

# Consultation on the revised guidance on the use of enforcement action

October 2020

Every day SEPA works to protect and enhance Scotland's environment, helping communities and businesses thrive within the resources of our planet.



We call this **One Planet Prosperity**

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

[www.sepa.org.uk](http://www.sepa.org.uk)

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## Foreword

As Scotland, alongside many other nations, faces a public health emergency, SEPA's focus will be on protecting our environment, communities and people. We are protecting Scotland's environment by helping regulated businesses adjust and adapt to the extraordinary circumstances in which everyone's resources and capacities are severely constrained.

During this public health emergency, we are prioritising our efforts on those regulated sectors most crucial to the functioning of society. We will work as much as possible with businesses from other sectors. Where there has been non-compliance with environmental obligations, whether before, during or after the public health emergency, SEPA may take enforcement action where appropriate. That enforcement action includes the use of enforcement measures such as fixed monetary penalties and enforcement undertakings. SEPA also has the power to impose variable monetary penalties, but we have not used this power yet.

As businesses all over the world adapt and develop new ways of working, we too are adapting and with the help of this consultation, we are aiming to implement Variable Monetary Penalties (VMPs) to add to our existing enforcement options.

## Overview

In 2014 The Regulatory Reform (Scotland) Act was passed, giving SEPA its statutory purpose to protect and improve the environment in ways that, as far as possible, create health and well-being benefits and sustainable economic growth. One Planet Prosperity is our regulatory strategy for tackling the challenges of the 21st century facing Scotland's environment. We want to ensure that every regulated business fully meets their compliance obligations. Non-compliance with environmental regulations and obligations is non-negotiable. We also want to support businesses to innovate to go beyond compliance standards in a way that delivers economic and social success.

As a regulator, enforcement is an essential part of our toolkit. Following the 2014 Act, 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. The 2014 Act enabled the single largest ever expansion to SEPA's set of enforcement powers, so we have taken a staged approach to their implementation to make sure we use them effectively and appropriately. Since 2016, we have been working to further develop our approach to enforcement. This has included creating a dedicated enforcement function and phasing in the implementation of new powers to accept Enforcement Undertakings and issue Fixed Monetary Penalties. Having successfully completed these steps, we now want to move ahead to implement VMPs.

A VMP is a discretionary financial penalty that we can impose. VMPs are not available for all offences. The maximum penalty amount is set out in the legislation creating that offence, and is not the same for all environmental offences. The minimum VMP we will impose is £1,000.

VMPs are an important enforcement tool for non-compliance with environmental obligations and responsibilities. Through this consultation, we are inviting comments on our proposals so that we are able to finalise preparations to use VMPs as a form of enforcement action.

As a regulator, we take very seriously the responsibility that comes with having enforcement powers and the use of new enforcement tools. We recognise the need to be proportionate, consistent, accountable and transparent. We will ensure there is strong governance in place, as outlined in this consultation document, and we will review our use of VMPs, including the way we calculate penalties, in the future.

## Why are we consulting?

We have revised our Guidance on the use of enforcement action and have a statutory duty to consult on any revision. One of the major changes is our proposed process for determining VMP's and we would like to draw your attention to this section of the guidance and hear your views.

In 2016, SEPA published a consultation on proposed guidance on determining the amount of VMPs. We received a number of responses from different sectors and we have listened to your comments. We will discuss these in this consultation.

VMPs are a very important and useful addition to enhance our enforcement toolkit to tackle non-compliance with environmental obligations. Not having VMPs as part of our current toolkit is a gap that we are addressing with this consultation.

We have developed a new approach to calculating penalties, which incorporates aspects from the previous proposal and takes account of the responses to the previous consultation in 2016. Please read the [Proposed Guidance on How SEPA will determine a Variable Monetary Penalty](#) (see related documents).

With this consultation, we want to get your views on the proposed changes and how the new process addresses the comments made in 2016. Your feedback is important to us. If you feel we have not addressed those comments, this is your opportunity to tell us.

The other changes can be summarised as follows:

- We want you to understand when we may use a combination of enforcement measures.
- We want you to understand the various enforcement factors, such as foreseeability and previous compliance history.
- We want you to understand our approach to assessing Enforcement Undertaking (EU) offers, in light of experience.
- We want to ensure greater consistency between our approach to different kinds of undertakings.
- We want you to understand the circumstances where Fixed Monetary Penalties (FMP) might be appropriate, with examples in light of experience.
- We want you to understand how we can take account of financial hardship in relation to penalties.
- Explaining to you when we will provide information about costs incurred by us prior to seeking to recover those costs.

The changes are highlighted in the revised [Guidance on the use of enforcement action](#) (see related documents).

### **How to respond**

You can respond to this consultation [online](#). As our offices are currently closed, please do not mail your response. You can email your responses on the proposal to:

[VMPConsultation@sepa.org.uk](mailto:VMPConsultation@sepa.org.uk)

Responses should be submitted to us by 15 December 2020.

In addition, we are holding a series of online consultation awareness sessions at the end of November/early December (dates tbc). This is to provide an opportunity for you to hear more on our VMP proposal and ask us questions. To sign up, please email

[VMPConsultation@sepa.org.uk](mailto:VMPConsultation@sepa.org.uk) and include any questions you have on our consultation.

Invites will be sent out in due course.

### **Previous consultation**

In 2016, SEPA [consulted](#) on proposed guidance for determining the amount of Variable Monetary Penalties (VMPs) and we received responses from a wide range of consultees. The responses were addressed and published in a consultation [analysis report](#) in April 2017. From those responses, three prominent themes emerged:

1. Process
2. Financial benefit
3. Consistency in approach (Governance)

You also asked for clarification and more detail about the factors we will take into account. We have listened to your comments and this consultation shows how the new VMP process will address those points.

## 1. Process

Overall, there was good support for the VMP process with a majority of the consultees agreeing the impact categories had been correctly identified and backing the proposal that behavioural factors (e.g. compliance history) should be included in the decision-making process. The consultees agreed that the penalty should be higher for those who obstruct the investigation but would have liked further clarity on how SEPA assesses co-operation.

SEPA proposed taking a holistic approach to assessing multiple impacts (i.e. where water and air is impacted, we would look at the worst affected). However, some of the respondents felt that it would be more appropriate to look at the overall impact and felt that further clarity was required on how SEPA will assess moving from one band to the next.

In deciding the level of a VMP, it was thought that SEPA should consider mitigation in their decision-making and there was a strong feeling that VMP's should only be used for actual impact. The majority did not agree that the VMP could be less than a FMP and some consultees felt that technical/administrative offences should be addressed using a FMP rather than a VMP.

### **The new guidance addresses this as follows:**

- We will review the evidence and decide on the overall impact of the offence including those with multiple impacts. The impact categories (as described in previous guidance) have been removed. The new process 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.
- Behavioural factors will remain part of the assessment. This will include how the responsible person has co-operated with the SEPA investigation. In assessing co-operation we will consider the following:
  - Voluntary self-reporting. This does not include self-reporting of incidents (or other matters) as required by a licence condition.

- Co-operation with the SEPA investigation. This may include following SEPA advice during the investigations and complying with SEPA's investigatory requirements.
  - Non-cooperation or obstruction or hindrance of the SEPA investigation e.g. misleading the investigation, providing false information, preventing SEPA access to the site to carry out investigations etc. We would not normally consider delays in requests for information or taking action to resolve the issue as non-cooperative behaviour where an extension was agreed or the delay was minor. However where the delay is to the extent that it has prevented us from being an effective regulator then we may consider this as uncooperative behaviour.
  - Aggressive behaviour towards SEPA staff during the investigation e.g. threatening, intimidating or abusive (whether in relation to race, gender, orientation etc.) language or gestures towards a SEPA officer or causing physical harm to people or damage to property.
- SEPA expects all operators to be compliant with environmental obligations including permit conditions and to co-operate with SEPA during investigations. Therefore, co-operation will not result in a reduction in the penalty.
  - The bands have been removed, and instead the assessment will involve a review of the evidence and using our professional judgement to decide the seriousness and nature of offence. We will have oversight of all VMP's enabling us to apply consistency to our decision making and a VMP calculation tool will aid the calculation. The process of determining a VMP has been designed to ensure the VMP figure is reasonable and proportionate to the offence.
  - The VMP calculation tool works by placing a weighting to the factors, which are based on the importance and seriousness of each factor. Weightings are calculated as a percentage of the statutory maximum VMP amount for the relevant offence; and their application is discussed in the [Proposed Guidance on How SEPA will determine a Variable Monetary Penalty](#) (see related documents). For example, SEPA's primary



statutory purpose is to protect and improve the environment. The level of harm is most important in reflecting the seriousness of an offence. It is therefore important that the level of any impact on the environment and 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.

- We will consider any aggravating or mitigating factors, which may result in an increase or decrease of the VMP. Positive behaviours e.g. voluntary self-reporting, going beyond compliance and/or remediation may result in a reduction of the penalty. Negative behaviours e.g. poor compliance history, previous enforcement action and/or obstructing the SEPA investigation may result in an increase of the penalty.
- To ensure the overall penalty is proportionate and fair we will consider any other factors that are relevant to the case.
- Depending on the relevant offence, one of three FMP levels will apply: low (£300), medium (£600) and high (£1,000). We have set the minimum VMP level to the highest FMP level regardless of the actual offence.
- Monetary penalties (FMPs and VMPs) and undertakings (EUs and VMPUs) are collectively known as enforcement measures. The list of offences for which an enforcement measure can be used are included in the Environmental Regulation (Enforcement Measures) (Scotland) Order 2015. This includes technical/administrative type offences. Our internal governance arrangements ensure that any enforcement action we take, including the use of enforcement measures, is consistent and is made at the appropriate level within the organisation. Our Enforcement Guidance will ensure any enforcement action we take is proportionate to the offence.
- Risk of impact will remain a factor for consideration. Many of the offences for which SEPA may impose a VMP can be committed regardless of whether or not there has been an environmental impact. There may be circumstances where it will be

appropriate, having regard to the enforcement factors set out in SEPA's Enforcement Guidance, to impose a VMP where there has not been any actual environmental impact but that impact was likely to result if, for example, SEPA or another person had not intervened. Furthermore, the Lord Advocate's Guidelines allow SEPA to use enforcement measures where environmental harm was likely to be caused by the offence.

## **2. Financial benefit**

The majority of consultees in 2016 found the guidance surrounding financial benefit clear and understandable. The main concerns raised were about SEPA's ability to investigate a company's finances and how we would manage commercially sensitive financial information. Most supported how direct gain and indirect gain is calculated but there was some concern around the difficulty of calculating indirect gain (avoided costs). None of the consultees suggested an alternative method for calculating financial benefit, but would welcome the opportunity to challenge the calculations. There was a call to have a mechanism to resolve disputes.

### **The new guidance addresses this as follows:**

- We have a toolkit that encompasses our regulatory powers to obtain information, and a decision making process that allows us to apply both consistency and proportionality to our approach when determining financial benefit.
- When determining indirect gains we will look at the costs associated with carrying out an activity in accordance with environmental obligations. These costs will be an estimate of specific cost savings e.g. licence fees, infrastructure costs and disposal costs etc., but where we have evidence of costs that have been avoided or revenue generated by or in connection with the offence, we will use that information.
- On receiving a VMP notice of intent (NOI) from us, a person is entitled to make a written representation to us within 28 days. If we have overestimated indirect gains, or costs avoided, this provides an opportunity to dispute these amounts. Those who

are issued with a final VMP notice have a right of appeal. Appeals are considered by the Scottish Land Court.

- Commercially sensitive financial information is managed, where appropriate, in line with SEPA's access to information policy and procedures. There will be an opportunity at the representations stage to request SEPA to consider withholding from publication or redacting any information that may be regarded as commercially confidential.

### **3. Governance**

In 2016, the consultees showed good support for the process on the condition that the decision-making arrangements were designed to ensure proportionality and consistency. The majority of consultees would also like to see regular reviews of the methodology.

#### **The new guidance addresses this as follows:**

- SEPA has robust internal governance arrangements in place to ensure that decisions about the use of enforcement action are made at the appropriate level within the organisation. This will ensure that the Lord Advocate's Guidelines and [SEPA's Enforcement Policy](#) and Guidance is applied consistently across the agency.
- Each offence will be assessed on a case-by-case basis, considering all of the available evidence.
- A tool has been developed to aid the calculation and the methodology will apply consistency to the VMP amount based on our assessment of the facts of the offending. The calculation method is designed to ensure the VMP amount is reasonable and proportionate to the offence.
- We will be reviewing our use of VMPs, including the way we calculate penalties, in the future to take account of our experience in using them in practice.

- Our approach to enforcement is underpinned by the five principles of better regulation including transparency. [SEPA's Policy on Communicating Penalties and Undertakings](#) (see related documents) sets out that we will publish VMPs that we have imposed and may publicise where we have used a VMP for a relevant offence.

## Overview of proposed guidance to determining the level of VMP

Following an appropriate investigation there are robust internal governance arrangements in place to ensure that issuing a VMP is appropriate, proportionate and fair in the circumstances and that SEPA complies with the Lord Advocate's Guidelines.

The facts of the offence will be assessed and the level of VMP will be calculated within the prescribed limits of the legislation. We will determine a starting point that reflects the seriousness and nature of the offence. By using professional judgement, we will individually assess the:

- environmental impact (or likely impact);
- intent/culpability;
- socio-economic impact;
- financial benefit.

The financial benefit is determined from the evidence gathered during the investigation. This takes account of direct and indirect gains (avoided costs) in connection with the offence.

Once the starting point has been determined, we will consider any aggravating or mitigating factors. These factors reflect the attitude, behaviour and knowledge of the offender. Whilst some of these factors are not directly associated with the offence, they are relevant to the offence/offender because they show a pattern of positive or negative behaviours. We will use aggravating factors to increase the penalty and mitigating factors to decrease the penalty. This includes a review of:

- previous enforcement action taken against the individual or organisation;
- compliance with environmental obligations;
- co-operation with the SEPA investigation;
- foreseeability.

Where applicable we will also consider the appropriate level of mitigation to take account of:

- remediation by the individual or organisation;
- any other factor.

SEPA reserves its discretion whether or not to reduce the amount of the penalty by removing any amount to reflect the circumstances of the case, including remediation carried out, taking account of the financial benefit and impact caused by the offence.

Further detail can be found in the proposed guidance on how SEPA will determine a Variable Monetary Penalty’.

## Consultation questions

### Introduction

Q1. What is your name?

Q2. What is your email address?

Q3. What is your organisation?

### Process

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

- Yes
- Not sure
- No

Share your view with us?

Q5. Do you agree with our approach to calculating weightings?

- Yes
- Not sure
- No

Share your view with us?

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

- Yes
- Not sure
- No

Share your view with us?

## **Financial benefit**

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

- Yes
- Not sure
- No

Share your views with us?

## **Governance**

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

- Yes
- Not sure
- No

Share your view with us?

## **Other changes to the Guidance on the use of enforcement action**

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

Share your views with us?

## **Related Documents**

[Proposed guidance on how SEPA will determine a Variable Monetary Penalty](#)

[Guidance on the use of enforcement action](#)

[Policy on Communicating Penalties and Undertakings](#)

[SEPA Enforcement Policy](#)