



Northern Ireland
Assembly

Committee for Agriculture and Rural
Development

OFFICIAL REPORT (Hansard)

Reservoirs Bill:
Formal Clause-by-clause Scrutiny

10 June 2014

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:

Mr Paul Frew (Chairperson)
Mr Thomas Buchanan
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

The Chairperson: This session will be split into two parts. The first part will deal with further amendments, and then we will move to formal clause-by-clause consideration. Last week, the Committee expressed its discontent with the risk designation clauses — clauses 17 to 23. We did that by voting "not content" with clauses 17 to 20; by indicating that the Committee would recommend that, at Consideration Stage, the Assembly votes that clauses 17 to 23 not stand part of the Bill; and by agreeing to write to the Minister outlining our concerns with those clauses. We stopped at clause 21 because there is another, separate amendment here regarding the regulations for fees for appeals and awarding of costs that we had not received at that point. That is why we stopped.

The amendments for the provisions to make regulations in connection with the Water Appeals Commission for fees and awarding of costs were received and sent out to you on Friday, as were the amendments on the cost recovery issues. All of those, and all the other amendments previously received, are in your tabled papers. They are in order.

OK, subsequent to the decisions taken last week on risk designation, Rivers Agency has come forward with a set of amendments to address the Committee's concerns. We had an informal meeting yesterday, at which we got an opportunity to discuss this. The actual amendments are being tabled today and are in your tabled papers.

I ask the Committee to note that I intend to deal with the various sets of amendments in two different ways. First, the amendments to the regulations for fees etc, for the Water Appeals Commission and on cost recovery have been discussed in Committee on numerous occasions, both in oral presentations and written briefings. I am therefore content that the Committee has had sufficient time

to consider those. The Committee will vote on the clauses, as amended by these two sets of amendments.

On the amendments dealing with risk designation, I intend to take a different approach. These have been seen by members only today. They represent a substantial policy change, and, in my opinion, we need time to consider them. Whilst we will discuss them today, we will not have had sufficient time to decide whether the amendments address the concerns of the Committee. I do not propose that the Committee take a position today on whether they are acceptable. We will put that discussion on the agenda for next week, so that the Committee report can be finalised.

Are members content with this approach?

Members indicated assent.

The Chairperson: As always, I welcome David Porter and Kieran Brazier to the Committee. We have had previous written and oral briefings on the amendments to do with the provision to make the regulation for the appeals and costs awarded to parties being moved from DARD to OFMDFM and on the cost recovery and new appeals aspects. The amendments were emailed to members on Friday and are in your tabled papers.

David and Kieran, given the time constraints that we face, will you quickly explain those amendments once again? That is, basically, the amendments to do with the provision of making the regulation for the appeals, the costs awarded to parties moving from DARD to OFMDFM, and the costs recovery and appeals aspects.

Mr Kieran Brazier (Department of Agriculture and Rural Development): Shall I do that now?

The Chairperson: Yes please.

Mr Brazier: The power to charge fees and award costs is an issue that was identified by the Examiner of Statutory Rules. The Bill as currently drafted gives the Department the power, by regulation, to make provision for determining a fee and for the charging of that fee in relation to appeals under clauses 21, 73, 74, 77, 79, 82, 84 and 86. The Bill as currently drafted also gives the Department the power, by regulation, to make provision for the awarding of costs of the parties to such appeals under those clauses.

The Examiner of Statutory Rules suggested that it may be preferable to confer that power on the Office of the First and deputy First Minister rather than on this Department, as OFMDFM has similar functions in respect of the Water Appeals Commission and the Planning Appeals Commission. The Department has accepted the suggestion and proposes to address it as follows. First, in all the clauses that I referred to, we propose to remove all reference to determining a fee, the charging of a fee and the awarding of costs. Secondly, to confer that responsibility on the Water Appeals Commission and OFMDFM, we propose three new clauses: clauses 103A, 103B and 103C.

Clause 103A gives power to the Water Appeals Commission to award costs for all appeals that it hears under the Reservoirs Bill. Clause 103B is a bit technical in that it allows the Water Appeals Commission the power to award costs if it has invited people to a hearing in the appeal, even if those people have not attended. Clause 103C allows OFMDFM the power, by regulation, to specify fees that may be paid to the Water Appeals Commission by appellants under the Reservoirs Bill. This approach is now entirely consistent with the approach being taken in the Planning Act (Northern Ireland) 2011, which the Examiner of Statutory Rules referred to in his suggestion.

The Chairperson: OK. We will move on to the risk designations, but do members have any comments or questions on those specific amendments?

Mr McMullan: Under clause 103B, costs can be awarded if you are not there. Can you give an example of that?

Mr Brazier: In hearing an appeal, the commission may invite people to come along and give evidence verbally. However, if they do not accept that invitation or do not turn up, the Water Appeals Commission can still award costs to the appellants without the hearing having taken place. It allows costs to be awarded even if the people they have invited or who have expressed an interest in appearing before the commission have not done so.

The Chairperson: OK. If there are no further questions on those amendments, we will move on. I will ask David and Kieran to explain the proposed amendments to the risk designation process and the content from yesterday's informal meeting; I know that not all members were there.

Mr David Porter (Department of Agriculture and Rural Development): I will lead on this one. I am going to do two things. I will refer to the clauses — there are two clauses in particular to which I wish to draw your attention — and I will also explain the risk matrix that we have developed. This is operational; it is about trying to put the Bill into some sort of context to explain how this would work in practice.

In essence, the issues that the Committee have are, first, around the definition or the issue of risk designation and living below something that is high risk. That is an issue of terminology and the consequential reaction to that. Secondly, there is an issue where a reservoir manager could do some works but cannot influence either the probability of release or the consequence of it. We are trying to grapple with those two issues and, hopefully, you will see those through our proposed amendments to the Bill.

First, I will turn your attention to the changes to clause 17. You will see quite clearly in the amendments that we propose to remove the word "risk" from the Bill to make it absolutely crystal clear that the Bill is based on consequence. We have said that consistently throughout. When we were drafting the Bill, we were trying to make it future-proof, because risk is a function of two things: impact and likelihood. There continues to be no agreed methodology to determine the likelihood or probability of failure. We were trying to write a Bill that was future-proof, but because of that we were, potentially, tying ourselves in knots. In light of the Committee's concerns, we decided to take a step back and strip that word out and put in "consequence". Then we needed to make sure that there is provision in the Bill to allow us, if there is an agreed methodology, to revert to that. That is the first thing that will give some comfort to people that they no longer live below something that is, in statute, considered to be high risk. It is now going to be known as "high consequence". People will understand the consequence of failure, because of what is below it, as opposed to associating risk with something like the high risk of failure, which is not really what we are trying to describe. So that is the "consequence of failure" and the use of the word "risk".

That, then, got us to a point where we had to work out how a reservoir manager can influence what the risk designation is. How can they influence the consequence and the probability? They are going to be required to do some works by the inspecting engineer. If they carry those out, what is the tangible benefit that they can see? That is set out in the table: turn to that now. Where a structure is high consequence — ie the failure will impact on many people and potentially cause death — we have a range of boxes. Each one steps up as the probability of failure increases. We start on the left, where the reservoir has no outstanding matters in the interests of public safety, so the reservoir manager is fully compliant and has carried out their works. To the right of that is where matters have been identified, and that case we classify as a higher risk. What we are suggesting is that, operationally, we would know that as a high-risk structure. And then comes the case where the reservoir manager fails in their duty and does not carry out those matters in the interests of the public safety, and the Department has to step in. In that case, operationally, we would know that as a very high-risk structure.

There still remains an issue about whether the reservoir manager can influence the consequence. Can they move from a high consequence to a medium consequence? That is where I want to take you in this final moment or two: to clause 22. There is a very important point here that, I think, will tackle some of the concerns of the Committee. The Bill as originally drafted only enabled us to take a range of factors, such as the purpose for which a reservoir is being used, materials, the way it has been constructed and how it has been maintained into consideration in determining the probability of failure. We are proposing a very significant amendment here.

The Chairperson: Sorry for interrupting you, David. Members, this is on page 44 of your tabled papers. Clause 17 is on page 41, and clause 22 is on page 44.

Mr Porter: You will see in clause 22(3) that we have taken out the provision that we can only use those matters in determining, as it says in paragraph 22(1)(b), the probability of failure, and we have changed that to:

"the potential adverse consequences".

That is very significant, because it allows us first, as I have said before, to determine those reservoirs which could cause harm, ie where there is some dwelling, person or economic activity at risk. So then we know that those are not low; we know that they are either medium or high. In the past, we have described how, to differentiate those, we would use detailed flood inundation maps to determine the speed, velocity and depth of water. That was like an on/off switch. There was very little that you could really do to influence whether you were high consequence or medium consequence. The change to clause 22 allows the Department to take into account more factors in determining whether you are high consequence or medium consequence. So the use of the reservoir, and how it has been maintained — there are now factors whereby a reservoir manager can influence whether it is high consequence or medium consequence, and not just by knocking down buildings. Previously, that was what you would have had to do. Now, there may well be certain works that a reservoir manager could do that could then change the reservoir's consequence designation.

To summarise that, there are two things that we have done to the Bill. First, we have removed the word "risk" and entirely focused on "consequence". Secondly, by drawing in other matters that we can take into consideration in determining the consequence of failure, we have significant room to determine between high and medium consequence, and it also allows a reservoir manager to undertake works that could influence that and, therefore, the designation of a reservoir could potentially change.

The Chairperson: OK. Any questions on the risk designation amendment? Again, it is in clause 17 but its affects go right up to clause 22 and is, of course, entwined right throughout the Bill.

Mr Porter: That is correct.

The Chairperson: Any questions on that?

In the absence of members' questions, I will ask a question. We referred to your colour chart. Again, I appreciate and see the gains in what you have done here through the amendment by bringing into play factors that could be used to measure probability. So I understand that, and I see it as a gain. The fact that you have moved the labelling — the designation — from "risk" to "consequence" is, again, common sense to me; it is a gain. Having the consequence of reservoir failure mixed in with the probability to give you this part designation and the actions therein can change that.

However, I still have a problem with the actions within. The whole motive for me in this — and why I was not content — was that I thought that it was unfair that a reservoir owner could not change from the current rigours of the legislation to a better place with regard to regulation. From what I see here in front of me, the only differential now is that, whilst things may remain the same, if a reservoir owner initially does capital works at the start, his reservoir could well move from a high to a medium consequence. However, the actual risk probability does not really go to a better place because of his actions. In fact, if anything, it seems as if we have a new segment, which is very high risk. That does not mean anything different, because it was always there. It basically means that, where interests of safety are identified, a reservoir manager needs to do it, and if he does not do it, his reservoir goes straight into the very high risk category, which basically means that there will be enforcement.

Mr Porter: That is correct.

The Chairperson: Can you explain to me where the gain is? I can understand that you are starting to bring in a bit of fairness by the fact that you can change your consequence designation, but the probability which is now in has been given teeth by the fact that you are adding conditions by which you measure it. That is still the same as before, and we are still left with a regulatory burden because, under clauses 25 and 23, there is still at least one supervising engineer visit a year, and so on. So, if anything, we have not seen a gain in that regard. We have just seen a redesignation of the enforcement issue.

Mr Porter: There has been a gain in that that has moved from two per year to one per year. So, in essence, that gain has already been achieved. As I have said before, if the Committee wishes to push that out further, I have no objection to it. However, I do not believe that, contractually, anybody will be able to negotiate any better than what is written there, because we are exposing an engineer's professional indemnity (PI) insurance, and they will not take on a risk that they think is unreasonable. What is in the Bill is very reflective of what a reservoir manager who has a structure that is in good condition could expect to achieve. Irrespective of how pristine it is, I genuinely do not believe that they will be able to negotiate a better deal than what is shown. That is why I am absolutely comfortable

with those as minimum standards. If the Committee wishes to push it out further, we can do so. We would be doing that to satisfy ourselves; there will not, as I explained, be any real gain on the ground.

The big difference is that the reservoir manager can now control two different things. First, he controls the probability of failure: by not having measures required in the interests of public safety, he brings his structure into a reasonable condition. In the event of failure, that is his defence: he has done everything that the law asked of him.

Secondly, and more importantly, there may well be measures that he could undertake to reduce the risk from high to medium. That will make a difference to the regulatory burden because it is now based on consequence. If he could take some measure to divert the water, move the property or improve the structure, there is the potential to change from high consequence to medium consequence and therefore gain the benefit of not being required to have an inspecting engineer's report other than initially and not going from one inspection a year to two. That is now possible in the Bill; it was not when I spoke to you last week. That was the sticking point when the Committee voted on it. That has fundamentally changed. A reservoir manager can influence the consequence because of the range of factors that we can now take into consideration.

The Chairperson: OK. Are there any further questions on that amendment? No.

Thank you, David and Kieran, for that explanation of the amendments. Members, as I proposed earlier, given that we have not had sufficient time to consider all the policy implications, I propose that any decision made by the Committee on whether it feels that an amendment addresses its concerns be deferred until next week. I remind members that we retain the right to register formal opposition by the Committee to the Question that the clause stand part of the Bill at Consideration Stage.

Before we begin the formal clause-by-clause scrutiny, I refer members to the draft letter to the Minister. The Committee agreed last week that it be drafted for approval. I suggest that we defer a decision on issuing the letter until next week. I invite members to read it. It may well need to be amended, but that can be done next week, if we defer sending it until the discussion on the risk designation amendments. Are members content that we defer making a decision on the letter until next week?

Members indicated assent.

The Chairperson: Members should refer to their formal clause-by-clause matrix. It contains comments, responses and clarification from Rivers Agency on various clauses. Members will also find all the proposed amendments in sequence. These should enable members to follow the text of the amendments. Members should also have their copy of the Bill in front of them.

I will advise members of the options available to the Committee. We will take a formal vote on each clause and schedule. The options available to the Committee are to agree that it is content with the clause; agree that it is content with the clause as amended; agree that it is content with the new clause; or agree that it is not content with the clause or new clause. It can vote that it is not content with the clause or agree that a Committee amendment is required.

If we decide that we are not content with a clause, I remind members that, in advance of Consideration Stage, we also have the option to register our formal opposition to the Question that a clause stand part of the Bill. That 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 what they do not like about the current clause and what the policy objective is of an amendment or what they want the amendment to do. Please remember that, given the complexity and technical nature of the Bill, it is likely that only relatively simple amendments could be tackled in the time available. Members will know that they always have the option as individuals to table their own amendments, and Bill Office staff will assist with that.

I also want to inform members that I intend to group clauses about which there has been no query during the informal clause-by-clause scrutiny and no proposed amendment. If that is clear, we can start the formal part of the proceedings. Are there any questions at this point?

OK. Members will recall that, at last week's meeting, we considered up to clause 20. We will commence formal clause-by-clause consideration at clause 21. Finally, please be aware that it is my intention to finish the formal clause-by-clause consideration today. That will mean getting through

some 100 clauses and four schedules. If we do not get that done today, there will be an additional meeting.

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

The Chairperson: Two decisions need to be made today. The first relates to the regulation or fees for appeals and the awarding of costs by the Water Appeals Commission. The second decision will be on the risk designation process. I will, therefore, put two Questions. The first will relate to the Water Appeals Commission and is a technical amendment. The Examiner of Statutory Rules recommended that the responsibility for making regulations in clause 21(9) 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, 21(9) deals with the regulations to make provisions for the fee for the appeal and the awarding of costs of the parties to an appeal. There are also amendments to clauses 73(6), 74(2), 77(2), 79(7), 82(8), 84(6), 86(4) and 118(1) and to schedules 2 and 3. Those amendments are of a technical nature. The proposed amendment is at page 3 of the tabled papers.

Question, That the Committee is content to amend clause 21 in line with the departmental amendment, put and agreed to.

The Chairperson: I will now put the Question on the clause as amended. The Committee has serious concerns about the risk designation mechanism. Although it is content to amend the clause in line with the recommendation of the Examiner of Statutory Rules, it is not content with the clause as amended in so far as it relates to risk designation.

Is the Committee content with clause 21 as amended? I have to say that I am not. Are members agreed that we are not content?

Mr McMullan: Chair, can you state why you are not content?

The Chairperson: The crux is risk designation. We will talk about it next week, but we must push through the formal consideration.

Question, That the Committee is content with clause 21, subject to the proposed amendment, put and negatived.

The Chairperson: I formally acknowledge receipt of the amendments on risk designation from the Department. Unfortunately, the Committee has already started its clause-by-clause decision-making on the Bill. We are therefore content to consider the amendments proposed by the Department once the Committee has had adequate time to consider their text and impact on what is a complex and interconnected Bill.

Clause 22 (Matters to be taken into account under sections 17(3), 18(2), 20(3)(b)(ii) and 21(5)(a))

The Chairperson: As with clause 21, two decisions need to be made today. The first decision is on a recommendation from the Examiner of Statutory Rules on the number of regulations in the clause and its technical nature. The second decision will be on the risk designation process. I will therefore put two Questions. The first Question will be on the technical amendment. The Examiner of Statutory Rules said that there were two distinct rules at 22(4) when there should perhaps be one. The Department has suggested an amendment, which was considered at the meeting on 27 May. There is a consequential amendment to clause 117 as a result of the amendment to clause 22. The amendment is at page 4 of your tabled papers. The Committee has also requested clarification on the definition of cultural heritage, and the response is in the matrix.

Question, That the Committee is content to amend clause 22 in line with the departmental amendment, put and agreed to.

The Chairperson: We will now ask the Question on the clause as amended. The Committee has serious concerns about the risk designation mechanism and, although content to amend the clause in line with the Examiner of Statutory Rules' recommendations, is not content with the clause as amended in so far as it relates to risk designation.

Question, That the Committee is content with clause 22, subject to the proposed amendment, put and negatived.

The Chairperson: I wish to state the following, which can be added to the minutes. I formally acknowledge receipt of the amendments on risk designation from the Department. Unfortunately, the Committee has already started its clause-by-clause decision-making on the Bill. We are therefore content to consider the amendments proposed by the Department once the Committee has had adequate time to consider the text of the amendments and their impact on what is a complex and interconnected Bill.

Question, That the Committee is content with clause 23 put and agreed to.

Clause 24 (Supervision requirement and commissioning of supervising engineer etc.)

The Chairperson: The Committee has expressed concern about whether the level of penalties is commensurate with the offence. There was also concern about the responsibilities of a supervising engineer. The responses from the Department are in the matrix.

Question, That the Committee is content with clause 24, put and agreed to.

Clause 25 (Duties etc. in relation to supervision)

The Chairperson: The Committee has received an amendment to the clause to take account of the number of supervising engineer visits to high-risk and medium-risk reservoirs. The amendment is at pages 4 to 6 of the tabled papers. There is a consequential amendment at clause 33(4)(i).

Before I put the Question, I will say my piece. I am not yet content with clause 25(2)(k), which deals with the visits to a high-risk reservoir. The number of visits will change with the amendment to at least once in every 12-month period for a high-risk reservoir and at least once in every 24-month period for a medium-risk reservoir.

Again, there are two factors to my concerns. One is the words "at least". More could have been done on the minimum and maximum number of inspections in any given time. I am not content with the periods, namely 12 months and 24 months. I revert to my MOT analogy. A car goes through an MOT once a year. Is that comparable with a reservoir that has been in existence for a long time? Those are my concerns and the reasons why I am not content with the clause.

Members may well ask me whether we should amend the clause. The problem is that I do not see that I, and maybe even the Committee, are informed enough technically to put a time on it. We could push it out, but how far? You have heard the arguments from David and Kieran on what engineers are saying about their PI protection. So where would it be suitable for the Committee to draw the line? Again, I put the onus back on the Department. Really, the onus on setting a period should be placed there and not with the Committee.

My issues are with the words "at least" for a minimum; the absence of a maximum period; and with the intervals specified. I acknowledge that amendments were made and that the number of inspections was pushed out from twice every 12 months to once every 12 months for high-risk reservoirs and from at least once in every 12 months to at least once in every 24 months for medium-risk reservoirs. However, I am not content that that is enough. That is my spoke. Do members have any comments or questions?

Mr McMullan: How many times is a high-risk reservoir inspected before it is downgraded to medium risk? It will not always stay as a high-risk reservoir. Therefore, if it comes down to medium consequence, it will have a 24-monthly inspection. Are you looking for one inspection in every 36-month period?

The Chairperson: I am not content with the periods as they sit. This is all very much wrapped up with clause 17 and the risk designation and probability issue. That is where I sit. I see that gains have been made, and we now have the amendment, which we will discuss and debate next week. In the amendment, factors come into play that change the designation.

Mr McMullan: At the same time, you cannot let a reservoir go too long without inspection. I know that you may want to have a three-, four- or five-year inspection period, but you could be letting it go too far.

The Chairperson: It is about finding the balance. I do not know whether the Committee has the technical information to be able to make that informed judgement. That is why I am not proposing an amendment, but I am not content with the clause.

Mr McMullan: These decisions are all predicated on cost. Without the cost, we could, I think, take the decisions much more easily. However, we know that there is a cost to the inspections, so we are trying to find a suitable inspection period to cover that cost. That is what is really driving —

The Chairperson: It is the regulatory burden and then making sure that it is effective.

Mr McMullan: Yes, so we are keeping in our head the costs to the people who own the reservoirs. If a high-risk reservoir is inspected once a year, after three years, it should be ready for downgrading to medium risk. It cannot remain high risk every year if it complies with the regulations; it has to be downgraded at some stage.

The Chairperson: Yes, that is one of the points that I made before. A reservoir might have been there for 100 years without any movement. The new regime means visits by supervising engineers and inspection engineers' reports. If nothing has changed over that initial period, there could be a way to relax that regime. Given that it is time framed, I do not know how you would ever write that into a Bill. Do we have to do the same thing over and over again? Does a supervising engineer need to see the same thing over and over again? Rivers Agency would say that you would start with more visits in a 12-month period and a 24-month period, and then you get to the point at which you have one a year and one every 24 months. That is, I think, just too burdensome, and that is why I am not content.

Any other questions or queries?

Mr McMullan: How long does an inspection take? If you have an inspection once a year and write up your report, you are no sooner finished than you are into the following year.

The Chairperson: Every reservoir will be different.

Mr McMullan: It is about cost. We have cost in our head rather than the period of inspection. Costs are driving this decision.

The Chairperson: If you have an engineer supervising a reservoir every month —

Mr McMullan: If we are not content, we may leave that and come back to it next week.

The Chairperson: We have to do it formally. This has always been a fundamental issue. I am not content with it as it is. I do not have enough technical information to make an amendment.

Before I put the Question, do members have any other comments? No.

Question, That the Committee is content with clause 25, put and negatived.

Question, That the Committee is content with clauses 26 to 28 put and agreed to.

Clause 29 (Inspection timing: reservoir subject to pre-commencement inspection report)

The Chairperson: Whilst no comments were received in relation to the clause, there is a consequential amendment in clause 120. The amendment is at pages 6 and 7 of the tabled papers.

Question, That the Committee is content with clause 29, subject to the proposed amendment, put and agreed to.

Question, That the Committee is content with clauses 30 to 32 put and agreed to.

Clause 33 (Duties etc. in relation to inspection)

The Chairperson: No comments were raised in relation to the clause. However, it is consequential to the proposed amendment to 25(2)(k), which was considered at the meeting on 27 May. The amendment can be found at pages 7 and 8 of the tabled papers. Clause 33 is linked to clause 25(2)(k). I am not going to rehearse the issues, but I have a problem with the minimum time and the period between inspections. It is exactly the same issue.

Question, That the Committee is content with clause 33, subject to the proposed amendment, put and negatived.

Question, That the Committee is content with clauses 34 and 35, put and agreed to.

Clause 36 (Offences: supervision, inspection, record keeping)

The Chairperson: The Department is considering an amendment to the clause to ensure that, where a reservoir manager is required by other legislation to obtain consents, sufficient time is allowed to obtain such consents before enforcement action is considered. The amendment can be found at pages 8 and 9 of the tabled papers and includes a new clause 36A. There is a consequential amendment to clauses 37 and 70.

Question, That the Committee is content with clause 36, subject to the proposed amendment, put and agreed to.

New Clause

The Chairperson: New clause 36A is entitled:

"Offence in connection with inspection: failure to secure compliance with safety direction or recommendation"

The new clause 36A is at page 9 of the tabled papers.

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

Clause 37 (Defences: offence under section 36(1)(f))

The Chairperson: There is now a consequential amendment to clause 37 due to the amendment to clause 36. The amendment is at page 10 of the tabled papers.

Question, That the Committee is content with clause 37, subject to the proposed amendment, put and agreed to.

Question, That the Committee is content with clauses 38 to 48 put and agreed to.

Clause 49 (Offences: construction or alteration)

The Chairperson: There is an amendment to this clause, which can be found at pages 10 and 11 of the tabled papers.

Question, That the Committee is content with clause 49, subject to the proposed amendment, put and agreed to.

New Clause

The Chairperson: New clause 49A is entitled:

"Offences: failure to comply with safety direction in safety report, preliminary certificate or final certificate"

The new clause 49A is at pages 10 and 11 of the tabled papers.

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

Clause 50 (Defences: offences under section 49(1)(b) or (c))

The Chairperson: There is a consequential amendment due to the new clause 49A. It amends the title to "Defences: offences under section 49A(1)(a) or (b)", and it is at page 11 of the tabled papers.

Question, That the Committee is content with clause 50, subject to the proposed amendment, put and agreed to.

Question, That the Committee is content with clauses 51 and 52, put and agreed to.

Clause 53 (Flood plans)

The Chairperson: An amendment is proposed to this clause, and it can be found at pages 11 to 13 of the tabled papers.

Question, That the Committee is content with clause 53, subject to the proposed amendment, put and agreed to.

Question, That the Committee is content with clauses 54 to 64 put and agreed to.

Clause 65 (Commissioning of engineer by Department)

The Chairperson: We now come to the first of a number of clauses that deal with the issue of cost recovery. These are clauses 65(4), 67(6), 69(6), 71(7), 71(8), 86(1) and 92(8) and the new clauses 103A, 103B and 103C.

The Committee in its deliberations noted that, when the reservoir manager fails to comply with certain requirements of the Bill, the Department has provided itself with the powers to meet those requirements. This covers areas such as commissioning of an engineer, carrying out safety works etc. In most of these instances, the Department must recoup or recover the full costs. The Department seems to be working on the assumption that, in such cases, it would be because the reservoir manager was refusing to comply. The Committee understood that, in fact, in many cases, it could be because the reservoir manager would be financially unable to comply. This was a fundamental issue for the Committee. It did not want the Department having to pursue a community-based club or farmer when there was no likelihood of the reservoir manager being able to pay.

The Department agreed that it would amend a number of clauses to enable it to have discretion on cost recovery. Thus in cases where there was no possibility of a reservoir manager being able to pay or where payment would cause severe financial difficulties or even bankruptcy or, indeed, where it did make economic sense to seek to recover costs, the Department will have some discretion. However, as the Department will be making a decision on whether to recover costs, that has necessitated the provision of an appeal system in the Bill. The appeal system will be managed by the Water Appeals Commission for Northern Ireland. OFMDFM is the sponsor Department for the Water Appeals Commission, and its approval is therefore required for that new function and the relevant amendments. The amendments have been received, and we will come across them individually as we go through the clauses.

The first amendment is to clause 65, and it is on page 13 of the tabled papers. This was a major issue for many members of the Committee, and so the amendment is, if you like, a gain for the Committee.

I will put the Question: is the Committee content with clause 65 as amended?

Mr McMullan: Would the word "reasonable" not be better on the other side of the word "costs", rather than "costs reasonably incurred"?

The Chairperson: This is at clause 65.

The Committee Clerk: It is just the way that it is drafted.

Mr McMullan: Yes, but if you were reading it, what would you think?

The Chairperson: I can bring the officials forward if you wish, but they will probably say that that is the way that it is drafted.

Mr McMullan: OK. I will go with that.

The Chairperson: Are you happy enough?

Mr McMullan: Yes.

Mr Buchanan: On that, the amendment states that the Department:

"may by notice served ... require the manager to pay".

Therefore, the Department will have the flexibility to seek to restore any moneys that it has spent. However, the word "may" is used. How far can the Department go? It is still somewhat open-ended. If the Department moves in, does a bit of work and is looking to recover its money, is there a possibility that the reservoir manager could lose his house or part of a holding that he has? If he does not have the money to pay, is it possible that he is going to lose part of a business, a farm, a house or whatever?

The Chairperson: I ask the officials to come to the table. Did you hear all of that?

Mr Porter: Yes. The fundamental point is that those are the responsibilities of the reservoir manager. They are responsible for the structure. We have passed the point in the Bill of establishing that it is their responsibility as is the cost associated with that. When the reservoir manager does not fulfil their duty, which is established in law, the flexibility is there for the Department to step in and carry out the works. The question is then what costs we will recover.

The word "may" is there to give us some flexibility. We will not pursue when there is no prospect of cost recovery. That is the element that is in there. However, where there is a prospect of cost recovery and somebody is quite capable of carrying out that duty but chooses not to, we need the legislation to be quite strict. It is their responsibility. They own the structure, and if it fails, they are liable for the harm that is caused. We are regulating that function. It is highly important that that is made clear and that we do not write in a legal loophole whereby people who are quite capable of carrying out their duty just sit on their hands and wait for the Department to do it and have wriggle room to get out of it. It needs to be quite tight to make sure that we do not leave that prospect of people playing out legal arguments with us.

The Chairperson: OK. Are there any further questions for the officials, David and Kieran?

Mr Buchanan: It is still not overly clear. Somebody may not have the money to do what is required of them, but they have a holding or property, something like that. For example, if they have property, is there the possibility that that property could be seized to make up for the money that the Department is looking for?

Mr Porter: It would be exactly the same as if you owed the taxman money. In law, it says that you owe that money and, if you have the ability to pay that, it is right and proper that you are pursued for it. Just because you are going to lose something is not a good enough argument. If you dodge your tax, and you have assets, it is entirely right and proper, in law, for that to be pursued because you owe that money. That principle needs to be maintained. We recognise that there are people who hold this in a charity trust or who have been left a reservoir or a body of water in a will and they have no other assets. We need the discretion in a genuine case like that, so that the Department can put a case — internally to the Department and potentially to the Minister — to say that there is no reasonable prospect of cost recovery and it is not mischievousness by an individual or clever management of their assets. We need a little bit of wriggle room for those cases. However, if somebody is just avoiding their responsibility — in the same way as they might avoid paying tax or any other bill — and they have the ability to pay, they should pay in law. Just because you do not like paying is not a good enough defence. We have to be careful that we do not write that in.

The Chairperson: Various members want to speak. We have covered this, week in and week out. It is one of the fundamentals. We are going over ground that we have already covered. You used the example of tax, David, but you pay tax because you have made money. That is not the case if you are a reservoir owner. In most cases, the person has inherited it, and it may be a millstone round their neck.

Mr Porter: It applies irrespective of how you got it. If you were willed a house, not a reservoir, and it had a leaking roof, unfortunately it comes as a package, and you cannot separate out the bits that you would like to be left to you and give up the bits that you do not like. Unfortunately in life, that is what happens. You get good bits, and there are risks and responsibilities. We have established through history that, in common law, the owner of the land is responsible for this hazard; we have established that they are not managing it in a way that means that we can give an assurance to people, particularly those living downstream, that it is being managed in a reasonable way; and we have established that something needs to be done. Unfortunately, we cannot just say that we will let them off the pain bit of owning it because of the circumstances. However, we have put in a little bit of wriggle room so that we do not see people being made destitute over this. It is difficult in law to write that in, and this is as good as we can get it.

The Chairperson: I understand.

Mr Swann: I am looking for some clarity. If a reservoir owner has assets, the Department will pursue them for those assets.

Mr Porter: The Department would have to consider whether it was right and proper to pursue them. We are establishing the powers in law. The difficulty is the individual cases that you have to deal with. We cannot go through and say that there are 40 individual cases and that we will pursue this one because of this circumstance, but that we might not pursue that one. We have to take it on a case-by-case basis when it arises. That is where we need it to be tight, so that we do not leave a loophole. However, we need a little bit of discretion for the Department, so that, when we are presented with the facts of an individual case, we have the ability to apply a little bit of discretion.

Mr Brazier: As currently drafted, the Bill says that we "must" recover; the Department will pursue in any circumstances. The amendment gives the Department discretion and more accurately reflects its policy on cost recovery. We cannot write into the primary legislation all the scenarios that might come up around this. If the Department has incurred costs that should otherwise have been incurred by a reservoir manager, it has a responsibility to consider recovering those costs. That is what this is doing. That might lead to full-cost recovery in certain circumstances and no-cost recovery in others because of the circumstances of the individual reservoir manager. As drafted and introduced in the Assembly, there was no discretion around that. In addition, we have brought in, in the amendment, that if we decide to recover costs, the reservoir manager will have the right to appeal to the Water Appeals Commission as to the amount and the decision to recover.

Mr Swann: As far as I am aware, the Department's policy on cost recovery is full-cost recovery.

Mr Brazier: We checked that and that is not the case. This Bill accurately reflects the policy, and we checked that with our policymakers. We showed this proposed amendment to our policymakers, and they agreed that it accurately reflected the position.

Mr Porter: Maybe the example is better not to think of the extremes but the very small cases. For instance, if the Department had to step in and spend a few hundred pounds to do something, and it is going to cost us £10,000 to recover that cost, clearly we would put a case that it is not value for money to spend £10,000 to pursue and recover a few hundred pounds. In that case, irrespective of whether it was in the Reservoirs Bill or any other bit of the Department, there would have to be a judgement made on whether cost recovery was the correct thing to do.

Mr Swann: David, we pass SRs here quite regularly where we go for the cost recovery of the price of plastic shoes. So, when you are talking about the Department going after a few hundred pounds, they go after a few pence in certain cases. This example is purely theoretical: if somebody has been bequeathed a reservoir that then needs money, which they do not have, spent on it, and the Department moves in to seize the asset, the only asset they have is the reservoir. Will the Department take the reservoir or is that too big a risk for the Department?

Mr Porter: Again, I am not sure. We would need to consider that.

Mr Swann: But if he had a house, you would take the house.

Mr Porter: No, we would not say that.

Mr Brazier: Not necessarily.

Mr Swann: Not necessarily, but you may.

Mr Brazier: Yes, it is a possibility. It needs to be considered. The Department has incurred costs that would otherwise have been incurred by the reservoir manager, and it needs to consider the recovery of those costs. Whether it does or not —

Mr Porter: — is a different matter.

Mr Brazier: — depends on the circumstances.

Mr Swann: The flexibility may be in the legislation, but I think that it will be a different matter in practice.

Mr Brazier: The way the Bill is written, we would be in breach of the legislation if we did not apply how it is written.

Mr Irwin: I have issues similar to Robin's whereby someone can inherit a reservoir and quite possibly be asset-rich, but they do not have the funds. It would be a travesty if those people had to sell property.

Mr Porter: Unfortunately, that is a hazard associated with getting willed something. I am not sure how, in legislation, we can deal with that.

Mr Irwin: I know that. Put it this way: those who cannot afford it, you do not go after them; those who have assets, you do go after them. It is not fair either way.

Mr Porter: We are happy to revert to the previous one that says that we will just go after everybody, if that is what you want. That is the alternative.

Mr Irwin: Most of the time, you would be wasting your time.

Mr Swann: Put it this way, going back to that would make our decision an awful lot easier. *[Laughter.]*

Mr Porter: At least that is equally unfair on everybody. I do not know what to do here.

Mr Brazier: We brought that forward because that is what we thought the Committee was looking for: discretion. If we are hearing otherwise, we can revert.

Mr Irwin: Discretion is good, but —

Mr Brazier: We cannot give guarantees, if that is what the Committee is looking for. We just cannot.

Mr Porter: We cannot because we are bringing in a power in order to do something. We cannot write in, "In this particular case, we will do this, and in that particular case, we will do that". It is then how we deal with individual cases after that. The flexibility is good because at least it means that we do not have to recover costs. At least it requires us to pose that question to ourselves. Will we recover costs? Is it reasonable? At least that flexibility is a movement.

The Chairperson: We have opened up this debate again. We have had this countless times, and I know that the Department has moved and the Committee has made gains. I am happy to go into a five-minute closed session if members want to discuss the issue further. Otherwise, I will put the Question. It is completely up to members. A five-minute informal?

Members indicated assent.

The Committee went into closed session from 3.31 pm until 3.43 pm.

The Chairperson: I remind members that we are back in open session. We have discussed clause 65 in open and closed sessions.

Question, That the Committee is content with clause 65, subject to the proposed amendment, put and agreed to.

Question, That the Committee is content with Clause 66, put and agreed to.

Clause 67 (Enforcement notice: safety measures)

The Chairperson: An amendment is proposed to clause 67(6) to take account of the Committee position on discretion in seeking full cost recovery.

Question, That the Committee is content with clause 67, subject to the proposed amendment, put and agreed to.

Question, That the Committee is content with Clause 68, put and agreed to.

Clause 69 (Department's power to arrange taking of safety measures)

The Chairperson: An amendment is proposed to clause 69(6) to take account of the Committee's position on discretion over full cost recovery.

Question, That the Committee is content with clause 69, subject to the proposed amendment, put and agreed to.

Clause 70 (Offence under section 36(1)(f) or 49(1)(b): further remedies)

The Chairperson: There is a new consequential amendment to clause 70, due to the amendment of clause 36.

Question, That the Committee is content with clause 70, subject to the proposed amendment, put and agreed to.

Clause 71 (Emergency powers)

The Chairperson: There is an amendment to clause 71(7) and (8) to take account of the Committee position on discretion on full cost recovery. The amendment is at page 15 of tabled papers, and there is a new clause at 71A.

Question, That the Committee is content with the clause 71, subject to the proposed amendment, put and agreed to.

New Clause

The Chairperson: New clause 71A is entitled "Recovery of costs under section 65, 67, 69 or 71: appeal". It is a new clause due to the amendment to clause 71.

Question, That the Committee is content with new clause 71A, put and agreed to.

Question, That the Committee is content with clause 72 agreed to.

Clause 73 (Stop Notices: content and procedure)

The Chairperson: There is an amendment at 73(6) regarding the change in the responsibility for making regulations to clause 21(9); that is, it should rest with the Office of the First Minister and deputy First Minister rather than with the Department in order to avoid a conflict of interest.

Question, That the Committee is content with clause 73, subject to the proposed amendment, put and agreed to.

Clause 74 (Stop notices: compensation)

The Chairperson: There is an amendment at clause 74(2) regarding the change in the responsibility for making regulations to clause 21(9); that is, it should rest with the Office of the First Minister and deputy First Minister rather than with the Department in order to avoid a conflict of interest.

Question, That the Committee is content with clause 74, subject to the proposed amendment, put and agreed to.

Question, That the Committee is content with clauses 75 and 76, put and agreed to.

Clause 77 (Regulations as to enforcement undertakings: further provision)

The Chairperson: There is an amendment to clause 77(2) regarding the change in the responsibility for making regulations to clause 21(9); that is, it should rest with the Office of the First Minister and deputy First Minister rather than with the Department in order to avoid a conflict of interest.

Question, That the Committee is content with clause 77, subject to the proposed amendment, put and agreed to.

Question, That the Committee is content with clause 78, put and agreed to.

Clause 79 (Fixed monetary penalties: procedure etc)

The Chairperson: There is an amendment to clause 79(7) regarding the change in the responsibility for making regulations to clause 21(9); that is, it should rest with the Office of the First Minister and deputy First Minister rather than with the Department in order to avoid a conflict of interest.

Question, That the Committee is content with clause 79, subject to the proposed amendment, put and agreed to.

Question, That the Committee is content with clauses 80 and 81, put and agreed to.

Clause 82 (Variable monetary penalties: procedure etc)

The Chairperson: There is an amendment to clause 82(8) regarding the change in responsibility for making regulations to clause 21(9); that is, it should rest with the Office of the First Minister and deputy First Minister rather than with the Department in order to avoid a conflict of interest.

Question, That the Committee is content with clause 82, subject to the proposed amendment, put and agreed to.

Question, That the Committee is content with clause 83, put and agreed to.

Clause 84 (Undertaking referred to in section 82(5): enforcement)

The Chairperson: There is an amendment to clause 84(6) regarding the change in responsibility for making regulations to clause 21(9); that is, it should rest with the Office of the First Minister and deputy First Minister rather than with the Department in order to avoid a conflict of interest.

Question, That the Committee is content with clause 84, subject to the proposed amendment, put and agreed to.

Question, That the Committee is content with clause 85, put and agreed to.

Clause 86 (Recovery by the Department of certain costs)

The Chairperson: There is an amendment to clause 86(1) to take account of the Committee position on full cost recovery. There is also an amendment to clause 86(4) regarding the change in responsibility for making regulations to clause 21(9); that is, it should rest with the Office of the First Minister and deputy First Minister rather than with the Department in order to avoid a conflict of interest.

Question, That the Committee is content with clause 86, subject to the proposed amendments, put and agreed to.

Clause 87 (Publication of enforcement action)

The Chairperson: The Committee sought clarification of why enforcement actions were required to be published, and the response is on page 20 of the matrix.

Question, That the Committee is content with clause 87, put and agreed to.

Clause 88 (Powers of entry)

The Chairperson: The Committee sought clarification on exemptions for powers of entry or the differences between this clause and what is accepted as normal standard operating procedures.

Question, That the Committee is content with clause 88, put and agreed to.

Clause 89 (Warrants authorising entry)

The Chairperson: The Committee sought clarification on the use of the force element in the clause.

Question, That the Committee is content with clause 89, put and agreed to.

Question, That the Committee is content with clauses 90 to 91, put and agreed to.

Clause 92 (Compensation)

The Chairperson: There is an amendment to clause 92(8) to take account of the Committee position on full cost recovery.

Question, That the Committee is content with clause 92, subject to the proposed amendment, put and agreed to.

Question, That the Committee is content with clauses 93 to 95, put and agreed to.

Clause 96 (Power to require information and assistance from others)

The Chairperson: The Committee sought clarification on what was meant by "other body" and whether that covered the Secretary of State.

Question, That the Committee is content with clause 96, put and agreed to.

Question, That the Committee is content with clauses 97 to 102, put and agreed to.

Clause 103 (Reimbursement of costs incurred by Institution of Civil Engineers)

The Chairperson: No issues were identified with clause 103. However, there are new clauses 103A, 103B and 103C to take account of the amendments to clause 65.

Question, That the Committee is content with clause 103, put and agreed to.

New Clause

The Chairperson: New clause 103A is entitled "Power of Water Appeals Commission to award cost in an appeal".

Question, That the Committee is content with new clause 103A, put and agreed to.

New Clause

The Chairperson: New clause 103B is entitled "Orders as to costs: supplementary".

Question, That the Committee is content with new clause 103B, put and agreed to.

New Clause

The Chairperson: New clause 103C is entitled "Fees in relations to appeals".

Question, That the Committee is content with new clause 103C, put and agreed to.

Question, That the Committee is content with clause 104, put and agreed to.

Clause 105 (Grants)

The Chairperson: Members will recall that the Minister has advised that she is proposing a grant scheme, and this was discussed at last week's meeting.

Question, That the Committee is content with clause 105, put and agreed to.

Clause 106 (Assessment of engineers' reports etc.)

The Chairperson: The Committee expressed concern regarding the possibility of overengineering by engineers and the lack of checks and balances on engineers in the Bill. The Department has proposed an amendment and a new clause 106A. A briefing was given on this amendment at the meeting last week. Members should refer to the Hansard report of that briefing.

Question, That the Committee is content with clause 106, subject to the proposed amendment, put and agreed to.

New Clause

The Chairperson: New clause 106A is entitled "Publication of information as regards ranges of costs of engineers' services". It is directly related to the issues raised by the Committee on some sort of checks and balances on the engineers, as well as dealing with the information vacuum around the cost of hiring the various types of engineer.

Question, That the Committee is content with new clause 106A, put and agreed to.

Clause 107 (Notice to the Department of revocation of commissioning, or resignation, of engineer)

The Chairperson: The Committee sought clarification on the defence at clause 107(6).

Question, That the Committee is content with clause 107, put and agreed to.

Question, That the Committee is content with clauses 108 to 112, put and agreed to.

Clause 113 (Enforcement in relation to the Crown)

The Chairperson: The Committee sought clarification as to the reason why this clause was included in the Bill.

Question, That the Committee is content with clause 113, put and agreed to.

Question, That the Committee is content with clause 114, put and agreed to.

Clause 115 (Offences by bodies corporate and partnerships)

The Chairperson: The Committee sought clarification on who would be liable in a partnership or merger when an act of sabotage or vandalism took place.

Question, That the Committee is content with clause 115, put and agreed to.

Clause 116 (Supplementary, incidental, consequential etc. provision)

Question put, That the Committee is content with clause 116.

Mr McMullan: Are we dealing here with limited companies?

The Chairperson: This is clause 116. We have just voted on clause 115. Do you want to come in on clause 116?

Mr McMullan: No, it's OK.

Question accordingly agreed to.

Clause 117 (Orders and regulations)

The Chairperson: There is a consequential amendment to clause 117(3)(a)(ii) due to an amendment to clause 22.

Question, That the Committee is content with clause 117, subject to the proposed amendment, put and agreed to.

Clause 118 (Definitions)

The Chairperson: There is an amendment to clause 118. This is directly related to the technical amendment around who makes regulations to provide for appeals fees and awarding of costs in relation to the Water Appeals Commission.

Question, That the Committee is content with clause 118, subject to the proposed amendment, put and agreed to.

Question, That the Committee is content with clause 119, put and agreed to.

Clause 120 (Commencement)

The Chairperson: The Committee considered a proposed amendment to clause 120 at the meeting on 27 May. This is an amendment to allow for the two-phase approach as defined in discussions and the letter from the Minister that was considered last week. There is a further amendment to clause 120. The Committee was very much of this mind with regard to the two phases of the Bill, given the fact that we did not have all the information that we should have had with regards to initial audit and the information that would flow from that. Pardon the pun.

Question, That the Committee is content with clause 120, subject to the proposed amendments, put and agreed to.

Question, That the Committee is content with clause 121, put and agreed to.

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

Schedule 2 (Index of Defined Expressions)

The Chairperson: There is an amendment to schedule 2. It adds the words "the Water Appeals Commission" and "Section 118(1)".

Question, That the Committee is content with schedule 2, subject to the proposed amendment, put and agreed to.

Schedule 3 (Minor and Consequential Amendments)

The Chairperson: There is an amendment to schedule 3.

Question, That the Committee is content with schedule 3, subject to the proposed amendment, put and agreed to.

Question, That the Committee is content with schedule 4, put and agreed to.

Question, That the Committee is content with the long title, put and agreed to.

The Chairperson: That concludes clause-by-clause scrutiny of the Reservoirs Bill. The Committee staff will now draft the Committee report for consideration and approval by the Committee on 17 June.

Mrs Dobson: You will do that tonight.

The Chairperson: You would probably need to do it tonight to keep everything in your head. We can have a discussion next week on the amendments that we have received today. Having said that, we have already completed formal clause-by-clause scrutiny. Everything else will go into the Committee report that the staff will compile for our approval. The letter to the Minister will also need to be amended next week. I had better not be counting out numbers in my sleep. *[Laughter.]*