

Gloucestershire County Council

Land Drainage (Consenting and Enforcement) Regulatory Powers Protocol 2016-17

Contents

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| Contents | 1 |
| 1. Partnership Statement | 1 |
| 2. Introduction | 2 |
| 3.Consenting - Dealing with enquiries for consent orders on ordinary watercourses | 3 |
| 4. Enforcement..... | 6 |
| Step 1 – Action upon receipt of an enquiry / complaint / observation | 6 |
| Step 2 – Initial investigations..... | 6 |
| Step 3 – Initial action | 6 |
| Step 4 – Reminder | 7 |
| Step 5 – Prepare and Issue notices | 8 |
| Step 6 – Follow up of enforcement notice | 9 |
| Appendix A – Forms and letter templates | 11 |

1. Partnership Statement

- 1.1 Gloucestershire County Council, (the County Council), Cheltenham Borough Council, Cotswold District Council, Forest of Dean District Council, Gloucester City Council (the City Council), Stroud District Council and Tewkesbury Borough Council jointly support this protocol in relation to all Consenting & Enforcement powers on ordinary watercourses¹ bestowed upon the County Council as a Lead Local Flood Authority (LLFA) under the Land Drainage Act 1991 as amended by the Flood & Water Management Act 2010.

¹ Section 6(4) of the Flood and Water Management Act defines an ordinary watercourse as ‘a watercourse that does not form part of a Main River’

2. Introduction

- 2.1 From the 6th April 2012 paragraphs 26, 27, 31, 32(1), (2), (3), (5), (6) & (7), 33 & 34 of Schedule 2 of the Flood and Water Management Act 2010 (the Act) are now in force in both England and Wales. These paragraphs amend the Land Drainage Act 1991 (the 1991 Act).

- 2.2 The amendments transfer the Environment Agency's responsibility for flood defence consents and enforcement powers under sections 23, 24 and 25 of the 1991 Act and remove the powers to require works for maintaining flow of watercourses from District Councils (section 25 LDA). They also remove the following powers from the Environment Agency in relation to ordinary watercourses
 - 2.2.1 concurrent flood risk management powers (section 8 of the 1991 Act);
 - 2.2.2 default powers in relation to flooding (section 9(1) of the 1991 Act); and
 - 2.2.3 enforcement powers in relation to watercourse, bridge or drainage maintenance obligations (section 21 of the 1991 Act);

- 2.3 In addition they amend the prohibition on obstructions to ordinary watercourses to preclude the erection of any culvert without prior consent, and allow the relevant authority to attach reasonable conditions to a consent issued under section 23 of the 1991 Act.

- 2.4 Following meetings with District representatives on 8th March 2012, and obtaining the Gloucestershire County Council Lead Cabinet Member approval on 22nd March 2012, a delivery model within Gloucestershire for delivering the amendments to the 1991 Act was agreed, for a 12 month trial period. The 12 month trial period commenced on the 6th April 2012, and terminated on the 5th April 2013. Following this 12 month trial period the County Council, in partnership with the District Councils, have determined the most appropriate delivery model for each proceeding 12 month period.

- 2.5 In some districts, Gloucestershire County Council will delegate the responsibility for administering certain sections of the 1991 Act, using Section 13(4) of the 2010 Act, which states that 'a risk management authority may arrange for a flood risk management function to be exercised on its behalf by – another risk management authority'. For the purposes of this protocol, those risk management authorities to whom the County Council have delegated responsibility, will be referred to as the 'relevant authority'. The agreed delivery model and delegated powers for 2016-17 are illustrated in Table 1 below.

| Name of District | Relevant Authority for administering the following functions under the 1991 Act | | | Address | Telephone number |
|------------------|---|--|--|---|------------------|
| | Section 23 issuing consents for works on ordinary watercourses | Section 24 undertaking enforcement where works are completed on ordinary watercourses without a necessary consent, or in contravention to consent conditions | Section 25 undertaking enforcement to maintain proper flow of water within ordinary watercourses | | |
| Cotswold | Cotswold District Council | Cotswold District Council | Cotswold District Council | Environment and Commercial Services West Oxfordshire District Council Woodgreen New Yatt Road Witney OX28 1NB | 01993 861333 |
| Cheltenham | Cheltenham Borough Council | Cheltenham Borough Council | Cheltenham Borough Council | Municipal Offices Promenade Cheltenham Gloucestershire GL50 9SA | 01242 774984 |
| Forest of Dean | Shared between Tewkesbury Borough with Forest of Dean Council | Shared between Tewkesbury Borough with Forest of Dean Council | Shared between Tewkesbury Borough with Forest of Dean Council | Forest of Dean District Council Council Offices High Street Coleford Gloucestershire GL16 8HG | 01594 812263 |
| Tewkesbury | | | | Council Offices Gloucester Rd Tewkesbury Gloucestershire GL20 5TT | 01684 272168 |
| Gloucester City | Gloucestershire County Council | Gloucestershire County Council | Gloucestershire County Council | Flood Risk Management (Strategic Infrastructure) Gloucestershire County Council 1st Floor (West), Block 5 Shire Hall Westgate Street Gloucester GL1 2TG | 01452 427472 |
| Stroud | Stroud District Council | Stroud District Council | Stroud District Council | Water Resource Engineer Environmental Health Service Ebley Mill Stroud Gloucestershire GL5 4UB | 01453 754480 |

Table 1 Overview of which risk management authority will administer the relevant sections of the LDA

3. Consenting - Dealing with enquiries for consent orders on ordinary

watercourses

- 3.1 Request for consents will need to be dealt directly by the respective district council as outlined in Table 1. The contact details for each district are included.
- 3.2 A summary of the consent application process to be followed by the Consenting and Enforcement officers is indicated below and in Figure 1.
 - 3.4.1 On receipt of the above enquiry a case file will be opened, a unique number allocated and the master spreadsheet populated.
 - 3.4.2 The enquirer will be contacted and an application form with guidance information will be sent (Appendix A: CON-001, CON-002). A site inspection will be arranged if required, usually within 5 working days (and in any event within 10 working days), and a decision made upon whether the enquirer is advised to submit a consent order application or other advice is offered.
 - 3.4.3 Where no consent is required, a letter will be sent (Appendix A: CON-004) informing the enquirer of that decision and a copy of the letter placed in the case file.
 - 3.4.4 Where it is considered that consent for the proposed works is required the applicant can proceed with application on the form previously sent.
 - 3.4.5 The consent application form and associated guidance notes will be available on Gloucestershire County Council, which will allow applicants to download the application form and submit to the relevant authority directly.
 - 3.4.6 Upon receipt of an application the consenting officer will check the necessary information and payment has been supplied. If the application contains insufficient information or fee² it should be rejected and returned to the applicant, advising re-submission (Appendix A: CON-009). All applications will be acknowledged by letter within 5 working days (Appendix A: CON-003)
 - 3.4.7 Any request for consultation to other agencies should be sent within 5 working days of receipt of the application.
 - 3.4.8 All determinations for consent must be completed within 2 months of receipt of the application. The date of application is the day on which the application is made or when the liability to pay the consent fee is discharged.
 - 3.4.9 Refusals of consent should be notified to the applicant by letter (Appendix A: CON-005) with information about their right to appeal against the decision.
 - 3.4.10 If consent is to be granted this should be done so by letter (Appendix A: CON-006, CON-007) requesting a schedule of works so that completion of the works within the terms of the consent can be assessed by the consenting authority.

² The consent application fee will be £50

- 3.4.11 On completion of works they should be inspected to ensure conformance. Non conformance should be addressed with the enforcement procedure (detailed below). If the works conform the applicant should be notified by letter (Appendix A: CON-008) and the matter closed.
- 3.4.12 All time allocated to the consenting process should be recorded on the master spreadsheet.
- 3.4.13 The relevant authority shall be solely responsible for replying to enquiries relating to flood and drainage consents in CON29 and CON29O (Land Charge Search enquiries) for the area for which they are the responsible authority for consenting and enforcement. For the avoidance of doubt the District Council will be held liable for any failure to disclose such relevant information relating to flood and drainage consents in respect of any address in their relevant area.

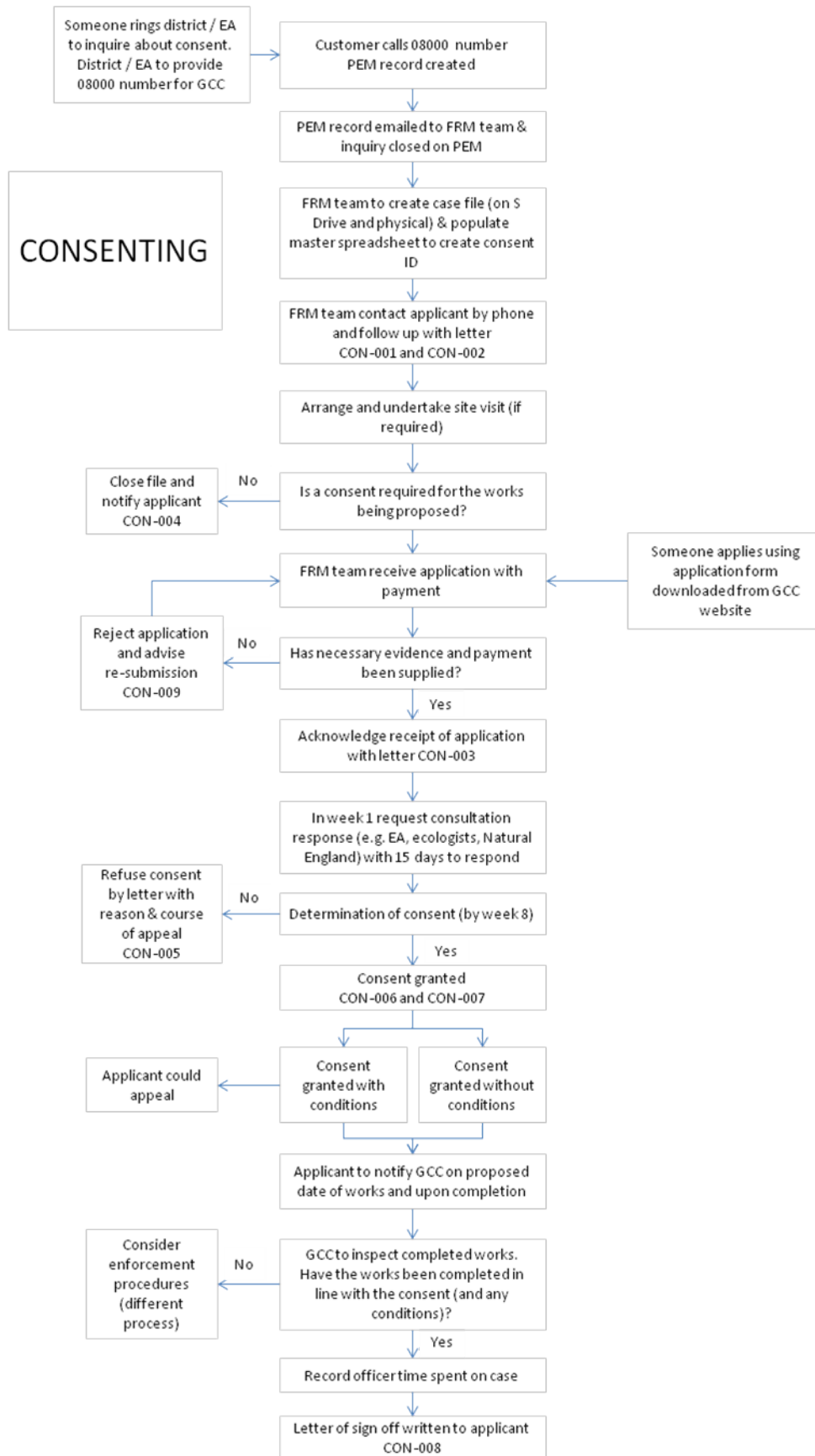


Figure 1 Flowchart of the consenting process

4. Enforcement

Step 1 – Action upon receipt of an enquiry / complaint / observation

- 4.1 Upon receipt of an enquiry or complaint (from a resident, for example) or by observation of any risk management authority; a case file will be opened, a unique reference number will be assigned, and the master spreadsheet updated.

Step 2 – Initial investigations

- 4.2 The relevant authority should identify the landowner. If there is doubt as to the landowner this may be determined by land searches through the Land Registry. The landowner should be contacted to arrange a site visit. All contact should be followed up by written correspondence (Appendix A: ENF_001 or ENF_002). A Section 16 notice under the Local Government (Miscellaneous Provisions) Act 1976 should also be issued to seek confirmation of the landowner. Initial contact should be made with the landowner within 5 working days (and in any event 10 working days) from receipt of the initial enquiry / complaint / observation.

- 4.3 If the problem is categorised as urgent by the receiving authority, attendance will be arranged as soon as possible, usually within 24 hours (and in any event within 72 hours).

Examples of matters requiring urgent action may include:

- *where there is immediate or imminent flooding of property;*
- *where there is a potential hazard to people or a risk to life, and/or;*
- *where there is a potential environmental pollution incident.*

- 4.4 In the event that immediate urgent action is deemed necessary, arrangements should be made to send appropriate services to the scene without delay. If the situation appears to be life-threatening or dangerous the public emergency services should be contacted. Wherever possible, Districts acting as the relevant authority on behalf of the County Council should contact the County Council prior to undertaking emergency action. However, it is recognised that in some life-threatening or dangerous situations this may not be possible.

- 4.5 At any stage of the enforcement process, where there is no requirement for written correspondence, a file note should be created to document all conversations, decisions and actions undertaken.

Step 3 – Initial action

- 4.6 Following a site visit with the relevant landowner the relevant authority should determine whether further action is required.

- 4.7 Upon inspection, if it is considered that the matter is not the cause of the drainage problem or is trivial in nature, and no action is to be taken or required, the complainant will be advised accordingly. In any event, a written communication will be sent to the complainant explaining the reason why no action is to be taken. The riparian owner should also be informed, as appropriate. (Appendix A: ENF_009)

Examples of matters not requiring action may include, for example:

- *minimal silting of watercourse;*
- *slight vegetation overgrowth, or;*
- *small quantity of debris.*

- 4.8 Where it is considered that action needs to be taken by the relevant landowner, person and/or Agency responsible, the following steps will be taken:

4.8.1 The person responsible will be contacted, the problem explained and remedial action requested. If the person is contacted other than by letter, then a letter detailing the salient points of the matter should be sent to him/her. (Appendix A: ENF_003).

4.8.2 The letter should be drafted in accordance with the Land Drainage Act 1991 and explain the problem and the reason for the action being required, as well as detailing the work needed to be carried out. A map clearly showing the location and extent of the problem will be included with the letter.

4.8.3 Request that the work be completed within four weeks of receipt of the letter, where the matter is straight forward. However there will be occasions when it is necessary to extend the period of compliance to accommodate exceptional circumstances e.g. flood conditions, or bird nesting season. The time allowed should be reasonable in the circumstances.

- 4.9 NB: The extent of the work required must be proportionate to the scale of the problem (this may be challenged in an appeal against an enforcement notice).

Examples of matters where action is considered appropriate, may include, for example:

- *a large fallen tree across watercourse;*
- *fencing or other structures causing obstruction;*
- *in-filled ditch, or;*
- *collapsed bank reducing capacity.*

- 4.10 **Every effort will be made by the relevant authority to resolve the situation by means of negotiation with the person responsible and obtain compliance with a request to satisfactorily undertake the work required before legal redress is sought.**

- 4.11 Advice regarding what work is needed will be given at any time and take account of local issues that may legitimately cause delays. Advice should be confirmed in writing if not given in writing in the first instance.

Step 4 – Reminder

- 4.12 If a positive response to the initial letter has not been received within four weeks (or time allowed to complete work), and on inspection no work has

been satisfactorily undertaken as required, there are two potential courses of action:

- 4.12.1 continue to negotiate with the landowner, through site visits / telephone calls, ensuring that all correspondence should be followed up via written correspondence, or;
 - 4.12.2 a formal reminder letter could be issued (Appendix A: ENF_004) giving the landowner 14 days to respond positively before enforcement action is taken.³
- 4.13 Should the second course of action be taken by the relevant authority there are a number of important points to consider, including:
- 4.13.1 Districts acting as the relevant authority on behalf of the County Council should contact the County Council to inform them that a reminder letter is going to be issued.
 - 4.13.2 The matter should be discussed with the County Council to obtain their sanction for enforcement action to be taken, if necessary. The County Council may consider that further actions are required, which when completed will allow the matter to proceed. However, if there is good reason why enforcement action may not be taken the case must either be resolved by way of negotiation or closed.
 - 4.13.3 Consideration should be given to all of the facts of the matter, before proceeding with the request for action that may later lead to the consideration of enforcement and possible prosecution proceedings.
- 4.14 Some examples are provided below of typical factors which may influence for or against action.

Examples of factors that may influence action:

- *Are any properties at risk of flooding*
- *The problem is serious*
- *All other attempts to remedy the situation have failed*
- *Deliberate and obvious action by landowner to obstruct watercourse*
- *The obstruction or problem has occurred fairly recently*
- *Support of parish council, community, etc*

Examples of factors that may influence against action:

- *Obstruction has been in place for a number of years*
- *Landowner is elderly, infirm or has serious illness*
- *Action has no community support*
- *Other options are available*

Step 5 – Prepare and Issue notices

- 4.15 If a positive response to the letter of reminder has not been received within 14 days from the reminder letter, and on inspection no work has been

³ The reminder letter should also include an official land ownership request under Section 16 of the Local Government (Miscellaneous Provisions) Act 1976, if this has not already been completed

satisfactorily undertaken as required, the relevant authority will need to consider whether an enforcement notice under section 24 or 25 of the LDA should be prepared. Where a District Council is acting as the relevant authority for enforcement on behalf of the County Council, a review meeting should be held with the County Council's flood risk management team to discuss whether an enforcement notice should be served.

- 4.16 Using letter template reference ENF_005, ENF_006 or ENF_007 (Appendix A) a formal notice should be prepared, The Notice will include, the nature of the works to be carried out and the period within which they are to be carried out, and the right of appeal to a magistrates' court within 21 days of service of the notice (NB: right of appeal only applied to section 25 notices).
- 4.17 A letter will accompany the Notice and inform the responsible person that in the event of their failure to satisfactorily undertake the work, the relevant authority may carry out the work themselves and recover from the person responsible the expenses reasonably incurred in doing so. It shall also be stated that without prejudice to their right to exercise that power, that person shall be guilty of an offence and liable, on summary conviction, to a fine not exceeding level 5 on the standard scale for section 24 notices and a fine not exceeding level 4 on the standard scale for section 25 notices

Step 6 – Follow up of enforcement notice

- 4.18 Following service of the Notice, one of three things will happen:
 - 4.18.1 the responsible person will carry out the work to the satisfaction of the authority – if the responsible person complies with the Notice and completes the work to the satisfaction of the relevant authority, the relevant authority shall write to them confirming the closure of the case and the end of the action (Appendix A: ENF_008);
 - 4.18.2 the responsible person may appeal the Notice (NB: right of appeal only applied to section 25 notices) – in such cases the County Council and the District Council (where they are the relevant authority) will work together to prepare evidence for the Magistrates, in collaboration with the County Council (and District Council) legal teams, and;
 - 4.18.3 the responsible person will fail to carry out the work to the satisfaction of the relevant authority
- 4.19 Where the responsible person fails to carry out the work to the satisfaction of the relevant authority there are three options available:
 - 4.19.1 the County Council and the District Council (where they are the relevant authority) decide that no further action will be undertaken – a letter should be sent to the responsible person (Appendix A: ENF_009);
 - 4.19.2 the County Council and the District Council (where they are the relevant authority) arrange for the work to be completed under section 24(4) or section 25(6)(a) and agree the mechanism for recovering costs, and;.
 - 4.19.3 the County Council or the District Council (where they are the relevant authority) commence prosecution action under section 24(3) or section 25(6)b *As it may be considered appropriate to commence prosecution action in the Magistrates Court at various stages of the above process due regard must be given to the Rules of Evidence (Police and Criminal*

Evidence Act) and the Crown Prosecution Service Guidelines from commencement of the process.

- 4.20** For the avoidance of doubt with regard to this agreement District Councils shall not undertake legal proceedings on the County Council's behalf unless:
- 4.20.1 the District Council has agreed to do so and is properly authorised to do so by the County Council; and
 - 4.20.2 the appropriate written consent from the County Council is obtained; and
 - 4.20.3 any other relevant legal agreements between the Parties have been entered into.

Appendix A – Forms and letter templates