Nos. 21-16958 (lead), 21-16960, 21-16961

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: Clean Water Act Rulemaking

AMERICAN RIVERS, et al.,
Plaintiffs/Appellees,

v.

MICHAEL S. REGAN, et al.,
Defendants/Appellees,
and
AMERICAN PETROLEUM INSTITUTE, et al.,
Intervenor-Defendants/Appellants,
and
STATE OF ARKANSAS, et al.,
Intervenor-Appellants.

Appeal from the United States District Court for the Northern District of California
Nos. 3:20-cv-04636, -04869, -06137 (Hon. William H. Alsup)

FEDERAL APPELLEES' ANSWERING BRIEF

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INTRODUCTION

This case involves a challenge to a rule promulgated by the Environmental Protection Agency (EPA) in 2020 setting forth requirements for water quality certification under Section 401 of the Clean Water Act (CWA), 33 U.S.C. § 1341. *See* 85 Fed. Reg. 42,210 (July 13, 2020) (the 2020 Rule). Approximately one year after publishing the 2020 Rule, EPA decided to commence a notice-and-comment rulemaking with the goal of issuing a revised rule in spring 2023. EPA therefore asked the district court to remand the 2020 Rule to the agency without vacatur. The court instead issued an order (the Remand Order) granting EPA's request for a remand, but, pursuant to Plaintiffs' request, the court also vacated the Rule.

EPA did not appeal. Various States and industry groups that had intervened to defend the 2020 Rule (collectively, Intervenors) now appeal the Remand Order, arguing only that the district court erred by vacating the Rule.

Under this Court's precedent, the appeals should be dismissed for lack of jurisdiction. The Remand Order—including its vacatur provision—is not a final order appealable by non-agency litigants. *See Alsea Valley Alliance. v. Department of Commerce*, 358 F.3d 1181, 1184-86 (9th Cir. 2004). Nor is the Remand Order tantamount to an injunction appealable by Intervenors under 28 U.S.C. § 1292(a)(1), and Intervenors do not argue otherwise. The Court therefore lacks jurisdiction and should dismiss the appeals.

However, if the Court determines that it has jurisdiction, any relief should be limited to reversing the portion of the Remand Order that vacated the 2020 Rule. The district court's decision to grant EPA's request for a voluntary remand should be left in place because Intervenors do not challenge that decision, and because Plaintiffs have not cross-appealed to challenge the decision.

STATEMENT OF JURISDICTION

(a) The district court had subject-matter jurisdiction under 28 U.S.C. § 1331 because Plaintiffs' claims arose under the CWA, 33 U.S.C. §§ 1251 et seq., and the Administrative Procedure Act (APA), 5 U.S.C. §§ 701 et seq. *See* 4-ER-540, 553-59.

(b) As demonstrated in the Argument section below, this Court lacks appellate jurisdiction because the Remand Order is not appealable by Intervenors as a final order under 28 U.S.C. § 1291 or as an injunction under § 1292(a)(1).

(c) The Remand Order was entered on October 21, 2021. 1-ER-5–22. The district court entered Final Judgment on November 17, 2021. 1-ER-4. Intervenors filed their notices of appeal on November 17 and 18, 2022, within one day after the judgment was entered. 4-ER-561–622. The appeals are therefore timely under Federal Rule of Appellate Procedure 4(a)(1)(B).

STATEMENT OF THE ISSUES

1. Whether the Court lacks appellate jurisdiction because non-agency litigants cannot appeal the Remand Order as a final order under 28 U.S.C. § 1291 or an injunction appealable under 28 U.S.C. § 1292(a)(1).

2. If the Court has jurisdiction, whether any relief granted to Intervenors should be limited to reversing the portion of the Remand Order vacating the 2020 Rule because Intervenors have not challenged the district court's decision to grant EPA's request for a voluntary remand without an adjudication of the merits, and because Plaintiffs have not cross-appealed to challenge that decision.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes are included in the attached Addendum.

STATEMENT OF THE CASE

A. Statutory and regulatory background

In 1970, Congress amended the Federal Water Pollution Control Act (FWPCA), ch. 758, 62 Stat. 1155, by enacting the Water Quality Improvement Act, Pub. L. No. 91-224, 84 Stat. 91. As amended, Section 21(b)(1) of the FWPCA prohibited a federal agency from issuing a license or permit for an activity that "may result in any discharge into the navigable waters of the United States" unless "the State in which the discharge originates or will originate" either (1) certified that "there is reasonable assurance" that "such activity will be

conducted in a manner which will not violate applicable water quality standards," or (2) waived the certification requirement. Sec. 103, § 21(b)(1), 84 Stat. at 108. Section 21(b)(1) specified that if a State failed to act on a request for certification "within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements . . . shall be waived." *Id*.

In 1971, EPA promulgated regulations to implement the certification requirement. *See* 36 Fed. Reg. 8563 (May 8, 1971) (40 C.F.R. Pt. 121 (2019)). The 1971 regulations required that a certification include, among other things, a "statement that there is a reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards" and a "statement of any conditions which the certifying agency deems necessary or desirable with respect to the discharge of the activity." 40 C.F.R. § 121.2(a)(3)-(4) (2019). The 1971 regulations further provided that the certification requirement "shall be waived" when either (a) the certifying authority provides written notification that it expressly waives its certification authority, or (b) the federal licensing or permitting agency sends written notification to EPA that the certifying authority failed to act on a certification request "within a reasonable period of time after receipt of such request, as determined by the licensing or permitting agency (which period shall generally be considered to be 6 months, but in any event shall not exceed 1 year)." *Id*. § 121.16(a)-(b).

In 1972, Congress further amended the FWPCA. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 2, 86 Stat. 816. As amended, the FWPCA became commonly known as the CWA. *See* 33 U.S.C. § 1251 note. Section 401 of the CWA carried forward the certification requirement that had first appeared in Section 21(b)(1) of the FWPCA. Under Section 401, a federal agency may not issue a license or permit for any activity that "may result in any discharge into the navigable waters" unless "the State in which the discharge originates or will originate" either (1) certifies that "any such discharge will comply with applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of [Title 33]," or (2) waives the certification requirement. *Id*. § 1341(a)(1); *see also id*. § 1377(e) (authorizing EPA "to treat an Indian tribe as a State" for purposes of Section 401 in certain circumstances). Like its predecessor provision, Section 401 specifies that if a State "fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements . . . shall be waived." *Id*. § 1341(a)(1).

The 1971 regulations remained in effect after the CWA was enacted. In July 2020, EPA promulgated the 2020 Rule, which revised the 1971 regulations. The 2020 Rule provides, among other things, that the scope of a CWA Section 401 certification "is limited to assuring that a discharge from a Federally licensed or permitted activity will comply with water quality requirements." 40 C.F.R. §

121.3 (2021); *see also id.* § 121.1(n) (defining "water quality requirements"). The 2020 Rule further provides that "the reasonable period of time" within which a certifying authority may act on a certification request "shall not exceed one year from receipt," *id.* § 121.6(a), and defines "[r]eceipt" to mean "the date that a certification request is documented as received by a certifying authority in accordance with applicable submission procedures," *id.* § 121.1(m) (emphasis omitted). The 2020 Rule took effect in September 2020. 85 Fed. Reg. at 42,210.

B. Factual and procedural background

After EPA published the 2020 Rule, 20 States, the District of Columbia, several Tribes, and various environmental groups (collectively, Plaintiffs) filed three separate suits against EPA and its Administrator in the United States District Court for the Northern District of California. *See* 4-ER-538–60, 623–701. Plaintiffs alleged that the 2020 Rule violated the CWA and sought an order vacating the Rule under the APA. *See* 4-ER-553–60. Intervenors moved to intervene to defend the 2020 Rule. 1-ER-9. The district court granted the motions to intervene, 4-ER-649–50, 687, 689, 701, and consolidated the cases, 1-ER-27.

In January 2021, the President issued an Executive Order directing federal agencies to review regulations issued during the prior Administration related to the protection of public health and the environment. Exec. Order No. 13,990, 86 Fed. Reg. 7037, 7037 (Jan. 20, 2021). The 2020 Rule was identified as one of the

regulations to be reviewed. *See* The White House, Fact Sheet: List of Agency Actions for Review (Jan. 20, 2021), http://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review. The district court agreed to hold these cases in abeyance while EPA reviewed the Rule. *See, e.g.*, No. 20-cv-4636, ECF No. 132 (N.D. Cal. Feb. 22, 2021).

In June 2021, EPA announced that it had completed its initial review of the 2020 Rule and that it had decided to "propose revisions to the rule through a new rulemaking effort." 86 Fed. Reg. 29,541, 29,542 (June 2, 2021). EPA explained that after considering the "text of CWA Section 401" and other factors, it had "identified substantial concerns with a number of provisions of the [2020] Rule that relate to cooperative federalism principles and CWA Section 401's goal of ensuring that states are empowered to protect their water quality." *Id*.

In July 2021, EPA filed a motion asking the district court to remand the 2020 Rule to the agency without vacating the Rule. 3-ER-452–79.[1] In its motion, EPA argued that a remand was appropriate because the agency had "identified 'substantial and legitimate concerns' with the [2020] Rule and ha[d] publicly announced its intention to reconsider and revise the Rule." 3-ER-463 (citation

[1] Challenges to the 2020 Rule had also been brought in the United States District Court for the District of South Carolina and the United States District Court for the Eastern District of Pennsylvania. *See* 2-ER-220–29. EPA likewise filed motions in those courts to remand the 2020 Rule to the agency without vacating the Rule, and those courts granted EPA's motions and remanded without vacatur. *See id*.

omitted). EPA stated that it expected to publish a proposed revised rule in the Federal Register by spring 2022 and to promulgate a final revised rule in spring 2023. 3-ER-461–62, 473–76. EPA explained that "continuing to litigate this case would interfere with [its] ongoing reconsideration process by forcing the Agency to structure its administrative process around pending litigation, rather than the Agency's priorities and expertise." 3-ER-465.

Plaintiffs responded that the district court should either deny EPA's motion or remand the 2020 Rule with vacatur. 2-ER-230–54; 3-ER-259–85, 416–37. EPA replied that it had "presented a classic case for remand without vacatur," 2-ER-214, and urged the court to "follow the other two district courts in which challenges to the Rule were filed, both of which ha[d] already remanded the [2020] Rule to EPA without vacatur," 2-ER-209, 220–29. Intervenors "had no objection to the relief that EPA requested," 2-ER-203, but opposed Plaintiffs' request for vacatur, 2-ER-139.

On October 21, 2021, the district court issued the Remand Order granting EPA's request for a remand of the 2020 Rule, but also vacating the Rule pursuant to Plaintiffs' request. 1-ER-5–22. The court held that a remand was appropriate because an agency may request a "remand to reconsider a decision without confessing error," 1-ER-15, and EPA had "expressed substantial concerns with the current formulation of the certification rule," 1-ER-16. The court further held that

vacatur of the 2020 Rule upon remand was warranted. 1-ER-16–21. The court stated that, "when an agency requests voluntary remand, a district court may vacate an agency's action without first making a determination on the merits." 1-ER-12.

Viewing vacatur as "a form of discretionary, equitable relief," 1-ER-12, the court found that vacatur was warranted for two reasons, 1-ER-16–21. First, although the court did not definitively hold that any aspect of the 2020 Rule is unlawful, the court expressed "significant doubts that EPA [had] correctly promulgated" the Rule in light of what the court viewed as a "lack of reasoned decision-making and apparent errors." 1-ER-17–18. Second, the court found that vacatur would "not intrude on any justifiable reliance" interests, given that the Rule had "only been in effect for thirteen months." 1-ER-19. The court thus ordered "vacatur of the [2020 Rule] upon remand to EPA," which it explained "will result in a temporary return to the [1971 regulations] until Spring 2023, when EPA finalizes a new certification rule." 1-ER-21. The court then entered judgment in favor of plaintiffs. 1-ER-4.

In November 2021, Intervenors asked the district court to stay the Remand Order pending appeal. 2-ER-81–110. EPA opposed the motion, arguing that the Remand Order is not a final order appealable by non-agency litigants under this Court's precedent and that Intervenors had not shown that they would suffer

irreparable harm absent a stay or that the public interest favored a stay. 2-ER-71, 74–79. The district court denied Intervenors' motion. 2-ER-26–39.

Intervenors then moved this Court for a stay pending appeal (ECF Nos. 20, 23). EPA again opposed a stay (ECF No. 26) and moved to dismiss the appeals for lack of jurisdiction on the ground that the Remand Order is not appealable by Intervenors (ECF No. 33). The Court denied the motions for a stay, finding that Intervenors had not demonstrated a likelihood of irreparable harm (ECF No. 41). The Court also denied the motions to dismiss without prejudice to the parties' ability to renew their jurisdictional arguments during merits briefing. *Id*.

Intervenors then filed an application in the Supreme Court for a stay pending appeal or, in the alternative, a petition for a writ of certiorari before judgment. EPA opposed the application, arguing that Intervenors had not established a likelihood of irreparable harm or a reasonable probability that certiorari would be granted if this Court ultimately ruled against Intervenors. *See* Federal Response, *Louisiana v. American Rivers*, No. 21A539 (U.S. Mar. 28, 2022). On April 6, 2022, the Supreme Court granted the application and stayed the Remand Order only "insofar as it vacates" the 2020 Rule (ECF No. 46). The same day, Intervenors filed their opening brief on the merits in this Court (ECF No. 47). Intervenors argue that the district court exceeded its authority in vacating the 2020

Rule, but they do not challenge the district court's decision to remand the Rule to EPA for further proceedings. *See id*.

On May 17, 2022, Plaintiffs filed a "Motion for an Indicative Ruling" in district court (ECF No. 200) pursuant to Federal Rule of Civil Procedure 62.1.[2] Although the district court entered judgment "in favor of plaintiffs and against defendants, intervenors, and intervenor defendants," 1-ER-4, and vacated the 2020 Rule in accordance with Plaintiffs' request, 1-ER-5–22, Plaintiffs now seek an indicative ruling from the district court that it would grant them "relief" from the judgment under Federal Rule of Civil Procedure 60(b) if this Court were to remand for that purpose. EPA and Intervenors have opposed Plaintiffs' motion (*see* ECF Nos. 201-202), which remains pending in district court.

On June 9, 2022, EPA's proposed revised certification rule was published in the Federal Register. *See* 87 Fed. Reg. 35,318 (June 9, 2022).

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[2] A district court can make an indicative ruling when a party files "a timely motion … for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending." Fed. R. Civ. P. 62.1(a). In that circumstance, Rule 62.1 provides that the court may: "(1) defer considering the motion; (2) deny the motion; or (3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue." *Id*. If the district court so states, the requestor must "promptly notify" the court of appeals, Fed. R. App. P. 12.1(a), which "may" in its discretion remand all or part of the case to the district court, Fed. R. App. P. 12.1(b).

SUMMARY OF ARGUMENT

1. This Court's precedent compels dismissal for lack of appellate jurisdiction because Intervenors cannot appeal the Remand Order as a final order under 28 U.S.C. § 1291 or as an injunction under 28 U.S.C. § 1292(a)(1). Under that precedent, a district court order remanding agency action for further administrative proceedings generally is not a final order appealable by non-agency litigants. *See Alsea Valley Alliance. v. Dep't of Commerce*, 358 F.3d 1181, 1184 (9th Cir. 2004); *Pit River Tribe v. U.S. Forest Service*, 615 F.3d 1019, 1074-77 (9th Cir. 2010). That general rule applies here because EPA has not appealed the Remand Order, and because the order does not meet the criteria for finality set forth in *Alsea Valley*. Contrary to Intervenors' apparent belief, the provision of the Remand Order vacating the 2020 Rule is not a separately appealable final order.

Intervenors have forfeited any argument that vacatur transforms the Remand Order into an injunction that they can appeal under 28 U.S.C. § 1292(a)(1). That argument lacks merit in any event because the Remand Order does not have the practical effect of enjoining Intervenors.

Finally, to the extent the district court intended to make the Remand Order appealable by Intervenors, that intent is not determinative. Because Intervenors may participate in the administrative process on remand and seek judicial review of EPA's final decision, the Remand Order is not final and appealable under this

Court's precedent, regardless of the district court's intent. These appeals should therefore be dismissed for lack of jurisdiction.

2. If the Court concludes that it has jurisdiction, any relief granted to Intervenors should be limited to reversing the portion of Remand Order vacating the 2020 Rule. Intervenors did not oppose EPA's request in district court for a remand of the 2020 Rule without an adjudication of the merits, and they do not challenge the district court's decision granting that portion of EPA's request. Plaintiffs also have not cross-appealed to challenge that aspect of the judgment. Consequently, the remainder of the Remand Order should be left in place.

ARGUMENT

I. The Court lacks jurisdiction because the Remand Order is not appealable by non-agency litigants.

As the parties seeking to invoke appellate jurisdiction, Intervenors bear the burden of establishing that jurisdiction exists. *Melendres v. Maricopa County*, 815 F.3d 645, 649 (9th Cir. 2016). Intervenors cannot meet their burden because they cannot appeal the Remand Order as a final order under 28 U.S.C. § 1291 or as an injunction under § 1292(a)(1). The appeals should therefore be dismissed.

A. The Remand Order is not a final order under *Alsea Valley*.

Section 1291 of Title 28 vests the courts of appeals with "jurisdiction of appeals from all final decisions of the district courts." 28 U.S.C. § 1291.

Under this Court's precedent, "remand orders" – including remand orders accompanied by vacatur of the challenged agency action – generally "are not 'final decisions' for purposes of section 1291" and are not appealable by non-agency litigants. *Alsea Valley*, 358 F.3d at 1184-86; *see also Pit River Tribe*, 615 F.3d at 1074-77. That general rule applies here because EPA has not appealed, and because the Remand Order does not meet this Court's criteria for finality. Consequently, the Court lacks jurisdiction and should dismiss the appeals.

Alsea Valley involved a challenge to an agency rule listing a species as threatened under the Endangered Species Act. 358 F.3d at 1183. On cross-motions for summary judgment, the district court held that the rule was unlawful, set it aside, and remanded to the agency for further proceedings. *Id*. Instead of appealing, the agency announced that it would comply with the remand order by conducting a public rulemaking to correct the defects identified by the district court. *See id*. at 1183-84. After judgment was entered, however, several environmental organizations intervened and appealed the district court's decision. *Id*. This Court held that the district court's decision was not a final order as to the intervenors and dismissed their appeal for lack of jurisdiction. *See id*. at 1184-87.

The Court explained that remand orders generally will be considered final and appealable by non-agency litigants only "where (1) the district court conclusively resolves a separable legal issue, (2) the remand order forces the

agency to apply a potentially erroneous rule which may result in a wasted proceeding, and (3) review would, as a practical matter, be foreclosed if an immediate appeal were unavailable." 358 F.3d at 1184 (citation omitted). The Court held that it did not need to address the first two criteria because the third had not been met: "Denying the [environmental organizations] an immediate appeal does not, as a practical matter, foreclose review." *Id*.

Because a non-agency litigant may seek review of the agency's final decision on remand, the Court explained, "only *agencies* compelled to refashion their own rules face the unique prospect of being deprived of review altogether. An agency, after all, cannot appeal the result of its own decision." *Id*. Therefore, although the agency may have had the right to immediately appeal the remand order, that alone did "not entitle the [intervenors] to appeal." *Id*.

The Court's reasoning applies here. EPA sought a remand of the 2020 Rule, without confessing error, to commence a new rulemaking. *See* 3-ER-457–68, 473–76. During the public participation phase, Intervenors will have the opportunity to submit their views to the agency regarding the merits of the 2020 Rule. *See id*. A remand is not final "with respect to private parties whose positions on the merits would be considered during the agency proceedings on remand." *Crow Indian Tribe v. United States*, 965 F.3d 662, 675 (9th Cir. 2020) (cleaned up).

Moreover, the Remand Order does not definitively hold that any portion of the 2020 Rule is unlawful or constrain EPA's discretion in fashioning a new rule. Indeed, nothing in the Remand Order prevents EPA from adopting on remand elements of the 2020 Rule that Intervenors support. *Cf. Pit River Tribe*, 615 F.3d at 1976 (remand order not final where it was "possible" that the agencies could decide not to extend the challenged leases). Consequently, this is not a case where the remand order forces the agency to issue a potentially erroneous rule on remand or predetermines the outcome of the administrative process. *Cf. Crow Indian Tribe*, 965 F.3d at 676 (remand order appealed by agency-defendant was also appealable on different grounds by private intervenors because the order required the agency to include certain commitments in any new rule, which preordained, at least in part, the outcome on remand); *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1174-76 (9th Cir. 2011) (holding that a limited remand on one issue was appealable by private plaintiffs because the district court had definitively rejected most of their claims, had "decided numerous legal issues distinct from those to be addressed in the agency remand," and had "placed a judicial imprimatur on the vast majority" of the agency's analysis).

If Intervenors conclude that EPA's final decision on remand is unlawful and adverse to their interests, they may seek judicial review at that time. And if Intervenors are dissatisfied with the district court's judgment in any future

litigation challenging EPA's final decision, Intervenors may appeal to this Court. "Until all these contingencies have played out, however, any decision by [this Court] could prove entirely unnecessary. The matter is not 'final,' therefore, for purposes of appellate review." *Alsea Valley*, 358 F.3d at 1185.

B. The vacatur component of the Remand Order is not a separately appealable final order.

Intervenors argue that the general rule that non-agency litigants may not appeal a remand order does not apply because they challenge the district court's decision to *vacate* the 2020 Rule, which EPA will not address on remand. *See* Opening Brief 5-7. This argument is foreclosed by *Alsea Valley*.

There as well, the environmental intervenors argued that the availability of judicial review of the agency's decision on remand was inadequate because it offered "no avenue for challenging the district court's order setting aside the [challenged rule] in the meantime." Opposition Brief of Intervenor-Defendants/ Appellees, *Alsea Valley Alliance v. Dep't of Commerce*, No. 01-36154, 2002 WL 32302657, at *39 (9th Cir. July 30, 2002). As the Court explained, that argument fails because the provision of a remand order vacating the challenged agency action is not "a separately appealable district court decision." *Alsea Valley*, 358 F.3d at 1185. Where (as here) the remand order does not satisfy the three criteria for finality, the Court lacks appellate jurisdiction "over the *entire* Remand Order," including the provision specifying whether the remand is with (or without) vacatur.

Id. at 1186 (emphasis added). If it were otherwise—if the provision specifying whether remand is with or without vacatur *were* appealable—the general rule that private parties cannot appeal a remand order could lose all practical significance because *every* remand order is either with or without vacatur.

C. Intervenors do not argue the Remand Order is tantamount to an injunction, and the argument lacks merit in any event.

Nor does it matter here that the vacatur component of a remand order could make the order appealable if it has the practical effect of granting an injunction. *See* 28 U.S.C. § 1292(a)(1); *see also Alsea Valley*, 358 F.3d at 1186-87. That the remand order is not labeled an injunction is not determinative. Jurisdiction under § 1292(a)(1) is "keyed to the need to permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence," and not to formalistic parsing of the wording of district court orders. *Gardner v. Westinghouse Broadcasting Co*., 437 U.S. 478, 481 (1978); *see also United States v. Orr Water Ditch Co*., 391 F.3d 1077, 1081 (9th Cir. 2004) (jurisdiction may lie under § 1292(a)(1) "[r]egardless of how a district court chooses to title an order").

Here, however, Intervenors have not argued that the Remand Order is tantamount to an injunction against them. And in contrast to arguments that a court lacks jurisdiction, "all arguments in favor of jurisdiction[] can be forfeited or waived," *Center for Biological Diversity v. EPA*, 937 F.3d 533, 542 (5th Cir. 2019), because a failure to entertain such arguments cannot result in an

impermissible expansion of judicial authority, *see McKenzie v. U.S. Citizenship & Immigration Servs., Dist. Dir.*, 761 F.3d 1149, 1155 (10th Cir. 2014); *see also, e.g.*, *Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804, 809 n.6 (1986); *Demontiney v. United States ex rel. Dep't of the Interior, Bureau of Indian Affairs*, 255 F.3d 801, 810 n.3 (9th Cir. 2001); *Tomlin v. Board of Trustees of Constr. Laborers Pension Trust for S. Cal.*, 586 F.2d 148, 152 (9th Cir. 1978). Consequently, Intervenors have forfeited any argument predicated on 28 U.S.C. § 1292(a)(1). *See Floyd v. Filson*, 949 F.3d 1128, 1138 n.2 (9th Cir. 2020) (issues not raised in an opening brief are forfeited).

Regardless, the Remand Order is not analogous to an injunction appealable by Intervenors because it does not direct them to take (or refrain from taking) any action. *See Alsea Valley*, 358 F.3d at 1186. Although the provision vacating the 2020 Rule effectively prohibits EPA from implementing the Rule during the remand, it "would be far too tenuous" to conclude "that this is the practical equivalent of 'enjoining'" EPA such that Intervenors alone can appeal, *id.*, particularly because § 1292(a)(1) provides only "a limited exception to the final-judgment rule" and is construed "narrowly," *id.*

D. The district court's intent to make the Remand Order appealable is not determinative.

Intervenors contend that the district court's entry of a "final judgment" "to ensure appealability," 1-ER-4, indicates that the court intended for the Remand

Order to be final and appealable and the district court's intent should control. *See* Opening Brief 4-5. But nothing in the judgment indicates that the district court intended to make the Remand Order appealable by Intervenors alone, in the absence of an appeal by EPA. Moreover, "[a]ppealability turns on the effect of the ruling, not the label assigned to it by the trial court." *In re Slimick*, 928 F.2d 304, 308 (9th Cir. 1990); *see also Pit River Tribe*, 615 F.3d at 1076 (holding that a remand order was not final even though it was accompanied by a judgment dismissing the lawsuit and included a statement that any challenge to the agency's decision on remand had to be brought in a new lawsuit).[3]

Alsea Valley again proves the point. There as well, the district court entered a separate "Judgment" after issuing its summary judgment and remand decision. *Alsea Valley Alliance v. Evans*, No. 6:99-cv-06265-HO, ECF No. 113 (D. Or. Sept. 12, 2001). The court then granted the environmental organizations' post-judgment motion to intervene solely for purposes of appealing the decision. *See id*., ECF No. 157 (D. Or. Nov. 15, 2011). The court explained that the intervention motion was untimely as to the district court proceedings themselves because the parties

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[3] The district court's remand order and judgment in *Pit River* are publicly available on PACER. *See Pit River Tribe v. Bureau of Land Management*, No. 2:02-CV-1314 JAM-JFM, ECF Nos. 100-101 (E.D. Cal. Dec. 23, 2008). This Court ultimately held that appellate review was available under the All Writs Act, 28 U.S.C. § 1651(a), *see* 615 F.3d at 1078-79, but Intervenors do not claim that the All Writs Act applies here.

had already litigated the issues "to completion at the trial court level. Summary judgment motions have been filed, briefed, argued, and ruled upon. Indeed, judgment has been entered." *Id*. at 3-4. The court also expressed the view that the summary judgment decision was an "appealable order" because it "finally determined a separate legal issue" and had "the practical effect of granting an injunction (prohibiting enforcement of [the challenged listing rule]) which could be viewed as having important consequences which can be effectively challenged only by immediate appeal." *Id*. at 14-15.

The district court in *Alsea Valley* thus clearly believed its work was done and intended for its summary judgment decision to be appealable. This Court nevertheless held that the decision was not appealable, either as a final order under § 1291 or as an injunction under § 1292(a)(1), because the intervenors would have the opportunity to participate in the administrative process on remand and to challenge any resulting final agency action. 358 F.3d at 1184-87. For the same reasons, the Remand Order at issue here is not appealable by Intervenors, regardless of whether the district court intended to make the order appealable.

This Court's decision in *Montes v. United States*, 37 F.3d 1347 (9th Cir. 1994), does not support a different conclusion because *Montes* did not involve a remand to a federal agency for further proceedings. *Montes* instead held that a district court order dismissing a complaint for lack of subject-matter jurisdiction

was not final and appealable because the record showed that the court intended to allow the plaintiff to amend the complaint. 37 F.3d at 1350-51. Intervenors' reliance on *Patel v. Del Taco, Inc.*, 446 F.3d 996 (9th Cir. 2006), is misplaced for the same reason: it too did not involve a remand to a federal agency. *See id.* at 1000 (holding that an order staying federal claims against a private corporation and compelling arbitration was not final and appealable).

Under this Court's clear precedent, where (as here) an order remanding to an agency does not satisfy the three-part test for finality or have the practical effect of granting an injunction, the order is not appealable by private litigants. *See Alsea Valley*, 358 F.3d at 1184-87; *Pit River Tribe*, 615 F.3d at 1974-77. As a result, the Court lacks jurisdiction and should dismiss the appeals.

II. Any relief granted to Intervenors should be limited to reversal of the portion of the Remand Order vacating the 2020 Rule.

If the Court concludes that it has jurisdiction, any relief should be limited to reversing the portion of the judgment vacating the 2020 Rule. Because Intervenors do not challenge the district court's decision to remand the Rule to EPA and Plaintiffs have not cross-appealed to challenge that decision, the remainder of the judgment should be left in place.

EPA agrees with Intervenors that when an agency seeks a voluntary remand without confessing error, the district court cannot vacate the challenged agency action unless the court first determines that the action is unlawful and carefully

considers the appropriate scope of relief. To be sure, a court may grant *preliminary* relief without definitively resolving the merits. *See, e.g., Winter v. Natural Resources Defense Council, Inc*., 555 U.S. 7, 20 (2008). But here, the district court exceeded its authority by purporting to permanently vacate the 2020 Rule without finding that the rule is unlawful. Therefore, if the Court determines that it has jurisdiction, EPA agrees with Intervenors that the portion of the Remand Order vacating the 2020 Rule should be reversed.

No valid basis exists, however, for disturbing the district court's decision to grant EPA's request for a voluntary remand of the 2020 Rule. *See* 1-ER-15–16. Intervenors do not challenge the district court's decision to grant a remand (ECF No. 47), and their opening brief confirms their comfort with an instruction to "the district court to … grant the Federal Defendants' motion to remand without vacatur," *id*. at 41.

Plaintiffs also have not cross-appealed to seek reversal of that portion of the judgment that remands the 2020 Rule to EPA. A cross-appeal would be required because reversal of the district court's remand would alter EPA's right under the judgment to have the 2020 Rule remanded without additional litigation or an adjudication of the merits. "Absent a cross-appeal, an appellee … may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary." *El Paso Nat. Gas Co. v. Neztsosie*, 526 U.S. 473, 479

(1999) (internal quotation marks omitted); *see also Greenlaw v. United States*, 554 U.S. 237, 244 (2008) (under the "cross-appeal rule, … an appellate court may not alter a judgment to benefit a nonappealing party").

Accordingly, even if the Court determines that it has jurisdiction over Intervenors' appeals and that the district court's decision to vacate the 2020 Rule was improper, any relief should be limited to the relief that Intervenors (the only appellants) have requested: reversal of the portion of the judgment vacating the 2020 Rule. The remainder of the judgment should be left in place.

CONCLUSION

For the foregoing reasons, the appeals should be dismissed for lack of jurisdiction. If the Court exercises appellate jurisdiction, any relief should be limited to reversal of the portion of the judgment vacating the 2020 Rule, and should leave in place the district court's remand of the 2020 Rule to EPA.

Respectfully submitted,

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Form 8. Certificate of Compliance for Briefs

9th Cir. Case Number(s) 21-16958

I am the attorney or self-represented party.

This brief contains 5,747 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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ADDENDUM

28 U.S.C. § 1291 – Final decisions of the district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 1292 – Interlocutory decisions

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

> (1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;
>
> (2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;
>
> (3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

* * * *