

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

REPLY BY APPELLANTS STEVEN B. POLLACK AND

BLUE ECO LEGAL COUNCIL

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The Department of Justice refuses to address its reversal of position from the amicus brief it filed in *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149 (4th Cir. 2000), App. At 47, with the position it takes in this case. Instead it purports to distinguish the cases based simply on the distance of plaintiffs from the violating discharges. The distance of plaintiffs from the discharges was not the issue in that case but rather, as here, if citizens must prove environmental degradation in a Clean Water Act case or just illegal discharges. The only thing that truly distinguishes the cases is that in *Gaston* the Department of Justice was advocating a position of law in the public interest and here it is zealously defending its own violating discharges.

Here the Department of Justice invites the Seventh Circuit to find defects in Blue Eco members' affidavits and urges that the defects are particular to only this case and only these citizen-appellants. The purported defects, however, involve failure to provide proof of environmental degradation to show standing. Such proof is not required by the environmental statutes and was rejected in the standing inquiry by the Fourth Circuit at the Department of Justice's urging. Further, Blue Eco members' alleged failure to prove environmental degradation above the 15ppb action level of another federal statute is not particular to its members; it represents a hurdle that no citizen can overcome and would allow the FBI and Coast Guard to continue violating the federal statutes.

If this Circuit adopts a position denying standing, it will overrule its decision in *Sierra Club v. Franklin Co. Power of Ill., LLC.*, 546 F.3d 918 (7th Cir. 2008); will

invalidate part of the citizen suit provisions of the Clean Water Act and Resource Conservation and Recovery Act which grant citizen standing for all illegal discharges, not just discharges creating lake killing levels of degradation; will interfere with a check and balance by Congress over the Executive at federal facilities; and will create a conflict between the Seventh and the Second, Fourth, Fifth, Eighth, and Ninth Circuits on an important federal question¹. And possibly unique for a circuit split, the Department of Justice will have taken successful positions on both sides of the issue. Blue Eco urges this Court to resist the Department of Justice's self-serving reversal of its prior well-reasoned position in *Gaston*.

The district court dismissal did significant damage to a meritorious citizen suit on a matter of great public importance. This Court should therefore quickly remand this case with instruction for the district court to determine if these federal agencies have violated federal environmental law.

Respectfully submitted,

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¹ *Friends of the Earth, Inc. v. Consol. Rail Corp.*, 768 F.2d 57 (2d Cir. 1985); *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149 (4th Cir. 2000); *Sierra Club v. Cedar Point Oil Co.*, 73 F.3d 546 (5th Cir. 1996); *U.S. v. Metro. St. Louis Sewer Dist.*, 883 F.2d 54 (8th Cir. 1989); *Ecological Rights Found. v. P. Lumber Co.*, 230 F.3d 1141 (9th Cir. 2000).

**CERTIFICATE OF COMPLIANCE WITH ELECTRONIC VERSION
SUBMISSION REQUIREMENTS**

This brief complies with the requirements of Circuit Rule 31(e)(1) because it has been submitted electronically in .pdf format via the Court's online system on March 13, 2009 and has been made available to counsel via email on March 13, 2009.

/s/ Steven B. Pollack, Esq.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and correct copies of the foregoing Plaintiff'-Appellant's Reply Brief were served on the party indicated below via USPS service, postage prepaid, and that 15 copies of the Brief were filed with the Clerk of the Court of Appeals for the 7th Circuit in person, all on March 13, 2009. Additionally, an electronic version was sent via email to the party indicated below on March 13, 2009.

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