

## **Options to Consider Regarding Contracts to Sell Corn to VeraSun – December 18, 2008**

### **Background Information**

In general, VeraSun seems to be handling grower contracts based on the original ownership of the ethanol facilities, as listed below.

#### **Former U.S. BioEnergy Ethanol Plants**

(Albert City, IA; Central City, NE; Dyersville, IA; Hankinson, ND; Janesville, MN; Marion, SD; Ord, NE; Woodbury, MI)

VeraSun has rejected most grower contracts with the former U.S. BioEnergy plants (other than the Marion plant) that call for delivery of the corn in November, December and January. In the next weeks and months, we expect that VeraSun may reject most – if not all – above market contracts with the former U.S. BioEnergy plants that come due in February and March and into the spring of 2009, except for those with the Marion plant as it may be brought back online. VeraSun may hold off taking any action on contracts with the former U.S. BioEnergy plants that call for delivery in the summer and fall of 2009. Under the procedure approved by the Bankruptcy Court, VeraSun has sent some notices to growers and will send future notices if they decide to reject the contracts. VeraSun will not need Court approval to reject them. As of December 15, these facilities are in a temporary (or “hot”) idle status, except Janesville, MN, which is idle.

#### **Former ASAlliances Ethanol Plants**

(Albion, NE; Bloomingburg, OH; Linden, IN)

At the former ASAlliances plants, most of the grower contracts are with Cargill so the above scenario does not apply. Cargill is not released from its obligation under grower contracts even if VeraSun rejects its contracts with Cargill. This principal of law will also apply in general to other intermediaries; however, if a small elevator has too many such contracts, its ability to handle these obligations may be uncertain. As of December 15, ethanol production continues at these facilities.

#### **Original / Other VeraSun Ethanol Plants**

(Aurora, SD; Charles City, IA; Fort Dodge, IA; Hartley, IA; \*Welcome, MN)

It is possible that VeraSun will treat similar contracts differently depending on the plant involved. For example, the original VeraSun plants may choose to use an “averaging” formula which may allow it to reject fewer contracts than at the former U.S. BioEnergy Plants. (\*Note: the Welcome, MN, facility has not started production. As a result, VeraSun is treating grower contracts similar for this plant to scenarios outlined above for the former U.S. BioEnergy plants.) Ethanol production continues at the first four of these facilities listed above, as of December 15.

**BECAUSE VERASUN MAY BE OPERATING DIFFERENTLY AT DIFFERENT PLANTS, IT MAY BE USEFUL FOR GROWERS TO CONTACT DIRECTLY THE PLANT WITH WHICH THEY HAVE CONTRACTED AND DETERMINE IF AN ARRANGEMENT CAN BE MADE WITH THAT PLANT.**

**NOTE: MANY OF THE OPTIONS DISCUSSED IN THIS BRIEFING PAPER MAY REQUIRE ADDITIONAL CONSULTATION WITH YOUR ATTORNEY.**

## **Options to Consider Regarding Contracts to Sell Corn to VeraSun - Continued**

VeraSun has recently sent notification to many growers - with contracts for delivery prior to January 31, 2009 - regarding contract rejections as outlined above.

In some cases, those letters provided growers with several alternatives. Under one alternative, the grower would be released from contract obligations if they agree to give up any claim to damages from the rejection of the contract. Under a second alternative, the grower and VeraSun would both agree to extend the contract until December, 2009 with the understanding that VeraSun may either reject or assume the contract at any time prior to December 2009. If the grower accepts neither alternative, then the contract will be rejected and the growers will have a claim for damages, which may or may not prove to have any value. The grower may want to confer with their lawyer to decide which alternative to choose.

All of these notices deal with contracts that call for delivery prior to January 31, 2009. VeraSun will be making decisions regarding contracts that call for delivery after January 31, 2009 and will be communicating with growers regarding such contracts.

### **Questions and Answers**

#### **QUESTION # 1**

**What can I do to learn if my contract will be rejected when the delivery date arises?**

If you have a contract that calls for delivery prior to the end of January 2009, you should have received a letter from VeraSun that should answer this question.

If you have a contract that calls for delivery after January 2009 and wish to know whether your contract will be rejected or not, then there are two steps you may take. NOTE: Each farmer will want to consider carefully if obtaining this information is useful or not. It is possible that making this request may accelerate the rejection of the contract.

One step involves contacting VeraSun and inquiring whether VeraSun intends to reject the contract.

Another step that the grower may take in order to force an accelerated decision is the filing of a motion in the Bankruptcy Court to ask the court to require VeraSun to notify the grower in advance of the current deadline, which is either the date of the delivery or the confirmation of a plan of reorganization, whichever occurs first. This action normally requires the expertise of an attorney.

**NOTE: MANY OF THE OPTIONS DISCUSSED IN THIS BRIEFING PAPER MAY REQUIRE ADDITIONAL CONSULTATION WITH YOUR ATTORNEY.**

## **Options to Consider Regarding Contracts to Sell Corn to VeraSun - Continued**

### **QUESTION # 2**

#### **How do I file a claim against VeraSun for damages suffered?**

Growers who suffer a loss as a result of the rejection of their contract or who otherwise have a claim against any of the VeraSun companies must file a claim with the bankruptcy court in order to share with other unsecured creditors any funds that may be available to pay those claims. If you do not file such a claim you will NOT receive any share of funds that may be available.

Often the filing of such a claim does not require a lawyer since most of the claim form is self explanatory. There are however, several tricky issues which may require consultation with an attorney. For example, normally you will calculate the damages from the rejection by subtracting the sale price of the corn on the day of delivery or the day of rejection from the contract amount, but special costs such as additional transportation and the like must be considered.

### **QUESTION # 3**

#### **What will be happening in this case in the future and how might it affect me?**

There are several other important issues that may impact growers. These include:

1. Whether or not the assets of the former U.S. BioEnergy plants are protected from the claims of creditors of other members of the VeraSun family of corporations, and vice versa.
2. Whether VeraSun keeps the plants operating or ready to operate (in a temporary or “hot” idle status.)
3. Whether any sale of VeraSun assets are “fair” to the plant with which the grower is concerned.
4. Whether the plan of reorganization treats growers fairly and in accordance with the provisions of the bankruptcy law.

Each of these issues may impact the treatment of the claims of growers.

### **QUESTION # 4**

#### **Is my contract subject to the special bankruptcy rules applicable to forward contracts?**

Counsel for the Ad Hoc Committee is currently determining if some of the contracts are subject to the special rules for “forward contracts.” If they are, then growers with this kind of contract may be able to go ahead and sell their corn if that is their marketing strategy and be relieved of the obligation to wait until the delivery date.

**NOTE: MANY OF THE OPTIONS DISCUSSED IN THIS BRIEFING PAPER MAY REQUIRE ADDITIONAL CONSULTATION WITH YOUR ATTORNEY.**

**This briefing paper was prepared for the National Corn Growers Association by David A. Lander, Thompson Coburn LLP, St. Louis, Missouri. For more info, see [www.ncga.com](http://www.ncga.com).**