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Ìrean Àrainneachdail na h-Alba

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Operational 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)

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)

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 identity 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 representer 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 representer 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 pursing 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) Remedying 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.