

Wh: Nicola

From: Wheeler, Nicola
Sent: 17 May 2012 15:50
To: Hutchinson, Peter
Subject: RE: Draft Renewable Heat Incentive Scheme Regulations

Peter

Thanks for your clarification on that point. If that is to be the case, then yes, DETI would be the main authority in the legislation. However, it would be more appropriate to just use the term "the Department" when referring to DETI instead of "the Authority". This would follow the normal drafting convention when referring to a Northern Ireland Department and would also be less likely to mislead the reader.

Regulations 53 and 54 for the most part should be removed and you should instead have reporting provisions along those lines in the agreement between yourselves and GEMA. I say for the most part because DETI may wish to consider retaining something in the legislation along the lines of paragraph (6) of Regulation 53 whereby DETI has the power and the duty to publish the information outlined on its own website. That is a policy matter for DETI to decide.

As for how the relationship between DETI and GEMA would be addressed in the legislation, it wouldn't be mentioned in the legislation. On the face of the Regulations DETI would be the point of contact for the reader. Section 114 of the 2011 Act gives the power to GEMA and DETI to enter into an agreement however, there is nothing to stipulate that or even facilitate such an agreement being put on a legislative footing. Therefore, the agreement would be done administratively and requires no mention in the Regulations themselves. When producing guidance notes and so on DETI should make it clear then that GEMA will actually be carrying out the functions on its behalf.

I hope this provides some assistance to you.

Kind regards

Nicola

✓
Been done
in Oct draft

From: Hutchinson, Peter
Sent: 17 May 2012 10:54
To: Wheeler, Nicola
Cc: McCutcheon, Joanne; Stewart, Susan
Subject: RE: Draft Renewable Heat Incentive Scheme Regulations

Nicola,

Thanks for looking through these draft regulations and providing advice to date. Also apologies for not replying sooner, was out of the office unexpectedly from Monday and only returned this morning.

Just to provide some clarity from a policy perspective, it is proposed that the administrative functions (making payments, deeming installers eligible/ineligible, receiving and processing applications) will be carried out by Ofgem, this will be done through an Agency Services Agreement between DETI and Ofgem. It is unlikely that NIAUR will have a role in this arrangement.

Based on this policy position, grateful if you would consider and advise how this should be addressed in the legislation. Should DETI be defined as the Authority and then sub-section 2 of section 114 of the 2011 Act cited as DETI entering into arrangements Ofgem relating to the administration of the scheme?

If it would be useful to meet to discuss I would be happy to do that.

Thanks again for this.

Peter

Peter Hutchinson

Renewable Heat
 Department of Enterprise, Trade & Investment
 Netherleigh
 Massey Avenue
 Belfast, BT4 2JP
 Tel: 028 9052 9532 (ext: 29532)
 Textphone: 028 9052 9304
 Web: www.detini.gov.uk

<< OLE Object: Picture (Device Independent Bitmap) >>

www.ni2012.com

Please consider the environment - do you really need to print this e-mail?

From: Wheeler, Nicola
Sent: 15 May 2012 17:06
To: Hutchinson, Peter
Subject: FW: Draft Renewable Heat Incentive Scheme Regulations

From: Wheeler, Nicola
Sent: 15 May 2012 17:05
To: 'peter'
Subject: Draft Renewable Heat Incentive Scheme Regulations

Peter

I had e-mailed you earlier saying that I would like to take some advice from Paul before coming back to you definitively on this matter. However, in advance of my meeting with Paul on Thursday I have some comments/queries in relation to the definition of "the Northern Ireland Authority".

Firstly, given that these are Northern Irish Regulations to apply in Northern Ireland, it would be more appropriate to just use the term "the Authority" rather than "the Northern Ireland Authority". When making regulations that are to apply within your own jurisdiction it would be uncommon to make reference to your region in the terminology used. I note that the term "the Northern Ireland Authority" is used in section 114 of the Energy Act 2011, however that is appropriate in that case. The 2011 Act is referring to a bodies outside it's own shores so appropriately refers to those bodies collectively as "the Northern Ireland Authority" to distinguish them from it's own GB Authority. Furthermore, the GB definition will serve it's purpose regardless of whether you use the term "the Authority" or "the Northern Ireland Authority" as the GB definition serves to permit GEMA to enter into arrangements to act on behalf of the Northern Ireland Authority which for their purposes is defined as DETI and NIAUR. Their definition applies merely for the purpose of that section and does not mean that you have to define your authority using the same terminology. The key is that GEMA can make arrangements with DETI and/or NIAUR so provided one or both have authority to act under your Regulations that will work.

Interestingly, I note that in regulations 23 and 24 of your draft the term "the Authority" has been used instead of "the Northern Ireland Authority." I am not sure if this is just a drafting error and the drafts person really intended to refer to the Northern Ireland Authority, or whether the drafts person was trying to convey reference to another different body, maybe the GB Authority. I suspect it is the former. However, if for example, these regulations do need to make reference to the GB Authority then you could define that as "the GB Authority".

The next issue is who is to be defined as the Authority. My response to this is that really that is a policy matter for DETI to decide based on who is to carry out the functions conferred on the authority. If we look at some examples of where the Authority is referred to throughout the Regulations, the Authority is meant to carry out the following tasks-

- Regulation 3 - make payments
- Regulation 4 - have opinions as to whether a plant is generating heat solely for an ineligible purpose
- Regulation 18- have opinions as to whether a single meter is capable of metering heat generated by all the plants sharing the metre
- Regulation 22 - receive and decide applications for accreditation and set out what information is to be provided in such applications
- Regulation 25 - register producers of biomethane

There are numerous other tasks and responsibilities that the Authority is referred to as having. The question for DETI is who is going to do these tasks? Is it going to be DETI, is it going to be NIAUR or is DETI planning to enter into an arrangement under section 113 of the 2011 Act for GEMA to carry out any or all functions?

There does not appear to be any power to define the Authority in these Regulations as being GEMA (OFGEM). From what I understand, section 113 of the 2011 Act provides that DETI may make Regulations establishing a scheme for the purpose of this renewable heat incentive. Under sub-section 2 these Regulations may confer functions on either DETI or NIAUR for the purposes outlined. There is nothing giving DETI the power to confer function on OFGEM. Any arrangement with OFGEM would have to be done administratively between the Authority (being DETI or NIAUR depending on who DETI) settles on to carry out the Authorities behalf the functions conferred on that Authority by the Scheme under the Regulations.

Currently, the Authority is defined as being both DETI and NIAUR. I don't think this is workable in practice. Not only for the reasons you have outlined, i.e. that it makes a nonsense of regulation 53 in that DETI cannot of course not report to itself. But also because it would cause complete confusion as to who is to do what tasks when it comes to the crunch on the ground. If the Authority is both DETI and NIAUR then who should a person apply to for accreditation, who should make payments, who should carry out all the daily practical arrangements?

I would ask you to consider the policy behind this and perhaps provide me with some views before I discuss the matter further with Paul on Thursday. I expect that he will re-iterate my view that the definition depends on DETI's policy response to this important question, unless of course Paul spots something that I have missed that would make it legally possible for only one or other to be the Authority.

I look forward to hearing from you.

Kind regards

Nicola

Nicola Wheeler

Principal Legal Officer

Departmental Solicitor's Office

Victoria Hall

12 May Street

Belfast

BT1 4NL

Ph 90 2(51275)

nicola.wheeler@dfpni.gov.uk