



**Scottish
Civil Justice
Council**

PUBLIC CONSULTATION: on the extension of Protective Expenses Orders (PEOs)

10 June 2026 - WORKING DRAFT (v1.3)

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The accompanying documents have been provided to support the proposals made within this consultation paper:

- *Draft Rules*
- *Draft Business and Regulatory Impact Assessment (BRIA)*
- *Draft Equalities Impact Assessment (EQIA)*
- *Respondent Information Form (RIF)*

SECTION 1: RESPONDING TO THIS CONSULTATION

1. In December 2025, the Scottish Civil Justice Council (the Council) considered its approach to rules on Protective Expenses Orders (PEO) in cases within the scope of the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention). Article 9 of the Convention provides certain rights to challenge environmental decision making. The Council agreed to consult on draft rules with a view to resolving issues with the rules on PEOs, as highlighted by the Aarhus Convention Compliance Committee.
2. Whilst a PEO can be obtained at common law (and the first PEO was granted under common law in *McGinty v Scottish Ministers* [2010] CSOH 5), this consultation is limited to the rules on PEOs for cases within the scope of Article 9 of the Aarhus Convention. The Council does not have wider information before it to suggest that there is a requirement to introduce a wider rule allowing PEOs in cases not involving Article 9 of the Convention.
3. This consultation proposes three broad changes: (1) the amendment of certain detailed parts of the existing rule within the Court of Session Rules; (2) the extension of those amended rules to a wider range of actions in the Court of Session; and (3) the introduction of similar rules to allow applications for a PEO in civil case before the Sheriff Appeal Court and Sheriff Court.
4. Feedback is sought from a wide range of individuals, organisations and public bodies, including members of the public, academics, businesses and business representative groups, community groups, non-governmental organisations, public bodies, the judiciary, the legal profession, court officials and the Scottish Legal Aid Board.
5. This consultation will be open for twelve weeks. Written responses are invited by **Friday XX XXX 2026**.
6. To respond please email scjc@scotcourts.gov.uk with your response, along with a completed **Respondent Information Form**.

How will your response be handled?

7. Your response will be handled in line with the information you provide within your Respondent Information Form. If you are content for your response to be published it will be uploaded to our website. If you ask for your response not to be published the Council will regard it as confidential and treat it accordingly.
8. All respondents should note that the Council is subject to the provisions of the Freedom of Information (Scotland) Act 2002. If a Freedom of Information (FOI) request is received about the responses to this consultation, any response (including those not published) may need to be made available when responding.

Why run a Public Consultation?

9. It is recognised that there is increased concern and interest in environmental issues and decisions, including as to the impact of climate change. It is also recognised that increased numbers of court challenges to environmental decisions may cause delays to projects or policies being implemented. Hence it is important for the Council to have a wide range of feedback on the draft rules from a broad range of society.

Who are we consulting with?

10. The Council would welcome responses from any interested party. In addition, the consultation papers will be emailed to those listed below who have responded to previous consultations or may have a more direct interest in this consultation:

General Public:

Litigants and potential litigants who may have sought or may seek cost protection against an adverse award of expenses being made against them and the public more generally

Academics

Professor Tom Mullen, Glasgow University
Professor Colin Reid, Dundee University
Academics from any Law School

Advice and Assistance:

Citizens Advice Scotland
Consumer Scotland

Those organisations that provide advice or assistance to any person that may be considering whether to seek a PEO when initiating a civil action.

Business Groups

CBI Scotland – Infrastructure Working Group
Federation of Small Businesses
Scottish Building Federation
Scottish Creel Fisherman
Scottish Renewables
Scottish Whisky Association

Those developers that have been involved in litigation where a motion for a PEO was considered.

Law Centres

Environmental Rights Centre for Scotland (ERCS)
Scottish Association of Law Centres (SALC)

Environmental groups:

Friends of the Earth Scotland
Greenpeace UK
John Muir Trust

Marine Conservation Society
Open Seas Trust
RSPB Scotland
Scottish Environment LINK
Sustainable Shetland
Trees for Life
Wildcat Haven Community Interest Company
Any other Non-Government Organisation (NGO) that has an interest in the protection of the environment.

Public Bodies:

Coalition of Scottish Local Authorities (COSLA)
Equalities and Human Rights Commission (EHRC) Scotland
Environmental Standards Scotland (ESS)
NatureScot
Scottish Information Commissioner
Scottish Environmental Protection Agency (SEPA)
Scottish Human Rights Commission (SHRC)
Scottish Public Services Ombudsman
Scottish Water

Judiciary:

Senators of the College of Justice
Sheriffs Principal
Sheriffs and Summary Sheriffs Association

Practitioners:

Faculty of Advocates
Society of Local Authority Solicitors
Society of Solicitor Advocates
Law Society of Scotland
Any law firms

Officials:

Scottish Courts and Tribunals Service
Scottish Legal Aid Board

11. To support the policy interests of Scottish Ministers, the Council has forwarded a copy of these consultation papers on to Scottish Government officials.
12. To support the policy interests of the [Equalities, Human Rights and Civil Justice Committee](#) (EHGRCJC) of the Scottish Parliament, the Council has forwarded a copy of these consultation papers on to the Convenor, and to [SPICe](#).

Comments and complaints

13. If you wish to provide any feedback to the Council on this consultation, or how it is being conducted, then please email scjc@scotcourts.gov.uk.

SECTION 2: GENERAL BACKGROUND

Purpose

14. This consultation seeks views on amendments to existing rules on PEOs in the Court of Session, a proposed amendment to widen the types of cases where an application can be made for a PEO in the Court of Session, and the introduction of rules in the Sheriff Appeal Court and the Sheriff Court. Together, these would amount to a considerable extension of the PEO regime.

Background

15. The UK is a signatory to the Aarhus Convention which provides procedural rights to participate in, obtain information on and challenge certain environmental proposals and decisions. These three aspects are often referred to as the three pillars of the Aarhus Convention.
16. In terms of the third pillar (that is access to justice) the Aarhus Convention provides rights to challenge environmental decision making, which should be available in a way that is not prohibitively expensive. As part of the compliance mechanism to the Aarhus Convention, the Aarhus Convention Compliance Committee has made a series of observations as to whether the court rules in Scotland fully implement Article 9 of the Aarhus Convention. In December 2025, the SCJC considered a new approach to Aarhus compliance, and agreed a further consultation should take place in 2026 to propose new rules with the aim of resolving all outstanding issues.
17. Court rules providing for an applicant to obtain a Protective Expenses Order (PEO) have been present since 2013. A PEO limits a litigant's liability to an adverse award of expenses being made against them in the event of losing the case, with a reciprocal cap (known as the cross cap) as to the extent to which, in the event of success, the party benefitting from the PEO can recover expenses. However, those rules are presently limited to certain types of action in the Court of Session.
18. The UK is a signatory to the Aarhus Convention. Under the Convention, members of the public (including NGOs) are given procedural rights to (1) obtain access to certain environmental information; (2) to participate in certain decisions regarding the environment and environmental decision-making and (3) to challenge certain environmental decisions. If the environmental decision is caught within Article 9 of the Aarhus Convention, and other provisions of Article 9 are satisfied, the procedures must be "not prohibitively expensive".
19. In Scotland, like many court systems, the general rule is that the unsuccessful party is normally found liable for the expenses or costs of the winning party. As expenses normally follow success they are determined at the end of a court action, and difficulties will arise with environmental cases falling within the terms

of Article 9. Rules allowing for an application to limit a party's liability for costs in the form of a PEO were enacted some time ago. Since then, the Aarhus Convention Compliance Committee has considered and reported issues with those rules.

20. Any members of the public, community groups or national environmental bodies considering whether (or not) to initiate a legal action need to ensure they have enough financial resources in place to meet the costs of securing their own legal representation, and in addition have the ability to meet the reasonable costs of their opponent should they lose.
 21. In practice, situations frequently arise where a litigant may only have limited resources available whereas their opponent may be a large well-funded organisation or public body with ready access to both significant funds and legal expertise. As such imbalances of power create a David versus Goliath situation that can act as a brake on those trying to pursue access to justice.
 22. When issues do exist, natural justice may require the court to consider making an order for *cost protection* i.e. protection from expenses.
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Protective Expensive Orders (PEOs)

23. In Scotland the method used for seeking *costs protection* is to lodge a motion for a Protective Expenses Order (PEO).
24. If that motion is granted the applicant gains protection against the financial risk of an adverse award of expenses being made against them. In practice that then means their liability to pay an award of expenses to their opponent is normally capped at £5,000 if they lose; and if they win the expenses they could recover from their opponent would be limited to a cross cap of £30,000.
25. There are 2 options currently available to potential litigants seeking a PEO in Scotland:
 - *A COMMON LAW PEO* – for this type of PEO a motion can be lodged under the common law ‘in any civil proceedings’ that may be ‘initiated in any court.
 - *AN ENVIRONMENTAL PEO* – for this type of PEO a motion for an *environmental PEO* is restricted to environmental actions proceeding under the rules stated within RCS Chapter 58A.

The volume of cases:

26. To date the transaction volumes have been very low. On average motions for either a common Law PEO or an Environmental PEO have been lodged in around 1 to 2 cases per annum. If the extension proposed in this consultation is supported, the working assumption is that the annual volume of applications would remain in single digits for some time.

The limited scope of the existing rules

27. At present the scope of the existing costs protection procedure is limited to litigants seeking an environmental PEO within a judicial review or a statutory appeal to the Court of Session under:

- *RCS Chapter 58A (Protective Expenses Orders in Environmental Appeals and Judicial Reviews)*.

28. *Annex 1* – sets out a brief history for those rules which first took effect from March 2013 and were subsequently amended in 2015, 2018 and 2024.

The Policy Objectives

29. The policy objectives of proposing to extend PEOs to other actions in the Court of Session, and actions in the Sheriff Appeal court and Sheriff Court are:

- *To improve Aarhus compliance* – by addressing the concerns that fall within the remit of the SCJC, from the reports of the Aarhus Convention Compliance Committee, enabling the SCJC to comply with its international obligations.
 - *To improve access to justice* – as widening the ability to apply for a PEO is likely to improve access to justice for those bringing an environmental dispute before the courts.
 - *To provide comparable rules* – as developing a fully Aarhus compliant set of rules in the Court of Session and then replicating that approach across the Sheriff Courts and the Sheriff Appeal Court aligns with the SCJC guiding principle of having similar rules, where appropriate, in all courts.
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The Aarhus Convention

30. Article 9 of the Aarhus Convention deals with Access to Justice and, in particular, the circumstances in which challenges can be made regarding access to environmental information, to decisions concerning Article 6 of the Convention (regarding public participation on specific activities) and on challenging contraventions of environmental law more generally. In particular, the ability to challenge decisions must be fair, equitable, timely and not prohibitively expensive.

31. Article 9(5) requires member states to consider what appropriate assistance mechanisms can be provided to “remove or reduce financial and other barriers to access to justice”. The Council is aware that the “assistance mechanisms” provided in Scotland include:

- The ability to access ‘*civil legal aid*’;
- The ability to access ‘*exemptions from court fees*’; and
- The ability to seek ‘*costs protection*’ (that is a PEO) in environmental cases.

32. In relation to exemptions from court fees, fee exemptions for Aarhus related cases were introduced with effect from July 2022. If court rules allowing environmental PEOs were extended to the Sheriff Appeal Court and the Sheriff Court, the Council anticipates that the Scottish Ministers would consider extending the same fee exemption regime to the Sheriff Appeal Court and the Sheriff Court.
33. The original PEO rules were introduced in the Court of Session in March 2013. If the extension proposed in this consultation were supported, there would be comparable cost protection procedures available to all potential litigants within the Sheriff Appeal Court and the Sheriff Courts, where the litigation falls within Article 9 of the Aarhus Convention.
34. Article 8 of the Aarhus Convention requires, in some circumstances, there to be an opportunity for the public to participate in the preparation of rules that may have a significant effect on the environment. This consultation provides such an opportunity for the public to participate.
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The proposed changes

35. The remainder of this paper is structured as follows:
- *Section 3* – proposes amendments to the existing Rules of the Court of Session so that they are fully Aarhus complaint.
 - *Section 4* – proposes a new procedure for use in the Sheriff Appeal Court.
 - *Section 5* – proposes a new procedure for use in the sheriff courts.
36. The narrative for each proposal should be read in conjunction with the “draft rules” instrument that accompanies this consultation.
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SECTION 3: AMENDING THE COURT OF SESSION RULES

37. This section summarises our proposed changes within the Court of Session and should be read in conjunction with the accompanying draft rules.

What happens at present?

38. The existing rules providing the ability to seek an environmental PEO within the Court of Session are found in:

RCS - Chapter 58A - Protective Expenses Orders in Environmental Appeals and Judicial Reviews:

- *58A.1 - Application and interpretation*
- *58A.2 – Applications relating to requests for environmental information*
- *58A.3 - Public participation in decisions on specific environmental activities*
- *58A.4 – Contravention of the law relating to the environment*

- 58A.5 - Applications for protective expenses orders
- 58A.6 - Determination of applications
- 58A.7 - Terms of protective expenses orders
- 58A.8 - Expenses of protection in reclaiming motions
- 58A.9 - Expenses of applications
- 58A.10 – Expenses of interveners

39. The rules allow for a PEO to be sought in “relevant proceedings”, which is defined within the interpretation clause at RCS rule 58A.1.

What is being proposed?

Concern A - The type of claims covered:

40. It is recognised that funding arrangements for Group Procedure have complexities. Group proceedings under RCS Chapter 26A will generally involve a financial remedy, and the funding of such proceedings usually relies on the ability to recover judicial expenses in the usual way. Those considerations alter the way that any PEO rule might interact with actions taken forward as group proceedings. The Council’s Group Procedure Working Group will separately consider that interaction between group procedure and the cost protection provided by a PEO.
41. The proposal in these draft rules is to extend the availability of the rules allowing application for a PEO to be made in all proceedings within the Court of Session, except for those arising under group procedure, where those proceedings fall within Article 9 of the Aarhus Convention.

Question 1 – Do you agree that, other than in group proceedings, a party should be able to apply for an Environmental PEO in any relevant proceedings that fall within Article 9 of the Aarhus Convention within the Court of Session? If not, why not?

Question 2 - Do you agree that the amendments proposed to be made to RCS rule 58A.1 will achieve the purpose of extending the potential to apply for a PEO in all civil proceedings in the Court of Session within the scope of Article 9 of the Aarhus Convention, other than group proceedings?

Concern B - The levels of the cost caps:

42. Historically RCS rule 58A.7 referenced the ability, on cause shown, for the court to change the cap that had been set within a PEO either up or down. The existing Court of Session rule reads:

58A.7 - Terms of protective expenses orders

- (1) A protective expenses order must—
- (a) limit the applicant's liability in expenses to the respondent to the sum of £5,000, or such other sum as may be justified on cause shown; and
 - (b) limit the respondent's liability in expenses to the applicant to the sum of £30,000, or such other sum as may be justified on cause shown.
- (2) Where the applicant is the respondent in proceedings mentioned in rule 58A.1(1)(a)—
- (a) paragraph (1)(a) applies as if the reference to the applicant's liability in expenses to the respondent was a reference to the applicant's liability in expenses to the appellant; and
 - (b) paragraph (1)(b) applies as if the reference to the respondent's liability in expenses to the applicant was a reference to the appellant's liability in expenses to the applicant.
- (3) In paragraph (1), "the respondent" means—
- (a) all parties that lodge answers in an application to the supervisory jurisdiction of the court;
 - (b) all respondents in an appeal under statute.

43. The Council has considered that wording and the option to use a term other than "on cause shown" to provide for the judicial discretion to determine where that fixed £5,000 cap can be lowered, if the court considers it reasonable to do so. The proposal made is that:

- If a PEO is granted, that cap should be set at a fixed maximum of £5,000 with the ability for the court to lower that figure through judicial discretion.

44. To implement the proposed change rule 58A.7 is amended to the effect that a fixed £5,000 cap would be applied, with that sum able to be lowered by the court (but not increased).

Question 3 – Do you agree with the cost cap for the applicant being a fixed maximum sum of £5,000 which the court may decrease but not increase? If not, why not?

Question 4 – Do you agree that the proposed draft wording of Rule 58A.5 achieves the purpose of providing judicial discretion to lower the cap, where it is reasonable to do so?

Concern C (i) - The application procedure – terms of representation:

45. RCS rule 58A.5 (3)-(a)-(ii) currently provides that in an application for a PEO the terms of which the applicant is represented should be provided. The current rule reads:

58A.5 (3) - *The applicant must lodge with the motion—*

- (a) *a statement setting out—*
 - (i) *the grounds for seeking the order;*
 - (ii) **the terms on which the applicant is represented;**
 - (iii) *an estimate of the expenses that the applicant will incur in relation to the proceedings;*

(iv) an estimate of the expenses of each other party for which the applicant may be liable in relation to the proceedings; and
(v) in the case of an application for liability in expenses to be limited to an amount lower or, as the case may be, higher than a sum mentioned in rule 58A.7(1), the grounds on which the lower or higher amount is applied for; and

(b) any documents or other materials on which the applicant seeks to rely.

46. The Council has considered the need for such information. It is not clear that such information is necessary for the court to know to be able to determine the application for a PEO. Further, as an estimate of the expenses that the applicant will incur in the proceedings is already required (which is arguably needed to understand the overall costs the applicant faces), it may, in some cases, be duplication. As such, the Council favours withdrawing the requirement to provide information on the terms on which the applicant is represented.

47. The proposed amendment to rule 58A.5 (3)-(a) would omit subparagraph(ii).

Question 5 – Do you agree that the requirement to provide terms of representation should be deleted? If not, why not?

Question 6 – Do you agree that the proposed deletions to Rule 58A.5 (3) achieves the purpose of no longer requiring the applicant to provide terms of representation, or do you have any other comment on that Rule?

Concern C (ii) - The application procedure – confidentiality of information:

48. In 2024, RCS rules 58A.5 and 58A.6 were amended to allow an applicant to request that any information provided is kept confidential. If the court makes such an order, then any breach constitutes a contempt of court and the court holds inherent common law powers to impose punishment, which can include imprisonment.

49. In its 2025 Compliance Report¹ the Compliance Committee welcomed those changes and then sought a clarification as to how that rule operates in practice.

50. The Council have considered the Compliance Committee's report to the Meeting of the Parties in November 2025. Whilst the Council notes that the consideration of this report has been deferred to a future Meeting of the Parties, it is unclear to the Council whether the Compliance Committee were seeking further information in reassurance as to the confidentiality of private information, or if the Compliance Committee were suggesting that such information should not be provided to the defender/respondent or interested parties. The Council considered this issue. It noted an application for a PEO is made and considered in the context of an adversarial system. It noted that a PEO can be a significant order to grant, given

¹ https://unece.org/sites/default/files/2025-11/ECE.MP_PP_2025.66.E.pdf. Note that the Meeting of the Parties deferred consideration of this report at its November 2025 meeting.

it limits the ability of a party to recover judicial expenses, even if that party is ultimately successful in the action. In those circumstances, the Council noted it was axiomatic to the fairness of the process in an adversarial system to allow both parties access to the information upon which the court will make its decision.

51. The Council noted that the rule was amended in 2024 as set out above. Accordingly, whilst the applicant's financial information is available to the other parties, the existing rules provide the applicant can seek to have that information kept private. The Council is not aware of any issues with that rule in practice.

Question 7 – are you aware of any difficulties with the handling or provision of financial information provided as part of an application for a PEO? If so, was this after the 2024 amendments to the rules?

Concern C (iii) - The application procedure – estimating expenses:

52. As part of the current Court of Session rule, an application for a PEO should include an estimate of the expenses for other parties for which the applicant may be liable in relation to the proceedings. The current rule reads:

58A.5 (3) - The applicant must lodge with the motion—

- (a) a statement setting out—*
 - (i) the grounds for seeking the order;*
 - (ii) the terms on which the applicant is represented;*
 - (iii) an estimate of the expenses that the applicant will incur in relation to the proceedings;*
 - (iv) an estimate of the expenses of each other party for which the applicant may be liable in relation to the proceedings; and***
 - (v) in the case of an application for liability in expenses to be limited to an amount lower or, as the case may be, higher than a sum mentioned in rule 58A.7(1), the grounds on which the lower or higher amount is applied for; and any documents or other materials on which the applicant seeks to rely.*

53. The Council have considered the requirement for this to be lodged as part of an application for a PEO. Whilst it noted concerns raised by the Aarhus Convention Compliance Committee may not in fact arise², it considered the necessity of providing this information. It was noted that judges would be reasonably familiar with approximate costs for different types of procedure. It was also noted that generic information on likely expenses arising in different types of cases could be provided to judges. It was also noted that estimates could be fraught with difficulties, as the natural tendency of parties was to overestimate rather than underestimate potential costs and liabilities.
54. The Council considered the application should have sufficient information in it to allow the court to determine whether the action would be prohibitively expensive without a PEO. It concluded that applicants should still provide an estimate of their own expenses but should not provide an estimate of their opponent's

² See Aarhus Strategy paper, considered by the Scottish Civil Justice Council on 8 December 2025, available [here](#) at paragraphs 59 to 67 and in particular at paragraph 65.

expenses. Accordingly, it concluded that in rule 58A.5 (3)-(a) subparagraph (iv) should be deleted.

55. The proposed amendment to rule 58A.5 (3)-(a) omits all of subparagraph (iv).

Question 8 – Do you agree that the requirement for an applicant to estimate their opponents' expenses should be deleted? If not, why not?

Question 9 – Do you agree that the draft wording proposed re Rule 58A.5 (3) achieves that purpose, or do you have any other comment on that Rule?

Concern D – Interveners:

56. In terms of the Court of Session rule 58.17, in a judicial review case a third party can seek to participate in a court action to the extent of lodging a public interest intervention. That is a written submission to the court only (and is different from where a third party, such as a developer, seeks to enter a court process as an interested party to defend a particular interest). The current rule reads:

RCS 58A.10 - Expenses of interveners

(1) Expenses are not to be awarded in favour of or against a relevant party, **except on cause shown.**

(2) **If the court decides expenses are to be awarded under paragraph (1), it may impose conditions on the payment of expenses.**

(3) In paragraph (1), "a relevant party" means a party who has—

(a) been granted leave to intervene under rule 58.19(1)(b) or;

(b) been refused or granted leave after a hearing under rule 58.19(1)(c)."

57. The existing RCS rule 58A.10 has a default position that expenses will not be awarded in favour of or against such an intervener. However, it also allows the court to grant expenses in favour of, or against a public interest intervener "on cause shown". In practice it is likely that such expenses would only be granted if there had been unreasonable conduct by the public interest intervener.

58. The Council has considered the concerns raised by the Aarhus Convention Compliance Committee. It notes that the Compliance Committee is concerned as to the discretion given to the court, but also a concern that a party raising the action may become liable for an intervener's costs. The Council noted that once a PEO is granted, the PEO regulates the liability relative to all expenses in the court action, whether that is intervener's expenses, court fees or liability for judicial expenses. However, it also considered the utility of retaining such a discretion. It noted that in practice the court will have made its own assessment of the purpose and utility of the intervention before granting the application to intervene. If the intervention is unlikely to be of assistance to the court, or if there is some indication that the proposed intervention is otherwise not reasonable, the court is likely to refuse permission to the intervener. Accordingly, the wider issues around the intervention are likely to have been considered before permission to intervene is granted.

59. Accordingly, removing that discretion will allow for increased predictability in relation to public interest interventions.

60. The proposal is to delete “on cause shown” where it appears in Rule 58.10 (1) above and delete Rule 58A.10(2) in its entirety.

Question 10 – do you agree that where a public interest intervention is allowed that it should be on a “no expenses due to or by” basis? If not, why not?

Question 11 – Do you agree that the draft wording proposed re Rule 58A.10 achieves that purpose, or do you have any other comment on that Rule?

Concern E - Court Fees:

61. Where a party to a court action is awarded expenses, that party must lodge an account of judicial expenses within a certain period. It is well understood that the account of judicial expenses can include any court fees incurred by that party. Where there is a PEO, court fees are not paid in addition to the figure at which the PEO was set. Rather, any claim for court fees is part of the PEO cap and cannot be in addition to it.

62. The Compliance Committee has queried whether court fees would be payable in addition. To avoid any confusion, the Council proposes that the Court of Session Rule 58A.7 (1)-(a) is amended to add a reference that the £5,000 cap is “inclusive of court fees”.

58A.7 - Terms of protective expenses orders

(1) A protective expenses order must—

(a) limit the applicant’s liability in expenses to the respondent to the sum of **£5,000**, or such other sum as may be justified on cause shown; and

(b) limit the respondent’s liability in expenses to the applicant to the sum of **£30,000**, or such other sum as may be justified on cause shown...

63. The proposed amendment to rule 58A.7 reads:

In rule 58A.7 (terms of protective expenses orders), in paragraph (1)—

(a) in sub-paragraph (a), for “£5,000, or such other”, substitute “£5000 (inclusive of court fees), or such lower”;

(b) in sub-paragraph (b), after “£30,000”, insert “(inclusive of court fees)”.

Question 12 – do you agree that rule 58A.7 of the Court of Session should be amended to make it clear that the cap granted by the court is inclusive of court fees? If not, why not?

Question 13 – Do you agree that the draft wording proposed re Rule 58A.7 achieves that purpose, or do you have any other comment on that Rule?

Reclaiming Motions (appeals)

64. Rule 58A.8(2) currently reads “subject to any review of the protective expenses order by the Inner House, the limits on the parties’ liability in expenses set by the order include liability for expenses occasioned by the reclaiming motion.” The Council is not aware of any cases where the Inner House has exercised this power, which is separate to the ability of the Inner House to determine a PEO which arises as a specific appeal (that is an appeal as to how the Outer House determined a PEO). A similar rule is proposed in relation to appeals from the Sheriff Court or Sheriff Appeal Court (RCS 58A.8A (3)).

Question 14 - Do you consider the existing ability of the Inner House to review the cap should be maintained within the rules or do you consider that the words “Subject to any review of the protective expenses order by the Inner House” should be omitted from draft RCS 58A.8 (2A)?

Question 15 - If you consider the power of review should remain, do you consider the circumstances in which the Inner House would exercise its power of review should be stated within the rule, and if so, in what circumstances would you consider it appropriate for the Inner House to review an existing PEO?

Question 16 - Do you consider draft rule 58A.8A(3) should be enacted, and if so, do you consider the circumstances in which the Inner House would exercise its power of review should be stated within the rule, and if so, in what circumstances would you consider it appropriate for the Inner House to review an existing PEO?

Onward appeals to the UK Supreme Court

65. In *Wildcat Community Interest Co Ltd v Scottish Ministers* [2025] CSIH 10 the Inner House was asked to consider an application for leave to appeal to the UK Supreme Court (UKSC). The Inner House observed that a PEO granted at an earlier stage in the proceedings would not extend to an application for leave to appeal to the UKSC. The Council considers a rule should be introduced to provide that where a PEO has already been granted, it would include any liability for judicial expenses in an application to the Court of Session: for leave to appeal to the UK Supreme Court.

66. The proposed change is to insert a new rule 58A.8B which reads:

58A.8B Expenses protection: appeals to the Supreme Court

(1) Paragraph (2) applies where—

- (a) the court has made a protective expenses order; or*
- (b) a protective expenses order has been made in the lower courts and that order remains in effect by virtue of rule 58A.8A(2).*

(2) Subject to any review of the protective expenses order by the Inner House, the limits on the parties’ liability in expenses set by the order include liability for expenses occasioned by the application for permission to appeal under Chapter 41A.

(3) A party who would have been entitled to apply for a protective expenses order in the proceedings which are the subject of the application for permission to appeal (but did not make a successful application) may apply for a protective expenses order in relation to the application for permission to appeal.

(4) The application is to be made no later than is reasonably practicable after the application for permission to appeal has been made.”.

Question 17 - Do you agree that a PEO should include any liability for expenses in terms of an application to the Court of Session for leave to appeal to the UKSC? If not, why not?

Question 18 - Do you agree that the draft wording proposed re Rule 58A.8B achieves that purpose, or do you have any other comment on that proposed rule?

General Observations

Question 19 - in addition to the proposals already covered within questions 1 to 18 above, do you have any other concerns or suggested changes to the wording of the rules provided within RCS Chapter 58A as amended?

SECTION 4: ESTABLISHING SHERIFF APPEAL COURT RULES

67. The Council proposes that rules are introduced in the Sheriff Appeal Court to allow an application for a PEO to be made in that court, or to allow an existing PEO to continue to apply, in cases within Article 9 of the Aarhus Convention where that litigation relates to an alleged act or omission contravening the law relating to the environment.

Question 20 - Do you agree that the ability to seek a PEO, or to have it carried forward, should be extended to the Sheriff Appeal Court? If not, why not?

68. To put that proposed change into effect the following new chapter is to be inserted into the Sheriff Appeal Court rules:

Procedural Code	New Chapter
Sheriff Appeal Court Rules 2021	CH 28A – Applications for Protective Expenses Orders

Question 21 - Do you agree that the draft wording of Chapter 28A achieves the purpose of extending an existing PEO to an appeal before the Sheriff Appeal Court, or allowing the Sheriff Appeal Court to make such an order?

Question 22 - Do you have a view on whether provision should be made allowing the Sheriff Appeal Court to review a protective expenses order, in terms of draft rule 28A.2 (3)?

Question 23 - If you consider draft rule 28A.2(3) should remain, do you consider the circumstances in which the Sheriff Appeal Court would exercise its power of review should be stated within the rule, and if so, in what circumstances would you consider it would be appropriate for the Sheriff Appeal Court to review an existing PEO?

Question 24 - Do you have any other comment on the proposed new Chapter 28A for the Sheriff Appeal Court?

SECTION 5: ESTABLISHING SHERIFF COURT RULES

69. The Council proposes that rules are introduced in the Sheriff Court to allow an application for a PEO to be made in cases that arise under Article 9 of the Aarhus Convention, that is in a civil litigation that relates to an alleged act or omission contravening the law relating to the environment. The proposed rules would provide a rule in each of ordinary cause, summary applications and statutory appeals, summary cause and simple procedure, allowing an application for a PEO to be made where there is civil litigation within Article 9 of the Aarhus Convention, that is in relation to an alleged act or omission contravening the law relating to the environment.

Question 25 - Do you agree that the ability to seek a PEO, should be extended to the Sheriff Court, where the litigation is within Article 9 of the Aarhus Convention? If not, why not?

70. It is proposed that new chapters and/or rules will be inserted into the Sheriff Court rules for each type of procedure as follows:

Court rule	New Chapter
Ordinary Cause Rules 1993	CH 31B – Protective Expenses Orders
Summary Application Rules 1999	Part LV – Protective Expenses Orders
Summary Cause Rules 2002	CH 23B – Protective Expenses Orders
Simple Procedure Rules 2016	Rule 17.18 – When is a Protective Expenses Order available? Rule 17.19 – How do I apply for a Protective Expenses Order? Rule 17.20 – When must the sheriff make a Protective Expenses Order?

Question 26 - Do you agree that the draft wording of each of the new rules/chapters achieves the purpose of extending the ability to apply for a PEO in proceedings under Article 9 of the Aarhus Convention?

71. The Council considered whether PEO rules were required in Simple Procedure, having noted that expenses are not capped in all types of case within Simple Procedure.

Question 27 - Do you consider that a rule in relation to PEOs should be introduced in Simple Procedure?

Question 28 - Do you have a view on whether the default cap of £5,000 should apply in an application for a PEO within Simple Procedure?

Question 29 - Do you have a view on whether a cross cap of £5,000 should apply within Simple Procedure? Or alternatively do you have a view on the whether the default cross cap of £30,000 should apply?

Other questions

Question 30 - Do you have any other comment on each of the proposed new Chapters, Part or rules for the sheriff court?

72. As proposed, draft rules RCS58A.4, OCR rule 31B.2 and 31B.3, summary application rule 3.55.1 and summary cause rule 23B.3 assume a PEO application would be made by a pursuer, petitioner or an appellant (in a statutory appeal). The Council wishes to canvas views as to whether such rules should make provision for a PEO to be made by any other parties, such as defenders, third parties or respondents, bearing in mind that the obligations under Article 9 of the Aarhus Convention only arise towards the “public” or the “public concerned” in terms of the meaning of those terms within the Convention.³

Question 31 - In each of the draft rules referred to above, do you consider that that rule should allow a PEO application to be made by a party other than a pursuer, petitioner or statutory appellant?

73. As currently drafted, these draft rules propose that for public interest interveners in judicial review and statutory appeals the discretion to award expenses is removed (see proposed changes to RCS 58A.10). The draft rules propose a broadly similar position as to expenses for interveners in draft rules for the Sheriff Appeal Court 28A.7, OCR 31B.8, summary application rule 3.55.8, summary cause rule 23B.8 and simple procedure rule 17.18(8).

Question 32 - Do you consider this is the correct approach to the expenses of interveners in the Sheriff Appeal Court and the rules listed above in the Sheriff Court? Do you have any other comment on those draft rules?

74. The Council is conscious that a PEO is a change to the usual rules regarding the consideration of expenses in Scotland and can have a significant effect on the conduct of litigation, on parties (both applicants and respondents) and on access to the courts. It is aware of comment concerned with how the courts might approach a situation where a party acts unreasonably, or in a way that has caused additional expense where there is a PEO in place. The existence of a PEO is likely to limit the ability of a court to make an award of expenses as a

³ Article 9(4) of the Convention defines “The public” as meaning “one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups” and Article 9(5) defines “The public concerned” as meaning “the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.”

sanction against that party. The Council wishes to ingather any relevant information to understand any issues that may arise in this respect.

Question 33 - Have you experienced any situations where the court may have awarded expenses against a party, but was unable to do so because of a PEO?

Question 34 - Do you have any experience of concerns in the conduct of litigation where a PEO was granted?

SECTION 6: THE CONSULTATION QUESTIONS

75. Given the proposals made within this paper; the Council would appreciate your feedback on the following questions:

Amending the Court of Session procedure

Concern A - The type of claims covered

Question 1 – Do you agree that, other than in group proceedings, a party should be able to apply for an Environmental PEO in any relevant proceedings that fall within Article 9 of the Aarhus Convention within the Court of Session? If not, why not?

Question 2 - Do you agree that the amendments proposed to be made to RCS rule 58A.1 will achieve the purpose of extending the potential to apply for a PEO in all civil proceedings in the Court of Session within the scope of Article 9 of the Aarhus Convention, other than group proceedings?

Concern B - The levels of the cost caps

Question 3 – Do you agree with the cost cap for the applicant being a fixed maximum sum of £5,000 which the court may decrease but not increase? If not, why not?

Question 4 – Do you agree that the proposed draft wording of Rule 58A.7 achieves the purpose of providing judicial discretion to lower the cap, where it is reasonable to do so?

Concern C (i) - The application procedure – terms of representation

Question 5 – Do you agree that the requirement to provide terms of representation should be deleted? If not, why not?

Question 6 – Do you agree that the proposed deletions to Rule 58A.5 (3) achieves the purpose of no longer requiring the applicant to provide terms of representation, or do you have any other comment on that Rule?

Concern C (ii) - The application procedure – confidentiality of information

Question 7 – are you aware of any difficulties with the handling or provision of financial information provided as part of an application for a PEO? If so, was this after the 2024 amendments to the rules?

Concern C (iii) - The application procedure – estimating expenses

Question 8 – Do you agree that the requirement for an applicant to estimate their opponents' expenses should be deleted? If not, why not?

Question 9 – Do you agree that the draft wording proposed re Rule 58A.5 (3) achieves that purpose, or do you have any other comment on that Rule?

Concern D – Interveners

Question 10 – do you agree that where a public interest intervention is allowed that it should be on a “no expenses due to or by” basis? If not, why not?

Question 11 – Do you agree that the draft wording proposed re Rule 58A.10 achieves that purpose, or do you have any other comment on that Rule?

Concern E - Court Fees

Question 12 – do you agree that rule 58A.7 of the Court of Session should be amended to make it clear that the cap granted by the court is inclusive of court fees? If not, why not?

Question 13 – Do you agree that the draft wording proposed re Rule 58A.7 achieves that purpose, or do you have any other comment on that Rule?

Reclaiming Motions

Question 14 - Do you consider the existing ability of the Inner House to review the cap should be maintained within the rules or do you consider that the words “Subject to any review of the protective expenses order by the Inner House” should be omitted from draft RCS 58A.8 (2A)?

Question 15 - If you consider the power of review should remain, do you consider the circumstances in which the Inner House would exercise its power of review should be stated within the rule, and if so, in what circumstances would you consider it appropriate for the Inner House to review an existing PEO?

Question 16 - Do you consider draft rule 58A.8A(3) should be enacted, and if so, do you consider the circumstances in which the Inner House would exercise its power of review should be stated within the rule, and if so, in what circumstances would you consider it appropriate for the Inner House to review an existing PEO?

Onwards appeals to the UK Supreme Court

Question 17 – Do you agree that a PEO should include any liability for expenses in terms of an application to the Court of Session for leave to appeal to the UKSC? If not, why not?

Question 18 – Do you agree that the draft wording proposed re Rule 58A.8B achieves that purpose, or do you have any other comment on that proposed rule?

General Observations

Question 19 – in addition to the proposals already covered within questions 1 to 16 above, do you have any other concerns or suggested changes to the wording of the rules provided within RCS Chapter 58A as amended?

Establishing a Sheriff Appeal Court procedure

Question 20 – Do you agree that the ability to seek a PEO, or to have it carried forward, should be extended to the Sheriff Appeal Court? If not, why not?

Question 21 – Do you agree that the draft wording of Chapter 28 achieves the purpose of extending an existing PEO to an appeal before the Sheriff Appeal Court, or allowing the Sheriff Appeal Court to make such an order?

Question 22 - Do you have a view on whether provision should be made allowing the Sheriff Appeal Court to review a protective expenses order, in terms of draft rule 28A.2 (3)?

Question 23 - If you consider draft rule 28A.2(3) should remain, do you consider the circumstances in which the Sheriff Appeal Court would exercise its power of review should be stated within the rule, and if so, in what circumstances would you consider it would be appropriate for the Sheriff Appeal Court to review an existing PEO?

Question 24 - Do you have any other comment on the proposed new chapter for the Sheriff Appeal Court?

Establishing a sheriff court procedure

Question 25 - Do you agree that the ability to seek a PEO, should be extended to the Sheriff Court, where the litigation is within Article 9 of the Aarhus Convention? If not, why not?

Question 26 – Do you agree that the draft wording of each of the new rules/chapters achieves the purpose of extending the ability to apply for a PEO in proceedings under Article 9 of the Aarhus Convention?

Simple Procedure

Question 27 - Do you consider that a rule in relation to PEOs should be introduced in Simple Procedure?

Question 28 - Do you have a view on whether the default cap of £5,000 should apply in an application for a PEO within Simple Procedure?

Question 29 - Do you have a view on whether a cross cap of £5,000 should apply within Simple Procedure? Or alternatively do you have a view on the whether the default cross cap of £30,000 should apply?

Other questions

Question 30 - Do you have any other comment on each of the proposed new Chapters, Part or rules for the sheriff court?

Question 31 - In each of the draft rules referred to above, do you consider that that rule should allow a PEO application to be made by a party other than a pursuer, petitioner or statutory appellant?

Question 32- Do you consider this is the correct approach to the expenses of interveners in the Sheriff Appeal Court and the rules listed above in the Sheriff Court? Do you have any other comment on those draft rules?

Question 33 - Have you experienced any situations where the court may have awarded expenses against a party, but was unable to do so because of a PEO?

Question 34 - Do you have any experience of concerns in the conduct of litigation where a PEO was granted?

Impact Assessments

Question 35 - Are you aware of any business impacts the Council should take into consideration, over and above those we have listed in the draft Business

and Regulatory Impact Assessment (BRIA) that accompanies this consultation?

Question 36 - Are you aware of any equality impacts on those with protected characteristics that the Council should take into consideration, over and above those we have listed in the draft Equality Impact Assessment (EQIA) that accompanies this consultation?

SECTION 7: THE NEXT STEPS

76. Following the closing date for this consultation the next steps will be:

Responses - the individual responses will be uploaded to the consultation page of the Council's website (where respondents gave permission).

Analysis of Responses – the secretariat will prepare an Analysis of Responses report to summarise the feedback received and clarify any suggested amendments or changes to be considered by the Council.

Consultation Response – once that analysis has been published, the secretariat will propose finalised rules for consideration by the Council.

Finalising the draft rules - the draft rules as consulted on will be finalised for consideration by the Council

Approval of the amendments – once those draft rules are approved by Council, they are then passed to the Court of Session for its consideration.

77. After a short period of consideration by the Court of Session, the Act of Sederunt will be signed by the Lord President on behalf of the Court. The next steps that arise on signing are:

Advance Publication – all Acts of Sederunt are statutory instruments, laid in the Scottish Parliament and automatically published online via legislation.gov.uk.

Scrutiny and Familiarisation - a time period is fixed between the date an instrument is laid and the date it comes into force to provide:

- Time for scrutiny by the Delegated Powers and Law Reform Committee (DPLRC) of the Scottish Parliament; and
- Time for practitioners, court officials, and the judiciary etc. to familiarise themselves with the changes made and update their systems of work.

Commencement – all Acts of Sederunt come into effect on the date stated within the statutory instrument.

What is the likely timescale for implementation?

78. The following bullet points suggest an indicative timeline for implementation of at least 12 months from the date this consultation is opened for responses:

- *3 months* - *to provide respondents sufficient time to provide informed responses.*
- *1 month* - *to review the responses received & publish the Consultation Analysis.*
- *1 month* - *to consider the policy positions & publish the Consultation Response.*
- *2 months* - *to update & finalise the draft rules to reflect the Consultation Response.*
- *1 month* - *to seek final approval of those draft rules from the Council.*
- *1 month* - *for the Court of Session to check, approve & enact the Act of Sederunt*
- *3 months* - *for familiarisation by users & parliamentary scrutiny by the DPLRC.*

79. It should be noted that the actual timeline will vary depending on the volume of responses to be analysed and the complexity of any legal points that might arise.

Secretariat to the Scottish Civil Justice Council
June 2026

BIBLIOGRAPHY

Legislation:

Environmental Protection Act 1990

<https://www.legislation.gov.uk/ukpga/1990/43/contents>

Existing Rules:

Act of Sederunt (Rules of the Court of Session Amendment) (Protective Expenses Orders in Environmental Appeals and Judicial Reviews) 2013

<https://www.legislation.gov.uk/ssi/2013/81/contents/made>

Act of Sederunt (Rules of the Court of Session 1994 Amendment) (No. 4) (Protective Expenses Orders) 2015

<https://www.legislation.gov.uk/ssi/2015/408/contents/made>

Act of Sederunt (Rules of the Court of Session 1994 Amendment) (Protective Expenses Orders) 2018

<https://www.legislation.gov.uk/ssi/2018/348/contents/made>

Act of Sederunt (Rules of the Court of Session 1994 Amendment) (Protective Expenses Orders) 2024

<https://www.legislation.gov.uk/ssi/2024/196/contents/made>

Aarhus Convention:

Aarhus Convention (*Jun 1998, UNECE*)

<https://unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf>

Aarhus Convention Implementation guide (*2014, UNECE*)

https://unece.org/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf

Research – by this Council:

Research on the cost caps used in practice: within PEOs (*Sep 2024, SCJC*)

https://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/publications/scjc-publications/research-on-the-cost-caps-used-in-practice.pdf?sfvrsn=ef272688_1

Research on the type of cases seeking a PEO (*Oct 2024, SCJC*)

https://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/publications/scjc-publications/20240930---research-on-the-type-of-cases-seeking-a-peo.pdf?sfvrsn=f459d1da_1

Research on the incidence of interveners: in PEO related cases (*Aug 2025, SCJC*)

<https://www.scottishciviljusticecouncil.gov.uk/publications/scjc-and-other-organisations'-publications>

BIBLIOGRAPHY...continued

Public Consultations – by this Council:

The 2017 Public Consultation

Consultation – on draft court rules in relation to Protective Expenses Orders (SCJC, Mar 2017)

<https://www.scottishciviljusticecouncil.gov.uk/consultations/scjc-consultations/consultation-on-draft-court-rules-in-relation-to-protective-expenses-orders>

Analysis of Responses - in relation to Protective Expenses Orders (SCJC, Nov 2017)

https://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/consultations/scjc-consultations/consultation-on-draft-rules-for-protective-expenses-orders/final-report-consultation-on-draft-rules-in-relation-to-protective-expenses-orders---analysis-of-responses-october-2017.pdf?sfvrsn=2492bd2_2

The 2025 Public Consultation

Extending the availability of Protective Expenses Orders (Aug 2025, SCJC)

<https://www.scottishciviljusticecouncil.gov.uk/consultations/scjc-consultations/extending-the-availability-of-protective-expenses-orders>

Consultation Analysis: on extending the availability of Protective Expenses Orders (Aug 2025, SCJC)

https://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/consultations/scjc-consultations/extending-the-availability-of-peos/consultation-analysis---on-extending-access-to-peos.pdf?sfvrsn=17b05817_1

Consultation Response: on extending the availability of Protective Expenses Orders (Jan 2026, SCJC)

https://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/consultations/scjc-consultations/extending-the-availability-of-peos/20260120---consultation-response---peos.pdf?sfvrsn=7336335e_1

Public Consultations – By the Scottish Government:

Legal Challenges to Decisions by Public Authorities under the Public Participation Directive 2003/35/EC: A Consultation

<https://www.webarchive.org.uk/wayback/archive/20150219185224/http://www.gov.scot/Publications/2012/01/09123750/12>

Legal challenges to decisions by Public Authorities under the Public Participation Directive 2003/35/EC: Scottish Government Response to Consultation Findings (Sep 2012, SG)

<https://www.webarchive.org.uk/wayback/archive/20150220233029/http://www.gov.scot/Publications/2012/10/6740/downloads>

BIBLIOGRAPHY...continued

Consultations - by the Ministry of Justice:

Cost Protection for Litigants in Environmental Judicial Review Claims (Aug 2012, MOJ)

https://consult.justice.gov.uk/digital-communications/cost_protection_litigants/results/cost-protection-litigants-response.pdf

GLOSSARY

The relevant terms used within this paper are:

Term	Meaning
Aarhus related case	Relevant proceedings that include a challenge to a decision, act or omission on grounds subject to the provisions of Article 6 of the Aarhus Convention. <i>Under the current rules that term covers:</i> • <i>Applications to the supervisory jurisdiction of the court, including applications under section 45(b) (specific performance of a statutory duty) of the Court of Session Act 1988(20), and</i> • <i>Appeals under statute to the Court of Session.</i>
ACCC	Acronym for – Aarhus Convention Compliance Committee (ACCC).
Cause shown	A term in Scots Law that means - where a valid reason has been demonstrated to the satisfaction of the court.
CSIH	Acronym for – the Inner House of the Court of Session (CSIH).
CSOH	Acronym for – the Outer House of the Court of Session (CSOH).
Common Law PEO	An application made under the common law seeking <i>costs protection</i> in any civil proceedings.
Environmental PEO	An application under the <i>costs protection procedure</i> established by the PEO Rules. These PEO applications are applicable in civil proceedings taken in the public interest that impact on the environment.
Intervener	A term in Scots Law that means – a person or organisation, that is not a party to proceedings, that makes an application seeking <i>leave to intervene</i> in proceedings by way of a written submission to assist the court.
PEO	Acronym for – a Protective Expenses Order (PEO). Scotland uses an adversarial legal system, with the general principle for expenses being that “expenses follow success” (<i>which equates to “loser pays”</i>). In circumstances that result in a significant imbalance of power between the parties to a civil action, the court may consider making a PEO if it is in the “interests of justice” to do so.
PEO Rules	RCS Chapter 58A (Protective Expenses Orders in Environmental Appeals and Judicial Reviews). Chapter 58A was first enacted by the Act of Sederunt (Rules of the Court of Session Amendment) (Protective Expenses Orders in Environmental Appeals and Judicial Reviews) 2013: https://www.legislation.gov.uk/ssi/2013/81/introduction/made Those PEO rules have been amended 3 times (in 2015, 2018 and 2024).
SCTS	Acronym for – Scottish Courts and Tribunal Service.
UKSC	Acronym for – UK Supreme Court (UKSC).
UNECE	Acronym for – United Nations Economic Commission for Europe (UNECE).

ANNEX 1 – HISTORY OF THE EXISTING RULES

The Scottish Government ran a Public Consultation on PEOs in 2011 and then lodged a ‘rules request’ with the Council in 2012. The initial rules implementing *Environmental PEOs* in Scotland then came into force from 25 March 2013:

<i>Statutory Instrument</i>	<i>SSI</i>	<i>W.E.F</i>	<i>Commentary</i>
Act of Sederunt (Rules of the Court of Session Amendment) (Protective Expenses Orders in Environmental Appeals and Judicial Reviews) 2013	2013/81	25.03.2013	New rules established a <i>costs protection procedure</i> within the Court of Session (<i>RCS: Chapter 58 A</i>).

In response to user experience, those 2013 rules have since been amended 3 times:

<i>Statutory Instrument</i>	<i>SSI</i>	<i>W.E.F</i>	<i>Commentary</i>
Act of Sederunt (Rules of the Court of Session 1994 Amendment) (No. 4) (Protective Expenses Orders) 2015	2015/408	11.01.2016	Extended the type of proceedings where a PEO could be sought.
Act of Sederunt (Rules of the Court of Session 1994 Amendment) (Protective Expenses Orders) 2018	2018/348	10.12.2018	Amended Chapter 38 (Reclaiming). Chapter 58 A (PEOs) was completely rewritten with additions for: - Defining prohibitively expensive; - Simplifying the procedure by a shift away from mandatory hearings to making decisions on the papers; - Limiting expenses to £500 (<i>for the application stage</i>); and - Providing the flexibility for the £5k and £30k thresholds to be lifted or lowered on cause shown.
Act of Sederunt (Rules of the Court of Session 1994 Amendment) (Protective Expenses Orders) 2018	2024/196	01.10.2024	Amended Chapter 58 A (PEOs): - Provided the ability to request confidentiality; - Removed a procedural unfairness on appeal; and - Reinforced the case precedent whereby no expenses are due to or by an intervener.

NOTE – there are 2 options available when applying for a PEO in Scotland – using this procedure for Environmental PEOs or alternatively using the common law to apply for a Common law PEO.

ANNEX 2 – ARTICLE 9 OF THE AARHUS CONVENTION

The text of Article 9 (Access to Justice) reads as follows:

Paragraph 1 - Each Party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information under article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law. In the circumstances where a Party provides for such a review by a court of law, it shall ensure that such a person also has access to an expeditious procedure established by law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law. Final decisions under this paragraph 1 shall be binding on the public authority holding the information. Reasons shall be stated in writing, at least where access to information is refused under this paragraph.

Paragraph 2 - Each Party shall, within the framework of its national legislation, ensure that members of the public concerned:

- (a) Having a sufficient interest or, alternatively,
- (b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition,

have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.

What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.

The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

Paragraph 3 - In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

Paragraph 4 - In addition, and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.

Paragraph 5 - In order to further the effectiveness of the provisions of this article, each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.