



March 26, 2018

Mr. Jeffrey H. Wood  
Acting Assistant Attorney General  
Environment and Natural Resources Division (ENRD)  
U.S. Department of Justice  
P.O. Box 7611  
Washington, DC 20044-7611

**IN RE: PES Holdings, LLC., et al., D.J. Ref. No. 90-5-2-1-10993/1**

Dear Assistant Attorney General Wood:

On behalf of more than 40,000 dues-paying corn farmers nationwide and more than 300,000 corn farmers who contribute to corn checkoff programs in their states, the National Corn Growers Association (NCGA) appreciates the opportunity to comment on the March 12, 2018, U.S. Department of Justice (DOJ) proposed Consent Decree and Environmental Settlement Agreement (Settlement Agreement) with the United States Bankruptcy Court for the District of Delaware in *In PES HOLDINGS LLC., ET AL.*, Civil Action No. 18-10122 (Bankr. D. Del.).

As producers of the primary feedstock used in the production of conventional biofuel, a key component of the Renewable Fuel Standard (RFS), corn farmers maintain a vested interest in the integrity of the RFS and in the Renewable Identification Number (RIN) compliance system for obligated parties, such as the Debtor, Philadelphia Energy Solutions Refining and Marketing (PESRM).

Since Congress enacted the RFS in 2005, corn farmers have responded to the growing market for ethanol, increasing production efficiency to help meet the RFS goals of moving the United States toward greater energy independence and security, boosting production of clean, renewable fuels, reducing greenhouse gas emissions and protecting consumers. This proposed Settlement Agreement would have negative policy implications for the RFS and future compliance with the Clean Air Act. As such, NCGA urges DOJ to withdraw and reconsider the proposed Settlement Agreement because it undermines the RFS and fails to hold all parties liable for violations of the Clean Air Act responsible.

### **THE RFS DID NOT CAUSE PESRM BANKRUPTCY**

PESRM has attempted to pin the blame for its bankruptcy filing on its obligations under RFS, citing compliance with the RFS as a leading reason for seeking bankruptcy protection. PESRM's RFS obligations are not to blame for its bankruptcy filing, but its poor financial decisions and those of its ownership group, including the Carlyle Group and Sunoco, Inc., have prevented PESRM from meeting its RFS

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obligations. Rather than ensure PESRM fulfilled its requirements under the Clean Air Act, the Carlyle Group prioritized returns to its investors over the financial health and stability of PESRM, and both the Debtors and responsible non-debtors are attempting to scapegoat the RFS for the refiner's bankruptcy filing.

PESRM's history shows numerous financial challenges. PESRM was last rescued from bankruptcy in 2012 by its current ownership structure, in combination with taxpayer support, including grants funded by taxpayers, environmental liability waivers and creation of a special tax-friendly zone.<sup>1</sup> At that time, RIN prices were at much lower levels than recent prices, yet the refiner still struggled for profitability, with refinery operations losing \$772 million between 2009 and 2011.<sup>2</sup>

The Carlyle Group, the current majority owner of PESRM, took steps to ensure its investors profited, regardless of the financial condition Carlyle's decisions left the refinery in. Based on reviews of bankruptcy court filings, Carlyle collected \$594 million in distributions from PES, returns that went to investors rather than back into the refinery or its workers.<sup>3</sup> Half of these distributions to investors were financed by loans that are now due. A Carlyle spin-off firm that guaranteed \$30 million in payments per quarter from a rail terminal, which became an unprofitable and little-used investment with changing crude oil markets and supply, also funded distributions to Carlyle.<sup>4</sup>

PESRM ownership and management chose to invest in rail capacity and focus on refining rather than add renewable fuels blending. Further, PESRM's 32 percent owner, Sunoco, Inc., made investment decisions that affected PESRM while also investing heavily in pipeline projects that would make the refinery uncompetitive by lowering its crude oil margins.<sup>5</sup> In prioritizing these investments, the ownership group ensured its returns while failing to ensure its Clean Air Act obligations would be met.

The Carlyle Group ended its plans to take PESRM public in 2016 and was unsuccessful in its attempts to sell the refiner during that year. Now that the ownership structure has squeezed all the dividends it can out of this refinery and PESRM is unable to repay loans taken out to help finance those distributions, they are seeking to also avoid the known compliance obligations under the Clean Air Act that they failed to meet.

## **PESRM's OBLIGATIONS**

The proposed Settlement Agreement would allow PESRM to negate more than half of its RFS compliance obligations, setting a dangerous precedent that refinery owners can walk away from their environmental obligations under bankruptcy protection. This precedent is even more damaging after

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<sup>1</sup> Simeone, C. (2018, February 2). Part 1: Philadelphia Energy Solutions Bankruptcy Basics. Retrieved March 23 from <https://kleinmanenergy.upenn.edu/blog/2018/02/02/part-1-philadelphia-energy-solutions-bankruptcy-basics>

<sup>2</sup> Wolfe, J. (2011, September 07). Sunoco to sell or close refineries. The Delaware County Daily News. Retrieved March 23, 2018, from <http://www.delcotimes.com/general-news/20110907/sunoco-to-sell-or-close-refineries>

<sup>3</sup> Renshaw, J. (2018, February 20). Refiner goes belly-up after big payouts to Carlyle Group. Reuters. Retrieved March 25, 2018, from <https://www.reuters.com/article/us-usa-biofuels-pes-bankruptcy-insight/refiner-goes-belly-up-after-big-payouts-to-carlyle-group-idUSKCN1G40I1>

<sup>4</sup> Renshaw, J.

<sup>5</sup> Simeone, C. (2018, February 4). Part 3: Philadelphia Energy Solutions Investors Prioritized Stronger Investments. Retrieved March 25, 2018, from <https://kleinmanenergy.upenn.edu/blog/2018/02/04/part-3-philadelphia-energy-solutions-investors-prioritized-stronger-investments>

review of the actions PESRM owners took to prioritize returns to investors over the financial health of the refinery and the ability to meet anticipated RIN obligations.

Refinery owners doubled down on their failure to plan to meet RFS obligations by reportedly selling RINs in the market when the refinery faced the March 31, 2018 compliance deadline to satisfy its 2017 obligations and a 2016 deficit carryover. In November 2017, Reuters reported that PES sold roughly 40 million RINs.<sup>6</sup> Following its bankruptcy filing, PESRM was observed selling RINs in the market, according to Reuters.<sup>7</sup> Another news outlet, OPIS, reported that PESRM engaged in “heavy RINs selling” in January, following its initial bankruptcy filing.<sup>8</sup>

The Debtor selling RINs needed for compliance while petitioning the bankruptcy court for relief from compliance with the law exhibits a lack of transparency. NCGA believes PESRM and EPA should fully disclose all RIN sales and transfers by the company since its decision to create the 2016 deficit carryover in March 2017. Further, NCGA believes the bankruptcy court and EPA should state in any final agreement that the RFS did not cause PESRM’s financial difficulties.

According to its court filings, PESRM had a total volume obligation of 467 million gallons, including 2017 obligations and its 2016 deficit carryover, and held approximately 210 million gallons of RINs. Under the proposed Settlement Agreement, PESRM would retire just 138 million RINs to resolve its prior liability of 467 million gallons. Further, PESRM would retire 64.6 million RINs toward its post-bankruptcy 2018 obligation, allowing the refiner to use credits that should have covered its past obligation to cover future obligations and giving PESRM a head start on its competitors in fulfilling future 2018 obligations. Finally, the proposed Settlement Agreement would allow PESRM to sell up to \$2.5 million in RINs, presumably the balance of its 210 million RINs held.

Every RIN obligation disregarded by the bankruptcy court disregards a gallon of homegrown biofuel that can’t make its way to consumers, can’t contribute to U.S. energy security and can’t grow the U.S. economy. Every RIN obligation disregarded circumvents environmental compliance. Every RIN obligation disregarded diminishes the market for renewable fuels, and, therefore, affects the market for feedstock providers such as corn farmers.

## **RFS LIABILITY OF PARENT CORPORATION**

The proposed Settlement Agreement fails to consider the liability parent companies, particularly the Carlyle Group and Sunoco, Inc., bear for PESRM’s RIN obligations. The provisions of 40 CFR § 80.1461 provide that any parent corporation is liable for any violation of the RFS that is committed by any of its subsidiaries and that each partner to a joint venture is jointly and severally liable for any violation committed by the joint venture. The DOJ and the Environmental Protection Agency (EPA) do not address the applicability of this regulation in the proposed Settlement Agreement, and NCGA urges them do so.

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<sup>6</sup> Renshaw, J., Prentice, C. “Struggling Philadelphia refiner sells biofuel credits; raises cash: sources.” Reuters, Nov. 14, 2017. <https://www.reuters.com/article/us-refineries-biofuels-philadelphia/struggling-philadelphia-refiner-sells-biofuel-credits-raises-cash-sources-idUSKBN1DE2UU>

<sup>7</sup> Renshaw, J. “Bankrupt Philadelphia refiner faces potential biofuel credit squeeze.” Reuters, Jan. 29, 2018. <https://www.reuters.com/article/philadelphia-energy-solutions-bankruptcy/bankrupt-philadelphia-refiner-faces-potential-biofuel-credit-squeeze-idUSL2N1PK226>

<sup>8</sup> Godwin, J. “RINs Prices Steady as Refiner RINs Selling Slows, but Concerns Remain.” OPIS Biofuels Update, Jan. 23, 2018, 5:52:01 EST.

The Carlyle Group is a \$12 billion corporation whose investors profited at the expense of PESRM's employees and the refiner's financial stability, yet the proposed Settlement Agreement does not hold the ownership group liable for PESRM's failure to meet its full compliance obligations and this violation of the RFS. While the Debtors claim they do not have the financial resources to comply with their Clean Air Act obligations, the parent corporations appear to have substantial resources to ensure RFS obligations are met and the liability protection provided for by the RFS regulation is upheld. The applicable federal regulation was intended to ensure RFS obligations continue to be met in a situation in which a subsidiary fails to meet obligations. All PESRM parent corporations and joint venture partners should be considered liable for RFS compliance under 40 CFR § 80.1461.

## **RFS OBLIGATIONS APPLY EQUALLY**

Under the RFS, the EPA gives obligated parties such as PESRM a choice. Obligated parties can blend biofuels in order to meet the intent of the law and receive their compliance credit, the RIN, for free. Alternately, obligated parties can forgo blending and purchase RINs from others that have blended in excess of their obligations. The RFS has been federal law since 2005. In that time, many refiners chose to blend in order to generate their RINs for free. A few refiners, such as PES, have chosen to rely on buying RINs. Those who chose to rely on purchased RINs to meet obligations must prioritize managing their RFS compliance in their financial decisions.

Regardless of whether obligated parties blend or purchase RINs, all parties must meet the same obligations. The Environmental Protection Agency (EPA), most recently in December of 2017, maintains that high RIN prices do not cause significant economic harm to refiners. As the agency stated, *"EPA has invested significant resources evaluating the impact of high RIN prices on refiners. After reviewing the available data, EPA has concluded that refiners are generally able to recover the cost of RINs in the prices they receive for their refined products, and therefore high RIN prices do not cause significant harm to refiners."*<sup>9</sup>

For PESRM to present its RFS obligations as the cause for its bankruptcy filing raises questions of why other merchant refiners, which are required to meet the same obligations under the Clean Air Act, are reporting large profit increases over the past several quarters. As other refiners report surging profits per share, PESRM's filing for bankruptcy protection represents an outlier among refiners' financial performance, further supporting the fact that causes other than the RFS have resulted in PESRM's bankruptcy.

## **CONCLUSION**

The proposed Settlement Agreement would reduce PESRM's RFS compliance obligation by nearly 70 percent, undermining the Clean Air Act and setting a precedent for other companies to follow to avoid environmental responsibilities under the law. The proposed Settlement Agreement is inappropriate, improper and inadequate.

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<sup>9</sup> EPA, *Renewable Fuel Standard Program – Standards for 2018 and Biomass-Based Diesel Volume for 2019; Response to Comments*. (Dec. 2017) 198

NCGA urges the DOJ to reject the proposed Settlement Agreement in order to ensure that PESRM's and its ownership group's environmental responsibilities under the Clean Air Act are properly fulfilled. Waiving PESRM's outstanding RIN obligations and failing to follow the law to hold its ownership group liable for these RFS violations undermines a successful energy policy that corn farmers have a vested interest in. Any settlement agreement should ensure PESRM and its liable ownership group fully comply with their RFS obligations under the law.

Sincerely,

A handwritten signature in black ink, appearing to read "Kevin Skunes". The signature is written in a cursive, flowing style.

Kevin Skunes, President  
National Corn Growers Association

