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Brief for the Appellant, Birdwatchers of Groveton, Inc.: Fourteenth Annual Pace National Environmental Moot Court Competition

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MEASURING BRIEF*

Civ. App. No. 01-878

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

BIRDWATCHERS OF GROVETON, INC.,
and
UNITED STATES,
Appellants,

v.

SUAVE REAL PROPERTIES, INC.,
Appellee.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW UNION

Brief for the Appellant,
BIRDWATCHERS OF GROVETON, INC.

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* This brief has been reprinted in its original form.

QUESTIONS PRESENTED

1. Did the court below err in holding that federal regulation of Sheldrake Pond is not justified under either the Commerce Clause or the Treaty Clause, given that the activity of polluting Sheldrake Pond, in the aggregate, substantially affects interstate commerce and given that the Clean Water Act is a necessary and proper means to the effectuation of the Migratory Bird Treaty?
2. Did the court below err in finding that Sheldrake Pond is not a "navigable water" under the Clean Water Act, given that Sheldrake Pond is both a playa lake, the destruction of which affects interstate commerce, and an important habitat for migratory birds, and given that Congress recently amended the Clean Water Act to ensure such bodies of water fall under its jurisdiction?
3. Did the court below err in holding that the lead shot and skeet parts which fall into and accumulate in Sheldrake Pond are not solid waste under the Resource Conservation and Recovery Act's *regulatory* definition covering permit violations, given that the lead shot and skeet parts are hazardous materials that are both discarded and abandoned?
4. Did the court below err in holding that the lead shot and skeet parts which fall into and accumulate in Sheldrake Pond are not solid waste under the Resource Conservation and Recovery Act's *statutory* definition of solid waste that presents an imminent and substantial endangerment to health or the environment, given that lead shot and skeet parts are discarded hazardous materials?

PARTIES TO THE PROCEEDING

Birdwatchers of Groveton, Inc., Appellant

United States, Appellant

Suave Real Properties, Inc., Appellee

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RELEVANT CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

The constitutional provisions relevant to the determination of this case are the Commerce Clause, Article I, Section 8, Clause 3, the Necessary and Proper Clause, Article I, Section 8, Clause 18, and the Treaty Clause, Article II, Section 2, Clause 2 of the United States Constitution. All three Clauses are printed in their entirety in Appendix B. The statutes relevant to this case are the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251 *et seq.* (1994), and the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901 *et seq.* (1994). Relevant portions of both Acts are reprinted in Appendix B. A number of the Environmental Protection Agency, ("EPA"), regulations and Army Corps of Engineers, ("Corps"), regulations are relevant to this case. The relevant regulations are also set forth in Appendix B. The Order from the District Court of New Union is set forth in Appendix A.

STATEMENT OF THE CASE

A. Procedural History

This is an appeal from an order entered on September 1, 2001, by Judge Romulus in the United States District Court for the District of New Union on Defendant's motion for summary judgment. The district court dismissed the action initiated by Appellant Birdwatchers of Groveton, Inc. ("BOG") against Appellee Suave Real Properties, Inc. ("Suave") seeking civil penalties and injunctive relief under the citizen suit provisions of the CWA and the RCRA. The district court justified its grant of summary judgment against BOG on four grounds. Regarding Suave's CWA violations, the district court said that BOG's action was precluded because Congress does not have the power under the Commerce Clause or Treaty Clause to protect bodies of water like Sheldrake Pond, and secondly, even if Congress has the power, Congress did not intend to protect such bodies of water under the CWA. Regarding Suave's RCRA violations, the district court said that lead shot and skeet parts do not fall under the EPA's regulatory definition or Congress' statutory definition of solid waste.

The district court granted a motion to intervene by the United States on behalf of the United States EPA. The United States acts as an Appellant in this case, challenging the district court's refusal to protect Sheldrake Pond under the CWA and its insistence that lead shot and skeet parts are not solid waste under

Congress' statutory definition in RCRA. With respect to the EPA's regulation, however, the United States supports the district court's conclusion that lead shot and skeet parts are not solid waste under that definition. Thus, BOG and the United States join each other in opposing the district court's ruling on three of the grounds. BOG, however, also opposes the district court's ruling on the fourth ground. Appellee Suave supports the district court's judgment in its entirety. (R. at 1-2).

B. Statement of the Facts

Located in New Union, Sheldrake Pond is a playa lake four feet deep and twenty-five acres in size during the wet part of the year. The lake serves as an important habitat for more than 200 species of bird, including a large number of migratory birds that stop at the Pond during annual interstate and international migrations. Many of the migratory birds, such as Mexican ducks, jacanas, avocets, sandhill cranes, and warbling vireos, travel as far as Canada and Mexico in their migrations. Members of BOG, a non-profit corporation organized in New Union, have traveled to Sheldrake Pond for over two decades to observe these many species of bird that congregate on Sheldrake Pond or its banks. (R. at 3).

The County of Groveton owns the land to the east and south of Sheldrake Pond, as well as a portion of the lake itself. Suave owns the land to the west and south of Sheldrake Pond, and a portion of the western end of the playa lake. In 2000, Suave filled a portion of the western end of Sheldrake Pond to build a platform for a skeet ejection device. Soon thereafter, Suave began managing a skeet shooting operation and recreational firing range near Sheldrake Pond. As a part of its skeet shooting operation, Suave ejects skeet over Sheldrake Pond, and shooters attempt to hit the skeet with lead shot fired from shotguns. As a result, lead shot and skeet parts continually fall into and around Sheldrake Pond. Additionally, though a berm has been placed behind the firing range, lead bullets occasionally overshoot the berm and enter into Sheldrake Pond. The lead shot, skeet, and lead bullets fall on both the County-owned and the Suave-owned portions of Sheldrake Pond as well as the adjacent land. Suave does not have an easement or other agreement with the County allowing Suave to invade the County's land and portion of the playa lake. (R. at 3-4).

STANDARD OF REVIEW

A court reviews a grant of summary judgment de novo. *Butler v. City of Prairie Village*, 172 F.3d 736, 745 (10th Cir. 1999). Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is *no genuine issue as to any material fact* and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c) (emphasis added). The facts are to be examined and reasonable inferences drawn in a light most favorable to the non-moving party. *Butler*, 172 F.3d at 745. If there is no genuine issue of material fact, the reviewing court determines whether the lower court correctly applied the substantive law. *Id.*

In evaluating a constitutional challenge to a federal statute, a court applies a de novo standard of review. *United States v. Luna*, 165 F.3d 316, 319 (5th Cir. 1999). When reviewing a challenge to the validity of a congressional exercise of power under the Commerce Clause, a court uses the following standards: "(1) whether a rational basis exists for finding that the regulated activity affects interstate commerce, and (2) whether the means chosen by Congress were 'reasonably adapted to the end permitted by the Constitution.'" *Deer Park Indep. School Dist. v. Harris County Appraisal Dist.*, 132 F.3d 1095, 1098 (5th Cir. 1998). "The burden for the challenger . . . is high." *Id.*

SUMMARY OF THE ARGUMENT

This Court should reverse the district court's grant of summary judgment to Suave Real Properties, Inc. on all four issues and remand this case for further proceedings on the merits.

First, Congress has the power under the Commerce Clause to regulate intrastate activities that affect interstate commerce, and the Necessary and Proper Clause allows Congress to enact any laws necessary to achieve that end. Regulation of Suave is appropriate because the pollution of Sheldrake Pond is an economic activity that, in the aggregate, substantially affects interstate commerce by destroying the habitat of over 200 species of bird and disrupting the ability of numerous birdwatchers to observe the birds in their natural environment. Additionally, the Clean Water Act ("CWA") is a valid means under the Necessary and Proper Clause of effectuating the migratory bird treaties between the

United States and Canada and Mexico, treaties that have been ratified by the Senate pursuant to the Constitution.

Second, Sheldrake Pond is a "navigable water" under the CWA. The Environmental Protection Agency's ("EPA") interpretation of "navigable waters" explicitly includes playa lakes, the use, degradation, or destruction of which affects interstate commerce. Congress charged the EPA with interpreting and implementing the CWA, and the EPA's interpretation is consistent with both congressional intent and the broad interpretation of the reaches of the CWA given by courts. Congress has further bolstered the EPA's definition by adopting it verbatim in a recent amendment. The amendment governs this case because it was a curative measure brought in direct response to a recent United States Supreme Court case. Finally, the congressional amendment makes clear that Sheldrake Pond is protected by the CWA not only because it is a playa lake, the destruction of which affects interstate commerce, but also because Sheldrake Pond is an important habitat for migratory birds.

Third, the district court erred in holding that lead shot and skeet parts are not "solid waste" under the *regulatory* definition, which is the EPA's interpretation of the Resource Conservation and Recovery Act ("RCRA"). The lower court misapplied deference to the EPA's interpretation of the regulatory language and incorrectly interpreted the "consumer use" exemption when applying it to the regulatory definition of "solid waste."

Fourth, the district court erred in holding that lead shot and skeet parts are not "solid waste" under the *statutory* definition found in RCRA. The lower court erroneously attempted to extend the "consumer use" exemption to the statutory definition of "solid waste." The extension of the "consumer use" exemption would not only lead to absurd results, but also would undermine the purpose of RCRA.

ARGUMENT

I. FEDERAL REGULATION OF WATER POLLUTION IN SHELDRAKE POND IS JUSTIFIED BY THE COMMERCE CLAUSE AND THE TREATY CLAUSE OF THE UNITED STATES CONSTITUTION

A. Congress' Authority under the Commerce Clause and Its Jurisdictional Reach under the Clean Water Act Are Broad

The Constitution of the United States grants Congress the power "[t]o regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. As Chief Justice Marshall stated nearly 200 years ago, the power to regulate commerce, "like all others vested in [C]ongress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the [C]onstitution." *Gibbons v. Ogden*, 22 U.S. 1, 196 (1824). The power is not confined to the regulation of commerce among the states: "It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end." *United States v. Darby*, 312 U.S. 100, 118 (1941). Together with its power to regulate the nation's commerce, Congress may enact laws that it deems 'necessary and proper' to achieve that end. *Groome Resources Ltd. v. Parish of Jefferson*, 234 F.3d 192, 202 (5th Cir. 2000) (quoting U.S. Const. art. I, § 8, cl. 18).

The Clean Water Act ("CWA" or "Act") prohibits the discharge, without a permit, of pollutants into "navigable waters." 33 U.S.C. §§ 1311(a), 1362(12)(A) (1994). Within the Act, "navigable waters" is further defined as "the waters of the United States." 33 U.S.C. § 1362(7) (1994). "[T]he Supreme Court has indicated that in defining 'navigable waters' as 'waters of the United States,' Congress intended 'to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed "navigable" under the classical understanding of that term.'" *United States v. Wilson*, 133 F.3d 251, 256 (4th Cir. 1997) (quoting *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985)). Thus, "the power of Congress to regulate the discharge of pollutants into at least some nonnavigable waters is indisputable . . . ." *Wilson*, 133 F.3d at 251; *United States v. Holland*, 373 F. Supp. 665, 673 (M.D. Fla. 1974) (holding "Congress is not limited

by the 'navigable waters' test in its authority to control pollution under the Commerce Clause"). This is in keeping with Congress' intent to exercise its full powers under the Commerce Clause. *Riverside Bayview Homes*, 474 U.S. at 133 (citing S. Conf. Rep. No. 92-1236, at 144 (1972); 118 Cong. Rec. 33756-57 (1972) (statement of Rep. Dingell)); *Leslie Salt Co. v. United States*, 896 F.2d 354, 357 (9th Cir. 1990).

B. Under the Power Granted by the Commerce Clause, the Jurisdictional Reach of the CWA Extends to Sheldrake Pond

There are "three broad categories of activity that Congress may regulate under its commerce power.'" *United States v. Morrison*, 529 U.S. 598, 608-09 (2000) (quoting *United States v. Lopez*, 514 U.S. 549, 558 (1995)). First, Congress may regulate the use of the channels of interstate commerce, and second, Congress has the authority to regulate and protect the instrumentalities of interstate commerce. *Morrison*, 529 U.S. at 609. Though BOG argued at the district court level that these two categories apply in this case, (*Birdwatchers of Groveton, Inc. v. United States*, Civ. No. 01-878, at 7 (D.N.U. 2001) ("R.")), BOG concedes that the activity at question is neither a "channel" nor an "instrumentality" of interstate commerce for purposes of this appeal. *See, e.g., Gibbs v. Babbitt*, 214 F.3d 483, 490-91 (4th Cir. 2000) (regulation limiting the taking of red wolves on private land is not a regulation of channels or things); *United States v. Pozsgai*, 999 F.2d 719, 734 (3d Cir. 1993) (regulation of pollution of wetlands "adjacent" to navigable waters is not a regulation of channel or instrumentality); *Rancho Viejo v. Norton*, No. CIV.A.1:00CV02798, 2001 WL 1223502, at *5 (D.D.C. Aug. 20, 2001) (regulation of housing development under Endangered Species Act is not a regulation of channel or instrumentality).

It is the third category of permissible regulation that encompasses this case: "those activities that substantially affect interstate commerce." *Morrison*, 529 U.S. at 609. Within this category are activities that "arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." *Gibbs*, 214 F.3d at 491 (quoting *Lopez*, 514 U.S. at 561). The pollution of Sheldrake Pond by Suave is just such an economic activity. Suave's discharge of fill material, skeet and lead substantially affects interstate commerce by destroying the habitat of over 200 species of bird and disrupting the ability of

numerous birdwatchers to observe the birds in their natural environment, particularly when such pollution is viewed in the aggregate. For this reason, the regulation of Suave falls within the powers of Congress as granted under the Commerce Clause. *See Lopez*, 514 U.S. at 560-61 (discussing cases upholding regulation of intrastate economic activity that, in the aggregate, substantially affects interstate commerce); *see also Wilson*, 133 F.3d at 256 ("Congress can clearly regulate discharges of pollutants that substantially affect interstate commerce.")

1. Regulation of Sheldrake Pond Satisfies the Four Factors Set Forth in United States v. Morrison

a. The Pollution of Sheldrake Pond is an Economic Activity

In *Morrison*, the Supreme Court enumerated four factors that help to determine whether an activity falls within the third category of activities Congress may regulate. 529 U.S. at 609-12. The first factor a court examines is whether "the activity in question [is] some sort of economic endeavor." *Id.* at 610. In answering this question, lower courts have been unanimous in finding that the economic nature of an activity must be "understood in broad terms." *Gibbs*, 214 F.3d at 491 (discussing *Wickard v. Filburn*, 317 U.S. 111 (1942)); *Groome*, 234 F.3d at 208; *United States v. Gregg*, 226 F.3d 253, 262 (3d Cir. 2000).

In the present case, Suave's discharging of fill material into Sheldrake Pond is an economic activity no matter how it is perceived. To begin with, Suave, a real estate management company, filled a portion of Sheldrake Pond in the process of developing land into a skeet shooting facility and firing range. (R. at 3-4.) As the court found in *Rancho Viejo*, the development of land for the purpose of constructing upon it "is plainly an economic activity." 2001 WL 12223502, at *6. Furthermore, Suave continues to deposit fill material or pollutants into the Pond in the course of operating the facility. (R. at 3-4.) Each skeet ejected into the air and landing in the Pond generates money for Suave as it simultaneously pollutes the water; thus, the pollution of the water is directly related to an economic endeavor.[1] Finally, the discharge of

1. Because the facts are unclear as to whether Suave makes money in the process of its operation, BOG requests that the Court view the available information in a light most favorable to BOG by inferring that the operation of the facility is for profit. *Butler v. City of Prairie Village, Kan.*, 172 F.3d 736, 745 (10th Cir. 1999).

pollutants on a broad scale is an activity economic in nature. Those persons discharging pollutants usually act in the furtherance of a business purpose and often avoid expensive treatment processes or the fees associated with disposing materials in a lawful manner.[2] *See* 33 U.S.C. § 1319(d) (1994) (directing courts to consider the economic benefit arising from a violation when determining civil penalties); S. Rep. No. 50, at 25 (1985) ("Violators should not be able to obtain an economic benefit vis-a-vis their competitors due to their noncompliance with environmental laws.").

Regardless of whether they are viewed broadly or narrowly, Suave's activities are economic and therefore distinguishable from the non-economic activities that the Supreme Court held could not be regulated in *Lopez* and *Morrison*. *See Lopez*, 514 U.S. at 567 (possession of a gun in a local school zone); *Morrison*, 529 U.S. at 613 (gender-motivated crimes). This distinction is important, for the Supreme Court has "upheld a wide variety of congressional Acts regulating intrastate economic activity," *Morrison*, 529 U.S at 610, including the regulation of homegrown wheat, which "involved economic activity in a way that the possession of a gun in a school zone does not." *Lopez*, 514 U.S at 560 (discussing *Wickard*, 317 U.S. 111).

b. The Statutory Language Contains a Jurisdictional Element

The second factor to which a court looks is whether the statutory language at issue "has an express jurisdictional element that restricts its application to activities that have an explicit connection with interstate commerce." *Rancho Viejo*, 2001 WL 12223502, at *8 (citing *Morrison*, 529 U.S. at 611-12). In this case, the presence of such an element is clear—the statute states: "waters of the U.S. means . . . [a]ll other waters . . . the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce . . . ."[3] Water Pollution Protection Act of

2. Suave, for example, saves money on the cost of cleaning those materials out of Sheldrake Pond and the cost of ensuring that those materials do not reach Sheldrake Pond.

3. It is important at this point to note the disjunctive phrasing of the definition. BOG is not arguing that the jurisdictional reach of the CWA extends to those waters the use of which *could* affect interstate commerce. *See Wilson*, 133 F.3d at 256-57 (holding that Commerce Clause does not support regulation of activity because it may possibly affect interstate commerce); *Cargill Inc. v. United States*, 516 U.S. 955, 958 (1995) (J. Thomas, dissenting) (questioning constitutionality of provision requiring

2001, P.L. 106-720; *see also* 40 C.F.R. § 122.2 (2000). Though a jurisdictional element is not dispositive and is relevant only in those cases in which a non-economic activity is being regulated, *Groome*, 234 F.3d at 211, the presence of such an element in this case is but another sign that the regulation of Suave under the CWA is squarely within Congress' power under the Commerce Clause. *See Morrison*, 529 U.S. at 612.

c. Congress Has Found that Water Pollution Substantially Affects Interstate Commerce

The third factor of *Morrison* is whether the legislative history of the act provides insight into the "legislative judgment that the activity in question substantially affects interstate commerce . . . ." 529 U.S. at 612. Prior to answering this question, it is important to note that Congress "is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce." *Id.* Nevertheless, for nearly 30 years, courts have recognized that "[t]he legislative history of the [Clean Water] Act is laden with reports, references and statements supporting the widely accepted conclusion that water pollution is a national problem severely affecting the health of our people, the welfare of the nation and the efficient conduct of interstate commerce." *United States v. Ashland Oil and Trans. Co.*, 364 F. Supp. 349, 351 (W.D. Ky. 1973) (citing A Legislative History of the Water Pollution Control Act Amendments of 1972, Vol. 1 & 2, and Comm. on Public Works, 93d Cong., Serial No. 93-1 (1st Sess. 1973)), *aff'd*, 504 F.2d 1317 (6th Cir. 1974); *see also Holland*, 373 F. Supp. at 673 (finding "[i]t is beyond question that water pollution has a serious effect on interstate commerce").

In addressing the legislative history component, the district court made two critical errors. First, it looked to evidence of the connection between migratory birds and interstate commerce. (*See* R. at 7.) The regulated activity in this case, however, is the discharge of pollutants into water, and it is the general impact of that activity on interstate commerce that is at issue.[4] *See, e.g.*,

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only that activity "could" affect interstate commerce); *but see Hoffman Homes, Inc. v. EPA*, 999 F.2d 256, 261 (7th Cir. 1993) (deferring to an interpretation of CWA that "indicates the regulation covers waters whose connection to interstate commerce may be potential rather than actual"). Rather, BOG asserts that the CWA's jurisdiction extends to Sheldrake Pond because Suave's activities *are* affecting interstate commerce, not because they could or may.

4. Even if this Court found it necessary to rely upon evidence of the relationship between migratory birds and interstate commerce, the record is clear that migratory

Groome, 234 F.3d at 213 (noting sufficient record of the general effects of housing discrimination on interstate commerce in Fair Housing Act case). Second, the lower court summarized the *Morrison* court as rejecting congressional findings on the basis that "just because Congress said so, does not make it so." (R. at 7.) However, the precise reason that the *Morrison* Court refused to uphold the statute was because the relationship between the activity and interstate commerce was too attenuated, regardless of the legislative findings. 529 U.S. at 615.

d. There Is a Direct Link Between the Pollution of Sheldrake Pond and Interstate Commerce

The final factor set forth in *Morrison* is an attenuation analysis. *See* 529 U.S. at 612, 615 (refusing to follow a "but-for causal chain from the initial occurrence of violent crime . . . to every attenuated effect"). In this case, the link between Suave's pollution of Sheldrake Pond and interstate commerce is direct and does not require that the Court "pile inference upon inference" to find a connection. *Lopez*, 514 U.S. at 567. The district court dismissed the relationship because "no human interstate activity has been alleged at Sheldrake Pond," (R. at 7), but such a distinction misses the mark. The fact that Appellants are comprised of a group of intrastate birdwatchers does not mean that the destruction and pollution of Sheldrake Pond has no effect on interstate commerce. For at least two decades, BOG's members had observed over 200 species of bird on the Pond, many of which were migratory.[5] (R. at

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birds are substantially connected to interstate commerce. *See, e.g., Andrus v. Allard*, 444 U.S. 51, 63 n.19 (1979) (the "assumption that the national commerce power does not reach migratory wildlife is clearly flawed"); *Cargill*, 516 U.S. at 959 (J. Thomas, dissenting) ("substantial interstate commerce depends on the continued existence of migratory birds"). The lower court summarily dismissed the Report of the Senate Environment Committee, P.L. 106-720, (R. at 7), but *Lopez* states that a court may look to "congressional committee findings" in its search for legislative judgment of the effect of an activity on interstate commerce. *Lopez*, 514 U.S. at 562. Moreover, a "court must defer to a congressional finding that a regulated activity affects interstate commerce if there is any rational basis for such a finding." *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276 (1981). The district court's dismissal of the Report as not being "real evidence," (R. at 7), overlooks the substantiation of the Report's findings in other cases. *See, e.g., Hoffman Homes*, 999 F.2d at 261; *Solid Waste Agency of Northern Cook County v. United States Army Corps of Eng'rs*, 191 F.3d 845, 850 (7th Cir. 1999) (citing statistics), *rev'd on other grounds*, 531 U.S. 159 (2001).

5. *Cf. Cargill*, 516 U.S. at 959 (J. Thomas, dissenting) (noting that "there was no showing that humans ever went to petitioner's property to . . . observe migratory birds"); *Hoffman Homes, Inc. v. EPA*, 999 F.2d 256, 261 (7th Cir. 1993) (noting that "there was no evidence that any migratory birds actually used" area in question); *but*

3). The effect of wildlife observation on commerce is astounding; for example, in 1980 more than 100 million Americans spent almost $14.8 billion to watch and photograph fish and wildlife. U.S. Congress, Office of Technology Assessment, Wetlands: Their Use and Regulation 54 (OTA-O-206, Mar. 1984). That intrastate birdwatchers contribute to interstate commerce cannot be denied and for this reason, the effect of Suave's activity on interstate commerce is not attenuated.

But BOG need not prove that Suave has affected interstate commerce on an individual basis; it need prove only that Suave's activity, "*in the aggregate*," substantially affects interstate commerce. *Lopez*, 514 U.S. at 561 (emphasis added). In other words, it is the "class" of regulated activities—not an individual instance—that is to be considered in the "affects" analysis. *Perez v. United States*, 402 U.S. 146, 154 (1971). "[W]here a general regulatory statute bears a substantial relation to commerce, the *de minimus* character of individual instances arising under that statute is of no consequence." *Lopez*, 514 U.S. at 558 (emphasis and citation omitted). The aggregate pollution of intrastate water bodies such as Sheldrake Pond, where people congregate to observe migratory birds, undoubtedly results in a substantial effect on interstate commerce. *See Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* ("*SWANCC*"), 531 U.S. 159, 194-95 (Stevens, J., dissenting) ("[I]t is undisputed that literally millions of people regularly participate in birdwatching" and that this activity "generate[s] a host of commercial activities of great value.") Moreover, the CWA is a "complex regulatory program," which "when considered as a whole satisfies [the Commerce Clause]." *Gibbs*, 214 F.3d at 497 (quoting *Hodel v. Indiana*, 452 U.S. 314, 329 n.17 (1981)).

The cases upon which the district court rests its decision are distinguishable from the instant case. (*See* R. at 6-7.) In both *Lopez* and *Morrison*, the Supreme Court refused to uphold regulations of non-economic activities that did not contain a jurisdictional element and, at best, were connected to interstate commerce in only the most tenuous manner. *Lopez*, 514 U.S. 549; *Morrison*, 529 U.S. 598. To the contrary, the discharge of pollutants and fill material by Suave meets every factor necessary to establish Congress' power to regulate such activity under the

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see Leslie, 55 F.3d at 1396 (upholding regulation of ponded areas despite lack of human interaction with migratory birds).

Commerce Clause. *See Morrison*, 609-12. Where an economic activity, in the aggregate, "substantially affects interstate commerce, legislation regulating that activity will be sustained." *Lopez*, 514 U.S. at 560; *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 258 (1964) ("if it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze" (citations omitted)). For these reasons, Congress has the power to regulate Suave under the Commerce Clause, and the district court's granting of summary judgment must be reversed.

C. The CWA Is a Necessary and Proper Means of Effectuating the Migratory Bird Treaties between the United States and Canada and Mexico

Congress may enact any law necessary to effectuate a treaty between the United States and another nation. *United States v. Lue*, 134 F.3d 79, 82 (2d Cir. 1998) (citing *Missouri v. Holland*, 252 U.S. 416, 432 (1920)). The authority to do so arises under the Necessary and Proper Clause. U.S. Const. art. I, § 8, cl. 18; *Missouri v. Holland*, 252 U.S. at 432. The only requirement is that the treaty be valid under Article II of the Constitution. *Missouri v. Holland*, 252 U.S. at 432; U.S. Const. art. II, § 2, cl. 2.

The United States has entered into treaties with both Canada (by way of Great Britain) and Mexico to assure the protection of birds migrating across North America. *See Missouri v. Holland*, 252 U.S. at 431; *Alaska Fish and Wildlife Fed. and Outdoor Council, Inc. v. Dunkle*, 829 F.2d 933, 941 (9th Cir. 1987). The United States Senate ratified each of these treaties pursuant to the Treaty Clause of the Constitution. *Missouri v. Holland*, 252 U.S. at 433; *United States v. Blanket*, 391 F. Supp. 15, 18 (W.D. Okla. 1975). Therefore, the treaties are valid exercises of the Executive's treaty power. *See Missouri v. Holland*, 252 U.S. at 432.

In its opinion, the district court summarily dismissed the argument that Sheldrake Pond falls within the jurisdiction of the CWA pursuant to the Treaty Clause. (R. at 7.) Without citing authorities, the district court stated "[a] treaty simply cannot transfer state authority to the federal government" and "there is [no] indication that Congress was acting pursuant to the Treaty Clause when it enacted the CWA." *Id.* While the district court was correct in stating that a treaty cannot, by itself, transfer state power to the federal government, *see Edwards v. Carter*, 580 F.2d 1055, 1069 (D.C. Cir. 1978), no such argument is being made here. It is the Necessary and Proper Clause of the Constitution *in con-*

junction with the migratory bird treaties, that grants the federal government the power to regulate Sheldrake Pond. *Missouri v. Holland*, 252 U.S. at 432.

"If [a] treaty is valid there can be no dispute about the validity of [a] statute under Article I, Section 8, as a necessary and proper means to execute the powers of the Government." *Missouri v. Holland*, 252 U.S. at 432. Contrary to the district court's opinion, Congress need not have acted solely in pursuance to the treaties in order for the CWA to reach Sheldrake Pond. So long as "the effectuating legislation bear[s] a rational relationship to a permissible constitutional end," it satisfies the Necessary and Proper Clause. *Lue*, 134 F.3d at 84.

Here, the CWA was enacted, *inter alia*, for the purpose of providing "for the protection and propagation of fish, shellfish, and wildlife." 33 U.S.C. § 1251(a)(2) (1994). According to the Ninth Circuit, the Act may be "plausibly" read to provide for the protection of migratory birds, *Leslie Salt Co. v. United States*, 55 F.3d 1388, 1394 (9th Cir. 1995), and the protection of migratory birds is a key aspect of the treaties. *Dunckle*, 829 F.2d at 941. Moreover, the Report of the Senate Environment Committee accompanying Congress' recent amendment to the CWA, P.L. 106-720, states that Congress "intended . . . to cover . . . waters that are important stopovers for migratory birds." S. Rep. No. 106-528, at 23 (2001). Providing an essential habitat for over 200 species of bird, Sheldrake Pond is such a body of water. (R. at 3.) Therefore, its regulation under the CWA is authorized as a necessary and proper means to the effectuation of the migratory bird treaties between the United States and Canada and Mexico.

II. SHELDRAKE POND IS NAVIGABLE WATER UNDER THE CWA

Sheldrake Pond falls within the CWA's definition of "navigable waters" for three reasons, any of which is sufficient to support jurisdiction. First, the use, degredation, and destruction of Sheldrake Pond affects interstate commerce, and such bodies of water are included within the EPA's interpretation of "navigable waters." Second, if there was any doubt as to whether Congress intended to include such bodies of water under the CWA, the doubt ended when Congress adopted the EPA's interpretation of "navigable waters" in a recent congressional amendment. Finally, Sheldrake Pond is an important habitat for migratory birds and under Congress' recent amendment, such bodies of water are also

covered under the CWA. Therefore, because Sheldrake Pond is a navigable water under the CWA, this Court should reverse the holding of the district court.

A. Sheldrake Pond Is a Body of Water, the Use, Degradation, or Destruction of Which Affects Interstate Commerce

Congress' express purpose in enacting the CWA was to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (1994). To accomplish this purpose, Congress used the broad term "navigable waters" in defining the reach of the CWA, intending to exercise its full authority under the Commerce Clause. S. Conf. Rep. No. 92-1236 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3776, 3822. The district court recognized this clear congressional intent (R. at 4), as have other courts. For example, the Eleventh Circuit has noted that

> Congress intended the definition of navigable waters under the Act to reach to the full extent permissible under the Constitution .... This broad definition makes it clear that the term 'navigable' as used in the Act is of limited import and that with the CWA Congress chose to regulate waters that would not be deemed navigable under the classical understanding of that term.

United States v. Eidson, 108 F.3d 1336, 1341 (11th Cir. 1997) (internal marks and citations omitted), *cert. denied*, 522 U.S. 899 (1997).

The Supreme Court has noted it is a "water body's capability of use by the public for purposes of transportation or commerce" that is the determinative factor in resolving whether the water body falls within the CWA. *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 168 (2001) ("*SWANCC*") (citing 33 CFR § 209.260(e)(1) (1974)). Similarly, the Supreme Court has unanimously agreed that even though Congress used the term "navigable water" in the CWA, the term "navigable" is of limited import. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985). The *Riverside Bayview Homes* Court noted the breadth of the federal regulation contemplated by the CWA and Congress' intent to repudiate limits that had been placed on federal regulation under previous statutes. *Id.*

Congress granted the EPA authority to implement and interpret the CWA. 33 U.S.C. § 1251(d) (1994); *see also SWANCC*, 531

U.S. at 184 n.10. The EPA interprets the term "navigable water," as used in the CWA, to include playa lakes "the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce . . . ." 40 C.F.R. § 122.2 (2001). Sheldrake Pond falls squarely within the EPA's definition of a playa lake, the use, degradation, or destruction of which affects interstate commerce, and is thus "navigable water" under the CWA. To be sure, it is not the presence of birds themselves that makes Sheldrake Pond "navigable water" under the CWA but rather the effect Sauve's activities have had on the many intrastate birdwatchers who visited the Pond. *See* 40 C.F.R. § 122.2 (2001).

Suave's allegation that Sheldrake Pond does not affect commerce because BOG's members are intrastate birdwatchers misses the mark. (*See* R. at 5.) The question, for the purposes of the Commerce Clause is not whether this single activity affects commerce; the question is whether the activity that Congress is attempting to regulate affects interstate commerce in the aggregate. *Lopez*, 514 U.S. at 561; *see also Perez*, 402 U.S. at 154. As the Supreme Court noted in *SWANCC*, millions of people spend over a billion dollars annually on recreational pursuits relating to migratory birds. 531 U.S. at 173. The use, degradation, and destruction of playa lakes like Sheldrake Pond, in the aggregate, affects interstate commerce because the millions of birdwatchers who spend billions of dollars will be detrimentally affected if such activities went unregulated. Accordingly, Suave's allegation that BOG's members are intrastate and therefore do not affect interstate commerce is without merit.[6]

B. The *SWANCC* Decision Does Not Affect the Conclusion that Sheldrake Pond Is a Navigable Water for Purposes of the Clean Water Act

The district court's erroneous conclusion that Sheldrake Pond was not navigable water under the CWA rested primarily on the recent *SWANCC* decision. (R. at 5-6.) The *SWANCC* decision is

6. The fact that Suave disputes that Sheldrake Pond is a playa lake, and instead is a vernal pool, either works against Suave or is irrelevant. (*See* R. at 5.) First, it is inappropriate to settle factual disputes at summary judgment. Fed. R. Civ. P. 56(c). If Suave seriously contends Sheldrake Pond is not a playa lake, the contention is a factual dispute that should be settled at trial and not on a motion for summary judgment. *See id.* Second, for the purposes of summary judgment facts are to be construed in a light most favorable to the nonmoving party. *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 888 (1990). Accordingly, Sheldrake Pond should be construed to be a playa lake as BOG has alleged and the district court has found. (R. at 5.)

not controlling for the case at hand for three reasons. First, *SWANCC* was dealing with a different law. Second, *SWANCC* was dealing with a different set of facts. Finally, *SWANCC* made very clear that the holding was limited to the particular facts of the case and specifically did not over-rule any statutes or previous case law.

1. SWANCC was Dealing with a Different Law

In *SWANCC*, the Supreme Court was dealing with the "Migratory Bird Rule," a regulation promulgated by the Army Corps of Engineers ("Corps") in an attempt to clarify the Corps' jurisdiction under the CWA. 531 U.S. at 164. The "Migratory Bird Rule" states that the CWA covers any intrastate water that could be used by migrating birds. 51 Fed. Reg. 41206 (1986). Thus, under the Corps' regulation, the presence of migratory birds is sufficient to make water subject to the jurisdiction of the CWA. *Id.* The *SWANCC* Court, however, disagreed: "We hold that 33 C.F.R. § 328.3(a)(3)(1999), as clarified and applied to petitioner's balefill site pursuant to the 'Migratory Bird Rule,' 51 Fed. Reg. [41206] (1986), exceeds the authority granted to respondents under [33 U.S.C. § 1344(a)]." 531 U.S. at 174.

In the case at hand Sheldrake Pond is navigable water under the CWA not because of the "Migratory Bird Rule," at question in *SWANCC*. Rather, Sheldrake Pond is navigable water under the CWA because Sheldrake Pond is a playa lake, the use, degradation, or destruction of which affects interstate commerce. This is critically distinct from the "Migratory Bird Rule." In *SWANCC*, the Court held that Congress did not intend for the mere presence of migratory birds to be sufficient to make water navigable for purposes of the CWA. 531 U.S. at 171-72. While the presence of migratory birds did not cut it in *SWANCC*, it is not just the presence of migratory birds but the use of Sheldrake Pond by recreational birdwatchers that, in the aggregate, affects interstate commerce in this case. As such, Sheldrake Pond fits the definition of "navigable water" under the EPA's regulation, which was not at question in *SWANCC*.

In *SWANCC* the Corps also attempted to argue that there was a substantial effect on interstate commerce, but it was unclear what the activity was that the Corps was claiming affected interstate commerce. 531 U.S. at 173. The Corps changed their argument midstream, focusing on the commercial nature of a municipal landfill instead of the recreational travelers and

birdwatchers. *Id.* In response, the Court spent only six sentences dealing with the Corps' contention, stating that the argument raised significant constitutional questions and that the Court would have to evaluate the precise object or activity that substantially affected interstate commerce. *Id.* Accordingly, little can be said of the *SWANCC* decision regarding the EPA statute, which defines a playa lake, like Sheldrake Pond, as "navigable water" for purposes of the CWA if the destruction of that water affects interstate commerce.

2. The Facts of SWANCC are Different from the Facts of this Case

Not only was *SWANCC* dealing with a different law, it was dealing with a different set of facts. In *SWANCC*, a municipality attempted to develop a 533-acre abandoned sand and gravel pit mining operation as a disposal site for baled, nonhazardous solid waste. 531 U.S. at 163. However, after the sand and gravel pit mining operation was abandoned, a number of permanent and seasonal ponds developed where mining depressions collected water. *Id.* The ponds ranged in size from under one tenth of an acre to several acres, and from several inches to several feet deep, and several migratory birds gathered at the ponds. *Id.*

The facts of this case are much different. Sheldrake Pond is not an abandoned gravel and sand mining pit, it is a playa lake. (R. at 5.) Note that playa lakes like Sheldrake Pond are explicitly included in both the EPA's and the Corps' definitions of navigable water under the CWA, while abandoned sand and gravel mining pits are not. 40 C.F.R. § 122.2 (2001); 33 C.F.R. § 328.3(3) (2001). Also, Sheldrake Pond is a more substantial body of water than the sand and gravel mining pits discussed in *SWANCC*. Sheldrake Pond is twenty-five acres in size and four feet deep during the wet season. (R. at 3.) The largest of the abandoned gravel pits in *SWANCC* was "several acres" and "several feet deep." 531 U.S. at 163.

Most importantly, in *SWANCC* there was no showing that birdwatchers were observing the migratory birds at the ponds. 531 U.S. at 173. Accordingly, the *SWANCC* Court could not evaluate the specific activity's impact, in the aggregate, on interstate commerce. *Id.* Here, it is undisputed that the members of BOG have been traveling to Sheldrake Pond for over two decades to view the large variety of bird species that visit Sheldrake Pond. This is the precise activity that the Corps failed to make clear in

SWANCC, which led the Court to say it could not reach the constitutional issues. 531 U.S. at 173. In this case, the activity affecting interstate commerce is clear and undisputed.

3. The Holding of SWANCC Is Limited

The *SWANCC* Court made clear that the holding in that case was limited, stating "[w]e hold that 33 CFR § 328(a)(3)(1999), *as clarified and applied to petitioner's balefill site* . . . exceeds the authority granted to [the Corps] under . . . the CWA." 531 U.S. at 174 (emphasis added). The Court in *SWANCC* did not over-rule the statute in question as unconstitutional. *Id.* Nor did they overrule any of the decades' worth of case law broadly interpreting the scope of the CWA. *Id.* The Court did comment on its landmark decision in *Riverside Bayview Homes* but distinguished that case from the issue in *SWANCC* and left *Riverside Bayview Homes* intact. *SWANCC*, 531 U.S. at 170-72. Likewise, the *SWANCC* Court made no mention of over-ruling *International Paper Co. v. Ouellette*, 479 U.S. 481(1987), a case where the Court upheld the EPA's broad definition of navigable waters as including almost any body of surface water that might affect interstate commerce. *Ouellette*, 479 U.S. at 486 n.6. Instead, the *SWANCC* Court chose to explicitly hold that the statute at question, applied to those particular facts, did not fall within the CWA. 531 U.S. at 174.

Case law and administrative interpretations since *SWANCC* have noted that the Supreme Court's holding was narrow. For example, in *United States v. Interstate General Co.*, 152 F.Supp.2d 843 (D. Md. 2001), the court said, "The SWANCC case is a narrow holding . . . . Because the Supreme Court only reviewed 33 CFR § 328.3(a)(3), it would be improper for this Court to extend the SWANCC Court's ruling any farther than they clearly intended."[7] In a memorandum addressing and explaining the impact of the

7. *See also Aiello v. Town of Brookhaven,* 136 F.Supp.2d 81,119 (E.D.N.Y. 2001) noting the continued validity of the EPA statute, 40 CFR 122.2, which is identical to the statute in question in *SWANCC*, and noting the continued breadth of navigable waters under decisional law; *see also United States v. Krilich*, 152 F. Supp. 2d 983, 988 (N.D. Ill. 2001). In *Krilich*, the court pointed out that *SWANCC* "does not clarify" what nonnavigable bodies of water fall within the CWA definition of navigable waters, except to make clear that migratory birds alone are insufficient. 152 F. Supp. 2d at 988. The court also noted that "[c]ases subsequent to *SWANCC* have not limited the definition of waters of the United States to those immediately adjacent to navigable (in the traditional sense) waters." *Id.* at 992 n.13; *see also Rancho Viejo v. Norton*, No. CIV.A.1:00CV02798, 2001 WL 1223502, at *9 (D.D.C. 2001) (stating that the *SWANCC* holding was limited to the specific application of the "Migratory Bird Rule").

SWANCC decision, General Counsel for the EPA and the Corps also noted the narrowness of the *SWANCC* decision: "Although the Court held that the Corps' application of § 328.3(a)(3) was invalid in *SWANCC*, the Court did not strike down §328.3(a)(3) or any other component of the regulations defining 'waters of the United States' . . . . [T]he Court's actual holding was narrowly limited . . . ." Environmental Protection Agency, United States Department of Army, *Memorandum of General Counsel* (January 19, 2001). Also worth mention is the fact that the Corps has not changed the regulation called into question in *SWANCC*. *See* 33 C.F.R. § 328.3(a)(3) (2001). Nor has the EPA changed its identical provision. *See* 40 C.F.R. 122.2 (2001); *see also Krilich*, 152 F. Supp. 2d at 988 n.5 ("[n]o final or proposed regulation has been found which revises the regulatory definitions in light of *SWANCC*").

In sum, because the *SWANCC* Court was dealing with a different law, different set of facts, and a carefully expressed narrow holding, the District Court erred in concluding that *SWANCC* was applicable to the case at hand. Thus, this Court should reverse the district court.

C. Congress' Recent Amendment Adopting the EPA's Definition of Which Waters are Covered by the CWA, Makes Clear that Bodies of Water Like Sheldrake Pond Fall Under the CWA

On August 15, 2001, Congress amended the CWA's definition of "navigable waters" to incorporate the EPA's definition of "waters of the United States." Water Pollution Protection Act Amendments of 2001, P.L. 106-720. If there was any doubt whether Congress intended to include bodies of water such as Sheldrake Pond under the CWA, the amendment sets those doubts to rest. Because Sheldrake Pond is a playa lake, the use, degradation, or destruction of which affects interstate commerce, it is a navigable water under the CWA's new definition. However, the lower court dismissed the amendment as inapplicable to this case because BOG's complaint was filed prior to the amendment. (R. at 6.) Citing no authority, the district court stated that it is commonplace statutory interpretation that unless a statute explicitly directs retrospective application, the statute in place at the filing of the complaint governs. *Id.* The district court is in error.

1. Congress' 2001 Amendment to the CWA is a Curative Statute and Therefore the Amendment Applies to the Case at Hand

Critical examination of relevant authority reveals that because the 2001 amendment is a curative statute, the amendment governs even though it was enacted after the complaint was filed. Curative statutes are measures that either "ratify prior official conduct or make a remedial adjustment in an administrative scheme." Ronald D. Rotunda and John E. Newark, Treatise on Constitutional Law: Substance and Procedure, § 15.9 (3d ed. 1999). A court will almost always sustain retroactive legislation when it is curative. *Id.*; *see also Federal Housing Admin. v. Darlington, Inc.*, 358 U.S. 84 (1958); *Anderson v. Mount Clemens Pottery Co.*, 328 U.S. 680 (1946); *Cisneros v. Alpine Ridge Group*, 508 U.S. 10 (1993).

In *Darlington*, for example, the Supreme Court examined an amendment similar to the one at question here. 358 U.S. 84. There Congress had enacted the Veterans Emergency Housing Act, a law authorizing the Federal Housing Authority to ensure veterans of World War II would have housing. *Id.* at 85. The FHA established a policy that housing under the program must be residential, and could not include transient housing. *Id.* In 1954 Congress adopted the FHA's policy into law as an amendment to the original act. *Id.* The plaintiff in the *Darlington* case maintained an apartment building that included some rentals for transients. *Id.* at 87. When Congress adopted the 1954 amendment, the plaintiff sought declaratory relief, arguing that the amendment would be unconstitutional if applied to his building because the amendment would apply retrospectively in violation of due process of law. *Id.* The Court disagreed, noting that "Congress by the 1954 Act was doing no more than protecting the regulatory system which it had designed. Those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." *Id.* at 91 (citing *Viex v. Sixth Ward Ass'n,* 310 U.S. 32 (1940); *Keefe v. Clark*, 322 U.S. 393 (1944)).

The Court's willingness to uphold curative statutes is explained by a number of factors. Curative statutes are often legislative responses to previous court decisions overruling specific administrative action. Rotunda, Treatise on Constitutional Law: Substance and Procedure, § 15.9; *see also Anderson v. Mount Clemens Pottery Co.*, 328 U.S. 680 (1946). When this happens, the

legislature is merely responding to a judicial suggestion to eliminate a defect in statutory law and the curative legislation just corrects the flaw. Rotunda, Treatise on Constitutional Law: Substance and Procedure, § 15.9. Additionally, curative statutes aid to ensure full effect is given to the original intent of the initial legislation. *Id.* Congress' 2001 Amendment to the CWA is curative because it was in direct response the Supreme Court's judicial determination in *SWANCC*. In *SWANCC*, the Court said that Congress did not intend to give the Corps the power asserted under the "Migratory Bird Rule." 531 U.S. at 174. The Report of the Senate Environment Committee ("Report") accompanying the amendment explains that the "Supreme Court's opinion . . . misinterpreted congressional intent . . . . We intended the [CWA] to cover isolated waters that are important stopovers for migratory birds." S. Rep. No. 106-528, at 23 (2001).

The lower court nonetheless dismissed the statute as not applicable, stating the amendment does not embody retroactivity. (R. at 6.) However, the amendment does embody retroactivity because Congress amended its definition of navigable waters to clarify the congressional intent behind the CWA. S. Rep. No. 106-528, at 23 (2001). Congress' definition in the CWA of navigable waters stood untouched for nearly three decades, in face of judicial decisions and administrative interpretations broadly construing the congressional intent behind navigable waters to exercise Congress' full power under the Commerce Clause. 33 U.S.C. § 1362(7) (1994). Then, the Supreme Court in *SWANCC* held that Congress did not intend to extend their power under the Commerce Clause as broadly as the Corps had said. 531 U.S. at 174. Shortly thereafter, Congress adopted the EPA's broad definition of navigable waters, which is identical to the provision at issue in *SWANCC* and which broadly defines navigable water. *Compare* 40 C.F.R. 122.2 (2001) *with* 33 C.F.R. 328.3 (2001).

The district court evidently believes that all of this is coincidental and evidences nothing. However, the legislative history behind the 2001 amendment clears up any uncertainty about what Congress intended. The Senate Environment Committee made clear that the purpose of the amendment was to clarify the congressional intent questioned in the *SWANCC* opinion, stating that Congress' intent has always been to have the CWA reach the very waters with which the Court in *SWANCC* was dealing. S. Rep. No. 106-528, at 23 (2001). Nevertheless, the district court contends that because the Conference Committee Report and the

House Committee Report were both silent on the issue, the amendment does not apply retroactively. (R. at 6.) The silence of the two committee's, however, evidences nothing—that is, their silence should not be construed to be in favor of retroactivity, nor against it. *See, e.g., Miller v. French*, 530 U.S. 327 (2000) (Souter, J., concurring in part and dissenting in part) ("the legislative history is neutral, for it is silent on this issue").

Finally, the district court asserts "the views of a later Congress are of no help in ascertaining the intent of the earlier congress." (R. at 6.) The Supreme Court disagrees, making clear that "[s]ubsequent legislation which declares the intent of an earlier law . . . is entitled to weight when it comes to the problem of construction." *See Darlington*, 358 U.S. at 90 (citing *United States v. Stafoff*, 260 U.S. 477, 480 (1923); *Sioux Tribe v. United States*, 316 U.S. 317, 329-30 (1942)). Giving weight to Congress' recent amendment of the CWA means acknowledging that Congress was merely clarifying its intent behind the CWA and responding to the *SWANCC* decision. In short, the timing of Congress' recent amendment, the legislative history of the amendment, and the intent of the amendment all make clear that the amendment is a curative statute in response the Court's ruling in *SWANCC*. Because the amendment is curative, it applies to the case at hand.

D. Congress' Recent Amendment also Makes Clear that Because Sheldrake Pond Is an Important Habitat for Migratory Birds, Sheldrake Pond Falls Under the CWA

The amended statute § 1362(7) also extends the jurisdiction of the CWA over Sheldrake Pond because of the "Migratory Bird Rule." The *SWANCC* Court said that Congress did not intend to cover isolated, intrastate non-navigable waters under the CWA solely on the basis of the presence of migratory birds. 531 U.S. at 171-72. But Congress responded to *SWANCC* with the 2001 Amendment to 33 U.S.C. § 1362(7), making clear that Congress intended to cover such waters under the CWA. S. Rep. No. 106-528, at 23 (2001). The Report evidences this intent, as does the fact that Congress adopted a definition of "navigable waters" identical to the one at question in *SWANCC*. *Id.*; *compare* 40 C.F.R. § 122.2 (2001) *with* 33 C.F.R. § 328.3 (2001).

Any doubt to whether Congress intended to include isolated, intrastate non-navigable waters under the CWA solely on the basis of migratory birds ended with the Congressional amendment to 33 U.S.C. § 1362(7). When Congress amended the CWA to in-

clude the EPA's definition of waters of the United States, Congress was presumptively aware of the administrative determinations interpreting the statute. *See Lindahl v. Office of Personnel Management*, 470 U.S. 768, 782 n.15 (1985). The Corp's statute, 33 C.F.R. § 328.3, is identical to the EPA's statute, 40 C.F.R. § 122.2. Moreover, the "Migratory Bird Rule" itself states "the EPA has clarified" that the CWA covers waters which are or could be used as habitats for migratory birds. 51 Fed. Reg. 41206 (1986). Congress specifically chose to adopt the EPA's definition of which waters are covered by the CWA. P.L. 106-720. To conclude that Congress adopted the EPA's definition of those waters, but not the EPA's clarification and application of that definition would be illogical and contrary to Supreme Court precedent. *See, e.g., Lindahl*, 470 U.S. at 782 n.15. The legislative intent behind the amendment dispels any question as to whether Congress meant to extend the CWA to waters that are or could be habitats for migratory birds. The Committee report makes clear Congress intended with the Amendment to 1362(7) to include waters used by migratory birds. S. Rep. No. 106-528, at 23 (2001). The Report states, "[w]e intended the terms [of the CWA] to cover isolated waters that are important stopovers for migratory birds." S. Rep. No. 106-528, at 23 (2001).

Over 200 species of birds have been observed at Sheldrake Pond over the past two decades by members of BOG. (R. at 3.) Many of those species are migratory birds that migrate between the United States and Canada and/or Mexico, including Mexican ducks, jacanas, avocets, sandhill cranes, and warbling vireos. *Id.* Sheldrake Pond is an important stopover for many birds during the birds annual interstate and international migration. *Id.* Accordingly, Sheldrake Pond falls within the definition of navigable waters under 33 U.S.C. § 1362(7) of the CWA.

For all of these reasons, this Court should reverse the holding of the district court and hold that Sheldrake Pond is navigable water under the CWA.

III. THE REGULATORY AND STATUTORY DEFINITIONS OF "SOLID WASTE" IN THE RESOURCE CONSERVATION AND RECOVERY ACT APPLY TO THE LEAD SHOT AND SKEET PARTS FALLING INTO AND ACCUMULATING IN AND ABOUT SHELDRAKE POND

BOG has asserted two causes of action under the citizen suits provision of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901, *et seq.* (1994). (R. at 8.) The first is based on Suave's failure to obtain a permit for the disposal of solid waste. 42 U.S.C. § 6972(a)(1)(A) (1994). The second is based on Suave's unlawful disposal of solid waste that imminently and substantially endangers human health and the environment. 42 U.S.C. § 6972(a)(1)(B) (1994).

Important to both causes of action is the definition of "solid waste." Unfortunately, however, there is an alleged dichotomy in how "solid waste" is defined under RCRA because the EPA's regulatory definition is slightly different from the statutory definition. *See Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co.*, 989 F.2d 1305, 1314 (2d Cir. 1993) ("*Conn. Coastal*"). These two definitions of solid waste are at issue in the present case because each cause of action alleged by BOG necessarily involves a different classification of solid waste. (R. at 8.) The definition used when enforcing violations of permit requirements, the first cause of action, is a regulatory definition outlined in 40 C.F.R. § 261.1(b)(1) (2001). The statutory definition, on the other hand, is used when prohibiting an imminent and substantial endangerment to health or the environment, which is BOG's second cause of action. *See* 42 U.S.C. § 6903(27) (1994). According to the EPA, the regulatory definition of solid waste is narrower than the statutory counterpart. *Conn. Coastal*, 989 F.2d at 1314.

The district court held that both the regulatory and the statutory definitions of solid waste do not apply in the present case because of the "consumer use exemption." (R. at 11.) However, this holding is in error. Because both definitions apply to the case at hand and the exemption does not, the district court's grant of summary judgment should be reversed.

A. Lead Shot and Skeet Parts That Fall Into and Accumulate In and Around Sheldrake Pond are "Solid Waste" Under the *Regulatory* Definition Because They are Discarded Materials That Have Been Disposed Of

1. In the Operation of Its Skeet Shooting Facility, Suave is Both Discarding and Abandoning Skeet and Lead Shot

The regulatory definition of "solid waste" is "any discarded material," and "discarded material" is further defined as any material that has been "[a]bandoned." 40 C.F.R. § 261.2(a)(1) and (a)(2)(i) (2001). The EPA has opined that "the element of 'abandonment' in the regulatory definition of solid waste renders that definition somewhat narrower than the statutory definition," which "encompasses 'discarded material' without requiring that the material have been abandoned." *Military Toxics Project v. EPA*, 146 F.3d 948, 951 (D.C. Cir. 1998). However, the EPA has never provided a reasonable analysis for such an interpretation. In reading regulations, courts "start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used." *Richards v. United States*, 369 U.S. 1, 9 (1962). The ordinary meanings of "abandoned" and "discarded" are essentially synonymous. Webster's Ninth New Collegiate Dictionary, 43, 360 (1988). Thus, the EPA's interpretation of its own regulation is illogical. Nevertheless, even under the EPA's narrow definition, Suave is violating RCRA by discarding solid waste without a permit.

Suave operates a skeet shooting operation in which skeet is ejected over the Pond and shooters fire at the skeet with shotguns containing lead shot. Whether the shooters hit or miss, skeet parts and lead shot fall into and around Sheldrake Pond. (R. at 3-4.) Therefore, the skeet shooters are *discarding material*, namely the lead shot and the skeet. These materials are being *abandoned* because the shooters do not choose to retrieve the materials after shooting. For these reasons, Suave is disposing "solid waste" as it is defined by the EPA's regulation.

2. The "Consumer Use Exemption" Does Not Apply to the Definition of Solid Waste

The EPA argues that "consumer products used for their intended purpose" are exempt from the definition of "solid waste." This argument may have merit with respect to specific exemptions

outlined in the regulations, such as pesticides and fertilizers, where the intended use involves the application of the products to the land because the products perform a function after being applied to the ground. *See* 40 C.F.R. § 262(2)(c)(1)(B)(ii) (2001). However, "[a]s a matter of policy, if all products used for their 'original intended purpose' were exempted from regulation, RCRA would be without teeth, since virtually all waste could fit within this loophole." *Connecticut Coastal Fisherman's Ass'n v. Remington Arms Co., Inc.*, 777 F. Supp. 173, 188 (D. Conn. 1991), *rev'd on other grounds*, 989 F.2d 1305 (2d Cir. 1993). Congress alluded to this possible loophole twenty-five years ago: "It is not only the waste by-products of the nation's manufacturing processes with which the committee is concerned: *but also the products themselves once they have served their intended purposes and are no longer wanted by the consumer.*" 1976 U.S.C.C.A.N. at 6240 (emphasis added). It is in accord with the purpose of RCRA to regulate the disposal of hazardous consumer products so that there is accountability for the materials once they are discarded and pose a danger to public health and the environment.

In an attempt to extend the consumer use exemption to this case, both the district court and the EPA analogize the exemption with the "military munitions rule," which states that military munitions that land on a firing range are not solid waste. 40 C.F.R. §§ 261.2(a)(2)(iv) and 266.202 (2001). However, this analogy is without merit. First, the rule states that military munitions are not regulatory solid waste when being used for "training, research, testing, and *recovery*, [and] *collection* . . . ." 40 C.F.R. § 266.202(a)(1)(iii) (2001) (emphasis added). The activities of recovery and collection do not occur in skeet shooting operations—that is, the skeet shooters never intend to recover or collect the skeet and lead shot. Second, there is no codified consumer use exemption pertaining to non-military firing ranges or skeet shooting operations.

Moreover, under Suave's interpretation of the regulatory definition of solid waste, any discarded hazardous material would not fall under the definition of solid waste if *at some point* it had been used for the purpose for which it was intended. This interpretation would lead to an exemption of the majority of consumer goods. For example, Suave argues that "[lead] shot, like a golf ball, is not discarded when it is fired and falls to the ground, for that is its intended use." (R. at 8.) This analogy, however, is fallacious. When people hit golf balls, they do not intend to discard

them or dispose of them. Rather, they *intend* to pick up the golf ball and hit it again.

Despite all of this, the district court deferred to the EPA's interpretation under *Chevron, U.S.A., Inc. v. National Resources Defense Counsel*, 467 U.S. 837 (1984). (R. at 9.) *Chevron* deference was inappropriate, however, because the EPA has not promulgated a "regulation" pertaining to the use of consumer goods for their intended purpose. Rather, the EPA has produced policy documents outlining their interpretation. "[C]lassification rulings are best treated like 'interpretations contained in policy statements, agency manuals, and enforcement guidelines.' They are beyond the *Chevron* pale." *United States v. Mead*, 533 U.S. 218, ___, 121 S. Ct. 2164, 2175 (2001) (citing *Christensen v. Harris County*, 529 U.S. 576, 587 (2000)). While EPA policy documents are not entitled to *Chevron* deference, they may be accorded some deference and in order to determine what degree of respect a policy document is entitled, the Supreme Court set out a three-prong test. *Mead*, 121 S. Ct. at 2172 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). First, a court asks how formal was the process in which the EPA made the interpretation? *Id.* Second, a court looks to how consistent the EPA has been in its interpretation? *Id.* Third, a court looks to the persuasiveness of the EPA's interpretation? *Id.*

In applying this test to the case at hand, the EPA did not develop its interpretation of the consumer use exemption in any formal process. (R. at 10.) Moreover, the EPA's interpretation of the consumer exemption has been inconsistent. The lower court found, the "EPA's interpretation of 'discarded,' the key word and concept in both definitions, has been inconsistent even in its interpretation for purposes of the regulatory definition. (R. at 10) (citing cases). Finally, the EPA's interpretation is unpersuasive. For these reasons, the district court erred in granting deference to the EPA's consumer use exemption.

3. Because Skeet and Lead Shot Fall within the Regulatory Definition of Hazardous Waste, Suave Is Violating RCRA by Not Having a Permit to Dispose of Those Materials

Within RCRA, Congress isolated hazardous waste for more stringent regulatory treatment than other solid waste. "[R]ecognizing the serious responsibility that such regulations impose, Congress required that hazardous waste—a subset of solid

waste as defined in the RCRA regulations—be clearly identified." *Conn. Coastal*, 989 F.2d at 1315. Waste meeting the narrower regulatory definition of solid waste can be a hazardous waste if it is specifically listed or if it exhibits characteristics such as ignitability, corrosivity, reactivity, or toxicity. *See* 40 C.F.R. § 261.3(c) and (d) (2001). A person disposing of waste that meets the "hazardous" definition may lawfully do so only with a permit. 42 U.S.C. § 6925(a) (1994).

A solid waste is hazardous if, using appropriate testing methods, an "extract from a representative sample of the waste contains any of the contaminants listed in Table 1 [of the regulation] at the concentration equal to or greater than" that specified. 40 C.F.R. § 261.24(a) (2001). For lead, the concentration threshold is 5.0 mg/L. *Id.* In *Conn. Coastal*, the court held that the lead concentration from spent lead shot that was discharged at a skeet shooting range into Long Island Sound was of sufficient toxicity to be classified as a hazardous solid waste. 989 F.2d at 1317. That court also held that the clay parts from skeet might also meet the threshold for toxicity, but the tests had not been completed. *Id.*

While the concentration levels of lead and skeet may be different in Sheldrake Pond, it is undisputed that spent lead shot and clay parts have fallen into and around Sheldrake Pond. (R. at 3-4.) Testing needs to be conducted on Sheldrake Pond to determine whether the lead shot and skeet parts are toxic. Thus, a genuine issue of material fact exists. Due to this factual dispute, it was inappropriate for the district court to grant summary judgment for Suave, pursuant to Fed. R. Civ. P. 56(c). For purposes of summary judgment facts are to be construed in the light most favorable to the nonmoving party. *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888 (1990). Therefore, for purposes of summary judgment, the lead shot and clay parts should be construed to contain the hazardous waste characteristic of toxicity, thus falling under the hazardous waste classification of the EPA's regulation.

B. Lead Shot and Skeet Parts That Fall Into and Accumulate In and Around Sheldrake Pond are Solid Waste Under the *Statutory* Definition Because They are Discarded Materials Resulting From Commercial and Community Activities

The definition of solid waste for statutory purposes is "any . . . *discarded material*, including . . . material resulting from commer-

cial . . . and from community activities." 42 U.S.C. § 6903(27) (1994) (emphasis added). Courts have consistently held that the statutory definition of solid waste is much broader than the regulatory definition. *See, e.g., Comite Pro Rescate De La Salud v. Puerto Rico Aqueduct and Sewer Authority*, 888 F.2d 180 (1st Cir. 1989) (defining 'solid waste' more narrowly for purposes of Subtitle C than for purposes of § 7002); *Conn. Coastal*, 989 F.2d at 1316 ("the statutory definition contains the concept of 'discarded material' but it does not contain the terms 'abandoned' or 'disposed of' as required by the regulatory definition.") Thus, under the statutory definition, it must only be determined whether lead shot and skeet are "discarded materials," not whether they have also been abandoned.

There is no doubt that the skeet shooters have *discarded* their lead shot and skeet once they attempt to shoot at the skeet. It is uncontroverted that the skeet shooters never intend to go into Sheldrake Pond or scour the edge of the pond and retrieve the spent lead shot and skeet that inevitably fall to the ground and into Sheldrake Pond.

The discarded materials are also hazardous waste under the statutory definition. *See* 42 U.S.C. § 6972(a)(1)(B). In *Conn. Coastal*, lead shot was found to be a hazardous solid waste and a substantial threat to the environment in violation of § 6972(a)(1)(B). 989 F.2d at 317. The definition of "hazardous waste" outlined in 40 C.F.R. § 261.24 remains the same whether applied to the regulatory or statutory definition of solid waste. Thus, any "discarded material" that has characteristics of "toxicity" may be deemed hazardous waste, depending upon the level of toxicity. *See id.* If Suave argues that there is insufficient evidence that lead shot and skeet parts are a "substantial endangerment," a genuine issue of material fact exists. Thus, summary judgment is inappropriate, and the case should be remanded for trial. *See* Fed. R. Civ. P. 56(c).

1. The Statutory Definition of Solid Waste Does Not Include A Consumer Use Exception

As earlier noted, there is no codified consumer use exception. The EPA agrees that this exemption should never apply to the statutory definition of solid waste. (R. at 8.) More importantly, this Court held that the consumer use exemption does not apply to the statutory definition. In *Neighborhood against Golf, Inc. v.*

Recreation Enterprises, Inc., 150 F.3d 1029 (12th Cir. 1999)[8] ("*NAG*"), the plaintiffs alleged "that golf balls were solid waste and that toxic components of golf balls, accumulating in the roughs when their owners could not find them, were leaching into groundwater, endangering neighborhood drinking water supplies." (R. at 10.) Giving deference to the EPA's interpretation, the district court held that "the statutory definition of solid waste does not except consumer products used for their intended purposes," and the Twelfth Circuit affirmed. (R. at 10.)

The district court states that the *NAG* court incorrectly applied deference and that it is not bound to follow that decision, even though the district court is within the Twelfth Circuit. (R. at 10.) In spite of the Twelfth Circuit's binding precedent, the district court contends that adhering to the holding in *NAG* would result in an incorrect statutory interpretation. (R. at 10.) The district court provides no analysis for this contention, however, and its decision is contrary to the long established principle of *stare decisis*, making clear that the district court is bound to follow the Twelfth Circuit's precedent.

The consumer use exception exempts consumer products used for their intended use. In an analogous case involving a trap shooting range along Long Island Sound, the court reviewed the intended use argument as it pertained to a statutory provision in the CWA. The court stated, "[t]he CWA's broad statutory definition of 'pollutant' has been interpreted to apply to substances emitted into United States waters, regardless of whether they have been put to beneficial use or to their intended use." *Long Island Soundkeeper Fund, Inc. v. New York Athletic Club of the City of New York*, No. 94 Civ. 0436 (RPP), 1996 WL 131863, *14 (S.D.N.Y. 1996); *see also Hudson River Fishermen's Ass'n. v. City of New York*, 751 F. Supp. 1088, 1101 (S.D.N.Y. 1990) ("[i]t is indisputable that a pollutant is a pollutant no matter how useful it may earlier have been"), *aff'd* 940 F.2d 649 (1991). The same is true for discarded solid and hazardous waste. It is irrelevant what the initial intended use might have been.

2. Suave's Interpretation of the Statutory Definition of Solid Waste Would Lead to Absurd Results

Suave's primary argument is that the statutory definition of solid waste is inapplicable because of the consumer use exemp-

8. This case is fictitious, but has been provided as part of the record. (R. at 10.)

tion. (R. at 9.) Suave also argues that there must be an affirmative action of "discarding," otherwise the statutory definition does not apply. *Id.* But neither argument holds weight. The logical extension of Suave's arguments is that Section 7002 could never apply to non-voluntary acts of depositing, spilling and leaking – all of which may cause substantial endangerment to public health or the environment.

Congress intended the RCRA to fill the gaps in environmental regulations and in particular provided that the citizen suit provision under Section 7002 should be interpreted broadly to abate imminent hazards to health or the environment. *Conn. Coastal*, 989 F.2d at 1315. BOG is bringing this suit against Suave to abate an imminent hazard to health and the environment and in doing so performing the function intended by Congress. The district court erred in granting Suave summary judgment.

CONCLUSION

For the reasons stated in this brief, Birdwatchers of Groveton, Inc., respectfully requests that this Court reverse in its entirety the district court's grant of summary judgment in favor Suave Real Properties, Inc., and remand this case for further proceedings on the merits.

APPENDIX A**

[R, 3] [A-1] UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW UNION

BIRDWATCHERS OF GROVETON, INC.,
Plaintiff, and

UNITED STATES OF AMERICA,
Intervenor, Civ. No. 01-878

v.

SUAVE REAL PROPERTIES, INC.,
Defendant.

Romulus, Judge.

ORDER

On December 20, 2000, Birdwatchers of Groveton, Inc. (BOG), a non-profit corporation organized under the laws of New Union, filed a complaint against Suave Real Properties, Inc. (Suave), a real estate management company organized under the laws of New Union. BOG alleged jurisdiction under the citizen suit provisions of the Clean Water Act (CWA), 33 U.S.C. § 1365, and the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6972. BOG alleged that its members are birdwatchers living and watching birds in Groveton County, New Union. It further alleged that its members watched birds on Sheldrake Pond from an adjacent county road for at least the last two decades, until Suave began using the pond-side area as a firearms and skeet shooting range in 2000. It further alleged that during those decades, its members observed over two hundred species of birds on the Pond or its banks, many of which are species that migrate between the United States and Canada and/or Mexico, such as Mexican ducks, jacanas, avocets, sandhill cranes, and warbling vireos. Sheldrake Pond is a long, narrow, shallow pond, running east to

** Editors Note: Appendix A contains a reproduction of the original hardcopy record. References to the record that refer to pages in Appendix A are indicated by [A-1], [A-2], etc. References made in the other briefs published in this volume refer to page numbers in the original hardcopy record, which can be found in Appendix A by the symbols [R. 3], [R. 4], etc. which have been inserted into Appendix A by the editorial staff of the Pace Environmental Law Review.

west, that is dry during part of the year and never more than four feet deep and twenty-five acres in extent during the wet part of the year. Even so, it is an important stopover for many birds, both aquatic and terrestrial, during their annual interstate and international migrations.

It is uncontested that Suave began operation in 2000 of the Groveton Rifle and Pistol Association (GRAPA) near the Pond and continues that operation today. The GRAPA facility consists of a pad for skeet shooters, together with a device that ejects skeet into the air, and a firing range. Suave filled a small portion of the western end of the Pond to build a platform for the skeet ejection device. Suave owns land to the west and south of the Pond, and part of the western end of the Pond. The County owns land to the east and south of the Pond, and the remainder of the Pond. Suave ejects skeet over the Pond, while skeet shooters at some remove from the Pond attempt to shoot the skeet with shotguns. When they hit the skeet, skeet parts and spent lead shot commonly fall into and around the Pond, both on Suave-owned and county-owned land and portions of the Pond. When they miss the skeet, the skeet commonly fall into both portions of the land and Pond and the spent shot falls similarly. The firing range is located south of the Pond, near its eastern end. A berm behind the targets designed to catch most of the spent shot is located about fifty feet from the Pond. Occasionally lead bullets fired on this range overshoot the berm and enter the Pond or the country's land beyond. There is no evidence that Suave has an easement over the County's land or portion of the Pond or other agreement with the County allowing these invasions of its land or portion of the Pond.

BOG alleges that Suave is violating CWA 33 U.S.C. § 1311(a) in two ways. First, filling and maintaining the fill in the Pond for the skeet ejection platform constitutes discharging fill material into navigable waters without a CWA 33 U.S.C. § 1344 permit. Second, ejection of skeet and firing shot and bullets into the Pond constitutes either discharging fill material into navigable waters without a CWA § 1344 permit or discharging pollutants into navigable waters without a CWA 33 U.S.C. § 1342 permit. BOG asks the court to assess civil penalties for these violations and to issue an injunction against their continuance. BOG alleges that Suave is violating RCRA in two ways. First, Suave is violating RCRA by disposing of hazardous waste (skeet, skeet parts, and lead shot) into and about the Pond without a RCRA permit, in violation of 42 U.S.C. § 6925(a). BOG asks the court to assess civil penalties for

these violations and to issue an injunction against their continuance. Second, 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. § 6972(a)(1)(B). BOG asks the court to issue an injunction requiring Suave to abate this endangerment. EPA has intervened in support of BOG in its CWA counts and the second part of its RCRA count.

These allegations raise numerous factual and legal issues. At this point, however, we are called on to decide only a few of them in response to a motion for summary judgment filed by Suave. First, Suave moves that we dismiss the CWA counts because Sheldrake Pond is not navigable water, either in a statutory or a constitutional sense. Second, Suave moves that we dismiss the RCRA counts because the use of skeet and lead shot for their intended purpose does not constitute disposal of waste. The United States intervened to oppose the first motion and to support and oppose different parts of the second. We grant both motions and dismiss the case.

I. The CWA Counts

A. Legal Background

The basic prohibition of the CWA is the addition of fill material or a pollutant to navigable water from a point source without a CWA permit. 33 U.S.C. §§ 1311(a), 1362 (12). "Navigable water" is defined in the CWA to be the "waters of the United States." 33 U.S.C. § 1362(7). The legislative history of the statute indicates that Congress intended the term to be interpreted to exercise the full extent of _ongressional constitutional authority. Conf. Rep. 92-1236, *reprinted in* 1972 U.S.C.C.A.N. 3776, 3822. The Environmental Protection Agency (EPA), which administers most of the CWA, including the § 1342 pollutant permitting program, has interpreted the term in its regulations to include intrastate waters, such as "playa lakes," which could affect interstate or foreign commerce. Such uses include use by interstate or foreign travelers for recreational purposes. 40 CFR § 122.2. The Army Corps of Engineers (COE), which administers the CWA's § 1344 fill permitting program, has similarly interpreted the term. 33 CFR § 328.3(a)(3). A playa lake is a lake that is intermittent, i.e., it is dry part of the year. There are a number of such lakes in the arid southwest. BOG argues that Sheldrake Pond is a playa lake. Suave argues that it is too small to be a lake, that it is

merely a "vernal pool," a pool that is wet in the spring and dry the rest of the year. EPA has not specifically included vernal pools within its definition of navigable water, probably because they are too small. Nor has the COE. BOG argues further that 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 Plains and further north, by migrating birds and by people watching the migratory birds for recreational purposes. Significantly, the COE has interpreted its regulatory definition of navigable waters to include waters that "are or would be used as habitat by birds protected by the Migratory Bird Treaties." 51 Fed. Reg. 41217 ("Migratory Bird Rule"). Suave argues bird flight is not commerce and that birdwatching at Sheldrake Pond is not part of interstate commerce because only BOG's members are alleged to watch birds there and they are intrastate birdwatchers.

These arguments are illuminated by recent judicial and legislative actions. In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, ___ U. S. ___, 121 S. Ct. 675 (2001) (*SWANCC*), the Court considered an almost identical legal and factual situation. There, as here, the water in question was isolated, with no allegation it had ever been or could ever be used for traditional navigation purposes or that it was connected in any way with such waters. The only difference was that the water at issue in *SWANCC* was a flooded gravel pit, that was always wet, and the water at issue here is a playa pond, which is intermittently wet. On January 9, 2001, the Court held that such insignificant and isolated waters were not within the congressional definition of navigable water. The Court reasoned that "waters of the United States" did not include all water or the definition would have no meaning beyond "water." It further reasoned that the "navigable" in "navigable water" had to have some meaning as well. Finally, it found no indication in either the statute or the legislative history that Congress intended to include such insignificant and isolated waters within its definition of navigable waters. Notwithstanding the lower court's finding that over a billion dollars a year is spent on migratory bird-based recreational activities, the Court commented that the "Migratory Bird Rule" invoked the "outer limits of Congress' power" under the Commerce clause. *Id. At* 683. Rather than addressing the constitutional issue of whether it was within Congress' Commerce Clause authority, it

interpreted that statute not to assert jurisdiction over such insignificant and isolated waters.

On August 15, 2001, Congress amended the CWA's definition of "navigable waters" to incorporate EPA's definition of the "waters of the United States" from 40 CFR § 122.2. See Water Pollution Protection Act of 2001, P.L. 106-720.[9] The Report of the Senate Environment Committee accompanying the Senate bill stated:

> The Supreme Court's opinion in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers,* ___ U.S. ___ (2001), misinterpreted congressional intent. When we first enacted the CWA in 1972, we intended that the terms "navigable waters" and "waters of the United States" extend as far as our Commerce Clause authority extends. We intended the terms to cover isolated waters that are important stopovers for migratory birds. We acknowledged then and reacknowledge today, that migratory birds, particularly migratory game birds, are instrumentalities of interstate commerce and that the flyways they use to migrate are highways of interstate commerce. Hundreds of thousands of our citizens travel across state boundaries to hunt them and carry their carcasses across state boundaries for food, competing with our billion-dollar interstate domesticated fowl industry. Migratory birds are objects sought by hundreds of thousands of our citizens for recreational observation. Both of these activities result in over a billion dollars annually in interstate expenditures. Not only the Commerce Clause justifies our jurisdiction to protect these waters, the Treaty Clause justifies it as well. We have entered into treaties with several nations to protect migratory birds, including their habitat. Waters used by such species during migration are essential to their survival.

S. Rep. 106-528, p. 23.[10]

B. Legal Analysis

The 2001 amendment is irrelevant to this case. It is commonplace that the statutory law that governs a case is the statutory law that exists at the time the complaint is filed, unless the statute explicitly directs that it be applied retrospectively. There is no such direction in the 2001 amendments. The complaint was filed more than eight months prior to the amendments. Although

9. This enactment exists only for the purposes of this Competition.
10. This Report exists only for the purposes of this Competition.

plaintiff argues that the Senate Report quoted above indicates a congressional intent that the amendments be applied retrospectively, it does not. The statute itself does not embody retroactivity, only the report of one chamber of Congress does so. Neither the Conference Committee Report nor the House Committee Report contains similar language, indeed, they are silent on this issue. The plaintiffs next argue that the Senate Report is a definitive indication of what Congress intended by its use of "navigable waters" and "waters of the United States" when it enacted the CWA in 1972. Of course, it is not. Few, if any, of the members of Congress in 1972 were still members of Congress in 2001. And it is commonplace that the views of a later Congress are of no help in ascertaining the intent of an earlier Congress. That is particularly true when the Court itself has told us what congressional intent was in the earlier enactment, as it has in *SWANCC*. Since the statute that controls is the pre-amendment statute and the Court has interpreted that statute not to cover insignificant and isolated waters such as Sheldrake Pond, we need go no further.

But if the plaintiff prevailed in its arguments, either that the amendments controlled this case or that the Senate Report indicated the congressional intent in 1972 was to regulate isolated waters like those at issue in this case, then we would reach the constitutional question that the Court avoided in *SWANCC*. In that event, we would hold that Congress exceeded its authority when it attempted to exercise its jurisdiction over insignificant, isolated playa ponds such as Sheldrake Pond. We start with the Court's observation in *SWANCC* that such an attempt would raise "significant constitutional and federalism questions." *Id. at* 684. They are, of course, the same questions considered by the Court recently in holding that a federal civil remedy for victims of gender-based violence and a federal offense for possession of a firearm in a school zone were unconstitutional. *See U.S. v. Morrison*, 529 U.S. 598 (2000); *U.S. v. Lopez*, 514 U.S. 549 (1995).

In both decisions, the Court reiterated the 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. *Morrison* at 608-9; *Lopez* at 558. Plaintiff first argues that Sheldrake Lake is part of a highway of interstate commerce, i.e., part of a migratory bird flyway. This argument sweeps too broadly. Since migratory birds can land virtually anywhere in the country, it would make the land and water of the whole coun-

try subject to federal regulation, obliterating the traditional state control over land and water use decisions that underlies our federalist division of powers between the two levels of government. Plaintiff then argues that migratory birds are instrumentalities of interstate commerce, citing *Missouri v. Holland,* 252 U.S. 416 (1919). Plaintiff's attempted use of *Missouri v. Holland* is misplaced in two respects. First, the Court did not hold that migratory birds were instrumentalities of interstate commerce, but merely that they were not property of the state and thus not immune from federal control. Second, the statute and regulations at issue in that case protected migratory birds from being killed, captured or sold, while the CWA regulates water pollution.

That leads to BOG's third argument: either that defendant's activities substantially affect the interstate commerce of hunting and observing migratory birds or that the aggregate of activities like defendant's substantially affects such commerce. Plaintiff has utterly failed to plead or prove facts sufficient to establish the first of these alternatives: no human interstate activity has been alleged at Sheldrake Pond. As to the second, the Court in both *Morrison* and *Lopez* acknowledged that a non-economic activity might, in the aggregate, sufficiently affect interstate commerce to justify regulation under the Commerce Clause. But in both cases the Court found that no such affect had been proven. Here the only proof plaintiff offers is the Senate Report quoted above. Of course this does not suffice to prove a factual issue. In *Morrison* the Court rejected specific congressional findings that possession of guns within a school zone affected interstate commerce, finding that just because Congress said so, does not make it so. It held that such factual issues were for courts to decide on real evidence. *Morrison* at 614. Plaintiffs have presented no evidence on this point beyond the Senate Report, which, of course, does not rise to even the level of congressional findings. Nor does the plaintiff's reliance on the Court of Appeal's decision in *SWANCC* or in *U.S. Pozsgai*, 999 F.2d 719, 732-44 (3rd Cir. 1993) help; both were obliterated by the Court's opinion in *SWANCC.*

Plaintiff's contention that the Treaty Clause justifies congressional usurpation of state authority over insignificant and isolated waters such as Sheldrake Pond, is a misplaced attempt to end-run its inability to exercise jurisdiction over those waters under the Commerce Clause. A treaty simply cannot transfer state authority to the federal government. Nor is there any indication that the treaties protecting migratory birds attempted to do so. Nor is

there any indication that Congress was acting pursuant to the Treaty Clause when it enacted the CWA. The Senate Committee may have thought it was doing so when enacting the 2001 amendments, but that is a far cry from Congress exercising such authority.

We therefore hold that the statutory definition of navigable waters controlling this case does not reach the insignificant and isolated waters of Sheldrake Pond. If it did, we would hold that Congress and EPA exceeded their constitutional authority in attempting to extend their jurisdiction to Sheldrake Pond. Accordingly, we dismiss BOG's CWA counts.

II. The RCRA ISSUES

BOG seeks a finding that 1) Suave is violating RCRA by disposing of shot and skeet parts, hazardous waste, on and about its Sheldrake Pond facility without a permit, actionable under 42 U.S.C. § 6972(a)(1)(A) and 2) the disposed shot and skeet parts, solid or hazardous waste, constitute an imminent and substantial endangerment, actionable under 42 U.S.C. § 6972(a)(1)(B). To make either of these findings, it is necessary to hold that the fired shot and skeet parts are solid waste, for hazardous waste is a subset of solid waste. This is a more complicated exercise that it might appear, for there are two definitions of "solid waste" that could be relevant. First, Congress defined solid waste as ". . . discarded material. . .resulting from industrial, commercial, mining and agricultural operations, and from community activities." 42 U.S.C. § 6903(27). Second, EPA has promulgated a definition of solid waste at 40 CFR § 261.2(b) that again defines it as "discarded material," and then defines "discarded material" in a long and complex manner. Courts, and even EPA officials, have commented that this definition is an incomprehensible quagmire. The D.C. Circuit, for instance, has characterized it as a "mind-numbing journey." *American Mining Congress v. U.S. EPA*, 824 F.2d 1177, 1189 (D.C. Cir. 1987). As it turns out, the second, regulatory, definition applies to allegations of violating RCRA's regulatory program under § 6972(a)(1)(A), and the first, statutory, definition applies to allegations that activities constitute imminent and substantial endangerments under § 6972(a)(1)(B). *Connecticut Coastal Fishmeren's Association v. Remington Arms Co., Inc.*, 989 F.2d 1305 (2nd Cir. 1993). *See also Long Island Soundkeeper Fund, Inc. v. New York Athletic Club of the City of New York*, 1996 WL 131863 (S.D.N.Y.). The Second Circuit's rea-

soning in this regard is complicated but impeccable, and we see no reason to repeat it here. Suave argues that using a consumer product for its intended use does not constitute disposal of the product under either definition. It further argues that shot, like a golf ball, is not discarded when it is fired and falls to the ground, for that is its intended use. EPA agrees that the "consumer use" exception applies to the regulatory definition of solid waste for purposes of § 6972(a)(1)(A), but argues that it does not apply to the statutory definition of solid waste for purposes of § 6972(a)(1)(B).

Complicating this issue is the "military munitions rule," 40 CFR § 261.2(a)(2)(iv), § 266.202. The rule was upheld in *Military Toxics Project v. EPA*, 146 F.3d 948 (D.C. Cir. 1998). Relevant portions of this rule essentially say that fired military munitions that land on a military firing range are not solid waste in the regulatory sense, but may be solid waste in the statutory sense if they land off the firing range. Happily, both Suave and BOG agree that the rule is irrelevant because it deals only with military munitions, which are not the focus of this case. While EPA agrees that the military munitions rule does not govern this case, it argues that the principles embodied in it 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 GRAPA firing range, for firing shot on a firing range is using shot for its intended purpose. And it interprets the statutory definition to cover shot landing off the firing range as in the military munitions rule. 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. But if the intended use of the ammunition at issue here is to shoot skeet or to shoot at a target, this court fails to understand why that purpose is accomplished when the shot lands on a firing range but is not accomplished when it lands off the range. We therefore agree with the principle parties to this case that the military munitions rule is not useful in making the required interpretation.

Suave and EPA argue that EPA's interpretation of its own regulation defining solid waste as not including consumer products used for their intended purposes is dispositive, absent a con-

flict with the statute or regulation. We agree and find that BOG has raised no such conflict to prevent that conclusion. Suave next argues that the statutory definition of solid waste should be interpreted to exclude consumer products used for their intended purposes as well. If materials do not warrant regulation as solid waste, neither do they warrant remedial activities as solid waste. There is a good deal of common sense in this argument and it has the great merit of consistency, a special virtue in a statutory and regulatory structure as complicated as RCRA's. Indeed, the decisions BOG cites in its argument against this conclusion interpret different sections of RCRA consistently for this very reason. But BOG and EPA argue that EPA's interpretation of the statutory definition to exclude the consumer use exception bars this approach, for EPA's interpretation is entitled to substantial deference. Their argument carried great weight under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), in which the Court held that if a statute was ambiguous and the implementing agency's interpretation of it was reasonable, its interpretation was entitled to great deference. But the Court has recently limited *Chevron* deference to agency interpretations that are embodied in rulemakings. *U.S. v. Mead Corp.*, 2001 WL 672258 (U.S.). Under *Mead*, 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.

BOG and EPA seek to cloak EPA's interpretation of the statutory definition with *Chevron* substantial deference rather than *Mead* relative respect using two arguments. First, they argue that EPA's definition is indeed embodied in a rule, 40 CFR 261.1(b)(2)(ii). But that rule only provides that the statutory definition of "solid waste" applies to the EPA imminent and substantial endangerment provision, 42 U.S.C. § 6972, and does not mention the citizen suit imminent and substantial endangerment provision that BOG invokes, 42 U.S.C. § 6972(a)(1)(B). Nevertheless, BOG argues "solid waste" should be interpreted identically in both provisions because the provisions are otherwise very similar, citing *Connecticut Coastal Fishermen's Association v. Remington Arms Co., Inc.*, 989 F.2d 1305 (2nd Cir. 1993), and *Comite Pro Rescate de la Salud v. Puerto Rico Aqueduct and Sewer Auth.*, 888 F.2d 180, 187 (1st Cir. 1990). We agree, for the same reason that we held that both the statutory and regulatory definitions should be interpreted to include the consumer use exception. But this

does not help BOG, for EPA's regulation merely says that the statutory definition applies to EPA imminent and substantial endangerment causes of action and by extension to similar citizen suit causes of action; it does not deal with whether the consumer use exception applies to the statutory definition of solid waste. In sum, it is irrelevant to the issue before us. Thus, absent a countervailing argument, 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 deference.

BOG and EPA next 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 Enterprises, Inc.*, 150 F.3d 1029 (12th Cir. 1999) (*NAG*),[11] a neighborhood association filed a multi-count complaint seeking to enjoin the operation of a golf course that disrupted the neighborhood in various ways. One count alleged that golf balls were solid waste and that toxic components of golf balls, accumulating in the roughs when their owners could not find them, were leaching into groundwater, endangering neighborhood drinking water supplies. Recreation Enterprises argued the golf balls were not solid waste because they were consumer products used for their intended purpose and hence they were not disposed. The district court rejected this argument, giving *Chevron* deference to EPA's interpretation that the statutory definition of solid waste did not except consumer products used for their intended purposes, and the Twelfth Circuit affirmed in *NAG*.

It now appears that *NAG* wrongly applied deference rather than respect to EPA's interpretation of RCRA. BOG argues that *NAG* nevertheless is controlling precedent in the Twelfth Circuit. Here BOG and EPA part company. Suave and EPA argue that this cannot be, for such a conclusion would forever bar courts in the Circuit from correct statutory interpretation. This Court agrees.

That leads to the final question: to what degree of respect is EPA's interpretation of the statute entitled? *Mead Corp.* sets forth a three-pronged inquiry to determine this. First, how formal was the process in which EPA made the interpretation? EPA did

11. This opinion exists only for the purposes of this Competition.

not develop its interpretation in any formal process. Second, how consistent has EPA been in its interpretation? EPA's interpretation has been inconsistent. EPA's application of the consumer use exception to the regulatory but not the statutory definition of solid waste is basically inconsistent. Moreover, EPA's interpretation of "discarded," the key word and concept in both definitions, has been inconsistent even in its interpretation for purposes of the regulatory definition. *American Petroleum Institute v. U.S. EPA*, 216 F.3d 50 (D.C. Cir. 2000); *Association of Battery Manufacturers v. U.S. EPA*, 208 F.3d 1047 (D.C. Cir. 2000); *American Petroleum Institute v. U.S. EPA*, 906 F.2d 729 (D.C. Cir. 1990); *American Mining Congress v. U.S. EPA*, 907 F.2d 1175 (D.C. Cir. 1990); *American Mining Congress v. U.S. EPA*, 824 F2d 1177 (D.C. Cir. 1987). Third, how persuasive is EPA's interpretation? EPA is very persuasive that Congress did not intend RCRA to regulate the use of consumer products for their intended purposes. The very reason for RCRA's regulatory program is to prevent endangerments. If Congress did not intend EPA to regulate the use of consumer products for their intended purposes to prevent endangerments, it is unlikely that Congress would intend the courts to ameliorate endangerments from the same use of those products. Therefore, we find EPA's interpretation of the statutory definition of solid waste to exclude the consumer use exception to be entitled to little, if any, respect.

In sum, we hold that EPA's interpretation is entitled to no deference under *Chevron* because it is not embodied in a rulemaking. Further, we hold that it is entitled to no respect under *Mead Corp.* because it was not developed in a formal process, has not been consistent, and is unpersuasive. For the very reasons that EPA's interpretation is unpersuasive, we hold that the consumer use exemption applies to both the statutory and regulatory interpretations of "solid waste." Accordingly, we dismiss BOG's RCRA counts.

APPENDIX B

RELEVANT CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

CONSTITUTIONAL PROVISIONS

U.S. Const. art. I, § 8, cl. 3:

The Commerce Clause states that Congress has the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

U.S. Const. art. I, § 8, cl. 18:

The Necessary and Proper Clause states that Congress has the power "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof"

U.S. Const. art. II, § 2, cl. 2:

The President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur"

STATUTES

CLEAN WATER ACT

33 USC § 1251. Congressional Declaration of Goals and Policy

(d) Administrator of Environmental Protection Agency to administer 33 USCS §§ 1251 et seq. Except as otherwise expressly provided in this Act [33 USCS §§ 1251 et seq.], the Administrator of the Environmental Protection Agency (hereinafter in this Act called "Administrator") shall administer this Act [33 USCS §§ 1251 et seq.].

33 USC § 1311. Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law. Except as in compliance with this section and sections 302,

306, 307, 318, 402, and 404 of this Act [33 USCS §§ 1312, 1316, 1317, 1328, 1342, 1344], the discharge of any pollutant by any person shall be unlawful.

33 USC § 1362. Definitions

(7) The term "navigable waters" means the waters of the United States, including the territorial seas.
(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

Water Pollution Control Act Amendment of 2001, P.L. 106-720.

"On August 15, 2001, Congress Amended the CWA's definition of 'navigable waters' to incorporate the EPA's definition of the 'waters of the United States' from 40 CFR § 122.2. R. at 3. (Note that this amendment is fictional and only exists for the purpose this competition).

RESOURCE CONSERVATION AND RECOVERY ACT

42 USC § 6903. Definitions

(27) The term "solid waste" means any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under section 402 of the Federal Water Pollution Control Act, as amended (86 Stat. 880) [33 USCS § 1342], or source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954, as amended (68 Stat. 923) [42 USCS §§ 2011 et seq.].

42 USC § 6925. Permits for Treatment, Storage, or Disposal of Hazardous Waste

(a) Permit requirements. Not later than eighteen months after the date of the enactment of this section [enacted Oct. 21, 1976], the administrator shall promulgate regulations requiring each person owning or operating an existing facility or planning to construct a new facility for the treatment, storage, or disposal of hazardous waste identified or listed under this subtitle [42 USCS §§ 6921 et seq.], to have a permit issued pursuant to this section. Such regulations shall take effect on the date provided in section 3010 [42 USCS § 6930] and upon and after such date the treatment, storage, or disposal of any such hazardous waste and the construction of any new facility for the treatment, storage, or disposal of any such hazardous waste is prohibited except in accordance with such a permit. . .."

42 USC § 6972. Citizen Suits

(a) In general. Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf—
(1) (A) against any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this Act [42 USCS §§ 6901 et seq.]; or
(B) against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, 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; or

REGULATIONS

33 C.F.R. § 328.3. Definitions

For the purpose of this regulation these terms are defined as follows:

(a) The term waters of the United States means
(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
(2) All interstate waters including interstate wetlands;
(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;
(4) All impoundments of waters otherwise defined as waters of the United States under the definition;
(5) Tributaries of waters identified in paragraphs (a) (1) through (4) of this section;
(6) The territorial seas;
(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) (1) through (6) of this section.

40 CFR § 122.2. Definitions

Waters of the United States or waters of the U.S. means:
(a) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
(b) All interstate waters, including interstate "wetlands;"
(c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, "wetlands," sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:
(1) Which are or could be used by interstate or foreign travelers for recreational or other purposes;
(2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(3) Which are used or could be used for industrial purposes by industries in interstate commerce;
(d) All impoundments of waters otherwise defined as waters of the United States under this definition;
(e) Tributaries of waters identified in paragraphs (a) through (d) of this definition;
(f) The territorial sea; and
(g) "Wetlands" adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition.

40 CFR § 261.24. Toxicity characteristic

(a) A solid waste exhibits the characteristic of toxicity if, using the Toxicity Characteristic Leaching Procedure, test Method 1311 in "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods," EPA Publication SW-846, as incorporated by reference in § 260.11 of this chapter, the extract from a representative sample of the waste contains any of the contaminants listed in table 1 at the concentration equal to or greater than the respective value given in that table. Where the waste contains less than 0.5 percent filterable solids, the waste itself, after filtering using the methodology outlined in Method 1311, is considered to be the extract for the purpose of this section.

40 CFR § 261.1(b)(1).

"The definition of solid waste contained in this part applies only to wastes that also are hazardous for purposes of the regulations implementing subtitle C of RCRA. For example, it does not apply to materials (such as non-hazardous scrap, paper, textiles, or rubber) that are not otherwise hazardous wastes and that are recycled."

40 C.F.R. § 261.2. Definition of solid waste

(a)(1) A solid waste is any discarded material that is not excluded by § 261.4(a) or that is not excluded by variance granted under §§ 260.30 and 260.31.
(2) A discarded material is any material which is:
(i) Abandoned, as explained in paragraph (b) of this section; or
(ii) Recycled, as explained in paragraph (c) of this section; or
(iii) Considered inherently waste-like, as explained in paragraph (d) of this section; or

(iv) A military munition identified as a solid waste in 40 CFR 266.202.
(b) Materials are solid waste if they are abandoned by being:
(1) Disposed of; or
(2) Burned or incinerated; or
(3) Accumulated, stored, or treated (but not recycled) before or in lieu of being abandoned by being disposed of, burned, or incinerated
(c) Materials are solid wastes if they are recycled — or accumulated, stored, or treated before recycling — as specified in paragraphs (c)(1) through (4) of this section.
(1) Used in a manner constituting disposal. (i) Materials noted with a "*" in Column 1 of Table I are solid wastes when they are:
(A) Applied to or placed on the land in a manner that constitutes disposal; or
(B) Used to produce products that are applied to or placed on the land or are otherwise contained in products that are applied to or placed on the land (in which cases the product itself remains a solid waste).
(ii) However, commercial chemical products listed in § 261.33 are not solid wastes if they are applied to the land and that is their ordinary manner of use. . . ."

40 CFR § 266.202. Definition of solid waste

(a) A military munition is not a solid waste when:
(1) Used for its intended purpose, including:
(i) Use in training military personnel or explosives and munitions emergency response specialists (including training in proper destruction of unused propellant or other munitions); or
(ii) Use in research, development, testing, and evaluation of military munitions, weapons, or weapon systems; or
(iii) Recovery, collection, and on-range destruction of unexploded ordnance and munitions fragments during range clearance activities at active or inactive ranges. However, "use for intended purpose" does not include the on-range disposal or burial of unexploded ordnance and contaminants when the burial is not a result of product use. . . ."

51 Fed. Reg. 41206. Section 328.3: Definitions

This section incorporates the definitions previously found in § 323.3 (a), (c), (d), (f) and (g). Paragraphs (c), (d), (f) and (g) were incorporated without change. EPA has clarified that waters of the

United States at 40 CFR 328.3(a)(3) also include the following waters:
a. Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or
b. Which are or would be used as habitat by other migratory birds which cross state lines; or
c. Which are or would be used as habitat for endangered species; or
d. d. Used to irrigate crops sold in interstate commerce.