United States Court of Appeals
for the Fifth Circuit

No. 21-30294

RESIDENTS OF GORDON PLAZA, INC.,

Plaintiff—Appellant,

versus

LATOYA CANTRELL, *in her official Capacity as Mayor of the City of New Orleans*; CITY OF NEW ORLEANS,

Defendants—Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 2:20-CV-1461

(Filed Feb. 1, 2022)

Before OWEN, *Chief Judge*, and CLEMENT and ENGELHARDT, *Circuit Judges.*

EDITH BROWN CLEMENT, *Circuit Judge*:

Appellant, the Residents of Gordon Plaza, Inc. ("Gordon Plaza"), appeals the dismissal with prejudice of its complaint, filed under the citizen-suit provision of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6972(a)(1)(B), against the Appellees—LaToya Cantrell, in her official capacity as Mayor of the City of New Orleans, and the City of New Orleans (collectively, the "City").

For the reasons that follow, we AFFIRM.

I.

A.

Gordon Plaza is an association of primarily African American residents of a neighborhood called Gordon Plaza located on the site of the Agriculture Street Landfill ("Site") that the City previously owned and operated. Because of this previous use, the Site allegedly contains significant levels of hazardous chemicals and solid waste. Approximately twenty years after the City ceased using the Site as a landfill, it developed the Site for residential use. The City is alleged to have targeted Black residents in selling the residential units and without disclosing that the Site had previously been used as a landfill.

In 1994, the Environmental Protection Agency ("EPA") listed the Site as a Superfund site on the National Priorities List ("NPL") based on concerns about arsenic, lead, and polynuclear aromatic hydrocarbon levels. From 1994 to 2001, the EPA fenced off part of the Site, removed two feet of soil in some areas, placed a permeable "geotextile mat" over some contaminated soils, and covered some contaminated soils with about a foot of soil. In 2002, the EPA announced it had "completed all response actions for the Agriculture Street Landfill site in accordance with Close Out Procedures for National Priorities List Sites."

In 2005, Hurricane Katrina devastated New Orleans. The complaint alleges that, after the storm, the U.S. Agency for Toxic Substances and Disease Registry (a federal public health agency of the U.S. Department of Health and Human Services) concluded that chemical concentrations at the Site "pose[d] an indeterminate public health hazard." And in 2018, the EPA determined that the soil on nine residential properties on the Site "may contain contaminant levels that are unacceptable for non-industrial use." Gordon Plaza alleges that, because of soil erosion caused by storms and the passing of time, the geotextile mat is exposed in some places and missing in others, releasing contaminated soil.

In 2008, the EPA and the City reached a Superfund consent decree ("Consent Decree" or "Decree") requiring the City to take certain actions to "protect the remedy" that the EPA installed at the Site, and "thereby, [protect] the public health or welfare or the environment at the Site." The "remedy" is defined as "the excavation of 24 inches of soil, placement of a permeable geotextile mat/marker on the subgrade, backfilling the excavated area with clean fill, covering the clean fill with grass sod, landscaping and yard restoration, driveway and sidewalk replacement, and final detailing." Because the "soil cap and geotextile mat covering the Site could be breached or degraded by excavation . . . or by the failure to maintain the vegetative cover over the soil cap," the Decree requires the City "to maintain the [soil] cap" at the Site. Specifically:

> The [City] will mow vegetation at least twice per year, and otherwise maintain[ ] its right of ways . . . in order to maintain a stable vegetative cover. Because lack of mowing/maintenance by private owners of land within the Site is likely to damage the subsurface geotextile mat, the City will use its available authorities to (a) require that landowners mow and otherwise maintain the grass vegetation on their properties, or (b) undertake the necessary maintenance directly.

The City must also "refrain from using the Site . . . in any manner that would interfere with or adversely affect the implementation, integrity, or protectiveness of the remedy."

The Decree also required the City to provide a Technical Abstract—a protocol for utility providers to "follow to maintain the integrity of the permeable soil and geotextile mat" with instructions on how to properly excavate beneath the geotextile mat, if necessary—to all utilities operating within the Site, and to "direct that all of its agencies and departments . . . incorporate the Technical Abstract . . . as standard operating procedures when working within the Site."

Among its other commitments under the Consent Decree, the City was required to "designate an official of the City as the Project Coordinator who will be responsible for ensuring the City's compliance with the requirements of the Decree" and who "shall be the lead point of contact for EPA with the City." The City "shall submit to EPA on an annual basis . . . a written

progress report that describes the actions which have been taken to achieve compliance." And the Decree additionally provides for EPA oversight, including access for "5-year reviews," for "[m]onitoring, investigation, removal, remedial or other activities at the Site," as well as for "[a]ssessing [the City's] compliance with [the] Consent Decree."

The EPA's most recent five-year review report was issued in 2018 ("2018 Five-Year Review Report") and comprises 31 pages of EPA findings and 321 pages of attachments and appendices. The Report concluded that the City was in compliance with the Consent Decree. Specifically, the Report stated that the "soil barrier that covers the entire site is in place and expected to remain in place over time, restricting exposure to the remaining subsurface contaminants associated with the site."

B.

On May 15, 2020, Gordon Plaza brought this citizen suit under RCRA, § 6972(a)(1)(B), alleging that the Site remains contaminated with hazardous chemicals causing residents to suffer from cancer and other health conditions. Gordon Plaza seeks a declaration of imminent and substantial endangerment and an order that the City perform an environmental quality analysis, risk assessment, and full abatement of the Site. The complaint failed to inform the district court of the 2008 Consent Decree between the City and the EPA.

The City attached the Decree to its responsive pleadings and moved to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), arguing that the suit was precluded by RCRA's statutory bar on citizen suits where a "responsible party is diligently conducting a removal action" pursuant to a consent decree with the EPA. *See* 42 U.S.C. § 6972(b)(2)(B)(iv); *see also* Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9601(23) (providing statutory definition of "removal" action). The district court took judicial notice of the Consent Decree and granted dismissal with prejudice based on its finding that the Decree "requires the City to perform removal actions on an ongoing basis" and that Gordon Plaza "fail[ed] to plausibly allege that the City's continued actions under the consent decree are not 'removal actions.' "

Gordon Plaza moved the court to reconsider its final order under Rule 59(e). *See* FED. R. CIV. P. 59(e). The district court denied the motion. Gordon Plaza timely appealed.

We note that the instant lawsuit presents Gordon Plaza's second time at bat on these claims—which it failed to properly inform the district court about as required by the local rules. *See* E.D. LA. L.R. 3.1. In April 2018, Gordon Plaza filed a RCRA citizen suit against the City, seeking the relocation of its members ("2018 Litigation"). The suit was dismissed without prejudice for lack of standing. *Residents of Gordon Plaza, Inc. v. Cantrell* (*Gordon Plaza I*), No. 18-4226, 2019 WL

2330450, at *2–3 (E.D. La. May 31, 2019).[1] Gordon Plaza's motion to amend the complaint was denied upon the district court's finding that Gordon Plaza had acted with "bad faith or dilatory motive" because, in part, its "theories of recovery [were] intentionally advanced in a piecemeal or disjointed fashion."

On appeal, Gordon Plaza argues three grounds for reversal. First, that the district court abused its discretion by relying on the City's diligent-removal-action defense, which Gordon Plaza contends was improperly asserted in a reply brief. Second, that the district court erred in finding that the City has been diligently engaged in a removal action.[2] And third, that the district court abused its discretion by denying leave to amend.

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[1] The *Gordon Plaza I* court offered its view in dicta that the 2008 Consent Decree did not trigger RCRA's statutory bar against citizen suits. 2019 WL 2330450, at *3–4. The court found that the City's obligations, such as "maintaining a stable vegetative cover, involve basic maintenance of completed removal actions" and are not, themselves, removal actions. *Id.* at *3. The court cited no authority for this holding. Because the district court's discussion of the citizen-suit statutory bar takes place in dicta and in a separate civil action seeking distinct relief, it was not the law of the case in the underlying proceedings. *See Med. Ctr. Pharmacy v. Holder*, 634 F.3d 830, 834 (5th Cir. 2011) (law of the case doctrine "govern[s] the same issue in subsequent stages *in the same case*" (emphasis added)).

[2] Gordon Plaza disputed the district court's taking judicial notice of the 2008 Consent Decree and the 2018 Five-Year Review Report. It has waived that issue on appeal.

II.

We review *de novo* the grant of a motion to dismiss under Rule 12(b)(6). *See Meador v. Apple, Inc.*, 911 F.3d 260, 264 (5th Cir. 2018). "To survive a motion to dismiss, 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*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* We accept all well-pleaded facts as true and draw all reasonable inferences in favor of the plaintiff. *See Kelson v. Clark*, 1 F.4th 411, 416 (5th Cir. 2021).

III.

Gordon Plaza sets forth three arguments to challenge the district court's dismissal of the complaint under RCRA's statutory bar, which provides that citizen suits may not be commenced where a "responsible party is diligently conducting a removal action" pursuant to a consent decree with the EPA. 42 U.S.C. § 6972(b)(2)(B)(iv). First, that the district court abused its discretion by considering whether the City's actions under the Consent Decree are removal actions because, according to Gordon Plaza, the City raised this defense in a reply brief. Second, that the court erroneously determined the City's actions under the Decree are "removal" actions. And third, that the court erred

when it found the City has been "diligently" performing those actions.

A.

We begin with the threshold issue whether the City first asserted in a reply brief its defense that its actions under the Consent Decree constituted "removal" actions. In the Fifth Circuit, a district court abuses its discretion when it considers new arguments raised for the first time in a reply brief without providing the "non-movant an adequate opportunity to respond prior to a ruling." *Thompson v. Dall. City Att'y's Off.*, 913 F.3d 464, 471 (5th Cir. 2019) (quoting *Vais Arms, Inc. v. Vais*, 383 F.3d 287, 292 (5th Cir. 2004)). Gordon Plaza contends that "[n]either the City nor the District Court identified any instance in which the City claimed—before that reply—to have conducted a 'removal action,' whether in the case under appeal or in the preceding case."

The City first asserted its defense that the Consent Decree with the EPA barred citizen suits under RCRA in the 2018 Litigation, and the court identified "[t]he question before [it] [as] whether defendants are . . . 'diligently conducting a removal activity' as required to preclude a citizen suit." *Gordon Plaza I*, 2019 WL 2330450, at *3 (quoting 42 U.S.C. § 6972(b)(2)(B)(iv)). The City stated that it was "asserting these same grounds for dismissal" in its motion to dismiss in the proceedings below. The City further explained that "Gordon Plaza's citizen suit is barred by

the RCRA since the EPA has been proceeding with a removal action . . . and has entered a Consent Decree with the City . . . in 2008 which has extended additional remediation and with which the City is in compliance." In asserting that Gordon Plaza's suit was statutorily barred, the City cited 42 U.S.C. § 6972(b)(2)(B)(iv). Notably, in its opposition to the motion to dismiss, Gordon Plaza recognized that "Section 6972(b)(2)(B)(iv) would only apply . . . if—in the present tense—'a responsible party [*e.g.*, the City] is diligently conducting a removal action,'" and argued that "[n]either EPA nor any other party . . . is actually engaging in a removal action because the agency finished the removal actions."

Because we find that the City raised its defense under 42 U.S.C. § 6972(b)(2)(B)(iv) in both the 2018 Litigation and in its motion to dismiss in the instant suit, we hold that the district court did not abuse its discretion by considering it.

B.

We turn next to Gordon Plaza's contention that this citizen suit is not barred because the City's obligations under the 2008 Consent Decree are not "removal" actions. Gordon Plaza sets forth two arguments. First, that we should accord deference to an EPA statement in the preamble to a proposed rule, which, according to Gordon Plaza, represents the EPA's authoritative interpretation of "removal" to exclude "operation and maintenance" activities. Second, that the City's

activities under the Consent Decree do not fall within the statutory definition of a "removal" action. Neither contention has merit.

1.

We turn first to the issue whether the EPA has provided an authoritative interpretation of "removal" to which we should accord deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), or, in the alternative, a persuasive interpretation under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). We find that deference is not appropriate under either framework.

When reviewing an agency's legal construction of the statute that it administers, we apply the two-step analysis established by the Supreme Court in *Chevron*. *See* 467 U.S. at 842–44. But before leaping into the *Chevron* two-step, we must determine whether the agency construction is of a form that warrants application of the framework at all. The Supreme Court has instructed federal courts not to reach *Chevron* steps one or two *unless* the court first determines "the agency interpretation claiming deference was promulgated in the exercise of that authority" to make rules carrying the force of law. *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001); *see also Dhuka v. Holder*, 716 F.3d 149, 155 (5th Cir. 2013) (noting the "predicate requirement that the agency have issued its interpretation in a manner that gives it the force of law"). We refer to this threshold inquiry as "*Chevron* step zero."

See Ali v. Barr, 951 F.3d 275, 279 (5th Cir. 2020) (citing Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 191 (2006)).

Gordon Plaza argues that the "EPA has spoken directly to the issue" before us in a *proposed* rule—specifically, the EPA's 2002 proposal to delete a particular Superfund site from the NPL. *See* EPA, *Notice of Intent to Delete the Del Norte County Pesticide Storage Area Superfund Site from the National Priorities List*, 67 Fed. Reg. 51,528 (Aug. 8, 2002). Gordon Plaza points to one sentence in the *preamble* to that proposed rule: The "CERCLA . . . defines response as removal and remedial actions, and does not include operation and maintenance activities." *Id.* According to Gordon Plaza, this sentence presents the EPA's "legal conclusion" that "removal" action excludes "operation and maintenance."

Notably, the proposed rule does not indicate an intention to clarify rights and obligations generally with the force of law but rather to set out a fact-bound inquiry into the application of a regulation to a particular party—here, the provision for NPL site deletion in the National Oil and Hazardous Substances Pollution Contingency Plan ("NCP"), 40 C.F.R. § 300.425(e). *See Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979); *see also Mead*, 533 U.S. at 226. And the specific language at issue does not purport to provide an agency position on the statutory definition of a "removal" action but to parrot Congress's existing definition for a "response" action. In any event, we have long held that "proposed regulations are entitled to no deference until final."

Howard Hughes Co. v. Comm'r, 805 F.3d 175, 185 (5th Cir. 2015) (quoting *In re Appletree Mkts., Inc.*, 19 F.3d 969, 973 (5th Cir. 1994)). This is, in part, because "a proposed regulation does not represent an agency's considered interpretation of its statute." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 845 (1986). And that logic is at play here where the purported legal conclusion from the preamble of the proposed rule fails to materialize in the finalized rule.

The final rule following the proposed rule consists of one sentence: "Table 1 of appendix B to part 300 is amended by removing the entry for" the particular site at issue. EPA, *Notice of Deletion for the Del Norte County Pesticide Storage Area Superfund Site from the National Priorities List*, 67 Fed. Reg. 58,731 (Sept. 18, 2002). The introductory summary of the final rule includes a notably distinct version of the language at issue: "The EPA and the State of California . . . have determined that all appropriate response actions under CERCLA, *other than* Operation and Maintenance and Five-Year reviews, have been completed." *Id.* (emphasis added). The addition of the phrase "other than" appears to undermine Gordon Plaza's position by suggesting that operation and maintenance activities *are* included within the scope of response activities.

Gordon Plaza persists that the EPA implicitly implemented an interpretation of "removal" that excludes operation and maintenance activities because the NCP only allows for sites to be deleted from the NPL "where no further response is appropriate," 40 C.F.R. § 300.425(e), and "response" is defined to include

"removal," 42 U.S.C. § 9601(25). But obvious separation-of-powers principles prevent us from deferring to language in the preamble of a proposed regulation that the EPA declined to include in its final rule, which itself only purported to provide an individual, ad hoc determination. *Appletree Mkts.*, 19 F.3d at 973. *Cf. Kaufman v. Nielsen*, 896 F.3d 475, 484–85 (D.C. Cir. 2018) (declining to accord *Chevron* deference to agency letter "singularly focused" on the application of a regulation to one individual and not "clearly intended to have general applicability and the force of law" (citation omitted)).

Because the language in the proposed rule does not provide an interpretation of "removal" carrying the force of law, it fails to pass *Chevron* step zero and we do not accord deference under that framework.

Gordon Plaza argues that the language in the proposed rule is at least entitled to *Skidmore* deference, which applies to "agency interpretations of statutes they administer that do not carry the force of law." *Luminant Generation Co. v. EPA*, 675 F.3d 917, 928 (5th Cir. 2012). *Skidmore* deference follows from the understanding that agency constructions, even where not authoritative, are entitled to respect insofar as they "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore*, 323 U.S. at 140. However, with the deferential thumb removed from the scale, only the "well-reasoned views of the agencies implementing a statute" warrant respect. *Mead*, 533 U.S. at 227 (quoting *Bragdon v. Abbott*, 524 U.S. 624, 642

(1998)). The weight provided to the agency's interpretation "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore*, 323 U.S. at 140.

The EPA's proposed rule lacks the necessary markers of persuasion. This statement about the statutory definition of "response" does not purport to interpret an ambiguous provision of CERCLA, and does not meaningfully set forward as the subject of notice-and-comment rulemaking the interpretation of an ambiguous statute. Rather, the language at issue is housed in the preamble of a proposed rule that purports to call for comment on the ad hoc deletion of a site from the NPL. The proposed rule is devoid of statutory interpretation or discussion. Its language does not indicate intent to provide a generally applicable interpretation of "removal." The sentence at issue—language that was not adopted in the final rule—lacks the hallmarks of persuasion and is not entitled to *Skidmore* deference.

We hold that neither *Chevron* nor *Skidmore* deference is warranted.

2.

Gordon Plaza asserts that CERCLA's definition of "removal" does not encompass the City's obligations under the Consent Decree. The classification of a "removal" action is a question of law. *United States v. W.R. Grace & Co.*, 429 F.3d 1224, 1234 (9th Cir. 2005).

The Consent Decree refers to the City's obligations as "proper operation and maintenance practices and institutional controls." The parties agree that the City's activities are "maintenance" actions. The essence of their dispute is whether the City's maintenance actions fall within the scope of "removal" actions under CERCLA.

The Decree provides that, "[u]nless otherwise expressly provided," terms used in the Decree adopt the definition provided in CERCLA or in regulations promulgated thereunder. The Decree does not define "removal action" or "operation and maintenance practices." CERCLA does not provide definitions for the terms "operation" or "maintenance" but defines the term "removal" as:

> The cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, [and] temporary evacuation and

> housing of threatened individuals not otherwise provided for. . . .

42 U.S.C. § 9601(23). We have recognized that "Congress intended that the term 'removal action' be given a broad interpretation." *Geraghty & Miller, Inc. v. Conoco Inc.*, 234 F.3d 917, 926 (5th Cir. 2000) (quoting *Kelley v. E.I. DuPont de Nemours & Co.*, 17 F.3d 836, 843 (6th Cir. 1994)), *abrogated on other grounds as recognized by Vine Street LLC v. Borg Warner Corp.*, 776 F.3d 312, 317 (5th Cir. 2015); *see also United States v. Lowe*, 118 F.3d 399, 402 (5th Cir. 1997) (noting the term is "defined broadly"). The definition of removal encompasses more than the "cleanup . . . of released hazardous substances from the environment"; it also covers the "monitor[ing], assess[ing], and evaluat[ion of] the . . . threat of release of hazardous substances" and the catchall "taking of such other actions . . . to prevent, minimize, or mitigate damage . . . , which may otherwise result from a . . . threat of release" of hazardous substances. § 9601(23). Accordingly, we have observed that removal is "aimed at *containing and* cleaning up hazardous substance releases." *Lowe*, 118 F.3d at 403 (emphasis added). And this understanding is reflected in the NCP, which lists examples that, "as a general rule," fall within the scope of a removal action, including the "[c]ontainment . . . of hazardous materials—where needed to reduce the likelihood of human, animal, or food chain exposure." 40 C.F.R. § 300.415(e)(8).

The definition of "removal" action encompasses the City's ongoing obligations under the Consent

Decree. The Decree states its objective is to task the City with fulfilling certain obligations in order to "protect the [EPA's] remedy on the Site and, thereby, the public health or welfare or the environment at the Site." In parallel language, "removal" broadly includes the "taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment." 42 U.S.C. § 9601(23).

The Decree specifically requires the City to "maintain a stable vegetative cover." The vegetative cover prevents erosion of the soil cap and geotextile mat. And "failure to maintain the vegetative cover" risks that the soil cap and geotextile mat will be "breached or degraded." The EPA installed the soil cap and geotextile mat to protect against "the release or threatened release of hazardous substances at the [Site]." "Because contaminants have been left in place beneath the geotextile mat," and "[b]ecause [the] lack of mowing/maintenance . . . is likely to damage the subsurface geotextile mat," "proper operation and maintenance practices and institutional controls are required to maintain the integrity of the cap." Accordingly, the City is obligated to mow vegetation "at least twice per year" and to "use its available authorities to (a) require that landowners otherwise maintain the grass vegetation on their properties, or (b) undertake the necessary maintenance directly." The City was also required to pass an ordinance requiring property owners to notify the City if they intend to excavate soil beneath the geotextile mat, and to "direct that all of its agencies

and departments" incorporate the Technical Abstract as standard operating procedure within the Site.

In sum, the City must maintain the vegetative cover, which protects the integrity of the geotextile mat, and thereby prevents the contaminants underneath from being released. This obligation easily falls within the definition of a "removal" action to include "the taking of such [] actions as may be necessary to prevent, minimize, or mitigate damage . . . , which may otherwise result from a release or threat of release." 42 U.S.C. § 9601(23).

Gordon Plaza wholly fails to engage with the statutory text, except to point out that the definition of "removal" does not explicitly include the terms "operation and maintenance." Gordon Plaza then points to EPA guidance and regulations, terminology in the 2008 Consent Decree and 2018 Five-Year Review, and dicta in our precedent—all of which Gordon Plaza alleges contradicts our reading of the statutory definition of "removal."

First, Gordon Plaza cites to language in an EPA regulation defining "[o]peration and maintenance" as "measures required to maintain the effectiveness of response actions," and separately defining "[r]espond or response" as "remove, removal, remedy, or remedial action, including enforcement activities related thereto." 40 C.F.R. § 300.5. But neither definition informs the definition of "removal" nor whether "removal" actions exclude "[o]peration and maintenance." Similarly, Gordon Plaza's citation to the NCP's

provision that operation and maintenance measures "are initiated after the remedy has achieved the remedial action objectives" is not helpful because CERCLA separately defines "remedy" and "removal." *See* 40 C.F.R. § 300.435(f)(1); 42 U.S.C. § 9601(23), (24).

Second, Gordon Plaza points to EPA Superfund guidance separately discussing removal actions and "post-removal site controls" ("PRSCs"). *See* EPA, *Superfund Removal Procedures: The Removal Response Decision, Site Discovery to Response Decision*, p. 8 (June 1998). But this guidance is not illuminating because the EPA defines PRSCs as "those activities that are necessary to sustain the integrity of a [] removal action following its conclusion" and concludes that a PRSC "may be a removal . . . action under CERCLA." 400 C.F.R. § 300.5.

Third, Gordon Plaza argues that the language in the Decree and the 2018 Five-Year Review Report reflect that the EPA does not consider the City's activities to be "removal" actions but "Post-Removal Activities" and "maintenance and protect[ion]" actions. But we have already explained that the City's "maintenance" of the vegetative cover and "protection" of the geotextile mat falls within the statutory definition of a "removal" action.

Finally, Gordon Plaza cites to dicta in our precedent that "a 'removal' is generally understood to be a short-term response." *Lowe*, 118 F.3d at 402. This generality arises from caselaw distinguishing the statutory definitions of "removal" and "remedial" actions.

E.g., *Voluntary Purchasing Grps., Inc. v. Reilly*, 889 F.2d 1380, 1382 n.4 (5th Cir. 1989). Whether removal actions are *generally* short- or long-term by comparison to remedial actions does not determine the specific question before us. *Cf. W.R. Grace & Co.*, 429 F.3d at 1244 (rejecting that removal actions *must* be short-term); *Village of Milford v. K-H Holding Corp.*, 390 F.3d 926, 934 (6th Cir. 2004) (same).

In short, Gordon Plaza has failed to point to authority clearly interpreting "removal" to exclude operation and maintenance activities. We hold that the City's maintenance obligations under the Decree are "removal" actions under CERCLA.

C.

We turn next to Gordon Plaza's contention that the City was not "diligently" conducting a removal action. We hold that Gordon Plaza has failed to plausibly plead this allegation.

At the threshold, we note that the Consent Decree provides a framework for ongoing monitoring of the City's performance of its obligations under the Decree. Specifically, the Decree provides for annual reporting, EPA oversight and 5-year review inspections, stipulated penalties if the City is found in noncompliance with its provisions, and dispute resolution culminating in court. We take note of these regular reporting and inspection requirements because RCRA's statutory bar on citizen suits is "intended to avert citizen suit interference with state and federal enforcement

activities." *Chico Serv. Station, Inc. v. Sol P.R. Ltd.*, 633 F.3d 20, 28 (1st Cir. 2011). We observed in the context of the Clean Water Act—which we have found "requires like interpretation" to the citizen-suit provisions of RCRA, *Cox v. City of Dallas*, 256 F.3d 281, 308 (5th Cir. 2001)—that "the citizens' role in enforcing the Act is 'interstitial' and should not be 'intrusive,'" *La. Env't Action Network v. City of Baton Rouge*, 677 F.3d 737, 740 (5th Cir. 2012) (per curiam) (quoting *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 61 (1987)). Here, Gordon Plaza's complaint addresses the same environmental concerns as the Consent Decree. *Cf. A-C Reorg. Tr. v. E.I. DuPont de Nemours & Co.*, 968 F. Supp. 423, 430–31 (E.D. Wis. 1997) (finding RCRA citizen-suit not barred by consent order where plaintiff's claims went beyond consent order).

The district court found that "[n]othing in the complaint indicates that the City fails to comply with the consent decree, or that the City is not diligently conducting a removal action in abiding by the consent decree." The complaint does not allege that the City is in violation of the Decree. It alleges that "no responsible party is diligently conducting a removal action" without any factual allegations in support. In an attachment to the complaint, Gordon Plaza included a photo of a person lifting a tarp on the ground next to a fenced off area of vegetation. The photo is dated May 10, 2016, and captioned: "Exposed geotextile mat (indicating the interface between fill and contaminated soil)." Gordon Plaza also points to a statement from the EPA's 2018

Five-Year Review Report (which was attached to the City's responsive pleadings): "The City reports quarterly grass cutting . . . , however, during the site inspection, heavily overgrown vegetation . . . was observed."

Gordon Plaza argues that it has thus plausibly alleged "deficient performance [] not adher[ing] to the actions ordered by the Decree." We disagree. The photo attached to Gordon Plaza's complaint is dated to 2016. Gordon Plaza concedes that the EPA has since reviewed the Site—in 2018—and found the City in compliance with the Consent Decree. Specifically, that the "soil barrier that covers the entire site is in place and expected to remain in place over time, restricting exposure to the remaining subsurface contaminants associated with the site." And that the City was mowing the vegetation more frequently than required. The EPA did not record exposed geotextile mat. The note of "overgrown vegetation" did not prevent the EPA's finding the City in compliance with the Decree.

"Factual allegations must be enough to raise a right to relief above the speculative level." *Gonzalez v. Kay*, 577 F.3d 600, 603 (5th Cir. 2009) (quoting *Twombly*, 550 U.S. at 555). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—that the pleader is entitled to relief." *Iqbal*, 556 U.S. at 679 (quoting FED. R. CIV. P. 8(a)(2)). Here, the complaint relies on a single conclusory statement and a photo predating the EPA's conclusion that the City is in compliance with the Consent Decree. We hold that Gordon Plaza has failed to

plausibly allege that the City is not diligently performing a removal action.[3]

IV.

Finally, Gordon Plaza contends the lower court improperly dismissed the complaint without leave to amend. We disagree. "Whether leave to amend should be granted is entrusted to the sound discretion of the district court, and that court's ruling is reversible only for an abuse of discretion." *Heinze v. Tesco Corp.*, 971 F.3d 475, 485 (5th Cir. 2020) (quoting *Pervasive Software Inc. v. Lexware GmbH*, 688 F.3d 214, 232 (5th Cir. 2012)). But a district court may only deny leave "for a substantial reason, such as undue delay, repeated failures to cure deficiencies, undue prejudice, or futility." *Stevens v. St. Tammany Par. Gov't*, 17 F.4th 563, 575 (5th Cir. 2021) (quoting *U.S. ex rel. Spicer v. Westbrook*,

[3] Gordon Plaza also argues that the issue of "diligence" is a question of fact that cannot be determined at the motion to dismiss stage. We disagree. We have explicitly declined to determine whether "diligence" is "a fact-intensive question that can only be answered after the proper development of a record." *See La. Env't Action Network*, 677 F.3d at 750 (considering the diligent-prosecution bar on citizen-suits under the Clean Water Act, 33 U.S.C. § 1365(b)(1)(B)). Gordon Plaza points to our holding in *Tanglewood East Homeowners v. Charles-Thomas, Inc.*, where we found that "diligence" under § 6972(b)(2)(B) "is a fact issue [] that the complainants cannot be expected to prove[] at the pleading stage." 849 F.2d 1568, 1574 (5th Cir. 1988). But *Tanglewood* did not involve a consent decree binding the responsible party's conduct, government oversight, reporting requirements, and site examinations; nor did it provide for penalties and dispute resolution in the case of a violation of the consent decree. We find those differences persuasive here.

751 F.3d 354, 367 (5th Cir. 2014)). Absent such factors, leave to amend should be "freely given." Fed. R. Civ. P. 15(a).

The district court denied Gordon Plaza's second attempt to plead its claims based on its findings of undue delay, bad faith or dilatory motive, repeated failures to cure deficiencies, and undue prejudice to the City. The court explained that the 2018 Litigation and the City's responsive pleading in the instant suit placed Gordon Plaza on notice of the materiality of the issue whether the City was diligently engaged in a removal action and the statutory bar under § 6972(b)(2)(B)(iv). Thus the court found the request for leave to amend unduly delayed and in bad faith.

As discussed, the City properly raised its defense under RCRA's statutory bar in both its responsive pleading and in the 2018 Litigation. Yet, Gordon Plaza failed to timely amend its pleadings and further failed to indicate with any particularity the factual allegations with which it proposes to amend its complaint. Indeed, Gordon Plaza implied in its briefing before us that it cannot provide more detailed allegations "without the benefit of discovery." Based on Gordon Plaza's repeated failure to cure its pleadings and lack of diligence to present any indication of the factual allegations with which it seeks to amend its complaint, we hold that the district court did not abuse its discretion in denying leave to amend.

* * *

We AFFIRM.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

RESIDENTS OF GORDON PLAZA, INC.	CIVIL ACTION
VERSUS	NO. 20-1461
LATOYA CANTRELL, ET AL.	SECTION "R" (3)

ORDER AND REASONS

(Filed Nov. 5, 2020)

Defendants Latoya Cantrell and the City of New Orleans (collectively "the City") move to dismiss this matter.[1] Plaintiff, Residents of Gordon Plaza, Inc. ("Residents") opposes the motion.[2] For the following reasons, the Court grants the motion.

I. BACKGROUND

This case is a dispute over environmental conditions at Gordon Plaza. Plaintiff alleges that Gordon Plaza sits atop the former Agriculture Street Landfill ("ASL").[3] According to the complaint, ASL was a City-operated dump from 1909-57 and from 1965-66.[4] During those years, plaintiff alleges, the City disposed of hazardous chemicals and solid waste at ASL.[5] And

[1] *See* R. Doc. 13.

[2] *See* R. Doc. 16.

[3] *See* R. Doc. 1 at 6 ¶ 28.

[4] *See id.* at 5 ¶ 24.

[5] *See id.* at 6 ¶ 26.

after the City ceased using ASL for waste-disposal purposes, plaintiff contends that the City developed approximately 47 acres of ASL for residential use in the 1970s and 1980s.[6] Plaintiff asserts that those residential developments include Gordon Plaza.[7]

Plaintiff alleges that in 1994, the Environmental Protection Agency ("EPA") placed the former ASL site on its "National Priorities List," noting concern about arsenic, lead, and polynuclear aromatic hydrocarbons levels.[8] Following ASL's placement on the National Priorities List, plaintiff alleges that from 1994 to 2001, the EPA fenced off a portion of ASL,[9] removed two feet of soil, and placed a permeable "geotextile mat"[10] over some contaminated areas, and covered those areas with approximately one foot of soil.[11] But, the Residents contend, the EPA did not replace soil or install a geotextile mat on at least nine residential properties at Gordon Plaza.[12] Plaintiff contends that after the EPA completed its work in 2002, it published a "Final

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[6] *See id.* at 6 ¶ 28.

[7] *See id.*

[8] *See id.* at ¶ 35.

[9] *See id.* at ¶ 36.

[10] According to the Fourth Five-Year Report, "[t]he purpose of the geotextile fabric . . . [is] to create a physical barrier between clean cover soils and the underlying contaminated soil." R. Doc. 13-3 at 18.

[11] *See* R. Doc. 1 at ¶ 36.

[12] *See id.* at ¶ 37.

Closeout Report" in which the EPA announced that it would take no further action at ASL.[13]

Plaintiff alleges that in 2005, Hurricane Katrina devastated ASL.[14] After the storm, the U.S. Agency for Toxic Substances and Disease Registry ("ATSDR")—a federal public health agency of the U.S. Department of Health and Human Services—allegedly concluded that chemical concentrations at ASL posed a public health hazard.[15] Plaintiff also contends that flooding and time have eroded the soil the EPA installed between 1994 and 2001.[16]

In 2008, the City entered into a consent decree with the EPA.[17] The consent decree requires the City to take actions to "protect the remedy"[18] at ASL, and "thereby, the public health or welfare or the environment."[19] The consent decree requires the City to "maintain the [soil] cap" at Gordon Plaza and to "provide for

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[13] *See id.* at 8 ¶ 43.

[14] *See id.* at 8 ¶ 45.

[15] *See id.* at 8 ¶ 46.

[16] *See id.*

[17] *See* R. Doc. 13-2.

[18] *See id.* at 9 ¶ 4. The consent decree defines "remedy" as "the excavation of 24 inches of soil, placement of a permeable geotextile mat/marker on the subgrade, backfilling the excavated area with clean fill, covering the clean fill with grass sod, landscaping and yard restoration, driveway and sidewalk replacement, and final detailing." *Id.* at 8.

[19] *See id.* at 9 ¶ 5.

appropriate restrictions on use and excavation of the property."[20]

Plaintiff asserts that ASL remains contaminated with harmful chemicals and that those chemicals cause cancer and other harmful health conditions.[21] On May 15, 2020, the Residents filed a complaint under the citizen suit provision of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6972(a)(1)(B).[22] The City filed a motion to dismiss in response.[23] The City argues that there is no subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1).[24] In the alternative, the City argues that the Residents fail to state a claim under Federal Rule of Civil Procedure 12(b)(6).[25] The Court considers the parties' arguments below.

II. LEGAL STANDARD

A. Rule 12(b)(1)

Under Rule 12(b)(1), "[a] case is properly dismissed for lack of subject matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate the case." *Home Builders Ass'n of Miss., Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998). In

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[20] *See id.*

[21] *See id.* at 10-11 ¶¶ 64-71.

[22] *See* R. Doc. 1.

[23] *See* R. Doc. 13.

[24] *See* 13-1 at 1.

[25] *See id.*

ruling on a Rule 12(b)(1) motion to dismiss, the Court may rely on (1) the complaint alone, presuming the allegations to be true (2) the complaint supplemented by undisputed facts; or (3) the complaint supplemented by undisputed facts and the Court's resolution of disputed facts. *Den Norske Stats Ojeselskap As v. HeereMac Vof*, 241 F.3d 420, 424 (5th Cir. 2001); *see also Barrera-Montenegro v. United States*, 74 F.3d 657, 659 (5th Cir. 1996). The party asserting jurisdiction bears the burden of establishing that the district court possesses jurisdiction. *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001).

B. Rule 12(b)(6)

To survive a Rule 12(b)(6) motion to dismiss, plaintiff must plead enough facts to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 547 (2007)). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678. The Court must accept all well-pleaded facts as true and must draw all reasonable inferences in favor of the plaintiff. *Lormand v. U.S. Unwired, Inc.*, 565 F.3d 228, 239, 244 (5th Cir. 2009). But the Court is not bound to accept as true legal conclusions couched as factual allegations. *Iqbal*, 556 U.S. at 678.

On a Rule 12(b)(6) motion, the Court must limit its review to the contents of the pleadings, including attachments. *Brand Coupon Network, L.L.C. v. Catalina Mktg. Corp.*, 748 F.3d 631, 635 (5th Cir. 2014). The Court may also consider documents attached to a motion to dismiss or an opposition to that motion when the documents are referred to in the pleadings and are central to a plaintiff's claims. *Id.* "In addition to facts alleged in the pleadings, however, the district court 'may also consider matters of which [it] may take judicial notice.'" *Hall v. Hodgkins*, 305 F. App'x 224, 227 (5th Cir. 2008) (citing *Lovelace v. Software Spectrum, Inc.*, 78 F.3d 1015, 1017-18 (5th Cir. 1996)).

III. DISCUSSION

A. Judicial Notice

A court may take judicial notice of adjudicative facts that are not subject to reasonable dispute, either because they are (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201(b). Conversion of the motion-to-dismiss into a motion for summary judgment is not required when the Court takes judicial notice under Federal Rules of Evidence 201(b). *See* 5C Wright & Miller, *Fed. Prac. & Proc. Civ.* § 1366 (3d ed.) (noting that matters of which a court can take judicial notice are not considered "matters outside the pleadings" and do not require conversion of a motion to dismiss into a motion

for summary judgment); *see also Gen. Retail Servs., Inc. v. Wireless Toyz Franchise, LLC*, 255 F. App'x 775, 785 (5th Cir. 2007) (quoting Wright & Miller with approval); *Bethea v. St. Pau. Guardian Ins.*, 2003 WL 292302 (E.D. La. 2003) ("Though the Court may not look beyond the pleadings [in deciding a 12(b)(6) motion], the [C]ourt may take into account matters of public record.").

The Court takes judicial notice of the City's consent decree with the EPA, which the City has attached to its motion to dismiss. *Group Against Smog and Pollution, Inc. v. Shenango Inc.*, 810 F.3d 116, 127 (3d Cir. 2016) (taking judicial notice of a consent decree and noting that consent decrees are "public records as they are court decisions and final judgments"). The Court also takes judicial notice of the EPA's "Fourth Five-Year Report" pertaining to the ASL site, which is also attached to the City's motion to dismiss.[26] *See Funk v. Stryker Corp.*, 631 F.3d 777, 783 (5th Cir. 2011) (affirming district court's decision to take judicial notice of publicly-available documents and transcripts produced by the FDA).

B. Subject Matter Jurisdiction

When a Rule 12(b)(1) motion is filed in conjunction with other Rule 12 motions, subject matter jurisdiction must be decided first because "the court must find jurisdiction before determining the validity of a claim." *Moran v. Kingdom of Saudi Arabia*, 27 F.3d 169, 172

[26] *See* R. Doc. 13-3.

(5th Cir. 1994). Accordingly, the Court turns first to its subject matter jurisdiction.

The City argues that the Court lacks statutory authority to adjudicate this lawsuit.[27] The City points to several provisions in RCRA that bar suit under the citizen-suit provision:

> (b) No action may be commenced under [the citizen suit provision] of this section if the [EPA] Administrator, in order to restrain or abate acts or conditions which may have contributed or are contributing to the activities which may present the alleged endangerment . . .
>
> (i) has commenced and is diligently prosecuting an action under section 6973 of this title or under section 106 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980;
>
> (ii) is actually engaging in a removal action under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980; or
>
> (iv) has obtained a court order (including a consent decree) . . . pursuant to which a responsible party is diligently conducting a removal action, Remedial Investigation and Feasibility Study (RIFS), or proceeding with a remedial action.

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[27] *See* R. Doc. 13-1 at 10-11; R. Doc. 18-1 at 4.

42 U.S.C. § 6972(B) (emphases added). The City argues that the above provisions are jurisdictional, meaning that if the Court finds plaintiff's suit statutorily barred under one of them, it must dismiss for lack of subject-matter jurisdiction.

But the City's argument is unavailing. The U.S. Supreme Court has made clear that "[w]hen Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 516 (2006); *see also Louisiana Envtl. Action Network v. City of Baton Rouge*, 677 F.3d 737, 749 (5th Cir. 2012) ("Absent such a clear statement from Congress, we hold that the 'diligent prosecution' bar is a nonjurisdictional limitation on citizen suits.").

Moreover, the Fifth Circuit has already clarified that the first of the above subsections—the "diligent prosecution" provision—is "a statutory defense, arising from RCRA itself" and that it "is not jurisdictional." *See Cox v. City of Dallas*, 256 F.3d 281, 303 n.40 (5th Cir. 2001) (citing 42 U.S.C. § 6972(B)). And the Seventh Circuit has explicitly held that the statutory bars in RCRA are not jurisdictional. *Adkins v. VIM Recycling, Inc.*, 644 F.3d 483, 491 (7th Cir. 2011) (writing that it was "incorrect" for the district court to treat RCRA's statutory bars as "a question of subject matter jurisdiction"). In *Adkins*, the Seventh Circuit reasoned that "RCRA's limits on citizen suits appear in separate provisions that do not 'speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts.'" *Id.* at 492 (quoting *Zipes v. Trans World Airlines, Inc.*,

455 U.S. 385, 394 (1982)). Based on this authority, the Court finds that it has subject matter jurisdiction over this matter, and it proceeds to consider the parties' arguments under Federal Rule of Civil Procedure 12(b)(6).

C. Failure to State a Claim

Plaintiff's suit is barred under 42 U.S.C. § 6972. Under § 6972, "[n]o action may be commenced" under RCRA's citizen-suit provision if the EPA "has obtained a court order (including a consent decree) . . . pursuant to which a responsible party is diligently conducting a *removal* action. . . ." *Id.* (emphasis added). The relevant statute defines "removal" as "the taking of such . . . actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment." 42 U.S.C. § 9601 (23) (cross-referenced by 42 U.S.C. § 6972).

The consent decree requires the City to perform removal actions on an ongoing basis. In the consent decree, the Court notes that "contaminants have been left in place beneath the geotextile mat" under Gordon Plaza.[28] It also notes that the soil cap and geotextile mat "could be breached or degraded . . . by the failure to maintain the vegetative cover over the soil cap."[29] As a result, the consent decree provides that "proper operation and maintenance practices and institutional

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[28] *See* R. Doc. 13-2 at 5.

[29] *See id.*

controls are required to maintain the integrity of the cap."[30] It orders the City to implement "[w]ork," *i.e.*, satisfy specified "compliance requirements,"[31] to "maintain the [soil] cap and provide for appropriate restrictions on the use and excavation of the property."[32] As to Gordon Plaza, the consent decree requires the City to "use its available authorities to (a) require that landowners mow and otherwise maintain the grass vegetation on their properties, or (b) undertake the necessary maintenance directly."[33] Additionally, the City must "maintain and repair the security fence,"[34] and "mow vegetation at least twice per year, and otherwise maintain . . . a stable vegetative cover" on property adjacent to Gordon Plaza.[35]

Plaintiff does not allege that the City fails to abide by the consent decree. Instead, plaintiff argues that the consent decree requires maintenance-type actions that are not removal actions. But this distinction plaintiff draws—without citation to authority—has no basis in the statute, which defines "removal" actions as those that "prevent, minimize, or mitigate damage to the public health" or "environment." 42 U.S.C. § 9601 (23). As recently as 2018, the EPA stated that the actions

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[30] *See id.* at 5.

[31] The consent decree defines the term "Work" as "the compliance requirements set forth in Section V of the Decree." *Id.* at 8-9.

[32] *See id.*

[33] *See id.* at 10.

[34] *See id.* at 8 ¶ 5(a).

[35] *See id.*

the City has taken, and continues to take under the consent decree, are "protective of human health and the environment" and that those actions will "continue to be protective" into the future.[36] In sum, plaintiff fails to plausibly allege that the City's continued actions under the consent decree are not "removal actions." Accordingly, § 6972 bars this suit.

IV. CONCLUSION

For the foregoing reasons, the City's motion is GRANTED.

New Orleans, Louisiana, this 5th day of November, 2020.

/s/ Sarah S. Vance
SARAH S. VANCE
UNITED STATES DISTRICT JUDGE

[36] *See* R. Doc. 13-3 at 3.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

RESIDENTS OF GORDON PLAZA, INC.	CIVIL ACTION
VERSUS	NO. 20-1461
LATOYA CANTRELL, ET AL.	SECTION "R" (3)

JUDGMENT

Considering the Court's Order and Reasons[1] on file herein,

IT IS ORDERED, ADJUDGED, AND DECREED that Plaintiff Residents of Gordon Plaza, Inc's complaint is dismissed with prejudice.

New Orleans, Louisiana, this 6th day of November, 2020.

/s/ Sarah S. Vance
SARAH S. VANCE
UNITED STATES DISTRICT JUDGE

[1] R. Doc. 25.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

RESIDENTS OF GORDON PLAZA, INC.	CIVIL ACTION
VERSUS	NO. 20-1461
LATOYA CANTRELL, ET AL.	SECTION "R" (3)

ORDER AND REASONS

(Filed Apr. 30, 2021)

Plaintiff, Residents of Gordon Plaza, Inc., ("Residents")[1] moves for the Court to alter or amend its Judgment[2] dismissing its complaint with prejudice.[3] Defendants, LaToya Cantrell and the City of New Orleans (collectively "the City"), oppose the motion.[4]

Plaintiff alleges that the City marketed a housing development to predominantly African Americans that was built on contaminated land in the 1970s and 1980s.[5] The complaint alleges that those residents, to this day, face degradative health effects as a result of the contaminants beneath their land.[6]

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[1] Plaintiff alleges that it is a corporation formed to help the members of the Gordon Plaza residential community. R. Doc. 1 at 3 ¶ 12.

[2] R. Doc. 26.

[3] R. Doc. 27.

[4] R. Doc. 31.

[5] R. Doc. 1 at 6, ¶¶ 28, 32.

[6] *Id.* at 11 ¶ 71.

In this case, the Court is presented with a discrete legal question—whether the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 69m, *et seq.*, bars plaintiff's cause of action. The RCRA says that "citizen suits," like plaintiff's, cannot proceed under certain conditions. Having considered RCRA's text, the weight of available authority, and the parties' arguments, the Court is convinced that one of those conditions—a consent decree between the City and the EPA, and the City's actions under that consent decree—precludes plaintiff's citizen suit. *See* discussion *infra*, Part III.

I. BACKGROUND

This case arises from the alleged environmental conditions at Gordon Plaza. In its complaint, plaintiff alleges that Gordon Plaza sits atop the former Agriculture Street Landfill ("ASL").[7] The Residents allege that ASL was a City-operated dump from 1909-57 and from 1965-66.[8] During those years, plaintiff alleges, the City of New Orleans disposed of hazardous chemicals and solid waste at ASL.[9] And after the City ceased using ASL for waste-disposal purposes, plaintiff contends that the City developed approximately 47 acres of ASL for residential use in the 1970s and 1980s.[10] Plaintiff

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[7] R. Doc. 1 at 1 ¶ 1.

[8] *Id.* at 5 ¶ 24.

[9] *Id.* at 6 ¶¶ 25-26.

[10] *Id.* at 6 ¶ 28.

alleges that those residential developments include Gordon Plaza.[11]

Plaintiff alleges that in 1994, the Environmental Protection Agency ("EPA") listed the former ASL site as a Superfund Site on the National Priorities List ("NPL"), noting its concern about arsenic, lead, and polynuclear aromatic hydrocarbon levels.[12] Following ASL's placement on the NPL, plaintiff contends that from 1994 to 2001, the EPA fenced off a portion of ASL,[13] removed two feet of soil, placed a permeable geotextile mat over some contaminated areas, and covered those areas with approximately one foot of soil.[14] Plaintiff alleges that after the EPA completed its work in 2002, it published a "Final Closeout Report" in which the EPA announced that it would take no further action at ASL, including at Gordon Plaza.[15]

In 2005, plaintiff alleges that Hurricane Katrina devastated the ASL.[16] After the storm, the U.S. Agency for Toxic Substances and Disease Registry ("ATSDR")—a federal public health agency of the U.S. Department of Health and Human Services—allegedly concluded that chemical concentrations at ASL posed an indeterminate public health hazard.[17] Plaintiff

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[11] *Id.*

[12] *Id.* at 7 ¶ 35.

[13] *Id.* at 7 ¶ 36.

[14] *Id.*

[15] *Id.* at 8 ¶ 43.

[16] *Id.* at 8 ¶ 45.

[17] *Id.* at 8 ¶ 46.

asserts that the soil the EPA installed between 1994 and 2001 has eroded, and that the hazardous waste at Gordon Plaza presents an imminent and substantial endangerment to health and/or the environment.[18] On May 15, 2020, the Residents filed a complaint under the citizen suit provision of RCRA, 42 U.S.C. § 6972(a)(1)(B).[19] Plaintiff asks that this Court order, among other things, the City to fully abate the alleged endangerment at the former ASL.[20]

The City moved to dismiss plaintiff's complaint.[21] In its motion to dismiss, the City informed the Court of what plaintiff did not mention in its complaint—the City entered into a consent decree with the EPA in 2008 to address the environmental conditions at Gordon Plaza.[22] The City asserted that the consent decree

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[18] *Id.* at 8 ¶ 47.

[19] *Id.* at 13 ¶ 84.

[20] *Id.* at 14 ¶ D.

[21] R. Doc. 13.

[22] As discussed *infra* in Part III.E, the record indicates that plaintiff is the same entity that filed suit against the City in *Residents of Gordon Plaza, Inc. v. Cantrell*, No. 18-4226, 2019 WL 2330450 (E.D. La. May 31, 2019). *See*, *e.g.*, R. Doc. 13-1 at 8; R. Doc. 35 at 2-3. There, another court dismissed plaintiff's claim for relocation on jurisdictional grounds, holding that plaintiff failed to establish associational standing. *Cantrell*, 2019 WL 2330450, at * 2. The City argued in that case, as it does here, that the consent decree bars plaintiff's claim. *Id.* at *3. After the court found plaintiff's claim dismissible on standing grounds, it considered in dicta whether the suit would otherwise be able to go forward notwithstanding the statutory bar. The court's discussion of the statutory bar is dicta because it "does not constitute an essential or integral part of the legal reasoning behind [the] decision." *See In re Hearn*, 376 F.3d 447, 453-54 (5th Cir. 2004) (quoting

precludes plaintiff's citizen suit to enforce the RCRA on behalf of the EPA.[23]

The Court took judicial notice of the consent decree.[24] The consent decree provides as follows:

> Objectives of the Parties. The objectives of the Parties in entering into this Consent Decree are to protect the remedy[25] on the [ASL] and, thereby, the public health or welfare or the environment at the [ASL], by the implementation of the Work and institutional controls by [the City], and to resolve the claims of [the United States] against [the City] for Past

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Centennial Ins. v. Ryder Truck Rental, Inc., 149 F.3d 378, 385-86 (5th Cir. 1998)). Notwithstanding this earlier litigation, in which it was made apparent that the consent decree would be material to whether plaintiff could bring a claim under the citizen-suit provision, plaintiff did not mention the consent decree anywhere in its complaint when it refiled its claim before this Court.

[23] R. Doc. 13-1 at 8.

[24] R. Doc. 25 at 7.

[25] The consent decree defines the term "remedy" to mean:

> The placement of a permeable geotextile mat followed with orange fencing (to serve as a highly visible marker), covering the mat/marker with twelve inches of clean fill, and re-establishing a vegetative layer on the clean fill on OU_1. For OU_2 and OU_3, the excavation of 24 inches of soil, placement of a permeable geotextile mat/marker on the subgrade, backfilling the excavated area with clean fill, covering the clean fill with grass sod, landscaping and yard restoration, driveway and sidewalk replacement, and final detailing.

R. Doc. 13-2 at 8 ¶ m.

> Response Costs as provided in this Consent Decree.[26]

Noting that the "soil cap and geotextile mat covering the Site could be breached or degraded by excavation . . . or by the failure to maintain the vegetative cover over the soil cap,"[27] the consent decree provides that "the City shall implement Work to maintain the [soil] cap" at the former ASL.[28] The consent decree provides:

> The [City] will mow vegetation at least twice per year, and otherwise maintain, its right of ways within OU_1 in order to maintain a stable vegetative cover. Because lack of mowing/ maintenance by private owners of land within the Site is likely to damage the subsurface geotextile mat, the City will use its available authorities to (a) require that landowners mow and otherwise maintain the grass vegetation on their properties, or (b) undertake the necessary maintenance directly.[29]

Additionally, the consent decree states that the City must "maintain and repair the security fence" on property adjacent to Gordon Plaza until 2018.[30]

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[26] R. Doc. 13-2 at 9 ¶ 4.

[27] *Id.*

[28] R. Doc. 13-2 at 9 ¶ 5.

[29] *Id.* at 10 ¶ 5(b).

[30] *Id.* at 9 ¶ 5(a). The consent decree provides that the City "shall maintain and repair the to the security fence . . . for a period of 10 years from the date of entry of the Decree, or until the Site is delisted from the NPL, or EPA otherwise approves the removal of the fence, whichever is sooner." *Id.* at 9 ¶ 5(a).

The consent decree also requires the City to take various actions "[w]ithin 60 days from the date of entry of this Decree."[31] Namely, the consent decree provides that the City must provide a Technical Abstract[32] to all utilities operating with the ASL, providing instructions on how to excavate soil beneath the geotextile mat, if such excavation should become necessary.[33] It also provides that "the City will join and maintain its membership in the LAOne Call program and will designate an office within the City as the point of contact to provide the Technical Abstract" for utilities operating in the ASL.[34] The consent decree also provides that, the City "will direct that all of its agencies and departments, including the Sewerage and Water Board of New Orleans," (SWB) incorporate the Technical Abstract as standard operation procedure at the ASL.[35]

The consent decree also provides that "within 60 days of the entry of this Decree and on an annual basis thereafter," the SWB must include a protocol for

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[31] R. Doc. 13-2 at 10 ¶¶ 5(c)-(e).

[32] The Technical Abstract, attached to the consent decree, provides a "protocol" that various utility providers "should follow to maintain the integrity of the permeable soil and geotextile mat implemented" by the EPA. That protocol includes, for example, notifying the City that excavation below the geotextile mat is necessary and that "[s]oils excavated within the top two feet of the excavation (above the geotextile) may be set aside and used as backfill in the same area." R. Doc. 13-2 at 41.

[33] *Id.* at 10 ¶ 5(c).

[34] *Id.* at 10 ¶ 5(d).

[35] *Id.* at 10 ¶ 5(e).

property maintenance[36] in bills to property owners.[37] If the SWB does not do so, the City must take up this task.[38] In addition, the consent decree indicates that the City must "designate an appropriate landfill facility for the disposal of soils excavated and removed from beneath the geotextile mat" within 45 days of the entry of the consent decree.[39]

The consent decree further provides that "[w]ithin 30 days of entry of this Decree, the [City] will designate an official of the City as the Project Coordinator who will be responsible for ensuring the City's compliance with the requirements of the Decree."[40] The Project Coordinator, "shall be the lead point of contact for the EPA with the City," and the Project Coordinator is "responsible for ensuring the City's compliance with the requirements of the Decree."[41]

The consent decree also provides a number of what it refers to as "institutional controls."[42] There, the consent decree requires that the City "refrain from using the ASL . . . in any manner that would interfere with or adversely affect the implementation, integrity,

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[36] The protocol for maintenance, like that Technical Abstract, provides procedures for excavating beneath the geotextile soil mat, when necessary. R. Doc. 13-2 at 42-43.

[37] *Id.* at 11 ¶ 5(f).

[38] *Id.* at 11 ¶ 5(f).

[39] *Id.* at 11 ¶ 5(g).

[40] *Id.* at 11 ¶ 6.

[41] *Id.*

[42] *Id.* at 11-17.

or protectiveness of the remedy."[43] The consent decree also provides that the City must "execute and record . . . an easement, running with the land, that grants a right of access" to the United States, and also "grants the right to enforce the land use restrictions" to the United States and to the State and its representatives.[44] The consent decree provides that the City "shall, within 45 days of entry of this Consent Decree" submit to the EPA a draft easement for review and approval.[45]

In the event that property is owned or controlled by persons other than the City where land use restrictions are needed, the City must execute and record a conveyance notice within 60 days of the entry of the consent decree.[46] The conveyance notice must run with the land, to alert future transferees of "the response action and waste in place, and to explain maintenance and excavation guidelines for the property."[47]

The consent decree also provides that, within 60 days, the City "shall submit to the EPA for approval a proposed zoning ordinance and/or permit requirement" that will require "owners or lessees of the land within the Site . . . who seek to excavate soil to a depth of greater than 18 inches . . . provide notice" to the City

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[43] *Id.* at 13 ¶ 7(b).

[44] *Id.* at 13 ¶ 7(c).

[45] *Id.* at 13 ¶ 8.

[46] *Id.* at 14 ¶ 9.

[47] *Id.*

before doing so.[48] The record indicates the City was able to pass this ordinance.[49] The consent decree further provides that "[i]f EPA determines that land/water use restrictions in the form of state or local laws, regulations, ordinances or other governmental controls are needed . . . [the City] shall cooperate with EPA's efforts to secure such governmental controls."[50]

The consent decree also provides a framework through which the EPA monitors the City's performance. Specifically, the consent decree provides that the City "shall provide" the EPA "with access at all reasonable times to the Site . . . for the purpose of conducting," among other things, "[m]onitoring, investigation, removal, remedial or other activities at the Site," as well as "[a]ssessing [the City's] compliance with [the consent decree]."[51] In addition, the consent decree indicates that the City "shall submit to EPA on an annual basis . . . a written progress report that describes the

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[48] *Id.* at 15-16 ¶ 11(a).

[49] R. Doc. 13-3 at 53. The ordinance provides that "[o]wners or lessees of land within the Agriculture Street Landfill Site who seek to excavate soil to a depth of greater than 18 inches shall provide notice to the Department of safety and Permits and shall first apply for an Excavation Permit certifying in such Excavation Permit application their intent to excavate and to comply with the U.S. Environmental Protection Agency's Protocol on Post-Removal maintenance for Property Owners for the handling of contaminated soils and repair of the soil/geotextile mat." *Id.*

[50] R. Doc. 1-2 at 16-17 ¶ 12.

[51] *Id.* at 12 ¶ 7(a)(1), (7).

actions which have been taken to achieve compliance."[52]

The consent decree provides that the City will "provide the [EPA] . . . access" to allow the EPA to perform "5-year reviews."[53] In its motion to dismiss, the City attached the EPA's most recent five-year report ("Report"), issued in May of 2018.[54] The Court took judicial notice of the Report.[55] The Report, comprising 31 pages of the EPA's findings and 321 pages of attachments and appendices, found the City in compliance with the consent decree.[56] Specifically, the EPA noted that the soil cap "is protected from erosion" and that the "soil barrier that covers the entire site is in place and expected to remain in place over time, restricting exposure to the remaining subsurface contaminants associated with the site."[57] The EPA found that the soil cap remained "protective of human health and the environment."[58]

The Report sets out the following "recommendations" with respect to ASL:

> OU_2: The constituents detected from the residential sub-slab surface do not appear to pose a toxicity risk from dermal/ingestion, but

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[52] *Id.* at 17 ¶ 14.

[53] *Id.* at 12 ¶ 7(a)(1).

[54] R. Doc. 13-3.

[55] R. Doc. 25 at 7.

[56] R. Doc. 13-3 at 3.

[57] *Id.*

[58] *Id.*

> indoor air sampling is recommended at this residential location to further aid in the evaluation of potential risk from vapor intrusion. Soil sampling results at the other residential properties at OU_2[59] will be communicated to the respective property owners.[60]
>
> OU_4: The City of New Orleans will be notified of the sampling results with detections of the site COCS that exceed residential screening levels on their rights-of-way.

Neither of these recommendations indicates a deficiency in the City's effort to preserve the soil cap, and the sampling recommendations address actions the EPA would take. At the end of the Report, the EPA indicates that another will follow in five years.[61]

The Court found that plaintiff's complaint, viewed in light of the consent decree and the Report, was statutorily barred by 42 U.S.C. § 6972, which provides:

> (B) No action may be commenced under [the citizen suit provision] of this section if the [EPA] Administrator, in order to restrain or abate acts or conditions which may have contributed or are contributing to the activities which may present the alleged endangerment . . .

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[59] The consent decree divides the ASL into multiple "operable units" or "OUs." OU_1 refers to "undeveloped property," while OU_2 includes "Residential Properties," including Gordon Plaza. R. Doc. 13-2 at 4.

[60] R. Doc. 13-3 at 11.

[61] *Id.* at 31.

> (iv) has obtained a court order (including a consent decree) . . . pursuant to which a responsible party is diligently conducting a *removal* action. . . .

42 U.S.C. § 6972(b)(2)(B)(iv) (emphasis added). The relevant statute defines "removal" as "the taking of such . . . actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release." 42 U.S.C. § 9601 (23) (cross-referenced by 42 U.S.C. §6972).[62]

In its complaint, plaintiff made the conclusory allegation that "[t]his lawsuit is not precluded by governmental action" because "no responsible party is diligently conducting a removal action . . . pursuant to a judicial or administrative order,"[63] referencing Section 6972(b)(2)(B)(iv). But plaintiff also alleged that contaminated soil lies underneath the soil cap at the ASL.[64] The consent decree indicates that the soil cap will erode if not protected.[65] The consent decree tasks the City with preserving the soil cap on an ongoing

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[62] R. Doc. 25 at 10. The term "release" means "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching dumping, or disposing into the environment. . . ." 42 U.S.C. § 9601 (22). There is no question that the soil cap prevents a "release" of contaminated soil. R. Doc. 1 at 2 ¶ 9 (referring to the installation of the soil cap as a "removal" action, which would require the soil cap to prevent "release" of hazardous substances).

[63] R. Doc. 1 at 2 ¶ 10.

[64] R. Doc. 1 at 7 ¶ 36.

[65] R. Doc. 13-2 at 9 ¶ 5.

basis through the foregoing obligations.[66] In the 2018 Report, the EPA found the City's actions "sufficient . . . to protect the permeable soil cover that covers the contaminants that remain in the subsurface soils."[67] The EPA noted that, as a result of the soil cap remaining in place, the remedy at the ASL continued to be "protective of human health and the environment."[68]

In its Order and Reasons dismissing plaintiff's lawsuit, the Court found, based on the allegations of the complaint, the consent decree, and the Report, that the action was barred by Section 6972(b)(2)(B)(iv), and the Court dismissed plaintiff's complaint with prejudice.[69] Now, plaintiff moves the Court to alter or amend its judgment under Federal Rule of Civil Procedure 59(e).[70] The Court considers the motion below.

II. LEGAL STANDARD

Reconsideration or alteration of an earlier order "is an extraordinary remedy that should be used sparingly." *Templet v. HydroChem Inc.*, 367 F.3d 473, 479 (5th Cir. 2004); *see also Fields v. Pool Offshore, Inc.*, No. 97-3170, 1998 WL 43217, at *2 (E.D. La. Feb. 3, 1998), *qff'd*, 182 F.3d 353 (5th Cir. 1999). In exercising its discretion, the Court must "strike the proper balance" between the need for finality and "the need to render just

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[66] *Id.*

[67] R. Doc. 13-3 at 7.

[68] R. Doc. 25 at 12.

[69] R. Doc. 26.

[70] R. Doc. 27.

decisions on the basis of all the facts." *Edward H. Bohlin Co. v. Banning Co.*, 6 F.3d 350, 355 (5th Cir. 1993). "'Under Rule 59(e), amending a judgment is appropriate (1) where there has been an intervening change in the controlling law; (2) where the movant presents newly discovered evidence that was previously unavailable; or (3) to correct a manifest error of law or fact.'" *Torres v. Livingston*, 972 F.3d 660, 663 (5th Cir. 2020) (quoting *Demahy v. Schwarz Pharma, Inc.*, 702 F.3d 177, 182 (5th Cir. 2012) (per curiam)). "A motion to alter or amend the judgment under Rule 59(e) . . . 'cannot be used to raise arguments which could, and should have been made before the judgment issued.'" *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 863-64 (5th Cir. 2003) (quoting *Simon v. United States*, 891 F.2d 1154, 1159 (5th Cir. 1990)).

III. DISCUSSION

A. Plaintiff's Reply Brief Argument

First, plaintiff argues that the Court committed a manifest error because it considered an argument raised for the first time in the City's Reply.[71] "Generally . . . district court's in this circuit will [not] 'review arguments raised for the first time in [a] reply brief.'" *RedHawk Holdings Corp. v. Schreiber Tr. of Schreiber Living Tr. - DTD 2/8/95*, 836 F. App'x 232, 235 (5th Cir. 2020) (quoting *Peteet v. Dow Chem. Co.*, 868 F.2d 1428, 1437 (5th Cir. 1989)). Plaintiff asserts that the City raised the following argument for the first time in its

[71] R. Doc. 27-1.

Reply brief: the City's activities under the consent decree were "removal actions" that preclude plaintiff's ability to bring a citizen suit under RCRA.[72]

In its motion to dismiss, the City wrote the following: "the EPA has been proceeding with a removal action . . . since 1994 and has entered a Consent Decree with the City of New Orleans in 2008 which has extended additional remediation and with which the City is in the compliance."[73] Plaintiff's position is that this language "arguably"[74] indicates that *the EPA*, and not *the City*, was engaged in a removal action. As a result, plaintiff argues, the City did not explicitly assert that *it* was engaged in removal actions until its Reply, where it wrote: "[t]here is no abatement action for Gordon Plaza to prosecute against the City as a 'citizen attorney general' where the EPA *and the City* have agreed to the abatement and removal work in the Consent Decree. . . ."[75]

Plaintiff's argument is without merit. In its motion to dismiss, the City argued that removal actions at Gordon Plaza preclude plaintiff's ability to avail itself of the citizen suit provision in RCRA.[76] Further, the City also cited 42 U.S.C. § 6972(b)(2)(B)(iv) to assert that plaintiff's citizen suit was statutorily barred.[77] As

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[72] *Id.* at 5.

[73] R. Doc. 13-1 at 8.

[74] R. Doc. 27-1 at 6.

[75] R. Doc. 20 at 3.

[76] R. Doc. 13-1 at 2

[77] *Id.* at 10.

plaintiff admitted in its opposition, this statute bars its citizen suit only if the City, and not the EPA, is engaged in a removal or a remedial action.[78] What is more, plaintiff responded to the City's argument in a broad fashion in its opposition, writing that "[n]either [the] EPA *nor any other party* . . . is actually engaging in a removal action. . . ."[79] The Court finds that the City raised this argument in its original motion to dismiss and that plaintiff had the opportunity to respond (and in fact did respond) to it. Thus, plaintiff fails to demonstrate that the Court made a manifest error of law when it considered the argument that the City was engaged in a removal action.

B. Plaintiff's *Chevron* Argument

Plaintiff next argues—for the first time on reconsideration—that the Court must defer to the EPA's interpretation of the word "removal" under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). At the outset, the Court notes that "[a] motion to alter or amend the judgment under Rule 59(e) . . . 'cannot be used to raise arguments which could, and should have been made before the judgment issued.'" *Rosenzweig, 332* F.3d at 863-64 (quoting *Simon v. United States*, 891 F.2d 1154, 1159 (5th Cir. 1990)). Plaintiff's failure to raise its *Chevron* argument in its opposition precludes its success on reconsideration.

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[78] R. Doc. 16 at 1.

[79] *Id.* at 2 (emphasis added).

But even if the Court opens the door to plaintiff's *Chevron* argument, it still fails. "[A] court's analysis of whether *Chevron* deference applies has a predicate requirement that the agency . . . issue[] its interpretation in a manner that gives it the force of law." *Dhuka v. Holder*, 716 F.3d 149, 155 (5th Cir. 2013); *see also United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001) (holding that, before deferring to an agency's interpretation of a statute under *Chevron*, courts must ask whether "Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority"). The Fifth Circuit and other courts have come to refer to this predicate requirement as "*Chevron* step zero." *Ali v. Barr*, 951 F.3d 275, 279 (5th Cir. 2020); *see also Martin v. Soc. Sec. Admin., Comm'r*, 903 F.3d 1154, 1159 (11th Cir. 2018) (referring to this requirement as "step zero"); *United States v. Harmon*, No. 19-395, 2020 WL 7668903, at *7 (D.D.C. Dec. 24, 2020) (same); *N. New Mexico Stockman's Ass'n v. United States Fish & Wildlife Serv.*, No. 18-1138, 2020 WL 6048149, at *85 (D.N.M. Oct. 13, 2020) (same).!!

Next, courts turn to *Chevron*'s familiar two-step framework. "At step one, [courts] ask 'whether Congress has directly spoken to the precise question at issue.'" *Gulf Fishermens Ass'n v. Nat'l Marine Fisheries Serv.*, 968 F.3d 454, 460 (5th Cir. 2020) (quoting *Chevron*, 467 U.S. at 842). "If the intent of Congress is clear, that is the end of the matter." *Chevron*, 467 U.S. 837 at 842. Only if the statute is "'truly ambiguous,'" *Gulf*

Fishermens Ass'n, 968 F.3d at 460 (quoting *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019)), should the Court proceed to step two, and courts must "'exhaust all the 'traditional tools' of construction,' including 'text, structure, history, and purpose'" before concluding that a statute is "truly ambiguous." *Gulf Fishermens Ass'n*, 968 F.3d at 460 (quoting *Kisor*, 139 S. Ct. at 2415 (2019). Step two then asks "whether the agency's construction [of the statute] is 'permissible.'" *Id.* (quoting *Sw. Elec. Power Co. v. EPA*, 920 F.3d 999, 1014 (5th Cir. 2019)). As explained below, plaintiff fails to demonstrate manifest error of law, because plaintiff fails to show that any of these requirements is satisfied in its motion for reconsideration.

1. Chevron *Step Zero*

For *Chevron* deference to apply, the EPA must have "issued its interpretation in a manner that gives it the force of law." *Dhuka*, 716 F.3d at 155. The text of the purported "agency interpretation" at issue here comes from a *proposed* rule, not a final rule. Specifically, plaintiff points to 67 Fed. Reg. 51,528. This page in the Federal Register contains the EPA's 2002 proposal to delete the Del Norte County Pesticide Storage Area Superfund Site from its National Priorities List (NPL). *Id.* The proposed rule contains the following passage:

> CERCLA[80] section 101(25) defines response as removal and remedial actions, and does not include operation and maintenance activities.[81]

Plaintiff asserts that the above passage indicates that "removal" actions, in the EPA's view, do not include "operation and maintenance activities."[82] It is plaintiff's position that the City's actions in preserving the soil cap at Gordon Plaza are maintenance activities, rather than removal actions.

Putting aside that the above passage does not purport to define the word "removal," but indicates that it is parroting CERCLA's definition of the word "response," courts have held that proposed rules, not having gone through the notice-and-comment process,[83] do

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[80] The Court notes that RCRA cross references the Comprehensive Environmental Response, Compensation and Liability Act's (CERCLA's) definition of "removal." *See* 42 U.S.C. § 6972(b)(2)(B)(ii) (cross-referencing CERCLA to define "removal action").

[81] R. Doc. 27-1 at 6; 67 Fed. Reg. 51,528.

[82] R. Doc. 27-1 at 4.

[83] The U.S. Supreme Court summarizes the notice-and-comment process as follows:

> First, the agency must issue a general notice of proposed rulemaking, ordinarily by publication in the Federal Register. Second, if notice is required, the agency must give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments. An agency must consider and respond to significant comments received during the period for public comment. Third, when the agency promulgates the final rule, it must include in

not carry the force of law. *See United States v. Springer*, 354 F.3d 772, 776 (8th Cir. 2004) (writing that "an agency that exercises its discretion to propose a rule has no duty to promulgate its proposal as a final rule" and that "it is well-settled that 'proposed regulations . . . have no legal effect' (quoting *Sweet v. Sheahan*, 235 F.3d 80, 87 (2d Cir. 2000)); *see also Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 845 (1986) ("It goes without saying that a proposed regulation does not represent an agency's considered interpretation of its statute and that an agency is entitled to consider alternative interpretations before settling on the view it considers most sound."). Indeed, the proposed rule here provides that the "EPA's Regional Office will accept and evaluate public comments before making a final decision to delete [the Site]." 67 Fed. Reg. 51,529.

As plaintiff points out, a final rule followed the proposed rule, which deleted the Del Norte County Pesticide Storage Area Superfund Site from the NPL. *See* 67 Fed. Reg. 58,730. But the final rule does not contain the language of the proposed rule that plaintiff relies on. Instead, it consists of one sentence, which provides, "Table 1 of appendix B to part 300 is amended by removing the entry for 'del Norte Pesticide Storage, Crescent City, CA.'" *Id.*[84] Plaintiff points to 40 C.F.R.

> the rule's text a concise general statement of its basis and purpose.

Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 96 (2015) (citations and alterations omitted).

[84] The final rule also contains an introductory summary that muddles the language in the proposed rule that plaintiff relies on

§ 300.425(e), which states that, sites can be removed from the NPL only when "no further response [including removal] is appropriate." Thus, plaintiff asserts, the Del Norte Site could not have been deleted had a removal action been ongoing, and, there, only operation and maintenance continued.

Plaintiff's position is that, in adopting a terse rule to delete a single site from the NPL—a list that includes over 1,000 sites[85]—the EPA intended to interpret the statute that defines the word "removal" in a manner that would carry sweeping implications for both the statute, 42 U.S.C. § 9601 (23) (defining removal), and other EPA regulations, 40 C.F.R. § 300.5 (defining removal); 40 C.F.R. § 300.415 (characterizing removal). There is no indication in the proposed rule or final rule that the EPA intended to do anything other than delete the Del Norte Site from the NPL. *Cf. Kaufman v. Nielsen*, 896 F.3d 475, 484-85 (D.C. Cir. 2018) (finding no *Chevron* deference in the adjudication context for agency letter that was not " 'clearly intended to

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to argue that removal actions cannot include operation and maintenance. The summary to the final rule indicates that:

> The EPA and the State of California, through the California Department of Toxic Substances Control, have determined that all appropriate response actions under CERCLA, *other than* Operation and Maintenance and Five-Year reviews, have been completed.

See 67 Fed. Reg. 58,730. The phrase "other than" means that operation and maintenance activities can fall into the definition of "response action," but here have been found not to foreclose eliminating the site from the NPL.

[85] *See* 40 C.F.R. § 300, App. B.

have general applicability and the force of law' when the letter singularly focused on Kaufman."); *United States v. Harmon*, No. CR 19-395, 2020 WL 7668903, at *8 (D.D.C. Dec. 24, 2020) (finding no *Chevron* deference in the agency adjudication context "under step-zero" where agency letter was "about the status of a single company and does not purport to express broader principles about application" of the statute). Accordingly, plaintiff fails to demonstrate that the EPA issued an interpretation of the statute defining the word "removal" in "a manner that gives it the force of law." *Dhuka*, 716 F.3d at 155. This forecloses the applicability of *Chevron* deference. *Id.*

2. Chevron *Step One*

But even assuming *Chevron* step zero is satisfied, plaintiff does not address *Chevron*'s remaining requirements. Under *Chevron*'s "step one," the Court asks "whether Congress has spoken directly to the precise question at issue." *Chevron*, 467 U.S. at 842. If Congress has spoken to the issue and "the intent of Congress is clear, that is the end of the matter." *Chevron*, 467 U.S. at 842. Only if Congress's intent is "truly ambiguous" may the Court proceed to step two of the *Chevron* analysis. *Gulf Fishermen Ass'n*, 968 F.3d at 460 (quoting *Kisor*, 139 S. Ct. at 2415).

Here, Congress has spoken directly to the issue, defining the term "removal" as follows:

> The terms "remove" or "removal" mean[] the cleanup or removal of released hazardous

> substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for, action taken under section 9604(b) of this title, and any emergency assistance which may be provided under the Disaster Relief and Emergency Assistance Act.

42 U.S.C. § 9601 (23) (cross-referenced by 42 U.S.C. § 6972(b)(2)(B)). Plaintiff does not establish, or even argue, that the above statute is ambiguous. Instead, plaintiff argues—for the first time in its Reply brief on its motion to reconsider—that the CERCLA, as a general matter, is a notoriously imprecise statute.[86] Plaintiff's general assertion that CERCLA is drafted with imprecision is a far cry from what the Fifth Circuit requires to demonstrate the requisite ambiguity for a particular statutory provision: "'exhaust[ing] all the

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[86] R. Doc. 35 at 5.

'traditional tools' of construction,' including 'text, structure, history, and purpose.'" *Gulf Fishermen Ass'n*, 968 F.3d at 460 (quoting *Kisor*, 139 S. Ct. at 2415). Not having demonstrated that Congress's definition of "removal" is "truly ambiguous," plaintiff fails to show that this prerequisite for *Chevron* deference is satisfied.

3. Chevron *Step Two*

Finally, plaintiff has not explained how *Chevron* step-two is satisfied. Under *Chevron*, a court need defer to an agency's interpretation of a statute only if the agency's construction is "permissible." *Sw. Elec. Power Co.*, 920 F.3d at 1014. "A permissible construction is one that 'reasonabl[y] accommodate[es] . . . conflicting policies that were committed to the agency's care by the statute." *Chevron*, 467 U.S. at 845. "An agency interpretation can fail *Chevron* step two if 'it is contrary to clear congressional intent or frustrates the policy Congress sought to implement.'" *Sw. Elec. Power Co.*, 920 F.3d at 1028 (quoting *Garcia-Carias v. Holder*, 697 F.3d 257, 271 (5th Cir. 2012)).

Plaintiff's proposed construction conflicts with the statute's plain language. In *United States v. Lowe*, 118 F.3d 399 (5th Cir. 1997), the Fifth Circuit examined CERCLA's definition of the term "removal." The *Lowe* court noted that CERCLA's definition of "removal" included the word "monitoring." *Id.* at 402. The Fifth Circuit observed that "[u]nder a plain language statutory reading with an eye to context, the monitoring

provided for under the 'removal' definition relates to an evaluation of the extent of a release or threat of a release of hazardous substances." *Id.* at 403. The Fifth Circuit held that "the monitoring referred to in [the statute's] definition of removal action . . . clearly include[s] government oversight." *Id.* at 404. Thus, "[g]overnment monitoring or oversight," carried out to "prevent or minimize the release of hazardous substances," constituted a "removal" action. *Id.* at 403.

Here, the proposed rule indicates that the so-called "operation and maintenance" activities at the Del Norte Site consisted of monitoring. The proposed rule provides that "Del Norte County will continue to provide monitoring at the Site" and that "Semiannual groundwater monitoring will be ongoing at the Site" to evaluate contamination levels. *See* 67 Fed. Reg. 51,530. If the EPA's proposed rule and final rule mean, as plaintiff suggests, that operation and maintenance activities which consist of monitoring cannot be a removal action, this would run contrary to the statute's plain language as explained in *Lowe*, where the Fifth Circuit observed that the statutory definition of the word "removal" included "monitoring" activities. *Lowe*, 118 F.3d at 403. Thus, plaintiff fails to demonstrate that the construction it seeks to impose on the proposed and final regulations is a permissible one.

4. *The City's Actions as "Removal" Actions*

Further, to hold that the City's actions under the consent decree are not "removal" actions, whether

under *Chevron* or some other doctrine of administrative deference, would run counter to other principles articulated in the *Lowe* case. The *Lowe* court found that "[t]he term removal is aimed at *containing* and cleaning up hazardous substance releases." *Id.* at 403 (5th Cir. 1997) (emphasis added). It further provided that the term "removal" is "defined broadly" and that it "includes those activities that are deemed necessary to prevent hazardous releases from adversely affecting the public health." *Id.*

Under *Lowe*, plaintiff's allegations, the consent decree, and Report indicate that the City's actions are removal actions. Plaintiff alleges that contaminated soil lies under the soil cap at the ASL.[87] The contaminated soil, plaintiff alleges, poses harm to its members.[88] The consent decree indicates that the geotextile mat and soil cap, placed on top of the contaminated soil, will not preserve themselves. Rather, "[t]he soil cap and geotextile mat covering the Site could be breached or degraded by excavation within the Site or by the failure to maintain the vegetative cover over the soil cap."[89] It further provides that "the City shall implement . . . Work to maintain the [soil] cap."[90]

This work, the consent decree indicates, is aimed at protecting "the public health or welfare or the

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[87] R. Doc. 1 at 7 ¶ 36.

[88] *Id.* at 1, 7, 8 ¶¶ 1, 36, 47.

[89] R. Doc. 13-2 at 9.

[90] *Id.*

environment at the Site."[91] The work includes mowing vegetation "at least twice per year" and "otherwise maintain[ing] a stable vegetative cover."[92] And where there are "private owners within the Site," the consent decree provides that "the City will use its available authorities to (a) require that landowners otherwise maintain the grass vegetation on their properties, or (b) undertake the necessary maintenance directly."[93] The consent decree also indicates that City must implement a number of controls. *See* discussion *supra*, Part I, at 5-11. For example, the City agreed to refrain from using the ASL in a manner that would disturb the remedy,[94] it passed an ordinance that requires property owners to notify the City in the event they intend to excavate soil beneath the mat,[95] and it agreed to "direct that all of its agencies and departments" incorporate the Technical Abstract as standard operating procedure within the ASL.[96] Under the consent decree, the City must use its "available authorities" to ensure that landowners "mow and otherwise maintain" the

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[91] *Id.*

[92] *Id.* at 10 ¶ 5(b).

[93] *Id.*

[94] *Id.* at 13 ¶ 7(b).

[95] R. Doc. 13-3 at 53. The ordinance provides that "[o]wners or lessees of land within the Agriculture Street Landfill Site who seek to excavate soil to a depth of greater than 18 inches shall provide notice to the Department of safety and Permits and shall first apply for an Excavation Permit. . . ." *Id.*

[96] R. Doc. 13-2 at 10 ¶ 5(e).

grass vegetation on their property, or it must "undertake the necessary maintenance directly."[97]

And as contemplated in *Lowe*, the City is not free from EPA oversight and monitoring—the consent decree indicates that the City "shall submit to EPA on an annual basis . . . a written progress report that describes the actions which have been taken" to maintain the soil cap.[98] The consent decree also provides that the City "shall . . . provide the United States and its representatives . . . with access at all reasonable times to the Site" for monitoring purposes.[99] Nothing in the complaint indicates that the City fails to comply with the consent decree, or that the City is not diligently conducting a removal action in abiding by the consent decree.

a. Plaintiff's Duration Argument

Plaintiff cherry picks one sentence from *Lowe* where the court wrote "[a] 'removal' is *generally* understood to be a short-term response. . . ." *Id.* at 402 (emphases added) (citing *Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1533-34 (10th Cir. 1992)). This general understanding comes from cases in which courts juxtapose the statutory definition of the word "removal" with the

[97] *Id.* at 10 ¶ 5(b).

[98] *Id.* at 17.

[99] *Id.* at 12.

word "remedial,"[100] and deduce that because "remedial" actions are "permanent" in nature, removal actions are generally short-term. *See Voluntary Purchasing Groups, Inc. v. Reilly*, 889 F.2d 1380, 1382

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[100] The statute defines the term "remedial action" as follows:

> The terms "remedy" or "remedial action" mean[ ] those actions consistent with *permanent remedy taken instead of or in addition to removal actions* in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment. The term includes, but is not limited to, such actions at the location of the release as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances and associated contaminated materials, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, onsite treatment or incineration, provision of alternative water supplies, and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment. The term includes the costs of permanent relocation of residents and businesses and community facilities where the President determines that, alone or in combination with other measures, such relocation is more cost-effective than and environmentally preferable to the transportation, storage, treatment, destruction, or secure disposition offsite of hazardous substances, or may otherwise be necessary to protect the public health or welfare; the term includes offsite transport and offsite storage, treatment, destruction, or secure disposition of hazardous substances and associated contaminated materials.

42 U.S.C. § 9601 (24) (emphasis added).

(5th Cir. 1989) (citing only the statutory definitions for "removal" and "remedial" and deducing that removal actions are "aimed at preventing environmental damage in the short-term"); *see also Exxon Corp. v. Hunt*, 475 U.S. 355, 360 (1986) (citing the statutory definitions for "removal" and "remedial," and noting in passing removal actions are "short-term cleanup," because "remedial actions" provide for a "permanent remedy"); *In re Bell Petroleum Servs.*, 3 F.3d 889, 894 (5th Cir. 1993) (citing *Reilly* and noting that "[r]emoval actions *generally* are immediate or interim responses" (emphasis added)).

But neither the Fifth Circuit nor the U.S. Supreme Court has purported to hold, or even to address, whether removal actions *must be* short-term actions to qualify as such. And, at least two circuits courts, the Ninth and the Sixth, have addressed that question and have rejected the invitation to impose that requirement under the statute. *See*, *e.g.*, *United States v. W.R. Grace & Co.*, 429 F.3d 1224, 1244 (9th Cir. 2005); *Village of Milford v. K-H Holding Corporation*, 390 F.3d 926 (6th Cir. 2004) (noting in passing that "[w]e acknowledge the point that this court repeatedly has observed that removal actions are frequently short-term actions in response to an emergency," but clarifying that it has "never held that such characteristics are requirements for finding the costs of an action recoverable as removal costs").

The Ninth Circuit's analysis in *Grace* is instructive. The *Grace* court considered the environmental conditions in Libby, Montana. In *Grace*, the EPA

invoked its authority under CERCLA to clean up asbestos-related contamination from mining operations that took place near Libby. *Grace*, 429 F.3d at 1226. The clean-up actions involved the removal of "hazardous soil from [a] screening plant, restrict[ing] access to contaminated roads, install[ing] a temporary cover on a school's ice skating rink, and excavat[ing] and backfill[ing] contaminated soil." *Id.* at 1242. The issue in that case—whether the EPA could recover the costs it spent in performing the cleanup—turned "on whether its response [was] properly characterized as a removal action," or whether its clean-up action was instead a "remedial" action. *Id.* at 1232. Rejecting the argument that removal actions must be short term, the *Grace* court noted that the statute did not mandate that outcome.

The *Grace* court cited to an EPA guidance memorandum,[101] where the EPA takes the position that "'removal actions are most often of short duration, but they certainly can be long-running responses, too, thereby undercutting the probative value of duration . . . in deciding whether an action is removal rather than remedial in nature.'" *Id.* at 1244 (quoting Stephen Luftig, Director, Office of Emergency and Remedial Response, Use of Non-Time-Critical Authority in Superfund Response Actions (Feb. 14, 2000), *available*

[101] The EPA's website suggests that this guidance document has not been superseded by further guidance. *See Non-Time Critical Removal Actions*, Environmental Protection Agency, https://www.epa.gov/superfund/nontime-critical-removal-actions (last visited Apr. 20, 2021) (listing the guidance document as part of "a partial list of the EPA's guidance for removals").

at https://semspub.epa.gov/work/HQ/129447.pdf (last visited Apr. 19, 2021)). The *Grace* court, relying on the EPA guidance, specifically noted that "'[a]s a practical matter, removal actions are often permanent solutions such as can be the case in a typical soil or drum removal.'" *Id.* Finding the reasoning in the guidance memorandum persuasive, the *Grace* court declined to impose the requirement on the statute that removal actions must be short-term actions. In addition, the *Grace* court considered more practical considerations, noting that it did not "want to tie the EPA's hands or compel it to adopt short-term remedies for fear that any more permanent solutions automatically will be dubbed 'remedial actions' and that it did not "make economic or practical sense to impose a requirement that removal actions must be only temporary in nature." *Id.*

The Court finds the *Grace* court's analysis of "removal" actions persuasive. Further, the plain language of the statutory definition of the word "removal" does not call for the Court to impose a requirement that all removals must be short-term actions. Accordingly, the Court finds that plaintiff fails to demonstrate manifest error with respect to its argument that removals must be short-term actions.[102]

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[102] Even if the Court assumes that the EPA's activities in installing the soil cap are distinct from the City's efforts to maintain the cap, plaintiff fails to recognize the concept of "post-removal site control," which the EPA says can constitute a removal action:

C. Plaintiff's Argument that It Is Entitled to Develop a Factual Record on the Question of "Diligence"

Next, plaintiff emphasizes a different passage in § 6972, arguing that it is entitled to develop a factual record on the City's "diligence":

> (B) No action may be commenced under [the citizen suit provision] of this section if the [EPA] Administrator . . .
>
> (iv) has obtained a court order (including a consent decree) . . . pursuant to which a responsible party *is diligently conducting* a removal action.

42 U.S.C. § 6972 (emphasis added). The Court finds that plaintiff fails to demonstrate manifest error on this ground as well.

"Congress intended for [citizen suits] to be utilized only when the government failed to exercise its power under RCRA." *River Village West LLC v. Peoples Gas Light and Coke Co.*, 618 F. Supp. 2d 847, 853 (N.D. Ill. 2008); *see also Kara Holding Corp. v. Getty Petroleum Mktg., Inc.*, 67 F. Supp. 2d 302, 307 (S.D.N.Y. 1999) ("[C]itizen suits are only intended to allow private

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> Post-removal site control means those activities that are necessary to sustain the integrity of a Fund-financed removal action following its conclusion. *Post-removal site control may be a removal or remedial action under CERCLA.* The term includes, without being limited to, activities such as relighting gas flares, replacing filters, and collecting leachate.

40 C.F.R. 300.5 (emphasis added).

attorneys general to fill the gaps in public enforcement endeavors, and are oftentimes conditioned upon the failure of federal and state officials to exercise their own enforcement responsibilities."). The citizen suit provision is not available to private attorneys general when the EPA and the State are engaged in addressing the alleged endangerment at issue. *Inc. Vill of Garden City v. Gensco, Inc.*, No. 0777-5244, 2009 WL 3081724, at *5 (E.D.N.Y. Sept. 23, 2009) ("The purpose of [RCRA] is clear; it is intended to prevent district courts and environmental agencies from acting at cross-purposes." (collecting cases)); *cf. R.E. Goodson Constr. Co. v. Int'l Paper Co.*, No. 02-4184, 2005 WL 2614927 (D.S.C. Oct. 13, 2005) ("To ensure that citizen suits are not duplicative or disruptive of federal or state remediation efforts, [RCRA] § 7002(b)(2) bars citizen suits in certain instances where the U.S. or a State has acted to address the alleged endangerment."). This framework is "intended to avert citizen suit interference with state and federal enforcement activities." *Chico Serv. Station, Inc. v. Sol Puerto Rico Ltd.*, 633 F.3d 20, 28 (1st Cir. 2011); *see also Louisiana Env't Action Network v. City of Baton Rouge*, 677 F.3d 737, 740 (5th Cir. 2012) (writing that, in the context of the Clean Water Act claim, "the citizens' role in enforcing the Act is 'interstitial' and should not be 'intrusive' " (quoting *Gwaltney of Smithfield, Ltd.*, v. *Chesapeake Bay Found., Inc.*, 484 U.S. 49, 61 (1987)); *Cox v. City of Dallas, Tex.*, 256 F.3d 281, 308 (5th Cir. 2001) ("We are persuaded that the similarity of the citizen suit provisions of the CWA and the RCRA requires like interpretation.").

Here, the consent decree indicates that the City must take actions to preserve the integrity of the soil cap at Gordon Plaza.[103] It also provides that the City "shall" provide a report to the EPA on an annual basis.[104] The consent decree also indicates that the City must "provide the United States and its representatives, including EPA and its contractors, with access at all reasonable times to the Site" to allow the EPA to engage in "[m]onitoring, investigation, removal, remedial or other activities at the Site, including 5-year reviews."[105] The EPA conducted its most recent review of the ASL in 2018, and found the City in compliance with the consent decree.[106] The EPA also found the City's actions in maintaining the soil cap protective of human health and the environment.[107] The 2018 Report also indicates that the EPA intends to produce another report in five years' time.[108]

The consent decree also provides a framework for the EPA to penalize the City if it violates the consent decree. The consent decree contains a section dedicated to stipulated penalties.[109] Under that section, "[s]tipulated penalties are due and payable within 30 days of the date of the demand for payment of the penalties by

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[103] *Id.* at 9 ¶ 5.

[104] *Id.* at 17 ¶ 14.

[105] *Id.* at 12.

[106] R. Doc. 13-3 at 3.

[107] *Id.* at 3.

[108] *Id.* at 31.

[109] R. Doc. 13-2 at 24.

the EPA" if the City is found in noncompliance.[110] And if the EPA and the City dispute whether the City acts in violation, the consent decree provides a framework for dispute resolution in which disagreements as to the City's compliance would ultimately be resolved by the Court.[111]

Plaintiff's view is that none of the above factors demonstrates whether the City is "diligently conducting" a removal action. Plaintiff points to passages in the Report that, plaintiff asserts, indicate that the City's actions have not been diligent. For example, plaintiff notes that the EPA found that the fencing on the property adjacent to Gordon Plaza was in a state of disrepair when it conducted the inspection leading to the Report.[112] But, as plaintiff admits elsewhere,[113] the City was no longer required to maintain the fence under the consent decree as of May of 2018, when the 2018 Report was issued. The Court also notes that plaintiff does not allege in the complaint that any of the harm it seeks relief from is due to the City's failure to maintain the security fencing in the property next to Gordon Plaza.

Plaintiff also asserts that the EPA noted in its Report that vegetation in a part of the ASL was overgrown. As to that undeveloped property, the Report indicates that the City reported quarterly grass

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[110] *Id.* at 24.

[111] *Id.* at 20-23.

[112] R. Doc. 27-1 at 11.

[113] R. Doc. 27-1 at 11 n.3.

cutting,[114] which was more frequent than the consent decree requires. The Decree states that the City must "mow [the] vegetation at least twice per year."[115] Importantly, the EPA's observations as to the security fence and vegetation did not undermine its ultimate determination that the City was in compliance with the consent decree.

Plaintiff also argues that the question of diligence is, by its nature, one that requires a more developed factual record.[116] That is, plaintiff argues that only further discovery could reveal whether the City is being diligent in conducting a removal action. This argument ignores the fact that plaintiff has been in litigation with the City over the alleged conditions at the ASL since 2018, the year the EPA issued the Report. Further, the plaintiff was aware of the consent decree and the obligations it imposes on the City, which this Court has found to be a removal action. *See* discussion *infra*, Part III.E. The members of plaintiff association allegedly live on the ASL[117] and are in a position to know or to have find out whether the City carried out its obligations under the consent decree. The Court does not see why plaintiff needs discovery to allege facts to indicate that the City's conduct of a removal action under the consent decree has not been diligent. Further, the Court notes that plaintiff's position has always

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[114] *Id.*

[115] R. Doc. 13-2 at 10.

[116] R. Doc. 27-1 at 10.

[117] R. Doc. 1 at 3 ¶ 12.

been that the City's conduct under the consent decree was not a removal or a remedial action. It only now seeks to pivot to the question of whether any removal action is being diligently conducted, a question which it could have and should have addressed earlier.[118]

Under plaintiff's reading of the statute, no defendant could ever win a motion to dismiss by invoking the statutory bar in 42 U.S.C. § 6972(b)(2)(B)(iv)—discovery would always be required to determine whether a defendant "*is* diligently conducting" a removal or remedial action at the present moment. The Court finds this contrary to the plain meaning of the statute, which precludes a citizen suit from "commenc[ing]" in the first instance. 42 U.S.C. § 6972; *see also Grp. Against Smog & Pollution, Inc. v. Shenango Inc.*, 810 F.3d 116, 129 (3d Cir. 2016) (taking judicial notice of two consent decrees, finding that plaintiff's citizen suit under the Clean Air Act under the "diligent prosecution" bar, and affirming dismissal under Rule 12(b)(6)).

Further, allowing pretrial discovery on the question of "diligence," when plaintiff does not even allege that the City is in violation of the consent decree would be unnecessarily disruptive of any ongoing cooperation between the EPA and the City regarding their handling of the conditions at Gordon Plaza. *Cf. Harlow v.* Fitzgerald, 457 U.S. 800, 817 (1982) (noting that pretrial discovery ought to be avoided in the qualified

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[118] Plaintiff filed its second complaint in 2020. *See id.* This complaint did not indicate any changes at the ASL since 2018, when it filed its first complaint.

immunity context because pretrial discovery can be "peculiarly disruptive of effective government"); *Wicks v. Mississippi State Emp. Servs.*, 41 F.3d 991, 995 n.16 (5th Cir. 1995) (noting that one of the purposes of qualified immunity is to avoid imposing the burdens of discovery on the defendant unnecessarily).

The Third Circuit's reasoning in *Group Against Smog & Pollution, Inc. v. Shenango Inc.,* 810 F.3d 116 (3d Cir 2016), is instructive. There, the court considered a plaintiff's citizen suit against a defendant's operations at the Neville Island Coke Plant. *Id.* at 120. The plaintiff sought to establish that the defendant's plant violated binding requirements under the Clean Air Act, 42 U.S.C. § 7604(a)(1). The Third Circuit consulted the so-called "diligent prosecution" bar to citizen suits under the Act. That provision provides:

> No action may be commenced—
>
> if the Administrator or State has commenced and is *diligently prosecuting* a civil action in a court of the United States or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any person may intervene as a matter of right.

42 U.S.C. § 7604 (emphasis added). The Third Circuit noted that a 2012 consent decree and a 2014 consent order that dealt with the violations at issue. *Shenango*, 810 F.3d at 121-22. The Court took judicial notice of both the consent decree and the consent order, reviewed the terms of those documents, and ruled that

plaintiff's citizen suit was barred, affirming the district court under Federal Rule of Civil Procedure 12(b)(6). *Id.* at 131-32. The court noted that "[b]oth the 2012 Consent Decree and 2014 Consent Order and Agreement utilize ongoing monitoring and recording of [defendant's] emissions, as well as allow . . . the right to inspect [defendant's] facilities or record emissions." *Id.* at 130. Because the consent decree and consent order remained in force at the time plaintiff filed its citizen suit, the court found that plaintiff's citizen suit was barred. *Shenango*'s analysis of "diligent prosecution" is analogous to the question of whether the City is "diligently conducting" a removal action here, insofar as *Shenango* indicates that the question of "diligence" need not be reserved for after the motion-to-dismiss stage.

Plaintiff relies on *Tanglewood E. Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1574 (5th Cir. 1988), for its argument that diligence is a question of fact. In *Tanglewood*, plaintiff's alleged that highly-toxic waste accumulated on their property in the years before it became a residential development. *Id.* at 1571. Under RCRA, the appellant argued that plaintiff's citizen-suit was barred under a different subsection of the statute that bars citizen suits when the EPA is "'diligently proceeding with a remedial action.' *Id.* at 1573 (quoting 42 U.S.C. § 6972(b)(2)(B)(iii)). Under that provision, the *Tanglewood* court found that the question of diligence was "a fact issue and that the complainants cannot be expected to prove, at the

pleading stage, the EPA's methodology or diligence in the cleanup efforts." *Id.*

But *Tanglewood* is distinguishable. That case did not involve a consent decree that purported to bind the responsible party's conduct. Indeed, the subsection of § 6972 at issue in *Tanglewood* does not contemplate the possibility that the EPA and the State might use a consent decree to enforce RCRA. Relatedly, there was no mention in *Tanglewood* of ongoing reporting requirements, or evidence of consistent EPA examinations of the site at issue.

And after *Tanglewood*, the Fifth Circuit decided *Louisiana Env't Action Network v. City of Baton Rouge*, 677 F.3d 737 (5th Cir. 2012). In that case, the court considered a provision in The Clean Water Act, 33 U.S.C. § 1251, *et seq.*, which bars citizen suits when the "EPA or State 'has commenced and is diligently prosecution a civil or criminal action . . . to require compliance with the standard.' *Id.* at 740 (quoting 33 U.S.C. § 1365(b)(1)(B)). The *Louisiana Environmental Action Network* court held that this so-called "diligent prosecution" bar was not jurisdictional, but it declined to answer whether the question of "diligent prosecution" was "a fact-intensive question that can only be answered after the proper development of a record." *Id.* at 750. The Fifth Circuit noted that it took "no position" on that argument. *Id.* In other words, *Louisiana Environmental Action Network* indicated that it is an open question whether the issue of "diligence" can be resolved based on the complaint and the enforcement record before the Court.

Given the circumstances of this case, where the consent decree requires the City to take actions to preserve the soil cap, which are necessary to protect the ASL from subsurface contamination; where the 2018 EPA Report indicates that the City is in compliance with its obligations, and that the ASL remains protected; and where plaintiff makes no argument or allegation that the City is in violation of the consent decree, the Court finds the record sufficient to hold that plaintiff's lawsuit is barred by 42 U.S.C. § 6972(b)(2)(B)(iv).

D. Plaintiff's Argument on Judicial Notice

Plaintiff argues that it is entitled to a hearing on the Court's taking judicial notice of the consent decree and the Report.[119] "Pursuant to Federal Rule of Evidence 201, a court is entitled to take judicial notice of adjudicative facts from reliable sources 'whose accuracy cannot reasonably be questioned." *Ctr. for Biological Diversity, Inc. v. BP Am. Prod. Co.*, 704 F.3d 413, 422 (5th Cir. 2013). !Plaintiff points to Federal Rule of Evidence 201(e), which provides:

> On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.

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[119] R. Doc. 27-1 at 2.

Plaintiff cited, quoted, and relied on both the consent decree and the Report extensively in its opposition to the City's motion,[120] never raising a concern with whether the Court should consider them. The Court finds that plaintiff's request to be heard on the issue of judicial notice is not timely and that plaintiff waived its right to object on this issue by availing itself of the contents of these documents in its opposition.

E. Previous Litigation

Plaintiff previously litigated a RCRA claim against the City involving the conditions at Gordon Plaza, and it failed to notify the Court of those proceedings. When the City moved to dismiss plaintiff's complaint, it noted that plaintiff previously filed a RCRA citizen suit, and that case was captioned as *Residents of Gordon Plaza, Inc. vs. Mitchell Landrieu*, No. 18-4226 (2018).[121]

There, the plaintiff sued the City before Judge Ivan L. R. Lemelle in the Eastern District of Louisiana,[122] seeking relocation of its members from Gordon

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[120] *See*, *e.g.*, R. Doc. 16 at 2, 3, 6, 8, 13, 14, 16.

[121] R. Doc. 13-1 at 8.

[122] The Court takes judicial notice of the public records filed in plaintiff's litigation. *See Joseph v. Bach & Wasserman*, L.L.C., 487 F. App'x 173, 178 (5th Cir. 2012) ("[T]he court may take judicial notice of matters of public record."); *see also Norris v. Hearst Trust*, 500 F.3d 454, 461 n.9 (5th Cir. 2007) ("[I]t is clearly proper in deciding a 12(b)(6) motion to take judicial notice of matters of public record.").

Plaza.[123] The court dismissed plaintiff's action without prejudice, finding that plaintiff had not established the requirements for associational standing.[124] Specifically, the court found that the relief plaintiff sought—relocation of its members—would require "individual participation" of members of the association, which precludes associational standing. *See Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 191 (5th Cir. 2012). After the court reached its holding, it offered a view in dicta as to whether the consent decree (the same one at issue in this case) barred plaintiff's citizen suit under 42 U.S.C. § 6972(b)(2)(B)(iv).[125]

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[123] R. Doc. 13-1 at 8-9. *See* R. Doc. 2 (Case No. 18-4226).

[124] R. Doc. 74 (Case No. 18-4226).

[125] R. Doc. 1 at 13 ¶ 84. The court's discussion of the statutory bar is not the law of this case. First, the court's discussion of the statutory bar takes place in dicta. *See* discussion *supra*, at 4-5 n.22; *In re City of Philadelphia Litig.*, 158 F.3d 711, 718 (3d Cir. 1998) (noting that "[t]he law of the case doctrine . . . does not apply to dicta"). Second, the case before Judge Lemelle was a separate civil action, following a different complaint, under which plaintiff sought different relief. *Med. Ctr. Pharmacy v. Holder*, 634 F.3d 830, 834 (5th Cir. 2011) ("The law-of-the-case doctrine 'posits that when a court decides upon a rule of law, that decision should continue to govern the same issue in subsequent stages *in the same case*.'" (emphasis added) (quoting *United States v. Castillo*, 179 F.3d 321, 326 (5th Cir. 1999))); *see also* 18B Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 4478 (2d ed. 2021) ("Law-of-the-case rules . . . do not apply between separate actions, even if they are related."). !!

Plaintiff filed for reconsideration in the earlier suit and sought to amend its complaint.[126] The court denied reconsideration, and it also denied plaintiff's motion to amend its complaint.[127] In denying plaintiff's motion to amend, the court found, among other things, that plaintiff acted with "bad faith and dilatory motive" because the plaintiff admitted it knew of other relief it could seek when it filed the complaint, but it made the conscious decision not to seek it because it "wished to emphasize [the relocation] remedy."[128] The court observed that plaintiff's "theories of recovery [were] intentionally advanced in a piecemeal [and] disjointed fashion,"[129] and it denied plaintiff leave to amend.

Two months after the court denied reconsideration, plaintiff filed the complaint before this Court. Under the local rules, plaintiff was required to inform the Court of those earlier proceedings. It did not do so. Eastern District of Louisiana Local Rule 3.1. provides:

> When in a civil matter, commenced in or removed to the court, involves subject matter that comprises all or a material part of the subject matter or operative facts of another action, whether civil or criminal, then or previously pending in any court or administrative agency, counsel must file a list and

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[126] R. Doc. 78 (Case No. 18-4226); R. Doc. 80 (Case No. 18-4226).

[127] R. Doc. 92 (Case No. 18-4226).

[128] R. Doc. 92 at 11 (Case No. 18-4226).

[129] *Id.* at 13 (Case No. 18-4226).

> description of all such actions then known to counsel and a brief summary of the relationship between the cases. . . .

Plaintiff submitted a Civil Cover Sheet with the clerk's office.[130] The Civil Cover Sheet asked plaintiff to identify "Related Case(s) If Any," when it filed its complaint. For whatever reason, plaintiff left that field blank.[131]

In addition to failing to notify the Court of this previous litigation, plaintiff also elected to not mention the consent decree in its complaint, notwithstanding that it had notice from the earlier litigation that the consent decree was material to whether its claim was statutorily barred. The Court considers plaintiff's motion to amend against this background.

F. Plaintiff's Argument for Dismissal Without Prejudice and Leave to Amend

Plaintiff asserts that the Court should modify its judgment and dismiss the case without prejudice and grant plaintiff leave to file an amended complaint.[132] In the Fifth Circuit, when a district court dismisses the complaint, but does not terminate the action altogether, the plaintiff may amend under Federal Rule of Civil Procedure 15 with permission from the court.

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[130] R. Doc. 1-8.

[131] After consultation with the judge who handled the other case, the Court finds that transfer to him at this juncture would not promote judicial economy.

[132] R. Doc. 27-1 at 12.

United States ex rel. Hebert v. Dizney, 295 F. App'x 717, 724 (5th Cir. 2008); *Rosenzweig*, 332 F.3d at 865. "When a district court dismisses an action and enters a final judgment, however, a plaintiff may request leave to amend only by either appealing the judgment, or seeking to alter or reopen the judgment under Rule 59 or 60." *Herbert*, 295 F. App'x at 724; *Rosenzweig*, 332 F.3d at 865. Here, the Court dismissed plaintiff's complaint with prejudice.[133] Because plaintiff timely filed a motion to reconsider,[134] the Court will consider plaintiff's request for leave to amend.

In the context of a motion for reconsideration, the Fifth Circuit has held plaintiff's motion for leave to amend "should be governed by the same considerations controlling the exercise of discretion under rule 15(a)." *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 597 n.1 (5th Cir. 1981); *see also Rosenzweig*, 332 F.3d at 864 (providing that a motion to amend on a Rule 59(e) disposition should be governed by the standard set out in Rule 15(a)).

While courts "should freely give leave when justice so requires," Fed. R. Civ. P. 15(a)(2), leave to amend is not automatic or granted in every case. *See Davis v. United States*, 961 F.2d 53, 57 (5th Cir. 1991). "[T]his Circuit examines five considerations to determine whether to grant a party leave to amend a complaint: (1) undue delay, (2) bad faith or dilatory motive, (3) repeated failure to cure deficiencies by previous

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[133] R. Doc. 26.

[134] R. Doc. 27.

amendments, (4) undue prejudice to the opposing party, and (5) futility of the amendment." *Smith v. EMC Corp.*, 393 F.3d 590, 595 (5th Cir. 2004). "Absent any of these factors, the leave sought should be 'freely given.'" *Id.* (quoting *Forman v. Davis*, 371 U.S. 178, 182 (1962)).

Plaintiff does not supply the Court with a copy of an amended complaint. "The failure to attach a copy of the proposed complaint is not, on its own, fatal to a motion to amend." *Pena v. City of Rio Grande City*, 879 F.3d 613, 618 (5th Cir. 2018). Still, it is incumbent upon the plaintiff to 'set forth with particularity the grounds for the amendment and the relief sought.'" *United States ex rel. Doe v. Dow Chem. Co.*, 343 F.3d 325, 331 (5th Cir. 2003) (quoting *United States, ex rel. Willard v. Humana Health Plan of Tex. Inc.*, 336 F.3d 375. 386-87 (5th Cir. 2003)). Plaintiff asserts that it intends to include additional factual allegations that would evince a lack of diligence on the part of the City,[135] but it gives no indication of what those facts are. After considering the relevant factors, the Court denies leave to amend.

1. *Undue Delay*

The Court finds that plaintiff has acted with undue delay. "Although Rule 15(a) does not impose a time limit 'for permissive amendment, at some point, time delay on the part of a plaintiff can be procedurally fatal.'" *Smith*, 393 F.3d at 595 (quoting *Whitaker v. City of Houston*, 963 F.2d 831, 836 (5th Cir. 1992)). "In such

[135] R. Doc. 27-1 at 13.

a situation, the plaintiff bears the burden of showing the delay to be 'due to oversight, inadvertence, or excusable neglect.'" *Id.* (quoting *Whitaker*, 963 F.2d at 836). Plaintiff has provided no reasonable explanation for why it could not include more detailed allegations regarding the City's alleged lack of diligence in its complaint. By way of the earlier litigation, plaintiff had notice that the consent decree, and the statutory bar set out in 42 U.S.C. § 6972(b)(2)(B)(iv), were material to whether its action could proceed. Further, plaintiff could have responded to the City's motion to dismiss with a request to amend the complaint, but it failed to do so. And in the instant motion, plaintiff does not even argue that its failure to include more detailed allegations was the product of "oversight, inadvertence, or excusable neglect." Accordingly, plaintiff fails to meet its burden to establish these factors, and the Court finds that this factor weighs against granting plaintiff leave to amend.

2. *Bad Faith or Dilatory Motive*

Bad faith in this context is a term of art, and it exists when a plaintiff is aware of facts and "fail[s] to include them in the complaint . . . giv[ing] rise to the inference that the plaintiff was engaging in tactical maneuvers to force the court to consider various theories." *Dussouy*, 660 F.2d at 599; *see also Wimm v. Jack Eckerd Corp.*, 3 F.3d 137, 140 (5th Cir. 1993) (affirming denial of leave to amend because of bad faith, because plaintiff "knew of the facts underlying their . . . claim before this action commenced"); *Cole v. Ridge*, No. 2004

WL 2237028, at *3 (N.D. Tex. Oct. 4, 2004) ("Bad faith may bar amendment if the movant was aware of certain facts but failed to plead them in order to gain a tactical advantage.").

Plaintiff failed to notify the Court that it had previously litigated a claim involving the environmental conditions at Gordon Plaza. In that case, the City argued that the consent decree barred plaintiff's citizen suit. Still, plaintiff did not include a single factual allegation in its complaint before this Court relevant to the consent decree. Now that the Court has dismissed plaintiff's complaint because it found that the City's compliance with the consent decree constituted diligent pursuit of a removal action, plaintiff argues that it is prepared to offer more detailed allegations as to why the City's conduct under the consent decree does not bar its citizen suit. To the extent that plaintiff was keeping these allegations in reserve, it acted with bad faith and dilatory motive.

3. *Repeated Failure to Cure Deficiencies*

The Court also finds that plaintiff has failed to cure deficiencies. Although the judgment in plaintiff's earlier suit was not a decision on the merits, this is plaintiff's second opportunity to provide the Court with a sufficient pleading. It has failed to do so.

4. *Undue Prejudice to the Defendant*

The Court finds that the City would suffer undue prejudice were the Court to allow plaintiff leave to amend. Plaintiff has been litigating against the City regarding the environmental conditions at Gordon Plaza for three years.[136] The Court will not subject the City to the prejudice associated with prolonged litigation and costs on the chance that plaintiff will file an adequate pleading on its third attempt.

IV. CONCLUSION

For the foregoing reasons, plaintiff's motion is DENIED.

New Orleans, Louisiana, this 30th day of April, 2021.

/s/ Sarah S. Vance
SARAH S. VANCE
UNITED STATES DISTRICT JUDGE

[136] R. Doc. 2 (Case No. 18-4226).

United States Court of Appeals
for the Fifth Circuit

No. 21-30294

RESIDENTS OF GORDON PLAZA, INCORPORATED,

Plaintiff—Appellant,

versus

LATOYA CANTRELL, *in her Official Capacity as Mayor of the City of New Orleans*; CITY OF NEW ORLEANS,

Defendants—Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 2:20-CV-1461

ON PETITION FOR REHEARING EN BANC

(Filed Mar. 2, 2022)

Before OWEN, *Chief Judge*, CLEMENT, and ENGELHARDT, *Circuit Judges.*

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R. 35 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc

(FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.