

HOW SEPA WILL DETERMINE A VARIABLE MONETARY PENALTY

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TABLE OF CONTENTS

Table of Contents	2
List of Tables	2
1. What is a VMP?	3
2. Overview	3
3. Assessment and determination of a VMP	5
3.1. Environmental Impact	5
3.1.1. What do we mean by environmental impact?.....	5
3.1.2. Things we will consider:.....	6
3.1.3. Potential for Environmental Impact	7
3.2. Economic Impact	8
3.3. Financial Benefit	10
3.4. Consideration of Aggravating and Mitigating Factors	10
3.4.1. Intent/Culpability.....	11
3.4.2. Foreseeability.....	13
3.4.3. Regulatory Compliance History	14
3.4.4. Previous Enforcement Action.....	17
3.4.5. Co-operation with SEPA’s Investigation	19
3.5. Consideration of other mitigating circumstances	21
3.6. VMP decision making	21
3.7. Related documents	21

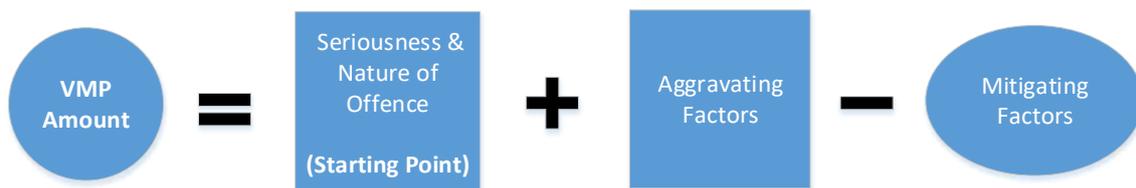
LIST OF TABLES

Table 1 - Environmental Impact Weightings	6
Table 2 - Potential for Environmental Impact Weightings	8
Table 3 - Economic Impact Weightings	9
Table 4 - Intent/Culpability Weightings	12
Table 5 - Foreseeable Weightings	14
Table 6 - Regulatory Compliance History Weightings	16
Table 7 - Previous Enforcement Weightings	18
Table 8 - Co-operation with SEPA Weightings	20

1. What is a VMP?

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

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



2. Overview

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

1. Environmental impact (or potential for impact)
2. Economic impact
3. Financial benefit

4. Intent/culpability
5. Foreseeability
6. Regulatory compliance history
7. Previous enforcement history
8. Co-operation with SEPA investigation

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

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

Important

The examples set out in this guidance do not form part of the methodology used in determining a variable monetary penalty (VMP). The examples, including any indicative assessments, are for illustration only. SEPA reserves its discretion to determine the amount of any VMP with regard to this guidance, according to the specific facts and circumstances of each case, and as such, SEPA's assessment of the facts and circumstances of any individual case may differ from the assessments contained in these examples.

3. Assessment and determination of a VMP

Starting point - consideration of material factors

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

3.1. Environmental impact

SEPA's primary statutory purpose is to protect and improve the environment. The level of impact is most important in reflecting the seriousness of an offence. It is therefore of the utmost importance that the level of any impact on the environment 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.

3.1.1. What do we mean by environmental impact?

"Environmental harm" is defined in section 17 of the Regulatory Reform (Scotland) Act 2014, as follows:

- a) harm to the health of human beings or other living organisms;
- b) harm to the quality of the environment, including:
 - i. harm to the quality of the environment taken as a whole;
 - ii. harm to the quality of air, water or land; and
 - iii. other impairment of, or interference with, ecosystems;
- c) offence to the senses of human beings;
- d) damage to property; or
- e) impairment of, or interference with, amenities or other legitimate uses of the environment.

We will consider any such environmental harm when we are assessing the level of environmental impact.

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

- no environmental impact;
- low environmental impact;
- medium environmental impact;
- high environmental impact;
- significant environmental impact.

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

Table 1 - Environmental impact weightings

Environmental Impact	Weighting % of Statutory Maximum of VMP
No impact	0
Low impact	5
Medium impact	10
High impact	20
Significant impact	25

3.1.2. Things we will consider:

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

An example scenario:

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

SEPA decision:

The environmental impact is the presence of a strong offensive odour lasting seven days which has given rise to complaints from the local community. The incident occurred during a period of hot weather and in the middle of the school holidays when local parks and outdoor recreational facilities would be enjoyed by the public. However, the odour quickly disappeared once the waste was removed from site leaving no lasting impact on the environment or the community. No further complaints were received from the public. The site is not located near any designated sites. The level of impact may be regarded as medium.

3.1.3. Potential for environmental impact

This section will only apply in circumstances where there was no actual environmental impact.

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

In assessing the potential for environmental impact, and having considered all the evidence, we will use our professional judgement to determine the level of the potential impact and categorise as:

- **no potential impact**
- **low potential impact** - e.g. failure of equipment/infrastructure/process likely to give rise to a low impact.
- **medium potential impact** - e.g. failure of equipment/infrastructure/process likely to result in a medium impact.
- **higher potential impact** - e.g. failure of equipment/infrastructure/process likely to result in a high or significant impact.

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

Table 2 - Potential for environmental impact weightings

Potential Environmental Impact	Weighting % of Statutory Maximum of VMP
No potential impact	0
Low potential impact	2.5
Medium potential impact	5
Higher potential impact	7.5

3.2. Economic impact

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

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

- **no economic impact**
- **low economic impact**
- **medium economic impact**
- **high economic impact**
- **significant economic impact**

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

Table 3 - Economic impact weightings

Economic Impact	Weighting % of Statutory Maximum of VMP
No Impact	0
Low impact to community or businesses	2.5
Medium impact to community or businesses	5
High impact to community or businesses	10
Significant impact to community or businesses	18.75

Things we will consider:

- Impact on businesses e.g. lost revenue due to closure of a business or undercutting legitimate businesses.
- Impact on public services e.g. road closures, utility supplies, public transport, clean-up costs (this may include costs incurred by the local authority to control, monitor and resolve the offence).
- Duration of the impact.

In our example scenario:

The odour of bin and food waste was present within the local community for seven days. The incident happened during a heatwave and local businesses, especially the café and public house, were affected due to the strength of the odour.

SEPA decision:

The economic impact to local businesses was prolonged and extended beyond daytime, into the evenings and weekend. The incident occurred during a period of hot weather and in the middle of a holiday period which affected the number of customers to the local café and public house. They reported a small loss in revenue and provided evidence to show a small drop in sales figures from both the previous week and the same period last year.

The economic impact may be regarded as low.

3.3. Financial benefit

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

In using a VMP, our aim is to remove any financial benefit gained through illegal activity, including costs avoided that would allow the activity to be carried out in accordance with legislation e.g. licence application fees/subsistence fees, infrastructure costs etc.

Financial benefit will be evidenced, calculated and recorded and the amount will be included in the overall VMP amount. No weighting is applied to this factor.

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

In our example scenario:

The waste recycling facility has benefited financially by not removing the food waste offsite within the timescale specified in their licence. By reviewing waste transfer notes, it was found that 33.5 tonnes of food waste was stored on site for more than 48 hours.

Based on SEPA's estimate of costs avoided, taking account of gate fees, transport and taxes, the company would have avoided costs of £1,000.

SEPA decision:

The financial benefit to the company was £1,000.

3.4. Consideration of aggravating and mitigating factors

Aggravating and mitigating factors reflect the attitude, behaviour and knowledge of the responsible person who has committed the relevant offence. While some of these factors

are not directly associated with the offence, they are relevant to the responsible person and may show a pattern of positive or negative behaviours whereby we may aggravate up or mitigate down the amount of the VMP. Therefore, a smaller weighting has been applied to those factors compared to the starting material factors. These are:

3.4.1. Intent/culpability

Under our Enforcement Guidance, one of the enforcement factors that we consider is the level of intent. It is important to establish blameworthiness of the responsible person (i.e. was the offence the result of an accident or committed deliberately) so that the penalty can reflect this.

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

- **low culpability** – Offence committed with little or no fault on the part of the individual/organisation as a whole, for example by accident or the act of a rogue employee and despite the presence of proper preventive measures, or where such proper preventive measures were unforeseeably overcome by exceptional events.
- **negligent** – Offence committed through act or omission, which a person exercising reasonable care would not commit. Failure by the individual/organisation as a whole to take reasonable care to put in place and enforce proper systems for avoiding commission of the offence.
- **reckless** – Actual foresight of, or wilful blindness to, risk of offending but risk nevertheless taken by an individual or, in the case of an organisation, person(s) whose position of responsibility in the organisation is such that their acts/omissions can properly be attributed to the organisation;

Or

Reckless failure by the individual/organisation to put in place and to enforce such systems as could reasonably be expected in all the circumstances to avoid commission of the offence.

- **deliberate** – Intentional breach of or flagrant disregard for the law by an individual or, in the case of an organisation, person(s) whose position of responsibility in the

organisation is such that their acts/omissions can properly be attributed to the organisation;

Or

Deliberate failure by an individual/organisation to put in place and to enforce such systems as could reasonably be expected in all the circumstances to avoid commission of the offence.

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

Table 4 - Intent/culpability Weightings

Culpability	Weighting % of Statutory Maximum of VMP
Low Culpability	0
Negligent	0.5
Reckless	1.25
Deliberate	2.5

In our example scenario:

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

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

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

SEPA decision:

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

3.4.2. Foreseeability

It is important to determine whether the consequence of the offence was foreseeable i.e. can the consequence of the offence/act be reasonably anticipated.



Foreseeability will only apply to offences where there has been actual impact.

To determine this, we may consider the knowledge of the responsible person at the time (not the knowledge they should have had), and whether a reasonable person in their position at the time would have foreseen the consequences of the breach. In the absence of evidence of foreseeability, we will normally assess this as not known.

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

Table 5 - Foreseeable weightings

Foreseeable	Weighting % of Statutory Maximum of VMP
Not foreseeable	-1.25
Not known	0
Foreseeable	1.25

In our example scenario:

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

SEPA decision:

There is evidence that the Managing Director of the responsible person is aware that as food waste breaks down it will emit an odour. The site has sufficient infrastructure on site to cope with 40 tonnes of food waste for a period of 48 hours. The responsible person knowingly stored food waste beyond the permitted storage time and continued to accept food waste. No action was taken by the responsible person to prevent or reduce off-site odour. The food waste continued to break down and the Managing Director was aware that the longer it was stored, the stronger the odour became and the further it could be detected. It is reasonable to anticipate storing food waste beyond the permitted storage time will result in odour beyond the site boundary that will become detectable within the local community. The consequences of this incident were foreseeable.

3.4.3. Regulatory compliance history

A responsible person's regulatory compliance history will be assessed by reviewing the previous five years' (prior to the current incident):

- a) Compliance Assessment Scheme (CAS) reports or other inspection reports where the responsible person is authorised and regulated by SEPA;
- b) previous correspondence that SEPA has had with the responsible person e.g. email and/or letters containing advice and guidance, warning letters etc.;

- c) substantiated pollution events linked to the responsible person.

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

In assessing the responsible person's regulatory compliance history and having considered all the evidence, we will use our professional judgement to determine the level of compliance.

A responsible person who is authorised by SEPA is categorised as:

- **not applicable** – where no inspections have been carried out in the last five years and CAS has defaulted to “Excellent”, and where no complaints have been substantiated and/or no guidance letters have been sent out regarding their environmental obligations.
- **A** – the responsible person has an excellent compliance record and goes beyond what is required by law - e.g. reusing resources/energy, carbon neutral, reducing energy usage.
- **B** – compliant with environmental obligations - e.g. always follows advice and guidance, actively contacts SEPA to ensure compliance is met. May have a small number of minor non-compliances recorded that are unlikely to cause risk to the environment.
- **C** – generally compliant with environmental obligations - e.g. repeated minor non-compliances that highlight poor site management or a risk of a major non-compliance or pollution event or a major non-compliance with environmental obligations.
- **D** – persistent non-compliance with environmental obligations - e.g. does not follow conditions of permit and fails to take steps to become compliant.

A responsible person who is not authorised by SEPA is categorised as:

- **not applicable** – Where there have been no dealings with SEPA in the last five years, and where no complaints have been substantiated and/or no guidance letters have been sent out regarding their environmental obligations.

- **A** – the responsible person has an excellent compliance record in relation to their environmental obligations and goes beyond what is required by law e.g. reusing resources/energy, carbon neutral, reducing energy usage.
- **B** – compliant with environmental obligations e.g. always follows advice and guidance, actively contacts SEPA to ensure compliance is met. May have a small number of minor non-compliances or complaints recorded that are unlikely to cause risk to the environment.
- **C** – generally compliant with environmental obligations e.g. repeated minor non-compliances that highlight poor site management or a risk of a major non-compliance or pollution event or a major non-compliance with environmental obligations.
- **D** – persistent non-compliance with environmental obligations e.g. does not comply with environmental obligations and fails to take steps to become compliant.

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

Table 6 - Regulatory compliance history weightings

Regulatory Compliance History	Weighting % of Statutory Maximum of VMP
A	-1.25
B or Not Applicable	0
C	1.25
D	2.5

Things we will consider:

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

In our example scenario:

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

SEPA decision:

The operator has received minor non-compliances and has already been marked non-compliant within the last two years for breaching storage limits. SEPA would consider this an example of a responsible person whose compliance history falls into category C.

3.4.4. Previous enforcement action

Previous enforcement action will be assessed by reviewing those actions taken by SEPA within the last five years, prior to the current incident.

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

In assessing previous enforcement history and having considered all the evidence, we will determine the level of previous enforcement action taken against the responsible person by categorising as:

- **no previous enforcement action recorded listed below;**
- **enforcement action comprising a final warning letter (FWL) or Statutory Notice*;**
- **enforcement action comprising an enforcement measure** - i.e. Fixed Monetary Penalty/Enforcement Undertaking/Variable Monetary Penalty/Variable Monetary Penalty Undertaking;
- **previous conviction for an environmental offence.**

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

Table 7 - Previous enforcement weightings

Previous Enforcement	Weighting % of Statutory Maximum of VMP
No previous enforcement action	0
Enforcement resulting in an FWL/statutory notice*	0.5
Enforcement resulting in an enforcement measure	1.25
Previous relevant convictions	2.5

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

- **Enforcement or regulatory notices** identifying a non-compliance or likely non-compliance or significant impact or likely impact and requiring steps to be taken (e.g. regulation 32 of the Water Environment (Controlled Activities) (Scotland) Regulations 2011 (CAR), section 42(5) of the Environmental Protection Act 1990 (EPA90), regulation 55 of the Pollution Prevention and Control (Scotland) Regulations 2012 (PPC 2012), regulation 46 of the Environmental Authorisations (Scotland) Regulations 2018 and section 21 of the Radioactive Substances Act 1993).
- **Suspension notices** which have the effect of temporarily suspending the authorisation of an activity until a particular time or until particular steps are taken (e.g. regulation 29 of CAR, sections 38 and 42(6) of EPA90, regulation 56 PPC 2012).
- **Revocation notices** prohibiting a responsible person from carrying on an environmental activity (e.g. regulation 29 of CAR, section 38 of EPA90, regulation 50 of PPC 2012 or regulation 31 of the Environmental Authorisations (Scotland) Regulations 2018).
- **Removal of waste notices** requiring an occupier to remove waste from land (e.g. section 59 of EPA90).
- **Works notices** requiring steps to be taken (e.g. Control of Pollution (Silage, Slurry and Agricultural Fuel Oil) (Scotland) Regulations 2003).
- **Prohibition notices** identifying an activity with an imminent risk of pollution or harm, and directing which steps need to be taken to remove the risk, and suspending any authorisation related to the activity (e.g. section 22 of the Radioactive Substances Act 1993).

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

In our example scenario:

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

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

SEPA decision:

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

3.4.5. Co-operation with SEPA's investigation

As a minimum SEPA expects full co-operation by a responsible person. Failing to co-operate, obstructing or hindering an investigation or displaying aggressive behaviour towards a SEPA officer is regarded as negative behaviour and the overall VMP will normally be increased.

SEPA will consider the level of co-operation and may have particular regard to the greatest aggravating effect e.g. if the responsible person starts off co-operating with an investigation but later stops co-operating and becomes aggressive to SEPA staff, the overall level of co-operation may be assessed as 'Aggressive'.

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

- co-operated with SEPA's investigation.
- uncooperative or obstructive or hindered SEPA's 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 with SEPA.
- aggressive behaviour towards SEPA staff during investigation - e.g. threatening, intimidating or abusive behaviour towards a SEPA officer or causing physical harm or damage.

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

Table 8 - Co-operation with SEPA's investigation weightings

Co-operation with SEPA	Weighting % of Statutory Maximum of VMP
Co-operated with SEPA's investigation	0
Uncooperative or obstructive or hindering investigation	1.25
Aggressive	2.5

In our example scenario:

SEPA's powers of investigation were explained to the Managing Director of Green Town Waste Recycling Ltd and access to all necessary documents was provided. SEPA also instructed the Managing Director to take steps to minimise the odour and remove the food waste off site to an authorised waste management facility within 24 hours.

SEPA decision:

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

SEPA considers the operator to be cooperative. The removal of the food waste is not directly related to the investigation in this case.

3.5. Consideration of other mitigating circumstances

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

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

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

3.6. VMP decision making

SEPA has robust internal governance arrangements in place to ensure that decisions are taken at the appropriate level. Before deciding on the VMP amount, we will consider whether or not to impose a VMP. We will determine the final VMP figure taking into account what is reasonable and proportionate given the particular facts of the case, the need for consistency, and the underlying objective in imposing the monetary penalty.

3.7. Related documents

- [Guidance on the use of Enforcement Action](#)
- [The Regulatory Reform \(Scotland\) Act 2014](#)
- [The Environmental Regulation \(Enforcement Measures\) \(Scotland\) Order 2015](#)
- [Lord Advocate's Guidelines to SEPA \(17 May 2016\)](#)

For information on accessing this document in an alternative format or language please either contact SEPA by emailing to equalities@sepa.org.uk

If you are a user of British Sign Language (BSL) the Contact Scotland BSL service gives you access to an online interpreter enabling you to communicate with us using sign language.

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

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