"whenever" that fits within the context and structure of Section 404. The Court adopted a definition of "whenever" from the *Oxford English Dictionary* ("at whatever time, no matter when"), while ignoring the following definition in the same dictionary: "[i]n any or every case in which."[11] Only the latter definition fits in the context of Section 404: because Section 404 is about permitting, "whenever" does not signal Congressional intent to empower EPA to act outside of permitting. If there is no permit proceeding, there can be no specification for EPA to prohibit, deny, restrict, or withdraw.[12]

Within the context of a statutory provision centered on permitting by another agency, the term "whenever" must, in Section 404(c), mean that EPA's ability to act depends on a predicate action—namely, a Corps specification that would otherwise cause an unacceptable adverse effect. That the term "whenever" could mean "at any time, no matter when" in another statutory context is irrelevant. In Section 404(c), "whenever" refers to EPA's ability to act ("in any or every case") with respect to a "specification" that would cause unacceptable harm. Specifications do not exist outside of the permitting context, as EPA itself acknowledged in *Mingo Logan* when it declared that "Congress did not need to use the word 'permit' in § 404(c); the word specification covers the same ground."[13] Yet, here, EPA has changed its tune and argues that Congress envisioned that EPA could create its own specification and then veto it. The CWA's text and legislative history confirm the obvious—that Congress intended no such result.

NRDC tries to backstop EPA's position on the meaning of "whenever" by proclaiming that Congress did not create a requirement that the Corps consult EPA under Section 404(c)

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[11] *See Oxford English Dictionary*, http://www.oed.com/view/Entry/228204?rskey=2mmPe8&result=2&isAdvanced=false#eid (last visited Aug. 25, 2014) (definition I.1.).

[12] The *Mingo Logan* court seemed to accept that the exercise of Section 404(c) authority is limited to the permitting context when it found that "Congress granted EPA a broad environmental '***backstop***' authority over the [Corps'] discharge site selection in subsection 404(c)." 714 F.3d at 612 (emphasis added). "'Backstop' authority" does not fairly encompass preemptively blocking another agency's exercise of the primary authority that one has been given the limited ability to backstop.

[13] Final Brief of Def.-Appellant U.S. EPA, Case No. 12-5150, ECF Document #1400061, at 30 (Oct. 17, 2012).

within the permitting context.[14] This argument ignores that Section 404, entitled "Permits for dredged or fill material," is indeed about permitting and, therefore, (just as EPA implicitly acknowledged in *Mingo Logan*) Congress did not need to specify (redundantly) that such consultation must occur within the permitting context.[15]

EPA's attempt to distinguish between "any defined areas" that it identifies and disposal sites that the Corps specifies for permits is similarly untenable. Under EPA's view, "any defined area" is not limited to disposal sites that are the subject of a Corps permitting process. Such a view, however, ignores that EPA can only use Section 404(c) to prohibit, deny, restrict, or withdraw ***specifications***. Viewed in its proper context within a permitting statute, "any defined area" can only mean the whole or part of a disposal site that the Corps has proposed to specify in a permit. In contrast, if that phrase were truly as "broad" or "expansive" as EPA contends, there would be virtually no limit on EPA's ability to define an area and preclude specifications. For instance, EPA could preemptively "define" the entire Bristol Bay watershed as unsuitable for specifications. The CWA does not support such a construction because that provision would cease to be about permitting, and would instead become a suitable vehicle for federal land use planning.[16]

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[14] *See* Dkt. No. 180 (NRDC Br., p. 5) at 7 n.27.

[15] In this case, the Corps' inability to consult meaningfully on an EPA veto outside of the permitting context is especially telling. When the Corps responded to EPA's February 28, 2014 letter, it indicated that it: (i) "has not received a permit application for [the Pebble project] and is therefore unable to evaluate the impacts of potential discharges associated with the Pebble deposit;" and (ii) "has not yet begun the public interest review and evaluation process, and [thus] it would be premature to submit any information for the record at this time." *See* Dkt. No. 24-21 (Letter from Col. Lestochi, U.S. Army Corps of Eng'rs, to EPA Regional Administrator D. McLerran (Mar. 14, 2014)) at 10-11. The Corps' letter confirms that, outside of the permitting context, there is no basis for it to conduct a public interest review or a review for compliance with the CWA Section 404(b)(1) guidelines. That the Corps cannot discharge its statutory duty to consult EPA under Section 404(c) in the absence of a permit proceeding provides further confirmation that "whenever" cannot possibly mean that EPA can invoke 404(c) "at any time," even outside of the permitting context. It shows instead that EPA can act "whenever" ("in any or every case") the Corps makes a specification that would cause unacceptable harm.

[16] EPA strains to analogize its Section 404(c) authority to its Section 303 authority to promulgate federal water quality standards and total maximum daily loads before any source applies for a permit. *See* Dkt. No. 188 (EPA Br., pp. 23-24) at 33-34. But, EPA's exercise of Section 303

(continued...)

Finally, EPA fails to address Congress's distinction between "such materials" (in Section 404(c)) and "dredged or fill material" generally.[17] While EPA is correct that the only antecedent for "such materials" is the term "dredged or fill material" in Section 404(a), the Agency disregards the fact that Section 404(a) refers to those dredged or fill materials the Corps proposes to "permit[], after notice and opportunity for public hearings, for [] discharge . . . at specified disposal sites."[18] Section 404 in its entirety pertains to dredged or fill material—something that the title and all subsections of that provision elucidate. Yet under EPA's rationale, Congress could have used "such materials" in every subsection following Section 404(a) any time it intended to refer to dredged or fill material generally. Congress deliberately chose not to do so.[19] Instead, it used the term "such materials" in Section 404 only once, in subsection (c), to refer back to the materials referenced in subsection (a)—namely, those dredged or fill materials that are the subject of a Corps permit.

In sum, the plain text and structure of Section 404 clearly convey Congress's intent to limit EPA's exercise of Section 404(c) authority to the permitting context.

B. Legislative History Confirms that EPA Cannot Exercise its Section 404(c) Authority Absent a Corps Permit Proceeding.

The legislative history of Section 404(c) validates the plain reading of Section 404(c) limiting its application to the permitting context. Recent Ninth Circuit decisions demonstrate

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(continued...)

authority is also backstop authority: it arises only ***after*** a ***state*** fails to act or acts inadequately. Moreover, EPA's commencement of a proceeding to set a federal water quality standard does not have the legal consequence of immediately suspending permit writers' authority to continue issuing discharge permits (under Section 402) during the pendency of the EPA proceeding to establish a water quality standard or total maximum daily load. Finally, EPA action under Section 303 is directed at water quality, whereas the challenged EPA action in this case is on its face directed at mining. *See* Dkt. No. 24-19 (Letter from D. McLerran, EPA, to T. Collier, Pebble Partnership, et al. (Feb. 28, 2014)).

[17] *See* Dkt. No. 24 (Pls.' Mot. for Prelim. Injunction, p. 15) at 23.

[18] 33 U.S.C. § 1344(a).

[19] *See 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").

that courts may consider legislative history when conducting the *Chevron* step one inquiry.[20] Here, the legislative history of Section 404(c) confirms that Section 404(c), like the rest of Section 404, is about permitting decisions, not land use planning.

EPA contends that the legislative history does not indicate that EPA is precluded from acting before the Corps has received a permit application.[21] But the passages we quoted in our motion for preliminary injunction make it clear that Congress understood that EPA would exercise its Section 404(c) authority only with respect to "specified site[s]" and "specific spoil" that the Corps was already considering.[22] Indeed, "the Conferees agreed that the Administrator of the Environmental Protection Agency should have the veto over the ***selection of the site*** for dredged spoil disposal and over any ***specific spoil to be disposed of in any selected site***."[23] There is nothing for EPA to veto if, as in this case, there is no selection of a disposal site and no specific spoil to be disposed of. Were EPA truly free to veto prospectively a specification outside of the permitting context, the legislative history would not have clarified that "[t]he decision is not duplicative or cumbersome ***because the permit application transmitted to [EPA] for review*** will set forth both the site to be used and content of the matter of the spoil to be disposed of at such site."[24]

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[20] *See, e.g.*, *Tablada v. Thomas* 533 F.3d 800, 804 (9th Cir. 2008) ("Applying the first step of the *Chevron* analysis, we looked at both the plain language of the statute and its legislative history, and found that the meaning of [a statutory term] was ambiguous."); *NRDC v. EPA*, 526 F.3d 591, 603-05 (9th Cir. 2008) ("An examination of the statutory language and its legislative history assists us in [the *Chevron* step one] inquiry."); *Resident Councils of Wash. v. Leavitt*, 500 F.3d 1025, 1031-34 (9th Cir. 2007) (evaluating the plain language, legislative history, purpose, and structure of a statute under *Chevron* step one).

[21] *See* Dkt. No. 188 (EPA Br., p. 25) at 35.

[22] *See* Dkt. No. 24 (Pls.' Mot. for Prelim. Injunction, p. 17) at 25.

[23] Conf. Rep.—Sen. Debate, 133 Cong. Rec. at 33699 (Oct. 4, 1972), *reprinted in* 1 A Legislative History of the Water Pollution Control Act Amendments of 1972, at 177 (1973) (emphasis added).

[24] *Id.* (emphasis added). NRDC unconvincingly asserts that this clarification merely addresses instances "when the Corps was ***already*** processing a 404 permit." Dkt. No. 180 (NRDC Br., p. 10) at 12 n.59 (emphasis in original). In fact, that statement comes from a passage that broadly summarized EPA's "responsibilities and authorities" under Section 404(c) and thus, was not so limited. *See* 118 Cong. Reg. at 33699.

Contrary to EPA's contentions, the legislative history also shows that the term "any defined area" cannot be construed more broadly than all or part of sites that are specified by the Corps during the permitting process:[25]

> Under this program, permits would be issued, after notice and opportunity for public hearings, for disposal of such material at ***specified sites***. The ***sites*** would be selected in compliance with guidelines developed by EPA in conjunction with the Corps of Engineers. The EPA Administrator is empowered to forbid or restrict the use of ***specified areas*** whenever he determines that disposal of material at a ***site*** would have an unacceptable adverse effect[.][26]

The foregoing discussion, which revolves around the Corps' permitting process, does not treat "areas" as a unique concept divorced from "sites" specified by the Corps. And given Section 404(c)'s placement within a provision that is about permits for dredged or fill material, the foregoing passage is incompatible with the assertion that Congress intended for "any defined area" to be broader than sites specified by the Corps in the permitting context.

Unable to point to anything in the legislative history that supports their position, EPA and its supporters try to undercut Senator Muskie. But his remarks, which summarize the Conferees' view on Section 404(c) are not just the "floor statement of a single legislator"[27] or mere "floor colloquy."[28] In fact, the Ninth Circuit has instructed that, "[a]s the legislation's primary sponsor, [Senator Muskie's] remarks are entitled to substantial weight."[29] The Supreme Court has likewise recognized the probative value of statements by Senator Muskie by citing them in

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[25] *See* Dkt. No. 188 (EPA Br., pp. 20-21) at 30-31.

[26] House Consideration of, and Agreement to Conference Report (H. Rep. 92-1465) on S. 2770, 118 Cong. Rec. 33752 (Oct. 4, 1972), reprinted in 1 A Legislative History of the Water Pollution Control Act Amendments of 1972, at 239 (1973) (emphasis added).

[27] Dkt. No. 188 (EPA Br., p. 25) at 35 n.41.

[28] Dkt. No. 180 (NRDC Br., p. 10) at 12 n.59.

[29] *United States v. Akers*, 785 F.2d 814, 819 (9th Cir. 1986). In a case involving a different statute, the Supreme Court found that "a statement of one of the legislation's sponsors . . . deserves to be accorded substantial weight in interpreting the statute." *Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976).

numerous cases as evidence of Congress's intent in passing the CWA.[30] Accordingly, the legislative history eliminates any reasonable doubt that Congress intended for EPA to exercise its Section 404(c) authority within Section 404's permitting context.[31]

C. The Court Should Not Defer to EPA's Interpretation of the Statute.

As explained above, the CWA's text, structure, and legislative history clearly convey Congress's intent to limit EPA's exercise of Section 404(c) authority to the permitting context. If, however, this Court finds that Section 404 is ambiguous, *Chevron* deference does not apply here because Section 404 is jointly administered by the Corps, which plays the lead role under the permitting scheme, and by EPA. In cases like this one, "[w]hen a statute is administered by more than one agency, a particular agency's interpretation is not entitled to *Chevron* deference."[32] The D.C. Circuit's opinion *Salleh* is particularly enlightening on this point. That case involved Section 610(a) of the Foreign Service Act, which gave authority to both the Secretary of State and the Foreign Service Grievance Board.[33] Specifically, section 610(a)(1) authorized the Secretary of State to separate employees from the foreign service, while section 610(a)(2) provided that certain employees are entitled to a hearing before the Foreign Service Grievance Board to establish cause for separation.[34] The Court rejected the Secretary of State's plea for *Chevron* deference to its interpretation of Section 610(a)(1) even though that provision

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[30] *See, e.g.*, *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 386 (2006); *Gwaltney of Smithfield Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 61, 62 (1987); *Tull v. United States*, 481 U.S. 422, 426 n.9 (1987); *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 129-131 (1977).

[31] NRDC's claim that the legislative history "supports EPA's prospective use of its 404(c) authority" rings hollow. Dkt. No. 180 (NRDC Br., p. 9) at 11. The general passages they cite describing the purpose of the CWA shed no light on the scope of EPA's Section 404(c) authority, nor do any of the passages demonstrating the evolution of Section 404(c). *See id.* Moreover, the quote from the Conference Report's discussion of Section 404(c) just tracks the statutory text without any explanation. *See id.* at 11-12.

[32] *See Scales v. INS*, 232 F.3d 1159, 1165 (9th Cir. 2000) (quoting *Proffitt v. FDIC*, 200 F.3d 855, 860 (D.C. Cir.); *see also Salleh v. Christopher*, 85 F.3d 689, 691-92 (D.C. Cir. 1996).

[33] *See Salleh*, 85 F.3d at 690-91.

[34] *See id.*

gave authority to the Secretary alone.[35] In so holding, the Court explained that the agencies in that case "have been delegated authority under two sequential provisions of § 610(a)," and thus, "[t]o determine their respective authority, the whole section must be interpreted."[36]

The statutory provision in this case, CWA Section 404, is comparable to that at issue in *Salleh*. Congress authorized the Corps to issue permits for dredged or fill material at specified disposal sites in Sections 404(a) and (b) of the CWA, and in a sequential provision, it gave EPA authority to prohibit, deny, restrict, or withdraw specifications.[37] The Corps appears to interpret these provisions collectively as authorizing EPA action under Section 404(c) only in instances where the Corps is undertaking "administrative processing of the application [for a Corps permit],"[38] whereas EPA believes it can act outside of the permitting context, as it has done in this case.[39] Like in *Salleh*, this Court should interpret the whole of Section 404 to determine the Corps' and EPA's respective authority, and it should decline to extend *Chevron* deference to EPA's interpretation of subsection 404(c).

D. Even if *Chevron* Step Two Applies, EPA's Interpretation Should Be Rejected Because it is Based on an Impermissible Construction of the Statute.

Should this Court ultimately proceed to *Chevron* step two, it should reject EPA's interpretation of Section 404(c) because it is based on an impermissible construction of the CWA. The Supreme Court has held that courts must reject an agency's statutory interpretation that "alters the federal-state framework by permitting federal encroachment upon a traditional state power" without a "clear indication that Congress intended that result."[40] Here, as in

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[35] *See id.* at 691-92.

[36] *Id.* at 692.

[37] *See* 33 U.S.C. §§ 1344(a)-(c).

[38] 33 C.F.R. § 323.6(b). This is the only provision within the Corps' regulations that mentions EPA's Section 404(c) authority. On its face, this provision plainly contemplates that a permit proceeding will be ongoing at the time an EPA Regional Administrator notifies the Corps that he intends to issue a public notice to prohibit/withdraw/deny/restrict a specification. *See id.*

[39] *See* 40 C.F.R. § 231.1(a).

[40] *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* ("*SWANCC*"), 531 U.S. 159, 172-73 (2001).

SWANCC, the Court should reject EPA's interpretation because it "would result in a significant impingement of the States' traditional and primary power over land and water use."[41]

Contrary to EPA's view,[42] the ability to exercise Section 404(c) authority outside of the permitting context ***does*** impermissibly alter the federal-state framework. Absent a permit proceeding, EPA's use of Section 404(c) can only be characterized as land use decision-making, which is "perhaps the quintessential state activity"[43] that has been "traditionally performed" by state and local governments.[44] In EPA's own words, its use of Section 404(c) in this case "[c]an serve as a model of proactive watershed planning."[45] By exercising its Section 404(c) authority outside of the permitting context, EPA is not asserting authority to regulate an existing or proposed activity; rather, it is asserting the authority to prevent uses categorically. Without the benefit of a permit application, and the Corps' and the State's regulatory reviews, EPA's exercise of Section 404(c) authority amounts to an assertion of the power to preclude the State of Alaska from deciding whether the lands in question can be used for mining.[46] This is particularly problematic because the lands at issue were the subject of a three-way land exchange that allowed the State to obtain lands that the federal government had previously withdrawn and set aside for conservation purposes.

EPA nonetheless claims that the Act's emphasis on state authority is of limited relevance because Congress generally gave EPA authority to administer the CWA and to promulgate

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[41] *Id.* at 174.

[42] *See* Dkt. No. 188 (EPA Br., p. 23) at 33.

[43] *FERC v. Mississippi*, 456 U.S. 742, 768 n.30 (1982).

[44] *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994).

[45] Dkt. No. 24-14 (US EPA, Bristol Bay 404(c) Discussion Matrix, HQ Briefing (Sept. 8, 2010)) at 1.

[46] EPA insists that it can intelligibly exercise its Section 404(c) authority outside of the context of a particular project. *See* Dkt. No. 188 (EPA Br., p. 21) at 31. According to EPA, its evaluation of the unacceptability of adverse effects "does not require a specific mine plan detailing specific discharges," but EPA fails to explain how it can "evaluate[] the potential adverse effects of discharges" without knowing, among other things, what exact pollutants are being discharged, at what precise locations, in what quantities, and whether potential effects are being mitigated.

regulations.[47] Such general provisions cannot, however, expand the scope of Section 404(c) and do not authorize unlawful intrusion into state land use authority.[48]

EPA also suggests that Section 404(c) is the sort of "clear and manifest statement from Congress" that justifies intrusion into states' traditional authority over land use.[49] An examination of other federal statutes reveals the flaw in that argument. Congress knows, for example, how to authorize federal agencies to withdraw lands for the purpose of limiting activities on those lands or to declare lands unsuitable for particular uses, and it speaks in no uncertain terms when delegating such authority with respect to even ***federal*** lands.[50] Surely if Congress deems it necessary to speak in such clear terms in those statutes, at least a comparably clear statement would be required with respect to the displacement of ***state*** authority over land and water use. Thus, "it [is] implausible that Congress would give to EPA through the[] modest words [in Section 404(c)] the power" to preempt State land use decisions through using Section 404(c) proceeding that is outside the permitting context.[51]

Although EPA's interpretation of Section 404(c) cannot be reconciled with the CWA's emphasis on state authority, EPA argues for *Chevron* deference by pointing to the 1979 preamble to its veto regulations, as well as to the age of those regulations.[52] Neither of those is compelling. The 1979 preamble relies primarily on the terms "whenever" and "any defined area" to justify the interpretation that Section 404(c) authorizes EPA to act outside of the

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[47] *See* Dkt. No. 188 (EPA Br., pp. 22-23) at 32-33 (citing 33 U.S.C. §§ 1251(d), 1361(a), 1344(c)).

[48] *See Gonzales v. Oregon*, 546 U.S. 243, 264-65 (2006) ("It would go . . . against the plain language of the text to treat a delegation for the 'execution' of [the Attorney General's] functions as a further delegation to define other functions well beyond the statute's specific grants of authority.").

[49] *Compare* Dkt. No. 188 (EPA Br., p. 23) at 33 *with* Dkt. No. 24 (Pls.' Mot. for Prelim. Injunction, p. 18) at 26 (quoting *Rapanos v. United States*, 547 U.S. 715, 738 (2006)).

[50] *See, e.g.*, 30 U.S.C. § 1272 (Surface Coal Mining and Reclamation Act ("SMCRA") provisions for designating areas unsuitable for surface coal mining); *id.* § 1281 (SMCRA provisions for designation of Federal lands unsuitable for noncoal mining); 43 U.S.C. § 1714 (withdrawals of Federal lands under the Federal Land Policy and Management Act).

[51] *Whitman v. Am. Trucking Ass'n, Inc.*, 531 U.S. 457, 468 (2001).

[52] *See* Dkt. No. 188 (EPA Br., pp. 26-28) at 36-38.

permitting context. As we have shown above, that interpretation is incompatible with its statutory context, finds no support in the legislative history, and would impermissibly result in federal intrusion upon traditional state authority. EPA's claim that the age of its regulatory interpretation merits deference is equally unpersuasive,[53] because this is not a case where EPA has consistently applied the regulation at issue or where the regulation has withstood administrative or judicial challenges over time. The authorities EPA cites on this point are inapposite. In *NLRB v. Bell Aerospace Co.*, deference to the agency was appropriate because the Agency had consistently applied an interpretation in "case after case" for more than two decades.[54] Similarly, in *Entergy Corp. v. Riverkeeper, Inc.*, the Court found that EPA "ha[d] been proceeding in essentially this fashion for over 30 years," citing EPA opinions and decisions from the Environmental Appeals Board and federal courts.[55] *Smiley v. Citibank (South Dakota), N.A.*, on the other hand, was not even a case where the agency argued for deference to a longstanding administrative construction.[56] Quite the contrary, that case involved a more than 100-year delay between the statute's enactment and the agency's promulgation of a regulation, which was "prompted by litigation."[57]

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[53] *See id.* at 38; *see also* Dkt. No. 180 (NRDC Br., p. 7) at 9. NRDC breaks from EPA in asserting that EPA has twice used Section 404(c) "prospectively," but even EPA admits that what it is doing in this case has "[n]ever been done before in the history of the CWA." *Compare* Dkt. No. 180 (NRDC Br., p. 8) at 10 n.49 *with* Dkt. No. 24-14 (US EPA, Bristol Bay 404(c) Discussion Matrix, HQ Briefing (Sept. 8, 2010)) at 1. NRDC's plea for deference to EPA based on those two prior veto decisions comes up short. *See Fort Stewart Schools v. Fed. Labor Relations Auth.*, 495 U.S. 641, 651-52 (1990) ("[I]f an agency's decision is to be sustained in the courts on any rationale under which the agency's factual or legal determinations are entitled to deference, it must be upheld on the rationale set forth by the agency itself."). In any event, both of the examples that NRDC relies on are distinguishable. The Bayou Aux Carpes veto was based on a specific Corps project. *See* 50 Fed. Reg. 47267 (Nov. 15, 1985). In Henry Rem Estate, EPA did not need to await submission of a permit application for the third of three rockplowing projects in the Everglades because it had all of the information it needed from one of the other projects on an adjacent tract of land. *See* 53 Fed. Reg. 30093 (Aug. 10, 1988).

[54] 416 U.S. 267, 287-89 & n.14 (1974).

[55] *See* 556 U.S. 208, 224-25 (2009).

[56] *See* 517 U.S. 735 (1996).

[57] *See id.* at 740-41.

Finally, as part of its *Chevron* step two analysis, NRDC argues that Congress acquiesced in EPA's regulatory interpretation of Section 404(c).[58] In NRDC's view, the fact that Congress did not amend Section 404(c) in 1987, years after EPA promulgated its veto regulations in 1979, somehow validates EPA's regulatory interpretation. The Supreme Court's opinion in *SWANCC* exposes the weakness of NRDC's argument.[59] *SWANCC* discussed a prior case in which the Court found acquiescence based on the fact that Congress had held hearings discussing an agency interpretation and had considered at least thirteen bills proposing to overturn that interpretation.[60] The Court explained that, "[a]bsent such overwhelming evidence of acquiescence, we are loath to replace the plain text and original understanding of a statute with an amended agency interpretation."[61] Here, NRDC cites no evidence whatsoever that Congress considered EPA's interpretation of Section 404(c) and thus, there is no basis to view the 1987 CWA amendments as "persuasive evidence that [EPA's] interpretation is the one intended by Congress."[62]

II. EPA's Assertion of Veto Authority Outside of the Permitting Context Unlawfully Conflicts with the Statehood Act Compact and Cook Inlet Land Exchange.

The land at issue in this case is not just any land. The Pebble lands were conveyed to the State through an express, three-way bargain—the Cook Inlet Land Exchange—under which Congress itself ensured that each party would receive valuable land in exchange for what it gave up. The exchange "involved a great deal of give and take by the parties involved."[63] Ultimately, the State agreed to relinquish previous land selections and not to select lands in the Lake Clark area, so the federal government could re-convey a portion of the lands to Cook Inlet Region Corporation, Inc. and use the remainder to consolidate its own holdings in the Lake Clark area

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[58] *See* Dkt. No. 180 (NRDC Br., pp. 8-9) at 10-11.

[59] *See* 531 U.S. at 169.

[60] *Id.* at 169 n.5.

[61] *Id.*

[62] *Nat'l Labor Relations Bd. v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974).

[63] Dkt. No. 24-23 (Federal-State Land Use Planning Commission for Alaska, *Cook Inlet Report*, at 9 (Mar. 6, 1976)) at 13.

for a future preserve.[64] In return, land that had previously been withdrawn from State selection so it could be preserved for conservation purposes, was made available by Congress to the State and selected by the State under the terms of Section 6(i) of the Alaska Statehood Act[65] so it could be developed—among other ways—to extract minerals for the economic benefit of the State and its citizens.[66] In other words, the State was promised something in return for what it gave up: specifically, the right to select the Pebble lands, including the right to use and develop the mineral resources conveyed.

EPA and Nunamta defend EPA's preemptive action by arguing in effect that the provisions of one Act of Congress, Section 404(c) of the CWA, can be freely invoked by a federal agency to override ***other*** Acts of Congress—the Alaska Statehood Act and Cook Inlet Land Exchange legislation. Here, EPA has decided that it has the power to renege on express agreements Congress entered into with the State. Yet not even Congress could "grant lands to a State on certain specific conditions and then later, after the conditions had been met and the lands vested, succeed in upsetting settled expectations through a belated effort to render those conditions more onerous."[67] In this case, EPA has assumed the power to plan how the Pebble land may be used, precisely the kind of decision-making that Congress left to the State. Indeed, EPA has presumed to possess authority to withdraw state land from particular development. Given the tension between EPA's asserted CWA authority and the Alaska lands legislation, the former must be interpreted so as to harmonize with the latter, and EPA's assertion of veto authority outside the permitting context must be set aside.[68]

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[64] *See* Dkt. No. 24 (Pls' Mot. for Prelim. Injunction, p. 23) at 31; *see also*, *e.g.*, Dkt. No. 25 (Smith Decl.) ¶ 17.

[65] The lands that were the subject of the Cook Inlet Land Exchange were to be treated just as lands selected under Section 6(i) of the Statehood Act. *See* Pub. L. No. 94-204, § 12(d)(1); *see also* Pub. L. No. 85-508, § 6(i) (1958).

[66] *See, e.g.*, Pub. L. No. 94-204, § 12(d)(1); Dkt. No. 24-24 (Terms and Conditions for Land Consolidation and Management in the Cook Inlet Area, Appendix D (Dec. 10, 1975)) at 15-16.

[67] *Asarco Inc. v. Kadish*, 490 U.S. 605, 632 (1989).

[68] *See* Dkt. No. 24 (Pls' Mot. for Prelim. Injunction, p. 30) at 38 (EPA may reasonably regulate, but "it may not exercise . . . authority in a way that would override an Act of Congress . . . and thereby use that general authority to thwart specific Congressional decisions").