GUN CLUB LEAD SHOT "HAZARDOUS WASTE" FOR ENVIRONMENTAL CLEANUP LAW

James C. Kozlowski, J.D., Ph.D.

The *Connecticut Coastal* decision described herein was brought to my attention by a student in my "Environmental Law for Biologists" course in the Environmental Science and Policy graduate program at George Mason University in Fairfax, Virginia. This interdisciplinary graduate program contains a masters and doctorate track in recreation resources policy which is coordinated by the Center for Recreation Resources Policy at George Mason. Within this context, the *Connecticut Coastal* opinion is particularly interesting in that pits two user groups (fishermen and a gun club) against each other in environmental toxic tort litigation, specifically the Resource Conservation and Recovery Act (RCRA).

RCRA became law in 1976. In pertinent part, RCRA requires the Environmental Protection Agency (EPA) to develop criteria for identifying and listing hazardous wastes. Further, RCRA requires EPA to establish standards and enforcement mechanisms for controlling hazardous waste generation, transport, and disposal. Control measures involve a permit system and "cradle to grave" record keeping system for listed materials. RCRA provides civil and criminal penalties for failure to have the necessary permits or records. In addition, RCRA authorizes EPA to issue compliance orders requiring cleanup or other remedial measures for RCRA violatations. As illustrated by the *Connecticut Coastal* case, tons of discarded lead shot at a trap and skeet club, in the absence of a RCRA permit, constituted a violation of RCRA requiring remedial measures consistent with EPA and state solid waste control programs.

GET THE LEAD OUT

In the case of *Connecticut Coastal Fishermen's Association v. Remington Arms Co., Inc.*, 989 F.2d 1305 (C.A.2d 1993), plaintiff Connecticut Coastal Fishermen's Association (the Association) brought suit against defendant Remington alleging that the lead shot and clay targets were hazardous wastes under the Resource Conservation and Recovery Act of 1976 (RCRA). Accordingly, the Association maintained that Remington was legally responsible under RCRA to clean up the lead shot and clay fragments it had permitted to be scattered on the land and in the sea at Remington's trap and skeet shooting club at Lordship Point in Stratford, Connecticut. The facts of the case were as follows:

> Remington Arms Co., Inc. has owned and operated a trap and skeet shooting club -- originally organized in the 1920s -- on Lordship Point in Stratford, Connecticut since 1945. Trap and skeet targets are made of clay, and the shotguns used to knock these targets down are loaded with lead shot. The Lordship Point Gun Club (the Gun Club) was open to the public and it annually served 40,000 patrons. After nearly 70 years of use, close to 2,400 tons of lead shot (5 million pounds) and 11 million pounds of clay target fragments were deposited on land around the club and in the adjacent waters of

Long Island Sound. Directly to the north of Lordship Point lies a Connecticut state wildlife refuge at Nells Island Marsh, a critical habitat for one of the state's largest populations of Black Duck. The waters and shore near the Gun Club feed numerous species of waterfowl and shorebirds.

In response to citizens' concerns regarding the impact of the Gun Club operations on the surrounding environment, the Connecticut Department of Environmental Protection (DEP or the Department) began an investigation in May 1985 into possible contamination. Concluding that the Gun Club's activities "reasonably can be expected to cause pollution," the DEP issued an administrative order on August 19, 1985, requiring Remington to: (1) Investigate the extent and degree of lead contamination of sediments and aquatic life as a result of past and present activities of the Remington Gun Club; (2) Perform a study to evaluate the potential for lead poisoning of waterfowl as a result of past and present activities at the Remington Gun Club; and (3) Take remedial measures as necessary to minimize or eliminate the potential for contamination of aquatic life and waterfowl.

The Order required that remedial action be completed in a year or by August 31, 1986, "except as may be revised by the recommendations of [a] detailed engineering study and agreed to by" the DEP. Meanwhile, pursuant to the DEP's August 1985 order, Remington commissioned a study by Energy Resources Company. The scope of the study was approved by the DEP on February 3, 1986.

The completed Energy Resources study was submitted to the DEP on July 2, 1986 -- one month before the August deadline for complete remediation. Based on the results of this study, the Department modified Order WC4122 on October 24, 1986 (modified order). The modified order required Remington to cease all discharges of lead shot at the Gun Club by December 31, 1986 and to submit a plan detailing remediation options by April 30, 1987. It did not prohibit Remington from continuing to operate the Gun Club after December 31, 1986, if steel shot was used in place of lead shot.

In response to the modified order, Remington commissioned a study by Battelle Ocean Sciences (Battelle) to look into remediation alternatives. Again, the DEP approved the scope of the Battelle study, though the study did not address remediation of the clay target fragments. Remington submitted the results of the Battelle study to the DEP on January 1, 1988.

In April 1988 the DEP invited the Coastal Fishermen to comment on the Battelle study. The Association expressed on May 13 concern about the lack of any remediation option for the clay targets debris. In September 1988 the DEP -- focusing on this concern -- directed Remington to investigate the effect of the clay targets on the environment. Remington asked Battelle to conduct a further study, which it submitted to

> the Department in February 1990. The DEP approved Battelle's latest report on June 8, 1990.
>
> As a result, but well over a year later, the DEP ordered Remington to supplement the proposed remediation plan to include removal of visible clay target fragments from the beach surface above the mean low water mark of Long Island Sound and to study the possible removal of targets from the water. Remington has now submitted the ordered supplemental report, and is awaiting its approval by the Department. It will have six months after the DEP approves the remediation plan to submit final engineering plans and a construction schedule. Because the proposed remediation plan involves dredging navigable waters of the United States, Remington will have to obtain permits from the U.S. Army Corps of Engineers. To date, none of the lead shot or the clay target fragments has been removed from Lordship Point or the surrounding waters of Long Island Sound.

According to the Association, "because the lead shot and clay targets are hazardous wastes, the Gun Club is a hazardous waste storage and disposal facility subject to RCRA requirements." In pertinent part, the Association asserted that Remington had created an "imminent and substantial endangerment" to human health and the environment under section 6972(a)(1)(B) for RCRA. Since Remington had never obtained a permit under § 3005 of RCRA for the storage and disposal of hazardous wastes, 42 U.S.C. § 6925, the Association sought a court order compelling Remington "to remedy the accumulations of shot and target debris." The district court agreed and granted summary judgment to the Association. Specifically, the court found that "the lead shot was a 'hazardous waste,' but believed there were genuine issues of material fact as to whether the clay targets were 'hazardous waste' under RCRA. Remington appealed.

As characterized by the appeals court, Remington maintained that it was not required to obtain a RCRA permit for the operation of its Gun Club facility because the debris did not constitute "an imminent and substantial endangerment to health and the environment under RCRA."

> Remington contended that because lead shot and clay target debris are not "solid wastes" -- and hence cannot be "hazardous wastes" regulated by RCRA -- it is not subject to a permit requirement. In essence, Remington contends that RCRA does not apply to the Gun Club because any disposal of waste that occurred there was merely incidental to the normal use of a product.

As noted by the appeals court, RCRA "authorizes citizens to sue to abate an 'imminent and substantial endangerment to health or the environment'."

> An imminent hazard citizen suit will lie against any "past or present" RCRA offender "who has contributed or who is contributing" to "past or present" solid waste handling practices that "may present an imminent and substantial endangerment to health or the

> environment." 42 U.S.C. § 6972(a)(1)(B)... [U]nder an imminent hazard citizen suit, the endangerment must be ongoing, but the conduct that created the endangerment need not be.

Having found that the materials at issue (lead shot and clay targets) constituted solid waste subject to RCRA controls, the specific issue before the appeals court was "whether they are hazardous waste" which posed an imminent and substantial endangerment to health or the environment. According to the court, the RCRA statute and regulations defined "hazardous waste" as follows:

> RCRA defines "hazardous waste" as a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may -- (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed. 42 U.S.C. § 6903 (5)(B).
>
> Certain wastes have been listed by the EPA as hazardous pursuant to 40 C.F.R. § 261.30. Alternatively, a waste is considered hazardous if it exhibits any of the characteristics identified in 40 C.F.R. §§ 261.20 through 261.24: ignitability, corrosivity, reactivity, or toxicity. The district court granted summary judgment in favor of the Association on the issue of whether the lead shot qualified as a hazardous waste, but at the same time stated there were genuine issues of material fact as to whether the clay targets were hazardous waste.

As noted by the appeals court, the district court had concluded that "the lead shot was hazardous waste as a matter of law because it satisfied the requirements of 40 C.F.R. § 261.24 for toxicity."

> That regulation provides that a solid waste is toxic, and therefore hazardous if, using appropriate testing methods, an "extract from a representative sample of the waste contains any of the contaminants listed . . . at the concentration equal to or greater than" that specified. 40 C.F.R. § 261.24(a). For lead, the concentration threshold is 5.0 mg/L.
>
> The Battelle study commissioned by defendant outlines the test method utilized as in accordance with EPA procedures, and was of the view that forty-five percent of the sediment samples analyzed exceeded the applicable limits for lead.

On the basis of these results, the appeals court found that "upland disposal of the sediments as they currently exist in the environment at Lordship Point would require use of a RCRA-certified hazardous waste disposal site."

> Remington does not challenge the accuracy or methodology of the Battelle study that clearly demonstrates that both the sediment at Lordship Point and the lead shot itself are

> toxic within the meaning of 40 C.F.R. § 261.24. The Battelle study further opines that "the accumulation of lead in the tissues of mussels and ducks [is] sufficient to indicate a lead contamination problem requiring remediation at Lordship Point."

Accordingly, the federal appeals court concluded, "as a matter of law, the lead shot is a solid waste which, due to its toxicity and the fact that it poses a substantial threat to the environment, is a hazardous solid waste subject to RCRA remediation and regulation." As a result, Remington would be required to properly dispose of the lead shot on the site consistent with RCRA regulations. Further, the court ordered further proceedings to ascertain whether the clay targets also constituted hazardous waste under RCRA.