

Environmental Protection Agency

§ 80.1166

false, incomplete or misleading information in this certification or submission is a fine of up to \$10,000 U.S., and/or imprisonment for up to five years.

[72 FR 24004, May 1, 2007, as amended at 73 FR 57258, Oct. 2, 2008]

§ 80.1166 What are the additional requirements under this subpart for a foreign producer of cellulosic biomass ethanol or waste derived ethanol?

(a) *Foreign producer of cellulosic biomass ethanol or waste derived ethanol.* For purposes of this subpart, a foreign producer of cellulosic biomass ethanol or waste derived ethanol is a person located outside the United States, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands (collectively referred to in this section as "the United States") that has been approved by EPA to assign RINs to cellulosic biomass ethanol or waste derived ethanol that the foreign producer produces and exports to the United States, hereinafter referred to as a "foreign producer" under this section.

(b) *General requirements.* (1) An approved foreign producer under this section must meet all requirements that apply to cellulosic biomass ethanol or waste derived ethanol producers under this subpart, except to the extent otherwise specified in paragraph (b)(2) of this section.

(2)(i) The independent third party that conducts the facility verification required under § 80.1155(a) must inspect the foreign producer's facility and submit a report to EPA which describes in detail the physical plant and its operation.

(ii) The independent third party that conducts the facility verification required under § 80.1155(a) must be a licensed Professional Engineer in the chemical engineering field, but need not be based in the United States. The independent third party must include documentation of its qualifications as a licensed Professional Engineer in the report required in paragraph (b)(2)(i) of this section.

(iii) The requirements of paragraphs (b)(2)(i) and (ii) of this section must be met before a foreign entity may be ap-

proved as a foreign producer under this subpart.

(c) *Designation, foreign producer certification, and product transfer documents.*

(1) Any approved foreign producer under this section must designate each batch of cellulosic biomass ethanol or waste derived ethanol as "RFS-FRETH" at the time the ethanol is produced.

(2) On each occasion when RFS-FRETH is loaded onto a vessel or other transportation mode for transport to the United States, the foreign producer shall prepare a certification for each batch of RFS-FRETH; the certification shall include the report of the independent third party under paragraph (d) of this section, and all the following additional information:

(i) The name and EPA registration number of the company that produced the RFS-FRETH.

(ii) The identification of the ethanol as RFS-FRETH.

(iii) The volume of RFS-FRETH being transported, in gallons.

(3) On each occasion when any person transfers custody or title to any RFS-FRETH prior to its being imported into the United States, it must include all the following information as part of the product transfer document information:

(i) Designation of the ethanol as RFS-FRETH.

(ii) The certification required under paragraph (c)(2) of this section.

(d) *Load port independent testing and refinery identification.* (1) On each occasion that RFS-FRETH is loaded onto a vessel for transport to the United States the foreign producer shall have an independent third party do all the following:

(i) Inspect the vessel prior to loading and determine the volume of any tank bottoms.

(ii) Determine the volume of RFS-FRETH loaded onto the vessel (exclusive of any tank bottoms before loading).

(iii) Obtain the EPA-assigned registration number of the foreign producer.

(iv) Determine the name and country of registration of the vessel used to

transport the RFS-FRETH to the United States.

(v) Determine the date and time the vessel departs the port serving the foreign producer.

(vi) Review original documents that reflect movement and storage of the RFS-FRETH from the foreign producer to the load port, and from this review determine the following:

(A) The facility at which the RFS-FRETH was produced.

(B) That the RFS-FRETH remained segregated from Non-RFS-FRETH and other RFS-FRETH produced by a different foreign producer.

(2) The independent third party shall submit a report to the following:

(i) The foreign producer containing the information required under paragraph (d)(1) of this section, to accompany the product transfer documents for the vessel.

(ii) The Administrator containing the information required under paragraph (d)(1) of this section, within thirty days following the date of the independent third party's inspection. This report shall include a description of the method used to determine the identity of the foreign producer facility at which the ethanol was produced, assurance that the ethanol remained segregated as specified in paragraph (j)(1) of this section, and a description of the ethanol's movement and storage between production at the source facility and vessel loading.

(3) The independent third party must:

(i) Be approved in advance by EPA, based on a demonstration of ability to perform the procedures required in this paragraph (d);

(ii) Be independent under the criteria specified in § 80.65(e)(2)(iii); and

(iii) Sign a commitment that contains the provisions specified in paragraph (f) of this section with regard to activities, facilities and documents relevant to compliance with the requirements of this paragraph (d).

(e) *Comparison of load port and port of entry testing.* (1)(i) Any foreign producer and any United States importer of RFS-FRETH shall compare the results from the load port testing under paragraph (d) of this section, with the port of entry testing as reported under paragraph (k) of this section, for the vol-

ume of ethanol, except as specified in paragraph (e)(1)(ii) of this section.

(ii) Where a vessel transporting RFS-FRETH off loads the ethanol at more than one United States port of entry, the requirements of paragraph (e)(1)(i) of this section do not apply at subsequent ports of entry if the United States importer obtains a certification from the vessel owner that the requirements of paragraph (e)(1)(i) of this section were met and that the vessel has not loaded any ethanol between the first United States port of entry and the subsequent port of entry.

(2)(i) If the temperature-corrected volumes determined at the port of entry and at the load port differ by more than one percent, the number of RINs associated with the ethanol shall be calculated based on the lesser of the two volumes in paragraph (e)(1)(i) of this section.

(ii) Where the port of entry volume is the lesser of the two volumes in paragraph (e)(1)(i) of this section, the importer shall calculate the difference between the number of RINs originally assigned by the foreign producer and the number of RINs calculated under § 80.1126 for the volume of ethanol as measured at the port of entry, and retire that amount of RINs in accordance with paragraph (k)(4) of this section.

(f) *Foreign producer commitments.* Any foreign producer shall commit to and comply with the provisions contained in this paragraph (f) as a condition to being approved as a foreign producer under this subpart.

(1) Any United States Environmental Protection Agency inspector or auditor must be given full, complete and immediate access to conduct inspections and audits of the foreign producer facility.

(i) Inspections and audits may be either announced in advance by EPA, or unannounced.

(ii) Access will be provided to any location where:

(A) Ethanol is produced;

(B) Documents related to ethanol producer operations are kept; and

(C) RFS-FRETH is stored or transported between the foreign producer and the United States, including storage tanks, vessels and pipelines.

(iii) Inspections and audits may be by EPA employees or contractors to EPA.

(iv) Any documents requested that are related to matters covered by inspections and audits must be provided to an EPA inspector or auditor on request.

(v) Inspections and audits by EPA may include review and copying of any documents related to the following:

(A) The volume of RFS-FRETH.

(B) The proper classification of gasoline as being RFS-FRETH;

(C) Transfers of title or custody to RFS-FRETH.

(D) Work performed and reports prepared by independent third parties and by independent auditors under the requirements of this section, including work papers.

(vi) Inspections and audits by EPA may include interviewing employees.

(vii) Any employee of the foreign producer must be made available for interview by the EPA inspector or auditor, on request, within a reasonable time period.

(viii) English language translations of any documents must be provided to an EPA inspector or auditor, on request, within 10 working days.

(ix) English language interpreters must be provided to accompany EPA inspectors and auditors, on request.

(2) An agent for service of process located in the District of Columbia shall be named, and service on this agent constitutes service on the foreign producer or any employee of the foreign producer for any action by EPA or otherwise by the United States related to the requirements of this subpart.

(3) The forum for any civil or criminal enforcement action related to the provisions of this section for violations of the Clean Air Act or regulations promulgated thereunder shall be governed by the Clean Air Act, including the EPA administrative forum where allowed under the Clean Air Act.

(4) United States substantive and procedural laws shall apply to any civil or criminal enforcement action against the foreign producer or any employee of the foreign producer related to the provisions of this section.

(5) Applying to be an approved foreign producer under this section, or producing or exporting ethanol under such approval, and all other actions to comply with the requirements of this

subpart relating to such approval constitute actions or activities covered by and within the meaning of the provisions of 28 U.S.C. 1605(a)(2), but solely with respect to actions instituted against the foreign producer, its agents and employees in any court or other tribunal in the United States for conduct that violates the requirements applicable to the foreign producer under this subpart, including conduct that violates the False Statements Accountability Act of 1996 (18 U.S.C. 1001) and section 113(c)(2) of the Clean Air Act (42 U.S.C. 7413).

(6) The foreign producer, or its agents or employees, will not seek to detain or to impose civil or criminal remedies against EPA inspectors or auditors, whether EPA employees or EPA contractors, for actions performed within the scope of EPA employment related to the provisions of this section.

(7) The commitment required by this paragraph (f) shall be signed by the owner or president of the foreign producer company.

(8) In any case where RFS-FRETH produced at a foreign producer facility is stored or transported by another company between the refinery and the vessel that transports the RFS-FRETH to the United States, the foreign producer shall obtain from each such other company a commitment that meets the requirements specified in paragraphs (f)(1) through (7) of this section, and these commitments shall be included in the foreign producer's application to be an approved foreign producer under this subpart.

(g) *Sovereign immunity.* By submitting an application to be an approved foreign producer under this subpart, or by producing and exporting ethanol to the United States under such approval, the foreign producer, and its agents and employees, without exception, become subject to the full operation of the administrative and judicial enforcement powers and provisions of the United States without limitation based on sovereign immunity, with respect to actions instituted against the foreign producer, its agents and employees in any court or other tribunal in the United States for conduct that violates

the requirements applicable to the foreign producer under this subpart, including conduct that violates the False Statements Accountability Act of 1996 (18 U.S.C. 1001) and section 113(c)(2) of the Clean Air Act (42 U.S.C. 7413).

(h) *Bond posting.* Any foreign producer shall meet the requirements of this paragraph (h) as a condition to approval as a foreign producer under this subpart.

(1) The foreign producer shall post a bond of the amount calculated using the following equation:

$$\text{Bond} = G * \$ 0.01$$

Where:

Bond = amount of the bond in U.S. dollars.

G = The largest volume of ethanol produced at the foreign producer's facility and exported to the United States, in gallons, during a single calendar year among the most recent of the following calendar years, up to a maximum of five calendar years: The calendar year immediately preceding the date the refinery's application is submitted, the calendar year the application is submitted, and each succeeding calendar year.

(2) Bonds shall be posted by any of the following methods:

(i) Paying the amount of the bond to the Treasurer of the United States.

(ii) Obtaining a bond in the proper amount from a third party surety agent that is payable to satisfy United States administrative or judicial judgments against the foreign producer, provided EPA agrees in advance as to the third party and the nature of the surety agreement.

(iii) An alternative commitment that results in assets of an appropriate liquidity and value being readily available to the United States provided EPA agrees in advance as to the alternative commitment.

(3) Bonds posted under this paragraph (h) shall:

(i) Be used to satisfy any judicial judgment that results from an administrative or judicial enforcement action for conduct in violation of this subpart, including where such conduct violates the False Statements Accountability Act of 1996 (18 U.S.C. 1001) and section 113(c)(2) of the Clean Air Act (42 U.S.C. 7413);

(ii) Be provided by a corporate surety that is listed in the United States De-

partment of Treasury Circular 570 "Companies Holding Certificates of Authority as Acceptable Sureties on Federal Bonds"; and

(iii) Include a commitment that the bond will remain in effect for at least five years following the end of the latest annual reporting period that the foreign producer produces ethanol pursuant to the requirements of this subpart.

(4) On any occasion a foreign producer bond is used to satisfy any judgment, the foreign producer shall increase the bond to cover the amount used within 90 days of the date the bond is used.

(5) If the bond amount for a foreign producer increases, the foreign producer shall increase the bond to cover the shortfall within 90 days of the date the bond amount changes. If the bond amount decreases, the foreign refiner may reduce the amount of the bond beginning 90 days after the date the bond amount changes.

(i) *English language reports.* Any document submitted to EPA by a foreign producer shall be in English language, or shall include an English language translation.

(j) *Prohibitions.* (1) No person may combine RFS-FRETH with any Non-RFS-FRETH, and no person may combine RFS-FRETH with any RFS-FRETH produced at a different refinery, until the importer has met all the requirements of paragraph (k) of this section.

(2) No foreign producer or other person may cause another person to commit an action prohibited in paragraph (j)(1) of this section, or that otherwise violates the requirements of this section.

(k) *Requirements for United States importers of RFS-FRETH.* Any United States importer shall meet the following requirements:

(1) Each batch of imported RFS-FRETH shall be classified by the importer as being RFS-FRETH.

(2) Ethanol shall be classified as RFS-FRETH according to the designation by the foreign producer if this designation is supported by product transfer documents prepared by the foreign producer as required in paragraph (c) of this section.

(3) For each ethanol batch classified as RFS-FRETH, any United States importer shall have an independent third party do all the following:

(i) Determine the volume of gasoline in the vessel.

(ii) Use the foreign producer's RFS-FRETH certification to determine the name and EPA-assigned registration number of the foreign producer that produced the RFS-FRETH.

(iii) Determine the name and country of registration of the vessel used to transport the RFS-FRETH to the United States.

(iv) Determine the date and time the vessel arrives at the United States port of entry.

(4) Where the importer is required to retire RINs under paragraph (e)(2) of this section, the importer must report the retired RINs in the applicable reports under § 80.1152.

(5) Any importer shall submit reports within 30 days following the date any vessel transporting RFS-FRETH arrives at the United States port of entry to the following:

(i) The Administrator containing the information determined under paragraph (k)(3) of this section.

(ii) The foreign producer containing the information determined under paragraph (k)(3)(i) of this section, and including identification of the port at which the product was off loaded, and any RINs retired under paragraph (e)(2) of this section.

(6) Any United States importer shall meet all other requirements of this subpart for any imported ethanol or other renewable fuel that is not classified as RFS-FRETH under paragraph (k)(2) of this section.

(1) *Truck imports of RFS-FRETH produced by a foreign producer.* (1) Any foreign producer whose RFS-FRETH is transported into the United States by truck may petition EPA to use alternative procedures to meet all the following requirements:

(i) Certification under paragraph (c)(2) of this section.

(ii) Load port and port of entry testing under paragraphs (d) and (e) of this section.

(iii) Importer testing under paragraph (k)(3) of this section.

(2) These alternative procedures must ensure RFS-FRETH remains segregated from Non-RFS-FRETH until it is imported into the United States. The petition will be evaluated based on whether it adequately addresses the following:

(i) Contracts with any facilities that receive and/or transport RFS-FRETH that prohibit the commingling of RFS-FRETH with Non-RFS-FRETH or RFS-FRETH from other foreign producers.

(ii) Attest procedures to be conducted annually by an independent third party that review loading records and import documents based on volume reconciliation to confirm that all RFS-FRETH remains segregated.

(3) The petition described in this section must be submitted to EPA along with the application for approval as a foreign producer under this subpart.

(m) *Additional attest requirements for producers of RFS-FRETH.* The following additional procedures shall be carried out by any producer of RFS-FRETH as part of the attest engagement required for renewable fuel producers under this subpart K.

(1) Obtain listings of all tenders of RFS-FRETH. Agree the total volume of tenders from the listings to the volumes determined by the third party under paragraph (d) of this section.

(2) For each tender under paragraph (m)(1) of this section, where the ethanol is loaded onto a marine vessel, report as a finding the name and country of registration of each vessel, and the volumes of RFS-FRETH loaded onto each vessel.

(3) Select a sample from the list of vessels identified in paragraph (m)(2) of this section used to transport RFS-FRETH, in accordance with the guidelines in § 80.127, and for each vessel selected perform the following:

(i) Obtain the report of the independent third party, under paragraph (d) of this section, and of the United States importer under paragraph (k) of this section.

(A) Agree the information in these reports with regard to vessel identification and ethanol volume.

(B) Identify, and report as a finding, each occasion the load port and port of entry volume results differ by more

than the amount allowed in paragraph (e) of this section, and determine whether the importer retired the appropriate amount of RINs as required under paragraph (e)(2) of this section, and submitted the applicable reports under § 80.1152 in accordance with paragraph (k)(4) of this section.

(ii) Obtain the documents used by the independent third party to determine transportation and storage of the RFS-FRETH from the foreign producer's facility to the load port, under paragraph (d) of this section. Obtain tank activity records for any storage tank where the RFS-FRETH is stored, and activity records for any mode of transportation used to transport the RFS-FRGAS prior to being loaded onto the vessel. Use these records to determine whether the RFS-FRETH was produced at the foreign producer's facility that is the subject of the attest engagement, and whether the RFS-FRETH was mixed with any Non-RFS-FRETH or any RFS-FRETH produced at a different facility.

(4) Select a sample from the list of vessels identified in paragraph (m)(2) of this section used to transport RFS-FRETH, in accordance with the guidelines in § 80.127, and for each vessel selected perform the following:

(i) Obtain a commercial document of general circulation that lists vessel arrivals and departures, and that includes the port and date of departure of the vessel, and the port of entry and date of arrival of the vessel.

(ii) Agree the vessel's departure and arrival locations and dates from the independent third party and United States importer reports to the information contained in the commercial document.

(5) Obtain a separate listing of the tenders under this paragraph (m)(5) where the gasoline is loaded onto a marine vessel. Select a sample from this listing in accordance with the guidelines in § 80.127, and obtain a commercial document of general circulation that lists vessel arrivals and departures, and that includes the port and date of departure and the ports and dates where the ethanol was off loaded for the selected vessels. Determine and report as a finding the country where

the ethanol was off loaded for each vessel selected.

(6) In order to complete the requirements of this paragraph (m) an auditor shall:

(i) Be independent of the foreign producer;

(ii) Be licensed as a Certified Public Accountant in the United States and a citizen of the United States, or be approved in advance by EPA based on a demonstration of ability to perform the procedures required in §§ 80.125 through 80.127, 80.130, 80.1164, and this paragraph (m); and

(iii) Sign a commitment that contains the provisions specified in paragraph (f) of this section with regard to activities and documents relevant to compliance with the requirements of §§ 80.125 through 80.127, 80.130, 80.1164, and this paragraph (m).

(n) *Withdrawal or suspension of foreign producer approval.* EPA may withdraw or suspend a foreign producer's approval where any of the following occur:

(1) A foreign producer fails to meet any requirement of this section.

(2) A foreign government fails to allow EPA inspections as provided in paragraph (f)(1) of this section.

(3) A foreign producer asserts a claim of, or a right to claim, sovereign immunity in an action to enforce the requirements in this subpart.

(4) A foreign producer fails to pay a civil or criminal penalty that is not satisfied using the foreign producer bond specified in paragraph (g) of this section.

(o) *Additional requirements for applications, reports and certificates.* Any application for approval as a foreign producer, alternative procedures under paragraph (l) of this section, any report, certification, or other submission required under this section shall be:

(1) Submitted in accordance with procedures specified by the Administrator, including use of any forms that may be specified by the Administrator.

(2) Signed by the president or owner of the foreign producer company, or by that person's immediate designee, and shall contain the following declaration:

I hereby certify: (1) That I have actual authority to sign on behalf of and to bind [insert name of foreign producer] with regard to

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all statements contained herein; (2) that I am aware that the information contained herein is being Certified, or submitted to the United States Environmental Protection Agency, under the requirements of 40 CFR part 80, subpart K, and that the information is material for determining compliance under these regulations; and (3) that I have read and understand the information being Certified or submitted, and this information is true, complete and correct to the best of my knowledge and belief after I have taken reasonable and appropriate steps to verify the accuracy thereof. I affirm that I have read and understand the provisions of 40 CFR part 80, subpart K, including 40 CFR 80.1165 apply to [insert name of foreign producer]. Pursuant to Clean Air Act section 113(c) and 18 U.S.C. 1001, the penalty for furnishing false, incomplete or misleading information in this certification or submission is a fine of up to \$10,000 U.S., and/or imprisonment for up to five years.

[72 FR 24004, May 1, 2007, as amended at 73 FR 57258, Oct. 2, 2008]

§ 80.1167 What are the additional requirements under this subpart for a foreign RIN owner?

(a) *Foreign RIN owner.* For purposes of this subpart, a foreign RIN owner is a person located outside the United States, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands (collectively referred to in this section as "the United States") that has been approved by EPA to own RINs.

(b) *General Requirement.* An approved foreign RIN owner must meet all requirements that apply to persons who own RINs under this subpart.

(c) *Foreign RIN owner commitments.* Any person shall commit to and comply with the provisions contained in this paragraph (c) as a condition to being approved as a foreign RIN owner under this subpart.

(1) Any United States Environmental Protection Agency inspector or auditor must be given full, complete and immediate access to conduct inspections and audits of the foreign RIN owner's place of business.

(i) Inspections and audits may be either announced in advance by EPA, or unannounced; and

(ii) Access will be provided to any location where documents related to RINs the foreign RIN owner has ob-

tained, sold, transferred or held are kept.

(iii) Inspections and audits may be by EPA employees or contractors to EPA.

(iv) Any documents requested that are related to matters covered by inspections and audits must be provided to an EPA inspector or auditor on request.

(v) Inspections and audits by EPA may include review and copying of any documents related to the following:

(A) Transfers of title to RINs.

(B) Work performed and reports prepared by independent auditors under the requirements of this section, including work papers.

(vi) Inspections and audits by EPA may include interviewing employees.

(vii) Any employee of the foreign RIN owner must be made available for interview by the EPA inspector or auditor, on request, within a reasonable time period.

(viii) English language translations of any documents must be provided to an EPA inspector or auditor, on request, within 10 working days.

(ix) English language interpreters must be provided to accompany EPA inspectors and auditors, on request.

(2) An agent for service of process located in the District of Columbia shall be named, and service on this agent constitutes service on the foreign RIN owner or any employee of the foreign RIN owner for any action by EPA or otherwise by the United States related to the requirements of this subpart.

(3) The forum for any civil or criminal enforcement action related to the provisions of this section for violations of the Clean Air Act or regulations promulgated thereunder shall be governed by the Clean Air Act, including the EPA administrative forum where allowed under the Clean Air Act.

(4) United States substantive and procedural laws shall apply to any civil or criminal enforcement action against the foreign RIN owner or any employee of the foreign RIN owner related to the provisions of this section.

(5) Submitting an application to be a foreign RIN owner, and all other actions to comply with the requirements of this subpart constitute actions or activities covered by and within the meaning of the provisions of 28 U.S.C.