the District Engineer does not notify the RA that the Corps will take corrective action to prevent the unacceptable adverse effects, then the RA shall publish the notice of the RA's proposed determination. *Id.* § 231.3(a)(2). If an application is submitted to the Corps, the District Engineer may not issue a permit for the discharge of dredged or fill material at a site located in the defined area until final action is taken by EPA under 40 C.F.R. pt. 231. *Id.*; 33 C.F.R. § 323.6(b). However, the District Engineer may process a permit application while the § 404(c) process is underway. 33 C.F.R. § 323.6(b).

After the RA publishes the notice of the proposed determination, any interested person may submit comments during a 30- to 60-day comment period. 40 C.F.R. § 231.4(a). In addition, where there is significant public interest in the proposed determination, or if an affected landowner or the permit holder or applicant requests a hearing, the RA shall convene a public hearing consistent with the requirements set forth in the regulations. *Id.* § 231.4(b)-(g). After the conclusion of the public comment period, or the public hearing if one is held, the RA must either withdraw the proposed determination or prepare a recommended determination to deny, restrict, or withdraw the use for specification. *Id.* § 231.5(a). If the RA prepares a recommended determination, it must be "promptly" forwarded along with the administrative record to the EPA Administrator at EPA Headquarters for review. *Id.* § 231.5(b). If the RA decides to withdraw the proposed determination, then the RA must notify the Administrator of the RA's intent to withdraw. *Id.* § 231.5(c). The Administrator has the option to review the RA's proposed withdrawal. If the Administrator decides against review, then the RA must publish a notice of the withdrawal, which "shall constitute final agency action." *Id.* § 231.5(c)(1). However, if the Administrator decides to review the proposed withdrawal, then "final agency action does not occur until the Administrator makes a final determination." *Id.* § 231.5(c)(2).

After reviewing the RA's recommendation to prohibit specification or to deny, restrict, or withdraw the use for specification, EPA Headquarters must initiate consultation with the Chief of Engineers, the owner, and the permit applicant, "if any," who have 15 days to notify EPA Headquarters of their intent to take corrective action to prevent the unacceptable adverse effects. *Id.* § 231.6. EPA Headquarters must then make a final decision affirming, modifying, or rescinding the RA's recommended determination, and publish notice of that decision in the *Federal Register*. *Id.* That final determination "constitutes final agency action" for the purpose of judicial review. *Id.*[6]

II. FACTUAL BACKGROUND

A. Context and History of the Pebble Mine Proposal

The Bristol Bay watershed is rich in resources. Among other things, it supports the world's largest sockeye salmon fishery and one of the largest Chinook salmon fisheries. The fisheries directly or indirectly support 6,267 jobs on an annual average basis; 2,032 of these jobs are held by local residents, while 2,922 are held by other Alaska residents and 1,313 go to non-Alaska residents.[7] The total direct expenditures associated with the salmon fisheries across these sectors is approximately $480 million annually.[8] In addition, for more than 4,000 years, the fisheries have been the foundation for the livelihood and the culture of native peoples. In some Bristol Bay communities, 90 percent or more of residents report that they participate in subsistence harvest

[6] The EPA Administrator has delegated this authority to the Assistant Administrator for Water, pursuant to EPA Delegation 2-43, sections 1.f. & 2.c.

[7] EPA, An Assessment of Potential Mining Impacts on Salmon Ecosystems of Bristol Bay, Alaska, 2014 ("BBWA" or "Assessment"), Appendix E, p. 21, available at http://cfpub.epa.gov/ncea/bristolbay/recordisplay.cfm?deid=253500

[8] *Id.* at 18. Values are in 2009 dollars.

activities.[9] The net economic value of fish harvested and the cultural value of engaging in a subsistence lifestyle is estimated to total between $154.4 million and $220.6 million annually.[10]

The watershed also contains mineral resources. Twenty-five years ago, the Pebble deposit, a large deposit of low-grade porphyry ore bearing copper, gold and molybdenum, was discovered. For the past thirteen years, Northern Dynasty Minerals Ltd. ("NDM") and Pebble Limited Partnership ("Pebble") have performed exploratory and other work in an effort to determine whether the Pebble deposit could be an economically viable resource. Currently, NDM subsidiaries are the sole limited partner and the general partner in Pebble.[11] Pebble has a conceptual plan for the development of a mine and requisite infrastructure (including a deepwater port, liquefied natural gas ("LNG") terminal, natural gas pipeline, 400 megawatt electric power plant, and a 86-mile transportation corridor to access the mine site) at an initial cost of approximately $5 billion.[12]

Until 2013, Anglo American PLC, the world's third-largest mining company, and NDM were each limited partners in Pebble. Anglo American, a "major" mining company, committed $1.425 billion to fund the work necessary to advance the mine project;[13] NDM a "junior" mining company, provided access to the mining rights, which are owned by NDM subsidiaries.[14] In September 2013,

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[9] *Id.* at 22 (quoting Holen et al. 2011, p. 20).

[10] *Id.* at 23.

[11] Declaration of Joan K. Meyer, Ph.D ("Meyer Decl."), ¶ 10.

[12] Meyer Decl., ¶ 24. *See also* Northern Dynasty Minerals Ltd., The Pebble Project: The Future of U.S. Mining and Metals, June 6, 2014, corporate presentation available at: http://www.northerndynastyminerals.com/ndm/Presentations.asp?ReportID=598393, accessed July 25, 2014; BBWA, chapter 1 & 2, ES-10 & 6-3.

[13] Meyer Decl., ¶ 51 (citing Anglo American, "Press Release – Anglo American establishes 50:50 partnership in Pebble project with Northern Dynasty," August 1, 2007).

[14] *See* Meyer Decl., ¶¶ 11-16 (discussing "junior" and "major" mining companies).

Anglo American announced its withdrawal from the limited partnership. Anglo American ascribed its decision to changes in the minerals markets and Anglo American's need to focus its efforts on projects that could yield a return in a shorter time horizon.[15] After having invested $556 million in the project, Anglo American determined that its interest in Pebble had no value, and wrote off its entire investment.[16]

Shortly after Anglo American withdrew, Rio Tinto, the second largest mining company in the world, announced that it was reassessing its participation in the Pebble project.[17] Rio Tinto held 19.1% of the stock in NDM, and had previously written down its $181.5 million investment by $131 million.[18] In early 2014, Rio Tinto, for the same reasons given by Anglo American, divested itself of its interest in the project by donating its NDM shares to two Alaskan nonprofit organizations,[19] which sold them in June 2014 for a total of $12.96 million.[20]

The withdrawal of Anglo American and Rio Tinto from the Pebble project coincided with the downturn in the mining industry worldwide. In the face of weak market conditions, it is standard practice for mining companies to review their portfolios of undeveloped projects, and to

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[15] Declaration of Christopher R. Lattanzi ("Lattanzi Decl."), ¶ 41; Meyer Decl., ¶ 52 (citing Anglo American, "Press Release - Anglo American statement re: Pebble project," September 16, 2013).

[16] Meyer Decl., ¶ 52.

[17] *Id.*, ¶ 55 (citing Rio Tinto, "Media Release – Rio Tinto to undertake a strategic review of its shareholding in Northern Dynasty," December 23, 2013).

[18] *See id.*, ¶ 56 (citing Wendy Stueck, "Rio Tinto to acquire 9.9% of Northern Dynasty," Northern Dynasty Minerals, July 7, 2006; Rio Tinto, "Full Year 2013 Rio Tinto PLC Earnings Conference Call – Final," February 27, 2014).

[19] *Id.*, (citing Rio Tinto, "Media Release - Rio Tinto Gifts Stake in Northern Dynasty Minerals to Alaskan Charities," April 7, 2014).

[20] S. Caldwell, "Months after receiving surprise gift, Alaska nonprofits sell interest in Pebble Partnership," Alaska Dispatch News, June 17, 2014, available at http://www.adn.com/node/1593876?sp=/99/18

prioritize those projects in a manner that optimizes the allocation of capital. The market downturn shows no signs of abating, and there is currently little interest among mining companies or other investors in assisting with the financing of long lead-time, capital intensive mine projects such as Pebble.[21]

Although Pebble cannot meaningfully advance the project on its own, Pebble continues to hold out the promise of jobs for local communities and revenue for the state at a yet-to-be-determined date that is at least several years in the future.[22] As discussed below, Pebble's proposal also presents a threat of potentially large dimensions to the environment and to people whose livelihoods and ways of life have long depended on the existing qualities of the Bristol Bay watershed.

B. EPA's Involvement with the Pebble Mine Proposal

Since 2003, EPA has participated with Pebble, NDM, the State of Alaska and other federal agencies in meetings, working groups, preliminary assessment reviews, and other collaborative efforts to lay the groundwork for a thorough and efficient review process for the many permits that the Pebble project would require.[23]

In 2010, after Pebble failed for several years to submit a CWA permit application as Pebble had said that it would, nine Bristol Bay tribal governments requested that EPA initiate proceedings under CWA § 404(c) to protect the Nushagak and Kvichak River watersheds and Bristol Bay against

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[21] Lattanzi Decl., ¶¶ 9, 56

[22] Even as Anglo American announced its withdrawal from the partnership, Pebble CEO John Shively asserted, "The project, when developed, will generate almost 1,000 direct Alaskan jobs, nearly $200 million in annual revenue for the state and local governments, and over $1 billion in annual economic activity." T. Bradner, "Game Over? Anglo pulls out of Pebble," Alaska Journal of Commerce, Sept. 19, 2013.

[23] Declaration of Richard B. Parkin ("Parkin Decl."), ¶¶ 2-14.

the adverse effects of mining sulfide ores.[24] Similar requests followed from other tribal entities, organizations representing commercial and recreational fishermen, sporting goods manufacturers and vendors, conservation organizations, the faith community, restaurateurs, a coalition of jewelers, and elected officials. EPA also received requests to refrain from initiating § 404(c) proceedings from four Bristol Bay tribal governments, other tribal organizations, the Governor of Alaska, economic policy organizations, and Pebble. Over the following months, EPA met with interested parties to hear their views about the need for and possible effects of a § 404(c) proceeding.

On February 7, 2011, EPA announced its intention to conduct a scientific assessment to better understand how large-scale mining projects might affect water quality and the fisheries in the Bristol Bay watershed.[25] Such an assessment is not required under EPA's regulations. The assessment process began with outreach to interested parties. EPA, working in collaboration with National Marine Fisheries Service, U.S. Fish and Wildlife Service and U.S. Geological Survey, assembled a team of scientists with appropriate expertise to review existing information and compile an assessment, following EPA's guidelines for ecological risk assessments.[26] The resulting May 2012 draft "Assessment of Potential Mining Impacts on Salmon Ecosystems of Bristol Bay, Alaska" and public comments on the draft were submitted to a peer review panel of twelve independent experts to evaluate the soundness of the scientific analysis. The peer reviewers heard public comments, deliberated as a panel, and wrote individual reviews which were compiled into a report that EPA published for public comment.[27]

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[24] *Id.*, ¶ 16.

[25] *Id.*, ¶¶ 23-24.

[26] *Id.*, ¶¶ 25-26.

[27] *Id.*, ¶¶ 27-30.

EPA compiled a second draft Assessment in April 2013 and a draft response to peer review comments, which were again submitted to the peer reviewers to determine whether their original review comments had been appropriately addressed. EPA released the April 2013 draft for another round of public comment.[28]

As part of the Assessment process, EPA held eight public meetings on the first draft Assessment, visited many Bristol Bay communities, met with Pebble and toured the Pebble site, consulted with tribal governments and state agencies, met with representatives of Alaska Native Claims Settlement Act corporations, and solicited written comments on the first and second drafts of the Assessment, which resulted in more than 1.1 million public comments.[29]

After considering peer review, public and stakeholder comments, EPA released the final Assessment and final response to peer review comments in January 2014. Among other things, the Assessment found a range of potential adverse impacts, the extent of which would depend, in part, on the size of the mine. A summary of potential direct impacts included the following:

> Due to the mine footprint (the area covered by the mine pit, waste rock piles, TSFs [tailings storage facilities], groundwater drawdown zone, and plant and ancillary facilities), **38, 89, and 151 km (24, 55, and 94 miles) of streams would be lost**—that is, eliminated, blocked, or dewatered—in the Pebble 0.25, 2.0, and 6.5 scenarios, respectively.[30] This translates to losses of 8, 22, and 36 km (5, 14, and 22 miles) of streams known to provide spawning or rearing habitats for coho salmon, sockeye salmon, Chinook salmon, and Dolly Varden.
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> Altered streamflow due to retention and discharge of water used in mine operations, ore processing and transport, and other mine activities would reduce the amount and

[28] *Id.*, ¶¶ 32-33.

[29] *Id.*, ¶¶ 35-37.

[30] The three mine scenarios evaluated in the Assessment represent different scales of mining the Pebble deposit, based on the amount of ore processed: 0.25 (approximately 0.25 billion tons of ore over 20 years); 2.0 (approximately 2.0 billion tons of ore over 25 years); and 6.5 (approximately 6.5 billion of ore over 78 years). Assessment, Executive Summary at 11.

> quality of fish habitat. **Streamflow alterations exceeding 20% would adversely affect habitat in an additional 15, 27, and 53 km (9.3, 17, and 33 miles) of streams** in the Pebble 0.25, 2.0, and 6.5 scenarios, respectively, reducing production of sockeye salmon, coho salmon, Chinook salmon, rainbow trout, and Dolly Varden. Reduced streamflows would also result in the loss or alteration of an unquantifiable area of riparian floodplain wetland habitat due to loss of hydrologic connectivity with streams.
>
> Off-channel habitats for salmon and other fishes would be reduced due to **losses of 4.5, 12, and 18 km^2 (1,200, 3,000 and 4,900 acres) of wetlands and 0.41, 0.93, and 1.8 km^2 (100, 230, and 450 acres) of ponds and lakes** to the mine footprints in the Pebble 0.25, 2.0, and 6.5 scenarios, respectively.[31]

Additional potential adverse impacts would include reductions in the quality of downstream habitat and reductions in water quality due to leakage of leachate from waste rock piles and tailings storage facilities, construction and operation of the transportation corridor, and various facility failures and accidents.[32]

In deciding to initiate § 404(c) proceedings, EPA considered the Assessment and the information considered in developing the Assessment.[33] On February 28, 2014, the EPA Regional Administrator for Region 10 sent a letter to Pebble, Alaska, and the Corps, stating that, "[a]fter careful consideration of available information, including extensive materials provided by the Pebble Partnership, [EPA Region 10] has decided to proceed under its Clean Water Act section 404(c) regulations to review potential adverse environmental impacts of discharges of dredged and fill

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[31] Assessment at 13 (emphasis in original).

[32] *Id.* at 14-25.

[33] Parkin Decl., ¶¶ 38-39. The Assessment will be a component of the administrative record that is compiled during the course of the § 404(c) proceedings. The administrative record will also include any information submitted at the public hearings and during the public comment period that is set to end September 19, 2014. In addition, contrary to Plaintiffs' allegations that EPA's § 404(c) process does not include "real public discussion," the above discussion demonstrates the intensely public and expert process that EPA has undertaken here. *See* Parkin Decl., ¶¶ 21, 15-39, 42.

material associated with mining the Pebble deposit in southwest Alaska." Dkt. 22, ¶¶ 12, 59, Ex. 1 (Dkt. 22-1); Dkt. 48, ¶ 31. Among other things, the letter initiating EPA's § 404(c) review process summarized the additional steps in the EPA § 404(c) administrative review process, which included an opportunity for Pebble, the State and the Corps to submit additional information during a consultation period. Dkt. 22-1.

On March 25, 2014, EPA Region 10 met with Pebble executives and the Alaska Attorney General. Pebble and the State subsequently provided information raising a number of legal, policy, scientific and technical issues. Proposed Determination at 2-11, 2-14.[34] The Corps had not evaluated the potential adverse effects of various discharges of dredged and fill materials to areas of the Bristol Bay watershed, and chose not submit information in response to EPA's February 28, 2014 notice letter.

On July 21, 2014, EPA Region 10 published a Notice of a Proposed Determination to restrict the use of certain areas as disposal sites for dredged or fill materials associated with mining the Pebble deposit. *See* Notice of Proposed Determination to Restrict Use of An Area as a Disposal Site; Pebble Deposit Area, Southwest Alaska ("Public Notice"), 79 Fed. Reg. 42,314 (July 21, 2014). Public hearings were scheduled to be held in seven Alaska communities in August, and public comments will be accepted by EPA through September 19, 2014. *Id.* As discussed above, EPA regulations prescribe additional steps in the § 404(c) process that must be taken before EPA Headquarters could make a final determination regarding the use of defined areas as disposal sites.

[34] Available at: http://www2.epa.gov/bristolbay/proposed-determination-pursuant-section-404c-clean-water-act-pebble-deposit-area (last visited August 18, 2014).

STANDARDS OF REVIEW

I. Standard Applicable to Preliminary Injunctions

Issuance of preliminary relief, before the merits of a case have been decided, is an "extraordinary and drastic remedy," *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008), that "may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. NRDC*, 555 U.S. 7, 22 (2008) (citation omitted). A party seeking such relief must establish that: (1) it is likely to succeed on the merits; (2) it is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in its favor; and (4) an injunction is in the public interest. *Id.* at 20 (rejecting the Ninth Circuit's earlier rule that the "possibility" of irreparable harm, as opposed to its likelihood, was sufficient in some circumstances to justify a preliminary injunction).

The Ninth Circuit has determined that its alternative "sliding scale" test is still valid after *Winter* but, even under that approach, "'*serious* questions going to the merits' and a balance of hardships that tips *sharply* towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (emphasis added). *But see Munaf*, 553 U.S. at 690 (a plaintiff must establish that he is "likely" to succeed on the merits). This standard requires more than a showing that "success is more likely than not;" it requires a plaintiff to demonstrate a "substantial case for relief on the merits." *Leiva-Perez v. Holder*, 640 F.3d 962, 967-68 (9th Cir. 2011). It is the plaintiff's burden to satisfy each of these four factors. *DISH Network Corp. v. FCC*, 653 F.3d 771, 776-77 (9th Cir. 2011), *cert. denied*, 132 S.Ct. 1162 (2012). Further, where injury to parts of the natural environment is at stake, the balance of harms will usually favor protection of the environment. *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987).

Because the equitable relief of a preliminary injunction is such an "extraordinary remedy," the legal remedies, separate from the equitable relief of an injunction, must be inadequate to protect the plaintiff's interests. *Winter*, 555 U.S. at 22; *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982). Accordingly, even where there is a violation of law, federal courts do not issue injunctions as a matter of right. *Weinberger*, 456 U.S. at 313 (declining to issue an injunction even in the face of a clear statutory violation).[35]

II. Standard Applicable to Statutory Construction

The underlying issues in this case involve the proper construction of provisions of the Clean Water Act. Where, as here, an agency with delegated rulemaking authority promulgates a regulation implementing a provision of the statute it administers, this Court reviews pursuant to the deferential standard set out in *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984) ("*Chevron*"). At step one of the *Chevron* inquiry, the Court evaluates whether congressional intent regarding the meaning of the text in question is clear from the statute's plain language. *See Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 986 (2005). If it is, the Court must give effect to that meaning. *Id.* If the statute is ambiguous, the Court then proceeds to step two. Under step two, the agency's interpretation is controlling "if it is a reasonable interpretation of the statute - not necessarily the only possible interpretation, nor even the interpretation deemed *most* reasonable by the courts." *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009) (emphasis in original).

[35] Defendants are aware, however, that the Court may elect to treat the briefing of the legal issues in the preliminary injunction context as merits briefing, pursuant to Fed. R. Civ. P. 65(a).

ARGUMENT

I. The Motions for Preliminary Injunction Should be Denied Because Plaintiffs' Claims Should be Dismissed.

As discussed in support of our motion to dismiss, Dkt. 150, Plaintiffs' claims should be dismissed, which would require denial of the motions for preliminary injunction. In addition, the United States' arguments in support of dismissal establish that Plaintiffs are not likely to succeed on their claims and that, even under the Ninth Circuit's "sliding scale" test, Plaintiffs have not raised serious questions regarding those claims. *See, e.g.*, *Sampson v. Murray*, 415 U.S. 61, 74 (1974) (reversing grant of injunction against agency proceedings, stating that "[u]ntil administrative action has become final, no court is in a position to say that such action did or did not conform to [law]); *Nationsbank Corp. v. Herman*, 174 F.3d 424, 427 (4th Cir. 1999) (plaintiff "would have no likelihood of prevailing on the merits of the present suit . . . since a party cannot prevail on the merits of a suit that it does not (yet) have the right to bring"); *Frey v. Commodity Exch. Auth.*, 547 F.2d 46, 49 (7th Cir. 1976) (reversing grant of injunction because contentions raised in premature judicial proceedings could be raised later in challenge of final agency action).

II. Plaintiffs Cannot Succeed on the Merits of Their Claims

A. EPA's Administrative Proceeding Does Not Violate the Clean Water Act.

1. The CWA Unambiguously Authorizes EPA to Make a § 404(c) Determination Before a Permit Application is Submitted.

Plaintiffs' argument that the CWA prohibits EPA from exercising its authorities under § 404(c) until some unspecified time after a § 404 permit application is submitted to the Corps fails at *Chevron* step one. The language of § 404(c) itself makes clear that EPA can prohibit, deny or restrict the use of any defined area for specification as disposal sites at any time, including before the submission to the Corps of an application for a permit.

Section 404 places no temporal restrictions or conditions precedent on the exercise of the authority vested in EPA by § 404(c). Instead, § 404:

> expressly empowers [the Administrator] to prohibit, restrict or withdraw the specification "*whenever*" he makes a determination that the statutory "unacceptable adverse effect" will result. 33 U.S.C. § 1344(c) (emphasis added). Using the expansive conjunction "whenever," the Congress made plain its intent to grant the Administrator authority to prohibit/deny/restrict/withdraw a specification at *any* time.

Mingo Logan Coal Co., 714 F.3d at 613 (emphasis by the court; citation omitted).[36] The language of § 404(c) unambiguously manifests the Congress's intent to confer on EPA broad authority that is not constrained by the timing of events in the permitting process. *See id.* This construction is further buttressed by § 404(c)'s use of terms that have both prospective (e.g., "prohibit," "restrict") and retrospective (e.g., "withdrawal") application. *See id.*

EPA's authority under subsection (c) is not constrained by subsections (a) or (b), which establish the Corps' authority to issue permits and specify disposal sites. Read together, those three subsections provide that:

(a) the Corps "may issue permits . . . for the discharge of . . . dredged or fill material . . . at specified disposal sites,"

but

(b) "each such disposal site shall be specified" "[s]ubject to subsection (c),"

which authorizes EPA to

(c) "prohibit the specification . . . of any defined area as a disposal site . . . and to deny or restrict the use of any defined area for specification . . .whenever" the agency makes an unacceptable adverse effect determination.

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[36] The central issue before the *Mingo Logan* Court was whether § 404(c) authorizes EPA to withdraw a site specification after the Corps has issued a permit. *Id.* at 609. While the "withdrawal" of a site specification is not at issue here because the Corps has not issued a permit, *Mingo Logan* addressed questions of interpretation of § 404 that are identical to questions presented by the Plaintiffs' claims in this case.

33 U.S.C. § 1344(a)-(c). In short, subsections (a) and (b) establish that every specification of a disposal site is subject to subsection (c). *See Mingo Logan Coal Co.*, 714 F.3d at, 610, 614. And subsection (c) authorizes EPA to prohibit or restrict specification of any defined area whenever the agency makes an unacceptable adverse effect determination. Plaintiff's argument that EPA's authority under §404(c) may be exercised only after the Corps has received a permit application is not supported by "reading the relevant statutory provisions as a whole." *See Pension Ben. Guar. Corp. v. Carter & Tillery Enters.*, 133 F.3d 1183, 1186 (9th Cir. 1998) (construing statutory subsection in the context of the entire section).

EPA's authority broadly applies to "*any* defined area." 33 U.S.C. § 1344(c) (emphasis added). "Read naturally, the word 'any' has an expansive meaning." *United States v. Gonzales*, 520 U.S. 1, 5 (1997). The CWA does not provide a definition for, or a process for identifying, "defined area," but § 404 distinguishes between disposal sites that are specified by the Corps and "defined areas" that are identified by EPA. Section 404(a) and (b) explain that the Corps specifies disposal sites. 33 U.S.C. § 1344(a) (Corps issues permits "for the discharge of . . . dredged or fill material . . . at specified disposal sites"); *id.* § 1344(b) ("each such disposal site shall be specified for each such permit"). Section 404(c) grants EPA broad authority to "prohibit the specification . . . of any defined area" and to "deny or restrict the use of any defined area for specification . . . as a disposal site" as long as EPA makes the requisite unacceptable adverse-effect determination. Nothing in the text of § 404 suggests that Congress intended to limit EPA's authority to only those areas that have been identified in a permit application or have been specified by the Corps.

EPA may prohibit, deny or restrict the use of any area for specification as a disposal site only after it first "determines . . . that the discharge of *such materials* into *such area* will have an unacceptable adverse effect. . . ." 33 U.S.C. § 1344(c) (emphasis added). Plaintiffs incorrectly argue that "such materials" refers to "particular materials the Corps proposes to permit to be discharged at particular

disposal sites." Dkt. 24 at 22; Dkt. 62 at 19.[37] The only antecedent for "such materials" is the reference in § 404(a) to "dredged or fill material." The antecedent for "such area" is the reference in § 404(c) to "any defined area." The clause relied on by Plaintiffs thus requires that EPA determine whether the discharge of dredged or fill material into any defined area would have an unacceptable adverse effect. As discussed above "any defined area" is a broad term that includes, but is not limited to, disposal sites that have been identified by the Corps or a permit applicant. Accordingly, the fact that "such materials" refers to "dredged or fill material" in section 404(a) does not limit EPA's authority under § 404(c) to materials of disposal sites identified in a Corps permit or in a permit application.

Pebble and APC argue that, "[w]ithout a permit application, EPA could not intelligibly exercise its § 404(c) authority." Dkt. 24 at 22-23. Their argument is premised on the incorrect assumption that EPA cannot intelligibly evaluate "unacceptable adverse effects" from discharges of dredged or fill material into defined areas unless a detailed mine plan has been submitted to the Corps. But EPA's evaluation does not require a specific mine plan detailing specific discharges. Instead, EPA evaluates the potential adverse effects of discharges and, if the effects are unacceptable, establishes appropriate prohibitions and restrictions on the use of defined areas for specification by the Corps. *See* Parkin Decl., ¶¶ 40-41. So far in the current 404(c) proceedings, EPA has looked to, among other things, the detailed analyses presented in the Assessment and the input received from Pebble, Alaska and other entities that may be affected by mining the Pebble deposit. *Id.*, 38-39, 42. Any affected party who believes that EPA has exercised its authority unintelligibly will have the opportunity to challenge any final agency action under § 404(c) as being arbitrary and capricious. *See* 5 U.S.C. § 706(2)(A). But there is not a final agency action at issue

[37] When citing to previously filed briefs, we cite to the page numbers assigned by the Court's Electronic Case Filing system rather than to the page numbers affixed by the filing party.

here, and the possibility that future final agency action might, under some subsequent circumstances, be arbitrary and capricious does not limit the authority expressly granted to EPA by Congress.

Nor can EPA's exercise of its § 404(c) authority be deemed to usurp the Corps' role or to have "prevented the Corps from even considering whether to specify a proposed disposal site or activity," as contended by Pebble and APC. Dkt. 24 at 23-24. "[T]he Congress granted EPA a broad environmental 'backstop' authority over the [Corps'] discharge site selection in subsection 404(c)." *Mingo Logan*, 714 F.3d at 612; *see also Nat'l Mining Ass'n. v. McCarthy*, No. 12-1530, 2014 WL 3377245, *4 (D.C. Cir. July 11, 2014) ("The Corps . . . makes the ultimate decision whether to approve the permit. EPA . . . makes the decisions on the disposal sites."). In addition, the fact that EPA initiated 404(c) proceedings for the area of the Pebble deposit does not prevent Pebble from submitting, or the Corps from processing, a permit application up to the point of permit issuance. 40 C.F.R. § 231.3(a)(2); 33 C.F.R. § 323.6(b). The Corps' regulations explicitly provide that "the Corps will continue to complete the administrative processing of the application while the § 404(c) procedures are underway including completion of final coordination with EPA under 33 C.F.R. Part 325." 33 C.F.R. § 323.6(b).

Plaintiffs argue that EPA's exercise of its § 404(c) authority in the absence of a permit application violates the CWA's general provisions recognizing State authority over State waters. Dkt. 24 at 26; Dkt. 62 at 18-19 (citing 33 U.S.C. §§ 1251(b), 1370). The relevance of these provisions is limited. The broad statement of policy in 33 U.S.C. § 1251 is also not instructive on the precise question at issue here: Although it recognizes the "primary responsibilities and rights of States" to reduce pollution and plan development, it also gives EPA the authority to "administer this chapter," providing that the States may "consult with the Administrator in the exercise of his authority." *Id.* § 1251(b), (d). Similarly, 33 U.S.C. § 1370 recognizes each State's "right or jurisdiction" over its waters "except as expressly provided" in the Act, but the Act expressly

provides for EPA generally to promulgate regulations, and specifically to prohibit, deny or restrict the use of any defined area for specification as a disposal site. *See id.* §§ 1361(a); 1344(c); *see also Arkansas v. Oklahoma*, 503 U.S. 91, 106-07 (1992).[38] Plaintiffs acknowledge that EPA may exercise its § 404(c) authority after a permit application has been filed, and they have no legal support for their contention that the exercise of that authority for the same purposes before an application is filed alters the federal-state balance. Moreover, contrary to Plaintiffs' claims (Dkt. 24 at 26; Dkt. 62 at 19-20), the exercise of authority to prohibit, deny or restrict specification of a disposal site does not constitute an "unprecedented intrusion" into state authority,[39] and the language of § 404(c) is a "clear and manifest statement from Congress" that EPA can "prohibit the specification . . . of *any* defined area as a disposal site . . . and deny or restrict the use of *any* defined area . . . *whenever*" it makes the requisite determination. *Id.* § 1344(c) (emphases added).

EPA's 404(c) authority to establish restrictions on disposal of dredged and fill material in defined areas before a permit application is filed can be analogized to its authorities under CWA § 303, 33 U.S.C. § 1313, to establish restrictions on pollutants other than dredged and fill material in defined stream segments and other water bodies as a predicate to the permitting of sources. For example, EPA has the authority to approve State-adopted, or to itself promulgate, water quality standards, which establish maximum concentrations of pollutants that protect the designated uses of each water body of the United States. 33 U.S.C. § 1313(b), (c)(3)-(4). EPA also approves or establishes total maximum daily loads ("TMDLs"). A TMDL identifies the maximum amount of a

[38] Legislative history of 33 U.S.C. § 1370, relevant at *Chevron* step two, shows that Congress's intent was to preserve "rights to *quantities* of water that have been established by any State." H.R. Rep. No. 95-830, at 52 (1977) (emphasis added).

[39] Pebble and APC allege broadly that that EPA's initiation of § 404(c) proceedings constitutes land use planning but, as discussed in more detail below, any argument that EPA's § 404(c) evaluation constitutes an unconstitutional intrusion on the State's land use authority must fail. *See infra* at 37-38 n. 49.

pollutant that can be added to a water body from all sources and still attain applicable water quality standards. 33 U.S.C. § 1313(d)(1)(C); 40 C.F.R. § 130.7(c)(1). Water quality standards and TMDLs provide the bases for limiting pollution from individual sources and may be established before any source applies for a permit and regardless of the type or size of operation of the source. Unlike other pollutants, discharges of dredged and fill material are not susceptible to regulation by the application of concentration limits and TMDLs – such material is either discharged to waters or it is not. Instead, EPA may exercise its 404(c) authority to establish restrictions for defined areas of waters of the United States in advance of permitting in order to protect those waters from unacceptable adverse effects.

Congress used broad language to act to avoid unacceptable adverse effects from discharges at disposal sites. "[S]tatutes written in broad, sweeping language should be given broad, sweeping application." *Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 298 (D.C. Cir. 2003) (Roberts, J.); *see also Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("courts must presume that a legislature says in a statute what it means and means in a statute what it says there"). The only way for this Court to give full effect to the broad language that Congress chose in § 404(c) is to read that provision to allow EPA to act before a permit application is submitted and a permit is issued.

Plaintiffs' resort to a small slice of legislative history does not salvage their narrow construction of § 404(c). *See* Dkt. 24 at 24-25; Dkt. 62 at 15, 19. The D.C. Circuit "construe[d] subsection 404(c) under *Chevron* step 1 because . . . the language unambiguously expresses the intent of the Congress," and held that the language "expressly empowers" EPA to exercise its § 404(c) authority "*whenever*" it makes an adverse-effects determination. *Mingo Logan*, 714 F.3d at 612, 613 (emphasis by the court).[40] A court may not "resort to legislative history to cloud a statutory text that

[40] Pebble and APC argue that this Court should not use the dictionary definition of "whenever" used by the D.C. Circuit because that court was "focused entirely on whether EPA could 'withdraw'

is clear." *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994); *SEC v. McCarthy*, 322 F.3d 650, 655 (9th Cir. 2003) (If a statute's plain language is ambiguous, the court may look to legislative history). Moreover, the legislative history Plaintiffs cite does not clearly support their narrow reading of the statute. Senator Edmund Muskie, the Senate's leading proponent of the Clean Water Act, briefly recited the Act's key provisions while the Senate considered the conference bill. With respect to § 404(c), he stated:

> *[P]rior to the issuance of any permit to dispose of spoil*, the Administrator must determine that the material to be disposed of will not adversely affect municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife or recreational areas in the specified site. Should the Administrator so determine, no permit may issue.

118 Cong. Rec. at 33,699, 1 LEGIS. HIST. 177 (emphasis added). The statement that EPA is authorized to act "prior to the issuance of any permit" cannot be read to preclude the agency from acting prior to the submission of a permit application to the Corps. The statement in the legislative history that EPA's exercise of its authority is "duplicative or redundant" of the Corps' review of a permit application, *id.*, does not suggest that EPA is precluded from acting before the Corps has received an application.[41]

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a specification of a disposal site after the Corps' issuance of a final permit." Dkt. 24 at 24. They cite no authority supporting their suggestion that "whenever" should be given a different definition in this case when considering EPA's authority to prohibit, deny or restrict specification of disposal sites.

[41] Even if Sen. Muskie's remarks could be interpreted otherwise, a floor statement of a single legislator, even one central to the passage of the Clean Water Act, is not controlling even in analyzing legislative history, let alone the meaning of statutory text. *See Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 752 (2012). That is particularly so here because Sen. Muskie's brief summary was imprecise in its description of other aspects of § 404. First, he stated that EPA "must" determine whether unacceptable adverse effects to the environment will ensue before a permit can issue. 118 Cong. Rec. at 33,699, 1 LEGIS. HIST. 177. But the Corps can issue a § 404(a) permit when EPA declines to make any determination under § 404(c). *See Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 557 U.S. 261, 270 (2009). Second, in the preceding paragraph of his remarks, Sen. Muskie indicated that EPA applies the 404(b)(1) Guidelines to determine whether a disposal site should be specified. 118 Cong. Rec. at 33,699, 1 LEGIS. HIST. 177. Yet the statute

In sum, this Court should hold for EPA at *Chevron* step one. EPA can exercise its authority "whenever" the agency makes an adverse-effect determination. EPA is acting squarely within that authority by initiating the process prescribed by its regulations, regardless of whether that process culminates—before or after Pebble submits a permit application to the Corps—in a decision prohibiting, denying or restricting the use of any defined area for the specification as a disposal site.

2. Even if § 404(c) is Ambiguous, EPA's Statutory Interpretation is Reasonable and Entitled to *Chevron* Deference.

Plaintiffs claim that EPA's regulation, 40 C.F.R. § 231.1(a), is invalid to the extent that it interprets § 404(c) to authorize EPA to prohibit the specification of a disposal site before a permit application has been submitted to the Corps. Dkt. 24 at 27; *see* Dkt. 62 at 16.[42] EPA's regulation comports with the unambiguous language of § 404(c), for the reasons discussed above. Even if this Court concludes that § 404(c) is ambiguous as to whether EPA can prohibit, deny, or restrict the use of a defined area as a disposal site before a permit application is submitted to the Corps, EPA's reasonable and permissible interpretation is entitled to deference under *Chevron* step two. *Chevron*, 467 U.S. at 842-43.

EPA's interpretation of § 404(c) is entitled to *Chevron* deference because Congress expressly delegated authority to EPA to interpret that provision. EPA administers the Clean Water Act "[e]xcept as otherwise expressly provided," 33 U.S.C. § 1251(d), and the agency may "prescribe such regulations as are necessary to carry out [its] functions" under the Act, *id.* § 1361(a). One of those functions is to prohibit, deny or restrict the use of any defined area for specification of fill disposal

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gives the Corps authority to specify disposal sites based on those guidelines. 33 U.S.C. § 1344(b). The errors in Sen. Muskie's floor statement diminish whatever weight this Court might ordinarily grant to his remarks. *See United States v. McGoff*, 831 F.2d 1071, 1090-91 (D.C. Cir. 1987).

[42] In an attempt to evade the 6-year statute of limitations, Plaintiffs claim to be challenging EPA's 1979 regulation "as applied," but their arguments precede a final agency action and present clear questions of law that do not turn on the facts of this case. *See* Dkt. 150.

sites to prevent the unacceptable adverse effects to the resources listed in § 404(c). *Id.* § 1344(c). An express delegation of rulemaking authority is the clearest sign that Congress intends for an agency to speak with the force of law when it addresses ambiguity in a statute. *See Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 713-14 (2011); *see also NRDC v. EPA*, 859 F.2d 156, 202 (D.C. Cir. 1988) (recognizing EPA's authoritative role in interpreting the Clean Water Act's complex "regulatory machinery").

EPA's regulations make clear that the agency interprets § 404(c) to authorize the agency to "prohibit the specification of a site under section 404(c) with regard to any existing or potential disposal site *before* a permit application has been submitted to or approved by the Corps or a state," and "to prohibit or otherwise restrict a site *whenever* he determines that the discharge of dredged or fill material is having or will have an 'unacceptable adverse effect.'" 40 C.F.R. § 231.1(a) (emphasis added). When promulgating its regulations, EPA articulated the basis for its conclusion that "the statute clearly allows it to use 404(c) before an application is filed":

> First, the statute says that the Administrator is authorized to take action "whenever" he makes certain determinations. Second, the actions he is authorized to take are not limited to permit situations. Rather, he may prohibit the specification of a site or deny or restrict the use of a site for specification. The phrase "any defined area" does not lead to a contrary conclusion. That phrase merely means that a 404(c) action must be directed at a particular or identifiable area rather than "wetlands" or some other generic category. The Corps does not "define" areas through the permit process; it "specifies" them.

44 Fed. Reg. at 58,077. EPA also explained the practical implications of its reading of the statute:

> EPA also feels that there are strong reasons for including this pre-permit authority in the present regulations. Such an approach will facilitate planning by developers and industry. It will eliminate frustrating situations in which someone spends time and money developing a project for an inappropriate site and learns at an advanced stage that he must start over. In addition, advance prohibition will facilitate comprehensive rather than piecemeal protection of wetlands.

Id. EPA thus sought to accommodate both the CWA's overriding goal of environmental protection and the goal of regulatory certainty. This Court should respect EPA's exercise of discretion in