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Submitted Via Email: pubcomment-ees.enrd@usdoj.gov

RE: In re PES Holdings LLC et. Al., D.J. Ref. No. 90-5-2-1-10993/1

Dear Acting Assistant Attorney General Wood:

The National Association of Convenience Stores ("NACS"), the National Association of Truckstop Operators ("NATSO") and the Society of Independent Gasoline Marketers of America ("SIGMA") (collectively the "Associations"), representing approximately 90% of the retail sales of motor fuel in the United States, appreciate this opportunity to voice strong objections to the proposed consent decree and environmental settlement agreement in the above-referenced matter (the "Proposal"). The Proposal is *inappropriate*, *inadequate*, and *improper*, and the Department of Justice should withdraw from and withhold its consent for the Proposal.

If finalized as proposed, the Proposal would bail out a company that has consciously chosen not to adjust its practices to comport with a regulatory regime enacted by Congress more than a decade ago. At the same time, the Proposal would punish forward-thinking companies who followed the rules and have behaved in the manner that Congress intended.

What's more, the Proposal represents a misunderstanding of how the fuel industry functions. Specifically, it accepts the inaccurate notion that a refiner's costs for acquiring and retiring Renewable Identification Numbers ("RINs") are not recovered by the refiner's charging more money for the fuel that it sells. This apparent misunderstanding is puzzling because the Environmental Protection Agency ("EPA" or the "Agency") accurately articulated this market reality as recently as four months ago.

Finally, the proposed consent decree would encourage *other* companies to behave in a similar manner as Philadelphia Energy Solutions ("PES") behaved, unleashing a level of moral hazard in the fuels industry that will benefit a small handful of companies at the expense of hundreds of others, all the while increasing prices at the pump for American consumers and harming the U.S. economy.

The Associations urge you to reconsider the Proposal in a manner consistent with the law and sound public policy.

I. Overview of the Associations

Collectively, the Associations represent approximately 90% of retail sales of motor fuel in the United States. NACS is an international trade association representing the convenience store industry with more than 2,100 retail and 1,750 supplier companies as members. NATSO currently represents approximately 2,500 travel centers and truckstops nationwide, comprised of more than 1,500 chain locations and hundreds of independent locations. SIGMA represents a diverse membership of approximately 260 independent chain retailers and marketers of motor fuel.

II. History of the Renewable Fuel Standard

Given the predominant role that the Renewable Fuel Standard ("RFS" or the "Program") plays in the retail motor fuels market in the United States, and the fact that PES fallaciously blames the RFS for its financial troubles, a brief history of the RFS is in order.

A. Statutory History

Congress first established the RFS in 2005,[1] but substantially expanded the Program in 2007.[2] The revised statute, which remains in effect today, calls for the introduction and blending of an increasing amount of biofuels into the nation's fuel supply, culminating in the use of 36 billion gallons of renewable fuels by 2022.

The purpose of the RFS is to: (1) enhance the energy security and independence of the United States by displacing petroleum products from unstable sources with renewable fuels, and (2) increase the use of renewable fuels that have more favorable emissions characteristics than traditional petroleum-based products.

Through 2022, the RFS establishes a number of renewable volume obligations ("RVOs"), which specify the volumes of renewable fuels that must be blended each year into the nation's transportation fuel supply for four separate renewable fuel categories: (1) cellulosic biofuel, (2) biomass-based diesel, (3) advanced biofuel, and (4) total renewable fuel. While "conventional" biofuels (generally, corn-based ethanol) do not have a specific mandate under the Program, the category generally makes up the difference between total renewable fuels and advanced biofuels. Conventional biofuels are, however, capped at a maximum of 15.0 billion gallons for each year after 2015.

B. Regulatory History

[1] Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005).

[2] Energy Independence and Security Act, Pub. L. No. 110-140, 121 Stat. 1492 (2007).

On February 3, 2010, EPA issued a final rule to implement the current iteration of the RFS.[3] Additionally, EPA is generally obligated to make annual RVO determinations by November 30th of the preceding year. EPA established the RVOs for 2013 on August 15, 2013;[4] the Agency finalized RVOs for 2014, 2015, and 2016 on December 14, 2015;[5] the final volumes for 2017 were issued on December 12, 2016;[6] and the final RVOs for 2018 were issued on December 12, 2017.[7]

Obligated parties – refiners, importers, and manufacturers (and any parent corporation or partner to a joint venture thereof) of petroleum products – are required to demonstrate compliance with the RFS by retiring annually a sufficient number of Renewable Identification Numbers ("RINs") to satisfy their annual RVOs. RINs are created when a renewable fuel producer produces a gallon of renewable fuel, and are "separated" from liquid renewable fuel gallons when that renewable fuel is blended with a petroleum product. Once RINs are separated, they can be bought and sold in an open, transparent market, not unlike traditional commodities.

Critically, EPA has stated that "all refiners and importers have RFS obligations in proportion to the fuels they produce or import, [so] they all have similar per gallon costs of compliance related to the RFS program."[8] EPA has further determined that merchant refiners are "generally not uniquely adversely impacted (relative to integrated refiners) [by the RFS]."[9]

III. <u>The Market's Response to the Renewable Fuel Standard</u>

The RFS resulted in a dramatic change in how motor fuels are regulated and brought to market. Understandably, therefore, it prompted many forward-thinking companies in the motor fuels supply chain to adjust their practices to better position themselves to compete and earn a profit. Other companies, which did not make similar adjustments, have been less successful since the RFS was enacted.

The retail fuels industry, for example, invested many hundreds of millions of dollars in the infrastructure necessary to store, blend, and dispense renewable fuels. Beyond acquiring physical

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[3] Regulation of Fuels and Fuel Additives: Renewable Fuel Standard Program, Final Rule, 72 Fed. Reg. 23,900 (May 1, 2007)(codified at 40 C.F.R. §80.1100 *et seq.*) *amended* by 75 Fed. Reg. 14,670 (Mar. 26, 2010)(codified at 40 C.F.R. § 80.1400 *et seq.*). More information on the RFS2 program, including a pre-publication version of EPA's regulations, can be found at: http://www.epa.gov/OMS/renewablefuels/.

[4] 78 Fed. Reg. 49794 (Aug. 15, 2013), *available at* https://www.gpo.gov/fdsys/pkg/FR-2013-08-15/pdf/2013-19557.pdf.

[5] 80 Fed. Reg. 77420 (Dec. 14, 2015), *available at* https://www.gpo.gov/fdsys/pkg/FR-2015-12-14/pdf/2015-30893.pdf.

[6] 81 Fed. Reg. 89746 (Dec. 12, 2016), *available at* https://www.gpo.gov/fdsys/pkg/FR-2016-12-12/pdf/2016-28879.pdf.

[7] 82 Fed. Reg. 58486 (Dec. 12, 2017), *available at* https://www.gpo.gov/fdsys/pkg/FR-2017-12-12/pdf/2017-26426.pdf.

[8] EPA *Denial of Petitions for Rulemaking to Change the RFS Point of Obligation* (EPA Report No. EPA-420-R-17-008) (Nov. 2017)[*hereinafter* Denial of Petitions], https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P100TBGV.pdf, at 22.

[9] *Id.* at 22.

infrastructure, successful fuel marketers and retailers have also adjusted their *business models* substantially. Many of the Associations' members became active participants in different markets, such as ethanol markets (which are tied to corn prices) and biodiesel markets (which are largely tied to soybean prices). They invested in alternative modes of transportation (such as rail) that can be more amenable to moving these products from place-to-place, and increased their footprint at fuel terminals in order to control the manner in which the products are blended and brought to market. To acquire new types of fuel products from new sources and efficiently bring these products to market necessitates significant financial investments in both physical infrastructure and the intellectual capital necessary to understand and master those new, complex markets.

Like their downstream counterparts, successful, forward-thinking refiners have also adjusted their practices to better enable them to compete under the RFS. Some, for example, acquired or strategically partnered with blending terminal facilities in order to reduce exposure to RIN costs and secondary market volatility. Others purchased or otherwise partnered with renewable fuel facilities. These types of activities – which similarly required substantial investments in both physical equipment and intellectual capital – enabled refiners to directly acquire and separate RINs in order to satisfy their obligations under the RFS.

Investments designed to diversify the fuel supply in this manner is precisely what Congress intended when it passed the RFS. Indeed, the Program is designed to incentivize all segments of the motor fuel supply chain to become active participants in renewable fuels markets. Fuel marketers and refiners that made these adjustments and investments have realized great success over the past decade. Less forward-thinking companies have had trouble competing in the RFS business climate. For these companies to blame the Program for their shortcomings, rather than blaming their own business decisions, is disingenuous.

A. PES's Response to the RFS

Some companies in the motor fuel supply chain made business decisions not to directly engage in the types of activities that Congress sought to incentivize when it enacted the RFS. It is possible that some of these companies did not effectively recognize the impact that the RFS would have on their business models. Other companies may have recognized the impact but simply hoped that Congress would change the policy (or, perhaps, that a bankruptcy proceeding would mitigate the consequences of their business decisions).

PES clearly falls into one of these categories. Consisting of two refineries in Philadelphia, PA, PES has approximately 1,100 employees and produces about 335,000 barrels of crude oil every day, making up about 28% of the East Coast's refining capacity.[10] PES, formerly owned by Sunoco, was sold in 2012 after it lost about $772 million between 2009 and 2011 (when RIN prices were nominal). It has since received a variety of subsidies and investments in an attempt to improve the facility's economic

[10] *See generally* Disclosure Statement for the Joint Prepackaged Chapter 11 Plan of Reorganization of PES Holdings, LLC and its Debtor Affiliates, Case No. 18-10122 (Jan. 22, 2018), http://www.omnimgt.com/cmsvol2/pub_47219/654434_10.pdf.

performance, although an IPO in 2015 valuing the company at $1.3 billion was postponed after investors balked at the high valuation price.[11]

PES has blamed its economic troubles on the RFS, specifically the requirement that the company must acquire and retire RINs to satisfy its RVOs. The company has specifically argued that its problem with RINs is the fact that RIN prices increased beginning in 2013, causing the company to spend what it deemed to be an excessive amount of money on RFS compliance. A report from the Kleinman Center for Energy Policy at the University of Pennsylvania agrees that by the end of 2013 higher RIN prices were apparent, but it notes that PES's investors also knew this, yet decided not to take action to change blending infrastructure or any related agreements to reduce any perceived RFS burdens.[12]

Instead, PES focused its financial capital elsewhere. During the decade that ended March 31, 2015, PES's owners had spent approximately $2 billion upgrading its facilities.[13] Yet, none of these upgrades went toward investing in blending infrastructure that would have enabled the company to acquire RINs by buying and blending biofuels.

The Kleinman Center analyzed several other more probable causes for PES's bankruptcy, the most notable of which is a lack of affordable access to domestic crude. The primary suppliers of PES's crude oil were producers in the Bakken. Following a dramatic drop in crude oil prices in late 2015 and early 2016, it was no longer economical for these producers to continue producing in certain areas and production fell by approximately 25%. Concurrently, new pipeline capacity was put in service connecting the Bakken to the U.S. Gulf Coast, providing producers in the Bakken with alternative sources of demand for, and an efficient alternative means of transporting, their product. Finally, at the end of 2015 Congress lifted the longstanding ban on domestic crude oil.

Thus, PES's suppliers suddenly had less product to sell and more customers to whom they could sell it.

For multiple reasons, PES was an unattractive customer for Bakken producers because it cost those producers less money to transport their crude elsewhere due to the Jones Act. The Act – which requires all goods transported by water between U.S. ports be carried on domestically constructed and owned vessels and crewed by U.S. citizens – raises the costs of transporting crude from the Bakken to Philadelphia relative to transporting it to foreign countries. In fact, it became less expensive to transport crude oil from North Dakota to certain areas in *Western Europe* than to send that same crude oil to *Philadelphia*. On top of this, when the Dakota Access pipeline opened in June 2017, it effectively caused all rail shipments of Bakken crude to East Coast refineries to end. This eliminated much of the

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[11] Jarrett Renshaw, *Philadelphia Energy Solutions ends bid to go public*, REUTERS (Sept. 14, 2016), https://www.reuters.com/article/us-pes-ipo/philadelphia-energy-solutions-ends-bid-to-go-public- idUSKCN11K25W.

[12] Christina Simeone, *Part 3: Philadelphia Energy Solutions Investors Prioritized Stronger Investments,* Kleinman Center for Energy Policy Blog (February 4, 2018), https://kleinmanenergy.upenn.edu/blog/2018/02/04/part-3-philadelphia-energy-solutions-investors-prioritized-stronger-investments.

[13] *See generally Philadelphia Energy Solutions Inc., SEC Filing,* https://www.sec.gov/Archives/edgar/data/1632808/000104746915000839/a2223083zs-1.htm.

return-on-investment that PES envisioned when it spent almost $200 million to increase rail oil handling capacity at its refineries.[14]

Overall, the Kleinman Center found that between 2012 and 2017, PES saw an estimated $1.83 billion reduction in revenues due to issues with the supply of crude oil and spent an additional $855 million on capital improvement projects, some of which—namely the rail terminal—did not pan out in terms of returns.[15] Both of these costs are greater than the $832 million PES said it spent on RINs.

In sum, as oil industry observers have noted, PES's poor cash situation is more the result of the business decisions rather than the RFS:

> *The rail contract exemplifies the financial demands [the private equity firm The Carlyle Group] imposed on PES in the years leading up to the refiner's bankruptcy [...]. The Carlyle-led consortium collected at least **$594** million in cash distributions from PES before it collapsed, according to a Reuters review of bankruptcy filings. Carlyle paid **$175** million in 2012 for its two-thirds stake in the refiner. More than half the distributions to the Carlyle-led investors were financed by loans against PES assets that the refiner now can't pay back, the filings show. The rest came from the refiner's operating budget and payments PES made under the terminal deal to North Yard, a firm with no offices or employees that PES spun off in 2015.*[16]

IV. RINs and the Market: RIN Prices Are Baked Into Wholesale Fuel Prices

Irrespective of its questionable business decisions, the fundamental flaw with PES's argument that its RIN obligations are the source of its financial woes is the fact that RIN costs are *baked into* the "crack spread," *i.e.*, the gross margin that a refinery makes by refining crude oil into petroleum products (such as motor fuel).

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[14] Initially, the lack of markets for Bakken crude made moving it to Philadelphia a desirable alternative for producers. As alternative markets (including foreign markets) for this commodity developed, however, absorbing the cost of railing product to Philadelphia in order to sell it became less attractive, thereby raising the cost of PES's crude oil. (Grassley Energy Policy Staff (February 5, 2018). *RINs & PES* [Memorandum], *available at* https://www.grassley.senate.gov/sites/default/files/MEMO%20Grassley%20Analysis%20Finds%20RFS%20Has%20Minimal%20Impact%20on%20Success%20of%20Refineries.pdf.)

[15] Christina Simeone, *Part 2: Philadelphia Energy Solutions Ch. 11 Fact and Fiction,* Kleinman Center for Energy Policy Blog (February 3, 2018), https://kleinmanenergy.upenn.edu/blog/2018/02/03/part-2-philadelphia-energy-solutions-ch-11-fact-and-fiction.

[16] Jarrett Renshaw, *INSIGHT-Refiner goes belly-up after big payouts to Carlyle Group*, REUTERS (Feb. 20, 2018), https://www.reuters.com/article/usa-biofuels-pes-bankruptcy/insight-refiner-goes-belly-up-after-big-payouts-to-carlyle-group-idUSL2N1PV1I8 (emphasis added).

RIN prices, as with all commodity prices, fluctuate depending on a variety of factors including supply and demand. When assessing how much of a product to produce and at what price, refiners use linear programs that examine a multitude of variables to determine what product output will generate the best result for the refiner.[17] As available market data highlights, RIN costs are one of the variables that refiners consider and incorporate into their economic decision-making models. In fact, obligated parties "consistently consider the cost of RINs in their trading decisions around obligated products" and obligated parties "*consistently incorporate expected RINs costs into their obligated products pricing*."[18] In other words, costs associated with RIN compliance are built into the price of fuel when sold by that refiner—so complaints about how costly (and burdensome) it is to purchase RINs are just not supported.

Numerous studies, performed by entities like Wells Fargo Equity Research, Harvard University, Iowa State University, and McKinsey and Company have also shown that RIN costs are passed downstream to consumers, instead of being paid solely by refiners.[19,20,21]

Even refiners generally acknowledge that RIN costs are baked into wholesale fuel prices:

- **Valero**: In its petition to EPA for a rulemaking under the RFS, Valero acknowledges the ability of refiners to recover the cost of RINs by setting higher prices for the gasoline and diesel they produce and sell.[22] Specifically, Valero states, "Part of how the current rule impedes the statutory goal is its tendency to raise gasoline prices for consumers...Merchant refiners must attempt to anticipatorily recover the extra RIN cost to them in the base price of the fuel. In doing so, the merchant refiners inadvertently raise the spot price for all gasoline."[23]

- **Chevron**: In comments to the EPA regarding the RFS, Chevron furthers Valero's point by noting that, "The current point of obligation does not create a hardship for independent or merchant refiners

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[17] The Tesoro Companies, Inc., Letter to EPA Docket (Feb. 15, 2017)(stating "many refiners long ago recognized that the costs of RIN compliance had to be incorporated into their respective economic decision-making models and processes. This resulted in the market process for fuels which carry RINs obligations (such as gasoline "BOBs" and diesel fuel) to price at a premium to fuels that do not carry this obligation (such as jet fuels or blended gasolines like E10)").

[18] Argus Media Group Consulting Services, Do Obligated Parties Include RINs Costs in Product Prices? (Feb. 2017), prepared for the Society of Independent Gasoline Marketers of America, *available at* https://www.regulations.gov/document?D=EPA-HQ-OAR-2016-0544-0269 (Attachment 4 of SIGMA and NACS comment letter; *see also* Knittel, Christopher R., Ben S. Meiselman, and James H. Stock. The Passthrough of RIN Prices to Wholesale and Retail Fuels Under the Renewable Fuel Standard. Working Paper 21343. NBER Working Paper Series, *available at* http://www.nber.org/papers/w21343.pdf.

[19] *See* Grassley Memorandum, *supra* note 14.

[20] Tom Fitzgibbon, et al., *Decoding the US refiner's exposure to RINs*, McKinsey & Company, Oil & Gas (September 2016), https://www.mckinsey.com/industries/oil-and-gas/our-insights/decoding-the-us-refiners-exposure-to-rins.

[21] *See* Denial of Petitions, *supra* note 8, at 25 (footnote 68 in the *Denial of Petitions* has additional studies)

[22] *See* Denial of Petitions, *supra* note 8, at 23.

[23] Valero, *Petition for Rulemaking: Renewable Fuel Standard Definition of Obligated Party - 40 C.F.R § 80.1406.* (Docket No.: EPA-HQ-OAR-2016-0544) (June 13, 2016), Comment ID No. EPA-HQ-OAR-2016-0544-0008, https://www.regulations.gov/document?D=EPA-HQ-OAR-2016-0544-0008. (*See* page 18.)

based on the cost of RIN acquisition. Chevron's market experience is consistent with the conclusion from several economic studies: the obligated party's RIN acquisition cost is nearly all recovered by the refiner in the gasoline and diesel fuel wholesale markets."[24]

- **American Fuel & Petrochemical Manufacturers (AFPM)**: In its own petition to EPA for a rulemaking under the RFS, AFPM explains the business logic behind pricing decisions related to RINs, stating, "Refiners compete for market share by trying to beat each other in the market on a price basis. The entity offering the best price to the buyers are the ones who can sell more of their products than their competitors. As a result, some refiners may not be able to pass along the full cost of their RIN compliance to a non-obligated Rack Seller, because their competitors may be able to absorb a higher proportion of the RIN cost in order to offer a more competitive price as a result of their market positions."[25] Although AFPM notes that refiners may not always be able to pass along the full cost of RINs, the implication is that the *intent* is to do so. Furthermore, by AFPM's own words, when the full cost of a RIN is unable to be passed through, that is because refiners are making a targeted business decision to choose not to pass along RIN costs to gain a competitive advantage.

PES itself essentially acknowledges the pass-through of RIN costs by stating that it must either "sell its products to customers without biofuels blended in or...[sell blended products] with a substantial price discount tied to the value of the RIN."[26] In effect, PES either sells the product with the cost of the RIN baked in (with the understanding that the buyer will sell the RIN for profit), or it sells a blended product with the price of the RIN removed (with the understanding that the seller at the terminal (PES) will then sell the RIN or use the RIN to retire a part of its RVOs).

Beyond assurances from market participants and outside observers, EPA (and the Department of Justice) should also review the Agency's final denial of a recent petition for a rulemaking under the RFS.[27] EPA surveyed this issue closely while it considered whether to change certain compliance obligations in the RFS program. The Agency found that:

> ...because all refiners and importers have RFS obligations in proportion to the fuels they produce or import, they all have similar per gallon costs of compliance related to the RFS program, and they all seek to recover those costs through the pricing of their products, whether that product is blended with renewable fuel and sold at a terminal or is unblended petroleum blendstocks sold at the refinery gate. Stated another way: merchant refiners can indeed expend significant funds to

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[24] Chevron, *Comments on Petitions for Rulemaking to Change the RFS Point of Obligation; Proposed Denials.* (Docket No.: EPA-HQ-OAR-2016-0544) (February 20, 2017), Comment ID No. EPA-HQ-OAR-2016-0544-0209, https://www.regulations.gov/document?D=EPA-HQ-OAR-2016-0544-0209. (*See* page 2.)

[25] AFPM, *Petition for Rulemaking: Renewable Fuel Standard Definition of Obligated Party - 40 C.F.R § 80.1406.* (Docket No.: EPA-HQ-OAR-2016-0544) (August 4, 2016), Comment ID No. EPA-HQ-OAR-2016-0544-0004, https://www.regulations.gov/document?D=EPA-HQ-OAR-2016-0544-0004. (*See* page 10-11.)

[26] Philadelphia Energy Solutions. (2018) Setting the Record Straight About RFS Compliance [Fact sheet], *available at* http://pes-companies.com/wp-content/uploads/2018/02/Fact-Sheet-Setting-the-Record-Straight-About-RFS-Compliance.pdf.

[27] *See* Denial of Petitions, *supra* note 8.

> purchase RINs needed to demonstrate compliance with the RFS program, but the cost is offset by a corresponding increase in the market price of the fuel they sell that is attributable to the RFS obligations. The market price they receive for the gasoline and diesel fuel they sell reflects the cost of RINs.[28]

Regarding the cost of RINs, therefore, EPA concluded that it "continues to believe that refiners, including merchant refiners, are generally able to recover the cost of RINs through the prices they receive for the petroleum blendstocks they sell."[29]

RIN prices are not harming refiners' profits. RIN costs, like the cost of crude oil, transportation, taxes, and labor, is simply a cost of manufacturing or importing any gallon of motor fuel in the United States. A refiner with no manufacturing costs undoubtedly would be better off in terms of profits than a refiner that has manufacturing costs. Since it is impossible to manufacture any product without input costs, however, it is important to acknowledge that RIN costs harm refiners' profits no more than any other cost of manufacture.

V. The Proposed Consent Decree is Flawed and the Department Should Withdraw and Withhold its Consent

Under the Proposal, the Department of Justice notes that it "reserves the right to withdraw or withhold its consent prior to approval of the Settlement Agreement by the Bankruptcy Court if the public comments regarding the Settlement Agreement disclose facts or considerations that indicate that this Settlement Agreement is inappropriate, improper, or inadequate."[30]

The Proposal is inappropriate, improper, and inadequate. It fails to impose a substantial civil monetary penalty on PES for failure to comply with environmental requirements; allows PES to avoid significant regulatory obligations, thereby rewarding business decisions that run counter to Congress's clear directive; punishes PES's competitors that have spent resources adjusting their practices to better comport with Congress's long-understood directives; and absolves PES's parent companies and joint venture partners from any liability, rewarding these entities – none of which are said to be in financial distress – while punishing consumers and companies that have played by the rules.

A. The Proposal would harm companies that sought to achieve Congress's objectives

Should PES have its RIN obligations cleared, as it is seeking to do, the market will see drastic negative effects. According to Phil Verleger, a prominent economist on oil issues, cancellation of PES's obligations would not only ruin the credibility of the RFS program, it would also cause chaos in the

[28] *See* Denial of Petitions, *supra* note 8, at 23.

[29] *See* Denial of Petitions, *supra* note 8, at 27.

[30] Proposal, Paragraph 35; *see also* 28 C.F.R. §50.7 (establishing the "policy of the Department of Justice to consent to a proposed judgment in an action to enjoin discharges of pollutants into the environment only after or on condition that an opportunity is afforded persons who are not named as parties to the action to comment on the proposed judgment prior to its entry by the court").

market by bringing a halt to RIN trading and causing the value of RINs to drop sharply, possibly near zero.[31] This result would undercut fuel marketers' incentives for incorporating renewable fuel into the fuel supply, which is antithetical to Congress's purpose in enacting the RFS.

The apparent failure of the parties to take into account the dramatic economic penalty that this settlement will impose on individuals who purchased product (that was priced at a level to anticipate a particular RIN cost), blended the product, and sold the finished product at retail at a price level that anticipated their recovery of the incremental cost element (via the sale of the RIN)—is of particular concern to the Associations. Absolving significant obligated parties, such as PES, from their RVOs will (1) reduce the value of all the RINs held by individuals who have actually undertaken activities that accomplish the purpose of the Program and (2) inject an element of moral hazard into the market that will only cause renewable fuels blenders to be less confident that they will recover their costs. This, in turn, will induce them to raise retail prices, which will negatively impact U.S. consumers and the U.S. economy as a whole.

In addition, in contrast to PES's statements about being forced to buy RINs, the refiner actually sold $40 million in RINs in November 2017.[32] Many have suggested that this was an attempt by PES to short the RINs market by betting that prices will fall before PES must square up with the EPA in the coming months of 2018.[33] As such, PES was already trying to damage the RFS program even before it filed for bankruptcy. On top of this, PES reportedly sold massive quantities of RINs in 2016, resulting in the company having a negative balance in that year of $111.4 million.[34] PES thus *raised cash* necessary to satisfy its obligations to its partners (such as the Carlyle Group) by sacrificing its ability to comply with the March 31, 2018 deadline to demonstrate compliance for its carry-over deficit from 2016 and 2017. Rather than being punished for such chicanery, the Proposal would *reward* it, absolving the Carlyle Group and other PES partners from *any* liability, while inviting other companies to consider a similar stratagem.

PES is not, however, the norm. Most parties that operate under the RFS have operated in good faith and have made business decisions that ensure that those companies can comply with their environmental obligations. It is inappropriate and improper, therefore, for the government to approve a Proposal that would pat a company on the back for shirking its responsibilities. Doing so punishes other entities that behaved precisely the way Congress intended for them to behave when it enacted the RFS.

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[31] Tom Kloza, *Verleger: PES Bankruptcy Judge Could Inflict Lehman-Like Moment*, Oil Price Information Service (February 6, 2018).

[32] Jarrett Renshaw and Chris Prentice, *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.

[33] *See, e.g.*, Grassley Memorandum on PES Bankruptcy (Feb. 5, 2018), https://www.grassley.senate.gov/sites/default/files/MEMO%20Grassley%20Analysis%20Finds%20RFS%20Has%20Minimal%20Impact%20on%20Success%20of%20Refineries.pdf.

[34] Jarret Renshaw, *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.

B. The Proposal would reward a bad actor and incentivize further negative behavior.

This Proposal, if approved, would set a terrible precedent in the marketplace and essentially provide a roadmap for other refineries to get rid of their unsecured debt and avoid environmental obligations. Under PES's bankruptcy plan, the company would pay off all general unsecured claims, which specifically *excludes* RIN liability. In this way, PES is intentionally utilizing a bankruptcy proceeding to avoid environmental responsibilities and obligations. A close examination of the available numbers indicates that the Proposal would grant PES relief from approximately seventy percent of its RFS obligations.[35] Moreover, while absolving PES of its prior RVOs, the Proposal would also give the company a head start with regard to compliance with 2018 obligations by allowing it to keep some of the RINs it currently possesses in reserve to pay for its upcoming obligations. This gives PES a competitive advantage over all of its competitors that have been operating in good faith within the confines of the Program's mandates and incentives.

Although PES's plan would ensure that other unsecured creditors are getting 100 cents on the dollar, the Proposal would ensure that the government would only be getting about 30 cents on the dollar. That represents a seventy percent "haircut." Even if a haircut were justified (which it is not in this case), it certainly is not justified at this magnitude—particularly since the Proposal would also absolve PES's parent companies and joint venture partners, none of whom are named debtors in the bankruptcy proceeding, from liability for the company's RVOs.[36] Such a move ignores RFS regulations, which explicitly impose liability on parent companies as well as joint venture partners.[37] It would be nothing short of providing economic benefits obtained through noncompliance with the Agency's regulations.

To allow PES to shirk its environmental obligations completely unsettles and destabilizes the nation's environmental regulatory scheme, which is designed to improve the country's environmental characteristics for all citizens. Such a result is contrary to public policy and one the DOJ should not be endorsing. The legality of permitting a company to utilize a bankruptcy proceeding to avoid statutory and regulatory obligations designed to enhance environmental benefits is also questionable.[38] The Proposal encourages others to pursue similar schemes to avoid compliance with the RFS (and other environmental regulations as well). Indeed, should this Proposal be approved – notwithstanding its gross inadequacy and impropriety – other companies seeking to avoid legal obligations will surely use this case as their roadmap for how to do so.

VI. Conclusion

[35] PES apparently has a minimum of 467 million RIN obligation (number will increase when accounting for 2018 obligations) for 2016 and 2017 RVOs.

[36] These include Philadelphia Energy Solutions LLC, Carlyle PES LLC, The Carlyle Group L.P., and Sunoco Inc.

[37] *See* 40 C.F.R. § 80.1461 (c), (d).

[38] *See e.g.*, *In re Torwico Electronics, Inc.*, (3 F. 3d 146 (3d Cir. 1993)(holding that environmental obligations under state law were not dischargeable).

The Proposal would reward a company that has thumbed its nose at the federal government's long-standing objectives for fuels policy in the United States, punish companies that have spent time and money seeking to help the government achieve those objectives, all the while incentivizing and providing a roadmap for other companies to similarly disregard their environmental obligations. For any number of reasons, the Associations sincerely hope that the Department of Justice will consider such a result inappropriate, inadequate, and improper, and accordingly withdraw from and withhold its consent for the Proposal.

The Associations stand ready to be of assistance to the Department in its consideration of this matter.