



**Scottish  
Civil Justice  
Council**

# **RESEARCH: ON THE TYPE OF CASES SEEKING A PROTECTIVE EXPENSES ORDER**

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## EXECUTIVE SUMMARY

### Purpose

1. To provide a snapshot of the type of cases that have sought a Protective Expenses Order (PEO) under either a) the 'cost capping regime' for environmental cases, or b) under the common law.

### Background

2. The implementation of the Aarhus Convention required Scotland to establish a "cost capping regime" for environmental cases. In response the Scottish Government ran a Public Consultation in January 2012 and then published its response in September 2012. The policy decisions then made led to the initial PEO Rules<sup>1</sup> that were commenced with effect from 25 March 2013.

#### *The existing rules:*

3. The PEO Rules have now been in place for 11 years, with 3 amending rules instruments having been made to date (*in 2015, 2018 & 2024*). Given the Rules Review underway by this Committee there is a reasonable expectation of further rule changes to follow.
4. The type of cases currently able to seek cost protection through the 'cost capping regime' flows from the criteria set out in RCS rule 58A.1:

#### 58A.1. - Application and interpretation of this Chapter

(1) *This Chapter applies to applications for protective expenses orders in—*

(a) *An appeal under section 56 of the Freedom of Information (Scotland) Act 2002(4) as modified by regulation 17 of the Environmental Information (Scotland) Regulations 2004(5);*

(b) *Relevant proceedings which include a challenge to a decision, act or omission which is subject to, or said to be subject to, the provisions of Article 6 of the Aarhus Convention;*

(c) *Relevant proceedings which include a challenge to an act or omission on the grounds that it contravenes the law relating to the environment.*

*"Relevant proceedings" means—*

(a) *Applications to the supervisory jurisdiction of the court, including applications under section 45(b) (specific performance of a statutory duty) of the Act of 1988;*

(b) *Appeals under statute.*

5. To assess whether rule 58A.1 (1) is working as intended required access to a) the subject matter underpinning each action taken to date and b) the legal basis

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<sup>1</sup> *Act of Sederunt (Rules of the Court of Session Amendment) (Protective Expenses Orders in Environmental Appeals and Judicial Reviews) 2013 (SSI [2013/81](#))*

for the challenge made. Hence the request made for the secretariat to research the practical outcome from using the current rule, and the extent to which the use of PEOs might be extended.

*The use of manual data collection:*

6. Applications for a PEO are made by lodging a motion and, given the low transaction volumes, the relevant data by motion lodged is not tracked automatically. Given that practical constraint; this paper reuses data from the “case summaries” within the annexes to the following SCJC publication:
  - “*Research on the cost caps used in practice (Aug 2024, SCJC)*”
7. Those 28 case summaries (16 environmental, 12 common law) were established through “manual” data collection using online searches of media coverage, along with any references made within legal publications, to isolate relevant cases. That reliance on public domain information does carry a risk of omission, so readers should note this paper may exclude some cases. If readers are aware of other PEO related cases then please email: [scjc@scotcourts.gov.uk](mailto:scjc@scotcourts.gov.uk).

*The research request made:*

8. To assess whether rule 58A.1 (1) works as intended the information sought was:
  - A list of the environmental actions where a PEO has been considered;
  - A list of the common law actions where a PEO has been considered;
  - A breakdown of the main environmental concern or common law concern that generated each case, and the legal basis for each challenge made; and
  - Whether any court opinions had suggested a need to amend rule 58A.1 (1).

*The research outcome:*

9. That research has identified 28 cases where a motion for a PEO has been considered by the courts to date:
  - Part 1 of this paper provides an indication of the underlying concerns driving the 16 cases that sought an environmental PEO; and
  - Part 2 indicates the concerns driving the 12 cases that sought a common law PEO.

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## **PART 1 – CASES THAT SOUGHT AN ENVIRONMENTAL PEO**

10. In the 11 years since the cost capping regime was introduced (in 2013) there have been 16 Aarhus cases where the use of a PEO was considered. Table 1.1 conveys the principal subject matter underpinning each case, along with main legal basis for the challenge made:

Research on the type of cases seeking a PEO

Table 1.1 – CASES SEEKING COST PROTECTION – THROUGH AN “ENVIRONMENTAL PEO”						
Vol	Case Ref:	All Opinion Ref:	Petitioner	Outcome	Subject Matter	Relevant Legislation
<b>Environmental PEOS – made since the cost capping regime was introduced</b>						
1	XA52/13	[2014] CSOH 30	Sally Carroll	granted	Wind farm – turbine w ithin 1.4k	Tow n and Country Planning (Scotland) Act 1997
2	P420/14	[2014] CSOH 116 [2015] CSOH 61	Friends of Loch Etive	refused	Rainbow trout farmon Loch Etive	Tow n and Country Planning (Scotland) Act 1997
3	P843/14	[2014] CSOH 172A [2015] CSOH 163 [2016] CSIH 33 [2016] CSIH 61	John Muir Trust	refused	Wind farm - Stronelairg, south of Fort Augustus)	Electricity Works (Environmental Impact Assessment) (S) Reg's 2000
4	P807/14	[2015] CSOH 27 [2016] CSIH 22	St Andrews Environmental	<b>granted</b>	Housing on Greenfields site	Tow n and Country Planning (S) Act 1997
5	P1328/14	[2015] CSOH 41 [2016] CSIH 10 [2016] CSIH 31	J Mark Gibson	<b>granted</b>	Wind farm – turbine w ithin 4.2k	Electricity Act 1989
6	P28/15	[2016] CSOH 103 [2017] CSIH 31	RSPB	<b>granted</b>	Wind farm -110 turbines Inch Cape Offshore	Electricity Act 1989 + Marine Works (Environmental Impact Assessment) Reg's 2007
7	P29/15	[2016] CSOH 104 [2017] CSIH 31	RSPB	<b>granted</b>	Wind farm -75 turbines Neart na Gaoithe	Electricity Act 1989 + Marine Works (Environmental Impact Assessment) Reg's 2007
8	P30/15	[2016] CSOH 104 [2017] CSIH 31	RSPB	<b>granted</b>	Wind farm -75 turbines Seagreen Bravo	Electricity Act 1989 + Marine Works (Environmental Impact Assessment) Reg's 2007
9	P31/15	[2016] CSOH 106 [2017] CSIH 31	RSPB	<b>granted</b>	Wind farm -75 turbines Seagreen Alpha	Electricity Act 1989 + Marine Works (Environmental Impact Assessment) Reg's 2007
10	P162/17	[2017] CSOH 135 [2018] CSIH 3	Simon Byrom	refused	Planning Decision – in Conservation Area	Planning (Listed Buildings and Conservation Areas) (S) Act 1997
11	P375/17	[2018] CSOH 11	Jordanhill Community Council	granted	Planning Decision – residential development	Tow n and Country Planning (S) Act 1997
12	P1032/16	[2018] CSOH 108	Matilda Gifford	refused	Undercover policing - of environmental activists	Inquiries Act 2005
13	P719/18	[2019] CSOH 19	No Kingsford Stadium Ltd	<b>granted</b>	Greenbelt Development – of 20,000 seat Football Stadium	Tow n and Country Planning (S) Act 1997
14	P414/20	[2021] CSOH 1 [2021] CSIH 68	Scottish Creel Fishermen's	<b>granted</b>	Not proceedings with proposed inshore fisheries pilot	Inshore Fishing (S) Act 1984 +Sea Fish (conservation) Act 1976 + Sea Fisheries Act 1968 + ministerial orders
15	P1102/20	[2021] CSOH 108	Trees for Life	<b>granted</b>	Licencing – for lethal control of beavers	Conservation (Natural Habitats, etc.) Regulations 1994
16	P107/23	[2023] CSOH 39 [2024] CSIH 9	Open Sea's Trust	<b>granted</b>	Licencing - Having regard to the National Marine Plan	Marine (S) Act 2010+ Sea Fishing (Licences and Notices) (S) Reg's 2011 + Fisheries Act 2020
<p><b>Notes:</b></p> <ol style="list-style-type: none"> <li>1. Volume: a count of 1 = the first opinion issued in a case</li> <li>2. Case reference number – is the unique identifier allocated to each case</li> <li>3. Opinion reference - reflects a format of [YYYY] - court fora – opinion number</li> <li>4. Petitioner – first person listed in the format of 'pursuer X v defender Y'</li> <li>5. Outcome: GRANTED = PEO considered and at least 1 granted REFUSED = PEO considered and no PEO made</li> </ol>						

## PART 2 – CASES THAT SOUGHT A COMMON LAW PEO

11. In the 19 year period since the first application for a common law PEO was made in 2005; there have been 12 cases where a common law PEO was considered. Table 2.1 conveys the principal subject matter driving each of those proceedings and the main legal basis for each challenge made:

Table 2.1 – CASES SEEKING COST PROTECTION – THROUGH A “COMMON LAW PEO”						
Vol	Case Ref:	All Opinion Ref:	Petitioner		Subject Matter	Relevant Legislation
<b>Common Law PEOs – made prior to the cost capping regime</b>						
1	P856/05	[2005] CSOH 165	Mary McArthur	refused	Contaminated blood	Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976
2	P1225/09	[2010] CSOH 5 [2011] CSOH 163 [2013] CSIH 78	Marco McGinty	granted	Proposed power station (Hunterston)	Town and Country Planning (Scotland) Act 1997
3	XA53/10	[2011] CSOH 10 [2011] CSOH 131 [2012] CSIH 19 [2012] UKSC 44	Road Sense / William Walton	<b>granted</b>	Aberdeen bypass	Roads (Scotland) Act 1984
4	P876/11	[2012] CSOH 32	Mary Theresa Doogan	refused	Midwives – medical terminations	Abortion Act 1967
5	P762/12	[2012] CSOH 156 [2013] CSOH 70 [2014] CSIH 38 [2014] CSIH 64 [2016] CSIH 77	Scotch Whiskey Association	<b>granted</b>	Minimum unit pricing for alcohol	Alcohol (Minimum Pricing) (Scotland) Act
6	XA120/14	[2015] CSOH 35	Hillhead Community Council	<b>granted</b>	National Air Quality Strategy	Road Traffic Regulations Act 1984
7	P255/13	[2013] CSOH 68 [2013] CSIH 70	Newton Mearns Residents	refused	Housing on Greenfields site	Town and Country Planning (Scotland) Act 1997
8	P698/12	[2013] CSOH 158 [2013] CSIH 116 [2014] CSIH 60 [2015] UKSC 4	Sustainable Shetland	<b>granted</b>	Wind farm -103 turbines	Electricity Act 1989 + Wild Birds Directive 2009
<b>Common Law PEOs – made since the cost capping regime was introduced</b>						
1	P1293/17	[2018] CSOH 8 [2018] CSIH 18 [2018] CSIH 62	Andy Wightman MSP	granted	Objection to - EU withdrawal (Brexit)	Article 50.2 of the Treaty on European Union
2	P680/19	[2019] CSOH 68 [2019] CSOH 70 [2019] CSIH 49	Joanna Cherry QC MP	<b>granted</b>	Objection to – proroguing of UK Parliament	European Union (Withdrawal) Act 2018,
3	A76/20	<a href="#">[2020] CSOH 75</a> <a href="#">[2021] CSOH 16</a> <a href="#">[2021] CSIH 25</a>	Martin James Keating	refused	Indy ref 2 - without UK consent	Scotland Act 1988
4	P395/22	[2022] CSOH 81 [2023] CSIH 9	John Halley	refused	fitness to practice as part time sheriff	Judiciary and Courts (S) Act 2008 + Courts Reform (S) Act 2014
<b>Notes:</b>						
1. Volume: a count of 1 = the first opinion issued in a case						
2. Case reference number – is the unique identifier allocated to each case						
3. Opinion reference - reflects a format of [YYYY] - court fora – opinion number						
4. Petitioner – first person listed in the format of ‘pursuer X v defender Y’						
5. Outcome: GRANTED = PEO considered and at least 1 granted REFUSED = PEO considered and no PEO made						

## PART 3 – EXTENDING THE AVAILABILITY OF PEO’S

12. The key policy objective for this research was to consider the extent to which environmental PEOs should be made available in the sheriff court. To underpin future discussions on that subject Table 3.1 provides an indicative list of the main Acts that have a logical link to protecting the environment. Any of these 53 Acts could generate a public interest legal challenge where the potential litigant might look to mitigate their financial risk through the use of a PEO:

Table 3.1 – LISTING OF ACTS – LINKED TO THE PROTECTION OF THE ENVIRONMENT			
count	PRIMARY LEGISLATION	CATEGORY	REFERENCE
1	Agriculture (Scotland) Act 1948	LAND	UKPGA Geo6...
1	Agricultural Land (Removal of Surface Soil) Act 1953	LAND	UKPGA Eliz2...
1	Clean Air Act 1993	AIR	UKPGA 1993/11
1	Climate Change Act 2008	CLIMATE	UKPGA 2008/27
1	Climate Change (Scotland) Act 2009	CLIMATE	ASP 2009/12
1	Climate Change (Emissions Reduction Targets) (Scotland) Act 2019	CLIMATE	ASP 2019/15
1	Community Empowerment (Scotland) Act 2015	LAND	ASP 2015/6
1	Control of Pollution Act 1974	NUISANCE	UKPGA 1974/40
1	Crofters (Scotland) Act 1993	LAND	UKPGA 1993/44
1	Deer (Scotland) Act 1996	WILDLIFE	UKPGA 1996/58
1	Electricity Act 1989	ENERGY	UKPGA 1989/29
1	Environment Act 1995	GOVERNANCE	UKPGA 1995/25
1	Environment Act 2021	GOVERNANCE	UKPGA 2021/30
1	Environmental Assessment (Scotland) Act 2005	GOVERNANCE	ASP 2005/15
<b>1</b>	<b>Environmental Protection Act 1990</b>	<b>GOVERNANCE</b>	<b>UKPGA 1990/43</b>
1	Flood Risk Management (Scotland) Act 2009	WATER	ASP 2009/6
1	Forestry and Land Management (Scotland) Act 2018	LAND	ASP 2018/8
1	Fuel Poverty (Targets, Definition and Strategy) (Scotland) Act 2019	ENERGY	ASP 2019/10
1	Fur Farming (Prohibition) (Scotland) Act 2002	WILDLIFE	ASP 2002/10
1	Heat Networks (Scotland) Act 2021	ENERGY	ASP 2021/9
1	Land Reform (Scotland) Act 2003	LAND	ASP 2003/2
1	Land Reform (Scotland) Act 2016	LAND	ASP 2016/18
1	Landfill Tax (Scotland) Act 2014	LAND	ASP 2014/2
1	Marine (Scotland) Act 2010	BIODIVERSITY	ASP 2010/5
1	Marine and Coastal Access Act 2009	BIODIVERSITY	UKPGA 2009/23
1	Natural Heritage (Scotland) Act 1991	GOVERNANCE	UKPGA 1991/28
1	Natural Environment and Rural Communities Act 2006	GOVERNANCE	UKPGA 2006/16
1	National Parks (Scotland) Act 2000	LAND	ASP 2000/10
1	Nature Conservation (Scotland) Act 2004	BIODIVERSITY	ASP 2004/6
1	Noise and Statutory Nuisance Act 1993	NUISANCE	UKPGA 1993/40
1	Pesticides Act 1998	PESTICIDES	UKPGA 1998/26
1	Planning (Scotland) Act 2019	PLANNING	ASP 2019/13
1	Planning etc. (Scotland) Act 2006	PLANNING	ASP 2006/17

## Research on the type of cases seeking a PEO

1	Planning (Hazardous Substances) (Scotland) Act 1997	CHEMICALS	UKPGA 1997/10
1	Plant Health Act 1967	PESTICIDES	UKPGA 1967/8
1	Protection of Badgers Act 1992	WILDLIFE	UKPGA 1192/51
1	Protection of Wild Mammals (Scotland) Act 2002	WILDLIFE	ASP 2002/6
1	Radioactive Material (Road Transport) Act 1991	RADIOACTIVITY	UKPGA 1991/27
1	Radioactive Substances Act 1993	RADIOACTIVITY	UKPGA 1993/12
1	Road Traffic Regulations Act 1984	PLANNING	UKPGA 194/27
1	Roads (Scotland) Act 1984	PLANNING	UKPGA 1984/54
1	Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003	WILDLIFE	ASP 2003/15
1	Sewerage (Scotland) Act 1968	WATER	UKPGA 1968/47
<b>1</b>	<b>Town and Country Planning (Scotland) Act 1997</b>	<b>PLANNING</b>	<b>UKPGA 1997/8</b>
1	UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021	GOVERNANCE	ASP 2021/4
1	Water (Scotland) Act 1980	WATER	UKPGA 1980/45
1	Water Industry (Scotland) Act 2002	WATER	ASP 2002/3
1	Water Resources (Scotland) Act 2013	WATER	ASP 2013/5
1	Water Services etc. (Scotland) Act 2005	WATER	ASP 2005/3
1	Wild Mammals (Protection) Act 1996	WILDLIFE	UKPGA 1996/3
1	Wildlife and Countryside Act 1981	WILDLIFE	UKPGA 1981/69
1	Wildlife and Countryside (Amendment) Act 1991	WILDLIFE	UKPGA 1991/39
1	Wildlife and Natural Environment (Scotland) Act 2011	WILDLIFE	ASP 2011/6
53			
<p><i>Notes:</i>  1. This list was compiled from the enactments listed on <a href="https://www.netregs.org.uk/about/">https://www.netregs.org.uk/about/</a> which is a site provided jointly by the Northern Ireland Environment Agency (NIEA) &amp; the Scottish Environment Protection Agency (SEPA).</p>			

## The Environmental Protection Act 1990

13. The Faculty of Advocates response to the 2017 SJCJ consultation on PEO Rules suggested that the Council should consider making environmental PEOs available in actions arising under the Environmental Protection Act 1990 ([UKPGA 1990/48](#)). Part III of that 1990 Act addresses statutory nuisance claims and Part V addresses litter etc. so that Act does have particular relevance to these two specific UNECE findings of non-compliance by the UK:

- **ACCC/C/2013/86 – Private Nuisance** – a member of the public alleged that the UK failed to comply with article 9 (3) and (4), of the Convention by not ensuring that the costs of access to justice in private nuisance cases, including her own, are fair, equitable, timely and not prohibitively expensive. The June 2015 findings concluded that the UK was non-compliant with article 9(4):  
[https://unece.org/env/pp/cc/acc.c.2013.86\\_united-kingdom](https://unece.org/env/pp/cc/acc.c.2013.86_united-kingdom)
- **ACCC/C/2016/142 – Littering** - a member of the public alleged that the UK failed to comply with article 9 (2)–(5) of the Convention in connection with access to justice relating to a public authority’s alleged failure to clear up litter. The July 2020 findings concluded that the UK was non-compliant with article 9 (4) and (9 (5):  
[https://unece.org/env/pp/cc/acc.c.2016.142\\_united-kingdom](https://unece.org/env/pp/cc/acc.c.2016.142_united-kingdom)



14. This research exercise, and those two UNECE findings, does support extending Environmental PEO's to the actions arising under the Environmental Protection Act 1990. If that direction of travel is agreed by the Committee, the secretariat will progress a Public Consultation on extending the availability of PEOs.

### **Town and Country Planning (Scotland) Act 1997**

15. The planning process in Scotland is an administrative procedure, not a court based procedure. That was a conscious political decision to ensure that challenges to key planning decisions are reserved to those democratically elected, rather than the courts. That said, there is ongoing debate around whether or not the rights to third party appeals should be incorporated into that administrative procedure. The Scottish Parliament has considered that matter on several occasions to date and decided not to make changes.

16. Several NGO's in Scotland take the opposing view and they lodged a complaint [ACCC/C/2022/196](#) with the UNECE on 29 August 2022. The UK State lodged its response rejecting that complaint on 12 July 2023. The UNECE has yet to take a decision on whether that complaint is admissible.

17. Given that planning is an administrative procedure; only a small subset of litigation arising from that administrative procedure makes it to the courts:

- *Challenges under the Environmental Information (Scotland) Regulations 2004* regarding access to the content, or the omitted content, within Environmental Impact Assessments (EIA); and
- *Challenges under Judicial Review procedure* - regarding the fairness of the administrative procedure used by public bodies when making those administrative planning decisions; and
- *Challenges arising as statutory appeals* – where the appeal route is expressly directed to the Court of Session by relevant sections in primary legislation.

18. As the planning process is not court based then it would not be appropriate to extend PEOs to the administrative planning decisions made under the Town and Country Planning (Scotland) Act 1997. That said, the secretariat will continue to monitor for the UNECE decision on the admissibility of complaint [ACCC/C/2022/196](#)

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### **CONCLUSIONS**

19. The conclusions from this research are:

*On extending PEOs in the Court of Session* – From the 16 cases seeking an environmental PEO to date, none of those reported court opinions suggested making changes to the procedure in use, which implies Rule 58A.1 (1) is working

as intended. In terms of extending PEO's to other procedures the Committees views are sought on the use of PEOs in "Group Procedure" actions.

*On extending PEOs to the sheriff court* – the CAFC has previously agreed "in principal" that extension should be considered subject to understanding a) the relevant categories of case and b) the practical impact making that change will have on court business. In drafting terms the rules for the proposed extension should be relatively straightforward to prepare - by mirroring Chapter 58A and then updating the interpretation clause to define the scope. The relevant proceedings to consider for the extension to the sheriff court would include:

- The Environmental Protection Act 1990,
- The Environmental Information (Scotland) Regulations 2004; and
- The Environmental Assessment (Scotland) Act 2005.

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## **NEXT STEPS**

20. The next steps are:

*PUBLICATION* – following consideration at this meeting, this research paper can be updated for feedback from members and then published as a public paper.

*AARHUS CONVENTION* – the publication of this research paper will inform DEFRA when collating the "2<sup>nd</sup> progress report on the UK Plan of Action"<sup>2</sup>.

**Secretariat to the Scottish Civil Justice Council  
September 2024**

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<sup>2</sup> as per the information request made at paragraph 9 (c) of decision VII/8s

## BIBLIOGRAPHY

### Court Opinions:

Many court decisions are made orally at the time of the hearing. Others may be reserved and issued, usually in writing, at a later date. Written decisions from the Supreme Courts are normally published, whilst those from the sheriff courts may be published in relation to cases which involve:

- A matter of principle;
- A particular point of general public importance; or
- An issue of legal significance

There will be circumstances when a particular decision is not published in the interests of justice. Where a court opinion is reported it can be viewed online:

- Via the judgements page on the SCTS website;  
<https://www.scotcourts.gov.uk/judgments/#/>
- Via the databases page on the BAILLI website;  
<https://www.bailii.org/databases.html>

### Existing Rules:

Act of Sederunt (Rules of the Court of Session Amendment) (Protective Expenses Orders in Environmental Appeals and Judicial Reviews) 2013  
<https://www.legislation.gov.uk/ssi/2013/81/contents/made>

Act of Sederunt (Rules of the Court of Session 1994 Amendment) (No. 4) (Protective Expenses Orders) 2015  
<https://www.legislation.gov.uk/ssi/2015/408/contents/made>

Act of Sederunt (Rules of the Court of Session 1994 Amendment) (Protective Expenses Orders) 2018  
<https://www.legislation.gov.uk/ssi/2018/348/contents/made>

Act of Sederunt (Rules of the Court of Session 1994 Amendment) (Protective Expenses Orders) 2024  
<https://www.legislation.gov.uk/ssi/2024/196/contents/made>

### Publications (by the SCJC)

Research on the cost caps used in practice (Aug 2024, SCJC)  
[https://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/publications/scjc-publications/research-on-the-cost-caps-used-in-practice.pdf?sfvrsn=ef272688\\_1](https://www.scottishciviljusticecouncil.gov.uk/docs/librariesprovider4/publications/scjc-publications/research-on-the-cost-caps-used-in-practice.pdf?sfvrsn=ef272688_1)

## GLOSSARY

The relevant terms used for the purposes of this paper are:

<i>Term</i>	<i>Meaning</i>
Aarhus Case	Relevant proceedings that include a challenge to a decision, act or omission on grounds subject to the provisions of Article 6 of the Aarhus Convention.  <i>That currently covers:</i> <ul style="list-style-type: none"> <li>• Applications to the supervisory jurisdiction of the court, including applications under section 45(b) (specific performance of a statutory duty) of the Court of Session Act 1988(20), and</li> <li>• Appeals under statute to the Court of Session.</li> </ul>
ACCC	Acronym for – the Aarhus Convention Compliance Committee (ACCC)
CSIH	Acronym for – the Inner House of the Court of Session (CSIH).
CSOH	Acronym for – the Outer House of the Court of Session (CSOH).
Common Law PEO	An application made under the common law. These PEO applications can be lodged in any civil proceedings.
Environmental PEO	An application made under the cost capping regime established by the PEO Rules. These PEO applications can be lodged in civil proceedings taken in the public interest that have an impact on the environment.
On cause shown	A term in Scots law – which would equate to saying ‘where a valid reason can be demonstrated’. The expectation set is that whenever a claim is being made it will need to be substantiated.
PEO	Acronym for – a Protective Expenses Order (PEO). Scotland uses an adversarial legal system, with the general principle for expenses being that “expenses follow success” ( <i>which equates to “loser pays”</i> ). In circumstances that result in a significant imbalance of power between the parties to a civil action, the court may consider making a PEO where it is in the “interests of justice” to do so.
PEO Rules	RCS Chapter 58A (Protective Expenses Orders in Environmental Appeals and Judicial Reviews).  Chapter 58A was first enacted by the Act of Sederunt (Rules of the Court of Session Amendment) (Protective Expenses Orders in Environmental Appeals and Judicial Reviews) 2013: <a href="https://www.legislation.gov.uk/ssi/2013/81/introduction/made">https://www.legislation.gov.uk/ssi/2013/81/introduction/made</a>
SCTS	Acronym for – the Scottish Courts and Tribunal Service
UKSC	Acronym for – the UK Supreme Court (UKSC).
UNECE	Acronym for – the United Nations Economic Council for Europe (UNECE).

## ANNEX 1 – KEY MILESTONE DATES

2005 – The first common law application for a PEO was made but rejected by the court. Within the reported court opinion<sup>3</sup> the court did recognise it was competent for a PEO to be granted in Scotland provided the relevant tests defined in case precedent were met. In practice it took a further 4 years for an order to be granted.

2010 – The first common law PEO was granted<sup>4</sup> in Scotland.

2013 – To implement the Aarhus Convention calls were made to establish a simple “fixed cost capping regime” for Aarhus related environmental cases. The Scottish Government undertook a Public Consultation in 2012 which led to the initial version of the PEO rules<sup>5</sup> as enacted. Those rules were commenced from 25 March 2013.

2024 – In the 11 year period since those PEO Rules were commenced there have been 3 amendments made:

- *In 2015* – the PEO Rules were amended to ensure the type of claims covered was consistent with a judgement of the UK Supreme Courts:
- *In 2018* – the PEO Rules were completely rewritten, moving from the high costs of mandatory hearings to a more streamlined process that could support the court making its decisions “on the papers”. In addition judicial independence was supported by providing the flexibility for the judiciary to move the cost caps up or down “on cause shown”; and
- *In 2024* – a further 3 amendments were made to incorporate earlier public consultation responses that were also carried forward as Aarhus concerns. That introduced a duty of confidentiality, allowed PEOs to be carried forward to appeals irrespective of who was appealing, and confirmed that costs would not normally be awarded for or against an intervener.

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<sup>3</sup> *McArthur v Lord Advocate* [2005] CSOH 165 (regarding: deaths from contaminated blood)

<sup>4</sup> *McGinty v Scottish Ministers* [2010] CSOH 5 (regarding: a proposal for a power station in Hunterston).

<sup>5</sup> *Act of Sederunt (Rules of the Court of Session 1994 Amendment) (No. 4) (Protective Expenses Orders) 2015* (SSI [2015/408](#))