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 vires 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 yet to be resolved by DETI at at policy level.

We welcome further discussion with DETI on areas where policy is in development.
Appendix 1

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

<table>
<thead>
<tr>
<th>No.</th>
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<th>Suggested solution</th>
<th>Priority level (H/M/L)</th>
<th>Contact</th>
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<tbody>
<tr>
<td>1a</td>
<td>Biomethane duration</td>
<td>Policy is to stop payments after 20 years but regulations don’t have a mechanism to do that.</td>
<td>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.</td>
<td>AM</td>
<td></td>
</tr>
<tr>
<td>1c</td>
<td>Biomethane provenance</td>
<td>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.</td>
<td>AM/FN</td>
<td></td>
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<tr>
<td>1e</td>
<td>Heat pump immersion heaters</td>
<td>Difficult to follow DECC’s policy of ignoring built in immersion heaters given the way the regs are drafted.</td>
<td>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</td>
<td>AM</td>
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**Memo**

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<tr>
<td>1g</td>
<td>Double counting</td>
<td>There is no general provision excluding heat use for parasitic loads from double counting for PSVs. Include parasitic loads as ineligible use, add general avoidance provision, add in any new specific loads identified (least good option).</td>
<td></td>
<td>RZ/AM</td>
<td></td>
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<tr>
<td>1h</td>
<td>Moving equipment rendering it ineligible</td>
<td>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 new “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.</td>
<td>H</td>
<td>FN/AM</td>
<td></td>
</tr>
<tr>
<td>1i</td>
<td>Gasification/pyrolysis</td>
<td>Further clarity on gasification/pyrolysis. DETI should clarify what they’re actually incentivising.</td>
<td></td>
<td>OM</td>
<td></td>
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## 2 Ambiguities (i.e. regulations unclear and sufficient risk of legal challenge)

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<tr>
<td>2a</td>
<td>&quot;Natural&quot; loss systems</td>
<td>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).</td>
<td></td>
<td>H</td>
<td>AM/FN</td>
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<tr>
<td>2b</td>
<td>Installation definition</td>
<td>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.</td>
<td></td>
<td>H</td>
<td>AM</td>
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<tr>
<td>2c</td>
<td>Building definition</td>
<td>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 Ofgem 15.08.11 – Ofgem did not have a strong policy intent in this area. The two year minimum period approach taken</td>
<td></td>
<td>H</td>
<td>AM/FN</td>
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<tr>
<td>Process definition</td>
<td>Memo</td>
<td></td>
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<td>and problematic.</td>
<td>by Ofgem seemed a little short, but they were</td>
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<td>Definition would include moored boats but exclude</td>
<td>content with us taking this approach on the</td>
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<td>boats that went up and down a waterway as</td>
<td>basis that it allowed us to draw a line using</td>
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<td>installations need to be in one place. However, note</td>
<td>existing precedents. It is not satisfactory that</td>
<td></td>
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<td>the fraud risks of allowing installations to move</td>
<td>Ofgem should be “clarifying” what is a key</td>
<td></td>
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<tr>
<td>around.</td>
<td>definition in the Regulations.</td>
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<td>Issues arising from space heating – why is it</td>
<td>Ofgem Legal considers that this definition</td>
<td></td>
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<td>important that it’s in a building when certain</td>
<td>requires clarification in the NI RHI</td>
<td></td>
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<tr>
<td>industrial processes may need heat to be vented</td>
<td>Regulations. DETI should give further thought</td>
<td></td>
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<tr>
<td>post-process e.g. drying.</td>
<td>to unusual buildings e.g. portacabins, tents,</td>
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<td>polytunnels, barges, distillation columns etc.</td>
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<td>and consider minimum energy efficiency</td>
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<td></td>
<td>standards for buildings (see comment below).</td>
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| Biogas production plant | Widely defined 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. |

| Heat pumps – ground water | Lack of clarity in Regulations that ground water is |
| source | an eligible source of heat (versus DECC internal |
| | view that it should be). |
| | Amend Regulations to give clarity on this |
| | (amendment to B(1) to include ground water |

| 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 |

| Regulation 14 (3) specifically | On first reading this regulation, it appears to |
| | exempt plants comprised of more than one plant |
| | from any MGS 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 |

| Reg. 17 (2) (a) Complex | Ofgem’s approach is that we will not pay on heat |
| metering | 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 |

L: FN
M: FN/OM
EW/PLF
AV

5 of 28
### Memo

| 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 |

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### 3 Administrative difficulties resulting from the regulations

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</table>
| 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). | H | AM |

This links with the loopholes in the Regulations (at 2(e) above, 32 below and in
### Memo

| 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/negligible uses within buildings; and (ii) 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

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<tr>
<td>4a</td>
<td>Lack of regulation of biomethane producers.</td>
<td>The Regs impose few obligations on producers of biomethane in relation to those placed on owners of accredited RHI installations.</td>
<td>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.</td>
<td>H</td>
<td>FN</td>
</tr>
<tr>
<td>4b</td>
<td>Biogas and biomethane boundary</td>
<td>This could encourage (wasteful) quenching of gas just to claim RHI biogas tariff. What type of biogas production does DETI want to encourage?</td>
<td></td>
<td>AM</td>
<td></td>
</tr>
<tr>
<td>4c</td>
<td>Brand new equipment</td>
<td>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?</td>
<td>L</td>
<td>AM</td>
<td></td>
</tr>
<tr>
<td>4d</td>
<td>Separate heating circuits/systems</td>
<td>Some participants may install additional pipework</td>
<td>Could consider imposing a requirement</td>
<td>M</td>
<td>EW</td>
</tr>
</tbody>
</table>
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

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</tr>
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<tbody>
<tr>
<td>5a</td>
<td>Useful heat</td>
<td>Currently minimal restrictions on what counts as eligible heat use and our powers are quite limited here. Please see legal comments below.</td>
<td></td>
<td>H</td>
<td>AM</td>
</tr>
<tr>
<td>5b</td>
<td>Industrial heat use</td>
<td>Industrial heat use outside of a building is not allowed but inefficient space heating is.</td>
<td></td>
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### 6 Stakeholder requests (common requests that may merit consideration)

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<tr>
<td>6a</td>
<td>Biomass from waste</td>
<td>At present, only municipal waste may be used and this is narrowly defined and excludes many would-be participants.</td>
<td>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.</td>
<td>L</td>
<td>AM</td>
</tr>
<tr>
<td>6b</td>
<td>Energy efficiency</td>
<td>Shouldn’t there be a minimum energy efficiency requirement before participation in the RHI?</td>
<td>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.</td>
<td>H</td>
<td>JB</td>
</tr>
<tr>
<td>6c</td>
<td>Extend scope of Preliminary Accreditation</td>
<td>As per 6a 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.</td>
<td>As per 6a below</td>
<td>L</td>
<td>EW/DS</td>
</tr>
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### 7 Legal
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<tr>
<td>7a</td>
<td>Publication of information</td>
<td>There is no ability for NIAUR to restrict publication of (aggregated) RHI info where this may reveal commercially sensitive information relating to a participant.</td>
<td>Express provision required giving NIAUR the power to restrict publication of information in these circumstances?</td>
<td>M</td>
<td>FN</td>
</tr>
<tr>
<td>7b</td>
<td>Repayment of grant monies in relation to biomethane production plant</td>
<td>Insert equivalent of r 23(1)(b) into r.25.</td>
<td></td>
<td>H</td>
<td>FN</td>
</tr>
<tr>
<td>7c</td>
<td>Power for the NIAUR to inspect participants’ premises for eligible heat use</td>
<td>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.</td>
<td>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.</td>
<td>H</td>
<td>FN</td>
</tr>
<tr>
<td>7d</td>
<td>How is the 10% ancillary energy content amount determined?</td>
<td>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.</td>
<td></td>
<td>M</td>
<td>FN</td>
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| 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.

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.

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.

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.

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.
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<tr>
<th></th>
<th>Change of ownership</th>
<th>Revoking accreditation</th>
<th>Applicability of Part 7 to previous participants</th>
<th>Reporting requirements for installations between 45kW and 1MW</th>
<th>Reg. 2</th>
<th>Reg. 2</th>
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<td>7j</td>
<td>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.</td>
<td>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.</td>
<td>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.</td>
<td>There are few obligations imposed on this category of participant. This presents a significant fraud risk.</td>
<td>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.</td>
<td>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 clarification:</td>
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<td>Clarification needed in Reg. 24(5) that a fresh application in relation to the same installation will not be permitted.</td>
<td>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.</td>
<td>DETI should 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.</td>
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**Definition:**
- heating system (see comment at Reg. 14)
- economically justifiable heat requirement (see comment at Reg. 14)
- 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 therefore 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 Ltd [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 then be developed as necessary without affecting other occurrences of the term "process" in the Regs. | M | FN |
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_a_000_...equivalentsguidance.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 I, S.53, reads "premises includes any place and, in particular, includes—(a) any vehicle, vessel, aircraft or havoccraft, (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).

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.

DETI to consider this definition in relation to existing legislation which has effect in Northern Ireland.

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14 of 28
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<tr>
<th>Reg. 2</th>
<th>The definition of &quot;participant&quot; states that &quot;where there is more than one owner&quot;, the participant is &quot;the owner with authority to act on behalf of all owners in accordance with Regulation 22(3)&quot;. Ofgem considers that this person should be defined as the &quot;representative owner&quot; in the Regulations. Ofgem considers that similar provision needs to be made in relation to multiple producers of biomethane.</th>
<th>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.</th>
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<td>Reg. 2</td>
<td>A definition of &quot;solid biomass&quot; 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.</td>
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<td>Reg. 2</td>
<td>The definition of &quot;steam measuring equipment&quot; includes the phrase &quot;means all the equipment needed to measure to the NI Authority’s satisfaction the mass flow rate and energy of steam... &quot;. 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 &quot;de facto&quot; minimum standard internally within NIAUR. The phrase &quot;to the NI Authority’s satisfaction&quot; 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).</td>
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<td>Reg. 5(b) and schedule 1, para (2)(f)</td>
<td>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, &quot;fuel&quot; 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</td>
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<td><strong>Reg. 12(1)(c)</strong></td>
<td>We note that paras (c) and (d) could be combined to read: &quot;the plant generates heat used for an eligible purpose and uses water or steam as a medium for delivering such heat.&quot;</td>
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<td><strong>Reg. 14</strong></td>
<td>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 &quot;D&quot; of Reg. 42.</td>
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<td><strong>Reg. 14</strong></td>
<td>&quot;Heating system&quot; 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.</td>
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<td><strong>Reg. 15</strong></td>
<td>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.</td>
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<td><strong>Reg. 15(2)</strong></td>
<td>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.</td>
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| **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
<table>
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<tr>
<th>Memo</th>
<th>Reg. 22</th>
<th>Reg. 22(a)</th>
<th>Regs. 23 and 25</th>
<th>Regs. 23 and 25</th>
<th>Reg. 24</th>
<th>Reg. 24(2)</th>
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<td>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.</td>
<td>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.</td>
<td>Before the words &quot;as the Authority may require&quot; please insert &quot;in such manner and form&quot;</td>
<td>The terms &quot;grant&quot; and &quot;public authority&quot; must be defined</td>
<td>Not clear whether or not any other form of existing environmental incentive constitutes a grant.</td>
<td>Subpara. (1) makes each of the provisions of Reg. 24 applicable to new owners who may have only acquired part 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 may 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.</td>
<td>Fails to acknowledge that ownership of an 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.</td>
<td>Where multiple ownership exists, paragraph (1) implies that NIAUR will split payments between owners</td>
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<td><strong>Reg. 24</strong></td>
<td>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.</td>
<td>Ofgem considers that provisions which are similar to Regs. 22(2)(c) and (3) should appear in Reg. 24.</td>
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<td><strong>Reg. 25</strong></td>
<td>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?</td>
<td>We suggest that further work is done in this area to clarify the desired policy outcomes.</td>
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<td><strong>Reg. 25</strong></td>
<td>There is no concept of multiple owners of biomethane production plant.</td>
<td>Ofgem considers that provisions that are similar to Regs. 22(2)(c) and (3) should appear in Reg. 25.</td>
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<td><strong>Reg. 33</strong></td>
<td>Should the title be “Producers of biomethane” for consistency with the definition of “participant” and the rest of the regs?</td>
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<td><strong>Reg. 34</strong></td>
<td>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.</td>
<td>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”</td>
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<td><strong>Reg. 34(m)</strong></td>
<td>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 a change in ownership of all or part of their accredited RHI</td>
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<td>Reg. 34(m)</td>
<td>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.</td>
<td>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.</td>
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<td>Reg. 34(p)</td>
<td>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 heating 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.</td>
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<td>Reg. 35</td>
<td>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.</td>
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<td>Part 7</td>
<td>Ofgem considers the time frames 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.</td>
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<td>Reg. 44(7)</td>
<td>To make sense of Reg. 44(8) the word “no” should be removed from Reg. 44(7).</td>
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<td>Reg. 44(4), and (10)</td>
<td>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?</td>
<td>DETI to reconsider the appropriateness of the present wording in light of Ofgem’s concerns.</td>
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<td>Reg. 44(8)</td>
<td>Repayment within 28 days may be problematic for Ofgem’s payment systems and may lead to increased risk of challenge to the NI RHI and/or failure to pursue enforcement action due to a breach by NIAUR of this requirement.</td>
<td>DETI should consider removing the timeframe and replace this with “as soon as reasonably practicable”.</td>
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<td>Reg. 44(9)(b)</td>
<td>Repayment should also be subject to any overpayment or offsetting measure deemed to be appropriate by NIAUR.</td>
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<td>Reg. 45(4)</td>
<td>Repayment should also be subject to any overpayment or offsetting measure deemed to be appropriate by NIAUR.</td>
<td></td>
<td>M FN</td>
<td></td>
<td></td>
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</tr>
<tr>
<td>Reg. 46(1)(b)</td>
<td>The period immediately following what?</td>
<td>Clarity of drafting is required.</td>
<td>M FN</td>
<td></td>
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<tr>
<td>Reg. 46(3)</td>
<td>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),</td>
<td>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,</td>
<td>M FN</td>
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<td></td>
<td></td>
<td>Memo</td>
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<tr>
<td>Reg. 47</td>
<td>There is no equivalent of Reg. 47((1)(b) for biomethane producers</td>
<td>It's not clear why biomethane producers do not face the same sanction as owners of installations. DETI to consider imposing an equivalent provision.</td>
<td></td>
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<tr>
<td>Reg. 48</td>
<td>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.</td>
<td>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 biomethane, each owner is jointly and severally liable to comply with the eligibility criteria and ongoing obligations and enforcement provisions.</td>
<td></td>
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</tr>
<tr>
<td>Reg. 48(2)(a)</td>
<td>This implies that a separate notice will need to be issued in relation to each PSP where an overpayment has been made</td>
<td>DETI to consider whether this Reg. should refer to &quot;payment or payments&quot; to address this administrative issue.</td>
<td></td>
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</tr>
<tr>
<td>Reg. 48(2)(b)</td>
<td>Present drafting suggests that NIAUR must decide on either repayment or offsetting, but does not allow for a mixture of both.</td>
<td>The word &quot;whether&quot; should be replaced by the words &quot;to what extent&quot;</td>
<td></td>
<td></td>
<td></td>
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</tr>
<tr>
<td>Reg. 50</td>
<td>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.</td>
<td>Express provision to be added to the Regulations.</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Reg. 51</td>
<td>Reviews. The provision does not fulfill DECC's</td>
<td>DETI is strongly advised to remove this</td>
<td></td>
<td></td>
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</tr>
</tbody>
</table>

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.
### Memo

<table>
<thead>
<tr>
<th>No.</th>
<th>Issue</th>
<th>Overview</th>
<th>Suggested solution</th>
<th>Priority level (H/M/L)</th>
<th>Contact</th>
</tr>
</thead>
<tbody>
<tr>
<td>8a</td>
<td>Extend scope of Preliminary Accreditation</td>
<td>At present limited access to use PA. Particularly an issue for smaller biomass installations &lt;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.</td>
<td>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.</td>
<td>M</td>
<td>DS</td>
</tr>
<tr>
<td>8b</td>
<td>Participant restrictions</td>
<td>Possibility of restricting participants to those 18 years and over. At the moment there's no restriction on the age of a participant.</td>
<td>DETI may wish to consider restricting the NI RHI Regulations to allow participation for only those over the age of 18.</td>
<td>M</td>
<td>AA</td>
</tr>
<tr>
<td>8c</td>
<td>Fraud prevention</td>
<td>At present, there is no requirement for medium-sized installations to provide an independent metering report. This has clear fraud risks.</td>
<td>DETI to consider adding this requirement.</td>
<td>H</td>
<td>AO</td>
</tr>
<tr>
<td>8d</td>
<td>'Records to be retained' requirement</td>
<td>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.</td>
<td>Add this requirement to the regulations.</td>
<td>L</td>
<td>LM</td>
</tr>
<tr>
<td>8e</td>
<td>Biomethane producers ongoing obligations</td>
<td>Reg. 34, subparas. (c), (g), (i), and (m) do not apply to biomethane producers.</td>
<td>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.</td>
<td>H</td>
<td>LM</td>
</tr>
</tbody>
</table>
Review of draft NI RHI Regulations

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<table>
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<tbody>
<tr>
<td><strong>8f</strong></td>
<td><strong>Class 2 meters</strong></td>
<td>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 the administrative burden on NIAUR of deciding what may or may not be ‘better’ than a class 2 meter. M LM</td>
</tr>
<tr>
<td><strong>8g</strong></td>
<td><strong>Steam meters</strong></td>
<td>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. L LM</td>
</tr>
<tr>
<td></td>
<td><strong>Biomethane producers’ requirement to comply with eligibility criteria</strong></td>
<td>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</td>
</tr>
</tbody>
</table>
Appendix 2

Issues specific to the draft NI RHI Regulations

<table>
<thead>
<tr>
<th>No.</th>
<th>Provision</th>
<th>Issue</th>
<th>Suggested solution</th>
<th>Priority</th>
<th>DETI response</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>headnotes</td>
<td>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?</td>
<td>DETI to clarify</td>
<td>L</td>
<td></td>
</tr>
<tr>
<td>2.</td>
<td>Heading</td>
<td>Should the word 'draft' be inserted before the words &quot;Statutory Rules of Northern Ireland&quot;? Should references to 2011 be to 2012?</td>
<td>DETI to clarify</td>
<td>L</td>
<td></td>
</tr>
<tr>
<td>3.</td>
<td>Title</td>
<td>The title of the GB RHI Regulations has been revised. Should the title of the NI Regulations be: &quot;The Renewable Heat Incentive Scheme Regulations (Northern Ireland) 2012&quot;?</td>
<td>DETI to clarify</td>
<td>L</td>
<td></td>
</tr>
<tr>
<td>4.</td>
<td>Preamble and words of enactment</td>
<td>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)?</td>
<td>DETI to clarify</td>
<td>L</td>
<td></td>
</tr>
<tr>
<td>5.</td>
<td>Citation and commencement</td>
<td>Does modern drafting practice for Northern Ireland follow the same principles as that for GB? If so should references to &quot;shall&quot; be &quot;will&quot;? Please also clarify any rules or procedures which will affect the commencement date.</td>
<td>DETI to clarify</td>
<td>L</td>
<td></td>
</tr>
<tr>
<td>6.</td>
<td>Reg. 2</td>
<td>Definition of &quot;the Department&quot; already appears in the enabling Act: is this definition superfluous?</td>
<td>DETI to clarify</td>
<td>L</td>
<td></td>
</tr>
<tr>
<td>7.</td>
<td>Reg. 2</td>
<td>Definition conflicts with the definition in The Energy Act 2011 (the &quot;enabling Act&quot;). Three issues arise here: 1. Definition of the Gas and Electricity Markets Authority already exists in the enabling Act (&quot;GEMA&quot;), which makes</td>
<td>Suggest removal of definition and all 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</td>
<td>H</td>
<td></td>
</tr>
</tbody>
</table>
8. **Reg. 2**

   Definition of “the Gas Order”. Should there be a footnote detailing the Statutory Rule and Order year and number? 

9. **Reg. 2**

   Definition of “NI”. Should Northern Ireland be abbreviated? 

10. **Reg. 2**

   Definition of “NI Authority” 

11. **Reg. 2**

   Definition of “pipe-line system”

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

   **Deti to clarify**

   **Deti to clarify**

   **Should this be the “Northern Ireland authority”, to be consistent with the enabling Act?**

   **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.**

   **See comments above concerning the vire of this provision. We consider that these functions, powers and obligations should be changed conferred on the Northern Ireland authority.**
**Review of draft NI RHI Regulations**

<table>
<thead>
<tr>
<th>Memo</th>
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**Reg. 48**

<table>
<thead>
<tr>
<th>Line</th>
<th>Description</th>
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<tbody>
<tr>
<td>13.</td>
<td>Regs. 5(c); 7(c); 8(b); 19; Applicability of MCS requirements</td>
</tr>
<tr>
<td>14.</td>
<td>Regs. 7(b);11(b); 15(1)c(III); 26(11)(c); Applicability of 200kWth threshold</td>
</tr>
<tr>
<td>15.</td>
<td>Regs. 8(a)(i); 9(c); 10; 500M figure</td>
</tr>
<tr>
<td>16.</td>
<td>Reg. 8(c); Co-efficient of performance</td>
</tr>
<tr>
<td>17.</td>
<td>Reg. 10; Reference to digester or plant</td>
</tr>
<tr>
<td>18.</td>
<td>Regs. 12(1); 23(1)(b); Retrospective start date</td>
</tr>
<tr>
<td>19.</td>
<td>15(1)c(i); 12 month commissioning period</td>
</tr>
<tr>
<td>20.</td>
<td>28(2); 50% minimum solid biomass content</td>
</tr>
<tr>
<td>21.</td>
<td>28(3); 29(2); 10% maximum fossil fuel content</td>
</tr>
<tr>
<td>22.</td>
<td>28(7); 50% maximum fossil fuel content</td>
</tr>
<tr>
<td>23.</td>
<td>29(1); 1MWth installation capacity</td>
</tr>
<tr>
<td>24.</td>
<td>29(6); 10% maximum fossil fuel content for ancillary purposes</td>
</tr>
<tr>
<td>25.</td>
<td>30; Installation capacity thresholds</td>
</tr>
<tr>
<td>26.</td>
<td>30(4)(a); 10% maximum fossil fuel contamination</td>
</tr>
<tr>
<td>27.</td>
<td>34(6); 28 day time limit</td>
</tr>
<tr>
<td>28.</td>
<td>35(1)(b); 10 year re-calibration requirement</td>
</tr>
<tr>
<td>29.</td>
<td>36(2); 7 day time limit</td>
</tr>
<tr>
<td>30.</td>
<td>37(1); 20 year tariff lifetime</td>
</tr>
<tr>
<td>31.</td>
<td>37(7); 12 month tariff period</td>
</tr>
<tr>
<td>32.</td>
<td>37(9)(a); Tariff rate review date</td>
</tr>
<tr>
<td>33.</td>
<td>37(10); Tariff for “initial heat” definition</td>
</tr>
<tr>
<td>34.</td>
<td>39(2); Formula</td>
</tr>
<tr>
<td>35.</td>
<td>40(1)(b); 1MWth capacity</td>
</tr>
<tr>
<td>36.</td>
<td>43(3); 28 day time limit in relation to informing NIAUR of commissioning of additional RHI capacity</td>
</tr>
<tr>
<td>37.</td>
<td>43(4); 12 month time limit on additional capacity</td>
</tr>
<tr>
<td>38.</td>
<td>43(6); Treatment of post-12 month additional capacity</td>
</tr>
<tr>
<td>39.</td>
<td>44(2); Imposition on NIAUR to notify participant within 21 days of a decision to withhold periodic support payments</td>
</tr>
</tbody>
</table>

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*DETI to confirm position – see comments on GB Regs. above*
### Memo

<table>
<thead>
<tr>
<th>Requirement</th>
<th>Duration/Time Limit</th>
<th>Action/Note</th>
</tr>
</thead>
<tbody>
<tr>
<td>40. 44(4)</td>
<td>6 month maximum withholding period</td>
<td>DETI to confirm position – see comments on GB Regs above</td>
</tr>
<tr>
<td>41. 44(5)</td>
<td>30 day mandatory review period</td>
<td>DETI to confirm position – see comments on GB Regs above</td>
</tr>
<tr>
<td>42. 44(7)</td>
<td>2 week delay period</td>
<td>DETI to confirm position – see comments on GB Regs above</td>
</tr>
<tr>
<td>43. 44(8)(b)</td>
<td>28 repayment deadline</td>
<td>DETI to confirm position – see comments on GB Regs above</td>
</tr>
<tr>
<td>44. 45(2)(c)</td>
<td>Requirement to send notice within 21 days of decision</td>
<td>DETI to confirm position – see comments on GB Regs above</td>
</tr>
<tr>
<td>45. 45(3)</td>
<td>Requirement to lift suspension within 21 days of satisfaction</td>
<td>DETI to confirm position – see comments on GB Regs above</td>
</tr>
<tr>
<td>46. 45(4)</td>
<td>6 month and 28 day requirements</td>
<td>DETI to confirm position – see comments on GB Regs above</td>
</tr>
<tr>
<td>47. 45(5)</td>
<td>1 year maximum suspension period</td>
<td>DETI to confirm position – see comments on GB Regs above</td>
</tr>
<tr>
<td>48. 46(2)</td>
<td>21 day notice period</td>
<td>DETI to confirm position – see comments on GB Regs above</td>
</tr>
<tr>
<td>49. 46(3)</td>
<td>10% penalty threshold</td>
<td>DETI to confirm position – see comments on GB Regs above</td>
</tr>
<tr>
<td>50. 47(2)</td>
<td>21 day notice period</td>
<td>DETI to confirm position – see comments on GB Regs above</td>
</tr>
<tr>
<td>51. 48(2)</td>
<td>21 day notice period</td>
<td>DETI to confirm position – see comments on GB Regs above</td>
</tr>
<tr>
<td>52. 49(2)</td>
<td>21 day notice period</td>
<td>DETI to confirm position – see comments on GB Regs above</td>
</tr>
<tr>
<td>53. 50(1)</td>
<td>Extent of inspection powers</td>
<td>DETI to confirm whether this should explicitly state 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</td>
</tr>
<tr>
<td>54. 50(2)</td>
<td>21 day notice period</td>
<td>DETI to confirm position – see comments on GB Regs above</td>
</tr>
<tr>
<td>55. 51(2)(a)</td>
<td>28 day time limit for request for statutory review</td>
<td>DETI to confirm position – see comments on GB Regs above</td>
</tr>
<tr>
<td>56. 51(5)</td>
<td>21 day notice period</td>
<td>DETI to confirm position – see comments on GB Regs above</td>
</tr>
<tr>
<td>57. 53(2)</td>
<td>First monthly reporting period</td>
<td>DETI to confirm position</td>
</tr>
<tr>
<td>58. 53(4)</td>
<td>First annual report dates</td>
<td>DETI to confirm position</td>
</tr>
<tr>
<td>59. 53(5)</td>
<td>First quarterly report date</td>
<td>DETI to confirm position</td>
</tr>
<tr>
<td>60. 53(7)</td>
<td>Quarterly period definition</td>
<td>DETI to confirm position</td>
</tr>
<tr>
<td>61. Sch. 1(2)(n)</td>
<td>Coefficient of performance to be decided</td>
<td>DETI to confirm position – is the decision subject to purely policy or legal issues?</td>
</tr>
<tr>
<td>62. Sch. 1(2)(v)</td>
<td>1MWth capacity threshold</td>
<td>DETI to confirm position</td>
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<tr>
<td><strong>63.</strong> Sch. 2(2)(j)</td>
<td>Date relating to land use</td>
<td>DETI to confirm position – is the decision subject to purely policy or legal issues?</td>
</tr>
<tr>
<td><strong>64.</strong> Sch. 2(5)</td>
<td>Date relating to planting of energy crop</td>
<td>DETI to confirm position – is the decision subject to purely policy or legal issues?</td>
</tr>
<tr>
<td><strong>65.</strong> Sch. 3</td>
<td>Tariff levels to be confirmed</td>
<td>DETI to confirm position and share data with Ofgem so that it understands what plant has been included in the calculations.</td>
</tr>
<tr>
<td><strong>66.</strong> Explanatory note</td>
<td>Regs 29 and 30 – 1MWth threshold to be confirmed</td>
<td>DETI to confirm position</td>
</tr>
</tbody>
</table>

**ENDS**
Review of draft NI RHI Regulations

No Impact on IT Systems Vires flowing from primary legislation

1.1. 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).
Appendix 1

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

<table>
<thead>
<tr>
<th>No.</th>
<th>Issue</th>
<th>Suggested solution</th>
<th>Impact on IT</th>
</tr>
</thead>
<tbody>
<tr>
<td>1a</td>
<td>Biomethane duration</td>
<td>Policy is to stop payments after 20 years but regulations don’t have a mechanism to do that.</td>
<td>No</td>
</tr>
<tr>
<td>1c</td>
<td>Biomethane provenance</td>
<td>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.</td>
<td>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.</td>
</tr>
<tr>
<td>1e</td>
<td>Heat pump immersion heaters</td>
<td>Difficult to follow DECC’s policy of ignoring built in immersion heaters given the way the Regs are drafted.</td>
<td>DETI should express 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 from renewable sources and used for eligible purposes.</td>
</tr>
<tr>
<td>1g</td>
<td>Double counting</td>
<td>There is no general provision excluding heat use for parasitic loads from double counting for PSPs.</td>
<td>Include parasitic loads as ineligible use, add general avoidance provision, add in any new</td>
</tr>
</tbody>
</table>
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 new “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.

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.

Gasification/pyrolysis

Further clarity on gasification/pyrolysis. DETI should clarify what they’re actually incentivising.

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.

2 Ambiguities (i.e. regulations unclear and sufficient risk of legal challenge)

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<tr>
<td>2a</td>
<td>“Natural” loss systems</td>
<td>Clarity on heat eligibility and metering requirements for “natural” system losses – particularly in pipes between buildings.</td>
<td>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.</td>
<td>May affect the way payments are calculated – if so this would impact the IT systems. May also require additional periodic information to be submitted which would require IT changes.</td>
</tr>
<tr>
<td>2b</td>
<td>Installation definition</td>
<td>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.</td>
<td>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.</td>
<td>No – issue of being open to legal challenge.</td>
</tr>
<tr>
<td>2c</td>
<td>Building definition</td>
<td>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</td>
<td>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</td>
<td>No – issue of legal challenge</td>
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No
22

Received from OFGEM on 18.10.2017
Annotated by RHI Inquiry
<table>
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<tr>
<th>Memo</th>
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<tr>
<td><strong>2d</strong> Process definition</td>
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<td><strong>2e</strong> Biogas production plant</td>
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<tr>
<td><strong>2f</strong> Heat pumps – ground water source</td>
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<td><strong>2g</strong> Regulation 14</td>
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<tr>
<td><strong>2h</strong> Regulation 14 (3) specifically</td>
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<tr>
<td><strong>2i</strong> Reg. 17 (2) (a) Complex metering</td>
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</table>

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). May impact eligibility criteria. Manual processes may be possible depending on the requirements. 

More relevant to DETI for the purposes of cost control than an issue which creates administrative issues. 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. 

If this is currently handled as eligible, it shouldn’t require any changes. If this is currently handled as eligible, it shouldn’t require any changes. 

Legal re-draft. 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. May affect the way payments are calculated – if so this would impact the IT systems. May also
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| 2j  | Reg. 15(c) | Placement of meters also affects ability to participate.  
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). | No |
| 2k  | Definition "naturally occurring" | Definition allowing for interseasonal heat transfer technology, within the naturally occurring Reg. 8 & Reg. 10 sections. |  |
| 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.  
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 production process. This means that NIAUR will not require additional periodic information to be submitted which would require IT changes. | 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”. | No – can be handled in declaration text which will be revised anyway. |
| 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.  
Formalise biomethane inspection powers including pre-registration inspections and third party access (added by FN). |  | No. |
### 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.

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<td>3c</td>
<td>Sanctions</td>
<td>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.</td>
<td></td>
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<tr>
<td>3d</td>
<td>Metering</td>
<td>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.</td>
<td>No.</td>
<td></td>
</tr>
<tr>
<td>3e</td>
<td>Data accuracy</td>
<td>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.</td>
<td>Make the accurate submission of data an ongoing obligation.</td>
<td>No. Could be handled in Declaration text.</td>
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</table>

### 3 Potential perverse outcomes

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<tr>
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<tbody>
<tr>
<td>4a</td>
<td>Lack of regulation of biomethane producers.</td>
<td>The Regs impose few obligations on producers of biomethane in relation to those placed on owners of accredited RHI installations.</td>
<td>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.</td>
<td>TBC depending on outcome of such a review. Most obligations should be handled without IT changes where possible (such as declaration text).</td>
</tr>
<tr>
<td>4b</td>
<td>Biogas and biomethane boundary</td>
<td>This could encourage (wasteful) quenching of gas just to claim RHI biogas tariff. What type of biogas production does DETI want to encourage?</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td>4c</td>
<td>Brand new equipment</td>
<td>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.</td>
<td>Further consideration to be given to eligibility of older/ refurbished plant. Is this possible without making administration difficult?</td>
<td>Could be problematic. Without a decision as to how this will be handled we can’t anticipate how we might administer it.</td>
</tr>
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<td>No.</td>
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<tr>
<td>4d</td>
<td>Separate heating circuits/systems</td>
<td>Some participants may install additional pipework and multiple smaller (and potentially less efficient) units in order to meet eligibility or higher-tariff thresholds</td>
<td>Could consider imposing a requirement that 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</td>
<td>TBC - Eligibility</td>
</tr>
<tr>
<td>5a</td>
<td>Useful heat</td>
<td>Currently minimal restrictions on what counts as eligible heat use and our powers are quite limited here. Please see legal comments below.</td>
<td>TBC - Eligibility/periodic info</td>
<td></td>
</tr>
<tr>
<td>5b</td>
<td>Industrial heat use</td>
<td>Industrial heat use outside of a building is not allowed but inefficient space heating is.</td>
<td>TBC - Eligibility/periodic info</td>
<td></td>
</tr>
<tr>
<td>6a</td>
<td>Biomass from waste</td>
<td>At present, only municipal waste may be used and this is narrowly defined and excludes many would-be participants.</td>
<td>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.</td>
<td>TBC – Periodic Info</td>
</tr>
<tr>
<td>6b</td>
<td>Energy efficiency</td>
<td>Shouldn’t there be a minimum energy efficiency requirement before participation in the RHI?</td>
<td>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.</td>
<td>TBC – Eligibility</td>
</tr>
<tr>
<td>6c</td>
<td>Extend scope of Preliminary Accreditation</td>
<td>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.</td>
<td>As per 8a below</td>
<td>Yes.</td>
</tr>
<tr>
<td>7a</td>
<td>Publication of information</td>
<td>There is no ability for NIAUR to restrict publication of (aggregated) RHI info where this may reveal commercially sensitive information relating to a participant.</td>
<td>Express provision required giving NIAUR the power to restrict publication of information in these circumstances?</td>
<td>No. Problem particularly for HIS.</td>
</tr>
<tr>
<td>7b</td>
<td>Repayment of grant monies in relation to biomethane production plant.</td>
<td>Insert equivalent of r 23(1)(b) into r.25.</td>
<td>Should be handled manually.</td>
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7 of 22
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<tr>
<td><strong>7c Power for the NIAUR to inspect participants’ premises for eligible heat use</strong></td>
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<tr>
<td>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.</td>
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<tr>
<td><strong>7d How is the 10% ancillary energy content amount determined?</strong></td>
</tr>
<tr>
<td>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.</td>
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<tr>
<td><strong>7f Biomethane producer definition</strong></td>
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<td>DECC's intention is that the party who injects biomethane onto the grid should be regarded as the &quot;producer of biomethane&quot; for the purposes of theRegs. We consider that the Regulations do not make this clear. Where &quot;producer&quot; is not defined, there is a risk that several parties in the biomethane production process may claim to be a &quot;producer&quot; under theRegs, 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 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</td>
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**TBC - Eligibility - mainly matter of legal challenge.**

**TBC - Eligibility/periodic info.**

**NO.**
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<tr>
<td><strong>Review of draft NI RHI Regulations</strong></td>
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<td><strong>biomethane</strong> (i) 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 (ii) 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.</td>
</tr>
<tr>
<td><strong>7g Retrospective application of new eligibility criteria and ongoing obligations: Has DETI considered if and how existing participants will be affected?</strong> E.g. where subsequent changes to the regulations after 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. TBC – could be handled with declaration text. May require more depending on approach.</td>
</tr>
<tr>
<td><strong>7h Power to amend conditions of accreditation once participation has commenced.</strong> 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. TBC – could be handled with declaration text. May require more depending on approach.</td>
</tr>
<tr>
<td><strong>7i Regulations 23 and 25</strong> 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 accreditation does not remedy this omission. 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. No.</td>
</tr>
<tr>
<td><strong>7j Change of ownership</strong> 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 instalation will not be permitted. TBC – Eligibility.</td>
</tr>
<tr>
<td><strong>7k Revoking accreditation</strong> 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...</td>
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<td>9 of 22</td>
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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, 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); 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.
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/dec/what%20we%20do/a%20low%20carbon%20uk/crc/1_20100219140648_e_0e-equivalentsguidance.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...

DETI to consider this definition in relation to existing legislation which has effect in Northern Ireland.
**Memo**

"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 I. 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).

**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 biogas may apply.

**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 provision should be included as the "representative owner" in the Regulations. 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...

TBC = Eligibility/
| 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. | TBC - eligibility |
| Reg. 5(b) and schedule 1, para (2)(i) | 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". | No. |
| Reg. 12(1)(c) | 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)(i). | No. |
| Reg. 14 | There is no equivalent of this regulation which applies to biomethane producers | TBC - Eligibility |

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.

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).
<table>
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<tr>
<th>Regulation</th>
<th>Description</th>
<th>Comments</th>
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<tr>
<td>Reg. 14</td>
<td>&quot;Heating system&quot; 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 &quot;heating system&quot; 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).</td>
<td>DETI should add a defined term to ensure clarity. It is not acceptable for this to be clarified in guidance. TBC – Eligibility, payments</td>
</tr>
<tr>
<td>Reg. 15</td>
<td>There is no equivalent of this regulation which applies to biomethane producers</td>
<td>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. TBC – Eligibility</td>
</tr>
<tr>
<td>Reg. 15(2)</td>
<td>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 &quot;...not been adapted for a non-residential use which is continuing.&quot;</td>
<td>DETI to consider.</td>
</tr>
<tr>
<td>Regs. 16-21 (metering)</td>
<td>There is no equivalent of these regulations which applies to biomethane producers</td>
<td>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 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. TBC – Eligibility – may be handled through manual process.</td>
</tr>
<tr>
<td>Reg. 22</td>
<td>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</td>
<td>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</td>
</tr>
<tr>
<td>Reg.</td>
<td>Text</td>
<td>Comment</td>
</tr>
<tr>
<td>------</td>
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</tr>
<tr>
<td>22(a)</td>
<td>Before the words &quot;as the Authority may require&quot; please insert &quot;in such manner and form&quot;</td>
<td>No.</td>
</tr>
<tr>
<td>23 and 25</td>
<td>The terms &quot;grant&quot; and &quot;public authority&quot; must be defined</td>
<td>DETI should provide clarity on what constitutes a &quot;grant&quot; and the bodies who qualify as a public authority.</td>
</tr>
<tr>
<td>23 and 25</td>
<td>Not clear whether or not any other form of existing environmental incentive constitutes a grant.</td>
<td>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.</td>
</tr>
<tr>
<td>24</td>
<td>Subpara. (1) makes each of the provisions of Reg. 24 apply to new owners who may have only acquired part 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.</td>
<td>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 &quot;participant&quot;, above) to inform NIAUR of partial changes in ownership. (See also comments on Reg. 34(m) below.</td>
</tr>
<tr>
<td>24(2)</td>
<td>Where multiple ownership exists, paragraph (2) implies that NIAUR will split payments between owners</td>
<td>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.</td>
</tr>
<tr>
<td>24</td>
<td>Fails to acknowledge that ownership of an accredited RHI Installation may change from being 100% ownership by one person to multiple ownership.</td>
<td>Ofgem considers that provisions that are similar to Regs. 22(2)(c) and (3) should appear in Reg. 24.</td>
</tr>
<tr>
<td>24</td>
<td>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.</td>
<td>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.</td>
</tr>
<tr>
<td>25</td>
<td>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</td>
<td>We suggest that further work is done in this area to clarify the desired policy outcomes.</td>
</tr>
</tbody>
</table>

No. Could be covered in Guidance – one authorised signatory can have multiple installations.
| **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. | No. |
| **Reg. 33** | Should the title be "Producers of biomethane" for consistency with the definition of "participant" and the rest of the Regs.? | 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". | No. |
| **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. This provision only applies to "participants". Participants 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). | Easiest fix is for Reg. 34(m) to be amended to read "they must notify the Authority within [28 days] prior to any change in ownership of all or part of their accredited RHI installation". | No. |
| **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. | 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 | No. Potentially covered in declaration text? |
## 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 RHIRegs do not appear to fully address DECC’s policy objectives in terms of useful heat.

<table>
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<tr>
<th>Northern Ireland Authority may require evidence of that authority.</th>
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| 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. |
| TBC – Eligibility |

## 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. |
| No. |

## 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.

<table>
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<tr>
<th>No.</th>
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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). | No. |
| 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. |
| 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”. |
| Reg. 44(9)(b) | Repayment should also be subject to any overpayment or offsetting measure deemed to be appropriate by NIAUR. | No. |
| Reg. 45(4) | Repayment should also be subject to any overpayment or offsetting measure deemed to be appropriate by NIAUR. | No. |
| Reg. 46(1)(b) | The period immediately following what? | Clarity of drafting is required. |
| 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), 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. | 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, 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 the decision. |

Clarity of drafting is required.
### Review of draft NI RHI Regulations

<table>
<thead>
<tr>
<th>Regulation</th>
<th>Description</th>
<th>Note</th>
</tr>
</thead>
<tbody>
<tr>
<td>Reg. 47</td>
<td>There is no equivalent of Reg. 47((1)(b)) for biomethane producers</td>
<td>NIAUR’s decision where the participant has a valid reason to consider that NIAUR has made a serious error of judgment.</td>
</tr>
<tr>
<td>Reg. 48</td>
<td>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.</td>
<td>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 biomethane, each owner is jointly and severally liable to comply with the eligibility criteria and ongoing obligations and enforcement provisions.</td>
</tr>
<tr>
<td>Reg. 48(2)(a)</td>
<td>This implies that a separate notice will need to be issued in relation to each PSP where an overpayment has been made.</td>
<td>DETI to consider whether this Reg. should refer to “payment or payments” to address this administrative issue.</td>
</tr>
<tr>
<td>Reg. 48(2)(b)</td>
<td>Present drafting suggests that NIAUR must decide on either repayment or offsetting, but does not allow for a mixture of both.</td>
<td>The word “whether” should be replaced by the words “to what extent”.</td>
</tr>
<tr>
<td>Reg. 50</td>
<td>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.</td>
<td>Express provision to be added to the Regulations.</td>
</tr>
<tr>
<td>Reg. 51</td>
<td>Reviews. The provision does not fulfil DECC’s intention of satisfying Article 6 obligations: the parliamentary ombudsman/judicial review provide the requisite Article 6 independent hearing – no review by the administering 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.</td>
<td>DETI is strongly advised to remove this provision from the NI RHI Regulations.</td>
</tr>
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</table>
## 4 Other

<table>
<thead>
<tr>
<th>No.</th>
<th>Issue</th>
<th>Overview</th>
<th>Suggested solution</th>
<th>Impact on IT</th>
</tr>
</thead>
<tbody>
<tr>
<td>9a</td>
<td>Extend scope of Preliminary Accreditation</td>
<td>At present limited access to use PA. Particularly an issue for smaller biomass installations &lt;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.</td>
<td>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</td>
<td>Yes</td>
</tr>
<tr>
<td>8b</td>
<td>Participant restrictions</td>
<td>Possibility of restricting participants to those 18 years and over. At the moment there's no restriction on the age of a participant.</td>
<td>DETI may wish to consider restricting the NI RHI Regulations to allow participation for only those over the age of 18.</td>
<td>No</td>
</tr>
<tr>
<td>8c</td>
<td>Fraud prevention</td>
<td>At present, there is no requirement for medium-sized installations to provide an independent metering report. This has clear fraud risks.</td>
<td>DETI to consider adding this requirement.</td>
<td>Probably not – it would depend on what point this would need to be provided. It may be covered through guidance and manual processes</td>
</tr>
<tr>
<td>8d</td>
<td>&quot;Records to be retained&quot; requirement</td>
<td>NIAUR may want to require biogas/biomass participants to produce planning permission documents upon request as a condition (part of the &quot;records to be retained&quot; requirement). There is however no explicit power for this in the regulations.</td>
<td>Add this requirement to the regulations.</td>
<td>No</td>
</tr>
<tr>
<td>8e</td>
<td>Biomethane producers ongoing obligations</td>
<td>Reg. 34, subparas. (c), (g), (i), and (m) do not apply to biomethane producers.</td>
<td>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 suitable obligations are imposed on them and behaviour can be monitored - and, where appropriate, enforcement action can be taken.</td>
<td>No</td>
</tr>
<tr>
<td>8f</td>
<td>Class 2 meters</td>
<td>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’</td>
<td>DETI to consider clarifying the Regulations. But not e because the administrative burden on NIAUR of deciding what may or may not be ‘better’</td>
<td>Probably not.</td>
</tr>
</tbody>
</table>
Review of draft NI RHI Regulations

<table>
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<tr>
<th>8g Steam meters</th>
<th>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.</th>
<th>No.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Biomethane producers' requirement to comply with eligibility criteria</td>
<td>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. Could impact accreditation process if eligibility requirements are changed. We may be able to manage this manually.</td>
<td></td>
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</table>
sometimes called the Ofgem legal review, but that’s a document you recognise, Mr Bissett?

Mr Bissett: Uh-huh.

Mr Scoffield QC: That was received with the email of the 2\textsuperscript{nd} of March. Can you describe what consideration you gave to it at that stage?

Mr Bissett: Well, with the work request that was sent through, it was sent through with various items. So it was sent through with another redraft of the regs by DETI, so DETI had revised the Northern Ireland regulations again. So they sent us a revised version of the RHI regs for Northern Ireland. They sent us a letter from DSO with comments, and I think they had tried to reflect the DSO comments in their – in the draft that they had sent through. And then they sent the Ofgem document, which was a lengthy document with comm— appendix 1 and appendix 2 comments. Quite a lengthy document; I think it’s 28 pages. When I received that, I asked for a telephone — so I was — and we were given a week’s — I think we were given five days, actually, to review it and respond on these, and I asked for a telephone call with the Department to discuss, principally, the Ofgem memo and what was the background to it and what was the intention.

Mr Scoffield QC: And why in particular did you ask for that meeting?

Mr Bissett: Well, I wanted to know because this document was dated — so this document is dated 4\textsuperscript{th} of November 2011, and it was sent to us in March with a very short time frame to do anything with any of the documents that they were providing to us. So, for the purpose of giving a — we have to give a very — a detailed fee quote, number of hours to be spent etc, so I needed to know exactly what it was they wanted us to do with this document, and that was the reason for the phone call.

2:45 pm

Mr Scoffield QC: I think the panel may have seen from the papers that the — and, again, please correct me if this is an incorrect summary — but the process was that a work request
would be sent through from DETI; you would have to provide an estimate of time and a fee quotation; and that would then be built in to the work request, and signed and approved, and work would start thereafter?

Mr Bissett: Not always. That — so, that — where they just copied my email into the document, I think that was relatively unusual on this occasion, but the process is right, and we weren’t allowed to start work, so we might’ve been given a very challenging time frame, but we couldn’t start work on the matter until we had got the sign-off from the senior person at DETI. But the description of what you have described is correct. So, the work request would come through and we’d have a discussion, and that would either lead to an amendment to the work request form or just the addition of our fee quote, and then that would be signed off by the DETI official.

Mr Scoffield QC: I want to come back to some of the detail of the Ofgem memo in a moment or two, but, before we do that, I want to try and explore this issue about exactly what you were to do with it, and who was doing what with it, and why. To do that, I want to turn firstly to DFE-66252, and this is the approved work request, so —. The panel needn’t turn to this, but the third page of this has Ms Hepper’s signature on the 7th of March, showing that the request is approved and work can commence on the basis of the fees which were set out in the body of the work request, but we see that the issue is described at the top of the page:

“The current draft RHI regulations have now closed to consultation. The consultation responses have required the Department to review the final design of the scheme to take account of the comments raised. The Departmental Solicitor’s Office (DSO) and Ofgem, who are responsible for administering the scheme, have also made comments … The Regulations now need to be updated and finalised in line with the final design of the scheme. Comments raised by DSO and Ofgem should also be considered and, if appropriate, reflected in the final draft
Mrs Wheeler: Yes.

Mr Lunny: Not — sorry, that’s the first one. If we could look at the second one. There it says:

“‘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.”

And it identifies where the term “heating system” appears. And it says, then, as a solution, in the next column:

“DETI should add a defined term to ensure clarity. It is not acceptable for this to be clarified in guidance.”

So, this was a document that was provided to DETI by Ofgem in November 2011. Now, did you ever see that document?

Mrs Wheeler: No, no.

Mr Lunny: Or have any of its contents communicated to you by DETI?

Mrs Wheeler: No.

Mr Lunny: That’s all I want to ask you about the issue of definitions. The other question I want to ask you — the only other question I want to ask you about your work in October 2011, and about what was or wasn’t done, is in relation to the funding.

Mrs Wheeler: Yes.

Mr Lunny: If you recall, when we looked at the letter of instruction of the 15th of August, it made it clear — I think in the third paragraph of the second page — that the funding was £25 million for the scheme — that that was being spread over four years.

Mrs Wheeler: Yes.

Mr Lunny: And you would have been aware from the regulations that DETI was under a duty to accredit eligible installations in respect of which properly made applications had been submitted, and the reference for that in the draft that you were looking at was regulation 22(6). If we could maybe bring that up, it’s at DFE-17188. If we could zoom in on
I have now had the opportunity to skim through some of the previous exchanges and would offer the following thoughts in advance of the meeting.

We need to know:

(a) whether DETI have now finalised their policy as regards which technologies etc. will be eligible under the scheme;
(b) whether there is yet a further draft of the NI SI, following the one prepared last October;
(c) if there is, whether it takes on board the numerous comments made by Faye Nicholls of Legal last year, shared with DET, as regards corrective amendments to the GB scheme which it appears would be desirable and comments she made in relation to the draft NI SI; and
(d) whether they are minded to await the amendments to the GB Regs being considered by DECC currently and which are expected to be enacted early next year and in the middle of next year (including to rectify deficiencies in the current Regs or whether, instead, they propose to proceed independently (Catherine emailed on this subject on 7 November last year).

I would be concerned were it to be suggested that a rigid timetable for enacting and bringing into force the Regs were to be adopted, at any rate at this early stage, as it no simple matter to determine at what stage the draft Regs would be ready for Ministerial signature. The danger is that a date will be selected which subsequently proves unrealistic but which has been publicly announced in advance and which it will hence be difficult presentationally to alter. If that happens it could lead to a policy formulation process which is rushed and so potentially flawed (including as regards the resources that will be required to administer the scheme), legal input which is likely to be similarly rushed and a corresponding increase in legal risks.

There are a number of imponderables which, individually and cumulatively, make the timetable uncertain and which, in my view, militate against a fixed timetable: I list below, in no particular order, those that have occurred to me. Others may occur later:

(a) State aids notification to Brussels will be necessary before the Regs can be enacted. As I understand this process took about 10 months to complete in the case of the GB Regs. It may not necessarily take as long in the case of the NI Regs but this can’t be guaranteed;
(b) The DECC Regs had to be notified to the Commission and other member States in draft pursuant to the “technical standards” directive, as they contained certain provisions which were considered by DECC to amount to notifiable technical specifications. I assume that the NI Regs, containing as they would many similar if not identical provisions, would also require notification in draft. I won’t describe all the directives’ provisions here. Suffice to say that it entails a three month minimum standstill period during which the draft Regs cannot lawfully be enacted and during which the commission and/or other member States may comment or issue a detailed opinion expressing the view that the measure would be an unjustifiable barrier to trade. Any comments have to be taken into account when the Regs are made and, if there is a detailed opinion, the commission must be persuaded that there is no barrier to trade after all and the standstill period is extended for at least a further 3 months. DETI would need to consider whether the Regs were notifiable, notify them in the prescribed form and deal with any unfavourable response as just described. Regs that are not notified when required to be are unenforceable and notified Regs to which significant amendments are made have to be renotified.
(c) The guidance on the GB Regs is in excess of 200 pages in length and did not have as much legal scrutiny as Legal considered desirable. It would not be prudent to assume that it could be applied wholesale to the NI Regs with only minimal changes. It needs a proper review and would in any case have to be expanded as compared with the GB guidance if the NI Regs will extend to additional technologies.
(d) The NI SI, like the GB one, will be an affirmative resolution SI, i.e. it requires express approval from both Houses of Parliament before it can be made (cf negative resolution SIs which are made and remain in force unless a Parliamentary resolution precluding that is adopted. Affirmative resolution SI generally take longer to complete the Parliamentary process and the final outcome is less certain;
(e) The legal powers in the Energy Act 2011 permit DETI and GEMA to agree that GEMA will carry out on behalf of DETI or NIAUR functions conferred on the latter by a Scheme made under the Act. This would necessitate an agreement being drawn up to give effect to such agreement. The agreement may need to be of fairly considerable length and, although precedents exist, they would need adaptation for present purposes and it is not clear how long the negotiation of the agreement would take. This is a key step and pre-requisite for the involvement of GEMA;
(f) Ofgem’s view is that the GB Regs are not ideally drafted in a number of respects, some of which are rather important. The table of corrective amendments mentioned above refers. The Table is lengthy and will require considerable time consuming thought on the part of Ofgem, if they have not already done that. Moreover recent modifications have been made to the items contained in the Table which would also need to be communicated to DETI and considered by them. Moreover there are now
NOTE OF DISCUSSION POINTS AND ACTIONS From RHI NORTHERN IRELAND: FEASIBILITY STUDY
REVIEW SESSION – 14:30-16:00 22 MAY 2012

Those in Attendance:

Keith Avis
Adam Tackley
Luis Castro
Richard Kayan
Marcus Porter

Apologies: Andrew Amato (available but not possible to contact via conference call), Catherine McArthur, Ruth Lancaster, Felicity Beverley.

Linking to GB Scheme

1. It was recognised that there are a number of issues with DETI mirroring the GB scheme directly. Most notably, the GB scheme operational processes will be updated to accommodate legislative changes taking place during this financial year. It was agreed that DETI will need to consider how this dovetails into the timing of the delivery of their scheme. Equally, if after considering, DETI wish to have something more bespoke for their scheme, there are cost and operational implications for Ofgem that will need to be considered.

Action: As part of discussions on the Agency Services Agreement it was agreed that we will need to be absolutely clear on how DETI will wish to reflect the GB legislation and accommodate the legislative changes coming down the line.

NI RHI Regs

2. The point was made that the GB Regs are not ideally drafted in a number of respects and as such modifications are being made to pick up on issues that have come to light during the operation of the scheme. At the end of last year Ofgem Legal produced a table of corrective amendments. They mentioned that they passed this onto the New Schemes Development team. It is unclear whether DETI have had sight of this table. Keith Avis took away a commitment to establish whether the table was shared with DETI.

3. DETI had confirmed that they will be sending their draft of the Regs by the end of the week. It was not clear how long we would have to comment. Keith Avis took away an action to seek clarity from DETI on this point.

Action: Keith Avis to secure a timeline from DETI on their early delivery milestones.
Action: Keith Avis to find out from Catherine McArthur whether the list of anticipated corrective amendments was sent to DETI last year.

Agency Services Agreement

4. In a telephone conversation before the meeting DETI had confirmed that they would be content to enter into an 'arrangement', along the lines of an Agency
Thanks Keith. Re the NIRO framework - I have checked and it was as I thought - we couldn't get access to it previously.

Therefore, as you suggested, it would be useful if you could send through some broad headings for us to consider prior to discussions.

Thanks
Joanne

Joanne McCutcheon
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Please consider the environment - do you really need to print this e-mail?

From: Keith Avis [mailto:Keith.Avis@ofgem.gov.uk]
Sent: 29 May 2012 10:19
To: McCutcheon, Joanne
Cc: Luis Castro; Matthew Harnack; Hutchinson, Peter
Subject: RE: NI RHI: Next Step Issues

Joanne
I am grateful for our discussion this morning. There are some action points flowing from this, and I have added to your comments below to cover these points. If I have missed anything do let me know.

Rgds
Keith

Keith Avis
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www.ofgem.gov.uk

From: McCutcheon, Joanne [mailto:Joanne.McCutcheon@detini.gov.uk]
Sent: 28 May 2012 14:17
To: Keith Avis
Cc: Luis Castro; Matthew Harnack; Hutchinson, Peter
Subject: RE: NI RHI: Next Step Issues

Keith
Sorry, I tried to return your call but you must be out of the office. Please see my responses attached to your e-mail below.
I'm not in the office this afternoon but will be here again tomorrow morning.

Regards
Joanne

Joanne McCutcheon
Received from OFGEM on 11.05.2017
Annotated by RHI Inquiry
From: Keith Avis [mailto:Keith.Avis@ofgem.gov.uk]
Sent: 24 May 2012 16:50
To: McCutcheon, Joanne
Cc: Luis Castro; Matthew Harnack
Subject: NI RHI: Next Step Issues

Joanne cc: Luis, Matthew

Further to our telephone conversation on Wednesday there are a couple of issues that I would like to pick up on that will hopefully enable us to move forward:

Agency Services Agreement:
We spoke about arranging a meeting between ourselves and our respective legal teams to scope this out. As discussed, I will send you a framework document over the next day or so that will give you a steer on the type of things that we would need this agreement to cover. That's great, once we have sight of this we can arrange a meeting/conference call. Joanne to speak to NIAUR, who have an Information sharing agreement with DETI, to secure a copy of the Agency Services Agreement for NtRO, which we can use as a framework for discussion. Keith to offer some dates from Ofgem (legal & development team) for a teleconference to discuss the detail of agreement with DETI.

Timeline:
I appreciate that your legal team are working on the draft regulations which will be sent to our own legal team shortly. Of course, we are happy to offer our views on this, but it would help us greatly to have details of your early milestones and associated dates, so that we can plan our input into your process. Latest draft will be sent to you shortly - we would appreciate a fairly quick turnaround. However, I'm presuming that since you saw them earlier in the process this should not be too onerous. If this is not the case I'm happy to discuss. We are hoping to hear from EU by end of June - depending on timing we may start the process to lay the regulations before assembly recess (early July). Keith flagged the issue of the need to allow for additional development time to accommodate resourcing issues around the Olympics. Joanne mentioned that regs may not now be laid before summer recess which is likely to push out the go live date to end September/October.

Issues Meeting:
Having talked to colleagues across Ofgem we wondered whether you would find it useful to come across to Ofgem for a meeting with those covering the GB operation, the IT process and the issues from a legal perspective. Given the need to move forward quickly, if this is an option that you would like to take up, grateful if you could let me have some potential dates from 7 June and I will co-ordinate things from this end. Good idea but I'll have to get back to you on this - we are short on the ground in terms of Personnel and have just launched our Premium Payment Scheme - likely to be late June before we could get across. Joanne to offer some end June dates for the meeting. Keith flagged the issue of amendments to the GB scheme and how this dovetails into the timing of the delivery of the Northern Ireland scheme. Keith flagged that in commenting on the early version of the regs Ofgem offered comments to DETI on issues that should be considered as part of further drafting. Joanne was going to look back through the detail that Ofgem had sent.

Costs:
Appreciate that Fiona's letter confirmed that you wished to enter into an Agency Services Agreement with Ofgem, but so that we can work with you on the agreement, I would be grateful if you could confirm to us in writing that you are content for us to start to incur resourcing cost now. Of course the ASA will set the terms of the agreement but we will need assurance of funding now so that we can work with you on pulling this together.

Happy to incur costs once staff are in place and work commences - is recruitment complete? Joanne to send a letter to confirm that DETI is prepared to meet the initial cost of Ofgem staffing, pending the delivery of the Agency Services Agreement.

Legal Contingency:
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From: Hutchinson, Peter [mailto:Peter.Hutchinson@detini.gov.uk]  
Sent: 13 June 2012 17:16  
To: Keith Avis  
Cc: McCutcheon, Joanne; Stewart, Susan  
Subject: NI RHI - Draft Regs

Keith,

Please see attached the current draft of the Northern Ireland RHI regulations – grateful if you could treat in confidence when sharing with your legal advisors.

Your legal team have previously seen a copy of these regulations and made comments. As discussed with Catherine previously, these regs largely reflect the GB RHI regs however are amended to cover specific issues with the proposed NI scheme, namely the tariffs and banding. We are aware that DECC intend to make legislative changes to the GB RHI in the near future however it would be our preference to closely follow their existing regs and then make necessary amendments in the future once DECC’s legislative programme is clearer.

Grateful if you would consider the attached regs and advise on any comments or required changes.

Thanks,

Peter

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The Department of Enterprise, Trade and Investment makes the following Regulations in exercise of the powers conferred on it by sections 113 and 121 of the Energy Act 2011.

Do DETI really want to omit the Table of Arrangements that the GBRegs include? The NI Regs seem more than long enough to warrant the inclusion of a table.

PART 1
INTRODUCTORY

Citation and commencement

1. These Regulations may be cited as the Renewable Heat Incentive Scheme Regulations (Northern Ireland) 2012 and shall come into operation on [●] 2012.

Interpretation

2. - In these Regulations—

"accreditation" means accreditation of an eligible installation by the Department following an application under regulation 22;

"accredited RHI installation" means an eligible installation which has been given accreditation;

1 2011 c. 16
“anaerobic digestion” means the bacterial fermentation of biomass in the absence of oxygen;

“biogas production plant” means a plant which produces biogas by anaerobic digestion,
gasification or pyrolysis;

“building” means any permanent or long-lasting building or structure of whatever kind and whether fixed or moveable which, except for doors and windows, is wholly enclosed on all sides with a roof or ceiling and walls;

“CHP” means combined heat and power;

“class 2 heat meter” means a heat meter which—

(a) complies with the relevant requirements set out in Annex 1 to the Measuring Instruments Directive;

(b) complies with the specific requirements listed in Annex MI-004 to that Directive; and

(c) falls within accuracy class 2 as defined in Annex MI-004 to that Directive;

“coefficient of performance” means the ratio of the amount of heating or cooling in kilowatts provided by a heat pump to the kilowatts of power consumed by the heat pump;

“commissioned” means, in relation to an eligible installation, the completion of such procedures and tests as constitute, at the time they are undertaken, the usual industry standards and practices for commissioning that type of eligible installation in order to demonstrate that it is capable of operating and delivering heat to the premises or process for which it was installed;

“date of accreditation”, in relation to an accredited RHI installation, means the later of—

(a) the first day falling on or after the date of receipt by the Department of the application for accreditation on which both the application was properly made and the plant met the eligibility criteria; and This amendment reproduces one DECC are including in their amending SI an interim cost control that is due to come into force in early July. Although those amending Regs have maintained temporary effects only (as regards interim cost control) the change to this definition is intended to be permanent. It is assumed that, given the imminence of the coming into force date of the amending Regs, DETI will wish to replicate the revised definition in the draft NI Regs, though confirmation of this would be appreciated.

(b) the day on which the plant was first commissioned;

“date of registration”, in relation to a producer of biomethane for injection, means the first day falling on or after the date of receipt by the Department of the application for registration on which, in relation to the amendment proposed here, the comments above relating to “date of accreditation” again apply, the application was properly made;

“The Department” means the Department of Enterprise, Trade and Investment: Is it necessary to include this definition? I assume, though I haven’t checked, that the NI Interpretation Act (which applies to these Regs by virtue of reg 2(2)) includes a provision similar to the one in the GB Interpretation Act whereby terms used in subordinate legislation have the same meaning as the meaning they bear in the relevant primary legislation unless the subordinate legislation states otherwise. If so then isn’t this definition superfluous given that the term is defined in the Energy Act 2011?

“eligibility criteria” has the meaning given by regulation 4;

“eligible installation” means a plant which meets the eligibility criteria;
“eligible purpose” means a purpose specified in regulation 3(2);

“gasification” means the substoichiometric oxidation or steam reformation of a substance to produce a gaseous mixture containing two or all of the following: oxides of carbon, methane and hydrogen;

“gas conveyor” means the holder of a licence under Article 8(1)(a) of the Gas (Northern Ireland) Order 1996;

“heat meter” has the same meaning as that given in Annex MI-004 of the Measuring Instruments Directive;

“ineligible purpose” means a purpose which is not an eligible purpose;

“injection” means the introduction of gas into a pipe-line system operated by a gas conveyor;

“installation capacity”, in relation to a plant, means the total installed peak heat output capacity of the plant;

“kWh” means kilowatt hours;

“kWhth” means kilowatt hours thermal;

“kWth” means kilowatt thermal;

“MCS” means the Microgeneration Certification Scheme or an equivalent scheme accredited under EN 45011 which certifies microgeneration products and installers in accordance with consistent standards;


“MWhth” means megawatt hours thermal;

“MWth” means megawatt thermal;

“ongoing obligations” means the obligations specified in Part 4;

“participant” means—

(a) the owner of an accredited RHI installation or, where there is more than one such owner, the owner with authority to act on behalf of all owners in accordance with regulation 22(3); or

(b) a producer of biomethane who has been registered under regulation 25;

“periodic support payments” have the meaning given in regulation 3;

“pipe-line system” means a pipe (together with any apparatus and works associated therewith), or a system of pipes (together with any apparatus and works associated therewith) for the conveyance of gas, not being—

this definition differs significantly from the GB one. It impacts on the definition of “injection”, which

\[2\]
\[3\] S.I. 1996/275 (N.I.2)


\[5\] 2003 c.33

\[6\] Only
in turn is used in reg 25. It is not clear whether the differences between this definition and its GB counterpart result in the effects of reg 25 being different in NI as compared with in GB

(a) a pipe or a system of pipes constituting or comprised in apparatus for heating or cooling or for domestic purposes;

(b) a pipe or a system of pipes wholly situated —

(i) within the site of any apparatus or works to which certain provisions of the Factories Act (Northern Ireland) 1965\(^1\) apply by virtue of section 125(1) of that Act (building operations and works of engineering construction);

(ii) within the boundaries of any land occupied as a unit for purposes of agriculture (within the meaning of the Agriculture Act (Northern Ireland) 1949\(^2\)) where the system of pipes is designed for use for purposes of agriculture; or

(iii) in premises used for the purposes of education or research;

“process” means any process other than the generation of electricity;

“pyrolysis” means the thermal degradation of a substance in the absence of an oxidising agent (other than that which forms part of the substance itself) to produce char and one or both of gas and liquid;

“quarterly period” means, except where otherwise specified, the first, second, third or fourth quarter of any year commencing with, or with the anniversary of, a participant’s tariff start date;

“retail prices index” means —

(a) the general index of retail prices (for all items) published by the Office of National Statistics;

or

(b) where the index is not published for a year, any substituted index or figures published by that Office;

“scheme” (except in this regulation) means the incentive scheme established by these Regulations;

“solar collector” means a liquid filled flat plate or evacuated tube solar collector;

“statement of eligibility” has the meaning given by regulation 22(6)(c);

“steam measuring equipment” means all the equipment needed to measure to the Department’s satisfaction the mass flow rate and energy of steam, including at least the following components —

(a) a flow meter;

(b) a pressure sensor;

(c) a temperature sensor; and

(d) a digital integrator or calculator able to determine the cumulative energy in MWh which has passed a specific point;

\(^1\) 1965 Chapter 26

\(^2\) 1949 Chapter 2
“tariff” means the payment rate per kWh in respect of an accredited RHI installation and per kWh in respect of biomethane injection;

“tariff end date” means the last day of the tariff lifetime;

“tariff lifetime” means—

(a) in relation to an accredited RHI installation, the period for which periodic support payments are payable for that installation; or

(b) in relation to a participant who is a producer of biomethane, the period for which that person is eligible to receive periodic support payments;

“tariff start date” means the date of accreditation of an eligible installation or, in relation to a producer of biomethane, the date of registration.

(2) The Interpretation Act (Northern Ireland) 1954¹ shall apply to these Regulations as it applies to an Act of the Northern Ireland Assembly.

Renewable heat incentive scheme

3.—(1) These Regulations establish an incentive scheme to facilitate and encourage the renewable generation of heat and make provision regarding its administration.

(2) Subject to Part 7 and regulation 24, the Department must pay participants who are owners of accredited RHI installations payments, referred to in these Regulations as “periodic support payments”, for generating heat that is used in a building for any of the following purposes—

(a) heating a space;

(b) heating water; or

(c) for carrying out a process.

(3) Subject to Part 7, the Department must pay participants who are producers of biomethane for injection periodic support payments.

PART 2

ELIGIBILITY AND MATTERS RELATING TO ELIGIBILITY

CHAPTER 1

Eligible installations

Eligible installations

4.—(1) A plant meets the criteria for being an eligible installation (the “eligibility criteria”) if—

(a) regulation 5, 6, 7, 8, 9, 10 or 11 applies;

(b) the plant satisfies the requirements set out in regulation 12(1);

¹ 1954 c.33 (N.I.)
(c) regulation 15 does not apply; and

(d) the plant satisfies the requirements set out in Chapter 3.

(2) But this regulation is subject to regulation 14.

CHAPTER 2

Eligibility criteria for technologies

Eligible installations generating heat from solid biomass if, as appears to be the case, it is not intended that RHI payments will be made to the owners of installations generating heat from solid biomass where the installation capacity of the plant is 1000kWth or above, shouldn’t reg 5 include a requirement that the installation have an i.e of less than that? Otherwise the owners concerned could be admitted to the scheme but would have no entitlement to payments, which is a nonsense.

5. — This regulation applies if the plant complies with all of the following requirements—

(a) it generates heat from solid biomass;

(b) the heat from the solid biomass is generated using equipment specifically designed and installed to use solid biomass as its only primary fuel source;

(c) in the case of a plant with an installation capacity of 45kWth or less, regulation 13 applies.

Eligible installations generating heat from solid biomass contained in municipal waste

6. — This regulation applies if the plant generates heat from solid biomass contained in municipal waste.

Eligible installations generating heat using solar collectors

7. — This regulation applies if the plant complies with all of the following requirements—

(a) it generates heat using a solar collector;

(b) it has an installation capacity of less than 200kWth

(c) in the case of a plant with an installation capacity of 45kWth or less, regulation 13 applies.

Eligible installations generating heat using heat pumps

8. — This regulation applies if the plant is a heat pump and complies with all of the following requirements—

(a) it generates heat using naturally occurring energy stored in the form of heat from one of the following sources of energy—

(i) the ground, other than naturally occurring energy, located and extracted from at least 500 metres below the surface of solid earth;

(ii) surface water;
(b) in the case of a heat pump with an installation capacity of 45kWth or less, regulation 13 applies;

(c) it has a coefficient of performance of at least 2.9.

Eligible installations which are CHP systems

9.—(1) Subject to paragraph (2), this regulation applies if the plant is a CHP system which complies with one of the following requirements—

(a) it generates heat and electricity from solid biomass and either regulation 6 applies or the plant complies with the requirement in regulation 5(b);

(b) it generates heat and electricity from biogas and complies with regulation 11(b) and (c);

(c) it generates heat and electricity utilising naturally occurring energy located and extracted from at least 500 metres beneath the surface of solid earth.

(2) This regulation does not apply if the plant—

(a) uses solid biomass to generate heat and electricity;

(b) is accredited under the Renewables Obligation Order (Northern Ireland) 2009;

(c) is, or at any time since it was accredited in accordance with sub-paragraph (b), has been a qualifying CHP generating station within the meaning of Article 2 of that Order.

Eligible installations generating heat using geothermal sources

10.— This regulation applies if the plant generates heat using naturally occurring energy located and extracted from at least 500 metres beneath the surface of solid earth.

Eligible installations generating heat using biogas

11.— This regulation applies if the plant complies with all of the following requirements—

(a) it generates heat from biogas;

(b) it has an installation capacity of less than 200kWth;

(c) it does not generate heat from solid biomass.

Other eligibility requirements for technologies

12.—(1) The requirements referred to in regulation 4(b) are—

(a) installation of the plant was completed and the plant was first commissioned on or after 1st September 2010, presumably this date is used, here and elsewhere in the draft Regs, because it was the date it was announced that there would be an NI RHI, the corresponding GB date being 15/9/2009.

(b) the plant was new at the time of installation;
(c) the plant uses liquid or steam as a medium for delivering heat to the space, water or process;
(d) heat generated by the plant is used for an eligible purpose.

(2) The requirements of paragraph (1)(a) and (b) are deemed to be satisfied where the plant was previously generating electricity only, using solid biomass or biogas, and was first commissioned as a CHP system on or after 1st September 2010;

(3) But the requirements of paragraph (1)(a) and (b) are not satisfied where the plant was previously generating heat only and was first commissioned as a CHP system on or after 1st September 2010.

MCS certification for microgeneration heating equipment

13. — This regulation applies where the plant for which accreditation is being sought is certified under the MCS and its installer was certified under the MCS at the time of installation.

Plants comprised of more than one plant

14.—(1) Subject to paragraph (2), and without prejudice to regulation 42(5)(b), the eligibility criteria are not met if the plant is comprised of more than one plant.

(2) Where two or more plants—
(a) use the same source of energy and technology;
(b) form part of the same heating system; and
(c) are not accredited RHI installations;

those plants (the “component plants”) are to be regarded as a single plant for the purposes of paragraph (1) provided that paragraph (3) applies.

(3) This paragraph applies where each component plant meets the eligibility criteria; and for that purpose a component plant can be taken to meet the eligibility criteria notwithstanding that regulation 13 does not apply.

Excluded plants

15.—(1) This regulation applies where the plant—
(a) is generating heat solely for the use of one domestic premises;
(b) is, in the Department’s opinion, generating heat solely for an ineligible purpose; or
(c) is a plant which—
(i) is additional RHI capacity within the meaning of regulation 42(2) and was first commissioned more than 12 months after the original installation was first commissioned;
(ii) generates heat from biogas or using a solar collector; and
(iii) has an installation capacity which, together with the installation capacities of all related plants, is 200kWth or above.

(2) For the purposes of this regulation—

“domestic premises” means single, self contained premises used wholly or mainly as a private residential dwelling where the fabric of the building has not been significantly adapted for non-residential use;

“related plant” means any plant for which an application for accreditation has been made (whether or not it has been accredited) which uses the same source of energy and technology and forms part of the same heating system as the plant referred to in paragraph (1)(c).

CHAPTER 3

Eligibility criteria in relation to metering and steam measuring

Metering of plants in simple systems

16.—(1) This regulation applies where—

(a) the plant is generating and supplying heat solely for one or more eligible purposes within one building;

(b) no heat generated by the plant is delivered by steam; and

(c) the plant is not a CHP system.

(2) Where this regulation applies, a class 2 heat meter must be installed to measure the heat in kWhth generated by the plant.

Metering of plants in complex systems

17.—(1) This regulation applies where regulation 16(1) does not apply.

(2) Subject to regulation 19—

(a) where heat generated by the plant is delivered by liquid, class 2 heat meters must be installed to measure both the kWhth of heat generated by that plant and the kWhth of heat used for eligible purposes by the heating system of which that plant forms part; and

(b) where heat generated by the plant is delivered by steam, the following must be installed—

(i) steam measuring equipment to measure both the heat generated in the form of steam by the plant and the heat in the form of steam used for eligible purposes; and

(ii) a class 2 heat meter or steam measuring equipment to measure any condensate or steam which returns to the plant.

(3) Where this regulation applies, and more than one plant is supplying heat to the heating system supplied by the plant, steam measuring equipment or class 2 heat meters must be installed, as appropriate, to measure the heat generated in kWhth by all plants supplying heat to that heating system.

Shared meters
Subject to paragraph (2), the heat generated by the plant must be individually metered.

Subject to regulation 42(8), the heat generated by two or more plants may be metered using one meter provided that—

(a) the plants use the same source of energy and technology;
(b) the plants will, once given accreditation, be eligible to receive the same tariff;
(c) the plants will then share the same tariff start date and tariff end date; and
(d) it is the Department’s opinion that a single meter is capable of metering the heat generated by all of those plants.

Metering of CHP systems generating electricity only before 1st September 2010

This regulation applies where the plant is a CHP system and the requirements of regulation 12(1)(a) and (b) are deemed to be satisfied in accordance with regulation 12(2).

Where this regulation applies, any existing heat meter or steam measuring equipment installed before the date of commencement of these Regulations may continue to be used by a participant to measure the heat generated by the CHP system and used for eligible purposes, provided that the CHP system was registered under the CHPQA before that date.

For the purpose of this regulation, “the CHPQA” means the Combined Heat and Power Quality Assurance Standard, Issue 3, January 2009, as published by the Department of Energy and Climate Change.

Matters relating to all heat meters and steam measuring equipment

All heat meters installed or used in accordance with these Regulations must, where applicable—

(a) be calibrated prior to use;
(b) be calibrated correctly for any water/ethylene glycol mixture; and
(c) be (or have been) properly installed in accordance with manufacturer’s instructions.

All steam measuring equipment installed or used in accordance with these Regulations must be—

(a) calibrated prior to use;
(b) capable of displaying measured steam pressure and temperature;
(c) capable of displaying the current steam mass flow rate and the cumulative mass of steam which has passed through it since it was installed; and
(d) properly installed in accordance with manufacturer’s instructions.

Additional metering requirements for plants generating heat from biogas

21.—(1) This regulation sets out additional requirements in relation to metering where a plant is generating heat from biogas.

(2) In that case—

(a) a class 2 heat meter must be installed to meter any heat directed from the plant combusting the biogas to the biogas production plant; and

(b) a class 2 heat meter must be installed to meter any heat supplied to the biogas production plant from any source other than—

(i) the plant combusting the biogas; and

(ii) where the biogas has been produced by anaerobic digestion, the feedstock from which it was produced.

PART 3

ACCREDITATION AND REGISTRATION

Applications for accreditation

22.—(1) An owner of an eligible installation may apply for that installation to be accredited.

(2) All applications for accreditation must be made in writing to the Department and must be supported by—

(a) such of the information specified in Schedule 1 as the Department may require;

(b) a declaration that the information provided by the applicant is accurate to the best of the applicant’s knowledge and belief;

(c) a declaration that the applicant is the owner, or one of the owners, of the eligible installation for which accreditation is being sought.

(3) The Department may, where an eligible installation is owned by more than one person, require that—

(a) an application submitted under this regulation is made by only one of those owners;

(b) the applicant has the authority from all other owners to be the participant for the purposes of the scheme; and

(c) the applicant provides to the Department, in such manner and form as the Department may request, evidence of that authority.

(4) Before accrediting an eligible installation, the Department may arrange for a site inspection to be carried out in order to satisfy itself that a plant should be accredited.

(5) The Department may, in granting accreditation, attach such conditions as it considers to be appropriate.

(6) Where an application for accreditation has, in the Department’s opinion, been properly made in accordance with paragraphs (2) and (3) and the Department is satisfied that the plant is an eligible installation the Department must (subject to regulation 23 and regulation 46(3))—

(a) accredit the eligible installation;
(b) notify the applicant in writing that the application has been successful;

(c) enter on a central register maintained by the Department the applicant's name and such other information as the Department considers necessary for the proper administration of the scheme;

(d) notify the applicant of any conditions attached to the accreditation;

(e) in relation to an applicant who is or will be generating heat from solid biomass, having regard to the information provided by the applicant, specify by notice to the applicant which of regulations 28 or 29 applies;

(f) provide the applicant with a written statement ("statement of eligibility") including the following information—

(i) the date of accreditation;
(ii) the applicable tariff;
(iii) the process and timing for providing meter readings;
(iv) details of the frequency and timetable for payments; and
(v) the tariff lifetime and tariff end date.

(7) Where the Department does not accredit a plant it must notify the applicant in writing that the application for accreditation has been rejected, giving reasons.

(8) Once a specification made in accordance with paragraph (6)(e) has been notified to an applicant, it cannot be changed except where the Department considers that an error has been made or on the receipt of new information by the Department which demonstrates that the specification should be changed.

Exceptions to duty to accredit

23.—(1) The Department must not accredit an eligible installation unless the applicant has given notice (which the Department has no reason to believe is incorrect) that, as applicable—

(a) no grant from public funds has been paid or will be paid in respect of any of the costs of purchasing or installing the eligible installation; or

(b) such a grant was paid in respect of an eligible installation which was completed and first commissioned between 1st September 2010 and the date on which these Regulations come into force, and has been repaid to the person or authority who made it.

(2) In this regulation, "grant from public funds" means a grant made by a public authority or by any person distributing funds on behalf of a public authority.

(3) The Department must not accredit an eligible installation if it has not been commissioned.

(4) The Department may refuse to accredit an eligible installation if its owner has indicated that one of the applicable ongoing obligations will not be complied with.

(5) The Department may refuse to accredit a plant which is a component plant within the meaning of regulation 14(2). We have urged that DEFra seriously consider delaying making these Regulations until substantial amendments to the GB Regs planned by DECC are made and including those amendments.
Changes in ownership

24. (1) This regulation applies where ownership of all or part of an accredited RHI installation is transferred to another person.

(2) No periodic support payment may be made to a new owner until—

(a) that owner has notified the Department of the change in ownership; and

(b) the steps set out in paragraph (3) have been completed.

(3) On receipt of a notification under paragraph (2), the Department—

(a) may require the new owner to provide such of the information specified in Schedule 1 as the Department considers necessary for the proper administration of the scheme;

(b) may review the accreditation of the accredited RHI installation to ensure that it continues to meet the eligibility criteria and should remain an accredited RHI installation.

(4) Where the Department has received the information required under paragraph (3)(a) and is satisfied as to the matters specified in paragraph (3)(b) it must—

(a) update the central register referred to in regulation 22(6)(c);

(b) where the new owner is the participant, send the new owner a statement of eligibility setting out the information specified in regulation 22(6)(f); and

(c) where applicable, send the new owner (if the new owner is the participant) a notice in accordance with regulation 22(6)(e).
(5) If, within a period of 12 months from the transfer of ownership of the accredited RHI installation, no notification is made in accordance with paragraph (2) or paragraph (4) does not apply, the installation will on the expiry of that period cease to be accredited and accordingly no further periodic support payments will be paid in respect of the heat it generates.

(6) The period specified in paragraph (5) may be extended by the Department where the Department considers it just and equitable to do so.

(7) Subject to paragraph (8), following the successful completion of the steps required under paragraphs (3) and (4), the new owner of an accredited RHI installation will receive periodic support payments calculated from the date of completion of those steps for the remainder of the tariff lifetime of that accredited RHI installation.

(8) Where a transfer of ownership of all or part of an accredited RHI installation takes place and results in that accredited RHI installation being owned by more than one person, the Department may require that only one of those owners is the participant for the purposes of the scheme and require that owner to comply with sub-paragraphs (b) and (c) of regulation 22(3).

Producers of biomethane

25.—(1) A producer of biomethane for injection may apply to the Department to be registered as a participant.

(2) Applications for registration must be in writing and supported by—

(a) such of the information specified in Schedule 1 as the Department may require;

(b) a declaration that the information provided by the applicant is accurate to the best of the applicant’s knowledge and belief;

(c) details of the process by which the applicant proposes to produce biomethane and arrange for its injection; and

(d) a notice given in accordance with paragraph (6).

(3) The Department may in registering an applicant attach such conditions as it considers appropriate.

(4) Where the application for registration is properly made in accordance with paragraph (2), the Department must (subject to paragraphs (5), (6) and (7))—

(a) notify the applicant in writing that registration has been successfully completed and the applicant is a participant;

(b) enter on a central register maintained by the Department the date of registration and the applicant’s name;

(c) notify the applicant of any conditions attached to their registration as a participant; and

(d) send the applicant a statement of eligibility including such of the information specified in regulation 22(6)(f) as the Department considers applicable.

(5) The Department may refuse to register an applicant if the applicant has indicated that one or more of the applicable ongoing obligations will not be complied with.
(6) The Department must not register an applicant unless that applicant has given notice (which the Department has no reason to believe is incorrect) that no grant from public funds has been paid or will be paid in respect of any of the equipment used to produce the biomethane for which the applicant is intending to claim periodic support payments. The comments above relating to reg. 23(1) and (2) apply here too and indeed a fortiori since there is no provision in reg 25 corresponding to reg 23(1)(b).

(7) The Department must not register an applicant if it would result in periodic support payments being made to more than one participant for the same biomethane.

(8) Where an application for registration is made after [here specify the date on which these Regulations come into force], the Department must not register the applicant unless, at the time of making the application, injection of biomethane produced by that applicant has commenced. This proposed amendment replicates one intended to have effect permanently that is included in DECC’s amending [Interim cost control] Regulations that are due to come into force at the beginning of July. In view of the imminence of the coming into force of those Regulations, it is assumed that DETI will wish to replicate this GB amendment here.

Preliminary accreditation

26.—(1) The Department may, upon the application by a person who proposes to construct or operate an eligible installation which has not yet been commissioned, grant preliminary accreditation in respect of that eligible installation provided—

(a) any necessary planning permission has been granted; or

(b) such planning permission is not required and appropriate evidence of this is provided to the Department from the relevant planning authority.

(2) The Department must not grant preliminary accreditation to any plant under this regulation if, in its opinion, that plant is unlikely to generate heat for which periodic support payments may be paid.

(3) An application for preliminary accreditation must be in writing and supported by such of the information specified in Schedule 1 as the Department may require.

(4) The Department may attach such conditions as it considers appropriate in granting preliminary accreditation under this regulation.

(5) Where a plant has been granted preliminary accreditation (and such preliminary accreditation has not been withdrawn) and an application for accreditation is made under this Part, the Department must, subject to regulation 23, grant that application unless it is satisfied that—

(a) there has been a material change in circumstances since the preliminary accreditation was granted such that, had the application for preliminary accreditation been made after the change, it would have been refused;

(b) any condition attached to the preliminary accreditation has not been complied with;

(c) the information on which the decision to grant the preliminary accreditation was based was incorrect in material particular such that, had the Department known the true position when the application for preliminary accreditation was made, it would have been refused; or

(d) there has been a change in applicable legislation since the preliminary accreditation was granted such that, had the application for preliminary accreditation been made after the change, it would have been refused.
(6) Where any of the circumstances mentioned in paragraph (7) apply in relation to a preliminary accreditation which the Department has granted and having regard to those circumstances the Department considers it appropriate to do so, the Department may—

(a) withdraw the preliminary accreditation;

(b) amend the conditions attached to the preliminary accreditation;

(c) attach conditions to the preliminary accreditation.

(7) The circumstances referred to in paragraph (6) are as follows—

(a) in the Department’s view there has been a material change in circumstances since the preliminary accreditation was granted;

(b) any condition attached to the preliminary accreditation has not been complied with;

(c) the Department considers that the information on which the decision to grant the preliminary accreditation was based was incorrect in a material particular;

(d) there has been change in the applicable legislation since the preliminary accreditation was granted such that, had the application for preliminary accreditation been made after the change, it would have been refused.

(8) The Department must send the applicant a notice setting out—

(a) its decision on an application for preliminary accreditation of a plant or on the withdrawal of any preliminary accreditation;

(b) any condition attached to the preliminary accreditation or any amendment to those conditions.

(9) The notice sent pursuant to paragraph (8) must specify the date on which the grant or withdrawal of preliminary accreditation is to take effect and, where applicable, the date on which any conditions (or amendments to those conditions) attached to the preliminary accreditation are to take effect.

(10) In paragraph (1), the reference to the person who proposes to construct an eligible installation includes a person who arranges for the construction of the eligible installation.

(11) This regulation does not apply to a plant which will generate heat using—

(a) a solar collector;

(b) a heat pump which complies with the requirements of regulation 8(a); or

(c) solid biomass, provided that the plant will have an installation capacity below 200kWth.

PART 4

ONGOING OBLIGATIONS FOR PARTICIPANTS

CHAPTER 1

Ongoing obligations relating to the use of solid biomass to generate heat
Interpretation

27. — In this Part—

"district council" shall have the same meaning as in section 44 of the Interpretation Act (Northern Ireland) 1954; is this definition necessary in view of reg 2(2)?

"energy content" means the energy contained within a substance (whether measured by a calorimeter or determined in some other way) expressed in terms of the substance’s gross calorific value within the meaning of British Standard BS 7420:1991 (Guide for determination of calorific values of solid, liquid and gaseous fuels (including definitions) published by the British Standards Institute on 28th June 1991);

"landfill gas" means gas formed by the digestion of material in a landfill;

"standby generation" means the generation of electricity by equipment which is not used frequently or regularly to generate electricity and where all the electricity generated by that equipment is used by the accredited RHI installation;

definition of “waste” is omitted. Isn’t a definition of that necessary given that the term is used 3 times in this Part?

Participants using solid biomass contained in municipal waste

28.—(1) This regulation applies to participants generating heat in an accredited RHI installation from solid biomass contained in municipal waste.

(2) The proportion of solid biomass contained in the municipal waste must be a minimum of 50 per cent.

(3) For the purposes of paragraph (2)—

(a) the proportion of solid biomass contained in the municipal waste is to be determined by the Department for every quarterly period;

(b) it is for the participant to provide, in such form as the Department may require, evidence to demonstrate to the Department’s satisfaction the proportion of the energy content of the municipal waste used in any quarterly period which is composed of fossil fuel, to enable the Department to determine the proportion of solid biomass in accordance with sub-paragraph (c);

(c) the proportion of solid biomass is the energy content of the municipal waste used in any quarterly period to generate heat less the energy content of any fossil fuel of which that municipal waste is in part composed, expressed as a percentage of the energy content of that municipal waste.

(4) The participant may use fossil fuel (other than fossil fuel mentioned in paragraph (3)(c)) in an accredited RHI installation for the following permitted ancillary purposes only—

(a) cleansing other fuels from the accredited RHI installation’s combustion system prior to using fossil fuel to heat the combustion system to its normal temperature;

(b) the heating of the accredited RHI installation’s combustion system to its normal operating temperature or the maintenance of that temperature;

(c) the ignition of fuels of low or variable calorific value;
(d) emission control;

e in relation to accredited RHI installations which are CHP systems, standby generation or the
testing of standby generation capacity.

(5) The energy content of the fossil fuel used during any quarterly period for the permitted ancillary purposes
specified in paragraph (4) must not exceed 10 per cent of the energy content of all the fuel used by that
accredited RHI installation to generate heat during that quarterly period.

(6) Without prejudice to paragraph (3)(b), when determining the proportion of solid biomass contained in
municipal waste, the Department may have regard to any information (whether or not produced to it by the
participant) if, in its opinion, that information indicates what proportion of the energy content of the
municipal waste is composed of fossil fuel.

(7) Subject to paragraph (8), where the participant produces to the Department—

(a) data published by the Department of the Environment or a district council demonstrating that
the proportion of municipal waste used by that participant which is composed of fossil fuel
is unlikely to exceed 50 per cent; and

(b) evidence that the municipal waste used has not been subject to any process before being
used that is likely to have materially increased that proportion;

the Department may accept this as sufficient evidence for the purposes of paragraph (3)(b) of the fact that the
proportion of the municipal waste used which is composed of fossil fuel is no more than 50 per cent.

(8) Where the Department so requests, the participant must arrange for samples of the municipal waste used
(or to be used) in the accredited RHI installation, or of any gas or other substance produced as the result of
the use of such municipal waste, to be taken by a person (and analysed in a manner) specified by the
Department, and for the results of that analysis to be made available to the Department in such form as the
Department may require.

(9) The participant may not generate heat using solid biomass contained in any waste other than municipal
waste.
(2) The participant may use solid biomass contaminated with fossil fuel only where the proportion of fossil fuel contamination does not exceed 10 per cent.

(3) Such contaminated biomass may not be used unless the fossil fuel is present because—

(a) the solid biomass has been subject to a process, the undertaking of which has caused the fossil fuel to be present in, on or with the biomass even though that was not the object of the process; or

(b) the fossil fuel is waste and was not added to the solid biomass with a view to its being used as a fuel.

(4) For the purposes of paragraph (2)—

(a) the proportion of fossil fuel contamination is to be determined by the Department for every quarterly period;

(b) it is for the participant to provide, in such form as the Department may require, evidence to demonstrate to the Department's satisfaction the proportion of fossil fuel contamination; and

(c) the proportion of fossil fuel contamination is the energy content of the fossil fuel with which the solid biomass used in any quarterly period is contaminated expressed as a percentage of the energy content of all solid biomass (contaminated or otherwise) used in that quarterly period to generate heat other than fossil fuel used in accordance with paragraphs (5) and (6).

(5) The participant may use fossil fuel (other than fossil fuel mentioned in paragraph (2) in an accredited RHI installation for the following permitted ancillary purposes only—

(a) cleansing other fuels from the accredited RHI installation’s combustion system prior to using fossil fuel to heat the combustion system to its normal temperature;

(b) the heating of the accredited RHI installation’s combustion system to its normal operating temperature or the maintenance of that temperature;

(c) the ignition of fuels of low or variable calorific value;

(d) emission control;

(e) in relation to accredited RHI installations which are CHP systems, standby generation or the testing of standby generation capacity.

(6) The energy content of the fossil fuel used during a quarterly period for the permitted ancillary purposes specified in paragraph (5) must not exceed 10 per cent of the energy content of all the fuel used by that accredited RHI installation to generate heat during that quarterly period.

(7) Where solid biomass contaminated with fossil fuel is used in an accredited RHI installation, the participant must keep and provide upon request written evidence including invoices, receipts and such other documentation as the Department may specify relating to fuel use and fossil fuel used for the permitted ancillary purposes specified in paragraph (5) and provide this information upon request to the Department, in such form as the Department may require, to demonstrate compliance with this regulation.

(8) Without prejudice to paragraph (7), the Department may have regard to any information (whether or not produced to it by the participant) if, in its opinion, that information indicates what proportion of the contaminated solid biomass is composed of fossil fuel.

(9) Where—
(a) the Department is not satisfied that the proportion of fossil fuel contamination (within the meaning of paragraph (4)(c)) does not exceed 10 per cent; or

(b) the Department is not satisfied as to the matters specified in paragraphs (5) and (6)

the Department may require the participant to arrange for samples of the fuel used (or to be used) in the accredited RHI installation, or of any gas or other substance produced as the result of the use of such fuel, to be taken by a person (and analysed in a manner) specified by the Department, and for the results of that analysis to be made available to the Department in such form as the Department may require.
Chapter 2

Ongoing obligations relating to the use of biogas to generate heat and the production of biomethane for injection

Biogas produced from gasification or pyrolysis

30.—(1) This regulation applies to participants producing biogas using gasification or pyrolysis and generating heat from that biogas in an accredited RHI installation.

(2) The participant may only use solid biomass or municipal waste as feedstock to produce the biogas.

(3) Where the participant uses municipal waste as feedstock—

(a) paragraphs (2), (3), (6) and (7) of regulation 28 apply to the proportion of solid biomass contained in the municipal waste used for feedstock in the same way as for the proportion of solid biomass contained in municipal waste used to generate heat; and

(b) paragraphs (4) and (5) of regulation 28 apply.

(4) Where the participant uses solid biomass (not being solid biomass contained in municipal waste) as feedstock—

(a) paragraphs (2), (3), (4) and (8) of regulation 29 apply to the contamination of solid biomass used for feedstock in the same way as for solid biomass contaminated with fossil fuel used to generate heat; and

(b) paragraphs (5) and (6) of regulation 29 apply.

(5) Where the Department so requests, the participant must arrange for samples of the municipal waste or solid biomass used (or to be used) as feedstock in the biogas production plant, or of any gas or other substance produced as a result of the use of such municipal waste or solid biomass, to be taken by a person (and analysed in a manner) specified by the Department, and for the results of that analysis to be made available to the Department in such form as the Department may require.

Participants generating heat from biogas

31.—(1) This regulation applies to participants generating heat from biogas in an accredited RHI installation where regulation 30 does not apply.

(2) A participant using biogas produced by anaerobic digestion may only use biogas which—

(a) was produced from one or more of the following feedstocks—

(i) solid biomass;

(ii) solid waste;

(iii) liquid waste; and

(b) is not landfill gas.

(3) The participant may use fossil fuel in the accredited RHI installation only in accordance with paragraphs (5) and (6) of regulation 29.
Biomethane producers

32.—(1) This regulation applies to participants producing biomethane for injection.

(2) A participant producing biomethane for injection from biogas made by gasification or pyrolysis may only use biogas made using solid biomass or municipal waste as feedstock.

(3) Where municipal waste is used as feedstock, paragraphs (2) and (3)(c) of regulation 28 apply to the proportion of solid biomass contained in municipal waste used as feedstock in the same way as for the proportion of solid biomass contained in municipal waste used to generate heat.

(4) Where solid biomass is used as feedstock, paragraphs (2), (3), and (4)(c) of regulation 29 apply to the contamination of solid biomass used for feedstock in the same way as for solid biomass contaminated with fossil fuel used by participants to generate heat.

(5) A participant producing biomethane for injection from biogas made by anaerobic digestion must comply with regulation 31(2).

(6) The participant must provide measurements in such format as the Department may request which satisfies the Department of all of the following—

(a) the gross calorific value and volume of biomethane injected;
(b) the gross calorific value and volume of any propane contained in the biomethane;
(c) the kWh of biomethane injected together with supporting meter readings and calculations;
(d) the kWhth of heat supplied to the biogas production plant (other than heat contained in feedstock to produce biogas by anaerobic digestion) which made the biogas used in any quarterly period to produce biomethane for injection;
(e) any heat supplied to the biomethane production process.

(7) The participant must keep and provide upon request copies or details of agreements with third parties with whom the participant contracts to carry out any of the processes undertaken to turn the biogas into biomethane and to arrange for its injection.

(8) The participant must keep and provide upon request written evidence including invoices, receipts, contracts and such other information as the Department may specify in relation to biogas purchased and feedstock used in the production of the biogas used to produce biomethane.

(9) The participant must provide sustainability information in accordance with Schedule 2.

Chapter 3

Ongoing obligations relating to other matters

Ongoing obligations: general

33.— Participants must comply with the following ongoing obligations, as applicable—

(a) they must keep and provide upon request by the Department records of type of fuel used and fuel purchased for the duration of their participation in the scheme;
they must keep and provide upon request by the Department written records of fossil fuel used for the permitted ancillary purposes specified in Chapters 1 and 2;

they must submit an annual declaration as requested by the Department confirming, as appropriate, that they are using their accredited RHI installations in accordance with the eligibility criteria and are complying with the relevant ongoing obligations;

they must notify the Department if any of the information provided in support of their application for accreditation or registration was incorrect;

they must ensure that their accredited RHI installation continues to meet the eligibility criteria;

they must comply with any condition attached to their accreditation or registration;

they must keep their accredited RHI installation maintained to the Department’s satisfaction and keep evidence of this including service and maintenance documents;

participants combusting biogas must not deliver heat by air from their accredited RHI installation to the biogas production plant producing the biogas used for combustion;

they must allow the Department or its authorised agent reasonable access in accordance with Part 9;

participants generating heat from solid biomass must comply with the regulation specified by the Department in accordance with regulation 22(6)(e);

they must notify the Department within 28 days where they have ceased to comply with an ongoing obligation or have become aware that they will not be able so to comply, or where there has been any change in circumstances which may affect their eligibility to receive periodic support payments;

they must notify the Department within 28 days of the addition or removal of a plant supplying heat to a heating system of which their accredited RHI installation forms part;

they must notify the Department within 28 days of a change in ownership of all or part of their accredited RHI installation;

they must repay any overpayment in accordance with any notice served under regulation 47;

they must, if requested, provide evidence that the heat for which periodic support payments are made is used for an eligible purpose;

they must not generate heat for the predominant purpose of increasing their periodic support payments;

they must comply with such other administrative requirements that the Department may specify in relation to the effective administration of the scheme.

Ongoing obligations in relation to metering

34.—(1) Participants must keep all meters and steam measuring equipment required to be used in accordance with these Regulations—

(a) continuously operating;
(b) properly maintained and periodically checked for errors; and

(c) re-calibrated every 10 years or within such period of time as may be specified in accordance with manufacturers’ instructions where available; whichever is the sooner,

and must retain evidence of this, including service and maintenance invoices, receipts or certificates for the duration of their participation in the scheme.

(2) The Department may, by the date (if any) specified by it, or at such regular intervals as it may require to enable it to carry out its functions under these Regulations, require participants to provide the following information—

(a) meter readings and other data collected in accordance with these Regulations from all steam measuring equipment, class 2 heat meters and other heat meters used in accordance with these Regulations in such format as the Department may reasonably require;

(b) in relation to participants using steam measuring equipment, a kWhth figure of both the heat generated and the heat used for eligible purposes together with supporting data and calculations; and

(c) the evidence and service and maintenance documentation specified in paragraph (1).

(3) Participants using heat pumps to provide both heating and cooling must ensure that their meters for those pumps enable them to—

(a) measure heat used for eligible purposes only; and

(b) where appropriate, measure (in order to discount) any cooling generated by the reverse operation of the heat pump,

and must provide upon request an explanation of how their metering arrangements have enabled the cooling in sub-paragraph (b) to be discounted.

(4) The data referred to in paragraph (2)(a) and (b) may be estimated in exceptional circumstances if the Department has agreed in writing to an estimate being provided and to the way in which those estimates are to be calculated.

(5) Nothing in this regulation prevents the Department from accepting further data from a participant, if the Department considers it appropriate to do so.

Ongoing obligations in relation to the provision of information

35.—(1) A participant must provide to the Department on request any information which the participant holds and which the Department requires in order to discharge its functions under these Regulations.

(2) Participants must retain the information referred to in Schedule 1, including such information as may reasonably be required by the Department under paragraph 1(2)(c), (f), (h), (k), (n), (v) or (w) and whether or not copies of that documentation have been supplied to the Department, for the duration of their participation in the scheme.

(3) Information requested under paragraph (1) must be provided within 7 days of the request or such later date as the Department may specify.

(4) Information provided to the Department under these Regulations must be accurate to the best of the participant’s knowledge and belief.
(5) Sub-paragraphs (3) and (4) of paragraph 1 of Schedule 1 have effect.

PART 5
PERIODIC SUPPORT PAYMENTS

Payment of periodic support payments to participants

36.—(1) Periodic support payments shall accrue from the tariff start date and shall be payable for 20 years.

(2) Periodic support payments shall be calculated and paid by the Department.

(3) Subject to regulation 42(5) and paragraph (7), reference to para (9) must go as that para has been removed and the words “this regulation” are in any event superfluous, the tariff for an accredited RHI installation shall be fixed when that installation is accredited.

(4) Subject to paragraph (7), the tariff for a participant who is a producer of biomethane is the biomethane and biogas combustion tariff set out in Schedule 3.

(5) Subject to paragraphs (6) and (7), again, reference to para (9) must go, the tariff for an accredited RHI installation is the tariff set out in Schedule 3 in relation to its source of energy or technology and installation capacity.

(6) For the purposes of paragraph (5), where the accredited RHI installation is one of a number of plants forming part of the same heating system its installation capacity is to be taken to be the sum of the installation capacities of that accredited RHI installation and all plants for which an application for accreditation has been made (whether or not they have been accredited) which—

(a) use the same source of energy and technology as that accredited RHI installation; and

(b) form part of the same heating system as that accredited RHI installation.

(7) The tariffs—

(a) for the period beginning with the commencement of these Regulations and ending with [31st March 2012], are the tariffs set out in Schedule 3; and

(b) for each subsequent year commencing with 1st April and ending with 31st March, are the tariffs applicable on the immediately preceding 31st March adjusted by the percentage increase or decrease in the retail prices index for the previous calendar year (the resulting figure being rounded to the nearest tenth of a penny, with any twentieth of a penny being rounded upwards).

(8) The Department must calculate the tariff rates each year in accordance with paragraph (7) and publish on (or before 1st April of each year a table of tariffs for the period commencing with 1st April of that year and ending with 31st March of the following year. Noted that what is reg 37(9) and (10) of the GB Regs is not replicated here, there being no tiers included in these draft Regs for small and medium biomass.

Periodic support payments for accredited RHI installations in simple systems

37.—(1) This regulation applies to participants who own an accredited RHI installation ("the installation") which—
(a) is generating and supplying heat solely for one or more eligible purposes used in one building;
(b) does not deliver heat by steam; and
(c) is not a CHP system.

(2) Subject to regulations 39 and 40, participants shall be paid a periodic support payment for the installation in respect of each quarterly period calculated in accordance with one of the following formulae, as applicable—

(a) \( A \times B \); or

(b) where the installation is generating heat from the combustion of biogas,
\[ A \times (B - C) , \]

where—

A is the tariff for the installation determined in accordance with regulation 36;
B is the heat in kWhth generated by the installation during the relevant quarterly period; and
C is the heat in kWhth directed from the installation or delivered by any other source to the biogas production plant which produced the biogas combusted in the relevant quarterly period (other than heat contained in feedstock used to produce biogas by anaerobic digestion).

Periodic support payments accredited RHI installations for complex systems

38.—(1) This regulation applies to participants who own an accredited RHI installation (“the installation”) which does not fall within regulation 37.

(2) Subject to regulations 39 and 40, participants shall be paid a periodic support payment for the installation in respect of each quarterly period calculated in accordance with one of the following formulae, as applicable—

(a) \( A \times B \times D/E \); or

(b) where the accredited RHI installation is generating heat from the combustion of biogas,
\[ A \times (B - C) \times D/E' \]

Where A is the tariff for the installation determined in accordance with regulation 36;
B is the heat in kWhth used by the heating system of which the installation forms part during the relevant quarterly period for eligible purposes;
C is the heat in kWhth directed from the installation or delivered from any other source to the biogas production plant which produced the biogas combusted in the relevant quarterly period (other than heat contained in feedstock used to produce biogas by anaerobic digestion) or, where there is no such heat, zero;
D is the heat in kWhth generated by the installation during the relevant quarterly period; and
E is the heat in kWhth generated by all plants supplying heat to the same heating system of which the installation forms part in the relevant quarterly period.

Fossil fuel contamination of solid biomass and fossil fuel used for permitted ancillary purposes

26
39.—(1) This regulation applies to participants generating heat in an accredited RHI installation where the heat is generated from solid biomass contained in municipal waste. Need to correct the indentation.

(2) Where heat is generated from solid biomass contained in municipal waste the periodic support payment calculated in accordance with regulation 37 or 38 shall be reduced pro rata to reflect the proportion of the energy content of the municipal waste used in the relevant quarterly period which was composed of fossil fuel and, where fossil fuel has been used for permitted ancillary purposes in accordance with regulation 28, to reflect the proportion of fossil fuel so used which resulted in the generation of heat. Noted that the references to “Case A” and “Case B” in the corresponding provision of the GB Regs are not replicated here as the provisions on case b are not replicated and thus there is no need to designate the surviving provisions (which equate to case A) as Case A, revival of case B reflects the apparent decision not to make RHI payments to owners of biomass installations where the installation capacity equals or exceeds 1 MWth.

Fossil fuel contamination adjustment to periodic support payments for producers and combustors of biogas produced from gasification and pyrolysis

40.—(1) This regulation applies to participants producing biogas from gasification or pyrolysis and generating heat from that biogas in an accredited RHI installation.

(2) Where, in accordance with regulation 30, a participant uses feedstock contaminated with fossil fuel, the periodic support payment calculated in accordance with regulation 37 or 38 shall be reduced pro rata to reflect the proportion of fossil fuel contamination in the feedstock used by the participant in the relevant quarterly period.

Periodic support payments to producers of biomethane

41. Participants producing biomethane for injection shall be paid a periodic support payment in respect of each quarterly period calculated in accordance with the following formula—

\[ A \times (B - (C + D + E)) \times F, \]

where—

A is the biomethane and biogas combustion tariff determined in accordance with regulation 36;

B is the kWh of biomethane injected in any quarterly period;

C is the kWh of propane contained in B;

D is the kWhth of heat supplied to the biogas production plant (other than heat contained in feedstock to produce biogas by anaerobic digestion) which produced the biogas from which the biomethane was made, from any heat source other than heat generated from the combustion of that biogas;

E is the kWhth of heat supplied to the biomethane production process; and

F applies only in relation to biomethane made using biogas produced from gasification or pyrolysis, and is the proportion of biomass contained in the feedstock used in the relevant quarterly period to produce the biogas.
ADDITIONAL RHI CAPACITY

Treatment of additional RHI capacity

42.—(1) This regulation applies where a participant installs additional RHI capacity.

(2) In this regulation “additional RHI capacity” means a plant which is—

(a) first commissioned after the date on which an accredited RHI installation (“the original installation”) was first commissioned;

(b) uses the same source of energy and technology as the original installation; and

(c) supplies heat to the same heating system as that of which the original installation forms part.

(3) A participant must inform the Department within 28 days of the additional RHI capacity being first commissioned.

(4) Paragraph (5) applies where the additional RHI capacity is first commissioned within 12 months of the date on which the original installation was first commissioned.

(5) Where this paragraph applies—

(a) the Department may review the accreditation of any accredited RHI installation using the same source of energy and technology and supplying heat to the same heating system as the additional RHI capacity;

(b) upon an application for accreditation of the additional RHI capacity, the Department must—

(i) treat the additional RHI capacity as if it were part of the original installation; and

(ii) decide whether or not to accredit the additional RHI capacity and original installation as one eligible installation in accordance with Part 3;

(c) subject to sub-paragraph (d), a refusal of accreditation under sub-paragraph (b)(ii) does not affect the accreditation of the original installation;

(d) if a review undertaken in accordance with sub-paragraph (a) results in a finding that a relevant ongoing obligation is no longer being complied with, the Department may take appropriate action under Part 7; and

(e) where the Department grants accreditation in accordance with sub-paragraph (b), from the date of that accreditation a participant’s periodic support payments in respect of the original installation will be replaced by periodic support payments calculated using the applicable tariff determined in accordance with paragraph (7) of regulation 36 in relation to the source of energy and technology concerned based on the sum of the installation capacities of the additional RHI capacity and the original installation, and will terminate with the tariff end date of the original accredited RHI installation.

(6) Paragraph (7) applies where the additional RHI capacity is first commissioned more than 12 months after the original installation was first commissioned.

(7) Where this paragraph applies, the Department may review the accreditation of any accredited RHI installation using the same source of energy and technology and supplying heat to the same heating system as the additional RHI capacity; and if a review results in a finding that a relevant ongoing obligation is no longer being complied with, the Department may take appropriate action under Part 7.
(8) All additional RHI capacity must be individually metered.
PART 7
ENFORCEMENT

Power to temporarily withhold periodic support payments to investigate alleged non-compliance

43.—(1) Where the Department has reasonable grounds to suspect that a participant has failed or is failing to comply with an ongoing obligation and the Department requires time to investigate, it may temporarily withhold all or part of that participant’s periodic support payments.

(2) Within 21 days of a decision to withhold periodic support payments, the Department must send a notice to the participant specifying—

(a) the respect in which the Department suspects the participant has failed or is failing so to comply;

(b) the reason why periodic support payments are being withheld;

(c) the date from which periodic support payments will be withheld;

(d) the next steps in the investigation; and

(e) details of the participant’s right of review including any relevant time-limits.

(3) The Department’s investigation must be commenced and completed as soon as is reasonably practicable.

(4) The Department may withhold a participant’s periodic support payments for a maximum period of 6 months commencing with the date specified in accordance with the notice required by paragraph (2)(c).

(5) The Department must review its decision to withhold a participant’s periodic support payments every 30 days commencing 30 days after the date of the notice required by paragraph (2).

(6) Following a review pursuant to paragraph (5), the Department must send a notice to the participant providing an update on—

(a) the progress of any investigation to date; and

(b) whether the Department intends to continue to withhold periodic support payments.

(7) For the purposes of calculating the time-limit specified in paragraph (4), no account is to be taken of any period attributable to the participant’s delay in providing any information reasonably requested by the Department.

(8) For the purposes of paragraph (7), a participant is not to be deemed to have delayed in providing information if that participant responds within 2 weeks of a request from the Department.

(9) On expiry of the period referred to in paragraph (4) or, if earlier, the conclusion of the investigation, the Department must—

(a) send the participant a notice specifying the outcome of the investigation or, where the investigation is not concluded, inform the participant accordingly; and

(b) pay within 28 days of the date of that notice all periodic support payments temporarily withheld under this regulation, subject to any permanent withholding or reduction of any such payments under regulation 45.
(10) If, on conclusion of the investigation, the Department is satisfied that a participant is failing or has failed to comply with an ongoing obligation it may impose one or more of the other sanctions set out in this Part.

Power to suspend periodic support payments where ongoing failure to comply

44.—(1) Where the Department is satisfied that a participant is failing to comply with an ongoing obligation it may suspend that participant’s periodic support payments.

(2) Within 21 days of a decision to suspend periodic support payments the Department must send a notice to the participant specifying—

(a) the respect in which the Department is satisfied that the participant is failing so to comply;
(b) the reason why periodic support payments are being suspended;
(c) the date from which the suspension is effective;
(d) the steps that the participant must take to satisfy the Department that it is complying with the ongoing obligation;
(e) the consequences of the participant failing to take the steps required pursuant to sub-paragraph (d) including potential sanctions; and
(f) details of the participant’s right of review including any relevant time-limits.

(3) Within 21 days of being satisfied that the participant is complying with the ongoing obligation the Department must remove the suspension.

(4) If, within 6 months the Department is satisfied that the participant has taken the steps specified by notice under paragraph (2), the Department may pay within 28 days of being so satisfied all periodic support payments withheld under this regulation.

(5) The maximum period for which the Department may suspend a participant’s periodic support payments is 1 year.

(6) Subject to paragraph (4), a participant may not recover any periodic support payments suspended in accordance with this regulation.

Power to permanently withhold or reduce a participant’s periodic support payments

45.—(1) Where the Department is satisfied that there has been a material or repeated failure by a participant to comply with an ongoing obligation during any quarterly period and the periodic support payment for that quarterly period has not been paid, the Department may request that the Department take one or more of the following actions—

(a) permanently withhold a proportion of the participant’s periodic support payment which corresponds to the proportion of that quarterly period during which the participant failed so to comply;
(b) reduce a participant’s periodic support payment for that quarterly period or for the quarterly period immediately following.

(2) Within 21 days of a decision to permanently withhold or to reduce a periodic support payment, the Department must send a notice to the participant specifying, as applicable—

(a) the respect in which the participant has failed so to comply;
(b) the reason why a periodic support payment is being withheld or reduced;
(c) the period in respect of which any periodic support payment is to be withheld or reduced;
(d) the level of any reduction; and
(e) details of the participant’s right of review including any relevant time-limits.

(3) Where reducing a periodic support payment in accordance with paragraph (1)(b), the Department may determine the level of the reduction (taking into consideration all factors which it considers relevant) up to a maximum reduction of 10 per cent of the periodic support payment in question.

Revocation of accreditation or registration

46.—(1) Where the Department is satisfied that there has been a material or repeated failure by a participant to comply with an ongoing obligation it may take one or more of the following actions—

(a) revoke accreditation for the accredited RHI installation in respect of which there has been a material or repeated failure;
(b) revoke accreditation for any other accredited RHI installations owned by that participant;
(c) in relation to a participant who is a producer of biomethane for injection, revoke that participant’s registration.

(2) Within 21 days of a decision to revoke accreditation or registration the Department must send a notice to the participant specifying—

(a) the reason for the revocation of accreditation or registration including, where applicable, details of the respect in which the participant has failed so to comply;
(b) an explanation of the effect of the revocation; and
(c) details of the participant’s right of review including any relevant time limits.

(3) Where accreditation of an accredited RHI installation has been revoked, or a participant’s registration has been revoked, the Department may refuse to accredit any eligible installations owned by the same person or refuse to register that person as a producer of biomethane for injection at any future date.

Overpayment notices and offsetting

47.—(1) Where the Department is satisfied that a participant has received a periodic support payment which exceeds that participant’s entitlement or has received a periodic support payment whilst failing to comply with an ongoing obligation it may—

(a) require the participant to repay the periodic support payment as a civil debt owed to the Department; or
(b) offset the periodic support payment against any future periodic support payments.

(2) Within 21 days of a decision to offset or require the participant to repay any periodic support payment the Department must send the participant a notice specifying—
(a) the periodic support payment which the Department believes has been overpaid and the sum which it is seeking to recover from the participant;

(b) whether the sum specified in sub-paragraph (a) will be recovered in accordance with paragraph (1)(a) or (1)(b);

(c) where applicable, a date by which the sum specified in sub-paragraph (a) must be repaid;

(d) the consequences of failing to make any repayments requested including potential sanctions or civil action; and

(e) details of the participant’s right of review including any relevant time limits.

PART 8
REVOCATION OF SANCTIONS

Revocation of Part 7 sanctions

48.—(1) The Department may at any time revoke a sanction imposed in accordance with Part 7 if it is satisfied that—

(a) there was an error involved in the original imposition of the sanction; or

(b) it is just and equitable in the particular circumstances of the case to do so.

(2) Within 21 days of a decision to revoke a sanction, the Department must send a notice to the participant specifying—

(a) the sanction which has been revoked;

(b) the reason for the revocation;

(c) what action if any the Department proposes to take in relation to any loss incurred by the participant as a result of the imposition of the sanction including the time within which any action will be taken; and

(d) details of someone within the Department whom the participant may contact if they are not satisfied with the proposals made by the Department under sub-paragraph (c).

PART 9
INSPECTION

Power to inspect accredited RHI installations

49.—(1) The Department or its authorised agent may request entry at any reasonable hour to inspect an accredited RHI installation and its associated infrastructure to undertake any one or more of the following—

(a) verify that the participant is complying with all applicable ongoing obligations;

(b) verify meter readings;

(c) take samples and remove them from the premises for analysis;
(d) take photographs, measurements or video or audio recordings;

(c) ensure that there is no other contravention of these Regulations.

(2) Within 21 days of a request made under paragraph (1) being (in its opinion) unreasonably refused the Department must send a notice to the participant specifying—

(a) the reason why the Department considers the refusal to be unreasonable;

(b) the consequences of the refusal, including potential sanctions for failing to comply with the ongoing obligation imposed by regulation 33(i); and

(c) details of the participant’s right of review including any relevant time-limits.

PART 10

REVIEWS

Right of review

50.—(1) Any prospective, current or former participant affected by a decision made by the Department in exercise of its functions under these Regulations (other than a decision made in accordance with this regulation) may have that decision reviewed by the Department.

(2) An application for review must be made by notice in such format as the Department may require and must—

(a) be received by the Department within 28 days of the date of receipt of notification of the decision being reviewed;

(b) specify the decision which that person wishes to be reviewed;

(c) specify the grounds upon which the application is made; and

(d) be signed by or on behalf of the person making the application.

(3) A person who has made an application in accordance with paragraph (2) must provide the Department with such information and such declarations as the Department may reasonably request in order to discharge its functions under this regulation, provided any information requested is in that person’s possession.

(4) On review the Department may—

(a) revoke or vary its decision;

(b) confirm its decision;

(c) vary any sanction or condition it has imposed; or

(d) replace any sanction or condition it has imposed with one or more alternative sanctions or conditions.

(5) Within 21 days of the Department’s decision on a review, it must send the applicant and any other person who is in the Department’s opinion affected by its decision a notice setting out its decision with reasons.
PART II

ADMINISTRATIVE FUNCTIONS OF THE DEPARTMENT AND NOTICES

Publication of guidance and tariffs

51.—(1) The Department must publish procedural guidance to participants and prospective participants in connection with the administration of the scheme. Noted that the provisions of reg 53(1) to (5) and 54 of the GB Regs are not replicated here, due to the fact that, although the proposal is that, as in the case of the GB Regs, DE should administer the NI Regs on behalf of another Department, that is to be effected by means of “arrangements”, being entered into under section 114 of the Energy Act 2011.

(2) The Department must publish the following information on its website—

(a) information in aggregate form as to—

(i) the number of accredited RHI installations;

(ii) their technology and installation capacity;

(iii) the amount of heat they have generated;

(iv) the total amount of periodic support payments made under each tariff; and

(b) information in aggregate form as to—

(i) the number of participants who are producers of biomethane;

(ii) the volume of biomethane produced for injection by those participants; and

(iii) the total amount of periodic support payments made in respect of that biomethane. Noted that the requirement in the GB Regs that the information be “current” (i.e. not more than 5 days out of date) is not replicated here. Effect of its inclusion in GB Regs appears to be to require publication every few days. Conversely, the effect of its exclusion here is unclear. Arguably publication is required only once—though it is not clear when? Surely there should be a requirement to publish at regular intervals (even if not every few days) as per the GB Regs. Publication only once seems fairly pointless.

Notices

52. A notice under these Regulations—

(a) must be in writing; and

(b) may be transmitted by electronic means.

Sealed with the Official Seal of the Department of Enterprise, Trade and Investment on

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A F Hepper
A senior officer of the Department of Enterprise, Trade and Investment
SCHEDULES

SCHEDULE 1 Regulations 22, 24, 25, 26 and 35

Information required for accreditation and registration

1.—(1) This Schedule specifies the information that may be required of a prospective participant in the scheme.

(2) The information is, as applicable to the prospective participant—

(a) name, home address, e-mail address and telephone number;
(b) any company registration number and registered office;
(c) any trading or other name by which the prospective participant is commonly known;
(d) details of a bank account in the prospective participant’s name which accepts pound sterling deposits in the United Kingdom;
(e) information to enable the Department to satisfy itself as to the identity of the individual completing the application;
(f) where an individual is making an application on behalf of a company, evidence which satisfies the Department, that the individual has authority from the company to make the application on its behalf;
(g) details of the eligible installation owned by the prospective participant including its cost;
(h) evidence, which satisfies the Department, as to the ownership of the eligible installation;
(i) evidence that the eligible installation was new at the time of installation;
(j) where an eligible installation has replaced a plant, details of the plant replaced;
(k) evidence which demonstrates to the Department’s satisfaction the installation capacity of the eligible installation;
(l) details of the fuel which the prospective participant is proposing to use;
(m) in relation to prospective participants generating heat from biomass, notification as to whether the prospective participant is proposing to use solid biomass contained in municipal waste and, if so, whether or not the prospective participant is regulated under the Pollution Prevention and Control Regulations (Northern Ireland) 2003;
(n) where the plant is a heat pump, evidence which demonstrates to the Department’s satisfaction, that the heat pump meets a coefficient of performance of at least 2.9;
(o) in respect of a producer of biogas or biomethane, details of the feedstock which the producer is proposing to use;

1 S.R. 2003 No. 46
(p) details of what the heat generated will be used for and an estimate of how much heat will be
used together with an estimate of the number of hours of operation per week in which heat will be
generated for an eligible purpose. This proposed amendment replicates one intended to have effect
permanently that is included in DECC’s amending (interim cost control) Regulations that are due to
come into force at the beginning of July. In view of the imminence of the coming into force of those
Regulations, it is assumed that DETI will wish to replicate this GB amendment here;

(q) details of the building in which the heat will be used;

(r) the industry sector for which the heat will be used;

(s) details of the size and annual turnover of the prospective participant’s organisation;

(t) details of other plants generating heat which form part of the same heating system as the
eligible installation to which the application relates;

(u) where regulation 13 applies, evidence from the installer that the requirements specified in
that regulation are met;

(v) such information as the Department may specify to enable it to satisfy itself that the
requirements of Chapter 3 of Part 2 have been met including—

(i) evidence that a class 2 heat meter, other heat meter or steam measuring equipment
has been installed;

(ii) evidence that the class 2 heat meter, other heat meter or steam measuring equipment
was calibrated prior to use;

(iii) in relation to all heat meters, details of the meter’s manufacturer, model, meter serial
number;

(iv) a schematic diagram showing details of the heating system of which the eligible
installation forms part, including all plants generating and supplying heat to that
heating system, all purposes for which heat supplied by that heating system is used,
the location of meters and associated components and such other details as may be
specified by the Department;

(v) where regulation 17 applies, if so requested by the Department, an independent report by a
competent person verifying that such of those requirements as the Department may specify have been met;

(w) such other information as the Department may require to enable it to consider the
prospective participant’s application for accreditation or registration.

(3) Information specified in this Schedule must be provided in such manner and form as the Department may
reasonably request.

(4) The costs of providing the information specified in this Schedule are to be borne by the applicant.
SCHEDULE 2

Provision of information in relation to the use of biomass in certain circumstances

Information to be provided to the Department where biomass is used for combustion or production of biomethane

1. This Schedule specifies the information that a participant is required to provide under regulation 32(9).

2. The information is information identifying to the best of the participant’s knowledge and belief, in such manner and form as the Department may require—

(a) the material from which the solid biomass was composed;

(b) the form of the solid biomass;

(c) its mass;

(d) whether the solid biomass was a by-product of a process;

(e) whether the solid biomass was derived from waste;

(f) where the solid biomass was plant matter or derived from plant matter, the country where the plant matter was grown;

(g) where the information specified in paragraph (f) is not known or the solid biomass was not plant matter or derived from plant matter, the country from which the operator obtained the solid biomass;

(h) whether any of the solid biomass used was an energy crop or derived from an energy crop and if so—

(i) the proportion of the consignment which was or was derived from the energy crop; and

(ii) the type of energy crop in question;

(i) whether the solid biomass or any matter from which it was derived was certified under an environmental quality assurance scheme and, if so, the name of the scheme;

(j) where the solid biomass was plant matter or derived from plant matter, the use to which the land on which the plant matter was grown has been put since 30th November 2005.

3. The information specified in paragraph 2 must be collated by reference to the following places of origin—

(a) United States of America or Canada;

(b) the European Union;

(c) other.

4. The information specified in paragraph 2 must be provided for every quarterly period.

5. For the purpose of this Schedule—
“energy crop” means a plant crop planted after 31st December 1989 which is grown primarily for the purpose of being used as fuel or which is one of the following—

(a) miscanthus giganteus (a perennial grass);
(b) salix (also known as short rotation coppice willow);
(c) populus (also known as short rotation coppice poplar);

“environmental quality assurance scheme” means a voluntary scheme which establishes environmental or social standards in relation to the production of biomass or matter from which a biomass is derived.
SCHEDULE 3 – Tariffs

Regulation 36 noted that there are substantial differences between the tariffs below and GB counterparts, including that, although the designation “large biomass” is retained, payments are not available for biomass plants having an installation capacity of 1000kWth or above.

Table 1

<table>
<thead>
<tr>
<th>Tariff name</th>
<th>Sources of energy or Technology</th>
<th>Installation capacity</th>
<th>Tariff Pence/kWh</th>
</tr>
</thead>
<tbody>
<tr>
<td>Small Biomass</td>
<td>Solid biomass including solid biomass contained in municipal solid waste and CHP</td>
<td>Less than 20kWth</td>
<td>6.2</td>
</tr>
<tr>
<td>Medium Biomass</td>
<td>As above</td>
<td>20kWth and above up to but not including 100kWth</td>
<td>5.9</td>
</tr>
<tr>
<td>Large Biomass</td>
<td>As above</td>
<td>100kWth and above up to but not including 1000kWth</td>
<td>1.5</td>
</tr>
<tr>
<td>Small heat pumps</td>
<td>Ground source heat pump, water source heat pump, deep geothermal</td>
<td>Less than 20kWth</td>
<td>8.4</td>
</tr>
<tr>
<td>Medium heat pumps</td>
<td>As above</td>
<td>20kWth and above up to but not including 100kWth</td>
<td>4.3</td>
</tr>
<tr>
<td>Large heat pumps</td>
<td>As above</td>
<td>100kWth and above</td>
<td>1.3</td>
</tr>
<tr>
<td>All Solar collectors</td>
<td>Solar collectors</td>
<td>Below 200kWth</td>
<td>8.5</td>
</tr>
<tr>
<td>Biomethane and biogas combustion</td>
<td>Biomethane injection and biogas combustion</td>
<td>All biomethane injection and biogas combustion below 200kWth</td>
<td>3.0</td>
</tr>
</tbody>
</table>
EXPLANATORY NOTE
(This note is not part of the Regulations)

These Regulations establish a renewable heat incentive scheme ("the scheme") under which owners of plants which generate heat from specified renewable sources and meet specified criteria may receive payments at prescribed tariffs for the heat used for eligible purposes. Payments may also be made to biomethane producers who produce biomethane for injection. The Regulations confer functions on the Department in connection with matters in connection with the general administration of the scheme.

Regulation 3 confers on the Department the function of making payments to participants in the scheme and specifies the eligible purposes for which heat will receive payment.

Chapter 1 of Part 2 (Regulation 4) defines criteria ("eligibility criteria") that must be satisfied for a plant to be eligible to participate in the scheme.

Chapter 2 of Part 2 (Regulations 5 to 15) specifies the eligibility criteria other than those in relation to metering.

Chapter 3 of Part 2 (Regulations 16 to 21) specifies the eligibility criteria in relation to metering, setting out the types of meters which may be used, the requirements with which they must comply and what must be measured.

Part 3 (Regulations 22 to 26) sets out the procedures for accreditation, registration, change of ownership and preliminary accreditation. Regulation 22 confers on the Department the function of accrediting eligible installations (which upon accreditation are known as accredited RHI installations) and specifies the process by which applicants apply to the Department for accreditation.

Regulation 23 specifies the circumstances in which the Department may not accredit a plant. These include matters relating to the receipt of grants from public funds; where a plant has not been commissioned; where an applicant has indicated that applicable ongoing obligations will not be complied with and where the plant is one of a number of plants which would together form one eligible installation in accordance with Part 2.

Regulation 24 specifies the procedure for notifying the Department where there has been a transfer in ownership of all or part of an accredited RHI installation and sets out the process by which the new owner may receive payments under the scheme.

Regulation 25 confers on the Department the function of registering producers of biomethane who are producing biomethane for injection. It specifies the process by which applicants apply to the Department for registration and specifies the circumstances in which an application for registration can be refused.

Regulation 26 sets out the process by which a person may apply for and the Department may grant preliminary accreditation in respect of a plant.

Chapter 1 of Part 4 (Regulations 27 to 29) sets out ongoing obligations for participants in the scheme with which participants generating heat from biomass must comply.

Regulation 28 applies to participants generating heat from solid biomass contained in municipal waste. It specifies the minimum proportion of solid biomass which must be contained in the municipal waste used, sets out how the proportion of solid biomass is determined and specifies the permitted uses of fossil fuel in accredited RHI installations.

Regulation 29 applies to participants generating heat from solid biomass, not being solid biomass contained in municipal waste, in accredited installations with an installation capacity of between 45kWth and 1MWth. It specifies the permitted levels of and reasons for fossil fuel contamination, sets out how the proportion of fossil fuel contamination is determined and specifies the permitted uses of fossil fuel in accredited RHI installations.
Chapter 2 of Part 4 (Regulations 30 to 32) sets out ongoing obligations for participants who are generating heat from biogas and producing biomethane for injection.

Regulation 30 applies to participants producing biogas using gasification or pyrolysis and generating heat from that biogas. It stipulates composition requirements for the feedstock used by participants and specifies the permitted uses of fossil fuel in accredited RHI installations.

Regulation 31 applies to participants generating heat from biogas to whom regulation 30 does not apply. It stipulates feedstock requirements for participants using biogas produced from anaerobic digestion and specifies permitted uses of fossil fuel in accredited RHI installations.

Regulation 32 applies to biomethane producers who produce biomethane for injection. It specifies composition requirements for feedstocks used to produce the biogas from which the biomethane is made and sets out the ongoing obligations relating to administration with which participants must comply. It also imposes a sustainability reporting requirement.

Chapter 3 of Part 4 (Regulations 33 to 35) sets out the specific obligations to those participants generating heat from biomass or biogas or producing biomethane for injection.

Regulation 33 specifies general ongoing obligations relating to administrative and other matters with which participants must comply.

Regulation 34 specifies the ongoing obligations in relation to metering. It imposes requirements on participants in relation to their heat meters and steam measuring equipment; requires participants to provide data when requested by the Department; and specifies the metering arrangements for participants using heat pumps for both heating and cooling. This regulation also permits the data to be estimated in exceptional circumstances.

Regulation 35 specifies ongoing obligations in relation to the provision of information and gives effect to Schedule 1.

Part 5 (regulations 36 to 41) confers on the Department the function of calculating and paying periodic support payments to participants. These regulations specify the method by which tariffs are assigned; confer a function on the Department to calculate and publish a table of tariffs each year based on the tariffs set out in Schedule 3 adjusted in line with the retail price index and specifies the method by which periodic support payments are calculated.

Part 6 (regulation 42) specifies how a plant using the same source of energy and technology as an accredited RHI installations and supplying heat to the same heating system (known as additional RHI capacity) is to be treated under the scheme.

Part 7 (regulations 43 to 47) sets out the provisions in relation to enforcement.

Regulations 43 to 45 confer on the Department a wide range of powers to temporarily or permanently withhold a participant’s periodic support payments or reduce a periodic support payment.

Regulation 46 confers a power on the Department to revoke accreditation or registration in certain circumstances.

Regulation 47 confers a power on the Department to recover overpayments.

Part 8 (regulation 48) confers on the Department a power to revoke any sanction imposed under Part 7 and specifies the circumstances and manner in which the Department may exercise this power.

Part 9 (regulation 49) confers on the Department or its authorised agent the power to inspect an accredited RHI installation and its associated infrastructure and specifies the manner and circumstances in which this power may be exercised and the consequences of refusal.
Part 10 (regulation 50) confers a right of review on any prospective, current or former participant affected by a decision made by the Department under these Regulations, sets out the process by which a person may request a review of such decisions and specifies the Department’s powers on review.

Part 11 (regulations 51 and 52) confers additional administrative functions on the Department. Under regulation 51 the Department must publish procedural guidance in connection with the administration of the scheme and requires the Department to publish certain information on its website.

Regulation 52 describes the form of notices under these Regulations.

A draft of these Regulations was notified to the European Commission in accordance with Directive 98/34/EC of the European Parliament and of the Council laying down a procedure for the provision of information in the field of technical standards and regulations (OJ L 204, 21.7.1998, p. 37) as amended by Directive 98/48/EC (OJ L 217, 5.8.1998, p. 18). Noted that this para has been included and it presumably reflects that either the notification has occurred or that, if it hasn’t, it will do. On the face of it, if the Regs are largely replicating the GB Regs, notification will be required (the GB Regs were notified) and the eventual Regs will be unenforceable if they should be notified in advance under the directive but aren’t. Complying with the requirements of the directive will involve notifying the draft Regs to Brussels and other member States and a minimum 3 months standstill period following the notification before it is lawful to enact the Regs.

Noted also that the para in the GB Regs re an impact assessment is not replicated here. Is this because there is no obligation in NI to produce an IA or is there simply no obligation to mention it in the F-N?
### Things DECC are aware of/old points that we don’t think need to be included unless there is new information

<table>
<thead>
<tr>
<th>Regulation</th>
<th>“Premises” definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>33</td>
<td>The term “premises” appears in the definition of “commissioning” 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 &amp; 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 another land covered...</td>
</tr>
</tbody>
</table>

### Regulation 14

<table>
<thead>
<tr>
<th>“Heating system” definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>The term “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. &quot;Heating system&quot; appears at: Regulation 14(2)(b); 15; 17(2)(a); 17(3); 34(1); 39(2); 43(1); 43(5); 43(7); Sch. 1(2)(v)(iv) and Explanatory note (Part 6).</td>
</tr>
</tbody>
</table>

**Note:** If it is decided, in the context of the introduction of a minimum standard, this should be dealt with by introducing an additional sub-clause at r-20 (2). If any substantive requirements as to our satisfaction is needed then I agree it should be be in the main body of the Reas rather than in this definition. DECC should add a defined term to ensure clarity. It is not acceptable for this to be clarified ex post facto. The fact that we have sought to provide an interpretation in guidance speaks for itself. E.g., it is clear from that fact that the meaning is not clear without a clear definition and the proper place for this is within the legislation.
Northern Ireland RHI Ofgem / DETI Meeting

Teleconference between officials from DETI and Ofgem to discuss the development of the NI Renewable Heat Incentive Scheme

From Keith Avis 19th July 2012
Date and time of Meeting 3 July 09:30 – 10:30
Location 9 Millbank

1. Those Present

Ofgem DETI
Keith Avis (KA) Peter Hutchinson (PeH)
Rita Chohan (RC) Marcus Porter (MP)
Paul Heigl (PaH) William Elliot (WE)

2. Regulation 23, provisions 1 & 2

2.1. There is a risk at present that this regulation exposes the GB scheme to infraction by the EU due to its terminology and wording. MP pointed out that there has not to date been any hint of infraction proceedings being brought against GB.

2.2. MP also offered to send over a note previously written informing DECC of the deficiencies with Regulation 23. MP also stated that the note does not offer a solution to those deficiencies as this may not be appropriate and would be for DECC/DETI lawyers to devise.

Action: Ofgem Legal to send a note to DETI spelling out our concerns with Regulation 23 as soon as possible.

3. Timings

3.1. DETI have informed us that their legal advice has been that they will now need to notify the EU regarding any technical standards within the legislation.

3.2. The result of this is that the earliest that DETI could affirm their legislation would be around 23rd October. The upside of this is that it aligns more closely the launch date for the scheme and Ofgem’s forecast for delivery of an operational online register.
on”. But I think Ofgem would’ve received queries as well, but that’s why I would’ve always
been, “Look, speak to Ofgem as the final port of call”.

**Dr MacLean:** Sorry, just one follow-on from that is that you had the legal letter from —
the legal review from Ofgem in November ’11, so it’s a year ago. It’s getting in to the launch
of the scheme — things beginning to come through. Were there any issues at all, not
necessarily this one, where Ofgem came back to you as the legislator to say, “This requires
some form of an amendment or addition or change”, so coming to you in that function,
because ultimately they couldn’t change any of that themselves?

**Mr Hutchinson:** No. The only sort of issue arose around the Carbon Trust loan issue,
where they came to us and, you know — I’m sure we’ll get in to that at some stage —

**Mr Lunny:** We will.

**Mr Hutchinson:** — but the issue arose that systems had been accredited which probably
shouldn’t have been accredited, based on the regulations — based on maybe an
interpretation of the GB regulations rather than the NI regulations. And I think, possibly after
I left, there was an agreement that the regulation would be changed to allow that sort of,
and that was through discussion with Ofgem and DETI at that stage. But, no, I don’t think
they met. I can’t recall them ever coming back and saying, “Look, this scheme’s been running
for a year. We’ve reviewed things. You need to change x, y and z in your regulations”, or us
going to them and asking the question, you know. I think it was just the regulations were
what they were, and any kind of change would be done through policy consultation.

**Dr MacLean:** And, as the Chairman asked you, there was never any conversation with
you, even unofficially, about the original warning coming horribly true and seeing these
elements.

**12:30 pm**

**Mr Hutchinson:** Not that I recall, but, as I say, you know, if there’s 100 accreditations in at
fair to say, you know, and to be fair to Mr Porter, I think he did make that point clear, but I
think, you know, that was from a legal opinion, and then I think the administrative side of
Ofgem, maybe, saw our viewpoint, and so there might’ve been a [Inaudible] like that.

Mr Lunny: Just to be fair, I’ll bring up Mr Porter’s email. It’s at OFG-205563. And it’s in the
middle of the page. You can see the heading. The subject is “RE: NIRHI teleconference
Minutes”, and what he says in the last full sentence in the email is:

“Thirdly, I think it important that there is an official record that, at our first “meeting” with DETI we
hammered home the fact that we had significant concerns regarding the course they are proposing to
adopt.”

Mr Hutchinson: I think —

Mr Lunny: Is that a fair characterisation of his approach, at least, in that teleconference?

Mr Hutchinson: I think he certainly would’ve been, I think, probably, the Ofgem contact
point who raised the concerns — would be my recollection. I think that would be my
understanding — my memory — of it. I think the minutes reflect that. My recollection of it
was, as I’ve said, “Look, this is an issue you’ll want to look at”. We’ve explained why we
didn’t think it was possible to do it at that point in time, but we would look at it in the future,
bearing in mind things like that Ofgem or DECC have said in their statement and that you’ve
just read out in terms of how unlikely they seen it to be at that stage, who are still a number
of months away from implementation, and we’ve thought, “Well, it’s an interim measure.
Let’s look at that in the second phase”, which we were already thinking about. And, it’s
raised at that teleconference. Probably, that discussion will have been relayed to Fiona and
discussed in terms of the approach, and Ofgem will have been advised what our view is, and
I don’t think it comes up again. I think we move on. I think we quickly move on to Ofgem and
them saying, “OK, now you need to notify your regulations for the technical standards
directive”, and that’s the next step then.
Ms Hepper: I think that they would’ve been — they were content that the two schemes worked as much in parallel as possible and that there wasn’t significant divergence, and I think both when you think of it in terms of this document and then, more specifically, in terms of June 2012, both of the senior people that I would’ve been dealing with, Bob Hull and Matthew Harnack, in their statements, their witness statements to the Inquiry, are unconcerned about that. They knew that we would be following the DECC track and they knew we would be consulting on specific changes and amendments and were comfortable — or appears were comfortable — at the time and in writing their witness statements with that.

Dr Keith MacLean (Technical Assessor to the Inquiry): Sorry, can I just check? So, what that means, basically, is that Mr Hull and Mr Harnack were not agreeing with their legal department and were happy for both DECC and DETI to go ahead and ignore the warnings that their legal department were giving?

Ms Hepper: Well, I don’t know: you’d have to ask them how comfortable they were, but certainly that was the message we were getting that, you know, DECC went ahead with their regulations. Ofgem were obviously — must’ve been — content with that. They knew that we would be following on in the slipstream; we would pick up on the changes as they happened, and they were obviously content for us to continue.

Dr MacLean: So could their contentment have been that, flawed as they thought the DECC scheme were, it was better for you to be doing the same as DECC even if it was wrong rather than to do something different?

Ms Hepper: Well, I don’t know that I would go as far as to say that what we were doing was wrong. What we were doing was going through a process where there would be amendments and changements [sic] and refinements and improvements, and, from that perspective, um, um, I presume that they were content because we all did go ahead.
MH was asked about this view and whether there was a difference of view in Ofgem; one saying “wait” and the other saying “we are entirely comfortable” [TRA-03875 to TRA-03876 (16-2)]. He was clear [TRA-03875 to TRA-03876 (21-12)]:

Mr Harnack: No, I don’t recognise that. No, I think that’s unlikely. I can’t — I can’t recall exactly what was being thought at the time, but I think that’s highly unlikely. You know, we — we always, where possible, sought to get the views of our legal team. And we always took — what’s the word? — um — took those views seriously, took — gave serious consideration to those. And, you know, in the vast majority of circumstances, we actually, you know, adopted those views and their recommendations and took them on.

And I — you know, my feeling with this particular question, this particular situation is we would have adopted those views. We would have — and that’s the sense that I got from the email — email exchange that Luis Castro was involved in, where he was — I think you just — it was just put up on screen a moment ago. I can’t remember exactly what it said, but it seemed like that was a united point of view from the Ofgem people at that meeting. And it was certainly Luis’s view and, I think fair to say, Keith’s view subsequent to that meeting, which would have suggested it was also their view at that meeting. So I don’t think it’s fair to say that there was a different view by the non-legal people to the legal people, and I don’t think that it would have been fair to say that Bob and I would have said, “No, no, don’t worry, ignore them,” or, you know, to paraphrase DETI. I don’t think that would have been right at all.

Accordingly, whether or not the issue was raised with the GEMA Board is not directly relevant in understanding “what went wrong” on the Scheme.

However, the repeated, somewhat scattergun, attempts by MP to escalate issues through various avenues has caused Ofgem to consider whether there is a separate learning point for Ofgem. Although MP did have other, more formal, escalation routes open to him, which he agreed he did not take, in particular, escalation to the head of legal [TRA-06306 to TRA-06307 (19-8)], Ofgem considered it helpful that a legal representative should attend the GEMA Board so that issues of this kind could be raised directly with the Board. In August 2018, Ofgem appointed a General Counsel who attends Ofgem’s Board. There are clear escalation routes for all Ofgem lawyers to the GC.

(iii) Summary: whether Ofgem should have done more
Mr Aiken: Yes.

Mr Nolan: These things were all — I’m not sure if they were all, sorry — I apologise for a certain looseness of my language; I’ve been reading sort of thousands of pages over the last while, so —.

Mr Aiken: Perfectly fine. We’ll work through it.

Mr Nolan: My sense —. A lot —. A number of things were at the gestation of the scheme, if you like. There were a number issues that were raised as potential problems with the scheme. This, I think, was one of them, was it? Sorry? So, yes, the legal risks, as pointed out, these were problems with the scheme. But they did not then translate into actions later on.

And, as I said, I think both organisations are culpable there, and I certainly include Ofgem in that, in the sense that — and I find it hard to understand why it happened. But it had identified these risks at the start, which it did identify and which I think DETI had said it would ameliorate during the course of the scheme, and said, “Yes, we’re going to fix all those”. But Ofgem did not monitor them. And I suppose you could say did not tell DETI it’d be monitoring them. I accept that too, although I think, fundamentally, Ofgem should have monitored them and should have kept them up.

I think it could have reasonably expected that DETI would have done what it said it was going to do, but I accept that, from the gestation of the scheme in Ofgem to the implementation of it, we lost something there. We did not monitor those things.

Mr Aiken: If we can hold that thought, Mr Nolan, because one of the subjects you know I’m going to come to is the question of an independent risk assessment for the Northern Ireland scheme that Ofgem had expressed an intention to do. And whether a number of these matters that you address, and we’ll look at today, might have been caught if those steps had been taken. So we’ll look at the context of that.

But what I understand you to be saying: is this, then, something that you consider, on
NORTHERN IRELAND RHI SUMMARY 2013

This report covers the period to mid-November 2013 and provides statistics on the uptake of the RHI scheme in Northern Ireland, based on output, tariff, efficiency, heat use and hours of operation.

As the scheme is fairly new, the number of applications received to date doesn’t form a strong basis for detailed and accurate conclusions for the scheme’s future. Statistics are however consistent, when adjusted for NI’s population, with the results of the scheme in other regions for their corresponding periods.

To date, 63 applications have been received. Fig.1 shows the status of these applications.

![Application status](image)

**Fig.1**

It is worth noting at this stage that all 63 applications are for solid biomass boilers, so there has been no analysis for different types of technologies used (i.e. solar thermal, heat pumps etc). Tariffs for the RHI scheme depend on the size of the actual installation measured in kWh. Figures 2&3 show the different tariffs and respective size ranges.

![Tariff distribution](image)

**Fig.2**

![Installation capacity](image)

**Fig.3**
Figures 4, 5 and 6 show the efficiency range for the 63 installations, the weekly hours of operation as well as what the produced heat is being used for. Note that these data are based on information supplied by applicants during the application process, and may not reflect actual or current outputs.

**Fig. 4**

![Efficiency Distribution](image1)

**Weekly hours of operation**

![Weekly Hours](image2)

**Heat uses**

![Heat Uses](image3)
Fig. 6

Finally, Fig. 7 shows the geographical distribution of the 63 installations on a post code basis.
Agree....

Thanks
A

From: Sophie Jubb
Sent: 23 July 2012 11:41
To: Andrew Amato
Subject: FW: DETI DRAFT REGS - for comparison for biomass

I am losing the plot with this. Well with Ollie. I can’t send this to IT. Am going to do a “subtle” mail back to all, just to forewarn you.

From: Marcus Porter
Sent: 20 July 2012 17:23
To: Oliver More; Sophie Jubb; Paul Heigl; Keith Avis; Luis Castro; William Elliott
Cc: Lindsay Goater
Subject: RE: DETI DRAFT REGS - for comparison for biomass

Ollie

See comments below in bold.

Marcus

From: Oliver More
Sent: 20 July 2012 11:04
To: Sophie Jubb; Paul Heigl
Cc: Lindsay Goater; Marcus Porter
Subject: RE: DETI DRAFT REGS - for comparison for biomass

Sophie/Paul

See below comments on draft Ni regs from the bioenergy perspective.

While the high level policy of the scheme appears the same as for GB, the administrative elements are certainly very different and will require large IT requirements, staff training (initial and ongoing) and a great deal of time for our team on UAT. In particular, the potential for the tariff differences to damage the existing RHI Register (GB) periodic payment calculations looks high (assuming the same IT system will be used). All it takes is for a developer to enter an ‘NI’ on the software instead of a ‘GB’ and it would all go wrong (as ha happened in the past) – I know testing is supposed to mitigate this but we often don’t get to test working systems until the third round of UAT (by which time we cannot test all of the hundreds of scenarios we might encounter)... Keith to note
Definitions:
- The gas regime in Northern Ireland is different to Great Britain – I don’t think Gas Act is applicable there.
- Definition of ‘pipeline’ system: why don’t they use the definition from the equivalent of the Gas Act for Northern Ireland?
- Does the NI gas network regulations cover GCV measurement of gas injected? I not, what measurement regime do DETI want us to use? E.g. accuracy?
- Biomethane tariff lifetime appears to have been clarified – but in defining ‘that person’ does this mean that one person could own several biomethane production plants and apply as one application? Don’t follow this comment. The definition seems to be the same.

Reg 6
- Is there a capacity limit on municipal waste plants? If so then the capacity limit needs to be stated. This provision is as in the GB Regs and, unless provision for a capacity limit is added, there will be none.

Reg 19
- Have they checked that CHPQA is applicable in NI? A leaflet I have that is dated Nov 2008 suggests the answer may be well be yes but I don’t think we can rely on that and I agree the point needs to be checked by DETI. Could that be conveyed to them please Keith?

Solid biomass
- Agree with Marcus – if the intention is that =>1mw are not to be included in the scheme then this should be an eligibility criteria. CAPACITY THEN BECOMES A KEY ISSUE and regulations should make clear what capacity is beyond simply ‘peak heat output capacity’, i.e. a reference to the form of heat to be include in the capacity – hot air? Hot liquid? Steam? And how this is to be measured. The risk is us is of having to reject someone to the scheme because of their capacity when it is us that must determine their capacity. Again – not sure what you have in mind here. How does eligibility come into it if over 1Mw are excluded? Also, why is capacity an issue?

Reg 27
- Difference to GB scheme – district council etc. rather than waste authority. Not a problem but obviously another training cost for the team – all these small differences add up to a large training cost. Keith to note

Reg 28 (municipal waste)
- What is ‘municipal waste’ in a Northern Ireland context? Does the ‘Waste and Emissions Trading Act 2003’ apply in Northern Ireland?
- In Great Britain, Ofgem has taken the view that municipal waste includes anything on the DEFRA list of municipal wastes, but this applies to England and Wales (I’m not even sure it applies to Scotland). So what applies in Northern Ireland (e.g. is a black bin bag from an office
‘municipal waste’? is paper from an office ‘municipal waste’? is waste wood from a furniture factory ‘municipal waste’? It appears that it does apply to NI and my guess is that DETI will want the list to be the same, even if it doesn’t apply outside E and W, but DETI should consider – Keith.

Reg 29
- Marcus’s comment at the top of this Regulation seems to indicate that he’s not happy with it, but at first glance I can’t see what the problem is. Seems to be clear and the same as GB. I remain of the view that its subtly different and I’m just pointing out but the existence of the difference doesn’t trouble me and, indeed, the NI version may be a slight improvement on the GB version. The difference, in a nutshell, is this: reg 30(2) in the GB Regs makes it a pre-condition of using solid biomass contaminated with bio-fuel that 4 requirements in reg 29 be complied with, including the requirements in 29(5) and (6) re auxiliary use. Why legitimacy of contamination should in this way hinge partly on compliance with the ancillary use requirements isn’t clear to me. Perhaps it’s a mistake but, be that as it may, the NI Regs differ in that they do not do that but instead make the legitimacy of contamination turn only on compliance with the 10% requirement and the requirement as to the reasons why the fossil fuel is present.
- Does need reference to the 10% limits being ‘in any quarterly period’. It would then differ from the GB Regs in that respect and DETI’s intention, in the main, is to replicate the GB Regs (warts and all).

Reg 32
- “(6) The participant must provide measurements in such format as the Department may request which satisfies the Department of all of the following—“ – is the intention that Ofgem decides the accuracy of CV and volume measurement equipment? This would be quite a task – in the GB scheme we’ve said that we will accept measurements based on whatever is acceptable in the current gas network. But if NI wants us to decide on the accuracy then this would be quite a task – would we insist on the Danalyser 500 (costing £250,000) or would we be content with something less accurate? No discussion taken place re this so far as I’m aware. For Keith to raise with DETI I suggest.

Reg 38
- Have I missed something or does the equivalent in the GB regs refer to heat used for eligible purposes rather than: “B is the heat in kWhth used by the heating system of which the installation forms part during the relevant quarterly period for eligible purposes.”; i.e. does this new tariff calculation mean they are paid on ‘ineligible’ heat uses? E.g. outdoor swimming pools? Sorry I don’t follow this point. So far as I can see the wording of this reg is exactly the same as in the corresponding provision in the GB Regs.

Reg 39(2)
- In the GB scheme the fossil fuel contamination and fossil fuel for ancillary purposes are only deducted =>1MW. NI appears to be deducting this for those below 1MW. This would mean measuring and sampling – a burdensome process. DECC tried to introduce a ‘light touch’ regime for below 1MW but NI seem to be making this burdensome for participants and Ofgem. Again, I don’t follow this comment. Reg 39(2) relates to biomass in municipal waste and corresponds to “Case A” in reg 40 of the GB regs. Isn’t that as it should be, given that reg 28 of the GB Regs is retained in the same terms in the NI regs (also reg 28). As to “Case
B”, surely the removal of that does no more than reflect the fact that NI are not funding large biomass plants of 1MWt or above (which explains why reg 29 in the GB Regs has no NI Regs counterpart.

Tariff table
- Not sure why the biomass tariffs have been changed? Three changes: 1. To the pence/kWh
2. Scrapping the tiered tariff and 3. Chaning the boundaries. THIS WILL REQUIRE VAST SUPPLEMENTARY COST. Keith to note Defining requirements, testing to ensure that NI works correctly etc. I hope we have a few ten’s/ hundreds of thousands in the budget for this. Also training of staff – we’ll have 20 staff who will need to understand this.
- The tiered tariff has proved a good way of reducing the incentive to waste heat in the scheme (i.e. once they have generated beyond the tier threshold, their fuel costs will often be higher than the RHI payments so boilers are only run if heat has a real value). So taking it out increases the likelihood of abuse and heat wastage.

From: Oliver More  
Sent: 20 July 2012 09:56  
To: Sophie Jubb; Paul Heigl  
Cc: Lindsay Goater; Kathryn Dowen  
Subject: RE: DETI DRAFT REGS - for comparison for biomass

Sophie, 

I’ll do this this morning.

Lindsay – a morning off accreditation to note.

Ollie  

From: Sophie Jubb  
Sent: 18 July 2012 16:37  
To: Kathryn Dowen; Oliver More  
Cc: Lindsay Goater  
Subject: FW: DETI DRAFT REGS - for comparison for biomass

Hi Kate/Ollie

Lindsay’s advised me that Kate should be able to take a look at these draft Regs for NI RHI next week – thank you Kate 😊. I am hoping that if you could compare these to the GB Regs, and let me know if there’s any differences between the 2 for biomass, that would be greatly appreciated. I have attached a list of the differences etc I’ve already picked out across the board from a system perspective, but I am by no means the biomass expert so would be very grateful for your much wiser assistance.

Thanks in advance

Sophie

This document is intended to identify the differences between the draft Northern Ireland RHI Regulations (the “NI Regulations”) and the Great Britain RHI Regulations (the “GB Regulations”).

Key differences and areas of existing uncertainty include:

- **Payment Tariffs**
  - There are significant differences between the Schedule 3 tariffs under the NI Regulations and the tariffs under the GB Regulations. Under the NI Regulations, the tiered tariff for small and medium biomass installations has been replaced with a single separate tariff for each category of installation. Under the NI Regulations, the tariff rates themselves are also generally lower for all installation. The NI Regulations also introduce a new tariff category for “medium heat pumps” and adjust the installation capacity boundaries for the existing tariff categories.

- **1MWth+ Installations**
  - Unlike under the GB Regulations, the owner of an eligible biomass plant with a capacity of 1MWth or above will not be entitled to receive any payments under the NI Regulations. However, as currently drafted, the eligibility criteria in the NI Regulations fail to preclude such installations from being accredited, with the result that the owner of a 1MWth installation could potentially be subject to the ongoing obligations under the Regulations, but not eligible to receive any payments. Given that we understand that DETI do not intend to include 1MWth installations and above within the NI Scheme, we expect that the eligibility criteria will in due course be amended to remove such possibility.

- **Eligibility requirements in respect of the grant of public funds**
  - (see the comments in respect of NI regulation 23 below)

- **Amendments to the GB Regulations**
  - It is unclear whether DETI intends to replicate some or indeed all of the permanent (corrective) amendments to the GB Regulations that are to be introduced by the Interim Cost Control SI, though they seem likely to do so. By contrast, they have stated that they do not intend to replicate the interim budgetary control provisions that DECC have just introduced in that SI which will, by their nature, automatically cease to have effect at the start of the next financial year.

A detailed breakdown of the differences between the GB Regulations and NI Regulations is provided in the Table below. Bold text has been used to indicate, on the basis of information currently available, the differences which are more likely to have a significant impact on the administration of the NI Regulations when compared with the manner in which we currently administer the GB Regulations.

**Table: Breakdown of key differences between the GB and NI Regulations.**

<table>
<thead>
<tr>
<th>NI regulation</th>
<th>Equivalent GB regulation</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Definitions</td>
<td>Definitions</td>
<td>The interim cost control SI will amend “Date of accreditation/registration” by 27/7/2012. DETI have indicated informally that they are happy to adopt the amendments, although this is yet to be reflected in a new draft of the NI Regulations.</td>
</tr>
</tbody>
</table>

Definition of “the Department” (i.e. DETI) corresponds to the definition of...
had thought about. So that’s the point I’m trying to make.

The Chairman: Can I just get that? My assumption was —. Yes: your assumption was what?

Mr Porter: Well, if — on the assumption that I did give this thought, and I imagine I would’ve done —

The Chairman: I would’ve thought so.

Mr Porter: — that DETI would have been into the question — they would’ve looked into the question of what the tariffs should be and they would’ve selected them accordingly.

Mr Aiken: Are you explaining, Mr Porter, that, from Ofgem’s perspective —? So, you’ve been presented with a draft of regulations that’s got no tiering in it, and someone has circulated that ultimately to Mr More to look at it from a biomass perspective, and he, having done so — and he doesn’t know whether DETI have thought about anything or not — identifies what, for him, is a — what turns out to be, prophetically, a very important point; that Ofgem should’ve and would’ve thought to itself, “We don’t need to worry about that because we’re sure DETI will have thought about it”.

Mr Porter: Well, I mean, I think it depends on what your role is really. And certainly, from my own point of view, I think my assumption would’ve been, as I’ve said, other people may have viewed it in a different way.

Mr Aiken: Yes, and that’s what I —. Because we’re gonna come to look at the legal bit, which —. And that’s why I’m trying to get the context of this right. So —. And I’m asking you just, from an Ofgem perspective, operationally, if the operations team have identified it, you know, what should they do about it? Because we’re going to see what legal do with it now but are you basically saying you don’t know what operations should’ve done with this identification of a potentially significant problem in the Northern Ireland scheme?

Mr Porter: I think they —. I mean, my assumption is that they would’ve thought that DETI
knew where it wanted to go with the tariffs, but, of course, it would’ve been open to them and, perhaps, on reflection, it would’ve been a good idea for them to specifically raise it. But of course, I mean —.

The Chairman: What about it being a good idea for you to specifically raise it, being a member of the professional regulators?

Mr Porter: Yes, except that, as I say, my assumption was that one I’ve just —

The Chairman: I know that —

Mr Porter: — mentioned.

The Chairman: — I know that but this is something a legal colleague brings up being a risk — a serious risk — and you simply assume that, “DETI have thought about it; it’s not really up to me to mention it”.

Mr Porter: I don’t think I saw it in those terms.

The Chairman: We’ll see.

Mr Aiken: One of the —.

Dr MacLean: It’s still on our screen: the issue that is being brought up is more about vast supplementary cost, the need to train staff. It’s not —. There’s no upper-case legal risk/challenge or whatever, so is that, therefore, something that’s commercial or operational and, therefore, needs to be looked at by the operational or commercial experts?

Mr Porter: Yes. I mean, as I say, at the time, I don’t think I would’ve been looking at it in that way. If I had thought, “Oh, this is a really significant point, could come back to bite DETI at a later point in time”, then I would’ve —. I would probably have said something.

Dr MacLean: But your expertise wasn’t as an economist or as a —

Mr Porter: No.

Dr MacLean: — an operational —.

Mr Porter: No, it wasn’t but had I thought it was significant at the time, I would probably
have said something anyway. I mean, there are no particular boundaries; if a policy issue arises and it appears important, I can comment on it. But I don’t think I was looking at it in that way at the time because, as I say, my assumption was that DETI knew what they were doing.

Dame Una O’Brien: Surely the whole point of getting —. I mean, it’s a common practice in public-sector bureaucracies to seek views from different perspectives in the organisation, so surely the idea — and, I mean, you know, it seems like it was a sensible thing, circulate it round, get different input — would be to leave all that input there and let it all be visible in what was shared.

Mr Porter: Yes. Um —.

Dame Una O’Brien: Because people bring different angles to bear. You know, you couldn’t expect the operational people to have a legal perspective and, likewise, the other way round.

Mr Porter: No, no. I mean, I can only reiterate: if I had thought at the time this is a material point, I think I would’ve piped up and said so because I generally do.

Mr Aiken: And in fairness to you, Mr Porter, just to be clear, I’m asking you cos you’re the person here and we don’t want to call every person from Ofgem along. You’re not the only person who’s copied into this email and we’re gonna have to get to the bottom of —. And, at the moment, I’ve no document that suggests this identification that Oliver More has engaged in was recorded, even within —. Because you will acknowledge — and I’m not gonna go to them — the emails where you recognise that although it’s the DETI scheme, if there’s a legal problem that flows out of it, it’ll be us that’ll be caught up in it — Ofgem — with them because we are doing the administration. You’ve got a scheme and someone within your organisation is identifying a particular problem that he foresees may be the case because of his experience from the GB scheme. And there’s the whole point: great synergy
between the two schemes that DETI are gonna benefit from, and that doesn’t appear to go on to a risk register, to be elevated to subject of discussion, to be communicated to DETI.

You can’t help with that other than —?

Mr Porter: I can’t; I don’t know what others may or may not have said after that.

Mr Aiken: OK. We’ll have to look into it further and call whoever we need to hear from.

But what I want to show, then, is what happens on the legal side with this document, because if we look at OFG-161309 — sorry, 161309, yes, please. You then comment on the — and this isn’t unique to you when I say this — but there’s a habit, it seems, in the communications that people comment within other people’s comments, and then it becomes very difficult to follow who’s saying what, especially if you don’t have coloured copies that are appearing. But I think, in this case, your comments are in bold.

So we’ve got you saying, on the 20th of July:

“Ollie

See comments below in bold.

Marcus”.

And then if we scroll down, we’re going to see Oliver’s email again, and, this time, you’re adding things like:

“Keith to note”.

If we scroll a little further down. So where he’s drawn attention to things, you then comment on them further. And if we scroll down a bit further — can you just keep going, please? In one of his comments, he couldn’t see what you — or couldn’t understand what you were saying. That’s regulation 29. Then you explain it in detail to him. And then if we move on further down, please, we’ll get to the tiering section. And here you’re telling Keith Avis to note at least the bit about supplementary cost. So you haven’t engaged in any comment on the next hyphenated point to do with Oliver More’s warnings.
as it turns out, is that something that ought to have been communicated given — and I say
this in the context of the panel is aware, and the Chairman made the point to you towards
the end of your evidence, particularly in the area of cost control, about warnings that were
being given — but is that a warning that ought to have been given at the time?

10:45 am

Mr Nolan: I think, yes, it ought to have been given. I do think, looking at the emails and
the back and forth and Mr Goater’s email, that there was a sense that the individuals
concerned said, “Well, listen, we’ve already warned DETI about tiering” — sorry, “We’ve
already warned them about some of the problems. They’re determined to go ahead, come
what may”, and I’m not saying that’s fair or not, but that would have seemed to have been
in the people’s — in the minds of the people. Certainly the Goater email said — seemed to
say, to me — “Listen, Mr More, we’ve been discussing this with DETI. They’re determined to
go ahead, regardless”. So, I think it is somewhat understandable for the individuals
concerned that they felt there was no point going back at that point. I accept the general
point that, ideally, it should have been sent again.

Mr Aiken: It appears to be a particular subject — and I don’t demur from what you’re
saying and the broad exchanges that have been going on — but it appears that in July of
2012, this — and it may be these other individuals, for instance, wouldn’t’ve been aware of
the nature of tiering; Mr More seems to have been on the money, as it were, on the subject,
but once it’s raised, it doesn’t appear to be transmitted —. What might reasonably be said is
it’s a lost opportunity to face DETI up to something they may not have understood. And we
now know, and I think in fairness to you, you make the point in your statement, “Well,
you’d, you know, got their own experts; you were doing the tariffs”. The panel have looked
at the CEPA error, as it were, and how tiering was being characterised. It’s really, “We only
need it if there’s a problem over the fuel”. But, in fact, Mr More’s on the right page, which,
Minutes

Northern Ireland RHI Ofgem / DETI Meeting

Teleconference between officials from DETI and Ofgem to discuss the development of the Northern Ireland Renewable Heat Incentive Scheme

<table>
<thead>
<tr>
<th>From DETI and Ofgem to discuss the development of the Northern Ireland Renewable Heat Incentive Scheme</th>
<th>Keith Avis</th>
<th>Keith Avis (DET)</th>
<th>26 June 2012</th>
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<tbody>
<tr>
<td>Location</td>
<td>9 Millbank</td>
<td>9 Millbank</td>
<td></td>
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</tbody>
</table>

1. **Those Present**

- Ofgem
  - Luis Castro
  - Keith Avis
  - Andrew Amato
  - Paul Heigl
  - Marcus Porter
  - William Elliot

- DETI
  - Joanne McCutcheon
  - Peter Hutchinson

2. **View on Regulations**

2.1. DETI confirmed that it was their intention that the NIRHI regulations would replicate the GB RHI regulations, although possibly with **differences in the tariff structure**, some amendments to the definitions section and **no provision for payments for biomass installations over 1MW**. Ofgem legal had fed in to it comments on the regulations which DETI said were helpful (*which include some changes of a permanent nature included in DECC’s interim cost control Regs*) and would consider as part of the process to finalise the regulations. DETI confirmed that it was their intention to have a phase two update to the regulations in summer 2013 which will reproduce the amendments on which DECC intend to consult this Summer.

2.2. **Action** DETI to work on final draft of the regulations which they will share with Ofgem before laying before the NI Assembly. Timetable is to obtain clearance before summer recess if possible and then lay during recess. If all necessary signatures are not obtained in time though this could lead to 4 to 6 weeks delay.

3. **GB RHI Legislative Amendments**

3.1. Ofgem raised concerns over the potential impact of the amendments to the GB regulations coming into force shortly after the NI RHI regulations. As the draft NI RHI regulations replicate the GB regulations as they currently stand, Ofgem could see logistical and presentational issues with the NI scheme initially being without these improvement updates. More importantly, DETI would be doing this in the knowledge that it would entail replicating also the various legal risks and administrative difficulties that have arisen from the deficiencies with the GB Regs, even though DECC are set to improve the Regulations considerably in this respect over the next few months and it would thus be open to DETI to delay making their Regulations for a few more months in order to take on board DECC's amendments. DETI were, however, clear that they have a commitment with their Minister to
B", surely the removal of that does no more than reflect the fact that NI are not funding large biomass plants of 1MWth or above (which explains why reg 29 in the GB Regs has no NI Regs counterpart.

Tariff table
- Not sure why the biomass tariffs have been changed? Three changes: 1. To the pence/ kWh
2. Scrapping the tiered tariff and 3. Chaning the boundaries. THIS WILL REQUIRE VAST SUPPLEMENTARY COST. Keith to note Defining requirements, testing to ensure that NI works correctly etc. I hope we have a few ten’s/ hundreds of thousands in the budget for this. Also training of staff – we’ll have 20 staff who will need to understand this.
- The tiered tariff has proved a good way of reducing the incentive to waste heat in the scheme (i.e. once they have generated beyond the tier threshold, their fuel costs will often be higher than the RHI payments so boilers are only run if heat has a real value). So taking it out increases the likelihood of abuse and heat wastage.

From: Oliver More
Sent: 20 July 2012 09:56
To: Sophie Jubb; Paul Heigl
Cc: Lindsay Goater; Kathryn Dowen
Subject: RE: DETI DRAFT REGS - for comparison for biomass

Sophie,

I’ll do this this morning.

Lindsay – a morning off accreditation to note.

Ollie

From: Sophie Jubb
Sent: 18 July 2012 16:37
To: Kathryn Dowen; Oliver More
Cc: Lindsay Goater
Subject: FW: DETI DRAFT REGS - for comparison for biomass

Hi Kate/Ollie

Lindsay’s advised me that Kate should be able to take a look at these draft Regs for NI RHI next week – thank you Kate 😊. I am hoping that if you could compare these to the GB Regs, and let me know if there’s any differences between the 2 for biomass, that would be greatly appreciated. I have attached a list of the differences etc I’ve already picked out across the board from a system perspective, but I am by no means the biomass expert so would be very grateful for your much wiser assistance.

Thanks in advance

Sophie
fact the most important source of information, it is plain that DETI did or should have known of the flaws from numerous other sources. This is addressed in (x) below.

(v) Communication about cost control, tiering and overcompensation

235. Ofgem staff raised cost control with DETI in the course of the administration of the Scheme. This was raised, not as something which DETI should do, but as something which DETI could consider and which Ofgem could readily facilitate because it was already administering the GB scheme which had cost controls and tiering. (As to why Ofgem did not present cost control/tiering as something which DETI should do, see [258] to [265] below.)

236. A meeting took place between Ofgem (MH, TC) and DETI (FH, JM, PH) on 29 May 2013. MH and TC went to see FH about DETI’s Phase 2 consultation. TC’s recollection that there was “definitely” a discussion around cost controls [TRA-06490 (13)], TC was clear, when pressed, that she can in fact remember what she was thinking about when she wrote in her witness statement that there was a discussion about cost control: [TRA-06499 (12-13)]. She explained:

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13 Ms Clifton: Yes. Based on my recollection, the phase 2 consultation was talking about
14 trying to come closer to GB, and that pretty much is matched in what Matthew said; you
15 know, talking about it broadly in line with GB. And, to my recollection, they did have a broad
16 conversation, as I say. I was very new in, so I didn’t really understand a lot about what they
17 were talking about at that point, but there was a conversation, as I recall, around cost
18 control at that point and that it was going to feed into the consultation and the consultation
19 was going live end of June.
20 Mr Aiken: And there was, in fairness, in the phase 2 consultation document, a cost-
21 control mechanism set out.
22 Ms Clifton: Yes. Tiering, I don’t recall —
23 Mr Aiken: Not tiering.
24 Ms Clifton: — because tiering was different. And the two — and I think, over the years,
25 quite a few people have got tiering and cost control a bit confused, but this was talking cost
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She was clear, when pressed again, that there was “definitely talking around [cost] controls” [TRA-06490 (13)].

237. CTI showed TC two contemporaneous documents relating to the meeting. One was an email summary from MH [OFG-162597]. The other was a note prepared by PH
[WIT 08731] which purports to be a minute of the meeting, although TC explained that she had never seen it [TRA-06487 (16-17)] and it was not shared with Ofgem. CTI made the point that there was no reference to “cost controls” in either note.

238. However, there is no divergence between the notes and they both accord with TC’s recollection that there was “definitely” a discussion around cost controls [TRA-06490 (13)], because that took place in the course of a discussion about the Phase 2 consultation which was “talking about trying to come closer to GB, and that pretty much is matched in what Matthew said; you know, talking about it broadly in line with GB… there was a conversation as, I recall, around cost control at that point and that it was going to feed into the consultation …” [TRA-06489 (13-18)]. The notes both match this recollection because they both refer to the Phase 2 discussion and addressing the divergence with GB.

239. As to PH’s note, under “Any other business” it explained:

4. Any other business

Fiona provided an update on the development and implementation of phase 2, focusing on the expansion of the existing non-domestic RHI. Fiona advised that consultancy work examining the options, costs and tariff levels for new technologies had been carried out by CEPA and Ricardo-AEA and was in the process of being finalised. It was likely that DETI would largely follow the GB expansion insofar that tariffs would be made available for biomass/bioliuid CHP, biomass direct air, deep geothermal and air source heat pumps. DETI was also considering support for biomass over 1MW and heat only bioliquids. Separately, DETI was also designing a domestic RHI scheme.

Peter advised that the other areas of divergence with DECC relating to administration, legal definitions and eligibility standards would also be considered in a forthcoming consultation.

240. MH’s note recorded:

(5) Further development
a. DETI are hoping to consult on changes to the scheme around the end of June for 12 weeks. Changes will be similar to GB. They are hoping to implement the changes at the same time as the bulk of GB changes, i.e. February next year. I noted that this will really help keep costs down.

241. There is no conflict between the Ofgem and DETI witnesses as to whether or not cost controls were discussed. Neither FH nor PH were asked about whether cost controls were discussed at this meeting, nor gave written evidence on the point.

242. A further meeting took place between DETI (PH, JM) and Ofgem (CP, GJ, TC) on 16 April 2014. TC does not recollect whether cost control was addressed in this meeting [TRA-06493 (11-13)]. However, GJ and CP were both clear that it was discussed.
243. CP’s evidence [TRA-09716] was that he prepared in advance of the meeting to talk about cost controls, because he was aware from DETI’s Phase 2 work that there was a group of things which DETI wanted to achieve in Phase 2, but that he had the impression that they might not be able to do everything [TRA-09717 (3-16), (17-19), (21-25), TRA-09718 (10-11)];

And the point I wanted to raise at the meeting, or the point I had for the meeting, was phase 2 was a different method of cost control but it requires new regulations and might be complex and requires more work than something we already had.

244. CP’s position was that the cost controls which GB had already introduced, i.e. degression, were a simpler mechanism for Ofgem and might help save DETI time and resource if they were pressed to fit everything into Phase 2 [TRA-09718 (14-20)];

245. CP also recalls tiering was discussed [TRA-0720 (9-11)]:

we may have talked about tiering in the same context. I don’t know the exact way we got to the conversation on tiering, but I do remember tiering being discussed. My main recollection was the discussion on degression versus other mechanisms.

246. In summary, his evidence was [TRA-09720 to TRA-09721 (25-6)];

Mr Poulton: My recollection of April is that there was quite a focused discussion around cost controls, and it was done in the context of the constraints and the focus on delivering the domestic scheme, which was, “Actually, you might be able to save time replicating degression”. That’s my recollection of that, and my understanding is Mr Hutchinson contributed to that discussion. And we agreed that the mechanism he had and was thinking about might be better than degression because degression wasn’t perfect either. That’s my recollection.
GJ was also asked about this meeting. He was pressed hard on whether he did in fact recollect a discussion on degression and was clear that he did (at both this meeting and the October meeting, addressed below); see [TRA-08908]:

Mr Aiken: And what I’m trying to —. Just so you understand, in the context of what we’re going to look at, I’m trying to understand whether this is, “I’m sure we would’ve talked about this and therefore we did” or “I actually remember that we talked about this” because here, on what you’re saying is, “I actually remember that we had these discussions”, and I want to be clear that is what you’re saying.

Mr John: I’m saying I actually remember. My recollection is having a discussion around degression —

Mr Aiken: Right.

Mr John: — at both meetings.

GJ and CP were shown an internal DETI note of the meeting [WIT-08736], and an email from GJ to other Ofgem staff sent five days after the meeting [OFG-89927]. It was put to GJ and CP that neither document refers to a discussion on degression. GJ remained clear in his view that this was discussed.

He explained that, in relation to his email, the reference to “policy changes” would have indicated the topic under which degression would have been discussed. It is also important to note that GJ’s email did not purport to be a minute of the meeting, but was simply a list of Ofgem action points following on from the meeting.

Although the internal DETI note of the meeting [WIT-08736] (which was not shared with Ofgem) does not expressly refer to cost control, it is consistent with CP’s recollection of the meeting, which was that a focus of the meeting related to Phase 2, and that he raised the issue of cost controls in the context in which he understood DETI was struggling to perhaps achieve all that they wanted to achieve in Phase 2. Phase 2 of the RHI is indeed the first item on the DETI note of the meeting, and it is clear from the note that there was a lot to be considered by way of changes and that DETI had, to date, focused on domestic, with lots of potential issues to deal with on non-domestic, and with not enough time to address them all in this round of legislative changes. The note records (amongst other things) under “Phase 2 of the RHI”:
Joanne explained that following the DETI consultation on Phase 2 of the scheme the focus had been primarily on implementing the domestic RHI. It was expected that ...

Peter outlined the non-domestic phase 2 elements. Explaining that the key issue would likely be tariffs for large biomass; combined heat and power; air source heat pumps; and deep geothermal. There would also need to be legislative changes regarding metering and the issue of grants/carbon trust loans. There may also be consequential legislative changes following the launch of the domestic RHI. Peter explained that air quality standards may also need to be considered but possibly not until 2015.

251. The DETI note is consistent with DETI presenting a picture that they were struggling to complete all that they may want to in the Phase 2 round of changes to the non-domestic scheme. CP’s evidence was that he raised degression in that context. Ofgem and DETI’s evidence therefore accords in this regard: DETI was busy and under pressure to deliver numerous aspects of Phase II, including the domestic scheme. DETI’s witnesses do not contract Ofgem’s evidence.

252. CP was also shown an internal email from TC [OFG-25327] which, again, did not expressly mention cost control or degression. He explained that the reference to the Phase 2 changes:

Is a reference to the context in which cost controls were discussed CP explained [TRA-09746 (5-9)]:

6 consultation, they wanted to do cost controls. We were bringing to the table a way of doing
7 that that had already been built that, given the pressures that are shown here, they might
8 not get around to the phase 2 changes for non-domestic, may allow them to do that earlier
9 than they thought. That would be my view on how the discussion was shaped.

253. Again, DETI’s witnesses were not asked about whether cost control was raised at this meeting and therefore there is no conflict on the evidence in relation to it.

254. In May 2014, the day before PH’s last day in the Department, EW discussed with him that tiering was a possible solution to overcompensation when overcompensation was raised with EW by PH.
The focus of that discussion was on carbon trust, but then PH moved on to discuss issues of overcompensation “while I’ve got you [EW] on the phone”.

PH’s handover note records aspects of the conversation [DFE-383320]. It shows that EW had explained that a solution would be to tier tariffs and this could be implemented by Ofgem.

EW confirmed in oral evidence that he explained that tiering was a potential solution to overcompensation [TRA-06647 (6-7)]. He was clear that the conversation was not just about carbon trust [TRA-06650 (22-24)].

It is important to be clear on precisely the message which EW was given in the conversation with PH. DETI’s Team II witnesses have criticised Ofgem for not raising with them an issue which they had identified as “urgent” in 2014: see SW witness statement [WIT-17001] at §§47, 60. The Inquiry has rightly been interested in why Ofgem’s messaging of the possibility of cost control and tiering, after May 2014, was presented simply as an option for DETI, rather than something which DETI should do, in light of the fact that it had been identified in May 2014 that the tariffs were overgenerous and that there was an urgent need to take action, by way of tiering.

In short, EW was not told that the tariffs were overgenerous nor was he told that the issue was urgent. Rather, he was told two things by PH. First, that DETI was simply looking into this and would continue to, not that a problem had been identified; and second, importantly, that DETI would not be doing anything about it, if in fact it did require action, until after the introduction of the domestic scheme.

EW was not told by PH that the issue was urgent (even though that was how PH described it later on the same day in his handover note). EW was told by PH that the domestic scheme would still take priority: this was despite PH having himself identified (although not communicated to Ofgem) that the issue was urgent, see [TRA-06648]:

76
Dr Ward: Yes.

Mr Lunny: — specifically in it?

Dr Ward: Um, yes, but he also — again, he also said at the end of the call, "This is something that we'll be looking at, but obviously we're looking at domestic RHI first". So, I was aware from that call in particular, as well as from more general awareness, that this wasn't likely to be something that would be on the top of DETI's priority list.

Mr Lunny: Because we know this is a fairly contemporaneous document, and it says:

"This issue would need to be considered as a matter of urgency."

And, if we scroll back up the page a little to the heading, he's described it as:

"Current / emerging issues."

But, on another page within the handover document, I think, it's referred to as one of a number of issues that require immediate action. Do you recall him using any of those terms: "immediate", "urgent"?

Dr Ward: I don't remember him using those terms — "immediate" or "urgent" — no.

Mr Lunny: And, when you mention the domestic scheme, did he tell you that it was going to take priority, or did you get that impression that it was the urgent or priority topic for DETI at that point in time?

Dr Ward: He must've said something like the "priority" or possibly the "prime focus", but some words very much like that. That's my recollection.

Mr Lunny: And what did you expect, then, would happen after your discussion with him, in relation to that 20 to 99-kilowatt biomass tariff and the possible introduction of tiering?

What did you anticipate at that point in time?

Dr Ward: So, I guess, at the point I put the phone down, I thought, "That's something that DETI are going to go away and consider further". It was — I think that that phone call had made enough of an impression on me that I sort of set about trying to provide some

See also [TRA-06660 to TRA-06661 (21-6)], when pressed in his evidence as to the strength of his message on the problem of overcompensation and the need for tiering to Team II (in the communications outlined below), EW explained that Ofgem did not know it was urgent, had not been told of the indicators which PH had that overcompensation was in fact a problem (such as the communications from Janette O'Hagan and the issues raised at the ECO hub event) and had been told by PH in May 2014 that introduction of the domestic scheme was the priority; see [TRA-06664]
The Inquiry sent PH a section 21 request after EW gave evidence, asking whether his recollection accords with that of EW. PH’s statement is very carefully worded [WIT-09323 to WIT-09324]. It is important that the Panel review PH’s statement in response carefully because, although the approach is one which suggests that EW’s evidence may be called into doubt, the substance of the statement does not in fact do so. At most, PH says he has “no memory” of: (1) mentioning the Smart Eco Hub; (2) discussing the domestic scheme or (3) suggesting a review of the non-domestic scheme would have to wait.

Importantly, PH does not say that he told EW that the matter was urgent, simply that he felt the matter was urgent and that he was surprised that EW did not identify the sense of urgency “given the comments I made immediately after this conversation within the handover note” (§8.4). However, EW was not given a copy of the handover note.

Nor can it be right that the Handover Note is a record of the conversation with EW: (1) it was a handover note, and does not purport to be such a record; indeed it would be an odd approach to a handover note to use it as a place to formally record the detail of a conversation, particularly since DETI did not have the habit of making
such records in the ordinary course of business; (2) PH can’t be right to say that the note is an accurate record of what was discussed, because on his evidence (a) he did not mention Janet O’Hagan, but she is mentioned in the note; and (b) he did not mention the Phase II priority being given to the domestic scheme, but that is reflected in the note.

Further, the contemporaneous emails sent by EW following the conversation with PH are inconsistent with PH having told EW that there was an urgent need to address compensation by tiering:

(i) First, EW wrote an internal email in which EW relayed the conversation to other staff at Ofgem [OFG-25647]. That email accords with EW’s recollection of the discussion with PH, in that it indicates that the issue of tiering arose in the context of a conversation about carbon trust (“while I’ve got you on the phone”, as EW put it in oral evidence: see [254] above) and that tiering was mentioned by PH merely as an aside:

(a) The summary of the conversation relayed to other Ofgem staff reflects that the balance of the conversation related to carbon trust. Tiering is, graphically, mentioned simply as an aside in the conversation, being reflected in a sentence in square brackets;

(b) EW makes no mention of PH referring to an urgent need to introduce tiering. To the contrary, EW’s record of the conversation is that “[…be [PH] will be recommending [his successor] consider introducing a tiered tariff to the NI regs]” (emphasis added). This, again, accords with EW’s oral evidence (see [254]) that tiering was presented to him as something to which DETI, in due course, would be giving consideration and that it was not presented to him as something which DETI had already decided required action;

(ii) Second, in EW’s email to PH on the day after the conversation, attaching the case study [OFG-00675], EW refers to the work being prepared to help with “any considerations on tiered tariffs under the NI RHI” (emphasis added). This accords with EW’s recollection that tiering was presented to him as something which was to be considered by DETI, not something which had already been identified as necessary by DETI.

As to further discussions, after the conversation in May 2014, following the conversation EW sent PH examples which dealt with both the Carbon Trust and
issues of potential overcompensation (as well as multiple boilers – see [300] to [302] below) [TRA-06651(20-22)], [OFG-00675].

267. EW explained, when challenged on the value of these examples, that his aim was just to provide an example, not all examples [TRA-06653 (11-12), (21-24)]. He was not expecting to be providing a full analysis of all possible cases or of the issue of overcompensation; he was just illustrating the point, if DETI were investigating (as he was told by PH that they would be) of something of which they should be mindful. UOB expressed a struggle to see how the examples can provide information on tiering, because the word “tiering” is not there [TRA-06656 to TRA-06658 (18-18)]. However, EW explained that the response and the examples sent reflected how the conversation with PH started which was about Carbon Trust and which moved on to heat usage and tiering [TRA-06658 (15-18)]. See also EW [TRA-06657 (7-12)].

268. UOB expressed concern that it was not easy to untangle the issue from a tiering perspective for someone new coming in because it is buried in the examples. However, as the Chairman noted, the handover note expressed PH’s view on tiering and overcompensation (see EW evidence session [TRA-06660(9-14)]).

269. EW explained that did not think to do an extraction of the key variables to work out overcompensation, it was not on his to do list because he considered he would have been duplicating work that DETI were doing. They had the information and had said this was something PH said they would be looking at (EW1 [TRA-06682 (19-20)]), and “to the extent that I viewed this as something that would be done, I would have viewed that as something that DETI were going to do” [TRA-06683(2-6)]. Indeed, that is reflected in EW’s own communications to other Ofgem staff, immediately after the conversation with PH (see [265] above).
EW explained that he was prompted by his discussion in May 2014 with PH to discuss tiering with SW and SH over the following months [TRA-06649 (8-9)]. He was clear that he discussed tiering with them before the meeting in October 2014 [TRA-06665(3-12)]:

> Dr Ward: So I can't put a date on exactly when during that period, but I know some point between Mr Hughes and Mr Wightman starting and the meeting that we had in October 2014, where we went over to Belfast, I know that we had discussed the possibility to introduce depression and the ability to introduce tiering because I remember some of the conversation that then happened at the October meeting, and part of that was saying, "As we've already discussed, at a working level, these are things that Ofgem can do", but, to be clear, I remember having those discussions, both in terms of depression and tiering, as something that Ofgem could deliver, not specifically something that Ofgem should be requ— delivering or need to be delivering. I don't remember a specific conversation around levels of compensation.

These discussions occurred in a telephone conference. EW could not recall whether he referred back to his conversation with PH about high load factors and did not want to say that he did, absent a precise recollection, but he considered it was the logical thing to have done [TRA-06667 (11-12)] and he would be surprised if he introduced the concept of tiering without at least mentioning why tiering was there in the first place (i.e. because of the risk of over compensation) (see [TRA-06666 (13-14)]). EW thought the natural thing to do would have been to have discussed the conversation with PH with SW and SH [TRA-06667(19-20)]. Later in his evidence, EW was shown a record of a conversation he had in 2016 with PWC which recorded that he had explained to PWC that “the particular issue about how these usage figures were actually different than would have been expected was raised with the department and it flowed into a conversation about look, if you want to do something different...”. EW explained that his recollection in 2016 was more contemporaneous than it was now, but if he remembered in 2016 talking about usage in 2014 then he expected that he did [TRA-06677(10-14), (23-24)].

The Inquiry has therefore clear evidence before it that EW did discuss tiering with both Team I and Team II before October 2014. As to why Team II do not appear to recollect those discussions, see paragraphs 275 to 279 below.

A further meeting took place in October 2014 between Ofgem (CP, GJ, TC, EW) and DETI (SH, SW, JNM).
EW was clear that he remembers the conversation on degression and tiering [TRA-06669]

Dr Ward: Yes. And I, in terms, I remember that the conversation being along the line —.

Again one of the sort of core topics of that meeting was finances, both in terms of agreeing
funding but also I remember us effectively saying — with Mr Mills in the room as well who
hadn’t been party to the earlier conversations — none of the things we’ve been talking
about at a working level is how Ofgem could introduce changes through things like
degression and tiering which can be introduced relatively readily because we’ve got this
experience of doing it on the GB scheme”. So that was very much —. It wasn’t a primary part
of the meeting but it definitely did form part of the meeting with all those present.

EW was asked about the evidence of SW which as that Ofgem “never once raised concerns
over the level of payment… despite Ofgem discussing this with the previous RHI team in May 2014”
(SW WS [WIT-17035] at §60). EW’s position was that there was not necessarily a
straight conflict in the evidence, because Ofgem were raising tiering along the lines
of “what can be introduced” rather than “this should be introduced to overcome a specific problem”
[TRA-06670 (4-6)].

It was put to EW that there was a conflict because SW linked this to the conversation
with PH (“despite Ofgem discussing this with the previous …team”). However, the discussion
with the previous team did not, as EW explained, raise a specific concern that tiering
was necessary, simply that this was something which DETI would be looking in to and
something which remained (despite PH having spotted the issue) a lower priority than
the introduction of the domestic scheme.

EW is clear that tiering was raised. As explained above, he cannot remember whether
he expressly made the link between tiering and overcompensation (but considers that
he would have, on the basis of that being a reasonable thing to do and on the basis
of his recollection at the time of his interview with PWC). However, in any event, if
he did not the reason why SH and SW may not have understood that talking about
tiering and degression was a flag by Ofgem of the issue of overcompensation is
because of the level of knowledge that they had at the time [TRA-06670 to TRA-
06671 (2-4, 28, 5)].

EW’s position is supported by SH and SW’s evidence:

(i) SH did not recollect the reference to tiering, but expressly clarified that he did
not say it did not happen [TRA-05898(4-6)].
(ii) SH explained that did not understand tiering even in early March 2015. His discussion about tiering at that point related purely to alignment with GB rather than from any understanding of what it did: [TRA-05905] He was frank in admitting that he simply didn’t understand the Scheme. Indeed, his proposals for the treatment of multiple boilers didn’t ever grasp the actual issue which was at stake (ie. potential overcompensation); see the exchanges with the Panel referred to below at [485] to [488] and [TRA-08614 to TRA-08615(6-2)];

(iii) SW explained that he did not understand even basic concepts involved in the scheme in June 2014 [TRA-06886 (5-9)].

279. Accordingly, if EW had raised a discussion about digression and tiering, SW would not have understood that to have been a conversation linked to the “level of payment”.

280. GJ also clearly recollected a discussion about degression (see [248] above), as did CP, as part of a business-as-usual discussion about tools that Ofgem had available of which degression and tiering were two [TRA-09753 to TRA-09754(24-1)]

281. JNM’s position on this is that there was nothing to record that Ofgem continued to press about action that “they had identified as urgent several months previously” [WIT-14526]. However, Ofgem’s witnesses did not suggest that they did do that: degression and tiering were mentioned as options which Ofgem could offer, not as something which DETI should do. (As to the reason why, see [258] to [265]). Ofgem had not identified any issue as “urgent”. PH had. However, as explained, that was not communicated to Ofgem.

282. As to the questioning of Ofgem’s accounts of the meetings in May 2014 and October 2014 founded on the fact that tiering and degression were not consulted on by DETI as potential developments (and therefore would not have been in DETI’s contemplation), the Inquiry should note that the DETI witnesses’ evidence demonstrates that DETI was prepared to consider adopting scheme changes it had not consulted on: see SH [TRA-08679].

283. DFE-94725 is a contemporaneous record that Ofgem explained to DETI that GB had degression on 15 December 2014.

(six) Communication about multiple boilers

(1) The issue with multiple boilers
site question. But, if I’m wrong about that, then I’ll highlight that for the panel on a subsequent occasion. I’ve someone trying to find the relevant piece of documentation at the moment.

What I want to do, Mr Poulton, is turn to the two meetings that you attended in Belfast in 2014. I’ve already drawn attention, in fairness to you, to the email you sent after the first meeting in April 2014, which was essentially an internal email that kicked on the data-sharing question and turned it away from a substantive question more to just a procedural one to get sorted out in terms of the transfer. But, there’s some debate as to what occurred at this meeting and at the one in October. So I’m going to look at some of the references that are available and then allow you to say what you want to say about the meeting.

It was the 16th of April 2014 in Belfast, and you discussed it before the Northern Ireland Public Accounts Committee when you appeared with Dr Ward and others on the 26th of October 2016. And you mentioned on that occasion — I’m not going to bring up the transcript, but I’m going to summarise what you said and, if I’ve got any of this wrong, you can correct me — that you recalled an April ’14 meeting and a discussion taking place about the degression mechanism. The reference for that, members of the panel, is PAC-05478 and a third of the way down the page. And you also said to the PAC that the meeting included a discussion about cost control, which may be a reference back to degression. That’s at PAC-05506. And you also explained that at that meeting there was a discussion about data sharing based on what more DETI wanted to receive. And that’s found at PAC-05475.

Now, it was slightly different in context, in terms of the proceedings and how they were unfolding, so we asked you some questions about the meeting in your witness statement. If we can pop on the screen, please, at WIT-282542, which is where I’m going to start. You refer to this meeting, Mr Poulton, in a number of place in your witness statement, so I’ve tried to take the references and put them in chronological order: about what happened in
advance of the meeting; what happened during the meeting; and what happened after the meeting.

So, in paragraph 9.1, you indicate being briefed. Your recollection is that you were briefed about the question of cost control:

“in advance of that meeting as something that DETI ... wanted to implement”

and you explain you “raised it as such at the meeting.”

And what I wanted to understand was: who briefed you about that? And I think you answer that in paragraph 16.2, at 282559. And there you say you don’t recall now, or at the time of making your statement, who exactly it was that talked to you about the issue. And I was going to ask you a series of questions, then, to the extent you can remember about —.

What do you recall them telling you in advance, as far as you can do without hindsight?

Mr Poulton: Um, quite difficult. I remember —. My recollection is that we talked about phase 2, so phase 2 was this grouping of certain things that DETI might want to do, and the impression —. My recollection is my impression at the time was that they might not be able to do everything that they wanted to do, which is not uncommon.

And the point I wanted to raise at the meeting, or the point I had for the meeting, was phase 2 was a different method of cost control but it requires new regulations and might be complex and requires more work than something we already had. So, I can’t recall whether that was the conversation I had before or whether I pieced that together myself, but that was the nature of what I wanted to get across in the meeting, which was: if you’re struggling to get things in and you’re tight for time, and we did recognise the resource constraints and we did recognise that phase 2 had a lot in it, and the focus was on domestic, therefore is this helpful from a non-domestic perspective to reuse something we already have? And I distinctly remember that conversation at that meeting.
“tiered tariffs and degression as two mechanisms that already existed in the system that were therefore quick / cheap to implement”.

Mr Poulton: Yes.

Mr Aiken: I’m just trying —. How would the discussion about the tiering of tariffs have come about because there hadn’t been any content in the consultation document about doing tiering?

Mr Poulton: I don’t recall how it came about. There may have just been a general discussion on —. If we were talking about reducing tariffs through a degression mechanism, we may have talked about tiering in the same context. I don’t know the exact way we got to the conversation on tiering, but I do remember tiering being discussed. My main recollection was the discussion on degression versus other mechanisms.

Mr Aiken: I’m not sure Mr John, who’s at the meeting as well — he certainly agrees with you: he says degression was discussed — I’m subject to correction from others, but I’m pretty sure he doesn’t suggest tiering was a subject of discussion. Dr Ward — we’ll look at what he had to say in 2016 about this meeting and what he says occurred, but has since said he was not actually at the meeting. But your recollection is, you say, there was a discussion about degression and about tiering.

Mr Poulton: Yes, my recollection is tiering was discussed.

Dr MacLean: We had a series of discussions with Mr John about this and ultimately seemed to come to a conclusion that, at both meetings, it was likely that he did a general setting out of the stall, in that, “These are the things that were being done for DECC”, bringing DETI up to speed on that, and that included degression. That seemed to be the extent of what was clear, rather than that it had been any sort of detailed discussion about specific measures for DETI. Is that consistent with your recollection?

Mr Poulton: My recollection of April is that there was quite a focused discussion around
cost controls, and it was done in the context of the constraints and the focus on delivering
the domestic scheme, which was, “Actually, you might be able to save time replicating
degression”. That’s my recollection of that, and my understanding is Mr Hutchinson
contributed to that discussion. And we agreed that the mechanism he had and was thinking
about might be better than degression because degression wasn’t perfect either. That’s my
recollection.

Mr Aiken: You go on to say in this paragraph that:

“Mr. Hutchinson was aware this was a scheme risk for DETI”.

As in, is that the lack of cost controls?

Mr Poulton: Yes. Cost controls weren’t in and they were considering bringing them in.

Mr Aiken: Do you know, when you went back, did anyone enter on Ofgem’s risk registers
the fact that there’s no cost-control mechanism?

Mr Poulton: I don’t believe we would include that on an operational —. I mean, it was a
known, I guess, issue because the scheme is live, but I don’t think we would’ve entered it on
to one of our registers, because it’s not something we could technically mitigate against.

Mr Aiken: It’s just that, in the fraud prevention strategy, which we looked at —. You’re
having a discussion now with DETI personnel about tiering, with a fraud prevention strategy
which, presumably by April 2014, you and Mr John — one or both of you — will have read,
along with Ms Clifton, which says that there is tiering. Do you see what I’m —?

Mr Poulton: No, I agree, and I can’t explain why those two things weren’t brought
together.

Mr Aiken: What I understand you to be flagging up here, as far as you were concerned:

arising out of the meeting, Peter Hutchinson, in May — in April ’14 — and therefore John
Mills, who you were meeting for the first time — but certainly Peter Hutchinson understood
the risk of no cost control. That’s what I take you to be saying was the import of the meeting
Mr John: — the two points kept DETI abreast of developments in GB scheme in terms of DECC and my recollection is they were interested. And the key thing from the April meeting was that they were keen to keep abreast of policy developments in GB because they wanted to follow those where they deemed them to be appropriate.

Mr Aiken: And what I’m trying to —. Just so you understand, in the context of what we’re going to look at, I’m trying to understand whether this is, “I’m sure we would’ve talked about this and therefore we did” or “I actually remember that we talked about this” because here, on what you’re saying is, “I actually remember that we had these discussions”, and I want to be clear that is what you’re saying.

Noon

Mr John: I’m saying I actually remember. My recollection is having a discussion around degression —

Mr Aiken: Right.

Mr John: — at both meetings.

Mr Aiken: Now, on the 5th —.

Dr MacLean: Are you saying at both meetings or just in relation to the 13th of October?

Mr John: At both meetings.

Dr MacLean: Degression at both meetings.

Mr John: Yes, in terms of the April meeting and the October meeting.

Mr Aiken: Now, what material we have, if we look at OFG-25312, please, in advance of going to the meeting, which is going to be your first physical interaction with the DETI team, which, at that stage, was going to be John Mills, who’d taken up post in the January of ’14, like you, and Joanne McCutcheon and Peter Hutchinson, who’d been there for a much longer period, and what you’re being provided with by Dr Ward is a:

“Soft copy of the briefing on Carbon Trust issue for DETI, as discussed.”
mechanism. So, from a policy change perspective, the new team were reviewing their plans.
There was some focus on the domestic scheme. And then, from a priority point of view, our
understanding was that they would then, you know, take forward any changes they’d want
to make to the non-domestic scheme. So, that’s my recollection.

Dr MacLean: Mr John, would it be fair to characterise what you were doing there as just
sort of laying out your stall, saying, “Look, these are things that we’re doing for GB at the
moment. If you ever wanted to do that, then we could do it for you as well”?

Mr John: So, yes, it was laying out the stall in terms of, operationally, what we could do
for them to support them. In October, it was, you know, it was a follow-on from the
discussion we’d had in April, you know, around the fact that they were, again as I said
before, you know, seeking to mirror policy where appropriate.

Dr MacLean: Putting it like that is very different to some of the exchanges that we saw
previously where warnings were being expressed and, you know, concerns about legal
challenge and other issues and exposure if DETI were not mirroring what GB were doing.
That’s a very different type of discussion than, “Here’s a list of things that we’ve done for
DECC and, if you were ever interested in any of them, then we could do them for you as
well”. Would you agree?

Mr John: Yes, it’s different. As I say, my recollection is that it was a discussion around
where the policies were on the two schemes and, you know, for me, it was very much how
DETI wanted to take forward their policy. The impression in the conversation I had was that
they were seeking to grow the scheme at that point in time and they were considering what
was appropriate for them under those circumstances.

Dr MacLean: So, in terms of priorities and the things that they were interested in and
pursuing, was (a) growth in the scheme and (b) getting the domestic scheme up and
running?
Meeting between DETI and Ofgem  
Wednesday, 16th April 2014  
Netherleigh

- John Mills, DETI  
- Joanne McCutcheon, DETI  
- Peter Hutchinson, DETI  
- Chris Poulten, Ofgem  
- Gareth John, Ofgem  
- Teri Clifton, Ofgem

John welcomed the Ofgem representatives to the meeting and explained it would be a good opportunity to discuss key issues pertaining to the administration of the NI RHI.

Teri agreed, proposing that the main areas of discussion would be Phase 2 of the NI scheme (domestic and non-domestic); Carbon Trust loans; Admin costs for 14/15 and beyond; and data sharing. Joanne was content with the proposed agenda and added the topic of communications.

1. Phase 2 of the RHI

Chris Poulten explained that the domestic RHI scheme had launched in GB the week previously and that Ofgem E-Serve was responsible for administering the scheme. The system developed was working well, in simple cases it was taking applicants 15 minutes from start of the application to accreditation. There was a significant drive from Government to promote the scheme and Ofgem expected to deal with a high number of queries / applications.

Joanne explained that following the DETI consultation on Phase 2 of the scheme the focus had been primarily on implementing the domestic RHI. It was expected that the Minister could be in the position to make an announcement by early June and the scheme could be implemented in the summer / autumn. It was currently proposed that the scheme would be administered in-house by the existing team responsible for the RHPP scheme. A permanent administrative system would need to be considered in due course.

It was agreed that it would be useful to share information on the NI domestic scheme, when launched, so Ofgem could direct consumers to the appropriate information if they contacted Ofgem in the first instance.

Joanne asked how Ofgem dealt with properties that could be classed as either domestic or non-domestic, was a domestic EPC sufficient to demonstrate compliance? Chris agreed this was a complex issue especially in cases where dwellings had swimming pools, annexed offices or some commercial aspect. From Ofgem’s perspective the EPC provided would need to cover the domestic elements only (i.e. exclude swimming pools and annexed office space / sheds etc). Therefore
To: Karen Wood[Karen.Wood@ofgem.gov.uk]; Edmund Ward[Edmund.Ward@ofgem.gov.uk]; Teri Clifton[teri.clifton@ofgem.gov.uk]; Atika Ashraf[Atika.Ashraf@ofgem.gov.uk]; Jacqueline Balian[Jacqueline.Balian@ofgem.gov.uk]; Chris Poulton[Chris.Poulton@ofgem.gov.uk]; Simon King[Simon.King@ofgem.gov.uk]
Cc: Jackie Balian[Jacqueline.Balian@ofgem.gov.uk]; Chris Poulton[Chris.Poulton@ofgem.gov.uk]; Simon King[Simon.King@ofgem.gov.uk]
From: Gareth John
Sent: 2014-04-21T20:02:51Z
Importance: Normal
Subject: DETI

All,

Myself Chris & Teri had a very productive meeting with DETI in Belfast last Wednesday 16th and we received some positive feedback on the service we provide.
(Thanks Teri/Edmund on the prep for the mtg)

Follow on actions:

1) Budget GJ – proposed a way forward for 2014/15 that reflected throughput and we agreed to set a budget based on this forecast and then review quarterly. Teri – can you chase Peter/Joanne @ DETI for a forecast of their numbers in 2014/15 – I don’t think they will outgrow the GB numbers though so starting with a ratio as per my attached s/s calc should provide some headroom in the budget and then we will review quarterly with them and adjust as required. – Action Gareth / Teri

2) Formalising a monthly conference call as part of our account mgmt and have a set agenda (maybe 1hr) – Action Teri

3) Have a 2 weekly 30 min call to pick up any issues / complaints / developments. - Action Teri

4) Data Sharing Agreement – Karen / Teri / Simon – as discussed – can you take this forward and confirm exactly what is required here and the associated legal costs (which I may absorb) – given we are acting as agent – the rationale we have with DECC about not releasing data should not apply – but we do need to have agreed processes in place for transfer / sharing of data and ensure there is a data owner / process for dealing with breaches etc. – would be good to get a view on this so Chris Poulton can go back to John Mills on 25th April if possible.

5) Carbon trusts / Grants / de-minimis etc. – Teri to set up a conf call with Peter/Joanne/Stephen Moore ? / Edmund to go through this on Wed 23rd / thu 24th april to try and resolve this and get:
   a) Workaround in place across all grant variants as required.
   b) Understand when Regs will church to simplify this for NI?

6) Phase 2 changes – Summarise NI changes and plans and follow up with DETI as required – Teri/Atika/Karen

7) Confirm arrangements for DETI to visit and see Domestic Demo - Chris

Teri – let me know if I’ve missed anything – Also if you can touch base with Chris later in the week and see if he is able to go back to DETI with updates on some of the points above.

Rgds
Gareth

Gareth John
Associate Director Renewable Heat Incentive (RHI) Non-Domestic New Scheme Development
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www.ofgem.gov.uk
Hi Chioma and NI guys

We had a really good meeting at DETI yesterday. It gave us a chance to meet John Mills who has taken over from Fiona Hopper. We mainly discussed costings for the coming year, data sharing and the good old carbon trust issue.

We've agreed to have one final conference call on the carbon trust stuff as we are close to a pragmatic solution on these. No change on the lines to take yet though, and I know we have a number stacking in anticipation of the decision.

One of the main things that came out operationally was that DETI would like us to start letting them know if we see any emerging issues. They have had a couple of ministerial complaints which is making them think about anything else that might be bubbling.

This is interesting as this is what Gareth and I have been talking about on the GB scheme too, so we need to share this wider - Martin, can you pick up at the main Monday meeting. If you have anyone showing dissatisfaction about their application, can you let your manager aware in the first instance. We can then create a ‘bubbling under’ list that we can share with DETI. I’m planning on setting up monthly meetings with them so we can discuss volumes, costs and anything that might be coming up over the next couple of months.

Finally, we talked about their plans for future changes. They are focusing on getting their domestic scheme up and running before the summer (keeping it in house at first). Their phase 2 reg changes may be worked on much later in the year, and at this stage is unlikely to include air quality but will include metering.

Regards
Ted

From: Chioma Ganzallo
Sent: 17 April 2014 09:15
To: Teri Clifton
Subject: FW: DETI trip tomorrow

Hi Teri,

Happy Easter to you. How was the meeting with DETI and was there any issue picked up that can be shared with the NI team.

Regards
Chioma

From: Chioma Ganzallo
Sent: 15 April 2014 09:53
To: Teri Clifton
Cc: Martin Baird
Subject: RE: DETI trip tomorrow

Hi Teri,

On the process, I am not too sure if this is an internal thing. This is regarding the NI privacy policy we send out to applicant before starting review on their applicant. Up till now this has not been integrated into the register. When an application has been submitted and before commencing on any review, applicant needs to agree to the provision provided for in the text. This NI privacy policy is sent out via email and we await response before review which can really slow down the process.

Another point is on the carbon trust loan. I was wondering if this issue has been fully resolved or applications are still considered on a case by case basis. I will let you know if there is any other point.

Regards
Chioma

From: Teri Clifton
Sent: 15 April 2014 08:57
To: Jack Paterson; Michael McKillop; Owen Allen; Chioma Ganzallo
Cc: Martin Baird
Subject: DETI trip tomorrow

Hi all

I’m visiting DETI tomorrow so was wondering if you’re aware of any issues that they might pick up on. Can you let me know by lunchtime today.

Thanks
Teri

Teri Clifton
Senior Manager, RHI Enquiries and Assessments
Dr Ward: Yes. And I, in terms, I remember that the conversation being along the line —.

Again one of the sort of core topics of that meeting was finances, both in terms of agreeing funding but also I remember us effectively saying — with Mr Mills in the room as well who hadn’t been party to the earlier conversations — “one of the things we’ve been talking about at a working level is how Ofgem could introduce changes through things like degression and tiering which can be introduced relatively readily because we’ve got this experience of doing it on the GB scheme”. So that was very much —. It wasn’t a primary part of the meeting but it definitely did form part of the meeting with all those present.

Mr Lunny: One of the reasons for the meeting was to sign the amendment to the administrative arrangements that finally disposed of the Carbon Trust —

Dr Ward: Yes.

Mr Lunny: — issue. Wasn’t that correct? That —

Dr Ward: That was another aspect —

Mr Lunny: — amendment is dated the 13th of October.

Dr Ward: — of the meeting. Yes. That’s right.

Mr Lunny: I want to take you, very briefly, just to, I suppose, two pieces of evidence in relation to what Mr Wightman and/or Mr Hughes can or can’t remember being discussed. One is Mr Wightman’s statement. If we could bring it up, it’s at WIT-17035. And if we could maximise, maybe, the bottom half and paragraph 60, we’ll see he says:

“I also arranged for key Ofgem personnel to come over to Belfast to meet us in October 2014. During all my regular contacts with Ofgem, they never once raised concerns over the level of payment that recipients were receiving. This was despite Ofgem discussing this with the previous RHI team in May 2014.”

So he appears to be suggesting there that there wasn’t any discussion about possible overcompensation occurring, even though that had taken place with Peter Hutchinson in May ’14, he doesn’t recall it being raised in any of his contacts.
John, please find attached summary of the key issues to be discussed with Ofgem on Monday.

St

Thx Seamus

As discussed please find attached a short briefing paper on the key issues for John.

Regards

Seamus

Seamus Hughes
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MEETING WITH OFGEM – MONDAY 13 OCTOBER

ISSUE: CHANGE CONTROL FOR ADMINISTRATION COSTINGS

Ofgem has sought to change the basis of its costing for the administration of the NI RHI as it considers the current arrangement is inappropriate due to the fact that tariff payments lag considerably behind the work of its operation team. A revised method of calculation is proposed for this year and beyond.

- A draft change control has been received from Ofgem. The change control is in respect of a revised method of calculation for costs to be charged for the running of the NI Non Domestic RHI Scheme.

- Suggested amendments were made to the Ofgem document to tighten the basis for costings and this was forwarded to Ofgem for agreement.

- DETI is content to sign the change control on the basis of the amended document.

ISSUE: - GRANTS AND OTHER PUBLIC SUPPORT AND STATE AID (CARBON TRUST)

This issue primarily concerns Carbon Trust Loans. In December 2013 DETI took the decision that under the current NI RHI regulations, an organisation receiving financial advantage under the Carbon Trust loan scheme should, in some circumstances, also be able to avail of support under the Renewable Heat Incentive. In addition, we also committed to operating the scheme in line with the EU State Aid de minimis funding arrangements.

- It is proposed that where an RHI applicant has availed of a Carbon Trust Loan or other public grant or support that DETI will decide whether or not the applicant is eligible for RHI based on information provided by Ofgem on a case by case basis.

- A minor change is proposed to the Administrative Arrangement to formalise this as a “retained function” for DETI.

- DETI is content to agree this process and will work with Ofgem in this manner for applications going forward. We are therefore appy to sign the proposed amendment to the Administrative Arrangement.

- DETI proposes to amend the NI Regulations to allow applicants to payback Carbon Trust Loans or other public support to allow access to RHI where de minimis limits would otherwise be exceeded.
ISSUE: - DATA SHARING PROTOCOL

DETI requires statistical information on the RHI Scheme for reporting purposes and this necessitates Ofgem sharing data to enable an analysis to be undertaken. Work is ongoing to facilitate this through a secure file transfer protocol, (SFTP). Monthly sharing of data is proposed.

- DETI is working closely with Ofgem to identify the data to be transferred and to draft an appropriate protocol document. This work is now progressing well.

- Ofgem are in communication with both DETI IT and IT Assist to develop the appropriate technical systems for the secure transfer of data in line with data protection rules.
tiered tariff being mentioned, but can you remember what this was about?

Mr Hughes: The meeting in October ’14 would have been the annual meeting, I suppose you would call it, where the costs, the administrative costs, for the year were agreed. That meeting there, certainly I do recall it. That would’ve been the focus of the meeting. I don’t recall any discussion at all about tariffs in that context in the meeting. I’m not saying Edmund didn’t raise it; he may have done so, but, I mean, I don’t recall it.

Mr Aiken: You make that point to PwC. What we’ll do, Ms Jordan will make a note of this for me before —. You’ll have to come back and maybe this point we can revert to if we can try and find the note and Dr Ward will be giving evidence, so, if we can find the material, we can put that to him and he can explain it further and then I can take you through it when you next give evidence.

Dr MacLean: Is this before formal minutes were kept of these meetings?

Mr Aiken: Can you remember when the formal minutes were —?

Mr Hughes: Formal minutes of Ofgem meetings didn’t happen until around about fairly well into ’15, I think. That particular meeting there, if I’m recollecting correctly, was a single focus. It was to agree the admin costs, and there were a number — I seem to remember a few changes made to the document on the day, and it was signed off both by John Mills and Chris Poulton from Ofgem, who was also at the meeting. But there would’ve been no formal minute of the meeting as far as I can remember.

Mr Aiken: I think, in fairness to you, you’ve produced various handwritten notes of Ofgem meetings that you had, and we’ll have a look to see if there is one for this. If there’s a note for an October meeting about the subject you’re discussing, that’s what you think this is a reference to, and you don’t have the recollection that’s being ascribed here.

Mr Hughes: No.

Mr Aiken: Right. Well, we’ll try and do a bit more work around that and return to it.
Mr Hughes: None whatsoever. I’m absolutely certain that meeting did not deal with the cost controls.

The Chairman: I didn’t hear that, I’m sorry.

Mr Aiken: Do you want to just repeat that for the Chairman? You’re absolutely certain —.

Mr Hughes: No, I’m absolutely certain that cost controls weren’t discussed in that meeting. I have no recollection of that at all. And I would have remembered.

Dame Una O’Brien: Is there a minute of the meeting?

Mr Hughes: No, there’s not. There was no minute, I don’t believe, of that meeting.

Dame Una O’Brien: Yes. Have we —? Is there a minute of it in the Ofgem records, Mr Aiken?

Mr Aiken: I don’t —. I think the answer to that is no. We’ll check just to be sure.

Dame Una O’Brien: Because they did seem to be quite assiduous in keeping minutes of meetings.

Mr Aiken: In fairness, the previous face-to-face meetings, there are minutes from DETI and not from Ofgem. There are email exchanges from Ofgem, where we can see, or work out, what they record as being discussed. I’m not sure there are for this October ’14 exchange. I’ll check that to be sure. I imagine, if there was any reference to this subject, we’d definitely have it brought to our attention, if we hadn’t found it ourselves.

Dame Una O’Brien: Yes. Mr Hughes, at a meeting such as this, whose job was it to have kept the minutes?

Mr Hughes: Well, normally, I mean, this — that particular meeting was, I suppose, a rather unusual one, in the sense that it was an annual meeting where Ofgem came across to meet with us. As far as I’m aware, that one followed sort of the same format as previous annual meetings of that nature, and it was really to sign off on the official cost-control document.
briefing was of a scheme which was underperforming and which needed to be given impetus to improve its performance and achieve the Executive’s Programme for Government target of 4% renewable heat by 2015. This was to be achieved principally by introducing the domestic scheme, which was not yet in place. Only the non-domestic scheme was in place. From the records of 2014 and my recollection, the main specific issues on RHI were, as I have mentioned, introduction of the domestic scheme; establishment of administrative arrangements with Ofgem, particularly arrangements associated with meeting Ofgem’s costs (Ofgem were the administrators of the scheme), but also data sharing, and carbon trust loans. This last issue was due to the problem created by RHI applicants having availed of carbon trust or other “green” loans at low rates of interest and using them to install renewable heat devices. This was considered double incentivisation. Applicants were required to pay back the loans before proceeding with their RHI application. This was resolved in the domestic regulations of December 2014.

18. My specific role in relation to RHI was to oversee and support the work of the RHI Branch to take forward existing policy and legislative development of the RHI schemes to achieve the Executive’s Programme for Government target of 4% renewable heat by 2015 (and 10% by 2020).

19. There was a difference between the non-domestic and domestic arrangements in that Energy Division was responsible for the administration and operational delivery of the domestic scheme and its predecessor, the Renewable Heat Premium Payment Scheme (RHPP). The non-domestic scheme was managed, administered and delivered by Ofgem, the GB energy regulator, which also administered the GB renewable heat scheme and the Renewables Obligation (the other significant renewable scheme-concerning renewable electricity) across the UK. Therefore, Energy Division did not have responsibility for the day to day running of the non-domestic scheme.

20. My period of responsibility did not include the planning, setting-up, design or implementation of the non-domestic RHI scheme, which all occurred before I joined Energy Division. I did not oversee the operation of the scheme, which, as I have said, was administered by Ofgem.
paragraphs or any of the 40 points in detail. I recall wanting to make sure Peter did a handover note. Looking back, the question to me about whether I did or didn’t see the note seems irrelevant. Even if I had, picking up on the detail of 40 points is not a reasonable expectation. There were, I think, 12 people at Peter’s level in Energy Division. Assuming they could also describe their activities in this level of detail would have made close to 500 points. I did not retain this level of detail.

74. Of course, looking back with hindsight we can see how important these issues were. But they were a couple of issues amidst a sea of potential risks: around security of supply, costs, connections, the NIRO scheme, electricity market reform, changes to the single electricity market and so on. There were multiple issues to be dealt with – for the most part all of them were described as urgent.

75. The handover note has been portrayed as raising the alarm about the non-domestic scheme. This is not my recollection at the time. For example, in terms of staffing, I had raised the question of whether someone needed to be temporarily promoted to cover the gap left by Joanne and Peter’s departure. The initial advice back from the branch was that this was unnecessary. There was not a sense of urgency on resources apart from dealing with the domestic scheme. I did temporarily promote Davina McCay in the end.

76. Records from my two meetings with Ofgem in April and October 2014, (Annex 12), show that the main substance of those meetings was, Ofgem’s fees for administering the non-domestic scheme, the question of data sharing and the issue referred to as “Carbon Trust Loans”. There is nothing to record that Ofgem escalated or continued to press about action, they had identified as urgent several months previously. I don’t recall any discussion with Ofgem about this.

77. The handover note identifies the question of tiering as an emerging issue (it had been included from the start in GB). When Stuart Wightman brought this to my attention in spring 2015, showing me the equivalent GB legislation, I immediately realised that it was an omission. This is when tiering came to the forefront of my consciousness.
83. In both cases Energy Division was removed from operational contact with applicants (the exception was the domestic RHI scheme where Energy Division administered the scheme). The Division’s main responsibilities lay in making payments to Ofgem for the scheme and for its services, maintaining and revising the legislative framework, and developing policy.

84. With the benefit of hindsight, the Departmental Statement suggests that the question of overly generous tariffs might have been inferred from contact with applicants. However, Energy Division was at a remove from non-domestic scheme applicants as Ofgem was responsible for the Scheme’s operation.

85. I met with Ofgem twice in 2014 and at neither of these meetings (the first set up and noted by “team 1” and the second by “Team 2”) do I recall these issues being highlighted. The first meeting was 16 April 2014 – just before Ofgem “highlighted” tariff and tiering issues.

86. From my recollection the meeting concentrated on the following:
- the cost of Ofgem’s services (Including change control). Uptake was mentioned but only in the context of calculating Ofgem’s charges;
- the question of who would administer the domestic scheme;
- Issues of provision of information by Ofgem to DETI (at around this time contact arrangements seems to have begun to be formalised with the initiation of regular monthly telephone conferences – see note of meeting).

87. This is supported by the documents at (Annex 12) (letter, Teri Clifton (Ofgem) to John Mills 13/03/14) and the note of the meeting (presumably Peter’s). There is no record of tiering and tariff levels. Perhaps these issues emerged from Ofgem very suddenly in the next couple of weeks before Peter’s handover note of mid-May 2014.

88. There was a further meeting with Ofgem on 13 October 2014 (which I did not recall clearly at my PWC interview). The briefing for that (Stuart Wightman to John Mills 10 October 2014) shows that the main issues were still administration costs, carbon
trust loans and data sharing. This position is reflected in the Ofgem letter to Stuart Wightman of 9 October 2014 – Annex 12).

89. It is suggested in the Departmental Statement that the issues of cost control were highlighted by Ofgem during this period. However, I do not recall this issue being highlighted in our dealings with Ofgem.

Staffing

90. Aside from transposition of the Energy Efficiency Directive, Electricity Market Reform, review of NIRO banding levels, the ETI Committee’s review of connections on the renewables side alone, the two issues preoccupying me around May/June 2014 in connection with RHI were the domestic scheme and staffing.

91. On staffing a number of posts needed to be filled across the Division and this involved me constructing information booklets, interest circulars and conducting interviews to fill several posts (including the Principal and Deputy Principal posts in Renewable Heat Branch). The majority of the burden of filling these posts fell on myself and the Division. Staff were not provided by the Department’s HR division.

Development of Domestic RHI

92. In June 2014 proposals for the domestic RHI scheme were taken through DETI’s internal governance procedure called casework. This is an extensive and time consuming process. The scheme eventually completed the process autumn 2014 and received DFP approval. DFP approval was granted until 2020/21. This was as far out as the UK Government had undertaken to fund the GB RHI scheme to new applications. Applications for the scheme were capped – so there was never an issue of applicants being able to “leave the heating running”. This influenced my view of the non-domestic scheme i.e. I assumed that there was a similar mechanism in it.

93. One of the main issues with the domestic scheme was how it would be administered – whether by Ofgem (as with the non-domestic scheme) or by Energy Division in-house staff (as with the domestic scheme’s precursor, the RHPP scheme). Use of in-house
The focus of this meeting was to agree a Change Control for Ofgem’s future administration costs for the NI scheme to be based on 3% of the costs of administering the GB scheme. During all my contacts with Ofgem, they never once raised concerns over the level of payment that recipients were receiving. This was despite Ofgem discussing this issue with the previous RHI team in May 2014.

7c. When you first acquired knowledge of the following documents which, inter alia, contain details of the modelling and assumptions upon which the RHI Scheme was based: the 2011 report from Cambridge Economic Policy Associates (‘CEPA’) and AEA Technology Ltd (‘AEA’), the 2012 addendum report from CEPA and AEA, the Business Case prepared in respect of the Scheme (approved by the Casework Committee on 9 March 2012), and the 16 March 2012 Submission to the DETI Minister in respect of the Scheme;

127. I cannot recall precisely when I first acquired knowledge of these documents. However, with the focus of my work on development and implementation of the Domestic RHI Scheme during the first 9 months, I would not have been proactively seeking these documents until around spring 2015 when the focus of our work switched from the domestic scheme to reviewing tariffs and progressing the Phase 2 proposals. I referenced the two CEPA Reports in the Business Case Addendum I developed to secure scheme re-approval. I commenced work on this in June 2015. I do not recall acquiring knowledge about the 2012 Submission until I started preparing briefing for the PAC hearings in the autumn of 2016.

7d. The system (if any) that was place to ensure that important information in respect of the RHI Scheme (such as, for example, the nature of the funding arrangement for the Scheme, its budget, the assumptions and modelling underpinning its design, important dates or milestones in the life of the Scheme, important action points, etc.) was known to the officials with responsibility for the Scheme at any material time, regardless of staff turnover in Energy Division;

128. Apart from the Handover Note prepared at DP level (see paragraph 118) there was no system in place to ensure that important information on the scheme assumptions, type of funding, important milestones (such as the need review tariffs or seek re-approval), risks and issues were known to those officials

Statement of Truth

I believe that the facts stated in this witness statement are true.

Signed: ____________________________

Dated: 20 June 2017
day so this would have been... I'm sure Seamus... I'm copied into the email, I'm sure Seamus spoke to me at the time, I can't actually, I know it’s only a year ago, I remember properly more the handover note than even that email but no I know it was referred to in the subsequent pages of the handover note but that, and I remember the bulleted list but no I wouldn’t, I would’ve have had a discussion and I don’t remember having a discussion with John about that.

IM Can you recall why that was missed? What’s your sense of why those issues were missed, because there were clear, there were red flags there undoubtedly, so even if they were missed or they were recognised but consciously de-prioritised because of A, B, C, D?

SW To be fair to my predecessors it was a very comprehensive note. Back to the point I think it, because of at the highest level, I don’t want to say underperformance because it wasn’t underperforming when you look at the usage but budgetary terms there was no immediate pressure with the non-domestic scheme. That conscious sort of decision had probably been set through the business planning process that we discussed.

IM And that essentially trumped or overruled the handover note flags?

SW Yeah the handover note, there is an element as well like the review should have happened in January ‘14, January ‘15 sorry, January ‘14, there is an element as well that the handover note can become a list of all the nasty things that needed, that we didn’t manage to do, I’m not suggesting that but, I think it was a very comprehensive handover note but the review of tariffs probably when I look at it now should have been at the top of it and I’m not suggesting, it’s there, it’s in black and white I can’t say this and I can’t that I wasn’t given the full handover note of all pages but I only remember the bullet pointed list and that was my initial... and I’ll be perfectly honest by the time I was probably in post 2 months there was probably new priorities arising elsewhere and the handover note was just to get, see me through that initial period to bed me in the post. As I say it took us to the end of the year to get to the domestic scheme in and then we were switching our attention to the non-domestic but the priority of the need to review, the urgency of reviewing the tariffs and well bringing cost control in wouldn’t have been apparent at that stage.

CK Just to take you back and I know in the handover note that Peter Hutchinson references a conversation, a specific conversation that Edmund, from Ofgem had specifically around you know the usage and I guess what they’re saying in GB and about how it was completely different than the CEPA assumptions... we’ve spoken to Edmund about that, now he references another meeting after that in October, now you, earlier on did reference Ofgem coming over and he said that ‘yes, they came over, 3 or 4 of them whoever it was that met with yourself, Seamus and John was there as well’, now they say it was in the context of annual review planning, budgeting planning etc., etc., but he did say that actually in that conversation, or in that meeting it was raised the fact that actually look if you look what’s actually happening on the ground the usage is different than what was in the assumptions and they even started talking about if you wanted to introduce cost control measure look we have they systems already sitting there, you know we use them for the GB scheme so actually the cost of it for Northern Ireland isn’t going to be significant if that’s what you wanted to consider. Do you recall that meeting with that conversation?

SW I can’t remember him or Edmund saying that specifically, unfortunately I don’t think there was a record of that meeting. And I wouldn’t dispute maybe he didn’t, I’m not going to say that he didn’t say it. Certainly the fact that he said it in May and subsequent conversations, it certainly wasn’t mentioned on a 1-2-1 for myself when I had conversations with Ofgem but that’s probably because there was issues around
the carbon trust loan issue, there was other issues, but really the shouldn’t they were minor when you look back now. If it was said on the fringe of that meeting it certainly wasn’t part of a formal discussion, it might have been said in passing, which is quite different to saying ‘listen we really need to, this is something we need to work together on urgently’ the fact that they could implement it with their systems is one thing, we’re looking at... it’s consulting on it, it’s getting the ministerial approval to it you know these things can take 6 months to a year for it to happen so again back to the AME/DEL point depends how quickly you, it can maybe happen but on, to that meeting I can’t dispute did he say something did he raise it or not but I would imagine it would have been on the fringe of the meeting it wouldn’t have been highlighted as a top priority item. I remember raising the issues about, in discussions about just in passing there would anecdotal claims that people were heating empty sheds and things like that and it’s obvious that in the GB scheme, and this was quite recent, that’s probably quite recent this conversation but again, there’s been ample opportunities for Ofgem to say well you know your usage etc. would have shown that.

IM And go back to the information you got, you said there’s weekly data coming through Stuart, you wouldn’t have been looking at it personally?

SW I would have seen it from time to time but it was more from the budgetary perspective in terms of simply application numbers. Forecasting and stuff.

IM Right so number of applications. So some of the data come through, comes through in spreadsheets, some of it has usage which is based on the projected usage that was as per the application form, in essence that’s not ...

SW The weekly data doesn’t actual usage as I understand it’s projected.

IM We understand though then there’s weekly stuff that goes to ...

CK ... finance ...

IM ... well it wouldn’t go weekly, well sorry it may be weekly but it wouldn’t be weekly in respect of every installation because of the meter readings are only taken ...

SW There’s the payment information stuff... I don’t know if it’s, I can’t remember if its weekly, if it’s as frequent as weekly but I think the reports that are alluded to are the ones that have what the applicant put on their application. But it’s still an indication, don’t get me wrong.

IM Maybe Clare if you would just excuse me from the meeting. I just have one of those reports ... 

CK ... we brought it in it’s on Leanne’s laptop.

IM Oh have you, oh have you because I’m was going to say I’d love to, because I’m trying to decipher what this is telling me so...

IM Right, so I am just showing Stuart – for the purposes of the tape – it’s an A3 sheet which is really a printed excel spreadsheet and it’s entitled RHI Ofgem monitoring report August 13. And there’s various columns running from left to right, so I think at that point in time Stuart this is listing the accredited live installations and we have RHI numbers for all of them – I don’t know there’s maybe 30-40 of them – and as
the Scheme in line with the law, despite the potential for perverse outcomes and “ultimately there’d been a policy decision made not to legislate for this. The policy position therefore was clear”: [TRA-09028 (9-18)].

121. There is no basis for a view that Ofgem’s treatment of DETI was affected by an assessment that having foolishly made its own bed, it should to lie in it. Rather, Ofgem:

(i) Reflected the degree of rectitude which Ofgem displays when faced with a clear policy choice by a Department. Ofgem was told the changes would be made as part of Phase II. DETI had instructed Ofgem to get on and administer the Scheme DETI had chosen (for all its flaws). For Ofgem to repeatedly re-state the same warnings which had already been given would have been to step outside that constitutionally underpinned rectitude. Of course, Ofgem should have communicated with DETI again once the risks of which it had warned had clearly materialised. But that is a different matter from repeatedly telling DETI that the policy it had chosen, despite warning, involved risk; and

(ii) Had a well-established view of its own role, under which the understanding was that the Government department itself carried out a policy-monitoring function in relation to the scheme which Ofgem administered.

These two factors influenced the extent of Ofgem’s warnings to DETI during the life of the Scheme.

II Ofgem’s Role

122. Three themes to Ofgem’s role have been discussed in the course of the Inquiry. The Inquiry has considered the extent of Ofgem’s role to:

(i) Administer;

(ii) Communicate;

(iii) Monitor.

123. These are addressed in turn below.

A. Administer