ANNEX C CONSULTATION QUESTIONNAIRE

1. Do you agree that the rules should not define ‘prohibitively expensive’?

NO, the John Muir Trust (JMT) does not agree.

We are responding to this consultation not as legal professionals but as an environmental organisation which has been through the process of applying unsuccessfully for PEOs – related to the same environmental case. There was a Judicial Review (successful for JMT) and an Appeal (overturning JR Opinion in favour of SM) with PEO applications for both. The PEO applications were refused on the basis of cost estimate claims from both SM and SSE that their expenses would be similar to JMT's costs. JMT costs were estimated to be £53,000 in the Outer House and £50,000 in the Inner House. Both SM and SSE had large legal teams and no evidence was brought forward at that stage to justify their claim. The Trust liability for costs to the Respondent, Scottish Ministers (SM), and the Interested Party, Scottish and Southern Energy (SSE), was said by SM and SSE, after the case, to come to more than £500,000 collectively - £189,000 for SM and £350,000 for SSE. After negotiation, the parties settled for £75,000 for the SM and £50,000 for SSE.

Of course, it might be argued that the Trust could have returned to court to argue for lesser costs there, or even for the PEO to be granted retrospectively. Few people, including legal professionals, who have followed our case would have bet money on the result, regardless of what they believed to be the correct interpretation of "*prohibitively expensive*". It certainly wasn't a risk the Trust could take after the interpretations which had been put on "*prohibitively expensive*" during the case. So the very thing which is supposed to make Scotland Aarhus compliant, the PEOs, massively extended our financial exposure.

hy do JMT believe there should be a definition?

If there isn't a definition in the Rules, this still leaves extensive opportunity for legal debate about what the actual interpretation in Scots law should be – whether in a hearing or by written argument. This was seen in the PEO Hearing for John Muir Trust v Scottish Ministers heard by Lord Philip, which took nearly three days. A considerable amount of that time was spent discussing what should be the interpretation of "*prohibitively expensive*". All the points now made in this consultation paper about what SHOULD happen going forward, including reference to the Edwards case, in terms of time in court; whether it was appropriate or possible for detailed examination of finances to be carried out in court; etc. were made in the John Muir Trust case but did not win the decision.

As the CJEU and the Supreme Court have already ruled on the meaning, surely that suggests that a definition in the Rule should be derived from the wording given by CJEU or the Supreme Court - rather than that a definition should be left out. Not defining "*prohibitively expensive*" might suggest that the SCJC doesn't wish to deal with the difficulties of defining the phrase – which clearly has not proven to be simple - at the high level of the Rules. However, no definition leaves judges to have to revisit the question every time and make their own mind up. It also leaves the Petitioner's legal advisors in a very difficult position when advising of the chances of success with applying for a PEO.

Another key reason for a definition is that 'prohibitively expensive' does not seem to mean the same thing to the judiciary as it does to the man in the street. It seems likely that the average man in the street would think the costs that the Trust was exposed to were "*objectively*" prohibitive, regardless of the Petitioners' resources.

Under current Rules, there is discussion about what is meant by '*reasonably*'? Again I realised it meant something different to the legal profession. It was said frequently that the costs being discussed and estimated by the Parties were reasonable because it was a complex case. I don't think that is what Court Rule 58A use of the word 'reasonably' is about. Surely it means 'reasonable to the Petitioner'?

One dictionary definition is "*(of a price or charge) so high as to prevent something being done or bought.*"

However, we know from case law that the fact that a Petitioner continues with an action does not mean they fail the "prohibitively expensive" test as there is an objective and subjective aspect.

Another dictionary definition is "*If the cost of something is prohibitive, it is too expensive for most people.*"

Surely something like this simple definition might be used to cover the objective and subjective aspects?

2. **Do you agree that the rules should not distinguish the question of prospects of success from the question of whether or not the proceedings are prohibitively expensive?**

No.
The Trust believes that prospects of success is now already covered by the "leave to appeal" stage. Therefore, consideration of prohibitively expensive should not include prospects of success. Moreover, there is a real risk that in assessing prospects of success, without the full case being presented or discussed, that judges may form a view on the merits of the case which then carries over to the actual judicial review or appeal.

3. **Do you have any comments on draft rule 58A.6 for the determination of an application?**

Draft rule 58A.6 is a good change – to try and have as much of the proceedings as possible without appearance of counsel in court. However, it is essential that opportunities are included in the exchange of arguments for the parties to have time to respond to key points. For example, in the John Muir Trust case various aspects of the Trust's audited accounts were questioned in court but there was no opportunity for the questions to be answered by the Trust's Director of Finance.

4. **Do you have any comments on draft rule 58A.9 for the expenses of the application?**

Draft rule 58A.9 brings a much needed degree of fairness to the process.

5. **Do you have any comments on draft rule 58A.8 for expenses protection in reclaiming motions?**

There are issues with cross-caps and also how caps are applied in the event of an Appeal which need detailed consideration of how they have actually worked in practice.
It is reasonable that if the Petitioner won in the Outer House, they should automatically get a PEO for any Appeal and that they should apply again if the Respondent won in the outer House. There seems to be a good case for no increased cap being applied to the petitioner if they have won in the first round.

6. Do you have any comments on the draft amendment to rule 38.16?

The Trust agrees with this amendment.

7. Do you have any other comments on the proposals contained in this paper?

If a PEO is refused on the basis of cost estimates given by Parties, then any costs reclaimed subsequently should be considered on the assumption that higher costs cannot be claimed.

The Trust was refused a PEO at Appeal stage on the basis of all the funds they had raised for the case, but excluding the costs of the Outer House proceeding. Clearly, this is unreasonable and needs a process to consider the overall costs.

If a PEO is refused, consideration should be given to ruling out any claim by Interested Parties at that early stage. This would reduce excessive spending and time wasting in court by the Interested Party repeating arguments already well-rehearsed which can occur and it achieves a “chilling” effect on the Petitioner.

Consideration could be given to having a higher cap for a national environmental organisation but which would still prevent exposing the organisation to unlimited liability.

Conversely, consideration should be given for community councils to easily gain a PEO with a very low cap as community councils are a part of our democratic structures to represent communities but they usually have little resource.