

## APPENDIX A

### UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW UNION

BIRDWATCHERS OF GROVETON, INC.,  
Plaintiff, and  
UNITED STATES OF AMERICA,  
Intervenor,

v.

Civ. No. 01-878

SUAVE REAL PROPERTIES, INC.,  
Defendant.

Romulus, Judge.

#### ORDER

On December 20, 2000, Birdwatchers of Groveton, Inc. (BOG), a non-profit corporation organized under the laws of New Union, filed a complaint against Suave Real Properties, Inc. (Suave), a real estate management company organized under the laws of New Union. BOG alleged jurisdiction under the citizen suit provisions of the Clean Water Act (CWA), 33 U.S.C. § 1365, and the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6972. BOG alleged that its members are birdwatchers living and watching birds in Groveton County, New Union. It further alleged that its members watched birds on Sheldrake Pond from an adjacent county road for at least the last two decades, until Suave began using the pond-side area as a firearms and skeet shooting range in 2000. It further alleged that during those decades, its members observed over two hundred species of birds on the Pond or its banks, many of which are species that migrate between the United States and Canada and/or Mexico, such as Mexican ducks, jacanas, avocets, sandhill cranes, and warbling vireos. Sheldrake Pond is a long, narrow, shallow pond, running east to west, that is dry during part of the year and never more than four feet deep and twenty-five acres in extent during the wet part of the year. Even so, it is an important stopover for many birds, both aquatic and terrestrial, during their annual interstate and international migrations.

It is uncontested that Suave began operation in 2000 of the Groveton Rifle and Pistol Association (GRAPA) near the Pond and continues that operation today. The GRAPA facility consists of a pad for skeet shooters, together with a device that ejects skeet into the air, and a firing range. Suave filled a small portion of the western end of the Pond to build a platform for the skeet ejection device. Suave owns land to the west and south of the Pond, and part of the western end of the Pond. The County owns land to the east and south of the Pond, and the

remainder of the Pond. Suave ejects skeet over the Pond, while skeet shooters at some remove from the Pond attempt to shoot the skeet with shotguns. When they hit the skeet, skeet parts and spent lead shot commonly fall into and around the Pond, both on Suave-owned and county-owned land and portions of the Pond. When they miss the skeet, the skeet commonly fall into both portions of the land and Pond and the spent shot falls similarly. The firing range is located south of the Pond, near its eastern end. A berm behind the targets designed to catch most of the spent shot is located about fifty feet from the Pond. Occasionally lead bullets fired on this range overshoot the berm and enter the Pond or the country's land beyond. There is no evidence that Suave has an easement over the County's land or portion of the Pond or other agreement with the County allowing these invasions of its land or portion of the Pond.

BOG alleges that Suave is violating CWA 33 U.S.C. § 1311(a) in two ways. First, filling and maintaining the fill in the Pond for the skeet ejection platform constitutes discharging fill material into navigable waters without a CWA 33 U.S.C. § 1344 permit. Second, ejection of skeet and firing shot and bullets into the Pond constitutes either discharging fill material into navigable waters without a CWA § 1344 permit or discharging pollutants into navigable waters without a CWA 33 U.S.C. § 1342 permit. BOG asks the court to assess civil penalties for these violations and to issue an injunction against their continuance. BOG alleges that Suave is violating RCRA in two ways. First, Suave is violating RCRA by disposing of hazardous waste (skeet, skeet parts, and lead shot) into and about the Pond without a RCRA permit, in violation of 42 U.S.C. § 6925(a). BOG asks the court to assess civil penalties for these violations and to issue an injunction against their continuance. Second, Suave's disposal of solid and hazardous waste into and about the Pond is creating an imminent and substantial endangerment, actionable under 42 U.S.C. § 6972(a)(1)(B). BOG asks the court to issue an injunction requiring Suave to abate this endangerment. EPA has intervened in support of BOG in its CWA counts and the second part of its RCRA count.

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

## I. The CWA Counts

### A. Legal Background

The basic prohibition of the CWA is the addition of fill material or a pollutant to navigable water from a point source without a CWA permit. 33 U.S.C. §§ 1311(a), 1362 (12). "Navigable water" is defined in the CWA to be the "waters of the United States." 33 U.S.C. § 1362(7). The legislative history of the statute indicates that Congress intended the term to be interpreted to exercise the full extent of congressional constitutional authority. Conf. Rep. 92-1236, *reprinted in* 1972 U.S.C.C.A.N. 3776, 3822. The Environmental Protection Agency (EPA), which administers most of the CWA, including the § 1342 pollutant permitting program,

has interpreted the term in its regulations to include intrastate waters, such as “playa lakes,” which could affect interstate or foreign commerce. Such uses include use by interstate or foreign travelers for recreational purposes. 40 CFR § 122.2. The Army Corps of Engineers (COE), which administers the CWA’s § 1344 fill permitting program, has similarly interpreted the term. 33 CFR § 328.3(a)(3). A playa lake is a lake that is intermittent, i.e., it is dry part of the year. There are a number of such lakes in the arid southwest. BOG argues that Sheldrake Pond is a playa lake. Suave argues that it is too small to be a lake, that it is merely a “vernal pool,” a pool that is wet in the spring and dry the rest of the year. EPA has not specifically included vernal pools within its definition of navigable water, probably because they are too small. Nor has the COE. BOG argues further that Sheldrake Pond is used in interstate commerce as part of an interstate and international bird migration pathway between the Gulf of Mexico and further south to the northern Great Plains and further north, by migrating birds and by people watching the migratory birds for recreational purposes. Significantly, the COE has interpreted its regulatory definition of navigable waters to include waters that “are or would be used as habitat by birds protected by the Migratory Bird Treaties.” 51 Fed. Reg. 41217 (“Migratory Bird Rule”). Suave argues bird flight is not commerce and that birdwatching at Sheldrake Pond is not part of interstate commerce because only BOG’s members are alleged to watch birds there and they are intrastate birdwatchers.

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

On August 15, 2001, Congress amended the CWA’s definition of “navigable waters” to incorporate EPA’s definition of the “waters of the United States” from 40 CFR § 122.2. See Water Pollution Protection Act of 2001, P.L. 106-720.<sup>1</sup> The Report of the Senate Environment Committee accompanying the Senate bill stated:

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<sup>1</sup> This enactment exists only for the purposes of this Competition.

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

S. Rep. 106-528, p. 23.<sup>2</sup>

## B. Legal Analysis

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

But if the plaintiff prevailed in its arguments, either that the amendments controlled this case or that the Senate Report indicated the congressional intent in 1972 was to regulate isolated waters like those at issue in this case, then we would reach the constitutional question that the Court avoided in *SWANCC*. In that event, we would hold that Congress exceeded its authority when it attempted to exercise its jurisdiction over insignificant, isolated playa ponds such as Sheldrake Pond. We start with the Court's observation in *SWANCC* that such an attempt would

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<sup>2</sup> This Report exists only for the purposes of this Competition.

raise “significant constitutional and federalism questions.” *Id.* at 684. They are, of course, the same questions considered by the Court recently in holding that a federal civil remedy for victims of gender-based violence and a federal offense for possession of a firearm in a school zone were unconstitutional. *See U.S. v. Morrison*, 529 U.S. 598 (2000); *U.S. v. Lopez*, 514 U.S. 549 (1995).

In both decisions, the Court reiterated the three categories of activity that Congress may regulate under the Commerce Clause: 1) highways of interstate commerce; 2) instrumentalities of interstate commerce; and 3) activities substantially affected by interstate commerce. *Morrison* at 608-9; *Lopez* at 558. Plaintiff first argues that Sheldrake Lake is part of a highway of interstate commerce, i.e., part of a migratory bird flyway. This argument sweeps too broadly. Since migratory birds can land virtually anywhere in the country, it would make the land and water of the whole country subject to federal regulation, obliterating the traditional state control over land and water use decisions that underlies our federalist division of powers between the two levels of government. Plaintiff then argues that migratory birds are instrumentalities of interstate commerce, citing *Missouri v. Holland*, 252 U.S. 416 (1919). Plaintiff’s attempted use of *Missouri v. Holland* is misplaced in two respects. First, the Court did not hold that migratory birds were instrumentalities of interstate commerce, but merely that they were not property of the state and thus not immune from federal control. Second, the statute and regulations at issue in that case protected migratory birds from being killed, captured or sold, while the CWA regulates water pollution.

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

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

The Senate Committee may have thought it was doing so when enacting the 2001 amendments, but that is a far cry from Congress exercising such authority.

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

## II. The RCRA ISSUES

BOG seeks a finding that 1) Suave is violating RCRA by disposing of shot and skeet parts, hazardous waste, on and about its Sheldrake Pond facility without a permit, actionable under 42 U.S.C. § 6972(a)(1)(A) and 2) the disposed shot and skeet parts, solid or hazardous waste, constitute an imminent and substantial endangerment, actionable under 42 U.S.C. § 6972(a)(1)(B). To make either of these findings, it is necessary to hold that the fired shot and skeet parts are solid waste, for hazardous waste is a subset of solid waste. This is a more complicated exercise that it might appear, for there are two definitions of "solid waste" that could be relevant. First, Congress defined solid waste as "... discarded material...resulting from industrial, commercial, mining and agricultural operations, and from community activities." 42 U.S.C. § 6903(27). Second, EPA has promulgated a definition of solid waste at 40 CFR § 261.2(b) that again defines it as "discarded material," and then defines "discarded material" in a long and complex manner. Courts, and even EPA officials, have commented that this definition is an incomprehensible quagmire. The D.C. Circuit, for instance, has characterized it as a "mind-numbing journey." *American Mining Congress v. U.S. EPA*, 824 F.2d 1177, 1189 (D.C. Cir. 1987). As it turns out, the second, regulatory, definition applies to allegations of violating RCRA's regulatory program under § 6972(a)(1)(A), and the first, statutory, definition applies to allegations that activities constitute imminent and substantial endangerments under § 6972(a)(1)(B). *Connecticut Coastal Fishermen's Association v. Remington Arms Co., Inc.*, 989 F.2d 1305 (2<sup>nd</sup> Cir. 1993). *See also Long Island Soundkeeper Fund, Inc. v. New York Athletic Club of the City of New York*, 1996 WL 131863 (S.D.N.Y.). The Second Circuit's reasoning in this regard is complicated but impeccable, and we see no reason to repeat it here. Suave argues that using a consumer product for its intended use does not constitute disposal of the product under either definition. It further argues that shot, like a golf ball, is not discarded when it is fired and falls to the ground, for that is its intended use. EPA agrees that the "consumer use" exception applies to the regulatory definition of solid waste for purposes of § 6972(a)(1)(A), but argues that it does not apply to the statutory definition of solid waste for purposes of § 6972(a)(1)(B).

Complicating this issue is the "military munitions rule," 40 CFR § 261.2(a)(2)(iv), § 266.202. The rule was upheld in *Military Toxics Project v. EPA*, 146 F.3d 948 (D.C. Cir. 1998). Relevant portions of this rule essentially say that fired military munitions that land on a military firing range are not solid waste in the regulatory sense, but may be solid waste in the statutory sense if they land off the firing range. Happily, both Suave and BOG agree that the rule is irrelevant because it deals only with military munitions, which are not the focus of this case. While EPA agrees that the military munitions rule does not govern this case, it argues that the principles embodied in it govern the interpretation of both the statutory and regulatory

definitions of solid waste. According to EPA, the exclusion embodies the Agency's consistent interpretation of the regulatory definition of solid waste as excluding commercial products used for their intended use, if their ordinary use results in their landing on the ground. Thus EPA interprets its regulatory definition of solid waste to exclude shot landing on the GRAPA firing range, for firing shot on a firing range is using shot for its intended purpose. And it interprets the statutory definition to cover shot landing off the firing range as in the military munitions rule. Under this interpretation it is important to find whether the portion of the Pond owned by the County is part of the skeet and firing ranges. But if the intended use of the ammunition at issue here is to shoot skeet or to shoot at a target, this court fails to understand why that purpose is accomplished when the shot lands on a firing range but is not accomplished when it lands off the range. We therefore agree with the principle parties to this case that the military munitions rule is not useful in making the required interpretation.

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

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

regulation merely says that the statutory definition applies to EPA imminent and substantial endangerment causes of action and by extension to similar citizen suit causes of action; it does not deal with whether the consumer use exception applies to the statutory definition of solid waste. In sum, it is irrelevant to the issue before us. Thus, absent a countervailing argument, under *Mead Corp.* EPA's interpretation that the statutory definition of solid waste does not include a consumer use exception is entitled only to relative respect, not substantial deference.

BOG and EPA next argue that our Circuit has already decided that EPA's interpretation that the statutory definition of solid waste does not include a consumer use exception and that decision must be followed under principles of stare decisis. In *Neighborhood against Golf, Inc. v. Recreation Enterprises, Inc.*, 150 F.3d 1029 (12<sup>th</sup> Cir. 1999) (*NAG*),<sup>3</sup> a neighborhood association filed a multi-count complaint seeking to enjoin the operation of a golf course that disrupted the neighborhood in various ways. One count alleged that golf balls were solid waste and that toxic components of golf balls, accumulating in the roughs when their owners could not find them, were leaching into groundwater, endangering neighborhood drinking water supplies. Recreation Enterprises argued the golf balls were not solid waste because they were consumer products used for their intended purpose and hence they were not disposed. The district court rejected this argument, giving *Chevron* deference to EPA's interpretation that the statutory definition of solid waste did not except consumer products used for their intended purposes, and the Twelfth Circuit affirmed in *NAG*.

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

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

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<sup>3</sup> This opinion exists only for the purposes of this Competition.

definition of solid waste to exclude the consumer use exception to be entitled to little, if any, respect.

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