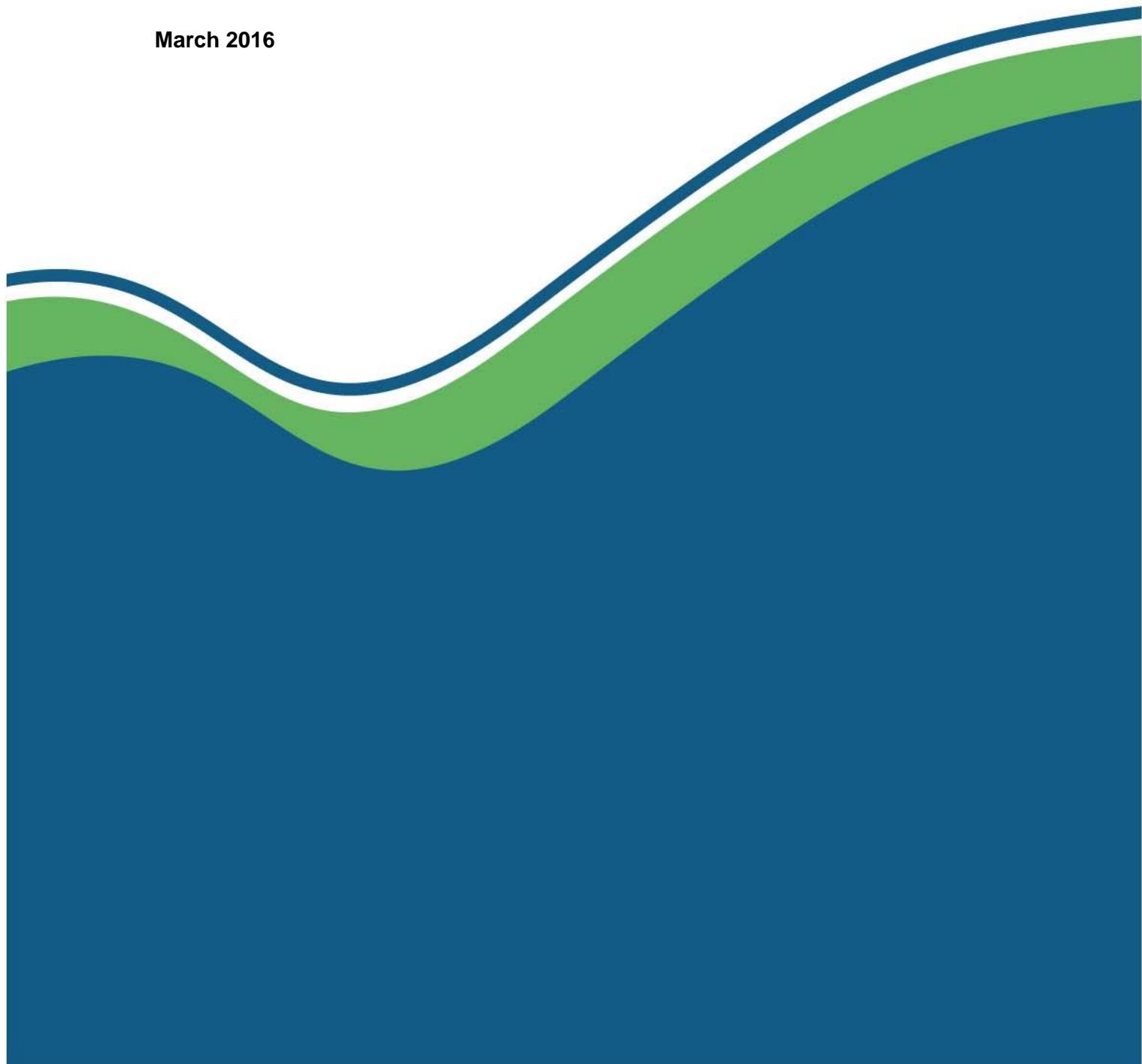




## **Summary of responses: SEPA's enforcement policy and guidance consultation**

**March 2016**



## **1. Introduction**

### **1.1 Regulatory Reform (Scotland) Act 2014**

The Regulatory Reform (Scotland) Act 2014 (RR(S) Act) has enabled Scottish Ministers to give the Scottish Environment Protection Agency (SEPA) the power to impose fixed and variable monetary penalties and to accept enforcement undertakings (the enforcement measures). These enforcement measures form part of a new enforcement framework for Scotland and will enable a more proportionate and flexible approach to tackling offending under environmental legislation. They will help us to change the behaviour of those who continue to perform poorly or who ignore their responsibilities, and mean that non-compliance can be tackled at an earlier stage (i.e. before it becomes entrenched). The overall aim is to deter and discourage offending by punishing those who damage the environment and undermine legitimate businesses in Scotland through a consistent, proportionate and targeted approach.

### **1.2 New enforcement framework for Scotland**

The new enforcement framework (the framework) for the environment is an important aspect of the joint SEPA and Scottish Government Better Environmental Regulation programme. This framework will be accompanied by other changes to the way we regulate and will result in action being targeted where it is most needed. The outcome will be more effective protection and improvement of the environment, meaning positive results both for communities and the economy in Scotland.

The framework builds upon the strengths of our existing enforcement approach and working relationship with the Crown Office and Procurator Fiscal Service (COPFS). It has been developed jointly with the Scottish Government and in partnership with COPFS. It will consist of:

- the Environmental Regulation (Enforcement Measures) (Scotland) Order, which came into force on 11 November 2015 (the Order).
- an updated SEPA enforcement policy.
- a guidance document which we are required to produce under the RR(S) Act. The guidance will explain how we will use the new enforcement measures and our approach to enforcement more generally for relevant offences (the enforcement guidance). We must have regard to this guidance when exercising our functions.
- guidelines from the Lord Advocate, which will be available later in the year, and which we will comply with.

### **1.3 Consultation on SEPA's updated enforcement policy and guidance**

On 23 July 2015 we published a consultation on an updated enforcement policy and proposed guidance under the new framework. This invited views on those elements of the framework which we are required to produce, to ensure that implementation is transparent and accountable.

Stakeholder engagement has been essential in shaping the new framework, which is part of the wider Better Environmental Regulation programme, and includes the Order, SEPA's enforcement policy and our guidance. Previous consultations have shown strong support for the underlying aims of our proposed enforcement approach and the proposals for the new measures.

### **1.4 Lord Advocate guidelines**

The Lord Advocate will produce guidelines to SEPA which we will comply with to help ensure that we use the new enforcement measures in a consistent and proportionate way and as part of the range of sanctions available to us, including prosecution. The consultation made it clear to stakeholders that SEPA will continue to report significant, persistent and deliberate acts to COPFS for consideration of criminal prosecution.

## **2. Overall response and conclusions**

A total of 35 responses were received, as listed at **Annex A**. These came from regulated businesses, local authorities, public bodies, professional and trade body associations and individuals.

An analysis has been undertaken and the summary findings for each question are set out in Section 4. The overall response to the consultation indicated that our enforcement:

- policy is clear in setting out SEPA's high level approach to enforcement;
- guidance is clear and understandable.

The responses also showed continued strong support for the underlying aims of SEPA's proposed enforcement approach and the new enforcement measures.

Many responses included comments on parts of the enforcement policy and proposed guidance. Several also included comments on Part 2 of the consultation which provided information on SEPA's implementation of the new enforcement measures. For clarity, views were not sought on Part 2 but these comments have been included for completeness.

As the consultation questions were wide-ranging, and the comments received quite broad, a summary of the responses is presented in Section 5 in themes.

### **3. Next Steps**

SEPA would like to thank everyone who responded to the consultation. The views expressed were of considerable assistance to updating the enforcement policy and the guidance. The comments also offered practical suggestions which will help with the successful implementation of the new enforcement measures.

It is our intention to publish enforcement policy and guidance ahead of the use of the new enforcement measures. A phased implementation will then commence when all the elements of the new enforcement framework are in place.

A consultation on how the amount of a variable monetary penalty (VMP) will be determined will also be undertaken this year and we will not impose any VMP's until this consultation is complete and the methodology, with guidance, has been published.

In addition, and as a result of comments made, we will be developing more detailed guidance on enforcement undertakings and setting out our policy on the publishing and publicising of penalties and undertakings. Whilst the initial focus for the latter is likely to be on the publishing of information associated with the use of the new enforcement measures, as required under the Order, we will also consider how best and when to integrate this with other penalties and enforcement actions. Both our guidance and our policy will be developed with input from stakeholders (but not as part of a formal consultation process).

### **4. Consultation responses by question**

The consultation was split into four main questions with Question 3 comprised of a part 'a' and part 'b'. The overall responses are given below, with a brief look at the types of comments made. Distinct themes emerged from consideration of the comments and an overview of these is presented in Section 5.

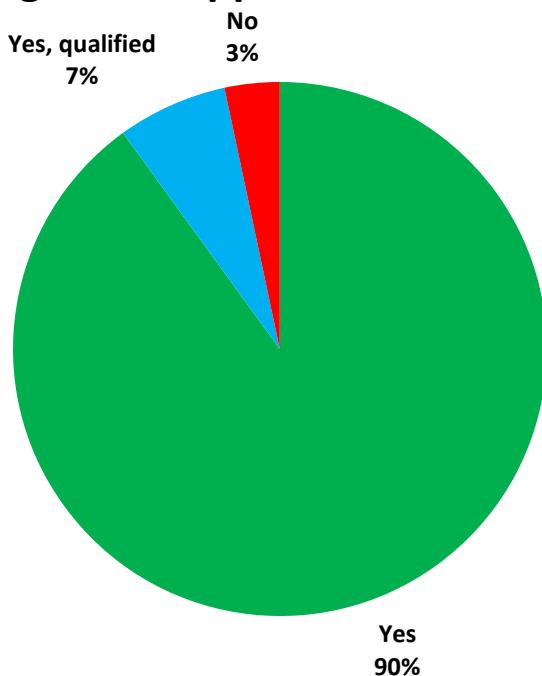
Where no answer was given to a question we have specified how many of these there were but not included these in the percentage breakdowns in the pie chart analysis.

#### 4.1 Question 1 - Enforcement policy

*Is the enforcement policy clear in setting out SEPA's high level approach to enforcement?*

Answer	Number	Percentage
Yes	27	90%
Yes, qualified	2	7%
No	1	3%
No, qualified	0	-
<b>Totals</b>	<b>30</b>	<b>100%</b>

#### Is the enforcement policy clear in setting out SEPA's high level approach to enforcement?



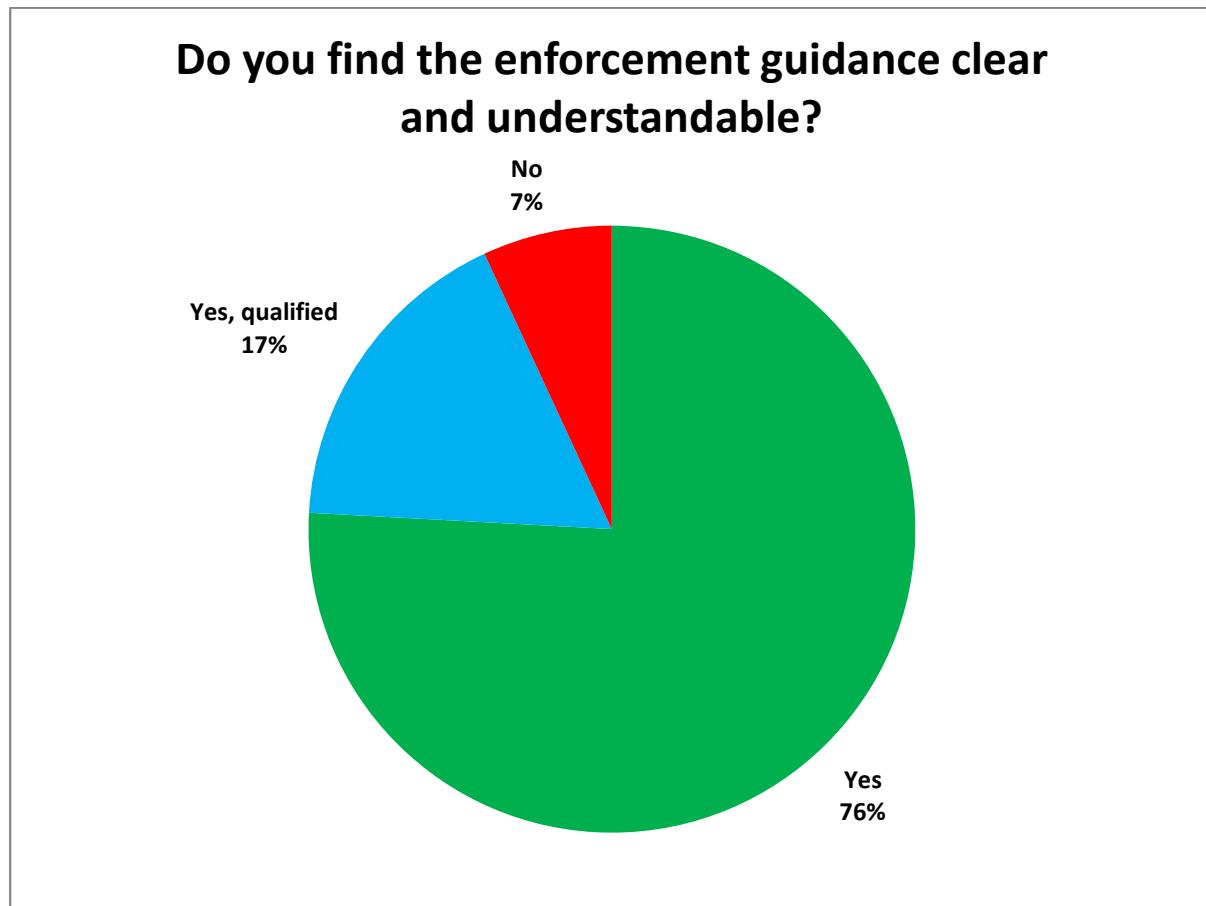
The policy in general was supported by nearly all respondents. The only respondent to answer 'no' to this question also made positive comments about the intent of the policy but disagreed with the publication of the use of enforcement actions, out of concern of disproportionate reputational damage for their business.

5 respondents did not comment on this question and, of these, 1 made supportive comments of the overall intent of the policy.

#### 4.2 Question 2 - Enforcement guidance

*Do you find the enforcement guidance clear and understandable?*

Answer	Number	Percentage
Yes	22	76%
Yes, qualified	5	17%
No	2	7%
No, qualified	0	-
<b>Totals</b>	<b>29</b>	<b>100%</b>



The majority of respondents found the guidance clear and understandable, with several respondents saying that they liked the use of flow charts. The two that did not find the guidance clear asked for more information on the practical implementation of the measures, for example by providing additional examples, flow charts and expanding of the use of tables.

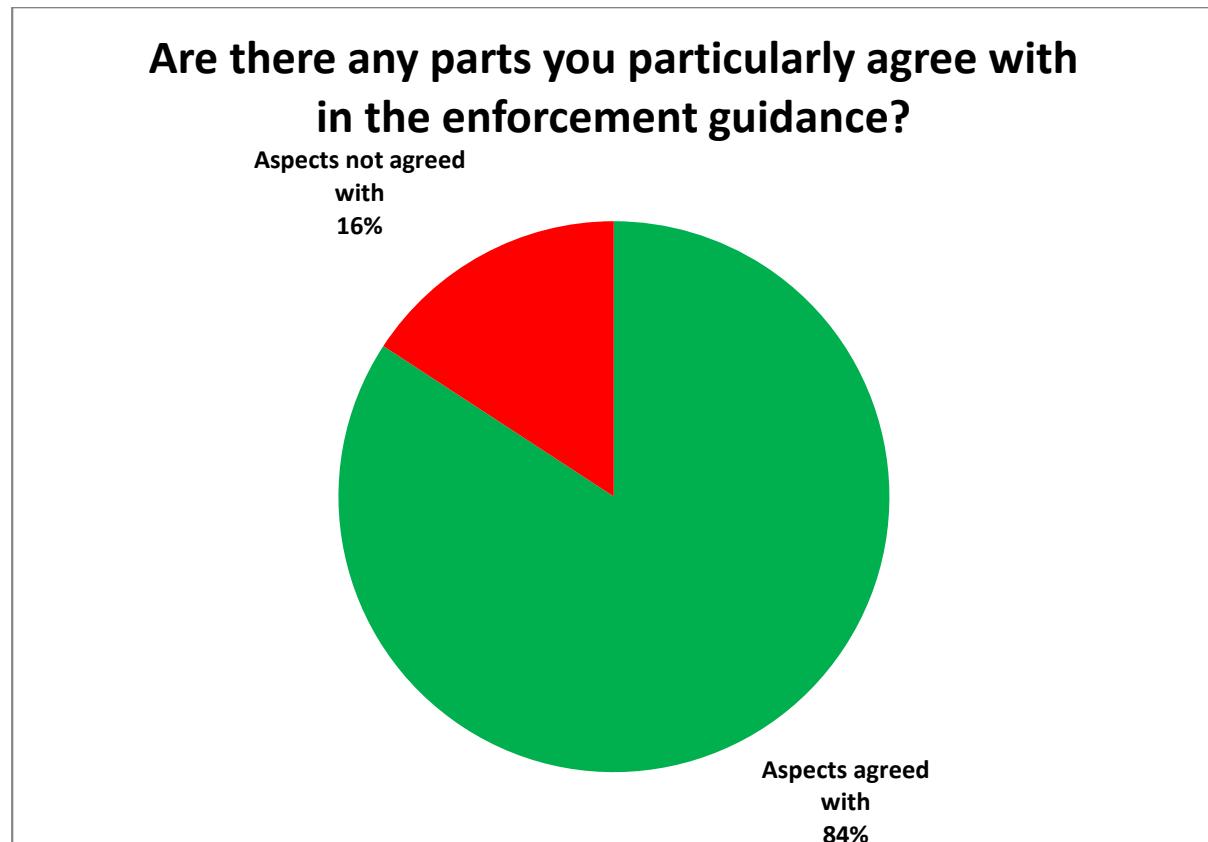
There were five respondents who answered 'yes' to this question but who also sought clarification on technical aspects of the enforcement framework. These requests covered almost all aspects of the framework including variable monetary penalties (VMPs), fixed monetary penalties (FMPs), appeals, enforcement undertakings, how to go 'beyond compliance' and what the 'interface' between the new civil sanctions and prosecution is.

One respondent was concerned that the length of the document would put some operators off using it. 6 respondents decided to make no comment on this question.

**4.3 Question 3, part 'a' - Are there any parts you particularly agree or disagree with in the enforcement guidance?**

*State the aspects of the enforcement guidance that you particularly agree with:*

Type of response	Number	Percentage
Agree comments only	16	84%
Mixed agree and disagree comments	3	16%
<b>Totals</b>	<b>19</b>	<b>100%</b>



Out of the 36 respondents, 16 actively said that they agreed with particular aspects of the guidance. Another 16 made no comment at all.

The positive comments covered general support for the approach SEPA intends to use, the use of enforcement undertakings and the practical aspects, such as phased implementation and periodic reviews.

Out of the three respondents who agreed and disagreed, the comments covered a wide range of issues including the:

- need for SEPA to use their powers proportionately;
- need for SEPA to clarify its intentions with regard to publicity;
- interaction of the enforcement framework with the Compliance Assessment Scheme (CAS) and how 'beyond compliance' fits in;
- appeals routes available and concerns about the costs to operators.

**4.4 Question 3, part 'b' - Are there any parts you particularly agree or disagree with in the enforcement guidance?**

*State the aspects of the enforcement guidance that you particularly disagree with:*

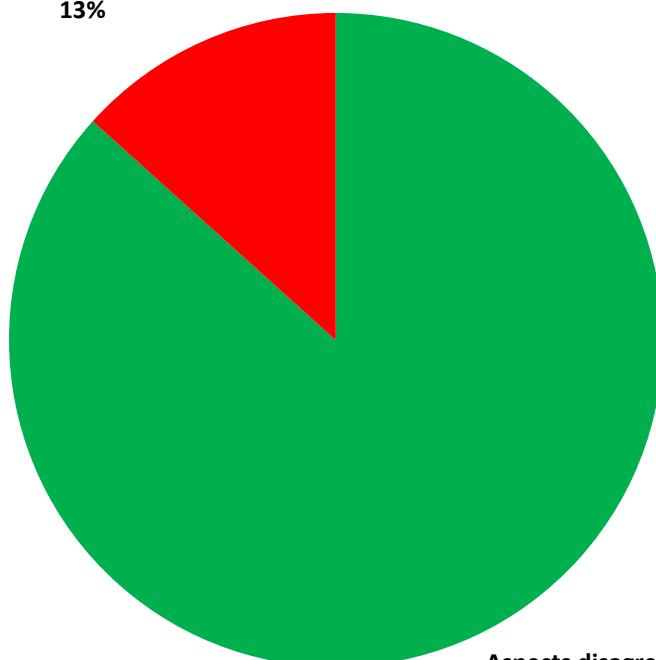
Type of response	Number	Percentage
Disagree comments only	13	87%
Mixed disagree and agree comments	2	13%
<b>Totals</b>	<b>15</b>	<b>100%</b>

### **Are there any parts you particularly disagree with in the enforcement guidance?**

Disagree but some agree comments

13%

Aspects disagreed with  
87%



Well over half of the respondents (20) did not feel the need to comment on things that they agreed or disagreed with in the guidance. 4 respondents said they did not disagree with any aspects and 2 had both 'agree and disagree' comments.

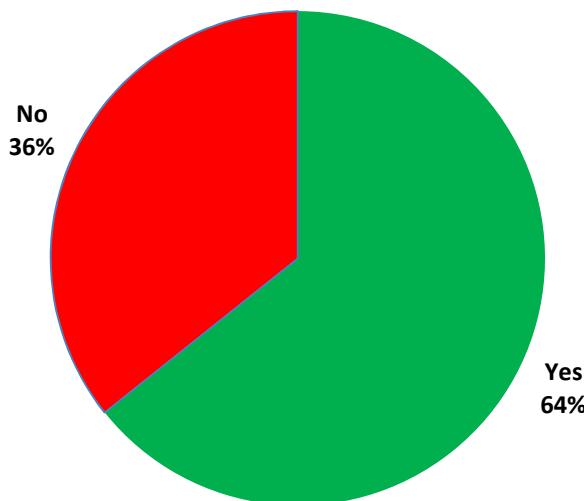
The remainder of the respondents who made 'disagree comments' did so on a wide range of issues, including:

- whether going 'beyond compliance' is needed or appropriate and how it will be measured;
- the appeals route;
- interaction of the enforcement framework with the charging scheme and the potential for financially penalising operators twice for the same offence;
- the need for SEPA to use its powers proportionally;
- how enforcement undertakings will work in practice and how they will be monitored.
- the complexity of variable monetary penalties (VMPs);
- the use of publicity.

**4.5 Question 4 - Is there anything missing that you would have expected the enforcement guidance to have covered?**

Answer	Number	Percentage
Yes	18	64%
Yes, qualified	0	-
No	10	36%
No, qualified	0	-
<b>Totals</b>	<b>28</b>	<b>100%</b>

**Is there anything missing that you would have expected the enforcement guidance to have covered?**



18 respondents (64%) felt that the guidance should have covered additional aspects, including:

- clarification on the use of safeguards for (and the measurement and monitoring of) enforcement undertakings;
- the need for clearer language, improvements to processes, increased safeguards, and, additional detail on the interaction with SEPA's Compliance Assessment Scheme and new Regulatory Charging Scheme proposals.

10 said that they did not think anything was missing from the guidance and a further 7 made no comment on this question.

## **5. Themes across questions**

This section provides a summary of the themes that emerged from the responses and which spanned across the questions.

### **5.1 Overall policy and guidance**

The consultation set out that in most cases SEPA's first approach to enforcement would continue to be the provision of advice and guidance through engagement with operators. Many respondents said that they supported this approach. In addition, the range of measures available to us was seen by many respondents as a positive aspect, allowing us the flexibility to impose proportionate penalties.

There was some concern that the new enforcement measures could disproportionately affect both larger and smaller operators and therefore the proportionate use of SEPA's new powers is imperative. Many respondents expressed a need for fairness and consistency in implementing the new measures.

Several respondents emphasised that the Lord Advocate's (LA) guidance would be important and wanted assurances that SEPA would not use its new powers until the guidelines had been published. The inclusion of more examples was also something that respondents felt would add to understanding and consistency over time.

There was a good level of support for providing SEPA with the ability to recover its costs from taking enforcement action but that these costs would need to be reasonable. A couple of respondents expressed concern that the new measures could be used to raise additional sources of income for SEPA.

### **5.2 Publishing enforcement actions**

Greater clarity on SEPA's intentions with regard to the publishing of information on enforcement actions was sought by several respondents, including when and what information will be published and how it will be disseminated.

One respondent raised concerns over the possibility of disproportionate reputational damage to organisations for relatively minor offences and suggested that SEPA use the ability to publish information on enforcement actions with discretion. Another respondent raised concerns that the benefits of encouraging enforcement undertakings could be undermined by the potential reputational damage if details of the undertaking itself and the organisation were published.

Others felt it was important that enforcement undertakings were made public since many incidents leading to enforcement action would mean the public were aware and expecting a visible response.

### **5.3 Enforcement undertakings**

SEPA's proposed use of enforcement undertakings were mentioned by 13 of the 35 respondents. The intent behind this type of measure was generally supported but some reassurances were sought on:

- how this enforcement measure will be used in practice;
- how effectiveness will be measured / monitored;
- whether the safeguards and appeals processes would be made fair.

It was also suggested by some that greater clarity is required over what options are available to a responsible person whose offer of an undertaking has been rejected in light of there being no right of appeal under the Order. This could include submitting a revised offer but only if other enforcement action had already been decided.

Several respondents suggested that more information is needed on what is expected for an enforcement undertaking to be acceptable and on several practical aspects of how they will be used. For example, how quickly after an event the offer would need to be made and how harm is to be assessed and quantified.

Questions were raised over what 'beyond compliance' is, and how it will be measured with several respondents suggesting that requiring an offer to go 'beyond compliance' is unreasonable. One respondent indicated that they felt it would be inconsistent with the approach taken by other regulators.

Lastly, one respondent suggested that the guidance should clarify whether the effectiveness of remedial action will be monitored on a continual basis, and if so how this will be done.

### **5.4 Technical aspects**

Many of the comments were about how the measures will be used. They also included requests for clearer language and for the use of further examples of the practical steps and decision-making processes.

In particular, the following were highlighted by respondents as areas that required greater clarity:

- how the amount of a variable monetary penalty (VMP) will be determined;
- whether taking any action, or offering to take the action needed to restore or bring a site into compliance by making representations to SEPA after a notice of intent has been served, could prevent a final fixed or variable penalty notice being served;
- where there is a successful appeal by the appellant that both the expenses of an appeal and what happens to SEPA costs is made clear;
- a recognition that if the VMP is to remove financial benefit accrued as a result of offending, then the VMP amount may be quite high, possibly higher than fines in the criminal court;
- that the restorative/compensatory element of any penalty is aimed solely at restoring the harm done to the environment in general, and not to any private property or interests;
- what the debt recovery process is, particularly as this will be shorter and possibly more direct than for other civil debts;
- how historical compliance or non-compliance will be considered.

## **5.5 Interaction with the SEPA Compliance Assessment Scheme and charging scheme**

The interaction of the enforcement framework with SEPA's Compliance Assessment Scheme (CAS) and the charging scheme was picked up by a number of respondents. Some raised concern as to whether instances of non-compliance will result in the operator being penalised twice in instances where they may have a fine imposed on them as well as see an increase in the charges they are required to pay SEPA (due to lower CAS scores). There was a strong interest in being kept informed and engaged in any proposals to revise CAS and more especially how charges would be affected.

## **5.6 Comments that are out of scope**

Some comments were made that were out of scope for this consultation. All have been considered and, where appropriate, have been passed to the relevant SEPA team.

## **Annex A**

### **List of respondents**

<b>1.</b>	ANON
<b>2.</b>	David Taylor
<b>3.</b>	Soilutions Ltd
<b>4.</b>	ANON
<b>5.</b>	ANON
<b>6.</b>	Prof. Colin T Reid
<b>7.</b>	Alistair McGowan
<b>8.</b>	Valpak Ltd
<b>9.</b>	Aberdeenshire Council
<b>10.</b>	Dounreay Site Restoration Limited
<b>11.</b>	Scottish Power
<b>12.</b>	ANON
<b>13.</b>	North Ayrshire Council
<b>14.</b>	Local Authority Recycling Advisory Committee
<b>15.</b>	The Royal Environmental Health Institute of Scotland
<b>16.</b>	Scottish and Southern Energy
<b>17.</b>	East Ayrshire Council
<b>18.</b>	Scotch Whisky Association
<b>19.</b>	Renewable Energy Association
<b>20.</b>	Scottish Salmon Producers' Organisation
<b>21.</b>	ANON
<b>22.</b>	Scottish Environmental Services Association
<b>23.</b>	ANON
<b>24.</b>	Scottish Sea Farms
<b>25.</b>	Scottish Land & Estates
<b>26.</b>	South Lanarkshire Council
<b>27.</b>	Scottish Natural Heritage
<b>28.</b>	Perth and Kinross Council
<b>29.</b>	Law Society of Scotland
<b>30.</b>	British Trout Association
<b>31.</b>	Scottish Water
<b>32.</b>	The Confederation of UK Coal Producers (Coalpro)
<b>33.</b>	ANON
<b>34.</b>	Stirling Council
<b>35.</b>	Crown Office and Procurator Fiscal Service