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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 92-7191L, 92-7193XAP

CONNECTICUT COASTAL FISHERMEN'S ASSOCIATION,

Plaintiff-Appellee-Cross-Appellant

v.

REMINGTON ARMS CO., E.I. DUPONT DE NEMOURS & CO.

Defendants-Appellant-Cross-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The Court has requested the views of the Environmental
Protection Agency (EPA) on the following question:

[W]hether lead shot and clay target debris
deposited on land and in the water in the
normal course of skeet and trap shooting is
"discarded material" within the meaning o[f]
42 U.S.C. § 6903(2[7]) so as to constitute
"solid waste" under the Resource Conservation
and Recovery Act.

STATEMENT OF THE CASE

A. Introduction

We appreciate the opportunity to present our views to the
Court on the applicability of the statutory and regulatory

definitions of "solid waste" in the Resource Conservation and Recovery Act (RCRA) to expended lead shot and target debris from the normal use of those materials for skeet and trap shooting. This is a question of considerable importance given its potential application to gun clubs nationwide, individual hunters, the military, and law enforcement authorities.

The Environmental Protection Agency (EPA) does not now regulate the use of lead shot and targets under its RCRA regulations. The regulations governing the treatment, storage, and disposal of hazardous waste are comprehensive in character, regulating the wastes from the point of generation to ultimate disposal. By and large, these comprehensive regulations are designed around waste emanating from industrial processes found across the United States. As such, application of this regulatory structure to gun clubs, hunters, and others involved with trap and skeet shooting is inappropriate, as discussed, infra, pp. 17-18. Developing an entirely different set of regulatory requirements for such ranges would be a very expensive and time-consuming endeavor, given the resource limitations that constrain EPA. Thus, EPA has instead directed its efforts at more wide-spread environmental concerns, including other initiatives directed at reducing the amount of lead that enters the environment. The pages that follow set out EPA's views on the question posed by the Court. They reflect not only an appreciation of the law, but also the regulatory and policy

consequences of a determination that skeet and trap shooting would be subject to RCRA regulation.

B. Statutory Overview

Facilities which treat, store, or dispose of hazardous wastes (TSDs) are required to comply with various requirements set forth in RCRA.¹ A "hazardous waste", as defined in section 1004, 42 U.S.C. 6903(5), must first be a "solid waste". RCRA statutorily defines "solid wastes" in section 1004, 42 U.S.C. 6903(27). The statutory definition of "solid waste" in RCRA provides in pertinent part as follows:

The term "solid waste" means any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining and agricultural operations, and from community activities ... but does not include ... industrial discharges which are point sources subject to permits under section 1342 of title 33[, the Clean Water Act].

42 U.S.C. 6903(27).

1/ These include obtaining a permit for treatment, storage, or disposal of "hazardous waste" under Section 3005 of RCRA. 42 U.S.C. 6925. A RCRA permit includes technical standards for operating the facility, provisions for groundwater monitoring, financial responsibility to guarantee funds for closure of the facility, a requirement to engage in corrective action (i.e., cleanup) for any releases of hazardous constituents from solid waste management units at the facility, and a plan to close the facility in an environmentally sound manner. 42 U.S.C. 6925; 40 C.F.R. Parts 264, 270, 271. The permitting program and the substantive requirements applicable to those who treat, store, or dispose of hazardous waste are contained in Subtitle C of RCRA.

The term "hazardous waste" refers to those solid wastes that may "(A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or (B) pose 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).

The terms "solid waste" and "hazardous waste" are defined for purposes of the regulatory program under Subtitle C of RCRA, at 40 C.F.R. 261.2 (solid waste) and 40 C.F.R. 261.3 (hazardous waste).

EPA's authority to remediate "the past or present handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste" that "may present an imminent and substantial endangerment to human health or the environment" is contained in section 7003 of RCRA. 42 U.S.C. 6973.

Section 7003 provides, in pertinent part:

Notwithstanding any other provision of this chapter, upon receipt of evidence that the past or present handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment, the Administrator may bring suit . . . against any person . . . to restrain such person from such handling, storage, treatment, transportation, or disposal, to order such person to take such other action as may be necessary, or both.

42 U.S.C. 6973(a). Section 7003 provides broad remedial authority. When a swift, injunctive response to an existing hazard is essential, section 7003 fills the gap left by RCRA's

essentially prophylactic manifesting, permitting, and reporting requirements. Congress intended Section 7003 to be construed broadly:

An endangerment means a risk of a harm, not necessarily actual harm, and proof that the past or present handling, storage, treatment, transportation or disposal of any solid or hazardous waste may present an imminent and substantial endangerment is grounds for an action seeking equitable relief The primary intent of the provision is to protect human health and the environment....

Senate Committee on Environment and Public Works, Report on Solid Waste Disposal Act Amendments of 1983, S. Rep. No. 284, 98th Cong., 1st Sess. 59 (1983).

Private citizens may bring civil actions to enforce RCRA under section 7002, 42 U.S.C. 6972. In 1984 Congress amended section 7002 to provide a private cause of action analogous to section 7003's imminent and substantial endangerment provision. Hazardous and Solid Waste Amendments of 1984, P.L. No. 98-616, section 401, 98 Stat. 3221 (1984). The amendments were in direct response to prior judicial decisions declaring section 7003 remedies unavailable to those bringing citizens' suits. See United States v. Hooker Chemicals & Plastics Corp., 749 F.2d 968, 978-82 (2d Cir. 1984). Under the citizen suit provision:

. . . any person may commence a civil action on his own behalf--

(B) against any person . . . who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment. . . .

42 U.S.C. 6972(a)(1)(B). Congress intended this imminent and substantial endangerment provision of section 7002 to allow citizens "exactly the same broad substantive and procedural claim for relief which is already available to the United State[s] under section 7003." S. Rep. No. 284, 98th Cong., 1st Sess. 56 (1983).

C. Factual Background and Proceedings Below.

This case involves a trap and skeet shooting club operated by Remington Arms (Remington), which is located in Stratford, Connecticut on Long Island Sound. Skeet shooting activities were conducted at Remington for over fifty years. Expended shot and target fragments have been deposited on Remington's property and in the Sound.

In its amended complaint, filed October 21, 1987, plaintiff Connecticut Coastal Fishermen's Association (CCFA) alleges violations of the Clean Water Act (CWA) and RCRA resulting from the deposition of lead shot and of clay targets on the land and in the water from use of the facility as a shooting range. The complaint alleges that the lead shot and clay targets are hazardous waste which was disposed of at the facility without a permit in violation of RCRA. Amended Complaint, Para. 36-8, 42-4. Plaintiff seeks relief for these alleged violations under RCRA section 7002(a)(1)(A), 42 U.S.C. 6972(a)(1)(A), which authorizes citizens to enforce EPA's hazardous waste regulations that implement Subtitle C of RCRA. Amended Complaint, Para. 54-7. Plaintiff also seeks relief under section 7002(a)(1)(B), 42

U.S.C. 6972(a)(1)(B), which, as explained above, authorizes citizens to seek injunctive relief to remediate hazardous waste management activities that may cause imminent and substantial harm to human health or the environment. Amended Complaint, Para. 58-9. In addition, the complaint alleges that discharge of lead shot and clay targets into the Sound violates section 301(a) of the CWA, 33 U.S.C. 1311(a), because it is a discharge of a pollutant without a permit as required by section 402 of the CWA, 33 U.S.C. 1342, and because it is the discharge of fill material without a permit as required by section 404 of the CWA, 33 U.S.C. 1344. Amended Complaint, Para. 46-53.

The district court noted that approximately 4 million pounds of lead shot and 11 million pounds of target fragments have been deposited at the gun club. Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co., et al., 777 F. Supp. 173, 176, 183 n.23 (D. Conn. 1991). Plaintiff alleges that there has been an adverse impact on wildlife from ingestion of the lead shot and clay target debris. Amended Complaint, Para. 26, 32.

The Connecticut Department of Environmental Protection (DEP) has been interested in remediating this site since 1985. It ordered Remington to terminate all use of lead shot in 1986 and to develop a plan for the remediation of the lead shot and the larger target fragments. 777 F. Supp. at 176. Plaintiff objects to the limited scope of the remediation ordered by the DEP, particularly with respect to the target fragments, which they allege to contain carcinogenic polyaromatic hydrocarbons. *Id.*

On cross motions for summary judgment, the district court dismissed the plaintiff's CWA claims, finding that they were barred under section 309(g)(6)(A) of the CWA, 33 U.S.C. 1319(g)(6)(A), because of the existence of the prior DEP administrative compliance orders.²

With respect to the RCRA claims, the district court held that the lead shot and target fragments are solid waste under RCRA, and that the lead shot is also a hazardous waste. It held that there is a genuine dispute of fact as to whether the target fragments are hazardous waste. 777 F. Supp. at 194-95.

In determining that the lead shot and target fragments are solid waste, the court focused on whether they are "discarded materials" under the statutory definition of solid waste in 42 U.S.C. 6903(27). It held that the lead shot and target debris were "abandoned by being disposed of" and were for that reason "discarded materials" within the definition of "solid wastes." 777 F. Supp. 188, 194. The court rejected defendants' argument, based in part on a regulatory interpretive letter by the director of the Office of Solid Waste at EPA, that these items are not discarded, but were instead placed on the land in the normal use of the product. The Court held that shooting at targets is

2/ The United States has already filed with the Court briefs in North and South Rivers Watershed Ass'n v. Town of Scituate, No. 91-1255 (1st Cir.) and Washington Public Interest Research Group v. Pendleton Woolen Mills, No. 92-35105 (9th Cir.), which outline its view as to the scope of section 309(g)(6)(A) of the CWA, 33 U.S.C. 1319(g)(6)(A), and will not reiterate that view here.

itself an act of discarding lead shot, target debris, and spent cartridges. 777 F. Supp. at 193.

Both parties appealed from aspects of the district court's order. The case has been fully briefed, and oral argument was held on June 11, 1992.

SUMMARY OF ARGUMENT

The Court has requested EPA's views on whether the deposited lead shot and target fragment are "solid wastes," a prerequisite to their being "hazardous wastes." 42 U.S.C. 6904(5). In responding, it is important for the Court to realize that the question needs to be addressed with respect to each of plaintiff's RCRA claims -- the claim under section 7002(a)(1)(A) to enforce EPA's hazardous waste regulations and the claim under section 7002(a)(1)(B) to abate an imminent and substantial endangerment. Thus, the first issue is whether EPA's regulatory definition of "solid waste," found at 40 C.F.R. 261.2, applies. If the lead shot and target fragments fall within the regulatory definition of solid waste (and if they are also found to be hazardous wastes), these wastes are subject to the comprehensive, prospective controls applied to industrial and other hazardous wastes. These controls include as permitting requirements, land disposal restrictions, and technical standards for operating the facility.

In addition, the Court must examine whether the expended shot and target fragments are solid wastes under the statutory definition of solid waste in section 1004(27) of RCRA. 42 U.S.C.

6903(27). This is the definition that applies to plaintiff's claim under section 7002(a)(1)(B), 42 U.S.C. 6972(a)(1)(B), that Remington's activities presents a substantial endangerment to human health and the environment.

We address each of these points below. Our view is that the expended shot and target fragments are not solid wastes under the regulations; therefore, the hazardous waste regulations do not apply to the facility's activities. However, we interpret the more encompassing statutory definition to apply to the expended shot and targets with the result that citizen suits and government enforcement actions seeking remediation can be brought if these shooting activities may create an imminent and substantial endangerment.³

ARGUMENT

I. THE EXPENDED SHOT AND TARGETS ARE NOT SOLID WASTES UNDER EPA'S REGULATIONS

Our view is that the district court erred in holding that the discharge of lead shot and target fragments in the normal use of those products at a shooting range is the "abandonment" of those materials "by being disposed of" pursuant to 40 C.F.R. 261.2(a) & (b). With certain exceptions that do not apply here, the regulations indicate that a "solid waste" is "any discarded

3/ We note that there is an exception to the statutory definition of "solid waste" in RCRA for "industrial discharges which are point sources subject to permits under [section 402 of the Clean Water Act]," 33 U.S.C. 1342. See 42 U.S.C. 6903(27). The Court has not requested EPA's view on the scope of section 402 of the Clean Water Act.

material." 40 C.F.R. 261.2(a)(1). A "discarded material" is defined as including materials which are "abandoned." 40 C.F.R. 261.2(a)(2). The regulations then indicate that "[m]aterials 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(b).

The district court held that the lead shot and target fragments are abandoned by being disposed of and are, therefore, solid waste.⁴ 777 F. Supp. at 188, 194. We disagree. The regulations do not classify as solid wastes those commercial products whose use involves application to the land, or whose use necessarily entails land application, when those products are used in their normal manner. EPA has consistently declined to regulate under RCRA the use of products, and we adhere to that position in the case at bar.

4/ CCFA's complaint also alleges that the lead shot and target fragments were being "stored" on the grounds of the gun club. Amended Complaint, para. 41. This contention was not addressed by the district court, and CCFA barely mentions it on appeal, but it is, in any case, unavailing. Under the regulations, "storage" is "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. Since there is nothing temporary about the situation of the lead shot or target fragments on the Remington site, it is not "storage" under the regulations. Furthermore, even if Remington were to remove the lead shot and target fragments every ninety days, it would not be in compliance with the regulations governing the temporary accumulation of hazardous waste, which require the waste to be placed in a closed container, in tanks meeting specified design standards, or on drip pads. 40 C.F.R. 262.34(a)(1).

EPA has repeatedly taken the position that its regulatory jurisdiction under RCRA does not apply to products that are applied to the land in the ordinary manner of use. Most importantly, for purposes of this litigation, EPA took such a position with respect to the discharge of ammunition and expended cartridges in an interpretive letter written by Sylvia Lowrance, Director of EPA's Office of Solid Waste, to Jane Magee, Assistant Commissioner for Solid and Hazardous Waste Management, Indiana Department of Environmental Management, Sept. 6, 1988, which is in the record at App. 459-60. In the letter, which addresses the issue of "the applicability of ... RCRA .. regulations to shooting ranges," Ms. Lowrance takes the position that Indiana University's shooting ranges are not hazardous waste disposal facilities subject to regulation under Subtitle C of RCRA because the ammunition has not been discarded.

The discharge of ball and sport ammunition at shooting ranges does not, in our opinion, constitute hazardous waste disposal. This is because we do not consider the rounds to be discarded, which is a necessary criterion to be met before a material can be considered a solid waste, and, subsequently, a hazardous waste (see 40 CFR 261.3(a)). Rather, the shooting of bullets is within the normal and expected use pattern of the manufactured product. This interpretation extends to the expended cartridges and unexploded bullets that fall to the ground during the shooting exercise.

App. at 459. In the interpretive letter, EPA analogized the discharge of ammunition to "the use of pesticides whereby the expected, normal use of a pesticide may result in some discharge

to the soils." App. at 459. Thus, as the letter indicates, EPA has disclaimed regulatory jurisdiction pursuant to RCRA over other situations, such as the use of a pesticide, in which use of a product involves leaving that product on the land. See 50 Fed. Reg. 614, 628 (Jan. 4, 1985) (EPA notes that it is not asserting RCRA regulatory jurisdiction over pesticide applications because this activity involves use of a product, not recycling of a waste).

EPA's view that ordnance is not discarded material, as expressed in its interpretive letter, is also repeated in the preamble to its proposed regulations for corrective action for solid waste management units at hazardous waste management facilities. There, as here, EPA argues that ordnance is not discarded material because it would be expected to land on the ground and that the "ordinary use" of ordnance therefore includes placement on land. 55 Fed. Reg. 30798, 30809 (July 27, 1990).

The "normal use" exception to the definition of "discarded material" is echoed in other regulatory exceptions to the definition of "solid waste." In particular, discarded commercial chemical products are hazardous wastes "when they are otherwise applied to the land in lieu of their original intended use or when they are contained in products that are applied to the land in lieu of their original intended use." 40 C.F.R. 261.33 (emphasis added). Thus, by implication at least, such products are not hazardous wastes when they are applied to the land and

that is their original intended use.⁵ There is a parallel exception as to those categories of materials that are solid wastes when recycled -- or accumulated, stored, or treated before recycling -- for commercial chemical products that "are applied to the land and that is their ordinary manner of use." 40 C.F.R. 261.2(c)(1)(ii). Although this exception would not apply to the lead shot or clay targets, it confirms EPA's consistent position that regulatory jurisdiction under RCRA does not apply to products that are applied to the land in the ordinary manner of use.

Although the district court did not find EPA's interpretation of the regulations, as expressed in the interpretive letter, to be persuasive, 777 F. Supp. at 188, this Court should sustain EPA's interpretation as reasonable. First, this Court should give EPA's interpretation of its own regulations substantial deference. Beazer East, Inc. v. U.S. EPA, Region III, 963 F.2d 603, 606-07 (3d Cir. 1992) (court should defer to agency's construction of its own regulation, unless plainly erroneous or inconsistent with the regulation); Chemical Waste Management v. EPA, 869 F.2d 1526, 1539 (D.C. Cir. 1989) (an agency's interpretation of its own regulations will be accepted unless it is plainly wrong); see also Wagner Seed Co. v.

5/ Neither party appears to claim that the lead shot or the target debris constitutes a commercially pure grade of any chemical such as would qualify it as a commercial chemical product under 40 C.F.R. 261.33. See the Comment following 40 C.F.R. 261.33(d).

Bush, 946 F.2d 918, 922 (D.C. Cir. 1991) (interpretive letter ruling is entitled to deference), cert. denied, 112 S.Ct. 1584 (1992). A high degree of deference is particularly appropriate when Congress has implicitly delegated interpretive authority to the agency by its use of "highly general terms, which are neither perfectly 'clear,' nor clearly express an 'unambiguous' congressional intent as to scope or precise boundaries." Comite Pro Rescate de la Salud v. Puerto Rico Aqueduct and Sewer Authority (PRASA), 888 F.2d 180, 185 (1st Cir. 1989) (accepting EPA's interpretation of the term "domestic sewage" in the exclusion to RCRA's statutory definition of "solid waste"), cert. denied, 494 U.S. 1029 (1990). See Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 843 & n.9 (1984) (when statute is ambiguous, administering agency is entitled to make a reasonable policy choice); American Mining Congress v. EPA, 907 F.2d 1179, 1186 (D.C. Cir. 1990) (the term "discarded" in statutory definition of solid waste is "marked by the kind of ambiguity demanding resolution by the agency's delegated lawmaking powers").

It is not "plainly wrong" for EPA to view use of a product as not involving the product's abandonment by disposal. A shooter does not "abandon" lead shot or targets in the process of skeet or trap shooting. The ammunition and the target are being used as they were intended to be used by their manufacturers. Certainly the focus of the shooter's activity is not to rid himself of the shot and targets, but instead to use them. The fact that the shot and targets ultimately end up in contact with

the environment much in the way that wastes do is not dispositive. The D.C. Circuit rejected the idea of a functional definition for "discarded" in American Mining Congress v. EPA, 824 F.2d 1177, 1190 n.18 (D.C. Cir. 1987). See also 50 Fed. Reg. 627 (Jan. 4, 1985) ("abandoned" simply means "thrown away"). Under the normal use of the term "discarded," the shooting of a gun at a clay target is not the same as the "discarding" or "abandoning" of either the ammunition or the target.

This was also the view of the only prior case to address this issue. In Barcelo v. Brown, 478 F. Supp. 646, 669 (D. P.R. 1979), rev'd in part on other grounds, 643 F.2d 835 (1st Cir. 1981), rev'd sub nom. Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982), the district court held that the discharge of ordnance is not the discarding of material within the definition of solid waste in RCRA. The district court in the instant case declined to follow Barcelo on the ground that "[t]he basis for the Court's holding was that military operations are specifically not covered by RCRA," 777 F. Supp. at 192, but in fact the Barcelo opinion also asserts that "it is obvious that [the discharge of ordnance] although causing the incidental depositing of debris [is] not the discarding of material." Barcelo, 478 F. Supp. at 669. This Court should not find "clearly wrong" an interpretation of the term "discarded materials" that another court found to be "obvious."

An additional reason for deferring to the agency's regulatory interpretation of "discarded material" is that that

term "constitutes a small part of a comprehensive regulatory scheme that Congress entrusted the EPA to administer." PRASA, 888 F.2d at 185. In such a context, the PRASA court held, "considerable weight" should be given to EPA's construction. Id. at 186. Here, as in PRASA:

The proper application of the definitional exception raises the very sort of interstitial legal question, related to proper administration of a complex statutory scheme, to which an agency is often in a better position than a court to offer a proper answer.

Id.

EPA is appropriately exercising its discretion in excluding the use of lead shot and target debris from the comprehensive Subtitle C regulatory program. Under the current regulations, if lead shot and target debris used in the normal manner are hazardous waste, then target ranges would be hazardous waste disposal facilities.⁶ These facilities would have to meet the full panoply of RCRA regulations. Among other obligations, these facilities would have to obtain RCRA permits -- a very expensive and time consuming proposition -- and be designed with features,

^{6/} A "disposal facility" means "a facility ... at which hazardous waste is intentionally placed into or on any land or water, and at which waste will remain after closure." 40 C.F.R. 260.10. "Disposal" includes the "placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment." 42 U.S.C. 6903(3). By letter to the court, defendants' counsel has conceded that if the lead shot is hazardous waste, placement of the shot on the land or water is "disposal" requiring a RCRA permit. Letter from Mark R. Sussman to the Honorable Richard J. Cardamone, the Honorable Ralph K. Winter, and the Honorable J. Daniel Mahoney, June 17, 1992.

such as double liners, leachate collection systems, groundwater monitoring, etc., that were not adopted nor are suitable for target ranges. See generally 40 C.F.R. Parts 264 and 265 subpart N (standards for landfills). In addition, the expended lead shot and targets (if hazardous wastes) would have to be treated prior to land disposal, i.e., before touching the earth, in order to comply with the land disposal restrictions of 40 C.F.R. Part 268. See American Petroleum Institute v. EPA, 906 F.2d 729, 736 (D.C. Cir. 1990) (pretreatment of hazardous wastes must occur before land disposal takes place). Obviously, compliance with these requirements would not be feasible. Thus, the practical effect of a determination that the lead shot and targets fragments are solid waste under the current comprehensive set of RCRA regulations is that shooting ranges would not likely be able to remain in operation and still comply with the RCRA regulations. EPA does not interpret its regulations to create this result. See PRASA, 888 F.2d at 187 (construing definition of solid waste narrowly for regulatory purposes to avoid imposition of Subtitle C regulatory requirements on particular types of facilities is reasonable).⁷

2/ The district court rejected defendants' argument as to the "administrative nightmare" that would be caused by applying RCRA regulations to shooting activities, reasoning that a solid waste is not considered hazardous waste unless it meets a quantity threshold. 777 F. Supp. at 188-89. The district court's analysis was flawed. First, the district court was mistaken in asserting that solid wastes become hazardous wastes under the regulations based on the quantity accumulated. Instead, a solid waste is a hazardous waste (irrespective of the quantity of that
(continued...)

In short, the Agency has adopted a reasonable construction of its own regulations which this Court should uphold.⁸

7/ (...continued)

waste) if it is either listed specifically as a hazardous waste or if it exhibits a property known as a characteristic. 40 C.F.R. 261.3(a)(2)(i) and (ii). Neither the lead shot nor the targets are listed as hazardous wastes. To determine whether they exhibit a characteristic, a specific test protocol must be used (which simulates conditions the material would be exposed to in an unsecure landfill environment) to determine the concentration of certain chemicals, including lead, that would be found in the extract. See 40 C.F.R. 261.24. The question of whether the targets and lead shot exhibit a characteristic of hazardous waste is an issue of fact as to which we express no view.

The rules do create an exemption from regulation for hazardous wastes generated by small quantity generators. 40 C.F.R. 261.5(a) & (b); 42 U.S.C. 6921(d). These rules provide (for purposes relevant here) that hazardous wastes generated by a generator who generates less than 100 kilograms (220 pounds) of hazardous waste in a month are not subject to most of the Subtitle C regulations. This determination is made on a month-to-month basis. In addition, if such a generator accumulates more than 1000 kilograms of hazardous waste on-site at any time, all of the accumulated hazardous wastes become subject to regulation. 40 C.F.R. 261.5(g)(2). This threshold is so low that it would probably not apply to many, if any, shooting ranges, although it should exempt most individual hunters.

8/ The plaintiff has cited a corrective action order issued by EPA's Region I against a Remington Arms manufacturing and testing facility in Bridgeport, Connecticut. The order identified certain target shooting areas at the facility as areas of concern for purposes of corrective action pursuant to 42 U.S.C. 6928(h). The order contained no discussion of why these shooting areas were subject to RCRA corrective action authority. To the extent the order was based on the theory that expended shot is a regulatory solid waste, it is inconsistent with EPA's interpretation of its regulations.

II. RCRA REMEDIAL ACTIONS TO ABATE IMMINENT AND SUBSTANTIAL ENDANGERMENTS CAUSED BY EXPENDED SHOT AND TARGET FRAGMENTS ARE NOT FORECLOSED BY EPA'S FAILURE TO INCLUDE THESE MATERIALS IN THE REGULATORY DEFINITION OF SOLID WASTE.

Although, as explained above, the expended lead shot and target fragments do not fall within the regulatory definition of "solid waste," they still may provide a basis for plaintiff's imminent and substantial endangerment claim because RCRA's statutory definition of solid waste, and not EPA's regulatory definition, control such actions.

The plaintiff's RCRA claim for injunctive relief from waste management that may present an "imminent and substantial endangerment to health or the environment" was brought under section 7002(a)(1)(B) of RCRA's citizen suit provision. 42 U.S.C. 6972(a)(1)(B). As discussed above, the United States may bring such actions under section 7003. 42 U.S.C. 6973. In failing to apply the statutory definition of solid waste to plaintiff's imminent and substantial endangerment claim, the district court erred. The regulations unambiguously state that the regulatory definition of solid waste applies only for purposes of implementing Subtitle C of RCRA, the hazardous waste provisions, 40 C.F.R. 261.1(b)(1), and that the broader statutory definition applies for purposes of the imminent and substantial endangerment authorities. 40 C.F.R. 261.1(b)(1) ("A material which is not defined as a solid waste in this part, ... is still a solid waste...if...in the case of section 7003[, the imminent and substantial endangerment authority], the statutory elements are

established"). The citizen suit imminent hazard provision, section 7002(a)(1)(B), had not yet been enacted at the time EPA wrote this regulation. However, as the First Circuit has held, the statutory definition applies for purposes of section 7002(a)(1)(B) as well. PRASA, 888 F.2d at 187.

The explanations EPA gave when proposing and finally promulgating the RCRA Subtitle C regulations have consistently borne out its clear intent, based in turn upon its analysis of Congress's intent, to apply a broader interpretation to the terms "hazardous waste" and "solid waste" for purposes of its imminent and substantial endangerment authority than for its Subtitle C regulatory program. In 1980, in promulgating regulations for the identification and listing of hazardous waste, EPA explained that

although this regulation limits what may be regulated as a "hazardous waste" under [Subtitle C] of RCRA, it does not limit those materials which may be considered "hazardous wastes" under other sections of the statute, particularly ... Section 7003.... Unlike Sections 3002 through 3004 and Section 3010, Congress did not confine the operations of Section ... 7003 to "hazardous wastes identified or listed under this subtitle".

45 Fed. Reg. 33084, 33090 (May 19, 1980) (emphasis in original). In proposing amendments to the regulatory definition of solid waste in 1983, EPA reiterated that "the proposed definition is part of the process of identifying hazardous wastes for purposes of Subtitle C, and has no other applicability. Consequently, these other statutory provisions [including section 7003] need not be limited to the materials covered by this definition." 48 Fed. Reg. 14472, 14484 (April 4, 1983). Yet again in 1985, in

issuing the final rule, EPA explained that the statutory definitions of solid and hazardous waste would apply, rather than the regulatory definitions, when Section 7003 was involved. 50 Fed. Reg. 614, 627 (January 4, 1985). EPA observed that:

[T]he regulatory definition [of solid waste] does not limit the Agency's jurisdiction under Section ... 7003 of RCRA. Rather, the statutory definitions of solid and hazardous waste will apply when these provisions are involved. ... Congress clearly intended a broader definition of waste to apply when [an imminent and substantial endangerment is] involved.

Id.

Furthermore, section 7003 is not subject to Subtitle C's limitations because it is not within Subtitle C, and, as section 7003 plainly reads, an action under section 7003 shall lie "[n]otwithstanding any other provision of this chapter." 42 U.S.C. 6973(a). As the Fourth Circuit recognized in determining that "disposal" for purposes of section 7003 was governed by the statute's definitional section, rather than by the more restrictive use of that term in EPA's Subtitle C regulations: "Section 7003 does not . . . depend on regulations for its application. It became operative upon enactment without need for the promulgation of regulations." United States v. Waste Industries, Inc., 734 F.2d 159, 168 (4th Cir. 1984). It noted further that section 7003 "provide[s] a remedy for environmental endangerment by hazardous or solid waste, whether or not those engaging in the endangering acts are subject to any other provision of the Act". Id. at 164.

EPA applies a broader definition of solid waste for remedial purposes than for regulatory purposes in order to preserve the widest possible latitude for imminent threats to the public and the environment and to limit RCRA's prospective regulatory requirements to waste management activities that warrant comprehensive regulation from time of generation until final disposition. There is no contradiction in applying a narrower interpretation of the term "discarded" for regulatory purposes than for remedial purposes. This was the precise type of issue addressed by the First Circuit in PRASA, where the court accepted EPA's narrow construction of the "domestic sewage" exclusion to the statutory definition of "solid waste" so as to preserve its imminent hazard authority even though EPA applied a different definition for regulatory purposes so as to avoid unwarranted imposition of burdensome Subtitle C regulations. PRASA, 888 F.2d at 187. The court concluded that "interpreting the same words somewhat differently as they apply to different parts of the statute" makes sense when necessary "to permit that statute to fulfill its basic congressionally determined purposes." *Id.* See also Mobil Oil Corp. v. EPA, 871 F.2d 149, 151-54 (D.C. Cir. 1989) (upholding different constructions of the same statutory term ("facility") in different Subtitle C provisions where the opposing constructions each reasonably furthered statutory goals

and purposes); United Technologies Corp. v. EPA, 821 F.2d 714, 721-23 (D.C. Cir. 1987) (same).⁹

Just as in the PRASA and Waste Industries cases, it is perfectly reasonable to interpret a term -- here, "solid waste" -- more restrictively for regulatory purposes than for purposes of the imminent and substantial endangerment authority. Excluding lead shot and target fragments used in the normal course of skeet and trap shooting from the regulatory definition of "solid waste" makes sense because those regulatory requirements were not designed for this type of activity and would, in the vast majority of cases, result in unnecessary regulation. However, an interpretation under which these activities are included in the broader statutory definition of "solid waste" applicable to RCRA remedial authorities is also reasonable since, in those instances in which lead shot and target fragments are never recovered and may create an imminent and substantial endangerment, remedial intervention may be required.

2/ It should be noted that the Agency's 1988 interpretive letter, discussed supra, pp. 12-13, only interpreted the regulatory definition of solid waste. See App. at 459. ("This is in response to your letter on the applicability of ... RCRA ... regulations to shooting ranges. In your letter you indicated that [you have] received a preliminary notice of intent to sue under RCRA, alleging that the university shooting ranges are hazardous waste landfills, fully subject to the requirement for an operating permit and all applicable facility standards.") The memorandum this does not express any view as to whether the expended shot at target ranges can be a solid waste for purposes of the imminent hazard authorities in section 7002(a)(1)(B) and 7003.

Furthermore, a construction of the language of the statutory definition of "solid waste" so as to include the expended shot and target fragments at issue in this case is reasonable. The literal meaning of "discarded" certainly can encompass shot and targets released into the environment and left to accumulate long after they have served their intended purpose. In other words, the ammunition and target fragments, if left on the ground indefinitely, eventually become discarded materials within the statutory definition of "solid waste." They still remain exempt from RCRA's comprehensive Subtitle C regulation, however, because EPA has not chosen to exercise its full regulatory authority under the statute.¹⁰ Therefore, deference to EPA's

^{10/} There are certain activities involving use of products resulting in deposit of hazardous materials on the land that EPA does not view as within either the regulatory or statutory solid waste definitions. EPA does not regard authorized use of pesticides to be covered by either the regulatory or remedial authorities. Such use is controlled comprehensively under another environmental statute, the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). 7 U.S.C. 136 et seq. RCRA regulation of any type would interfere with this carefully crafted, plenary regulatory scheme. See PRASA, 888 F.2d at 185 (EPA has considerable discretion to determine appropriate interface of jurisdiction between RCRA solid waste definition and the other environmental statutes it administers). Furthermore, RCRA instructs EPA to "integrate all provisions of this Act for purposes of administration and enforcement and shall avoid duplication, to the maximum extent practicable, with the appropriate provisions" of the other environmental statutes it administers, including FIFRA. 42 U.S.C. 6905(b). This provision reinforces the reasonableness of EPA's disclaimer of RCRA jurisdiction over activities comprehensively regulated under FIFRA.

EPA also does not view RCRA regulatory or statutory authorities as applying to use and deposition of ordnance by the military. EPA accepts the view of the district court in Barcelo (continued...)

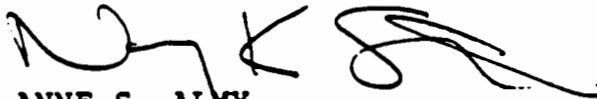
interpretation of the statutory definition of "solid waste" is appropriate.

CONCLUSION

For all the foregoing reasons, the district court's ruling on plaintiff's motion for summary judgment on the RCRA claims should be reversed in part and the case remanded for further proceedings.

Respectfully submitted,

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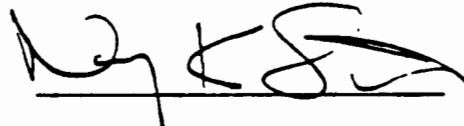
v. Brown, 478 F. Supp. at 669, that RCRA does not apply to specifically military activities like discharging ordnance. 55 Fed. Reg. 30798, 30809 (July 27, 1990) ("materials resulting from uniquely military activities engaged in by no other parties fall outside the definition of solid waste"). That is also the view expressed by the district court in this case. 777 F. Supp. at 192.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief for the United States as Amicus Curiae has been served upon counsel by placing the same in first-class mail, postage prepaid and properly addressed, this 28th day of August 1992, to the following:

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A handwritten signature in dark ink, appearing to read 'Nancy R. Stoner', is written over a horizontal line.

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August 28, 1992