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7
8 **UNITED STATES DISTRICT COURT**

9 **DISTRICT OF ARIZONA**

10 Center for Biological Diversity; Sierra
Club; and Grand Canyon Wildlands
11 Council,

12 Plaintiffs,

13 v.

14 United States Forest Service,

15 Defendant,

16 and

17 The National Rifle Association of
America; Safari Club International; and
18 National Shooting Sports Foundation,
Inc.,

19 Intervenor-Defendants.
20

No. CV-12-8176-PCT-SMM

**NATIONAL SHOOTING SPORTS
FOUNDATION'S MOTION FOR
JUDGMENT ON THE PLEADINGS
AND SUPPORTING MEMORANDUM**

(Oral Argument Requested)

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MOTION 1

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MOTION

1
2 Intervenor-Defendant National Shooting Sports Foundation, Inc., (“NSSF”) moves
3 the Court for a judgment on the pleadings pursuant to Rule 12(c), Fed.R.Civ.P. Judgment
4 on the pleadings is appropriate because, even accepting the well-pled facts in Plaintiffs’
5 Complaint as true, Plaintiffs’ claim is defective as a matter of law in the respects
6 described below and should be dismissed. This motion is supported by the following
7 Memorandum of Points and Authorities and the pleadings on file with the Court.

8 NSSF also requests that the Court take judicial notice of certain undisputed facts
9 set forth in the U.S. Fish and Wildlife’s official rulemaking notice concerning the
10 introduction of California condors, which are set forth below. *See Establishment of a*
11 *Nonessential Experimental Population of California Condors in Northern Arizona; Final*
12 *Rule*, 61 Fed. Reg. 54044 (Oct. 16, 1996) (codified at 50 C.F.R. § 17.84(j)) (“Condor
13 Rule”); *see also Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001) (holding
14 that a court may take judicial notice of undisputed matters of public record without
15 converting a motion to dismiss into a motion for summary judgment).

MEMORANDUM OF POINTS AND AUTHORITIES**I. INTRODUCTION.**

17
18 Plaintiffs have brought a citizens’ suit under the Resource Conservation and
19 Recovery Act (“RCRA”), 42 U.S.C. §§ 6901-92k, in which they allege that recreational
20 hunting on the Kaibab National Forest is resulting in the “disposal” of lead in the form of
21 spent ammunition on Forest Service land. *See* Complaint for Declaratory and Injunctive
22 Relief (ECF Doc. 1) (“Compl.”) ¶ 1. According to Plaintiffs, this spent ammunition
23 presents an “imminent and substantial endangerment to health or the environment”
24 because it is consumed by California condors when feeding on animal carcasses, leading
25 to lead poisoning. Compl. ¶¶ 1, 35-42 (quoting 42 U.S.C. § 6972(a)(1)(B)). Defendant
26 United States Forest Service (“Forest Service”) is alleged to be “contributing” to the

1 endangerment, and hence liable under the RCRA citizen suit provision, by failing to
2 prohibit the use of lead ammunition by hunters and by issuing special use permits for
3 guiding and outfitting that do not prohibit the use of lead ammunition. *Id.* ¶¶ 45-46.
4 Plaintiffs request declaratory and injunctive relief against the Forest Service, including a
5 permanent injunction prohibiting the creation of an “imminent and substantial
6 endangerment to health or the environment” within the Kaibab National Forest. *See*
7 Compl. ¶ 47.

8 Even if these allegations are accepted as true, Plaintiffs’ Complaint suffers from
9 serious defects. Under the RCRA citizen suit provision, Section 7002(a)(1)(B), Plaintiffs
10 must establish that the Forest Service (1) “has contributed or [] is contributing to” (2) “the
11 past or present handling, storage, treatment, transportation, or disposal” (3) “of any solid
12 or hazardous waste,” (4) “which may present an imminent and substantial endangerment
13 to health of the environment.” 42 U.S.C. § 6972(a)(1)(B). Plaintiffs, however, cannot
14 establish that use of lead ammunition for hunting is a “disposal” of a “solid waste” within
15 the meaning of Section 7002(a)(1)(B). In addition, Plaintiffs have failed to allege any
16 particular “disposal” of lead ammunition within the Kaibab National Forest linked to the
17 harm alleged in their Complaint, i.e., lead poisoning of California condors. Therefore,
18 NSSF respectfully requests the court to enter judgment dismissing Plaintiffs’ Complaint
19 with prejudice on the grounds raised herein.¹

20 **II. SUMMARY OF MATERIAL FACTS.**

21 Defendant Forest Service is an agency within the Department of Agriculture and is
22 responsible for the administration of the Kaibab National Forest. Compl. ¶ 8.² Located in

23 ¹ By limiting this motion to the grounds raised herein, NSSF is not waiving any other
24 defenses that it may raise at a later stage of these proceedings, including but not limited to
the affirmative defenses raised in NSSF’s Answer to Plaintiffs’ Complaint.

25 ² The facts set forth below are accepted as true for the purpose of this motion. NSSF reserves
the right to contest the facts alleged in Plaintiffs’ Complaint should this motion be denied.

26

1 northern Arizona, this national forest contains about 1.6 million acres of land and, in
2 places, borders on the Grand Canyon. *Id.*

3 Recreational hunting takes places within the Kaibab National Forest, particularly
4 for large mammals such as deer and elk. *Id.* ¶ 33. Much of this hunting takes place
5 during the fall hunting season. *Id.* The Forest Service issues special use permits to
6 hunting guides and outfitters who take clients on hunting trips within the national forest.
7 *Id.* ¶ 34.

8 The Forest Service does not prohibit or restrict the use of lead ammunition by
9 hunters on the Kaibab National Forest. *Id.* Likewise, the Arizona Department of Game
10 and Fish, which regulates hunting in Arizona, does not prohibit or restrict the use of lead
11 ammunition by hunters. *Id.*; *see also* A.R.S. §§ 17-102 (providing that wildlife “are
12 property of the state and may be taken at such times, in such places, in such manner and
13 with such devices as provided by law or rule of the commission”), 17-231 (setting forth
14 the general powers and duties of the Arizona Game and Fish Commission, including
15 establishing hunting rules and the manner and methods of taking wildlife).

16 Hunters that are successful in killing a deer or elk may field dress the animal and
17 leave a portion of the carcass behind. Compl. ¶ 35. In that case, scavengers such as
18 California condors may find and feed on the abandoned carcass. *Id.* ¶ 29, 35. Also, a
19 hunter may wound an animal, and the animal may escape and later die in the forest. *Id.*
20 ¶ 28, 35. If that occurs, scavengers such as California condors may find and feed on the
21 carcass. *Id.* ¶ 35. In these cases, if the hunter used lead ammunition, condors may ingest
22 lead fragments found in the carcass and be poisoned. *Id.* ¶¶ 30-31.

23 There were 73 California condors in northern Arizona and southern Utah when the
24 Complaint was filed in 2012. *Id.* ¶ 36. These birds were introduced by the U.S. Fish and
25 Wildlife Service (“FWS”) as a nonessential experimental population pursuant to a special
26 regulation issued under Section 10(j) of the Endangered Species Act (“ESA”), 16 U.S.C.

1 § 1539(j). *See* Condor Rule, 61 Fed. Reg. 54044; Compl. ¶ 40.

2 In its rulemaking, the FWS stated that Section 10(j) is designed to allow the
3 experimental population to be managed “in a manner that will ensure that current and
4 future land, water or air uses and activities should not be restricted” *Id.* at 54049.
5 Prior to releasing any condors, the FWS evaluated “[c]urrent and future land, water [and]
6 air uses” within the experimental population area, including “sport hunting,” and
7 concluded that these uses “should not be restricted due to the designation of the
8 nonessential experimental population of California condors.” *Id.* at 54050. The FWS
9 acknowledged that lead poisoning from hunting could result in condor deaths. *Id.* at
10 54054-55. The FWS explained that notwithstanding this threat, no restrictions would be
11 placed on public hunting or other outdoor recreational activities. *Id.* at 54052, 54055.
12 Condors in the experimental population use and occupy a large geographic area in parts of
13 three states. The experimental population area established by FWS’s Condor Rule is
14 defined by Interstate 40 on the south, U.S. Highway 191 on the east (parallel to the New
15 Mexico and Colorado state borders), Interstate 70 on the north, and Interstate 15 to U.S.
16 Highway 93 near Las Vegas, Nevada, on the west. *Id.* at 54049-50, 54059 (map).
17 However, condors are wide-ranging and have travelled into eastern Nevada, southwestern
18 Arizona, along the Mogollon Rim to the New Mexico border, and as far north as Flaming
19 Gorge, Wyoming. U.S. Fish and Wildlife Service, *A Review of the Third Five Years of*
20 *the California Condor Reintroduction Program in the Southwest (2007-2011)* 11 (2012)
21 (“Condor Report”).³

22 Plaintiffs allege in their Complaint that lead poisoning has been the leading cause

23 ³ The FWS Condor Report is referenced in the Complaint as the “SCRT 2012 Report.”
24 *See* Compl. ¶ 39. This report is an official public document issued by the FWS, and
25 Plaintiffs have cited and quoted from the report in their Complaint. It is available at
https://www.fws.gov/cno/es/calcondor/PDF_files/3rd-5YR-Review-Final%20.pdf. NSSF
26 therefore references this report as well.

1 of condor deaths. Compl. ¶ 37. Of the 46 condor deaths in the southwest from 1996,
2 when the species was introduced, and 2011, 21 deaths (48%) have been attributed to lead
3 poisoning—an average of 1.4 condor deaths per year. *Id.* ¶ 38 (citing Condor Report).
4 Two additional condor deaths are suspected to have been caused by lead poisoning. *Id.*

5 According to the Condor Report, spent ammunition incidentally consumed by
6 scavenging condors is the primary source of lead exposure. *Id.* ¶ 39. “[R]adiographs have
7 continued to reveal lead pellets and fragments in the digestive tracks of lead-poisoned
8 condors and bullet fragments in deer and coyotes collected in the condor’s range.” *Id.*
9 (quoting Condor Report at 14). Condors have been detected with elevated levels of lead
10 in their blood and in some cases have been treated with chelation to prevent lead
11 poisoning. *Id.* ¶ 40.

12 The Condor Report states that the Peregrine Fund “found that an abrupt increase of
13 blood lead levels has corresponded with increased use of deer hunting areas on the Kaibab
14 Plateau and southern Utah since 2002. Spikes in blood lead levels have been associated
15 with condor visitation to these regions during and just after the big-game hunting season.”
16 Condor Report at 17.⁴

17 Plaintiffs do not allege that hunting with lead ammunition, within the California
18 condor’s experimental population area, occurs *solely* within the Kaibab National Forest.
19 *See generally* Compl. In fact, hunting with lead ammunition occurs throughout the
20 condor’s experimental population area, including southern Utah. *See* Condor Rule, 61
21 Fed. Reg. 54050 (describing current and future activities within the experimental
22 population area), 54052 (discussing hunting in the vicinity of the Vermillion Cliffs

23 ⁴ In their Complaint, Plaintiffs apparently intended to quote these sentences from the
24 Condor Report, but the quotation omitted “southern Utah” from the first sentence and
25 included “Kaibab Plateau” in the second sentence of the quotation. *Compare* Compl. § 42
26 *with* Condor Report at 17. We assume these were typographical errors, and have
substituted the correct language from the Condor Report in the text above.

1 reintroduction area), 54054-55 (discussing hunting and the potential for lead poisoning).

2 Plaintiffs do not allege that lead ammunition has been disposed at any specific
3 locations within the Kaibab National Forest. *See generally* Compl. Likewise, Plaintiffs
4 do not allege that lead ammunition has been allowed to accumulate at any specific
5 disposal sites within the Kaibab National Forest. *Id.* Furthermore, Plaintiffs do not allege
6 that any California condor deaths have been caused by exposure to lead ammunition at
7 any specific locations within the Kaibab National Forest. *Id.*

8 **III. STANDARD OF REVIEW.**

9 “Judgment on the pleadings is properly granted when, accepting all factual
10 allegations in the complaint as true, there is no issue of material fact in dispute, and the
11 moving party is entitled to judgment as a matter of law.” *Chavez v. United States*, 683
12 F.3d 1102, 1108 (9th Cir. 2012) (quoting *Fleming v. Pickard*, 581 F.3d 922, 925 (9th Cir.
13 2009)) (alterations from original not shown). “Analysis under Rule 12(c) is ‘substantially
14 identical’ to analysis under Rule 12(b)(6) because, under both rules, a court must
15 determine whether the facts alleged in the complaint, taken as true, entitle the plaintiff to a
16 legal remedy.” *Pit River Tribe v. Bureau of Land Mgmt.*, 793 F.3d 1147, 1155 (9th Cir.
17 2015) (quoting *Chavez*, 683 F.3d at 1108). Accordingly, dismissal is proper if a party
18 fails to assert a cognizable legal theory or fails to allege sufficient facts to support a legal
19 claim. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990).
20 Furthermore, conclusory allegations and unwarranted inferences are insufficient to defeat
21 a motion for judgment on the pleadings. *See Cholla Ready Mix, Inc. v. Civish*, 382 F.3d
22 969, 973 (9th Cir. 2004); *see also Chavez*, 683 F.3d at 1108 (“a court discounts
23 conclusory statements, which are not entitled to the presumption of truth, before
24 determining whether a claim is plausible”).

25 Based on these well-settled principles, NSSF is entitled to judgment on the
26 pleadings and Plaintiffs’ RCRA claim should be dismissed with prejudice.

1 **IV. LEGAL FRAMEWORK.**

2 RCRA provides both regulatory and remedial authorities with regard to solid and
3 hazardous wastes. RCRA's regulatory program imposes a comprehensive "cradle-to-
4 grave" regulatory structure for tracking wastes from their generation to their ultimate
5 disposal and storage, including a requirement to obtain a permit for the treatment, storage,
6 and disposal of any hazardous wastes. *See generally* 42 U.S.C. §§ 6921-6939e; 40 C.F.R.
7 §§ 260-68, 270-73; *see also Conn. Coastal Fishermen's Ass'n v. Remington Arms Co.,*
8 *Inc.*, 989 F.2d 1305, 1313 (2d Cir. 1993). RCRA's remedial program, on the other hand,
9 authorizes the United States to bring "imminent hazard" lawsuits under Section 7003 of
10 RCRA, 42 U.S.C. § 6973, against persons who have contributed or who are contributing
11 to the disposal of a solid or hazardous waste that may present an imminent and substantial
12 endangerment to health or the environment.

13 RCRA also authorizes two different kinds of citizen suits to enforce, respectively,
14 the Act's regulatory and remedial programs under RCRA. On the regulatory side, Section
15 7002(a)(1)(A) authorizes private citizens to bring a lawsuit to enforce "any permit,
16 standard, regulation, condition, requirement, prohibition or order which has become
17 effective pursuant to [RCRA]." 42 U.S.C. § 6972(a)(1)(A). This provision is not at issue
18 in this case. On the remedial side, Section 7002(a)(1)(B) authorizes a citizen to
19 commence a civil action on his own behalf:

20 Against any person, including the United States ... [1] who
21 has contributed or who is contributing [2] to the past or
22 present handling, storage, treatment, transportation, or
23 disposal [3] of any solid or hazardous waste [4] which may
 present an imminent and substantial endangerment to health or
 the environment.

24 42 U.S.C. § 6972(a)(1)(B) (numbering added for reference purposes).

25 To be subject to either of RCRA's programs, the material at issue must first meet
26 the definition of a "solid waste." This is because "hazardous wastes" are a subset of

1 “solid wastes” under RCRA. *Conn. Coastal*, 989 F.2d at 1313 (citing 42 U.S.C. §
2 6903(5)). Accordingly, for a material to be classified as a “hazardous waste,” it must first
3 qualify as “solid waste.” *Id.* (citing *United Technologies Corp. v. U.S. EPA*, 821 F.2d
4 714, 716 n.1 (D.C. Cir. 1987)).

5 The definition of “solid waste” under RCRA varies depending on the statutory
6 context in which it is used. With respect to RCRA’s remedial authorities—the program
7 implicated here—the statutory definition of “solid waste” applies. *See* 40 C.F.R.
8 § 261.2(b)(2)(ii) (providing that the statutory definition of solid waste applies to imminent
9 hazard lawsuits brought by the United States); *see also Conn. Coastal*, 989 F.2d at 1315
10 (holding that statutory definition of solid waste applies to citizen suits brought to abate an
11 imminent hazard to health or the environment under RCRA Section 7002(a)(1)(B)).
12 Under this definition, “solid waste” means any “garbage, refuse, sludge from a waste
13 treatment plant, water supply treatment plant, or air pollution control facility and *other*
14 *discarded material* ... resulting from industrial, commercial, mining and agricultural
15 operations, and from community activities.” 42 U.S.C. § 6903(27) (emphasis added).

16 With respect to RCRA’s regulatory authorities, the Environmental Protection
17 Administration (“EPA”) has adopted a definition of solid waste that defines the term to
18 mean “any discarded material” and further defines discarded materials as those which are
19 “abandoned.” 40 C.F.R. § 261.2(a); *see Conn. Coastal*, 989 F.2d at 1314 (discussing
20 EPA’s regulatory definition of solid waste). The regulation further provides that materials
21 are solid waste if they are “abandoned” by being “[d]isposed of.” 40 C.F.R. § 261.2(b).

22 The Ninth Circuit has not considered the precise meaning of the terms “solid
23 waste” or “discarded material” in the context of spent ammunition. However, in a
24 different context, the court defined the term “discard” to mean to “cast aside; reject;
25 abandon; give up.” *Safe Air For Everyone v. Meyer*, 373 F.3d 1035, 1041 (9th Cir. 2004)
26 (considering whether grass residue remaining after commercial harvest is a solid waste).

1 **V. ARGUMENT.**

2 **A. Hunting With Lead Ammunition Is Not A “Disposal” of a “Solid**
3 **Waste” under RCRA.**

4 Because Plaintiffs have brought suit under RCRA’s remedial authorities and,
5 specifically, RCRA Section 7002(a)(1)(B), the statutory definition of solid waste is
6 controlling. Accordingly, Plaintiffs must establish that lead ammunition fired for hunting
7 purposes is “garbage, refuse, sludge from a waste treatment plant, water supply treatment
8 plant, or air pollution control facility and other discarded material ... resulting from
9 industrial, commercial, mining and agricultural operations, and from community
10 activities.” 42 U.S.C. § 6903(27). The only part of this definition that could possibly
11 apply to spent lead ammunition is “discarded material.”

12 While the Ninth Circuit has never defined solid waste or discarded material in the
13 context of lead ammunition (or other ammunition or ordnance), other courts have
14 addressed whether spent ammunition can be considered a discarded material and,
15 therefore, a solid waste under RCRA’s regulatory and remedial programs. These cases
16 establish two important rules: (1) lead ammunition (or any other ordnance) fired for target
17 practice or similar purposes is not “discarded material” at the time of discharge because
18 the person firing such ammunition is putting the product to its intended use; and (2) lead
19 ammunition can only be considered a discarded material if it is allowed to accumulate for
20 an extended period of time. *See e.g., Conn. Coastal*, 989 F.2d at 1316; *Water Keeper*
21 *Alliance v. U.S. Dept. of Defense*, 152 F. Supp. 2d 163, 169 (D.P.R. 2001). Applying
22 these rules, lead ammunition discharged in the course of hunting animals in the Kaibab
23 National Forest cannot be considered a discarded material under RCRA. Therefore,
24 Plaintiffs’ RCRA claim fails as a matter of law.

25
26

1 **1. Lead ammunition is not a “discarded material” when it is fired**
2 **for the purpose of hunting animals.**

3 In *Water Keeper*, the plaintiffs sued the Department of Defense, alleging, among
4 other things, that the Navy’s firing of ordnance was a disposal of a solid waste that may
5 present an imminent and substantial endangerment to health or the environment. *Water*
6 *Keeper*, 152 F. Supp. 2d at 166 (citing 42 U.S.C. § 6972(a)(1)(B)). In addressing this
7 claim, the court framed the issue as follows: “whether as soon as ordnance is fired and
8 makes contact with the land it is ‘discarded material.’ If it is not discarded material, it is
9 not solid waste, and Plaintiffs [cannot] bring suit ... under RCRA’s citizen suit
10 provision.” *Id.* The court determined that ordnance was not discarded material and
11 dismissed the plaintiffs’ RCRA claim.

12 The *Water Keeper* court made several observations in reaching its holding that are
13 instructive here. First, relying on the Second Circuit’s holding in *Connecticut Coastal*, the
14 court found that ordnance does not become discarded material until after it has been
15 allowed to “accumulate” after serving its “intended purposes.” *Id.* at 167 (discussing
16 *Conn. Coastal*, 989 F.2d at 1316). The court found that the Second Circuit’s analysis in
17 *Connecticut Coastal* “strongly suggests that munitions must ‘accumulate’ for an
18 unspecified amount of time before they can be considered discarded material and thus
19 solid waste.” *Id.* Accordingly, spent ammunition or ordnance does not automatically
20 become solid waste after its use, even if the material will remain on the ground following
21 its use. *Id.*

22 Second, the defendants argued that under the EPA’s Military Munitions Rule,⁵

23 ⁵ See *Military Munitions Rule: Hazardous Waste Identification and Management;*
24 *Explosives Emergencies; Manifest Exemption for Transport of Hazardous Waste on*
25 *Right-of-Ways on Contiguous Properties*; Final Rule, 62 Fed. Reg. 6629 (Feb. 12, 1997)
26 (codified at 40 C.F.R. Parts 260, 261, 262, 263, 264, 265, 266, and 270) (“Military
Munitions Rule”).

1 “firing ordnance on an active military training range is ‘*the use of a product for its*
2 *intended purpose and is not the discarding of waste material.*’” *Id.* (emphasis added).
3 The defendants acknowledged that the Military Munitions Rule only addressed when
4 military munitions were solid waste for regulatory purposes and that the statutory
5 definition of solid waste applied to the plaintiffs’ citizen suit. *Id.* at 167-68. But because
6 both the statutory and regulatory definitions of solid waste use the term “discarded
7 materials,” the court found the EPA’s rule to be instructive. *Id.* at 168.

8 Third, the *Water Keeper* court looked to the Southern District of New York’s
9 analysis in *No Spray Coalition, Inc. v. City of New York*, 2000 WL 1401458 (S.D.N.Y.
10 2000), *aff’d*, 252 F.3d 148 (2nd Cir. 2001), in which that court addressed a claim under
11 RCRA Section 7002(a)(1)(B) that the City of New York’s spraying of pesticide to halt the
12 spread of the West Nile Virus was a disposal of a solid or hazardous waste. *Id.*
13 Specifically, the court quoted the following portion of the Southern District’s decision in
14 *No Spray Coalition*:

15 It would contort the statutory language and do violence to the
16 intent of Congress in enacting RCRA to hold that pesticide
17 that has been sprayed but has yet to reach the mosquitos or
18 their habitats is “discarded material.” The very Second Circuit
19 Court of Appeals case that Plaintiffs cite, [*Connecticut*
20 *Coastal*], indicates that material is not discarded until after it
21 has served its intended purpose. Here, the intended purpose of
the spray is to drift through the air until coming to rest on the
mosquitos and their habitats. Thus, it cannot be said that the
insecticide is discarded when it is sprayed, and Plaintiffs’
claims under RCRA are dismissed.

22 *Id.* (quoting *No Spray Coalition*, 2000 WL 1401458, at *4). Likewise, the court in *Water*
23 *Keeper* found it could not be said that spent munitions were not used for their intended
24 purpose. Moreover, the court rejected plaintiffs’ argument that ordnance that missed
25 targets did not serve its intended purposes and therefore was discarded material. *Id.* at
26 168-69. The court found that “regardless of whether the ordnance performs as the gunner

1 or bomber wishes, it is most certainly being used for its intended purposes and is thus not
2 discarded material under RCRA. To hold otherwise would torture the meaning of the
3 term discarded material.” *Id.* at 169. Accordingly, the court determined that munitions
4 were not discarded materials when fired and dismissed Plaintiffs’ RCRA claim. *Id.*

5 Applying the court’s analysis in *Water Keeper* to this case, lead ammunition (or
6 any type of ammunition) discharged in the act of hunting an animal cannot be considered
7 a “disposal” of a “solid waste” under Section 7002(a)(1)(B) of RCRA. A hunter firing
8 ammunition from his or her weapon for the purpose of taking an animal is using the
9 ammunition for its normal and intended use—indeed, the ammunition cannot be put to its
10 intended use without the hunter discharging it into the environment. Accordingly, the
11 hunter cannot be considered to have intended to “discard” the ammunition. In the words
12 of the district court in *Water Keeper*, “[t]o hold otherwise would torture the meaning of
13 the term discarded material.” *Water Keeper*, 152 F. Supp. 2d at 169.

14 **2. Lead ammunition can only be considered a “discarded material”**
15 **under RCRA’s remedial provisions upon proof of disposal and**
accumulation at a particular location.

16 The issue of whether the discharge of lead ammunition for hunting purposes can be
17 considered a disposal of a solid waste under RCRA appears to be a matter of first
18 impression. However, several cases have addressed the question of when lead
19 ammunition fired at shooting ranges may become a discarded material subject to RCRA’s
20 regulatory and/or remedial provisions. These cases generally have held that lead
21 ammunition fired at a shooting range is not a solid waste for purposes of RCRA’s
22 regulatory provisions and can only become subject to RCRA’s remedial provisions as
23 “discarded material” if it is allowed to accumulate over long periods of time without
24 attempts to recover the spent ammunition. *See e.g., Conn. Coastal*, 989 F.2d at 1308,
25 1313-18 (acknowledging EPA’s conclusion that lead ammunition discharged at shooting
26 ranges does not fall within regulatory definition of solid waste, but not reaching that issue

1 due to other defects in plaintiffs' claim; and basing its holding that lead shot was
2 "discarded material" on factual finding that over 5 million pounds of shot had
3 accumulated over a 70-year period); *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199,
4 207-14 (2d Cir. 2009) (holding lead shot at shooting range did not meet regulatory
5 definition of solid waste, but not reaching issue of whether lead shot was "discarded
6 material" under statutory definition of RCRA after finding plaintiffs could not establish an
7 imminent and substantial endangerment to health or the environment); *Simsbury-Avon*
8 *Preservation Soc., LLC v. Metacon Gun Club, Inc.*, 2006 WL 2223946, at *8-9 (D. Conn.
9 2006) (holding that lead bullets at shooting range that were periodically recovered and not
10 left to accumulate could not be considered "discarded material" under statutory definition
11 of solid waste).⁶

12 Of these cases, only in *Conn. Coastal* did the court find that spent lead ammunition
13 was "discarded material" for purposes of RCRA's remedial provisions. However, in that
14 case, nearly 5 million pounds of spent lead ammunition had accumulated over a period of
15 70 years in a discrete, identifiable area. *Conn. Coastal*, 989 F.2d at 1308, 1316. In
16 contrast to the facts in *Conn. Coastal*, Plaintiffs have not alleged a single discrete location
17
18

19 ⁶ *Contra Benjamin v. Douglas Ridge Rifle Club*, 673 F. Supp. 2d 1210 (D. Or. 2009)
20 (holding that genuine issue of material fact existed as to whether spent lead ammunition at
21 shooting range had accumulated long enough to be considered subject to regulatory
22 definition of solid waste). The court in *Benjamin* reached the opposite conclusion of most
23 courts addressing the issue of whether lead ammunition at a shooting range is a solid
24 waste for purposes of RCRA's regulatory provisions. The court's decision was based in
25 part on the flawed logic that "if lead shot meets the broad statutory definition of solid
26 waste, it necessarily meets the narrower regulatory definition." *Id.* at 1221. This is
backward. If the regulatory definition of solid waste is in fact narrower (i.e., restricted to
a smaller class of materials), additional elements must be satisfied for a material to qualify
as a solid waste under the regulatory definition. Accordingly, a material meeting the
definition of a solid waste under the statutory definition does not necessarily meet the
narrower regulatory definition.

1 at which a “disposal”⁷ of lead ammunition has occurred. Instead, the factual basis for the
2 Plaintiffs’ claim is that hunting with lead ammunition within the Kaibab National
3 Forest—an area containing some 1.6 million acres of land—is a disposal of solid waste.
4 See Compl. at ¶¶ 8, 13, 33-35.

5 To state a claim under RCRA Section 7002(a)(1)(A), Plaintiffs must be able to
6 allege an identifiable “disposal” of a material that is a “solid or hazardous waste.” 42
7 U.S.C. § 6972(a)(1)(B). Without being able to identify any specific location where a
8 disposal of spent lead ammunition has actually occurred, Plaintiffs cannot establish that
9 lead ammunition was disposed and thereafter allowed to accumulate for a sufficient period
10 of time to be considered “discarded material” under RCRA. Consequently, Plaintiffs have
11 failed to allege facts necessary to support a claim under Section 7002(a)(1)(B) of RCRA.

12 **B. Plaintiffs’ Failure to Identify a Discrete Disposal Location Is Fatal to**
13 **Their Claim.**

14 As explained above, the cases finding potential liability under RCRA’s remedial
15 provisions have involved an alleged disposal of a solid or hazardous waste at a discrete
16 and identifiable location. Plaintiffs’ inability to identify a particular site where lead
17 ammunition was allegedly disposed and left to accumulate so as to become solid waste is
18 also fatal to their claim because, without such information, they cannot establish that
19 hunting with lead ammunition *in the Kaibab National Forest* presents an imminent and
20 substantial endangerment to health or the environment, as required under RCRA Section
21 7002(a)(1)(B). *Price v. U.S. Navy*, 39 F.3d 1011, 1021 (9th Cir. 1994) (affirming district
22 court’s denial of RCRA claim where plaintiff failed to prove existence of hazardous level

23 ⁷ “Disposal” is defined under RCRA as “the discharge, deposit, injection, dumping,
24 spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or
25 water so that such solid waste or hazardous waste or any constituent thereof may enter the
26 environment or be emitted into the air or discharged into any waters, including ground
waters.” 42 U.S.C. § 6903(3).

1 of contamination on subject property); *Cordiano*, 575 F.3d at 214 (rejecting imminent and
2 substantial endangerment claim because plaintiff’s evidence provided “no more than a
3 speculative prospect of future harm”).

4 The factual basis of Plaintiffs’ “imminent and substantial endangerment” claim is
5 their allegation that hunting with lead ammunition within the Kaibab National Forest has
6 resulted in the poisoning of California condors. See Complaint ¶¶ 30, 35-42. But
7 according to Plaintiffs’ Complaint, the “Southwest condor population” occurs in both
8 northern Arizona and southern Utah, an area that is obviously much larger than the
9 Kaibab National Forest. See Compl. ¶ 36; see also Condor Rule, 61 Fed. Reg. 54049-50,
10 54059 (map). It is also undisputed that hunting with lead ammunition occurs throughout
11 much of this area, including areas near the condor reintroduction site at Vermillion Cliffs,
12 on land managed by the Bureau of Land Management. See *id.* at 54047-48 (discussing
13 release site), 54052 (discussing hunting near the Vermillion Cliffs reintroduction site),
14 54054-55 (discussing hunting and the potential for condor lead poisoning).

15 Given the extensive range used by the condor experimental population and the
16 undisputed fact that hunting occurs throughout much of this area, Plaintiffs must identify a
17 specific “disposal” location within the Kaibab National Forest, i.e., land managed by the
18 Forest Service, that is linked to the lead poisoning of a condor. Without alleging such
19 facts, Plaintiffs cannot claim that hunting with lead ammunition in the Kaibab National
20 Forest may present imminent and substantial endangerment to health or the environment.
21 As the Supreme Court held in *Meghrig v. KFC Western, Inc.*:

22 Section [7002](a)(1)(B) [of RCRA] permits a private party to
23 bring suit only upon a showing that the solid or hazardous
24 waste at issue “may present an imminent and substantial
25 endangerment to health or the environment.” The meaning of
26 this timing restriction is plain: *An endangerment can only be*
“imminent” if it “threaten[s] to occur immediately,”
Webster’s New International Dictionary of English Language
1245 (2d ed.1934), and the reference to waste which “may

1 present” imminent harm quite clearly excludes waste that no
 2 longer presents such a danger. As the Ninth Circuit itself
 3 intimated in *Price v. United States Navy*, 39 F.3d 1011, 1019
 4 (1994), *this language “implies that there must be a threat*
 5 *which is present now*, although the impact of the threat may
 not be felt until later.” It follows that § 6972(a) was designed
 to provide a remedy that ameliorates present or obviates the
 risk of future “imminent” harms

6 516 U.S. 479, 485-86 (1996) (emphasis added).

7 In short, more is required to properly allege a claim under RCRA Section
 8 7002(a)(1)(B) than extremely vague allegations about the impact of hunting with lead
 9 ammunition on the “Southwest condor population.” Without alleging the location of a
 10 specific disposal of solid waste and how that disposal presents an “imminent and
 11 substantial endangerment” with reasonable specificity, Plaintiffs are not entitled to relief
 12 against the Forest Service for “contributing” to the disposal of solid waste.

13 **C. The Condor Rule Precludes an “Imminent and Substantial**
 14 **Endangerment” Finding.**

15 In order to prevail on their claim, Plaintiffs must prove that the endangerment to
 16 health or the environment alleged in their Complaint is both (1) “imminent,” i.e.,
 17 “threatens to occur immediately;” and (2) “substantial,” i.e., “serious, and there must be
 18 some necessity for the action.” *City of Fresno v. United States*, 709 F. Supp. 2d 934, 943
 19 (E.D. Cal. 2010) (quoting *Meghrig*, 516 U.S. at 485, and *Price*, 39 F.3d at 1019). The
 20 Condor Rule, however, precludes a finding that lead poisoning of condors from hunting
 21 with lead ammunition presents a “substantial” endangerment.

22 Plaintiffs’ Complaint hinges on alleged lead poisoning of the “Southwest condor
 23 population” caused by hunting with lead ammunition in the Kaibab National Forest.
 24 Compl. ¶¶ 25-40. Plaintiffs acknowledge that this condor population was introduced into
 25 the region in 1996, *see* Compl. ¶ 40, but fail to disclose that these birds were introduced
 26 by the FWS as a *nonessential* experimental population pursuant to a special rule issued

1 under Section 10(j) of the ESA. *See* Condor Rule, 61 Fed. Reg. 54044. In issuing that
2 rule, the FWS evaluated the potential impact of hunting with lead ammunition on the
3 nonessential experimental population and acknowledged that lead poisoning was a serious
4 threat to the population. *Id.* at 54050, 54054-55. Notwithstanding this risk, FWS
5 concluded that no restrictions would be placed on public hunting or other outdoor
6 recreational activities in the experimental population area, which includes the Kaibab
7 National Forest. *Id.* at 54052, 54055.

8 Given the FWS' evaluation of the threat of hunting with lead ammunition in the
9 Condor Rule and its finding that this threat was acceptable, the endangerment to condors
10 alleged in Plaintiffs' Complaint cannot be construed as "substantial" within the meaning
11 of RCRA Section 7002(a)(1)(B). Because Plaintiffs have failed to allege a harm that
12 could constitute a "substantial" endangerment under RCRA Section 7002(a)(1)(B),
13 Plaintiffs' Complaint must be dismissed.

14 **VI. CONCLUSION AND RELIEF REQUESTED**

15 For the foregoing reasons, NSSF respectfully requests that the Court enter a
16 judgment dismissing Plaintiffs' Complaint with prejudice pursuant to Rule
17 12(c), Fed.R.Civ.P.

18 RESPECTFULLY SUBMITTED this 12th day of August, 2016.

19 FENNEMORE CRAIG, P.C.

20
21 By s/ Norman D. James

22 Norman D. James
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25 Foundation, Inc.*
26

CERTIFICATE OF SERVICE

I hereby certify that on August 12, 2016, I electronically transmitted the foregoing NATIONAL SHOOTING SPORTS FOUNDATION, INC.'S MOTION FOR JUDGMENT ON THE PLEADINGS to the Clerk's Office using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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