

JUN 25 2019

Carla Shaw
Carla Shaw

PERKINScoie

700 13th Street, NW
Suite 600
Washington, D.C. 20005-3960

T +1.202.654.6200
F +1.202.654.6211
PerkinsCoe.com

June 25, 2019

Jonathan G. Hardin
Partner
JHardin@perkinscoie.com
D. +1.202.654.6297
F. +1.202.654.9983

VIA MESSENGER

Hon. Andrew R. Wheeler
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue N.W.
Washington, D.C. 20460

Re: Notice of Intent to Sue Under 42 U.S.C. § 7604(a)(2) for Failure to Perform Non-Discretionary Duty to Act on Ergon-West Virginia's Petitions for a Small Refinery Hardship Exemption from the Renewable Fuel Standard for the 2016, 2017, and 2018 Compliance Years

Dear Administrator Wheeler:

We are counsel for Ergon-West Virginia, Inc. ("EWV"), and we write regarding its petitions for an exemption from the Renewable Fuel Standard for the 2016, 2017, and 2018 compliance years based on disproportionate economic hardship under Section 211(o)(9)(B) of the Clean Air Act, 42 U.S.C. § 7545(o)(9)(B). All three of these small refinery hardship petitions are still pending before the agency. This letter, sent on behalf of EWV, provides notice of EWV's intent to commence a civil action against the Administrator pursuant to 42 U.S.C. § 7604(a)(2) for failure to perform a nondiscretionary act or duty.

The Clean Air Act states that "[t]he Administrator shall act on any petition submitted by a small refinery for a hardship exemption not later than 90 days after the date of receipt of the petition." 42 U.S.C. § 7545(o)(9)(B)(iii); accord 40 C.F.R. § 80.1441(e)(2)(ii) ("The Administrator shall act on such a petition not later than 90 days after the date of receipt of the petition."). As a result, the Administrator's duty to act on EWV's petitions within the specified timeframe is not discretionary. The Administrator has not issued a decision on any of EWV's pending petitions, even though the deadline for acting on each petition has long passed. The Administrator's failure to act on EWV's petitions "constitute[s] a failure to perform such [nondiscretionary] act or duty." 40 C.F.R. § 54.3(a).

EWV's small refinery hardship petition for the 2016 compliance year was the subject of litigation in *Ergon-West Virginia, Inc. v. EPA*, 896 F.3d 600 (4th Cir. 2018). In a decision published on July 20, 2018, the U.S. Court of Appeals for the Fourth Circuit unanimously held that EPA's denial of EWV's petition was arbitrary and capricious. *Id.* at 601. The court vacated EPA's decision and remanded the petition to the agency "for further proceedings consistent with this opinion." *Id.* at

Hon. Andrew R. Wheeler
June 25, 2019
Page 2

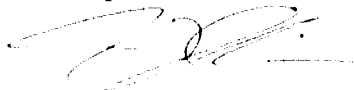
614. The mandate issued and formally terminated the Fourth Circuit's jurisdiction on September 11, 2018. Therefore, the deadline for the Administrator to act on EWV's 2016 petition lapsed by no later than December 10, 2018.

EWV submitted its small refinery hardship petitions for the 2017 and 2018 compliance years on December 14, 2017, and December 21, 2018, respectively. The deadlines for the Administrator to act on EWV's 2017 and 2018 petitions therefore lapsed on or around March 14, 2018, and March 21, 2019, respectively.

EWV intends to sue the Administrator in federal court 60 days after delivery of this letter to "order the Administrator to perform" a nondiscretionary duty. 42 U.S.C. § 7604(a); *id.* § 7604(b)(2). The full name and address of the person providing this notice of intent to file suit on EWV's behalf is Jonathan Grant Hardin, Perkins Coie LLP, 700 13th Street N.W., Suite 600, Washington, D.C., 20005-3960. *See* 40 C.F.R. § 54.3(a).

We hope EPA will decide EWV's 2016, 2017, and 2018 small refinery hardship petitions as soon as possible, such that it will be unnecessary to commence litigation to compel the Administrator to act on those petitions.

Sincerely,



Jonathan G. Hardin

cc (by email): LeAnn Johnson Koch, Esq.
Perkins Coie LLP

Kirk A. Latson
Ergon, Inc.

J. Kevin Watson, Esq.
Watson Heidelberg Jones, PLLC

Patrick R. Jacobi, Esq.
U.S. Department of Justice