

No. 08-3857

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Steven B. Pollack and Blue Eco Legal Council

Plaintiffs-Appellants

v.

Department of Justice, Coast Guard, Navy, Marines, and
Department of Defense

Defendants-Appellees

Appeal from the United States District Court
For the Northern District of Illinois,
Case No. 08-C-320
The Honorable Judge Guzman Presiding

BRIEF FOR APPELLANTS STEVEN B. POLLACK AND

BLUE ECO LEGAL COUNCIL

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JURISDICTIONAL STATEMENT

The United States District Court had federal question subject matter jurisdiction pursuant to 28 U.S.C. § 1331 to hear Plaintiff-Appellant citizen group's claims for violations arising under federal environmental statutes including the Clean Water Act, 33 U.S.C. § 1365, Resource Conservation Recovery Act, 42 U.S.C. § 6972(a)(1)(A) and (B), and the Comprehensive Environmental Response Compensation and Liability Act (a.k.a. Superfund), 42 U.S.C. § 9659(a) and (b). Each of these federal statutes allows any citizen to maintain a civil action in federal district court against any person, including the United States, for violating any provision.

The United States District Court also had subject matter jurisdiction as against the President for tort under the Federal Tort Claims Act, 28 U.S.C. § 1346(b).

The foregoing sources of District Court jurisdiction and the citizen group's standing to bring suit under them are the subject of this appeal.

The United States District Court for the Northern District of Illinois, Eastern Division, was the proper venue pursuant to 28 U.S.C. § 1391(e)(2) because the majority of the property that is the subject of the action is located in this district.

This appeal is taken from a final judgment issued by the District Court on September 12, 2008 that granted Defendant-Appellee Government's Motion to Dismiss all counts of the citizen group's Complaint for lack of standing. There are

no remaining issues pending before the District Court. The United States Court of Appeals therefore has jurisdiction over this appeal from a final decision of the District Court pursuant to 28 U.S.C. § 1291.

The United States Court of Appeals for the Seventh Circuit has jurisdiction over this appeal from the United States District Court for the Northern District of Illinois pursuant to 28 U.S.C. § 1294 and 28 U.S.C. § 41.

The notice of appeal was filed November 10, 2008. Agencies of the United States are parties and therefore the appeal was timely filed within the 60 days provided pursuant to Fed. R. App. P. 4(a)(1)(B).

STATEMENT OF THE ISSUE

Seeking relief from ongoing violation of the Clean Water Act, Resource Conservation and Recovery Act, and public nuisance, must citizen plaintiffs prove degradation of natural resources to show a concrete harm for purposes of standing where violation of the underlying laws only requires proving an illegal discharge?

STATEMENT OF THE CASE

On January 14, 2008, Blue Eco and Pollack filed a citizen suit in the United States District Court for the Northern District of Illinois pursuant to Clean Water Act (CWA), 33 U.S.C. § 1365, Resource Conservation Recovery Act (RCRA), 42 U.S.C. § 6972(a)(1)(A) and (B), and public nuisance under Illinois law. Plaintiffs alleged that the agencies of the federal government had repeatedly violated the

CWA, RCRA, and their rights as trust beneficiaries to the Lake Michigan lakebed. Specifically, plaintiffs claimed that the agencies were violating the CWA by discharging hazardous pollutants without a permit, were creating an imminent and substantial endangerment under RCRA by discarding toxic waste into the environment, and were creating a public nuisance by allowing 90 years of discharges to accumulate on public land including the beach, a park, and the lakebed. Plaintiffs sought declaratory and injunctive relief to prevent further violations, an order of removal to abate the endangerment, civil penalties to compensate the public for damage to natural resources, and their costs in bringing the action.

After briefing was concluded on Blue Eco's motion for preliminary injunction and the Government's motion to dismiss, the district court declined to rule on the merits of the case. The court instead dismissed plaintiffs' complaint for lack of standing, holding that none of plaintiffs' members had shown injury in fact. *See* Short App at 12.

This appeal is taken from a final judgment issued by the District Court on September 12, 2008 that granted Defendant-Appellee Government's Motion to Dismiss all counts of the citizen group's Complaint for lack of standing.

STATEMENT OF THE FACTS

Defendant FBI owns and operates a firearms training facility on the shore of Lake Michigan. At this site, federal agents, municipal police, and social guests

discharge lead bullets towards an earthen berm with the lake acting as an impact area for “errant rounds and ricochets.” *See Army Corps Regulation 33 CFR 204 (Nov. 19, 1979); Navy Assessment (1984), Pl. Mot. Prel. Inj. Reply, Ex 4, Docket at 55; FBI Property Assessment (1986), Complaint Ex. G; FBI Property Assessment (2006, 2008), Def. Mot. to Dismiss, Ex 5, Docket at 48.* The FBI also operated a shotgun range on the edge of the bluff until four days after suit was filed. The shotgun range discharged directly into the lake without the benefit of the berm. *See DOJ letter, Pl. Mot. Prel. Inj. Reply, Ex 11, Docket at 55.* Prior to the FBI receiving ownership of the property around 1986, it was used for the same purpose by defendants Navy and Marines. The only difference was that no earthen berm was used for much of the period from 1918 to 1986 so that all discharges landed in the lake impact area. Plaintiffs allege that federal defendants do not have a National Pollution Discharge Elimination System (NPDES) permit to discharge lead bullets into Lake Michigan and that generally no permits of that type are ever issued.

Plaintiff Blue Eco Legal Council is an unincorporated environmental public interest organization dedicated to protecting the Great Lakes watershed. One of Blue Eco’s stated missions is to conduct “watchdog litigation against the executive branch of government when it, through its extensive operations, violates the environmental laws it is sworn to enforce.” Blue Eco’s “watchdog activities center around threats to water resources in the United States.” *See Blue Eco Affidavit, App at 1.*

Southwestern Lake Michigan water and sediment rotate counter-clockwise. *See Short App at 15.* Plaintiff Steven Pollack is a member of Blue Eco who lives with his family thirteen miles down lake from the FBI's facility. Pollack has resided on this property since 1996 and grew up in the same town. His property is served by the Highland Park municipal water department that draws raw water from Lake Michigan. *See Highland Park Water Quality Report, Short App at 15.* Pollack and his family consume Lake Michigan water and fish and enjoy the Lake Michigan watershed. *See Pollack Affidavit, App at 4.* Specifically, Pollack drinks the water commercially provided by his municipality and eats fish that are commercially caught in the lake. *Id.* Further, Pollack claims that he enjoys the public beaches along the lake in the Chicago suburban area and watching the avian wildlife that uses the Lake Michigan watershed. *Id.*

Pollack claims that the pollution and threat of pollution from the FBI's and Coast Guard's ongoing discharges of lead into the environment has adversely affected his and his family's use and enjoyment of the Lake Michigan watershed. *Id.* He limits the amount of fish he consumes and is concerned about the lead in his drinking water. *Id.* He states that if it were not for this concern about pollution, he would eat fish more often, be more likely to visit public beaches and parks including the one next to the FBI range, and would not be so concerned for the health of wildlife using the Lake Michigan watershed. *Id.*

Darren Miller is a Blue Eco member who states that he is concerned that the lead sitting on open land next to the FBI range threatens local wildlife including

shorebirds that use Lake Michigan in their seasonal migration. *See Miller Affidavit, App at 7.* He states that his enjoyment watching their migration is lessened knowing about the environmental harms in his area. *Id.*

Other Blue Eco members live closer to the FBI range including North Chicago mayor Leon Rockingham Jr. *See Blue Eco Affidavit, App at 1.* Although affidavits were only submitted for two Blue Eco members who live in Highland Park, the Complaint states that Blue Eco members include “Great Lakes residents whose drinking water supply and natural environment is harmed by Defendants’ actions in violation of federal environmental law.” *See Compl. at ¶3.*

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Steven Pollack and Blue Eco Legal Council brought a citizen suit against federal defendants including the FBI and Coast Guard under the Clean Water Act, 33 U.S.C. §§ 1251-1387, Resource Conservation and Recovery Act, 42 U.S.C. § 9659(a) and (b), and Illinois public nuisance. Plaintiffs allege that the various agencies have been illegally discarding toxic pollutants in the form of lead bullets into the Great Lakes. Pollack, a Blue Eco member, lives thirteen miles downstream from the FBI’s training facility in North Chicago. He submitted an affidavit that the agencies’ illegal discharges caused him to reduce his use and enjoyment of Lake Michigan as a source of drinking water, food, and aesthetic appeal. Pollack also submitted evidence that the pollutants released by the agencies adversely affect or threaten the water quality and natural environment of Lake Michigan. The district

court dismissed the case, holding that plaintiffs lacked standing because they had not demonstrated sufficient injury in fact. Dismissing the action, however, encroaches on congressional authority by erecting barriers to standing so high as to frustrate citizen rights to enforce federal environmental laws and vindicate rights under the common law of public nuisance law. Because Plaintiffs have standing to sue, this Court must reverse the judgment and remand for a determination of whether the FBI and Coast Guard have illegally discharged pollutants without a permit.

ARGUMENT

STATUTORY SCHEME

The Seventh Circuit reviews district court determinations of standing de novo. *Sierra Club v. Franklin Co. Power of Ill., LLC.*, 546 F.3d 918, 924(7th Cir. 2008).

Congress enacted the Federal Water Pollution Control Act Amendments of 1972, also known as the Clean Water Act (CWA), "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).¹ This legislation constituted "a major change in the enforcement mechanism of the Federal water pollution control program." *Am. Petroleum Inst. v. Train*, 526 F.2d 1343, 1344 (10th Cir. 1975) (internal quotation marks omitted).

¹ This brief relies heavily on the Fourth Circuit's en banc opinion in *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149 (4th Cir. 2000) for its Clean Water Act history and standing analysis.

Previously, enforcement of water laws entailed measurement of the quality of receiving waters. *See e.g.* Water Quality Act of 1965, Pub. L. No. 89-234, 79 Stat. 903. However, water quality measurements led to substantial enforcement problems. *See EPA v. Cal. ex rel. St. Water Resources Control Bd.*, 426 U.S. 200, 202-03, 48 L. Ed. 2d 578, 96 S. Ct. 2022 (1976). Using water quality standards to control water pollution was "inadequate in every vital respect." Sen. Rpt. 92-414, at 7 (1971) (reprinted in 1972 U.S.C.C.A.N. 3668, 3674).

The Clean Water Act, therefore, shifted the focus of enforcement efforts from water quality standards to direct controls on the discharge of pollutants -- i.e., "effluent limitations." *See* 33 U.S.C. § 1311; *Nat. Resources Def. Council, Inc. v. EPA*, 915 F.2d 1314, 1316 (9th Cir. 1990). Previously a plaintiff had to offer proof of actual damage to a body of water to establish a violation. Congress now wanted to directly control illegal pollution discharges. *See, e.g., U.S. v. Winchester Mun. Utils.*, 944 F.2d 301, 304 (6th Cir. 1991). The Government no longer had to "search for a precise link between pollution and water quality" to control pollution. Sen. Rpt. 92-414, at 8 (1971) (reprinted in 1972 U.S.C.C.A.N. at 3675). Rather, they could now prove a violation of the statute if a facility was discharging pollutants into the water that the Act prohibited.

The CWA centers on section 301(a). This section provides: "Except as in compliance with this section and [other sections of the Act], the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a). In section 402 of the Act, Congress established the National Pollutant Discharge Elimination System

(NPDES), which authorizes the issuance of permits for the discharge of limited amounts of effluent. *Id.* at § 1342. The availability of such permits simply recognizes "that pollution continues because of technological limits, not because of any inherent rights to use the nation's waterways for the purpose of disposing of wastes." *Nat. Resources Def. Council, Inc. v. Costle*, 186 U.S. App. D.C. 147, 568 F.2d 1369, 1375 (D.C. Cir. 1977) (internal quotation marks omitted).

Critical to the enforcement of the CWA is the citizen suit provision found in section 505. 33 U.S.C. § 1365. Section 505(a) states that "any citizen may commence a civil action on his own behalf against any person including (i) the United States . . . who is alleged to be in violation of an effluent standard or limitation under this chapter." *Id.* at § 1365(a). An "effluent standard or limitation" is defined to include any term or condition of an approved permit. *See id.* at § 1365(f). Citizens may bring suit against any NPDES permit holder for violating its permit or as in this case against the owner of a facility discharging pollutants without a necessary permit. A successful suit may result in the award of injunctive relief and the imposition of civil penalties, mostly payable to the United States Treasury. *See id.* at § 1365(a). Blue Eco, representing its Illinois resident members, asks that these damages be set up to fund a trust overseen by national environmental groups for protection of the Great Lakes.

Section 505(g) sets forth the statutory standing requirement for the citizen suit provision of the Clean Water Act. *Id.* at § 1365(g). Specifically, it defines "citizen" as "a person or persons having an interest which is or may be adversely affected." *Id.*

Congress has indicated that this provision confers standing to enforce the Clean Water Act to the full extent allowed by the Constitution. *See Middlesex Co. Sewerage Auth. v. Natl. Sea Clammers Assn.*, 453 U.S. 1, 16, 69 L. Ed. 2d 435, 101 S. Ct. 2615 (1981) (citing Sen. Conf. Rpt. 92-1236, at 146 (1972) (reprinted in 1972 U.S.C.C.A.N. 3776, 3823), which notes that the term "citizen" in the Clean Water Act reflects the Supreme Court's decision in *Sierra Club v. Morton*, 405 U.S. 727, 92 S. Ct. 1361, 31 L. Ed. 2d 636 (1972)).

CONSTITUTIONAL STANDING REQUIREMENTS DO NOT BAR BLUE ECO AND ITS MEMBERS' CLAIMS

Article III of the Constitution limits federal courts to adjudicating only "cases" and "controversies." Standing, as a threshold, is "perhaps the most important" condition of justiciability. Proof of standing ensures that a plaintiff has a minimum personal stake in the dispute. *See Allen v. Wright*, 468 U.S. 737, 750-51, 82 L. Ed. 2d 556, 104 S. Ct. 3315 (1984). The standing requirement also "tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian College v. Ams. United for Separation of Church and St., Inc.*, 454 U.S. 464, 472 (1982).

To achieve the constitutional minimum for standing, "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen*, 468 U.S. at 751. The three

elements are: (1) injury in fact; (2) traceability; and (3) redressability. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Injury in fact requires a plaintiff to suffer a legally cognizable harm which is concrete and particularized, as well as actual or imminent. *See id.* at 560. Traceability requires that the injury is likely caused by the defendant's conduct and not by the independent action(s) of a third party not before the court. *See id.* Finally, redressability requires that it be likely and not speculative, that a favorable decision will remedy the injury. *See id.* at 561.

These requirements ensure that the judiciary is the appropriate forum in which to address a plaintiff's complaint. *See Allen*, 468 U.S. at 752.

Standing in environmental cases must be analyzed in the context in which the suit is brought. Sometimes environmental injury can be viewed as a traditional trespass on property or tortious injury to a person. In other cases, however, the harm can be to an individual's aesthetic or recreational interests. The Supreme Court has clearly stated that these latter interests may also be vindicated in the federal courts. *See, e.g., Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 183 (2000), (effect on "recreational, aesthetic, and economic interests" is cognizable injury for purposes of standing); *Lujan*, 504 U.S. at 562-63, (purely aesthetic interest is cognizable for purposes of standing); *Morton*, 405 U.S. at 734, ("Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society . . . deserving of legal protection through the judicial process."); *Assoc. of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 154, 25 L. Ed. 2d 184, 90 S. Ct. 827 (1970) (interest supporting

standing "may reflect aesthetic, conservational, and recreational as well as economic values" (internal quotation marks omitted)). Because these noneconomic interests are shared by the community at large, the Supreme Court has cautioned that environmental plaintiffs must themselves be "among the injured" so that Article III case or controversy requirements are not reduced to a formality. *Morton*, 405 U.S. at 735

Courts must therefore assess jurisdictional facts "to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted." *Allen*, 468 U.S. at 752. Courts will do this by asking such questions as: "Is the injury too abstract, or otherwise not appropriate, to be considered judicially cognizable? Is the line of causation between the illegal conduct and injury too attenuated? Is the prospect of obtaining relief from the injury as a result of a favorable ruling too speculative?" *Id.* If the plaintiff's claims are neither abstract nor overly speculative, the Constitution allows plaintiffs access to federal district court to adjudicate them.

STATUTORY STANDING REQUIREMENTS DO NOT BAR BLUE ECO AND ITS MEMBERS' CLAIMS

In addition to constitutional requirements for standing, *Lujan*, 504 U.S. at 560, statutory requirements for standing must also be met. The citizen suit provision of the Clean Water Act grants standing to any "person or persons having an interest which is or may be adversely affected." 33 U.S.C. 1365(g). Congress therefore confers standing on a "broad category of potential plaintiffs" who "can claim some

sort of injury," including actual or threatened injury of an economic or noneconomic nature. *Middlesex Co. Sewerage Auth.*, 453 U.S. at 16-17.

This grant of standing reaches the full extent of Article III. *Id.* at 16 ("It is clear from the Senate Conference Report that this phrase was intended by Congress to allow suits by all persons possessing standing under this Court's decision in *Sierra Club v. Morton*"). Therefore, a CWA plaintiff satisfies the statutory threshold if he meets the constitutional requirements for standing. Likewise, a RCRA plaintiff and a Federal Tort Claims Act plaintiff operate under a broad grant of standing according to the language used in each act.

BLUE ECO LEGAL COUNCIL HAS ORGANIZATIONAL STANDING TO
PURSUE CLAIMS ON BEHALF OF ITS MEMBERS

An organization may have standing to sue in federal court based on either an injury to the organization itself or as the representative of its members who have been harmed. *See Warth v. Seldin*, 422 U.S. 490, 511 (1975). The organization has representational standing when (1) at least one of its members would have standing to sue in his own right; (2) the organization seeks to protect interests germane to the organization's purpose; and (3) neither the claim asserted nor the relief sought requires the participation of individual members in the lawsuit. *See Hunt v. Wash. St. Apple Advert. Commn.*, 432 U.S. 333, 343 (1977).

Blue Eco asserts standing on behalf of itself and its members who have been harmed or threatened with harm by the FBI's and Coast Guard's ongoing discharges and the Navy's and Marine's unremediated past discharges. The

defendants in this case only challenge if the first requirement for organizational standing has been satisfied: if any member of Blue Eco has individual standing.

THE DISTRICT COURT ERRED IN REQUIRING BLUE ECO TO PROVIDE
EVIDENCE OF ENVIRONMENTAL DEGRADATION FOR PURPOSES
OF STANDING AND IN FINDING ON THE EVIDENCE
PRESENTED THAT IT HAD NOT

The district court held that Blue Eco lacked standing under Article III by failing to establish that any of its members suffered an injury fairly traceable to the federal agencies' alleged violations. The court pointed to the supposed absence of certain types of evidence: "If, as plaintiffs assert, lead bullets continuously degrade when they are in water, then North Chicago and Highland Park's historical drinking water quality reports should show a consistent increase in lead levels. And, perhaps they do. But plaintiffs have not provided those reports or any other evidence that shows lead levels have been on the rise or connects those increases to bullet degradation." *Short App at 16*. The district court therefore concluded that "[a]bsent such evidence, plaintiffs have not demonstrated that Pollack's drinking water has been or is likely to be rendered unsafe by defendants' operation of the North Chicago range." *Id.*

The district court erred when it ruled that 1) Blue Eco had to satisfy these extra-constitutional evidentiary hurdles for standing, and 2) that the evidence presented had not satisfied them. The district court required plaintiffs to prove that their water quality was degraded above 15ppb, an action level found in a different statute not involved in this case. *Id at 15*. Judge Guzman takes judicial

notice that “Highland Park’s latest water quality report shows that three of its sampling sites had lead in excess of the federal limit of 15 parts per billion (“ppb”), but the overall lead level in the city’s drinking water is below that level.” *Id.* If plaintiffs were required to prove unsafe drinking water quality to show standing, these three samples exceeding the 15ppb action level should have satisfied the district court’s heightened requirements. Instead, the district court concluded, “Pollack would have standing only if the evidence showed that the migration has injured him. It does not.” *Id.*

This conclusion by the district court was legal error. Blue Eco and Pollack have surpassed the threshold for establishing a case and controversy under Article III, the federal environmental statutes, and public nuisance set for establishing a case or controversy. Pollack is a classic example of an individual who has suffered an environmental injury in fact fairly traceable to a defendant's conduct that is likely to be redressed by the relief sought (removal). The trial court therefore erred in creating evidentiary hurdles to standing that the Constitution does not require and that Congress has not embraced. In fact, the legislative branch has invited Blue Eco’s private attorney general suit. The judicial branch is not at liberty to obstruct its resolution on the merits and should not be overly deferential to the executive branch when its agencies are defendants as owners and operators of federal facilities.

BLUE ECO HAS PROVEN INJURY IN FACT BY SHOWING THE EXECUTIVE'S
ILLEGAL DISCHARGES, MEMBERS' CONNECTION WITH THE RECEIVING
WATERS AND WATERSHED AND THE MEMBERS' REASONABLE
APPREHENSION OF THE ENVIRONMENTAL EFFECT

Injury in fact requires that a plaintiff come to federal court with more than a generalized grievance common to the public. *See Lujan*, 504 U.S. at 575. A plaintiff must suffer an invasion of a legally cognizable interest that is "concrete and particularized." *Id.* at 560. The alleged injury "must affect the plaintiff in a personal and individual way." *Id.* at 560. Otherwise, federal court litigation would become "no more than a vehicle for the vindication of the value interests of concerned bystanders." *Valley Forge*, 454 U.S. at 473 (internal quotation marks omitted).

Injury in fact also requires an actual or threatened invasion of a legally cognizable interest and not mere speculation. *See Lujan*, 504 U.S. at 560. Federal jurisdiction is not available for "an ingenious academic exercise in the conceivable." *U.S. v. Students Challenging Reg. Agency Proc. (SCRAP)*, 412 U.S. 669, 688, 37 L. Ed. 2d 254, 93 S. Ct. 2405 (1973). But the claimed injury "need not be large, an identifiable trifle will suffice." *Sierra Club v. Franklin Co. Power of Ill., LLC.*, 546 F.3d 918, 925(7th Cir. 2008); *Sierra Club v. Cedar Point Oil Co.*, 73 F.3d 546, 557 (5th Cir. 1996) (internal quotation marks omitted); *see also Conserv. Council of N.C. v. Costanzo*, 505 F.2d 498, 501 (4th Cir. 1974) ("The claimed injury need not be great or substantial; an identifiable trifle, if actual and genuine, gives rise to standing." (internal quotation marks omitted)).

Pollack has demonstrated injury in fact. He has produced evidence of actual or threatened injury to a waterway in which he has a legally protected interest. Pollack is a property owner whose drinking water lies in the path of the hazardous site the FBI's created. He and his family visit Lake Michigan. *See Pollack Affidavit, App at 4.* Pollack submitted an affidavit stating that he and his family visit Lake Michigan less and eat less fish from the lake because of his fears of pollution from the federal agencies' lead bullet discharges. *Id.* He is also concerned about the effect of the discharges on his water supply and the effect of the discharges on the local wildlife he enjoys observing. *Id.*

In fact, Pollack has alleged precisely the types of injuries that Congress intended to prevent by enacting the Clean Water Act. One of the recognized purposes of the Act is to ensure that the nation's waterways are "fishable and swimmable." *See, e.g., Shanty Town Assocs. Ltd. Partn. v. EPA*, 843 F.2d 782, 784 (4th Cir. 1988). Congress declared this goal to provide "for the protection and propagation of fish, shellfish, and wildlife and provide[] for recreation in and on the water." 33 U.S.C. § 1251(a)(2). The "injury required by Article III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." *Warth*, 422 U.S. at 500 (internal quotation marks omitted). The FBI and Coast Guard have avoided obtaining a permit pursuant to a statutory command that would limit such discharges to protect public health, fish, and wildlife and to allow recreational activities on the water. *See* 33 U.S.C. § 1312(a). These health and

recreational interests are constitutionally recognized as cognizable underpinnings for injury in fact. *See, e.g., Laidlaw*, 528 U.S. at 183; *Morton*, 405 U.S. at 734.

Under public nuisance, it is a violation “[t]o cause or allow . . . any offal, filth, or noisome substance to be collected, deposited, or to remain in any place, to the prejudice of others.” 720 ILCS 5/45-5(1) (Westlaw current through P.A. 95-1025 of the 2008 Reg. Sess). Further, it is a public nuisance “[t]o corrupt or render unwholesome or impure the water of a spring, river, stream, pond, or lake to the injury or prejudice of others.” 720 ILCS 5/45-5(3) (Westlaw current through P.A. 95-1025 of the 2008 Reg. Sess); *see also People ex rel. Burriss v. C.J.R. Processing, Inc.*, 269 Ill. App. 3d 1013, 1019, 647 N.E. 2d 1035 (1995). Plaintiffs assert that they are Illinois residents with an interest in the lakebed because they are trust beneficiaries under the public trust doctrine and the Submerged Lands Act. *See* 43 U.S.C. § 1311(a)(1)-(2).

Illinois owns a portion of the submerged land in Lake Michigan but holds it in trust for the people of the state according to the public trust doctrine. *See St. of Ill. v. Illinois C. R.R. Co.*, 146 U.S. 387, 452-53 (1892). The public trust doctrine protects state residents’ beneficiary interests in fishing and a healthful environment. *See People ex rel. Scott v. Chicago Park Dist.*, 360 N.E.2d 773, 780, 66 Ill. 2d 65, 78-81 (Ill. 1976), (stating that “it is appropriate to observe that there has developed a strong, though belated, interest in conserving natural resources and in protecting and improving our physical environment.” Additionally, “[i]t is

obvious that Lake Michigan is a valuable natural resource belonging to the people of this State in perpetuity.”)

The Illinois Supreme Court stated “[i]n general, a trust beneficiary is entitled to such equitable relief as will protect his interest in the trust property when such interest is endangered by the wrongful acts of the trustee.” *Burrows v. Palmer*, 125 N.E.2d 484, 486 (Ill. 1955). It also stated, “[i]f the public trust doctrine is to have any meaning or vitality at all, the members of the public...who are the beneficiaries of that trust, must have the right and standing to enforce it. To tell them that they must wait upon governmental action is often an effectual denial of the right for all time.” *Kluk v. Lang*, 531 N.E.2d 790, 794, 125 Ill. 2d 306, 315-16 (Ill. 1988) (quoting *Paepcke v. Pub. Bldg. Commn.*, 46 Ill.2d 330, 341 (1970)). The U.S. Supreme Court discussed federal trustees, explaining, “[a] trusteeship would mean little if the beneficiaries were required to supervise the day-to-day management of their estate by their trustee or else be precluded from recovery for mismanagement.” *U.S. v. Mitchell*, 463 U.S. 206, 227 (1983). Through the public trust doctrine, Pollack and other Illinois Blue Eco members have standing to bring suit against a party creating damage to the trust corpus of which they are beneficiaries.

Pollack is thus anything but a roving environmental troublemaker seeking to correct environmental wrongs wherever he might find them. He is a real person who owns a real home being serviced with drinking water from Lake Michigan in close proximity to the 3,000 acres of lakebed the FBI claims is being used as an impact area for discarded lead bullets. These facts unquestionably differentiate

Pollack from the general public. The federal agencies' discharge violations affect the concrete, particularized legal rights of this specific citizen. He brings this suit to vindicate his private interests in his and his family's well-being -- not some ethereal public interest. This set of facts rises to a level of concreteness "traditionally thought to be capable of resolution through the judicial process." *Allen*, 468 U.S. at 752, (internal quotation marks omitted).

Further, Blue Eco has presented considerable evidence that Pollack's fears are reasonable and not based on mere conjecture. The record is full of evidence that the FBI is fouling its receiving waters. Blue Eco discovered and submitted FBI and Navy reports and regulations showing that the FBI range is by design using three thousand acres of Lake Michigan as an impact area for errant rounds and ricochets. *See Navy Assessment (1984), Pl. Mot. Prel. Inj. Reply, Ex 4, Docket at 55; FBI Property Assessment (1986); Complaint Ex. G; FBI Property Assessment (2006, 2008), Def. Mot. to Dismiss, Ex 5, Docket at 48.* They also allege that the berm into which the FBI now directs its fire was only added in the late 1970's and that the Navy discharged all of its rounds into Lake Michigan from 1918 until the berm was built. *See Army Corps Regulation 33 CFR 204 (Nov. 19, 1979)*. Blue Eco submitted evidence that even now the berm is ineffective at containing lead bullets by proving they are ricocheting off-range into the adjacent park, beach, and by implication Lake Michigan. *See Barton Affidavits 1 and 2, App at 10 and 26*. Finally, the FBI admitted during discovery that it operated a shotgun range on the edge of the bluff until four days after suit was filed that discharged directly into Lake Michigan

without the benefit of an intervening berm. *See DOJ letter, Pl. Mot. Prel. Inj. Reply, Ex 11, Docket at 55.*

Plaintiffs also offered evidence in the form of EPA guidance documents for lead at outdoor ranges and other studies of the adverse health and environmental effects of lead. Human beings are sensitive to lead poisoning, which can result in irreversible brain damage to children and other neurological impairment. *See Complaint, Ex. B, Docket at 1.*

Plaintiffs went further and submitted evidence that the federal agencies' accumulated illegal discharges could and did cause environmental degradation. To begin with, the discharge of lead into drinking water sources is not permitted under the Clean Water Act. Because these discharge restrictions are set at the level necessary to protect the designated uses of the receiving waterways, their violation necessarily means that their uses may be harmed. *See, e.g., Pub. Interest Research Group of N.J., Inc. v. Rice*, 774 F. Supp. 317, 328 (D.N.J. 1991).

Furthermore, RCRA bans the offsite discharge of hazardous waste into the environment at operating facilities precisely to stop environmental degradation. The cradle to grave manifest system of that Act is applied to a facility's waste stream specifically to keep a party from externalizing its operating costs onto the environment. Finally, public nuisance, at common law, is by statutory definition a means for preventing environmental degradation and the federal agencies' violating discharges represent per se environmental damage.

FBI and Navy studies from 1986 and 2006 also admit the facility is having a potential effect on Lake Michigan. *Navy Assessment (1984), Pl. Mot. Prel. Inj. Reply, Ex 4, Docket at 55* (“Any lead and lead compounds migrating from the site will most likely impact the aquatic ecosystem of Lake Michigan adversely.”); *FBI Property Assessment (1986), Complaint Ex. G; FBI Property Assessment (2006, 2008), Def. Mot. to Dismiss, Ex 5, Docket at 48.*

In addition, Plaintiffs submitted water quality reports for the water plants serving their members’ homes with Lake Michigan water showing lead above the maximum contaminant level goal of zero. *See Compl. Ex. K, Docket at 1.* Because this zero represents the level “below which there is no known or expected risk to health”, the levels of 9.2ppb and 11ppb found respectively in Highland Park and North Chicago means the water being consumed by Plaintiffs has been affected by lead at levels that cause some health effect. Judge Guzman even noted that these water quality reports show several test results that exceed the higher Safe Drinking Water Act action level for lead of 15ppb (erroneously finding this dispositive when dismissing Plaintiff’s suit).

The most damage to natural resources was found by the FBI itself once it conducted testing after receiving notice of Blue Eco’s suit in October 2007. These studies showed significantly elevated quantities of lead in sediment taken from the facility's receiving waters and unnatural concentrations of lead in the groundwater which flows from the facility into Lake Michigan. The FBI submitted a declaration as part of its motion to dismiss showing lake sediment test results for lead as high

as 1,700 parts per million (ppm) (100ppm being considered “potentially hazardous”) and lead in groundwater as high as 200 parts per billion (ppb). *See FBI Property Assessment (2006, 2008), Def. Mot. to Dismiss, Ex 5, Docket at 48.* This latter level is magnitudes greater than the 15ppb action level for drinking water that Judge Guzman found dispositive. The FBI’s non-permitted violations of the CWA, RCRA, and public nuisance law thus actually affect the waterway's health.

This contamination affects not only Blue Eco’s North Chicago members, whose water treatment plant intake pipe sits inside the 3,000 acres the FBI admits it uses as an impact area, but also their members living down lake in the path of the environmental degradation. *See short app at 15; Blue Eco Affidavit, App at 1.* The FBI’s discharge affects or can affect the waters for a significant distance due to water movement driven by southwest winds. This means any water affected by the FBI’s discharges may travel towards the Highland Park water treatment plant 13 miles to the south. The littoral drift of sediment along the southwest quadrant of Lake Michigan also flows counterclockwise, from the North Shore to the Indiana Dunes. This natural phenomenon means that any lake sediment contaminated by the FBI facility will travel down lake towards Highland Park.

Pollack’s knowledge that pollution of the type discharged by federal defendants is in his drinking water shows that his fears are based on more than mere speculation. In sum, the evidence paints a stark picture: the FBI and Coast Guard have been accused of discharging lead offsite into a source of drinking water without a permit in violation of the CWA, RCRA, and public nuisance. Its discharge

affects or has the potential to affect the waterway south of the facility. North Chicago's water intake pipe sits within the impact area. The local water treatment plants have found the kinds of chemicals discharged by the FBI in the past, namely lead, and federal studies demonstrate the harmful environmental and health impacts of the toxic chemicals released by federal defendants. When this evidence is viewed in light of the legal threshold for standing, it is clear that the district court erroneously dismissed plaintiffs' suit. *See Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149 (4th Cir. 2000), *Franklin Co. Power of Ill., LLC*, 546 F.3d 918, *Ecological Rights Found. v. P. Lumber Co.*, 230 F.3d 1141 (9th Cir. 2000). Pollack's claim is not a "generalized grievance" that makes him a "concerned bystander" with a mere abstract interest in the environment. Pollack is "concerned," but no mere "bystander." *See Gaston Copper*, 204 F.3d at 156, 158; *Cedar Point Oil Co.*, 73 F.3d at 556.

It is useful to contrast Pollack's injury with those alleged by the plaintiffs in *Lujan v. Defenders of Wildlife*. In that case, the Defenders of Wildlife challenged a government decision making the Endangered Species Act inapplicable to American projects in foreign nations. 504 U.S. at 557-58. Two members of the group alleged that they had traveled to foreign countries and observed the habitats of endangered species that might be affected by the decision and future lack of regulation. *Id.* at 563. They also alleged intent to return overseas at some future time hoping to see the animals themselves. *Id.* at 563-64. The members feared that American

development projects might harm those species without protection from that Act. *Id.* at 563.

The Supreme Court dismissed the case for lack of standing because the environmental group's allegations were insufficient to establish injury in fact. *Id.* at 564-66. The members did not show how harm to the species would produce injury to themselves. *Id.* at 564. They could not demonstrate any injury "apart from their special interest in the subject." *Id.* at 563, (internal quotation marks omitted). The members' "some day" intentions to return to the areas they had visited were simply not enough. *Id.* at 564. The Court helpfully distinguished standing between challenges to government actions directly affecting a plaintiff such as the FBI's and challenges to proposed government regulations:

When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred...in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it. When, however, as in this case, a plaintiff's asserted injury arises from the government's allegedly unlawful regulation...of someone else, much more is needed.

Id. at 561-62. Pollack, unlike the plaintiffs in *Lujan*, need not resort to hypothetical harms to demonstrate his injury in fact because he is directly challenging the legality of government discharges of pollutants into an environment he claims to use and enjoy. He is not asserting a mere academic or philosophical interest in the protection of the Lake Michigan watershed. Nor does he claim that he "some day" intends to enjoy and use his natural environment. He is a property

owner whose water treatment plant is in the path of a toxic discharge and whose injury is ongoing. He is thus precisely the type of plaintiff that the Supreme Court envisioned in *Lujan* – namely, one who is acting to protect a "threatened concrete interest of his" own. 504 U.S. at 573.

The district court, however, required that plaintiffs present further evidence concerning one or more of the following: (1) that "bullets will continue to degrade as long as they remain in the lake"; (2) "the ability of lead to bioaccumulate in tissue and organs"; and (3) "reports or any other evidence that shows lead levels have been on the rise or connects those increases to bullet degradation." *See Short App at 16*. But the Supreme Court does not require such proof. In *Laidlaw*, the Court found that several citizen affidavits attesting to reduced use of a waterway out of reasonable fear and concern of pollution "adequately documented injury in fact." 528 U.S. at 181-83. Each of the citizens alleged that he or she would make greater recreational use of some part of the affected waterway were it not for their concern about the harmful effects of the defendant's discharges. *Id.* The Court required no evidence of actual harm to the waterway, noting: "We have held that environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." *Id.* at 183, (quoting *Sierra Club v. Morton*, 405 U.S. at 735).

This Circuit recently rejected requiring that a plaintiff prove harm to the environment with absolute certainty to show standing in a Clean Air Act case. *See*

Franklin Co. Power of Ill., LLC, 546 F.3d 918. The Clean Air Act citizen suit provision is nearly identical to the CWA and RCRA. Standing is therefore enlarged to the same outer bounds of constitutional limits in all three Acts. In *Franklin Co. Power of Ill., LLC*, this Circuit rejected the kind of proof required by this district court that the water quality exceed Safe Drinking Water Act action levels when it held that “likely exposure to pollutants is certainly something more than an ‘identifiable trifle,’ even if the ambient level of air quality does not exceed [certain national limits].” 546 F.3d at 925 (internal quotations omitted) (citing *Lafleur v. Whitman*, 300 F.3d 256, 270-71 (2d Cir. 2002)). This Court found standing where “the plant will release some pollutants and that [plaintiff] believes these pollutants will ruin her ability to enjoy Rend Lake and taint the surrounding area. And her belief is not so irrational that it can simply be discredited.” *Id* at 927.

No circuit has required additional scientific proof where there was a direct nexus between the claimant and the area of environmental impairment. In *Gaston Copper*, the Fourth Circuit found plaintiffs had standing in a case remarkably similar to this one. Plaintiffs owned property four miles downstream from a mining company that was discharging pollutants into the river. The pollutants showed up in plaintiff’s lake and they filed suit along with an environmental group. The district court dismissed the suit for lack of standing finding that the pollutants had not degraded plaintiff’s lake sufficient to show concrete harm. Plaintiffs appealed and the circuit panel upheld the dismissal. Plaintiffs then sought en banc review. The Department of Justice (DOJ) filed an amicus brief arguing the case was of

“substantial importance to the United States” because it “concerns the ability of citizens to establish standing to sue under the Act.” *DOJ 1999 amicus brief, App at 49*. Therefore, “[t]he standard set forth in the panel’s opinion would significantly restrict citizens’ ability to enforce the environmental laws.” *Id.* The en banc circuit agreed to overturn the dismissal because the Clean Water Act is an end of pipe statute that does not require proof of environmental degradation to any specific degree for purposes of standing. Requiring so much would raise proof for standing higher than that necessary to prove violation of the underlying statute.

Blue Eco based this brief substantially on that opinion because its facts and resolution mirrors this case. When the DOJ filed its motion to dismiss in this case, however, it failed to disclose this authority which is directly adverse to the arguments it presented. This Court might therefore ask the DOJ what happened in nine years that made it change its position on standing 180 degrees and then breach its duty of candor to the district Court. *See Tyler v. State*, 47 P.3d 1095, 1104 (Alaska App. 2001); ABA Formal Ethics Opinion 280 (June 1949). We might not even be arguing this appeal had the DOJ attorneys advised the district Court of this opinion as was their duty. *Karlin v. Culkin*, 162 N.E. 487, 489-90 (N.Y. 1928).

In *Cedar Point Oil Co.*, the Fifth Circuit found injury in fact for citizens' concern for the water quality in Galveston Bay where "two of the affiants live near Galveston Bay and all of them use the bay for recreational activities." 73 F.3d at 556. It was enough that "the affiants expressed fear that the discharge . . . will

impair their enjoyment of these activities because these activities are dependent upon good water quality." *Id.*

In *Friends of the Earth, Inc. v. Consol. Rail Corp.*, the Second Circuit found that two citizen affidavits "quite adequately satisfy the standing threshold." 768 F.2d 57, 61 (2d Cir. 1985). A first citizen stated by affidavit that "he passes the Hudson [River] regularly and finds the pollution in the river offensive to [his] aesthetic values." *Id.* (internal quotation marks omitted). A second citizen, a father, "averred that his children swim in the river, his son occasionally fishes in the river and his family has and will continue to picnic along the river." *Id.*

In *U.S. v. Metro. St. Louis Sewer Dist.*, the Eighth Circuit found standing where citizen groups' members state they "visit, cross, and frequently observe" the Mississippi River and "from time to time . . . use these waters for recreational purposes." 883 F.2d 54, 56 (8th Cir. 1989).

In *Gaston Copper*, the Fourth Circuit states that in "none of these cases...did the court require further specific allegations or evidence of the actual level of pollution in the waterway." 204 F.3d at 160.

Even threatened injury to Blue Eco represents injury in fact. The Supreme Court has held that threatened injury, not just actual injury, can serve to satisfy Article III requirements for standing. *See e.g. Valley Forge*, 454 U.S. at 472; *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979). "One does not have to await the consummation of threatened injury to obtain preventive relief. If

the injury is certainly impending that is enough." *Babbitt v. United Farm Workers Natl. Union*, 442 U.S. 289, 298 (1979), (internal quotation marks omitted). "Standing law does not require that a plaintiff wait until actual injury occurs in order to sue." DOJ 1999 amicus brief, in *Gaston Copper*, 204 F.3d 149, App at 51.

Increased risk therefore represents a cognizable harm. Threatened environmental injury is by nature based on probabilities. *Gaston Copper*, 204 F.3d at 160. For example, in *Village of Elk Grove Village v. Evans*, this Circuit found standing because "the Village is in the path of a potential flood" and "even a small probability of injury is sufficient to create a case or controversy." 997 F.2d 328, 329 (7th Cir. 1993). The District of Columbia Circuit in *Mt. Sts. Legal Found. v. Glickman*, found injury in fact from an increased risk of wildfire from particular logging practices. 320 U.S. App. D.C. 87, 92 F.3d 1228, 1234-35 (D.C. Cir. 1996). The Fifth Circuit, in *Cedar Point Oil Co.*, did not require the plaintiff to provide evidence of actual harm to the waterway (it explained "[t]hat this injury is couched in terms of future impairment rather than past impairment is of no moment.") 73 F.3d at 556.

In this case, the federal agencies' violations threaten the waters within the acknowledged range of their discharge. By producing evidence that the FBI is polluting Pollack's nearby water source, Blue Eco has shown an increased risk to its member's downstream uses. This threatened injury creates injury in fact. The district court should not demand that Blue Eco and Pollack wait until Lake Michigan becomes unproductive and unsanitary or discolors and smells bad before

they can summon the protections of the CWA, RCRA, and public nuisance. According to the Fourth Circuit, “[s]uch a novel demand would eliminate the claims of those who are directly threatened but not yet engulfed by an unlawful discharge.” *Gaston Copper*, 204 F.3d at 160. Article III is not a bar to concrete disputes like ours from court. *See Lujan*, 504 U.S. at 560-61.

The DOJ contends that Pollack and Blue Eco have not supplied adequate proof of environmental degradation to show injury in fact. "The relevant showing for purposes of Article III standing, however, is not injury to the environment but injury to the plaintiff. To insist upon the former rather than the latter as part of the standing inquiry . . . is to raise the standing hurdle higher than the necessary showing for success on the merits in an action alleging noncompliance with an NPDES permit." *Laidlaw*, 528 U.S. at 181. Pollack and other Blue Eco members have reasonable concerns about the effects of the federal agencies' discharges. These concerns are supported by objective evidence that the discharges directly affect their recreational and drinking water interests. These concerns constitute injury in fact. *See id.* at 183-85. Their claims are neither abstract nor speculative.

Blue Eco members can therefore be counted "among the injured" for standing purposes. *Lujan*, 504 U.S. at 563 (internal quotation marks omitted). The district Court demands too much. Its opinion creates barriers to resolution of claims by injured citizens who have a private interest in the use of public property and in the health of their families. Article III does not require such “judicial evisceration of the Clean Water Act's protections.” *Gaston Copper*, 204 F.3d at 161.

And the district Court decision violates separation of powers principles. Congress has written environmental citizen suit law that the Northern District of Illinois must respect. Knocking out proper citizen suits brought to enjoin illegal discharges at federal facilities not only infringes on a coequal branch of government's rightful exercise of Constitutional power, it does away with a check and balance of government. The executive branch not only violates environmental laws at federal facilities in this case, it also fails to enforce the law against itself. When the states will not step in to regulate, the citizen suit is the only way Congress can regulate the actions of the Executive branch. Congress cannot have done any more towards this goal than to enact the strict federal facilities provisions and create the expansive citizen suit provisions. The judiciary must recognize this and stop giving undue deference to federal polluters.

BLUE ECO'S INJURIES ARE FAIRLY TRACEABLE TO THE EXECUTIVE'S ILLEGAL CONDUCT

Blue Eco also satisfies the second requirement for standing. Its injuries must be "fairly traceable" to Defendants' acts. *See Lujan*, 504 U.S. at 560. Traceability, though, "does not mean that plaintiffs must show to a scientific certainty that defendant's effluent . . . caused the precise harm suffered by the plaintiffs." *Nat. Resources Def. Council, Inc. v. Watkins*, 954 F.2d 974, 980 (4th Cir. 1992) (quoting *Pub. Interest Research Group of N.J., Inc. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 72 (3d Cir. 1990)). Plaintiffs need not supply costly studies, or prove causation to a scientific certainty to meet a threshold jurisdictional requirement for major environmental statutes. *Gaston Copper*, 204 F.3d at 161. Plaintiffs need not

suffer actual tortuous injuries because the "fairly traceable" standard is "not equivalent to a requirement of tort causation." *Id.* (quoting *Duke Power Co. v. Carolina Env'tl. Study Group, Inc.*, 438 U.S. 59, 78 (1978)). The other circuits are in agreement. *See Cedar Point Oil Co.*, 73 F.3d at 557-58; *Nat. Resources Def. Council, Inc. v. Texaco Refining and Mktg., Inc.*, 2 F.3d 493, 505 (3d Cir. 1993); *Powell Duffryn Terminals, Inc.*, 913 F.2d at 72-73.

The DOJ in this case argued an intervening cause of lead pipes as the source of lead found in Blue Eco members' drinking water reports. First, such cause would be contributory rather than intervening. Lead is in the local drinking water supply and the federal defendants are discarding lead into this water body. That is enough because we "must merely show that a defendant discharges a pollutant that causes or contributes to the kinds of injuries alleged" in the specific area of concern. *Watkins*, 954 F.2d at 980 (internal quotation marks omitted). Defendants' discharges have affected or have the potential to affect Blue Eco members' interests. *See id.* at 980-81; *Gaston Copper*, 204 F.3d 149.

Blue Eco has proved as much. As to ongoing discharges, the Coast Guard has only voluntarily ceased its live fire training in the Great Lakes and Blue Eco has provided evidence that the Coast Guard continues to violate these laws. *See Pl. Reply, Mot. Prel. Inj. Ex 8 and 9, Docket at 55*. The FBI only shut down shotgun operations directly into the lake four days after suit was filed. *See DOJ letter, Pl. Mot. Prel. Inj. Reply, Ex 11, Docket at 55*. The entire range was shut down April 1, 2008, the night before Blue Eco's temporary restraining order hearing. *See Def.*

Memorandum in Opposition to Pl. Mot. for TRO, Docket at 35. Blue Eco brought 40 FBI lead bullets into court to prove ongoing violations even though the FBI had been claiming the berm caught all the bullets. *See Barton1 Affidavit, App. at 10.* The bullets were found in Foss Park, North Chicago's only public access to Lake Michigan. One bullet was found under a swing set. *Id.* Spent lead bullets were also found sitting on the beach below the range. *Id.* At a court-ordered range visit Blue Eco documented evidence of ricochets on defendant's range proving it is too small to safely contain all discharges onsite. *See Barton2 Affidavit, App. at 26.*

Much of the evidence discussed above which proves injury in fact also proves traceability to the FBI. Lead is shown in North Chicago and Highland Park water quality reports. The FBI is discarding lead bullets into the lake that supplies water for Highland Park and North Chicago. The Navy and Marines discarded lead bullets into the same area from 1918 until turning over the range to the FBI in 1986. The Navy and FBI both issued reports in 1986 stating the range was likely impacting the lake. Test conducted by the FBI after getting plaintiffs' 90-day notice of suit show groundwater, which flows into Lake Michigan, having lead 13 times the Safe Drinking Water Act action level. Lake sediment is contaminated with lead as much as 17 times the level considered hazardous. Without any requirement to do so for standing purposes, plaintiffs have proved federal defendants are discharging pollutants at levels that cause environmental degradation.

According to the DOJ in its amicus brief in *Gaston Copper*, citizen groups have standing "on the basis of a member's claim that he or she used a body of water

in the general area of the discharge, but without requiring any showing that the member used the precise spot at which the discharge occurred.” *App at 52*, (citing *Sierra Club v. Simkins Industries, Inc.*, 847 F.2d 1109, 1113 (4th Cir. 1988)(Patapsco River); *Cedar Point Oil Co.*, 73 F.3d at 556, 558 (Galveston Bay); *Metro. St. Louis Sewer Dist.*, 883 F.2d at 56 (8th Cir. 1989)(Mississippi River); *Consol. Rail Corp.*, 768 F.2d 57, 61 (2d Cir. 1985)(Hudson River)).

Blue Eco and its members’ affidavits together with objective evidence from the DOJ establish that their injuries are fairly traceable to the FBI: 1) the FBI is discharging lead into Lake Michigan; 2) the lake sediment is now contaminated with lead at hazardous levels; and 3) lead is present in the municipal water supply serving several Blue Eco members. The DOJ argued the exact opposite from its 1999 amicus brief in its motion to dismiss in this case; “In fact, according to Google Maps, [Pollack] lives nearly 13 miles from the FBI Range and Foss Park. As we discuss below, there is a vast difference between asserting a vague “interest” in the natural environment or another community’s drinking water supply and sufficiently alleging a concrete injury-in-fact that is caused by the Defendants and can be redressed by this Court.” *See Def. Mot. to Dismiss at 9, Docket at 48*. The district court, following the DOJ argument, found compelling that “though Highland Park’s water is drawn from Lake Michigan, it uses different intake pipes than those that supply North Chicago.” *Short App at 15*.

Notwithstanding that several Blue Eco members do live in North Chicago (*see Blue Eco Affidavit, App at 1*) the district court does note that Highland Park’s

municipal water supply also contains lead (at 9.2ppb, well above the lead maximum contaminant level goal of zero). *See Short App at 15.* Plaintiffs, including those living in Highland Park and other municipalities served by Lake Michigan as a water source claim an interest that DOJ minimizes as vague. In reality their claims are very specific;

“Blue Eco...members include Great Lakes residents whose drinking water supply and natural environment is harmed by Defendants’ actions in violation of federal environmental law”, Complaint at ¶3;

“members of the public whose potable (drinking) water supply is drawn from the Great Lakes”, Complaint at ¶9.

“I drink water drawn from Lake Michigan and I am concerned that the discharges of lead munitions by the federal defendants into Lake Michigan is negatively affecting the drinking water supply of Highland Park and other local municipalities I visit that draw their drinking water from Lake Michigan” Pollack and Miller Affidavits, App at 4, 7.

“I use and enjoy the public areas along the Illinois portion of Lake Michigan and I am concerned that the lead munitions discharged by federal defendants that is sitting on open land at Foss Park and the beach below the FBI Range will harm visitors to these public areas who may come into contact with this hazardous material and therefore makes it less likely I will visit these public areas myself or with my children” ” Pollack and Miller Affidavits, App at 4, 7.

“I enjoy watching the wildlife in the Great Lakes watershed and I am concerned that the lead munitions discharged by federal defendants that are sitting on open land and in shallow water near the FBI Range in North Chicago will harm local shorebirds and waterfowl; and lessens the enjoyment I get observing them migrate between seasons” ” Pollack and Miller Affidavits, App at 4, 7.

“I enjoy eating freshwater and ocean fish and I am concerned that the lead munitions discharged by the federal defendants into the waters of the United States and onto submerged lands are entering the water column and bioaccumulating in the tissue and organs of fish coming into contact with the contaminated water and is therefore lessening my desire to consume fish ” Pollack Affidavit, App at 4

Plaintiffs have therefore stated a genuine interest in the receiving waters of defendants' lead discharges. Lead is found in the local lake serving as a drinking water source, in the impact area, and thirteen miles downstream in plaintiffs' drinking water.

Defendants argue that Highland Park drinking water is different from the North Chicago water in the impact area. This flies in the face of DOJ's prior position in *Gaston Copper* where the DOJ stated plaintiffs do have standing when asserting an interest in the general water body being affected. The DOJ, in its amicus brief, went further by stating "[m]any of these cases involve quite large bodies of water; nevertheless, these courts drew the reasonable inference that waterborne pollutants migrate, without demanding scientific proof that they had done so." *App at 52*.

Like the migration of waterborne pollutants, the courts should allow plaintiffs to reasonably infer that the shorebirds and waterfowl they claim to watch and enjoy in Highland Park can and may follow the Lake Michigan shoreline during their migration and be harmed by ingesting lead lying on open land that plaintiffs found and presented in open court. *See Barton Affidavits 1 and 2, App at 10, 26; Motion for Temporary Restraining Order, Docket at 27; Compl. at ¶42-44*. There was even a prior local incident (43 miles from the FBI range as the bird flies) - at an outdoor range near Lake Geneva, WI at the Playboy shotgun facility that discharged to water. There, the US EPA declared an imminent and substantial endangerment from the lead in the wetland:

USFWS investigated the death of 218 Canada geese on Lake Geneva, Wisconsin...and determined that the cause of death was acute lead poisoning after ingestion of lead shot from the site. The concentration of total lead in sediments is high enough to warrant concern even without preferential ingestion for grit. Potential ingestion by any bottom feeding organism able to engulf lead shot might be expected to suffer injury.

The geologic resource may potentially be impaired to the point of being unable to provide suitable habitat for waterfowl and other wetland species.

The potential exists for the lead shot to slowly dissolve and migrate into the sediments and surrounding surface waters.

Due to the existence of lead shot in a wetland which is utilized as a feeding area for migrating birds, that the geologic resource may potentially be impaired as a suitable habitat, and that lead may potentially migrate into sediments and surface waters, actual or threatened release of hazardous substances from the South Lakes Trap and Skeet Club, if not addressed by implementing the response actions selected in this Action Memorandum [removal of lead], may present an imminent and substantial endangerment to public health, or welfare, or the environment .

Pl Reply, Mot. Prel. Inj., Ex 6, Docket at 55. Plaintiffs need not await the death of 218 more Canada geese from ingestion of the same substance in this case. The South Lakes facility only operated from 1968 until 1992 whereas the FBI site has operated since 1918 and continued until the night before Blue Eco's temporary restraining order hearing. The threat alone, together with Pollack's rational concerns about the geese he enjoys watching creates the standing necessary to continue this lawsuit. There existed prior to 1992 the potential for citizen suit enforcement in the absence of diligent prosecution. If the USFWS, United States Environmental Protection Agency (USEPA), and DOJ had failed or refused to take this action, surely a citizen would have had standing to shut down Southern Lakes.

The courts could not require plaintiff to have actually seen the geese that died to have standing. However, that is exactly what the court below did by specifically requiring plaintiffs to state they “watch[] birds that feed at, nest on or routinely use the land or water near the range” and then denying standing to Pollack and Miller notwithstanding their affidavits stating concern for the birds they see nearby and reasonable belief that the birds use the local shoreline. *See Short App at 17; Pollack and Miller Affidavits, App at 4, 7.*

Article III sets the minimum requirements for standing; Congress decided to give citizen plaintiffs standing to the full extent allowed by Article III of the Constitution. 33 U.S.C. 1365(g); *Middlesex Co. Sewerage Auth.*, 453 U.S. at 16. To require more proof for standing than proof required for a CWA or RCRA violation would be impermissible interference by the judiciary with Congress’ constitutional right to have laws enforced the way they are written.

A FAVORABLE DECISION BY THE DISTRICT COURT WILL
REDRESS THE HARMS BLUE ECO CLAIMS

Finally, Blue Eco has standing because a favorable decision by the district court will redress Pollack’s injuries. Redressability ensures that a plaintiff "personally would benefit in a tangible way from the court's intervention." *Warth*, 422 U.S. at 508. Plaintiffs’ claims are redressable when seeking declaratory and injunctive relief by "alleging a continuing violation or the imminence of a future violation" of the statute at issue. *Steel Co. v. Citizens for a Better Env.*, 523 U.S. 83 (1998); *see also Laidlaw*, 528 U.S. at 186-88.

Here Blue Eco seeks declaratory, injunctive, and other relief for the federal agencies' continuing and threatened future violations of federal and common law. This is not a case where the defendant acknowledges certain acts violate the law but argues it did not commit those acts; the Coast Guard admitted to discharging its lead munitions into navigable water but denied that those acts broke the law. *See DOJ letter, Compl. Ex. C, Docket at 1.*

Even though the record is replete with cases where regulators have shut down ranges for exactly these types of violations, ironically no court has ever found a violation by the federal government. In *Stone v. Naperville Park Dist.*, the USEPA had “advised the Defendants that a[n NPDES] permit was required for trap shooting”. 38 F.Supp.2d 651, 655 (N.D. Ill. 1999). The Northern District of Illinois granted summary judgment to the Plaintiff on the issue of the Defendants' liability under the CWA because “the undisputed facts establish[ed] that the [shooting range operators] have violated the Clean Water Act” by discharging into navigable waters without an NPDES permit. *Id.* at 656. The court held that a “shooting range, as well as each firing station, constitutes a ‘point source’ as defined by the [Clean Water] Act. The whole purpose of the facility is to ‘discharge pollutants’ in the form of lead shot and shattered clay targets.” *Id.* at 655. In *U.S. v. Lake Geneva Assocs., Playboy Enterprises, et al* 98-C-0972 (consent decree entered) (E.D. WI. 1998), the DOJ, on behalf of the USEPA, entered into a consent decree ordering defendants to repay the federal government for cleanup responses undertaken to remove lead shot from a wetland and an order prohibiting further violations.

Declaratory and injunctive relief is required in this case and the district courts should not be so quick to deny citizen standing. Not only did Blue Eco allege continuing violations in its complaint, but it found 40 FBI bullets in the adjacent public park and beach that had ricocheted offsite after the complaint was filed. The FBI then shut down the range on April 1, 2008, more than three months after suit was filed, to avoid the temporary restraining order Blue Eco was seeking. In fact, the FBI admits ongoing violations by shutting down its shotgun range four days after suit was filed. *See* Pl. Reply Mot. Prel. Inj. Ex 11, Docket at 55.. Until the federal courts adjudicate this issue as commanded by the Constitution and Congress, the Executive branch will continue discharging hazardous waste into navigable waters and deny violating the law. Blue Eco has demanded relief for continuing and threatened future violations at every stage of this litigation, including this appeal, and its damages are therefore redressable by a favorable ruling.

CONCLUSION

This case illustrates the importance of the judiciary staying within its constitutionally prescribed role of deciding the laws given to it by Congress. Courts cannot create new rules of evidence for environmental standing by demanding direct evidence of degradation. Such evidentiary requirements are not demanded by Article III or the Federal Rules of Evidence. Congress and common law have likewise not required as much in the Clean Water Act, Resource Conservation Recovery Act, and public nuisance. The district court ruling raises standing

requirements higher than what is needed to prove violation of the underlying laws. Thus, the ruling invalidates a portion of the citizen suit provisions of those laws that allow a person to sue anyone for any violation.

As the DOJ argued in its amicus brief and the Fourth Circuit adopted in its en banc opinion:

“litigants routinely rely on circumstantial evidence to prove any number of contested issues. And if a prosecutor may rely wholly on circumstantial evidence to prove that a criminal defendant is guilty beyond a reasonable doubt, there is no apparent reason -- and certainly not a reason apparent from the Constitution, the Federal Rules, or the Clean Water Act itself -- to regard this type of proof as per se deficient for establishing standing in a Clean Water Act case. Citizens may thus rely on circumstantial evidence such as proximity to polluting sources, predictions of discharge influence, and past pollution to prove both injury in fact and traceability.”

Gaston Copper, 204 F.3d at 164; *DOJ amicus brief*, *App* at 49. This is what Blue Eco did. To require more would impose on environmental suits an uncharacteristic set of evidentiary requirements without reason.

This case is thick with irony. Congress has declared illegal exactly the types of acts being committed by the Department of Justice. Congress left no doubt these laws apply to the federal government when it enacted federal facilities provisions making the executive liable to the same degree and using the same standards as private parties. Further irony is that the DOJ in another case successfully used the federal courts by suing the Playboy Club for its discharges of lead into water and the district court surely found standing in entering a consent decree. The Fourth Circuit in 1999 upheld the dismissal of a similar citizen suit on the same grounds of

insufficient water degradation but then overturned the decision en banc with the help of an amicus brief filed by the DOJ on behalf of the environmental group in that case. Yet the DOJ in this case argued exactly opposite its 1999 amicus brief position and withheld that case from this district court. If the will of Congress to make the federal executive comply with the environmental laws at federal facilities is ever going to be achieved, it needs to happen in this Seventh Circuit case, at these federal facilities, with this private attorney general.

Otherwise, this Circuit will frustrate congressional intent by returning to the prior system of water quality standards, the failure of which led to the enactment of the Clean Water Act in the first place. *See e.g.* Water Quality Act of 1965, Pub. L. No. 89-234, 79 Stat. 903. According to the DOJ in 1999, “[a]n important reason for the Clean Water Act’s shift from water quality standards to end-of-pipe standards was to eliminate the need to address questions of causation and injury in enforcement proceedings.” *App at 50*. And the Fourth Circuit, heeding the DOJ’s argument states: “[t]o have standing now turn on direct evidence of such things as the chemical composition...of receiving waters would throw federal legislative efforts to control water pollution into a time warp by judicially reinstating the previous statutory regime in the form of escalated standing requirements.” *Gaston Copper*, 204 F.3d at 163. Congress intended, and this Court needs to firmly instruct its district courts, that the only issue as to standing is whether defendants have violated the law by discharging pollutants in the absence of a permit and if plaintiffs have an interest in and a reasonable concern for the receiving waters.

"The law of Article III standing is built on a single basic idea -the idea of separation of powers." *Allen*, 468 U.S. at 752. Courts in the Northern District must avoid infringing upon this principle by refusing to decide concrete cases where Congress invites citizen suit adjudication. This case presents a concrete controversy in which courts are left with no other choice but to effectuate Congress' clearly expressed language and intent. To bar the courthouse door to Pollack's and other Blue Eco members' claims of private injury would undermine the citizen suit provision of the Clean Water Act and the Resource Conservation Recovery Act. Plaintiffs therefore ask this panel to reverse the judgment of the district court and remand this case for a determination of whether federal executive agencies have discharged pollutants without a permit, created an imminent and substantial endangerment, and damaged natural resources in Illinois.

Respectfully submitted,

/s/ Steven B. Pollack
Law office of Steven B. Pollack
On behalf of himself and as director and counsel for
Blue Eco Legal Council
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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION,
TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains less than 12,276 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2002 in size 12 Century font.

/s/ Steven B. Pollack

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and correct copies of the foregoing Plaintiff-Appellant's Opening Brief and one copy of the Appendix were served on the party indicated below via USPS service, postage prepaid, and that 15 copies of the Brief and 10 copies of the Appendix were filed with the Clerk of the Court of Appeals for the 7th Circuit in person, all on January 15, 2008.

Elizabeth Ann Peterson
U.S. Department of Justice
Environment & Natural Resources Division
Appellate Section
P.O. Box 23795 (L'Enfant Plaza Station)
Washington, D.C. 20026

/s/ Steven B. Pollack, Esq.

SHORT APPENDIX

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STATEMENT OF COUNSEL REGARDING CONTENTS OF APPENDIX:

The undersigned counsel of record, Steven B. Pollack, Esq., hereby states pursuant to Circuit Rule 30 that all of the materials required by Circuit Rule 30(a) to be included in the short appendix attached to Plaintiff-Appellant's Brief are so included, and all of the materials required by Circuit Rule 30(a) and (b) to be included in an appendix are included either in the short Appendix attached to Plaintiff-Appellant's Brief or in the Appendix filed by Plaintiff-Appellant under separate cover.

/s/ Steven B. Pollack, Esq.

APPEAL, BROWN, PROTO, TERMED

United States District Court
Northern District of Illinois - CM/ECF LIVE, Ver 3.2.2 (Chicago)
CIVIL DOCKET FOR CASE #: 1:08-cv-00320

Pollack et al v. United States Department of Justice et al
Assigned to: Honorable Ronald A. Guzman
Demand: \$9,999,000
Case in other court: 08-03857
Cause: 42:6901 Environmental Cleanup Expenses

Date Filed: 01/14/2008
Date Terminated: 09/12/2008
Jury Demand: Both
Nature of Suit: 893 Environmental Matters
Jurisdiction: U.S. Government Defendant

Date Filed	#	Docket Text
01/14/2008	1	COMPLAINT filed by Steven B. Pollack, Blue Eco Legal Council; Jury Demand. Filing fee \$ 350. (Attachments: # 1 Exhibit 1# 2 Exhibit 2# 3 Exhibit 3# 4 Exhibit 4# 5 Exhibit 5# 6 Exhibit 6# 7 Exhibit 7# 8 Exhibit 8# 9 Exhibit 9# 10 Exhibit 10# 11 Exhibit 11# 12 Exhibit 12# 13 Exhibit 13# 14 Exhibit 14)(mjc,) (Entered: 01/16/2008)
01/14/2008	2	CIVIL Cover Sheet. (mjc,) (Entered: 01/16/2008)
01/14/2008	3	ATTORNEY Appearance for Plaintiffs Steven B. Pollack, Blue Eco Legal Council by Steven B. Pollack. (mjc,) (Entered: 01/16/2008)
01/15/2008	5	SUMMONS Issued as to United States Department of Defense, United States Coast Guard, U.S. Attorney, and U.S. Attorney General. (mjc,) (Entered: 01/16/2008)
01/15/2008	6	SUMMONS Issued as to United States Navy, United States Marines. (mjc,) (Entered: 01/16/2008)

01/24/2008	7	MINUTE entry before Judge Ronald A. Guzman :The Court orders the parties to appear for an initial status hearing. All parties shall refer to and comply with Judge Guzman's requirements for the initial appearance as outlined in Judge Guzman's case management procedures, which can be found at: www.ilnd.uscourts.gov.Status hearing set for 3/14/2008 at 09:30 AM.Mailed notice (cjpg,) (Entered: 01/24/2008)
01/24/2008	8	SUMMONS Returned Executed by Steven B. Pollack, Blue Eco Legal Council as to United States Navy served on 1/24/2008, answer due 3/24/2008; United States Marines served on 1/24/2008, answer due 3/24/2008; United States Department of Defense served on 1/24/2008, answer due 3/24/2008; United States Department of Justice served on 1/24/2008, answer due 3/24/2008; United States Coast Guard served on 1/24/2008, answer due 3/24/2008 (Pollack, Steven) (Entered: 01/24/2008)
01/28/2008	9	DESIGNATION of Linda A. Wawzenski as U.S. Attorney for Defendants United States Navy, United States Marines, United States Department of Defense, United States Department of Justice, United States Coast Guard (Wawzenski, Linda) (Entered: 01/28/2008)
01/31/2008	10	<i>FIRST</i> AMENDED complaint by Steven B. Pollack, Blue Eco Legal Council against all defendants (Attachments: # 1 Exhibit A# 2 Exhibit B# 3 Exhibit C# 4 Exhibit D# 5 Exhibit E# 6 Exhibit F# 7 Exhibit G# 8 Exhibit H# 9 Exhibit I# 10 Exhibit J# 11 Exhibit K# 12 Exhibit L# 13 Exhibit M# 14 Exhibit N# 15 Exhibit TableOfExhibitsAmended)(Pollack, Steven) (Entered: 01/31/2008)
01/31/2008	11	ATTORNEY Appearance for Defendants United States Navy, United States Marines, United States Department of Defense, United States Department of Justice, United States Coast Guard by Linda A. Wawzenski <i>for David S. Gualtieri</i> (Wawzenski, Linda) (Entered: 01/31/2008)
02/19/2008	12	ATTORNEY Appearance for Defendants United States Navy, United States Marines, United States Department of Defense, United States Department of Justice, United States Coast Guard by David S. Gualtieri (Gualtieri, David) (Entered: 02/19/2008)

03/06/2008	13	MOTION by Plaintiffs Steven B. Pollack, Blue Eco Legal Council for preliminary injunction (Attachments: # 1 Plaintiffs Brief in Support of Motion for Preliminary Injunction# 2 Exhibit Exhibit 1 - Affidavit of James Barton# 3 Notice of Filing Notice of Filing# 4 Certificate of Service)(Pollack, Steven) (Entered: 03/06/2008)
03/07/2008	14	NOTICE of Motion by Steven B. Pollack for presentment of motion for preliminary injunction, 13 before Honorable Ronald A. Guzman on 3/14/2008 at 09:30 AM. (Pollack, Steven) (Entered: 03/07/2008)
03/10/2008	15	REPORT of Rule 26(f) Planning Meeting by Steven B. Pollack, Blue Eco Legal Council (Pollack, Steven) (Entered: 03/10/2008)
03/10/2008	16	REPORT of Rule 26(f) Planning Meeting by United States Navy, United States Marines, United States Department of Defense, United States Department of Justice, United States Coast Guard (Attachments: # 1 Exhibit List and Exhibits 1 and 2)(Gualtieri, David) (Entered: 03/10/2008)
03/11/2008	17	MOTION by Plaintiffs Steven B. Pollack, Blue Eco Legal Council to compel <i>Property Inspection on March 17, 2008</i> (Attachments: # 1 Certificate of Service)(Pollack, Steven) (Entered: 03/11/2008)
03/11/2008	18	NOTICE of Motion by Steven B. Pollack for presentment of motion to compel 17 before Honorable Ronald A. Guzman on 3/14/2008 at 09:30 AM. (Pollack, Steven) (Entered: 03/11/2008)
03/12/2008	19	RESPONSE by United States Navy, United States Marines, United States Department of Defense, United States Department of Justice, United States Coast Guard in Opposition to MOTION by Plaintiffs Steven B. Pollack, Blue Eco Legal Council to compel <i>Property Inspection on March 17, 2008</i> 17 (Attachments: # 1 Exhibit Exhibit List and Exhibits 1-3)(Gualtieri, David) (Entered: 03/12/2008)
03/13/2008	20	REPLY by Steven B. Pollack, Blue Eco Legal Council to response in opposition to motion, 19 (Pollack, Steven) (Entered: 03/13/2008)

03/14/2008	21	MINUTE entry before Judge Ronald A. Guzman :Status hearing held and continued to 3/21/2008 at 09:00 AM. Defendant's oral motion to extend time to answer or otherwise plead is granted. Defendant is given to 4/30/2008 to file its motion to dismiss and supporting memoranda and its response to plaintiff's motion for preliminary injunction, 13 . Defendant's oral motion to stay discovery is granted until further order of court. Plaintiff's motion to compel property inspection is denied without prejudice. The parties are given to 3/20/2008 to file a joint proposed discovery schedule.Advised in open court (jms,) (Entered: 03/14/2008)
03/19/2008	22	MINUTE entry before Judge Honorable Ronald A. Guzman: Status hearing set for 3/21/08 is reset to 3/26/2008 at 09:30 AM. on parties request.Mailed notice (cjpg,) (Entered: 03/19/2008)
03/20/2008	23	REPORT of Rule 26(f) Planning Meeting by Steven B. Pollack, Blue Eco Legal Council (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3)(Pollack, Steven) (Entered: 03/20/2008)
03/20/2008	24	Defendants' Proposed Plan for Focused Discovery and Objections to Plaintiffs' Proposal by United States Navy, United States Marines, United States Department of Defense, United States Department of Justice, United States Coast Guard (Gualtieri, David) (Entered: 03/20/2008)
03/26/2008	25	MINUTE entry before Judge Honorable Ronald A. Guzman:Status hearing held on 3/26/2008. Status hearing set for 4/23/2008 at 09:30 AM.Mailed notice (cjpg,) (Entered: 03/27/2008)
03/28/2008	26	MOTION by Plaintiffs Steven B. Pollack, Blue Eco Legal Council for leave to file <i>Second Amended Complaint</i> (Attachments: # 1 Affidavit James Barton March 28 Affidavit)(Pollack, Steven) (Entered: 03/28/2008)
03/28/2008	27	MOTION by Plaintiffs Steven B. Pollack, Blue Eco Legal Council for temporary restraining order (Attachments: # 1 Proposed Second Amended Complaint)(Pollack, Steven) (Entered: 03/28/2008)
03/28/2008	28	MOTION by Plaintiffs Steven B. Pollack, Blue Eco Legal Council to expedite <i>Motion for Preliminary Injunction</i> (Pollack, Steven) (Entered: 03/28/2008)

03/28/2008	29	NOTICE of Motion by Steven B. Pollack for presentment of motion for leave to file 26 before Honorable Ronald A. Guzman on 4/1/2008 at 09:30 AM. (Pollack, Steven) (Entered: 03/28/2008)
03/28/2008	30	NOTICE of Motion by Steven B. Pollack for presentment of motion for temporary restraining order 27 before Honorable Ronald A. Guzman on 4/1/2008 at 09:30 AM. (Pollack, Steven) (Entered: 03/28/2008)
03/28/2008	31	NOTICE of Motion by Steven B. Pollack for presentment of motion to expedite 28 before Honorable Ronald A. Guzman on 4/1/2008 at 09:30 AM. (Pollack, Steven) (Entered: 03/28/2008)
03/28/2008	32	AFFIDAVIT by Plaintiffs Steven B. Pollack, Blue Eco Legal Council to amend/correct MOTION by Plaintiffs Steven B. Pollack, Blue Eco Legal Council for leave to file <i>Second Amended Complaint</i> 26 <i>Affidavit by James Barton March 28</i> (Pollack, Steven) Text Modified by the Clerk's Office on 3/31/2008 (mjc,). (Entered: 03/28/2008)
03/31/2008	33	ATTORNEY Appearance for Defendants United States Navy, United States Marines, United States Department of Defense, United States Department of Justice, United States Coast Guard by Matthew R. Oakes (Oakes, Matthew) (Entered: 03/31/2008)
03/31/2008	34	MINUTE entry before Judge Honorable Ronald A. Guzman:Set hearing as to motion for leave to file 26 , motion to expedite 28 , motion for temporary restraining order 27 :Motion Hearing set for 4/1/2008 at 9:30 a.m. is reset to 10:30 AM. on Court's own motion. Mailed notice (cjk,) (Entered: 03/31/2008)
03/31/2008	35	MEMORANDUM by United States Navy, United States Marines, United States Department of Defense, United States Department of Justice, United States Coast Guard in Opposition to motion for temporary restraining order 27 , motion to expedite 28 (Attachments: # 1 Declaration Declaration of Donald Henke, # 2 Exhibit Waukegan News Article, # 3 Declaration Declaration of Robert Grant)(Oakes, Matthew) (Entered: 03/31/2008)

04/01/2008	36	MINUTE entry before Judge Honorable Ronald A. Guzman: Motion hearing held on 4/1/2008. Motion by Plaintiffs for leave to file Second Amended Complaint 26 is granted. Motions by Plaintiffs for temporary restraining order 27 , for preliminary injunction 13 and to expedite preliminary injunction 28 are entered and continued generally. Mailed notice (cjb,) (Entered: 04/02/2008)
04/18/2008	37	MINUTE entry before Judge Honorable Ronald A. Guzman: Status hearing set for 4/23/08 is reset to 5/8/2008 at 09:30 AM. on parties' request. Mailed notice (cjb,) (Entered: 04/18/2008)
04/22/2008	38	MOTION by Plaintiffs Steven B. Pollack, Blue Eco Legal Council to compel, MOTION by Plaintiffs Steven B. Pollack, Blue Eco Legal Council for sanctions (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4)(Pollack, Steven) (Entered: 04/22/2008)
04/22/2008	39	NOTICE of Motion by Steven B. Pollack for presentment of motion to compel, motion for sanctions 38 before Honorable Ronald A. Guzman on 4/24/2008 at 09:30 AM. (Pollack, Steven) (Entered: 04/22/2008)
04/24/2008	40	MINUTE entry before Judge Honorable Ronald A. Guzman: Motion hearing held on 4/24/2008. Motion by Plaintiffs Steven B. Pollack, Blue Eco Legal Council to compel and for sanctions 38 is denied. Mailed notice (cjb,) (Entered: 04/24/2008)
04/25/2008	49	PROTECTIVE Order Signed by Judge Honorable Ronald A. Guzman on 4/25/2008.(mjc,) (Entered: 05/05/2008)
04/28/2008	41	MOTION by Plaintiffs Steven B. Pollack, Blue Eco Legal Council to compel <i>Two Environmental Studies by US Navy</i> (Attachments: # 1 Exhibit 1)(Pollack, Steven) (Entered: 04/28/2008)
04/28/2008	42	MOTION by Plaintiffs Steven B. Pollack, Blue Eco Legal Council to compel <i>Ammunition Use Records</i> (Pollack, Steven) (Entered: 04/28/2008)
04/28/2008	43	MOTION by Plaintiffs Steven B. Pollack, Blue Eco Legal Council to compel <i>VIP Records</i> (Attachments: # 1 Exhibit 1, # 2 Exhibit 2)(Pollack, Steven) (Entered: 04/28/2008)

04/28/2008	44	MOTION by Plaintiffs Steven B. Pollack, Blue Eco Legal Council for sanctions <i>for Discovery Violations</i> (Pollack, Steven) (Entered: 04/28/2008)
04/28/2008	45	NOTICE of Motion by Steven B. Pollack for presentment of motion to compel 43 , motion for sanctions 44 , motion to compel 42 , motion to compel 41 before Honorable Ronald A. Guzman on 5/1/2008 at 09:30 AM. (Pollack, Steven) (Entered: 04/28/2008)
04/30/2008	46	<i>Defendants' Motion to Dismiss Second Amended Complaint</i> NOTICE of Motion by Matthew R. Oakes for presentment of before Honorable Ronald A. Guzman on 5/8/2008 at 09:30 AM. (Oakes, Matthew) (Entered: 04/30/2008)
04/30/2008	47	MOTION by Defendants United States Navy, United States Marines, United States Department of Defense, United States Department of Justice, United States Coast Guard to dismiss <i>Second Amended Complaint</i> (Oakes, Matthew) (Entered: 04/30/2008)
04/30/2008	48	MEMORANDUM motion for preliminary injunction, 13 , motion to dismiss 47 by United States Navy, United States Marines, United States Department of Defense, United States Department of Justice, United States Coast Guard <i>United States' Combined Memorandum in Support of Its Motion to Dismiss and in Opposition to Plaintiffs' Motion for a Preliminary Injunction</i> (Attachments: # 1 Exhibit Index and Attachments 1-4, # 2 Exhibit Attachment 5-Lorenz Declaration, # 3 Exhibit Attachments 6-10, # 4 Exhibit Attachments 11-15)(Oakes, Matthew) (Entered: 04/30/2008)

05/01/2008	51	MINUTE entry before Judge Honorable Ronald A. Guzman:Motion hearing held on 5/1/2008. Motion by plaintiffs to compel Two Environmental Studies by US Navy 41 is granted. Motion by plaintiffs to compel ammunition use records 42 is granted in part as stated in open court. Motion to compel VIP records 43 is granted in part as stated in open court. Motion by plaintiffs for sanctions 44 is denied. Status hearing set for 5/8/08 is reset to 5/21/2008 at 09:30 AM. Mailed notice (cjpg,) (Entered: 05/07/2008)
05/01/2008	52	MINUTE entry before Judge Honorable Ronald A. Guzman:Minute entry dated 5/1/08 is amended to include the following: Plaintiffs' reply to defendants' response to plaintiffs' motion for preliminary injunction is due 5/15/08. Set deadlines as to by Defendants United States Navy, United States Marines, United States Department of Defense, United States Department of Justice, United States Coast Guard to dismiss Second Amended Complaint 47 : Response due 6/2/08. Reply due 7/2/08. (cjpg,) (Entered: 05/07/2008)
05/06/2008	50	TRANSCRIPT of proceedings for the following dates: 4/1/08; Before the Honorable Ronald A. Guzman. (mjc,) (Entered: 05/07/2008)
05/12/2008	53	STATUS Report by United States Navy, United States Marines, United States Department of Defense, United States Department of Justice, United States Coast Guard (Attachments: # 1 Exhibit Letter Transmitting May 12 Production)(Oakes, Matthew) (Entered: 05/12/2008)
05/12/2008	54	MINUTE entry before Judge Honorable Ronald A. Guzman:Minute entry dated 5/1/08 [doc. no. 51] is corrected as follows: "Motion by Plaintiffs to compel Ammunition Use Records [doc. no. 42] is withdrawn." Minute order stands in all other respects. Mailed notice (cjpg,) (Entered: 05/12/2008)
05/15/2008	55	REPLY by Steven B. Pollack, Blue Eco Legal Council to MOTION by Plaintiffs Steven B. Pollack, Blue Eco Legal Council for preliminary injunction 13 , memorandum,, 48 (Attachments: # 1 Affidavit Blue Eco, # 2 Affidavit Barton1, # 3 Affidavit Barton2, # 4 Affidavit Pollack, # 5 Affidavit Miller, # 6 Exhibit 1, # 7 Exhibit 2, # 8 Exhibit 3, # 9 Exhibit 4, # 10 Exhibit 5, # 11 Exhibit 6, # 12 Exhibit 7, # 13 Exhibit 8, # 14 Exhibit 9, # 15 Exhibit 10, # 16 Exhibit 11, # 17 Exhibit 12, # 18 Exhibit Table of Exhibits)(Pollack, Steven) (Entered: 05/15/2008)

05/16/2008	56	May 21 Status Hearing STATEMENT by United States Navy, United States Marines, United States Department of Defense, United States Department of Justice, United States Coast Guard (Oakes, Matthew) (Entered: 05/16/2008)
05/16/2008	57	Opposition to Defendants' Statement STATEMENT by Steven B. Pollack, Blue Eco Legal Council (Pollack, Steven) (Entered: 05/16/2008)
05/21/2008	58	MINUTE entry before the Honorable Ronald A. Guzman:Status hearing held on 5/21/2008. Mailed notice (cjj,) (Entered: 05/27/2008)
06/02/2008	59	RESPONSE by Steven B. Pollack, Blue Eco Legal Council in Opposition to MOTION by Defendants United States Navy, United States Marines, United States Department of Defense, United States Department of Justice, United States Coast Guard to dismiss <i>Second Amended Complaint</i> 47 (Attachments: # 1 Exhibit 1, # 2 Certificate of Service)(Pollack, Steven) (Entered: 06/02/2008)
07/01/2008	60	REPLY by United States Navy, United States Marines, United States Department of Defense, United States Department of Justice, United States Coast Guard to memorandum,, 48 , MOTION by Defendants United States Navy, United States Marines, United States Department of Defense, United States Department of Justice, United States Coast Guard to dismiss <i>Second Amended Complaint</i> 47 (Attachments: # 1 Exhibit 1 to 4 to U.S. Reply Mem. and Index) (Gualtieri, David) (Entered: 07/01/2008)
08/13/2008	61	MOTION by Plaintiffs Steven B. Pollack, Blue Eco Legal Council for leave to file <i>supplement to Defendants' motion to dismiss</i> (Attachments: # 1 Supplement to Defendants' motion to dismiss) (Pollack, Steven) (Entered: 08/13/2008)
08/13/2008	62	NOTICE of Motion by Steven B. Pollack for presentment of motion for leave to file 61 before Honorable Ronald A. Guzman on 8/26/2008 at 09:30 AM. (Pollack, Steven) (Entered: 08/13/2008)

08/19/2008	63	MINUTE entry before the Honorable Ronald A. Guzman: Motion by Plaintiffs Steven B. Pollack, Blue Eco Legal Council for leave to file supplement to Defendants' motion to dismiss 61 is granted. Mailed notice (cjpg,) (Entered: 08/19/2008)
08/27/2008	64	RESPONSE by Defendants United States Navy, United States Marines, United States Department of Defense, United States Department of Justice, United States Coast Guard to notice of motion 62 to Plaintiffs' <i>Supplemental Brief</i> (Gualtieri, David) (Entered: 08/27/2008)
09/12/2008	65	MINUTE entry before the Honorable Ronald A. Guzman: Pursuant to Memorandum Opinion and Order dated 9/12/08, the Court grants defendants' motion to dismiss the second amended complaint for lack of subject matter jurisdiction [doc. no. 47], and strikes as moot plaintiffs' motions for a temporary restraining order [doc. no. 27], a preliminary injunction [doc. no. 13] and to expedite the motion for preliminary injunction [doc. no. 28]. Any pending motions or schedules are stricken as moot. Civil case terminated. Mailed notice (cjpg,) Modified on 9/12/2008 (cjpg,). (Entered: 09/12/2008)
09/12/2008	66	MEMORANDUM Opinion and Order Signed by the Honorable Ronald A. Guzman on 9/12/2008:Mailed notice(cjpg,) (Entered: 09/12/2008)
09/12/2008	67	ENTERED JUDGMENT Signed by Deputy Clerk on 9/12/2008:Mailed notice(cjpg,) (Entered: 09/12/2008)
11/09/2008	68	NOTICE of appeal by Steven B. Pollack, Blue Eco Legal Council regarding orders 65 , 66 , 67 Filing fee \$ 455, receipt number 0752000000003263494. (Pollack, Steven) (Entered: 11/09/2008)
11/09/2008	69	DOCKETING Statement by Steven B. Pollack, Blue Eco Legal Council regarding notice of appeal 68 (Pollack, Steven) (Entered: 11/09/2008)
11/10/2008	70	NOTICE of Appeal Due letter sent to counsel of record. (gej,) (Entered: 11/10/2008)
11/10/2008	71	TRANSMITTED to the 7th Circuit the short record on notice of appeal 68 . Notified counsel (gej,) (Entered: 11/10/2008)

11/10/2008	72	ACKNOWLEDGEMENT of receipt of short record on appeal regarding notice of appeal 68 ; USCA Case No. 08-3857. (kjd,) (Entered: 11/13/2008)
11/18/2008	73	SEVENTH CIRCUIT transcript information sheet by Steven B. Pollack, Blue Eco Legal Council (Pollack, Steven) (Entered: 11/18/2008)
12/15/2008	74	TRANSMITTED to the USCA for the 7th Circuit the long record on appeal 68 (USCA no. 08-3857) consisting of 2 volumes of pleadings, 1 transcript and 3 volumes of loose pleadings. (gej,) (Entered: 12/15/2008)
12/15/2008	75	USCA RECEIVED on 12/16/2008 the long record regarding notice of appeal 68 . (gej,) (Entered: 12/17/2008)

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Community Right-to-Know Act. *See* 42 U.S.C. § 11002; 40 C.F.R. § 372.65. The Coast Guard discharged the bullets into the Great Lakes without a permit under the CWA and has taken no action to retrieve them. (Second Am. Compl. ¶¶ 7, 13.)

On December 18, 2006, the Coast Guard issued a press release saying that it had “withdraw[n] the Notice of Proposed Rulemaking to establish 34 safety zones for live-fire training on the Great Lakes.” (*Id.*, Ex. D, Coast Guard Press Release of 12/1/8/06.) The release also said that the Coast Guard would “not conduct live-fire training on the Great Lakes to satisfy non-emergency training requirements unless [it] publish[ed] a rule.” (*Id.*)

On March 10, 2007, plaintiffs submitted a Freedom of Information Act request to the Justice Department seeking documents regarding the FBI firearms training that occurs at the Great Lakes Naval Base in North Chicago, Illinois. (*Id.*, Ex. F, Letter from Pollack to FBI of 3/10/07.) In response, plaintiffs received, among other things, an April 25, 1986 real estate appraisal of the FBI’s North Chicago facility, which says that the “property has been used for a firing range since 1918” and uses 2,975 acres of Lake Michigan as “the impact area for overfiring.” (*Id.*, Ex. G, Real Estate Appraisal of 4/25/86 at 1-2.) Consequently, the appraisal states, “[h]azardous waste contamination, primarily from lead, may pose a threat to ground water and possibly to lake waters.” (*Id.* at 1.) Plaintiffs allege that the FBI continues to use the North Chicago firing range and discharges, or allows other agencies to discharge, lead bullets into the lake. (*Id.* ¶ 18.)

Plaintiffs also allege that there are two water intake areas in the range impact area, one of which is for drinking water used by the city of North Chicago. (*Id.* ¶ 21.) The City of North Chicago’s Water Quality Report for 2006 shows that two of the water sites it sampled had concentrations of lead in excess of 15 parts per billion (“ppb”), the maximum allowed by law. (*Id.*, Ex. K, 2006 North Chicago Water Quality Report.)

Plaintiffs contend that the government's operation of the North Chicago firing range violates CWA, RCRA, CERCLA and constitutes a public nuisance, and they seek a declaration that defendants have damaged the water and land surrounding the firing range, an order requiring them to stop firing lead bullets into that area and remediate the damage they have caused, and an award of damages.

Discussion

There are two kinds of Rule 12(b)(1) motions: those that attack the sufficiency of the jurisdictional allegations and those that attack the factual basis for jurisdiction. Facial attacks are subject to the same standard as motions pursuant to Rule 12(b)(6) motions; that is, the Court accepts as true all well-pleaded factual allegations of the complaint, drawing all reasonable inferences in plaintiff's favor. *United Phosphorus, Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 946 (7th Cir. 2002). However, in factual attacks, like this one, "the court is not bound to accept the truth of the allegations in the complaint." *Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm'n*, 149 F.3d 679, 685 (7th Cir. 1998). "Rather, the plaintiff has the obligation to establish jurisdiction by competent proof, and the court may properly look to evidence beyond the pleadings in this inquiry." *Id.*

Defendants argue that the Court lacks jurisdiction over the claims asserted in the second amended complaint because neither plaintiff has standing to pursue them. An individual plaintiff has standing to sue if he suffered a particularized injury, *i.e.*, one that affects him "in a personal and individual way," that is fairly traceable to defendants' conduct and can be redressed by a decision in his favor. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 & n.1 (1992). Defendants say Pollack has not satisfied the particularized injury element.

With respect to that element, plaintiffs allege that Pollack “lives several miles south of . . . North Chicago,” which obtains its drinking water from the firing range impact area and has recently detected lead in its drinking water. (Second Am. Compl. ¶¶ 9, 21-22.) However, the story told by the evidence plaintiffs submitted is a bit different.

For example, Pollack attests that he lives in Highland Park, about thirteen miles south of the North Chicago water intakes. (*See* Pls.’ Reply Supp. Mot. Prelim. Inj. at 8; *id.*, Exs., Pollack Aff. ¶ 3.) Moreover, though Highland Park’s water is drawn from Lake Michigan, it uses different intake pipes than those that supply North Chicago. *See* City of Highland Park 2008 Drinking Water Quality Report at 1, available at, <http://www.ci.highland-park.il.us/pdf/pw/waterQualityReport.pdf>. Further, Highland Park’s latest water quality report shows that three of its sampling sites had lead in excess of the federal limit of 15 parts per billion (“ppb”), but the overall lead level in the city’s drinking water is below that level. *Id.* at 3.

Plaintiffs do not dispute those facts but point out that North Chicago’s water has a higher concentration of lead, 11 ppb, than Highland Park’s. (*See* Pls.’ Reply Supp. Mot. Prelim. Inj., Exs., Ex. K, 2006 North Chicago Water Quality Report.) Given that fact, and the dynamic nature of the lake’s water, *see* U.S. E.P.A & Gov’t of Canada, *Great Lakes: Environmental Atlas and Resource Book*, ch. 2, § 4, available at, <http://epa.gov/greatlakes/atlas/index.html>, plaintiffs say the risk that the lead found in North Chicago’s water will migrate to the intakes for Highland Park is sufficiently concrete to support the injury component of standing.

Assuming, *arguendo*, that the movement of the lake’s water could cause contaminants found near North Chicago to migrate to Highland Park, Pollack would have standing only if the evidence showed that the migration has injured him. It does not. On the contrary, the most recent reports for North Chicago and Highland Park show that the lead levels in those cities’ drinking water are 11 ppb

and 9.2 ppb, respectively, well below the 15 ppb limit set by the government. *See* City of Highland Park 2008 Drinking Water Quality Report, available at, <http://www.ci.highland-park.il.us/pdf/pw/waterQualityReport.pdf> at 3; (Pls.' Reply Supp. Mot. Prelim. Inj., Exs., Ex. K, 2006 North Chicago Water Quality Report).

Plaintiffs acknowledge that the reported lead levels are within governmental limits, but they say that fact is not dispositive of the injury issue because: (1) the bullets will continue to degrade as long as they remain in the lake; and (2) the lead level readings from North Chicago and Highland Park are "limited in number and do not account for the ability of lead to bioaccumulate in tissue and organs." (Pls.' Reply Supp. Mot. Prelim. Inj. at 8.)

Plaintiffs have not, however, offered evidence that supports those assertions. The 1986 appraisal of the North Chicago site says that it has been used as a firing range since 1918, and, as a result, the surrounding land and water are contaminated by lead. (Second Am. Compl., Ex. G, Real Estate Appraisal of 4/25/86 at 1-2.) If, as plaintiffs assert, lead bullets continuously degrade when they are in water, then North Chicago and Highland Park's historical drinking water quality reports should show a consistent increase in lead levels. And, perhaps they do. But plaintiffs have not provided those reports or any other evidence that shows lead levels have been on the rise or connects those increases to bullet degradation. Nor have they shown, through affidavits or otherwise, that the water tests done by North Chicago and Highland Park are "limited in number," that lead accumulates in human organs and tissue, or that the 15 ppb lead level established by the government does not account for that accumulation. Absent such evidence, plaintiffs have not demonstrated that Pollack's drinking water has been or is likely to be rendered unsafe by defendants' operation of the North Chicago range.

Alternatively, Pollack says he has been injured because: (1) “the enjoyment [he] get[s] [from] observing” the migration of “shorebirds and water fowl” to and from “the Great Lakes watershed” is “lessen[ed]” by his “concern[] that the lead munitions . . . will harm [the birds]”; (2) he is “less likely” to use the “public areas along the Illinois portion of Lake Michigan” because he fears that “the lead munitions . . . at Foss Park and the beach below the [range] will harm” visitors to those areas; and (3) his “desire to consume fish” from “the waters of the United States” is decreased because he fears the “fish [are] coming into contact with” water contaminated by bullets from the North Chicago range. (Pls.’ Reply Supp. Mot. Prelim. Inj., Exs., Pollack Aff. ¶¶ 5-7.)

There is no question that injury to aesthetic interests, like enjoying wildlife and the natural environment, can be sufficient to confer standing. *See Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972). But “injury in fact . . . requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured.” *Id.* at 735 (quotation omitted).

Pollack has not made the requisite showing. He does not say that he: (1) watches birds that feed at, nest on or routinely use the land or water near the range and his pursuit is being tarnished by fear that the bullets will harm the birds; (2) has stopped using the land near the range, or uses it less, because of his fears of contamination; or (3) has stopped consuming, or decreased his consumption of, Lake Michigan fish because he fears that the bullets have contaminated it. Instead, he says that: (1) his enjoyment of avian migration “from the Great Lakes watershed” is lessened by his fear that the birds in that area – which encompasses all five of the Great Lakes and is 750 miles wide, <http://epa.gov/greatlakes/basicinfo.html> – are being harmed by bullets from North Chicago; (2) he is “less likely” to visit any portion of Illinois’ shoreline, which is sixty-one miles long, *see* National Park Service, *Great Lakes Shoreline Recreation Area Survey*, at 1, available at, http://www.nps.gov/history/history/online_books/rec_area_survey/great-lakes/il.htm, because he

fears that people who visit that land will be harmed by contamination from the range; and (3) he has less desire to eat fish from U.S. waters, a source that presumably includes all bodies of water within or bordering on this country, because he fears that the fish have been in contact with water contaminated by bullets from the range. (Pls.' Reply Supp. Mot. Prelim. Inj., Exs., Pollack Aff. ¶¶ 5-7.) In other words, Pollack says he has standing to sue because defendants have harmed his general interest in the welfare of the wildlife and environment of the entire Great Lakes, not because their actions have harmed him in any personal or individual way as Article III requires. *See Sierra Club*, 405 U.S. at 735 (allegations that land development in a national park "would destroy or otherwise adversely affect the scenery, natural and historic objects and wildlife of the park and would impair the enjoyment of the park for future generations" did not give the Sierra Club standing to contest the development because there was no evidence that its members used the park "in any way that would be significantly affected by the proposed" development). Defendants' motion to dismiss Pollack's claims for lack of subject matter jurisdiction is, therefore, granted.

The result is the same for Blue Eco Legal Council, "an environmental organization with an interest in the environmental safety of the Great Lakes watershed" whose members are "Great Lakes residents whose drinking water supply and natural environment is harmed by Defendants' actions." (Second Am. Compl. ¶ 3.) Blue Eco has standing if: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977).

Like Pollack, the other members of Blue Eco have standing to sue only if defendants' alleged actions harm or threaten to harm them in some concrete way. Pollack, as Executive Director of Blue

Eco, submitted an affidavit that says he and twenty-seven other people are members of the organization. (Pls.' Reply Supp. Prelim. Inj., Exs., Blue Eco Aff. ¶ 7.) As noted above, plaintiffs have not shown that Pollack has standing, and the record is equally barren for the other members of the group.¹ Because plaintiffs have not shown that Blue Eco satisfies the first element of organizational standing, the Court grants defendants' motion to dismiss its claims for lack of subject matter jurisdiction.

Conclusion

For the reasons set forth above, the Court grants defendants' motion to dismiss the second amended complaint for lack of subject matter jurisdiction [doc. no. 47], and strikes as moot plaintiffs' motions for a temporary restraining order [doc. no. 27], a preliminary injunction [doc. no. 13] and to expedite the motion for preliminary injunction [doc. no. 28]. This case is terminated.

SO ORDERED.

ENTERED: September 12, 2008



HON. RONALD A. GUZMAN
United States District Judge

¹Plaintiffs submitted the affidavit of only one other Blue Eco member, Darren Miller, whose injury assertions are identical to those made by Pollack in paragraphs five and six of his affidavit. (*Compare* Pls.' Reply Supp. Mot. Prelim. Inj., Exs., Pollack Aff. ¶¶ 5-6, *with id.*, Miller Aff. ¶¶ 5-6.)