including generating some 15,000 American jobs and contributing as much as $2.5 billion to gross domestic product annually.[17]

In fact, prior to EPA's initiation of the Section 404(c) veto process, the Pebble Project was providing vital economic opportunities for local communities. Before the Pebble Partnership's exploration activities, Plaintiff Alaska Peninsula Corporation's ("APC") villages[18] were dying due to high fuel costs, the economically depressed Bristol Bay fishery, and few alternative economic opportunities.[19] Recognizing that the Bristol Bay fishery does not provide a sustainable economy for APC and its owners,[20] APC looked to other sources of income, including resource development, in particular. APC developed an environmental services company, APC Services, which contracted with Pebble to perform hydrology work.[21] That company was extremely profitable, providing much-needed employment to the Native Village of Newhalen.[22] Likewise, another APC subsidiary, Wetaviq, Ltd., contracted with resource development companies to engage APC's over 800 Alaska Native shareholders through community outreach.[23] Following EPA's announcement of the veto, the APC subsidiaries have had to lay off employees and significantly downsize,[24] and the ensuing economic disaster has driven APC Shareholders to relocate away from the villages, thereby accelerating the loss of opportunity and culture.[25]

Other local communities and businesses face a similarly dire fate. For example, before EPA's veto announcement, the Iliamna Development Corporation ("IDC") was providing a

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[17] Flanagan Decl. ¶¶ 6-7.

[18] APC is a consolidated village corporation within the meaning of ANCSA § 3(j) for the Native villages of Newhalen, Kokhanok, South Naknek, Ugashik and Port Heiden.

[19] *See* Declaration of Trefon Angason (June 24, 2014) ("Angason Decl.") ¶¶ 4, 5, 16, 19.

[20] *See id.* ¶¶ 17-18.

[21] *See id.* ¶¶ 10-12.

[22] *See id.* ¶¶ 10-12.

[23] *Id.* ¶¶ 11-12.

[24] *Id.*

[25] *Id.* ¶ 13.

range of services with respect to the Pebble Project, including, among other things, fuel and equipment transport, van shuttles, and catering.[26] Development of the Pebble Project also benefited the local community, giving rise to new lodges and other businesses.[27] This economic activity came to an abrupt halt upon EPA's announcement of its decision to commence the Section 404(c) veto process.[28] The Pebble Partnership can no longer use most of the services that IDC previously provided, which forced IDC to lay off 120 employees.[29] IDC's continued existence is threatened, and the local community has already lost roughly $1.5 million in revenue due to lost jobs and lost demand for local services.[30]

II. EPA Investigations in the Bristol Bay Watershed and Decision to Initiate a Veto Proceeding

Internal EPA emails show that the Agency has been contemplating a Section 404 veto since roughly 2008-09. For example, in a June 16, 2008 email exchange between Phillip North, an EPA ecologist working in Alaska, and Patricia McGrath, EPA Region 10 mining coordinator, Mr. North refers to the "Pebble visit" and "my 404 review."[31] Since 2009, EPA appears to have collaborated extensively in developing its veto strategy with external Pebble opponents, including Trout Unlimited,[32] as well as Geoffrey Parker, counsel to several Tribal Councils that

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[26] Declaration of Lisa Reimers (June 19, 2014) ("Reimers Decl.") ¶¶ 2, 16.

[27] *See id.* ¶ 18.

[28] *See id.* ¶¶ 31-39.

[29] *See id.* ¶ 36.

[30] *See id.* ¶¶ 32, 37.

[31] Ex. 3. Additional emails from 2008 and 2009 show ongoing discussion of a possible EPA veto with respect to the Pebble Project. *See, e.g.*, Ex. 4 (Email from P. North, EPA Region 10, to P. McGrath, EPA Region 10 (Aug. 26, 2008)) (stating that "[t]he 404 program has a major role. I would like the benefit of hearing what other EPA folks are thinking."); Ex. 5 (Email from P. North, EPA Region 10, to M. Szerlog, EPA, et. al. (Aug. 17, 2009)) (advocating that the Pebble project "merit[s] consideration of a 404C veto").

[32] *See, e.g.*, Ex. 6 (Email from M. Szerlog, EPA, to S. Brown, Trout Unlimited, et al. (Nov. 4 2009)) (referencing times and dates for a possible meeting to discuss the Pebble Mine proposal); Ex. 7 (Email from N. Stoner, EPA Deputy Assistant Administrator for the Office of Water, to S. Brown, Trout Unlimited (Sept. 27, 2010)) (reflecting Ms. Stoner's willingness to have a "Pebble mine discussion follow up"); Ex. 8 (Email from P. North, EPA Region 10, to S. Brown, Trout

(continued...)

petitioned EPA in May 2010 to exercise its Section 404(c) authority with respect to Pebble.[33] In particular, *EPA specifically "ask[ed Mr. Parker] for [his] thoughts on what might help a 404(c) determination to be relatively stable over subsequent administrations."*[34]

Perhaps most notably, EPA was weighing the pros and cons of a preemptive 404(c) veto determination no later than September 2010.[35] Although EPA was concerned that a preemptive veto has "[n]ever been done before in the history of the CWA[,]" it nevertheless emphasized that such a veto could be a "model" for "watershed planning."[36] With respect to its Section 404(c) authority generally, EPA touted the advantage of seizing "control of the process and decision[,]" while at the same time recognizing the limitations of a 404(c) action: "[t]here is no real public discussion – public involvement is to comment then sue if they have the resources (NEPA, 404 permit, 404(c))."[37] Ultimately, EPA determined that the pros outweighed the cons—in December 2010, EPA prepared a funding proposal to "[i]nitiate the process and publish a CWA 404(c) 'veto' action for the proposed permit for the Pebble gold mine in Bristol Bay, AK," even

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(continued...)

Unlimited (June 11, 2010)) (referencing a Pebble briefing to "Dennis" that "seemed to go well" and indicating that Mr. North "think[s] they understand at least the resources issues"). Presumably, the "Dennis" that is mentioned in the June 11, 2010 email is Defendant Dennis McLerran.

[33] *See, e.g.*, Ex. 9 (Letter from G. Parker, to D. McLerran, EPA (May 7, 2010)) (referencing the Tribes' petition); Ex. 10 (Email from P. North, EPA Region 10, to G. Parker (Sept. 14, 2010)) (forwarding an internal EPA email discussing 404(c) strategy with respect to Pebble and the Bristol Bay); Ex. 11 (Email from P. Hough, EPA Region 10, to G. Parker (Feb. 14, 2012)) (stating that, "[w]e appreciate your thoughts regarding the schedule for our watershed assessment and any potential future actions. We will take these under advisement").

[34] Ex. 12 (Memorandum from G. Parker, to P. Hough, EPA Region 10, et al. (Sept. 12, 2011)) (emphasis added).

[35] Ex. 13 (US EPA, Bristol Bay 404(c) Discussion Matrix, HQ Briefing (Sept 8, 2010)), at 1, *available at* http://oversight.house.gov/wp-content/uploads/2014/03/09-08-2010-EPA-Bristol-Bay-HQ-Briefing.pdf.

[36] *Id.* (emphasis added).

[37] *Id.* at 2.

though no one had applied for such a permit.[38] Tellingly, the funding proposal reveals that "[g]iven the magnitude of the proposed project's environmental impact *and the Administration's decision to proceed*, we have no choice but to support this work."[39]

Months after EPA had mapped out a 404(c) strategy and after it proposed to invest money to veto a non-existent permit, EPA launched a study in February 2011 of the Bristol Bay watershed ostensibly in response to Native Corporation petitions.[40] EPA explained that the Bristol Bay Watershed Assessment ("BBWA") would address the impacts of "large-scale mining" throughout the vast watershed.[41] In fact, the assessment focused almost exclusively on mining of the Pebble deposit, and the assessment itself proclaimed that it "largely addresses the potential effects of a single, hypothetical mine at the Pebble deposit."[42]

For the BBWA, EPA based its understanding of the Pebble mine project on Northern Dynasty Minerals' 2011 Preliminary Economic Assessment, a corporate disclosure filing intended only to assess the future economic potential of the Pebble deposit.[43] In 2011, Northern Dynasty Minerals submitted a description of possible mine facilities to the Canadian regulatory authorities to fulfill corporate disclosure requirements.[44] Because of the limited purpose of that submission, it was not required to identify environmental protection or mitigation measures that might ultimately be employed.[45] In reality, the Partnership is free to propose different facilities

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[38] Ex. 14 (US EPA, FY11 Proposed Investment: Bristol Bay 404(c) (Dec. 2010)), at 1, *available at* http://oversight.house.gov/wp-content/uploads/2014/03/12-2010-FY11-EPA-Bristol-Budget.pdf.

[39] *Id.* (emphasis added).

[40] *See* Assessment of Potential Large-Scale Mining on the Bristol Bay Watershed of Alaska, 77 Fed. Reg. 11,111 (Feb. 24, 2012).

[41] *See id.*

[42] Ex. 15 (US EPA, External Review Draft, *An Assessment of Potential Mining Impacts on Salmon Ecosystems of Bristol Bay, Alaska*, p. 8-13 (May 2012) (excerpts)), at 15; *see also* Dkt. No. 18 (Fogels Decl.) ¶ 18; Taylor Decl. ¶¶ 26-27.

[43] *See, e.g.*, Jenkins Decl. ¶ 16; Thiessen Decl. ¶¶ 11-12; Hodgson Decl. ¶ 7.

[44] *See* Thiessen Decl. ¶ 11; Hodgson Decl. ¶ 7.

[45] *See* Thiessen Decl. ¶¶ 12-14; *see also* Jenkins Decl. ¶¶ 16-22; Hodgson Decl. ¶¶ 7-8.

for the actual mine operation.[46] In fact, Northern Dynasty's Preliminary Economic Assessment explicitly states that "[t]he project description that the Pebble Partnership ultimately elects to submit for permitting under NEPA may vary in a number of ways."[47]

Also in connection with the BBWA, EPA conducted a peer review of certain studies that had been conducted by avowed mine opponents.[48] EPA's peer reviewers leveled serious criticisms at these studies, but EPA relied on them in the BBWA anyway.[49] EPA went on to conduct a peer review of the BBWA itself.[50] EPA's own peer reviewers concluded that the BBWA was not adequate to serve as a decision document.[51] In response, EPA was forced to

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[46] *See, e.g.*, Thiessen Decl. ¶¶ 20-22; Hodgson Decl. ¶¶ 7-9.

[47] Thiessen Decl. ¶ 13.

[48] *See* Ex. 16 (Crowell & Moring LLP, Comments on Second External Review Draft of *An Assessment of Potential Mining Impacts on Salmon Ecosystems of Bristol Bay, Alaska*, pp. 32-40 (June 28, 2013) (excerpts)), at 4-12 (detailing how the peer reviewers commented extensively on how seven studies are biased and discussing anti-Pebble efforts by many of the authors of those studies).

[49] *See id.* Full copies of the peer review comments on those studies are available on EPA's website at http://cfpub.epa.gov/ncea/bristolbay/recordisplay.cfm?deid=182065.

[50] *See* An Assessment of Potential Mining Impacts on Salmon Ecosystems of Bristol Bay, 77 Fed. Reg. 33,213 (June 5, 2012) (announcing peer review panel members and draft charge questions); *see also* Final Peer Review Report: External Peer Review of EPA's Draft Document, *An Assessment of Potential Mining Impacts on Salmon Ecosystems of Bristol Bay, Alaska* (Sept. 17, 2012), *available at* http://www.epa.gov/ncea/pdfs/bristolbay/Final-Peer-Review-Report-Bristol-Bay.pdf.

[51] *See* Ex. 17 (EPA Response to Peer Review Comments on the May 2012 and April 2013 Drafts of the BBWA (January 2014), pp. 65, 68, 82 (excerpts)) (Stubblefield comments at 3: "Unfortunately, because of the hypothetical nature of the approach employed, the uncertainty associated with the assessment, and therefore the utility of the assessment, is questionable"; Van Zyl comments at 5: "The resulting risk assessment can be at best characterized as preliminary, screening level, or conceptual. There are both technical and process issues that must be addressed before this risk assessment can be considered complete or of sufficient credibility to be the basis for a better understanding of the impacts of mining in the Bristol Bay watershed."; Slaughter comments at 7: "this assessment does not (or cannot, presumably because of limited EPA authority) address the full suite of probable consequences of the PLP project. Permit application and NEPA review hopefully *would* be more adequate and comprehensive.") (emphasis in original).

agree.[52] Recently, one of those peer reviewers, Dirk Van Zyl, elaborated further on how the analysis in the BBWA is incomplete, the level of detail is inconsistent, and the mining scenarios analyzed in that document "fail to employ international best-mining practices and, for several reasons, would not be granted permits in Alaska or elsewhere in the United States."[53]

EPA published the final BBWA in January 2014.[54] At that time, EPA announced that it had reached no conclusions about a Section 404 veto, but that it had found that a Pebble mine would threaten substantial harm to the Bristol Bay fishery. About a month later, on February 28, 2014, Dennis McLerran, Regional Administrator of EPA Region 10, sent a letter to the Corps, the State of Alaska, and the Pebble Partnership announcing that EPA was initiating a proceeding under CWA Section 404(c) to veto or restrict any permit for "discharges of dredged and fill material associated with mining the Pebble deposit[.]"[55] Regional Administrator McLerran wrote that "[t]he Agency is taking this step because it has reason to believe that porphyry copper mining of the scale contemplated at the Pebble deposit would result in significant and unacceptable adverse effects to important fishery areas in the watershed."[56]

On April 29, 2014, the Pebble Partnership and the State of Alaska submitted separate objections to EPA's decision to conduct veto proceeding.[57] Among other things, both the State and the Pebble Partnership objected to EPA's decision because no permit application to engage in such activities had been filed, and because, by conducting this veto proceeding involving

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[52] *See id.* at 2 ("this assessment is based on available data and is intended as a background scientific document rather than a decision document"); *id.* at 8 ("This is not a permitting document."); *id.* at 9 ("The assessment is not intended to duplicate or replace a regulatory process.").

[53] Declaration of Dirk Van Zyl (June 19, 2014) ("Van Zyl Decl.") ¶¶ 9-13.

[54] *See* 79 Fed. Reg. 3,369-70 (Jan. 21, 2014).

[55] Ex. 18 (Letter from D. McLerran, EPA, to T. Collier, Pebble Partnership, et al. (Feb. 28, 2014)).

[56] *Id.*

[57] *See* Ex. 19 (Letter from T. Collier, Pebble Partnership, to D. McLerran, EPA (Apr. 29, 2014)); Ex. 20 (Letter from M. Geraghty, Alaska Attorney General, to D. McLerran, EPA (Apr. 29, 2014)).

Statehood Act lands, EPA was assuming authority that Congress had given to the State.[58] The Corps announced that it could not respond to EPA's letter because the Corps had no permit application to review.[59]

On May 5, 2014, in response to congressional requests and hotline complaints, EPA's Inspector General announced a decision to launch an investigation into EPA's conduct relating to the BBWA.[60]

On May 21, the Pebble Partnership filed the complaint in this action, seeking to enjoin the veto proceeding on the grounds that the CWA did not authorize it because no permit application had been filed, and it violated rights conferred on the State under the Statehood Act.[61] The State of Alaska moved to intervene in this action as a plaintiff on May 30, 2014.[62]

ARGUMENT

The Pebble Partnership can establish the elements necessary to obtain a preliminary injunction: (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) a temporary restraining order or preliminary injunction is in the public interest.[63] This is even more clearly true under the Ninth Circuit's "sliding scale" test, used in awarding injunctive relief.[64] Under the "sliding scale" approach "to evaluating the first and third *Winter* elements, a preliminary injunction may be granted when there are 'serious questions going to the merits and a hardship

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[58] *See* Ex. 19 (Apr. 29, 2014 Pebble Letter), at 49-53; Ex. 20 (Geraghty Letter) at 20 (Attachment 1).

[59] *See* Ex. 20 (Geraghty Letter), at Attachment 1.

[60] *See* Ex. 21 (Memorandum from P. Gilbride, US EPA, to N. Stoner, US EPA, et al. (May 2, 2014)).

[61] *See* Dkt. No. 1.

[62] *See* Dkt. No. 17.

[63] *Shell Offshore, Inc. v. Greenpeace*, 709 F.3d 1281, 1289 (9th Cir. 2013) (citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)); Fed. R. Civ. P. 65(b)(1).

[64] *Shell Offshore*, 709 F.3d at 1291; *Alliance for the Wild Rockies v. Cotrell*, 632 F.3d 1127, 1131-32 (9th Cir. 2011).

balance that tips sharply toward the plaintiff,' so long as 'the other two elements of the *Winter* test are also met.'"[65]

I. The Pebble Partnership is Likely to Succeed on the Merits of its Claims.

The Pebble Partnership is "likely" to prevail on the merits of its claims.[66] In its Complaint, the Pebble Partnership seeks relief on two claims and is likely to prevail on both. An injunction is warranted if the Court finds that the Pebble Partnership is likely to prevail on either.

A. The CWA Does Not Authorize EPA to Conduct a Veto Proceeding Outside of the Permitting Context.

"When reviewing a challenge to an agency's statutory authority, [the Court's] inquiry must begin by examining the statutory language."[67] If "Congress has spoken directly to the issue, so that there is a clearly expressed intent, . . . [the Court must] reject administrative constructions of a statute that are inconsistent with the statutory mandate or that frustrate the policy Congress sought to implement."[68] In this case, the CWA's text, structure, legislative history, and purpose all confirm that EPA cannot lawfully exercise its Section 404(c) authority outside of the Corps' Section 404 permitting process for the Pebble project.

1. The Plain Text and Structure of Section 404 Show that EPA Must Exercise Its Section 404(c) Authority within the Context of a Particular Permitting Process.

Analysis of the statute shows that Pebble is likely to succeed on the merits of its CWA claim. Section 404 addresses "Permits for dredged or fill material."[69] Subsection (a) establishes the Secretary's ability to issue permits; subsection (b) establishes the Secretary's ability to specify disposal sites with respect to each permit; subsection (c), in turn, qualifies that authority by providing that the Administrator of EPA may prohibit or withdraw such a specification. By its plain language, Section 404(c) cannot apply in the absence of a Corps permitting process

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[65] *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 944 (9th Cir. 2013) (quoting *Alliance for the Wild Rockies*, 632 F.3d at 1131-32).

[66] *Winter*, 555 U.S. at 20.

[67] *Pac. Nw. Generating Co-op v. Dep't of Energy*, 580 F.3d 792, 806 (9th Cir. 2009).

[68] *Id.*

[69] 33 U.S.C. § 1344.

under Sections 404(a) and (b). These subsections revolve around the Corps' issuance of permits for the discharge of dredged or fill material at *specified disposal sites*:

> (a) the Corps has authority to "issue permits . . . for the discharge of dredged or fill material . . . at specified disposal sites[;]" and
>
> (b) "[E]ach such disposal site shall be specified for each such permit" by the Corps through application of the Section 404(b)(1) Guidelines; and
>
> (c) EPA has authority to "prohibit the specification . . . of *any defined area* as a disposal site" if it determines "that the discharge of *such materials* into *such area* will have an unacceptable adverse effect" on certain resources.[70]

These provisions reflect Congress's intent that EPA cannot exercise its Section 404(c) authority outside of the permitting process. Only the Corps can "specif[y]" disposal sites and determine "defined area[s]" for specification as a disposal site. With limited exceptions (not relevant here),[71] the Corps does so only upon receipt of permit application. Importantly, EPA recently endorsed this very construction of the statute in *Mingo Logan Coal Co. Inc. v. EPA* (D.C. Cir. No. 12-5150): "Congress did not need to use the word 'permit' in § 404(c); the word 'specification' covers the same ground."[72] EPA further asserted in that case that "Section 404(a) and (b) explain that the Corps specifies disposal sites in permits."[73]

Any EPA Section 404(c) proceeding must be confined to a proposed discharge of specific ("such") materials into a specific ("such") area. "Such materials," as used in Section 404(c), does not refer to dredged or fill material generally, but rather to whatever particular materials the Corps proposes to permit to be discharged at particular disposal sites.[74] Moreover, a proposed discharge—not merely an associated operation or activity—must be certain to ("will") have an "unacceptable adverse effect."[75] Without a permit application, EPA could not intelligibly

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[70] 33 U.S.C. §§ 1344(a)-(c) (emphasis added).

[71] *E.g.*, Corps civil works program; statewide programs under 33 U.S.C. § 1288(b)(4)(B)-(C); and certain federal construction projects. *See* 40 C.F.R. § 230.2(a).

[72] Final Brief of Def.-Appellant U.S. EPA, ECF Document #1400061, at 30 (Oct. 17, 2012).

[73] *Id.* at 25.

[74] 33 U.S.C. § 1344(c).

[75] *Id.*

exercise its Section 404(c) authority. Precisely what "such materials" are involved, the exact location of their discharge ("such [defined] area"), and the level of adverse effect, among other things, can be known only upon submission of a permit application, the completion of an environmental impact statement, and the Corps' specification (proposed or final) of particular discharge materials and a disposal site(s).[76]

Other provisions in Section 404 and the Act's overall structure confirm that EPA cannot exercise its Section 404(c) as broadly as it proposes to here.[77] Congress did not use the words "such materials" anywhere other than in Section 404(c). Where Congress wanted to reference dredged or fill material generally—*i.e.*, outside of the context of the permitting process—it did so. For example, Section 404(t) provides that nothing shall preclude or deny a State's right "to control the discharge of dredged or fill material in any portion of the navigable waters within the jurisdiction of such State[.]"[78] Similarly, Section 208 outlines requirements for state programs "to control the discharge or other placement of dredged or fill material into navigable waters[.]"[79] The reference to "such materials" in Section 404(c) can only mean those that the Corps proposes to permit to be discharged at specified disposal sites.

Moreover, the Corps has exclusive authority to issue Section 404 permits.[80] Congress intended for EPA's role within Section 404 permitting to be a limited one, with the veto process being an exception rather than the rule.[81] By exercising its veto authority before the Corps has even received a permit application, EPA effectively usurps the Corps' statutorily delegated role

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[76] Importantly, such facts are not known here. Pebble is not committed to a single mine design or operation plan, and for practical reasons cannot do so prior to consultation with a new investor. *See* Thiessen Decl. ¶¶ 20-22, 18; *see also* Hodgson Decl. ¶ 9.

[77] *See Ass'n of Irritated Residents v. EPA*, 686 F.3d 668, 679 (9th Cir. 2011) (at *Chevron* step one, courts "not only examine the precise statutory section in question, but also analyze the provision in the context of the governing statute as a whole[.]").

[78] 33 U.S.C. § 1344(t).

[79] *Id.* § 1288(b)(4)(B).

[80] *See Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261, 273-74 (2009) ("Section 402 thus forbids the EPA from exercising permitting authority that is 'provided to the Corps' in § 404.").

[81] *See id.* at 274.

as the "principal player" in the Section 404 permit process.[82] EPA's preemptive action has prevented the Corps from even considering whether to specify a proposed disposal site or activity. Nothing suggests that Congress intended to take such an extraordinary step in Section 404(c), when it "carv[ed] out [] limited circumstances for EPA involvement in the issuance of Section 404 permits[.]"[83] To construe Section 404(c) as has EPA renders the "such materials" and "such area" language so vague that every wetland-containing location in America would be subject to veto at any time.[84] The statute does not support such a broad power.

Finally, the D.C. Circuit's recent affirmance of EPA's *post-permit issuance* exercise of its Section 404(c) authority in *Mingo Logan* does not validate EPA's position here. That Court's expansive view of the term "whenever" in Section 404(c) is not controlling.[85] There, the Court was focused entirely on whether EPA could "withdraw" a specification of a disposal site after the Corps' issuance of a final permit.[86] If anything, that decision undercuts EPA's position in this case, as the D.C. Circuit apparently interpreted EPA's Section 404(c) authority to be confined to instances where the Corps has already received a permit application and has either specified a disposal site (in a final permit) or proposed to do so (in a proposed permit).[87] Nowhere does *Mingo Logan* discuss the issue here, *i.e.*, whether EPA can exercise its Section 404(c) authority in the absence of the Corps' permitting process.

2. The Clean Water Act's Legislative History Confirms that Congress Did Not Authorize a Veto Outside of the Permitting Process.

"Although there is no ambiguity in [Section 404] that requires consulting legislative history to reject the EPA's contrary interpretation, . . . the legislative history supports our

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[82] *See Nat'l Mining Ass'n v. Jackson*, 816 F. Supp. 2d 37, 45 (D.D.C. 2011).

[83] *Id.* at 44.

[84] *See* 33 U.S.C. § 1344(c).

[85] *Mingo Logan*, 714 F.3d 608, 613 (D.C. Cir. 2013).

[86] *See id.*

[87] *See, e.g.*, *id.* at 614 ("*During the permitting process*, the disposal sites are proposed, reviewed — *perhaps even 'specified'* . . . — but the final specifications are included *in the permit itself*.") (emphasis added); *id.* at 612 (describing Section 404(c) as giving EPA "'backstop' authority over the Secretary's discharge site selection").

interpretation" and confirms that Congress did not intend Section 404(c) to apply outside of permitting situations.[88] The Senate Debate on the Conference Report reflects an intent that EPA would make decisions on whether to exercise its Section 404(c) authority *after* the Corps had received a permit application:

> The decision is not duplicative or cumbersome because the *permit application transmitted to the Administrator for review* will set forth both the site to be used and the content of the matter of the spoil to be disposed. The Conferees expect the Administrator to be expeditious in his determination as to whether a site is acceptable or if specific spoil material can be disposed of at such site.[89]

Other discussions from the Senate Debate on the Conference Report reflect an understanding that EPA would make determinations on whether to take action under Section 404(c) within the context of a permitting process: "prior 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 [the specified site]. Should the Administrator so determine, no permit may issue."[90]

Congress gave EPA veto authority over the "selection of the site . . . and over any specific spoil to be disposed of in any selected site" when a potential permitting decision of the Corps would not be in line with the environmental considerations underlying the Clean Water Act.[91] Congress obviously assumed that the Corps would have already considered a specific site in reviewing an already-submitted permit application. The precise reference to transmission of the "permit application . . . to the Administrator for review" for Section 404(c) purposes confirms that Congress expected that EPA would exercise its authority under that provision only with respect to existing permit applications.[92]

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[88] *Ass'n of Irritated Residents*, 686 F.3d at 680.

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

[90] *Id.*

[91] *Id.*

[92] *Id.*

3. EPA's Pre-Application Exercise of Section 404(c) Authority Conflicts with the CWA's Federalism Principles.

EPA's exercise of its Section 404(c) authority with respect to the Pebble deposit in the absence of a permit application "alters the federal-state framework by permitting federal encroachment upon a traditional state power."[93] By initiating the Section 404(c) process before the Corps has received any applications for Section 404 permits anywhere within the Pebble deposit areas, EPA has impermissibly claimed authority to engage in land use planning.[94] The Supreme Court has long recognized that land use planning is a "quintessential state and local power."[95] Congress left no doubt in the CWA that it intended to recognize and preserve such state authority. Section 101(b) of the Act announces "the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution" and "to plan the development and use . . . of land and water resources[.]"[96] Similarly, Section 510 bars any interpretation of the Act that would "impair[] or in any manner affect[] any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States[,]" except as otherwise "expressly provided" by the statute.[97] Because Section 404(c) contains no "clear and manifest statement from Congress to authorize an unprecedented intrusion into traditional state authority[,]" that provision cannot bear the interpretation that EPA has adopted.[98] This Court should avoid construing the CWA to authorize EPA to act under Section 404(c) to preclude land uses for broad areas before any permit applications have been submitted.

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[93] *Solid Waste Agency of N. Cook Cty. v. Army Corps of Eng'rs* ("*SWANCC*"), 531 U.S. 159, 173 (2001).

[94] *See* Ex. 13 (US EPA, Bristol Bay Discussion Matrix) (identifying the ability to engage in "proactive watershed planning" as an advantage for exercising Section 404(c) authority "before permit applications").

[95] *Rapanos v. United States*, 547 U.S. 715, 738 (2006) (collecting cases).

[96] 33 U.S.C. § 1251(b).

[97] *Id.* § 1370.

[98] *See Rapanos*, 547 U.S. at 738; *accord SWANCC*, 531 U.S. at 172-74 (same).