IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

SEARS, ROEBUCK & CO., Plaintiff, v. WILLIAMS EXPRESS, INC. AND HOLIDAY ALASKA, INC., Defendants.	Case No. 3:10-cv-00221-TMB

ORDER

This is an action by Plaintiff Sears, Roebuck & Co. against Defendants Williams Express, Inc. ("Williams") and Holiday Alaska, Inc. ("Holiday") for injunctive relief and damages under various causes of action based on environmental contamination at a facility managed by the Defendants.[1] Williams, joined by Holiday, now moves under Federal Rule of Civil Procedure 12(c) for dismissal of Plaintiff's claim under the Resource Conservation and Recovery Act ("RCRA") "citizen suit" provision, 42 U.S.C. § 6972.[2] Plaintiff opposes the motion.[3] The Parties have not requested oral argument and the Court finds that it would not be helpful. For the reasons discussed below, Williams' motion is DENIED.

[1] *See* Dkt. 1.

[2] *See* Dkts. 23-24.

[3] Dkt. 25.

I. BACKGROUND

A. RCRA

"RCRA is a comprehensive environmental statute that governs the treatment, storage, and disposal of solid and hazardous waste."[4] Its 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.'"[5]

Under RCRA's "citizen suit" provision:

> any person may commence a civil action on his own behalf . . . against any person, including any past or present generator . . . or past or present owner or operator of a treatment, storage, or disposal facility, 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 . . . .[6]

"[D]isposal" is defined broadly to include "spilling" and "leaking" of any "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 or be emitted into the air or discharged into any waters, including ground waters."[7] An appropriate district court has jurisdiction "to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment,

---

[4] *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 483 (1996) (citation omitted).

[5] *Id.* (quoting 42 U.S.C. § 6902(b)).

[6] 42 U.S.C. § 6972(a)(1)(B).

[7] *Id.* § 6903(3).

transportation, or disposal of any solid or hazardous waste[,] . . . to order such person to take such other action as may be necessary, or both . . . ."[8]

B. Plaintiff's Allegations

Plaintiff operates a mass distribution operation facility at 5900 Old Seward Highway in Anchorage, Alaska.[9] Defendants manage a facility that was previously operated as a service station (the "Facility") located at 6010 Old Seward Highway, across the street from Plaintiff's distribution operation.[10]

Plaintiff alleges that Defendants' predecessor first detected soil contamination at the Facility in 1987.[11] In 1989, pollutants were detected in neighboring residential area wells.[12] In 1991, Defendants' predecessors entered into a "Compliance Order" by consent with the Alaska Department of Environmental Conservation ("ADEC").[13] Plaintiff alleges that the Compliance Order requires Defendants "to clean up or remove contaminated soil and clean up and restore contaminated groundwater to levels that will not exceed regulatory thresholds in a prudent and workmanlike manner."[14] Plaintiff contends that the Defendants "have failed to meet the requirements of the Compliance Order."[15]

---

[8] *Id.* § 6972(a).

[9] Dkt. 1 ¶ 9.

[10] *Id.* at 1, ¶¶ 9-13.

[11] *Id.* ¶ 15.

[12] *Id.* ¶ 16.

[13] *Id.* ¶ 21.

[14] *Id.*

[15] *Id.*

According to Plaintiff, Defendants, their predecessors, and their environmental consultant conducted environmental investigations of the Facility from 1987 through 2004.[16] These investigations uncovered soil and groundwater contamination from petroleum products.[17] The Defendants installed a pump and treat ("P&T") system, as well as a vapor extraction ("VES") system, to remediate the contamination in the early 1990s.[18] However, both systems allegedly "failed" and were "shut down" by Defendants in 2003 and 2007, respectively.[19]

Defendants' environmental consultant, Shannon & Wilson, has allegedly continued to monitor and investigate the Facility, and determined that soil and groundwater contamination extends beyond the Facility's boundaries.[20] Plaintiff contends that Shannon & Wilson's monitoring of its property "has revealed benzene, GRO ["gasoline range organics"], and DRO ["diesel range organics"] concentrations in groundwater at levels up to 2,600 times state cleanup criteria."[21]

In a March 2010 report, which Plaintiff attached to the Complaint, Shannon & Wilson explain that the purpose of their work is to "enhanc[e] the rate of progress towards a 'cleanup complete' designation (with or without institutional controls) from the ADEC."[22] It notes that

---

[16] *Id.* ¶ 17.

[17] *Id.*

[18] *Id.* ¶ 18.

[19] *Id.*

[20] *Id.* ¶ 19.

[21] *Id.* ¶ 24.

[22] *Id.* Ex. B at 6.

the P&T and VES systems were shut down in light of decreased effectiveness.[23] The report further states that Shannon & Wilson's work has been approved by, or undertaken in consultation with ADEC.[24] It also concludes that "the contaminant plume appears to be stable and does not appear to pose an immediate threat to receptors[25] . . . [and t]herefore, long-term groundwater monitoring at the site will be continued, with no additional remedial action contemplated at this time."[26] A separate Shannon & Wilson report, also attached to the Complaint, indicates that Williams paid to have residents in the area connected to the municipal water supply, although some residents apparently declined the offer.[27]

Plaintiff alleges that "[t]he Facility is substantially contaminated with hazardous substances which have migrated and will continue to migrate from the Facility and may present an imminent and substantial endangerment to human health or the environment."[28] Therefore, Plaintiff concludes that Defendants have violated RCRA because "they have contributed to the disposal of hazardous waste, including petroleum products, at the Facility and that disposal continues today to present an imminent and substantial endangerment to health or the environment."[29]

---

[23] *Id.*

[24] *Id.* at 8.

[25] This appears to mean "human and ecological" receptors. *See id.* Ex. A at 13.

[26] *Id.* Ex. B at 21.

[27] *Id.* Ex. A at 3, 13-15.

[28] *Id.* ¶ 23.

[29] *Id.* ¶¶ 30-31.

In addition to its RCRA claim, Plaintiff also asserts claims under Alaska Stat. § 46.03.822(a), for trespass, and for nuisance.[30] Plaintiff seeks an injunction "requiring Defendants to immediately and fully investigate and delineate the scope of environmental contamination at and adjacent to the Facility and develop and implement an effective remediation plan . . . ."[31] Plaintiff also seeks damages, civil penalties, attorneys' fees, costs, pre-judgment interest, and a declaration "holding [D]efendants liable for all future remedial action costs, removal costs and response costs incurred by Sears as a result of release of hazardous substances at the Facility . . . ."[32]

II. LEGAL STANDARD

Courts evaluate Rule 12(c) motions for judgment on the pleadings under the same standard that applies to motions to dismiss for failure to state a claim upon which relief may be granted under Rule 12(b)(6).[33] A complaint must set forth "a short and plain statement of the claim showing that the pleader is entitled to relief."[34] When considering a motion to dismiss evaluating the sufficiency of a complaint under Rule 12(b)(6), courts generally assume that all allegations in the complaint are true, even if doubtful in fact.[35]

---

[30] *Id.* ¶¶ 33-46.

[31] *Id.* at 9-10.

[32] *Id.* at 10.

[33] *Pacific W. Group, Inc. v. Real Time Solutions, Inc.*, 321 Fed. App'x 566, 569 (9th Cir. 2008) (citing *Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188, 1192 (9th Cir. 1989)).

[34] Fed. R. Civ. P. 8(a)(1).

[35] *Bell Atlantic Corp. v Twombly*, 550 U.S. 544, 555 (2007).

In order to survive a motion to dismiss, a complaint must include "[f]actual allegations [that are] enough to raise a right to relief above the speculative level."[36] In order to do so, the "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"[37] In determining whether a complaint pleads sufficient facts to cross "the line between possibility and plausibility," courts may disregard "[t]hreadbare" legal conclusions.[38] Then courts should determine whether the well-pleaded allegations "plausibly establish" the claims or whether they fail in light of "more likely explanations."[39] However, a plaintiff need not plead "all facts necessary to carry" his or her burden.[40] "Determining whether a complaint states a plausible claim for relief . . . [is] a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."[41]

Generally, the court should not consider materials outside of the pleadings when ruling on a motion to dismiss for failure to state a claim.[42] However, courts may consider materials

---

[36] *Twombly*, 550 U.S. at 555.

[37] *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Twombly*, 550 U.S. at 556-57).

[38] *Id.* (citing *Twombly,* 550 U.S. at 555, 557).

[39] *Id.* at 1949, 1951.

[40] *Al-Kidd v. Ashcroft*, 580 F.3d 949, 977 (9th Cir. 2009), *rev'd on other grounds* __ S. Ct. __, No. 10-98, 2011 WL 2119110 (2011).

[41] *Iqbal*, 129 S. Ct. at 1950 (citation omitted).

[42] *See Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 925 (9th Cir. 2001).

submitted with or relied on by the pleading at issue, even if they are not physically attached to it, where their authenticity is not disputed.[43]

III. DISCUSSION

Williams moves to dismiss Plaintiff's claims, arguing that they fail to state a claim under RCRA's citizen suit provision, and alternatively, that the Court should dismiss or stay the action pursuant to the primary jurisdiction doctrine.[44] As discussed below, the Court finds that it cannot resolve these issues in Defendants' favor on this record.

A. Failure to State a Claim

Williams asserts that Plaintiff cannot prevail on its RCRA claim because it does not allege sufficient facts to support a plausible claim that the contamination at issue presents "an imminent and substantial endangerment to health or the environment."[45] Williams also alleges that Plaintiff has not alleged sufficient facts to make out a claim for injunctive relief, which it contends is the only remedy available to Plaintiff under RCRA.[46]

1. Imminent and Substantial Danger Requirement

Some courts have characterized RCRA's citizen suit requirements as follows:

> (1) the defendant must be a person, including, though not limited to, one who was or is a generator or transporter of solid or hazardous waste, or one who was or is an owner or operator of a solid or hazardous waste treatment, storage, or disposal facility; (2) that this defendant contributed to, or is contributing to, the handling, storage, treatment, transportation, or disposal of a solid or hazardous waste; and

---

[43] *San Francisco Patrol Special Police Officers v. City & Cnty. of S.F.*, 13 Fed. App'x 670, 675 (9th Cir. 2001) (citing *Lee v. City of L.A.*, 250 F.3d 668, 688 (9th Cir. 2001), *overruled on other grounds by Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1125-26 (9th Cir. 2002)).

[44] Dkt. 23.

[45] *Id.* 23 at 7-11.

[46] *Id.* 23 at 11-14.

> (3) that such waste may present an imminent and substantial endangerment to health or the environment.[47]

Williams asserts that Plaintiff has not sufficiently alleged the third requirement."[48]

A danger is "imminent" where "it threatens to occur immediately."[49] Thus, the danger must be "present *now*, although the impact of the threat may not be felt until later."[50] At the same time, "imminence" does not necessarily mean "immediate."[51] "An 'imminent hazard' may be declared at any point in a chain of events which may ultimately result in harm to the public."[52] Moreover, Congress' use of the word "may" before the phrase "imminent and substantial" indicates that the language should be interpreted "expansive[ly] . . . to confer upon the courts the authority to grant affirmative equitable relief to the extent necessary to eliminate any risk posed by toxic wastes."[53]

---

[47] *See, e.g.*, *Burlington N. & Santa Fe Ry. Co. v. Grant*, 505 F.3d 1013, 1020 (10th Cir. 2007) (citing *Cox v. City of Dallas*, 256 F.3d 281, 292-93 (5th Cir. 2001)).

[48] 42 U.S.C. § 6972(a)(1)(B).

[49] *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 485 (1996) (citation omitted).

[50] *Id.* (quoting *Price v. United States Navy*, 39 F.3d 1011, 1019 (9th Cir. 1994)) (emphasis original).

[51] *Scotchtown Holdings LLC v. Town of Goshen*, No. 08-CV-4720 (CS), 2009 WL 27445, at *2 (S.D.N.Y. Jan. 5, 2009) (citation omitted).

[52] *Price v. United States Navy*, 39 F.3d 1011, 1019 (9th Cir. 1994) (citation omitted).

[53] *Sullins v. Exxon/Mobil Corp.*, 729 F. Supp. 2d 1129, 1136 (N.D. Cal. 2010) (citation omitted); *accord Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 210 (2d Cir. 2009) (citations omitted).

A danger is "substantial" where it is "serious"[54] and there is "some necessity for the action."[55] In determining whether a danger is "substantial," "courts should 'recognize that risk may be assessed from suspected, but not completely substantiated, relationships between imperfect data, or from probative preliminary data not yet certifiable as fact."[56] "[A]n endangerment is substantial if there is reasonable cause for concern that someone or something may be exposed to a risk of harm by release, or threatened release, of a hazardous substance if remedial action is not taken."[57]

"'[E]ndangerment' means a threatened or potential harm and does not require proof of actual harm."[58] "The combination of the word 'may' with the word 'endanger,' both of which are probabilistic," suggests that "a reasonable prospect of future harm is adequate" to satisfy the requirement "so long as the threat is near-term and involves potentially serious harm."[59]

---

[54] *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 399 F.3d 248, 259 (3d Cir. 2005) (quoting *Cox v. City of Dallas*, 256 F.3d 281, 300 (5th Cir. 2001)); *Cordiano*, 575 F.3d at 210 (citations omitted).

[55] *Price*, 39 F.3d at 1019.

[56] *Honeywell*, 399 F.3d at 260.

[57] *Burlington N. & Santa Fe R'way Co. v. Grant*, 505 F.3d 1013, 1021 (10th Cir. 2007) (citation omitted); *accord Sullins*, 729 F. Supp. 2d at 1136 (citation omitted).

[58] *Price v. United States Navy*, 39 F.3d 1011, 1019 (9th Cir. 1994) (citations omitted).

[59] *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 211 (2d Cir. 2009) (citations omitted). Some courts have also suggested that "for an imminent and substantial endangerment to exist: (1) there must be a population at risk, (2) the contaminants must be listed as hazardous under RCRA, (3) the level of contaminants must be above levels that are considered acceptable by the State, and (4) there must be a pathway of exposure." *See Price v. United States Navy*, 818 F. Supp. 1323, 1325 (S.D. Cal. 1992), *aff'd* 39 F.3d 1011 (9th Cir. 1994). However, as the Third Circuit has persuasively observed, the statutory underpinnings for several aspects of this test are in doubt. *See Honeywell*, 399 F.3d at 260-61.

Plaintiff cites a number of cases for the proposition that evidence of soil or groundwater contamination is sufficient to survive a summary judgment motion.[60] Some of these cases also suggest that contamination at levels above state cleanup standards is sufficient to survive summary judgment.[61] Most notably, in rejecting a requirement that a plaintiff establish contamination "at levels above that considered acceptable by the state" to show an imminent and substantial endangerment, the Third Circuit stated, "[p]roof of contamination in excess of state standards may support a finding of liability, and may alone suffice for liability in some cases, but its required use is without justification in the statute."[62]

Proof of contamination in excess of state standards may support a finding of liability in some cases; however, the specific nature of the standards may be determinative of how much significance the court should accord to that proof.[63] Additionally, the mere fact that a contaminant was introduced by a defendant does not, alone, establish an "imminent and

---

[60] Dkt. 25 at 5-6 (citing *K-7 Enters, L.P. v. Jester*, 562 F. Supp. 2d 819, 828-29 (E.D. Tex. 2007); *Marrero Hernandez v. Esso Standard Oil Co.*, 597 F. Supp. 2d 272, 287 (D.P.R. 2009); *87TH St. Owners Corp. v. Carnegie-Hill-87TH St. Corp.*, 251 F. Supp. 2d 1215, 1218 (S.D.N.Y. 2002); *Raymond K. Hoxsie Real Estate Trust v. Exxon Educ. Found.*, 81 F. Supp. 2d 359, 366 (D.R.I. 2000); *Craig Lyle Ltd. P'ship v. Land O'Lakes, Inc.*, 877 F. Supp. 476, 483 (D. Minn. 1995); *Zands v. Nelson*, 797 F. Supp. 805, 809 (N.D. Cal. 1992); *American Int'l Specialty Lines Ins. Co. v. 7-Eleven, Inc.*, No. 3:08-cv-807-M, 2010 WL 184444, at *3 (N.D. Tex. Jan. 19, 2010)).

[61] *See K-7 Enters.*, 562 F. Supp. 2d at 828-29; *Raymond K. Hoxsie*, 81 F. Supp. 2d at 366; *Craig Lyle*, 877 F. Supp. at 483; *American Int'l Specialty Lines*, 2010 WL 184444, at *3.

[62] *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 399 F.3d 248, 259 (3d Cir. 2005)

[63] *See Cordiano*, 575 F.3d at 212-14 (finding that the mere fact that some samples at the site exceeded applicable state standards did not create a triable issue of fact given that the state agency reviews a number of factors when determining whether to require remediation).

substantial" danger.[64] Indeed, where "specific factual circumstances at issue prevent" any harm to humans or the environment, dismissal is appropriate.[65] Similarly, "[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."[66]

In an unpublished decision, the Ninth Circuit found that a stable gasoline plume did not create an imminent and substantial endangerment to health or the environment.[67] In that case, the contamination exceeded the regulatory cleanup standard, the contamination had migrated and might continue to migrate, and contaminated groundwater was located in an aquifer that was designated as having municipal and industrial uses.[68] Nonetheless, the court noted that the threatened aquifer was not suitable for beneficial use, the plume had stabilized and the transmissivity of the aquifer was "very low," the plaintiff was only recommending passive remediation coupled with monitoring, and the underground storage tanks had been removed "making further expansion of the plume purely speculative."[69] The court also indicated that the plaintiff "presented no evidence of what future harm would be caused by expansion of the plume

---

[64] *Steilacoom Lake Improvement Club, Inc. v. Washington*, 138 Fed. App'x 929, 933 n.5 (9th Cir. 2005).

[65] *See Scotchtown Holdings LLC v. Town of Goshen*, No. 08-cv-4720 (CS), 2009 WL 27445, at *2 (S.D.N.Y. 2009) (citations omitted).

[66] *Christie-Spencer Corp. v. Hausman Realty Co.*, 118 F. Supp. 2d 408, 420 (S.D.N.Y. 2000) (citation omitted).

[67] *Birch Corp. v. Nevada Inv. Holding, Inc.*, 152 F.3d 924, No. 97-55282, 1998 WL 442982, at *3 (9th Cir. June 29, 1998).

[68] *Id.*

[69] *Id.*

and whether that harm would be substantial."[70] The court emphasized that there was no evidence of any "planned excavations" or use of the ground water that would demonstrate an imminent endangerment.[71] In contrast, a district court within this Circuit reached the opposite conclusion where an otherwise stable contamination plume was in a redevelopment zone and the local department of environmental health services indicated that ground water at the site would be suited for drinking water in the future.[72]

Plaintiff notes that the state cleanup level for "Gasoline Range Organics," which several samples from the site significantly exceed,[73] represents a level that:

> if exceeded, indicates an increased potential for hazardous substance migration or for risk to human health, safety, or welfare, or to the environment; the level of a petroleum hydrocarbon may not remain at a concentration above the maximum allowable concentration unless a responsible person demonstrates that the petroleum hydrocarbon will not migrate and will not pose a significant risk to human health, safety, or welfare, or to the environment; free product must be recovered as required [under the administrative regulations].[74]

To the extent that Plaintiff is suggesting that exceeding these limits alone will establish "a reasonable prospect" of potentially serious future harm in the present case, the Court disagrees. Something more concrete will be required for Plaintiff to prevail on this issue.

---

[70] *Id.*

[71] *Id.* at *2-3.

[72] *Sullins v. Exxon/Mobil Corp.*, 729 F. Supp. 2d 1129, 1136-37 (N.D. Cal. 2010); *see also Newark Group v. Dopaco, Inc.*, No. 2:08-cv-2623-GEB-DAD, 2010 WL 3619457, at *7 (E.D. Cal. Sept. 13, 2010) (finding that evidence establishing that the building in question was scheduled to be demolished and that the demolition would expose workers to the contaminants was sufficient to survive summary judgment).

[73] *See* Dkt. 1 Ex. B at 35.

[74] Alaska Admin. Code tit. 18, § 75.345, table B.2, cmt. 13.

Of course, at this point, it is still very early in this litigation. Indeed, nearly all of the cases cited by both Parties and reviewed by the Court in the course of its own research were decided on summary judgment. On a motion to dismiss, the Court's task is to evaluate allegations, not evidence. Plaintiff has alleged that the contamination exceeds state cleanup criteria, and that the contamination has migrated and will continue to migrate, and that it accordingly may present an imminent and substantial endangerment to human health or the environment. The cleanup criteria represent levels that the state has determined present a potential for migration or a risk to health or the environment.

Defendants' consultant contends that the contamination plume is "stable" and that ADEC has been consulted on its cleanup plan. Plaintiff relied on the Shannon and Wilson report to establish issues that the Defendants had conceded. It also establishes that Shannon and Wilson consider the plume stable. It does not necessarily establish, as a matter of fact, that the plume is stable. Defendants may eventually be able to demonstrate that there is no genuine issue of material fact as to whether the plume is stable and that there is no risk to human health or the environment. This may entitled them to summary judgment. For now, however, in light of the nature of the state standards, Plaintiff's allegations are sufficient to plausibly assert that the contamination "may present an imminent and substantial endangerment to health or the environment."

2. Plaintiff's Requested Relief

Williams next contends that Plaintiff's RCRA claim fails because Plaintiff does not seek any additional relief beyond that required by the Compliance Order.[75] Under RCRA, a district

[75] Dkt. 23 at 11-14.

court may "restrain 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 . . . to order such person to take such other action as may be necessary or both."[76] Accordingly, the Supreme Court has held that an award of past cleanup costs is not permissible under RCRA.[77] In that same case, the Court did not rule out the possibility that "a private party could seek to obtain an injunction requiring another party to pay cleanup costs which arise after a RCRA citizen suit has been properly commenced . . . ."[78] Most courts, however, have since held that no damages are available to a private party under RCRA, including for cleanup costs incurred after the action was commenced.[79]

In its Complaint, Plaintiff alleges that the Compliance Order required Defendants' predecessors "to clean up or remove contaminated soil and clean up and restore contaminated groundwater to levels that will not exceed regulatory thresholds in a prudent and workmanlike manner."[80] Plaintiff further claims that Defendants "have failed to meet the requirements of the Compliance Order."[81] Plaintiff then requests "[i]njunctive relief requiring Defendants to immediately and fully investigate and delineate the scope of environmental contamination at and

---

[76] *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 484 (1996) (quoting 42 U.S.C. § 6972(a)).

[77] *Id.* at 484-88.

[78] *Id.* at 488.

[79] *See Tyco Thermal Controls LLC v. Redwood Indus.*, No. C 06-07164 JF (PVT), 2010 WL 3211926, at *18 (N.D. Cal. Aug. 12, 2010) (citations omitted).

[80] Dkt. 1 ¶ 21.

[81] *Id.*

adjacent to the Facility, and develop and implement an effective remediation plan . . . ."[82] Plaintiff also seeks a "[d]eclaratory judgment holding defendants liable for all future remedial action costs, removal costs and response costs incurred by Sears as a result of releases of hazardous substances at the Facility" and civil penalties.[83]

Williams contends that Plaintiff has not alleged facts "that could plausibly entitle [it] to an injunction."[84] Notably, injunctive relief is a remedy, not a cause of action.[85] Plaintiff does not need to demonstrate that it is entitled to a permanent injunction in its pleading. All it needs to do at this stage is to state a claim upon which a permanent injunction could be granted and request an injunction as a remedy for the claim.[86]

Williams appears to argue that Plaintiff cannot do that here because Plaintiff is not requesting anything beyond what the Compliance Order already requires. The Parties cite several RCRA cases which either found that a state regulatory agency's action was or was not already providing the relief sought by the plaintiff.[87] All of these cases were decided on summary judgment.

---

[82] *Id.* at 9-10.

[83] *Id.* at 10.

[84] Dkt. 23 at 11.

[85] *See, e.g.*, *Moreno v. Citibank, N.A.*, No. C 09-5339 CW, 2010 WL 1038222, at *5 (N.D. Cal. Mar. 19, 2010).

[86] *Cf. id.*

[87] *See* Dkt. 23 at 12-14 (discussing *87TH St. Owners Corp. v. Carnegie-Hill-87TH St. Corp.*, 251 F. Supp. 2d 1215, 1219-22 (S.D.N.Y. 2002), and *West Coast Home Builders, Inc. v. Aventis Cropscience USA Inc.*, Nos. C 04-2225 SI, C 04-2648 SI, 2009 WL 2612380, at *3-5 (N.D. Cal. Aug. 21, 2009)); Dkt. 25 at 9 (discussing *Interfaith Cmty. Org. v. PPG Indus., Inc.*, 702 F. Supp. 2d 295, 301-02 (D.N.J. 2010), and also citing *Lambrinos v. Exxon Mobil Corp.*, No. 1:00-CV-1734, 2004 WL 2202760, at *6-7 (N.D.N.Y. Sept. 29, 2004)).

Under RCRA, a plaintiff may seek more relief beyond that which a state agency might require.[88] At this point, Plaintiff is alleging that Defendants are not meeting the requirements of the Compliance Order and is seeking an order requiring Defendants to "develop and implement an effective remediation plan." This may or may not prove to be reasonably possible, but that is a factual question which the Court cannot resolve at this point. Plaintiff will have to articulate something much more specific to survive summary judgment, but its allegations are sufficient to survive the pleading stage.[89]

B. Primary Jurisdiction

Williams also contends that this Court should abstain from hearing Plaintiff's RCRA claim under the primary jurisdiction doctrine because hearing the claim would require resolving issues that are within the "special competence" of ADEC.[90] Primary jurisdiction "is a prudential doctrine under which courts may, under appropriate circumstances, determine that the initial decisionmaking responsibility should be performed by the relevant agency rather than the courts."[91] It applies "whenever the enforcement of a claim subject to a specific regulatory scheme requires resolution of issues that are 'within the special competence of an administrative

---

[88] *See PPG Indus.*, 702 F. Supp. 2d at 301 & n.6 (citing *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 399 F.3d 248, 259-60, 261 n.6 (3d Cir. 2005)).

[89] *Compare 87TH St. Owners Corp.*, 251 F. Supp. 2d at 1219-22 (granting summary judgment where the plaintiff could not identify a specific action to eliminate a danger to the public health or environment that the defendant could take beyond what it was already required to do), *with Stoll v. Kraft Foods Global, Inc.*, No. 1:09-cv-0364-TWP-DML, 2010 WL 3702359, at * (S.D. Ind. Sept. 6, 2010) (rejecting defendant's motion to dismiss RCRA plaintiffs' claim for injunctive relief as moot in light of an EPA order because plaintiffs had not been afforded "the opportunity to specify precisely what injunctive relief they are seeking").

[90] Dkt. 23 at 14-18.

[91] *Davel Commc'ns., Inc. v. Qwest Corp.*, 460 F.3d 1075, 1086 (9th Cir. 2006) (quoting *Syntek Semiconductor Co. v. Microchip Tech. Inc.*, 307 F.3d 775, 780 (9th Cir. 2002)).

body.'"[92] This would typically involve "issue[s] of first impression, or of a particularly complicated issue that Congress has committed to a regulatory agency."[93] The doctrine does not, however, "require that all claims within an agency's purview be decided by the agency," nor is it "intended to 'secure expert advice' for the courts from regulatory agencies every time a court is presented with an issue conceivably within the agency's ambit."[94]

Although there is no fixed formula for determining when the doctrine applies, courts in the Ninth Circuit generally examine whether there is "(1) the need to resolve an issue that (2) has been placed by Congress within the jurisdiction of an administrative body having regulatory authority (3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory scheme that (4) requires expertise or uniformity in administration."[95] Courts determining whether to apply the primary jurisdiction doctrine in RCRA citizen suit cases have also considered a separate set of factors, namely whether: (1) the court "is being called upon to decide factual issues not within the conventional experience of judges, or are instead issues of the sort that a court routinely considers"; (2) "the defendants could be subjected to conflicting orders of both the court and the administrative agency"; (3) "relevant agency proceedings have actually been initiated"; (4) "whether the agency has demonstrated diligence in resolving the

---

[92] *Id.* (quoting *Farley Transp. Co. v. Santa Fe Trail Transp. Co.*, 778 F.2d 1365, 1370 (9th Cir. 1985)).

[93] *Syntek*, 307 F.3d at 780 (quoting *Brown v. MCI WorldCom Network Servs., Inc.*, 277 F.3d 1166, 1172 (9th Cir. 2002)).

[94] *Davel*, 460 F.3d at 1086 (quoting *Brown*, 277 F.3d at 1172).

[95] *Id.* (quoting *United States v. General Dynamics Corp.*, 828 F.2d 1356, 1362 (9th Cir. 1987)).

issue or has instead allowed the issue to languish"; and (5) "the type of relief requested," particularly whether it involves "injunctive relief requiring scientific or technical expertise."[96]

Most of the cases that Williams relies upon were decided on summary judgment, and as those cases acknowledge, there is a split of authority as to whether courts should abstain from hearing RCRA citizen suit claims when a state agency is already involved.[97] As the Ninth Circuit has noted, the question at the motion to dismiss stage is whether doctrine necessarily applies to allegations as plead in the complaint.[98]

Here, it does not appear that this case presents an issue of first impression and the Court cannot yet determine whether it presents particularly complicated issues committed to ADEC's jurisdiction. Similarly, although ADEC is plainly involved in the process of remediating the Facility, the Court cannot yet determine whether it will be called upon to decide factual issues that are not within the conventional experience of judges, whether the Defendants may be subjected to conflicting orders, or whether evaluating the relief sought by Plaintiff will require scientific or technical expertise. Indeed, as noted above, at this point Plaintiff is not required to provide the specific terms of the injunctive relief that it is requesting.

Plaintiff has essentially alleged that ADEC has not been diligent in resolving the contamination at the Facility, claiming that the Defendants have not satisfied the terms of the

---

[96] *See Davies v. National Coop. Refinery Ass'n*, 963 F. Supp. 990, 997-1000 (D. Kan. 1997) (citing *Friends of Santa Fe Cnty. v. LAC Minerals, Inc.*, 892 F. Supp. 1333, 1349-50 (D.N.M. 1995)).

[97] *See, e.g.*, *Davies*, 963 F. Supp. at 997-1000 (noting that the court had denied the defendants' motions for judgment on the pleadings in light of the split of authority, but granting the defendants' motion for summary judgment based on the doctrine).

[98] *Davel Commc'ns., Inc. v. Qwest Corp.*, 460 F.3d 1075, 1088 (9th Cir. 2006).

Compliance Order. That may be the case – the fact that the Compliance Order is now twenty years old suggests that Plaintiff's claim is plausible. Of course, it is equally plausible that Defendants are satisfying the terms of the Compliance Order, and that they, with ADEC's blessing, have taken all action that they reasonably can be expected to take at this point. On this record, the Court cannot determine what the true facts are.

Accordingly, the Court will retain jurisdiction for the time being, but will permit Defendants to renew their arguments on a full record at the summary judgment stage.

IV. CONCLUSION

For the foregoing reasons, Williams' motion for judgment on the pleadings (Docket No. 23) is DENIED.

Dated at Anchorage, Alaska, this 8th day of June, 2011.

/s/ Timothy M. Burgess
TIMOTHY M. BURGESS
UNITED STATES DISTRICT JUDGE