IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 08-3857

STEVEN B. POLLACK and BLUE ECO LEGAL COUNCIL

Plaintiffs/Appellants

v.

UNITED STATES DEPARTMENT OF JUSTICE; UNITED STATES COAST GUARD, UNITED STATES DEPARTMENT OF THE NAVY; UNITED STATES MARINES; UNITED STATES DEPARTMENT OF DEFENSE

Defendants/Appellees

ANSWERING BRIEF FOR THE FEDERAL APPELLEES, UNITED STATES DEPARTMENT OF JUSTICE, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
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OPINION BELOW

The opinion of the district court (Hon. Ronald A. Guzman) is not reported. It is reproduced at pp. 12-19 of the "short appendix"to the opening brief (Short App. 12-19) .

JURISDICTION

A. District Court Jurisdiction. – In the district court, the plaintiffs, Steven B. Pollack and Blue Eco Legal Council ("Blue Eco") alleged jurisdiction pursuant to 28 U.S.C. 1331; the Clean Water Act, 33 U.S.C.

1365; the Resource Conservation and Recovery Act (RCRA); 42 U.S.C. 6972(a)(1)(A) & (B); the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA); and the Federal Tort Claims Act (FTCA). The Jurisdictional Statement at pp. 1-2 of Mr. Pollack's and Blue Eco's (collectively, "Pollack's") brief (Br. 1-2) is not complete and correct, because, among other things, the district court concluded that Pollack lacked standing to sue.

B. Appellate Jurisdiction. – This Court's jurisdiction rests on 28 U.S.C. 1291. The district court entered final judgment on September 12, 2008. Pollack filed a timely notice of appeal on November 9, 2008, within sixty days of the entry of judgment, as required by Fed. R. App. P. 4(a)(1) and 28 U.S.C. 2107.

ISSUES PRESENTED

Pollack sued under various citizen-suit provisions to challenge alleged contamination of the waters of Lake Michigan from firearms training activities conducted in, and on federal property abutting, the lake. The issues are:

1. Whether Pollack established standing to sue by alleging injury from contamination of drinking water drawn from Lake Michigan where

no evidence showed that the challenged activities had affected, or were likely to affect, the drinking water.

2. Whether Pollack established standing to sue by alleging injury to his enjoyment of wildlife and the envrionment from contamination of Lake Michigan, where no evidence demonstrated that any particular area or activity previously enjoyed by Pollack had been impaired by contamination from the challenged activities.

STATEMENT OF THE CASE

This case concerns standing to challenge certain federal firearms training activities in the Great Lakes area. Steven Pollack and Blue Eco Legal Council, a self-styled environmental organization, allege broadly that federal firearms training activities in and abutting Lake Michigan have resulted in violations of various federal environmental statutes and have injured Pollack's aesthetic interests in the environment of the Great Lakes watershed, as well as his interests as a user of drinking water drawn from Lake Michigan and as a "beneficiary" of Illinois's "trust ownership" of the bed of Lake Michigan.

The district court dismissed the case for want of standing. It found that Pollack had failed to show that he had suffered injury from the effects

of the challenged activities on drinking water or fish. It further concluded that Pollack had not shown that the challenged activities would have an injurious effect on his aesthetic interests, and instead had alleged only generalized injury to the welfare of the wildlife and environment of the entire Great Lakes.

STATEMENT OF THE FACTS

A. Factual Background – Since 1918, federal military and law enforcement agencies have used a site located on bluffs above Lake Michigan in North Chicago, Illinois, (the "FBI Range") for various kinds of firearms training. For decades, "impact berms" designed to prevent the intrusion of ammunition into the bed or waters of Lake Michigan have been in use at the FBI Range. In addition, during 2006, the United States Coast Guard conducted live-fire training activities in Lake Michigan. It is undisputed that the Coast Guard's training activities were discontinued in 2006.

Pollack sued various federal agencies (Short App. 20), seeking declaratory and injunctive relief – including a declaration of liability for

CERCLA response costs – and $55.2 million in damages.[1/] Pollack alleged generally that discharges of lead bullets from the FBI Range and from live-fire training exercises conducted by the Coast Guard were "damaging natural resources and the public water supply" and had resulted in the violation of a host of federal environmental statutes (Supp. App. 1). His Complaint sought orders enjoining the firearms training activities and requiring the payment of damages for the assessment and removal of hazardous material from the bed of Lake Michigan (*id.* at 12). Pollack further claimed damages pursuant to the Federal Tort Claims Act for violation of the common law of nuisance (*id.* at 13).

1. The FBI Range. – Pollack sought to enjoin the use of the FBI Range for firearms training. The Range is located in the city of North Chicago, Illinois, and is currently operated by the Federal Bureau of Investigation. The FBI Range occupies an area of approximately 14 acres and is located on bluffs overlooking Lake Michigan. The FBI Range is the primary small

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[1/] Because the district court concluded that Pollack had not established the existence of a justiciable case or controversy, it had no occasion to address whether, as a claim for damages in excess of $10,000, the action at issue here was within the exclusive jurisdiction of the Court of Federal Claims. See 28 U.S.C. 1346.

arms training and qualification facility for hundreds of FBI special agents and thousands of state, local, and municipal law enforcement agents throughout the region, as well as the Navy and the Marines. The Range has been in use continuously since it was acquired by the Navy in 1918, as a practice range for training with various types of small firearms. It includes a federally controlled "Impact Area" of approximately 2,975 acres in Lake Michigan. See 33 C.F.R. 334.830. Early use of the facility by the military may have involved direct firing into a much larger "impact area," (see 13 Fed. Reg. 9547 (Dec. 31, 1948)) access to which was carefully controlled to prevent danger to vessels on the water. See 33 U.S.C. 3; 33 C.F.R. 334. Although a portion of Lake Michigan remains designated as a safety area, since at least 1979, firearms training on the Range has not involved firing into the lake and instead is conducted using ballistic backstops, also known as impact berms, designed to capture the ammunition discharged at the site.[2/] The Range has not operated since April of

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[2/] In January 2008, the FBI permanently discontinued its use of a shotgun range at the site (Supp. App. 59-60). The record shows that, while skeet shooting that occurred on this shotgun range was not directed into a backstop, it occurred infrequently; it involved steel shot, not lead; and it is unlikely that the steel pellets entered the lake (*id.*).

2008.

The FBI took over the operation of the Range in 1976.[3/] Since that time, all training targets on the Range have been situated in front of the ballistic backstops or other devices designed to intercept fired bullets. See 44 Fed. Reg. 66,213 (Nov. 19, 1979). At the time the site was transferred from the Navy to the FBI, an environmental assessment report indicated that lead and other potentially hazardous materials were present at the site (see App. 39-41). Lead and other metals were removed from the berms sometime before 1986 (Supp. App. 33).

The FBI is currently conducting an evaluation and preliminary assessment of the FBI Range pursuant to 40 C.F.R. § 300.410 (Supp. App. 16) to determine whether releases of hazardous substances from the site may be occurring. In April of 2006, the FBI commissioned an environmental assessment, the results of which led the FBI to undertake analytical sampling of soils, groundwater and Lake Michigan sediment at the FBI Range in October of 2007 (*id.*). Based on the results of the sampling and

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[3/] The FBI leased the Range from the U.S. Navy from 1976 until 1987. In September 1987, the General Services Administration transferred the property to the FBI (See Supp. App. 28).

the 2006 assessment report, the FBI commissioned further studies pursuant to CERCLA section 104, 42 U.S.C. 9604, to characterize the hydrogeological conditions of the FBI Range and to collect additional soil, water, and sediment samples from the FBI Range, the neighboring park ("Foss Park"), and Lake Michigan. Results of this preliminary assessment and site inspection are expected in the near future and will be reviewed by the FBI and other appropriate agencies to determine whether additional response actions are required.

2. The Coast Guard training exercises

The Coast Guard provides for the security of the Great Lakes region, including, among other things, 11 major ports, 13 nuclear power plants, and 348 regulated terminals and facilities. 72 Fed. Reg. 520, 521 (Jan. 5, 2007). To counter overseas, cross-border, and domestic threats, the Coast Guard began arming Coast Guard cutters and smaller vessels in the Great Lakes, giving rise to the need for training in the maritime environment in which it operates. *Id.* In light of these new training needs, the Ninth District of the Coast Guard conducted live-fire weapons training exercises at various locations on the five Great Lakes in 2006.

In August of 2006, the Coast Guard published a proposed regulation

that would have established permanent "safety zones" throughout the Great Lakes from which vessels would be excluded during live-fire gun exercises. 71 Fed. Reg. 43,402 (Aug. 1, 2006). Following numerous public hearings and review of public comments raising concerns about, among other things, the number and location of the proposed safety zones as well as public safety, environmental, and other issues, the Coast Guard withdrew the proposal to conduct further gunnery training on the Great Lakes. 72 Fed. Reg. at 520-21. The Coast Guard has not proposed to conduct further live-fire training exercises in the Great Lakes since the withdrawal of its proposed rule in December 2006.

B. Procedural Background

On January 14, 2008, Pollack filed suit against the United States Navy, Marines , Coast Guard, Department of Defense, and Department of Justice. As amended (Clerk's Record entry No. 36 (CR 26), see Short App. 4), the Complaint charged that the accumulation of lead bullets discharged into "state-owned lake beds" had damaged "natural resources and the public water supply."[4/] It sought declaratory judgment that the federal

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[4/] The Complaint alleged violations of the Clean Water Act, 33 U.S.C. 1362; (continued...)

defendants were liable for the costs of the assessment, remediation and damages alleged (Supp. App. 12) and an injunction prohibiting the federal defendants from discharging lead bullets into "waters of the United States" or onto public lands adjoining the FBI Range. Additionally, it sought 1) payment into escrow by the federal government of $35.2 million for the cost of underwater assessment and removal of hazardous materials from the bed of Lake Michigan, and 2) payment of $20 million in tort damages to environmental organizations with which Blue Eco is not affiliated (Supp. App. 12-13).

Between the filing of the Complaint and April 30, 2008, when the United States filed its motion to dismiss, Pollack filed a motion for a preliminary injunction, a motion for a temporary restraining order, two amended complaints, and multiple motions for discovery and sanctions. The district court allowed the parties to conduct limited discovery, and the

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[4/](...continued)
and the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6972; "releases" within the meaning of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. 9601, resulting in response costs and natural resource damages under sections 9607 and 9620 of that act; and violations of the common law of nuisance under Illinois state law (Supp. App. 7-12).

United States took discovery regarding the basis of Pollack's standing, which resulted in affidavits of Blue Eco, Steven B. Pollack, as the Executive Director of Blue Eco, and Darren Miller, a member of the organization (App. 2-9).[5/]

Pollack's affidavit stated (App. 5) that he is a resident of Highland Park, Illinois, that his community drinks water drawn from Lake Michigan, and that he is concerned that the presence of lead in the water is "negatively affecting the drinking water supply" of his and other communities he visits that draw their drinking water from the lake (*id.*). Pollack also alleged that he enjoys "watching wildlife in the Great Lakes watershed" and uses "public areas along the Illinois portion" of the shore of Lake Michigan (*id.*). He alleged injury from his "concern" that the presence of lead bullets at and adjacent to the FBI Range "will harm local

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[5/] For purposes of standing, there is no distinction between Blue Eco Legal Council and Steven Pollack, its executive director, as the district court correctly concluded (Short App. 19 & n.1). Blue Eco Legal Council is unincorporated, has no defined purpose other than to sue government and other entities to enforce environmental laws, and consists of volunteers loosely affiliated with Mr. Pollack (App. 2). To the extent that Blue Eco Legal Council alleged representational standing on behalf of its members, Blue Eco relied on the affidavits of Mr. Pollack and a second, nearly identical affidavit signed by Darren Miller, the only other member of the organization claiming injury here (Compare App. 5 with App. 8).

shorebirds and waterfowl" and "will harm visitors to these public areas," making it "less likely" that he himself might visit them, and decreasing his enjoyment of observing wildlife and his desire to consume "freshwater and ocean fish" (*id.*).

The federal defendants moved to dismiss the complaint for lack of subject matter jurisdiction (CR 35), asserting, among other grounds for dismissal, that Pollack lacked standing to sue.[6/] On September 12, 2008, the district court granted the federal defendants' motion (Short App. 19).

The district court concluded that the record did not establish that Pollack had suffered injury- in-fact, and that he therefore lacked standing (Short App. 18). With respect to injury from lead in drinking water, the court noted that the evidence did not establish that Pollack was injured by

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[6/] The motion rested on legal deficiencies requiring the dismissal of each of the counts of the complaint, in addition to lack of a justiciable case or controversy. Among other deficiencies, Pollack's statutory claims regarding the FBI Range are barred by 42 U.S.C. 9613(h), because there is an ongoing CERCLA response at the site; his claims for response costs and injunctive relief pursuant to CERCLA must be dismissed in any event because Pollack has not incurred response costs, and injunctive relief is not available under CERCLA; the RCRA and CWA claims regarding the Coast Guard training exercises impermissibly allege"wholly past" violations, and in any event the RCRA claims are addressed to actions that are not subject to RCRA; and Pollack failed to exhaust administrative relief as required by the FTCA.

lead in his drinking water because the evidence showed no connection between the challenged activities and Highland Park's drinking water. Moreover, the evidence showed that the lead concentration in the drinking water supply for the City of Highland Park was below the federal limit of 15 parts per billion ("ppb") (Short App. 15). The district court also rejected Pollack's allegation that he was injured for purposes of standing on the ground that lead in higher concentration in the drinking water in North Chicago would migrate to the location of the Highland Park water intake and thereby affect him (Short App. 15). The court noted that North Chicago's reported lead concentration, while slightly higher than that of Highland Park, was nonetheless "well below" the 15 ppb federal limit, and that Pollack had offered no evidence to suggest either that the lead in the North Chicago water was attributable to lead bullets from the FBI Range or that the lead found in North Chicago's water was likely to migrate to the intakes for highland Park and result in increased lead in Pollack's water (*id.*). It therefore dismissed as speculative Pollack's allegation that the challenged training activities had caused, or were likely to cause, Pollack to be injured by exposure to lead in drinking water (Short App. 15-16).

With respect to the alleged injury to Pollack's enjoyment of wildlife and his diminished desire to consume fish, the district court again found that Pollack had failed to make the requisite showing to establish standing (Short App. 17). It found that Pollack's statements amounted to an assertion that he had standing "because defendants have harmed his general interest in the welfare of the wildlife and environment of the entire Great Lakes, not because the actions have harmed him in any personal or individual way," as required by Article III (Short App. 18). Because Blue Eco Legal Council's purported standing to sue was derived from injury to its members as reflected in Pollack's affidavit, the district court concluded that Blue Eco also lacked standing to sue and dismissed the Complaint for want of jurisdiction (*id.*). This appeal followed.

SUMMARY OF ARGUMENT

The district court correctly applied this Court's precedents in granting the government's motion to dismiss on the ground that Pollack lacked standing. Following discovery directed at jurisdictional facts, the district court concluded that Pollack had not established injury-in-fact where he relied on unsupported assertions that the challenged activities threatened to affect his drinking water and on generalized claims of injury

to fish in waters of the United States and to the environment of the Great Lakes region. The district court's rejection of his assertions was fully consistent with this Court's precedents, which allow consideration of all jurisdictional evidence in the record where a party challenges the court's subject-matter jurisdiction.

Pollack did not show that his drinking water had been, or was likely to be, affected by the challenged firearms training activities. Instead, he asserted, without supporting evidence, that the challenged activities had caused lead to contaminate water and sediments and that the contamination was likely to affect his drinking water. The record showed that municipal drinking water, both in Pollack's community and in the community where the contamination allegedly is occurring, is within federal safety standards and that both communities have attributed existing lead in their water to sources other than contamination of Lake Michigan from federal firearms training activities. In the absence of evidence supporting a claim that the challenged activities may have affected his drinking water, the district court properly concluded that Pollack had not established standing as a user of drinking water drawn from Lake Michigan.

The record is equally devoid of evidence of particularized environmental injury. Although Pollack alleged that he enjoys observing wildlife, he did not provide any basis for a conclusion that wildlife he has observed, or has planned to observe in the future, has been, or is likely to be, adversely affected by the challenged activities. His statements that he uses and enjoys public areas along "the Illinois portion of Lake Michigan" and "eating freshwater and ocean fish" are similarly overbroad, particularly where he does not allege that his behavior, as opposed to his mental state, has been affected in any way by his concern that the challenged firearms training activities have injured the environment or fish. Because alleged harm to the general environment does not support standing in the absence of particularized harm to Pollack, the district court correctly concluded that Pollack lacked standing, and properly dismissed his complaint.

ARGUMENT

A. Standard of review

In this case the district court granted a motion to dismiss on the ground that the plaintiffs had failed to establish standing to sue. This appeal therefore presents a question of law that is subject to *de novo*

review. *Winkler v. Gates*, 481 F.3d 977, 982 (7th Cir. 2007) ("[w]hether a party has standing to bring a 'case or controversy' before the court is a question of law that this court reviews de novo"). Where factual findings entered into the district court's decision, those findings are reviewed for clear error. *Id.*

B. Pollack has not established standing to sue.

Article III of the United States Constitution restricts the jurisdiction of the federal courts to the resolution of actual "cases" and "controversies." U.S. Const. art. III, § 2, cl. 1. "[T]he doctrine of standing serves to identify those disputes which are appropriately resolved through the judicial process." *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). Whether a party has standing is a "threshold jurisdictional question" courts must address before adjudicating the merits. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 93-102 (1998).

The Supreme Court in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), described the irreducible minimum that a plaintiff seeking to invoke a federal court's jurisdiction must demonstrate in order to have standing. A plaintiff must establish (1) that they have suffered an "injury in fact" — an "invasion of a legally protected interest which is (a) concrete

and particularized, and (b) actual or imminent, not conjectural or hypothetical;" (2) that their injury is fairly traceable to the challenged action of the defendant, and not the result of the "independent action of some third party not before the court;" and (3) that it is likely as opposed to merely speculative that their injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife,* 504 U.S. at 560-61 (citations and internal quotation marks omitted).

1. The district court properly considered the factual evidence concerning whether Pollack had been, or was likely to be, injured by the challenged activities.

On a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1), the court is not bound to rely on the allegations in the complaint and may properly look to evidence beyond the pleadings. *See, e.g., Commodity Trend Service, Inc. v. Commodity Futures Trading Com'n,* 149 F.3d 679, 685 (7th Cir. 1998) ("The presumption of correctness that we accord to a complaint's allegations falls away on the jurisdictional issue once a defendant proffers evidence that calls the court's jurisdiction into question. At that point, a court need not close its eyes to demonstrated jurisdictional deficiencies in a plaintiff's case and accord a plaintiff's unproven allegations greater weight than substantive evidence to the

contrary."); *International Harvester Co. v. Deere & Co.*, 623 F.2d 1207, 1210 (7th Cir.1980). Therefore, although the general factual allegations of injury resulting from the defendant's conduct ordinarily suffice on a motion to dismiss, where the court presumes that general allegations embrace those specific facts that are necessary to support the claim, *Lujan v. National Wildlife Federation*, 497 U.S. 871, 889 (1990), where jurisdictional facts are challenged, the court may look behind the bare allegations of the Complaint. See, *e.g.*, *Calderon v. United States*, 123 F.3d 947, 951 n.2 (7th Cir.1997) (courts "may properly look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists") (quotation omitted). Therefore, as the district court correctly observed (Short App. 14), 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. *Grafon Corp. v. Hausermann*, 602 F.2d 781, 783 (7th Cir. 1979) ("In cases where the jurisdiction of the court is challenged as a factual matter, the party invoking jurisdiction has the burden of supporting the allegations of jurisdictional facts by competent proof").

In this case, the federal defendants raised factual questions concerning Pollack's alleged injury (see Short App. 14), and conducted directed discovery, in which Pollack filed affidavits to rebut the federal defendants' challenge (see App. 2-9) to his standing. The district court therefore was not required to rely on the remarkably broad statements contained in the Complaint that purported to establish injury-in-fact, and properly reviewed all of the jurisdictional evidence in the record. It concluded that despite the opportunity to provide specifics, Pollack had failed to establish standing because he had not shown that he had been, or was likely to be, adversely affected by the challenged training activities (Short App. 15-18; and see Br. 14).

Pollack stated in his affidavit that he resides in Highland Park, a community located approximately 13 miles south of the FBI Range (App. 5). He further stated that he "is concerned" that the discharge of lead munitions into lake Michigan is negatively affecting the drinking water of his and other communities, and is also concerned that such discharges "will harm local shorebirds and waterfowl," and are "bioaccumulating in the tissue and organs of fish coming into contact with" water contaminated by them (*id.*). But his affidavit, like his Complaint, failed to connect

any injury to Pollack with facilities or water in North Chicago, where the Range is located. First, his affidavit did not show that he has been injured by exposure to lead in drinking water, because he did not show that the water in Lake Michigan generally contains elevated levels of lead that could be attributed to the challenged activities, and the record shows that his drinking water is within federal safety standards. Moreover, he did not state that he or any other member of Blue Eco resided in North Chicago at the time the Complaint was filed, drank or used water from the vicinity of the FBI Range, ate fish from Lake Michigan, or had used Foss Park or other public areas in the immediate vicinity of the FBI Range. And the record contained no evidence that Pollack had previously used or enjoyed a particular location, or had viewed wildlife, that allegedly had been, or was likely to be, contaminated with lead by the training activities. The district court concluded (Short App. 16-18) that the injury reflected in Pollack's statements was not sufficiently concrete or particularized in the absence of evidence that the alleged contamination had invaded, or threatened to invade, his drinking water; or had caused environmental damage to particular areas or wildlife used or enjoyed by Pollack or other

Blue Eco members.

Pollack appeals from this ruling on the ground that the district court erred by concluding that the evidence in the record was insufficient to support the injury to Pollack alleged in his lawsuit. Pollack incorrectly contends (Br. 27) that his affidavit "surpassed the threshold for establishing a case and controversy; and that the district court's "extra-constitutional" requirement of further evidence erroneously required Pollack to "prove that his water quality was degraded above 15 ppb [of lead]" (*id.*), contrary to this Court's precedents. As we show below, the district court properly applied well-established legal principles. It created no new requirements, and instead carefully examined the jurisdictional evidence in the record in light of this Court's precedents, and concluded that Pollack had not provided the "competent proof" required to establish standing. See *Grafon Corp. v. Hausermann*, 602 F.2d at 783.

2. *Pollack did not demonstrate "actual or imminent" injury from contamination of drinking water because he provided no evidence, in affidavits or otherwise, linking his drinking water to the challenged activities.*

Pollack challenges the district court's conclusion that the record is devoid of critical evidence. He erroneously contends (Br. 15) that it was

"legal error" for the court to conclude – in the absence of any evidence supporting a connection between bullets at the FBI Range and drinking water 13 miles away – that Pollack had failed to establish injury for purposes of demonstrating his standing to sue. To the contrary, confronted with a challenge to the jurisdictional facts alleged in Pollack's Complaint, the district court applied the correct standard and properly considered evidence submitted by both parties on the question of Pollack's standing.

As the district court properly concluded, the jurisdictional evidence failed to support his contention that his drinking water is, or is likely to be, affected by contamination allegedly resulting from firearms training activities. Pollack resides in Highland Park, Illinois, approximately 13 miles south of North Chicago, where the FBI Range is located (Short App. 15). Pollack did not provide any evidence that Lake Michigan as a whole contains elevated concentrations of lead that could be attributed to the challenged activities. Indeed, the only evidence in the record relevant to drinking water safety consisted of recent water quality reports for both Highland Park and North Chicago, which showed that the lead level in

each community's water supply in was well within federal safety standards (Short App. 16), and that both identified the corrosion of household plumbing systems and erosion of natural deposits – not contamination in water from Lake Michigan – as the likely sources of lead in the water (Short App. 16; Supp. App. 66).

These facts raised substantial questions about Pollack's contention that he had standing as a user of drinking water drawn from Lake Michigan. Faced with this challenge, Pollack failed to provide evidence connecting the Highland Park municipal drinking water to any contamination from firearms training activities, and instead offered bare assertions that the chemical and physical forces at work in the lake would cause the alleged contamination from the challenged activities to threaten his drinking water. But to support standing, the injury or threat of injury must be both "real and immediate," not "conjectural" or "hypothetical." *Summers v. Earth Island Institute*, 555 U.S. __ at slip op. 7-8 (2009); *City of Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983). The district court therefore correctly declined to rely on Pollack's unsupported contentions, pointing out that they actually raised more questions than they answered (Short

App. 16). See *Public Citizen v. National Highway Traffic Safety Admin*, 513 F.3d 234, 238 (D.C. Cir. 2008) ("the constitutional requirement of imminence as articulated by the Supreme Court requires a very strict understanding of what increases in risk or risk levels will support injury in fact") (internal quotation marks omitted).

On appeal, Pollack again invites the Court to assert jurisdiction based on unsupported allegations (Br. 22-23) that he lives "in the path of the environmental degradation" and that "any lake sediment contaminated by the FBI facility will travel down the lake toward Highland Park." Pollack now speculates that the presence of lead in sediments at the FBI Range, combined with the "littoral drift of sediments," will cause lead from the FBI Range to contaminate Highland Park's water supply. He invites this Court to assume the accuracy of his statements (Br. 22 -23) that the discharge of bullets at the Range has contaminated the sediments, that natural forces will wash lead-laden sediments in the direction of Highland Park, and that the presence of those sediments is likely to affect the quality of the Highland Park water supply, none of which was included in his Complaint or his affidavit. He also asks this Court to

conclude that the district court erred by requiring him to establish facts, rather than conjecture, to support his claim of injury. This Court should decline Pollack's invitation.

As the district court observed, Pollack made no attempt to connect his water to the activities he challenged. For example, (Short App. 16), if Pollack had shown that drinking water quality reports showed a steady increase in lead over the course of the decades during which the firearms training activities have been conducted, those reports might support an inference that the activities were causing lead to be present in drinking water drawn from Lake Michigan. But Pollack provided no evidence showing such an increase, nor any other evidence that the intrusion of lead bullets into the lake has had, or is likely to have, *any* effect on drinking water consumed by Pollack. Nor did Pollack allege that his "concern" regarding the presence of lead in his drinking water has affected his behavior. Pollack did not allege that he has ceased to use his local tap water for personal consumption or otherwise has altered his conduct, despite his knowledge that lead is present in the water.

On the record here, it is purely conjectural that the existing – safe –

lead concentration in Highland Park's municipal water supply is related to the challenged firearms training activities. The only evidence in the record relating to the source of lead in that water supply suggests otherwise: The City of Highland Park has concluded that the likely source of lead is not from the lake, but rather from corrosion in household plumbing (Supp. App. 66). Even assuming that the unsupported statements in Pollack's brief (Br. 23) are correct, therefore, the record does not support an inference that Pollack has been, or is likely to be, injured by the training activities he seeks to enjoin by virtue of lead contamination in his drinking water. Nor is there evidence that a court order could redress the "injury" reflected in lead concentrations in excess of zero (see Br. 22). See, *e.g., City of Elk Grove Village v. Evans*, 997 F.2d 328, 329 (7th Cir. 1993) (even small probability of injury may support standing where the relief sought would reduce the probability). As the district court correctly concluded (Short App. 16), in the absence of evidence that Pollack's bald assertions are true, Pollack has not demonstrated that Pollack or any other Blue Eco member has suffered actual or threatened injury to his drinking water from the challenged firearms training

activities.

Pollack asserts that the required nexus is shown here by the presence of lead both at the FBI Range and in the drinking water of communities served by Lake Michigan. need not establish a connection to the challenged activities where a substance discharged upstream is found in downstream water, relying (Br. 28) on *Friends of the Earth v. Gaston Copper Recycling Corp.*, 204 F.3d 149 (4th Cir. 2000). He contends that the mere presence of lead is sufficient to establish the required nexus. Pollack's reliance on *Gaston Copper* is misplaced.[7/]

In *Gaston Copper*, the plaintiff organization alleged standing to challenge illegal discharges from a recycling facility located four miles

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[7/] Pollack suggests that *Gaston Copper* is dispositive of the standing question in this case and that the government had an ethical duty to bring it to his attention. As we discuss, the facts in *Gaston Copper* were significantly different from the facts here. In this case, the alleged contamination occurred significantly farther from any area in which the plaintiffs could claim a protected interest, there was no evidence that contamination from the challenged activities was ever detected in an area used by the plaintiffs, the alleged connection to the activities was based on the presence of lead in municipal drinking water although the record supported an alternative source of lead, and the plaintiffs did not allege any change in their behavior prompted by the presence of the contamination. The United States accordingly has not taken conflicting legal positions in the two cases, and was under no duty to advise Pollack or the district court of the existence of this Fourth Circuit precedent.

upstream on the ground that materials discharged from the facility had been found in a lake owned by a member of the plaintiff organization and located entirely on his property. *Gaston Copper Recycling Corp.*, 204 F.3d at 153. The Court in *Gaston Copper* noted that the plaintiff had "submitted various federal, state, and private studies as evidence that the pollutants released by Gaston Copper adversely affected or threatened" a privately-owned lake; and that the owner of the lake used it regularly for fishing and swimming and alleged that his grandchildren swam and fished in it almost daily during the summer. *Id.* at 151, 153. The allegations in *Gaston Copper* included that the lake owner limited the amount of time that his family swam in the lake and the quantity of fish that they ate from it out of fear of the effects of Gaston Copper's chemicals. *Id.* at 153. The owner also alleged that actual or threatened pollution had diminished the value of his property. *Id.* The lake at issue in *Gaston Copper* was situated within a river system, with a known and predictable flow of water, and the contaminants found reflected a cocktail of multiple substances known to have been discharged by the recycling facility. *Id*. at 152.

In contrast, there is no evidence in the record that the alleged

discharges challenged here are "upstream" from Highland Park or otherwise could be associated with Highland Park's drinking water. *Gaston Copper* provides no support for Pollack's attempt to connect the challenged activities to municipal drinking water through a single, common contaminant (lead) closely associated with a source (household plumbing) unrelated to the waterway.

Nor did Pollack provide evidence connecting allegedly contaminated lake water with any plaintiff. The Complaint did not allege that Pollack or any other Blue Eco member has ever fished or swum in any part of Lake Michigan. And, unlike the plaintiffs in *Gaston Copper*, Pollack does not own or use property that allegedly has been contaminated and does not contend that he regularly uses the areas allegedly contaminated by activities at the FBI Range,[8/] or has ceased to use or visit such areas. Indeed, Pollack's *only*

[8/] Despite Pollack's statements (Br. 6,23) *e.g.* that "contamination affects * * * Blue Eco's North Chicago members," any alleged injury to these members is irrelevant to Blue Eco's appeal. No affidavit was filed below to support any such injury. Indeed, Blue Eco's affidavits demonstrate that it did not represent any North Chicago residents at the time the Complaint was filed. It therefore may not rely on injury to these members, who were recruited for the purpose of establishing standing after the Complaint was filed. Compare Supp. App. 70 with App. 2). Blue Eco must demonstrate standint at the time of the filing of its Complaint. *Perry v. Village of*
(continued...)

visit to Foss Park or to any area allegedly affected by the FBI Range reflected in the record here took place *after* he filed the complaint in this case (App. 11,17). Indeed, the record does not even contain any allegation that Pollack has changed his habits with respect to water or fish drawn from Lake Michigan, and instead merely asserts (App. 5) that he is *concerned* about contamination of his drinking water; and that he no longer *desires* to eat fish from *any* water body, including the oceans, as much has he previously desired to do so. Accordingly, nothing in the reasoning of the court in *Gaston Copper* is inconsistent with the district court's conclusion in this case that Pollack's affidavits were insufficient to demonstrate standing.

3. Pollack did not establish "particularized" environmental injury, because he failed to show that any particular wildlife or area that he had used or enjoyed had been, or was likely to be, contaminated by the challenged firearms training activities.

The district court found (Short App. 17) that the evidence failed to establish Pollack's standing based on environmental harm, because the

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[8/](...continued)
Arlington Heights, 186 F. 3d 826, 830 (7th Cir. 1999) ("Because standing goes to the jurisdiction of the federal court to hear a particular case, it must exist at the commencement of the suit") .

highly general statements in Pollack's affidavit failed to establish the required nexus between Pollack and the harm alleged. Pollack incorrectly equates (Br. 26) the district court's requirement that the evidence show actual or imminent injury to Pollack with a requirement that it establish "proof of harm to the environment with absolute certainty." But the district court did not reject Pollack's allegations that the challenged activities may have resulted in environmental harm; it merely concluded that Pollack's affidavit did not establish discrete harm that was personal to him or to other members of Blue Eco (Short App. 18). In the absence of such particularlized harm – harm that affects the plaintiff in a personal and individual way – the affidavits did not make the "irreducible minimum" showing to establish injury sufficient to confer standing to sue. *Lujan v. Defenders of Wildlife*, 504 U.S. at 561; *Summers v. Earth Island Institute*, 555 U.S. ___, *slip op.* 4-5. Pollack asserts (Br. 37) that the district court should have inferred nonetheless that he would be injured with respect to his enjoyment of wildlife viewing. To the contrary, it was Pollack's burden to establish each of the elements of standing. *Warth v. Seldin*, 422 U.S. 490, 518 (1975). And where the defendant raises factual questions concerning

jurisdiction, plaintiff has the burden of supporting the jurisdictional allegations of the complaint by competent proof. *Grafon Corp. v. Hausermann*, 602 F.3d at 783.

The affidavits filed in support of Pollack's standing state (see Br. 36) that members of the organization "enjoy watching the wildlife in the Great Lakes watershed" and are "concerned that lead munitions discharged by the federal defendants * * * will harm local shorebirds and waterfowl" and that this "lessens the enjoyment they get from observing them migrate." But these purely subjective fears of environmental hazards do not establish standing. First, the injury alleged must be injury to the plaintiff, not merely injury to the environment. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 181 (2000). Pollack may not assert injury from his "concern" that birds will be injured unless he can establish both 1) a realistic threat of harm to the birds and 2) that he uses the affected area and is a person for whom the aesthetic and recreational values of the area have been, or will be, lessened by the challenged activity. *Id.* at 183.

Pollack has not identified any species of wildlife that uses areas that allegedly have been contaminated by the FBI Range. Nor has Pollack

alleged that any member has observed, or been deterred by the challenged activities from observing, wildlife at the Range or wildlife that use the area affected by the Range as habitat. Instead, Pollack alludes to the presence of lead at the site and in drinking water reports, and states that he enjoys viewing "wildlife" in the "Great Lakes watershed." The district court correctly concluded that these allegations are not sufficiently concrete or particularized to establish standing to sue.

Unlike the plaintiffs in *Sierra Club v. Franklin County*, 546 F.3d 918 (7th Cir. 2008), whose allegations that their aesthetic interests would be impaired were based on evidence that they had frequented the area affected by the challenged project,[9/] Pollack stated only that he enjoyed the environmental values of the "Great Lakes watershed" (App. 5). Pollack's interest in observing the migration of birds in the entire Great Lakes

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[9/] The affidavit of Barbara McKasson, a member of the plaintiff organization in *Franklin County*, explained that "every other year since 1987, McKasson and her family ha[d] taken trips to fish, kayak, camp, and enjoy the natural beauty and clean environment of Rend Lake, located three miles from the proposed plant site. She claim[ed] if the Company buil[t] the plant under the 2001 permit, she w[ould] cease her biennial recreational trips because the pollutants emitted based on the permit w[ould] harm her and diminish her aesthetic enjoyment of Rend Lake." 546 F.3d at 925.

watershed, and "concern" that "fresh water and ocean fish" (*id.*) may have been in contact with water contaminated by bullets from firearms training activities, like taxpayers' interest in the proper use of tax funds, is too generalized to confer standing on a particular individual or group. See *Laskowski v. Spellings*,, 546 F.3d 822, 825 (7th Cir. 2008) ("taxpayers have no direct, personal interest in the money in the Treasury simply by virtue of having paid taxes and therefore suffer no redressible injury when the federal government puts money to unconstitutional use"). Individuals' interest in enjoying the environment is shared in common with all other individuals and is therefore too generalized and attenuated to support Article III standing. See, e.g. *Summers v. Earth Island Institute*, 555U.S. __ *slip op.* at 4; *Lujan v. Defenders of Wildlife,* 504 U.S. at 560-61; *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972).

Similarly, Pollack may not sue to redress injury to his interest in the enforcement of federal environmental laws (see Br. 17). Pollack asserts standing to challenge the federal defendants' actions because he believes that the challenged actions are contrary to Congress's goal in enacting the CWA. But Pollack's interest in the proper enforcement of federal law is not

personal to Pollack, and instead is shared by the public at large. Alleged injury to this interest therefore does not support standing. To establish standing, Pollack "must allege specific, concrete facts demonstrating that the challenged practices harm him, and that he personally would benefit in a tangible way from the court's intervention." *Warth v. Seldin*, 422 U.S. at 508. Absent the necessary allegations of demonstrable, particularized injury, there can be no confidence of "a real need to exercise the power of judicial review" or that relief can be framed "no broader than required by the precise facts to which the court's ruling would be applied." *Id.*, quoting *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 at 221-222 (1974).

In this case, Pollack alleges injury (Br. 38-39) from the government's alleged lack of enforcement of environmental laws against components of the federal government, but offers no facts showing injury from the alleged lack of enforcement that is concrete or personal to him or to other Blue Eco members.[10/] Instead, Pollack incorrectly relies (Br. 37-38) on "evi

[10/] There is no basis for Pollack's argument (Br. 32) that the decision in this case violates the separation of powers doctrine because citizen suits are a necessary check on Executive Branch power. Among other errors in this (continued...)

dence" that wildlife may be injured by lead from firing ranges. Pollack offers facts gleaned from documents[11/] indicating that EPA initiated administrative enforcement action against the operator of a shotgun range upon finding that 218 Canada geese had died of lead poisoning. The evidence presented in that case indicated that lead shot had been discharged into a wetland and had been ingested by the geese, which used the contaminated wetland as a feeding area (Supp. App. 52). But no such facts are alleged here (see Br. 36). Pollack did not offer evidence that wetlands have been contaminated by the activities challenged in this case, nor do his affidavits show that geese – or even shorebirds generally – have been injuriously exposed to lead from the challenged activities. The mere showing that lead is present at the FBI Range does not show that geese have been injured, and proof that Blue Eco members enjoy "viewing wildlife in the Great Lakes watershed" and that their "enjoyment of watching migration" is lessened by knowledge that lead is present at the

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[10/](...continued)
argument, its premise – that the decision prohibits citizen suits – is erroneous. The mere fact that Pollack lacks standing does not insulate the challenged actions from all citizen suits.

[11/] See Supp. App. 49-52.

FBI Range does not, as the district court correctly concluded, establish that any legally protected interest of a Blue Eco member has been, or is likely to be, impaired so as to confer standing to sue.

Nor does Pollack's status as an Illinois resident provide him or Blue Eco with redressible injury. Pollack posits (Br. 18) that because the states own lakebeds in trust for their residents, any alleged injury to the bed of Lake Michigan is actionable by Pollack in his capacity as a resident of Illinois, who is therefore also a beneficiary of the public trust in which Illinois holds a portion of the lakebed. Once again, any such injury is not personal to Pollack, but rather is shared with all other Illinois residents and is accordingly too attenuated to support standing. Pollack lacks a sufficiently personal, concrete interest in the lakebed to sue to protect its "property" interest as a member of the Illinois public. In sum, the district court correctly concluded that Pollack had failed to provide evidence sufficient to establish that a case or controversy within the subject matter jurisdiction of the federal courts was presented. It therefore properly dismissed the Complaint.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify pursuant to Fed. R. App. P. 32(a)(7) that the attached answering brief is proportionately spaced, has a typeface of 14 points or more and contains 7893 words, as counted by Wordperfect 12.0.

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CERTIFICATE OF SERVICE

I hereby certify that on March 3, 2009, copies of the foregoing Brief for the Federal Appellees and Supplemental Appendix were served on counsel by placing them in first class mail, postage prepaid, and addressed to the following:

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