

VeraSun Energy Bankruptcy Poses Perils for Farmers and Elevators

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VeraSun Energy and its 24 subsidiaries filed Chapter 11 bankruptcy on October 31, 2008 in the United States Bankruptcy Court in Delaware. The bankruptcy filing raises numerous questions for farmers and grain elevators that have legal relationships with VeraSun.

VeraSun operates 17 ethanol plants eight states:

Indiana	Iowa	Michigan	Minnesota	Nebraska	North Dakota	Ohio	South Dakota
Linden Reynolds	Albert City Charles City Dyersville Fort Dodge Hartley	Woodbury	Janesville Welcome	Albion Central City Ord	Hankinson	Bloomington	Aurora Marion

The bankruptcy filing raises numerous questions for farmers who have contracted to deliver grain to VeraSun and also for elevators. Here's a rundown of the most important questions:

Q. Will farmers and elevators be paid for corn delivered before filing?

A. VeraSun will treat claims of corn suppliers that supplied corn to it at different times differently as is required by the bankruptcy code. VeraSun will treat all corn suppliers that supplied corn to its plants before October 11, 2008 as unsecured creditors that *may* share in a dividend at some time, many months in the future. However, VeraSun has received confirmation from the Delaware Bankruptcy Court that corn suppliers who supplied corn from October 11 through October 31 will be treated as priority creditors that can be paid in full from VeraSun's cash *provided they agree to continue supplying corn at prevailing market prices, not contracted prices*. VeraSun's attorneys drafted the following language that is found in the Bankruptcy Court's Order Affirming the Administrative Expense Status of the Claims of Creditor that provided goods (corn) within 20 days of the bankruptcy filing:

In return for receiving prompt payment on account of obligations arising with respect to any 20-Day Goods, the Vendors, through the endorsement of any check for payment or other written acknowledgment in respect of such 20-Day Goods, shall be deemed to have agreed to continue supplying Goods to the Debtors *at prevailing market prices* in accordance with the most favorable terms and conditions (including payment terms) pursuant to historical practices in effect between such Vendor and the Debtors in the twelve months prior to the Petition Date, or such other terms and conditions as are agreed to by the Debtors and the applicable Vendor.

This language appears to trump any obligations that the VeraSun Debtors have to pay the contract prices they agreed to pay farmers and elevators while requiring the farmers and elevators to continue selling corn

at current market prices. This interpretation is further supported by the language in the Corn Suppliers Letter from VeraSun dated November 4th that provides the following:

We have also requested specific authority from the Court to pay those trade partners from whom we have received corn on or after October 11, 2008 in the ordinary course. We have been granted authority by the Court to make these payments. *However, if you already received a check but have not yet cashed it, we need to re-issue you a check. Also, to get authority from the Court to pay for corn delivered before the filing date, we will need an acknowledgment from you that you will continue to do business with us on normal terms. This acknowledgment will be on the back of the check to pay for the corn and will be accepted by your endorsement.*

Farmers and elevators that sign the checks in order to get prompt payment for the corn that VeraSun purchased within 20 days of filing appear to have agreed to continue supplying corn at prevailing market prices.

Warning: Farmers and elevators that receive checks from VeraSun for grain delivered between October 11 to October 31st should show the checks to their attorneys to determine the what signing the check will contractually obligate to perform in the future. They could be agreeing to deliver corn at the prevailing market price with payment on the most favorable terms provided within the past 12 months.

Q. Will VeraSun honor its contracts?

A. The bankruptcy code allows a debtor to decide whether to accept or reject contracts like grain supply contracts through the date of confirmation of the plan. Thus, if a farmer or elevator has a contract to sell grain to VeraSun for \$5.25 per bushel and the prevailing market price increases to \$6.00 per bushel VeraSun has the option to enforce the contract by accepting the contract.

At this time, VeraSun appears to have the upper hand as it can wait until plan confirmation to decide whether to accept or reject corn contracts while the farmers and elevators that have agreed to sell to VeraSun are required to honor those contracts until VeraSun decides whether to accept them.

Q. Do Farmers and Elevators Need to Honor Their Contractual Commitments to VeraSun?

A. VeraSun can enforce the terms of delivery contracts it has with farmers and elevators. Until VeraSun rejects a contract, the farmer or elevator is still bound by the terms of the contract. If the farmer or elevator sells the corn elsewhere, and the price increases VeraSun could require the farmer or elevator to fulfill the contract even if the cost of corn is considerably higher than the farmer or elevator will receive from VeraSun.

Note: Contract Holders can Seek Limit on Time for VeraSun to Accept or Reject Contracts.

The bankruptcy code makes provision for those burdened by contracts to request that the Bankruptcy Court enter an order requiring that the Debtors accept or reject the contracts by a date certain. If such a motion were filed and a date was set for VeraSun to accept or reject contracts, VeraSun would be required to

determine which contracts to accept or reject. If the contract was rejected, the farmer or elevator would be free to sell the corn to whomever it chose. Farmers and elevators should consider hiring a bankruptcy lawyer to collectively represent them in the VeraSun bankruptcy as their interests appear to be identical. By hiring one attorney, the farmers and elevators can have their interests properly represented when none of them could afford proper representation alone.

Q. What Happens if Vera Sun Rejects a Corn Delivery Contract?

A. If a corn supply contract is rejected the rejection is treated as if VeraSun rejected the contract on the day before it filed bankruptcy. The farmer or elevator whose contract is rejected will need to market its corn previously covered by the contract, then it can file a claim in the VeraSun bankruptcy that will be treated as an unsecured claim that can share in the dividend paid to unsecured creditors many months later. There is no guarantee that any payment will be made to unsecured creditors.