

HONORABLE ROBERT J. BRYAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

LIGHTHOUSE RESOURCES, INC.;
LIGHTHOUSE PRODUCTS, LLC; LHR
INFRASTRUCTURE, LLC; LHR COAL,
LLC; and MILLENNIUM BULK
TERMINALS-LONGVIEW, LLC,

Plaintiffs,

v.

JAY INSLEE, in his official capacity as
Governor of the State of Washington;
MAIA BELLON, in her official capacity as
Director of the Washington Department of
Ecology; and HILARY S. FRANZ, in her
official capacity as Commissioner of Public
Lands,

Defendants.

No. 3:18-cv-05005-RJB

STATES OF CALIFORNIA, MARYLAND,
NEW JERSEY, NEW YORK and OREGON,
and the COMMONWEALTH OF
MASSACHUSETTS'S AMICUS BRIEF IN
SUPPORT OF DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT ON
COMMERCE CLAUSE ISSUES

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1 Amici, the States of California, Maryland, New Jersey, New York, and Oregon, and the
 2 Commonwealth of Massachusetts (“Amici States”) respectfully submit this amicus curiae brief
 3 in support of the motions for summary judgment filed regarding Plaintiffs’ Commerce Clause
 4 claims by Defendants Jay Inslee, in his official capacity as Governor of the State of
 5 Washington, and Maia Bellon, in her official capacity as Director of the Washington
 6 Department of Ecology (collectively, “Washington”).¹

7 I. INTRODUCTION

8 Plaintiffs Lighthouse Resources (“Lighthouse”) and Burlington Northern Santa Fe
 9 Railroad (“BNSF”) argue that the Commerce Clause prohibits Washington from denying
 10 permits for a large-scale industrial terminal (“Terminal”) based on its environmental impacts,
 11 alleging that the State’s decision interferes with Plaintiffs’ efforts to increase profits by shipping
 12 coal to Asia. Plaintiffs’ thus attempt to transform the dormant Commerce Clause into an all-
 13 purpose shield protecting a business’s ability to operate precisely where and how it wants.
 14 Amici States urge the Court to reject this attempted intrusion on state and local police power to
 15 protect residents and local environments, as well as on the cooperative federalism model
 16 established by Congress in the Clean Water Act.

17 Indeed, the key element of a dormant Commerce Clause claim—that the challenged
 18 action confers an advantage for in-state interests over out-of-state competitors—is missing
 19 entirely from this case. *See Kentucky v. Davis*, 553 U.S. 328, 337–38 (2008). Absent such
 20 economic protectionism by Washington, Plaintiffs’ claims simply boil down to an attack on a
 21 land use decision based on an assessment of local environmental impacts—an assessment
 22 Plaintiffs do not and cannot challenge here. But that local land use decision only prevents
 23 Lighthouse from developing a particular project in a particular place, and the ability to develop
 24 a project in a preferred location is not protected by the Commerce Clause. Further, Washington
 25

26 ¹ Amici States were previously granted leave to file as amicus curiae in this case on August 21,
 27 2018. *See* Dkt. 134; *see also* Dkt. 103. Amici States’ first brief supported Washington’s
 successful motion for summary judgment on Plaintiffs’ preemption claims. *See* Dkt. 136.

1 has also not interfered with foreign commerce in an area requiring uniformity; in fact, it has not
2 regulated foreign commerce at all. Plaintiffs' dormant Commerce Clause claims fail.

3 II. AMICI STATES' INTEREST

4 Pursuant to their historic police powers, Amici States and their political subdivisions
5 enforce myriad state and local laws to protect the environment and the public health and safety
6 of their residents. The power of state and local governments to regulate land use to prevent or
7 minimize development projects' adverse impacts on the environment or public health and safety
8 has been recognized for generations. *See, e.g., Euclid v. Ambler Realty Co.*, 272 U.S. 365, 389-
9 90 (1926); *Mugler v. Kansas*, 123 U.S. 623, 666 (1887). This well-established state and local
10 authority applies to land use throughout the relevant jurisdiction and, thus, applies to lands that
11 border navigable rivers or sit on coastlines, just as it does to lands that do not. The exercise of
12 this state and local authority over land use can affect corporations' abilities to conduct business,
13 including their abilities to use navigable waters, in the ways they prefer.

14 Whether or not the proposed project borders navigable waters, a State's exercise of its
15 police power authority can lawfully affect a company's ability to get its product to certain
16 domestic and global markets. For example, state and local authorities routinely make decisions
17 regarding the possible expansion of highways, the siting and permitting of manufacturing and
18 distribution facilities, the authorization of oil and gas development, and other activities that may
19 affect how easily a product may be shipped from point A to point B, or whether it can be
20 shipped at all. But those effects do not, by themselves, transform a State's exercise of its
21 historic police power into an unconstitutional interference with interstate or foreign commerce.
22 Amici States therefore have an interest in Plaintiffs' attempt to invoke the dormant Commerce
23 Clause to invalidate a land use decision adopted to protect the local environment and the health
24 and safety of local residents.

25 Amici States also regulate navigable waters as part of a system of cooperative
26 federalism established pursuant to the federal Clean Water Act. 33 U.S.C. §§ 1251-1387.
27 Section 401 of the Clean Water Act mandates that all entities requiring a federal permit for a

1 discharge into navigable waters must also obtain a certification from the State that the proposed
2 project will not violate water quality standards, including those established pursuant to state
3 laws. 33 U.S.C. § 1341. State regulation of these navigable rivers and coastlines pursuant to
4 express congressional authority necessarily may affect shipping operations and therefore both
5 interstate and foreign commerce. Thus, Amici States have an interest in rebutting Plaintiffs'
6 contentions regarding constitutional limitations on a State's congressionally-authorized
7 authority to take these regulatory actions.

8 III. BACKGROUND²

9 Lighthouse is a coal company that, naturally, wants to sell more coal, including to
10 markets overseas. Lighthouse currently exports coal to foreign markets through existing
11 terminals, which are located in the United States along the East and West Coasts and in the Gulf
12 of Mexico, and in both Mexico and Canada. Nonetheless, Lighthouse wants to construct and
13 operate a new coal export terminal. It evaluated dozens of available sites on the West Coast and
14 ultimately selected Longview, Washington, as its desired location, along the banks of the
15 Columbia River.

16 Before it could begin building this large-scale industrial Terminal, Lighthouse was
17 required to obtain a series of permits and authorizations from state and local authorities,
18 including a state certification under Clean Water Act section 401. In reviewing Lighthouse's
19 requests for the necessary permits and authorizations, Washington analyzed the Terminal's
20 anticipated environmental impacts, as required by state law, and determined that the Terminal
21 would create unavoidable and significant negative environment impacts on Washington's
22 environment and the public health and safety of its residents. *See Lighthouse Resources Inc. v.*
23 *Inslee*, No. 18-cv-5005, 2018 WL 6505372, at *1-2 (W.D. Wa. Dec. 11, 2018). On the basis of
24 these serious threats to public health and the environment, Washington denied Lighthouse the
25 necessary permits to operate the Terminal, including the section 401 certification.

26 _____
27 ² The Court is familiar with the facts of this case, and Amici States thus recite only those facts
here that are most relevant to this brief.

IV. ARGUMENT

The crux of Plaintiffs’ dormant Commerce Clause claims is that the Clause guarantees them the right to build the Terminal wherever they want, regardless of Washington’s conclusions about impacts on the public health and safety of its residents and the environment. That is not the law. The dormant Commerce Clause prohibits economic protectionism—something Plaintiffs have not, and cannot, allege. The Clause does not provide unfettered protection for Lighthouse to construct a Terminal wherever it would prefer, based on its assessment of the most lucrative location for its intended operations. Nor does the Clause override historic state and local police power authority to make land use decisions in the interest of protecting the environment and the health and safety of their residents.

A. Washington’s actions do not discriminate against, or excessively burden, interstate commerce.

The dormant Commerce Clause “is driven by concern about economic protectionism”—specifically “regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.” *Davis*, 553 U.S. at 337–38 (internal quotations omitted). At the same time, dormant Commerce Clause jurisprudence recognizes that local autonomy is foundational to our system of federalism. *Id.* at 338. “Under the resulting protocol for dormant Commerce Clause analysis, [courts] ask whether a challenged law discriminates against interstate commerce.” *Id.* Where discrimination is found, the law is “virtually *per se* invalid and will survive only if it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.” *Id.* (internal quotations omitted). “Absent discrimination for the forbidden purpose, however, the law will be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.” *Id.* at 338-39 (internal quotations and citations omitted).³

³ State actions that regulate extraterritorially may also run afoul of the dormant Commerce Clause. Plaintiffs make no allegation that Washington’s denial of Lighthouse’s permits regulates conduct occurring wholly out-of-state, and so Amici States do not address that issue here.

1 While Plaintiffs characterize their challenges as claims of discrimination against, and
 2 excessive burdens on, interstate and foreign commerce, the facts Plaintiffs actually allege
 3 simply convey that, in their view, their own business plans were hindered by Washington’s land
 4 use decision. Specifically, Lighthouse alleges that Washington has “discriminated against
 5 Lighthouse’s and its subsidiaries’ efforts to transport into Washington coal that is being mined
 6 in Montana, Wyoming, and other states.” Lighthouse Compl. at ¶ 241; *see also id.* at ¶ 242.
 7 BNSF similarly alleges that Washington has “discriminated against BNSFs’ efforts to transport
 8 coal into Washington” from other States. BNSF Compl. at ¶ 111; *see also id.* at ¶ 112. These
 9 are allegations of injuries to Plaintiffs’ businesses, without any allegations even suggesting that
 10 other businesses, specifically in-state competitors, received competitive advantages over
 11 Plaintiffs. Such allegations, on their own, do not give rise to a viable dormant Commerce
 12 Clause claim.

13 **i. The dormant Commerce Clause does not protect the preferences of**
 14 **individual businesses concerning how to sell their goods.**

15 The dormant Commerce Clause “protects the interstate market, not particular interstate
 16 firms.” *Exxon Corp. v. Maryland*, 437 U.S. 117, 127 (1978). Thus, without violating the
 17 dormant Commerce Clause, Maryland could prohibit petroleum refiners from operating retail
 18 gasoline stations in the State, even though the refiners clearly preferred to sell their product
 19 through a distribution chain they controlled. *See id.* at 119, 128. Similarly, Minnesota could
 20 constitutionally prohibit milk packaged in non-reusable plastic containers from being sold in the
 21 State, even though some milk producers preferred the very packaging Minnesota prohibited.
 22 *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 470 (1981). The crux of Plaintiffs’
 23 claims here—that they may not build an export terminal precisely where they would like to—
 24 simply is not a dormant Commerce Clause violation because such “harm” is not the concern of
 25 the Clause. *See also Nat’l Ass’n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1148
 26 (9th Cir. 2012) (“[A] state regulation does not become vulnerable to invalidation under the
 27 dormant Commerce Clause merely because it affects interstate commerce. A critical

1 requirement for proving a violation of the dormant Commerce Clause is that there must be a
2 *substantial burden on interstate commerce.*”) (internal citation omitted, emphasis in original).

3 **ii. Washington’s actions do not constitute economic protectionism and are not**
4 **prohibited by the Commerce Clause.**

5 Plaintiffs have also failed to allege, and cannot allege, the essential facts necessary to
6 state a discrimination claim under the dormant Commerce Clause. Again, the Clause prohibits
7 economic protectionism—“regulatory measures *designed to benefit in-state economic interests*
8 *by burdening out-of-state competitors.*” *Davis*, 553 U.S. at 337-38 (emphasis added).

9 Accordingly, to establish a discrimination claim under the Commerce Clause, Plaintiffs must
10 not merely demonstrate that Washington is “discriminating against” their individual business,
11 but also that Washington is discriminating *in favor* of Plaintiffs’ in-state competitors. Indeed,
12 “in the absence of actual or prospective competition between the supposedly favored and
13 disfavored entities in a single market there can be no local preference”—in other words, no
14 discrimination. *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 300 (1997). Plaintiffs have
15 identified no in-state firms that are similarly situated—no in-state competitors that
16 Washington’s decision favors—and, thus, their claims fail. *See Exxon*, 437 U.S. at 125
17 (“disparate treatment [claim] ... meritless” in the absence of local competitors); *Tracy*, 519 U.S.
18 at 298 (“Conceptually, of course, any notion of discrimination assumes a comparison of
19 substantially similar entities.”).

20 In fact, Plaintiffs allege injury to an entire group of competitors—all potential investors
21 in the development of coal export facilities in Washington—without any claim that in-state
22 investors are favored relative to out-of-state investors. *Lighthouse Compl.* at ¶ 246; *see also*
23 *BNSF Compl.* at ¶ 116. This allegation is implausible, of course, because the rejection of
24 *Lighthouse’s* specific plans for a specific location does not obviously injure anyone else. But
25 even if Plaintiffs could prove this allegation were true, this alleged injury to *all* potential
26 developers or operators of coal export facilities would not establish that Washington’s actions
27 were protectionist. *See Clover Leaf Creamery Co.*, 449 U.S. at 471-72 (no protectionism where

1 prohibition applied to “all milk retailers ... without regard to whether the milk, the containers,
2 or the sellers are from outside the State”). Plaintiffs simply have no discrimination claim
3 without any in-state competitor receiving an advantage, and Plaintiffs can point to no such
4 competitor.

5 It is of no matter that Plaintiffs attempt to style their claim as one of discriminatory
6 purpose. While discrimination under the dormant Commerce Clause can be found in a law’s
7 purpose, advantages for in-state competitors remain a necessary element of such discrimination.
8 *Tracy*, 519 U.S. at 298. Thus, even if Plaintiffs could show that Washington was motivated by
9 an opposition to coal (which, after extensive discovery, they cannot), their discrimination
10 claims would still fail. Plaintiffs cannot satisfy the basic, threshold test for this claim.⁴

11 **iii. Washington’s actions impose no significant burden on interstate commerce**
12 **and are not prohibited by the Commerce Clause.**

13 Finally, Plaintiffs have not alleged, and cannot show, that Washington’s land use
14 decision regarding a single potential terminal site imposes an excessive burden on interstate
15 commerce in violation of the *Pike* balancing test. Under that test, the challenged law “will be
16 upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to
17 the putative local benefits.” *Davis*, 553 U.S. at 338 (internal quotations omitted, modification
18 in original). Courts “need not examine the benefits of the challenged law[,],” when it does “not
19 impose a significant burden on interstate commerce.” *Nat’l Ass’n of Optometrists & Opticians*
20 *v. Harris*, 682 F.3d 1144, 1155 (9th Cir. 2012). And “there is not a significant burden on
21 interstate commerce merely because a non-discriminatory regulation precludes a preferred,
22 more profitable method of operating [a business].” *Id.* at 1154; *see also United Haulers Ass’n,*
23 *Inc. v. Oneida-Herkimer Solid Waste Management Auth.*, 550 U.S. 330, 346-47 (2007)

24 ⁴ Notably, Plaintiffs argue that Washington’s denial of Lighthouse’s permits will substantially
25 harm the State financially, costing it an economic windfall of approximately \$146 million in tax
26 revenues, substantial infrastructure upgrades, and other major investments in Washington.
27 Lighthouse Compl. at ¶ 73-4. Plaintiffs have not even attempted to explain how Washington’s
rejection of these economic benefits could constitute economic protectionism and therefore
could violate the dormant Commerce Clause.

1 (emphasizing the absence of “any disparate impact on out-of-state as opposed to in-state
2 businesses”).

3 Yet, that is precisely what Plaintiffs claim here—that Washington has violated the
4 dormant Commerce Clause because Lighthouse cannot construct what it wants, where it wants.
5 In fact, Lighthouse itself alleges that it identified 27 potential export terminal sites on the West
6 Coast. Lighthouse Compl. at ¶ 53. It then alleges that it concluded the Millennium Bulk
7 Terminal site in Longview, Washington “was the preferred site.” *Id.* at ¶ 54. But it does not
8 allege why it cannot pursue those other 26 sites or, even, why it *must* find a site on the West
9 Coast. That it might cost more to develop elsewhere, whether on the West Coast or not, does
10 not transform Washington’s land use permit denial into a constitutional violation. The
11 Commerce Clause neither protects Plaintiffs’ preferred “methods of operation” nor protects
12 against the fact that government action may increase the cost of doing business. *See Exxon*, 437
13 U.S. at 128. Indeed, this Court need not even consider the benefits here because Plaintiffs have
14 failed to allege the significant burden on commerce that would trigger that inquiry. *Harris*, 682
15 F.3d at 1155. Plaintiffs’ claim of excessive burden fails at the threshold stage.⁵

16 Plaintiffs’ *Pike* claim is particularly implausible because, under section 401 of the Clean
17 Water Act, Congress has expressly authorized States to regulate the quality of navigable waters
18 within their own jurisdictions, subject to minimum federal standards, notwithstanding that a
19 denial of certification under that authority might affect commerce more or less in the precise
20 way Plaintiffs assert here. Accordingly, “Congress has struck the balance it deems appropriate,
21 [and] the courts are no longer needed to prevent States from burdening commerce.” *Merrion v.*
22 *Jicarilla Apache Tribe*, 455 U.S. 130, 154 (1982). That is, Congress has already determined
23 that the benefits of a State preventing “significant unavoidable adverse impacts,” as Washington
24

25 ⁵ If the court were to consider the putative local benefits, Plaintiffs’ claims would still fail. As
26 discussed above, Plaintiffs do not allege a significant burden on interstate commerce, whereas
27 the local benefits of Washington’s actions—including the protection of water quality—are
substantial, well-documented, and not subject to dispute here. *See* Dkt. 227, 14-17.

1 did here, outweigh the effects a section 401 certification denial might have on commerce.

2 There simply is no *Pike* claim here.

3 **B. Washington's actions do not implicate the foreign dormant Commerce Clause.**

4 Plaintiffs alternatively contend that by not issuing permits for the Terminal, Washington
5 has unconstitutionally interfered with a supposed uniform "federal policy" to export as much
6 energy as possible all over the world. Previously, Washington and Intervenors have extensively
7 articulated why such a uniform federal policy in favor of energy exports, particularly one
8 overriding the need for environmental protection, does not in fact exist. *See* Dkt. 206 and 208.
9 Below, Amici States emphasize two points. First, Washington's denial of Lighthouse's permits
10 to construct the Terminal in Washington simply does not regulate foreign commerce. Second,
11 Washington's denial of Lighthouse's permits in no way "impair[s] uniformity in an area where
12 federal uniformity is essential," or prevents the federal government from speaking with "one
13 voice when regulating commercial relations with foreign governments." *See Japan Line, Ltd. v.*
14 *County of Los Angeles* 441 U.S. 434, 448 (1979) ("*Japan Line*").

15 **i. Washington's denial of Lighthouse's Permit does not regulate foreign**
16 **commerce.**

17 Most fundamentally, Washington's decision not to issue permits for Lighthouse's
18 Terminal in no way regulates commerce with foreign entities. Washington is neither
19 prohibiting Lighthouse from selling coal in Asia nor forbidding foreign nations from purchasing
20 Lighthouse's coal. Rather, Washington is merely prohibiting the construction of a specific
21 proposed industrial facility at a particular site because the proposed facility will create
22 significant local pollution. Washington is not manipulating foreign trade by placing a quota,
23 tariff, or embargo on products for its own economic benefit. *See South-Central Timber*
24 *Development, Inc. v. Wunnicke*, 467 U.S. 82, 100 (1984) (Alaska law requiring wood be
25 processed by in-state companies prior to export violated foreign dormant Commerce Clause).
26 Washington is not subjecting a foreign or multinational entity to in-state taxes. *See Japan Line*,
27 441 U.S. at 444-55 (Los Angeles tax applied to foreign-owned shipping containers violated

1 foreign dormant Commerce Clause). While Washington’s land use decision may or may not
 2 impact Lighthouse’s profitability, as virtually *all* land use decisions might impact a company’s
 3 profitability, such an effect is not a constitutional violation.

4 Amici States are aware of no case in which a local land use decision was overturned due
 5 to its potential impact on the market for specific products in foreign commerce, and for good
 6 reason. Assume, for the sake of argument, that Plaintiffs are correct that Washington’s decision
 7 not to permit the Terminal regulates foreign commerce and interferes with a unitary federal
 8 policy of “export[ing] American energy all over the world.” Lighthouse Compl. ¶ 195; BNSF
 9 Compl. ¶ 89. Given the various forms of energy resources and the global nature of such
 10 markets, *any* state or local interference with a private company’s ability to domestically produce
 11 or export an energy resource would violate the foreign dormant Commerce Clause. Under that
 12 assumption, for example, a decision by California not to authorize an oil refinery along its
 13 coastline could violate the foreign dormant Commerce Clause. So could a decision by Maine to
 14 zone an area for coastal preservation rather than energy export terminals. There is no reason
 15 that Plaintiffs’ argument would stop at the water’s edge. A decision by Utah not to authorize
 16 additional coal mines could similarly interfere with foreign commerce, as it could result in less
 17 coal being sold overseas. So could a decision by North Dakota not to permit additional oil and
 18 gas drilling. As these examples demonstrate, if Plaintiffs’ sweeping theory were correct, the
 19 foreign dormant Commerce Clause would cast a long shadow over local land use decisions that
 20 for centuries have been recognized as part of historic state and local police power authority.
 21 Because Plaintiffs’ novel legal theory would upend these historic state and local powers and
 22 enjoys no support in any existing caselaw, this Court should summarily reject it.

23 **ii. Land use decisions like the one Washington made here are inherently local**
 24 **and need not be uniform nationwide.**

25 The goal of the foreign dormant Commerce Clause is to prevent States from
 26 “impair[ing] uniformity in an area where federal uniformity is essential.” *Japan Line*, 441 U.S.
 27 at 448. But deciding what to build and where to build it, as Washington has done here, is one of

1 the most quintessential historic *local* government functions. *Euclid v. Ambler Realty Co.*, 272
2 U.S. 365 (1926) (zoning law prohibiting industrial development upheld as valid police power
3 function). It is not an area for which national uniformity is essential (or probably even possible
4 given that these decisions are, by their very nature, specific to the proposed project and site at
5 issue). In fact, the Clean Water Act manifests Congress’s intent to maintain a system of
6 cooperative federalism over the siting of facilities like Lighthouse’s Terminal that impact
7 navigable waters. While the Clean Water Act establishes national minimum controls for
8 pollutant discharges into navigable waters, Congress expressly preserved the rights of States to
9 impose their own more stringent controls, 33 U.S.C. § 1370, and authorized States to veto
10 projects requiring federal permits by denying water quality certifications, 33 U.S.C. § 1341. By
11 explicitly preserving state and local police power over land abutting navigable waters, subject to
12 minimum federal benchmarks, Congress determined that national uniformity over such land use
13 decisions is neither essential nor desired. Because Washington’s land use decision does not
14 impair uniformity in an area where uniformity is “essential,” it does not violate the Commerce
15 Clause.

16 V. CONCLUSION

17 Plaintiffs’ Commerce Clause arguments boil down to their dissatisfaction with a
18 traditional land use decision Washington made to protect its residents and natural resources, and
19 their complaints that Washington’s decision has made it harder for them expand their
20 businesses. The dormant Commerce Clause, however, respects Washington’s long-standing
21 police power authority to make local land use decisions and does not provide Plaintiffs with a
22 constitutional right to override that authority in order to build an export terminal in their
23 preferred location. There is no Commerce Clause claim here.

1 DATED: February 14, 2019

2 BRESKIN JOHNSON TOWNSEND, PLLC

3 By: s/ Roger Townsend

4 Roger Townsend, WSBA #25525
5 1000 Second Avenue, Suite 3670
6 Seattle, WA 98104
7 Tel: (206)652-8660
8 rtownsend@bjtlegal.com

9 OF COUNSEL:

10 Xavier Becerra
11 ATTORNEY GENERAL OF CALIFORNIA

12 Christie Vosburg
13 Supervising Deputy Attorney General
14 Elaine Meckenstock
15 Deputy Attorney General
16 Elizabeth B. Rumsey*
17 Deputy Attorney General
18 Scott J. Lichtig*
19 Deputy Attorney General
20 California Department of Justice
21 1300 I Street
22 Sacramento, California 94612
23 Tel: (916) 210-7815
24 scott.lichtig@doj.ca.gov
25 *Pro Hac Vice Granted

26 *Attorneys for Plaintiffs*

1 FOR THE STATE OF MARYLAND:

2 BRIAN E. FROSH
3 Attorney General
4 JOHN B. HOWARD, JR.
5 Special Assistant Attorney General
6 200 St. Paul Place
7 Baltimore, MD 21202
8 (410) 576-6300

9 FOR THE STATE OF NEW JERSEY:

10 GURBIR S. GREWAL
11 Attorney General
12 LISA J. MORELLI
13 Deputy Attorney General
14 R.J. Hughes Justice Complex
15 25 Market Street, P.O. Box 093
16 Trenton, NJ 08625

17 FOR THE STATE OF OREGON:

18 ELLEN F. ROSENBLUM
19 Attorney General
20 PAUL GARRAHAN
21 Attorney-in-Charge
22 Natural Resources Section
23 STEVE NOVICK
24 Special Assistant Attorney General
25 Natural Resources Section
26 General Counsel Division
27 Oregon Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 947-4593

FOR THE COMMONWEALTH OF MASSACHUSETTS:

MAURA HEALEY
Attorney General
SETH SCHOFIELD
Senior Appellate Counsel
Assistant Attorney General
Energy and Environment Bureau
One Ashburton Place, 18th Floor
Boston, MA 02108
(617) 963-2436

FOR THE STATE OF NEW YORK:

LETITIA JAMES
Attorney General
BARBARA D. UNDERWOOD
Solicitor General
STEVEN C. WU
Deputy Solicitor General
JUDITH N. VALE
Senior Assistant Solicitor General
MICHAEL J. MYERS
Senior Counsel
Environmental Protection Bureau
The Capitol
Albany, NY 12224
(518) 776-2382

CERTIFICATE OF SERVICE

I hereby certify that on this date I filed the foregoing document with the Clerk of the Court using the court's ECF filing system which will automatically serve the filing on registered ECF users.

DATED February 14, 2019, at Seattle, Washington.

s/Nerissa Tigner
Nerissa Tigner, Paralegal

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