



**Summary of responses:  
Consultation on determining the amount of a variable  
monetary penalty**

**April 2017**



## 1. Introduction

1.1 One of SEPA's most important roles, as Scotland's principal environmental regulator, is to protect and improve the environment, health and the wellbeing of people in Scotland. Where a responsible person causes, or risks causing, harm or fails to comply with the conditions of their authorisation or other legislative requirements, or fails to obtain an authorisation SEPA needs to be able to take action to rectify this.

1.2 SEPA prefers to work with a responsible person and use advice and guidance to achieve our enforcement outcomes. There are situations when this type of partnership approach will not secure the desired enforcement outcomes and another form of enforcement action is appropriate in line with our published [policy](#) and [guidance](#).

1.3 In September 2016 SEPA published a consultation on how to determine the amount of a variable monetary penalty (VMP) in circumstances where this measure is decided as the appropriate enforcement action to use.

1.4 The scope of the consultation did not encompass the availability of a VMP as this tool was made available to SEPA under the Environmental Regulation (Enforcement Measures) (Scotland) Order 2015 and is a part of the environmental enforcement framework, introduced under the Regulatory Reform (Scotland) Act 2014 (the 2014 Act). SEPA and the Scottish Government had already consulted on the 2014 Act and this had shown strong support for the underlying aims of the proposed approach to enforcement.

### What is a VMP?

1.5 A VMP is an enforcement measure that will be used by SEPA to drive better compliance through responding to a failure to comply. They will be used to remove the financial benefit of illegal activity and impose a penalty that reflects the severity of the impacts associated with the activities. It is hoped that their use will also act as a deterrent. The previous history and behaviour of the offender will also inform the level of penalty imposed (i.e. if slow to act or obstructive the penalty imposed will be higher).

1.6 VMPs will therefore 'vary' because they will be made specific to the circumstances of an offence.

## 2. Consultation on determining the amount of a variable monetary penalty

### Overall response and conclusions

2.1 SEPA received a total of 16 responses from a wide range of regulated businesses, trade bodies and one individual. Annex A lists the respondents. An analysis has been undertaken and the summary findings for each question are set out in this document.

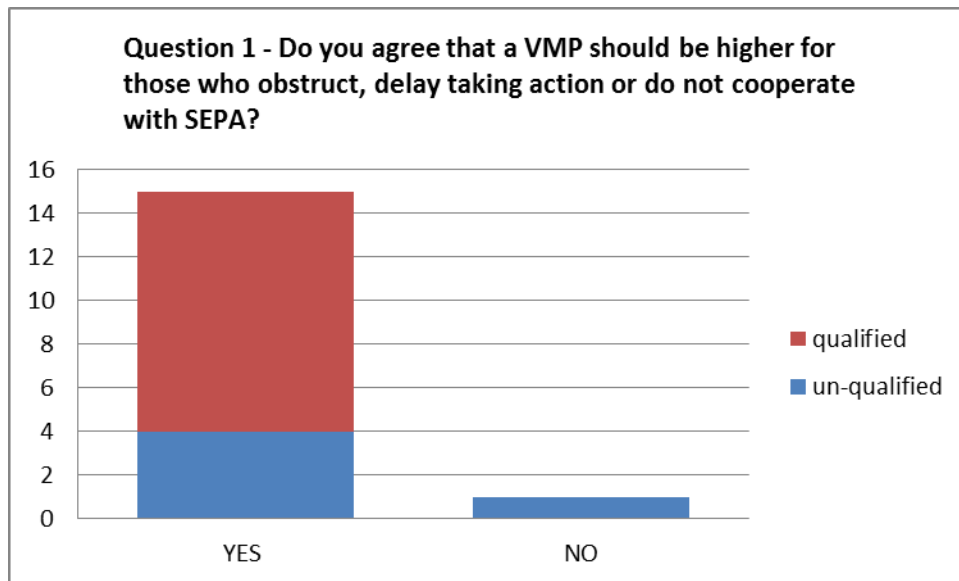
2.2 Overall, there was a good level of support for the methodology proposed for determining the amount of a VMP. Some of this support was conditional on the decision-making process being designed in such a way as to ensure proportionality and consistency when imposing a VMP. Clear guidance and staff with the necessary expertise were identified as key dependencies for implementation to succeed.

## 3. Consultation responses by question

3.1 The consultation set out eleven questions relating to how SEPA proposed to determine the level of VMP based on the use of structured professional judgement. These were grouped around financial benefit, the seriousness / severity of the impacts and the previous history / behaviour of the offender. An overview of the responses to each question is given below together with a sense of the comments.

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

Answer	Number	%
Yes	4	25%
Yes, qualified	11	69%
No	1	6%
No, qualified		0%
<b>Total</b>	16	100%



3.2 Virtually all respondents supported a VMP being higher for those that do not fully cooperate with SEPA. The only respondent to answer 'no' to this question had concerns about the overall intent of the new environmental enforcement framework in Scotland.

3.3 There were three distinct themes in the responses:

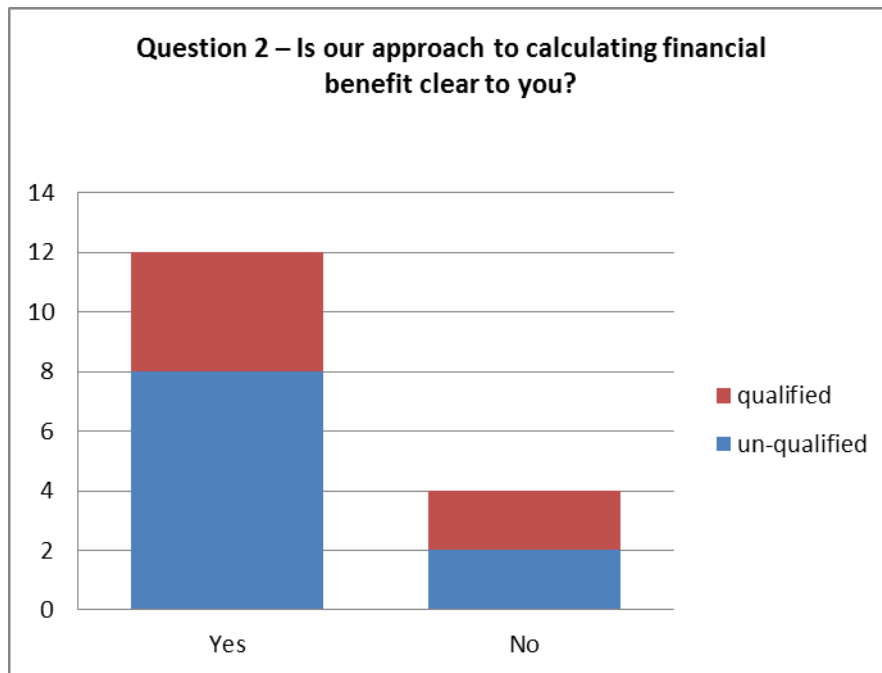
3.3.1 Definition of terms such as “delay” or “not co-operating” could be open to a wide interpretation. SEPA should be open to alternative proposals being put forward by offenders or negotiations taking place about timescales and were encouraged not to view this as uncooperative or obstructive behaviour.

3.3.2 A call for consistency and proportionality of enforcement action and making sure [SEPA's Enforcement Policy](#) and [Enforcement Guidance](#) was adhered to together with that of the [Lord Advocate's Guidelines](#) to SEPA.

3.3.3 SEPA should listen to and consider 'mitigating circumstances' in its decision-making.

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

Answer	Number	%
Yes	8	50%
Yes, qualified	4	25%
No	2	12.5%
No, qualified	2	12.5%
<b>Total</b>	<b>16</b>	<b>100%</b>



3.4 For this question, the majority of respondents found the guidance clear and understandable. The ‘qualified yes’ comments included a desire for more detail of how the approach would work in practice (i.e. use of examples or case studies).

3.5 The principal concerns were about the ability to investigate a company’s finances (i.e. what were the limits of SEPA’s powers and was there in-house expertise) and an apparent lack of any mechanism to resolve disputes. Questions were raised as to how SEPA would manage commercially sensitive financial information.

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

Answer	Number	%
Yes	12	75%
No	4	25%
<b>Total</b>	<b>16</b>	<b>100%</b>

3.6 In general, respondents supported the proposed approach to calculating financial benefit. Concerns expressed related to the difficulties of calculating indirect gains leading to several respondents requesting additional guidance on calculating financial benefit so that they could be reassured of the proportionality to the offence committed.

3.7 The comments to this question can be put into five main themes:

3.7.1 SEPA’s capacity to investigate a company’s finances (i.e. the availability of accounting expertise in SEPA); the safe storage and control of potentially commercially sensitive data; and, how freedom of information enquiries would be handled.

3.7.2 Opportunity to challenge SEPA’s financial benefit calculations and the call for a mechanism to resolve disputes.

- 3.7.3 Reassurance about how SEPA would take into consideration the offender's previously good track record and any extenuating circumstances.
- 3.7.4 Some concerns about the same level of VMP being imposed for an offence with a low environmental impact when compared with circumstances where a more serious environmental impact had resulted.
- 3.7.5 Costs of investigating the financial benefit component of a VMP possibly being more than the £40,000 maximum.

**Question 4 – Do you have any comments on other ways to calculate financial benefit that you feel should be considered?**

Answer	Number	%
Yes	6	37.5%
No	10	62.5%
<b>Total</b>	<b>16</b>	<b>100%</b>

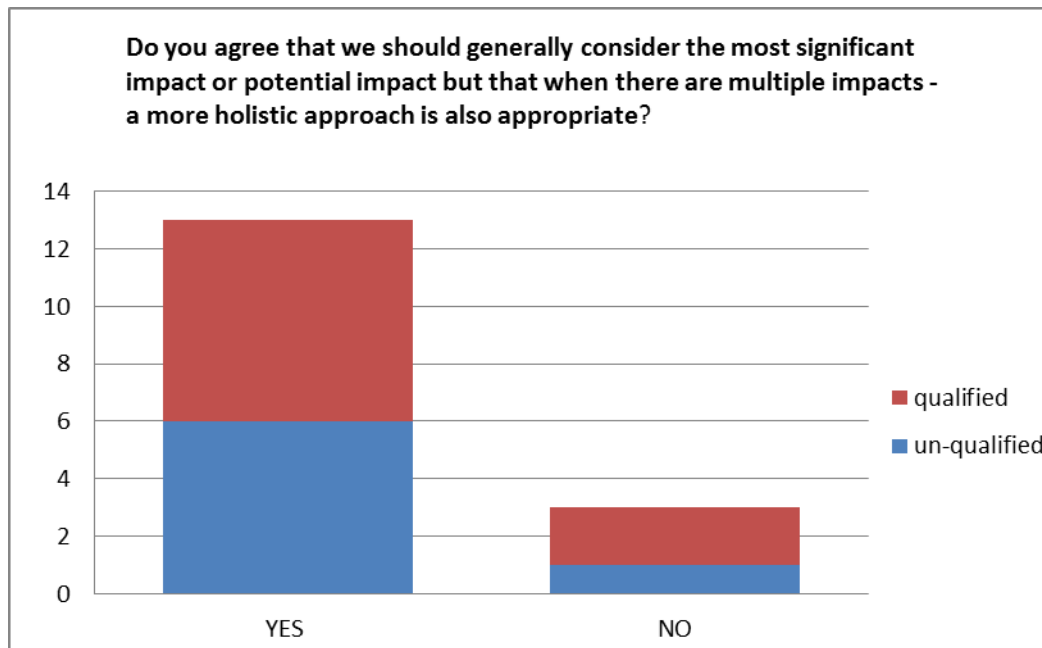
3.8 To a large degree, the comments from those who answered 'yes' reiterated the points made to question 3 on how direct and indirect benefit will be determined by SEPA. Of the 10 respondents who commented 'no', none came forward with alternative methods or approaches to calculating the financial benefit.

3.9 An additional point made was that calculating indirect gains is more difficult to assess than direct gains, and additional guidance would be needed. Again, some respondents wanted a procedure to resolve disputes to ensure the process is sufficiently transparent and proportionate to the offence committed.

3.10 Reassurance was also sought on SEPA having robust information systems in place and ensuring that the penalty imposed did not exceed the £40,000 maximum.

**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?**

Answer	Number	%
Yes	6	37.5%
Yes, qualified	7	44%
No	1	6%
No, qualified	2	12.5%
<b>Total</b>	<b>16</b>	<b>100%</b>



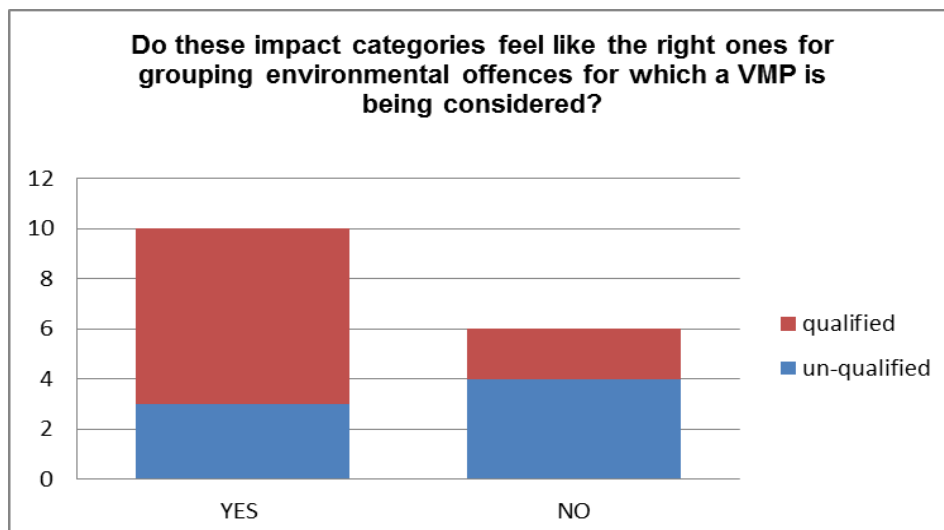
3.11 The majority of respondents felt that that this would appear to be a reasonable approach. Some indicated that where there may be multiple impacts of comparable magnitude to air, land and water, it could be more appropriate to look at the overall impact in determining a VMP. One respondent felt that only “actual” and not “potential” impacts should be addressed.

3.12 From those who supported the approach, further clarity was sought on what SEPA means when it says that it will consider multiple impacts in a "more holistic way", and how it will achieve this. One respondent felt that the decision to consider the most significant impact in cases where there are multiple impacts had not been sufficiently justified in the consultation document.

3.13 Several respondents said that the above concerns could be addressed in guidance.

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

Answer	Number	%
Yes	3	18.75%
Yes, qualified	7	43.75%
No	4	25%
No, qualified	2	12.5%
<b>Total</b>	<b>16</b>	<b>100%</b>



3.14 62.5% agreed in principle with the proposed impact categories of ‘actual harm’, ‘risk of harm’ and ‘technical / administrative’ offences.

3.15 The concerns raised by those that did not consider the three impact categories were the correct way forward included the ambiguity involved in defining the extent and probability of any ‘risk of harm’. A number said that this allowed for differences of opinion and that this could negatively affect the regulatory relationship with SEPA. This was accompanied by the view that only those events that have demonstrable impacts should be considered.

3.16 The scale and complexity of some of the larger scale operators meant that they were concerned about getting unfairly targeted because of the level of risk that was inherent in their operations. There was an expectation that SEPA’s risk assessment process would be published so that risks could continue to be effectively managed.

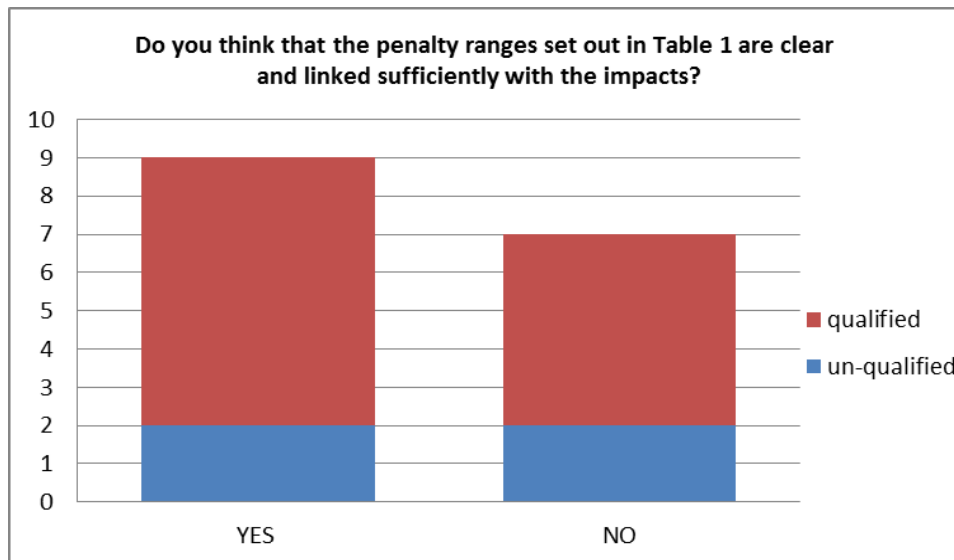
3.17 Otherwise, the most contentious issue raised related to ‘technical/administrative offences’, with both those agreeing and disagreeing with the proposed impact categories raising concerns about the proposal to use VMPs for this particular category of offence. There was a strong feeling that VMPs should be available for instances of genuine environmental harm only, falsification of records and other more serious offences. A view was put forward that ‘technical / administrative’ breaches should be tackled via advice and guidance or by the use of a fixed monetary penalty (FMP).

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

3.18 The consultation document outlined five impact bands, A to E, for each impact category with an associated penalty range from low to high. Once allocated to an impact band, SEPA proposed that the penalty would remain at the lowest end of the range unless the behaviour of the offender and previous history suggested it should be escalated.

Answer	Number	%
Yes	2	12.5%
Yes, qualified	7	44%
No	2	12.5%
No, qualified	5	31%
<b>Total</b>	<b>16</b>	<b>100%</b>





3.19 Those respondents that agreed that the penalty ranges are clear tended to qualify this support by saying that further clarity was needed on information to support decisions at the boundaries between the impact bands. Moving an offence from one band to the next had significant impacts for the offender in financial terms. In addition, some other respondents felt that the bands were clear but not consistent. A couple of respondents did not agree with the policy position that a VMP could be lower than a FMP.

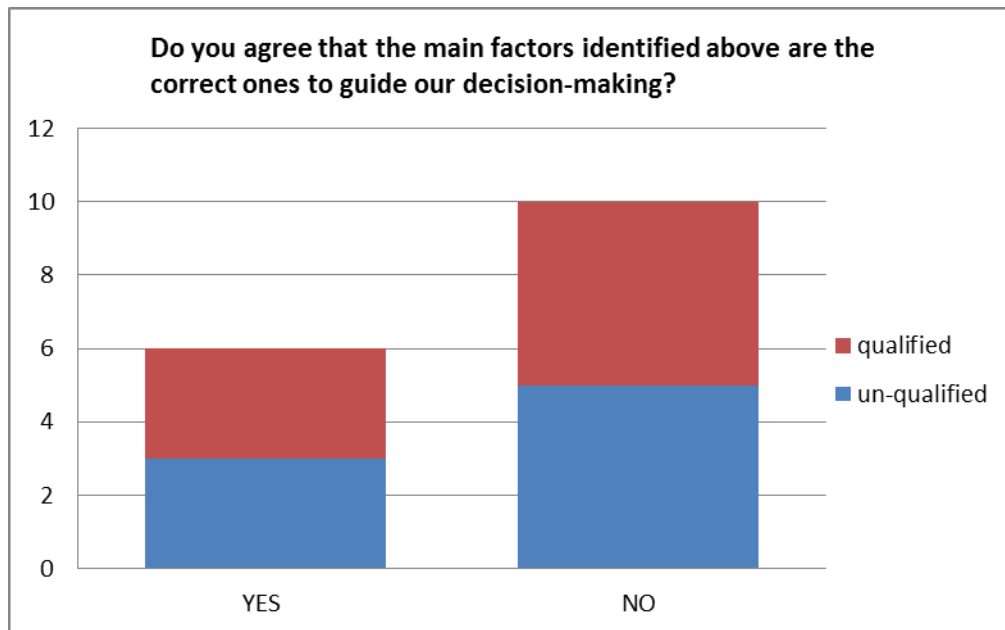
3.20 A strong message emerged about how SEPA would assess when an offence should move from one penalty level to the next. Some respondents considered that the ranges were inconsistent across the bands with some penalty amounts doubling from the lowest (most co-operative behaviour) to the highest (most obstructive behaviour).

3.21 As indicated previously, a large number of respondents expressed concern about the appropriateness of a VMP to technical / administrative offences. In particular, imposing a VMP for a simple administrative error with no major environmental impact or consequences was felt excessive.

3.22 Many of these concerns could be addressed by a clear assessment process which would provide reassurance that impact bands would be consistently applied. In addition, it was felt that SEPA should consider a review of the methodology at regular intervals to help ensure consistency.

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

Answer	Number	%
Yes	3	19%
Yes, qualified	3	19%
No	5	31%
No, qualified	5	31%
<b>Total</b>	<b>16</b>	<b>100%</b>

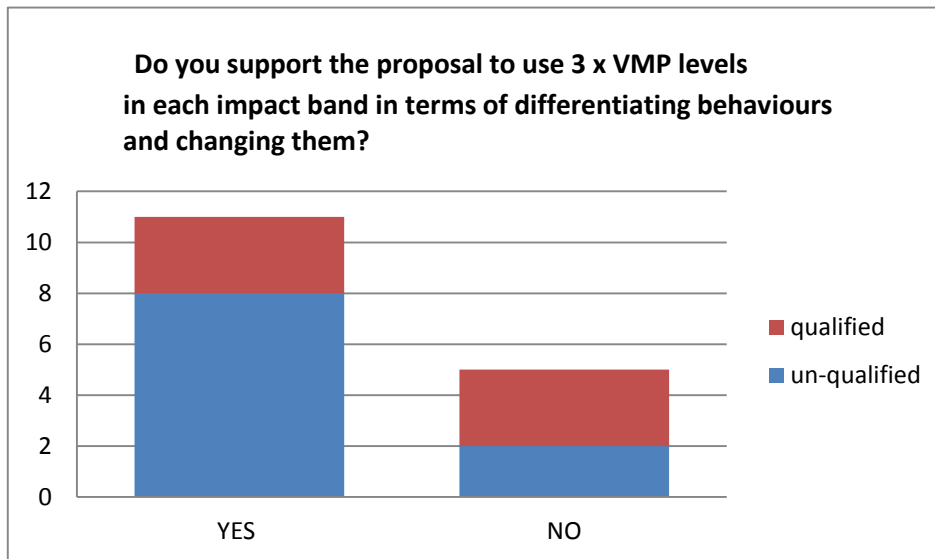


3.23 Most of the concerns raised in questions 7 and 8 were repeated in responses to this question (i.e. further explanation required on the boundaries between the impact bands, more detail on the type of offending and implications for technical / administrative offences and the ambiguities in defining the extent and probability of any risk of harm offences).

3.24 In addition, the proposal to include 'receptor sensitivity' and 'scale of harm' on the same axis was a cause for concern. Some respondents felt that for actual harm and risk of harm offences, clarity was called for on how factors such as these and 'duration/frequency' and 'likelihood' would be assessed by SEPA.

**Question 9 - Do you support the proposal to use 3 x VMP levels in each impact band in terms of differentiating behaviours and changing them?**

Answer	Number	%
Yes	8	50%
Yes, qualified	3	18.75%
No	2	12.5%
No, qualified	3	18.75%
<b>Total</b>	<b>16</b>	<b>100%</b>

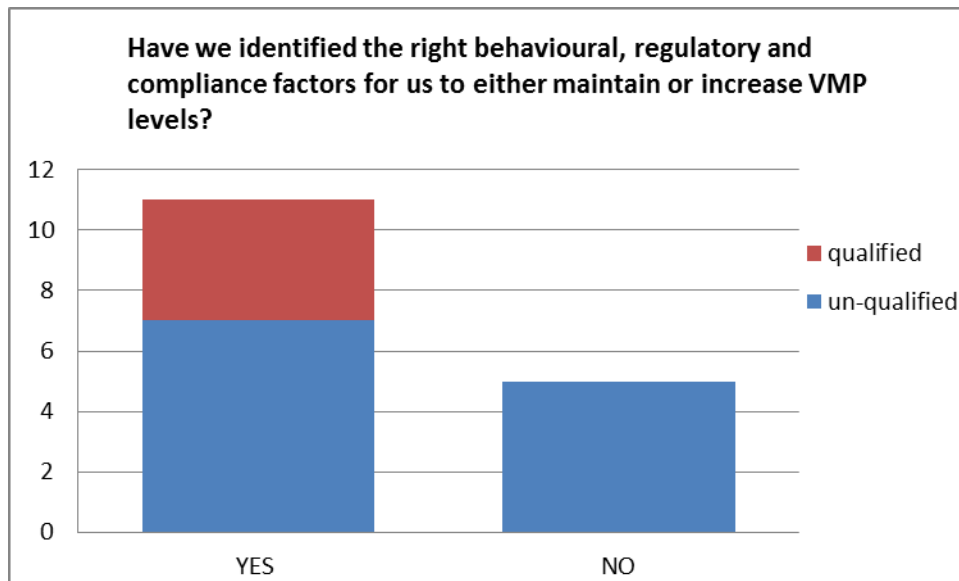


3.25 68.75% of respondents were supportive of the proposal to take into account behavioural factors of offenders by introducing three VMP levels in each of the impact bands. There was also strong support for the inclusion of previous compliance history. However, some felt that guidance is required to explain and define the criteria that must be met to move an offence from the lowest level to the middle and highest VMP levels.

3.26 Those who did not support this proposal commented on the need for a clear statement on how SEPA will assess behavioural factors (intent, foreseeability, action taken and previous regulatory and compliance history). This was seen as a requirement for a consistent and proportionate approach to setting the amount of a VMP

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

Answer	Number	%
Yes	7	44%
Yes, qualified	4	25%
No	5	31%
No, qualified		0%
<b>Total</b>	16	100%



3.27 There was a strong level of support for what was proposed with endorsement for the methodology to establish the behavioural factors that will influence SEPA's decision on the level a VMP is set at. This support was partly qualified by comments around the subjective nature of these factors - intent, foreseeability, action taken and previous regulatory and compliance history.

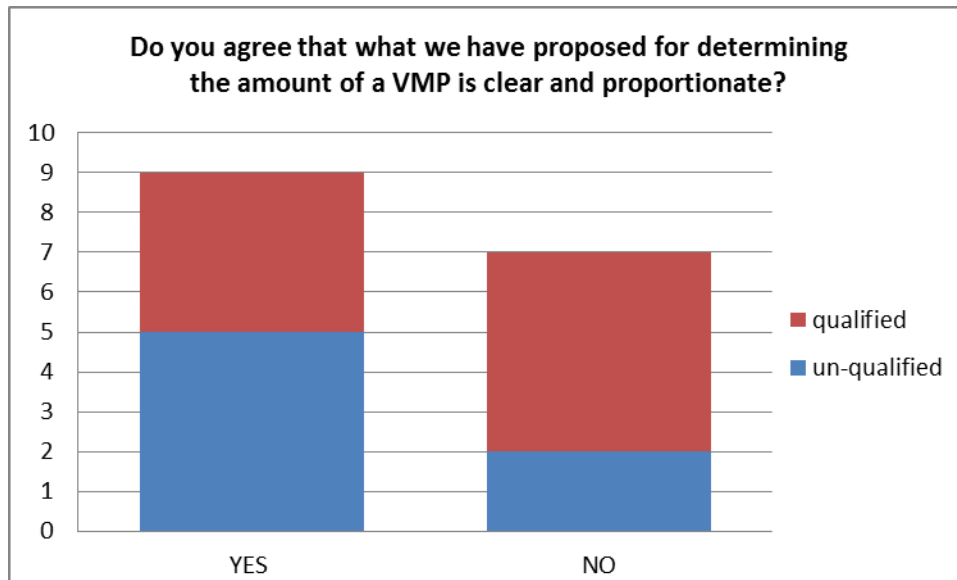
3.28 The five respondents who did not think that the right behavioural factors had been identified shared the concern that potential subjectivity could creep in, especially around the enforcement factors. Three respondents commented that it would be unreasonable to use a VMP in instances where harm is unintentionally caused and where that offender can demonstrate that all reasonable and practicable measures had been taken. Two respondents disagreed with the statement that "Where remediation is not possible, principally this should be due to technical or logistical barriers and not solely on financial grounds", on the basis that there will be cases where the environmental benefit gained from remediation is far outweighed by the financial costs of the remediation.

3.29 Many of the views expressed were about the assessment of behaviour and context needing to be as objective as possible. SEPA demonstrating that its approach to structured professional judgement was appropriately governed and that the amount of a VMP is made as fairly and as consistently as possible were reiterated.

3.30 Concerns about whether SEPA could establish the relative importance of each factor to be considered in any assessment in a rigorous and consistent manner were raised. However, the inclusion of mechanisms to challenge decisions as detailed in SEPA's [Enforcement Guidance](#) - for example, the right 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, were welcomed.

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

Answer	Number	%
Yes	5	31%
Yes, qualified	4	25%
No	2	13%
No, qualified	5	31%
<b>Total</b>	<b>16</b>	<b>100%</b>



3.31 The comments made to this question indicated support for SEPA using VMPs as an enforcement measure and recognition that they could drive behaviour change effectively. However, additional guidance to staff and operators was seen as an essential part of reassuring offenders that SEPA's approach to calculating a VMP will be done proportionately, transparently and consistently.

3.32 One respondent commented that SEPA's approach to calculating a VMP could unfairly target those responsible for managing large-scale, complex operations. Another respondent wanted to put on record their opposition to the use of the Scottish Land Court as the appeals court for the VMPs – no reason for this was given.

#### **4. Overall conclusions and next steps**

4.1 There were a wide variety of views expressed in a relatively small number of responses. For comparison, SEPA received 16 responses to this 2016 consultation against 35 responses to the updated enforcement policy and guidance that we consulted on in 2015. A small number were entirely positive and a small number entirely negative with the majority expressing a good level of support for the use of a structured professional judgement approach to determining the amount of a VMP by SEPA. SEPA therefore intends to implement this approach.

4.2 Adjustments will be made in light of the consultation around the governance and decision-making to ensure consistency. Consideration will be given to the establishment of a VMP Determination Group involving a small number of experienced senior managers and with representation from across SEPA's business.

4.3 SEPA will develop guidance and change the VMP levels in light of comments received on the comparison between lowest, middle and highest penalties in each impact category and impact band.

4.4 In relation to the policy position that the lowest VMP level imposed could be below that imposed by a FMP, SEPA intends to stick to this position as it wants to ensure sufficient flexibility is retained around how best to challenge and change offending behaviours. SEPA will, however, adhere as it is required to do under the 2014 Act to its [Enforcement Policy](#), [Enforcement Guidance](#) and the [Lord Advocate's Guidelines](#).

4.5 SEPA wishes to place on record its thanks to those who responded and who engaged constructively with our staff in the 12 week public consultation period.

## Annex A

### List of respondents

<b>Respondent</b>	<b>Sector</b>
Malcolm Construction	Construction
British Trout Association	Food and Farming
NFU Scotland	Food and Farming
Scottish Salmon Producers Organisation	Food and Farming
Scotch Whisky Association	Food and Farming
Anonymous	Private Individual
UK Environmental Law Association	Legal Profession
Mineral Products Association Scotland	Mining & Quarrying
Patersons of Greenoakhill Ltd	Mining & Quarrying
Tillicoultry Quarries	Mining & Quarrying
Scottish Power	Power
Scottish and Southern Energy	Power
INEOS	Oil Refining
Scottish Environmental Services Association	Waste and Recycling
Valpak	Packaging
Scottish Water	Public Water Supply and Sewerage