

Consultation name: Extending the availability of Environmental Protective Expenses Orders

Consultation lead: The Scottish Civil Justice Council

Date of submission: December 2025

1. Environmental Standards Scotland (ESS) welcomes the opportunity to respond to the Scottish Civil Justice Council's consultation on extending the availability of Environmental Protective Expenses Orders (PEOs).

2. ESS is a non-ministerial office directly accountable to Scottish Parliament, since 1 October 2021, it has been a component of the system of environmental governance in Scotland following the UK's exit from the European Union and the end of oversight of implementation of European Union environmental law by the European Commission and the European Court of Justice. ESS' remit is to:

- ensure public authorities, including the Scottish Government, public bodies and local authorities, comply with environmental law
- monitor and take action to improve the effectiveness of environmental law and its implementation

Do you agree that the ability to seek a PEO should now be extended to the sheriff court for the summary applications that can arise under the Environmental Protection Act 1990? If not why not?

3. The Aarhus Convention ('the Convention') is an international treaty that guarantees the public rights of access to environmental information, participation in environmental decision-making, and access to justice in environmental matters. The body responsible with overseeing compliance with the Convention, the Aarhus Convention Compliance Committee (ACCC), has repeatedly criticised Scotland's system for preventing prohibitively expensive environmental litigation do not comply with the requirements of the Convention.

ESS has undertaken work on this issue and continues to monitor the efforts by the Scottish Government and the Scottish Civil Justice Council (SCJC) to achieve compliance with the requirements of the Convention. Achieving full compliance with the Convention is not optional and is essential to uphold environmental rights and ensure Scotland meets its international obligations.

The principle underpinning Aarhus is that those acting in the public interest to protect the environment should not face prohibitively expensive financial burdens. Where the risk of such a burden exists, a chilling effect operates which may prevent individuals from pursuing legitimate challenges to protect the environment.

ESS accordingly supports extending the ability to seek an environmental Protective Expense Order (PEO) to Sheriff Courts for summary applications under the Environmental Protection Act 1990. In ESS' view, this reform would address one of the compliance gaps identified by the ACCC.

Do you have any concerns or suggested changes to the wording of the proposed cost protection rules as set out in the new Part LV of the Summary Application Rules?

4. ESS notes that the proposed Sheriff Court rules largely replicate the existing PEO framework used in the Court of Session, aspects of which the ACCC has found to be non-compliant with the requirements of the Convention.

For example, in its October 2025 *Report of the Compliance Committee on decision VII/8s concerning compliance by the United Kingdom*, the ACCC concluded that:

- the ability to vary cost caps of PEOs ‘on cause shown’ introduces legal uncertainty
- the requirement for PEO applicants to disclose terms of legal representation and estimate the other party’s costs is burdensome and potentially a deterrent

ESS appreciates that the SCJC is consulting on potential future rule changes that may address these concerns. Further comments on this are provided in ESS’ responses to Questions 7, 8 and 9. Nonetheless, in ESS’ view, extending rules which have already been found to be non-compliant by the ACCC may not be an optimal solution, as it risks perpetuating existing barriers to justice and further negative ACCC opinion.

Other than summary applications; are there other types of actions raised within the sheriff court where you think lodging a motion for an *Environmental PEO* should be an option? If so please provide examples?

5. Whilst it may be that the majority of foreseeable actions will be summary, actions for interdict or specific implement which turn on the common law of nuisance may proceed under the Ordinary Cause Rules.

It is important to note at this stage that there are a variety of statutory actions (or responses thereto) which may fall within the ambit of the Convention but outwith the current drafting of the rules, given that the latter focuses only on actions arising out of the Environmental Protection Act 1990. It would be challenging to give an exhaustive list, but two examples would be:

- actions under section 75 of the Local Government (Scotland) Act 1973 where a local authority intends to dispose of an environmental common good asset

- appeals under the Civic Government (Scotland) Act 1982, which turn on the waste management operation of a licenced premises

ESS would prefer that the rules refer to the broad definitions given in the Convention. It may be helpful to have regard to the definition of ‘environmental information’ in the regulation 2 of the Environmental Information (Scotland) Regulations 2004, or of ‘environmental protection’ in s45 of the UK Withdrawal from the European Union (Continuity)(Scotland) Act 2021.

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

6. Yes. ESS supports allowing PEOs to be carried forward or sought afresh in the Sheriff Appeal Court. This supports procedural fairness and continuity of cost protection, aligning with Aarhus principles.

Do you have any concerns or suggested changes to the wording of the proposed rules as set out in the new SAC Chapter 28A?

7. This proposal essentially replicates the PEO rules currently applied in the Court of Session and extends them to the Sheriff Appeal Court. As such, all of the concerns and observations outlined in our response to Question 2 (on extending the PEO rules to Sheriff Court) apply here.

Do you agree that the current ability to seek a PEO within the Court of Session should also be available to a multiparty action initiated under Group Procedure? If not, why not?

8. ESS welcomes the introduction of rules that ensure all claimants—whether individuals or groups—are protected from undue barriers when seeking to uphold environmental rights. ESS therefore supports extending the availability of PEOs to

group proceedings, recognising that cost certainty is essential for enabling public interest litigation.

Do you have a view on whether rule 58A.7 should continue to support the court increasing the caps upwards by exception, or whether that reference to “on cause shown” should be deleted so that this rule reverts to using “fixed maximum sums”?

9. The ACCC has previously found that the ability of the courts to increase financial liability ‘on cause shown’ – despite there being a PEO in place – is incompatible with the requirements of the Convention.

ESS acknowledges the SCJC’s rationale for retaining ‘on cause shown’ as a safeguard against abuse of process or bad faith claims. However, in ESS’ view, it is essential that whatever approach is chosen satisfies the requirements of the Convention, as determined by the ACCC.

To this end, possible alternatives could be:

- introduce a system based on the qualified one-way costs shifting now used for personal injury claims, with clear criteria for when costs may be awarded
- remove ‘on cause shown’ entirely and maintain fixed maximum cost caps to ensure certainty and compliance with the Convention

Do you have a view on whether rule 58A.5 should continue to require applicants to provide information on the terms on which they are legally represented, or whether section (3) (a) (ii) should be withdrawn?

10. The ACCC has expressed concerns that requiring people to disclose how they are paying for legal representation—such as whether they’re receiving free or discounted legal help—can discourage them from applying for cost protection. In practice, this means that individuals or groups trying to challenge environmental decisions might feel exposed or uncomfortable sharing sensitive financial details.

The 2024 amendments to the PEO rules in the Court of Session introduced confidentiality provisions for the information submitted when applying for a PEO. The ACCC has recently noted that it remains unclear how the confidentiality provisions will operate in practice, particularly in relation to the disclosure of pro bono or reduced-fee representation. The ACCC has requested further information before deciding whether this aspect of the rules addresses its previous concerns.

ESS considers it essential that any approach adopted fully meets the Convention's requirements, as interpreted by the ACCC.

Do you have a view on whether rule 58A.5 should continue to require applicants to provide an estimate of the likely expenses that could be awarded against them, or whether section (3) (a) (iv) should be withdrawn?

11. ESS notes that the ACCC has been critical of this rule. In ESS' view, it is essential that whatever approach is chosen satisfies the requirements of the Convention, as determined by the ACCC. Accordingly, ESS considers this rule should be withdrawn.

Do you have any other suggested improvements regarding the PEO Rules, over and above those already raised directly with the Council or indirectly via the compliance committee?

12. ESS has a concern about the scope of cost protection relating to interveners under the current and proposed PEO rules. While the provisions introduced in 2024 offer protection for and against 'relevant parties' granted leave to intervene in the public interest, ESS is concerned that these may not extend to other types of interveners.

This limitation risks excluding parties who may have a legitimate interest in environmental proceedings but do not fall within the definition of 'relevant party' under Rule 58.19. This would include parties specified by an order made by the Lord Ordinary under rules 58.4(1), 58.11(2) or 58.12(2), and statutory intervenors like ESS.

ESS considers that cost protection should apply more broadly to all categories of interveners who may participate in Aarhus-related cases

Do you agree with the rule change made that makes provision for confidentiality to be sought within a motion for a PEO?

13. Yes. ESS supports the rule change that allows applicants to request confidentiality when lodging a motion for a PEO. This is a positive step that helps protect sensitive financial information and may encourage greater participation in environmental litigation, particularly from individuals and groups with limited resources.

However, as previously noted, ESS has concerns about the uncertainty surrounding whether confidentiality requests will be granted. The current approach requires a specific motion to be made, rather than treating confidentiality as the default starting point. This lack of assurance may deter applicants from seeking a PEO.

Do you agree with the rule change made that supports carrying a PEO over on appeal in the same manner regardless of who is appealing?

14. Yes. ESS supports the rule change allowing PEOs to carry over on appeal regardless of who is appealing. This improves procedural fairness and aligns with Aarhus requirements. The ACCC has previously found that requiring claimants to reapply for a PEO on appeal, while respondents could carry theirs forward, was procedurally unfair and contributed to non-compliance. The 2024 rule change was welcomed by the ACCC and considered to have resolved this specific issue.

Do you agree that it is useful for rule 58A.10 to replicate the information from case precedent regarding intervener's expenses?

15. ESS welcomes the progress made in clarifying the treatment of intervener expenses within the PEO rules. The inclusion of provisions that replicate case precedent and offer improved protection to and from interveners is a positive step toward reducing uncertainty and financial risk for claimants.

However, as outlined in our response to Question 10, ESS remains concerned that the current rules only apply to a narrow category of ‘relevant parties’—specifically those granted leave to intervene in the public interest. This excludes other types of interveners, such as statutory bodies or parties deemed ‘directly affected’, who may still be able to claim expenses against a PEO applicant.