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March 22, 2018

Jeffrey H. Wood
Acting Assistant Attorney General
U.S. DOJ – ENRD
P.O. Box 7611
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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 Mr. Wood:

Please find enclosed the comments of Growth Energy on the Proposed Consent Decree and Environmental Settlement Agreement lodged by the Department of Justice with the United States Bankruptcy Court for the District of Delaware in In re PES Holdings LLC, et al., Civil Action No. 18-10122 (Bankr. D. Del.) on March 12, 2018.

Although the comment period does not expire until March 26, 2018, we are submitting these comments now to provide the Department of Justice the maximum amount of time to review. We reserve the right to submit additional or supplemental comments prior to the deadline.

Please not do not hesitate to contact us if you have any questions on these comments. Thank you for considering our comments.

Sincerely,

Emily Skor, CEO
Growth Energy

Enclosure

COMMENTS OF GROWTH ENERGY ON THE PROPOSED CONSENT DECREE AND ENVIRONMENTAL SETTLEMENT AGREEMENT

Growth Energy submits these comments on the Proposed Consent Decree and Environmental Settlement Agreement (the "Proposed Settlement")[1] because the Proposed Settlement would have significant business impacts, extending well beyond these settling parties, to renewable fuels manufacturers and oil refiners who comply with the Renewable Fuels Standard program ("RFS Program"), and broad policy implications for the RFS Program, other EPA fuels regulations, and compliance with environmental law by financially distressed companies. Taking into account all of these important interests, this deal is inappropriate, improper and inadequate, and the Department of Justice should withdraw from and withhold its consent to the Proposed Settlement. The Proposed Settlement is critically flawed in multiple respects, including:

First, it unjustifiably allows PESRM (and the other Debtors) to avoid their environmental obligations, accepting retirement of 138 million Renewable Identification Number ("RIN") credits for the 2016 and 2017 compliance periods and the first quarter of 2018 against a Renewable Volume Obligation ("RVO") of 467 million RINs plus the obligation PESRM incurs in the first quarter of 2018, likely totaling well over 500 million RINs. That is a discount of more than 70 percent.

Second, rather than taking the bare minimum step of requiring PESRM to apply all of what we understand are 210 million currently held RIN credits toward partial compliance with its 2016 and 2017 environmental obligations, the Proposed Settlement allows PESRM to use some of their currently held RINs as credits to their 2018 obligations tied to petroleum refined during the bankruptcy, and to carry an additional

[1] Unless stated otherwise, defined terms used but not otherwise defined in these comments are intended to have the meaning ascribed to them in the Proposed Settlement.

64.6 million RINs forward as further credit toward 2018 compliance. Thus, notwithstanding uncorrected noncompliance for 2016 and 2017, the Proposed Settlement gives PESRM a head start advantage for this year, ahead of competitors who have been complying with the law.

Third, and most importantly, the Proposed Settlement would resolve the RVO liability not only of the Debtors, who have asserted that they lack the financial wherewithal to meet their obligations, *but it would also give a free pass to non-debtor entities who are clearly liable for the RVO obligations*: the Debtors' parent companies and joint venture partners, including Philadelphia Energy Solutions LLC ("PES"), Carlyle PES, LLC, The Carlyle Group L.P. ("Carlyle") and Sunoco, Inc. None of these entities are Debtors in the bankruptcy proceedings. There is no allegation that any are in financial distress; quite to the contrary, Carlyle claims $195 billion in assets. *And each of them is directly liable for the RIN obligations.* The applicable EPA regulations explicitly impose direct liability on parent companies and joint venture partners in order to guarantee compliance in just this type of situation—where the subsidiary asserts it does not have the financial ability to comply. The Proposed Settlement would inexplicably release these non-debtor entities without requiring them to make good on this guarantee.

This Proposed Settlement fails and indeed impedes all of the Department of Justice's recently stated goals of civil environmental law enforcement: to require compliance; remove economic benefits obtained through noncompliance; remedy harm to public health or the environment; and punish and deter violations through civil penalties. This Proposed Settlement would encourage rather than discourage others to pursue similar schemes to avoid compliance with the RFS Program, with similarly structured

EPA fuels regulations, and with environmental laws generally. It would also establish a terrible precedent of allowing bankruptcy to be used to avoid environmental liabilities, even the liabilities of affiliated companies that do not themselves file for bankruptcy.

From all of these perspectives, this is a very bad settlement for the government, for competitors who comply with the law, for manufacturers who have invested in producing renewable fuels that deliver the benefits Congress intended, and for the public interest. Fortunately, just as the EPA renewable fuel regulations protect against subsidiary companies without the assets to comply, the Department of Justice public comment regulations provide an opportunity for the Department to change course before such a misguided settlement can become effective. Growth Energy urges the Department of Justice to avail itself of that opportunity here.

I. BACKGROUND

A. Growth Energy

Growth Energy is a trade association of biofuel producers with its headquarters in Washington, D.C. Growth Energy advocates for policies that protect the environment while increasing the United States' energy independence and creating jobs for U.S. workers.

Growth Energy's members rely on the RFS Program to sell renewable fuels and receive revenue based on the market value of RINs. That market value is substantially impacted by the obligation of refiners to meet their RIN obligations under the RFS Program. Relieving PESRM, the other Debtors, and the non-debtor parent companies and joint venture partners from this obligation would reduce the demand for RINs and renewable fuels, and thus adversely affect the businesses of Growth Energy member companies.

B. The Debtor and Non-Debtor Entities

PES Holdings, together with the other Debtors and non-debtor PES,[2] operate an enormous petroleum refining complex near Philadelphia encompassing the Point Breeze and Girard Point refineries. *See* Disclosure Statement for the Joint Prepackaged Chapter 11 Plan of Reorganization of PES Holdings, LLC and Its Debtor Affiliates, Case No.18-10122, Doc. No. 10 (the "Disclosure Statement"), at 1.

According to the Debtors' filings,[3] PESRM directly owns the refining complex, and PES Holdings owns 99.99% of PESRM. *See* Corporate Organizational Chart (Ex. F to Disclosure Statement), a copy of which is attached hereto as Appendix A. In turn, non-debtor PES owns 100% of PES Holdings. *Id.* Non-debtor Carlyle PES, LLC owns 65.04% of PES, with non-debtor PES Equity Holdings LLC owning 32.52%. *Id.* As described in the companies' security filings, PES is a "joint venture" of The Carlyle Group, L.P. and Sunoco, Inc.[4] *See, e.g.*, Energy Transfer Partners, L.P. Form 10-K For the fiscal year ended Dec. 31, 2017, SEC File Number 1-31219 at 21 ("Our wholly-owned subsidiary, Sunoco, Inc., owns an approximate 33% non-operating interest in PES, a refining joint venture with The Carlyle Group, L.P., which owns a refinery in Philadelphia.").

[2] PES refers to Philadelphia Energy Solutions LLC, a non-debtor defined as the "Parent" under the Plan. *See* Plan Art. I.A.120.

[3] The Plan and Disclosure Statement, along with the other documents filed in the Debtors' Chapter 11 bankruptcy cases (the "Chapter 11 Cases"), are all publically available on the Debtors' claims agent website, available at: www.omnimgt.com/sblite/philadelphiaenergy/.

[4] *See Value Creation*, Carlyle Partners, https://web.archive.org/web/20170702053224/http:/www.carlyle.com/media-room/corporate-videos/philadelphia-energy-solutions-refinery-value-creation (last visited March 22, 2018) (describing PES as a joint venture); *see also* Disclosure Statement, at 15 (providing that the Company was formed in 2012 as a holding company by affiliates of Carlyle and Sunoco).

C. The RFS Program

1. RFS Requirements

Congress enacted the RFS Program, codified at Section 211(o) of the Clean Air Act, 42 U.S.C. § 7545(o), to require transportation fuel sold in the United States to contain a certain minimum volume of renewable fuels. Congress originally enacted the Program in 2005, in the Energy Policy Act of 2005. Pub. L. No. 109-58, § 1501, 119 Stat. 594, 1067-1076 (2005). Congress amended and expanded the Program in the Energy Independence and Security Act of 2007 ("EISA"). Pub. L. No. 110-140, § 1 *et seq.*, 121 Stat. 1492 (2007). By requiring the use of renewable fuels, Congress sought to reduce greenhouse gas ("GHG") emissions, encourage the development of the renewable fuels sector, and reduce the country's reliance on imported oil. *See* S. Rep. No. 110-65, at 2-3 (2007). For a fuel to qualify as a renewable fuel under the RFS Program, the fuel generally must (among other requirements), achieve a reduction in lifecycle GHG emissions (from production through use in motor vehicles) as compared to petroleum fuel.

Congress directed EPA, in Section 211(o)(2) of the Act, to promulgate regulations to ensure that gasoline in the United States, on an annual average basis, contains specified volumes of renewable fuel. 42 U.S.C. § 7545(o)(2)(A)(i). The statute specifies that the regulations shall contain compliance provisions applicable to refineries, blenders, distributors and importers. 42 U.S.C. § 7545(o)(2)(A)(iii)(I). Congress further directed that EPA's regulations must provide for a credit program (without imposing any per-gallon obligation for the use of renewable fuel), such that those who blend gasoline with more than the required renewable fuel earn credits that they may use or sell. § 7545(o)(5). Credits are valid for up to twelve months from the date of generation, and

those entities that are unable to generate or purchase sufficient credits to meet their obligations for any year may carry forward a deficit if they achieve compliance and offset the deficit in the following year. 42 U.S.C. § 7545(o)(5)(C) and (D).

EPA first adopted RFS regulations in 2007, and updated those regulations in 2010 following Congress's amendments to EISA. 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 (March 26, 2010) (codified at 40 C.F.R. § 80.1400 *et seq*.). Under the regulations, refiners are "obligated parties" who must demonstrate that they have satisfied their Renewable Volume Obligation ("RVO") for each annual compliance period, which RVO is calculated as a portion of the overall renewable fuels mandatory volumes apportioned based on the refiner's gasoline and diesel fuel production. 40 C.F.R. §§ 80.1406(a)(1), (b) and 80.1407. The regulations provide that producers of renewable fuels generate RINs to represent the volume of renewable fuels they produce. 40 C.F.R. § 80.1426. RINs are "assigned" to each gallon of renewable fuel when it is produced. *Id*. When the renewable fuel is blended into gasoline, refiners can use the RINs to demonstrate compliance with their RVO (called "retiring" the RINs), or can sell the RINs. 40 C.F.R. §§ 80.1427(a)(1), 80.1428.

The price of RINs is determined in market transactions between RIN sellers and buyers based on supply and demand.[5] The market value of RINs thus also affects the market value of renewable fuels that Growth Energy members manufacture. Refiners are required by March 31 of each year to demonstrate that they have complied with their

[5] *See, e.g.*, Chris Prentice, *Biofuel Credits Surge Ahead of EPA Deadline for 2017 Requirements: Traders*, Reuters (Mar. 20, 2017), https://www.reuters.com/article/us-usa-biofuels-credits/biofuels-credits-surge-ahead-of-epa-deadline-for-2017-requirements-traders-idUSKBN16R2EX.

RVO for the prior calendar year by retiring sufficient RINs. 40 C.F.R. §§ 80.1427 and 80.1451(a)(1). As provided in the statute, a refiner can carry a deficit from one year into the next year, as long as the refiner in the subsequent year complies for both the first and the second years (*i.e.*, does not carry any deficit into a third year). 40 C.F.R. § 80.1427(b).[6]

2. Enforcement of the RFS and Liability

The EPA regulations prohibit any person from failing to acquire sufficient RINs to meet that person's RVO and from failing to meet any requirement that applies to that person under the regulations, or from causing another person to commit a violation. 40 C.F.R. §1460(c)(1), (e), (f). Critically here, EPA's regulations also specify that, in addition to the person committing or causing another person to commit a violation, "any parent corporation is liable for any violation that is committed by any of its subsidiaries," and "each partner to a joint venture is jointly and severally liable for any violation committed by the joint venture operation." 40 C.F.R. § 1461(c) and (d).

Under the Clean Air Act, a person who violates the RFS regulations is subject to injunctive relief "to restrain violations. " 42 U.S.C. § 7545(d)(2). In other words, a court can order a refiner that fails to demonstrate compliance with its RIN obligations to do so. A violator is also subject to civil penalties of up to $46,192 for every day of each violation as well as "the amount of economic benefit or savings resulting from the violation." 42 U.S.C. § 7545(d)(1); 40 C.F.R. § 80.1463(a); *see also* 83 Fed. Reg. 1,190, at 1,193 (Jan. 10, 2018). [7]

[6] *See* EPA, Reporting Deadlines for Fuel Programs, https://www.epa.gov/fuels-registration-reporting-and-compliance-help/reporting-deadlines-fuel-programs (last updated Mar. 27, 2017).

[7] Since the program's inception, EPA has pursued a number of enforcement actions against violators, including a $27 million civil penalty the agency assessed against Chemoil Corporation for its failure to

D. PES Bankruptcy and the Proposed Plan

On January 21, 2018, the Debtors filed the Chapter 11 Cases, and on January 22, 2018, the Debtors filed their Plan and Disclosure Statement. On March 12, 2018, the United States, on behalf of EPA, filed its Notice of Settlement in the Chapter 11 Cases ("Notice of Lodging"), attaching a copy of the Proposed Settlement. On March 16, 2018, the Debtors filed their First Amended Joint Prepackaged Chapter 11 Plan of Reorganization (the "Amended Plan") in the Chapter 11 Cases, which Amended Plan incorporated the Proposed Settlement.

In the bankruptcy filings, the Debtors complain of the oppressive effects of the RFS Program, describing it as "the primary driver behind the Debtors' decision to seek relief under the Bankruptcy Code, " Disclosure Statement, at 1, yet the Debtors' own Disclosure Statement highlights that other factors appear primarily responsible for PESRM's insolvency and that the RIN shortfalls have resulted from their own financial decisions.

The Debtors themselves acknowledge the problems that they encountered with changes in the oil markets and operating challenges, *see id*. at 26-28, and third party analysis has pinned PESRM's problems on factors that are unrelated to the RFS.[8] As explained in the Debtors' Disclosure Statement, PESRM had an RVO of 467 million RINs and held 210 million RINs as of December 31, 2017. Disclosure Statement, Notes

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retire 72.7 million RINs. *See* EPA, Civil Enforcement of the Renewable Fuel Standard Program, https://www.epa.gov/enforcement/civil-enforcement-renewable-fuel-standard-program.

[8] *See* Letter to The Honorable Chuck Grassley from Philip K. Verleger Jr., available at https://www.pkverlegerllc.com/assets/documents/180208GrassleyLetter.pdf (Feb. 8, 2018) (explaining that the financial problems resulted from "1) PES' failed gamble regarding the availability of lower-cost US crude, 2) its refusal to invest in its facility, and 3) competitive pressures in the US East Coast market" and summarizing those findings); *see also* University of Pennsylvania, Kleinman Center for Energy Policy, blog post available at https://kleinmanenergy.upenn.edu/blog/2018/02/04/part-3-philadelphia-energy-solutions-investors-prioritized-stronger-investments (last visited Mar. 22, 2018) (Part 3: Philadelphia Energy Solutions Investors Prioritized Stronger Investments).

to the Liquidation Analysis, n.7. Despite the fact that this compliance issue must have been obvious long before the end of 2017, it has been reported that the Debtors undertook significant transactions in the period leading up to the Chapter 11 filing. First, Reuters reported that PESRM reportedly sold roughly 40 million RINs prior to filing for bankruptcy, apparently reducing its holdings to the 210 million RINs it held at the end of the year.[9] Moreover, PESRM reportedly sold large amounts of credits in 2016, leaving it with a negative balance of $111.4 million in that year, effectively raising cash by risking its ability to comply by the March 31, 2018 deadline to demonstrate compliance for its carry-over deficit from 2016 and for 2017. *Id.*

In addition, the Disclosure Statement explains that the Debtors executed a series of prepetition intercompany transactions, including those by which they made significant payments to non-debtor PES. Disclosure Statement, at 22. These payments (aggregating almost double the cost of the RIN obligation now at issue), included approximately $305 million from PESRM and $311 million from Debtor North Yard Logistics, L.P. ("NYL"). *Id.*

In other words, while the Debtors attempt to pin their financial troubles on the RFS Program, they also acknowledge their own financial missteps and the fact that they transferred substantial amounts of cash to PES in the years leading up to the bankruptcy filing.

E. The Proposed Settlement

On March 12, 2018, the United States lodged in the Bankruptcy Court the

[9] *See* Jarrett 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.

Proposed Settlement with the Debtors to "resolve a dispute about the obligations and liabilities of PESRM and related parties under the Clean Air Act's Renewable Fuels Standard program." Notice of Lodging, at 1. The recitals explain that PESRM contends it is unable to comply with its "Pre-Effective Date" RVOs due to its financial circumstances, and that the United States has reviewed the Debtors' financial information and "determined that PESRM has limited ability to comply with its pre-Effective Date RVOs." *Id*. at 3 and 5. The recitals say nothing about the projected future ability of PESRM or the reorganized company to comply with RVO obligations it incurs Post-Effective Date through its continued operation, or about the ability of PESRM's parent companies and joint venture partners to satisfy pre- or post-bankruptcy RVO obligations, even though these entities appear to receive a release from liability under the settlement as "Covered Entities."

The Pre-Effective Date RVO for which PESRM claims an inability to comply includes (i) the portion of 2016 RVO that it carried over from the 2016 compliance period to 2017 and its RVO for the 2017 compliance period (collectively 467 million RINs), for which the rules require PESRM to demonstrate compliance by March 31, 2018, as well as (ii) the *pro rata* RVO based on PESRM's gasoline and diesel fuel production from January 1, 2018 through the first quarter of 2018. *Id*. at 3. We do not know the amount of that *pro rata* RVO and the United States should disclose it. Nevertheless, one can estimate, based on the 467 million RINs owed for 2017 and a portion of 2016, that the RVO through the first quarter of 2018 will likely be at least 60 million additional RINs, and possibly much more. Accordingly, the total RVO with which PESRM claims it does not have the financial ability to comply for the period is

likely well over 500 million RINs.

Under the Proposed Settlement, PESRM would retire 138 million of its currently held RINs to satisfy all liability with respect to the RVOs for this Pre-Effective Date RVO (including 2016, 2017 and essentially the first quarter of 2018). In other words, the United States would be agreeing that 138 million RINs will satisfy PESRM's obligation of well over 500 million RINs. This amounts to almost 400 million RINs that will not be satisfied, and a discounting of the RIN obligations by over 70%.

Most of the 2018 Pre-Effective Date period was and is *after* the January 21, 2018 bankruptcy filing date, during which PESRM as a debtor-in-possession clearly is obligated to comply with applicable environmental requirements. *Cf.* 28 U.S.C. § 959(b) (debtors-in-possession are required operate their property in compliance with the laws);[10] *see also* 11 U.S.C. 503(b)(1)(D) (post-petition expenses for preserving the estate are administrative expenses). Since the post-petition RIN obligations had to be satisfied under any scenario, and assuming those came to 20 million RINs a month, the RINs effectively being retired for pre-petition refining activities are likely under 100 million—a discounting of close to 80%, if not more.

Moreover, the Proposed Settlement does not require PESRM to use all of what we understand are its currently held 210 million RINs to satisfy its Pre-Effective Date RVO. Rather, the Proposed Settlement provides that PESRM is to retire 64.6 million of these RINs as a credit to satisfy the RVO for the *post-Effective Date portion of 2018*—projected as April 1, 2018 through the end of the year—that the reorganized company will incur. And then the Proposed Settlement allows PESRM to sell what appears to be

[10] *See also In re Wengert Transp., Inc.*, 59 B.R. 226, 231 (Bankr. N.D. Iowa 1986) (section 959(b) requires that a debtor's "rehabilitation must be undertaken in full compliance with all… valid state and federal laws").

the remainder of PESRM's currently held RINs for $2.5 million.

In other words, rather than requiring PESRM to use its 210 million RINs to satisfy as much of its current RVO as possible, the Proposed Settlement will allow PESRM to allocate more than 30 percent of those RINs as a credit toward *future* compliance and to sell some of them for cash. This leads to the unfair result that PESRM, an entity that is facing a multi-hundred million RIN shortfall for prior years, would emerge from bankruptcy not on equivalent footing with its competitors, but with a compliance head start even though these other entities have been steadfastly generating or purchasing RINs the whole time. After allowing PESRM to avoid compliance and use a significant portion of its RINs for future compliance, the Proposed Settlement imposes no civil penalty for noncompliance.

The Proposed Settlement also provides a covenant not to sue "Covered Entities." This covenant not to sue is with respect to the Pre-Effective Date RVO as well as the portion of the 2018 Post-Effective Date RVO covered by the 64.6 million RINs from PESRM's current holdings that would be credited for that *future* portion of 2018. Covered Entities is defined to include, among others, Parent Parties, which we believe encompasses all of the parent companies and joint venture partners above PESRM. This release of parent companies and joint venture partners would be provided notwithstanding that the Proposed Settlement imposes no obligation on them whatsoever, and even though the RFS regulations specify that they are directly liable for the failure of PESRM to comply.

Consistent with the regulatory requirements in 28 C.F.R § 50.7, the Proposed Settlement provides for a public comment period before the settlement can become

effective. Paragraph 35 of the Proposed Settlement provides: "The United States 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."

II. REASONS THE UNITED STATES SHOULD WITHDRAW

The Proposed Settlement is fundamentally flawed and is inappropriate, improper and inadequate. First, it is unreasonable to require PESRM to retire only 138 million of its RINs to satisfy its undisputed legal obligation, especially where it possesses 210 million RINs. It is also unfair to competitors. The Proposed Settlement allows PESRM to sell $2.5 million of its currently held RINs and apply its remaining 64.6 million as a credit toward the reorganized company's RVO for the rest of 2018. In so doing, this would allow PESRM not only to avoid any penalty for substantial noncompliance, but to turn that noncompliance into an advantage over the competition for 2018. At the very least, the United States should require PESRM to apply all of its RINs to satisfy its Pre-Effective Date RVO.

Even more critically, the Proposed Settlement unreasonably releases PESRM's parent companies and joint venture partners from any liability at all without asking anything of them in return, disregarding the plain liability of those entities to guarantee compliance. Even if EPA's financial analysis showed an inability of the Debtors to fund more RINs, surely that analysis, had it been done, would have concluded that the parent companies and joint venture partners could readily comply with the RIN obligations.

The Proposed Settlement would thus undermine the goals and purposes of the RFS Program and the liability regime common to all of EPA's fuel programs, encouraging rather than discouraging similar ploys to avoid compliance.

A. The Proposed Settlement Inappropriately and Improperly Facilitates The Avoiding of Environmental Liabilities

There can be no ambiguity that the Debtors filed for bankruptcy protection as an attempt to avoid their RIN obligations. The Debtors initial Plan filed in the Chapter 11 Cases—which has now been amended to incorporate the Proposed Settlement—was structured as an asset sale to sell the Debtors' assets free and clear of the RIN obligations, but also structured to provide the Debtors could switch to a reorganization if they reached an agreement with the United States on the RIN obligations. In addition, the Plan—both as initially filed and now as amended—proposes to pay General Unsecured Claims in full on "the date due in the ordinary course of business," while the Plan also specifically excludes "RIN Liability" from the definition of "Claim." Plan, Art.II. B.9 and Art. I.A.24. In other words, the terms of the Plan itself—as initially filed and amended—make clear the purpose of the bankruptcy filing was clearly to seek to evade the RIN obligations.

The Proposed Settlement would allow the Debtors (and the Covered Entities), in large part, to do just that, in direct conflicts with applicable law. The law in the Third Circuit is that environmental compliance obligations are not dischargeable claims but obligations that exist in and after bankruptcy. In *In re Torwico Electronics, Inc.,* 8 F.3d 146 (3d Cir. 1993), the court held that obligations imposed under New Jersey state law to clean up a property that the debtor had previously operated were not dischargeable, even though the cleanup would cost money.

That bankruptcy does not vitiate environmental compliance obligations is eminently logical. When Congress creates environmental compliance obligations, it is concerned with physically remediating negative environmental impacts. The RFS is no different than other environmental laws in this respect. When Congress passed the law, it ascertained that the RFS reduces pollution while creating other benefits such for important policy goals, such as energy security, *see* S. Rep. No. 110-65, at 2-3 (2007) (discussing emissions reductions goals of RFS program), and subsequent EPA analyses have corroborated the environmental benefits of the program. For example, EPA projected that the increased use of renewable fuels would have positive impacts on air quality, including by reducing emissions of carbon monoxide, particulate matter, benzene, and acrolein. *See* Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program 75 Fed. Reg. 14,670, 14,802 (Mar. 26, 2010); *see also* 14,764–14,799 (analyzing effects on GHG emissions), 14,799–14,816 (analyzing effects on other tailpipe emissions), and 14,839–14,842 (analyzing benefits to national security).

Therefore, absent the Proposed Settlement, the Debtors and the Covered Entities would not have been able to evade their RFS obligations, and they should not be able to do so under the Proposed Settlement.

B. The Settlement Obligations of PESRM Are Inadequate

PESRM has acknowledged that its RVO for 2016 and 2017 is 467 million RINs. It is not reasonable for the United States to release PESRM, after it retires 138 million RINs, from a remaining RVO obligation for 2016 and 2017 of 329 million RINs, plus whatever additional RVO obligation PESRM will have incurred in 2018 through the April 1 projected Effective Date. The United States should disclose the amount of the RVO incurred to date in 2018 (and projected through the Effective Date), so that

stakeholders might be apprised of the total shortfall in use of renewable fuels resulting from this release.

Based on information available to Growth Energy, the Proposed Settlement represents a release from more than seventy percent of the RVO obligation. PESRM held 210 million RINs as of December 31, 2017 and we understand continues to hold that amount. Rather than requiring PESRM to use the remaining 72 million RINs toward remedying its noncompliance to date, the Proposed Settlement allows PESRM to hold 64.6 million RINs for the benefit of the reorganized company's *future* compliance, and apparently to sell the rest for $2.5 million.

Jeffrey Wood, Acting Assistant Attorney General of the Environment and Natural Resources Division ("ENRD"), recently summarized the pertinent "goals" of civil enforcement cases as follows: "to require violators to come into compliance with the law and take measures to abate ongoing violations; . . . remove economic benefits obtained through noncompliance; remedy harm to public health or the environment; and punish and deter violations through civil penalties." Memorandum from Jeffrey H. Wood, Acting Assistant Attorney General, to ENRD Section Chiefs and Deputy Section Chiefs, at 5-6 (March 12, 2018).

The Proposed Settlement hinders rather than advances these goals. PESRM will not come into compliance; in fact, it will come nowhere near compliance. Nor does the Proposed Settlement remove economic benefits obtained through noncompliance let alone deter noncompliance through penalties. PESRM has itself asserted that compliance with its 2016-2017 RVO would cost it $350 million. By releasing PESRM from more than seventy percent of this RVO, it appears that PESRM will save more than seventy

percent of $350 million, or more than $250 million. This is money that PESRM's competitors are paying to comply. This settlement does not ensure a level playing field; rather it tilts the field markedly in one direction. And the playing field is skewed even further by EPA's proposal to allow PERSM to carry forward the very RINs it should have used for past compliance to the Post-Effective Date time period, meaning that PESRM's law-abiding competitors need to move the ball further than PESRM to show compliance. This is unfair not only to competitors but to the renewable fuels producers who have made investments to supply the renewable fuels that PESRM would be relieved of the obligation to ensure are used.

Finally, the Proposed Settlement will result in harm to the public. The required use of renewable fuels reduces greenhouse gas emissions, reduces emissions of other tailpipe emissions such as carbon monoxide and harmful particulates, and benefits domestic agriculture as well as national energy security. Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program, 75 Fed. Reg. 14,670, at 14,670 (reducing GHG emissions), 14,800 (reducing other tailpipe emissions), 14,766 (benefitting domestic agriculture), and 14,839 (benefitting national energy security) (Mar. 26, 2010).

To be sure, the recitals to the Proposed Settlement state that the United States "has reviewed financial information submitted by Debtors and determined that PESRM has limited ability to comply with its pre-Effective Date RVOs, and PESRM asserts that in the absence of a settlement or ruling against the United States' objections to the Plan, the Debtors would face a risk of liquidation." Proposed Settlement, at 5. In other words, the United States appears to justify vitiating the primary goals of civil enforcement on the

grounds that PESRM simply does not have the financial ability to pay. If this is true, the United States should provide detailed information supporting that contention so that stakeholders and the Court might be able to evaluate its validity.

Moreover, impacted stakeholders would be reasonable in their skepticism that the Proposed Settlement's allowance that PESRM can credit 64.6 million of its currently held RINs toward the *future* RVO of the reorganized company can be justified based on inability to pay. This would require some *future* projection that the reorganized company will not be able comply in 2018 by generating sufficient profit in operating the refinery assets in compliance with regulatory requirements as all other refiners are required to do. The Proposed Settlement references no determination by the United States regarding the ability of PESRM (or the other Debtors) to comply with the environmental laws going forward, such that a credit from its currently held RINs must be allocated toward future rather than past compliance obligations. If the United States has conducted such an analysis and come to that conclusion, it should say so and explain the basis for this allocation.

C. The Proposed Settlement Improperly Releases Parents and Joint Venture Partners

Even if PESRM in fact is unable to do more to meet its RVO, the United States has provided no justification to release the Covered Entities, including the parent companies and joint venture partners, from all liability. The RFS Program regulations, just like virtually all of U.S. EPA's fuels regulations, impose liability on parent companies for violations committed by subsidiaries, and on joint venture partners for violations committed by the joint venture operation, precisely to address the situation where the subsidiary does not have the ability to comply. The parents and joint venture

partners here, such as Carlyle Group, L.P., are sophisticated companies participating in the energy sector that presumably understood the regulatory regime when they made their investment decisions, there is no evidence they are unable to ensure compliance, and they have no grounds to be released from this liability. Yet the Proposed Settlement unreasonably releases them without any commitment from them to comply, setting a terrible precedent not only for the RFS Program but for enforcement of similar requirements in all of EPA's fuels regulations.

The Proposed Settlement also undermines a range of environmental protection laws that impose liability on corporate parents as assurance that public health and the environment will be protected. These legal requirements extend liability beyond a single company in order to protect against the risk that the operating company will fail and the public and the environment will suffer the consequences. Allowing a failing operating company to seek bankruptcy protection and then, as is the case here, bring its parent companies along for the ride in obtaining a shield against liability undermines the regulatory purpose of imposing liability on the parent companies to back-stop the obligation, creating a loophole big enough for a massive oil refinery.

1. The Regulations Provide for Parent Company and Joint Venture Partner Liability

The liability provisions of EPA's RFS regulations are clear:

> (c) Parent corporation liability. ***Any parent corporation*** is liable for any violation of this subpart that is committed by any of its subsidiaries.
>
> (d) Joint venture liability. ***Each partner to a joint venture*** is jointly and severally liable for any violation of this subpart that is committed by the joint venture operation.

40 C.F.R. § 80.1461(c) and (d) (emphasis added).

EPA explained in the RFS rulemaking, in response to comments, that the "the ability to hold a parent corporation liable for violations caused by a subsidiary company is necessary in order to ensure that the goals of the RFS program are met in the event that relief cannot be obtained by the subsidiary company." EPA, 420-R-07-66 , Renewable Fuel Standard Program: Summary and Analysis of Comments 11–19 (April 2007). Furthermore, EPA justified this approach as "consistent with the gasoline sulfur program, the Highway and Nonroad Diesel sulfur programs, and other fuels programs." *Id*.

In fact, EPA has adopted a similar parent and joint venture partner liability regime in virtually all of its regulations implementing requirements for transportation fuels under Section 211 the Clean Air Act. 42 U.S.C. § 7545.[11] In a program like the RFS, where a refiner is not required to use or acquire renewable fuels on an ongoing basis but instead can defer such action for more than two calendar years and then purchase RIN credits to demonstrate compliance, there can be is a significant risk of default. The regulations adopt a form of financial assurance requiring parent companies and joint venture partners to stand behind the compliance obligation of the operating subsidiary. The situation presented here, where the Debtors claim they do not have the financial resources to comply but have parent corporations and joint venture partner entities with substantial resources, is precisely the type of situation that EPA intended its liability regime to address.

There is no serious question that all parent companies, including the ultimate parent, are subject to this liability. Any argument that the liability is limited to direct

[11] *See* 40 C.F.R. Subpart D and § 80.87(b)(3) and (4) (reformulated gasoline requirements), 40 C.F.R. Subpart H and § 80.395(a)(11) and (12) (gasoline sulfur requirements), 40 C.F.R. Subpart I and § 80.612(5) and (6) (diesel sulfur requirements), 40 C.F.R. Subpart J and § 80.1015(a)(3) (gasoline toxics requirements), 40 C.F.R. Subpart L and § 80.1360(a)(3) and (4) (gasoline benzene requirements), 40 C.F.R. Subpart O and § 80.1662(a)(12) and (13) (additional gasoline sulfur requirements).

parents, but not those further up the corporate structure, is simply not tenable. Limiting this liability to a direct parent holding company with no assets would make a mockery of EPA's purposes in imposing such liability. In the context of rulemaking for EPA's programs, EPA explained that the Agency defines "parent company" broadly as "any company (or companies) with controlling ownership interest, and a subsidiary of a company as any company in which the refiner or its parent(s) has a controlling ownership interest." Control of Hazardous Air Pollutants from Mobile Sources; Final Rule, 72 Fed. Reg. 8,428, 8,490 (Feb. 26, 2007) (the "Benzene Rule"). The use of "any" in both the liability regulations ("any parent company"), and the preamble explanation ("any company (or companies)"), signals EPA's intention not to limit liability to the single, direct parent, which is of course easily circumvented with intermediate holding companies. More explicitly, in the preamble to the proposed benzene rule, EPA recognized that "[i]n many cases, there are likely to be multiple layers of parent companies, with the ultimate parent being the one for which no one else has controlling interest." Control of Hazardous Air Pollutants from Mobile Sources; Proposed Rulemaking, 71 Fed. Reg. 15,804, 15,878 (Mar. 29, 2006) (the "Benzene Proposal"). EPA clarified that in such cases, "all parent companies, and all subsidiaries of all parent companies, [will] be taken into consideration when evaluating compliance." *Id*.

This approach is also consistent with other EPA definitions and general corporate law. *See* 40 C.F.R. § 704.3 (EPA definition of "parent company" in regulations under the Toxic Substances Control Act (TSCA) to mean "a company that owns or controls another company); Reporting and Recordkeeping Requirements; Small Manufacturer Exemption Standards; Final Rule, 49 Fed. Reg. 45,425, 45,426 (Nov. 16, 1984) (explaining TSCA

parent definition to include a company that "has the power to control the management and policies of the other company"); *see also Weinstein Enters, Inc. v. Orloff*, 870 A.2d 499, 507 (Del. 2005) ("[i]n the context of imposing fiduciary responsibilities, it is well established in the corporate jurisprudence of Delaware that control exists when a stockholder owns, directly or indirectly, more than half of a corporation's voting power.") (citations omitted).

There is no basis to release the Covered Entities, and all of the parent companies and joint venture partners should remain liable. As explained in the Debtors' Disclosure Statement, Carlyle PES, LLC holds a sixty-five percent interest in PES. *See* Corporate Organizational Chart (Ex. F to Disclosure Statement), attached hereto as Appendix A. Carlyle PES is part of The Carlyle Group, L.P. *See* Philadelphia Energy Solutions Inc. Amendment No. 7 to Form S-1, July 27, 2015, Registration No. 333-202119 at 259. PES Equity Holdings, LLC, a wholly-owned subsidiary of Energy Transfer Partners, L.P., *see* Philadelphia Energy Solutions Inc. Amendment No. 7 to Form S-1, July 27, 2015, Registration No. 333-202119 at 16, owns thirty-two percent of PES, and senior management owns the remaining two percent. *See* Corporate Organizational Chart (Ex. F to Disclosure Statement), attached hereto as Appendix A. PES wholly owns all of the Debtor entities, including PESRM. Accordingly, none of these non-debtor entities should be released under the Proposed Settlement. Indeed, the following chart attached as Appendix B shows that, upon information and belief, four managing directors at The Carlyle Group (Rodney Cohen, David Albert, David Marchick and David Stonehill) control the board of PES, serving with two executive members and one member from Sunoco. These are the same members as serve on the boards of PES Holdings, LLC and

PESRM (except that Joseph Colella, from Sunoco, is not believed to be on the board of PES).

Finally, the companies themselves, including Energy Transfer Partners, L.P., have repeatedly characterized their relationship as joint venture partners with respect to this refinery operation. The most recent annual report filed with the SEC by Energy Transfer Partners, L.P. is explicit that Carlyle and Sunoco are joint venture partners and even describes Carlyle as owning the refinery:

> Our wholly-owned subsidiary, Sunoco, Inc., owns an approximate 33% non-operating interest in PES, ***a refining joint venture with The Carlyle Group, L.P.*, which owns a refinery in Philadelphia**.

Energy Transfer Partners, L.P. Form 10-K For the fiscal year ended Dec. 31, 2017, SEC File Number 1-31219 at 21 (emphasis added). *See also* Philadelphia Energy Solutions Inc. Amendment No. 7 to Form S-1, July 27, 2015, Registration No. 333-202119 at 18 (emphasis added) (withdrawn on Sept. 13, 2016 due to decision not to pursue public offering) ("PES LLC is a ***joint venture originally formed among Carlyle, PES Equity (as successor-in-interest to Sunoco)*** and members of our management to own and operate the Philadelphia refining complex and the North Yard terminal.") (emphasis added); Sunoco Logistics Partners L.P. Form 10-K For the fiscal year ended Dec. 31, 2012, SEC file number 1-312219 at 45 ("In September 2012, Sunoco contributed the refining assets of its Philadelphia refinery to Philadelphia Energy Solutions ("PES"), ***a joint venture between The Carlyle Group and Sunoco***, which enabled the Philadelphia refinery to continue operating.") (emphasis added).[12]

[12] *See also Value Creation*, Carlyle Partners, https://web.archive.org/web/20170702053224/http://www.carlyle.com/media-room/corporate-videos/philadelphia-energy-solutions-refinery-value-creation (last visited March 22, 2018) (Brian P. MacDonald, CEO, Chairman and President, Sunoco, describing Carlyle as a partner in the PES project).

2. Non-Debtor Parent Entities and Joint Venture Partners Would Not Be Entitled to a Bankruptcy Release

The United States cannot justify the release of the parent companies and joint venture partners in the Proposed Settlement on the grounds that they might have gotten such a release anyway from the Bankruptcy Court. While the Debtors' Plan purports to provide for broad release and discharge provisions for non-debtor third parties, absent the Proposed Settlement, the non-debtor parent entities and joint venture partners would not be entitled to a release of their RFS liability. The government routinely negotiates carve-out language from third-party release provisions. *See, e.g.*, Transcript of Hearing on First Day Motions at 44, *In re PES Holdings, LLC*, No. 18-10122 (KG) (Bankr. D. Del. Jan. 23, 2018) (Counsel for the government, noting that the "discharge provisions in the plan are very way overbroad… Fortunately, we've been able to negotiate resolutions with Kirkland & Ellis in many, many other cases, and we're very hopeful we can do so here."); *see also* Objection by the United States, Civil Division Department of Justice, to the Debtors' Disclosure Statement and Plan, Docket No. 272, filed on Mar. 20, 2018 (the "United States Civil Division Objection"), at 12-13, and 20 (seeking carve-out language and providing that "the United States opts out of and objects to the third party non-debtor limitation of liability, injunction and exculpation and release provisions" in the Plan); *see also* United States Trustee's Objection to the Plan, Docket No. 261, filed on Mar. 19, 2018, at 7-9 (the "UST Objection") (objecting to the Plan's release provisions).

The recitals to the Proposed Settlement specify that, in the absence of the settlement, "the United States, on behalf of EPA, would have objected to the confirmation of the Plan, *inter alia*, based on the EPA's belief that the Plan failed to provide for compliance with the Debtors' Pre-Effective Date RVOs and failed to properly

harmonize bankruptcy and environmental law." Proposed Settlement at 3. The Proposed Settlement does not resolve these concerns, and the United States should object to confirmation of the Plan under these circumstances, which objection the Court would be required to grant.

The mere fact that the Debtors sought in the proposed Plan to provide for non-debtor third-party release and discharge provisions does not provide grounds to release the Covered Entities. Case law in the Third Circuit provides ample precedent for the United States to have objected to the release and discharge provisions, including on the basis that the Bankruptcy Court lacks constitutional jurisdiction to approve third-party release provisions and that the provisions violate applicable law.

i. The Bankruptcy Court Lacks Constitutional Jurisdiction to Approve Non-Debtor Release Provisions

The Bankruptcy Court lacks constitutional authority to determine EPA's authority to enforce the RFS obligations against the non-debtor parent and joint venture entities. Article III of the Constitution limits the Bankruptcy Court's power as an Article I tribunal, at least absent consent (which here the United States should not provide), to enter judgment disposing of claims that are based on non-bankruptcy substantive law and not made against the debtor itself. *See Stern v. Marshall*, 564 U.S. 462, 503 (2011) (holding that the "Bankruptcy Court below lacked the constitutional authority to enter a final judgment on a state law counterclaim that is not resolved in the process of ruling on a creditor's proof of claim"); *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1939 (2015) ("[R]ecently in *Stern*, this Court held that Congress violated Article III by authorizing bankruptcy judges to decide certain claims for which litigants are constitutionally entitled to an Article III adjudication."); *Executive Benefits Ins. Agency v.*

Arkison, 134 S. Ct. 2165, 2172 (2014) (same).

Stern's principles apply directly, and the United States could have objected to the release and discharge provisions—indeed, such objections were raised in the United States Civil Division Objection—so they are not a basis for the release of the Covered Entities in the Proposed Settlement. The obligations of the non-debtor parent and joint venture entities are based on congressionally mandated RIN obligations, do not "stem from the bankruptcy itself," and rather arise under non-bankruptcy federal law, specifically the Clean Air Act and EPA's RFS regulations. Accordingly, "the responsibility for deciding" these environmental obligations "rests with Article III judges in Article III courts," and that responsibility cannot be wrested from an Article III Court and given to a non-Article III tribunal by an Act of Congress. *Stern*, 564 U.S. at 484; s*ee also In re NEC Holdings Corp.*, No. 10–11890 PJW, 2011 WL 1740414, at *2 (Bankr. D. Del. May 4, 2011), *as amended* (May 18, 2011) (environmental claims did not qualify as "core" under 28 U.S.C. § 157(b)(2)(A)). It is therefore clear that, as in *Stern*, entry of a final order by the bankruptcy court that conclusively disposes of (by releasing without their consent), environmental claims to enforce obligations against non-debtor parties would constitute an improper exercise of the "judicial power of the United States" in violation of Article III.[13]

[13] In *Opt-Out Lenders v. Millennium Lab Holdings II, LLC (In re Millennium Lab Holdings II, LLC)*, 242 F.Supp.3d 322, 328 (D. Del. 2017), the District Court stated that "*Stern* made clear the limitation on a Bankruptcy Court's authority to enter a final order on a non-core claim for which the claimant has a constitutional right to adjudication by an Article III court." While on remand, the bankruptcy court in that case did hold it had constitutional authority to approve a nonconsensual third-party release, we believe that case is not determinative. *First*, the bankruptcy court decision is currently on appeal. *See* Civ. No. 17-1461-LPS (D. Del. 2017). *Second*, in that case, the court found that the objecting party waived its right to contest the court's constitutional adjudicatory authority, which, if EPA elects to object and not consent to the release of the Covered Entities in the Proposed Settlement or the court's constitutional adjudicatory authority, would be inapplicable here. *In re Millennium Lab Holdings II, LLC*, 575 B.R. 252, 288-95 (Bankr. D. Del. 2017).

The United States had no obligation to consent to the releases, and instead of entering into the Proposed Settlement, the United States should object to the third party release and discharge provisions in the Plan and seek to hold the parent corporations and joint venture partners liable for the RFS Program violations, which is precisely what the RFS regulations provide for and allow.

ii. A Release Would Violate Applicable Law

In addition, absent the United States' consent, any release of the non-debtor parent entities and joint venture partners would be impermissible and contravene applicable Third Circuit law and environmental regulations. Particularly here, where the environmental regulations provide explicitly for direct liability of the non-debtor parent and joint venture companies, there is no justification for a release. The enforcement of the distinct liability against the "Covered Entities" is entirely independent of the business rational for the bankruptcy reorganization. Whether they have such separate, clear and direct liability to ensure compliance with the Pre-Effective Date RVOs of PESRM by acquiring and retiring the requisite RINs has nothing to do with the rationale for reorganizing PESRM as an ongoing enterprise. A release of that liability is neither fair nor relevant, less alone necessary, for the success of the Plan.

Bankruptcy Courts in Delaware have previously held that they do not have the power to grant a non-debtor third-party release absent consent of the releasing party (either by contract or a mechanism of voting in favor of the plan). *See, e.g.*, *In re Abeinsa Holding, Inc.*, 562 B.R. 265, 285 (Bankr. D. Del. 2016) ("The third-party release in this Plan is designed to apply only to parties who affirmatively consent and, thus, is fair and equitable."); *In re Washington Mutual, Inc.*, 442 B.R. 314, 351-52 (Bankr. D.

Del. 2011) (finding non-debtor third-party releases impermissible absent affirmative agreement of the affected party); *In re Spansion Inc.*, 426 B.R. 114, 145 (Bankr. D. Del. 2010) ("Courts have determined that a third party release may be included in a plan if the release is consensual and binds only those creditors voting in favor of the plan."); *In re Coram Healthcare Corp.*, 315 B.R. 321, 335 (Bankr. D. Del. 2004) ("Trustee (and the Court) do not have the power to grant a release of the Noteholders on behalf of third parties."); *In re Exide Techs.*, 303 B.R. 48, 71-74 (Bankr. D. Del. 2003) (approving non-debtor third-party releases because they only bound creditors and equityholders who had accepted the terms of the plan); *In re Zenith Elecs. Corp.*, 241 B.R. 92, 111 (Bankr. D. Del. 1999) (requiring debtors to modify a non-debtor third-party release to only bind creditors who voted in favor of the plan). *See also In re SunEdison, Inc.*, 576 B.R. 453, 464 (Bankr. S.D.N.Y. 2017) (requiring debtors to modify a release because non-voting creditors cannot be deemed to consent to a third-party release).

For example, in *Washington Mutual*, certain parties objected to confirmation of the debtors' proposed plan, arguing that non-debtor third-party releases could only be accomplished with the affirmative agreement of the affected party. 442 B.R. at 351. The bankruptcy court agreed, stating that the Third Circuit has recognized that third-party releases "are the exception, not the rule," and holding that it did "not have the power to grant a third party release of a non-debtor. Rather, any such release must be based on consent of the releasing party (by contract or the mechanism of voting in favor of the plan)." *Id.* at 351–352 (citations omitted).

A non-consensual third party release provision in a Plan is nothing more than an end-run around section 524 of the Bankruptcy Code. *See* 11 U.S. 524(e) ("discharge of a

debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt"). While certain courts in the Third Circuit have permitted nonconsensual non-debtor third-party releases if they meet the standard of fairness and necessity to the reorganization, and the court makes specific factual findings to support these conclusions, those cases are inapplicable here, where the RFS regulations specifically provide for non-debtor liability. Indeed, as provided for in the United States Civil Division Objection "[w]hile the Third Circuit stopped short of adopting a *per se* rule that a non-debtor release in a reorganization plan is not permissible (as other circuits have done), it held that, *at most*, such a provision could be valid in "extraordinary" cases." *See* United States Civil Division Objection, at 20 (internal citations omitted) (emphasis added).

Here, the environmental regulations specifically impose liability on parent corporations and partners to a joint venture for any violation committed by a subsidiary or the joint venture operation, *see* 40 C.F.R. § 1461(c) and (d), and there is no basis to release the parent corporations and joint ventures partner. Such a release was not essential to the reorganization and it was not essential to the survival of the refinery. All the release would do is give the Covered Entities a free pass they have no entitlement to, and in so doing run roughshod over just about every fundamental environmental enforcement principle the Department and ENRD had articulated. There is no basis for the EPA to provide the release of Covered Entities in the Proposed Settlement, and the United States, on behalf of the EPA, should object to the release of non-debtor entities.

D. The Proposed Settlement's Compliance Provisions are Inadequate

The Proposed Settlement is also deficient in protecting against non-compliance with the terms of the settlement itself. This is of particular concern in this situation, where PESRM has been operating for more than two years while incurring an RVO obligation that it now claims it cannot satisfy when due on March 31, 2018.

First, the specified stipulated penalties in Paragraph 18 of the Proposed Settlement are inadequate, falling short of the penalties that would apply pursuant to the Clean Air Act. Although the penalty for failure to comply with the RINs retirement requirements (after five days at $10,000 per day) is the inflation-adjusted amount specified in the Clean Air Act of $46,192, the statute specifies that this is in addition to "the amount of economic benefit or savings resulting from the violation." 42 U.S.C. § 7545(d)(1). Where the RVO obligation and thus the RINs retirement requirements could cost a hundred million dollars (or more), a daily penalty of $46,192 is 0.046 percent of the compliance cost, and the $10,000 per day stipulated penalty for the first five days is in the range of 0.01 percent of a that amount. It is essential that the stipulated penalty provision create a real deterrent to noncompliance. The stipulated penalty in the Proposed Settlement does not accomplish such deterrence, and should either be much higher or include the amount of economic benefit resulting from the violation.

Second, just as the RFS regulations themselves impose direct liability on parent companies and joint venture partners in order to assure and guarantee compliance, the Proposed Settlement should clearly specify that those entities in control of PESRM going forward are responsible for meeting the RIN requirements on a going forward basis. In a situation where the Debtors are avoiding these liabilities because they say they do not have the financial resources to comply, it is certainly reasonable and in the public interest

for EPA to ensure that it does not again find itself in the same position in the future, with the reorganized company making the same plea.

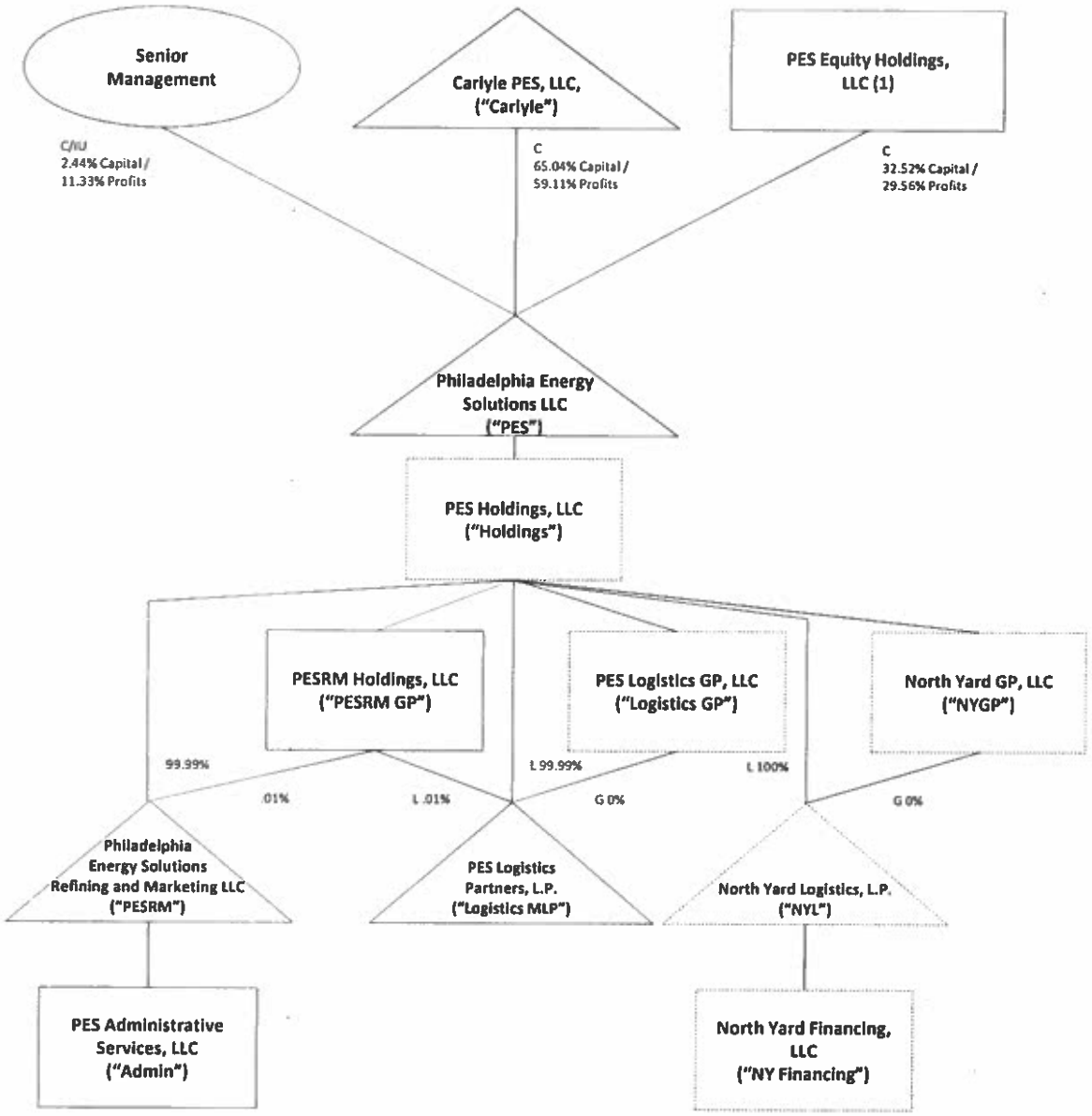
III. CONCLUSION

If the fundamental goal of environmental enforcement is to require compliance with the environmental laws, what possible justification could there be for the Department of Justice to enter into a settlement that allows massive non-compliance? The only justification offered so far is the Debtors' financial distress, and even that is not explained with any detail. However, even accepting that justification, it cannot conceivably apply to non-debtors, who are not in distress and not part of the bankruptcy process.

Nor can the Department point to the potential litigation risk that EPA would face in pursuing claims against non-debtors to justify a 70-80% reduction in the scope of compliance, when: (i) the applicable regulations clearly impose liability on parents and joint venture partners; (ii) multiple non-debtors entities, including Carlyle entities, fall within one or both of those categories; and (iii) as other components of the Department of Justice have argued in this very case, there would be no basis for non-debtors to obtain a non-consensual release from the Bankruptcy Court. Any litigation risk is small, and cannot justify such unprecedented levels of non-compliance.

The Proposed Settlement is inappropriate, improper and inadequate, and we urge the Department of Justice to withdraw from it and insist instead on full compliance.

APPENDIX A



— = ownership
⬚ = disregarded entity for U.S. federal income tax purposes
△ = partnership of U.S. federal income tax purposes
▭ = corporation for U.S. federal income tax purposes
┈ = indebtedness
G = general partner
L = limited partner
C = common units
S = subordinated units
IDRs = incentive distribution rights
C = Common Units
IU = Incentive Units

(1) PES Equity Holdings, LLC is a subsidiary of Energy Transfer Partners, L.P.

APPENDIX B

Philadelphia Energy Solutions, LLC Board[1]	**PES Holdings, LLC Board**[2]	**Philadelphia Energy Solutions Refining & Marketing LLC (PESRM) Board**[3]
John B. McShane *Executive Vice President, General Counsel, Secretary*	John B. McShane *Executive Vice President, General Counsel, Secretary*	John B. McShane *Secretary*
Gregory Gatta *CEO*	Gregory Gatta *Manager*	Gregory Gatta *Manager*
Rodney Cohen *Manager*	Rodney Cohen *Manager*	Rodney Cohen *Manager*
David Albert *Manager*	David Albert *Manager*	David Albert *Manager*
David Marchick *Manager*	David Marchick *Manager*	David Marchick *Manager*
David Stonehill *Manager*	David Stonehill *Manager*	David Stonehill *Manager*
Robert W. Owens *Manager*	Robert W. Owens *Manager*	Robert W. Owens *Manager*
	Joseph Colella *Manager*	Joseph Colella *Manager*

	The Carlyle Group (see below)
	Sunoco (see below)

[1] Information on the board composition is from the PES LLC website (*see* http://pes-companies.com/sitemap/).
[2] Information on the board composition is from PES Holdings bankruptcy petition, the petition is available on the website of the Debtors' claim agent at www.omnimgt.com/sblite/philadelphiaenergy/.
[3] Information on the board composition is from PESRM bankruptcy petition, the petition is available on the website of the Debtors' claim agent at www.omnimgt.com/sblite/philadelphiaenergy/

The Carlyle Group[4]	**Sunoco, Inc.**[5]	**Sunoco Logistics Partners L.P.**[6]
Rodney Cohen *Managing Director and Co-Head (Carlyle Growth Partners and Equity Opportunity Fund)*	Robert W. Owens *Former President & CEO, Consultant*	Joseph Colella *Senior Vice President of Business Development*
David Albert *Managing Director, Portfolio Manager and Co-Head (Energy Mezzanine Opportunities Fund)*		
David Marchick *Managing Director, Global Head of External Affairs, Management Committee Member*		
David Stonehill *Managing Director (Equity Opportunity Fund)*		

[4] Information on Carlyle individuals obtained from The Carlyle Group website (*see* https://www.carlyle.com/about-carlyle/team).

[5] Sunoco, Inc. is a subsidiary of Energy Transfer Partners, L.P. Upon information and belief, Roberts Owens was Senior Vice President of Marketing at Sunoco, Inc. from 2001 to 2012 and was President and CEO from 2012 until his retirement in 2017; he now serves as a Consultant to the company. Information on Robert Owens obtained from S&P Capital IQ and www.bloomberg.com.

[6] Sunoco Logistics Partners L.P. is a subsidiary of Energy Transfer Partners, L.P. Information on Joseph Colella obtained from http://analysis.petchem-update.com/supply-chain-logistics/sunoco-logistics-eyes-market-gains-northeast-pipeline-terminal-expansions and https://www.linkedin.com/in/joseph-colella-76ab3793/.