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Your ref: SOL 50647/2015

Mr Paul McGinn  
Departmental Solicitor's Office  
Victoria Hall  
12 May Street  
BELFAST  
BT1 4NL

12<sup>th</sup> January 2016

Dear Paul

## **THE RENEWABLE HEAT INCENTIVE SCHEMES (AMENDMENT) REGULATIONS (NI) 2016**

1. I hope that you had a good break over Christmas and best wishes for a happy new year. Many thanks for agreeing at such short notice to meet tomorrow morning for an initial discussion on urgent RHI closure legislation.

### **Current position**

2. The current position on the RHI is summarised in the attached submission to the Minister of 31 December (**Annex A**). You will note that DFP has confirmed that it will not grant retrospective approval for the scheme and has given approval for funding only up until March 2016, subject to certain conditions. We have asked the Minister to approve the suspension/closure of the scheme as soon as possible and to seek Executive approval to bring forward immediate legislation to effect this. Although the RHI is a DETI led scheme and not of itself cross-cutting, Executive approval is considered necessary because of the implications for PFG targets and the significant budget issue. The effect of the closure might be considered cross cutting as the scheme has been particularly attractive to the agriculture industries.

### **Draft Regulations**

3. We are very grateful for the confirmation in your letter dated 16 October that the wide powers in section 113 of the Energy Act 2011 enables us to provide for closure/suspension of the schemes and for the draft provision which you provided. We have used this as the basis for developing further the draft provision that you sent to us and a revised draft is attached at **Annex B** for your consideration. This covers the non-domestic scheme – once you have had an opportunity to advise on the issues raised in this letter we will develop a more complete set of Regulations to

cover also the domestic scheme. No doubt you will be able to improve on the current draft but I hope there is enough here to at least assist your consideration.

4. I also attach at **Annex C** a more detailed analysis of the issues which need to be included in our draft Regulations. This aims to explain our rationale for the amendments to your draft and notes some more detailed queries for your consideration.

### Arrangements in GB

5. In GB, the Renewable Heat Incentive Scheme (Amendment) Regulations 2012 amended the Renewable Heat Incentive Scheme Regulations 2011 ('the 2011 Regulations') to introduce a mechanism to restrict access to the scheme if the forecast for total expenditure reaches a certain point. When consulting on the policy DECC noted that the proposed 2012 GB Regulations would provide an interim suspension measure and that a more sophisticated cost control measure would be put in place the following year.
6. Under the interim 2012 arrangements, a new Part 10A was introduced into the 2011 Regulations. The process under the new regulations 51A and 51B of the revised 2011 Regulations made provision for the publication by the Secretary of State of weekly forecasts for total expenditure on the scheme. When the total expenditure forecast for the scheme hit a specified amount (£67.9m under regulation 51A(4)), the Secretary of State was obliged to advise Ofgem and Ofgem was required to publish a 'notice of restriction'. Regulation 51A (7) and (9) set out what the notice of restriction and notice of suspension must contain. The notice of restriction had to specify the dates when the notice of restriction will begin and end and when the period of suspension would begin and end. I am not entirely clear how the arrangement would have worked in practice and I understand it was not 'triggered' during 2012. Ofgem could not accredit installations where the application is received during a period of restriction, unless it would be accredited before the date of suspension commences (see regulation 5 of the GB 2012 Regulations which amends regulation 23 of the 2011 Regulation). During the period of suspension no applications for accreditation could be made (see regulation 51A(10) to (12)). There are exceptions made to cover applications for preliminary accreditation.
7. In 2013, DECC established its longer term cost control measures under the Renewable Heat Incentive Scheme (Amendment) Regulations. These Regulations completely replaced the cost control measures established by the 2012 Regulations. Regulation 8 removed regulations 51A and 51B from the 2011 Regulations. Instead the 2013 Regulations established a very detailed arrangement for setting tariffs which involves calculating forecasts to determine how the tariffs are calculated for each type of plant. Regulation 4 amends regulation 37 of the 2011 Regulations to provide for the calculation of the initial tariff and for the tariff for each subsequent year and requires Ofgem to publish tables every 3 months setting out these tariffs. Also under a new regulation 37E inserted by regulation 5 the SoS is required to publish quarterly expenditure forecasts and, if tariffs change, tariff change notices.
8. For ease of reference, I attach at **Annex D** copies of the GB 2011 Regulations and the amending Regulations from 2012 (which established the interim suspension arrangement) and 2013 (which introduced the current tariff reduction and

forecasting arrangements). The arrangements have continued to be refined and amended by a series of further Regulations in 2013, 2014 and 2015.

9. This is provided as background information - there is no intention to replicate the GB provisions here. The GB arrangements have proved very complex and have required ongoing revision and refinement. The Department is not resourced to administer such labour intensive arrangements and would prefer to keep the process straightforward, as outlined in the draft you provided. In any event, the budget position means we need to introduce a complete suspension, rather than an incremental tariff reduction.

### **Timing for Regulations**

10. The Assembly rises on 19 March, so 14 and 15 March are the very latest dates for the required debate on the legislation and ideally we would make the legislation earlier than that. Unless the Executive approves additional funding for the scheme, it must be closed/suspended by no later than the end of March.

### **Process, notice and consultation**

11. Given the timing and the financial position, the Department will not be conducting a policy consultation on the legislation. In any case, the Department does not consider that there are policy options: if additional funding is not approved, then the scheme must be closed to new applications, certainly in the short term. The Executive will be asked to approve the Department proceeding on this basis.
12. The issue of cost control was raised in the July 2013 consultation on Phase 2 of the Northern Ireland Renewable Heat Incentive (copy of paper attached at **Annex E** – see in particular paragraphs 4.12-4.14).
13. The paper does refer to DETI needing to “...retain the right to suspend the scheme if budget limits could be breached.” However, at that time, it was not envisaged that this would happen and indeed, the consultation proposed a ‘tariff degression’ system along the lines of that introduced in GB in 2013. As noted above, the Department does not consider the GB route appropriate.
14. Respondents to the consultation considered the trigger method of budget management a disincentive which could cause further uncertainty in the market. They also sought clarity from DETI that any suspension would impact only on new applications and not existing accreditations and suggested good clear advance warning with guidance and parameters for any cost control measures.
15. The Department is keen to ensure that potential applicants have advance notice of the proposed suspension/closure adequate to enable them to consider their position and to give them a reasonable prospect of submitting applications before the closing date. This must be balanced however with the overriding need to address the budget situation.
16. We have therefore revised the draft so as to extend the availability of the scheme to those who have submitted applications for accreditation by the closing date rather than just those who are accredited by such date. This gives potential applicants a reasonable opportunity to apply under the schemes and reduces the risk of

complaints in relation to installations for which applications are made but not processed by the suspension date. This is covered in more detail in Annex C.

17. Mindful of the need to close the RHI as soon as possible, we are seeking your views on whether we can make provision for the Notice requirements to be satisfied before as well as after the Regulations come into operation. We have suggested a minimum Notice period of 4 weeks but can only meet this if we can publish the Notice before the Regulations come into operation.
18. In practice, therefore the Notice will serve a dual purpose in the absence of a policy consultation on the legislation. It will give potential applicants notice of the proposed closure/suspension and the legislation which is being brought forward to give effect to this and it will fulfil the statutory requirement under that legislation to give notice. Subject to your views, the Department would propose to publish the Notice as quickly as possible after Executive clearance of the policy.
19. If you do not consider that we can provide for the notice period under the Regulations to 'run' before the date of operation then we must suspend the scheme at very short notice, perhaps a matter of days after the Regulations come into operation. I assume in that case we could publish a non statutory notice of the proposed closure following Executive clearance of the policy?
20. We would really appreciate your early consideration of this particular point which goes to the heart of our proposed process and which will inform the Executive paper.

#### **Relationship between the Notice and Regulations**

21. You will note that we have raised some queries about what additional provision might be made in the Regulations and the extent of information to be included in the published Notice of closure/suspension.
22. Bearing in mind the relationship between the two we would like to clear the draft Notice with you as well and are working on a draft which we will develop further following our discussion tomorrow morning.

Yours sincerely,

**Helen Vaughan**  
**Energy Division**

cc John Mills  
Stuart Wightman  
Seamus Hughes  
Peter Briggs  
Gail Anderson

ANNEX B

PROPOSED LEGISLATIVE CHANGE REQUIRED

AMENDMENTS TO THE RENEWABLE HEAT INCENTIVE SCHEME REGULATIONS (NORTHERN IRELAND) 2012

Inclusion of new regulation 23A and 23B as follows:

**Suspension of the operation of the scheme**

23A.—(1) This regulation applies where it appears to the Department [, following consultation with the Department of Finance and Personnel,] that it does not have or is not likely to have sufficient funds available to it for the purpose of meeting the costs of—

- (i) periodic support payments for all RHI installations accredited in pursuance of regulation 22 and all installations that would be likely to be accredited in pursuance of that regulation;
- (ii) periodic support payments for all RHI installations registered in pursuance of regulation 25 and all installations that would be likely to be registered in pursuance of that regulation; and
- (iii) RHI payments for all accredited domestic plants accredited in pursuance of regulation 21 of the Domestic Renewable Heat Incentive Scheme Regulations (Northern Ireland) 2014(1) and all plants that would be likely to be accredited in pursuance of that regulation;

(2) Where this regulation applies, the Department [may] by notice ('notice of suspension') published in such manner as the Department may think appropriate, suspend the operation of the scheme in relation to:

- (i) applications for accreditation;
- (ii) applications for registration; and
- (iii) applications for preliminary accreditation

made after a date specified in the notice of suspension ('the date of suspension').

**Comment [HV1]:** For discussion whether we can have this in Regulations or if it's one for the Notice

**Comment [HV2]:** Query whether we need 'full' in here – Ofgem queried this and commented  
*"This suggests the full 20 years period for all installations currently accredited or likely to be accredited during the whole lifetime of the scheme."*

The Department wants to consider the need for suspension in relation to annual costs and the wider overall budget.

[STUART/SEAMUS/PETER – check please]

**Comment [PB3]:** Inserted to take account of any biomethane registrations

**Comment [PB4]:** Inserted as the budget for domestic and non-domestic schemes is not split; the intention is to be able to take into consideration the total annual cost of both schemes.

**Comment [HV5]:** Do we need to define 'the scheme' or is it adequately covered by regulation 3 of the 2012 Regulations?

(1) SR 2014 No. 301

(3) The date specified in the notice of suspension must not be less than 4 weeks from the date of publication of the notice of suspension.

(4) The requirement to give notice under paragraphs (2) and (3) may be satisfied by notice given before, as well as after, the coming into operation of this regulation.

(5) Subject to paragraph (6) during the period of suspension no:

- (i) applications for accreditation;
  - (ii) applications for registration; or
  - (iii) applications for preliminary accreditation
- may be made.

(6) Paragraph (5) does not apply in relation to a [first?] application for accreditation of an eligible installation where -

- (i) an application for preliminary accreditation was made in respect of the eligible installation before the date of suspension;
  - (ii) the eligible installation has been granted preliminary accreditation; and
  - (iii) that accreditation has not been withdrawn,
- but it does apply to an application for accreditation of additional capacity of such an installation pursuant to regulation 42.

(7) The Department may, by notice ('notice of revocation') published in the same manner as a notice of suspension published under paragraph (2), revoke any such notice and the notice of revocation shall specify the date on which the period of suspension will end.

(8) In this regulation –

“application for accreditation” means an application for accreditation of an eligible installation under regulation 22 and includes an application for accreditation of additional capacity for such an installation pursuant to regulation 42;

“application for registration” means an application for registration under regulation 25

**Comment [HV6]:** Check with Paul – I don't think we say 'under' here as I think an application for accreditation of additional capacity is made under regulation 22 and regulation 43 just establishes the particular arrangements which apply in respect of additional capacity applications

"application for preliminary accreditation" means an application for preliminary accreditation under regulation 26

"period of suspension" means the period from the date of suspension specified in a notice under regulation 23A(2) until the date specified in a notice of revocation under regulation 23A(7).

**Consequential amendments**

**23B.** – (1) In regulation 22(6) for the words "subject to regulation 23 and regulation 46(3)" substitute "subject to regulation 23, regulation 23A and regulation 46(3)".

(2) In regulation 25(4) for the words "subject to paragraphs (5) to (8)" substitute "subject to paragraphs (5) to (8) and regulation 23A".

(3) In regulation 26(5) for the words "subject to regulation 23" substitute "subject to regulations 23 and 23A".

**Robinson, Susan**

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**From:** Vaughan, Helen  
**Sent:** 12 January 2016 15:21  
**To:** McGinn, Paul  
**Cc:** McCormick, Andrew (DETI); Stewart, Chris (DETI); Mills, John (DETI); Wightman, Stuart; Hughes, Seamus; Anderson, Gail; Briggs, Peter  
**Subject:** RHI closure  
**Attachments:** letter to DSO re draft regulations.docx; Extract for RHI change.docx

Paul,

Thank you so much for agreeing to meet tomorrow morning to discuss RHI closure. Stuart Wightman, Seamus Hughes and I will see you at 10am at your office.

I attach a covering letter which incorporates **Annex C** (note of more detailed queries on the legislative provisions) and a separate **Annex B** (revised draft regulation 23A)– these papers cover the key issues relating to the closure.

I'm sending down in hard copy a more complete briefing pack which also includes the following background material to assist your consideration:

**Annex A** – copy of submission to Minister of 31 December (outlines current position)

**Annex D** – copies of relevant GB legislation

**Annex E** - copy of DETI 2013 consultation

Many thanks again.

Helen



23A - (1) This paragraph applies where it appears to the Department that it does not have or is not likely to have sufficient funds available to it for the purposes of meeting the total costs of:-

- (a) periodic support payments for all eligible installations accredited under Regulation 2 and all installations likely to be so accredited; and
- (b) RHI payments for all plants accredited under Regulation 21 of the Domestic Renewable Heat Incentive Scheme Regulations (Northern Ireland) 2014 and all plants likely to be so accredited.

(2) Where paragraph (1) applies, the Department may, by notice published in such a manner as it may think appropriate, suspend the operation of the scheme in relation to the making of:-

- (a) applications for accreditation under Regulation 22;
- (b) applications for registration under Regulation 25; and
- (c) applications for preliminary accreditation under Regulation 26,

made after a date specified in the notice (the date of suspension) and accordingly after that date no such applications may be made or granted.

(3) The date of suspension must not be less than four weeks from the date of publication of the notice in which it is specified.

(4) Paragraph (2) does not apply to an application for accreditation for an eligible installation now regulation 22 where:-

- (a) an application for preliminary accreditation was made under regulation 26 in respect of the eligible installation before the date of suspension;
- (b) that application has been granted (whatever that grant was before or after the date of suspension); and
- (c) the preliminary accreditation has not been withdrawn.

(5) In paragraph (4), the reference to an ‘application for accreditation’ does not include any application for the accreditation of additional RHI capacity under regulation 42.

(6) The Department may revoke any notice under paragraph (2) by a further notice in writing and that revocation shall have effect from such date as may be specified in that further notice.

DRAFT

55A - (1) Where Regulation 23A(1) of the Renewable Heat Incentive Scheme Regulations (Northern Ireland) 2012 applies, the Department may, by notice published in such a manner as it thinks appropriate suspend the operation of the scheme in relation to applications for accreditation under Regulation 17 made after the date specified in the notice (“the date of suspension”) and accordingly, after that date no such application may be made or granted.

(2) The date of suspension must not be less than four weeks from the date of the publication of the notice in which it is specified.

(3) The Department may revoke any notice under paragraph (2) by a further notice in writing and the revocations shall have effect from such date as may be specified in that further notice.