From:	Catherine McArthur
To:	Hutchinson, Peter; McCutcheon, Joanne
Cc:	Jonah Anthony; Faye Nicholls
Subject:	Review of Draft Regulations
Date:	07 November 2011 12:01:41
Attachments:	image001.gif Review of draft NI RHI Regulations1.doc

Hi Peter and Joanne,

Please find attached the legal review of the draft regulations. This document includes (at Appendix 1) a number of issues that were raised with DECC in our review of their final regulations. As these weren't addressed by DECC at the time they still apply to the current regulation on which your draft is based.

In addressing the issues there are a couple of possible approaches from your end, and if you could advise us of your preferred approach we can build recommendations into the Feasibility Study as to how these changes could be handled:

1. Delay the changes to the regulations until DECC reviews their own regs. This has the advantage of keeping the two schemes aligned, but the disadvantage of having to be reactionary and change your regulations based on DECC's changes, and potentially when the scheme has not been operational for long.

2. Be proactive in addressing the issues raised in DETI's first set of regulations for the scheme, with DECC addressing the issue at a later point. This has the advantage of addressing the issues and having a more robust scheme from commencement. The disadvantage might be that DECC may take different decisions in addressing some of these issues when they do amend their regulations, which will set the two schemes further apart. You could also consult with DECC in making any changes if you wanted to ensure that your policy positions would remain fairly consistent.

If DETI decided to take the latter approach one of the major areas that would be impacted would be accreditation. Our recommendation would be to implement processes for manual checks during the accreditation process instead of making late changes to the IT systems. This would be a more cost-effective option for enforcing the new eligibility obligations, with the option of incorporating the changes into the IT system for accreditation at a later date either in line with DECC making similar changes, or in line with later IT systems development to accommodate policy changes that will involve further systems development (such as inclusion of ASHPs or Bioliquids).

If DETI decides to address any or all of these issues in their revision of the regs we would look at setting the scope for development work necessary once we have had a chance to review the revised regs. By implementing manual processes where possible we would aim to minimise or avoid any additional costs during development and operations.

When you've had a chance to consider your preferred approach please let me know.

Kind regards,

Catherine McArthur
Policy Development Manager

New Scheme Development
9 Millbank
London
SW1P 3GE
Tel: 0207 901 7000
www.ofgem.gov.uk

ofgem E-Serve

Memo

Review of draft NI RHI Regulations

First Ofgem legal review of the draft Northern Ireland Renewable Heat Incentive ("NI RHI") Regulations, concentrating on issues of administration by the Gas and Electricity Markets Authority ("GEMA") of the NI RHI scheme and deficiencies in the draft NI RHI Regulations	From	Faye Nicholls
	To	Jonah Anthony and Catherine McArthur
	cc	Marcus Porter; Ashley Malster; Jacqueline Balian.
	Date	4 November 2011

1. Introduction

1.1. This purpose of this memo is to highlight to the Department of Enterprise, Trade and Investment ("DETI") issues which have arisen during the course of the development stage of the Great Britain RHI scheme ("GB RHI") and identified as areas which require review and revision in amending regulations. It also considers *viries* issues specific to the proposed administration of the NI RHI scheme by GEMA. Due to time constraints, this review does not incorporate those issues which have arisen during the legal review by Ofgem's legal team (Commercial Legal) of the latest version of Ofgem's guidance document for the GB RHI. We propose to inform DETI of these further issues with our comments on the next iteration of the draft NI RHI Regulations during the Development phase. This memo does not discuss the terms of arrangements to be made between the Northern Ireland authority and GEMA for the administration of the NI RHI scheme.

2. *Vires* flowing from primary legislation

2.1. Section 114 of the Energy Act 2011 provides that the Northern Ireland authority ("NIa") and GEMA are entitled to enter into arrangements for GEMA to act on behalf of the NIa for, or in connection with, the carrying out of any functions that may be conferred on the NIa under, or for the purposes of, any scheme that may be established under s. 113. We note a distinction between s.114 of this Act and s. 121 of the Energy Act 2004 (which provides for GEMA to act on behalf of the Northern Ireland Authority for Utility Regulation ("NIAUR") in the administration of the NIRO), which has an additional provision that NIAUR and GEMA may "give effect to" these arrangements.

We would welcome DETI's view on whether or not s. 114 of the Energy is deficient in not expressly stating that the NIa and GEMA may "give effect to" the arrangements stated in s114(1).

2.2. We note that the powers in ss. 113 and 114 of the Energy Act 2011 don't come into force until two months after the date on which this Act was passed. Therefore, the NI RHI Regulations and any arrangements between GEMA and the NIA cannot be made before 21st December 2011.

3. Procedural issues

3.1. Confirmation is sought from DETI that the Regulations will be subject to Confirmatory Resolution (meaning that the Regulations cannot be made unless a draft of the Regulations has been laid before and approved by a resolution of the Northern Ireland Assembly) and that no Parliamentary approval is required from Westminster.

3.2. Because the NI RHI will involve State aid within the meaning of Article 107(1) of TFEU, DETI will need to obtain State aid approval before the NI RHI Regulations are made. We note that, in relation to the GB RHI scheme, DECC submitted a pre-notification for State

Aid approval to the Commission in late December 2010 and did not receive the Commission's decision until 29 September 2011.

We would welcome clarification from DETI in relation to its timetable for obtaining State aid approval.

3.3. The provisions of the draft Great Britain RHI Regulations also required a technical specification notification to be made to the European Commission. It's likely that a similar notification will be required to be made by DETI. If so, we note that the NI RHI Regulations cannot come into effect until the expiry of a standstill period of 3 months, running from the date of receipt of the notification by the European Commission.

We would welcome clarification from DETI in relation to its timetable for submitting any relevant technical standards notifications.

4. Costs of administration of the scheme

4.1. It's our understanding that the NI RHI, like the GB RHI, will be funded directly from treasury funds, rather than by fossil fuel suppliers. Consequently, an issue which has arisen in relation to the administration of the GB RHI is that of ensuring sufficient funds to meet the administrative requirements of the scheme. Funding arrangements will need to be discussed in detail by DETI, NIAUR and GEMA.

5. Scope of GEMA's administration of the NI RHI

5.1. Discussion of the scope of GEMA's administration of the NI RHI scheme is outside the scope of this memo. However, DETI and GEMA will need to discuss the nature and extent of GEMA's agency and those functions that will be reserved to the NIa (for example it is unlikely that GEMA will be able to recoup debts owed to the NIa). This will require further legal analysis.

5.2. The Energy (Northern Ireland) Order 2003 bestows duties and functions upon NIAUR which are substantively the same as those to which GEMA is subject to pursuant to the Electricity Act 1989 and the Gas Act 1986. Any arrangements between NIAUR and GEMA must not fetter either of the parties' ability to discharge their regulatory powers, obligations and duties.

6. Review of the draft NI RHI Regulations

6.1. During development of the GB RHI scheme, Ofgem noted a number of deficiencies in the drafting of the GB RHI Regulations. Because DETI has chosen to use the GB RHI Regulations as the basis for the NI RHI Regulations, we attach a table detailing our notes on the GB scheme at **Appendix 1,** which we have revised in order to make sense of this in relation to the draft NI RHI Regulations. This table is a working draft because work is yet to commence in earnest on the next iteration of the GB RHI Regulations, at which point further issues may come to light (which we may share with DETI). Likewise, further issues may arise in relation to the operation of the GB RHI scheme, when it goes live. Again, we may share information on these issues with DETI.

6.2. Please see **Appendix 2** for further comments specifically in relation to the working draft NI RHI Regulations (dated 4 October 2011). We note that there remain a significant number of issues that have yetto be resolved by DETI at at policy level.

We welcome further discussion with DETI on areas where policy is in development.

ofgem E-Serve

Memo

Appendix 1

Issues relevant to both the GB RHI Regulations and the draft NI RHI Regulations

1 Policy mismatch (i.e. regulations don't implement DECC's stated policy)					
No.	Issue	Overview	Suggested solution	Priority level (H/M/L)	Contact
1a	Biomethane duration	Policy is to stop payments after 20 years but regulations don't have a mechanism to do that.			AM
1c	Biomethane provenance	Biogas from outside GB shouldn't be allowed. Added by FN: There is no specific provision in the RHI Regulations which deals with the geographical location of facilities used to produce the biogas or biomethane for injection. We believe this means that: a) Biogas that is produced in one location can then be tankered (or piped?) to a different location for upgrading to biomethane and injecting into the grid b) Biogas from Biogas Production which is undertaken outside GB could potentially be used as an input to Biomethane Processing which occurs in GB; and/or c) Biomethane Processing may occur outside GB, with the end product being delivered for Biomethane Injection in GB.	Added by FN: In meeting of 15.8.11, DECC stated that they were comfortable with biogas being tankered within GB as in 9 a). However it was not DECC's original policy intent to allow biogas from outside of GB. Ofgem noted that there was a risk of non-GB biogas or biomethane being used for injection in GB. DECC noted that they were unsure whether it would actually be possible for biogas produced outside the GB to be used as an input in GB, however DECC recognised that without specific reference disallowing non-GB biogas/biomethane in the regulations, such biogas/biomethane would have to be allowed. Ofgem legal commented that restricting the ability of other EU member states to produce biogas or biomethane for combustion/ biomethane injection in the UK could restrict trade between member states but that DECC should raise this with DECC legal, as state aid provisions may permit this kind of restriction. Either way, amending regulations would be required to impose such a restriction.		AM/FN
1e	Heat pump immersion heaters	Difficult to follow DECC's policy of ignoring built in immersion heaters given the way the Regs are drafted.	DETI should expressly state whether or not (or to what extent) such systems are eligible. This will be of particular importance for the NIAUR, who must only pay for heat generated		AM

			from renewable sources and used for eligible purposes.		
1g	Double counting	There is no general provision excluding heat use for parasitic loads from double counting for PSPs.	Include parasitic loads as ineligible use, add general avoidance provision, add in any new specific loads identified (least good option)		RZ/AM
1h	Moving equipment rendering it ineligible	Uprooting an already-accredited installation and moving it to a new site, would render it ineligible – as it would constitute a different application with a now "old" installation. This issue has come up a few times in guidance consultation events, because of concerns that finance companies would want to take back equipment in the event of a default, install it at a new location and still be able to claim RHI.	DECC agreed (15.08.11) that moving a plant to a new site would render a plant ineligible. DECC did acknowledge the issue that has been raised about finance companies wanting to be able to take stranded equipment and would be concerned if this was a big blocker to RHI take-up, but they agreed this was something that would need to be taken forward in separate regulations (e.g. 2012). DETI to consider its position in light of these comments.	H	FN/AM
1i	Gasification/pyrolysis	Further clarity on gasification/pyrolysis. DETI should clarify what they're actually incentivising.			OM
2 Ambiguities (i.e. regulations unclear and sufficient risk of legal challenge)					
No.	Issue	Overview	Suggested solution	Priority level (H/M/L)	Contact
2a	"Natural" loss systems	Clarity on heat eligibility and metering requirements for "natural" system losses – particularly in pipes between buildings.	Ofgem is currently working on a methodology for calculating heat loss across systems. Consider whether or not to include such a methodology directly in the NI RHI Regulations (or the insertion of a provision providing NIAUR with the discretion to set a methodology to determine heat loss.	H	AM/FN
2b	Installation definition	What counts as an installation for purposes of what must be 'new' and which plant may not receive grants – currently relying on Ofgem guidance, but open to legal challenge where our interpretation doesn't suit applicant.	Ofgem requires clear direction from DETI in relation to exactly what plant forms each type of eligible installation/ biomethane production plant. This information should be gathered in the course of DETI's research into the costs of purchasing and installing heat generation plant (from which it will calculate the appropriate tariff levels). It may be that a lack of such detailed information prolonged the time which the European Commission needed in order to assess overcompensation for the purposes of awarding state aid approval for the GB RHI Regulations.	H	AM
2c	Building definition	Requires greater clarity, particularly what is meant by "permanent and long lasting", as there is no useful legal precedent for this term, which is opaque	Issue raised with DECC 15.8.11 – DECC did not have a strong policy intent in this area. The two year minimum period approach taken	H	AM/FN

		and problematic. Definition would include moored boats but exclude boats that went up and down a waterway as installations need to be in one place. However, note the fraud risks of allowing installations to move around. Issues arising from space heating – why is it important that it's in a building when certain industrial processes may need heat to be vented post-process e.g. drying.	by Ofgem seemed a little short, but they were content with us taking this approach on the basis that it allowed us to draw a line using existing precedents. It is not satisfactory that Ofgem should be 'clarifying' what is a key definition in the Regulations. Ofgem Legal considers that this definition requires clarification in the NI RHI Regulations. DETI should give further thought to unusual buildings e.g. portacabins, tents, polytunnels, barges, distillation columns etc. and consider minimum energy efficiency standards for buildings (see comment below).		
2d	Process definition	Wide definition of "process": DETI may wish to narrow this definition down, to specifically exclude certain processes.	More relevant to DETI for the purposes of cost control than an issue which creates administrative issues.	L	FN
2e	Biogas production plant	Explicit in the Regulations that the biogas production plant does not form part of i) an eligible installation generating heat from solid biomass; or ii) the equipment used to produce biomethane. See email to OM from FN 27.7.11. This means that participants may receive (and do not need to repay) grants for the biogas production plant that forms part of their facility.	As biogas production plant generally forms the most expensive part of biomethane production facilities/ biogas combustion facilities, this will affect the tariff levels that DETI wish to set/ may mean that DETI expressly states that biomethane production plant forms: i) part of the equipment used to produce biomethane and ii) part of the an eligible installation generating heat using biogas.	M	FN/OM
2f	Heat pumps – ground water source	Lack of clarity in Regulations that ground water is an eligible source of heat (versus DECC internal view that it should be)	Amend Regulations to give clarity on this (amendment to 8(1) to include ground water		EW/PLF
2g	Regulation 14	Ofgem has required detailed legal input in order to interpret Regulation 14 and the provision is not clear. If possible, it would be re-drafted to make the policy intent more clear	Legal re-draft		AV
2h	Regulation 14 (3) specifically	On first reading this regulation, it appears to exempt plants comprised of more than one plant from any MCS requirements. However, this is not the case since 5(c), 7(c) and 8(b) take precedence. However, Re-drafting could make this clearer.	Legal re-draft		AV
2i	Reg. 17 (2) (a) Complex metering	Ofgem's approach is that we will not pay on heat lost between buildings, but this will allow for certain complex systems to only meter at the point of generation. Placement of meters also affects ability to participate.	Legal re-draft required. This ties in with the point on "Natural" heat loss, above. Ofgem is currently working on a methodology for calculating heat loss across systems. Consider whether or not to include such a methodology directly in the NI RHI Regulations (or the insertion of a provision providing NIAUR with the discretion to set a methodology to	H	AV

			determine heat loss. DETI to consider where meters should be placed.		
2j	Reg. 15(c)	Suggest moving this section to the additional capacity section (Reg. 43/44) to ensure Regulations are not spread out (Reg. 15(c) was a last minute addition and could be missed if AC section read in isolation)	Re-position of Reg. 15(c) to additional capacity section (Reg. 43/44).		AV
2k	Definition "naturally occurring"	Defining this could help clear up the eligibility of heating systems that use interseasonal heat transfer methods (DECC policy intent).	Definition allowing for interseasonal heat transfer technology, within the naturally occurring Reg. 8 & Reg. 10 sections.		AV
3 Administrative difficulties resulting from the regulations					
No.	Issue	Overview	Suggested solution	Priority level (H/M/L)	Contact
3a	Access rights	Lack of clear right to require access to heat distribution system to check for eligible uses (in non-domestic properties). Accreditation condition is a second best. This represents a clear fraud risk.	i) Insert an ongoing obligation in Reg. 34 to the effect that participants must procure access to non-domestic properties in/ on/ over which an installation and/ or its associated infrastructure is located; and ii) Consider clarifying/ revising the term "associated infrastructure" in Regulation 50; and iii) Add a further subparagraph to Reg. 50(1) to "verify eligible heat use".	H	AM
3b	Biomethane production	Lack of right in Regs. to inspect any aspect of biomethane production. May have been expectation that gas conveyor would be verifying but they won't be verifying that it came from renewable sources. Added by FN: I'm worried that if we don't audit then the figures will be open to fraud. We would like to be able to audit: • Whether the kWh figures they have been providing to us match the measurement readings from the facility itself (e.g. they will have volume and GCV readings at the site, resulting in kWh figures, which we need to be able to check). • Whether kWh figures from propane they're providing us are correct. There is no power for NIAUR to inspect the biogas plant used to supply the biogas for the biomethane	Formalise biomethane inspection powers including pre-registration inspections and third party access (added by FN). This links with the loopholes in the Regulations (at 2(e) above, 32 below and in	H	AM

		production process. This means that NIAUR will not have the ability to verify or audit compliance with Reg. 33 feedstock/ biomass composition requirements, use of external heat in biogas plant, integrity of supply chain up to injection, sustainability reporting requirements etc.	relation to the exclusion on inspections of biomethane production plat at Regs. 34(i) and 50) which means that biogas plant is not considered to be part of the biogas combustion installation/ biomethane production plant. The other related issues need to be addressed in order to be able to insert provisions dealing with the issue highlighted here.		
3c	Sanctions	Currently only downside of applying for something wholly ineligible is that we won't give them the money they're not eligible to receive, plus perceived risk of a successful fraud prosecution.			AM
3d	Metering	Do Regs. have the right balance of allowing pragmatic approach whilst giving us enough backup to impose requirements?: We are keen to revisit this in light of (i) the heat loss approach we adopt; (ii) any approach we can formalise on a mixture of eligible/ineligible uses within buildings; and (iii) any changes to the building definition noted above			EW
3e	Data accuracy	A condition is to be applied stating that participants will submit accurate data. There is not an explicit power under the regulations to require this, which means that in circumstances where inaccurate data is submitted (either knowingly or unknowingly) there is no clear enforcement action that can be taken.	Make the accurate submission of data an ongoing obligation.	H	LM
4 Potential perverse outcomes					
No.	Issue	Overview	Suggested solution	Priority level (H/M/L)	Contact
4a	Lack of regulation of biomethane producers.	The Regs impose few obligations on producers of biomethane in relation to those placed on owners of accredited RHI installations.	We would suggest that a full review of the draft Regs, as they are intended to apply to biomethane producers, be carried out to ensure that DETI's policy objectives are met.	H	FN
4b	Biogas and biomethane boundary	This could encourage (wasteful) quenching of gas just to claim RHI biogas tariff. What type of biogas production does DETI want to encourage?			AM
4c	Brand new equipment	Requirement that all relevant equipment must be brand new could lead to wasteful throwing away of acceptable ancillary equipment, but permitting it may create extra complications in working out which piece of equipment is accredited and tracking its movement.	Further consideration to be given to eligibility of older/ refurbished plant. Is this possible without making administration difficult?	L	AM
4d	Separate heating circuits/systems	Some participants may install additional pipework	Could consider imposing a requirement that	M	EW

		and multiple smaller (and potentially less efficient) units in order to meet eligibility or higher-tariff thresholds	where separate heating systems serve the same end heat use purpose, they are considered to be part of the same heating system – amounts to a tightening (statement) of the definition of a heating system		
5 Gaming opportunities					
No.	Issue	Overview	Suggested solution	Priority level (H/M/L)	Contact
5a	Useful heat	Currently minimal restrictions on what counts as eligible heat use and our powers are quite limited here. Please see legal comments below.		H	AM
5b	Industrial heat use	Industrial heat use outside of a building is not allowed but inefficient space heating is.		H	AM
6 Stakeholder requests (common requests that may merit consideration)					
No.	Issue	Overview	Suggested solution	Priority level (H/M/L)	Contact
6a	Biomass from waste	At present, only municipal waste may be used and this is narrowly defined and excludes many would-be participants.	DETI should consider the possibility of opening up the biomass from waste category beyond municipal waste – or at least allowing non-municipal waste to be counted as legitimate contamination that is not paid for. Also, is there good reason to prohibit supplementing municipal waste with other biomass (e.g. wood) if source is temporarily unavailable for example? In all cases, any opening up of this category must be capable of proper administration.	L	AM
6b	Energy efficiency	Shouldn't there be a minimum energy efficiency requirement before participation in the RHI?	This also concerns the definition of building, above. DETI should consider whether or not any existing standards of energy efficiency in building legislation may assist in setting such a minimum level.	H	JB
6c	Extend scope of Preliminary Accreditation	As per 8a below - there are a number of smaller businesses that would like to install but feel constrained by uncertainty of eligibility and not willing to commit large sums of money on basis of uncertainty.	As per 8a below	L	EW/DS
7 Legal					

No.	Issue	Overview	Suggested solution	Priority level (H/M/L)	Contact
7a	Publication of information	There is no ability for NIAUR to restrict publication of (aggregated) RHI info where this may reveal commercially sensitive information relating to a participant.	Express provision required giving NIAUR the power to restrict publication of information in these circumstances?	M	FN
7b	Repayment of grant monies in relation to biomethane production plant.	Insert equivalent of r 23(1)(b) into r.25.		H	FN
7c	Power for the NIAUR to inspect participants' premises for eligible heat use	As the regulations are currently drafted, NIAUR has the power to inspect a participant's installation (providing this is not on third party premises) but does not have the power to inspect the participant's premises for eligible heat use.	According to Counsel's opinion (see email from Morag Drummond dated 2 Aug 2011 at 18:00), incidental to the performance of NIAUR's accreditation/ registration duty under Reg. 22 is a power to ensure that the eligibility criteria truly have been met. But it's not clear that this extends to inspection of the participant's premises. The regulations should be amended to incorporate a power to inspect eligible heat use.	H	FN
7d	How is the 10% ancillary energy content amount determined?	Reg. 28 provides for NIAUR to determine the proportion of solid biomass that is contained in municipal waste but does not have a similar provision in relation to the 10% energy content. Reg. 29 provides for NIAUR to determine the proportion of fossil fuel contamination that is contained in solid biomass but does not have a similar provision in relation to the 10% energy content limit for ancillary purposes.		M	FN
7f	Biomethane producer definition	DECC's intention is that the party who injects biomethane on to the grid should be regarded as the "producer of biomethane" for the purposes of the Regs. We consider that the Regulations do not make this clear. Where "producer" is not defined, there is a risk that several parties in the biomethane production process may claim to be a "producer" under the Regs, including one or more of: i) The person who produces the biogas ii) The person who processes biogas inputs into biomethane e.g. by removing inert compounds such as CO2 and nitrogen iii) The person who adds propane etc. to	At present, Ofgem has stated, in its Guidance, that it will consider the person who pays for the biomethane to be produced to be the "producer of biomethane". Although this reflects the policy position, it is an unsatisfactory and risky approach, which is not clearly supported by the Regs. If the present drafting is adopted by DETI, this places NIAUR under risk of challenge, if the same approach is to be taken. The regulations should clearly state that/ define a 'producer of biomethane' to be the person who pays for biomethane to be processed so that it is suitable for injection.	H	FN

		biomethane to bring its GCV up to grid levels iv) The person who adds odorant to, or pressurises and/or injects biomethane. Very often, these persons could be the gas conveyor. Consequently, there's a risk that: (i) one or more participants could apply for registration for (some portion) of the same biomethane (ii) there could be multiple owners of a biomethane stream (e.g. an injection facility owned in % shares by more than one party) who may seek registration (see other comments on multiple owners); and (iii) one organisation could register different biomethane plants either under a single registration or under separate registrations in respect of different injection sites. Therefore, a clearer definition of producer is required, or other restrictions/requirements need to be introduced to otherwise limit the risks noted above.			
7g	Retrospective application of new eligibility criteria and ongoing obligations: Has DETI considered if and how existing participants will be affected?	E.g. where subsequent changes to the regulations alter the eligibility criteria and ongoing obligations, is an existing participant obliged to comply with eligibility criteria and ongoing obligations from time to time or do they only have to comply with the requirements that were set at the time the accreditation date for the duration of the tariff lifetime?	This also relates to point 7h below. DETI should also consider this issue in relation to regulation 22(8) regarding changes to accreditation and cf. regulation 26 in relation to preliminary accreditation.		
7h	Power to amend conditions of accreditation once participation has commenced.	The regulations do not enable NIAUR to amend, revoke or add conditions, once an installation is accredited/ producer registered. Over the twenty year tariff lifetime, it's highly likely that this power will be required and without correction, NIAUR's administration will be fettered and could lead to perverse outcomes.	Express provision needs to be added to the Regulations.	H	FN
7i	Regulations 23 and 25	Because Regs 23 and 25 are not ongoing obligations, it appears that participants will not be required to not receive/ pay back grants once they're participating in the scheme; NIAUR does not have the power to use the part 7 enforcement powers in this case. Attaching a condition of	Clarification of Regs. 23 and 25 (add non-receipt of grant monies to the ongoing obligations for all participants) and possible exception to use Part 7 sanctions to remedy examples of double-funding.	H	FN

		accreditation does not remedy this omission.			
7j	Change of ownership	It's not clear that Reg. 24(5) prevents a fresh application being made by a new owner after the 12 month time period has lapsed. I.e. the provision relates to one particular accreditation. A fresh accreditation would be a new accreditation.	Clarification needed in Reg. 24(5) that a fresh application in relation to the same installation will not be permitted.	M	FN
7k	Revoking accreditation	As the revocation power is framed in terms of ongoing obligations there is a concern that we do not have a clear, unambiguous ability to revoke someone's accreditation if they applied for accreditation with incorrect information, we accredit on that basis and then subsequently find out about the incorrect information and consider we would have not accredited them if we'd have known.		H	AM/MP
7l	Applicability of Part 7 to previous participants	Part 7 sanctions only apply to existing participants. Therefore, where NIAUR finds that a previous participant (e.g. a previous owner of an installation) has been in breach of its obligations/ has received monies that it was not due, NIAUR would have no recourse.	Enforcement provisions need to be amended to enable NIAUR to take enforcement action against those who have participated in the scheme but are no longer participants. DETI to also consider changing Reg. 36 so that participants must keep information and provide, on request, such information for a specified amount of time after their participation in the scheme has ceased.	H	FN
	Reporting requirements for installations between 45kW and 1MW	There are few obligations imposed on this category of participant. This presents a significant fraud risk.	DETI should consider how it wants to reduce the risk of fraud arising from this issue. Conditions cannot be relied on: express obligations should be imposed.	H	FN
	Reg. 2	Re the definitions of "date of accreditation"/ "date of registration" DETI to note that the effect of this wording means that payments cannot be backdated to the date on which the applicant made its application.	DETI to consider whether or not it wants to be able to backdate payments from the date of submission of an application or leave the Regulations as they are.	L	FN
	Reg. 2	As a general comment, Ofgem has a considerable number of concerns, noted in these comments in relation to the definitions used in the GB Regulations, or the omission of such definitions. It is critical that these concerns are addressed by DETI as, without clear definitions, the Authority will not be able to advise NIAUR appropriately and NIAUR will be unable to administer the scheme without serious risk of legal challenge. In addition to the shortcomings of existing definitions addressed in these comments, we also suggest that the following terms may require			

		definition: •heating system (see comment at Reg. 14) •economically justifiable heat requirement (see comment at Reg. •process/qualifying process (see Reg. 2)			
	Reg. 2	"Process" is defined in the Regs as "any process other than the generation of electricity". DECC has advised that, in their initial view, the dictionary definition of process should otherwise apply to that term (responses to Ofgem comments on 21 Feb draft RHI Regs). Process is there defined as "a continuous and regular action or succession of actions taking place or carried on in a definite manner; a continuous (natural or artificial) operation or series of operations" (as cited in *R v AI Industrial Products Plc [1987] IRLR 296* a case pertaining to the meaning of process under the Factories Act 1961 where a one-off demolition of a kiln was not a "process"). "Process" or "process heating" does not appear to be explicitly defined in any existing UK legislation. Process heating is referred to in Annex I of the Detailed guidelines for the implementation and application of Annex II to Directive 2004/8/EC (Cogeneration Directive, 11 Feb 2004), s.5.6, which provides guidance on useful heat but process heating is not itself defined. The US Department of Energy defines process heating as "the direct process end use in which energy is used to raise the temperature of substances involved in the manufacturing process". The Carbon Trust produces a Technology Overview (CTV031) for process heating which describes process heating as "a diverse area". The Overview lists the following "more common" processes covered by the term: cooking, baking, drying, evaporation, laundering, sterilisation, forced air drying, distillation, heat treatment, annealing, chemical processing, catalytic and steam cracking, firing ceramics, smelting, glass melting and arc furnaces. The definition of the term "process" in the Regs does not currently seek to limit the meaning of the term "process", other than to exclude electricity generation. Therefore, based on the above analysis,	The current definition of "process" should be replaced with an alternative defined term of "qualifying process" which should be used at r. 3(2) (c) and r.12 (1)(c) (although note comments below on streamlining the drafting of r. 12(1)(c). The definition of "qualifying process" could be then be developed as necessary without affecting other occurrences of the term "process" in the Regs.	M	FN

		process/process heating is likely to lend itself to wide interpretation. DETI should consider from a policy perspective if there are any process to which heat might be supplied which the government does not consider suitable for RHI support so that the definition can be drafted more narrowly in order to cover these off and ensure that NIAUR can administer in line with clear policy. In addition, we note that "process" is used in other contexts in the draft RHI Regs (e.g. r. 22(6)(f); 25(2)(c); 28(7)(b); 29(3)(a); 33(7) and Sch. 2, para 2(d). These occurrences would also attract the definition given in r. 2.			
	Reg. 2	The definition of MCS as presently drafted (…or equivalent scheme accredited under EN45011 which certify microgeneration products and installers in accordance with consistent standards" creates the risk that NIAUR would be obliged to evaluate whether an EN45011 accredited scheme for the certification of microgeneration products and installers is "equivalent" for the purposes of the NI RHI. This is not workable in practice bearing in mind the range of schemes which participants may claim meet the equivalency test and could cause unacceptable delays in the accreditation process. It should be a policy matter for DETI to agree those schemes which it deems equivalent. Therefore, the drafting should be amended to read "means the Microgeneration Certification Scheme or other scheme accredited under EN45011 which certifies microgeneration products and installers in accordance with consistent standards and which has been recognised as equivalent to the Microgeneration Certification Scheme by the Department." We note in this regard that a similar issue arose in connection with the use of schemes equivalent to the Carbon Trust Standard for early action metrics under the CRC Energy Efficiency Scheme. In the Scheme Order, Schedule 8 para 5 (6) (b) the drafting used was "such other rules concerning the certification of emissions which the administrator and the participant agree." This drafting led to uncertainty for the Environment Agency and			

		participants and resulted in the need to issue a DECC guidance document on the issue (see: http://www.decc.gov.uk/assets/decc/what%20we%20do/a%20low%20carbon%20uk/crc/1_20100219140648_e_@@_ctsequivalentsguidance.pdf.)			
	Reg. 2	The term “premises” appears in the definition of “commissioned” and “domestic premises” and in Regulation 50 regarding inspection. “Premises” is defined in varying ways in other legislation. The Electricity Act 1989 states that “premises” “includes any land, building or structure” and The Rights of Entry (Gas and Electricity Boards) Act 1954 defines “premises” as “a building or part of a building” (s.3). The Health & Safety at Work Act 1974, Part 1. S.53, reads “premises includes any place and, in particular, includes—(a) any vehicle, vessel, aircraft or hovercraft, (b) any installation on land (including the foreshore and other land intermittently covered by water), any offshore installation, and any other installation (whether floating, or resting on the seabed or the subsoil thereof, or resting on other land covered with water or the subsoil thereof), and (c) any tent or movable structure”. A similar approach is taken in public sector guidance on interpreting this term, for example, HMRC guidance manuals state that “premises include any building or structure, any land and any means of transport”. This suggests that “premises” is wider in scope than the phrase used in the draft regulation’s definition of eligible purpose (“building or other enclosed structure”) (see later comment on this phrase) and introduces uncertainty in relation to the meaning of “commissioned”. Therefore, the definition of “commissioned” requires clarification. Could the phrase ”delivering heat to the premises or process for which it was installed” be replaced by “delivering heat for eligible purposes”? This approach has already been used at r. 17 (2) (a). See also our comments on “process” at r. 3 (2).	DETI to consider this definition in relation to existing legislation which has effect in Northern Ireland.	L	FN
	Reg. 2	In definition of “participant” suggest changing “a producer” to “the producer” to ensure that only one (or one representative of multiple owners) producer of biomethane may apply.		M	FN

	Reg. 2	The definition of "participant" states that "where there is more than one… owner", the participant is "the owner with authority to act on behalf of all owners in accordance with Regulation 22(3)". Ofgem considers that this person should be defined as the "representative owner" in the Regulations. Ofgem considers that similar provision needs to be made in relation to multiple producers of biomethane.	It is not satisfactory that Ofgem should have to define this person, as it does at present (see glossary in Ofgem's draft guidance document). It would be clearer and neater to be able to rely on a defined term from the Regs.		
	Reg. 2	A definition of "solid biomass" is required in order to provide clarity on ineligible forms of biomass. E.g. is tallow eligible – this is solid at ambient temperatures, but is likely to be a liquid when combusted.		M	FN
	Reg. 2	The definition of "steam measuring equipment" includes the phrase "means all the equipment needed to measure to the NI Authority's satisfaction the mass flow rate and energy of steam…". This places the onus on NIAUR to determine a satisfactory degree of accuracy for steam measurement. It is not yet practicable to introduce a minimum standard (e.g. the 2% accuracy level which has been discussed) or for NIAUR to issue detailed guidance on satisfactory levels of accuracy, there will not be a transparent benchmark for steam measurement which applicants need to meet to gain accreditation. Therefore, if NIAUR sought to reject an application on the basis that the measurement accuracy delivered by steam measurement equipment was not satisfactory, there is a potential risk of challenge to such a decision on grounds of fairness, due process etc. There will also be practical difficulties in achieving a consistent approach to assessing satisfactory levels of measurement accuracy without setting a "de facto" minimum standard internally within NIAUR.	The phrase "to the NI Authority's satisfaction" should be removed. If it is DETI's intention to introduce a minimum standard, this should be dealt with by introducing an additional sub-clause at r.20 (2).	M	FN
	Reg.5(b) and schedule 1, para (2)(l)	We note that the section of the Energy Act 2011 which refers to eligible technologies for the RHI (s. 113 (4)) refers to sources of energy rather than fuels (presumably as fuel is not relevant to particular technologies such as heat pumps, solar etc.). In addition, "fuel" is not defined either in the Energy Act 2011 or the Regs. Therefore, it would be preferable to use this wording from the primary legislation in describing eligible installations. We suggest amending Reg. 5(b) to read "…installed to			

		use solid biomass as its only source of energy" and replace "fuel" with "source of energy" in Schedule 1, para (2)(l)			
	Reg. 12(1)(c)	We note that paras (c) and (d) could be combined to read: "the plant generates heat used for an eligible purpose and uses water or steam as a medium for delivering such heat".			
	Reg. 14	There is no equivalent of this regulation which applies to biomethane producers The effect of not requiring specific detail in relation to biomethane production plant is that specifics do not form part of a biomethane producer's eligibility criteria for the RHI scheme. Therefore, for the purposes of audit, the Authority will have no knowledge of the capacity of such plant at registration and therefore no way of verifying the authenticity or accuracy of the figure provided at element "D" of Reg. 42.	This issue relates also to the fact that, at present. Biogas production plant is not part of the equipment used to produce biomethane. This issue must be tackled in order to resolve the audit matter highlighted here.	M	FN
	Reg. 14	"Heating system" should be defined as this concept is a key determinant of whether multiple plants should be treated as a single installation, the treatment of additional capacity and the calculation of payments. The term "heating system" appears at: Regs 14(2)(b); 15; 17(2)(a); 17(3); 34(1); 37(6); 39(2); 43(1); 43(5); 43(7); Sch. 1(2)(v)(iv) and Explanatory note (Part 6).	DETI should add a defined term to ensure clarity. It is not acceptable for this to be clarified in guidance.	H	FN
	Reg. 15	There is no equivalent of this regulation which applies to biomethane producers	The effect of this is to make all biomethane production plant eligible for the scheme, regardless of its capacity or composition. DETI may wish to reconsider this matter.	L	FN
	Reg. 15(2)	If it is DETI's policy that previously adapted premises which are now used wholly as a private residential dwelling (e.g. a former guest-house now in use as a purely residential property) should be treated as domestic, the drafting could be amended to read "…not been adapted for a non-residential use which is continuing."	DETI to consider. Ofgem's approach to determining whether or not premises are domestic is based on the treatment of such premises by the Valuation Office for rating purposes. Is this a consistent approach that can be used in Northern Ireland? If not, further provisions may need to be included in the Regulations.		
	Regs. 16-21 (metering)	There is no equivalent of these regulations which applies to biomethane producers	The effect of this is that there is no obligation on a biomethane producer to install meters of any particular standard. It is our understanding that this is because DECC and Ofgem are satisfied that appropriate	L	FN

			installation measures are already required under existing legislation concerning connection to the gas grid (and that therefore the required standards will be met and readings provided). DETI should consider whether or not it is satisfied with this position or whether it wants to impose metering standards.		
	Reg. 22	It is DECC policy that only owners, not agents, can participate in the scheme. The Regulations do not effect this policy because the Regs don't prevent the owners giving a nominal share to an agent to enable it to administer the scheme as an owner.	If DETI considers this to be undesirable from a policy perspective, this could be resolved by requiring that the person who has day to day interaction with the Authority (the person who is authorised to access the central register) is someone who exercises management control over the participant (or to whom such management control has been delegated).	L	FN
	Reg. 22(a)	Before the words "as the Authority may require" please insert "in such manner and form"		H	FN
	Regs. 23 and 25	The terms "grant" and "public authority" must be defined	DETI should provide clarity on what constitutes a "grant" and the bodies who qualify as a public authority.	H	FN
	Regs. 23 and 25	Not clear whether or not any other form of existing environmental incentive constitutes a grant.	DETI to clarify. For example, in the GB scheme, consideration was given to whether or not the benefit derived from CERT, CESP, CCL, RO and WHD schemes was to be considered as a grant.	H	FN
	Reg.24	Subpar. (1) makes each of the provisions of Reg. 24 apply to new owners who may have only acquired <u>part</u> ownership. The effect of subpara. (2) is that NIAUR may not pay the new owner until the provisions of Reg. 24 have been satisfied. The effect of this provision means that NIAUR would have to cease payments to the other owners of the installation (via the representative owner), which is not satisfactory. The provision also places a significant administrative burden on new owners who have only acquired part ownership and increases the administrative burden for NIAUR too.	In relation to the transfer of part of the ownership of an accredited RHI installation DETI should consider the option of requiring the representative owner (see comments in Reg. 2 in relation to the definition of "participant", above) to inform NIAUR of partial changes in ownership. (See also comments on Reg. 34(m) below.	H	FN
	Reg. 24(2)	Where multiple ownership exists, paragraph (2) implies that NIAUR will split payments between owners	Reg. 37 needs to clarify that NIAUR will make payments to a single bank account held in the participant's name, as provided to NIAUR by the particular owner that has day to day interaction with the Authority.	H	FN
	Reg. 24	Fails to acknowledge that ownership of an	Ofgem considers that provisions that are	H	FN

		accredited RHI Installation may change from being 100% ownership by one person to multiple ownership.	similar to Regs. 22(2)(c) and (3) should appear in Reg. 24.		
	Reg. 24	Fails to acknowledge that the transfer of ownership of biomethane production plant may occur and that such transfers may also mean that ownership changes from being 100% ownership by one person to multiple ownership.	Ofgem considers that provisions which are similar to Regs. 22(2)(c) and (3) should be added to Reg. 24 in relation to biomethane production plant.	H	FN
	Reg. 25	Producers of biomethane may be in the position of producing biomethane at different locations for injection into the grid at different metered points. It is not clear whether, in these circumstances, a biomethane producer might seek to register as a participant under one single accreditation or as multiple "participants". This may also affect how new biomethane capacity at one location is dealt with e.g. could such additional production be accredited as a new participant, thus restarting the tariff lifetime?	We suggest that further work is done in this area to clarify the desired policy outcomes.	M	FN
	Reg. 25	There is no concept of multiple owners of biomethane production plant.	Ofgem considers that provisions that are similar to Regs. 22(2)(c) and (3) should appear in Reg. 25.	H	FN
	Reg. 33	Should the title be "Producers of biomethane" for consistency with the definition of "participant" and the rest of the Regs.?		L	FN
	Reg. 34	It is not desirable that multiple owners can interact at will with NIAUR, not only for administrative simplicity but also because interaction with multiple owners, on a day to day basis, could present unmanageable risks for the Authority, such as duplication of, and disputes in relation to, the submission/validity of data and receipt of payments, not to mention the increased risk of fraud. Ofgem considers that this may apply equally to in respect of multiple producers of biomethane.	Ofgem considers that r.22(3)(b) does not clearly cover ongoing participation and requests that a provision be added to regulation 34, stating that, where multiple ownership exists NIAUR may require that day to day interaction with NIAUR is conducted by the representative owner (see comments at Reg. 2 above), including receiving payments from NIAUR into its nominated bank account and distributing such payments to the other owners. This would also mean that Reg. 24(2) would need to be redrafted to clarify that payments are made to the representative owner, not the new part owner. E.g. "no periodic support payment may be made ~~to a new owner~~ to a participant until"	H	FN
	Reg. 34(m)	Regulation 34(m) does not oblige owners who have relinquished ownership of an installation to notify the NIAUR of the change in ownership, as this provision only applies to 'participants'. Participants	Easiest fix is for Reg. 34(m) to be amended to read "they must notify the Authority ~~within~~ [[28] days] prior to ~~of~~ a change in ownership of all or part of their accredited RHI	H	FN

		are, by definition, owners of RHI installations. Therefore, if someone has relinquished ownership of an installation, they are no longer a participant and therefore not obliged to comply with Regulation 34(m).	installation".		
	Reg. 34(m)	At present representative owners (see comments on definition of "participant" above) only need to acquire the consent of all other owners to act on their behalf when making their application. Over twenty years, it is possible that ownership of parts of the accredited RHI Installation will change ownership, but there is no ongoing obligation on the representative owner to have new part owners' consent. This means that it may be possible for NIAUR to pay a representative owner (see comments at Reg. 2 in relation to the definition of "participant" above) who does not have the consent from other owners to act on their behalf.	Reg. 34(m) should make it an explicit requirement that, where there has been a transfer of ownership of part of the accredited RHI Installation, the representative owner must also have authority from the new owner to be the participant for the purposes of the scheme and provide to the Northern Ireland Authority, in such manner and form as the Northern Ireland Authority may require evidence of that authority.	H	FN
	Reg. 34(p)	Useful heat: DECC's RHI policy document sets out the intention that heat which is to be eligible for RHI must be supplied to meet (i) an economically justifiable heating requirement and (ii) a new or existing heat load which is "not created artificially, purely to claim the RHI" (page 25). This requirement is referred to in this clause in the wording. In a broader context, we note that the draft RHI Regs do not appear to fully address DECC's policy objectives in terms of useful heat.	Depending on DETI's intentions in this regard, it should consider clarifying r. 3 (2), for example, "…where the heat is used in a building and meets an economically justifiable heat requirement." The term "economically justifiable heat requirement" should then be defined in line with DETI policy e.g. a new or existing heat load that would otherwise be met by an alternative form of heating. Please note that, were such additional requirement to be introduced, we would require an express accreditation requirement indicating that participants will need to demonstrate the economic justification to NIAUR if required so there is no expectation that NIAUR will be determining what is or is not economically justifiable.	M	FN
	Reg. 35	Ofgem considers that the issues arising in relation to notification of a partial change of ownership of an accredited RHI Installation (see Reg. 34(m) above) should apply equally to producers of biomethane, in order to mitigate against the possibility of paying the same producer twice, or paying a representative producer (see comments at Reg. 2 in relation to the definition of "participant" above) who does not have the consent from other biomethane production plant owners to act on their behalf.	Suggest removal of timescales.	H	FN

	Part 7	Ofgem considers the timeframes placed on NIAUR in the Regulations to be inappropriate and unworkable. In our view they present a material risk to the enforcement of the NI RHI scheme. NIAUR is already bound by statute to carry out its functions with regard to: (i) the principles under which regulatory activities should be transparent, accountable, proportionate, consistent, targeted only in cases in which action is needed; and (ii) in accordance with those principles that appear to it to represent the best regulatory practice. Such obligations establish a prerequisite that NIAUR must perform its functions within reasonable timescales. Consequently, the timescales set by the Regs. are superfluous to requirements. More importantly, if they remain, they will constrain NIAUR's ability to discharge its functions in the most appropriate manner.			
	Reg. 44(7)	To make sense of Reg. 44(8) the word "no" should be removed from Reg. 44(7).		H	FN
	Reg. 44(4), and (10)	The six month timeframe could be a problematic restriction for NIAUR and was inserted into the GB Regulations against Ofgem's wishes. It means that, at the end of the 6 month period, NIAUR must repay withheld monies or apply another sanction, when an extension of *this* sanction may be the most proportionate approach (the wording of paragraph (10) means that the Reg. 44 sanction cannot be re-applied). What happens if the investigation requires further time?	DETI to reconsider the appropriateness of the present wording in light of Ofgem's concerns.	H	FN
	Reg. 44(8)	Repayment within 28 days may be problematic for Ofgem's payment systems and may lead to increased risk of challenge to the NIAUR and/ or failure to pursue enforcement action due to a breach by NIAUR of this requirement.	DETI should consider removing the time frame and replace this with "as soon as reasonably practicable".	M	FN
	Reg. 44(9)(b)	Repayment should also be subject to any overpayment or offsetting measure deemed to be appropriate by NIAUR.		M	FN
	Reg. 45(4)	Repayment should also be subject to any overpayment or offsetting measure deemed to be appropriate by NIAUR.		M	FN
	Reg. 46(1)(b)	The period immediately following what?	Clarity of drafting is required.	M	FN
	Reg. 46(3)	10% limit on penalty: Ofgem is concerned that limiting the level of reduction to 10% of a single payment may not be an adequate penalty and therefore not actually "deter further abuse" (the objective stated in DECC's policy document),	DETI should consider removing r. 49(3): NIAUR is already bound by statute to carry out its functions with regard to the principles under which regulatory activities should be transparent, accountable, proportionate,	M	FN

		particularly as the Regs. prevent NIAUR from applying this sanction for more than one payment. What is of more concern is that this Reg. implies that NIAUR's decision "will take into consideration all factors relevant" to the penalty.	consistent, targeted only in cases in which action is needed and in accordance with those principles that appear to it to represent the best regulatory practice. This is why NIAUR is not fettered by such provisions elsewhere in its regulation. Furthermore, the inclusion of such a provision suggests that NIAUR's decisions would not be commensurate with the seriousness of the breach, but for the fact that the regulations require it and could cause unwarranted damage to reputation of NIAUR. The removal of r.46(3) does not preclude a participant from requesting a review of NIAUR's decision where the participant has a valid reason to consider that NIAUR has made a serious error of judgment.		
	Reg.47	There is no equivalent of Reg. 47((1)(b) for biomethane producers	It's not clear why biomethane producers do not face the same sanction as owners of installations. DETI to consider imposing an equivalent provision.	M	FN
	Reg. 48	Where there are multiple owners of an accredited RHI installation, it is not clear what, if any, ability NIAUR has to enforce this provision against owners who are not the representative owner.	DETI to consider adding an express provision (perhaps at Reg. 22(3)) that, where there are multiple owners of an accredited RHI Installation/ producers of biomenthane, each owner is jointly and severally liable to comply with the eligibility criteria and ongoing obligations and enforcement provisions.		
	Reg. 48(2)(a)	This implies that a separate notice will need to be issued in relation to each PSP where an overpayment has been made.	DETI to consider whether this Reg. should refer to "payment or payments" to address this administrative issue.	L	FN
	Reg. 48(2)(b)	Present drafting suggests that NIAUR must decide on either repayment or offsetting, but does not allow for a mixture of both.	The word "whether" should be replaced by the words "to what extent"	M	FN
	Reg.50	Where heat is exported from an accredited installation to a third party user, NIAUR's powers of inspection, as currently drafted, arguably do not allow it to inspect such third party premises, where output heat from the installation might be used, in order to verify that heat is being used for an eligible purpose. It is critical to the calculation of RHI payments and the enforcement of the scheme that participants have a legal obligation to ensure rights of access for the purposes of inspection by the Authority e.g. by means of the contractual arrangements for the supply of heat from the RHI installation to the end user.	Express provision to be added to the Regulations.	H	FN
	Reg. 51	Reviews. The provision does not fulfil DECC's	DETI is strongly advised to remove this	H	FN

		intention of satisfying Article 6 obligations: the parliamentary ombudsman/ judicial review provide the requisite Article 6 independent hearing – no review by the administrating body would ever be considered to be 'independent'. Therefore the only effect of this provision is to add an unnecessary and resource intensive layer of administration which NIAUR and Ofgem (acting as its agent) may struggle to cope with as the volume of reviews increases over the duration of the scheme.	provision from the NI RHI Regulations.		
8 Other					
No.	Issue	Overview	Suggested solution	Priority level (H/M/L)	Contact
9a	Extend scope of Preliminary Accreditation	At present limited access to use PA. Particularly an issue for smaller biomass installations <200kw. There are a number of smaller businesses that would like to install but feel constrained by uncertainty of eligibility and not willing to commit large sums of money on basis of uncertainty.	By extending scope we would also be potentially cutting work on enquiry handling – at present they are asking a lot of questions that take up our time, and it may be quicker/more efficient to allow PA instead. I would suggest extending to all non MCS installations	M	DS
8b	Participant restrictions	Possibility of restricting participants to those 18 years and over. At the moment there's no restriction on the age of a participant.	DETI may wish to consider restricting the NI RHI Regulations to allow participation for only those over the age of 18.	M	AA
8c	Fraud prevention	At present, there is no requirement for medium-sized installations to provide an independent metering report. This has clear fraud risks.	DETI to consider adding this requirement.	H	AO
8d	'Records to be retained' requirement	NIAUR may want to require biogas/biomass participants to produce planning permission documents upon request as a condition (part of the 'records to be retained' requirement). There is however no explicit power for this in the regulations.	Add this requirement to the regulations.	L	LM
8e	Biomethane producers ongoing obligations	Reg. 34, subparas. (c), (g), (i), and (m) do not apply to biomethane producers.	In light of this deficiency, Ofgem has, for example, imposed a condition that biomethane producers must notify Ofgem within 28 days of any changes to their registered biomethane plant which may affect their eligibility. Because there is not an explicit provision in the Regulations to require this, imposing a condition is not satisfactory and places NIAUR at risk if the same approach were adopted. The ongoing obligations should be reviewed in consideration of the fact that many do not apply to producers of biomethane, so that	H	LM

			suitable obligations are imposed on them and behaviour can be monitored - and, where appropriate, enforcement action can be taken.		
8f	Class 2 meters	While the draft NI RHI Regulations currently state that a 'class 2 meter' must be installed the guidance has been updated and now states that 'class 2 meters or better' are sufficient.	DETI to consider clarifying the Regulations. But not e the administrative burden on NIAUR of deciding what may or may not be 'better' than a class 2 meter.	M	LM
8g	Steam meters	Regulation 20 (2) (c) states that 'All steam measuring equipment…must be capable of displaying the current steam mass flow rate and the cumulative mass of steam which has passed through it since it was installed…'. The guidance has been updated and now states 'since it was installed **or calibrated…'**	Update the regulations to reflect this change		LM
	Biomethane producers' requirement to comply with eligibility criteria	Due to the drafting of the Regulations (registration of biomethane producers falls under Part 3 (which is outside the 'eligibility criteria' provisions of Part 2), 34(e) does not apply to biomethane producers. DECC's reasoning is that the requirements already imposed on such persons in order to inject onto the grid would in themselves provide evidence of suitable quality and health and safety practices.	DETI may wish to consider whether or not the DECC approach is sufficient or whether additional eligibility criteria should be set.	L	FN/OM

Appendix 2

Issues specific to the draft NI RHI Regulations

No.	Provision	Issue	Suggested solution	Priority level	DETI response
1.	**headnotes**	Does NI drafting procedure require headnotes stating briefly the nature of the instrument, the statutory provision prescribing the procedure which it must follow and the form of that procedure?	DETI to clarify	L	
2.	**Heading**	Should the word 'draft' be inserted before the words "Statutory Rules of Northern Ireland"? Should references to 2011 be to 2012?	DETI to clarify	L	
3.	**Title**	The title of the GB RHI Regulations has been revised. Should the title of the NI Regulations be: "The Renewable Heat Incentive Scheme Regulations (Northern Ireland) 2012"?	DETI to clarify	L	
4.	**Preamble and words of enactment**	Should the section numbers missing (marked by square brackets) be 113 and 121? Should a footnote provide the year and chapter number of the Energy Act 2011 (2011 c. 16)?	DETI to clarify	L	
5.	**Citation and commencement**	Does modern drafting practice for Northern Ireland follow the same principles as that for GB? If so should references to "shall" be "will"? Please also clarify any rules or procedures which will affect the commencement date.	DETI to clarify	L	
6.	**Reg. 2**	Definition of "the Department" already appears in the enabling Act: is this definition superfluous?	DETI to clarify	L	
7.	**Reg. 2**	Definition conflicts with the definition in The Energy Act 2011 (the "enabling Act"). Three issues arise here: 1. Definition of the Gas and Electricity Markets Authority already exists in the enabling Act ("GEMA"), which makes	Suggest removal of definition and <u>all</u> references to the Gas and Electricity Markets Authority in the draft NI RHI Regulations. In relation to point 3, The Renewables Obligation Order (Northern Ireland) 2009	H	

		this definition superfluous; 2. If a definition of the Gas and Electricity Markets Authority is considered necessary, should this be "GEMA", so as not to conflict with the enabling Act?: and, most importantly 3. We do not consider that GEMA should be referred to at all in the NI RHI Regulations, as the enabling Act confers powers on DETI (pursuant to s.113 (2)) to make regulations providing for the Northern Ireland authority (either DETI or the NIAUR) to administer an NI RHI scheme. The arrangements whereby GEMA may carry out these administrative should not form part of the Regulations. Therefore, any provision in the NI RHI Regulations which purports to confer powers or functions on GEMA will, in our opinion, be *ultra vires.*	("NIRO") may provide a useful precedent: references to the Authority relate to NIAUR (as defined by The Energy (Northern Ireland) Order 2003) and there is no reference to GEMA acting as agent for NIAUR in relation to the performance of the NIAUR's functions. Instead, a separate and subsequent agreement, between NIAUR and GEMA, exists and provides for the carrying out by GEMA of certain of NIAUR's functions under the NIRO. We suggest that a similar arrangement is made between GEMA and NIAUR in relation to the administration of the NI RHI scheme and that this approach accords with the intention of ss. 113 and 114 of the enabling Act.		
8.	**Reg. 2**	Definition of "the Gas Order". Should there be a footnote detailing the Statutory Rule and Order year and number?	DETI to clarify	L	
9.	**Reg. 2**	Definition of "NI". Should Northern Ireland be abbreviated?	DETI to clarify	L	
10.	**Reg. 2**	Definition of "NI Authority"	Should this be the "Northern Ireland authority", to be consistent with the enabling Act?		
11.	**Reg. 2**	Definition of "pipe-line system"	This differs from the definition of "pipe-line system" under the GB RHI Regulations. We would be grateful for clarity from DETI as to the intention and practical implications of this revised definition.	M	
12.	**Regs. 3(2) and (3); 37(2); 37(8);45(4); 46(1); 48(1)(a); and explanatory note references at para. 1, Reg. 3, Part 5,**	References purporting to confer powers, functions and obligations on the GB Authority	See comments above concerning the *vires* of this provision. We consider that these functions, powers and obligations should be changed conferred on the Northern Ireland authority.	H	

	Reg. 48				
13.	**Regs. 5(c); 7(c); 8(b); 19;**	Applicability of MCS requirements	Comment "a" at Reg. 13 appears to confirm applicability, but DETI to confirm position		
14.	**Regs. 7(b);11(b); 15(1)(c)(iii); 26(11)(c);**	Applicability of 200kWth threshold	DETI to confirm position		
15.	**Regs. 8(a)(i); 9(c); 10;**	500M figure	DETI to confirm position		
16.	**Reg. 8(c)**	Co-efficient of performance	DETI to confirm position – is the decision subject to purely policy or legal issues?		
17.	**Reg. 10**	Reference to digester or plant	DETI to confirm position		
18.	**Regs. 12(1)(a), (2) and (3); 23(1)(b);**	Retrospective start date	DETI to confirm position		
19.	**15(1)(c)(i)**	12 month commissioning period	DETI to confirm position		
20.	**28(2)**	50% minimum solid biomass content	DETI to confirm position		
21.	**28(5); 29(2)**	10% maximum fossil fuel content	DETI to confirm position		
22.	**28(7)(a) and (b)**	50% maximum fossil fuel content	DETI to confirm position		
23.	**29(1)**	1MWth installation capacity	DETI to confirm position		
24.	**29(6)**	10% maximum fossil fuel content for ancillary purposes	DETI to confirm position		
25.	**30**	Installation capacity thresholds	DETI to confirm position		
26.	**30(4)(a)**	10% maximum fossil fuel contamination	DETI to confirm position		
27.	**34(k),(l),(m)**	28 day time limit	DETI to confirm position		
28.	**35(1)(b)**	10 year re-calibration requirement	DETI to confirm position		
29.	**36(3)**	7 day time-limit	DETI to confirm position		
30.	**37(1)**	20 year tariff lifetime	DETI to confirm position		
31.	**37(7)(a) and (b) and (8)**	Tariff rate review date	DETI to confirm position		
32.	**37(9)(a)**	12 month tariff period	DETI to confirm position		
33.	**37(10)**	Hourly figure for "initial heat" definition	DETI to confirm position		
34.	**39(2)(a)**	Formula	DETI to clarify how this revision changes the formula calculation.		
35.	**40(1)(b)**	1MWth capacity	DETI to confirm position		
36.	**43(3)**	28 day time limit in relation to informing NIAUR of commissioning of additional RHI capacity	DETI to confirm position		
37.	**43(4)**	12 month time limit on additional capacity	DETI to confirm position		
38.	**43(6)**	Treatment of post-12 month additional capacity	DETI to confirm position – see comments on GB Regs. above		
39.	**44(2)**	Imposition on NIAUR to notify participant within 21 days of a decision to withhold periodic support payments	DETI to confirm position – see comments on GB Regs. above		

40.	**44(4)**	6 month maximum withholding period	DETI to confirm position – see comments on GB Regs above		
41.	**44(5)**	30 day mandatory review period	DETI to confirm position – see comments on GB Regs above		
42.	**44(7)**	2 week delay period	DETI to confirm position – see comments on GB Regs above		
43.	**44(8)(b)**	28 repayment deadline	DETI to confirm position – see comments on GB Regs above		
44.	**45(2)(c)**	Requirement to send notice within 21 days of decision	DETI to confirm position – see comments on GB Regs above		
45.	**45(3)**	Requirement to lift suspension within 21 days of satisfaction	DETI to confirm position – see comments on GB Regs above		
46.	**45(4)**	6 month and 28 day requirements	DETI to confirm position – see comments on GB Regs above		
47.	**45(5)**	1 year maximum suspension period	DETI to confirm position – see comments on GB Regs above		
48.	**46(2)**	21 day notice period	DETI to confirm position – see comments on GB Regs above		
49.	**46(3)**	10% penalty threshold	DETI to confirm position – see comments on GB Regs above		
50.	**47(2)**	21 day notice period	DETI to confirm position – see comments on GB Regs above		
51.	**48(2)**	21 day notice period	DETI to confirm position – see comments on GB Regs above		
52.	**49(2)**	21 day notice period	DETI to confirm position – see comments on GB Regs above		
53.	**50(1)**	Extent of inspection powers	DETI to confirm whether this should explicitly state that that the right of inspection to verify that heat is used for eligible purposes extends to non-domestic buildings where heat is used on-site.		
54.	**50(2)**	21 day notice period	DETI to confirm position – see comments on GB Regs above		
55.	**51(2)(a)**	28 day time limit for request for statutory review	DETI to confirm position – see comments on GB Regs above		
56.	**51(5)**	21 day notice period	DETI to confirm position – see comments on GB Regs above		
57.	**53(2)**	First monthly reporting period	DETI to confirm position		
58.	**53(4)**	First annual report dates	DETI to confirm position		
59.	**53(5)**	First quarterly report date	DETI to confirm position		
60.	**53(7)**	quarterly period definition	DETI to confirm position		
61.	**Sch. 1(2)(n)**	Coefficient of performance to be decided	DETI to confirm position – is the decision subject to purely policy or legal issues?		
62.	**Sch. 1(2)(v)**	1MWth capacity threshold	DETI to confirm position		

63.	**Sch. 2(2)(j)**	Date relating to land use	DETI to confirm position – is the decision subject to purely policy or legal issues?		
64.	**Sch. 2(5)**	Date relating to planting of energy crop	DETI to confirm position – is the decision subject to purely policy or legal issues?		
65.	**Sch. 3**	Tariff levels to be confirmed	DETI to confirm position and share data with Ofgem so that it understands what plant has been included in the calculations.		
66.	**Explanatory note**	Regs 29 and 30 – 1MWth threshold to be confirmed	DETI to confirm position		

ENDS