

# Natural Resources Wales Enforcement and Sanctions Policy

## Annex 1 Variable Monetary Penalty

### 1. General principles

Under our Enforcement and Sanctions Policy, Variable Monetary Penalties may be used for specific offences. They can be especially effective where the imposition of a financial penalty may change offender behaviour and deter others. This may include, for example, cases where significant environmental damage require restoration and imposing a VMP is also an alternative to a fine imposed by a court for a successful prosecution. Variable Monetary Penalties will also be used to remove an identifiable financial benefit or saving resulting from non-compliance or where there is evidence of negligence and mismanagement, but this is not sufficient to warrant prosecution.

### 1.2 Government guidance

The Government has issued guidance to regulators on how they must calculate Variable Monetary Penalties (Defra/WG guidance and RES Act guidance).

This methodology follows that guidance. It is important to note that:

- Variable Monetary Penalties have to be calculated individually for each offence and the starting point for the deterrent component (see below) for each offence has to be individually determined.
- Where more than one offence is committed, a separate VMP may be imposed at the same time for each offence.
- The limit of the amount of the total payment under any single VMP in Wales may not exceed the maximum amount of the fine for that offence.

### 1.3 Overview of components of a Variable Monetary Penalty

#### Variable monetary penalties (VMPs)

The [Sentencing Council's Definitive guideline for the Sentencing of Environmental Offences](#) (referred to as the 'Guideline' within this section) explains how to assess a suitable penalty for an environmental offence. It follows a stepped approach. It applies to individual offenders (aged 18 and over) and organisations.

We use a similar stepped approach to calculate a VMP. To illustrate our approach, we have set out the steps we would apply to an organisation. We would use the steps in the Guideline for an individual when calculating a VMP for an individual.

#### Step 1: compensation

We will take account of compensation paid to third parties and victims for:

- personal injury
- loss or damage resulting from an offence

We will use our discretion to reduce the amount of a VMP if compensation has been paid.

#### Step 2: confiscation

This is not relevant to VMPs. The proceeds of a crime can only be confiscated following a conviction.

#### Step 3: determining the offence category

We will use culpability (blame) and harm factors when we work out the offence category.

We will use the definitions in the Guideline to assess culpability.

We will use the categories of harm in the Guideline to assess harm. But, as part of our assessment we will use our Incident Categorisation Guidance and Compliance Classification Scheme (CCS) classifications as evidence of harm.

Together the culpability and harm factors indicate how serious the offence is. We will use the result to identify our starting point and category range when we assess the appropriate penalty.

#### Step 4: starting point and category range

When we calculate a VMP we will assess the:

- size of the organisation, by turnover or equivalent
- financial circumstances of an individual

In the Guideline, the starting point for the most serious, deliberate offence by a large organisation is £1 million - that is the top of the scale.

The maximum penalty we can impose using a VMP is £250,000 which is the statutory cap. So, we have reduced the starting point by a factor of 4 to reflect the statutory maximum. This applies across all of the tables.

We consider that the maximum penalty for a VMP should be the maximum fine for a Crown Court case, which is sometimes unlimited. So, we will restrict this to the statutory cap for VMPs which is £250,000. Where the maximum fine that can be imposed for a

particular offence in the Crown Court is less than £250,000, we will reduce the starting point for calculating the penalty to reflect the lower maximum fine for that offence.

The Guideline includes a summary of aggravating and mitigating factors. We will identify if any combination of these or other relevant factors should result in adjusting the starting point penalty up or down. For example, relevant recent convictions and/or a history of non-compliance are likely to result in us applying a substantial upward adjustment.

We may treat very large organisations (VLOs) in a class of their own. This is in line with how the courts deal with fines for VLOs - applying a mechanistic increase or reduction is not considered helpful. An example of this is the judgment in the case: [R v Thames Water Utilities Limited \(2015\) EWCA Crim 960](#).

After step 4 we will 'step back' and apply the factors set out in steps 5 – 7. This is to review whether the penalty as a whole is fair and correct. We will adjust as necessary keeping it within the statutory maximum cap.

Step 5: step back - removal of any economic benefit derived from the offending

The penalty can include an amount to cover any obvious financial benefit unlawfully gained by the offender. We will only add this if it does not exceed the maximum penalty we can apply.

Step 6: step back – proportionality

We will check whether the proposed penalty based on turnover is proportionate to the means of the offender. We will balance the need for the penalty to have a real economic impact with the organisation's ability to pay.

We may, where we receive evidence, allow time for payment or allow payment by instalments.

Step 7: step back – consider other factors that may warrant adjustment

Our calculation will take any other factors into account. For example, matters which came up in the investigation or as a result of representations received.

Step 8: consider any factors that might indicate a reduction, such as assistance to the prosecution

This factor does not apply to calculating a VMP. Though it may have been a factor which influenced the choice of sanction.

Step 9: reduction for guilty pleas

This does not apply for calculating a VMP.

Step 10: ancillary orders

We may adjust the VMP if the offender will face financial expenditure as a result of following a compliance or restoration notice. This includes compliance with any other notice where expenditure directly benefits the environment.

This adjustment is not appropriate if the recipient benefits from the work, such as site improvements.

Step 11: totality principle

We will take account of whether the total VMP is proportionate to the offending behaviour. In particular, we will consider any recovery of costs we have sought and any other discretionary requirements.

Step 12: reasons

We will explain how we calculated the VMP and give our reasons in our notice of Intent.