UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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SCOTCHTOWN HOLDINGS LLC,

Plaintiff,

- against -

THE TOWN OF GOSHEN and
STEPHEN P. ANDRYSHAK as Superintendent
of Highways of the Town of Goshen,

Defendants.

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08-CV-4720 (CS)

MEMORANDUM DECISION AND ORDER

Appearances:

James G. Sweeney, Esq.
James G. Sweeney, P.C.
Goshen, New York
Counsel for Plaintiff

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Hackensack, New Jersey
Counsel for Defendants

Seibel, J.

Before this Court is Defendants' Motion to Dismiss[1] (Doc. 16) pursuant to Federal Rule of Civil Procedure 12(b)(6), which was filed on October 24, 2008. Plaintiff's opposition (Doc. 18) was filed on November 12, 2008, and Defendants filed a reply memorandum (Doc. 17) on December 1, 2008. The Court heard oral argument on December 19, 2008. For the reasons stated below, Defendants' Motion is granted.

I. Background

On May 20, 2008, Plaintiff Scotchtown LLC filed this action against Defendants Town of Goshen and Stephen P. Andryshak, Superintendent of Highways for Goshen, alleging a violation of RCRA, as well as trespass, private nuisance and negligence claims pursuant to New York State common law. Plaintiff alleges that Defendants have used and continue to use road salt

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[1] No discovery has occurred in this case and Defendants acknowledge that their Motion focuses primarily on the alleged deficiencies of Plaintiff's Complaint. (Def.'s Reply 1.) Nevertheless, Defendants have fashioned this Motion as a Motion for Summary Judgment because they rely on certain exhibits outside the pleadings to support their argument that Plaintiff's federal claim under the Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. § 6972, has failed to satisfy the ripeness test for land use disputes announced by the Supreme Court in *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985). The Court need not consider these exhibits because *Williamson* is not applicable to Plaintiff's RCRA claim. *Williamson*'s exhaustion requirement applies to land use or regulatory challenges. *See Murphy v. New Milford Zoning Comm'n*, 402 F.3d 342, 347-48 (2d Cir. 2005). Plaintiff's RCRA claim is not a challenge to any land use or regulatory action, but rather seeks cessation of conduct by Defendants that allegedly endangers human health. As discussed in Part II.B, RCRA's citizen suit provision requires a plaintiff to allege "an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B). If a plaintiff alleges such an endangerment, then the claim is ripe. *See Interfaith Cmty. Org. v. AlliedSignal, Inc.*, 928 F. Supp. 1339, 1349 (D.N.J. 1996) (denying motion to dismiss RCRA claim on ripeness grounds because complaint alleged that hazardous waste presented an imminent and substantial endangerment to health or the environment). Accordingly, to the extent that Defendants' Motion challenges the sufficiency of Plaintiff's allegations of an "imminent" endangerment, the Court analyzes it as a Motion to Dismiss for failure to state a claim under RCRA. The parties do not object to this treatment.

containing sodium chloride to remove snow and ice from Goshen highways, including those on a particular 33.4 acre tract of land owned by Plaintiff (the "Site"). Plaintiff asserts that the road salt used by Defendants over years has accumulated in the snow banks on the sides of the highways and has leached into the ground and ground water below. As a result, the ground water below the Site allegedly contains sodium chloride at levels unsafe for human consumption. Because of such contamination, Plaintiff contends that it was forced to abandon its efforts to develop the Site for residential purposes. With respect to the RCRA claim, Plaintiff seeks a mandatory injunction requiring Goshen to remedy the contamination, a prohibitory injunction preventing Goshen from continuing to use sodium chloride for clearing ice from its highways, and the costs already incurred in its efforts to remedy the contamination. With respect to the state law claims, Plaintiff seeks $3.5 million as compensatory damages for its inability to develop the Site. Defendant Andryshak also moves to dismiss on the independent basis that he was not given proper notice under RCRA.

II. Discussion

A. Standard of Review

In deciding a motion to dismiss under Rule 12(b)(6), a court must "accept[] all factual allegations in the complaint and draw[] all reasonable inferences in the plaintiff's favor." *Ruotolo v. City of New York*, 514 F.3d 184, 188 (2d Cir. 2008) (internal quotation marks omitted). In order to withstand dismissal, the complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1974 (2007) (disavowing the oft-quoted statement from *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), that "a complaint should not be dismissed for failure to state a claim unless it appears beyond

doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief"). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 1965-66 (internal quotation marks omitted). Thus, "at a bare minimum, the operative standard requires the 'plaintiff [to] provide the grounds upon which his claim rests through factual allegations sufficient to raise a right to relief above the speculative level.'" *Goldstein v. Pataki*, 516 F.3d 50, 56-57 (2d Cir. 2008) (quoting *Twombly*, 127 S. Ct. at 1974).

B. RCRA

RCRA is "a comprehensive environmental statute designed to ensure that solid and hazardous wastes are not disposed of in manners harmful to the public health or the environment." *Christie-Spencer Corp. v. Hausman Realty Co.*, 118 F. Supp. 2d 408, 419 (S.D.N.Y. 2000) (citing 42 U.S.C. § 6902(a)). "To accomplish these objectives, RCRA regulates the generation, handling, treatment, storage, transportation, and disposal of solid and hazardous wastes." *Id.* (citing 42 U.S.C. §§ 6922-25). "In an effort to secure enforcement of [RCRA]'s provisions to the fullest extent possible, Congress conferred enforcement power not only on the EPA or a duly authorized state agency, but also in certain circumstances on affected United States citizens themselves." *Id.* Plaintiff brings its claim pursuant to RCRA's citizen-suit provision, which provides, in pertinent part, that:

> [A]ny person may commence a civil action on his own behalf –
>
> . . . .
>
> (B) against any person . . . who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal

> of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment . . . .

42 U.S.C. § 6972(a)(1)(B). Although "'imminency' does not necessarily mean 'immediately,'" the Supreme Court "has said that the language of the RCRA 'implies that there must be a threat which is present now, although the impact of the threat may not be felt until later.'" *Christie-Spencer*, 118 F. Supp. 2d at 419 (quoting *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 486 (1996)). Indeed, "[c]ourts will not find that an imminent and substantial endangerment exists if the risk of harm is remote in time, completely speculative in nature, or de minimis in degree." *Id.* at 420 (internal quotation marks omitted).

Accepting as true all factual allegations in the Complaint for the purposes of this Motion only, Defendant has discharged and continues to discharge sodium chloride on the Site, causing the groundwater beneath the Site to exceed levels deemed safe for human consumption by the New York State Department of Health, thereby preventing Plaintiff from proceeding with its plans to develop residential housing units on the Site. (Compl. ¶ 32-45.) Based on these facts, Plaintiff contends that the sodium chloride presents "an imminent and substantial endangerment to the health of the future occupants of any dwellings constructed or to be constructed on the Site." (Compl. ¶ 42.) The Complaint does not allege any deleterious effects that the sodium chloride has had or may have on health or the environment other than preventing the development of the Site, nor did Plaintiff identify any such effects in his motion papers or at oral argument.

The purported endangerment to health of future occupants is not actionable under RCRA because, under Plaintiff's own theory, the harm posed by the sodium chloride will never occur. If indeed the ground water is contaminated, as Plaintiff alleges, it will never be approved for

human consumption, as Plaintiff also alleges. "By definition . . . § 6972(a)(1)(B) excludes waste that no longer presents a danger." *Leister v. Black & Decker*, No. 96-1751, 1997 U.S. App. LEXIS 16961 at *9 (4th Cir. July 8, 1997). Similarly, under RCRA's plain terms it must exclude waste that will never present a danger. Accordingly, courts routinely dismiss RCRA claims where, notwithstanding the existence of hazardous substances in a water supply, the specific factual circumstances at issue prevent humans from actually drinking contaminated water. *See, e.g., Two Rivers Terminal, L.P. v. Chevron USA, Inc.*, 96 F. Supp. 2d 432, 446 (M.D. Pa. 2000) (dismissing RCRA claim where there was no risk of endangerment to health because drinking wells were not exposed to contaminated water); *Leister*, 1997 U.S. App. LEXIS 16961 at *9 (dismissing RCRA claim where filtration system eliminated threat to health posed by hazardous substances in water supply). There being no allegation of actual or threatened damage to human health or the environment, Plaintiff's RCRA claim must be dismissed as a matter of law. *Cf. Gache v. Town/Village of Harrison*, 813 F. Supp. 1037, 1045 (S.D.N.Y. 1993) (denying motion for summary judgment on RCRA claim where conflicting expert reports created question of fact as to whether landfill on plaintiff's property caused or threatened environmental damage).

I recognize that Plaintiff finds itself in somewhat of a "Catch-22," being unable to develop the Site because of Defendants' alleged pollution but foreclosed from pursuing a RCRA claim for remediation because the pollution renders lawful development of the Site impossible.[2] But this is not to say that the Plaintiff has no cause of action against Defendants, just that RCRA is not the right one. As one court in this District has noted, "[p]rotection of health and the

[2] Defendants point out that alternative water sources are potentially available, but for purposes of this Motion I accept Plaintiff's claim that development is impossible given the contaminated ground water.

environment from the improper disposal of solid waste is RCRA's objective, not protection of plaintiff's plans to develop [its] property." *Gache*, 813 F. Supp. at 1045. Where the only endangerment alleged is to hypothetical occupants who under Plaintiff's own theory will never consume the allegedly contaminated water, and thus will not suffer adverse health effects from it, the case does not fit the narrow criteria set by Congress for citizen suits under RCRA. Congress saw fit to limit such suits to conduct that presents an imminent and substantial endangerment to the environment or health, and I am constrained to dismiss where neither form of endangerment is alleged. The dismissal of the RCRA claim should not be interpreted as condonation of pollution or as an impediment to Plaintiff's pursuit of an actionable claim under any alternative theory for either an injunction or damages, but merely as a determination that the facts alleged here do not fit the limited remedy created by Congress.

In addition, Plaintiff's claim against Defendant Andryshak must also be dismissed on the alternative ground that he was not given proper notice under RCRA. A citizen suit cannot be commenced "prior to ninety days after the plaintiff has given notice of the endangerment to . . . any person alleged to have contributed to or to be contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste . . . ." 42 U.S.C. § 6972 (b)(2)(A). One of the purposes of this requirement is "to allow a potential defendant to promptly rectify the problem." *Bldg. & Constr. Trades Council of Buffalo v. Downtown Dev., Inc.*, 448 F.3d 138, 158 (2d Cir. 2006) (internal quotation marks omitted). The Supreme Court has instructed that the notice requirements are "mandatory conditions precedent to commencing suit under the RCRA citizen suit provision" and that, even where the proper parties had notice in fact, "a district court may not disregard these requirements at its discretion." *Hallstrom v.*

Tillamook County, 493 U.S. 20, 31 (1989). Plaintiff's RCRA claim thus must be dismissed as to Defendant Andryshak in any event because he was not a recipient of the December 7, 2007 notice letter Plaintiff sent to Defendant Goshen.

Regarding Plaintiff's remaining state-law claims, the "traditional 'values of judicial economy, convenience, fairness, and comity'" weigh in favor of declining to exercise supplemental jurisdiction where all federal-law claims are eliminated before trial. *Kolari v. New York-Presbyterian Hosp.*, 455 F.3d 118, 122 (2d Cir. 2006) (quoting *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7 (1988)). Having determined that the only claim over which this Court has original jurisdiction should be dismissed, not only prior to trial but prior to any discovery, I decline to exercise supplemental jurisdiction over Plaintiff's remaining state-law causes of action. *See id.* (citing 28 U.S.C. § 1367(c)(3)). Thus, Plaintiff's negligence, trespass, and nuisance causes of action are dismissed without prejudice.

III. Conclusion

It is hereby ORDERED that Defendants' Motion to Dismiss Plaintiffs' Complaint is GRANTED. The Clerk of Court is respectfully directed to terminate the pending motion (Doc. 16) and to close the case.

SO ORDERED.

Dated: January 5, 2009
White Plains, New York

Cathy Seibel
CATHY SEIBEL, U.S.D.J.