

## **Perkins Coie Team Achieves Massive Fifth Circuit Victory for Small Refineries Over EPA Concerning Renewable Fuel Standard**

**WASHINGTON, D.C. (November 30, 2023)** – A Perkins Coie team secured an enormous legal victory over the U.S. Environmental Protection Agency (EPA) before the United States Court of Appeals for the Fifth Circuit for a group of small petroleum refineries with respect to the agency's Renewable Fuel Standard (RFS).

The refineries had sought hardship relief from the RFS administered by EPA under the Clean Air Act. But in a series of sweeping administrative decisions in 2022, EPA essentially eliminated hardship relief for all small refineries. Many of those refineries operate in rural areas with smaller margins, and they provide significant high-paying jobs in their communities. EPA's actions were a direct threat to these refineries' continued operations. Along with eliminating hardship relief, EPA took the position that the refineries could not challenge the hardship denials in their regional circuit courts of appeals, as had been done in the past, because these new EPA actions were purportedly "nationwide" in scope and thus needed to be challenged only in the D.C. Circuit.

The Perkins Coie team challenged both EPA's new interpretation and its attempt at forum shopping, and the team continued to bring challenges on behalf of small refineries denied hardship relief by EPA in the regional circuits. EPA told each of those circuits that the petitions for review must be dismissed or transferred to the D.C. Circuit, and some courts agreed to transfer without any reasoning.

But the Perkins Coie team convinced the Fifth, Eleventh, and D.C. Circuit Circuits to issue stays of EPA's decisions, and it convinced the regional circuits to hear argument on the venue issue alongside the question whether EPA's decisions were contrary to law. While the Eleventh and D.C. Circuits' cases remain pending, on November 22 a Fifth Circuit panel agreed with the firm's arguments across the board, in a stinging rebuke of the EPA's actions. The Court concluded that EPA was wrong in arguing that the challengers could not bring their petitions for review in their regional circuit, and that EPA had acted contrary to law when it denied six small refineries' hardship petitions years after they were submitted by relying on a new statutory interpretation and a new economic theory. The EPA decisions vacated by the Fifth Circuit would have required these small refineries collectively to expend more than one billion dollars on already out-of-date compliance credits with no corresponding environmental benefit.

Writing for the majority, U.S. Circuit Judge Jerry E. Smith held that EPA's decision was "impermissibly retroactive," contrary to law, and "counter to the record evidence." EPA acted unreasonably when it retroactively applied a new adjudicative methodology that harshly penalized refineries "for their good-faith and justified reliance on the agency's prior approach." In addition, the agency adopted a "misguided" approach to the key statutory criterion for hardship relief: whether the refinery would experience "disproportionate economic hardship" from RFS compliance. And EPA impermissibly denied hardship relief based on a new economic theory—that *all* small refineries, no matter their individual circumstances, can fully "passthrough" their compliance costs under the RFS program—that the Fifth Circuit rejected as "implausible" and "contrary to the evidence."

The court vacated the EPA decisions denying hardship relief and remanded for new decisions that comply with the law.

The Fifth Circuit case was successfully argued by the co-leader of Perkins Coie's [Appeals, Issues & Strategy](#) practice, partner [Michael Huston](#). The firm team also included partners [LeAnn Johnson Koch](#), [Alexandra Bromer](#), and [Jonathan Hardin](#), counsel [Sopen Shah](#), associates [Karl Worsham](#) and [Aimee Ford](#), and paralegal Sheri Pais.

The Perkins Coie legal team represented Calumet Shreveport Refining, The San Antonio Refinery LLC, Ergon Refining Inc., Ergon-West Virginia Inc., and Placid Refining Co. LLC before the Fifth Circuit. The firm is also currently representing numerous other small refineries in similar actions pending before the U.S. Courts of Appeals for the Eleventh and D.C. Circuits.

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