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MEASURING BRIEF*

Civ. App. No. 01-878

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

BIRDWATCHERS OF GROVETON, INC.,
and
United States,
Appellants,
v.
Suave Real Properties, Inc.,
Appellee.

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

BRIEF FOR APELLANT, UNITED STATES

OHIO NORTHERN UNIVERSITY PETTIT COLLEGE OF LAW

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* This brief has been reprinted in its original form.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the district court erred in holding that Suave, Inc. did not violate the Clean Water Act (CWA) because Sheldrake Pond is not navigable water under the CWA §§ 33 U.S.C. 1311(a), 1362(7) and (12), and; whether this case is governed by the amendment made to § 1362(7) in 2001 and if so whether that amendment extends the jurisdiction of the CWA over Sheldrake Pond.
2. Whether the district court erred in holding that neither the Commerce Clause nor the Treaty Clause of the Constitution justify federal regulation of water pollution in Sheldrake Pond.
3. Whether the district court erred in holding that fired shot and skeet parts are not solid waste when they fall to the ground under the Environmental Protection Agency's definition of solid waste in 40 C.F.R. § 261.2.
4. Whether the district court erred in holding that fired shot and skeet parts are not solid waste when they fall to the ground under 42 U.S.C. § 6972(a)(1)(B).

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PROCEDURAL HISTORY

This is an appeal from an order entered by Judge Romulus in the United States District Court for the District of New Union on the defendant's motion for summary judgment. The district court, in its decision below, dismissed a suit initially brought by Birdwatchers of Groveton, Inc. ("BOG") against Suave Real Properties, Inc. ("Suave"), seeking civil penalties and injunctive relief under the citizen suit provisions of the Clean Water Act ("CWA") and the Resource Conservation and Recovery Act ("RCRA"). (R. at 3–4). The district court granted Suave's motion in its entirety, and justified its decision on two grounds. The court held that BOG's action does not fall under the coverage of the CWA because Sheldrake Pond was not a "navigable water" in either a statutory or a constitutional sense; and that the action was not proper under RCRA because Suave's disposal of skeet parts and lead shot did not constitute the disposal of solid waste. (R. at 4).

The district court had previously granted the United States' motion to intervene in the action on behalf of the United States Environmental Protection Agency ("EPA"). (R. at 1). The United States is now an appellant in this case, challenging the lower court's holding that Sheldrake Pond is not statutorily or constitutionally a navigable water for purposes of the CWA, as well as the court's holding that the skeet parts and lead shot discharged by Suave are not solid waste under RCRA. The United States does support one portion of the lower court's ruling. That is, that fired shot and skeet parts do not fall under the EPA's regulations at 40 C.F.R. § 261.2. The United States, however, opposes the ultimate judgment of the lower court, dismissing BOG's action against Suave.

STATEMENT OF THE FACTS

BOG is a non-profit corporation whose members are birdwatchers who live in Groveton County. (R. at 3). Its members watched birds on Sheldrake Pond from Groveton County land for at least 20 years until the year 2000 when Suave began operating a shooting range near the pond. (R. at 3). Over that period of time, members of the organization observed numerous species of birds, including many species of migratory birds. (R. at 3).

Sheldrake Pond is a long, narrow, shallow pond. It is dry during part of the year, and during the wet season it does not exceed

four feet in depth or twenty-five acres in extent. (R. at 3). It is an important stopover for many species of migratory birds.

Suave is a real estate management company which operates the Groveton Rifle and Pistol Association ("GRAPA") near Sheldrake Pond. (R. at 3). Suave owns land to the west and south of the Pond, and part of the western end of the Pond itself. The remainder of the Pond and surrounding land is owned by Groveton County. (R. at 3).

The GRAPA facility owned by Suave contains a firing range, a pad for skeet shooters to stand on, and a device which launches skeet into the air. The skeet launching device sits on a platform at the western end of the Pond. In order for the platform to be built Suave filled a portion of the western end of the Pond. (R. at 3).

Skeet from the ejection device is launched over Sheldrake Pond, while skeet shooters stand a distance back from the pond and attempt to shoot the ejected skeet. (R. at 3). Whether the material is hit or missed by the skeet shooters, skeet parts and lead shot fall into and around the Pond. Lead bullets from the firing range are also occasionally discharged into the Pond. (R. at 3-4). Both the skeet, lead shot and bullets commonly fall into both the county-owned portions of the Pond and surrounding land as well as onto areas owned by Suave. (R. at 3-4).

On December 20, 2000, BOG filed a complaint against Suave under provisions of both the CWA and RCRA. First, BOG alleges that Suave is violating the CWA by putting and maintaining fill material into the Pond, which BOG alleges is a navigable water, without a permit provided for under 33 U.S.C. § 1344. BOG maintains that this constitutes a violation of 33 U.S.C. § 1311(a). BOG further alleges that the skeet parts, lead shot, and bullets which are discharged into the Pond constitute a discharge of fill materials and/or pollutants into a navigable water without a CWA permit, also in violation of 33 U.S.C. 1311(a). BOG seeks both civil penalties and injunctive relief against Suave.

BOG alleges that Suave's actions violate RCRA as well. First, it alleges that Suave's discharges violate 42 U.S.C. § 6925(a) because they constitute a disposal of hazardous waste without a RCRA permit. BOG asks the court to remedy this portion of the alleged RCRA violations by issuing an injunction and assessing civil penalties against Suave. BOG also alleges that Suave's disposal of skeet, lead shot and bullets in and around the pond cre-

ates a cause of action under 42 U.S.C. § 6972(a)(1)(B) by creating an imminent and substantial endangerment.

STANDARD OF REVIEW

This appeal seeks a reversal of the district court's grant of summary judgement. The district court's dismissal of the claims which BOG brought under the CWA and RCRA present a legal issue. In reviewing questions of law, the court must apply a *de novo* standard of review. *Bechtel Cont. Co. v. Sec'y of Labor*, 50 F.3d 926, 931 (11th Cir. 1995); *Salde Regina Coll. v. Russell*, 499 U.S. 1217 (1991). A *de novo* standard of review is the standard the court must apply in this case.

SUMMARY OF THE ARGUMENT

This court should reverse those portions of the district court's holding which held that Sheldrake Pond is not a navigable water and thus cannot be regulated under the CWA, that extending CWA jurisdiction over the pond would exceed Congress' constitutional authority, and that the fired shot and skeet parts discharged by Suave are not solid waste within the meaning of the statutory definition contained in RCRA. This court should affirm the portion of the district court's holding that found that the fired shot and skeet parts do not fall within the narrow regulatory definition of solid waste contained at 40 C.F.R. § 261.2 (2001).

First, Sheldrake Pond is a navigable water and thus, falls under the CWA. Under the statute and regulatory definitions as they existed at the time the complaint was filed, the pond constitutes a navigable water. *See* 33 U.S.C. § 1362(7) (1994); 33 C.F.R. § 328.3 (2001); 40 C.F.R. §§ 122.2, 230.3(s) (2001). Aside from this, the 2001 amendment to the definitional section of the CWA governs this case. A grant of injunctive relief under the amendment would not have retroactive effect. *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 201 (1921). Thus, the traditional presumption against retroactivity does not apply and the amendment should be applied with respect to such relief. *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994). Further, there is evidence of congressional intent that the amendment apply to cases pending at the time of its enactment. This intent may be discerned from the legislative history of the statute. *Ohio ex rel. Brown v. Georgeoff*,562 F. Supp. 1300, 1309 (D.C. Ohio 1983). Due to the presence of this clear congressional intent, the statute must be applied retroactively to grant civil penalties

against Suave, even in the face of the traditional presumption against retroactivity. *Landgraf*, 511 U.S. at 277.

Second, the district court erred in holding that Congress cannot regulate, small, isolated ponds used by migratory birds as resting places. Ponds like Sheldrake Pond are subject to regulation pursuant to the Commerce Clause because they are channels of interstate commerce, are utilized by instrumentalities of interstate commerce and because lack of regulation would have a substantial affect on interstate commerce. *See United States v. Lopez*, 514 U.S. 549 (1995). The established use of Sheldrake Pond by migratory birds makes the pond a channel of interstate commerce. *See Leslie Salt Co. v. United States* 55 F.3d 1388 (9th Cir. 1995). The birds themselves have been recognized as instrumentalities of interstate commerce. *See id.* at 1393-94. The cumulative affect of a lack of regulation on ponds like Sheldrake Pond would have a detrimental effect on interstate commerce. *See National Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1050 (D.C. Cir. 1997).

The district court also erred in ruling that Congress may not regulate Sheldrake Pond and similarly situated bodies of water pursuant to its treaty powers. In its opinion the district court indicated that ruling that the Treaty Powers permitted regulation of Sheldrake Pond would, in effect, allow Congress to regulate an area that it could not otherwise regulate under the Commerce Clause. (R. at 5). However, Congress may take such steps as are necessary and proper to implement treaties. *See Missouri v. Holland*, 252 U.S. 416, 432 (1920). Congress has stated that one of the purposes of the CWA is the protection of wildlife in general. *See* S. Rep. No. 99-445 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6113. Therefore, it would appear that Congress simply meant that the CWA function as another means of effectuating the several treaties that the United States has entered into for the protection of migratory birds and other wildlife in general.

Third, the court correctly held lead shot and skeet parts are not solid waste under the regulatory definition of solid waste. 40 C.F.R. § 261.2. (2001). The EPA's regulatory definition of solid waste is only intended to cover those materials that are subtitle C hazardous waste. *See Conn. Coastal Fisherman's Assoc. v. Remington Arms Co., Inc.*, 989 F.2d 1305 (2nd Cir. 1993). "Dual definitions of solid waste are suggested by the structure and language of RCRA." *Id.* at 1315. Suave's discarded lead shot and skeet parts are materials used for their intended purpose and are therefore

outside the regulatory definition of solid waste. *See Military Toxics Project v. United States EPA*, 146 F.3d 948 (D.C. Cir. 1998).

Finally, the court erred by finding that lead shot and skeet parts are not solid waste for purposes of 42 U.S.C.(a)(1)(B) (1994). The court incorrectly held lead shot and skeet parts were not solid waste under the statutory definition because the court misapplied the consumer use exception. *See Long Island Soundkeeper Fund v. N.Y. Athletic Club,* unreported, No. 94 Civ. 0436 (RPP) 1996 WL 131863 (S.D.N.Y. March 22, 1996). When RCRA was enacted it was clear that Congress wanted to regulate solid waste that had served its intended purpose and was not longer wanted by the consumer. H.R. Rep. No. 94-1419(I), at 2 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6240. The broad definition of solid waste in RCRA includes "any discarded material" but does not include products that are still useful. *Military Toxics Project,* 146 F.3d at 951. Lead shot and skeet parts are not products that are still useful but have served their intended purpose and are no longer wanted by Suave. The EPA's interpretation of the statutory definition was developed under the authority given the EPA by Congress. As it is a reasonable interpretation it should be applied in this case. Therefore, this court should hold that lead shot and skeet parts are solid waste under 42 U.S.C. § 6972(a)(1)(B) and create an imminent and substantial hazard to health and the environment.

ARGUMENT

I. THE DISTRICT COURT ERRED IN HOLDING THAT SHELDRAKE POND IS NOT A NAVIGABLE WATER UNDER THE CWA, 33 U.S.C. §§ 1311(a), 1362(7) & (12), AND THAT THIS CASE IS NOT COVERED BY THE 2001 AMENDMENT TO 1362(7), WHICH WOULD CLEARLY EXTEND CWA JURISDICTION OVER THE POND

Unless a permit has been issued to allow it, section 301 of the Clean Water Act prohibits the discharge of any pollutant, which by definition includes solid waste, into a navigable water. 33 U.S.C. §§ 1311(a), 1362(12) (1994). However, to be covered by the CWA prohibition, a water body must fall within the definition of a "navigable water." The term is defined in section 502 to mean "waters of the United States." 33 U.S.C. § 1362(7) (1994). This definition is elaborated on by the regulations set forth by the EPA

and the Army Corps of Engineers ("Corps"). *See* 33 C.F.R. § 328.3 (2001); 40 C.F.R. §§ 122.2, 230.3(s) (2001). The district court erroneously held Sheldrake Pond is not a "navigable water" and thus, that Suave's discharges into the Pond do not fall under the CWA prohibition.

A. *Sheldrake Pond is a navigable water under 33 U.S.C. §1362(7) as it existed at the time the complaint was filed*

The CWA regulates discharges into navigable waters, which it defines as waters of the United States. The EPA and the Corps both of which enforce the CWA, have regulations defining the term "waters of the United States." *See* 33 C.F.R § 328.3 (2001); 40 C.F.R. §§ 122.2, 230.3(s) (2001). The definitions of this term put forth by both agencies include:

> all waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including . . .intrastate. . . 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 . . . which are or could be used by interstate or foreign travelers for recreational or other purposes . . . .

Id.

In 1986, in an attempt to "clarify" the reach of its jurisdiction under 33 C.F.R. § 328.3, the Corps stated in what became known as the Migratory Bird Rule that CWA jurisdiction extends to intrastate waters "[w]hich are or would be used as habitat by birds protected by Migratory Bird Treaties; or . . .[w]hich are or would be used as habitat by other migratory birds which cross state lines. . .." 51 Fed. Reg. 41217 (1986). On January 9, 2001, the Supreme Court issued *Solid Waste Agency of Northern Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001) ("SWANCC"). In that case, the Supreme Court held that the Migratory Bird Rule as applied to the site in the case, was unenforceable because it exceeded the authority granted to the Corps under the CWA. *Id.* at 174. It is clear, under this decision, that the mere presence of migratory birds will not be enough to extend CWA jurisdiction to a site. It is important to note that the site at issue in the *SWANCC* case was not a wetland, rather, it was an abandoned sand and gravel pit which was being used by migratory birds. The Court did *not*, however, strike down any part of the

underlying regulation which the Migratory Bird Rule was intended to clarify. *Id.* The Court's decision in *SWANCC*, therefore, did not reach the question of whether isolated wetlands may fall under the definition of waters of the United States, and thus be a navigable water on a basis other than those covered in the Migratory Bird Rule. *United States v. Krilich*, 152 F. Supp.2d 983, 988 (N.D. Ill. 2001).

The lower court based its grant of summary judgment with respect to the CWA portions of the complaint, on the fact that the *SWANCC* decision clearly would not allow jurisdiction to extend over isolated wetlands. However, it is clear from the holding of that case as well as the discussion of the district court in *Krilich*, that the *SWANCC* decision was not so far reaching. While the Court's decision did limit the reach of the CWA somewhat, the regulations promulgated by the EPA and the Corps which define the term "waters of the United States" are clearly left intact. In *SWANCC* the Court chose not to determine the exact meaning of "navigable waters" as used in the CWA. *U.S. v. Interstate General Co.*, 152 F. Supp.2d 843 (D. Md. 2001). In doing so, the Supreme Court stated, "The exact meaning of [the term navigable waters as used in §404(g) of the CWA] is not before us and we express no opinion on it." *SWANCC,* 531 U.S. at 171. Under the regulations, the power of Congress to regulate the discharge of pollutants into at least some non-navigable waters is indisputable. Congress can clearly regulate discharges of pollutants that could substantially affect interstate commerce. *See U.S. v. Lopez,* 514 U.S. 549, 558-59 (1995).

In the case at hand, Sheldrake Pond clearly falls within the purview of the regulatory scheme without any necessity for reliance on the Migratory Bird Rule's clarification. Major portions of the Pond are county land and therefore, are open to use by the public. Sheldrake Pond is a wetland or natural pond which is or could be used by interstate travelers for recreational purposes. Aside from containing many species of birds, at a depth of 4 feet and a size of 25 acres Sheldrake Pond could also be used for rafting, wading, swimming, and other recreational purposes. Courts have discussed ponds on private lands with respect to their recreational value. *State of Cal. Ex rel. State Water Resource Control Bd. v. F.E.R.C.*, 966 F.2d 1541, 1550 n.2 (1992); *see also Swift v. Norfolk & Western Ry. Co.*, unreported, No. 94C2117, 1996 WL 437346 at * 3 (N.D. Ill. Aug. 10, 1996). Clearly, if ponds on private land have recreational value for the public at large, a pond on pub-

lic land has even greater value for public recreation. As such Sheldrake Pond clearly falls within the regulatory framework and is subject to regulation under the CWA. Therefore, the Court's decision in *SWANCC* does not reach the determination of this case, and Sheldrake Pond clearly falls under 33 U.S.C. §1362(7) as it existed before the 2001 amendment.

B. *Even if Sheldrake Pond were held not to be a navigable water under the previous version of the statute, the 2001 Amendment governs this case, and extends CWA jurisdiction over the Pond*

In August of 2001, in response to the Supreme Court's decision in *SWANCC*, Congress amended the CWA's definition of "navigable waters." Water Pollution Protection Act of 2001, P.L. 106-720. Under the amendment, the CWA definition was extended to incorporate the EPA's definition of "waters of the United States" from 40 C.F.R. § 122.2. P.L. 106-720 (2001). Due to the 2001 amendment, the statutory definition of "navigable waters" now expressly includes intrastate waters such as playa lakes, "wetlands," prairie potholes, wet meadows, and natural ponds whose degradation could affect interstate commerce, including such waters which could be used by interstate travelers for recreational purposes. *Id.* Thus, even if this court finds that the *SWANCC* decision invalidated the regulations defining "waters of the United States" as beyond the statutory authority of the agency, the statutory amendment constitutes a legislative overruling of that decision, and clearly extends jurisdiction over such waters as the regulation would have covered. Because Sheldrake Pond would clearly fall under the definition of the 2001 amendment under the playa lake, natural pond, and wetland provisions, the application of the amendment would extend CWA jurisdiction over this case.

Further, because it overrules the *SWANCC* case, the 2001 amendment implicitly authorizes the use of the Migratory Bird Rule. The legislative history of the amendment makes this clear stating that the *SWANCC* case misinterpreted congressional intent and acknowledging the importance of migratory birds. S. Rep. 106-528, p. 23 (2001). Under the 2001 amendment CWA jurisdiction is clearly extended over isolated, purely intrastate waters which provide important stopping points for migratory birds.

1. *Under the Landgraf/Lindh analysis the 2001 amendment should be applied to this case*

The Supreme Court has set forth a test for courts to use in determining whether a newly enacted statutory provision may be applied to pending cases. Because such a question is at issue in the case at hand, this test must be used by the court to determine whether application of the 2001 amendment to this case would be appropriate.

The framework for this analysis comes out of two cases: *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994) and *Lindh v. Murphy*, 521 U.S. 320 (1997). Under the *Landgraf* two-step analysis:

> When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e.,* whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, [there is a strong presumption against such application] absent clear congressional intent favoring such a result.

Landgraf, 511 U.S. at 280. In *Lindh* the Court added another step to this analysis, holding that ordinary rules of construction still apply, and "may remove even the possibility of retroactivity (as by rendering the statutory provision wholly inapplicable to a particular case) . . . ." *Lindh,* 521 U.S. at 326.

A fairly complex analysis results from the application of *Landgraf* and *Lindh.* First, the court must look for an express command from Congress as to whether the statute should or should not reach pending cases. *Landgraf*, 511 U.S. at 263. If there is such an express directive, the court must follow it. If there is no such direct command, the court must then apply traditional rules of statutory construction to determine whether Congress manifested an intent, through the statutory language, that the statute be applied only to cases filed after its enactment. *Lindh*, 521 U.S. at 326. If it is clear from the statutory language under normal construction rules, that the statute was not intended to apply to pending cases, the court must defer to that intent.

In the absence of either an express directive or a clear intent to have a statute apply only to future cases, a court must determine whether the statute would have retroactive effect. *Landgraf*, 511 U.S. at 280. A statute cannot be considered to operate retroactively merely due to the fact that it is applied to a case arising from conduct which occurred before the statute was enacted, or because it disappoints a party's expectations based on prior law. *Landgraf*, 511 U.S. at 269. Justice Story set forth the classic definition of retroactivity in 1814, stating that a retroactive application is one which "creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already in the past . . . ." *Society for Propagating the Gospel v. Wheeler,* 22 F.Cas. 756, 767 (C.C.D.N.H. 1814). Statutes "conferring or ousting jurisdiction" and those which change procedural rules are types of laws which can generally be applied without "raising concerns about their retroactivity." *Landgraf*, 511 U.S. 274-75. If a statute is found not to have a retroactive effect then it may be applied to the pending case.

If the statutory amendment is found to have a retroactive effect courts fapply a presumption that Congress did not intend the statute to operate retroactively. *Landgraf*, 511 U.S. at 277. This presumption may be rebutted through evidence of congressional intent that the statute should apply to pending cases. This can be determined through both language of the statute and its legislative history. *Ohio ex rel. Brown v. Georgeoff,* 562 F. Supp. 1300, 1309 (D.C. Ohio 1983).

a. Application of the 2001 amendment would not have a retroactive effect

The statutory amendment in this case has no express directive as to its temporal reach. Such a command would generally say something like, "[t]he new provisions shall apply to all proceedings pending on or commenced after the date of enactment." *Martin v. Hadix*, 527 U.S. 343, 354 (1998). Because a clear statement of this nature is not present in the language of the amendment, the inquiry turns to whether normal rules of statutory construction would preclude the amendment's application to pending cases. Again, such statutory language is not present in the case at hand. Therefore, the examination of whether the 2001 statutory amendment may be applied to the case at hand, which was pending at the time of its enactment, begins with the question

of whether application of the amendment would have a retroactive effect.

The inquiry into whether a statute has a retroactive effect "demands a commonsense, functional judgment about 'whether the new provision attaches new legal consequences to events completed before its enactment.'" *Martin v. Hadix*, 527 U.S. 343, 357-58 (1998)(citing *Landgraf*, 511 U.S. at 270). In making this judgment, the court must be guided by "considerations of fair notice, reasonable reliance, and settled expectations." *Martin*, 527 U.S. at 358. In this case a grant of injunctive relief as sought by BOG in its complaint against Suave would have no retroactive effect, and thus should be granted.

In *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184 (1921), the Supreme Court considered the propriety of granting injunctive relief against picketers under a statute which was passed while the case was on appeal. *Id.* The Court determined that injunctive relief was proper, stating that "relief by injunction operates in futuro and the right to it must be determined as of the time of the hearing." *Id.* at 201. In other words, a grant on injunctive relief under a statute enacted after an action is filed cannot be retroactive because injunctive relief is aimed only at regulating *future conduct.* Thus, such relief does not attach new legal consequences to conduct which is in the past.

The Supreme Court's decision in *American Steel Foundries* applies to this case. In the case at hand, plaintiffs seek injunctive relief to prevent Suave from continuing to discharge lead shot and skeet parts into Sheldrake Pond. Because such relief is inherently prospective, the traditional presumption against retroactivity does not apply. The application of CWA jurisdiction over Sheldrake Pond clearly is not retroactive as to a grant of injunctive relief. Because a grant of an injunction under the 2001 amendment would have no retroactive effect, such relief is proper under the *Landgraf/Lindh* analysis.

b. *There is clear evidence of congressional intent that the amendment should apply to pending cases*

Assuming that a grant of civil penalties against Suave under the 2001 amendment to the CWA would have a retroactive effect, the presumption against retroactive application of statutes applies. However, this presumption may be rebutted by evidence of congressional intent that the amendment apply to cases which were pending at the time of its enactment. *Landgraf*, 511 U.S. at

277. Such evidence is present in this case and therefore, the court must apply the amendment to this case.

In *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982), the Supreme Court considered a case which fell, in part, under an amendment made to an existing law while the case was on appeal. The majority decided the case assuming that the amendment *would* apply, but finding that it would not affect the outcome. *Id.* at 87-8. The dissent argued that the application of the amendment should change the outcome of the case. *Id.* at 90, (Brennan, J. dissenting). More importantly, in its discussion, the dissent explained the rationale for applying the statutory amendment to cases which were on appeal at the time of its enactment. The dissent pointed out that the legislative history suggested congressional intent that the amendment apply to cases pending at the time of its enactment. *Id.* at 90, n.1 (Brennan, J. dissenting). Statements from the sponsors of the amendment explaining the intended effect were the pieces of legislative history which led the dissent to the conclusion that retroactive application was contemplated by Congress. *Id.* (Brennan, J. dissenting). These statements manifested express disapproval of certain lower court holdings which were then on appeal. *Id.* (Brennan, J. dissenting). The dissent inferred from this apparent desire to overrule certain court cases, that the amendment should be applied to pending cases.

Cases have similarly found congressional intent for retroactive application of a statute in cases involving the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"). In *Gould, Inc. v. A & M Battery & Tire Serv.*, 232 F.3d 162 (3rd Cir. 2000), the court of appeals noted that CERCLA applies retroactively although the statute does not expressly mandate such application. *Id.* at 170. In making its determination that CERCLA would apply retroactively in that case, the court looked at the legislative history. "According to that history, the Act 'provides for relief from liability for both retroactive and prospective transactions.'" *Id.* Due to this express statement in the legislative history as to CERCLA's temporal reach, the court held that the statute should apply retroactively.

In the instant case the legislative history does not expressly state the intent of Congress as to whether the 2001 amendment to the CWA should apply retroactively. However, the legislative history makes it even more clear than in the *Kaiser Steel* case that Congress did intend the amendment to apply to cases pending at

the time of its enactment. The intent of Congress, according to the legislative history, was to overrule the Supreme Court's holding in *SWANCC*. Further, the history states that "[Congress] intended the terms [of the CWA] to cover isolated waters that are important stopovers for migratory birds. We acknowledged [at the time of the CWA's enactment] and reacknowledge today, that migratory birds . . . are instrumentalities of interstate commerce. . . ." S. Rep. 106-528, p. 23. This language, in that it looks backwards as well as forward, clearly shows that Congress intended to obliterate the *SWANCC* holding.

The district court misapplied the law in holding, merely due to the lack of express language in the statute itself, that there is no evidence that Congress intended retroactivity. In the absence of statutory language, the court must look to the legislative history as required by the *Landgraf/Lindh* analysis. The district court itself acknowledged that the legislative history evidenced an intent of retroactivity. (R. at 6). To fail to apply the amendment to this case would be to act contrary to the clear intent of Congress. Under the *Landgraf/Lindh* test, the court cannot do this. Due to the evidence of congressional intent that the amendment apply retroactively, the traditional presumption against such application has been rebutted and the amendment must be applied to this case.

II. THE DISTRICT COURT ERRED IN HOLDING THAT CONGRESS DID NOT HAVE THE POWER TO REGULATE WATER POLLUTION IN SHELDRAKE POND PURSUANT TO THE COMMERCE CLAUSE OR THE TREATY POWERS GRANTED TO CONGRESS BY THE CONSTITUTION OF THE UNITED STATES

The Commerce Clause provides that Congress has the power to "regulate commerce . . . among the several states." U. S. Const. art. I, § 8, cl. 3. The Supreme Court has interpreted the Commerce Clause to mean that Congress may regulate interstate commerce if such regulation touches one of three areas: 1) channels of interstate commerce; 2) instrumentalities of interstate commerce; 3) activities that have a substantial affect on interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558-59 (1995). Sheldrake Pond and the activities that take place there fall into all three of these categories.

Congress may also pass such laws as are necessary for the implementation of treaties entered into by the United States. *Missouri v. Holland*, 252 U.S. 416 (1920). However, "what an act of Congress could not do unaided, in derogation of the powers reserved to the States, a treaty cannot do." *Id.* at 432. Nevertheless, if a treaty is valid, states are bound by that treaty. *Id.* at 434. Migratory bird treaties are valid. Furthermore, acts of Congress that protect migratory birds are also valid. *Id.* at 435.

The district court held that Congress could not regulate isolated waters such as Sheldrake Pond. (R. at 7). The district court stated that migratory birds were not channels of interstate commerce, instrumentalities of interstate commerce, nor did they have a substantial effect on interstate commerce. (R. at 7). The district court also held that Congress, could not regulate Sheldrake Pond pursuant to the Treaty Powers using the CWA since the CWA was not enacted pursuant to the Treaty Powers. (R. at 7).

A. *The District Court erred in finding that Congress did not have the power to regulate Sheldrake Pond under the Commerce Clause*

The district court rejected the Commerce Clause argument as a whole under the guise of the Court's holding in *SWANCC*, 531 U.S. 159 (2001). However, the district court did concede that if Congress intended for the CWA to serve as a protective measure for migratory birds that the holding in *SWANCC* would not apply. (R. at 6). The Court in *SWANCC* did not address the issue of whether the Congress, through the Commerce Clause, intended to regulate isolated ponds. *SWANCC*, 531 U.S. at 684.

Sheldrake Pond is a channel of interstate commerce. A channel of interstate commerce is any means of transportation or intercourse used in interstate commerce. *See Heart of Atlanta Motel v. United States*, 379 U.S. 241, 256 (1964). Resting-places of migratory birds have been recognized as having a sufficient connection to interstate commerce to be considered a channel of interstate commerce. *See Leslie Salt Co. v. United States,* 55 F.3d 1388, 1395 (9th Cir. 1995); *Utah v. Marsh*, 740 F.2d 799, 803 (10th Cir. 1984).

Sheldrake Pond has been used as a resting-place for migratory birds for two decades. (R. at 3). For that same period of time members of BOG have observed some two hundred species of birds that have stopped and rested at Sheldrake Pond. *Id.* Therefore, the district court erred in finding that Sheldrake Pond is not

a channel of interstate commerce. The district court stated that to hold Sheldrake Pond out as a channel of interstate commerce would, in effect, stretch the CWA to all lands in the country since birds can land virtually anywhere. (R. at 7). This is not so. "Well-established use or special attractiveness as a migratory bird habitat creates a substantial connection to interstate commerce." *United States v. Hallmark Construction Co.*, 30 F. Supp. 2d 1033, 1041 (N.D. Ill. 1988); *see also Hoffman Homes, Inc. v. Adm'r of United States Env't Prot. Agency*, 999 F.2d 256, 260-61 (7th Cir. 1993). In order for other lands to be considered resting- places for migratory birds, and subject to the CWA, a complaining party would have to establish that migratory birds are more likely to use that area than any other. *Hallmark Constr. Co.*, 30 F. Supp. 2d at 1041 (where one of two ponds were preferred by migratory birds the court held that the one not used is not subject to the CWA).

Even if Sheldrake Pond was not considered a channel of interstate commerce, the birds themselves are instrumentalities of interstate commerce. "Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities." *Lopez*, 514 U.S. at 558. Migratory birds have been recognized by the courts to be instrumentalities of interstate commerce. *Leslie Salt Co.*, 55 F.3d at 1393-94. Courts have recognized that millions of dollars are spent each year both hunting and watching birds. *Leslie Salt Co.*, 55 F.3d at 1394.

Nevertheless, even if the birds are not instrumentalities of interstate commerce the firearms used by Suave's clientele are. Shooters at GRAPA use shotguns to shoot the clay skeet ejected from GRAPA's platform. There is no evidence in the record that the shotguns used were not involved in interstate commerce. The court, when considering a motion for summary judgment, should take the facts and evidence in a light most favorable to the non-moving party. *Mize v. Jefferson City Board of Educ.*, 93 F.3d 739 (11th Cir. 1996).

The purpose of the regulations enacted pursuant to the CWA are to maintain the integrity of the nation's aquatic ecosystems through the regulation of dredge or fill materials. 40 C.F.R. § 230.1 (2001). Dredge or fill material is classified as a pollutant under the terms of the regulations, the same as solid waste materials and munitions. 40 C.F.R. § 230.3(o) (2001). Therefore the dis-

charge from the firearms is an applicable area of regulation under the CWA.

In 1999, manufacturers in 21 states produced over one million shotguns. Annual Firearms Manufacturing and Export Report, (Bureau of Alcohol, Tobacco and Firearms Feb. 8, 2001), *at* http://www.atf.treas.gov/firearms/stats/index.htm. It is unlikely that all the shotguns used at the pistol and rifle range were produced solely within New Union. Although granting BOG and the United State's motion would also burden interstate commerce, the protection of interstate commerce should not injure the environment. *National Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1056 (D.C. Cir. 1997) [hereinafter *NAHB*]. The district court erred in finding that neither the birds nor the firearms used were instrumentalities of interstate commerce.

Not allowing Congress to regulate waters like Sheldrake Pond would also have a substantial effect on interstate commerce. The district court looked to the fact that no out-of-state travelers came to Sheldrake Pond in determining that the activities at Sheldrake Pond did not have a substantial effect on interstate commerce. (R. at 7). However, the EPA may regulate natural ponds that have the potential for use by interstate travelers. *See Hoffman Homes, Inc.*, 999 F.2d at 261; 40 C.F.R. § 230.3(s)(3)(iii) (2001). Potential use by interstate travelers is all that is required. *Hoffman Homes, Inc.*, 999 F.2d at 261.

There is no argument that the degradation of one small pond that is used as a resting-place for migratory birds will have a substantial effect on interstate commerce. However, small activities that, when viewed in the aggregate, do substantially affect interstate commerce are subject to Congressional regulation. *NAHB*, 130 F.3d at 1050; *see also Wickard v. Filburn*, 317 U.S. 111, 127-28 (1942). The fact that one particular areas "own contribution to [interstate commerce] may be trivial by itself is not enough to remove [that activity] from the scope of federal regulation where. . . [such] contribution, taken together with that of many others similarly situated, is far from trivial." *Katzenbach v. McClung*, 379 U.S. 294, 301 (1964) (quoting *Wickard*, 317 U.S. at 127-28). Sheldrake Pond and the birds that land there provide such a nexus. To allow all similar migratory bird resting-places around the country to be encroached upon in a similar manner would substantially affect interstate commerce.

The district court stated that Congress must have intended for the CWA to touch and concern isolated ponds, pursuant to the

Commerce Clause, in order for it be applicable. In rejecting the congressional intent argument the district court stated that the intent at the time of the CWA's enactment is controlling. Congress intended the CWA to assist in the protection of wildlife as well as to ensure clean water for the citizens of the United States. S. Conf. Rep. 92-1236 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3776, 3777. This rationale has resounded through other legislation enacted pursuant to and in light of the CWA. *See* Year of Clean Water, Pub. L. No. 101-424, 104 Stat. 914 (1990). To hold that Congress did not intend for the CWA to protect migratory birds ignores the plain intent of Congress at the time the CWA was enacted. The district court erred in not recognizing that Congress intended for the CWA to protect wildlife in general, and therefore, protect migratory birds.

B. *The District Court erred in finding that Congress could not regulate Sheldrake Pond pursuant to the Treaty Clause of the Constitution of the United States*

In 1916, the United States entered into a treaty with Great Britain that provided for the protection of migratory birds. *See* Convention for the Protection of Migratory Birds, December 18, 1916, U.S.-Gr. Brit., 39 Stat. 1702. In 1936, the United States entered into a similar treaty with Mexico. *See* Convention Between the United States of America and Mexico for the Protection of Migratory Birds and Game Mammals, February 7, 1936, U.S.-Mex., 50 Stat. 1311. Both treaties provide that the United States will enact whatever laws are necessary to effectuate the treaties. 39 Stat. 1702; 50 Stat. 1311. "Congress has the power to pass such legislation as is necessary and proper to implement [treaties]." *United States v. Yian*, 905 F. Supp. 160, 163 (S. D. N. Y. 1995), *aff'd sub nomine, United States v. Wang Kun Lue*, 134 F.3d 79 (2d Cir. N.Y. 1997).

While the CWA does not specifically state that it was enacted for the purposes of implementing either treaty, Congress has repeatedly considered the protection of wildlife in regards to insuring clean water. *See* S. Rep. No. 99-445 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6113; S. Conf. Rep. No. 92-1236 at 2 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3776, 3777. However, a law enacted pursuant to a treaty is valid so long as it does not infringe upon the Constitution. *Missouri*, 252 U.S. at 432. Laws have been enacted under these treaties to provide for the protection of migratory birds. *See* 16 U.S.C. §§ 703-711 (1994). However, other laws

that do not specifically name the treaty as the justification for enacting the statute may serve the purpose of effectuating the treaty. *See also United States v. Bramble*, 103 F.3d 1475 (9th Cir. 1996). "[I]f the treaty is valid there can be no dispute about the validity of the statute under Article I, Section 8, as a necessary and proper means to execute the powers of the Government." *Id.* at 1480 (quoting *Missouri*, 252 U.S. at 383).

The United States has entered into treaties with neighboring countries not just for the protection of migratory birds, but also for the protection of wildlife in general. *See* Annex I to the Agreement Between the United States and United Mexican States on Cooperation for the Protection and Improvement of the Environment in the Boarder Area, August 22, 1990, U.S.-Mex., T.I.A.S No. 11,269. The CWA states that part of its purpose is the protection of wildlife. 33 U.S.C. § 1251(a)(2) (1994). Therefore, it would appear that Congress intended that the CWA simply act as another means of enforcing the several treaties between the United States and other nations regarding the protection of migratory birds and other forms of wildlife. Courts have recognized that one of the purposes of the treaties and the laws enacted in pursuance thereof was to protect migratory birds as they travel. *See Shouse v. Moore*, 11 F. Supp. 784, 785 (E.D. Ky. 1935). Therefore, the protection of the resting-places of migratory birds is a necessary and proper means of implementing these various treaties.

So long as the treaty is valid and does not violate the Constitution the statutes enacted as a means to effectuate that treaty are also valid. *Missouri*, 252 U.S. at 432. The district court, however, stated that the Treaty Powers argument was invalid as an attempt to bypass the regulation of the states through the Commerce Clause. (R. at 7). A valid treaty binds the states as well as the federal government. *Missouri*, 252 U.S. at 434. "No doubt the great body of private relations usually fall within control of the State, but a treaty may override [the states'] power[s]." *Id.*

The regulations set forth pursuant to the CWA are also appropriate for the enforcement of the several wildlife protection treaties entered into by the United States. When Congress acts it "give[s] to those who were to act under such general provisions 'power to fill up the details' by establishment of administrative rules and regulations." *Shouse*, 11 F. Supp. at 787. Therefore, the district court erred in holding that the CWA, through the Treaty Powers, was not a valid means of regulating isolated ponds that serve as resting-places for migratory birds.

III. THE DISTRICT COURT CORRECTLY HELD THAT FIRED SHOT AND SKEET PARTS ARE NOT SOLID WASTE UNDER 40 C.F.R. § 261.2

Solid waste is defined in the regulations as:

> (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. . .

40 C.F.R. § 261.2 (2001). This regulatory definition of "solid waste" is narrow and does not apply to lead shot and skeet parts deposited by Suave at Sheldrake Pond because the materials have not been "abandoned." *See Conn. Coastal Fisherman's Assoc. v. Remington Arms Co.,* 989 F.2d 1305 (2nd Cir. 1993). If a material is found to fall under the regulatory solid waste classification it is, by definition, hazardous waste. Once materials have been deemed to be hazardous waste, RCRA's regulatory plan requires those materials to be handled in accordance with a strict scheme of permitting, manifest tracking requirements, and waste treatment and handling standards and practices administered by the EPA. *See* 42 U.S.C. §§ 6921-6939(e) (1994). Because lead shot and skeet parts come to rest on the land in and around Sheldrake Pond as a result of their proper and expected use, they do not fall under the regulatory permitting scheme. *See Long Island Soundkeeper Fund Inc. v. N.Y. Athletic Club*, unreported, 94 Civ. 0436 (RPP), 1996 WL 131863 (S.D.N.Y. March 22, 1996.).

A. *Suave's lead shot and skeet parts are not solid waste under 40 C.F.R. § 261.2 because the materials have not been abandoned*

RCRA provides a regulatory scheme to track wastes from "cradle-to-grave." *C&A Carbone, Inc. v. City of Clarkstown*, 511 U.S. 383, 408 (1994). Only materials that have been determined to satisfy the narrow regulatory definition of solid waste (i.e. subtitle C hazardous wastes) are subject to RCRA regulation as hazardous waste under the subtitle C cradle-to-grave regulatory scheme. *Military Toxics Project v. EPA*, 146 F.3d 948, 951 (D.C. Cir. 1998). Subtitle C of RCRA, also known as Subchapter III, is

titled Hazardous Waste Management and includes sections of RCRA that call upon the EPA to provide regulations for the identification and handling of hazardous waste. *See* 42 U.S.C. §§ 6921-6939(e). The regulations specifically state that "the definition of solid waste contained in this part applies only to wastes that also are hazardous for purposes of the regulations implementing subtitle C of RCRA." 40 C.F.R. § 261.1 (2001). The EPA has specifically narrowed the regulatory definition of solid waste for purpose of implementing subtitle C. *Military Toxics Project*, 146 F.3d 948. This means the narrow regulatory definition of solid waste will only apply to those materials which are first deemed to be hazardous waste under RCRA. Although all hazardous waste must first be solid waste, not all solid waste is hazardous. *United Tech. Corp. v. EPA*, 821 F.2d 714, 717, n.1 (D.C. Cir. 1987). In this case, while the spent ammunition and skeet parts do fall under the statutory definition as explained below, they do not fall under the regulatory definition, which encompasses only hazardous waste.

RCRA provides a separate and distinct definition of solid waste which does not require "abandonment" as the regulatory definition does. 42 U.S.C. § 6903(27) (1994). The statutory definition of solid waste is used to determine if a material is a solid waste. Once the statutory definition is satisfied a further determination must be made to see if a material is a subtitle C solid waste and subject to the strict regulatory scheme.

The statute defines hazardous waste to be a subset of solid waste, further indicating that a material must be a solid waste before it can fall under RCRA. 42 U.S.C. § 6903(5) (1994). The EPA contends lead shot and skeet parts are solid waste under the broader statutory definition of solid waste. However, there is no need to make a determination of whether such materials are hazardous waste because even if lead shot and skeet parts were hazardous waste they have not been abandoned and are used for their intended purpose which excludes them from the regulatory scheme of RCRA.

The abandonment element in the regulatory definition requires solid waste to be "disposed of." *Military Toxics Project*, 146 F.3d at 951. However, the statutory definition of "solid waste" states that any discarded material that poses an imminent and substantial hazard to the environment may be the subject of a lawsuit under the citizen suit provisions of RCRA. *Id.* The EPA contends that Suave's lead shot has not been abandoned or disposed of by being used for their intended purpose, but do present

an imminent and substantial hazard by being discarded at Sheldrake Pond.

In the case of *Long Island Soundkeeper Fund Inc. v. N.Y. Athletic Club*, unreported, No. 94 Civ. 0436 (RPP), 1996 WL 131863 (S.D.N.Y. March 22, 1996), a federal district court addressed a case with facts strikingly similar to those of the present case. The New York Athletic Club was operating a trap shooting range on Long Island Sound and was sued by the Soundkeeper Fund for violations of RCRA's statutory and regulatory prohibitions on solid and hazardous waste disposal. The court held that spent rounds of ammunition and target fragments did not fall within the narrow regulatory definition of 40 C.F.R. § 261.2, stating that these materials were not "discarded material within the meaning of the regulation, because they [had] not been 'abandoned' as the term is defined in [40 C.F.R. § 261.2]." *Long Island Soundkeeper*, 1996 WL 131863 at *25. Under this rationale the court should find Suave's spent ammunition and skeet parts not to fall under the definition of solid waste contained in 40 C.F.R. § 261.2.

B. *Lead shot and skeet parts used for their intended purpose are not solid waste under 40 C.F.R. § 261.2*

Under RCRA's regulatory scheme, products used in a normal and intended manner have not been disposed of and do not fall under the regulatory definition of solid waste. The firing of lead shot at skeet targets is only for the activity of using those materials for their intended purpose.

"An agency's interpretation of it's own regulations will be accepted unless it is plainly wrong." *General Carbon Co. v. Occ. Safety & Health Review Comm'n*, 860 F.2d 479, 483 (D.C. Cir. 1988), *See also, e.g., Natural Res. Defense Council v. EPA*, 25 F.3d 1063 (D.C. Cir. 1994).

The intended use principal, which runs throughout the regulations, comes from an established EPA principal that materials involved in application to the land as part of their ordinary manner of use are not solid waste. The EPA "continues to interpret the RCRA Subtitle C regulations as not extending to products whose use involves application to the land, or where use necessarily entails land application, when those products are used in their normal manner." *Military Munitions Rule*, 62 Fed. Reg. 6622, 6630 (1997). In the case of *Conn. Coastal Fisherman's Ass'n. v. Remington Arms Co.*, 989 F.2d 1305 (2nd Cir. 1993), at the request of the Second Circuit the EPA filed an Amicus Curie brief.

The brief discussed the Agency's belief that lead shot and skeet parts are not "solid waste" under the regulatory definition because they have been used for their intended purpose. *Id.* at 1315. In the brief, the EPA asserted the position that regulatory jurisdiction does not apply to products that are deposited on the land in their ordinary manner of use. 62 Fed. Reg. at 6630. The regulations incorporate this assertion into many of the rules that govern products that would be useless unless they could be applied to land. *Id.* For example, in the regulations governing military munitions the rule specifically exempts munitions used for their intended purpose from hazardous waste regulation. 40 C.F.R. § 266.202 (2001). This position was upheld by the D.C. Circuit, which found that the military munitions rule is only one example of the longstanding interpretation of the regulatory definition of solid waste as excluding products whose intended use involves application to the land. *Military Toxics Project*, 146 F.3d at 955. The regulations contain other examples of this principal by stating that commercial chemical products are not solid waste if they are applied to the land and that is their ordinary manner of use. 40 C.F.R. § 261.2(c)(1)(B)(ii) (2001). While the regulations for military munitions and pesticides do not directly apply to the case at bar, they are just a few examples of the established principal excluding materials being used for their intended purpose from the narrow regulatory definition of solid waste.

The lead shot used at the firing range constitutes a product used for the intended purpose of hitting clay targets. The firing of the lead shot necessarily requires the product will be applied to the land on and around Sheldrake Pond. This court should uphold the longstanding interpretation of the regulations as excluding products used for their intended purpose and necessarily require application to the land. As stated above, merely because the products do not fall under the regulatory definition of solid waste does not mean they do not pose an imminent and substantial hazard to the environment. A holding that lead shot and skeet parts are not "solid waste" under the regulatory definition would not bar the EPA and BOG from seeking relief under the citizen suit provisions of RCRA which apply the broader statutory definition of solid waste. For these reasons this court should find lead shot and skeet parts are not solid waste under the regulatory definition of this term because they have been used for their intended use.

IV. THE DISTRICT COURT ERRED IN HOLDING THAT FIRED SHOT AND SKEET PARTS ARE NOT SOLID WASTE FOR PURPOSES OF 42 U.S.C. § 6972(a)(1)(B)

The broad statutory definition of solid waste applies to citizen suits brought to abate imminent hazard to health or the environment. *Conn. Coastal Fisherman's Ass'n v. Remington Arms Co.,* 989 F. 2d 1305, 1315 (2nd Cir. 1993). Solid waste is defined in RCRA 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 from community activities. . . .

42 U.S.C. § 6903(27) (1994). The lead shot and skeet parts discharged at Suave's shooting range fall under the "other discarded material" category because they are solid material resulting from a commercial operation or a community activity which have been discarded and, therefore, are solid waste under 42 U.S.C. § 6972(a)(1)(B) (1994).

A. *The lead shot and skeet parts discharged by Suave constitute discarded material under the statutory definition of solid waste*

"This [issue] turns on the meaning of the phrase, 'and other discarded material,' contained in the statute's definitional provisions." *American Mining Congress v. EPA*, 824 F.2d 1177, 1179 (D.C. Cir. 1987) ("*AMC I*"). If the spent ammunition and target fragments are held to be "other discarded materials" then they come within the statutory definition of solid waste. "As the Supreme Court has often observed, 'the starting point in every case involving statutory construction is the language employed by Congress.'" *AMC I,* 824 F.2d at 1183 (*quoting*, *CBS v. FCC*, 453 U.S. 367, 377 (1981)). The court must "start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used." *Id.* (*quoting*, *Securities Indus. Ass'n v. Board of Governors*, 468 U.S. 137, 149 (1984)). "The ordinary, plain-English meaning of the word 'discarded' is 'disposed of,' 'thrown away' or 'abandoned.'" *Id.* at 1184. Suave's lead shot and skeet

parts fit the plain language of the statute as materials that are being "disposed of" or "thrown away" at Sheldrake Pond.

RCRA does not expressly define the term "discarded" but does define the term "disposal." The court must examine how Congress defined the term "disposal" because it is integrated in the plain meaning of the term "discarded." Disposal is defined as:

> the discharge, deposit, injection, dumping, spilling, leaking, or 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 or be emitted into the air or discharged into any waters, including ground waters.

42 U.S.C. § 6903(3) (1994). The fired shots and skeet parts which fall to the ground or in the pond at Suave's facility fit some of the adjectives listed above, including discharge, deposit, or placing. The court in *AMC I* stated that the definitional section of RCRA made clear Congress' intent because the definition of solid waste "is situated in a section containing thirty-nine separate, defined terms." *AMC I*, 824 F.2d at 1189. "This is definitional specificity of the first order." *Id.* The D.C. Circuit court upheld the ruling in *AMC I* when it said, "once we have determined a statue's clear meaning, we adhere to that determination under the doctrine of stare decisis. . . ." *Ass'n of Battery Recyclers, Inc. v. United States EPA*, 208 F.3d 1047, 1052 (D.C. Cir. 2000) (*quoting*, *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990)). However, "a complete analysis of the statutory term 'discarded' calls for more than resort to the ordinary, everyday meaning of the specific language at hand." *AMC I*, 824 F.2d at 1185. The court in *AMC I* stated the "sense in which a term is used in a statute must be determined by reference to the purpose of the particular legislation." *Id.* Suave's lead shot and skeet parts clearly fit the plain meaning of the statutory definition of solid waste, and to determine RCRA's purpose this court need only look to Congress when it said:

> 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.

H.R. Rep. No. 94-1491(I), at 2 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6240. Suave's lead shot and skeet parts meet the criteria of "discarded materials" that have served their intended purpose and are no longer wanted by the consumer. The intended use principal the EPA has established for the narrow regulatory definition of solid waste addressed above does not apply to this broader statutory definition. Congress is clear that RCRA was enacted to "eliminate the last remaining loophole in the environmental law, that of unregulated land disposal of discarded materials and hazardous wastes." *Id.* at 4.

B. *If this court does not find the plain language of the statute clear, and does not follow the precedent set by AMC I and its progeny, the court should defer to the EPA's interpretation of the statutory definition of solid waste and give the highest level of deference*

The "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 121 S.Ct. 2164, 2171 (2001). This recent opinion by the Supreme Court in *Mead* conflicts with the longstanding approach regarding agency interpretations developed by the Court in *Chevron*. The Supreme Court in *Chevron* laid out a two-step analysis to review an agencies construction of statutes the agency is required to oversee. *See Chevron U.S.A., Inc. v. Natural Res. Defense Council Inc.*, 467 U.S. 837 (1984). The first step of the *Chevron* test is whether Congress has directly spoken on the issue. *Chevron* 467 U.S. at 842. If Congress has addressed the issue, the analysis ends. *Id.* However, if the court finds Congress has not addressed the issue, the second step of *Chevron* looks to see if the agency's answer is based on a permissible construction of the statute. *Id.* at 843. If the court finds Congress has not addressed the issue, *Chevron* deference should still be given because the agency's interpretation is based on a permissible construction. *Id.*

1. *Congress has delegated authority to the EPA to make rules carrying the force of law and the interpretation was promulgated in the exercise of that authority*

Pursuant to RCRA, the EPA promulgates regulations and establishes national standards for the management of hazardous wastes. *See* 42 U.S.C. §§ 6911, 6912, 6921-6939(e) (1994). Congress in Subtitle C isolated hazardous waste, a subset of solid waste, for more stringent regulatory treatment. *Conn. Coastal*, 989 F.2d at 1315. Congress recognized the serious responsibility the regulations impose and this is why they required hazardous waste to be clearly identified. *Id.* The statute directs the administrator to create specific "criteria" for the identification and listing of hazardous wastes. 42 U.S.C. § 6921. The EPA has done this by creating regulations for the sole purpose of administering to subtitle C hazardous wastes.

The specific provision in the regulation applicable to this case states "a material which is not defined as a solid waste in [40 C.F.R. § 261.2], or is not a hazardous waste identified or listed in this part, is still a solid waste. . . if. . . in the case of section 7003 [42 U.S.C. § 6973], the statutory elements are established." *Comite Pro Rescate De La Salud v. Puerto Rico Aqueduct and Sewer Authority*, 888 F.2d 180, 187 (1st Cir. 1989) (*quoting*, 40 C.F.R. § 261.1(b)(2) (2001)). The court in *Comite* went on to hold that because the § 6972(a)(1)(B) citizen suit had not been enacted yet, the regulation should apply to it as well because the language is the same as the § 6973 provision. *Id.* at 187. The court in *Connecticut Coastal* came to the same conclusion when it held "the broader statutory definition of solid waste applies to citizen suits brought to abate imminent hazard to health or the environment." *Conn. Coastal*, 989 F.2d at 1315. This means the regulations, in an effort to single out subtitle C hazardous wastes, did not want to leave the door open for those materials that might still pose an imminent and substantial danger to the environment but are not hazardous waste under the regulations. Rather, the regulations specifically point to the statutory definition and its application to the citizen suit provision of RCRA. *Id.* at 1314.

Even though the regulatory definition does not apply, materials such as lead shot and skeet parts can still be solid waste under the imminent hazard suit provisions of RCRA, because the materials are solid waste under the statutory definition. Thus, if the more stringent requirement of *Mead* applied, the EPA's administration of this provision qualifies for *Chevron* substantial defer-

ence because Congress has delegated the authority to the EPA to make rules carrying the force of law. The EPA has exercised this authority through its interpretation. Therefore, this court should find Suave's disposal of lead shot and skeet parts to be solid waste under RCRA.

2. *If the court does not find Congress gave such authority, the EPA's interpretation still qualifies for Chevron deference because the interpretation is reasonable*

The Supreme Court in *Mead* addressed *Chevron* deference only when it appeared that Congress delegated authority to the agency to make rules carrying the force of law. *Mead*, 121 S.Ct. at 2171. Under *Mead,* if a court does not find that Congress delegated such authority, it must look to "the degree of the agency's care, its consistency, formality, and relative expertness, and the persuasiveness of the agency's position." *Id.* However, the court in *Mead* left open the ability of an agency to "administer their statute case-by-case, 'making law' as they implement their program not necessarily through formal adjudication." *Id.* at 2180 (Scalia, J., dissenting). This means the EPA may chose to administer their authority over RCRA through the formal process of rulemaking or do so on a case-by-case basis and still receive *Chevron* deference.

When evaluating the interpretation of a statute in cases, courts use the *Chevron* analysis to determine its reasonableness. The first step of the *Chevron* analysis is whether Congress has directly addressed the precise question at issue. *Chevron*, 467 U.S. at 843. The EPA argues above that Congress has directly addressed this issue, and the first step of *Chevron* is met, by examining the plain meaning of the language Congress used in RCRA. In the alternative that a court finds Congress has not spoken directly on the issue the court must move to the second step of the *Chevron* analysis.

The second step of the *Chevron* analysis is whether the agency's interpretation is based on a permissible construction of the statute. *Id.* Courts have applied the *Chevron* analysis and concluded that the EPA's interpretation of the statutory definition of solid waste is reasonable. *Conn. Coastal*, 989 F.2d 1305. The court in *Connecticut Coastal*, like the present case, considered whether lead shot and skeet parts were solid waste under the statutory definition of solid waste. The *Connecticut Coastal* court recognized the complexity of using different definitions for the term

solid waste because "[d]ual definitions of solid waste are suggested by the structure and language of RCRA." *Id.* at 1315. That court went on told hold "that the EPA regulations reasonably interpret the statutory language." *Id.* This court should follow the same reasoning in the determination that although two different definitions of solid waste exist, they are clearly distinct, and their application to legal issues is unique. Therefore, this court, like the court in *Connecticut Coastal*, should find lead shot and skeet parts do fall under the broad statutory definition of solid waste for purposes of 42 U.S.C. § 6972(a)(1)(B).

CONCLUSION

For the reasons stated in this brief, the United States respectfully requests that this Court affirm in part and reverse in part the district court's grant of summary judgment in favor of Suave, Inc. With respect to the district court's holding that shot and skeet parts are not solid waste under the regulatory definition the United States requests affirmance. With respect to the district court's holding that BOG's suit could not be maintained under the CWA, that Congress does not have jurisdiction to regulate Sheldrake Pond pursuant to the Commerce Clause and Treaty Powers, and that fired shot and skeet parts are not solid waste under the statutory definition contained in RCRA, the United States requests reversal.

APPENDIX

16 U.S.C. § 703 (1994):

Unless and except as permitted by regulations made as hereinafter provided in this subchapter, it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export, any migratory bird, any part, nest, or egg of any such bird, or any product, whether or not manufactured, which consists, or is composed in whole or in part, of any such bird or any part, nest, or egg thereof, included in the terms of the conventions between the United States and Great Britain for the protection of migratory birds concluded August 16,

1916 (39 Stat. 1702), the United States and the United Mexican States for the protection of migratory birds and game mammals concluded February 7, 1936, the United States and the Government of Japan for the protection of migratory birds and birds in danger of extinction, and their environment concluded March 4, 1972 and the convention between the United States and the Union of Soviet Socialist Republics for the conservation of migratory birds and their environments concluded November 19, 1976.

33 U.S.C. § 1362(7) (1994):

Except as otherwise specifically provided, when used in this chapter:

(1) The term "State water pollution control agency" means the State agency designated by the Governor having responsibility for enforcing State laws relating to the abatement of pollution.

(2) The term "interstate agency" means an agency of two or more States established by or pursuant to an agreement or compact approved by the Congress, or any other agency of two or more States, having substantial powers or duties pertaining to the control of pollution as determined and approved by the Administrator.

(3) The term "State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands.

(4) The term "municipality" means a city, town, borough, county, parish, district, association, or other public body created by or pursuant to State law and having jurisdiction over disposal of sewage, industrial wastes, or other wastes, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 1288 of this title.

(5) The term "person" means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.

(6) The term "pollutant" means 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. This term does not mean

(A) "sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces" within the meaning of section 1322 of this title; or
(B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.
(7) The term "navigable waters" means the waters of the United States, including the territorial seas.
(8) The term "territorial seas" means the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles.
(9) The term "contiguous zone" means the entire zone established or to be established by the United States under article 24 of the Convention of the Territorial Sea and the Contiguous Zone.
(10) The term "ocean" means any portion of the high seas beyond the contiguous zone.
(11) The term "effluent limitation" means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.
(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means
(A) any addition of any pollutant to navigable waters from any point source,
(B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.
(13) The term "toxic pollutant" means those pollutants, or combinations of pollutants, including disease-causing agents, which after discharge and upon exposure, ingestion, inhalation or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will, on the basis of information available to the Administrator, cause death, disease, behavioral abnormalities, cancer, genetic mutations,

physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring.
(14) The term "point source" means 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.
(15) The term "biological monitoring" shall mean the determination of the effects on aquatic life, including accumulation of pollutants in tissue, in receiving waters due to the discharge of pollutants
(A) by techniques and procedures, including sampling of organisms representative of appropriate levels of the food chain appropriate to the volume and the physical, chemical, and biological characteristics of the effluent, and
(B) at appropriate frequencies and locations.
(16) The term "discharge" when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.
(17) The term "schedule of compliance" means a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard.
(18) The term "industrial user" means those industries identified in the Standard Industrial Classification Manual, Bureau of the Budget, 1967, as amended and supplemented, under the category of "Division D—Manufacturing" and such other classes of significant waste producers as, by regulation, the Administrator deems appropriate.
(19) The term "pollution" means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.
(20) The term "medical waste" means isolation wastes; infectious agents; human blood and blood products; pathological wastes; sharps; body parts; contaminated bedding; surgical wastes and potentially contaminated laboratory wastes; dialysis wastes; and such additional medical items as the Administrator shall prescribe by regulation.
(21) Coastal recreation waters
(A) In general The term "coastal recreation waters" means–

(i) the Great Lakes; and
(ii) marine coastal waters (including coastal estuaries) that are designated under section 1313(c) of this title by a State for use for swimming, bathing, surfing, or similar water contact activities.
(B) Exclusions The term "coastal recreation waters" does not include–
(i) inland waters; or
(ii) waters upstream of the mouth of a river or stream having an unimpaired natural connection with the open sea.
(22) Floatable material
(A) In general The term "floatable material" means any foreign matter that may float or remain suspended in the water column.
(B) Inclusions The term "floatable material" includes–
(i) plastic;
(ii) aluminum cans;
(iii) wood products;
(iv) bottles; and
(v) paper products.
(23) Pathogen indicator The term "pathogen indicator" means a substance that indicates the potential for human infectious disease.

33 U.S.C. § 1251 (1994):

(a) Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective
The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter–
(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;
(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;
(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;
(4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;

(5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State;
(6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans; and
(7) it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpoint sources of pollution.
(b) Congressional recognition, preservation, and protection of primary responsibilities and rights of States
It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.
(c) Congressional policy toward Presidential activities with foreign countries
It is further the policy of Congress that the President, acting through the Secretary of State and such national and international organizations as he determines appropriate, shall take such action as may be necessary to insure that to the fullest extent possible all foreign countries shall take meaningful action for the prevention, reduction, and elimination of pollution in their waters and in international waters and for the achievement of goals regarding the elimination of discharge of pollutants and the improvement of water quality to at least the same extent as the United States does under its laws.
(d) Administrator of Environmental Protection Agency to administer chapter

Except as otherwise expressly provided in this chapter, the Administrator of the Environmental Protection Agency (hereinafter in this chapter called "Administrator") shall administer this chapter.

(e) Public participation in development, revision, and enforcement of any regulation, etc.

Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States. The Administrator, in cooperation with the States, shall develop and publish regulations specifying minimum guidelines for public participation in such processes.

(f) Procedures utilized for implementing chapter

It is the national policy that to the maximum extent possible the procedures utilized for implementing this chapter shall encourage the drastic minimization of paperwork and interagency decision procedures, and the best use of available manpower and funds, so as to prevent needless duplication and unnecessary delays at all levels of government.

(g) Authority of States over water

It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

42 U.S.C. § 6903 (1994):

As used in this chapter:

(1) The term "Administrator" means the Administrator of the Environmental Protection Agency.

(2) The term "construction," with respect to any project of construction under this chapter, means

(A) the erection or building of new structures and acquisition of lands or interests therein, or the acquisition, replacement, expansion, remodeling, alteration, modernization, or extension of existing structures, and

(B) the acquisition and installation of initial equipment of, or required in connection with, new or newly acquired structures or the expanded, remodeled, altered, modernized or extended part of existing structures (including trucks and other motor vehicles, and tractors, cranes, and other machinery) necessary for the proper utilization and operation of the facility after completion of the project; and includes preliminary planning to determine the economic and engineering feasibility and the public health and safety aspects of the project, the engineering, architectural, legal, fiscal, and economic investigations and studies, and any surveys, designs, plans, working drawings, specifications, and other action necessary for the carrying out of the project, and

(C) the inspection and supervision of the process of carrying out the project to completion.

(2A) The term "demonstration" means the initial exhibition of a new technology process or practice or a significantly new combination or use of technologies, processes or practices, subsequent to the development stage, for the purpose of proving technological feasibility and cost effectiveness.

(3) The term "disposal" means the discharge, deposit, injection, dumping, spilling, leaking, or 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 or be emitted into the air or discharged into any waters, including ground waters.

(4) The term "Federal agency" means any department, agency, or other instrumentality of the Federal Government, any independent agency or establishment of the Federal Government including any Government corporation, and the Government Printing Office.

(5) The term "hazardous waste" means 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.

(6) The term "hazardous waste generation" means the act or process of producing hazardous waste.

(7) The term "hazardous waste management" means the systematic control of the collection, source separation, storage, transportation, processing, treatment, recovery, and disposal of hazardous wastes.

(8) For purposes of Federal financial assistance (other than rural communities assistance), the term "implementation" does not include the acquisition, leasing, construction, or modification of facilities or equipment or the acquisition, leasing, or improvement of land.

(9) The term "intermunicipal agency" means an agency established by two or more municipalities with responsibility for planning or administration of solid waste.

(10) The term "interstate agency" means an agency of two or more municipalities in different States, or an agency established by two or more States, with authority to provide for the management of solid wastes and serving two or more municipalities located in different States.

(11) The term "long-term contract" means, when used in relation to solid waste supply, a contract of sufficient duration to assure the viability of a resource recovery facility (to the extent that such viability depends upon solid waste supply).

(12) The term "manifest" means the form used for identifying the quantity, composition, and the origin, routing, and destination of hazardous waste during its transportation from the point of generation to the point of disposal, treatment, or storage.

(13) The term "municipality"

(A) means a city, town, borough, county, parish, district, or other public body created by or pursuant to State law, with responsibility for the planning or administration of solid waste management, or an Indian tribe or authorized tribal organization or Alaska Native village or organization, and

(B) includes any rural community or unincorporated town or village or any other public entity for which an application for assistance is made by a State or political subdivision thereof.

(14) The term "open dump" means any facility or site where solid waste is disposed of which is not a sanitary landfill which meets the criteria promulgated under section 6944 of this title and which is not a facility for disposal of hazardous waste.

(15) The term "person" means 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.
(16) The term "procurement item" means any device, good, substance, material, product, or other item whether real or personal property which is the subject of any purchase, barter, or other exchange made to procure such item.
(17) The term "procuring agency" means any Federal agency, or any State agency or agency of a political subdivision of a State which is using appropriated Federal funds for such procurement, or any person contracting with any such agency with respect to work performed under such contract.
(18) The term "recoverable" refers to the capability and likelihood of being recovered from solid waste for a commercial or industrial use.
(19) The term "recovered material" means waste material and byproducts which have been recovered or diverted from solid waste, but such term does not include those materials and byproducts generated from, and commonly reused within, an original manufacturing process.
(20) The term "recovered resources" means material or energy recovered from solid waste.
(21) The term "resource conservation" means reduction of the amounts of solid waste that are generated, reduction of overall resource consumption, and utilization of recovered resources.
(22) The term "resource recovery" means the recovery of material or energy from solid waste.
(23) The term "resource recovery system" means a solid waste management system which provides for collection, separation, recycling, and recovery of solid wastes, including disposal of nonrecoverable waste residues.
(24) The term "resource recovery facility" means any facility at which solid waste is processed for the purpose of extracting, converting to energy, or otherwise separating and preparing solid waste for reuse.
(25) The term "regional authority" means the authority established or designated under section 6946 of this title.
(26) The term "sanitary landfill" means a facility for the disposal of solid waste which meets the criteria published under section 6944 of this title.
(26A) The term "sludge" means any solid, semisolid or liquid waste generated from a municipal, commercial, or industrial wastewater treatment plant, water supply treatment plant, or air pol-

lution control facility or any other such waste having similar characteristics and effects.

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

(28) The term "solid waste management" means the systematic administration of activities which provide for the collection, source separation, storage, transportation, transfer, processing, treatment, and disposal of solid waste.

(29) The term "solid waste management facility" includes–

(A) any resource recovery system or component thereof,

(B) any system, program, or facility for resource conservation, and

(C) any facility for the collection, source separation, storage, transportation, transfer, processing, treatment or disposal of solid wastes, including hazardous wastes, whether such facility is associated with facilities generating such wastes or otherwise.

(30) The terms "solid waste planning", "solid waste management", and "comprehensive planning" include planning or management respecting resource recovery and resource conservation.

(31) The term "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.

(32) The term "State authority" means the agency established or designated under section 6947 of this title.

(33) The term "storage", when used in connection with hazardous waste, means 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.

(34) The term "treatment", when used in connection with hazardous waste, means any method, technique, or process, including neutralization, designed to change the physical, chemical, or biological character or composition of any hazardous waste so as to

neutralize such waste or so as to render such waste nonhazardous, safer for transport, amenable for recovery, amenable for storage, or reduced in volume. Such term includes any activity or processing designed to change the physical form or chemical composition of hazardous waste so as to render it nonhazardous.
(35) The term "virgin material" means a raw material, including previously unused copper, aluminum, lead, zinc, iron, or other metal or metal ore, any undeveloped resource that is, or with new technology will become, a source of raw materials. (36) The term "used oil" means any oil which has been–
(A) refined from crude oil,
(B) used, and
(C) as a result of such use, contaminated by physical or chemical impurities.
(37) The term "recycled oil" means any used oil which is reused, following its original use, for any purpose (including the purpose for which the oil was originally used). Such term includes oil which is re-refined, reclaimed, burned, or reprocessed.
(38) The term "lubricating oil" means the fraction of crude oil which is sold for purposes of reducing friction in any industrial or mechanical device. Such term includes re-refined oil.
(39) The term "re-refined oil" means used oil from which the physical and chemical contaminants acquired through previous use have been removed through a refining process.
(40) Except as otherwise provided in this paragraph, the term "medical waste" means any solid waste which is generated in the diagnosis, treatment, or immunization of human beings or animals, in research pertaining thereto, or in the production or testing of biologicals. Such term does not include any hazardous waste identified or listed under subchapter III of this chapter or any household waste as defined in regulations under subchapter III of this chapter.
(41) The term "mixed waste" means waste that contains both hazardous waste and source, special nuclear, or by-product material subject to the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.).

33 C.F.R. § 328.3 (2001):

For the purpose of this regulation these terms are defined as follows:
(a) The term "waters of the United States" means
(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce,

including all waters which are subject to the ebb and flow of the tide;
(2) All interstate waters including interstate wetlands;
(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;
(4) All impoundments of waters otherwise defined as waters of the United States under the definition;
(5) Tributaries of waters identified in paragraphs (a)(1)-(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.
(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 EPA. Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 123.11(m) which also meet the criteria of this definition) are not waters of the United States.
(b) The term "wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.
(c) The term "adjacent" means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands."
(d) The term "high tide line" means the line of intersection of the land with the water's surface at the maximum height reached by a

rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

40 C.F.R. § 230.1 (2001):

(a) The purpose of these Guidelines is to restore and maintain the chemical, physical, and biological integrity of waters of the United States through the control of discharges of dredged or fill material.
(b) Congress has expressed a number of policies in the Clean Water Act. These guidelines are intended to be consistent with and to implement those policies.
(c) Fundamental to these Guidelines is the precept that dredged or fill material should not be discharged into the aquatic ecosystem, unless it can be demonstrated that such a discharge will not have an unacceptable adverse impact either individually or in combination with known and/or probable impacts of other activities affecting the ecosystems of concern.
(d) From a national perspective, the degradation or destruction of special aquatic sites, such as filling operations in wetlands, is considered to be among the most severe environmental impacts covered by these Guidelines. The guiding principle should be that degradation or destruction of special sites may represent an irreversible loss of valuable aquatic resources.

40 C.F.R. § 230.3(o):

For purposes of this Part, the following terms shall have the meanings indicated:

. . .

(o) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials not covered by the Atomic Energy Act, heat, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial, municipal, and agricultural

waste discharged into water. The legislative history of the Act reflects that "radioactive materials" as included within the definition of "pollutant" in section 502 of the Act means only radioactive materials which are not encompassed in the definition of source, byproduct, or special nuclear materials as defined by the Atomic Energy Act of 1954, as amended, and regulated under the Atomic Energy Act. Examples of radioactive materials not covered by the Atomic Energy Act and, therefore, included within the term "pollutant", are radium and accelerator produced isotopes. See Train v. Colorado Public Interest Research Group, Inc., 426 U.S. 1 (1976) . . . .

40 C.F.R. § 230.3(s) (2001):

For purposes of this Part, the following terms shall have the meanings indicated:

. . .

(s) The term "waters of the United States" means:

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purposes by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under this definition.

(5) Tributaries of waters identified in paragraphs (1) through (4) of this section;

(6) The territorial sea;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (s)(1)-(6) of this section; waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling

ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States.
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 EPA.

40 C.F.R. § 261.1 (2001):

(a) This part identifies those solid wastes which are subject to regulation as hazardous wastes under Parts 262 through 265, 268 and Parts 270, 271, and 124 of this chapter and which are subject to the notification requirements of section 3010 of RCRA. In this part:
(1) Subpart A defines the terms "solid waste" and "hazardous waste", identifies those wastes which are excluded from regulation under Parts 262 through 266, 268 and 270 and establishes special management requirements for hazardous waste produced by conditionally exempt small quantity generators and hazardous waste which is recycled.
(2) Subpart B sets forth the criteria used by EPA to identify characteristics of hazardous waste and to list particular hazardous wastes.
(3) Subpart C identifies characteristics of hazardous waste.
(4) Subpart D lists particular hazardous wastes.
(b)(1) The definition of solid waste contained in this Part applies only to wastes that also are hazardous for purposes of the regulations implementing Subtitle C of RCRA. For example, it does not apply to materials (such as non- hazardous scrap, paper, textiles, or rubber) that are not otherwise hazardous wastes and that are recycled.
(2) This Part identifies only some of the materials which are solid wastes and hazardous wastes under Sections 3007, 3013, and 7003 of RCRA. A material which is not defined as a solid waste in this Part, or is not a hazardous waste identified or listed in this Part, is still a solid waste and a hazardous waste for purposes of these sections if:
(i) In the case of Sections 3007 and 3013, EPA has reason to believe that the material may be a solid waste within the meaning of Section 1004(27) of RCRA and a hazardous waste within the meaning of Section 1004(5) of RCRA; or

(ii) In the case of Section 7003, the statutory elements are established.

(c) For the purposes of Sections 261.2 and 261.6:

(1) A "spent material" is any material that has been used and as a result of contamination can no longer serve the purpose for which it was produced without processing;

(2) "Sludge" has the same meaning used in §§ 260.10 of this Chapter;

(3) A "by-product" is a material that is not one of the primary products of a production process and is not solely or separately produced by the production process. Examples are process residues such as slags or distillation column bottoms. The term does not include a co-product that is produced for the general public's use and is ordinarily used in the form it is produced by the process.

(4) A material is "reclaimed" if it is processed to recover a usable product, or if it is regenerated. Examples are recovery of lead values from spent batteries and regeneration of spent solvents.

(5) A material is "used or reused" if it is either:

(i) Employed as an ingredient (including use as an intermediate) in an industrial process to make a product (for example, distillation bottoms from one process used as feedstock in another process). However, a material will not satisfy this condition if distinct components of the material are recovered as separate end products (as when metals are recovered from metal-containing secondary materials); or

(ii) Employed in a particular function or application as an effective substitute for a commercial product (for example, spent pickle liquor used as phosphorous precipitant and sludge conditioner in wastewater treatment).

(6) "Scrap metal" is bits and pieces of metal parts (e.g.,) bars, turnings, rods, sheets, wire) or metal pieces that may be combined together with bolts or soldering (e.g., radiators, scrap automobiles, railroad box cars), which when worn or superfluous can be recycled.

(7) A material is "recycled" if it is used, reused, or reclaimed.

(8) A material is "accumulated speculatively" if it is accumulated before being recycled. A material is not accumulated speculatively, however, if the person accumulating it can show that the material is potentially recyclable and has a feasible means of being recycled; and that—during the calendar year (commencing on January 1)—the amount of material that is recycled, or trans-

ferred to a different site for recycling, equals at least 75 percent by weight or volume of the amount of that material accumulated at the beginning of the period. In calculating the percentage of turnover, the 75 percent requirement is to be applied to each material of the same type (e.g., slags from a single smelting process) that is recycled in the same way (i.e., from which the same material is recovered or that is used in the same way). Materials accumulating in units that would be exempt from regulation under §§ 261.4(c) are not be included in making the calculation. (Materials that are already defined as solid wastes also are not to be included in making the calculation.) Materials are no longer in this category once they are removed from accumulation for recycling, however.

(9) "Excluded scrap metal" is processed scrap metal, unprocessed home scrap metal, and unprocessed prompt scrap metal.

(10) "Processed scrap metal" is scrap metal which has been manually or physically altered to either separate it into distinct materials to enhance economic value or to improve the handling of materials. Processed scrap metal includes, but is not limited to scrap metal which has been baled, shredded, sheared, chopped, crushed, flattened, cut, melted, or separated by metal type (i.e., sorted), and, fines, drosses and related materials which have been agglomerated. (Note: shredded circuit boards being sent for recycling are not considered processed scrap metal. They are covered under the exclusion from the definition of solid waste for shredded circuit boards being recycled (§§ 261.4(a)(13)).

(11) "Home scrap metal" is scrap metal as generated by steel mills, foundries, and refineries such as turnings, cuttings, punchings, and borings.

(12) "Prompt scrap metal" is scrap metal as generated by the metal working/fabrication industries and includes such scrap metal as turnings, cuttings, punchings, and borings. Prompt scrap is also known as industrial or new scrap metal.

40 C.F.R. § 266.202:

(a) A military munition is not a solid waste when:

(1) Used for its intended purpose, including:

(i) Use in training military personnel or explosives and munitions emergency response specialists (including training in proper destruction of unused propellant or other munitions); or

(ii) Use in research, development, testing, and evaluation of military munitions, weapons, or weapon systems; or

(iii) Recovery, collection, and on-range destruction of unexploded ordnance and munitions fragments during range clearance activities at active or inactive ranges. However, "use for intended purpose" does not include the on-range disposal or burial of unexploded ordnance and contaminants when the burial is not a result of product use.

(2) An unused munition, or component thereof, is being repaired, reused, recycled, reclaimed, disassembled, reconfigured, or otherwise subjected to materials recovery activities, unless such activities involve use constituting disposal as defined in 40 CFR 261.2(c)(1), or burning for energy recovery as defined in 40 CFR 261.2(c)(2).

(b) An unused military munition is a solid waste when any of the following occurs:

(1) The munition is abandoned by being disposed of, burned, detonated (except during intended use as specified in paragraph (a) of this section), incinerated, or treated prior to disposal; or

(2) The munition is removed from storage in a military magazine or other storage area for the purpose of being disposed of, burned, or incinerated, or treated prior to disposal, or

(3) The munition is deteriorated or damaged (e.g., the integrity of the munition is compromised by cracks, leaks, or other damage) to the point that it cannot be put into serviceable condition, and cannot reasonably be recycled or used for other purposes; or

(4) The munition has been declared a solid waste by an authorized military official.

(c) A used or fired military munition is a solid waste:

(1) When transported off range or from the site of use, where the site of use is not a range, for the purposes of storage, reclamation, treatment, disposal, or treatment prior to disposal; or

(2) If recovered, collected, and then disposed of by burial, or landfilling either on or off a range.

(d) For purposes of RCRA section 1004(27), a used or fired military munition is a solid waste, and, therefore, is potentially subject to RCRA corrective action authorities under sections 3004(u) and (v), and 3008(h), or imminent and substantial endangerment authorities under section 7003, if the munition lands off-range and is not promptly rendered safe and/or retrieved. Any imminent and substantial threats associated with any remaining material must be addressed. If remedial action is infeasible, the operator of the range must maintain a record of the event for as long as any

threat remains. The record must include the type of munition and its location (to the extent the location is known).

40 C.F.R. § 261.2 (2001):

(a)(1) A solid waste is any discarded material that is not excluded by §§ 261.4(a) or that is not excluded by variance granted under §§§§ 260.30 and 260.31.
(2) A discarded material is any material which is:
(i) Abandoned, as explained in paragraph (b) of this section; or
(ii) Recycled, as explained in paragraph (c) of this section; or
(iii) Considered inherently waste-like, as explained in paragraph (d) of this section; or
(iv) A military munition identified as a solid waste in 40 C.F.R. 266.202.
(b) Materials are solid waste if they are abandoned by being:
(1) Disposed of; or
(2) Burned or incinerated; or
(3) Accumulated, stored, or treated (but not recycled) before or in lieu of being abandoned by being disposed of, burned, or incinerated.
(c) Materials are solid wastes if they are recycled—or accumulated, stored, or treated before recycling—as specified in paragraphs (c)(1) through (c)(4) of this section.
(1) Used in a manner constituting disposal.
(i) Materials noted with a "*" in Column 1 of Table I are solid wastes when they are:
(A) Applied to or placed on the land in a manner that constitutes disposal; or
(B) Used to produce products that are applied to or placed on the land or are otherwise contained in products that are applied to or placed on the land (in which cases the product itself remains a solid waste).
(ii) However, commercial chemical products listed in §§ 261.33 are not solid wastes if they are applied to the land and that is their ordinary manner of use.
(2) Burning for energy recovery.
(i) Materials noted with a "*" in column 2 of Table 1 are solid wastes when they are:
(A) Burned to recover energy;
(B) Used to produce a fuel or are otherwise contained in fuels (in which cases the fuel itself remains a solid waste).

(ii) However, commercial chemical products listed in §§ 261.33 are not solid wastes if they are themselves fuels.
(3) Reclaimed. Materials noted with a "*" in column 3 of Table 1 are solid wastes when reclaimed (except as provided under 40 C.F.R. 20(a)(17)).
(4) Accumulated speculatively. Materials noted with a "*" in column 4 of Table 1 are solid wastes when accumulated speculatively.

Table 1

Use Energy Reclamation (§§ Speculative constituting recovery/ 261.2(c)(3)) accumulation disposal (§§ fuel (§§ (except as (§§ 261.2(c)(1)) 261.2(c)(2)) provided in 261.2(c)(4)) 261.4(a)(17) for mineral processing secondary materials)

	1	2	3	4
Spent Materials	(a)	(a)	(a)	(a)
Sludges (listed in 40 CFR Part 261.31 or 261.32	(a)	(a)	(a)	(a)
Sludges exhibiting a characteristic of hazardous waste	(a)	(a)	—	(a)
By-products (listed in 40 CFR 261.31 or 261.32)	(a)	(a)	(a)	(a)
By-products exhibiting a characteristic of hazardous waste	(a)	(a)	—	(a)
Commercial chemical products listed in 40 CFR 261.33	(a)	(a)	—	—
Scrap metal other than excluded scrap metal (see 261.1(c)(9))	(a)	(a)	(a)	(a)

Note: The terms "spent materials," "sludges," "by-products," and "scrap metal" and "processed scrap metal" are defined in §§ 261.1.

(d) Inherently waste-like materials. The following materials are solid wastes when they are recycled in any manner:
(1) Hazardous Waste Nos. F020, F021 (unless used as an ingredient to make a product at the site of generation), F022, F023, F026, and F028.
(2) Secondary materials fed to a halogen acid furnace that exhibit a characteristic of a hazardous waste or are listed as a hazardous waste as defined in subparts C or D of this part, except for brominated material that meets the following criteria:
(i) The material must contain a bromine concentration of at least 45%; and
(ii) The material must contain less than a total of 1% of toxic organic compounds listed in appendix VIII; and
(iii) The material is processed continually on-site in the halogen acid furnace via direct conveyance (hard piping).
(3) The Administrator will use the following criteria to add wastes to that list:

(i)(A) The materials are ordinarily disposed of, burned, or incinerated; or
(B) The materials contain toxic constituent listed in Appendix VIII of Part 261 and these constituents are not ordinarily found in raw materials or products for which the materials substitute (or are found in raw materials or products in smaller concentrations) and are not used or reused during the recycling process; and
(ii) The material may pose a substantial hazard to human health and the environment when recycled.
(e) Materials that are not solid waste when recycled.
(1) Materials are not solid wastes when they can be shown to be recycled by being:
(i) Used or reused as ingredients in an industrial process to make a product, provided the materials are not being reclaimed; or
(ii) Used or reused as effective substitutes for commercial products; or
(iii) Returned to the original process from which they are generated, without first being reclaimed or land disposed. The material must be returned as a substitute for feedstock materials. In cases where the original process to which the material is returned is a secondary process, the materials must be managed such that there is no placement on the land. In cases where the materials are generated and reclaimed within the primary mineral processing industry, the conditions of the exclusion found at §§ 261.4(a)(17) apply rather than this paragraph.
(2) The following materials are solid wastes, even if the recycling involves use, reuse, or return to the original process (described in paragraphs (e)(1) (i)-(iii) of this section):
(i) Materials used in a manner constituting disposal, or used to produce products that are applied to the land; or
(ii) Materials burned for energy recovery, used to produce a fuel, or contained in fuels; or
(iii) Materials accumulated speculatively; or
(iv) Materials listed in paragraphs (d)(1) and (d)(2) of this section.
(f) Documentation of claims that materials are not solid wastes or are conditionally exempt from regulation. Respondents in actions to enforce regulations implementing Subtitle C of RCRA who raise a claim that a certain material is not a solid waste, or is conditionally exempt from regulation, must demonstrate that there is a known market or disposition for the material, and that they meet the terms of the exclusion or exemption. In doing so, they must provide appropriate documentation (such as contracts showing

that a second person uses the material as an ingredient in a production process) to demonstrate that the material is not a waste, or is exempt from regulation. In addition, owners or operators of facilities claiming that they actually are recycling materials must show that they have the necessary equipment to do so.

42 U.S.C. § 6911 (1994):

(a) Office of Solid Waste

The Administrator shall establish within the Environmental Protection Agency an Office of Solid Waste (hereinafter referred to as the "Office") to be headed by an Assistant Administrator of the Environmental Protection Agency. The duties and responsibilities (other than duties and responsibilities relating to research and development) of the Administrator under this chapter (as modified by applicable reorganization plans) shall be carried out through the Office.

(b) Interagency Coordinating Committee

(1) There is hereby established an Interagency Coordinating Committee on Federal Resource Conservation and Recovery Activities which shall have the responsibility for coordinating all activities dealing with resource conservation and recovery from solid waste carried out by the Environmental Protection Agency, the Department of Energy, the Department of Commerce, and all other Federal agencies which conduct such activities pursuant to this chapter or any other Act. For purposes of this subsection, the term "resource conservation and recovery activities" shall include, but not be limited to, all research, development and demonstration projects on resource conservation or energy, or material, recovery from solid waste, and all technical or financial assistance for State or local planning for, or implementation of, projects related to resource conservation or energy or material, recovery from solid waste. The Committee shall be chaired by the Administrator of the Environmental Protection Agency or such person as the Administrator may designate. Members of the Committee shall include representatives of the Department of Energy, the Department of Commerce, the Department of the Treasury, and each other Federal agency which the Administrator determines to have programs or responsibilities affecting resource conservation or recovery.

(2) The Interagency Coordinating Committee shall include oversight of the implementation of—

(A) the May 1979 Memorandum of Understanding on Energy Recovery from Municipal Solid Waste between the Environmental Protection Agency and the Department of Energy;
(B) the May 30, 1978, Interagency Agreement between the Department of Commerce and the Environmental Protection Agency on the Implementation of the Resource Conservation and Recovery Act [42 U.S.C.A. §§ 6901 et seq.]; and
(C) any subsequent agreements between these agencies or other Federal agencies which address Federal resource recovery or conservation activities.
(3) The Interagency Coordinating Committee shall submit to the Congress by March 1, 1981, and on March 1 each year thereafter, a five-year action plan for Federal resource conservation or recovery activities which shall identify means and propose programs to encourage resource conservation or material and energy recovery and increase private and municipal investment in resource conservation or recovery systems, especially those which provide for material conservation or recovery as well as energy conservation or recovery. Such plan shall describe, at a minimum, a coordinated and nonduplicatory plan for resource recovery and conservation activities for the Environmental Protection Agency, the Department of Energy, the Department of Commerce, and all other Federal agencies which conduct such activities.

42 U.S.C. § 6912:

(a) Authorities
In carrying out this chapter, the Administrator is authorized to—
(1) prescribe, in consultation with Federal, State, and regional authorities, such regulations as are necessary to carry out his functions under this chapter;
(2) consult with or exchange information with other Federal agencies undertaking research, development, demonstration projects, studies, or investigations relating to solid waste;
(3) provide technical and financial assistance to States or regional agencies in the development and implementation of solid waste plans and hazardous waste management programs;
(4) consult with representatives of science, industry, agriculture, labor, environmental protection and consumer organizations, and other groups, as he deems advisable;
(5) utilize the information, facilities, personnel and other resources of Federal agencies, including the National Institute of Standards and Technology and the National Bureau of the Cen-

sus, on a reimbursable basis, to perform research and analyses and conduct studies and investigations related to resource recovery and conservation and to otherwise carry out the Administrator's functions under this chapter; and
(6) to delegate to the Secretary of Transportation the performance of any inspection or enforcement function under this chapter relating to the transportation of hazardous waste where such delegation would avoid unnecessary duplication of activity and would carry out the objectives of this chapter and of the Hazardous Materials Transportation Act.
(b) Revision of regulations
Each regulation promulgated under this chapter shall be reviewed and, where necessary, revised not less frequently than every three years.
(c) Criminal investigations
In carrying out the provisions of this chapter, the Administrator, and duly- designated agents and employees of the Environmental Protection Agency, are authorized to initiate and conduct investigations under the criminal provisions of this chapter, and to refer the results of these investigations to the Attorney General for prosecution in appropriate cases.

42 U.S.C. § 6921 (1994):

(a) Criteria for identification or listing. Not later than eighteen months after October 21, 1976, the Administrator shall, after notice and opportunity for public hearing, and after consultation with appropriate Federal and State agencies, develop and promulgate criteria for identifying the characteristics of hazardous waste, and for listing hazardous waste, which should be subject to the provisions of this subchapter, taking into account toxicity, persistence, and degradability in nature, potential for accumulation in tissue, and other related factors such as flammability, corrosiveness, and other hazardous characteristics. Such criteria shall be revised from time to time as may be appropriate.
(b) Identification and listing
(1) Not later than eighteen months after October 21, 1976, and after notice and opportunity for public hearing, the Administrator shall promulgate regulations identifying the characteristics of hazardous waste, and listing particular hazardous wastes (within the meaning of section 6903(5) of this title), which shall be subject to the provisions of this subchapter. Such regulations shall be based on the criteria promulgated under subsection (a) of this sec-

tion and shall be revised from time to time thereafter as may be appropriate. The Administrator, in cooperation with the Agency for Toxic Substances and Disease Registry and the National Toxicology Program, shall also identify or list those hazardous wastes which shall be subject to the provisions of this subchapter solely because of the presence in such wastes of certain constituents (such as identified carcinogens, mutagens, or teratagens) at levels in excess of levels which endanger human health.

(2)(A) Notwithstanding the provisions of paragraph (1) of this subsection, drilling fluids, produced waters, and other wastes associated with the exploration, development, or production of crude oil or natural gas or geothermal energy shall be subject only to existing State or Federal regulatory programs in lieu of this subchapter until at least 24 months after October 21, 1980, and after promulgation of the regulations in accordance with subparagraphs (B) and (C) of this paragraph. It is the sense of the Congress that such State or Federal programs should include, for waste disposal sites which are to be closed, provisions requiring at least the following:

(i) The identification through surveying, platting, or other measures, together with recordation of such information on the public record, so as to assure that the location where such wastes are disposed of can be located in the future; except however, that no such surveying, platting, or other measure identifying the location of a disposal site for drilling fluids and associated wastes shall be required if the distance from the disposal site to the surveyed or platted location to the associated well is less than two hundred lineal feet; and

(ii) A chemical and physical analysis of a produced water and a composition of a drilling fluid suspected to contain a hazardous material, with such information to be acquired prior to closure and to be placed on the public record.

(B) Not later than six months after completion and submission of the study required by section 6982(m) of this title, the Administrator shall, after public hearings and opportunity for comment, determine either to promulgate regulations under this subchapter for drilling fluids, produced waters, and other wastes associated with the exploration, development, or production of crude oil or natural gas or geothermal energy or that such regulations are unwarranted. The Administrator shall publish his decision in the Federal Register accompanied by an explanation and justification of the reasons for it. In making the decision under this paragraph,

the Administrator shall utilize the information developed or accumulated pursuant to the study required under section 6982(m) of this title.

(C) The Administrator shall transmit his decision, along with any regulations, if necessary, to both Houses of Congress. Such regulations shall take effect only when authorized by Act of Congress.

(3)(A) Notwithstanding the provisions of paragraph (1) of this subsection, each waste listed below shall, except as provided in subparagraph (B) of this paragraph, be subject only to regulation under other applicable provisions of Federal or State law in lieu of this subchapter until at least six months after the date of submission of the applicable study required to be conducted under subsection (f), (n), (o), or (p) of section 6982 of this title and after promulgation of regulations in accordance with subparagraph (C) of this paragraph:

(i) Fly ash waste, bottom ash waste, slag waste, and flue gas emission control waste generated primarily from the combustion of coal or other fossil fuels.

(ii) Solid waste from the extraction, beneficiation, and processing of ores and minerals, including phosphate rock and overburden from the mining of uranium ore.

(iii) Cement kiln dust waste.

(B)(i) Owners and operators of disposal sites for wastes listed in subparagraph (A) may be required by the Administrator, through regulations prescribed under authority of section 6912 of this title—

(I) as to disposal sites for such wastes which are to be closed, to identify the locations of such sites through surveying, platting, or other measures, together with recordation of such information on the public record, to assure that the locations where such wastes are disposed of are known and can be located in the future, and

(II) to provide chemical and physical analysis and composition of such wastes, based on available information, to be placed on the public record.

(ii)(I) In conducting any study under subsection (f), (n), (o), or (p), of section 6982 of this title, any officer, employee, or authorized representative of the Environmental Protection Agency, duly designated by the Administrator, is authorized, at reasonable times and as reasonably necessary for the purposes of such study, to enter any establishment where any waste subject to such study is generated, stored, treated, disposed of, or transported from; to inspect, take samples, and conduct monitoring and testing; and to

have access to and copy records relating to such waste. Each such inspection shall be commenced and completed with reasonable promptness. If the officer, employee, or authorized representative obtains any samples prior to leaving the premises, he shall give to the owner, operator, or agent in charge a receipt describing the sample obtained and if requested a portion of each such sample equal in volume or weight to the portion retained. If any analysis is made of such samples, or monitoring and testing performed, a copy of the results shall be furnished promptly to the owner, operator, or agent in charge.

(II) Any records, reports, or information obtained from any person under subclause (I) shall be available to the public, except that upon a showing satisfactory to the Administrator by any person that records, reports, or information, or particular part thereof, to which the Administrator has access under this subparagraph if made public, would divulge information entitled to protection under section 1905 of Title 18, the Administrator shall consider such information or particular portion thereof confidential in accordance with the purposes of that section, except that such record, report, document, or information may be disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out this chapter. Any person not subject to the provisions of section 1905 of Title 18 who knowingly and willfully divulges or discloses any information entitled to protection under this subparagraph shall, upon conviction, be subject to a fine of not more than $5,000 or to imprisonment not to exceed one year, or both.

(iii) The Administrator may prescribe regulations, under the authority of this chapter, to prevent radiation exposure which presents an unreasonable risk to human health from the use in construction or land reclamation (with or without revegetation) of (I) solid waste from the extraction, beneficiation, and processing of phosphate rock or (II) overburden from the mining of uranium ore.

(iv) Whenever on the basis of any information the Administrator determines that any person is in violation of any requirement of this subparagraph, the Administrator shall give notice to the violator of his failure to comply with such requirement. If such violation extends beyond the thirtieth day after the Administrator's notification, the Administrator may issue an order requiring compliance within a specified time period or the Administrator may commence a civil action in the United States district court in the

district in which the violation occurred for appropriate relief, including a temporary or permanent injunction.

(C) Not later than six months after the date of submission of the applicable study required to be conducted under subsection (f), (n), (o), or (p), of section 6982 of this title, the Administrator shall, after public hearings and opportunity for comment, either determine to promulgate regulations under this subchapter for each waste listed in subparagraph (A) of this paragraph or determine that such regulations are unwarranted. The Administrator shall publish his determination, which shall be based on information developed or accumulated pursuant to such study, public hearings, and comment, in the Federal Register accompanied by an explanation and justification of the reasons for it.

(c) Petition by State Governor

At any time after the date eighteen months after October 21, 1976, the Governor of any State may petition the Administrator to identify or list a material as a hazardous waste. The Administrator shall act upon such petition within ninety days following his receipt thereof and shall notify the Governor of such action. If the Administrator denies such petition because of financial considerations, in providing such notice to the Governor he shall include a statement concerning such considerations.

(d) Small quantity generator waste

(1) By March 31, 1986, the Administrator shall promulgate standards under sections 6922, 6923, and 6924 of this title for hazardous waste generated by a generator in a total quantity of hazardous waste greater than one hundred kilograms but less than one thousand kilograms during a calendar month.

(2) The standards referred to in paragraph (1), including standards applicable to the legitimate use, reuse, recycling, and reclamation of such wastes, may vary from the standards applicable to hazardous waste generated by larger quantity generators, but such standards shall be sufficient to protect human health and the environment.

(3) Not later than two hundred and seventy days after November 8, 1984, any hazardous waste which is part of a total quantity generated by a generator generating greater than one hundred kilograms but less than one thousand kilograms during one calendar month and which is shipped off the premises on which such waste is generated shall be accompanied by a copy of the Environmental Protection Agency Uniform Hazardous Waste Manifest form

signed by the generator. This form shall contain the following information:

(A) the name and address of the generator of the waste;

(B) the United States Department of Transportation description of the waste, including the proper shipping name, hazard class, and identification number (UN/NA), if applicable;

(C) the number and type of containers;

(D) the quantity of waste being transported; and

(E) the name and address of the facility designated to receive the waste.

If subparagraph (B) is not applicable, in lieu of the description referred to in such subparagraph (B), the form shall contain the Environmental Protection Agency identification number, or a generic description of the waste, or a description of the waste by hazardous waste characteristic. Additional requirements related to the manifest form shall apply only if determined necessary by the Administrator to protect human health and the environment.

(4) The Administrator's responsibility under this subchapter to protect human health and the environment may require the promulgation of standards under this subchapter for hazardous wastes which are generated by any generator who does not generate more than one hundred kilograms of hazardous waste in a calendar month.

(5) Until the effective date of standards required to be promulgated under paragraph (1), any hazardous waste identified or listed under this section generated by any generator during any calendar month in a total quantity greater than one hundred kilograms but less than one thousand kilograms, which is not treated, stored, or disposed of at a hazardous waste treatment, storage, or disposal facility with a permit under section 6925 of this title, shall be disposed of only in a facility which is permitted, licensed, or registered by a State to manage municipal or industrial solid waste.

(6) Standards promulgated as provided in paragraph (1) shall, at a minimum, require that all treatment, storage, or disposal of hazardous wastes generated by generators referred to in paragraph (1) shall occur at a facility with interim status or a permit under this subchapter, except that onsite storage of hazardous waste generated by a generator generating a total quantity of hazardous waste greater than one hundred kilograms, but less than one thousand kilograms during a calendar month, may occur without the requirement of a permit for up to one hundred and eighty

days. Such onsite storage may occur without the requirement of a permit for not more than six thousand kilograms for up to two hundred and seventy days if such generator must ship or haul such waste over two hundred miles.

(7)(A) Nothing in this subsection shall be construed to affect or impair the validity of regulations promulgated by the Secretary of Transportation pursuant to the Hazardous Materials Transportation Act.

(B) Nothing in this subsection shall be construed to affect, modify, or render invalid any requirements in regulations promulgated prior to January 1, 1983 applicable to any acutely hazardous waste identified or listed under this section which is generated by any generator during any calendar month in a total quantity less than one thousand kilograms.

(8) Effective March 31, 1986, unless the Administrator promulgates standards as provided in paragraph (1) of this subsection prior to such date, hazardous waste generated by any generator in a total quantity greater than one hundred kilograms but less than one thousand kilograms during a calendar month shall be subject to the following requirements until the standards referred to in paragraph (1) of this subsection have become effective:

(A) the notice requirements of paragraph (3) of this subsection shall apply and in addition, the information provided in the form shall include the name of the waste transporters and the name and address of the facility designated to receive the waste;

(B) except in the case of the onsite storage referred to in paragraph (6) of this subsection, the treatment, storage, or disposal of such waste shall occur at a facility with interim status or a permit under this subchapter;

(C) generators of such waste shall file manifest exception reports as required of generators producing greater amounts of hazardous waste per month except that such reports shall be filed by January 31, for any waste shipment occurring in the last half of the preceding calendar year, and by July 31, for any waste shipment occurring in the first half of the calendar year; and

(D) generators of such waste shall retain for three years a copy of the manifest signed by the designated facility that has received the waste. Nothing in this paragraph shall be construed as a determination of the standards appropriate under paragraph (1).

(9) The last sentence of section 6930(b) of this title shall not apply to regulations promulgated under this subsection.

(e) Specified wastes

(1) Not later than 6 months after November 8, 1984, the Administrator shall, where appropriate, list under subsection (b)(1) of this section, additional wastes containing chlorinated dioxins or chlorinated-dibenzofurans. Not later than one year after November 8, 1984, the Administrator shall, where appropriate, list under subsection (b)(1) of this section wastes containing remaining halogenated dioxins and halogenated-dibenzofurans.

(2) Not later than fifteen months after November 8, 1984, the Administrator shall make a determination of whether or not to list under subsection (b)(1) of this section the following wastes: Chlorinated Aliphatics, Dioxin, Dimethyl Hydrazine, TDI (toluene diisocyanate), Carbamates, Bromacil, Linuron, Organo- bromines, solvents, refining wastes, chlorinated aromatics, dyes and pigments, inorganic chemical industry wastes, lithium batteries, coke byproducts, paint production wastes, and coal slurry pipeline effluent.

(f) Delisting procedures

(1) When evaluating a petition to exclude a waste generated at a particular facility from listing under this section, the Administrator shall consider factors (including additional constituents) other than those for which the waste was listed if the Administrator has a reasonable basis to believe that such additional factors could cause the waste to be a hazardous waste. The Administrator shall provide notice and opportunity for comment on these additional factors before granting or denying such petition.

(2)(A) To the maximum extent practicable the Administrator shall publish in the Federal Register a proposal to grant or deny a petition referred to in paragraph (1) within twelve months after receiving a complete application to exclude a waste generated at a particular facility from being regulated as a hazardous waste and shall grant or deny such a petition within twenty-four months after receiving a complete application.

(B) The temporary granting of such a petition prior to November 8, 1984, without the opportunity for public comment and the full consideration of such comments shall not continue for more than twenty-four months after November 8, 1984. If a final decision to grant or deny such a petition has not been promulgated after notice and opportunity for public comment within the time limit prescribed by the preceding sentence, any such temporary granting of such petition shall cease to be in effect.

(g) EP toxicity

Not later than twenty-eight months after November 8, 1984, the Administrator shall examine the deficiencies of the extraction procedure toxicity characteristic as a predictor of the leaching potential of wastes and make changes in the extraction procedure toxicity characteristic, including changes in the leaching media, as are necessary to insure that it accurately predicts the leaching potential of wastes which pose a threat to human health and the environment when mismanaged.

(h) Additional characteristics Not later than two years after November 8, 1984, the Administrator shall promulgate regulations under this section identifying additional characteristics of hazardous waste, including measures or indicators of toxicity.

(i) Clarification of household waste exclusion A resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purposes of regulation under this subchapter, if—

(1) such facility—

(A) receives and burns only—

(i) household waste (from single and multiple dwellings, hotels, motels, and other residential sources), and

(ii) solid waste from commercial or industrial sources that does not contain hazardous waste identified or listed under this section, and

(B) does not accept hazardous wastes identified or listed under this section, and

(2) the owner or operator of such facility has established contractual requirements or other appropriate notification or inspection procedures to assure that hazardous wastes are not received at or burned in such facility.

42 U.S.C. § 6972 (1994):

(a) In general

Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf—

(1)(A) against any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter; or

(B) against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment; or (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator. Any action under paragraph (a)(1) of this subsection shall be brought in the district court for the district in which the alleged violation occurred or the alleged endangerment may occur. Any action brought under paragraph (a)(2) of this subsection may be brought in the district court for the district in which the alleged violation occurred or in the District Court of the District of Columbia. The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce the permit, standard, regulation, condition, requirement, prohibition, or order, referred to in paragraph (1)(A), to restrain 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 referred to in paragraph (1)(B), to order such person to take such other action as may be necessary, or both, or to order the Administrator to perform the act or duty referred to in paragraph (2), as the case may be, and to apply any appropriate civil penalties under section 6928(a) and (g) of this title.

(b) Actions prohibited

(1) No action may be commenced under subsection (a)(1)(A) of this section—

(A) prior to 60 days after the plaintiff has given notice of the violation to—

(i) the Administrator;

(ii) the State in which the alleged violation occurs; and

(iii) to any alleged violator of such permit, standard, regulation, condition, requirement, prohibition, or order, except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of subchapter III of this chapter; or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States or a State to require compliance with such permit, standard, regulation, condition, requirement, prohibition, or order.

In any action under subsection (a)(1)(A) of this section in a court of the United States, any person may intervene as a matter of right.

(2)(A) No action may be commenced under subsection (a)(1)(B) of this section prior to ninety days after the plaintiff has given notice of the endangerment to—

(i) the Administrator;

(ii) the State in which the alleged endangerment may occur;

(iii) any person alleged to have contributed or to be contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in subsection (a)(1)(B) of this section, except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of subchapter III of this chapter.

(B) No action may be commenced under subsection (a)(1)(B) of this section if the Administrator, in order to restrain or abate acts or conditions which may have contributed or are contributing to the activities which may present the alleged endangerment—

(i) has commenced and is diligently prosecuting an action under section 6973 of this title or under section 106 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980

(ii) is actually engaging in a removal action under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [42 U.S.C.A. §§ 604];

(iii) has incurred costs to initiate a Remedial Investigation and Feasibility Study under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [42 U.S.C.A. §§ 9604] and is diligently proceeding with a remedial action under that Act [42 U.S. C.A.§§ 9601 et seq.]; or

(iv) has obtained a court order (including a consent decree) or issued an administrative order under section 106 of the Comprehensive Environmental Response, Compensation and Liability Act of 980 [42 U.S.C.A. §§ 9606] or section 6973 of this title pursuant to which a responsible party is diligently conducting a removal action, Remedial Investigation and Feasibility Study (RIFS), or proceeding with a remedial action.

In the case of an administrative order referred to in clause (iv), actions under subsection (a)(1)(B) of this section are prohibited only as to the scope and duration of the administrative order referred to in clause (iv).

(C) No action may be commenced under subsection (a)(1)(B) of this section if the State, in order to restrain or abate acts or conditions which may have contributed or are contributing to the activities which may present the alleged endangerment—

(i) has commenced and is diligently prosecuting an action under subsection (a)(1)(B) of this section;

(ii) is actually engaging in a removal action under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [42 U.S.C.A.§§ 9604]; or

(iii) has incurred costs to initiate a Remedial Investigation and Feasibility Study under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 [42 U.S.C.A. §§ 9604] and is diligently proceeding with a remedial action under that Act [42 U.S.C.A. §§ 9601 et seq.].

(D) No action may be commenced under subsection (a)(1)(B) of this section by any person (other than a State or local government) with respect to the siting of a hazardous waste treatment, storage, or a disposal facility, nor to restrain or enjoin the issuance of a permit for such facility.

(E) In any action under subsection (a)(1)(B) of this section in a court of the United States, any person may intervene as a matter of right when the applicant claims an interest relating to the subject of the action and he is so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest, unless the Administrator or the State shows that the applicant's interest is adequately represented by existing parties.

(F) Whenever any action is brought under subsection (a)(1)(B) of this section in a court of the United States, the plaintiff shall serve a copy of the complaint on the Attorney General of the United States and with the Administrator.

(c) Notice

No action may be commenced under paragraph (a)(2) of this section prior to sixty days after the plaintiff has given notice to the Administrator that he will commence such action, except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of subchapter III of this chapter. Notice under this subsection shall

be given in such manner as the Administrator shall prescribe by regulation. Any action respecting a violation under this chapter may be brought under this section only in the judicial district in which such alleged violation occurs.

(d) Intervention

In any action under this section the Administrator, if not a party, may intervene as a matter of right.

(e) Costs

The court, in issuing any final order in any action brought pursuant to this section or section 6976 of this title, may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or substantially prevailing party, whenever the court determines such an award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(f) Other rights preserved

Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or requirement relating to the management of solid waste or hazardous waste, or to seek any other relief (including relief against the Administrator or a State agency).

(g) Transporters

A transporter shall not be deemed to have contributed or to be contributing to the handling, storage, treatment, or disposal, referred to in subsection (a)(1)(B) of this section taking place after such solid waste or hazardous waste has left the possession or control of such transporter, if the transportation of such waste was under a sole contractual arrangement arising from a published tariff and acceptance for carriage by common carrier by rail and such transporter has exercised due care in the past or present handling, storage, treatment, transportation and disposal of such waste.

42 U.S.C. § 6973 (1994):

(a) Authority of Administrator

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 on

behalf of the United States in the appropriate district court against any person (including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility) who has contributed or who is contributing to such handling, storage, treatment, transportation or disposal 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. A transporter shall not be deemed to have contributed or to be contributing to such handling, storage, treatment, or disposal taking place after such solid waste or hazardous waste has left the possession or control of such transporter if the transportation of such waste was under a sole contractural arrangement arising from a published tariff and acceptance for carriage by common carrier by rail and such transporter has exercised due care in the past or present handling, storage, treatment, transportation and disposal of such waste. The Administrator shall provide notice to the affected State of any such suit. The Administrator may also, after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and the environment.

(b) Violations

Any person who willfully violates, or fails or refuses to comply with, any order of the Administrator under subsection (a) of this section may, in an action brought in the appropriate United States district court to enforce such order, be fined not more than $5,000 for each day in which such violation occurs or such failure to comply continues.

(c) Immediate notice

Upon receipt of information that there is hazardous waste at any site which has presented an imminent and substantial endangerment to human health or the environment, the Administrator shall provide immediate notice to the appropriate local government agencies. In addition, the Administrator shall require notice of such endangerment to be promptly posted at the site where the waste is located.

(d) Public participation in settlements

Whenever the United States or the Administrator proposes to covenant not to sue or to forbear from suit or to settle any claim arising under this section, notice, and opportunity for a public meeting in the affected area, and a reasonable opportunity to comment on the proposed settlement prior to its final entry shall be

afforded to the public. The decision of the United States or the Administrator to enter into or not to enter into such Consent Decree, covenant or agreement shall not constitute a final agency action subject to judicial review under this chapter or chapter 7 of Title 5.