

COUNTY COMMISSION FAYETTE COUNTY, WEST VIRGINIA

ORDER NUMBER 2018- 001

Establishment of “Fayette County Environmental and Public Health Protection Special Settlement Fund”

I. FINDINGS OF LEGISLATIVE FACT:

- a. The Fayette County Commission **FINDS** that the complete text of this Order in its original proposed form was published on the official webpage of the Fayette County Commission and, thereby, made available to the Public for review and comment for at least two (2) complete working days prior to its consideration by the Fayette County Commission at its regularly scheduled public meeting;
- b. By Resolution adopted at its noticed, public meeting on October 13, 2017, the Fayette County Commission formally referred to the Environmental and Public Health Protection Unit (hereinafter: “**EPHPU**”) of the Office of the Fayette County Prosecuting Attorney four (4) sites or matters involving known or suspected, imminent and substantial endangerments to the Public Health, Safety, Welfare or the Environment within Fayette County that have arisen, or are arising, out of the past or present generation, treatment, transportation or disposal of toxic substances, hazardous wastes, hazardous substances or pollutants and contaminants for priority investigation by the Fayette County Prosecuting Attorney, and, as may be deemed appropriate by the Fayette County Prosecuting Attorney, for prosecution of such civil and criminal causes of action, including claims for timely and appropriate investigation and abatement of all such endangerments, as are available to Fayette County under applicable law against appropriate parties who are or may be legally responsible for such released toxic substances, hazardous wastes, hazardous substances, or pollutants and contaminants;
- c. The Fayette County Commission, following consultation with the Fayette County Prosecuting Attorney, further **FINDS** that the establishment of a separate, segregated Special Account of Fayette County for use only to receive, hold, invest, expend, account for, and manage all funds, property, services, and claims (hereinafter: “**Settlement Proceeds**”) received by or on behalf of Fayette County to resolve or satisfy, in whole or in part, any liability pursuant to any claim or matter brought, in whole or in part, by or behalf of Fayette County or the Fayette County Commission by the EPHPU of the Office of the

COUNTY COMMISSION OF FAYETTE COUNTY, WEST VIRGINIA
ORDER No. 2018- 001

Establishment of “Fayette County Environmental and Public Health Protection Special Settlement Fund”

Fayette County Prosecuting Attorney, and to manage and account for all site investigation, remediation, oversight and monitoring, and enforcement costs and expenses incurred or to be incurred by or on behalf of Fayette County in connection with any such claim or matter would aid the expeditious prosecution and resolution of Fayette County's environmental and public health protection claims, and facilitate the administration of such **Settlement Proceeds** to support the County's on-going site investigative, remedial, and legal enforcement actions on or in connection with any case or matters referred to the EPHPU by the Fayette County Commission, or on any Environmental or Public Health Protection claim that may properly be asserted by the Fayette County Prosecuting Attorney pursuant to applicable federal, state or county law;

- d. In order to encourage settlement of environmental and public health protection claims and other tort, breach of contract and violation of law claims, the United States Congress, in its enactment of Section 468B of the U.S. Internal Revenue Code, 26 U.S.C. § 468B, authorized the U.S. Internal Revenue Service to adopt federal regulations that would provide favorable treatment under federal income taxation law not otherwise available under federal law to, *inter alia*, a segregated settlement fund established by a state or local government, and to the "Transferor(s)" (*i.e.*, settling Persons or parties in a case or matter, and their insurers) of **Settlement Proceeds** into any such a settlement fund when such a qualified transfer of **Settlement Proceeds** is made into such a segregated settlement fund in order to resolve or satisfy, in whole or in part, any liability pursuant to any Environmental or Public Health Protection claim or other tort, breach of contract or violation of law claims by a state or local government.

II. CONCLUSIONS OF LAW:

The Fayette County Commission, following consultation with the Fayette County Prosecuting Attorney, makes the following Conclusions of Law:

- a. West Virginia Code § 7-1-9 authorizes a West Virginia county commission, in addition to all other powers and duties conferred upon them by law, "to create and establish, by proper order, special funds to be used for any purpose which such [county commission] now or hereafter may by the provisions of chapter seven [§§ 7-1-1 et seq.] or article eleven [§§ 8-11-1 et seq.], chapter eight of [the West Virginia] Code be authorized to accomplish.
- b. A provision of Chapter seven of the West Virginia Code, to wit, West Virginia Code §-7-1-3kk, authorizes a county commission, in addition to all other power and duties conveyed upon it by law, "to enact ordinances, issue orders and take other appropriate and necessary actions for the elimination of hazards to public health and safety and to abate or cause to be abated anything which the commission determines to be a public nuisance."
- c. A separate provision of Chapter Seven of the West Virginia Code, to wit, § 7-1-3ff, grants plenary authority to a West Virginia county commission "to adopt ordinances regulating the removal and clean-up of any accumulation of refuse or debris, overgrown vegetation or toxic spillage or toxic seepage located on private lands which is determined to be unsafe, unsanitary, dangerous or detrimental to the public safety or welfare, whether the result of natural or manmade force or effect."
- e. The civil claims and choses-in-action referred by the Fayette County Commission for investigation and possible prosecution by the Fayette County Prosecuting Attorney by this

COUNTY COMMISSION OF FAYETTE COUNTY, WEST VIRGINIA
ORDER No. 2018- 001

Establishment of "Fayette County Environmental and Public Health Protection Special Settlement Fund"

Commission’s Resolution 2017-~~001~~, adopted October 13, 2017, include authority to investigate, assert and, if appropriate, settle liability to Fayette County on claims of Fayette County: (i) pursuant to West Virginia Code §§ 7-1-3ff and 3kk; (ii) for recovery of Costs of Response to Hazardous Substances released into the Environment incurred and to be incurred by Fayette County pursuant to Section 107(a) of the federal Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C. § 9601-9675 (hereinafter: CERCLA or “federal Superfund Act”); and (iii) for any necessary relief required for the timely and competent abatement of any condition presenting an imminent and substantial endangerment to the public health, safety, welfare, or the environment within Fayette County pursuant to applicable federal, state or county law.

- f. The creation of a special settlement fund of Fayette County to receive, manage, invest and disburse **Settlement Proceeds** received by or on behalf of Fayette County on matters and claims referred for investigation and possible prosecution by the Fayette County Prosecuting Attorney pursuant to this Commission’s Resolution 2017- **001**, adopted October 13, 2017, is a purpose that the Fayette County Commission is “authorized to accomplish by the provisions of Chapter seven of the West Virginia Code” within the meaning of that phrase as set forth in West Virginia Code § 7-1-9;
- g. In exercise of its congressionally-granted rulemaking authority, the U.S. Internal Revenue Service has, in compliance with the federal Administrative Procedures Act, lawfully promulgated federal regulations codified at 26 C.F.R. § 1.468B-1 that expressly create and define a “Qualified Settlement Fund” for purposes of federal law. Those regulations provide that a settlement fund is a “Qualified Settlement Fund” if:
 - (a) it is established pursuant to an order of any state, or political subdivision thereof, and is subject to the continuing jurisdiction of that governmental authority;
 - (b) it is established to resolve or satisfy one or more contested or uncontested claims that have resulted or may result from an event (or related series of events) that has occurred and that has given rise to at least one claim asserting liability: (i) under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (hereinafter referred to as CERCLA), as amended, 42 U.S.C. 9601 et seq.; or (ii) arising out of a tort, breach of contract, or violation of law (hereinafter: “**Qualified Claims**”); and
 - (c) its assets are otherwise segregated from other assets of the Transferor (and related persons).
- h. The provisions of federal income tax law provide the following significant income tax benefits to Fayette County and to “transferors” (*i.e.*, parties settling their liability to Fayette County) of money or property into a Fayette County “Qualified Settlement Fund”, which beneficial treatments are not otherwise available under federal tax laws:
 - (a) 26 C.F.R. § 1.468B-2(b)(1) provides that, in general, amounts transferred to the qualified settlement fund by, or on behalf of, a transferor to resolve or satisfy a liability for which the fund is established are **excluded** from gross income of the qualified settlement fund;
 - (b) 26 C.F.R. § 1.468B-3(c) provides that, in general, “economic performance,” which is a prerequisite of federal income tax law that must occur before a transferor may deduct the value of its transfer into a qualified settlement fund, occurs with respect to the

transferor's liability on a **Qualified Claim** to the extent the transferor makes a transfer to a qualified settlement fund to resolve or satisfy that liability. (**Note:** In the absence of this provision, a transferor settling some or all of its liability to Fayette County on a Qualified Claim by Fayette County would **not** be able to deduct the amount of that transfer until the transferred funds or property were actually applied or expended in the course of the resulting site investigation or long-term site remedial actions, which could result in the transfer not being deductible to transferor for an extended period of time, possible years or decades.);

- (c) 26 C.F.R. § 1.468B-2(b)(2) provides that, in general, a Qualified Settlement Fund is allowed to deduct from its gross income (*i.e.*, the Fund's earnings) the full amount of its administrative costs and other incidental expenses incurred in connection with the operation of the qualified settlement fund to the same extent those expense would be deductible pursuant to chapter 1 of the Internal Revenue Code in determining the taxable income of a corporation. Such administrative costs and other incidental expenses include state and local taxes (if any), legal, accounting, and actuarial fees relating to the operation of the Qualified Settlement Fund.

III. ORDER OF THE COUNTY COMMISSION OF FAYETTE COUNTY, WEST VIRGINIA:

a. **Establishment of Special Settlement Fund:** NOW, THERE BE IT ORDERED by the County Commission of Fayette County, West Virginia that, pursuant to its authority under West Virginia Code § 7-1-9, there should be, and hereby is, established a Special Fund of Fayette County entitled the "**Fayette County Environmental and Public Health Protection Special Settlement Fund,**" (hereinafter: "**Special Settlement Fund**") which shall at all time remain under the continuing jurisdiction of the Fayette County Commission; and

b. **Establishment of Certain Site-specific Sub-Funds:** BE IT FURTHER ORDERED by the County Commission of Fayette County, West Virginia that pursuant to its authority under West Virginia Code § 7-1-9, there should be, and hereby is, established within the **Fayette County Environmental and Public Health Protection Special Settlement Fund** the following Site-specific Settlement Sub-Funds; each established as a Special Fund of Fayette County:

- (1) Wolf Creek Watershed Protection Settlement Fund;
- (2) Arbuckle Creek Watershed Protection Settlement Fund; and
- (3) Minden Area Environmental & Public Health Protection Settlement Fund.

c. **Creation & Administration of Special Settlement Fund as "Qualified Settlement Fund":** BE IT ALSO FURTHER ORDERED by the County Commission of Fayette County, West Virginia that the **Fayette County Environmental and Public Health Protection Special Settlement Fund** and each of its Site-specific Sub-Funds, is established as, and at all times shall be maintained and operated so as to qualify as, a "Qualified Settlement Fund" as defined by federal law, with the Fayette County Administrator serving, in full communication and cooperation with the Fayette County Prosecuting Attorney, as

COUNTY COMMISSION OF FAYETTE COUNTY, WEST VIRGINIA
ORDER No. 2018-~~621~~

Establishment of "Fayette County Environmental and Public Health Protection Special Settlement Fund"

Administrator of such **Special Settlement Fund**, specifically including each of its Site-specific Sub-Funds. The Fund Administrator, with the advice and consent of the Fayette County Prosecuting Attorney (or his designee), promptly shall apply to U.S. Internal Revenue Service for recognition of the **Fayette County Environmental and Public Health Protection Special Settlement Fund**, and its Site-specific Sub-Funds as a “Qualified Settlement Fund” under federal law. Moreover, the Fund Administrator shall account for, maintain and invest the corpus of such Fund, accounted for by the case or matter that gave rise to the transfer of such monies or property into the **Special Settlement Fund**, in compliance with West Virginia law, including such lawful Orders of the Fayette County Commission as may from time to time be issued, and shall timely file such reports and returns with respect to such **Special Settlement Fund** as properly may be required or requested by law; and

d. Mandatory Deposits to the Special Settlement Fund: BE IT ALSO FURTHER ORDERED by the County Commission of Fayette County, West Virginia that, unless the General Laws of the State of West Virginia otherwise require, all money or property, non-exclusively including any claim, cause of action or chose-in-action, together with any other thing of value received in settlement or full or partial satisfaction of any such claim, cause of action or chose-in-action, by or on behalf of Fayette County to resolve or satisfy, in whole or in part, one or more contested or uncontested claims that have resulted or may result from an event (or related series of events) that has occurred and that has given rise to at least one claim of Fayette County asserting liability: (1) under CERCLA; (2) arising out of a tort, breach of contract, or violation of law relating, directly or indirectly, to, or arising, in whole or in part, from or in connection with any authority or responsibility of the Fayette County Commission under applicable federal, state or county law, including the common law, to secure, provide, or restore adequate protection of the public health, safety, welfare or the environment within Fayette County; or (3) of a kind now or hereafter designated by the Commissioner of the U.S. Internal Revenue Service in a revenue ruling or revenue procedure; shall be deposited into and credited to the **Fayette County Environmental and Public Health Protection Special Settlement Fund**, or, if received to resolve or satisfy such a claim of Fayette County asserting liability relating to site or matter for which a Site-specific Sub-Fund has been established by the Fayette County Commission, into such Site-specific Sub-Fund;

e. Certain Restrictions on Permissible Deposits to the Special Fund: BE IT ALSO FURTHER ORDERED by the County Commission of Fayette County, West Virginia that, notwithstanding the provisions of Section III.d of this Order, no money or property of any kind received by or on behalf of Fayette County to resolve or satisfy any actual or potential liability of the Transferor for the provision of services or property to the Fayette County Commission shall be deposited into or maintained in the **Fayette County Environmental and Public Health Protection Special Settlement Fund**, or any of its Site-specific Sub-Funds, unless:

- (1) the Transferor's obligation to provide services or property to the Fayette County Commission is extinguished by a transfer or transfers to such Fund or Site-specific Sub-Fund; or
- (2) the Transferor's liability to provide services or property to the Fayette County Commission arises under CERCLA, and, following the transfer of the Transferor's money or property to such Fund, or any of its Site-specific Sub-Funds, the Transferor's

only remaining liability to the Fayette County Commission (if any) is a remote, future obligation to provide services or property;

f. Expenditures, Appropriations, or Transfers from the Special Settlement Fund:

BE IT ALSO FURTHER ORDERED by the County Commission of Fayette County, West Virginia no amount shall be expended from, withdrawn from, paid out of, or transferred within the **Fayette County Environmental and Public Health Protection Special Settlement Fund** or any of its Site-specific Sub-Funds unless in full compliance with one of the following requirements of this Paragraph III.f:

- (1) **Expenditures or Appropriations:** By an application for a special order or appropriation from the **Special Settlement Fund**, specifically including any of its Sub-Funds, brought before the Fayette County Commission for final action by:
 - (A) any Officer, Office, Commission, Agency, Board, or Authority of Fayette County, other than the Fayette County Prosecuting Attorney (or his designee that contains a certification that the entire contents of the motion or application has been previously submitted to the Fayette County Prosecuting Attorney (or his designee) for review and comment, and that the Fayette County Prosecuting Attorney (or his designee) has provided a written recommendation to the Fayette County Commission for final action on the request or application; or
 - (B) the Fayette County Prosecuting Attorney (or his designee), and such application seeks **only** payment of one or more uncontested, legitimate invoices from one or more properly registered and qualified vendors of Fayette County that supplies goods, services or commodities to Fayette County pursuant to the terms of a contract approved by the Fayette County Commission in connection with one or more matters or cases in which the Fayette County Prosecuting Attorney is providing legal service to, or for the benefit of, Fayette County which application contains or is accompanied by written certification from the Fayette County Prosecuting Attorney that such invoice(s) meet the requirement of this Sub-paragraph III.f.1.B, and are recommended to the Fayette County Commission for approval for payment; or
 - (C) the Fayette County Prosecuting Attorney (or his designee), and such application does not **solely** concern payment of one or more uncontested, legitimate invoices from one or more properly registered and qualified vendors of Fayette County, which application is accompanied by either: (i) the written justification for the application and the written recommendation of the Fayette County Prosecuting Attorney (or his designee) to the Fayette County Commission regarding the final disposition of the application; or (ii) an oral recommendation of the Fayette County Prosecuting Attorney or his designee to the Fayette County Commission regarding the justification for and final disposition of the application made either on the record of a public meeting of the Fayette County Commission, or, if appropriate, on the minutes of a lawfully-held Executive Session of the Fayette County Commission; or
 - (D) one or more Fayette County Commissioners by a motion that does not conform with all of the requirements set forth in sub-paragraphs (A) through (C), inclusive, of this Section III.f.1, which motion either: (i) reflects by its terms that the entire substance of the motion has been presented to the Fayette County Prosecuting

Attorney (or his designee) for his review and comment at least forty-eight (48) hours prior to the making of the motion, and that the Fayette County Commission has received (or will receive prior to the final vote of the Fayette County Commission on such motion) the recommendation of the Fayette County Prosecuting Attorney (or his designee) for final action on the motion; or (ii) which motion is made at a properly-noticed public meeting or Executive Session of the Fayette County Commission at which the Fayette County Prosecuting Attorney or his designee is present, and is accompanied by the written or oral waiver of the Fayette County Prosecuting Attorney (or his designee) of the opportunity for the 2 working days pre-review period with respect to the motion, and presentation to the Fayette County Commission of the recommendation of the Fayette County Prosecuting Attorney (or his designee) for final action on the motion prior the final vote of the Fayette County Commission on such motion; or

- (2) ***Transfers within the Special Settlement Fund:*** The Fund Administrator may, with the advice and written consent of the Fayette County Prosecuting Attorney, transfer or lend upon appropriate terms any amount(s) which has **not** been committed, appropriated, or indentured by a contract approved by, or a special order or appropriation issued by, the Fayette County Commission: **(A) from the Special Settlement Fund to any of its Site-Specific Sub-Fund; (B) from any Site-Specific Sub-Fund of the Special Settlement Fund to the Special Settlement Fund; or (C) between any of the Site-Specific Sub-Funds of the Special Settlement Fund;**

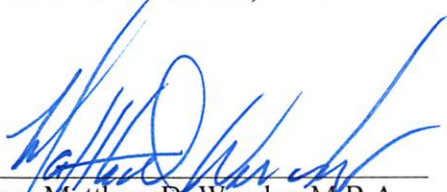
g. Disposition of Uncommitted Monies or Property in the Special Settlement Fund Following Final Judgment in a Case or Matter: **BE IT ALSO FURTHER ORDERED by the County Commission of Fayette County, West Virginia** that any monies or property of any kind remaining in the **Special Settlement Fund**, or any of its Site-specific Sub-Funds, following Final Judgment in the case or matter that gave rise to transfer of those monies or property into such Fund or Sub-Fund, which have not been committed, appropriated, or indentured by a contract approved by, or a special order or appropriation issued by, the Fayette County Commission, may, by Order of the Fayette County Commission, be transferred to the General Fund of Fayette County for appropriation by the Fayette County Commission for any lawful purpose. Notwithstanding any other provision of this Order, no such remaining funds shall revert to, be transferred to, or otherwise be applied to the principal use or benefit of any Transferor (or to any insurer of any Transferor on whose behalf the insurer made a transfer) into the **Special Settlement Fund**.

h. Retention of Prosecuting Attorney's Enforcement Discretion: **BE IT ALSO FURTHER ORDERED by the County Commission of Fayette County, West Virginia** that nothing in this Order is intended to, nor shall this Order or any provision of it be interpreted to, in any way limit or restrict the discretion of the Fayette County Prosecuting Attorney in any federal civil action in which the County Commission of Fayette County or any Officer, Board, Agency or Authority of Fayette County is a party to consent on behalf of Fayette County to the creation by any Court of the United States of a settlement trust or fund that qualifies pursuant to Section 468B(g)(2) of the U.S. Internal Revenue Code, 26 U.S.C. § 468B(g)(2), for **complete** exemption from all federal, state or local taxation, and that also provides to


Transferors into such a settlement trust or fund the same significant federal tax benefits as are provided by federal law for a Qualified Settlement Fund.

IT IS SO RESOLVED, ORDERED, AND DONE with the majority vote of the Fayette County Commission, by the County Commission of Fayette County, West Virginia this 5th day of January 2018.

**COUNTY COMMISSION
FAYETTE COUNTY, WEST VIRGINIA**

By: 
Hon. Matthew D. Wender, M.B.A.
Its President

ATTEST:


Kelvin E. Holliday
County Clerk, Fayette County, West Virginia

FILED IN MY OFFICE
FEB 22 2019
Teste: Kelvin Holliday
County Clerk

Fayette County
Kelvin E Holliday, Clerk
Instrument 201900002760
02/22/2019 @ 01:04:51 PM
MISCELLANEOUS NO FEE
Book 8 @ Page 678
Pages Recorded 8



COUNTY COMMISSION OF FAYETTE COUNTY, WEST VIRGINIA
ORDER No. 2018- 001

Establishment of "Fayette County Environmental and Public Health Protection Special Settlement Fund"