ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FRIENDS OF THE EARTH, *et al.*, *Plaintiffs-Appellees*, v. DEBRA A. HAALAND, in her official capacity as Secretary of the Interior, *et al*., *Defendants-Appellees*, and AMERICAN PETROLEUM INSTITUTE and STATE OF LOUISIANA, *Intervenor-Defendants-Appellants*	No. 22-5036, 22-5037 (Consolidated)

APPELLEES' COMBINED RESPONSE TO INTERVENOR-APPELLANT'S EMERGENCY MOTION TO EXPEDITE AND CROSS-MOTION TO DISMISS

Pursuant to Rule 27 of the Federal Rules of Appellate Procedure and Circuit Rules 27(c), (f), and (g), Plaintiffs-Appellees ("Conservation Groups") respond to Intervenor-Defendants-Appellants American Petroleum Institute's ("API") Emergency Motion to Expedite and cross-move to dismiss API's and the State of Louisiana's consolidated appeals for lack of jurisdiction.

API's request to expedite this appeal is unwarranted because it is premised entirely on its unfounded concern that a party may later take a position that this Court cannot grant effective relief after June 30, 2022. No party has adopted or argued that position. Indeed, Conservation Groups have disclaimed that position, and the government's statements to the district court contradict it. *See* Suppl. Regarding API's Emergency Mot. Expedite, Doc. No. 1935499 (noting Conservation Groups' agreement that the Department of Interior may continue to review bids if this Court reverses the district court order). Apart from its concern about a position that Conservation Groups have already assured API they will not take, API has not identified any other factor warranting expedited consideration of this appeal and has not carried its heavy burden to demonstrate strong compelling reasons that this rare relief is necessary. The Court should deny the motion to expedite.

Expedited consideration is also unwarranted for the more fundamental reason that this Court lacks jurisdiction over this consolidated appeal and should therefore dismiss it. The district court has not entered final judgement, and the remand order challenged in this appeal is not itself appealable. The district court held that Federal Appellees ("Interior"), violated the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332 *et seq*., by failing to take a hard look at impacts from greenhouse gas emissions before offering 80 million acres of

offshore land in the Gulf of Mexico for lease to oil and gas companies in Lease Sale 257. Mem. Op., D. Ct. Dkt. No. 78. In its order, the district court vacated Interior's record of decision to hold the sale as well as action taken based on that decision and remanded the matter to Interior "for further proceedings." Order 2, D. Ct. Dkt. No. 77; Mem. Op. 67.

Interior has not noticed an appeal of the district court's decision. Under this Circuit's case law, it is "axiomatic" that parties other than the federal government "may not appeal a district court's order remanding to an agency because it is not final" within the meaning of 28 U.S.C. § 1291. *N. Air Cargo v. U.S. Postal Serv.*, 674 F.3d 852, 857 (D.C. Cir. 2012) (citing *N.C. Fisheries Ass'n, Inc. v. Gutierrez*, 550 F.3d 16, 19–20 (D.C. Cir. 2008)). Accordingly, this Court lacks jurisdiction over this consolidated appeal and should dismiss.

BACKGROUND

This case involves Interior's decision to hold an unlawful offshore oil and gas lease sale (Lease Sale 257), based on a faulty analysis in a December 2017 environmental impact statement. Compl. 3–4, ¶¶ 4–7, D. Ct. Dkt. No. 1; *see also* 82 Fed. Reg. 59,644 (Dec. 15, 2017). That analysis and Interior's record of decision failed to take a hard look at the effects of greenhouse gas emissions resulting from the lease sale. Mem. Op. 27–39. Specifically, Interior failed to calculate the greenhouse gas emissions from the sale by ignoring the probable

reduction in foreign consumption that would occur if Interior decided not to hold the lease sale and ignoring readily available methods to evaluate and estimate the resulting greenhouse gas emissions. *Id.* at 31–38. As a result of that faulty analysis, Interior reached the counterintuitive conclusion that total greenhouse gas emissions would be slightly *higher* if Interior were to *not* hold the lease sale. Both the Ninth Circuit and the District Court for the District of Alaska previously evaluated Interior's use of the exact same emissions analysis, and both found its use to be arbitrary. *Ctr. for Biological Diversity v. Bernhardt*, 982 F.3d 723 (9th Cir. 2020); *Sovereign Iñupiat for a Living Arctic v. Bureau of Land Mgmt.*, No. 3:20-cv-00290, 2021 WL 3667986 (D. Alaska Aug. 18, 2021).

Conservation Groups immediately challenged Interior's record of decision to hold the sale in violation of NEPA and the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq*. *See* Compl. After briefing on cross-motions for summary judgment, the district court granted Conservation Groups' motion in part and held that Interior failed to take a hard look at the indirect climate impacts of the sale in violation of NEPA and the APA. Mem. Op. 2, 38–39. The district court agreed with Conservation Groups that "excluding the reduction in foreign consumption emissions was not a reasonable methodology" and that Interior "provided no reasons . . . to think that it was." *Id.* at 38. "Barreling full-steam ahead with blinders on was simply not a reasonable action," especially after having been

informed of this problem by "not one but two different courts." *Id*. In its order, the district court "vacate[ed] the Record of Decision for Lease Sale 257, and the action taken based on that Record of Decision, including Lease Sale 257, and remand[ed] to the agency for further proceedings." Order 2; Mem. Op. 67.

This Court docketed and then consolidated two separate appeals filed by Intervenor API and Intervenor State of Louisiana on February 11, 2022. Doc. Nos. 1934783, 1934788, 1934791. API filed its Emergency Motion to Expedite ("Mot. to Expedite") that same day. Doc. No. 1934877.

ARGUMENT

I. Expedited Consideration is Unwarranted.

"The Court grants expedited consideration very rarely." D.C. Circuit, *Handbook of Practice and Internal Procedures* 34 (as amended March 16, 2021) ("Circuit Handbook"). To meet the high standard for granting a request, "[t]he movant must demonstrate that the delay will cause irreparable injury and that the decision under review is subject to substantial challenge," or that third parties not before the Court have "an unusual interest in prompt disposition." *Id*. This Court grants such motions only when the reasons for doing so are "strongly compelling." *Id*. API has failed to carry its burden to demonstrate that this appeal warrants this "rare[]" treatment. *Id*.

API does not, for example, even mention irreparable injury from a delay, nor does it assert that any third parties have an "unusual interest" sufficient to compel expedited resolution. Rather, the sole basis for API's request is that all parties had not yet agreed with its assertion that "Interior could award leases based on the high bids submitted in November 2021 if this Court reverses the District Court's decision after June 30, 2022," when Interior's current Five-Year Leasing Plan expires. Mot. to Expedite 6. But as API reported in its February 16, 2022 Supplement Regarding its Motion to Expedite, Conservation Groups have already agreed that if this Court reverses the district court on the merits or modifies the district court's vacatur order after June 30, 2022, Interior could continue its review of the bids received for Lease Sale 257 pursuant to 30 C.F.R. § 556.516 and exercise its discretion to accept or reject the high bids submitted in November 2021. Doc. No. 1935499.

Although Interior takes no position on the motion to expedite, API has presented no evidence that Interior disagrees. Indeed, API highlights Interior's representation in the district court that without vacatur, Interior viewed the "date of the sale for five-year program purposes would still be November 2021, well within the established 2017-2022" leasing program and that Interior would retain its full discretion to decide what steps to take with existing bids. Mot. to Expedite 6

(quoting Interior's Suppl. Remedy Br. 4, D. Ct. Dkt. No. 74). *See also* Mem. Op. 62.

In the face of these statements from Conservation Groups and Interior's representations in the district court, API does not—and cannot—demonstrate a credible basis for its concern that the parties might later assert something different. This unlikely scenario falls far short of the strong showing of irreparable injury or other special factors required to expedite this case. Circuit Handbook 34. The Court should deny the motion to expedite as unnecessary.

II. The Court Should Dismiss This Consolidated Appeal for Lack of Jurisdiction.

API's request to expedite is also unnecessary because this Court lacks jurisdiction to hear this appeal and should dismiss. The party invoking this Court's jurisdiction bears the burden of establishing that the Court has jurisdiction over the appeal. *Sierra Club v. EPA*, 292 F.3d 895, 899 (D.C. Cir. 2002). Neither API nor Louisiana can do so here.

It is well-established that this Court does not have jurisdiction over a private party's appeal of an order remanding a matter to an agency for additional proceedings.[1] "A federal court created by Congress pursuant to Article III of the

[1] In this context, the term "private party" includes any non-federal party, including non-federal government parties. *See, e.g., Pueblo of Sandia v. Babbitt*, 231 F.3d 878 (D.C. Cir. 2000) (applying the remand rule to dismiss an appeal by New Mexico county).

Constitution has the power to decide only those cases over which Congress grants jurisdiction." *Al-Zahrani v. Rodriguez*, 669 F.3d 315, 317 (D.C. Cir. 2012). The courts of appeals have jurisdiction to hear "appeals from all final decisions of the district courts." 28 U.S.C. § 1291; *see Pueblo of Sandia v. Babbitt*, 231 F.3d 878, 880 (D.C. Cir. 2000). "It is black letter law" in this Circuit "that a district court's remand order is not normally 'final' for purposes of appeal under 28 U.S.C. § 1291." *N.C. Fisheries Ass'n*, 550 F.3d at 19; *accord N. Air Cargo*, 674 F.3d at 857; *see also Lakes Pilots Ass'n v. U.S. Coast Guard*, 359 F.3d 624, 625 (D.C. Cir. 2004) ("A remand order usually is not a final decision." (quoting *NAACP v. U.S. Sugar Corp.*, 84 F.3d 1432, 1436 (D.C. Cir. 1996)); *Pueblo of Sandia*, 231 F.3d at 880 ("It is well settled that, as a general rule, a district court order remanding a case to an agency for significant further proceedings is not final." (quoting *In re St. Charles Pres. Investors, Ltd.*, 916 F.2d 727, 729 (D.C. Cir. 1990)).

This rule rests on the reality that rather than resolving the dispute, a remand order "simply turns it back for further proceedings by the agency, after which it 'may well return [to court] again.'" *Am. Haw. Cruises v. Skinner*, 893 F.2d 1400, 1403 (D.C. Cir. 1990) (citation omitted). As this Court has observed, this rule "promotes judicial economy and efficiency by avoiding the inconvenience and cost of two appeals: one from the remand order and one from a later district court decision reviewing the proceedings on remand." *Sierra Club v. U.S. Dep't of*

Agric., 716 F.3d 653, 656 (D.C. Cir. 2013). Consequently, remand orders generally cannot be appealed. *NAACP*, 84 F.3d at 1436.

Here, the order at issue is not final because the district court remanded Interior's action to the agency "for further proceedings." Order 2; Mem. Op. 67. There is nothing on the face of the order or in the accompanying memorandum opinion to indicate that the district court intended to issue a final, appealable order or to certify the order for immediate appeal under Rule 54(b) of the Federal Rules of Civil Procedure. *See Building Indus. Ass'n v. Babbitt*, 161 F.3d 740, 743 (D.C. Cir. 1998) (explaining that an order certified as immediately appealable must, as a "bright-line requirement," contain both an "express determination that there is no just reason for delay and . . . an express direction for the entry of judgment" (quoting Fed. R. Civ. P. 54(b))).

Intervenors can of course seek review of the district court's remand order once it is final. Though their appeals are premature at this time, if either party is unsatisfied with the ultimate outcome following remand, that party "may still challenge the remanded proceedings—as well as the remand order requiring them—after the proceedings are complete." *U.S. Dep't of Agric.*, 716 F.3d at 657 (citing cases); *Lakes Pilots Ass'n*, 359 F.3d at 625 (holding that a party aggrieved by the outcome on remand may "seek judicial review, including review in the court of appeals, raising not only new issues but all those on which it got no satisfaction

in its original challenge").[2] "[T]his [C]ourt has recognized that although § 1291 inevitably results in some delay, 'Congress has determined that such delay must be tolerated.'" *U.S. Dep't of Agric.*, 716 F.3d at 658 (quoting *Salazar ex rel. Salazar v. District of Columbia*, 671 F.3d 1258, 1261 (D.C. Cir. 2012)).

Because the Court lacks jurisdiction over Intervenor-Appellants API and Louisiana's appeal of the district court's non-final remand order, the consolidated appeals should be dismissed.

CONCLUSION

For the foregoing reasons, this Court should deny API's Motion to Expedite and dismiss API and Louisiana's consolidated appeal for lack of jurisdiction.

Respectfully submitted this 18th day of February, 2022.

/s/ Brettny E. Hardy
Brettny E. Hardy (CADC Bar No. 625354)
EARTHJUSTICE
50 California Street, Suite 500
San Francisco, CA 94111
415-217-2000 Telephone
206-343-1526 Fax
bhardy@earthjustice.org

[2] In rare cases, the federal agency to which the case is remanded may appeal if it would have no opportunity to do so after the proceedings on remand. *Occidental Petroleum Corp. v. S.E.C.*, 873 F.2d 325, 330 (D.C. Cir. 1989). But Intervenors do not qualify for this exception. *See N.C. Fisheries Ass'n*, 550 F.3d at 20 ("[T]hat path is not normally available to a private party."); *see also Occidental*, 873 F.2d at 331 ("[A] private party may not, in most cases, immediately appeal a district court order remanding a case for further agency proceedings.").

Stephen D. Mashuda (CADC Bar No. 60505)
Shana E. Emile (CADC Bar No. *pending*)
EARTHJUSTICE
810 Third Ave., Suite 610
Seattle, WA 98104
206-343-7340 Telephone
206-343-1526 Fax
smashuda@earthjustice.org
semile@earthjustice.org

Attorneys for Plaintiffs-Appellees Friends of the Earth, Healthy Gulf, Sierra Club, and Center for Biological Diversity

CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) because it contains 2,213 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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Respectfully submitted this 18th day of February, 2022.

/s/Brettny E. Hardy
BRETTNY E. HARDY
CADC No. 625354