

# **New Environmental Enforcement Framework**

**Consultation on New Enforcement  
Measures for the Scottish  
Environment Protection Agency  
and the Relevant Offences Order**

# **NEW ENVIRONMENTAL ENFORCEMENT FRAMEWORK - CONSULTATION ON NEW ENFORCEMENT MEASURES FOR THE SCOTTISH ENVIRONMENT PROTECTION AGENCY AND THE RELEVANT OFFENCES ORDER**

## **FOREWORD**

Through our joint working on Better Environmental Regulation, the Scottish Environment Protection Agency (SEPA) and the Scottish Government are working towards a new regulatory system built on improving performance and incentivising positive behaviours. This will help SEPA to target the issues that matter, delivering outcomes for the environment, communities and economy.

Now that the Regulatory Reform (Scotland) Act 2014 has been passed, we can act on the findings from the [May 2012 consultation](#) and take another big step towards improving the way environmental regulations are applied in practice across Scotland.

SEPA already seeks to engage, encourage and inform those who are subject to environmental legislation, so as to secure compliance. Most operators in Scotland understand and comply with environmental requirements and we want to incentivise those who perform well and champion the environment. However, environmental crime harms our environment, damages our economy and poses a risk to human health. As well as impacts here in Scotland, environmental crime is a worldwide issue. Without regulatory controls and investment in infrastructure legitimate business can be undermined and the environment and communities put at risk. That is why SEPA needs a better range of interventions to tackle poor performance, non-compliance and environmental crime.

The proposals for the new enforcement measures for SEPA set out in this consultation will truly make a difference to Scotland and bring benefits to our environment, businesses and communities. The environment will benefit as SEPA will be better placed to deliver swifter and more effective environmental protection and improvement. Legitimate businesses will benefit from a level playing field that sees greater proportionality in the system and a tighter focus on penalising the poorest performers and those who flout the law. Communities will be protected as SEPA and the criminal courts will have a greater range of enforcement tools and tougher sanctions to use against those who blatantly disregard their responsibilities in relation to the environment and the communities in which they operate.

We would like to thank all stakeholders who have engaged, and continue to engage, with the Better Environmental Regulation agenda. The proposals in this consultation have been shaped by feedback from stakeholder engagement. We cannot deliver the shared outcomes we seek without continuing to work in partnership on this agenda and would encourage all our stakeholders to respond to this consultation.



**Paul Wheelhouse MSP  
Minister for Environment  
and Climate Change**



**David Sigsworth  
SEPA Chairman**

## List of Acronyms

the Act	The Regulatory Reform (Scotland) Act 2014
BER	Better Environmental Regulation
CAR	Water Environment (Controlled Activities) Scotland Regulations 2011
COPFS	Crown Office and Procurator Fiscal Service
EU	Enforcement Undertaking
FMP	Fixed Monetary Penalty
FSB	Federation of Small Businesses
HMRC	HM Revenue & Customs
NCP	Non-Compliance Penalty
PPC	Pollution, Prevention and Control (Scotland) Regulations 2012
SEPA	Scottish Environment Protection Agency
SLC	Scottish Land Court
VMP	Variable Monetary Penalty

## Contents

FOREWORD.....	1
List of Acronyms.....	2
SUMMARY .....	4
1. BACKGROUND.....	7
1.1 High Level Policy Approach to Environmental Regulation .....	7
1.2 High Level Policy Aspirations for Enforcement.....	8
1.3 The New Environmental Enforcement Framework.....	9
1.4 Previous Consultations and Conclusions .....	10
1.5 What Proposals Are We Now Consulting On? .....	11
1.6 How to respond.....	11
1.7 Handling your response .....	12
2. THE PROPOSALS.....	13
2.1 How Will SEPA’s Enforcement Approach Change? .....	13
2.2 Intent and Design of the new enforcement measures .....	14
2.2.1 Fixed Monetary Penalties (FMPs) .....	15
2.2.2 Variable Monetary Penalties (VMPs).....	19
2.2.3 VMP Undertaking and Non-Compliance Penalties (NCPs).....	24
2.2.4 Enforcement Undertakings (EUs).....	26
2.2.5 Court Powers and Vicarious Liability .....	29
3. ADMINISTRATION OF THE NEW ENFORCEMENT MEASURES.....	31
3.1 Payment of fines into The Scottish Consolidated Fund.....	31
3.2 Enforcement Costs Recovery.....	31
3.3 Ability to Pay .....	32
3.4 Discounts, Period for Payment and Late Payment Penalties .....	32
3.5 Publishing Information on Use of Enforcement Measures .....	33
4. SAFEGUARDS.....	36
4.1 General .....	36
4.2 Appeals.....	36
5. NEXT STEPS.....	38
5.1 Getting Ready .....	38
ANNEX A – Relevant Offences .....	39
ANNEX B – Examples of Fixed Penalties .....	66
ANNEX C – Respondent Information Form and Consultation Questions .....	67

## SUMMARY

This consultation on new enforcement measures for SEPA has been developed as part of the joint Scottish Government-SEPA Better Environmental Regulation (BER) programme.

We are taking a [phased approach to programme implementation](#) to allow time for stakeholders to comment and prepare. As part of this package we are planning further consultation on enforcement later this year, including analysis of this consultation, the draft Order and SEPA guidance.

### **The New Environmental Enforcement Framework and SEPA's Approach**

SEPA and the Scottish Government have been working with the Crown Office and Procurator Fiscal Service (COPFS) to develop a new environmental enforcement framework for Scotland.

This new framework comprises new enforcement measures for SEPA and new court powers and requirements. The aim is to deter and punish actions which damage the environment and undermine legitimate businesses in Scotland through a consistent, proportionate and targeted approach.

SEPA will continue to refer significant, persistent and deliberate acts to COPFS for prosecution. The Regulatory Reform (Scotland) Act 2014 (the Act) enables new enforcement measures for SEPA and enhances the scope of the tools SEPA has available to encourage behaviour change.

Guidance to SEPA from the Lord Advocate on the exercise of its functions relating to enforcement will ensure that the new enforcement measures will be applied consistently and proportionately as part of the whole range of sanctions that are available.

SEPA's approach to enforcement will be based on the core principles of proportionality, behaviour change and removal of financial benefit from illegal activity. The consultation sets out the design and use of the new enforcement measures and outlines a number of safeguards to be built in to the new framework.

### **New Enforcement Measures**

Following stakeholder feedback from the [May 2012 consultation](#) on outline proposals for the new enforcement framework, this consultation invites further comments from stakeholders on the design and use of the new enforcement measures available to SEPA, including Fixed Monetary Penalties, Variable Monetary Penalties, Enforcement Undertakings and Non-compliance Penalties, and the relevant offences for each.

The consultation identifies Fixed Monetary Penalties (FMPs) as an appropriate sanction for particularly low level offending such as administrative offences or where an operator has failed to take on board advice from SEPA. A banded approach is proposed with low penalties set at £300, medium penalties at £600 and high penalties at £1,000.

Variable Monetary Penalties (VMPs) are intended to operate in relation to offending that is at the upper end of the scale, but beneath the level of offending appropriate for prosecution, for offences such as less significant illegal disposal of waste or breaches of a licence. Penalties will be calculated based on a methodology taking account of the financial benefit gained, the gravity of the offence and other aggravating or mitigating factors. The maximum penalty that may be imposed will be specified in the Order. Non-compliance penalties will also be available to SEPA.

Through Enforcement Undertakings (EUs) SEPA will be able to consider a voluntary offer from operators who are usually compliant to pro-actively take steps to make amends for any non-compliance and its effects.

Finally, in order to frame the criminal offences that the new court powers and requirements, vicarious liability, FMPs, VMPs and EUs will be available for, the Act requires these 'relevant offences' to be set out by Order. These are set out as part of this consultation in **Annex A**.

## Questions

The table below summarises the specific questions asked in the consultation:

	<b>Topic</b>	<b>Question</b>
1	SEPA's Enforcement approach	Are these the right aims to underpin SEPA's enforcement approach?
2a	Fixed Monetary Penalties (FMPs)	Do you agree with the suggested list of 'relevant offences' for SEPA's use of FMPs?
2b	Fixed Monetary Penalties (FMPs)	Do you agree with the three proposed FMP levels of £300, £600 and £1000 to allocate across the range of offences identified as appropriate for fixed monetary penalties?
3a	Variable Monetary penalties (VMPs)	Do you agree with the suggested list of 'relevant offences' for SEPA's use of VMPs?
3b	Variable Monetary Penalties (VMPs)	Do you have any further comments on the proposed approach to calculating VMPs, based on a single generalised methodology reflecting the values for financial benefit, gravity and aggravating or mitigating factors?
4	Non-Compliance Penalties (NCPs)	Do you consider that a penalty set at a 40% uplift is a sufficient penalty for non-compliance with an undertaking offered in respect of a VMP?
5	Enforcement Undertakings (EUs)	Do you agree SEPA should look more favourably on community-focussed EUs?
6	Court Powers	Do you support the approach to relevant offences to which these new court powers and requirements apply?
7	Vicarious Liability	Do you support the approach to relevant offences to which the vicarious liability requirements apply?
8	Administration	Do you have any further comments on the proposed administration of the new enforcement measures?

9	Safeguards	Do you agree that the proposed safeguards for the new enforcement measures address the concerns raised through the previous consultation?
10	Further comments	Do you have any further comments on how these proposals will impact on businesses, communities and the environment?

We are seeking your views to ensure we have accountability and transparency in the programme. We want to get it right to benefit from a more flexible, risk-based, outcome-focussed approach to enforcement.

## 1. BACKGROUND

### 1.1 High Level Policy Approach to Environmental Regulation

Many of the challenges facing the environment, communities and the economy, such as climate change, sustainable resource use and environmental crime, are complicated, interlinked and change over time. Successfully tackling these challenges will require positive behaviour change, with individuals, companies and other groups within society taking greater responsibility for the environment.

Scotland needs, and SEPA wants to be, an environmental regulator who:

- acts for the benefit of the public at large to regulate activities that have the potential to cause environmental harm and does this in an outcome-focussed, proportionate, transparent, accountable, consistent and targeted manner;
- takes a preventative approach, seeking to understand behavioural drivers and address root causes;
- takes a risk and outcome-based approach, informed by a broad range of evidence and analysis;
- uses proportionate tools to deliver outcomes effectively;
- seeks to understand and respond to stakeholders, forming shared objectives and productive partnerships;
- promotes greater responsibility in society for the environment, informing and encouraging voluntary action within communities and encouraging businesses to be good neighbours;
- promotes the business benefits of good environmental performance, supports enterprise, acts to support key and emerging business sectors and helps to deliver a level playing field for legitimate operators; and
- anticipates and adapts continually to meet emerging challenges and opportunities, developing and drawing from a “state of the art” toolkit.

The Scottish Government and SEPA are working together as part of a joint Better Environmental Regulation programme to help deliver these outcomes. SEPA needs to target its resource where it is most needed to deliver measurable outcomes for the environment and contribute to the health and wellbeing of Scotland’s communities and the economy. This programme includes policy development, legislative change to deliver a new regulatory framework, new enforcement tools and a new regulatory charging scheme. This work supports a SEPA programme of organisational change. The direction of change has been shaped by good practice both within Scotland and internationally and was informed by key reviews such as the [Hampton review<sup>1</sup>](#) and [Macrory report<sup>2</sup>](#). SEPA continues to engage with the [Regulatory Review Group](#) which promotes and champions better regulation in Scotland. SEPA has also contributed to the development of the [Strategic Code of Practice for Regulators](#). This engagement will continue as the new enforcement framework takes shape.

---

<sup>1</sup> Reducing administrative burdens: effective inspection and enforcement, Philip Hampton, March 2005, see <http://www.berr.gov.uk/files/file22988.pdf>

<sup>2</sup> Regulatory Justice: Making Sanctions Effective, Final Report, November 2006, Professor Richard B. Macrory, see <http://www.berr.gov.uk/files/file44593.pdf>

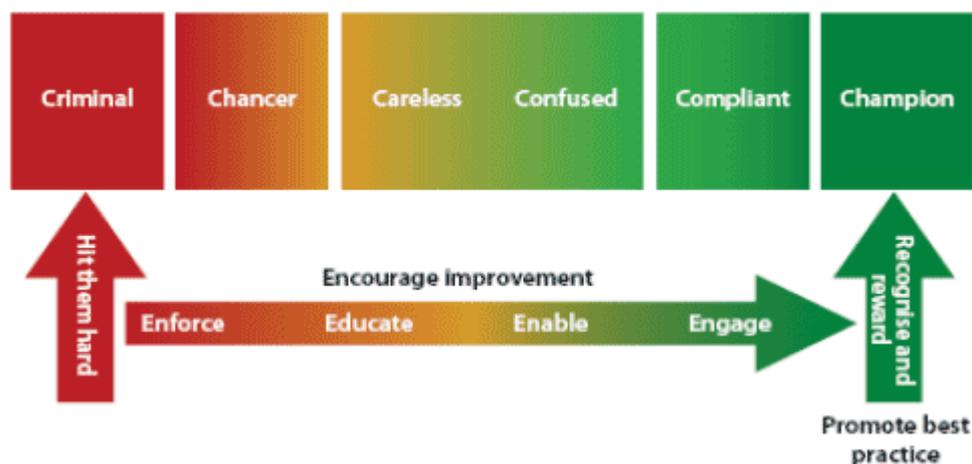
Improvements to its enforcement approach are only one aspect of a broad ranging [change agenda](#) within SEPA. SEPA increasingly carries out its work in a targeted manner, drawing on a range of tools to deliver specific measurable results. In this context, enforcement action is only one tool in a package of measures which SEPA is deploying, often in partnership with others, to achieve specific outcomes for Scotland's environment, economy and communities.

## 1.2 High Level Policy Aspirations for Enforcement

Environmental crime harms our environment, damages our economy and poses a risk to human health. As well as impacts here in Scotland, environmental crime is a worldwide issue. Without regulatory controls and investment in infrastructure legitimate business can be undermined and the environment and communities put at risk.

SEPA already seeks to engage, encourage and inform those who are subject to environmental legislation, so as to secure compliance. Most operators in Scotland understand and comply with environmental requirements. However, SEPA needs a better range of interventions to tackle poor performance, non-compliance and environmental crime. The compliance spectrum below illustrates SEPA's broad approach although, in practice, operators can display a range of behaviour, for example a company can be performing to champion level in some areas but can be disappointingly careless in others. Seeking to understand why companies and individuals behave the way they do helps SEPA in deciding the best approach.

Compliance and engagement spectrum



SEPA does, and always will, refer significant, persistent and deliberate acts to the Crown Office and Procurator Fiscal Service (COPFS) for consideration of prosecution. The [Environmental Crime Task Force](#), created in 2011, brings together the key partners in this area to identify opportunities and priorities for preventing, tackling and deterring environmental crime. However, below this level of significant crime the existing statutory toolkit currently available to SEPA to enforce lower level offending is largely limited to a set of statutory notices such as enforcement notices, suspension notices and revocation notices. These do not always allow for proportionate and effective enforcement action across the range of lower level offending that SEPA routinely deals with.

The policy and operational aspiration is for more proportionate and flexible enforcement measures that are more responsive to the facts of each separate case and, as a result,

more effective in achieving positive behavioural change. This includes strengthening the powers of the courts in dealing with the more significant and wilful breaches of environmental legislation and providing SEPA with new enforcement tools to enable it to take a proportionate approach in dealing with the range of lower level offending.

### **1.3 The New Environmental Enforcement Framework**

SEPA and the Scottish Government have been working in liaison with COPFS to develop a new environmental enforcement framework for Scotland. This included the necessary enabling provisions on enforcement in the Regulatory Reform (Scotland) Act 2014 (the Act). The new framework builds upon the strengths of the existing enforcement approach and working relationship between COPFS and SEPA. The new enforcement framework will consist of a new enforcement order, relevant offences order(s), guidelines from the Lord Advocate, an updated SEPA Enforcement Policy and formal guidance which SEPA is required to prepare about how it will use the new enforcement measures.

The Act enables improvements to the enforcement framework for environmental offences. These include a strengthening of the Court powers:

- requiring the Courts to consider financial benefit accrued by an offender when determining fine levels;
- extending the existing Court powers to make compensation orders; and
- providing the Courts with the power to require offenders convicted of prescribed environmental offences to publicise information about the offence via a publicity order; with provision for corporate offending.

SEPA will continue to report significant, persistent and deliberate acts to COPFS for consideration of prosecution, but the Act enables new enforcement measures for SEPA to deal directly with the range of lower level offending. These include the imposition by SEPA of FMPs, VMPs and acceptance by SEPA of Enforcement Undertakings. Enforcement Undertakings are aimed at enabling legitimate operators to voluntarily make amends for lower level offending. There is also enabling provision made for cost recovery by SEPA for VPMs in certain circumstances. SEPA will only have the power to use the new measures in relation to “a relevant offence”, with different offences specified for different purposes, and these will be as specified in an Order made by the Scottish Ministers.

In the short term the new enforcement measures will be brought in and sit alongside the different types of statutory notices which exist under current legislation, including the waste, water, radioactive substances and pollution prevention and control legislation. The Act also enables a move away from the four main regulatory/permissioning regimes to a single, consistent, integrated legislative framework of regulation so, in due course, the enforcement measures will form part of this framework which will include a modern, consistent set of notices.

One of the key aspects of the new enforcement framework required by the Act is that SEPA must comply with guidelines issued by the Lord Advocate. These guidelines will ensure that the new enforcement measures will be applied consistently and proportionately as part of the whole range of sanctions that are available (including prosecution). Close working between SEPA and COPFS, building on the existing

relationship, will be a key aspect to the successful operation of the new enforcement framework.

To ensure there is proper transparency and accountability, the Act also requires SEPA to publish guidance regarding its use of these enforcement measures and to publish information about cases where they have been used.

#### **1.4 Previous Consultations and Conclusions**

Stakeholder engagement has been essential in shaping this new enforcement framework as part of the wider Better Environmental Regulation agenda.

The [stakeholder response](#) to a high level SEPA Better Environmental Regulation consultation in 2010/11 showed strong support for enhanced enforcement tools for SEPA. In 2012, there was a joint Scottish Government-SEPA consultation on [Proposals for an Integrated Framework of Environmental Regulation](#). This sought stakeholder views on outline proposals for new enforcement measures including the options for strengthening court sentencing powers, new FMPs and VMPs and voluntary enforcement undertakings for SEPA and proposals for publicity orders and safeguards. The stakeholder response showed strong support in principle for the general direction, although some of this support was caveated subject to seeing more detail on how the measures would be developed and applied. Key points from the stakeholder feedback were as follows:

- FMPs should be set irrespective of the nature of the offender;
- penalties should reflect the seriousness of the offence and set at a level which is punitive and sufficient to have an impact on the offender;
- calculation of the penalties should be transparent, clearly describe the starting point, and the relevant aggravating and mitigating factors that have been applied;
- it was wrong to restrict the ability to offer an undertaking to instances involving "little or no blameworthy conduct" and that these should be available as a means of redress in all circumstances;
- that there should be a requirement for undertakings to be publicised, as transparency of enforcement undertakings and a means to involve the public in the process was felt to be important;
- there was a need for a consistent, transparent, proportionate and independent appeal route (respondees offered views on the three main routes of appeal: to the Scottish Ministers, through the judicial system or through a separate tribunals process); and
- the need for a review process to keep oversight of how the proposed enforcement tools are being used.

This stakeholder engagement helped to shape the development of the Regulatory Reform (Scotland) Act 2014 and the proposals contained in this current consultation.

## **1.5 What Proposals Are We Now Consulting On?**

This consultation focuses on the intent and design of the new enforcement measures for SEPA and the scope of the 'relevant offences' order for the new enforcement measures, court powers and vicarious liability.

Informed by feedback from this current consultation, SEPA and Scottish Government intend to consult jointly later in 2014 on a draft enforcement Order, a revised SEPA enforcement policy and the SEPA guidance on use of the new enforcement measures. The intention is that the new arrangements will be in place by spring 2015.

The Act includes a new significant environmental harm offence at section 40. This includes at section 40(9) an ability for the Scottish Ministers to set out in an Order that environmental harm is "significant" if it is caused or may be caused to an area designated in the order for the purposes of this section. It is not intended to make such an Order at this stage so this does not form part of the consultation.

The Act also included provisions which introduce vicarious liability for certain offences by employees and agents and where an activity is carried out by arrangement with another. This consultation proposes the relevant offences for these vicarious liability provisions which need to be set out by Order.

Many stakeholders, whilst largely supporting the direction of travel, have asked to be engaged in the development of the new measures. This consultation provides stakeholders with an early opportunity to comment on proposals for the detailed intent and design of the new enforcement measures. As such it focuses on specific aspects of the design of the new arrangements. This includes detail on the approach that the Scottish Ministers intend to take to defining 'relevant offences', some changes to SEPA's enforcement approach and detailed proposals which will inform the development of the formal SEPA guidance for stakeholders. Stakeholder views at this stage will help with the development of the Order, the formal SEPA guidance, and necessary changes to SEPA's enforcement policy and will help SEPA in preparing for the new arrangements.

## **1.6 How to respond**

Respond to the consultation online using the Scottish Government's Consultation Hub on [Citizen Space](#).

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

Environmental Quality Division  
Scottish Government  
Area 1-D North  
Victoria Quay  
EDINBURGH  
EH6 6QQ  
Tel: 0131 244 0205  
Fax: 0131 244 0245  
E-mail: [EQCAT@scotland.gsi.gov.uk](mailto:EQCAT@scotland.gsi.gov.uk)

Responses should be made on the attached Respondent Information Form and returned to us by Friday 3<sup>rd</sup> October 2014. Earlier responses would be welcome.

### **1.7 Handling your response**

We need to know how you wish your response to be handled and, in particular, whether you are happy for your response to be made public. Please complete and return the Respondent Information Form attached at **Annex C** with your response as this will ensure that we treat your response appropriately.

If you ask for your response not to be published we will regard it as confidential, and we will treat it accordingly.

Further information about the Scottish Government consultation process is available on the [Scottish Government website](#).

## 2. THE PROPOSALS

### 2.1 How Will SEPA's Enforcement Approach Change?

The new framework and enforcement measures will enable SEPA to take a more strategic, proportionate and effective approach to enforcement.

Proportionality will remain a core principle of SEPA's approach. SEPA already seeks, wherever possible, to engage, encourage and inform those who are subject to environmental regulation, so as to secure compliance. This is a successful approach and will continue as SEPA recognises that most operators in Scotland understand and comply with their environmental requirements.

The changes to SEPA's enforcement approach, outlined below, build on SEPA's existing approach and enforcement policy.

As previously stated, future enforcement action carried out by SEPA will increasingly form only one tool in a package of measures which SEPA is deploying, as part of strategic plans, to achieve specific outcomes consistent with its [general purpose](#).

Key aims underpinning the approach to enforcement will be to:

- change the behaviour of the offender;
- deter future non-compliance;
- eliminate any financial gain or benefit from non-compliance;
- be proportionate to the nature of the offence and the harm caused; and
- restore the harm caused by regulatory non-compliance, where appropriate.

The approach to achieving the desired outcome will differ depending on the nature of the non-compliance, the harm caused and the regulatory history of the operator in question. The approach which delivers, in a proportionate way, the key aims most effectively will often be the appropriate sanction to use. For example, an enforcement undertaking may be acceptable from one operator, but the same non-compliance by a different operator may be addressed more effectively by a combination of sanctions, such as an enforcement notice and VMP.

The aim of removing financial gain or benefit from low-level non-compliance will be a key focus in the future to help drive behavioural change and deter future non-compliance. As such, the levels of any VMPs will have removal of financial benefit at their core. Prosecution, together with the new duty on the courts to take into account financial benefit, together with any Proceeds of Crime Act will continue to be used to remove financial gain from more significant offending. Where it is apparent that there has been significant financial benefit either arising from a relevant offence, or, more broadly, arising from a relevant offence which forms part of a criminal lifestyle, SEPA will report the offending to COPFS for consideration of prosecution and action under the Proceeds of Crime legislation.

Operators who do not change their behaviour in response to enforcement measures used by SEPA (for example, non-compliance with previous enforcement measures or previous convictions) will also be referred to COPFS for consideration of prosecution. Early intervention by SEPA before the behaviour becomes chronic or persistent will increasingly

become a core element behind SEPA's enforcement approach. The potential to remove some or all financial benefit from non-compliance at an early stage will help incentivise operators to come into compliance before non-compliance becomes part of the operating practice. It should also help to deter potential freeloaders from undertaking illegal activities. An inspection regime which targets poor performers will support that early intervention and encourage compliance on an ongoing basis.

The new enforcement measures are designed to address lower level offending at the more compliant end of the spectrum where referral to the Procurator Fiscal for consideration to prosecute in some circumstances may be a disproportionate response. These are the compliance gaps that SEPA has identified and hope that the new enforcement tools will allow an earlier change in behaviour and a proportionate enforcement response.

In addition to paying the financial penalty, which is primarily concerned with the removal of financial benefit, the operator will be required to restore any harm caused to the environment. Ensuring restoration of any harm caused to the environment remains a key outcome of SEPA's new enforcement measures. In some cases SEPA will serve a formal enforcement notice to achieve the required restoration but in many circumstances an operator will be expected to carry out restoration of harm caused voluntarily.

An undertaking enables an offender to address the offending in a constructive way and avoid the stigma and reputational damage of a potential criminal conviction or other enforcement action. Given these advantages, SEPA does not consider that payments to be made as part of an undertaking should simply equate to the financial advantage gained or restoration of harm caused.

SEPA's enforcement policy will reflect the Lord Advocate's guidelines, the approach set out above and refer to the new enforcement measures.

### **Question 1 – SEPA's Enforcement Approach:**

**Are these the right aims to underpin SEPA's enforcement approach?**

#### **2.2 Intent and Design of the new enforcement measures**

The following sections set out and invite comment on the new enforcement measures in greater detail, describing what they are, how SEPA will use them in practice and how penalties will be calculated or determined.

SEPA will only be able to use these measures in relation to a 'relevant offence' as specified in an Order made by the Scottish Ministers. Therefore this consultation also sets out and invites comment on the relevant offences in broad terms for each measure, as well as for the new court powers and vicarious liability. A detailed table of relevant offences is set out at **Annex A**.

## 2.2.1 Fixed Monetary Penalties (FMPs)

### Description

A Fixed Monetary Penalty (FMP) is a fine, fixed by legislation, that SEPA may impose for a specified minor offence.

It is important to distinguish between where SEPA may use an FMP and the offences for which these may potentially be available (the relevant offences) which may comprise a broad spectrum of offences. In practice, SEPA will largely use an FMP within a narrow band of outcome-based, targeted cases designed around SEPA's strategic priorities and consistent with its general purpose. The broader range of 'relevant offences' and more limited circumstances where SEPA may use them are described below.

### Relevant Offences

FMPs are an appropriate and proportionate sanction for particularly low level offending where:

- it is considered a relatively low monetary penalty is likely to be sufficient to change the offender's behaviour;
- the circumstances of the offence are invariable (i.e. there is no scope for different levels of environmental harm caused to be taken into account); and
- there is little or no actual environmental impact.

They are likely to be suitable for 'administrative' offences where there has been a failure in getting important information on time and to the right standard to SEPA.

We propose that it is proportionate for the majority of very low level offending committed under existing environmental legislation to be dealt with using an FMP. These offences include:

- failure to act on information notices for licensed activities;
- failure to display copies of certificates of registration or authorisation under Radioactive Substances legislation;
- failure to timeously notify SEPA of construction, enlargement etc of silo or slurry storage system;
- failure to furnish a Producer Responsibility certificate of compliance;
- failure to comply with requirements regarding sludge used on agricultural land;
- transport of controlled waste without being registered carrier;
- failure to comply with waste duty of care requirements;
- carrying on an exempt waste activity without being registered;
- failure to comply with the conditions of a Radioactive Substances Exemption Order; or
- failure to notify SEPA 14 days before change in operation of PPC installation.

A detailed table of the offences we propose should be included in the Relevant Offences Order in respect of VMPs is set out at **Annex A**.

FMPs may also be suitable to change the behaviour of an operator who has failed to take on board previous advice and guidance in relation to an offence where there is little or no directly associated environmental impact. For example, FMPs may be used where there has been a failure to maintain a septic tank or small scale open burning or minor odour nuisance. These types of offences may, depending on the circumstances, be appropriate for an FMP where the offence is capable of applying in a wide range of circumstances but the specific cases involve very low level offending. For example a breach of registration or general binding rule under water legislation, or a breach of condition of a PPC permit.

There is a range of offences and circumstances for which FMPs may be inappropriate due to their general seriousness. These offences include operating without a higher level authorisation (for example, a PPC permit or CAR water use licence), failing to register as a packaging producer and failure to comply with an enforcement notice. These may be more suited to disposal using a VMP.

### **How SEPA will use FMPs**

SEPA will be able to impose an FMP on any person where SEPA is satisfied on the balance of probabilities that the person has committed a 'relevant offence' prescribed for that purpose. In practice, initial SEPA implementation of the use of these new enforcement measures will happen in a phased manner with FMPs being used initially to support the achievement of specific outcomes. For example, these may be used as one of a range of measures to tackle existing poor compliance, support specific projects aimed at tackling a particular problem and in reacting to incidents of low level harm or impact.

The failure to submit data returns is an ongoing compliance problem for SEPA. Non-returns can compromise SEPA's ability to protect the environment, plan and review the effectiveness of regulation and undermine SEPA's efforts at compliance with requirements to report under European Directives. These problems include incomplete data returns and non-submission of producer responsibility certificates of compliance or non-notifications of slurry store construction or fish stock treatment or production tonnage.

*Example - the Industrial Emissions Directive requires that the users of solvent have to submit returns on the use of solvents for reporting to the European Commission. There is clear evidence of many sites where three letters, numerous phone calls and face to face meetings have still not delivered compliance. SEPA lacks the appropriate tools to change the behaviour of operators and imposing a FMP is therefore viewed as one mechanism to help improve compliance.*

SEPA deals with a large number of low level harms, or activities which harm the environment, on a reactive basis. While of low significance on their own, many of these harms can become chronic or persistent where the existing tools fail to change behaviour early. They also have the potential to escalate. Intervening early with fixed monetary penalties may, in many instances, prevent recurrence and reduce the ongoing nature of some of these problems. Examples include odour, burning of waste, maintenance of septic tanks, storing waste outwith a site boundary and poor bunding and maintenance around oil storage.

*Example - SEPA investigates around 300 waste burning incidents each year. About 70% of these incidents are resolved by giving advice and guidance. These range from mixed*

*waste (plastics, aerosols and clinical wastes) being burned rather than transferring waste from the site where it was produced, to cases involving 'persistent' burning of waste at skip hire sites.*

This is an example where early use of FMPs, after an operator has failed to take on board advice and guidance, may be a proportionate enforcement tool to prevent an escalation to more serious and persistent contraventions for which a VMP or prosecution may be more appropriate responses.

### **How the FMP is calculated/determined**

The amount of any FMP must be specified in an order made under the Act. It is important that the specified level of penalty is sufficiently high to incentivise a change in behaviour, without being too high so as to become disproportionate. On the one hand, if the penalty is too low it will not provide the necessary leverage to achieve the desired behaviour change. On the other, if the penalty is too high, it may be disproportionate to the level of offending, resulting in unfair penalties being imposed. It is important, and very much the intention, to strike the right balance.

We have considered a number of different options for specifying the amount of FMP applicable to each offence. These are:

- a single amount across all relevant offences;
- a different amount for individuals and companies (or other regulated organisations). This reflects the approach in Part 3 of the Regulatory Enforcement and Sanctions Act 2008 and the Environmental Civil Sanctions (England) Order 2010 (SI 2010/1157);
- a bespoke amount for each relevant offence; and
- a series of bands (low, medium and high amounts) with groups of relevant offences in each band.

The first two approaches are not favoured on the basis that they make the FMP a blunt, inflexible measure which is unlikely to be proportionate or to achieve the desired behavioural change across all the relevant offences. There was feedback from the last consultation paper that suggested that it made little sense to have a different penalty for individuals and companies. A small company may have much less ability to pay in reality than some individuals. The third approach is not favoured on the basis that it would be disproportionately difficult to manage and add potential complexity to what is intended to be a straightforward measure. The favoured approach is therefore a banded approach with an amount specified in relation to a number of relevant offences with shared regulatory outcomes.

We have looked at a number of different fixed penalty levels across different regulatory regimes in Scotland (a summary is attached at **Annex B**) and propose that:

- low FMPs should be specified at £300;
- medium penalties should be set at a level of £600; and
- high penalties at £1,000.

These penalty amounts may be allocated among the offences identified as appropriate for fixed penalties. We propose that the lower penalty amount is appropriate for outcomes associated with getting the right information on time and to the right standard; and

propose the higher penalty amounts are appropriate for low level offending where there is at least a risk of environmental harm. Considering the examples above we suggest that the 'getting the right information' examples would have a fixed monetary penalty of £300 whilst the low level harm offences would have a penalty of £600.

There is a question as to the type of offending suitable for a penalty of £1,000. There is an argument that the type of offending that would attract this level of penalty may be more proportionately dealt with under a VMP which would allow the penalty to be set at a level appropriate for the facts of the case and in particular to achieve the desired change in behaviour. On the other hand there are some offences that may be suitable for a higher fixed penalty of £1,000 – for example, offences involving the provision of false or misleading information to SEPA, which are deliberate attempts to subvert the regulatory process, but which may have no direct environmental impact.

Another option is to have two bands for FMPs of £300 and £800.

We do not think we should provide for a higher fixed penalty to be served where the offender has failed to change their behaviour after the service of the first FMP. If an offender fails to respond to the first FMP then the next appropriate response from SEPA for the continuing offending is a VMP or to submit a report to COPFS for consideration of prosecution.

#### **Question 2 – Fixed Monetary Penalties (FMPs):**

**a) Do you agree with the suggested list of 'relevant offences' for SEPA's use of FMPs?**

**b) Do you agree with the three proposed FMP levels of £300, £600 and £1000 to allocate across the range of offences identified as appropriate for fixed monetary penalties?**

## 2.2.2 Variable Monetary Penalties (VMPs)

### Description

A Variable Monetary Penalty (VMP) is a proportionate discretionary monetary penalty which SEPA can impose up to a level specified in the Order.

VMPs differ from FMPs as they are intended to operate in relation to offending that is at the upper end of the scale of offending, but beneath the level of offending that, pursuant to the Lord Advocate's guidelines, is appropriate for reporting to COPFS for consideration of prosecution. There will be cases where SEPA and COPFS need to liaise to decide whether a VMP is appropriate or whether referral to the Procurator Fiscal will achieve the most appropriate outcome.

Clarification over the 'hierarchy of offences' was one of the issues raised in evidence given to Parliament in the context of the Regulatory Reform (Scotland) Bill<sup>3</sup>.

### Relevant Offences

In principle, VMPs are appropriate for offences where the circumstances of the offence are variable and need to be taken into account in delivering a fair and proportionate sanction. There is a significant amount of overlap between the list of offences for which FMPs are appropriate and those where a VMP may be appropriate. This reflects the character and seriousness of the offences, any potential wider impact of the offending and the deterrent that is appropriate to prevent similar offending, which will often depend on the circumstances. The character of offence is not itself an indicator of the seriousness of the offence. For example, a breach of an emission limit within a permit could result in differing enforcement responses depending on the circumstances surrounding the breach, including:

- the level of breach;
- the environmental harm caused;
- the behaviour of the offender prior to and after the breach; and
- whether a financial advantage has been gained by the offender as a result of the offending.

We therefore propose that it is proportionate for most offences to be available for a VMP. For example, in addition to those specified in the previous section in relation to FMPs, these would include:

- failure to have an appropriate authorisation for a regulated activity
- breach of waste management licence conditions;
- breach of a condition of a registration or authorisation issued under the Radioactive Substances Act;
- breach of a condition of a water use licence;
- breach of a condition of a PPC permit;
- carrying on a controlled activity without an authorisation under water legislation;
- illegal shipment of waste;

---

<sup>3</sup> Evidence given by Dr Sarah Hendry, University of Dundee to the Rural Affairs, Climate Change and Environment Committee on 29 May 2013, Col 2289

- failing to register as a packaging producer;
- illegal disposal of controlled waste; and
- failure to comply with an enforcement or similar statutory notice.

A detailed table of the offences we propose should be included in the Relevant Offences Order in respect of VMPs is set out at **Annex A**

### **How SEPA will use VMPs**

The Act enables an order to be made which provides SEPA with the power to impose VMPs on any person where SEPA is satisfied on the balance of probabilities that the person has committed a so-called “relevant offence” prescribed for that purpose. In assessing whether a person has committed an offence, SEPA will always undertake an investigation into the offence without discriminating between cases which may result in a VMP and those that may result in other outcomes.

VMPs will be used by SEPA to respond to non-compliant operators at the upper end of the scale of lower-level offending, where financial penalties may operate as an incentive and deterrent to change behaviour. They will do so either by removing financial benefits or by penalising the operator for non-compliance, and by publishing measures taken.

SEPA will ensure that the specification of the relevant offences in the notice of intent is clear and precise, including the dates specifying the period of the offending, in the documents relating to the new enforcement measures. This will ensure that should the offence continue or recur then SEPA will not be precluded from taking further enforcement action or submitting a report to COPFS for consideration of prosecution.

SEPA will not use VMPs in circumstances where:

- they are unlikely to change the behaviour of the offender; or
- the Lord Advocate’s guidelines require the matter to be reported to COPFS.

Where there are multiple offenders we propose that SEPA may impose a penalty on each of those offenders.

### **How the VMP is calculated/determined**

The Act requires that the maximum amount of any VMP, specified in the Order, cannot exceed the maximum penalty that may be imposed on summary conviction for the offence to which the notice relates. In most of the cases where SEPA takes enforcement action, this is £40,000.

In order to ensure that a consistent approach is taken to the determination of VMP amounts and to provide the right balance between proportionality and ease of design, communication and use, we propose that a single generalised methodology for the calculation of such penalties is developed for all relevant offences. This will also ensure that fines are not seen as arbitrary, and will help with the consideration of appeals. This is preferable to a penalty being determined on a case by case basis taking account of all the circumstances but without reference to a single methodology for calculation of that penalty (this would ensure a proportionate penalty was imposed but at the expense of consistency and transparency). It is also preferable to designing different methodologies for different

offences (which may be more proportionate than a single methodology but could undermine transparency and increase the complexity of the system).

We have reviewed a number of environmental models for determining VMPs including those used by the Environment Agency in England, the US Environment Protection Agency, the Environment Protection Authority in South Australia and Environment Canada. While each of these methodologies differ in detail, they are generally based around three key components:

- the benefit accrued from the offence;
- the gravity or seriousness of the offence; and
- the behaviour of the offender prior to and after offence.

First, there is the “benefit” component of the penalty to reflect any financial benefit resulting from non-compliance. This ensures that the offender is in no better a position than those who have complied in a timely fashion with regulatory requirements. Second, there is the “gravity” component which is an additional amount to reflect the seriousness of the non-compliance and is intended to deter future non-compliance. Third, in order to take account of individual circumstances in determining a penalty, relevant differences between cases related to the behaviour of the offender must also be taken into account, such as degree of wilfulness or negligence, history of non-compliance, degree of cooperation, steps taken to prevent or mitigate any harm, and other unique factors specific to the circumstances of the offending.

We propose a methodology for calculation of penalties that incorporates these three key components:

- financial benefit;
- gravity; and
- aggravating/mitigating factors (context of the offence and factors relating to the operator)

The basic calculation proposed is:

Financial benefit + (Gravity plus or minus Aggravating/Mitigating factors).

The three factors are explained in more detail below. However, the proposed methodology is based around the following principles:

- that the offender will be no better off from causing the offence and therefore not at a financial advantage to compliant competitors;
- that the gravity aspect is proportionate and sufficiently penalises the offender; and
- that the context of the offence and factors relating to the operator are reflected in the level of penalty.

#### *First component: Financial Benefit*

A key aim of a VMP is to eliminate financial gain or benefit from non-compliance. This includes both the costs avoided and the profit obtained as a result of causing the offence. The avoided costs include savings that are deferred or permanently avoided, such as costs avoided through failure to:

- install suitable treatment facilities and monitoring equipment;

- have the appropriate management systems and staffing in place;
- undertake their required monitoring;
- to obtain the necessary environmental authorisations; or
- undertake sufficient maintenance.

The value of the financial benefit component is “ring-fenced” in this methodology and is not modified by any of the other components. In the rare cases where there is no financial benefit associated with an offence, the proposed level of the VMP can still be calculated based on the gravity of the offence and the behaviour of the offender.

### *Second component: Gravity*

An additional amount is needed to reflect the seriousness or the gravity of the offence. This allows differentiation between those offences that cause harm and those that do not. This will be proportionate to:

- the significance of the environmental harm caused;
- the significance of the risk of environmental harm caused; or
- whether it was a breach of a management condition of an authorisation, such as requiring data to be collected or reported, which allows SEPA to assess compliance or environmental impact but which in itself causes no environmental harm.

We therefore propose having a range of categories within the gravity component that reflect the significance or seriousness of the offence, and will attribute set values to each of the categories. The significance of the impact would then be assessed and would be graded from low to high. Non-submission of data (no environmental harm) will have a lower gravity penalty than an offence that caused environmental harm. Likewise, an offence that has presented a risk of environmental harm will attract a lower penalty than one that has caused actual environmental harm.

It is important to stress that these categories are within the context of less significant offending. There will always be a presumption in favour of reporting significant, persistent and deliberate offending to COPFS for consideration of prosecution.

### *Third component: Aggravating or Mitigating factors*

There must be operator-specific adjustment factors to promote proportionality and flexibility while safeguarding consistency of treatment of similar offenders, and these apply only to the gravity component.

A number of incidents that SEPA deals with involve operators who prior to the incident were compliant with the legislation. In some cases offenders are keen to atone for a mistake and restore the environmental damage caused. It is important therefore that the level of penalty adequately reflects the behaviour of the offender both prior to and after the offence.

The factors (many of which are linked) we propose are relevant to reduce or increase the amount of the gravity component are:

- culpability – that the offence was the result of an accident and not deliberate, negligent or reckless;

- previous advice and guidance – offender not previously given advice regarding compliance;
- predictability – the action or inaction of the offender was not a contributing factor to the offence;
- obligation awareness – offender was not aware of the non-compliance, or not aware that conduct was unlawful;
- hazard awareness – offender was not aware of the risk to the environment from non-compliance;
- offence reporting – offender reported the non-compliance to SEPA immediately on becoming aware of the offence;
- operator cooperative with SEPA – offender has assisted SEPA in investigation of offence;
- precautions – offender took all necessary precautions to avoid offence;
- incident response – offender took all necessary measures as soon as possible to mitigate any harm or remedy non-compliance;
- remediation – steps taken by offender to remediate harm;
- number of previous violations – offender has no previous convictions/enforcement measures for environmental offences;
- similarity to previous violations – that offender has previous convictions/enforcement measures for environmental offences but not analogous to offence;
- time elapsed since previous violations – offender has previous convictions/enforcement measures for similar environmental offences but more than eg 3 years has elapsed;
- response to previous violations – offender has previous convictions/enforcement measures but took all necessary measures to avoid recurrence;
- enforcement history – offender has no history of significant non-compliance; and
- compliance history – offender has good compliance record

We propose that the offender bears responsibility for demonstrating factors relevant to reducing the penalty. In principle, we propose that the maximum increase or decrease in the gravity component as a result of aggravating or mitigating factors should be 50%. This will ensure that the principal factor in setting the level of a VMP, for cases not dominated by financial benefit, is the gravity of the offence.

### **Question 3 – Variable Monetary Penalties (VMPs):**

**a) Do you agree with the suggested list of ‘relevant offences’ for SEPA’s use of VMPs?**

**b) Do you have any further comments on the proposed approach to calculating VMPs, based on a single generalised methodology reflecting the values for financial benefit, gravity and aggravating or mitigating factors?**

### **2.2.3 VMP Undertaking and Non-Compliance Penalties (NCPs)**

#### **Description**

It is possible for a person to offer to SEPA an undertaking as to action to be taken by that person, in response to a VMP notice of intent being served by SEPA (which may be referred to as a VMP undertaking), for all or any of the following purposes:

- to secure the position is restored to what it would have been if the offence had not been committed;
- to benefit the environment to the extent that the commission of the offence has harmed the environment; and
- to secure that no financial benefit arising from the commission of the offence accrues to the person.

SEPA can accept or reject such an undertaking and will take any undertaking accepted into account in its decision. SEPA can decide not to issue a VMP or to issue a lower VMP and accept an undertaking. Similar principles apply to both undertakings accepted in response to a VMP notice and an enforcement undertaking. SEPA will expect more than simply the minimum required to restore the position to what it would have been or to remove financial benefit. There is an incentive for operators to offer SEPA an undertaking which includes restoration of harm caused to the environment and some additional benefit to the environment. Once a final decision is made by SEPA to serve a VMP the person is liable to pay the VMP and will also be expected to restore the environment.

#### **How VMP Undertakings will be used**

For VMP undertakings, the rationale is to allow operators to offer a quick and effective resolution of non-compliance as a response to SEPA indicating its intention to issue a VMP in response to non-compliance at the upper end of the scale of low level offending. VMP undertakings are intended to encourage positive behaviour from operators who are usually broadly compliant. They are an alternative or may operate in conjunction with a VMP imposed by SEPA, where appropriate.

If a person fails to comply with a VMP undertaking, a Non-Compliance Penalty (NCP) will be applied. This is a monetary penalty, fixed by legislation, that the regulator may impose where SEPA is satisfied that a person has failed to comply (in whole or in part) with a VMP undertaking.

#### **How NCPs will be calculated/determined**

We propose that the level of the NCP will be calculated by reflecting the level of (or proportion of) the VMP proposed in the notice of intent in relation to the act or omission in question, with an additional 40% uplift on that penalty related to the delay arising from non-compliance. We consider that this approach should be set out in the Order. The policy intention is for this measure to act as a deterrent to using undertakings in relation to VMPs as a delaying tactic.

Where an undertaking is accepted and a VMP is also imposed, the NCP will reflect the amount by which the proposed VMP was discounted to take account of the undertaking, with the addition of a 40% uplift on that amount.

In the case of failure to comply with any of the terms of the undertaking, we propose that the NCP will be an amount equivalent to the full amount of the VMP with the addition of a 40% uplift on that amount.

In the case of partial failure to comply with the terms of the undertaking, we propose that the NCP will be an amount equivalent to a proportion of the VMP reflecting the extent to which the undertaking has not been complied with, plus an additional 40% uplift on that amount.

For example if a notice of intent is issued for a VMP of £2,000, and the offender offers an EU as an alternative but fails to comply with half of its undertakings, then SEPA may determine that the undertaking has been half complied with, and the NCP will be half of the original penalty proposed (plus a 40%) uplift. In this case, the non-compliance penalty would be £1,400.

We also propose that SEPA would be able to exercise a degree of discretion to waive the uplift in cases where an operator, who had the best intentions and made every effort to comply but through circumstances outwith their control, were unable to achieve the outcome in the timescale or way that was originally envisaged in the original offer.

#### **Question 4 – Non-Compliance Penalties (NCPs):**

**Do you consider that a penalty set at a 40% uplift is a sufficient penalty for non-compliance with an undertaking offered in respect to a VMP?**

## 2.2.4 Enforcement Undertakings (EUs)

### Description

An Enforcement Undertaking (EU) is an offer, formally accepted by the regulator, to make amends for non-compliance and its effects.

SEPA will have the ability to consider a voluntary offer of an EU from any person to take specified actions within an agreed timescale in circumstances where SEPA has reasonable grounds to suspect that person has committed a “relevant offence” prescribed for that purpose. In assessing whether a person has committed an offence, SEPA will always undertake a certain level of investigation to establish the nature of the offence that has occurred and SEPA may still elect to carry out a full investigation into an offence prior to acceptance of an offer.

With EUs the rationale is to allow operators who are usually broadly compliant with regulatory requirements to voluntarily and pro-actively offer a quick and effective resolution of non-compliance. They are intended to encourage positive behaviour and are an alternative, where appropriate, to the other enforcement measures that may be applied by SEPA.

It will, of course, also be possible for an EU to be offered after an investigation has commenced (ie reactive), but before an enforcement decision has been made by SEPA.

### Examples

*The Environment Agency in England has accepted undertakings from operators in respect of (i) oil storage offences where the operator offered to decommission old pipework, install a new oil storage tank and pipework, implement a new planned maintenance regime and to review and improve drainage systems, as well as carrying out remediation works and make a financial contribution to charity; (ii) waste producer responsibility offences where the operator has offered to register with a compliance scheme, improve internal procedures and make a financial contribution to charity, and (iii) transfrontier shipment of waste offences where the operator offered to implement an internal compliance plan, obtain necessary inspection certificates, dispose of waste in an environmentally friendly manner and make a financial contribution to charity.*

*The South Australia Environment Protection Authority has accepted undertakings from several operators including those in respect of an offence relating to offensive odour from waste management operations where the operator offered to operate an odour curtain system to reduce odours, operate in accordance with a cell volume and lifespan plan; carry out 6 monthly aerial infra-red monitoring to detect landfill hotspots; update the local community on a quarterly basis; and operate an environmental report hotline and other specified measures to involve the community reference group affected by the odour.*

### Relevant Offences

In order to maximise the potential for operators to offer these to SEPA we propose that the fuller suite of environmental offences should be a “relevant offence” for the purposes of enforcement undertakings. A table of the offences we propose should be included in the Relevant Offences Order in respect of EUs is set out at **Annex A**.

## **How SEPA will use Enforcement Undertakings**

SEPA cannot impose an EU; therefore operators must be proactive in submitting any offer. SEPA is under no obligation to accept any EU. It is the responsibility of the operator to present a suitable offer to SEPA for determination. It is contrary to the policy intent behind the new enforcement measures for EUs to involve protracted negotiations and SEPA will either accept or decline an offer based on the content of the submitted offer. To ensure that operators do not have an unrealistic expectation of what may be acceptable to SEPA, and that SEPA is not offered marginal or unacceptable undertakings, it is anticipated that a list of specified outcomes will be developed to provide further guidance on the acceptability of appropriate offers.

An EU enables an offender to address the offending in a constructive way and avoid the stigma and reputational damage of an enforcement action. Given these advantages, SEPA does not consider that payments to be made as part of an EU should simply equate to the financial advantage gained by offending or restoration of harm caused.

## **How EUs will be calculated/determined**

An offer of an EU should only be accepted where:

- SEPA has reasonable grounds to suspect that an offence has been committed;
- SEPA considers that an EU is an appropriate regulatory option;
- SEPA considers that an EU may be accepted in terms of the Lord Advocate's guidelines;
- the offer addresses the act or omission which SEPA is concerned about, commits to stop any act or omission that constitutes the offence and/or take steps to prevent recurrence of the offence – in other words, to take action to return to, and remain in, compliance. This is a legal requirement;
- the offer should propose to restore the position to what it would have been if the offence had not been committed (primary restoration), where this is possible. Again this is a legal requirement; and
- the operator offers an appropriate beneficial action over and above a return to compliance or restitution by an operator.

We will therefore expect the operator to make an offer which goes beyond the minimum required to comply or restore the environment. In a case where there has been financial benefit, whether through avoided costs or money made from the offending, an EU should remove this financial benefit and also offer an additional benefit to the environment.

We therefore propose that the Scottish Ministers should specify in an Order made under section 27(3)(c) of the Act that an offer may also include some form of beneficial recompense to make amends for committing the offence.

SEPA will undertake an initial assessment to determine whether an EU is an appropriate regulatory option and consider a number of factors at this stage including:

- the likelihood that the offender will comply with the EU in light of their compliance history;
- the nature of the offence and the significance of any environmental harm caused as a result of the offence;

- the regulatory impact of the undertaking compared to other forms of enforcement action; and
- the prospects of securing a timely and satisfactory outcome.

There will be circumstances where an EU will not usually be an appropriate regulatory option. These include:

- where the offence has caused significant environmental harm;
- where the Lord Advocate’s guidelines preclude acceptance of an EU;
- where SEPA has already decided to impose a FMP or VMP in respect of the offence or to report the offence to COPFS for consideration of prosecution; and
- where the offer includes a clause denying liability.

We propose that a person offering an EU must demonstrate to SEPA that it has consulted interested parties prior to making an offer to SEPA, and taken account of the views expressed. In particular, the Scottish Government and SEPA are interested in the community aspects of an EU. If the offence is site specific (as opposed to a non-site specific offence, for example, a nationwide trading scheme or producer responsibility offence) there may be benefits in making it clear that SEPA would be much more likely to accept an offer if it had involved consultation with the community, for example, through a community council. This would help the operator to consider if local environmental improvements or direct local engagement (for example, the development of a “good neighbour agreement”), if beneficial, could form part of the offer.

## **Question 5 – Enforcement Undertakings**

**Do you agree SEPA should look more favourably on community-focussed EUs?**

## 2.2.5 Court Powers and Vicarious Liability

### Court Powers

#### Description

The Act introduces a number of new powers and requirements for the criminal courts including:

- section 34 - compensation orders against persons convicted of relevant offences requiring payments to SEPA, a local authority or an owner/occupier of land for costs incurred or to be incurred in preventing, reducing, remediating or mitigating the effects of any harm, loss, damage or adverse impacts to result from the offence;
- section 35 - fines for relevant offences where the courts must consider financial benefit which has accrued or is likely to accrue to the offender as a result of the offence; and
- section 36 - power to order for the offence to be publicised through a publicity order which will require the party convicted to publish the fact that they have been convicted, along with details of the offence and the sentence passed by the court.

#### Relevant Offences

The offences to which these new court powers and requirements apply need to be specified in a relevant offences Order.

It is proposed that, in principle, the offences which merit consideration for inclusion for these purposes are those where the offence carries a risk of significant environmental harm, actual environmental harm or may involve serious wrongdoing. It will be for the Courts to use these new powers, as appropriate, on a case by case basis, and to take account of financial benefit where that is relevant, such as to ensure a level playing field for compliant operators. Account has also been taken of the maximum sentence currently available on summary conviction in identifying the more serious offences. A table of offences which we propose should be included in the Relevant Offences Order in respect of those sections of the Act is set out in **Annex A**.

### Vicarious Liability

In the context of the provisions establishing vicarious liability for environmental offences by the Act, “relevant offences” need to be specified by Order for the purposes of sections 38 and 39 of the Act in particular. Section 38 establishes vicarious liability for certain offences by employees and agents and section 39 establishes vicarious liability where the activity is carried out by arrangement with another. While there was broad support from other respondees for the proposals relating to vicarious liability in the Bill at Stage 1, the written evidence from Scottish Land & Estates expressed concern at the “*undefined list of offences to which this provision can apply*”<sup>4</sup>.

---

<sup>4</sup>Evidence submitted in relation to the Regulatory Reform (Scotland) Bill by Scottish Land & Estates available at

[http://www.scottishlandandestates.co.uk/index.php?option=com\\_content&view=article&id=2548:scottish-land-a-estates-provides-evidence-on-regulatory-reform&catid=71:national&Itemid=107](http://www.scottishlandandestates.co.uk/index.php?option=com_content&view=article&id=2548:scottish-land-a-estates-provides-evidence-on-regulatory-reform&catid=71:national&Itemid=107)

Therefore we propose in principle, that the offences which merit consideration for inclusion for these purposes are those where the offence carries a risk of significant environmental harm, actual environmental harm or may involve serious wrongdoing, and which are capable of being committed by an employee, agent or contractor acting on behalf of another person. Account has also been taken of the maximum sentence currently available on summary conviction in identifying the more serious offences.

The offences which we propose should be included in the relevant offences Order in respect of the vicarious liability sections of the Act are set out in the table in **Annex A**.

**Question 6 – Court Powers:**

**Do you support the approach to relevant offences to which these new court powers and requirements apply?**

**Question 7 – Vicarious Liability:**

**Do you support the approach to relevant offences to which the vicarious liability requirements apply?**

### 3. ADMINISTRATION OF THE NEW ENFORCEMENT MEASURES

#### 3.1 Payment of fines into The Scottish Consolidated Fund

While FMPs, VMPs and NCPs will be paid to SEPA, to ensure the regulator is seen as being independent of any financial gain associated with its enforcement activities, SEPA will remit all penalties paid to it to the Scottish Consolidated Fund [administered by the Scottish Government].

#### 3.2 Enforcement Costs Recovery

The Act, under section 30, allows an Order to include provision for SEPA to require a person on whom a VMP is imposed to pay the costs incurred by SEPA in relation to the imposition of the penalty. We propose to include such a provision in the Order. These costs would include, for example, costs incurred by SEPA:

- in investigating the offence resulting in the notice of intent to serve the penalty being issued;
- in assessing representations made including any assessment of financial benefit;
- in carrying out further investigatory work after the notice of intent but before the penalty is imposed;
- in administering the imposition of the penalty; and
- any legal or other advice obtained as part of that process.

These costs will not include any arising after the imposition of the notice, such as those costs incurred by SEPA in recovering any penalty from the offender, or any costs incurred by SEPA in carrying out routine inspections not directly related to the imposition of the penalty but which may have resulted in an investigation being carried out.

In its evidence submitted to the Rural Affairs, Climate Change and Environment Committee, the Federation of Small Businesses (FSB) sought assurance that *“investigation costs remain cost-effective and proportionate in the event that such costs are to be recovered from the individual being investigated”*.<sup>5</sup>

There are various options available to SEPA to ensure this remains the case. SEPA could recover its costs on a full recovery basis. Current average costs of investigation are between £10,000 and £20,000<sup>6</sup>. This would be in line with the polluter pays principle and would allow for these costs to be fully borne by the polluter rather than the public purse. However, as pointed out by FSB in evidence, in some cases SEPA’s costs calculated on a full recovery basis may be disproportionate to the amount of the VMP.

---

<sup>5</sup> Evidence submitted in relation to the Regulatory Reform (Scotland) Bill by the Federation of Small Businesses. Available at [http://www.scottish.parliament.uk/S4\\_RuralAffairsClimateChangeandEnvironmentCommittee/General%20Documents/Federation\\_of\\_Small\\_Businesses.pdf](http://www.scottish.parliament.uk/S4_RuralAffairsClimateChangeandEnvironmentCommittee/General%20Documents/Federation_of_Small_Businesses.pdf)

<sup>6</sup> In the Financial Memorandum related to the Regulatory Reform (Scotland) Bill, attached to the Explanatory Notes associated with the Bill, it was stated that: “The costs will vary depending on the seriousness of the case, but on average they are expected to be in the region of £10,000 to £20,000 per case.

There could be a fixed scale of costs in relation to SEPA investigations, which is set at a proportionate level in respect of the VMP. This will result in some instances where the amount of costs is more than incurred by SEPA, and some cases where the amount recovered is less than the amount incurred, but will be transparent and proportionate for operators penalised for non-compliance.

SEPA is proposing to take a proportionate approach to the recovery of costs in the first instance and shall use its discretion in ensuring that the amount specified in any enforcement costs recovery notice is proportionate to the amount of the VMP to which it relates. It is intended that this approach will be monitored in the first 2 years of operation of VMPs to assess the appropriateness of SEPA moving to full cost recovery in the future.

In relation to EUs, and in line with the polluter pays principle, SEPA believes it is appropriate to anticipate the recovery of its costs of investigating the underlying offence and considering the terms of the EU. There are benefits to an operator of entering into an EU, not least the avoidance of other enforcement measures being imposed. It therefore seems appropriate that these costs are borne by the operator. As above, it could be possible for SEPA to set out up front an amount which would represent recovery of costs that SEPA would expect to be paid by the operator as part of the EU. This has the value of certainty and transparency for the operator but would not necessarily represent the costs spent by SEPA on a particular case. This should also apply to VMP undertakings in the same way.

### **3.3 Ability to Pay**

In principle, SEPA should not seek to impose a penalty which is beyond the means of the offender. However, the adoption of a single generalised methodology for calculation of a penalty has the result that ability to pay is not part of that methodology. The responsibility for demonstrating inability to pay rests with the offender. We propose that evidence should be presented along with the representations following receipt of notice of intent, along with a suitable alternative payment strategy.

### **3.4 Discounts, Period for Payment and Late Payment Penalties**

#### *Administration of penalty notices*

Before serving a FMP or VMP notice, SEPA will first issue a notice of intent in relation to the penalty to the person who is to be liable to pay the amount specified in the notice. SEPA will then impose the penalty by notice giving the person a specified period of time to pay the penalty. Discounts and late payment penalties are also proposed.

#### *Notice of Intent*

A notice of intent must be served stating the reason for the penalty proposed, the amount of the penalty and giving 28 days to make representations after which SEPA intends to issue the penalty notice (this applies to FMPs and VMPs).

#### *Discount period (28 days)*

Where the notice of intent relates to a FMP only, the Act allows for the notice of intent to offer the person the opportunity to discharge liability for the FMP by payment of a sum specified in the notice of intent. This sum must be less than or equal to the amount of the penalty. We are still considering whether it is appropriate to offer that person an

opportunity to discharge liability for the penalty by a discount. Under the Environmental Civil Sanctions (England) Order 2010 the penalty may be discounted by 50%. It is our current view that 50% is too large a discount and that a more appropriate discount is 30%.

It is possible to offer an early payment discount once the final notice has been issued. There is a question that arises as to whether this allows a person to appeal a notice and still have a discount available to them. It avoids the allegation that people will simply pay up to take advantage of the discount, thereby losing their right to make representations.

However, allowing a discount on a FMP undermines the principles on which it has been imposed, since penalty levels will be fixed with a view to changing behaviour and a reduced penalty will be less likely to affect behavioural change.

#### *Final Notice issued*

A final notice must be served stating the reason for the penalty, the amount of the penalty and right of appeal etc. This is the point at which the penalty is imposed.

#### *Payment period*

It is proposed that the penalty must be paid within 56 days of the date of receipt of the notice or 28 days of outcome of any appeal against the notice.

#### *Late Payment Penalty*

It is possible to impose a late payment penalty where a FMP is not paid within 56 days (or 28 days after appeal, if the FMP is appealed). Again under the Environmental Civil Sanctions (England) Order 2010 the amount payable under the FMP is increased by 50%. We are considering whether this is the right approach for Scotland and, if so, how significant that late payment penalty should be.

#### *Late Payment Interest*

If a VMP payment is not paid within 56 days (or 28 days after appeal, if the VMP is appealed), we are proposing late payment interest at a daily rate will be applied to any amount that remains unpaid, up to a maximum of the amount of the penalty. We propose a daily rate of 2.5% above the base lending rate, which is consistent with HMRC provision.

An alternative is to continue to allow interest to accrue without limiting the amount of interest to the amount of the penalty.

#### *Recovery of penalties*

SEPA may only recover penalties as civil debts after the penalty period has expired, so any recovery will be in respect of the increased late payment penalty amount (i.e. FMP plus late payment levy, or VMP plus penalty interest).

### **3.5 Publishing Information on Use of Enforcement Measures**

Section 32 of the Act gives the Scottish Ministers the option of requiring SEPA to publish such information as they specify “as regards cases in which [SEPA] has done what the order permits it to do”. Under the Act, the order will prescribe what information needs to be published, what that information must relate to or how and for how long that information must be published.

During the progress of the Bill through Parliament, Professor Colin Reid submitted written evidence which highlighted that:

*“Publicity for the enforcement action taken is an essential element for securing public confidence in the use of the new mechanisms.”<sup>7</sup>*

The Act provides that information may be required as regards cases where SEPA has done what the order permits it to do in relation to the imposition of a FMP or a VMP or as to the acceptance of an EU. This is likely as a minimum to require information to be provided by SEPA about when it has imposed a FMP or a VMP or accepted an EU.

We also consider that publication of the acceptance of a VMP undertaking should be treated in the same way as publication of the acceptance of an EU, and that the imposition of a NCP should be treated in the same way as the imposition of a VMP. Furthermore, we consider that where SEPA has issued a certificate of non-compliance, then that information should be made publicly available.

We propose that it is premature to publish information relating to a notice of intent because at that stage there has not been an opportunity for the person who has been served with the notice to make representations, and SEPA has not made a decision to impose the penalty concerned. It would not be fair or reasonable for SEPA to publish information as regards the penalty at that stage.

We also propose that for the same reasons it is not appropriate for SEPA to publish offers of EUs. These are voluntary undertakings and it would be a disincentive to these forms of enforcement measure if information was published before the undertaking was accepted by SEPA and at a time when the operator was prepared to discuss with SEPA remediation or restoration action.

We propose that SEPA publishes full details of the enforcement measures giving information on who the action was taken against, the breach of legislation that gave rise to the measures, what actions were undertaken and the penalty imposed. This option could include a copy of the penalty notice or undertaking in question. The advantage of this option is that it allows detailed scrutiny of SEPA’s use of the enforcement measures and reflects SEPA’s approach to transparency and accountability. This is similar to the approach adopted by the Information Commissioner and the South Australia EPA.

The information concerning enforcement measures may be published in different ways, for example through statistics rather than details of individual cases. It is consistent with the promotion of wider availability of environmental information for this to be published on SEPA’s website. Other options include SEPA publishing the information as part of its annual reporting or in a separate single purpose publication focusing on the new enforcement measures.

---

<sup>7</sup> Evidence submitted in relation to the Regulatory Reform (Scotland) Bill by Professor Colin T. Reid, University of Dundee, May 2013. Available at [http://www.scottish.parliament.uk/S4\\_EconomyEnergyandTourismCommittee/Bills/RRB\\_-\\_Professor\\_Colin\\_Reid.pdf](http://www.scottish.parliament.uk/S4_EconomyEnergyandTourismCommittee/Bills/RRB_-_Professor_Colin_Reid.pdf)

It is proposed that the information will be published in the first instance on SEPA's website. SEPA will also publish a summary of its use of the enforcement measures annually. This will include details of whether offers for EUs have been made and not accepted and where notices of intent have been served but not followed up with a final notice for whatever reason.

**Question 8 – Administration:**

**Do you have any further comments on the proposed administration of the new enforcement measures?**

## 4. SAFEGUARDS

### 4.1 General

The Lord Advocate's guidelines, issued under section 31 (1) and (2) of the Act, will provide an important safeguard and the next section of this consultation document outlines the approach to governance and staff training that SEPA plans to undertake. When using the new enforcement measures, SEPA must adhere to these guidelines. The Scottish Government, COPFS and SEPA will regularly review the new environmental enforcement framework to assess how well it is working.

### 4.2 Appeals

Appeals against decisions to grant or refuse permits, conditions or enforcement made by SEPA are currently heard by the Scottish Ministers and normally adjudicated on by Reporters in the Directorate for Planning and Environmental Appeals. There are between five to ten appeals per year in relation to regulatory decisions made by SEPA.

Through the previous [consultation](#) and [workshop](#), stakeholders raised concerns around the need for a consistent, transparent, proportionate and independent appeal route for the people affected by the new enforcement measures.

65% of respondees to the previous consultation wanted additional safeguards, with the appeals route being the key concern. In evidence given to the Scottish Parliament, it was indicated that "it is not clear enough what the appeals process will be. [The Committee] have heard evidence from the Law Society of Scotland and Colin Reid about that."<sup>8</sup>

The Regulatory Reform (Scotland) Act 2014, like other environmental legislation, makes provision for a route of appeal. With the wider tribunals landscape in Scotland still taking shape, we have previously indicated that the precise appeal route for the new enforcement measures will be set in the Order. These will provide for appeals on grounds that:

- the decision was based on an error of fact;
- the decision was wrong in law;
- in the case of a VMP, that the amount of the penalty was unreasonable; or
- that the decision was unreasonable for any other reason.

The broad nature of the grounds means that these appeals may require expert evidence from SEPA and the appellant. The effect of an appeal will be dealt with in the Order.

In considering the above, the Scottish Government's preferred route for hearing such appeals is through the Scottish Land Court (SLC), a specialist court which could apply its

---

<sup>8</sup> Evidence given by Dr Sarah Hendry, University of Dundee to the Rural Affairs, Climate Change and Environment Committee on 29 May 2013, Col 2289 Available at:

<http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=8301&mode=pdf>

expertise to hearing these types of cases and provide access to justice for appellants. The SLC's primary jurisdiction is in crofting and agricultural holdings disputes, but it also deals with appeals from the Scottish Ministers in relation to rural payments (subsidies from the European Union) and some appeals under the nature conservation legislation and in relation to nitrate vulnerable zones. It is based in Edinburgh but holds hearings throughout Scotland. If the SLC errs on a point of law then there is a further appeal to the Court of Session.

Its Chairman has the status of a judge of the Court of Session, and its Deputy Chairman is a sheriff, so it has the necessary expertise to handle disputes involving questions of law. Its other members are experts in land use and valuation, and the Court is used to dealing with cases involving the assessment of expert evidence in relation to such matters.

We intend to utilise established procedures in the SLC. With typical cases taking 6 months to resolve and with costs of £100 to apply for the appeal, we believe this route would address the concerns raised through the previous consultation.

**Question 9 – Safeguards:**

**Do you agree that the proposed safeguards for the new enforcement measures address the concerns raised through the previous consultation?**

**Question 10 – Further comments:**

**Do you have any further comments on how these proposals will impact on businesses, communities and the environment?**

## **5. NEXT STEPS**

### **5.1 Getting Ready**

SEPA recognises the responsibility that comes with these new enforcement powers and is committed to ensuring that they are implemented at an operational level in a proportionate manner that is consistent with the policy intent. SEPA has made commitments to stakeholders and during evidence given to the Scottish Parliament that robust governance will be put into place and that staff will be trained and supported in working with the new measures. SEPA has set aside staff resource to prepare for the implementation and the Scottish Government will ensure that SEPA has sufficient resource to implement these new powers.

In its evidence given to the Rural Affairs, Climate Change and Environment Committee, SEPA has committed to implementing the new enforcement measures on a national basis, with robust internal governance arrangements. This will ensure that there is consistency in the use of the new enforcement measures and will also enable SEPA to monitor the way in which activities are carried out across Scotland in a much more rigorous way than is possible at present.

SEPA will implement governance arrangements to ensure that decisions on enforcement measures are made consistently and at an appropriate level in the organisation. The more significant decisions will have oversight from the highest management levels in SEPA, while less significant decisions will be subject to robust governance arrangements to drive consistency and proportionality and to reassure operators.

SEPA has committed resource to preparing for the implementation and this will include the development of new internal guidance, systems for monitoring use of enforcement measures and arrangements for staff training. SEPA will train authorised officers in the use and practical application of the new enforcement powers.

SEPA is planning a phased implementation to allow close monitoring and early learning around the use of the new measures, which will in turn be fed into the review of how the new measures are working in practice.

The Scottish Government, with input from SEPA and other partners, will also report on and measure the success of the new enforcement measures as part of the annual report laid before the Scottish Parliament on the operation of Part 3 of the Regulatory Reform (Scotland) Act 2014.

## **ANNEX A – Relevant Offences**

We propose that the 'relevant offences' which should be set out by Order to apply to the new court powers and requirements, vicarious liability, FMPs, VMPs and EUs are those listed in the table below.

Offence	Relevant Offences for purposes of section 35: Duty on courts to have regard to financial benefit when determining the amount of the fine (and related section 108 powers to investigate financial benefit)	Relevant Offences for purposes of section 34 and 36: Additional court powers	Relevant Offences: Vicarious Liability	Schedule 3: Fixed Monetary Penalties	Amount of Fixed Penalty L= Low penalty level M = Medium penalty level M/H = High penalty level or, if no High penalty level available, Medium penalty level	Relevant Offences: Variable Monetary Penalties	Relevant offences: Enforcement Undertakings
<b>Control of Pollution Act 1974</b>							
Section 30Z(3) (failure to give notice of proposed abandonment of a mine to SEPA timeously)				✓	L	✓	✓
<b>Wildlife and Countryside Act 1981</b>							
Section 14K(1) (failure to carry out operation in accordance with species control order)	✓			✓	M	✓	
Section 14K(2) (obstruction of any person carrying out operation in accordance with species control order)	✓			✓	M	✓	
Section 14K(3) (causing or permitting excluded operation)	✓			✓	M	✓	
<b>Sludge (Use in Agriculture) Regulations 1989 (SI 1989/1263)</b>							
Reg 9 (failure to comply with requirements re sludge used on agricultural land)	✓	✓	✓	✓	M	✓	✓
<b>Control of Pollution (Amendment) Act 1989</b>							
Section 1(1) (transport of controlled waste without being registered carrier)	✓		✓	✓	L	✓	✓

Section 5(4)(a) (intentionally obstructs authorised officer or constable in exercise of powers)				✓	L		
Section 5(4)(b) (fails w/o reasonable excuse to comply with requirements imposed in exercise of enforcement powers)	✓			✓	L		
Section 6(9)(a) (intentionally obstructs authorised officer or constable in exercise of powers under warrant to seize vehicles)				✓	L	✓	
Section 7(3)(a) (failure w/o reasonable excuse to provide information)	✓			✓	L	✓	✓
Section 7(3)(b) (providing false or misleading information)	✓			✓	M/H	✓	✓
<b>Environmental Protection Act 1990</b>							
Section 33(6) (deposit of controlled waste on land except under waste management licence – s33(1)(a))	✓	✓	✓	✓	M	✓	✓
Section 33(6) (keeping or managing controlled waste in manner likely to cause pollution or harm to health –s33(1)(c))	✓	✓	✓	✓	M	✓	✓
Section 33(6) (keep/treat/dispose of controlled waste on land or with mobile plant not in accordance with waste management licence – s33(1)(b))	✓	✓	✓	✓	M	✓	✓
Section 34(6) (failure w/o reasonable excuse to comply with duty of care requirements)	✓		✓	✓	L	✓	✓
Section 35(7B)(a) (false entry in records kept under condition of licence)	✓			✓	M/H	✓	✓
Section 35(7B)(b) (forge licence/use or make document like licence likely to deceive)	✓			✓	M/H	✓	✓
Section 44(1)(a) (false or misleading statement in compliance with requirement to provide information)	✓			✓	M/H		✓
Section 44(1)(b) (false or misleading statement to obtain licence etc)	✓			✓	M/H	✓	✓
Section 44(2) (false entry in records kept)	✓			✓	M/H	✓	✓

Section 47(commercial and industrial waste: failure to comply with requirements re placing of receptacles)				✓	L		
Section 57(failure to comply with Ministerial direction re acceptance &c of waste)				✓	L		
Section 59(5) (failure w/o reasonable excuse to comply with s59 notice re waste removal)	✓	✓		✓	M	✓	✓
Section 63(2) (depositing waste (not controlled waste but would be special waste) without statutory consent)	✓	✓	✓	✓	M	✓	✓
Section 71(3) (failure w/o reasonable excuse to comply with information notice)	✓			✓	L	✓	✓
Section 78M(1) (failure w/o reasonable excuse to comply with contaminated land remediation notice)	✓	✓		✓	M	✓	✓
Section 78M(1) (failure w/o reasonable excuse to comply with contaminated land remediation notice in respect of radioactive contaminated land)(as modified under the Radioactive Contaminated Land (Scotland) Regulations 2007)	✓	✓		✓	M	✓	✓
<b>Radioactive Substances Act 1993</b>							
Section 32(1)(a) (keeping or using radioactive material without registration or exempt)	✓	✓		✓	M	✓	
Section 32(1)(a) (keeping, using, lending or letting mobile radioactive apparatus without registration or exempt)	✓	✓		✓	M	✓	
Section 32(1)(a) (disposing of radioactive waste other than in accordance with authorisation)	✓	✓		✓	M	✓	
Section 32(1)(a) (disposing of radioactive waste from mobile radioactive apparatus other than in accordance with authorisation)	✓	✓		✓	M	✓	
Section 32(1)(a) (disposing of radioactive waste other than in accordance with authorisation when received for purpose of disposal)	✓	✓		✓	M	✓	

Section 32(1)(a) (accumulating radioactive waste with a view to its disposal other than in accordance with an authorisation)	✓	✓		✓	M	✓	
Section 32(1)(b) (breach of registration or exemption regarding radioactive material or mobile radioactive apparatus)	✓	✓		✓	M	✓	
Section 32(1)(c) (breach of authorisation re disposal or accumulation of radioactive waste)	✓	✓		✓	M	✓	
Section 32(1)(d) (breach of enforcement notice or prohibition notice)	✓	✓		✓	M	✓	
Section 33(1) (failure to display copies of certificates of registration or authorisation)				✓	L	✓	
Section 33(2) (taking down or defacing document required to be displayed, w/o reasonable excuse)				✓	L		
Section 33(3) (failure to comply with notice re site or disposal records)	✓			✓	L	✓	
Section 34A(1)(a) (false or misleading statement to obtain reg or auth etc)	✓			✓	M/H	✓	
Section 34A(1)(b) (false or misleading statement in compliance with requirement to provide information)	✓			✓	M/H	✓	
Section 34A(2)(a) (false entry in records kept under condition of reg or auth)	✓			✓	M/H	✓	
Section 34A(2)(b) (false entry in records kept to qualify for exemption)	✓			✓	M/H	✓	
				✓			
<b>Environment Act 1995</b>				✓			
Section 27(3)(a) (fail to comply with information notice re land)	✓			✓	L	✓	✓
Section 27(3)(b) (false statement re information notice re land)	✓			✓	M/H	✓	✓
Section 110(1) (obstructing etc an authorised person)				✓	L	✓	
Section 110(2)(a) (fail to comply with requirement of investigatory powers)	✓			✓	L	✓	
Section 110(2)(b) (fail to provide facilities or assistance or allow inspection)				✓	L	✓	
Section 110(2)(c) (preventing answer of s108 questions)				✓	L	✓	

Section 110(3) (pretending to be authorised person)				✓	L	✓	
				✓			
<b>Special Waste Regulations 1996 (SI 1996/972)</b>							
Reg 18(1) (failure to comply with any obligation or requirement under the regs except for regulation 17 and 17A)	✓	✓	✓	✓	L	✓	✓
Reg 18(1) (failure to comply with any obligation or requirement under regulation 17 or 17A)	✓	✓	✓	✓	M	✓	✓
Reg 18(3) (false or misleading statement in compliance with requirement to provide information)	✓			✓	M/H	✓	✓
Reg 18(4) (false entry in records or register kept)	✓			✓	M/H	✓	✓
<b>Control of Major Accident Hazards Regulations 1999/743</b>							
Section 33(1)(c) of the Health and Safety at Work etc. Act 1974 (to contravene any health and safety regulations or any requirement or prohibition imposed in relation to COMAH requirements)	✓	✓	✓				
Section 33(1)(e) (contravene requirement imposed by an inspector under section 20)	✓						
Section 33(1)(g) (contravene any requirement or prohibition imposed by an improvement notice or a prohibition notice)	✓	✓					
Section 33(1)(i) (fail to comply with information notice)	✓						
Section 33(1)(k) (false or misleading statement in compliance with requirement to provide information or to obtain document under statute)	✓						
Section 33(1)(l) (false entry in register etc)	✓						
Section 33(1)(m) (forge or use issued document etc with intent to deceive)	✓						

<b>Environmental Protection (Disposal of Polychlorinated Biphenyls and other Dangerous Substances) (Scotland) Regulations 2000 (SSI 2000/95)</b>							
Reg 13(1) (holding contaminated equipment without registration)	✓	✓		✓	M	✓	✓
Reg 13(2)(a) (holding PCBs)	✓	✓		✓	M	✓	✓
Reg 13(2)(b) (holder of PCBs who fails to dispose of them as required)	✓	✓		✓	M	✓	✓
Reg 13(2)(c) (holder of equipment who fails to decontaminate or dispose of it as required)	✓	✓		✓	M	✓	✓
Reg 13(3) (holder of equipment who fails to comply with requirements re labelling)	✓			✓	L	✓	✓
Reg 13(4)(a) (false or misleading information supplied pursuant to reg 6)	✓			✓	M/H	✓	✓
Reg 13(4)(b) (failure w/o reasonable excuse to provide information under reg 10)	✓			✓	L	✓	✓
Reg 13(4)(c) (false or misleading information provided under reg 10)	✓			✓	M/H	✓	✓
<b>Waste and Emissions Trading Act 2003</b>							
Section 13(2) (failure to maintain prescribed records, gather prescribed information, or make prescribed returns under Landfill Allowances Scheme (Scotland) Regulations 2005)	✓			✓	L	✓	✓
Section 13(4)(a) (intentionally to obstruct person in the exercise of investigatory powers)				✓	L	✓	
Section 13(4)(b) (fail to comply with requirement imposed under investigatory powers)	✓			✓	L	✓	
<b>Water Environment and Water Services (Scotland) Act 2003</b>							
Section 18(9)(a) (refusal or failure w/o reasonable excuse to provide information required by SEPA under s18 notice)	✓			✓	L	✓	✓

Section 18(9)(b) (altering, suppressing, or destroying document required by SEPA under s18 notice)	✓			✓	M/H	✓	✓
<b>Landfill (Scotland) Regulations 2003 (SSI 2003/235)</b>							
Reg 19(1)(a) (breach of prohibition on acceptance of certain wastes and waste acceptance criteria)	✓	✓		✓	M	✓	✓
Reg 19(1)(b) (breach of waste acceptance requirements)	✓	✓		✓	M	✓	✓
Reg 19(1)(c) (acceptance of hazardous waste at a landfill not classified as a landfill for hazardous waste)	✓	✓		✓	M	✓	✓
<b>The Control of Pollution (Silage, Slurry and Agricultural Fuel Oil) (Scotland) Regulations 2003 (SSI 2003/531)</b>							
Reg 11 (breach of reg 2(1) requirements re storage of silage)	✓	✓	✓	✓	M	✓	✓
Reg 11 (breach of reg 2(2) prohibition on unwrapping silage bales or opening and emptying silage bags less than 10m from waters)	✓	✓	✓	✓	M	✓	✓
Reg 11 (breach of reg 3(1) requirement to store slurry in a slurry storage system which meets requirements)	✓	✓	✓	✓	M	✓	✓
Reg 11 (breach of reg 6 requirements re bulk bagged silage storage)	✓	✓	✓	✓	M	✓	✓
Reg 11 (breach of reg 10 requirement re notification of construction, enlargement or reconstruction of silo or slurry storage system)	✓	✓		✓	L	✓	✓
<b>End-of-life Vehicles (Producer Responsibility) Regulations 2005 (SI2005/263)</b>							
Reg 23(1)(a) (failure to register as producer and declare responsibility for vehicles on market, to notify on cessation or change in circumstances relating to registration)	✓			✓	L	✓	✓

Reg 23(1)(b) (failure of producer to establish system for collection of ELVs, apply for approval of system, or notify significant changes in system details)	✓			✓	L	✓	✓
Reg 23(1)(c) (failure of producer to ensure system is accessible to person disposing of applicable ELV)	✓			✓	L	✓	✓
Reg 23(1)(d) (failure to ensure that ATF part of system has sufficient capacity to treat vehicles)	✓			✓	L	✓	✓
Reg 23(2) (failure to attain reuse and recycling targets for ELVs treated at ATFs in system, or to notify Sec of State of details of annual rates)	✓			✓	L	✓	✓
Reg 23(3)(a) (failure to submit compliance certificate for targets attained to Sec of State per reg 19)	✓			✓	L	✓	✓
Reg 23(3)(b) (knowingly or recklessly furnishing a false or misleading reg 19 certificate )	✓			✓	M/H	✓	
Reg 23(3)(c) (failure w/o reasonable excuse to furnish information required by Sec of State under reg 19(3))	✓			✓	L	✓	
Reg 23(3)(d) (knowingly or recklessly furnishing false or misleading information required by Sec of State)	✓			✓	M/H	✓	
Reg 23(4) (intentionally delaying or obstructing authorised person)				✓	L	✓	
<b>Transfrontier Shipment of Waste Regulations 2007 (SI 2007/1711)</b>							
Reg 17 (breach of Art 49(1) requirement to manage shipments in environmentally sound manner and without endangering human health)	✓	✓	✓	✓	M	✓	✓
Reg 18 (transport of waste in breach of notification/movement or the Annex VII document)	✓	✓	✓	✓	M	✓	✓
Reg 19 (breach of shipment of waste requirements re Art 3(1) or 3(5) waste)	✓	✓	✓	✓	M	✓	✓
Reg 20 (breach of shipment of waste requirements re Art 3(2) or 4 waste)	✓	✓	✓	✓	M	✓	✓

Reg 21 (transport of waste destined for disposal in third country in breach of Art 34)	✓	✓	✓	✓	M	✓	✓
Reg 22 (transport of waste destined for disposal in EFTA country in breach of Art 35(1) or 35(5))	✓	✓	✓	✓	M	✓	✓
Reg 23 (transport of Art 36(1) waste in breach of requirements)	✓	✓	✓	✓	M	✓	✓
Reg 23A (transport of waste listed in Annex 111 or 111A of Community Regulation and export of which is not prohibited under Art 36)	✓	✓	✓	✓	M	✓	✓
Reg 23B (transport of Art 37(5) waste in breach of requirements)	✓	✓	✓	✓	M	✓	✓
Reg 24 (transport of Art 38(1) waste in breach of requirements)	✓	✓	✓	✓	M	✓	✓
Reg 25 (transport of waste to Antarctic, transport of waste destined for disposal in an overseas country or territory in breach of Article 40(1), 40(2) and 40(3))	✓	✓	✓	✓	M	✓	✓
Reg 26 (transport of waste destined for disposal from a third country in breach of Art 41(1))	✓	✓	✓	✓	M	✓	✓
Reg 27 (transport of waste destined for disposal from a Basel Convention country in breach of Art 42(1))	✓	✓	✓	✓	M	✓	✓
Reg 28 (transport of waste destined for recovery from a third country in breach of Art 43(1))	✓	✓	✓	✓	M	✓	✓
Reg 29 (transport of waste destined for recovery from a OECD Decision country in breach of Art 44(1))	✓	✓	✓	✓	M	✓	✓
Reg 30 (transport of waste destined for recovery from a non-OECD decision country in breach of Art 45)	✓	✓	✓	✓	M	✓	✓
Reg 31 (transport of waste from overseas country in breach of Art 46(1))	✓	✓	✓	✓	M	✓	✓
Reg 32 (transport of waste destined for disposal from third country, transported through UK, in breach of Art 47)	✓	✓	✓	✓	M	✓	✓
Reg 33 (transport of waste destined for recovery from non-OECD decision country, transported through UK, in breach of Art 48(1))	✓	✓	✓	✓	M	✓	✓

Reg 34 (transport of waste destined for recovery from OECD decision country, transported through UK, in breach of Art 48(2))	✓	✓	✓	✓	M	✓	✓
Reg 35 (transport of waste destined for recovery from non-OECD decision country destined for OECD decision country, or from OECD decision country destined for non-OECD decision country, transported through UK, in breach of Art 48(3))	✓	✓	✓	✓	M	✓	✓
Reg 36 (failure to notify competent authority of illegal shipment of waste)	✓	✓	✓	✓	M	✓	✓
Reg 37 (breach of requirements on operator of facility that receives notifiable waste)	✓	✓	✓	✓	M	✓	✓
Reg 38 (failure to confirm/certify to competent authority by operator of facility who carries out interim recovery or disposal activities and providing confirmation and transmitting certificate to the notifier)	✓	✓	✓	✓	M	✓	✓
Reg 39 (failure by operator of recovery facility to sign Annex VII doc or keep information in accordance with Art 20(2))	✓	✓	✓	✓	M	✓	✓
Reg 40 (failure by consignee to keep documents sent to or by competent authority)	✓	✓	✓	✓	M	✓	✓
Reg 41 (failure by consignee to sign Annex VII doc, provide copy contract per Art 18(2) or keep information in accordance with Art 20(2))	✓	✓	✓	✓	M	✓	✓
Reg 42 (failure by operator of laboratory to sign Annex VII doc or keep Annex VII doc for 3 yrs)	✓	✓	✓	✓	M	✓	✓
Reg 43 (failure by notifier to keep a copy of the movement doc or any doc sent to or by competent authorities re notified shipment)	✓	✓	✓	✓	M	✓	✓
Reg 44 (failure by person who arranges shipment of waste to provide copy of Art 18(2) contract on request or to keep information given under Art 18(1))	✓	✓	✓	✓	M	✓	✓
Reg 45 (failure to ensure signed copy of Annex VII document received by competent authority)	✓	✓	✓	✓	M	✓	✓

Reg 52 (failure to comply with any notice served under Regs)	✓	✓		✓	M	✓	✓
Reg 53(a) (obstructing person acting in execution of Regs)				✓	L	✓	
Reg 53(b) (false or misleading information given to person acting in execution of Regs)				✓	M/H		✓
Reg 53(c) (failure to give assistance or information or produce any record as required by person acting in execution of Regs)				✓	L		✓
Reg 54 (false or misleading information or otherwise endeavouring to obtain consent to shipment or approval of a financial guarantee or equiv insurance by deception)	✓	✓	✓	✓	M/H	✓	✓
<b>Sulphur Content of Liquid Fuels (Scotland) Regulations 2007 (SSI 2007/27)</b>							
Reg 7(1) breach of reg 4(1) (use of heavy fuel oil with non-compliant sulphur content – does not apply where PPC permit condition includes condition) or 5 (use of gas oil with non-compliant sulphur content)				✓	L		✓
<b>Producer Responsibility Obligations (Packaging Waste) Regulations 2007 (SI 2007/871)</b>							
Reg 40(1)(a) (failure to register as a producer)	✓	✓		✓	M	✓	✓
Reg 40(1)(b) (failure to recover and recycle packaging waste as calculated)	✓	✓		✓	M	✓	✓
Reg 40(1)(c) (failure to furnish a certificate of compliance)	✓	✓		✓	L	✓	✓
Reg 40(3) (failure to comply with recovery and recycling obligations of scheme operator)	✓	✓		✓	M	✓	✓
Reg 40(4) (breach of requirement re issuing PRNs or in breach of conditions re re-issuing of PRNs)	✓	✓		✓	L	✓	✓

Reg 40(5) (knowingly or recklessly furnishing false or misleading information to the regulating agency or a scheme operator)	✓	✓		✓	M/H	✓	✓
Reg 40(6) (failure w/o reasonable excuse to comply with information notice)	✓	✓		✓	L	✓	✓
Reg 40(7) (intentionally delaying or obstructing an authorised person)				✓	L	✓	
Reg 40(8) (failure [by a holding company] to comply with group recovery and recycling obligations or failure to provide certificate of compliance)	✓	✓		✓	L	✓	✓
<b>Transfrontier Shipment of Radioactive Waste and Spent Fuel Regulations 2008 (SI 2008/3087)</b>							
Reg 4(1) (shipment of radioactive waste or spent fuel out of UK or into UK from a third country, without an authorisation)	✓	✓	✓	✓	M	✓	✓
Reg 4(2) (shipment of radioactive waste or spent fuel into UK from another Member State without an authorisation from country of origin)	✓	✓	✓	✓	M	✓	✓
Reg 5(1) (shipment of radioactive waste or spent fuel into UK from a third country by way of transit to another Member State without an authorisation from country of destination)	✓	✓	✓	✓	M	✓	✓
Reg 5(2) (shipment of radioactive waste or spent fuel into UK from a third country for transit to another third country without an authorisation from the appropriate competent authority)	✓	✓	✓	✓	M	✓	✓
Reg 8(2) (failure to notify the competent authority of receipt of radioactive waste or spent fuel from outside UK within 15 days)	✓	✓	✓	✓	M	✓	✓
Reg 9(4) (failure to notify the competent authority of arrival of consignment of radioactive waste or spent fuel in the UK within 15 days)	✓	✓	✓	✓	M	✓	✓
Reg 10(2) (failure to ensure that consignment accompanied with standard EURATOM documentation)	✓	✓	✓	✓	M	✓	✓

Reg 11(2) (false or misleading statement in an application for authorisation)	✓	✓	✓	✓	M/H	✓	✓
Reg 14(3) (failure to comply with instruction from competent authority to return consignment to country of origin, take corrective safety measures or dispose of it)	✓	✓	✓	✓	M	✓	
Reg 14(4) (for radioactive waste or spent fuel sent out of UK, failure to comply with notice requiring shipment to be taken back)	✓	✓	✓	✓	M	✓	✓
Reg 15(2) (failure to comply with Schedule 2 information notice)	✓			✓	L	✓	✓
Reg 15(2) (failure to comply with Schedule 2 enforcement notices or prohibition notices)	✓	✓		✓	M	✓	✓
<b>REACH Enforcement Regulations 2008 (SI 2008/2852)</b>							
Reg 11(1) (contravene a listed REACH provision)	✓	✓		✓	M	✓	✓
Reg 11(2) (contravene Article 67 of REACH)	✓	✓		✓	M	✓	✓
Reg 13(1)(a) (obstructing an authorised person)	✓			✓	L	✓	
Reg 13(1)(b) (false or misleading statement)	✓			✓	M/H		✓
Reg 13(2)(a) (fail to comply with requirement under powers of enforcement)	✓			✓	L	✓	✓
Reg 13(2)(b) (fail to provide facilities or assistance or allow inspection)				✓	L	✓	
Reg 13(2)(c) (preventing answer of questions under powers of enforcement)				✓	L	✓	
Reg 13(4) (pretending to be authorised person)				✓	L	✓	
				✓			
				✓			
<b>Environmental Liability (Scotland) Regulations 2009 (SSI 2009/266)</b>							
Reg 10(6) (failure w/o reasonable excuse to comply with requirements re taking necessary preventive measures, notice of threat, information or additional information relating to an imminent threat of environmental damage)	✓	✓		✓	M	✓	✓

Reg 11(7) (failure w/o reasonable excuse to comply with requirements re identifying potential remedial measures)	✓			✓	M	✓	✓
Reg 12(5) (failure w/o reasonable excuse to comply with requirements re notifying of environmental damage, take steps to limit or prevent further damage, take remedial measures, or provide information about the damage)	✓	✓		✓	M	✓	✓
Reg 18(4) (failure w/o reasonable excuse to provide information required to determine responsibility for costs of environmental damage)	✓			✓	L	✓	✓
<b>Fluorinated Greenhouse Gases Regulations 2009 (SI 2009/261)</b>							
Reg 51(1)(a) (fail to comply with information notice)	✓			✓	L	✓	✓
Reg 51(1)(b) (fail to comply with enforcement or prohibition notice)	✓			✓	M	✓	✓
Reg 51(1)(c) (fail to comply with direction/requirement of authorised person)	✓			✓	L	✓	✓
Reg 51(1)(d) (preventing a person from appearing before or answering questions for authorised person)				✓	L	✓	✓
Reg 51(1)(e) (obstruction of authorised person)				✓	L	✓	
Reg 51(1)(f) (provide false or misleading information)	✓			✓	M/H	✓	✓
Reg 51(1)(g) (pretend to be an authorised person)				✓	L	✓	
Reg 51(2) (failing to remove etc imported products containing fluorinated greenhouse gases when required by Sec of State or Ministers)	✓			✓	M	✓	✓
Reg 51(3) (provide false or misleading Article 6.4 information)	✓			✓	M/H	✓	✓
<b>Waste Batteries and Accumulators Regulations 2009 (SI 2009/890)</b>							
Reg 89(1)(a) (producer fails to comply with requirements re declaration of battery)	✓			✓	L	✓	✓

producer registration number)							
Reg 89(1)(a) (producer fails to comply with requirements re their obligation re financing net costs from collection, treatment and recycling, membership of battery compliance scheme, information provided to operators of battery compliance scheme, record keeping, reporting, joining another scheme on withdrawal of approval, obligations after withdrawal of scheme approval, declaration of compliance by producer, duty of small producer to register, and notification of changes to registration	✓			✓	M	✓	✓
Reg 89(1)(b) (false and misleading information provided by producer in compliance with Regs)	✓			✓	M/H	✓	✓
Reg 89(1)(c) (false and misleading declaration of compliance by producer)	✓			✓	M/H	✓	✓
Reg 89(1)(d) (false and misleading report provided by producer in compliance with Regs)	✓			✓	M/H	✓	✓
Reg 89(2)(a) (scheme operator fails to comply with requirements re financing net costs of collection, treatment and recycling, membership of battery compliance scheme, treatment and recycling, record keeping, reporting, declaration of compliance by battery compliance scheme, registration of scheme members, notification of changes to registrations, duty to arrange for and ensure collection from distributors, duty to accept waste portable batteries without charge)	✓			✓	M	✓	✓
Reg 89(2)(b) (false and misleading report provided by scheme operator in compliance with Regs)	✓			✓	M/H	✓	✓
Reg 89(2)(c) (false and misleading declaration of compliance by scheme operator)	✓			✓	M/H	✓	✓

Reg 89(4)(a) (failure of approved battery treatment operator to comply with requirements re conditions of approval, reporting or record keeping)	✓			✓	M	✓	✓
Reg 89(4)(b) (false or misleading report provided by approved battery treatment operator in compliance with Regs)	✓			✓	M/H	✓	✓
Reg 89(6)(a) (disposal of waste automotive and industrial batteries in landfill or by incineration)	✓			✓	M	✓	✓
Reg 89(6)(b) (issue of evidence note by non-approved battery treatment operator or exporter or treatment/recycling of waste industrial or automotive batteries by non-approved operator or export of waste industrial or automotive batteries non-approved exporter)	✓			✓	L	✓	✓
Reg 89(6)(c) (disclosure of information disclosed by agency)	✓			✓	L	✓	✓
Reg 89(6)(d) (failure w/o reasonable cause to comply with enforcement notice)	✓			✓	M	✓	✓
Reg 89(6)(e) (failure w/o reasonable cause to comply with requirement imposed by enforcement officer)	✓			✓	L	✓	✓
Reg 89(6)(f) (obstruction of enforcement officer)				✓	L	✓	
Reg 89(6)(g) (failure to provide assistance or information as required by enforcement officer)				✓	L	✓	
Reg 89(6)(h) (failure w/o reasonable cause to produce record or information when required by enforcement officer)	✓			✓	L	✓	✓
Reg 89(6)(i) (false or misleading information provided to enforcement officer)	✓			✓	M/H	✓	✓
<b>Flood Risk Management (Scotland) Act 2009</b>							
Section 47(1)(a) (refusal or failure w/o reasonable excuse to provide information required by SEPA under s43(5) notice)	✓			✓	L	✓	✓

Section 47(1)(b) (altering, suppressing, or destroying document required by SEPA under s43(5) notice)	✓			✓	M/H	✓	✓
Section 80(5) (prevents or obstructs authorised person from exercising powers under warrant)				✓	L	✓	
<b>Waste Information (Scotland) Regulations 2010 (SSI 2010/435)</b>							
Reg 6(1)(a) (failure to provide information to SEPA following waste information request within 28 days)	✓			✓	L	✓	✓
Reg 6(1)(b) (false or misleading statement provided to SEPA in response to waste information request)	✓			✓	M/H	✓	✓
<b>CRC Energy Efficiency Scheme Order 2010 (SI 2010/768)</b>							
Article 106(1)(b) (make false or misleading statement in compliance with Order)	✓			✓	L	✓	✓
Article 106(2)(a) (fail w/o reasonable excuse to comply with enforcement notice)	✓			✓	M	✓	✓
Article 106(2)(b) (fail w/o reasonable excuse to provide facilities or assistance or permit inspection, or preventing a person from appearing before or answering questions for authorised person)				✓	L	✓	
Article 106(4) (pretend to be an authorised person)				✓	L	✓	
Article 106(5) (refuse to allow access to premises)	✓			✓	L	✓	✓
<b>Environmental Protection (Controls on Ozone-Depleting Substances) Regulations 2011 (SI 2011/1543)</b>							
Reg 4(1) (breach of the EU Regulation set out in Schedule 2)	✓			✓	M	✓	✓
Reg 4(2)(a) (failure to comply with an enforcement notice)	✓			✓	M	✓	✓
Reg 4(2)(b) (failure to comply with reg 11 notice)	✓			✓	M	✓	✓

Reg 4(3)(a) (intentionally to obstruct person acting in the execution or enforcement of the EU Regulation)				✓	L	✓	
Reg 4(3)(b) (fail w/o reasonable excuse to give to any such person any assistance or information)				✓	L	✓	
Reg 4(3)(c) (false or misleading information)	✓			✓	M/H	✓	✓
Reg 4(3)(d) (fail to produce a document or record to any such person when required to do so)	✓			✓	L	✓	✓
<b>Ozone-Depleting Substances (Qualifications) Regulations 2009 (SI 2009/216)</b>							
Reg 9(a) (preventing a person from appearing before or answering questions for authorised person)				✓	L	✓	
Reg 9(b) (obstruction of authorised person)				✓	L	✓	
Reg 9(c) (false or misleading information)	✓			✓	M/H	✓	✓
Reg 9(d) (fail to produce record when required to do so)	✓			✓	L	✓	✓
				✓			
<b>Mercury Export and Data (Enforcement) Regulations 2010 (SI 2010/265)</b>							
Reg 5 (to contravene or fail to comply with specific requirements of EU Regulation on banning of metallic mercury and mercury compounds and mixtures etc including data reporting obligations)	✓			✓	M	✓	✓
Reg 6(a) (obstruction of authorised person)				✓	L	✓	
Reg 6(b) (fail w/o reasonable excuse to give to any such person any assistance or information)				✓	L	✓	
Reg 6(c) (false or misleading information)	✓			✓	M/H	✓	✓
Reg 6(d) (fail to produce record when required to do so)	✓			✓	L	✓	✓
<b>Waste Management Licensing (Scotland) Regulations 2011 (SSI 2011/228)</b>							
Reg 19(1) (carrying on exempt activity without being registered)	✓			✓	M	✓	✓

Reg 28(6) (carrying on exempt activity in breach of registration obligations)	✓			✓	M	✓	✓
Reg 30(1) (arrange for recovery or disposal of controlled waste on behalf of another person unless registered as broker or dealer)	✓			✓	M	✓	✓
Schedule 4, para 12(1) (collection or transport of waste unless registered as carrier)	✓			✓	M	✓	✓
Schedule 4, para 14(4) (failure to keep records eg special waste)	✓			✓	M/H	✓	✓
Schedule 4, para 14(6) (making false or misleading statements in records kept or making a false entry in records)	✓			✓	M/H	✓	✓
Schedule 4, para 14 (7) (making a false entry in records)	✓			✓	M/H	✓	✓
<b>Water Environment (Controlled Activities)(Scotland) Regulations 2011 (SSI 2011/209)</b>							
Reg 44(1)(a) (breach of prohibition on carrying on controlled activity without authorisation or in breach of conditions)	✓	✓	✓	✓	M	✓	✓
Reg 44(1)(b) (breach of general binding rule)	✓	✓	✓	✓	M	✓	✓
Reg 44(1)(c) (breach of registration)	✓	✓	✓	✓	M	✓	✓
Reg 44(1)(d) (breach of licence)	✓	✓	✓	✓	M	✓	✓
Reg 44(1)(e) (obstructing an authorised person exercising powers)				✓	L	✓	
Reg 44(1)(f) (fail to comply with requirement imposed by authorised person exercising powers)	✓			✓	L	✓	
Reg 44(1)(g) (fail to provide facilities or assistance or allow inspection)				✓	L	✓	
Reg 44(1)(h) (preventing another person appearing or from answering questions)				✓	L	✓	
Reg 44(1)(i) (pretending to be authorised person)				✓	L	✓	
Reg 44(1)(j) (fail to comply with enforcement notice)	✓	✓		✓	M	✓	✓
Reg 44(1)(k) (fail to comply with information notice)	✓			✓	L	✓	✓

Reg 44(1)(l) (false or misleading statement in compliance with requirement to provide information or in order to obtain authorisation or vary, transfer or surrender authorisation)	✓			✓	M/H	✓	✓
Reg 44(1)(m) (false entry in records kept)	✓		✓	✓	M/H	✓	✓
Reg 44(1)(n) (forge/use/make document issued under condition with intent to deceive)	✓		✓	✓	M/H	✓	✓
Reg 44(1)(o) (cause or permit an offence under reg 44(1)(a)-(d) or (j))	✓	✓	✓	✓	M	✓	✓
Reg 44(1)(o) (cause or permit an offence under reg 44(1)(e)-(i))				✓	L	✓	
Reg 44(1)(o) cause or permit an offence under reg 44(1)(k)	✓			✓	L	✓	
Reg 44(1)(o) cause or permit an offence under reg 44(1)(l)-(n)	✓			✓	M/H	✓	
<b>Reservoirs (Scotland) Act 2011</b>							
Section 5(2) (failure to co-operate with other reservoir managers where there is more than one reservoir manager of a controlled reservoir)	✓			✓	M/H (high risk reservoir) M (any other reservoir)	✓	✓
Section 17(1) (failure to register, failure to notify that new reservoir manager or failure to notify that ceased to be reservoir manager)	✓			✓	L (any other reservoir) M (high risk reservoir)	✓	✓
Section 17(2) (false or misleading information provided in relation to registration)	✓			✓	M/H	✓	✓
Section 42(1)(a) (failure to give notice of proposed construction or alteration works)	✓			✓	L (any other reservoir) M (high risk reservoir)	✓	✓
Section 42(1)(b) (failure to appoint a construction engineer)	✓			✓	M/H (high risk reservoir) M (any other reservoir)	✓	✓
Section 42(1)(c) (failure to notify SEPA of the appointment of construction engineer)	✓			✓	L (any other reservoir) M (high risk reservoir)	✓	✓

Section 42(1)(d) (failure to take safety measures in safety report)	✓	✓		✓	M/H (high risk reservoir) M (any other reservoir)	✓	✓
Section 42(1)(e) (failure to comply with preliminary certificate or final certificate re construction or alteration)	✓			✓	M/H (high risk reservoir) M (any other reservoir)	✓	✓
Section 52(1)(a) (failure to appoint inspecting engineer and carry out required inspections)	✓			✓	M/H (high risk reservoir) M (any other reservoir)	✓	✓
Section 52(1)(b) (failure to notify SEPA appointment of inspecting engineer)	✓			✓	L (any other reservoir) M (high risk reservoir)	✓	✓
Section 52(1)(c) (failure to take measures in inspection report)	✓	✓		✓	M/H (high risk reservoir) M (any other reservoir)	✓	✓
Section 52(1)(d) (failure to appoint supervising engineer)	✓			✓	M/H (high risk reservoir) M (any other reservoir)	✓	✓
Section 52(1)(e) (failure to notify SEPA of appointment of supervising engineer)	✓			✓	L (any other reservoir) M (high risk reservoir)	✓	✓
Section 52(1)(f) (failure to carry out visual inspection of reservoir as directed by supervising engineer)	✓			✓	M/H (high risk reservoir) M (any other reservoir)	✓	✓
Section 52(1)(g) (failure to comply with notice identifying anything affecting safety of reservoir)	✓	✓		✓	M/H (high risk reservoir) M (any other reservoir)	✓	✓
Section 52(1)(h) (failure to keep record of water levels)	✓			✓	L (any other reservoir)	✓	✓

					M (high risk reservoir)		
Section 52(2) (failure w/o reasonable excuse to give inspection engineer copy of final certificate and latest inspection report)	✓			✓	L (any other reservoir) M (high risk reservoir)	✓	✓
Section 58(1)(a) (failure to keep records incl copies of safety reports, certificates, construction certificate, inspection reports and s50 notices)	✓			✓	L (any other reservoir) M (high risk reservoir)	✓	✓
Section 58(1)(b) (failure to display emergency response information)	✓			✓	M (high risk reservoir)	✓	✓
Section 66(1)(a) and (b) (failure to comply with notice requiring appointment of engineer or notification of appointment)	✓			✓	M/H (high risk reservoir) M (any other reservoir)	✓	✓
Section 70(1) (failure to comply with s69(2) notice requiring compliance with duty to comply with safety report or inspection report)	✓	✓		✓	M/H (high risk reservoir) M (any other reservoir)	✓	✓
Section 76(1) (failure to comply with stop notice)	✓	✓		✓	M/H (high risk reservoir) M (any other reservoir)	✓	✓
Section 94(1) (preventing or obstructing a person entitled to enter land under s91)				✓	L (any other reservoir) M (high risk reservoir)	✓	
Section 99(1) (fail to provide reasonable facilities to engineers or information or assistance to SEPA)				✓	L (any other reservoir) M (high risk reservoir)	✓	
Section 99(2) (altering, suppressing, or destroying document required by engineer under s97 or SEPA under s98)	✓			✓	M/H	✓	✓
Section 103(4) (failure to notify SEPA of revocation of appointment of engineer or resignation of engineer)	✓			✓	L (any other reservoir) M (high risk reservoir)	✓	✓

<b>Pollution Prevention and Control (Scotland) Regulations 2012 (SSI 2012/360)</b>							
Reg 67(1)(a) (operating an installation or mobile plant, except under and to the extent authorised by a permit)	✓	✓	✓	✓	M	✓	✓
Reg 67(1)(b) (breach of condition of a permit)		✓	✓	✓	M	✓	✓
Reg 67(1)(c) (failure to notify SEPA 14 days before change in operation)	✓			✓	L	✓	✓
Reg 67(1)(d) (breach of enforcement notice, suspension notice or closure notice under the 2003 Landfill Regs)	✓	✓		✓	M	✓	✓
Reg 67(1)(e) (failure w/o reasonable excuse to comply with information notice)	✓			✓	L	✓	✓
Reg 67(1)(f) (failure to notify SEPA immediately of breach of permit)	✓			✓	L	✓	✓
Reg 67(1)(g) (false or misleading statement in compliance with regulations or landfill regs or to obtain etc permit)	✓			✓	M/H	✓	✓
Reg 67(1)(h) (false entry in records kept under condition of permit)	✓		✓	✓	M/H	✓	✓
Reg 67(1)(i) (forge/use/make document issued under condition with intent to deceive)	✓			✓	M/H	✓	✓
Reg 67(1)(j) (failure to comply with court order pursuant to reg 70 (remediation order)		✓					
Reg 67(1)(k) (failure to provide information from solvents installation)	✓			✓	L	✓	✓
<b>Volatile Organic Compounds in Paints, Varnishes and Vehicle Refinishing Products Regulations 2012 (SI 2012/1715)</b>							
Reg 8(1) contravene reg 4 (placing on market of products with VOC content exceeding limits or not with compliant labelling)	✓			✓	M	✓	✓
<b>CRC Energy Efficiency Scheme Order 2013 (SI 2013/1119)</b>							

Article 82(1) (make false or misleading statement in compliance with Order)	✓			✓	M/H	✓	✓
Article 82(2) (fail w/o reasonable excuse to comply with enforcement notice)	✓			✓	M	✓	✓
Article 82(4) (pretend to be an authorised person)				✓	L	✓	
Article 82(5) (refuse to allow access to premises)	✓			✓	L	✓	✓
<b>The Waste Electrical and Electronic Equipment Regulations 2013 (SI 2013/3113)</b>							
Regulation 90 (1) (a) (fail to comply with producer obligations viz. financing obligations, obligation to be a member of a compliance scheme or to register as a small producer, obligation to provide information to the operator of the scheme, obligation to submit a declaration of compliance (DOC) and record keeping obligations)	✓			✓	M	✓	✓
Regulation 90 (1) (b) (knowingly or recklessly furnishing false or misleading information in connection with application to register as a small producer or to an operator of a scheme)	✓			✓	M/H	✓	✓
Regulation 90 (1) (c) (knowingly or recklessly furnish false or misleading information in or in connection with a declaration of compliance under Reg 19)	✓			✓	M/H	✓	✓
Regulation 90 (2) (failure by producer to declare EEE producer registration number, to mark EEE with crossed out wheelie bin symbol, to mark EEE with date mark or to provide information on new types of EEE)	✓			✓	L	✓	✓
Regulation 90 (3) (a) (contravention of or failure to comply by an operator of a scheme with Scheme obligations viz. obligation to register producers, obligation to apply to register producers and authorised representatives, obligation to notify of new scheme, obligation in respect of financing the costs of collection etc of WEEE from private households and from	✓			✓	M	✓	✓

users other than private households, obligations to ensure appropriate treatment and recovery, reporting obligations, obligation to provide a DOC and to comply with conditions of approval of the scheme)							
Regulation 90 (3) (b) (furnishing a report which knowingly or recklessly contains false or misleading information)	✓			✓	M/H	✓	✓
Regulation 90 (3) (c) (knowingly or recklessly furnish false or misleading information in or in connection with a declaration of compliance under Reg 39)	✓			✓	M/H	✓	✓
Regulation 90 (4) (failure by an operator of a scheme to set up systems to prioritise the reuse of whole appliances)	✓			✓	M	✓	✓
Regulation 90 (6) (failure by a distributor who supplies new EEE to make specified written information available to users of EEE in private households)	✓			✓	L	✓	✓
Regulation 90 (7) (a) (failure by an approved exporter who exports used EEE to hold and retain documentation to substantiate claim that is used EEE).	✓			✓	L	✓	✓
Regulation 90 (7) (a) (failure by an operator of an ATF or an exporter to submit an application for approval or to comply with the conditions of approval or reporting or record keeping requirements)	✓			✓	L	✓	✓
Regulation 90 (7) (b) (operator of ATF or approved exporter furnishing a report which knowingly or recklessly contains false or misleading information)	✓			✓	M/H	✓	✓
Regulation 90(8)(a) (failure by final user of WEEE [other than a private household] to finance costs of collection, treatment, recovery and environmentally sound disposal of WEEE and to ensure that it is treated at an ATF or exported by an approved exporter for treatment)	✓			✓	L	✓	✓
Regulation 90(8)(a) (contravention of prohibition on showing costs of financing collection etc of WEEE from private households to purchaser of new EEE at	✓			✓	L	✓	✓

time of sale)							
Regulation 90(8)(a) (contravention of prohibition against issuing evidence notes unless the person is an operator of an AATF or is an approved exporter and WEEE is received during approval period)	✓			✓	M	✓	✓
Regulation 90(8)(b) (failure without reasonable cause to comply with an enforcement notice)	✓			✓	M	✓	✓
Regulation 90(8) (c) (failure without reasonable cause to comply with a requirement imposed under investigatory powers)	✓			✓	L		
Regulation 90 (8) (d) (intentional obstruction of person acting in execution of Regulations)				✓	L	✓	
Regulation 90 (8) (e) (failure, without reasonable cause, to give assistance or information to any person acting in execution of the Regulations if reasonably required for performance of functions)				✓	L	✓	
Regulation 90 (8) (f) (failure, without reasonable cause, to produce information when required to do so)	✓			✓	L	✓	✓
Regulation 90 (8) (g) (knowingly or misleadingly furnishing false or misleading information to any person acting in execution of the Regulations)	✓			✓	M/H	✓	✓
Regulation 90 (9) (failure by a person who collects or transports WEEE to ensure that WEEE is collected and transported in a way that optimises reuse and recycling)	✓			✓	M	✓	✓
<b>Regulatory Reform (Scotland) Act 2014</b>							
Section 40(1) (significant environmental harm offence)	✓	✓	✓				
Section 41(7) (failure to comply with remediation order made in relation to significant environmental harm offence)	✓	✓					

## **ANNEX B**

### **Examples of Fixed Penalties Used by Regulatory Authorities within Scotland**

Under the Aquaculture and Fisheries (Scotland) Act 2007 there is the ability to set a scale of administrative penalties with the top end of the scale being 80% of level 4 on the standard scale. The Aquaculture and Fisheries (Scotland) Act 2007 (Fixed Penalty Notices) Order 2008 prescribes a scale of fixed penalties setting four penalty levels at £250, £500, £1000, and £2000. The Marine Directorate of Scottish Government (now part of Marine Scotland) issued "Guidance for Industry on Administrative Penalties" (April 2008) which provides guidance on which offences those different penalty levels apply to. The guidance also indicates how those penalties will escalate up the scale of penalty levels after a first administrative penalty. For an offence on penalty level 2 (miscellaneous offences), the penalty goes up from £500 on a second administrative penalty to £1,000 and a third penalty within a consecutive 2 year period will lead to a referral to COPFS.

Under the Planning (Listed Buildings) (Amount of Fixed Penalty) (Scotland) Regulations 2011, a penalty of £2,000 is available. A higher penalty (£3,500) is possible where there has been a breach of a second listed building enforcement notice relating to the same steps or works as specified in an earlier listed building enforcement notice.

Under the Town and Country Planning (Amount of Fixed Penalty) (Scotland) Regulations 2009 penalties are available of £300 where a person has failed to comply with the requirements of a breach of condition notice and £2,000 where a person has failed to comply with the requirements of an enforcement notice.

Under the Transfrontier Shipment of Waste Regulations 2007 - £300 in respect of any offence under those Regulations.

Under the Sale of Tobacco (Registration of Moveable Structures and Fixed Penalty Notices) (Scotland) Regulations 2011 - £50 and £200. In addition, the £200 penalty may be increased where there have been previous enforcement actions within a period of 2 years, escalating to £1200 where there are five previous enforcement actions, and in further £200 increments for each additional previous enforcement action, in terms of Schedule 1 to the Regulations.

Under the Prohibition of Smoking in Certain Premises (Scotland) Regulations 2006- £50 and £200 'Fixed penalty conditional offers' (commonly known as fiscal fines) may be issued by procurators fiscal for less serious offences.

Levels of fiscal fine are set by the Scottish Government and are currently £50, £75, £100, £150, £200, £250 and £300.

## ANNEX C

# RESPONDENT INFORMATION FORM for the Consultation on New Enforcement Measures for SEPA and the Relevant Offences Order

Please Note this form **must** be returned with your response to ensure that we handle your response appropriately



### 1. Name/Organisation

Organisation Name

Title Mr  Ms  Mrs  Miss  Dr  Please tick as appropriate

Surname

Forename

### 2. Postal Address

<input type="text"/>		
Postcode	Phone	Email

### 3. Permissions - I am responding as...

**Individual** / **Group/Organisation**

Please tick as appropriate

- (a) Do you agree to your response being made available to the public (in Scottish Government library and/or on the Scottish Government web site)?

Please tick as appropriate  Yes  No

- (b) Where confidentiality is not requested, we will make your responses available to the public on the following basis

Please tick ONE of the following boxes

Yes, make my response, name and address all available

or

Yes, make my response available, but not my name and address

or

Yes, make my response and name available, but not my address

- (c) The name and address of your organisation **will be** made available to the public (in the Scottish Government library and/or on the Scottish Government web site).

Are you content for your **response** to be made available?

Please tick as appropriate  Yes  No

- (d) We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Please tick as appropriate  Yes

## CONSULTATION QUESTIONS

### **Question 1 – SEPA’s Enforcement Approach**

**Are these the right aims to underpin SEPA’s enforcement approach?**

Yes  No

Additional comments.

### **Question 2 – Fixed Monetary Penalties (FMPs)**

**A) Do you agree with the suggested list of ‘relevant offences’ for SEPA’s use of FMPs?**

Yes  No

Additional comments.

**B) Do you agree with the three proposed FMP levels of £300, £600 and £1000 to allocate across the range of offences identified as appropriate for fixed monetary penalties?**

Yes  No

Additional comments.

### **Question 3 – Variable Monetary Penalties (VMPs)**

**A) Do you agree with the suggested list of ‘relevant offences’ for SEPA’s use of VMPs?**

Yes  No

Additional comments.

**B) Do you have any further comments on the proposed approach to calculating VMPs, based on a single generalised methodology reflecting the values for financial benefit, gravity and aggravating or mitigating factors?**

[Click here to enter text.](#)

**Question 4 - Non-Compliance Penalties (NCPs)**

**Do you consider that a penalty set at a 40% uplift is a sufficient penalty for non-compliance with an undertaking offered in respect of a VMP?**

Yes  No

Additional comments.

**Question 5 – Enforcement Undertakings (EUs)**

**Do you agree SEPA should look more favourably on community-focussed EUs?**

Yes  No

Additional comments.

**Question 6 – Court Powers**

**Do you support the approach to relevant offences to which these new court powers and requirements apply?**

Yes  No

Additional comments.

**Question 7 – Vicarious Liability**

**Do you support the approach to relevant offences to which the vicarious liability requirements apply?**

Yes  No

Additional comments.

**Question 8 – Administration**

**Do you have any further comments on the proposed administration of the new enforcement measures?**

Yes  No

[Click here to enter text.](#)

**Question 9 – Safeguards**

**Do you agree that the proposed safeguards for the new enforcement measures address the concerns raised through the previous consultation?**

Yes  No

Additional comments.

**Question 10 – Further Comments**

**Do you have any further comments on how these proposals will impact on businesses, communities and the environment?**

[Click here to enter text.](#)



© Crown copyright 2014

You may re-use this information (excluding logos and images) free of charge in any format or medium, under the terms of the Open Government Licence. To view this licence, visit <http://www.nationalarchives.gov.uk/doc/open-government-licence/> or e-mail: [psi@nationalarchives.gsi.gov.uk](mailto:psi@nationalarchives.gsi.gov.uk).

Where we have identified any third party copyright information you will need to obtain permission from the copyright holders concerned.

ISBN: 978-1-78412-633-9 (web only)

Published by the Scottish Government, July 2014

The Scottish Government  
St Andrew's House  
Edinburgh  
EH1 3DG

Produced for the Scottish Government by APS Group Scotland, 21 Tennant Street, Edinburgh EH6 5NA  
DPPAS32735 (07/14)

w w w . s c o t l a n d . g o v . u k