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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

PRESCOTT DIVISION

Center for Biological Diversity, et al., Plaintiffs, vs. United States Forest Service, Defendant, and National Rifle Association of America and Safari Club International, and National Shooting Sports Foundation, Inc., Defendants-Intervenors.	**CASE NO. 3:12-cv-08176-PCT-SMM** **DEFENDANTS-INTERVENORS NATIONAL RIFLE ASSOCIATION OF AMERICA AND SAFARI CLUB INTERNATIONAL'S MOTION TO DISMISS** **(ORAL ARGUMENT REQUESTED)**

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MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Defendants/Intervenors, National Rifle Association of America and Safari Club International (collectively "NRA/SCI") move for dismissal of Plaintiffs' claim for relief under Federal Rule of Civil Procedure 12(b)(6).[1]

Plaintiffs' claim for relief, brought under the Resource Conservation and Recovery Act's ("RCRA") citizen suit provision, is premised on the theory that hunters' use of lead-based ammunition is harming an experimental, non-essential population of captive-reared California condors that was created, as expressly authorized by statute, in 1996. Plaintiffs disagree with the well-debated, but nonetheless approved, parameters of the experiment. Specifically, Plaintiffs seek to use RCRA to nullify a lynchpin provision of the special rule: the existence of the experimental population would *not* result in the curtailment of existing land uses, *e.g.*, hunters' use of lead-based ammunition. RCRA was not intended to, nor does it, operate as a limitation on experimental, non-essential populations authorized by the Secretary of the Interior under 16 U.S.C. § 1539(j) (Section 10(j) of the Endangered Species Act ("ESA")). Because the law does not provide for

[1] Although NRA/SCI have filed an answer in this case, they are filing a motion to dismiss, and not a motion for judgment on the pleadings, because the named defendant has not yet filed an answer. Under Rule 12, a party cannot file a motion for judgment on the pleadings until "[a]fter the pleadings are closed[.]" Fed. R. Civ. P. 12(c). "Ordinarily, this means that a Rule 12(c) motion must await the answer of all defendants." *Moran v. Peralta Cmty. Coll. Dist.*, 825 F. Supp. 891, 894 (N.D. Cal. 1993). "Courts having addressed this issue have held that 'closed' means every defendant must file an answer before a Rule 12(c) motion can be filed[,] even when one defendant has filed a motion to dismiss instead of answering," *Habeeba's Dance of the Arts, Ltd. v. Knoblauch*, No. 2:05-CV-926, 2006 WL 968642, at *2 (S.D. Ohio 2006) (discussing cases). Because the courts treat a motion to dismiss and a motion for judgment on the pleadings under the same legal standard, if NRA/SCI is incorrect about filing a motion to dismiss, the title of the document should not matter. *See United States v. In re Seizure of One Blue Nissan Skyline Auto., & One Red Nissan Skyline*, 683 F. Supp. 2d 1087, 1089 (C.D. Cal. 2010) ("The standard for assessing a Rule 12(c) motion for judgment on the pleadings is the same as the standard for a Rule 12(b)(6) motion to dismiss.") *citing Enron Oil Trading & Trans. Co. v. Walbrook Ins. Co., Ltd.*, 132 F.3d 526, 529 (9th Cir. 1997).

relief based on the facts alleged by Plaintiffs, the Court should dismiss the Complaint for failure to state a claim upon which relief may be granted.

STATEMENT OF FACTS AND LAW

In the interest of brevity, NRA/SCI requests that the Court consider the sections regarding material facts and legal background provided in United States Forest Service's ("Forest Service") Motion to Dismiss (Dkt. 123, "FS MTD") and Defendant-Intervenor National Shooting Sports Foundation's Motion for Judgment on the Pleadings (Dkt. 124, "NSSF MJOP") on file in this Action.

ARGUMENT

I. Plaintiffs Fail to State a Cause of Action under RCRA Because the Complaint Does Not Sufficiently Plead the Existence or Threat of an Imminent and Substantial Endangerment to: (a) Human Health or (b) the Environment.

Plaintiffs have not alleged an imminent and substantial endangerment to human health or the environment. They sue under RCRA's citizen suit provision, 42 U.S.C. section 6972(a)(1)(B), which states, in pertinent part, that "any person may commence a civil action . . . against any person . . . who is contributing to the . . . disposal of any solid . . . waste which may present an imminent and substantial endangerment to health or the environment[.]" *See* Compl., ¶ 2. "RCRA's primary purpose . . . is to reduce the generation of hazardous waste and to ensure the proper treatment, storage, and disposal of that waste which is nonetheless generated, 'so as to minimize the present and future threat to human health and the environment.'" *Meghrig v. KFC W., Inc.* 516 U.S. 479, 483 (1996) (citing 42 U.S.C. § 6902(b)); *accord* Compl., ¶ 18. Thus, for Plaintiffs' RCRA suit to survive, their pleading must allege, at least, that the Forest Service's inaction regarding hunters' use of lead-based ammunition "presents an imminent and substantial endangerment to [(1) human] health or [(2)] the environment." The Complaint fails on both points.

A. The Complaint's Cursory, General Allegations Regarding Lead (Pb) Exposure and Its Potential Effect on Human Health Are Factually Insufficient to Anchor a RCRA Citizen Suit.

Plaintiffs' Complaint does not actually allege that there is an imminent and substantial threat to *human* health as a result of the use of lead-based ammunition in the KNF. Instead, Plaintiffs' Request for Relief vaguely asks this Court to "[p]ermanently enjoin the Forest Service from creating or contributing to the creation of an imminent and substantial endangerment to human health or the environment within the Kaibab National Forest [('KNF').]" In fact, the Complaint includes only two direct comments as to human exposure to lead: (1) "[l]ead is a potent, potentially deadly toxin, exposure to which can cause damage to many organs in the body and cause . . . humans . . . severe adverse health effects[,]" and (2) "Plaintiffs' members have read many scientific studies and reports documenting the threat to human health . . . posed by spent lead ammunition[.]" Compl., ¶¶ 25, 15.

Even if both of these general statements are true, Plaintiffs have not sufficiently alleged how the use of lead-based ammunition in the KNF has or will imminently and substantially impact human health, as required for a RCRA citizen suit. 42 U.S.C. § 6972(a)(1)(B). Plaintiffs allege no facts establishing a link between lead in harvested game and lead exposure resulting from consumption of such game by humans. Plaintiffs' general awareness that human health can *potentially* be affected by lead exposure is a far cry from sufficiently alleging an endangerment to human health in the KNF that could be remedied under RCRA. "Factual allegations [in a complaint] must be enough to raise a right to relief above the speculative level" to get passed the pleading stage. *Bell Atl. Corp. v. Twombly* 550 U.S. 544, 555 (2007).

Further, assuming arguendo that this Action is intended to prevent human consumption of game harvested with lead-based ammunition, Plaintiffs did not plead a claim on that basis. Such a claim would be drastically different from the claim actually

pleaded—whether an experimental, non-essential population of a few hundred animals are being endangered by the Forest Service's "inaction" such that RCRA's citizen suit provision is applicable. "Federal Rule of Civil Procedure 8(a)(2) requires . . . a short and plain statement of the claim showing that the pleader is entitled to relief. [T]he statement need only give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Erickson v. Pardus* 551 U.S. 89, 93 (2007) (citing *Twombly*, 550 U.S. 544, 555) (internal quotation marks omitted). The Complaint does not include any allegation causally linking the Forest Service's inaction regarding the use of lead-based ammunition in the KNF with an exposure leading to a potential or actual threat to human health. Thus, if Plaintiffs intended to state a claim upon which relief could be granted, vis-à-vis a threat to human health, they have failed. Fed. R. Civ. P. 12(b)(6).

B. Animals that Are Being Utilized in a Highly Controlled Experiment Run by the Federal Government Are Not Part of the "Environment" as that Term Is Used in RCRA.

The gravamen of Plaintiffs' case is an alleged threat to an experimental population of California condors, but that experimental designation necessarily prevents Plaintiffs from bringing a successful RCRA claim. Plaintiffs, somewhat surreptitiously, admit that the California condor population at issue has only existed since 1996. Compl., ¶¶ 38, 40. Tellingly, the Complaint makes no mention of *how* this population came into existence. The population is part of an experiment—and the presence of hunting with lead ammunition is expressly recognized within the parameters of the experiment. Thus, as described below, Plaintiffs cannot reasonably argue that the population is part of "the environment" for purposes of a RCRA citizen suit.

As an express condition of the experiment, the U.S. Fish and Wildlife Service ("FWS"), which is primarily conducting this experiment, used a Section 10(j) designation to "assure that all actions undertaken pursuant to the proposed action [i.e., the creation of the experimental non-essential population] will be compatible with existing land uses."

See NRA/SCI's Request for Judicial Notice ("RJN"), Ex. 1 (Final Environmental Assessment ["EA"], at ii); see *id.* at p. 62 ("the non-essential, experimental designation provides increased opportunities for assuring that the release and the management of the condors do not disrupt or conflict with other activities"). The Final EA for the experiment is clear: "the non-essential, experimental population status that would apply to the condors effectively means that no existing activities, including sport hunting, will be disrupted by the release." *Id.* at 35. And the Final EA does not just refer to the protection of hunting per se—it directly states that this experiment will not impact hunters' use of lead-based ammunition. The Final EA is without ambiguity on this point, stating that, "[i]f lead poisoning becomes a significant source of mortality for California condors released in the proposed action, . . . mandatory use of non-lead bullets would not be mandated under the provisions of the 10(j) reintroduction." *Id.*

Hunters' use of lead-based ammunition was plainly an expected part of the experiment; FWS's final rule statement in the Federal Register confirms it. 61 Fed Reg. 54044, 54055 (Oct. 16, 1996). Removing any doubt that the experiment was not to undermine land use rights, the FWS agreed that, if it faced a situation in which it would otherwise be compelled to remove the experimental status (e.g., by changing status of the condor to threatened or endangered), or designate critical habitat, the FWS would instead remove all California condors from the experimental area and revoke the experimental population rule. 50 C.F.R. § 17.84(j)(11)(ii).[2] Plaintiffs, however, refuse to recognize this fact because doing so would doom their case.

The Complaint raises an issue of first impression: whether RCRA's citizen suit provision is applicable to an alleged "imminent and substantial endangerment to . . . the environment" that exists only as the result of the Secretary of the Interior having

[2] The only exception to this rule is that removal is not required if the Service gets *all* of the condor reintroduction partners to agree that the population should continue to exist in its current location. 50 C.F.R. § 17.84(j)(11)(ii).

established a non-essential, experimental population (under Section 10(j)) *that would not exist, and would not suffer the alleged endangerment, but for the experiment*? The answer is "no."

"The entire purpose of an experimental population designation is to allow the Secretary some leeway and authority to 'experiment' in the management, preservation and conservation of a species." *WildEarth Guardians v. Lane*, No. CIV 12-118 LFG/KBM, 2012 WL 6019306, at *9 ((D.N.M., Dec. 3, 2012), *as amended* (Dec. 4, 2012). Section 10(j) expressly allows the Secretary of the Interior to move animals in and out of the environment for experimentation. That the "laboratory" here is tens of thousands of acres does not, however, change the fact that without the experiment, the condors would not be in the KNF. The ESA allows for the Secretary of the Interior to operate a "laboratory" on a broad scale (16 U.S.C. § 1539(j)),[3] so the relevant California condor population is artificial, and not part of "the environment" as RCRA uses that term.

The terms of the experiment show the non-essential, experimental population of California condors should not be considered part of "the environment" because that is plainly contrary to the idea behind Section 10(j). Under this subsection, the Secretary can establish a population "wholly separate geographically from nonexperimental populations of the same species" for purposes of experimentation. 16 U.S.C. § 1539(j)(1). "It is a well[-]established axiom of statutory construction that, whenever possible, a court should interpret two seemingly inconsistent statutes to avoid a potential conflict." *California ex rel. Sacramento Metro. Air Quality Mgmt. Dist. v. United States*, 215 F.3d 1005, 1012 (9th Cir. 2000). Recognizing statutorily authorized, non-natural, experimental populations are beyond RCRA's reference to "the environment" would avoid the

[3] Through the 10(j) rule, the Secretary of the Interior has the authority to allow incidental *and* non-incidental harm to otherwise protected animals. Indeed, the only limitation on the Secretary is that any authorized non-incidental harm is the result of an act that is "for scientific purposes or to enhance the propagation or survival of the affected species." 16 U.S.C. § 1539(a)(1).

potential conflict between ESA and RCRA. Thus, the Court should hold that an alleged endangerment presented by lead-based ammunition—which was expressly contemplated and accepted as part of the placement of the non-essential experimental population—is not subject to a citizen suit under RCRA.

II. Spent Lead-Based Ammunition Present in Carrion Is Not a Solid Waste Under Ecological Rights Foundation.

The NSSF MJOP explains that lead-based ammunition is not "discarded material" when used for its intended purpose by a hunter. NRA/SCI supplements that argument here.

The NSSF MJOP's discussion of *Water Keeper Alliance v. U.S. Department of Defense*, 152 F. Supp. 2d 163, 169 (D.P.R. 2001), concerns, inter alia, the fact that the *Water Keeper* court relied on the EPA's Military Munitions Rule in holding that "firing ordnance on an active military training range is '*the use of a product for its intended purpose and is not the discarding of waste material.*'" *Id.* at 167. (emphasis added). Though *Water Keeper* concerned munitions actually used by the military, courts have also applied the Military Munitions Rule regarding public sector ammunition use.

In a different case, concerning a closed shooting range, the court deferred

> to the EPA's expertise [vis-à-vis the Military Munitions Rule, and held that] lead shot and target debris are not "discarded" because at a shooting range they are used as intended. Because they are not "discarded," they do not come within the RCRA definition of "solid waste." Because the lead shot and target debris is not "solid waste," it does not qualify as "hazardous waste" and instead falls outside the ambit of RCRA. That conclusion is consistent with the majority of the five court decisions which have addressed RCRA allegations in the context of firing ranges.

Otay Land Co. v. U.E. Ltd., L.P., 440 F.Supp.2d 1152, 1180, (S.D. Cal. 2006).[4] But as

[4] *Otay Land* was vacated on an issue not relevant hereto (*see* 338 Fed.Appx. 689), but the vacatur does not affect the persuasive value of the trial court's opinion as to whether spent lead-based ammunition, used as it is intended to be used, constitutes disposed-of "solid waste" under RCRA. *See DHX, Inc. v. Allianz AGF MAT, Ltd.* 425 F.3d 1169,

correctly noted in the NSSF MJOP, although there is case law discussing how to characterize spent ammunition at a shooting range in response to a RCRA claim, there is no such authority concerning the characterization of spent ammunition present in an area where hunting with lead-based ammunition is legal. NSSF MJOP at 12. Nonetheless, a recent Ninth Circuit opinion suggests that hunters' spent lead-based ammunition is not "solid waste."

That case involved a RCRA claim levied against utility companies based on the assertion that "wood preservative that escapes from utility poles" constituted "solid waste" and "may present an imminent and substantial endangerment to health or the environment." *Ecological Rights Found. v. Pac. Gas and Elec. Co.* 713 F.3d 502, 514-15, (9th Cir. 2013). The *Ecological Rights* court, holding that RCRA is ambiguous as to "solid waste," looked to the Military Munitions Rule, *No Spray Coalition, Inc. v. City of New York*, 252 F.3d 148, 150 (2d Cir. 2001), and other authority to answer the key question before the court—whether a manufactured product has served its intended purpose and is "no longer wanted by the consumer." *Id*. at 515. The court held that:

> escaping preservative is neither a manufacturing waste by-product nor a material that the consumer . . . no longer wants and has disposed of or thrown away. Thus, we conclude that PCP-based wood preservative that escapes from treated utility poles through normal wear and tear, while those poles are in use, is not automatically a RCRA "solid waste."

Id.

As *Ecological Rights* notes, the forgoing conclusion is consistent with the application of the Military Munitions Rule: "EPA treats spent munitions under RCRA . . . as not having been 'discarded' through their normal use." *Id.* at 516. The *Ecological Rights* court recognized that "[it] defies reason to suggest that" "36 million utility-owned wood poles" are "producing 'solid waste[.]'" *Id.* at 517. The court noted that if utility

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1176 (9th Cir. 2005) ("at minimum, a vacated opinion still carries informational and perhaps even persuasive or precedential value").

pole seepage—"released into the environment as a natural, expected consequence of its intended use"—is 'solid waste,' then "everything from wood preservative that leaches from railroad ties to lead paint that naturally chips away from houses would be . . . potentially actionable under 42 U.S.C. § 6972(a)(1)(B)." *Id.* at 517-18.

Ecological Rights is important to the instant matter because it addresses RCRA's application where there is *no* discrete place of "accumulation." Lead projectiles used for hunting do not "accumulate" in a single, relatively small location, like they do at a shooting range. Rather, to the extent spent lead-based ammunition exists in the KNF, its broad dispersion throughout the KNF is more similar to the escaped preservative discussed in *Ecological Rights* than concentrated spent ammunition accumulated on a few acres at a shooting range. There has to be a limit to RCRA's scope. Based on the Ninth Circuit's recent analysis in *Ecological Rights* regarding utility poles—and that court's reference to lead paint chips—it is clear that hunters' lead-based ammunition, when used as intended, should not be considered a "solid waste" under RCRA.

III. Even Assuming Plaintiffs Could Meet the Prima Facie Burden for Their RCRA Claim, ESA Section 10(j) Prevents Application of RCRA Under Well-Established Law Regarding the Interpretation of Conflicting Federal Statutes.

Plaintiffs' RCRA claim is grounded in an alleged endangerment resulting from hunters' use of lead-based ammunition, an activity that was expressly authorized within the parameters of the applicable 10(j) rule. 50 C.F.R. § 17.84(j)(11)(ii); RJN, Ex. 1, at p. 35. Accordingly, if the Court concludes Plaintiffs have established a prima facie claim under RCRA's citizen suit provision, then there is an irreconcilable conflict between ESA's authorization of nonessential, experimental populations and RCRA's broad remedial purpose regarding the "disposal" of "waste" that may endanger the environment. Plaintiffs' RCRA claim, and thus their lawsuit, should be dismissed because: (1) RCRA's "imminent and substantial endangerment" provision pre-dates

Section 10(j); (2) Section 10(j) is the more narrow and specific statute regarding the management of condors in the experimental population area, which includes the KNF; and (3) application of RCRA in this instance is repugnant to the purpose of Section 10(j) and would effectively nullify it.

"Where two statutes conflict, the later-enacted, more specific provision generally governs." *United States v. Juvenile Male*, 670 F.3d 999, 1008 (9th Cir. 2012). A new statute can be read as amending a prior statute if there is a "'positive repugnancy' between the provisions of the new and those of the old that cannot be reconciled[.]" *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 664 n.8 (2007). Furthermore, "Congress must be presumed to have known of its former legislation and to have passed new laws in view of the provisions of the legislation already enacted." *United States v. Trident Seafoods Corp.*, 92 F.3d 855, 864 (9th Cir. 1996). When the legislative history of RCRA's "imminent and substantial endangerment" provision is compared to that of Section 10(j) of the ESA, it is clear that the latter, which is more recent and much more specific, controls.

As of 1980, RCRA included a provision authorizing a cause of action to restrain disposal of a solid or hazardous waste that "may present an imminent and substantial endangerment to health or the environment[.]" *See United States v. Price* 688 F.2d 204, 208 (3d Cir. 1982) (noting that the complaint was filed in 1980, under a version of 46 U.S.C. § 6793 that included the relevant "imminent and substantial" language); *see also* RJN at Ex. 2, p. 5043.[5] Section 10(j), on the other hand, was not enacted until 1982.

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[5] To be clear, Plaintiffs' suit is brought under 42 U.S.C. § 6972, which concerns citizen suits, and not 42 U.S.C. § 6973, discussed above, which concerns, inter alia, the Administrator of the EPA's authority to bring an action concerning an "imminent and substantial endangerment." The distinction, however, is one without a difference, as it is clear the citizen suit provision has no greater reach than the provision discussed in the text above: the citizen suit provision is directly patterned on 42 U.S.C. section 6973. "[RCRA's citizen suit provision] confers on citizens a limited right under section 7002 [e.g., 42 U.S.C. § 6973] to sue to abate an imminent and substantial endangerment

Forest Guardians v. U.S. Fish and Wildlife Serv. 611 F.3d 692, 705 (10th Cir. 2010) (Congress amended the ESA in 1982 to . . . authorize the FWS to designate certain reintroduced populations of endangered and threatened species as "experimental populations."). As the Tenth Circuit has explained:

> *Congress added section 10(j) . . . to address the [FWS]'s and other affected agencies' frustration over political opposition to reintroduction efforts perceived to conflict with human activity.* Although the Secretary already had authority to conserve a species by introducing it in areas outside its current range, Congress hoped the provisions of section 10(j) would,[—]with the clarification of the legal responsibilities incumbent with the experimental populations[—]actually encourage private parties to host such populations on their lands.

Wyoming Farm Bureau Federation v. Babbitt 199 F.3d 1224, 1231-33 (10th Cir. 2000) (emphasis added). In creating Section 10(j), Congress's intent was to give the Secretary of the Interior the "flexibility and discretion in managing the reintroduction of endangered species. By regulation, *the Secretary can identify experimental populations . . . and, consistent with that determination, provide control mechanisms (i.e., controlled takings)* where the Act would not otherwise permit the exercise of such control measures against listed species." (*Id.*) (italics added).

The legislative history of Section 10(j) shows that Congress intended to provide the Secretary with extreme leeway in scientific research and actions aimed at protecting endangered species, so much so that the Secretary is allowed to authorize potential harm to certain members of a species' population if the Secretary believes it will result in a net gain to the species as a whole. Conversely, nothing in RCRA's legislative history suggests that the "imminent and substantial endangerment" provision(s) were contemplated to address (1) if a well-established recreational activity could constitute "disposal" of a "solid waste," or (2) if a statutorily authorized, government-run

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pursuant to the standards of liability established under section 7003 [e.g., 42 U.S.C. § 6973]." RJN at Ex. 2 (i.e., H.R. REP. 98-198(I), 53, 1984 U.S.C.C.A.N. 5576, 5612).

experiment could be subject to a RCRA suit based on an alleged endangerment that was a known element of the experiment. Given the foregoing, application of RCRA's citizen suit provision would be a "positive repugnancy" that should be avoided.

If the Court determines that Plaintiffs have made a prima facie RCRA citizen suit claim, then an irreconcilable conflict between the ESA and RCRA arises. That is, the experiment at issue was plainly authorized under Section 10(j), including the alleged endangerment, which is the gravamen of Plaintiffs' lawsuit. And either the ESA must yield, effectively removing the flexibility Congress provided to the Service in 1982 to further the goals of the ESA, or Plaintiffs' RCRA claim against the federal government —an unprecedented type of claim that RCRA was not intended to authorize—must fail. Given the timing, purpose, and scope of the two statutes at issue, Congress's intent should be preserved, and Plaintiffs' RCRA claim should be dismissed.

IV. The Forest Service Is Not a Contributor under RCRA Precedent in this Circuit, and Even Assuming Arguendo It Is, Policy Concerns Dictate that "Non-Regulation" of an Alleged Disposal of Waste Does Not Justify RCRA Citizen Suit Liability.

The Forest Service has explained why its inaction concerning the use of lead ammunition in KNF does not amount to "contributing" to the disposal of a "solid waste." FS MTD at 14 ("the mere existence of those authorities falls far short of the *Hinds*[6] court's threshold for measure of control necessary to state a claim under RCRA against the Service"); 17 ("Plaintiffs' Complaint relies entirely on allegations of unexercised regulatory authority."). As the Forest Service explains, the Court should find that the Forest Service's inaction, especially in the context of "unexercised regulatory authority," is not contributing to the disposal of a solid waste under RCRA. *Id.* at 15-16.

A strong policy rationale supports this conclusion. Finding contribution in this situation would expose federal, state, local, and tribal governments to potential RCRA

[6] *Hinds Inv., LP v. Angioli*, 654 F.3d 846, 850 (9th Cir. 2011).

liability any time they possess authority to stop a third party activity that is a violation of RCRA, but do not exercise that authority. *See Ecological Rights*, 713 F.3d at 517-18 (creating liability under RCRA for seepage of preservative from utility poles across the country "would lead to untenable results"). Another court held that "[n]either the statute nor the legislative history indicate that the phrase 'has contributed or ... is contributing to' contained in § 6972(a)(1)(B) or § 6973(a) was intended to extend to state regulatory agencies that have permitted ongoing violations of the prohibition against open dumping[.]" *Ringbolt Farms Homeowners Ass'n v. Town of Hull*, 714 F. Supp. 1246, 1261 (D. Mass. 1989). Instead, the court recognized "the congressional intent that the enforcement actions should be directed at those actually involved in the dumping." *Id.* at 1260-61 (citing legislative history stating that "[i]t was also Congress' intent that persons seeking to enforce the open dumping prohibition bring suit—not against the Federal government or the state—but against persons engaged in the act of open dumping").

The concern over RCRA liability for inaction would be true for activities on lands managed by the government and activities subject to the government's authority to regulate in general; for example, under the Commerce Clause or under a state's police power. Governments choose to not exercise authority for various reasons, including reasons related to fiscal, resource allocation, mission, or policy concerns that cut in favor of not regulating something that is potentially subject to regulation. Under Plaintiffs' theory, governments would risk RCRA liability every time such entities did not take action to regulate or stop an activity that might create RCRA liability.[7]

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[7] By way of example, the federal land management agencies manage a tremendous amount of land. The Forest Service "[m]anages 193 million acres of national forests and grasslands." RJN at ¶ 3. The Bureau of Land Management "administers more public land – over 245 million surface acres – than any other Federal agency in the United States." *Id.* at ¶ 4. The Fish and Wildlife Service "manage[s] the 150 million-acre National Wildlife Refuge System." *Id.* at ¶ 5.

For the same reason, courts have expressed concern over subjecting the federal government's inactions, such as unexercised regulatory authority, to obligations under the National Environmental Policy Act ("NEPA"). *See State of Alaska v. Andrus*, 591 F.2d 537, 541–42 (9th Cir. 1979) ("It is unnecessary for us to decide the exact scope, if any, of the Secretary's power to stop the [wolf-kill] program. Even if it is a broad power, the decision not to exercise it here does not trigger the NEPA requirement that an environmental impact statement be prepared."). And as the D.C. Circuit explained, "[n]o agency could meet its NEPA obligations if it had to prepare an environmental impact statement every time the agency had power to act but did not do so. . . . It would be an imaginative and vigorous agency indeed which could identify and prepare all the statements and explanations appellees' reading of NEPA would have the statute demand." *Defs of Wildlife v. Andrus*, 627 F.2d 1238, 1246 (D.C. Cir. 1980); *accord Int'l. Ctr. For Tech. Assessment v. Thompson*, 421 F. Supp. 2d 1, 8 (D.D.C. 2006). The *Defenders* court further explained that "[t]here are literally thousands of decisions which Federal officials are authorized to and could conceivably make under existing law. If the mere existence of this authority was a basis for invoking NEPA regardless of whether a Federal decision was required to be or had been made the scope of the environmental review process would be vastly expanded." *Defenders,* 627 F.2d at 1246-47.[8]

Similarly, in a related context involving a federal agency, the Ninth Circuit found that "the National Park Service's inaction in merely permitting the dangerous condition to persist did not rise to the level of affirmative contribution necessary to sustain a claim of negligent exercise of retained control." *Jones v. United States*, 509 Fed. Appx. 644, 645

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[8] *See also Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, No. 09-CV-8011-PCT-PGR, 2011 WL 4551175, at *10 (D. Ariz. Sept. 30, 2011) (ruling, in a previous lawsuit brought by a Plaintiff in the present case, that resource management plans allowing for "hunting and other forms of recreation [did not constitute an action] causally related to the use of lead ammunition by hunters" such that NEPA analysis was required on that issue).

(9th Cir. 2013) (unpublished). Accordingly, this Court should find that the Forest Service's alleged inaction regarding hunters' use of lead-based ammunition in the KNF, assuming it even has the authority to ban such use, is insufficient to hold it liable as a contributor under RCRA.

V. Hunting in the KNF Is Not a Community Activity, and Thus, Hunters' Spent Ammunition Is Not "Solid Waste" Under RCRA.

For another reason, spent hunting ammunition is not "solid waste" under RCRA. It is not "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) (emphasis added); *see also Ecological Rights Found.*,713 F.3d at 514 ("We begin with RCRA's definition of 'solid waste,' which is …'other discarded material . . . resulting from industrial, commercial, mining and agricultural operations, and from community activities. . . ."') (first ellipsis added, all other alterations in original). As the First Circuit explained, RCRA "defines 'solid waste,' not simply in terms of *type* of material, but also in terms of *source*." *Comite Pro Rescate De La Salud v. Puerto Rico Aqueduct & Sewer Auth.*, 888 F.2d 180, 185 (1st Cir. 1989) (emphasis in original). Spent hunting ammunition does not *result from* any of the listed sources.

Spent hunting ammunition does not result from industrial, mining, or agricultural operations, giving these terms their ordinary meaning. *See Schindler Elevator Corp. v. U.S. ex rel. Kirk*, 563 U.S. 401, 407 (2011) (noting that when statutory terms are undefined, courts will give them their ordinary meaning.). And hunting in the KNF is a recreational activity—not a commercial operation—because the Forest Service does not charge hunters. *See Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co.*, 777 F. Supp. 173, 188 n.21 (D. Conn. 1991) (plaintiffs alleged that Remington's club was a commercial operation because its "members were charged a fee[;]" Remington did not

contest the issue); *see also Lands Council v. Martin*, 479 F.3d 636, 642 (9th Cir. 2007) (collecting and relying on dictionary definitions for "commercial [,]" e.g., "work intended for commerce[,]" "work that is intended for the mass market[,]" and work that "relates to or is connected with trade and traffic or commerce in general . . . is occupied with business or commerce").

The few authorities interpreting "community activity" demonstrate that spent hunting ammunition does not come from a "community activity." The common meaning interpretation suggests that a "community activity" is a group activity, as the word "group" recurs in definitions of "community." *See, e.g., The American Heritage Dictionary of the English Language*, 374 (5th ed. 2011); *Webster's II New College Dictionary*, 227 (1995). Consistent with this meaning, the defendant in *Remington* did not contest the plaintiff's allegations that its club was a "community activity" because it "was used by a number of community groups." *Connecticut Coastal*, 777 F. Supp. at 188 n.21. Courts have focused on activities that involve the public generally, such as clearing land for road construction, *Adams v. NVR Homes, Inc.*, 135 F. Supp. 2d 675, 687 n.8 (D. Md. 2001), and storm-water runoff from public highways, *Raritan Baykeeper, Inc. v. NL Industries, Inc.*, No. 09-CV-4117 JAP, 2013 WL 103880, at *26 (D.N.J. Jan. 8, 2013). In contrast, a Minnesota court found that an individual's storage of old vehicles, building materials, and fixtures on private property did not "result[] from 'community activities"' under a local waste ordinance. *Cty. of Isanti v. Kiefer*, No. A15-1912, 2016 WL 4068197, at *1, 3 n.1 (Minn. Ct. App. Aug. 1, 2016).

These authorities demonstrate that a "community activity" is something more public or group centered than individuals hunting and, importantly, deciding whether to use lead-based ammunition. Community activities require more participants than hunting does—like an entire community using a road or many groups of people target shooting at a club. Therefore, the Court should not deem the few individuals hunting in the KNF who

use lead-based ammunition a "community activity."

Thus, spent hunting ammunition is not "solid waste," within the meaning of 42 U.S.C. § 6903(27), and therefore falls outside of RCRA's boundaries.

CONCLUSION

The very existence of the experimental population here was achieved by FWS making a promise to the public and various state, federal, and tribal entities that existing land uses, expressly including hunters' use of lead-based ammunition, would not be disturbed as a result of the condor experiment. Plaintiffs, however, want the Court to allow the experiment to continue—but *only* on their terms (elimination of lead-based ammunition). Because Plaintiffs have not stated valid or plausible claims for relief under RCRA, as explained above and in the FD MTD and NSSF MJOP,, NRA/SCI respectfully request this Court dismiss this action with prejudice.

Respectfully submitted this 26th day of August, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of August, 2016, I electronically transmitted the **DEFENDANTS-INTERVENORS NATIONAL RIFLE ASSOCIATION OF AMERICA AND SAFARI CLUB INTERNATIONAL'S MOTION TO DISMISS** to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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