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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.,

Intervenor-Defendants

Case No: 3:12-cv-08176-SMM

PLAINTIFFS' CONSOLIDATED RESPONSE TO MOTIONS TO DISMISS AND MOTION FOR JUDGMENT ON THE PLEADINGS

(ORAL ARGUMENT REQUESTED)

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INTRODUCTION

Spent lead ammunition is poisoning wildlife, including critically imperiled California condors, on the Kaibab National Forest ("Kaibab"). Defendant United States Forest Service moves to dismiss Plaintiffs' claim, arguing that the Forest Service is not "contributing to" this endangerment. *See* Dkt. 123 ("USFS Mot."). But this Court has already ruled, and the Forest Service has openly admitted, that it has the authority to prohibit the use of lead ammunition on the Kaibab. Because the Forest Service has unquestionable authority over what happens on its land, it has a "measure of control" over the spent lead ammunition, as required by the Ninth Circuit to state a claim under the Resource Conservation and Recovery Act ("RCRA").

Intervenor-Defendants National Shooting Sports Foundation ("NSSF"), National Rifle Association of America ("NRA"), and Safari Club International ("SCI") also move to dismiss Plaintiffs' claim. *See* Dkt. 124 ("NSSF Mot."), Dkt. 125 ("NRA Mot."). Intervenors' arguments are likewise unavailing because Plaintiffs have adequately alleged all of the elements of a RCRA claim, and because the Endangered Species Act ("ESA") section 10(j) status of California condors is simply irrelevant to the Forest Service's liability for RCRA endangerment. For all of these reasons, this Court should deny the motions to dismiss.

FACTUAL BACKGROUND

Every year, wildlife species that call the Kaibab home, or otherwise rely on it as important habitat, are needlessly poisoned and killed from exposure to spent lead ammunition. *See* Complaint for Injunctive and Declaratory Relief, Dkt. 1 (hereafter "Complt.") at ¶¶ 25–29, 35. Wildlife species are exposed to spent lead ammunition when they consume animals that have been shot with lead ammunition. *See id.* at ¶¶ 27–29, 35. When lead-core rifle bullets strike an animal they often fragment into hundreds of small pieces of lead that can be found several inches from the site of the wound in large game animals. *See id.* at ¶ 30. A small lead fragment is enough to severely poison or kill a bird,

even one as large as a California condor. *See id.* Wildlife that ingest spent lead ammunition, even in minute amounts, experience many adverse health effects, including death. *See id.* at ¶ 31. In turn, wildlife experiencing these effects are far more susceptible to other forms of mortality. *See id.*

Nowhere is the threat of spent lead ammunition in Arizona more apparent than on the Kaibab, an approximately 1.6 million-acre parcel of federal property in northern Arizona owned and managed by the Forest Service. *See id.* at ¶¶ 8, 33. Lead ingestion and poisoning from ammunition has been documented in many avian predators and scavengers that inhabit the Kaibab, including bald and golden eagles, northern goshawks, ferruginous hawks, turkey vultures, and ravens. *See id.* at ¶ 27.

But there is no better evidence of the regular exposure to spent lead ammunition and its harmful effects on wildlife than what scientists, including federal government researchers, have documented regarding lead poisoning in California condors. *See id.* at ¶¶ 36–42. Currently, there are approximately 73 free-flying condors in northern Arizona and southern Utah. *See id.* at ¶ 36. Lead poisoning from exposure to spent lead ammunition is the leading cause of condor mortality in Arizona, and the primary obstacle to achieving a self-sustaining population of condors there. *See id.* at ¶¶ 37–39. Because condors are tracked and monitored, including for lead poisoning, more extensively than other species, they serve as an indicator of lead exposure occurring to other wildlife inhabiting the Kaibab. *See id.* at ¶¶ 39–42. As this Court previously recognized, "'[b]ut for' Defendant's decision to allow toxic lead ammunition to be disposed of in the [Kaibab National Forest], there would be no lead waste that could be consumed, and local animal species would not suffer from lead poisoning[.]" Memorandum of Decision and Order ("Order"), Dkt. 81, at 5–6.

LEGAL FRAMEWORK

In enacting RCRA, Congress recognized that "disposal of solid waste . . . in or on the land without careful planning and management can present a danger to human health

and the environment" and that "inadequate and environmentally unsound practices for the disposal or use of solid waste have created greater amounts of air and water pollution and other problems for the environment and for health." 42 U.S.C. § 6901(b)(2)–(3). Congress authorized citizens to bring suit in federal district court to address risks to the environment posed by improperly controlled and managed solid and hazardous wastes, including spent lead ammunition. Specifically, RCRA authorizes any person to commence a civil action against anyone "*including the United States*" who has contributed or who is contributing to the disposal of solid waste that may present an imminent and substantial endangerment to the environment. *Id.* § 6972(a)(1)(B) (emphasis added). And Congress vested district courts with tremendous power to remedy a potential endangerment. RCRA provides that the district court "shall have jurisdiction ... *to restrain any person* who has contributed or who is contributing to the past or present ... 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 ....*" *Id.* § 6972(a) (emphasis added). Courts have noted that the "expansive language of this provision was intended to confer 'overriding authority to respond to situations involving a substantial endangerment to health or the environment.'" *United States v. Price*, 688 F.2d 204, 213 (3d Cir. 1982) (citing H.R. Comm. Print No. 96-IFC 31, at 32) (1979)).[1] Such a broad, jurisdictional grant furthers Congress's primary goal behind RCRA endangerment citizen suits, "namely the prompt abatement of imminent and substantial endangerments." H.R. Rep. No. 98-198, pt. 1, at 53 (1984).

STANDARD OF REVIEW

To defeat a Rule 12(b)(6) dismissal, a complaint need not contain "detailed factual

[1] The *Price* decision was discussing 42 U.S.C. § 6973 (RCRA § 7003), which sets forth the U.S. Environmental Protection Agency's ("EPA") analogous power to bring suit to restrain anyone contributing to an imminent and substantial endangerment. RCRA sections 7002(a)(1)(B) and 7003 use the same standard of liability and are thus "similarly interpreted." *Cox v. City of Dallas*, 256 F.3d 281, 294 n. 22 (5th Cir. 2001).

allegations." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A complaint need only plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). At the motion to dismiss stage, general factual allegations suffice because courts "presume that general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Hence, courts "must accept as true all material allegations of the complaint, [] must construe the complaint in favor of the complaining party[,]" *Warth v. Seldin*, 422 U.S. 490, 501 (1975), and must draw all reasonable inferences in favor of the nonmoving party. *W. Ctr. for Journalism v. Cederquist*, 235 F.3d 1153, 1154 (9th Cir. 2000) (per curiam).

ARGUMENT

I. The Forest Service is a "Contributor" Under RCRA

Contrary to the Forest Service's arguments, USFS Mot. at 9–17, Plaintiffs have adequately alleged that the Forest Service is a "contributor" under RCRA. The statute is clear:

> [A]ny person may commence a civil action on his own behalf [] against any person, including the United States and any other governmental instrumentality or agency … who has contributed or who is contributing to the past or present … disposal of any solid … waste which may present an imminent and substantial endangerment to … the environment[.]

42 U.S.C. § 6972(a)(1)(B). Plaintiffs' theory of liability tracks this language: the Forest Service, a federal agency, has contributed and is contributing to the past and present disposal of solid waste, in the form of spent lead ammunition, that may present an imminent and substantial endangerment to wildlife on the Kaibab. Plaintiffs allege that the Forest Service's "contributor" status arises from the Forest Service's control over waste disposal activities on the Kaibab due to its ownership and consequent management of the land. *See, e.g.*, Complt. at ¶¶ 8, 13, 21–24, 33–34, 45–46.

The Forest Service does not, and cannot, deny its ultimate authority and control

over activities on the Kaibab, including its authority over both hunting and waste disposal. But the Forest Service attempts to downplay its authority, arguing that it does not have the requisite control over hunting on the Kaibab because it chooses to defer to the state on hunting issues; because individual hunters, and not the Forest Service, decide what type of ammunition to use and whether and how to dispose of shot wildlife; and because the Forest Service would have to engage in significant legal process to exercise its authority to control the disposal of spent lead ammunition on the Kaibab. *See* USFS Mot. at 13–16. These arguments miss the point. The relevant test is whether the Forest Service has a "measure of control" over activities on the Kaibab, not whether the Forest Service has exercised such control. Plaintiffs have adequately alleged in the Complaint that the Forest Service, as landowner of the Kaibab, manages activities that occur there, and thus has the necessary "measure of control" over the disposal of solid waste on the Kaibab that qualifies it as a "contributor."

A. The Statute, Legislative History, and EPA Guidance Make Clear that the Forest Service is a Contributor

Although RCRA does not define "contributing," the Act's legislative history makes clear that Congress intended that the phrase be liberally interpreted. *See* S. Rep. 96-172, at *5 (May 15, 1979) (stating that RCRA section 7003 "allow[s] the agency to take enforcement action against any practice which is presenting a substantial endangerment health or the environment" and noting that "[s]ome terms and concepts, such as persons 'contributing to' disposal resulting in a substantial endangerment, are meant to be more liberal than their common law counterparts"). Relying on this legislative history, many courts have thus "liberally construed" the term. *See, e.g.*, *U.S. v. Aceto Agr. Chemicals Corp.*, 872 F.2d 1373, 1383 (8th Cir. 1989) (discussing legislative history and noting that "an explicit allegation of control" is not required to establish liability) (internal quotation marks omitted).

Further, consistent with Congressional intent, EPA, the agency charged with

administering RCRA, has concluded that the phrase "has contributed to or is contributing to" should be "broadly construed[,]" and agreed with the *Aceto* court's definition of "contributing to" as meaning "to have a share in any act or effect." *See* OFFICE OF ENFORCEMENT AND COMPLIANCE ASSURANCE, U.S. EPA, GUIDANCE ON THE USE OF SECTION 7003 ("Section 7003 Guidance"), at 17 (1997).[2] In EPA's guidance, which the federal government conspicuously fails to cite, EPA expressly listed as examples of a contributor, "an owner who fails to abate an existing hazardous condition of which he or she is aware" and "a person who *owned the land* on which a facility was located *during the time that solid waste leaked* from the facility." *Id.* at 18 (emphasis added). The Forest Service fits squarely into both of these examples. The Forest Service has been aware of the harm posed by spent lead ammunition on the Kaibab for at least 20 years but has failed to abate the endangerment; and the Forest Service is indisputably the owner and manager of the land where the endangerment continues to occur.

Importantly, this Court should give great weight to EPA's interpretation of "contributor" because EPA is the agency empowered with administering the statute. *See Ashoff v. City of Ukiah*, 130 F.3d 409, 410 (9th Cir. 1997) ("Were we to find RCRA ambiguous, we would defer to the EPA's interpretation so long as it is reasonable and supported by the language of the statute."); *Gonzales v. Oregon*, 546 U.S. 243, 254–61 (2006) (indicating that deference should be given to the agency with the relevant expertise). The Forest Service's position in this case is inconsistent with EPA's long-held and reasonable interpretation of the statute, and should therefore be rejected.

B. The Forest Service Meets the *Hinds* Test for Contributing

The governing case in the Ninth Circuit on the meaning of "contributing" establishes two bases for a party to be liable as a contributor: either a party (1) "ha[s] a measure of control over the waste at the time of its disposal" or (2) "[is] otherwise

[2] *Available at* https://www.epa.gov/sites/production/files/2013-10/documents/use-sec7003-mem.pdf (last visited Sept. 15, 2016).

actively involved in the waste disposal process." *Hinds Investments, L.P. v. Angioli*, 654 F.3d 846, 851 (9th Cir. 2011).[3] In *Hinds*, the owner of two shopping centers sued the manufacturers of equipment used at dry cleaning stores operating in the shopping centers under RCRA section 7002(a)(1)(B). *Id.* at 848–49. The district court dismissed the RCRA claims "because they did not allege active involvement by [the manufacturers] in handling or disposing of waste, as required for RCRA liability," *id.* at 849, and the Ninth Circuit affirmed, declining to expand the definition of "contribute" to the "[m]ere design of equipment that generated waste, which was then improperly discarded" by someone else, on someone else's property. *Id.* at 852. In doing so, the court recognized that a defendant may be liable where it "'had authority to control … any waste disposal.'" *Id.* at 851–52 (quoting *Aceto*, 872 F.2d at 1383).

Plaintiffs have adequately alleged that the Forest Service has a "measure of control" over waste disposal activities on the Kaibab. Here, as distinguishable from the *Hinds* defendants, Plaintiffs are not suing gun or lead ammunition manufacturers for contributing to an endangerment on the Kaibab. Rather, Plaintiffs' theory is based on the well-established principle of landowner liability for solid waste disposal that may present an imminent and substantial endangerment to the environment. *See Conn. Coastal Fisherman's Ass'n v. Remington Arms Co., Inc.*, 989 F.2d 1305, 1316 (2d Cir. 1993) (holding a gun club liable for allowing lead shot disposal in contravention of RCRA); *see also Potomac Riverkeeper v. Nat'l Capital Skeet and Trap Club*, 388 F. Supp. 2d 582, 589 (D. Md. 2005) (denying motion to dismiss against state official in his official

[3] Plaintiffs focus on *Hinds*' "measure of control" test because the Forest Service's control over the Kaibab clearly satisfies this test. However, the Forest Service's status as a landowner who has known for decades that solid waste disposed of on their property is harming wildlife there and not only chooses not to stop such disposal but also issues special permits facilitating the hunting activity that causes the endangerment, *see* Complt. at ¶¶ 13, 24, 34, also meets the *Hinds* "active involvement" test. Plaintiffs' allegations are sufficient, at the motion to dismiss stage, to establish the Forest Service's active involvement in the disposal of spent lead ammunition on the Kaibab.

capacity where gun club operations were allegedly causing endangerment on state owned property); *Benjamin v. Douglas Ridge Rifle Club*, 673 F. Supp. 2d. 1210, 1222 (D. Or. 2009) (reasoning that liability under RCRA can be established by allowing lead shot to accumulate on land). If there is any parallel to be made here, it is between the Forest Service, landowner of the Kaibab, and the owner of the shopping centers at issue in *Hinds*. And in *Hinds*, the shopping center owner was *the plaintiff* who was seeking to recover clean-up and remediation costs from other potentially responsible entities. *See Hinds,* 654 F.3d at 849.

The Forest Service clearly has a control over activities that occur on the Kaibab. *See* U.S. Const. art. § IV, 3, cl. 2 (the Property Clause of the U.S. Constitution, giving Congress the power to "dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States"). The Supreme Court has recognized Congress's "complete power" over public lands, including "the power to regulate and protect wildlife living there[.]" *Kleppe v. New Mexico*, 426 U.S. 529, 540–41 (1976); *see also United States v. Hunt*, 278 U.S. 96, 99–100 (1928) (in case involving hunting on the Kaibab, affirming Forest Service's authority to manage national forest system lands and holding that the "power of the United States to ... protect its lands and property does not admit of doubt ... the game laws or any other statute of the state to the contrary notwithstanding"). Pursuant to this power, Congress has enacted numerous statutes conferring the Forest Service with authority over public lands and resources. *See, e.g.,* 16 U.S.C. §§ 473–82, 551 (the Organic Administration Act of 1897, granting the Forest Service the authority to regulate the use of public lands to improve and protect those areas); 16 U.S.C. §§ 528–531 (the Multiple-Use Sustained Yield Act of 1960, permitting the Forest Service to balance different uses on public lands, including for outdoor recreation and wildlife purposes); 43 U.S.C. § 1732(b) (provision in the Federal Land Policy Management Act allowing the Forest Service to "designate areas of public land and of lands in the National Forest System where, and establish periods when, no

hunting or fishing will be permitted for reasons of public safety, administration, or *compliance with provisions of applicable law*") (emphasis added).

Indeed, this Court has already ruled on this issue. In addressing the Forest Service's first motion to dismiss, the Court ruled:

> Defendant has authority to regulate activities in the National Forests. This broad authority includes the right to issue regulations that restrict actions that threaten endangered species of animals, such as the California condor. Defendant opts not to exercise this authority and instead allows the use and disposal of lead on the land which it administers. Although Defendant may choose not to ban certain types of ammunition in deference to Arizona's regulation of hunting, it is not thereby automatically relieved of its affirmative duty to stop the disposal of environmental contaminants in the KNF.

Order, Dkt. 81, at 5. And the Forest Service does not, and really cannot, dispute this authority. The Forest Service even admitted during oral argument before the Ninth Circuit that it had the authority to prohibit the use of lead ammunition on the Kaibab, if it chose to do so:

> Judge Parker: Could the Forest Service, if it was so inclined, ban the use of lead ammunition in the Forest, in the Kaibab Forest? ...
>
> Mr. Brabender (for Forest Service): The Forest Service does have that authority.[4]

See also USFS Mot. at 4 ("[T]he Secretary has authority to *prohibit* hunting in certain limited circumstances.").[5]

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[4] *See* United States Courts for the Ninth Circuit, Official Recording of Oral Argument in Ctr. for Biological Diversity v. USFS, No. 13-16684 (Nov. 18, 2015) at 18:18, *available at* http://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000008616 (last visited Sept. 15, 2016).

[5] By emphasizing the word "prohibit" the Forest Service may be suggesting that its authority is limited to prohibiting hunting in certain circumstances, but not regulating the type of ammunition used. To the extent this is what the Forest Service is really arguing here, this position is contradicted not only by overwhelming authority discussed above, but also by the Forest Service's own admission during oral argument before the Ninth Circuit.

Despite acknowledging its authority, the Forest Service provides three reasons for why its authority is purportedly insufficient to satisfy *Hinds'* "measure of control" test, all of which fail. First, the Forest Service points to its practice of deferring to states to regulate hunting on federal lands. *See* USFS Mot. at 14. But, as this Court has already held, the fact that the Forest Service has chosen to defer to states on the issue of hunting does not deprive the Forest Service of its ultimate authority over and responsibility for activities, including waste disposal and hunting, on its own property. Moreover, by definition, the *Hinds* "measure of control" test does not require that an entity have ultimate control over waste disposal to be liable under RCRA—"some degree of control" suffices. *See Hinds*, 654 F.3d at 851; *see also United States v. Valentine*, 885 F. Supp. 1506, 1512 (D. Wyo. 1995) (denying summary judgment on the basis that "it is not necessary that a party have control over the ultimate decisions concerning waste disposal ... to be found to be a contributor within the purview of RCRA"). Indeed, the Fifth Circuit affirmed a district court opinion denying summary judgment to the defendant City of Dallas on the issue of RCRA contributor liability, where the City's subcontractor illegally disposed of waste into a landfill, the City knew that such disposal was occurring, and the City continued to work with the subcontractor and took no steps to stop the disposal. *See Cox*, 256 F.3d at 297 (holding that "[t]he district court did not clearly err in finding that this 'lax oversight' of its contractors and their disposal of City waste is evidence of the City's 'contributing to' liability").

Second, the Forest Service notes that individual hunters choose which type of ammunition to use and whether and how to dispose of shot animals. USFS Mot. at 14. While this may be true to date, it is irrelevant to liability. As the Ninth Circuit explained in this case, "the Forest Service has the authority to control certain conduct of the third-party hunters." *Ctr. for Biological Diversity v. USFS*, 640 Fed. Appx. 617, 619 (9th Cir. 2016). If the Forest Service properly exercised its authority over the Kaibab, individual hunters would not be legally permitted to hunt in a manner that would result in the

disposal of spent lead ammunition on the Kaibab.

Lastly, the Forest Service resorts to arguing that, even if Plaintiffs' allegations regarding the Forest Service's authority to control hunting on the Kaibab are true, this authority does not satisfy *Hinds'* "measure of control" test because the Forest Service's exercise of this authority "would involve significant legal process, opportunities for public participation, and a lengthy series of steps by the Service." USFS Mot. at 14. This is akin to arguing that the Forest Service should not be held liable under RCRA as a matter of law because it would be too difficult for the Forest Service to abate the endangerment on the Kaibab. But, of course, the question for the Court here is whether Plaintiffs have adequately alleged that the Forest Service has a "measure of control" over waste disposal on the Kaibab; the fact that exercising this control might involve legal process is simply beside the point. Moreover, almost all agency actions involve some amount of legal process; the mere fact that because the Forest Service, owner of the Kaibab, also happens to be a regulatory agency that must follow procedure, does not shield the agency from liability. Indeed, necessary procedures were no hurdle to the federal government when it established regulations to prohibit the use of lead ammunition for waterfowl hunting. *See* 51 Fed. Reg. 42,103 (Nov. 21, 1986).

At bottom, the Forest Service is asking this Court to find that, in spite of its landowner status, it deserves special treatment as a federal regulatory agency, but such special treatment is not warranted. Congress expressly stated that federal agencies are subject to RCRA's imminent and substantial endangerment previous. *See* 42 U.S.C. § 6972(a)(1)(B).[6] In fact, Plaintiffs strongly doubt that EPA would decline to enforce

[6] Several cases discuss government liability in terms of its ability to control waste disposal practices. *See, e.g.*, *Holy Cross Neighborhood Ass'n v. U.S. Army Corps of Engineers*, No. Civ.A. 03-370, 2003 WL 22533671, at *8 (E.D. La. Nov. 3, 2003) (finding plaintiffs satisfied the requirements in Federal Rule of Civil Procedure 8(a) by putting the "[U.S. Army Corps of Engineers] on notice that the RCRA [section 7002(a)(1)(B)] claim rests on the management of and plan to dredge the Industrial Canal"); *Foster v. United States*, 922 F. Supp. 642, 660 (D.D.C. 1996) (finding it could

RCRA against a private landowner if that landowner told EPA that it should not have to abate an imminent and substantial endangerment on its own property because it would be difficult to do so.

Further, all of the Forest Service's arguments fail because they are premised on the assumption that a person must actually *exercise* control in order be a contributor under RCRA. *See* USFS Mot. at 14–16. The *Hinds* court made clear that a person can be a contributor under RCRA by having a "measure of control" *or* by being "actively involved" in waste disposal. In arguing that "unexercised regulatory authority" is insufficient to satisfy *Hinds*' "measure of control" test, the Forest Service reads into this test the requirement that a regulatory agency must actually exercise its authority, *i.e.,* take some sort of action, in order to have a "measure of control." Thus, the Forest Service is conflating the Ninth Circuit's two separate tests for RCRA contributor liability, and is attempting to place a higher burden on Plaintiffs to show such liability than is actually required by RCRA or by the Ninth Circuit.

C. The Forest Service's Reliance on *Aceto*, *Marathon Oil*, and *Valentine* is Misplaced

The Forest Service points to three cases, relied upon by the *Hinds* court, to support its argument that the Forest Service does not have an adequate "measure of control" over waste disposal on the Kaibab. *See* USFS Mot. at 10–12 (discussing *United States v. Aceto Agric. Chem. Corp.*, 872 F.2d 1372 (8th Cir. 1989), *Marathon Oil Co. v. Texas City Terminal Ry. Co.*, 164 F. Supp. 2d 914 (S.D. Tex. 2001), and *United States v. Valentine*, 885 F. Supp. 1506 (D. Wyo. 1995)). *Hinds* describes these cases as instances where "[c]ourts that have not explicitly held that RCRA liability requires active involvement by defendants [but] have nonetheless suggested that substantial affirmative action is required and have permitted RCRA claims to survive only with some allegation of defendants'

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not "be said that the United States lacked actual control over the disposal of wastes from the neighboring military reservation or the Canal itself").

continuing control over waste disposal." *Hinds*, 654 F.3d at 851. But none of these cases actually supports the Forest Service's argument that it does not have a "measure of control" over waste disposal activities on the Kaibab.

As an initial matter, these cases, based on "some degree of control," do not make "active involvement" in the waste disposal process a condition precedent to establish liability. *See Aceto*, 872 F.2d at 1384; *Marathon Oil*, 164 F. Supp. 2d at 920–21; *Valentine*, 885 F. Supp. at 1512; *accord United States v. Waste Indust.*, 734 F.2d 159, 164 (4th Cir. 1984) (interpreting RCRA section 7003 and concluding "unlike the provisions of [RCRA's] subtitle C, [section 7003] does not regulate conduct but regulates and mitigates endangerments"). Moreover, in each of these cases the courts found the facts and allegations sufficient to establish RCRA contributor liability, so in that respect they support Plaintiffs', not the Forest Service's, position.

Importantly, *Aceto*, *Marathon Oil,* and *Valentine*, and *Hinds* itself, did not address the issue of whether the *owner* or *manager* of a waste disposal site has sufficient control over the disposed waste to warrant RCRA liability[7] and, as such, the Forest Service's argument falls short. Simply because the *Aceto*, *Marathon Oil*, and *Valentine* courts found the defendants' control in those cases sufficient to establish contributor liability, does not mean that only control stemming from similar roles is required. Notably, Plaintiffs are not aware of any cases—and the Forest Service has not cited any—where a

[7] In these cases the courts did not need to address the issue of landowner liability because the landowners or facility operators either acknowledged their liability through settlements or were bankrupt. *See Aceto,* 872 F.2d at 1375 & n.1 (owner of disposal site bankrupt and federal and state governments seeking to hold pesticide manufacturers that generated waste liable for past and future costs to clean-up the site); Unopposed Motion to Dismiss Texas City Terminal Railway Company, Marathon Oil Co., et al. v. Texas City Terminal, et al., Case No. 3:01-CV-00336, 2005 WL 6177690 (S.D. Tex. June 24, 2005) (moving to dismiss owner of property due to settlement); *Valentine*, 885 F. Supp. at 1507 (noting the parties that constructed and operated the Site); *see also* Consent Decree by Hon. Alan B. Johnson Between USA and Settling Defendants, *USA v. Valentine, et al*, 1:93CV01005, Dkt. 384 (consent decree between United States and operators of facility).

current property owner has escaped liability under RCRA for ongoing waste disposal on its property that is causing endangerment.

And in fact, the Forest Service here has far more direct control over the waste disposal activities on the Kaibab than the defendants did in *Aceto*. In *Aceto*, the court found that the plaintiffs had adequately alleged that pesticide manufacturers "contributed to" the endangerment to the environment at a facility, operated by a third-party, where their pesticides were processed, where the manufacturers (1) contracted with the facility to process their pesticides; (2) retained ownership of the pesticides through the process; and (3) supplied specifications for the pesticides to the facility. *See Aceto*, 872 F.2d at 1383. Thus, while the *Aceto* defendants had a role in the processing of their pesticides, they did not own or manage the facility where the waste was actually created or disposed of; nor did they have any control over the actual disposal of the waste itself. This long chain of attenuated control over disposal is far from the unequivocal control that the Forest Service has over activities on its property, and waste generated from those activities, through its role as landowner and manager of the Kaibab.

Furthermore, "the idea that ownership imposes responsibility for hazardous conditions on one's land is certainly not novel." *U.S. v. Price*, 523 F. Supp. 1055, 1073 (D.N.J. 1981); *see also id.* at 1073–74 (finding that property owners who bought property several years after it ceased being a landfill, but who were aware that toxic chemicals had been dumped at the landfill, were "contributing to the disposal (i.e., leaking) of wastes merely by virtue of their studied indifference to the hazardous condition that now exists"). In fact, RCRA's liability scheme is similar to provisions that appear in other environmental statutes, most notably section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), which provides that owners of facilities shall be liable for costs and damages associated with cleaning up contaminated sites. 42 U.S.C. § 9606(a)(1).[8] EPA, the federal agency which administers

[8] Due to the similarities between the statutes, this Court can look to CERCLA cases to

both RCRA and CERCLA, takes the position that landowners are liable for contamination on their property due to their failure to act to prevent the contamination. *See* Section 7003 Guidance, at 18 (listing as an example of a RCRA "contributor", "an owner who fails to abate an existing hazardous condition of which he or she is aware").

Ultimately, Plaintiffs have adequately alleged that the Forest Service has the authority, as landowner and manager, to control activities on the Kaibab. The Forest Service does not deny that if it chose to, it could regulate the disposal of spent lead ammunition on the Kaibab. *See supra* at 9. While the Forest Service has chosen to exercise its authority by deferring the regulation of hunting to the states, it still retains the responsibility, as landowner and manager, to step in when activities on its property are contributing to an imminent and substantial endangerment of the environment.

D. The NRA's "Policy" Arguments Should Be Rejected

The NRA also makes "policy" arguments for why this Court should not conclude that the Forest Service is a "contributor" under RCRA. *See* NRA Mot. at 12–15. But, the NRA's policy arguments cannot change the plain meaning of RCRA. *See, e.g.*, *United States v. Rodgers*, 466 U.S. 475, 484 (1984) ("Resolution of the pros and cons of whether a statute should sweep broadly or narrowly is for Congress."); *Doe v. Dep't of Veterans Affairs*, 519 F.3d 456, 461 (8th Cir. 2008) ("Our role is to interpret and apply statutes as written, for the power to redraft laws to implement policy changes is reserved to the legislative branch."). And indeed, Congress intended the reach of the imminent and

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help inform its interpretation of RCRA. *See Valentine*, 885 F. Supp. at 1514, n. 3 (in considering RCRA's imminent and substantial endangerment provision, noting that "[w]e rely on authority discussing CERCLA ... as it provides a useful analogue. Here, and in many other instances, CERCLA and RCRA are not significantly different"). In evaluating CERCLA liability, numerous courts have found landowners liable for contamination caused by other persons. *See, e.g.*, *N.Y. v. Shore Realty Corp.*, 759 F.2d 1032, 1044 (2d Cir. 1985) (finding current landowner liable for contamination "without respect to causation"); *U.S. v. Northernaire Plating Co.*, 670 F. Supp. 742, 747–49 (W.D. Mich. 1987) (finding landowner liable for contamination caused by tenant), *aff'd U.S. v. R.W. Meyer, Inc.*, 932 F.2d 568 (6th Cir. 1991).

substantial endangerment provisions to be broad, to extend to the United States, and "to confer upon the courts the authority to grant affirmative equitable relief *to the extent necessary to eliminate any risks posed by toxic wastes*." *United States v. Price*, 688 F.2d at 213–214 (emphasis added).

The NRA presents a slippery slope argument that finding the Forest Service liable in this case would open regulators "to potential RCRA liability any time they possess authority to stop a third party activity that is a violation of RCRA[.]" NRA Mot. at 12–13. The NRA ignores that the Forest Service is a landowner, not simply a regulator. Also, the cases the NRA relies upon are distinguishable because they turned on questions of whether there was final agency action, discretionary agency action, or whether the Eleventh Amendment barred suit. None of those factors is present here.[9] In sum, the NRA's policy argument would effectively leave citizens no recourse against a landowner in situations where small aggregate actions create a serious imminent and substantial endangerment to the environment, the landowner knows of the problem, and chooses not to abate the endangerment. Following the NRA's argument to its logical conclusion directly contradicts the plain language of RCRA and the express intent of Congress.

II. Plaintiffs Have Sufficiently Alleged the Remaining Elements of a RCRA Imminent and Substantial Endangerment Claim

Contrary to Intervenors' arguments, Plaintiffs have sufficiently alleged the disposal of a "solid waste." First, the definition of "solid waste" includes "discarded material." 42 U.S.C. § 6903(27). Spent lead ammunition left on the Kaibab is "discarded material" and therefore a "solid waste" because once left in the environment it has served

[9] In particular, *Ringbolt Farms Homeowners Ass'n v. Town of Hull*, 714 F. Supp. 1246 (D. Mass. 1989), is easily distinguished. First, the only active claim against the state regulatory agency in that case was a state law claim barred by the Eleventh Amendment. *Id.* at 1250–1251. Moreover, the claim against the state was premised on its failure to enforce RCRA for violations occurring at a landfill owned, not by the state, but by the Town of Hull. But here, the Forest Service not only regulates the Kaibab, it is also the landowner.

its intended purpose, it is no longer wanted, and it is not being reused, recycled, or reclaimed in any fashion. Second, Intervenors' argument that Plaintiffs must identify a "discrete and identifiable" disposal location is untethered from the statutory language of RCRA and not supported by case law. Finally, Plaintiffs need not show a "community activity," and even if they did, Plaintiffs' allegations meet this requirement.

A. Spent Lead Ammunition Disposed of on the Kaibab is "Discarded Material" Within the Meaning of RCRA

Plaintiffs' allegations meet the Ninth Circuit's test for discarded material. Neither the NRA nor the NSSF recites the clear test the Ninth Circuit has set forth for whether something is "discarded material" and therefore "solid waste." In *Safe Air*, the Ninth Circuit determined that the plain meaning of "discard" is "to 'cast aside; reject; abandon; give up.'" *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1041 (9th Cir. 2004) (citation omitted). The panel went on to find three factors relevant when determining whether something constitutes "solid waste": "(1) whether the material is destined for beneficial reuse or recycling in a continuous process by the generating industry itself[]; (2) whether the materials are being actively reused, or whether they merely have the *potential* of being reused[]; [and] (3) whether the materials are being reused by its original owner, as opposed to use by a salvager or reclaimer[.]" *Id. at* 1043 (internal quotations and citations omitted). The Ninth Circuit later noted that "[t]he key to whether a manufactured product is a 'solid waste,' then, is whether that product 'ha[s] served [its] intended purpose [] and [is] no longer wanted by the consumer.'" *Ecological Rights Found. v. Pac. Gas & Elec. Co.*, 713 F.3d 502, 515 (9th Cir. 2013) (citing H.R.Rep. No. 94–1491(I), at 2 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6240).

Under this test, spent lead ammunition left in the environment has served its purpose and is no longer wanted by the consumer (the hunter). Either the spent lead ammunition was lost in a wounded animal that was shot and never retrieved, or left behind in a gut pile. *See* Complt. at ¶¶ 28–29. Defendants have not argued that spent lead

ammunition on the Kaibab has been reclaimed, reused, or recycled. The very fact that spent lead ammunition is in the environment long enough to cause the endangerment is a testament to this fact. *See, e.g.*, *id.*, ¶¶ 27–32. Moreover, spent lead ammunition left in the environment does not even have the *potential* to be reused or recycled because "[w]hen lead-core rifle bullets strike an animal they often fragment into hundreds of small pieces…." *Id.*, ¶ 30. Therefore, spent lead ammunition is "discarded material" under Ninth Circuit precedent.

The NRA's reliance on the result of the *Ecological Rights* case (*see* NRA Mot at 8–9) is misplaced. The Ninth Circuit concluded that wood preservative from utility poles was "not automatically" a solid waste because it was still wanted by the consumer for its intended purpose as a preservative. *Ecological Rights*, 713 F.3d at 515–16. The court "include[d] the word 'automatically' to reflect what [the court was] not deciding[,]" speculating that wood preservatives could become "solid waste" if "it accumulate[d] in the environment as a natural, expected consequence of the material's intended use. " *Id.* at 518 (citing U.S. EPA, *Best Management Practices for Lead at Outdoor Shooting Ranges* ("Lead Ammunition BMP"), EPA–902–B–01–001, at I–8 (June 2005) and relevant case law for the proposition that "[s]pent lead shot (or bullets), left in the environment, is subject to the broader definition of solid waste written by Congress"). Here, the hunter no longer wants the spent lead ammunition and it no longer serves a useful function. Regardless of the success of the hunt, the ammunition served its purpose once it came to rest in the environment. And since that lead ammunition no longer serves a useful function, it has been left in the environment where it poses an imminent and substantial endangerment to California condors and other wildlife.

Furthermore, the Military Munitions Rule ("MMR") noted in *Ecological Rights* and in *Water Keeper Alliance v. U.S. Dep't of Def.*, 152 F. Supp. 2d 163, 167–69 (D.P.R. 2001) (*see* NSSF Mot. at 10–12; NRA Mot. at 7–9.), is irrelevant to this case, as it only

addresses *military* munitions and the narrower *regulatory* definition of solid waste.[10] 62 Fed. Reg. 6622-01, 6623 (defining military munitions); *id.* at 6624–26 (describing when materials are "solid waste" for regulatory purposes) (Feb. 12, 1997).

Rather than looking to the MMR, this Court should look to EPA's views as set forth in a different, *on-point*, guidance document. EPA has consistently found that "spent lead shot (or bullets), left in the environment, is subject to the broader definition of solid waste written by Congress and used in sections 7002 and 7003 of the RCRA statute." Lead Ammunition BMP, at I–8. In the Lead Ammunition BMP, a guidance document developed with the help of both the NSSF and the NRA, EPA stated that the imminent and substantial endangerment provision of RCRA allows citizens to "to compel cleanup of or other action for 'solid waste' (e.g., spent lead shot) posing an actual or potential imminent and substantial endangerment." *Id.* Even prior to the development of the Lead Ammunition BMP, EPA stated "that [spent lead ammunition was] discarded because they have been 'left to accumulate long after they have served their intended purpose.'" *Conn. Coastal*, 989 F.2d at 1316 (quoting EPA Amicus Brief); *see also Simsbury-Avon Pres. Soc'y, LLC. v. Metacon Gun Club, Inc.*, No. CIV. 3:04CV803JBA, 2005 WL 1413183, at *5 n.4 (D. Conn. June 14, 2005) (citing the Lead Ammunition BMP approvingly); *Douglas Ridge Rifle Club*, 673 F. Supp. 2d at 1221–22 (same). In summary, under the Ninth Circuit's test, and the relevant EPA guidance,[11] spent lead ammunition in the Kaibab is solid waste within the meaning of RCRA.

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[10] No party contests that the broader statutory definition of "solid waste," as opposed to the narrower regulatory definition that applies only to RCRA Subchapter III, applies to Plaintiffs' imminent and substantial endangerment claim. *See, e.g.*, *Conn. Coastal*, 989 F.2d at 1315. This distinction is important because it was not Congress' intent that the narrower regulatory definition stand in the way of "citizen suits brought to abate imminent hazard[s] to … the environment." *Id.* As such, cases relying exclusively on the narrower regulatory definition have little or no persuasive authority here.

[11] EPA's Section 7003 Guidance, discussed *supra* at I.A., is also on point. There, EPA lists expended lead shot, spent rounds, and target fragments located in and around shooting ranges as an example of "solid waste." Section 7003 Guidance, at 15.

Furthermore, this Court should reject Intervenors' attempt to insert an additional element into the definition of "discarded material"—that spent lead ammunition is "discarded material" only if "allowed to accumulate over long periods of time." NSSF Mot. at 12. Courts have relied on the fact that spent lead ammunition had accumulated in the environment for a period of time only to demonstrate that it was clearly no longer serving its intended purpose. *See, e.g.*, *Conn. Coastal*, 989 F.2d at 1316 (relying on EPA's statement that spent lead ammunition was "discarded" because it had been "left to accumulate long after [it had] served [its] intended purpose"); *Douglas Ridge Rifle Club*, 673 F. Supp. 2d at 1222 (noting spent lead ammunition "left in the environment" after serving its "intended purpose" was solid waste). These cases do not *require* that spent lead ammunition accumulate for "long periods of time" (NSSF Mot. at 12), if it is already clear the materials have been discarded or abandoned. Here, Plaintiffs have alleged a historical and ongoing endangerment to the environment caused by spent lead ammunition that has accumulated on the Kaibab. *See* Complt. at ¶¶ 3, 7, 27–31, 35, 37–42, 45–46 (noting "hundreds of instances of lead exposure in condors since the Southwest condor population was reintroduced" 20 years ago). At the least, the spent lead ammunition is in the environment long enough to cause the imminent and substantial endangerment, which is the ongoing harm this lawsuit is intended to address. *Id.* at ¶¶ 28, 29, 35, 37–42.

The other case law cited by Intervenors on this point is easily distinguishable. The court in *Water Keeper Alliance* relied on the MMR which, as explained above, is inapplicable here. 152 F. Supp. 2d at 167–69; *see also Otay Land Co. v. U.E. Ltd., L.P.*, 440 F. Supp. 2d 1152, 1179–80 (S.D. Cal. 2006) (similarly relying upon the MMR and cases discussing the narrower regulatory definition of solid waste). Second, the court in *Cordiano v. Metacon Gun Club, Inc.* never reached the issue of whether lead shot at the defendant's site was "discarded" because plaintiffs failed to raise an issue of material fact

demonstrating an imminent and substantial endangerment to the environment. 575 F.3d 199, 209–215 (2d Cir. 2009). In contrast, this case is at the motion to dismiss stage and Plaintiffs have clearly alleged an imminent and substantial endangerment to the environment. *See, e.g.*, Complt. at ¶¶ 25, 27–32, 35, 37–42, 44–47. Third, unlike in *Simsbury-Avon Pres. Soc'y, LLC v. Metacon Gun Club, Inc.*, Civ. No. 3:04-cv-803, 2006 WL 2223946, at *8–*10 (D. Conn. Aug. 2, 2006), Intervenors have not argued that spent lead ammunition is recovered from the Kaibab for reuse or recycling. Finally, while *No Spray Coalition, Inc. v. City of New York*, 252 F.3d 148, 150 (2d Cir. 2001), found that pesticides are not discarded when "sprayed into the air with the design of effecting their intended purpose: reaching and killing [insects]," a lower court relied on the case to clarify that "pesticides are only discarded, and therefore constitute solid waste, when they have ceased to serve their intended purpose." *Chart v. Town of Parma*, No. 10-CV-6179P, 2014 WL 4923166, at *33 (W.D.N.Y. Sept. 30, 2014). Similarly, spent lead ammunition abandoned in the environment long enough to post an imminent and substantial endangerment has ceased to serve its intended purpose.

B. Plaintiffs Have Adequately Alleged "Disposal"

Intervenors are simply wrong that Plaintiffs cannot show the "disposal" of solid waste because they have not identified a "discrete and identifiable location." *See, e.g.*, NSSF Mot. at 14; NRA Mot. at 9. Nothing in the statutory language, or the case law Intervenors cite, suggests that Plaintiffs must show a "discrete and identifiable" disposal location. In fact, the definition of "disposal" is broad and only limits the definition to solid waste which "may enter the environment or be emitted into the air or discharged into any waters…." 42 U.S.C. § 6903(3); *see also, e.g.*, *Waste Indus.*, 734 F.2d at 164–65 (noting that the definition of "disposal" "must necessarily be broad and general"). Clearly, spent lead ammunition has "enter[ed] the environment." *See* Complt. at ¶¶ 3, 27–30, 35, 37–40, 41. And to the extent Plaintiffs are required to specify a disposal location,

they have done so: where hunting occurs on the Kaibab. *See id.* at ¶¶ 7, 35, 42, 45–46. The statute requires nothing more.

C. Plaintiffs Need Not Establish a "Community Activity;" Alternatively, They Have Done So

Finally, the NRA argues that hunting is not a "community activity" within the meaning of RCRA, so it cannot result in the disposal of solid waste. *See* NRA Mot. at 15–17. But the statute defines solid waste as "discarded material" and then gives a *nonexhaustive* list of potential sources of that material that includes "community activity." 42 U.S.C. § 6903(27). The definition does not require that the solid waste must come from a particular source, only that the waste be "discarded." Even if the discarded material must come from "community activities," the NRA's own intervention papers belie its argument. *See, e.g.*, Declaration of Todd Geiler, Dkt. 98, at ¶ 4 (describing is "longstanding family tradition" of hunting in Arizona and on the Kaibab); Declaration of Michael John Rusing, Dkt. 102, at ¶ 7 ("I started hunting about 54 years ago with friends and family while I was growing up in Prescott, Arizona."); Declaration of Chris W. Cox, Dkt. 97, at ¶ 7 (NRA officer describing other NRA employees' work as "promoting the interests of the hunting community in wildlife management"). Finally, the NRA's reliance *County of Isanti v. Kiefer*, No. A15-1912, 2016 WL 4068197 (Minn. Ct. App. Aug. 1, 2016); *see also* NRA Mot. at 16—where a Minnesota state court held one individual's actions can not be considered community activities under a local waste ordinance—is wholly irrelevant because it does not address RCRA, and the harm to the environment on the Kaibab is obviously not due to the actions of one hunter.

III. California Condors' Status as an ESA Section 10(j) Population Does Not Affect The Forest Service's Liability Under RCRA

Congress enacted section 10(j) of the ESA in order to allow the Secretary of Interior to "authorize the release … of any population … of an endangered species or a threatened species outside the current range of such species if the Secretary determines

that such release will further the conservation of such species." 16 U.S.C. § 1539(j). Intervenors take this limited grant of authority to be a sweeping abrogation of the applicability of all other federal environmental laws, including RCRA. *See* NRA Mot. at 9–12; NSSF Mot. at 16–17. This is wrong. While section 10(j) of the ESA grants the Secretary "some leeway" in the management of experimental populations, it only loosens restrictions imposed by the ESA itself, not other laws. *See WildEarth Guardians v. Lane*, No. CIV 12-118 LFG/KBM, 2012 WL 6019306 at *4, *9 (D.N.M. Dec. 3, 2012), *as amended* (Dec. 4, 2012) (noting that section 10(j) "attempted to provide the Secretary with a looser and more flexible approach in promulgating regulations, without the strictures and unbending restrictions of ESA § 9").[12] Pursuant to this authority, in 1996, FWS reintroduced California condors into the species' historic habitat in northern Arizona. 61 Fed. Reg. 54,044 (Oct. 16, 1996).

As an important starting point, the Court can easily dispose of the Intervenors' arguments because they ignore the fact that Plaintiffs plead an imminent and substantial endangerment to wildlife *other than condors*. *See, e.g.*, Complt. at ¶¶ 27–32, 35 (alleging endangerment from exposure to spent lead ammunition to many species of avian predators and scavengers, including bald and golden eagles, hawks, turkey vultures, and ravens). This Court recognized Plaintiffs' allegations involved "local animal species," including condors. Order, Dkt. 81, at 5–6. However, even if the Court does consider the Interveners' ESA section 10(j) arguments related to condors, it should easily dismiss them because 10(j) wildlife populations are clearly part of the "environment" within the meaning of RCRA, there is no conflict between ESA section 10(j) and RCRA, and Plaintiffs have adequately pleaded a "substantial" endangerment.

[12] Furthermore, the Environmental Assessment ("EA") that FWS completed to evaluate the impact of reintroducing the southwest population of California condors, relied on by the NRA, explicitly notes that "[t]he distinction between essential and non-essential experimental populations is important as to whether, and how, certain portions *of the ESA are applied*." *See* Notice of Errata Re Request for Judicial Notice, Dkt. 129, at 3 (emphasis added).

A. ESA Section 10(j) Wildlife Populations Are Clearly Part Of The Environment

Contrary to the NRA's argument, NRA Mot. at 4–7, California condors and other 10(j) wildlife populations are part of the environment. "[I]n the absence of [a statutory definition, courts] construe a statutory term in accordance with its ordinary or natural meaning." *F.D.I.C. v. Meyer*, 510 U.S. 471, 476 (1994). The Oxford English Dictionary defines "the environment" as "[t]he natural world or physical surroundings in general, either as a whole or within a particular geographical area, esp. as affected by human activity."[13] This broad definition likewise comports with Congress's intent that RCRA, as a remedial statute, be liberally construed, as well as with RCRA section 7002(a)(1)(B) case law. *See, e.g.*, *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 399 F.3d 248, 259 (3d Cir. 2005) (noting that "given RCRA's language and purpose, Congress must have intended that if an error is to be made in applying the endangerment standards, the error must be made in favor of protecting . . . the environment") (internal quotation marks and citation omitted). Applying this broad interpretation, the term "environment" clearly encompasses the Kaibab and wildlife that live and forage there, including condors.

The NRA points to provisions of the EA to support its argument that condors are not part of "the environment." *See* NRA Mot. at 5. But FWS's statement in the EA that it believed sport-hunting would not be affected by the reintroduction has no bearing on whether the Forest Service can be liable for contributing to an imminent and substantial endangerment under RCRA. If the Court ordered the Forest Service to abate the endangerment on the Kaibab, and the Forest Service chose to do that by prohibiting hunters from using lead ammunition, such a decision would be mandated by RCRA, not by ESA section 10(j). Similarly, the NRA's threat that FWS might choose to remove the California condors from the Kaibab as a result of Plaintiffs' lawsuit, *see* NRA Mot. at 5,

[13] *See* http://www.oed.com/view/Entry/63089?redirectedFrom=environment#eid (last visited Sept. 15, 2016).

is based on a misreading of the regulatory language governing the California condor 10(j) population. This provision only states "[l]egal actions or other circumstances may compel a change in this nonessential experimental population's legal status ... or compel the [Fish and Wildlife] Service to designate critical habitat for the California condors[.]" 50 C.F.R. § 17.84(j)(11)(ii). Plaintiffs' RCRA challenge will not affect the condors' legal status or result in the designation of critical habitat under the ESA, and thus does not trigger FWS's purported agreement to remove the population. The Court should reject the NRA's unsupported argument that 10(j) wildlife populations are not a part of the environment.

B. RCRA's Imminent and Substantial Endangerment Provision and ESA Section 10(j) Do Not Conflict

There can be no question that ESA section 10(j) does not *explicitly* amend or repeal RCRA's imminent and substantial endangerment provision. *See* 16 U.S.C. § 1539(j). Thus, if any conflict were to exist it must be implicit. However, "repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal is clear and manifest." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 662 (2007) (internal quotation marks omitted). But nothing in the text or legislative history of ESA section 10(j) indicates Congress's "clear and manifest" intent to amend or repeal RCRA section 7002. In fact, to Plaintiffs' knowledge, Congress did not mention RCRA at all when it amended the ESA to include section 10(j).

Indeed, rather than being repugnant to one another, the relevant RCRA and ESA provisions serve similar purposes. The purpose of RCRA's imminent and substantial endangerment provision is to protect human health and the environment, including wildlife, from harm presented by the disposal of solid and hazardous waste. 42 U.S.C. § 6972(a)(1)(B). The purpose of ESA section 10(j) is to "further the conservation of" endangered and threatened species. *See, e.g.*, 16 U.S.C. § 1539(j)(2)(A); *see also* H.R. Rep. 97–567, at *34 (1982) (stating that ESA section 10(j) grants the Secretary "broad

flexibility in promulgating regulations *to protect*" experimental populations) (emphasis added). Thus, rather than conflicting, RCRA's imminent and substantial endangerment provision furthers ESA section 10(j)'s conservation purpose by allowing citizens to act to abate an imminent and substantial endangerment affecting ESA-listed species.

At bottom, the gravamen of the NRA's "conflict" argument is not the ESA itself but rather the Condor Rule, 50 C.F.R. § 17.84(j), which establishes the southwest population of California condors as a 10(j) population. But if there were a conflict between RCRA and the Condor Rule, RCRA controls; FWS, acting under the authority granted to it under ESA section 10(j), cannot adopt regulations that amend, circumvent, or restrict the statutory mandates of RCRA. *See Sacks v. S.E.C.*, 648 F.3d 945, 950 (9th Cir. 2011) ("Where an administrative regulation conflicts with a statute, the statute controls.") (quoting *United States v. Doe*, 701 F.2d 819, 823 (9th Cir. 1983)).

Moreover, there is no real conflict in any event. The NRA is simply wrong that the Condor Rule expressly authorized the use of lead ammunition. NRA Mot. at 9 (citing 50 C.F.R. § 17.84(j)(11)(ii)). While the Rule mentions hunting, it never states that hunting with lead is expressly allowed. To the degree that the EA discusses spent lead ammunition, it only states "mandatory use of non-lead bullets would not be mandated *under the provisions of the 10(j) reintroduction*." *See* NRA Request for Judicial Notice, Dkt. 126-1, at 4 (emphasis added). This says nothing of whether ammunition may be regulated by other means. This admission acknowledges that sport hunting may need to be restricted to some extent. In short, the NRA has failed to identify any conflict between the ESA and RCRA, and any purported tension between Plaintiffs' suit and a FWS rule must be resolved in favor of the controlling statute, RCRA.

C. Plaintiffs Adequately Alleged A "Substantial" Harm to the Environment

Intervenors' final argument—that the endangerment is not "substantial" due to the condors' 10(j) status (*see* NSSF Mot. at 16–17)—is equally unavailing. As the Fifth

Circuit explained, "the operative word in § 6972(a)(1)(B) is 'may';" and "an endangerment is 'substantial' if it is 'serious.'" *Cox*, 256 F.3d at 299–300. Plaintiffs' Complaint plainly meets this standard. The fact that this is a 10(j) population of condors does not make their poisoning any less "serious." *See, e.g.*, *United States v. Valentine*, 856 F. Supp. 621, 627 (D. Wyo. 1994) (finding that evidence of wildlife mortalities was significant in determining whether there existed an imminent and substantial endangerment). Moreover, whether "there exists an imminent and substantial endangerment to health or the environment … is question of fact," and should not be addressed on a motion to dismiss. *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 188 F. Supp. 2d 486, 503–04 (D.N.J. 2002).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request the Court deny the motions to dismiss and motion for judgment on the pleadings.

Respectfully submitted,

Dated this 16th day of September, 2016.

s/ Allison LaPlante
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CERTIFICATE OF SERVICE

I hereby certify that on September 16, 2016, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing, which will send notification of such filing to the following:

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