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**Re: Comments of the National Biodiesel Board, Growth Energy, and the Renewable Fuels Association on the Consent Decree and Environmental Settlement Agreement *In re: PES Holdings, LLC***

Dear Mr. Sands,

The National Biodiesel Board (“NBB”), Growth Energy, and the Renewable Fuels Association (“RFA”) appreciate the opportunity to provide comment to the Department of Justice on the Consent Decree and Environmental Settlement Agreement in *In re PES Holdings LLC*, No. 19-11626 (Bankr. D. Del.) (“Settlement Agreement”).

We urge the Department of Justice and EPA to reconsider their Settlement Agreement that allows PES Holdings LLC and the other debtors (collectively, “PES”) to escape the vast majority of their obligations under the Renewable Fuel Standard (“RFS”) as determined by the Consent Decree and Environmental Settlement Agreement (“2018 Consent Decree”).

PES failed to meet its renewable identification numbers (“RINs”) Retirement Obligation of approximately 154 million RINs to satisfy its RVOs for the period of January 1, 2019 through June 30, 2019 pursuant to the 2018 Consent Decree. Despite the explosion and pending bankruptcy, PES continued to produce gasoline and diesel fuel from crude oil, triggering additional RINs Retirement Obligations under the 2018 Consent Decree and the CAA and the RFS Regulations. Unfortunately, the Settlement Agreement erases PES’s responsibility for RIN compliance and places the burden onto the biofuels producers to bear the impacts of PES’s inability to meet its RFS obligations.

As NBB, Growth Energy, and RFA stated in our comments in response to the 2018 Consent Decree, the Government does not need to enter (or now reduce the RIN obligations in) a settlement that rewards the deliberate decision of PES and its parent companies to ignore the requirements of the RFS.

PES’s bankruptcy was the result of decisions that placed it in a poor position to deal with changes in the U.S. oil market. To the extent PES cannot meet the 2018 Consent Decree, it is because it deliberately chose not to invest in blending equipment and then ensured through dividends and other expenditures that it lacked the funds to purchase RFS credits.

Renewable Volume Obligations (“RVOs”) are not dischargeable in bankruptcy. As the Settlement Agreement acknowledges, PES’ obligation to retire RINs does not meet the definition of a “claim” in bankruptcy. Instead, RVOs are the type of non-monetary environmental compliance obligations that can continue to be enforced despite bankruptcy proceedings. RVOs can be satisfied only through performance, as the 2018 Consent Decree acknowledges, yet the Government continues to discount the settlement allowing PES to escape the majority of their RIN obligation. Refiners such as PES can meet their RFS obligations by: (1) blending or otherwise using biofuels or (2) purchasing RINs from another company that has blended or used biofuels. *See* 40 C.F.R. § 80.1400 *et seq.*

Moreover, parent companies are liable under the RFS for any failure of their subsidiaries or affiliates to meet their RVOs. 40 CFR 80.1461(c). PES is a joint venture owned by the Carlyle Group, LLC (“Carlyle”) and Sunoco, Inc. (“Sunoco”), both of which are large, solvent corporations. Those companies easily could have met PES’s obligations, but the Government chose not to require them to do so.

The Government therefore does not need to further discount a settlement agreement that already let PES and its parent companies out of their RIN obligations for pennies on the dollar. We ask that EPA continue to require PES to comply in full with the 2018 Consent Decree and not factor in events outside of RFS compliance that led to their bankruptcy. PES’ RVO liabilities should not be discounted any more than they already have been in the 2018 Consent Decree, which already relieved PES of more than 70 percent of its RFS compliance obligations for 2016-2017.

The lesson that PES and others will learn from this bankruptcy is that they can fail to comply with the RFS and then settle millions of dollars of RIN obligations. To discourage such behavior in the future, EPA must hold PES to its RIN obligations *and* impose penalties that would remove any economic benefit to PES from its failure to comply *and* impose substantial additional penalties to create a sufficient deterrent.

The Settlement Agreement is an unnecessary concession to PES that sets a dangerous precedent that will encourage other refiners to neglect their RFS obligations and then seek to reduce them through a settlement. If the Government finalizes the Settlement Agreement in its current form, it will severely injure the members of NBB, Growth Energy, and RFA, along with other renewable fuel producers. It would also hurt farmers across the country and everyone who is employed in the renewable fuel supply chain.

The precedent that the Settlement Agreement sets will have an even more detrimental impact than the original 2018 Consent Decree. If PES is allowed to receive such a sizeable discount, even though it disregarded its obligations and *sold* RINs prior to bankruptcy, other refiners will look to do the same. Refiners that are in financial distress for any reason can attempt to blame it on the RFS and significantly reduce their RFS compliance costs through a settlement with the Government in a bankruptcy proceeding. Refiners could even follow PES’s model to *create* financial distress through poor management or excessive dividends if they can hope to receive the same treatment that PES does in the Settlement Agreement. And the impact of the Settlement Agreement would not necessarily be limited to the RFS—it could incentivize companies to use bankruptcy filings to escape their regulatory obligations under the Clean Air Act, the Clean Water Act, the Resource Conservation and Recovery Act, and other environmental statutes.

The Settlement Agreement would significantly harm all producers of biofuels and the harm would not stop there. A reduction in the RIN market and corresponding reductions in renewable fuel production would harm the farmers who produce soybeans, corn, animal products, and other feedstocks, as well as all of the employees in the renewable fuel production supply chain.

NBB, Growth Energy, and RFA request that the Department of Justice withdraw the Settlement Agreement that reduces the RIN Retirement Obligations from \$35 million to \$10 million as it is inappropriate, improper, and inadequate.

Sincerely,

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