UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JOHN CHART,

Plaintiff,

v.

TOWN OF PARMA,

Defendant.

DECISION & ORDER

10-CV-6179P

PRELIMINARY STATEMENT

Plaintiff John Chart ("Chart") has sued the Town of Parma (the "Town") over alleged contamination of the Town Park (the "Park") with topsoil containing unsafe levels of arsenic, lead, DDT, DDD and DDE. (Docket # 12). Chart is suing under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6972(a)(1)(A) and (B). Chart seeks an injunction requiring the Town to remediate the contamination, as well as response costs, attorneys' fees and other expenses.

Currently pending before the Court is defendant's motion to dismiss the complaint for lack of subject matter jurisdiction and for failure to state a cause of action under Rules 12(b)(1) and (b)(6) of the Federal Rules of Civil Procedure, respectively. (Docket # 32). Chart has cross-moved to amend the complaint.[1] (Docket # 34). For the reasons discussed below,

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[1] Defendant's motion under Rule 12(b)(6) is improper because the Town has already answered Chart's original complaint and his subsequent amendments. *See* Fed. R. Civ. P. 12(b)(6) (any Rule 12(b)(6) defenses must be asserted by motion prior to a responsive pleading). The proper vehicle for defendant's motion to dismiss is a motion for judgment on the pleadings under Rule 12(c). Under either rule, however, the Court reviews Chart's pleadings under the same standard. *Graham v. Elmira City Sch. Dist.*, 2011 WL 2837629, *2 (W.D.N.Y. 2011) (motion for judgment on the pleadings under Rule 12(c) is subject to same standard as motion to dismiss under Rule 12(b)(6)). Accordingly, this Court will consider defendant's motion under Rule 12(c).

Chart's cross-motion to amend the complaint is denied, and defendant's motion to dismiss the second amended complaint is granted in part and denied in part.

FACTUAL BACKGROUND

According to the complaint, in 2003 the Town purchased 1086 cubic yards of topsoil from Crowley Development Corporation ("Crowley") to make improvements to the Park. (Docket # 12 at 21). The topsoil that Crowley sold to the Town originated from a former apple orchard. (*Id*. at ¶¶ 19, 21). Pesticides including arsenic, lead, DDT, DDE and DDD were allegedly used in the orchard, resulting in contamination of the soil. (*Id*. at ¶ 20). The Town used the soil it purchased from Crowley to backfill the Park's football, baseball and other multi-use fields. (*Id*. at ¶¶ 18-24).[2] According to Chart, testing has revealed that the soil in the Park's football field contains unsafe levels of arsenic, lead, DDT, DDE and DDD. Indeed, Chart has attached to his complaint a letter to the Town from the New York State Department of Health advising that "arsenic is present in subsurface soils . . . above levels typically found in New York State" and suggesting that the Town remove the soil and backfill it with clean soil. *(Id*. at ¶ 82; Ex. G). In addition, the Department of Health suggested that the Town conduct further testing to verify the boundary between the contaminated and native soil. (*Id*. at ¶ 83; Ex. G).

Chart filed his original complaint on March 30, 2010. (Docket # 1). He amended it on July 16, 2010, and again on August 4, 2010. (Docket ## 8, 12). On December 12, 2010, the

[2] According to the complaint, Crowley was notified in July 2003 that the soil originating from the former apple orchard was contaminated and was instructed to cease its sale. (Docket # 12 at ¶ 22). The terms of a subsequent consent order dated August 5, 2005 required Crowley to remediate the site pursuant to Monroe County Department of Health protocol. (*Id*. at ¶ 23).

Court amended the scheduling order and extended the deadline for amending the pleadings until March 15, 2011. (Docket # 19). On August 30, 2011, the parties stipulated to stay the deadlines contained in the scheduling order for filing motions to compel, complete expert discovery and filing dispositive motions. (Docket # 24). The stipulation did not mention the deadline for amending the pleadings. The parties further agreed that defendant would file a motion to dismiss, but would not seek dismissal on the ground that "the arsenic-contaminated soils alleged in the complaint do not pose an imminent and substantial threat pursuant to RCRA." (*Id*.).

Defendant filed the instant motion to dismiss on September 29, 2011. (Docket # 32). On October 20, 2011, seven months following the deadline for amending the pleadings, Chart cross-moved to file a third amended complaint. (Docket # 34). Defendant opposes Chart's motion to amend. (Docket # 47).

DISCUSSION

I. Motion to Amend

Chart's proposed third amended complaint seeks to clarify or cure problems identified by defendant in its motion to dismiss the pending second amended complaint. Thus, before reviewing the merits of Chart's second amended complaint, I address whether Chart should be permitted to amend that complaint.

In deciding a motion to amend filed after the deadline for amending the pleadings has expired, a court must balance the requirements of Rules 15(a) and 16(b) of the Federal Rules of Civil Procedure. *See Parker v. Columbia Pictures Indus.*, 204 F.3d 326, 339 (2d Cir. 2000). Under Rule 15, "[t]he Court should freely give leave [to amend] when justice so requires." Fed.

R. Civ. P. 15(a)(2). Generally, under Rule 15, if the underlying facts or circumstances relied upon by a party seeking leave to amend may be a proper subject of relief, that party should be afforded the opportunity to test the claim on its merits. *United States ex rel. Mar. Admin. v. Cont'l Ill. Nat'l Bank and Trust Co. of Chi.*, 889 F.2d 1248, 1254 (2d Cir. 1989) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)). "In the absence of any apparent or declared reason – such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. – the leave sought should, as the rules require, be 'freely given.'" *Foman v. Davis*, 371 U.S. at 182.

Rule 16(b) requires the district court to enter a scheduling order setting a deadline for subsequent proceedings in the case, including amendments to the pleadings. Fed. R. Civ. P. 16(b). By limiting the time for amendments, the rule is designed to offer a measure of certainty in pretrial proceedings, ensuring that "at some point both the parties and the pleadings will be fixed." *See* Fed. R. Civ. P. 16. Advisory Committee's Note (1983 amendment, discussion of subsection (b)). The rule provides that "[a] schedule may be modified only for good cause and with the judge's consent." Fed. R. Civ. P. 16(b)(4); *see also Parker v. Columbia Pictures Indus.*, 204 F.3d at 340.

In *Parker*, the Second Circuit addressed the showing required of a party moving to amend its pleadings after the time set by the court for filing such motions. 204 F.3d at 340. In that case, the court joined several other circuits in holding that "the Rule 16(b) 'good cause' standard, rather than the more liberal standard of Rule 15(a), governs a motion to amend filed

after the deadline a district court has set for amending the pleadings." *Id*. (internal citations omitted) (collecting cases).

According to the Second Circuit, "despite the lenient standard of Rule 15(a), a district court does not abuse its discretion in denying leave to amend the pleadings after the deadline set in the scheduling order where the moving party has failed to establish good cause." *Parker*, 204 F.3d at 340. "Good cause," the court reasoned, "depends on the diligence of the moving party." *Id*.; *accord Holmes v. Grubman*, 568 F.3d 329, 335 (2d Cir. 2009) ("[w]hether good cause exists turns on the 'diligence of the moving party'") (quoting *Grochowski v. Phoenix Constr.*, 318 F.3d 80, 86 (2d Cir. 2003)), *cert. denied*, 131 S. Ct. 795 (2010); *Kassner v. 2nd Ave. Delicatessen Inc.*, 496 F.3d 229, 244 (2d Cir. 2007); *Carnrite v. Granada Hosp. Grp., Inc.*, 175 F.R.D. 439, 446 (W.D.N.Y. 1997).

In determining whether to grant a motion to amend, the court must weigh the good cause shown for the delay against the prejudice to the non-movant that will result from the amendment. *See Kassner v. 2nd Ave. Delicatessen Inc.*, 496 F.3d at 244; *Evans v. Syracuse City Sch. Dist.*, 704 F.2d 44, 46-47 (2d Cir. 1983). Considerations of prejudice include whether the new claim would (i) require significant additional discovery; (ii) significantly delay the resolution of the dispute; or (iii) prevent the non-moving party from bringing a timely action in another jurisdiction. *Block v. First Blood Assoc.*, 988 F.2d 344, 350 (2d Cir. 1993) (collecting cases). "However, the absence of prejudice to a nonmoving party does not alone fulfill the good cause requirement of Rule 16(b)." *Woodworth v. Erie Ins. Co.*, 2009 WL 3671930, *3 (W.D.N.Y. 2009) (emphasis omitted) (internal citations omitted).

Here, Chart moved to amend his complaint seven months following the deadline in the scheduling order. Chart does not address the Rule 16(b) good cause standard or argue that he could not have moved to amend the complaint sooner. (Docket # 34). Further, review of the proposed third amended complaint reveals no new factual allegations arising from discovery. Rather, the proposed amended complaint adds facts and characterizations concerning Chart's alleged use of the Park. In addition, the "open dumping" allegations (discussed *infra*) are apparently based on plaintiff's observations that the Town aerated its playing fields. Those facts are also not new facts learned during discovery, but are facts which were known to plaintiff at the inception of this lawsuit. At oral argument, counsel explained that the purpose of the proposed amended complaint was to conform the pleadings to the proof adduced during discovery, but she did not argue that the motion could not have been filed sooner. On this record, I cannot find that Chart acted with sufficient diligence to amend his complaint and thus deny the motion to amend.

II. Motion to Dismiss for Lack of Standing

I turn next to the Town's motion to dismiss Chart's pending second amended complaint on the grounds that he has not sustained his burden of establishing standing to bring this action. (Docket # 32 at 4). Standing is not a "mere pleading requirement but rather an indispensable part of the plaintiff's case" and must be evaluated by "the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). At the pleading stage, "general factual allegations of injury resulting from defendant's conduct may suffice" because the court presumes "that general allegations embrace

those specific facts that are necessary to support the claim." *Id*. (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990)).

> To demonstrate standing under Article III, a plaintiff:
>
> > must have suffered an injury-in-fact – an invasion of a legally protected interest, which is (a) concrete and particularized, and (b) actual and imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be 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. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Id. at 560-61 (internal quotations, citations and brackets omitted); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000). "Particularized" means that the "the injury must affect the plaintiff in a personal and individual way." *Lujan v. Defenders of Wildlife*, 504 U.S. at 560 n.1.

Here, defendant argues that Chart has not sufficiently alleged an injury-in-fact and that the remedies available to him under the RCRA statute will not redress his alleged injuries. (Docket # 32 at 4).

A. <u>Injury-In-Fact</u>

"[E]nvironmental 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." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. at 183 (citing *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972)). Thus, allegations that the defendant's conduct has "directly affected" a plaintiff's recreational interests are sufficient to establish an injury-in-fact at the pleading stage. *Id.* at 182-84. For

example, in *Laidlaw*, the Supreme Court held that plaintiffs had adequately alleged standing where they asserted, *inter alia*, that they would like to use the river for recreational purposes, such as fishing, camping and swimming, but would not do so because of concerns about pollution caused by defendant. *Id*. at 182-83. *See also Riverkeeper, Inc. v. Mirant Lovett, LLC*, 675 F. Supp. 2d 337, 351 (S.D.N.Y. 2009) (injury-in-fact adequately pleaded where complaint asserts that members' recreational interests are "adversely affected" by defendant's failure to comply with Clean Water Act requirements); *Sierra Club v. Gibco Corp*., 1986 WL 12481, *2 (W.D.N.Y. 1986) (standing adequately alleged where plaintiffs asserted that they were concerned "about the effect the defendant's activities [were] having on the cleanliness and safety of the environment" and that they had "curtailed their family recreational outings [to allegedly affected river and creek]"). *See also Kern v. Wal-Mart Stores, Inc*., 804 F. Supp. 2d 119, 129 (W.D.N.Y. 2011) (standing adequately asserted where "[plaintiffs] have alleged . . . that they use Tonawanda Creek for drinking and recreational activities, and have implied that they have curtailed those uses to avoid exposure to the pollutant of the stormwater") (citing *Laidlaw*, 528 U.S. at 183). In contrast, a plaintiff who does not allege any reliance on the affected area for "either aesthetic value or recreation" or fails to allege any "physical contact at all" does not have standing to bring a claim. *Doyle v. Town of Litchfield*, 372 F. Supp. 2d 288, 303 (D. Conn. 2005).

In addition, "the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing." *Lujan*, 504 U.S. at 562-63. Thus, allegations of aesthetic harm may also be sufficient to establish standing. *Mancuso v. Consol. Edison Co. of New York, Inc*., 130 F. Supp. 2d 584, 590-91 (S.D.N.Y. 2001) (averments that plaintiff's "aesthetic sensibilities" were "offended when viewing tumored

animals as he passed the property on his walks" established injury-in-fact at the pleading stage), *aff'd*, 25 F. App'x 12 (2d Cir. 2002); *Concerned Area Residents for the Env't v. Southview Farm*, 834 F. Supp. 1410, 1414 (W.D.N.Y. 1993) (plaintiffs adequately alleged standing by asserting that observing and smelling discharged manure was offensive and "diminished their quality of life and their ability to enjoy the surrounding environment").

Here, Chart's second amended complaint alleges that he walked in the Park six or seven times monthly "prior to learning of the Contamination in April 2009." (Docket # 12 at 11). Chart further alleges that over the last twenty-two years he "has frequently enjoyed walking the nature trail . . . either alone or accompanied by friends" and that until his dog died in 2008, he "routinely" walked with the dog at the Park. (*Id*. at ¶¶ 11-12). In addition, Chart has alleged that he "has a deep appreciation for the Park and always has enjoyed its wildlife, natural beauty and quaintness" and that he is "concerned for the effects of the Contamination on the children and spectators that continue to use the Park." (*Id*. at ¶¶ 14-15). Finally, Chart "fears that the contamination will have a severe impact on the wildlife and the natural and aesthetic well-being of the Park." (*Id*. at ¶ 16).

On this record, I find that Chart's complaint plausibly suggests that he regularly used the Park until he learned of the contamination and that he stopped using the Park after the discovery. Although Chart has not directly alleged that he stopped walking in the Park after learning of the contamination, that implication reasonably follows from the allegations. *Cf. Kern v. Wal-Mart Stores, Inc.*, 804 F. Supp. 2d at 129. For this reason, I find that Chart has plausibly alleged that the contamination adversely affected his recreational interest in walking the Park's nature trails. *See Riverkeeper, Inc. v. Mirant Lovett, LLC*, 675 F. Supp. 2d at 351. In addition,

Chart has alleged that he is afraid and concerned that the contamination will adversely affect other users of and wildlife in the Park, as well as diminish the natural beauty in the Park. *Cf. Simsbury-Avon Preservation Soc'y, LLC v. Metacon Gun Club, Inc*., 2006 WL 2223946, *5 (D. Conn. 2006) (plaintiff's "fear and uncertainty" that defendant's actions could pollute a nearby state park was reasonable and conferred standing); *Sierra Club v. Gibco Corp*., 1986 WL 12481 at *2. Taken together, Chart's allegations sufficiently assert that he has suffered an injury-in-fact from the alleged contamination.

Defendant counters that Chart cannot plausibly allege an injury-in-fact because he has not alleged that he used any of the allegedly contaminated areas. (Docket # 32 at 5-6). The complaint identifies the contaminated areas as "a football field, a baseball field south and west of the football field, a swale north and west of the baseball field, a multi-use field north of the football field and other places currently unknown to plaintiff." (Docket # 12 at ¶ 24). Defendant argues that the Park's nature trails are not alleged to be contaminated and that Chart has not alleged that he used any of the sports fields. Therefore, defendant argues, "plaintiff's enjoyment of the Park's nature trails does not confer standing." (Docket # 32 at 7).

In my view, this argument "confuses the standing inquiry with the merits inquiry." *Simbsury-Avon Preservation Soc'y, LLC v. Metacon Gun Club, Inc.*, 2006 WL 2223946 at *5. To demonstrate standing, a plaintiff need not establish an injury to the environment but to himself – here, Chart has alleged that he fears the effects of the contamination on others and the wildlife in the Park and has implied that he no longer uses the Park. The issue is not whether the area of the Park that Chart used was contaminated; rather, it is whether he was "reasonable to 'curtail [his] recreational use'" of the Park because of the alleged pollution. *Id*. (citing *Laidlaw*,

528 U.S. at 184-85). I cannot find that Chart's alleged curtailment of his use of the nature trails because of the fears of contamination was so unreasonable that the allegation should be discredited, even if the hiking trails themselves are not alleged to be contaminated.[3]

B. Redressability

Defendants further contend that Chart has not established the third prong of the standing inquiry – redressability. Chart seeks a permanent injunction ordering the Town to investigate the contamination and remediate it. (Docket # 12 at 17). The Town argues that remediation will not redress Chart's injuries because he has not demonstrated that it would allay his fears over invisible contamination. (Docket # 32 at 8-9). I disagree. Having found that Chart's allegations may reasonably be read to imply that he ceased using the Park as a result of his fears of contamination, they may also be read to imply that after the contamination is remediated, his fears will be addressed and he will resume walking the Park and enjoying its aesthetic beauty and nature. *See Laidlaw*, 528 U.S. at 185-86 ("a sanction that effectively abates [the illegal conduct] and prevents its recurrences provides a form of redress"); *Simbsury-Avon Preservation Soc'y, LLC*, 2006 WL 2223946 at *6 (remediation would redress threatened harm of exposure to lead); *Altamaha Riverkeepers v. City of Cochran*, 162 F. Supp. 2d 1368, 1372 (M.D. Ga. 2001) (plaintiffs' fears of pollution would be redressed if City was ordered to comply with permit required under the Clean Water Act).

[3] Indeed, Chart has submitted a sworn affidavit in which he states that he walked across the allegedly contaminated sports fields to reach his car when he hiked the nature trails. (Docket # 44 at ¶ 3). In that affidavit, Chart also swore that he has not visited the Park since learning of the contamination "except to take soil samples, photographs, and to speak to Town Board members about my concern about the arsenic-contaminated soils there." (*Id*. at ¶ 6).

Accordingly, defendant's motion to dismiss Chart's complaint for lack of standing is denied. I turn next to the merits of Chart's complaint.

III. Motion for Judgment on the Pleadings Under Fed. R. Civ. P. 12(c)

A. General Legal Principles

"RCRA is a comprehensive environmental statute that governs the treatment, storage, and disposal of solid and hazardous waste." *Meghrig v. KFC W., Inc*., 516 U.S. 479, 483 (1996). "RCRA's primary purpose . . . is to reduce the generation of hazardous waste and to ensure the proper treatment, storage, and disposal of that waste which is nonetheless generated, 'so as to minimize the present and future threat to human health and the environment.'" *Id*. (quoting 42 U.S.C. § 6902(b)); *Connecticut Coastal Fisherman's Assoc. v. Remington Arms Co., Inc*., 989 F.2d 1305, 1313 (2d Cir. 1993) ("RCRA establishes a 'cradle-to-grave' regulatory structure for the treatment, storage and disposal of solid and hazardous wastes").

RCRA authorizes two types of citizen suits. The first is a "permitting violation claim" under 42 U.S.C. § 6972(a)(1)(A). Under that provision, a citizen may bring suit against any entity "who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order" under the solid waste disposal provisions. 42 U.S.C. § 6972(a)(1)(A); *South Road Assocs. v. Int'l Bus. Mach. Corp*., 216 F.3d 251, 253 (2d Cir. 2000). Under this provision, the plaintiff must allege "an ongoing or intermittent violation of the relevant statute." *Connecticut Coastal Fisherman's Assoc. v. Remington Arms Co., Inc*., 989 F.2d at 1315 (citing *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc*., 484 U.S. 49, 57 & n.2 (1987)). There is no "blanket test for whether a defendant is engaged in an ongoing

violation of RCRA"; rather, the court must perform "a close reading of the allegations against the statute" to determine whether the particular conduct alleged amounts to an ongoing violation of RCRA. *South Road Assocs. v. Int'l Bus. Mach. Corp*., 216 F.3d at 254.

The second type of claim under 42 U.S.C. § 6972 is called an "imminent and substantial endangerment" claim. Specifically, a citizen may sue any person who "has contributed or who is contributing to the past or present . . . 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).

Here, Chart has sued the Town of Parma under both sections. Defendant has moved to dismiss Chart's first cause of action brought under Section 6972(a)(1)(A) on several grounds: namely, that (1) he fails to allege that the soil is a solid waste and, even if he has, topsoil is not a solid waste; (2) the alleged misconduct is not ongoing and thus is not cognizable under the statute; and, (3) the statute of limitations has expired. (Docket # 32-1 at 2). The Town has also moved to dismiss Chart's second claim for "imminent and substantial endangerment" under Section 6972(a)(1)(B) as it pertains to hazardous waste.[4] (Docket ## 24, 32).

I turn first to the Town's challenge to Chart's first cause of action, the "permitting" claim.[5] As discussed above, following the Town's motion to dismiss, Chart cross-moved to amend his complaint. (Docket # 34). In addition, in his opposition to the motion to dismiss, Chart contended that his complaint asserts a claim that the Town violated RCRA's

[4] Plaintiff's counsel asserted at oral argument that she did not read defendant's pending motion to include any challenge to Chart's second cause of action.

[5] Counsel confirmed at oral argument that Chart's first cause of action does not assert a claim that the Town disposed of the soil in violation of 42 U.S.C. § 6925.

prohibition of open dumping. (Docket # 42 at 12). The Town counters that the complaint does not adequately plead an open dumping claim. (Docket # 47 at 19-20).[6]

B. Sufficiency of First Cause of Action

To avoid dismissal, a complaint must contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "[T]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id*. Rather, the complaint "must allege facts that are not merely consistent with the conclusion that the defendant violated the law, but which actively and plausibly suggest that conclusion." *Port Dock & Stone Corp. v. Oldcastle Ne., Inc.*, 507 F.3d 117, 121 (2d Cir. 2007) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. at 557-58).

The Supreme Court has counseled district courts to employ a two-step analysis in evaluating the sufficiency of a proposed amended claim. *Ashcroft v. Iqbal*, 129 S. Ct. at 1950. First, the court must "identify[] pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Id*. Thus, the court should accept as true any well-pleaded factual allegations, but reject legal conclusions unsupported by facts. *Id*. Next, the court should "determine whether [the well-pleaded factual allegations] plausibly give rise to an entitlement to relief." *Id*. In doing so, the court is permitted to "draw on its judicial experience and common sense." *Id*.

[6] In addition, the Town argued that Chart had failed to provide notice of his open dumping claim in his Notice of Intent to Sue the Town. (Docket # 47 at 21).

Utilizing this framework, courts have dismissed complaints that omit factual allegations, but merely recite legal conclusions tracking the statutory language. *See*, *e.g.*, *Inst. for the Dev. of Earth Awareness v. People for Ethical Treatment of Animals*, 2009 WL 2850230, *3-4 (S.D.N.Y. 2009) (dismissing cause of action that contained only "conclusory assertions [but] . . . no factual allegations," and rather "simply restated the [statutory] language"); *Willey v. J.P. Morgan Chase, N.A.*, 2009 WL 1938987, *4 (S.D.N.Y. 2009) (dismissing complaint that contained only "formulaic recitations" of the elements of the claim, unsupported by factual allegations; "*ipse dixit* pleading is insufficient" under *Iqbal*).

Chart's first cause of action alleges:

> Defendant Disposed of the Contamination on the Site without a permit or complying with the regulatory requirements for a solid or hazardous waste treatment, storage or disposal facility in violation of RCRA. By reason of the foregoing, defendant is in violation of a permit, standard, regulation, condition, requirement or prohibition pursuant to RCRA.

(Docket # 12 at ¶¶ 93, 94). The complaint further alleges that the "Disposal of the Contamination was conducted by . . . the defendant without a permit and without complying with the regulatory requirements for a solid or hazardous waste treatment, storage or disposal facility" and that "these violations of permitting and regulatory requirements are continuing, since an unpermitted solid or hazardous waste landfill remains in place." (*Id*. at ¶¶ 85, 86).

At oral argument, Chart's counsel maintained that the second amended complaint adequately pleads a claim that the Town violated RCRA's prohibition against open dumping, although counsel conceded that the complaint does not identify or mention RCRA's open

dumping provisions or regulations. Rather, counsel maintained that the complaint adequately pleads the factual allegations supporting such a claim.

Section 6945 of RCRA prohibits "any solid waste management practice or disposal of solid waste or hazardous waste which constitutes the open dumping of solid waste or hazardous waste." 42 U.S.C. § 6945. That section is enforceable through Section 6972 against "persons engaged in the act of open dumping." *Id*. Thus, Chart may maintain this cause of action only if he has adequately alleged that the Town was "engaged in the act of open dumping," at the time the complaint was filed. *South Road Assocs.*, 216 F.3d at 255; *Mervis Indus., Inc. v. PPG Indus., Inc*., 2010 WL 1381671, *3 (S.D. Ind. 2010).

Open dumping is defined by statute and regulation. First, RCRA defines "open dump" as "any facility or site where solid waste is disposed of which is not a sanitary landfill which meets the criteria promulgated under section 6944[7] of this title and which is not a facility for disposal of hazardous waste." 42 U.S.C. § 6903(14).[8] In addition, applicable regulations specify that facilities or practices which fail to meet the criteria in 40 C.F.R. §§ 257.1-257.4 or §§ 257.5-257.30 constitute open dumps or open dumping, respectively. 40 C.F.R. § 257.1; *South Road Assocs.*, 216 F.3d at 256 ("40 C.F.R. pt. 257 lists criteria for determining what is, and what is not, an open dump"). In other words, "[b]ecause open dumps are prohibited by § 6945(a), and because failing any one criterion listed in §§ 257.1 through 257.4 automatically renders a facility

[7] 42 U.S.C. § 6944 directs the EPA to "promulgate regulations containing criteria for determining which facilities shall be classified as . . . open dumps within the meaning of this chapter." 42 U.S.C. § 6944(a).

[8] The Second Circuit has observed that "no functional difference" exists between the terms "open dump" and "open dumping" within the meaning of the statute or applicable regulations. *South Road Assocs.*, 216 F.3d at 255 n.3.

an open dump, failure to satisfy any one criterion itself violates RCRA." *South Road Assocs.*, 216 F.3d at 256 (emphasis deleted).

Chart admits that his pending complaint does not specify the particular regulation promulgated under Section 6944 that he contends the Town violated. Indeed, even at oral argument, counsel did not identify which regulation the Town allegedly violated. Thus, even if the complaint is construed to assert a statutory open dumping claim, the Court is unable to review the Town's alleged conduct against the applicable regulatory criteria to determine the sufficiency of the allegations. This alone constitutes grounds for dismissal. *See*, *e.g.*, *George v. Reisdorf Bros., Inc*., 410 F. App'x 382, 386-87 (2d Cir. 2011) (affirming grant of summary judgment where plaintiff failed to cite "the relevant federal regulations, which themselves define 'open dump' by reference to a facility's compliance with the criteria laid out in 40 C.F.R. pt. 257"); *Hackensack Riverkeeper, Inc. v. Delaware Ostego Corp*., 450 F. Supp. 2d 467, 487 (D.N.J. 2006) ("[t]o escape dismissal [p]laintiffs must plead facts sufficient to support a claim that [defendant's facilitates] violate at least one of the EPA's criteria in 40 C.F.R. Part 257 . . . that are used to identify illegal open dumps"; in other words, "a plaintiff must allege that the facilities meet one or more of the actionable § 257 dumping criteria").

Chart maintained at oral argument that his factual allegations that the Town disposed of the arsenic-contaminated soil without a permit and that an unpermitted solid or hazardous waste landfill remains in place are adequate to place defendant on notice that he is asserting a claim for open dumping. The flaw in this argument is that even if his complaint may be construed to plead a claim for open dumping, the factual allegations are insufficient to plausibly suggest that the violation was ongoing at the time the complaint was filed.

RCRA defines "disposal" as "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment." 42 U.S.C. § 6903(3). An open dumping claim based upon the introduction into the environment of a contaminant, as here, is grounded in the RCRA statute, 42 U.S.C. § 6945(a), and its associated regulations, 40 C.F.R. § 257.3-4 ("contamination" is the introduction of a substance that would cause the concentration of a toxic substance to exceed the allowable level). *June v. Town of Westfield*, 370 F.3d 255, 259 (2d Cir. 2004). Read together, the statute and regulations prohibit "the act of introducing a substance that causes . . . exceedances, [rather than] the action of the [toxic substance] on the environment." *Id*. (quoting *South Road Assocs*., 216 F.3d at 257) (affirming grant of summary judgment to defendants where plaintiff "fail[ed] to allege that, at the time of the filing of his lawsuit, the defendants continued to introduce substances that made the exceedances worse"; allegation that town shored up embankment with backfill allegedly containing toxic substances was of "a purely historical act"); *South Road Assocs.*, 216 F.3d at 257 ("[a]t best, the complaint alleges past introduction and continuing [contaminant] exceedances[; . . .] [t]his historical act cannot support a claim for violation of 42 U.S.C. § 6945(a) and 40 C.F.R. § 257.3-4(a)"); *Mervis Indus., Inc. v. PPG Indus., Inc.*, 2010 WL 1381671 at *3 ("fact that pollutants remain on the [property] unremediated [and continue to leach, migrate and be drawn into the soil, groundwater and creek] is not sufficient to allege an ongoing violation of the open dumping prohibition"). *See also Lewis v. FMC Corp*., 786 F. Supp. 2d 690, 711 (W.D.N.Y. 2011) (discussing claim based upon "introduction" of contaminant). *Cf. Northern Cal. River Watch v. Honeywell Aerospace*, 830 F. Supp. 2d 760, 770

(N.D. Cal. 2011) (denying motion to dismiss where plaintiff had alleged that open dumping was continuing).

Here, Chart's 2010 complaint alleges that the Town purchased soil from Crowley between April and June 2003. (Docket # 12 at ¶ 21). Chart then alleges that the Town "disposed of" the topsoil on various football, baseball and multi-use fields. (*Id*. at ¶ 24). He has not alleged that the Town continues to dispose of the soil. Thus, Chart's allegations do not plausibly state a claim under the open dumping provisions because he has not alleged that the Town was "engaged in the act of open dumping" at the time Chart filed his complaint.[9] Thus, this claim must be dismissed. Having so found, I do not address defendant's challenge that Chart's first cause of action is barred by the statute of limitations.

C. Sufficiency of Second Cause of Action Pertaining to Hazardous Waste

Although the Town stipulated not to seek a ruling on Chart's imminent and substantial endangerment claim, the Town seeks to dismiss the second claim, brought under 42 U.S.C. § 6972(a)(1)(B), insofar as it is based on the allegation that the Town disposed of hazardous waste that presents an imminent and substantial endangerment to health or the environment, in violation of that statute. (The Town does not challenge the imminent and substantial endangerment claim based on the alleged disposal of non-hazardous solid waste).

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[9] Chart attempted to remedy this deficiency in his proposed third amended complaint by alleging that "upon information and belief, between June 2003 and at least September 2009 the Town continuously and/or intermittently re-introduced the Topsoil to the ground surface by performing core aeration of the areas in which the Topsoil was placed. Moreover, during regular field play and during periods of rain and snow, the grass cover on the fields is worn away and pesticide-contaminated Topsoil is re-exposed to the surface." (Docket # 34-2 at ¶¶ 23-24).

Even if these allegations were directly before the Court, it is far from clear that they would be sufficient to withstand dismissal. *See*, *e.g.*, *South Road Assocs.*, 216 F.3d at 257 (moving waste from one place to another under state plan or program does not constitute "introduction" of wastes under RCRA); *Remington Arms*, 989 F.3d at 1313, 1315 (allegation that "the lead shot previously deposited in the sound is a point source discharging pollutants as it dissolves" does not constitute adequate allegation of disposal).

Because I conclude that the claim may proceed, I decline to address plaintiff's contention that the parties' stipulation forecloses defendant from raising this challenge at this time.

Under RCRA, hazardous wastes are a subset of solid wastes. *Remington Arms Co., Inc.*, 989 F.2d at 1313. Thus, a threshold issue is whether a complaint alleges that the material at issue is a solid waste. *Id*. "The RCRA regulations create a dichotomy in the definition of solid waste." *Id*. at 1314; *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 205 (2d Cir. 2009). The statutory definition of solid waste is broader than the regulatory definition. The broader statutory definition applies to imminent and substantial endangerment claims brought under § 6972(a)(1)(B). *Remington Arms*, 989 F.2d at 1315; *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d at 206. Under that definition, solid waste is "any garbage, refuse . . . or other discarded material . . . resulting from industrial, commercial, mining and agricultural operations and from community activities." 42 U.S.C. § 6903(27). The Town has not contended that the topsoil does not qualify as solid waste under this broader definition.[10] Rather, the Town contends that Chart has failed to allege that the topsoil qualifies as hazardous waste.

"RCRA itself does not include a list of hazardous wastes nor a specific method for determining whether a waste is hazardous." *Edison Elec. Inst. v. United States E.P.A.*, 2 F.3d 438, 441 (D.C. Cir. 1993). Rather, RCRA defines hazardous waste as:

> a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may--

[10] The narrower regulatory definition applies to permitting claims brought under 42 U.S.C. § 6972(a)(1)(A). *Id*. The Town's motion does challenge the solid waste allegations pertaining to the first cause of action. (*See* Docket # 32 at 12-14).

> (A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or
>
> (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

42 U.S.C. § 6903(5).

Congress delegated to the EPA the responsibility of drafting regulations to "develop and promulgate criteria for identifying the characteristics of hazardous waste, and for listing hazardous waste." 42 U.S.C. § 6921; *Edison Elec. Inst. v. United States E.P.A.*, 2 F.3d at 441. "Certain wastes are listed as *per se* hazardous." *Envtl. Def. Fund, Inc. v. Wheelabrator Technologies, Inc.*, 725 F. Supp. 758, 760 n.3 (S.D.N.Y. 1989) (citing 40 C.F.R. §§ 261.30-261.33(f)); 40 C.F.R. § 261.30 ("a solid waste is hazardous waste if it is listed in" subpart D, 40 C.F.R. §§ 261.31-261.35). "Those wastes not listed by the EPA as *per se* hazardous are deemed such only if they exhibit one of the following four characteristics: corrosivity, ignitability, reactivity, or toxicity, 40 C.F.R. § 261.21-261.24, and are not otherwise exempt from classification as a hazardous waste." *Id*. (citing 40 C.F.R. § 261.3(a)(1)). *See also United States v. Mobil Oil Corp.*, 1997 WL 1048911, *9 (E.D.N.Y. 1997) ("[a] substance is hazardous if it is 'listed' in regulations published by the EPA or if it exhibits a 'characteristic' of hazardousness, such as toxicity") (citing 40 C.F.R. § 262.11).

In his second amended complaint, Chart alleges that "upon information and belief," the soil would fail the "Environmental Protection Agency Toxicity Test for arsenic, indicating the soil is hazardous waste under RCRA." (Docket # 12 at ¶ 46). Chart makes similar

allegations regarding lead, DDT, DDE and DDD. (*Id*. at ¶¶ 53, 58). The Court construes these allegations, as defendant has, as Chart's contention that under 40 C.F.R. § 261.3(a)(2)(i), the soil exhibits the characteristic of "toxicity" as described in 40 C.F.R. § 261.24, subpart C of Part 261.

In order to be classified as a hazardous waste because of toxicity, the material must be tested by and fail the Toxicity Characteristic Leaching Procedure ("TCLP"). 40 C.F.R. § 261.24(a). According to defendant, "[t]he TCLP test is designed to simulate what contaminants would leach out of solid waste buried in a landfill when rainwater percolates through it." (Docket # 32-1 at 22). Under this procedure, if the testing "shows that the waste contains any of the contaminants listed in table 1 at a concentration equal to or greater than the respective value given in the table, then the waste, by definition, constitutes hazardous waste." *United States v. Henry*, 136 F.3d 12, 16 (1st Cir. 1998). According to defendant's memorandum of law, however, only a fraction of contaminants customarily leach out of solid waste under the TCLP test; thus, the TCLP typically yields "a much lower concentration" of contaminants. (Docket # 32-1 at 22). The regulatory limit for arsenic according to table 1 is 5 milligrams per liter (mg/L). 40 C.F.R. § 261.24. DDD, DDE and DDT do not appear in table 1.

In order to state a hazardous waste claim under RCRA, Chart need only allege that the soil contains one hazardous waste. Because I conclude that Chart's complaint adequately alleges that the soil contains characteristics of toxicity related to arsenic, I decline to address the other substances.

Although counsel admitted at oral argument that TCLP testing had not yet been performed because the procedure is expensive, defendant has not cited, and this Court has not found, any caselaw dismissing a hazardous waste claim under 42 U.S.C. § 6972(a)(1)(B) for

failure to allege TCLP testing. Further, the complaint alleges that several tests conducted between August 13, 2009 and November 16, 2009 showed that arsenic levels in the soil ranged from 5.3 mg/kg to 188 mg/kg, from 40.8 mg/kg to 69.3 mg/kg, and from 16.3 mg/kg to 90.5 mg/kg. (Docket # 12 at ¶¶ 37-41). Chart's complaint thus alleges that environmental testing has revealed that certain soil samples contain over 37 times the permissible amount of arsenic. Chart's environmental expert has submitted an affidavit stating that the average concentration of arsenic is 50 milligrams per kilogram – ten times the permissible maximum. (Docket # 40 at ¶ 4C). Although the TCLP test measures milligrams per liter and Chart's tests measured milligrams per kilogram,[11] I agree that the alleged test results, which are clearly pled in the complaint, plausibly suggest that the soil contains levels of arsenic exceeding permissible levels. In the absence of proof in admissible format that the TCLP test yields lower concentration of contaminants in the leachate than in the soil, and the range of difference,[12] I decline to dismiss the complaint on the grounds that the plaintiff did not perform costly tests before filing suit. In other words, I find that it is plausible to infer from these allegations that the soil will fail the TCLP test. Although Chart may ultimately be unable to sustain his claim on the merits, he has sufficiently alleged that the soil is hazardous waste because of the presence of toxic concentrations of arsenic.

For the above-stated reasons, I deny defendant's motion to dismiss Chart's Section 6972(a)(1)(B) claim as to hazardous waste.

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[11] Webster's defines a liter as "the volume of a kilogram of distilled water at 4°C." WEBSTER'S NEW WORLD DICTIONARY 825 (2d. College Ed. 1984).

[12] The Town's allegations about the TCLP test are contained only in the memorandum of law, rather than in an affidavit submitted by an individual with knowledge of environmental testing.

CONCLUSION

For the reasons stated above, defendant's motion to dismiss **(Docket # 32)** is **GRANTED in PART** and **DENIED in PART**. Plaintiff's motion to amend the complaint **(Docket # 34)** is **DENIED**. A **status conference** shall be held on October 17, 2012 at 11:00 a.m.

IT IS SO ORDERED.

s/Marian W. Payson

MARIAN W. PAYSON
United States Magistrate Judge

Dated: Rochester, New York
August 28, 2012