

**To:** Michelle Murdoch[Michelle.Murdoch@ofgem.gov.uk]  
**From:** Lindsay Goater  
**Sent:** 2012-11-21T19:57:47Z  
**Importance:** High  
**Subject:** FW: Progressing NIRHI applications  
**Received:** 2012-11-21T19:57:00Z

FYI – pls do not share any further...

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**From:** Matthew Harnack  
**Sent:** 21 November 2012 19:39  
**To:** Lindsay Goater; Jacqueline Balian  
**Subject:** RE: Progressing NIRHI applications

An update on this:

Having spoken to Bob about the legal advice Marcus has given, we feel uncomfortable about processing applications without having the agreement in place. I note that we haven't received any applications yet, but it would be best to instruct staff to let us know when one is received so that we can consider whether we can process it if the agreement is still outstanding. If in doubt, do not process it.

There are related questions about whether we can do level 1 checks (because that is not really processing, it's just checking that an application is complete), and going to the other extreme whether we can even receive applications, but it's best if we're notified if we do receive one before the agreement is signed so that we can decide.

As said before, I hope and expect that the agreement will be finalised by the end of next week, so hopefully we won't need to actually contemplate this, but obviously I can't guarantee this will be the case.

Matthew

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**From:** Matthew Harnack  
**Sent:** 21 November 2012 18:11  
**To:** Lindsay Goater; Jacqueline Balian  
**Subject:** RE: Progressing NIRHI applications

Thanks Lindsay. Good to know.

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**From:** Lindsay Goater  
**Sent:** 21 November 2012 09:36  
**To:** Matthew Harnack; Jacqueline Balian  
**Subject:** RE: Progressing NIRHI applications

As of this morning, still zero applications received – will start reviewing when we get one back!

*(It is at least arguable that answering queries and sending out forms are not set out in the Regulations – they are simply administrative necessities to prepare applicants to apply - and so do not need a legal basis. I would have thought DETI could have anyone perform such functions through a simple contract for service. The only functions related to core accreditation, and hence the law, are really the decision and entering details on the Register. Until we do that, we are simply providing admin support to another UK Government body.)*

Lindsay

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**From:** Matthew Harnack  
**Sent:** 20 November 2012 18:41  
**To:** Jacqueline Balian  
**Cc:** Lindsay Goater  
**Subject:** RE: Progressing NIRHI applications

Hi Jacqueline,

please don't make any changes unless Bob says to. In other words, keep processing for now.

Fyi In practical terms there is almost zero chance of the agreement not being signed, and it will in all likelihood be signed by next week.

And there is almost zero chance of legal challenge on this basis, and massive reputational damage if we don't operate the scheme (even if temporarily).

Matthew

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**From:** Marcus Porter  
**Sent:** 20 November 2012 18:13  
**To:** Jacqueline Balian  
**Cc:** Matthew Harnack; Keith Avis; Mary Smith; Lindsay Goater; Ruth Lancaster  
**Subject:** RE: Progressing NIRHI applications

Jacqueline

Thanks for letting me know.

"Some concerns" does rather understate my position I have to say.

I can only reiterate the advice I have already given: Quite simply, there is no legal basis for us to do anything at all unless and until the arrangements are entered into.

There is no distinction to be drawn in this regard between processing an application and accrediting/refusing accreditation at the end of the process. Neither will be any more lawful than the other.

We have no more legal power to act than any other person or organisation you might care to name and acting without legal power is, in administrative law terms, pretty much the worst contravention of the law that a public authority can commit.

As at today's date it is DETI's responsibility to administer the Regulations.

In the event of a legal challenge we will not have a leg to stand on I'm afraid if we proceed as you say. No ifs, buts or maybes and any decisions we take are likely to be declared null and void. Nor can I conceive of any way in which we could, as you put it, minimise the impact.

Rarely have I come across a legal issue that is more clear cut.

As regards the detail of what is being proposed, I note that you use the expression "until the administrative agreement has been signed". What if it becomes clear that it won't be signed at all because agreement is not reached as to all the terms? It's implicit I think in what you say that you accept that we cannot accredit at present because there are no arrangements. So presumably you also accept that if there continue to be no arrangements we will continue to have no power to accredit. What then should we then tell an applicant who has submitted an application in the belief that it will be processed up to and including accreditation /rejection? What reason do we give, having reached the stage immediately prior to accrediting/rejecting, for *not* actually doing so and how do we justify it?

It would scarcely be any better if we still had a reasonable expectation that the arrangements would at some stage be signed but it wasn't clear when. How long should we tell an applicant that the "pause" to which you refer will last in those circumstances and what reason do we give for it?

You'll recall no doubt from the advice counsel gave in relation to grants, under the GB Regs, to the effect that (where commissioning has already taken place) at the point where we are satisfied that an applicant has both submitted a "proper" application and that he is eligible, we *must* accredit. There is no legal basis on which we can decline to do so.

Remember also that it was decided that it was decided that the expression "date of accreditation" should mean the first date on which the applicant satisfies the above requirements, irrespective of when we tell them "we hereby accredit you" and that the 20 year period for RHI payments commences with the date of accreditation.

The NI Regs are structured in the same way and thus should be operated in the same way.

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**From:** Jacqueline Balian

**Sent:** 20 November 2012 17:04

**To:** Marcus Porter

**Cc:** Matthew Harnack; Keith Avis; Mary Smith; Lindsay Goater

**Subject:** Progressing NIRHI applications

Hi Marcus,

We had a brief discussion yesterday about how we are dealing with NIRHI applications. This is just a quick note to confirm that Bob has decided that we will progress applications up to the point at which a decision to accredit (or not) is made. At this point, if it is reached, we will pause until the administrative agreement has been signed. This means that we will accept applications and we will carry out the normal checks to establish eligibility. The only thing we cannot do is make a decision.

I recognise that you have some concerns about this approach so I wanted formally to let you know that this is the decision so that we can find a way to minimise the impact of any issues which you can envisage arising.

Best wishes

Jacqueline

**Jacqueline Balian**

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