

January 2003

Judges' Bench Memorandum: Fourteenth Annual Pace National Environmental Moot Court Competition

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Recommended Citation

Michelle D. Land, *Judges' Bench Memorandum: Fourteenth Annual Pace National Environmental Moot Court Competition*, 20 Pace Envtl. L. Rev. 449 (2003)

DOI: <https://doi.org/10.58948/0738-6206.1174>

Available at: <https://digitalcommons.pace.edu/pelr/vol20/iss1/17>

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**FOURTEENTH ANNUAL PACE NATIONAL
ENVIRONMENTAL LAW MOOT COURT COMPETITION**

Judges’ Bench Memorandum

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EXECUTIVE SUMMARY

Recreationists are pitted against each other in this case whereby a birdwatching organization has sued a skeet shooting and firing range operation for violation of the Clean Water Act (CWA) and the Resource Conservation and Recovery Act (RCRA). The Birdwatchers of Groveton (BOG) and the United States Environmental Protection Agency (EPA) appeal the decision of the District Court, which held that a 2001 amendment to the CWA extending jurisdiction over isolated waters did not govern the case. BOG and EPA also appeal the holding that neither the Commerce Clause nor the Treaty Clause justifies federal regulation of

water pollution over the isolated Sheldrake Pond. With respect to the RCRA issues, BOG and EPA oppose the lower court's decision that fired shot and skeet parts are not "solid waste" when they fall to the ground under the statutory definition. However, they part company regarding the regulatory definition, since only Suave opposes the lower court's holding that fired and skeet parts are not "solid waste" when they fall to the ground under the EPA's definition of "solid waste." This memorandum addresses all five legal issues and explores arguments of all parties.

The CWA prohibits the addition of fill material or a pollutant into navigable waters. The legislative history of the statute indicates that Congress intended the term "navigable waters" to be interpreted to the fullest constitutional extent. A recent Supreme Court decision, however, held that isolated waters were not within the congressional definition of "navigable waters" thereby stripping federal regulatory jurisdiction over isolated waters used by migratory birds. As a result, the Court skirted the constitutional issue of whether it was within Congress' Commerce Clause authority to assert jurisdiction over insignificant, isolated waters such as Sheldrake Pond. In response to the Supreme Court's decision, Congress amended the CWA's definition of "navigable waters" to incorporate isolated waters that are important stopovers for migratory birds. At issue in this appeal is whether the amendment, which occurred eight months after BOG filed its complaint, can be retroactively applied to Suave's firing and skeet shooting range locale.

For twenty years, birdwatchers of BOG had been observing migratory birds using Sheldrake Pond as a stopover, until Suave began using the pond-side area as a firearms and skeet shooting range. By applying the amended definition of "navigable waters" to Suave's range, this appeal must determine if, in fact, Congress has the authority to regulate activity involving isolated ponds under the Commerce Clause. The Supreme Court has established three categories of activity that Congress may regulate under the Commerce Clause: 1) highways of interstate commerce; 2) instrumentalities of interstate commerce; and 3) activities substantially affected by interstate commerce. The primary argument is that Suave's activities either substantially affect the interstate commerce of hunting and observing migratory birds or that the aggregate of such activities substantially affects such commerce. The resolution of this issue will hinge primarily on the assessment of evidence on this point. Moreover, while BOG argues that the

Treaty Clause justifies congressional usurpation of state authority over isolated waters such as Sheldrake Pond, there is no indication that Congress was acting pursuant to the Treaty Clause when it enacted the CWA.

The aim of RCRA is to reduce the generation of hazardous waste and ensure proper treatment, storage, and disposal of that waste. To hold that Suave has violated RCRA requires a finding that shot and skeet parts are "solid waste." However, navigating through the statutory and regulatory definitions of "solid waste" is no easy mission, as they each apply to separate and distinct sections of the RCRA citizen suit regime. Congress' definition of "solid waste," which includes "discarded material," applies to allegations that activities constitute an imminent and substantial endangerment. The EPA's regulatory definition of "solid waste" also includes "discarded material" which is further defined in a complicated manner. The EPA's definition applies to allegations of violating RCRA's regulatory program. Ultimately, the issue of whether fired shot and skeet parts are "solid waste" when they fall to the ground for purposes of the RCRA citizen suits turns on whether the EPA's "consumer use" exception applies. It is EPA's position that the regulatory definition of "solid waste" excludes commercial products used for their intended use, if their ordinary use results in their landing on the ground. Therefore, it is the task of this Court to analyze the appropriate deference to be afforded to the EPA's interpretation of the statutory and regulatory definitions of "solid waste."

SUGGESTED QUESTIONS FOR THE JUDGES

Does the 2001 Congressional Amendment to the CWA's definition of "navigable waters" apply to Suave's activities?

What law do the courts normally apply when there is a change in the law during trial?

Is the legislative amendment retroactive to when BOG filed its complaint?

Does it matter whether or not the amendment is retroactive since Suave's activities are continuing?

Can congressional intent for retrospectivity be satisfied by an intention reflected in the report of only one chamber of Congress?

What are the policy reasons for prospective application of the legislative amendment?

Did Congress exceed its authority under the Commerce Clause in amending the CWA to regulate isolated intrastate waters because those waters do or potentially could serve as habitat for migratory birds?

To what extent can the Report of the Senate Environment Committee be used to indicate congressional finding?

Would federal jurisdiction over isolated waters intrude upon traditional state and local government authority to control land use matters?

To what extent does the *SWANCC* decision apply to non-navigable, isolated, intrastate waters? Does the decision apply narrowly to such waters based on their use by migratory birds or does it extensively cover all non-navigable waters and waters not physically connected to navigable water?

Since migratory birds reside only temporarily in any location, how can individual states effectively protect them absent a national scope?

How can the holding in *Missouri v. Holland*, which relates to statutes and regulations protecting migratory birds under the Migratory Bird Treaty Act, be reconciled with Suave's alleged violation of the CWA?

Have the courts traditionally upheld Commerce Clause regulation of intrastate activity only where the activity is economic in nature? Can the protection of suitable habitat for migratory birds rise to a level of "commercial" activity?

Does the placement of fill within Sheldrake Pond constitute an economic activity that in the aggregate has a substantial effect on interstate commerce?

What are the policy implications of giving Congress the power to regulate non-economic conduct having a substantial effect on interstate commerce?

Does the Migratory Bird Treaty justify a shift from state delegated authority to federal authority over isolated wetlands under the Treaty Clause?

Is the Migratory Bird Treaty self-executing or non-self-executing and how might that affect its constitutionality?

Does the Tenth Amendment of the U.S. Constitution constrain federal regulation of isolated ponds under the Migratory Bird Treaty?

Was Congress acting pursuant to the Treaty Clause when it enacted the CWA in 1972?

Is federal regulation of water quality in isolated ponds a valid exercise of authority under the Migratory Bird Treaty Act?

Did the Court below err in holding that fired shot and skeet parts are not solid waste when they fall to the ground under EPA's definition of solid waste in 40 C.F.R. § 262.2?

Did the Court below err in holding that fired shot and skeet parts are not solid waste when they fall to the ground under 42 U.S.C. § 6972(a)(1)(B)?

Does fired lead shot that hits the ground sit under the common understanding of the term "discarded?"

How much, if at all, did EPA consider the "consumer use exception" in the Military Munitions Rule? Is it relevant to our analysis?

Are the D.C. Circuit cases, considering the meaning of the statutory definitions of "discarded," relevant to our analysis?

Are the *Chevron* or *Mead* Supreme Court decisions relevant to EPA's interpretation of its regulations?

What are the policy arguments for applying the "consumer use exceptions" to fired lead under the regulatory definition of "solid waste?"

How much deference is EPA's interpretation of the statutory definition of "solid waste" entitled to? Under *Mead*, should the court defer to EPA's interpretation of the statute? If not, what effect does the decision of this court in *NAG*, which was decided under *Chevron*, have on the case at bar?

How does the law of the circuit deal with intervening Supreme Court decisions that do not address the holding of the precedent, but reject its reasoning?

How persuasive is EPA's interpretation of the statute that Congress did not intend to regulate the use of consumer products for intended purposes?

Why might it make sense to include fired lead shots, when they aggregate in large quantities, under the statutory definition of "solid waste" as used in § 6972(a)(1)(B)?

QUESTIONS PRESENTED

I. DOES THE 2001 CONGRESSIONAL AMENDMENT TO THE CWA'S DEFINITION OF "NAVIGABLE WATERS" APPLY TO SUAVE'S ACTIVITIES?

A. Suave Will Argue the Amendment Should Not Apply to the Defendant Because of the Traditional Presumption Against Statutory Retroactive Application

As with many canons of statutory construction, there is tension among the courts regarding retroactivity. Until the landmark case *Landgraf v. USI Film Products* resolved whether to apply statutory amendments retroactively or prospectively, there was an apparent conflict, even within holdings of the United States Supreme Court. 511 U.S. 244 (1994). One generally accepted canon was that "retroactivity is not favored in the law . . . congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Bowen v. Georgetown Univ. Hosp.*, 480 U.S. 204, 208 (1988). The opposite canon was to apply the law in effect at the time a court renders its decision, unless such application results in manifest injustice or runs contrary to congressional intent. See *Bradley v. Richmond School Bd.*, 416 U.S. 696 (1974). Although the United States Supreme Court noted the "apparent tension" in *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, the Court found it unnecessary to resolve the conflict because the congressional intent was clear and therefore governed. 494 U.S. 827, 837 (1990). While the Court in *Kaiser* chose not to resolve the conflict between the two conflicting expressions, in *Landgraf* it had to focus on the tension in the absence of instruction from Congress. The Court ultimately held that where a new statute would impair rights a party possessed when he acted, increase his liability for past conduct, or impose new duties with respect to transactions already completed, the traditional presumption against retroactivity applies absent clear congressional intent otherwise. 511 U.S. at 280.

There is a traditional presumption against retroactive application of a statute, absent a clear congressional intent favoring such a result. See *Landgraf*, 511 U.S. 244 (1994). The presumption against statutory retroactivity is founded upon elementary considerations of fairness dictating that an individual has a right to know what the law is and to conform his or her conduct accordingly. See *id.* at 265. Therefore, a law will not be construed as retroactive unless the act clearly, by express language or neces-

sary implication, indicates the legislature intended a retroactive application. See *Bowen v. Georgetown Univ. Hosp.*, 480 U.S. 204, 208 (1988) (holding that Department of Health did not have the power to promulgate retroactive cost-limit rules because authority to issue retroactive rules was not authorized by Congress).

The anti-retroactivity principle is expressed in several provisions of the United States Constitution. As noted by the Court in *Landgraf*, "[t]he *Ex Post Facto* Clause flatly prohibits retroactive application of penal legislation." *Landgraf*, 511 U.S. at 249. Although the action at bar is a civil matter, the Clean Water Act ("CWA") can be enforced criminally under 33 U.S.C. Section 1319(c) and Congress' amendment to the definition of "navigable waters" applies to both civil and criminal cases alike. Other Constitutional provisions prohibiting retroactive legislation include: the prohibition on States from passing laws "impairing the Obligation of Contracts" in Article I, Section 10, clause 1; the Fifth Amendment's Takings Clause preventing the Legislature from depriving private persons of vested property rights except for a "public use" and upon payment of "just compensation; the prohibition in Article I, Sections 9-10 preventing the legislature from singling out disfavored persons and meting out summary punishment for past conduct (prohibitions on "Bills of Attainder"); and the Due Process Clause of the Fifth Amendment which protects the interest in fair notice that may be compromised by retroactive legislation.

According to the landmark case, *Landgraf v. USI Film Products.*, in the civil context, prospectivity remains the appropriate default rule unless Congress has made clear its intent to disrupt settled expectations. *Id.* at 265. In *Landgraf*, the plaintiff was sexually harassed by a co-worker at the defendant's workplace. *Id.* at 244. The Equal Employment Opportunity Commission determined, in an administrative action, that the plaintiff had likely been the victim of sexual harassment, creating a hostile work environment in violation of Title VII of the Civil Rights Act of 1964, but concluded that her employer had adequately remedied the violation. *Id.* at 248. In the plaintiff's subsequent judicial action against the company, the District Court concluded that her decision to resign was not justified because the harassment was not so severe and her employer had adequately remedied the violation. *Id.* The court found her employment was not terminated in violation of Title VII. Thus, she was not entitled to equitable relief. *Id.* at 249. Since Title VII did not then authorize any other form of

relief, the court dismissed her complaint. *Landgraf*, 511 U.S. at 249. While the plaintiff's appeal was pending, the Civil Rights Act of 1991 became law, thereby creating a right to recover compensatory and punitive damages for certain Title VII violations, and provided a right to a jury trial if damages were claimed. See Civil Rights Act of 1991, Pub. L. 102-106, Sec. 102, 105 Stat. 107 (codified as amended at 42 U.S.C.A. § 1981(a)). The Court of Appeals for the Fifth Circuit rejected plaintiff's argument that her case should be remanded for a jury trial on damages pursuant to the 1991 Act relying on the premise that "a court must 'apply the law in effect at the time it renders its decision, unless doing so would result in the manifest injustice or there is statutory direction or legislative history to the contrary.'" *Landgraf*, 968 F.2d at 432 (quoting *Bradley v. School Bd.*, 416 U.S. 696, 711 (1974)). The Supreme Court affirmed the Fifth Circuit's holding; finding that the damages and jury trial provisions were not retroactive and therefore would not apply to cases pending on appeal when the statute was enacted. See 511 U.S. 244.

The Court in *Landgraf* opined, "when a case implicates a federal statute enacted after the events giving rise to the suit, a court's first task is to determine whether Congress has expressly prescribed the statute's proper reach." *Id.* at 280. As the Court noted, the relevant legislative history reveals little to suggest that members of Congress believed that an agreement had been reached on the controversial retroactivity issue. Therefore, the Court held that Section 102 should not govern cases arising before its enactment because it authorizes punitive damages, sharing key characteristics of criminal sanctions thus raising questions under the *Ex Post Facto* Clause if retroactively imposed. See *id.* at 281.

Plaintiff filed its complaint eight months before Congress amended the CWA definition of "navigable waters" to cover isolated waters such as Sheldrake Pond. Statutory law existing at the time a complaint is filed governs the case, unless a subsequently enacted statutory provision explicitly directs that it be applied retroactively. See *Landgraf*, 511 U.S. 244; *Bowen*, 480 U.S. 204. There is no express language, or necessary implication, in the statutory language of the CWA amendment or its accompanying Senate Report, indicating the legislature's intent for retroactive application. See S. Rep. No. 106-528, at 23 (2001). Applying the amended definition of "navigable waters" to the Defendant's pre-amendment location of its rifle range and skeet shooting oper-

ation at Sheldrake Pond would create liability under the CWA. As clearly indicated by the U.S. Constitution and case law, a new enactment should not be held to judicially imply retroactivity if not expressly provided, as in this case. The *Ex Post Facto* Clause of Article I of the Constitution and the Takings and Due Process Clause of the Fifth Amendment guarantee defendants a right to fair notice of the legal consequences of their actions, a right which would be jeopardized by retroactive application of the amended definition of "navigable waters." Holding otherwise would put the Defendant in a position of potential criminal sanctions and thereby raise a serious question under the *Ex Post Facto* Clause if retroactively imposed.

B. BOG Will Argue Retroactive Application is Appropriate Because Congress Intended the Statutory Amendment to be Curative

Courts recognize the traditional presumption against retroactive application of a new enactment can be overcome by ordinary statutory interpretation. In the landmark case governing this issue, the Supreme Court stated that "[t]he Constitution's restrictions, of course, are of limited scope. Absent a violation of one of those specified provisions, the potential unfairness of retroactive civil legislation is not a sufficient reason for a court to fail to give a statute its intended scope." *Landgraf*, 511 U.S. at 267. Therefore, a strong argument can be made that courts interpret statutory legislation as retroactive when the new measures will either ratify prior official conduct or make remedial adjustment in an administrative scheme. See Nowak & Rotunda, *Constitutional Law Hornbook* 410 (4th ed. 1991).

BOG is likely to argue that Congress' 2001 amendment of the CWA definition of "navigable waters" falls under one of two exceptions to the presumption against retroactivity. The general rule is that application of curative legislation is acceptable if its function is to repair the consequences of a "legal accident or mistake." One example might be the failure of lawmakers to make provisions for unforeseen circumstances which should have been provided for. See Norman J. Singer, *Sutherland on Statutory Construction* 376 (6th ed. 2000).

In the Supreme Court case, *Anderson v. Mount Clemens Pottery Co.*, the Court gave an unexpected and expansive interpretation of the Fair Labor Standards Act (FLSA), thereby exposing coal mine operators to a potential liability of over five billion dol-

lars in claims of their employees. 328 U.S. 680 (1946). To remove this liability, Congress passed the Portal-to-Portal Act, which eliminated both the right to sue for the overtime pay claim at issue in *Anderson* and the jurisdiction of the courts to hear such claims. See Nowak & Rotunda, *Constitutional Law Hornbook* 411 (4th ed. 1991). This retroactive measure not only cured a defect in the existing legislation that arose because of the Court's interpretation of that legislation, but it also gave full effect to the original congressional intent behind the FLSA. See *id.*

In the case at bar, Congress' Report accompanying the 2001 CWA amendment to the definition of "navigable waters" clearly expresses the curative nature of the amendment: "The Supreme Court's opinion in [SWANCC] misinterpreted congressional intent. . . . [W]e *intended* the terms to cover isolated waters that are important stopovers for migratory birds." S. Rep. No. 106-528, at 23 (2001) (emphasis added). BOG will therefore argue that because the amendment was curative in nature, the presumption against retroactive legislation is overcome and the due process clause limitation is not violated.

A second exception to the presumption against retroactivity can be argued where a new rule merely clarifies or explains a previous rule. While this exception is strikingly similar to the first, it is a somewhat stronger argument. The Supreme Court's decision in *Smiley v. Citibank*, 517 U.S. 735 (1996), supports this position. In *Smiley*, the plaintiff filed suit in California against a bank chartered in South Dakota, alleging the bank violated California law by charging excessive late fees on a credit card. *Id.* at 738. The bank argued federal banking laws allow a national bank to charge interest at the rate allowed in the state of incorporation, and the late fees were proper because they were a form of interest. *Id.* at 745. After suit was filed, the Comptroller of Currency adopted a new rule specifically including late fees in the definition of interest. *Id.* at 740. The Court held that this rule could be applied retroactively to the plaintiff's case because the rule did not alter the Comptroller's previous interpretation of the term "interest." *Id.* at 735.

A Florida State court decision in *Env'tl. Trust v. Florida*, 714 So. 2d 493 (1998), also supports BOG's argument for retroactivity and is on point with the case at bar. In that case, an Inland Petroleum Trust Fund was established in 1986 to encourage restoration of ground waters and surface waters polluted by the discharge of petroleum and related products from underground storage sys-

tems. *Id.* at 495. The administrator of the program, the Department of Environmental Protection, adopted a rule implementing the statute. *Id.* On March 22, 1996, while a proceeding under the rule was pending, the Department published its first notice of a proposed amendment to the rule and promulgated the amendment on September 27, 1996. *Id.* at 496. When retroactive application of the amendment was challenged, the *Environmental Trust* court stated that “an exception [to the proscriptive versus retroactive application] may apply if the rule merely clarifies an existing rule and does not establish new requirements.” *Id.* at 500. Accordingly, the court held that the revised version of the rule “can be applied retroactively because it merely restates the Department’s settled interpretation of the existing rule.” *Id.* at 501.

In the case at bar, it can be similarly argued that the Conference Committee specifically stated in its Report accompanying the 1972 legislation that it intended the terms “navigable waters” and “waters of the United States” to extend as far as the Commerce Clause authority extends. Furthermore, the Senate Report accompanying the 2001 amendment reiterated that in 1972 Congress had “intended the terms to cover isolated waters that are important stopovers for migratory birds.” S. Rep. No. 106-528, at 23. In enacting the 2001 amendment, Congress was merely clarifying how it had intended the 1972 CWA definition to be construed. Therefore, retroactive application is appropriate.

C. Retroactive Application is Irrelevant in this Case Since Defendant’s Violation of the CWA is Continuing

Whether or not retroactivity of the amended CWA definition of “navigable waters” applies in this case is irrelevant since the Defendant’s violations are continuing today. Suave continues to maintain the fill in Sheldrake Pond for the skeet ejection platform without a CWA Section 1344 permit. Suave also continues to operate its skeet shooting and firing ranges, thereby discharging either fill material or pollutants into navigable waters without the appropriate CWA permits under 33 U.S.C. Section 1344 or Section 1342 respectively. Accordingly, Congress’ CWA Amendment will apply at least to Defendant’s violative activities taking place after August 15, 2001 which are the same activities resulting from the firing range and skeet shooting operation prior to the amendment.

II. DID CONGRESS EXCEED ITS AUTHORITY UNDER THE COMMERCE CLAUSE IN AMENDING THE CWA TO REGULATE ISOLATED INTRASTATE WATERS BECAUSE THOSE WATERS DO OR POTENTIALLY COULD SERVE AS HABITAT FOR MIGRATORY BIRDS?

Congress enacted the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, as amended, Pub. L. No. 95-217, 91 Stat. 1566, 33 U.S.C. §§ 1251-1387 (Clean Water Act, hereinafter "CWA") "to restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (1994). One of the goals of the CWA is to attain "water quality which provides for the protection and propagation of fish, shellfish, and wildlife." *Id.* § 1251(a)(2). A major tool in achieving this goal is a prohibition on the discharge of any pollutants, including dredged or fill material, into "navigable waters," except in accordance with the Act. *Id.* §§ 1311(a), 1362(12)(A). The CWA provides that "the term 'navigable waters' means the waters of the United States, including the territorial seas." *Id.* § 1362(7). The Conference Report accompanying the CWA explained that "the conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by any agency determinations which have been made or may be made for administrative purposes. See S. Conf. Rep. No. 92-1236, at 144 (1972). Section 404 of the CWA, 33 U.S.C. § 1344, authorizes the United States Army Corps of Engineers ("Corps") to issue permits for the discharge of dredged or fill material into "navigable waters," defined by the Act as "waters of the United States." 33 U.S.C. § 1362(7) (1994).

On January 9, 2001, in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* ("SWANCC"), the United States Supreme Court held that the CWA did not authorize the federal government to prohibit a landfill operator from filling isolated ponds on its property merely because the ponds were used as a habitat for migratory birds. 531 U.S. 159 (2001). This case involved a proposal to convert a defunct gravel-mining pit to a non-hazardous landfill. *Id.* at 163. Since the parcel had not been utilized for forty years, the parcel had evolved into a natural woodland containing hundreds of seasonal and permanent ponds utilized by plants and wildlife, including migratory birds. *Id.* A maze of trenches and surface depressions remained, which created hundreds of seasonal and permanent ponds. *Id.* The Solid

Waste Agency's plan to create a multi-county landfill would require 17.6 acres of ponds and small lakes to be filled as part of the development with the Agency. *Id.* The Corps asserted jurisdiction over the isolated, intrastate ponds by deeming the water bodies as "navigable water" under the CWA and accordingly denied the petitioner a permit to develop the property. *Id.* The Supreme Court held, in a 5-4 decision, that the Corps exceeded its statutory authority by asserting jurisdiction over these ponds. *See* 531 U.S. 159 (2001). The Court did not, however, reach the question of whether Congress could exercise such authority under the Commerce Clause of the U.S. Constitution.

Explaining its decision, the Court in *SWANCC* stated that it found no indication in either the statute or the legislative history that Congress intended to include such insignificant and isolated waters within its CWA definition of "navigable waters." 531 U.S. at 174. In response to the *SWANCC* decision, Congress amended the CWA's definition of "navigable waters" to incorporate EPA's definition of the "waters of the United States" from 40 C.F.R. Part 122.2. *See* Water Pollution Protection Act, Pub. L. No. 106-720 (2001). Included under the EPA's definition of "waters of the United States," are "all other waters such as intrastate lakes, rivers, streams (including intermittent streams) . . . playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce. . . ." 40 C.F.R. § 122.2 (2001). The Report of the Senate Environmental Committee accompanying the Senate bill stated that the Supreme Court's opinion in *SWANCC* misinterpreted congressional intent. *See* S. Rep. No. 106-528, at 23. In fact, when Congress first enacted the CWA in 1972, it intended the terms "navigable waters" and "waters of the United States" to extend as far as the Commerce Clause authority extends. *See* S. Conf. Rep. No. 92-1236, at 144. Furthermore, Congress intended the terms to cover isolated waters that are stopovers for migratory birds as they are instrumentalities of interstate commerce. *See id.*

If Defendant prevails in its argument that amendments to a statute should be applied prospectively, the statute that controls this case is the pre-amendment statute. Since the Court has already interpreted the pre-amendment statute not to cover insignificant and isolated waters such as Sheldrake Pond, the Court need not go further. However, should the Plaintiff prevail in its argument that the amendment governs this case, then the Court must address whether Congress exceeded its authority when it at-

tempted to exercise its jurisdiction over insignificant, isolated playa ponds such as Sheldrake Pond.

A. There is No Constitutional Basis for Congress to Assert Federal Jurisdiction Over Isolated Wetlands Which Do Not Affect Interstate Commerce

Defendant, Suave, will argue that there is no constitutional basis for Congress to assert jurisdiction over isolated wetland and playa ponds such as Sheldrake Pond. By claiming to have jurisdiction over the isolated and primarily seasonal Sheldrake Pond because migratory birds use them, Congress “obliterates the distinction between what is national and what is local.” *United States v. Morrison*, 529 U.S. 598, 617-18 (2000). If federal authority reaches all water and wetlands used by migratory waterfowl, there is nothing to prevent the federal government from regulating every tree in which migratory birds roost and every lawn on which they feed. *See* Reply Brief for the Petitioner at 1, *Solid Waste Agency v. U.S. Army of Eng’rs*, 531 U.S. 159 (2001) (No. 99-1178). If migratory bird use supplied a sufficient connection to interstate commerce because duck hunters and bird watchers travel and spend money, then nothing would be so far removed from interstate commerce that it cannot be linked to it in some fashion. *Id.* (citing Pet. Br. 43-44 & n.18). Its approach leaves the commerce power “without effective bounds” that are “essential to the maintenance of our constitutional system” of enumerated federal powers. *Morrison*, 529 U.S. at 608; *United States v. Lopez*, 514 U.S. 549, 555 (1995).

In *United States v. Lopez*, the Supreme Court restricted the scope of the federal Commerce Clause power to commercial activities that “substantially affect” interstate commerce. 514 U.S. 549 (1995). The Court struck down the Gun Free School Zones Act of 1990, a federal statute prohibiting the knowing possession of firearms within 1,000 feet of a school. *Id.* The *Lopez* Court identified two main reasons for its holding. First, the Court found that the Act was not within the bounds of federal Commerce Clause powers because the Act, a criminal statute, did not regulate a commercial activity. *Id.* at 532. Second, the Court rejected the Act under the Commerce Clause power because the Act did not require gun possession to be connected in any way to interstate commerce. *Id.* The Court commented that without jurisdictional language limiting the Act’s application to gun possession affecting interstate commerce, or legislative findings that it did affect interstate com-

merce, the Court could not determine if Congress had a rational basis to conclude that the Act substantially affected interstate commerce. *Id.* at 563.

Plaintiffs will argue that the Report of the Senate Environmental Committee accompanying the proposed CWA amendment in this case did, in fact, describe that migratory birds are instrumentalities of interstate commerce because they are hunted for food and carried across state boundaries, and they are the objects of recreational value for national citizens. S. Rep. No. 106-528, at 23. However, even if the Court were to deem the Report "congressional findings," the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation. *See Morrison*, 529 U.S. at 614.

The *Lopez* Court identified three broad categories of activity that Congress may regulate under the Commerce power. *Lopez*, 514 U.S. at 558. First, "Congress may regulate the use of the channels of interstate commerce." *Id.* Second, "Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities." *Id.* Finally, "Congress's Commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce." *Id.* In respect to the last category, the Court concluded that the activity must "substantially affect" interstate commerce to be regulated. *Id.* at 559. Because the Act did not fall within the first two types of regulation, the Court analyzed, under the third category, whether the regulation of guns within school zones substantially affects interstate commerce. *Id.* In determining whether an activity "substantially affects" interstate commerce, the Court implied that the activity regulated must be an intrastate or interstate commercial or economic activity that affects interstate commerce. *See Lopez*, 514 U.S. at 561. The government contended that the Act substantially affected interstate commerce because violence produces costs affecting the national economy. *Id.* The government further argued that guns within school zones affect the quality of education, which in turn affects the productivity of citizens and thus the national economy. *Id.* However, the Court rejected the arguments because to sustain them would "pile inference upon inference in a manner that would . . . convert congressional authority under the Commerce Clause to a general police power of the sort retained by the states." *Id.* at 567.

In a more recent case, the Supreme Court reiterated that Congress' regulatory authority under the Commerce Clause is not without effective bounds. The Court in *Morrison* held that the Commerce Clause did not provide Congress with authority to enact a civil remedy provision of the Violence Against Women Act. *Morrison*, 529 U.S. 598. Upon its analysis under the *Lopez* framework, the Court found that the provision was not regulation of activity that substantially affected interstate commerce; gender motivated crimes were not economic activity; and the provision contained no jurisdictional element establishing that such a federal cause of action was in pursuance of Congress' power to regulate interstate commerce. *Id.* at 609.

Moreover, the *Morrison* Court affirmed that the aggregation principle may not be invoked to sanction congressional action every time Congress chooses to regulate intrastate non-economic activity. *Id.* at 613. Specifically, this Court held that the commerce power did not allow the federal government to regulate any activity, such as violence against women, that could be linked through a long causal chain to indirect and unspecified effects on interstate commerce, such as impacts on jobs and medical costs. *Id.* at 614. Because virtually all human activity has similar, though attenuated, impacts on commerce, such a line of reasoning would effectively grant Congress an unlimited authority to regulate any human activity. See Brief of Pacific Legal Foundation in Support of Petitioners at 23, *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001) (No. 99-1178). Similar to the link between violence and commerce espoused in the Violence against Women Act of *Morrison*, the Plaintiff's theory of a link between interstate commerce in bird hunting and watching and the destruction of bird habitat proves too much. For if Congress may regulate "waters" simply because they may be used by migratory birds, then Congress would have no limits on its federal commerce power to regulate any land or object used by any animal since the ownership, breeding, sale, observation, hunting, and studying of all animals surely has a great effect on interstate commerce. See *id.* at 24.

B. BOG Contends that the Use of Sheldrake Pond by Migratory Birds for Habitat Provides a Constitutionally Sufficient Basis for Federal Regulation Under the Commerce Clause

1. The Placement of Fill Material in the Waters of the United States is a Class of Economic Activity that Substantially Affects Interstate Commerce

The Supreme Court has identified “three broad categories of activity that Congress may regulate under its commerce power”: (1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce, or person and things in interstate commerce; and (3) intrastate activities that “substantially affect” interstate commerce. *Lopez*, 514 U.S. at 558-59 (citing *inter alia*, *Perez v. United States*, 402 U.S. 146, 150 (1971)). Under *Lopez*’s third category, Congress may regulate interstate activities that do not individually have a pronounced effect on interstate commerce, if the aggregate effect of the class of activities is substantial. *Id.*

In *Wickard v. Filburn*, the Supreme Court upheld the application of a penalty provision of the 1938 Agricultural Adjustment Act when a farmer grew wheat on his farm for personal use that was more than the allotment permitted to him under the federal scheme. *Wickard*, 317 U.S. 111, 117 (1942). The Act was adopted to regulate the price of wheat on the national market. *Id.* at 128. *Filburn* challenged the federal regulation that wheat grown for his own use was beyond the Commerce power. *Id.* In its Commerce Clause analysis, the *Wickard* Court reasoned that although the impact on the interstate wheat market of this individual farmer’s activity was minimal, if all farmers engaged in the same activity, the impact could be significant. *Id.* at 125. That one such person’s production of wheat may have had trivial effects upon commerce was of no import, the Court held, “where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.” *Id.* at 127-28.

Similar to the matter in *Wickard*, the cumulative effect of filling in wetlands has a clear effect on interstate commerce, through the decrease of commerce generated by migratory birds. The cumulative impact of not uniformly regulating isolated wetlands will affect interstate commerce generated by hunters, photographers and other recreationists who incur expenses to hunt or view the migratory birds that depend on isolated wetlands during migra-

tion. Furthermore, even narrowly defining the class of regulated activity as the filling of isolated wetlands used by migratory birds would mean that destruction of those wetlands would have a substantial aggregate effect on interstate commerce. Isolated wetlands used by migratory birds provide a sufficient connection to interstate commerce because wetlands form a part of a commercial enterprise which provides habitat for migratory birds that subsequently generate commerce. Wetlands provide food, shelter, resting and feeding places on migratory routes, and all migratory birds depend on wetlands for their survival. See U.S. Fish and Wildlife Service, *Update to the North American Waterfowl Management Plan* 20 (1994). The filling of isolated wetlands is of particular concern because for many migratory birds, small isolated wetlands provide a unique habitat that is essential to their survival. See Gibbs, *Importance of Small Wetlands for the Persistence of Local Populations of Wetland-Associated Animals*, *Wetlands*, vol. 13, no.1, Mar. 1993, at 25.

The reduction of migratory bird populations would substantially impact interstate commerce, as billions of dollars are spent annually on hunting, recreational observation and study of migratory birds. For example, migratory birds are the object of hunting activities that generate billions of dollars of commerce each year. In 1996, 3.1 million people hunted migratory birds and spent more than \$2.99 billion doing so. See Southwick Associates, U.S. Fish and Wildlife Service, *The Economic Importance of Hunting* 8 (1998). Among the migratory birds associated with Sheldrake Pond and its banks are Mexican ducks, which are commonly associated with recreational hunting in the southwest. See Order Civ. No. 01-8785, at 3. Like bird hunting, bird watching annually generates several billion dollars of commerce. In 1996, some 62.9 million Americans spent \$29 billion on wildlife-watching activities, including bird-watching. See *National Survey of Fishing, Hunting, and Wildlife Associated Recreation* 90-91, tbls. 39, 40 (1996). Almost \$20 billion is spent each year on equipment for wildlife watching. See *id.* Out of 17.7 million bird-watchers, 14.3 million people took trips specifically to observe, feed, or photograph waterfowl; 9.5 million took trips for other water-associated birds, such as heron. See *id.* at 45, 90. More than six million people crossed state lines in order to engage in bird-watching. See *id.* at 90.

Wetlands, including isolated wetlands, represent one of the most important components in preserving environmental quality.

Isolated wetlands are inherently valuable for their water filtration, flood and erosion control, and as wildlife habitat. The environmental services provided by wetlands are of value to the national economy and have been estimated globally at more than \$330 billion annually. See Costanza et al., *The Value of the World's Ecosystem Services and National Capital*, Nature, Vol. 387, May 15, 1997, at 259. These environmental attributes of isolated wetlands are similar to those of adjacent wetlands that the Court found appropriate for federal regulation in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 134-35 (1985). In *Riverside Bayview Homes*, the Court upheld application of the CWA to an intrastate wetland adjacent to a navigable intrastate lake. *Id.* at 134. The Court reasoned that the wetlands directly impacted the quality of the lake water by serving as a natural filtration system. See *id.* at 133-34. Although the Court expressly reserved judgment on the application of the CWA to an isolated wetland, it did conclude that "the language, policies and history of the [CWA] compel a finding that the Corps has acted reasonably in interpreting the Act to require permits for the discharge of fill materials into wetlands adjacent to the 'waters of the United States.'" *Id.* at 139.

Sheldrake Pond is used in interstate commerce as part of an interstate and international bird migration pathway between the Gulf of Mexico and further south to the northern Great Plain and further north, by migrating birds such as jacanas, avocets, sandhill cranes, warbling vireos, and Mexican ducks. See Order Civ. No. 01-8785, at 3, 5. To be sure, BOG members have been bird-watching at Sheldrake Pond for two decades and have sighted over two hundred birds species, many of which are migratory. The birding community is not restricted to regional interest, as most birders travel interstate specifically to see species that are only found in certain locales and have been sighted and logged by fellow birders. Therefore, unlike the criminal statute in *Lopez*, regulation of isolated wetlands ensures migratory bird habitat that in turn, generates substantial commerce that can be construed as part of a "commercial" enterprise.

2. The Protection of Migratory Bird Habitat Furthers a Governmental and Public Interest that has Long Been Recognized to be a Matter of National Concern

The Corps' and EPA's exercise of regulatory authority in this case falls well within constitutional limits. Because migratory birds are a shared resource of the several states, their protection has traditionally been regarded as a task most appropriately performed by the national government. "The protection of migratory birds has long been recognized as 'a national interest of very nearly the first magnitude.'" *North Dakota v. United States*, 460 U.S. 300, 309 (1983) (quoting *Missouri v. Holland*, 252 U.S. 416, 435 (1920)). The Court in *Holland* explained that the protection of migratory birds is an interest inherently unsuited to effective vindication by the States. *Holland*, 252 U.S. at 435. Migratory birds can be protected only by national action in concert with that of another power. *See id.* at 431-33. In his opinion for the Court, Justice Holmes stated that,

[t]he subject matter is only transitorily within the State and has no permanent habitat therein. But for the treaty and the statute there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed. It is not sufficient to rely upon the States.

Id. at 435.

The protection of habitat is an integral feature of federal efforts to protect the well-being of migratory birds. The Court in *Holland* emphasized that the protection of migratory birds is principally entrusted to the national government because it is a task inherently unsuited to piecemeal accomplishment. *Id.* Thus, Congress' CWA assertion of regulatory jurisdiction over "isolated" waters used as migratory bird habitat is fully in keeping with traditional conceptions of the "distinction between what is truly national and what is truly local." *Morrison*, 529 U.S. at 617-18. No matter how comprehensively one State were to regulate wetlands, its regulation would never be able to adequately protect migratory birds whose survival necessarily depends on regulation that insures the supply of wetland habitat in many States.

3. The CWA Permit Requirement Under 33 U.S.C. § 1344, is Environmental Regulation; not a form of Land Use and Zoning Traditionally Reserved to the States

Contrary to Defendant's argument that the Migratory Bird Rule intrudes upon the traditional authority of State and local governments to engage in land use planning, the permit requirement in Section 1344 of the CWA does not constitute conventional land use planning or zoning. To suggest that the regulation of land and water use under the CWA should be scrutinized closely under the Commerce Clause as regulation of "local" activities, would be inconsistent with prior Supreme Court jurisprudence. For several decades, the Court has recognized that "the power conferred by the Commerce Clause [is] broad enough to permit congressional regulation of activities causing air or water pollution, or other environmental hazards that may have effects in more than one State." *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 282 (1981).

The CWA's Section 1344 is a form of environmental protection or pollution control, *see* 33 U.S.C. § 1251, and leaves the ultimate determination of land use to State and local authorities. In *Cal. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987), the Court found the distinction between land use planning and environmental protection critical to its preemption analysis. The Court in *Granite Rock* upheld the authority of a state agency to regulate the impacts of mining on federal public lands because it found that the agency's review was limited to the environmental impacts of mining and did not determine the underlying land use. *See id.* The Court expressed the distinction as such, "[l]and use planning in essence chooses particular uses for the land; environmental regulation, at its core, does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits." *Id.* at 587; *see also Hodel*, 452 U.S. at 275-76. Similarly, Section 1344 of the CWA does not dictate the particular use to which a parcel of property may be employed. Rather, it regulates the manner in which the proposed use can be accomplished by eliminating or mitigating the environmental impacts of fill.

III. DOES THE MIGRATORY BIRD TREATY JUSTIFY A SHIFT FROM STATE DELEGATED AUTHORITY TO FEDERAL AUTHORITY OVER ISOLATED WETLANDS UNDER THE TREATY CLAUSE?

A. BOG Will Argue Federal Jurisdiction Over Isolated Wetlands Used by Migratory Birds is Constitutional Under the Treaty Power

If federal jurisdiction over isolated wetlands used by migratory birds is rejected under the Commerce Clause, federal jurisdiction is nevertheless appropriate under the Treaty Power of the United States Constitution. Constitutional provisions confer treaty-making power to the federal government; specifically to the President and the Senate, provided two-thirds of the Senators present concur. *See* U.S. Const. art. II, § 2, cl.1. Other language expressly prohibits states from entering, in their own right, into treaties or alliance. *See* U.S. Const. art. I, § 10, cl. 1, cl. 3. Moreover, Treaties are proclaimed in the text of the Constitution to be the supreme law of the land and binding upon states. *See* U.S. Const. art. VI, cl. 2. The treaty power is specifically delegated to the federal governments and the Tenth Amendment only purports to apply to non-delegated powers. U.S. Const. amend. X. Therefore, the Tenth Amendment does not limit the treaty power.

Although there are no express limitations on treaty making in the text of the Constitution, the Supreme Court has endeavored to define the scope of the treaty power. Under the Treaty Power, Congress may enact legislation to implement the provisions and purposes of a treaty signed by the United States. This authority is expressed in Article II, section 3, which states that the executive shall “take care” that “the laws be faithfully executed” and was reiterated in *Missouri v. Holland*, 252 U.S. 416 (1920). In 1916, the United States signed the Migratory Bird Treaty with Great Britain on behalf of Canada to protect and regulate migratory birds and their habitats. To implement the purpose of the Treaty, Congress enacted legislation known as the Migratory Bird Treaty Act (“MBTA”) in 1918. The Act makes it unlawful “by any means . . . to pursue, hunt, take . . . export, import . . . any migratory bird, any part, nest, or eggs of any such bird.” 16 U.S.C. § 703 (1994). In *Holland* the Supreme Court upheld the Act as a valid exercise of the Treaty Power. *See Holland*, 252 U.S. at 416. The state of Missouri brought a bill in equity to prevent the Migratory Bird Treaty, and the regulations made pursuant to this agreement,

from being enforced by the federal game warden. *Id.* at 431. Missouri claimed ownership of the birds within its border and argued that the statute was “an unconstitutional interference with the rights reserved to the States by the Tenth Amendment . . .” *Id.* at 431. The federal government argued that the Treaty and its implementing legislation took precedence over any conflicting state regulation. *Id.* at 417-24. The Supreme Court upheld the constitutionality of the MBTA based on articles II and VI of the United States Constitution. *Id.* at 434. Recognizing that birds were of important national interest, Justice Holmes stated “[w]ild birds are not in the possession of anyone; and possession is the beginning of ownership,” and furthermore that birds are “only transitarily within the State and [have] no permanent habitat therein.” *Id.* at 434-35. As stated in his opinion, Holmes feared that without the federal protection of the treaty and statute, there would soon be no birds in need of protection. *Holland*, 252 U.S. at 435.

Since discharges of dredged and fill material into isolated waters and pollution of isolated waters can destroy or degrade the habitat of migratory birds, Congress can justify legislation to protect isolated waters as a necessary and proper means of implementing the Migratory Bird Treaty and the protection of migratory birds. In light of the Supreme Court’s holding in *Holland*, it is possible that Congress may be able to regulate a broader class of activities under the Treaty Power than is appropriate under the Commerce Clause. See Stephen M. Johnson, *Federal Regulation of Isolated Wetlands After SWANCC*, 31 *Envtl. L. Rep. (Envtl. L. Inst.)* 10669 (June 2001). In the same way that the Treaty Power and the Necessary and Proper Clause authorized Congress to enact legislation to protect migratory birds, those powers may authorize Congress to act to limit the destruction or degradation of isolated waters, even though such legislation, in the absence of a treaty, might be outside of Congress’ power in light of the Tenth Amendment, or beyond Congress’ Commerce Clause powers. See *id.*

B. Suave Will Argue Congress May Not Usurp its Constitutional Limitations Under the Guise of the Treaty Power

One primary limitation placed on the treaty power by courts is to hold a treaty invalid if it violates specific provisions of the Constitution. For example, in *Reid v. Covert*, the Supreme Court held that the federal government cannot, through a treaty, de-

prive citizens of their Sixth Amendment right to a jury trial. 354 U.S. 1, 16 (1957). In its decision, the Court stated that there is nothing in the language of the Supremacy Clause “which intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution.” *Id.* The Supreme Court in *Holland* told us that Congress can approve treaties and enact implementing regulations under the authority of a treaty to protect birds of international commerce. *See* 252 U.S. 416 (1920). However, the federal government may not, by treaty, expand its Commerce Clause jurisdiction beyond constitutional limitations. Similarly, Congress may not justify congressional usurpation of state authority over isolated waters in order to end-run its inability to exercise jurisdiction over those waters under the Commerce Clause. Ultimately, if all Congress was doing was exercising Commerce Clause power to protect water highways, then it was not permitted to do so.

Moreover, there is no indication either in the statutory language itself, or in the legislative history, that Congress was acting pursuant to the Treaty Clause when it enacted the CWA. Rather, the Senate Report discusses Commerce Clause jurisdiction, while there is no mention of the Treaty Clause. Under 16 U.S.C. § 703 of the Migratory Bird Treaty, Congress specifically states that it is unlawful “to pursue, hurt, take, capture, kill . . . any migratory bird . . .” pursuant to the terms of the conventions between the United States and Great Britain, Mexico, Japan and the Union of Soviet Socialist Republics “for the conservation of migratory birds and their environments.” In contrast, nothing in the CWA statute language nor in the legislative history indicates that Congress was enacting the CWA pursuant to the Treaty Power. Rather, congressional reports discuss only Commerce Clause jurisdiction.

IV. DID THE COURT BELOW ERR IN HOLDING THAT FIRED SHOT AND SKEET PARTS ARE NOT SOLID WASTE WHEN THEY FALL TO THE GROUND UNDER EPA'S DEFINITION OF SOLID WASTE IN 40 C.F.R. § 262.2?

V. DID THE COURT BELOW ERR IN HOLDING THAT FIRED SHOT AND SKEET PARTS ARE NOT SOLID WASTE WHEN THEY FALL TO THE GROUND UNDER 42 U.S.C. § 6972(a)(1)(B)?

[Note: Because these issues are interrelated, they are addressed concurrently rather than as separate issues.]

A. Statutory and Regulatory Background

The Resource Conservation and Recovery Act ("RCRA") "is a comprehensive environmental statute that governs the treatment, storage, and disposal of solid and hazardous waste." *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 483 (1996). The aim of RCRA is "to reduce the generation of hazardous waste and to ensure the proper treatment, storage, and disposal of that waste which is nonetheless generated 'so as to minimize the present and future threat to human health and the environment.'" *Id.* at 483. Consequently, the Act creates a "cradle-to-the-grave" regulatory framework. *Conn. Coastal Fishermen's Ass'n v. Remington Arms Co.*, 989 F.2d 1305, 1313 (2d Cir. 1993). Section 6972(a) of RCRA authorizes citizen suit provisions: (1)(A) against any person alleged to be in violation of any requirement; or (1)(B) against any person, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment. 42 U.S.C. §§ 6972(a)(1)(A) & (1)(B) (1994). Plaintiff, BOG, alleges that Suave is violating RCRA by disposing of hazardous waste (skeet, skeet parts and lead shot) into and about Sheldrake Pond without a Section 6925(a) permit. This violation is actionable under 42 U.S.C. Section 6972(a)(1)(A). Plaintiff also alleges that Suave's disposal of solid and hazardous waste into and about the Pond is creating an imminent and substantial endangerment, actionable under 42 U.S.C. Section 6972(a)(1)(B).

Under RCRA, "hazardous wastes" are a subset of "solid wastes." *Remington*, 989 F.2d at 1313 (citing 42 U.S.C. § 6903(5)). Congress defined the term "hazardous waste" as a "solid waste"

which exhibits enumerated hazardous characteristics. 42 U.S.C. § 6903(3). Therefore, for a waste to be classified as hazardous, it must first qualify as a solid waste under RCRA. *See United Techs. Corp. v. U.S. EPA*, 821 F.2d 714 (D.C. Cir. 1987). Congress broadly defined “solid waste” in the statute as: “any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material . . . resulting from industrial, commercial, mining and agricultural operations, and from community activities,” along with a few specific exclusions. 42 U.S.C. § 6903(27). The statute does not, however, define “discarded,” thereby creating an uncertainty whether Defendant’s spent lead shot and skeet parts are “solid waste.” Legislative history does not satisfactorily assist in resolving this uncertainty. *See Remington*, 989 F.2d at 1314. The legislative history reflects that by regulating the “disposal of discarded materials and hazardous wastes” under RCRA, the committee was not only concerned with regulating the nation’s manufacturing by-products, but also the products themselves once they have served their intended purposes and are no longer wanted by the consumer. *Id.* (quoting H.R. Rep. No. 94-1491 (1976)). However, the legislative history does not indicate at what point products have served their intended purposes.

Hazardous waste disposal is regulated by Subchapter III of RCRA. Subchapter III jurisdiction depends on whether or not a particular substance is hazardous waste as defined in that Subchapter. Congress charged the Administrator of the Environmental Protection Agency (“EPA”) with the task of developing and promulgating regulations “identifying the characteristics of hazardous waste, and listing particular hazardous wastes (within the meaning of Section 6903(5)), which shall be subject to the provisions of [Subchapter III]. . . .” 42 U.S.C. § 6921(b) (1994). The regulations governing the identification and listing of hazardous waste include a regulatory definition of “solid waste” that “applies only to wastes that are also hazardous for purposes of the regulations implementing [Subchapter III] of RCRA.” 40 C.F.R. § 261.1(b)(1) (2001). For purposes of Subchapter III, EPA has provided a regulatory definition of solid waste that is distinct from the statutory definition. The regulatory definition is narrower than its statutory counterpart. The regulations define solid waste as “any discarded material” and in turn define discarded material as, among other things, “abandoned.” *Id.* § 261.2(a). Material is deemed “abandoned” if it is: “(1) [d]isposed of; or (2) [b]urned or

incinerated; or (3) [a]ccumulated, stored, or treated (but not recycled) before or in lieu of being . . . disposed of, burned or incinerated." *Id.* § 261.2(b).

As discussed in *Remington*, "[t]he EPA distinguishes between RCRA's regulatory and remedial purposes and offers a different definition of solid waste depending upon the statutory context in which the term appears." 989 F.2d at 1314. As a result, RCRA regulations create a dichotomy in the definition of solid waste. *See Remington*, 989 F.2d at 1314. The regulations state that the statutory definition of solid waste, rather than the more narrow regulatory definition, applies to "imminent hazard" lawsuits brought by the United States under 42 U.S.C. Section 6973. 40 C.F.R. § 261.1(b)(2)(ii) (2001). Furthermore, according to 40 C.F.R. Part 261.1(b)(1) (2001), citizen suits enforcing the EPA's hazardous waste regulations under 42 U.S.C. Section 6972(a)(1)(A) invoke the narrow regulatory definition of solid waste. The regulations are silent, however, on which definition of solid waste is to be applied to the second citizen suit, authorizing citizens to sue to abate "imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B) (1994). The court in *Remington* concluded that regulatory language referring to Section 6973 must also apply to section 6972(a)(1)(B), because the two provisions are nearly identical. *See* 989 F.2d at 1314 (citing *Comite Pro Rescate de la Salud v. Puerto Rico Aqueduct and Sewer Auth.*, 888 F.2d 180 (1st Cir. 1990)).

B. The Arguments

[Note: Conceptually, these arguments are most easily addressed and understood simultaneously and have therefore not been briefed in the traditional subheading manner.]

All three parties agree that the statutory definition of "solid waste" applies to BOG's Section 6972(a)(1)(A) claim and that the regulatory definition applies to its Section 6972(a)(1)(B) claim. However, the parties disagree on what "solid waste" means under each definition and whether fired shot, skeet and skeet parts are waste when they hit the ground for the purposes of either citizen suit claim. Suave argues that using a consumer product for its intended use does not constitute disposal of the product under either definition. It argues that shot, like a golf ball, is not discarded in either sense when it is fired and falls to the ground, for that is its intended purpose. BOG argues that the consumer product exclusion applies to neither definition. It is the EPA's position

that the consumer use exception applies to the regulatory definition of solid waste for purposes of Section 6972(a)(1)(A), but that it does not apply to the statutory definition of solid waste for purposes of Section 6972(a)(1)(B). Therefore, in order to resolve this issue, it must be determined whether and, if so, at what point lead shot and skeet parts become “discarded,” under either definition.

Since the term “discarded” may have different meanings for the regulatory and statutory definition of “solid waste,” each citizen suit pursued by Plaintiff must be analyzed according to the applicable definition. The parties agree that the EPA’s regulatory definition of “discarded” includes material that is abandoned, recycled, considered inherently waste-like, or a military munition identified as solid waste in 40 Part C.F.R. 266.202. 40 C.F.R. § 261.2(a)(1). Material is deemed “abandoned” if it is: “(1) [d]isposed of; or (2) [b]urned or incinerated; or (3) [a]ccumulated, stored, or treated (but not recycled) before or in lieu of being . . . disposed of, burned or incinerated.” *Id.* § 261.2(b). Thus, Plaintiff’s action against Suave for violating RCRA Section 6972(a)(1)(A), will turn on whether the lead shot and skeet parts are “abandoned.” The statute, on the other hand, does not further define the term “discarded.” In interpreting “discarded,” the courts have used the ordinary dictionary meaning which is “to throw away; reject.” *The American Heritage Dictionary* 402 (2d ed. 1982). However, while interpreting the statutory definition of solid waste, EPA has stated that materials are discarded when they have been “left to accumulate long after they have served their intended purpose.” *Conn. Coastal Fishermen’s Ass’n v. Remington Arms Co.*, 989 F.2d 1305, 1313 (2d Cir. 1993) (citing the EPA’s *amicus curiae* position). Accordingly, resolution of Plaintiff’s “imminent and substantial endangerment” suit under RCRA Section 6972(a)(1)(B) will require an analysis of the EPA’s interpretation of when a consumer product has served its intended purpose.

1. District of Columbia Court of Appeals Case Law on “Discarded”

The District of Columbia Court of Appeals has addressed the meaning of “discarded” in the statutory definition of “solid waste” in several cases. These cases all addressed whether material used in a manufacturing process is waste after being used and subsequently recycled or waiting to be recycled. First, in *Am. Mining Cong. v. U.S. EPA*, 824 F.2d 1177 (D.C. Cir. 1987) (“*AMC P*”), the

Court held that the term “discarded” conforms to its ordinary and plain meaning. *Id.* at 1193. Thus, items that are “disposed of, abandoned, or thrown away” are discarded. *Id.* The court in *AMC I* concluded that “in process secondary materials,” that is, materials “destined for immediate reuse in another phase of [an] industry’s ongoing production process,” are not discarded under RCRA. *Id.* at 1185, 1193. This holding was reaffirmed in *Ass’n of Battery Recyclers, Inc. v. U.S. EPA*, 208 F.3d 1047 (D.C. Cir. 2000), where the court reiterated that EPA cannot regulate as solid waste secondary material destined for reuse as part of a continuous industrial process that is therefore not abandoned or thrown away. *Id.* at 1053.

At the other end of the spectrum the court has held that a material that has been “indisputably ‘discarded’ *before* being subject to [reclamation] . . . has become part of the waste disposal problem,” is therefore subject to regulation as a solid waste. *Am. Petroleum Inst. v. EPA*, 906 F.2d 729, 741 (D.C. Cir. 1990) (“*API*”) (emphasis in original). In *API*, the court explained that where a material was “delivered to [a metals reclamation] facility not as part of an ‘ongoing manufacturing or industrial process’ within ‘the generating industry,’ but as part of a mandatory waste treatment plan prescribed by EPA,” the material is not precluded from being classified by EPA as a solid waste. *Id.* Finally, material somewhere between the extremes of ongoing production and indisputable discard was addressed in *Am. Mining Cong. v. U.S. EPA*, 907 F.2d 1179 (D.C. Cir. 1990) (“*AMC II*”). In deferring to EPA’s determination, the court held that sludge from wastewater stored in surface impoundments, which “may” later be reclaimed for treatment can be regulated as discarded because they are no longer part of an industrial process. *Id.* at 1186-87.

The District of Columbia Court of Appeals cases interpreting the statutory definition of “discarded” revolve around whether wastes that are recycled or destined for recycling are “discarded.” They are of questionable relevance. BOG is likely to argue that ultimately, the District of Columbia Court of Appeals analyses depended on whether the material in question is “part of the waste disposal problem” that Congress was addressing with RCRA. *AMC I*, 824 F.2d at 1186. Since Suave is depositing lead shot and skeet parts into Sheldrake Pond from where their hazardous constituents may be taken up in the food chain, BOG will maintain that the material is “part of the waste disposal problem” and is therefore “discarded.” Thus, BOG will further argue that relying

on the case law interpreting the meaning of “discarded” is proper. Suave could counter the argument by contending that fired lead shot and skeet parts are not “discarded,” but instead “used.” The placement of lead shot and skeet parts in and around the Pond after being used is merely the end result of use. Thus, Suave will argue that since the material at issue in this case is not “discarded,” the case law generated by the District of Columbia Court of Appeals is not relevant. Suave might also argue that the cases are not relevant because they are distinguishing between material that is “discarded” and “recycled,” which is at the other end of the waste spectrum from spent lead shot.

2. Consumer Use Exception

The issue of whether fired shot, skeet and skeet parts are hazardous waste when they fall to the ground for purposes of Sections 6972(a)(1)(A) and (a)(1)(B) turns on whether the “consumer use” exception applies. A recent District Court of Puerto Rico case, *Water Keeper Alliance v. U.S. Department of Defense*, involved a similar issue under the Section 6972(a)(1)(B), “imminent and substantial endangerment” claim. 152 F. Supp. 2d 163 (2001). In *Water Keeper Alliance*, the court addressed whether an ordinance used by the Navy during training exercises become “discarded material” as soon as it is fired and makes contact with the land in a live impact area. *Id.* In dismissing the Section 6972(a)(1)(B) claim, the court found that “RCRA does not support [the] contention that munitions become discarded material immediately upon being fired. . . .” *Id.* at 169. The court’s opinion relied on the decision in *Remington* to conclude that munitions cannot be considered discarded until sometime after they have served their intended use. *Id.* at 168. The court adopted the EPA’s *amicus curiae* argument that munitions “eventually” become discarded material by being “left to accumulate long after they have served their intended purpose.” *Id.* at 167 (citing Dkt. No. 73).

The court in *Water Keeper Alliance* also relied on a recent case involving the spraying of pesticides to invoke the “consumer use” exception. See 152 F. Supp. 2d at 168 (citing *No Spray Coalition, Inc. v. New York*, No. 00 Civ. 5395, 2000 U.S. Dist. LEXIS 13919, at *4 (S.D.N.Y. Sept. 25, 2000)). In that case, plaintiffs asserted that once pesticides are sprayed onto or into the air, land and waters of New York City they become discarded solid wastes. *Id.* The Southern District of New York held that, “it would contort the statutory language and do violence to the intent of Congress in

enacting RCRA to hold that pesticide that has been sprayed but has yet to reach the mosquitoes or their habitats is “discarded material.” *Id.* The court’s holding hinged on the fact that the intended purpose of the spray is to drift through the air until coming to rest on the mosquitoes and their habitats.

a. Military Munitions Rule

Also pertinent to the “consumer use” exception analysis is the EPA’s Military Munitions Rule (“MMR”), which was upheld in *Military Toxics Project v. EPA*, 146 F.3d 948 (D.C. Cir. 1998). The EPA’s regulatory definition of “discarded material” includes “a military munition identified as a solid waste in 40 C.F.R. Section 266.202.” 40 C.F.R. § 261(a)(2)(iv) (2001). The MMR provides an exception to the definition by stipulating that a military munition is not a statutory or regulatory solid waste when it is used “for its intended purpose.” *Id.* § 266.202(a)(1). However, according to the Rule, a used or fired military munition is a solid waste, and subject to a RCRA Section 6973 claim, if the munition lands off-range and is not promptly rendered safe and/or retrieved. *Id.* § 266.202(d). Therefore, a military munition that lands on a firing range is not a solid waste and cannot be a hazardous waste for purposes of RCRA Section 6972 claims, while a munition that lands off range and is not retrieved or rendered safe, is a statutory solid waste and hence is subject to an imminent and substantial endangerment claim under RCRA Section 6973.

Both BOG and Suave agree that the MMR deals only with military munitions, not at issue in this case, and therefore the Rule is irrelevant. However, the EPA argues that although the Rule may not govern this case, it is relevant in that the principles embodied in the Rule govern the interpretation of both the statutory and regulatory definitions of solid waste. According to EPA, the exclusion embodies the Agency’s consistent interpretation of the regulatory definition of solid waste as excluding commercial products used for their intended use, if their ordinary use results in their landing on the ground. Thus, EPA interprets its regulatory definition of solid waste to exclude shot landing on the Groveton Rifle and Pistol Association’s firing range, for firing shot on a firing range is using shot for its intended purpose. Moreover, the EPA interprets the statutory definition to cover shot landing off the firing range as in the MMR. Under this interpretation, it is important to find whether the portion of the Pond owned by the County is part of the skeet and firing ranges. However, if the in-

tended use of the ammunition at issue here is to shoot skeet or to shoot at a target, then as the lower court found, it is not clear why the purpose is accomplished when the shot lands on a firing range but is not accomplished when it lands off the range.

3. *Chevron* Agency Interpretation Deference

It is well settled that an agency's interpretation of its own regulation must be given controlling weight unless it is plainly erroneous or inconsistent with the statute or regulation. *See Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945); *Chevron U.S.A., Inc. v. Nat'l Res. Def. Council*, 467 U.S. 837 (1984). Consequently, EPA's interpretation of its own regulation defining solid waste as not including consumer products used for their intended purposes is dispositive, absent a conflict with the statute. Unless BOG can raise such a conflict, BOG's Section 6972(a)(1)(A) claim against Suave for violating the RCRA permit requirement should be dismissed.

Suave argues that the statutory definition of solid waste should be interpreted to exclude consumer products used for their intended purposes as well. Suave's reasoning is that if materials do not warrant regulation as solid waste under Section 6972(a)(1)(A), neither do they warrant remedial activities as solid waste under Section 6972(a)(1)(B). BOG and EPA counter this argument by claiming that EPA's interpretation is that the consumer use exception is not to be applied to the statutory definition of solid waste and that this interpretation is to be afforded deference under *Chevron*. The *Chevron* analysis first addresses "whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842-43 (1984). If, however, the statute is silent or ambiguous, the question is whether the implementing agency's interpretation of the statute is arbitrary, capricious or manifestly contrary to the statute. *See id.* at 843. Finally, if the agency's interpretation is reasonable, then it is entitled to deference. *See id.* However, the analysis does not end here as the Supreme Court has recently limited *Chevron* deference to agency interpretations that are embodied in rulemaking. *See United States v. Mead Corp.*, 533 U.S. 218 (2001).

a. Stare Decisis and Law of the Circuit

BOG and EPA argue that our Circuit has already decided that EPA's interpretation that the statutory definition of "solid

waste" does not include a consumer use exception and that decision must be followed under principles of stare decisis. In *Neighborhood Against Golf, Inc. v. Recreation Enters., Inc.*, 150 F.3d 1029 (12th Cir. 1999) ("NAG"), Plaintiffs sought to enjoin the operation of a golf course under RCRA, alleging that the toxic components of accumulated golf balls were leaching into the groundwater thereby endangering the neighborhood drinking water supplies. *Id.* Defendants in *NAG* argued the golf balls were not "solid waste" because they were consumer products used for their intended purpose and hence they were not disposed. *Id.* The Twelfth Circuit affirmed the District Court's grant of *Chevron* deference to EPA's interpretation that the statutory definition of solid waste did not except consumer products used for their intended purposes. *Id.* However, in light of the recent United States Supreme Court decision in *Mead Corp.*, the *NAG* court wrongly applied deference rather than respect EPA's interpretation of RCRA. BOG argues that *NAG* nevertheless is controlling precedent in the Twelfth Circuit. Suave and EPA counter argue that to hold as such would forever bar courts in the Circuit from correct statutory interpretation.

A decision of a panel of the Court of Appeals is the law of the circuit and a later panel is compelled to follow it unless an inconsistent decision of the U.S. Supreme Court requires modification of the decision, or the circuit court sitting en banc overrules the prior decision. 2A Federal Procedure: Rule of Interpanel Accord § 3:851 (Lawyers ed., 1994). A Court of Appeals is bound by the decisions of the Supreme Court, even though the judges of the Court of Appeals feel that a decision of the Supreme Court is unsound or in error. *Id.* § 3:704. The essential principles of stare decisis may be described as follows: (1) an issue of law must have been heard and decided, (2) if "an issue is not argued, or though argued is ignored by the court, or is reserved, the decision does not constitute a precedent to be followed", (3) "a decision . . . is stare decisis despite the contention that the court was not properly instructed by counsel on the legislative history, or that the argument was otherwise insufficient," (4) a decision may properly be overruled if "seriously out of keeping with contemporary views . . . [or] passed by in the development of the law . . . or . . . proved to be unworkable," and (5) there is "a heavy presumption that settled issues of law will not be reexamined." *Equal Employment Opportunity Comm'n v. Frank J. Trabucco*, 791 F.2d 1, 9-10 (1st Cir. 1986) (citing 1B Moore's Federal Practice ¶ 0.402[2], 30-55).

This Circuit must not follow its law of the circuit in light of the Supreme Court's decision in *Mead Corp.*, qualifying *Chevron* deference to agency interpretations that are embodied in rulemaking. See 533 U.S. 218. This Circuit's decision in *NAG* was based on *Chevron* deference for an agency interpretation not embodied in rulemaking. According to recent intervening Supreme Court case law, such deference is not appropriate. BOG will likely argue that the Supreme Court decision in *Mead Corp.*, does not constitute precedent for this case because it was not addressing the issues raised here. Assuming that to be true, it is still to be considered "seriously out of keeping with contemporary view . . . [or] passed by in the development of law," and thus may be overruled. *Equal Employment Opportunity Comm'n*, 791 F.2d at 9-10. Therefore, the court should analyze the EPA's interpretation of the RCRA statutory definition of "solid waste" according to *Mead Corp.*, irrespective of this Circuit's prior holding in *NAG*.

b. *Mead Corp.* Agency Interpretation Relative Respect

Under *Mead Corp.*, agency interpretations not embodied in rulemakings are entitled only to such respect as may be warranted by the formality of the agency's determination, the consistency of the agency's interpretation and its persuasiveness. See *Mead Corp.*, 533 U.S. at 303 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40' (1944)). BOG and EPA argue that EPA's definition of "solid waste" is indeed embodied in a rule, namely 40 C.F.R. Part 261.1(b)(2)(ii). That rule, however, only explicitly provides that the statutory definition of "solid waste" applies to the EPA imminent and substantial endangerment claim under RCRA Section 6973 but does not deal with whether the consumer use exception applies to the imminent and substantial endangerment claim that BOG invokes under RCRA Section 6972(a)(1)(B). See 40 C.F.R. pt. 261.1(b)(2)(ii). Therefore, under *Mead Corp.*, EPA's interpretation that the statutory definition of "solid waste" does not include a consumer use exception is entitled only to relative respect, not substantial respect.

The final question to be considered is to what degree of respect is EPA's interpretation of the statute entitled. In order to resolve this, an analysis under *Mead Corp.*'s three-pronged inquiry is required. See 533 U.S. at 304. The first question to address is how formal was the process in which EPA made the interpretation? The EPA's interpretation has not been formally developed or adopted in a notice-and-comment rulemaking or for-

mal adjudication. The second prong to consider is how consistent has EPA been in its interpretation? The EPA has long interpreted its definition of "discarded material" not to include consumer goods used for their intended purposes. In the 1993 case of *Connecticut Coastal Fishermen's Association v. Remington Arms Company*, 989 F.2d 1305, 1316 (2d Cir. 1993), EPA filed an *amicus curiae* brief stating that the statutory definition of solid waste encompasses lead shot and clay targets because they are 'discarded.' *Id.* The EPA has since stated that it "sees no compelling reason to alter this longstanding interpretation of its regulatory definition of the term 'solid waste.'" Military Munitions Rule: Hazardous Waste Identification and Management; Explosives Emergencies; Manifest Exemption for Transport of Hazardous Waste on Right-of-Ways on Contiguous Properties, 62 Fed. Reg. 6622, 6630 (Feb. 12, 1997) (codified at 40 C.F.R. pts. 260, 261, 262, 263, 264, 265, 266, and 270). The MMR is but an extension of the EPA's regulatory definition of solid waste as excluding products, such as pesticides and fertilizers, the intended use of which involves application to the land. See 40 C.F.R. § 261.2(c)(1)(B)(ii) (2001). EPA continues to interpret the RCRA Subchapter III regulations as not extending to products whose use involves application to the land, or where use necessarily entails land application, when those products are used in their normal manner. Rather, the firing of munitions is within the normal and expected use of the product. In the Preamble to the MMR, EPA states that,

Under RCRA, the use of products for their intended purpose, even when the use of the product results in deposit on the land, does not necessarily constitute "discard," is not waste management, and is not subject to regulation. For example, RCRA does not regulate the use of pesticides by farmers, even though pesticides are discharged to the environment during use (see 40 C.F.R. Sections 262.10(d) and 262.70 (2001)). By the same logic, RCRA does not regulate the use of dynamite or other explosives during quarrying or construction activities. EPA has consistently held that the use of munitions (military or otherwise) for their intended purpose does not constitute "discard," and therefore is not a waste management activity.

Military Munitions Rule: Hazardous Waste Identification and Management; Explosives Emergencies; Manifest Exemption for Transport of Hazardous Waste on Right-of-Ways on Contiguous Properties, 62 Fed. Reg. at 6628.

EPA disagrees with a commenter's proposition in the MMR Preamble that munitions are a "solid waste" when they hit the ground because they have no further function, unlike pesticides, which continue to have a function on the ground. *See id.* EPA's interpretation focuses on whether a product was used as it was intended to be used, not on whether a product is to perform some function once on the ground. Therefore, the Agency is maintaining its position that munitions that are fired are products used for their intended purpose, even when they hit the ground since hitting the ground is a normal expectation for their use. *See id.*

The final step in the *Mead Corp.* analysis is how persuasive is EPA's interpretation? EPA's interpretation of the statutory definition to exclude the consumer use exception is very persuasive in light of the purpose of RCRA. In the MMR Preamble, EPA responds to a comment expressing concern over the relative merits of not regulating the munitions on an active range while regulating munitions that land off a range. *See Military Munitions Rule: Hazardous Waste Identification and Management; Explosives Emergencies; Manifest Exemption for Transport of Hazardous Waste on Right-of-Ways on Contiguous Properties*, 62 Fed. Reg. at 6632. EPA states that the Agency views the firing of munitions that land on active ranges as product use, while munitions that land off range and are not promptly rendered safe and/or retrieved, are more like a spill that is not promptly remediated. *See id.* at 6633. EPA considers such munitions to be "discarded," "abandoned," or "disposed of" and thus statutory solid waste potentially subject to RCRA corrective action. *See id.* This distinction makes sense since consumer products such as pesticides and lead shot cannot be integrated with the RCRA regulatory scheme when used for their intended purpose. To do so would mean that a hunter would be required to tie a RCRA manifest on a bullet before firing it. Furthermore, the hunter would have to assure that the bullet lands on a permitted transport, treatment and disposal facility. Therefore, a consumer product, such as lead shot, used for its intended purpose cannot be "discarded" in the regulatory sense. However, hazardous consumer products such as pesticides and lead shot could create imminent and substantial endangerments even though used for their intended purpose, thereby warranting remedial action. For the statutory definition as used in RCRA Section 6972(a)(1)(B), the statute is looking at what materials cause sufficient environmental concerns to require cleanup on a quasi-public nuisance basis, even though the materi-

als were never subject to the regulatory scheme. See 42 U.S.C. § 6972(a)(1)(B) (1994). When lead shot and skeet parts accumulate in a pond they have the potential to cause serious harm to benthic and waterfowl populations as well as the entire food chain. Thus, it is within the RCRA regime to include fired bullets when they aggregate in large, post-consumer use quantities that pose environmental problems and are "part of the waste problem."

EPA's interpretation is therefore entitled to relative respect under *Mead Corp.* because it has been longstanding and is persuasive. The Court should hold that the consumer use exception does not apply to the statutory interpretation of "solid waste." Accordingly, the Court should reverse the judgment of the lower court in part and remand BOG's Section 6972(a)(1)(B) imminent and substantial endangerment claim for consideration on the merits.