

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

WILLIAM A. NICKLE, JR.,)	
)	
Plaintiff)	
)	
v.)	Civil Action No. 03-322 GMS
)	
UNITED STATES ARMY CORPS OF)	
ENGINEERS,)	
)	
Defendant.)	
)	

MEMORANDUM AND ORDER

I. INTRODUCTION

The *pro se* plaintiff, William A. Nickle, Jr., filed the present action in the Superior Court of the State of Delaware in and for New Castle County on or about February 25, 2003, seeking damages for neglect, nuisance, inconvenience, and real estate depreciation. Nickle alleges that lead chips and lead dust have fallen from the St. Georges Bridge, owned by the United States Army Corps of Engineers (“Corps”), onto his property. Because Nickle’s claims are cognizable under the Federal Tort Claims Act (“FTCA” or “Act”), the defendant removed the action to federal court on March 23, 2003.¹ The defendant now moves to dismiss the suit for lack of subject matter

¹ In a June 13, 2003 letter to the court (D.I. 11), the plaintiff expresses concern regarding the removal of the case from Superior Court to federal court. By way of explanation for the benefit of the *pro se* plaintiff, the court notes that in some contexts, a defendant may remove a civil case from state court to a United States district court pursuant to 28 U.S.C. § 1441. If the suit is one that the district court may properly hear, *i.e.*, if the federal court has original jurisdiction over the action, it may be removed to the district court embracing the location of the state court in which the action was pending. 28 U.S.C. § 1441(a) (2003). Because the plaintiff’s claims of neglect and nuisance constitute allegations of negligent or wrongful acts or omissions by an individual acting in an official capacity on behalf of a federal agency, they are construed as claims pursuant to the Federal Tort Claims Act. *See* 28 U.S.C. §§ 1346 (b)(1), 2671-2680 (2003). This court has original and exclusive jurisdiction over claims arising from the FTCA.

jurisdiction (D.I. 3). For the following reasons, the court will grant the motion.

II. STANDARD OF REVIEW

The defendant moves for dismissal for lack of subject matter jurisdiction, presumably pursuant to Federal Rule of Civil Procedure 12(b)(1). An attack pursuant to this Rule challenges the jurisdiction of the court to address the merits of the complaint. *Lieberman v. Delaware*, 2001 WL 1000936, at *1 (D. Del. 2001). Such a motion may challenge the court’s jurisdiction facially, based on the legal sufficiency of the claim, or factually, based on the sufficiency of jurisdictional fact. *Mortensen v. First Fed. Sav. and Loan*, 549 F.2d 884, 891 (3d Cir. 1977) (distinguishing standards governing each type of challenge); 2 JAMES W. MOORE, MOORE’S FEDERAL PRACTICE § 12.30[4] (3d ed. 1997) (same); *compare Lieberman*, 2001 WL 1000936, at *1 (finding facial challenge where defendant did not dispute facts alleged in complaint that supported court’s subject matter jurisdiction) *and Rhoades v. United States*, 950 F. Supp. 623, 629 (D. Del. 1996) (finding factual challenge where jurisdictional question was “inextricably intertwined with the merits of the cause of action”). The instant case presents a facial challenge because the defendant does not attack the merits of the plaintiff’s claims but, rather, alleges procedural defects. Accordingly, the plaintiff is afforded certain safeguards: the court must accept the facts alleged in the complaint as true, and draw all reasonable inferences in favor of the plaintiff. *Mortensen*, 549 F.2d at 891.

III. FACTUAL BACKGROUND

The plaintiff lives in St. Georges, Delaware, near the St. Georges Bridge. The bridge,

28 U.S.C. § 1346 (b)(1). Thus, the present action was properly removed from state court to this court.

completed in 1942, is owned and operated by the United States Army Corps of Engineers.² The bridge was painted with lead-based paint, and Nickle alleges that lead paint chips and dust have fallen from the bridge onto his property.³ Beginning in 1998, the plaintiff engaged in extensive communication with the Corps and others regarding his concerns as to the lead particles. In his complaint and briefing, Nickle references numerous telephone calls, letters, and meetings between himself, employees of the Corps, then-Governor Thomas Carper, and others. At some point thereafter, perhaps in 2000 or 2001, the Corps began to remove the lead particles from the plaintiff's property. Nickle alleges that the Corps did not remove all of the chips and dust from his property and the surrounding area and that, as a result, "lead dust is still blowing on [his] property." Answer (D.I. 5) at 2. The plaintiff is extremely concerned about the health risk posed by the lead particles as well as the resulting physical and financial damage to his property. Nickle seeks damages for, among other things, the loss of the use of his property, the cost and nuisance of keeping children out

² The court has noticed this fact, gleaned from the World Wide Web site of the Corps, <http://www.usace.army.mil/>, and other essential facts that were omitted from the parties' briefing. Notably, by way of briefing, the defendant has submitted only a one-page Motion to Dismiss comprising seven sentences, with no supporting brief, and a one-page "reply letter" filed several days after a reply brief was due. (Although the defendant complains that it did not recognize the plaintiff's April 24, 2003 letter to the court as a brief, the document was clearly labeled "Plaintiff Brief," and docketed as such.) Furthermore, the defendant's submissions included no legal research or argument whatsoever, save bare citations to two cases. Regardless of the defendant's view of the viability of the plaintiff's claims, every motion, particularly a case-dispositive one, merits a complete treatment by the parties, especially those parties with the benefit of counsel. Thus, although the court recognizes that the principles at issue in the present motion are not extraordinarily complex, it would have appreciated a less cursory treatment by the United States.

³ Indeed, it appears undisputed that lead particles have fallen from the bridge onto residential properties below. For example, the Corps' Web site describes the "increased incidence of lead paint chips flaking off the old bridge," and contains links to press releases regarding the "contamination" of residential properties and the Corps' cleanup efforts. See <http://www.nap.usace.army.mil/stg/stg.htm>.

of his yard, the Corps' inadequate attempt to remove the chips and dust from his property, and depreciation of the value of his property.

IV. DISCUSSION

As noted above, the plaintiff's allegations have been construed as claims against the United States pursuant to the Federal Tort Claims Act. "The FTCA is designed to ease court congestion, expedite fair settlement, and provide equitable treatment to the injured individual." *Frantz v. United States*, 791 F. Supp. 445, 447 (D. Del. 1992). To further these goals, the Act requires any claimant to file an administrative claim "to the appropriate Federal agency"⁴ before filing suit in court. 28 U.S.C. § 2675(a) (2003). Such a claim constitutes: (1) an executed Standard Form 95 or other written notification of the incident; (2) a claim for a sum certain for money damages alleged to have resulted from the incident; and (3) if the claim is filed on behalf of the claimant, evidence of the authority to present a claim on behalf of the claimant. 28 C.F.R. 14.2(a) (2003); *Frantz*, 791 F. Supp. at 448. The claim must "have been finally denied by the agency in writing and sent by certified or registered mail" before the claimant may bring a suit in court. 26 U.S.C. § 2675(a). Fulfillment of the administrative claim requirement is an essential prerequisite to the court's subject matter jurisdiction over an FTCA claim. *Washington v. Curry*, 2002 WL 233192, at *2 (D. Del., Feb. 14, 2002); *Dondero v. United States*, 775 F. Supp. 144, 147 (D. Del. 1991) ("Tort claims against the United States shall be barred unless they are first presented in writing to the appropriate Federal agency."). Thus, failure to comply with the administrative exhaustion requirement must result in a dismissal. It is the plaintiff's burden to establish that a proper administrative claim was

⁴ The appropriate federal agency is the agency "whose activities gave rise to the claim." 28 C.F.R. 14.2 (b)(1) (2003).

filed. *Frantz*, 791 F. Supp. at 449.

Nickle alleges extensive communications with the Army Corps of Engineers regarding his complaints about the lead-based paint chips and dust. Arguably, any one of his letters may have served as the “written notification of an incident” as required by the FTCA.⁵ The second criterion, however, requiring a claim of a sum certain, is more problematic for the plaintiff. It is said that the sum certain requirement is designed to promote settlements: “The initial purpose of the regulations requiring a statement of the specific sum claimed is to enable a determination by the head of the federal agency as to whether the claim falls within the jurisdictional limits of his exclusive authority to process, settle or to properly adjudicate the claim.” *Bialowas v. United States*, 443 F.2d 1047, 1050 (3d Cir. 1971); *see also Dondero*, 775 F. Supp. at 147 (noting that the federal agency is in “the best position” to assess nature of claims and possesses “a degree of expertise” in settling them). Regardless of the purpose of the requirement, it is strictly construed. *Dondero*, 775 F. Supp. at 147. The parties may not waive the jurisdictional requirements, and the court may not excuse noncompliance. *Id.*

Even construing the facts in the light most favorable to Nickle, it seems apparent that he has not met the jurisdictional requirements of the FTCA. It does not appear that any of the plaintiff’s letters to the Corps contained a claim for a specific sum certain regarding the damages he believes

⁵ As support for its Motion to Dismiss, the defendant submitted affidavits by officers of the Corps’ Baltimore and Philadelphia Districts who handle administrative tort claims against the agency. Neither employee is aware of any such claim filed by the plaintiff against the Corps. This evidence, however, does not address the argument that any of the plaintiff’s letters to the agency may have constituted “other written notification” of his claim for purposes of 28 C.F.R. 14.2(a). In any case, the court views the question as moot, given the apparent failure of the plaintiff to include a request for a sum certain in any of his letters to the Corps and the absence of any final, written denial by the agency. Thus, even if one of his letters constituted written notification to the agency, such notification was deficient.

to have occurred as a result of the Corps' negligence. Moreover, even if he had, there is no indication that such a claim has been "finally denied by the agency in writing and sent by certified or registered mail." It is the plaintiff's burden to establish these elements. Having failed to do so, the court must conclude that Nickle has not met the jurisdictional prerequisites for filing a claim in court. Therefore, although the court finds that the plaintiff's claims, if true, demonstrate disturbing conduct on the part of the United States and its agents in the Army Corps of Engineers, it is bound by the legal principles discussed above to dismiss the case.

V. CONCLUSION

The plaintiff has not demonstrated that he filed an administrative claim including a sum certain that was denied by the agency before filing the present action, as required by the FTCA. Therefore, the court lacks subject matter jurisdiction to hear the case, and it must be dismissed.

IT IS HEREBY ORDERED that:

1. The defendant's Motion to Dismiss (D.I. 3) is GRANTED;
2. The present action is DISMISSED WITH PREJUDICE;
3. The Clerk of the court is directed to close this case.

Dated: July 10, 2003

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE