Pace Environmental Law Review

Volume 20
Issue 1 *Symposium Edition*

Article 20

January 2003

Brief for the Appellee, Suave Real Properties, Inc.: Fourteenth Annual Pace National Environmental Moot Court Competition

Della Au Belatti
University of Hawaii, William S. Richardson School of Law

Clavert Chipchase
University of Hawaii, William S. Richardson School of Law

Chris Kempner
University of Hawaii, William S. Richardson School of Law

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 Appellee,
SUAVE REAL PROPERTIES, INC.

UNIVERSITY OF HAWAII WILLIAM S. RICHARDSON SCHOOL OF LAW
Della Au Belatti
Clavert Chipchase
Chris Kempner
COUNSEL FOR APPELLEE

---

* This brief has been reprinted in its original form.

QUESTIONS PRESENTED

I. Whether the court below correctly held that Sheldrake Pond, an isolated intrastate playa pond, is not "navigable water" as defined by the Clean Water Act, 33 U.S.C. §§ 1331(a), 1362(7) & (12)? Does the amendment to the Clean Water Act, 33 U.S.C. § 1362(7), adopted eight months after litigation began, apply to this case? If so, does that amendment extend federal regulatory jurisdiction to Sheldrake Pond?

II. Whether the court below correctly held that the nexus between pollution and fill in Sheldrake Pond and interstate commerce is insufficient to justify federal regulation pursuant to the Commerce Clause? If so, does the treaty power support such regulation?

III. Whether the court below correctly held that shot and skeet used for its intended purpose is not "solid waste" when it falls to the ground under the EPA's definition of solid waste in 40 CFR § 261.2 as the term applies to BOG's citizen suit under 42 U.S.C. § 6972(a)(1)(A)?

IV. Whether the court below correctly held that shot and skeet used for its intended purpose is not "solid waste" when it falls to the ground under the statutory definition of solid waste applicable to BOG's citizen suit under 42 U.S.C. § 6972(a)(1)(B)?

TABLE OF CONTENTS

QUESTIONS PRESENTED 626
TABLE OF CONTENTS 627
TABLE OF AUTHORITIES 629
STATEMENT OF THE CASE 633
SUMMARY OF THE ARGUMENT 635
ARGUMENT 636
I. THE CWA DOES NOT EXTEND FEDERAL REGULATORY JURISDICTION TO SHELDRAKE POND 636
A. Sheldrake Pond is not "Navigable Water" Under the CWA 637
B. The Amendment to the CWA Does Not Operate Retroactively 640
11. *Congress did not clearly state that it intended the new definition of "navigable waters" to operate retroactively* 640
12. *The amendment would have a retroactive effect and therefore operates only prospectively* 642
C. The Amendment Would Unconstitutionally Extend the CWA to Sheldrake Pond 643
II. NEITHER THE COMMERCE CLAUSE NOR THE TREATY POWER SUPPORT FEDERAL REGULATION OF SHELDRAKE POND 643
A. Sheldrake Pond Cannot be Regulated Pursuant to the Commerce Clause 644
1. *Sheldrake Pond is not a "channel of interstate commerce."* 644
2. *Sheldrake Pond is not an "instrumentality of interstate commerce."* 645
3. *Suave's activities do not "substantially affect interstate commerce."* 646
a. The regulated activity is not an "economic endeavor." 647
b. There is no express jurisdictional element to limit the reach of the regulation 648
c. The legislative history does not contain express findings regarding the substantial effect that filling isolated ponds has on interstate commerce 649

d. The link between pollution in Sheldrake Pond and a substantial effect on interstate commerce is particularly attenuated 649
B. The Treaty Power May Not be Used to Regulate Sheldrake Pond 651
III. SHOT AND SKEET USED FOR ITS INTENDED PURPOSE IS NOT SOLID WASTE FOR PURPOSES OF REGULATION AND REMEDIATION 652
A. BOG Fails to Meet Minimum Jurisdictional Requirements Under RCRA Because the Shot and Skeet Used for Its Intended Purpose is not Discarded 652
B. The Intended Use Exception Serves RCRA's Purpose and Intent to Regulate Post-Consumer Waste 655
C. The EPA's Regulatory Definition of "Solid Waste" Excluding Shot and Skeet Used for Its Intended Purpose is Controlling 655
1. *The EPA's intended use exception requires Chevron deference* 656
2. *The EPA's intended use exception is a permissible construction of the statute* 657
D. The Intended Use Exception Also Applies to Used Shot and Skeet When They Fall to the Ground Under the Statutory Definition of Solid Waste Applicable to the 42 U.S.C. § 6972(a)(1)(B) Suit 659
CONCLUSION 662
APPENDIX A: RECORD ON APPEAL ..... **
APPENDIX B: RELEVANT PROVISIONS ..... **

** Editor's Note: The Appendices have not been published here and are not on file.

TABLE OF AUTHORITIES

United States Constitution:

U.S. CONST. art. I, § 1 651
U.S. CONST. art. I, § 8 643-644
U.S. CONST. art. II, § 2 651

United States Supreme Court Cases

Alden v. Maine, 527 U.S. 706 (1999)..... 643
Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988). 637, 640, 642
Bradley v. Richmond Scl. Bd., 416 U.S. 696 (1974)..... 640
Brecht v. Abrahamson, 507 U.S. 619 (1993) 647
Bruner v. United States, 343 U.S. 112 (1953)..... 641
Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984)..... 656-657, 660
Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102 (1980) 637
Douglas v. Seacoast Products, Inc., 431 U.S. 265 (1977) 646
Duplex Printing Co. v. Deering, 254 U.S. 443 (1921)..... 642
Fed. Hous. Auth. v. Darlington, Inc., 358 U.S. 84 (1958).... 639
Gregory v. Ashcroft, 501 U.S. 452 (1991) 643
Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) 651
Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 249 (1964) 644-645
INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) 660
INS v. St. Cyr, 121 S.Ct. 2271 (2001)..... 640-641
Kaiser Alum. & Chem. Corp. v. Bonjorno, 494 U.S. 827 (1990) 640
Kent v. Dulles, 357 U.S. 116 (1958)..... 651
Landsgraf v. USI Film Products, 511 U.S. 244 (1994) ... 640-642
Lindh v. Murphy, 521 U.S. 320 (1997)..... 640-642
Martin v. Hadix, 527 U.S. 345 (1999) 641
Missouri v. Holland, 252 U.S. 416 (1920)..... 644, 646, 651
Neely v. Henkel, 180 U.S. 109 (1901) 651
North Dakota v. United States, 460 U.S. 300 (1983)..... 651
Red Lion Broadcasting v. FCC, 395 U.S. 367 (1969)..... 639
Rivers v. Roadway Express, Inc., 511 U.S. 298 (1994) 641
Riverside Bayview Homes, Inc. v. United States, 474 U.S. 121 (1985)..... 639, 651
Skidmore v. Swift & Co., 323 U.S. 134 (1944) 660

Solid Waste Agency v. United States Army Corps of Eng'rs, 531 U.S. 159 (2001) ..... *passim*
Thorpe v. Durham Hous. Auth., 393 U.S. 268 (1969) 640
United States v. Darby, 312 U.S. 100 (1941)..... 644-645
United States v. Lopez, 514 U.S. 549 (1995) ... 639, 643-648, 650
United States v. Mead Corporation, 121 S.Ct. 2164 (2001).. 656-657, 660
United States v. Morrison, 529 U.S. 598 (2000).... 644, 646-647, 649-650
United States v. Sec. Ind. Bank, 459 U.S. 70 (1982) 643

United States Court of Appeals Cases

American Mining Congress v. EPA, 824 F.2d 1177 (D.C. Cir. 1987) 653-654
American Mining Congress v. EPA, 907 F.2d 1179 (D.C. Cir. 1990) 654, 657, 661-662
American Petroleum Inst. v. EPA, 906 F.2d 729 (D.C. Cir. 1990)..... 654, 657
American Petroleum Inst. v EPA, 216 F.3d 50 (D.C. Cir. 2000)..... 661
Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co., 989 F.2d 1305 (2d Cir. 1993) 652-654, 661
Hoffman Homes, Inc. v. EPA, 999 F.2d 256 (7th Cir. 1993). 650
Leslie Salt Co. v. United States, 896 F.2d 354 (9th Cir. 1990)..... 638, 650
Military Toxics Project v. EPA, 146 F.3d 948 (D.C. Cir. 1998)..... 656, 658
Nat'l Ass'n of Home Builders v. Babbitt, 130 F.3d 1041 (D.C. Cir. 1997) 645
Neighborhood Against Golf, Inc. v. Recreation Enterprises, Inc., 150 F.3d 1029 (12th Cir. 1999)..... 662
Quivira Min. Co. v. EPA, 765 F.2d 126 (10th Cir. 1985).... 637
Rice v. Harken Expl. Co., 250 F.3d 264 (2d Cir. 2001) ... 637-638
San Francisco Baykeeper v. Cargill Salt Div., 263 F.3d 963 (9th Cir. 2001) 637
Solid Waste Agency v. United States Army Corps of Eng'rs, 191 F.3d 845 (7th Cir. 1999) 650
United States v. ILCO, Inc., 996 F.2d 1126 (11th Cir. 1993)..... 659
United States v. Larkins, 852 F.2d 189 (6th Cir. 1988) 648
United States v. Pozsgai, 999 F.2d 719 (3d Cir. 1993) 650

United States v. Wilson, 133 F.3d 251 (4th Cir. 1997) ..638, 648-649

United States District Court Cases

Long Island Soundkeeper Fund, Inc. v. New York Athletic Club, No. 94 Civ. 0436, 1996 WL 131863 (S.D.N.Y. Mar. 22, 1996) 655, 659
No Spray Coalition, Inc. v. City of New York, No. 00-5395JSM, 2000 WL 1401458 (S.D.N.Y. Sept. 25, 2000)... 652, 661
United States v. Krilich, 152 F. Supp. 2d 983 (N.D. Ill. 2001) 637-638
Water Keeper Alliance v. Department of Defense, 152 F. Supp. 2d 163 (D.P.R. 2001) 652-655, 660-661

Statutes

5 U.S.C. § 706(a)(2) (1994) 658
5 U.S.C. § 706(2) (1994) 656
16 U.S.C. §§ 703-711 (1994) 651
16 U.S.C. § 703 (1994) 651
16 U.S.C. §§ 715-715s (1994) 651
16 U.S.C. § 715f (1994) 651
16 U.S.C. § 1311(a) (1994) 648
33 U.S.C. §§ 1251-1387 (1994) 648, 650
33 U.S.C. § 1251(a) (1994) 647
33 U.S.C. § 1251(b) (1994) 639, 648
33 U.S.C. § 1319(a)-(c) (1994) 648
33 U.S.C. § 1342 (1994) 636, 648
33 U.S.C. § 1344 (1994) 636, 648
33 U.S.C. § 1362(7) (1994) 636, 648
33 U.S.C. § 1365 (1994) 656
42 U.S.C. § 6903 (1994) 652
42 U.S.C. § 6903(5) (1994) 652
42 U.S.C. § 6903(27) (1994) 652-654
42 U.S.C. § 6912(a)(1) (1994) 657
42 U.S.C. §§ 6921-39b (1994) 652
42 U.S.C. § 6921(a)-(b) (1988) 653
42 U.S.C. § 6921(a) (1994) 654, 657
42 U.S.C. § 6925(a) (1994) 653
42 U.S.C. §§ 6941-49(a) (1994) 652
42 U.S.C. § 6942(a) (1988) 653
42 U.S.C. § 6972 (1994) 652

42 U.S.C. § 6972(a) (1994) 652
42 U.S.C. § 6972(a)(1)(A) (1994) 654-655
42 U.S.C. § 6972(a)(1)(B) (1994) 653
42 U.S.C. § 6976(a) (1994) 658
Water Pollution Protection Act of 2001, Pub. L. No. 106-720 641

Federal Regulations

33 C.F.R. § 328.3 (1999) 636
33 C.F.R. § 328.3(a)(3) (1999) 637-638
40 C.F.R. § 122.2 (1999) ..... *passim*
40 C.F.R. § 261.1(b)(1) (1999) 654
40 C.F.R. § 261.2 (1999) 654-655
40 C.F.R. § 261.2(a) (1999) 652
40 C.F.R. § 261.2(b)(1) (1999) 654
40 C.F.R. § 261.2(c)(1)(B)(ii) (1998) 658
40 C.F.R. § 261.33 (1998) 658

Legislative Materials

122 CONG. REC. H19,764 (1976) 655
H. R. REP. NO. 94-103 (1976) 655
S. CONF. REP. NO. 92-1236 (1972) 638
S. REP. NO. 106-528 (2001) 641, 649, 651

Regulatory History Materials

50 Fed. Reg. 614 (1985) 653
51 Fed. Reg. 41217 (1986) 636
53 Fed. Reg. 20765 (1988) 636
62 Fed. Reg. 6622 (1997) 658-660

Administrative Materials

Guidance for U.S. Army Corps of Eng'rs and EPA Field Offices Regarding Clean Water Act Section 404 Jurisdiction Over Isolated Waters in Light of *United v. Wilson* (May 28, 1998), *withdrawn* (Jan. 19, 2001), http://www.epa.gov/owow/wetlands/wilson.htm 638
Memorandum from Gary S. Guzy, General Counsel EPA and Robert M. Anderson, Chief Counsel U.S. Army Corps of Eng'rs, to Distribution List (Jan. 19, 2001), http://www.epa.gov/owow/wetlands/swanccnav.html 637, 651

U.S. Environmental Protection Agency Best Management Practices for Lead at Outdoor Shooting Ranges, http://www.epa.gov/region2/waste/leadshot..... 655

Law Reviews

Migratory Bird Rule Does Not Fly with the Supreme Court, 2001 ARMY LAW 39 637

Dictionaries

BLACKS LAW DICTIONARY 267 (7th ed. 1999) 645
MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 330 (10th ed. 1999) 653

STATEMENT OF THE CASE

This is an appeal from an order entered by Judge Romulus in the United States District Court for the District of New Union. Judge Romulus granted summary judgment in favor of the defendant and dismissed all claims against the company.

I. Statement of the Facts

Sheldrake Pond is an isolated seasonal pond located in Groveton County, New Union. (Record on Appeal ("R.") at 3, 5). The pond 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." (R. at 3). Defendant, Suave Real Properties, Inc. ("Suave"), is a real estate management company organized under the laws of New Union. (R. at 3). Suave owns the western end of the pond, as well as the land to the west and south, and the county owns the remainder of the pond and the land to the east and south. (R. at 3).

Last year, Suave began operation of a recreational rifle and skeet shooting facility, the Groveton Rifle and Pistol Association ("GRAPA"), near Sheldrake Pond. (R. at 3). Suave filled a small portion of the pond on the western end to build a skeet ejection platform for the GRAPA operation. (R. at 3). Suave ejects skeet from the platform, and shooters from a pad some distance away test their skills by attempting to shoot the skeet with shotguns. (R. at 3). Suave also constructed a firing range, with targets and a protective berm, south of the pond near its eastern end. (R. at 4). Suave positioned the berm behind the targets and approximately fifty feet from the pond. (R. at 4). As with any skeet and firing

range, spent rounds and skeet parts fall to the ground during the ordinary course of the GRAPA operation. (R. at 3-4).

Plaintiff, Birdwatchers of Groveton, Inc. ("BOG"), is a non-profit corporation organized under the laws of New Union. (R. at 3). Its members, recreational birdwatchers, live and watch birds in Groveton County. (R. at 3). During the last two decades, BOG members observed over two hundred bird species, including many that migrate between the United States and other countries, in and around Sheldrake Pond. (R. at 3-4). BOG has not alleged that the GRAPA operation has in fact harmed any birds. (R. at 3-4).

II. Procedural History

BOG filed this action against Suave on December 20, 2000.[1] (R. at 3). BOG alleged that Suave violated 16 U.S.C. § 1311(a) (1994) in two respects. First, that filling a small portion of Sheldrake Pond for a skeet ejection platform "constitutes discharging fill material into navigable waters without" a Section 1344 permit. (R. at 4). Second, that fallen skeet and lead shot constitute "either discharging fill material into navigable waters without a [Section 1344] permit or discharging pollutants into navigable waters without a [Section 1342] permit." (R. at 4). BOG sought civil penalties and injunctive relief for both counts. (R. at 4).

BOG also alleged that Suave violated two provisions of RCRA. First, that the use of shot and skeet at the GRAPA range constitutes hazardous waste disposal without a permit in violation of 42 U.S.C. § 6925(a) (1994). (R. at 4). Second, that the used shot and skeet parts create "an imminent and substantial endangerment" actionable under 42 U.S.C. § 6972(a)(1)(B) (1994). (R. at 4). BOG requested civil penalties and injunctive relief for the first RCRA count and an injunction requiring abatement for the second. (R. at 4).

The United States filed and was granted a motion to intervene on behalf of the United States Environmental Protection Agency ("EPA"). (R. at 1). Suave subsequently moved for summary judgment on each count. The EPA joined BOG in opposing summary judgment on the first, second, and fourth counts, but supported Suave's motion with respect to the third. (R. at 4).

---

1. BOG asserted jurisdiction pursuant to the citizen suit provision of the Clean Water Act (CWA), 33 U.S.C. § 1365 (1994), and the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6972 (1994). (R. at 3).

The district court found no merit to BOG's claims and granted summary judgment in favor of Suave on all counts. The court held that Sheldrake Pond was not "navigable water" in the statutory sense, and beyond the regulatory authority of the federal government in any case. (R. at 7-8). The court also held that the intended use exception applied to both the statutory and regulatory meanings of "solid waste," thereby exempting the fired shot and skeet from RCRA's jurisdiction. (R. at 10-11). Suave asks this Court to affirm the decision of the district court.

SUMMARY OF THE ARGUMENT

I. The CWA does not extend to Sheldrake Pond. The CWA regulates "navigable waters," defined as "waters of the United States." Those terms have identifiable limits. Sheldrake Pond is neither navigable in fact nor adjacent to such waters. The presence of migratory birds is irrelevant. Furthermore, it overextends constitutional jurisprudence to claim a nexus between interstate commerce and the regulation of pollution in Sheldrake Pond. Congress did not intend such a result when it promulgated the CWA. Rather, Congress left the power to regulate isolated, intrastate ponds with the states.

The recent amendment to the CWA does not alter this conclusion. Retroactive legislation is disfavored in the law. Consequently, courts will not construe statutes and administrative rules to have retroactive effect unless their express language requires that result. There is no such language in either the amendment or the legislative history, and therefore the amendment operates only prospectively. Absent genuine retroactive application, neither the amendment nor the accompanying report affects the scope of the CWA.

II. Application of the CWA to Sheldrake Pond is an unconstitutional extension of federal power. The alleged filling or polluting of an isolated, intrastate pond has no legitimate nexus to interstate commerce. Federal regulation of the pond would distort the balance between national and local authority, and eviscerate the states' traditional powers to regulate land use.

There is no alternative constitutional basis for regulating Sheldrake Pond. The CWA was promulgated pursuant to the Commerce Clause, not the treaty power. Most of the CWA is constitutional on its face and in application. The regulation of isolated, intrastate waters, however, is properly left to the states.

III. Fired shot and skeet parts are not "solid waste" when they fall to the ground as that term is used in either the regulatory or statutory provisions of RCRA. RCRA defines solid waste as "discarded material." Accordingly, the threshold jurisdictional requirement for either definition requires that the material first be discarded. The fired shot and skeet parts in this case have not been discarded, but rather have fallen to the ground in the ordinary and intended use of the products.

Certain activities are exempt from RCRA's jurisdiction because the activities constitute the intended use of consumer products. Understanding this distinction, courts have held products such as munitions and insecticides used for their intended purpose are not discarded until some time after serving that intended purpose. As those courts have recognized, to rule otherwise would create the absurd result of regulating shot as solid waste when it is fired – clearly not a result Congress intended when it enacted RCRA.

ARGUMENT

I. THE CWA DOES NOT EXTEND FEDERAL REGULATORY JURISDICTION TO SHELDRAKE POND

The CWA grants the EPA jurisdiction over "navigable waters," defined as "waters of the United States, including the territorial seas." 33 U.S.C. §§ 1362(7), 1342, 1344 (1994). The EPA has interpreted this grant, at its broadest, to include: "All other waters such as intrastate lakes . . . playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate commerce . . . ." 40 C.F.R. § 122.2 (1999). BOG and the EPA assert that Sheldrake Pond is a playa lake[2] and subject to regulation because it "is used in interstate commerce as part of an interstate and international bird migration pathway . . . ."[3] (R. at 5). Their argument, however, is undercut by principles of statutory interpretation and rendered wholly impotent by the Supreme Court's decision in *Solid Waste Agency v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001) ["*SWANCC*"]. Neither the recent amendment to the CWA nor the accompanying

2. "Playa" means that the water is intermittent. (R. at 5).

3. BOG and the EPA invoke the so called "migratory bird rule," see 51 Fed. Reg. 41217 (1986); 53 Fed. Reg. 20765 (1988), which the U.S. Army Corps of Engineers ("Corps") and the EPA have used to determine their jurisdiction pursuant to coextensive definitions. *Compare* 40 C.F.R. § 122.2, *with* 33 C.F.R. § 328.3 (1999).

Committee Report resurrects their claim. The Court should therefore "avoid the significant constitutional and federalism questions" raised by extending CWA jurisdiction to an isolated, intrastate pond and affirm the district court's holding.

A. Sheldrake Pond is not "Navigable Water" Under the CWA

It is axiomatic that "the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). So too "that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). Accordingly, federal regulatory jurisdiction does not attach unless Sheldrake Pond is a "water of the United States." After *SWANCC*, that conclusion is untenable.

In *SWANCC*, the Court held that "33 C.F.R. § 328.3(a)(3) (1999), as clarified and applied . . . pursuant to the 'Migratory Bird Rule,' exceeds the authority granted to the [Corps] under § 404(a) of the CWA." 531 U.S. at 174 (citations omitted). The Court concluded that neither the text of the CWA nor the legislative history allow for such a broad jurisdictional rule. *Id.* at 168, 172-73. The EPA maintains a coextensive definition of "waters of the United States," and used the migratory bird rule to "clarify and apply" its regulations as well. *See supra* note 2. Accordingly, *SWANCC* applies with equal force to the EPA, and the EPA cannot rely on the migratory bird rule to determine its jurisdiction under the CWA. *United States v. Krilich*, 152 F. Supp. 2d 983, 988 (N.D. Ill. 2001); *Migratory Bird Rule Does Not Fly with the Supreme Court*, 2001 ARMY LAW 39, 41; *see also San Francisco Baykeeper v. Cargill Salt Div.*, 263 F.3d 963, 964 (9th Cir. 2001); *Rice v. Harken Expl. Co.*, 250 F.3d 264, 268-69 (2d Cir. 2001). Indeed, the EPA recognized *SWANCC* as having that effect and advised field staff that they "should no longer rely on the use of waters or wetlands as habitat for migratory birds as the sole basis for assertion of regulatory jurisdiction under the CWA." Memorandum from Gary S. Guzy, General Counsel, EPA and Robert M. Anderson, Chief Counsel, U.S. Army Corps of Eng'rs, to Distribution List, 1, 3-4 (Jan. 19, 2001), http://www.epa.gov/owow/wetlands/swanccnav.html. Thus, the migratory bird rule does not support federal regulation of Sheldrake Pond.

As the district court correctly concluded, *SWANCC* also repudiated much of the prevailing wisdom with respect to the CWA.[4] Significantly, the *SWANCC* Court held that the term "navigable" had at least the import of revealing "what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." 531 U.S. at 172. The Court also concluded that the Corps' application of their regulations to the isolated, intrastate ponds at issue raised "significant constitutional and federalism questions," without a clear statement from Congress that it intended such a result. *Id.* at 173-74. Indeed, the Court found nothing in the Act or the legislative history that signified "Congress intended to exert anything more than its commerce power over navigation."[5] *Id.* at 168 n.3. Accordingly, the Court declined the Corps' "invitation to take what they see as the next ineluctable step after *Riverside Bayview Homes*," and refused to accord any deference to the agency's broad interpretation. *Id.* at 171, 174. After *SWANCC*, whatever the extent of the CWA, it stops short of "the outer limits of congressional power." *See id.* at 168 n.3, 172-74; *Rice*, 250 F.3d at 268; *Krilich*, 152 F. Supp. 2d at 988.

One circuit has gone even further, holding that "in promulgating 33 C.F.R. § 328(a)(3), the [Corps] exceeded its congressional authorization under" the CWA. *United States v. Wilson*, 133 F.3d 251, 257 (4th Cir. 1997). In *Wilson*, the court concluded that there was no evidence Congress intended to legislate so broadly and "[a]bsent a clear indication to the contrary, we should not lightly presume that . . . Congress authorized the [Corps] to assert its jurisdiction in such a sweeping and constitutionally troubling manner." *Id.* This holding eliminated the Corps most sweeping basis for jurisdiction throughout the Fourth Circuit, and the EPA recognized *Wilson* as infirming its counterpart definition in that circuit as well. *See* Guidance for U.S. Army Corps of Eng'rs and EPA Field Offices Regarding Clean Water Act Section 404 Juris-

4. Before *SWANCC*, it was widely held that "navigable," did nothing to limit the extent of the CWA. *See, e.g., Quivira Min. Co. v. EPA*, 765 F.2d 126, 129 (10th Cir. 1985). Many courts also concluded that regulatory jurisdiction under the CWA extended to the limits of congressional power. *See, e.g., Leslie Salt Co. v. United States*, 896 F.2d 354, 357 (9th Cir. 1990). So too that a court must defer to "reasonable" agency interpretations of the Act. *Id.*

5. The Court specifically rejected the argument that S. CONF. REP. NO. 92-1236, at 144 (1972), expressed Congress's intent to extend the CWA to the outer limits of the Commerce Clause. *SWANCC*, 531 U.S. at 168 n.3.

diction Over Isolated Waters in Light of *United States v. Wilson*, 2-3 (May 28, 1998), *withdrawn* (Jan. 19, 2001), http://www.epa.gov/owow/wetlands/wilson.htm.

This Court need not go as far to resolve the issues here, because, as the district court held, it is clear from *SWANCC* that the CWA does not extend to Sheldrake Pond. First, the pond is neither navigable in fact nor adjacent to such waters, (R. at 3), and thus beyond what the text of the CWA will allow. *SWANCC*, 531 U.S. at 168, 173. Second, it invokes the "outer limits of congressional power"—particularly without the benefit of the migratory bird rule—to find a sufficient nexus between interstate commerce and the regulation of fill or pollution in Sheldrake Pond. *See United States v. Lopez*, 514 U.S. 549, 567 (1995). Congress, however, did not intend to so extend its power when it promulgated the CWA. *SWANCC*, 531 U.S. at 168, 172-74. Finally, extending federal regulatory jurisdiction to local land and water use issues, such as regulating fill in a seasonal intrastate pond, raises "significant constitutional and federalism questions," which is again contrary to the text of the CWA and the expressed legislative intent. *Id.* at 173-74; *see also* 33 U.S.C. § 1251(b) (1994) ("It is the policy of Congress to recognize, preserve, and protect the primary responsibility and rights of the states to prevent, reduce, and eliminate pollution . . . ."). Thus, the CWA to cannot be construed to regulate isolated, intrastate ponds,[6] and because EPA cannot exceed its statutory grant, its regulations do not apply to Sheldrake Pond. *Suave*, 531 U.S. at 172-74. To hold otherwise would contravene the cannons of statutory interpretation and the clear language of *SWANCC*.

Absent true retroactive application (addressed *infra* Section B), the recent amendment to the CWA cannot alter this conclusion. It is certainly true that a "later law is entitled to weight when it comes to the problem of construction." *Fed. Hous. Auth. v. Darlington, Inc.*, 358 U.S. 84, 90 (1958). This interpretive rule, however, does not apply to cases pending when the later explicative enactment became law. *See id.*; *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 380-82 (1969). In this case, Congress passed the amendment well after BOG filed its complaint. (R. at 5-6).

6. Although *Riverside Bayview Homes, Inc. v. United States*, 474 U.S. 121 (1985), contains some broad language, the Court held only that wetlands adjacent to navigable waters are within the meaning of "waters of the United States." *Id.* at 131 n.8. Any argument that *Riverside* stands for more was rejected in *SWANCC*. 531 U.S. at 167-68, 171-72.

Consequently, it would circumvent the rules of retroactive application to give any weight to the amendment without first holding that, as a matter of law, the amendment governed pending cases. *See INS v. St. Cyr*, 121 S. Ct. 2271, 2287-93 (2001). Therefore, this Court should affirm the district court's holding that *SWANCC* precludes federal regulatory jurisdiction over Sheldrake Pond.

B. The Amendment to the CWA Does Not Operate Retroactively

"[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our republic." *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994). Consequently, "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result."[7] *Bowen*, 488 U.S. at 208. Neither the amendment nor its legislative history contains such a statement, and applying the amendment to the facts of this case would have a retroactive effect. Therefore, the amendment operates only prospectively.

1. *Congress did not clearly state that it intended the new definition of "navigable waters" to operate retroactively*

BOG and the EPA ask the Court to apply a change to the CWA adopted eight months after this case began, and seven months after the Supreme Court settled the issues of law that would otherwise govern. (R. at 3, 5-6). Thus, this "case implicates a federal statute enacted after the event in suit, [and therefore] the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach." *Landgraf*, 511 U.S. at 280.

"The standard for finding such unambiguous direction is a demanding one. 'Cases where [the] Court has found truly 'retroactive' effect adequately authorized by statute have involved *statutory language so clear that it could sustain only one interpretation.*'" *St. Cyr*, 121 S. Ct. at 2288 (quoting *Lindh v. Murphy*, 521 U.S. 320, 328 n.4 (1997)) (emphasis added). In contrast, the stat-

7. *Thorpe v. Durham Hous. Auth.*, 393 U.S. 268 (1969), and *Bradley v. Richmond Scl. Bd.*, 416 U.S. 696 (1974), were anomalies, *see Kaiser Alum. & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 837 (1990); *Landgraf*, 511 U.S. at 288-90 (Scalia, J., concurring), and neither those nor any subsequent decisions "cast doubt on the traditional presumption against truly 'retrospective' application of a statute." *Landgraff*, 511 U.S. at 279.

ute at issue merely "amended the CWA's definition of 'navigable waters' to incorporate the EPA's definition of 'waters of the United States . . . .'" (R. at 5). The amendment was silent as to its temporal scope. (R. at 6).

BOG and the EPA attempt to overcome this deficiency by arguing that the accompanying Committee Report indicates that Congress intended the amendment to apply retroactively. *Id.* It does not. The report is certainly clear as to that committee's intent with respect to the sweep of the CWA, but the report has no language expressly prescribing its "proper reach" through time. *See* S. REP. NO. 106-528, at 23 (2001); (R. at 6); *cf. Martin v. Hadix*, 527 U.S. 345, 352-57 (1999). The Supreme Court has rejected the notion that inferences gleaned, even from the statute itself, establish congressional intent to apply an enactment retroactively. *See, e.g., St. Cyr*, 121 S. Ct. at 2287-90. In any case, as the district court noted, one committee report should not direct retrospective application where the Conference Committee Report, the House Committee Report and the statute itself are silent. (R. at 6).

That the amendment is "restorative" is likewise of little import. "[T]he choice to enact a statute that responds to a judicial decision is quite distinct from the choice to make the responding statute retroactive." *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 305 (1994). Following this rule in *Rivers*, the Court held that Congress' decision to legislatively overrule an earlier decision was insufficient to compel retroactive application. *Id.* at 305-11. The Court assumed that Congress enacted the statute because it disapproved of the Court's earlier interpretation, and that the legislators believed the Court's decision departed from the congressional intent and prior interpretations. *Id.* at 306-07. Nevertheless, the Court refused to presume that even restorative statutes apply retroactively. *Id.* at 311.

Traditionally, the absence of express congressional direction ended the discussion, because courts presumed that all statutes operated prospectively.[8] *Kaiser*, 494 U.S. at 841-44 (Scalia, J.,

8. New procedural rules, statutes either conferring or ousting jurisdiction, and changes in the propriety of prospective relief will often be applied to pending case. *See Landgraf*, 511 U.S. at 273-75. The amendment to the CWA, however, does not involve a procedural change, but instead broadens federal regulatory powers and potentially imposes a new liability upon Suave. *See Lindh*, 521 U.S. at 327-28. Nor does the amendment address the jurisdiction of the federal courts, but rather expands the sweep of the CWA. *Compare Bruner v. United States*, 343 U.S. 112, 116-17 (1953),

concurring). In some recent cases, however, the Court has recognized a second facet to the test: "When . . . the statute contains no such express command, the court must determine whether the new statute would have a retroactive effect . . . . If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result." *Landgraf*, 511 U.S. at 280.

2. *The amendment would have a retroactive effect and therefore operates only prospectively*

Applying the newly enacted definition of "navigable waters" to this case would have a retroactive effect. A statute has a retroactive effect when it "would impair rights a party had when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf*, 511 U.S. at 280.

After *SWANCC*, Sheldrake Pond was beyond the scope of the CWA. Suave was neither civilly nor criminally liable under federal law for its conduct there, and the GRAPA operation could continue—subject to any applicable state and local regulations. BOG and the EPA, however, seek to close the GRAPA operation and impose civil and possibly criminal penalties on Suave. (R. at 4). Therefore, to apply the amendment to this case would "increase [Suave's] liability for past conduct [and] impose new duties with respect to transactions already completed." *See Landgraf*, 511 U.S. at 280-86. That would plainly alter the legal consequences of conduct occurring before the amendment's effective date.[9] *See Bowen*, 488 U.S. at 219 (Scalia, J., concurring). There is no clear indication that Congress intended such a result. *Cf. Landgraf*, 511 U.S. at 280. Therefore, *SWANCC* controls the outcome of this case.

---

with Water Pollution Act of 2001, Pub. L. No. 106-720; *see also Landgraf*, 511 U.S. at 274 n.27. The prospective relief exception will be addressed *infra* note 11.

9. The prospective relief exception comes from *Duplex Printing Co. v. Deering*, 254 U.S. 443 (1921), where the Court applied a new enactment, governing the propriety of labor injunctions, to a pending case. *Id.* at 464. In this case, however, BOG seeks civil penalties as well, (R. at 4), and [r]etroactive application of punitive damages would raise a serious constitutional question." *Landgraf*, 511 U.S. at 281. In addition, the CWA subjects Defendant to criminal penalties, 33 U.S.C. § 1319(a)-(c) (1994), and retroactive penal legislation is particularly disfavored. *See Landgraf*, 511 U.S. at 266. Finally, when most recently faced with a similar issue, the Court did not retroactively apply a change in the ability of a prisoner to pursue the prospective relief of habeas corpus. *Lindh*, 521 U.S. at 342 (Rehnquist, J., dissenting).

There is nothing unusual or inequitable about this result. "The principle that statutes operate only prospectively, while judicial decisions operate retroactively, is familiar to every law student." *United States v. Sec. Ind. Bank*, 459 U.S. 70, 79 (1982).

In light of the foregoing analysis, the amendment would have a retroactive effect, and there is neither an express congressional statement nor clear legislative intent as to temporal reach of the enactment. Therefore, it should not apply to this or any case pending when the amendment became law, and the Court should affirm the district court's holding that there is no statutory basis for federal regulation of Sheldrake Pond.

C. The Amendment Would Unconstitutionally Extend the CWA to Sheldrake Pond

The EPA's definition (now the statutory definition) is extremely broad, extending to "all other waters . . . the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce . . . ." 40 C.F.R. § 122.2. It is difficult to imagine any waters exempted from that definition. Thus, if applied retroactively, the amendment probably extends federal regulatory jurisdiction to Sheldrake Pond. As applied, however, the new definition does not comport with the Constitution.

II. NEITHER THE COMMERCE CLAUSE NOR THE TREATY POWER SUPPORT FEDERAL REGULATION OF SHELDRAKE POND

A delicate division of power between the three coordinate branches and between federal and state defines our system of government. *See, e.g.*, *Alden v. Maine*, 527 U.S. 706, 713 (1999). A "healthy balance of power between the States and the Federal Government" is needed to "reduce the risks of tyranny and abuse from either front." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). To that end, the United States Constitution provided for a limited federal government and delegated to it those powers necessary to ensure a stable Union. *See* Art. I, § 8. It is only with respect to those few and defined powers that the federal government may act, and any action taken in excess of or beyond those powers is invalid. *See, e.g.*, *Lopez*, 514 U.S. at 552. Because federal regulation of Sheldrake Pond is beyond the purview of the Commerce Clause and does not implicate the treaty power, the CWA cannot constitutionally be applied to the pond.

A. Sheldrake Pond Cannot be Regulated Pursuant to the Commerce Clause

The Commerce Clause empowers Congress to "regulate Commerce with foreign nations and among the several states." U.S. CONST. art. I, § 8. Only conduct that is both commerce and interstate in effect, at least in the aggregate, is within the reach of Congress. *See, e.g.*, *Lopez*, 514 U.S. at 553. Accordingly, the Supreme Court established three categories of activity that contain the requisite nexus to interstate commerce. "First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or person or things in interstate commerce . . . . Finally, Congress' commerce authority includes the power to regulate those . . . activities that substantially affect interstate commerce." *Id.* at 558-59 (citations omitted); *see also United States v. Morrison*, 529 U.S. 529 U.S. 598, 609 (2000). None of these categories allow for federal regulation of Sheldrake Pond.

1. *Sheldrake Pond is not a "channel of interstate commerce."*

In *Lopez*, the Court held that the Gun-Free School Zones Act of 1990, which prohibited firearm possession in school zones, could not be sustained as a regulation of the channels of interstate commerce, because it did not regulate "the use of the channels of interstate commerce, nor [was] it an attempt to prohibit the interstate transportation of a commodity through the channels of interstate commerce . . . ." 514 U.S. at 558-59. That conclusion was easy for the *Lopez* Court because the term "channels of interstate commerce" is limited to those objects that facilitate the interstate transportation of persons or commodities and the activities intimately associated with such transportation. *See, e.g.*, *Lopez*, 514 U.S. at 558-59; *accord Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 249, 255-56 (1964); *United States v. Darby*, 312 U.S. 100, 113-14 (1941).

That limitation is controlling here as well. The migration of birds obviously does not involve the interstate transportation of persons. Nor are wild migratory birds commodities. It is well settled that migratory birds (and all wild animals) are *ferae naturae* and as such incapable of ownership without possession. *See, e.g.*, *Missouri v. Holland*, 252 U.S. 416, 434 (1920). As migratory birds

alighting on or near Sheldrake Pond are not and have never been owned, it is difficult to imagine how the birds could be considered a "commodity," which is "[a]n article of trade or commerce . . . [and] embraces only tangible goods, such as products or merchandise." BLACK'S LAW DICTIONARY 267 (7th ed. 1999). Wild birds are not "products or merchandise." Nor are they in "trade or commerce." Until a migratory bird is killed or captured, it cannot be a tangible good; until the bird is bought or sold, it is not in "trade or commerce."[10] At that point, federal regulation may indeed be appropriate, but not before.

In addition, as the district court concluded, the assertion pressed by BOG and the EPA "sweeps too broadly." (R. at 7). Their argument would transform any place where migratory birds stop or take refuge with any regularity into a channel of interstate commerce. (R. at 7). The Supreme Court has inveighed against regulations that have no identifiable stopping point. *See, e.g.*, *Lopez*, 514 U.S. at 564. A holding that Sheldrake Pond is a channel of interstate commerce simply because it is visited by migratory birds would extend federal regulatory jurisdiction beyond all previously known limits.

The pond's isolated temporal nature makes it virtually inconceivable that it could be used for the interstate transportation of commodities in any other manner. Therefore, this Court should affirm the district court's conclusion that neither the *use* of a channel of interstate commerce, nor the regulation of a *commodity* in interstate commerce is at issue here.

2. *Sheldrake Pond is not an "instrumentality of interstate commerce."*

In the court below, BOG asserted that migratory birds are "instrumentalities of interstate commerce." (R. at 7). It is first worth noting that BOG and the EPA do not intend to regulate mi-

10. Judge Wald's opinion in *Nat'l Ass'n. of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997), that a "taking" of endangered species can be regulated as a channel of interstate commerce is unpersuasive. First, Judge Wald failed to convince either of her colleagues. *Id.* at 1063 (Sentelle, J., dissenting). Second, the "channels of interstate commerce" embraces only the "movement of persons or things interstate." *Id.* at 1058 (Henderson, J., concurring). Finally, the Court in *Darby* and *Heart of Atlanta* did not sustain the statutes *because* they protected the channels of interstate commerce from immoral purposes, *but in spite* of the fact that Congress had legislated for moral reasons. *See Darby*, 312 U.S. at 115; *Heart of Atlanta*, 379 U.S. at 257.

gratory birds,[11] but rather Sheldrake Pond. (R. at 1). Thus, the Court would need to hold that the pond (not the birds) is an instrumentality of interstate commerce. As Sheldrake Pond is intrastate, isolated, and stationary, such a conclusion is untenable. In any case, their argument stretches the term "instrumentalities" beyond all meaning.

"Instrumentalities of interstate commerce" embraces the vehicles that actually travel across state lines—the railroads, cars, trucks, airplanes—and the operators of such vehicles. *See Lopez*, 514 U.S. at 558-59 (citations omitted). That is, the "instrumentalities of interstate commerce" are those objects that facilitate the interstate transportation of commodities or persons. *See id.* Nothing of the sort is at issue here, and the term has not since been expanded. *See Morrison*, 529 U.S. at 609.

As discussed, "[i]t is pure fantasy to talk of 'owning' wild fish, birds, or animals." *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 284 (1977). So too of commanding or using migratory birds to transport commodities or persons across state lines. *Cf. Lopez*, 514 U.S. at 558-59. The obvious logistical impossibilities aside, they go where instinct dictates and creative arguments to the contrary do not make it otherwise. Thus, Sheldrake Pond cannot be regulated as an instrumentality of interstate commerce.

3. *Suave's activities do not "substantially affect interstate commerce."*

The first step in this analysis is to "evaluate the precise object or activity that, in the aggregate, substantially affects interstate commerce." *SWANCC*, 531 U.S. at 173. In the court below, BOG and the EPA asserted that "[Suave's] activities substantially affect the interstate commerce of hunting and observing migratory birds or that the aggregate of activities like [Suave's] substantially affects such commerce." (R. at 7). These arguments lack merit. An indirect and attenuated connection to interstate commerce is insufficient to justify federal regulation. *Lopez*, 514 U.S. at 567. Courts will not "pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Id.* Rather, the activity in question, at least in the

11. BOG relied on *Missouri v. Holland* to support this argument. (R. at 7). As the district court noted, however, the Court in *Missouri* did not hold that migratory birds are instrumentalities of interstate commerce. *See* 252 U.S. at 430; *accord* (R. at 7).

aggregate, must *itself* and *in fact* substantially affect interstate commerce. *Id.* at 559.

Accordingly, the Court in *Morrison* recognized four considerations to be examined in determining whether federal regulation is justified under the third category. First, is "the activity in question some sort of economic endeavor." *Morrison*, 529 U.S. at 611. Second, does the law contain "an express jurisdictional element which limits its reach." *Id.* (quoting *Lopez*, 514 U.S. at 562). Third, are there "express congressional findings regarding the [effect] upon interstate commerce[.]" *Id.* at 612 (quoting *Lopez*, 514 U.S. at 562). Finally, is the "link between [the regulated activity] and a substantial effect on interstate commerce attenuated." *Id.*

a. The regulated activity is not an "economic endeavor."

BOG and the EPA do not seek to regulate an "economic activity." Indeed, the CWA has little to do with commerce. The Act is intended to "restore and maintain the chemical, physical and biological integrity of Nation's waters[.]" 33 U.S.C. § 1251(a) (1994). This goal is laudable, but the Court has never sustained the regulation of a noneconomic intrastate activity under the Commerce Clause. *Lopez*, 514 U.S. at 560. "[T]hus far in our Nation's history [the Court has] upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." *Morrison*, 529 U.S. at 613.

In *Lopez*, for example, the Court held that the Gun-Free School Zone Act of 1990 did not regulate economic activity. 514 U.S. at 561. In reaching this conclusion, the Court reasoned that the Act was "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Id.* The Court also recognized that in our federal system, "the 'States possess primary authority for defining and enforcing the criminal law.'" *Id.* at 561 n.3 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993)). Finally, the Court concluded that the statute was "not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Id.* at 561. Therefore, the court held, the statute could not "be sustained under [the] cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate substantially affects interstate commerce." *Id.*

This case parallels *Lopez* in many respects. First, the discharge of fill or pollution into navigable waters without a 33 U.S.C. § 1342 or § 1344 permit subjects the offender to criminal penalties. *See* 33 U.S.C. § 1319(a)-(c). Second, land and water use regulation is traditionally a state concern. *See e.g.*, *SWANCC*, 531 U.S. at 174. Indeed, in the CWA "Congress chose 'to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution . . . .'" *Id.* at 167 (quoting 33 U.S.C. § 1251(b) (1994)). Finally, the regulation of Sheldrake Pond is not an essential part of a larger regulation of economic activity. *See* 33 U.S.C. §§ 1251-1387 (1994). Therefore, whatever the regulation of Sheldrake Pond is, it is not the regulation of an economic endeavor.

b. There is no express jurisdictional element to limit the reach of the regulation

Superficially, the CWA and accompanying regulations contain a jurisdictional element. The Act applies to "navigable waters," which means "waters of the United States." 33 U.S.C. § 1362(7). So too the EPA's definition of "waters of the United States," which Congress has now adopted, limits regulatory jurisdiction to those waters "the use, degradation or destruction of which would affect or could affect interstate or foreign commerce . . . ." 40 C.F.R. § 122.2. This, however, is a limitation without substance. If federal jurisdiction attaches whenever "the use of" waters "would or could affect" interstate commerce, the EPA may regulate every pool of water or wetland in the entire country, because there will be always be the possibility that a particular activity *could* affect interstate commerce. *See United States v. Larkins*, 852 F.2d 189, 193 (6th Cir. 1988) (Merritt, J., concurring).

It is also significant that the test for whether an activity is within the purview of the Commerce Clause is not whether the activity "would or could affect" interstate commerce, but whether the activity *substantially affects* interstate commerce. *Lopez*, 514 U.S. at 559. This limitation reveals that the purported jurisdictional element fails to comport with constitutional requirements. *See id.* Indeed, the Fourth Circuit concluded as much in *Wilson*. *See* 133 F.3d at 257. Consequently, there is no jurisdictional element to "ensure, through case-by-case inquiry," that the activity in question in fact substantially affects interstate commerce, *Lopez*, 514 U.S. at 561, and nothing prevents the EPA from acting in excess of constitutionally prescribed limits.

c. The legislative history does not contain express findings regarding the substantial effect that filling isolated ponds has on interstate commerce

Before the recent amendment, Congress made no findings regarding the substantial effect that filling or polluting isolated, intrastate ponds has on interstate commerce. *See Wilson*, 133 F.3d at 257. Indeed, the Court in *SWANCC* examined the legislative history of the CWA and found nothing that indicated "Congress intended to exert anything more than its commerce power over navigation." 531 U.S. at 168 n.3. The Court also determined that Congress intended the term "navigable" to convey some independent meaning. *Id.* at 172. These conclusions belie any argument that Congress concluded filling or polluting ponds like Sheldrake will have a substantial effect on interstate commerce. Instead, they establish a congressional intent to *exclude* isolated, non-navigable waters from regulation. *See id.* at 172-74.

The recent amendment does not alter this conclusion. The amendment itself was silent as to the nexus between isolated waters and interstate commerce. (R. at 5-6). The accompanying Senate Committee Report made certain statements regarding the importance of migratory birds and the expenditures associated with recreational hunting and observation, but it did not conclude that the "use, degradation or destruction" of ponds like Sheldrake *would* have a *substantial* effect on interstate commerce. *See* S. REP. NO. 106-528, at 23 (2001). In any case, as the district court noted, the report does not suffice to prove a factual issue. (R. at 7). Indeed, the Court in *Morrison* rejected much clearer and more detailed congressional findings as insufficient "to sustain the constitutionality of Commerce Clause legislation." 529 U.S. at 614.

d. The link between pollution in Sheldrake Pond and a substantial effect on interstate commerce is particularly attenuated

Sheldrake Pond itself is neither economic nor interstate in nature. (R. at 3-4, 7). To overcome this fatal flaw, BOG and the EPA rely on activities removed, in varying degrees, from the pond. (R. at 7). For example, it is certainly true that "millions of people spend billions of dollars annually on recreational pursuits relating to migratory birds." *SWANCC*, 531 U.S. at 173. It is also true that Defendant operates a skeet and rifle range near Sheldrake

Pond. (R. at 3-4). These activities, however, are not the subject of regulation. Rather, the regulated activity is water pollution. *See* 33 U.S.C. §§ 1251-1387; *accord* (R. at 1-3). Reliance on either the economy of recreational pursuits relating to migratory birds or the GRAPA operation to overcome the obvious lack of commerce in filling or discharging materials into an isolated, intrastate pond is exactly the type of sweeping and attenuated reasoning the Court invalidated in *Lopez* and *Morrison*. *See Lopez*, 514 U.S. at 567; *Morrison*, 529 U.S. 612-13.

For example, the Court in *Lopez* rejected the government's assertion that violent crime around schools affected interstate commerce because the cost of crime is substantial and reduced the effectiveness of education. 514 U.S. at 563-64. The argument has merit, but the Court refused to concern itself with inferential reasoning. *Id.* at 567. Similarly, in *Morrison*, the Court acknowledged that Congress expressly found that gender-motivated violence affected interstate commerce by deterring potential victims from engaging in employment and commerce, thereby reducing national productivity. 529 U.S. at 615. Instead of considering the truth of that assertion, the Court dismissed it as based upon "a method of reasoning rejected as unworkable if we are to maintain the Constitution's enumeration of powers." *Id.*

The "method of reasoning" rejected in *Morrison* and *Lopez* is precisely the type that BOG and the EPA employ here. The Court would be required examine activities incidental to Sheldrake Pond, and then assume that those activities, at least in the aggregate, will "substantially affect interstate commerce." That is an attenuated argument based solely on assumption and inference. The jurisprudence countenances against taking that course.

Thus, each of the considerations identified in *Morrison* point to the inescapable fact that the alleged fill and pollution of Sheldrake Pond does not substantially affect interstate commerce. In light of the foregoing, the Court should affirm the district court's conclusion that the Commerce Clause does not support federal regulation of Sheldrake Pond.[12]

12. Uniformly, the opinions sustaining federal regulation of isolated intrastate waters against a Commerce Clause challenge were decided before *Morrison*, and therefore lacked the benefit of the Court's latest and most specific guidance. *See Solid Waste Agency v. United States Army Corps of Eng'rs*, 191 F.3d 845 (7th Cir. 1999); *United States v. Pozsgai*, 999 F.2d 719, 733-34 (3d Cir. 1993); *Hoffman Homes, Inc. v. EPA*, 999 F.2d 256, 261 (7th Cir. 1993); *Leslie Salt Co.*, 896 F.2d at 1360.

B. The Treaty Power May Not be Used to Regulate Sheldrake Pond

The President has the "[p]ower, by and with the Advice and Consent of the Senate, to make Treaties . . . ." U.S. CONST. art. II, § 2. When the United States becomes a signatory to a treaty, Congress may act to make any provisions or purposes of that treaty binding on the people and the states. *See Missouri*, 252 U.S. at 431; *Neely v. Henkel*, 180 U.S. 109, 121 (1901). Neither the executive nor the judiciary, however, has the power to legislate, U.S. CONST. art. I, § 1; *see also Hampton v. Mow Sun Wong*, 426 U.S. 88, 114 (1976); *Kent v. Dulles*, 357 U.S. 116, 129 (1958), and the extent of Congress' implementation power is not before the Court.

Congress enacted the CWA pursuant to Commerce Clause, not the treaty power. *See, e.g.*, *Riverside*, 474 U.S. at 133; *see also* 40 C.F.R. § 122.2 (referring to an effect on interstate commerce as the basis for jurisdiction); Guzy Memorandum, *supra*, at 4. One statement in the report of a Senate Committee acting nearly thirty years after the CWA became law does not rewrite history, particularly when the report does not identify the treaties to which it refers or on which amendment purports to rely. *See*. S. REP. NO. 106-528, at 23 (2001). Consequently, any effort to weld the CWA to the treaty power is hollow.

A ruling in Suave's favor, however, would not affect the validity of any law or treaty. Nor does Suave attack the national effort to protect and preserve migratory birds. *See* 16 U.S.C. §§ 703-711 (1994); 16 U.S.C. §§ 715-715s (1994); *see also North Dakota v. United States*, 460 U.S. 300 (1983). Those laws and underlying treaties, which generally do not regulate habitat, or do so only with consent of the states or through compulsory purchase, remain intact. *See* 16 U.S.C. § 703; 16 U.S.C. § 715f; *see also North Dakota*, 460 U.S. 300. The issue before the Court is simply distinct and unrelated to the treaty power or those laws.

In light of the foregoing analysis, Sheldrake Pond cannot constitutionally be regulated pursuant to the Commerce Clause or the treaty power. Water pollution is certainly a serious problem, and Sheldrake Pond and the migratory birds that visit it may well require protection. The solution, however, is not an "end-run" around the Constitution. In this case, such protection is properly left to the state.

III. SHOT AND SKEET USED FOR ITS INTENDED PURPOSE IS NOT SOLID WASTE FOR PURPOSES OF REGULATION AND REMEDIATION

Fired shot and skeet parts are not "solid waste" when they fall to the ground as that term is used in RCRA. *See* 42 U.S.C. §§ 6972(a), 6903(27) (1994). Material must be solid waste in order to invoke RCRA's jurisdiction. *See, e.g.*, *Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co.*, 989 F.2d 1305, 1313 (2d Cir. 1993). In the instant case, the shot and skeet used for its intended purpose is outside the scope of material that Congress intended to regulate when it enacted RCRA. *See Water Keeper Alliance v. Department of Defense*, 152 F. Supp. 2d 163, 169 (D.P.R. 2001). To interpret the statute otherwise, for instance to interpret shot and skeet to be simultaneously used and discarded when it falls to the ground, would create the absurd result of requiring RCRA permits with the sale of all bullets.

Both the statutory and regulatory provisions of RCRA define the term "solid waste." *Compare* 42 U.S.C. § 6903(27), *with* EPA Solid Wastes, 40 C.F.R. § 261.2(a) (1999). Jurisdiction under either definition requires that the material be discarded. *See Water Keeper*, 152 F. Supp. 2d at 169. Accordingly, courts have held that products such as munitions and insecticide cannot "be considered discarded until some time after they have served their intended purpose." *Id.* at 168; *see also No Spray Coalition, Inc. v. City of New York*, No. 00-5395JSM, 2000 WL 1401458, at *4 (S.D.N.Y. Sept. 25, 2000). Thus, this court should affirm the district court's dismissal of BOG's citizen suit under RCRA for lack of jurisdiction.

A. BOG Fails to Meet Minimum Jurisdictional Requirements Under RCRA Because the Shot and Skeet Used for Its Intended Purpose is not Discarded

Through RCRA, Congress granted the EPA the jurisdiction to regulate and remediate solid and hazardous wastes. Solid wastes are regulated under Subtitle D of the statute. *See* 42 U.S.C. §§ 6941-49a (1994). Hazardous wastes are a subset of solid waste and more stringently regulated under Subtitle C of RCRA. *See* 42 U.S.C. §§ 6903, 6921-39b (1994). "Because 'hazardous waste' is defined as a subset of 'solid waste,' 42 U.S.C. § 6903(5), the scope of EPA's jurisdiction is limited to those materials that constitute

'solid waste.'" *American Mining Congress v. EPA*, 824 F.2d 1177, 1179 (D.C. Cir. 1987) ["*AMC I*"]; *accord Ass'n of Battery Recyclers, Inc. v. EPA*, 208 F.3d 1047, 1056 (D.C. Cir. 2000).

BOG asserts two claims. First, that use of shot and skeet at the GRAPA range amounts to hazardous waste disposal in violation of 42 U.S.C. § 6925(a) permitting requirements. (R. at 4). Second, that the used shot and skeet parts creates an "imminent and substantial endangerment" actionable under 42 U.S.C. § 6972(a)(1)(B). (R. at 4). Both allegations contort RCRA's definition of solid waste and the intent of Congress to regulate post-consumer waste. Consequently, the lower court properly dismissed the case because it fails to meet minimum jurisdictional requirements under either provision.

The statute defines solid waste as "discarded material." 42 U.S.C. § 6903(27). The statute does not define the term discarded, but the ordinary, plain meaning of the word "discard" is "to get rid of esp. as useless or unpleasant." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 330 (10th ed. 1999). In the instant case, rather than discarded, the shot and skeet fired at GRAPA range are ordinary products used for their intended purpose. *See Water Keeper*, 152 F. Supp. 2d at 167 (citations omitted). Furthermore, the EPA interprets its own regulations defining solid waste to exclude consumer products used for their intended purposes. 50 Fed. Reg. 614, 619 (1985). In short, "[n]ot being discarded material, these munitions cannot be considered solid waste." *See Water Keeper*, 152 F. Supp. 2d at 169.

Solid waste is defined in both the statutory and regulatory provisions of RCRA. *See Remington*, 989 F.2d at 1315. "Dual definitions of solid waste are suggested by the structure and language of RCRA." *Id.* First, Congress explicitly defined solid waste within the statute, *inter alia*, as "discarded material . . . resulting from industrial, commercial, mining and agricultural operations, and from community activities." 42 U.S.C. § 6903(27). Under Subtitle D, the EPA is only authorized to publish "guidelines" for non-hazardous waste management, thus the term solid waste does not require further explanation beyond RCRA's statutory definition. *See Remington*, 989 F.2d at 1315 (comparing 42 U.S.C. § 6942(a) (1988) with § 6921(a) & (b) (1988)). Accordingly, the statutory definition of solid waste under 42 U.S.C. § 6903(27) controls BOG's citizen suit under § 6972(a)(1)(B). *See Remington*, 989 F.2d at 1315.

Second, recognizing that more stringent regulation is required for hazardous waste under Subtitle C, Congress explicitly directed the Administrator of the EPA to "develop and promulgate criteria for identifying the characteristics of hazardous waste, and for listing hazardous waste, which should be subject to regulation under subchapter III." 42 U.S.C. § 6921(a) (1994). For purposes of hazardous waste regulation, the EPA adopted a narrower regulatory definition of solid waste as "any *discarded* material" which is further defined, among other things, as "abandoned."[13] 40 C.F.R. § 261.2(a) (emphasis added). This narrower, regulatory definition of solid waste, however, "applies only to wastes that also are hazardous for purposes of the regulations implementing Subtitle C of RCRA." 40 C.F.R. § 261.1(b)(1) (1999). Accordingly, the regulatory definition of solid waste applies to BOG's citizen suit under Section 6972(a)(1)(A) (1994). *See Remington*, 989 F.2d at 1315.

In the instant case, fired shot and skeet parts are neither "discarded material" as defined by 42 U.S.C. § 6903(27), nor "abandoned" as defined by 40 C.F.R. § 261.2. Rather, shot and skeet fall within the category of activities exempt from the statute's jurisdiction "because they are like ordinary usage of commercial products." *See AMC I*, 824 F.2d at 1180 (citing 50 Fed. Reg. 614, 619); *see also Water Keeper*, 152 F. Supp. 2d at 168. In *AMC I*, the Court of Appeals for the District of Columbia held that the term discarded conformed to its plain and ordinary meaning, thus "discarded" refers to material "disposed of, abandoned, or thrown away." 824 F.2d at 1193. Although subsequent decisions of the D.C. Circuit limited the application of this holding, these decisions only concerned the proper scope of the EPA's regulatory jurisdiction with regard to recycling of secondary materials such as metal-bearing sludge and slag resulting from industrial production. *See, e.g., American Petroleum Inst. v. EPA*, 906 F.2d 729 (D.C. Cir. 1990) ["*API*"]; *American Mining Congress v. EPA*, 907 F.2d 1179 (D.C. Cir. 1990) ["*AMC II*"]. "Congress clearly and unambiguously expressed its intent that 'solid waste' (and therefore EPA's regulatory authority) be limited to materials that are 'discarded.'" *Id.*

Ordinary use of shot and skeet results in fired shot and skeet parts that fall to the ground. "RCRA does not support Plaintiffs' contention that munitions become discarded material immedi-

13. Material is deemed abandoned if it is "disposed of." 40 C.F.R. § 261.2(b)(1) (1999). See Appendix B-4 for the statutory definition of "disposal."

ately upon being fired." *See Water Keeper*, 152 F. Supp. 2d at 169. Similarly, fired shot and skeet parts are not discarded when they fall to the ground because ordinary and intended use of products is outside RCRA's definition of solid waste. Thus, the district court correctly concluded that use of these products at GRAPA range is not within RCRA's jurisdiction. (R. at 11).

B. The Intended Use Exception Serves RCRA's Purpose and Intent to Regulate Post-Consumer Waste

When enacting RCRA, Congress did not intend to regulate consumer products used for their intended purpose. The legislative history behind RCRA reveals that the objective of the bill was to address the "danger posed by improper disposal of discarded materials." *Introduction of the Resource Conservation and Recovery Act of 1976*, 122 CONG. REC. H19,764 (1976). Also evident is that Congress intended to limit the term solid waste to only those materials disposed of *after* their intended use.

For example, in introducing RCRA to the House of Representatives, Rep. Rooney noted: "This country is the most productive society in the history of the world: a fact reflected in the amount of materials which need to be disposed of after their *intended use*." *Id.* (emphasis added). In subsequent hearings, Rep. Rooney reaffirmed this basic assumption regarding the limits of the term solid waste, stating: "This act has as its objective the proper disposal of all materials after their *intended use*." H. R. REP. NO. 94-103, at 1 (1976) (emphasis added). Given RCRA's legislative record, Congress could not have intended to regulate consumer products as they are ordinarily used for their intended purpose. Thus, an intended use exception for shot and skeet accords with both Congressional intent and common sense. Further supporting this reading, the EPA interprets its own regulatory definition of solid waste to exclude shot and skeet used for its intended purpose.

C. The EPA's Regulatory Definition of "Solid Waste" Excluding Shot and Skeet Used for Its Intended Purpose is Controlling

BOG alleges that use of shot and skeet is disposal of hazardous waste without a permit in violation of Subtitle C, 40 C.F.R. § 261.2, and thus is subject to regulation and enforcement under 42 U.S.C. § 6972(a)(1)(A). To interpret discarded material as including fired shot and skeet would require the material be simul-

taneously used and discarded when it falls to the ground. Such an interpretation, however, is untenable.

Under current EPA policy, "[l]ead shot is not considered a hazardous waste subject to RCRA at the time it is discharged from a firearm because it is used for its intended purpose." Environmental Protection Agency, Best Management Practices for Lead at Outdoor Shooting Ranges, http://www.epa.gov/region2/waste/leadshot; *see also Long Island Soundkeeper Fund, Inc. v. New York Athletic Club*, No. 94 Civ. 0436, 1996 WL 131863, at *9 (S.D.N.Y. Mar. 22, 1996). The EPA's interpretation excluding discharged lead shot is in accord with both the regulation and the plain language and intent of the statute. Thus, the court below correctly concluded that the "EPA's interpretation of its own regulations defining solid waste as not including consumer products used for their intended purposes is dispositive." (R. at 9); *see also Military Toxics Project v. EPA*, 146 F.3d 948, 956 (D.C. Cir. 1998) (citations omitted).

1. *The EPA's intended use exception requires Chevron deference*

When circumstances imply that Congress expected the EPA to speak with the force of law to address an ambiguity in the RCRA statute, the court must accept that resolution. *See United States v. Mead Corporation*, 121 S. Ct. 2164, 2172 (2001) (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 845-46 (1984)). Analysis of the regulatory definition of solid waste entails statutory interpretation as outlined in *Mead*. 121 S. Ct. at 2171. Where "Congress has 'explicitly left a gap for an agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.'" *Id.* (quoting *Chevron*, 467 U.S. at 843-44). "[A]ny ensuing regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute.
Id.; *see also* 5 U.S.C. § 706(2) (1994). Furthermore, a court "is obliged to accept the agency's position if Congress has not previously spoken to the point at issue and the agency's interpretation is reasonable." *Mead*, 121 S. Ct. at 2172 (citing *Chevron*, 467 U.S. at 842-45).

Congress may explicitly or implicitly delegate authority to an agency. Express delegation exists where Congress explicitly left a gap for agency to fill and any ensuing regulation is binding unless

procedurally defective. *See id.* at 2171. Relevant here is that Congress explicitly directed the Administrator of the EPA to "develop and promulgate criteria for identifying the characteristics of hazardous waste,[14] which should be subject to the provisions of this subchapter." 42 U.S.C. § 6921(a). In addition, Congress authorized the Administrator of the EPA to "prescribe, in consultation with Federal, State, and regional authorities, such regulations as are necessary to carry out his functions under this chapter." 42 U.S.C. § 6912(a)(1) (1994). Both provisions evidence express delegation of authority.

Alternatively, the Supreme Court has recognized that "even without express authority to fill a specific statutory gap, circumstances pointing to implicit congressional delegation present a particularly insistent call for deference." *Mead*, 121 S. Ct. at 2172-73. Similar to the Chevron deference accorded to an express delegation, an implicit delegation of authority by Congress to the agency to "fill a particular gap" may be "apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law." *Id.* at 2172 (citing *Chevron*, 467 U.S. at 845).

It is apparent from the ambiguity present in the potentially limitless definition of solid waste that Congress delegated authority to the EPA to determine the jurisdictional limits of its own regulatory definition of solid waste. *See AMC II*, 907 F.2d at 1186; *API*, 906 F.2d at 740-41. Thus, as an agency administering its own statute, the EPA meets the first of the two step Chevron inquiry because Congress has not "directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. Furthermore, the EPA's intended use exception meets the second prong of the *Chevron* test because, as discussed below, the EPA's interpretation is a permissible construction of the statue.

2. *The EPA's intended use exception is a permissible construction of the statute*

Applying "Chevron deference,"[15] the Court of Appeals for the District of Columbia denied a petition for review of the final Mili-

14. See Appendix B-4 for the statutory definition of "hazardous waste."

15. As noted above, Congress has expressly delegated authority to the EPA to promulgate rules for the regulation of hazardous waste, therefore the outcome of *Military Toxics Project* would be the same under a *Mead* analysis.

tary Munitions Rule ("MMR") promulgated by the EPA. *See Military Toxics Project*, 146 F.3d at 950. The court held that the MMR, which created a Subtitle C conditional exemption for military munitions, was a permissible construction of RCRA, "[b]ecause the EPA's interpretation of its own regulation is neither plainly erroneous nor inconsistent with the regulation, [the court accepted] it as controlling." *Id.* The court recognized it could only set aside the EPA's action in promulgating the MMR if it were found to be "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." *Id.* at 954 (citing 42 U.S.C. § 6976(a) (1994); 5 U.S.C. § 706(a)(2) (1994)).

The court acknowledged the EPA's intended use exemption under the MMR is "but one example of its 'longstanding interpretation' of the regulatory definition of solid waste as excluding products, such as pesticides and fertilizers, the intended use of which involves application to the land." *Military Toxics Project*, 146 F.3d at 955. Emphasizing the legitimacy of the ordinary use exception, the court contrasted EPA regulation 40 C.F.R. § 261.2(c)(1)(B)(ii) (1998) ("commercial chemical products . . . are not solid wastes if they are applied to the land and that is their ordinary manner of use") with EPA regulation 40 C.F.R. § 261.33 (1998) (listing commercial chemicals that are hazardous wastes "when they are otherwise applied to the land in lieu of their intended use"). *Id.* The EPA set forth other examples of the ordinary use exception, noting "the use of explosives (e.g., dynamite) for road clearing, construction, or mining does not trigger RCRA regulation, even though any residuals on the ground serve no further function."[16] 62 Fed. Reg. 6622, 6630 (Feb. 12, 1997) (relevant portions codified at 40 C.F.R. pt. 266). Similarly, the GRAPA activities do not trigger RCRA although the shot and skeet serve no further function on the ground. Thus, "the EPA's reading [is] a permissible construction of the statute." *Military Toxics Project*, 146 F.3d at 958.

In promulgating the final MMR, the EPA noted that Subtitle C regulations do not extend "to products that are used in their normal manner. In EPA's opinion, the use of munitions does not constitute a waste management activity because *the munitions are not 'discarded.' Rather, the firing of munitions is within the*

16. Further justifying the MMR regulatory exception, the EPA noted that the "waste might pose a hazard only under limited management scenarios, and other regulatory programs already address such scenarios." *Military Toxics Project*, 146 F.3d at 958 (citing 62 Fed. Reg. at 6636).

normal and expected use of the product." 62 Fed. Reg. at 6630 (emphasis added). Using similar reasoning, other courts have reviewed and upheld other EPA policies that applied the intended use exception to exempt normal and expected use of a product from RCRA regulation. *See Long Island Soundkeeper Fund*, 1996 WL 131863, at *7 (holding that the EPA's inclusion of a proper and expected use exception into its own regulations is reasonable, and therefore spent shot and target fragments do not fall within the regulatory definition of "solid waste" under RCRA).

In contrast, the court in *United States v. ILCO, Inc.* upheld EPA policy and regulations that deemed spent battery components "part of the waste disposal problem" once the original consumer discarded the battery. 996 F.2d 1126, 1131-32 (11th Cir. 1993). With regard to a battery, the intended use is wholly unrelated to its subsequent discard. In contrast, firing shot at skeet is intrinsic to its use. Thus, to interpret a fired shot to be simultaneously used and discarded when it falls to the ground would effectively regulate shooting of all bullets under RCRA. Statutory interpretations that lead to absurd results, however, should be avoided.

In this instance, Congress has delegated the necessary authority to the EPA to create an intended use exception under the regulatory definition of solid waste for non-military lead shot and skeet. Furthermore, the EPA's policy is reasonable and in accord with the statute's intent, therefore as the district court properly noted, the EPA intended use exception controls.

D. The Intended Use Exception Also Applies to Used Shot and Skeet When They Fall to the Ground Under the Statutory Definition of Solid Waste Applicable to the 42 U.S.C. § 6972(a)(1)(B) Suit

Common sense and consistency require that fired shot and skeet parts that are not *regulated* as solid waste do not warrant *remedial* activities as solid waste. (R. at 9). This accords with the plain language of the statute as well. The lower court correctly interpreted *both* the regulatory and statutory definitions of solid waste to exclude shot and skeet used for its intended purpose. (R. at 9). It is EPA policy, however, to read the statutory definition of solid waste without the consumer use exception. This interpretation is plainly erroneous and inconsistent with prior EPA positions and the RCRA statute itself. Thus, it is not controlling.

While the statutory definition of solid waste varies slightly from the regulatory definition, the intended use exception should apply with equal force. "[T]he regulatory definition of solid waste simply adds to the statutory definition the requirement that the discarded material also be 'abandoned.'" *Water Keeper*, 152 F. Supp. 2d at 167 n.4. "[B]oth definitions contain the term discarded material. Thus any definition of discarded material, even if provided by the [regulation], is instructive." *See id.* at 168. The *Water Keeper* court, citing to the District of Columbia Circuit's review of the MMR in *Military Toxics Project*, extended the regulatory exemption to the statutory definition of solid waste. The court interpreted the exemption broadly based on EPA policy and reasoning that "the use of munitions does not constitute a waste management activity because the munitions are not 'discarded.'" *Id.* (citations omitted).

The weight accorded to an administrative judgment "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[17] *Mead*, 121 S. Ct. 2164 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). "An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference' than a consistently held agency view." *INS v. Cardoza-Fonseca*, 480 U.S. 421 n.30 (1987) (citations omitted). Furthermore, "[i]f a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron*, 467 U.S. at 843, n.9.

Here, the EPA's distinction between the regulatory and statutory definition of solid waste is arbitrary, contrary to Congressional intent and unrelated to the EPA's reasoning for applying the regulatory consumer use exception. As explained by the EPA when promulgating the MMR, the agency "focuses on whether a product was used as it was intended to be used, not on whether the purpose of the product is to perform some function once on the ground." 62 Fed. Reg. at 6630. Given this reasoning, there is no rational explanation to read the statutory definition of solid waste

17. This deference arises from the "value of the *uniformity* of an agency's administrative and judicial understandings" required by the highly detailed regulatory schemes necessary to implement national law. *Mead*, 121 S. Ct. at 2175 (citations omitted) (emphasis added).

without the intended use exception. Indeed, the EPA has never formally provided any rationale for this distinction. Failing "to provide a rational explanation for its decision" renders the EPA decision arbitrary and capricious. *American Petroleum Inst. v. EPA*, 216 F.3d 50, 58 (D.C. Cir. 2000); *see also AMC II*, 907 F.2d at 1191. Thus, the EPA policy to read the statutory definition of solid waste without the intended use exception is arbitrary and capricious.

Similarly, the court in *No Spray Coalition* recognized that it was contrary to the statutory language and Congressional intent of RCRA to hold that pesticide that has been sprayed but has yet to reach the mosquitoes or their habitats is "discarded material" under the statutory definition applicable to § 6972(a)(1)(B) citizen suits. 2000 WL 1401458 at *4. Citing to *Remington*, for the proposition that material is not discarded until some time after it has served its intended purpose, the court reasoned that the insecticide could not be discarded when it is sprayed because the intended purpose of the spray is to drift through the air until coming to rest on the mosquitoes and their habitats. *Id.* at *4 (citing *Remington*, 989 F.2d at 1316). Likewise, the *Water Keeper* court applied this analysis to discharged munitions, holding that "neither insecticide nor munitions become discarded at the time of their release; rather, they cannot be considered discarded until some time after they have served their intended purpose." 152 F. Supp. 2d at 168. Here, shot fired at skeet falls to the ground during its ordinary use, thus as these courts have recognized, these materials are not discarded.

Moreover, the EPA's distinction between shot landing on the GRAPA range as opposed to that landing off is equally arbitrary. There is no uniformity. While place of landing might be relevant to other, common law causes of action, it bears no relation to whether a product was used as intended. As elaborated on by the court in *Water Keeper*, this distinction runs contrary to the reasoning behind the EPA's regulatory exception for intended use. 152 F. Supp. 2d at 168-69.

"Regardless of whether the ordnance performs as the gunner or bomber wishes, it is most certainly being used for its intended purpose and is thus not discarded material under RCRA." *Id.* at 169. Alternatively, "taken to its logical conclusion, every piece of ordnance that did not land precisely where it was intended would be considered discarded material immediately upon being fired" and such an extreme result could "not have been within Con-

gress's contemplation in drafting RCRA." *Id.* Furthermore, the EPA's distinction between shot landing on the GRAPA range and that landing off is arbitrary and capricious because the agency has failed "to provide a rational explanation for its decision." *See AMC II*, 907 F.2d at 1191.

Finally, BOG and EPA attempt to rely on a previous decision in this circuit, *Neighborhood Against Golf, Inc. v. Recreation Enterprises, Inc.*, 150 F.3d 1029 (12th Cir. 1999) ["*NAG*"] for the proposition that the consumer use exception does not apply to the statutory definition of solid waste. (R. at 10-11). The Supreme Court's decision in *Mead*, however, overruled NAG by implication. As the district court correctly held, *NAG* cannot be relied upon as controlling precedent because the court wrongly applied deference rather than respect in its analysis of the EPA's interpretation. (R. at 10). Thus, relying on *NAG* as controlling precedent would improperly bar courts in the Twelfth Circuit from the correct statutory interpretation.

As outlined above, the district court properly concluded that skeet and shot when it falls to the ground is outside both the regulatory and statutory definition of solid waste, regardless of where it lands. Thus, Suave respectfully requests this court to affirm the lower court.

CONCLUSION

As outlined in the foregoing analysis, Suave respectfully requests this court to affirm the judgment of the district court in all respects.