C. D. Michel, Cal. B.N. 144258
W. Lee Smith, Cal. B.N. 196115
Scott M. Franklin, Cal. B.N. 240254
MICHEL & ASSOCIATES, PC
180 E. Ocean Boulevard, Suite No. 200
Long Beach, CA 90802
Telephone: 562-216-4444
Facsimile: 562-216-4445
Emails: cmichel@michellawyers.com
lsmith@michellayers.com
sfranklin@michellawyers.com

Jeremy E. Clare, DC B.N. 1015688
Safari Club International
501 2nd Street, NE
Washington, DC 20002
Telephone: 202-543-8733
Facsimile: 202-403-2244
Email: jclare@safariclub.org

Attorneys for Defendants-
Intervenors National Rifle Association
of America and Safari Club International

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

PRESCOTT DIVISION

Center for Biological Diversity, et al.,

Plaintiffs,

vs.

United States Forest Service,

Defendant, and

National Rifle Association of America and Safari Club International, and National Shooting Sports Foundation, Inc.,

Defendants-Intervenors.

CASE NO. 3:12-cv-08176-PCT-SMM

DEFENDANTS-INTERVENORS NATIONAL RIFLE ASSOCIATION OF AMERICA AND SAFARI CLUB INTERNATIONAL'S MOTION TO DISMISS

(ORAL ARGUMENT REQUESTED)

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii
MEMORANDUM IN SUPPORT OF MOTION TO DISMISS 1
STATEMENT OF FACTS AND LAW 1
ARGUMENT 2
I. Plaintiffs Fail to State a Cause of Action under RCRA Because the Complaint Does Not Sufficiently Plead the Existence or Threat of an Imminent and Substantial Endangerment to: (a) Human Health or (b) the Environment. 2
A. The Complaint's Cursory, General Allegations Regarding Lead (Pb) Exposure and Its Potential Effects on Human Health Are Factually Insufficient to Anchor a RCRA Citizen Suit. 2
B. Animals that Are Being Utilized in a Highly Controlled Experiment Run by the Federal Government Are Not Part of the "Environment" as that Term Is Used in RCRA. 3
II. Spent Lead-Based Ammunition Present in Carrion Is Not a Solid Waste Pursuant to *Ecological Rights Foundation*. 5
III. Even Assuming Plaintiffs Could Meet the Prima Facie Burden for Their RCRA Claim, ESA Section 10(j) Prevents Application of RCRA Under Well- Established Law Regarding the Interpretation of Conflicting Federal Statutes. 6
IV. The Forest Service Is Not a Contributor under RCRA Precedent in this Circuit, and Even Assuming Arguendo It Is, Policy Concerns Dictate that "Non-Regulation" of an Alleged Disposal of Waste Does Not Justify RCRA Citizen Suit Liability. 9
V. Hunters' Spent Ammunition Is Not "Solid Waste" Under RCRA Because Hunting Is Not a Community Activity. 12
VI. The Case Should Be Dismissed Because It Lacks a Required Party. 13
CONCLUSION 14
CERTIFICATE OF SERVICE 16

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

Cases

Adams v. NVR Homes, Inc.,
135 F. Supp. 2d 675 (D. Md. 2001) 13

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007) 3

Comite Pro Rescate De La Salud v. Puerto Rico Aqueduct & Sewer Auth.,
888 F.2d 180 (1st Cir. 1989) 12

Conley v. Gibson,
355 U.S. 41 (1957) 3

Conn. Coastal Fishermen's Ass'n v. Remington Arms Co.,
777 F. Supp. 173 (D. Conn. 1991) 13

Conn. Coastal Fishermen's Ass'n v. Remington Arms Co.,
989 F.2d 1305 (2d Cir. 1993) 6

Conservation Force, Inc. v. Manning,
301 F.3d 985 (9th Cir. 2002) 14

Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.,
No. 09-CV-8011-PCT-PGR, 2011 WL 4551175 (D. Ariz. Sept. 30, 2011) 12

Cty. of Isanti v. Kiefer,
No. A15-1912, 2016 WL 4068197 (Minn. Ct. App. Aug. 1, 2016) 13

Defenders of Wildlife v. Andrus,
627 F.2d 1238 (D.C. Cir. 1980) 11, 12

Dine Citizens Against Ruining Our Env't v. Bureau of Indian Affairs,
932 F.3d 843 (9th Cir. 2019) 14

Ecological Rights Found. v. Pac. Gas and Electric Co.,
713 F.3d 502 (9th Cir. 2013) 5, 6, 10, 12

Forest Guardians v. U.S. Fish and Wildlife Serv.,
611 F.3d 692 (10th Cir. 2010) 8

Furrer v. Brown,
62 F.3d 1092 (8th Cir. 1995) 8

Hinds Inv., LP v. Angioli,
654 F.3d 846 (9th Cir. 2011) 10

Int'l Ctr. for Tech. Assessment v. Thompson,
421 F. Supp. 2d 1 (D.D.C. 2006) 11

Jones v. United States,
509 F. App'x 644 (9th Cir. 2013) 12

Lands Council v. Martin,
479 F.3d 636 (9th Cir. 2007) 13

Lincoln Props., Ltd. v. Higgins,
No. CIV. S-91-760DFL/GGH, 1993 WL 217429 (E.D. Cal. Jan. 21, 1993) 12

Meghrig v. KFC W., Inc.,
516 U.S. 479 (1996) 2

Nat'l Ass'n of Home Builders v. Defenders of Wildlife,
551 U.S. 644 (2007) 7, 9

No Spray Coalition, Inc. v. City of New York,
252 F.3d 148 (2d Cir. 2001) 5

Republic of Philippines v. Pimentel,
553 U.S. 851 (2008) 14

Ringbolt Farms Homeowners Ass'n v. Town of Hull,
714 F. Supp. 1246 (D. Mass. 1989) 10

Safe Air for Everyone v. Meyer,
373 F.3d 1035 (9th Cir. 2004) 4

Simsbury-Avon Pres. Soc'y v. Metacon Gun Club, Inc.,
575 F.3d 199 (2d Cir. 2009) 8

State of Alaska v. Andrus,
591 F.2d 537 (9th Cir. 1979) 11

United States v. Juvenile Male,
670 F.3d 999 (9th Cir. 2012) 7

United States v. Price,
688 F.2d 204 (3d Cir. 1982) 8

United States v. Trident Seafoods Corp.,
92 F.3d 855 (9th Cir. 1996) 7

WildEarth Guardians v. Lane,
No. CIV 12-118 LFG/KBM, 2012 WL 6019306 (D.N.M. Dec. 3, 2012) 4

Wyo. Farm Bureau Fed'n v. Babbitt,
199 F.3d 1224 (10th Cir. 2000) 8, 9

Statutes

16 U.S.C. § 1539(j) .... passim
42 U.S.C. § 6902(b) 2
42 U.S.C. § 6903(27) 12
42 U.S.C. § 6972(a)(1)(B) .... passim
42 U.S.C. § 6973 .... 7, 8, 10

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Rules

61 Fed Reg. 54044 (Oct. 16, 1996) 4
Fed. R. Civ. P. 8(a)(2) 3
Fed. R. Civ. P. 12(b)(6) 1, 3, 14
Fed. R. Civ. P. 12(b)(7) 14
Fed. R. Civ. P. 12(c) 1
Fed. R. Civ. P. 19(a)(1) 13

Regulations

36 C.F.R. § 251.50(c) 12
36 C.F.R. § 261.50(a) 9
36 C.F.R. § 261.70(a) 9
50 C.F.R. § 17.84(j)(11)(ii) 6

Constitutional Provisions

U.S. CONST. amend. XI 14

Other Authorities

BLACK'S LAW DICTIONARY (11th ed. 2019) 4, 13
THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2011) 13

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Defendants-Intervenors, National Rifle Association of America and Safari Club International ("NRA/SCI") move for dismissal of Plaintiffs' claim for relief under Federal Rule of Civil Procedure 12(b)(6).[1] Plaintiffs' claim for relief, brought under the Resource Conservation and Recovery Act's ("RCRA") citizen suit provision, is premised on the theory that hunters' use of lead-based ammunition is harming an experimental, non-essential population of California condors that was created, as expressly authorized by statute, in 1996. Plaintiffs disagree with the well-debated, but nonetheless approved, parameters of the experiment. Specifically, Plaintiffs seek to use RCRA to retroactively nullify a lynchpin provision of the Endangered Species Act ("ESA") Section 10(j) rule that established and regulates the condor population: the existence of the experimental population would not curtail hunters' use of lead-based ammunition. RCRA was not intended to, nor does it, operate as a limitation on experimental, non-essential populations authorized by the Secretary of the Interior under Section 10(j). Because the law does not provide for relief based on the facts alleged by Plaintiffs, the Court should dismiss the Complaint for failure to state a claim upon which relief may be granted.

STATEMENT OF FACTS AND LAW

In the interest of brevity, NRA/SCI request that the Court consider the sections regarding material facts and legal background provided in United States Forest Service's ("Forest Service") Motion to Dismiss (Dkt. 157, "FS MTD") and Defendant-Intervenor National Shooting Sports Foundation's Motion for Judgment on the Pleadings (Dkt. 160, "NSSF MJOP") on file in this Action.

---

[1] Although NRA/SCI have filed an answer in this case, they are filing a motion to dismiss, and not a motion for judgment on the pleadings, because the named defendant has not yet filed an answer. Under Rule 12, a party cannot file a motion for judgment on the pleadings until "[a]fter the pleadings are closed[.]" Fed. R. Civ. P. 12(c).

ARGUMENT

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

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

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

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

scientific studies and reports documenting the threat to human health . . . posed by spent lead ammunition[.]" Compl., ¶¶ 25, 15.

Even if these general statements are true, Plaintiffs have not sufficiently alleged how the use of lead-based ammunition in the KNF has or will imminently and substantially impact human health, as required for a RCRA citizen suit. 42 U.S.C. § 6972(a)(1)(B). Plaintiffs' general awareness that human health can *potentially* be affected by lead exposure is a far cry from sufficiently alleging an endangerment to human health in the KNF that could be remedied under RCRA. "Factual allegations [in a complaint] must be enough to raise a right to relief above the speculative level[.]" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the ... claim is and the grounds upon which it rests." *Id.* (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957) (alteration in original). The Complaint does not include any allegation causally linking the Forest Service's inaction regarding the use of lead-based ammunition in the KNF with an exposure leading to a potential or actual threat to human health. Thus, Plaintiffs have failed to state a claim under RCRA that hunters' use of lead-based ammunition, or the non-regulation thereof, is a threat to human health. Fed. R. Civ. P. 12(b)(6).

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

The Complaint raises an issue of first impression: whether an alleged harm to a non-essential, experimental population—*that would not exist, and would not suffer the alleged endangerment, but for the experiment*—qualifies as an "imminent and substantial endangerment to . . . the environment" under RCRA. The answer is no.

"The entire purpose of an experimental population designation is to allow the Secretary [of the Interior] some leeway and authority to 'experiment' in the management, preservation and conservation of a species." *WildEarth Guardians v. Lane*, No. CIV 12-118 LFG/KBM, 2012 WL 6019306, at *9 (D.N.M. Dec. 3, 2012), *as amended* (Dec. 4,

2012). Importantly, the presence of hunting with lead ammunition was expressly recognized as an element of the experiment from the beginning. 61 Fed. Reg. 54044, 54055 (Oct. 16, 1996). The Final Environmental Assessment ("EA") for the experiment is clear: "the non-essential, experimental population status that would apply to the condors effectively means that no existing activities, including sport hunting, will be disrupted by the release." NRA/SCI's Request for Judicial Notice ("RJN"), Dkt. 162, Ex. 1 at ii, 35. The Final EA explicitly anticipates hunters' ongoing use of lead-based ammunition; this use is acknowledged as part of the experiment. The text of the Final EA proves this point unambiguously: "[i]f lead poisoning becomes a significant source of mortality for California condors released in the proposed action, . . . mandatory use of non-lead bullets would not be mandated under the provisions of the 10(j) reintroduction." *Id.*

Because RCRA does not define "environment," it is properly interpreted in its "ordinary, contemporary, [and] common meaning[.]" *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1041 (9th Cir. 2004). "Environment" is commonly understood as describing "[t]he natural world in which living things dwell and grow." BLACK'S LAW DICTIONARY (11th ed. 2019). The endangerment Plaintiffs allege is not to the "natural world" but *only* to a specific population of animals that are being used for an experiment—an experiment that expressly incorporates the alleged endangerment. That the experimental "laboratory" here is tens of thousands of acres and not in a room on a university campus or in an enclosure at a zoo does not create a legal distinction—animal experiments relying on human interference (e.g., relocating animals) are all inherently occurring outside of the "natural world."

Statutorily authorized, non-natural, experimental populations are beyond RCRA's reference to "the environment." Any conclusion otherwise would cause conflict between the ESA and RCRA. *See supra* Part III. And, in this case, the Final EA explicitly recognized that hunters' use of lead-based ammunition would not be restricted due to the introduction of the experimental condor population. The use of RCRA contemplated by

the Plaintiffs herein would operate as just such a restriction. Thus, the Court should hold that the alleged endangerment presented by lead-based ammunition is not subject to a citizen suit under RCRA.

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

The Ninth Circuit's ruling in *Ecological Rights Foundation v. Pacific Gas and Electric Company* strongly suggests that Plaintiffs' RCRA claim fails because hunters' spent lead-based ammunition is not "solid waste." 713 F.3d 502, 514-15 (9th Cir. 2013). *Ecological Rights* involved a RCRA claim levied against utility companies based on the assertion that "wood preservative that escapes from utility poles" constituted "solid waste" and "may present an imminent and substantial endangerment to health or the environment." *Id.* In holding that RCRA is ambiguous as to "solid waste," the Court looked to the Military Munitions Rule, *No Spray Coalition, Inc. v. City of New York*, 252 F.3d 148, 150 (2d Cir. 2001), and other authorities to determine that the "key to whether a manufactured product is a 'solid waste,'" is "whether that product" has served its intended purpose and is "no longer wanted by the consumer." *Id*. at 515. The Court held that:

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

Id.

As *Ecological Rights* notes, the forgoing conclusion is consistent with the application of the Military Munitions Rule: "EPA treats spent munitions under RCRA . . . as not having been 'discarded' through their normal use." *Id*. at 516. The *Ecological Rights* Court recognized that "[it] defies reason to suggest that" "36 million utility-owned wood poles" are "producing 'solid waste[.]'" *Id*. at 517. The Court noted that if utility pole seepage—"released into the environment as a natural, expected consequence of its intended use"—is solid waste, then "everything from wood preservative that leaches from

railroad ties to lead paint that naturally chips away from houses would be . . . potentially actionable under 42 U.S.C. § 6972(a)(1)(B)." *Id*. at 517-18. The Court declined to extend RCRA so far beyond the interpretation compelled by "common sense." *See id.* at 517. Just as wood preservative seeping from utility poles and lead paint chipping away from houses are the expected consequences of those products' intended use, lead fragments left in carrion is an expected consequence of the intended use of lead-based ammunition while hunting in the KNF.

Although "accumulation" was not an issue in *Ecological Rights*, the Court suggested that a material could become "a RCRA 'solid waste' when it accumulates in the environment as a natural, expected consequence of the material's intended use." *Id.* at 518. But lead projectiles used for hunting do not "accumulate" in a single, relatively small location, like they may do at a shooting range. *Conn. Coastal Fishermen's Ass'n v. Remington Arms Co.*, 989 F.2d 1305, 1316 (2d Cir. 1993) (holding lead shot at gun range "left to accumulate long after [it] had served [its] intended purpose" was "solid waste"). Rather, to the extent spent lead-based ammunition exists in the KNF, its broad dispersion throughout the KNF is more akin to the escaped preservative discussed in *Ecological Rights* than concentrated spent ammunition accumulated on a few acres at a shooting range. There must be a limit to RCRA's scope. Based on the Ninth Circuit's analysis in *Ecological Rights* regarding utility poles and that court's reference to lead paint chips, hunters' lead-based ammunition, when used as intended, should not be considered a "solid waste" under RCRA.

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

Plaintiffs' RCRA claim is grounded in an alleged endangerment resulting from hunters' use of lead-based ammunition, an activity that was expressly authorized within the parameters of the applicable Section 10(j) rule. 50 C.F.R. § 17.84(j)(11)(ii); RJN, Ex. 1 at 35. Accordingly, if the Court concludes Plaintiffs have established a prima facie

claim under RCRA's citizen suit provision, then an irreconcilable conflict exists between the ESA's authorization of non-essential, experimental populations and RCRA's broad remedial purpose regarding the "disposal" of "waste" that may endanger the environment. Plaintiffs' RCRA claim, and thus their lawsuit, should be dismissed because RCRA's "imminent and substantial endangerment" provision pre-dates Section 10(j), Section 10(j) is the more narrow and specific statute regarding the management of condors in the experimental population area including the KNF, and application of RCRA in this instance is repugnant to the purpose of Section 10(j) and would effectively nullify it.

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

As of 1980, RCRA included a provision authorizing a cause of action to restrain disposal of a solid or hazardous waste that "may present an imminent and substantial endangerment to health or the environment[.]" *See United States v. Price*, 688 F.2d 204, 208 (3d Cir. 1982) (noting that the complaint in that case was filed in 1980, under a version of 42 U.S.C. § 6973 that included the relevant "imminent and substantial" language).[2] Section 10(j), on the other hand, was enacted in 1982. *Forest Guardians v.*

[2] To be clear, Plaintiffs' suit is brought under 42 U.S.C. § 6972, which concerns citizen suits, and not 42 U.S.C. § 6973, discussed above, which concerns, inter alia, the

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

5
6
7
8
9
10

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

11 *Wyo. Farm Bureau Fed'n v. Babbitt*, 199 F.3d 1224, 1232-33 (10th Cir. 2000) (emphasis
12 added). In creating Section 10(j), Congress's intent was to give the Secretary of the
13 Interior the "flexibility and discretion in managing the reintroduction of endangered
14 species. By regulation, the Secretary can identify experimental populations . . . and,
15 consistent with that determination, provide control mechanisms (i.e., controlled takings)
16 where the Act would not otherwise permit the exercise of such control measures against
17 listed species." *Id.* at 1233.

18 The legislative history of Section 10(j) shows that Congress intended to provide
19 the Secretary with extreme leeway in scientific research and actions aimed at protecting
20 endangered species, so much so that the Secretary is allowed to authorize potential harm
21 to certain members of a species' population if the Secretary believes it will result in a net

22
23
24
25
26
27
28

Administrator of the EPA's authority to bring an action concerning an "imminent and substantial endangerment." The distinction, however, is one without a difference, as the citizen suit provision has no greater reach than the provision discussed in the text above because it is directly patterned on § 6973 and '"confers on citizens a limited right under [§ 6972] to sue to abate an imminent and substantial endangerment pursuant to the standards of liability established under [§ 6973].' H.R. Rep. No. 198, 98th Cong., 2d Sess., pt. 1, at 53 (1984), *reprinted in,* 1984 U.S.C.C.A.N. 5576, 5612." *Furrer v. Brown*, 62 F.3d 1092, 1100 (8th Cir. 1995). *See* RJN at Ex. 2. The two provisions' language are "nearly identical." *Simsbury-Avon Pres. Soc'y v. Metacon Gun Club, Inc.*, 575 F.3d 199, 206 (2d Cir. 2009).

gain to the species as a whole. *See id.* Conversely, nothing in RCRA's legislative history suggests that the "imminent and substantial endangerment" provision(s) were contemplated to address (1) if a well-established recreational activity could constitute "disposal" of a "solid waste," or (2) if a statutorily authorized, government-run experiment could be subject to a RCRA suit based on an alleged endangerment that was a known element of the experiment. Given the foregoing, application of RCRA's citizen suit provision to disrupt FWS' statutorily authorized experiment would be a "positive repugnancy" that should be avoided. *Nat'l Ass'n of Home Builders*, 551 U.S. at 664 n.8.

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

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

The Forest Service has fully explained why its inaction concerning the use of lead ammunition in KNF does not amount to "contributing" to the disposal of a "solid waste." (FS MTD at 11-12 ("the mere existence of [36 C.F.R. § 261.70(a), 261.50(a)] falls far short of the *Hinds*[3] threshold to state a claim . . ."); *id.* at 12 ("Plaintiffs' unprecedented theory would effectively eliminate all meaningful boundaries on RCRA liability . . . .")). As the Forest Service explains, the Court should find that the Forest Service's inaction, especially in the context of "unexercised regulatory authority," is not contributing to the

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

disposal of a solid waste under RCRA. *Id.* at 9-13.

A strong policy rationale supports this conclusion. Finding contribution in this situation would expose federal, state, local, and tribal governments to potential RCRA liability any time they possess authority to stop third-party activity that violates RCRA but do not exercise that authority. *See Ecological Rights*, 713 F.3d at 517-18 (creating liability under RCRA for seepage of preservative from utility poles across the country "would lead to untenable results"). This expansion of liability is not based on language within the statute or the legislative history. *Ringbolt Farms Homeowners Ass'n v. Town of Hull,* 714 F. Supp. 1246, 1261 (D. Mass. 1989) (noting that "[n]either the statute nor the legislative history indicate that the phrase 'has contributed or ... is contributing to' contained in § 6972(a)(1)(B) or § 6973(a) was intended to extend to state regulatory agencies that have permitted ongoing violations of the prohibition against open dumping[.]"). Instead, the legislative history makes clear that Congress's intent was "that the enforcement actions should be directed at those actually involved in the dumping." *Id.* at 1260-61 (citing legislative history stating that "*[i]t was also Congress' intent that persons seeking to enforce the open dumping prohibition bring suit—not against the Federal government or the state—but against persons engaged in the act of open dumping*").

The concern regarding RCRA liability for inaction would be true for activities on lands managed by the government and activities subject to the government's authority to regulate in general, for example, under the Commerce Clause or under a state's police power. Governments choose not to exercise their authority for various reasons, including fiscal, resource allocation, mission, or policy concerns that cut in favor of not regulating something potentially subject to regulation. Under Plaintiffs' theory, governments would

risk RCRA liability every time such entities did not act to regulate or stop an activity that might create RCRA liability.[4]

For the same reason, courts have expressed concern over subjecting the federal government's inaction, such as unexercised regulatory authority, to obligations under the National Environmental Policy Act ("NEPA"). *See State of Alaska v. Andrus*, 591 F.2d 537, 541-42 (9th Cir. 1979) ("It is unnecessary for us to decide the exact scope, if any, of the Secretary's power to stop the [wolf-kill] program. Even if it is a broad power, the decision not to exercise it here does not trigger the NEPA requirement that an environmental impact statement be prepared."). As the D.C. Circuit explained, "[n]o agency could meet its NEPA obligations if it had to prepare an environmental impact statement every time the agency had power to act but did not do so. . . . It would be an imaginative and vigorous agency indeed which could identify and prepare all the statements and explanations appellees' reading of NEPA would have the statute demand." *Defenders of Wildlife v. Andrus*, 627 F.2d 1238, 1246 (D.C. Cir. 1980); *accord Int'l Ctr. for Tech. Assessment v. Thompson*, 421 F. Supp. 2d 1, 8 (D.D.C. 2006). The D.C. Circuit pointed to "literally thousands of decisions which Federal officials are authorized to and could conceivably make under existing law. If the mere existence of this authority was a basis for invoking NEPA regardless of whether a Federal decision was required to be or had been made the scope of the environmental review process would be vastly expanded." *Defenders*, 627 F.2d at 1246-47.[5] Similarly, in a related

---

[4] By way of example, the federal land management agencies manage a tremendous amount of land. "The Forest Service stewards an impressive portfolio of landscapes across 193 million acres of National Forests and Grasslands in the public trust." RJN at Ex. 3. "The Bureau of Land Management administers more surface land (245 million acres or one-tenth of America's land base) . . . than any other government agency in the United States." *Id.* at Ex. 4. The Fish and Wildlife Service "manage[s] the National Wildlife Refuge System . . . encompassing more than 150 million acres." *Id.* at Ex. 5.

[5] *See also Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, No. 09-CV-8011-PCT-PGR, 2011 WL 4551175, at *10 (D. Ariz. Sept. 30, 2011) (ruling, in a previous lawsuit brought by a Plaintiff in the present case, that resource management plans

1 context involving a federal agency, the Ninth Circuit found that "the National Park
2 Service's inaction in merely permitting the dangerous condition to persist did not rise to
3 the level of affirmative contribution necessary to sustain a claim of negligent exercise of
4 retained control." *Jones v. United States*, 509 F. App'x 644, 645 (9th Cir. 2013)
5 (unpublished). Efforts to expand liability for governmental decisions not to act, as
6 Plaintiffs advocate here, have been repeatedly rejected for very good reasons.

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

10 **V. Hunters' Spent Ammunition Is Not "Solid Waste" Under RCRA Because**
11 **Hunting Is Not a Community Activity.**

12 Spent hunting ammunition is not "solid waste." It is not "discarded material …
13 *resulting from industrial, commercial, mining, and agricultural operations, and from*
14 *community activities. . . .*" 42 U.S.C. § 6903(27) (emphasis added); *Ecological Rights*,
15 713 F.3d at 514 ("We begin with RCRA's definition of 'solid waste.'"). As the First
16 Circuit explained, RCRA "defines 'solid waste,' not simply in terms of *type* of material,
17 but also in terms of *source*." *Comite Pro Rescate De La Salud v. Puerto Rico Aqueduct &*
18 *Sewer Auth.*, 888 F.2d 180, 185 (1st Cir. 1989); *see also Lincoln Props., Ltd. v. Higgins*,
19 No. CIV. S-91-760DFL/GGH, 1993 WL 217429, at *10 (E.D. Cal. Jan. 21, 1993)
20 ("[Section] 6903(27) defines 'solid waste' by *source,* rather than just *type.*"). Spent
21 hunting ammunition does not *result from* any of the listed sources.

22 Spent hunting ammunition does not result from industrial, mining, or agricultural
23 operations. And hunting is a recreational activity—not a commercial operation—because
24 the Forest Service does not charge a fee or require a permit to hunt. 36 C.F.R.
25 § 251.50(c); *Conn. Coastal Fishermen's Ass'n v. Remington Arms Co.,* 777 F. Supp. 173,
26 188 n.21 (D. Conn. 1991) (defendant did not contest the plaintiff's allegation that it was a

---

27 allowing for "hunting and other forms of recreation [did not constitute an action] causally
28 related to the use of lead ammunition by hunters" such that NEPA analysis was required on that issue).

commercial operation because its "members were charged a fee"); *see also Lands Council v. Martin,* 479 F.3d 636, 642 (9th Cir. 2007) (collecting and relying on dictionary definitions for "commercial," e.g., "work intended for commerce" or "the mass market").

Hunting is not a "community activity" either. The common meaning of "community activity" is a group activity, as the word "group" recurs in definitions of "community." *See, e.g.*, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, 374 (5th ed. 2011); BLACK'S LAW DICTIONARY (11th ed. 2019). When interpreting "community activity," courts have focused on activities that involve the public generally, such as clearing land for road construction. *Adams v. NVR Homes, Inc.,* 135 F. Supp. 2d 675, 687 n.8 (D. Md. 2001). Likewise, the defendant in *Remington Arms* conceded that the club was a "community activity" because the club "was used by a number of community groups." *Conn. Coastal,* 777 F. Supp. at 188 n.21. In contrast, an individual's storage of old vehicles, building materials, and fixtures on private property did not "result[] from 'community activities'" under a waste ordinance that mirrored RCRA. *Cty. of Isanti v. Kiefer*, No. A15-1912, 2016 WL 4068197, at *1, 3 n.1 (Minn. Ct. App. Aug. 1, 2016).

These authorities demonstrate that a "community activity" is something more public or group-centered than recreational hunting. Community activities require more participants—like an entire community using a road or many groups of people target shooting at a single location, e.g., a shooting club. Therefore, the Court should not deem the few individuals hunting on their own, *see* FS MTD at 16 (no permit is required to hunt in the KNF), a "community activity."

VI. The Case Should Be Dismissed Because It Lacks a Required Party.

The Court should dismiss Plaintiffs' Complaint for failure to join the State of Arizona. Under Fed. R. Civ. P. 19(a)(1), Arizona is a required party because it has a legally protected interest in the subject matter of this suit—which, as framed by Plaintiffs, necessarily includes the regulation of hunting in Arizona—and proceeding

with this suit in its absence will impair that interest. "Unquestionably the States have broad trustee and police powers over wild animals within their jurisdictions[; i]t has also long been recognized that a state has a legitimate interest in providing 'enjoyment to its own people.'" *Conservation Force, Inc. v. Manning*, 301 F.3d 985, 996 (9th Cir. 2002) (international quotation marks omitted). Notwithstanding the importance of Arizona to this action, it cannot be joined because of its sovereign immunity. U.S. CONST. amend. XI. Accordingly, in "equity and good conscience," this suit should be dismissed. *See Dine Citizens Against Ruining Our Env't v. Bureau of Indian Affairs*, 932 F.3d 843, 851, 857-58 (9th Cir. 2019).[6]

Any party can raise a Rule 12(b)(7) defense. *Republic of Philippines v. Pimentel*, 553 U.S. 851, 861 (2008). NRA/SCI adopt the arguments presented in the State of Arizona's amicus curiae brief in support of dismissal. (Dkt. 159). For the reasons stated above and explained in Arizona's brief, the Court should hold that the State of Arizona is a required party that cannot be joined and dismiss Plaintiffs' Complaint.

CONCLUSION

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

[6] NRA/SCI raise the defense of failure to join a required party in this 12(b)(6) motion, instead of a 12(b)(7) motion, as a matter of judicial efficiency given that the Court can consider the issue *sua sponte* absent a motion from a party. *Republic of Philippines v. Pimentel*, 553 U.S. 851, 861 (2008).

Respectfully submitted this 12th day of November, 2019.

MICHEL & ASSOCIATES, P.C.

/s/ Jeremy E. Clare
Jeremy E. Clare
Attorney for Defendant -Intervenor Safari Club International

/s/ C.D. Michel
C.D. Michel, *Attorneys for Defendant -Intervenor National Rifle Association of America*

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of November, 2019, I electronically transmitted the foregoing motion and memorandum in support to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

Michael Charles Augustini
US Dept of Justice
P.O. Box 23986
Washington, DC 20026-3986
202-616-6519
Fax: 202-514-8865
Email: michael.augustini@usdoj.gov

Attorney for Defendant, United States Forest Service

Allison LaPlante
Earthrise Law Center
Lewis & Clark Law School
10015 S.W. Terwilliger Blvd.
Portland, OR 97211
(503) 768-6894
Email: laplante@lclark.edu

Attorney for Plaintiffs

Norman D. James
Rhett A. Billingsley
Fennemore Craig, P.C.
2394 E. Camelback Road, Suite 600
Phoenix, AZ 85016-2394
Telephone: (602) 916-5000
Email: njames@fclaw.com
rbilling@fclaw.com

Attorneys for Defendant Intervenor National Shooting Sports Foundation, Inc.

Kevin M. Cassidy
Earthrise Law Center
Lewis & Clark Law School
P.O. Box 445
Norwell, MA 02061
781-659-1696
Email: cassidy@lclark.edu

Attorney for Plaintiffs

Adam F. Keats
Center for Biological Diversity
351 California St., Ste. 600
San Francisco, CA 94104
415-436-9682
Fax: 415-436-9683
Email: akeats@centerforfoodsafety.org

Attorney for Plaintiffs

Leo John LeSueur
Office of the Attorney General
2005 N Central Ave
Phoenix, AZ 85004-1592
602-542-0640
Fax: 602-542-4377
Email: john.lesueur@azag.gov

Attorney for Defendant Intervenor, State of Arizona

/s/ Jeremy E. Clare
Jeremy E. Clare