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# CONSULTATION ON DETERMINING THE AMOUNT OF A VARIABLE MONETARY PENALTY

## Foreword

In this consultation, we set out our proposals for determining the amount of a Variable Monetary Penalty (VMP) and would very much welcome your views ahead of us implementing this new enforcement measure in 2017.

We want VMPs to deter those who commit offences – by removing the financial benefit, imposing a penalty that reflects the severity of impacts, and, which is far tougher on those who are slow to act or who are uncooperative. This is an essential part of our new Regulatory Strategy and the Better Environmental Regulation programme that we are delivering in partnership with the Scottish Government.

Our staff will ensure that VMPs are fairly and proportionately applied so that our enforcement actions make a really positive contribution to tackling illegal activity. They will, as a result, help to ensure a more level playing field for legitimate operators and that prosecution is used for the most serious offending.

I see our use of VMPs as another step forward in being able to challenge those who commit environmental offences and to bring about improvements in their behaviour such that compliance with environmental legislation is achieved. We also want offenders to come forward with undertakings that offer environmental improvements and longer term gains in sustainability.

Consistency in approach is our intention whilst recognising that VMPs (by their very name and nature) will 'vary' because they will be made specific to the circumstances of an offence, the associated impacts and behaviour of the offender.



A handwritten signature in blue ink, appearing to read 'Terry A'Hearn', written in a cursive style.

Terry A'Hearn, Chief Executive

## SUMMARY

The table below sets out the questions in this consultation on which we are seeking your views. Each section provides an outline of the approach that we intend to take to determine the amount of a variable monetary penalty (VMP).

Section	Area of Consultation	Questions
1	Introduction	<b>Question 1</b> - Do you agree that a VMP should be higher for those who obstruct, delay taking action or do not cooperate with SEPA?
2	Financial Benefit	<p><b>Question 2</b> – Is our approach to calculating financial benefit clear to you?</p> <p><b>Question 3</b> - Do you have any comments on how direct and indirect gain will be determined by us?</p> <p><b>Question 4</b> –Do you have any comments on other ways to calculate Financial Benefit that you feel should be considered?</p>
3	Impacts	<p><b>Question 5</b> – Do you agree that we should generally consider the most significant impact or potential impact but that when there are multiple impacts - a more holistic approach is also appropriate?</p> <p><b>Question 6</b> – Do these impact categories feel like the right ones for grouping environmental offences for which a VMP is being considered?</p> <p><b>Question 7</b> – Do you think that the penalty ranges set out in <b>Table 1</b> are clear and linked sufficiently with the impacts?</p> <p><b>Question 8</b> – Do you agree that the main factors identified above are the correct ones to guide our decision-making?</p>
4	Behaviour and Context	<p><b>Question 9</b> – Do you support the proposal to use 3 x VMP levels in each Impact Band (<b>Table 2 of Annex C</b> refers) in terms of differentiating behaviours and changing them?</p> <p><b>Question 10</b> – Have we identified the right behavioural, regulatory and compliance factors for us to either maintain or increase the VMP level?</p> <p><b>Question 11</b> – Do you agree that what we have proposed for determining the amount of a VMP is clear and proportionate?</p>

We would welcome your comments as this will help us to achieve the right outcomes from our enforcement actions, principally around bringing about changes to behaviour that support compliance.

## HOW TO RESPOND AND BY WHEN

Respond to the consultation [online](#) **by 28 November 2016** when the consultation period will end.

You can respond by sending your comments on the proposals in this consultation to the following address:

Rob Morris  
Scottish Environment Protection Agency  
Strathallan House  
The Castle Business Park  
Stirling  
FK9 4TZ  
E-mail: [VMPSResponses@sepa.org.uk](mailto:VMPSResponses@sepa.org.uk)

## SECTION 1

## INTRODUCTION

This consultation relates specifically to how we will determine the amount of a variable monetary penalty (VMP) in circumstances where SEPA has determined a VMP is the appropriate enforcement tool to use.

Reference should also be made to our published Enforcement Guidance<sup>1</sup> along with the Lord Advocate's Guidelines to SEPA in respect of how we decide whether a VMP is the appropriate enforcement tool. You'll see from these documents that prosecution will continue to be the vehicle for the most serious offences.

Here, we set out how we propose using our professional judgement to determine the amount of a VMP in a particular set of circumstances.

Following our analysis of the responses to this consultation we will finalise guidance for our staff on the use of VMPs and will have suitable governance arrangements for our decision-making. There are two mechanisms available to challenge our actions which include the entitlement to make representations to us on receipt of a Notice of Intent to serve a VMP and/or to appeal a decision to impose a final penalty. These additional safeguards are explained in full in our Enforcement Guidance.

### 1.1 How will a Variable Monetary Penalty be calculated?

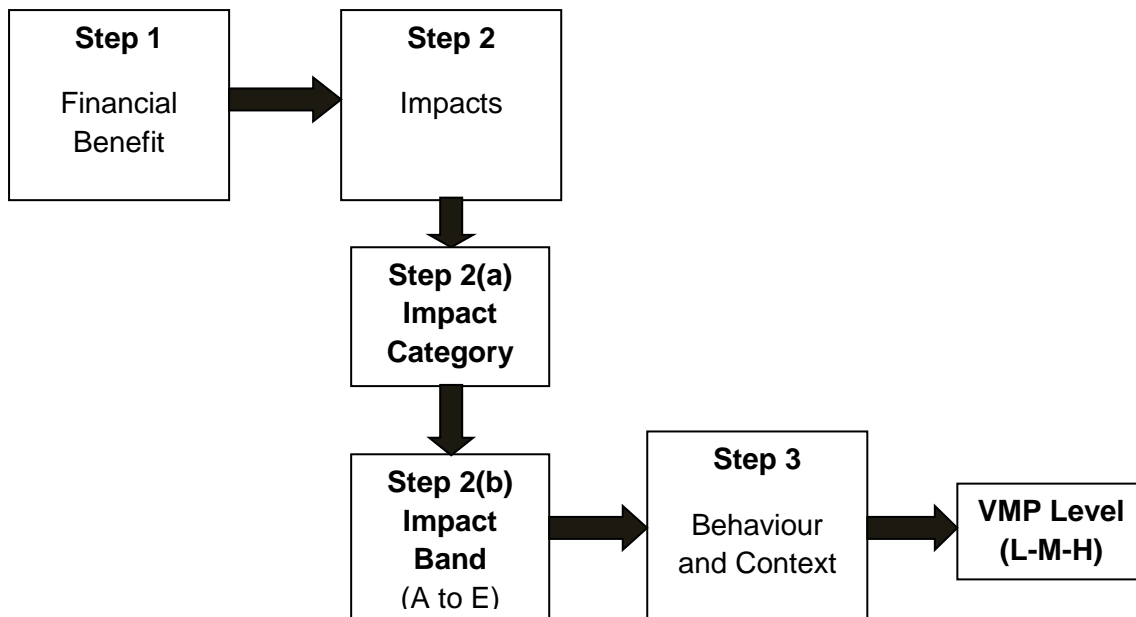
<b>VMP = Financial Benefit + Penalty (Impact + Behaviour and Context)</b>
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This consultation document sets out the steps for a VMP to be calculated. The Financial Benefit gained will be added to a Penalty that we determine by professional judgement as being appropriate (i.e. based on the severity of impacts, the behaviour of the offender and the context of the offence).

The amount of a VMP will vary according to the specific circumstances and we will assess the evidence gathered at each of the steps illustrated below as part of our decision-making.

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<sup>1</sup> <http://www.sepa.org.uk/media/219242/enforcement-guidance.pdf>



As indicated above, we will have in place robust internal governance arrangements so that we demonstrate our guidance has been applied and our decisions are justified.

All recommendations to impose a VMP will involve a small number of professional experts providing advice together with a national group of senior managers who will oversee the decisions we make.

## 1.2 Our expectations

Regulated businesses should be aware of what is legally required and be prepared to work cooperatively with our staff in meeting these legal obligations and when dealing with us because an offence has been committed under environmental legislation.

We expect positive behaviours from those we regulate (e.g. quick response, good levels of cooperation, prompt action etc.) and believe that these are more likely to result in future compliance and that such behaviours offer the potential to deliver wider social, economic and environmental benefits.

In the context of an offence, we therefore expect to be notified promptly about incidents and to be met with a constructive approach during our investigations. We want harm to be stopped quickly and remediation and restoration to be undertaken proactively.

Negative behaviours on the other hand (e.g. a delayed response, poor cooperation and failure to take action to prevent harm or the risk of harm) will most likely lead to an increase in the penalty we impose.

**Question 1 - Do you agree that a VMP should be higher for those who obstruct, delay taking action or do not cooperate with SEPA?**

## SECTION 2

## FINANCIAL BENEFIT (Step 1)

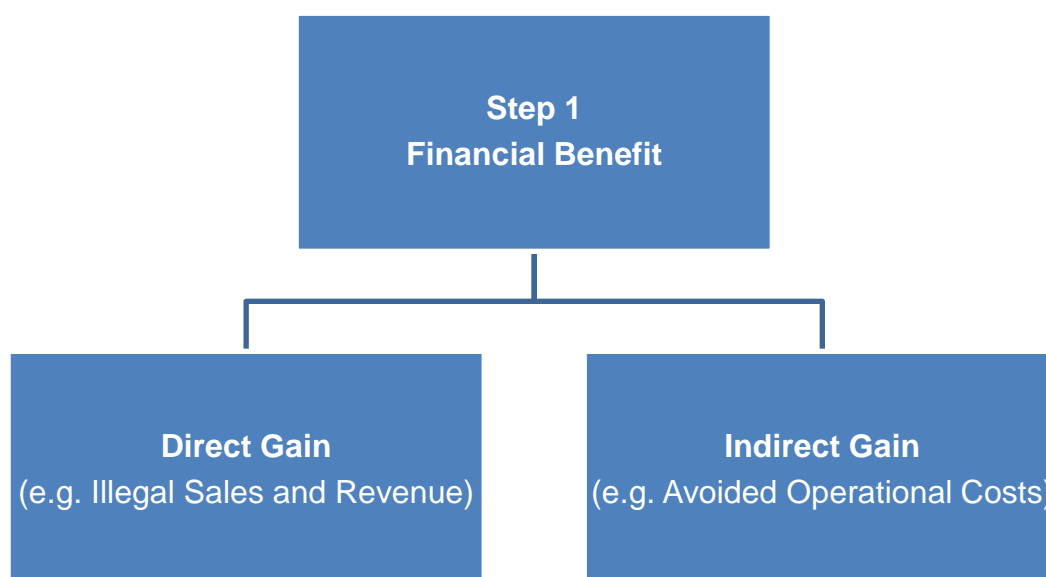
### 2.1 Introduction

Financial benefit is the advantage in terms of monetary gain (or where a financial loss has been lessened or a cost has been avoided) that a person or company has obtained as a result of or in connection with committing an offence. Clearly, offenders can obtain a range of financial benefits from breaching environmental law through avoiding or delaying compliance with regulatory requirements or by achieving a competitive advantage.

Such activity can be motivated by financial gain and will often be undertaken with no regard for the environmental impacts or the effect on communities or the economy. Significant negative impacts can therefore arise for legitimate businesses because of prices being undercut by offenders who avoid the costs of compliance (e.g. by circumventing or ignoring legislative requirements).

**VMPs will aim to remove any direct and indirect financial benefit and we will endeavour to identify or estimate all financial benefit associated with an offence. It is acknowledged that financial benefit will not always be an identifiable feature of a case and in some circumstances there may be very little obvious monetary gain, avoided costs or loss.**

If a VMP is to be an effective deterrent, the VMP must ultimately place the offender in a worse position than those who have complied. It is therefore important to calculate financial benefit made by any illegal activity under investigation by us so that we can fully consider the context and overall severity of an offence.



It is acknowledged that we may not be able to identify or justify financial benefit in all cases. In such cases the value of financial benefit will be considered to be zero.

## **2.2 How will we calculate financial benefit?**

Financial benefit will vary on a case-by-case basis in that it might include any combination of direct monetary gain from illegal revenue and indirect benefit from avoiding the operational costs associated with meeting regulatory requirements.

As part of SEPA's investigation into an offence, our staff seek to gather evidence of such direct gain (such as monies received for services) and indirect gain (such as costs avoided, including infrastructure necessary to operate legally, gate fees avoided of lawfully dealing with waste etc.).

Any financial benefit that we calculate in relation to a VMP will relate to the offence only and the timescale over which the offence was committed. No future financial benefit should be considered or past financial benefit where this was made before the date of the relevant offence.

We will also avoid double counting of financial benefits between offences and enforcement sanctions, to ensure that any offender is not penalised more than once for an individually discrete amount of financial benefit. For example, where we have in addition to serving a VMP also served a statutory notice in relation to the infrastructure at a site and where the steps to be taken in that notice require incurring capital costs, we won't include these as avoided operational costs in determining the VMP.

If the statutory notice requiring infrastructure is not complied with, however, and SEPA decides to impose a subsequent VMP for the separate offence of non-compliance with a statutory notice, the avoided costs could be included in such a VMP, as we will expect the offender to comply with whatever combination of enforcement actions that we decide to take.

It is important to be able to adequately justify within any VMP calculation what we believe an offender has made financially from their conduct, with a detailed justification as to how we have come to that conclusion. We will never arbitrarily assign a level of financial benefit to a case.

We will base the financial benefit on available information we collect during an investigation and this will depend on the specific circumstances of the offence.

**Question 2 - Is our approach to calculating financial benefit clear to you?**

**Question 3 - Do you have any comments on how direct and indirect gain will be determined by us?**

**Question 4 - Do you have any comments on other ways to calculate Financial Benefit that you feel should be considered?**



## SECTION 3

## IMPACTS (Step 2)

### 3.1 Introduction

We will always take account of environmental impacts in determining the amount of VMP to be imposed.

In many cases, there is a predominant impact to air, water or land which has clear consequences for communities, habitats<sup>2</sup>, species and ecosystem services<sup>3</sup>. In such circumstances we will consider the most significant impact or potential impact in so far as we are able to do so within the terms of the relevant legislation.

We recognise that there will not always be a predominant impact but multiple, equally ranking, impacts which we will consider in a more holistic way.

For the majority of offences suitable for a VMP, we consider that only one, or one predominant, impact is likely to be evident. The decision on this will be determined by an assessment of the evidence by our staff.

If we intend using a VMP in respect of a case involving multiple impacts, it may be that we would first discuss this proposed course of action with the Crown Office and Procurator Fiscal Service.

**Question 5 - Do you agree that we should generally consider the most significant impact or potential impact but that when there are multiple impacts - a more holistic approach is also appropriate?**

### 3.2 What impact categories will we use?

We will use three **Impact Categories** for offences, as follows:

#### **(a) Actual harm offences -**

These will have caused a demonstrable impact or harm to the environment and important receptors. Such offences will most likely have involved a release of pollutants and associated impacts. We will also consider the duration / frequency of these offences.

#### **(b) Risk of harm offences -**

These offences include situations where there has been a release of pollutants but, perhaps fortuitously, there were no impacts or these were mitigated or avoided or could not be assessed or identified.

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<sup>2</sup>Habitats include for example; cultivated land; permanent grassland; forest and woodland; rivers and lakes; freshwater wetlands; urban areas; coastal land or coastal waters.

<sup>3</sup> SEPA's approach adopts the Common International Classification of Ecosystem Services as a basis for assessing how people's uses of the environment are affected. This provides a common standard that is being adopted across Europe as advised by the European Environment Agency.

Also, these include circumstances where there is risk of pollutants being released which could cause impact or harm.

When assessing the risk of harm caused by a pollution release (i.e. where there is no evidence of impact or only evidence of some impact), in addition to considering any scientific evidence, we may take into account the duration/frequency of offence and any likely effects that the pollutant may have caused.

Frequent or long-running offences will be considered as an increased risk and in circumstances where it is more likely that the harm could occur, the VMP will be higher.

**(c) Technical /administrative offences -**

These are offences which are not directly associated with actual or potential harm. Most often, they are linked to a legislative requirement not being complied with or condition(s) of authorisation breached. However, this could include an obligation on an operator to record information not being met which then prevents compliance with other conditions being demonstrated (i.e. in relation to emissions).


**Question 6 - Do these impact categories feel like the right ones for grouping environmental offences for which a VMP is being considered?**

### 3.3 What Impact Bands are being proposed

We have set out five **Impact Bands**, A to E, for each **Impact Category**. A penalty range from low to high has also been developed (**Table 1** below refers).

**Table 1** **Impact Categories, Impact Bands and associated penalty ranges**

IMPACT CATEGORY	Impact Band A	Impact Band B	Impact Band C	Impact Band D	Impact Band E
(a). Actual Harm	£600 - £3k	£4,000 - £8k	£9,200 - £14k	£15,200 - £20k	£24,000 - £40k
(b). Risk of Harm	£400 - £2k	£2,400 - £4k	£4,400 - £6k	£6,800 - £10k	£12,800 - £24k
(c). Technical/Administrative	£200 - £1k	£1,200 - £2k	£2,200 - £3k	£3,400 - £5k	£5,400 - £7k



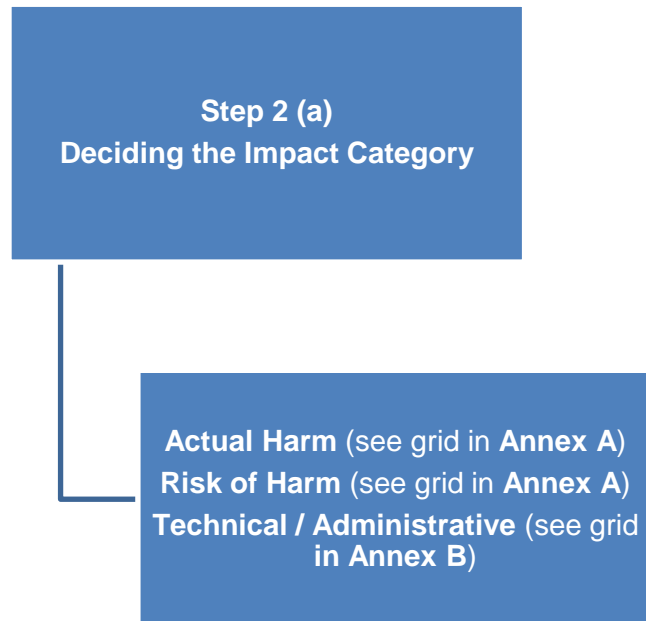
Increasing Severity

Once allocated to an **Impact Band**, the penalty will be assumed as remaining at the lowest end of the range pending consideration of behaviour of the offender and context of the offending.

This principle is being adopted because we expect, as a minimum, compliance with environmental legislation. Our assumption is that offender behaviour has been good unless there is evidence of poor or obstructive behaviour which we will take account of in **Step 3**. Such behaviour would increase the level of the VMP imposed.

### 3.4 Deciding the Impact Category

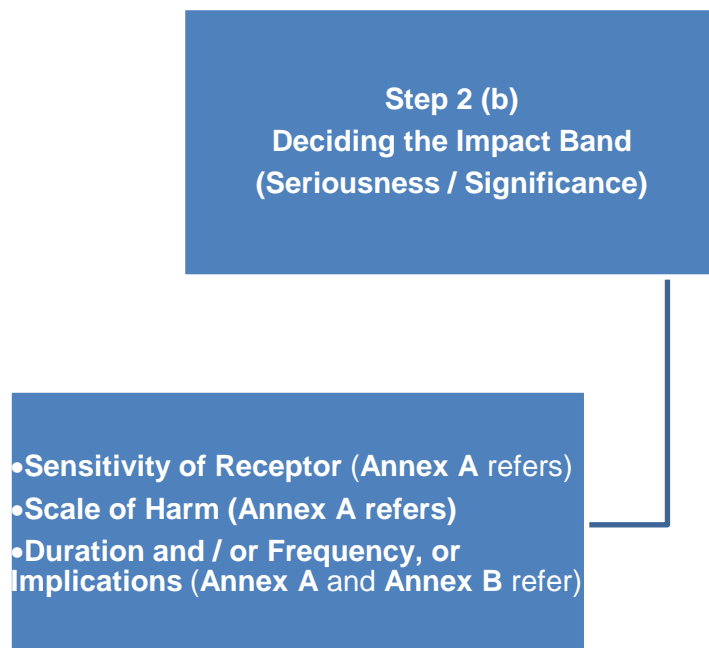
The decisions we take on which **Impact Category** to place an offence within will be based on the evidence we have gathered during our investigations and through subsequent discussion of the financial, regulatory and scientific information.



**Question 7 - Do you think that the penalty ranges set out in Table 1 are clear and linked sufficiently with the impacts?**

### **3.5 Deciding the Impact Band (Seriousness / Significance)**

We will determine which Impact Band to allocate an offence based on the **Sensitivity of the Receptor** (very low to very high), its **Scale** of impact (very low to very high) and the **Duration** of impact (for Actual Harm, very short to very long) or **Likelihood** (for Risk of Harm, low to very likely) or Implications (for Tech.



We will carry out appropriate investigations to enable us to determine the seriousness / significance of the impacts of an offence and this information will guide which **Impact Band**, A-E, is to be used.

The penalty range is quite wide in each **Impact Band**. Again, our assumption is that positive behaviour will be more likely to result in compliance and that the lowest VMP Level, as per **Table 2** in **Annex C**, will apply unless there is justification to adjust it upwards because of poor behaviour and/or previous compliance history.

The VMP will be guided by our assessment of the impacts and our judgement of offender behaviour.

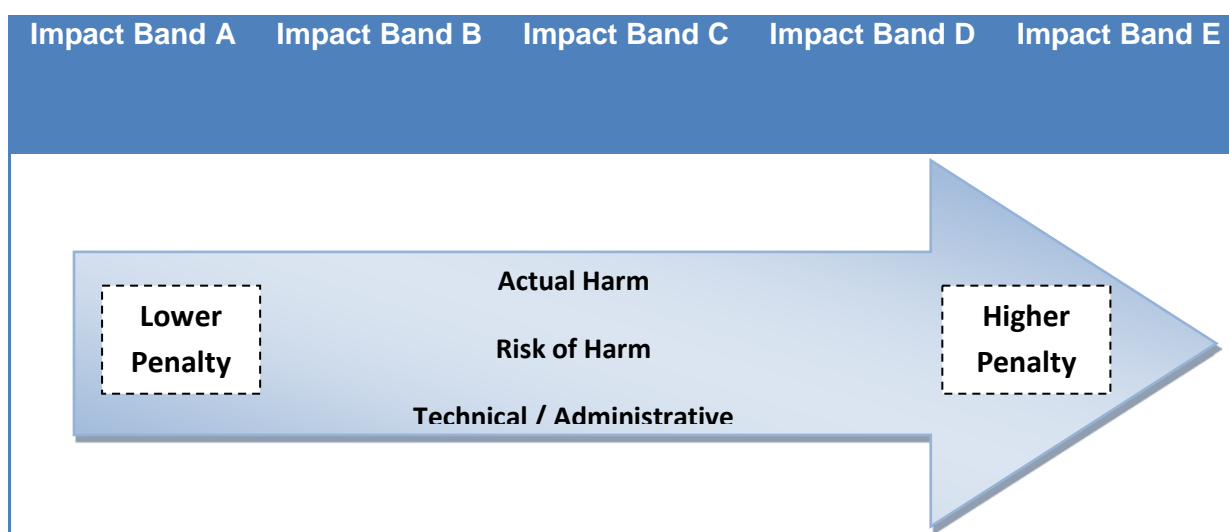
### 3.6 How the Grids at Annex A and Annex B Work

**Annex A** and **Annex B** show the grids and key parameters that we will use as part of our decision-making around which **Impact Band** to assign a particular offence and set of impacts to.

In using the grid at **Annex A**, where sensitivity and scale are on the same axis, we will default to whichever is the highest of these impacts in relation to a particular offence. This means that harm caused to a highly sensitive part of the environment but for which the impacts are of a low scale will be placed in **Impact Band E** unless the duration suggests this should be **Impact Band C** or **D**. An offence that results in impacts that are of a high scale but to a part of the environment that is of low sensitivity will also be placed in **Impact Band E** unless the duration suggests this should be **Impact Band C** or **D**.

Technical / administrative offences are assessed according to the level of statutory risk under the particular regulatory framework. Such offences can arise from: a failure to obtain an authorisation; delayed or incomplete data submissions; a failure to record information; failure to display required notices; or to submit data etc. Again, a higher penalty will be imposed for offences resulting in more serious implications and where there are multiple and repeated failures.

The more significant / serious offences (according to their impact on a receptor, scale of harm and duration/frequency) will normally attract a higher penalty (i.e. towards Impact Band D or Band E).



### 3.6.1 Sensitivity of Receptor

We will be guided by how sensitive the part of the environment, habitat or ecosystem service that has been or is likely to be impacted by the offence. The more sensitive the receptor and the more specific the impact on it is the higher the VMP will be. Evidence of specific impacts on the health and well-being of people or organisms that are sensitive would be likely to increase the seriousness / significance of an offence.

A designated internationally important protected habitat would be considered more sensitive than a site with no designation. Similarly, a designated Site of Special Scientific Interest (SSSI) would be considered more sensitive than a site that is of local importance.

### 3.6.2 Scale of Harm

Here, we need to consider the extent (or magnitude), severity and nature of the impact, or potential impact, including:

- Physical extent (e.g. length of the river impacted or the number of people affected).
- Severity (e.g. assessing the scale and significance of an exceedance of an Environmental Quality Standard, EQS, or Emission Limit Value (ELV) or the extent of ecological damage caused).
- Nature (e.g. the volume and type of discharge, release or deposit).

If the evidence indicates a greater scale of harm the resulting VMP will be higher.

### 3.6.3 Duration and / or Frequency and Likelihood

The length of time that a receptor has been impacted and, where possible, including an estimate of the length of time to recover to pre-incident status, is another important aspect for our evidence gathering and decision-making for offences that result in actual harm.

Similarly, the period for which a service<sup>4</sup> the environment provides is unavailable or affected will also need to be taken into account if this is the main impact. For intermittent offences the frequency of the offence and resulting harm should be used.

In brief, the longer the period of time the receptor has been affected (or the more frequent the harm) the higher the fine. **Impact Band A** would reflect a shorter duration / lower frequency and thereby a lower penalty. **Impact Band E** would reflect a longer duration / higher frequency and a penalty that is higher.

For risk of harm offences, it is the likelihood of impacts arising that will guide our decisions. **Impact Band A** would reflect a low likelihood and **Impact Band E** an offence that would be very likely to result in harm.

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<sup>4</sup> Again, SEPA's approach is to adopt the Common International Classification of Ecosystem Services as a basis for assessing how people's uses of the environment are affected.

### **3.6.4 What about Technical / Administrative offences?**

From the outset, we will assume that awareness of what is legally required will be known.

Technical or administrative offences do not necessarily result in direct harm to the environment but that they may undermine regulation and prevent compliance being achieved. A broadly similar approach is to be taken to determining the seriousness / significance for these type of offences as to that taken for offences that cause actual harm or pose a risk of harm.

The only differences are explained below.

#### **Type of offending**

For technical / administrative offences considered suitable for a VMP the following are common types:

- Minor delay in the submission of data and/or incomplete / poor quality return.
- Major delay in the submission of data and/or very poor quality return.
- Non-submission of data or no record keeping (single failure).
- Non-submission of data, no record keeping and/or failure to register (multiple failures).
- Multiple and repeated failures.

The longer the offence lasts or the more frequently it occurs the higher the VMP needs to be.

#### **Implications**

Various risks are posed to the regulatory framework and achievement of compliance and the availability of evidence to inform decision-making, including:

- Preventing compliance assessment by SEPA.
- Failing to attain UK or Scottish-level priorities and targets.
- Non-compliance with legislative deadlines.

The more significant the implications of an offence are (i.e. statutory deadlines not met) the higher the VMP will be.

**Question 8 - Do you agree that the main factors identified above are the correct ones to guide our decision-making?**

## SECTION 4

## BEHAVIOUR AND CONTEXT (STEP 3)

### 4.1 Introduction

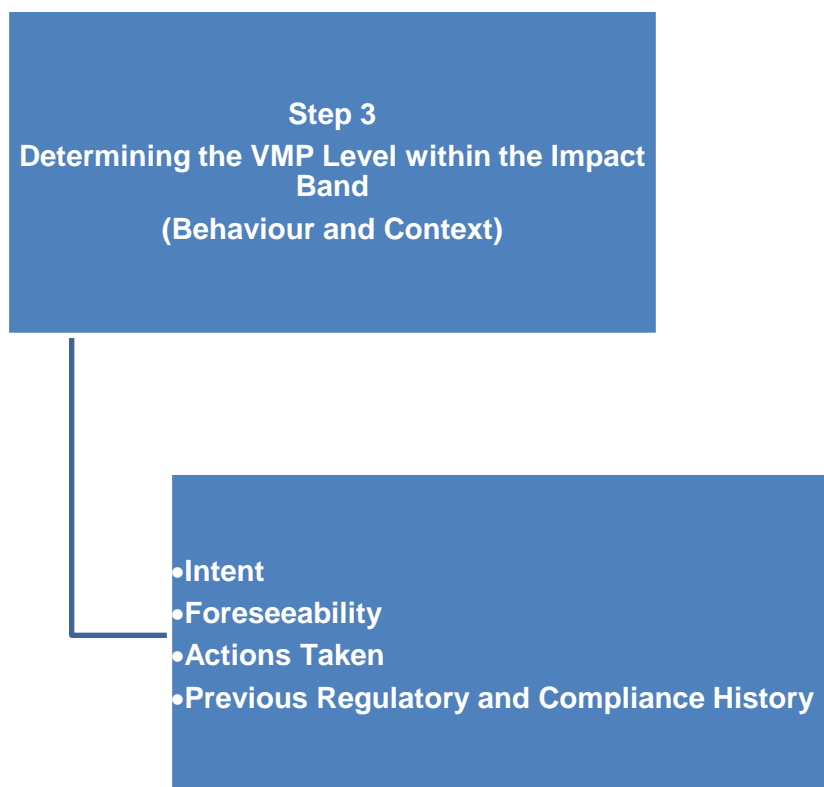
This part of the consultation focuses on the behavioural factors that will influence our decision on the VMP Level based on the intent, foreseeability, action taken and previous regulatory and compliance history associated with an offence / offender.

The context of the offence, including the conduct / behaviour, actions and previous regulatory and compliance history of the operator, are important influences on the VMP that we decide to impose. After all, the main aim of using a VMP is to achieve a positive change in behaviour through the use of a timely and proportionate sanction.

We propose using three **VMP Levels** from low (A1, B1 etc.) to high (A3, B3 etc.) in each of the **Impact Bands**. This section focuses on the behavioural factors that will influence our decision on the level based on the intent, foreseeability, action taken and previous regulatory and compliance history that is associated with an offence / offender. **Table 2 of Annex C** sets out the detailed **VMP Levels**.

Our presumption from the outset is that a VMP will be placed in the lowest level in an Impact Band unless there is evidence of poor conduct / behaviour necessitating a tougher penalty. Compliance is non-negotiable and cooperative behaviour is our baseline expectation.

**Question 9 - Do you support the proposal to use 3 x VMP levels in each Impact Band (Table 2 of Annex C refers) in terms of differentiating behaviours and changing them?**





## 4.2 Intent

Offences arise for a wide variety of reasons and we will assess whether and to what extent there is intent shown (i.e. a deliberate or a wilful disregard or recklessness etc.) versus negligence, a genuine accident or an exceptional series of events leading to unforeseen consequences.

Where the offence was committed intentionally, this would be regarded as a deliberate, wilful or reckless act. After determining the Impact Category (i.e. actual harm, risk of harm or technical / administrative), the placement in a particular VMP level within an Impact Band, as set out in **Table 2 of Annex C**, should be towards the highest level as a consequence of such intent.

More generally, we will consider what the offender's attitude has been towards environmental protection, to achieving compliance (or going beyond compliance) and the overall attitude that has been shown to our staff. Positive attitude (i.e. taking swift action, listening and acting on advice and guidance) or operators who may have unintentionally caused harm would mean the VMP level remains lower.

Conversely, if an operator has shown wilful disregard or recklessness that causes harm and who shows poor attitude (e.g. by responding slowly, being unwilling to listen and completely ignoring advice) then the VMP level imposed would be adjusted upwards towards the highest end of the range.

It may be that there has been no previous regulatory contact and in these circumstances there can be no presumption of how the operator would have responded to our advice. Each situation must be assessed on its own merits.

## 4.3 Foreseeability

Some offences are obvious and bound to occur without preventative action (i.e. they can be foreseen). Others arise from unforeseen and exceptional circumstances, for example, as a result of third party intervention such as isolated vandalism or the actions of a disgruntled employee.

How effectively the risks could have been managed (e.g. by putting in place preventative measures and procedures) should be the main focus in such circumstances.

Where it can be demonstrated that an offender had exercised all reasonable and practicable measures to prevent an offence from occurring (i.e. because it was foreseeable), this will help to justify the VMP remaining at the lowest end of the range in **Table 2 of Annex C**. This fits with the behaviours we believe are needed to support compliance.

In relation to hazards that can be foreseen, we will consider the type of hazard (e.g. toxicity of pollutants, process controls or issues with a particular technology etc.). If the offence involved the release of a chemical then awareness of the potential environmental effects would be available via the Material Safety Data Sheet or COSHH Assessment Documentation. Omitting to take account of such freely available information would lead to a higher VMP.

A failure to identify obvious and controllable hazards or risks and not putting in place preventative measures that would have controlled the risks, prevented or mitigated their impacts would result in a VMP at the highest level in the range.

#### **4.4 Actions taken**

We want and expect positive behaviours towards achieving compliance, in dealing with our staff and in addressing the impacts arising from an offence.

Actions that deliver compliance include meeting mandatory technical or infrastructure requirements required by an authorisation or in legislation or the adoption of voluntary measures such as industry standards, management systems, procedural controls and training.

The speed of response, level of cooperation and the actions taken (including whether the offender acted promptly, was aware of preventative measures and had put those measures in place before an offence - but also during and after an offence) will all be taken into consideration in deciding the VMP level to be imposed. Our assumption is that they will be positive and the VMP level will remain at the lowest level unless there is evidence of poor behaviour or a lack of action.

We will also consider the circumstances through which the operator and we became aware that there was an incident or offence. Prompt notification is our assumption and justification for a VMP remaining at the lowest level.

As well as the timeliness of the notification by the offender, it is the accuracy and quality of the information provided by the offender which is important. Whilst it is acknowledged that an offender may need time to make preliminary investigations before notifying us, we expect in most circumstances that notification should take place prior to or during any investigation by the operator.

We recognise that there may be circumstances in which an offender is genuinely unaware that they have caused an incident or an offence and notification was not really an option for them. On its own, this lack of awareness and inability to notify should not result in the VMP level being adjusted upwards.

If, however, the offender was aware of the incident or offence and did not notify SEPA (or possibly other regulators or interest groups) or actively attempted to suppress knowledge of the incident then this will lead to the VMP level being increased. The main considerations here are whether the offender was acting reasonably despite being aware of the offence/incident and if they had actively tried to hide it. Also, we should determine if they should have had the notification systems in place which either failed or were absent.

In circumstances where the offending behaviour has continued, no mitigating steps have been taken or there is evidence that an offender has covered up an offence or delayed taking action in mitigating the offence, this will lead to a higher VMP being imposed.

Where delayed notification results in further actual or potential harm to the environment we will impose a higher VMP. We expect the offender to be able to demonstrate that they have taken all reasonable mitigating steps to rectify or cease the breach after the incident or offence has occurred. Such behaviour would warrant a VMP remaining at the lowest level.

The level of cooperation shown by the offender to SEPA during the course of our investigations into the offence is important but also during any work to remediate impacts. Assisting us to carry out our investigations, attending interviews and providing records are part of this and would justify the VMP remaining lower.

Where remediation is not possible, principally this should be due to technical or logistical barriers and not solely on financial grounds.

Where remediation is possible an assessment will be made of the offender's speed of response and whether this has been made voluntarily or at our request. Full remediation is where the offender has restored the environment as far as possible to that which existed prior to the offence.

#### **4.5 Previous regulatory and compliance history**

We will consider previous environmental convictions, offences, breaches or non-compliances over the previous 3 year period (and not before then) – for consistency and transparency.

This could include:

- An authorisation or regulatory provision being breached.
- A polluting substance being discharged or released.
- Technology/managerial process failures.
- An act or failure to act was the basis of the breach.

We will also consider the period of time over which similar breaches have been ongoing as this may strongly reflect the conduct / behaviour of the offender and their attitude to achieving full compliance.

Where there has been no previous enforcement action against the offender there would be no need to adjust the VMP level upwards for this particular aspect of their behaviour and context. Similarly, where the offence is a first time breach and there have been no previous occurrences, this will be another reason not to escalate the VMP. However, the opposite will apply where previous breaches have been ongoing and for a significant period of time.

The type and level of previous enforcement responses can be considered so that the relative seriousness of each of the breaches is taken into account. Where we have used enforcement action against the offender previously this will most likely mean placement in a higher VMP level.

In terms of compliance history, we will consider performance under our Compliance Assessment Scheme (CAS), where an authorisation is assessed, and also make an assessment of the offender's overall compliance history over the past 3 years.

It is therefore quite possible for similar types of offences (i.e. that have been allocated to the same impact category) to end up with a different VMP being imposed because of the adjustments we will make in light of an offender's conduct / behaviour, previous regulatory and compliance history and any financial information they may have provided to us.

**Question 10 - Have we identified the right behavioural, regulatory and compliance factors for us to either maintain or increase the VMP level?**

**4.6 Overall approach and main focus**

We will use structured professional judgement in our decision-making throughout and will, via appropriate governance arrangements, ensure that in calculating the amount of a VMP to be imposed that the provisions of this guidance are applied.

Our actions can also be challenged via the additional safeguards that are detailed in our Enforcement Guidance - to make representations to us on receipt of a Notice of Intent to serve a VMP and the entitlement to appeal a decision to serve a final penalty notice.

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

Achieving behaviour change is our main focus in imposing a VMP. This means that we will take into account information that is specific to the operator and offence in deciding what Impact Band and VMP level is proportionate.

We would not, as a matter of principle, seek to impose a VMP which is beyond the means of the offender. If an offender considers the level of VMP imposed in a Notice of Intent served on them by us to be beyond their means, they may as part of the process of making written representations to us, seek to demonstrate an inability to pay the level proposed.

**Question 11 - Do you agree that what we have proposed for determining the amount of a VMP is clear and proportionate?**

<b>ANNEX A</b>  <b>IMPACT BANDS A to E for:</b> <b>(a) ACTUAL HARM and</b> <b>(b) RISK of HARM</b> <b>OFFENCES</b>	<b>Low Sensitivity / Scale</b>	<b>Moderate Sensitivity / Scale</b>	<b>High Sensitivity / Scale</b>
<b>Short Duration / Low Likelihood</b>	<b>A</b>	<b>B</b>	<b>C</b>
<b>Moderate Duration / Moderate Likelihood</b>	<b>B</b>	<b>C</b>	<b>D</b>
<b>Long Duration / Very Likely</b>	<b>C</b>	<b>D</b>	<b>E</b>

<b>ANNEX B</b>  <b>IMPACT BANDS A to E for:</b> <b>(c) TECHNICAL / ADMINISTRATIVE</b> <b>OFFENCES</b>	<b>Low</b> <b>Implications</b>  <b>(i.e. very low</b> <b>statutory risk)</b>	<b>Moderate</b> <b>Implications</b>	<b>High Implications</b>  <b>(i.e. high statutory risk)</b>
<b>Minor Delay / Incomplete / Poor</b>	<b>A</b>	<b>B</b>	<b>C</b>
<b>Major Delay / Very Poor, Non-Submission of Data or</b> <b>Failure to Register</b>  <b>(Single Failure)</b>	<b>B</b>	<b>C</b>	<b>D</b>
<b>Multiple and Repeated Failures</b>	<b>C</b>	<b>D</b>	<b>E</b>

**ANNEX C – Table 2 – Impact Bands and VMP Levels for the three Impact Categories**

<b>Impact Bands</b>	<b>(a) Actual Harm VMP Levels</b>	<b>(b) Risk of Harm VMP Levels</b>	<b>(c) Technical / Administrative VMP Levels</b>
A1 (Lowest)	£600	£400	£200
A2 (Middle)	£1,800	£1,200	£600
A3 (Highest)	£3,000	£2,000	£1,000
B1 (Lowest)	£4,000	£2,400	£1,200
B2 (Middle)	£6,000	£3,200	£1,600
B3 (Highest)	£8,000	£4,000	£2,000
C1 (Lowest)	£9,200	£4,400	£2,200
C2 (Middle)	£11,600	£5,200	£2,600
C3 (Highest)	£14,000	£6,000	£3,000
D1 (Lowest)	£15,200	£6,800	£3,400
D2 (Middle)	£17,600	£8,400	£4,200
D3 (Highest)	£20,000	£10,000	£5,000
E1 (Lowest)	£24,000	£12,800	£5,400
E2 (Middle)	£32,000	£18,400	£6,200
E3 (Highest)	£40,000	£24,000	£7,000