



March 26, 2018

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:

The Biotechnology Innovation Organization ("BIO") welcomes 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.), IN RE: PES Holdings, LLC., et al., D.J. Ref. No. 90-5-2-1-10993/1¹.

BIO is greatly concerned by DOJ and the U.S. Environmental Protection Agency's ("EPA") Settlement Agreement with PES Holdings, LLC and its Debtor Affiliates (collectively the Debtors),² including Debtor Philadelphia Energy Solutions Refining and Marketing LLC ("PESRM"), to resolve a dispute about the obligations and liabilities of PESRM and related parties under the Clean Air Act's Renewable Fuel Standard ("RFS") program, which requires refiners to blend renewable fuels into gasoline or diesel fuel or obtain Renewable Identification Numbers ("RINs") to meet Renewable Volume Obligations ("RVOs").

Background

As the world's largest trade association representing biotechnology companies, academic institutions, state biotechnology centers and related organizations across the United States and in more than 30 other nations, BIO members are involved in the research and development of innovative healthcare, agricultural, and industrial and environmental biotechnology products.

In the energy space, BIO represents over 75 companies leading the development of new technologies for producing conventional and advanced biofuels. Through the application of industrial biotechnology, BIO members are improving conventional biofuel processes, furthering advanced and cellulosic biofuel production technologies, and speeding development of new energy crops.

The RFS has been an economic driver for these companies. It has spurred investment, research and development, and commercialization of advanced and cellulosic biofuels. The RFS has enabled

¹ Notice of Lodging of Proposed Consent Decree and Environmental Settlement Agreement Under The Clean Air Act, 83 Fed. Reg. 11792 (Mar. 16, 2018). Available at <https://www.federalregister.gov/documents/2018/03/16/2018-05338/notice-of-lodging-of-proposed-consent-decree-and-environmental-settlement-agreement-under-the-clean>

² Debtors in this matter include: PES Holdings, LLC; North Yard Financing, LLC; North Yard GP, LLC; North Yard Logistics, L.P.; PES Administrative Services, LLC; PES Logistics GP, LLC; PES Logistics Partners, L.P.; PESRM Holdings, LLC; and Philadelphia Energy Solutions Refining and Marketing LLC.

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the advanced biofuels industry to make significant investments to meet the requirements of the RFS.

This Settlement Agreement undermines the goals of the RFS by allowing refiners like the Debtors to escape their RIN obligations under the law. By putting more RIN credits into the market place, obligated parties will opt to avoid liquid gallons of advanced and cellulosic biofuels in favor of cheap credits, jeopardizing investments and developments of new biofuel technologies and facilities. Moreover, the Debtors have made a spurious claim to the bankruptcy court that the RFS program materially caused their financial difficulties. The record to date shows that the Debtors shirked compliance with the RFS program while paying unwarranted dividends to shareholders.

RIN Costs Not Responsible for Debtors Bankruptcy

As has been documented in a number of articles and academic studies, the cost of RINs under the RFS have little to do with the financial difficulties for the refinery associated with the Debtors and PESRM. Instead, a series of questionable agreements and a shift in oil markets have cut into the refiner's margins, greatly increasing the debt for the Debtors. As such, the United States and EPA should not reward the Debtors by lowering their obligations to obtain RINs and meet the RVOs.

The refinery owned by the Debtors has had serious financial issues long before the cost of RINs would be a factor. Back in 2011, the refinery's previous owner, Sunoco – now Energy Transfer Partners ("ETP") – intended to shut down its two refineries by July 2012³ claiming it had lost \$772 million between 2009 and 2011⁴. While it was at risk for closure, its RIN obligations were \$13 million dollars.

To keep the refinery operating, Sunoco formed a joint venture with private-equity firm Carlyle Group LP ("Carlyle") to form PESRM in 2012. Sunoco, now ETP has a noncontrolling one-third share, while Carlyle paid \$175 million in 2012 for its two-thirds stake in the refiner⁵. The group also received \$25 million state grants, tax breaks, and environmental-liability waivers.⁶

PESRM then made \$700 million in new investments and, at the direction of its investor-controlled board, took out a \$550 million loan in 2013 to finance capital projects and to pay dividends to Carlyle and Sunoco⁷. Among those investments were a rail-unloading terminal to receive domestic crude-oil shipments, spending \$100 million in 2013 and another \$30 million in 2014 to double its capacity.⁸ At the same time, despite knowing the RFS would have escalating compliance requirements, PESRM did not make any investments to build blending terminal facilities in order to reduce exposure to RIN costs and secondary market volatility⁹.

³ Simeone, C. (2018, February 2). Part 1: Philadelphia Energy Solutions Bankruptcy Basics. Retrieved March 16, 2018, from <https://kleinmanenergy.upenn.edu/blog/2018/02/02/part-1-philadelphia-energy-solutions-bankruptcy-basics>

⁴ Wolfe, J. (2011, September 07). Sunoco to sell or close refineries. The Delaware County Daily News. Retrieved March 16, 2018, from <http://www.delcotimes.com/general-news/20110907/sunoco-to-sell-or-close-refineries>

⁵ Renshaw, J. (2018, February 20). Refiner goes belly-up after big payouts to Carlyle Group. Reuters. Retrieved March 16, 2018, from <https://www.reuters.com/article/us-usa-biofuels-pes-bankruptcy-insight/refiner-goes-belly-up-after-big-payouts-to-carlyle-group-idUSKCN1G40I1>

⁶ Bryant, M. (2017, August 2). Philly's PES refinery, the East Coast's largest, seeks debt relief. The Philadelphia Inquirer. Retrieved March 16, 2018, from <http://www.philly.com/philly/business/energy/philly-pes-refiner-the-east-coasts-largest-seeks-debt-relief-20170802.html>

⁷ Bryant, M. (2017, August 2). Philly's PES refinery, the East Coast's largest, seeks debt relief. The Philadelphia Inquirer. Retrieved March 16, 2018, from <http://www.philly.com/philly/business/energy/philly-pes-refiner-the-east-coasts-largest-seeks-debt-relief-20170802.html>

⁸ Renshaw, J. (2018, February 20). Refiner goes belly-up after big payouts to Carlyle Group. Reuters. Retrieved March 16, 2018, from <https://www.reuters.com/article/us-usa-biofuels-pes-bankruptcy-insight/refiner-goes-belly-up-after-big-payouts-to-carlyle-group-idUSKCN1G40I1>

⁹ Simeone, C. (2018, February 4). Part 3: Philadelphia Energy Solutions Investors Prioritized Stronger Investments, from <https://kleinmanenergy.upenn.edu/blog/2018/02/04/part-3-philadelphia-energy-solutions-investors-prioritized-stronger-investments>

After construction of the rail terminal, PESRM spun off the terminal, creating North Yard as a separate firm, North Yard Logistics LP ("North Yard"). PESRM then signed a ten-year agreement with North Yard to pay \$1.95 for each barrel unloaded and agreed to a minimum quarterly volume of 170,000 bpd, guaranteeing the \$30 million quarterly payments to North Yard. For any barrel PESRM unloaded above the threshold, the refinery paid North Yard 51 cents.¹⁰

This deal made sense for PESRM provided it continued to have access to cheap domestic crude oil. As a result, PESRM took on more debt when oil prices were high, profit margins were fat, and the refinery enjoyed an unexpected boom in discounted domestic crude oil brought in by rail¹¹. However, in 2015 world oil prices crashed wiping out much of the discount PESRM enjoyed. Construction of the Dakota Access Pipeline and Congress lifting a ban on the export of U.S. crude oil in the Consolidated Appropriations, 2016, P.L. 114-113¹², further reduced their access to cheaper domestic crude oil.¹³

However, in developing its deal with North Rail, PESRM had no contingency plan to protect the refiner against the rapid changes in the oil markets. As a result, PESRM paid the minimum quarterly payments of \$30 million to North Yard even if little crude oil arrived. Most of those assets flowed to the investors that own both PES and North Yard, led by the Carlyle Group. In total, PESRM paid North Yard a total of \$298 million between 2015 until August 2017. The Carlyle-led investor group received \$151 million, in eight distributions, of the total paid to North Yard¹⁴.

For the Debtors to now claim that the obligations to obtain RINs and meet the RVOs are responsible for the financial difficulties and they should be granted relief is specious at best. Prior to PESRM's ownership of the refinery, it had a long history of financial difficulties, which almost led to its closure in 2012. The Debtors should have been aware that the RFS would have escalating compliance requirements and could have made investments to handle the compliance costs. Instead, they chose to take on more debt, take out loans, and structure contracts that ensured private investors received hundreds of millions of dollars, while PESRM went further into debt. In addition to neglecting its RIN obligations, the Debtors also failed to keep up its tax responsibilities to the Commonwealth of Pennsylvania¹⁵. In filings before the court, PESRM owes the Commonwealth an estimated \$3.8 billion in unpaid fuels taxes between 2015 and January 2018.

Rather than reward the Debtors and their parent company for actively avoiding their obligations under the law, the court should reject the agreement to drop over half of its compliance obligation under the RFS. It rewards PESRM and the Carlyle Group at the expense of the rest of the U.S. for evading its legal responsibilities as the owners of PES. This settlement also ignores the RFS regulation, 40 CFR § 80.1461(c) that any parent corporation is liable for any violation of the RFS

¹⁰ Renshaw, J. (2018, February 20). Refiner goes belly-up after big payouts to Carlyle Group. Reuters. Retrieved March 16, 2018, from <https://www.reuters.com/article/us-usa-biofuels-pes-bankruptcy-insight/refiner-goes-belly-up-after-big-payouts-to-carlyle-group-idUSKCN1G40I1>

¹¹ Bryant, M. (2017, August 2). Philly's PES refinery, the East Coast's largest, seeks debt relief. The Philadelphia Inquirer. Retrieved March 16, 2018, from <http://www.philly.com/philly/business/energy/philly-pes-refiner-the-east-coasts-largest-seeks-debt-relief-20170802.html>

¹² United States, Government Printing Office. (2015, December 18). Government Printing Office. Retrieved March 16, 2018, from <https://www.congress.gov/114/plaws/publ113/PLAW-114publ113.pdf>

¹³ Maykuth, A. (2017, May 19). The flush times are over for Philadelphia oil refiners. The Philadelphia Inquirer. Retrieved March 16, 2018, from <http://www.philly.com/philly/business/energy/the-flush-times-are-over-for-philadelphia-oil-refiners-20170519.html>

¹⁴ Renshaw, J. (2018, February 20). Refiner goes belly-up after big payouts to Carlyle Group. Reuters. Retrieved March 16, 2018, from <https://www.reuters.com/article/us-usa-biofuels-pes-bankruptcy-insight/refiner-goes-belly-up-after-big-payouts-to-carlyle-group-idUSKCN1G40I1>

¹⁵ Renshaw, J. (2018, March 19). Pennsylvania says bankrupt refiner owes \$3.8 bln in taxes – filing. Reuters. Retrieved March 21, 2018, from <https://www.reuters.com/article/usa-biofuels-pes-bankruptcy/pennsylvania-says-bankrupt-refiner-owes-3-8-bln-in-taxes-filing-idUSL1N1R10LL>

that is committed by any of its subsidiaries¹⁶. As the RFS requires, the Debtors, or its ownership group should be required to meet its requirements under the law and the full cost of its RIN obligations. BIO urges the court to reject the consent decree until it ensures the Debtors, PESRM, and its ownership group fulfills its obligations under the RFS.

Excess RINs

According to its Chapter 11 court filings and declarations, “[a]s of December 31, 2017, PESRM had a gross Renewable Volume Obligation (‘RVO’) equivalent to approximately 467 million gallons, and held approximately 210 million gallons of RINs.”¹⁷ The Court records acknowledge that PESRM carried a portion of its 2016 RVOs forward into 2017, creating a “2016 deficit carryover.”¹⁸ The record does not clarify whether PESRM had 2016 deficit carryovers in the nested RVOs (for cellulosic, biomass-based diesel, and advanced biofuels). The 467 million gallon RVO represents PESRM’s overall obligations for 2017 and its deficit from 2016.

PESRM created this overall 2016 deficit carryover at the end of March 2017. Under the RFS regulations (40 CFR §80.1427 (b)), PESRM was then not permitted to create a new deficit carryover in the overall RVO for 2017. The 2017 RVOs were publicized December 12, 2016.

Despite being required under the rules to meet the full combined 2017 RVO and 2016 deficit carryover with valid RINs by the 2017 compliance date of March 31, 2018, PESRM was reported to be selling RINs in the market. In November 2017, Reuters reported that PES sold roughly 40 million RINs.¹⁹ Following its bankruptcy filing, PESRM was observed selling RINs in the market, according to Reuters.²⁰ Another news outlet, OPIS, reported that PESRM engaged in “heavy RINs selling” in January, following its initial bankruptcy filing.²¹ In any final agreement, 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.

PESRM sought relief from the bankruptcy court by claiming that the RFS program – and in particular the costs of RINs – were the primary cause of its financial difficulties. Notably, PESRM claimed that the structure of the RFS program and its position as a so-called merchant refiner “has created a thirdparty ‘market’ for RINs in direct contravention of the intention of the RFS Program. Those without an RVO, such as large fuels retailers, can generate RINs and then sell them for a windfall profit to Obligated Parties like PESRM or other third parties for profit.” Clearly PESRM sought to profit from selling RINs in the market while ignoring its 2016 deficit carryover and 2017 RVOs. In any final agreement, EPA and the bankruptcy court should state clearly for the record that the RFS program was not a cause of PESRM’s financial difficulty.

To settle its 467 million gallon overall RVO, PESRM will retire 138 million of the 210 million RINs that it acknowledged owning.

¹⁶ 40 CFR § 80.1461, Who is liable for violations under the RFS program? Available at: <https://www.gpo.gov/fdsys/pkg/CFR-2012-title40-vol17/pdf/CFR-2012-title40-vol17-sec80-1461.pdf>

¹⁷ DISCLOSURE STATEMENT FOR THE JOINT PREPACKAGED CHAPTER 11 PLAN OF REORGANIZATION OF PES HOLDINGS, LLC AND ITS DEBTOR AFFILIATES. Case 18-10122 Doc 10, 01/22/18.

¹⁸ <https://www.justice.gov/enrd/consent-decree/file/1043081/download>.

¹⁹ 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>

²⁰ 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>

²¹ Godwin, J. “RINs Prices Steady as Refiner RINs Selling Slows, but Concerns Remain.” OPIS Biofuels Update, Jan. 23, 2018, 5:52:01 EST.

Those RINs include:

- a. 1,458,177 D3 RINs;
- b. 57,569,049 D4 RINs; and
- c. 78,972,774 D6 RINs.

Nowhere does the Court record indicate the vintages of these RINs. PESRM's outstanding obligation of 329 million RINs will be excused and not made up by other refiners. PESRM should not be rewarded for its disregard of its 2016 and 2017 RVOs, particularly in light of its cynical claim that others were reaping a windfall from selling RINs to obligated parties, when in fact PESRM was fully engaged in speculative RIN selling. EPA should provide a full record of how PESRM's RINs will be applied to the company's overall, advanced, biomass-based diesel and cellulosic RVOs for 2016 and 2017 and how much of each specific RVO is being forgiven.

Moreover, other obligated parties should not be rewarded for PESRM's disruption of the RFS obligations. EPA established the RFS volume requirement for 2017 at 19.28 billion gallons. The agency is now forgiving 0.329 billion gallons of the requirement, which clearly and significantly reduces the market for biofuels of all types. The agency should state clearly for the record in this Consent Decree and Environmental Settlement Agreement that this reduction in the 2017 RFS volume requirements will not impact waiver calculations under 42 U.S. Code §7545(o)(7) or any future RFS annual rules or analysis conducted under 42 U.S. Code §7545(o)(2)(B)(ii).

Since the start of 2018, PESRM has accrued a new overall 2018 RVO equivalent to 10.67 percent of its gasoline and diesel production. When it emerges from reorganization, PESRM will begin accruing a new RVO for 2018 at the same rate. Under the agreement, EPA will forgive the 2018 RVO through April 10, and allow the reorganized refiner to use 64.6 million RINs against its new obligation. Moreover, EPA has waived for PESRM the requirements of 40 C.F.R. § 80.1427(a)(5), which would under the law limit PESRM's use of 2017 vintage RINs to 20 percent of its 2018 RVOs. It is unclear whether the 64.6 million RINs that PESRM will be allowed to use to meet the 2018 RVO contain 2016 vintage RINs, which normally would be prohibited. EPA should instead accept the 64.6 million RINs as settlement for PESRM's January 1 through April 10 RVO.

EPA should state for the record how much of PESRM's 2018 obligation – with full disclosure for each RVO category – through April 2018 will be forgiven. And again the agency should make clear that the reduction will not impact waiver calculations under 42 U.S. Code §7545(o)(7) or any future RFS annual rules or analysis conducted under 42 U.S. Code §7545(o)(2)(B)(ii).

The remaining 7.4 million RINs that PESRM declared to have on hand in January 2018 will apparently be sold (or have been sold) and the estimated proceeds of \$27.5 million provided to Merrill Lynch Corporation (MLC) as collateral during the reorganization. Under the prepackaged plan, MLC will then return this money to the reorganized refiner when it emerges from the Chapter 11 proceedings. The record does not specify the RIN categories or vintages involved in the sale, but the estimated price suggests that the majority must be D3 RINs. EPA should provide a full record of the RINs and vintages involved in this transaction. EPA has consistently demonstrated that merchant refiners recover the costs of RIN obligations in pricing their products. PESRM, therefore, gains significant benefit from this transaction, by avoiding its legal obligation while passing costs to other parties.

EPA's settlement bars the reorganized PESRM from using the deficit carryover provision under 40 C.F.R. § 80.1427(b) through the 2022 compliance year. This is appropriate given PESRM's proven use of the provision to engage in speculative selling of RINs. EPA should additionally specify that the reorganized PESRM may not avail itself of the cellulosic biofuel credit provisions under 40 C.F.R. §80.1456 through the 2022 compliance year, given that its speculative RIN selling appears to have involved D3 RINs.

Conclusion

BIO respectfully requests EPA and DOJ reconsider its Settlement Agreement with the Debtors and PESRM. As we noted, the obligations to obtain RINs and meet the RVOs are not responsible for the financial difficulties associated with this refinery. This asset has had a long history of financial difficulties that almost led it to close in 2012, which had nothing to do with the cost of RINs. Further, the Debtors should not be allowed to escape their obligations under the RFS because they chose to take on more debt, take out loans, and structure contracts that ensured private investors received hundreds of millions of dollars while PESRM went further into debt.

This Settlement Agreement has the potential to destabilize the RIN markets under the RFS, PESRM's outstanding obligation of 329 million RINs will be excused and not made up by other refiners. This action will be undermining the RIN markets, create uncertainty for investors in the advanced and cellulosic biofuels space, and jeopardize the long-term investments necessary for the development of these biofuels. It is critical the RIN structure under the RFS be allowed to function as the market intends as the value of these credits are critical as our companies make significant investments to create new agricultural supply chains, build infrastructure for liquid biofuels, and develop innovative new technologies. These credits have enabled our industry to create new jobs, contribute to rural prosperity, and diversify our nation's energy supply. PESRM should not be rewarded for its disregard of its 2016 and 2017 RVOs, particularly in light of its cynical claim that others were reaping a windfall from selling RINs to obligated parties, when in fact PESRM was fully engaged in speculative RIN selling.

A proper settlement of PESRM's RIN obligations will ensure stable implementation of the RFS in line with the statutory requirements can help drive the growth of the advanced and cellulosic biofuels industry. Thank you for considering these comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Brent Erickson". The signature is fluid and cursive, with a prominent initial "B" and a trailing flourish.

Brent Erickson
Executive Vice President
Industrial and Environmental Section