



Northern Ireland  
Assembly

Committee for Agriculture and Rural  
Development

# OFFICIAL REPORT (Hansard)

Reservoirs Bill:  
Formal Clause-by-clause Scrutiny

3 June 2014

# NORTHERN IRELAND ASSEMBLY

## Committee for Agriculture and Rural Development

### Reservoirs Bill: Formal Clause-by-clause Scrutiny

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**Members present for all or part of the proceedings:**

Mr Paul Frew (Chairperson)  
Mr Joe Byrne (Deputy Chairperson)  
Mrs Judith Cochrane  
Mrs Jo-Anne Dobson  
Mr William Irwin  
Mr Declan McAleer  
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

**In Attendance:**

Ms Roisin Kelly	NIA Bill Office
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**The Chairperson:** I welcome to the Committee, as always, David Porter and Kieran Brazier. Thank you very much again for your attendance. You are no strangers to the Committee. You may as well be paid-up members of the Committee, if there is such a thing. You are very welcome to the Committee to discuss this very important issue.

David and Kieran, will you now explain the proposed amendments, which include an additional clause? The amendments to clauses 36 and 49 can be found at pages 3 to 12 of tabled papers. The amendments to clause 106 can be found on pages 13 to 15. If it is in order, will you please quickly take us through the proposed amendments in sequence? Thank you.

**Mr David Porter (Department of Agriculture and Rural Development):** Thank you, Mr Chair. We will deal first with the amendments relating to clause 36. We have discussed those related to a human rights issue in that reservoir managers needed to be able to deploy a defence that what they were being asked to do was not causing them to infringe some other legislation. We have accepted that, and you will see that those amendments have been made. That was just a little bit of legal tidying up. It was certainly not a significant issue, so, unless the Committee wants me to, I do not intend to go through it in much more detail than that.

What is much more significant is what we have done to clause 106. At the last Committee session, clause 106 was in the category of, "We have considered but are not minded to make a change". What I am presenting to you today is a significant change to that position. We listened to what the

Committee said to us previously and re-emphasised at the last meeting. We took that away and really thought about a way of dealing with it that satisfies the issues that you are raising and delivers what we need. We got to a point where we recognised that there are two elements to this issue. The first is the cost of engineering services and the second is the over-engineering. You will see that we have tried to deal with both issues. We have dealt with them in two different ways, and I will explain why we have had to do that.

First, on the cost of engineering services, we continued to reiterate that we were not prepared to introduce a regulated system, but that, administratively, we were quite happy to publish the cost of engineering services, possibly the average cost and the range, as we had discussed. That is really where clause 106A came from. We have added the provision that the Department may publish information on the range of costs for the provision of relevant services by engineers. This allows us to publish the range of costs, probably based on the average costs and then the outliers, to give people an indication of what they should expect to pay. They can then look at it and say whether they are getting a good deal or a bad deal; it allows them then to ask that question. We feel that this is consistent with the legal advice we got in that we are not entering into the realm of dealing with the contractual relationship between an individual and their engineer. It allows us to publish information without being embroiled in the contractual relationship.

As I said, we took a slightly different approach to over-engineering. Again, we thought long and hard about it. Initially, we were thinking primarily about an organisation that would administer the process. However, when we thought about it, Rivers Agency and the enforcement authority will be doing more than just administering a process. In the absence of the reservoir manager carrying out his duty, we would step in and carry out the engineering work. The first thing we would do in that situation would be to ask, "Does what we are about to step in and do actually need to be done?". Our defence, or power, is that we can step in in the interests of public safety. So, the first thing that we, as a Department, would say is, "Right, this person has not done this. We are going to spend public money on it. Is this a reasonable step to take?" We recognise that our role in that situation is to question what the engineer has recommended in order to satisfy ourselves that it is reasonable for us to step in and spend public money.

**The Chairperson:** I will stop you there. As regards the mechanics of the Bill, when a reservoir manager gets a supervising report and is told to do a, b and c, how can he question that?

**Mr Porter:** That is exactly what this clause is going to do. Instead of there just being reference to the "quality" of the reports, we have added the words "and content", which are very important. The word "quality" could relate to just the format and type and whether it is in the right paragraphs or covers roughly the right issues. We have gone a significant step beyond that in that it is not just the look and feel of the report that is covered but what the report actually says. This is what we mean by dealing with over-engineering. Where a reservoir manager is concerned about over-engineering, we will have an interest in that as the reservoir authority. This then gives us the power to be concerned about not only the quality of the report but its content, which could be either good or bad.

We are specifically steering away from using the term "over-engineering" because there may well be poor quality reports or poor content reports that we want to address. It is not just about gold-plating. That is why we felt that it was best to keep it like that. So, there is reference not just to "quality", which is what was in the clauses previously, but "and content". We hope that the words "and content" will allow us to address reservoir managers' concerns about over-engineering.

**The Chairperson:** I will just stop you there. We will take this in bite-size chunks. Do members have any comments about clause 106 and proposed new clause 106A? On page 15 of your tabled papers, you can see how it affects the clause when that is added. The words "and content" have been added to the first line, and then there is a whole new clause 106A. Any there any comments, members, before we allow David to move on?

**Mr Byrne:** Again, Chairman, it is a welcome change, given what we said last week.

**The Chairperson:** OK. Do Members have any other comments? On the practicalities, David, it says, "The Department may". Sometimes, we worry about the word "may" because it can mean all sorts of things and sometimes can be more forcibly put, as the word "will". Sometimes we want it to be a "will"; sometimes a "may". For more reassurance, would you be minded to change the word "may"?

**Mr Porter:** There are lots of "mays" throughout the Bill. They give us permissive powers, so that where we see that a problem is developing, we have the ability to step in. We tend to keep the "musts" to the absolute fundamentals, the things that we must do or else the system will not work. If the system is working well, and we have no reason to step in, the "mays" give us the flexibility to reserve that position. So, the power is there, and what I would say is that if there is evidence that we were not using that power then the Committee has the ability to challenge the Minister and say that, in this particular case, the Department has permissive powers and really should be using them. In that way, you can challenge the Department and Minister and say: "You really need to be using the power in this case."

**The Chairperson:** How will you know that there is a problem with over-engineering? How will you know that supervising engineers are making visits needlessly and recommending work that is on the safe side and not really practicable?

**Mr Porter:** I think it came out of our discussions about the case of a reservoir manager flagging this up as a problem. That is the most likely place that it will come from. However, it is not necessarily the only place, because, obviously, we will be getting the reports in on a regular basis and, if we see a disparity between work required on reservoirs of similar structure, where some have more onerous requirements than others, it will prompt the question as to what is going on. However, I think it is more likely to be a case of a reservoir manager posing the question or wanting to have a discussion with us about whether the things he is being asked to do are reasonable. He will say, "The Department, the reservoir enforcement authority, will require me to do these. If I do not do them, it is over to you guys in the Department to do it." That is where there would be a greater role for us. It is not just about receiving reports and giving somebody a tick to say that they are complying; there is an enforcement role that requires us to bring some intelligence to this as well.

**Mrs Dobson:** I apologise for missing last week's session; I know that you went through this in detail then. It is a good idea to assess the content of a report. As we know, this issue was raised by many owners. You have said that the Department would do it, but who exactly would be expected to undertake the assessment primarily?

**Mr Porter:** Which assessment do you mean?

**Mrs Dobson:** The assessment of engineers' reports and everything in clause 106.

**Mr Porter:** In a case where a reservoir manager is not content, they can first have a discussion with us and, hopefully, we can allay their fears. That can be informal. If we then find that there is something wrong with it, we can use the clause to say to the reservoir engineer, "We are not content with the quality or content of your report." So, there is an informal step that we could take, as the enforcement authority, because a person may well get it wrong.

**Mrs Dobson:** So, it is at first informal, but the clause is there for protection?

**Mr Porter:** This is the formal power to actually do something.

**The Chairperson:** There are amendments to clause 49. Are they similar in effect to the amendments to clause 36?

**Mr Porter:** Yes.

**The Chairperson:** Can you just clarify it for us?

**Mr Kieran Brazier (Department of Agriculture and Rural Development):** Clause 36 is about compliance with inspection reports written by the inspecting engineer. Clause 49 is about compliance with instructions from a construction engineer. They are parallel to one another, and the same approach has been taken for both. The consequential amendment to clause 70 is necessary because it refers to clauses 36 and 49. So, the same approach has been taken for both.

**The Chairperson:** Do members want to say anything on the amendments to clauses 36 and 49? There are no comments on that.

Before we start the clause-by-clause scrutiny, I would like to go into closed session for a period. It would be better, though, to go through this in open session before we start. Thank you very much, David and Kieran, for the time being.

Members should have the informal clause-by-clause matrix open and the Hansard report from the meeting of 27 May in order to refer to the comments received from Rivers Agency on issues raised during evidence sessions. You will also wish to ensure that you can quickly reference the letters at pages 114 and 115.

We will take a formal vote on each clause in, and schedule to, the Bill. The options available to the Committee are to agree that the Committee is content with the clause, agree that the Committee is content with the clause as amended, or agree that it is content with the new clause. That is basically three contents but meaning different things by way of whether the clause was agreed as it was, as amended, or whether it was a new clause. The fourth option is to agree that the Committee is not content with a clause or a new clause. Within that, you can vote that you are not content with a clause or agree that a Committee amendment is required. We will basically vote on whether we are content with a clause or, if not content, whether we simply vote it down or agree that a Committee amendment is required. I will probably end up reading all that again. If we decide that we are not content with a clause, I remind members that, in advance of Consideration Stage, we have the option of registering our formal opposition to the Question that a clause stand part of the Bill. This will ensure that the clause is debated at Consideration Stage.

If a member is not happy with something and wants to vote against a clause or propose an amendment, they will need Committee agreement. For a Committee amendment, they need to be very clear about what they do not like about the current clause, what the policy objective of an amendment would be, or what they want the amendment to do. This is purely so that the staff — the Clerk of Bills and the Committee Clerk — know exactly what they need to write up by way of an amendment. Members know that they always have the option, as individuals, to put down their own amendments to the Bill, and the Bill Office staff will assist with that.

I intend to group clauses where there have been no queries during the informal clause-by-clause scrutiny or no proposed amendments. Again, please shout or bring to our attention the fact that you are not happy, even with the way in which they are grouped. If there is one clause in a grouping that you are not happy with, please shout.

Before we start the clause-by-clause scrutiny, I want to go into closed session, if that is in order.

**Mr Byrne:** Chairman, in relation to the process and the mechanics of bringing this forward, obviously we want to get to a stage where the Minister and the Department present the Bill — is that right? — and then there would be debates on certain matters. Does the Committee want to agree as much as possible before the Bill re-enters the Assembly or do we want a debate in the Assembly? That is our job.

**The Committee Clerk:** The Bill is at Committee stage. The Committee is undertaking a detailed scrutiny of each clause. The Committee report will inform all Members. However, the Bill will come back once its Committee Stage is finished and it is scheduled for Consideration Stage debate. That scheduling is at the Minister's discretion. That is when the debate will take place in the Assembly on the Bill, at Consideration Stage. The next debate will be in the Assembly at Consideration Stage, to be scheduled at the Minister's discretion.

**Mr Byrne:** What is the timescale? Does the Committee or the Department have a view on whether to have accelerated passage?

**The Committee Clerk:** No. It is too late; we cannot have that now. It is a completely different procedure that would have needed to have been agreed quite a while back, and we would not have gone through the process that we are engaged in.

**The Chairperson:** Remember that the onus is on the Department to bring forward the Bill.

**Mr Byrne:** So, the Department can determine the pace of passage of the Bill.

**The Committee Clerk:** Yes, after it comes out of Committee.

**The Chairperson:** Our responsibility is to scrutinise the Bill, and our report will reflect that scrutiny.

**The Committee Clerk:** The debate in the Chamber — Roisin will keep me right here — will be on the clauses with proposed amendments or groups of clauses that are to be amended. If the Committee decides that it is not content with a clause and wants to debate it, that is when it registers that it is not content with a clause and intends to vote it down. So, if there is not an amendment or something but you are not particularly happy with a clause, you should register that now, and you will have a debate on that aspect of the Bill. OK?

**The Chairperson:** Are members content to go into closed session for a brief period to have a discussion?

Members indicated assent.

*The Committee went into closed session from 2.37 pm until 3.26 pm.*

#### **Clause 1 (Controlled reservoirs)**

**The Chairperson:** The Committee sought clarification on how the cubic capacity of a reservoir would be measured, and the response is in the matrix. The Committee also considered changing the 10,000 cubic metre threshold, but the evidence suggested that this would make minimum difference.

*Question, That the Committee is content with clause 1, put and agreed to.*

**The Chairperson:** Clauses 2 to 5 can be grouped, as no issues with them were identified.

*Question, That the Committee is content with clauses 2 to 5, put and agreed to.*

#### **Clause 6 (Reservoir managers)**

**The Chairperson:** The Committee requested clarification of where the Department has performed the work on a designated watercourse that flows to, through or from a controlled reservoir that may have involved works to the dam structure, as specified under clause 6(8). The response from the Department is on the matrix.

*Question, That the Committee is content with clause 6, put and agreed to.*

*Question, That the Committee is content with clause 7, put and agreed to.*

#### **Clause 8 (Duty of multiple reservoir managers to co-operate)**

**The Chairperson:** The Committee sought clarification on the offences and associated levels of fines. The Department's response is in the matrix.

*Question, That the Committee is content with clause 8, put and agreed to.*

#### **Clause 9 (Controlled reservoirs register)**

**The Chairperson:** The Committee requested an explanation of what information may not be included in the register if the Secretary of State considered it would affect national security. The response from the Department is in the matrix.

*Question, That the Committee is content with clause 9, put and agreed to.*

**The Chairperson:** Clauses 10 to 14 can be grouped together, as no issues were identified.

*Question, That the Committee is content with clauses 10 to 14, put and agreed to.*

### **Clause 15 (Registration: supplementary)**

**The Chairperson:** The Committee expressed concern at the onus placed on a retiring reservoir manager to inform the Department that there was a new reservoir manager. The response from the Department is in the matrix for clause 15.

*Question, That the Committee is content with clause 15, put and agreed to.*

### **Clause 16 (Offences: registration)**

**The Chairperson:** The Committee expressed concern about the impact that clause 15 would have on clause 16(5), and the response from the Department is in the matrix.

*Question, That the Committee is content with clause 16, put and agreed to.*

### **Clause 17 (Giving a risk designation)**

**The Chairperson:** I will group clauses 17 to 23. The Committee expressed concern around the term "risk" and the unfairness that this creates around the risk designation process. The response from the Department is in the matrix. The Department is not proposing to amend this clause. However, it has proposed an amendment to clause 25(2)(k) that will reduce the minimum number of visits that will be required by the supervising engineer. I am grouping these from clause 17 to clause 23.

Are there any comments, members? I will raise one. I am still concerned that there is no fairness in this system. I have a concern around the word "risk" being used as a designation when there is absolutely no chance of a reservoir owner or manager being able to change or reduce that. I do feel that "high consequence" would be better terminology, because, at the end of the day, there would be high consequences if there were a breach. I do believe that there should also be a secondary designation whereby a reservoir could be high consequence and then either high risk or low risk depending on the investment that the manager has put into the structure and also the advice that he was given, either from the inspection engineer or the supervisor engineer. That would bring, I believe, a degree of fairness into the system. It would mean that the reservoir owner, when encouraged to invest in his structure, would get some gain — more gain than the amendment at clause 25(2)(k) — and that the stigma attached to a designation being high risk would be minimised.

I think that I have covered all of my concerns there. Now, that would make it a lot more complicated. You would not just have the three designations: high, medium and low risk. It would mean that you could well have high consequence, high risk; high consequence, low risk; medium consequence, high risk; and medium consequence, low risk. You could have five. Whilst a reservoir manager could not affect whether it is high consequence, medium consequence or low consequence, he could affect whether it is high risk or low risk. I know that we have been through the arguments with Rivers Agency and the engineers, but there is just that degree of unfairness there that, no matter how much a reservoir manager looks after his structure and his land, and whatever investment he puts into it and whatever probability there is for a breach of that dam, it is not being measured and there is no real reward for someone looking after their structure. Whilst we would not want anybody to be negligent in their actions — we all have responsibilities — I think that there is a very high degree of unfairness in this clause and the clauses associated with it — clauses 17 to 23.

Are there any other comments, members?

**Mr Irwin:** I have similar concerns. We have always had concerns about this. As it stands, it leaves a degree of unfairness for the reservoir owners.

**Mrs Dobson:** I also am concerned. I feel, as you and William Irwin have said, that the concerns raised by the reservoir owners and us have not been adequately taken on board by Rivers Agency. I do not feel that they are adequately covered in clause 25. I share your concerns about clauses 17 to 23. I do not think that they suffice. To agree with it would not be fair at all to the reservoir owners. I echo your sentiments.

**Mr Byrne:** I can see the merits in having a differentiated position between the risk factor and the consequence factor if capital improvements have been done on the foot of advice from an engineer. I can see that it would be sensible and practical to recognise that.

**The Chairperson:** If there are no further comments, I will put the Question.

*Question, That the Committee is content with clause 17, put and negatived.*

**Mr Milne:** In the light of what you said, I am very much of a similar mind.

**The Chairperson:** Are members content to vote that we are not content with the clause?

**Mr Byrne:** Not content as currently drafted.

**The Chairperson:** If we vote that we are not content, which we have, and there are no contrary voices of that mind, we will get the Committee Clerk to draft a form of words for the Committee report, as we have indicated here today. This has been a thread throughout the whole debate on that. What more, Stella, do you need, then, at this stage?

**The Committee Clerk:** Indicate intention to vote against the clause stand part at Consideration Stage.

**The Chairperson:** Yes, and that the Committee will indicate its intention to vote against the clause, as it sits, standing part at Consideration Stage of the Bill. Are members content?

*Members indicated assent.*

**The Chairperson:** Can we also write to the Minister outlining the concerns and the desired course of action?

**Mr Byrne:** Yes, I think that it is only fair to the Department that we write to it formally.

**The Chairperson:** OK? So that covers clauses 17 and 23.

**The Committee Clerk:** That is clauses 17 to 19, but there is another decision to be made at clause 21, if you do not mind.

**The Chairperson:** I can go down each question. We have said that we are not content with clause 17 to 19: are members clear that we are not content?

**The Committee Clerk:** Clauses 19 to 20, sorry.

**The Chairperson:** We are not content with clauses 17, 18 and 19.

**Mr Byrne:** We are not content with clause 17 and consequently, we are not content with clauses 18, 19 and 20. Is that right?

**The Committee Clerk:** Yes.

**The Chairperson:** Yes. Are all members agreed? I will put the Question again.

*Question, That the Committee is content with clauses 18 to 20, put and negatived.*

**Clause 21 (Appeal against Department's decision in a review under section 20)**

**The Committee Clerk:** There are two issues here: there is one about not being content with the clause, but there is also this issue about clause 21(9).

**The Chairperson:** Yes, which I think we need to go through. Clause 21 will be part of the grouping with clause 17, so we will not be content with that either. However, there is an additional aspect to this, which is the appeal against the Department's decision in a review under section 20. The Examiner of Statutory Rules recommended that the responsibility for making the regulations in clause 21(9) should rest with the Office of the First Minister and deputy First Minister rather than the Department in order to avoid a conflict of interest. An amendment is therefore required to clause

21(9). For clarity, clause 21(9) deals with the regulations to make provisions for the appeal and the awarding of costs of the parties in an appeal.

There are also amendments proposed to clauses 73(6), 74(2), 77(2), 79(7), 82(8), 84(6) and 86(4). These amendments are rather technical in nature. We have been informed that amendments to this and the other clauses have been drafted by the Department but still require the approval of the First Minister and deputy First Minister. This has been sought and has not yet been received. We therefore do not have sight of the series of amendments. I understand that amendments here will result in new clauses later in the Bill.

We have two options: we can finish today at clause 21 and hope to have these amendments at the meeting next week. If they are still not available next week, we will have to continue with the formal vote on the clause regardless. Or we can register our discontent and say that we are content with the clause as drafted as we have not had sight of the amendments. Members will be aware that undoing such a decision at a later stage will be very complicated and messy, but it can be done.

Again, one of the options is to finish today at clause 21 and hope that the proposed amendments are before us next week. There is no guarantee in that, because their destiny is not in River Agency's or DARD's hands; they are in the hands of the Office of the First Minister and deputy First Minister. Certainly, we cannot blame the Rivers Agency for that. However, we could also simply register our discontent and say that we are not content with the clause as drafted as we have not yet had sight of the amendments. Again, that can come out in our Committee report to say that the reason we are not content is because we did not see the amendments at the formal clause-by-clause scrutiny stage. We can then carry on. I am entirely in your hands, members.

**Mr Byrne:** Personally, I believe that we should pull the handbrake at this point until we have the amendments presented to us, because I think that we are working in the dark.

**The Chairperson:** Are members content, then, that we finish today at clause 21 and hope to see the amendments at the meeting next week? Are members content? Can we do 22?

**The Committee Clerk:** No.

**The Chairperson:** Right, OK. So are members content, then, to leave it at 21 and hope that the amendments come forward, and no matter what, next week we carry on, whether we see the amendments or not?

*Members indicated assent.*

**The Committee Clerk:** We have no choice, we are out of time.

**The Chairperson:** We will just register our discontent because we have not seen them, which is fair enough. That is what we will have to do. We cannot scrutinise something that is not in front of us, and we cannot be content with that, so we will put it in our report.

Members, we will have a long meeting next week because there are so many other clauses to get through. I am happy enough with the attendance that we have this week to go through clause-by-clause scrutiny at this point, but, if we could have the same next week that would be great. OK, members, content to leave it at that?

*Members indicated assent.*

**The Chairperson:** Thank you.