

Stakeholder Working Group on Public Rights of Way

Meeting notes for the seventh meeting of the Group
held on 25th June 2009
at 4 East Parade, Sheffield.

Attendance

- 7.1 The meeting was chaired by Ray Anderson and attended by:
Alasdair Mitchell, Alex Lewis, Andrea Graham, Carys Drew, Dave Waterman, Gavin Stark, Gwyn Williams, Janet Davis, John Thorp, Kate Ashbrook, Mike Walker, Paul Johnson, Richard Gething, Robert Halstead, Rosalinde Shaw, Sarah Slade & Terry Robinson.
- 7.2 Apologies were received from Alan Kind, Mark Weston & Sue Steer.

Notes of the previous meeting

- 7.1 The draft meeting note for 5/6 May 2009 was confirmed, subject to three changes:
- a. Dave Waterman's name needs to be removed from the attendance list at paragraph 6.1.
 - b. Gwyn Williams said that he would suggest some detailed edits to ensure that the notes accurately reflected points made in connection with the Birds and Habitats Directives: in particular on the generality of Article 6.2 and the need for join up between procedures.
 - c. Correction of a typo in the last sentence of paragraph 6.52.

Process improvements

Introduction

- 7.2 Ray Anderson (RA) made a short introduction to the meeting, emphasising the need for the Group to 'leave baggage at the door' and work together positively to reach a consensus about the way forward. The Group would not sit indefinitely, and Natural England would have to consider whether there was any point in its continuing to meet if progress towards an agreement was not being made.
- 7.3 Rosalinde Shaw (RS) then presented a proposal for improving the definitive map modification order (DMMO) procedure, illustrating suggested changes with numbered flowcharts. Copies of the flowcharts are appended as annexes to this meeting note. Annex 1

shows the current DMMO procedure and Annex 2 RS's proposed new procedure. The same numbering system is used in both flowcharts so that comparison can be made. Overall the number of process steps would be reduced in the new procedure from 24 to 17.

7.4 RS suggested that what the Group had been working towards was to make the process clearer, more flexible and more efficient. She emphasised that a key feature of the proposal is the introduction of a new stage (step 3a) for dialogue with landowners. It is proposed to make it easier to divert routes claimed on documentary evidence by adding a new section to follow s.119 of the Highways Act 1980. This was combined with a further change whereby the Surveying Authority (SA) would notify landowners of applications: currently it is the applicant that must serve notice. Encouraging dialogue and improving understanding from an early stage is expected to make the process work better by preventing adversarial situations from developing. The flow chart illustrates how these changes might alleviate the need for detailed investigation by the SA and so allow bypass of process step 4.

7.5 RS also drew attention to a number of other changes involving amalgamation or removal of process steps to simplify later stages of the procedure and prevent possible procedural looping.

7.6 The Group then discussed the suggested changes.

Level of test

7.7 It was agreed that a two stage evidential test was not needed for documentary claims. Currently the DMMO procedure includes two levels of test namely whether on the balance of probabilities the right:

- a. is reasonably alleged to subsist¹; or,
- b. actually subsists.

7.8 Reasonably alleged to subsist is a lesser test and is applied early in the procedure when the SA decides whether or not to make an order (step 5). Actually subsists is a stronger test and is applied later in the procedure where the order is determined (steps 18 and 19). It was suggested that the procedure was designed this way to allow for claims that include user evidence, where contradictory statements can be difficult to resolve. It was said that many SAs already consider it good practice to apply the actually subsists test at the earlier stage. This aspect of the DMMO procedure is specified on the face of primary legislation but could be changed by means of a Legislative Reform Order (LRO).

¹ Note that this distinction does not apply where the claim is for the status of a route already recorded on the definitive map to be upgraded.

Judicial Review

7.9 It was agreed that the possibility of Judicial Review (JR) (step 8) did not need to be included in the flowchart since it is not part of the statutory procedure. Arguably JR is unlikely at this point, since there are opportunities for objection during the procedure and for Statutory Review at the end.

Non-determination appeal

7.10 The current DMMO procedure includes a right of appeal for the applicant to the Secretary of State (SoS) against non determination of an application by the SA (step 6). This can be exercised after 12 months. Most SAs have a statement of priority for handling applications and use this in defence at any appeal. There is no national guidance on priority statements and most SAs take applications chronologically, with limited exceptions such as where an application would help to address an urgent public safety issue. Few (if any) appeals have been upheld and the SoS generally accepts cases made by SAs that resources are limiting progress.

7.11 From an applicant's point of view it was said to be highly unsatisfactory that there appeared to be no redress where applications are effectively ignored.

7.12 It was suggested that an appeal on non-determination ought also to be allowed to landowners who may be affected by people attempting to use the claimed route or be unable to sell their property. A pending application prevents an owner from getting an injunction against trespass. It was agreed that the appeal would be more balanced if it was open to both landowner and applicant.

7.13 From a SA's point of view, the main concern is that scarce resources are being diverted from processing claims to defending appeals.

7.14 The Group discussed possibilities for improving this situation. It was suggested that the purpose of this appeal is to prevent unfair treatment of applicants if SAs were to cherry pick applications. That being so, the grounds for appeal are mal-administration where the SA does not have proper procedures or is not following them correctly. A counter argument was made that an element of timeliness was needed also, to prevent SAs from starving this area of work of resources. It was said that if a SA has a backlog of applications then the time-limit appeal only worsens the overall situation, leading to further dissatisfaction for applicants and landowners.

7.15 Several suggestions were made, firstly on backlogs and resourcing this area of work and then on complaints that individual applications are not being progressed.

- 7.16 A comment was made that there would be more incentive on SAs to put resources into this area of work if the system itself was working better. The situation on backlogs is not helped by appeals on individual applications, which will tend to exacerbate any resourcing issues. This would be better tackled through established local government mechanisms such as scrutiny committees where the public can go along and ask a question. Also the local government ombudsman can put pressure on an authority that is not performing. A suggestion was made to introduce a new indicator for this area of work but this idea was rejected as being very unlikely to happen: Defra are pursuing a general indicator for rights of way work.
- 7.17 For complaints relating to individual applications a suggestion was made that an alternative to appeal to the SoS would be for the applicant to apply for a magistrates court order. A precedent for this is the procedure for complaints about obstructions on rights of way². In this case Highway Authorities have a defence if dealing with the obstruction is part of a programme of work. A concern was expressed that this might increase bureaucracy, since local authorities would be likely to involve lawyers in any court related procedure. It was said that this had been a concern when the procedure on obstruction was introduced and that Defra had needed to put aside a large sum to cover the additional burden on the courts, although in the event only a fraction of this was needed.
- 7.18 Another suggestion was that where a SA does not deal with applications within 12 months it should be considered as deemed refusal and the case passed directly to the SoS to determine. This option was discounted since it might encourage SAs to ignore applications and transfer the burden to the SoS.
- 7.19 In conclusion it was agreed that each SA should have a clear policy and procedure for handling applications, and that national guidance should be given to inform this. SAs should draw up their policy in consultation with LAFs and subject to local scrutiny. Complaint should be possible for both applicant and affected landowner where the SA does not follow its published policy. This might be more effective if it were by application for magistrates court order.

A standard for applications

- 7.20 The Group have previously discussed the Winchester decision and noted that applications for a DMMO can fail on a technical defect but can't be refused on lack of evidence. Currently an application need only include a single item of (possibly weak) evidence to start the DMMO procedure. Weak applications can clog up the system by generating work for SAs and adding to backlogs.

² This was brought in under the Countryside and Rights of Way Act 2000, by inserting a new section in Highways Act 1980: section 130A.

This is a particular concern for land owners who will have been notified as part of the application process and should be able to expect its determination in a reasonable timescale.

- 7.21 A possible solution was suggested that all applications should be made via parish or town councils and that these bodies could have a role in filtering applications: they are elected bodies and accountable to the public. However, the suggestion was rejected by the Group on grounds of practical difficulties in involving parishes in vetting applications and achieving a consistent approach.
- 7.22 Another suggestion was made that SAs be given a new power to reject applications that are poorly researched and appear on the face of it to be untenable. It was agreed that this would be reasonable in principle, so that only “duly made” applications are taken forward by the SA³. National guidance would be needed on the use of such a power. A suggestion was made that guidance should avoid a prescriptive formulation on evidence, but should give an indication of the approach to be followed. Alex Lewis (AL) agreed to give some further thought to how an application threshold could be defined. It was agreed that this might be with reference to whether the application is sufficient to establish a prima facie case that rights exist.
- 7.23 There was some discussion of whether rejection of an application as not duly made should rule out further applications for the recording of the same right. A further suggestion was made that there should be a time-limit on resubmission of an application. Concerns were expressed that this would be unjust. If such a bar related to a route, it would mean that the action of one ill-informed member of the public would preclude others from making a successful claim at a later date. If on the other hand it related to an individual’s ability to apply, it would be difficult to make that workable in practice, and it would not deliver any greater certainty in relation to a particular route.
- 7.24 A suggestion was made that rejection of an application as not duly made should be a matter between the SA and the applicant – with notification of the landowner only occurring if the SA accepted an application as duly made. This ties in with another suggested change: that the SA (rather than the applicant, as at present) would notify the landowner of an application. So in this scenario the SA could reject an application as not duly made, but neither the owner nor any other third party would be informed of the application or its rejection. It would remain open to the applicant or anyone else to make a further application relating to the same route, but with additional information. Only if a duly made application was received would the owner be notified and the potential existence of the right become more widely acknowledged as the process went forward.

Negotiation with affected land owners

³ This reflects the approach taken at present with village green applications.

- 7.25 The Group has already agreed that SAs should be able negotiate with affected landowners over how serious conflicts with established land use could be mitigated by changes to the alleged rights. A comment was made that this would only be effective as a way of short circuiting the current DMMO procedure if agreements made between SAs and landowners could not be vetoed.
- 7.26 It was agreed that if the SA cannot reach in a timely fashion an agreement with an owner about the change needed to avoid serious conflict with modern land use, it would simply proceed to conventional consideration of the evidence as to whether the right exists.
- 7.27 The Group then discussed how these proposals might be applied: firstly where there are no concerns from affected landowners; and secondly where a landowner proposes a change to the route applied for.
- 7.28 Where there are no concerns from affected landowners then a suggestion was made that the SA could simply accept the application at face value and proceed to advertise its decision. It was argued that the public should not be able to object to this since the landowner can anyway dedicate a public highway should they wish. A comment was made that the SA would get uncomfortable if there were lots of objections, even if the objections had no locus. Thus a suggestion was made that in this situation (should it ever arise) the DMMO process could be circumvented altogether were the landowner to agree to dedicate the route as a public right of way. A counter point was made that this would be creation of a highway and that legally a highway cannot be created that already exists – hence the idea of recognition agreements as previously discussed by the Group whereby a landowner would recognise rather than dedicate a right of way, and the route would then be added to the map by reference to this as a legal event. The recognition agreement proposal would need primary legislation and a further power could be added to allow for a route to be diverted at the same time. A comment was made that where a highway already exists the preferred approach should be some more direct process to get it recorded, rather than a purported dedication.
- 7.29 The Group then discussed the possible remit for SAs to negotiate with landowners over changes to alleged rights to mitigate serious conflicts with established land use.
- 7.30 Where a suitable diversion is agreed between the SA and landowner it was agreed that it should not be possible for the public to object. A comment was made that it is possible to divert a route within the current legislation by making a concurrent order: in other words making a diversion at the same time as the DMMO. However, the procedure is cumbersome and for the landowner carries the risk that they could accept the DMMO but that the diversion might still be objected to. The proposed new section to

follow section 119 of the Highways Act 1980⁴ is designed to solve this problem by giving a new power to SAs to divert an unrecorded route without the public being able to object.

- 7.31 Where the application is to upgrade an existing route, an argument was made that the public should have a say if a diversion is proposed, for example that would mean the re-routing of an established footpath.
- 7.32 A proposal was made that there should be flexibility to consider changes in status but that a downgrade in status would need to be agreed by the applicant. It was suggested, for example, that SAs should be allowed to consider proposals that would substantially improve the bridleway network in exchange for downgrade in status. Even so, several in the Group felt that downgrade in status could not be justified and would always be against the public interest. A further suggestion was made that it should not be possible to downgrade status below that of bridleway.
- 7.33 It was agreed that width could be subject to negotiation between the SA and landowner, subject to a statutory minimum. The minimum would be linked to status. Where the application was to upgrade an existing route the width could not be less than currently recorded. A suggestion was made that this could be achieved by putative amendment to schedule 12A of the Highways Act 1980. A similar approach was suggested for other limitations such as gates on restricted byways.
- 7.34 An argument was made that SAs could not exercise a power to decide for the public unless it had heard from them. A comment was made that where a proposed diversion had the support of local users it should not be possible for the agreement to be vetoed by people without a direct interest. A suggestion was made that SAs should consult over proposals and have regard to representations but that it should not be possible to veto agreements between the SA and the landowner within the parameters discussed. So this would be a means of short circuiting the DMMO process, subject to a degree of consultation but not objection. LAFs would be unlikely to get involved in every case but should be included in any consultation.
- 7.35 It was agreed that an overriding statutory principle should be that there should be no overall detriment to the public as a result of any change proposed under these procedures - and that guidance on the use of this new SA power would be needed. This might be achieved by virtue of the general duty on highway authorities to assert and protect public rights, or by a further qualification linked to this duty.
- 7.36 A suggestion was made that a time limit is prescribed for negotiations. It was agreed that negotiations should not be open ended but that it should be left in the hands of the authority to

⁴ This proposal is described in MTGPAPER 7.4

conclude when an agreement was not possible taking account of the best use of its resources.

Reasoned objections

- 7.37 The Group then discussed the scope for objections later in the process, after the SA has made and advertised its decision (process steps 11 and 17).
- 7.38 Several process steps are amalgamated in RS's proposed new procedure, following determination of the application (step 5). The SA will advertise its decision and objections can be made against acceptance or refusal of the application. In advertising its decision the SA will write to affected landowners. If it has decided to make an order, the advertisement may take the form of a draft. This is a change from the current procedure and means that any errors can be more easily corrected prior to the order being made/confirmed.
- 7.39 A comment was made that a problem with the current procedure is that all objections, whether or not they are valid, are escalated to the Planning Inspectorate (PINS). This situation is analogous to that previously discussed for applications. It was agreed that only reasoned objections should be allowed and that objectors should be required to spell out their reasons for objection. This would need to be more than dressing up spurious objections by repeating the wording in legislation.
- 7.40 A concern was raised that landowners often do not have resources available to do the archive work needed to object when rights are alleged to exist. In response it was said that under the proposed changes landowners will have been informed early in the process and will be told of the evidence cited in support of a duly made application.
- 7.41 A comment was made that an issue with the current procedure can be that evidence is deliberately withheld. It was commented that it is hard to legislate against this happening – or prove it has happened – but that requiring applications and objections to be duly made would go a long way towards removing any incentive to hold back evidence. A suggestion was made that all parties should be encouraged to make available evidence early in the process and that there should be scope for inspectors to award costs where it is clear that relevant information has wilfully been withheld.
- 7.42 A proposal was made that SA's should be able to disregard irrelevant objections in the same way that PINS can do at present. PINS are increasingly taking a strong line on irrelevant objections but it would be better if this could happen earlier in the procedure. A suggestion was made to spell out more clearly the type of grounds on which objections cannot be made e.g. safety, environment, amenity and security. AL agreed to draft such a list for consideration at the next meeting, informed by the current PINS

guidance. Any limits on objections would need to be made clear at the stage the SA decision was advertised.

- 7.43 A comment was made that the law currently does not distinguish between objections and positive representation. Positive representations should not need to be forwarded to PINS in a case where no objection have been made. It was suggested that where positive representations are made these should be treated as a registration of interest so that people can be notified where objections are sustained and the case passed to the SoS for determination.

Applying the procedural changes retrospectively

- 7.44 A question was asked as to whether the procedural improvements that were under discussion could be made retrospective, in the sense of being applied to applications that are already in the system. It was agreed that unless this were the case, the improvements would fail to address the current problems with SA backlogs . DW reminded the Group of the precedent set in this respect by section 67 of the Natural Environment and Rural Communities Act 2006. He agreed to investigate the legal scope to apply the “duly made” test to applications retrospectively.

- 7.45 The various proposals for reform that had been discussed were agreed and welcomed around the table. The question was put to DW as to whether implementing such an approach would be tenable. DW replied that it would require changes in the present law, and securing a slot for primary legislation might be difficult or take a long time. A legislative reform order (LRO) would be the most likely way of implementing the Group’s proposed reforms in a timely way. Taking this approach would need a strong consensus across the different sectors of interest, and a package of improvements that taken overall would have a deregulatory effect and be in the public interest. The normal timetable for processing a LRO is 18 months, so the earliest timescale for legislative change would be 2-3 years from the Group publishing its recommendations.

Options relating to the cut off for unrecorded rights of way

Introduction

- 7.46 At its meeting on 5-6 May, the Group assessed five options in relation to whether and when the cut-off date should take effect. In the light of this discussion, the secretariat had prepared an options paper for Group members to discuss further with constituents. In summary the options identified were:

Option 1a: 2026 cut-off is implemented, extinguishing unrecorded rights

Option 1b: 2026 cut-off is implemented, extinguishing unclaimed rights

Option 2: 2026 cut-off is scrapped

Option 3a: 2026 cut-off is brought forward to take effect as soon as possible

Option 3b: 2026 cut-off is brought forward to take effect after a one-off process of perhaps six years to secure recording of useful rights

Feedback on the options paper

7.47 Group members gave feedback on the options paper and indicated the option(s) preferred by their sector. Unsurprisingly, no one option was preferred by all Group members. A comment was made that the options were anyway a reflection of each sector's previously held views. Most members referred to the frustration their sector had felt in trying to take a view on these options in isolation, without knowing what procedural reforms the Group was likely to propose.

7.48 In summary, and with this heavy caveat, the feedback was: options 1a and/or 1b were considered second choice by the majority of the Group; options 2 and 3a were either strongly supported or even more strongly opposed; and there was opposition to 3b and also concern over the practicability of this option.

Agreeing a way forward

7.49 After members had given feedback the chair spoke and emphasised that the Group will have strongest influence on Government if it can reach a consensus view on the way forward. A unanimous recommendation from this Group would be hard for any Government to ignore. Much less persuasive would be if the Group were not able to agree or if it decided to present Government with a range of options.

7.50 A suggestion was made that doing away with the cut off would be counter to the Guiding Principles, in that these state that there should be certainty: no cut off, no certainty. A reply was made that the issue the Group had been asked to address was what to do about the cut off date and that that removing the 'sword of Damocles' had been advocated from the beginning. It is difficult for users to discuss certainty when existing backlogs of claims are not being addressed: for example 230 outstanding applications in Staffordshire; Herefordshire's estimate of 10 years to process their current 100 applications resourced at their current level of 2 staff.

7.51 A suggestion was made that the Group have identified a number of good ways of improving the procedure for handling claims and that these should be recommended to Government. The cut off provision should be left as it is (i.e. uncommenced) for the time

being, and looked at again in say 5 or 10 years time once the improvements have had time to get the claims determination system working properly and the current backlogs cleared. This was agreed. If the proposed process improvements are implemented and have the desired effect, the Group would expect the cut off date to be commenced with appropriate saving provisions and exemptions. These might include routes featured on the Street Works Register or covered by duly made applications for which processing is not completed by the cut off date.

- 7.52 A comment was made that the new proposal is the best option for mitigating against the risk of a pre-cut off claims rush, a major concern for landowner interests. Landowner concern over a pending applications will also be lessened if there can be effective negotiation over claims.
- 7.53 A suggestion was made that there should be a time limit beyond which a claim cannot be resubmitted, for example 5 years. In response it was said that this was not needed because it is implicit in the cut off provisions. A further comment was made that the cut off is for routes to be recorded on the definitive map and so the fact that a duly made application had been made would not currently protect the application unless it was processed and added to the map ahead of the cut off date. It was agreed that this was correct but that there is an option for regulations on this point and that it is implicit from Defra policy that it would do this.
- 7.54 In the situation where the SA is aware of a route but no application has been made, it was suggested that the SA could resolve to make an order. This would be an administrative act whereby the SA proposes to make an order in the future. A concern was raised that this would need to be a transparent process. A parallel was suggested with commons registration where an extra six month window was allowed after the closing date for applications during which authorities could review the situation and address any outstanding issues before the process was formally closed. This would follow the precedent of a similar window at the end of the original commons registration process, in 1970.

Other suggestions

- 7.55 It was commented that a number of other suggestions for process improvements had been made, either to or by the Group but also in other forums, and that the Group should consider whether adopting any of these suggestions might enhance its agreed recommendations. Mike Walker (MW) agreed to compile a list of suggestions made by the local authority sector. Some examples were quoted:
- a. A power to SAs to sever an order and so progress with unopposed routes or sections of routes if appropriate: this can only be done by the SoS at present.

- b. The cost of advertisement of SA decisions could be reduced if this could be by a much shorter advert, linked to details on a website.

7.56 The Group had also previously resolved to discuss further the effect of the Andrews judgement, to consider whether any change in the law is required to confirm the validity of useful public rights actually awarded under the 1801 Inclosure Act.

Actions

7.1 AL to give further thought to how a threshold for duly made applications might be defined and for the secretariat to circulate to the Group

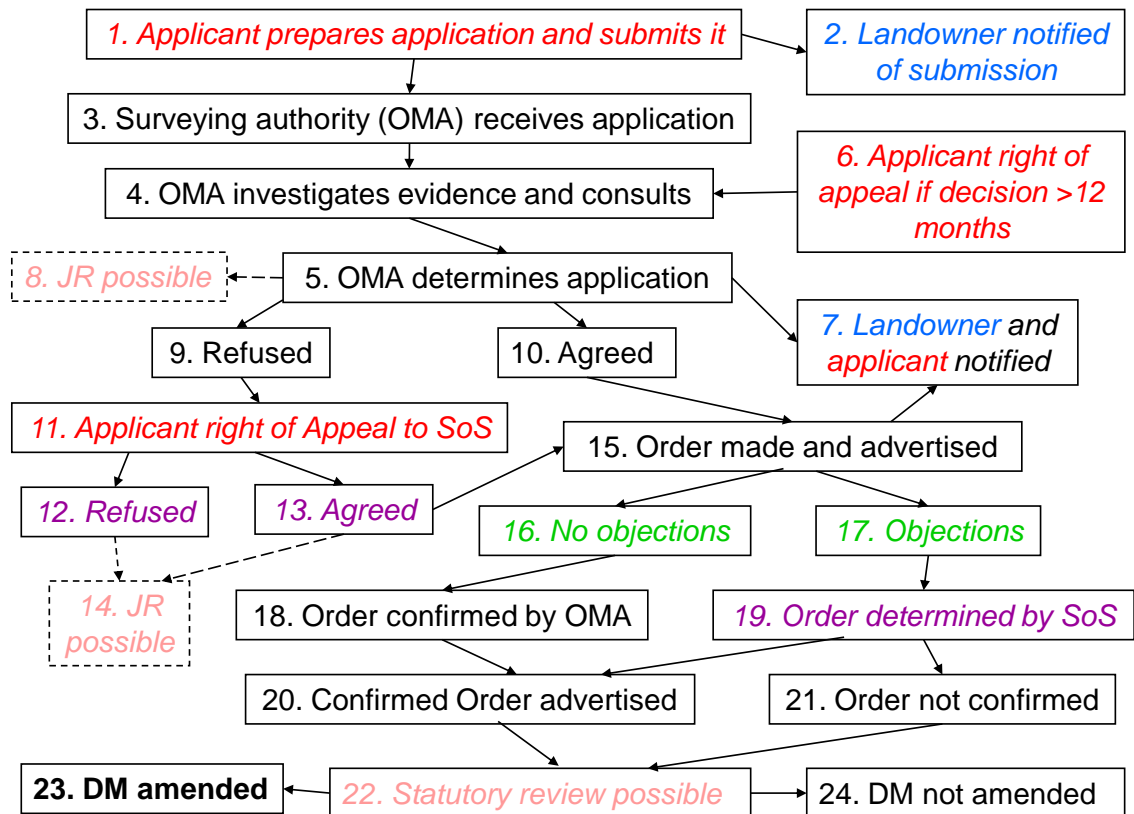
7.2 AL to propose a list of factors to which objections to an order could not relate, drawing on existing PINS guidance.

7.3 DW to investigate the scope to make the threshold test for applications apply retrospectively.

7.4 MW to compile a list of other process improvements that have been suggested by local authority sector and might be included within the reform package.

7.5 Secretariat to prepare a paper setting out the agreement over the cut-off and with an annex outlining the procedural reforms agreed by the Group. This paper would be an outline for Group members to share and discuss with constituents over the summer. The Secretariat will initially prepare a draft of this paper for comment by the Group before finalising for wider circulation.

Annex 1. Current DMMO process



Annex 2. Flowchart for proposed process improvements presented at the meeting. Numbered items are referred to in the meeting notes.

