**ORAL ARGUMENT NOT YET SCHEDULED**

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

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| **CLEAN AIR COUNCIL, EARTHWORKS, ENVIRONMENTAL DEFENSE FUND, ENVIRONMENTAL INTEGRITY PROJECT, NATURAL RESOURCES DEFENSE COUNCIL, and SIERRA CLUB,** | ) | |
| **Petitioners,** | ) | |
| **v.** | ) | **No. 17-1145** |
| **SCOTT PRUITT, Administrator, United States Environmental Protection Agency, and UNITED STATES ENVIRONMENTAL PROTECTION AGENCY** | ) | |
| **Respondents.** | ) | |

**MOVANT INTERVENOR-RESPONDENTS' RESPONSE IN OPPOSITION TO PETITIONERS' EMERGENCY MOTION FOR A STAY OR, IN THE ALTERNATIVE, SUMMARY VACATUR**

Pursuant to Federal Rules of Appellate Procedure 18 and 27 and D.C. Circuit Rules 18 and 27, the following Movant Intervenor-Respondents respectfully submit this response in opposition to the Petitioners' Emergency Motion for a Stay Or, In the Alternative, Summary Vacatur (ECF No. 1678141) (hereinafter "Emergency Stay Motion"): the American Petroleum Institute ("API"), GPA Midstream Association ("GPA"), the Interstate Natural Gas Association of

America ("INGAA"), the Independent Petroleum Association of America ("IPAA") and other independent producers,[1] Texas Oil & Gas Association ("TXOGA"), and Western Energy Alliance ("WEA"). The State Movant Intervenor-Respondents[2] support this filing but are not joining it.

This Court lacks jurisdiction to adjudicate the Petitioners' motion because it requires this Court to evaluate the merits of a non-final agency action: EPA's administrative reconsideration proceeding. The validity of both EPA's decision to open reconsideration proceedings and grant the stay must await EPA's final action that terminates the reconsideration process.

Moreover, the Petitioners have also failed to satisfy the four-factor test for a judicial stay pending review of EPA's action, "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources; Grant of Reconsideration and Partial Stay," 82 Fed. Reg. 25,730 (June 5, 2017) ("EPA's Stay Decision"). *See* D.C. Circuit Rule 18(a)(1) (requiring motions for stays pending review of an agency order to "discuss, with specificity … (i) the

[1] The full list of movant-intervenor independent producers are in IPAA et al.'s Unopposed Motion for Leave to Intervene in Support of Respondents (ECF No. 1679651) and the signature block to this filing.

[2] The State Movant Intervenor-Respondents are: the States of West Virginia, Alabama, Kansas, Louisiana, Montana, Ohio, Oklahoma, South Carolina, and Wisconsin; the Commonwealth of Kentucky; the Commonwealth of Kentucky Energy and Environment Cabinet; and Attorney General Bill Schuette for the People of Michigan.

likelihood that the moving party will prevail on the merits; (ii) the prospect of irreparable injury to the moving party if relief is withheld; (iii) the possibility of harm to other parties if relief is granted; and (iv) the public interest."). Finally, EPA's limited, narrow three-month stay is reasonable and not overly broad.

## BACKGROUND

This case stems from several actions by the United States Environmental Protection Agency ("EPA" or "Agency") under the Clean Air Act ("CAA") regarding new source performance standards ("NSPS") for the oil and natural gas sector. The most recent is "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources; Final Rule," 81 Fed. Reg. 35,824 (June 3, 2016) ("Quad Oa Rule" or "2016 NSPS Rule").[3] On April 18, 2017, Administrator Pruitt granted reconsideration of narrow issues in the 2016 NSPS Rule and stated an intent to stay the effectiveness of those issues. *See* Letter from E. Scott Pruitt, Adm'r, EPA, to Howard J. Feldman, API, et al., re: "Convening a Proceeding for Reconsideration of Final Rule, 'Oil and Natural Gas Sector: Emission Standards for New, Reconstructed and Modified Sources,' published

[3] The Movant Intervenor-Respondents here are Petitioners in the related cases addressing 2016 NSPS Rule and related NSPS rules, consolidated in *American Petroleum Institute v. EPA*, No. 13-1108 (D.C. Cir.). These cases are currently being held in abeyance.

June 3, 2016, 81 Fed. Reg. 35824" (Apr. 18, 2017), Docket No. EPA-HQ-OAR-2010-0505-7730 ("Pruitt Letter").

In this case, Petitioners challenge EPA's Stay Decision, published on June 5, 2017. EPA's Stay Decision granted reconsideration of two additional issues and granted a three-month stay, pursuant to CAA § 307(d)(7)(B), of the following parts of the 2016 NSPS Rule: (1) the fugitive emissions requirements (also referred to as leak detection and repair ("LDAR")), (2) the standards for pneumatic pumps at well sites, and (3) the requirements for certification by a professional engineer.

## ARGUMENT

The Petitioners' motion for a judicial stay asks this Court to review the validity of EPA's administrative reconsideration proceeding under CAA § 307 and conclude that EPA's stay is unlawful because the underlying reconsideration proceeding is unlawful. EPA's administrative reconsideration proceedings have not concluded, however. Consequently, there is no final agency action regarding reconsideration for this Court to review. This Court lacks jurisdiction to resolve a challenge to the validity of EPA's stay that requires review of non-final agency action. 42 U.S.C. § 7607(b)(1).

The Petitioners are also wrong that EPA must apply the four-factor preliminary injunction test that applies to stays pending judicial review to a three-month stay during administrative reconsideration under CAA § 307(d)(7)(B). The

Petitioners' cite no legal authority to support their assertion. *See* Emergency Stay Motion at 6, 24. The four factor test applies to stays pending review, which are of undetermined length, not to stays during reconsideration, which are limited to three months. Moreover, no precedent from this Court (or any other court) requires EPA to apply the four-factor test under § 307(d)(7)(B). In contrast, the Petitioners' request for a stay pending review clearly requires the four-factor test. But the Petitioners have not explained how each of the four factors is satisfied here. The motion must be denied.

Finally, the Petitioners rely heavily on alleged concessions made in API's petition for administrative reconsideration. Petitioners have mischaracterized API's petition for reconsideration. API's petition does not support Petitioners' motion.

## I. The Petitioners' Motion Necessarily Challenges the Merits of EPA's Reconsideration Proceeding, Which This Court Currently Lacks Jurisdiction to Review.

The crux of the Petitioners' motion is that the stay is unlawful because EPA inappropriately granted administrative reconsideration. Throughout their motion, the Petitioners repeatedly argue that EPA did not meet the statutory criteria for granting administrative reconsideration. *See* Emergency Stay Motion at 5-6, 10-22. As such, the Petitioners' motion necessarily requires this Court to assess the validity of the reconsideration proceeding. *See id.* at 10 (arguing that the stay is

invalid because "EPA may not issue an administrative stay absent a valid reconsideration proceeding").

But this Court has no authority to evaluate the validity of EPA's reconsideration proceeding while it is pending. Nowhere in the Petitioners' motion do they cite to any such authority. This Court only has jurisdiction to review final agency action. 42 U.S.C. § 7607(b)(1). To be final, agency action must meet two criteria. First, it "must mark the consummation of the agency's decisionmaking process,–it must not be of a merely tentative or interlocutory nature." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (internal quotation marks and citation omitted). Second, the agency action "must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Id*. at 178 (internal quotation marks omitted). Neither requirement is met here. EPA has merely initiated its reconsideration proceeding, with no decision on its outcome. Reconsideration will result in final action only when the proceeding is complete and EPA issues a final rule or other action that marks the culmination of the reconsideration process. No rights or obligations will be determined until EPA completes the administrative reconsideration process.

Notably, CAA § 307(d)(7)(B) expressly provides for judicial review only when EPA denies a reconsideration petition (which is final agency action). 42 U.S.C. § 7607(d)(7)(B) ("If the Administrator refuses to convene [a proceeding for

reconsideration], such person may seek review of such refusal in the United States court of appeals for the appropriate circuit as provided in [section 307(b)].”). Absent from § 307(d)(7)(B) is any suggestion that EPA’s decision to grant reconsideration and undertake a rulemaking proceeding creates a right to immediately challenge the act of granting. Granting a reconsideration petition, like granting a rulemaking petition, merely starts a process that will not culminate in a final agency action until EPA completes the reconsideration proceeding. Thus, on the plain face of CAA § 307(d)(7)(B), the instant motion and underlying petition to review EPA’s stay are premature.

Further, no other provision of the CAA provides a cause of action to challenge EPA’s decision to open a reconsideration proceeding. And for good reason: doing so would entangle this Court in evaluating the details of an on-going administrative proceeding, contrary to Congress’ purpose for promulgating § 307(d)’s statutory exhaustion requirement in the first place. *See Med. Waste Inst. & Energy Recovery Council v. EPA,* 645 F.3d 420, 428 (D.C. Cir. 2011). The purpose of section 307(d)’s exhaustion requirement “is to ensure that the agency is given the first opportunity to bring its expertise to bear on the resolution of a challenge to a rule.” *Appalachian Power Co. v. EPA*, 135 F.3d 791, 818 (D.C. Cir. 1998). It would contradict § 307(d)’s purpose for this Court to rule on the merits

of issues under reconsideration before EPA makes a final determination on these issues.

The only reasonable reading of CAA § 307(b)(1) and (d)(7)(B) is that judicial review of EPA's decision to grant reconsideration must await the completion of reconsideration. This Court does not currently have jurisdiction to assess the validity of the reconsideration proceeding. Likewise, Petitioners cannot challenge EPA's stay with a collateral attack on the validity of the reconsideration proceeding. Therefore, this Court lacks jurisdiction to review the stay on that basis.

## II. EPA is Not Required to Apply the Four-Factor Test for Stays Pending Judicial Review When Deciding Whether to Issue a Stay Under CAA § 307(d)(7)(B).

Petitioners assert, without authority, that the EPA stay is invalid because the Administrator did not consider the four-factor test imposed on movants for a stay pending review of an agency order. D.C. Cir. Rule 18. Petitioners are wrong. Neither the CAA nor this Court's precedent require the Administrator to apply that test in deciding whether to grant a stay of a rule's effectiveness under § 307(d)(7)(B). EPA's stay is tied to a pending administrative reconsideration proceeding and limited to three months. The Administrator provided a rational basis for granting the stay, and that is all that was required.

The plain text of section 307(d)(7)(B) does not require EPA to apply the four-factor test when deciding whether to issue a three-month stay. The statute states that "[t]he effectiveness of the rule may be stayed during such reconsideration, however, by the Administrator or the court for a period not to exceed three months." 42 U.S.C. § 7607(d)(7)(B). The only statutory preconditions for granting a stay are: (1) an on-going proceeding for reconsideration and (2) a time-limit of three months. Nothing in this language compels EPA to use the four-factor test that applies to stays pending review, which are of undetermined duration, to a limited, three-month stay under § 307(d)(7)(B). Moreover, there is no precedent in this Court requiring that test for a three-month stay under § 307(d)(7)(B).

Because there are no express decision-making criteria governing the issuance of a stay under § 307(d)(7)(B), the Administrator's decision to grant a stay must be upheld as long as it is not arbitrary and capricious. Here, the Administrator provided a rational basis for his decision to grant a stay. That is all that is required under the law. *See, infra,* Section IV.

## III. The Petitioners Fail to Justify a Judicial Stay Pending Review of EPA's Action.

Petitioners seek a judicial stay pending review, which is subject to D.C. Circuit Rule 18. But the Petitioners have failed to meet the requirements for a judicial stay pending review, which is an "extraordinary remedy." *Cuomo v. NRC*,

772 F.2d 972, 978 (D.C. Cir. 1985). D.C. Circuit Rule 18(a)(1) requires a motion for a stay pending review to "discuss, with specificity, each of the following factors: (i) the likelihood that the moving party will prevail on the merits; (ii) the prospect of irreparable injury to the moving party if relief is withheld; (iii) the possibility of harm to other parties if relief is granted; and (iv) the public interest." It is the Petitioners' burden to prove these four factors with specificity. Because the Petitioners have failed to do so, their motion should be denied.

### A. The Petitioners Have Failed to Show Likelihood of Success on the Merits Because This Court Lacks Jurisdiction to Review the Validity of EPA's Reconsideration Proceeding.

The fundamental flaw with the Petitioners' motion is that it necessarily requires this court to determine the validity of the on-going administrative reconsideration proceeding under CAA § 307. As previously discussed, this Court lacks jurisdiction to review non-final agency action. *See, supra*, Section I. Thus, the likelihood of success on the merits prong would require a facial showing that the § 307(d) findings here were not made. If the stay order contains those findings–which it does here–Petitioners' challenge to their validity must await EPA's final action. Thus, Petitioners have failed to demonstrate a likelihood of success on the merits.

### B. The Petitioners Have Failed to Show They Will Suffer Irreparable Harm from a Targeted, Narrow Three-Month Stay of Specific Provisions of the Quad Oa Rule.

The Petitioners have failed to show, with specifics, that they will suffer an irreparable injury from a brief, targeted three-month stay of certain narrow provisions in the Quad Oa Rule. The Petitioners cite alleged aggregate emissions as harm, without any assessment for what portion of these emissions would actually be remedied by vacating EPA's three-month stay. Instead, the Petitioners erroneously include assumed benefits from inspections and leak corrections that would take place after the three-month stay period ends. This does not establish that the limited three-month stay will cause irreparable harm. The Petitioners fail to meet their burden.

The Petitioners' irreparable harm allegations are insufficient. The Petitioners claim they will be irreparably harmed by excess emissions resulting from assumed leaks from thousands of wells. *See* Emergency Stay Motion at 25-31. The Petitioners present Dr. David Lyon's declaration, estimating the total emissions across all of those wells would occur during the 90-day stay period. *Id.*; *see also* Emergency Stay Motion, Attach. 5 ("Lyon Decl.").

But Dr. Lyon's analysis is based on faulty assumptions. Dr. Lyon calculated the emission reductions by assuming they would take place *outside* of the three-month stay period. Lyon Decl. ¶19 (stating that his assumption of annual emission reductions relied on inspections that "would not all occur within the initial, 90-day stay period" because "EPA has indicated that it will extend the stay beyond 90

days, and so these estimates provide a reasonable approximation of the near-term impacts of EPA's stays."); *id.* ¶21 (providing estimated emissions and stating that they are "a reasonable proxy for excess emissions that would result from a stay of the initial survey, *as well as* for annual emission reductions that would be lost *if the 90-day stay is* extended.") (emphasis added). Dr. Lyon's emission estimates are explicitly premised on avoiding harm that is unrelated to EPA's three-month stay, and thus Dr. Lyon's analysis as a whole is faulty.

The Petitioners have thus failed to provide any reasonable estimate of what portion of these alleged emissions would actually be reduced if this Court were to grant them a judicial stay, which could lawfully only rescind EPA's three-month stay. Even assuming swift judicial action, this Court could, at most remedy some 60-70 days of the stay, decreasing further the benefit and showing how unlikely irreparable harm is.

The Petitioners cannot justify a judicial stay of the only action at issue here–EPA's three-month stay–by using emission reductions beyond the three-month period. The possibility of a future stay is beyond the scope of this case, beyond the scope of the Petitioners' petition, and, as a non-final action, beyond this Court's jurisdiction. If EPA were to finalize the proposed two-year stay of certain Quad

Oa requirements,[4] that would be a separate agency action that could be challenged. Speculation about future EPA actions cannot, however, justify a stay of EPA's limited three-month stay under § 307(d)(7)(B).

In any event, the Petitioners have also failed to show specifically how they will be irreparably harmed by EPA's three-month stay. The Petitioners cite generally to the number of wells and amounts of projected emissions but do not point to specific members with specific ailments that will suffer irreparable injuries due to these specific emissions during EPA's three-month stay. Moreover, they are unable to attribute irreparable harm to specific people due to the *portion* of these emissions that would reasonably be reduced if a judicial stay were granted.

### C. The Petitioners Have Failed to Address Prejudice to Other Parties from Issuing a Judicial Stay.

The Petitioners fail to "discuss, with specificity," "the possibility of harm to other parties if relief is granted." D.C. Cir. Rule 18(a)(1). The Petitioners state in passing that "the compliance burden on regulated entities is modest." Emergency Stay Motion at 10. Petitioners provide essentially no analysis to support this

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[4] On June 12, 2017, Administrator Pruitt signed a pre-publication notice titled, "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources: Stay of Certain Requirements," which proposes to stay the parts of the Quad Oa Rule at issue here for an additional two years. https://www.epa.gov/sites/production/files/2017-06/documents/oil_and_gas_2-year_stay_frn2.pdf. Once published, this proposed rule will be subject to a 30-45 day comment period.

statement. *Id.* at 32-33. The Petitioners' failure to analyze the harm to others is fatal to their motion.

More importantly, Petitioners' "analysis" is focused on the wrong issue. The question is not whether the Quad Oa Rule harms regulated entities. The question is whether granting an *emergency stay* would cause harm. The Petitioners have entirely failed to analyze the harm that would come from such a sudden disruption.

Since April, regulated entities have known that the LDAR requirements would be stayed. Pruitt Letter at 2; *see also* Lyon Decl. ¶ 14 (noting that regulated entities received "assurance" on April 18th that the LDAR requirements would be temporarily stayed). Affected sources understandably have relied on the existence of the stay in making and implementing their compliance plans for affected provisions. The Petitioners have failed to acknowledge or address the harms to affected sources that would flow from suddenly eliminating the administrative stay and requiring immediate compliance with the stayed provisions. Thus, their motion is insufficient to invoke the extraordinary remedy of a judicial stay.

### D. The Petitioners Have Failed to Show that a Stay of EPA's Action Supports the Public Interest.

The Petitioners have also failed to show, with specifics, how a judicial stay serves the public interest. The Petitioners again rely on inaccurate emission estimates that unlawfully look beyond the scope of EPA's three-month stay. *See*

Emergency Stay Motion at 31-32. The Petitioners' motion articulates no other benefit to the public interest. This is insufficient for the Petitioners to carry their burden.

## IV. EPA's Targeted, Narrow Three-Month Stay Is Not Arbitrary and Capricious.

EPA's stay is a legitimate, reasonable use of its authority. The Petitioners allege that the LDAR stay is overbroad because it goes beyond those issues on which reconsideration was granted and EPA failed to adequately explain its stay decision.[5] The Petitioners' arguments miss the mark.

The first flaw in Petitioners' attack is that they fail to engage the factors that are relevant under the statutory language. A key part of any arbitrary and capricious analysis is whether the agency evaluated the relevant factors. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983). The statute states that the "effectiveness *of the rule* may be stayed during such reconsideration." 42 U.S.C. § 7607(d)(7)(B) (emphasis added). The statute does not provide further limiting language on EPA's authority to stay *the rule*. The term "rule" in section 307(d)(7)(B) is most logically interpreted as an entire rule or an entire discrete piece of a rule, not narrowly focused elements of a rule.

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[5] The Petitioners do not specifically argue that EPA's stay regarding the other reconsideration issues (certification of closed vent system by a professional engineer and well site pneumatic pump standards) are arbitrary and capricious.

The breadth of the statutory language Congress chose is key. Congress knew that objections to a rule often would relate to only parts of the rulemaking. Reconsideration is compulsory if it was "impracticable to raise" the objection during the comment period or "if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review," and if the "objection is of central relevance to the outcome of the rule." 42 U.S.C. § 7607(d)(7)(B). Congress must have been aware this test would often only apply to specific issues within a larger rule. Yet Congress chose the language "effectiveness of the rule," rather than qualifying the phrase or choosing more limited language tied specifically to the exact provisions under reconsideration.

Second, the LDAR stay is not overbroad. The stayed provisions are inextricably related to those provisions on which EPA has granted reconsideration. The Petitioners describe EPA's stay of the LDAR program as "expansive." Emergency Stay Motion at 23. But the record shows this is not true.

On April 18, 2017, Administrator Pruitt granted reconsideration of the fugitive emission requirements for low production well cites and the process related to the alternative means of emission limitations for fugitive emission requirements. 82 Fed. Reg. at 25,731. On May 26, 2017, Administrator Pruitt signed a Federal Register notice to stay the LDAR requirements because the reconsideration issues "determine the universe of sources that must implement the

fugitive emissions requirements." *Id.* at 25,732. EPA knew that a stay just of the portions under reconsideration would "generate" "uncertainties" "regarding the application and/or implementation of the fugitive emissions requirements." *Id.* at 25,733. Application and implementation issues are legitimate reasons for EPA to stay these interrelated provisions. As EPA reconsiders the inclusion of low production well sites and the process for use of an alternative means of emission limitations ("AMEL"), EPA may very well address other portions of the LDAR program to accommodate changes to the universe of regulated sources.

Finally, EPA reasonably evaluated the relevant factors in light of the language and purpose of CAA § 307(d)(7)(B). Administrative agencies possess inherent authority to reconsider or revise their decisions. *Landis v. N. Am. Co.,* 299 U.S. 248, 254 (1936); *Dietz v. Bouldin,* 136 S.Ct. 1885 (2016). Section 307(d)(7)(B) is a statutory exhaustion requirement, designed to ensure EPA has an opportunity to evaluate comments before a court does and to provide proper notice and comment for issues of central relevance.

EPA's stay here serves both purposes. The stay enhances EPA's ability to evaluate how altering provisions related to low production well sites and/or the AMEL process may affect the overall implementation and effectiveness of the LDAR program. A short stay enhances EPA's ability to begin reconsideration with minimal confusion or disruption of the LDAR program. The stay also

increases the odds EPA will receive more useful comments and make better use of them.

## V. The Petitioners' Mischaracterize API's Reconsideration Petition.

The Petitioners argue that EPA could not have lawfully granted administrative reconsideration because API allegedly conceded that its LDAR objections did not qualify for reconsideration under CAA § 307(d)(7)(B). *See* Emergency Stay Motion at 7-8, 13-14, 15, 17. API's petition does not contain any such admission. API stated that the second category contains "additional issues where we believe changes to the rule are needed, but where we are not asking for administrative reconsideration." Letter from Howard J. Feldman, API, to Gina McCarthy, Adm'r, EPA, at 1 (Aug. 2, 2016) (submitting API's reconsideration petition), http://www.api.org/news-policy-and-issues/letters-or-comments/2016/08/26/api-petition-to-epa-for-reconsideration. API did not concede that these issues were inappropriate for reconsideration. Instead, API declined to comment on the merits of these issues for reconsideration, deciding instead to request EPA consider them if EPA decided to open proceedings for reconsideration. Petitioners' attempt to read more into API's petition is groundless speculation.

## CONCLUSION

The Movant Intervenor-Respondents respectfully request this Court deny the Petitioners' motion.

Respectfully submitted,

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Dated: June 15, 2017

## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(g) of the Federal Rules of Appellate Procedure and Circuit Rule 18(b), I hereby certify that the foregoing MOVANT INTERVENOR-RESPONDENTS' RESPONSE IN OPPOSITION TO PETITIONERS' EMERGENCY MOTION FOR A STAY OR, IN THE ALTERNATIVE, SUMMARY VACATUR contains 3,896 words, as counted by a word processing system that includes headings, footnotes, quotations, and citations in the count, and therefore is within the word limit of 3,900 words set by Circuit Rule 18(b). I also certify that this document complies with the typeface and type-style requirements of Rule 32(a)(5) and (6) of the Federal Rules of Appellate Procedure because it has been prepared in a proportionally spaced typeface using Microsoft Word™ 2010 with 14-point Times New Roman font.

*/s/ William L. Wehrum*
William L. Wehrum

DATED: June 15, 2017

## CERTIFICATE OF SERVICE

I hereby certify that, on this 15th day of June 2017, a copy of the foregoing MOVANT INTERVENOR-RESPONDENTS' RESPONSE IN OPPOSITION TO PETITIONERS' EMERGENCY MOTION FOR A STAY OR, IN THE ALTERNATIVE, SUMMARY VACATUR was electronically filed with the Clerk of the Court by using the Court's CM/ECF system. All registered CM/ECF users will be served by the Court's CM/ECF system.

*/s/ William L. Wehrum*
William L. Wehrum