

To: Gareth John[Gareth.John@ofgem.gov.uk]
Cc: Teri Clifton[teri.clifton@ofgem.gov.uk]; Michael Knight[Michael.Knight@ofgem.gov.uk]; James Robinson[James.Robinson@ofgem.gov.uk]; Edmund Ward[Edmund.Ward@ofgem.gov.uk]; Jane Pierce[Jane.Pierce@ofgem.gov.uk]
From: Chris Poulton
Sent: 2016-12-21T07:06:35Z
Importance: Normal
Subject: Re: Northern Ireland Non Domestic Renewable Heat Incentive RHI - Letter from Andrew McCormick [OFFICIAL Internal Only]
Received: 2016-12-21T07:06:36Z

At a very initial glance I'm worried about talking about anything proportionate. We know that with all the political pressure that's out the window. So I think the focus should be on what do they actually want us to look at: the Pwc ones ? In which case we make clear we can't take action and the other pieces as mentioned here. Is it it applications not yet approved in which case fine, but requires funding. As they are going to all other sites....

Overall it seems a little long and we can focus on those key areas ?

C

Sent from my iPhone

On 20 Dec 2016, at 22:26, Gareth John <Gareth.John@ofgem.gov.uk> wrote:

All,

Please see full draft of the response letter for discussion at 11am tomorrow, feel free to place any comments , changes , correct any grammar or prose etc.

Given the follow on emails asking us to act in line with Andrew's letter on a specific referral– I propose we get this off tomorrow luncheon – so we can refer to our response. In light of this it maybe worth making even clearer that we will not be asking for corroborative 'independent' evidence in all cases.

Note I've selected James' firmer para below and have followed that with a further provocative one in the penultimate para of the letter.

I've not gone any further on detail of what enhanced independent evidence might mean as we really need a view from DfE – but for example it could lead to compulsory IRMAs as well enhanced site visits on 2128 installations with associated costs (some to the participant/ applicant) – again we can go for a platinum belt and braces sit visit and report – but this will always be against a backdrop of what the regs allow and what we interpret in line with those regs to be non compliant and then what is deemed to be a proportionate sanction in terms of any non compliance evidenced and concluded.

Rgds

Gareth

From: James Robinson

Sent: 20 December 2016 13:46

To: Gareth John

Cc: Chris Poulton; Edmund Ward; Jane Pierce; Teri Clifton; Michael Knight

Subject: RE: Northern Ireland Non Domestic Renewable Heat Incentive RHI - Letter from Andrew McCormick [OFFICIAL Internal Only]

Gareth,

Thanks. We had a quick chat on this. Perhaps we should go with something like:

“As regards your last substantive paragraph, I note that you have asked your officials to work with my team to amend the administrative arrangements in relation to your proposed 100% inspection programme. We will of course aim to work constructively with you in that respect, but I would ask that your officials engage with my team on the detailed proposals for the programme and not just changes to the arrangements. Otherwise, there is a risk that a programme emerges that would cause us difficulties with respect to the exercise of our other functions, particularly enforcement, and which may require a re-appraisal of our ability to carry out those wider functions.”

If this wording is thought to be too much of a threat, alternative softer wording might be” “As regards your last substantive paragraph, I note that you have asked your officials to work with my team to amend the administrative arrangements in relation to your proposed 100% inspection programme. We will of course aim to work constructively with you in that respect, but I would ask that your officials engage with my team on the detailed proposals for the programme and not just changes to the arrangements, so as to ensure an effective and coherent overall regime is maintained.”

James Robinson

Acting Legal Director
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From: Gareth John

Sent: 20 December 2016 13:20

To: James Robinson

Cc: Chris Poulton; Edmund Ward; Jane Pierce; Teri Clifton; Michael Knight

Subject: RE: Northern Ireland Non Domestic Renewable Heat Incentive RHI - Letter from Andrew McCormick [OFFICIAL Internal Only]

Thanks James,

I have some bits for the square brackets and other missing bits which I will include so we have a draft of the finished letter this afternoon –

One point I wanted to just check was around mixed functions as it were:

DfE have indicated they want to proceed with 100% site audits and have indicated they are looking to potentially contract directly and locally to achieve this. This brings into question serious questions for me around accountability of functions and what information we can act on – it doesn't seem very clean – In the event we do not agree with DfE approach - I can't be in control of the function if I'm not in control of the site visit / audit strategy and can satisfy myself that compliance activity is in line with a proportionate approach in line with the regs.

- Some further legal words on that would be appreciated. An associated point is that any consequences of the 100% visits may challenge / contradict or bring into question assessments that have either already been taken , are planned or are in flow.

Rgds

Gareth

From: James Robinson

Sent: 20 December 2016 11:39

To: Gareth John

Cc: Chris Poulton; Edmund Ward; Jane Pierce; Teri Clifton; Michael Knight

Subject: RE: Northern Ireland Non Domestic Renewable Heat Incentive RHI - Letter from Andrew McCormick [OFFICIAL Internal Only]

Gareth,

An initial straw person of the 'legal' bits, although the wording needs checking and confirming – I have made some assumptions.

James

James Robinson

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From: James Robinson

Sent: 20 December 2016 10:51

To: Gareth John

Cc: Chris Poulton; Edmund Ward; Jane Pierce; Teri Clifton; Michael Knight

Subject: RE: Northern Ireland Non Domestic Renewable Heat Incentive RHI - Letter from Andrew McCormick [OFFICIAL Internal Only]

Gareth,

My thoughts on your questions are as follows:

1. the arrangements - can we still operate them given this letter

1. In the context of the Arrangements, there are two points which are particularly relevant. The first is that para 1.4 of the Arrangements makes clear that we are not in an agent-principal relationship, and para 3.1 provides that *"GEMA will carry out the Conferred Functions and the Ancillary Activities and will at all times act in a manner which is consistent with any applicable obligations that arise as a matter of law, including any requirement to respect any personal or commercial confidentiality"*. The obligation to *"at all times act in a manner which is consistent with any applicable obligations that arise as a matter of law"* includes, in my view, the usual administrative law constraints around the exercise of statutory discretion. These include not fettering our discretion and not taking into account irrelevant considerations. It is for this reason that we have consistently said that DETI should not seek to instruct or direct us to carry out any of the conferred functions in a particular way. If we did carry out a function in response to such a direction, our decision would be at risk of challenge. To be fair, it is possible to read Dr McCormick's letter as not purporting to instruct or direct us, but rather a *request* for us to act in a certain way ("I would be grateful if"; "consideration should be given to"), seeking confirmation that we have so acted. Para 4 of the letter also talks of there being an 'expectation' rather than a requirement.

2. The second point is that the Annex to the Arrangements (on auditing), provides that *"GEMA will communicate with DETI regarding the Terms of Reference for the audit activity undertaken by Deloitte/Ricardo-AEA, and endeavour to ensure that any DETI concerns regarding the NI RHI are adequately addressed. Upon completion of the audits, GEMA will share the outcomes where they relate to the NI RHI."* (my emphasis). Although this seems strictly to relate to the ToR, it's clear that we can't just put our hands over our ears when DfE talk about their concerns over the audit and compliance programme.

3. However, if we were to apply an enforcement policy that rigidly operated on the basis of 'produce independent evidence to support your claims or you're out of the scheme', there is a good chance that that would be successfully challenged as either a fettering of our discretion (as the over-rigid application of policy in exercising a discretion) or possible unreasonableness. At the end of the day, the assessment of any evidence is for us to make (at least at present), and needs to relate to the circumstances of each case. But given the level of concern that has been raised over the PWC/referral cases, it might be appropriate to consider that we would need a good standard of evidence to overcome prima facie evidence of non-compliance in these cases. However, I note that Dr McCormick suggests that "inspection activity" might be the sort of corroborative independent evidence he is looking for, and presumably we have already done this for the 'questionable' sites.

4. As I read the letter, Dr McCormick is not talking about independent corroborative evidence for every single application: I read it (and we can make that interpretation clear in our reply) as relating to the 'doubtful eligibility' cases, particularly the PWC ones and recent third party referrals. So we could read the letter as setting out strong concerns about the audit/compliance programme which we are being asked to address in a certain way. If we consider that, as part of endeavouring to take into account DfE's concerns, it is appropriate for us to apply an enhanced level of evidence to satisfy ourselves that those cases that have already been identified as being of concern as to eligibility, then we could properly do that. However, we return to the question of eligibility, and that is for us to establish based on the requirements of the Regulations. Dr McCormick's paragraph 4 talks of expecting enforcement action in cases of 'poor insulation or inefficiency', neither of which (subject to correction) are eligibility requirements. Any evidence that we demanded or took into account in relation to participants/applicants would need to be relevant to the requirements of the scheme. So we'd have to clarify that aspect in our reply.

5. My view is that we can continue to operate the Arrangements, although we need to be careful with our reply and our approach going forward.

2. In terms of the instructions - is there anything we can reasonably do in line with current arrangements.

1. As noted above, we should not treat this as an instruction, but rather a request. Given that he has identified that 'inspection activity' would be one way of supplying corroborative independent evidence, arguably we are doing all that we should anyway. In relation to cases where we have still to reach a conclusion, you are free to consider whether there is additional evidence that we should be requesting if there are issues on which we have concerns or doubts.

3. Does this bring into account question of whether we can reasonably operate the function of compliance under these instructions

2. I think that may depend on his response to our response. If he insists on trying to bring in things which aren't provided for in the regulations, then we should consider our position in this respect, as we would presumably not want to operate other than in accordance with the law. He says that "I have asked my officials to work with your

team to amend the administrative arrangements accordingly [in relation to 100% inspections], so something seems to be coming in terms of new Arrangements. Presumably we should flag up that if there would need to be a change request, with funding, to operate a 100% inspection regime.

I'll work up some draft text for the letter in relation to the Arrangements etc and circulate separately.

James

James Robinson

Acting Legal Director

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From: Gareth John

Sent: 19 December 2016 18:06

To: Chris Poulton

Cc: James Robinson; Edmund Ward; Jane Pierce; Teri Clifton

Subject: Re: Northern Ireland Non Domestic Renewable Heat Incentive RHI - Letter from Andrew McCormick

Thanks Chris,

James what's your view in terms of :

1. the arrangements - can we still operate them given this letter
2. In terms of the instructions - is there anything we. An reasonably do in line with current arrangements.
3. Does this bring into account question of whether we can reasonably operate the function of compliance under these instructions

Chris ,

In terms of the PWC report and findings we have supported fully and have reiterated a number of times including at my board and subsequent mtg last Thursday that

1. We have provided a view on all the cat 2,3,4s and where these are at and I specifically asked if there where any outstanding actions on Ofgem in terms of providing that update and the answer was no
2. These are with DfE to review and come back, but we have made it clear we can only operate in line with the existing regulations and arrangements.
3. A)Where we believe further action is a potential prospect we are waiting on photos from DfE the original PWC / rumbold site inspections and I requested a his info again last Thursday . These have been outstanding since at least our last trip to Belfast if not before.
3. B)

In addition there are I believe some follow on site visits we may wish to deploy - and have these planned in.

Teri - Can you confirm on 3.B for us

James - can you construct some of the legalise on the arrangements points and myself / Teri will pick up the rest and draft a response.

Rgds

Gareth

Gareth John

Gareth.John@ofgem.gov.uk

Received from OFG on 19 Dec 2016

Annulated by RHI Inquiry

On 19 Dec 2016, at 17:09, Chris Poulton <Chris.Poulton@ofgem.gov.uk> wrote: