

DRAFT 12/9/08

A-8. Summary of Consultations Outside the Agency

Comments received during 30-day *Federal Register* comment period.

The OMB and EIA received sets of comments in response to the October 22, 2008, (73 FR 62973) notice soliciting comments on biodiesel data collection requirements mandated by the EPACT2005. Comments and responses are summarized below.

1) Comment: Do not collect data on glycerin production. It is not required by EPACT 2005 and is unrelated to the intent of that act.

Comment received from: Minnesota Soybean Processors (MnSP) and National Biodiesel Board (NBB).

EIA Response:

The term “glycerin” will be changed to “glycerol” in order to clarify that respondents should report this co-product without water and alcohol content. Respondents will be asked to identify if the glycerol product data was obtained by laboratory analysis. Glycerol comes out of a biodiesel plant in solution with water; this solution is known as crude glycerin. Glycerin may be sold in crude form, refined to a higher grade, or used to make other chemicals. The instructions to Form 22M will clarify that chemicals produced by the reaction of glycerol are “other co-products” and should not be reported as glycerol. Data on co-products of biodiesel production enter into the *Annual Energy Outlook*'s projection of biodiesel use, which is based on a comparison of the cost of biodiesel and the cost of petroleum diesel. Glycerol from biodiesel production is assumed to offset part of the biodiesel production cost, resulting in a lower net cost than if glycerol were not considered. The projected consumption of biodiesel is constrained to the minimum levels of biodiesel consumption set by the Energy Independence and Security Act of 2007 but may be higher if the relative economics are favorable.

Data on biodiesel co-products other than glycerol are not currently included in the *Annual Energy Outlook* analysis. If survey responses indicate that the biodiesel industry is producing substantial quantities of other co-products, the analysis could be extended to include the other co-products.

For its forecasts of biodiesel use, EIA currently estimates the yield of glycerol based on a rule of thumb published by the National Biodiesel Board. Forms 22M and 22S will provide real-world quantitative information on the production of glycerol in conjunction with biodiesel. The quantity of glycerol and exact composition of the biodiesel yielded will depend on the kinds of vegetable oil or fat and alcohol used as inputs. The yield of glycerol according to raw material can be estimated from laboratory studies, but chemical reactions carried out at industrial scale often behave very differently than the same reaction carried out on a laboratory bench top. Thus, EIA's current estimates may not be accurate for any particular feedstock.

The quantity of co-products from biodiesel production also impacts EIA's estimation of the balance of energy production and consumption in the *Monthly Energy Review*, *Annual Energy Review*, and the *Annual Energy Outlook*. Currently, the inputs to biodiesel production include vegetable oil, fat, alcohol, natural gas and electricity. The only output that is explicitly accounted for is the biodiesel itself. In order to balance inputs and outputs, a term called "Losses and Co-Products" is calculated. The survey responses to questions on glycerol production and other co-product production will enable EIA to accurately split co-products from energy lost in production, for use in lifecycle and other policy analysis.

A Yes or No question as to whether the glycerol output was confirmed by laboratory analysis at least once during the reporting cycle will be added. Some producers perform laboratory analysis to determine how much glycerol is contained in the glycerin that is coming out of their plant, while others do not. EIA does not intend to force biodiesel producers to do laboratory tests that they would not otherwise have carried out. EIA would, however, like to be able to separate the responses that were determined by laboratory analysis. This subset of responses will be used to determine average glycerol yield according to the type of vegetable oil or fat used.

Collection of data for these purposes is authorized under 15 U.S.C. §790(a), of the Federal Energy Administration Act of 1974 (FEA Act), Public Law 93-275. See Section A-1, which describes the legal authority for data collection under Public Law 93-275.

MnSP notes that ethanol producers are not required to report distiller's dry grain (DDG) production on EIA's Oxygenate Survey (EIA-819M). This is true, but it ignores the fact that EIA-819M was first fielded in a dramatically different regulatory and economic climate. EIA is considering adding DDG production to EIA-819M when it comes up for reauthorization.

2) Comment: If collected, glycerin production should be reported in pounds, not gallons.

Comment received from: MnSP and NBB

EIA Response: The form will be changed to allow glycerol reporting in either pounds or gallons.

3) Comment: EIA proposes to collect sales volume and revenue to obtain retail and wholesale pricing information. These data can be obtained by other means, specifically by purchasing through commercial sources or through a phone survey of retailers and wholesalers.

Comment received from: MnSP

EIA Response: MnSP and NBB claim that the data on producer revenue that EIA proposes to collect will not meet the statutory requirement to collect market prices of biodiesel. The term “market” encompasses retail, wholesale, and plant gate prices of biodiesel. The proposed volume and revenue data will be used to identify volume weighted plant gate prices, which are the most relevant for energy policy analysis. Volume weighted average prices are a more accurate measure of market conditions than simple arithmetic means. The current period weighted average price method used by EIA will take the reference month’s sales volumes and the revenue for the reference month to calculate a weighted average price for that month. Posted or spot prices do not reflect the extensive contribution of contract transaction in determining the retail and wholesale price, nor do they indicate how much volume is purchased or sold at that price (i.e. no product may have been sold at all at a particular posted price). Private commercial data sources collect price data from a limited number of suppliers that have a data link with credit companies and generally do not apply statistical methods. The market coverage of the price data from commercial sources is also incomplete in some regions. Private commercial data sources do not provide any measures of accuracy or data quality for the data they sell. Another problem exists with wholesale price data from private commercial sources. It is not always clear whether a quoted price is gross or net of the applicable tax credits. It is our understanding that in some circumstances the biodiesel producer claims the tax credits and in other circumstances the biodiesel purchaser claims the tax credits. EIA needs to know who is claiming the tax credit in order to estimate the price of biodiesel at the plant gate.

4) Comment: Requiring producers to report sales volume and revenue as “subject to tax credit” and “not subject to tax credit” will allow outside parties access to confidential taxpayer information. EIA has not produced evidence of methods for safeguarding taxpayer information from public access.
Comment received from: MnSP

EIA Response:

After the 60-day comment period, EIA eliminated collection of tax credit data in order to overcome respondents’ concerns about disclosure of company-specific tax data. EIA determined that the general purposes of the Energy Policy Act could be achieved if sales revenue data are categorized as with or without credit incentives. Thus, the EIA is not asking respondents to report specific tax data.

EIA will protect the survey values reported on Forms EIA-22M and EIA-22S from any unauthorized disclosures to the public. The reported data are stored in a secured physical facility and access to the secured servers where the data reside is restricted to a small group of staff who work on the survey. No EIA staff are allowed to take any company level data outside of the building and employees may not access company level data from remote off-site locations. The data will be used by EIA only for generating statistical aggregate estimate for complying with the Section 205 of the Department of Energy organization Act. Company level data will not be released to the public

The information reported on Forms EIA-22M and EIA-22S will be protected and not disclosed to the public to the extent that it satisfies the criteria for exemption under the Freedom of Information Act (FOIA), 5 U.S.C. §552, the Department of Energy (DOE) regulations, 10 C.F.R. §1004.11, implementing the FOIA, and the Trade Secrets Act, 18 U.S.C. §1905. The Federal Energy Administration Act requires the EIA to provide company-specific data to other Federal agencies when requested for official use. The information reported on this form may also be made available, upon request, to another DOE component; to any Committee of Congress, the Government Accountability Office, or other Federal agencies authorized by law to receive such information. A court of competent jurisdiction may obtain this information in response to an order. The information may be used for any non-statistical purposes such as administrative, regulatory, law enforcement, or adjudicatory purposes.

EIA uses written data sharing agreements with each federal agency that requests access. The written agreements state the conditions for sharing the information, the purpose of the data sharing, and the procedures for protecting the data, restrictions on disclosing company level information, and destruction of data upon terminating the agreement. Each agency must comply with EIA's conditions for protecting the information including no disclosure of company identifiable information in the reports that use EIA data and abiding by EIA's requirements relating to data security and restricted access. In response to a request for company level data based on request under the Freedom of Information Act, EIA would deny the FOIA request based on the grounds that this information is protected from release under the exemptions for FOIA and the release of the company level information would cause substantial harm to the competitive position of the respondent who reported the information.

5) **Comment:** The term "tax credit" is never defined.

Comment received from: Minnesota Soybean Processors and National Biodiesel Board

EIA Response: EIA will add instructions to define "tax credit" as the Federal blending and income tax credits for biodiesel. The terminology on the survey form will be changed from Sales "Subject To Credit" to "Sales For Which Producer Claimed Tax Credit."

6) **Comment:** Reporting volume and revenue subject to, or not subject to, tax credit has potential to result in public disclosure of company-specific tax-related information, according to EIA's confidentiality policy. This is inconsistent with confidentiality protections in Section 6103 of the Internal Revenue Code. Furthermore, these data will not provide accurate market price data.

Comment received from: NBB

EIA Response:

No reasons were cited for why the information needed protection or how the release of the information would cause any competitive harm. The sole reason provided for the need to protect the information was that some of the data elements collected on

the form are related to taxes and some of the information is also reported to the Internal Revenue Service.

EIA is required by law to share energy information with other federal agencies that is consistent with their official purpose pursuant to Section 12 of the Federal Energy Administration Act of 1974, section 11 of the Energy Supply and Environmental Coordination Act of 1974, and section 205 of the Department of the Energy Organization Act of 1977. The laws governing the use of energy data that EIA collects are different than the specific statutory protections that Congress provided to the Internal Revenue Service. There is no comparable legislation that applies to EIA like section 6103 of the Internal Revenue Code applies to the Internal Revenue Service. Section 6103 only applies to IRS data and does not apply to data collected by EIA.

7) Comment: Do not require the reporting of methanol and other catalysts used in biodiesel production. It is not needed to meet the intent and spirit of the statutory requirements of Section 1508 of P.L. 109-58.

Comment received from: National Biodiesel Board

EIA Response: Alcohols and catalysts used in biodiesel production will be used in energy forecasting models, the results of which are published in EIA's *Annual Energy Outlook*.

Collection of these data is authorized under 15 U.S.C. §772(b), of the Federal Energy Administration Act of 1974 (FEA Act), Public Law 93-275. See Section A-1, which describes the legal authority for data collection under Public Law 93-275.

MnSP states that there is no requirement to report ethanol, if it is used as an input to biodiesel production. EIA expects that most biodiesel will be produced using methanol, but MnSP is correct in that ethanol may be used instead. This line will be changed from "Methanol Used in Production" to "Alcohol Used in Production". Any ethanol used must be reported there. This will be clarified in the form instructions.

The term "other catalysts" will be changed to "catalysts" to clarify that all catalysts should be reported in this line.