



Northern Ireland
Assembly

Committee for Agriculture and Rural
Development

OFFICIAL REPORT (Hansard)

Reservoirs Bill: DARD (Rivers Agency)
Officials

29 April 2014

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:

Mr Paul Frew (Chairperson)
Mr Joe Byrne (Deputy Chairperson)
Mr Thomas Buchanan
Mrs Jo-Anne Dobson
Mr William Irwin
Miss Michelle McIlveen
Mr Oliver McMullan
Mr Ian Milne
Mr Robin Swann

Witnesses:

Mr Kieran Brazier	Department of Agriculture and Rural Development
Mr David Porter	Department of Agriculture and Rural Development

The Chairperson: Gentlemen, you are very welcome. We will do exactly the same as we did at our previous meeting, so this session will be very similar in style and fashion. I will start with the audit issue. I know that we covered that to a certain extent at our last evidence session on 8 April, but some issues are still outstanding. We had some concerns then, so is there anything that you want to add at this stage before we move on?

Mr David Porter (Department of Agriculture and Rural Development): Thank you, Mr Chairman, for the opportunity to discuss the Reservoirs Bill with you. We attended all the evidence sessions and have been thinking long and hard about some of the issues — in particular, the need for an audit. At our previous session, it was accepted that the ideal would be to be in a position to know the condition of all reservoirs and to get to the point at which we could then inform any further decisions. That is not in question. What really is in question in our minds is how we achieve that: first, within the policy framework that has been agreed by the Executive and, secondly, in a way that does not shift the responsibility, or will continue to confirm that responsibility, with the reservoir manager but in a way that facilitates those issues and gets the information.

The last time I was here, I introduced the possibility of some sort of grant aid, at least to commence the requirements of the Bill. We have had some further discussions and thoughts on that. That is still in our minds. It is still caveated in that we have to take the issue to the Minister. We have to seek approval for it through the Department and also from the Minister. If that were a way to help to take the Bill forward, we would certainly be keen to explore it, because it would put us in a much better-informed position.

That leads on to the question of what to do with the subsequent elements of the Bill and whether you leave the Bill as it sits at the moment. We have identified that, if you simply introduce the Bill and the requirement is only for an inspection, an inspection may not necessarily give you the costs, because an inspection report does not necessarily have to give you that. All an inspecting engineer has to say is, "Here are the defects". The obvious thing for a reservoir manager or owner to say is, "Tell me the cost as well", but there is no requirement to have that under the legislation.

We have one or two things in our minds. One is the possibility of adding a number of additional clauses that introduce a first inspection. That first inspection allows a qualified reservoir inspector or engineer not only to look at the structure but to quantify the indicative costs. That would then allow us to have not only the reports on the condition but the bit that we feel is missing: the cost element. That would allow us to be informed of whether there is a big or a relatively small problem, and it would give us some idea of how we could go forward. We need to look at the clauses to see whether that is the way forward or whether we simply introduce it using the current provisions. We need to work through those with our drafters to see what the best way forward is. On the basis of that, and if that is acceptable to the Committee, we will take that away and seek to redraft some of the clauses, then offer those back to you for your clause-by-clause consideration.

The Chairperson: That would be welcome. It would give the Committee much more with regard to quantum and quantity to be able to measure the problem. Do members want to ask questions on the specific issue of an audit, the initial inspection and measuring the problem?

Mr Swann: If it is possible to do that, is there any way that we could delay the introduction of further parts of the Bill, with maybe a delaying clause or something along those lines, so that the rest of the legislation does not come into effect until that audit is completed?

Mr Porter: I refer you to clause 120(1)(a). On commencement, the sections mentioned there — 1, 2, 5, 6, 39, 88 to 92, and so on — will come in when the Bill gains Royal Assent. A commencement order is then required for the other provisions, and regulations are required for some. We will undertake that work to see whether that list remains valid under what we are saying, or whether you would need to take some of those items out so that they do not come in at the point of Royal Assent. What exactly would be in the commencement order? You can stage the commencement order to do exactly what you have said, but it may be useful to make that clearer, either in the clause or in the documentation, so that everybody is clear about how we expect it to go forward.

Mr Kieran Brazier (Department of Agriculture and Rural Development): That clause brings in a natural pause, but perhaps the pause is not constructed in the way that we want it to be, now that we have considered the needs of the Agriculture Committee. We will look to do that and make sure that the main components are mentioned so that, when the Bill comes in, those clauses can be enacted immediately.

The Chairperson: Are there any other comments on the audit and the discussion that Robin has started?

Mr Byrne: My comment ties into the same issue: consultation with the private or third sector. There has been a feeling among some private owners, and certainly among third sector owners, that there has not been sufficient consultation. There is an open question about that. Given that there is a sense of grievance among those managers, be they in the private or third sector, it makes sense to address that issue. I welcome the comments about possibly having some delays in getting the overall strategy teed up. Can either of the witnesses explain what the issue is in trying to seek a pot of money to carry out the required audit benchmarking exercise?

Mr Porter: I need to take this back to the Department and seek approval, and we will then put that as a recommendation to the Minister. We will put it in the context of the negotiations that we have had on scrutiny. We all know that things are tight: in the Department, certainly, in the years to come, there is not a lot of money. However, we are talking about a relatively modest sum, at least to start the process. To be clear: we are not talking about construction work because this relates only to inspections. Based on our figures, an inspection report costs £2,250, and that is a reasonable enough figure. If it costs roughly £2,000 for each reservoir, we are not talking about millions of pounds; it would cost £100,000 to £200,000. That is the type of scale. I would be relatively comfortable with taking a bid to the Minister for that.

Mr Byrne: I welcome that statement.

This exercise is largely EU-driven in order to meet EU requirements and regulations. I would have thought that the Department could have applied directly to get a grant to cover the costs of the quantum of the initial benchmarking programme.

Mr Porter: We can explore that. We have given some thought to what a grant scheme would look like, and we also need to recognise that some people have been very conscientious and already have reports. I would hate to be in a position whereby we grant-aid something that is very specific and then the people who have put their house in order miss out on that benefit.

We are proposing a grant that would give initial assistance of a certain amount per reservoir as opposed to a fee for a certain activity. Therefore, if people did not have their initial inspection, it would cover that cost, but if they have already had their initial inspection because they were conscientious, they may be able to use the grant for other requirements in the Bill — for instance, employing a supervising engineer or doing minor remedial works. It would be the same amount of money, but it could be used in a slightly different way. We do not want to penalise conscientious people who have put their house in order.

The Chairperson: Sorry, Joe, have you finished?

Mr Byrne: There would be a better chance of getting a comprehensive package that covered every initial audit of the entire infrastructure of waterways or reservoirs. I can see how a case can be made for that, whereas, with individual issues or individual reservoirs, it is more complicated and cumbersome.

The Chairperson: You talk about a grant scheme for reservoir managers or owners for a certain piece of work, and I take your point about fairness and the fact that some people may have already done that work. If the scheme were Department-led and done in-house, you could ask reservoir owners whether they had done the initial work and, if you were assured of that, that would reduce the burden or unfairness because you would be able to use that exercise as part of your work?

Mr Porter: We can certainly look at that to see whether we can separate out those who have a report. The issue would be that they will have paid for it out of their own pocket, so they may view it as unfair. If, like others, they had waited, the report would have been funded, and they would not have had to pay for it out of their own pocket. We do not want to penalise conscientious people.

The money could be per reservoir to help with the initial implementation of the Reservoirs Bill, given that, for the vast majority of people, it will be their first inspection. We know the costs of a first inspection, and we would bid for a figure that is very similar to that. However, if people have already had that first inspection, I do not want a situation whereby they would say that they were conscientious and had put their house in order, had abided by the principles of what reasonable owners should do, but were getting no financial help because they had funded the inspection themselves before any grant was available.

I will build on Joe's point about private owners. We would try to get such owners up to speed, engage them with the process and encourage them with a time-bound grant. I am talking off the top of my head, but moneys could be available for two years, for instance, after the Bill is commenced, which would allow time for us to get all the inspection reports. We do not want to be in a position whereby, two years in, we know that 140 reports have been submitted, but we cannot get the last 11. We do not know whether those 11 are not being done because they have big problems that would slow any potential for a capital grant scheme or whether they are not being done because there is no issue with them. If the grant was time-bound, that would encourage private owners to come on board, get the work done and move forward.

The Chairperson: Robin Swann is next.

Mr Swann: Are you moving on to general questions, Chair?

The Chairperson: Yes, I am; sorry.

Mr Swann: Clause 120 relates to commencement. Subsection (2) states:

"The other provisions of this Act come into operation on such day or days as the Department may by order appoint."

That control will still rest with the Department, and there will be no reference back to the Committee or the House.

Mr Porter: We need to look at that. We might change some provisions from a commencement order to regulation. I will leave some of the issues that we talked about until we come to the operational requirements. We have had some thoughts on that, and we may be able to change some of the wording from being so prescriptive to be by regulation. That would allow us to come back to you for discussion.

Mr Swann: That ties in with an issue that comes into immediate effect after Royal Assent: the definition of reservoir managers. You will be aware of the Committee's concerns as to who should or could be a reservoir manager, especially for community and voluntary groups managing lakes or parts of lakes for regulation purposes. The Committee was keen that the responsibility of a reservoir manager should rest with the reservoir owner rather than somebody being designated to do that. That has already been accepted by the Minister for Regional Development for NI Water. No matter who is operating a reservoir, NI Water is still the reservoir manager.

Mr Porter: That is absolutely unquestionable. Northern Ireland Water is on record in the Committee for Regional Development and in this Committee as saying that it is the reservoir manager. If it leases a reservoir to somebody else, it remains the reservoir manager. It will not transfer that risk to somebody else. In that case, there is no possibility of a misunderstanding. There is the possibility of a misunderstanding if a lease is not clear. We said previously that community groups should revisit their leases to make sure that it is clear where responsibility lies. We cannot write people out of the legislation. The legislation defines who the reservoir manager is as opposed to who is not the reservoir manager. If you are any of these, you are the reservoir manager, and you are quite correct to say that the default is the owner.

Mr Brazier: We have taken legal advice, and the Bill reflects the common law position, which is that the person who mainly controls or manages a reservoir is the person responsible, not the owner.

Mr Swann: Maybe we do not have the complete scenario. Do some reservoirs have multiple contracts or users?

Mr Porter: We have come across examples of multiple owners who own different bits of folios. That is covered in clause 8, whereby there is a duty on multiple reservoir owners to cooperate. They can appoint a single reservoir manager and can then apportion responsibility. That requirement means that it is more than encouragement, and there is a duty on them. In certain cases, that may mean that managers need to sit down, have a conversation and come to an agreement, because the law requires them to do so. There is a duty on them to cooperate in a manner that ensures reservoir safety.

Mr Brazier: That could be quite complicated. Ten farmers, for example, could have fields that run down to reservoirs. Under the Bill, each farmer or landowner would have a responsibility for the reservoir. They would have to get together and nominate one reservoir manager who would act on behalf of all of them. It would not remove the responsibility from any individual, but the reservoir manager would act on behalf of all of them. The manager would probably be the person who is responsible for the majority of the reservoir, particularly the impoundment.

The Chairperson: What about the competency of a reservoir manager if it is a cooperative of owners and one person is designated? There are similar scenarios in fishing clubs whereby someone could be the best fisherman in the world but would not have a clue how to manage a reservoir. There is a competency issue, and that will not prevent something from happening.

Mr Porter: No, which is why the role of supervising engineers is so important. Those people are competent, and they will give day-to-day advice, if required, on their visits. The way in which that relationship will develop is that an engineer will start by calling out a couple of times and explaining the risks that are associated with the reservoir and what you need to look for on a day-to-day basis. He or she will set up the paperwork system, and will maybe set up a water monitoring situation so that

people do not need to be competent, provided they can then follow that instruction. When a supervising engineer is not content that those works have been done correctly, he or she will want to be assured that that is in place, either by offering the service or by giving further training to someone else to carry out that role.

It sounds very elaborate to talk about training people in competency, but I need to stress that these are fairly routine inspections. You examine whether there is any change in the crest level and whether any wet spots have appeared that are different. You make sure that the spillway remains clear and that nothing is blocking it, and perhaps you take a dip of a water level, write that down on paper and make sure that it is recorded. These are relatively routine and rudimentary functions, but they still need to be done. A supervising engineer would expect that to be done and will work with the reservoir owner or manager to make sure that it is in place.

Committee suspended for a Division in the House.

On resuming —

The Chairperson: I am sorry for the interruption. We were talking about reservoir managers. David, you were cut off in mid-flow. I do not know if you can pick that up again. I had asked about the issue of competence. Robin, I do not know if you had come in on the back of that. I do not remember.

Mr Swann: I do not remember either.

The Chairperson: You were trying to reassure us about the supervising engineer and inspections and working with the manager to bring him up to a certain capacity of training and engagement. I think you said that that will be sufficient.

Mr Porter: Absolutely. That is a key role for the supervising engineer. We almost need to differentiate the roles of an inspecting engineer and a supervising engineer. The inspecting engineer appears once every 10 years and does his duty on that day. That is the big inspection. The supervising engineer almost treats the structures as if they are their own. The supervising engineer David McKillen was here giving you evidence about building a relationship with the reservoir manager, and that relationship changes over time as the reservoir manager becomes more competent and comfortable with carrying out duties. The supervising engineer then has to do less and less, and they can maybe then go down to two inspections a year or potentially one inspection a year on the medium-impact structures. They will not accept shoddy records, and they will not be able to do their annual statement in the absence of any other evidence. They will ensure that reservoir managers understand that role and will train them up if need be.

The Chairperson: Robin, I know that this is your issue, so just chip in at any time if you feel that you need to. When does the liability, competence or responsibility go on to the supervising engineer as opposed to the manager?

Mr Porter: In law, the reservoir manager is responsible. Duties are defined for the supervising engineer, and that is his role. It is quite stringent because it states that they are appointed "at all times". That does not mean that they have to camp out on the structure, but they do have to be readily available at all times. I can tell you that supervising engineers take that responsibility very seriously. For instance, even if they go on holiday for a fortnight, they will deputise someone to that role, because, if an incident happens, they have to be available at all times. That is what the 1975 Act says in England, Scotland and Wales, and we have replicated that level of responsibility and commitment in our Bill.

The Chairperson: No other members have questions on the issue of reservoir managers. Is there anything else that you want to add on reservoir managers that you keen to tell us about, perhaps because we have not picked up on it, or are you content?

Mr Porter: I think that we are content on that area.

The Chairperson: OK. I am going to bring in Tom to discuss the operating requirements.

Mr Buchanan: Why is the Department still so struck on the fact that high-risk reservoirs require a minimum of two inspections every year? If an inspection is done, something is identified and work is

carried out, why would there be a need for two or more inspections every year? We feel that one inspection would be ample in any one year when it has already been inspected and work has been done to the standard required. Why do we need a minimum of two inspections a year?

Mr Porter: I will explain the rationale for that. There is, however, a discussion to be had on that point because we are trying to ensure that, as we go through this scrutiny, we are not using a sledgehammer to crack a nut. Perhaps this is one of the areas in which we have a bit of room for discussion.

The rationale initially came from advice from the Institution of Civil Engineers and the supervising engineers. They said that the best or optimum way of managing high-impact structures is to see them in two different conditions during a year. So you could maybe see them in summer conditions, when the water would perhaps be lower and vegetation is high; and in winter conditions, when the water level would be high but maybe the vegetation would not be as great on the dam structure. We accepted that as evidence and put it out to public consultation. If you recall, we went out to public consultation on just high-risk and low-risk reservoirs. Through that public consultation, we heard a very clear voice that that on/off switch was not suitable and there was a strong feeling that the designations should be high, medium and low.

We wanted to make sure that there was a differentiation between high-risk and medium-risk reservoirs. Therefore, we stuck with the two inspections for the high-risk reservoirs and arrived at the one inspection for low-risk reservoirs. It was really just to make sure that there was some differentiation and to demonstrate that we were being proportionate in our approach.

That is the rationale and why it is in the Bill. However, if there is a strong feeling among the Committee that that is maybe too onerous a standard, we are quite happy to look at that. The reason why we are quite happy to look at that is because that is just the minimum standard. For structures that are in a very poor condition, the supervising engineer may well recommend a slightly higher standard, and that is where the benefit of bringing your structure into a good condition will be gained. If a structure is in a very poor condition and has not been looked at for many years, the supervising engineer might say that he wants to see it every month until certain works are done, and it may be that it could go to the minimum standard when those works have been delivered.

As I said, it is two inspections at the minute, but we are happy to look at that if, after discussion, the Committee feels that that is too onerous. I have had a discussion with the institution about whether we could ease up on that slightly. It has stressed, however, that medium-risk structures should not be pushed out too far because the engineers still need to have familiarity with and understanding of those structures. If it were pushed out to something like one in five, they would feel that there is a disconnect from the structure. That would result in engineers not being prepared to take the risk of exposing their company to doing that work. You might think that that approach would mean fewer inspections and that, therefore, it would be cheaper, but because of the additional risk that companies would associate with that, it might actually push the price up. If there is a feeling that that should be looked at again, we are happy enough to take that on board.

The Chairperson: Tom, you may want to come in with another question.

Mr Buchanan: Go ahead.

The Chairperson: This is tied in with risk designation. In all cases, the reservoir manager will not be able to do anything to remove a high-risk or medium-risk designation because of the population centre below. There is a degree of unfairness: the onus and responsibility is on them to keep their reservoir up to a fit standard. The fact is that, when they carry out that work and they take that pain financially, it makes absolutely no difference to the risk label or the minimum standard. If you were to add a consequence to that to the effect that, if you do that work, the burden becomes less, whether in the label or the burden of inspections, you could make it a fairer system and less of a burden. It also keeps the responsibility where it is, and it rewards responsibility and responsible reservoir managers.

Mr Porter: There are two aspects to that. One is the word "risk". I fully accept that somebody hearing that they live below a high-risk structure may well feel uneasy. We are not talking about risk in the sense that it is at the point of failure. It is the balance between likelihood, probability and consequence that we are trying to communicate. Perhaps we are better talking about high-consequence reservoirs. Some people could argue that it is semantics and that we are just playing with words, but it may better communicate what we are trying to put across to people. It is not that the

structure that people are living below is at the point of failure, and the risk is very high in comparison with the risk of crossing a busy road or flying on a plane or something like that. It is purely because of the quantum of the impact that it would cause. We have had some discussions about that. We will maybe look at it again to see whether that word is the right one for our Bill.

The second aspect is the reward aspect. The reward is getting from the enhanced inspection that the supervising engineer will require down to the minimum standard. I am not sure how we can put that in so that it is obvious in the Bill, but the point is that we get the reward by looking at that minimum standard and making sure that it is the absolute bare minimum that we will accept and are comfortable with. Any structures in not great condition will not get that; they will have an enhanced inspection regime by a supervising engineer just because of the nature of the structure or what is in the downstream. Maybe the reward is easing up on that minimum standard.

Mr Buchanan: Where you have something named high risk, work is done to it, it is brought up to a standard and it is still called high risk, does that have any implications for someone who is then looking to take out insurance to cover themselves? Does high risk make it more difficult to take out insurance compared with something that is low risk? If you go to an insurance company and say, "Well, this is high risk", you know quite well what is going to happen.

Mr Porter: We can certainly look at the wording to see whether that will ease it up. Do you want me to answer the insurance point now?

The Chairperson: That was actually Michelle's question but she is absent at the minute so, yes, it would lead on. It is clause 25(2)(k), regarding the visiting of the reservoir and a high-risk reservoir being visited at least twice every 12 months and a medium-risk reservoir being visited at least once every 12 months.

Mr Porter: Are the Committee's thoughts that that should be reduced to once in 12 months? The option is to be not quite so prescriptive and change that to wording such as, "an inspection regime will be introduced by regulation".

The Chairperson: I am not convinced that one visit in every 12 months is not burdensome. I still believe that that may well be too frequent when we have reservoirs that have been here forever and a day. Although they are growing older, they are still here. If you compare it with other inspection regimes throughout the living world, it seems to be just too burdensome. Again, if you leave it more flexible, how do you regulate that so you do not get this by default anyway?

Mr Porter: Yes, that is the issue.

The Chairperson: That might mean a more robust or stringent appeals mechanism.

Mr Porter: Maybe the thing to do is to leave that with us. We will have a look at that and come back with an alternative, with a bit of rationale behind it, rather than just what our gut feeling is, if that is acceptable.

The Chairperson: OK, no problem. Tom mentioned insurance and public liability.

Mr Porter: I want to deal with two different aspects on insurance. The first is the insurance of properties that are downstream. The second is the insurance of the reservoir itself. We need to be clear that they are completely different insurance issues.

I spoke to the Association of British Insurers (ABI), which said that a property downstream of a reservoir would be covered by its property insurance. That would be a reasonable thing to be covered by property insurance in the event of failure. They would not inflate prices for houses below reservoirs, because they are comfortable enough. They understand the risk. However, they are concerned that they are not regulated in Northern Ireland, but we are dealing with that and going through this process. We will get a Bill and regulation. I do not get any sense within the Committee or among even reservoir managers that people do not recognise that something needs to be done, so I think we will get something. Knowing that we are bringing forward a Reservoirs Bill and will regulate our structures brought some comfort to the ABI. Individual household insurance will be not influenced by structures when we get the Bill in place.

The second issue is liability insurance. My understanding is that it is virtually impossible to get liability insurance for dam breach. It is not insurable. You just could not afford the liability associated with that, so I caution and encourage anyone who believes that they have it to check that that is the case. They certainly do not have it if they have not declared that they have a reservoir on their property. It is not a standard component of any business or property insurance. The liability associated with that will not be covered, so anybody who thinks they are insured needs to have a discussion with their insurance company. The first thing that the company will ask, because we have examples of that even here, is, "Have you got a supervising engineer and an inspection engineer, and when was the last time an expert looked at it?"

I think that this was raised by the Antrim angling club in discussions in one of the stakeholder groups. In order to get third-party liability insurance on the paths around the structure, it had to have an inspection report to show that the club was managing the structure and that it was in reasonable condition. That was not to get insurance for a dam breach; it was to get third-party liability insurance on the paths around the reservoir. They had to show that they were managing their structure in a reasonable way. I would encourage people who think that they are insured to go and have a discussion with their insurance company to make sure that it is covered. If they assume that it is covered in a household or business policy without them having declared it, I would be really cautious. The liability associated with a dam breach will not just be part of a normal household or business insurance.

The Chairperson: I understand. Are there any questions on that, Tom?

Mr Buchanan: No; that is quite clear and covers the issue of insurance.

The Chairperson: Jo-Anne, you wanted to touch on the issue of a worst-case scenario.

Mrs Dobson: Yes, Chair. May we have a look at clause 69? I suggest that consideration be given to soften that to allow a wider discretion as to whether or not DARD will go for full cost recovery. It just seems to me that a common-sense approach is needed rather than the very heavy-handed approach that is there at the minute. Have you considered that aspect at all?

Mr Porter: This is another area that we have picked up from some of the discussions that you have had and some of the evidence that you have taken from other people. Clause 69(6) is very black and white. The term "the amount of any costs" means that we would be duty bound to recover costs under the job code and everything associated with that. If there is no prospect of cost recovery, the Department will need to take a decision. It cannot just go after money that it has no prospect of getting.

Mrs Dobson: I am just thinking of the scenario of maybe an elderly person who has no means of paying and the mental anguish that you put that person through when there is no way of recovering it. Common sense should come into play.

Mr Porter: We will still keep quite strong on the first part of that. There will still be a duty on the reservoir manager to pay. However, maybe it could be something along the lines of "if requested" or "if deemed appropriate". There has to be some discretion. However, if it is requested and we think that it is reasonable to recover the costs, the Bill does need to state that they "must pay" so that we do not have a loophole whereby people can say, "I am quite able to pay, but I am going to give you the runaround", and we have no powers.

Mrs Dobson: How then, David, do you find a form of words so that you are not putting people through —

Mr Porter: We will have to take that clause back to the drafters. That is another clause for which we will present you with an alternative.

Mr Brazier: Clause 71(7) states:

"If the Department considers it appropriate to do so, it may by notice served on the reservoir manager require the manager to pay the Department such amount of the costs reasonably incurred".

So, there is already a form of words in a clause that is not as black and white as the one that you have just quoted.

Mrs Dobson: So, that could be incorporated into clause 69?

Mr Brazier: Yes; words to that effect. We are not sure whether we need to go to another form of words that will change that one and the others to make it the way that David has suggested, but we are working with our drafter on that.

Mrs Dobson: If that were incorporated, it would go some way towards alleviating people's concerns that they are going to be pursued to the bitter end whether they have the money or not.

Again, under the heading of worst-case scenario, I have asked you before about my concerns, and concerns that I have heard, about over-engineering. I know that you have answered on this before, David. How do we get around the concerns that have been raised with me about recommendations being over-engineered and people's fear that they are going to incur prohibitive expenses? Are you concerned about the potential effect and people's fear of the worst-case scenario in which they are going to incur this excessive cost that there is no way that they can deal with? How do you alleviate that fear? How do you address in the Bill the concerns about over-engineering? Have you any proposals for that?

Mr Porter: Again, I am not sure whether we can necessarily address that in the Bill itself. What I can say is that there are a number of appeal mechanisms in the Bill. If a reservoir manager feels that what was recommended is over-engineered, they can take an appeal and get another person's opinion. In addition, the professional conduct in the institution is very stringent.

Mrs Dobson: It goes to their reputation.

Mr Porter: Yes. There is a mechanism whereby professional conduct committees can place sanctions against professional members if they are mistreating a client, not dealing with them in a professional way, not being up front about costs or charging something different than was agreed.

Mrs Dobson: I just do not want reservoir owners to feel that their hands are tied completely; that they are at the mercy of the engineers; that, even if it is over-engineered, they will have to pay these costs come what may; and that they have nowhere to turn. It needs to be built in somewhere that they can go at it from another angle to take the pressure off and so that, if, in their eyes, it is being over-engineered, they are not going to face an excessive bill because they have no choice in the matter.

Mr Porter: The dispute mechanism in the Bill is probably the first way of dealing with that. You then have the profession. The last time that we were here, we also discussed whether we could have some sort of oversight role on costs.

Mrs Dobson: It would probably be reassuring if there was that oversight role so that they do not feel that they are on their own. It has just been said to me, "Come what may, we are going to have to pay. We have no choice. If we feel that it has been over-engineered, we have nowhere to turn. Who is protecting us from that?" So, do you foresee an oversight role for yourselves?

Mr Porter: The last time that we were here, we said that we would have a look at that and see whether we can fit that in. I stress that that is not so that it becomes a regulated activity. We could put in an annual statement a range of costs that we saw for supervising costs or inspection report costs. Someone could then look at where they fit into that range. That would either give them comfort that they are paying roughly what other people are paying or that they are one of the outliers, which would at least alert them to ask why.

Mrs Dobson: There would be those guidelines.

Mr Porter: There may well be a reason why. It may be because your structure is particularly complex or in particularly poor order or because you, as a reservoir manager, did nothing, chose to do nothing or felt that you could not do anything and that you needed more assistance. It would at least flag up those outliers and allow an individual to ask the question. We are committed to that. We are quite happy to keep to that commitment and look at that for you.

Mrs Dobson: Finally, what do you foresee as the means of redress if the owners feel that the recommendations of the engineers are too excessive? How will they know where to turn or where to go? Will there be guidance on how to appeal or where they should turn?

Mr Porter: That is covered in clause 57.

Mrs Dobson: So that is enshrined in the Bill?

Mr Porter: Yes. Clause 57 deals with referral to a referee, clause 58 deals with the requirements of a preliminary certificate, and clause 59 deals with the commissioning of a referee.

Mr Brazier: What would happen in practice is that, if a reservoir manager felt that there was over-engineering — to use that term — they could agree with the reservoir manager to have another reservoir engineer look at the reservoir. If they wanted a completely independent person to be appointed, the Institution of Civil Engineers could do that for them.

Mrs Dobson: Would getting a second report bring an additional cost for the manager?

Mr Brazier: Yes, it would.

Mrs Dobson: They would then fear that they will have to pay again for another report.

Mr Brazier: Yes, there is that risk.

Mrs Dobson: David, you spoke about guidelines on the upper and lower limits of the prices. Will there be anywhere where you can step in and say no if they feel that it is being over-engineered, or are they on their own?

Mr Porter: Because it is not a regulated activity, we will be able to have an oversight role. We will be able to give an indication of costs. However, if there are outliers from that, we would not be able to cap costs or fees. It would just be an indication to someone who is tendering for this work or asking for a price whether they have a fair deal. I am not sure how we can go further from that.

Mrs Dobson: I am just concerned that if they were over-engineered they would have to go to the expense of another report.

Mr Porter: Although there is additional cost in this, if the institution felt that a manager had a problem with an engineer, a discussion could take place with the institution about whether there was malpractice. There would be no cost in having, at least, that initial discussion, which may well allow for any fears to be dismissed and for an assurance to be given. An individual might want to take that step before going down the formal route of appointing a referee. Moreover, when it comes to getting a very high price for some work, most reservoir managers will know that it is expensive, but they will not know whether it is high or low because they are not engineers.

Mrs Dobson: Hence the fears about over-engineering.

Mr Porter: We accept that. There may be a process whereby they do not have a high price but have been given the right price and it is just a bit bigger.

The Chairperson: It is not necessarily all about the cost of the report or the cost of the work. Does it sit more neatly in clause 106, which is titled "Assessment of engineers' reports etc"?

Mr Brazier: I was coming to that.

The Chairperson:

"The Department may by regulations make provision for the assessment of the quality of reports, written statements and certificates given under this Act"

by the various engineers.

Mr Porter: What we are getting at is that there is a required minimum standard. It has to say certain things in a certain format, and it has to have certain pieces of information. That allows us, then, if it is not in that format. The way it works in GB is that there are guidelines. The 10-year reports all look very similar; they all have the same contents page and they all follow the same structure.

The Chairperson: They used a template.

Mr Porter: The EA produced templates saying that that was the way it wanted them. This power is to say that they are not coming to us in the way that we would like to see them.

The Chairperson: So it is the form of the reports?

Mr Porter: It is the form rather than the content. I know of one case in England where exactly what you are describing took place and another engineer had to be brought in, but I know only of that one case. There are 2,200 reservoirs —

Mrs Dobson: But it is the owners' or managers' fear that it will happen to them.

Mr Porter: But there is only one that I know of since the regulations came in where someone was going over and above what they should have been required to do. Another engineer came in on that case and was critical of the reports; the engineers were removed and someone else completed the reports. Although it is a possibility, it is very rare. The guys who are here view themselves as being at the top of their profession, and they are very conscientious.

Mrs Dobson: I understand that, but there is a real fear. It is about getting past that for reassurance that there will be some comeback and that they will not be over-engineered.

Mr Milne: I want to ask you about the grants scheme. I know that it was covered very sensibly at the start of our discussion. Just to be clear when we are talking about grants, is it grants that are foreseen to cover private and third-sector parties exclusively?

Mr Porter: At the moment, the clause does not specify who is covered; we have to do that by regulation. We would set out in the regulations exactly who would and who would not be eligible.

During the Second Stage debate, the Minister made a commitment. She said that she was particularly interested in looking at the third sector, the not-for-profit organisations. That was in response to issues that were brought to the Floor. She was not saying that those were the only organisations that she was interested in; she was responding to comments that were predominantly about third-sector and not-for-profit organisations. That is why she responded in that way. It will not necessarily be restricted to that. First, we need to establish that we can take out a grants scheme and establish that audit, and then see what larger capital grant is required and, at that stage, determine who should be eligible and who can get money from elsewhere.

Mr Milne: That is done on all the reservoirs.

Mr Porter: That is what we propose. We will have a scheme that will require owners to carry out their first inspection. It will be a first inspection-plus, because we need to have a cost component to it so that we can at least sit with a suite of 151 reports and come up with a figure of what it will take to bring structures up to standard. At that stage, we will at least be better informed to make a business case for a capital grant scheme, for instance. We might have enough evidence to satisfy ourselves that this, in fact, is not an issue and that we are talking about relatively small sums of money and that private owners and companies should have that burden. We will have to wait and see what size of figure we end up with.

Mr Milne: We are talking about the initial inspection at this stage.

Mr Porter: Yes, we are focused on the initial inspection. I am proposing not to restrict that. We need 151 reports —

Mr Milne: — before we see where we are.

Mr Porter: I do not believe that I need 151 times whatever figure I can bid for, because Northern Ireland Water's structures are already inspected. The figures that we are talking about are small in comparison with its overall budget. Our structures are already inspected, so we do not need any assistance, and, again, it is small in comparison with our overall budget. You have heard from a number of district councils, including Belfast. They have already had theirs done.

Mr Milne: Are we talking about 50, roughly?

Mr Porter: I think that we are focused on that smaller number. I think that 50-ish structures need assistance to get the first inspection done.

The Chairperson: Yes, that is a very good point — it should not be just not-for-profit organisations. A lot of private sector individuals do not make a profit out of the reservoirs, so there is no financial gain to them. They would certainly need to be a part of it too.

Mr Porter: I have no issue with saying that it will cost us more to work out who should get the assistance for the initial tranche of inspections than it will to administer the scheme. However, I may have an issue when it comes to giving out large capital grants to commercial companies, although that is a debate for another day. I do not think that we need get into that. First, we need to have the figures to understand whether it is a real situation and one that we will have to find a way around, or whether they are in reasonably good condition and need only a bit of tidying up or minor work, as opposed to some of the major capital works that we think may be required.

The Chairperson: Are you content with the justification for a Bill, as opposed to the other two ways mentioned in the explanatory notes? You talk about the reservoir licensing scheme. Option 1 was to do nothing — soft regulate. Why could you not have used a licensing regime, or the existing legislation of article 30 of the Drainage (Northern Ireland) Order 1973 and article 297 of the Water and Sewerage Services (Northern Ireland) Order 2006?

Mr Porter: First, I will deal with the options considered, and then I will deal with the other legislation.

I am absolutely convinced that the panel engineer system is the right system, as it means that independent advice is given to the reservoir manager, as opposed to centralising that and then charging for the service. The panel engineer system will be more cost-effective for individual managers than if government tried to do it and charged for a licence system. I am absolutely comfortable with that, as were those who responded to the public consultation. Question 4 asked: are you content that option 3, the panel engineer system, would be the preferred implementation option? Out of 13 responses, 11 were content and the other two were content, provided that assistance was required. That means that every response to the public consultation was positive that this was the appropriate system out of the options that we considered.

I am absolutely and utterly convinced that the self-regulation system does not work. We have evidence of inspection reports being done and no subsequent work being carried out. We know of other examples where obvious defects are not being addressed. Government needs to do something to give assurances that those reservoirs are in good condition. I have absolutely no doubt in my mind that self-regulation should not be considered as a realistic option and that, therefore, new legislation is required. I want to talk about whether a Bill is required, as opposed to bolting it on to the Drainage Order or the Water and Sewerage Services Order. The Drainage Order deals with the arrest of injury to land and enables us only to require the opening of sluices or valves. It is about drawing down water to stop harm to land. There is no requirement in it for any inspection or improvement works. As soon as you stop injuring land, in essence, the Drainage Order is satisfied. It is very specific.

The second point is that it cannot be used on Departments. We cannot serve notice on harbours and other listed public-sector bodies. Again, that dismisses it as a realistic option. The Water and Sewerage Services Order was a realistic option. We could have brought in regulations for the construction, repair and maintenance of dams and reservoirs. However, the legal advice was that the thrust of the Bill was the supply of public water and sewerage services and that, although we could have brought regulations for the safety of reservoirs through it, it could have been challenged, because the thrust of the legislation is public water supply, not private dams. In the face of that challenge, the regulations brought in may well be destabilised. The advice was that it would be easier

to go for a blank sheet of paper and introduce a reservoirs Bill that is clean and tidy, with all the legislation in one document, which can then be subjected to scrutiny, as we are doing today.

The Chairperson: I am happy enough with that.

The other outstanding issue is RPA in planning and local government. Oliver, do you want to come in on that?

Mr McMullan: No.

The Chairperson: Are you convinced that, given RPA and the role of local government in planning, there is no place in the Bill to say that councils have to be involved, side by side either Rivers Agency or the enforcement agency in Planning Service, to create or prevent something from happening? Where do you see councils sitting in the Bill after RPA?

Mr Porter: I do not see that requirement in the Bill. The reason it is not in the Bill is that it is adequately covered in the new draft PPS 15. Probably the most significant change between the current PPS 15 and the new draft PPS 15 is that the old policy had four policy areas and the new one has five; it has an FLD5, specifically about development in proximity to reservoirs.

So I feel that it is adequately covered under the new version of PPS 15. The public consultation on that has just finished, and they are going through the consultation responses at the minute. We expect that it will be confirmed with some slight tweaks.

The Chairperson: Will the FLD5 put a complete blanket ban or moratorium on development downstream in inundation maps?

Mr Porter: It absolutely will not because it is perfectly safe to live below a reservoir provided that somebody looks after it, provided that an engineer looks at the reservoir a couple of times a year, provided that some rudimentary evidence is kept of water levels and you can check whether there is leakage, provided that somebody keeps an eye on whether it is moving, and provided that every 10 years an inspection engineer carries out their role. It is perfectly safe to live below a reservoir. When working with planning on the new policy, we were very conscious to make the point that we were making sure that development was not stopped below reservoirs.

That is not to say that all development is appropriate. You have to recognise that there is still a risk that you could get failure. Therefore, FLD5 deals with that. It questions that there will be a presumption against development in the potential flood inundation area for proposals that include essential infrastructure; storage of hazardous substances; and bespoke accommodation for vulnerable groups. It is perfectly safe to live there, and it is perfectly safe to carry on in your workplace; however, if you can find somewhere else to do it, it might be better to do so. Therefore if there is essential infrastructure, storage of hazardous substances or bespoke accommodation for vulnerable groups, you might want to think about putting those somewhere else. Then, at least, you will not have the problem of how you evacuate them in the event of a failure. It is a presumption against; it is not an absolute ban if there is no viable alternative.

As part of the flood risk assessment, a road has to go below a reservoir. That does not block it entirely, but at least it poses the question. Justification will have to be provided at planning stage why it has to be there and why that road cannot be somewhere else.

The Chairperson: Since development can change the status of a reservoir to high risk, there is an unfairness, as I see it, because the reservoir manager has done nothing different, but they will have a different level of burden depending on how the Bill travels through its passage. Is there anything that can be done in the Bill or in FLD5 to assure a reservoir owner? I know that the developer has to provide assurance regarding reservoir safety, but it is not really in his gift to provide reservoir safety. How does that work?

Mr Porter: It would work in a similar way to your having a requirement for a sight line that goes on to third-party land. If you want your development, you need to deal with the person who owns the third-party land and come to an arrangement to secure that land and achieve your sight line. In essence, and being very simplistic, this is no different. If you want to develop downstream of a reservoir and you want planning approval, you, as the developer, need to work with the owner and agree whatever

works are needed to satisfy the planning condition. It is not dissimilar from how planning conditions work today. I suspect that there will be some difficult situations where a reservoir manager does not want a development downstream, but, in essence, that is no different from somebody who owns a field not wanting development beside them and, therefore, will not sell the ground for the sight line. It is no different from that situation because we are dealing with third-party land, and you cannot be compelled to give up your property.

The Chairperson: Yes and no, in that the reservoir manager may not own the land to be developed. Basically, then, if the reservoir manager sees that he is one development away from going from medium to high risk, he will put a blanket ban on everybody and every development that comes near him. That hurts, and the unfairness flips over, in that the person who owns and wishes to develop the land downstream will not be able to, because that development will default the risk level from medium to high.

Mr Porter: You are absolutely right. If we take it away from reservoirs, there are sites and pieces of fields in towns that are not developed, not because of reservoirs but because they cannot get agreement with neighbours. It is really no different from that. The cost associated with this then needs to be factored in. If we cannot assure people that they are living below a safe reservoir, a development might not be the right thing to do. Although it is painful for an individual who had hoped for value, not allowing a development to proceed in an unsafe manner might be the right thing to do for the greater good.

The Chairperson: It is not in your gift and nothing to do with Rivers Agency, because it is a private-party agreement. However, could you envisage a developer saying to the reservoir manager, "I will pay for your additional inspection. We will accrue that burden for you and pay for it because it gives us our planning application and an assurance that you are going up to standard."?

Mr Porter: Absolutely, and I could see the reservoir owner being in a relatively good negotiating position, particularly in such a case. That applies not just to a move from low to medium risk but also from medium to high. Although the burden is slightly different, there is an additional burden there as well. All that does is strengthen the negotiating position of the reservoir manager to make sure that they do not get caught with an unnecessary burden, that it, rightly, sits with the developer, who can then factor that cost in and say, "Well, I have £100,000 of work to do that, plus this longer-term burden: does that make this site viable and attractive or do I walk away and develop somewhere else?".

The Chairperson: OK. I have no further questions. Members, this is our last chance to discuss the Bill before we go into informal clause-by-clause scrutiny. Do any other members have questions for David and Kieran? I know that we have covered all the main topics over the last two sessions, but if there is something additional that you want to ask or that you are not sure of that you want to clarify, this is the time to do it. OK.

David or Kieran, is there anything that you want to ask us or say to us?

Mr Porter: Sorry, I do not want to extend everybody's time, but there is one piece of clarification that I feel is worthwhile. Somebody said that Scotland has no regulation, but it is bringing in the Reservoirs (Scotland) Bill to introduce regulation. That is slightly incorrect. The Reservoirs Act 1975 covers England, Scotland and Wales. So, their structures have been regulated since 1930.

The new Scottish legislation removes that piece of GB-wide legislation and puts in bespoke Scottish legislation. It is that which has not been commenced, so their structures are regulated today; all that is happening is that the reservoirs authority will change. They are also going to have high-, medium- and low-risk categories and 10,000 cubic metres. In fact, the Scottish Bill is very similar to what we are scrutinising. However, their structures are regulated today. I thought that that clarification would be useful.

The Chairperson: OK.

Mr Swann: Just a brief point that has not been covered anywhere else: some private reservoir owners are feeling a bit of stress and strain about what may come. Is the Department working with any other agencies to give support and guidance to the owners of private dams, or even to the Ulster Farmers' Union, because they corresponded with us?

Mr Porter: We are not working specifically with anybody that I can think of, but we are happy to work with other groups if that would —

Mr Swann: As you get further down the line and people start to get worried as we go through the Bill clause by clause, it is something that the Department may need to be aware of. Some of the DARD inspectorate work with rural support and get training through it as well in identifying signs of stress or strain.

Mr Porter: I think that it is something that we can take on board.

Mr Brazier: Absolutely, that is a good suggestion.

The Chairperson: Members have no further comments. Kieran and David, thank you very much for your time. I am sure that it has been time spent wisely for the Committee and you. It is an important piece of work that we have taken seriously, so thank you. Next week, we go into informal clause-by-clause consideration, and I know that there will be work for you to do beforehand. We will let you get on with that over the next few days. *[Laughter.]*