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Mr Paul McGinn  
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2 April 2012

Dear Paul

### **The Northern Ireland Renewable Heat Regulations**

You will be aware of the work ongoing in the Department on the development of the Northern Ireland Renewable Heat scheme (RHI) and the various legislative requirements. You and your colleague, Nicola Wheeler, have kindly commented on previous draft Regulations that were prepared by our external legal advisor's Arthur Cox. These draft Regulations have been revised further, following your comments and due to changes in policy, and I now wish to seek your advice on two specific issues.

Following your consideration of these issues the Regulations will face further revisions and will be reviewed by Ofgem, as the proposed administrator of the RHI scheme. Once in 'final draft' form they will be resubmitted to DSO for formal consideration, advice and approval. For your convenience, I have attached the most recent draft form of the NI Regulations separately to this note (entitled "*RHI Regulations – tracked changes*").

### **Background**

The EU Renewable Energy Directive (2009/28/EC), published in the Official Journal of the European Union on 5 June 2009, requires that Member States ensure that 15% of their energy consumption comes from renewable sources by 2020. This requirement extends beyond electricity to heating and cooling as well as transport.

DECC has set a target of 12% renewable heat for England and Wales by 2020. This target, coupled with the 30% target for renewable electricity consumption, will assist in Great Britain meeting its requirements under the Renewable Energy Directive. In order to achieve this target, DECC has launched a RHI in Great Britain.

Northern Ireland is not included as part of the wider Great Britain RHI. There are many differences between the heat and renewable heat markets in Great Britain and Northern Ireland that mean that it has been more appropriate for a separate assessment to be taken on how the local market can be developed.

## Legislative Position

Renewable heat is largely a new area of work for the Department and therefore there are no primary powers in Northern Ireland legislation that would allow the introduction of a RHI or payments to be made to generators of renewable heat. However, in March 2011, the Department successfully tabled a Legislative Consent Motion (LCM) in the Assembly and obtained the necessary approvals.

The LCM allowed for DECC to amend draft legislation to extend renewable heat powers to Northern Ireland. These powers are now contained within the Energy Act 2011. I have attached relevant sections of the Energy Act 2011 for your consideration at **Annex A**.

As previously mentioned, draft Regulations have been developed by Arthur Cox and these were passed to DSO on 15<sup>th</sup> August 2011 and comments were kindly provided on 3<sup>rd</sup> October 2011.

## Current issues to consider

There has been ongoing work on renewable heat policy and the Regulations have therefore been revised accordingly. Previous DSO comments have also been taken on board.

At this stage I would like to raise two issues with you in order to receive guidance in advance of additional drafting.

### *i) Definition of the "Authority"*

Sections 113 and 114 of the Energy Act 2011, attached at **Annex A**, provide the framework for GEMA (Ofgem) to enter into arrangements with a Northern Ireland authority to carry out the functions of administration of the RHI. DETI intends to enter into such an arrangement with Ofgem, either via a contract or an Agency Services Agreement (ASA), and advice is being sought from Central Procurement Directorate on this matter.

The subordinate legislation therefore primarily relates to conferring of powers contained in the Section 113 of the 2011 Energy Act Section onto a Northern Ireland Authority, these powers include the establishment of the RHI and administration arrangements (payments, checks, accreditations etc). As the draft Regulations currently stand, the powers are to be conferred to a Northern Ireland Authority which is defined as either DETI or NIAUR.

The issue has arisen as to whether *the Authority* should be defined as Ofgem or alternatively should a definition relating to an *Administrator* be introduced? This issue arose as the current draft suggests *the Authority* should report to the *Department* – this obviously could not be the case as both are defined as DETI.

In the corresponding GB Regulations *the Authority* is defined as GEMA (Ofgem). However, Ofgem have advised that they do not think it is appropriate for them to be cited in the NI regulations as Section 113 (2) of the enabling powers refers solely to DETI or NIAUR administering the scheme. They suggest that GEMA is not referred

to in the NI Regulations and that *the Authority* relate to either DETI or NIAUR and then a subsequent arrangement is made with GEMA as per section 114.

I would be grateful if you would consider this matter and advise which would be the most appropriate way forward on this issue. The Department has included some of the potentials options below which may include:

- DETI is defined as the Authority and any references to the Authority and the Department interacting are removed as being superfluous (i.e. Regulations 53 and 54). DETI then would enter into a separate agreement with Ofgem regarding these tasks;
- NIAUR is defined as the Authority. DETI would then liaise with NIAUR to put in place an appropriate agreement with Ofgem (similar to administration arrangements already in place for the administration of the Northern Ireland's Renewables Obligation). This would not be the Department's preferred route as it would create additional costs for DETI and more significantly, renewable heat is not a regulated activity and therefore not under the remit of NIAUR;
- Ofgem is defined in the legislation as either the Authority or as the administrator. As previously mentioned Ofgem do not want to be included in the NI Regulations and believe that the Department do not have the vires to do so;
- For the definition of the Authority in the NI Regulations, refer to Section 114 of the Energy Act 2011. I would appreciate your advice as to whether the Department would have the vires to do so.

I would appreciate your timely consideration and advice regarding this matter.

## **ii) Articles relating to administrative reporting arrangements**

I would also be grateful for your advice on the need or relevance of a number of Regulations within the current draft regulations relating to administrative reporting arrangements. Such an example is Regulations 53 and 54 of the draft NI Regulations entitled *Administrative functions of the Authority and notices*.

It would appear that these Regulations relate solely to expected standards of the Administrator in reporting on the scheme. On consideration, DETI are querying whether these Regulations are required in legislation and instead should form part of the ASA with Ofgem. Similar Regulations are contained in the corresponding GB Regulations, which are also attached separately as a PDF document for your convenience.

I would appreciate, again, your advice on this matter.

## **Next Steps**

Once you have considered and advised on the two highlighted issues there will be further iterations of the current draft Regulations as the policy is finalised and the administration arrangements are agreed with Ofgem. Ofgem legal advisors will also be given an opportunity to consider the Regulations and will advise on potential areas of challenge from stakeholders.

Once the Regulations are in draft final format, I will resubmit for your consideration and clearance.

Given the urgent need to have the RHI scheme in place in order to support the industry, meet EU targets and utilise funding, it is expected that these Regulations should be finalised and ready to be laid in the Assembly in late April / early May 2012.

If it is felt that a meeting would be useful to discuss these issues that could be arranged.

It would be most helpful if solicitors at DSO would have capacity to facilitate this process, and your views on this would be appreciated.

Yours sincerely

A handwritten signature in black ink, appearing to read 'P. Hutchinson', with a long horizontal stroke extending to the right.

**PETER HUTCHINSON**  
**Renewable Heat**

cc Fiona Hepper  
Joanne McCutcheon  
Nicola Wheeler  
Susan Stewart