

## Chapter 6 – The ministerial submissions of 8 June and 5 July 2011 and the launch of the public consultation

### The ministerial submission of 8 June 2011

- 6.1 A submission dated 8 June 2011 was prepared by Ms Hepper for Minister Foster for the purpose of informing her of the conclusions contained in the draft final CEPA report of 31 May 2011, which was discussed in the previous chapter of this Report.<sup>454</sup> A draft Impact Assessment accompanied the submission and is also discussed further below.
- 6.2 Ms Hepper told the Inquiry that she had signed off the submission, which was probably drafted by a combination of Mr Hutchinson and Ms McCutcheon.<sup>455</sup> The Minister does not appear to have had an opportunity to consider the draft report of 31 May 2011 until it was brought to a meeting with Ms Hepper on 14 June.<sup>456</sup> When asked by Inquiry Counsel whether it would have been better to give the Minister some time to consider the detailed figures in the report before the meeting, Ms Hepper said “Well you know that’s the way we did it and it did seem to work...”<sup>457</sup>
- 6.3 The submission timing was recorded as “Immediate” in order to allow the CEPA analysis to be published as part of the imminent public consultation. Included in the “Background” section of the submission was an account of the £25 million AME funding spread over the period 2011-15 to be provided by HMT in the course of which it was said:
- “Discussions with DECC regarding funding post 2015 have revealed the following: DECC see no difficulties re funding going forward as both DECC and HMT regard RHI as a priority, flag-ship policy; plus, HMT recognise that the scheme will be open until 2020 and that significant funding post 2015 will be required. It is also the case that DETI received a pro-rata allocation of the UK funding for the period up to 2015, and HMT are aware that our scheme will complement DECC’s, will therefore also require funding in the next spending review and we need our portion of the ‘UK pot.’”<sup>458</sup>
- 6.4 As discussed in chapter 3, Ms Hepper did not explain the unusual nature of the funding in the submission, nor any potential risks to the DEL budget of overspending or refer to the consequential need for budget controls. The Inquiry noted that such information also does not appear to have been provided to CEPA by either Mr Hutchinson or Ms Hepper. With regard to potential budgetary control, at page 44 of the May 2011 draft final report CEPA recorded that funding for a capital grant scheme could control its budget as follows:
- “In a first come first served approach, potential beneficiaries would apply for subsidy. This would be awarded until the amount available was exhausted. Potentially, this subsidy could be allocated into different pots or pools for different types of beneficiary to recognise differences between groups.”<sup>459</sup>

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454 WIT-00739 to WIT-00749; complete version may be found at DFE-29387 to DFE-29405

455 TRA-01896

456 TRA-01868

457 TRA-01869

458 WIT-00740

459 DFE-187797

- 6.5 CEPA advised that an alternative way to distribute capital grants would be on a competitive basis in the form of a Challenge Fund. In either case the grants would be kept within a capped budget and would be more appropriate for a scheme in which uptake was uncertain and subject to unpredictable surges.<sup>460</sup> Such an advantage offered by a capital grant/Challenge Fund also did not appear in the submission.
- 6.6 In the course of giving evidence, Ms Hepper thought her expectation that funding for new applicants would extend to 2020 might have been based upon a conversation between Ms McCutcheon and Jo Greasley of DECC.<sup>461</sup> However this submission was dated 8 June, the same date upon which Mr Hutchinson had emailed seeking advice from DECC as to whether it would be correct to state in the consultation that the scheme would remain open to applicants to 2020 if no funding was secure after 2015. He was also enquiring how the AME classification impacted on unspent money or overspend in one year and whether funding could be “rolled over.” The answer to that email enquiry post-dated the submission to Minister Foster.<sup>462</sup>
- 6.7 In oral evidence Ms Hepper said that “our mind-set was it’s capped in each year and we’ll not be going above that.”<sup>463</sup> However, it is rather difficult to reconcile such a mind-set with the clear terms of the earlier April/May 2011 email exchange, including HMT’s Mr Parker and then Ms Clydesdale and Ms Brankin warning of the need for clear cost controls (which is dealt with in greater detail at chapter 3 of this Report).
- 6.8 The Inquiry remains unclear as to precisely what Ms Hepper and her team believed in June 2011 in relation to the effect of the cap on the annual funding, namely whether it could act as some form of cost control or whether it would simply not be exceeded in practice for some other reason. In either event, any reassurance which was felt at this point about not exceeding the annual cap is difficult to understand in the context of a scheme which was volatile, with an unpredictable demand, and in which, once accredited, applicants would become entitled to grandfathered subsidy for 20 years. Furthermore, specific warnings had been received from DETI Finance and HMT that not only should the caps not be exceeded but that any excess had a potential to impact upon the DEL budget. The Inquiry also notes in this regard that the risk of exceeding the scheme budget was specifically included as ‘risk E’ on the Scheme Risk Register, which was later forwarded to the Casework Committee considering the scheme.<sup>464</sup>
- 6.9 In her submission of 8 June Ms Hepper confirmed that, although a draft final of the CEPA report had been received on 31 May, there were a “number of issues” that still needed to be addressed before the report could be finalised.<sup>465</sup> A copy of the CEPA draft final report was not supplied with the 8 June submission nor was it supplied in advance to Dr Crawford, who did not ask to see it.<sup>466</sup> In such circumstances he could not have been in a position to ensure that the technicalities would be fully understood and communicated to the Minister.
- 6.10 Ms Hepper’s submission noted the view expressed in the CEPA report that if no funding was guaranteed for new applicants after 2015 a Challenge Fund or grant system would be preferable, but she went on to refer to several issues to be considered if such an option were

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460 DFE-187798

461 TRA-01875

462 WIT-16380 to WIT-16382

463 TRA-01875

464 WIT-07061 to WIT-07073

465 WIT-00740

466 TRA-07517

adopted. These included that such a grant-based scheme would need to be administered by the Department or a contracted third party and thus result in additional resource pressure, that it could be complicated and require applicants to have an understanding of technology and their likely heat demands, that it could encourage the selection of a limited number of technologies at the expense of diversity, and that experience suggested that such a system would not provide long-term stable support once funding came to an end.<sup>467</sup> The submission did not refer to the relative cost benefits or the overall cost-effectiveness of the Challenge Fund, the lower support cost per unit of heat or how the potential risks to funding could be much better contained by such a fund.

- 6.11 In the submission Ms Hepper explained CEPA's advice relating to an NI RHI scheme and the need to adjust the tariffs to the different pattern of fossil fuel use as compared to GB in terms of oil rather than gas.<sup>468</sup> She also pointed out the "major issue" with an NI RHI scheme would be that customers could be potentially "over incentivised" and inefficient technologies supported.<sup>469</sup> If an NI RHI scheme was the preferred option, Ms Hepper advised that such a scheme should be in place by 1 April 2012 and suggested the establishment of a renewable heat group with inter-departmental membership.<sup>470</sup>
- 6.12 One of the issues that DETI officials had raised with CEPA following the provision of the draft final report was a need to be very clear as to why RHI was the preferred option over a Challenge Fund. CEPA had responded "Our recommendation is based on the assumption that DETI wants to do an RHI. The Challenge Fund is for comparison purposes to show what could be achievable."<sup>471</sup> The Inquiry was not provided with any written or oral evidence to establish that DETI ever challenged that assumption. Indeed, although both Mr Hutchinson and Ms Hepper denied that Energy Division officials had sought from CEPA a recommendation for an RHI scheme, each was unable to point to any clear documentary rejection, or recall any specific oral rejection, of the CEPA assertion that DETI had preferred an RHI scheme.
- 6.13 In the course of reviewing the various options discussed in the report Ms Hepper advised at paragraph 24 of her submission that:
- "The NI RHI is the preferred approach and offers the highest potential renewable heat output at the best value."<sup>472</sup>
- 6.14 Ms Hepper stated in oral evidence that this only referred to a comparison with the GB RHI scheme and, in support of that interpretation, she pointed out that the submission closed with a recommendation to consider all the options. However, she accepted that the submission did not contain any indication of that limited comparison or any detailed basis for asserting that the NI RHI scheme offered either higher heat potential or better value than the GB RHI scheme. The submission listed the options at paragraph 12 as (a) - (e), in which the NI RHI scheme at (e) was dealt with quite separately from the GB RHI scheme, capital grants, renewable challenge fund and 'do nothing'.<sup>473</sup>

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467 WIT-00742 to WIT-00743

468 WIT-00744

469 WIT-00743

470 WIT-00746 to WIT-00747

471 CEP-143606

472 WIT-00744

473 TRA-01887 to TRA-01893

- 6.15 When this aspect of the submission (that “the NI RHI is the preferred approach and offers the highest potential renewable heat output at the best value”), which was repeated in the public consultation document,<sup>474</sup> was drawn to the attention of Mr Cockburn, a director of CEPA, in the course of his oral evidence to the Inquiry he expressed the view that it did not accurately reflect the CEPA draft final report of 31 May 2011.<sup>475</sup> Mr Connolly told the Inquiry that he did not recall reading Ms Hepper’s reference to the NI RHI scheme offering the highest output for the best value, although he had been copied into the submission, but he accepted that any reasonable reading of the CEPA draft final report of 31 May would not have led to such a conclusion.<sup>476</sup>
- 6.16 In his oral evidence to the Inquiry Mr Hutchinson agreed with Ms Hepper’s explanation that this sentence had been intended to be read in the context of a comparison between a bespoke NI RHI scheme and the GB RHI scheme, although he accepted that the wording of the submission “could be interpreted as misleading” and that words such as “highest” and “best” did not lend themselves easily to the articulation of a limited comparison between only two options. He agreed that it was poorly drafted, at odds with the CEPA draft final report of 31 May 2011 and open to misinterpretation,<sup>477</sup> but he firmly rejected the suggestion by Dr Crawford that there had been any deliberate intention to mislead the Minister.<sup>478</sup> Mr Thomson, the Deputy Secretary in DETI at the material time, accepted in oral evidence that the statement was “potentially misleading”.<sup>479</sup>
- 6.17 Dr Crawford told the Inquiry that he and the Minister saw this reference to an NI RHI scheme offering the highest potential heat output at the best value as a rational and “clear steer” for preferring that option to the four alternatives and not being limited to a comparison with the GB RHI scheme.<sup>480</sup>
- 6.18 The Inquiry accepts that it was appropriate for other factors to be considered, when weighing up which option to choose, including benefitting from linking to the administration of the GB RHI scheme, the stakeholders’ preference generally to follow GB, the imbalance of resources between GB and NI, the lack of HMT budget for administration costs etc. However, in order to be able to make an informed decision, the Minister should have been told in the submission that the Challenge Fund was a cost-effective alternative to the RHI scheme.
- 6.19 This essential additional information was not identified as a contra-indication to a clear preference the Inquiry considers to then have been held by a number of DETI officials, apparently believed by some officials to be shared by the Minister, for an NI RHI scheme.

## The GB Impact Assessment for the Legislative Consent Motion

- 6.20 The submission of 8 June enclosed a draft GB Impact Assessment (IA) for the 2011 UK Energy Bill, which Minister Foster ultimately signed on 14 June 2011, the date of the meeting to discuss the submission.<sup>481</sup> That document was completed using a template provided by DECC

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474 DFE-29971

475 TRA-01275 to TRA-01276

476 TRA-03424 to TRA-03426

477 TRA-01609 to TRA-01615

478 WIT-09305

479 TRA-05716 to TRA-05721

480 TRA-07634 to TRA-07635

481 WIT-00751 to WIT-00757

for DETI in the course of arrangements to obtain the LCM in order to include the enabling powers for the introduction of the RHI in Northern Ireland in the 2011 UK Energy Act. The IA recorded as a key assumption/risk that:

“Results are sensitive to assumptions on fuel prices: reductions in fossil fuel prices will increase the resource cost of renewables and vice versa.”<sup>482</sup>

That IA also included, at paragraphs 3 and 16, references to the effect that DETI had already expressed a preference for an NI RHI, based on earlier research, and that a consistent approach with GB and DECC would be beneficial. Paragraph 3 of the ‘Evidence Base’ section contained a statement that:

“DETI has already indicated that a Northern Ireland RHI is the preferred method of incentivisation however before this can be designed and delivered a full economic appraisal is required.”<sup>483</sup>

A similar statement appeared at paragraph 16.<sup>484</sup> It seems striking that these statements were included in the draft IA provided to the Minister along with the very submission in which she, as Minister, was being asked to express her own preference.

- 6.21 There are a number of other pieces of documentary evidence which suggest that, by this time, there may have been an emerging preference for an ongoing NI RHI scheme, rather than a capital grant fund type of incentivisation for renewable heat or, at least, an emerging assumption that this was likely to be the type of scheme which the Department would ultimately pursue. For instance, the Minister’s announcement in September 2010 that renewable heat would be incentivised was apparently interpreted subsequently as a commitment to introduce a scheme similar to the GB RHI scheme.<sup>485</sup>
- 6.22 Minister Foster stated that she had not expressed or even considered such a preference until she read the submission and the IA and that she did not know why a preference was expressed for an NI RHI scheme in the IA. She explained that her press release of September 2010<sup>486</sup> was drafted by officials and followed the receipt of the AECOM Pöyry report. It was also prior to the commissioning of the economic appraisal, and at a point when no consideration had been given to the various potential methods of incentivisation.<sup>487</sup>
- 6.23 At paragraph 15 of the Impact Assessment it was stated that DETI was still conducting an analysis of the various options which would be considered by the Minister, followed by a public consultation over the summer of 2011. Paragraphs 17 and 18 of the same document had recorded that early indications were that local stakeholders wished a similar scheme to the GB RHI to be implemented in Northern Ireland. Further, that any delay would leave Northern Ireland at a disadvantage in comparison to GB and could lead to local skills being lost.<sup>488</sup> However, in her oral evidence Minister Foster agreed that there had been a “direction of travel” in DETI from 2009 for a renewable heat incentive scheme.<sup>489</sup>

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482 WIT-00752

483 WIT-00753

484 WIT-00755

485 See the Minister’s speech to the Northern Ireland Assembly in March 2011 in relation to the legislative consent motion [DFE-29148 to DFE-29149]; and footnote 2 in the IA signed on 14 June 2011 [WIT-00753], in support of what was said in paragraph 3 of that IA (referred to above).

486 INQ-30183 to INQ-30184

487 WIT-20563

488 WIT-00755

489 TRA-07722

6.24 The Inquiry further notes that not only were the full projected lifetime costs of £257 million for the scheme from the CEPA draft final report of 31 May 2011 not included anywhere in the 8 June submission, but the Minister was also being asked to sign the GB IA template for the 2011 UK Energy Bill with the cost sections left blank. The Minister signed this attesting, as set out on the GB *pro forma*, that she was satisfied the impact assessment represents “a reasonable view of the likely costs, benefits and impacts of the leading options.”<sup>490</sup>

### The meeting with the Minister on 14 June 2011

6.25 Ms Hepper accepted in oral evidence that a number of significant matters should have been dealt with, or dealt with in greater detail, in the 8 June submission. She also agreed in her evidence to the Inquiry that a Challenge Fund offered a better mechanism for controlling cost than a demand-led NI RHI scheme. However, she told the Inquiry that these matters had been fully explained by her to Minister Foster and Dr Crawford, at a substantial meeting lasting 30 minutes to an hour on 14 June 2011, at which she went through the 8 June submission and showed them a copy of the draft final CEPA report of 31 May 2011.<sup>491</sup>

6.26 As recorded on the annotations on the front page of the 8 June submission, the meeting had been originally fixed for 13 June but was then rearranged for 14 June.<sup>492</sup> Ms Hepper maintained it was at that meeting that the details of HMT funding for the NI RHI scheme, the limitation of the “most heat for best value” phrase (in a comparison with the GB RHI scheme) and the relative attractions of a Challenge Fund and an RHI scheme were fully discussed, assisted by the contents of the draft final CEPA report including the relevant tables and calculations contained within it.<sup>493</sup> Dr Crawford thought that this was unlikely, since (on his evidence) he and Minister Foster would have at least asked to take copies of the relevant tables from the report if they had been discussed in the way in which Ms Hepper suggested.<sup>494</sup> As noted above, it seems that a copy of the report was not provided in advance to either the SpAd or the Minister’s Private Office.

6.27 Ms Hepper was asked if she had discussed at the meeting the full cost of the NI RHI scheme, including the “tail” of payments that would continue even if it was closed to new applicants after 2015, amounting potentially to many millions of pounds. She said that she remembered that being one of the issues discussed and that they “went through all of the funding issues, as well, before she [the Minister] made any decision.”<sup>495</sup>

6.28 Ms Hepper also told the Inquiry that she had specifically explained that the reference to the RHI scheme being the preferred option, since it offered most heat at least cost was limited to a comparison with the GB RHI scheme rather than a comparison with all of the options mentioned in the submission. She said that she “did not recall that being a point of any difficulty”, and also that the £100 million saving represented by the Challenge Fund was fully discussed in the context of the “non-monetary issues” which were addressed at the meeting.<sup>496</sup>

6.29 Ms Hepper also said that, on 14 June, she was able to inform Minister Foster of the significant changes that were likely to be made in the forthcoming final version of the CEPA report as

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490 WIT-00751

491 See Ms Hepper’s oral evidence generally as to this meeting at TRA-01872 to TRA-01896

492 WIT-00739

493 TRA-01872; TRA-01886 to TRA-01889; TRA-01892 to TRA-01893

494 TRA-07657 to TRA-07663

495 TRA-01886

496 TRA-01891

- a consequence of discussions between Mr Hutchinson and Mr Morrow, the relevant CEPA representative, between the submission on 8 June and the meeting on 14 June.<sup>497</sup> The Inquiry has carefully considered Ms Hepper’s representations about this aspect of her evidence, as well as generally in respect of what transpired at the meeting on 14 June 2011.
- 6.30 For his part, Mr Hutchinson thought that such contacts with CEPA – to clarify what might be any likely significant change in the final CEPA report – took place on 15 June or later.<sup>498</sup>
- 6.31 CEPA representatives were asked by the Inquiry to comment in detail about their engagement with DETI officials in the context of Ms Hepper’s evidence as to what would have been known by 14 June 2011 about the likely content of their final report of 28 June 2011. In light of their evidence, it seems somewhat unlikely that Ms Hepper would have been aware of, or been justifiably confident about, changes that were likely to occur in the final report as Mr Morrow appears to have been on holiday from 6 June to 21 June 2011 and would not have been a party to exchanges with either Mr Hutchinson or Ms Hepper during that time.<sup>499</sup>
- 6.32 Furthermore, the initial queries and comments from Mr Hutchinson sent to CEPA on 7 June with regard to the balance of options were not the subject of an initial reply until 15 June 2011, the day after the meeting with Minister Foster.<sup>500</sup> Discussions about remodelling were not completed until after teleconferences on 21 June and 27 June. CEPA also had no recollection of communicating to DETI about any correction of errors in the model which led to estimated lower lifetime subsidy costs for the Challenge Fund or the revised higher lifetime subsidy costs in respect of the NI RHI scheme until the final report was issued on 28 June 2011.<sup>501</sup>
- 6.33 Returning to the meeting of 14 June 2011 itself, it seems to the Inquiry that presenting the Minister in a meeting with a report of more than 100 pages containing complex and detailed calculations, which the Minister had no opportunity to read beforehand, as a basis for expanding upon an earlier submission would seem to have been asking a lot of any Minister. If she had been presented with such an abundance of technical detail Minister Foster could simply have asked for more time to read the report and consider the oral explanations. There is no suggestion that this occurred. Ms Foster has also told the Inquiry that, had she been informed as to the limited function of the assertion that the RHI scheme delivered the most heat at the least cost in the context of the consultant’s calculations that it was the Challenge Fund that did so, she would have required the submission to be redrafted.<sup>502</sup> Again, there is no suggestion that this occurred, although the Inquiry accepts that this is plainly not in itself determinative of what was or was not explained to the Minister at the meeting. The Inquiry considers that another alternative would have been to ensure that any such clarification or changes were included in a written record, minute or note of the meeting.
- 6.34 Dr Crawford told the Inquiry that if any material changes (to the position as set out in the CEPA draft report of 31 May 2011) had been revealed at the meeting on 14 June it would have been expected that they would have been incorporated in a further submission. He also said that if the tables contained in the CEPA draft report had been presented and explained there was “no way” that the Minister would have signed off the submission.<sup>503</sup>

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497 TRA-01864

498 TRA-01997 to TRA-01999; WIT-108110

499 WIT-108106 to WIT-108112

500 CEPA-113610 to CEP-113612

501 WIT-105063 to WIT-105064

502 TRA-07775 to TRA-07776

503 TRA-07659 to TRA-07660

- 6.35 Ms Hepper accepted that, with hindsight, it would have been preferable to have more clearly highlighted the specific changes from the content of the draft report of 31 May in order to focus the attention of Minister Foster and Dr Crawford when they were later sent the final CEPA report of 28 June.<sup>504</sup> The Inquiry notes that in practical terms that might not have been of much assistance, since neither of them read that final report in any event, although relevant changes could of course have been highlighted in the body of the covering submission (dealt with below).
- 6.36 Ms Hepper told the Inquiry that she suspected that Minister Foster went through the full final report “in some detail.”<sup>505</sup> Minister Foster told the Inquiry that she did not know why Ms Hepper had said that, since she “would have been aware that I wouldn’t read all the technical reports in that fashion.”<sup>506</sup>
- 6.37 In the Inquiry’s view it seems clear that the ‘misleading’ view of the NI RHI scheme derived from the 8 June 2011 submission – that, of all of the options, it provided the most renewable heat at the least cost – continued to be held by the Minister and her SpAd after the meeting on 14 June.
- 6.38 Either at or after the meeting of 14 June, Minister Foster marked “14/6 noted” on the submission. Neither she nor her Private Office made any specific responses to the recommendations in the submission either by annotation on the submission or subsequent email. In her evidence Minister Foster was unable to recall specific details of the meeting of 14 June, but having reconsidered the CEPA draft final report of 31 May 2011 she told the Inquiry that she considered it highly unlikely that Ms Hepper took her through the details it contained, given the length of the report – some 97 pages, extending to 133 pages with annexes – and the technical nature of the calculations, in the context of a 30-45 minute meeting.<sup>507</sup>
- 6.39 Minister Foster denied that she was informed of the potential for any AME overspending to have an adverse impact upon the DEL budget either in conversations with Ms Hepper or from any other source.<sup>508</sup> Further, the former Minister also told the Inquiry that she was satisfied that if the statement (as to the RHI producing the most heat at least cost) had been properly explained to her, in the context of appropriate advice about the Challenge Fund, she would have directed the submission to be redrafted.<sup>509</sup>
- 6.40 It seems clear to the Inquiry that, whatever may or may not have been said during the meeting on 14 June, the Minister and her SpAd continued to believe that the funding was standard AME and that the expert advice was that the NI RHI scheme would produce the most heat at the least cost. That she had good ground for believing the latter would have been confirmed when she was presented with further Regulatory Impact Assessments to sign in July 2011 and on 13 April 2012, drafted by Mr Hutchinson, that contained precisely the same assertion in a review of the five options of which the NI RHI and GB RHI schemes were clearly separate options.<sup>510</sup> The statement was also repeated again without qualification in the SL1 letters that were drafted for the Minister to forward to Jim McManus, ETI Committee Clerk, on 16 March 2012<sup>511</sup> and 13 April 2012.<sup>512</sup>

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504 TRA-01871

505 TRA-01868

506 TRA-07780 to TRA-07781

507 WIT-20566 to WIT-20567

508 TRA-07784 to TRA-07786

509 TRA-07775 to TRA-07776

510 DFE-70749 to DFE-70760

511 DFE-262810 to DFE-262814

512 ETI-05984 to ETI-05988

- 6.41 Continued repetition of the assertion would have been incompatible with the conclusions of CEPA in the final report of 28 June 2011, which (the Inquiry accepts) had been published on the DETI website. If Ms Hepper realised that it was necessary to, and did effectively, explain the very limited reference of the statement to the Minister, the Inquiry finds it difficult to understand how the unvarnished assertion subsequently came to be repeated in important documents.
- 6.42 Unfortunately, the Inquiry has been unable to unearth any documentary minute or memorandum of the meeting on 14 June 2011, nor has any participant before the Inquiry been able to provide any such record. As mentioned above, the ministerial response to the submission was limited to the word “noted 14/6”, handwritten on the submission<sup>513</sup> and a simple email indicating that she was content.<sup>514</sup> Thus, there is no written record capturing the view the Minister expressed on the proposed design of an incentive scheme for Northern Ireland or for an indication of her preferred option for incentivisation by either a Challenge Fund or an RHI scheme.
- 6.43 How the Minister’s response was understood also depends, of course, on what was discussed and/or decided at the meeting of 14 June and how the Minister expressed herself at that meeting (as to which the Inquiry has no clear record). However, the Minister’s response must also be considered in the context of her having signed the related Impact Assessment (IA) on 14 June 2011. In that IA it seems clear that the Northern Ireland RHI was presented as the preferred option. For instance, on the first page, which the Minister signed, in the box which requires any preferred option to be justified, it is noted that: “The Northern Ireland RHI option is consistent to the GB position and provides long-term, stable support for those wishing to invest.”<sup>515</sup> The Minister had been asked to approve and sign the IA, which was attached to the 8 June submission as an annex, to support the necessary amendment to the 2011 Energy Bill (to allow powers to be taken to implement the NI RHI scheme).<sup>516</sup> This appears consistent with an understanding that the NI RHI option was understood as being presented as the favoured option, although the Inquiry notes Ms Hepper’s evidence that she does not recall sharing any preference for any particular option with the Minister at the meeting.<sup>517</sup>
- 6.44 For completeness, it should be noted that in a subsequent submission to the Minister of 17 June 2011, which related to briefing the ETI Committee and ministerial colleagues, there is a reference back to the meeting of 14 June 2011 and that “Following consideration, you agreed that a Northern Ireland RHI should be designed and implemented”, with an explanation that the NI RHI scheme will be similar to the GB scheme.<sup>518</sup>
- 6.45 The Inquiry has carefully considered the evidence of the various relevant witnesses in relation to the meeting which was held on 14 June 2011. Its conclusions in relation to this are set out in the findings below. The Inquiry has been seriously inhibited in a full and proper consideration of the decision-making which occurred at, or as a result of, this meeting by reason of the lack of any authoritative record of what was discussed or decided, or what further explanation or analysis was provided in relation to the contents of the 8 June submission or the version of the CEPA report which was then available. The Inquiry’s ultimate view as to what Ms Hepper is likely to have communicated, or not communicated, to the Minister in the course of this

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513 WIT-00739

514 WIT-00750

515 DFE-29535

516 See the typed annotation at the top of the submission at DFE-29542

517 TRA-01872 to TRA-01873

518 DFE-29480 to DFE-29485, at DFE-29481

meeting has been reached as a result of an assessment of each witness's credibility, having had the opportunity to see and hear each of them give oral evidence, and in light of all of the surrounding evidence which might cast light on these issues as discussed in this section of the Report and elsewhere.

6.46 The Inquiry was particularly influenced by Ms Hepper's evidence to the effect that she communicated to the Minister, on 14 June, the likely significant changes which would be forthcoming in CEPA's later final report. As already noted above, by reason of the evidence on this issue from others, particularly from CEPA itself, the Inquiry concludes that it is highly unlikely that Ms Hepper would have been in a position to share this information at her meeting with the Minister. Her adherence to her position that she would have done so, when the Inquiry considers this highly unlikely in light of other objective evidence of what was likely to have been known and communicated at that time, leads the Inquiry to consider that Ms Hepper may have a misplaced confidence in the level of detail and clarity of what she communicated to the Minister and her SpAd at the meeting of 14 June. Although Ms Hepper might well believe that she communicated clearly the qualification on the endorsement of the NI RHI option and the potential risk to the DEL budget of overspend – and the Inquiry cannot rule out for certain that these matters were discussed by reason of the lack of any clear record – in the light of the full evidence the Inquiry has considered, it has taken the view that these matters were unlikely to have been discussed, or at least unlikely to have been communicated in a sufficiently clear and effective way. What happened (or did not happen) after the meeting seems to the Inquiry to be consistent with this view.

6.47 In relation to the lack of a note or record of the meeting, when questioned by Senior Counsel to the Inquiry, Ms Hepper said her experience was that it was "not unusual" for there to be no record of an exchange or meeting with the Minister and that was "certainly my current experience."<sup>519</sup> When she was then asked about whether the application of the relevant Private Office guidance/directions (which required a record of the meeting to be prepared by those who met with the Minister) had fallen into disuse her reply was as follows:

"I think that would not be an unfair reflection of what happens. And, certainly, even in the early days, I don't recall the private office ever formally asking for a minute if something didn't turn up. But, then again, private offices are busy areas and the onus was being put on divisions and directorates to do it. But I think human nature is, when things get busier and busier, you know, some of these things do fall by the wayside."<sup>520</sup>

6.48 Mr Sterling's evidence to the Inquiry was similar with regard to taking an official note when he conceded:

"Yes, I think I've already talked about the context in which we were operating in, and indeed I have, in recent times, spoken to just all [sic] the permanent secretaries. And the sort of common view is that, over a period of time, the good practice in terms of minuting meetings with Ministers largely lapsed."<sup>521</sup>

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519 TRA-05200

520 TRA-05200

521 TRA-06121

- 6.49 Minister Foster stated that she was not aware that the practice had lapsed and found the fact that it had to be “quite shocking”.<sup>522</sup> The Inquiry simply notes that the relevant paragraphs of the DETI Private Office Guidance, paragraphs 37-39, clearly placed the obligation to record a note upon the relevant “agency, branch, division etc”.<sup>523</sup> This Private Office Guidance is dealt with in greater detail later in this Report.
- 6.50 The Inquiry also notes that on 9 June, the day after her submission to the Minister but before the meeting of 14 June 2011, Ms Hepper had issued a work request to the Department’s external legal advisers, Messrs Arthur Cox Solicitors, to draft Northern Ireland Renewable Heat Incentive Regulations which were to be “based largely, in the first instance, on the GB equivalent Regulations.”<sup>524</sup> A copy of the GB regulations was attached.<sup>525</sup> Ms Hepper told the Inquiry that this was simply “parallel processing” to ensure that, in the event that an RHI scheme was chosen, there would be draft regulations to annex to the necessary consultation document.<sup>526</sup>
- 6.51 On 21 June 2011, having elected to proceed with the NI RHI, Minister Foster wrote to her then ministerial colleagues and the then chair of the ETI Committee.<sup>527</sup> The letters were each accompanied by a detailed annex setting out the approach being taken, and the reasons for it.<sup>528</sup> The letters explained that the NI tariffs were still being finalised but they would be based upon similar lines to GB, affording a 12% rate of return for all technologies barring solar thermal which would have a 6% rate of return.<sup>529</sup>

### The ministerial submission of 5 July 2011

- 6.52 As has already been discussed, the final report from CEPA was delivered on 28 June 2011 and Minister Foster was supplied with a copy, together with a further submission, on 5 July, seeking approval for the contents of the draft NI RHI consultation documents which were also provided.<sup>530</sup> The submission was timed “Desk Immediate” with the continued incomplete reference to the financial implications and a recommendation that the final CEPA report should be published, together with the public consultation document, on the DETI website.
- 6.53 In contrast to the draft report of 31 May, the final CEPA report showed that all the options were now capable of producing the targeted 10% renewable heat by 2020. However, this would only be achieved if there was an increase in the baseline or “do nothing level”, and considerable uptake, particularly with large users, would be needed outside the RHI as well.
- 6.54 The following tables contain data extracted from the CEPA final draft report of 31 May 2011 and the final report from 28 June 2011. From the first two tables it can be seen that in the May draft final report, the Challenge Fund produced more renewable heat at a slightly lower cost.<sup>531</sup> By the time of the June final report, the Challenge Fund still produced more renewable heat but now at significantly lower cost (well below half).<sup>532</sup>

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522 TRA-08271 to TRA-08272

523 DFE-416566

524 DFE-15666 to DFE-15668

525 DFE-15624 to DFE-15655

526 TRA-01897 to TRA-01898

527 DFE-29564 to DFE-29574; DFE-29553 to DFE-29563

528 DFE-29568 to DFE-29574; DFE-29557 to DFE-29563

529 DFE-29568; DFE-29557

530 DFE-29643 to DFE-29905

531 DFE-187760 to DFE-187761

532 DFE-187931 to DFE-187932

**Table 1 – CEPA Final Draft Report & Final Report Data**

Renewable Heat Produced (% of total)	May Draft	June Final	Change
Challenge Fund	8.75	11.69	+2.94
NI RHI	7.56	11.14	+3.58
Advantage/Disadvantage of CF over NIRHI	1.19	0.55	

**Table 2 – CEPA Final Draft Report & Final Report Data**

Lifetime Cost of Heat (£/kWh)	May Draft	June Final	Reduction/Increase
Challenge Fund	0.47	0.24	-0.23
NI RHI	0.50	0.57	+0.07
Advantage/Disadvantage of CF over NIRHI	0.03	0.33	

6.55 The next two tables show how the projected lifetime costs and benefits of the schemes radically changed between May and June.<sup>533</sup> On these comparisons, the Challenge Fund (including the assumed administration costs) became roughly £200 million to £250 million more attractive than the NI RHI.

**Table 3 – CEPA Final Draft Report & Final Report Data**

Lifetime Cost of Heat (£m)	May Draft	June Final	Reduction/Increase
Challenge Fund	351	212	-139
NI RHI	257	405	+148
Advantage/Disadvantage of CF over NIRHI	-94	257	

**Table 4 – CEPA Final Draft Report & Final Report Data**

Net Present Value (£m)	May Draft	June Final	Increase/Reduction
Challenge Fund	-114	-24	-90
NI RHI	-140	-242	+102
Advantage/Disadvantage of CF over NIRHI	26	218	

6.56 This clearly demonstrates how volatile the costs and benefits were to the operation of the model and the assumptions used within it. In the course of one month the Challenge Fund total costs decreased by £139 million and those of the NI RHI scheme increased by £148 million. This meant that the difference in total lifetime costs between the two schemes changed by

£287 million and that in this regard the Challenge Fund went from being more expensive than the NI RHI scheme by £94 million to being less expensive by £193 million. Big changes could also be seen for the Net Present Value/Cost which also took into account other factors, such as the savings in carbon that would result from displacing fossil fuels from the heating sector. CEPA explained in a written statement to the Inquiry that the big changes for the Challenge Fund resulted from a modelling error when compiling the May draft report in which much higher biomass fuel prices were incorrectly used in the inputs – this was rectified for the June final report, thus reducing the lifetime subsidy costs by £150 million.<sup>534</sup>

- 6.57 Although the 5 July 2011 submission would appear to be the first occasion on which Minister Foster and Dr Crawford received the final CEPA report, the submission did not draw their attention to any of these very significant changes between the draft final report of 31 May and the final report of 28 June and it does not seem that the Minister was given any reason to look at it in detail. The submission did not formally record any of the specific matters said by Ms Hepper to have been discussed during the 14 June meeting.
- 6.58 In the section of the Executive Summary of the final CEPA report headed ‘Options considered and overall assessment’ CEPA stated: “We conclude that the Challenge Fund delivers the most renewable heat, at the lowest cost, and delivers 10% under both long-term funding scenarios.”<sup>535</sup>
- 6.59 CEPA looked in detail at efficiency, the level of renewable heat, the overall monetisable benefit/cost of the options and concluded at section 12.2:
- “The findings from the cost-benefit analysis are pretty stark in terms of net cost differences between the schemes...Given that the amount of grant is sufficient to meet the desired target, the best value for money seems to be in the grant approaches, especially the Challenge Fund.”<sup>536</sup>
- 6.60 The report then went on to identify other factors that might lead to a preference for an NI RHI scheme, such as administrative simplicity in being able to ‘piggy-back’ on the GB RHI scheme at a lower cost and the ability to learn from the GB experience by alignment with the GB RHI scheme rather than adopting a ‘go it alone’ policy.<sup>537</sup> The final report also drew attention to the importance of the level at which any subsidy was set, the significant uncertainty represented by the relative prices of biomass, oil and gas and, in that context, the importance of regular monitoring and review. These were factors to which a Challenge Fund would be much less exposed than a scheme with pre-set incentives, such as the non-domestic NI RHI scheme. In the case of the former, the subsidy levels would be re-set each time there was a call for bids and would be determined competitively amongst those installing the technology under current and realistic market conditions, rather than being set in advance by administrators who would effectively have to predict and/or second guess the costs and benefits as well as how such factors might be subject to change over time.<sup>538</sup>
- 6.61 When asked by the Inquiry, Ms Hepper said that she had not thought it necessary to raise anything from the final report with Minister Foster.<sup>539</sup> She considered that she had appraised the Minister of the extent to which the Challenge Fund was better value for money at the 14

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534 WIT-108115 to WIT-108116

535 DFE-187930

536 DFE-188025

537 DFE-188025

538 DFE-188007 to DFE-188008

539 TRA-01901

June meeting, but that there was the other side of the equation to be considered including wider energy issues, such as the gas industry.<sup>540</sup> She did not think that she should have gone back to the Minister with regard to the increased lifetime costs contained in the final report and she took comfort from the fact that neither Minister Foster nor Dr Crawford raised any further questions with herself or Peter Hutchinson after receiving the 28 June final report.<sup>541</sup>

## The July 2011 consultation

6.62 On 20 July 2011 DETI published a public consultation document entitled ‘The Development of the Northern Ireland Renewable Heat Incentive.’<sup>542</sup> In the executive summary to the consultation document Minister Foster referred to the tariffs being “grandfathered” and “guaranteed” for 20 years but did not repeat the link to the 12% rate of return.<sup>543</sup> However, paragraph 3.36 of the consultation document explained that:

“The tariffs have been designed to bridge the gap between existing heating systems and the renewable heat alternative, with consideration given to the capital cost, operating costs and the non-financial ‘hassle’ factors that are involved in replacing existing heating systems with renewable heating technologies.”<sup>544</sup>

In addition, paragraph 3.37 stated that, apart from solar thermal, the tariffs had been designed to provide a rate of return of 12% over the lifetime of the technology.<sup>545</sup>

6.63 The Inquiry notes the confusion that ensued around the concept of ‘grandfathering’. The intention of providing a particular rate of return to investors can be achieved by protecting tariff payments for the duration of the scheme if the predominant costs are from the up-front capital investment, as with solar thermal. However, when the running costs dominate and are variable, as with biomass, the target rate of return can only be achieved by varying the payments as necessary – both upwards and downwards. Ms Foster made clear in her oral evidence that her references to ‘grandfathering’ related to the rate of return, not to a fixed payment level.<sup>546</sup>

6.64 The CEPA final report of 28 June 2011 was published on the Department’s website together with the public consultation document.<sup>547</sup> Included in the supporting documentation for the consultation was a draft RIA and draft regulations.<sup>548</sup> The draft RIA prepared by Mr Hutchinson dealt with the draft regulations, which were obviously intended to implement an RHI scheme. The RIA referred to other options noted in the CEPA report but it was made clear that DETI was now consulting on an RHI scheme specific to Northern Ireland.<sup>549</sup> The proposed NI RHI scheme was described at Option 5 as offering “the highest potential renewable heat output at the best value”, a statement which was clearly incompatible with the conclusions reached by CEPA in the final June report.<sup>550</sup> While the documents noted that administration costs had been estimated at approximately 10% of the overall costs, the gross cost figures respectively for the Challenge Fund and the RHI were not provided by way of comparison in the RIA.<sup>551</sup> In effect, the public were not invited to express views on the alternative benefits offered by the Challenge Fund.

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540 TRA-01911 to TRA-01914

541 TRA-01913 to TRA-01914

542 DFE-63726 to DFE-63837

543 DFE-63733

544 DFE-63750

545 DFE-63750

546 TRA-08506 to TRA-08507

547 DFE-187925 to DFE-188067; DFE-04002 to DFE-04111

548 DFE-04049 to DFE-04098

549 DFE-04096

550 DFE-04091

551 DFE-04095

## Findings

- 39.** The Inquiry is conscious that the multitude of matters for which Minister Foster was responsible may have had a greater impact on her ability to recall the detail of a specific meeting by contrast with Ms Hepper who, being responsible for energy matters, may have had a clearer recall of detail. However, having reflected upon the evidence, the Inquiry has concluded that while Ms Hepper may believe that she did so, it is unlikely that she told the Minister that the statement “the NI RHI Scheme produced the most heat at the best value” was restricted to a comparison with the GB non-domestic RHI scheme or, at any rate, that she did so in a sufficiently clear and effective manner. Equally, it is unlikely that the potential risk to the DEL block grant set out in the earlier official-level email exchange of April 2011 (into which Ms Hepper was copied) was adequately and effectively explained by Ms Hepper to the Minister. These were points of very considerable importance. Not ensuring that the Minister clearly understood about the restricted comparison provided continuing misleading confidence about the value for money of the NI RHI scheme. Not ensuring that the Minister clearly understood the risk to the DEL block is likely to have significantly reduced the appreciation of the necessity for budget control mechanisms.
- 40.** The Inquiry also believes that the Minister and/or her SpAd should have requested and retained a copy of the draft CEPA report, whether it was properly presented at the 14 June 2011 meeting or not. Both that document and the final June report from CEPA, having been properly read and analysed by the Energy Division officials, should have been presented in an effectively summarised form in a submission to the Minister. Even though they were not presented in such a form, the Inquiry finds that Dr Crawford, the Minister’s SpAd, should at least have sought such summaries and, if necessary, read the original documents.
- 41.** In the further submission to the Minister on 5 July 2011, following receipt of the CEPA final report of 28 June 2011, Ms Hepper, Ms McCutcheon and Mr Hutchinson failed to highlight to the Minister the very significant changes that had been made to the report since the draft of 31 May.
- 42.** The Inquiry considers that, following the July 2011 submission, the fundamental difference of view (which has emerged during the course of the Inquiry) between Minister Foster and Dr Crawford with regard to consideration of expert reports and, in particular, whose responsibility it was to read and analyse technical reports attached to submissions (a matter which is dealt with later in this Report), is likely to have contributed to the failure effectively to comprehend the full implications of the CEPA reports.
- 43.** Ms Hepper also denied that energy officials had sought from CEPA a recommendation for an RHI scheme but, as with Mr Hutchinson, she was unable to point to any clear documentary rejection, or recall any specific oral rejection, of the CEPA assertion that DETI had preferred an RHI scheme. In all of the circumstances the Inquiry is satisfied that an RHI scheme was preferred by energy officials by this stage.

44. Indeed, taking into account all of the relevant evidence, the Inquiry is persuaded that, between 2009 and 2011, a clear preference emerged amongst DETI energy officials and, based upon the advice from officials, was adopted by the DETI Minister for an NI RHI scheme; a preference that by 2011 had strengthened to the point that the alternative of an overall more cost effective capital grant scheme, the Challenge Fund, was no longer seriously considered in the decision making process. Three key factors lay behind that preference: the fact that GB had opted for an RHI scheme; the belief that some cost discount could be obtained by engaging Ofgem administration services; and the need to ensure that the offered funding was spent in Northern Ireland and not returned to HMT.
45. The Inquiry found the explanation offered by Ms Hepper and Mr Hutchinson for the inclusion of the assertion in the 8 June submission – that the NI RHI scheme produced the most heat at the best value – very difficult to reconcile with the evidence. Ms Hepper and Mr Hutchinson both agreed that it was intended that the assertion was qualified in the sense that it was restricted to a comparison between the GB RHI scheme and an NI RHI scheme. If so, the Inquiry found that the failure clearly to articulate such a restriction or qualification in a submission intended to provide a helpful summary of technically complex options was a serious omission that was likely to mislead any reader. That omission was subsequently compounded by repetition of the unqualified assertion in a number of further important documents, including RIAs and SL1 letters drafted or approved by Ms Hepper and Mr Hutchinson. If that qualification or restriction had been adequately explained to Minister Foster and Dr Crawford during the meeting of 14 June there may have been an amendment of the submission but, in any event, there would more than likely have been some clarification in the subsequent documents.