has been committed.

In 2016, the Lord Advocate released guidelines to us on the use of enforcement measures and the material factors to consider for each offence. In the same year, we consulted on proposed guidance on how to determine a Variable Monetary Penalty. We considered the comments from the 2016 consultation and revised our approach. This new approach incorporates aspects from the previous proposal and takes account of the responses to the previous consultation in 2016. The new proposed process formed part of this consultation.

3. Consultation summary response

SEPA received 19 responses from a variety of industry and trade bodies. Overall, there was a good level of support for the proposed process for determining a VMP with some agreeing that the methodology will provide a level of structure and consistency to the determination. However, most respondents would like more detail included in the guidance.

We asked six questions in the consultation with additional comments provided by the respondents. The questions and responses are dealt with in more detail below.

4. Response by question

Questions 1-3 were identifier questions relating to the respondents.

4.1. Q4: Are you satisfied the guidance clarifies how co-operation will be assessed?

Table A - % Response to Q4

Option	Total	Percent
Yes	10	52.63%
Not sure	3	15.79%
No	4	21.05%
Not Answered	2	10.53%

From the 19 responses, 13 (68.42%) respondents provided further comment.

Majority of respondents were satisfied on how SEPA will assess co-operation and felt that the list of behavioural factors was broadly appropriate. However, whilst they agreed with the assessment most of the respondent's noted that only 'self-reporting' offered a reduction in

the penalty and felt that 'co-operation with SEPA investigation' should also result in a reduction.

The proposed assessment does not offer a reduction in the penalty where the Responsible Person is required to report incidents/non-compliance as part of their licence conditions. Some felt that licensed sites were at a disadvantage compared to unlicensed sites e.g. those operating under General Binding Rule's (GBRs) are at an advantage because they could see a reduction in penalty if they voluntarily report the incident simply because they are not a licensed site.

As well as the points above, those respondents who were not satisfied or unsure with how co-operation will be assessed were also concerned that:

- in cases that require a licence from other regulatory bodies e.g. a licence to carry out remedial work in a designated water body, then the delay in obtaining such a licence would be seen by SEPA as not being co-operative.
- the factors (e.g. environmental impact, co-operation, compliance history etc.) would only be taken into consideration after the decision has been taken to impose a VMP.

One respondent felt it was important to formalise engagement with external partners during investigations and another would like to understand the standard of proof required when identifying factors to calculate a VMP.

4.1.1. SEPA response

SEPA expects everyone to be compliant with their environmental obligations regardless of whether they are licensed by us, and to co-operate with our investigations. We do not consider that a Responsible Person(s) should be rewarded for simply following their licence conditions or the relevant legislation. We also believe that there should be a level playing field for everyone and no one should be disadvantaged by our assessment of VMPs. We have reviewed the section on co-operation and considered the comments made by the respondents. We have made it clear that the level of cooperation relates only to cooperation

with SEPA's investigation and provided examples of what will be considered as not co-operating.

SEPA cannot and will not instruct someone to do something that breaches other legislation. In such a scenario as described in the consultation response above, where the responsible person delayed applying for such licences, SEPA will engage with the Responsible Person(s) during the investigation to an incident and the enforcement process, so that discussions can take place at an early stage to address any conflicts with other regulatory bodies. We have reviewed the guidance and made it clear that this is an aggravating factor only where there has been a lack of cooperation with SEPA's investigation. Repairs or maintenance, for example, or remedial works carried out by the responsible person will not normally be part of the SEPA investigation itself. We have removed the reduction afforded where there is self-reporting. This ensures there is no discrimination between a licensed operator who is required to self-report, and unlicensed operator who self-reports an incident on their own accord.

SEPA will only decide on the level of enforcement action, including a VMP, once an appropriate investigation has been completed. The appropriate investigation involves collecting evidence to show the offence has occurred, the person(s) responsible and the impact the offence has caused to the environment and the community. As part of the investigation, officers will also collect information to show the level of co-operation, compliance history and any previous enforcement action among other factors.

SEPA use evidence and information provided by the investigating officer(s) to ensure the evidential threshold has been met. In accordance with legislation, the burden of proof in the case of a VMP is on the 'balance of probabilities' therefore the standard of proof required is less than what is required for a criminal case where the burden of proof is 'beyond reasonable doubt'.

SEPA will consult with our external partners during an investigation where it is appropriate to do so. We do not intend to formalise this process or include it in guidance, but we will continue to consider whether consultation with external partners is required on a case-by-

case basis. We also engage with external partners out with our enforcement process and will look to do more of this in the future.

4.2. Q 5: Do you agree with our approach to calculating weightings?

Table B - % Response to Q5

Option	Total	Percent
Yes	9	47.37%
Not sure	3	15.79%
No	5	26.32%
Not Answered	2	10.53%

From the 19 responses, 13 (68.42%) respondents provided further comment.

Many of the respondents agreed with our approach to calculating weightings and felt that it provided structure to the process with some also agreeing that the greatest weighting should be applied to the environmental impact factor.

However, of the respondents who disagreed or were unsure with our approach, some felt that:

- further explanation of weightings was required;
- they would like to see less emphasis on zero weightings;
- there were some inconsistencies between the increases of the weightings.

There was also concern amongst this group that the new process removed technical/administrative offences as seen in the previous consultation (2014) and would like further guidance on this.

4.2.1. SEPA response

SEPA provided an explanation of how the factors are weighted as part of the consultation. This will be included in the proposed guidance on determining a variable monetary penalty. Additional information was included in the consultation document, and we have reviewed

these and included some of that information in the guidance document. We will also review the weightings to ensure there are no inconsistencies between the weighting before implementing the process.

In our proposed process, zero weightings are only applied to situations where there has been no impact to the environment or where the responsible person has acted in a way that would be expected of them e.g. complying with their environmental obligations or co-operated with a SEPA investigation. SEPA does not consider it appropriate to reward the Responsible Person(s) for doing what is required of them i.e., complying with the relevant environmental legislation. Nor do we consider it fair to penalise them by increasing the penalty for complying, however we do think it appropriate to include their level of compliance in our assessment hence why we have included a zero weighting.

Technical/administrative offences are still considered under our proposed process, but the assessment has been revised. In the 2016 consultation the proposed process set out three impact bands: actual harm, risk of harm and technical/administrative offences. Those bands have been removed and the new process looks at the overall impact and takes into consideration the enforcement factors set out in our [Enforcement Guidance](#) and the material factors highlighted in the [Lord Advocate's Guidelines](#), including actual and potential environmental impacts and economic impacts.

An example of a technical administrative offence may include non-submission of waste data returns at a landfill site. The investigating team will investigate fully to consider the reason why the returns have not been submitted or any subsequent effects e.g. is the operator storing too much waste on site or landfilling material that should not be landfilled. Under the updated guidance, there may not be a direct environmental impact resulting from this kind of offence, and therefore that element would not increase the penalty amount.

4.3. Q6: Are you satisfied the process to determine a VMP is fair, proportionate and that all relevant factors have been covered?

Table C - % Response to Q6

Option	Total	Percent
Yes	11	57.89%
Not sure	4	21.05%
No	2	10.53%
Not Answered	2	10.53%

From the 19 responses, 10 (52.63%) respondents provided further comment.

Majority of the respondents were satisfied the process is fair and proportionate and that all the relevant factors have been covered with some commenting that the consultation process was more engaging and helpful.

However, of the respondents who disagreed, or were unsure, some would like to see additional information on SEPA's internal governance arrangements included in the guidance.

One respondent considered that negligence and reckless should not have the same meaning whilst another would like to understand how multiple failures would be assessed e.g. a licence holder with a number of sites who submits data returns for each site on the same day but experiences a systems failure preventing them from submitting on time. The respondent felt that licence holders with multiple sites would be unfairly prejudiced compared to a single site licence holder.

Some of the respondents raised concerns of double counting in parts for example:

- SEPA costs could be considered when assessing the socio-economic impact when the legislation allows SEPAs costs to be recovered elsewhere.

- When licence subsistence fees are increased as a result of non-compliance(s) within the SEPA Compliance Assessment Scheme (CAS).

4.3.1. SEPA response

The consultation paper discusses SEPA's internal governance procedures which ensure that decisions on enforcement action are made at the right level within the agency with the right level of oversight. For clarity, enforcement decisions are not made by officers on the ground. They are made by managers who have decision making authority and there will be oversight at the appropriate level in the organisation to ensure enforcement action is applied consistently throughout the agency. As with all incidents or non-compliance, SEPA will follow its [Enforcement Guidance and Policy](#) including carrying out an appropriate investigation. We will follow our internal process, review evidence, and in the case of enforcement measures, apply the [Lord Advocate's Guidelines](#). All the information on how enforcement action is governed will be available in the revised Guidance on the use of Enforcement Action when it is published.

For the level of culpability, we have separated out factors of reckless and negligence and applied the definitions used within the English sentencing guidelines.

It is understood that many of the licence holders we regulate operate multiple sites or have multiple licences across different regimes. In deciding to use a VMP, we will have considered the enforcement factors (including proportionality) set out in our [Enforcement Guidance and Enforcement Policy](#). We will assess each non-compliance/incident on a case-by-case basis, and we will use our discretion to consider whether we think it is appropriate to consider the non-compliance at other sites or across multiple licences. The Regulatory Reform (Scotland) Act 2014, section 23(2)(c) prevents SEPA from issuing multiple VMPs for the same act or omission constituting that same offence.

SEPA's costs are not considered in the economic impact factor but we will consider things like clean-up costs incurred by a local authority/taxpayer and apply the appropriate weighting having considered any other evidence for this factor. The Environmental Regulations (Enforcement Measures) (Scotland) Order 2015 allows SEPA to recover costs

incurred in the imposition of a VMP by serving a Costs Recovery Notice (CRN). The CRN will be served following the VMP Final notice and will include a breakdown of the costs incurred. SEPA is entitled to recover its full costs but (at this time) has taken the decision to limit the costs to a maximum of 30% of the VMP. Anyone who receives a CRN has the right to appeal to the Scottish Land Court.

SEPA's costs for imposing a VMP are calculated separately to licence subsistence fees and only apply to the offence to which the VMP relates. Costs incurred in the imposition of a VMP may include investigating the offence, carrying out additional monitoring, obtaining legal advice etc. Further information on how SEPA will recover costs will be available in the Guidance on the Use of Enforcement Action. Licence subsistence fees may increase when a site's Compliance Assessment Scheme (CAS) status is downgraded and as a result requires additional inspections within the CAS year (see section 1.17 of the Guidance on the use of Enforcement Action).

4.4. Q7: Are you content that financial benefit will be calculated fairly and that we will manage commercially sensitive documents appropriately?

Table D - % Response to Q7

Option	Total	Percent
Yes	6	31.58%
Not sure	6	31.58%
No	5	26.32%
Not Answered	2	10.53%

From the 19 responses, 10 (52.63%) respondents provided further comment.

Majority of the respondents were not content or were unsure that financial benefit would be calculated fairly or how commercially sensitive documents would be managed. Most of the respondents who provided further comment, including those who answered yes to the

question, would like more clarity on how SEPA will calculate financial benefit and how commercially sensitive information will be managed.

One respondent was unclear how the process would consider economic impacts on third parties and how consultation with them will be taken forward. Another felt that there should be the ability for discussions to take place between SEPA and the Responsible Person(s) during the calculation process and not only at the point of representations.

4.4.1. SEPA response

The consultation paper highlights that commercially sensitive financial information is managed, where appropriate, in line with SEPA's access to information policy and procedures. Further information on these policies can be found on our website at <https://www.sepa.org.uk/help/privacy-policy/>.

The consultation paper and the proposed guidance on determining a VMP discusses how financial benefit will be calculated. Financial benefit will always be considered as part of an investigation into an incident or non-compliance. We will calculate financial benefit by reviewing evidence which shows any monies gained through illegal activity (direct gain), including costs avoided (indirect gain) that would allow the activity to be carried out in accordance with legislation e.g. licence application fees/subsistence fees, infrastructure costs etc. Financial benefit may include direct gain, indirect gain or both. Details of how we have calculated financial benefit in relation to any case will be included in the notice of intent and in the final VMP notice.

As well as gathering evidence on financial benefit we will also gather information where the impact affects third parties. This may include looking at how the incident or non-compliance has impacted on the local community and businesses. Where a third party has been affected, SEPA will engage with those parties and may include obtaining witness statements and holding community or stakeholder meetings. SEPA also engage with the Responsible Person(s) during investigations, and this will not change going forward.

4.5. Q8: Do you agree our proposed process is addressing proportionality and consistency?

Table E – % Response to Q8

Option	Total	Percent
Yes	9	47.37%
Not sure	6	31.58%
No	2	10.53%
Not Answered	2	10.53%

From the 19 responses, 13 (68.42%) respondents provided further comment.

Majority of the respondents agree that the process addresses proportionality and consistency. Most of respondents who provided further comment including those who answered 'no' or 'unsure' to the question have said that they would like to see additional information on our governance procedures. This was to ensure that there is consistency across the agency. This point is echoed in responses to Q6 above.

One of the respondents would like to understand more on how a challenge to a VMP will be considered by SEPA e.g. is there a central review and oversight or does the same team who originally determined the VMP carry out the review?

4.5.1. SEPA response

SEPA's response to the comments looking for additional information to governance arrangement can be found in our response to Q6 above. There is no requirement for SEPA to include governance arrangements in external guidance documents. However, we will include some information in our revised guidance to the use of enforcement action to provide assurance that decisions are taken at the correct level and there will be oversight at the appropriate level within the organisation. This is to ensure a consistent approach to enforcement action is taken across SEPA.

Following the Notice of Intent to issue a VMP, the Responsible Person(s) have 28 days to provide representations. SEPA will appoint an independent reviewer to ensure a fair and proportionate assessment of the representations. The independent reviewer will be a member of SEPA staff who has not been involved in the investigation or decision to impose a VMP. We will continue to follow our internal governance procedures ensuring any decision to continue with a VMP is taken at the right level within the agency. Where the Responsible Person(s) is still not satisfied with the imposition of a VMP, they can appeal to the Scottish Land Court within 28 days of a Final Notice being served.

4.6. Q9: Do you have any comments on the other changes highlighted in our Guidance on the use of enforcement action?

From the 19 respondents who participated in the consultation, 10 (52.63%) of them provided comment to Q9.

Some of the comments reiterated earlier responses which we have covered above e.g. more detail on how financial benefit is calculated. Others wanted to clarify that they are supportive of VMPs subject to the comments provided above and considered VMPs to be a welcome addition to the enforcement toolkit. The other comments covered a range of areas such as:

- **Ability to pay** – it was felt that considering a Responsible Person(s) ability to pay the VMP would not encourage positive behaviour although it was appreciated that not everyone has the same means to pay for an offence.
- **Advice and guidance** – it was felt that advice and guidance is too soft an approach, contributes to environmental harm and removes the onus from the Responsible Person(s).
- **Fixed Monetary Penalties (FMP)** – it was felt that this power should be used more widely, particularly if SEPA has highlighted an offence to the Responsible Person(s) and the offence continues beyond that point.
- **Criminal proceedings** - some respondents commented that it would not be appropriate for SEPA to impose a penalty where the matter has been reported to

Crown Office Procurator Fiscal Service (COPFS) and a decision has been taken by COPFS not to prosecute in the public interest.

4.6.1. SEPA response

VMPs will be a welcomed addition to SEPA's enforcement toolkit ensuring that those who fail to comply with their environmental obligations are held accountable and to deter future non-compliance. SEPA is required to consider representations submitted by the Responsible Person(s) which may include their ability to pay the VMP. We will only consider ability to pay where the Responsible Person(s) has provided evidence of financial hardship. We take account of representations to ensure the VMP is paid in full, normally due 56 days following the Final Notice or under an agreed payment plan. It will not be acceptable to claim an inability to pay without evidence to back this up. Where the VMP has not been paid, or only partially paid, by the date specified in the Final Notice then SEPA can recover the outstanding balance as a civil debt. This approach is not uncommon and ability to pay a financial penalty is also considered within the Scottish criminal justice system.

SEPA will continue to provide advice and guidance to operators to help them understand their environmental and legal obligations. It is important for operators to understand what is expected of them to ensure that they do all they can to protect Scotland's environment. We do not advise on techniques or processes a Responsible Person(s) should use as it is their responsibility to decide what measures are appropriate for their business whilst ensuring the environment is protected.

FMPs continue to be a useful enforcement tool to deal with minor incidents and non-compliance. In some instances, these may be repeat minor offences. As with all incidents or non-compliance, SEPA will follow its [Enforcement Guidance and Policy](#). Further to this the Regulatory Reform (Scotland) Act 2014, section 20(2)(c) prevents SEPA from issuing multiple fixed monetary penalties (FMPs) for the same act or omission constituting that same offence.

If criminal proceedings are commenced in respect of an act or omission that constitutes an offence, SEPA is not able to impose a penalty for that act or omission constituting that

same offence. The [Lord Advocate's guidelines](#) to SEPA confirm that where SEPA has reported to COPFS an offence in relation to which a VMP may be used, and COPFS considers that prosecutorial action is not possible or appropriate at that time, COPFS will notify SEPA. SEPA has discretion in those circumstances as to whether or not to impose a VMP or other enforcement measure. The important point is that the sufficiency of evidence will not dictate the route that the offences take through the system, and the evidence available will not dictate whether the case will be referred to COPFS or dealt with directly by SEPA.

5. Next steps

SEPA received a wide range of comments from respondents which have been on the whole, positive and constructive. We considered these responses when finalising our guidance documents. VMPs are now available for use as an enforcement option. A review of our use of VMPs, including the way we calculate penalties, will be carried out in the future.

6. Annex

6.1. Respondent List

Table F – Respondent List

Respondent	Industry/Sector
Alba Ecology	Other
Veolia	Regulated industry/trade body
Markon	Regulated industry/trade body
Magnox	Regulated industry/trade body
INEOS	Regulated industry/trade body
Chartered Institute for Waste Management (CIWM)	Other
Association of Environmental Clerks of Works (AECOW)	Regulated industry/trade body
Scottish Environmental Services Association (SESA)	Regulated industry/trade body
Resource Management Association Scotland (RMAS)	Regulated industry/trade body
Oil and Gas UK	Regulated industry/trade body
SSE	Regulated industry/trade body
RJ McLeod	Regulated industry/trade body
Fisheries Management Scotland	Non Governmental Organisation (NGO)
Forth District Salmon Fisheries Board	Regulated industry/trade body
The Association for Renewable Energy and Clean Technology	Regulated industry/trade body
Law Society of Scotland	Other
Anon	Not answered
Anon	Not answered

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<http://contactscotland-bsl.org/>

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