

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

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MURRAY ENERGY CORPORATION,		)	
		)	
Petitioner,		)	Case No. 16-1127,
		)	consolidated with
v.		)	Cases No. 16-1175,
		)	16-1204, 16-1206,
UNITED STATES ENVIRONMENTAL		)	16-1208, and 16-1210
PROTECTION AGENCY and		)	
REGINA A. McCARTHY, Administrator,		)	
U.S. Environmental Protection Agency,		)	
		)	
Respondents.		)	
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On Petition for Review of Final Action of the  
United States Environmental Protection Agency

**MOTION FOR LEAVE TO INTERVENE AS RESPONDENTS**

Pursuant to Federal Rule of Appellate Procedure 15(d) and Circuit Rule 15(b), the Commonwealths of Massachusetts and Virginia, the States of California, Connecticut, Delaware, Iowa, Illinois, Maine, Maryland, Minnesota, New Hampshire, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington, the District of Columbia, the Cities of Baltimore, Chicago, and New York, and the County of Erie, New York (collectively, State and Local Government Movants) hereby move for leave to intervene in support of Respondents Environmental Protection Agency, et al. (EPA) in this action, for the reasons set forth below:

1. On February 16, 2012, EPA promulgated the “National Emission Standards for Hazardous Air Pollutants from Coal- and Oil- Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units,” 77 Fed. Reg. 9304 (Air Toxics Rule), to address emissions of hazardous air pollutants—including mercury and other pollutants that are extremely dangerous to human health and the environment—from coal- and oil-fired electric utility steam generating units (power plants) under section 112 of the Clean Air Act. *Id.* at 9310-11, 9367-69. The Rule was challenged in this Court on multiple grounds by several states, industry groups, and regulated entities. In 2014, this Court upheld the Rule in full. *White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222, 1229 (D.C. Cir.) (per curiam). The Supreme Court granted certiorari on a single issue and held that EPA had acted unreasonably when it failed to consider costs before determining that it was “appropriate,” under section 112(n)(1)(A), to regulate emissions of hazardous air pollutants from power plants. *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015).

2. On remand, this Court declined to vacate the Rule, noting that EPA was proceeding expeditiously to complete a rulemaking in response to the decision in *Michigan*.<sup>1</sup> Order, *White Stallion Energy Ctr. v. EPA*, D.C. Cir. No. 12-1100, at 2

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<sup>1</sup> The Supreme Court denied a petition for certiorari to review this Court’s decision

(Dec. 15, 2015). On December 1, 2015, EPA published a proposed supplemental finding that, considering costs, regulation of coal- and oil-fired power plants' toxic emissions was "appropriate," 80 Fed. Reg. 75,025, and opened a comment period; most of the undersigned state and local governments joined in submitting comments in support of the proposed finding.<sup>2</sup> The Administrator signed the final supplemental finding on April 14, 2016, and on April 25, 2016, it was published in the Federal Register, "Supplemental Finding That It Is Appropriate and Necessary To Regulate Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units," 81 Fed. Reg. 24,420, 24,452 (Apr. 25, 2016) (Supplemental Finding). On the same day, Murray Energy Corporation filed its Petition for Judicial Review of the Supplemental Finding (Murray Petition).

3. The Air Toxics Rule sets national, technology-based emission standards to reduce power-plant emissions of hazardous air pollutants, including mercury, which is a potent neurotoxin; acid gases, which are associated with

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to remand without vacating the Air Toxics Rule on June 13, 2016. *Michigan v. EPA*, No. 15-1152 (*petition for cert. filed* Mar. 14, 2016). Most of the states and local governments joining in this motion filed an opposition to that petition. Brief in Opposition of States, Local Governments and Public Health and Environmental Organizations, *Michigan v. EPA*, No. 15-1152 (*opposition filed* May 6, 2016).

<sup>2</sup> See Comments of the Attorneys General of Massachusetts, California, Connecticut, Delaware, Illinois, Iowa, Maine, Maryland, Minnesota, New Hampshire, New Mexico, New York, Oregon, Rhode Island, Vermont, and District of Columbia; the Solicitor General of Baltimore; the Corporation Counsels of Chicago and New York City; and the County Attorney of Erie County, New York, EPA-HQ-OAR-2009-0234-20497.

numerous chronic and acute health disorders; and non-mercury metals, such as arsenic, chromium, and nickel, which are known or suspected carcinogens. 77 Fed. Reg. at 9310; 76 Fed. Reg. 24,976, 25,003-05 (May 3, 2011). In addition, operation of the controls used to reduce power-plant emissions of hazardous metals and acid gases will reduce power-plant emissions of fine particulate matter (PM<sub>2.5</sub>) and sulfur dioxide (SO<sub>2</sub>), resulting in further public health and environmental benefits. 80 Fed. Reg. at 75,041. EPA estimated that, when fully implemented, the Rule would reduce annual coal-fired power-plant emissions of mercury by 75 percent, hydrogen chloride gas by 88 percent, and non-mercury metals by 19 percent. *Id.* at 75,033.

4. State and Local Government Movants are responsible for protecting the health and welfare of their residents and natural resources and therefore have a compelling interest in defending the Supplemental Finding and the Air Toxics Rule. Of particular concern to State and Local Government Movants is the mercury emitted by power plants—which contributed half of all domestic mercury emissions prior to full implementation of the Rule. 81 Fed. Reg. at 24,428. Mercury emitted by power plants is deposited in waterbodies and bioaccumulated in fish, endangering people, in particular children and developing fetuses, and wildlife, exposed to it through fish consumption. 76 Fed. Reg. at 24,977-78, 25,000-01, 25,013, 25,018. Mercury contamination is so widespread throughout

the Nation's waterbodies that all fifty states have mercury-related fish consumption advisories in place<sup>3</sup> and many of the State Movants have been required to develop state- or region-wide mercury water pollution budgets known as "total maximum daily loads" (TMDLs) in order to meet Clean Water Act water quality standards.<sup>4</sup> *See* 33 U.S.C. § 1313(d) (requiring development of TMDLs for impaired waters).

5. Due to concerns about the serious harms mercury poses to human health and the environment, many of the State Movants promulgated stringent state limits on mercury emissions from power plants in advance of the Air Toxics Rule.<sup>5</sup> However, because a significant portion of mercury deposition in many states originates from out-of-state power plants, the Rule's national controls are needed to address the harms posed by power-plant mercury emissions and to achieve State Movants' TMDL goals.<sup>6</sup> Because the Air Toxics Rule furthers state efforts to

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<sup>3</sup> U.S. EPA, 2011 National Listing of Fish Advisories, 4 (2013), <https://www.epa.gov/sites/production/files/2015-06/documents/technical-factsheet-2011.pdf>.

<sup>4</sup> *See* Regional Mercury Total Maximum Daily Load, vi (2007) (Northeast TMDL), *available at* [http://ofmpub.epa.gov/waters10/attains\\_impaired\\_waters.show\\_tmdl\\_document?p\\_tmdl\\_doc\\_blobs\\_id=74831](http://ofmpub.epa.gov/waters10/attains_impaired_waters.show_tmdl_document?p_tmdl_doc_blobs_id=74831); Minnesota Statewide Mercury Total Maximum Daily Load (2007) (Minnesota TMDL), *available at* <http://www.pca.state.mn.us/index.php/view-document.html?gid=8507>.

<sup>5</sup> *See* CONN. GEN. STAT. § 22a-199; MASS. CODE REGS., tit. 310, § 7.29; DEL. ADMIN. CODE, tit. 7, § 1146-6; ILL. ADMIN. CODE tit. 35, § 225.230; MD. CODE REGS. tit. 26, § 11.27.03.D; MINN. R. 7011.0561; N.H. REV. STAT. ANN. § 125-O:11-18; N.Y. COMP. CODES R. & REGS. tit. 6, § 246.6; OR. ADMIN. R. 340-228-0606.

<sup>6</sup> Northeast TMDL, *supra* note 4, at 44; Minnesota TMDL, *supra* note 4, at 20-21,

reduce mercury contamination from power-plant emissions on a nationwide basis and to meet their Clean Water Act obligations, State Movants have a strong interest in defending the Rule and Supplemental Finding.

6. In addition, State and Local Government Movants have unique economic interests in protecting their fisheries from power-plant mercury pollution that are distinct from EPA's interests in this action. Mercury contamination limits the ability of the residents of State and Local Government Movants to enjoy recreational and commercial fisheries and reduces the billions of dollars in economic benefit derived from those fisheries.<sup>7</sup>

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45 (stating that federal regulation of out-of-state sources, such as power plants, holds most promise for reaching its TMDL goals); *see also* Total Maximum Daily Load for Mercury Impairments Based on Concentration in Fish Tissue Caused Mainly by Air Deposition to Address 122 HUC 14s Statewide (2009) (New Jersey TMDL), [http://www.nj.gov/dep/wms/bear/TMDL%20HG%20document%20final%20version%209-8-09\\_formated%20for%20web%20posting%20js.pdf](http://www.nj.gov/dep/wms/bear/TMDL%20HG%20document%20final%20version%209-8-09_formated%20for%20web%20posting%20js.pdf), at 31 (noting that twenty-six percent of New Jersey's air deposition mercury load originates from five surrounding states).

<sup>7</sup> In the seventeen Intervenor States, more than nine million freshwater anglers contributed close to \$8.6 billion to the states' economies through fishing trip and equipment expenditures in 2011, supporting 135,000 jobs with salaries and wages amounting to more than \$4.5 billion annually. *See* U.S. Fish and Wildlife Serv., 2011 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation (2013), *available at* <https://www.census.gov/prod/www/fishing.html> (providing trip & equipment expenditure information); Am. Sportfishing Ass'n, Sportfishing in America: An Economic Force for Conservation, 7, 9 (2012), [http://asafishing.org/uploads/2011\\_ASASportfishing\\_in\\_America\\_Report\\_January\\_2013.pdf](http://asafishing.org/uploads/2011_ASASportfishing_in_America_Report_January_2013.pdf). The total economic multiplier effect for freshwater fishing in these states is approximately \$14.5 billion. *Id.* at 7, 9.

7. Finally, State and Local Government Movants have direct and long-standing interests in this action because many of the State and Local Government Movants participated extensively in the regulatory and judicial proceedings leading up to the adoption of the Air Toxics Rule and the issuance of the Supplemental Finding. For example, most of the State and Local Government Movants intervened in support of the Rule in *White Stallion* and participated as respondents in the subsequent review by the Supreme Court in *Michigan* that led to EPA's issuance of the Supplemental Finding.<sup>8</sup> Most of the State and Local Government Movants also submitted comments to EPA in 2011 in response to the Agency's proposed Air Toxics Rule, and again in 2016 in response to the proposed Supplemental Finding at issue in this action.

8. State and Local Government Movants' interests will not be adequately represented by the other parties to this action. As representatives of their residents, State and Local Government Movants' interests differ from those of other parties. State and Local Government Movants have unique sovereign interests in limiting hazardous air pollution in order to protect the health of their residents, the economic vitality of their fisheries, and the integrity of their natural resources.

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<sup>8</sup> Many of the State and Local Government Movants were also petitioners in *New Jersey v. EPA*, 517 F.3d 574 (2008), in which they successfully challenged the insufficiently protective 2005 Clean Air Mercury Rule. EPA promulgated the Air Toxics Rule to replace that rule after *New Jersey* vacated it.

9. This motion is timely filed. *See* Order, ECF No. 1613741 (May 18, 2016) (ordering that procedural motions in this case are due on July 25, 2016). Pursuant to Circuit Rule 15(b), this motion also constitutes a motion to intervene in all petitions for review of the challenged administrative action.

10. Allowing the State and Local Government Movants to intervene to protect their own rights and interests here will not unduly delay or prejudice the rights of any other party.

11. Counsel for EPA has informed counsel for State and Local Government Movants that Respondents do not oppose this motion. Counsel for Petitioners in Cases No. 16-1127, 16-1175, 16-1204, 16-1206, 16-1208, and 16-1210 have stated that they take no position on the motion.

12. Counsel for the Commonwealth of Massachusetts represents that the other parties listed in the signature blocks below consent to the filing of this motion.

For the foregoing reasons, the State and Local Government Movants respectfully request that this Court grant their motion to intervene.



Dated: July 1, 2016

Respectfully Submitted,

FOR THE COMMONWEALTH OF MASSACHUSETTS

MAURA HEALEY  
ATTORNEY GENERAL

By: /s/ JILLIAN M. RILEY

Melissa Hoffer  
Jillian M. Riley  
Tracy L. Triplett  
Assistant Attorneys General  
Environmental Protection Division  
One Ashburton Place, 18th Floor  
Boston, MA 02108  
(617) 963-2424  
jillian.riley@state.ma.us

FOR THE STATE OF CALIFORNIA

KAMALA D. HARRIS  
ATTORNEY GENERAL  
David A. Zonana  
Supervising Deputy Attorney General  
California Department of Justice  
1515 Clay Street, Suite 2000  
Oakland, CA 94612  
(510) 622-2100

FOR THE STATE OF CONNECTICUT

GEORGE JEPSEN  
ATTORNEY GENERAL  
Matthew I. Levine  
Scott N. Koschwitz  
Assistant Attorneys General  
55 Elm Street  
Hartford, CT 06141  
(860) 808-5250

FOR THE STATE OF DELAWARE

MATTHEW P. DENN  
ATTORNEY GENERAL  
Valerie S. Edge  
Deputy Attorney General  
Delaware Department of Justice  
102 West Water Street, 3rd Floor  
Dover, DE 19904  
(302) 739-4636

FOR THE STATE OF IOWA

THOMAS J. MILLER  
ATTORNEY GENERAL  
Jacob J. Larson  
Assistant Attorney General  
Environmental Law Division  
Office of the Iowa Attorney General  
Wallace State Office Building  
1305 E. Walnut Street  
Des Moines, Iowa 50319  
(515) 281-5341

FOR THE STATE OF ILLINOIS

LISA MADIGAN  
ATTORNEY GENERAL  
Matthew J. Dunn  
Gerald T. Karr  
James P. Gignac  
Assistant Attorneys General  
69 W. Washington Street, 18<sup>th</sup> Floor  
Chicago, IL 60602  
(312) 814-0660

FOR THE STATE OF MAINE

JANET T. MILLS  
ATTORNEY GENERAL  
Gerald D. Reid  
Assistant Attorney General  
Chief, Natural Resources Division  
6 State House Station  
Augusta, ME 04333  
(207) 626-8545

FOR THE STATE OF MARYLAND

BRIAN E. FROSH  
ATTORNEY GENERAL  
Roberta R. James  
Assistant Attorney General  
Office of the Attorney General  
Maryland Department of the Environment  
1800 Washington Blvd., Suite 6048  
Baltimore, MD 21230  
(410) 537-3748

FOR THE STATE OF NEW HAMPSHIRE

JOSEPH A. FOSTER  
ATTORNEY GENERAL  
K. Allen Brooks  
Senior Assistant Attorney General  
33 Capitol Street  
Concord, NH 03301  
(603) 271-3679

FOR THE STATE OF MINNESOTA

BY ITS COMMISSIONER OF  
THE MINNESOTA POLLUTION  
CONTROL AGENCY

LORI SWANSON  
ATTORNEY GENERAL  
Max Kieley  
Assistant Attorney General  
Karen D. Olson  
Deputy Attorney General  
445 Minnesota Street, Suite 900  
St. Paul, MN 55101-2127  
(651) 757-1244

FOR THE STATE OF NEW MEXICO

HECTOR BALDERAS  
ATTORNEY GENERAL  
Tannis L. Fox  
Assistant Attorney General  
Consumer and Environmental  
Protection Division  
P.O. Box 1508  
Santa Fe, NM 87504  
(505) 827-6695

## FOR THE STATE OF NEW YORK

ERIC T. SCHNEIDERMAN  
ATTORNEY GENERAL  
Andrew B. Ayers  
Senior Assistant Solicitor General  
Michael J. Myers  
Assistant Attorney General  
Environmental Protection Bureau  
The Capitol  
Albany, NY 12224  
(518) 776-2382

## FOR THE STATE OF RHODE ISLAND

PETER F. KILMARTIN  
ATTORNEY GENERAL  
Gregory S. Schultz  
Special Assistant Attorney General  
Rhode Island Department of  
Attorney General  
150 South Main Street  
Providence, RI 02903  
(401) 274-4400, ext. 2400

## FOR THE COMMONWEALTH OF VIRGINIA

MARK HERRING  
ATTORNEY GENERAL  
John W. Daniel, II  
Deputy Attorney General  
Lynne Rhode  
Senior Assistant Attorney General and Chief  
Matthew L. Gooch  
Assistant Attorney General  
Environmental Section  
Office of the Attorney General  
900 East Main Street  
Richmond, VA 23219  
(804) 225-3193

## FOR THE STATE OF OREGON

ELLEN F. ROSENBLUM  
ATTORNEY GENERAL  
Paul A. Garrahan  
Attorney-in-Charge  
Natural Resources Section  
Oregon Department of Justice  
1162 Court Street NE  
Salem, OR 97301  
(971) 673-1943

## FOR THE STATE OF VERMONT

WILLIAM H. SORRELL  
ATTORNEY GENERAL  
Nicholas F. Persampieri  
Assistant Attorney General  
109 State Street  
Montpelier, VT 05609  
(802) 828-6902

## FOR THE STATE OF WASHINGTON

ROBERT W. FERGUSON  
ATTORNEY GENERAL  
Katharine G. Shirey  
Assistant Attorney General  
P.O. Box 40117  
Olympia, WA 98504  
(360) 586-6769

FOR THE DISTRICT OF COLUMBIA

KARL A. RACINE  
ATTORNEY GENERAL  
James C. McKay, Jr.  
Senior Assistant Attorney General  
Office of the Attorney General  
441 Fourth Street, NW  
Suite 630 South  
Washington, DC 20001  
(202) 724-5690

FOR THE CITY OF BALTIMORE

GEORGE A. NILSON  
CITY SOLICITOR  
William R. Phelan, Jr.  
Chief Solicitor  
Dawn S. Lettman  
Assistant City Solicitor  
Baltimore City Department of Law  
100 N. Holliday Street  
Baltimore, MD 21202  
(410) 396-4094

FOR THE CITY OF CHICAGO

STEPHEN R. PATTON  
CORPORATION COUNSEL  
Benna Ruth Solomon  
Deputy Corporation Counsel  
30 N. LaSalle Street, Suite 800  
Chicago, IL 60602  
(312) 744-7764

FOR THE CITY OF NEW YORK

ZACHARY W. CARTER  
CORPORATION COUNSEL  
Christopher King  
Carrie Noteboom  
Assistant Corporation Counsel  
100 Church Street  
New York, NY 10007  
(212) 356-2319

FOR ERIE COUNTY, NEW YORK

MICHAEL A. SIRAGUSA  
ERIE COUNTY ATTORNEY  
Jeremy Toth  
Second County Attorney  
Erie County Department of Law  
95 Franklin Street, 16<sup>th</sup> Floor  
Buffalo, NY 14202  
(716) 858-2200

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing Motion for Leave to Intervene as Respondents filed through the Court's CM/ECF System has been served electronically on all registered participants of the CM/ECF System as identified in the Notice of Docket Activity.

/s/ JILLIAN M. RILEY

Dated: July 1, 2016

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REGINA A. McCARTHY, Administrator,		)	
U.S. Environmental Protection Agency,		)	
		)	
Respondents.		)	
<hr/>		)	

**CERTIFICATE AS TO PARTIES**

Pursuant to D.C. Circuit Rules 27(a)(4) and 28(a)(1)(A), Movant-Intervenors the Commonwealths of Massachusetts and Virginia, the States of California, Connecticut, Delaware, Iowa, Illinois, Maine, Maryland, Minnesota, New Hampshire, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington, the District of Columbia, the Cities of Baltimore, Chicago, and New York, and the County of Erie, New York hereby certify as follows:

**Petitioners.** The Petitioners in the above-captioned cases are:

16-1127 — Murray Energy Corporation

16-1175 — ARIPPA

16-1204 — Michigan Attorney General Bill Schuette, on behalf of the People of Michigan, the States of Alabama, Arizona, Arkansas, Kansas, Kentucky, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, Texas, West Virginia, Wisconsin, and Wyoming, and the Texas Commission on Environmental Quality, Public Utility Commission of Texas, and Railroad Commission of Texas

16-1206 — Oak Grove Management Company LLC

16-1208 — Southern Company Services, Inc., Alabama Power Company, Georgia Power Company, Gulf Power Company, and Mississippi Power Company

16-1210 — Utility Air Regulatory Group

**Respondents.** The Respondents in the consolidated cases are the United States Environmental Protection Agency (EPA) and Regina A. McCarthy, Administrator of EPA.



Dated: July 1, 2016

Respectfully Submitted,

FOR THE COMMONWEALTH OF  
MASSACHUSETTS

MAURA HEALEY  
ATTORNEY GENERAL

By: /s/ JILLIAN M. RILEY

Melissa Hoffer  
Jillian M. Riley  
Tracy L. Triplett  
Assistant Attorneys General  
Environmental Protection Division  
One Ashburton Place, 18th Floor  
Boston, MA 02108  
(617) 963-2424  
jillian.riley@state.ma.us

FOR THE STATE OF CALIFORNIA

KAMALA D. HARRIS  
ATTORNEY GENERAL  
David A. Zonana  
Supervising Deputy Attorney General  
California Department of Justice  
1515 Clay Street, Suite 2000  
Oakland, CA 94612  
(510) 622-2100

FOR THE STATE OF  
CONNECTICUT

GEORGE JEPSEN  
ATTORNEY GENERAL  
Matthew I. Levine  
Scott N. Koschwitz  
Assistant Attorneys General  
55 Elm Street  
Hartford, CT 06141  
(860) 808-5250

## FOR THE STATE OF DELAWARE

MATTHEW P. DENN  
ATTORNEY GENERAL  
Valerie S. Edge  
Deputy Attorney General  
Delaware Department of Justice  
102 West Water Street, 3rd Floor  
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(302) 739-4636

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THOMAS J. MILLER  
ATTORNEY GENERAL  
Jacob J. Larson  
Assistant Attorney General  
Environmental Law Division  
Office of the Iowa Attorney General  
Wallace State Office Building  
1305 E. Walnut Street  
Des Moines, Iowa 50319  
(515) 281-5341

## FOR THE STATE OF ILLINOIS

LISA MADIGAN  
ATTORNEY GENERAL  
Matthew J. Dunn  
Gerald T. Karr  
James P. Gignac  
Assistant Attorneys General  
69 W. Washington Street, 18<sup>th</sup> Floor  
Chicago, IL 60602  
(312) 814-0660

## FOR THE STATE OF MAINE

JANET T. MILLS  
ATTORNEY GENERAL  
Gerald D. Reid  
Assistant Attorney General  
Chief, Natural Resources Division  
6 State House Station  
Augusta, ME 04333  
(207) 626-8545

## FOR THE STATE OF MARYLAND

BRIAN E. FROSH  
ATTORNEY GENERAL  
Roberta R. James  
Assistant Attorney General  
Office of the Attorney General  
Maryland Department of the Environment  
1800 Washington Blvd., Suite 6048  
Baltimore, MD 21230  
(410) 537-3748

## FOR THE STATE OF NEW HAMPSHIRE

JOSEPH A. FOSTER  
ATTORNEY GENERAL  
K. Allen Brooks  
Senior Assistant Attorney General  
33 Capitol Street  
Concord, NH 03301  
(603) 271-3679

## FOR THE STATE OF MINNESOTA

BY ITS COMMISSIONER OF  
THE MINNESOTA POLLUTION  
CONTROL AGENCY

LORI SWANSON  
ATTORNEY GENERAL  
Max Kieley  
Assistant Attorney General  
Karen D. Olson  
Deputy Attorney General  
445 Minnesota Street, Suite 900  
St. Paul, MN 55101-2127  
(651) 757-1244

## FOR THE STATE OF NEW MEXICO

HECTOR BALDERAS  
ATTORNEY GENERAL  
Tannis L. Fox  
Assistant Attorney General  
Consumer and Environmental  
Protection Division  
P.O. Box 1508  
Santa Fe, NM 87504  
(505) 827-6695

## FOR THE STATE OF NEW YORK

ERIC T. SCHNEIDERMAN  
ATTORNEY GENERAL  
Andrew B. Ayers  
Senior Assistant Solicitor General  
Michael J. Myers  
Assistant Attorney General  
Environmental Protection Bureau  
The Capitol  
Albany, NY 12224  
(518) 776-2382

## FOR THE STATE OF RHODE ISLAND

PETER F. KILMARTIN  
ATTORNEY GENERAL  
Gregory S. Schultz  
Special Assistant Attorney General  
Rhode Island Department of  
Attorney General  
150 South Main Street  
Providence, RI 02903  
(401) 274-4400, ext. 2400

## FOR THE STATE OF OREGON

ELLEN F. ROSENBLUM  
ATTORNEY GENERAL  
Paul A. Garrahan  
Attorney-in-Charge  
Natural Resources Section  
Oregon Department of Justice  
1162 Court Street NE  
Salem, OR 97301  
(971) 673-1943

## FOR THE STATE OF VERMONT

WILLIAM H. SORRELL  
ATTORNEY GENERAL  
Nicholas F. Persampieri  
Assistant Attorney General  
109 State Street  
Montpelier, VT 05609  
(802) 828-6902

## FOR THE COMMONWEALTH OF VIRGINIA

MARK HERRING  
ATTORNEY GENERAL  
John W. Daniel, II  
Deputy Attorney General  
Lynne Rhode  
Senior Assistant Attorney General and Chief  
Matthew L. Gooch  
Assistant Attorney General  
Environmental Section  
Office of the Attorney General  
900 East Main Street  
Richmond, VA 23219  
(804) 225-3193

## FOR THE DISTRICT OF COLUMBIA

KARL A. RACINE  
ATTORNEY GENERAL  
James C. McKay, Jr.  
Senior Assistant Attorney General  
Office of the Attorney General  
441 Fourth Street, NW  
Suite 630 South  
Washington, DC 20001  
(202) 724-5690

## FOR THE CITY OF CHICAGO

STEPHEN R. PATTON  
CORPORATION COUNSEL  
Benna Ruth Solomon  
Deputy Corporation Counsel  
30 N. LaSalle Street, Suite 800  
Chicago, IL 60602  
(312) 744-7764

## FOR THE STATE OF WASHINGTON

ROBERT W. FERGUSON  
ATTORNEY GENERAL  
Katharine G. Shirey  
Assistant Attorney General  
P.O. Box 40117  
Olympia, WA 98504  
(360) 586-6769

## FOR THE CITY OF BALTIMORE

GEORGE A. NILSON  
CITY SOLICITOR  
William R. Phelan, Jr.  
Chief Solicitor  
Dawn S. Lettman  
Assistant City Solicitor  
Baltimore City Department of Law  
100 N. Holliday Street  
Baltimore, MD 21202  
(410) 396-4094

## FOR THE CITY OF NEW YORK

ZACHARY W. CARTER  
CORPORATION COUNSEL  
Christopher King  
Carrie Noteboom  
Assistant Corporation Counsel  
100 Church Street  
New York, NY 10007  
(212) 356-2319

FOR ERIE COUNTY, NEW YORK

MICHAEL A. SIRAGUSA  
ERIE COUNTY ATTORNEY  
Jeremy Toth  
Second County Attorney  
Erie County Department of Law  
95 Franklin Street, 16<sup>th</sup> Floor  
Buffalo, NY 14202  
(716) 858-2200