

Environmental Standards Scotland
Ìrean Àrainneachdail na h-Alba

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ENVIRONMENTAL
Standards Scotland
Ìrean Àrainneachdail na h-Alba

11 July 2024

Our ref: ESS.EIR.001

Dear [REDACTED],

Thank you for your email of the 13 June 2024 to Environmental Standards Scotland (ESS) requesting information under the Freedom of Information (Scotland) Act 2002. The information which you request is as follows:

1. Copies of all policies, guidance and any other internal documents which are used by ESS staff when handling and making decisions relating to representations.

Response:

As the information you have requested is 'environmental information' for the purposes of the Environmental Information (Scotland) Regulations 2004 (EIRs), we are required to deal with your request under those Regulations. We are applying the exemption at section 39(2) of the Freedom of Information (Scotland) Act 2002 (FOISA), so that we do not also have to deal with your request under FOISA.

Please find below the following documents which cover all policies, guidance and internal documents referenced in your request. Where applicable, personal data has been redacted.

- ESS – representation form
- ESS – full operational guidance
- ESS – effectiveness checklist
- ESS – significance checklist
- ESS – investigation plan template
- ESS – standard assessment template
- ESS – technical guidance
- ESS – whistleblowing policy
- ESS – service standards
- Legal Procedure – information provision and sharing
- Legal Procedure – Section 24 information notice

If you are unhappy with this response to your request under the Freedom of Information (Scotland) Act 2002, you may ask us to carry out an internal review of the response by writing to:

Mark Roberts
Chief Executive Officer
Environmental Standards Scotland
Thistle House
91 Haymarket Terrace
Edinburgh
EH12 5HD
Email foi@environmentalstandards.scot

Your review request should explain why you are dissatisfied with this response, and should be made within 40 working days from the due date when you received this letter. We will complete the review and tell you the result within 20 working days from the date when we receive your review request.

If you are not satisfied with the result of the review, you then have the right to appeal to the Scottish Information Commissioner. More detailed information on your appeal rights is available on the Commissioner's website at: [Appeal to the Commissioner | Scottish Information Commissioner \(itspublicknowledge.info\)](https://www.itspublicknowledge.info)

Yours sincerely,

A large black rectangular redaction box covering the signature area.A small black rectangular redaction box covering the name of the officer.

Freedom of Information Officer
Environmental Standards Scotland

ENVIRONMENTAL Standards Scotland Ìrean Àrainneachdail na h-Alba

Representation Form

The purpose of this form

We can accept and will consider (free of charge) any representation which includes any instance of concern from anyone about how public authorities discharge their environmental law responsibilities or the effectiveness of environmental law itself.

The purpose of this form is to enable you to set out your representation in a structured way so that we can carry out an initial assessment and consider what steps, if any, should or can be taken. We may also wish to contact you to discuss your representation or seek further information from you. If you have any difficulties in using or completing this form, our staff are more than happy to assist and can be contacted at Representations@environmentalstandards.scot.

Please use this form to contact us if you have specific concerns:

- that a public authority isn't complying with an environmental law;
- that an environmental law isn't being implemented or applied properly; or
- that an environmental law isn't effective in protecting the environment.

In this context a public authority means a person carrying out any function of a public nature and environmental law means any law which is mainly about the environment.

Compliance relates to whether a public authority is failing to take proper account of environmental law when exercising its functions or is acting in a way that is contrary to (or incompatible with) environmental law.

Environmental law means any law which includes provisions mainly about the environment and environmental protection, with environmental protection including:

- (a) protecting, maintaining, restoring or improving the quality of the environment,
- (b) preventing, mitigating, minimising or remedying environmental harm caused by human activities; and
- (c) monitoring, considering, assessing, recording, reporting on or managing data on anything relating to paragraphs (a) and (b).

In practical terms, the effectiveness of environmental law relates to whether the law is achieving its intended effect in protecting the environment and contributing to our international obligations relating to environmental protections.

Next steps

It is important to explain that, before considering what action should be taken, we normally expect that you will have given the relevant public authority the opportunity to respond to the issue or that you have tried to resolve your concerns through other available mechanisms. Whatever action we do take, we will write to you setting out the reasons for this and provide as much further assistance as we can.

It is also important to understand that we are not an appeal or complaints body for individual decisions taken by public authorities in the exercise of their regulatory functions in relation to a particular person or case (for example, a decision on an application for a licence or a decision on regulatory enforcement in a specific case).

The '[How to raise a concern](#)' and '[Frequently Asked Questions](#)' pages on our website provide further information on our role and may assist you in completing this form.

By submitting this form you agree to our [Data Privacy Notice](#). ESS may use the information you provide but we will not share your personal information without obtaining prior consent from you. You may tell us at any time if you wish to withdraw your representation.

When you have completed this form, please send it to Representations@environmentalstandards.scot.

Section 1 – Your representation

1. Please tell us below the name of the public authority you are contacting us about.

Click or tap here to enter text.

2. What area of the environment does your representation relate to? (for example, air quality/pollution, water quality/pollution, contaminated land, nature conservation, protected sites, protected species, climate change environmental assessment and monitoring).

Click or tap here to enter text.

3. Have you already contacted the public authority about the matter?

Yes

No

Have you received a response?

Yes

No

If the answer to either of the above questions is 'no', please tell us in the box below why this is the case.

Click or tap here to enter text.

4. Does your representation relate to:

- A public authority not complying with an environmental law?
Yes No Don't know

- Environmental law not being implemented or applied properly?
Yes No Don't know

- An environmental law isn't effective in protecting the environment?
Yes No Don't know

5. If the answer to the above questions is 'no', ESS may not be able to help you. If you have answered 'yes' or 'don't know' to any of the questions above, please tell us in the box below what the background to your representation is, including the key dates when decisions/actions were taken, and specifically what you feel has gone wrong. If possible, please include below the details of the environmental law(s) your concerns relate to and, whether there any related public authority policies, guidance and/or decisions.

It would also be of assistance if you could also provide copies of the public authority's response to you and any supporting information you have.

Click or tap here to enter text.

6. What outcome are you seeking through bringing your representation to ESS?

Click or tap here to enter text.

7. How did you hear about ESS?

Click or tap here to enter text.

Section 2 – Your details

The person who identified the problem should normally fill in this form. If you are acting on behalf of someone else, please check and confirm that they are content for you to do so.

First Name

Click or tap here to enter text.

Last Name

Click or tap here to enter text.

Your Organisation's name
(if applicable)

Click or tap here to enter text.

Telephone Number

Click or tap here to enter text.

Email address

Click or tap here to enter text.

Address Line 1

Click or tap here to enter text.

Address Line 2

Click or tap here to enter text.

Town/City

Click or tap here to enter text.

Post Code

Click or tap here to enter text.

Preferred contact method

Click or tap here to enter text.

To investigate your concerns, or make further enquiries, we normally need to contact the public authority to confirm that you have tried to

resolve your concerns with them first. We may also need to discuss with the public authority the nature of your concerns. This means that we may need to share with the public authority personal information related to your case.

Diversity Monitoring

ESS would appreciate if you could assist us to ensure we are reaching as many people as possible and preventing barriers from using our service. To support this, we have a Diversity Monitoring Form available on our website at <https://www.environmentalstandards.scot/wp-content/uploads/2023/02/ESS-Diversity-Monitoring-Form.docx>

Filling in this form is voluntary and will not affect our investigation of your representation.

Your completed Diversity Monitoring Form will be stored anonymously in a secure database, separate from your representation. You may submit the form along with your representation or separately.

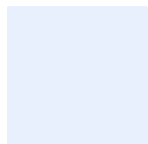
Declaration

By completing and signing this form, I confirm that the information given is accurate and that I provide my consent for ESS to share information about me with the public authority/authorities subject to the representation **(if you have any concerns about us sharing your information with the public authority please contact us to discuss)**.

I also understand that ESS may access and review information about my concerns held by the public authority and that, depending on the nature of the representation, this may include sensitive personal information. I also understand that my personal information will be retained by ESS as set out in our privacy notice.

Signature

(Click image to add a digital signature file)



Click or tap here to enter text.

Date

Click or tap here to enter text.

Section 3 – Checklist

- Have you fully completed all sections of the form that apply to you?

Yes

No

- Have you included copies of all your supporting paperwork (in particular any response you have received from the public authority)?

Yes

No

- Please do not send us original documents. To help protect your information we do not hold original documents on our files. Any original documents you send will be returned. Also, when our involvement with your representation comes to an end, the documents we hold on our files will be destroyed in line with our records retention policy.
- If you plan to send us large amounts of documents, please put your documents in date order, putting the most recent document at the front and oldest at the back.

Environmental Standards Scotland

Investigation Operational Guidance

Version 5.0

March 2024

Operational Guidance

Document Register

Version	Description	Date	Author
1.0	Full operational procedures	Sept 2021	Head of Investigations, Standards and Compliance
2.0	Revision following review by Investigations Team	April 2022	Head of Investigations, Standards and Compliance
3.0	Revision following review by Investigations Team	May/June 2022	Head of Investigations, Standards and Compliance
4.0	Revision following sign off and publication of Strategic Plan	October 2022	Head of Investigations, Standards and Compliance
5.0	Revision following ISC team review in October 2023	March 2024	Head of Investigations Standards and Compliance
5.1	Addition of section on whistleblowing (C7) and insertion of links to s24 notice and information provision and sharing procedure	May 2024	Head of Investigations, Standards and Compliance

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SECTION A - The Guidance

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A1 – About the Guidance

In line with the requirements of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 (“the 2021 Act”), Environmental Standards Scotland (ESS) must provide for persons (including members of the public, non-governmental organisations (NGO) and other bodies) to make representations to it about any matter concerning:

- whether a public authority is failing (or has failed) to comply with environmental law; and/or,
- the effectiveness of environmental law or of how it is (or has been) implemented or applied.

Having received representations, ESS may decide to proceed to investigate. ESS may also investigate on its own initiative any matter concerning the above.

This guidance document has been produced to ensure consistency of approach to the handling of representations (from receipt to investigation) and own initiative investigations. This is a large document which has been designed to work best electronically, therefore, should not be printed for general use.

How to use this guidance

Section C sets out the basic process for progressing a representation with rules on sign-off, timeframes and recording responsibilities. Section D sets out our approach to informal resolution. Sections E and F provide more detailed guidance on how to carry out an investigation and our approach to taking enforcement action.

Compliance with this guidance

Staff must comply with this guidance, unless there is a clear rationale not to do so. Such circumstances might include: an unusual case where normal procedure cannot be followed; a case where there are special needs; or, where following the guidance would have an adverse equality impact. Care should be taken, however, to act fairly and not to depart from the guidance in a way that would give rise to perceived/actual bias or unfairness.

It may be that, in some cases, some of the steps are not followed in the order laid out in the guidance. Where there is significant deviation from the outlined process (including timescales), staff must document the rationale for this on a file note.

Responsibilities

This guidance and any associated documents are prepared under the direction of the Head of Investigations, Standards and Compliance. The Head of Investigations, Standards and Compliance also has responsibility for reviewing guidance annually. Members of staff also have a responsibility to flag up any suggested/required changes which they believe can improve the way ESS operates, including the standard of service we provide to stakeholders.

A2 – Equalities

The Equality Act 2010 (“the 2010 Act”) consolidated and replaced the previous equality and discrimination legislation for Scotland, England and Wales. The 2010 Act makes it unlawful to act in a particular way or reach a particular decision where it would be discriminatory.

The 2010 Act covers discrimination because of age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. These categories are known as protected characteristics.

In short, when providing a service or exercising a public function, ESS must act and make decisions in a way that avoids discrimination, harassment and victimisation. Accordingly, staff should be **at all times** vigilant of any equality impacts on individuals when providing a service or making any decision. Further information and guidance in this area can be found at: [Equality Act 2010 | Equality and Human Rights Commission \(equalityhumanrights.com\)](https://www.equalityhumanrights.com)

Reasonable adjustments

Under the 2010 Act public authorities have to make changes in their approach or provision to ensure that services are accessible to disabled people as well as everybody else. This duty is ‘anticipatory’, which means that we should actively think about what’s likely to be needed in advance, rather than waiting to respond to any difficulties that may emerge.

Case Example

Ms Jones made a representation to ESS in which she mentioned that she was visually impaired. Ms Jones does not ask for any reasonable adjustments to be made for her. Given that the requirement to make reasonable adjustments is anticipatory, staff asked Ms Jones whether there was any adjustments we could make that would assist her in accessing our service. We agreed with Ms Jones that we would send all documentation to her in large font text and would call her to read over each piece of correspondence sent.

Changes to the guidance must be assessed to ensure that they do not impact adversely on groups such as:

- minority ethnic communities (including gypsy/travellers; refugees and asylum seekers)
- women, men and non-binary people
- religious/faith groups
- disabled people
- older people
- children and young people
- the lesbian, gay, bisexual and transgender community
- prisoners

Guidance on equality impact assessments can be found at: [Equality Impact Assessment \(EQIA\)](#). Where a change is suggested, it is the responsibility of the person making the suggestion to give an initial view on this.

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B1 – Delegated Authority

Only the Board is given statutory authority by the 2021 Act; however, as the Board would not have the time to physically review or authorise every decision that requires to be taken, it has agreed to delegate areas of responsibility to ESS staff. In legal terms, this means the actions of a member of staff acting with delegated authority are the actions of the Board.

Only with delegated authority can individual staff invoke the powers of investigation granted to the Board. Similarly, staff decisions which impose obligations on authorities (for example, the production of information) will carry the status of a Board decision. If any members of staff are in doubt about the scope of their delegated authority, they should refer to their line manager in the first instance. Information on decisions reserved for ESS Board and the scheme of delegation can be found in ESS' standing orders at [ESS - Board - Standing orders final](#)

B2 – Legal framework

Statute

The Board draws its authority from the 2021 Act, which both enables the actions of the Board and limits its powers. Each section of this guidance sets out the parts of the 2021 Act that is relevant to our work. Any action of the Board which is out with the scope of the 2021 Act would be beyond its powers, or *ultra vires*. Such action would be open to challenge by judicial review and could be set aside by the courts.

As a public body, ESS is also subject to both the Freedom of Information (Scotland) Act 2002 (FOISA), the Environmental Information (Scotland) Regulations 2004 (EIR) and the Data Protection Act 2018 (DPA). FOISA requires that we make information available to a member of the public on request, unless there is an absolute or qualified exemption that means we cannot release the information. One of the absolute exemptions prohibits the release of information covered by the DPA. The DPA covers personal information relating to a living individual, while FOISA generally covers any non-personal information. Barring any exceptions to disclosure, the EIRs require that we make available environmental information upon request.

The above legislation requires us to record and store information in a particular way and to respond to any request for information in a prescribed manner. More details of our responsibilities under these acts can be found at: [Procedure - Freedom of Information \(FOI\) Protocols and ESS Data Protection Policy](#)

Human Rights

Human Rights in the UK derive from the European Convention on Human Rights (ECHR), which form part of the law of Scotland through the Human Rights Act (HRA) 1998 and the Scotland Act 1998. The HRA makes it unlawful for a public authority to act, or fail to act, in a way that is incompatible with the ECHR. This is significant for ESS as it may consider both whether a public authority has properly considered human rights implications in reaching a decision, and also ensures ESS duly considers human rights in reaching any decision. It is important to remember though that the 2021 Act does not give ESS the authority to determine what is and is not a human right – only a court can do this.

Common Law and Natural Justice

Beyond any statutory duties and limits placed on the Board, it must also fulfil any duties imposed on it by common law. Common law is made up of previous decisions by judges in courts or other tribunals. The main common law duty imposed on ESS is to act in accordance with natural justice. In simple terms, this means we must act fairly and we must be clear to others that we are acting fairly. In practice, this means that ESS must have a fair procedure for dealing with representations, must be impartial and must give adequate reasons for its decisions.

One further important consideration here is that ESS cannot 'fetter' its discretion. This means we cannot commit ourselves to always exercising our discretion in a particular way, but must instead consider the circumstances of each case before deciding whether or not to exercise discretion.

Judicial Review

If there is doubt about whether a decision of ESS is lawful it may be challenged in the courts through an application for judicial review. Judicial review can only be requested for three reasons: illegality (e.g. ESS did not have the authority to make the decision);

irrationality (the decision cannot be logically supported); or, unfairness (the decision was biased or otherwise against natural justice).

B3 – Standards and Principles

Principles of Public Life

These are often referred to as the 'Nolan Principles' after the Parliamentary Committee that first set them down in 1995. These are written from the standpoint of public office holder, although when staff act under delegated authority these principles must also apply to their actions, and as a matter of good practice should apply to the actions of all public sector staff. These are relevant to consideration of our own actions and those of the public authorities we investigate. The Nolan Principles are:

- **Selflessness:** Holders of public office should act solely in terms of the public interest. They should not do so in order to gain financial or other benefits for themselves, their family or their friends.
- **Integrity:** Holders of public office should not place themselves under any financial or other obligation to outside individuals or organisations that might seek to influence them in the performance of their official duties.
- **Objectivity:** In carrying out public business, including awarding contracts, holders of public office should make choices on merit.
- **Accountability:** Holders of public office are accountable for their decisions and actions to the public and must submit themselves to whatever scrutiny is appropriate to their office.
- **Openness:** Holders of public office should be as open as possible about all the decisions and actions they take. They should give reasons for their decisions and restrict information only when the wider public interest clearly demands.
- **Honesty:** Holders of public office have a duty to declare any private interests relating to their public duties and to take steps to resolve any conflicts arising in a way that protects the public interest.

- **Leadership:** Holders of public office should promote and support these principles by leadership and example.

All our policies and guidance should be read in the light of these principles. See [here](#) for more information on public standards.

Civil Service code

Although ESS is a completely independent body, its staff are technically civil servants. As such, staff are expected to carry out their role in accordance with the core values of the civil service, which can be found at: [The Civil Service code - GOV.UK \(www.gov.uk\)](http://www.gov.uk)

ESS Service Standards

ESS is committed to offering a high-quality service to those who engage with us and use our service and we have in place service standards to help those who use our service understand what they can expect from us.

Having service standards is important as they not only manage the expectations of the relevant parties, they also allow ESS to gauge relative performance and drive continuous improvement in our service. Staff should at all times act within the terms of our service standards, which can be found at: [ESS - Service Standards](#)

Complaints about ESS' standards of service

Anyone who has a concern about the standard of service received from ESS is entitled to complain about this. ESS' complaints handling procedures ([ESS - Complaints Policy](#)) are based on the Scottish Public Service Ombudsman's (SPSO) statement of complaints handling principles, which state that an effective complaints handling procedure should be:

- **User-focused:** it puts the complainant at the heart of the process.
- **Accessible:** it is appropriately and clearly communicated, easily understood and available to all.
- **Simple and timely:** it has as few steps as necessary within an agreed and transparent timeframe.

- **Thorough, proportionate and consistent:** it should provide quality outcomes in all complaints through robust but proportionate investigation, and the use of clear quality standards.
- **Objective, impartial and fair:** it should be objective, evidence-based, and driven by the facts and established circumstances, not assumptions. This should also be clearly demonstrated.

and should:

- **Seek early resolution:** it aims to resolve complaints at the earliest opportunity, to the service user's satisfaction wherever possible and appropriate.
- **Deliver improvement:** it is driven by the search for improvement, using analysis of outcomes to support service delivery and drive service quality improvements.

The SPSO has also set out guidance for public service providers on model complaints handling procedures (model CHPs) by developing and publishing standardised model CHPs for the local authority sector, the housing sector, the further and higher education sectors, and the Scottish Government, Scottish Parliament and Associated Public Authorities in Scotland. These model CHPs provide a standardised and consistent complaints procedure across the public sector in Scotland. They include guidance on: process and accountability; tools for investigation and redress; and publicising, recording, learning and improvement. Further information on the principles and the guidance can be found on SPSO's website at: [We are Scotland's Ombudsman | SPSO](#).

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C1 – Initial handling of representations

Upon receipt of a representation, investigation staff are required to consider whether it falls within ESS' remit and, taking into account other factors, whether it is 'fit for investigation'. Whilst the consideration of the representation is to be carried out by investigation staff, all staff should be invited to contribute any relevant knowledge or experience to this process.

Often, representations will be brought in relation to a specific set of circumstances or an individual decision or action by a public body, which ESS cannot overturn. When this appears to be the case, staff should consider whether the representation raises any broader, systemic, issues. This should be kept in mind throughout each step of assessing the representation, as set out below.

ESS' remit

Section 20 of the 2021 Act sets out the scope of ESS' functions. In terms of investigation, ESS is empowered to investigate, either on its own initiative or in response to any representation made to it, any matter concerning:

- whether a public authority is failing (or has failed) to comply with environmental law; and/or
- the effectiveness of environmental law or of how it is (or has been) implemented or applied.

The 2021 Act also sets out the meaning of these key terms, including "public authority", "environmental law" and "compliance and effectiveness of environmental law".

Accordingly, upon receipt of a representation investigation staff will consider whether the representation:

- concerns a public authority; and relates to
- environmental law; and
- compliance with environmental law; and/or
- the effectiveness of environmental law or of how it is or has been implemented or applied.

It will often be appropriate to contact the person making the representation to ensure the issues they are raising have been accurately captured in the documents they have provided. Where a representation raises issues that do not meet the above criteria, staff will brief the Head of Investigation, Compliance and Standards with a view to the case being closed as out with ESS' remit. Investigation staff will write to the person making the representation explaining the reasons why their representation does not fall within ESS' remit and signpost as appropriate. A [Standard Assessment Template](#) has been created to assist staff in making their assessment and to ensure an auditable record of their consideration exists.

Determining whether a representation relates to a public authority

The definition of public authority is broad and means a person exercising any function of a public nature that is not a function of any of the following:

- Environmental Standards Scotland;
- a court or tribunal;
- the Scottish Parliament;
- the Parliament of the United Kingdom;
- a Minister of the Crown (within the meaning of the Ministers of the Crown Act 1975);
- a body to which paragraph 3 (reserved bodies) of Part III of schedule 5 of the Scotland Act 1998 applies; or
- a function in connection with proceedings in the Scottish Parliament or the Parliament of the United Kingdom.

Although the public authority and the responsibilities in question should in most cases be clear, public authorities exercise their functions through a variety of means. There is no single universal test for assessing whether functions are public in nature and each representation should be considered on its own merits. In considering whether the function is of a public nature, investigation staff should undertake a broad assessment, making reference to the following factors:

- the extent to which the state has assumed responsibility for the function in question (in other words, is it a 'governmental' function?);
- the role and responsibility of the state in relation to the subject matter in question;
- the nature and extent of the public interest in the function in question;
- the extent to which the state, directly or indirectly, regulates, supervises or inspects the performance of the function in question;
- the extent to which the state makes payment for or subsidises the function in question; and
- whether the function involves or may involve the use of statutory coercive powers.

It is important to note that a function can be of a public nature irrespective of the legal status of the person or body who performs the function, or whether the person/body performs the function under a contractual or other agreement. As a result, in certain circumstances the actions of private or third sector organisation can fall within ESS' remit; for example, where functions are being exercised under 'outsourcing' arrangements or other mechanisms. Where functions are being carried out on behalf of a public body, investigation staff will explore the arrangements in place to gain a firm understanding of the decision-making process.

Where representations relate to (directly or indirectly) the activities of private actors, the Head of Investigations, Standards and Compliance will be consulted to help determine whether the case is within ESS' remit.

Case Example

Mr Jones contacts ESS concerned that the noise from a major airport in his locality is having significant effects on him and his family and that the airport operator has not made a strategic noise map as per the requirements of the Environmental Noise (Scotland) Regulations 2006. As the airport has a number of responsibilities under the 2006 regulations, it is exercising functions of a public nature and thus falls within the definition of a public authority.

Determining whether a representation relates to environmental law

Before ESS can investigate an issue (either through representations or on its own initiative), it must be confident that the related legislative provision constitutes “environmental law”.

The definition of environmental law within the 2021 Act is broad, and means any legislative provision which is **mainly concerned** with **environmental protection**. The 2021 Act defines environmental protection as follows:

- protecting, maintaining, restoring or improving the quality of the environment;
- preventing, mitigating, minimising or remedying environmental harm caused by human activities; or
- monitoring, considering, assessing, recording, reporting on or managing data on anything relating to the above.

Accordingly, it is **critical** that investigation staff carefully assess the nature and purpose of the legislative provision in question. If the legislative provision does not fall within any of the above definitions, it would not constitute ‘environmental law’ for the purposes of the 2021 Act and would be out with ESS’ remit. It may be the case that the legislative provision in question addresses multiple objectives and it may not be immediately apparent whether it is mainly aimed at environmental protection. Where this is the case, investigation staff should again assess carefully the nature and purpose of the provision, seeking advice from line management as appropriate. Similarly, investigation staff should remember that, although legislation may not ostensibly concern the environment, there may be a section or particular provision within it which falls under ESS’ remit.

Case Example

Mr Jones contacts ESS with his concern that Scottish Ministers are not complying with the requirements of Regulation 7 of the Environmental Noise (Scotland) Regulations 2006, specifically that they have not reviewed and revised a strategic

noise map following the construction of a dual carriageway in his community. As Regulation 7 is mainly concerned with environmental protection (namely the environmental harm caused by human activities), the representation is within the remit of ESS.

Case Example

An environmental NGO contacts ESS with a concern that the Court of Session rules on Protective Expenses Orders (PEOs) do not adequately incorporate the Aarhus Convention's obligations. Although not immediately apparent, the rules are effectively secondary legislation concerning the environment. Furthermore, as the rules were specifically amended to implement the UK's obligations on access to justice concerning breaches of environmental law, they fall under the definition of environmental protection as per section 45(1) of the 2021 Act.

Determining whether there has been a failure to comply with environmental law

The 2021 Act sets out the types of conduct by a public authority that could be a failure to comply with environmental law:

- the authority failing (or having failed) to take proper account of environmental law when exercising its functions;
- the authority exercising (or having exercised) its functions in a way that is contrary to, or incompatible with, environmental law; or
- the authority failing (or having failed) to exercise its functions where the failure is contrary to, or incompatible with, environmental law.

It is important to stress that the effects of bullet points two and three mean that both the actions and omissions of public authorities could constitute a failure to comply with environmental law and fall under ESS' remit.

In assessing whether a public authority has failed to comply with environmental law it will be necessary to identify which of the above 2021 Act provisions and types of conduct are relevant. Investigation staff will also need to understand and explain how we believe the specific actions or omissions by the public authority may have failed to take account of, or were contrary to, the specific environmental law provision.

Case Example

A local community group contacts ESS concerned that their local authority failed to carry out an assessment of the likely environmental impacts of a development of a large chemical factory in their locality before granting consent, contrary to the requirements of the Town & Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2017. As the representation relates to an alleged failure of a public authority to exercise its functions, contrary to environmental law, the representation is within the remit of ESS.

Determining whether the issues raised by a representation relate to the effectiveness of environmental law

ESS' remit includes investigating and taking action in circumstances where a public authority has failed to apply or implement environmental law effectively even where their actions may have complied with the law.

ESS can also investigate and take action where a representation identifies that an environmental law is in itself ineffective, for example, was poorly drafted or does not include sufficient measures to secure adequate environmental protection.

The 2021 Act (para 44(7)) provides a somewhat cryptic and circular definition of the effectiveness of environmental law that requires some interpretation to be of practical use. For practical ESS case assessment purposes, determining where an environmental law is

effective will involve consideration of whether it is **achieving its intended effect** in relation to:

(i) environmental protection; and

(ii) improving the health and wellbeing of Scotland's people, and achieving sustainable economic growth, so far as consistent with environmental protection; and

(b) in contributing to the implementation of any international obligation of the United Kingdom relating to environmental protection.

The meaning of Environmental Protection is defined in detail by the 2021 Act para 45(1) which includes preventing, mitigating, minimising, remedying environmental harm, which is defined in further detail in para 45(2-5). These definitions and a checklist methodology for assessing whether an issue relates to the effectiveness of an environmental law can be found at: [ESS - Effectiveness Checklist](#)

Case Example

An environmental NGO contacts ESS concerned that there are weaknesses in the law in relation to the remediation of contaminated land and that this has led to inconsistent application across Scotland, in turn affecting the quality of the local environment and leading to ongoing environmental harm. As the representation relates to the intended effects of the law in respect of environmental protection, it falls within the remit of ESS.

Exclusions

The 2021 Act **specifically excludes some areas of legislation from the definition of environmental law and** ESS does not have a remit to investigate any legislative provision concerning:

- disclosure of, or access to, information;

- national defence or civil emergency; or
- finance or budgets.

It is also important to note that ESS' remit covers only the legislative provisions contained in Acts of the Scottish Parliament or provisions which would be within the legislative competence of the Scottish Parliament. Investigation staff should consult with their line manager if they are in any doubts over the legislative exclusions.

Case Example

Mrs Smith contacts ESS with her concern that her local authority is not proactively publishing important environmental data, which she believes is a breach of the Environmental Information (Scotland) Regulations 2004. As Mrs Smith's representation relates to the disclosure of data, it is out with ESS' remit and should be rejected. Mrs Smith should be informed that her representation is not being taken forward with signposting given to the Scottish Information Commissioner.

C2 – Prematurity: has the public authority had the opportunity to resolve the issue?

ESS operates on the principle that it is generally more efficient and effective to first try to resolve matters at the closest point to the dispute and therefore it is particularly important that the public authority concerned has had the opportunity to resolve the matter before ESS is engaged. Accordingly, before exercising its investigatory powers, ESS **generally** expects that public authorities will have first had the opportunity to consider and respond to the issues raised within a representation.

Where it is clear from the information received that the public authority has not had the **opportunity** to consider and respond – or that it has not finished dealing with the matter – investigation staff will consider whether it is appropriate to signpost the representer to the public authority first. Similarly, if the issues brought to ESS are substantively different from those made to the public authority, investigation staff should consider signposting the representer back to the relevant public authority.

Notwithstanding the above, investigation staff have the discretion to waive this general requirement, for example, where the issue/s within a representation are time-critical or where the representation concerns the effectiveness of environmental law itself. Investigation staff should inform their line manager immediately where they believe it is appropriate to proceed without the matter first having been raised with the public authority.

C3 – Alternative remedies: have all complaint/appeal routes been exhausted?

ESS oversees a wide range of public authorities, however investigation staff should remember that environmental concerns may also fall under the remit of other oversight bodies, who will have been set up specifically to look at particular functions and will have specialist expertise in their areas of responsibility. There may also exist statutory appeal routes for those persons or organisations who contact ESS.

Where such a body or statutory appeal route appears to exist, investigation staff should consider whether it is more appropriate for the representer to be directed to the alternative oversight body or statutory appeal route. Investigation staff will also explain to the representer that the details of their case may be kept under review as part of our monitoring and evaluation activities.

Before referring the matter, investigation staff should be clear about the core issues in dispute and be satisfied that the alternative oversight body's remit or statutory appeal route covers them. Investigation staff should also be satisfied that the oversight body has the powers to address the matters in dispute. Where investigation staff are unclear over whether a suspected alternative oversight body has a role, investigation staff should consider contacting the organisation to discuss, on an anonymised basis, our understanding of their role and powers.

Case Example

Mr Smith contacts ESS claiming that a local waste management company's operations are causing environmental damage in the area where he resides. Mr Smith is unhappy that the Scottish Environment Protection Agency (SEPA) has not

taken any action to stop the harmful processing of waste, and believes they have not followed their own guidance in this connection.

The Scottish Public Services Ombudsman considers complaints of maladministration and service failure. Maladministration covers a broad range of acts (or omissions), including a failure to follow the law or guidance.

Although the representation may relate to a failure to comply with the law, given:

- the matter concerned falls within SPSO's jurisdiction;
- SEPA is a body under SPSO's jurisdiction; and
- SPSO has the powers to put right what has gone wrong,

Mr Smith's representation should be rejected and investigation staff should signpost him to the SPSO.

Case Example

Mr Smith contacts ESS claiming that a local waste management company's operations are causing environmental damage in the area where he resides. Mr Smith is unhappy that SEPA has not taken any action to stop the harmful processing of waste; however, he believes that this has resulted from a 'loophole' in the relevant legislation.

Mr Smith's representation concerns the effectiveness of environmental law, thus ESS' remit is engaged. As no other oversight body in Scotland is charged with considering the effectiveness of environmental law, or has the requisite enforcement powers, Mr Smith's representation should not be referred elsewhere.

The above examples demonstrate that decision-making in this area can be complex and each representation has to be considered on its own merits, taking careful account of what is set out in the representation form, including the outcomes sought by the representer.

Only when these are fully understood can an informed position be taken as to what the appropriate course of action is.

In some cases, it may be that some of the issues raised within a representation engage ESS' remit, but others would be better addressed by an alternative body. In such cases, investigation staff should write to the representation contact as soon as practically possible to advise of the areas that ESS will not -or cannot - consider further, and signpost appropriately.

If investigation staff are unclear on what course of action should be taken, immediate advice should be sought from their line manager.

C4 – Does the representation meet ESS significance criteria?

The 2021 Act does not compel ESS to investigate every representation that is made to it. Accordingly, ESS has a level of discretion over what matters it investigates and it is for the Board to determine the criteria which engages its investigatory powers under the 2021 Act.

The Scottish Government's policy intention was not for ESS to investigate every representation made to it and the parliamentary briefings are clear that ESS' role is to look at matters raising substantial environmental concern. Accordingly, the Board has agreed the following principle-based criteria for deciding whether to investigate:

- Does the matter arise from a significant or potentially significant incident concerning the environment?
- Does the matter raise public health concerns?
- Is the matter something which seriously affected (or could seriously affect) the welfare of any member of the public?
- Does the matter concern significant alleged neglect or systemic non-compliance?
- Could the matter undermine public confidence?
- Does the matter concern an alleged failure to meet international obligations?

If the answer to any of the above questions is yes, the representation is 'a candidate for investigation' and should be moved to the 'pre-investigation' stage of our process where further assessment will be undertaken to ascertain what, if any, action should be taken. A checklist methodology for assessing and determining these questions is included within the [Standard Assessment Template](#).

Where the representation is unclear on these questions, investigation staff should make contact with the representer and/or public authority to seek clarification on the background to the representation. If, following these enquiries, the representation does not meet the criteria for investigation, staff will brief the Head of Investigation, Standards and Compliance with a view to closing the case and thereafter write to the representer to explain this and that the details of their case may be kept under review as part of our monitoring and evaluation activities. Investigation staff should also provide any further assistance necessary, including signposting to any other bodies who may be able to assist.

C5 – Can ESS add value?

A final consideration when assessing a representation is the value ESS can add by investigating the matters raised within the representation. There may be cases where other bodies could, or are planning to, take action which could resolve the issue raised and that ESS investigation would essentially amount to double handling.

Therefore, when considering a representation, staff should consider the landscape around the issue, to identify any work being undertaken by other relevant bodies (e.g. governmental departments) such as ongoing or upcoming policy reviews.

C6 – Pre-investigation

ESS has committed to assessing whether representations will be taken forward within 20 working days of the representation being received. In many, if not all, cases, consideration of remit and significance issues will be complex and require enquiries of other bodies. It therefore may not be possible to decide whether we will investigate within 20 working days. In these circumstances, the case should be moved to 'pre-investigation' stage.

When a case is at pre-investigation stage, staff may make information requests to other bodies under section 23 of the Continuity Act, carry out research, discuss the case further with the representation contact, and otherwise carry out any number of investigatory actions.

At the end of the pre-investigation, the possible outcomes are:

- case is closed with no further action taken by ESS (for example if it is concluded that remit is not met)
- case is closed and ESS commit to monitor the matter (for example if significance criteria is not met at that time but it is acknowledged it may be in the future)
- case is deemed suitable for informal resolution
- case is deemed suitable for investigation

In any of these scenarios, a briefing note should be prepared for the Head of Investigations, Standards and Compliance, and the representation contact should be informed of the outcome.

C7 – Whistleblowing

The Public Interest Disclosure Act 1998 names ESS as a **prescribed person**. This means that anyone who has concerns that their employer is not properly handling its environmental responsibilities can report the matter directly to us. If the information they provide meets certain criteria, they may be protected by whistleblowing law.

What is whistleblowing?

Whistleblowing is the process whereby an employee is offered legal protection where they raise a concern about the organisation they work for. The concern they raise must be in the **public interest** and could be about malpractice, wrongdoing, risk or illegal proceedings, which harms, or creates a risk of harm, to individuals, the wider community or the environment. Whether a report is in the public interest will depend on:

- the number of people affected;
- the nature and impact of the wrongdoing; and
- who the wrongdoer is.

Generally, this means that the concern must have an impact that is wider than one employee's personal circumstances.

Handling whistleblowing concerns?

Whistleblowing concerns may come to ESS' attention in a variety of ways. For example, staff may be approached at an external event or contact made through work e-mail. In order to ensure that the whistleblower is treated in the proper manner, it is critical that their concerns are processed in a uniform and standard way. Accordingly, should any ESS staff receive contact that could constitute whistleblowing, they **must direct** the individual to contact ESS through our secure e-mail inbox at:

Whistleblowing@environmentalstandards.scot. In order to maintain the confidentiality of the whistleblower, this inbox can only be accessed by authorised ESS staff.

Upon receipt of a concern that may amount to whistleblowing, staff will make early contact with the individual concerned to discuss the background and context to their concern. Staff should discuss the following with the individual:

- what is their connection to the employer - are they a current or former employee?;
- the type of wrongdoing;
- the location of the wrongdoing;
- how they became aware of the wrongdoing;
- any key dates that might be helpful;
- who else knows about the wrongdoing;
- whether any supporting documents or evidence exists and can be provided;
- whether the incident has been reported internally, and if so, what the response has been;
- their views in relation to confidentiality; and
- provide assurance of the security of our process.

Deciding what action should be taken

ESS may receive contact from individuals on a variety of issues relating to their employment. Accordingly, it is important that staff are clear that whistleblowing is not the same as making a complaint or raising a grievance. It concerns instead situations where an employee has witnessed or has knowledge of some form of malpractice in their workplace and feels that they need to raise a concern in the **public interest**.

Having assessed any written contact, and/or having spoken to the individual raising concerns, staff will thereafter assess whether what has been raised constitutes a 'protected disclosure'. Factors which need to be taken into account include:

- is the individual a 'worker'? The term 'worker' has a special wide meaning for whistleblowing protection. As well as employees, it includes the self-employed, agency workers and people who aren't employed but are in training with employers.
- Is the individual revealing information of the right type? In other words, is what is being revealed a 'qualifying disclosure'? To be protected, an individual needs to reasonably believe that malpractice or 'relevant failure' in the workplace is happening, has happened or will happen. Protected disclosures must also be made in the public interest, which means that the individual is raising the concern because it affects other people, e.g. members of the public. The types of malpractice the law covers are:
 - Failure to comply with a legal obligation
 - Threats to people's health and safety
 - Damage to the environment

The law also covers a deliberate attempt to cover up any of these.

- Is the disclosure a 'protected disclosure'? In order for a disclosure to be protected, it must fulfil the following requirements:
 - It must be made in the public interest
 - The individual must reasonably believe that the information is substantially true
 - The individual must reasonably believe they are making the disclosure to the right 'prescribed person'

If the answer to the above questions is yes, it is likely that the disclosure is a qualifying disclosure and that it is protected by whistleblowing legislation. Whatever assessment is made, staff will prepare a briefing note for the Head of ISC setting out the background and context of the disclosure, including the rationale for their view on whether the disclosure is protected. The briefing will thereafter be discussed by the ESS Executive Team.

If ESS does not consider that the issues raised meet the required threshold, staff will thereafter contact the individual to inform them of this, signposting to other remedies or prescribed persons as appropriate.

If ESS considers that the issues raised qualifies as a protected disclosure, staff will proceed to consider whether the issues raised fall within ESS' remit (see section C1) and, if so, assess them against ESS' significance criteria (see section C4). It is important to note that ESS' significance criteria includes public interest considerations; therefore, if any of these criteria are satisfied it is likely that the public interest will be engaged.

Should the issues raised meet any of ESS' significance criteria, staff will give consideration to whether the matter should move to the pre-investigation or investigation stage. Staff will prepare a briefing note for the Head of ISC setting out the background to the concern, their assessment of remit and significance and their provisional view of what action should be taken. If the decision is taken not to investigate, staff will write to the individual confirming this, including signposting to any alternative remedies available.

Should the Board or Executive Team agree to proceed to investigation, the case will be treated as an 'own initiative investigation' and the investigation will follow the standard process as set out in this guidance (see section E) and the individual will be updated of this.

Confidentiality and data handling

Confidentiality, particularly for the whistleblower, must be at the heart of any action undertaken by the ESS. Any breach of confidentiality will have potentially serious implications for the whistleblower and the reputation of ESS.

Upon receipt of a concern that may amount to whistleblowing, staff will update the case tracker to record this. These entries are made for recording and statistical purposes thus they will contain no personal data or any information that could identify the individual. Staff will request an eRDM file is set up and ensure that the appropriate security protocols are in place (such protocols include authorised personnel only access, appropriate naming conventions and the default security classification setting of OFFICIAL: SENSITIVE – personal) for all documents held within the file.

Whether through making initial enquiries, or through the course of an investigation, staff must **NEVER** reveal the identity of any individuals who contact us through whistleblowing channels to their employer. In this connection, staff must be conscious of whether any contact with the public body has the potential to identify indirectly the individual. If staff

have any concerns on this whatsoever they must immediately raise this with the Head of ISC and/or contact the individual to discuss the possibility of inadvertent identification.

Similarly, any internal briefing papers or reports will not identify the whistleblower, and such documents will be marked with the OFFICIAL: SENSITIVE – personal classification.

SECTION D – Informal resolution

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D1 – Informal resolution – what is it and when is it applicable?

What is informal resolution?

Informal resolution is the process by which ESS works with public authorities to swiftly resolve concerns about compliance and effectiveness, and to agree any remedial action needed to protect the environment, without having recourse to our formal enforcement powers.

Informal resolution can often be the most effective way of securing a swift resolution of matters relating to compliance with, or effectiveness of, environmental law, without the need to issue a compliance notice or prepare an improvement report. The 2021 Act requires that ESS sets out how it intends to engage with the public authorities we investigate with a view to swiftly resolving matters without recourse to formal powers. Accordingly, staff should consider whether informal resolution is appropriate and achievable **throughout all stages of a representation** and liaise with public authorities to secure this.

The 2021 Act also states that a public authority must 'make all reasonable efforts' to swiftly resolve any matter which ESS raises and reach agreement with ESS on any remedial action the authority should take for the purposes of environmental protection. **It is important to note that this is an ongoing duty and is thus applicable throughout the life of an open case.**

This provision should enable ESS and public authorities to resolve issues without the need for ESS to exercise its formal enforcement powers.

Deciding whether informal resolution is applicable

As noted above, informal resolution can be a relatively quick and efficient way of securing appropriate outcomes and thus ESS should actively consider the scope for this throughout the life of an open case.

In considering whether informal resolution is appropriate, the starting point is the powers conferred on ESS by the 2021 Act, which are that ESS can take the steps it considers appropriate to secure:

- a public authority's compliance with environmental law; and/or
- improvement in the effectiveness of environmental law or in how it is implemented or applied.

The key point is that **ESS can take the steps it considers appropriate** to resolve matters. ESS can initiate informal resolution where there is evidence that:

- a public authority has not complied with environmental law or there is a risk of non-compliance;
- environmental law is not effective; or
- improvements can be made in the implementation or application of environmental law.

For the purposes of this guidance these are collectively known as 'environmental failures'.

Whatever the level of the enquiries conducted, investigation staff should generally ask themselves the following questions throughout their consideration of the representation:

- Do I understand the nature of the issue at hand, including which environmental laws apply?
- Am I satisfied there is evidence of an environmental failure (or risk of an environmental failure) and, if so, what that failure is?
- Do I have an idea of what has caused (or may cause) the environmental failure?
- Can I provide evidence to support this and reason my position adequately?

Where the answer to some or all of these questions is yes, this indicates a potential for informal resolution and ESS may be in a position to approach the public authority with a view to seeking resolution. Where the answer to any of these questions is unclear, the option of seeking clarification from the public authority, conducting further research, or seeking advice from colleagues or external advice is open to investigation staff (see [Section E](#) 'Internal liaison and external advice')

Where a decision point has been reached regarding pursuing informal resolution, investigation staff should prepare a briefing note for the Head of Investigations, Standards and Compliance, setting out:

- The nature of the issue at hand, including the environmental laws which apply;
- Why they believe there may have been an environmental failure, or there is a risk of environmental failure, and what that failure is;
- Any reasons for the environmental failure;
- A summary of the supporting evidence on which their view is based;
- Any recommendation/s for how the failure can be resolved.

The Head of Investigations, Standards and Compliance and staff member will consider the briefing paper and decide on whether there are sufficient grounds for pursuing informal resolution with the public authority.

D2 – Requesting information from public authorities

Establishing whether there has been an environmental failure may not be a quick or easy process and investigation staff may have to conduct extensive enquiries, both with the presenter and public authority concerned. The 2021 Act provides the following two mechanisms for the production of information to ESS by public authorities:

Section 23 places a duty on public authorities to co-operate with ESS and give it such assistance as requested (including the provision of information), in connection with the exercise of its functions.

Section 24 enables ESS, through the use of an information notice, to require public authorities to provide it with the information it reasonably requires for the exercise of its functions.

Where investigation staff have to make any ‘pre-investigation’ enquiries with public authorities (for example, to assess whether a representation is fit for investigation or to consider whether informal resolution is appropriate), these should be requested under the public authority’s section 23 co-operation duties. Where enquiries are needed,

investigation staff should let the public authority know the background to their enquiries and be clear that the information should be provided under the terms of section 23 of the 2021 Act. Staff should also set out a timescale by which the information should be received. Further information on the provision of information to ESS using statutory powers can be found [here](#).

Where a public authority refuses to provide the information requested, or where there are difficulties obtaining this, investigation staff should immediately raise this with their line manager. If the matter cannot be resolved, consideration will be given to whether an information notice should be issued (see Section E3 for guidance on the use of information notices).

D3 – Agreeing appropriate remedial action with the public authority and securing effective outcomes

The intent behind any enforcement action ESS takes (including informal resolution), is to:

- secure compliance with environmental law and, where necessary, change behaviour;
- stop or reduce the risk of harm to the environment arising from the non-compliance and ensure remediation and/or mitigation of the failure;
- secure improvements in the effectiveness of environmental law; or
- secure improvements in how environmental law is being implemented or applied.

Where investigation staff consider there is scope for informal resolution, they will contact the public authority concerned, setting out their reasons for the view that there has been an environmental failure, or where improvements could be made, and either invite the body to discuss and agree suitable measures or, where there is a strong justification, set out in advance any measures required to resolve the failure. Individual measures securing compliance should generally be action-focused (for example, reinstate monitoring), whereas measures securing improvement should generally be outcome-focused - stating the outcome to be achieved, not the action to be taken (for example monitoring data should be gathered and reported on by a particular date). It is important to note that, when seeking resolution, investigation staff are fully cognisant of our role and remit, and that we

cannot seek for individual regulatory decisions to be overturned, nor can we seek individual redress for injustice or hardship caused as a result of those regulatory decisions.

The following, non-exhaustive list provides some examples of how environmental failures can arise in practice and how they could be resolved through informal resolution:

- Failures in policy – a public authority has failed to understand or accept its responsibilities:
 - Clear, written assurance from the public authority that it understands and accepts its responsibilities and confirmation that relevant policies and/or procedures reflect this.
- Failures in process or procedures – a public authority's plans are not able to deliver the public authority's responsibilities:
 - Confirmation of changes to policy/guidance/practice/procedure with evidence of how the changes will deliver the public authorities responsibilities.
- Failures in execution – human error or inappropriate behaviour by a member of staff:
 - Additional training for the staff member/s involved;
 - Department or organisation wide bulletins issued;
 - Planned audits of staff training/performance.
- Failures in the application of resources – too late, incomplete, insufficient prioritisation, etc:
 - Confirmation of changes to policy/guidance/practice/procedure with evidence of how the changes will remedy the failure.

ESS will always seek to work constructively with public authorities to reach informal resolution and, whilst ESS may have a view on what needs to change, there may be a number of ways to resolve an issue successfully. Where a public authority suggests an alternative approach, investigation staff should consider whether the approach meets the

intention behind taking enforcement action, seeking advice from colleagues or external advice as appropriate.

Where informal resolution is reached, investigation staff should agree with the public authority a reasonable and realistic timescale for the measures to be implemented and explain the evidence which ESS will require to confirm compliance. A summary report should be produced, with details of the case background, informal resolution process, and outcome, and future monitoring. The summary report will be published on ESS' website, and shared with the public authority and representation contact.

It is the responsibility of the individual member of staff to ensure that the public authority provides evidence demonstrating compliance by the completion date agreed. Staff will accurately record the measures agreed and implemented so that they can be reported and used for future analysis or monitoring. Where appropriate, staff may carry out actions to ensure informal resolution has been effective in achieving the outcome sought. For example, where informal resolution has resulted in an organisation updating its guidance, ESS may seek evidence that the updated guidance is being used appropriately in practice.

Where informal resolution cannot be achieved, staff will alert their line manager of this so that consideration can be given to whether the representation needs to progress to the investigation stage or to formal action to secure compliance and/or effectiveness. Staff will write to the presenter and public authority concerned informing them of this.

SECTION E – Carrying out an effective investigation

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E1 – Identifying and framing grounds of investigation – Representations

In simple terms, a 'ground of investigation' is the description given to the specific issue which will be investigated by ESS. Early identification of the ground/s of investigation provides assurance to those bringing representations that we have captured the issue/s at the heart of the matter, and is key to enabling staff to begin planning the scope and direction of their investigation.

At this stage, the representation will have been assessed as within remit and 'fit for investigation' and staff will have considered the possibility of informal resolution where appropriate. As ESS generally expects that the matters of concern raised within any representation should already have been raised with the public authority concerned, in a background narrative to the representation may already exist, which should include the material issue/s which ESS is being asked to consider. The ESS representation form should also set out the position/concerns about the actions, or lack of action, by the public body. Furthermore, where informal resolution has been considered, staff should already have a firm understanding of the relevant issues within the representation.

Having said this, it may be the case that the representation (or ESS' research arising from the representation) points towards other, more significant or systemic, issues which go beyond those within the representation.

Having taken into account all of the information gathered, staff will prepare a briefing note for the Head of Investigations, Standards and Compliance setting out the background to the representation and their initial view on what the ground/s of investigation should be. If agreed, a briefing will be made to ESS' executive team with a view to recommending to the Board that a decision is made on investigating the matter. Should the Board agree to investigate, staff will thereafter contact the person making the representation outlining the proposed grounds of investigation. Staff should do this by telephone and thereafter write to the person making the representation using the agreement template letter. This is to ensure we have a clear record on the file of what we have decided, and what has been agreed. **It is critical that, when drafting grounds of investigation (including ESS' carried out under ESS 'own initiative' power), staff are able to identify and set out a clear link to ESS' remit.** Failure to do so may result in an unfocused investigation which is open to challenge.

Where the person making the representation does not agree with our understanding of the representation, or the grounds of investigation as defined, attempts should be made by staff to accommodate any changes suggested by the person making the representation, whilst taking account of the checklist below. If the wording cannot be agreed, it should be made clear to the person making the representation that, although we commit to trying to agree the grounds of investigation wherever possible, we retain the right to decide the final wording of the grounds.

Additionally, where ESS' has decided to investigate an issue which is substantively different, or broader, to that raised in the representation, staff should provide full written reasons for this decision so that the representer is able to both understand the decision and challenge this.

Case Example

Mrs Smith contacts ESS explaining that she is unhappy that the Scottish Government has failed to achieve legal limits on air quality and that the plans they have in place to achieve this are inadequate. Taking into account what Mrs Smith said in her representation form, and the Scottish Government's response, staff identified that the representation relates to compliance with the law and the effectiveness of the measures taken to achieve compliance. The grounds of investigation identified were as follows:

- The Scottish Government has failed to meet air quality targets, as set out in the set out in the Air Quality Standards (Scotland) Regulations 2010.
- The Scottish Government's plan to achieve air quality targets is ineffective, insofar as it fails to set out how and when compliance will be achieved.

The above grounds demonstrate a direct link to ESS' remit and separate issues of compliance and effectiveness which are capable of being substantiated or not.

E2 – Investigation planning

Having finalised the grounds of investigation, staff should prepare a detailed plan for the investigation. In all cases it is important to demonstrate that we have investigated the **material issue/s in dispute** (in simple terms, a material issue is a key issue at the heart of the representation and which must be addressed). It is therefore necessary to identify from the representation and any surrounding evidence what is and is not relevant to the decision you need to make.

Staff may be able to identify the material issue from the information within what has been said to the public authority, the public authority's response and the representation made to ESS. As noted already, where informal resolution has been attempted, staff should have a firm grasp on what the material issues are. Where this is not the case, efforts should be made to clarify this, through, for example, discussions with the parties in dispute, colleagues or external advisers.

The primary tool to assist staff in planning the investigation is the [investigation plan](#). The investigation plan is crucial to helping staff structure and organise their work throughout the investigation and will assist in focusing on the key issues and provide early warning of any problems that may need to be addressed. In simple terms, the investigation plan needs to identify the material issues raised by the representation, the evidence required, the sources of evidence and the staff member's initial assessment of matters of significance.

The investigation plan should be completed detailing:

- the agreed grounds of investigation;
- where applicable, the stated desired outcome(s) of the person making the representation;
- the key issues/points of dispute with the public authority to be explored under each ground of investigation;
- the evidence currently available/presented;

- further evidence required from the person making the representation or public authority and the source and method(s) of obtaining it ('lines of enquiry');
- any other lines of enquiry;
- identification of and reference to any relevant legislation, policies, procedures, guidance and practice to be explored that may be of relevance to the representation;
- any expert advice likely to be required; and
- indicative timescales for each strand of work and, if possible, the anticipated timescale for completing the investigation.

When staff have prepared their initial investigation plan, they will discuss the contents with the Head of Investigations, Standards and Compliance.

It is important to remember that the investigation plan is a 'live' document and will require to be updated throughout the life of the investigation. For example, lines of enquiry identified at the beginning of an investigation may no longer need to be pursued or others may arise. Where this occurs, the investigation plan should be updated of any changes, including the rationale for them. This will not only assist the investigation, but will also allow ESS to respond in the event of challenge and will enable comprehensive briefings to be made across the organisation.

E3 – Notifying the public authority

Once the decision to investigate has been made, staff will write to the public authority explaining this, including a background to the case and the specific grounds of investigation. It is also good practice to contact the public authority first by telephone to explain the decision and manage expectations. A standard template letter has been created in this connection which sets out:

- the legal powers ESS is operating under;
- what the public authority can expect during an investigation;
- ESS' standards of service; and

- the responsibilities of the public authority during the investigation.

Where staff have already explored the possibility of informal resolution with the public authority, the public authority concerned will already be aware that ESS is considering the matter to be investigated. Any previous attempts at informal resolution should be set out in the notification letter, including the outcome of those attempts. Any further submissions from the public authority at this stage will be treated as contributions to the investigation, which staff will consider and respond to as required.

E4 – Establishing early reasonable lines of enquiry and devising an information notice

What evidence do we need and useful questions to ask

Evidence is the information which establishes the facts on which our decision is based. As a general rule, evidence should only be sought in respect of the material points in dispute. There's also no point in pursuing lines of enquiry which, even at their most favourable interpretation, will have no impact on the outcome.

Through the information that has already been gathered, and through the initial investigation planning, staff should have a firm grasp of the nature of the issue at hand and what evidence is required to progress the investigation. While staff may not be able to foresee all lines of enquiry at this early stage, it is important to try to make as comprehensive enquiries as early as possible. The following questions will assist staff in devising early lines of enquiry and the information notice:

- **Do I understand the representation and what has happened in the case?**

It follows that, before deciding on which lines of enquiry to pursue and before requesting information from the public body, staff must understand the nature of the representation and have a good appreciation of the material issues. Failure to do so may lead to an unfocused or ineffective request for information. Where staff are unclear on the nature of the representation, or need to gain a fuller understanding of what has happened, they should consider discussing the representation with colleagues or making further enquiries with the person making the representation or with the public authority.

- **Am I unsure of any of the facts important to the material issues?**

Having identified the material issues in the case, it is important to think about what facts might be relevant. For example, in cases concerning sewage discharge monitoring, important facts might be the dates of any inspections undertaken, the results of those inspections and the methodology employed. Identifying these facts early will enable staff to make a focused request to the public authority.

- **Is there a dispute about the facts?**

Having considered the information supplied by the person making the representation and any responses provided by the public authority, staff may identify a dispute about relevant facts. For example, the person making the representation may assert that the discharge monitoring methodology used by the public authority was not as was claimed. Staff should identify any instance where such a dispute exists and consider:

(a) whether it is material to the investigation; and

(b) if it is, what data/evidence do you need to resolve the uncertainty/establish the facts?

- **Do I need to consult with outside bodies or seek external advice to provide more data/interpret the evidence?**

There may come a point in the investigation where, having gathered all the relevant evidence, the analysis of that evidence is outwith the competency of ESS staff (for example, the analysis of scientific data). It is important that staff are aware of when this point is reached and are able to identify who should be consulted in this connection (see section E6 “Internal liaison and external advice”)

- **Do I have an idea about what should have happened?**

There may be occasions when a public authority’s guidance or policy intention is clear and thus staff have an indication of what should have happened. Having this understanding can often be useful as it will assist in developing specific and focused

lines of enquiry – especially where what took place does not accord (or appear to accord) with what the public authority generally expects should happen.

- **What does the person making the representation claim happened and what did they expect to happen?**

This can often be a useful question to ask as it sets the expectations of those making the representation in context and enables staff to understand more fully why the representation has been made.

- **Is there any relevant law, policy, procedure, guidance or practice?**

A key part of evidence gathering is to establish the context of the relevant law, policy, procedure, guidance or practice in place at the relevant time and we will likely have to consider the policy framework surrounding the public authority's actions and any applicable legislation. Having a firm understanding of this context will enable us to make a focused request for evidence from the public authority, leading to a more focused response to our enquiries.

- **Does each party have evidence to support their respective positions?**

There exists a number of opportunities for relevant parties to provide evidence to ESS during the life of a case. For example, those making representations are able to submit this in support of their representation and public authorities are able to do so during attempts at informal resolution or as a result of ESS' initial enquiries.

Notwithstanding this, staff may identify relevant areas where relevant evidence is missing or has not been supplied.

Consideration should be given to the most effective method of gathering information including through written requests, telephone interviews, face-to-face interviews and site visits. On deciding on the most effective method of seeking evidence, thought should be given to the type of evidence sought, the cost implications of different methods of obtaining this and the requirement to meet any specific accessibility needs.

In gathering evidence, ESS will always remain impartial and will not pre-judge the case. We will treat all parties fairly and without bias. All enquiries will be carried out with integrity

and transparency and we will be clear about what information we need and why it is needed.

Proportionality

It is important to emphasise that proportionality **is not** about saving resources. It is about ensuring that appropriate resource is applied in reaching the aim of the investigation, which is to reach a clearly explained, fair and reasonable decision.

Too little enquiry risks us not achieving the aim in the first place and, where the aim has been achieved further enquiry would be disproportionate. There is also no point in requesting information which will have no impact on the outcome. Accordingly, staff should at all stages carefully consider whether or why the information they are requesting is important and think about how it adds to the information already gathered.

Notwithstanding this, staff should always feel confident in making requests for information if it appears to them that it has some bearing on the matter being investigated. If staff are in any doubt as to whether an information request is required, they should discuss this with colleagues or their line manager. **It is critical that the investigation plan is updated with the rationale for any decision in this connection** as ESS could be criticised where there is a lack of a clear rationale for investigative decisions. If staff decide not to follow a particular enquiry then make sure the reason for this stands up. If it does there is unlikely to be any challenge from the person making the representation or public authority.

Devising an information notice

As noted in Section C2 (“Informal resolution and requesting information from public authorities”), there are two mechanisms for ESS to obtain information – under sections 23 or 24 of the 2021 Act. Where a representation has progressed to the investigation stage, the general rule is that any requests for information will be made to the Chief Executive of the public authority (copying in any relevant person/department) using an ‘information notice’ under ESS’ section 24 powers. Section 24 states that ESS may, by issuing an information notice, **require** a public authority to provide information which ESS reasonably requires for the purposes of exercising any of its functions. The template notice which staff must use can be found [here](#).

The rationale for using our section 24 powers is that it lets the public authority know at a senior level that ESS is formally investigating and enables ESS to set legally enforceable parameters over the type of information required and the timescales by which it is to be received. It is important to note that the meaning of information within the 2021 Act is **broad**, and includes:

- any document or a copy of, or extract from, any document;
- documents of any type or copies of, or extracts from, such documents; and
- any explanation or other information (including unrecorded information).

It is also important to note that staff should make reasonable efforts to establish whether the required information is publicly available, for example through the public authority's website or other resources such as Scotland's environment website (www.environment.gov.scot). Following the public authority's response, staff may require further clarification or have further questions to ask. Where this is the case, staff should use their discretion as to whether it is more efficient to make quick enquiries with the public authority under section 23 of the 2021 Act.

Before issuing an information notice, or if they are unclear on any of the above, staff will liaise with their line manager to ensure that the request is tightly focussed. When issuing an information notice, staff will adhere to the requirements of section 24 (which are embedded in the template notice) and thus the notice **MUST** specify:

- (a) the information, or the nature of the information, which is to be provided;
- (b) the purposes for which, and the particular matters in connection with which, it is required;
- (c) the form in which it is to be provided;
- (d) the means by which it is to be provided; and
- (e) the date on or by which, or the period within which, it must be provided.

Where the information is not received by the date specified in the information notice, staff will record this and issue a reminder letter specifying a final date for expected receipt. If

the information remains outstanding, or where the public authority refuses to provide the information requested, investigation staff will immediately raise this with the Head of Investigations, Standards and Compliance, who will consider what further steps should be taken.

E5 – Requesting information from other, relevant bodies

Although the public authority subject to the representation may be relatively clear, the landscape in respect of environmental issues is often complex and multiple public authorities may have had some involvement or have an interest in the background to the representation. Accordingly, it may be the case that relevant information may be held by other public authorities. Where staff believe this to be the case – and cannot source the information through their own efforts – they can issue a section 24 information notice to any public authority they believe holds information which they require. It is good practice to make telephone contact first to manage expectations.

Given the complexity of the landscape, it may not always be obvious where relevant information is held; however, it is the role of investigation staff to identify and source this information, either through their own research or through seeking advice from colleagues or advisers. Where information cannot be sourced through our own efforts, it is open to staff to contact public authorities under their duty to co-operate with ESS to explore with them where relevant information may be held.

If staff are unclear on any of the above, they should seek guidance from their line manager.

Case Example

During an ESS investigation into the Scottish Government's implementation of the Clean Air Directive, staff become aware that all local authorities should hold information about air quality monitoring in their respective areas. Staff consider that this information is relevant to the material issue under investigation, and an information notice was issued to relevant local authorities seeking this information.

E6 – Internal liaison and external advice

At this stage in the investigation, investigation staff will have identified the material issues. Staff will normally have also received a response to any lines of enquiry pursued and will have begun to focus on the important questions that need to be addressed. It may be the case, however, that the answers to some of these questions are outwith the competency of investigation staff, or that enquiries into relevant questions are best taken forward by others within ESS. When this occurs, investigation staff will prepare a briefing paper for the Head of Investigations, Standards and Compliance setting out the specific area of work which they require assistance, including any background papers previously prepared on the subject matter. Investigation staff will thereafter liaise with the relevant department to ascertain whether this work can be taken forward internally and, if so, agree when the work can be completed taking into account the requirements of the investigation plan. In order to efficiently complete this work, it is important that all staff understand the necessity for clear and open dialogue in this connection. The process for commissioning internal analysis can be found here: [\[yet to be completed\]](#)

It may also be the case that the answers we seek cannot be found through our own collective efforts (for example, where there is a dispute about the interpretation of scientific information or the methodology used by a public authority). Where this occurs, staff will consider the requirement for external advice.

For noting – in time include section on how the external adviser will be identified. We will await the outcome of our broader work in this connection.

Engaging the external adviser

When seeking advice, staff will be clear on what advice they are seeking and how this should be provided. Staff must ensure they ask directly the specific questions that they need answered. Good communication between staff and adviser is crucial, so staff should always seek to discuss the case with the adviser if unsure about the advice given, or if ancillary questions are raised by the advice. The following is a summary of what we expect of external advisers:

- To provide specific answers to specific questions posed by ESS staff, supported by evidence.

- Where applicable, advisers should specifically refer to the following:
 - relevant legislation;
 - relevant guidelines, policies or procedures;
 - relevant scientific evidence;
 - relevant national standards; and/or
 - standard norms or practice.
- Include references and if possible the hyperlinks in the appropriate section.
- To provide a clearly written, unambiguous response. Any technical terms should be explained in the text, a glossary or footnotes.
- If the adviser feels they need clarification or other documents they will contact ESS at the earliest opportunity to minimise delay.
- If the adviser identifies environmental failures, they should provide a view on what could be done to avoid the same issues occurring in the future. Equally, if the adviser identifies further questions that need to be put to the public authority, they should point these out in their report.
- If the adviser notes significant issues outwith the scope of the advice, they will make a separate note of this.

Legal advice

Legal advice may need to be sought at various stages of our process. For example, to help assess whether ESS' remit is engaged or to understand the legal responsibilities of a public authority or to clarify the circumstances in which enforcement action can be taken. It is important that staff are clear on why legal advice will assist in the case and that the terms of the request are succinct and to the point. Accordingly, any request for legal advice should be submitted to the Head of Investigations, Standards and Compliance for approval and should include the following:

- a background to the investigation;

- confirmation of whether legal advice has previously been received on the same (or connected) subject;
- a summary of the material issues;
- the specific advice to be sought; and
- why the advice sought is relevant to the material issues.

In the Head of Investigations, Standards and Compliance's absence, the request should be submitted to the Chief Executive.

It is important to note that it is ESS, not advisers, who are charged with investigating issues of environmental concern. Accordingly, it is for ESS to frame the parameters of any investigation and weigh the evidence before reaching a decision. Whilst external advice will clearly play an important part in ESS' consideration, staff are not bound by such advice and it is for them to make the assessment based on all the facts and circumstances of the case. Having said this, if staff are minded to reject or depart from the advice received, a file note must be created setting out the specific reasons for this.

E7 – Analysing the evidence

At this stage of the investigation, staff will have a deep understanding of the nature of the case, pursued relevant and reasonable lines of enquiry, obtained the required information from the public authority and, where appropriate, sought internal or external advice. When analysing the evidence, it is extremely important to be mindful of the type of issue being investigated. For example, when investigating the effectiveness of environmental law, what happened may often not be in dispute and our enquiries and determination will likely be influenced by the policies underpinning what took place and any advice received. In investigating compliance, the assessment of the evidence may be more complex as there may often be competing accounts as to what happened.

Identifying the material facts

Although staff should always try to identify and obtain the evidence they believe is relevant to the investigation, it will often be the case that information or data obtained is ultimately

irrelevant to the decision. An important step in sorting out what is and is not relevant is to identify the **material facts**.

In simple terms, material facts are those facts which need to be established in order to come to a view on the issue in dispute - in other words - facts that are capable of influencing the outcome of the investigation.

Case Example: illustrating material facts

Mrs Smith contacts ESS claiming that SEPA's interpretation of environmental data is flawed. Mrs Smith claims that, as a result of this, SEPA is not properly carrying out its statutory duties.

In this example, the material issue for ESS is whether environmental law is being properly implemented. Material facts in this case **could be**:

- The way SEPA collects the data;
- The methodology which should be used when interpreting data;
- The methodology SEPA uses when interpreting the data;
- Relevant SEPA guidance; or
- Relevant legal/policy provisions.

Classes of evidence

ESS will receive evidence in a number of different forms, for example:

Official or personal: Official documents are generally those produced by organisations, while personally-produced documents are those produced by individuals. It should not be assumed that official documents are more reliable than personally-produced ones, or that computer records are more accurate than hand written or manual records.

Documentary or narrative: Evidence will be either documentary (a letter or computer file record, for example) or it will be narrative (the account provided to you verbally or in writing by the person making the representation or a staff member). It is often assumed that documentary evidence is more reliable than personal recollection; however, the people

directly involved may have had more and better reason to notice what was happening at the time than the member of staff who created the documentary record.

The following questions will help staff in deciding how useful any piece of information is during their analysis of the evidence:

Relevance: Is the information relevant to the issue being investigated? Does it help in either proving or disproving a fact at issue?

Time: When was the information created and how close was it to the events in question? Is the information (for example, a policy) the one that was in place at the time of the events being looked at?

Expertise: Who created the information? Is it the opinion of someone who has up-to-date, specialist knowledge of the issues? If so, do we need to seek our own advice?

Direct or indirect: Is it the recollection of someone who was there at the time of the event, or is it relying on 'usual' practice and what someone expects to have happened? Is the information second-hand and does it rely on what someone else told someone, or on records made by a third party?

Credibility: Does the document contain obvious errors which makes the whole document less reliable? If something is stated as a fact in one document but this fact isn't supported by other information it may make the document less credible. What is the source of the information? For example, is it a well-referenced or researched guideline, or is it an unchecked internet article?

Representativeness: Is a single document representative of all the relevant documents? For example, if one letter suggests that an individual wasn't given an important piece of information is that true of all the letters sent to them? Sometimes, records or correspondence may have been destroyed – in such cases you must decide whether the information that remains available is going to be enough to draw a conclusion.

Meaning: Is the evidence understandable? In some cases, a document will be useless, for example, if it is written in such a way that it is impossible to read or to make any sense of. Can you ask for a transcript?

Authenticity: Is the document genuine and are you sure of its source? It may be that a document that seems to be from a certain source (to make it more credible) is not what it seems to be at first glance. If there is doubt as to the authenticity of a document, you will need to resolve the doubt before relying on the information it contains.

Proportionality: Do you have enough evidence to answer the core questions raised in the investigation? A lot of time can be invested in over-investigating an issue about which you already have enough information to answer the question, or on an issue which isn't actually in dispute. What will it add if you interview 10 people if you already have 4 broadly similar statements or 4 very different ones? If it won't ever be clear then you may need to reach a conclusion based on other factors rather than continuing to gather more contradictory statements.

Decision-making biases

Decision-making biases impact on how we process and interpret information in the world around us and affect the decisions and judgments we all make every day. They can arise from social pressures, where we want to be like those around us; from attention deficits, where we simply don't remember or mis-remember information; from heuristics or rules of thumb, the everyday shortcuts we need to be able to get through a day of endless decision making; and our individual motivations which may unjustifiably impact the conclusions we reach. The best way to avoid decision-making biases is to be aware of when they commonly occur and check our thinking regularly to spot if they have occurred. Here are some of the most common decision making biases:

Availability Bias occurs when we prefer information which is more recent or more readily available over information about more distant or less memorable events, which may in fact be more relevant. "This is just like the case I saw last week."

Anchoring Bias occurs when we put too much emphasis on one piece of information when making a decision simply because it formed part of our initial thinking.

Confirmation Bias happens when we prefer information which confirms what we want to believe. Remember this may also apply to information you are given by others.

Hindsight Bias exists where we judge a situation by what we now know to be the case rather than what we should reasonably have known at the time.

Overconfidence Bias occurs when a person overestimates the reliability of their judgements. This can include the certainty one feels in one's own ability, performance, level of control, or chance of success (for example, 80% of drivers think they are better than average).

Fundamental Attribution Error & Actor-Observer Bias We all have a tendency to blame others' personalities when things go wrong. Instead of looking objectively at the situation, we excuse ourselves from blame because of external events - you were late because you are unorganised but I got held up by the bad weather!

Information Bias occurs when we keep seeking out more information which won't actually make any difference to our decision. If you have enough information to reach a reasonable decision you can stop.

Clustering Illusion happens when we string together randomly occurring events to make a cohesive story. This is a strong human tendency and again you may see examples of it from those providing you with information.

Blind Spot Bias is the failure to recognise your own biases.

Balancing the evidence

In all cases we will need to weigh and balance arguments about facts and be clear about how we have done so and why. It is also important when making our decision that staff are clear about the difference between fact and opinion, as there may be times when we need to make a judgement between different opinions – which is appropriate – so long as we're clear on the reasoning behind our decision.

'**On balance**' is generally the standard that ESS investigators will use. In practical terms this means that, in cases where there are competing accounts which are material to the issue in dispute, staff should assess from all the information gathered whether it is **more likely** that events happened or that they didn't happen. The balance will be very clear cut in some cases but more fine in others. It is these fine balance cases that can be

particularly hard to judge and where you need to be especially careful to explain your final decision.

A good decision will demonstrate that it has taken account of any contrary evidence as well as the evidence that supports it and will explain why evidence has been used in the way that it has to inform the decision, for example, in cases where it is not straightforward or self-explanatory, or where the evidence is of varying quality. In short, our decisions should leave an uninformed reader in no doubt as to the reasons for the conclusion.

In all decisions, staff will follow this general approach:

- Do not prejudge – the decision can only be made when you have the evidence.
- Impartiality is something that we need to manage actively, i.e. we cannot assume we are objective but need to make sure we understand our own position and prejudices. This is something all staff need to bear in mind not only generally but whether any individual case raises issues for us, such as conflict of interest or reasonable perceptions of bias.
- Give clear reasons why you are coming to a decision – why you are relying on one piece of evidence and not another. This is the step that makes visible the first two steps and will also demonstrate our thinking to the relevant parties and in the event of challenge. It will also enable us to assess whether we have taken into account relevant factors or considerations.

E8 – Recording our rationale

In order to demonstrate the robustness of our decision-making, staff will ensure that the following is clear from a review of the file:

- we have understood the representation;
- the grounds of investigation have a direct link to ESS' remit;
- if there are disputes of fact, how we have come to our decision, including weighting if we have had to come to a decision where the dispute cannot be resolved by documentary evidence;

- what expert advice we have sought, why it is relevant and how we have assessed this;
- that all relevant policy/legislation (including our own) has been identified and thereafter considered;
- that representations from all parties have been taken into account; and
- the reasoning we have employed to come to our decision.

SECTION F – Taking enforcement action

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F1 – What is enforcement action?

The law gives ESS significant powers to secure public authorities' compliance and places a duty on all public authorities to co-operate in resolving matters swiftly and reaching agreement on implementing remedial action. Accordingly, ESS may take the steps it considers appropriate to secure public authorities' compliance with environmental law or improve the effectiveness of environmental law, or how it is implemented or applied. This is what we mean by enforcement action.

Enforcement action may arise from any part of our functions, for example as a result of an ESS investigation or monitoring assessment. Enforcement action may also take place at any stage of our process and through a variety of mechanisms, such as informal resolution, compliance notices or improvement reports. In extreme cases, ESS may apply for judicial review or intervene in civil proceedings.

The intent behind any enforcement action we take is to:

- secure compliance with environmental law and, where necessary, change behaviour;
- stop or reduce the risk of harm to the environment arising from the non-compliance and ensure remediation and/or mitigation of the failure;
- secure improvements in the effectiveness of environmental law; or
- secure improvements in how environmental law is being implemented or applied.

The type of enforcement action we take will depend on the nature of the failing and the consequences (or potential consequences) of this. In deciding what enforcement action is required ESS will also take into account whether immediate action is required to protect the environment. Our general approach to enforcement is informed by the following principles.

Effectiveness

Although we aim to work in a proportionate and timely way, we will at all times seek to ensure that the enforcement action we take is an effective and lasting solution.

Openness and transparency

Where we take enforcement action, we will explain the basis for this action and the steps required by the public authority to address matters. We will also, where appropriate, explain the arrangements in place to appeal against our decision to take enforcement action.

In order to secure public confidence in our work, ESS may publicise our work, including where enforcement action is taken.

Proportionality

ESS will be proportionate in the way we use enforcement action, and will always seek to take only the measures necessary to achieve our aim. Where appropriate, we will also seek to engage with public bodies at all stages to resolve matters quickly and informally.

Focusing

As part of an evidence-based approach to our work, the intelligence we gather will inform both our investigation strategy and the types of enforcement action we take.

Timeliness

The legislation under which we operate places a duty on public authorities to make all reasonable efforts to swiftly resolve matters we raise and to reach agreement on any remedial action required. Accordingly, we will seek to positively engage with all relevant parties at the earliest opportunity.

Consistency and accountability

Whilst each case is different, we aim to ensure there is an appropriate level of consistency in our decision-making. All enforcement decisions will be made by staff with an appropriate level of training and we will be clear who is responsible for the decisions we make. We will also be clear about how our decisions can be appealed or reviewed.

'Informal' enforcement action

Enforcement action includes any action taken by ESS through informal resolution. How staff should approach informal resolution is set out at pages 22-28.

F2 – Formal enforcement action – compliance notices

Section 31 of the 2021 Act sets out the circumstances in which ESS may issue a compliance notice to a public authority. A compliance notice is a notice requiring a public authority to take action to address its failure to comply with environmental law.

At this stage, staff will have developed a deep understanding of the issues involved and will be confident in the conclusions they have drawn from the evidence. Where staff have identified an environmental failure, **and where attempts at informal resolution have been unsuccessful or deemed unsuitable**, staff will proceed to consider whether a compliance notice should be issued.

Section 31 states that ESS may issue a compliance notice where the following has been identified:

- a public authority **is failing** to comply with environmental law; or
- a public authority **has failed** to comply with environmental law and it is likely that the failure will occur again; and
- the failure to comply **is causing, or has caused**, environmental harm or a risk of environmental harm; and
- the failure relates to a public authority's **regulatory functions**.

The definition of environmental law has already been discussed at pages 13-15 and staff should make reference to this during their consideration. In respect of regulatory functions, the 2021 Act defines these as:

- (1) functions conferred by or under any enactment of:
- imposing requirements, restrictions or conditions in relation to an activity;
 - setting standards and outcomes in relation to an activity; or
 - giving guidance in relation to an activity; or

(2) functions which relate to the securing of compliance with, or enforcement of, requirements, restrictions, conditions, standards, outcomes or guidance which by or under any enactment relate to an activity.

Accordingly, before issuing a compliance notice, staff will need to explain and evidence the following:

- why the public authority is failing to comply with environmental law **or** has failed in circumstances that make it likely that the failure will continue or be repeated;
- what the failing is or how it has caused environmental harm **or** how there is a risk of harm occurring; and
- the regulatory function the failure relates to.

Where staff consider that a compliance notice should be issued, they must submit a briefing paper to the Head of Investigations, Standards and Compliance setting out the above information.

Case Example

A local community group contacted ESS concerned that their local authority failed to carry out an assessment of the likely environmental impacts of a development of a large chemical factory in their locality before granting consent, contrary to the requirements of the Town & Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2017 (“the 2017 regulations”).

Following investigation, ESS substantiated the community group’s concern and concluded that the local authority had **failed** to comply with the requirements of the 2017 regulations. ESS was also satisfied that the environmental impact assessment fell under the local authority’s **regulatory functions** and that the evidence pointed towards a **likelihood that the failure would reoccur**, with a resultant **risk of environmental harm occurring**. A compliance notice was accordingly issued to the public authority.

Content of a compliance notice

Section 33 sets out the information that must be included within a compliance notice. This information can be split broadly into the following two categories: the reasons for the view there has been an environmental failure; and the steps required to remedy the failure.

(i) The reasons for the view that there has been an environmental failure

The following information must be included within a compliance notice:

- (a) a statement of the grounds for issuing the notice, including a statement of:
 - (i) the regulatory function of the public authority to which the alleged failure to comply with environmental law relates;
 - (ii) the provision of environmental law to which the alleged failure relates;
 - (iii) the alleged conduct which has caused ESS to conclude that the public authority is failing to comply with environmental law or has failed to comply with environmental law and the failure will likely continue or be repeated;
 - (iv) ESS' reasons for reaching that conclusion; and
 - (v) the environmental harm or risk of environmental harm being caused, or having been caused, by the alleged failure.

It is important to note that ESS will issue an investigation report to the relevant parties, which will set out the reasons for our conclusion that there has been an environmental failure. Although much of the above information may be included in the investigation report itself, investigation staff will ensure that the investigation report includes an annex which clearly setting out all of this information.

(ii) Remediating the environmental failure

The following information must be included within a compliance notice:

- (b) details of the steps that ESS requires the public authority to take in order to address its failure to comply with environmental law (which may include steps designed to remedy or mitigate, or prevent any continuance or repeat of, the failure);

- (c) the date of issue of the notice;
- (d) the period within which the required steps are to be taken (which cannot be less than 28 days);
- (e) information about the person to whom, and as to how and by when, any representations about the notice may be made;
- (f) information about the right to appeal, including the period within which an appeal may be made; and
- (g) an explanation of the consequences of failure to comply with the requirements of the notice.

A number of the above requirements are procedural in nature and must be included within the annex to the investigation report.

Whilst it is not possible to set out definitively the range of steps that ESS requires the public authority to take (see pages 27-28 for how environmental failures can occur in practice and some of the steps we might require a public authority to take), staff will at all times have regard to the enforcement principles and intent set out above when considering how best to secure compliance and prevent environmental harm. It is also important to remember that staff will also be able to seek internal or external advice when considering what action in this connection should be taken.

Restrictions on issuing a compliance notice

Section 32 of the 2021 Act sets out the circumstances in which ESS **cannot issue** a compliance notice, namely:

- (1) a failure to comply with environmental law arising out of any decision taken by a public authority in the exercise of its regulatory functions in relation to a particular person or case (for example, a decision on an application for a licence or a decision on regulatory enforcement in a specific case); or
- (2) a failure to comply with environmental law arising out of particular conduct if it has prepared an improvement report in respect of the same failure arising out of the same conduct.

In respect of restriction 1, whilst ESS investigations may take into account the way individual cases have been handled, this will often be to consider any wider or systemic issues arising from these cases. The 2021 Act is clear, however, that it is not ESS' role to act as a de facto appeal body in individual regulatory decisions and thus enforcement action cannot be taken to overturn those decisions. This is the reason why it is important that staff, when initially assessing the representation, consider the availability of appeal routes or alternative oversight bodies where the concern relates to a particular person or case or where the outcome sought is the overturning of decisions in respect of a particular person or case.

Case Example

Mr Jones contacts ESS concerned that Scottish Forestry failed to consult with the relevant local authority prior to granting permission to a local landowner to fell trees covered by a tree preservation order, contrary to section 33(2)(a) of the Forestry and Land Management (Scotland) Act 2018 ("the 2018 Act").

Although the issue of general compliance with the requirements of section 33 of the 2018 Act may form the subject of ESS investigation, as the public authority's decision relates to an individual case, ESS would not be able to take any enforcement action in respect of the specific decision about which Mr Jones is concerned (it should be noted that section 68 of the 2018 Act allows for appeals to be made in respect of the individual regulatory decision).

Variation of a compliance notice

As noted above, when issuing a compliance notice, ESS must set out a date by which the steps required by the public authority are to be taken. Section 34 of the 2021 Act allows for ESS to extend the period by which compliance action must be taken by the public authority.

Whilst staff will have already considered a proportionate timescale by which compliance action should be taken by the public authority (which the public authority will already have sight of in the draft decision issued to it), there may be instances where it would be fair and

reasonable to reconsider this, for example where unforeseen circumstances outwith the public authority's control create difficulties in them taking the action required within the deadline specified.

Where a public authority informs staff of any difficulties in meeting the deadline for compliance action, staff will highlight this immediately to the Head of Investigations, Standards and Compliances, who will consider carefully whether the compliance period should be extended. If the decision to extend the compliance period is made, staff must confirm this in writing to the public authority. Staff will also inform any relevant party of the decision to extend, including the reasons for this.

Case Example

Following our finding that a local authority had failed to carry out assessments of the likely environmental impacts of large scale developments, contrary to the requirements of the Town & Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2017 ("the 2017 regulations"), ESS issued a compliance notice requiring that within 3 months the local authority amend its policies and procedures in this area and ensure all relevant staff are trained in the changes.

The local authority subsequently contacted ESS explaining that, due to a spike in Covid-19 cases, it was highly unlikely that they would be able to train all relevant staff within the timescale required. Given the unforeseen nature of these circumstances, an extension of the compliance period was granted to the local authority.

Withdrawal of a compliance notice

Section 35 of the 2021 Act states that ESS may withdraw a compliance notice

- (a) at any time before completion of the steps that are to be taken to comply with the requirements of the notice,
- (b) by giving notice in writing to that effect to the public authority to whom the compliance notice was issued.

Where a compliance notice is withdrawn, it has to be treated as if it had never been issued and staff will update the relevant records accordingly. Staff should also inform any relevant party of the decision to withdraw the notice, including the reasons for this.

Appeals against a compliance notice

Although ESS will issue draft reports of our investigations, which will provide all relevant parties the opportunity to submit any new and material evidence or point out any factual inaccuracies, public authorities have the right to appeal to a sheriff against a compliance notice in the following circumstances:

- (a) it has not conducted itself in the manner alleged in the notice;
- (b) the alleged conduct specified in the notice does not constitute —
 - (i) a failure to comply with environmental law; or
 - (ii) a failure to comply with environmental law in circumstances that make it likely that the failure will continue or be repeated; or
- (c) the alleged failure to comply with environmental law specified in the notice is not causing, or has not caused, environmental harm or a risk of environmental harm.

It should be noted that the grounds of appeal relate **only** to the alleged conduct of the public authority and/or the effects of that conduct. There are no appeal grounds in respect of the compliance action required. Nonetheless, the grounds of appeal available to public authorities serve as a reminder to staff of the importance of being clear in our decision as to why we consider there has been an environmental failure.

Where an appeal is lodged, staff should be aware that the compliance period is suspended until the appeal is finally determined, or withdrawn. The possible outcomes of an appeal are:

- cancellation of the compliance notice; or
- confirmation of the notice, either with or without modifications.

Monitoring implementation of a compliance notice

It is the responsibility of the individual member of staff to ensure that the public authority provides sufficient evidence demonstrating compliance by the completion date specified in the compliance notice. Staff will accurately record the actions taken so that these can be reported on and used for future analysis or monitoring.

Where staff consider that a public authority has not complied with a compliance notice, they will immediately raise this with the Head of Investigations, Standards and Compliances, who will consider what steps are necessary, which could include reporting the matter to the Court of Session.

F3 – Formal enforcement action – improvement reports

Section 26 of the 2021 Act sets out the circumstances in which ESS may issue an improvement report to a public authority. An improvement report is a report setting out the details of the alleged environmental failure and recommending measures that Scottish Ministers, or any other public authority, should take in order to:

- (a) comply with environmental law; or
- (b) improve the effectiveness of environmental law or how it is implemented or applied.

As previously noted, at this stage staff will have developed a deep understanding of the issues involved and will be confident in the conclusions they have drawn from the evidence. Where an environmental failure has been identified, and where attempts at informal resolution have been unsuccessful and **a compliance notice is not suitable**, staff will proceed to consider whether an improvement report should be issued.

Section 26 of the 2021 Act states that ESS may issue an improvement report if it considers that in **exercising its functions** (including regulatory functions), a public authority has failed to:

- comply with environmental law;
- make effective environmental law; or

- implement or apply environmental law effectively.

ESS may also prepare an improvement report if it considers that the combined effect of two or more public authorities exercising their functions (including regulatory functions) in the same or a similar way constitutes a systemic failure by those authorities to:

- comply with environmental law;
- make effective environmental law; or
- implement or apply environmental law effectively.

It is important to emphasise that the circumstances in which ESS can issue an improvement report in respect of compliance failures **are broader** than those where we can issue a compliance notice. This is because, unlike compliance notices, improvement reports are not confined to a public authority's regulatory functions, but any function that is carried out by the authority. In simple terms, a public authority function means any act or activity which is carried out by a public authority in the exercise of its responsibilities.

Content of an improvement report

Section 28 of the 2021 Act states that the following information must be set out in an improvement report:

- The grounds for preparing the report, including details of the alleged conduct and circumstances which have caused ESS to conclude that a public authority has failed, or (as the case may be) that two or more public authorities have collectively failed, to:
 - comply with environmental law;
 - make effective environmental law; or
 - implement or apply environmental law effectively;
- An explanation of our reasons for reaching this conclusion (including details of the relevant environmental law and any evidence, research, expert advice or other information which we took into account);

- The impact of the failure (including any environmental harm, risk of environmental harm or missed opportunity to improve the quality of the environment);
- A proposed timescale for the Scottish Ministers, or other public authority, to take the remedial measures recommended in the report.

The investigation reports we issue will set out the specific reasons for our conclusion that there has been an environmental failure and will therefore satisfy a number of the requirements listed above. Staff will **ensure**, however, that our investigation report clearly explains the impact of the environmental failure, and why we consider environmental harm has (or may) be caused.

Whilst it is not possible to set out definitively the range of remedial measures that ESS might recommend a public authority takes, (see pages 23 and 24 for how environmental failures can occur in practice and some of the steps we might expect a public authority to take), staff will at all times have regard to the intent behind ESS enforcement and our enforcement principles when considering what action should be recommended. Staff will also be mindful of the guiding principles on the environment as set out in section 13 of the 2021 Act and should seek advice from colleagues or obtain internal or external advice if they are unclear on the nature of the remedial action to be taken.

Restrictions on preparing an improvement report

Section 27 of the 2021 Act sets out the following circumstances in which ESS **cannot issue** an improvement report:

- (1) where the failure to comply with environmental law arises out of any decision taken by a public authority in the exercise of its regulatory functions in relation to a particular person or case (for example, a decision on an application for a licence or a decision on regulatory enforcement in a specific case); or
- (2) where we have already issued a compliance notice to a public authority in respect of the same failure arising out of the same conduct and we have not subsequently withdrawn this.

As noted previously, the 2021 Act is clear that it is not ESS' role to act as a de facto appeal body in individual regulatory decisions and thus enforcement action cannot be

taken to overturn those decisions. Accordingly, ESS cannot issue an improvement report in respect of these types of cases. This is the reason why it is important that staff, when initially assessing the representation, consider the availability of appeal routes or alternative oversight bodies where the concern relates to a particular person or case or where the outcome sought is the overturning of decisions in respect of a particular person or case.

Procedural requirements

Where ESS prepares an improvement report, we must:

- send a copy of the report to Scottish Ministers;
- lay a copy of the report before the Scottish Parliament; and
- publish a copy of the report.

As has already been noted, ESS will issue an improvement report to all relevant parties, which will contain the reasoning and evidence behind our findings. In line with our commitment to openness and transparency, ESS will publish our improvement reports.

Monitoring implementation of an improvement report

Under section 30 of the 2021 Act, once ESS has issued an improvement report, Scottish Ministers must prepare an improvement plan setting how they propose to deal with the recommendations within the report. Scottish Ministers must lay a copy of their improvement plan before the Scottish Parliament, which will consider and either reject or approve the plan.

The effect of section 30 is that the responsibility of monitoring compliance, and approving the plan laid by Scottish Ministers, passes to the Scottish Parliament. Notwithstanding this, staff will monitor the implementation of the recommendations, which ESS will report publicly on.

Compliance notice or improvement report?

Staff will note that the 2021 Act allows ESS to issue improvement reports or compliance notices where a public authority has failed to comply with environmental law. In

determining which type of enforcement action should be taken, staff should consider the nature of the function carried out by the public authority which lies at the heart of the representation.

For example, if the function is a 'regulatory function', a compliance notice should normally be issued. The reason for this is that section 26(3) of the 2021 Act states that, before preparing an improvement report in respect of any failure arising out of a public authority exercising its regulatory functions, ESS **must be satisfied** that the failure could not be addressed more effectively by issuing a compliance notice.

Where the failure to comply does not relate to a 'regulatory' function, a compliance notice **cannot be issued** and so enforcement action must be taken through the issuing of an improvement report.

Case Example

A local community group raised with ESS their concern that their local authority had repeatedly failed to designate Air Quality Management Areas where air quality objectives were unlikely to be met. Following investigation, ESS substantiated the community group's concerns.

As the function concerned does not relate to a regulatory function, ESS **could not** issue a compliance notice to the public authority. Accordingly, an improvement report was issued.

F4 – Judicial review

What is judicial review?

In very simple terms, judicial review is the process by which a court reviews a decision, act or failure to act by a public body or other official decision maker. Traditionally, the grounds of judicial review have been divided into three main categories:

- 1) that the decision maker acted unlawfully ('illegality');

- 2) that the decision was made using an unfair procedure ('procedural impropriety'); and
- 3) that the decision was so unreasonable as to be irrational ('irrationality' or 'unreasonableness').

The remedies available through judicial review include:

- reduction of the decision;
- declarator;
- suspension and interdict; and
- specific performance or specific implement.

When can ESS apply for judicial review?

Alongside (and notwithstanding) our powers to issue a compliance notice or improvement report, ESS has the power to make an application for judicial review in relation to a public authority's conduct in the following circumstances:

- the conduct constitutes a serious failure to comply with environmental law; and
- it is necessary to make the application to prevent, or mitigate, serious environmental harm.

It is important to note that judicial review can **only be applied for where a public authority has failed to comply with environmental law**. In contrast to compliance notices and improvement reports, before taking this action ESS has to be satisfied that both the failure of the public authority to comply **and** the environmental harm, or risk of harm, caused as a result of that failure is **serious**.

Determining whether the failure to comply is serious

In determining whether the failure of a public authority is serious (it is not possible for this guidance to address every scenario which may arise), factors which may be considered include whether:

- the conduct is systemic and/or longstanding in nature;
- the conduct is flagrant or deliberate; or
- the conduct demonstrates neglect on the part of the public authority.

Determining whether environmental harm is serious

In determining whether the environmental harm caused by the failure to comply is serious, factors which may be considered include:

- the impact and scale of the harm caused (or at risk of occurring) to the environment and/or to human health;
- the significance and sensitivity of the area affected (or at risk of being affected) by the environmental harm;
- the likelihood of the further environmental harm occurring; or
- the irreversibility of the environmental harm if action is not taken.

It is important to stress that, before ESS can apply for judicial review, we must be satisfied that both the failure to comply **and** the harm is serious. We must also be satisfied that the environmental harm is either ongoing (mitigation) or and that there is a risk of it occurring should action not be taken (prevention).

Why judicial review?

As ESS' power to apply for a judicial review relates to public authorities' compliance with the law, staff will be clear on why this course of action should be taken, as opposed to taking other enforcement action in respect of compliance. Staff should also be satisfied that the remedy sought is one that can be achieved through judicial review.

As judicial review is one of the most serious and resource intensive actions ESS can take, where staff consider that judicial review should be applied for they must submit a briefing paper to the Head of Investigations, Standards and Compliance setting out the following information:

- the reasons why other enforcement action should not/cannot be taken by ESS;

- the reasons for their view that non-compliance is serious;
- the reasons for their view that environmental harm is, or may be, serious; and
- the reason for their view that judicial review can mitigate or prevent this harm.

Case Example

After issuing an improvement report under section 26 of the 2021 Act in respect of a public authority's failure to comply with the law when exercising its functions, Scottish Ministers respond that they do not intend to implement the recommendations made within the report.

Since issuing the report, ESS received further information that the public authority had known for some time that they were not complying with environmental law and that there were consequent public health risks, which have not been removed or mitigated. In these circumstances, ESS decided to apply for judicial review on the grounds of irrationality seeking interdict to stop the ongoing harm.

F5 – Intervening in civil proceedings

What do we mean by intervening in civil proceedings?

In simple terms, intervention in civil proceedings is where a party voluntarily, or through invitation, decides to join a dispute that involves other people or bodies. Intervention is more often than not taken in cases that involve matters of wider public interest than just the concerns of the individual parties to the dispute. Public bodies can decide to take an interest in the proceedings and seek to intervene in them so that it can be legally represented and can present arguments to the court on the issues.

The 2021 Act defines proceedings as civil proceedings before a court, including appeal proceedings and proceedings on an application for judicial review.

When can ESS apply to intervene in civil proceedings?

The grounds for ESS seeking to intervene in civil proceedings are very similar to the grounds for applying for judicial review, namely:

- the allegation relates to a serious failure by the public body to comply with environmental law; and
- it is necessary to intervene to prevent, or mitigate, serious environmental harm.

Staff should also note that the ability to intervene **only** applies to a public authority's **compliance** with environmental law. Accordingly, where staff consider that the allegation (or point in dispute) within civil proceedings meets the grounds above, ESS can seek to intervene in the proceedings for the purpose of making a submission to the court.

Given the similarity in the grounds, staff will make reference to the factors which we consider in determining whether to seek judicial review when assessing whether the allegation in the proceedings and environmental harm is serious.

Why intervene in civil proceedings?

Unlike the other enforcement actions open to ESS, not all the facts of the case or the evidence on which the action is based will be held by ESS. Nevertheless, ESS may possess information gathered in previous investigations or from our monitoring and evaluation function that may raise issues that would assist the court.

Given the resource intensive nature of intervening, where staff consider that intervention is appropriate or necessary, they must submit a briefing paper to the Head of Investigations, Standards and Compliance setting out the following information:

- the nature of the point in dispute in the civil proceedings;
- the reasons for their view that the allegation of non-compliance is serious;
- the reasons for their view that environmental harm is, or may, be serious; and
- the value or impact that intervention could have (e.g. how can it mitigate or prevent environmental harm).

Case Example

ESS becomes aware that an environmental body is taking civil proceedings against the Scottish Government in respect of an alleged failure to comply with the requirements of the Aarhus convention in respect of access to justice.

Given the reports of the Aarhus Compliance Committee that Scotland has failed over a number of years to adhere to the requirements of the Aarhus convention (alleged longstanding failure), and the consequential risk of environmental harm (serious or non-serious) if barriers to access to justice are not removed, ESS decided to apply to intervene in the proceedings.

Checklist methodology for assessing whether a matter of concern relates to the ‘effectiveness of environmental law’.

Environmental Standards Scotland’s functions include “to investigate (either on its own initiative or in response to any representations made to it by another person) any matter concerning ... the effectiveness of environmental law or of how it is (or has been) implemented or applied.”

This checklist is provided to assist in identifying and assessing effectiveness on a preliminary basis, by comparing the available information to high-level concepts which underpin, and relate to, the definition of effectiveness of environmental law as set out in the 2021 Continuity Act. It should be noted that full evaluation of effectiveness will be a complex process. Unless otherwise indicated, any answer of ‘Yes’ in the checklist indicates a potential for ineffectiveness and the matter should be subject to further review as part of the investigation process.

Relevant definitions

The definition of effectiveness of environmental law as set out in section 44(7) of the Continuity Act is as follows:

references to the effectiveness of environmental law are references to the effectiveness of environmental law, or any particular aspect of it—

(a) in achieving its intended effect by reference to its contribution to—

(i) environmental protection, and

(ii) improving the health and wellbeing of Scotland’s people, and achieving sustainable economic growth, so far as consistent with environmental protection, and

(b) in contributing to the implementation of any international obligation of the United Kingdom relating to environmental protection,

and references to “effective environmental law” are to be construed accordingly.

The definition of “environmental protection” within the Continuity Act is as follows:

- (a) protecting, maintaining, restoring or improving the quality of the environment,
 (b) preventing, mitigating, minimising or remedying environmental harm caused by human activities,
 (c) monitoring, considering, assessing, recording, reporting on or managing data on anything relating to paragraphs (a) and (b).

Checklist – Initial Evaluation of Environmental Law Effectiveness

Assessment Criteria (and factors to be considered)	Y / N / Unclear (U)	Guidance Notes	Assessor notes
Is there any concern that the law itself, or the public authority's implementation of the law is contrary to the intended effect of the law(s) to deliver environmental protection?	<input type="checkbox"/> Y <input type="checkbox"/> N <input type="checkbox"/> U	This assessment may be evaluated either at high-level or in collective review of the associated criteria presented as bullet points below.	
<ul style="list-style-type: none"> Are there claims or evidence in the representation that the law itself or a public authority's implementation fails to achieve its intended effect? 	<input type="checkbox"/> Y <input type="checkbox"/> N <input type="checkbox"/> U	Where the representation does not indicate potential issues with the effectiveness of the law or its application, it would be out with our remit to investigate this aspect unless we have reason to believe a potential issue exists.	
<ul style="list-style-type: none"> Do the applicable laws cited / identified relate to environmental protection? 	<input type="checkbox"/> Y <input type="checkbox"/> N <input type="checkbox"/> U	<p>Review whether the intended effect of the law supports "environmental protection" (as defined by the 2021 Continuity Act).</p> <p>Note a "Yes" response to this question in isolation does not confirm a potential for ineffectiveness; a "No" response would indicate that the law(s) in the representation are not deemed to be environmental laws and therefore investigation would be outside the remit of ESS.</p>	
<ul style="list-style-type: none"> Are there concerns or evidence to suggest the law itself is ineffective in protecting the environment? 	<input type="checkbox"/> Y <input type="checkbox"/> N <input type="checkbox"/> U	<p>Examples of ineffective law include:</p> <ul style="list-style-type: none"> Poorly-drafted laws; e.g. vague wording, lack of detail, difficult to interpret on a practical basis, insufficient scope to achieve environmental protection Those excluding a framework for enforcement 	

Assessment Criteria (and factors to be considered)	Y / N / Unclear (U)	Guidance Notes	Assessor notes
		<ul style="list-style-type: none"> Those which allow undue exceptions or loopholes which would allow a party to degrade the environment without consequence. 	
<ul style="list-style-type: none"> Are there concerns or evidence that the public authority's implementation or application of the law is ineffective? 	<input type="checkbox"/> Y <input type="checkbox"/> N <input type="checkbox"/> U	Where the effectiveness of the law itself is not challenged, then ESS should assess whether the ineffectiveness is related to the public authority's policies, actions, procedures, or failure to act.	
Optional High Level Review: <ul style="list-style-type: none"> Does the law, the intended effect of the law, or its implementation by a public authority appear contrary to the EU guiding principles relating to environmental law? 	<input type="checkbox"/> Y <input type="checkbox"/> N <input type="checkbox"/> U	Reviewing against EU Guiding Principles allows a separate, high-level assessment of effectiveness. The principles are summarised as follows: <ul style="list-style-type: none"> The precautionary principle (as it relates to the environment); Preventative action should be taken to avert environmental damage; Environmental damage should as a priority be rectified at source; The polluter should pay. 	
Assessment Criteria	Y / N / N/A	Guidance Notes	Assessor notes
Is there any concern that the law itself, or the public authority's implementation of the law is contrary to the intended effect of the law(s) to improve the health and wellbeing of Scotland's people, and achieve sustainable economic growth, so far as consistent with environmental protection?	<input type="checkbox"/> Y <input type="checkbox"/> N <input type="checkbox"/> U	This assessment may be evaluated either at high-level or in collective review of the associated criteria presented as bullet points below. Sustainable development policies and frameworks are valuable tools for evaluating viable balances between growth and environmental protection. WCED Our Common Future defines sustainable development as that which "meets the needs of the present without compromising the ability of future generations to meet their own needs."	
<ul style="list-style-type: none"> Are there concerns or evidence in the representation relating to potential risks to the health and wellbeing of Scotland's people? 	<input type="checkbox"/> Y <input type="checkbox"/> N <input type="checkbox"/> U	More detailed review of the potential impacts to human health and their significance are evaluated separately under the ESS significance checklist.	

Assessment Criteria (and factors to be considered)	Y / N / Unclear (U)	Guidance Notes	Assessor notes
<ul style="list-style-type: none"> Are any alleged health risks at a scale where these may potentially impact on the Health Performance Indicators monitored in Scotland's National Performance Framework? 	<input type="checkbox"/> Y <input type="checkbox"/> N <input type="checkbox"/> U	Relevant health performance indicators include: life expectancy, mental well-being, life expectancy, work related ill health, and child wellbeing and happiness. Additional details here: https://nationalperformance.gov.scot/	
<ul style="list-style-type: none"> Are there concerns or evidence in the representation that there are issues with the law or its implementation relating to sustainable economic growth? 	<input type="checkbox"/> Y <input type="checkbox"/> N <input type="checkbox"/> U	Examples of relevant issues include: <ul style="list-style-type: none"> Unreasonable hindrance of economic growth The economic growth allowed by the law is environmentally unsustainable 	
<ul style="list-style-type: none"> Are there concerns or evidence that the law, or its implementation, may cause substantial socio-economic harm to an individual or group (e.g. business, industry, community) and unable to receive compensation or redress? 	<input type="checkbox"/> Y <input type="checkbox"/> N <input type="checkbox"/> U	A law or application of the law which causes targeted, irreparable economic or social harm may have issues with its effectiveness; however it should be noted that rectification of environmentally unsustainable activities can justifiably hinder the socio-economic performance of affected groups.	
<p>Optional High Level Review:</p> <ul style="list-style-type: none"> Could the law, or its implementation, directly or indirectly cause undue harm or irrecoverable depletion to the following capital assets: natural, human, social, manufactured, financial? 	<input type="checkbox"/> Y <input type="checkbox"/> N <input type="checkbox"/> U	As a separate, high-level assessment, reference The Forum for the Future's Five Capital Models for definitions and examples.	
<p>Is there any concern that the law itself, or how it is applied is contrary to contributing to the implementation of any international obligation of the United Kingdom relating to environmental protection?</p>	<input type="checkbox"/> Y <input type="checkbox"/> N <input type="checkbox"/> U	Where the representation concerns international obligations, initial review of the reference should be carried out to inform this assessment. UK climate change key agreements: UNFCCC (1992); Kyoto Protocol (1997); Paris Agreement (2015). See A Green Future: Our 25 Year Plan to Improve the Environment Annex 3: The UK's international agreements to protect or improve the environment for a non-exhaustive list of other international environmental agreements.	

Annex XX – Checklist for determining the significance of an Environmental Failure

The 2021 Act does not require ESS to investigate every representation that is made to it. Accordingly, the ESS Board has agreed principle based criteria for deciding whether to investigate or not.

Where ‘environmental failures’ highlighted in representations received or identified through ESS monitoring satisfy one or more of the six principle based assessment criteria they will move to the next stage of the investigation process.

The significance checklist will be used to assist in determining the importance of these environmental failures and allow these to be prioritised accordingly, in line with one of ESS’s strategic outcomes “**Investigating the most important Environmental Concerns**”.

Where the representation is unclear on the checklist questions, further contact should be made with the person making the representation and/or public authority for clarification.

Checklist considerations:

- Significance is a very subjective concept and is generally determined on the basis of evidence available and expert judgement at the time.
- To minimise the risk of challenge it is important to ensure that the manner in which significance has been attributed is transparent and justified.
- In determining whether an environmental failure is likely to have a significant impact will depend upon the ‘*circumstance of each case*’ involving a number of factors and the interplay between these.
- A level of discretion and flexibility should be applied when prioritising environmental failures using the checklist to ensure that issues of interest and/or concern either made to/or initiated by ESS can be further reviewed as part of the investigation process.
- The checklist is not exhaustive and should be treated as a live document undergoing regular review and update as more environmental failures are identified for example through the ESS preliminary investigation process, ESS monitoring function or published case law.

Checklist based on principle based criteria agreed by ESS Board

Assessment Criteria (and factors to be considered)	Y / N Unclear(U)	Guidance Notes	Assessor notes
1. Does the matter arise from a significant or potentially significant incident concerning the environment?	<input type="checkbox"/> Y <input type="checkbox"/> N <input type="checkbox"/> U	Staff may wish to refer to Environmental Assessment (Scotland) Act 2005 (legislation.gov.uk) – Schedule 2	
Is a negative environmental impact likely?	<input type="checkbox"/> Y <input type="checkbox"/> N <input type="checkbox"/> U	Likelihood - ranging from certainty to a remote possibility. Frequency/timing - ranging from continuous to a one off event.	
Is any negative environmental impact likely to happen on a recurring or frequent basis?	<input type="checkbox"/> Y <input type="checkbox"/> N <input type="checkbox"/> U	Can the impact be considered direct or indirect.	
Does the size, spatial extent and scope of the environmental impact give rise for concern?	<input type="checkbox"/> Y <input type="checkbox"/> N <input type="checkbox"/> U	The more widespread, long lasting or serious the environmental effects, the greater the likelihood that ESS will progress the case. Consideration should be given to any on-site and off-site effects (localised and transboundary)	
Is any negative environmental impact likely be short term?	<input type="checkbox"/> Y <input type="checkbox"/> N <input type="checkbox"/> U	Timescale – longer term issues have greater potential for harm however shorter term effects resulting in a 'tipping effect' need to be considered.	
Is any negative environmental impact reversible?	<input type="checkbox"/> Y <input type="checkbox"/> N <input type="checkbox"/> U	If an effect is not repeated (permanent or continuous) and easily reversible, it is less likely to be considered a significant effect.	
Is any of the receiving environment sensitive in nature and is this likely to be affected?	<input type="checkbox"/> Y <input type="checkbox"/> N <input type="checkbox"/> U	Local effects can be significant where they arise in particularly sensitive areas. For example an SSI or an area where quality standards or limit values are already being exceeded.	
Is the environmental impact of the issue raised likely to interact with another environmental impact to intensify the negative effect?	<input type="checkbox"/> Y <input type="checkbox"/> N <input type="checkbox"/> U	Cumulative effects can be considered in terms of synergistic effects, additive impacts and secondary effects.	

Assessment Criteria (and factors to be considered)	Y / N Unclear(U)	Guidance Notes	Assessor notes
Has the public authority taken (or does it intend to take) any action in respect of the alleged environmental failure?	<input type="checkbox"/> Y <input type="checkbox"/> N <input type="checkbox"/> U		
Does the evidence suggest this action is proportionate and timely and will remedy the failure and/or reverse its impact?	<input type="checkbox"/> Y <input type="checkbox"/> N <input type="checkbox"/> U		
2. Does the matter raise public health concerns?	<input type="checkbox"/> Y <input type="checkbox"/> N <input type="checkbox"/> U	Refer to www.healthscotland.scot	
Does the representation disclose evidence that the environmental failure has or might have an effect on public health?	<input type="checkbox"/> Y <input type="checkbox"/> N <input type="checkbox"/> U	Public health in a broader context encompasses physical, mental, and social wellbeing and resilience. Also consider the 'vulnerability' of the population at risk. e.g. risk to young children or older people may be higher than risk to (healthy) adults	
Does the size (spatial extent) and scale (size of the population) likely to be affected cause concern?	<input type="checkbox"/> Y <input type="checkbox"/> N <input type="checkbox"/> U	Consideration should be given to whether the concern relates to high level plans over large areas or to isolated / site specific plans.	
Is there imminent risk to public health or safety?	<input type="checkbox"/> Y <input type="checkbox"/> N <input type="checkbox"/> U	Concerns relating immediate harm or danger should be considered a high priority.	
Has the public authority taken (or does it intend to take) any action in respect of the alleged environmental failure?	<input type="checkbox"/> Y <input type="checkbox"/> N <input type="checkbox"/> U		
Does the evidence suggest this action is proportionate and timely and will remedy the failure?	<input type="checkbox"/> Y <input type="checkbox"/> N <input type="checkbox"/> U		
3. Is the matter something which significantly affected (or could significantly affect) the welfare of any member of the public?	<input type="checkbox"/> Y <input type="checkbox"/> N <input type="checkbox"/> U		

Assessment Criteria (and factors to be considered)	Y / N Unclear(U)	Guidance Notes	Assessor notes
Does the representation claim that the alleged environmental failure has or might have an effect on an individual?	<input type="checkbox"/> Y <input type="checkbox"/> N <input type="checkbox"/> U	Is this an ongoing or delayed effect? Has/will it directly or indirectly affect the individual?	
Does the representation disclose any evidence in support of this contention?	<input type="checkbox"/> Y <input type="checkbox"/> N <input type="checkbox"/> U	If so, is the effect significant? For example; has/will the alleged environmental failure: <ul style="list-style-type: none"> • directly affect quality of life (emotionally or physically)? • cause serious injury or death? • cause financial hardship? 	
4. Does the matter concern significant alleged neglect or systemic non-compliance?	<input type="checkbox"/> Y <input type="checkbox"/> N <input type="checkbox"/> U		
Is there a history of legal breaches in this area?	<input type="checkbox"/> Y <input type="checkbox"/> N <input type="checkbox"/> U	Assessing disregard by PA to environmental law (whilst exercising functions).	
Is there a history of non-compliance in general?	<input type="checkbox"/> Y <input type="checkbox"/> N <input type="checkbox"/> U	Wider or systemic effects will be considered as having greater significance.	
Does any breach or non-compliance relate to two or more public authorities?	<input type="checkbox"/> Y <input type="checkbox"/> N <input type="checkbox"/> U		
Has the public authority (authorities) known about the environmental failure?	<input type="checkbox"/> Y <input type="checkbox"/> N <input type="checkbox"/> U	If yes, how long?	
Are there any court judgments relevant to the issue?	<input type="checkbox"/> Y <input type="checkbox"/> N <input type="checkbox"/> U	If yes, are these recent?	

Assessment Criteria (and factors to be considered)	Y / N Unclear(U)	Guidance Notes	Assessor notes
Has the public authority (authorities) taken (or intend to take) any action in respect of the alleged environmental failure?	<input type="checkbox"/> Y <input type="checkbox"/> N <input type="checkbox"/> U		
Does the evidence suggest this action is proportionate and timely and will remedy the failure?	<input type="checkbox"/> Y <input type="checkbox"/> N <input type="checkbox"/> U		
5. Could the matter undermine public confidence?			
Is there a high level of public opinion on the issue concerned?	<input type="checkbox"/> Y <input type="checkbox"/> N <input type="checkbox"/> U	How many representations been received regarding this issue? Over what time period? Has there been any Parliamentary petitions raised or media coverage regarding the issue?	
Is there any community group involvement in the issue?	<input type="checkbox"/> Y <input type="checkbox"/> N <input type="checkbox"/> U		
Are there any court judgments relevant to the issue?	<input type="checkbox"/> Y <input type="checkbox"/> N <input type="checkbox"/> U		
Have any statements been made by elected representatives on the issue?	<input type="checkbox"/> Y <input type="checkbox"/> N <input type="checkbox"/> U		
Have any statements been made by the public authority on the issue?	<input type="checkbox"/> Y <input type="checkbox"/> N <input type="checkbox"/> U		
Is this a current / ongoing issue?	<input type="checkbox"/> Y <input type="checkbox"/> N <input type="checkbox"/> U	Long standing or ongoing/ current issues are likely to present higher significance?	

Assessment Criteria (and factors to be considered)	Y / N Unclear(U)	Guidance Notes	Assessor notes
Has the public authority taken (or does it intend to take) any action in respect of the alleged environmental failure?	<input type="checkbox"/> Y <input type="checkbox"/> N <input type="checkbox"/> U		
Does the evidence suggest this action is proportionate and timely and will remedy the failure?	<input type="checkbox"/> Y <input type="checkbox"/> N <input type="checkbox"/> U		
6. Does the matter concern a failure to meet international obligations?	<input type="checkbox"/> Y <input type="checkbox"/> N <input type="checkbox"/> U	Refer to 25 Year Environment Plan: Annex 3: The UK's international agreements to protect or improve the environment (publishing.service.gov.uk)	
Does this representation refer to an international obligation?	<input type="checkbox"/> Y <input type="checkbox"/> N <input type="checkbox"/> U		
Is Scotland (or the UK) a signatory to this?	<input type="checkbox"/> Y <input type="checkbox"/> N <input type="checkbox"/> U		
Is the obligation enforceable?	<input type="checkbox"/> Y <input type="checkbox"/> N <input type="checkbox"/> U		
Does the obligation concern individual rights?	<input type="checkbox"/> Y <input type="checkbox"/> N <input type="checkbox"/> U		

ESS INVESTIGATION PLAN TEMPLATE

(insert ESS case ref number here)

Investigator	
Body Under Investigation	
Terms of reference (what needs to be investigated)	The terms of reference will have already been agreed by the Board. Insert also any relevant information contained within the briefings to the Board, such as rationale and focus of the investigation.
Outcomes sought	If applicable, insert here the outcomes sought by the person making the representation (e.g. that all river barriers are removed by 2027)
Provisional time-frame	A provisional timeframe may not always be known initially but staff should include an indicative timescale when this becomes reasonably apparent.
Resources Required	Insert here what staff time will be devoted to the investigation (e.g. SIO x.75 or HoI x.1). Also insert what staff resource from other teams might be needed (e.g. statistician or scientific adviser input)
Relevant Legislation, Reports and Guidance	Insert here any relevant legislation. The briefings to the Board will contain this information however update if any further legislation comes to our notice.
Points of dispute	Insert here any key issues/points of dispute with the public authority which needs to be explored under each ground of investigation (e.g. representer claims that the public authority's interpretation of statutory nuisance legislation is incorrect).

Lines of enquiry (inc issues that need to be explored or clarified)	At the planning stage, investigation staff will consider the potential lines of enquiry that need to be made during the investigation. Lines of enquiry identified at the beginning of an investigation may no longer need to be pursued or others may arise. Where this occurs, the investigation plan should be updated of any changes, including the rationale for them. This will not only assist the investigation, but will also allow ESS to respond in the event of challenge and will enable comprehensive briefings to be made across the organisation. Further information on devising lines of enquiry can be found in the operational guidance.
Current Sources of evidence	Insert here the evidence that we already have (e.g. within the representation, open source research or through initial section 23 requests).
Expert advice required	Insert here whether we consider expert advice may need to be sought. Where possible, include what the advice might need to cover and where it can be gotten from.
People or organisations to be contacted, or who have an interest.	Insert here any organisations we suspect may hold relevant information pertinent to the investigation or those that we think we can liaise with (e.g the CCC).
Communication Plan – including adherence to service standards.	Insert here the meetings which will be scheduled internally (e.g. SIO will meet with Hol to weekly) and the updates that will require to be given to the relevant parties (e.g. SIO will update parties monthly). Also include here the internal briefings that will be given (e.g. bimonthly Board update or initial briefing for ESS staff)
Milestones	Insert here the investigation milestones. These milestones should normally be consistent with our technical and operational guidance (e.g. briefing for Hol within 28 days or briefing for Hol within 10 days of receiving information).
Further considerations	Insert here any information which we think needs to be considered during the investigation (e.g. monitor analogous work being carried out by another oversight body)
Potential Risks/ Horizon Scanning	Insert here any risks/stumbling blocks identified during the investigation (e.g. Parliament in recess, holiday periods, resources, staff illness)

***** IMPORTANT *** Staff should remember to always insert the dates of any changes or amendments to this plan and set out clear rationale for this**

ENVIRONMENTAL Standards Scotland

Ìrean Àrainneachdail na h-Alba

standard assessment template

Last Updated (Date)

By (Initials)

Case Details

Case Reference

Assigned Officer

Enquiry/representation
Raised by

Area of Concern

Assessment of enquiry/representation to ESS remit

Provide a remit assessment in the table below.

Area of Remit	Evaluation
Does the representation relate to a public authority?	
Does the representation relate to environmental law?	
Do the issues raised by the representation relate to a failure to comply with environmental law?	
Do the issues raised by the representation relate to the effectiveness of environmental law?	
Do the issues raised by the representation relate to the effectiveness of implementation or application of environmental law?	
Does the representation pertain to any legislative provisions excluded from ESS's remit, per the 2021 Act?	<p>Excluded matters:</p> <ul style="list-style-type: none"> • Disclosure of, or access to, information • National defence or civil emergency; or • Finance or budgets.

Is the representation premature?	
Have any alternate remedies been identified?	

Assessment of enquiry/representation to ESS investigation criteria

Provide a remit assessment in the table below.

Investigation Criteria	Evaluation
Does the matter arise from a significant or potentially significant incident concerning the environment?	
Does the matter raise public health concerns?	
Is the matter something which seriously affected (or could seriously affect) the welfare of any member of the public?	
Does the matter concern significant alleged neglect or systemic non-compliance?	
Could the matter undermine public confidence?	
Does the matter concern a failure to meet international obligations?	

Case actions

Provide a summary of identified actions and associated target dates in the table below.

Action	Target Date	Complete? (Yes/No)

Information requests

Provide a summary of information requests in the table below.

Contact	Information Requested	Date of Request	Required Date of Return	Date Received

Outcome

Please tick the relevant outcome and enter the date of the final issue.

Tick	Outcome	Date of Decision / Final Report
<input type="checkbox"/>	Closed before becoming active case (e.g. outwith ESS remit or does not meet investigation criteria/eligibility for informal resolution)	
<input type="checkbox"/>	Informal Resolution	
<input type="checkbox"/>	Compliance Notice	
<input type="checkbox"/>	Improvement Report	
<input type="checkbox"/>	Judicial Review	
<input type="checkbox"/>	Closed without enforcement after active investigation	
<input type="checkbox"/>	Keep under review / monitoring	

For cases with informal or formal resolution, provide a summary of conclusions, actions taken, requirements, and/or other relevant details below:

Post Investigation Monitoring Requirements

The post-investigation requirements are as follows:

- No monitoring or further review required
- The following post-investigation monitoring programme should be carried out:

- Case is to be kept under review – provide a summary and target dates below:

Additional Information / Notes for Record

Any additional notes may be placed in the box below.

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TEMPLATE VERSION: 1.3

LAST UPDATED BY: [REDACTED]

DATE: April 2022

ENVIRONMENTAL
Standards Scotland
Ìrean Àrainneachdail na h-Alba

Environmental Standards Scotland

Investigations
technical guidance

September 2023

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Section A - INTRODUCTION AND PURPOSE OF THE TECHNICAL GUIDANCE

In line with the requirements of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 (“the 2021 Act”), ESS must provide for individuals (including members of the public, Non-Government Organisations (NGOs) and other bodies) to make representations to it about any matter concerning –

- whether a public authority is failing (or has failed) to comply with environmental law; and
- the effectiveness of environmental law or how it is (or has been) implemented or applied.

On receipt of an enquiry or representation, ESS may decide to conduct further work, such as pre-investigation enquiries or proceed to the investigation stage. ESS may also investigate any matter concerning the above through its own initiative.

This document sets out the technical processes for dealing with such enquiries and representations, and the roles and responsibilities of staff in this connection. This document is aligned to, and consistent with, ESS’ service standards.

Section B - INITIAL ENQUIRIES

The Investigations Team is responsible for all administrative work involving initial enquiries. This includes cases which ESS has yet to decide whether to consider further or investigate, and includes all general enquiries to ESS from members of the public, NGOs and other bodies. The majority of this type of correspondence will relate to queries about ESS' role and remit.

B1 - Initial calls and correspondence – general administration

All incoming correspondence and telephone calls relating to casework are dealt with by the Investigations Team.

For all enquiries, an eRDM folder should be created and all correspondence saved there. Guidance on how to create an eRDM folder can be found at: [ESS - Guidance Note - Setting up a new ERDM Case Folder details - Objective ECM \(scotland.gov.uk\)](#)

Staff will also create an entry on the Investigation Case Tracker (ICT) ([ESS - Investigations database master Case TRACKER details - Objective ECM \(scotland.gov.uk\)](#)) and populate as much information as can be ascertained from the contact. Staff will allocate an ESS reference number to the enquiry which should be referenced on all subsequent written correspondence.

When a telephone enquiry is received from a person or body who has not contacted ESS on a previous occasion (a check of the ICT will establish this), staff will obtain the following details:

- full name, address, telephone number and email address;
- the public authority the enquiry/representation is about;
- whether the concern has been considered by the public authority concerned, and whether the public authority has responded to the matter; and
- an outline of the concern, including key issue(s) and any relevant environmental law(s).

Where an individual has stipulated a wish to be contacted by email, staff will ensure that the ICT is updated to record this.

Where there are doubts about how to deal with written correspondence in non-active cases, this should be passed to the Head of Investigations (HoI). Otherwise, staff have responsibility for replying to all correspondence received at this stage in the process.

In terms of ESS' service standards, all initial contact must be acknowledged within 3 working days of receipt. Emails to ESS' mailbox are acknowledged automatically.

All subsequent correspondence received by the Investigation Team should be responded to within 5 working days of receipt.

B2 - Recording and logging of information

ESS aims to be a paper free office and accordingly all correspondence received will be stored electronically on eRDM and must follow the correct naming convention. Naming convention guidance is available here: ([ESS - eRDM Naming Conventions Guidance \(Investigation team only November 2021\) details - Objective ECM \(scotland.gov.uk\)](#))

Where the contact is by way of a telephone call, staff will prepare a file note detailing all matters discussed, including the date and time of call. All telephone notes must be stored in the eRDM folder.

Section C - HANDLING OF REPRESENTATIONS

C1 – Setting up

Where the person or body contacting ESS indicates a wish to make a formal representation to us, a representation form and accompanying information should be sent to them, using:

- Standard letter – representation form issued

Representation forms may be received by post, email or ESS' website. All representation forms received through the post should be scanned and saved on eRDM. Staff will populate the ICT with the relevant information.

If a representation is received without there having been any prior contact, an eRDM file should be set up as per the instructions: [ESS - Guidance Note - Setting up a new ERDM Case Folder details - Objective ECM \(scotland.gov.uk\)](#)

The website investigations table running list document on eRDM ([Website - Investigations Tables - Running Lists - 20230126 details - Objective ECM \(scotland.gov.uk\)](#)) should also be updated at this stage, and an email sent to the Community and Engagement Lead that this has been completed in order for the website to be updated.

When a representation has been received, staff should generate and begin to complete a Standard Assessment Template ([ESS - Standard Assessment Template details - Objective ECM \(scotland.gov.uk\)](#)). This should be saved on the relevant eRDM file, with an '!' as the first character in the title, so it always appears as the first document on the file.

The standard assessment template is a live document and will be updated through the life of the case.

C2 - The sift

As per the standard assessment template, on receipt of a representation, staff will carry out an initial assessment of the concerns raised. This is known as the "sift". The purpose is to determine whether the representation is one which will be accepted for pre-investigation, and has five stages:

- (a) to establish whether further information is required from the person making the representation or public authority;
- (b) to ensure that the representation falls within ESS' remit;
- (c) to confirm that the representation is not premature;
- (d) to determine if there is an alternative remedy; and
- (e) to establish that the case meets ESS' criteria for investigation.

It may be that the sift cannot be completed before the service standard deadlines to acknowledge the representation. If this is the case, the representation contact should be sent:

- Standard letter – to the person making the representation – acknowledge receipt of representation.

In accordance with ESS' service standards, where the representation form is the individual's first contact with ESS the acknowledgement must be sent within 3 working days of receipt.

In all other cases, the response should be sent within 5 working days of receipt.

(a) Whether further information is required from the person making the representation, and whether it might be beneficial to meet with him/her

Staff will in all cases make efforts to speak to the person making the representation, to introduce themselves and answer any questions about ESS' role. In some cases it may be necessary to obtain further information from the person making the representation, or to meet with them to obtain first-hand the reasons for their concerns. The following factors will be taken into account in any decision in this connection:

- whether such a meeting is likely to be beneficial to the representation;
- the seriousness and/or complexity of the representation; and
- the individual's ability to express his/her concerns in writing or by telephone.

Details of any meetings or telephone discussions with those making representations should be fully recorded and saved within the eRDM folder.

(b) Remit

A representation may raise issues that are out with the remit of ESS; for example, issues that do not relate to a public authority's failure to comply with environmental law or the effectiveness/implementation/application of environmental law. Where this occurs, staff will notify the person making the representation of this by letter, with applicable signposting, using:

- Standard letter – post representation – out with remit with signposting

(c) Prematurity

If the representation is considered to be within ESS' remit, but it has not yet been made to the public authority concerned, or is still being dealt with by the public authority, staff may consider it to be premature. Staff will call the individual to explain that ESS will generally only consider the representation once the public authority has responded to their concerns. If appropriate (e.g. if the individual has experienced a delay or is unsure of progress) the individual should be advised to contact the public authority for an update on the status of their submission. Afterwards, staff will issue:

- Standard letter – to the person making the representation – premature representation

(d) Alternative remedy

Those making representations may raise issues which, although ESS could look at them, fall within the specific designated remit of another 'oversight' body, or there is an appropriate appeal procedure available. Where such routes are identified, the Investigations Team will notify the individual of this by letter, using:

- Standard letter – post representation – not accepted for investigation e.g. alternative remedy available with signposting

(e) Investigation criteria

Where we consider that an alternative remedy is not available or suitable, staff will proceed to consider whether the representation meets ESS' criteria for investigation. At this stage the decision is only whether to move to pre-investigation, but at least one of the investigation criteria must be met to take the case forward.

In deciding whether the representation should be accepted for further consideration, staff should use the 'investigation criteria checklist' in the Standard Assessment Template form. They may also wish to utilise the significance checklist - [ESS - Significance Checklist details - Objective ECM \(scotland.gov.uk\)](#)

All of the above should be documented in the Suitability for Pre-Investigation internal briefing note - [Environmental Standards Scotland: Procedures and Templates: Representations and Investigations: 2021-2026 - Objective ECM](#)

The briefing note should be sent to the Hol once complete for sign off.

If it is determined that the case is suitable for pre-investigation, staff will notify the person making the representation of this by letter, using:

- Standard letter – post representation – representation accepted for further consideration

The website investigations table running list document on eRDM ([Website - Investigations Tables - Running Lists - 20230126 details - Objective ECM \(scotland.gov.uk\)](#)) should be updated at this stage, and an email sent to the Community and Engagement Lead that this has been completed in order for the website to be updated.

The ICT should also be updated at this stage.

NOTE: In accordance with ESS' service standards, the decision to reject a representation or accept it for pre-investigation will be made within 20 working days of the receipt of the representation form.

Section D - PRE-INVESTIGATION

Once the decision has been made to accept the representation for pre-investigation, the designated Senior Investigation Officer (SIO) will assess what further information is required in order to determine whether the case is suitable for informal resolution or investigation.

The SIO should always consider, **as early as possible**, whether there are any policies or procedures, or initial enquiries, relevant to the representation and request/make these as appropriate. The SIO can, at any point, request any further information from the public authority which they reasonably require for the purposes of their investigation.

Pre investigation enquiries should be made using the 'request for information' template

D1 - Dealing with delays

Given that ESS aims to deal with matters in accordance with its standards of service, it is essential that public authorities supply their paperwork timeously. Where the public authority fails to provide its file within the 15 working day period specified in the standard letter, the SIO will contact the public authority to establish the reason for the delay and a date on which ESS can expect the paperwork, using:

- Standard letter – to public authority - reminder re papers

An extension to the deadline up to 10 working days can be agreed by the SIO. If the public body states they require more than an additional 10 working days, the SIO should discuss this with the Hol.

The SIO will also inform the representation contact of the delay in receiving the paperwork.

In the event that the public authority fails to provide its paperwork by the date specified in the reminder letter, the SIO will inform the Hol who will decide what further action should be taken.

Staff will update the standard assessment template and ICT on when the relevant paperwork was requested and received.

D2 - Updating parties on progress

Throughout both the pre-investigation and investigation processes, SIOs must update the relevant parties on the progress of the investigation at least once every 30 working days (6 weeks). However, all contact with relevant parties – e.g. a telephone call to discuss the case or an exchange of correspondence – accounts for an update for these purposes. Formal updates should therefore be issued within six weeks of the last contact with the relevant parties.

Relevant parties are updated using:

- Standard letter – to relevant parties – update

In general, updates should be brief but contain sufficient information to keep the relevant parties reasonably informed as to the progress of the investigation. Generally, the information conveyed should be confined to procedural rather than substantive matters. In other words, SIOs should avoid telling relevant parties anything that could give an indication of what ESS' decision on the investigation might be. Where relevant parties request an indication of the likely outcome of their case, they should be told that they must await the formal decision on the matter.

In terms of timescales, relevant parties may be told that ESS aims to deal with their case within a specified period, which will vary from case to case, depending on complexity or volume. Where staff are confident of a realistic date of completion, they will inform the relevant parties of this.

Judgement needs to be exercised as to how much information is given to the relevant parties. In some cases it may be appropriate to give more information than in others. This may be the case, for example, where the representation involves issues which have significantly impacted the person making the representation. If the SIO is in any doubt, they should consult with the Hol

D3 - Informal Resolution

Having assessed the relevant paperwork, staff will consider if there is scope for informal resolution, or if the case should be moved to investigation. The Internal Briefing Note – Conclusion of Pre-Investigation template should be used - [ESS - Template - Internal Briefing Note: Conclusion of Pre-Investigation details - Objective ECM \(scotland.gov.uk\)](#)

If the case is concluded to be suitable for informal resolution, the briefing note should be sent to the Hol for sign off.

Once agreed, the SIO will write to the public authority using:

- Standard letter – to public authority – proposal for informal resolution

Where attempts at informal resolution have been successful, the SIO will confirm this in writing to the public authority and to any other relevant party, using:

- Standard letter – to public authority – informal resolution achieved
- Standard letter – to person making the representation – informal resolution achieved

D4 - Moving to investigation

Should informal resolution be unsuccessful or inappropriate, the SIO will consider whether the case should be moved to formal investigation.

Having taken into account all of the information gathered, The Internal Briefing Note – Conclusion of Pre-Investigation template should be used to set out the background and the SIOs initial view of what the ground/s of investigation should be - [ESS - Template - Internal Briefing Note: Conclusion of Pre-Investigation details - Objective ECM \(scotland.gov.uk\)](#)

If agreed, a briefing will be made to ESS' executive team with a view to recommending to the Board that a decision is made on investigating the matter. Should the Board agree to investigate, the case will be moved to the investigation stage.

Section E - INVESTIGATION

Once the Board has agreed to investigate, the ICT should be updated accordingly. The website investigations table running list document on eRDM ([Website - Investigations Tables - Running Lists - 20230126 details - Objective ECM \(scotland.gov.uk\)](#)) should also be updated at this stage, and an email sent to the Community and Engagement Lead that this has been completed in order for the website to be updated.

E1 - Grounds of Investigation

Staff will thereafter contact the person making the representation outlining the proposed grounds of investigation.

Staff should do this by telephone and thereafter write to the person making the representation, and the public body concerned, using the “Grounds of Investigation” (“Gol”) letter

The Gol letter lists the matter/s which will be considered by ESS and is issued as soon as possible, but in every case within 20 working days of the date of the decision to investigate. The exception to this is where the issues involved in the case are very complex, or the paperwork extensive, making it impossible to issue an accurate and comprehensive Gol letter within that timescale. In such cases, the SIO should write to person making the representation within the 20 working day period notifying him/her of this, explaining the reasons for the delay and advising them of a date on which they should expect the Gol letter.

When confirming the Gol Investigation Officers should use:

- Standard letter – to person making the representation – confirm Grounds of Investigation
- Standard letter – to public authority - confirm Grounds of Investigation

Where a Gol letter raises difficult issues, Investigation Officers should discuss these with the HoI.

Where the person making the representation does not agree with our understanding of the representation, or the grounds of investigation as defined, attempts should be made by staff to accommodate any changes suggested by the person making the representation. If the wording cannot be agreed, it should be made clear to the person making the representation that, although we commit to trying to agree the grounds of investigation wherever possible, we retain the right to decide the final wording of the grounds.

Once the grounds for investigation are finalised, staff should prepare a plan for the investigation using the Investigation Plan Template: [ESS - Investigation Plan Template details - Objective ECM \(scotland.gov.uk\)](#)

During the course of the investigation, there may be scope for the representation to be resolved without the need to reach an investigative finding. Where an SIO believes such

scope exists, they will discuss this with the HoI. If, following engagement with the public authority an agreement is reached on appropriate remedial action, the SOI will issue:

- Standard letter – to relevant parties – remedial action taken and no further action necessary

E2 - Determination of cases

Where the decision is taken to investigate, the outcome of each case investigation will be issued through an investigation report. In substantiated cases, the final decision may include an improvement plan or compliance notice.

Investigation report

There are four versions of the investigation report that will be saved on eRDM.

- FIRST DRAFT– the SIO's own draft. To avoid confusion, SIOs should work on a single draft and should not create numerous different ones.
- VERSION FOR BOARD (TRACKED) – the working draft used by the HoI containing any tracked changes to the first draft.
- VERSION FOR BOARD (UNTRACKED) – the version sent to the Board with the tracking removed.
- VERSION FOR ISSUE/PUBLICATION – the final version, as issued to the relevant parties, and which may be published on the website.

Before completing the first draft investigation report SIOs must:

- check that the draft reflects the facts of the case as contained within the case file.
- proof-read the draft for inconsistencies in approach, typos and grammatical errors (this should be done by the SIO dealing with the case, but it may assist to have another SIO proofread the draft);
- ensure that there is nothing in the draft that could result in the inappropriate identification of any individual;
- ensure that alphabetical suffixes ascribed to individuals referred to in the report are used consistently throughout; and
- as a result of these checks, be **entirely satisfied** that the draft is of good enough quality to issue/publish (i.e. contains sound findings capable of withstanding scrutiny, and is well presented)

Once these checks have been carried out, and all necessary amendments have been made, the SIO will record in the ICT the fact that the first draft is complete. An email should be sent to the Hol stating that the report is ready to be reviewed and thereafter considered by the Board.

E3 - The role of the Head of Investigations

The Hol is involved in the reviewing and editing all first drafts of investigation reports.

Generally, the Hol is responsible for:

- ensuring the findings and any recommendations made in the report are sound, capable of withstanding scrutiny and reflect the available evidence.
- ensuring that the report reads well, is free from error and is of sufficient quality to be issued and published.
- reporting to the Board on the progress of investigations.

Any significant changes made by the Hol to first drafts will be tracked within the “VERSION FOR BOARD (TRACKED)”. Following their involvement, the Hol will either give feedback to the SIO via email, or alternatively prepare a brief report, using:

- Investigation report – feedback Form

The report will contain comments on the nature and extent of any changes which the Hol has made to the first draft. The comments will be discussed with the SIO in order to assist them in the drafting of future reports.

E4 - Case conferences

All investigation reports are dealt with by the Board (or a quorum of the Board) at a case conference (the case conference may or may not coincide with the scheduled bimonthly Board meetings). Case conferences are attended by Board members, the Executive Team and the relevant SIO. Case conferences are informal and are intended to encourage full discussion of the main issues arising in cases, with a view to the Board approving or amending investigation reports or seeking further information.

Prior to a case conference the SIO will carry out basic ‘open source’ research on the internet to establish if the circumstances detailed in the investigation report could lead to one or more of the people involved being identified. By way of example this may be achieved by searching on the person making the representation or other relevant person’s name or alternatively key elements of the case. If that search identifies the circumstances of the representation this should be highlighted in the ‘Summary and Key Findings’ section of the investigation report to facilitate further discussion at the case conference.

The Hol is responsible for submitting reports to the Board and will prepare the agenda for case conference.

The SIO will incorporate in this version any amendments agreed at the Board meeting. All amendments will be tracked. The SIO will notify the HoI as soon as the investigation reports have been amended following the case conference. The HoI will then undertake a final check of the amended versions of the reports, making any further revisions considered necessary. Where, for any reason, the revisions are significant (i.e. where they materially alter the consideration of the representation or the conclusion reached) the HoI will discuss this with the SIO concerned, with a view to resubmitting to the Board.

Assuming the reports are approved at case conference, the SIO will, immediately following the meeting, update eRDM to reflect that the report is now ready to be issued to the relevant parties in draft form.

In respect of every investigation report dealt with at case conference, the Board will consider whether the report should be published. In general, reports are not published where publication might:

- risk harm to anyone referred to in the report;
- give rise to a real risk of identification of anyone referred to in the report; or
- prejudice or affect ongoing or potential legal proceedings.

E5 - Issuing draft reports

Following the Board's decision to approve the report, the SIO will issue a draft report to the relevant parties. Draft reports are issued to allow parties to comment on the factual accuracy of the report or to provide any new information that is material to the issue at hand. Staff will issue draft reports using:

- Investigation report – issued in draft to relevant parties

Should any responses to the draft report cause investigation staff to question the substance of the initial conclusions, they will report this to the HoI and will make any enquiries considered necessary. If, following this, the investigation report needs to be amended, the HoI will submit the amended report to the Board setting out the changes and the rationale for these. Once the Board have approved the final investigation report, the relevant SIO will update the ICT to this effect.

E6 - Pre-publication procedures

Once the report is approved at case conference, and is to be published, the SIO will, immediately following the final Board meeting, create a further version of the report marked **VERSION FOR PUBLICATION**.

The SIO will thereafter prepare a letter to the person making the representation enclosing the investigation report, using:

- Standard letter – to person making the representation - enclosing investigation report

The SIO will also prepare letters to the public authority to accompany the reports using:

- Standard letter – letter to public authority - enclosing investigation report

As soon as possible after the case conferences, the Hol will agree with the corporate services team a date for publication of those reports which are to be published. The Hol will inform the SIO of this date so that it can be included in the letters to the relevant parties.

The Investigation Team will also draft a news release in connection with the publication, which will be emailed to the Chief Executive for approval.

E7 - Publication issuing procedure

Relevant parties are given reports two clear working days in advance of publication on ESS' website. Where possible, the relevant parties will be sent reports by email.

Where reports are posted, this must be done in sufficient time to ensure that they reach the person making the representation's address two clear working days prior to publication. For example, if publication is due to take place after close of business on a Wednesday, the report must be received recorded delivery by the Monday before. This ensures that the person making the representation has two working days to read the report prior to publication.

The Corporate Services Team is responsible for ensuring that reports to be published are placed on ESS' website at the appointed time.

E8 - Post publication procedure

Monitoring discharge of compliance notices

The Hol has overall responsibility for ensuring that compliance notices are implemented.

Where no response has been received to the compliance notice within 28 days of the date of publication, the SIO will write to the public authority, using:

- Standard letter – to public authority regarding discharge

The investigation process is complete only when it is clear that the public authority has discharged the compliance notice and staff will update the ICT when this occurs.

In the event that a public authority challenges a compliance notice or fails, without reasonable explanation, to discharge the measures within it the Hol will immediately notify and brief the Board which will decide what further steps should be taken.

Retention of case-related information

Reference should be made to ESS' Records Management Policy.

PROCEDURES CREATED BY: [REDACTED]

DATE CREATED: 2 November 2021

REVIEWED: 22 October 2022

PRESENT REVIEW: 16 September 2023

NEXT REVIEW: 16 September 2024

Environmental Standards Scotland

External Whistleblowing Policy

December 2022

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Version Control

Version number	Author	Purpose/Changes	Date
1.0	██████	First version	29 June 2022
1.1	██████	Addition of inbox details	13 December 2022

1. The aim of this policy

This policy sets out how Environmental Standards Scotland (ESS) deals with reports from employees of Scottish public authorities and others who have concerns about how their organisation handles its environmental responsibilities. This policy aims to:

- encourage individuals to feel confident in raising concerns at the earliest opportunity;
- provide an avenue for individuals to raise concerns and receive feedback on any action taken;
- set out how ESS will deal with individuals who raise concerns and provide reassurance of how they will be protected from possible reprisals or victimisation if they have made the disclosure in good faith.

2. ESS' remit and our role in whistleblowing

We are an independent body, accountable to the Scottish Parliament and responsible for scrutinising, investigating and securing improvements in public authorities' compliance with environmental law, the effectiveness of environmental law, and the way it is being implemented and applied in Scotland.

We can receive 'representations' from anyone who has concerns about the environment and we will work with those who make representations to understand the nature of the issue and what further action we should take. We can begin an independent investigation through a representation or through our own initiative.

If we find that a public authority is not complying with environmental law, or that the law itself is not effective or being implemented or applied properly, we can take enforcement action to put things right.

The Public Interest Disclosure Act 1998 names ESS as a **prescribed person**. This means that anyone who has concerns that their employer is not properly handling its environmental responsibilities can report the matter directly to us. If the information they provide meets certain criteria, they may be protected by whistleblowing law.

3. What is whistleblowing?

Whistleblowing is the process whereby an employee is offered legal protection where they raise a concern about the organisation they work for. The concern they raise must be in the public interest and could be about malpractice, wrongdoing, risk or illegal proceedings, which harms, or creates a risk of harm, to individuals, the wider community or the environment. Whether a report is in the public interest will depend on:

- the number of people affected;
- the nature and impact of the wrongdoing;
- who the wrongdoer is.

Generally, this means that the concern must have an impact that is wider than one employee's personal circumstances.

Although an employee may feel able to report their concern to their employer in the first instance, we recognise that someone may choose not to do this and report the matter directly to us instead. For example, they may:

- wish to remain anonymous;
- believe that the organisation will try to cover up or ignore the wrongdoing; or
- be worried about being treated unfairly for making their concerns known, or they may know that the issue was raised by others before but wasn't dealt with.

Additionally, a person may choose to approach our office after they've reported their concern internally if they feel it wasn't dealt with in an appropriate and timely manner.

Under the Public Interest Disclosure Act 1998, individuals are offered protection against any negative treatment they may suffer as a result of making a disclosure which is in accordance with the whistleblowing legislation.

4. Concerns that do not count as whistleblowing

Whistleblowing is not the same as making a complaint or raising a grievance. It concerns instead situations where an employee has witnessed some form of malpractice in their workplace and feels that they need to raise a concern.

This means that unless your particular case is in the public interest, personal grievances are not covered by whistleblowing law and these types of reports should be made under your employer's grievance policy. The Advisory, Conciliation and Arbitration Service (Acas) offers assistance and advice on resolving workplace disputes.

5. Who can raise a concern?

The protections offered by the whistleblowing legislation apply to workers, or former workers, as well as other individuals such as agency workers and contractors.

6. When should you raise a concern with ESS?

Your place of work may have its own whistleblowing policy that you can use to make a disclosure.

However, if you don't feel comfortable reporting directly to your employer, or if you have already reported directly to your employer but the wrongdoing has continued or the issue has not been investigated appropriately, you can disclose this directly to our office.

7. How to raise a concern with ESS

You can reach our whistleblowing team by email at:

Whistleblowing@environmentalstandards.scot

Your report will be acknowledged within three working days.

8. What can you disclose to ESS?

If you have a concern about how a public authority is handling its environmental responsibilities you can report this to us. This could include, for example, telling us about a failure to comply with, or properly implement, legal obligations in respect of the environment, or any gaps in the law which have caused, or have the potential to cause, environmental harm.

If your information does not relate to the environment, we may not be the correct person to make a report to. Please consult this list if you are not sure who is the correct prescribed person:

<https://www.gov.uk/government/publications/blowing-the-whistle-list-of-prescribed-people-and-bodies--2/whistleblowing-list-of-prescribed-people-and-bodies>

9. What information do you need to provide?

When raising a concern, you should provide:

- your connection to the employer - are you a current or former employee?;
- the type of wrongdoing;
- the location of the wrongdoing;
- how you became aware of the wrongdoing;
- any key dates that might be helpful;
- who else knows about the wrongdoing;
- any supporting documents or evidence;
- whether the incident has been reported internally, and if so, what the response has been.

We **do not** require you to gather evidence to prove your claim, although we will accept any evidence that you already have.

You do not have to give us your name or contact details, however, if you do give us your contact details, we will make every effort to protect your identity. Giving us your contact details may also mean that we are able to speak with you to gather further information, although you can ask that we do not do this.

10. Confidentiality, data protection and anonymity

The information you provide to us and your identity will be treated as confidential. Without your consent, we will never explicitly reveal your identity to your employer. If you wish, you can request that the report is recorded anonymously.

Please be aware that, despite our commitment to confidentiality, your employer may still be able to identify that the information has come directly from you - for example, if you have previously raised the same issue with them directly. For this reason, we recommend that disclosures are not made anonymously as this may make it more difficult to prove that any detriment to you as an individual subsequently arose from the disclosure.

11. What action will ESS take?

This will depend on the nature of your disclosure. Following your initial report, we will review the information provided and determine what our next steps should be.

Our next steps may include:

- contacting you with specific questions in relation to the information you have provided;
- investigating whether we hold any other relevant information about the employer or area you have made a disclosure about;
- confirming to you whether the disclosure is being treated as whistleblowing.
- Confirming to you whether the disclosure is for us to investigate, or, signposting you to an alternative prescribed person by providing you with the list of prescribed persons if not;

- contacting the public authority to discuss the matter with them;
- beginning an investigation;
- engaging in compliance activities.

12. How will ESS hold and use the information you provide?

We will:

- record all the information in our secure internal systems;
- create a secure folder which only select members of staff have access to;
- contact you to acknowledge receipt of your report (if you have provided contact details);
- pass the details of the report (but not your personal details) to the relevant ESS team to identify next steps;
- contact you to provide feedback, if appropriate, or to ask additional questions.

13. Will I find out what happened as a result of my report?

We will aim to provide you with feedback where this is permissible by law. The feedback you receive will depend on the information you have provided and the action that we have taken, or propose to take.

We are unable to commit to providing ongoing or interim feedback.

If you have any questions about this information, or about our role as a prescribed person, please contact us at Whistleblowing@environmentalstandards.scot

Our Service Standards

Environmental Standards Scotland (ESS) is committed to providing a consistently high standard of service. These standards set out what you can expect from us, and our commitments to you.

Our commitments to you

We will:

- Engage with you in a respectful manner
- Deliver our work in a timely manner
- Ensure our services are accessible
- Be trusted, transparent, and independent
- Improve our performance against standards over time

Engage with you in a respectful manner

We will act with integrity and will treat you with courtesy and respect. We will treat anyone who seeks our services in a fair and equitable way.

We will make our communications as clear as possible. We will use plain language without any jargon. The person handling your case or enquiry will provide you with a reference and their contact details for further correspondence. We will take the time to listen to you and understand your concerns. As we look into the matters you raise with us, we will explain our processes and keep you updated on our progress.

We will clearly explain our decisions to you. In cases where we believe another organisation will be better placed to consider your concerns, we will provide you with their details.

Deliver our work in a timely manner

We will:

- Acknowledge your initial correspondence (including emails, letters, and telephone calls) to ESS within three working days of receipt.
- Provide a response to all correspondence within 20 working days of receipt.
- Respond to Freedom of Information (FOI)/Environmental Information Regulations (EIR) requests within 20 working days of receipt, and Subject Access Requests within 40 days, unless we require further information from you, in which case the 20 working days start from when the additional information is provided. In exceptional circumstances we may require 40 days to respond to an EIR. More details can be found on our website at the following address: <https://environmentalstandards.scot/freedom-of-information/>
- Respond to any complaints you have about our service within the timescales set by the Scottish Public Services Ombudsman. [How to handle complaints | SPSO](#)
- Pay bills to businesses within 10 working days.

Where you have submitted a representation, we will:

- Assess whether we will take your case forward - aiming to make a decision on this within 20 working days of receiving your representation. During this time we may contact you to clarify the issues you have raised, contact public authorities to seek information, clarify the relevant legislation and legal requirements, including whether the issue is within our remit. If there are any delays to this target, we will inform you and provide you with reasons.

- Respond within five working days of receipt to all subsequent correspondence you provide relating to the representation.

If we think your case may lead to an investigation we will, whenever possible, provide you with an estimate of the time required to complete our work. Should we not be able to achieve this, for example, due to unforeseen circumstances, complications, or other organisations not providing us information in a timely manner, we will inform you of the delay and provide an updated estimate for completion. Your assigned investigation officer will keep you updated regularly during the investigation phase.

Ensure our services are accessible

We will make our services are easy to access. We will work with you to accommodate any specific needs or assistance you require. Please do not hesitate to tell us your requirements so that we are aware of your needs and can improve the accessibility of our service over time.

We will provide information on our website on how to use our services. If you are uncertain about our services or our role as an organisation, we will be pleased to answer any queries you may have.

Matters of environmental concern can be raised with us through a variety of methods – including by phone, email, and submissions through our website. To assist us in assessing your concerns, we will ask you to complete a simple form which provides us with details and facts about the issue you are concerned about. No one should be disadvantaged because of this requirement and we will provide advice and support to those who want help setting out their concerns to us.

Be trusted, transparent, and independent

We aim to be recognised as an independent, fair and strong champion for environmental protection. In carrying out our duties, we will be open and transparent, keep you informed about our progress and provide you with opportunities to input and influence our work. We will be impartial, evidence driven, and consider all the information provided to us. We will assign a skilled and capable officer to your case, and will engage external experts when we require advice for complex or technical issues. We will explain our processes, and make you aware of any restrictions which apply to our work. We will publish our investigation and analytical reports so that everyone can understand the reasons for our findings and conclusions.

Protecting the confidentiality of Personal Data is a critical responsibility that we take very seriously. More details can be found on our website at the following address:

<https://environmentalstandards.scot/privacy-policy/>

Improve our performance against standards over time

We will monitor our performance and improve our services by listening to you and learning from your interaction with us. Your feedback is valuable to us and we encourage you to provide us with comments on your experience, so that we can understand better what we are doing well and the areas we can improve. You can submit comments to us by email, phone call, or a submission through our website.

While we are dedicated to delivering high-quality services, we may not get it right for everybody all of the time. If this happens, you have the right to complain and bring your concerns to our attention. We will handle your complaint in accordance with the Scottish Public Services Ombudsman complaint handling principles.

If you wish to make a complaint about our service, our formal complaints procedures can be found on our website at [Get in touch - Environmental Standards Scotland](#).

Information provision and sharing procedure

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Version control

Version number	Author	Purpose / changes	Date
1.0		First draft	21/03/24
2.0		Second draft following consultation with Data Group	22/05/24

1. Purpose


This policy is intended to provide guidance on the various ways in which Environmental Standards Scotland (ESS) might obtain and share information. The appropriate mechanism for doing so will depend on the context within which the information is being obtained/shared and the type of information. It also provides some guidance regarding collecting personal data, however specific advice should be sought from the Data Protection Officer (DPO) in the event you are considering collecting or sharing personal data.

Role	Current holder
Accountable Officer (AO)	[REDACTED] (Chief Executive)
Senior Information Risk Owner (SIRO)	[REDACTED] (Head of CSC)
Data Protection Officer (DPO)	[REDACTED] (Business and Finance Manager)
In house solicitor	[REDACTED]

2. The different mechanisms

2.1 Using statutory powers to require provision of information:

- **using statutory powers under section 23 (2021 Act)** – section 23 places a duty on public authorities to co-operate with ESS and give it such assistance as requested (including the provision of information), in order to exercise its functions
- **using statutory powers under section 24 (2021 Act)** – section 24 enables ESS, by issuing an [information notice](#), to require public authorities to provide it with the information it reasonably requires for the exercise of its functions. Failure to comply with an information notice can result in ESS reporting the matter to the Court of Session where the Court may (either or both) make orders for enforcement or deal with the matter as a contempt of court

 **Guidance Note:** The circumstances in which the Investigation Team may consider using powers under section 23 or issuing an information notice under section 24 are outlined in the [Operational Guidance](#). For others, this will be a matter of judgement. However, it is likely that the use of an information notice will be more appropriate where:

- the information is sought from a public authority where non-compliance or failing to apply/implement environmental law by that body is already suspected or confirmed
- it is anticipated that the public authority may not comply with a request under section 23
- there is a preference to have the option to take further enforcement action in the event of non-compliance with the notice

Advice should be sought from ESS' In-house Solicitor if unsure.


2.2 Information sharing on a voluntary basis

💡 Guidance Note: There may be some circumstances where it is **not** considered appropriate to use statutory powers to require production of certain information. This may be, for example, because the arrangement represents a more voluntary sharing of information between partner agencies or because the holder of the information is not a “public authority” under the 2021 Act. In these cases, voluntary arrangements for information sharing may be established, ranging in formality.

- **Framework Agreement (or Framework Document)** – a formal document setting out the terms of agreement between two bodies in relation to matters such as governance, financing and operation. Framework Agreements can be legally binding or not and this is specified within the document. It may be appropriate if an ongoing relationship is envisaged between the parties and there is a need to formalise that relationship and define key roles and responsibilities. It will cover more than simply information sharing. An example is the [Framework Document](#) between ESS and Scottish Ministers
- **Memorandum of Understanding (MOU)** – a written agreement that outlines the relationship between two or more parties on matters of common interest. This can include principles of cooperation, areas of collaboration, disagreement resolution and information sharing, including issues of confidentiality. It is not legally binding. A Memorandum of Understanding may be appropriate where specific terms (as provided for by a Framework Agreement) are not required, but parties wish to enter a non-legally binding statement of intent as regards their broad relationship and ways of working together. An example is the [MOU](#) between ESS, the Office for Environmental Protection and Interim Environmental Protection Assessor for Wales
- **Information Sharing Agreement (ISA)** – a document setting out conditions of sharing a particular type or category of information between two bodies (e.g. monitoring and sampling data, survey results, public complaint trends etc). The level of detail required varies and some ISAs can be very brief. An

ISA can, but does not always, include provision on personal data sharing. An ISA may be appropriate where the relationship between the parties is limited to information sharing, rather than broader matters as provided for by Framework Agreements and MOUs

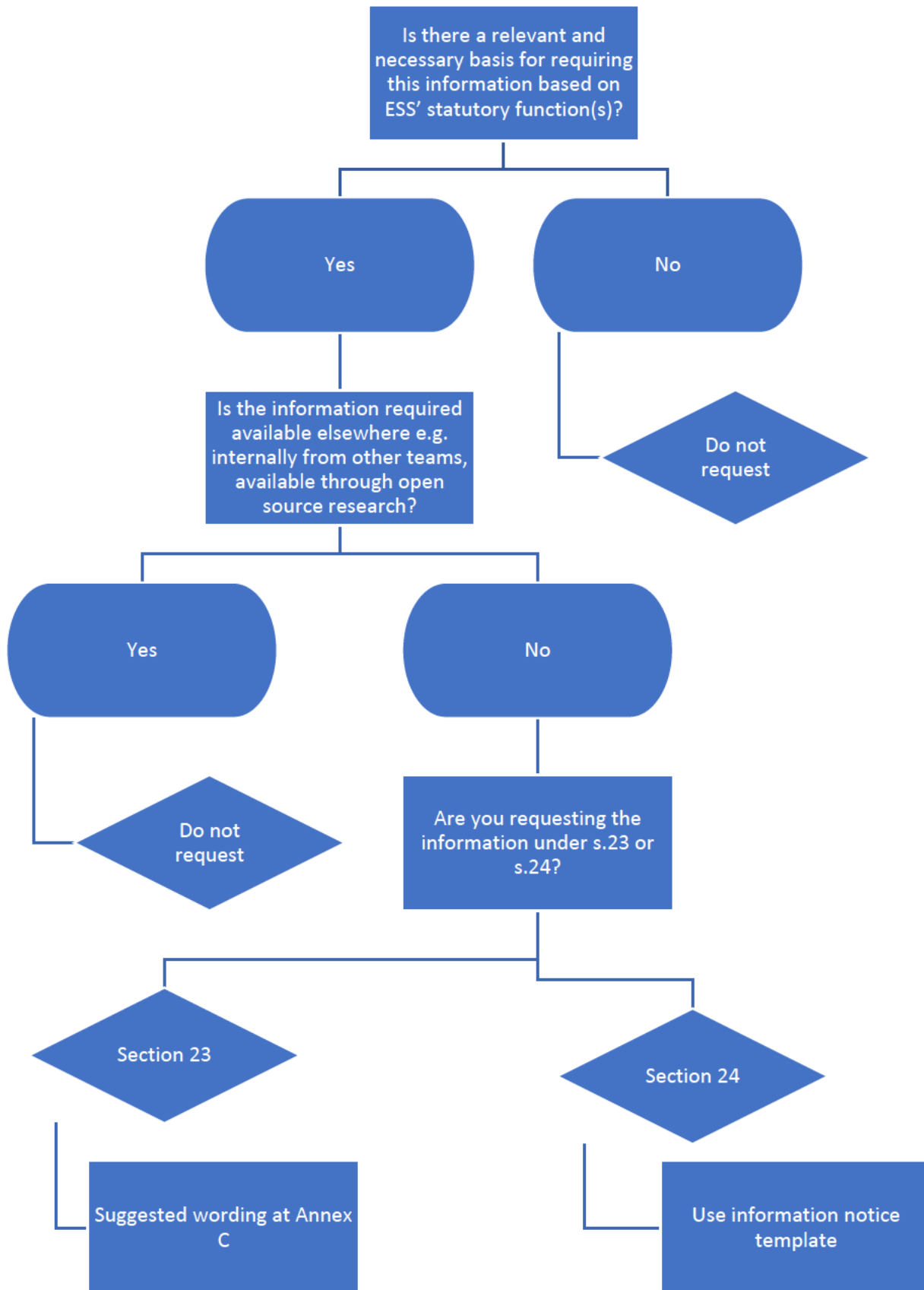
- **Data Sharing Agreement (DSA)** – a description of the ways that personal data is shared among two or more parties. A DSA can stand alone or be part of a broader document, such as an MOU or information sharing agreement. This will be appropriate where the information being shared is personal data. Useful information about when a DSA might be appropriate and what to include can be found in the ICO's [Code of Practice](#). An ESS template for the necessary sharing of personal data can be found [here](#)
- **Non-formalised information sharing** – this may be appropriate where non-contentious, non-confidential information, such as an unpublished report or research paper, is being shared between bodies with little conditions for use required. In this case, correspondence relating to the information sharing could feasibly be done by letter or email, however consideration requires to be given to whether the use of standard conditions or caveats is needed (see Annex D), depending on circumstances

 Guidance Note: for the characteristics of each mechanism see Annex B.

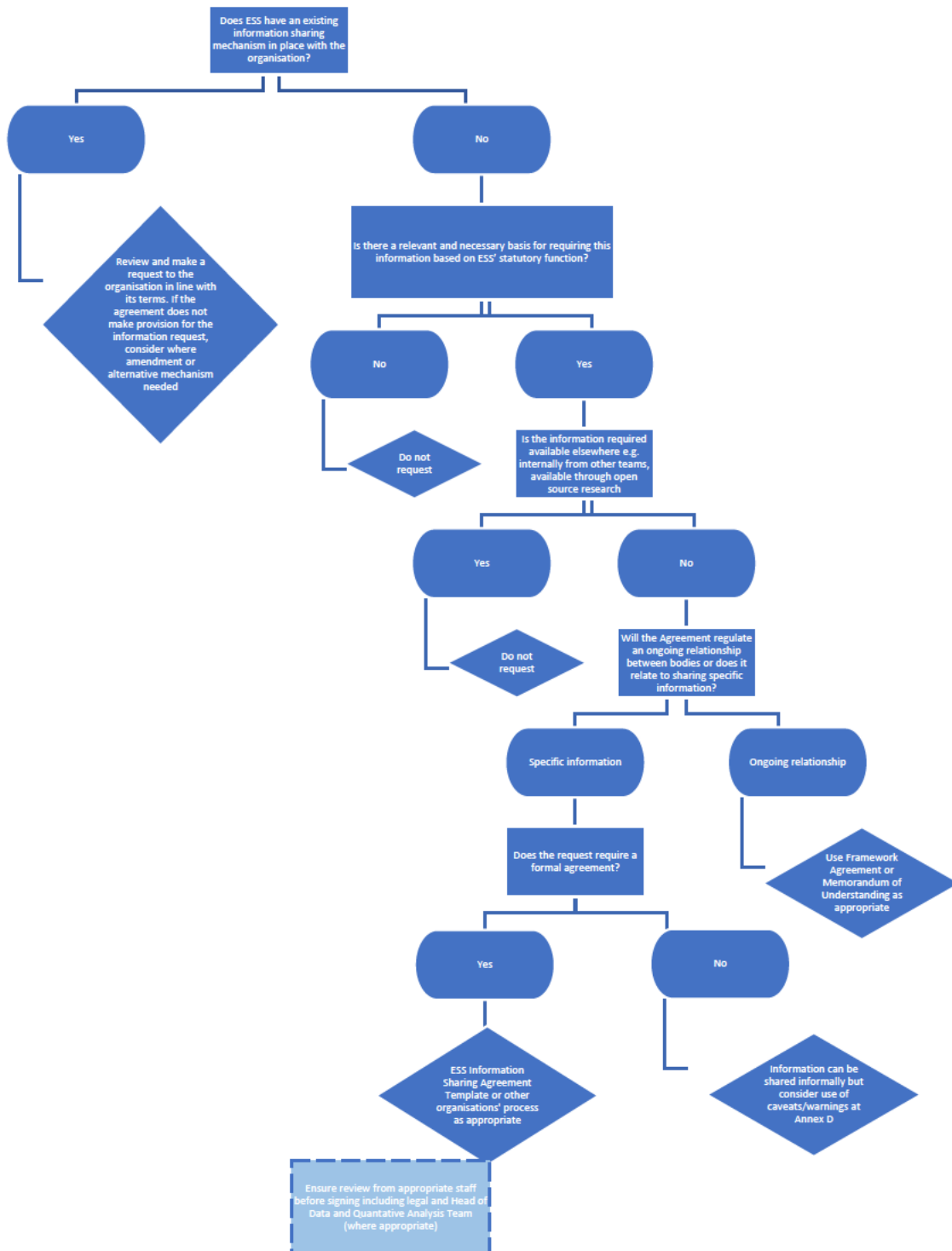
3. Flowchart navigation

- If you are requiring a public authority to provide you with information using statutory powers under section 23 or section 24 – **use Flowchart 1**
- If information is being shared by or with another body on a voluntary basis – **use Flowchart 2**
- If the information requested/shared contains, or is likely to contain, personal data – **use Flowchart 3**

4. Flowchart 1: Information Provision under Statutory Powers



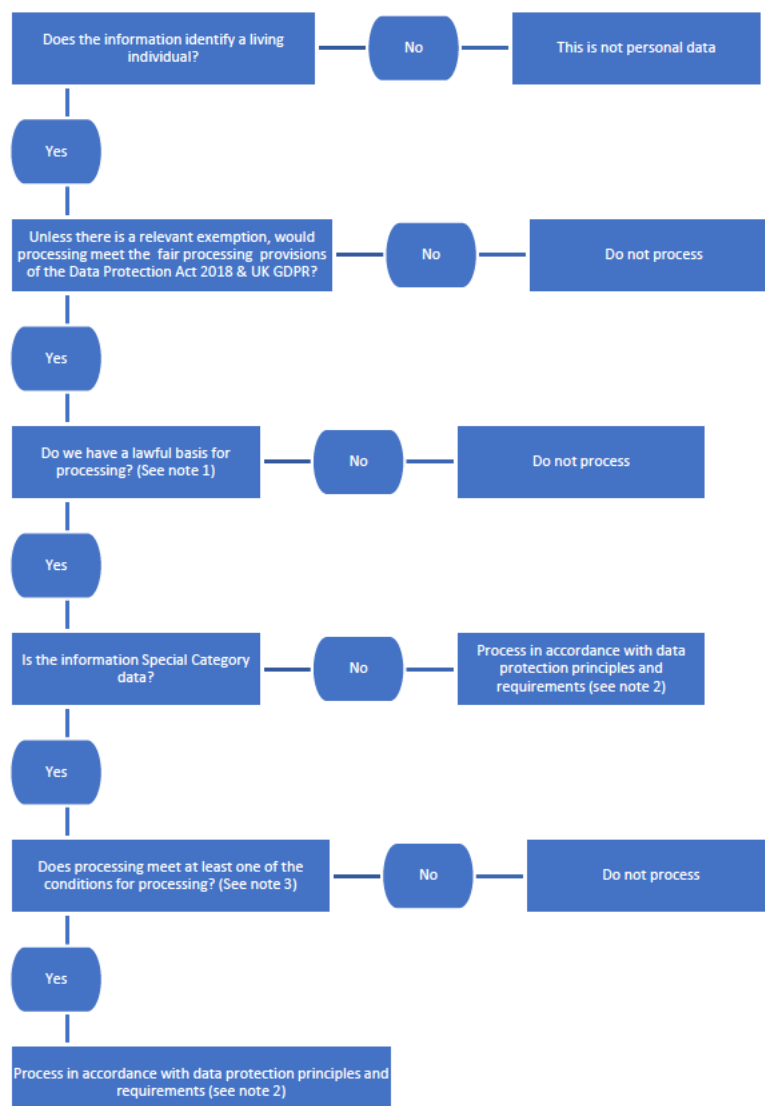
5. Flowchart 2: Voluntary Information Sharing



6. Flowchart 3 – Where requests include (or may include) Personal Data

💡 Guidance Note: where personal data is being requested or shared you must:

- seek advice from the DPO
- consider whether you need to complete a Data Protection Impact Assessment (DPIA) to assess the risks of processing the data and work out how to mitigate those risks (you are obliged to carry out a DPIA for data sharing that is likely to result in a high risk to individuals although this may be subject to change in future)
- consider the use of a Data Sharing Agreement, or inclusion of a Data Sharing Agreement in your Framework Agreement, MOU or Information Sharing Agreement



Note 1 – Lawful Basis

Processing personal data will be lawful only if at least one of following is met:

- the data subject has given **consent** to the processing of their personal data for one or more specific purposes
- the processing is necessary for the performance of a **contract** to which the data subject is party or in order to take steps at the request of a data subject prior to entering into a contract
- the processing is necessary to comply with a **legal obligation** to which the controller is subject
- the processing is necessary to protect the **vital interests** of the data subject or another person
- the processing is necessary for the performance of a **public task** carried out in the public interest or in the exercise of official authority vested in the controller
- the processing is necessary for the purposes of the **legitimate interests** pursued by the controller or by a third party, except where such interests are overridden by the interests and fundamental rights and freedoms of the data subject

Note 2 – Data Sharing Principles

Any processing of personal data, including collecting, storing, consulting and using or sharing of the data, must be done in accordance with the following Data Sharing Principles:

- **lawfulness, fairness and transparency** – it is processed lawfully (i.e. based on a lawful basis), fairly and in a transparent manner in relation to the data subject
- **purpose limitation** – it is collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes

- data minimisation – it is adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed
- accuracy – it is accurate and, where necessary, kept up to date and reasonable steps are taken to ensure that any inaccurate personal data, having regard to the purposes for which they are processed, is erased or rectified without delay
- storage limitation – it is kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data is processed
- integrity and confidentiality – it is processed in a manner that ensures appropriate security of the personal data, including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organisational measures

Note 3 – Special Category Data

Special category data is defined as:

- race
- ethnic origin
- politics
- religion
- trade union membership
- genetics
- biometrics (where used for ID purposes)
- health
- sex life
- sexual orientation

Note there are separate and specific safeguards for personal data relating to criminal offences and convictions.

The processing of special category data is prohibited unless one of the following exceptions are met, usually referred to as 'conditions for processing special category data':

- explicit consent
- employment, social security and social protection (if authorised by law)
- vital interests
- not-for-profit bodies
- made public by the data subject
- legal claims or judicial acts
- reasons of substantial public interest (with a basis in law)
- health or social care (with a basis in law)
- public health (with a basis in law)
- archiving, research and statistics (with a basis in law)

Five of the conditions only apply if your processing has a basis in law. In the UK, this authorisation or basis in law is set out in the DPA 2018.

Use of special category data, particularly on a large scale, can affect other obligations and in particular the need for documentation, DPIAs and DPOs and further advice must be sought from the DPO and ESS' In-house Solicitor if you plan to process special category data.

7. Annex A – Definitions


For the purposes of this document, the following terms have the following meanings:

- ‘information provision’ – information being provided to ESS under statutory powers (section 23 and 24 of the 2021 Act)
- ‘information sharing’ – voluntary sharing of information between individuals, professions and organisations, including public, private and voluntary sectors, to inform ESS’ and statutory function.
- ‘personal data’ – information relating to an identifiable individual for the purposes of DPA/GDPR

8. Annex B – Characteristics of different mechanisms

	Statutory basis	Voluntary	Regulates relationship between bodies	Useful for specific information sharing	Formalised	Non-formalised	Personal data only
S.23 request	X			X	X		
S.24 notice	X			X	X		
Framework Agreement		X	X		X		
MoU		X	X		X		
ISA		X		X	X		
DSA		X		X	X		X
Non-formalised		X		X		X	

9. Annex C – section 23 requests: standard wording

 Guidance Note: the following standard wording can be incorporated into a letter or email and amended as required. You should use this wording when making a new request for information. If you are seeking additional (associated) information or clarification of information it is sufficient to refer back to the wording of the original request.

Environmental Standards Scotland (ESS) is currently monitoring/undertaking an investigation into [provide brief summary of particular matters in connection with which the information is required].

Section 23(1) of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 places a duty on public authorities to cooperate with ESS and provide such reasonable assistance as it requests (including the provision of information), in connection with the exercise of its functions.


ESS is therefore requesting your reasonable assistance in providing the following information:

- []
- []
- []

The information should be submitted to [email address] or by post. Please reference [reference if appropriate] in your return correspondence.

I would be grateful if you could provide the requested assistance within [] business days of the date of this letter. If you have any questions or queries, please do not hesitate to contact me at the above e-mail address.

10. Annex D: template caveats for including in non-formalised request

 Guidance Note: The following caveats can be inserted into any non-formalised request to an organisation as appropriate. The wider text of the request is not prescribed since there will be a variety of ways in which the information will have come to the attention of ESS – e.g. through a meeting with the organisation, through an existing relationship or through an online search – and these will require different levels of detail and introduction. Consideration should be given to whether the following caveats are required, depending on the nature of the request and who the information is being requested from. However, it is likely that the implications of FOISA/EIR and data protection will be relevant to most requests and there is therefore a strong presumption in favour of including caveat (1) and (2) as a minimum.

1. FOISA/EIR

Information received will not be quoted and attributed to individuals or organisations for official publication without your prior permission to do so. However, we may publish or disclose the information you provide, in accordance with the access to information regimes. These are primarily the Freedom of Information (Scotland) Act 2002 (FOISA) and the Environmental Information Regulations 2004 (EIRs).

ESS – as a public authority – has obligations under FOISA and EIRs to disclose information in response to a request made under these Acts unless an exemption applies. If you want the information you provide to be treated as confidential, it would be helpful if you could provide an explanation of this when you provide the information. If we receive a request for disclosure of the information, we will take full account of your explanation and may consult with you, however we cannot give an assurance that confidentiality can be maintained in all circumstances.

In all other circumstances, we are happy to keep the data confidential, for example ensuring that this is stored securely and only sharing with others with your explicit agreement, and would be happy to enter into an information sharing agreement or MoU to reflect this if that would be helpful.

2. Personal Data


Unless otherwise stated, we would ask that any information provided to us does not relate to an identified or identifiable individual or is rendered anonymous in such a way that individuals are not (or are no longer) identifiable. Further information regarding the anonymisation of personal data, and the issues you need to consider to ensure anonymisation is effective, can be found at the ICO's website. Where personal data is provided, we will hold and process this in accordance with the privacy notice on our website.

3. Retention and Destruction of shared information

Any information provided will be subject to ESS' Retention and Destruction policy.

4. Intellectual Property

Nothing in this Agreement is intended to affect either party's ownership of its intellectual property rights. Any information provided, which is protected by intellectual property law, will not be used without prior permission from the holder.

 Guidance Note: extracts of third party works (including data, images, graphs, figures etc) may be reused or reproduced without permission provided it has already been made available to the public and is sufficiently acknowledged. This does not apply to unpublished works, so you must appropriate controls must be placed on any future use or reproduction of any information provided to us, which is not publicly available.

5. Partnerships and Joint Ventures

Nothing in this arrangement will be construed as creating a partnership or joint venture between the parties. Neither party will represent itself as being the agent of the other party, nor is either party authorised to commit the other party to any arrangement with a third party.

Template Information Notice under Section 24(1)

REMOVE THIS COVER PAGE PRIOR TO ISSUE

Guidance:

- sections in **yellow highlight** are required information and must be completed
- guidance to assist in completion is in **grey highlight** within the template. Please ensure this is deleted prior to issue
- a copy of the final information notice should be forwarded to ESS' In-house Solicitor for records purposes

Version number	Author	Purpose / changes	Date
1.0		First version	March 2024
2.0		Following approval of Exec Team	May 2024

Information Notice under Section 24(1) of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021

Public Authority: [REDACTED]

[This should be the name of the public authority (not an individual, key contact etc). If you wish to mark the accompanying correspondence FAO an individual, that is acceptable, but ensure the Notice and Schedule are clearly directed at the public authority.]

Address: [REDACTED]

Under section 24(1) of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 ('the Act'), Environmental Standards Scotland (ESS), has the power to issue a notice in writing (an 'Information Notice') to a public authority requiring it to provide such information as ESS reasonably requires for the purpose of exercising any of its functions.

ESS hereby requires the above named public authority to provide the information specified in the Schedule to this Notice, in the form and by the means specified and by the date provided.

This information is required in connection with [provide brief summary of particular matters in connection with which the information is required] and for the purposes of [delete as appropriate]:

- monitoring public authorities' compliance with environmental law
- monitoring effectiveness of environmental law and how it is implemented and applied

- investigating whether a public authority is failing (or has failed) to comply with environmental law
- investigating the effectiveness of environmental law or of how it is (or has been) implemented or applied
- taking such steps as ESS considers appropriate to secure a public authority's compliance with environmental law
- taking such steps as ESS considers appropriate to secure improvement in the effectiveness of environmental law or in how it is implemented or applied]

Failure to comply

Failure to comply with this Information Notice, without reasonable excuse, may result in ESS reporting the matter to the Court of Session pursuant to section 25 of the Act, whereby the Court may (either or both) make such order for enforcement as it considers appropriate or deal with the matter as a contempt of court.

[Electronic or wet signature at appropriate level]_____

Signed for and on behalf of Environmental Standards Scotland

Date: []

**Schedule to Information Notice under Section 24(1) of the UK
Withdrawal from the European Union (Continuity) (Scotland) Act 2021**

1. Public Authority: [REDACTED]

[This should be the name of the public authority (not an individual, key contact etc). If you wish to mark the accompanying correspondence FAO an individual, that is acceptable, but ensure the Notice and Schedule are clearly directed at the public authority.]

2. Address: [REDACTED]

3. Information required: [REDACTED]

[Information includes document(s) of any type or a copy or extract from any such document(s) and any explanation or other information (including unrecorded information).]

4. Form in which information to be provided: [REDACTED]

5. Means by which information to be provided: [REDACTED]

6. Date by which information must be provided: [REDACTED]

[If different items of information are required in different forms, by different means or by different dates, consideration can be given to presenting the information in tabular form.]