

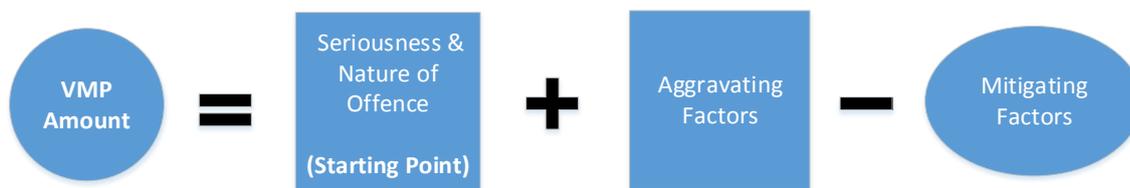
# PROPOSED GUIDANCE ON HOW SEPA WILL DETERMINE A VARIABLE MONETARY PENALTY



## What is a VMP?

A variable monetary penalty (VMP) is a discretionary financial penalty, which the Scottish Environment Protection Agency (SEPA) can impose to deal with more serious offences that do not require to be reported to Crown Office and Procurator Fiscal Service (COPFS). The maximum penalty amount is the maximum fine that may be imposed on summary conviction for an offence. This is set out in the legislation creating that offence, and is not the same for all environmental offences. For example, the maximum penalty amount that can be imposed for offences under the Special Waste Regulations 1996 is £5,000 whereas the maximum penalty amount that can be imposed for offences under the Water Environment (Controlled Activities)(Scotland) Regulations 2011 is £40,000. The minimum VMP we will impose is £1,000.

VMPs are not available for all offences. The relevant offences for which we can impose a VMP are set out in [The Environmental Regulation \(Enforcement Measures\)\(Scotland\) Order 2015](#).



## Overview

In determining whether a VMP is the appropriate enforcement tool for a particular offence, SEPA will have considered the enforcement factors in our Guidance on the use of Enforcement Action and taken account of the material factors highlighted in the [Lord Advocate's Guidelines](#) (LAGs). Our determination of the amount of a VMP will be based on those factors and includes:

- 1) Environmental and human health impacts (or likely impacts)
- 2) Intent/Culpability
- 3) Socio-economic impact
- 4) Financial Benefit
- 5) Foreseeability
- 6) Compliance History
- 7) Previous enforcement history
- 8) Co-operation with SEPA investigation

The LAGs provide guidance to us on our use of monetary penalties and where a material factor is considered to be at a significant level, then SEPA may consult with COPFS to ascertain whether the matter should be reported to COPFS for consideration of prosecution or other action. In some cases, COPFS may consider that referral for consideration of prosecution is not the appropriate enforcement tool and SEPA may consider the use of a VMP.

In determining the amount of a VMP, we will use our professional judgement to decide the nature and seriousness of the offence taking into account: environmental/human health impacts or risk of such impacts, intent/culpability, socio-economic impact and financial benefit, as well as other factors. Each offence will be assessed on a case-by-case basis, considering all of the available evidence. A tool has been developed to help calculate the VMP amount and works by applying weightings to our assessment of these matters. Weightings are calculated as a percentage of the statutory maximum VMP amount for a relevant offence; their application is discussed below. The process of determining a VMP has been designed to ensure the amount of a VMP is reasonable and proportionate to the offence.

## **Assessment and determination of a VMP**

### **Starting Point - Consideration of Material Factors**

The starting material factors are considered to be the most relevant to reflect the seriousness of an offence. These are factors that are directly associated with the offence and are key to establishing a starting point that is proportionate to the offence. Therefore, a higher weighting is attributed to those material factors than the aggravating or mitigating behaviours discussed further below. The starting material factors are:

#### **1. Environmental/Human Health Impact**

SEPA's primary statutory purpose is to protect and improve the environment. The level of impact is most important in reflecting the seriousness of an offence. It is therefore of the utmost importance that the level of any impact on the environment and/or human health as a result of an offence is proportionately reflected in the amount of the VMP. To reflect that, the highest weighting has been attributed to this factor in setting the starting point.

In assessing the Environmental and Human Health Impact and having considered all the evidence, we will use our professional judgement to determine the level of impact and categorise as:

- No Environmental/Human Health Impact
- Low Environmental/Human Health Impact
- Medium Environmental/Human Health Impact
- High Environmental/Human Health Impact
- Significant Environmental/Human Health Impact

Based on the above, weightings apply as per Table 1 (below).

**Table 1 – Environmental/human impact weightings**

<b>Environmental/Human Health Impact</b>	<b>Weighting % of Statutory Maximum of VMP</b>
No impact	0
Low impact	5
Medium impact	10
High impact	15
Significant impact	21.25

**Things we will consider:**

- Effect or damage to air quality, water quality and land e.g. water contamination leading to a fish kill. There may be cases where there have been multiple impacts e.g. effects to land and water. In those cases, we will consider the overall impact.
- Hazardous properties of materials/substances e.g. asbestos, radioactive substances, persistent organic pollutants etc.
- Impact to sensitive receptors/designated sites e.g. Sites of Special Scientific Interest (SSSI), Bathing Waters etc.
- Any nuisance caused e.g. noise and/or vibration, offensive odour, dust etc.
- Duration of impact

### **An example scenario:**

On 28 July 2019, SEPA received 50 complaints from local residents of Green Town regarding odour escaping the boundary of Green Town Waste Recycling Ltd. The facility is located within 500m of the local community and the odour is described as a strong smell of bins and rotten food. Two SEPA officers attended the area, substantiated an offensive odour and found that the odour was a result of the facility having stored up to 33.5 tonnes of food waste on site for 4 days (since 24 July). The odour remains in the community for 7 days. The licence conditions state that food waste shall be stored for no more than 48 hours, and the maximum storage capacity for food waste is 40 tonnes.

### **SEPA decision:**

The environmental impact is the presence of a strong offensive odour lasting 7 days, which has given rise to complaints from the local community. However, the odour quickly disappeared once the waste was removed from site leaving no lasting impact on the environment or the community. No further complaints were received from the public. The site is not located near any designated sites. The level of impact may be regarded as low.

### **1.1 Risk of Environmental and Human Impact**

We may impose a VMP if it is likely that the offence would have resulted in an impact on the environment or on human health, even if no actual impact has resulted from the offence. Having considered the seriousness of risk of impact relative to actual impact, we have concluded that risk of impact is less serious than actual impact and the weighting applied will be lower than where there is actual impact.

In assessing the risk of Environmental/Human Health Impact, and having considered all the evidence, we will use our professional judgement to determine the level of risk of impact and categorise as:

- **No risk**
- **Low risk** e.g. failure of equipment/infrastructure/process likely to give rise to a low impact

- **Medium risk** e.g. failure of equipment/infrastructure/process likely to result in a medium impact.
- **High risk** e.g. failure of equipment/infrastructure/process likely to result in a high or significant impact.

Based on the above, weightings apply as per Table 2 (below).

Table 2 – Risk of impact weightings

<b>Risk of Environmental/Human Health Impact</b>	<b>Weighting % of Statutory Maximum of VMP</b>
No risk of impact	0
Low risk of impact	2.5
Medium risk of impact	5
High Risk of impact	7.5

*Note: Risk of impact will only apply in circumstances where there was no actual impact to the environment and/or human health.*

## **2. Intent/Culpability**

Under our Enforcement Guidance, one of the enforcement factors that we consider is the level of intent. It is important to establish blameworthiness of the person (i.e. was the offence the result of an accident or committed deliberately) to help determine the seriousness of the offence. This is an important factor to consider but the seriousness of the offence is affected less by culpability than by environmental/human health impact, which is why a weighting lower than that for environmental/human health impact has been applied.

In assessing the intent/culpability, and having considered all the evidence, we will use our professional judgement to determine the level of intent/culpability and categorise as:

- **Low Culpability** – Offence committed with little or no fault on the part of the individual/organisation as a whole, for example by accident or the act of a rogue employee.

- **Negligent/Reckless** – Offence committed through an act or omission, which a person exercising reasonable care would not commit. Failure by the individual/organisation as a whole to take reasonable care to put in place and enforce proper systems for avoiding commission of the offence.  
Or  
Actual foresight of, or wilful blindness to, risk of offending but risk nevertheless taken by an individual or in the case of an organisation, person(s) whose position of responsibility in the organisation is such that their acts/omissions can properly be attributed to the organisation;  
Or  
Reckless failure by the individual/organisation as a whole to take reasonable care to put in place and enforce proper systems for avoiding commission of the offence.
- **Deliberate** – Intentional breach of or failure to comply with the law by an individual or in the case of an organisation, person(s) whose position of responsibility in the organisation is such that their acts/omissions can properly be attributed to the organisation.  
Or  
Deliberate failure by an individual/organisation to put in place and to enforce such systems as could be reasonably be expected in all the circumstances.

Based on the above, weightings apply as per Table 3 (below).

**Table 3 – Intent/Culpability weightings**

Culpability	Weighting% of Statutory Maximum of VMP
Low Culpability	0
Reckless/Negligent	5
Deliberate	10

### **In our example scenario:**

SEPA officers questioned employees of Green Town Waste Recycling Ltd who advised that they were instructed by the Managing Director to arrange for the removal of food waste only once the weight reached 40 tonnes. The food waste is removed from site and taken to an authorised Energy from Waste facility who recently amended their charging system;

- food waste uplift < 40 tonnes = £90/tonne
- food waste uplift ≥ 40 tonnes = £50/ tonne

The employee reminded the Managing Director of the storage limits for food waste contained in the SEPA licence and was advised that they had approval from SEPA to store food waste beyond the 48hours. The operator did not receive SEPA approval nor did they apply to modify their licence.

### **SEPA decision:**

The operator's actions demonstrate a clear intention to disregard the licence conditions in order to save money. In this scenario, the intent/culpability element may be regarded as deliberate.

### **3. Socio-economic Impact**

Under our Enforcement Guidance, one of the material enforcement factors that we consider is the broader economic impact of an offence. In particular, SEPA will consider if the offence has had an economic impact on the local community, local and other private businesses, or caused disruption to public services and infrastructure. If an offence has had this kind of impact, it is important to reflect that in the level of the starting point.

In assessing the socio-economic impact and having considered all the evidence, we will use our professional judgement to determine the level of each impact and categorise as:

- No socio-economic impact
- Low socio-economic impact

- Medium socio-economic impact
- High socio-economic impact
- Significant socio-economic impact

Based on the above, weightings apply as per Table 4 (below).

**Table 4 – Socio-economic impact weightings**

<b>Socio-economic Impact</b>	<b>Weighting% of Statutory Maximum of VMP</b>
No Impact	0
Low impact to community or businesses	2.5
Medium impact to community or businesses	5
High impact to community or businesses	7.5
Significant impact to community or businesses	13.75

**Things we will consider:**

- Impact on local amenity e.g. closure to parks, outdoor sporting facilities etc. inability to use private outdoor space.
- Impact on businesses e.g. lost revenue due to closure of a business or undercutting legitimate businesses,
- Impact on public services e.g. road closures, utility supplies, public transport, clean-up costs (this may include costs incurred by SEPA or the Local Authority to control, monitor and resolve the offence).
- Duration of the impact

### **In our example scenario:**

The odour of bin and food waste was present within the local community for 7 days. The incident happened during a heat wave and the local community were unable to enjoy the use of their private gardens or local outdoor facilities due to the strength of the odour.

### **SEPA decision:**

The socio-economic impact may be regarded as medium. The impact to the local community was prolonged and extended beyond daytime, into the evenings and weekend. The incident occurred during a period of hot weather and in the middle of the school holidays when local parks and outdoor recreational facilities would be enjoyed by the public. Local businesses reported a loss in revenue and provided evidence to show a drop in sales figures from both the previous week and the same period last year.

## **4. Financial Benefit**

Our Enforcement Policy states that we will place an emphasis not just on stopping the offending and securing compliance but also on deterring future non-compliance, including the removal of financial benefit gained from illegal activity.

In using a VMP, our aim is to remove any financial benefit gained through illegal activity, including costs avoided 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 will be evidenced/calculated and recorded and the amount will be included in the overall VMP amount. No weighting is applied to this factor.

The VMP amount cannot be higher than the statutory maximum VMP for the relevant offence. If adding the amount of financial benefit to the amount calculated by applying the other starting material factors would result in an overall VMP amount that is higher than the statutory maximum VMP for the relevant offence, then the VMP amount will be set as the statutory maximum VMP for that offence. Where financial benefit cannot be evidenced or calculated then the value will be zero.

### **In our example scenario:**

The waste recycling facility has benefited financially by not removing the food waste offsite within the timescale specified in their licence. By reviewing waste transfer notes, it was found that 33.5 tonnes of food waste was stored on site for more than 48 hours. Based on SEPA's estimate of costs avoided, it would have cost the facility £90/tonne (including gate fees, transport and taxes) to remove the waste. Over the four day period it would have cost the company £3,015 (33.5t x £90). If the company had met the 40t threshold to be eligible for the discounted rate of £50/tonne during the permitted storage time, it would have cost the company £2,000.

### **SEPA decision:**

The company has saved a minimum of £1015 by storing waste beyond 48hours.

## **Consideration of Aggravating and Mitigating Factors**

Aggravating and mitigating factors reflect the attitude, behaviour and knowledge of the person who has committed the relevant offence. Whilst some of these factors are not directly associated with the offence, they are relevant to the offence/person and may show a pattern of positive or negative behaviours whereby we may aggravate up or mitigate down the amount of the VMP. Therefore, a smaller weighting has been applied to those factors compared to the starting material factors. These are:

### **1. Foreseeability**

It is important to determine whether the consequence of the offence was foreseeable i.e. can the consequence of the offence/act be reasonably anticipated. Foreseeability will only apply to offences where there has been actual impact.

To determine this we may consider the knowledge of the person at the time (not the knowledge they should have had), and whether a reasonable person in their position at the time would have foreseen the consequences of the breach.

Based on the above, weightings apply as per Table 5 (below).

**Table 5 – Foreseeable weightings**

<b>Foreseeable</b>	<b>Weighting % of Statutory Maximum of VMP</b>
Not foreseeable	-1.25
Foreseeable	1.25

**In our example scenario:**

The operator’s permit clearly states that food waste shall be stored on site no longer than 48 hours. The storage facilities at the site were sufficient to comply with the conditions of the permit.

**SEPA Decision:**

As food waste breaks down it will emit an odour. The site has sufficient infrastructure on site to cope with 40 tonnes of food waste for a period of 48 hours. The site knowingly stored food waste beyond the permitted storage time and continued to accept food waste. No action was taken by the operator to prevent or reduce off-site odour. The food waste continued breakdown and the longer it is stored the stronger the odour becomes. It is reasonable to anticipate storing food waste beyond the permitted storage time will result in odour beyond the site boundary that will become detectable within the local community.

**2. Regulatory Compliance History**

A person’s regulatory compliance history will be assessed by reviewing the previous five years:

- a) Compliance Assessment Scheme (CAS) reports or other inspection reports where the individual or organisation is authorised and regulated by SEPA
- b) Previous correspondence that SEPA has with the individual or organisation e.g. email/letters containing advice and guidance, warning letters etc.
- c) Pollution events as recorded by SEPA.

The review may take into account any relevant compliance/non-compliance that highlights the operator's attitude towards regulatory compliance.

Where an individual or organisation has had no previous dealings with SEPA, we will normally assume compliance with their regulatory requirements and their compliance history may be assessed as excellent, unless there are reasons to suggest otherwise.

In assessing a person's compliance history and having considered all the relevant information, we will use our professional judgement to determine the level of compliance and categorise as:

- **Beyond compliant** – Operator has an excellent compliance record and goes beyond what is required by law e.g. reusing resources/energy, carbon neutral, reducing energy usage.
- **Excellent** – compliant with environmental obligations e.g. always follows advice and guidance, actively contacts SEPA to ensure compliance is met. May have a small number of minor non-compliances recorded but unlikely to cause risk to the environment.
- **Broadly compliant** – generally compliant with environmental obligations e.g. repeated minor non-compliance or a major non-compliance with environmental obligations and may indicate poor site management or highlights a risk of a major non-compliance or pollution event.
- **Poor** – persistent non-compliance with environmental obligations e.g. does not follow conditions of permit and fails to take steps to become compliant.

Based on the above, weightings apply as per Table 6 (below).

**Table 6 – Compliance History weightings**

<b>Regulatory Compliance History</b>	<b>Weighting % of Statutory Maximum of VMP</b>
Beyond Compliance	-1.25
Excellent	0
Broadly Compliant	1.75
Poor	2.5

### **Things we will consider:**

- Does the operator show a disregard for their environmental obligations?
- Does the operator take steps to become and remain compliant?
- Are there non-compliances that may indicate poor management, a disregard for environmental obligations or may lead to a more significant non-compliance and/or pollution event?

#### **In our example scenario:**

The current CAS status for Green Town Waste Recycling Ltd is Good. Over the last two years, the operator has received minor non-compliances for a variety of breaches including but not limited to; failure to submit waste data returns on time for two quarters of 2018 and breaching storage conditions and storage limits.

#### **SEPA decision:**

The operator has received minor non-compliances and has already been marked non-compliant within the last two years for breaching storage limits. SEPA would consider this an example of a person who is broadly complaint.

### **3. Previous Enforcement**

Previous enforcement action will be assessed by reviewing those actions taken by SEPA within the last five years.

Where an individual or organisation has had different forms of enforcement action taken against them, we will take account of the form of enforcement action that has the greatest aggravating effect on the penalty. Only enforcement action taken prior to the current offence for which the VMP is being issued will normally be considered in this assessment

In assessing previous enforcement history and having considered all the evidence, we will use our professional judgement to determine the level of previous enforcement action taken by categorising as:

- No previous enforcement action recorded
- Enforcement action comprising a final warning letter (FWL) or Statutory Notice\*
- Enforcement action comprising an Enforcement Measure e.g. Fixed Monetary Penalty/Enforcement Undertaking/Variable Monetary Penalty
- Previous conviction for an environmental offence

Based on the above, weightings apply as per Table 7 (below).

**Table 7 – Previous Enforcement weightings**

Previous Enforcement	Weighting % of Statutory Maximum of VMP
No previous enforcement	0
Enforcement resulting in a FWL/Statutory Notice	1.25
Enforcement resulting in an Enforcement Measure	2.5
Previous Relevant Convictions	3.125

\*List of statutory notices normally considered when assessing previous enforcement action:

- **Enforcement notices** identifying a non-compliance or likely non-compliance 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), regulation 46 of the Environmental Authorisations (Scotland) Regulations 2018 and section 21 of the Radioactive Substances Act 1993.
- **Suspension notices** that 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 or regulation 31 of the Environmental Authorisations (Scotland) Regulations 2018).
- **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, 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).

We will take into account non-compliance with any statutory notices that we consider relevant to the assessment of a person's compliance history.

### **In our example scenario:**

In the last five years Green Town Waste Recycling Ltd has been subject to the following enforcement action:

1. March 2019 – Final Warning Letter for failing to submit waste data returns for quarter three and four of 2018.
2. January 2018 - A fixed monetary penalty (FMP) was issued regarding breaches of the storage limits of waste residues.
3. November 2017 – Enforcement Notice to remove waste following breaches in storage limits.

### **SEPA decision:**

The operator has been subject to several different forms of enforcement action in the past five years. The form of enforcement action that has the greatest aggravating effect is the FMP and it is this that will be considered to adjust the level of VMP.

#### **4. Co-operation with SEPA Investigation**

As a minimum SEPA expects full co-operation with any investigation by an individual or organisation. Voluntary self-reporting of an incident will be regarded as a positive behaviour and a reduction will normally be applied to the overall VMP. Failing to co-operate, obstructing or hindering an investigation or displaying aggressive behaviour towards a SEPA officer is regarded as negative behaviour and the overall VMP will normally be increased.

In assessing the operator's co-operation with the SEPA investigation and having considered all the evidence, we will use our professional judgement to determine the level of co-operation by categorising as:

- **Voluntary self-reporting.** This does not include self-reporting of incidents (or other matters) as required by law e.g. as a requirement of a licence condition.
- **Co-operated with SEPA investigation**

- **Non co-operation or obstructed or hindered SEPA investigation** e.g. misleading the investigation, providing false information, preventing SEPA access to the site to carry out investigations etc.
- **Aggressive behaviour** towards SEPA staff during investigation e.g. threatening, intimidating or abusive behaviour (whether in relation to race, gender, orientation etc.) towards a SEPA officer or causing physical harm or damage.

Based on the above, weightings apply as per Table 8 (below).

**Table 8 – Co-operation with SEPA weightings**

<b>Co-operation with SEPA</b>	<b>Weighting % of Statutory Maximum of VMP</b>
Voluntary Self reporting	-1.25
Co-operated	0
No co-operation or obstructive or hindering investigation	1.25
Aggressive	3.125

### **In our example scenario:**

SEPA's powers of investigation were explained to the Managing Director of Green Town Waste Recycling Ltd and access to all necessary documents was provided. SEPA instructed the Managing Director to take steps to minimise the odour and remove the food waste off site to an authorised waste management facility within 24 hours. The facility failed to remove the food waste and was issued an Enforcement Notice for its removal. The Enforcement Notice was not complied with and the food waste was only removed 4 days later once the weight reached 40 tonnes.

### **SEPA decision:**

The company understood SEPA's powers of investigation, allowed access to site records and provided all information requested by SEPA.

The site was responsive to SEPA's requests for information however, the company did not co-operate with SEPA's instruction to remove the food waste and source of the odour nor did they comply with the Enforcement Notice. SEPA considers the operator uncooperative.

## **5. Consideration of other mitigating circumstances**

We will use our discretion to consider whether it is appropriate to reduce the level of a VMP by removing any amount to reflect the unique circumstances of a case.

We will use our professional judgement to determine the appropriate level by which to reduce the level of a VMP, if any, to reflect any other factor not already considered by us, including for example any works carried out or arranged by the individual or organisation to remedy the impact of the offence.

Where reduction(s) are applied, they will be at a level that ensures the final VMP amount is never less than £1,000.

## **VMP decision making**

SEPA has robust internal governance arrangements in place to ensure that decisions are taken at the appropriate level. Before deciding on the VMP amount, we will consider whether to impose a VMP and/or determine the final VMP figure taking into account what is reasonable and proportionate given the particular facts of the case, the need for consistency, and the underlying objective in imposing the monetary penalty.

## **Related documents**

Guidance of the use of Enforcement Action