

ENVIRONMENT AND RURAL DEVELOPMENT COMMITTEE

Wednesday 29 September 2004

Session 2

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ENVIRONMENT AND RURAL DEVELOPMENT COMMITTEE 22nd Meeting 2004, Session 2

CONVENER

*Sarah Boyack (Edinburgh Central) (Lab)

DEPUTY CONVENER

*Mr Mark Ruskell (Mid Scotland and Fife) (Green)

COMMITTEE MEMBERS

*Rob Gibson (Highlands and Islands) (SNP)
*Karen Gillon (Clydesdale) (Lab)
*Alex Johnstone (North East Scotland) (Con)
*Maureen Macmillan (Highlands and Islands) (Lab)
*Mr Alasdair Morrison (Western Isles) (Lab)
*Nora Radcliffe (Gordon) (LD)

COMMITTEE SUBSTITUTES

Alex Fergusson (Galloway and Upper Nithsdale) (Con)
Janis Hughes (Glasgow Rutherglen) (Lab)
Jim Mather (Highlands and Islands) (SNP)
Jeremy Purvis (Tweeddale, Ettrick and Lauderdale) (LD)

*attended

THE FOLLOWING ALSO ATTENDED:

Fergus Ewing (Inverness East, Nairn and Lochaber) (SNP)
John Farquhar Munro (Ross, Skye and Inverness West) (LD)

THE FOLLOWING GAVE EVIDENCE:

John Banfield (Competition Commission)
Stephen Hill (Coal Authority)
Elspeth MacDonald (Scottish Executive Legal and Parliamentary Services)
Angela McTeir (Scottish Executive Environment and Rural Affairs Department)
Stuart Rolley (Coal Authority)
Dr John Simpson (Office of the Water Industry Commissioner for Scotland)
Tony Smith (Office of Water Services)
Alan Sutherland (Water Industry Commissioner for Scotland)
Allan Wilson (Deputy Minister for Environment and Rural Development)

CLERK TO THE COMMITTEE

Tracey Hawe

SENIOR ASSISTANT CLERK

Mark Brough

ASSISTANT CLERK

Chris Berry
Catherine Johnstone

LOCATION

Committee Room 6

Scottish Parliament

Environment and Rural Development Committee

Wednesday 29 September 2004

[THE CONVENER *opened the meeting at 09:38*]

Subordinate Legislation

Environmental Protection (Restriction on Use of Lead Shot) (Scotland) (No 2) Regulations 2004 (SSI 2004/358)

The Convener (Sarah Boyack): Good morning. I apologise for the delay, but I was informed that the lifts were not working and I wanted to ensure that witnesses and committee members were able to make it upstairs in one piece and to recover from the effort.

I do not think that there are any apologies for absence. We have two visiting members with us this morning—John Farquhar Munro and Fergus Ewing. I welcome members, witnesses and members of the press and public to our meeting. I remind everybody to switch off their mobile phones.

Our first item of business is subordinate legislation. We are considering under the negative procedure the Environmental Protection (Restriction on Use of Lead Shot) (Scotland) (No 2) Regulations 2004 (SSI 2004/358). I welcome the Deputy Minister for Environment and Rural Development, Allan Wilson, and his officials. I remind members that this is the second set of regulations that we have considered on this topic. The previous regulations were revoked by the minister during the summer in response to substantial concerns that had been raised by the Subordinate Legislation Committee about their drafting. The Subordinate Legislation Committee has now considered the new regulations and reported that it has no comment to make, so in a sense that means that the Parliament's scrutiny of legislation is working.

Today, we have a motion that has been lodged by John Farquhar Munro inviting the committee to recommend to the Parliament that nothing further be done under the regulations. I thought that I should first of all clarify how I intend to deal with this piece of business. I shall do what has been done with other pieces of subordinate legislation when there has been a challenge to the Executive. I propose to begin with a question-and-answer session, to let members clarify any purely

technical matters and ask for explanations in relation to these detailed regulations while the officials are at the table. Once we move on to the debate, we will not be able to ask any technical questions of the officials, so members will have the chance to address those issues in depth first. Once we have done that and members have raised any technical points that they want to raise, we shall move on to the debate on the motion itself.

I invite the Deputy Minister for Environment and Rural Development to make some opening remarks. I am particularly keen to get factual background information rather than have a debate on the motion, which we shall come to when I invite John Farquhar Munro to move his motion.

The Deputy Minister for Environment and Rural Development (Allan Wilson): I shall be as brief and factual as possible in the circumstances. The simple aim of the regulations is to prevent lead shot from causing pollution of the environment, which is fully consistent with our previous discussion on the water framework directive. I know from some of the views that were expressed in our extensive consultation on banning lead shot that there are people out there who do not believe that lead is a poison. However, there have been decades of research to that effect. Lead is a very harmful substance both to land and to wildlife, which is why we also take steps to reduce its use in other areas of life.

The case that lead is a poison is, I submit, overwhelming. That is why the regulations seek to amend the Environmental Protection Act 1990 for the dual purpose of ensuring that lead does not contaminate wetlands and that waterfowl are protected. The regulations seek to ban the use of lead shot over wetlands in order to protect our waterfowl, as clear scientific evidence has shown that lead is a threat to birds such as swans and ducks. Those birds ingest grit, which often contains spent lead shot, and the consequence of that is a slow poisoning—when enough lead is ingested, obviously the birds can die.

A voluntary ban on the use of lead shot has been in place in Scotland since 1995, and many of our responsible shooters have already moved away from using lead shot over wetlands. However, there is a further need to introduce a legal option of control, which is to comply with an international commitment given by the UK Government in 1999 under the African-Eurasian migratory water bird agreement, which included an obligation to phase out the use of lead shot over wetlands. Legislation is already in place in England and Wales, so I submit that it is appropriate that we do the same in Scotland as part of that international commitment.

We obviously had the option of following the English example when that legislation was introduced five years ago, but we did not think that that approach was appropriate for those who shoot in Scotland, given some of the differences in sites and species north of the border. The clear message that we got from consultations on the subject, and from discussions with shooting organisations and individual shooters, is that measures in Scotland should reflect what is happening in the Scottish countryside. I believe that that is what we have done in the regulations, which are proportionate, relevant to the Scottish situation, enforceable and fully in line with our international commitments to the African-Eurasian migratory water bird agreement.

09:45

As far as our consultations are concerned, people have argued that some shooters might be confused about what constitutes a wetland. However, we do not share that view. We have worked closely in this respect with the most prominent shooting association in the UK, the British Association for Shooting and Conservation, which is satisfied that we are putting in place measures that its members will understand. Indeed, BASC itself acknowledges that our proposals represent the best possible deal for Scotland's shooting community.

I realise that the proposals will add to shooters' costs in pursuing their sport, but I do not believe that the increase will be significant. That said, I acknowledge that not all guns will be able to use steel shot. I expect that the greater move towards the use of steel shot will lead to an increase in steel shot production which, in turn, could reduce the cost for shooters. That has certainly happened in other countries where the use of lead shot has been restricted. I imagine that the same thing will happen in Scotland.

I appreciate the shooting community's importance to our wider rural economy. However, I do not believe that our proposed ban will have any negative impact on the number of shooting trips that are made to Scotland, principally because responsible shooters already use non-toxic shot over wetlands. That in itself indicates that responsible shooters accept that we are doing the right thing. Although we are not entirely banning lead shot, restricting its use over wetland areas will have the environmental and wildlife benefit that I have outlined.

I hope that that clarifies our position. I have tried to stick to the facts of the matter, although I appreciate that there is some debate to be had around the fringes.

The Convener: I think that every committee member bar one—who I have no doubt will

volunteer themselves soon—wants to ask a question. I will try to work through everyone before we get on to the debate itself.

Karen Gillon caught my eye first.

Karen Gillon (Clydesdale) (Lab): There seems to be some confusion over the definition of wetlands and over the areas in Scotland that will be affected. How can the matter be better set out in the accompanying guidance?

Allan Wilson: We hope that the guidance will eradicate practitioners' doubts about the definition of wetlands in the regulations. Indeed, in the regulations, we have already moved to clarify the basic Ramsar convention definition underpinning the definition of wetlands in respect of peat-lands. As we do not intend the regulations to have an adverse impact on, for example, grouse shooting, they will cover only peat-lands with visible water. That clarification was made as a result of responses we received to the consultation on the initial regulations.

The response to the consultation also indicated that some further clarification was needed on temporary areas, which are now defined in the regulations as areas that are

"covered with water on a seasonal, intermittent or regular basis".

That definition, which is already acceptable to representative bodies such as BASC Scotland, will be clarified further in supporting guidance.

Karen Gillon: I am slightly concerned about that. Only last month, there was a not particularly seasonal prevalence of rain in my constituency that resulted in large areas of peat-land being covered in very visible water. How do the regulations affect such areas?

Allan Wilson: Ultimately, it would be up to the courts to interpret such matters. In the regulations, we simply set out our intention to prevent the irresponsible discharge of lead shot over temporary wetlands, as defined. We have discussed this matter with the representative organisation of British shooters, which is content with our definition and thinks that it offers the best possible deal for shooters.

Nora Radcliffe (Gordon) (LD): I echo Karen Gillon's concerns about a definition having to be interpreted in the way that will be necessary in this case. I think of grouse moors on which there are peat-hags and visible water—they could be described as puddles, but there is still visible water. Would it be possible to have map-based definitions, so that we could examine wetlands on a case-by-case basis to determine whether there was a danger to wildfowl?

Allan Wilson: We have taken a habitat-based approach to the issue. The difficulty of using the site of special scientific interest-type, map-based approach that was used in England and to which the member refers is that unless someone has detailed knowledge of an area and a map in front of them they will not know that they are on an SSSI. However, most people will know when they come across wetlands. If they are responsible shooters, they will know not to discharge lead shot over that area. The intention is not to discount large areas of the nation's peat-lands, as would have been the case had we used the simple Ramsar definition. That explains the use of the visible-water definition. I submit that people will understand that on their shooting expeditions.

Nora Radcliffe: Is there any prospect of your producing map-based guidance, perhaps as something separate from the regulations? It seems to me that such guidance would be less subject to interpretation and clearer for people. Anyone shooting over a piece of ground would have to have the permission of the owner, who would know how the map defined the vulnerable area.

Angela McTeir (Scottish Executive Environment and Rural Affairs Department): We have clarified the position so that peat-lands are understood to mean peat-lands with visible water. Similarly, temporary areas will mean only

"wetlands which are covered with water on a seasonal, intermittent or regular basis".

We think that the visible-water approach is much simpler, because we do not intend to cover puddles or very small areas of water. The regulations refer to areas that most people would recognise as wetland sites, which would probably be marked by emergent vegetation. Every permutation of the regulations has been underpinned by Crown Office support, legal support and ecological advice. The supporting guidance will receive a similar level of scrutiny and will be consistent with the terms of the regulations.

We do not think that there is scope for grid references. The position becomes a bit more confusing if people have to refer to Ordnance Survey maps and so on. This is a visible, simple approach that is proportionate to the policy behind the regulations.

Allan Wilson: The inclusion of areas that are covered with water on a temporary or intermittent basis, which has already been mentioned, is particularly significant. Taken as a whole, the approach constitutes a proportionate but responsible approach to the problem.

Nora Radcliffe: How did you arrive at the estimate that about 5 per cent of the landmass would be defined as wetlands? Was that done on the basis of maps?

Angela McTeir: The estimate was not made on the basis of maps, but relates to known sites that are recognised as wetlands. Obviously, we also took into account areas that are temporarily recognised as wetlands—they are still wetlands, even if only temporarily. It is not our intention to cover puddles or other bodies of water that occur infrequently. The definition relates to areas that are known to flood and are recognised as such. Those areas have all been included in the 5 per cent figure.

Allan Wilson: If I were a shooter and had doubts about whether an area constituted a wetland, I would err on the side of caution and use alternative shot.

Fergus Ewing (Inverness East, Nairn and Lochaber) (SNP): It strikes me that there are very few areas outwith towns and cities in Scotland that are not prone to flooding from time to time. So far, the definition seems about as clear as mud.

The regulations create a criminal offence and therefore, as with any criminal offence, the first requirement of the law is that it must be clear, because, unless it is clear, it will be unclear to shooters whether they are breaching the law. I will ask a couple of questions on that topic.

The Convener: Just stick to questions, Fergus.

Fergus Ewing: Article 2 of the Ramsar convention as revised by the Regina amendments states:

"The boundaries of each wetland shall be precisely described and also delimited on a map",

but the minister states that there will be no map. The Scottish Executive is therefore in breach of the Ramsar convention.

Allan Wilson: The first thing that I will say, which I said in response to Nora Radcliffe's point, is that current best-practice guidance for shooters—which is produced by the British Association for Shooting and Conservation, as well as the Countryside Alliance, the Game Conservancy Trust, the Scottish Rural Property and Business Association and the Scottish Gamekeepers Association—already recommends that only non-toxic shot be discharged over wetlands that are of importance to waterfowl. There is already good-practice guidance, and most responsible shooters already follow it.

Fergus Ewing: That is not the question, though.

The Convener: Let the minister continue.

Allan Wilson: Thank you, convener.

My legal representative will come to the precise legal definition of Ramsar sites. I submit that, if the best-practice guidance that is already adopted by those involved in the practice is well understood

and is already being observed, the requirement to define wetlands better or further on maps does not arise. We have taken a habitat approach to the matter, examined closely the definition of temporary and intermittent wetlands to which Fergus Ewing refers and come up with a description that could be applied fairly and equitably in our courts. We have also considered the Ramsar definition in relation to peat-lands. I have made it abundantly clear that it is not our intention to extend the ban on the use of lead shot to peat-lands generally, but only where there is a visible water presence.

Elsbeth MacDonald (Scottish Executive Legal and Parliamentary Services): On the alleged breach of the Ramsar convention, we use the definition of wetlands from the Ramsar convention as a recognised definition, but simply for the purpose of these regulations. The regulations are not intended to implement the Ramsar convention; they have a domestic policy purpose. We simply used a well-recognised and known definition of wetlands and refined it for the purposes of the regulations to create a proportionate and recognisable offence.

Fergus Ewing says that there is a need for certainty, but we think that we have achieved certainty. We have had many and long consultations on the definition with colleagues in the Crown Office in particular, and they are content—as we are—that the courts can interpret the definition on the basis of the facts and circumstances before them. Our criminal courts are used to doing that.

Fergus Ewing: I take it that it is accepted that article 2 of the Ramsar convention is binding and therefore that, when it provides that

“The boundaries of each wetland shall be precisely described and also delimited on a map”,

that obligation has been obtempered. Has it?

Allan Wilson: We are not implementing the Ramsar definition in the regulations.

Fergus Ewing: Is there a map showing the wetlands?

Elsbeth MacDonald: No.

Fergus Ewing: Is that not a clear breach of article 2 of the convention, which says that that is what is required?

The Convener: There are two points here: the first is whether the regulations implement the Ramsar convention and the second is whether, because another piece of legislation implements the convention, there is clarity on what the wetlands boundaries are. That is my understanding of the question.

Allan Wilson: I think that we have answered it.

Elsbeth MacDonald: Yes, we have answered it. We are not relying on any of the maps that were prepared for the Ramsar convention. Indeed, my administrative colleague tells me that no UK maps were prepared for that convention. That does not prevent us from relying on an internationally-recognised definition of wetlands in our definition of wetlands in the regulations, which have another purpose.

The Convener: Okay. Thank you. As no other member wishes to come in on this issue, I will move on to the next on my list of members.

10:00

Mr Alasdair Morrison (Western Isles) (Lab): Minister, in your introductory remarks, you said that the aim of the regulations was to prevent further pollution of the environment. How do you and your officials quantify the extent of damage to wildlife, watercourses and so forth?

My other question relates to the way in which information and data are collated. Do you have independent, credible sources? For example, do you rely heavily on information that the RSPB Scotland provides or do you go to independent, credible sources?

Allan Wilson: A lot of issues are involved and my colleagues will come back to the member on some of them. Clearly, there has been a welter of research into the impact of wildfowl ingestion of lead shot, dating back to as long ago as 1983, when the study “The incidence and significance of ingested lead pellet poisoning in British wildfowl” was published. That study included samples from the Solway firth, Islay, south Tayside and Fife, north-east Grampian and the Moray firth. There is evidence of the impact of lead shot in Scotland.

The overarching policy objective of the regulations is to prevent lead shot from entering wetlands. As I said, comparable regulations have been in place in England since 1999 and in Wales since 2002. They are based on recommendations and advice from the Joint Nature Conservation Committee, which incorporated input from Scottish Natural Heritage—our own independent advisers—and from bodies across the UK.

As I said earlier, recommendations and advice led to the previous Government adopting a voluntary phase-out of the use of lead shot over UK wetlands in 1995. The UK Government that came to power in 1997 determined that the voluntary approach was not sufficient to ensure the protection of waterfowl. Furthermore, it determined that that approach did not meet our obligations under the African-Eurasian migratory water bird agreement to which I referred.

The regulations meet our international obligations. They will prevent wildfowl from ingesting lead shot that is used over wetlands and, as a consequence, prevent the slow and painful death of many wildfowl.

Alex Johnstone (North East Scotland) (Con): Following on from that, I was confused by your opening remarks. What are we trying to achieve with the regulations? Are we trying to keep lead out of the water or lead shot out of waterfowl?

Allan Wilson: We are trying to produce wide environmental benefits through preventing lead from entering the water environment and, therefore, from being ingested by wildfowl, which would suffer as a consequence. As the member knows, the use of lead shot outwith wetland areas is not prohibited. It could be argued from an environmental perspective that a more comprehensive ban would be a better approach. However, we take the view that to do so would be disproportionate to the impact that is liable to be produced in terms of wider recreational interests and the rural economy. We have taken a proportionate approach that seeks to prevent the use of lead shot over wetlands and the consequential harmful effect on wildlife.

Alex Johnstone: I accept that the ingestion of lead shot by waterfowl can have serious effects on their health, but given the scale of the impact, would not it be appropriate, in defining the area to be covered by the regulations, to take into account areas in which waterfowl feed rather than areas in which water lies?

Allan Wilson: As I said, we could have used more extensive regulations that prohibited the use of lead shot—a prospective poison—throughout the entire expanse of Scotland. However, in recognition of the substantial contribution that recreational shooting makes to the rural and national economies, we decided—in accordance with our international obligations—to take the proportionate response of banning the use of lead shot in wetlands in order to protect wildfowl that may ingest it. That does not mean that we will remove entirely the adverse environmental impact of lead shot. Clearly, we will not do so if we continue to permit its use in other areas.

Alex Johnstone: In many people's opinion, the voluntary ban fulfils our international obligations. The regulations will extend the ban in accordance with the desires of the Government in Scotland.

Allan Wilson: The international agreement that I mentioned, to which the UK Government signed up, places an obligation on us to introduce regulations to comply with the intent of the agreement. I repeat that the response is proportionate. We accept our international obligations but aim to ensure that recreational

shooting, with its contribution to the wider rural economy, can continue in a responsible manner that takes into account the adverse impact of lead shot on the wider environment.

Fergus Ewing: Has research been done into blood lead levels in trapped live wildfowl?

Allan Wilson: As I said, extensive research has been done and dates back almost 20 years. That research includes the samples to which I referred—some of which were from Fergus Ewing's constituency—that indicate that the ingestion of lead shot has an adverse impact on birds, in that they die as a consequence. I do not believe that that is in dispute.

Fergus Ewing: No one is resisting the contention that ingesting lead is poisonous or not good for you.

Allan Wilson: You seem to be in favour of continuation of the use of lead shot.

The Convener: Can we stick to the questions? This is not a debate—at this point, we merely want to establish points of fact and to ask technical questions.

Fergus Ewing: Let me restate the question. Has specific research been done into blood lead levels in trapped live wildfowl? That is the specific issue that we are talking about.

Allan Wilson: The specific issue is whether wildfowl ingest spent lead shot and whether they are poisoned as a consequence. Considerable research has been done on that and the case has been proven. We have signed international treaties that seek to prevent the practice.

John Farquhar Munro (Ross, Skye and Inverness West) (LD): Early in your presentation, you suggested that evidence has been established that the ingestion of lead shot is fatal to many wildfowl. What is that evidence?

Allan Wilson: I am sure that the member would accept that lead is universally regarded as a poison and that many years of research have established its toxic effect on animals and humans. Lead shot has been identified as posing a particular threat to waterfowl because it results in lead poisoning. As I say, that was recognised in an international agreement—the African-Eurasian migratory water bird agreement. Considerable research was done around the globe in respect of that agreement.

I mention again the 1983 study by G P Mudge to which I referred earlier—"The incidence and significance of ingested lead pellet poisoning in British wildfowl"—which included samples from the Solway firth, Islay, south Tayside, Fife, north-east Grampian and the Moray firth. Well-founded research evidence helped the Joint Nature

Conservation Committee to come to the conclusion that it did and to advise Government in 1999 in England, in 2000 in Wales and ourselves here in Scotland five years later than in England that the incidence of lead shot in our wetlands, and its subsequent ingestion by wildfowl, has a debilitating effect on them: it poisons them and ultimately kills them.

John Farquhar Munro: You mentioned research on the Scottish coast—on the Solway and the Moray firths. A fairly extensive investigation was undertaken on lead shot on foreshores. In spite of that extensive survey, statistics have never been produced to show what was discovered by that research. Can the minister enlighten the committee on that research?

Angela McTeir: I can only add to what the minister has said. The overwhelming factor is that the provisions have been endorsed at international level through the African-Eurasian migratory water bird agreement, which cannot really be argued against. The UK has already put in place two sets of regulations. The other main issue that we cannot sidestep is that, in addition to the effect on waterfowl, the regulations state that they are

“for the purpose of preventing the substance or articles specified from causing pollution of the environment and harm to the health of animals”.

I think that it is undisputed that lead is a contaminant.

John Farquhar Munro: That introduces an element—pollution of the environment—that we are not debating today. We are here to discuss the ingestion of lead shot by wildfowl.

Angela McTeir: Yes, but I referred to the joint purpose of the regulations.

Allan Wilson: I thought that I made clear in my response to Alex Johnstone that we could have taken a more disproportionate approach to the issue—given that lead is a contaminant that we all know—and banned the use of lead shot more generally. However, we did not do that; we took what we consider to be a proportionate response, taking account of the fact that, as I said, recreational shooting makes a contribution to the rural economy that is valued locally and nationally. We have adopted what I think is a balanced approach, which seeks to prevent the use of lead shot over wetlands rather than more generally, because wetlands are where wildfowl are more commonly liable to ingest it. That is not to say that lead shot cannot be ingested by wildfowl elsewhere, as has been suggested by others. Ours is a balanced and proportionate response. The alternative was to ban its use more generally.

Alex Johnstone: The minister has quoted extensively from research that has been done on the ingestion of lead by waterfowl, but is there any

research or evidence available to him that covers the issue of lead as a dissolved contaminant in water in the natural environment?

Allan Wilson: I do not have such information at my fingertips, but I have been at the committee on previous occasions when members of your party and other Opposition parties have called for action on replacement of lead pipes in our water distribution and supply system precisely because of the contaminant effect of lead. There is considerable scientific evidence to support the view that lead is a contaminant and that it is a toxin when it is dissolved in water. Consequently, the actions that we are taking are to help prevent wildfowl from ingesting lead shot.

The Convener: Two members—Mark Ruskell and Maureen Macmillan—have not yet asked questions.

Rob Gibson (Highlands and Islands) (SNP): Excuse me, but I have not asked a question yet, either.

The Convener: I have been waiting for you to catch my eye. I will add you to my list.

10:15

Mr Mark Ruskell (Mid Scotland and Fife) (Green): One criticism that has been levelled at the regulations concerns the increased use of steel shot. It has been argued that steel shot is deficient in its effective range and killing power compared with lead and that, as a result, it can lead to a higher wounding ratio in the quarry. What consideration have you given to that issue in redrafting the regulations?

Allan Wilson: We have given some consideration to the issue because, if the argument had been shown to be true, there would obviously be an impact on animal life and bird life. However, studies have shown that, if steel is used appropriately, its range is not significantly reduced and it is no more likely to wound than is lead. As I said, the regulations have been worked up closely with the British Association for Shooting and Conservation, which has welcomed their introduction as being the best deal on offer. Obviously, that organisation is best placed to judge such issues.

Maureen Macmillan (Highlands and Islands) (Lab): Is it true that the regulations will inadvertently impact on some clay pigeon shooting clubs—for example, those with a range that borders a firth or the sea? Did you consult clay pigeon shooting organisations before the regulations were laid?

Allan Wilson: The regulatory impact assessment identified that a few clubs shoot exclusively over wetland sites. As I said,

supporting guidance will be produced on the scope of the regulations. My officials would expect to visit sites, in respect of which particular concerns have been expressed, in order to ensure that the appropriate alternative arrangements are put in place or that the sites have the best available guidance on the appropriate use of shot. Officials will work on such matters and guidance will be produced with clay pigeon shooters so that they are fully prepared for the implementation of the regulations next March.

I accept that an on-cost for shooters is involved, and there is obviously a price difference—which I referred to in my opening remarks—for people who currently use lead shot and those who will consequently have to use alternative shot. However, that is the price of the environmental benefits that will be brought for wildfowl.

Rob Gibson: I want to follow that up. I would be interested to know whether, in the evidence that you received, you received any information about whether clay pigeon shooters have moved over to non-lead shot.

Allan Wilson: I am not particularly familiar with that matter.

Angela McTeir: We have received responses from clay pigeon sites. Obviously, our contention is that alternative shot—such as steel shot or other types of shot—can be used, but as the minister said, we would certainly be happy to meet representatives of any clay pigeon shoots who have particular concerns. It was identified that very few will be exclusively affected by the regulations because their intention is curtailed to cover only wetland sites and not surrounding areas.

Rob Gibson: In the area in which I live, there is one such clay pigeon shoot, which fires on to an estuary in order to avoid danger to other people. It is interesting to note that in England, areas such as those in question have been defined as all areas below the high-water mark. Why was that definition not adopted in Scotland?

Angela McTeir: It is included as part of the Ramsar definition. Intertidal and marine areas are included, too.

Allan Wilson: I am familiar with the example that you refer to—Maureen Macmillan and others have also raised it with me. The guidance will seek to assist the few clay pigeon shoots that are likely to be adversely affected by the regulations either to change their shot, which is the obvious alternative, or to redirect their activities to avoid shooting over wetlands.

Rob Gibson: I will take up a second issue. It has been suggested that not many countries or parts of the world have introduced a lead-shot ban, yet we know that in Canada, the United

States, Sweden and Denmark such a ban has been in place. Have you any consequential evidence on the effects of shooting—either of clays or wildfowl—in those areas? Has there been any diminution of the business of shooting in those areas as a result of the ban?

Angela McTeir: I do not have any evidence to hand but, as the minister said, our approach is intended to be proportionate and the ban would cover only areas that the African-Eurasian migratory water bird agreement specifies—namely, wetlands. We decided against taking a piecemeal approach so that we would cover all wetland areas because all such areas are of importance to waterfowl whether they are designated or not. The key is that the ban would cover wetland sites only. The evidence has been scrutinised fully by the Crown Office so that the ban is recognisable and enforceable.

Rob Gibson: I understand that, but do you have any international evidence about such a ban's effects on the shooting business?

Allan Wilson: We have sought to take a balanced and proportionate approach. There is already evidence from down south and internationally of a more responsible approach being taken by shooters in voluntarily not using lead shot. There has been a diminution internationally and domestically in the use of lead shot.

We now propose to take that voluntary approach one stage further, and to ban the use of lead shot over wetlands for the reasons in which we are now well versed. That should have a beneficial environmental effect, but it will also not prevent groups of international shooters from coming here to enjoy the recreation that shooting as a sport provides in large parts of our country. Guidance will be available in different languages for those international shooters so that they do not fall foul of our laws when they come here. I stress again that we are taking a balanced and proportionate response that recognises the importance of shooting in an international context, with international visitors coming here to practise their sport, as well as in the context of protection of wildfowl through better environmental protection measures.

The Convener: Okay. We have been round the table and everybody has had a chance to ask questions. I am keen to move to the debate if everybody is content to do so.

Fergus Ewing: I would like to raise another topic briefly.

The Convener: What is the topic?

Fergus Ewing: The topic is the impact of the possibility of steel shot having a greater chance of

becoming embedded in nearby trees, which might cause many health and safety concerns in relation to cutting and dressing timber.

The Convener: Can I have a quick response from the minister or his officials?

Fergus Ewing: You asked what the topic was, but may I pose a particular question?

The Convener: I am sorry: I thought that you asked a question about the impact of steel shot.

Fergus Ewing: It has been put to me that, if steel shot becomes embedded in trees and those trees are then logged with a band-saw in the sawmill, the band-saw will splinter and disintegrate if it comes into contact with any steel. That would mean in turn that steel detectors would have to be used in sawmills. Has any assessment been made of that problem and of the potential financial consequences that it might have on the sawmill industry in Scotland?

Angela McTeir: That issue has been raised previously and we are fully aware of it. Alternative shot is already widely used by responsible shooters and—according to BASC Scotland—

“bismuth is widely and successfully used and steel shot is increasingly being used without the problems that shooters were led to expect.”

Representative bodies already recognise and use non-toxic shot over wetlands. We do not imagine that steel shot embedding in trees would be a particular difficulty over purely wetland sites.

Allan Wilson: I will supplement that—

The Convener: Be brief, because I want to move to the debate.

Allan Wilson: The Forestry Commission Scotland has not objected to the proposals in the regulations.

The Convener: We move to the formal debate—[*Interruption.*] I ask members to be quiet, please. I invite John Farquhar Munro to speak to and move motion S2M-1712. I hope that he will keep his speech to the time limit.

John Farquhar Munro: The committee will know that when the Westminster Parliament debated similar legislation, a spokesperson said in evidence that many countries had already banned lead shot, but further investigation determined that that was untrue. Many parts of the world have no such ban and I am concerned that the committee might be misled.

It has been suggested that wildfowl are at particular risk from poisoning by lead-loaded cartridges, but most of the evidence that has been collected on that is based on research in America. It is hardly surprising that the evidence from America suggests that, because America shoots

as it does everything else: to excess. The US has shot duck heavily from raised platforms over shallow lakes, which concentrates residual lead pellets in a small area and makes them more likely to be ingested by resident wildfowl. Such shooting does not take place in Scotland, so the risk to wildfowl here is minimal.

The research that was undertaken in Scotland over a period of months concentrated on a heavily shot area of the Moray firth, which we have heard about this morning. After much work, a single pellet was found at quite some depth. Other areas in which samples were collected were the Solway firth, Islay, Tayside, Fife and north-east Grampian. It was estimated that 2.3 per cent of the wild mallard population might die—not would die—each winter as a result of lead-pellet ingestion. No evidence has been produced to support that suggestion and no statistics were produced following those extensive coastal surveys. It is interesting to note that fewer than 10 incidents of wildfowl poisoning have been reported in the past 20 years, so we do not have a serious problem in Scotland.

The alternatives to lead cartridges, which cost about £3 for a box of 25, are steel, bismuth and tungsten cartridges. Steel-loaded cartridges are slightly dearer than that, but tungsten cartridges cost in excess of £20 for a box of 25, which I suggest puts them out of the average shooter's reach. Steel shot also damages the modern gun and can lead to serious injury, especially from ricochet in woodlands, as we have heard, or near rock outcrops.

We have also heard about the ambiguity over the definition of wetlands, which is so vague as to be almost impossible to divine with any certainty. It is claimed that wetlands amount to about 5 per cent of Scotland's land surface. Any legislation would require to define their location. The regulations will also restrict shooting over Scotland's foreshores between high and low watermarks. That surely represents considerably more than the estimated 5 per cent of Scotland's surface area. After all, we have a huge coastline.

Apart from those who participate in game shooting, on which we seem to be concentrating, many hundreds of sportsmen participate in clay pigeon shooting. Most clubs have sited their target areas to allow shooting over water in the interests of safety. The regulations will force those clubs to move to other sites if such sites can be identified and—more important—approved in their localities. That will entail considerable expense.

The voluntary approach, which is currently encouraged by the “Code of Good Shooting Practice” should be adopted and accepted by the Executive without the need for further legislation.

Accordingly I move,

That the Environment and Rural Development Committee recommends that nothing further be done under the Environmental Protection (Restriction on Use of Lead Shot) (Scotland) (No.2) Regulations 2004 (SSI 2004/358).

10:30

Allan Wilson: I will briefly supplement my earlier remarks. The different approach that has been taken reflects in part the fact that Scotland is different from England and Wales. The proportion of shooting that takes place outside wetlands is much higher in Scotland, contrary to what we have just heard. Additional species restrictions, which might have offered an alternative approach, would impose unnecessary burdens on people who shoot in such areas. The Executive's approach is simpler and would identify wetlands by habitat definition rather than by site boundary, which would ensure that all wetlands, whether or not they are designated, would be covered by the regulations. That approach would enable us fully to meet our international obligations under the African-Eurasian migratory water bird agreement. Members should note that I said "African-Eurasian"; hence the lack of reference to North America, despite John Farquhar Munro's rather gratuitous reference to that part of the world.

The regulations represent a proportionate response. The evidence that wildfowl ingest lead shot and suffer painful death as a consequence is available to anyone who cares to look for it, as is scientific evidence of lead contamination in the wider environment. Far from banning the use of lead shot completely, which some people might consider to be a more proportionate response, we will continue to permit the use of lead shot outwith wetlands. That means that clay pigeon shooters and other shooters will have to use an alternative: steel shot, which I accept is more expensive. However, that is the price that must be paid for the environmental benefit that banning lead shot would bring. We recognise the important contribution of recreational shooting to the rural and national economy and we will take steps via guidance associated with the regulations to ensure that the recreational shooting trade continues unaffected. In conclusion, the response is proportionate and the regulations are worthy of members' support.

Alex Johnstone: I understand the reasons for the regulations and I accept many of the principles that lie behind them. However, I have problems with the regulations and cannot support them. I am well aware that ingestion of lead shot by waterfowl can lead to serious ill health and death and I am aware of the action that has been taken over a number of years in an attempt to prevent that from happening; for example, the ban on use of lead

shot as a line weight by fishermen represented a major step forward.

There is due cause for considering how we can reduce the amount of lead shot that is fired in wetlands. However, we must look closely at the instrument's purpose. The problem is that there is a vagary in the motivation for the instrument pursuing the line that it does. I do not believe that there is adequate evidence to suggest that firing lead shot over wetlands causes water contamination—we are talking about an awful lot of water and very little lead shot.

The issues that we must deal with are those that revolve specifically around ingestion of lead shot by waterfowl. The lead shot is in the mud at the bottom of shallow water, which waterfowl filter in order to feed. If we are to go down the road that the instrument proposes, we must be prepared to be specific about the instrument's purpose and what we want it to prevent. Consequently, I cannot support the instrument because its purpose and scope are not tightly enough defined; it is inadequately focused in respect of protection of water birds that feed in such circumstances. We need more tightly focused legislation, so I will vote against the instrument in the hope that the minister might bring back something that sets out specifically to achieve the aims and objectives that he and I both support.

Nora Radcliffe: There is an existing and apparently widely observed voluntary code that prohibits the use of lead shot when shooting over wetlands that are of importance to waterfowl. The regulations seek to encapsulate that in law and indeed to extend the prohibition to all wetlands because of the polluting effects of lead. I share in some measure Alex Johnstone's concern about an apparent lack of research to underpin the regulations, but this is an occasion where the precautionary approach is acceptable.

I would still like tighter, map-based definitions of wetlands in general. We make far too little use of maps, which are a useful tool that could be used much more in official measures.

I do not understand why, other than for reasons of cost, clay pigeons cannot be shot with steel shot. It occurs to me that, if steel shot is lighter, clay pigeons could be thinner and the cost could be equalised in that way. However, that is a bit of a diversion.

I presume that the minister's assurances that there is no intention for grouse moors to be affected by the measure will have force in any interpretation of the regulations in a court of law. I think that, on balance, the regulations are reasonable and proportionate and I am happy to accept them.

Fergus Ewing: In his arguments, the minister has made much of the support of the BASC. However, the BASC may be concerned that, were it not to support the instrument, there would be stricter regulations. That concern is perhaps borne out by the fact that the minister has pointed out that a stricter, more draconian regime could have been introduced.

It seems to me that there is a lack of clarity in the instrument's definition of wetlands. The minister has resisted providing a map, but regulation 3 plainly says:

"wetlands" has the meaning given in ... the Ramsar Convention."

As I have previously said, the convention says that wetlands

"shall be ... delimited on a map".

The instrument seems to be in glaring breach of the Ramsar convention. How exactly shooters are supposed to know whether they are on wetlands is unclear to me. If they do not know that, they will not know whether they are potentially committing a criminal offence. Clarity is the first requirement when drafting any statutory offence.

The Fraser of Allander institute estimated that the value of wildfowling to the Scottish economy was £5.7 million a year. That was in 1990, so the value is likely to be much greater now. We heard that the cost of bismuth or steel shot is likely to be far greater than that of lead shot. People who are members of clay pigeon clubs may not be wealthy enough to be able to continue with their sport.

Perhaps the most serious point is the lack of evidence on which the measure is based. No one denies that consuming large quantities of lead is dangerous to the health of humans, animals or birds—that is not in dispute. However, it is unclear that there is evidence to demonstrate that ingestion of lead shot has led to widespread wildfowl poisoning. Where is that evidence? John Farquhar Munro mentioned that there have been 10 cases in 20 years. In my view, that is an unsound basis on which to proceed.

When I asked the minister whether he could identify specific evidence, there was no answer. The evidence, such as there has been, seems to emanate from the United States of America. As John Farquhar Munro has pointed out, the evidence from the Moray firth and the Solway that has been referred to does not exclude the clear alternative possibility that the lead poisoning emanated from ingestion of split shot from fishing. Although the use of split shot has been banned, I understand that the lead from it will not necessarily have dissipated, because it will have been attached to fishing lines and will tend to have become embedded in the sea bed.

Once again, the Parliament is being asked to support a piece of legislation that will impact severely on many people's recreational pursuits and on an area that is of great value to the economy on the basis of, at the very least, spurious evidence. The minister has not addressed the question of why there has not been testing of ducks to see whether they have lead poisoning. For example, at the Highland Deephaven Clay Pigeon Club in Evanton, which has operated for 30 years, twice a week 50 or 60 people shoot clay pigeons, using perhaps 100 or 125 shots apiece and discharging into the estuary 390lb of lead per session. If ever there was a place in Scotland at which evidence could and should have been taken to see whether lead poisoning resulted from the deposit of such a huge quantity of lead, that would be it. No such evidence has been taken and not one dead duck has been spotted on the shore. Where is the evidence?

We are being asked to proceed on the basis of what people describe as the precautionary principle. Put simply, that principle states that it is better to be safe than sorry. We all agree with that, but at what cost? Where is the evidence? I respectfully suggest that in his answers today the minister has failed completely to describe any evidential basis on which to proceed with the measure.

Mr Morrison: The past hour has been very instructive. I knew a few things about the issue before I came to the meeting at 9.30 am. One of those indisputable facts is that lead is poisonous both to waterfowl and to human beings. I also knew the importance of shooting to the rural and national economy, as outlined by my good friend John Farquhar Munro. As a fellow Highlander, a crofter, a shooter and—I have heard alleged—a poacher of note, John is well aware of the importance of shooting in his constituency. I, too, know the importance of clay pigeon clubs from a recreational point of view. Clay pigeon shooting is one of the few sports at which Scotland does reasonably well at international level.

When I came here this morning, I intended to support my friend John Farquhar Munro, but we have had a very good question-and-answer session. That is a credit to the system that we use in the Parliament, which allows us to ask questions that relate to the facts, although I note that one of the visiting members failed to observe the normal courtesies that are always extended and adhered to by members of the committee. However, that is another issue.

I return to the overarching aim of the regulations and the question posed by Alex Johnstone. Preventing waterfowl from ingesting lead shot is a good aim. What about the evidence? Again, I have

heard Mr Ewing—a visiting member—saying that there is no evidence. I fondly recall Mr Ewing discounting and dismissing out of hand almost a year ago another topic that we are talking about—scallop fishing and the need to conserve. He said that livelihoods would be ruined and that fishermen would be made bankrupt. Then, he accused the same minister of failing to produce evidence. Twelve months later we have the evidence—scallops are being conserved and the livelihoods of fishermen and processors are being protected.

Although I will not support my friend John Farquhar Munro, that has absolutely nothing to do with the Lord Burton of Dochfour. I know that John Farquhar will appreciate why I will not be listening to the Lord Burton's contentions and petition—neither will I be listening to the evidence of Mr Ewing, his political and philosophical soul mate.

The regulations are well framed, although there are issues relating to clay pigeon clubs. One of the officials said that the Executive would willingly discuss with clubs the implications and potential fall-out if the regulations are passed. I urge the minister and his officials to do that. I came here with a view to supporting John Farquhar, but I genuinely believe that I have heard enough to convince me that the regulations are worth passing.

10:45

Mr Ruskell: We have had a useful discussion and evidence session this morning. On balance, I will be voting for the regulations, because they are adequately focused.

The Ramsar convention has been a red herring this morning. As the minister said, in this instance part of it is being used solely to define wetlands. The regulations are not about implementing the Ramsar convention. I say that as a member who came to this committee to argue for a statutory underpinning of Ramsar in the Nature Conservation (Scotland) Bill.

The definition of wetlands in the regulations is adequate. In Strathallan where I live—I am not a shooter, by the way—I know where the wetlands are. I know where the permanent wetlands are, I know where the Ramsar wetlands are, and I know where the temporary wetlands are—I know which areas flood. If I were a shooter, I would know the areas in which I could not use lead shot.

I do not think that there is evidence from England and Wales that the regulations will damage the shooting industry. I say to John Farquhar Munro that I have not been convinced by his argument. The regulations will build on the good practice that has been established through the voluntary code and give it a statutory underpinning, so I will support them.

Karen Gillon: I am generally the most sympathetic member of the Labour group to the Scottish Gamekeepers Association. I am not known for being the most environmentally stringent member of our group. However, I read the information carefully and I have listened to the debate. For me, the key questions are: are alternatives available? Yes, they are. Are the costs of those alternatives prohibitive? They do not seem to be, from the evidence that I have seen. Do the regulations represent good practice? Yes, they do. The voluntary code, which others are urging us to continue with, is good practice. The regulations seek to implement in law what is already good practice, as currently followed by good shooters. For those reasons, the environmental gains outweigh the other points that have been made and I will support the regulations.

Maureen Macmillan: I support the regulations and I will vote against John Farquhar Munro's motion.

I am pleased that the minister is taking account of clay pigeon clubs, for which there might be some difficulty with changing to steel shot, as steel shot can ricochet off the traps. The solution is not just a simple one of saying that the clubs should go for steel shot. Moreover, tungsten is too expensive for the amount of shot that is used.

I would like all possible help to be given to clubs such as the one in Evanton, on which I have corresponded with the minister. It will be a big upheaval for those clubs if they have to move clubhouses and traps and find other sites. I would like the minister and his officials to work closely with those clubs that are affected to find a good solution. The clubs appreciate the problems of lead shot and I do not think that they are opposed to the legislation, but they want to see how they can deal with it in a way that does not affect them too badly. With those provisos, I am happy not to support John Farquhar Munro's motion.

The Convener: We have heard from all the members who wanted to speak. Do you want to respond briefly, minister?

Allan Wilson: I agree entirely with what Mark Ruskell had to say latterly about an attempt—not a deliberate attempt, I presume—to obfuscate and obscure. It is difficult to believe that Fergus Ewing, given his legal background, does not understand the concept of importing a definition from one document and using it in another. The explanatory note makes clear what the definition is. As I said, we have acted in consultation with shooting interests to better define peat-lands and to further define what constitutes temporary wetlands, in order to minimise any confusion that could arise. I repeat that the regulations are a proportionate measure, which take account of the wider interests of the rural economy—and of our national

economy more generally—with regard to the income generated from recreational shooting. The regulations also address the real environmental problem posed by the use of lead shot over wetlands and I commend them to the committee.

The Convener: Thank you, minister. I invite John Farquhar Munro to wind up with any final comments and to indicate whether he wishes to press or withdraw his motion.

John Farquhar Munro: We have taken up quite a considerable amount of the committee's time on the issue, so I shall simply press my motion.

The Convener: The question is, that motion S2M-1712, in the name of John Farquhar Munro, be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Johnstone, Alex (North East Scotland) (Con)

AGAINST

Boyack, Sarah (Edinburgh Central) (Lab)

Gibson, Rob (Highlands and Islands) (SNP)

Gillon, Karen (Clydesdale) (Lab)

Macmillan, Maureen (Highlands and Islands) (Lab)

Morrison, Mr Alasdair (Western Isles) (Lab)

Radcliffe, Nora (Gordon) (LD)

Ruskell, Mr Mark (Mid Scotland and Fife) (Green)

The Convener: The result of the division is: For 1, Against 7, Abstentions 0.

Motion disagreed to.

The Convener: As the motion is disagreed to, the committee is content with the instrument and will make no recommendation to the Parliament.

As John Farquhar Munro said, we have had a lengthy debate, but I feel that it is important to discuss such matters in some detail, especially when we receive so many representations. In some ways, therefore, I am grateful to him for taking up the committee's time this morning.

I thank the visiting members for attending and the minister and his officials for fielding a whole host of questions.

10:53

Meeting suspended.

10:57

On resuming—

Water Services etc (Scotland) Bill: Stage 1

The Convener: Today is the fourth day of our consideration of the Water Services etc (Scotland) Bill at stage 1. We will be focusing on the model of competition and regulation that is proposed and on comparisons with United Kingdom bodies. We will also have a go at examining the charge determination regime and the provisions on coal mine water discharge in part 3 of the bill, so we need to take some quite specific evidence.

A series of witnesses has been selected to enable us to tackle those issues in depth. As members have no relevant interests to declare, we can move straight to our first panel. I welcome Alan Sutherland, who is the water industry commissioner for Scotland, and Dr John Simpson, who is the director of cost and performance in the office of the WIC.

We will not have opening statements. I am very grateful that, as with other witnesses, you have provided evidence in advance, which will form the basis for our questions. You may also find that we put the same questions to you that we have put to previous witnesses, to find out whether we get the same answers. I invite Rob Gibson to kick off with the first question.

Rob Gibson: I welcome the chance to talk to the water industry commissioner and his colleague on the regulatory regime that they have been seeking to apply. The tone of your paper seems to acknowledge that that is the means by which utilities will be regulated in future. Some of us, at least, find that the move to competition is not necessarily related to the best interests of customers, many of whom have been failed by the current system. Debate has developed in other committees, such as the Finance Committee, about exactly what kind of and how much investment Scottish Water should have.

Your evidence states that much of the evidence that we have heard on the setting of wholesale prices

"is likely to be conditioned by self-interest".

Why should I think that your submission is not conditioned by self-interest?

11:00

Alan Sutherland (Water Industry Commissioner for Scotland): My submission is conditioned by and based on the interests of customers in general. On my comment about self-

interest, the evidence from the gas and electricity industries is fairly clear that, when a split is suggested or imposed, the incumbent companies inevitably say, "You don't understand how difficult the split will be—it cannot be done and it will not benefit customers." However, the evidence from general utilities sectors is that splits have brought benefits.

Rob Gibson: You are talking about non-domestic users, but the fact is that the bulk of the people whom we represent—the domestic users—are not likely to be materially affected by the thrust of the proposals. The retail and wholesale issues relate more to the operation of the Competition Act 1998 and not to the reasonable provision of water supplies to domestic customers in Scotland.

Alan Sutherland: When we prepared the strategic review for the minister in 2001, we suggested that the introduction of retail competition could benefit customers in general and that the benefit of simply injecting greater transparency into the industry's cost structure would be at least as great. I have talked at length with people in industries that have been through similar splits and I have often been told about the debates that happen between companies at the time of the splits. One company might say, "That's your cost," while the other replies, "No it's not; I don't want that cost." Many activities that do not really add value for customers, both domestic and non-domestic, are identified in that process and companies ask why they are doing them. Therefore, the overall costs for the industry come down.

Transparency is important. There can be no real doubt that the transparency on cost that has resulted from the work of the regulatory regime in the past three or four years has brought about the 20 per cent reduction in Scottish Water's operating costs in the past two years. That is money that would otherwise have had to come from customers. By the end of the present regulatory period, as a direct consequence of the reductions in operating costs, customers' bills will be 15 per cent lower than they would otherwise have been.

Rob Gibson: You describe a process, but it is difficult to bring competition to bear in a system in which there are around 200 different sources of water. The system is different from that anywhere else, apart perhaps from Yorkshire, which is the nearest possible comparator in England. The idea that the reduction in water prices that you talk about has somehow helped people to get more water supplies is not correct because we know that it has not tackled development constraints. That shows a direct mismatch between the reduction in prices and the ability of many communities to get the water supply that they require. You certainly make the case that there

has been a reduction in costs, but you do not address the fact that many of our witnesses have said that the proposals are a total mismatch with what is required.

Alan Sutherland: Several issues are tied up in that question, but let me tackle development constraints. Of the three options in the Executive's consultation on quality and standards II, ministers adopted the middle option. Post consultation, ministers recognised that not too much money had been provided for dealing with development constraints, so they added in £50 million to deal with first-time connection to the water supply and rural sewerage. However, 5 per cent of the post-efficiency £1.8 billion investment programme—that is, £90 million—was put in to handle growth issues in addition to that pre-efficiency £50 million allocation, which was reduced to £42 million to reflect the efficiency target. Those moneys were in addition to the industry's basic maintenance of capital—some £500 million to £600 million over the regulatory period—that will also marginally affect the ability to connect to water supplies and sewers.

The delivery of the investment programme is a different issue. In our revenue settlement, we charged Scottish Water with delivering that £1.8 billion in roughly equal instalments in each of the four years. To date, that has not happened. In our April investment and asset management report, which was based on Scottish Water's first almost two years, we highlighted the fact that, if it was to complete the £1.8 billion programme by the end of the regulatory period, Scottish Water would have to spend at a rate that was unprecedented in monetary terms. The percentage increase that is required has been achieved only once before.

I suggest that the mismatch is not between the reduction in operating costs and the development constraints—we are well aware of what people are saying about those constraints—but between the delivery of the allocated investment programme, which is being paid for by customers at this time, and the development constraints. Operating cost reductions are not the issue.

Rob Gibson: If there is a disagreement between the regulator and Scottish Water about how that can be achieved, will providing a clearer definition of the water industry commission's powers solve that problem?

Alan Sutherland: Solve what problem?

Rob Gibson: Will it meet the need to tackle development constraints at the levels that require to be spent?

Alan Sutherland: It is important to understand that the current function of my office is to advise Scottish ministers on the revenue requirements for delivering the investment programme that

ministers specify after consultation. Under the new system, the office will have a slightly different function. Scottish Executive ministers will still have the responsibility to define the investment programme that they want, but the commission will then have to reach a decision, rather than simply offer advice, on what pricing level is required to fund that investment programme.

The Convener: That is a helpful clarification.

Nora Radcliffe: Further to Rob Gibson's question, I want to ask whether Alan Sutherland's impression is that Scottish Water will fulfil its investment programme even if the programme is back-loaded. Will the work get done even if it is all concentrated in the final part of the investment period?

Alan Sutherland: It is not for a regulator to predict how Scottish Water will do. We thrive on evidence and data; we do not like hypothesising. I can only repeat that, in pound terms, the extent of spend that is still required to be delivered has never been achieved in the history of the UK water industry. In percentage terms, as an increase over what was delivered in the first two years, the amount of expenditure that has still to be delivered has been achieved only once. It was achieved only by one company, on the basis of a much smaller capital programme than that which is to be delivered in Scotland. The delivery of the entire programme by 1 April 2006 would represent a significant achievement—it would be a first. Nora Radcliffe asked whether everything would ultimately be delivered, to which I reply yes, because regulation will ensure that that happens. We are working hard to ensure that we have proper definition of the capital programme and can vouch for its delivery and the benefits that customers have been promised.

Maureen Macmillan: I want to pursue that point a wee bit. What has caused the bottleneck? Is it true that, as some people suggest, the downsizing of the water industry and loss of personnel have led to a lack of capacity to deliver?

Alan Sutherland: It is not for me to comment on how Scottish Water is managed. Scottish Water still has more operating cost available to spend in relation to its size and geography than has any company in England and Wales, which is why it is still rather inefficient, despite its creditable performance in its first two years—we look forward to more of that. There is still an efficiency gap. The resources are there and it is for management to consider how to use them. Customers are certainly providing an adequate amount of money.

Nora Radcliffe: I would like clarification on some of the points in your submission. You say:

"It is important that Scottish Water should be able to appeal a decision to the Competition Commission or could challenge process through a judicial review."

Can you clarify that statement and expand on what it means? Does it refer to two different types of appeal or are you suggesting that there should be an appeals process beyond an appeal to the Competition Commission? What are the pros and cons?

Alan Sutherland: When the proposed new water industry commission determines how much it should cost to deliver the policy objectives that ministers will set out in January, it is right and proper that there should be a mechanism whereby Scottish Water can appeal if it does not like the commission's analysis. It is likely that such an appeal would be complex, because it would involve many issues—colleagues keep telling me that I assume the issues are too simple. The issues are complex and our method of going about the process will fill five thick volumes, which gives an indication of the volume and detail of activity that we have to deal with. It is reasonable that an appeals body should have the expertise and experience to be able to respond to those issues.

Judicial review, as I understand it, is different and involves the consideration of whether we have acted in accordance with the proper process. If we do not act in that way we, like other public bodies, can be subject to judicial review.

Nora Radcliffe: Are you suggesting that there should be two routes of appeal for two different types of dissatisfaction?

Alan Sutherland: Yes. I think that that is in line with general regulatory practice.

Nora Radcliffe: That is fine. I just wanted clarification because I was not sure whether the statement about two types of appeal represented an either/or approach—

Alan Sutherland: We were not proposing a three-tier system.

The Convener: Are you happy with the drafting of the bill in that respect, or should it be amended?

Alan Sutherland: I am not a lawyer, so I am probably not the best person to comment on the drafting of statute. The bill seems reasonably clear to me, but that might be because we think that we understand the regulatory process in England and Wales and in other utility industries. Perhaps that conditions our view, but I think that the question should be answered by someone who is rather more specialised in legal drafting.

The Convener: But you are saying that you are pretty happy with what is in the bill and that it seems to do the job. Someone else can debate the question whether it does exactly what it is intended to do.

Alan Sutherland: The policy memorandum has moved us forward considerably. Indeed, it and the

letter that Mr Finnie sent me in May about starting work on the next review have very much clarified what the responsibilities of ministers are and what the responsibilities of the commissioner/commission will be in order to calculate the costs of the very important ministerial policy objectives that I am sure will be debated by members.

11:15

The Convener: Following on from Nora Radcliffe's question about appeals and our discussion about whether Scottish Water should be able to appeal certain decisions, I wonder what your view is on the suggestion that there should also be an appeal process for individual consumers who are unhappy about their banding or the amount that they are being charged.

Alan Sutherland: The third volume of our approach sets out a number of questions for consultation on the introduction of what are called tariff baskets, which are effectively the tariffs that apply to discrete groups of customers. Instead of trying to predict in advance each particular tariff, of which there are about 250 in Scottish Water, we would set only 10 price limits for the various baskets. We expect guidance from ministers in January on the exact weightings that they want between the various groupings in light of the consultation paper, "Paying for Water Services 2006-2010", which the Executive has already launched and the study that it has commissioned on cross-subsidy in the water industry. After those two processes are complete, we expect to receive fairly clear statements from ministers about what they expect each group to pay in relation to the other groups.

In the consultation, we have suggested that metered customers with household-type characteristics—which would cover the few hundred households in Scotland that have a meter, or smaller businesses—are grouped together instead of being lumped into a tariff basket with all other metered customers, which is what happens in England and Wales. As a result, you would be able to look at prices or receive clear guidance from ministers about how they expect the household or small business user to be treated in relation to the various other water service users.

The Convener: But what about appeals? What happens if someone is not happy with the bill that they end up paying? This is particularly important, given that bills have been rising. I know that people can complain to Scottish Water, but if they are not happy with its response, should they have recourse to someone else? No one has suggested that the water industry commissioner should take on the job; however, it has been pointed out that with other utilities people can complain to bodies such as energywatch.

Alan Sutherland: In that respect, the committee might want to discuss the water customer consultation panels. I was keen for them to be set up at the time and I feel that they play a valuable role. Perhaps members will feel it appropriate to give the panels the additional function that you outlined. I certainly think that their role should be expanded and strengthened. A customer group should be able to lobby with regard to particular situations; on the other hand, I am required by statute to fulfil a regulatory function that immediately has to reach the general customer interest by balancing one group against another.

The Convener: I think that I understand that. The representations to the water customer panels are to do with different key interest groups but, a couple of weeks ago, we were debating the issue of individual customers who are unhappy with their bills. Whom do they go to? I do not think that the water customer panels want to hear those complaints.

Alan Sutherland: If someone is paying on a rateable value, I suppose that one of their options is to appeal it. If they are unhappy with their council tax banding and the charge that relates to that, I assume that they can appeal the banding. I appreciate that that is probably not terribly helpful, but it is not the commission's role to consider individual customers.

The Convener: I was not suggesting that it would be a role for the commission. I was saying that we were talking about regulation of utilities and that other utilities industries have organisations to which people can complain. Do you think that that is a good idea? It has been suggested by other witnesses that there is a gap in the water industry.

Dr John Simpson (Office of the Water Industry Commissioner for Scotland): The parallels in the water industry in England and Wales and in other regulated utilities would be where a customer who was unhappy with the level of their bill and who appeared to have no recourse of complaint to the company complained to a body similar to the panels that we have in Scotland. For example, they could complain to WaterVoice or energywatch. Dealing with complaints would be the day-to-day activity of that type of body. There is a role for the panels in Scotland in dealing with that kind of issue. It would be very difficult for a regulatory body to do it.

The Convener: We will come back to that. I would like to read the evidence because I do not think that that was the view of the water customer panels.

Nora Radcliffe: There are four things in the submission that I would like to clarify. Convener, is it all right for me to carry on and for other members to come in behind me?

The Convener: Yes, if you keep your questions focused.

Nora Radcliffe: Page 3 of your submission mentions the consultation on the detailed principles of the licensing regime, the draft licence and the fact that you are proposing to hold

“two further rounds of consultation before a licence was issued to a new entrant”.

Are you referring to a new entrant other than Scottish Water?

Alan Sutherland: Absolutely. Assuming that the bill goes through, in April next year we plan to consult on the principles that we should include in the licence for the retail arm of Scottish Water. There would then be a separate consultation on a draft licence for Scottish Water retail. Between 2006 and 2008, when it is suggested that new entrants might be able to come into the market, we plan to have a further two rounds of consultation, basically structured in the same way, on the principles that ought to be put into a new entrant's licence and on a draft base licence for a new entrant. Hopefully, we can expand the consultation and ensure that people have a full opportunity to comment on the process as it progresses.

Nora Radcliffe: Presumably, if the second consultations came up with a slightly different licence, Scottish Water would have to be relicensed under the modified arrangements.

Alan Sutherland: The normal process is that either the licence giver and licensee agree or such matters get referred to the Competition Commission.

Nora Radcliffe: Thank you, that is helpful. The final two questions are about your possible approaches to setting wholesale prices. I burned a lot of midnight oil trying to get my head round this. Are those approaches mutually exclusive or are you likely to arrive at a combination of one or more of them?

Alan Sutherland: Three of the approaches are mutually exclusive. We do not consider the efficient component pricing rule to be appropriate when two businesses have been physically split, because it concerns the pricing of access and not a wholesale price per se. However, some of the principles that underlie that rule could be used. To ensure comparability in the next review, we will calculate the initial wholesale price on a retail-minus basis, but it will probably be a retail-minus accounting basis rather than an ECPR basis.

The long-run marginal cost approach is almost the mirror image of the ECPR. It would probably give extra benefit to new entrants at the incumbent's expense, so we are not terribly keen on it.

The other two approaches that we talk about, which are the accounting approach and the commonsense check of how much it costs the gas industry to read a meter and to serve and bill a customer, for example, are not mutually exclusive. We hope that it is reasonably good practice analytically to reach one answer based on a debate with Scottish Water about where activities go and what the costs are, but to compare that with other industries and processes, to ensure that the answers that we receive are realistic.

Nora Radcliffe: If you go for the comparator approach and consider other utility industries, I presume that the state of infrastructure will be a major factor in your comparisons, because the state of the infrastructure in the water industry is different.

Alan Sutherland: We would examine retail processes, not pipes and assets. We are often told how bad the infrastructure assets in Scotland are. For anyone who is interested, we reported in our investment and asset management report in April on what Scottish Water's data say versus the situation in England and Wales. The infrastructure may well not be in as good nick as it could be on either side of the border—it is not just a Scottish problem. Perhaps we ought not to beat ourselves up too much on how much worse Scotland's infrastructure is, because the objective data do not support that.

Nora Radcliffe: I was talking about comparisons of utilities. Some utilities have a far better, more efficient and more modern infrastructure than the water industry does.

Dr Simpson: Our intention is not to compare the wholesale parts of water and gas businesses, because it is clear that the activities and engineering are different. We want to compare the retail parts—

Nora Radcliffe: The administrative operations.

Dr Simpson: That is because common sense suggests that those activities should be broadly the same in different utilities.

Mr Ruskell: I will ask about the composition of the water industry commission. The commission's role concerns price regulation, but that is with a view to facilitating Scottish Executive policies on economic development, social equity and environmental protection. Should the commission be composed entirely of economists, or should other advisers have a role? I raise that because the submission to the committee from the Office of Water Services talks about the water services regulation authority in England and the establishment of sub-committees. I presume that sub-committees will work on aspects of stakeholder involvement or even policy objectives and their delivery. Will you share your thoughts on

that? Should such arrangements be established here? Do you have a view on how the commission should be composed? Would sub-committees or sub-groups have a role in it?

11:30

Alan Sutherland: The size and nature of the commission are decisions for ministers. Clearly, the results of the commission's price determination will have consequential impacts on customers, businesses, households and all sorts of issues. One of the strengths of what is being proposed is that, after a draft determination of prices is produced in June next year, there will be an opportunity for people to make representations and for ministers to decide that they do not like the price outcome and that they want something else included or something removed. One of the strengths of going for this structure is that there will be clarity between the ministerial responsibility to make policy decisions and the commission's ability to price the lowest sustainable cost of delivering the policy objectives. That clarity is important.

It is for others to decide who should be a member of the commission. Clearly, the role of the commission should be to cost what ministers state is the policy rather than to get involved in the interpretation or development of policy. To do otherwise would be for the commission to turn itself into a mini-representative body, which is not what it is meant to be.

Mr Ruskell: But clearly you are enabling Executive policy to be implemented. I accept that price is crucial to investment in environmental protection and to the cross-subsidies between domestic and non-domestic consumers and between large and small businesses. In effect, you are recommending those major decisions to ministers.

Alan Sutherland: No. Ministers are saying—

Mr Ruskell: But you are coming up with proposed solutions.

Alan Sutherland: No. As we speak, the quality and standards III process is under way. The process involves multiple stakeholders, including the Scottish Environment Protection Agency, the Convention of Scottish Local Authorities, the drinking water quality regulator, business, the Scottish Consumer Council and water panels. They are looking at all the investment requirements over the next eight years in Scotland. The Executive has raised a number of issues that are out to consultation at the moment.

In January, post the consultation, ministers will reach a decision on what needs doing. We will then look at the programme, cost it and include the

costs in the price determination. The programme has been costed by Scottish Water, but the costs do not get reviewed until ministers say what bits of it they want. After the draft determination is concluded in June, there will be a second opportunity for people to say that they want a bit more or a bit less environmental benefit, given what they are willing to pay. The draft determination will become final only at the end of November next year and it will take effect for customers in April 2006.

Neither the commission nor the commissioner is taking any decisions about whether to protect a particular estuary or whether to give people in Dundee a better quality of water supply. Those decisions are part of the ministerial process, post consultation.

The Convener: We will be discussing the issues with the minister next week. Given that we have been debating quality and standards III and "Investing in Water Services 2006-2014" for the past few weeks, we have an overview on that.

I will stick to the issue of the task of the water industry commission. Would it be helpful to have a requirement in the bill that, when you are reaching your conclusions, sustainable development should be one of the guiding issues that you must consider, as it is for the water services regulation authority?

Alan Sutherland: That is one of these questions that is difficult for me to answer.

The Convener: You can give the committee your thoughts, without necessarily giving us a yes or no.

Alan Sutherland: My thoughts are that we should all live by principles of sustainable development. We all ought to be conscious of what we are doing now and the impact that that has on others now and in the future. However, when I think about the issue, which is something that we have done a lot, I keep coming back to the point that there is a clear distinction between the policy side, which has to be the responsibility of ministers, and what ought to be the responsibility of the bean counters—us—which is to cost that policy. I would expect ministers to tell us that they want us to take sustainable development into account and that they want the investment programmes to deliver sustainable development, and to say what they mean by "sustainable development". Although I am ready to be corrected on this, I do not think that it is right that the people who are charged with calculating how much ministerial policy costs should interpret what sustainable development means or decide to include additional costs that ministers have not said that they want, following their consultation and according to their definitions.

There is a role for sustainable development but, particularly given the need to avoid replicating what was probably a lack of clarity in the old regime, I am not sure that we should have a lack of clarity in this framework about what ministers are responsible for, what the commission is responsible for and what Scottish Water is responsible for. Clarity is important and we should not do anything to compromise that.

The Convener: We may come back to that point with other witnesses.

Alex Johnstone: I will move away from what we have been saying and go back to basics. You made it clear earlier that you believe that competition is beneficial to customers. Given some of the reservations that have been raised by other witnesses, do you think that the model of competition that is provided by the bill is adequate to deliver enough competition to deliver such benefit?

Alan Sutherland: Rob Gibson raised an issue about the number of sources of water. If I remember rightly, the committee has heard evidence on the absence of a national water grid. That limits the areas of the water industry where there can be competition in the sense of different people doing the same activity, as opposed to competition for who can do something cheapest—for example, deciding whether to contract something out or to do it yourself is a form of competition. We went through a fairly extensive analysis of the matter back in 2001. We concluded that the only area where there can be in-the-market competition, as we economists would call it, where different people do the same thing, is in the area of retail.

Such competition can bring benefits in a couple of ways. First, retailers typically up their game when they are in competition with one another—they give a better service, their billing is more accurate and timely and they respond more quickly to queries. Secondly, a new entrant will often have significant advantages in terms of the scale and scope of their activities. If they already have a billing system for customers—if they already send out bills to customers for their electricity, gas and, perhaps, their telephone—issuing another bill through the system would only have a marginal cost. Therefore, that would allow a company to consider going into another market and unless an incumbent expanded the scale and scope of its billing system, it would be relatively disadvantaged. There is typically a margin compression.

Alex Johnstone: We have heard concerns that retail competition would be possible in such a limited area that it would be unattractive for many companies to become involved. Is there a danger that the bill's scope will not extend far enough to

create the kind of regime that would begin to deliver benefits? I think that you have answered that question already, but I am putting it in a more straightforward form.

Alan Sutherland: We are not short of approaches from people who are interested in doing various things in the Scottish water industry. People are interested in coming into the market. They would probably come into it now if Parliament was not considering this bill. Rather than making their intentions known now, they are waiting for the clarity that will come from the bill.

I think that there will be entrants to the market and that you will get messages. Some of the submissions to you are interesting on the subject of the market being terribly small and uninteresting. That is what people said about the gas and electricity markets.

Alex Johnstone: I will try a third time. Might some of the potential new entrants to the marketplace be more attracted if the terms of the bill were slightly broader in creating the opportunity for them to enter?

Alan Sutherland: If the Parliament was interested in exposing the entire industry to competition and throwing all the domestic customers into the same pot, I am sure that the market would inevitably be bigger and that there would be more interest. I have my views on whether that is worth doing in public policy terms and I am sure that you all have your views on that.

Alex Johnstone: I think that I have got the answer that I was after.

The Convener: Okay. If there are no other questions, I thank the witnesses for coming along. It has been useful having your written evidence and being able to ask you questions.

We will have a quick, two-minute recess while we let the first set of witnesses escape—although they are obviously allowed to stay for the next evidence—and the second panel come to the front.

11:42

Meeting suspended.

11:46

On resuming—

The Convener: I welcome the second panel of witnesses. We have with us Tony Smith, the director of competition and consumer affairs at the Office of Water Services—Ofwat—and John Banfield, the senior inquiry director at the Competition Commission. I noticed you in the gallery earlier and I thank you for being here. We

will not take opening statements from you because we already have your written submissions, so I will go straight to members for questions. Alex Johnstone will kick off.

Alex Johnstone: Thank you.

Do the witnesses think that the bill will open up competition in the Scottish water industry, or do they regard the bill as an attempt to restrict possible current competition?

Tony Smith (Office of Water Services): I do not think that it is particularly for us to comment on the choices that are made in Scotland. You will have read in our evidence about what is planned as a result of the Water Act 2003 and you will have noticed a couple of key differences between England and Wales and Scotland. First, there will be no forced retail separation in England and Wales. However, the flip side is that there will be the potential for new entrants to access the water undertakers' networks.

Another feature that is different is the fact that, for the first three years of the new regime, there will be a threshold that will mean that only customers who use more than 50 megalitres a year will be open to competition. That is the amount that a large hospital, a school or a university would use, or, in the business sector, a company that uses water for its processes—for example, a company in the brewing industry or a paper manufacturer.

A combination of features will make the markets somewhat different. Our view is that there will be interest in the market in England. Initially, the market will be limited and is likely to have only around 2,300 customers. It would be helpful for potential new entrants if the market was bigger—people have already said that down in England. Nevertheless, we think that there will be interest, both in the retail market, which is more restricted than it is up here, and in common carriage, which is the aspect that you do not have up here. I do not know about the situation in Scotland.

Alex Johnstone: Following on from what we heard from the water industry commissioner, I wonder whether you believe that the bill's proposed model of competition will be robust enough to stand up to challenge?

Tony Smith: That is a tricky one because none of this has been tested in the courts yet. Down in England and Wales, there are debates about whether the model there is legally sustainable. Certainly, the Department for Environment, Food and Rural Affairs' view is that it is; hence DEFRA has put that sort of regime in place.

There have not been any challenges to the regime as a whole, although we are aware of companies that would challenge our interpretation

of what we call the costs principle, which is a key element of the regime in England and Wales that concerns how prices are set. It is too early to say whether there will be a challenge. Only time will tell.

Alex Johnstone: Finally, I have a question on how we should defend the concept of competition. One of your roles is to monitor the effectiveness of competition in the industry. Do you believe that competition delivers cheaper water?

Tony Smith: We expect it to, but we will have to see. As a result of the way in which the regime will be structured in England and Wales, due to the costs principle that I mentioned, competition should occur where it is effective. The regime will not be based on companies and new entrants who try to pick cherries, to use the jargon, and to get the most attractive customers who cost the least to serve—companies will not be able to do that under the regime that will exist in England and Wales. There will be competition where there is a competitive advantage for a company that comes in to compete with the incumbent water company. In that respect, we expect that there will be benefits to customers.

As far as the Government's objectives are concerned, it is equally important that there will not be disbenefits to customers who cannot get into the competitive market because of the limit on the regime or who choose not to get into it; therefore, there is protection for such customers in how things are set up. However, I hope that there will be direct benefits for those customers who are competed for.

The experience of other utilities in England and Wales and elsewhere is that there are knock-on benefits. There is no doubt that even the prospect of competition causes companies to raise their game—we are seeing that even in the water industry in England and Wales. When companies start to understand their customers better, they will ensure that they provide a better service and they will understand their costs much better, which makes them far more effective in dealing with customers and with the costs of doing so.

The new regime in England and Wales might be small—certainly for the first three years—but we think that it will be attractive to new entrants. It will have benefits for customers and will not have any disbenefits for customers who are not directly touched by competition, which is important.

Alex Johnstone: Is the Competition Commission in a position to compare the model that has been chosen in Scotland with the model that is operating south of the border? Can you say whether the levels of competition that they provide are equal or different?

John Banfield (Competition Commission):

No, unfortunately. As yet, we have not looked at competition in water supply even in England and Wales. We have been involved in competition issues in other utilities—especially gas—but the contexts of utilities differ somewhat. I would not want to express a view on the matter.

Maureen Macmillan: The Ofwat submission talks about setting and monitoring price limits in England and Wales, and states:

“In setting price limits, Ofwat takes into account guidance from the Secretary of State and the Welsh Assembly ... on the improvements to drinking water quality and the environment that the companies are required to deliver”.

Where does the Welsh Assembly’s agenda for social development, or that of the United Kingdom Parliament, come in there? You might have heard in earlier evidence that we are quite concerned about, for example, expanding infrastructure for social housing and so on. Where do such matters sit with you? How are they dealt with?

Tony Smith: We receive guidance in various respects, and not only to do with the periodic review, which is referred to. We receive guidance from ministers and the Welsh Assembly Government for us to take into account in the price-setting process. As the paper says, that guidance is primarily around the big items of the programme, such as the environment and water quality.

They also put in issues that they are concerned about. For example, we are currently reaching the end of our price review. Affordability is an issue for customers who already find it difficult to pay and who will find it even more difficult to pay after the review, when prices are likely to go up. Both the Secretary of State for Environment, Food and Rural Affairs and the National Assembly for Wales have expressed their concerns about that. They have given us their view on the issue and have told us what they are doing on the topic. A review is considering the options for customers who find it difficult to pay their bills.

That is one angle; however, it does not stop there. The prices are set for five years, but each year we have to approve the charging schemes of all the companies. When we do that, we consider tariff proposals to ensure that they will not discriminate against groups of customers and that they are cost-reflective. We also take into account guidance that is given to us by the Secretary of State for Environment, Food and Rural Affairs about things such as vulnerable groups of customers and ensuring that, if there is any rebalancing to be done between customer groups, that happens gradually and price changes are phased in so that a customer whose demand has not changed does not have a rapid change in price from year to year. Ministers’ views are made

known to us through various sets of guidance that we observe as we do our job.

Maureen Macmillan: So, is there cross-subsidy in the pricing structure?

Tony Smith: Cross-subsidies between groups—say, between domestic and non-domestic groups—have probably been largely unwound since privatisation. However, to the extent that there are still prices across a company for a particular set of customers, there is a cross-subsidy. Within any particular company, there are some customers in regions which it is easier and cheaper to serve and other customers in areas of the company’s territory that are more expensive to serve. When it considered the provisions in the Water Act 2003 relating to competition, the Government was keen not to unwind those cross-subsidies.

Maureen Macmillan: It does not want to unwind them.

Tony Smith: It does not want to unwind them. It wants to maintain common, cross-company prices for customers.

Maureen Macmillan: When people pay for their water, does an element of the charges pay for the development of infrastructure—for example, for social housing in rural areas—or is that paid for by a separate Government department? Do you know how it works?

Tony Smith: I am not sure how that specific aspect works. Each time that there is a pricing review, development and growth are considered as part of the companies’ plans, which must respond to development demands. The situation in England is somewhat different from the situation in Scotland, in that developers pay for connection to the system. Indeed, they pay at two levels: they pay an infrastructure charge for the impact that they will have on the system as a whole; and they pay a site-specific amount for connection.

The companies’ plans and the pricing deal for the next five years that we have to come out with will include the work that the companies have to do to respond to development. In some areas of England and Wales, that involves a pretty significant amount of money, especially in the south-east of England where there is pretty rapid growth in some areas. Development issues have to be addressed constantly, but they are addressed overall rather than, for example, rural housing being dealt with specifically.

Maureen Macmillan: Yes. We have made a distinction between commercial development, which the developer will make money out of, and development for social purposes to meet a need in a community.

Mr Ruskell: I want to pursue the issue of guidance. To what extent are indicators and targets part of the guidance that you work with or things that you must be aware of? I am thinking of indicators on water poverty or investment in social housing, or targets on leakage, for example.

Tony Smith: Ministerial guidance has clear implications for the environment and water quality, because it is translated into standards that companies must deliver or consent levels for discharges of effluent. Ofwat and the environmental and water quality regulators consider what the guidance will mean for companies and companies consider the investments that they will need to include in their plans if they are to deliver what is required. In that sense, there are specific outcomes.

12:00

Mr Ruskell: That applies to issues on which there is statutory guidance, but how would the policies of the National Assembly for Wales or the Westminster Parliament be delivered?

Tony Smith: I think that it is true to say that ministers have not set a target on water poverty that identifies percentages for the maximum amount of money that a customer should have to spend on water, for example. There are guideline levels, but the guidance does not specify limits. We are not allowed to set prices in a way that is driven by the amount that people who can least afford water can spend; we are statutorily required to set prices that allow the companies to do what they need to do—to “finance their functions” is the term that is used.

However, we take account of the implications for customers because not only is the Government concerned about those implications but the companies themselves are concerned about them. If a customer cannot pay, the company has to deal with debt issues and all the rest of it and, as members know, other water customers pay more. The approach is less specific than setting targets in the way that Mark Ruskell mentioned.

Mr Ruskell: The WIC said that, in essence, you have a bean-counting function. I am concerned to know whether you count the right beans and whether you design pricing in a way that reflects an awareness of the various policies.

Tony Smith: As you can imagine, we take part in stakeholder discussions and do a huge amount of research on what people are thinking. Various poverty groups tell us about their issues and we encourage that, both in the lead-up to the review and in the aftermath of it. There are two stages to the process: a draft determination, which contains our proposals; and a final determination. During the four or five months between the two stages,

we take account of everybody's comments. In England and Wales, we encourage discussion even before the review process starts, by asking the water companies to put their business plans in the public domain. That encourages a debate around the consequences of proposed price increases or around the environmental and price implications of proposed programmes. There is plenty of opportunity for everybody to input to the process. As you can imagine, people are not slow to come forward and tell us about their concerns.

Rob Gibson: I am intrigued by your comment that the Ofwat board tries to make decisions that are politically sound as well as trying to deliver effective outcomes. Given that you interpret ministers' indications of what should happen, how are you dealing with the emerging targets and indicators on sustainable development? Your submission discusses the matter in terms of your general aims—thank you for that—but, during the next few years, there will be much more specific indicators and targets for sustainable development.

Tony Smith: I ought to say that the sustainability duty will come into force only when the new water and sewerage regulatory authority is in place, in 2006, so we are not formally obliged to meet that duty at the moment. However, as we pointed out recently in our draft determination document, we already act as if that duty were in place. We take account of the four threads of sustainable development. The water services regulation authority will have to work on that area, because you are right—targets on sustainability will become more specific as we move forward.

We address each of the elements of sustainability as a result of the various aspects of guidance that we get, but as yet there are no specific measures on sustainability. The issues are there—environmental protection and social development are examples of issues that we must take into account. In our draft determination document, we have outlined how we have taken account of each of those elements this time. It will be for the new regulatory authority to consider how that develops over time, in the light of progress in understanding what sustainable development means. It is critical to consider how we trade off the four threads of sustainable development against each other. We still have thinking to do on that, in preparation for the establishment of the new authority.

Rob Gibson: I want to explore a little more of your thinking on water conservation, how you have tackled that this time and how you think that progress on that will be made.

Tony Smith: As you will recall, leakage is quite a big issue. In the mid-1990s, the water industry, prompted by Ofwat, put in place a set of targets—

which it is largely achieving—which have resulted in, for example, a reduction of well over 25 per cent in the peak levels of leakage.

There is also the subject of metering. I think that it is true that there are many more meters in England and Wales than there are in Scotland. Although we would not advocate universal metering, we would support certain customers opting for meters and the selective use of meters in particular circumstances.

We operate in a way that we think seeks to conserve water, but we take account of the economics of the situation—as we should do, given our role. For example, we do not want leakage to be reduced at all costs; we want it to be reduced to the point at which it would be uneconomic to go any further.

It is interesting that, under the Water Act 2003, the secretary of state will have a role to play in achieving water conservation; I think that he or she will have to produce a report every three years on what actions have been taken to do that.

Rob Gibson: That was useful; thank you.

The Convener: That was helpful. Although we focus on water conservation, there are obviously other issues that we should think about when we consider sustainable development, such as the use of energy for processing water. It gets very difficult to work out the trade-offs between the different decisions. We are keen that such trade-offs are made and that they are part of the process. We do not want it to be assumed that such matters are being considered; we are eager to find out where that is put into the system. Everyone has to do that in different ways. We would not expect the WIC or the minister, who sets policy objectives, to do that to the same extent. It is a question of ensuring that sustainable development is taken into account throughout the process. That has been our concern when we have discussed whether there should be a statutory function at the regulatory end.

Tony Smith: That is a political choice. One could give each of the regulators—the quality regulators as well as the economic regulator—a specific role. That could produce a healthy tension between the regulators, who have a narrow set of objectives and whose activity has limited scope, and the ministers, who set the objectives. Alternatively, one could get the regulators to share a common agenda by giving them a broader set of complementary duties. That choice exists.

The Convener: That is a very concise way to put it, and I think that we shall put that to the minister next week when we have him before us.

I would like to ask John Banfield about two angles on the same question, which we have

heard from a number of witnesses. If we are talking about the Scottish water industry, why should we go to the United Kingdom Competition Commission as a last port of call on competition issues? That question was raised both by a large company and by those representing consumers, and they came at it from two different angles. There is a general sense of concern about how, as an overarching UK organisation, the Competition Commission can be in tune with the policy issues and the reality on the ground in Scotland. There is also concern about the whole issue of competition, as there will be different regimes operating to slightly different policy objectives.

There is a concern that, because England and Wales is a bigger area, that would shape the Competition Commission's views in considering decisions in the Scottish water industry. Some people fear that that would push us down the route towards greater privatisation than is necessarily wanted in Scotland. I am putting to you what has been said to us, and I would like some reassurance from you. Do you think that those are fair concerns? How would you attempt to reassure people that they will not be a problem?

John Banfield: They are understandable questions. We are quite used to dealing with Scottish references. We have done quite a few over the years and I have done two in the past two years that solely concerned parts of Scotland, the latest being the bus-rail merger. We have Scottish members. On the specific legal context of any case, we do every regulatory inquiry in the context of the slightly varying sets of statutory objectives that apply in the particular case, so we are broadly adaptable. Nevertheless, there tends to be a common thread in how we approach regulatory inquiries.

We would undoubtedly take evidence and as many views as possible would be invited, and we would have hearings in Scotland. In other water inquiries, we have always had hearings with local consultative committees, and I am sure that we would do that in this case as well. In my view, we would be well aware of the local views on specific issues. On competition issues, we have not actually dealt with water competition cases as such in England and Wales, so we might find that things actually work the other way round if we come across such issues in the Scottish water context before we come across them in an English and Welsh water context. However, every inquiry that we do is done in the context of the specific statutory duties. We would take into account the local context and we would undoubtedly get evidence from the Scottish Executive and from consumer groups.

The Convener: That is helpful. We are all aware that competition policy is set at UK level, but a

clear policy on how the water industry is operated is coming through in the bill that we are debating. It is quite important that that issue is addressed up front and in an open way.

John Banfield: Going through the papers makes it clear that your focus is different from that in respect of other utilities that I have dealt with in other parts of the country, and we would be alert to that.

The Convener: That is useful. I thank both witnesses for their written evidence and for being prepared to come along and answer our questions today.

12:13

Meeting suspended.

12:16

On resuming—

The Convener: We now move to our third panel of witnesses. We shall try to create a bit of sparkiness in the committee, because we have been in session since 9.30 this morning. Our witnesses are Stuart Rolley, senior development manager, and Stephen Hill, development manager, from the environmental team of the Coal Authority. I thank them both for attending.

As with previous panels, we will not hear opening statements from you, but we have copies of your written evidence. We were particularly keen to have you along this morning, because part 3 of the bill has probably had least attention. We had a brief discussion of part 3 last week, when representatives from the Convention of Scottish Local Authorities were here, with regard to the Fife interests, but we want to ensure that we scrutinise that element of the bill more fully.

I think that I should give Mark Ruskell the opportunity to kick off, as he expressed an interest last week in the practical application of the bill, particularly in the area that he represents, Mid Scotland and Fife.

Mr Ruskell: Do you believe that the bill is clear enough in setting out your responsibilities with regard to discharges from mine workings?

Stuart Rolley (Coal Authority): I believe that it is. For some time now, we have had an on-going programme of remediating mine water discharges. There are issues with liability on a site-specific basis, as you would imagine, but our focus is very much on cleaning up mine water pollution. We work closely with SEPA, which provides much of the information on the discharges that it considers are in need of remediating. We use SEPA's priority list as the basis for our work and cleaning up mine water pollution is very much the focus of that work.

Mr Ruskell: Will the bill affect your relationship with SEPA? I know that, at the moment, you work through a memorandum of understanding.

Stuart Rolley: That is correct.

Mr Ruskell: Will that change in any way?

Stuart Rolley: No, it will continue in much the same way. Until now, we have been working under the auspices of Lord Strathclyde's statement on the coal industry in 1993-94. The bill gives us a more formal statutory basis for the work that we are carrying out.

Alex Johnstone: Thank you for your submission; I now understand your role much better than I did before.

The one issue that has been brought to my attention, and which I would like to raise briefly, is the compulsory purchase powers. I understand why compulsory purchase powers would be necessary—your submission is very detailed on that matter—but I would like to clarify the nature of what you would be seeking to compulsorily purchase. In the event of access being denied, would you seek to purchase land in order to gain access to a mine, or are we talking about the purchase of abandoned mines?

Stuart Rolley: The mine workings underground are virtually all vested in the Coal Authority, so they are, in effect, our property. Problems occur when the water rises and comes out of those mines and causes pollution. Our preferred way of trying to treat that is by means of a type of reedbed site whereby we can clean up the water. We go through a feasibility process to work out all the possible ways in which we can treat water. As members might imagine, in some circumstances, such as those involving reedbeds and ponds, we need the land to be reasonably flat and close to the discharge. Indeed, when the requirements of a piece of land are very distinctive, we require reasonable amounts of it to construct reedbeds and other facilities to clean up the water.

Alex Johnstone: In this case, we are talking about land to access and perform certain works. I presume that, in the vast majority of cases, agreements can be reached well in advance of compulsory purchase orders having to be made.

Stuart Rolley: Absolutely. We see compulsory purchase orders very much as a last resort. During the feasibility process, we consider all the options, some of which centre on land. However, in some cases, because of geography and the underground situation, we are limited in that respect. It is pertinent to point out that we have been delayed in dealing with two of the most polluting discharges on SEPA's priority list because we have been unable to gain access to the land.

Alex Johnstone: How likely is it that the power will be used? Are the two cases that you mentioned the only current examples in Scotland?

Stuart Rolley: They are the most pressing cases, simply because they are the worst examples in the country. To be perfectly honest, I think that they are the worst examples in the UK and, under normal circumstances, we would have resolved them. However, because of access problems, we have had to resolve problems further down our list. That said, because we are working on a phased basis, we have not reached the bottom of that list, but I imagine that there will be problems further down it: there always are.

Alex Johnstone: But I am sure that you will agree that the compulsory purchase option can often smooth negotiations.

Stuart Rolley: It helps.

Rob Gibson: Alex Johnstone has asked many of the questions that I wanted to ask. Have you ever had to have recourse to the compulsory purchase option in England and Wales?

Stuart Rolley: No.

Rob Gibson: The compulsory purchase process usually takes quite a long time. Are you prepared to comment on the nature of the powers that might be required?

Stuart Rolley: We are aware that the process can be complicated and long-winded; that is another reason for it being our last resort. However, as has been mentioned, the important point is that we have the powers. People are no longer able simply to say no and to leave the matter at that. We have another option, even though we would not ordinarily choose it.

Rob Gibson: At the current rate, it will take almost 20 years to deal with the nearly 90 discharges that have still to be tackled. Should we not consider introducing enhanced compulsory purchase powers, even if only to persuade people that we are serious about dealing quickly with such matters?

Stuart Rolley: We hope that under our current programme we will complete our work on the discharges by 2015. That is not quite 20 years.

As I have said, the very threat of our being able to use compulsory purchase powers will unlock the majority of situations. I genuinely do not think that we will ever exercise them.

The Convener: In your submission, you say that the extra powers that you have to access land and monitor the situation will help to concentrate landowners' minds. Is that how you intend to use those powers?

Stuart Rolley: We need to monitor what is happening underground. However, British Coal left

us very little information about the underground water situation in some areas, which means that we have to drill boreholes at certain places. As you might imagine, the position of underground workings determines where we can drill boreholes for access. On occasion, we have found it difficult to get a certain piece of land, which has meant that we have had to compromise on where we have positioned the boreholes. Obviously, that also compromises the kind of information that we receive from below the ground, which is not as good as we would like it to be.

The Convener: How does your work relate to SEPA's work as our environmental regulator? Your submission comments that it will take 20 years to deal with some of the pollution problems and says:

"This is not consistent with the ... EC Water Framework Directive".

At what point does a system kick in and say that it must be done faster? You have raised a big issue.

Stuart Rolley: We intend to comply with the water framework directive, and that is why 2015 is an end date for us. The polluting discharges on the list that SEPA and the Environment Agency in England and Wales have identified are programmed to have been processed by that time.

Stephen Hill (Coal Authority): In addition, although the majority of the known discharges will have to be treated by 2015, the underground situations are developing and will develop at different rates. Some might not need anything doing with them until beyond 2015.

The Convener: Equally, they might deteriorate and you would need to work on or monitor them.

Stuart Rolley: That would add to the number.

The Convener: How do you report discharges? To most of us, what you do is new. What is your process for communicating the level of the problem? In the Parliament, we debate environmental justice issues and SEPA bringing cases against companies that pollute the environment. Not a great deal of attention has been paid to that in Scotland in recent years, and what you have said has put it on our agenda.

Stuart Rolley: We are aware that there is a public relations problem. We have six-monthly meetings with SEPA at which we go through what we have done in the previous six months. SEPA sometimes adds items to the programme and sometimes takes them off. At the local level, a planning process accompanies our construction of the schemes and there is advertising alongside that. Beyond that, it is difficult for us to get our work out into the public domain, although we use all the usual publications and take interested people round what we do. We are proud of the

programme, because it has made a real difference in the 10 years that the authority has been around, but we would welcome any suggestions on how to publicise the work more.

The Convener: Have any mine owners or owners of polluted land been prosecuted for not dealing with the problem or not helping you to address the issue?

Stuart Rolley: That is probably a question for SEPA; I do not know.

The Convener: I just wondered whether you were aware of it having happened.

Stuart Rolley: Not to my knowledge.

The Convener: Your work is a good way to concentrate the mind, and I know that SEPA has used it as a way of highlighting which companies have not helped them to tidy up environmental pollution.

Nora Radcliffe: You say that anything that you plan goes through the planning process, so I assume that you are not exempt from it.

Stuart Rolley: We have permitted development powers for certain elements, but, in essence, we still go through the full planning process and end up with planning permissions and conditions like everybody else does.

Nora Radcliffe: There is a safeguard in that.

If you drill a monitoring borehole, what is the evidence of the hole above ground? I presume that it does not occupy a big footprint.

Stuart Rolley: Most of the time, a borehole would simply be covered by a grate that we would lift up to get access to it.

Nora Radcliffe: So there would not even be a building above it; it would be only a hole in the ground with a cover on.

Stuart Rolley: Yes, exactly that.

Nora Radcliffe: You talked about how important it is to get access to the roadways, but do you have reasonable plans of the mines with which you expect to have to deal?

Stuart Rolley: Yes, we have. One of the authority's major functions is to provide information on coal mining, and we have a repository for all the old mining plans from British Coal and way back, so we have access to all available mine plans. As you can imagine, the more modern plans are very accurate and useful because of surveying techniques, but the older the plans get, the more unimpressive and difficult to use they are.

Nora Radcliffe: Are you the holding body for that information?

Stuart Rolley: Yes.

Nora Radcliffe: When new railways, for example, are built, we keep getting nasty surprises, but as you are the repository for such information, anything that comes to light will be fed to you.

Stuart Rolley: In the same way, when somebody buys a house in an old mining area, the mining report that they do comes through us. We use the information that we hold to give them that report.

Rob Gibson: Does the bill go far enough? Is there a need, or is there scope, for similar legislation to be introduced for other types of mine working?

12:30

Stuart Rolley: The authority was set up, resourced and funded on the basis of coal mining pollution. We have plenty to do in dealing with that. If mines other than coal mines were to be considered, resources and budgetary concerns would have to be addressed.

In purely practical terms, the treatment of coal-mine water is similar to that of water from other mines. Our technical knowledge—again, it is something of which we are proud—is nationally and internationally renowned. Many people from various countries visit us to see how we work and what we do. We are quite capable, technically, of taking on other types of mining.

Rob Gibson: Should we be concerned about other types of mine working? Have such concerns reached your horizon?

Stuart Rolley: We consult and work closely with SEPA and the EA and we know that they are concerned about other types of mining. We have no detailed knowledge on the subject as it is outside our remit.

Alex Johnstone: Is it the case that all active mining operations, including opencast mines, fall under the auspices of SEPA and therefore would not be your responsibility?

Stuart Rolley: That is right. In the case of closures post-1999, it is the operator's responsibility to satisfy SEPA that no pollution will result from the closure of their operation.

The Convener: I thank you both for coming along and helping us to understand how the bill will be enacted and what its impact will be. Your point about the topic's low profile should be of concern to everybody. It is obvious that, although this is a big environmental issue, it is not as visible as some of the other issues that have come before us. Thank you for answering our questions and for your submission.

That concludes today's evidence-taking session. Next week, the minister will be before us. Following discussions with the clerks, we have asked the Scottish Parliament information centre to refresh the list of issues on which we might want to focus with the minister. We have covered a huge amount of ground over the past few weeks and we do not want to lose sight of any of the key issues in our questioning of the minister. In addition to looking at the bill, we will look at the consultations on the principles of charging, quality and standards III and the investment programme. The real challenge for us next week will be how to get through everything.

Subordinate Legislation

Oil and Fibre Plant Seed (Scotland) Regulations 2004 (SSI 2004/317)

Fodder Plant Seeds Amendment (Scotland) Regulations 2004 (SSI 2004/380)

Agricultural Wages (Permits to Infirm and Incapacitated Persons) (Repeals) (Scotland) Regulations 2004 (SSI 2004/384)

Sea Fishing (Enforcement of Community Satellite Monitoring Measures) (Scotland) Revocation Regulations 2004 (SSI 2004/391)

Sea Fishing (Enforcement of Community Satellite Monitoring Measures) (Scotland) Order 2004 (SSI 2004/392)

Common Agricultural Policy Support Schemes (Modulation) (Scotland) Amendment Regulations 2004 (SSI 2004/398)

12:32

The Convener: Agenda item 3 is consideration of subordinate legislation. I hope that we can crack through this item relatively swiftly.

We have six instruments to consider under the negative procedure. The Subordinate Legislation Committee has considered all six instruments and has commented on only the first two. Members have before them an extract from that committee's report. I think that we would want to welcome the detail in some of the instruments. Are members happy to make no recommendation to the Parliament?

Members *indicated agreement.*

Meeting closed at 12:34.

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