

PRIVILEGED & CONFIDENTIAL

**COMMON INTEREST AND CONFIDENTIALITY 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 and confidentiality agreement (the “Agreement”), specifically the States of New Jersey, New York, Connecticut, and Delaware, the Commonwealth of Massachusetts, the City of New York, and any other State, municipality, or other governmental entity that completes the attached Addendum (collectively, the “Parties”) are participating as, or contemplate participating together as, litigants or counsel for participants and/or 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 Clean Air Act (the “Act” or “CAA”) to promulgate Federal Implementation Plans for States, including without limitation Illinois, Indiana, Michigan, Ohio, Pennsylvania, Virginia, and West Virginia (the “Upwind States”), for the 2008 ozone National Ambient Air Quality Standards (“NAAQS”) under the Good Neighbor Provision of the Clean Air Act (the “Litigation”). The Litigation includes *New Jersey, et al. v. Wheeler, et al.* Case No. 1:20-cv-01425-JGK (S.D.N.Y.), *New York, et al. v. Wheeler, et al.*, Case No. 1:20-cv-00419-LGS (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 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 analyses, 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 interests, 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 will further their common objectives and will fall within the protections outlined in this document.

Both federal and state law provide for the sharing of confidential and/or privileged Information (as defined below) 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 establishing enforceable FIPs for the Upwind States, as required by the Act. 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, through their duly authorized undersigned counsel, hereby agree as follows:

1. **Parties.** The Parties to this Agreement are the States of New Jersey, New York, Connecticut, and Delaware, the Commonwealth of Massachusetts, the City of New York, and any other State, municipality, or other governmental entity that joins this Agreement by executing the attached Addendum and circulating a copy to all Parties, as set forth in paragraph 11.

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 District Courts for the Southern District of New York, District of the District of Columbia, the United States Court of Appeals for the District of Columbia Circuit, and any other courts, including the United States Supreme Court. The Parties recognize that the sharing and disclosure of privileged and/or confidential information among them is essential in the Litigation. The purpose of this Agreement is to ensure that the privileged and/or confidential information shared will be used in preparing for and developing effective legal positions, including development of litigation strategy and the preparation of legal briefs and other court filings, 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 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 Jersey, et al. v. Wheeler, et al.*, Case No. 1:20-cv-01425-JGK (S.D.N.Y.), *New York et al. v. EPA*, Case No. 1:20-cv-00419-LGS (S.D.N.Y.), *New York, et al. v. EPA*, Case No. 19-1019 (D.C. Circuit), 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); *O’Boyle v. Borough of Longport*, 94 A.3d 299 (N.J. 2014); *Minebea Co. v. Pabst*, 228 F.R.D. 13, 15 (D.D.C. 2005); and in 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 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 be deemed confidential and protected under this Agreement.

6. **Confidentiality Statement.** The Parties agree to protect all communications and documents exchanged among them related to the Litigation, regardless of whether such communications or document exchanges occurred before or after the effective date of this Agreement, as confidential and privileged, as defined in Paragraph 4 above. This protection applies to the maximum extent allowable under applicable law and incorporates all applicable privileges including, but not limited to, the attorney-client privilege, attorney work-product protections, joint defense privilege, and governmental privileges including, but not limited to, the deliberative process privilege where applicable. 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 protections as to any confidential and/or privileged material provided by another Party(ies).

7. **Non-Disclosure.** Protected Information is to be used by the recipient of the information solely in connection with preparing and presenting the Parties’ positions in judicial and/or administrative proceedings regarding EPA’s statutory duty to promulgate

FIPs for the Upwind States for the 2008 ozone NAAQS. Protected Information may not be shared by a recipient with any nonparty to this Agreement without prior written waiver from all parties to this Agreement, unless the relevant party determines that disclosure is: a) required by applicable law; and b) not otherwise covered by paragraph 8 below. In the event that the relevant party determines that disclosure is required by applicable law and not otherwise covered by paragraph 8, it agrees to use its best efforts, as permitted by applicable law, to give all Parties to this Agreement five working days’ notice prior to disclosure. Notwithstanding the foregoing, any Party may release, disclose, discuss, or make available Protected Information to or with its governing body, staff, management, consultants, experts, clients, and/or counsel who have a need for such information as part of their responsibilities associated with the Litigation, provided that any such persons are notified of their obligation to keep such Protected Information confidential pursuant to this Agreement.

8. **Requests for Release and/or Disclosure.** The Parties agree and acknowledge that the governmental parties to the agreement are 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 nonparty 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 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 other entities to this Agreement shall not be considered a modification and shall be accomplished by having the new party execute the attached Addendum and distribute a copy to all Parties; provided, however, that if any existing party to this Agreement provides written notice of its objection within five 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. **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.

13. **Termination.** Any Party to the Agreement may terminate its Agreement to this document upon written notice to the other Parties. In such instance, the terminating Party and its counsel will continue to be bound by this Agreement with regard to any Protected Information received prior to the termination.

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. **Nondisqualification 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 cause, which 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 Agreement as a reason to disqualify any other lawyer or law firm acting as counsel in any other legal matter or proceeding, consistent with the applicable Rules of Professional Conduct.

16. **Counterparts.** This Agreement may be executed in counterparts, each of which shall constitute an original hereof, and all counterparts so executed shall collectively constitute one binding agreement of the Parties, notwithstanding that all Parties are not signatory to the same counterpart. Counsel signing this Agreement on behalf of the named Party or Parties it represents certifies that it has the authority to execute this Agreement on behalf of said Party or Parties, that Counsel has fully informed the Party or Parties it represents of the terms of this Agreement, and that its Party-clients have agreed to be bound by all of the terms of this Agreement.

17. **Effective Date.** This Agreement becomes effective upon 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 above. 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: May 4, 2020

STATE OF NEW JERSEY

/s/ Robert J. Kinney
ROBERT J. KINNEY
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New Jersey Office of the Attorney General
Environmental Enforcement &
Environmental Justice Section
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ADDENDUM

**TO COMMON INTEREST AND CONFIDENTIALITY 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:

THE STATE OF CONNECTICUT

/s/ Jill Lacedonia
Jill Lacedonia
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THE STATE OF NEW YORK

/s/ Morgan A. Costello
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THE COMMONWEALTH OF MASSACHUSETTS

/s/ David S. Frankel
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Delaware, by and through Valerie S. Edge, desires to become a Party to the attached Agreement.

Now, therefore, counsel for Delaware, 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: 5-4-2020

NAME OF PARTY: State of Delaware

By: _____

Name: Valerie S. Edge

Title: Deputy Attorney General

Address: Dept. of Justice

102 W. Water Street

Dover DE 19904

(302) 257 3219

Valerie.edge @ Delaware.gov

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The City of New York, by and through James E. Johnson, desires to become a Party to the attached Agreement.

Now, therefore, counsel for the City of New York, 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: June 12, 2020

NAME OF PARTY: City of New York

JAMES E. JOHNSON
Corporation Counsel of the
City of New York

By:


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