



# UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION VII  
901 NORTH 5TH STREET  
KANSAS CITY, KANSAS 66101

April 3, 2006

Mr. David Hallberg, President  
E3BioFuels, LLC  
4780 South 131<sup>st</sup> Street  
Omaha, NE 68137

Dear Mr. Hallberg:

Re: Nebraska Ordnance Plant Site  
Mead, Nebraska

The purpose of this letter is to respond to your request dated March 21, 2006, for information regarding potential liability protections pursuant to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) applicable to E3BioFuels as an owner of property at or near the Former Nebraska Ordnance Plant (NOP) Site located in Mead, Nebraska. Although this letter does not provide a release from CERCLA liability, it describes certain CERCLA statutory provisions and policies that appear to be applicable to E3BioFuels and may address certain liability questions you have with regards to the Site.

As you are likely aware, to date the U.S. Army Corps of Engineers has been conducting investigatory and cleanup work at the NOP subject to a Federal Facility Agreement under CERCLA Section 120 with the Environmental Protection Agency (EPA) and the state of Nebraska. There have been two Records of Decisions (RODs) for the site where cleanup remedies have been selected. The first ROD selected a remedy to address explosives-contaminated soil associated with NOP activities. This remedy was completed in 1998. The second ROD was signed in 1997, and selected a remedy to address solvent and explosives contamination in groundwater. This remedy includes a groundwater containment component, and a component to specifically address areas with relatively high levels of groundwater contamination (i.e. "hot spots"). Components of the groundwater containment of the remedy have been constructed. Actions to address groundwater "hot spots" are pending.

Based on the information you provided by electronic mail on March 28, 2006, it is EPA's understanding that the property where you intend to conduct activity is generally located in the southern half of Section 12, Township 14 North, Range 8 East. This property is north and east of NOP Load Line 1, and just south of a groundwater monitoring well installed at the Site, MW-57B. Several Site documents contain information that may be relevant to the environmental condition of the E3BioFuels property at this location. These documents include:

- Remedial Investigation Report, Operable Unit No. 2 (Groundwater) for Former NOP, Mead Nebraska;
- Remedial Investigation Report, Operable Unit No. 3 for Former NOP, Mead Nebraska; and
- Aerial Photographic Analysis of Nebraska Army Ordnance Plant, Mead, Nebraska

In our review, we noted the following areas of interest at the NOP that may be relevant to the property in question. These areas include:

- Area of Potential Waste Disposal Southeast of Bomb Booster Area – Aerial photographs identify a potential waste disposal area in photos as early as 1949. This area appears to be located approximately  $\frac{1}{4}$  to  $\frac{1}{2}$  mile north of the E3Biofuels property, and is not contiguous with the E3 property. It was evaluated in the Remedial Investigation for Operable Unit No. 3, and there were no contaminants reported at the area at levels of concern.
- Former High Explosives Storage Area – The majority of the E3BioFuels property appears to be located on an area that is identified as a “High Explosives Storage Area” on historical aerial photos. This area has been used for cattle feeding operations since the 1970s. In our review, we did not locate information which indicated whether any sampling of the High Explosives Storage Area has been conducted. An August 10, 1995, letter from the Corps of Engineers (Leland Fuerst) indicates that no soil sampling had been conducted by the Corps on the Mead Cattle Company property (as of that date).
- MW-57B - This groundwater monitoring well is located approximately  $\frac{1}{4}$  to  $\frac{1}{2}$  mile to the north and west of the E3BioFuels property, and is located in a direction upgradient of the property relative to groundwater flow. There were no contaminants reported at levels of concern in MW-57B in the Remedial Investigation Report for Operable Unit No. 3. Additional sampling conducted by the Corps similarly did not indicate contamination in MW-57B at levels of concern. Sampling of this monitoring well was discontinued in 1995.
- Underground Storage Tanks – A 1997 Environmental Site Assessment prepared for the Mead Cattle Company, Inc., indicates that underground storage tanks were removed by the Mead Cattle Company in 1992. An August 19, 1992, letter from the Nebraska Department of Environmental Quality (David Chambers) indicates that no further action regarding the tank removal was required at that time. The location of these tanks relative to the E3BioFuels property is unclear from our review.
- General Groundwater Contamination – Several areas of interest regarding the NOP Site are located northwest of the E3BioFuels property, in a direction upgradient relative to groundwater flow. These areas are not contiguous with the E3BioFuels property, but could have potential to release contaminants to

groundwater which could flow towards or onto E3BioFuels property. Of primary interest would be the Administration Area of the Former NOP. Sampling conducted by the Corps during various investigations has not identified the presence of contaminants, including solvents (such as trichloroethylene), in groundwater at levels of concern upgradient of the E3BioFuels property.

In summary, the sampling conducted to date as part of the Corps of Engineers investigation of the NOP has not identified the presence of contamination at levels of concern that are impacting the E3BioFuels property. As stated above, EPA does not have any information regarding possible sampling of the former High Explosives Storage Area.

Under CERCLA, any person who owns a site or any portion of a site may be liable for clean up activities, or for the cost of clean up activities, at the site. However, recent statutory amendments to CERCLA, as well as certain EPA policies that state when EPA may use its enforcement discretion not to pursue certain types of parties, are intended to address barriers to purchases of property and encourage redevelopment. The Small Business Liability Relief and Brownfields Revitalization Act of 2002 provides important protections from Superfund liability to three categories of landowners who meet certain statutory criteria. The “bona fide prospective purchaser” (BFPP), “contiguous property owner” and “innocent landowner” provisions state that a person meeting certain criteria set forth in the statute is protected from CERCLA liability. The focus of this letter will be on the BFPP provisions set forth in CERCLA Section 107(r) which may be particularly applicable to E3BioFuels’ situation.<sup>1</sup>

The EPA has developed policy and guidance documents to implement the potential liability protection for these types of landowners. EPA’s Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability (March 6, 2003) can be found at:

<http://www.epa.gov/compliance/resources/policies/cleanup/superfund/common-element-guide.pdf>.

In addition, since the BFPP provisions may be particularly applicable to E3BioFuels’ current situation, you may wish to consult EPA’s Bona Fide Prospective Purchasers and the New Amendments to CERCLA (May 31, 2002) which can be found at:

<http://epa.gov/compliance/resources/policies/cleanup/superfund/bonf-pp-cercla-mem.pdf>.

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<sup>1</sup> CERCLA also provides statutory protections for “contiguous property owners” and “innocent landowners”. However, to qualify for these protections a person must, among other requirements, perform all appropriate inquiry prior to purchase and buy without knowing, or having reason to know, of contamination on the property. It is EPA’s current understanding that E3BioFuels may not be able to meet this statutory requirement.

These documents discuss in more detail the specific statutory requirements.

To qualify as a BFPP a person must meet the CERCLA § 101(40) and § 107(r) criteria, purchase the subject property after January 11, 2002, and perform all appropriate inquiry prior to purchase and may buy knowing, or having reason to know, of contamination on the property. It is our understanding that a Phase 1 Environmental Site Assessment was performed on the subject property prior to E3BioFuels' purchase of the property. On November 1, 2005, EPA published a final rule establishing standards and practices for conducting an "all appropriate inquiry". Although the rule is not effective until November 1, 2006, it clearly states that in the interim parties can use the new standard or independent industry standards (ASTM E1527-97, ASTM E1527-00, or ASTM E1527-05). More information about this rule can be found at:

<http://www.epa.gov/brownfields/regneg.htm>.

In addition to performing "all appropriate inquiry" and establishing that E3BioFuels is not affiliated with any other person who is potentially liable under CERCLA for response costs, there are several continuing obligations a landowner must meet in order to achieve and maintain its landowner liability protection. These obligations are discussed more thoroughly in the policies referenced above.

It should also be noted that to the extent EPA's response action at a site increases the fair market value of the property, EPA may have a windfall lien on the property. The windfall lien is limited to the increase in fair market value attributable to EPA's response action, capped by EPA's unrecovered response costs. EPA's policy regarding windfall liens can be found at:

<http://www.epa.gov/compliance/resources/policies/cleanup/superfund/interim-windfall-lien.pdf>.

Although EPA does not have information at this time that groundwater contamination is impacting the E3BioFuels' property, you may also wish to consult EPA's Policy Towards Owners of Property Containing Contaminated Aquifers. This policy provides that EPA will exercise its enforcement discretion by not taking action against a property owner to require clean up or pay for clean up costs where hazardous substances have come to the property solely as the result of subsurface migration in an aquifer from a source outside the property, and the landowner did not cause, contribute to or aggravate the release or threat of release of any hazardous substances. There are certain criteria outlined in the Contaminated Aquifer policy that must be met in order for EPA to apply this policy, which can be viewed at:

<http://www.epa.gov/brownfields/html-doc/aquifer.htm>.

In conclusion, this letter provides information with respect to the Site based on information EPA has available to it at this time. Additional information regarding the nature and extent of hazardous substance contamination at the Site may become available in the future, and as the property owner you should ensure that you are aware of the

condition of your property so that you are able to take reasonable steps with respect to any hazardous substance contamination at the property. The EPA hopes that the above information is helpful to you in addressing your questions and concerns. If you would like more information about the NOP, we direct your attention to the Administrative Record for the Site located at the Mead Public Library, which contains documents related to the Site. If you have any questions about this letter or would like to discuss these issues further, please do not hesitate to contact me at (913) 551-7131, or Alyse Stoy of our Office of Regional Counsel at (913) 551-7826.

Sincerely,

A handwritten signature in black ink, appearing to read "Scott Marquess". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Scott Marquess  
Federal Facilities\Special Emphasis Branch