No. 04-1763

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

ENVIRONMENTAL DEFENSE; NORTH CAROLINA SIERRA CLUB;
NORTH CAROLINA PUBLIC INTEREST RESEARCH GROUP,
Plaintiff-Intervenor-Appellants,

v.

DUKE ENERGY CORPORATION,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES' PETITION FOR PANEL REHEARING AND PETITION FOR REHEARING EN BANC

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The United States petitions for panel rehearing and rehearing en banc in this action to enforce the requirements of the Prevention of Significant Deterioration ("PSD") program under the Clean Air Act ("CAA") at eight Duke Energy Corporation ("Duke") power plant facilities in North and South Carolina. The panel held that the Environmental Protection Agency ("EPA") must interpret the statutory term "modification" consistently in PSD and the separate New Source Performance Standards ("NSPS") program. United States v. Duke Energy Corp., No. 04-1763 (4th Cir. June 15, 2005) (to be published at 411 F.3d 539). The panel thus ruled that EPA must interpret the PSD regulations at issue so that a project can be a "modification," and thus trigger PSD requirements, only if it increases the hourly rate at which a unit potentially could emit pollutants — rather than, per the plain language and EPA's interpretation of the PSD regulations, if the project would increase the total amount the unit would actually emit per year.

The panel's ruling is incorrect as a matter of statutory interpretation. Furthermore, it improperly intrudes on the authority of the D.C. Circuit, the court charged by Congress with review of nationally applicable CAA regulations. Indeed, nine days after the panel ruled, that court held that the CAA requires the use of actual emissions to measure emissions increases under PSD. New York v. EPA, No. 02-1387 (D.C. Cir. June 24, 2005).

The United States accordingly petitions for panel rehearing and rehearing en banc. First, under Fourth Circuit Rule 40(b), panel rehearing is appropriate because the panel overlooked material legal matters and because changes in the law occurred after the case was submitted — namely, the D.C. Circuit issued its decision. Second, under Federal Rule of Appellate Procedure 35(b)(1), rehearing en banc is appropriate

because the proceeding involves questions of exceptional importance: whether EPA must interpret every component term in the statutory term "modification" identically in the PSD and NSPS programs or instead has authority to exercise its rulemaking discretion to effectuate the different purposes for which Congress enacted each program; and whether the panel exceeded this Court's authority by improperly invalidating portions of the PSD regulations.

BACKGROUND

PSD requirements apply when certain types of facilities are constructed, with the term "construction" being statutorily defined to include "modification (as defined in [42 U.S.C. 7411(a)])." 42 U.S.C. 7475(a), 7479(2)(C). The cross-referenced definition of "modification" appears in the part of the CAA establishing the separate, pre-existing NSPS program. Thus, for both PSD and NSPS, the statutory definition of "modification" is "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." 42 U.S.C. 7411(a)(4).

EPA has issued regulations that interpret component terms within this statutory definition differently for the two programs. This appeal concerns how to measure whether a change "increases" emissions and thus constitutes a modification. NSPS regulations consider a change's effect on maximum hourly emission rates (measured in kilograms per hour), while the PSD regulations consider total annual emissions (tons per year).[1/] Compare 40 C.F.R. 60.14(b) (1975) (NSPS) with 40 C.F.R.

[1/] The PSD regulations applicable to most of the projects at issue were (continued...)

51.166(b)(2), (3), (21), (23) (1987) (PSD). Thus, under PSD but not NSPS, EPA's longstanding position has been that a change that will lead to an increase in a unit's hours of operation without changing the hourly emissions rate can be a modification.

This historic difference in regulatory approach reflects the different statutory purposes of the two programs. The NSPS program, enacted in 1970, directs EPA to promulgate technology-based performance standards for new or modified facilities in certain categories. 42 U.S.C. 7411. These standards are based on application of the best demonstrated system of emission reduction and apply regardless of the actual effect of a source's emissions on local air quality. Id. In contrast, Congress enacted PSD in 1977 to prevent a significant decline of air quality in areas where ambient air quality standards were being met. 42 U.S.C. 7470; see Ala. Power v. Costle, 636 F.2d 323, 346–51 (D.C. Cir. 1979). Thus, the PSD program focuses directly on the effect of new construction and modification on local air quality. 42 U.S.C. 7475(a)(3). Indeed, Congress enacted PSD to regulate sources that might contribute to the significant degradation of local air quality despite NSPS and other CAA provisions. 42 U.S.C. 7470(1); see Ala. Power, 636 F.2d at 346–51.

In December 2000, the United States sued Duke for its failure to comply with PSD requirements in conducting twenty-nine refurbishment projects at its power plants. App. 49–126. Three private groups intervened as plaintiffs. App. 153.

[1/](...continued)
promulgated in 1980 and recodified in 1987. 45 Fed. Reg. 52,676 (1980); 40 C.F.R. 51.166 (1987). Some projects are subject to regulations from 1992, 57 Fed. Reg. 32,314 (1992), but the differences are not material here. EPA issued new PSD rules in 2002 and 2003 that continue to focus on total annual emissions, not maximum hourly emission rates. 67 Fed. Reg. 80,186 (2002); 68 Fed. Reg. 61,248 (2003).

On cross-motions for summary judgment, the district court issued an opinion adopting legal standards to govern further proceedings. United States v. Duke Energy, 278 F. Supp. 2d 619 (M.D.N.C. 2003). Of note here, the court held that PSD applies only when a unit's maximum hourly emission rate increases, whether or not total annual emissions increase. Id. at 640–49. The court's analysis was driven largely by the conclusion that Congress in 1977 incorporated then-existing NSPS regulations into the statutory definition of "modification" for PSD. Id. at 642–43 & n.20; see id. at 631–32. To permit immediate appeal, the United States and the plaintiff-intervenors stipulated that they did not contend that Duke's projects resulted in increases in maximum hourly emission rates, only in hours of operation. App. 1405–06. The district court thus entered final judgment for Duke. App. 1412–19.

On June 15, 2005, this Court affirmed. The panel did not rule upon the district court's "incorporation" theory. Instead, it held that Congress' decision to define "modification" in PSD by reference to NSPS required EPA to interpret the statutory term identically in the two programs: "When Congress mandates that two provisions of a single statutory scheme define a term identically, the agency charged with administering the statutory scheme cannot interpret these identical definitions differently." Slip op. at 12–13. The panel concluded that its statutory analysis was dictated by a Supreme Court decision in the tax context, Rowan Cos. v. United States, 452 U.S. 247 (1981). Slip op. at 13–15. The panel reasoned that it was not invalidating the PSD regulations but rather merely mandating one particular interpretation thereof. Id. at 15 n.7. Finally, the panel ruled that absent further rulemaking EPA must interpret the PSD regulatory definition of "modification" to require an increase in a unit's maximum hourly emission rate. Id. at 18–19. Because

the United States and the plaintiff-intervenors had stipulated that they did not so contend with regard to Duke's projects, the panel affirmed. Id.

On June 24, 2005, the D.C. Circuit issued an opinion reviewing both the PSD regulations at issue here and later PSD regulations. It rejected the argument that Congress incorporated the 1977 NSPS regulatory definition of "modification" into the PSD statutory provisions while finding that the petitioners there had waived the separate argument that Congress required that EPA interpret the term identically in the two programs. New York v. EPA, slip op. at 24–26. Later in its opinion, however, the D.C. Circuit held that "the CAA unambiguously defines 'increases' in terms of actual emissions" and that "the plain language of the CAA indicates that Congress intended to apply [New Source Review ("NSR")[2/]] to changes that increase actual emissions instead of potential or allowable emissions." Id. at 61–64.

DISCUSSION

I. CONGRESS HAS NOT MANDATED THAT EPA INTERPRET COMPONENT TERMS OF "MODIFICATION" IDENTICALLY FOR THE SEPARATE PSD AND NSPS PROGRAMS.

A. The Panel's Chevron Analysis Was in Error.

As an initial matter, the panel inaccurately defined the precise question at issue in applying the first step of the Chevron analysis. It stated that the question was whether the term "modification" must be construed identically in PSD and NSPS. Slip op. at 12. In fact, both sets of regulations define "modification" largely by repeating the statutory definition. 40 C.F.R. 51.166(b)(2)(i) (1987); 40 C.F.R. 60.14(a) (1975). The precise question at issue is whether a particular component term

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[2/] NSR is the program that includes PSD, which applies in areas that attain national ambient air quality standards, and similar requirements for other areas.

within that definition — namely, "increases the amount of any air pollutant emitted," 42 U.S.C. 7411(a)(4) — must be construed identically in the two contexts.

The holding that Congress has required that each component term within "modification" be interpreted identically in PSD and NSPS is unfounded. A term found in different provisions in a single statute need not necessarily be interpreted consistently. See, e.g., Gen. Dynamics Land Sys. v. Cline, 540 U.S. 581, 595–97 (2004). Indeed, this Court and others have already held that EPA can interpret terms common to the PSD and NSPS statutory provisions differently to effectuate the two programs' different purposes. E.g., PEPCo v. EPA, 650 F.2d 509, 517 n.2, 518 (4th Cir. 1981); Ala. Power, 636 F.2d at 397–98.

The panel found this principle inapplicable because "Congress' decision to create identical statutory definitions of the term 'modification' has affirmatively mandated that this term be interpreted identically in the two programs." Slip op. at 18. That is, the panel found significant that Congress incorporated a whole definition rather than just using the same word in different places. That distinction is unpersuasive: the cross-reference simply means that many of the same words appear in both PSD and NSPS statutory provisions without being further defined by Congress. Cf. New York v. EPA, slip op. at 24 ("So far as appears, then, these incorporations by reference are the equivalent of Congress's having simply repeated in the NSR context the definitional language used before in the NSPS context."). At the least, it is possible that Congress intended to use one statutory definition while recognizing that EPA might interpret ambiguous component terms to suit the particular purposes of the two programs (subject, of course, to judicial review at the second step of the Chevron analysis).

Indeed, contrary to the panel's analysis, precedent indicates that EPA can interpret component terms within the statutory term "modification" differently in PSD and NSPS. The panel faulted the United States for not "cit[ing] a single case in which any court has held that identical statutory definitions can be interpreted differently by the agency charged with enforcement of the statute," slip op. at 18, but the United States did cite this Court's decision in PEPCo and the D.C. Circuit's seminal opinion in Alabama Power. Both addressed the statutory term "stationary source" and confirmed that EPA can interpret that term differently in PSD and NSPS. PEPCo, 650 F.2d at 518; Ala. Power, 636 F.2d at 395–98.

The panel did not address Alabama Power and distinguished PEPCo on the ground that the term "stationary source" is defined in the NSPS provisions but not in the PSD provisions. Slip op. at 17. As this Court recognized in PEPCo, however, the D.C. Circuit held that the NSPS statutory definition of that term "controlled" for PSD — in part because of the very cross-reference on which the panel relied — yet it also held that EPA may interpret component terms within that definition differently under the two programs. PEPCo, 650 F.2d at 517 n.2; Alabama Power, 636 F.2d at 395–98; see also id. at 400–02 (allowing different emissions "increase" tests in PSD and NSPS). Moreover, the term "stationary source" is itself a component term in the statutory definition of "modification," just like the term "increases the amount of any air pollutant" at issue in this case. 42 U.S.C. 7411(a)(4). Under the panel's reasoning, Congress has mandated that EPA interpret all such component terms identically in PSD and NSPS. The contrary conclusion of the courts in PEPCo and Alabama Power indicates that the panel's reasoning is incorrect.

B. The Panel's Reliance on Rowan Was Misplaced.

Contrary to the panel's conclusion, the Supreme Court's decision in Rowan does not stand for the proposition that Congress' use of similar language in two statutory provisions alone requires an agency to interpret those provisions in an identical manner. Slip. op. at 13–15. To the contrary, the Rowan Court's reasoning suggests that identical statutory definitions are merely the starting point of the analysis. The Court traced the history of the statutory definition of the term "wages" in the Federal Insurance Contributions Act ("FICA"), the Federal Unemployment Tax Act ("FUTA"), and a tax withholding statute and found that the statutory definitions were "substantially the same." 452 U.S. at 255. That consistency was "strong evidence that Congress intended 'wages' to mean the same thing" in each statute. Id. Rather than end its analysis there, however, the Court proceeded to consider the legislative history of the statutes. It found that the legislative history indicated "a congressional concern for 'the interest of simplicity and ease of administration'" and that Congress chose to address that concern by using the same "wages" definition for withholding as in FICA and FUTA. Id. Indeed, a Senate Report explicitly linked interpretation of the different provisions. Id. The legislative history thus was an essential part of the Rowan Court's analysis. Cf. United States v. Cleveland Indians Baseball, 532 U.S. 200, 212–16 (2001) (finding no need for identical interpretation of statutory term "wages paid" in FICA, FUTA, and separate benefits provision).

The legislative history in this case is completely different. Congress expressed no intent that ambiguous statutory terms common to PSD and NSPS should be interpreted identically when it adopted the technical amendment defining

"construction" under PSD to include "modification (as defined in [42 U.S.C. 7411(a)])." 42 U.S.C. 7479(2). The panel stated:

> the expressed intent in the congressional summary of the legislative amendments to "conform" the definition of modification in the PSD provisions "to usage in other parts of the Act," 123 Cong. Rec. 36,253 (Nov. 1, 1977), indicates congressional concern with the same sort of simplicity and consistency that the Rowan Court discerned * * * .

Slip op. at 15. The cited legislative history actually states in whole that the amendment in question "[i]mplements conference agreement to cover 'modification' as well as 'construction' by defining 'construction' in [PSD] to conform to usage in other parts of the Act." 123 Cong. Rec. 36,253, 36,331 (1977) (emphasis added), available at 1977 U.S.C.C.A.N. 3665. Congress' evident purpose was not to conform the definition of modification in PSD to that in NSPS, but rather that to ensure that modifications be subject to PSD in the first place. Indeed, after considering this same legislative history, the D.C. Circuit concluded:

> the phrases "usage" [in the legislative history] and "used in" [in 42 U.S.C. 7501(4), an analogue to 42 U.S.C. 7479(2) elsewhere in the NSR provisions] refer not to regulatory usage, but only to usage in the statute itself. They tell us no more than if Congress had used a little more ink and repeated the NSPS definitions verbatim.

New York v. EPA, slip op. at 25; see also Ala. Power, 636 F.2d at 396.

II. THIS COURT LACKS JURISDICTION IN THIS CASE TO HOLD THAT EPA MUST INTERPRET THE STATUTORY TERM "MODIFICATION" IDENTICALLY UNDER NSPS AND PSD.

A. This Court Lacks Jurisdiction to Invalidate Nationally Applicable CAA Regulations in This Enforcement Action.

Congress directed that petitions for review of nationally applicable CAA regulations may be filed only in the D.C. Circuit, and only within 60 days of their promulgation. 42 U.S.C. 7607(b). This provision's purpose is to promote the "even

and consistent national application" of such regulations. S. Rep. No. 91-1196, at 40–41 (1970); see Tug Valley Recovery Ctr. v. Watt, 703 F.2d 796, 799 n.3 (4th Cir. 1983); Dayton Power & Light Co. v. EPA, 520 F.2d 703, 707 (6th Cir. 1975); NRDC v. EPA, 512 F.2d 1351, 1354, 1356–57 (D.C. Cir. 1975). In particular, Congress specified that "[a]ction of the Administrator with respect to which review could have been obtained [in the D.C. Circuit in a proper petition for review] shall not be subject to judicial review in civil or criminal proceedings for enforcement." 42 U.S.C. 7607(b)(2). This Court thus has held that it lacks jurisdiction to rule upon arguments that "may be read as challenging not only the EPA's interpretation of its regulations but also the regulations themselves." PEPCo, 650 F.2d at 513; see Monongahela Power Co. v. Reilly, 980 F.2d 272, 275 (4th Cir. 1993); cf. 1000 Friends of Md. v. Browner, 265 F.3d 216, 224 n.6 (4th Cir. 2001) (noting, but not resolving, tension between D.C. Circuit conclusion in Texas Municipal Power Agency v. EPA, 89 F.3d 858 (D.C. Cir. 1996), that 60-day limit but not choice of courts is jurisdictional and this Court's treatment of choice of courts as jurisdictional). Given that this action is an enforcement action, was not filed in the D.C. Circuit, and began well more than 60 days after the PSD regulations in question were promulgated, this Court does not have jurisdiction in this case to review the regulations.

B. The Tension Between the Panel's Adoption of a Test Based on Potential Emissions and the D.C. Circuit's Recent Holding that the Statute Requires an Actual Emissions Test Demonstrates That the Panel Exceeded This Court's Jurisdiction.

After acknowledging that it could not review the validity of the PSD regulations at issue, the panel concluded that it was merely mandating one possible interpretation of these regulations. Slip op. at 15 n.7. The D.C. Circuit in New York

v. EPA held nine days later, however, that the statutory language mandates a contrary interpretation. This is precisely the type of outcome that 42 U.S.C. 7607(b) was enacted to prevent.

The panel adopted an approach under which an activity can be a modification only if it increases a unit's potential emissions (because it increases the maximum hourly emissions rate), regardless of whether actual emissions will increase (because, for instance, the activity will lead to longer hours of operation). Slip op. at 18–19; see App. 1415 (awarding final judgment based on stipulations regarding potential emissions). Soon thereafter, in considering petitions for review of these and other PSD regulations, the D.C. Circuit indicated that such an approach is inconsistent with the statutory language. To be sure, the D.C. Circuit found that the precise argument on which the panel based its decision had been waived and thus "express[ed] no opinion as to whether Congress intended to require that EPA use identical regulatory definitions of modification across the NSPS and NSR programs."[3/] New York v. EPA, slip op. at 26. In another portion of its opinion, however, the D.C. Circuit held that "the CAA unambiguously defines 'increases' in terms of actual emissions" and that "the plain language of the CAA indicates that Congress intended to apply NSR to changes that increase actual emissions instead of potential or allowable emissions."[4/] Id. at 61–64 (emphasis added).

3/ The D.C. Circuit rejected the separate argument that the parties briefed here — namely, that Congress in 1977 intended to incorporate then-existing NSPS regulatory provisions into the PSD program. New York v. EPA, slip op. at 24–26.

4/ The D.C. Circuit so held over EPA's contrary view that the statutory language is ambiguous, in that it leaves to EPA to decide both the baseline from which the (continued...)

The tension between the two decisions demonstrates that the panel exceeded this Court's jurisdiction. Again, Congress directed that review of nationally applicable CAA regulations should be sought in timely-filed petitions for review in the D.C. Circuit precisely to avoid such a result.

C. The Panel's Statutory Holding Improperly Invalidates Portions of the Regulations.

Furthermore, requiring EPA to interpret the PSD regulations to adopt the NSPS test for measuring emissions increases is inconsistent with the plain text of the regulations and thus is not "interpretation" at all, but rather invalidation. The PSD regulations on their face require a comparison of total annual emissions before and after the project, not merely a comparison of maximum hourly emission rates. The regulations refer to "[a]ny increase in actual emissions" and incorporate a tons-per-year standard of measurement. 40 C.F.R. 51.166(b)(2)(i), (3), (21) (1987). PSD is different in this critical respect from NSPS, which employs an "emission rate" test with a kilograms-per-hour standard rather than tons-per-year. 40 C.F.R. 60.14(b) (1975). The difference reflects the difference between the two programs' purposes.[5/] See supra pages 2–3.

[4/](...continued)
"increase" should be measured and the method of measuring increases. New York v. EPA, slip op. at 62. Since the time for EPA and other parties to file petitions for rehearing in New York v. EPA has not run, that decision is not yet final. To give the D.C. Circuit an opportunity to rule on any filed petitions, this Court in its discretion may decline to rule on this petition for rehearing until after proceedings in New York v. EPA are complete.

[5/] Of course, there are instances when having similar or identical provisions in the two regulatory regimes would be appropriate, and EPA retains the discretion to determine when such an approach is appropriate.

Nevertheless, the panel in a footnote concluded that the PSD regulations could be interpreted to adopt an hourly rate test as in NSPS. Slip op. at 15 n.7. The panel did not explain how its position could be reconciled with the regulatory text, though it noted that the district court had attempted to do so and described that court's reasoning.[6] Id. at 10, 15 n.7. That reasoning was, however, inconsistent with the regulatory language. The district court largely ignored the applicable part of the PSD regulations and reached its conclusion based on a misreading of an inapplicable part, known as the "increased hours" exclusion. 278 F. Supp. 2d at 640–41. Under that exclusion, "[a] physical change or change in the method of operation shall not include" an "increase in the hours of operation or in the production rate." 40 C.F.R. 51.166(b)(2), (iii) (1987). Based on a misunderstanding of that provision, the court thought the regulations could be read to say that an emissions increase traceable to increased hours of operations cannot trigger the PSD provisions.

This analysis is incorrect. The "modification" test has two steps. First, a source must determine whether a physical or operational change will occur. 40 C.F.R. 51.166(b)(2)(i) (1987). Second, if so, the source must determine whether the change will result in a significant net emissions increase. Id. By its explicit terms, the "increased hours" exclusion applies at the first step of the analysis, not the second step — that is, it affects whether something is a "change," not how to calculate emissions increases. Id. 51.166(b)(2)(iii)(f). The fact that the regulations exclude

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[6] The panel also noted that "EPA's Director of the Division of Stationary Source Enforcement twice opined" that the PSD regulations could be interpreted to adopt an hourly rate test, slip op. at 16 n.7, but the documents in question — two letters written by an inferior EPA official in 1981 — contained no analysis of the regulatory language and in fact were inconsistent with that language. App. 234–35, 242–43.

certain increases in the hours of operation from the definition of "change" does not imply that such increases, when caused by a physical change, are irrelevant at the second step of the analysis. Rather, the exclusion merely indicates that an increase in hours of operation will not itself be considered a "change" for PSD purposes. E.g., Puerto Rican Cement v. EPA, 889 F.2d 292, 298 (1st Cir. 1989); WEPCo v. Reilly, 893 F.2d 901, 916 n.11 (7th Cir. 1990); United States v. Ohio Edison, 276 F. Supp. 2d 829, 876 (S.D. Ohio 2003).

III. THIS APPEAL MERITS REHEARING EN BANC.

The United States respectfully submits that this Court should grant this petition and rule that the CAA does not require EPA to interpret every component term within the statutory term "modification" identically under PSD and NSPS. As indicated by the involvement of numerous amici curiae including sixteen states and the District of Columbia in this appeal, PSD is the focus of intense interest. The panel's holding has serious consequences for EPA's ability to maintain a consistent and fair regulatory scheme. In particular, the decision undermines critical aspects of the PSD rules for "modifications" within this Circuit; changes the rules under which industry within this Circuit will compete against those elsewhere; and creates substantial confusion among the regulated community, EPA and state regulators, and the courts as to the reach and application of PSD at sources in this Circuit. The panel's analysis may also be applied in other statutory contexts.

Alternatively, this Court should rule that it lacks jurisdiction to issue holdings that, like the panel's holding, call into question portions of nationally applicable CAA regulations. Given the complicated scientific, technical, economic, and public health concerns that EPA must consider, implementing the statute on a nationwide basis is

a complex process whose predictability relies in large part on the finality of the D.C. Circuit's rulings in timely-filed petitions for review. If other courts were to invalidate regulations while hearing enforcement actions, EPA's administration of the CAA would be thrown into disarray. By ruling either that the Court lacks jurisdiction to rule as the panel did or that EPA has authority to interpret component terms within the statutory definition of "modification" differently for PSD and NSPS to effectuate each program's purposes, this Court should resolve the tension between the panel's decision and the D.C. Circuit's decision and honor Congress' intent to ensure the uniform application of PSD regulations nationwide.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court grant this petition for panel rehearing and rehearing en banc, vacate the panel's decision, and reverse and remand for the reasons stated in the United States' briefs.

Respectfully submitted,

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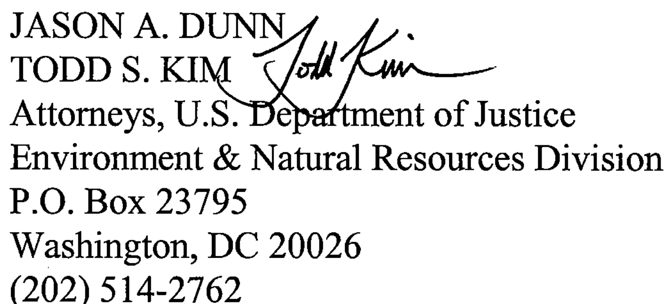

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