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| **From:** | Clarke, Helen (DFP) on behalf of McGinn, Paul |
| **To:** | Hughes, Seamus |
| **Subject:** | RENEWABLE HEAT INCENTIVE (AMENDMENT) REGULATIONS (NORTHERN IRELAND) 2015 - SOL 50647/2015 |
| **Date:** | 10 September 2015 11:34:34 |
| **Attachments:** | Seamus Hughes(2).docx |

Seamus,

Please see attached from Mr Paul McGinn, DSO.

Many thanks,

Helen

**Helen Clarke**
PS/Claire Archbold/Paul McGinn
Departmental Solicitor's Office
Victoria Hall
12 May Street
BELFAST, BT1 4NL
Tel: (02890) (2)51242
Email: Helen.Clarke@dfpni.gov.uk

# Departmental Solicitor's Office

Department of Finance and Personnel
www.dfpni.gov.uk

Victoria Hall
12 May Street
Belfast BT1 4NL
Tel: 028 9025 1246
DX464 NR Belfast1

Seamus Hughes
Department of Enterprise
Trade and Investment
Netherleigh
Massey Avenue
BELFAST
BT4 2JP

10th September 2015

Our Ref: SOL 50647/2015

Dear Seamus

**RENEWABLE HEAT INCENTIVE (AMENDMENT) REGULATIONS (NORTHERN IRELAND) 2015**

Thank you for your minute of 26th August and for sending me a further draft of these Regulations. I have a number of comments.

1. The title to the Regulations does not appear to have been changed as suggested in my letter of 19th August.

2. Accepting that there is nothing "stand alone" in these Regulations and they simply amend existing Regulations, it is nevertheless necessary to attract the Interpretation Act (NI) 1954. The rules contained in that Act relate to more than simply the new substantive provisions inserted in the existing Statutory Rule. To give the simplest example, the reference in Regulation 3 to "Regulations 4 to 10" needs to be construed in accordance with Section 11(6) of the 1954 Act.

3. In relation to Regulation 2(1A) to be inserted in the Renewable Heat Incentive Scheme Regulations (NI) 2012, I have a couple of points.

   (a) I agree that "eligible plant" is not defined but "eligible installation" is and that is the term that should be used.
   (b) The question is asked whether the effect of this provision could be

circumvented by locating plants externally in boiler houses with a short stretch of external pipework? The answer to that is "yes" if the suggested revised wording was adopted. This refers to all eligible installations providing heat to a given building. However, the original wording referred to eligible plant "in" a given building. That is to say, the rule only applies where the eligible plant is inside the building. With the one amendment suggested at (a) above, I would, therefore, keep the former paragraph (1A).

4. In new Regulation 3(2)(d), something appears to have gone awry. The drafting here should refer to cleaning or drying where "that use is not on a commercial basis". Otherwise, I am not sure that I understand the comments made by the Regulator. The purpose of the amendment is to allow periodic support payments in relation to the generation of heat used in a building for cleaning or drying provided that use is not on a commercial basis. I am not sure I can see how the use of heat for cleaning and drying can take place outside the building. Moreover, the whole purpose of Regulation 3(2) appears to be to confine periodic support payments to heating used in a building.

5. Nor is the effect of the new provision already covered by sub-paragraph (c). If we accept that cleaning or drying are processes, then the effect of the substitution is to exclude commercial cleaning or drying from the possibility of periodic support payments and without it, such payments would have to be made where cleaning or drying was done commercially.

6. Comment has been made about the omission of the word "accredited" before RHI Installation in new Regulation 24A(2), (3B) and (4). This is a drafting point. Paragraph (1) states

> "This Regulation applies where in an accredited RHI Installation is moved to a new location during the tariff lifetime".

Thus, the following paragraphs are all about a particular accredited RHI Installation; that is to say one that has moved location. All of the following references to an RHI Installation must be to that particular installation. You will note that the definite article is used. The word "accredited" in the context of those references is, therefore, superfluous. It is already understood because it must be an accredited installation. As the word adds nothing it is, therefore, good drafting practice to omit it.

7. A number of issues arise from the amendments to Regulation 36.

   (a) I agree that it would be better to refer to installations accredited on or after 5th October 2015;
   (b) There is the suggestion that the Department may want to put in a cut off date for providing "approvals". It seems to me, however, that there is already an automatic cut off date. Paragraph (7A) refers to installations accredited without preliminary approval. The preliminary approval must, therefore, be given by the Department before accreditation.

(c) Further questions have been raised about the "rounding up" or "rounding down" methodology proposed by the Department. I will leave it to the Department to satisfy itself whether what is proposed achieves its intentions.

(d) I do agree, however, that the drafting of paragraph (7B), (7A)(b) and (7B)(b) should be consistent. The same rounding formula should be used in all.

(e) In paragraph (7A), "the next following " is correct;

(f) I also agree that in paragraph (9) the reference should be to "small or medium" biomass tariffs. In addition, I think that sub-paragraph (a) and (b) should each refer to the "relevant" tier 1 (or tier 2) tariff specified in Schedule 3A.

(g) In relation to the definition of "the initial heat", I think I would leave the phrase "and used for eligible purposes" where it is. While that phrase is used to qualify the provision for calculating the tariff for further heat generated in paragraph (9)(b), it is missing from the provision for the calculation of tariffs for initial heat in paragraph (9)(a). Moreover, "initial heat" is also used in the definition of "further heat generated" in paragraph (10) and I think that it is necessary to clarify that the 1,314 hours referred to in that definition refers to a period when initial heat was used for eligible purposes.

(h) I am somewhat confused by the suggestion that "further heat generated" should be defined as meaning the heat generated by an accredited RHI Installation in excess of the initial heat. Surely the whole point about the reference to 1,314 hours is that any period of heat generation after that period is "further heat generated" rather than "initial heat generated".

(i) Reference has been made to the need to define "advanced" in paragraph (11). This refers to installations being at an advanced stage and therefore eligible for payments under Schedule 3. The conditions for eligibility are set out in Regulation 4(1). Among the eligibility requirements are that the installation in question must satisfy the conditions set out in Regulation 12. I would imagine that the requirement that the installation is "at an advanced stage" would be construed in accordance with this provision.

8. Regulation 12 amends Regulation 2 of the Domestic Renewable Heat Incentive Scheme Regulations (NI) 2014. I note the change that you have made but I am still not entirely certain how this is intended to operate. When you say that the actual rate applied shall be determined from the microgeneration certificate for the installation, does this certificate actually specify the ratio in question? In addition, if you are substituting "and will be fixed at 2.5" you will have to do so by the phrase "and will be fixed at a minimum of 2.5".

9. A number of issues have been raised in connection with Schedule 3A but these appear to be largely technical matters which I will leave to the Department at this point.

Apart from the foregoing, you have raised with me the question of whether the Department can amend the Regulations to provide that no new applicants will receive payments without DFP approval. This would, in effect, give a discretion to DFP to decide whether or not payments could be made. As you are aware, there is a statutory duty to make payments where the eligibility criteria are satisfied. What you would have to do, therefore, is to amend regulation 4 to provide that the duty does not apply in certain circumstances. Indeed, Regulation 4(2) already in effect does this. However, unlike Regulation 4(2) which provides that the duty does not apply in certain defined circumstances what is now being proposed is that the duty does not apply where a Department (DFP) administratively decides that it will not do so. This is simply incompatible with the nature of a duty to make the payments. If the Department decided to proceed along this route, the only way to do so would be to replace the duty to make payments with a discretion.

Moreover, I do not think it would be compatible with the powers under which the Department were operating to give this sort of discretion to DFP. Section 113(1) of the Energy Act 2011 gives DETI the power to make Regulations about the administration and financing of the scheme in question. And in that context, the Act enables the Regulations to confer functions on DETI or the Utility Regulator or both. I think the clear intention was, therefore, that to the extent that any discretion is to be exercised under the Regulations, that must be a matter for the Department rather than DFP.

Yours sincerely

Paul McGinn

**PAUL McGINN**
**Director Division 2**