

United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

WASHINGTON, DC 20510-6175

February 27, 2020

The Honorable Donald J. Trump
President of the United States
The White House
Washington, D.C. 20500

Dear President Trump:

We are deeply concerned about a recent decision by a three-judge panel of the U.S. Court of Appeals for the Tenth Circuit, invalidating hardship relief for three small refineries under the Renewable Fuel Standard (RFS).¹ If allowed to stand, the decision will put a dozen small refineries in the Tenth Circuit under severe financial strain and thousands of jobs at risk. If applied nationally, it will jeopardize nearly all small refineries. More widely, the decision will dramatically increase RFS compliance costs for refineries of all sizes and raise gasoline prices for American drivers. We urge you, in the strongest terms, to file a petition for rehearing *en banc* and, if necessary, seek review by the U.S. Supreme Court. We also urge you to oppose pending efforts asking the D.C. Circuit to apply the Tenth Circuit's decision nationally.²

In granting standing to a biofuels coalition, the three-judge panel found that the coalition was harmed by EPA's decisions to grant relief to two small refineries for 2016 and one small refinery for 2017. We find this inconsistent with the facts and legal precedent. Data from the Energy Information Administration shows that ethanol blending rates have remained steady or increased since 2016. Last September, Administrator Wheeler testified that "[e]thanol demand has not been impacted by the small refinery program."³ We note that, in 2018, a federal bankruptcy court rejected standing for a biofuel coalition alleging harm from EPA's decision to forgo retiring 426 million compliance credits (or RINs) for a large refinery.⁴ That is over triple the amount of relief that EPA granted the three small refineries at issue in the recent Tenth Circuit decision.

On the merits, the three-judge panel held that if a small refinery has not received hardship relief each year since 2006, it is no longer eligible to receive hardship relief. The ruling all but ignores the plain text of the Clean Air Act, which states that a small refinery may apply for hardship relief "at any time."⁵ It also conflicts with the position of the EPA over Democrat and Republican administrations – namely, that a small refinery is eligible for hardship relief whether or not it received relief in the prior year.⁶ The ruling is also at odds with a decision from the U.S. Court of Appeals for the Fourth Circuit, which implicitly acknowledged that small refineries are eligible to receive hardship relief whether or not they had received relief each year since 2006.⁷

¹ *Renewable Fuels Association et al. v. EPA et al.*, No. 18-9533 (10th Cir. Jan. 24, 2020).

² *Renewable Fuels Association et al. v. EPA*, No. 19-1220 (D.C. Circuit).

³ *Science and Technology at the Environmental Protection Agency*: Hearing Before H. Comm. on Science, Space, and Technology (Sept. 19, 2019) (statement of Andrew Wheeler, Admin. of the Environmental Protection Agency).

⁴ *In Re PES Holdings, LLC*, No. 18-10122 (Bankr. D. Del., Apr. 4, 2018).

⁵ 42 U.S.C. 7545(o)(9)(B)(i).

⁶ 40 C.F.R. § 80.1441(e)(2)(iii); 79 Fed. Reg. 42,128, 42,152 (July 18, 2014).

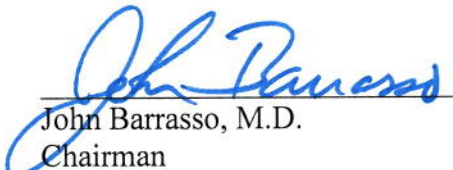
⁷ *Ergon-West Virginia Inc. v. EPA*, 896 F.3d. 600, 607 (4th Cir. 2018) (In its analysis of EPA's denial of hardship relief to Ergon for 2016, the Fourth Circuit discussed that EPA had denied Ergon relief for 2014 and 2015.)

We note that, in a prior case, the Tenth Circuit did not even inquire whether a small refinery had received relief each year since 2006, suggesting the question was irrelevant.⁸

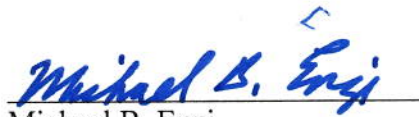
As Administrator Wheeler put it, the Tenth Circuit's decision "has the potential of completely changing the small refinery program."⁹ If allowed to stand and applied or adopted nationwide, it is believed that only two small refineries would still be eligible for hardship relief, putting tens of thousands of jobs at dozens of ineligible small refineries at risk. Since the decision, the price of RFS compliance credits (or RINs) has already tripled. If your administration does not appeal the decision, RIN prices will increase exponentially. Higher RIN prices will inevitably mean higher gasoline prices for American families and businesses. We trust that you share our view that higher fuel prices and fewer jobs are the last thing the American public or economy need.


Thank you in advance for your consideration.

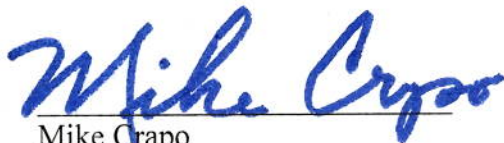
Sincerely,


John Barrasso, M.D.
Chairman
U.S. Senate Committee on
Environment and Public Works



James E. Risch
United States Senator


Michael B. Enzi
United States Senator


James M. Inhofe
United States Senator

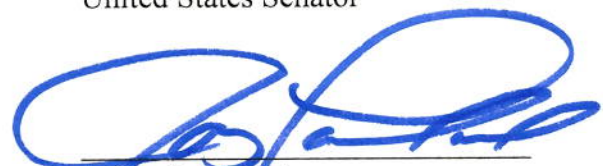

Mike Crapo
United States Senator


Shelley Moore Capito
United States Senator


Steve Daines
United States Senator


John Kennedy
United States Senator


Mike Lee
United States Senator


James Lankford
United States Senator

⁸ *Sinclair Wyo. Ref. Co. v. EPA*, 887 F.3d 986 (10th Cir. 2017). Notably, Judge Lucero participated in both cases.

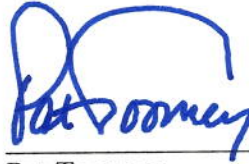
⁹ Interview with Andrew Wheeler, Administrator of the Environmental Protection Agency (Feb. 8, 2020), <http://energy.agwired.com/2020/02/08/wheeler-court-decision-could-change-small-refinery-program/>.



Ted Cruz
United States Senator



Roger F. Wicker
United States Senator



Pat Toomey
United States Senator

Cc:

William Barr, Attorney General

Jeffrey Clark, Assistant Attorney General, Environment and Natural Resources Division

Andrew Wheeler, Administrator, Environmental Protection Agency

Dan Brouillette, Secretary of Energy