

GUIDANCE ON THE USE OF ENFORCEMENT ACTION

(Revised 2021)

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1. Introduction

1.1. Purpose

This guidance is directed at any person (including a business) carrying on any activity where we are the enforcing authority and explains how we will use enforcement action. It aims to:

- make clear what enforcement action we can take, and under what circumstances different types of enforcement action might be appropriate;
- explain the pro-active, voluntary enforcement action that can be offered to make amends and prevent recurrence;
- give an overview of what to expect and the options available to any person against whom we take enforcement action.

A very wide range of activities and people are regulated by us, for example: a householder with a septic tank, a waste carrier, farmers, waste disposal companies and manufacturing companies etc. This guidance applies where a person has not complied with their environmental responsibilities or caused or allowed another person to be non-compliant. In this document, the person responsible for the non-compliance is referred to as the 'responsible person'.

In addition, this guidance supports our enforcement policy and aligns with the [Scottish Regulators' Strategic Code of Practice](#)¹.

This guidance does not include information about how we use civil penalties under the [Emissions Trading Scheme \(ETS\)](#)² and [Energy Savings Opportunities Scheme](#)³ or fixed penalty notices under the [Transfrontier Shipment of Waste Regulations 2007](#)⁴. Separate guidance on these is available (this does not form part of this Guidance).

¹ [Scottish regulators' strategic code of practice - gov.scot \(www.gov.scot\)](http://www.gov.scot)

² <http://www.sepa.org.uk/regulations/climate-change/uk-emissions-trading-system/>

³ <https://www.sepa.org.uk/regulations/climate-change/energy-savings-opportunities-scheme>

⁴ <http://www.sepa.org.uk/regulations/waste/transfrontier-shipment-of-waste/>

For some of the offences enforced by SEPA there are other regulators, such as local authorities and the Health and Safety Executive, who also have an enforcement role. This guidance only applies to enforcement by SEPA for these offences.

1.2. Background

The Regulatory Reform (Scotland) Act 2014 (the Act) has set up a new environmental enforcement framework in Scotland. The Act builds upon existing environmental legislation and the enforcement action available under that legislation. Several components work together to provide a robust framework with appropriate safeguards:

1.2.1. Regulatory Reform (Scotland) Act 2014 (the Act)

The Act includes the enabling powers for the Environmental Regulation (Enforcement Measures) (Scotland) Order 2015, has strengthened the sentencing powers of the criminal courts in relation to environmental crime and has imposed a requirement on the courts to consider any financial benefit accrued as a result of offending in deciding the amount of fines.

1.2.2. Environmental Regulation (Enforcement Measures) (Scotland) Order 2015 (the Order)

The Order gives SEPA the power to impose monetary penalties and accept voluntary undertakings, and sets the framework and procedure for their use. It also extends the jurisdiction of the [Scottish Land Court](#)⁵ to hear appeals in relation to these matters.

1.2.3. Lord Advocate's Guidelines under the Act

In addition, the Lord Advocate has given SEPA guidance on the exercise of its functions in relation to monetary penalties and voluntary undertakings. When we consider using monetary penalties or accepting a voluntary undertaking, we must have regard to the Lord Advocate's Guidelines under the Act. The guidelines are an important safeguard in the system. Where SEPA is considering issuing monetary penalties or accepting a voluntary undertaking, they provide a framework for

⁵ <http://www.scottish-land-court.org.uk/>

deciding whether SEPA may take such action, or whether the case should instead be referred to the Crown Office and Procurator Fiscal Service (COPFS) for consideration of prosecution.

1.2.4. SEPA’s Guidance on the use of enforcement action

This guidance sets out our approach to enforcement in more detail and meets our requirement under Articles 9 and 10 of the Order to publish guidance on:

- how we use monetary penalties and voluntary undertakings;
- how offences are enforced;
- the action that we might take to enforce those offences;
- the circumstances where we are likely to take that enforcement action, and the different sanctions (including criminal sanctions) that a person who commits an offence may be liable to.

1.3. Why SEPA needs enforcement powers

One of our most important roles, as Scotland’s principal environmental regulator, is to protect and improve the environment, as well as contributing to improving the health and the wellbeing of people in Scotland.

Where a responsible person causes, or risks causing, harm, or fails to comply with the conditions of their authorisation or other legislative requirements or fails to obtain an authorisation we need to be able to take action to rectify this. In this guidance we refer to these failures as non-compliance.

Ideally, we would seek to work with a responsible person and use advice and guidance to achieve our enforcement outcomes. There are situations when this type of partnership approach on its own will not secure our desired enforcement outcomes and another form of enforcement action is appropriate from the outset.

1.4. Our approach to enforcement

Regulation is about changing behaviour in a way that generates positive outcomes for the environment, communities and the economy. In individual cases where we identify non-compliance the enforcement outcomes we seek to achieve are to:

- secure compliance with regulatory requirements designed to protect and improve the environment and bring the activity under regulatory control and stop offending;
- remove financial benefits arising from illegal activity;
- stop harm or reduce the risk of harm to an acceptable level;
- restore or remediate the harm caused by non-compliance, where appropriate;
- deter future non-compliance and re-offending.

1.5. The types of enforcement action available

The form of enforcement action, or combination of enforcement actions, which we use to achieve our enforcement outcomes, will differ depending on the nature of the non-compliance, the harm caused and the compliance history of the responsible person in question, including any wider criminality. We will also consider what immediate action is needed to protect the environment. How we decide what enforcement action is needed is described in the [enforcement decision-making section of this guidance](#).

Although the use of almost all enforcement actions will be initiated by us, there is one particular enforcement action that is initiated by a responsible person.

1.6. Enforcement undertaking – an action that can be offered by a responsible person

An enforcement undertaking provides an opportunity, primarily to otherwise compliant people or businesses, to remedy non-compliance. The responsible person voluntarily offers to us a solution to non-compliance that provides for:

- the restoration and remediation of environmental harm, where appropriate;
- steps to prevent recurrence;
- the removal of any financial benefit;
- environmental benefits that go beyond the minimum needed to restore the position.

It is important to note that an enforcement undertaking is not available for all offences and, even where these are available, we will decide whether or not to

accept the undertaking. When considering acceptance, we will consider a number of factors. Detailed information can be found in the section on [enforcement undertakings](#).

1.7. Enforcement action that we can take

The different enforcement actions that are available for us to initiate are set out in Table A below with an overview of the circumstances in which their use may be appropriate. It should be noted that this is not a hierarchy of enforcement actions or a series of sequential enforcement steps. We will take whatever action is the most appropriate to achieve our outcomes, particularly to change behaviour. Also, we are not limited to choosing one type of enforcement action and, in some circumstances, a combination of enforcement actions may be used.

Links are provided to more detailed information for each type of enforcement action.

Table A - The different types of enforcement actions available for SEPA to initiate (in alphabetical order)

Enforcement action	Role of the enforcement action	When would use be appropriate?	Summary of how the enforcement action may be challenged
Advice and guidance including warning letters (in response to non-compliance)	To inform and raise awareness and where it is the most appropriate action to achieve our desired outcome(s).	<p>Where there is a minor non-compliance, and there is no or little direct harm and no evidence of deliberate, repeat or continued offending.</p> <p>Where a change in behaviour will result from giving the responsible person a better understanding of what needs to be done to comply with environmental obligations.</p> <p>At all stages irrespective of any other enforcement action that we consider appropriate.</p>	
<u>Civil court action</u>	To instruct a responsible person to take a particular course of action. E.g. to stop an activity being carried on, or to carry out restoration or remedial works. If the responsible person ignores the order, they risk being in contempt of court.	Where other enforcement actions are ineffectual, we may use the civil courts to remedy non-compliance. For example, by seeking an interdict to stop someone from doing something that they are not allowed to do or by asking the court to enforce the terms of a statutory notice if it has not been fully complied with.	<p>When we seek a court order, this can be challenged in court before the order is made.</p> <p>There may be a right of appeal against the court order if the court dealing with the action allows it.</p>

Enforcement action	Role of the enforcement action	When would use be appropriate?	Summary of how the enforcement action may be challenged
Final warning letters	<p>To raise awareness of non-compliance and as a final attempt to change behaviour without using, for example, a statutory notice, a monetary penalty or referring non-compliance to the Crown Office and Procurator Fiscal Service.</p> <p>To make it clear to the responsible person that a failure to take preventative steps to stop the non-compliance will not be tolerated.</p>	<p>Where we consider that the threat of further enforcement action being taken is needed.</p> <p>Advice and guidance will also be provided on how to comply with environmental obligations.</p>	
* <u>Fixed Monetary Penalties (FMP) (£300, £600, £1000)</u>	To change behaviour, deter future non-compliance and punish non-compliance.	<p>Only available for offences set out in Schedule 4 of the Order⁶. There is no flexibility to use an FMP in any other circumstances or to change the amount of the penalty.</p> <p>Normally appropriate where an offence involves no direct harm or minimal harm, with no lasting effects or impact on communities, and when little (if any) financial benefit arises from the offence.</p>	<p>An FMP notice of intent can be challenged by making written representation to us within 28 days of receiving the notice.</p> <p>An FMP final notice can be challenged by making an appeal to the Scottish Land Court within 28 days of receiving the final notice.</p>

⁶ <http://www.legislation.gov.uk/ssi/2015/383/made>

Enforcement action	Role of the enforcement action	When would use be appropriate?	Summary of how the enforcement action may be challenged
<p><u>Prosecution</u> (referring matters to the Crown Office and Procurator Fiscal Service (COPFS) for consideration of prosecution)</p>	<p>To punish significant and serious offending and, where possible, to remove financial benefit resulting from that offending. Prosecution is a strong deterrent for future non-compliance. Sentencing options available to the courts may allow publicity to be given to convictions, and allow compensation or restoration orders to be made which contribute towards remediation or restoration of harm.</p>	<p>Available for all offences but generally used for those offences that are most serious, or there is evidence of wider criminality.</p>	<p>After criminal proceedings are started, there will be an opportunity to defend them in court.</p>

<p><u>Statutory notice</u></p>	<p>Different statutory notices fulfil different roles, and their availability is dependent on the precise wording of the relevant legislation.</p> <p>The most commonly used notices are:</p> <p>An enforcement notice - useful if remedial steps or preventative steps need to be taken to address non-compliance.</p> <p>A section 59 notice under the Environmental Protection Act 1990 - only applicable where waste has been deposited on land illegally.</p> <p>A suspension or prohibition notice requires the responsible person to stop an activity from taking place until steps are taken to address non-compliance. Once the steps are taken the activity can resume.</p> <p>A revocation notice - appropriate where we consider that the activity needs to stop and we do not consider that the activity should be resumed in the future.</p> <p>Note: This is not an exhaustive list of statutory notices.</p>	<p>To specify the steps that need to be taken to stop the activity or harm from continuing, or the steps needed to prevent the harm or risk of harm in the future.</p> <p>To restore the environment, where appropriate.</p> <p>To specify the steps that need to be taken, to secure compliance and restore the position.</p>	<p>The ability to appeal depends on the particular type of notice served. Information about how to appeal against the statutory notice will be included with the notice.</p>
<p><u>*Variable Monetary Penalties (VMP)</u></p>	<p>To change behaviour, deter future non-compliance and punish more</p>	<p>Only available for offences set out in Schedule 4 of the Order⁷.</p>	<p>A VMP notice of intent can be challenged by making written</p>

Enforcement action	Role of the enforcement action	When would use be appropriate?	Summary of how the enforcement action may be challenged
	<p>significant non-compliance than is proportionate to deal with using an FMP.</p> <p>Additionally, they can be used to remove the money that has been made or the costs that have been avoided as a result of the non-compliance.</p>	<p>Where the circumstances of the offence need to be taken into account in delivering a fair and proportionate sanction.</p> <p>Where environmental harm/human health impact has, or might have, been caused or there has been disruption to the regulatory system and/or there has been financial benefit. An example of disruption could be failure to submit monitoring data or failure to register with an appropriate producer responsibility scheme.</p>	<p>representation to us within 28 days of receiving the notice.</p> <p>A VMP final notice can be challenged by making an appeal to the Scottish Land Court within 28 days of receiving the final notice.</p>

⁷ <http://www.legislation.gov.uk/ssi/2015/383/made>

Enforcement action	Role of the enforcement action	When would use be appropriate?	Summary of how the enforcement action may be challenged
<p>*Variable monetary penalty undertaking</p>	<p>To provide a limited opportunity to the responsible person to use their resources to restore harm caused rather than paying a penalty.</p> <p>To remove any financial benefit and offer environmental benefits that go beyond the minimum needed to restore the position (for example, the condition of land or quality of a watercourse).</p> <p>To include steps offered by the responsible person that also secure compliance.</p>	<p>Only available to a responsible person when we issue a VMP notice of intent.</p> <p>When the responsible person's compliance history indicates that they will comply with the undertaking.</p>	<p>There is no right of appeal if we reject an offer of a VMP undertaking.</p>

* introduced under the Environmental Regulation (Enforcement Measures) (Scotland) Order 2015.

1.8. Examples of offences that the enforcement actions apply to

There are many offences set out in the legislation we enforce, for example:

- Regulation 11 of Control of Pollution (Silage, Slurry and Agricultural Fuel Oil) (Scotland) Regulations 2003 (failure to comply with requirements under regulation 2(1), 2(2), 3(1) or 6).
- Section 33(6) of Environmental Protection Act 1990 (unauthorised or harmful depositing, treatment or disposal etc. of waste; non-compliance with conditions of a waste management licence).
- Section 34(6) of Environmental Protection Act 1990 (failure to comply with duty of care requirements).
- Section 59(5) of Environmental Protection Act 1990 (failure to comply with notice requiring removal of waste).
- Regulation 67(1)(a) of Pollution Prevention and Control (Scotland) Regulations 2012 (operating without a permit).
- Regulation 67(1)(b) of Pollution Prevention and Control (Scotland) Regulations 2012 (failure to comply with conditions of a permit).
- Regulation 44(1)(a) of Water Environment (Controlled Activities) (Scotland) Regulations 2011 (carrying on a controlled activity (i.e. activity liable to cause pollution, abstraction of water or impoundment) without having an appropriate authorisation from SEPA or complying with a general binding rule).
- Regulation 44(1)(b) of Water Environment (Controlled Activities) (Scotland) Regulations 2011 (failure to comply with general binding rules).
- Regulation 44(1)(d) of Water Environment (Controlled Activities) (Scotland) Regulations 2011 (failure to comply with a water use licence).
- Section 32(1) of Radioactive Substances Act 1993 (offences relating to registration or authorisation, including failure to comply with a condition of an authorisation).
- Section 17(1) or (2) of the Reservoirs (Scotland) Act 2011 (failure to comply with registration requirements).
- Regulation 28(6) of Waste Management Licensing (Scotland) Regulations 2011 (carrying on an exempt activity in non-compliance of the registration obligations).

1.9. How the use of enforcement actions will be governed

When we consider using fixed and variable monetary penalties or accepting an enforcement undertaking, we must have regard to the Lord Advocate's Guidelines under the Act. For these particular enforcement actions, the Guidelines:

- set the framework for their use by us;
- are the safeguard that prevents us from imposing our own penalties, or accepting undertakings, in cases which should go through the criminal courts.

We also have robust internal governance arrangements for enforcement decisions which ensure that decisions about the use of enforcement action are made at an appropriate level in the organisation.

From time to time, we may publish regulatory position statements on our web site. Where relevant we will consider these in deciding if, or what, enforcement action may be appropriate.

1.10. Additional safeguards

There are additional safeguards that relate to a fixed or variable monetary penalty. These include:

- A responsible person who receives from us a notice of intent to serve a monetary penalty (fixed or variable) is entitled to make representations to us. The process for making representations is described in more detail in the section related to each of these actions.
- A responsible person who receives a final monetary penalty notice (fixed or variable) from us following receipt of a notice of intent is entitled to appeal against the decision to serve the penalty notice, whether or not they have already made representations. The process for making an appeal is described in more detail in the section related to each of these actions.

These additional safeguards for FMPs and VMPs ensure that there is a mechanism for challenging our actions, just as there are appeal mechanisms for statutory notices. When we issue a statutory notice, we always include information on any right of appeal against that notice.

1.11. How SEPA determines which enforcement action is appropriate

Having first taken any immediate action to protect the environment or human health we will collect the facts and/or evidence about the offence before making a decision on what enforcement action(s) may be appropriate.

The form of enforcement action which we use will differ depending on the:

- enforcement outcome(s) we are seeking to achieve;
- significance of the offence, which is dependent on several Enforcement factors.

The [enforcement decision-making section](#) describes how we will be systematic and consistent.

It is important to understand that, because of the wide range of circumstances under which offences occur, there is significant overlap between the lists of offences for which fixed and variable monetary penalties and enforcement undertakings will be available, as set out in Schedule 4 of the Order⁸.

1.12. Who can action be taken against?

Where a responsible person has not complied with their environmental responsibilities, we may take enforcement action against that person. In general, employers are responsible for the actions of their employees and would be considered as a responsible person where non-compliance is the result of their employees' actions.

If an investigation identifies a number of persons who are responsible for the non-compliance, and we have enough evidence to take action against each responsible person, we may progress multiple actions.

Other examples of when someone is a responsible person include:

⁸www.legislation.gov.uk/ssi/2015/383/made

- a company in circumstances where its directors are also legally responsible. We may take action against each of the responsible directors;
- a firm or partnership, in circumstances where individual partners are also legally responsible. We may take action against each of the responsible partners as well as or instead of the firm or partnership;
- an unincorporated association, in circumstances where its governing body or management committee, office bearers and/or members are also legally responsible. We may take action against each of the responsible members who has committed an offence as well as, or instead of, the association.

In summary, for any offence we may take:

- action against each of the responsible persons;
- the same or a different enforcement action or impose the same or a different penalty on each of the responsible persons. This is to reflect any difference in the behaviour of the different parties involved.

In practice, this approach could result in actions being taken against company directors and the company itself for the same non-compliance.

1.13. Combining the different types of enforcement action

We may combine either fixed monetary penalties or variable monetary penalties with other enforcement actions where we consider this will achieve the desired outcomes.

For the same act or omission constituting an offence it is generally not possible to combine:

- fixed monetary penalties with variable monetary penalties;
- criminal proceedings with fixed or variable monetary penalties;
- criminal proceedings or monetary penalties with enforcement undertakings, unless the commitments given in an enforcement undertaking are not delivered, and SEPA issues a certificate of non-compliance to that effect.

In addition, we would not accept an enforcement undertaking if we had already decided to take any other type of enforcement action (other than advice and guidance).

If we have used enforcement action to deal with an offence but this fails to change behaviour and the offending is repeated or continues, or an additional offence has been committed, we will consider all the available enforcement actions in deciding the appropriate action to take next. However, it is unlikely we would use the same type of enforcement action if this has previously failed to change behaviour.

We are not prevented from using a fixed monetary penalty or variable monetary penalty or from accepting an enforcement undertaking for an act or omission in relation to one offence if we have used this type of enforcement action for an act or omission constituting a similar (but not the same) previous offence or a different offence. A penalty notice or undertaking will specify the time and/or period of an offence, location of the offence and other details of the act or omission that has resulted in an offence being committed. This makes it clear that the same non-compliance occurring at a different time or over a different period, or at a different location is a different act or omission.

Also, if we identify a referral to COPFS for consideration of prosecution as the most appropriate enforcement action for repeat or additional offending we may refer the matter to COPFS even if we have used a fixed or variable monetary penalty or accepted an enforcement undertaking to deal with a similar previous offence or a different offence.

Examples illustrating the circumstances when it may be appropriate to combine enforcement action are included in this guidance.

1.14. Publishing and publicising information

We are required to publish information about fixed monetary penalties, variable monetary penalties, non-compliance penalties and cost recovery notices issued by us and undertakings accepted by us.

We will report details of enforcement actions on the website and also in the annual enforcement report.

We may also publicise the use of particular enforcement actions in other ways when we consider it appropriate to secure one or more of our enforcement outcomes. The information we will publish, and how, is set out in our Communicating Penalties and Undertakings Policy, available on the SEPA website.

1.15. How SEPA will evaluate the effectiveness of our approach to enforcement

We will review this guidance and our governance procedure and make any necessary amendments in light of experience.

We will also review the circumstances in which the various enforcement actions have been used and how effective they were in achieving the desired enforcement outcome(s).

1.16. Cost recovery

In line with the polluter pays principle, we consider that the costs of carrying out an investigation into an environmental offence should be borne in a proportionate way by the responsible person rather than the public purse. For this reason, we will seek to recover at least part of the costs we have incurred in investigating offences in certain circumstances. These circumstances include recovering costs from the recipient of the penalty notice where we impose a variable monetary penalty to the extent permitted under the Order. We will also expect the recovery of our costs to be included in any enforcement undertaking or variable monetary penalty undertaking that is offered to us.

Further information about the process for recovery of the costs incurred by us is set out in the guidance about each of the types of enforcement action. We are unable to recover our investigation costs from the recipient of the penalty notice when we impose a fixed monetary penalty.

1.17. How enforcement action interacts with compliance schemes

1.17.1. SEPA's compliance assessment scheme (CAS)

For Part A and some Part B activities under the Pollution Prevention and Control (Scotland) Regulations 2012 (PPC), our CAS⁹ takes account of the effort invested by us in poorly performing sites by increasing charges for those sites based on their previous compliance assessment record. This means that costs are recovered for the additional work that we need to do to bring these sites into compliance.

A failing PPC site might therefore be subject to a monetary penalty for a specific non-compliance and may also have to pay an increased charge or fee as a result of our CAS.

1.17.2. General binding rules, cross compliance and single farm payments

Where there has been non-compliance, land managers may face the possibility of both Scottish Government's Rural Payments and Inspections Directorate (SGRPID) and us taking enforcement action. We and SGRPID share information on non-compliance but the decision to impose a cross compliance penalty or to impose a monetary penalty is a matter for each separate agency. This is because the purpose of each enforcement response differs.

⁹ <http://www.sepa.org.uk/regulations/authorisations-and-permits/compliance-assessment-scheme/>

2. Enforcement decision-making

2.1. Choosing what enforcement action we will take

For any non-compliance, our priority will be to identify whether, and if so what, immediate action is needed to protect the environment and human health. If any immediate action is needed, we will take action to ensure the responsible person is clear what steps they must take. In some circumstances we may take steps ourselves to ensure the environment and communities are protected. If non-compliance causes damage or an imminent threat of damage to land or water, then it may fall within the scope of the Environmental Liability (Scotland) Regulations 2009 and bring about additional obligations for the responsible person and SEPA.

When we identify potential non-compliance, we undertake an investigation, appropriate to the circumstances, to collect the available evidence regardless of what any eventual enforcement action may be. Any enforcement action we take must be supported by sufficient evidence.

Having identified through investigation that offending has occurred, in general we seek to achieve restoration of any harm caused and to change behaviour to prevent future offending or harm. In each individual case where we identify offending, the enforcement outcomes we seek to achieve are one or more of the following:

- to secure compliance with regulatory requirements designed to protect and improve the environment and bring the activity under regulatory control and stop offending;
- to remove financial benefits from illegal activity;
- to stop harm or reduce the risk of harm to an acceptable level;
- restore or remediate the harm caused by regulatory non-compliance, where appropriate;
- to deter future non-compliance and re-offending.

For any non-compliance there may be a number of different enforcement outcomes we want to achieve.

In deciding which enforcement action to take we consider:

- how effective we expect that action will be at achieving our desired enforcement outcomes and at changing behaviour to ensure lasting compliance;
- the significance of the offending.

In addition, there are several [Enforcement factors](#) we take into account when making these decisions. In all cases we will consider:

- [intent](#);
- [foreseeability](#);
- [impact](#);
- [financial implications](#);
- [deterrent effect](#);
- [previous history](#).

This is not an exclusive list and depending on the particulars of an individual case other factors may need to be considered.

Deciding on the right enforcement action is not simply about applying a set of prescriptive rules that determine the type of enforcement action depending on the combination of factors involved. Using the facts and/or evidence we will decide how important each factor is in the circumstances of each case. In general terms the more significant the impact, the greater the scale of the offending and/or the more deliberate the behaviour, the more likely it is that the appropriate form of enforcement action is a referral to COPFS for consideration of prosecution.

By taking into account all these factors and how effective enforcement action is expected to be in the individual circumstances, we make an informed and reasoned judgement about which enforcement action(s) is:

- most likely to produce the desired outcome(s);
- proportionate to the significance of the offending.

In any event and taking into account all the circumstances of the case, we must be satisfied that whatever action we take is reasonable.

The things we consider in reaching an informed decision about the appropriate action are illustrated in our [enforcement 'decision-making' diagram](#).

Example 1

We will consider which enforcement action, or combination of actions, would best change behaviour in light of the responsible person's behaviour towards the offence.

If the responsible person provides us with the details of an offence voluntarily or through a self-reporting mechanism, then we may consider that advice and guidance might be an appropriate response – depending on other factors.

Should the responsible person be uncooperative in the investigation or remediation then we may consider that advice and guidance is unlikely to change behaviour - depending on the other factors - and that another type of enforcement action is needed.

Table B below indicates the most common outcomes associated with each enforcement action. This table is indicative only because we will consider the facts of each individual case when deciding which enforcement action(s) are likely to be effective at delivering the outcomes for an individual case.

Example 2

If removal of financial benefit is the outcome most likely to drive change in behaviour, then the most effective actions for doing this are a variable monetary penalty or referral to the Crown Office and Procurator Fiscal Service (COPFS) for consideration of prosecution, including recovery under the Proceeds of Crime Act 2002.

Table B - Enforcement actions and their principal outcomes

	Restore / remediate harm	Secure compliance	Stop harm/reduce risk	Deter future non- compliance	Remove financial benefit
Advice and guidance	✓	✓		✓	
Final warning letter/warning letter		✓		✓	
Statutory notice – enforcement notice	✓	✓	✓	✓	
Statutory notice – revocation notice		✓	✓		
Statutory notice – section 59 notice (Environmental Protection Act 1990)	✓				
Statutory notice – prohibition notice		✓	✓		
Statutory notice – suspension notice	✓	✓	✓		
Variation of conditions		✓			
Enforcement undertaking	✓	✓			✓
Variable monetary penalty undertaking	✓	✓			✓
Fixed monetary penalty				✓	
Variable monetary penalty				✓	✓
Civil court actions	✓		✓		
Criminal sanctions	✓			✓	✓

2.2. Using fixed or variable monetary penalties or accepting enforcement undertakings

Where harm to the environment or human health has occurred, wherever possible that harm should be restored or remediated. We will consider if it may be more appropriate in those circumstances for money to be put towards remediation or upgrading of equipment, rather than monetary penalties being imposed. In these circumstances we would encourage a responsible person to consider offering an enforcement undertaking.

When we consider using a fixed monetary penalty (FMP), a variable monetary penalty (VMP) or accepting an enforcement undertaking (EU) as the appropriate measure to use to deal with non-compliance, we must have regard to the Lord Advocate's Guidelines under the Act. We have to be mindful that using an FMP or a VMP or accepting an EU in relation to an offence constituted by a specific act or omission will mean that criminal proceedings cannot generally be taken for that same act or omission. The Lord Advocate's Guidelines under the Act make sure that the appropriate kinds of offences remain part of the criminal justice system.

All financial penalties are paid into the Scottish Consolidated Fund.

2.3. Enforcement factors

What are the enforcement factors that SEPA always considers?

2.3.1. Intent

We will consider the following questions to help determine the level of intent:

- Was the offence committed deliberately, recklessly or with negligence?
- Was the offence proactively reported to SEPA?
- Was any false or misleading information provided?
- Has the responsible person worked constructively with SEPA to rectify the non-compliance and mitigate any harm?
- Has the responsible person cooperated fully and helpfully with our investigation?

- Was the responsible person aware of their legal obligations i.e. were they aware of authorisation requirements, or have they had correspondence, information or previous SEPA warnings or discussion?
- Was the offence the result of a genuine accident or exceptional events?

Where an offence was committed as a result of an accident or a genuine mistake this is less likely to result in referral to COPFS for consideration of prosecution.

2.3.2. Foreseeability

Here, we will consider the following questions:

- Could the circumstances leading to the offence reasonably have been foreseen?
- Was the responsible person aware of the hazards associated with the activity, and the preventative measures that might have been taken?
- Were preventative measures taken or not taken?

Where the circumstances could have reasonably been foreseen, we will normally apply a form of enforcement action beyond advice and guidance or the issuing of a warning.

2.3.3. Impact

There are three aspects that we will consider here:

- The extent and significance of the potential and/or actual harm to people and the environment;
- Whether steps have been taken to mitigate any harm or remediate and restore the environment;
- Whether the offending impacts on our ability to be an efficient and effective regulator, for instance where our staff are seriously obstructed in the conduct of their duties.

Where the harm caused is significant or there is serious obstruction, we would normally refer the offence to COPFS for consideration of prosecution.

2.3.4. Financial implications

We will consider the following questions when determining the level of financial benefit:

- Is legitimate business being undercut?
- Has revenue accrued or have costs been avoided, such as costs saved by not obtaining an authorisation?

If the responsible person has gained financial benefit and if removal of financial benefit is the main outcome that we want to achieve, we will normally consider serving a VMP or a referral to COPFS for consideration of prosecution. These are the enforcement actions which are most effective at removing financial benefit. Enforcement undertakings are another possible enforcement measure that might be effective in these circumstances.

There may be other cases where there is a broader economic impact e.g. on the local community, local and other private businesses, disruption to public services or infrastructure. We will take this into account when considering the appropriate enforcement action.

2.3.5. Deterrent effect

We will consider the deterrent effect, both on the responsible person and others, when choosing which form of enforcement action is most appropriate.

2.3.6. Previous history

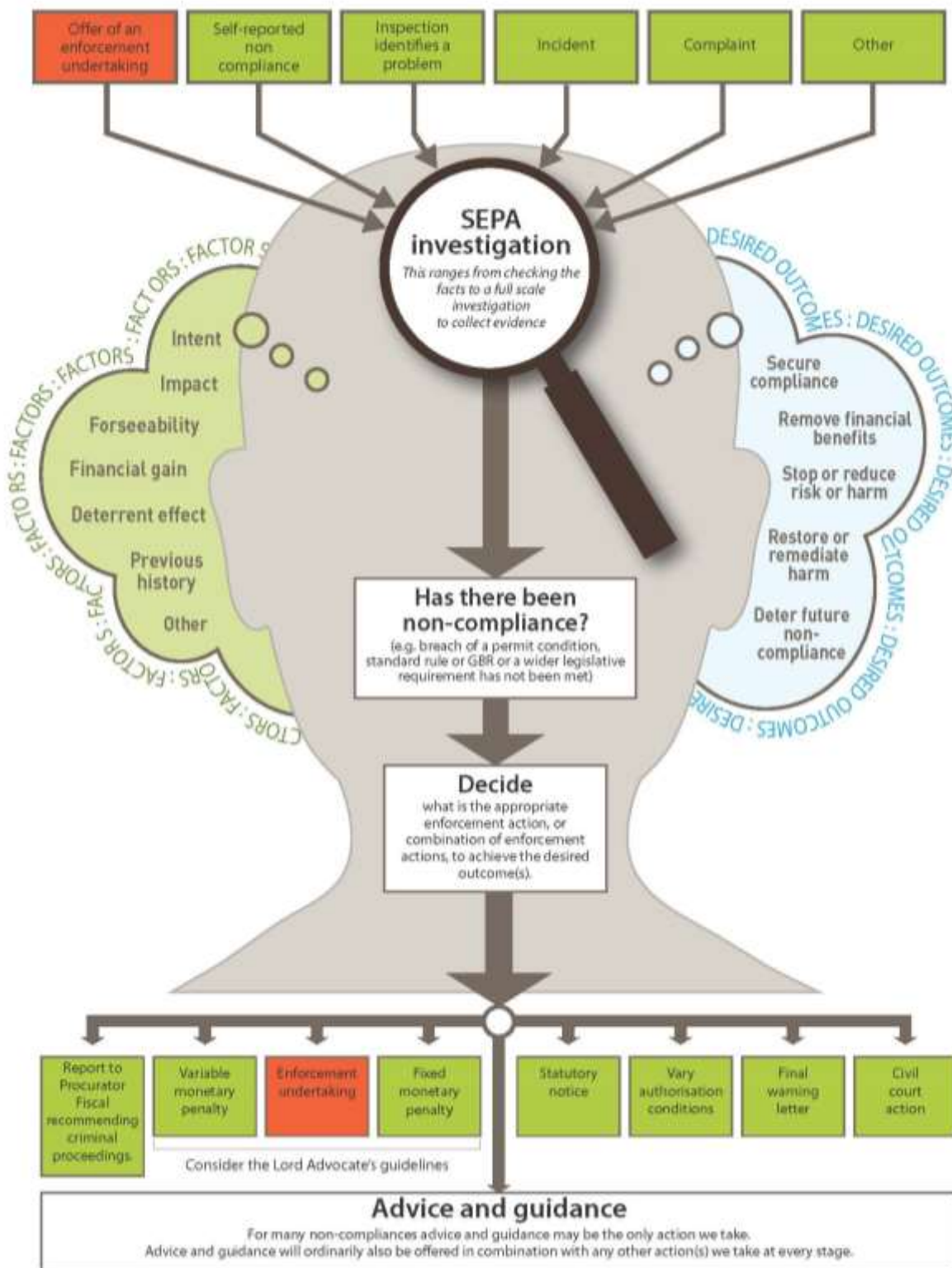
We will consider the following questions to help determine the approach of the responsible person to compliance:

- How well has the responsible person responded to advice and guidance, or other enforcement actions that we have taken in the past?
- What is the degree of previous offending (including site-specific offending or previous offending by the responsible person, or companies/directors associated with that person, at other sites) and is there any evidence of wider criminality?

- How do they score under our compliance assessment scheme (CAS), where appropriate, and what previous enforcement actions have been taken against the responsible person? For example, is there a history of compliance and the offending is uncharacteristic.
- What is the general attitude of the responsible person towards meeting their regulatory obligations and SEPA in general? For example, in the past has the responsible person worked proactively and constructively with SEPA?

Where offending has continued or been repeated, despite us taking enforcement action, we will normally change our enforcement response to pursue a more effective course of enforcement action.

Figure 1 - Enforcement decision-making diagram



4. Enforcement undertakings

4.1. What is an enforcement undertaking?

An enforcement undertaking (EU) is an offer, made voluntarily by a responsible person and formally accepted by us, to make amends for non-compliance and its effects and to prevent recurrence. In addition, an offer needs to include appropriate beneficial action. SEPA would encourage offers to include actions that demonstrate preventative longer-term actions.

An EU is intended to encourage positive behaviour by allowing broadly compliant responsible persons or businesses to use their resources to the greater benefit of the environment and communities affected rather than a penalty being imposed or prosecution for the offence.

We consider that where harm to the environment or human health has occurred, wherever possible, that harm should be remedied. It may be more appropriate in some circumstances for financial resources to be put towards remediation or upgrading of equipment or systems, rather than monetary penalties being imposed. In these circumstances we would encourage a responsible person to consider offering an EU.

If we accept the offer, the agreed actions become the terms of the undertaking, and the responsible person must comply with them. Whilst we are under no obligation to accept any offer of an EU, we have included below guidance about making an acceptable offer. In addition to this guidance, more detailed information and guidance on EUs is available on the EU Offer Form.

EUs are not available for all offences. The offences for which we can accept an EU are set out in Schedule 4 of the [Order](#)¹⁰.

The responsible person may wish to seek independent legal advice before making an offer of an EU.

¹⁰ www.legislation.gov.uk/ssi/2015/383/made

4.2. When should an EU be offered?

An EU can be offered at any time before we have decided what enforcement action we will take, even before we are aware of the non-compliance. However, we will not consider the content of an offer until we have carried out an appropriate investigation and considered if an undertaking is appropriate in the particular circumstances.

We may also consider accepting an EU, offered reactively by the responsible person, after we have investigated the non-compliance provided we have not already reached a decision on what enforcement action to take.

If you intend to offer an EU, you should tell us this as soon as possible rather than waiting until the offer is ready to submit because:

- i) this will allow us to carry out an appropriate investigation and tell you if we will consider an offer of an EU in the circumstances of your non-compliance, before you have invested time and effort preparing a detailed offer;
- ii) we are unable to accept an offer if we have already decided what enforcement action we will take.

Therefore, it is beneficial to a responsible person (and to us) to engage with us as early in the process as possible. For example, when non-compliance is first identified, rather than waiting until we have carried out a detailed investigation and are considering what enforcement action we might take in response to the non-compliance.

By engaging early, the responsible person is able to better manage the resolution of non-compliance, is more likely to submit an acceptable offer and may reduce investigation costs incurred by us.

4.3. What are the benefits of an EU?

An EU is a flexible enforcement option and we, the responsible person, affected communities and the environment can all benefit from its use.

The flexibility of an EU provides an opportunity to someone who is not compliant to design their own response to non-compliance rather than us imposing requirements, which has a number of benefits:

- it enables a responsible person to address offending in a constructive way;
- an undertaking can be tailored to the circumstances, which includes addressing any impact on the local community, recreational users of the environment and other businesses;
- a faster and more effective resolution because the responsible person designing the offer has ownership of the actions;
- an opportunity to offer a more sustainable and practical response to the needs of Scotland's environment.

The underpinning principles of an EU mean that:

- the focus of the undertaking must be on restoration and remediation of the local environment and preventing repeated non-compliance.
- we expect the EU to improve the wider, longer term environmental performance of the responsible person making the offer.

Furthermore, if the EU is accepted and provided that it is complied with to our satisfaction, the responsible person making the offer:

- is protected from both criminal proceedings and monetary penalties and the reputational damage that may occur from these forms of enforcement action;
- avoids the stigma of a criminal prosecution and any subsequent damage to their reputation.

4.4. When an EU may be acceptable?

When considering whether to accept an offer, we will take into account the following factors:

- the nature of the offence and the significance of any environmental harm caused as a result of the offence;
- whether the EU delivers a better environmental outcome, demonstrating commitment to more preventative and longer term actions;

- the likelihood that the responsible person will comply with the EU in light of their compliance history;
- the prospects of securing a timely outcome.

4.5. When an EU is inappropriate?

We will not consider an EU to be an appropriate enforcement action where:

- the offence has caused significant environmental harm (including damage that requires remedial measure to be taken under the Environmental Liability (Scotland) Regulations 2009);
- the offer includes a clause denying liability;
- we believe the responsible person will not comply with the EU offered.

In addition, we cannot accept an EU when we have already decided to:

- impose a fixed monetary penalty or a variable monetary penalty in respect of the offence;
- refer the offence to COPFS for consideration of prosecution.

In addition, in considering the circumstances of the non-compliance against our [Enforcement factors](#) and the Lord Advocate's Guidelines there will be circumstances where it is not appropriate to accept an EU.

4.6. Preparing a suitable offer for determination by SEPA

Given the advantages of offering an EU, whilst we will give some feedback on a draft proposal if requested and where appropriate, we do not intend to enter into protracted negotiations about the offer. We will either accept or decline a final offer based on its content. We expect the responsible person to address the following points when making an acceptable offer so as to:

- prevent recurrence;
- demonstrate preventative, longer term benefits for the environment or the local community including steps to introduce more sustainable business practices;

- go beyond the minimum required to restore the environment or if not possible to make a compensatory offer - we do not consider that actions to be made as part of an EU should simply equate to restoration of harm caused;
- remove more than the financial advantage gained - we do not consider that payments to be made as part of an EU should simply equate to the financial advantage gained by offending.

We will look more favourably on an offer:

- that demonstrates preventative, longer term benefits for the environment or the local community;
- where it delivers restoration and/or compensatory benefits to the environment or the community directly affected by the offence;
- that reflects the costs incurred by us (see below).

We will confirm in writing our decision about whether or not we accept an offer. If the offer is rejected the responsible person may decide to submit a different offer. Any revised offer should be submitted quickly as we are unable to accept an offer of an EU if we have already taken a formal decision about what other enforcement action we will take.

4.7. How SEPA will recover the costs we have incurred

The responsible person making an offer will be expected, as part of the EU, to pay the costs borne by us in investigating the offence and considering the EU, and the costs of any subsequent compliance monitoring and other activities to be carried out by us to assess compliance with the EU. To enable the operator to offer a suitable amount, we will provide information about the costs incurred. The amount may not necessarily represent the full costs incurred by us for the particular offence.

4.8. Is there a right of appeal?

If we reject the offer of an EU, the responsible person making the offer has no right of appeal against that decision.

4.9. Variation of EUs

If it becomes impossible for the responsible person to comply with the EU as accepted by SEPA, the responsible person may apply to SEPA for amendment of

the EU. It is at our discretion whether or not to agree to any proposed amendments. Any amendment to an EU will need to provide equivalent benefit to the environment or communities, equivalent financial commitment and address the additional cost incurred by SEPA in considering the amendment.

If the amended offer is rejected the responsible person may decide to submit a further amendment. This should be submitted quickly as we are unable to accept an amended offer if we have already taken a formal decision about what other enforcement action we will take.

Example 3

Where an EU commits funding to a third party to support a local improvement project, but the third party decides not to proceed, the responsible person may apply to SEPA for amendment of the EU.

4.10. When a responsible person does not comply with the terms of the EU

We will monitor compliance with any commitments made in an EU. If we are satisfied that the responsible person has not complied with any or all of the terms of their EU, we may issue a certificate of non-compliance.

This certificate of non-compliance will set out the:

- details of the EU;
- grounds for considering that the terms of the EU have not been complied with.

If a non-compliance certificate has been issued, we may subsequently take any form of enforcement action in relation to the specified offence, including referral of the matter to COPFS for consideration of prosecution. When considering what other enforcement action to take, we will take into account any partial compliance with the terms of the EU.

If we issue a certificate of non-compliance, an appeal can be made to the Scottish Land Court within 28 days of receiving the certificate of non-compliance on the basis that:

- the decision was based on an error of fact;
- the decision was wrong in law;
- the decision was unreasonable;
- any other reason.

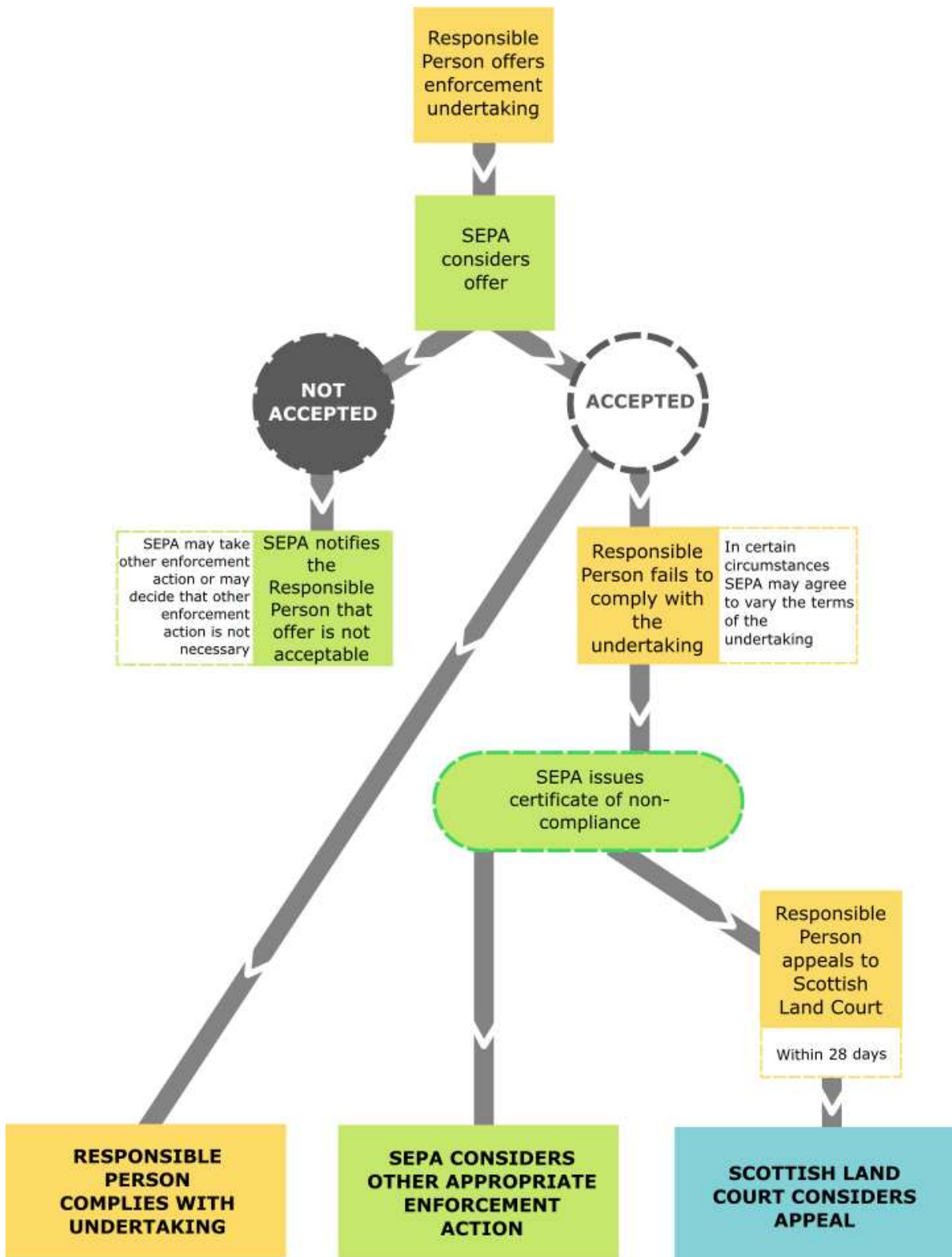
We will provide detail in the certificate of non-compliance about how to make an appeal and about the timescale and consequences of making an appeal. However, the process for submitting an appeal and the relevant forms is also available on the [Scottish Land Court](#) website.

An appeal means that the certificate of non-compliance does not take effect until after the appeal has concluded. This means that we cannot impose monetary penalties and there can be no criminal proceedings for the offence until the appeal has concluded.

4.11. Combining the use of different types of enforcement action

The underpinning principles and benefits of an EU mean that they are not intended to be used in conjunction with other types of enforcement action.

Figure 2 - Enforcement undertaking flowchart



5. Civil court actions

5.1. What are civil court actions?

We may seek an interdict (or interim interdict) from the civil courts, which is a court order that requires a responsible person to stop doing something.

We may also seek a court order to enforce the terms of a statutory notice, for example under regulation 35 of the Water Environment (Controlled Activities) (Scotland) Regulations 2011 or under regulation 68 of the Pollution Prevention and Control (Scotland) Regulations 2012, if it has not been partially or fully complied with.

If the responsible person ignores the order, they risk being in contempt of court.

5.2. When SEPA may consider civil court actions

We will consider civil court actions (i.e. non-criminal) where:

- the use of statutory notices or other enforcement action would fail or has failed to protect the environment or human health;
- those who are operating a particular process or carrying on a particular activity are doing so without an authorisation and refuse to cease activities.

5.3. When SEPA will not use a civil court action

If other enforcement action would be more effective at achieving our enforcement outcomes, we will not be likely to use civil court actions to achieve those outcomes.

For example, if we consider that an enforcement notice will ensure that an activity that is causing environmental harm ceases, then we will not seek an interdict or interim interdict to do so.

In addition, there will be circumstances where it is not appropriate to use civil court actions. This will be determined when reviewing the circumstances of the non-compliance against our [Enforcement factors](#).

5.4. Is there a right of appeal?

There may be a right of appeal against the interdict or interim interdict or other remedy that has been awarded if the court dealing with the action allows it.

5.5. Combining the use of different types of enforcement action

A civil court action will usually only be appropriate in exceptional cases where other enforcement action has not been effective at delivering the enforcement outcome sought by us. It will usually be the case, therefore, that civil court actions are sought where other forms of enforcement action have been used or considered in order to achieve those outcomes.

6. Final warning letters

6.1. What is a final warning letter?

A final warning letter is a written warning about a particular non-compliance. It provides a reasonable opportunity for the responsible person to address that non-compliance and take preventative steps to stop the non-compliance from continuing or recurring.

If we issue a final warning letter, we will be clear about the steps to be taken to rectify or prevent further non-compliance in order to avoid further enforcement action being taken.

The final warning letter provides a final chance for responsible persons to change their behaviour and come into compliance before we take further enforcement action.

Any subsequent enforcement action including prosecution might relate to the non-compliance covered by a final warning letter.

6.2. When a final warning letter may be used

The use of a final warning letter is primarily aimed at those without a history of offending and where there is:

- no or minimal environmental harm with no lasting effects or impacts on communities;
- a low level of culpability;
- no evidence of financial benefit.

A final warning letter may be an appropriate response in circumstances where:

- advice and guidance, or other warnings, has not been effective;
- giving a final warning is expected to change the behaviour of the responsible person;
- the responsible person should be given an opportunity to remedy the non-compliance or to take preventative steps to ensure that the non-compliance

does not recur. This may apply where, for example, there is no history of offending;

- a monetary penalty is not required to change the behaviour of the responsible person.

6.3. When SEPA will not use a final warning letter

We may take enforcement action, where it is appropriate to do so, without issuing a final warning letter. A final warning letter is not a prerequisite to us taking another form of enforcement action, including imposing a fixed or variable monetary penalty or referral to COPFS for consideration of prosecution.

We will not use a final warning letter in circumstances where:

- a notice of intent for a fixed or variable monetary penalty will be served;
- a final warning letter has previously been issued to the same responsible person for similar non-compliance;
- advice and guidance alone is likely to change the behaviour of the responsible person and the threat of further enforcement action is unnecessary;
- where there has been significant financial benefit;
- where there has been significant environmental harm.

In addition, there will be [circumstances](#) where it is not appropriate to use a final warning letter. This will be determined when reviewing the circumstances of the non-compliance against our [Enforcement factors](#).

7. Fixed monetary penalties

7.1. What is a fixed monetary penalty?

A fixed monetary penalty (FMP) is a financial penalty that we may impose for a specified offence. There are three levels of penalty which are prescribed in legislation: £300; £600 and £1000. Therefore, the amount of the FMP is set in law.

FMPs are not available for all offences. The offences for which we can impose an FMP, and the amount of the FMP, are set out in Schedule 4 of the Order¹¹.

Common offences where we have previously taken enforcement action are set out in the following Table C. This table identifies the amount of the FMP that is associated with that offence.

Table C - Common offences and FMP amounts

Offence	Fixed Penalty
Section 33(6) of the Environmental Protection Act 1990 (unauthorised or harmful depositing, treatment or disposal etc. of waste; non-compliance with conditions of a waste management licence)	£600
Reg 44(1)(a) of Water Environment (Controlled Activities) (Scotland) Regulations 2011 (carrying on a controlled activity (i.e. activity liable to cause pollution, abstraction of water or impoundment) without having an appropriate authorisation from SEPA or complying with a General Binding Rule)	£600
Reg 67(1)(b) of Pollution Prevention and Control (Scotland) Regulations 2012 (failure to comply with conditions of a permit)	£600
Reg 44(1)(d) of Water Environment (Controlled Activities) (Scotland) Regulations 2011 (failure to comply with a water use licence)	£600
Section 34(6) of Environmental Protection Act 1990 (failure to comply with duty of care requirements)	£300
Section 59(5) of Environmental Protection Act 1990 (failure to comply with notice requiring removal of waste)	£600

¹¹ www.legislation.gov.uk/ssi/2015/383/made

Offence	Fixed Penalty
Reg 11 of Control of Pollution (Silage, Slurry and Agricultural Fuel Oil) (Scotland) Regulations 2003 (failure to comply with requirements under regulation 2(1), 2(2), 3(1) or 6)	£600
Reg 28(6) of Waste Management Licensing (Scotland) Regulations 2011 (carrying on an exempt activity in non-compliance of the registration obligations)	£600
Reg 44(1)(b) of Water Environment (Controlled Activities) (Scotland) Regulations 2011 (failure to comply with general binding rules)	£600
Reg 67(1)(a) of Pollution Prevention and Control (Scotland) Regulations 2012 (contravention of permit requirements)	£600
Section 17(1) or (2) of the Reservoirs (Scotland) Act 2011 (failure to comply with registration requirements).	£1,000

7.2. When an FMP may be used

Before imposing an FMP, we must have enough evidence that the responsible person has committed the offence to which the penalty relates.

The use of an FMP is appropriate where:

- the offence has not caused environmental harm or has caused minimal environmental harm with no lasting environmental effects or impacts on communities (including recreational users and other businesses);
- little financial benefit (if any) has arisen;
- when no environmental harm has been caused but the regulatory system has been undermined, e.g. failure to register with SEPA or a failure to submit monitoring data.

Other factors that we will consider include whether:

- this is part of persistent offending or offending over a prolonged period;
- advice and guidance has been given previously;

- a relatively low monetary penalty is likely to change the responsible person's behaviour and deter future non-compliance;
- the FMP will deter others.

The following examples provide an indication of the level of offending when an FMP may be the most appropriate enforcement action:

- administrative non-compliances, such as a failure to return data;
- very minor non-compliance with an authorisation.

Where there has been an offence occurring over consecutive days, and we have decided that an FMP is an appropriate action to use, we will normally impose a single FMP for the period of offending. The FMP notice will state the time period of offending it covers and any further offending may result in further enforcement action being taken by us. A further offence includes the same non-compliance but involving a different act or omission. For example, an act or omission which occurs at a different time or over a different period of time.

7.3. When SEPA will not use an FMP

The use of an FMP is not appropriate where:

- an FMP has already been imposed on that person for the same matter;
- a variable monetary penalty notice has been served on that person for the same matter;
- an enforcement undertaking from the same person dealing with the same matter has been accepted by us and complied with;
- criminal proceedings have already commenced in relation to the same matter.

In addition, there are [circumstances](#) where it may not be appropriate to use an FMP. This will be determined when reviewing the circumstances of the non-compliance against our Enforcement factors or the Lord Advocate's Guidelines.

7.4. What to expect in an FMP notice of intent

Where we have decided that we intend to impose an FMP, the first thing we have to do is to issue a ‘notice of intent’ that sets out the reasons for our decision. This will include:

- a description of the offence which we consider to have been committed;
- the amount of the proposed penalty;
- information about the right to make representations in relation to that proposed penalty.

A responsible person may wish to seek independent legal advice if we serve a notice of intent or an FMP final notice.

7.5. Can a proposed FMP be challenged?

Anyone who has received a notice of intent for an FMP can challenge the notice by making written representations to us within 28 days of having received the notice. How to do this will be set out in the notice of intent.

We have the discretion to extend the 28 day period e.g. if the circumstances are complicated or the responsible person needs independent support in order to make a representation. However, it is important that the person on whom the notice of intent has been served contacts us within the 28 days to request an extension, explaining the circumstances and reasons for the request.

A representation may include information that:

- the offence alleged in the notice did not occur or was not committed by the recipient of the notice;
- there is a defence available;
- the amount of the FMP is beyond the means of the recipient and would cause them financial hardship, together with appropriate supporting evidence.

Representations about a proposed FMP should include:

- the FMP notice of intent reference number;

- full name and address;
- the address of the site or place where the offence was committed;
- an explanation why the proposed penalty should not be imposed.

We will consider any representations and make a decision on whether we intend to impose an FMP at the earliest practicable time but in any event within six months of receiving the representation (or a longer period if agreed with the responsible person). If we decide to impose the FMP, we will serve an FMP final notice. If we decide not to impose the FMP, we will confirm this in writing.

Where we are satisfied, on the evidence provided, that the responsible person is unable to pay the full amount of the penalty within the statutory timescales we may, at our discretion, choose to accept an alternative payment proposal.

If after the period for representations has expired no representations have been made, we will issue the FMP final notice, unless other evidence has come to light that changes our decision. If we decide not to issue the FMP final notice on the basis of any other evidence that may have come to light, the responsible person will be informed.

7.6. What to expect in an FMP final notice

Where we have decided to impose an FMP, we will issue an FMP final notice. This sets out the grounds for us imposing the penalty and will include:

- a description of the offence that has been committed;
- the amount of the penalty;
- how payment can be made;
- when payment must be made;
- the consequences of non-payment and any late payment penalties;
- information about the right to appeal against the penalty.

The FMP has to be paid within 56 days from the date of the penalty notice. Late payment will result in the amount payable being increased by 40%.

If the FMP is not paid on time, the responsible person is liable for the amount of the penalty and any late payment penalty as a civil debt. We will take action to recover that debt. The Order allows SEPA to proceed directly to recovery without the need for a judgment from the civil courts.

7.7. Right of appeal

The responsible person can appeal to the Scottish Land Court within 28 days of receiving the FMP final notice, on the basis that:

- the decision was based on an error of fact;
- the decision was wrong in law;
- the decision was unreasonable;
- any other reason.

An appeal cannot be made against the amount imposed. This amount is as prescribed by the Order.

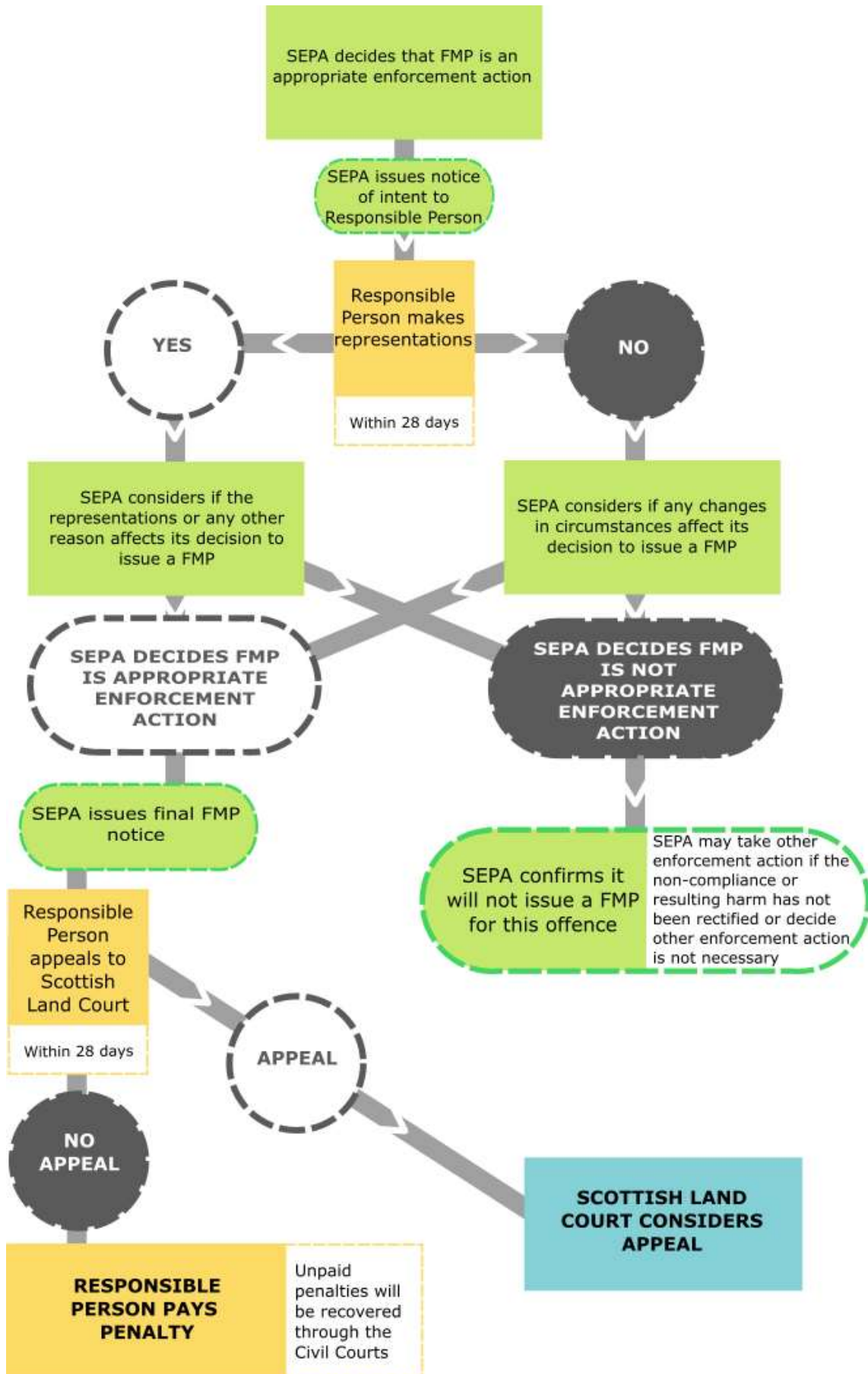
We will provide details in the FMP final notice about how to make an appeal and about the timescale and consequences of making an appeal. However, the process for submitting an appeal and the relevant forms are also available on the [Scottish Land Court](#) website.

An appeal means that payment of the penalty is postponed until after the appeal has concluded.

7.8. Combining the use of different types of enforcement action

An FMP may be used alone or in conjunction with other enforcement action (except a variable monetary penalty, enforcement undertaking or prosecution) to secure our enforcement outcomes.

Figure 3 - Fixed monetary penalty flowchart



8. Prosecution

8.1. Prosecution and the Procurator Fiscal's role

We have the ability to refer offences to the Crown Office and Procurator Fiscal Service (COPFS) for consideration of prosecution. Their role includes assessing the sufficiency of evidence and assessing whether or not it is in the public interest to pursue criminal proceedings.

8.2. When prosecution may be appropriate

Available for all criminal offences, we will normally refer to COPFS for consideration of prosecution or other action those offences that are most serious.

Once we have referred a case, the decision on whether or not to take court proceedings or to deal with the case by way of a fiscal warning letter or fiscal fine is a matter for COPFS alone.

We may impose a fixed monetary penalty or variable monetary penalty or accept an enforcement undertaking if COPFS decides not to take court proceedings or to otherwise deal with the case. This could happen, for example, if we consider that an offence is serious but COPFS decides that there is not a public interest in prosecution, taking the wider context of the offending into account.

The legislation that establishes an offence also establishes the maximum fine for each offence and in some circumstances will provide that imprisonment or an unlimited fine may be imposed.

8.3. When prosecution is not an option

Criminal proceedings cannot be taken for a particular offence when we have:

- imposed a fixed monetary penalty (FMP) for that offence;
- imposed a variable monetary penalty (VMP) for that offence;
- accepted a VMP undertaking for that offence;
- imposed a VMP and accepted a VMP undertaking for that offence;

- accepted an enforcement undertaking (EU) for that offence unless the offender fails to adhere to any or all of the terms of the EU.

In addition, there will be circumstances where it is not appropriate to prosecute. This will be determined when reviewing the circumstances of the non-compliance against our enforcement factors.

9. Statutory notices

9.1. What is a statutory notice?

A statutory notice is a formal notice, served by us, which arises from non-compliance or negative environmental impacts or a risk of either. It normally sets out the steps needed to bring the recipient back into compliance or address any negative environmental impacts. It will inform the recipient what they need to do and failure to comply with these steps is an offence in most cases.

9.2. When a statutory notice may be used

A statutory notice may only be used where the relevant legislation allows for it.

Generally, a statutory notice is used when we wish to specify the measures to be taken to prevent, stop or remediate environmental harm, address a risk of environmental harm or to prevent, stop or remedy non-compliance. We may also issue a notice requiring information.

There is a range of statutory notices available to us across numerous regimes and these may be used wherever appropriate. They can include:

- **Enforcement/Regulatory notices** identifying a non-compliance or likely non-compliance or significant impact or likely impact and requiring steps to be taken (e.g. regulation 32 of the Water Environment (Controlled Activities) (Scotland) Regulations 2011 (CAR), section 42(5) of the Environmental Protection Act 1990 (EPA90), regulation 55 of the Pollution Prevention and Control (Scotland) Regulations 2012 (PPC 2012), regulation 46 of the Environmental Authorisations (Scotland) Regulations 2018 or section 21 of the Radioactive Substances Act 1993);
- **Suspension notices** which have the effect of temporarily suspending the authorisation of an activity until a particular time or until particular steps are taken (e.g. regulation 29 of CAR, sections 38 and 42(6) of EPA90, regulation 56 PPC 2012);
- **Revocation notices** prohibiting a responsible person from carrying on an environmental activity (e.g. regulation 29 of CAR, section 38 of EPA90,

regulation 50 of PPC 2012 or regulation 31 of the Environmental Authorisations (Scotland) Regulations 2018);

- **Removal of waste notices** requiring an occupier to remove waste from land (e.g. section 59 of EPA90);
- **Works notices** requiring steps to be taken (e.g. Control of Pollution (Silage, Slurry and Agricultural Fuel Oil) (Scotland) Regulations 2003);
- **Prohibition notices** identifying an activity with an imminent risk of pollution or harm, and directing which steps need to be taken to remove the risk, and suspending any authorisation related to the activity (e.g. section 22 of the Radioactive Substances Act 1993);
- **Information notices** require the recipient to submit information to allow SEPA to discharge their regulatory responsibilities (e.g. section 71(2) of EPA90, regulation 36(2) of CAR, regulation 63(2) PPC 2012 or regulation 37 of the Environmental Authorisations (Scotland) Regulations 2018).

9.3. When is a statutory notice not likely to be used?

We are unlikely to use a statutory notice in circumstances where an enforcement undertaking or a VMP undertaking, which achieve the same outcome, has been offered and accepted by us.

9.4. What to expect in a statutory notice

A statutory notice will usually state the legislation which allows SEPA to issue the notice, and will specify the grounds for SEPA issuing the notice. This might include the details of the contravention that SEPA has identified. The statutory notice will also set out:

- who needs to take action;
- the steps to be taken which might include stopping an activity or part of an activity;
- by when the steps must be taken;
- whether or not an appeal can be made (see below).

The notice may also set out what the consequences of the notice are and/or what the consequences of failing to comply with the notice are.

A responsible person may wish to seek independent legal advice if we serve a statutory notice.

A notice requiring removal of waste under section 59(1) might include for example, the following information:

- Environmental Protection Act 1990, Waste Management Licensing (Scotland) Regulations 2011 i.e. the legislation which allows SEPA to issue the notice;
- the name and address of the person who is required to comply with the notice i.e. who needs to action;
- that SEPA is satisfied that controlled waste has been deposited in contravention of section 33(1) of the Environmental Protection Act 1990 i.e. the details of the contravention that SEPA has identified;
- requiring the removal of controlled waste identified in the notice from land identified in the notice by a specified date i.e. the steps to be taken, and by when;
- explaining that failure to comply with the notice is a criminal offence, and that if someone fails to comply with a notice SEPA may itself take the steps required and then recover the cost of doing that i.e. the consequences of the failure to comply with the notice;
- explaining that the person may appeal to the sheriff.

9.5. Appealing against a statutory notice

Whether the responsible person can appeal against the notice depends on the legislative framework of the particular notice served. Details explaining how to appeal a statutory notice will be included with the notice.

9.6. When SEPA can recover costs it has incurred

Where an enforcement notice under the Water Environment (Controlled Activities) (Scotland) Regulations 2011 or a regulatory notice under the Environmental Authorisations (Scotland) Regulations 2018 is served on a responsible person, we may recover the costs of carrying out the investigation from them. We will issue a notice requiring the responsible person to pay the amount of those costs.

9.7. Combining the use of different types of enforcement action

A statutory notice may be used alone or in conjunction with other enforcement action to secure our enforcement outcomes in the examples in this guidance.

9.8. When a statutory notice is not complied with

Failure to comply with a statutory notice may result in further enforcement action. This may include a Fixed Monetary Penalty, Variable Monetary Penalty or a report to the Procurator Fiscal for consideration of prosecution.

10. Variable monetary penalties

10.1. What is a variable monetary penalty?

A variable monetary penalty (VMP) is a discretionary financial penalty, which we can impose. The maximum penalty amount is set out in the legislation creating that offence, and is not the same for all environmental offences. Where no legislative maximum exists, the maximum VMP SEPA may impose is £40,000. The minimum VMP we will impose is £1,000.

VMPs are not available for all offences. The offences for which we can impose a VMP are set out in Schedule 4 of the [Order](#)¹².

10.2. When a VMP may be used

Before imposing a VMP, we must have enough evidence that the responsible person has committed the offence to which the penalty relates.

A VMP is aimed at offences where the circumstances of the offence need to be taken into account in delivering fair and proportionate enforcement action. For some cases we may need to liaise with the Crown Office and Procurator Fiscal Service (COPFS) to decide whether referral to COPFS for consideration of prosecution is more appropriate.

The use of a VMP may be appropriate where any of the following apply:

- environmental harm has been caused or is likely to be caused;
- no environmental harm has been caused but the regulatory system has been undermined, e.g. failure to register with an appropriate producer responsibility scheme or a failure to submit monitoring data;
- there has been an adverse impact on communities (including recreational users and other businesses);
- there has been financial benefit.

¹² www.legislation.gov.uk/ssi/2015/383/made

Other factors that we will consider include whether:

- this is a first time offence;
- advice and guidance has been given previously;
- the VMP is likely to change the responsible person's behaviour;
- a VMP will lead to faster resolution of the non-compliance;
- the VMP will deter others.

Where there has been an offence occurring over consecutive days, we will normally impose a single VMP rather than a series of VMPs. The VMP notice will state the time period of offending it covers.

If the offence continues or recurs, we are not prevented from taking further enforcement action in relation to that continuing or recurring offending or referring that continuing or recurring offending to COPFS for consideration of prosecution.

10.3. When SEPA will not use a VMP

We will not use a VMP when:

- the VMP is unlikely to change the behaviour of the responsible person;
- the matter is to be referred to COPFS for consideration of prosecution;
- an FMP has already been imposed on that responsible person for the same matter;
- a VMP has already been imposed on that responsible person for the same matter;
- a VMP undertaking has been accepted for the same matter;
- an EU has been accepted and complied with for the same matter.

In addition, there are [circumstances](#) where it may not be appropriate to use a VMP. This will be determined when reviewing the circumstances of the non-compliance against our Enforcement factors or the Lord Advocate's Guidelines.

10.4. What to expect in a VMP notice of intent

Where we have decided that we intend to impose a VMP, the first thing we have to do is to issue a ‘notice of intent’ that sets out the reasons for our decision. This will include:

- a description of the offence which we consider to have been committed;
- the amount of the proposed penalty and how we have determined it;
- information about the right to make representations in relation to that proposed penalty;
- information about the availability of a [variable monetary penalty undertaking](#).

A responsible person may wish to seek independent legal advice if we serve a notice of intent or a final penalty notice for a VMP.

10.5. What is a VMP undertaking?

When we have served a notice of intent, the responsible person may choose to make an offer to use their resources to the greater benefit of the environment in place of paying the penalty proposed. If accepted by us, this replaces the VMP. Such an offer is known as a VMP undertaking. More information about what a VMP undertaking is and how it could be used is set out in a [dedicated section](#) of this guidance.

10.6. Can a proposed VMP be challenged?

Anyone who has received a notice of intent for a VMP can challenge the notice by making written representations to us within 28 days of having received the notice. How to do that will be set out in the notice of intent.

We have the discretion to extend the 28 day period e.g. if the circumstances are complicated or the responsible person needs independent support in order to make a representation, but it is important that the responsible person on whom the notice of intent has been served contacts us within the 28 days to request an extension, explaining the circumstances and reasons for the request.

Representations may include information that:

- the offence alleged in the notice did not occur or was not committed by the recipient;
- there is a defence available;
- the amount of the penalty is incorrect or unreasonable;
- the amount of the penalty is beyond the means of the responsible person and would cause them financial hardship, together with appropriate supporting evidence.

Representations about a proposed VMP should include:

- the VMP reference number, full name and address;
- the address of the site or place where the offence was committed;
- an explanation why the proposed penalty should not be imposed.

We will consider any representations and make a decision on whether we intend to impose a VMP at the earliest practicable time but in any event within six months of the end of the period for receiving representations. We will make one of the following decisions:

- to impose a VMP for the amount in the notice of intent;
- to impose a VMP for a reduced amount;
- not to impose a VMP.

If we decide not to impose a VMP, we will confirm this in writing. If we decide to impose a VMP, a final VMP notice will be issued.

Where we are satisfied, on the evidence provided, that the responsible person is unable to pay the full amount of the penalty within the statutory timescales we may, at our discretion, choose to accept an alternative payment proposal or, in exceptional cases, we may consider reducing the amount of the penalty.

If after the period of representations has expired no representations have been made, we will issue the final VMP notice, unless other evidence has come to light

that changes our decision. If we decide not to issue the VMP final notice on the basis of any other evidence that may have come to light, the responsible person will be informed.

10.7. What to expect in a final VMP notice

Where we have decided to impose a VMP, we will issue a final VMP notice. This sets out the grounds for us imposing the penalty and will include:

- a description of the offence that has been committed;
- the amount of the penalty and how we have determined it;
- how payment can be made and when payment must be made;
- the consequences of non-payment and any late payment interest;
- information about the right to appeal against the penalty.

The VMP has to be paid within 56 days from the date of the final VMP notice unless an alternative payment proposal is specified. Late payment will result in interest at a rate of 8% per annum being applied to the amount that is outstanding.

If the VMP is not paid on time, the responsible person is liable for the amount of the penalty and any late payment interest as a civil debt. We will take action to recover that debt. The Order allows SEPA to proceed directly to recovery without the need for a judgment from the civil courts.

10.8. Is there a right of appeal?

The responsible person can appeal to the Scottish Land Court within 28 days of receiving the final VMP notice, on the basis that:

- the decision was based on an error of fact;
- the decision was wrong in law;
- the amount of the penalty is unreasonable;
- the decision was unreasonable for any other reason;
- any other reason.

We will provide details in the final notice about how to appeal and about the timescale and consequences of making an appeal. The process for submitting an appeal and the relevant form are also available on the [Scottish Land Court web site](#)¹³.

An appeal means that payment of the penalty is postponed until after the appeal has concluded.

10.9. How SEPA will determine a VMP?

We will consider the facts of the offence and calculate the level of VMP. First, we will determine a starting point that reflects the seriousness and nature of the offence. By using our professional judgement, we will individually assess the:

- environmental impact (or potential impact);
- economic impact;
- financial benefit.

The financial benefit is determined from the evidence gathered during the investigation. This takes account of direct and indirect gains (including avoided costs) in connection with the offence.

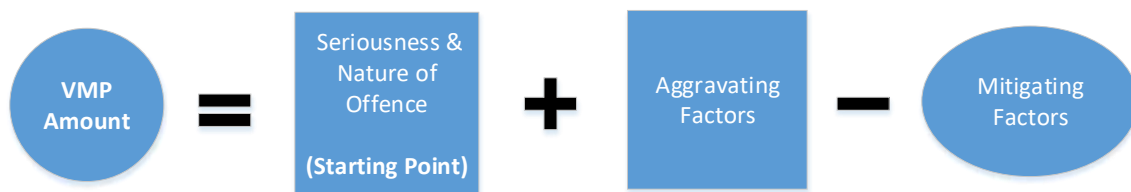
Once the starting point has been determined, we will consider any aggravating or mitigating factors. These are factors which reflect the attitude, behaviour and knowledge of the offender. We use aggravating factors to increase the penalty and mitigating factors to decrease the penalty. This includes a review of:

- intent/culpability;
- previous enforcement action taken against the responsible person;
- compliance with environmental obligations;
- co-operation with the SEPA investigation;
- foreseeability.

¹³ <http://www.scottish-land-court.org.uk/>

Where applicable we will also consider whether it is appropriate to reduce the level of the penalty to reflect the unique circumstances of a case, for example to reflect any other mitigating factor not already considered by us. SEPA reserves its discretion whether or not to reduce the amount of the penalty.

Please refer to SEPA's [How SEPA Will Determine a Variable Monetary Penalty Guidance](#) for further information.



10.10. How SEPA will recover the costs we have incurred?

We will recover from the responsible person the costs that we have incurred during the process of imposing a VMP up to a maximum of 30% of the amount of the VMP. This will be done by issuing a costs recovery notice shortly after we serve the final VMP notice. These costs can include the expense involved in:

- investigating the offence resulting in the notice of intent being issued;
- carrying out additional monitoring to identify environmental impact;
- installing monitoring equipment that is needed to assess environmental impact;
- administering the penalty;
- obtaining any legal or other advice as part of that process.

We will give an indication of these costs when we issue the Notice of Intent for the VMP.

We will not recover any costs incurred by us after we issue the Notice of Intent for the VMP, such as the costs of assessing any representations, carrying out further investigations or monitoring or the costs of recovering any penalty that is due.

We will not seek to recover any costs that are incurred by us in carrying out routine inspections which may have resulted in further investigations being carried out but which are not directly related to the imposition of the penalty. These are an aspect of our charging scheme.

We anticipate that in most cases the amount to be paid will not reflect the full expense incurred by us and we will provide a breakdown of the full costs incurred by us. This approach will be reviewed within two years of first issuing a VMP with a view to assessing the appropriateness of moving to full cost recovery in the future.

The costs have to be paid within 56 days from the date of the costs recovery notice. Late payment will result in 8% interest per annum being applied to the amount that is overdue. If the costs are not paid on time, the responsible person is liable for the amount of the penalty as a civil debt and we will take action to recover that debt. The Order allows SEPA to proceed directly to recovery without the need for a judgment from the civil courts.

We may withdraw a costs recovery notice or reduce the amount of those costs at any time.

The responsible person can appeal against a costs recovery notice or the amount of those costs, particularly if the responsible person considers that some or all of those costs were unnecessarily incurred.

The responsible person can appeal to the [Scottish Land Court](#) within 28 days of receiving the costs recovery notice, against the decision to impose the costs recovery notice or the amount of the costs.

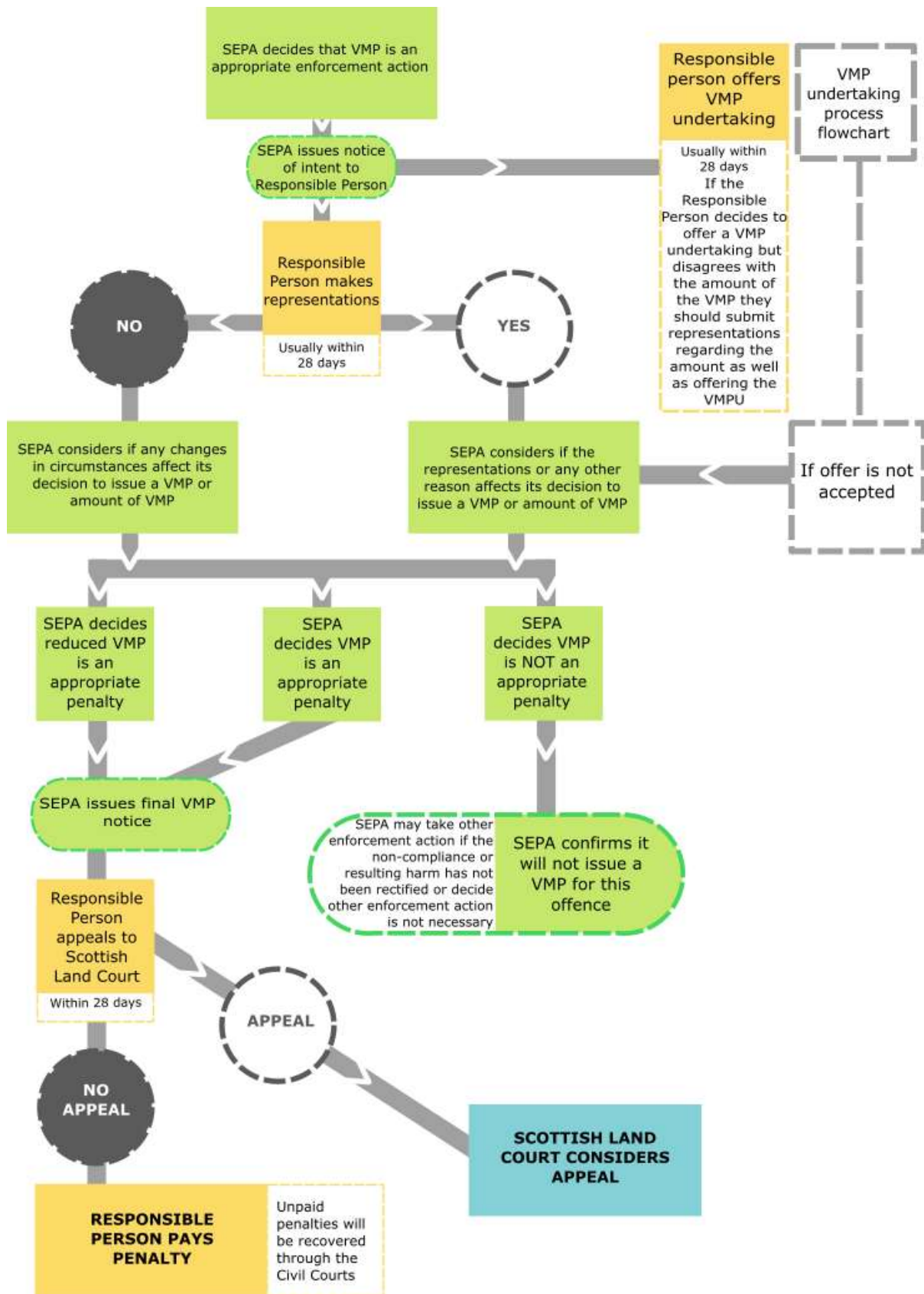
We will provide detail in the costs recovery notice about how to make an appeal and about the timescale and consequences of making an appeal. An appeal means that payment of the costs is postponed until after the appeal has concluded.

10.11. Combining the use of different types of enforcement action

A VMP may be used alone or in conjunction with other enforcement action e.g. a statutory notice to secure our enforcement outcomes. The costs associated with

complying with the steps set out in a statutory notice will be taken into account when setting the amount of the VMP.

Figure 4 - Variable monetary penalty flowchart



11. Variable monetary penalty undertakings

11.1. What is a VMP undertaking?

In response to us issuing a VMP notice of intent a responsible person can offer a variable monetary penalty (VMP) undertaking to make amends for non-compliance and its effects and to prevent recurrence. This is a limited opportunity for a person to make an offer which brings benefits to the environment or the local community instead of paying the VMP.

The offer will have to comprise a range of actions for any or all of the following purposes:

- To ensure the position, including the condition of the environment, is restored to what it would have been if the offence had not been committed.
- To provide benefit to the environment that matches the extent of harm arising from the offence.
- To secure that no financial benefit has accrued to the responsible person as a result of the offence being committed.

VMP undertakings are intended to encourage positive behaviour by allowing the responsible person to use their resources to the greater benefit of the environment, in place of paying the penalty imposed.

If we accept the offer, the agreed actions become the terms of the undertaking, and the responsible person must comply with them. Whilst we are under no obligation to accept any offer of a VMP undertaking we have included below guidance about making an acceptable offer.

The responsible person may wish to seek independent legal advice before making an offer of a VMP undertaking.

11.2. What are the benefits of a VMP undertaking?

We would strongly encourage a responsible person to engage with us as early in the process as possible, and in particular to consider an enforcement undertaking before we issue a VMP notice of intent. One of the key benefits of an enforcement undertaking (rather than a VMP undertaking) is to enable the early resolution of a non-compliance so that behaviour change, and restorative steps happen sooner rather than later. By engaging

early, the responsible person is able to better manage the quick resolution of non-compliance, is more likely to submit an acceptable offer and may reduce the investigation costs incurred by us. However, we recognise that there may be circumstances where this is not possible.

A VMP undertaking provides an opportunity for the responsible person to design their own response to non-compliance rather than having a VMP imposed on them, and we, the responsible person, affected communities and the environment can all benefit from their use.

If the VMP undertaking is accepted and provided that it is fully complied with to our satisfaction, the responsible person is protected from a monetary penalty and the potential reputational damage which may occur from it.

A VMP undertaking has a number of benefits for the responsible person and us including:

- it enables a responsible person to address offending in a constructive way;
- it can be tailored to the circumstances, which includes addressing any impact on the local community, recreational users of the environment and other businesses;
- a faster and more effective resolution because the responsible person designing the offer has ownership of the actions;
- an opportunity to offer a more sustainable and practical response to the needs of Scotland's environment.

The underpinning principles of a VMP undertaking mean that:

- the focus of the undertaking must be on restoration and remediation of the local environment and preventing repeated non-compliance;
- we expect the undertaking to improve the wider, longer term environmental performance of the responsible person making the offer.

11.3. When a VMP undertaking may be acceptable

To prevent an offer of a VMP undertaking being used as a way to delay action, there is a presumption that an offer of a VMP undertaking will be refused unless we are satisfied that there is a genuine reason for an offer of an Enforcement Undertaking not being made

earlier. Any offer must also reflect the additional impact that delay has had on the community affected, other businesses, the environment and users of the environment, as well as the ongoing impact of regulatory non-compliance.

We will consider an offer of a VMP undertaking in the following circumstances:

- any financial benefit accrued has been negated by the undertaking;
- the measures are likely to ensure no repeat offending;
- it delivers a better environmental outcome, demonstrating commitment to more preventative and longer term actions;
- it demonstrates that the behaviour of the responsible person has changed for the better;
- we believe the responsible person will comply with the conditions of the undertaking;
- the responsible person has a valid reason for not offering an Enforcement Undertaking prior to the VMP notice of intent.

11.4. When SEPA will not consider the use of a VMP undertaking

One of the underpinning principles of a VMP undertaking is that the responsible person will comply with the terms of the undertaking. We consider our acceptance of an undertaking inappropriate when:

- the responsible person has failed to comply with the mandatory requirements of a statutory notice;
- the offer includes a clause denying liability;
- it appears to us that the responsible person, for any reason, might not comply with the undertaking;
- it appears they might use the undertaking as a way to delay taking action;
- the responsible person does not have a valid reason for failing to offer an Enforcement Undertaking prior to the VMP notice of intent.

11.5. Preparing a suitable offer for determination by SEPA

We will give some feedback on a draft proposal if requested and where appropriate, but we do not intend to enter into protracted negotiations about the offer. We will either accept or decline an offer based on its content. We expect the responsible person to address the following points when making an acceptable offer:

- how they will prevent recurrence;
- how the offer demonstrates preventative, longer term benefits for the environment or the local community including steps to introduce more sustainable business practices;
- how the offer goes beyond the minimum required to restore the environment or if not possible to make a compensatory offer - we do not consider that actions to be made as part of a VMP undertaking should simply equate to restoration of harm caused;
- how the offer removes more than the financial advantage gained - we do not consider that payments to be made as part of a VMP undertaking should simply equate to the financial advantage gained by offending.

We will look more favourably on an offer:

- that demonstrates preventative, longer term benefits for the environment or the local community;
- where it delivers restoration and/or compensatory benefits to the environment or the community directly affected by the offence;
- that reflects the costs incurred by us (see below).

A VMP undertaking is offered as an alternative to paying the full amount of the VMP, as set out in the notice of intent. If you disagree with the amount of the VMP you must submit [representations](#) at the same time as submitting the offer of a VMP undertaking and within the period allowed for representations (usually 28 days). SEPA will consider any representations and the amount of VMP that would have been included in a final VMP notice will be stated as part of our acceptance of the offer (where it is accepted). This amount will be used to calculate the non-compliance penalty should the undertaking not be complied with.

We will confirm in writing our decision about whether or not we accept an offer.

11.6. How SEPA will recover the costs we have incurred?

The responsible person making an offer will be expected, as part of the VMP undertaking, to pay the costs borne by us in investigating the offence and considering the undertaking, and the costs of any subsequent compliance monitoring and other activities to be carried out by us to assess compliance with the undertaking.

To enable the responsible person to offer a suitable amount, we will provide information about the costs incurred when we issue the Notice of Intent in relation to the VMP. The amount may not necessarily represent the full costs incurred by us for the particular offence.

11.7. Is there a right of appeal?

If we reject the offer of a VMP undertaking, the responsible person making the offer has no right of appeal against that decision.

11.8. Variation of VMP undertakings

If it becomes impossible for the responsible person to comply with the VMP undertaking as accepted by SEPA, the responsible person may apply to SEPA for amendment of the VMP undertaking. It is at our discretion whether or not to agree to any proposed amendments. Any amendment to a VMP undertaking will need to provide equivalent benefit to the environment or communities, equivalent financial commitment and address the additional cost incurred by SEPA in considering the amendment.

If the amended offer is rejected the responsible person may decide to submit a further amendment. This should be submitted quickly as we are unable to accept amended offer if we have already taken a formal decision about what other enforcement action we will take.

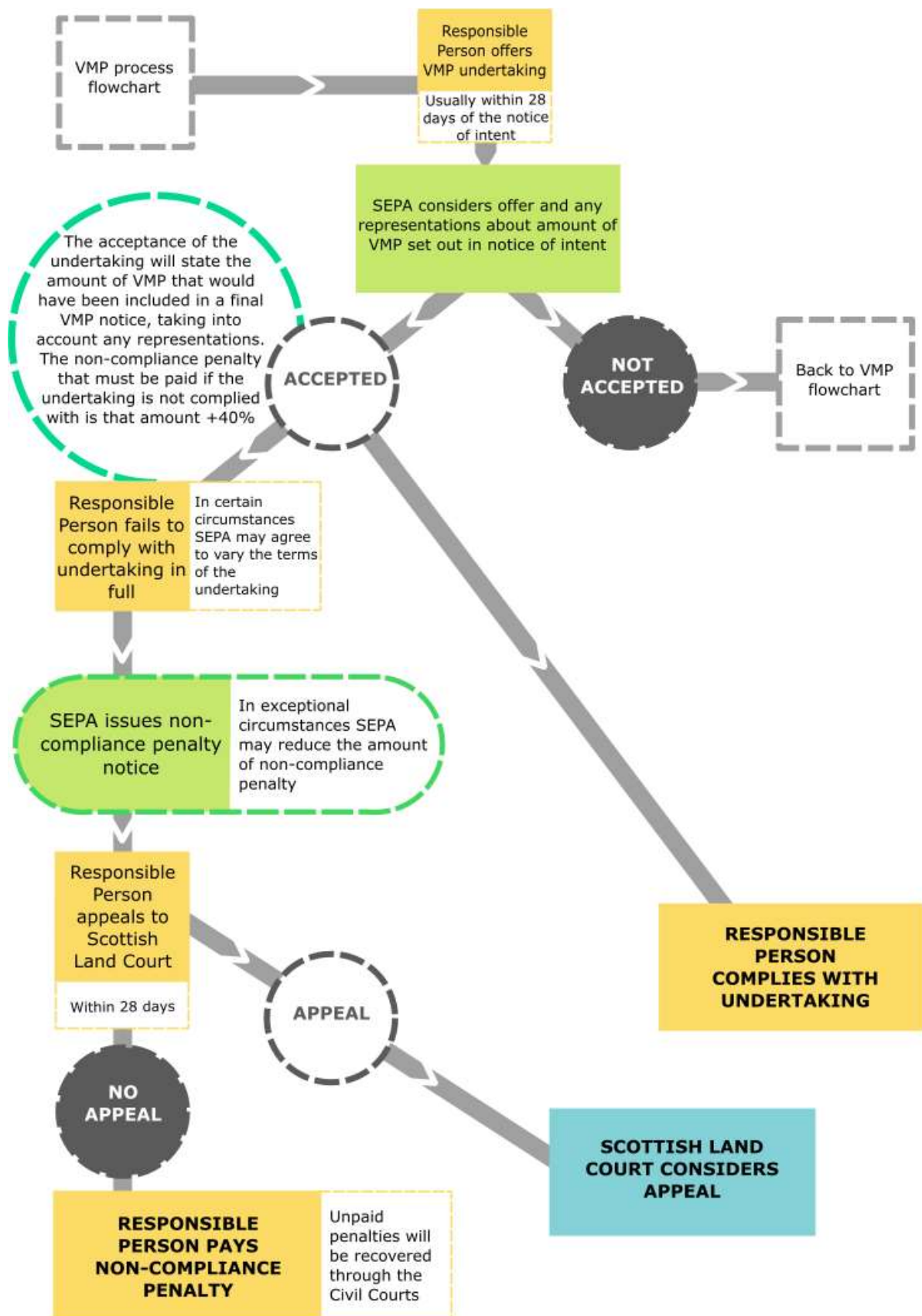
Example 4

Where a VMP undertaking commits funding to a third party to support a local improvement project but the third party decides not to proceed, the responsible person may apply to SEPA for amendment of the VMP undertaking.

11.9. When a responsible person does not comply with the terms of the VMP undertaking

We may serve a [Non-compliance penalties](#) if a responsible person fails to comply with their undertaking. This includes circumstances when a responsible person uses their undertaking to delay coming into compliance or to delay the remediation or restoration of the environment.

Figure 5 - Variable monetary penalty undertaking flowchart



12. Non-compliance penalties

12.1. What is a non-compliance penalty?

A non-compliance penalty (NCP) is a monetary penalty that we may impose only when the responsible person has failed to comply with a [variable monetary penalty \(VMP\) undertaking](#). This means that the responsible person has failed to deliver one or more of the agreed actions. We will impose the penalty by serving an NCP notice.

12.2. When a non-compliance penalty may be used

We can impose an NCP where there has been whole or partial non-compliance with the VMP undertaking i.e. either all or only some of the actions have not been delivered. We will consider the reasons for the non-compliance before imposing an NCP.

We will endeavour to make a decision on whether to issue an NCP at the earliest practicable time, and in any event within six months of identifying the VMP undertaking in question has not been complied with in part or completely.

12.3. When SEPA cannot use an NCP

We are unable to use an NCP when the responsible person has failed to comply with:

- a fixed monetary penalty;
- a variable monetary penalty;
- an enforcement undertaking;
- a statutory notice.

12.4. How SEPA will calculate an NCP

If the VMP undertaking is not complied with, the level of NCP will be the amount of VMP (in pounds sterling) stated in the acceptance of the VMP undertaking - together with an additional 40% uplift. The amount of VMP stated in the acceptance of the VMP undertaking is the amount of VMP that would have been included in the final VMP notice had the undertaking not been accepted. In deciding this amount, we will take into account any representations made to us within the period for representations, usually 28 days from

having received the notice of intent, regarding the amount specified in the VMP notice of intent.

We may, at our discretion and in exceptional circumstances, adjust the amount of the non-compliance penalty where satisfied that non-compliance with the VMP undertaking was due to circumstances out with the responsible person's control.

The NCP has to be paid within 56 days of the date of the notice. Late payment will result in interest at a rate of 8% per annum being applied to the amount that is overdue.

12.5. Is there a right of appeal?

The responsible person has the right to appeal against the imposition of an NCP on the basis that:

- the decision to serve the notice was based on an error of fact;
- the decision was wrong in law;
- the decision was unreasonable for any reason (including that the amount is unreasonable);
- any other reason.

We will provide detail in the notice about how to make an appeal and about the timescale and consequences of making an appeal. However, the process for submitting an appeal and the relevant forms are also available on the [Scottish Land Court](#) website.

An appeal means that payment of the penalty is postponed until after the appeal has concluded.

13. How we may combine the use of different enforcement actions

Example 5

Someone fails to comply with conditions of an environmental authorisation by failing to submit data on time. This happens on three separate occasions over a six month period.

We respond by issuing a fixed monetary penalty (FMP) and a statutory notice requiring an investigation into the reasons for the late reporting to be carried out and recommendations to prevent future non-compliance to be submitted to us. Then a further notice might require those recommendations to be implemented to ensure compliance with the particular authorisation condition. We would continue to offer advice and guidance throughout.

By using the FMP and the statutory notice together, we aim to change behaviour and to deter future non-compliance.

Example 6

Someone has failed to take preventative steps to stop construction works from having an adverse effect on the environment.

We might respond by issuing a statutory notice requiring the works to stop and steps to be taken to mitigate the effect on the environment. This response deals with the immediate harm to the environment.

The responsible person has received a statutory notice from us at another site for a similar problem. It is obvious that their behaviour has not changed despite that earlier intervention. We might, therefore, issue a notice of intent for a variable monetary penalty (VMP), where the VMP seeks to remove financial benefit (excluding the avoided costs relating to steps that should have been taken to mitigate the effect on the environment

where these steps have subsequently been, or are now being, taken) and address the gravity of the offence.

We would continue to offer advice and guidance to the developer throughout.

Example 7

Someone is storing waste without having an appropriate environmental authorisation.

In cases where authorising the activity is not appropriate, we might issue a statutory notice requiring steps to be taken to mitigate the effects on the environment and would require the activity to stop. We might also issue a notice of intent to serve a variable monetary penalty (VMP). The VMP would seek to remove financial benefit (excluding the avoided costs relating to steps that should have been taken to mitigate the effect on the environment where these steps have subsequently been, or are now being, taken), punish the person for carrying on an unauthorised activity, and to deter future non-compliance.

If they do not comply with the statutory notice by carrying out the steps specified in the notice, further enforcement action might be merited, including a second VMP to remove the avoided costs associated with steps to be taken to mitigate the effects on the environment.

We would continue to offer advice and guidance throughout.

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

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

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

www.sepa.org.uk
Strathallan House, The Castle Business Park, Stirling, FK9 4TZ

