

**COMMON INTEREST AGREEMENT REGARDING THE SHARING OF
INFORMATION CONCERNING EXECUTIVE ORDER 13927: ACCELERATING THE
NATION'S ECONOMIC RECOVERY FROM THE COVID-19 EMERGENCY BY
EXPEDITING INFRASTRUCTURE INVESTMENTS AND OTHER ACTIVITIES**

The parties to this common interest agreement (the “Agreement”), specifically the States of Maryland, Massachusetts, Pennsylvania, New Jersey, Washington, Michigan, the District of Columbia, and any other State, municipality, or other governmental entity that joins this Agreement with unanimous consent of the existing parties by executing the attached Addendum and circulating a copy to all Parties, as set forth in paragraph 11 (each a “Party” and, collectively, the “Parties”), are considering actions to challenge, including via litigation, Executive Order No. 13927 signed by President Trump on June 4, 2020 (the “EO”). *See* 85 Fed. Reg. 35165 (June 9, 2020). The parties anticipate challenging the EO either facially or as applied by federal agencies pursuant to its terms before an appropriate agency or federal court and in any subsequent administrative or judicial proceedings.

The Parties to this Agreement are affected by the federal government’s use of emergency regulations to avoid full compliance with the National Environmental Policy Act (NEPA), the Endangered Species Act (ESA), and the Clean Water Act (CWA) to fast-track infrastructure projects. The Parties have a common interest in ensuring that infrastructure and energy projects are developed only under full compliance with federal environmental laws. The Parties also have an interest in ensuring that the public is both aware of any projects that receive emergency treatment and afforded the opportunity to comment on those projects as required by NEPA, the ESA, CWA, and the Administrative Procedure Act (APA). Moreover, the parties share an interest in ensuring that the term “emergency”, as used in regulations allowing for alternative consultation under the ESA and environmental review under NEPA is appropriately interpreted and not misused for inappropriate purposes. The Parties thus have a common interest in advocating the Parties’ interests in any administrative and judicial proceedings concerning the EO (the “Litigation”).

The Litigation has required and will continue to require the sharing of information, legal analyses, draft briefs and other draft court filings, and other documents among the Parties as well as documents requesting further information about the development and implementation of the EO. The Parties wish to pursue their common interest throughout the preparations for, and the course of, any administrative and judicial proceedings involving the Litigation by exchanging privileged materials, while avoiding any waiver of the privileged nature 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 will further their common objectives.

Both federal and state law provide for the sharing of confidential and/or privileged information 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

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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, through their duly authorized undersigned counsel, hereby agree to the following, effective as of the date below, regardless of when signed.

1. **Parties.** The Parties to this Agreement are the States of Maryland, Massachusetts, Pennsylvania, New Jersey, Washington, Michigan, the District of Columbia and any other State, municipality, or other governmental entity that joins this Agreement with unanimous consent of the existing parties 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 described above, and their work in connection with the Litigation presents common issues of fact and law. The Parties recognize that the sharing and disclosure of confidential and/or privileged information among them, both in preparation for and during administrative and/or judicial proceedings, is essential in the Litigation. The purpose of this Agreement is to ensure that the confidential and/or privileged information shared will be used for developing effective legal positions (which will likely but may not always involve all Parties), including development of litigation strategy and the preparation of legal briefs, and that this confidential and/or privileged 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 Litigation,

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including but not limited to the common interest privilege recognized in cases such as *Schaeffler v. United States*, 806 F.3d 34, 40 (2d Cir. 2015); *In re Sealed Case*, 29 F.3d 715, 719 n.5 (D.C. Cir. 1994); *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); *Minebea Co. v. Pabst*, 228 F.R.D. 13, 15 (D.D.C. 2005); *Ken's Foods, Inc. v. Ken's Steak House, Inc.*, 213 F.R.D. 89, 93-94 (D. Mass. 2002); *Hanover Ins. Co. v. Rapo & Jepsen Ins. Serv., Inc.*, 870 N.E.2d 1105, 1109 (Mass. 2007); and *O'Boyle v. Borough of Longport*, 218 N.J. 168 (2014); 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 absence of such a legend shall not waive any privilege or protection available under this Agreement or otherwise. In addition, any Party may, where appropriate, 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 shall be deemed confidential and protected under this Agreement when discussing matters related to the matters covered by this Agreement.

6. **Confidentiality Statement.** The Parties agree to protect all information exchanged among them regarding the Litigation, regardless of whether such information 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, joint defense privilege, and governmental privileges including, but not limited to, the deliberative process privilege where applicable ("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 7 of the Agreement. Any inadvertent disclosure of Protected Information that is inconsistent with this Agreement shall not waive any privilege applicable to such Protected Information.

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 regarding the Litigation. 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: (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 five calendar days in advance, to all parties to this Agreement prior to disclosure. Notwithstanding the foregoing, any Party may release, disclose, discuss, or make available Protected Information to or with its staff, management, consultants, experts, clients, and/or counsel who have a need for such information as part of their responsibilities associated with the matters covered by this Agreement, 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

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that each Party 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 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 calendar days prior to the date on which response to such request is due, to all parties to this 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.

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 matters covered by the Agreement.

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 and that money damages would be inadequate. 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 governmental 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.

12. **Integration.** This written Agreement memorializes the entirety of the Parties' preexisting oral agreement regarding the confidentiality of their communications.

13. **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.

14. **Termination.** Any Party to the Agreement may terminate its participation in this Agreement 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.

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, either the

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fact of the Agreement or any information learned as a result of this Litigation as a reason to disqualify any other lawyer or law firm acting as counsel in such other legal matter or proceeding.

16. **Counterparts.** This Agreement may be executed in counterparts.

17. **Effective Date.** This Agreement becomes effective as to each Party on the date such Party executes the Agreement. This Agreement becomes effective as to each subsequently signing Party on the date such Party executes the Addendum. All confidential and/or privileged information previously disclosed by one Party to another Party concerning the Litigation is fully subject to this Agreement. This Agreement is binding on all successors or assigns of the Parties.

FOR THE STATE OF MARYLAND:

Dated: June 19, 2020

/s/Steven J. Goldstein

Steven J. Goldstein
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FOR THE DISTRICT OF COLUMBIA

Dated: June 19, 2020

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/s/ Jennifer L. Berger

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FOR THE COMMONWEALTH OF PENNSYLVANIA

Dated: June 19, 2020

/s/ Ann R. Johnston

Ann R. Johnston

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FOR THE STATE OF NEW JERSEY

Dated: June 19, 2020

/s/ Lisa Morelli

Lisa Morelli

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FOR THE COMMONWEALTH OF MASSACHUSETTS

Dated: June 19, 2020

/s/ Turner Smith

Turner Smith

Assistant Attorney General

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Office of the Attorney General

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FOR THE PEOPLE OF THE STATE OF MICHIGAN

Dated: June 19, 2020

/s/ Gillian E. Wener

Gillian E. Wener

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FOR THE STATE OF WASHINGTON

Dated: June 19, 2020

/s/ William R. Sherman

William R. Sherman

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ADDENDUM TO COMMON INTEREST AGREEMENT REGARDING THE SHARING OF INFORMATION CONCERNING EXECUTIVE ORDER 13927: ACCELERATING THE NATION'S ECONOMIC RECOVERY FROM THE COVID-19 EMERGENCY BY EXPEDITING INFRASTRUCTURE INVESTMENTS AND OTHER ACTIVITIES

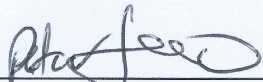
Minnesota, by and through its Attorney General, desires to become a Party to the attached Agreement.

Now, therefore, counsel for Minnesota, 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: 6/19/2020

NAME OF PARTY:

Minnesota
KEITH ELLISON

By: 

Name: Peter Surdo

Title: Special Assistant Attorney General

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Phone: (651) 757-1061

Email: peter.surdo@ag.state.mn.us

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_____, by and through _____,
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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: _____

Phone: _____

Email: _____