



## **PRIVILEGED & CONFIDENTIAL**

### **COMMON INTEREST AGREEMENT REGARDING THE SHARING OF INFORMATION CONCERNING LITIGATION TO COMPEL UNITED STATES ENVIRONMENTAL PROTECTION AGENCY TO UNDERTAKE OVERDUE MANDATORY DUTIES FOR THE 2008 OZONE NATIONAL AMBIENT AIR QUALITY STANDARDS**

The parties to this common interest agreement (the “Agreement”), specifically the State of New York, the State of New Jersey, Clean Air Task Force for its client Clean Wisconsin, Earthjustice, Downwinders at Risk, Appalachian Mountain Club, Texas Environmental Justice Advocacy Services, and Sierra Club, and any government and non-government entities who have executed the attached Addendum (hereinafter the “Parties”), are contemplating participating together as litigants or counsel for litigants in one or more citizen suits or other litigation to be brought against the United States Environmental Protection Agency and/or Administrator Andrew Wheeler (together, EPA) seeking to compel EPA to comply with certain nondiscretionary duties under the Act to promulgate Federal Implementation Plans for States including without limitation Illinois, Indiana, Michigan, Ohio, Pennsylvania, Virginia, and West Virginia for the 2008 ozone national ambient air quality standards (NAAQS) under the Good Neighbor Provision of the Clean Air Act (Litigation). The Litigation includes *New York, et al. v. Wheeler, et al.*, Case No. 1:20-cv-00419-LGS (S.D.N.Y.), *New York, et al. v. EPA*, Case No. 19-1019 (D.C. Circuit), *Downwinders at Risk, et al. v. Wheeler*, Case No. 1:20-cv-00349 (D.D.C.), *New Jersey, et al. v. Wheeler, et al.*, Case No. 1:20-cv-01425-JGK (S.D.N.Y.), and any other subsequent or related litigation.

The Parties to this Agreement have a common interest in the successful prosecution of the Litigation to ensure EPA takes prompt action as required under the Clean Air Act and does not weaken or further delay environmental protections for the Parties and their residents and/or members, or impair other sovereign, quasi-sovereign and proprietary interests, as applicable. The Litigation has required and will continue to require the sharing of information, legal analysis, draft documents, draft administrative comments, draft briefs, draft court filings, correspondence and other privileged documents among the Parties. The Parties have previously agreed to hold confidential all of their oral and written communications regarding the Litigation and hereby reduce that agreement to writing. In so doing, the Parties intend that all prior written or oral communications remain confidential and subject to their common interest privilege and other applicable privileges and protections from disclosure. The Parties wish to pursue their common interest throughout the preparations for, and the course of, the Litigation by exchanging privileged materials, while avoiding any waiver of the confidentiality of those privileged materials. The Parties agree to share information for the purpose of advancing their common interest, to keep such information and materials confidential, and to protect any privileges attaching to such information and materials to the extent authorized by law. The Parties also agree that the sharing of information, both written and oral, among their governing boards, staff, management, consultants, experts, clients, and counsel, as applicable, will further their common objectives.





Both federal and state law provide for the sharing of confidential and/or privileged information<sup>1</sup> among those with common interests during the course of and in anticipation of litigation, without a waiver of any otherwise applicable privileges, protections, immunities, and exemptions from disclosure, so that the claims and defenses of the parties may be thoroughly investigated and prepared without giving undue advantage to the opposing side. Maintaining such confidentiality is necessary for the accomplishment of the Parties' objectives with respect to the Litigation. This document sets forth the agreement under which the Parties and their respective governing boards, staff, management, consultants, experts, clients, and counsel will manage and protect confidential and/or privileged information shared and exchanged in preparation for, and during the course of, the Litigation.

THEREFORE, the Parties to this Agreement agree as follows:

1. **Parties.** The Parties to this Agreement are the State of New York, the State of New Jersey, Earthjustice, Downwinders at Risk, Appalachian Mountain Club, Texas Environmental Justice Advocacy Services, Clean Air Task Force for its client Clean Wisconsin, and Sierra Club. Pursuant to Paragraph 11 below, additional government or non-government entities, through their counsel, may join this agreement and become Parties by executing the appropriate version of the attached Addendum and circulating a copy to all Parties.

2. **Purpose.** The Parties share common interests and goals in prosecuting the Litigation, which seeks to compel EPA to comply with certain mandatory duties under the Act, and their prosecution of the Litigation presents common issues of fact and law that may arise in legal challenges before the United States Court of Appeals for the District of Columbia Circuit, the United States District Courts for the Southern District of New York, District of the District of Columbia, and any other courts, including the United States Supreme Court. The Parties recognize that the sharing and disclosure of privileged and confidential information among them is essential in the Litigation. The purpose of this common interest agreement is to ensure that the privileged and/or confidential information shared will be used for developing an efficient joint prosecution of such litigation, including developing litigation strategy and the preparation of legal briefs, and that this privileged and/or confidential information will not be disclosed to third parties or otherwise disclosed such that any privileges or other basis for confidentiality attached to these communications and documents are waived.

3. **"Information,"** as used in this Agreement, refers to any and all documents, materials, information, and communications, whether oral or written, electronic or paper. "Information" includes, but is not limited to, documents, materials, information, and communications exchanged among the Parties' governing boards, staff, management, consultants, experts, clients, and/or counsel.

4. **"Confidential and/or privileged information"** is information provided by or exchanged between one Party and another with the expectation of confidentiality and which is subject to one or more applicable privileges, protections, immunities, or exemptions from disclosure, including but not limited to, the attorney-client, attorney work product, deliberative

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<sup>1</sup> "Information," as used in this Agreement, is defined below.





process, and official information privileges and protections. “Confidential and/or privileged information” shall include information provided by or exchanged between the Parties prior to the execution of this agreement. The signing of this Agreement shall not waive any applicable privilege, protection, immunity or exemption from disclosure or otherwise affect the status of “confidential and/or privileged information” exchanged prior to the signing of this Agreement by the Parties.

5. **“Common Interest Privilege,”** as used in this agreement means the privilege arising from the common interests of the Parties in preparing for and conducting the prosecution of the Litigation, including without limitation, *New York, et al. v. Wheeler, et al.*, Case No. 1:20-cv-00419-LGS (S.D.N.Y.), *New York, et al. v. EPA*, Case No. 19-1019 (D.C. Circuit), *Downwinders at Risk, et al. v. Wheeler*, Case No. 1:20-cv-00349 (D.D.C.), *New Jersey, et al. v. Wheeler, et al.*, Case No. 1:20-cv-01425-JGK (S.D.N.Y.), and any subsequent or related litigation, including but not limited to the common interest privilege recognized in cases such as *Schaeffler v. United States*, 806 F.3d 34, 40-41 (2d Cir. 2015); *Waller v. Financial Corp. of America*, 828 F.2d 579, 583, n.7 (9th Cir. 1987); *Hunydee v. United States*, 355 F.2d 183 (9th Cir. 1965); *Continental Oil Company v. United States*, 330 F.2d 347 (9th Cir. 1964); *Loustalet v. Refco, Inc.*, 154 F.R.D. 243 (C.D. Cal. 1993); *Minebea Co. v. Pabst*, 228 F.R.D. 13, 15 (D.D.C. 2005); *O’Boyle v. Borough of Longport*, 94 A.3d 299 (N.J. 2014); Fed. R. of Evid. 501.

To avoid misunderstandings or inadvertent disclosure, all documents exchanged pursuant to this agreement should bear the legend **“Confidential – Protected by Common Interest Privilege”** or words to that effect. However, the inadvertent failure to include such a legend, including on documents or correspondence exchanged between Parties prior to the execution of this Agreement, shall not waive any privilege or protection available under this agreement or otherwise. In addition, any Party may, where appropriate, also label documents exchanged pursuant to this agreement with other appropriate legends, such as, for example, “Attorney-Client Privileged” or “Attorney Work Product.” Oral communications among the Parties regarding the Litigation shall also be deemed confidential and protected under this Agreement.

6. **Confidentiality Statement.** The Parties agree to protect all communications and documents exchanged among them regarding the Litigation, regardless of whether such communications or document exchanges occurred before or after the effective date of this Agreement, as confidential and privileged to the maximum extent allowable under applicable law, based upon all applicable privileges including, but not limited to, the attorney-client privilege, attorney work-product protections, common interest privilege, joint defense privilege, and governmental privileges including, but not limited to, the deliberative process privilege where applicable (hereinafter, “Protected Information”). Pursuant to this Agreement, rights in the confidentiality of Protected Information, and the confidences attached thereto, have not and will not be waived except as provided in paragraph 8 of this Agreement. Any inadvertent disclosure of Protected Information that is inconsistent with this Agreement shall not waive the confidentiality of such Protected Information. The privileges and other confidentiality protections covered by this Agreement are held jointly by the Parties; no Party is authorized unilaterally to waive any privilege or other confidentiality protection as to any confidential and/or privileged material provided by another Party(ies).





7. **Use of Protected Information.** Protected Information is to be used by the recipient of the information solely in connection with preparing and presenting the Parties' positions related to the Litigation. Protected Information may not be shared by a recipient with any non-party to this Agreement without prior written waiver by all Parties to this Agreement, unless the relevant Party determines that disclosure is (i) required by applicable law, and (ii) not otherwise covered by paragraph 8, *infra*, concerning Requests for Release and/or Disclosure. If the relevant Party determines the disclosure is required by applicable law and not otherwise covered by paragraph 8, *infra*, then it agrees to use its best efforts, as permitted by applicable law, to provide notice at least seven calendar days in advance, to all Parties to this Agreement prior to disclosure.

8. **Requests for Release and/or Disclosure.** The Parties agree and acknowledge that one or more of the Parties is subject to freedom of information or public records laws, and that nothing in this Agreement is intended to alter or limit the disclosure requirements of such laws. A Party who receives a request from a non-party to release, disclose, discuss, or obtain access to any information, including Protected Information (whether by way of a subpoena, discovery request, or request under any federal or state statute) shall use its best efforts, as permitted by applicable law, to provide notice, at least five (5) calendar days prior to the date on which response to such a request is due, to all Parties to the Agreement. Unless the other Parties consent to disclosure or release of Protected Information, the Party receiving the request for disclosure shall assert, to the extent authorized by law, and subject to any mandatory disclosure laws or court orders, all relevant and applicable privileges and other objections that the Party receiving the request determines are relevant and applicable to the disclosure of such information. This Agreement shall not prohibit disclosure by a Party of any Confidential and/or privileged materials that originated with that Party or were independently obtained (*e.g.*, from a non-Party).

A Party preparing to disclose any Information in response to a freedom of information or public records request shall, at the request of any other Party to this agreement to review the responsive Information planned for release, provide electronic copies of the proposed responsive Information, including any proposed redactions, before disclosure to any non-Party.

9. **No Agency or Additional Attorney-Client Relationships.** This Agreement shall not create any agency or similar relationship among the Parties. Nor shall this Agreement alter the existing attorney-client relationships among the Parties or create any new attorney-client relationships. No Party shall have authority to waive any applicable privilege or other confidentiality protection on behalf of any other Party; nor shall any waiver of an applicable privilege or protection by the conduct of any Party be construed to apply to any other Party. Nothing in this Agreement is intended or shall be construed to obligate any of the Parties to disclose or share any information or material relating to the Litigation.

10. **Enforcement.** The Parties agree that a breach of a provision of this Agreement by a Party may cause irreparable harm to the other Parties and therefore agree that injunctive relief is the appropriate means to enforce this Agreement. No Party shall be subject to any claim for damages as a result of a breach of this Agreement.

11. **Modification.** It is agreed that any modifications to this Agreement shall be in writing and signed by all Parties. The inclusion of additional states, municipalities, or other



government or non-government entities as parties to this Agreement shall not be considered a modification and shall be accomplished by having such prospective party execute the attached Addendum and provide a copy to all Parties; provided, however, that if any existing party to this Agreement provides written notice of its objection within two business days of receipt of notice of the prospective party's execution of such Addendum, the execution of the Addendum by the prospective party shall be considered a Modification requiring the signature of all Parties in order to become effective.

12. **Association Parties:** Parties that are associations agree that access to Protected Information obtained from other Parties shall be limited to the association entity itself, its employees, attorneys and agents, and that dissemination of such information by such Parties to non-parties, including members of such association Parties, shall require a prior written waiver by the Parties pursuant to paragraph 7 of this Agreement.

13. **Integration.** This written Agreement memorializes the entirety of the Parties' pre-existing oral agreement regarding the confidentiality of their communications. It is agreed that this Agreement itself, any amendments thereto, and all discussions among the Parties related to the Agreement are themselves subject to the attorney-client privilege, common interest privilege, and work product doctrine.

14. **Severability.** If any provision of this Agreement is determined by a court of competent jurisdiction to be invalid, in whole or in part, such determination shall not affect the validity of any other provision of this Agreement.

15. **Termination, Extension and Withdrawal.** This Agreement shall terminate on January 1, 2025 unless extended. The Parties or any subset of the Parties may extend the Agreement by executing a letter memorializing their intention to extend the Agreement for an additional period. Prior to termination, any Party to this Agreement may withdraw upon prior written notice to all other Parties. In the event of either termination or withdrawal by a Party(ies), all of the Parties (*i.e.*, those that continue to be Parties, withdrew from this Agreement, or were Parties before the Agreement terminated) shall continue thereafter to be bound by this Agreement with regard to any Information obtained at any time prior to such termination or withdrawal, and this Agreement shall continue to protect all Information disclosed between the Parties. Upon withdrawal, a withdrawing Party will prospectively cease to be entitled to receive any Information, and shall promptly destroy or return to the sender all Information received after the withdrawal.

16. **Counterparts and Signatures.** This Agreement may be executed in counterparts. Ink signatures scanned and transmitted by facsimile or e-mail shall be considered and effective as originals.

17. **Non-disqualification Agreement.** The Parties agree that no Party or attorney for a Party to this Agreement may attempt to use, in any other legal proceeding or case that is not related to the subject matter of this Agreement, either the fact of the Agreement or any information learned as a result of this joint effort as a reason to disqualify any other lawyer or law firm acting as counsel in any future legal proceedings involving the Litigation, consistent with the applicable Rules of Professional Conduct.





18. **Effective Date.** This Agreement becomes effective upon its execution by at least two Parties (including in counterparts and whether in a signature block or execution of the attached Addendum), and shall, once executed, supersede any prior confidentiality agreements among the Parties on the same subject. This Agreement becomes effective as to any additional party on the date such party executes the attached Addendum, in accordance with paragraph 11 *supra*. All of the Parties' communications with each other concerning the Litigation and all Information exchanged prior to execution of this Agreement are fully subject to this Agreement.

It is so AGREED.

Dated: 4/29, 2020

**FOR THE STATE OF NEW YORK**

LETITIA JAMES

*Attorney General of New York*

By:

Morgan Costello

Morgan A. Costello

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Dated: \_\_\_\_\_, 2020

**FOR THE STATE OF NEW JERSEY**

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18. **Effective Date.** This Agreement becomes effective upon its execution by at least two Parties (including in counterparts and whether in a signature block or execution of the attached Addendum), and shall, once executed, supersede any prior confidentiality agreements among the Parties on the same subject. This Agreement becomes effective as to any additional party on the date such party executes the attached Addendum, in accordance with paragraph 11 *supra*. All of the Parties' communications with each other concerning the Litigation and all Information exchanged prior to execution of this Agreement are fully subject to this Agreement.

It is so AGREED.

Dated: \_\_\_\_\_, 2020

**FOR THE STATE OF NEW YORK**

LETITIA JAMES  
*Attorney General of New York*

By: \_\_\_\_\_

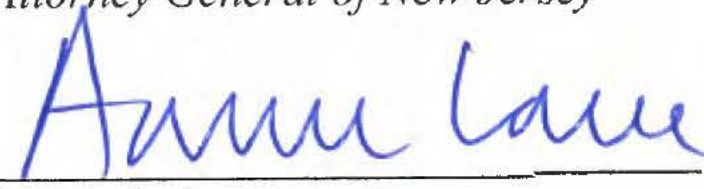
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Dated: March 12, 2020

**FOR THE STATE OF NEW JERSEY**

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Dated: 4.29.2020, 2020

**FOR CLEAN AIR TASK FORCE,  
AND ITS CLIENT, CLEAN WISCONSIN**

By: *Ann B. Weeks*

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Dated: \_\_\_\_\_, 2020

**FOR DOWNWINDERS AT RISK,  
APPALACHIAN MOUNTAIN CLUB, TEXAS  
ENVIRONMENTAL JUSTICE ADVOCACY  
SERVICES, AND SIERRA CLUB**

By: \_\_\_\_\_

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Dated: \_\_\_\_\_, 2020

**FOR CLEAN AIR TASK FORCE,  
AND ITS CLIENT, CLEAN WISCONSIN**

By: \_\_\_\_\_

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Dated: April 29, 2020

**FOR DOWNWINDERS AT RISK,  
APPALACHIAN MOUNTAIN CLUB, TEXAS  
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SERVICES, AND SIERRA CLUB**

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## ADDENDUM

### **COMMON INTEREST AGREEMENT REGARDING THE SHARING OF INFORMATION CONCERNING LITIGATION TO COMPEL UNITED STATES ENVIRONMENTAL PROTECTION AGENCY TO UNDERTAKE OVERDUE MANDATORY DUTIES FOR THE 2008 OZONE NATIONAL AMBIENT AIR QUALITY STANDARDS**

\_\_\_\_\_, by and through \_\_\_\_\_, desires to become a Party to the attached Agreement.

Now, therefore, counsel for \_\_\_\_\_, agrees to the terms of the Agreement and to deliver copies of this executed Addendum to all Parties to the Agreement within five business days.

DATED: \_\_\_\_\_

NAME OF PARTY:

By: \_\_\_\_\_

Name:

Title:

Address: