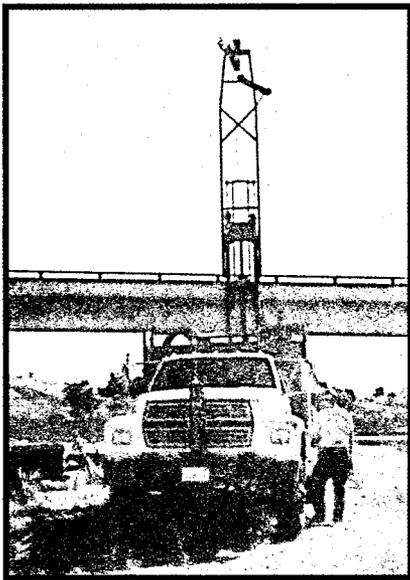


**REGULATORY ANALYSIS REPORT
MARICOPA COUNTY SHERIFF'S SHOOTING RANGE
NEAR MCMICKEN DAM
SURPRISE, ARIZONA
CONTRACT FCD 2004C029
WORK ASSIGNMENT NO. 3**

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Consultants**

Ninyo & Moore

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Phoenix, AZ 85009

PREPARED FOR:
Flood Control District of Maricopa County
2801 West Durango Street
Phoenix, Arizona 85009

PREPARED BY:
Ninyo & Moore
Geotechnical and Environmental Sciences Consultants
3001 South 35th Street, Suite 6
Phoenix, Arizona 85034

January 30, 2006
Project No. 600996003

January 30, 2006
Project No. 600996003

Mr. Michael Greenslade, P.E.
Flood Control District of Maricopa County
2801 West Durango Street
Phoenix, Arizona 85009

Subject: Regulatory Analysis Report
Maricopa County Sheriff's Shooting Range
Near McMicken Dam
Contract FCD 2004C029
Work Assignment No. 3

Dear Mr. Greenslade:

In accordance with your authorization, Ninyo & Moore is pleased to provide this regulatory analysis report regarding the Maricopa County Sheriff's Shooting Range located near the McMicken Dam in Surprise, Arizona. The activities were performed under Flood Control District of Maricopa County Contract No. 2004C029, Work Assignment No. 3, and in general accordance with Ninyo & Moore's revised proposal dated June 30, 2005.

Ninyo & Moore appreciates this opportunity to be of service to Flood Control District of Maricopa County. If you have any questions or comments regarding this report, please call the undersigned at your convenience.

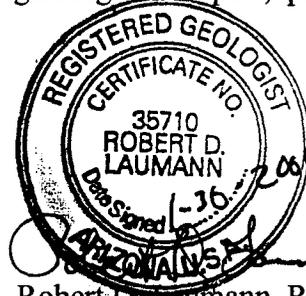
Respectfully submitted,
NINYO & MOORE



Dwight H. Clark, C.H.M.M., C.E.T.
Senior Environmental Engineer

HAL/DHC/RDL/hmm

Distribution: (1) Addressee



Robert D. Laumann, R.G.
Principal Geologist/Division Manager

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Appendices

- Appendix A – Connecticut Coastal Fishermen’s Association v. Remington Arms Company, Inc.
- Appendix B – Arizona Department of Environmental Quality Letter, dated October 20, 1999
- Appendix C – Arizona Department of Environmental Quality Inspection Report, dated August 20, 2001
- Appendix D – Arizona Department of Environmental Quality Letter, dated July 21, 1995
- Appendix E – Arizona Department of Environmental Quality Letter, dated September 30, 1994
- Appendix F – Long Island Soundkeeper Fund, Inc. and New York Coastal Fisherman’s Association, Inc. v. New York Athletic Club of the City of New York

EXECUTIVE SUMMARY

Ninyo & Moore was retained by the Flood Control District of Maricopa County to perform a regulatory analysis and a data gap analysis of previous site documentation for the Maricopa County Sheriff's Office Shooting Range, located near the McMicken Dam in Surprise Arizona. The Sheriff's Shooting Range consists of an approximately 19.72-acre area located in Section 24 of Township 4 North, Range 2 West, Gila and Salt River Meridian and is in Maricopa County Assessor's Parcel Number 503-75-016. The range is situated just east of the McMicken Dam, north of the principal spillway. The current shooting range configuration consists of five bays. Bay 1 is used as a rifle range, Bay 2, Bay 3, and Bay 4 are used as pistol and shotgun ranges and Bay 5 is used for Special Weapons and Tactics (SWAT) training. In addition, approximately four open burning treatment units (burn pits) were reportedly used for the demilitarization of small arms ammunition. Additionally, a dumpster (bin) used to burn fireworks and chemical irritants, such as chloroactonphenone, o-chlorobenzylidenemalononitrile, and pepper spray was previously operated and remains at the site.

The regulatory analysis considered the past, present, and future operating scenarios as well as the closure of the facilities. The data gap analysis considered the Phase I and Phase II Environmental Site Assessments performed for the Maricopa County Risk Management Office. The data gap analysis resulted in the identification of five potential data gaps. The regulatory analysis presents several conclusions regarding the current and future regulatory concerns for the facility.

1. INTRODUCTION

Ninyo & Moore performed a regulatory analysis of applicable environmental regulations and a data gap analysis of previous site documentation for the Sheriff's Shooting Range, located near the McMicken Dam, Surprise, Arizona.

The Sheriff's Shooting Range consists of an approximately 19.72-acre area located in Section 24 of Township 4 North, Range 2 West, Gila and Salt River Meridian and is in Maricopa County Assessor's Parcel Number 503-75-016. The range is situated just east of the McMicken Dam, north of the principal spillway. The current shooting range configuration consists of five bays. Bay 1 is used as a rifle range, Bay 2, Bay 3, and Bay 4 are used as pistol and shotgun ranges and Bay 5 is used for Special Weapons and Tactics (SWAT) training. In addition, approximately four open burning treatment units (burn pits) were reportedly used for the demilitarization of small arms ammunition. Additionally, a dumpster (bin) used to burn fireworks and chemical irritants, such as chloroactonphenone (CN), o-chlorobenzylidenemalononitrile (CS), and pepper spray was previously operated and remains at the site.

2. SCOPE OF WORK

The scope of work for this report included a regulatory analysis of applicable environmental regulations associated with shooting ranges including the Resource Conservation and Recovery Act (RCRA), the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Clean Water Act (CWA). In addition, Ninyo & Moore performed a data gap analysis of previous site documentation including the following documents:

- *Final Phase I / II - Environmental Site Assessments of Sheriff's Shooting Range, Surprise Arizona, EEC Project No. 203169.01, dated June 28, 2004.*
- *Maricopa County Risk Management, Environmental Division Request for Quote, Environmental Consulting Services - Environmental Site Remediation Surprise Shooting Range Surprise, Arizona, dated May 6, 2005.*
- *Final Phase II Environmental Site Assessment Surprise Shooting Range Burn Units & Off-site Drainage Surprise Arizona, EEC Project No. 203169.02, dated January 31, 2005.*

3. ENVIRONMENTAL REGULATORY ANALYSIS

3.1. Resource Conservation Recovery Act

RCRA was passed into law in 1976 and governs generation, transportation, treatment, storage, characterization, and disposal of hazardous waste. For evaluation of the potential regulatory impacts under RCRA the following key issues are presented:

- The lead shot and bullets in the earthen firing range berms.
- The lead shot, bullets, explosive charge casings, and clay targets on the firing range floor.
- The lead shot and bullets that ricochet and/or are misfired and deposited outside of the firing range boundaries.
- The earthen materials moved or removed from berms during maintenance operations.
- The closure of open burning treatment units (RCRA facility assessment or corrective action).

For any waste to be a hazardous waste the waste must first be classified as a solid waste. RCRA section 1004(27) defines solid waste as “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 community activities, ...” unless otherwise excluded. Hazardous waste is defined by RCRA section 1004(5) as “a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may (A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.” A solid waste is further defined as a hazardous waste if it is listed by the United States Environmental Protection Agency (USEPA) as defined by Title 40 Code of Federal Regulations (CFR) §261.30 or it is hazardous by characteristic (40 CFR §261.20), if it is not excluded by regulation as codified by 40 CFR §261.4. Characteristic wastes are wastes that exhibit the

characteristics of ignitability, corrosivity, reactivity or toxicity as defined by 40 CFR §261.20 through §261.24.

The court case Connecticut Coastal Fishermen's Association (CCFA) v. Remington Arms Company, Inc. (Remington), 989 F.2d 1305, 1314 (United States Court of Appeals, Second Circuit Court) addressed RCRA applicability at shooting ranges. The summary judgment is included in Appendix A for reference. The CCFA sued Remington, alleging lead shot and clay targets are considered hazardous waste under RCRA and that Remington was operating without a RCRA operating permit. Section 3005(a) of RCRA requires owners or operators of facilities that store or disposal of hazardous wastes to obtain an RCRA operating permit, unless exempt.

The case of CCFA v. Remington was decided on March 29, 1993, in which the court ruled that lead shot and clay targets were solid waste because they were considered discarded because they were "left to accumulate long after they have served their intended purpose." The court also concluded that lead shot exhibited the characteristic of toxicity and was therefore a hazardous waste. In addition, the court determined that shooting ranges do not manage hazardous wastes and do not need a RCRA operating permit.

However, there are slightly differing views regarding whether lead shot on a range is a solid waste (and therefore potentially a hazardous waste) and when it becomes a waste. An USEPA document entitled *Best Management Practices for Lead at Outdoor Shooting Ranges*, dated January 2001 states that "...if discharged lead shot is recovered or reclaimed on a regular basis, no statutory solid waste (or hazardous waste) would be present..." (p. 1-7). An Arizona Department of Environmental Quality letter, dated October 20, 1999, regarding the Rio Salado Sportsmen's Club (Appendix B) stated that "[t]he disposition of lead ball and shot ammunition at shooting ranges is within the normal and expected use pattern of the manufactured product and the resultant lead debris onto the soil is allowed under the Resource Conservation and Recovery Act." The letter further clarifies that under RCRA section 7002, "federal courts can compel remedial actions at shooting ranges where an imminent and substantial endangerment to health or the environment may exist." Additionally, an

ADEQ inspection report issued to Pima Pistol Club from an inspection conducted on August 20, 2001, (Appendix C) stated that “[b]ullets and shot that are used on, and remain on, the gun club property are exempt from regulations as long as the gun club is in operation. Bullets and shot that ricochet off the property and into the surrounding environment are considered solid waste. If they contain lead, they are generally considered hazardous waste.” Another letter from ADEQ to the Tucson Rod and Gun Club (Appendix D) dated July 21, 1995 stated that “...the discharge of lead shot, bullets, and skeet at a shooting clubs and ranges does not require a RCRA permit nor is the discharge considered a hazardous waste unless it can be shown that an imminent and substantial endangerment to health or the environment may exist.” The letter continued to state that upon closure of the range that the range would be required to remediate the soil to the applicable standards. An additional letter from ADEQ to the City of Mesa, dated September 30, 1994 (Appendix E), regarding the police firing range in Mesa, Arizona states that “[l]ead bullets fired into a soil berm at an active firing range are being used for their intended purpose. RCRA regulations are not applicable to the lead bullets when fired into the earthen berm.”

Another potential RCRA issue deals with reclamation and recycling of lead shot from shooting range soils. According to *Best Management Practices for Lead at Outdoor Shooting Ranges* (USEPA, 2001) the process of reclaiming and recycling lead from shooting range soils is exempt from RCRA regulations according to 40 CFR §261.4(a)(13). In addition, the USEPA document states that, following the removal of lead from the soil the soil may be placed back on the range as a part of range clearance activities, and the soil is also exempt from RCRA Subtitle C regulations. It is noted that the document indicated that “timely” separation of lead from soils is exempt from RCRA regulations; however, a clear timeframe for removal is not specified.

Based on the information provided, Ninyo & Moore concludes that lead shot into active firing berms is not considered a waste if lead removal and recycling has occurred in a “timely” manner. Based the Phase I documentation, lead removal activities were last performed in 1990 by the Sun City Posse; however, no documentation exists regarding lead removal.

While "timely" is not defined, 15 years could be considered excessive by regulatory agencies.

Ninyo & Moore noted during site reconnaissance that lead shot was present in a stockpile and around a small drainage east of Bay 4. The stockpile was noted in Phase II documentation as "Part of Old Berm". The lead and associated soils are located in the opposite direction of firing positions and are not part of an active berm. Based on the USEPA guidance (2001), the lead should be removed from soil to be re-used to avoid regulation as a waste. This concept of re-use may be key in the operations and maintenance of the range facilities. EEC collected a composite sample in the area of the drainage and stockpile. The analytical results for the sample reported a result of 9,700 parts per million (ppm) of lead, exceeding the State of Arizona non-residential Soil Remediation Level (SRL) of 2,000 ppm. The analytical result also exceeds the 20 times Toxicity Characteristic Leaching Procedure (TCLP) theoretical threshold of 100 ppm indicating that it could exceed the RCRA TCLP standard and exhibit the characteristic of toxicity. If the soil in the pile were to exceed the TCLP regulatory value of 5 ppm it would be considered a hazardous waste. The soil placed in the North Berm as noted in the Phase I ESA, which was shown to have high concentrations of lead, may pose unique problems.

During the site reconnaissance on September 6, 2005, Ninyo & Moore noted several cans of pepper spray and mace. Discarded aerosol cans that are declared a waste are generally considered hazardous waste because aerosol cans generally exhibit the characteristic of reactivity. Reactivity as defined by 40 CFR §261.23(6) means a substance "is capable of detonation or explosive reaction if it is subjected to a strong initiating source or if heated under confinement." In addition, confiscated fireworks were also present at the site. Fireworks exhibit the characteristic of ignitability and are considered a hazardous waste. The pepper spray, mace, and fireworks were placed in cardboard boxes located outside an office building at the Sheriff's Shooting Range, with no labeling. The date the pepper spray, mace and fireworks were declared a waste is unknown; however, 60 days has elapsed since site reconnaissance and the pepper spray and mace are still present on the site. Potential issues

include improper labeling of a hazardous waste and improper storage under generator accumulation requirements under 40 CFR §262.34.

In addition, the Phase II documentation indicated that Bay 4 of the Sheriff's Range may be impacted by polynuclear aromatic hydrocarbons (PAHs) from clay targets. Upon closure further characterization and additional cleanup may be warranted due to PAHs.

Arizona Administrative Code R18-8-280 requires an owner and operator of a facility to develop a site assessment plan where unauthorized disposal or discharge of hazardous waste or hazardous waste constituent has occurred which has not been remediated. An RCRA Facility Assessment (RFA) or other action similar in nature may be performed to obtain information on the nature and extent of the discharge in the former burn units and lead associated with shooting activities.

The shooting ranges will likely require cleanup under the RCRA corrective action process upon range closure due to high probability that soils will be considered hazardous due to lead.

3.2. Comprehensive Environmental Response Compensation and Liability Act

CERCLA creates liability for cleanup for present owners and all past owners and operators who caused or allowed a release of a hazardous substance into the environment. Clean-up activities performed under CERCLA regulations generally occur at abandoned shooting ranges, and CERCLA liability is unlikely to be brought against a currently operating shooting range. The closure and clean-up process for currently active shooting ranges will typically occur as a RCRA Corrective Action; however, the letter from ADEQ regarding the active police firing range in Mesa, Arizona (Appendix E) states that “[c]ontaminated soil would be subject to regulation under CERCLA. Cleanup could be required if the contaminated media posed an imminent and substantial endangerment pursuant to Section 7003 of CERCLA. Excavating soil would generate a solid waste and possibly a hazardous waste under RCRA.”

3.3. Clean Water Act

The CWA provides the framework for regulating pollutants into Waters of the United States (WUS). WUS are defined in 33 CFR 328.3(a) as the following:

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)-(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)-(6) of this section; and
8. Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with the USEPA.

For the purpose of this study, WUS refers to "tributaries of waters." The nearest tributary is the McMicken Dam outlet channel which discharges into the Agua Fria River (FCDMC, 2005).

In the court case Long Island Soundkeeper Fund, Inc. and New York Coastal Fisherman's Association, Inc. (plaintiffs) v. New York Athletic Club (NYAC) of the City of New York (Appendix F) the plaintiffs brought suit against the NYAC claiming violations of the CWA including discharge of pollutants from a point source into WUS without a National Pollutant Discharge Elimination System (NPDES) permit.

The term "discharge of pollutants" as defined under the Clean Water Act in 33 United States Code (USC) §1362(12)(A) includes "any addition of any pollutant to navigable waters from any point source". A point source is defined in 33 USC §1362(14) as "...any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture." In addition, pollutant is defined as "...dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water..." in 33 USC §1362(6).

The court concluded that the shooting range itself was considered a point source within the definition of the CWA and that lead shot, bullets, wadding, and clay target debris do constitute pollutants as defined by the CWA. Therefore, the court prohibited the NYAC from operating its shooting range "unless and until it obtains an NPDES permit as required by the CWA."

Bullets and bullet fragments were observed in numerous areas behind the impact berms at the Sheriff's Range and on top of the dam. It is unknown if these areas are within WUS. A jurisdictional delineation to the WUS is pending for the area behind the McMicken Dam.

4. DATA GAP ANALYSIS

Ninyo & Moore performed a data gap analysis of previous site documentation including the following documents:

- *Final Phase I / II - Environmental Site Assessments of Sheriff's Shooting Range, Surprise Arizona, EEC Project No. 203169.01, dated June 28, 2004.*
- *Maricopa County Risk Management, Environmental Division Request for Quote, Environmental Consulting Services - Environmental Site Remediation Surprise Shooting Range Surprise, Arizona, dated May 6, 2005.*
- *Final Phase II Environmental Site Assessment Surprise Shooting Range Burn Units & Off-site Drainage Surprise Arizona, EEC Project No. 203169.02, dated January 31, 2005.*

The first potential data gap is that no assessment beyond the active berms was performed during Phase II activities. Based on site reconnaissance performed by Ninyo & Moore evidence of lead extends beyond the active shooting range berms.

The second potential data gap is that the use of explosives in the SWAT training area was not assessed during Phase II activities. The Phase II refers to the SWAT training area as also an explosive entry training area. During the Ninyo & Moore site reconnaissance it was noted that several explosives charge device carcasses contained residues. These device carcasses were ejected from the training areas and were noted on the berm. Ninyo & Moore was unable to ascertain during the site reconnaissance, the explosives used. Several explosive compounds may be present as components of the explosive mixes used by the SWAT units, and these explosive compounds may have State of Arizona SRLs.

The third potential data gap is the lack of the evaluation of potential lead leaching at the site. TCLP analysis should be used to assess whether soil at the site leaches lead at concentrations indicative of hazardous waste. This test method would be used for waste determinations for disposal of waste materials.

The fourth potential data gap is the usage of composite sampling techniques. The use of composite methods can reduce sampling costs and in the scope of the Phase II ESA can evaluate the berms and soil for potential remediation options. However, the composite techniques may allow

a hot spot far exceeding the highest-reported sample results, noted at 17,000 ppm, to not be observed. Use of discrete samples to analyze the individual components of a composite sample is recommended.

The fifth potential data gap is the use of sieved samples for lead analysis with no documentation of the amount of large bullets and fragments removed from the sample. The Phase II report does note that this allows for evaluation of only the lead with high potential for leaching or bioavailability. The lack of total lead data would not allow for judgments to be made on the effectiveness of remediation.

5. CONCLUSIONS

During the research performed to develop this report Ninyo & Moore has come to several conclusions. The research generally indicated that regulatory agencies are inconsistent in historical implementation of the relevant regulations. Therefore, ADEQ involvement will be paramount to defining the agency's position on many of these matters. The conclusions are:

- The berms containing lead bullets and shot are not regulated under RCRA if the lead is removed in a timely fashion and not allowed to be considered abandoned. Ninyo & Moore recommends further study and discussions with ADEQ to determine the time frames in which the bullets and shot may be considered abandoned.
- The active shooting of lead bullets and shot into berms is not regulated under RCRA as it is the intended use of the bullets and shot.
- The perpetual build-up of lead in the earthen berms may lead to a situation where an agency or member of the public could claim imminent endangerment from the lead discharges from the ranges. Ninyo & Moore recommends the implementation of best management practices to include routine lead reclamation from the earthen berms.
- Lead shot and bullets that leave the range area are considered a solid waste. Ninyo & Moore recommends further study to assess whether the shot and bullets off the range areas meet the definition of hazardous waste.
- The collection of lead shot and bullets for the express purpose of recycling is exempt from regulation under RCRA. The remaining lead concentrations in soil may become regulated by ADEQ if the soil is impacted above the SRLs. Ninyo & Moore recommends that any removal for recycling be performed with environmental oversight to document the activity and any remaining soil impacts.

- The re-use of lead-impacted soil on site may be acceptable if the lead is removed for reclamation or disposal prior to reusing the soil. Ninyo & Moore recommends implementation of a best management practice to remove the lead from soils to be re-used on the range including documentation of the activities.
- Upon closure of the range a complete characterization and subsequent site remediation will be required under RCRA. Ninyo & Moore recommends the retention of a qualified environmental consulting firm to document the activities on behalf of the operators and owners. The documentation should be coordinated with ADEQ to receive a determination of "no further action" to mitigate future liabilities associated with the range.
- The waste materials being stored require labeling to meet the requirements of 40 CFR §262.34. Additionally, it is unknown if the Maricopa County Sheriff's Office has received the appropriate training and has management systems in place to manage RCRA wastes on this site. Ninyo & Moore recommends that Maricopa County review the waste management procedures with the Sheriff's Office.
- The bullets and shot falling within the delineated WUS are subject to permitting under the NPDES program of the CWA. Ninyo & Moore recommends the redesign of the berm system to mitigate off-site impacts from bullets in the areas delineated as WUS and, if required, the pursuit of a NPDES permit.
- The explosives used in the SWAT training area are not adequately characterized. Ninyo & Moore recommends that the SWAT area be fully characterized to better understand the potential impacts, if any.

6. REFERENCE

- Arizona Administrative Code, 1999, Title 18, Environmental Quality Chapter 7, Department of Environmental Quality Remedial Action, Appendix A, Soils Remediation Levels.
- Arizona Administrative Code, 1999, Title 18, Environmental Quality Chapter 8, Department of Environmental Quality Waste Management, Appendix A, Soils Remediation Levels.
- Code of Federal Regulations, 2004, Title 40, Part 261 through 264, Hazardous Waste Management System.
- Code of Federal Regulations, 2004, Title 33, Part 328, Definition of Waters of the United States.
- EEC, Final Phase I / II - Environmental Site Assessments of Sheriff's Shooting Range, Surprise Arizona, EEC Project No. 203169.01, dated June 28, 2004.
- EEC, Final Phase II Environmental Site Assessment Surprise Shooting Range Burn Units & Off-site Drainage Surprise Arizona, EEC Project No. 203169.02: dated January 31, 2005.
- Flood Control District of Maricopa County (FCDMC), 2005 Personal Communications Mr. Robert Stevens to Mr. Dwight Clark of Ninyo & Moore.
- Maricopa County Risk Management, Environmental Division Request for Quote, Environmental Consulting Services - Environmental Site Remediation Surprise Shooting Range Surprise, Arizona, dated May 6, 2005.
- Resource Conservation and Recovery Act, 1976, Public Law 94-580, As Amended (1984, 1988).
- United States Code, 2005, Title 33, Section 1362, Clean Water Act.
- United States Environmental Protection Agency, Best Management Practices for Lead at Outdoor Shooting Ranges, USEPA-902-B-01-001, January 2001, Region 2.

APPENDIX A

**CONNECTICUT COASTAL FISHERMAN'S ASSOCIATION V.
REMINGTON ARMS COMPANY, INC.**

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CONNECTICUT COASTAL FISHERMEN'S ASSOCIATION

v.

REMINGTON ARMS CO.

March 29, 1993, Decided

OPINION (CARDAMONE, Circuit Judge):

Critical on this appeal is the meaning of the terms "solid waste" and "hazardous waste," as these terms are defined in the Solid Waste Disposal Act, 42 U.S.C. §§ 6901-6992 (1988), as amended by the Resource Conservation and Recovery Act of 1976 ("RCRA") and the Hazardous and Solid Waste Amendments of 1984. Defining what Congress intended by these words is not child's play, even though RCRA has an "Alice in Wonderland" air about it. We say that because a careful perusal of RCRA and its regulations reveals that "solid waste" plainly means one thing in one part of RCRA and something entirely different in another part of the same statute.

"When I use a word," Humpty Dumpty said in a rather scornful tone, "it means just what I choose it to mean -- neither more nor less." "The question is," said Alice, "whether you can make words mean so many different things." "The question is," said Humpty Dumpty, "which is to be master -- that's all."

Lewis Carroll, *Through the Looking-Glass* ch. 6 at 106-09 (1872). Congress, of course, is the master and in the discussion that follows, we undertake to discover what meaning Congress intended in its use of the words solid and hazardous waste.

FACTS

Remington Arms Co., Inc. (Remington or appellant) has owned and operated a trap and skeet shooting club -- originally organized in the 1920s -- on Lordship Point in Stratford, Connecticut since 1945. Trap and skeet targets are made of clay, and the shotguns used to knock these targets down are loaded with lead shot. The Lordship Point Gun Club (the Gun Club) was open to the public and it annually served 40,000 patrons. After nearly 70 years of use, close to 2,400 tons of lead shot (5 million pounds) and 11 million pounds of clay target

fragments were deposited on land around the club and in the adjacent waters of Long Island Sound. Directly to the north of Lordship Point lies a Connecticut state wildlife refuge at Nells Island Marsh, a critical habitat for one of the state's largest populations of Black Duck. The waters and shore near the Gun Club feed numerous species of waterfowl and shorebirds.

Plaintiff, Connecticut Coastal Fishermen's Association (Coastal Fishermen or plaintiff) brought suit against defendant Remington alleging that the lead shot and clay targets are hazardous wastes under RCRA and pollutants under the Clean Water Act (Act), 33 U.S.C. §§ 1251-1387. Remington has never obtained a permit under § 3005 of RCRA for the storage and disposal of hazardous wastes, 42 U.S.C. § 6925, or a National Pollutant Discharge Elimination System (pollution discharge) permit pursuant to § 402 of the Clean Water Act, 33 U.S.C. § 1342. Plaintiff insists that Remington must now clean up the lead shot and clay fragments it permitted to be scattered on the land and in the sea at Lordship Point.

Because the debris constitutes an imminent and substantial endangerment to health and the environment under RCRA, we agree.

LEGAL BACKGROUND

In response to citizens' concerns regarding the impact of the Gun Club operations on the surrounding environment, the Connecticut Department of Environmental Protection (DEP or the Department) began an investigation in May 1985 into possible contamination. Concluding that the Gun Club's activities "reasonably can be expected to cause pollution," the DEP issued an administrative order (Order WC4122) on August 19, 1985, requiring Remington to:

- 1) Investigate the extent and degree of lead contamination of sediments and aquatic life as a result of past and present activities of the Remington Gun Club.
- 2) Perform a study to evaluate the potential for lead poisoning of waterfowl as a result of past and present activities at the Remington Gun Club.
- 3) Take remedial measures as necessary to minimize or eliminate the potential for contamination of aquatic life and waterfowl.

Order WC4122 required that remedial action be completed in a year or by August 31, 1986, "except as may be revised by the recommendations of [a] detailed engineering study and agreed to by" the DEP. It did not order Remington to cease discharging lead shot or targets or to obtain a pollution discharge permit. The DEP did not then have authority to issue RCRA permits.

Meanwhile, pursuant to the DEP's August 1985 order, Remington commissioned a study by Energy Resources Company. The scope of the study was approved by the DEP on February 3, 1986. On April 10, 1986, plaintiff

sent Remington a letter of intent to sue for Clean Water Act and RCRA violations, see 33 U.S.C. § 1365(b)(1)(A); 42 U.S.C. § 6972(b)(1)(A), complaining of the discharge of lead shot and clay targets. The completed Energy Resources study was submitted to the DEP on July 2, 1986 -- one month before the August deadline for complete remediation. Based on the results of this study, the Department modified Order WC4122 on October 24, 1986 (modified order). The modified order required Remington to cease all discharges of lead shot at the Gun Club by December 31, 1986 and to submit a plan detailing remediation options by April 30, 1987. It did not prohibit Remington from continuing to operate the Gun Club after December 31, 1986, if steel shot was used in place of lead shot.

In response to the modified order, Remington commissioned a study by Battelle Ocean Sciences (Battelle) to look into remediation alternatives. Again, the DEP approved the scope of the Battelle study, though the study did not address remediation of the clay target fragments. Remington submitted the results of the Battelle study to the DEP on January 1, 1988. In April 1988 the DEP invited the Coastal Fishermen to comment on the Battelle study. Plaintiff expressed on May 13 concern about the lack of any remediation option for the clay targets debris.

In September 1988 the DEP -- focusing on this concern -- directed Remington to investigate the effect of the clay targets on the environment. Remington asked Battelle to conduct a further study, which it submitted to the Department in February 1990. The DEP approved Battelle's latest report on June 8, 1990. As a result, but well over a year later, the DEP ordered Remington to supplement the proposed remediation plan to include removal of visible clay target fragments from the beach surface above the mean low water mark of Long Island Sound and to study the possible removal of targets from the water. Remington has now submitted the ordered supplemental report, and is awaiting its approval by the Department. It will have six months after the DEP approves the remediation plan to submit final engineering plans and a construction schedule. Because the proposed remediation plan involves dredging navigable waters of the United States, Remington will have to obtain permits from the U.S. Army Corps of Engineers. To date, none of the lead shot or the clay target fragments has been removed from Lordship Point or the surrounding waters of Long Island Sound.

Meanwhile, the Coastal Fishermen's Association filed its original complaint on April 24. The complaint alleges that the operation of the Gun Club involved the discharge of pollutants from a point source without a pollution discharge permit in violation of the Clean Water Act, and that because the lead shot and clay targets are hazardous wastes, the Gun Club is a hazardous waste storage and disposal facility subject to RCRA requirements. Plaintiff sought a declaration that Remington had violated and was violating both the Act and the RCRA orders compelling it to remedy the accumulations of shot and target

debris. Plaintiff sought civil penalties and attorney's fees.

On September 11, 1991, the United States District Court for the District of Connecticut ruled that it lacked jurisdiction over plaintiff's Clean Water Act causes of action because the DEP was "diligently prosecuting an action under a [comparable] State law," as provided in § 309(g)(6)(A)(ii) of the Act, precluding citizen suits. Turning to the RCRA claims, the district court held that the lead shot and clay targets were "discarded material" under 42 U.S.C. § 6903(27), were "solid waste" under that statute, and therefore were subject to regulation under RCRA. It further stated that the lead shot was a "hazardous waste," but believed there were genuine issues of material fact as to whether the clay targets were "hazardous waste" under RCRA.

[On this appeal,] we asked the EPA to file an amicus brief "addressing whether lead shot deposited on land and in the water in the normal course of skeet and trap shooting is 'discarded material' within the meaning of 42 U.S.C. § 6903 (22) so as to constitute 'solid waste' under [RCRA]."

DISCUSSION

I. CLEAN WATER ACT

[The Court dismissed the suit with respect to the Clean Water Act, as citizens suits are only authorized under the CWA if there is a "state of either continuous or intermittent violation" of the Act, and citizen plaintiffs may not pursue claims under it for "wholly past" violations, *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 57 (1987). In this case, Remington made a "final irrevocable decision" never to reopen the Gun Club to trap and skeet shooting at any time in the future, offering as support the fact that the trap and skeet houses -- from which targets used to be thrown -- were dismantled and removed from the Gun Club premises in November of 1988. Thus, there could be no continuing violation.]

II. RESOURCE CONSERVATION AND RECOVERY ACT

A. Overview

Turning now to Remington's appeal from the district court's RCRA ruling, plaintiff asserts that Remington has been operating an unpermitted facility for the treatment, storage or disposal of hazardous wastes in violation of 42 U.S.C. § 6925 (a citizens suit claim under § 6972(a)(1)(A)) and has created an "imminent and substantial endangerment" to human health and the environment under § 6972(a)(1)(B). The district court did not distinguish between these causes of action in granting plaintiff summary judgment. Remington, as noted, never obtained a RCRA permit for the operation of its Gun Club facility, but contends that because lead shot and clay target debris are not "solid wastes" -- and hence cannot be "hazardous wastes" regulated by RCRA -- it is not subject to a permit requirement. In essence, Remington contends that RCRA does not apply to the Gun Club because any disposal of

waste that occurred there was merely incidental to the normal use of a product.

RCRA establishes a "cradle-to-grave" regulatory structure for the treatment, storage and disposal of solid and hazardous wastes. Solid wastes are regulated under Subchapter IV §§ 6941-49a; hazardous wastes are subject to the more stringent standards of Subchapter III §§ 6921-39b. Under RCRA "hazardous wastes" are a subset of "solid wastes." See 42 U.S.C. § 6903(5). Accordingly, for a waste to be classified as hazardous, it must first qualify as a solid waste under RCRA. We direct our attention initially therefore to whether the lead shot and clay targets are solid waste.

B. Statutory Analysis

i. The Chevron Rule

Our analysis of the definition of solid waste entails statutory interpretation as outlined in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984). First, the reviewing court must address "whether Congress has directly spoken to the precise question at issue" by focusing on the language and structure of the statute itself, and then -- if necessary -- examine congressional purpose expressed in legislative history. *American Mining Congress v. EPA*, 824 F.2d 1177, 1182 (D.C. Cir. 1987) (AMC I). A clear legislative purpose ends our inquiry, but if "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. In such case, we may not substitute our interpretation of the statute for that of an executive branch agency charged with administering it, but must defer to the agency's reasonable interpretation of an otherwise ambiguous statute.

ii. Application of the Chevron Rule

We consider first the statutory definition of solid waste. RCRA defines solid waste as:

any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material . . . resulting from industrial, commercial, mining and agricultural operations, and from community activities . . .

42 U.S.C. § 6903(27) (emphasis added). Remington admits that its Gun Club is a "commercial operation" or a "community activity;" it challenges the district court's finding that the lead shot and clay target debris are "discarded material." The statute itself does not further define "discarded material," and this creates an ambiguity with respect to the specific issue raised by Remington: At what point after a lead shot is fired at a clay target do the

materials become discarded? Does the transformation from useful to discarded material take place the instant the shot is fired or at some later time?

The legislative history does not satisfactorily resolve this ambiguity. It tells us that RCRA was designed to "eliminate[] the last remaining loophole in environmental law" by regulating the "disposal of discarded materials and hazardous wastes." H. R. Rep. No. 1491, 94th Cong., 2d Sess. 4 (1976). Further, the reach of RCRA was intended to be broad.

"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. For these reasons the term discarded materials is used to identify collectively those substances often referred to as industrial, municipal or post-consumer waste; refuse, trash, garbage and sludge."

Id. at 2. Yet, the legislative history does not tell us at what point products have served their intended purposes. The statutory definition of "disposal" as "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water," 42 U.S.C. § 6903(3), while broad, sheds little light on this question. Remington's focus on RCRA as being intended to address only solid waste "disposal" -- in the sense of the affirmative acts of collecting, transporting, and treating manufacturing or industrial by-products -- clearly is too narrow because it ignores legislative aim and fails to take into account the often non-voluntary acts of depositing, spilling and leaking. The statute and legislative history do not instruct as to how far the reach of RCRA extends. Thus, we proceed to the second step of the Chevron analysis and consider the EPA's interpretation.

The RCRA regulations create a dichotomy in the definition of solid waste. The EPA distinguishes between RCRA's regulatory and remedial purposes and offers a different definition of solid waste depending upon the statutory context in which the term appears. In its amicus brief, the EPA tells us that the regulatory definition of solid waste -- found at 40 C.F.R. § 261.2(a) -- is narrower than its statutory counterpart. The regulations define solid waste as "any discarded material" and further define discarded material as that which is "abandoned." 40 C.F.R. § 261.2(a). Materials that are abandoned have been "disposed of." 40 C.F.R. § 261.2(b). According to RCRA regulations, this definition of solid waste "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). As previously noted, Subtitle C [Subchapter III] contains more stringent handling standards for hazardous waste, and hazardous waste is a subset of solid waste.

The regulations further state that the statutory definition of solid waste, found at 42 U.S.C. § 6903(27), applies to "imminent hazard" lawsuits brought by the

United States under § 7003, 42 U.S.C. § 6973. See 40 C.F.R. § 261.1(b)(2) (ii). This statement recognizes the special nature of the imminent hazard lawsuit under RCRA. Currently, RCRA authorizes two kinds of citizen suits. The first, under § 7002(a)(1)(A), 42 U.S.C. § 6972(a)(1)(A), enables private citizens to enforce the EPA's hazardous waste regulations and -- according to 40 C.F.R. § 261.1(b)(1) -- invokes the narrow regulatory definition of solid waste. The second type of citizen suit, under § 7002(a)(1)(B), 42 U.S.C. § 6972(a)(1)(B), authorizes citizens to sue to abate an "imminent and substantial endangerment to health or the environment." While the regulations do not specifically mention this second category of citizen suit, regulatory language referring to § 7003 must also apply to § 7002(a)(1)(B) because the two provisions are nearly identical. Consequently, the broader statutory definition of solid waste applies to citizen suits brought to abate imminent hazard to health or the environment.

We recognize the anomaly of using different definitions for the term "solid waste" and that such view further complicates an already complex statute. Yet, we believe on balance that the EPA regulations reasonably interpret the statutory language. Hence, we defer to them. Dual definitions of solid waste are suggested by the structure and language of RCRA. Congress in Subchapter III isolated hazardous wastes for more stringent regulatory treatment. Recognizing 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. The statute directs the EPA to develop specific "criteria" for the identification of hazardous wastes as well as to publish a list of particular hazardous wastes. 42 U.S.C. § 6921 (a) & (b). By way of contrast, Subchapter IV that empowers the EPA to publish "guidelines" for the identification of problem solid waste pollution areas, does not require explanation beyond RCRA's statutory definition of what constitutes solid waste. *Id.* § 6942(a). Hence, the words of the statute contemplate that the EPA would refine and narrow the definition of solid waste for the sole purpose of Subchapter III regulation and enforcement.

C. Regulatory Definition of Solid Waste

The EPA, as amicus, concludes that the lead shot and clay targets discharged by patrons of Remington's Gun Club do not fall within the narrow regulatory definition of solid waste. Again, this issue is one we need not resolve because plaintiff has failed to allege a valid claim, brought under the § 7002(a)(1)(A) citizen suit provision, that Remington violated § 6925 of RCRA.

Plaintiff first alleges that Remington is operating a hazardous waste disposal facility without a permit, in violation of § 6925. This claim alleges a "wholly past" RCRA violation and is dismissed under *Gwaltney*. The Supreme Court acknowledged that the language in the citizen suit provisions of the Clean Water Act and § 7002(a)(1)(A) of RCRA is identical, yielding the same requirement that plaintiff allege an ongoing or intermittent violation of the

relevant statute. *Gwaltney*, 484 U.S. at 57 & n.2. Because we find no valid allegation of a present violation with respect to Coastal Fishermen's Clean Water Act suit, we must reach the same result with respect to its first claim under § 7002(a)(1)(A) of RCRA.

Second, plaintiff alleges that Remington owns or is operating a hazardous waste storage facility without a permit in violation of § 6925. Because plaintiff's alleged "violation" would continue as long as the lead shot and clay targets are "stored" in the waters of Long Island Sound, *Gwaltney* does not bar this claim. But RCRA and its regulations do. RCRA defines "storage" as "the containment of hazardous waste, either on a temporary basis or for a period of years, in such a manner as not to constitute disposal of such hazardous waste." § 6903(33). Neither the statute nor its accompanying regulations define "containment," but "storage" is further defined in the regulations as "the holding of hazardous waste for a temporary period, at the end of which the hazardous waste is treated, disposed of, or stored elsewhere." 40 C.F.R. § 260.10 (1992). The lead shot and clay targets now scattered in the waters of Long Island Sound at no time have been contained or held.

Moreover, the very essence of Coastal Fishermen's complaint is that Remington left the debris in the sound with no intention of taking additional action. Hence, the alleged storage of the waste logically may not be an interim measure as the regulations require. Coastal Fishermen therefore failed to state a valid claim that Remington owns or operates a hazardous waste storage facility or that it violated § 7002(a)(1)(A). Because only such a violation would trigger application of the regulatory definition of solid waste, it is unnecessary to decide whether the lead shot and clay targets fall within RCRA's regulatory scope.

D. Statutory Definition of Solid Waste

Coastal Fishermen's allegation that the lead shot and clay target debris in Long Island Sound creates an "imminent and substantial endangerment" under § 7002(a)(1)(B) of RCRA need not meet the present violation hurdle. See *Gwaltney*, 484 U.S. at 57 n.2. An imminent hazard citizen suit will lie against any "past or present" RCRA offender "who has contributed or who is contributing" to "past or present" solid waste handling practices that "may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B). Therefore, under an imminent hazard citizen suit, the endangerment must be ongoing, but the conduct that created the endangerment need not be.

As already noted, RCRA regulations apply the broader statutory definition of solid waste to imminent hazard suits. The statutory definition contains the concept of "discarded material," 42 U.S.C. § 6903(27), but it does not contain the terms "abandoned" or "disposed of" as required by the regulatory definition. 40 C.F.R. §§ 261.2(a)(2), (b)(1). Amicus interprets the statutory

definition of solid waste as encompassing the lead shot and clay targets at Lordship Point because they are "discarded." Specifically, the EPA states that the materials are discarded because they have been "left to accumulate long after they have served their intended purpose." Without deciding how long materials must accumulate before they become discarded -- that is, when the shot is fired or at some later time -- we agree that the lead shot and clay targets in Long Island Sound have accumulated long enough to be considered solid waste. Compare AMC I, 824 F.2d at 1185-86 (in-process secondary materials destined for immediate reuse as part of ongoing production process are not subject to RCRA because not discarded) with American Petroleum Inst. v. EPA, 906 F.2d 729, 741 (D.C. Cir. 1990) (distinguishing AMC I on grounds that once product is "indisputably 'discarded'," it has become part of waste disposal problem and may be regulated under RCRA).

E. Hazardous Waste

Having resolved that the lead shot and clay targets are discarded solid waste, we next analyze whether they are hazardous waste. RCRA defines "hazardous waste" as

"a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may
-- * * *

(B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed."

42 U.S.C. § 6903(5)(B).

Certain wastes have been listed by the EPA as hazardous pursuant to 40 C.F.R. § 261.30. Alternatively, a waste is considered hazardous if it exhibits any of the characteristics identified in 40 C.F.R. §§ 261.20 through 261.24: ignitability, corrosivity, reactivity, or toxicity. The district court granted summary judgment in favor of plaintiff on the issue of whether the lead shot qualified as a hazardous waste, but at the same time stated there were genuine issues of material fact as to whether the clay targets were hazardous waste. 777 F. Supp. at 194-95. Remington objects to both rulings.

i. Lead Shot

The district court concluded that the lead shot was hazardous waste as a matter of law because it satisfied the requirements of 40 C.F.R. § 261.24 for toxicity. See 777 F. Supp. at 194. That regulation provides that a solid waste is toxic, and therefore hazardous if, using appropriate testing methods, an "extract from a representative sample of the waste contains any of the contaminants listed . . . at the concentration equal to or greater than" that specified. 40 C.F.R. § 261.24(a). For lead, the concentration threshold is 5.0 mg/L. Id. table 1.

The Battelle study commissioned by defendant outlines the test method utilized as in accordance with EPA procedures, and was of the view that "Forty-five percent of the sediment samples analyzed exceeded the [applicable limits for lead]. On the basis of these results, upland disposal of the sediments as they currently exist in the environment at Lordship Point would require use of a RCRA-certified hazardous waste disposal site."

Remington does not challenge the accuracy or methodology of the Battelle study that clearly demonstrates that both the sediment at Lordship Point and the lead shot itself are toxic within the meaning of 40 C.F.R. § 261.24. The Battelle study further opines that "the accumulation of lead in the tissues of mussels and ducks [is] sufficient to indicate a lead contamination problem requiring remediation at Lordship Point." As a matter of law, the lead shot is a solid waste which, due to its toxicity and the fact that it poses a substantial threat to the environment, is a hazardous solid waste subject to RCRA remediation and regulation.

Amicus, National Rifle Association (NRA), contends that RCRA must be "integrated" with other environmental statutes and because the Toxic Substances Control Act exempts from the definition of "toxic substance" shells and cartridges for use in firearms, see 15 U.S.C. § 2602(2)(B)(v) (1988), the lead shot should not be classified as a hazardous waste (presumably because it should not be considered "toxic") under RCRA.

NRA misreads the Toxic Substances Control Act. The section relied on, 15 U.S.C. § 2602(2), does not purport to define "toxic" substances, but rather defines "chemical" substances. And "integration" under RCRA is designed "for purposes of administration and enforcement and [to] avoid duplication," 42 U.S.C. § 6905(b)(1), not, as NRA urges, for the perilous purpose of engaging in a far-ranging search through the United States Code for exemptions from particular provisions of one environmental statute in order to apply them to another.

In fact, were RCRA to be integrated with other environmental statutes, it would seem more appropriate to look to the Migratory Bird Treaty Act, prohibiting the use of lead shot in 12 gauge or larger shotguns when duck hunting. . . .

F. Other Arguments Raised by Remington and Amici

The National Shooting Sports Foundation, in an amicus brief, contends that imposing liability under RCRA is an impermissible imposition of liability for past lawful conduct. This contention misperceives the nature of the presumption against retroactive application of a statute to conduct lawful when done. Connecticut Coastal Fishermen only seeks appropriate relief under RCRA for Remington's operation of the club subsequent to the effective date of RCRA

and its applicable regulations. Merely because from such time until suit was filed no action was taken to enforce RCRA against defendant does not mean the statute is being retroactively applied.

CONCLUSION

For the foregoing reasons, the judgment of the district court is affirmed, in part, and reversed, in part.

APPENDIX B

**ARIZONA DEPARTMENT OF ENVIRONMENTAL QUALITY LETTER
DATED OCTOBER 20, 1999**



HWS-RGD-0209

ARIZONA DEPARTMENT OF ENVIRONMENTAL QUALITY

Governor Jane Dee Hull Jacqueline E. Schafer, Director

October 20, 1999

REF: HW99-0279

Mr. Timothy J. Paris
Beus Gilbert, PLLC
Attorneys at Law
3200 North Central Avenue Suite 1000
Phoenix, Arizona 85012

RE: Rio Salado Sportsmen's Club/Usery Mountain Recreation Area

Dear Mr. Paris:

The Arizona Department of Environmental Quality (ADEQ) is in receipt of your letter dated July 16, 1999 regarding the Rio Salado Sportsmen's Club (RSSC) firing range. As stated in your letter, you and your client have substantial concerns regarding environmental contamination resulting from the use of lead shot and ammunition at the facility.

The United States Environmental Protection Agency (USEPA) has recently written an interpretation regarding this issue. (Attachment dated August 6, 1999) Please review this letter for guidance. As stated in the USEPA interpretation there are no specific regulations the USEPA has developed for the operation of shooting ranges. The disposition of lead ball and shot ammunition at shooting ranges is within the normal and expected use pattern of the manufactured product and the resultant lead debris onto the soil is allowed under the Resource Conservation and Recovery Act. (RCRA)

Remedial authority does exist under RCRA sections 7002 and 7003. Under 7002 federal district courts can compel remedial actions at shooting ranges where an imminent and substantial endangerment to health or the environment may exist. Under 7003 of RCRA the USEPA may bring suit in the appropriate court.

If the lead shot is or becomes a threat under the Clean Water Act, then remedial actions can be compelled similar to the RCRA concern if there is imminent and substantial endangerment to health or the environment. Additionally, if and when the RSSC closes, then waste determinations and an assessment as to whether it meets ADEQ soil remediation level (SRLs) would need to be made. This may entail soil remediation.

Enclosed are additional letters that USEPA has written on the same subject. If you have questions or would like to discuss the matter further, please call Del Caudle, of my staff at (602) 207-4111.

Sincerely,

A handwritten signature in cursive script that reads "Lupe Buys".

Lupe M. Buys, Unit Manager
Hazardous Waste Inspections and Compliance Unit

Enclosures

cc: Del Caudle, HWICU
Denise McConaghy, HWICU

APPENDIX C

**ARIZONA DEPARTMENT OF ENVIRONMENTAL QUALITY INSPECTION REPORT
DATED AUGUST 20, 2001**

**ARIZONA DEPARTMENT OF ENVIRONMENTAL QUALITY
WASTE PROGRAMS DIVISION**

HAZARDOUS WASTE INSPECTION REPORT

INSPECTION DATE: August 30, 2001
FACILITY NAME: Pima Pistol Club
EPA ID NUMBER: N/A
STREET ADDRESS: 13990 N. Lago Del Oro Pkwy
CITY/STATE/ZIP: Tucson, Arizona 85738
TELEPHONE NUMBER: (520) 825-3603
MAILING ADDRESS: P.O. Box 8704crb, Tucson, AZ 85738

FACILITY REPRESENTATIVE(S) AND TITLE(S):

1. Jem Ellison, Manager

ADEQ REPRESENTATIVE(S):

1. Richard McIver, Hazardous Waste, Compliance Officer
2. Jacqueline Maye, Hazardous Waste, Compliance Officer

OTHER PARTICIPANTS/AGENCIES:

None

NOTE: All regulatory citations to 40 CFR are as adopted by the Arizona Administrative Codes (AAC) R18-8-201 et seq. Any omissions in this report shall not be construed as a determination of compliance with applicable regulations.

HAZARDOUS WASTE DETERMINATION

1. **Generator Status, as Facility has Reported**
RCRIS Status/Year: N/A
Facility Annual Report Status/Year: Non-generator

2. **Business Activity/Manufacturing Process Descriptions:**
Member-owned gun range used for target practice and matches.

GENERAL INFORMATION

This inspection was conducted as a result of a citizen complaint regarding potential lead contamination into the wash to the north and east of the property from bullets, and ricochets off the property that could be dangerous to people that live in the neighborhood.

In speaking with the neighbors and the manager of the gun club it appears that the problem with ricochets was worse in years past before the berms at the site were raised.

Mr. Ellison provided the following information during the inspection of the gun club:

PHYSICAL INSPECTION of the GUN CLUB

The shooting range has been located at the site since 1968. It has five ranges that shoot toward the east. Four neighborhood homes are located to the north and northeast of the range. Mr. Ellison said that he cannot 100 per cent guarantee that no bullets ever go off the range property. He indicated that whenever the gun club has the funds, they raise and fortify the berms with dirt. He also expressed concern for wildcat shooters in the general area not associated with the gun club. At the time of the inspection, the compliance officers did not see any bullets go off of the property.

Range #1:

- 50 yard youth range, newest range, used for pistol target shooting practice.
- The dirt berms on the north and east sides of this range were reconstructed in June 2001 to move them out of the wash area.
- In June 2001, the berms were also heightened to approximately 28 feet so there are no over flies of bullets from the range.

Range #2:

- 100 yard range for rifle target shooting practice.
- The dirt berms on the sides and back of this range are double bermed due to the penetration capabilities of rifle shells.

Ranges #3 and #4:

- 50 yard ranges used for pistol shooting matches.
- Except for the south side of range #4 being slightly lower, the dirt wall berms on these ranges are approximated 28-30 feet high.

Range #5:

- 200 yard range unfinished and unused.

INSPECTION of the NEIGHBORS' PROPERTIES

The compliance officers spoke with two neighbors of the gun club, one of which was the original complainant. They expressed concerns that in the past bullets have ricocheted off of the gun club property and onto their properties. The complainant indicated that bullets had hit the house being imbedded or leaving marks. The house has been renovated so those areas are no longer detected. The compliance officers walked the back and side yards of properties, and checked one roof top, but did not find any stray bullets at that time.

RECOMMENDATIONS

ADEQ recommends that the Pima Pistol Club consider assessing off site to the north and east of the property, and in the wash area. The purpose of the assessment is to discern whether there is a threat to the environment from lead or lead contaminated soil. Bullets and shot that are used on, and remain on, the gun club property are exempt from regulation as long as the gun club is in operation. Bullets and shot that ricochet off the property and into the surrounding environment are considered solid waste. If they contain lead, they are generally considered hazardous waste. The potential for surface water runoff containing lead residues from the property to neighboring washes should also be considered. Should the off site assessment indicate that there is an accumulation of solid or hazardous waste over the Soil Remediation Levels adopted by ADEQ (see A.A.C. R18-7-201 *et.seq.*), then an appropriate clean-up should be conducted.

If the gun club ceases operation, then the gun club property must be cleaned up at that time to levels protective of human health and the environment. Expended bullets may be recycled, and would therefore be exempt from solid or hazardous waste regulations.

The following information is being provided to the Pima Pistol Club:

- 1) EPA's Best Management Practices for Shooting Ranges
- 2) ADEQ's How to Hire a Consultant
- 3) ADEQ letter dated October 20, 1999 on firing range issues

ATTACHMENTS

- 1) Maps provided by Mr. Ellison

APPENDIX D

**ARIZONA DEPARTMENT OF ENVIRONMENTAL QUALITY LETTER
DATED JULY 21, 1995**

ARIZONA DEPARTMENT OF ENVIRONMENTAL QUALITY

Fife Symington, Governor Edward Z. Fox, Director

REF: HW95-0399

JUL 21 1995

Mr. Lloyd Wundrock
c/o Tucson Rod and Gun Club
P. O. Box 12921
Tucson, AZ 85732-2921

Dear Mr. Wundrock:

This letter is in response to your inquire of June 21, 1995 regarding regulatory jurisdiction and remediation issues at the Tucson Rod and Gun Club (TRGC). The following is the Arizona Department of Environmental Quality's (ADEQ) response to your questions:

1. Analytical requirements and regulatory limits for hazardous waste determination and Health Based Guidance Levels (HBGLs) for copper and lead.

Analytical testing requirements for soil potentially contaminated with lead would require usage of EPA Methods 7420 or 6010 for total lead and if applicable, Method 1311 for Toxicity Characteristic Leaching Procedure (TCLP). The TCLP regulatory level for lead is 5.0 milligrams per liter (mg/l). Copper is not a hazardous waste metal however, the EPA Methods for total copper are 7210 or 6010. ADEQ has two levels of HBGLs for cleanup of soil that may be used based on what the property is zoned. These two HBGL categories are explained in more detail in the answer to Question #5. The Residential HBGLs for copper and lead are 4,300 milligrams per kilogram (mg/kg) and 400 mg/kg respectively. The Industrial HBGLs for copper and lead are 18,060 mg/kg and 1,680 mg/kg respectively.

2. What are the proper disposal procedures for spent clay targets?

Pursuant to the Code of Federal Regulations (CFR) 40 Part 262.11, a person (facility) who generates a solid waste, must determine if that waste is a hazardous waste according to Subpart C of 40 CFR 261. Therefore, TRGC must perform a waste determination on all wastes generated, including clay targets and dispose of all material appropriately. ADEQ does not have information on record that indicates whether clay targets would exhibit a characteristic of a hazardous waste.

Lloyd Wundrock
c/o Tucson Rod and Gun Club
REF: HW95-0399
Page 2

3. Which entity would be considered environmentally responsible for the remediation of any contamination?

Pursuant to Arizona Administrative Code (AAC) R18-8-262.A and the Code of Federal Regulations (CFR) 40 Part 262.34/265.31, the operator and/or owner is responsible for maintaining the facility to minimize the release of hazardous waste or hazardous waste constituents such as lead to the air, soil or surface water.

4. Based upon the ownership of the property, which agency has regulatory jurisdiction, ADEQ or EPA?

ADEQ has been given authorization by EPA to implement the Resource Conservation and Recovery Act (RCRA) through the Arizona Hazardous Waste Management Act and therefore has the regulatory jurisdiction over the TRGC even though the property is owned by the federal government (U.S. National Forest Service).

5. If TRGC ever vacated the property for any reason, would the property have to be cleaned up to respective HBGLs? Could TRGC remain as a tenant on the property and continue current operations and activities if the lead deposition on-site were deemed "hazardous"?

The site should be remediated upon abandonment of target shooting activities at the site. The site would also require remediation before abandonment if contamination levels from the operation posed an imminent threat to human health and the environment.

ADEQ has established a new soil cleanup policy based on Health Based Guidance Levels (HBGLs) that are protective of human health and the environment. There are two categories of HBGLs that may be used to remediate a site. The first level is the Residential HBGLs. Residential HBGLs are used on sites that are zoned for residential use or when the operator and/or property owner wish to remediate a site to these more stringent cleanup levels and therefore not have any institutional controls on the property once it is remediated provided that there is no threat to groundwater, does not cause a nuisance, or effect an ecological sensitive environment. The Residential HBGLs for copper and lead are 4,300 milligrams per kilogram (mg/kg) and 400 mg/kg respectively.

Lloyd Wundrock
c/o Tucson Rod and Gun Club
REF: HW95-0399
Page 3

The second category is the Industrial or Commercial HBGLs. The Industrial cleanup levels are less stringent and may be used in industrial or commercial zoned areas. There are institutional controls on the property such as a Land Use Restriction and a Seller Disclosure that is required at the time the property is sold. Additionally, ADEQ will maintain a list of these properties on a database as public information. The Industrial HBGLs for copper and lead are 18,060 mg/kg and 1,680 mg/kg respectively.

Additionally, the facility may decide to perform a site specific health risk assessment to determine cleanup levels that are protective of human health and the environment. The institutional controls for this level of remediation are Seller Disclosure and possibly Land Use Restriction.

In a recent court case, (Connecticut Coastal Fisherman's Association v. Remington Arms Co.) the U.S. Court of Appeals for the Second Circuit decided that lead ammunition used at a skeet shooting facility met the statutory definitions of a solid waste and hazardous waste under RCRA. The Court's opinion was that when expended shot and other debris (i.e., clay pigeons) pose an imminent and substantial endangerment to health or the environment, a citizen may bring a lawsuit under Section 7002 of RCRA. Attached are two EPA Hazardous Waste Compendium regulatory interpretation letters on the issue of shooting ranges and gun clubs (REF: 9441.1992(31), 9444.1993(04)).

ADEQ concurs that the discharge of lead shot, bullets, and skeet at a shooting clubs and ranges does not require a RCRA permit nor is the discharge considered a hazardous waste unless it can be shown that an imminent and substantial endangerment to health or the environment may exist. Likewise, whenever the facility is no longer operated as a shooting club or range, remediation of the property is required to levels protective of human health and the environment.

APPENDIX E

**ARIZONA DEPARTMENT OF ENVIRONMENTAL QUALITY LETTER
DATED SEPTEMBER 30, 1994**

0069



ARIZONA DEPARTMENT OF ENVIRON

Fife Symington, Governor Edward Z. Fo

10/12

Wayne -

September 30, 1994
REF: HW94-0563

Mr. Peter W. Knudson, P.E.
Senior Civil Engineer
City of Mesa Engineering
20 East Main Street, Suite 400
Mesa, Arizona 85211-1466

Re: Police Firing Range, Mesa, Arizona

Dear Mr. Knudson:

On June 20, 1994, ADEQ received a letter which summarizes your understanding of the applicability of Resource Conservation and Recovery Act (RCRA) regulations, based on a June 15 telephone conversation between Ms. Julie Richman of my staff and yourself, to an active police firing range operated by the City of Mesa.

With the following additions, ADEQ agrees with the general content of your statement. Lead bullets fired into a soil berm at an active firing range are being used for their intended purpose. RCRA regulations are not applicable to the lead bullets when fired into the earthen berm.

Expended bullets are not a solid waste when recycled and therefore are not a hazardous waste pursuant to 40 CFR 261.

Contaminated soil would be subject to regulation under CERCLA. Cleanup could be required if the contaminated media posed an imminent and substantial endangerment pursuant to Section 7003 of CERCLA. Excavating soil would generate a solid waste and possibly a hazardous waste under RCRA.

If the TCLP (Toxicity Characteristic Leaching Procedure) test is performed and results exceed the TCLP regulatory limits (5.0 mg/l for lead), then the waste would need to be disposed of properly as a hazardous waste.

Analytical data for lead contaminated soil at other firing ranges indicates a hazardous waste. Disposal options for the City of Mesa firing range, at the time of closure, could include recycling the bullets for their lead content, in accordance with 40 CFR 261.6(a)(3)(iv), or disposal at a properly permitted treatment, storage or disposal (TSD) facility.

Pls include in
HWS Policy Binder.
(Regulatory interpretation)

Suggested key words:

Firing range / lead bullets

Pls see me if any
questions

Thx Julie 261.6

Mr. Peter W. Knudson, P.E.
September 30, 1994
Page 2

If you have any questions or need clarification of items contained in this letter, please contact Ms. Julie Richman of my staff at (602) 207-4128.

Sincerely,



Patrick F. Kuefler, Manager
Hazardous Waste Compliance Unit

PFK:JER:jr

cc: Dale Anderson, Manager, HWIU
Anthony Leverock, P.E., Manager, HWPU
Julie Richman, Compliance Officer, HWCU
Andy Soesilo, Manager, HWS

APPENDIX F

**LONG ISLAND SOUNDKEEPER FUND, INC. AND NEW YORK COASTAL
FISHERMAN'S ASSOCIATION, INC. V. NEW YORK ATHLETIC CLUB OF THE
CITY OF NEW YORK.**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
LONG ISLAND SOUNDKEEPER FUND, INC.
and NEW YORK COASTAL FISHERMEN'S
ASS'N, INC.,

Plaintiffs,

94 Civ. 0436 (RPP)
OPINION AND ORDER

-v-

NEW YORK ATHLETIC CLUB OF THE CITY OF
NEW YORK,

Defendant.

-----X

A P P E A R A N C E S

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By: Charles H. Critchlow, E.A. Dominianni

Submissions Amicus Curiae:

Dennis C. Vacco, Attorney General of the State of New York,
Victoria A. Graffeo, Solicitor General, James H. Ferreira and
Gordon J. Johnson, Assistant Attorneys General, Albany, New
York, of counsel for State of New York as amicus curiae.

Lois J. Schiffer, Assistant Attorney General, and Nancy K. Stoner, Attorney, Environment and Natural Resources Division, United States Department of Justice, of counsel for United States as amicus curiae

ROBERT P. PATTERSON, JR., U.S.D.J.

Plaintiffs and Defendant cross move for summary judgment on various claims asserted by Plaintiffs in this litigation brought pursuant to the Federal Water Pollution Control Act (the "Clean Water Act" or "CWA"), 33 U.S.C. §1251 et seq., and the Federal Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §6901 et seq. For the reasons stated below, Plaintiffs' motion for partial summary judgment is granted and Defendant's motion for summary judgment is granted in part and denied in part.

Background

By a Complaint dated January 24, 1994, Plaintiffs, Long Island Soundkeeper Fund ("Soundkeeper") and New York Coastal Fishermen's Association ("Fishermen") allege violations of the Clean Water Act and RCRA by Defendant, the New York Athletic Club ("NYAC"), in the operation of a trap shooting range at its Travers Island facility on Long Island Sound ("the Range"). Plaintiffs' Complaint contains four claims for relief under RCRA, based on alleged violations of statutory and regulatory prohibitions of solid and hazardous waste disposal and two claims for relief under the CWA based on alleged violations of the statutory prohibition of discharge of pollutants from a point source into navigable waters of the United States without a National Pollution Discharge

Elimination System ("NPDES") permit and discharge of dredged and fill material into navigable waters without a permit issued by the United States Army Corps of Engineers. Plaintiffs seek declaratory and injunctive relief, remediation, civil penalties and attorney's fees.

Plaintiff Soundkeeper is a not-for-profit organization whose primary interest is to conserve and enhance the biological integrity of Long Island Sound and to protect its natural resources. Compl. ¶8. Most of Soundkeepers' members live on or near Long Island Sound and make use of the coastal region for a number of activities, including: fishing, boating, swimming, shellfishing, and birdwatching. Compl. ¶8. Plaintiff Fishermen is a not-for-profit organization whose primary purpose is to encourage the protection and rational use of New York's coastal heritage. Compl. ¶10. Defendant is a membership association organized under the not-for-profit corporation laws of the State of New York. Plaintiffs' Statement Pursuant to Local Rule 3(g) ("Pl. 3(g)") ¶3. For over sixty years in the months from November to April, Defendant has operated a trap shooting range on premises owned by it at Travers Island, Pelham Manor, New York. Pl. 3(g) ¶9. Spring launchers are used to throw clay targets out over Long Island Sound. Defendant's Statement Pursuant to Local Rule 3(g) ("Def. 3(g)") ¶11. Individuals stand on concrete platforms, facing Long Island Sound, from which they fire at the clay targets launched over the water. Pl. 3(g) ¶12. Prior to the 1994-95 trap shooting

season, lead shot was used at the NYAC range. During the 1994-95 season, NYAC switched to steel shot. Affidavit of Stephen A. Vasaka, sworn to on May 19, 1995 ("Vasaka Aff.") ¶5.

In its motion, Defendant challenges Plaintiffs' ability to maintain their claims on the ground that Plaintiffs failed to provide adequate notice of their intent to sue and that Plaintiffs have not satisfied their burden to demonstrate that they have standing to sue as constitutionally required. Furthermore, Defendant challenges Plaintiffs' substantive claims under the CWA and RCRA. Plaintiffs, in their motion, contend that they are entitled to summary judgment on their claim that Defendant violated the CWA's requirements of permits with respect to discharge of pollutants from point sources into navigable waters of the United States.

Oral argument on Plaintiffs' motion and Defendant's cross motion was heard on May 23, 1995. Subsequent to oral argument, the Court requested submission of Amicus Briefs by the Environmental Protection Agency ("EPA") and the New York State Department of Environmental Conservation ("DEC") to address the claims made by both parties regarding liability. The EPA and DEC submitted briefs on September 25, 1995. The parties thereafter responded to those briefs.

Discussion

Summary judgment is appropriate "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). Summary judgment cannot issue if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The initial burden rests on the moving party to demonstrate that there exists no genuine issue of material fact and that it is entitled to judgment as a matter of law. See, Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970). The moving party may satisfy its burden by showing the absence of evidence which would support the claims made by the non-moving party. See, Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). The Court must view the facts in the light most favorable to the non-moving party. See, United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). If, however, the evidence presented by the nonmoving party "is merely colorable, or is not significantly probative, summary judgment may be granted." Anderson v. Liberty Lobby, 477 U.S. at 249-250 (internal citations omitted).

Defendant's cross motion for summary judgment will be addressed first because Defendant's motion challenges Plaintiffs' ability to maintain their action in its entirety.

I. Defendant's Motion for Summary Judgment

Defendant contends that dismissal of Plaintiffs' Complaint is appropriate based upon [1] Plaintiffs' failure to

provide adequate notice of their intent to sue as required by RCRA and the CWA; [2] lack of individual and organizational standing; [3] Plaintiffs' inability to bring a citizen suit under RCRA; [4] the inadequacy of Plaintiffs' claims alleging that Defendant's operation of its trap shooting range results in disposal of solid waste and open dumping in violation of RCRA; [5] the inadequacy of Plaintiffs' claim that Defendant is required to obtain a dredge and fill permit under the CWA; and [6] the insufficiency of Plaintiffs' claim that an NPDES permit is required under the CWA.

A. Failure to Provide Adequate Notice

Defendant contends that the claims brought by Plaintiff Soundkeeper should be dismissed because Soundkeeper failed to provide notice as required by RCRA, the CWA and regulations promulgated thereunder and because the notice provided by Plaintiff Fishermen did not state alleged CWA violations with the specificity required by that statute.

Defendant contends that Plaintiff Soundkeeper should be precluded from proceeding as a party to this litigation because it failed to provide at least sixty or ninety days notice of intent to sue as required by the CWA and RCRA. 33 U.S.C. §1365(b)(1)(A); 42 U.S.C. §6972(b)(1),(2). In order to bring suit under RCRA or the CWA, a plaintiff must comply with the notice provisions of the relevant statute. See, Hallstrom v. Tillamook County, 493 U.S. 20, 26 (1989). Defendant concedes that Plaintiff Fishermen sent a

timely letter by which it provided timely notice of its intent to sue, but contends that Notice provided by a single plaintiff does not serve as notice from all plaintiffs. Plaintiffs' Memorandum of Law in Support of Their Motion for Partial Summary Judgment ("Pl. Mem.") Ex. 1. Notice provided by a single plaintiff in a suit brought by multiple plaintiffs constitutes "substantial compliance" with the notice requirements of the CWA and RCRA. Cf. Student Public Interest Research Group of New Jersey, Inc. v. AT&T Bell Laboratories, 617 F. Supp. 1190, 1193-94 (D.N.J. 1985). Accordingly, Defendant's argument that Plaintiff Soundkeeper should be dismissed for failing to send its own notice of intent to sue fails.

In addition to attacking Plaintiff Soundkeeper's failure to provide separate notice of its intent to sue, Defendant contends that the notice provided by Plaintiffs is not sufficiently specific with respect to Defendant's alleged violation of the CWA's NPDES permit requirements.¹ Defendant refers to the EPA's regulation promulgated under the CWA, which requires that:

Notice regarding an alleged violation of an effluent standard or limitation or of an order with respect thereto, shall include sufficient information to permit the recipient to identify the specific standard, limitation, or order alleged to have been violated, the activity alleged to constitute a violation, the person or persons responsible for the alleged violation, the location of the alleged violation, and the full name,

¹ Defendant does not argue that the text of Plaintiffs' notice applicable to Plaintiffs' claims under RCRA lacked specificity required by that statute.

address, and telephone number of the person giving notice.

40 C.F.R. §135.3(a). Fishermen's letter of intent to sue stated that:

The New York Coastal Fishermen's Association will bring this suit under 42 U.S.C. §6972(a)(1)(A) (authorizing a suit against any person who violates any permit, standard, regulation, effective pursuant to RCRA), 42 U.S.C. §6972(a)(1)(B) (authorizing suit against any person who has contributed or is contributing to the disposal of any solid or hazardous waste which may present imminent and substantial endangerment to health or the environment), and 33 U.S.C. §1365(a)(1)(A) (authorizing a suit against any person who is "alleged to be in violation of an effluent standard or limitation" under the CWA.)

Pl. Mem., Ex. 1 at 1. The letter provided additional details regarding the nature of Plaintiff's claims under both RCRA and the CWA. Defendant claims that Fishermen's June 25, 1993 letter is deficient as a notice of intent to sue under CWA's permit requirements because it fails "to identify the specific standard, limitation or order alleged to have been violated." 40 C.F.R. §135.3(a). The regulation cited by Defendant does not specifically state the level of detail required in a notice of intent to sue, but only requires that Plaintiffs provide "sufficient information to permit the recipient to identify" the standard, limitation or order allegedly violated. In their letter, Plaintiffs state that:

The skeet and trap shooting platforms at the New York Athletic Club on Travers Island which discharge lead shot into the waters of the Lower Harbor are "point sources" within the meaning of Section 502(14) of the CWA, 33 U.S.C. §1362(14). The discharge of lead and targets into the Lower Harbor violates Section 301(a) of CWA, 33 U.S.C. §1311(a).

This is adequate notice to Defendant of Plaintiffs' allegation that Defendant's trap shooting range is a point source and that it is committing continuing violations of the CWA's effluent limitations. Plaintiffs have provided adequate notice to Defendant of their intent to sue because Defendant has been exceeding and continues to exceed the effluent limitations contained in the CWA, and because Defendant has not obtained an NPDES permit to exceed the zero limitation on effluents contained in the CWA. Accordingly, Defendant's motion for summary judgment based on inadequate notice of intent to sue as required by the CWA is denied.

B. Standing

Defendant contends that dismissal of Plaintiffs' Complaint is appropriate because Plaintiffs lack standing to assert their claims. In order to invoke the jurisdiction of a federal court, a plaintiff must establish standing to sue. The doctrine of standing, based upon the "case or controversy" requirement of Article III of the Constitution, obligates a plaintiff to allege injury in fact, which must be actual or imminent and not conjectural. Whitmore v. Arkansas, 495 U.S. 149 (1990). Furthermore, the alleged injury must be fairly traceable to the actions of the defendant and likely to be redressed by a favorable decision. See, Whitmore v. Arkansas, 495 U.S. 149, 155 (1990); Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 38-43 (1976). The party seeking to invoke federal jurisdiction

bears the burden of establishing the above mentioned elements. Lujan v. Defenders of Wildlife, 112 S.Ct. 2130, 2136 (1992). The Supreme Court has pointed out that "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e. with the manner and degree of evidence required at the successive stages of the litigation." Lujan, 112 S.Ct. at 2136. Defendant has made a motion for summary judgment on the issue of Plaintiffs' standing to sue. Accordingly, it is necessary to determine whether Plaintiffs have provided facts sufficient to carry their burden of proof of standing at this point in the litigation.

Plaintiffs have submitted affidavits of several members of both Plaintiff organizations, attesting to the alleged injuries they have suffered and will continue to suffer as a result of Defendant's operation of its trap shooting range at Travers Island. Wilma Turnbull, President of the Coastal Fishermen's Association, has averred:

I live on Eastchester Bay a few miles from the area of the Defendant, New York Athletic Club of the City of New York's (NYAC) Gun Club site, and I regularly frequent the Lower New Rochelle Harbor for personal recreational purposes. I generally visit Glen Island Park and Pelham Bay Park four to five times a year for hiking, bird watching, and walking along the shoreline. My enjoyment of the area has been diminished, however, by the view of the debris of targets and shot gun shell wadding in these parks. I have seen this debris along the Glen Island Park wall that faces NYAC. The sight of this garbage is offensive to me. I also regularly hike along the Siwanoy Trail, located on Pelham Bay Park and am offended by the shooting debris deposited by the flood tides of previous storms.

Affidavit of Wilma Turnbull, sworn to on October 7, 1994 ("Turnbull Aff.") at ¶4. Turnbull proceeded to aver:

I plan to continue regular visits to these areas as part of my normal recreational activities in the foreseeable future. I have made definite plans to hike the Siwanoy Trail in Pelham Bay Park later this fall."

Turnbull Aff. at ¶5.

Jorge Santiago, a member of the Coastal Fishermen's Association, averred:

Twice a month I go hiking and birdwatching on the Hunter's Island area of Pelham Bay Park for personal recreation. When I walk along the beach, I clean up debris that I find there. On this shore trail I have found shell casings from New York Athletic Club washed up by tidal floods. In the same area I have seen waterfowl feeding. I am offended by the shooting debris that I see on this trail. I am concerned that marine life and water fowl are seriously harmed by the pollution from the shooting debris and the poisonous effects of lead.

Affidavit of Jorge Santiago, sworn to on October 11, 1994 ("Santiago Aff.") at ¶4.

In his affidavit, Winthrop T. Parker, an active member of Plaintiff Soundkeeper, states:

I live a few miles from NYAC's Gun Club site, and regularly come to the area for my personal recreation. Two to three times a month in the late fall and early spring I walk along the trails of Hunter's Island and Twin Island on Pelham Bay Park and along the shore of Glen Island Park. I am very upset by the shooting of lead shot into the water by NYAC's Gun Club at this time of year, and the sight of shell casings, and wadding along the shore at low tide.

Affidavit of Winthrop T. Parker, sworn to on October 11, 1994

("Parker Aff.") at ¶5. Parker proceeded to explain that:

[a]lthough I am the descendant of two generations of fishermen, I do not fish any longer. My grandfather and father who lived on Pelham Bay, used to fish from a rowboat, anchored in front of the NYAC, at a safe distance from the shooting. The discharged lead pellets would fall into the water near them, and often into their boat so that at the end of the day, the bottom of the boat would be covered in spent lead shot. I know that lead is very toxic. I would fish again if the water were clean, and not polluted by lead shot.

Parker Aff. at ¶6.

In support of their motion for summary judgment on the basis of Plaintiffs' lack of standing, Defendant argues that the injuries alleged by Plaintiffs' affiants are "mere conjecture." Defendant contends that conjectural claims regarding the adverse effects of Defendant's continued operation of the trap shooting range on marine and bird life in its vicinity can be equated with hypothetical claims found insufficient to give rise to standing in Lujan v. National Wildlife Federation, 110 S.Ct. 3177, 3187-89 (1990) and Lujan v. Defenders of Wildlife, 112 S.Ct. 2130, 2137-40 (1992). Plaintiffs' factual assertions respecting standing are not, however, limited to conjectural concerns regarding the future impact of the Gun Club's activities on the lower harbor. The above-cited portions of Plaintiffs' affidavits set forth allegations of actual aesthetic injury to individual members of both Plaintiff groups. Contrary to Defendant's assertions, the affidavits submitted by Plaintiffs do identify members of each group who regularly use the lower harbor for recreational purposes,

who intend to continue to use it, and who attest to aesthetic injury caused by activities conducted by Defendant. (Turnbull Aff. ¶4,5; Santiago Aff. ¶4, Parker Aff. ¶5.) The injury alleged--aesthetic harm and concerns regarding the impact of Defendant's activities on the intertidal zone and surrounding area--is injury that could be remedied, if the remediation and injunctive relief sought by Plaintiffs is granted. Cf. Simon, 426 U.S. 26.

For the first time in reply papers responding to Amicus Briefs submitted by the State of New York and the United States, Defendant argues that Plaintiffs have failed to demonstrate that their claims fall within the "zone of interests" protected by RCRA. The "zone of interests" test is one of several judicially imposed, but not constitutionally mandated "prudential limitations on a litigant's standing to bring a claim." Defenders of Wildlife, Friends of Animals And Their Environment v. Hodel, 851 F.2d 1035, 1039 (8th Cir. 1988). Congress may abrogate these limitations by legislatively extending standing under a particular statute to the limits allowed by the Constitution. Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 100 (1979).

The standing provision of RCRA reads, in relevant part...

[A]ny 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 chapter.

42 U.S.C. §6972(a)(1)(A). The broad provision extends standing under the statute to the limits allowed by the Constitution. Plaintiffs Soundkeeper and Fishermen are both "persons" within the meaning of RCRA's standing provision.² Cf. Defenders of Wildlife, 851 F.2d at 1039. Like the plaintiffs in Defenders of Wildlife, Plaintiffs here "need meet only the constitutional requirements for standing" for their RCRA claims. Defenders of Wildlife, 851 F.2d at 1039. Plaintiffs have satisfied their burden to demonstrate constitutional standing requirements by alleging statutory and regulatory violations of RCRA and the CWA by Defendant. For the above stated reasons, Defendant's motion for summary judgment based on Plaintiffs' lack of standing to sue under the CWA and RCRA is denied.

C. Plaintiffs' Claims under RCRA

Defendant also claims that it is entitled to summary judgment on three of Plaintiffs' RCRA claims, namely, the

² RCRA defines "person" as:
an individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body and shall include each department, agency, and instrumentality of the United States.

42 U.S.C. §6903(15).

allegations that: [1] it has been operating without a permit a facility for the treatment, storage or disposal of solid or hazardous wastes in violation of 42 U.S.C. §6925; [2] it has failed to comply with operating requirements for disposal by permit of hazardous waste in violation of 42 U.S.C. §6924; and [3] it has, as a "facility" within the meaning of RCRA, caused a discharge of waste material which constitutes open dumping prohibited by RCRA.³ Defendant's first and second contentions, relating to the alleged violation of permit requirements under RCRA, are addressed together; Defendant's argument that Plaintiffs' claims of open dumping of solid waste must be dismissed will be addressed separately.

1. Operation of Unpermitted Facility

Defendant argues that the Plaintiffs may not pursue in this Court their claims based on violation of an unpermitted facility because the RCRA permit procedures have been superseded by New York's EPA authorized program. The Complaint charges that Defendant has caused the discharge of hazardous waste--lead shot, lead fragments, lead residue, targets and target fragments--as defined in the statute and its regulations without a permit as required by RCRA and numerous violations of federal standards

³ Defendant does not at this time move for summary judgment on Plaintiffs' claim that operation of the Range results in the disposal of waste "which may present an imminent and substantial endangerment to human health and the environment" brought pursuant to 42 U.S.C. §6972(a)(1)(B).

applicable to operators of hazardous waste disposal facilities. Compl. ¶¶95-103, 109. In addition to citing federal regulations, the Complaint cites provisions of New York State's regulatory program that coincide with the federal regulatory provisions allegedly violated by Defendant.

The EPA is responsible for administering RCRA. Under the statutory scheme, states may apply for and receive authorization to administer their own programs regulating disposal of hazardous waste. 42 U.S.C. §6926. In 1986, New York State received final authorization under §3006 of RCRA, 42 U.S.C. §6926, to administer and enforce its own hazardous waste program. See, 57 Fed. Reg. 9978 (Mar. 23, 1992). Defendant argues that New York State's EPA authorized program regulating hazardous waste disposal supersedes RCRA's federal permit and notification requirements. In support of its argument, Defendant cites Orange Environment, Inc. v. County of Orange, 860 F. Supp. 1003, 1020-21 (S.D.N.Y. 1994), in which the court was not forced to decide whether the existence of an EPA authorized hazardous waste program in New York precludes a citizen suit under §§3004 and 3005(a) of RCRA, 42 U.S.C. §§6924 and 6925, because the Plaintiffs had conceded defeat on the issue. See, Orange Environment, 860 F. Supp. at 1021. The Second Circuit decision cited by Defendant and by the court in Orange Environment, for the proposition that citizen suits under RCRA may be unavailable where independent state hazardous waste programs supersede the federal regulatory program enacted under RCRA, is

Dague v. City of Burlington, 935 F.2d 1343 (2d Cir. 1991), rev'd in part, 112 S.Ct. 964 (1992). Dague, however, did not confirm, as thought by Judge Goettel, the Vermont District Court's determination that a citizen suit under RCRA's statutory and federal regulatory provisions is not available where an authorized state hazardous waste program exists since that determination was not the subject of the appeal. Thus, the question of whether a citizen suit may be maintained, pursuant to 42 U.S.C. §6972(a)(1)(A), in New York State for violations of §§3004 and 3005(a) of RCRA despite the existence of an EPA authorized state hazardous waste management program, has not been answered by the Second Circuit.

Several courts in other circuits that have addressed the question, however, have determined that the citizen suit provisions of RCRA remain available in states that have EPA authorized hazardous waste maintenance programs that supersede EPA's regulations. See, e.g., Murray v. Bath Iron Works Corp., 867 F. Supp. 33 (D. Me. 1994) ("According to the two courts that have squarely addressed the issue, a citizen suit under section 6972(a)(1)(A) is still available for violations of a state authorized program, since the state program, in having received EPA authorization under RCRA, 'has become effective' pursuant to RCRA, as required by section 6972(a)(1)(A)." Id. at 43.); Lutz v. Chromatex, Inc., 725 F. Supp. 258, 261 (M.D.Pa. 1989); but see Thompson v. Thomas, 680 F. Supp. 1, 3 (D.D.C. 1987); City of Heath,

Ohio v. Ashland Oil, Inc., 834 F. Supp. 971, 978 (S.D. Ohio 1993).

The Lutz court relied on commentary by the EPA concerning authorization of Texas' hazardous waste management plan stating the Agency's position that citizen suits remain available in states that have EPA authorized hazardous waste programs:

EPA believes that RCRA, the Federal regulations and the Texas application provide for a number of important avenues for public participation in hazardous waste management. Consequently, EPA finds that the Texas program, with its new program commitments, satisfies the Federal requirements in this area.

Under RCRA, Section 7002, any person may commence a civil action on his own behalf against any government instrumentality or any person who is alleged to be in violation of permits, regulations, conditions, etc.....As a result, any person, whether in an authorized or unauthorized State, may sue to enforce compliance with statutory and regulatory standards.

Lutz, 725 F. Supp. at 261 (quoting 45 Fed.Reg. 85016) (Dec. 24, 1980) (emphasis added)). Plaintiffs' claims based on alleged violations of §§3004 and 3005(a) of RCRA, 42 U.S.C. 6924, 6925 and the state's program cannot be dismissed for lack of a federal question based on the existence of an EPA authorized state hazardous waste program in New York.

Defendant also moves for dismissal of Plaintiffs' claim, under 42 U.S.C. §6972(a)(1)(A), that Defendant has been operating an unpermitted facility for the treatment, storage, or disposal of hazardous waste in violation of 42 U.S.C. §§6924 and 6925. Defendant contends that it is entitled to summary judgment on these claims because [1] the activities at the Range do not result in the

"disposal" of shot or targets; and [2] the shot and target fragments are not solid waste within the meaning of RCRA's regulatory framework.⁴

In its Amicus brief submitted in this matter, the EPA urges the Court to conclude that shot and target fragments do not constitute "solid waste" within the meaning of the regulations promulgated under RCRA. The regulations provide:

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...*

(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.

40 C.F.R. §261.2. Spent rounds of ammunition and target fragments are not, the EPA asserts, "discarded material" within the meaning of the regulation, because they have not been "abandoned" as that term is defined in the above cited regulation. Because the shot and target fragments come to rest on land and in water surrounding NYAC as a result of their proper and expected use, the EPA contends that its permitting requirements are not applicable. While the Second Circuit has not resolved the issue of whether a

⁴ Hazardous wastes are a subset of solid wastes in the EPA's regulations.

trap shooting range constitutes a facility for the disposal of hazardous waste within the meaning of RCRA, it has discussed the fact that the regulatory definition of "solid waste" is narrower than the statutory definition. See, Connecticut Coastal Fishermen's Ass'n. v. Remington Arms, 989 F.2d 1305, 1314 (2d Cir. 1993). The EPA's interpretation of its own regulations is reasonable. As such, it is entitled to deference from this Court. See, Beazer East, Inc. v. United States E.P.A. Region III, 963 F.2d 603, 606-07 (3rd Cir. 1992); Cf. Chevron U.S.A. Inc. v. National Resources Defense Council, 467 U.S. 837 (1984). Spent shot and target fragments do not, therefore, fall within the regulatory definition of "solid waste" under RCRA. Accordingly, Defendant's motion for summary judgment dismissing Plaintiffs' first and second claims for relief under RCRA is granted.

2. Open Dumping in Violation of Section 4005(a) of RCRA, (42 U.S.C. §6945(a))

Defendant also moves for summary judgment with respect to Plaintiffs' claim that the operation of the shooting range constitutes "open dumping" prohibited by section 4005(a) of RCRA (42 U.S.C. §6945) and regulations promulgated thereunder.

Defendant contends that Plaintiffs' claims based on the EPA's regulations regarding solid waste disposal in surface water fail as a matter of law because private citizens cannot sue under RCRA's citizen suit provision for violations of the regulations promulgated at 40 C.F.R. §257.3-3. Neither side cites controlling

authority addressing the availability of citizen suits under the EPA's surface water regulations.

Defendant's motion raises a question of statutory construction that requires consideration of several provisions of RCRA and the EPA's regulations promulgated thereunder. The section Plaintiffs rely upon, 4005(a) of RCRA (42 U.S.C. §6945), provides:

Upon promulgation of criteria under section 6907(a)(3) of this title, any solid waste management practice or disposal of solid waste or hazardous waste which constitutes the open dumping of solid waste or hazardous waste is prohibited, except in the case of any practice or disposal of solid waste under a timetable or schedule for compliance established under this section. The prohibition contained in the preceding sentence shall be enforceable under section 6972 of this title against persons engaged in the act of open dumping.⁵

42 U.S.C. §6945(a). Congress thus did not in section 4005(a) of RCRA (42 U.S.C. §6945(a)) define what specific practices constitute prohibited open dumping practices. The statutory prohibition in section 4005(a) of RCRA (42 U.S.C. §6945(a)) references criteria to be promulgated by the EPA under section 1008(a) of RCRA (42 U.S.C. §6907(a)(3)). Through section 4005(a) of RCRA (42 U.S.C. §6945(a)), Congress explicitly delegated authority to the EPA to develop criteria for determining what will constitute open dumping practices prohibited by RCRA. The statute expressly states that

⁵ RCRA's citizen suit provision enables individuals to bring suit "against any person...who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter." 42 U.S.C. §6972(a).

upon promulgation of criteria under section 1008(a) of RCRA (42 U.S.C. §6907(a)(3)) defining "open dumping" under section 4005(a) (42 U.S.C. §6945(a)), violations of the statutory "open dumping" provision will be enforceable under the statute's citizen suit provision, section 7002 of RCRA (42 U.S.C. §6972).

Section 1008(a) (42 U.S.C. §6907(a)), referenced in section 4005(a) (42 U.S.C. §6945(a)), is entitled "Solid waste management information and guidelines" and states:

Within one year of October 21, 1976, and from time to time thereafter, the Administrator shall, in cooperation with appropriate Federal, State, municipal, and intermunicipal agencies, and in consultation with other interested persons, and after public hearings, develop and publish suggested guidelines for solid waste management. Such guidelines shall--

* * *

(3) provide minimum criteria to be used by the States to define those solid waste management practices which constitute the open dumping of solid waste or hazardous waste and are to be prohibited under subchapter IV of this chapter.

42 U.S.C. §6907(a). Thus the statutory prohibition in section 4005(a) of RCRA (42 U.S.C. §6945(a)) of open dumping is limited to criteria promulgated under section 1008(a) of RCRA (42 U.S.C. §6907(a)), nowhere does it include any criteria developed by the EPA under section 4004(a) of RCRA (42 U.S.C. §6944(a)), entitled "Criteria for sanitary landfills; landfills required for all disposal."⁶

⁶ Section 4004(a) of RCRA (42 U.S.C. 6944(a)) states:
Not later than one year after
October 21, 1976, after

Following the above described statutory framework in its regulations developed to define open dumping practices, the EPA was careful to distinguish between criteria promulgated for purposes of section 1008(a)(3) of RCRA (42 U.S.C. §6907(a)) and criteria promulgated for purposes of section 4004(a) of RCRA (42 U.S.C. §6944(a)) as follows:

(1) Facilities failing to satisfy criteria adopted for purposes of section 4004(a) will be considered open dumping for purposes of State solid waste management planning under the Act.

(2) Practices failing to satisfy criteria adopted for purposes of section 1008(a)(3) constitute open dumping which is prohibited under section 4005 of the Act.

40 C.F.R. §257.1(a) (46 Fed. Reg. 47048, 47052 (Sept. 23, 1981)).

The criteria upon which Plaintiffs base their claim state:

(a) For purposes of section 4004(a) of the Act, a facility

consultation with the States, and after notice and public hearings, the Administrator shall promulgate regulations containing criteria for determining which facilities shall be classified as sanitary landfills and which shall be classified as open dumps within the meaning of this chapter. At a minimum, such criteria shall provide that a facility may be classified as a sanitary landfill and not an open dump only if there is no reasonable probability of adverse effects on health or the environment from disposal of solid waste at such facility. Such regulations may provide for the classification of the types of sanitary landfills.

42 U.S.C. §6944(a).

shall not cause a discharge of pollutants into waters of the United States that is in violation of the requirements of the National Pollutant Discharge Elimination System (NPDES) under section 402 of the Clean Water Act, as amended.

[And]

(b) For purposes of section 4004(a) of the Act, a facility shall not cause a discharge of dredged or fill material to waters of the United States that is in violation of the requirements under section 404 of the Clean Water Act, as amended.

40 C.F.R. §257.3-3(a), (b) (46 Fed. Reg. 47048, 47052 (Sept. 23, 1981)). The EPA's commentary addressing these criteria explained that:

[t]oday's amendments...modify the surface-water criterion of §257.3-3. As originally promulgated, that standard would have made discharges violating requirements under Section 402 or Section 404 of the Clean Water Act open dumping practices as well. A party causing such a violation could simultaneously be subject to penalties under the CWA and a citizen suit to enjoin "open dumping" under RCRA. Today's amendment eliminates this double liability. However, since the open dump inventory classification for purposes of the State planning program does not impose legal sanctions under RCRA, the Criteria retain the provision that a violation of Section 402 or Section 404 makes a facility an open dump...EPA believes that the CWA enforcement mechanisms are sufficient to handle violations under Sections 402 and 404.

46 Fed. Reg. 47048, 47050 (Sept. 23, 1981).⁷ The language of the

⁷ The original criteria referred to in the commentary read:

- (a) A facility or practice shall not cause a discharge of pollutants into waters of the United States that is in violation of the requirements of the National Pollutant Discharge Elimination System (NPDES) under Section 402 of the Clean Water Act, as amended.
- (b) A facility or practice shall

regulations and the accompanying EPA commentary make it clear that the EPA did not intend for the surface water criteria promulgated under section 4004(a) of RCRA (42 U.S.C. 6944(a)) to authorize citizen suits for open dumping practices in violation of section 4005(a) of RCRA (42 U.S.C. §6945(a)). This conflicts with Plaintiffs' contention that it can bring suit for violation of section 4005(a) of RCRA (42 U.S.C. §6945(a)) alleging violations of surface water criteria promulgated for purposes of section 4004(a) of RCRA (42 U.S.C. §6944(a)). Because Congress explicitly delegated to the EPA the authority to develop criteria concerning actionable open dumping practices, the EPA's construction of RCRA's prohibition of open dumping must be given controlling weight unless it is "arbitrary, capricious, or contrary to the statute." Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984). The EPA's construction takes account of the provision of RCRA which states that "[t]he Administrator shall integrate all provisions of this chapter for purposes of administration and enforcement and shall avoid duplication, to the maximum extent practicable, with the appropriate provisions of...the Federal Water Pollution Control Act [33 U.S.C. §1251 et

not cause a discharge of dredged or material or fill material to waters of the United States that is in violation of the requirements under Section 404 of the Clean Water Act, as amended.

44 Fed. Reg. 53460, 53461 (September 13, 1979).

seq.].” 42 U.S.C. §6905(b)(1). The interpretation contemplates the availability of relief under CWA and determines it to be adequate. The interpretation is not arbitrary, capricious, or clearly contrary to the statute. Accordingly, the EPA's regulations and its own interpretation thereof are entitled to deference. See, Chevron U.S.C. Inc., 467 U.S. at 844; see also, Beazer East, Inc., 963 F.2d at 606-07. Defendant's motion for summary judgment with respect to Plaintiffs' open dumping claims under RCRA is granted. But see, Orange Environment, Inc. v. County of Orange, 860 F. Supp. 1003 (S.D.N.Y. 1994) (denying summary judgment against open dumping claim brought by environmental group to force county landfill to comply with 40 C.F.R. Pt. 257); Gache v. Town of Harrison, N.Y., 813 F. Supp. 1037 (S.D.N.Y. 1993) (denying summary judgment against 42 U.S.C. §6945(a) claim brought by landowner for discharge of landfill leachate into water); Dague v. City of Burlington, 732 F. Supp. 458, 467 (D. Vt. 1989).

Defendant also seeks summary judgment dismissing Plaintiffs' contention that Defendant is subject to 40 C.F.R. §257.3-1, which states that:

Facilities or practices in floodplains shall not restrict the flow of the base flood, reduce the temporary water storage capacity of the floodplain, or result in washout of solid waste, so as to pose a hazard to human life, wildlife, or land or water resources.

This regulation appears irrelevant since the Defendant's operations are not alleged to be on a floodplain. Accordingly, Defendant's motion for summary judgment with regard to Plaintiffs' claim that

operation of the Range results in violations of 40 C.F.R. §257.3-1 is granted.

D. Plaintiffs' Claims Under the Clean Water Act

Defendant also contends that it is entitled to summary judgment on both of Plaintiffs' claims brought under the CWA. First, Defendant contends that it is entitled to summary judgment on Plaintiffs' claim that it violated the CWA by failing to obtain an NPDES permit because operation of the Range does not result in discharges of pollutants from a point source.⁸ Second, Defendant argues that Plaintiffs' contention that its operation of the Range results in discharge of dredge and fill material without a permit as required by the CWA, should be dismissed because the materials deposited in Long Island Sound as a result of the operation of the Range do not fall within the regulatory definition of "dredge" or "fill" material.

Regulations promulgated by the Army Corps of Engineers define "dredged materials" as "material that is excavated or dredged from waters of the United States" 33 C.F.R. §323.2(c) and "fill material" as "any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of an waterbody." 33 C.F.R. §323.2(e). Defendant

⁸ Defendant's argument that summary judgment is appropriate on Plaintiffs' claims that it failed to obtain an NPDES permit in violation of the CWA is addressed below, with Plaintiffs' claim that they are entitled to summary judgment on the same claim.

contends that the Army Corps of Engineers' regulations promulgated under the CWA deserve deference and that because the operation of the Range does not result in removal of anything from the waters of Long Island Sound and because the purpose of the activity carried out at the Range is recreational and not oriented towards changing the bottom elevation, Plaintiffs' claim that Defendant was required to obtain a permit pursuant to 33 U.S.C. §1344 fails. Plaintiffs did not in their papers or at oral argument attempt to support the position that operation of the Range generates "dredge" or "fill" material within the meaning of the CWA. Activities conducted at the Range are not oriented towards changing the bottom elevation, nor do they result in removal of anything from navigable waters of the United States. Defendant's motion to dismiss Plaintiffs' claim that Defendant has failed to obtain a permit for a dredge and fill operation in violation of the CWA is granted.

II. Plaintiffs' Motion for Summary Judgment on Their CWA Claim

Plaintiffs contend that they are entitled to summary judgment on their claim that Defendant has violated and continues to violate the CWA.⁹ Under the statute, "discharge of a pollutant"

⁹ Section 505(a) of the CWA reads:
(a) Authorization; jurisdiction
Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf--
(1) against any person...who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or

is defined as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. §1362(12). Citizen suits may be brought under Section 505(a) of the CWA if [1] plaintiffs provide 60 days notice, 33 U.S.C. §1365(b)(1)(A), [2] the suit is not preempted by state or federal enforcement action prior to the filing of the complaint, 33 U.S.C. §1365(b)(1)(B); and [3] the Plaintiff in good faith alleges a continuing violation in its complaint. Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., 484 U.S. 49 (1987). A violation of the effluent limitations of the Act is demonstrated where a person discharges a pollutant into navigable waters from a point source without a permit as required by the Act. United States v. Velsicol Chemical Corp., 438 F. Supp. 945, 948 (W.D. Tenn. 1976).

Defendant concedes that it is a person within the meaning of the CWA. Def. 3(g) ¶3. Likewise, Defendant concedes that the waters of Long Island Sound into which debris from its trap shooting range fall are "navigable waters" within the meaning of the CWA. Def. 3(g) ¶6. The questions which remain to be resolved are [1] whether the trap shooting range (or any part of it) constitutes a point source within the meaning of the CWA; and [2] whether target debris and spent shot are pollutants within the meaning of the CWA.

limitation.

33 U.S.C. §1365(a)(1).

The CWA defines "point source" as

any discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.

33 U.S.C. §1362(14). Defendant contends that neither the Range nor any aspect of it constitutes a point source within the meaning of the CWA. In support of its argument, Defendant cites United States v. Plaza Health Laboratories, Inc., 3 F.3d 643 (2d Cir. 1993), cert. denied, 114 S.Ct. 2764 (1994), where the court determined that an individual is not a point source within the meaning of the Act. Plaintiffs in this action, however, do not contend that individuals shooting at clay targets are point sources within the meaning of the CWA, but that the Range itself, the mechanical target launchers, and the platforms upon which a rotation of individuals stand to shoot targets constitute point sources.

In its Amicus brief, the EPA--the agency to which Congress gave substantial discretion in administering the CWA--submits to the Court that "point sources" include "all discrete, identifiable sources from which pollutants are emitted or conveyed into United States waters." Amicus Brief of the United States of America at 6. The Second Circuit has acknowledged that:

The definition of a point source is to be broadly interpreted: "The touchstone of the regulatory scheme is that those needing to use the waters for waste distribution must seek and obtain a permit to discharge that waste, with the quantity and quality of the discharge regulated. The concept of a point source was

designed to further this scheme by embracing the broadest possible definition of any identifiable conveyance from which pollutants might enter waters of the United States."

Dague v. City of Burlington, 935 F.2d 1343, 1354-55 (2d Cir. 1991) (quoting United States v. Earth Sciences, Inc., 599 F.2d 368, 373 (10th Cir. 1979). Other courts have recognized that a wide range of polluting activities are point sources within the meaning of the Act where human activity generates pollution and pollutants are conveyed into water by human effort. See, e.g., Concerned Area Residents For The Environment v. Southview Farm, 34 F.3d 114, 118 (2d Cir. 1994), cert. denied, 115 S.Ct. 1795 (1995) (manure spreading vehicles and tankers that discharge on field from which manure flows into navigable waters are point sources within the meaning of the CWA); Committee To Save Mokelumne River v. East Bay Mun. Utility Dist., 13 F.3d 305, 308-09 (9th Cir. 1993) (spillway and valve of dam that channels acid mine runoff from abandoned mine site constitute point sources within meaning of CWA); Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 923 (5th Cir. 1983) (bulldozers and backhoes constitute point sources within the meaning of the CWA); Sierra Club v. Abston Const. Co., Inc., 620 F.2d 41, 45 (sump pits into which contaminated runoff from strip mining operation which sometimes overflowed into navigable waters considered point sources within the meaning of the CWA); Romero-Barcelo v. Brown, 478 F. Supp. 646, (D.P.R. 1979), rev'd on other grounds, 643 F.2d 835 (1st Cir. 1981), aff'd sub nom., Weinberger

v. Romero-Barcelo, 456 U.S. 305 (1982) ("It would be a strained construction of unambiguous language for the Court to interpret that the release or firing of ordnance from aircraft into the navigable waters of Vieques is not '...an addition of any pollutant...from any point source...', particularly in view of the broad rather than narrow interpretation given to this type of statute." Id. at 664).

The trap shooting range operated by Defendant, which is designed to concentrate shooting activity from a few specific points and systematically direct it in a single direction--over Long Island Sound--is an identifiable source from which spent shot and target fragments are conveyed into navigable waters of the United States. As such, the Range constitutes a point source within the meaning of the CWA. The remaining question is whether the spent shot and target fragments conveyed into United States waters constitute pollutants within the meaning of the CWA.

The CWA defines "pollutant" as:

dredged spoil, solid waste, incinerator residue, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.

33 U.S.C. §1362(6). Defendant argues that spent shot and target fragments which land in Long Island Sound as a result of the operation of the Range are not "pollutants" within the meaning of

the CWA. It argues that DEC has exercised its interpretive authority with respect to the Act to determine that trap shooting ranges fall outside of the Act's permitting requirements. In support of this argument, Defendant relies upon a series of communications between Stephen Vasaka, Chairman of the Trap Shooting Committee of NYAC and Herbert Doig, an employee of the New York State DEC. Mr. Vasaka wrote in a letter of March 3, 1994:

[I] write this letter to seek confirmation by your office that the operation of this facility does not constitute the disposal of solid or hazardous waste under the Resource Conservation and Recovery Act (RCRA), any federal environmental law or regulation which your office oversees [sic] or implements, or any other applicable environmental law or regulations administered by your office. I further write to seek your confirmation that the DEC requires no permitting of this facility under any of the environmental laws it administers including RCRA and the Clean Water Act provisions regarding discharge of pollutants.

Supplemental Affidavit of Stephen A. Vasaka, Sworn to on May 19, 1995 ("Suppl. Vasaka Aff."), Ex. A at 1. Defendant submits a letter, dated May 15, 1995, written by Mr. Doig in response to Mr. Vasaka's inquiry of March, 1994:

[T]his will advise that the Department does not regulate shooting activities on ranges and that current environmental laws do not require permits for discharge of lead or steel shot on shooting ranges.

Suppl. Vasaka Aff. Ex. B. The position taken by New York State in its Amicus Brief, as well as the position taken by the United States, contradicts Mr. Doig's representation and undermines Defendant's argument. The 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. See, Hudson River Fishermen's Ass'n. v. City of New York, 751 F. Supp. 1088, 1101 (S.D.N.Y. 1990), aff'd 940 F.2d 649 ("It is indisputable that a pollutant is a pollutant no matter how useful it may earlier have been." Id.)

The CWA, moreover, does not require any showing that a pollutant has caused environmental damage to enforce the NPDES permitting requirement. See, City of Milwaukee v. Illinois, 451 U.S. 304, 310 (1981); see also, Orange Environment, Inc. v. County of Orange, 811 F. Supp. 926, 934 (S.D.N.Y. 1993) ("the CWA's requirement that all discharges covered by the statute must have a NPDES permit "is unconditional and absolute. Any discharge except pursuant to a permit is illegal." Id.) (quoting United States v. Tom-Kat Development, Inc., 614 F. Supp. 613, 614 (D. Alaska 1985) (quoting Kitlutsisti v. Arco Alaska, Inc., 592 F. Supp. 832, 839 (D. Alaska 1984))). In Connecticut Coastal Fishermen's Association v. Remington Arms Co., 989 F.2d 1305, 1313 (2d Cir. 1993), the Second Circuit stated that spent ammunition fired from guns--be it composed of lead or steel--which lands in navigable waters constitutes a pollutant within the meaning of the CWA. Congress' purpose in enacting the CWA is broadly stated: "[t]he objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the nation's waters." 33 U.S.C. §1251(a). Given the statute's broad mandate, case law

interpreting the meaning of "pollutants" within the CWA, and the arguments of the EPA and DEC, shot and target debris generated by operation of Defendant's trap shooting range constitute pollutants within the meaning of the CWA. Accordingly, Plaintiffs' motion for partial summary judgment is hereby granted.

Plaintiffs are entitled to declaratory and injunctive relief available under the CWA and shall submit an order on notice within five days of the filing of this Opinion and Order enjoining Defendant from operating its trap shooting range unless and until it obtains an NPDES permit as required by the CWA.

Conclusion

For the above stated reasons, Defendant's motion for summary judgment is granted in part and denied in part, Plaintiffs' motion for partial summary judgment is granted.

IT IS SO ORDERED.

Dated: New York, New York
March 20, 1996

Robert P. Patterson, Jr.
U.S.D.J.